



DOT LITIGATION NEWS

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October 31, 2013

Volume No. 13

Issue No. 2

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Supreme Court Litigation

Supreme Court Holds that Federal Law Preempts Certain Restrictions Placed on Motor Carriers by the Port of Los Angeles

On June 13, the Supreme Court decided American Trucking Associations, Inc. v. City of Los Angeles, 133 S. Ct. 2096 (2013), a case that involves important issues about the preemption of state measures affecting the motor carrier industry. DOT worked extensively with the Solicitor General's office to determine the government's views as amicus curiae, and the Court largely adopted the position set forth in the government's brief.

The case arises out of a decision in 2008 by the Port of Los Angeles (the Port), an independent division of the City of Los Angeles, to require "concession agreements" with motor carriers that operate drayage trucks on Port property. Drayage trucks obtain cargo from ships in marine terminals and transport them relatively short distances to customers or to other means of transportation. Although the Port itself does not contract for drayage services, it develops and leases terminals to shipping lines and other companies that use drayage services in the course of their operations.

The Port developed the concession agreements as part of a "Clean Truck Program," adopted in response to community concerns and litigation about environmental damage and other harms that could result from the Port's expansion. As part of that program, the Port banned certain high-polluting trucks, imposed fees on terminal operators for the use of other high-emission trucks, and adopted other measures aimed at reducing environmental harm.

Motor carriers who failed to sign the concession agreements may be restricted from operating drayage trucks on Port property.

The concession agreements, which were signed by over 600 motor carriers by spring 2010, contained various provisions, including the following: (1) an employee-driver provision, requiring a gradual transition to 100% employee drivers for drayage trucks, rather than using independent owner-operators; (2) a plan for off-street parking for permitted trucks; (3) truck maintenance requirements; (4) posting of placards on permitted trucks with a telephone number for members of the public to call with concerns about drayage trucks, emissions, and safety; and (5) a demonstration of financial capability to meet the terms of the concession agreements.

The case has a lengthy and complicated procedural history. The American Trucking Associations (ATA), a national motor carrier association, filed suit in federal district court seeking injunctive relief. ATA contended that certain provisions of the concession agreements were preempted by the Federal Aviation Administration Authorization Act (FAAAA), 49 U.S.C. § 14501 et seq. That statute, as the Ninth Circuit explained in the decision from which certiorari was sought, ATA v. City of Los Angeles, 660 F.3d 384 (9th Cir. 2011), contains various provisions that restrict states "from undermining federal deregulation of interstate trucking." In particular, FAAAA forbids a state from enacting a law "related to a price, route, or service of any motor carrier . . . with respect to the transportation of property." 49 U.S.C. § 14501(c)(1). The statute contains an exception for measures falling within state

safety regulatory authority. Id.
§ 14501(c)(2)(A).

The district court denied a preliminary injunction, and ATA appealed. Before the Ninth Circuit, the United States filed a brief as amicus curiae supporting ATA's position, arguing that the concession agreements were preempted by FAAAA. Furthermore, the United States rejected the theory that the "market participant" doctrine applied to save the concession agreements from being invalidated. That doctrine distinguishes between impermissible state regulation and permissible exercises of state purchasing authority. However, as the United States' brief noted, the Port was not a purchaser in the market for drayage services.

The Ninth Circuit reversed and remanded. On remand, the district court granted a preliminary injunction against certain provisions of the concession agreements, but denied it as to other provisions. In a second appeal, the Ninth Circuit reversed in part. The district court then held a bench trial and ruled in the Port's favor, denying a permanent injunction and holding that the five disputed provisions of the concession agreements, as noted above, were either not preempted by FAAAA or were saved by the statute's safety exception or the market participant doctrine.

On appeal for the third time, the Ninth Circuit held that the employee-driver provision was preempted by FAAAA and that no exception applied. However, the court upheld the other four main provisions as beyond the scope of FAAAA or as covered by the safety exception or market participant doctrine. Judge Randy Smith filed a vigorous dissenting opinion.

ATA filed its petition for writ of certiorari on December 22, 2011. Before the Supreme

Court, ATA challenged the Ninth Circuit's decision upholding the concession agreement provisions relating to financial capability, maintenance, off-street parking, and placards. (By contrast, the Port did not seek review of the Ninth Circuit's adverse ruling on the employee-driver provision.) First, ATA argued that the concession agreements are preempted by FAAAA. As the Supreme Court ruled in Rowe v. N.H. Motor Transp. Association, 552 U.S. 364 (2008), FAAAA sweeps broadly to preempt state measures "having a connection with, or reference to, carrier rates, routes or services." The concession agreements, ATA contended, fall within this rule, and the Ninth Circuit's decision runs counter to the Supreme Court's direction that the FAAAA preemption provision should be read broadly. Second, ATA argued that no market participant exception is available under FAAAA and would not apply in any event, since the Port does not act as a purchaser in the market for drayage services. Third, ATA contended that barring federally licensed motor carriers access to Port property effectively suspends those carriers' federal registrations, in violation of the Supreme Court's decision in Castle v. Hayes Freight Lines, Inc., 348 U.S. 61 (1954).

The Supreme Court reversed in part and remanded the case to the Ninth Circuit. In a unanimous decision, Justice Kagan wrote that the Port's concession agreements have the "force and effect of law" within the meaning of the FAAAA. Here, the Port was not merely contracting for services, but instead, had developed a regime that was essentially regulatory. Indeed, the concession agreements carried the threat of criminal prosecution, distinguishing them from the types of commercial arrangements that may be permissible exercises of state proprietary power. The fact that the state

may not have any serious intention of enforcing the agreements criminally did not alter this conclusion.

Furthermore, the Court declined at this stage to decide whether the concession agreements ran afoul of Castle. Under Castle, the Court held, a state may not bar federally licensed motor carriers from operating on state highways, but may bar a vehicle from the roads until the vehicle is in compliance with state safety regulations. Here, the record was unclear as to whether the state would actually penalize motor carriers in a way that violated the Castle doctrine, making a decision on this issue premature. However, the Court left room in its decision for a party to return to raise a challenge on this ground if it faced concrete enforcement action.

Justice Thomas filed a concurring opinion expressing doubts about Congress's authority over drayage trucks at the Port under the Commerce Clause, but joining the Court's opinion nonetheless.

The Court's opinion largely followed the reasoning of the government's amicus brief on the merits.

The briefs in the case can be found at <http://www.scotusblog.com/case-files/cases/american-trucking-associations-inc-v-city-of-los-angeles/>.

Supreme Court Holds that Federal Law Does Not Preempt State Law Causes of Action in Challenge to Nonconsensual Vehicle Tow

On May 13, the Supreme Court issued its decision in Dan's City Used Cars, Inc. v. Pelkey, 133 S. Ct. 1769 (2013), a case involving the preemption of state laws in the

motor carrier context. DOT worked closely with the Solicitor General's office to determine the government's views as amicus curiae, and the Court adopted the approach set forth in the government's brief.

This case arose out of a state court lawsuit in New Hampshire. Pelkey sued Dan's City, a tow truck operator, for harm resulting from the towing of his vehicle without consent. Pelkey's car was towed from his landlord's property during a snowstorm, while he was suffering from medical problems. He did not learn that his vehicle was towed until returning from the hospital, where he had his foot amputated and had suffered a heart attack. Pelkey's lawyer then tried to arrange for the return of the car from Dan's City, but was unsuccessful; the car was disposed of without any compensation to Pelkey.

Pelkey filed suit in New Hampshire Superior Court, alleging that Dan's City's conduct in connection with the disposition of his car constituted negligence and violated the state's consumer protection statute. Among other things, Pelkey contended that Dan's City had not followed statutory procedures for the handling of a towed vehicle and had made misstatements about the value and condition of the car. The trial court granted summary judgment to Dan's City, concluding that Pelkey's claims were preempted by the Federal Aviation Administration Authorization Act (FAAAA), 49 U.S.C. § 14501 et seq., which forbids a state from enacting a law "related to a price, route, or service of any motor carrier . . . with respect to the transportation of property." 49 U.S.C. § 14501(c)(1). In the trial court's judgment, Pelkey's lawsuit constituted an attempt to enforce a state law related to motor carrier "services," which the FAAAA preempts.

The Supreme Court of New Hampshire reversed. It ruled that Pelkey's state law claims were not preempted by the FAAAA, for two reasons. First, the court ruled that the claims were not "with respect to the transportation of property" under the federal statute, but instead, were claims with respect to the collection of a debt. The state laws forming the basis for Pelkey's claims merely permitted Pelkey to attempt to recover the value of his lost property. Second, the relevant state laws were not "related to a price, route, or service of any motor carrier" under the FAAAA. The state law claims instead related to conduct after the towing had occurred.

From that decision, the Petitioner sought a writ of certiorari, which the Supreme Court granted on December 7, 2012.

The Supreme Court affirmed unanimously in an opinion written by Justice Ginsburg. The Court recognized that it had interpreted the term "related to" in the FAAAA broadly, including in cases like Rowe v. New Hampshire Motor Transp. Association, 552 U.S. 364 (2008), in which the Court held as preempted a Maine law that regulated tobacco delivery service procedures in the state. Nonetheless, the Court ruled that the "related to" language in the federal statute is not boundless, and does not preempt state measures that have a "remote" or "tenuous" effect upon motor carrier prices, routes or services. Here, the Court reasoned, the New Hampshire laws forming the basis for the lawsuit were not "related to" the "transportation of property" or the "service" of a motor carrier, for largely the reasons given by the state court. Instead, the claim here related to the disposition of a vehicle after the transportation—the towing—had ceased. Furthermore, although the FAAAA defines transportation to include "handling" and "storage," that only refers to conduct

incidental to, rather than after, a movement. Finally, the Court stated that claims of the type presented in this case do not undermine Congress's deregulatory intent, and that preempting such claims might leave injured parties without a remedy in many cases. Unlike in certain other contexts, like aviation consumer protection, where the Department plays a key role in enforcement, there is no federal remedial scheme for claims like Pelkey's.

The United States filed a brief at the merits stage supporting Pelkey's position and urging the Court to affirm the decision below. The Court agreed in virtually all respects with the arguments made in the government's brief.

The decision and briefs in the case can be found at <http://www.scotusblog.com/case-files/cases/dans-city-used-cars-inc-v-pelkey/>.

Supreme Court Requires Warrant for Nonconsensual Blood Draw of DUI Suspect

On April 17, the Supreme Court issued its decision in Missouri v. McNeely, 133 S. Ct. 1552 (2013), a case involving the scope of the protection afforded under the Fourth Amendment of the U.S. Constitution to individuals subjected to nonconsensual blood draws after being stopped for driving under the influence of alcohol (DUI). The case has important implications for DUI enforcement. The Department assisted in the government's submission of a brief in this case as amicus curiae.

The case arose out of a DUI traffic stop in Missouri. A state highway patrolman stopped McNeely's vehicle for a speeding violation at around 2:00 a.m. The patrolman

observed that McNeely had bloodshot eyes, slurred his speech, and smelled of alcohol. After McNeely performed poorly on field-sobriety tests, the patrolman arrested him for DUI. McNeely would not consent to a breath test. However, the patrolman believed, from reading a traffic safety publication, that it was legally permissible to subject a DUI suspect to a nonconsensual, warrantless blood draw. Thus, the patrolman drove McNeely to a hospital and ordered a medical professional to draw his blood for alcohol testing. The patrolman never sought a warrant.

McNeely's blood was drawn for testing less than half an hour after the traffic stop. An analysis of the blood sample showed that his blood-alcohol content was above the legal limit. The trial court granted McNeely's motion to suppress the results of the blood test, ruling that the Fourth Amendment, as well as Missouri law, did not permit the blood draw absent consent, a warrant, or exigent circumstances beyond those present in this case.

The Missouri Supreme Court reached the same result, in a decision reported at 358 S.W.3d 65 (2012). Citing the U.S. Supreme Court's decision in Schmerber v. California, 384 U.S. 757 (1966), the Missouri Supreme Court ruled that the Fourth Amendment requires "special facts" to demonstrate exigency for a warrantless blood draw. That was not the case here, because the mere fact that alcohol diminishes in the bloodstream over time does not alone give rise to an exigency that necessarily threatens the destruction of evidence.

The State of Missouri petitioned for a writ of certiorari on May 22, 2012. The Supreme Court granted the petition on September 25, 2012.

In an opinion written by Justice Sotomayor, the Supreme Court affirmed the Missouri Supreme Court's decision. The Court recognized the state's concern that alcohol metabolizes in the blood over time, and that DUI evidence, particularly with respect to blood alcohol content (BAC), may be lost. However, the Court held that this concern does not create a per se "exigency" to excuse the usual Fourth Amendment requirement of obtaining a warrant for nonconsensual blood draws. Instead, the Court held that such exigencies must be decided under the totality of the circumstances, just as in other cases involving the Fourth Amendment.

Here, the state relied upon the argument that warrantless, nonconsensual bloods draws are permissible per se, and had not shown that there were specific, exigent circumstances in this particular case to justify the blood draw. The Court left open the possibility that in some DUI cases, there may be circumstances that "make obtaining a warrant impractical[,] such that the dissipation of alcohol from the bloodstream will support an exigency justifying a properly conducted warrantless blood test." However, on the thin record available in this case, the Court determined that it was not in a position to offer guidance on what types of circumstances might satisfy that test. But the Court explained that there is no reason to excuse the warrant requirement where an officer has an opportunity to try to obtain a warrant while the DUI suspect is being transported to a medical facility for the blood test, so long as this does not cause significant additional delay. Furthermore, the Court pointed out that changes in technology have facilitated the use of telephonic warrants or other expedited warrant procedures in many jurisdictions, and this bears upon whether exigent circumstances exist in individual cases.

Justice Sotomayor was joined in her opinion by Justices Scalia, Ginsburg, and Kagan, and also joined in most respects by Justice Kennedy, who filed an opinion concurring in part. Chief Justice Roberts filed an opinion concurring in part and dissenting in part, joined by Justices Breyer and Alito. In that opinion, the Chief Justice contended that a particular rule should apply in DUI cases: If an officer has time to secure a warrant before blood is to be drawn, he must do so; if the officer could reasonably conclude that there is no time in which to obtain a warrant before blood can be drawn, then there are exigent circumstances that permit a warrantless blood draw. Justice Thomas filed a dissenting opinion, adopting the view that the body's metabolization of blood constitutes an exigency that excuses the warrant requirement.

The United States filed an amicus brief in this case supporting the State of Missouri, arguing that the warrantless, nonconsensual blood draw was constitutionally permissible. The government had argued that the State's interest in law enforcement counseled in favor of a bright-line rule that broadly permits warrantless, nonconsensual blood draws in DUI cases. In reaching its decision, the Court relied in part upon studies from NHTSA submitted by the government and other parties. In addition to data about accidents and fatalities resulting from drunk driving, the Court cited a NHTSA study demonstrating that in some jurisdictions, the use of warrants for blood draws actually reduced breath test refusals and improved BAC evidence collection for DUI cases.

The decision and briefs in the case can be found at <http://www.scotusblog.com/case-files/cases/missouri-v-mcneely/>.

Supreme Court Denies Review of Decision Upholding DOT Airline Passenger Consumer Protection Rule

On April 1, the Supreme Court denied the petition for a writ of certiorari filed by Spirit Airlines and Allegiant Air seeking review of the July 24, 2012, decision of the U.S. Court of Appeals for the District of Columbia Circuit, Spirit Airlines, Inc., et al. v. USDOT, 687 F.3d 403 (D.C. Cir. 2012), that rejected the airlines' challenge to DOT's April 2011 air passenger consumer protection rule. Spirit Airlines, Inc., et al. v. USDOT (No. 12-656).

At issue in the case below were provisions of the most recent DOT air passenger consumer protection rule that (1) end the practice of permitting sellers of air transportation to exclude government taxes and fees from the advertised price (Airfare Advertising Rule), (2) prohibit the sale of nonrefundable tickets by requiring airlines to hold reservations at the quoted fare without payment or to cancel without penalty for at least 24 hours after the reservation is made if the reservation is made one week or more prior to a flight's departure (24-Hour Rule), and (3) prohibit post purchase baggage fee increases after the initial ticket sale (Post-Purchase Price Rule). The D.C. Circuit upheld DOT's rule in all respects.

The airlines sought further review of the Airfare Advertising Rule and 24-Hour Rule (the airlines did not seek Supreme Court review of the Post-Purchase Price Rule). The airlines argued, among other things, that the Airfare Advertising Rule violates the First Amendment by mandating "total cost" advertising and by restricting the airlines' truthful speech about the share of each ticket

that consists of government taxes and fees. The airlines also argued that DOT exceeded its statutory mandate to prohibit unfair or deceptive practices in the industry by implicitly “reregulating” the airline industry - and with allegedly only scant evidence in the rulemaking record - in requiring full-fare advertising and by, under the 24-Hour Rule, supposedly “prohibiting” non-refundable tickets.

The United States filed a brief in opposition on February 27 arguing that the D.C. Circuit’s decision was correct and did not conflict with any Supreme Court decision or decision of any other court of appeals. The government maintained that the Airfare Advertising Rule constitutes a reasonable exercise of DOT’s longstanding authority to prevent consumer confusion in airfare advertising and is consistent with the First Amendment. Moreover, the 24-Hour Rule does not violate the Airline Deregulation Act of 1978. That rule does not prohibit nonrefundable tickets. Rather, consistent with DOT’s statutory authority, the rule only requires airlines to hold reservations without payment, or allow cancellation without penalty, for 24 hours. The government also maintained that the D.C. Circuit correctly found sufficient evidence to support DOT’s underlying rulemaking, and that even if it did not, such a claim would not warrant review by the Court.

The D.C. Circuit’s opinion is available at [http://www.cadc.uscourts.gov/internet/opinions.nsf/B3C8FBE2AB1F6A9185257A45004EE709/\\$file/11-1219-1385164.pdf](http://www.cadc.uscourts.gov/internet/opinions.nsf/B3C8FBE2AB1F6A9185257A45004EE709/$file/11-1219-1385164.pdf).

United States Files Amicus Brief in Airline Deregulation Act Preemption Case

On July 31, the United States filed an amicus brief in Northwest, Inc. v. Ginsberg (No. 12-462). This case concerns whether the Airline Deregulation Act of 1978 (ADA) preempts a claim that an airline’s revocation of a person’s frequent flyer program membership violates the common law implied covenant of good faith and fair dealing. The government’s brief supported reversal of the decision of the U.S. Court of Appeals for the Ninth Circuit under review.

This case arises out of Northwest Airlines’ frequent flyer program, WorldPerks. Ginsberg was a member of the WorldPerks program between 1999 and 2005 and had obtained “platinum elite” status. During the course of Ginsberg’s participation in the program, he made frequent complaints and continually asked for compensation over and above Northwest’s guidelines. As a result, Northwest revoked Ginsberg’s WorldPerks membership. Ginsberg made attempts to determine the specific reasons why Northwest revoked his membership and ultimately was notified that pursuant to Northwest’s General Terms and Conditions of the WorldPerks Program, “abuse of the WorldPerks program” as determined by Northwest in its “sole judgment” may result in cancellation of the member’s account.

In January 2009, Ginsberg filed a class action against Northwest Airlines in the U.S. District Court for the Northern District of California and raised four allegations: 1) breach of contract; 2) breach of the implied covenant of good faith and fair dealing; 3) negligent misrepresentation; and 4) intentional misrepresentation. Northwest filed a Motion to Dismiss and argued that

the ADA preempted the plaintiffs' claims. With regard to the claims alleging breach of the implied covenant of good faith and fair dealing, negligent misrepresentation and intentional misrepresentation, the district court dismissed those claims with prejudice because they were preempted under the ADA. As for the breach of contract claim, the district court found that this claim could go forward pursuant to the Supreme Court's holding in Wolens. However, the court ultimately held that Ginsberg did not allege facts sufficient to show a material breach of the contract.

Ginsberg then filed an appeal with the Ninth Circuit, but only appealed the court's holding with regard to the breach of the implied covenant of good faith and fair dealing claim. Before the Ninth Circuit, Ginsberg argued that the implied covenant of good faith and fair dealing was not an enactment of state law and thus fell outside the scope of ADA preemption. Additionally, Ginsberg argued that even if the implied covenant of good faith and fair dealing amounted to an enactment of state law, his claim was not preempted because Northwest's WorldPerks Program was not related to prices, routes or services.

The Ninth Circuit agreed with Ginsberg, reversed the decision of the District Court, and held that the ADA does not preempt common law contract claims, including a breach of the implied covenant of good faith and fair dealing claim. Ginsberg v. Northwest, Inc., 695 F.3d 873 (9th Cir. 2012). In looking to the language of the ADA's preemption provision, the Ninth Circuit held that Ginsberg's claim was, at best, tenuously related to Northwest's prices. Furthermore, the Ninth Circuit stated that Congress only intended to preempt state laws that directly regulate rates, routes, or

services, not any matter "related to" rates, routes or services.

Northwest Airlines filed a Petition for Writ of Certiorari on October 11, 2012, and the Supreme Court granted the Petition on May 20, 2013.

The United States filed an amicus brief supporting reversal of the Ninth Circuit's decision, relying heavily upon American Airlines v. Wolens, 513 U.S. 219 (1995), a prior Supreme Court preemption case involving a frequent flyer program. Relying upon Wolens, the government argued that Ginsberg's claim relates to Northwest's prices and services because frequent flyer programs relate to mileage credits for free tickets and flights and class of service upgrades. Furthermore, while Wolens held that the ADA does not preempt routine breach of contract claims, the government argued that Ginsberg's implied covenant of good faith and fair dealing claim is preempted because it seeks to impose an extra-contractual obligation on Northwest and thus is preempted. However, because states differ in their use and application of the implied covenant of good faith and fair dealing, the United States noted that if the implied covenant is used simply to "rechristen fundamental principles of contract law" and does not seek to enlarge or enhance the contract's terms, then the claim would not be preempted. Oral argument is scheduled for December 3, 2013.

The briefs in this case can be found at http://www.scotusblog.com/case-files/cases/northwest-inc-v-ginsberg/?wpmp_switcher=desktop.

United States Files Amicus Brief in Test of Air Carrier Immunity under Aviation and Transportation Security Act

On September 5, the United States filed an amicus brief in Air Wisconsin Airlines Corp. v. Hoepfer (No. 12-315), in which petitioner Air Wisconsin seeks reversal of a decision of the Supreme Court of Colorado that it was not protected from civil liability by the immunity provisions of the Aviation and Transportation Security Act (ATSA), 49 U.S.C. § 44941, for statements it made describing one of its pilots as a possible security threat. ATSA confers immunity from civil liability on an air carrier that “makes a voluntary disclosure” to law-enforcement and public-safety officials “of any suspicious transaction relevant to a possible violation of law or regulation, relating to air piracy, a threat to aircraft or passenger safety, or terrorism.” 49 U.S.C. § 44941(a). Such immunity does not apply to a disclosure made “with actual knowledge that the disclosure was false, inaccurate, or misleading” or “with reckless disregard as to the truth or falsity of that disclosure.” 49 U.S.C. §§ 44941(b). In its brief, the government agreed with Air Wisconsin that the Colorado Supreme Court erred in holding that ATSA immunity may be denied without a determination that the air carrier’s disclosure was materially false.

This case arose in December 2004 when respondent William Hoepfer, an Air Wisconsin pilot, was in Virginia to take a certifying test for a new aircraft, his fourth test attempt after three previous failures. Hoepfer understood that he would lose his job if he failed this fourth test, but during the test Hoepfer experienced difficulty and became angry, believing that the test administrators were engineering the test to

fail him. Hoepfer ended the test prematurely and left the facility, stating his intent to contact his union’s legal representative. One of the test administrators reported the events to a manager overseeing Hoepfer’s testing. The manager instructed another Air Wisconsin employee to drive Hoepfer to Dulles Airport and booked Hoepfer on a flight back to Denver, his home base, later that day.

Meanwhile, the manager reported the events to his supervisors, and they scheduled a meeting that same day to discuss the incident. During the meeting, the participants discussed Hoepfer’s displays of anger; his knowledge that he would likely be fired; his status as a Federal Flight Deck Officer (FFDO), which authorized him to carry a TSA-owned and issued firearm onboard a commercial aircraft; and two previous incidents where disgruntled employees had boarded aircraft with firearms, one of which resulted in a crash, killing all aboard, and the second which nearly caused a crash. After this meeting, the manager called TSA to report Hoepfer as a possible security threat and made the following two statements, as determined by the jury in the case below:

“[Hoepfer] was an FFDO who may be armed. He was traveling from IAD-DEN [Dulles International Airport to Denver International Airport] later that day and we were concerned about his mental stability and the whereabouts of his firearm;”

“Unstable pilot in FFDA program was terminated today.”

On the basis of these statements, TSA officers at Dulles removed Hoepfer from his plane after he had already boarded, questioned him, and ultimately released him,

allowing him to fly back to Denver that evening.

Hoepfer subsequently brought suit in Colorado state court, asserting, among others, a defamation claim against Air Wisconsin. The trial court twice denied Air Wisconsin's assertion of ATSA immunity, once in denying a motion for summary judgment, and once in denying a motion for directed verdict. The jury then found in favor of Hoepfer on his defamation claim, awarding approximately \$1.4 million in damages. The Colorado Court of Appeals affirmed the jury verdict, ruling that ATSA immunity was a jury question and that the jury's denial of immunity was supported by clear and convincing evidence.

The Colorado Supreme Court affirmed the verdict, though it reversed the appellate court and held that, as a matter of Colorado law, ATSA immunity is a question of law for the court. However, the court held that this error was harmless because it concluded, on its own review of the evidence, that Air Wisconsin was not entitled to ATSA immunity.

The Colorado Supreme Court expressly held that the statements of the Air Wisconsin manager, quoted above, were made with reckless disregard as to their truth or falsity, in which case the statute precludes immunity. Because the statutory reckless disregard language was drawn from the "actual malice" standard in New York Times Co. v. Sullivan, 376 U.S. 254 (1964), the court looked to Sullivan and its progeny, which together define First Amendment limitations on defamation claims, for guidance in interpreting the meaning of reckless disregard in the defamation context. The definition of recklessness from these cases includes statements made with a "high degree of awareness of . . . probable falsity,"

or where the speaker "entertained serious doubts as to the truth of his publication." St. Amant v. Thompson, 390 U.S. 727, 731 (1986) (internal quotations and citations omitted). But the court also held that it was unnecessary to determine whether the statements were true or false, as long as it found that the statements were made recklessly. In other words, it proceeded to address the second step of the actual malice analysis without having dealt with the first, and threshold, step of truth or falsity of the statement.

In its amicus brief, the United States argued that the Colorado Supreme Court erred in concluding that ATSA leaves air carriers exposed to civil liability when they report materially true information about potential air-security threats to the proper authorities. Noting how the ATSA immunity language mirrors the actual malice standard in the Supreme Court's defamation jurisprudence, and that ATSA itself states that it is intended to "encourage airline employees to report suspicious activities," the government argued that Congress intended the immunity language to be construed broadly enough to avoid chilling threat reports by air carrier employees. Accordingly, the material falsity of an air carrier's communication of a possible threat should be evaluated from the perspective of the presumed recipient of the communication, namely, a reasonable air-safety official and whether any inaccuracies in the air carrier's communication change the substance of the potential threat to air safety that the communication conveys. The application of that standard to the facts in this case compel the conclusion that petitioner is immune to liability for its call to TSA because petitioner's choice of language in its communication with TSA did not exceed a rational interpretation of the circumstances. Accordingly, the government's brief urges the Supreme Court

to vacate the decision of the Colorado Supreme Court and remand the case for further proceedings consistent with a proper application of ATSA.

The Supreme Court has scheduled argument in the case for December 9. The briefs in the

case can be found at <http://www.scotusblog.com/case-files/cases/air-wisconsin-airlines-corp-v-hoeper/>.

Departmental Litigation in Other Courts

D.C. Circuit Substantially Upholds Hours-of-Service Final Rule

On August 2, the U.S. Court of Appeals for the District of Columbia Circuit issued its decision in American Trucking Associations, Inc. v. FMCSA and Public Citizen, et al v. FMCSA, 724 F.3d 243 (D.C. Cir. 2013), consolidated cases challenging certain provisions of FMCSA's December 2011 driver hours-of-service rule, which became effective July 1, 2013. The unanimous panel upheld all but one element of FMCSA's 2011 final rule.

Public Citizen and a group of truck safety advocates (Safety Advocates) challenged the agency's support for the 11-hour driving period, the 34-hour restart (which allows drivers who have reached their weekly driving limit to drive again after 34 hours), and the agency's alleged failure to comply with Congress's mandate that the agency "ensure . . . the operation of commercial motor vehicles does not have a deleterious effect on the physical condition of the operators." The American Trucking Associations (ATA) challenged the new requirement that the 34-hour restart period be used no more than one time per week and include two night-time periods. ATA also contests the rule's 30-minute break requirement.

The government challenged the standing of all the petitioners to seek review of the rule. On the merits, the government argued that FMCSA reasonably chose to limit the 34-hour restart requirement, retain the 11-hour daily driving limit, and impose an off-duty break requirement. The government also argued that Safety Advocates waived their objections to the 34-hour rule by not raising them during the rulemaking process. Lastly, the government argued that given the extremely technical nature of the agency's analysis and the level of explanation given in the rulemaking documents, the court should give deference to FMCSA's determinations in the final rule.

The panel first addressed standing, holding that petitioners satisfied Article III and prudential standing requirements with one significant exception: the court held that declarations in support of the standing submitted by the Safety Advocates were insufficient to support their standing to challenge the 34-hour restart because the declarations did not establish that the truck-driver declarant was injured by that provision of the final rule. On the merits, the court agreed with the agency's arguments, relying on the principle of judicial deference to the expertise of executive branch agencies dealing with technical matters. Wherever petitioners tried to substitute their views for those of

FMCSA, the court deferred to the technical judgments of the agency. The court, however, vacated the 30-minute break as applied to short-haul drivers because the final rule did not contain a justification for the agency's decision to apply this requirement to the unique context of short-haul operations. All of the other challenges brought by ATA and the Safety Advocates were rejected.

On August 22, the court denied a petition for rehearing filed by *pro se* intervenor William Trescott, who subsequently sought Supreme Court review of the court's decision.

The opinion in the case can be found at: [http://www.cadc.uscourts.gov/internet/opinions.nsf/D6BADB06E71C018F85257BBB004DEFAD/\\$file/12-1092-1449738.pdf](http://www.cadc.uscourts.gov/internet/opinions.nsf/D6BADB06E71C018F85257BBB004DEFAD/$file/12-1092-1449738.pdf).

D.C. Circuit Rejects Challenges to Mexico Long-Haul Trucking Pilot Program

On July 26, the U.S. Court of Appeals for the District of Columbia Circuit issued a consolidated opinion in Owner-Operator Independent Drivers Association v. USDOT, et al. and International Brotherhood of Teamsters, et al. v. USDOT, et al., 724 F.3d 206 (D.C. Cir. 2013), denying multiple challenges raised in petitions for review of FMCSA's U.S.-Mexico Cross-Border Pilot Program. The opinion had originally been issued on April 19, but the court issued a revised opinion on July 26 after considering the parties' rehearing briefs.

Petitioner Owner-Operator Independent Drivers Association (OOIDA) raised seven distinct arguments in its petition for review. The D.C. Circuit found none to be persuasive. First, OOIDA argued that 49 U.S.C. §§ 31302 and 31308 require all truck

drivers operating in the United States to have state-issued commercial driver licenses (CDLs) and that the pilot program violates these statutory requirements by allowing drivers for the Mexico-domiciled trucks to use their Mexican CDLs. The court rejected this argument, finding that Congress, in enacting two separate laws that allow for Mexican truckers with Mexican CDLs to drive on U.S. roads, clearly indicated its intent and decision that Mexico-domiciled trucks could drive on U.S. roads using drivers with Mexican CDLs and that the Mexican CDL could be considered the essential equivalent of a state CDL for purposes of these statutory schemes.

OOIDA next argued that the pilot program violated a U.S. statute requiring all commercial drivers to undergo physical exams by examiners who are listed on a national registry. *See* 49 U.S.C. §§ 31149(c)(1)(A)(i) & (d). In rejecting this argument, the Court held that the Secretary fulfilled this requirement by finding that the issuance of a Mexican CDL, which requires a physical exam every two years, provides adequate proof of medical fitness to drive, noting also that the National Registry was not yet in effect.

The court similarly rejected OOIDA's argument that drug test specimens of Mexican drivers collected in Mexico violated DOT drug testing regulations, finding that no rule required collection in the United States so long as the specimen was tested at a U.S.-certified laboratory. The court also rejected OOIDA's catch-all argument that by recognizing Mexican CDLs and medical certification, the pilot program allows the Mexico-domiciled carriers to comply with Mexican law instead of U.S. law and regulation. The court further rejected OOIDA's challenges to pilot program statutory requirements, finding that

49 U.S.C. § 31315(c) does not require compliance with separate procedures for granting exemptions from safety regulations under 49 U.S.C. § 31315(b) and that the agency met the requirement to publish a list and analysis of all safety laws and regulations for which it will accept compliance with corresponding and equivalent Mexican laws. Lastly, the court rejected OOIDA's contention that the pilot program was not designed to achieve an equivalent level of safety as required by 49 U.S.C. § 31315(c)(2).

In a separate petition, the Teamsters, joined by Public Citizen, raised six additional and distinct issues challenging the legality of the pilot program. The Teamsters argued that the pilot program unlawfully permits Mexico-domiciled carriers to enter the United States with vehicles that do not comply with the certification requirements of the Motor Vehicle Safety Act, 49 U.S.C. §§ 30112 and 30115, and therefore fails to meet Federal Motor Vehicle Safety Standards (FMVSS). The court rejected this argument, granting Chevron deference to the government's interpretation of the FMVSS as applying only to vehicles that are "import[ed] into the United States" or introduce[d] . . . in interstate commerce" and finding that the court's prior interpretation of "interstate commerce" in National Association of Motor Bus Owners v. Brinegar, 483 F.2d 1294 (D.C. Cir. 1973) did not foreclose the agency's interpretation in this case.

Relying on the D.C. Circuit's decision in International Brotherhood of Teamsters v. Peña, which upheld the determination that Mexican medical standards need not be identical to American standards, see 17 F.3d 1478 (D.C. Cir. 1994), the court rejected the Teamsters argument concerning the difference between vision tests for color

recognition in Mexico and the United States, accepting the agency's explanation for its determination that the Mexican medical standards, some of which are more stringent than American standards, taken as a whole provide an equivalent level of safety.

The court further found that the statutory requirement that Mexico grant U.S.-domiciled trucks "simultaneous and comparable authority" to operate in Mexico was satisfied by Mexico's grant of legal authority for U.S. trucks to operate in Mexico despite the practical difficulties that such trucks may encounter and similarly rejected the Teamster's argument that the pilot program impermissibly granted credit to motor carriers that participated in the previous 2007 pilot program.

The Teamsters also contended that the pilot program did not include a reasonable number of participants necessary to yield statistically valid findings as required by 49 U.S.C. § 31315(c)(2)(C). The court held that the agency could not control whether Mexico-domiciled trucking companies would ultimately avail themselves of the opportunity to participate in the pilot program and that the agency has thus "met its obligation to include a sufficient number of participants so as to yield valid results." The court also rejected the Teamster's challenge to the agency's statistical methodology, granting deference to the agency's approach.

Lastly, the Teamsters argued that FMCSA violated NEPA by failing to adequately evaluate the alternatives presented to minimize the environmental impact of the program and by conducting its environmental analysis after the agency had already decided to proceed with the program. The court rejected these challenges, upholding the agency's position

that it lacked authority to impose alternatives proposed by the Teamsters that exceed the scope of both the agency's authority and the pilot program and relying on the Supreme Court's decision in Department of Transportation v. Public Citizen, 541 U.S. 752 (2004) (agency was not responsible for evaluating environmental impacts under NEPA in light of the President's decision to lift the moratorium on Mexican motor carrier operations throughout the United States). The court further found that the Teamsters had not identified any aspect of the pilot program that the agency could have designed differently and thus the belated issuance of the Environmental Assessment for the program was "technical error."

OOIDA filed a petition for rehearing on the single issue of whether the agency may allow Mexico-domiciled truck drivers to operate in the United States using their Mexican commercial drivers' licenses given the language of 49 U.S.C. §§ 31302 and 31308, further arguing that the court's ruling repeals by implication the clear language of these statutes based on later-enacted appropriations laws, which is impermissible and in conflict with Supreme Court precedent and Circuit law.

The Teamsters sought rehearing en banc on two issues, contending that (1) the court's holding that Mexico-domiciled trucks are not required to display a decal certifying FMVSS compliance conflicts with the court's prior decision in Brinegar, which held that retread tires on trucks travelling on the highways in interstate commerce were considered to be "introduced in interstate commerce" under the same statute, and (2) the characterization of the agency's failure to consider environmental impacts before issuing its decision to proceed with the pilot program as a harmless "technical error"

undermines the meaning of NEPA and conflicts with Supreme Court and Circuit precedent on agencies' obligations under NEPA.

On July 26, the D.C. Circuit issued an order denying the OOIDA and Teamsters requests for rehearing and amending the slip opinion concerning the impact of Brinegar, distinguishing it from the facts in the present case. On October 24, OOIDA sought Supreme Court review of the D.C. Circuit's denial of its petition for review. Like its rehearing petition, OOIDA's petition for certiorari was limited to the issue of whether the agency may allow Mexico-domiciled truck drivers to operate in the United States using their Mexican commercial drivers' licenses.

The opinion in these cases can be found at: [http://www.cadc.uscourts.gov/internet/opinions.nsf/DFA379A6AF9DBBF785257BB4005133E6/\\$file/11-1251-1448602.pdf](http://www.cadc.uscourts.gov/internet/opinions.nsf/DFA379A6AF9DBBF785257BB4005133E6/$file/11-1251-1448602.pdf).

D.C. Circuit Rejects OOIDA's Challenge to FMCSA's Application of the National Medical Examiner Registry Rule

On July 26, the U.S. Court of Appeals for the District of Columbia Circuit denied a petition for review filed by the Owner-Operator Independent Drivers Association (OOIDA) that challenged FMCSA's decision not to require commercial motor vehicle operators employed by Mexico-domiciled motor carriers to hold a medical certificate from a certified examiner listed on the National Registry of Certified Medical Examiners. Petitioner in OOIDA v. USDOT, et al., 724 F.3d 230 (D.C. Cir. 2013), argued that (1) FMCSA had no authority to exempt Mexican drivers from the requirement to have a current and valid

medical certificate issued by an individual listed on the National Registry of Medical Examiners, (2) FMCSA's statutory responsibilities are not circumscribed by prior international agreements, (3) to the extent that such pre-existing international agreements conflict with respondents' statutory responsibilities respecting medical certification of drivers, the statutory responsibilities abrogate any obligations created by pre-existing international agreements, and (4) there is no support for the proposition that Congress intended to exempt Canadian and Mexican drivers from the statutory requirements for driver medical certificates. OOIDA cited its challenge to FMCSA's Mexican pilot program in OOIDA v. USDOT, et al. as a related case, distinguishing this matter as challenging Respondents' determination to permanently exempt, outside of the pilot program, both Mexico and Canada-domiciled drivers from the same medical certification requirements.

A majority of the panel rejected all of petitioner's arguments and upheld that portion of the final rule specifying that the national registry requirements do not apply to the medical certification of properly licensed Canadian and Mexican drivers. The court stated that "absent some clear and overt indication from Congress," it will not construe a statute to abrogate existing international agreements even when the statute's text is not itself ambiguous. Judge Sentelle dissented, opining that the clear language of the statute trumped the conflicting provisions of the earlier international agreements.

On September 9, OOIDA filed a petition for rehearing en banc. The court ordered the government to respond to the rehearing request. The government's response is due November 8.

The opinion in this case can be found at: [http://www.cadc.uscourts.gov/internet/opinions.nsf/137173EF7025F4C885257BB40051341D/\\$file/12-1264-1448590.pdf](http://www.cadc.uscourts.gov/internet/opinions.nsf/137173EF7025F4C885257BB40051341D/$file/12-1264-1448590.pdf).

D.C. Circuit Holds Metrics and Standards Statute Unconstitutional

On July 2, in Association of American Railroads v. USDOT, 321 F.3d 666 (D.C. Cir. 2013), the U.S. Court of Appeals for the District of Columbia Circuit held that Congress violated constitutional nondelegation principles by granting authority to FRA and Amtrak to jointly develop metrics and standards for the purpose of measuring improvement to Amtrak's performance.

This case is an appeal of a decision of the U.S. District Court for the District of Columbia upholding the constitutionality of Section 207 of The Passenger Railroad Investment and Improvement Act of 2008 (PRIIA), which required FRA and Amtrak to jointly develop metrics and standards to evaluate the performance and service quality of Amtrak's intercity passenger trains. The Association of American Railroads (AAR) alleged that Section 207 violated the Constitution's Due Process Clause and non-delegation doctrine. The district court found neither claim to be meritorious.

In its briefing and argument to the D.C. Circuit, AAR argued that Congress unconstitutionally delegated lawmaking authority to Amtrak, a private entity, when it gave Amtrak joint responsibility to issue the metrics and standards. AAR's claim was based in part on the fact that when Congress created Amtrak, it declared that Amtrak was not a department, agency or instrumentality of the government. AAR also contended that Amtrak's role in developing the metrics and standards violates the Due Process

Clause because Amtrak is a private entity that has a financial interest in the new standards, thereby contaminating the regulatory process with the potential for bias.

In response, FRA argued that the statute does not violate the non-delegation doctrine because FRA's role as co-author of the metrics and standards ensured more than sufficient government involvement and oversight and because there is pervasive federal involvement and oversight in Amtrak's activities. In addition, FRA argued that the statute readily withstands scrutiny under the relaxed Due Process Clause standard for rulemakings, regardless of Amtrak's public or private status, for substantially the same reasons as the non-delegation claim.

The D.C. Circuit was not persuaded that Section 207 gave FRA sufficient involvement in the development of the metrics and standards, noting that had FRA and Amtrak been unable to agree on the metrics and standards, the statute authorized a mediator who could have been a private, non-governmental individual to resolve the conflict. The court then held that notwithstanding a degree of government control over it, Amtrak is a private entity with respect to Congress's power to delegate regulatory authority and that thus Section 207 constitutes an unconstitutional delegation of regulatory power. The court did not reach AAR's due process argument.

On August 16, FRA filed a petition for rehearing or rehearing en banc, requesting a rehearing because the panel's invalidation of an Act of Congress presented a question of exceptional importance. In its response to this petition, AAR stated that the panel had correctly held that the law was an unconstitutional delegation and that there is

no legal precedent to support the Government's position. The court denied FRA's petition on October 11.

The opinion in this case can be found at: [http://www.cadc.uscourts.gov/internet/opinions.nsf/CDEBEB30087672FE85257B9C004F3720/\\$file/12-5204-1444666.pdf](http://www.cadc.uscourts.gov/internet/opinions.nsf/CDEBEB30087672FE85257B9C004F3720/$file/12-5204-1444666.pdf).

San Francisco Appeals Dismissal of its Challenge to PHMSA's Oversight of State Pipeline Safety Program

On October 4, the City and County of San Francisco (City) filed its opening brief in City and County of San Francisco v. USDOT (9th Cir. No. 13-15855), the appeal of a district court decision that dismissed appellants' lawsuit against DOT and PHMSA alleging violations of the Pipeline Safety Act (PSA) and the APA. 2013 WL 772652 (N.D. Cal. Feb. 28, 2013). The lawsuit, initially filed in February 2012, related to the September 2010 rupture of a natural gas pipeline in San Bruno, California. The ensuing explosion resulted in eight fatalities, multiple injuries, and the destruction of 38 homes. The NTSB investigated the incident and issued findings, recommendations, and conclusions in August 2011. The ruptured pipeline was operated by Pacific Gas & Electric and is regulated by the California Public Utilities Commission (CPUC) under delegated authority from PHMSA through a state certification process.

In the original complaint, framed as a "citizens suit" under the PSA, the City had alleged that the federal defendants violated the PSA by (1) failing to ensure that certified state authorities, including the CPUC, are satisfactorily enforcing compliance with the minimum federal

pipeline safety standards, (2) failing to take appropriate action to achieve adequate enforcement of federal standards to the extent state authorities are not, and (3) disbursing federal funds to the CPUC without determining whether it is effectively carrying out its pipeline safety program. The City sought declaratory judgment and injunctive relief.

Without a hearing, the district court granted the federal defendants' motion to dismiss the complaint, agreeing that an action for injunctive relief against the government for failing to properly administer the PSA, known as a mandamus claim, is not authorized by the citizens suit provision of the PSA. The court, however, granted the City leave to amend in order to make a claim under the APA. The City filed an amended complaint, alleging the same conduct by DOT and PHMSA violated the APA. A hearing on the government's motion to dismiss the amended complaint was held December 20, 2012, in San Francisco.

On February 28, 2013, the district court dismissed the amended complaint, without leave to amend, and entered judgment for DOT and PHMSA. The court agreed that the APA does not provide a vehicle for the City to challenge the general adequacy of the defendants' action. In this case, the City was unable to allege DOT or PHMSA had failed to take a discrete, non-discretionary action required by statute. Furthermore, the court found the City's attempt to recast the same facts into a theory that defendants had acted arbitrarily and capriciously under the APA added nothing of substance and must also be dismissed.

After filing a notice of appeal to the U.S. Court of Appeals for the Ninth Circuit, the City filed its opening brief on October 4. In

its brief, the City reasserts its earlier claims. A nonprofit pipeline safety organization filed an amicus brief in support of the appellant. DOT and PHMSA's response brief is due November 4.

United States Files Brief Supporting MWAA in Challenge to MWAA's Use of Toll Road Revenue to Fund Silver Line Construction

On July 19, the United States filed an amicus brief supporting the appellee in Corr v. Metropolitan Washington Airports Authority (4th Cir. 13-1076), a case with a lengthy procedural history concerning the legality of the use of Dulles Toll Road revenue for the construction of the Silver Line Metro.

In 1983, prior to the creation of the Metropolitan Washington Airports Authority (MWAA), the United States, through FAA, granted Virginia a 99-year easement within the Dulles Airport Access Highway Right-of-way for construction and operation of the Dulles Toll Road. In 2008, Virginia transferred possession and control over the Dulles Toll Road to MWAA. Plaintiffs in this case brought suit against MWAA in the U.S. District Court for the Eastern District of Virginia, asserting that MWAA's plan to fund construction of the Silver Line Metrorail Project through toll increases on the Dulles Toll Road was illegal. Plaintiffs asserted three claims. First, plaintiffs alleged that the increased tolls were an illegal exaction under color of federal law, in violation of the Fifth and Fourteenth Amendments of the United States Constitution, arguing that the use of Dulles Toll Road funds for the Metrorail Project amounted to a tax that required legislative authority to institute and that Congress could not have delegated such

authority to MWAA. Plaintiffs' second claim, illegal exaction under color of state law, in violation of 42 U.S.C. § 1983, asserted essentially the same argument as applied to Virginia, that the Virginia legislature lacked the authority to grant MWAA taxing power through the interstate compact that became the Washington Airports Act. Plaintiffs' third claim cited to several provisions of the United States and Virginia Constitutions, arguing that the Metrorail Project funding plan denied plaintiffs the right to vote for the representatives (*i.e.*, the MWAA Board of Directors) who were implementing this tax.

MWAA subsequently filed a motion to dismiss for lack of standing and failure to state a claim. The District Court ruled in favor of MWAA, dismissing the case with prejudice on standing grounds, but also addressing the merits of the complaint. Corr v. MWAA, 800 F. Supp. 2d 743 (E.D. Va. 2011). The court held that the plaintiffs had demonstrated Article III standing but lacked prudential standing because they raised a generalized grievance that was centrally a policy question best left to other branches of government. In reaching this conclusion, the court relied upon a Fourth Circuit opinion in a prior case challenging the Metrorail Project, Parkridge 6, LLC v. USDOT, 420 Fed. Appx. 265 (4th Cir. 2011). The court continued to address plaintiffs' multiple overlapping merits arguments, but determined that plaintiffs' claims must fail because the Dulles Toll Road tolls are fees, not taxes. Finally, the court determined that under the Supremacy Clause the interstate compact preempts any contrary provision of Virginia state law or the Virginia Constitution, thus plaintiffs' claims under state law must fail. Plaintiffs initially appealed the district court's decision to the U.S. Court of Appeals for the Federal Circuit, arguing that MWAA was a

federal instrumentality subject to Federal Circuit jurisdiction under the Little Tucker Act, 28 U.S.C. § 1346(a)(2). MWAA objected to the court's jurisdiction, arguing that MWAA is not a federal instrumentality, and requested dismissal of the appeal or a transfer to the Fourth Circuit. The Federal Circuit granted MWAA's motion and transferred the case to the Fourth Circuit. Corr v. MWAA, 702 F.3d 1334 (Fed. Cir. 2012). On appeal, plaintiffs/appellants argue that they should not be denied standing on prudential grounds, that the tolls are a tax, and that MWAA lacks legal authority to exercise a taxing power.

Because the Department has an interest in this case given the involvement of two DOT operating administrations in the Metrorail Project, FTA and FAA, and given the Secretary's continued oversight of MWAA under the terms of the lease and federal statute, the United States filed an *amicus* brief supporting MWAA. The government's brief, filed on July 19, arguing that the compact between Virginia and the District of Columbia, ratified by the Airports Act, preempts any other applicable state or local law and that the Airports Act text authorizes the use of Dulles Toll Road tolls to fund the Silver Line. Oral argument is currently scheduled for December 11.

Ninth Circuit Hears Oral Argument in Challenge to Honolulu Rail Transit Project

On August 15, the U.S. Court of Appeals for the Ninth Circuit heard oral argument in Honolulutraffic.com, et al. v. FTA, et al. (9th Cir. 13-15277), a partial appeal of a decision of the U.S. District Court for the District of Hawaii in Honolulutraffic.com v. FTA, et al. (D. Haw. 11-00307) denying plaintiffs-appellants' challenge to the

environmental Record of Decision (ROD) for the Honolulu Rail Transit Project (Project), a 20-mile, elevated, rapid rail system running between downtown Honolulu and the western suburb of Kapolei. Plaintiffs-appellants' appeal maintains, contrary to District Court's ruling, that FTA and Honolulu Authority for Rapid Transportation (HART), the Project sponsor and co-defendant, violated NEPA by identifying an overly narrow purpose and need for the Project and failing to adequately evaluate a reasonable range of alternatives. Plaintiffs-appellants also appealed the denial of their claims alleging that the FTA and HART violated Section 4(f) of the DOT Act by improperly identifying certain alternatives as imprudent because they did not meet the purpose and need of the Project and failed to adequately identify Native Hawaiian burials sites. In addition to hearing argument on plaintiffs-appellants' claims, the Ninth Circuit heard argument regarding whether it had jurisdiction over plaintiffs-appellants' claims in light of the fact that the District Court remanded three Section 4(f) issues to FTA for further evaluation, and that evaluation was pending.

Court Denies Government's Motion to Dismiss in Challenge to Digital Billboard Guidance

On October 23, the U.S. District Court for the District of Columbia denied motions to dismiss filed by the government and the intervening defendant, Outdoor Advertising Association of America (OAAA) in Scenic America v. USDOT, et al., No. 13-93, 2013 WL 5745268 (D.D.C. Oct. 23, 2013). Scenic America alleges that FHWA's 2007 guidance on commercial electronic variable message signs (a/k/a digital billboards) did not follow the required rulemaking process

pursuant to the APA. Additionally, the FHWA allegedly violated the Highway Beautification Act (HBA) and its own HBA regulations by not amending agreements with the State to allow digital billboards.

The government and OAAA's motions to dismiss, filed in June, essentially argued that Scenic America lacked standing to bring the lawsuit on the following grounds: 1) failure to establish injury-in-fact; 2) failure to show that the injury was caused by the 2007 guidance; and 3) failure to show that a decision by the court vacating the 2007 guidance would redress the claimed injuries of Scenic America. In addition, the defendants maintained that the 2007 guidance was not a final agency action reviewable under the APA.

In its opinion, the court determined that Scenic America adequately established standing to bring suit and that the 2007 guidance was an appealable final agency action. In its analysis of defendants' standing arguments, the court found that the 2007 guidance caused injury to Scenic America by forcing it "to combat an increased number of digital billboards with a concomitant drain on the resources dedicated to other conservation programs." That increase was caused by the 2007 guidance, the court ruled, because states that had previously not permitted digital billboards did so after the guidance was issued. The last final standing prerequisite, redressability, was satisfied because vacating the 2007 guidance would, at the least, slow the approval of digital billboards by the FHWA Divisions. On the final agency action issue, the court determined that Division Offices could no longer reject a state's proposal to allow digital billboards on the ground that digital billboards violated the prohibition on moving, flashing or intermittent lights in FHWA's agreement

with the state on HBA implementation. As such, the 2007 guidance had legal consequences in that it limited agency discretion and therefore had a binding effect.

Court Rules on Motion to Dismiss Challenge to Denial of Loan Guarantee Refinance Application

On May 6, the U.S. District Court for the District of Columbia partially granted and partially denied the federal defendant's motion to dismiss in American Petroleum Tankers Parent, LLC v. United States, et al., No. 12-1165, 2013 WL 1859311 (D.D.C. May 6, 2013), in which American Petroleum Tankers Parent, LLC, (APT) sought APA review and emergency relief in the nature of mandamus in connection with APT's application for a loan guarantee under the Federal Ship Financing Program. APT had submitted its application for a loan guarantee under the Program, better known as the "Title XI" program, with MarAd on August 31, 2010. The application requested a \$470 million loan guarantee, which would cover the cost of refinancing five vessels already owned by APT. APT intended to use the loan guarantees to refinance its existing debt, which it had incurred to construct these same five vessels.

MarAd denied APT's application because, among other things, the application was economically unsound and would exhaust available program resources. APT's Complaint alleged that MarAd's decision was arbitrary, capricious, or an abuse of discretion (first cause of action), and that the Secretary's and the DOT Credit Council's involvement in the application process was contrary to law (second cause of action). (The Credit Council consists of the heads of several of the Department's operating administrations and reviews all

Departmental loan applications to ensure consistent credit policies and management practices across all Departmental credit programs.)

The government's motion to dismiss sought dismissal of the entire action for lack of subject matter jurisdiction and failure to state a claim upon which relief may be granted. In that motion, the government argued that MarAd's Title XI decisions are unreviewable by the court because MarAd's decisions are committed to agency discretion, and therefore, the APA does not provide the relief APT seeks. Additionally, the government maintained that the Secretary has statutory authority to require the Credit Council's involvement in the application process and that no statute or regulation prevents either the Secretary or the Credit Council from advising MarAd on APT's application. In response, APT asserted that MarAd's Title XI decisions are, in fact, reviewable, and that nothing prevents a court from reviewing the decisions for abuse of that discretion and their compliance with the law under the APA. APT also contends that the Secretary and Credit Council are not to be a part of the MarAd Title XI process.

The court denied the dismissal of the first and second causes of action, but granted the dismissal of the third cause of action that requested the additional remedy to recuse the Maritime Administrator as the decision-maker. Thus, two of APT's claims continued. Those two claims allege that defendants' actions were arbitrary, capricious, and otherwise unlawful under the APA and that the Secretary of Transportation unlawfully interfered with the Maritime Administrator's responsibilities regarding Title XI applications.

On June 14, after defendants filed the administrative record (AR), APT filed a motion to compel filing of the full administrative record and for leave to conduct limited discovery alleging that the AR was deficient because, among other things, documents were redacted as deliberative process and only MarAd filed an AR. APT sought documents from the Credit Council members and depositions of then-Maritime Administrator David Matsuda, then-Associate Administrator for Business and Financial Development George Zoukee, and then-Office of Marine Financing Director Daniel Ladd. The court denied APT's request save the inclusion of two speeches made by then-Secretary of Defense Panetta that were cited in MarAd's denials letters.

The briefing of summary judgment motions and cross-motions by APT and the defendants was completed on September 17.

Court Denies TRO Motion in DBE Appeal

On April 1, the U.S. District Court for the Western District of Washington denied plaintiff's motion for a temporary restraining order and dismissed the case for lack of subject matter jurisdiction in Rebar International, Inc. v. Departmental Office of Civil Rights, et. al., No. 13-242, 2013 WL 1314945 (W.D. Wash. April 1, 2013). Rebar International, a firm certified as a Disadvantaged Business Enterprise (DBE) in Washington State, filed an action seeking judicial review of a remand decision by DOT's Departmental Office of Civil Rights (DOCR). Pending the court's disposition of Rebar's petition, Rebar filed a motion seeking to temporarily enjoin the remanded hearing from taking place. DOT filed a response to Rebar's motion for temporary injunctive relief and argued, among other

things, that DOCR's remand decision is not final agency action and thus, the case should be dismissed for lack of jurisdiction.

After finding reasonable cause to believe that Rebar may not be eligible to continue participating as a DBE, FHWA directed the Office of Minority and Women's Business Enterprises (OMWBE), the state certifying agency, to initiate decertification proceedings against Rebar. OMWBE convened a show cause review hearing, but failed to conduct an independent investigation and to prosecute the matter as required pursuant to DOT's DBE program regulations. As a result, the Certification Committee chairing the show cause review hearing found that OMWBE failed to meet its burden of proof and determined that Rebar should not be decertified.

Pursuant to the DBE program regulations, FHWA appealed the Certification Committee's decision to DOCR. Upon reviewing the administrative record, DOCR decided to remand the matter back to the State with instructions for OMWBE to prosecute the case and to further develop the record.

The court agreed with DOT and found that DOCR's remand decision was not final agency action and thus dismissed the case for lack of subject matter jurisdiction.

Government Moves for Summary Judgment in Constitutional Challenge to DBE Statute and Regulations

On June 14, the government filed a motion for summary judgment in Geyer Signal, Inc. v. Minnesota Department of Transportation, et al. (D. Minn. 11-0321), a lawsuit challenging the constitutionality of the statute authorizing DOT's Disadvantaged

Business Enterprise (DBE) regulations, the regulations themselves, and their implementation by the Minnesota Department of Transportation as a federal-aid highway fund recipient. DOT is an intervenor in the case, which has been brought by a non-DBE highway construction subcontractor in the U.S. District Court for the District of Minnesota. Plaintiff alleges, among other things, that the federal DBE statute and regulations are unconstitutional because they are not sufficiently supported by the legislative record and they cause an overconcentration of subcontract awards to DBEs in various construction specialty areas, including landscaping and traffic control, plaintiff's areas of specialty. Plaintiff claims that but for the race- and gender-conscious provisions of the DBE program, plaintiff would be able to compete for and win more subcontracts.

In its motion for summary judgment, the United States argued that DOT's DBE program is narrowly tailored to serve a compelling interest and thus passes constitutional muster under the strict scrutiny standard that applies to such programs. Specifically, the government argued that remedying race and gender discrimination is a well-recognized compelling interest for congressional action and that myriad hearings, reports, and studies demonstrate the strong basis in evidence for the DBE program. These sources show that minorities and women form businesses at disproportionately low rates, their businesses earn less than similar businesses owned by white men, they disproportionately lack access to credit and wealth, which limits their ability to start and grow their businesses, and that there are consistent disparities between the availability of minority- and women-owned

businesses and their utilization in public contracting.

As to the narrow-tailoring requirement, the government argued that DOT's regulations require recipients to use race-neutral means to achieve their goals to the maximum extent possible, ensure that only appropriate DBEs can enter the program, undergo regular reviews, are flexible and reflect the local availability and utilization of DBEs, and do not create an undue burden on third parties (such as plaintiff), by, among other things, requiring DOT highway funds recipients to take appropriate measures to address the type of overconcentration alleged by plaintiff.

Summary judgment briefing in the case has been completed, and oral argument on the summary judgment motions filed by the state defendant and federal defendant-intervenor was held on September 23.

Federal Defendants File Motion to Dismiss Challenge to New Detroit River Bridge

On August 30, the federal defendants in Detroit International Bridge Company, et al. v. U.S. Department of State, et al. (D.D.C. No. 10-476) filed their motion to dismiss this challenge to various federal agency actions related to the construction of the proposed New International Trade Crossing bridge (NITC) connecting Detroit, Michigan, and Windsor, Canada. Plaintiffs are the owners of the Ambassador Bridge, the only bridge connecting the Detroit area to Canada, and have sought Coast Guard approval for their own new bridge (the New Span) to be built adjacent to the Ambassador Bridge. FHWA, the State Department, and the Coast Guard are among the federal

defendants. The Government of Canada is also a co-defendant.

Plaintiffs seek declaratory and injunctive relief against the defendants for violating their alleged franchise rights to construct a new bridge across the Detroit River by proposing the NITC. Plaintiffs claim that they have the exclusive franchise to construct a bridge in the area pursuant to the Boundary Waters Treaty of 1909 and the 1921 act that authorized the American Transit Company, plaintiffs' alleged predecessor in interest, to build the Ambassador Bridge (ATC Act). Plaintiffs also argue that the defendants have violated their right to build a new span by delaying the Coast Guard approval needed to build the New Span. The plaintiffs further allege that the defendants have violated the Takings Clause of the Fifth Amendment and the Equal Protection Clause of the Fourteenth Amendment by favoring the NITC over the New Span and doing so without just compensation. Finally, plaintiffs allege that the State Department improperly issued a Presidential Permit for the NITC and that Congress, in the International Bridge Act of 1972 (IBA), improperly delegated its constitutional authority to approve the Crossing Agreement.

In their motion to dismiss, federal defendants address plaintiffs' claims as follows: (1) the IBA by its terms does not delegate Congress' power to approve state agreements with foreign powers such as the Crossing Agreement and that even if the non-delegation doctrine was applicable, delegation here was permissible because Congress supplied an intelligible principle to guide the State Department's actions; (2) neither the Boundary Waters Treaty nor the ATC act confer a private right of action and, in any event, neither the act nor the treaty

include an exclusive franchise right, express or implied; (3) the takings claim must be dismissed because it can only be brought in the Court of Federal Claims under the Tucker Act; (4) plaintiffs failed to establish standing to assert their APA claim against the State Department's issuance of a Presidential Permit for the NITC and its approval of the Crossing Agreement, actions that are, in any event, non-reviewable; and (5) plaintiffs failed to sufficiently plead their equal protection argument because they cannot allege that they are similarly situated to the NITC proponents or that they have been subject to differential treatment and, even if they could establish differential treatment, they cannot show the absence of a rational basis. (Plaintiffs' claims against the Coast Guard for unreasonable delay in the processing of a navigation permit for the New Span were addressed separately in cross-motions for summary judgment filed in May.)

Court of Federal Claims Concludes Trial on Love Field Takings Claim

On September 25, 2013, the Court of Federal Claims concluded the trial in Love Terminal Partners v. United States (Fed. Cl. 08-536), in which Love Terminal Partners (LTP) and Virginia Aerospace seek compensation for an alleged taking of their property (a passenger terminal facility and other structures at Love Field in Dallas, Texas) through federal legislation.

Congress has long imposed restrictions on air carrier operations at Love Field under the Wright Amendment in order to support Dallas-Fort Worth International Airport (DFW). In 2006, the concerned parties (the cities of Dallas and Fort Worth, the DFW airport board, Southwest Airlines, and American Airlines) reached agreement on

resolving their disputes about the use of Love Field, including the demolition of the LTP terminal. The parties recognized the anticompetitive nature of their agreement and urged Congress to adopt legislation permitting it to go forward. Later that year, Congress responded by enacting the Wright Amendment Reform Act (WARA), which referenced the aforementioned agreement in phasing out existing restrictions and imposing others. In order to ensure that Love Field did not expand, the concerned parties had agreed, and WARA included a provision, to cap the number of passenger gates permitted at the airport. LTP alleges that these restrictions took its property. The

complaint seeks \$120 million as just compensation.

The trial took place from October 1 to October 10, 2012, and included the testimony of various fact and expert witnesses, including FAA employees. However, after conclusion of the trial, the Plaintiffs sought to replace one of their experts because of new information that Plaintiffs argued could taint the expert's credibility. The judge permitted Plaintiffs to provide a new expert and thus reopened the trial. Simultaneous post-trial briefs are due November 26, and responsive briefs are due January 10, 2014.

Recent Litigation News from DOT Modal Administrations

Federal Aviation Administration

D.C. Circuit Rejects Challenge to the Fair Treatment for Experienced Pilots Act

On June 21, the U.S. Court of Appeals for the District of Columbia Circuit in Adams v. United States, 720 F.3d 915 (D.C. Cir. 2013), affirmed the district court's dismissal of what appears to be the last of the legal challenges to the Fair Treatment for Experienced Pilot's Act (FTEPA). Under the FTEPA, the maximum age for part 121 air carrier pilots was raised to 65. This age change was non-retroactive, but pilots who turned 65 before the statute became effective were eligible to be rehired by the carrier; however, they were not entitled to retain their seniority. The statute provided a "safe harbor" against liability for employment discrimination for carriers that acted in

accordance with the FTEPA. In this case, as in various others that have been litigated since the FTEPA was enacted in 2007, the plaintiffs were pilots who turned 65 after the enactment of the statute and who asserted a litany of APA and constitutional claims. After observing that "time and tide wait for no man," the court concluded that certain claims were moot because more than five years had passed since the effective date of the statute, and thus "with mathematical certainty," none of the plaintiffs remained qualified to pilot a part 121 flight.

With regard to the remaining claims, the court held that the need to maintain workplace harmony provided a rational basis for the statute's non-retroactivity and, thus, agreed that there was no violation of equal protection. Similarly, the court agreed that the district court's dismissal of the due process (both procedural and substantive) and bill of attainder claims was proper. In reaching this conclusion, the court noted that those challenging substantive due process

bear the burden of showing that—in this case—the Congress acted in an arbitrary and irrational way; and that contrary to imposing a barrier to employment as might be the case with a bill of attainder, the FTEPA increased the piloting opportunities for over-60 pilots, albeit not in the way they would have preferred.

The opinion in the case can be found at: [http://www.cadc.uscourts.gov/internet/opinions.nsf/022BC1DEFF05507485257B91004EEC85/\\$file/11-7142.pdf](http://www.cadc.uscourts.gov/internet/opinions.nsf/022BC1DEFF05507485257B91004EEC85/$file/11-7142.pdf).

Second Circuit Denies Petition for Review of Study of Enclosed Marine Trash Transfer Facility Adjacent to LaGuardia Airport

On April 9, the U.S. Court of Appeals for the Second Circuit denied the petition for review in Paskar and Friends of LaGuardia Airport, Inc. v. USDOT, 714 F.3d 90 (2d Cir. 2013), in which petitioners challenged a September 2, 2010 letter transmitting the “Evaluation of the North Shore Marine Transfer Station and its Compatibility with Respect to Bird Strikes and Safe Air Operations at LaGuardia Airport.” The report at issue was prepared by a blue-ribbon panel of bird hazard experts who examined the extent to which the Marine Transfer Station (MTS), a proposed enclosed trash transfer facility, if properly managed, would nonetheless constitute a wildlife attractant and would therefore be incompatible with safe airport operations at LaGuardia. In 2006, the City of New York (City) proposed refurbishing four closed transfer stations; one of them is located in the Borough of Queens, less than one mile from LaGuardia Airport. The report included recommendations for action by the City’s Department of Sanitation and concluded that the MTS will be compatible

with safe air operations so long as it is constructed and operated in accordance with the Report’s recommendations.

On January 7, 2011, the United States filed a motion to dismiss the petition for review on the ground that the FAA letter was not an “order” and that the court of appeals therefore lacks subject matter jurisdiction to hear the petition under the applicable judicial review provision in 49 U.S.C. § 46110. On April 6, 2011, the court held that the letter is an order for purposes of 49 U.S.C. § 46110. In its April 2013 decision, however, the court revisited its earlier jurisdictional ruling and held that letter was not, in fact, a reviewable agency order. Specifically, the court determined that nothing in the letter imposes an obligation, denies a right, or fixes a legal obligation. The letter, the court found, simply advises the City to follow a review panel’s safety recommendations regarding the construction and operation of the MTS. In that sense, the court noted, the letter differs from FAA’s Hazard/No Hazard determinations and wildlife hazard assessments, which can affect parties’ rights, obligations, and legal relationships and have been found to be reviewable in some instances.

Montana Supreme Court Rejects Tort Claims against the United States Based on Contribution and Indemnity

On July 16, the Supreme Court of Montana issued its opinion in Metro Aviation, Inc., et al. v. United States, 305 P.3d 832 (Mont. 2013) on questions certified to the court by the U.S. District Court for the District of Utah. This matter arose in connection with an action under the Federal Tort Claims Act (FTCA) following a 2007 accident where an airplane owned by Metro Aviation crashed

near Bozeman, Montana. The pilot, a Metro employee, and two passengers died in the crash. All three were Montana residents. Metro settled one of the passenger claims without litigation and settled the other passenger claim after the passenger's estate filed suit against Metro. The United States was not a party to any of these settlements or to the litigation brought by the passenger. Thereafter, Metro filed an FTCA action in the U.S. District Court for the District of Montana alleging negligence by the air traffic controller at the air traffic control center in Salt Lake City. Metro also asserted alternative claims of indemnity and contribution to recover the amounts paid in the passenger settlements. The court granted the United States' motion to transfer the case to the U.S. District Court for the District of Utah.

The United States moved for partial summary judgment on Metro's claims for indemnity and contribution, arguing that they were barred under Montana law. The district court agreed that Montana law applied, but found that Montana law was unsettled with respect to the specific issues. For this reason, the district court certified the following questions to the Montana Supreme Court:

A. May a person who has settled a claim with a victim then bring an action for contribution, even though the settling claimant never filed a court action?

B. Where a defendant in a pending action enters into a settlement with the plaintiff in advance of trial, may the settling defendant bring a contribution action against a person who was not a party to the original action?

C. Does Montana recognize a common law right of indemnity where the negligence of the party seeking indemnification was remote, passive, or

secondary, compared to that of the party from whom indemnity is sought?

In answering each of these questions in the negative, the Montana Supreme Court focused on particular elements of the Montana statute. With respect to contribution, the Montana statute referred to parties to "an action," which Metro argued included the insurance claim by the passenger who never filed suit. The court reviewed relevant Montana law and held there was "no legal support" for the interpretation that an insurance claim qualifies as "an action." Similarly, the court refused to interpret the Montana statute as permitting a separate action against a person who was not a party to the original action. Here, Metro could have named the United States as a party when the second passenger filed suit, but it did not. Accordingly, the court refused to read into the statute the authority to bring a separate contribution action. Finally, the court noted that, unlike contribution, indemnity seeks to shift the entire burden of loss and, thus, the court held that it would not be fair or appropriate to permit such shifting where, as here, the indemnity claim arose in the context of comparative negligence (active vs. passive/remote).

Agreement Reached in Runway Protection Zone Suit by Greater Orlando Aviation Authority

A settlement agreement has been reached between FAA and the Greater Orlando Aviation Authority (GOAA) that will resolve Greater Orlando Aviation Authority v. FAA (11th Cir. No. 12-15978C). The Acting Assistant Attorney General approved the settlement agreement on September 25; it has been executed by the parties and is in effect as of September 27, 2013. In

accordance with the agreement, on September 27, 2013 GOAA filed a Voluntary Dismissal of the Petition. The court is expected to dismiss the case shortly.

The petitioner sought judicial review of FAA's Interim Guidance on Runway Protection Zones (RPZ), issued September 27, 2012, and Advisory Circular (AC) 150/5300-13A, Airport Design, issued September 28, 2012. The AC addresses FAA's standards and recommendations for airport design, which includes those for RPZs. The Interim Guidance further clarified FAA policy on land uses within RPZs pending the development of final guidance. This policy requires the FAA to document alternatives to introducing new incompatible land uses into RPZs, including alternatives that could avoid introducing the land use into the RPZ, minimize the impact of the land use on the RPZ, and/or mitigate the risk of the land use to people and property on the ground.

The issues raised by the Greater Orlando Aviation Authority (GOAA) in its petition for review include: (1) whether the AC and Interim Guidance are arbitrary and capricious with regard to the RPZ standards contained therein; (2) whether FAA may adopt an Advisory Circular without using the formal rulemaking process under 14 CFR 11; and (3) whether the RPZ standards contained in the AC and Interim Guidance are arbitrary and capricious as applied to GOAA. GOAA also believes the Interim Guidance and AC could have an adverse impact on planned construction and development projects at Orlando International Airport (MCO) and Orlando Executive Airport, including a rail corridor and planned expansion of a roadway crossing through an RPZ at MCO.

Briefs Filed in NEPA Suit over Actions Related to Snohomish County Airport/Paine Field

On June 21, the Cities of Mukilteo and Edmonds, Washington, Save Our Communities, and two individuals filed their brief in the U.S. Court of Appeals for the Ninth Circuit in support of their petition for review of the FAA's Finding of No Significant Impact/Record of Decision (FONSI/ROD) for the Amendment to the Operations Specifications for Air Carrier Operations, Amendment to a Federal Aviation Regulations Part 139 Certificate, and Modification of the terminal building at Snohomish County Airport/Paine Field, Everett, Washington. City of Mukilteo, Washington v. DOT (9th Cir. No. 13-70385). Two airlines, Allegiant and Horizon, had asked the FAA to issue amendments to their operations specifications to allow scheduled commercial air service to and from Paine Field. The proposed service would require an amendment to the Airport's existing Federal Aviation Regulations (FAR) Part 139 operating certificate as well. The above federal actions triggered the need for environmental review under NEPA, resulting in an Environmental Assessment (EA).

In petitioners' opening brief, their primary argument is that FAA's approval of the FONSI/ROD is arbitrary and capricious because FAA failed to incorporate or analyze the project's reasonably foreseeable impacts. Petitioners argue that the introduction of commercial service at Paine Field is the camel's nose under the tent, opening the way for more and more flights by these two airlines and for more and more airlines to initiate commercial service. Therefore, petitioners assert that the forecast

used in the EA should have included flights by these airlines above general national/local trends and by other airlines that could be accommodated by the future terminal contemplated in the airport master plan. In addition, petitioners claim that the air quality analysis does not properly account for the project's impacts.

FAA filed its brief on August 21, arguing that FAA's predictions about the number of future operations at Paine Field are the types of factual, technical decisions for which the agency's findings should be reviewed only for substantial evidence. FAA argued that analyzing the impact beyond the long range plans provided by the airlines, coupled with historical data and future forecasts by the FAA, and beyond the physical capacity of the associated terminal improvements, was speculative and not required under NEPA. In addition, FAA argued that it complied with NEPA when it determined that the air quality impacts of its decision would not be significant and complied with the Clean Air Act when FAA determined that the air quality impacts of its decision were de minimis.

Petitions filed their reply brief on October 10. The case has not yet been scheduled for oral argument.

Local Citizens and Community Groups Sue FAA over RNAV Procedure at Boston Logan Airport

On August 5, three community associations representing Milton, Fairmont Hill, and Hyde Park, Massachusetts and thirteen residents of Readville and Milton, Massachusetts filed a petition for review pro se of FAA's Finding of No Significant Impact/Record of Decision (FONSI/ROD) implementing an air traffic control Area

Navigation (RNAV) standard instrument departure (SID) on Runway 33 Left (33L) at Boston-Logan International Airport (BOS or Logan) in the U.S. Court of Appeals for the First Circuit.

The petition for review in Fleitman v. FAA (1st Cir. 13-1984) arose from an Environmental Assessment (EA) studying the proposed action. The purpose of the proposed action was to increase the efficiency of the Air Traffic Control procedures at Logan and in the Boston TRACON's adjoining/overlying airspace by using NextGen technology. The EA studied the no action alternative and the proposed alternative. The proposed alternative overlays the Runway 33L conventional vector departure procedure (LOGAN SIX) as closely as possible, given existing RNAV design criteria. The overlay exists until the first waypoint, then the new departure procedure transitions to join the other RNAV routes from the other BOS runways. The Runway 33L RNAV SID is designed to remain within the historical jet tracks that depart Runway 33L. The conventional vector procedure, LOGAN SIX, will remain in use for non-RAV capable jet aircraft and turboprop aircraft.

On June 4, after completion of the EA, FAA issued the FONSI/ROD finding that the proposed action did not result in a significant impact over the studied impact areas included in the EA and selected the proposed project for implementation.

Federal Highway Administration

Court Grants FHWA's Cross- Motion for Summary Judgment and Dismisses Claims as to Phase I of Bonner Bridge Replacement Project, Plaintiffs Appeal

On September 16, the U.S. District Court for the Eastern District of North Carolina entered an order denying plaintiffs' motion for summary judgment and granting defendants' cross-motions for summary judgment in Defenders of Wildlife et. al. v. FHWA, et. al., No. 11-35, 2013 WL 5216630 (E.D.N.C. Sept. 16, 2013). The complaint challenged the Final Environmental Impact Statement (FEIS), Environmental Assessment (EA), and Record of Decision for phase 1 of the Bonner Bridge replacement project located in the Outer Banks of North Carolina. Plaintiffs in this case are not-for-profit organizations whose stated missions are to protect and preserve wild animals and their habitats. Plaintiffs sought preliminary and permanent injunctive relief and alleged violations of NEPA and Section 4(f) of the DOT Act. The Bonner Bridge replacement project proposes to reconstruct the aging current bridge which runs north-south for approximately two miles and spans the Oregon Inlet, the waterway that separates Bodie Island and Hatteras Island.

Plaintiffs alleged in their complaint that Defendants failed to assess and disclose environmental impacts adequately in the FEIS and EA, unlawfully segmented the project, failed to rigorously examine reasonable alternatives, and failed to prepare a supplement to the FEIS after substantial changes to the proposal and in light of new

information in violation of NEPA and the APA. Plaintiffs also alleged Defendants violated Section 4(f) of the DOT Act.

The court ruled in favor of defendants on all claims. With respect to the segmentation claim, the court found that Defendants acted reasonably when choosing to consider construction from Bodie Island to Rodanthe in phases given the unique geography present in the area of the project. The court found that phase 1 of the project had logical termini, independent utility, and did not place restrictions on future phases of the project as plaintiffs claimed. With respect to the disclosing of environmental impacts claim, the court found that defendants had adequately disclosed all impacts. The court found the terminal groin had been adequately considered pursuant to NEPA and defendants had adequately considered other indirect impacts of the project. With regard to the analysis of alternatives claim, the court held that defendants had adequately considered plaintiffs' preferred alternative, the Pamlico Sound Bridge Corridor Alternative, and had properly dismissed it. The court also held that defendants had adequately examined the high speed ferry alternative proposed by plaintiffs and had found it to be unreasonable and hence properly eliminated from detailed study. Lastly, with regards to the Section 4(f) claims, the court held that defendants had met all requirements. The court held defendants properly analyzed the use of protected resources, conducted an appropriate feasible and prudent alternative analysis, and did proper planning and mitigation of harm for the use of protected land.

Plaintiff appealed the district court's decision to the U.S. Court of Appeals for the Fourth Circuit on October 1.

FHWA Wins the Ohio River Bridges Case, Plaintiff Appeals

On July 17, the U.S. District Court for the Western District of Kentucky found in favor of the defendants in the Ohio River Bridges Project case, Coalition for the Advancement of Regional Transportation v. FHWA et al., No. 10-7, 2013 WL 3776492 (W.D. Ky. July 17, 2013). The court entered a Memorandum Opinion and Order sustaining defendants' Motion for Judgment on the Pleadings and Motions for Summary Judgment, denying plaintiff's Motion for Trial and Motion for Summary Judgment, and dismissing all remaining claims for relief with prejudice. The complaint challenged the SFEIS/RROD for the Ohio River Bridges Project, which is located in Louisville, Kentucky, and southern Indiana, and includes two bridges spanning the Ohio River as well as improvements to connected roadways. Plaintiff, CART, is a volunteer-member, tax exempt 501(c)(3) organization that promotes modern transit planning.

Plaintiff's claims were brought pursuant to NEPA, the DOT Act, the Clean Water Act (CWA), the Clean Air Act (CAA), and the Federal Aid Highway Act (FAHA) under the APA. CART's twenty claims were grouped into four categories by the Court: 1) violations of the procedural mandates of NEPA; 2) violations of various FAHA funding regulations, including the statute's prohibition of federal participation in certain tolled facilities; 3) impacts to the water and air quality of the region in violation of NEPA, the CWA and the CAA; and 4) intentional discrimination against racial minorities in violation of Title VI. In a lengthy and thorough fifty-nine page decision, the court found for defendants on all claims.

With regard to the NEPA claims, the court found that CART failed to demonstrate that defendants improperly joined the two bridges in one project to create a "mega project." It found that defendants did undertake the required rigorous evaluation in creating the project's purpose and need statement and that the statement was not too narrowly drawn. It also found the purpose and need statement was not deficiently based on outdated information as alleged by CART. The court found that defendants did take a hard look at the likely impacts of tolling of the project, including the impact of the tolling period on low income and minority populations. It found that defendants gave due consideration to a reasonable range of alternatives. The court found that defendants engaged in a well-reasoned selection process and fulfilled their obligations under NEPA and did not pre-select any particular alternative as alleged by CART. The court found that defendants adequately addressed the issue of tunnel spoilage to the most practical degree possible. Lastly, it found that defendants' decision not to prepare a second supplemental EIS was not arbitrary or capricious.

Regarding the financial planning and funding claims against the project, the court found that the project's Toll Agreement was based upon a sound and reasonable conclusion. It found that the mixed funding used for the project ranging from federal financing to debt financing was an adequate plan to fully fund the project and was in fact common for such complex construction projects. The court found no reasoned or legal basis for questioning the oversight costs of the project and that Defendants did not fail to include detailed cost estimates of the project. Regarding the water, air, and other environmental quality standard claims, the court found that defendants adequately

considered and addressed all required environmental concerns in their development of the project. These included CART's CWA, CAA, greenhouse gas emissions, and water quality disclosure claims.

Lastly, CART alleged that various elements of the project violated Title VI of the Civil Rights Act of 1964. While CART conceded that these claims cannot lie against the federal defendants, it continued to pursue these claims against the state defendants. The court agreed with this and granted federal defendants' Motion for Judgment on the Pleadings as to the Title VI claims asserted against them. Analyzing the Title VI claims against the state defendants, the court had serious questions about whether CART had proper standing to pursue its Title VI claims, however addressed their substance in its opinion given the public nature of the lawsuit. The court found CART did not assert proper Title VI causes of action in conjunction with its assertions of NEPA violations in these claims. It also found various claims by CART fell short of stating Title VI claims. Distinct Title VI claims were not found to be established and thus failed. The court also dismissed two related NEPA claims implicating Title VI claims. And lastly, CART's one true Title VI claim, intentional discrimination, was found to be vague, unsupported, and speculative. The court found that the extensive administrative record did not support this argument and there lacked any reasonable suggestion in the record of discriminatory intent by the defendants.

Plaintiff appealed the district court's decision to the U.S. Court of Appeals for the Sixth Circuit on September 16.

Motion to Dismiss Granted in NEPA Challenge to Utah Highway Project

On May 13, the U.S. District Court for the District of Utah granted federal defendants' motion to dismiss the complaint challenging the FEIS/ROD for the Bangerter 600 West Project. In Moyle Petroleum Company v. LaHood et al., No. 12-00901, 2013 WL 1981947 (D. Utah May 13, 2013), plaintiff, Moyle Petroleum (Moyle), which operates a gas station in Draper, Utah, alleged that USDOT did not fully comply with the procedures mandated by NEPA in its FEIS/ROD and that it will suffer environmental and economic harm as a result. The Bangerter 600 West Project is located in Draper, Utah, south of Salt Lake City. The project would build an interchange on Bangerter Highway near 600 West and eliminate signals from the intersection at 200 West.

In its opinion, the court agreed with federal defendants that plaintiff did not have either Article III standing or prudential standing under NEPA's "zone of interest." The court found that plaintiff failed to demonstrate it had suffered an "injury in fact," which is the first prong in the three prong test for Article III standing. The court reasoned that the harm suffered by the plaintiff as a result of the alleged NEPA violation must be an environmental harm. The court rejected plaintiff's attempt to link its allegations of procedural harm with allegations of degradation of air quality. The court found that plaintiff's interests were in property access and business revenues from commuter traffic. Such harms, the court concluded, were not linked to the environmental changes that may result from the project. Second, in reviewing whether the plaintiff would have been able to

establish prudential standing, the court found that the harms alleged by plaintiff were purely economic harms and not environmental harms, and as such were not within NEPA's "zone of interests."

Summary Judgment Granted in Cedar Rapids Highway 100 Case

On June 10, the U.S. District Court for the Southern District of Iowa granted defendants' Motion for Summary Judgment in Sierra Club, et al. v. LaHood, et al., No. 11-258 (S.D. Iowa June 10, 2013). The case was filed by the Sierra Club Iowa Chapter and two individuals as a challenge to the Highway 100 project west of Cedar Rapids, Iowa under NEPA and Section 4(f) of the DOT Act. The proposed new highway would go through the Rock Island County Preserve and would be adjacent to the Rock Island State Preserve.

This project has an extensive history beginning in the 1970s. A Final Environmental Impact Statement was completed in 1979, and FHWA granted location approval in 1980. The project stalled because of funding issues and slowed economic growth in the area. The project was later reactivated and a Supplemental Draft EIS was issued in 2001. Subsequently, the Rock Island County Preserve was established and designated as a Section 4(f) resource. A Draft Section 4(f) Evaluation and a Final Supplemental EIS/Section 4(f) Evaluation were prepared, and a Record of Decision was issued in June 2008. Among other claims, plaintiffs asserted that a second Supplemental EIS should have been issued because six years passed between the issuance of the DSEIS and the FSEIS.

The court found that the alternatives to the preferred route were properly considered,

that the purpose and need for the project was adequately justified, and that alternatives not impacting the Preserve were not arbitrarily eliminated. The court held that FHWA complied with the procedural requirements of NEPA when considering the project's adverse environmental impacts. The court further held that FHWA satisfied its obligation under NEPA with respect to considering and addressing comments from the public. The court rejected plaintiffs' claim that a second SDEIS should have been prepared, finding that there were no significant new circumstances or information requiring such action. With respect to Section 4(f), the court found that FHWA reasonably concluded there were no prudent or feasible alternatives to the preferred route and properly considered mitigation measures.

Preliminary Injunction Denied in Rhode Island Case

On June 5, U.S. District Court for the District of Rhode Island heard argument on plaintiffs' motion for a preliminary injunction seeking to prohibit the Rhode Island from imposing all electronic tolls (AETC) on the Sakonnet River Bridge. In Town of Portsmouth v. FHWA, et al., (D.R.I. No. 13-267), plaintiff alleges that the imposition of tolls after the bridge was open to traffic was a violation of 23 U.S.C. § 129, that the decision to impose tolls was contrary to the commitments made in the Final Environmental Impact Statement, and failure to prepare a Supplemental Environmental Impact Statement (SEIS) was a violation of NEPA. The agency prepared a reevaluation and determined that an SEIS was not required since there were no significant environmental impacts resulting from AETC.

The court issued a bench decision and held that plaintiffs had not satisfied the test for a preliminary injunction on the following grounds: (1) plaintiffs did not show irreparable harm in that the alleged harm resulting from loss of business from diversion was conjecture and highly speculative and that bridge users could be compensated if an injunction was granted after a decision on the merits; (2) plaintiffs were unlikely to succeed on the merits because they have no private right of action to bring a lawsuit under section 129 and that they have not shown violations of law by the agencies; (3) the public interest favors the State government since an injunction will prevent them from acquiring funding to maintain their roads; and (4) the balancing of harms favors the government in this case. The court also cited the Tax Injunction Act, which precludes a federal court from issuing an injunction against the state collection of a tax if a state remedy exists. The court raised the act at an earlier hearing on a temporary restraining order. The court indicated that the Tax Injunction Act may override all the other issues and prohibit issuance of any injunction, but indicated that it is not yet ready to rule on its applicability. Based on the court's ruling, the State can proceed to impose the tolls as planned and the infrastructure is in place to meet that goal.

Court Denies Motion for Preliminary Injunction in NEPA and MBTA Challenge to California Highway Project

On July 2, the U.S. District Court for the Northern District of California denied plaintiffs' Motion for a preliminary injunction (PI) in Native Songbird Care & Conservation, et al. v. LaHood, et al. (N.D. Cal. No. 13-2265). The complaint was filed on May 17 by a coalition of environmental

groups and one individual. The Marin-Sonoma Narrows (MSN) Project involves widening a particularly congested portion of U.S. Route 101 north of San Francisco. Plaintiffs' complaint alleges federal and state defendants violated NEPA and the Migratory Bird Treaty Act (MBTA) due to Caltrans' contractors' misapplication of exclusionary netting to inhibit birds (largely cliff swallows) from nesting under bridges set to undergo replacement or modification as a result of the MSN Project. Specifically, the complaint alleges: 1) that FHWA's 2009 final environmental impact statement (FEIS) and Record of Decision (ROD) failed to take a "hard look" at potential impacts to cliff swallow colonies as a result of the project; 2) that FHWA failed to issue a SEIS once impacts to migratory birds became clear; and 3) that the deaths of migratory birds as a result of the netting violated the MBTA. FHWA issued its ROD in October 2009, and the agency's section 139(l) notice of limitations on claims expired on May 24, 2010. The notice listed both NEPA and the MBTA. As a result, Plaintiffs' claims that FHWA's 2009 ROD violated NEPA and the MBTA are time-barred.

The court concluded that plaintiffs failed to demonstrate: 1) that they are likely to succeed on the merits; 2) that they would suffer irreparable harm absent relief; 3) that the balance of the equities tips in their favor; and 4) that an injunction would be in the public interest. The court held that, "at best," plaintiffs had demonstrated "serious questions" as to the merits of one of their claims, that the FHWA should have prepared a Supplemental Environmental Impact Statement (SEIS) to analyze the impacts associated with the deaths of approximately 65-75 cliff swallows at a highway construction site.

The court noted that plaintiffs had requested a “mandatory injunction,” *i.e.*, that Caltrans be required to remove the netting from the bridges. In the Ninth Circuit, such a motion is subject to heightened scrutiny: “Plaintiffs must show that ‘extreme or very serious damage will result’ to their claimed interests.” Slip op. at 20-21, quoting Park Vill. Apartment Tenants Ass’n v. Mortimer Howard Trust, 636 F.3d 1150, 1161 (9th Cir. 2011).

With regard to the merits, the court held that plaintiffs’ claims directly challenging FHWA’s 2009 ROD under both NEPA and the MBTA were barred by the applicable statute of limitations, 23 U.S.C. § 139(l)(1). As FHWA had issued neither a SEIS nor a re-evaluation, any remaining claims had to be reviewed under the standard of 5 U.S.C. § 706(1), through which a reviewing court may “compel agency action unlawfully withheld or unreasonably delayed.” While expressing some concern over the lack of final agency action on which to base a decision, the court concluded that “[p]laintiffs have not established a substantial likelihood of success on the merits of their claims that a [SEIS] is required in this situation. At best, they have established serious questions going to the merits of that claim.” Id. at 17.

As for likelihood of irreparable harm, the court found that while at least 65 cliff swallows were killed as the result of improperly installed netting, the netting has been repaired and no cliff swallows have died at either bridge since late April. Therefore, “the evidence does not support the claim that these harms are sufficiently likely to continue occurring in the future to the degree necessary to invoke the extraordinary remedy of injunctive relief.” Id. at 18.

Finally, in a blended discussion of the balance of the equities and the public interest, the court found that plaintiffs had shown only a colorable claim regarding the need for an SEIS and that Caltrans had demonstrated real harm that would result from a delaying the bridge work. For example, Caltrans had shown that due to the very narrow window for in-water work at the bridges (June 15-October 1, a permit condition for protected fish species), any injunction would result in construction being shut down for a full year. That being the case, “[t]he balance of equities [did] not tip, much less tip sharply, in Plaintiffs’ favor.” Id. at 26.

Caltrans first became aware of problems with the netting in late March 2013 and immediately began working with the U.S. Fish and Wildlife Service and the California Department of Fish and Wildlife to remedy the situation. Approximately 69 birds, nearly all cliff swallows, have died as a result of the netting, though only one of these mortalities occurred after May 5, 2013.

Court Denies TRO/PI in Challenge to U.S. Highway 51 Project in Wisconsin

On May 9, the U.S. District Court for the Western District of Wisconsin denied the plaintiff’s motion for a temporary restraining order (TRO) and preliminary injunction (PI) in Bhandari, et al. v. USDOT, et al. (W.D. Wis. No. 13-220). The case was filed on March 29 by four individual landowners as a complaint for declaratory and injunctive relief. Plaintiffs also filed a motion for a TRO and PI prohibiting construction until an adequate public hearing pursuant to 23 U.S.C. § 128 has been provided; adequate consideration has been given to the economic, social and

planning effects of the project; and the project has been reconsidered for funding under the Highway Safety Improvement Program using proper criteria. The project will elevate County High C and North Star Drive and create an overpass without ramps over U.S. Highway 51 in Merrill, Wisconsin. Plaintiffs' property, which includes a service station, will lose access to the highway. Federal funds were used for preliminary engineering. The state requested and later withdrew its request for advance construction authorization. Advance construction authority would have permitted the state to convert the project from state funds to Federal Highway Safety Improvement Program funds at a later date.

A TRO hearing was held on May 3. On May 8, the court denied defendants' Motions to Dismiss. The court determined that the hearing requirement was triggered at the application stage, and therefore the Federal government retained an interest in the project. On May 9, the court denied plaintiff's Motion for a TRO and PI, finding that plaintiffs were not likely to succeed on the merits and that the balance of harms weighs in favor of defendants. The court found that the Wisconsin Department of Transportation gave meaningful consideration to plaintiffs' concerns about the project. It found no case enjoining a government agency solely based on its failure to create or maintain a transcript of a public hearing. The court found that while the public has an interest in ensuring that public criticism is considered in designing highway projects, the public arguably has an even greater interest in correcting documented, unsafe intersections.

Work on the project is currently underway. Plaintiffs are now proceeding pro se. They have filed Proposed Findings of Fact in lieu of a Motion for Summary Judgment.

Court Denies Request to Reopen Case and for Preliminary Injunction against Wisconsin Highway 164 Project

On September 27, the U.S. District Court for the Eastern District of Wisconsin denied plaintiffs' motion to reopen and for preliminary injunction in Highway J Citizens Group, et al. v. USDOT, et al. (E.D. Wis. No. 05-212). Plaintiffs sought to enjoin work to improve Wisconsin Highway 164 (WIS 164) between County Q and County E in Washington County, Wisconsin. The complaint, originally filed in February 2005, alleged violations of NEPA, the Federal Aid Highway Act (FAHA), and the Clean Water Act (CWA) relating to proposed improvements to WIS 164 that would have expanded the roadway from two to four lanes. In September 2009, the court granted in part plaintiffs' motion for summary judgment and vacated FHWA's March 2002 Record of Decision, vacated wetland-fill permits issued by the U.S. Army Corps of Engineers, and remanded the matter to the parties to correct deficiencies noted in the court decision so as to comply with NEPA, FAHA, and CWA. After further status hearings, the case was dismissed without prejudice in July 2011.

Plaintiffs claimed in their motion to reopen and for preliminary injunction that project work is underway in violation of the court's previous orders. Defendants maintained that no federal action has occurred and that any future challenges to the new project must be filed in a separate lawsuit.

Court Declines to Enjoin Alabama Project While Record is Assembled

On October 24, the U.S. District Court for the Middle District of Alabama declined to

enjoin activities associated with the Northern Beltline Project (Project), a proposed 52-mile controlled-access highway from the I-59/I-20 intersection west of Birmingham to I-59 on the east side of Birmingham. The court in Black Warrior RiverKeeper, Inc. v. FHWA, et al. (M.D. Ala. No. 11-00267) had issued a scheduling order in June 2013 calling for production of the administrative record and a privilege log to plaintiff by September 27. Defendants sought to extend the time for producing the record by 30 days. The court denied that request and required defendants to show cause why he should not enjoin project activities. Defendants filed their response to the show cause order on October 9. Plaintiff filed a response on October 11. In its ruling, the court indicated that it was satisfied that defendants are making good faith efforts to complete the administrative record and privilege log.

The Project was originally envisioned in the 1960s to provide a northern by-pass around Birmingham. The Project was initially evaluated in a 1997 final environmental impact statement (FEIS) and was approved by FHWA in the 1999 Record of Decision. In 2006, a reevaluation was prepared to evaluate a three mile segment of the overall 52 mile project – between SR 79 and SR 75. After the filing of plaintiff's original complaint, ALDOT completed a new Project reevaluation which was approved by FHWA on March 29, 2012. Under the March 2012 reevaluation, the initial construction work for the Project will occur between SR 79 and SR 75. Plaintiff alleges that FHWA and Alabama DOT (ALDOT) violated the NEPA in approving the project's 1997 FEIS and 2006 and 2012 reevaluations, that ALDOT was engaged in illegal project segmentation, and that a supplemental environmental impact statement must now be prepared.

ALDOT has obtained all necessary federal and state permits to commence with construction between SR 79 and SR 75, including a Section 404 permit from the Army Corps of Engineers and a state water discharge permit. ALDOT expects to let the project in November, and construction is anticipated to begin in February 2014. Summary judgment briefing is scheduled to commence in January 2014 and be completed in March 2014. Plaintiff has not sought a preliminary injunction, but this remains a possibility. Also, plaintiff will likely file suit against the Corps and seek to consolidate the two cases.

Settlement Reached in Case Challenging Zoo Interchange Project

On June 13, the parties in Milwaukee Inner-City Congregations Allied for Hope, et al. v. Gottlieb, et al. (W.D. Wis. No. 12-556) reached a tentative settlement agreement. Plaintiffs filed a complaint challenging the approval of the Milwaukee Zoo Interchange project in August 2012. On February 6, plaintiffs filed a motion for preliminary injunction, and the court found that they would suffer irreparable harm in the absence of an injunction and were likely to succeed on the merits of their case. However, it determined that an evidentiary hearing was necessary in order to make a decision on the balance of harms and determine whether an injunction should be granted. Before the court issued a final decision on the preliminary injunction, the parties agreed to enter into settlement negotiations mediated by the judge assigned to the case.

As part of the agreement, defendants agree to fund two bus routes from downtown Milwaukee to Waukesha County. Funding is capped at \$11.5 million over 4 years, and

the details of the routes will be determined after plaintiffs conduct an evaluation of the route options. The selected routes will be evaluated in consultation with plaintiffs after two years to determine whether ridership justifies continued operation or if funds need to be reallocated to other routes at that time. Defendants also agree to a one-time payment of \$2 dollars to Milwaukee County Transit to improve transit capacity in the inner-city Milwaukee area. These improvements will allow the Environmental Justice (EJ) communities to more easily reach the departure points for the flyer routes describe above.

During the lawsuit, Plaintiffs expressed concern that the 18 foot shoulders included in the design for the project would be converted into an additional lane of traffic in the future without any analysis. Defendants agreed that 6 feet of shoulder on the east-west section of the interchange will be striped off once construction is complete. The shoulder will not be converted into an additional lane to add capacity unless further environmental analysis is done. If such a conversion is proposed, plaintiffs will be notified and have the opportunity to participate in the impacts and EJ analysis.

The \$13.5 million dollars for the agreed upon transit projects will come from funds already budgeted for the project's traffic management plan. Negotiations to finalize the specifics of the terms are ongoing.

Property Owners File New Suit in Louisiana Challenging Sufficiency of Public Hearings and Pre-NEPA Feasibility Study

On May 6, Willis-Knighton Medical Center, filed their second complaint seeking declaratory judgment and injunctive relief

against construction of the LA 3132 Inner Loop Extension. Plaintiffs in Willis-Knighton Medical Center, et. al., v. LaHood, et. al. (W.D. La. No. 13-928) are a nonprofit corporation that owns and operates a retirement community located in the vicinity of Louisiana State Highway 3132 (LA 3132) in Shreveport, Louisiana (Willis-Knighton) and Finish 3132 Coalition, L.L.C., which describes itself as an organization "formed for the purposes of promoting the completion of LA 3132 to the Port as originally planned."

The LA 3132 Inner Loop Extension would extend the road roughly from an interchange with I-49 to the future location of I-69. The project has existed as a concept since as early as 1990, but consultants completed a Stage 0 document just last September. A Stage 0 document, essentially a feasibility study, is a type of planning document the state uses to scope projects before the beginning of the NEPA process. The Louisiana Division has approved a contract to prepare an Environmental Assessment and, if necessary, an EIS for the project.

Plaintiffs allege flaws with the public hearing process associated with the Stage 0 study and with the alternative routes selected for consideration in the final Stage 0 Report. Specifically, plaintiffs allege the open house-style public hearings associated with the Stage 0 Report did not allow attendees to speak to an audience of other attendees, which thus purportedly precluded a public exchange of information thereby limiting and discouraging public participation in violation of 23 U.S.C. §§ 128, 134, and 135. Plaintiffs also allege that the public meetings failed to adequately identify alternatives being considered in the Stage 0 feasibility study. They ask the court to enjoin defendants from proceeding with a Stage 1 study and evaluation of alternatives until

Defendants have conducted a town hall-style public hearing to present the Stage 0 feasibility study, including a broader range of alternative routes.

Local, state, and federal defendants have filed motions to dismiss. Federal defendant's motion was filed on July 30, plaintiffs filed their response on August 23, and federal defendants filed their reply on August 30. After obtaining leave from the court, plaintiffs filed a sur-reply on September 13.

Response Brief Filed in Federal Circuit Oregon Contract Case

On March 27, the government timely filed a response brief in White Buffalo Construction, Inc. v. United States (Fed Cir. No. 12-5045). The case is a challenge to a termination for default of a construction contract awarded in August 1998 to White Buffalo Construction, Inc. (White Buffalo). FHWA later converted the termination for default to a termination for convenience. However, in October 2007, White Buffalo filed a complaint in the U.S. Court of Federal Claims claiming that FHWA breached its duty of good faith and fair dealing, and seeking costs, lost profits, and attorney's fees. The court found that FHWA did not act in bad faith when it terminated White Buffalo's contract and agreed with the government's position related to costs associated with pre-termination work that White Buffalo had completed. White Buffalo Construction, Inc. v. United States, 101 Fed. Cl. 1 (2011).

In its brief urging reversal of a decision of the Court of Federal Claims, White Buffalo argued that the trial court erred in its determination that that the government did not act in bad faith. In addition, White Buffalo argued that the trial court's rejection

of its testimony regarding its profit margin was clearly erroneous and that the court's failure to include a subcontractor's claim in the final judgment was the result of a mathematical error.

In its response brief, the government argued that the trial court did not have jurisdiction to entertain White Buffalo's bad faith claims. The government argued, alternatively, that the trial court's finding that White Buffalo failed to establish bad faith was not clearly erroneous. The government responded to White Buffalo's challenge to the trial court's determinations regarding profit margin by arguing that the trial court's calculation of profit upon work performed was not an abuse of discretion. Finally, the government argued that the Court should affirm the judgment amount despite the trial court's omission from that amount of \$29,529 for one of the subcontractor's claims. The government argued that White Buffalo failed to present any objective or documentary evidence that it had paid, must pay, or would ever pay the subcontractor for the amount in question.

Oral argument in the case was held on October 11.

Challenge to Buy America Waiver Transferred to District Court

On July 8, the U.S. Court of Appeals for the District of Columbia Circuit granted the government's motion to transfer United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, et al. v. FHWA, et al. (D.D.C. 13-01301) to the U.S. District Court for the District of Columbia on the ground that the district courts, not the courts of appeals, have jurisdiction over the case. In this case, eight entities comprised of a workers union and

various steel and iron manufacturing corporations seek judicial review of a December 21, 2012, memo issued by FHWA that clarified the scope of a long-standing general waiver for manufactured products under the FHWA's Buy America requirement in 23 U.S.C. § 313. Plaintiffs filed their complaint in this case on October 4. The government's answer is due on December 9.

Lawsuit Filed in Florida District Court against Single Point Urban Interchange Project

On August 1, RB Jai Alai, LLC filed a complaint for declaratory and emergency injunctive relief in the U.S. District Court for the Middle District of Florida challenging on NEPA grounds the proposal to build a single point urban interchange (SPUI) in Seminole County, Florida. RB Jai Alai, LLC v. Florida Department of Transportation, et al. (M.D. Fla. No. 13-1167). Plaintiff claims to own property and business in the area affected by the project.

The proposed project involves the intersection of SR 15/600 (US 17/92) at SR 436 located in the southwest region of Seminole County, FL. The SPUI will elevate 4 lanes of SR 15/600 (US 17/92) and SR 436. The SPUI includes an elevated overpass over SR 436 as well as the addition of bike lanes, sidewalks and drainage improvements. A Categorical Exclusion (CE) was done in 2004 and a Reevaluation was completed in 2012.

Plaintiff asserts that Defendants' actions in advancing the project have been contrary to law, arbitrary and capricious, and an abuse of discretion under NEPA and the APA. It claims the CE and Preliminary Design and Engineering study conducted for the project

are based on old and flawed traffic data. Plaintiff commissioned its own traffic study dated May 9, 2012, which produced different results indicating the flyover or elevated overpass is not needed. Plaintiff prefers an at grade intersection improvement referred to as the "Boulevard Plan." Plaintiff also asserts that the 2012 Reevaluation is flawed and inadequate due to relying on dated information.

FDOT filed a Motion to Dismiss for Failure to State a Claim on September 24, and FHWA filed a Motion to Dismiss on October 4. Plaintiff filed a motion for a preliminary injunction on October 16, which the court denied without prejudice the same day.

Complaint Challenges Tier One ROD in Illiana Corridor Project

On July 10, Openlands, Midewin Heritage Association, and Sierra Club filed a complaint in the U.S. District Court for the Northern District of Illinois challenging the Tier One Record of Decision for the Illiana Project, alleging NEPA and DOT Act Section 4(f) violations. Plaintiffs in Openlands, et al. v. USDOT, et al. (N.D. Ill. No. 13-4950) are three not-for-profit environmental organizations with members in the project area.

The Illiana Corridor Project is a bi-state project that will create a tolled expressway along the edge of the Chicago metropolitan area. The toll road will run east-west from I-55 near Wilmington, IL, to I-65 near Lowell, IN. The Project's identified purpose is to improve regional mobility, address local and parallel corridor travel deficiencies, and provide for the efficient movement of freight. The Tier One study resolved issues regarding transportation mode, facility type, and general location,

resulting in the selection of a preferred corridor. A combined Tier One FEIS/ROD was signed on January 17, 2013.

Plaintiffs assert that FHWA approval of the Tier 1 FEIS and ROD was arbitrary and capricious because it relied on flawed population and employment forecasts, which inflated projected population growth for the Illiana Expressway study area. Plaintiffs allege several violations of both NEPA and Section 4(f). The NEPA claims allege defendants: (1) conducted a flawed analysis of the Project need and the performance of the alternatives; (2) failed to reasonably explain or justify the Project's inconsistencies with the MPOs' long-range plans; and (3) failed to take a "hard look" at environmental impacts including noise, light, and air pollution and the impacts of low-density sprawled population growth. The Section 4(f) claims allege Defendants: (1) failed to reasonably and adequately address the preferred alternative's constructive use of lands protected by Section 4(f); and (2) failed to adequately consider reasonable, prudent, and feasible alternatives to avoid harmful impacts to protected lands in the area, including the Midewin National Tallgrass Prairie and Alternative Route 66.

The Indiana Department of Transportation has moved to intervene in the lawsuit; the Illinois Department of Transportation is expected to do the same. The Tier Two study is currently in the Draft EIS stage.

Contract Disputes Act Appeal Filed over Sequoia National Park Project

On April 9, Allen Engineering Contractor Inc. appealed under the Contract Disputes Act, 41 U.S.C. § 7101 *et seq.*, a Contracting Officer's denial of claims on a contract to reconstruct an approximately 1.5m segment

of Generals Highway in Sequoia National Park in California. Plaintiff in Allen Engineering Contractor, Inc. v. United States (Fed. Cl. No. 13-254) alleges breaches of contract by FHWA caused it to incur increased costs and delays related to temporary shoring, retaining wall footing steps, underdrain system, zee wall foundations, consulting fees, and failure to obtain an early completion incentive. Plaintiff requests \$6.3 million in damages, plus interest, and an extension of the contract period of 621 days.

Federal Motor Carrier Safety Administration

D.C. Circuit Rejects Motion for Emergency Stay Challenging FMCSA's Conditional Safety Rating, Dismisses Petition for Lack of Prosecution

On August 21, the U.S. Court of Appeals for the District of Columbia Circuit denied a motion for emergency stay in Yowell Transportation Services, Inc. v. FMCSA (D.C. Cir. No. 13-1238). On August 13, Yowell, a for-hire motor carrier, filed a petition for review and motion for emergency stay one day before a proposed conditional safety rating was to become final. Yowell had likewise filed an administrative review the previous day with the agency, seeking an emergency stay and administrative review of the conditional safety rating. The agency decisionmaker denied the stay, and the administrative review is pending before the agency. Yowell argued to the court that FMCSA investigators improperly relied on guidance set forth in the Agency's Electronic Field Operations Training Manual (eFOTM),

which petitioner argued modified the Safety Fitness Rating Methodology in 49 C.F.R. Part 385 without notice and comment rulemaking in violation of the APA. Yowell submitted that if the emergency stay were not granted, shippers would not hire the motor carrier because of the conditional rating and Yowell would suffer irreparable harm. On August 16, the government filed its response opposing the stay on the grounds that the court lacked jurisdiction while the request for administrative review was still pending before the agency and that Yowell had not established the factors needed to support an emergency stay.

The court denied the stay and ordered Yowell to show cause within 30 days why the petition should not be dismissed as incurably premature or as untimely. Yowell did not respond to the court's show cause order, and on October 2, the court dismissed the petition for lack of prosecution.

Ninth Circuit Affirms FMCSA Final Order in Household Goods Enforcement Case

On August 30, the U.S. Court of Appeals for the Ninth Circuit dismissed the petition for review in Dandino, Inc. v. USDOT, et al., 729 F.3d 917 (9th Cir. 2013) and affirmed the final order of FMCSA's Assistant Administrator in a civil penalty enforcement case. Dandino, a household goods motor carrier, had sought a stay and review of a final agency order imposing a \$25,000 civil penalty based on Dandino's transportation of household goods in interstate commerce without the required operating authority. The \$25,000 penalty was the minimum amount that could be assessed under the governing statute, 49 U.S.C. § 14901(d)(3). The Ninth Circuit rejected Dandino's argument that "operating authority" is not

registration under 49 U.S.C. § 13905 and held that there was no legal support for Dandino's argument that it was arbitrary and capricious for FMCSA to define operating authority to mean registration under Chapter 139. Further, the court found that FMCSA followed the statutory requirements in 49 U.S.C. § 13905 when it revoked Dandino's registration for lack of insurance and that such revocation resulted in Dandino lacking operating authority and violating 49 C.F.R. § 392.9a by continuing its operations. The court further noted that Dandino's argument that it was insured at all relevant times misconstrues the legal requirements; the issue was not whether Dandino was insured, but whether it had demonstrated that fact to FMCSA before its registration was revoked. The court upheld FMCSA's final order and penalty assessment.

With respect to FMCSA's jurisdictional challenge, the court held that where FMCSA mails a final order in a civil penalty case to a respondent and there is no proof of actual receipt, there is a rebuttable presumption that the order was received, and the 30-day time period for filing a petition for review begins three days after the date the order was mailed. The court rejected FMCSA's argument that the 30-day period begins when the order is issued or served, holding that Congress intended a party to have a full 30 days to petition for review after receiving notice of the order. The court further noted that FMCSA's Rules of Practice may be in conflict with the court's holding and the statutory time period set in 49 U.S.C. § 521(b)(2)(9).

TransAm Trucking Challenges Agency Dismissal of Request for Administrative Review

On June 13, TransAm Trucking, Inc. (TransAm) filed a petition for review with the U.S. Court of Appeals for the Tenth Circuit, TransAm Trucking, Inc. v. FMCSA (10th Cir. No. 13-9572), challenging FMCSA's decision dismissing TransAm's request for administrative review of its proposed "conditional" safety rating. TransAm argued to the Assistant Administrator in the administrative proceeding below that FMCSA erroneously cited TransAm for a violation of 49 C.F.R. § 395.8(k)(1) and asked that its safety rating be changed from "conditional" to "satisfactory." While TransAm's petition with the Assistant Administrator was pending, the agency upgraded TransAm to a "satisfactory" safety rating based on corrective action taken under 49 C.F.R. § 385.17. TransAm argued that its upgraded safety rating did not moot its request for administrative review because the violation, which served as the basis for its initial "conditional" safety rating, continued to appear to the public as a "serious violation" in FMCSA's Safety Measurement System (SMS) and TransAm had no other venue in which to challenge the citation of the violation. The Assistant Administrator held in his final decision that because TransAm's safety rating already had been upgraded, he could not grant any further relief, and that challenges "to the impact of the compliance review data on the SMS score" are not within his jurisdiction. The Tenth Circuit granted TransAm an extension of time in which to file its opening brief pending the outcome of while settlement discussions. On October 17, the parties executed a settlement agreement that would resolve the ongoing litigation.

Oral Argument Held in Trucking Groups' Challenge to FMCSA's CSA Program

On September 10, the U.S. Court of Appeals for the District of Columbia Circuit heard oral argument in Alliance for Safe, Efficient and Competitive Truck Transportation, et al. v. FMCSA et al. (D.C. Cir. No. 12-1305). Petitioners challenge several FMCSA documents regarding the agency's Compliance, Safety, Accountability (CSA) program and the Safety Measurement System (SMS). Petitioners allege that a PowerPoint presentation and various informational handouts published on the FMCSA website are a "final rule and/or regulation" subject to challenge under the Hobbs Act and a "legislative rule" promulgated without rulemaking in violation of the APA. Petitioners further claim that the posted materials constitute a de facto procedure for issuing a safety rating in violation of 49 USC § 31144 and that FMCSA abdicated its statutory obligation to provide uniform safety fitness standards, thereby exposing shippers to a patchwork of state tort law and placing the burden of assessing safety on shippers. Petitioners also argue that the use of allegedly flawed SMS methodology unfairly prejudices the ability of small carriers to compete in the market.

FMCSA argues in response that the court lacks jurisdiction to hear the case because the challenged documents do not change or interpret prior policy, impose a legal obligation, deny a legal right or fix a legal relationship. The documents merely describe the information available in the SMS and the manner in which the SMS affords FMCSA a vitally needed basis for allocating its scarce enforcement resources. Even if the computation and publication of

SMS rankings could be deemed a final agency action amenable to judicial review, such action occurred with the implementation of the SMS in December 2010, not upon the 2012 publication of informational documents. Additionally, FMCSA's suggestion that shippers, brokers and others may find SMS data useful when making business decisions is not a new position for the Agency. For nearly a decade, FMCSA recommended that public users access SafeStat and use that information to make business decisions. FMCSA's longstanding position has been that the public disclosure of accurate and transparent safety performance data creates strong incentives for motor carriers to improve and maintain their safety record.

The panel's questions to both parties during oral argument focused primarily on the issue of jurisdiction. The panel noted that to the extent the challenged documents are consistent with the agency's 2010 Federal Register notice announcing implementation of the SMS, they cannot be challenged as a new legislative rule. The panel also expressed skepticism that the documents imposed a legal consequence sufficient to constitute a legislative rule. Further, even if the SMS itself imposed a legal consequence, that consequence occurred with the implementation of the SMS in 2010, making the petition for review untimely.

Briefs Filed in OOIDA Challenge to FMCSA Administrator's Letter on Fatigue Out-of-Service Criteria

On August 16, petitioner filed its opening brief in Owner-Operator Independent Drivers Association v. Ferro, et al. (D.C. Cir. No. 12-1483), a petition for review of FMCSA's October 23, 2012, letter responding to a letter from the Owner-

Operator Independent Drivers Association (OOIDA) requesting action on the recently-amended Fatigue Out-of-Service Criteria (OOSC) issued by the Commercial Vehicle Safety Alliance (CVSA). OOIDA asserts that the FMCSA letter constitutes a "new rule or new interpretation of an existing rule, established without notice and comment, that materially changes what had historically been the agency's policy" on fatigued drivers. On June 18, the court referred the case to the merits panel, directing the parties to fully brief the issues raised in the government's February 11 motion to dismiss for lack of jurisdiction.

In its brief, OOIDA argued that the letter changes a long-standing agency position of refraining from performance-based fatigue determinations. OOIDA states that the agency's position on fatigue was established in a 1999 hours of service rulemaking that rejected application of performance-based fatigue indicators in place of hours of service restrictions. In its response brief filed September 18, FMCSA re-submitted jurisdictional arguments that the letter took no action and therefore does not constitute a final agency action for purposes of Hobbs Act jurisdiction. The government further argues that OOIDA is attempting to challenge the CVSA criteria as a rulemaking, an issue already resolved by the D.C. Circuit in National Tank Truck Carriers, Inc. v. FHWA, 170 F.3d 203 (D.C. Cir. 1999), which rejected a similar challenge to the CVSA OOSC as rules issued absent notice and comment. The government further argues that OOIDA lacks standing because it has not shown and cannot show that any of its members suffered injury as a result of the letter, which did not change state inspectors long-standing practice of issuing out-of-service orders when a driver is too fatigued to safely operate a commercial motor vehicle. On the

merits of OOIDA's petition, the government argues that OOIDA is asking the court to prevent state officials from placing a driver out-of-service when the driver has not exceeded hours of service limitations even if the driver is falling asleep at the wheel or acknowledges that he or she has not slept in over a week.

Briefs Filed in Challenge to FMCSA's Pre-employment Screening Program

On May 10, the Owner-Operator and Independent Drivers Association (OOIDA) and Fred Weaver, Jr., an OOIDA member, filed a petition for review alleging that the State of Montana's denial of a request to remove a record of violation from FMCSA's Motor Carrier Management Information System (MCMIS) based on a Montana state court's dismissal of a citation written for the violation constitutes FMCSA final action. OOIDA has raised identical issues in district court, where OOIDA believes jurisdiction over this matter properly lies, in OOIDA v. USDOT, et al. (D.D.C. No. 12-1158), challenging FMCSA authority under 49 U.S.C. § 31150, the statute mandating the Agency's Pre-Employment Screening Program (PSP).

In their August 23 opening brief, petitioners in Weaver, et al. v. FMCSA, et al. (D.C. Cir. No. 13-1172) argued that Montana's denial is not a rule, regulation, or order subject to Hobbs Act jurisdiction and that petitioners challenge to FMCSA's execution of the PSP program should be heard in the district court. On the merits of the claim, petitioners argued that FMCSA has exceeded the scope of its authority under PSP by including "non-serious" violations in Petitioner Weaver's PSP report and failing to comply with the statutory limitations in the PSP

statute. The government, in its opening brief filed on September 25, agreed that review of Montana's denial was not subject to Hobbs Act jurisdiction. The government further argued that petitioners were complaining about state action, not federal agency action, and did not identify any enforcement or other agency action that would subject the agency to jurisdiction in any court. On the merits, the government argued that petitioners are essentially challenging FMCSA's reasonable exercise of discretion to include "non-serious" violations in the PSP reports. As such, petitioners failed to file a timely Hobbs Act challenge to the Agency's 2010 and 2012 published notices describing the records that would be released under PSP and cannot now raise that issue in this or any other proceeding.

In its reply brief filed on October 16, OOIDA argued that the Federal Register notices describing the release of records under 49 U.S.C. § 31150 were issued pursuant to the Privacy Act, 5 U.S.C. § 552a, and do not fall under Hobbs Act jurisdiction. OOIDA further argues that its claims are not addressed in these Federal Register notices and to the extent their claims are addressed in the 2012 Federal Register notice, OOIDA argues that the agency's position is so "buried" within the notices as to invalidate them as adequate public notice. OOIDA finally argues that neither Federal Register notice qualifies as a rule, regulation, or final order under the Hobbs Act and that the agency's improper delegation of authority to the states rendered Montana's action and the agency's failure to act thereon as FMCSA final agency action that is properly subject to an Administrative Procedure Act challenge in a district court.

The D.C. Circuit has scheduled oral argument in this case for December 5.

Court Stays OOIDA Challenge to Violations Reporting in FMCSA's Pre-employment Screening Program

On June 17, the U.S. District Court for the District of Columbia ordered the parties in Owner-Operator Independent Drivers Association v. USDOT, et al. (D.D.C. No. 12-1158) to show cause why the court should not stay the proceedings pending the D.C. Circuit's decision on jurisdiction in Weaver, et al. v. FMCSA, et al. (D.C. Cir. No. 13-1172). Both cases challenge the accuracy of information in the Agency's Motor Carrier Management Information System (MCMIS) and Pre-employment Screening Program (PSP), which uses driver safety information from MCMIS. The government did not object to a stay, but noted the procedural distinctions between the two cases. OOIDA objected to a stay, noting that plaintiffs would be prejudiced by the delay in resolution of their lawsuit. On September 25, the court, citing the need to conserve judicial resources and act within the scope of its authority, issued an order staying the district court proceedings pending resolution of the matter pending before the D.C. Circuit.

OOIDA's complaint alleges violations of the PSP implementing statute, 49 U.S.C. § 31150, the Fair Credit Reporting Act, 15 U.S.C. § 1681 et seq., the Privacy Act, 5 U.S.C. § 552a et seq. and the APA, 5 U.S.C. § 706(2)(A) and (D), alleging that FMCSA failed to remove records of violations from MCMIS and PSP following dismissal of an associated citation by a state court or prosecutor. OOIDA also alleges that the Secretary has failed to designate individual

violations as "serious driver violations" per the PSP implementing statute and thus FMCSA may not report violations under PSP unless designated as an out-of-service violation under existing Federal regulations. OOIDA identifies a letter from the FMCSA Administrator responding to OOIDA's complaints as final agency action reviewable under the APA.

The government's September 17, 2012 motion to dismiss arguing lack of district court jurisdiction under the Hobbs Act, 28 U.S.C. § 2342, is pending.

Broker Association Challenges MAP-21 Increased Security Requirements

On July 16, the Association of Independent Property Brokers and Agents, Inc. (AIPBA) sued to block implementation of section 32918 of the Moving Ahead for Progress in the 21st Century Act (P.L. 112-141) (MAP-21), which requires that FMCSA-regulated property brokers and freight forwarders file evidence of \$75,000 of financial security with the agency, effective October 1, 2013. The plaintiff in Association of Independent Property Brokers and Agents, Inc. v. Foxx, et al. (M.D. Fla. 13-342), an independent, not-for-profit trade group comprised of small and mid-size independent property brokers, alleges that the new bond amount is not rationally related to a legitimate government purpose and violates its substantive due process rights under the Fifth Amendment and that agency guidance related to the new bond amount was a rule improperly promulgated without notice and comment. On September 26, AIPBA filed a Motion for Preliminary Injunction to enjoin implementation of the challenged provisions. On October 17, the court ordered both parties to file briefs on whether

the U.S. Court of Appeals for the 11th Circuit has jurisdiction over the case under the Hobbs Act.

Federal Railroad Administration

D.C. Circuit Rejects Chlorine Institute's Challenge to FRA's Positive Train Control Rule

On June 11, the U.S. Court of Appeals for the District of Columbia Circuit dismissed a challenge to FRA's final rule relating to Positive Train Control Systems (PTC Final Rule) in The Chlorine Institute, Inc. v. FRA, et al., 318 F.3d 922 (D.C. Cir. 2013). The Rail Safety Improvement Act of 2008 (RSIA) mandates the nationwide implementation of positive train control (PTC) systems by Class I railroads and railroads providing intercity or commuter rail passenger transportation by December 31, 2015. PTC systems designed to prevent train-to-train collisions, over-speed derailments, incursions into established work zones and the movement of a train through a switch left in the wrong position.

The Chlorine Institute (CI), whose members include shippers of chlorine by rail, raised three challenges to the PTC Final Rule. CI first argued that FRA was arbitrary and capricious when it eliminated the two qualifying test provisions in the PTC Final Rule. Second, CI argued that when FRA eliminated the two-qualifying test provisions in the PTC Final Rule, it disregarded a statutory provision of the RSIA, which requires that any PTC implementation plan (PTCIP) provide for the implementation of PTC systems in a manner that addresses areas of greater risk before areas of lesser risk (section 20157(a)(2)). Finally, CI

claimed that FRA acted in an arbitrary and capricious manner by eliminating the 2008 baseline provision for determining the rail routes on which PTC must be installed.

In its opinion, the court dismissed CI's petition for review due to lack of jurisdiction. It held that CI had not established that its members face a present or imminent injury from the PTC Final Rule and, as a result, its challenge was not ripe for judicial review. To establish such an injury, CI had the burden of proving that at least one of its members was under the threat of suffering a concrete and particularized injury and that the threat was actual and imminent, not conjectural. The court found that CI's arguments that the PTC Final Rule would limit or eliminate its members' ability to ship chlorine by rail were merely speculative. The court did note that as the PTCIP process advances and it becomes clear which track segments will be outfitted with PTC, an injury to CI's members may emerge, making it appropriate for CI to challenge the PTC Final Rule at that time. In a concurring opinion, Judge Kavanaugh added that the Surface Transportation Board will ensure that chlorine shippers will continue to receive common carrier transportation by rail, when reasonably requested.

The opinion can be found at: [http://www.cadc.uscourts.gov/internet/opinions.nsf/AC7D0A9C2AA031EB85257B8700507F24/\\$file/12-1298-1440648.pdf](http://www.cadc.uscourts.gov/internet/opinions.nsf/AC7D0A9C2AA031EB85257B8700507F24/$file/12-1298-1440648.pdf).

Federal Transit Administration

Court Dismisses Suit over Boston's Green Line Extension Project

On September 11, the U. S. District Court for the District of Massachusetts granted defendants' motion to dismiss for lack of standing in Wood, et al. v. Massachusetts Department of Transportation, et al. (D. Mass. No. 13-10115). Plaintiffs had challenged the Finding of No Significant Impact (FONSI) issued by FTA on July 9, 2012 for the Boston Green Line Extension (GLX) project. The Massachusetts Department of Transportation (MassDOT) and the Massachusetts Bay Transportation Authority (MBTA) are jointly proposing to build the GLX, an extension of the existing MBTA Green Line light rail transit (LRT) route from a relocated Lechmere Station in Cambridge to College Avenue in Medford. The proposed GLX is an approximately 4.3-mile, seven station extension that will operate on the exclusive right of way of the MBTA Commuter Rail System, adjacent to existing commuter rail service. The lawsuit, brought by two individuals and a citizen advisory group, challenged the NEPA process on the GLX project. The plaintiffs contended, among other things, that the FONSI did not adequately identify and analyze all relevant environmental and socioeconomic impacts of the projects. They further contended that the FONSI does not adequately mitigate the public engagement violations under Title VI and the American with Disabilities Act.

Summary Judgment Motions Taken Under Submission in Suit Challenging Crenshaw/LAX Transit Corridor Project

Plaintiffs and defendants in Crenshaw Subway Coalition, et al. v. FTA, et al. (C.D. Cal. 12-01672) have filed cross motions for summary judgment in this challenge the Record of Decision (ROD) issued by the FTA for the Crenshaw/LAX Transit Corridor Project (Project) on the grounds that FTA allegedly violated NEPA by failing to adequately identify and evaluate Project impacts, alternatives, and mitigation measures. The Project is an 8.5-mile light rail line extending from the existing Metro Exposition Line at Crenshaw and Exposition Boulevards south to the Metro Green Line's Aviation Boulevard/LAX Station.

In their Motion for Summary Judgment and subsequent supporting filings, the plaintiff community groups made the following arguments: (1) the Environmental Impact Statement (EIS) failed to adequately evaluate and disclose the community and safety impacts of some street level portions of the approved light rail line; (2) FTA and the Los Angeles County Metropolitan Transportation Authority (LACMTA), the Project sponsor and co-defendant, failed to identify adequate measures to mitigate the Project's visual, safety and construction noise and traffic impacts; (3) FTA failed to supplement the EIS after plaintiffs presented new information related to significant traffic impacts at a particular intersection and visual impacts from the introduction of fencing that were not previously evaluated; and (4) FTA and LACMTA failed to evaluate the reasonable alternative of undergrounding portions of the approved street level light rail line.

FTA, in its Opposition to plaintiffs' summary judgment motion and in its Cross-Motion for Summary judgment, denied that it violated NEPA in any way and argued that the administrative record supported all of the ROD findings, including those related to Project alternatives, impacts, and mitigation measures.

On August 8, the U.S. District Court for the Central District of California, on its own motion, took the parties' cross-motions for summary judgment under submission without a hearing.

Plaintiffs File Summary Judgment Motion in Lawsuits Challenging the Regional Connector Light Rail Project in Los Angeles

On September 6, plaintiffs filed their motions for summary judgment in the lawsuits challenging FTA's Record of Decision (ROD) for the Regional Connector Light Rail Project in Los Angeles. Today's IV, Inc. v. FTA, et al. (C.D. Cal. No. 13-00378) (Today's IV); Japanese Village, LLC v. FTA, et al. (C.D. Cal. No. 13-00396) (Japanese Village); 515/555 Flower Associates, LLC v. FTA, et al. (C.D. Cal. 13-00453) (Flower Associates). The Regional Connector Project is a 1.9-mile light rail project connecting the existing Metro Blue, Gold and Exposition lines through downtown Los Angeles. The Today's IV and Flower Associates lawsuits primarily allege that FTA and the Los Angeles County Metropolitan Transportation Authority (LACMTA), the project sponsor, violated NEPA by failing to adequately consider alternatives to and impacts from cut-and-cover construction along Flower Street. The Japanese Village lawsuit alleges that FTA and LACMTA violated NEPA by failing to review impacts

related to construction and operating an underground light rail line under the Japanese Village Plaza.

Two Lawsuits Filed over Baltimore Red Line Project

On August 14 and 15, two pro se complaints were filed challenging the Final Environmental Impact Statement and Record of Decision for the Baltimore Red Line Project, a proposed 14.1-mile light rail transit line from the Centers for Medicare & Medicaid Services in Baltimore County to the Johns Hopkins Bayview Medical Center campus in Baltimore City.

In Cutonilli v. FTA, et al. (D. Md. 13-02373), the plaintiff seeks declaratory and injunctive relief, alleging that the defendant agencies failed to evaluate all reasonable alternatives, specifically Mr. Cutonilli's hybrid alternative of heavy rail for the East Side of the corridor and bus rapid transit for the West Side. Plaintiff did not plead any specific injury, other than the alleged deficient review.

In Collins v. O'Malley, et al. (D. Md. 13-02398), three plaintiffs request relief in the amount of five billion dollars in addition to a cease and desist order "stopping" the project, as well as the Purple Line project – a proposed 16-mile light rail transit line in Southern Maryland connecting New Carrollton and Bethesda. In their three paragraph complaint, plaintiffs allege only a general violation of numerous laws.

Lawsuit Filed in Oregon over Lane Transit Project

On June 11, a group named Our Money Our Transit filed suit in the U.S. District Court for the Western District of Washington over

the West Eugene Bus Rapid Transit (BRT) project in Eugene, Oregon. Our Money Our Transit v. FTA, et al. (W.D. Wash. 13-01004). The project would add 8.8-miles (round trip) BRT service to two existing BRT projects in Eugene. Approximately 5.9 new miles of BRT lanes and 13 new BRT stations would be constructed. The lawsuit challenges FTA's NEPA Environmental Assessment and Finding of No Significant Impact issued on December 20, 2012. The suit also challenges FTA's New Starts process for the project. Although FTA was the sole defendant, Lane Transit District, the project sponsor, has filed a motion to intervene.

Maritime Administration

Maritime Insurance Contract Voided on Title XI Vessel for Breach of Warranty

On September 13, the U.S. District Court for the District of Guam issued its decision on cross motions for summary judgment in two consolidated cases, Guam Industrial Services, Inc., dba Guam Shipyard, et al. v. Zurich American Insurance Company, et al. and Zurich American Insurance Company, et al. v. Guam Industrial Services, Inc., dba Guam Shipyard, et al., Nos. 11-00014 & 11-00031, 2013 WL 5068873 (D. Guam Sept. 13, 2013). The United States was named as a defendant in the second case. The court was asked in cross motions for summary judgment to address issues relating to the insurance coverage for a sunken dry-dock, the MACHINIST. The United States, through the Title XI loan guarantee program, was the mortgagee on the dry-dock and was an additional assured and loss payee under the insurance policy. Zurich sought a declaration from the Court that it

was not liable under the marine insurance and oil pollution policies because Guam had warranted to Zurich that the dry-dock was U.S. Navy certified. The dry-dock never was U.S. Navy certified. The dry-dock was commercially certified, but that certification had expired at the time of the accident.

In its decision, the court noted that the general rule of admiralty law requires strict construction of express warranties in insurance contracts; breach of the express warranty by the insured releases the insurance company from liability even if compliance with the warranty would not have avoided the loss. The court also found it likely that this would be the same result under the insurance law of Guam. Accordingly, the court found that Guam had breached its warranty and invalidated its coverage under the marine insurance policy.

Guam argued that Zurich had waived this requirement because Zurich relied on the commercial certification of the dry-dock. The court found that the fact of whether Zurich so relied could have been an issue that would have had necessitated a factual determination at trial, but for the fact that Guam let its commercial certification of the dry-dock expire. Accordingly, the court rejected this waiver defense.

Guam further argued that it was entitled to coverage of the costs of removing the oil from the dry-dock's tanks under Zurich's oil pollution policy. The court rejected this argument finding that the oil pollution policy coverage applied only where there was damage to another's property or there is an actual discharge of oil. Here, only Guam's property was damaged and no oil was actually discharged.

United States Moves to Dismiss Liberty Global Logistics' Challenge to Administration of the Maritime Security Program

On July 15, the government filed a motion to dismiss Liberty Global Logistics, LLC v. United States (E.D.N.Y. No. 13-0399) for lack of standing and subject matter jurisdiction. Plaintiff in this case alleges that MarAd improperly denied plaintiff the opportunity to be awarded one of the transferred Maritime Security Program (MSP) Operating Agreements and otherwise to be awarded one or more of the affected MSP Operating Agreements. Plaintiff challenges MarAd's approval of a 2007 transfer of an agreement to American International Shipping, LLC, and the 2009 award of an agreement to Argent Marine Operations, Inc. Plaintiff claims that American Shipping, LLC, and Argent Marine Operations were not eligible vessel operators under the Maritime Security Act of 2003.

In its motion to dismiss, the government argued, among other things, that plaintiff's APA claims were not justiciable as Congress recently enacted a law expressly directing MarAd to offer to extend all existing Operating Agreements until 2025. Additionally the government argued that plaintiff's claims against the award of contracts and on the citizenship of MSP participants were statutorily required to be determined before the Court of Federal Claims and a Court of Appeals, respectively. Plaintiffs filed an opposition to the motion to dismiss on August 30.

National Highway Transportation Safety Administration

Writ of Mandamus Sought over Rear Visibility Standard

On September 25, 2013, several parties filed a Petition for Writ of Mandamus in the U.S. Court of Appeals for the Second Circuit asking the court to order DOT to issue a rear visibility standard within 90 days. The lawsuit, Gulbransen v. Foxx (2d Cir. 13-3645), was brought by Greg Gulbransen, a pediatrician who struck and killed his son in a backover accident in 2002, Susan Auriemma, a parent who backed over her child in a non-fatal accident several years ago, and three consumer and safety advocacy groups (Consumers Union; Advocates for Highway and Auto Safety; Kids and Cars, Inc.). The statute requiring DOT's rear visibility rulemaking is named for Dr. Gulbransen's son, Cameron. Petitioners contend that mandamus is appropriate because the governing statute obligated DOT to issue a final rule on rear visibility within three years of the law's enactment, thus, by February 28, 2011. Though the law permits DOT to extend the deadline if it "cannot be met," petitioners contend that DOT has delayed the issuance of the rule long beyond what Congress intended and has failed to offer sufficient justification for the delay in any event.

Court Dismisses Complaint Claiming that Vehicle Standard Denied Plaintiff Intellectual Property Rights, Plaintiff Appeals

On August 7, 2013, the U.S. Court of Federal Claims granted the government's

motion to dismiss in Michelotti v. United States, 2013 WL 4026920 (Fed. Cl. Aug. 7, 2013). The January 2013 complaint alleged that NHTSA exceeded its authority under the Highway Safety Act of 1970 by prohibiting enhanced brake light systems and that plaintiff, as an owner of a patent for an automatic automobile hazard warning light system prohibited by current government safety standards, has been denied “the rights and benefits of intellectual property ownership.” The United States filed a motion to dismiss for lack of subject matter jurisdiction. Plaintiff moved to amend the complaint to add a claim for patent infringement and alleged damages in the amount of \$10,100. The court denied the motion to amend, holding that it would not be in the interest of justice because it would not add any jurisdictional basis that would affect the outcome of the case. The court agreed with the government that none of the statutes cited by plaintiff provided a basis for jurisdiction in the U.S. Court of Federal Claims and that dismissal for lack of subject matter jurisdiction was thus appropriate. The court also found that transfer of this case to another court would not be in the interest of justice because it could not discern from the pleadings any cognizable claim upon which relief could be granted by another court. Plaintiff has appealed this decision to the U.S. Court of Appeals for the Federal Circuit.

Pipeline and Hazardous Materials Safety Administration

Petition Filed with D.C. Circuit over Authority to Regulate Kansas NGL Pipeline Facility

On April 8, the U.S. District Court for the Northern District of Oklahoma dismissed a complaint filed against the Department by ONEOK Hydrocarbon, L.P., et al. (ONEOK) seeking to prevent PHMSA from inspecting pipeline and storage facilities subject to DOT’s authority that are located on the grounds of ONEOK’s midstream natural gas liquids (NGL) facility in Bushton, Kansas. The district court case was dismissed on the grounds that 49 U.S.C. § 60119 vests the courts of appeals with exclusive jurisdiction over any challenge to a DOT/PHMSA order. ONEOK filed a related case in the D.C. Circuit, ONEOK Hydrocarbon, L.P. et. al. v. USDOT, et. al. (D.C. Cir. No. 13-1040) to preserve its rights in that venue which, by a March 25, 2013 order by the D.C. Circuit, was placed in abeyance until 30 days from the disposition of the above-referenced district court case.

On August 12, the Department filed a motion to govern future proceedings, moving the D.C. Circuit Court of Appeals to end the abeyance as no 10th Circuit appeal had been filed and establish dates for the submission of initial filings. On the same day, the court ended the abeyance and established September 11 as the deadline for initial submissions not yet filed and procedural motions, and September 26 as the deadline for submitting the certified index to the record and dispositive motions.

On September 18, the government filed a motion to dismiss ONEOK's petition for review on the ground that ONEOK's challenge to agency action was not ripe for review, or, in the alternative, that the case be held in abeyance pending the disposition of administrative enforcement proceedings before PHMSA involving the same basic issue.

On October 3, 2013, ONEOK filed its response, opposing the motion to dismiss, arguing that the petition was indeed ripe for judicial review, or, in the alternative, requesting that if the court granted the Department's request for an abeyance, the period should extend only until the agency issued a final order in one of the three administrative enforcement proceedings before PHMSA.

Prohibition on Carrying Butane Fuel Cells in Checked Airline Baggage Challenged in D.C. Circuit

On March 8, Lillipution Systems, Inc. filed a timely petition for review of a final PHMSA administrative rule that maintained a long-standing prohibition on airplane passengers carrying butane fuel cells containing flammable gas in their checked baggage. Lillipution Systems, Inc. v. PHMSA (D.C. Cir. No. 13-1058). Prior to PHMSA's rulemaking action, the International Civil Aviation Organization (ICAO), an agency of the United Nations, issued Technical Instructions for the Safe Transport of Dangerous Goods by Air. Those Technical Instructions, which were subsequently adopted in 2009 by various ICAO member nations and organizations, allowed two spare fuel cell cartridges containing flammable gas in checked baggage. The rule under review is inconsistent with the ICAO Technical Instructions. The Hazardous

Materials Statutes (49 U.S.C. § 5101 et seq.) allow PHMSA to deviate from international standards for safety and other good cause. The reviewing court is being asked to determine if PHMSA's actions on retaining the prohibition of these fuel cells in checked baggage is arbitrary and capricious or an abuse of discretion in light of the actions taken by other member ICAO nations. Petitioners argue that PHMSA failed to provide a reasoned explanation for its decision to depart from ICAO's standards. In response, PHMSA's brief argues that the risks presented by flammable gas on airplanes are obvious and that evidence in the record shows that flammable gases can burn quickly, explosively, and at high temperatures. Oral argument in the case is scheduled for December 12.

Bridger Pipeline Petition for Review of Enforcement Action Settled after Mediation

On February 15, Bridger Pipeline, LLC (Bridger) filed a petition for review in the U.S. Court of Appeals for the Tenth Circuit seeking review of a PHMSA order finding that Bridger had committed four violations of the Pipeline Safety Regulations, 49 C.F.R. Part 195, assessing a civil penalty of \$63,800, and imposing a compliance order. Bridger Pipeline, LLC v. PHMSA (10th Cir. No. 13-9517). Specifically, PHMSA found that Bridger had failed to review its Operations and Maintenance (O&M) manual at the required intervals; failed to demonstrate that it reviewed the work performed by its personnel to determine the effectiveness of procedures used in normal operations and maintenance; failed to demonstrate it had performed reviews of the work performed by its personnel and contractors to evaluate responses to abnormal operations to determine the

effectiveness of abnormal operating procedures; and failed to demonstrate it had performed adequate post-accident reviews. The court set a mediation conference for May 2, and the parties thereafter continued settlement discussions, which resulted in a settlement and the court's dismissal of the case on October 28 per stipulation of the parties. The settlement included agreement by Bridger to pay a \$45,000 civil penalty for failing to demonstrate that it had conducted a post-accident review of its employee activities no later than 45 days after an accidental hazardous liquid release on its Poplar pipeline and to take various actions to ensure compliance with the pipeline safety regulations applicable to its operations.

Environmental Groups Challenge New Enbridge Oil Pipeline

On August 23, the Sierra Club and the National Wildlife Federation filed a lawsuit in the U.S. District Court for the District of Columbia challenging the approval of Enbridge, Inc.'s Flanagan South tar-sands crude oil pipeline (Flanagan South) by the U.S. Army Corps of Engineers and other federal agencies, including the Department and PHMSA, and seeking a preliminary injunction halting any further federal action needed to permit construction of the pipeline. According to the complaint in Sierra Club, et al. v. Bostick, et al. (D.D.C. 13-1239), the agencies approved construction of the new pipeline without any environmental review or public notice, as required by NEPA. Flanagan South would transport tar-sands crude from Illinois to Oklahoma through thousands of waterways, communities, drinking water sources, and other environmentally sensitive areas, including federal wildlife refuges.

According to the complaint, Enbridge recently began construction of Flanagan South following its permitting, approval, and regulation by numerous federal agencies, including the Corps' verifications of dredge and fill of United States waters pursuant to a nationwide permit under section 404 of the Clean Water Act, a Biological Opinion and Incidental Take Statement issued by the U.S. Fish and Wildlife Service (permitting the "take" of endangered and threatened species), approval of the pipeline's oil spill response plan by PHMSA, and several other actions by other federal agencies. The complaint alleges these actions, taken both individually and collectively, constituted major federal action that triggered NEPA obligations but none of the agencies prepared either an environmental assessment or an environmental impact statement.

On September 17, the government filed an opposition to plaintiffs' motion for preliminary injunction. Included was PHMSA's declaration that described the agency's oil spill response plan review responsibilities and authority and explained that PHMSA had not yet received a new response plan application or revision to Enbridge's existing oil spill response plan to include Flanagan South. The declaration further explained that section 311(j)(5) of the Clean Water Act and 49 C.F.R. Part 194 direct PHMSA to approve plans that contain certain required elements and to require the revision of plans that do not contain the required elements. Because PHMSA's review of plans is non-discretionary, the government argued that the review of such plans is not subject to NEPA.

A hearing on the motion for preliminary injunction was held on September 27. A ruling on the preliminary injunction is expected soon.

Public Employees Organization Files FOIA Suit

On April 11, Public Employees for Environmental Responsibility (PEER) filed a FOIA complaint against PHMSA in the U.S. District Court for the District of Columbia. Public Employees for Environmental Responsibility v. PHMSA (D.D.C. No. 13-472). The complaint alleges that PHMSA's failure to disclose all requested records in response to two FOIA requests submitted in October 2012 was a constructive denial and wrongful

withholding of records. The requests concern more than 400 Oil Spill Facility Response Plans submitted to PHMSA under 49 C.F.R. Part 194.

On June 21, the government filed a status report and provided a number of documents responsive to PEER's FOIA requests. The court has granted PHMSA extensions to December 9 to file an answer and submit a further status report. PHMSA has been providing responsive documents to PEER on a rolling basis.

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