



# DOT LITIGATION NEWS

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## Supreme Court Litigation

### **Supreme Court Decides FHWA Federal Tort Claims Act Case**

On April 22, 2015, the Supreme Court issued a consolidated decision in United States v. June and United States v. Wong, 135 S. Ct. 1625 (2015), companion cases on appeal from the U.S. Court of Appeals for the Ninth Circuit in which the Court considered whether the two time limitations in the Federal Tort Claims Act (FTCA) are subject to equitable tolling. In a 5-4 decision, the Court affirmed the Ninth Circuit and held that the two FTCA limitations periods are not jurisdictional and are subject to equitable tolling.

June began as an administrative FTCA claim filed with FHWA. On February 19, 2005, Andrew Booth was killed in a crash on an interstate highway in Arizona when the car in which he was a passenger crossed a cable median barrier and crashed into oncoming traffic. More than five years after the accident, a conservator filed a FTCA claim with FHWA on behalf of the decedent's minor son. FHWA denied the claim as untimely based on the FTCA's requirement, under 28 U.S.C. § 2401(b), that a claim "shall be forever barred" unless it is filed within two years of the accrual of a claim.

June filed an action in district court, which granted the government's motion to dismiss and ruled that the FTCA's two-year bar is jurisdictional and not subject to equitable tolling. On appeal to the Ninth Circuit, the court was scheduled to hear oral argument when it issued an en banc decision in Wong v. Beebe, 732 F.3d 1030 (9th Cir. 2013), which held that the FTCA's other timing requirement (six month deadline for filing an action in court after the agency has

denied a claim) is not jurisdictional and is subject to equitable tolling. In December 2013, in an unpublished memorandum decision, the Ninth Circuit reversed the district court's decision in June and remanded. Based on its decision in Wong, the Ninth Circuit held that the two-year FTCA limitations period at issue in June is also not jurisdictional and is subject to equitable tolling.

The government filed petitions for certiorari in both June and Wong, and the Supreme Court granted certiorari in both cases on June 30, 2014. Briefing was completed on December 3, 2014, and the Court heard oral argument in both cases on December 10.

Writing for the majority, Justice Kagan relied primarily upon the Court's 1990 decision in Irwin v. Department of Veteran Affairs, 498 U.S. 1075 (1990), which held that there is a rebuttable presumption of equitable tolling in suits brought against the United States under a statute waiving sovereign immunity. Applying the Irwin rule and subsequent Supreme Court precedent to the FTCA, the Court found that Congress failed to provide the requisite "clear statement" for the Court to find the FTCA time limitations jurisdictional and not subject to equitable tolling. Instead, the Court held that "[n]either the text nor the context nor the legislative history indicates...that Congress meant to enact something other than a standard time bar." The Court described the FTCA's "shall be forever barred" language as "mundane statute-of-limitations language, saying only what every time bar, by definition must: that after a certain time a claim is barred," and thus the language has no jurisdictional significance. The Court

also noted that the FTCA's directive that the United States should be treated as if it were a private party cuts in favor of allowing equitable tolling since that is available to private parties in tort litigation.

Writing for the dissent, Justice Alito relied on the text, context, and history of the FTCA to find that no equitable tolling is permitted for the FTCA's two time limitations. The dissent found that the plain text of the statute based on the phrase "shall be forever barred" from the FTCA's provision on time limitations prohibits adjudication of untimely claims. In addition, as early as 1883, the Court has interpreted the phrase to impose a jurisdictional requirement that courts may not disregard. By the time Congress enacted the FTCA in 1946 using that phrase, it was well understood as depriving federal courts of jurisdiction over untimely claims, which also served to effectuate Congress's intent to place strict limits on the FTCA's waiver of sovereign immunity. Moreover, since the FTCA's enactment, the Court has continued to reaffirm the phrase's jurisdictional nature in cases involving the Tucker Act, which predates the FTCA and contains the same phrase, while confirming the connection between the Tucker Act and the FTCA.

The Court remanded June to the district court to decide whether plaintiff is entitled to equitable tolling.

The Court's opinion can be found at [http://www.supremecourt.gov/opinions/14pdf/13-1074\\_09m1.pdf](http://www.supremecourt.gov/opinions/14pdf/13-1074_09m1.pdf).

### **Supreme Court Holds Sign Ordinance Unconstitutional**

On June 18, 2015, the Supreme Court issued its decision in Reed v. Town of Gilbert, 135 S. Ct. 2218 (2015), a case presenting

questions about the scope of First Amendment protection afforded to a church that posts signs to direct people to its Sunday services. DOT assisted the Solicitor General's Office in the preparation of the government's brief, with particular attention to the potential impact of the case on the Department's implementation of the Highway Beautification Act of 1965, 23 U.S.C. § 131 (HBA). The Supreme Court agreed substantially with the government's views and ruled unanimously that the sign ordinance at issue was unconstitutional.

The petitioners, Good News Community Church and Pastor Clyde Reed, filed suit in federal district court challenging municipal sign restrictions imposed by the respondent, the Town of Gilbert, Arizona. Those who seek to post signs within town limits must ordinarily obtain a permit, subject to several exceptions set forth in the ordinance. Those exceptions include (1) ideological signs, which relate messages or ideas for noncommercial purposes; (2) political signs, e.g., those for political candidates; and (3) temporary directional signs relating to a qualifying event, which direct passersby to gatherings for religious, community, and charitable events. The Church, which meets on Sunday mornings at rented spaces in elementary schools, posts small signs around the community with the Church's name, contact information, and the direction of the Sunday service. Its signs fall under the category of "temporary directional signs" under the Town ordinance. As such, the Church's signs could be no more than 6 feet tall; no more than four such signs may be displayed on a single property; and the Church's signs could only be displayed for twelve hours before the service, during the service, and one hour afterward. By contrast, ideological and political signs have many fewer restrictions; they may be much larger and can be posted for longer periods,

or, in the case of ideological signs, without any time restriction.

The Church filed suit contending that the Town's ordinance unconstitutionally restricted free speech. The district court denied a preliminary injunction and, in a later proceeding, granted summary judgment for the Town, concluding that the ordinance did not violate the First Amendment. A divided Ninth Circuit panel affirmed, holding that the ordinance was content-neutral and that the ordinance should be upheld under the application of intermediate scrutiny. Reed v. Town of Gilbert, 707 F.3d 1057 (9th Cir. 2013).

The Supreme Court granted the Church's petition for a writ of certiorari on July 1, 2014. On the merits, the United States filed a brief in support of the Church, contending that the Town's signage ordinance violated the First Amendment. In the brief, the government contended that the ordinance would not survive either strict or intermediate scrutiny, although if the Court found it necessary to decide that question, intermediate scrutiny should apply when a sign regulation is based upon safety and aesthetic interests. In this case, the ordinance could not stand, the government argued, because there was no indication here that the Church's signs caused any greater safety concern or visual blight than political or ideological signs, which are subject to fewer restrictions under the Town ordinance. The government's brief also distinguished the Town's ordinance from the provisions of the HBA, which DOT implements in consultation with the states, and which is much more limited in its applicability.

The Supreme Court, in a decision written by Justice Thomas, held that the Town ordinance was a content-based regulation of speech and that it was consequently subject

to strict scrutiny under the First Amendment. Under this analysis, the Court explained, it was unnecessary to determine whether the Town had a particular animus against the speech expressed in the church's signs or whether there was any motive to censor the church. Nor did it matter whether the Town intended to suppress a particular viewpoint. Instead, the Town was required to show that the ordinance was narrowly tailored to address a compelling government interest. The Town had failed to do so, the Court concluded, because it had not justified the different treatment afforded under the ordinance to temporary directional signs and other types of signs, like political or ideological signs.

Justice Alito, joined by Justices Kennedy and Sotomayor, wrote a concurring opinion to emphasize that localities are still empowered under the Court's decision to enact a variety of signage laws to address legitimate local concerns. Justice Breyer wrote an opinion concurring in the judgment, contending that "content discrimination" should be reviewed in context rather than automatically triggering strict scrutiny. Justice Kagan, joined by Justices Ginsburg and Breyer, also wrote an opinion concurring in the judgment, expressing concern that the Court had found it necessary to decide the level of scrutiny that should apply. In the view of these Justices, the Town ordinance would have failed under any level of scrutiny, and the Court's strict scrutiny analysis might suggest that a variety of legitimate sign ordinances, as well as the HBA, could be subject to constitutional challenge in the future.

The Court's opinion can be found at [http://www.supremecourt.gov/opinions/14pdf/13-502\\_9olb.pdf](http://www.supremecourt.gov/opinions/14pdf/13-502_9olb.pdf).

### **Supreme Court Denies Review of Decision Upholding Silver Line Funding Mechanism**

On October 5, 2015, the Supreme Court denied certiorari in Corr, et al., v. Metropolitan Washington Airports Authority (No. 13-1559). Petitioners in this case sought review of a decision of the U.S. Court of Appeals for the Fourth Circuit upholding the Metropolitan Washington Airport Authority's (MWAA) use of toll road revenues to fund the Silver Line Metrorail expansion. See 740 F.3d 295 (4th Cir. 2014). While the Fourth Circuit upheld MWAA's use of toll road revenues to fund the Silver Line based upon Virginia state law, petitioners focused their petition on a constitutional separation-of-powers argument that they had raised earlier in the litigation and essentially argued that MWAA is a federal instrumentality exercising federal power and thus is subject to separation of powers scrutiny.

The Court requested the views of the United States, and on May 22, 2015, the United States submitted an amicus brief recommending that the Supreme Court deny the petition for certiorari. The United States noted that the court of appeals did not squarely address the constitutional question that petitioners now raise and also argued that the District Court for the Eastern District of Virginia correctly held that MWAA is not a federal entity. Furthermore, the United States noted that there is "no disagreement in the courts of appeals concerning whether public bodies created by compacts are federal entities for separation-of-powers purposes."

### **Supreme Court Declines to Review Motor Carrier Preemption Decision**

On May 4, 2015, the Supreme Court denied certiorari in Penske Logistics, LLC v. Dilts (No. 14-801), in which the petitioner sought review of the decision of the U.S. Court of Appeals for the Ninth Circuit under the federal motor carrier deregulation statute, the Federal Aviation Administration Authorization Act of 1994 (FAAAA or the Act), 49 U.S.C. § 14501(c). The case raised questions about the preemption of state employment laws in the trucking industry.

The case was filed in state court by appliance delivery truck drivers, who alleged that their employers denied them meal and rest breaks required by California law. Employees must usually receive a thirty-minute meal break after five hours on duty and must receive a second meal break after working for more than ten hours. Furthermore, employees must generally be given ten minutes of rest for every four hours on duty. Employers who fail to provide the requisite breaks are liable for civil penalties under California law, and must also provide an hour's worth of compensation to the employee for any meal or rest break that is not provided.

The district court ruled in favor of the carriers, concluding that the state break requirements were preempted by the FAAAA. The court held that the federal deregulation statute sweeps broadly in its preemptive scope and that the state break laws had an impermissible effect upon the "price, route or service of motor carriers" under section 14501(c).

On September 8, 2014, the Ninth Circuit issued its order and amended opinion in this case, holding that the state break laws remained valid under the FAAAA. The

court applied the traditional presumption against preemption in cases involving longstanding areas of state regulation for the protection of employees. As the court recognized, the FAAAA's preemption clause sweeps broadly, but the court also pointed out that the Supreme Court, in cases like Rowe v. New Hampshire Motor Transport Association, 552 U.S. 364 (2008), had held that the FAAAA preemption provision is not boundless and does not apply to state laws that have "only a tenuous, remote, or peripheral" impact upon motor vehicle prices, routes or services. By contrast, the panel concluded that "generally applicable background regulations that are several steps removed from prices, routes, or services, such as prevailing wage laws or safety regulations, are not preempted, even if employers must factor those provisions into their decisions about the prices that they set, the routes that they use, or the services that they provide." Such was the case here. The state laws did not have an impermissible impact upon routes or services; the carriers were simply compelled to "hire a sufficient number of drivers and stagger their breaks for any long period in

which continuous service is necessary." Such measures, while undoubtedly increasing the cost of doing business, do not run afoul of the FAAAA. Judge Zouhary wrote a concurring decision, emphasizing that Penske failed to carry its burden of proof to show specific evidence of the real-world impact of the California law on the company's routes or services.

The Ninth Circuit followed the reasoning set forth in DOT's brief, in which the Department contended that the state law was not preempted, and that the Department deserved deference in light of its expertise on these issues. In so doing, the Department pointed out that the result might be different in other cases, particularly under the parallel provisions of the Airline Deregulation Act (ADA), since the California break requirements may be more disruptive to airline rates, routes, or services.

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

### **District Court Denies Motions for Preliminary Injunctive Relief in All Aboard Florida Litigation**

On June 10, 2015, the U.S. District Court for the District of Columbia denied motions for preliminary injunctive relief in two related cases brought against DOT. Indian River County, et al. v. Rogoff, et al., 2015 WL 3616109; Martin County, et al. v. DOT, et al. (D.D.C. No. 15-632). Both cases involve DOT's authority, pursuant to 26 U.S.C. § 142(m), to allow state and local

governments to issue tax-exempt Private Activity Bonds (PABs) to private investors to finance certain transportation projects. In December 2014, DOT authorized a Florida state entity to issue up to \$1.75 billion in PABs on behalf of the All Aboard Florida project (the Project), a passenger rail project that will connect Miami and Orlando. Opponents of the project, including two counties along the route, have brought suit against DOT to vacate the PAB authorization. They allege that the Project did not meet the statutory eligibility criteria

under 26 U.S.C. § 142(m) and that DOT violated the NEPA by not preparing an environmental impact statement before making the authorization. The Project's owner and operator, All Aboard Florida Operations LLC (AAF), has intervened in support of DOT.

In its preliminary injunction decision, the court agreed with DOT and AAF that the plaintiffs had not met their burden of demonstrating Article III standing to sue. Among other things, the court held that the plaintiffs have not shown that an order vacating the PAB authorization would make it substantially less likely that AAF would complete the Project (AAF insists that it would find alternative financing). The court held, therefore, that even a favorable decision for plaintiffs would likely not redress the injuries they claim they will suffer from the Project and that they therefore had not demonstrated standing. The court did not reach the other arguments advanced by DOT and AAF, including their contentions that the Project was in fact eligible under the PAB statute and that the PAB authorization was not a "major federal action" requiring the preparation of an environmental impact analysis.

The court has permitted the plaintiffs to seek limited jurisdictional discovery from AAF relevant to the standing inquiry, and that discovery process is ongoing. In the meantime, a group opposed to the Project has brought a separate lawsuit against DOT related to a Freedom of Information Act request. Citizens Against Rail Expansion in Florida v. USDOT (D.D.C. 15-949).

### **D.C. Circuit to Consider Jurisdictional Scope of 49 U.S.C. § 46110**

The National Federation of the Blind (NFB) is challenging DOT's final rule requiring that twenty-five percent of kiosks at U.S. airports be accessible to passengers with disabilities. NFB originally filed their challenge in the U.S. District Court for the District of Columbia, but upon DOT's motion arguing that the case properly belonged in the U.S. Court of Appeals for the District of Columbia Circuit pursuant to 49 U.S.C. § 46110, the district court transferred the case to the D.C. Circuit. National Federation of the Blind, et al. v. USDOT, et al., 78 F. Supp. 3d 407 (D.D.C. 2015).

After the district court transferred the case to the D.C. Circuit, DOT filed a Motion to Dismiss because NFB filed its challenge outside the 60-day time period required by 49 U.S.C. § 46110. However, the motions panel referred DOT's motion to the merits panel and directed the parties to address the jurisdictional issues in their briefs.

NFB filed its opening brief on August 5, 2015, and continues to argue that the District Court has subject matter jurisdiction over the case because the final rule is a "rule" not an "order." Furthermore, NFB argues that even if the rule is an order under § 46110, NFB had reasonable grounds for filing outside of the 60-day time frame because the rules of statutory construction support NFB's interpretation of "order," because there is no controlling case law on the meaning of "order" in section 46110, and because DOT labeled the final rule as a "rule" and not an "order." With regard to the merits of the rule, NFB argues that DOT improperly considered costs when issuing

the rule and that DOT violated the Administrative Procedure Act by considering information that was not disclosed on the public rulemaking docket.

In its response brief, DOT reiterated its position that the D.C. Circuit should dismiss the petition because the rule is an order under section 46110 and thus the challenge is untimely. DOT relied heavily upon a recent D.C. Circuit opinion, New York Republic State Comm. v. SEC, 2015 WL 5010051 (D.C. Cir. 2015), reiterating that “statutory provisions for direct review of orders encompass challenges to rules.” Furthermore, DOT argued that NFB did not have reasonable grounds for delay because even if NFB was unsure about where to file their suit, NFB should have filed a protective petition in the D.C. Circuit within the 60-day timeframe required by § 46110. Assuming the court reaches the merits, DOT argued that it properly considered the costs, as the Air Carrier Access Act does not preclude DOT from considering costs. Furthermore, DOT argued that it may have erred if it had not considered costs, as various Executive Orders require a cost benefit analysis for significant rules. Finally, DOT noted that it did not violate the APA when it relied upon information provided after the close of the comment period because that information was duplicative of comments received from air carriers during the comment period.

### **Parties File Briefs Regarding the Constitutionality of FRA/Amtrak Metrics and Standards**

On March 9, 2015, the Supreme Court in DOT v. Association of American Railroads, 135 S. Ct. 1225 (2015), unanimously reversed the U.S. Court of Appeals for the District of Columbia Circuit and held that

Congress did not violate the Constitution’s non-delegation doctrine in authorizing FRA and Amtrak to jointly develop on-time performance metrics and standards because, for purposes of that doctrine, Amtrak is a federal governmental entity. The Supreme Court remanded the case to the D.C. Circuit to identify the issues that were properly preserved and to address issues to the extent they were properly before the Court of Appeals.

On remand, the parties filed briefs on June 29 (Association of American Railroads’ (AAR) brief), August 13 (government’s brief), and September 3 (AAR’s reply brief). The D.C. Circuit scheduled oral argument for November 10, 2015. In their briefs, the parties addressed whether the Due Process Clause prohibited Amtrak and the FRA from jointly promulgating metrics and standards and whether Amtrak’s corporate structure comports with the Appointments Clause. In addition, the government argued that AAR’s arguments were not properly preserved.

Section 207 of the Passenger Rail Investment and Improvement Act (PRIIA) required FRA and Amtrak to jointly develop metrics and standards to evaluate the performance and service quality of Amtrak’s intercity passenger trains. AAR had challenged Section 207 as violating the Constitution’s Due Process Clause and non-delegation doctrine because Amtrak, AAR argued, is a private entity.

The D.C. Circuit’s original decision relied heavily upon a provision in Amtrak’s enabling legislation stating that Amtrak “is not a department, agency, or instrumentality of the United States Government” in finding that Amtrak is a private corporation and thus cannot be given regulatory power under Section 207. The Supreme Court, however, noted that “[c]ongressional pronouncements,



though instructive as to matters within Congress' authority to address, are not dispositive of Amtrak's status as a government entity for purposes of separation of powers analysis under the Constitution." The Court relied upon a previous case involving Amtrak, Lebron v. National Railroad Passenger Corp., 513 U.S. 374 (1995), holding that Lebron "teaches that, for purposes of Amtrak's status as a federal actor or instrumentality under the Constitution, the practical reality of federal control and supervision prevails over Congress' disclaimer of Amtrak's governmental status." Looking at Amtrak's ownership and corporate structure, the Court pointed out that the federal government controls most of Amtrak's stock and that eight of Amtrak's nine Board members are appointed by the president and confirmed by the Senate. Furthermore, the Court noted that not only is Amtrak required to pursue public objectives mandated by statute, but that Amtrak is also financially dependent upon substantial federal subsidies. Therefore, the Court ultimately found that because "Amtrak was created by the Government, is controlled by the Government, and operates for the Government's benefit," Amtrak acted as a governmental entity in issuing the metrics and standards.

The Court vacated the D.C. Circuit's decision and remanded the case to identify any additional issues that are properly preserved. The Court's opinion noted that there are "substantial questions respecting the lawfulness of the metrics and standards—including questions implicating the Constitution's structural separation of powers and the Appointments Clause...." Justice Alito joined the majority opinion but wrote a concurring opinion discussing a number of constitutional questions that arise from the Court's decision that Amtrak is

part of the federal government. Justice Thomas also agreed with the Court's decision to vacate and remand the case for further consideration, but did not join the majority's analysis "because it fails to fully correct the errors that require [the Court] to vacate the Court of Appeals' decision." Justice Thomas "wrote separately to describe the framework that...should guide [the] resolution of delegation challenges and to highlight serious constitutional defects in PRIIA that are properly presented for the lower courts' review on remand."

### **Invitation Brief Addressing Preemption Issues Filed in Aviation Tort Case**

On September 21, 2015, the government filed a brief at the invitation of the U.S. Court of Appeals for the Third Circuit in Sikkelee v. Precision Airmotive Corp. (3d Cir. No. 14-4193), a case involving the scope of preemption of state law tort claims for aircraft design defects.

The case arose out of an airplane crash in 2005 in which the plaintiff's husband was killed. The decedent, David Sikkelee, was piloting a Cessna aircraft that crashed shortly after takeoff. The plaintiff, Jill Sikkelee, filed suit in the U.S. District Court for the Middle District of Pennsylvania, asserting state law claims against seventeen defendants alleged to have played a role in a defect that Sikkelee asserted had caused the crash. In particular, Sikkelee contended that there was a defect in the engine's carburetor and that the carburetor's throttle body to bowl screws had become loose and caused the engine to lose power.

At the present stage of the case, after the claims against other defendants were dismissed or settled, the dispute focuses on

Sikkelee's claims against Lycoming, the company that originally manufactured the engine that was installed on the aircraft that crashed. Lycoming manufactured that engine in 1969, and it was placed in storage for nearly thirty years. In 1998, the engine was installed on a Cessna aircraft, and an overhauled carburetor was installed on the engine at that time as well. In 2004, the engine was overhauled, and a replacement carburetor was again installed. That carburetor had itself been overhauled with replacement parts before it was put on the engine, following Lycoming manuals and service bulletins. The crash occurred in 2005, a year after the engine overhaul on the Cessna that Sikkelee piloted.

After several years of litigation, in September 2014, the district court granted Lycoming's motion for summary judgment in most respects, concluding that federal law preempted Sikkelee's state law claims. The court held that Sikkelee was essentially trying to prove that the aircraft engine and carburetor violated specific provisions in the Federal Aviation Regulations (FARs) relating to aircraft and apparatus design. But in the district court's view, FAA's approval process, and the agency's issuance of a "type certificate" for the engine design, was conclusive of the agency's determination that the engine and its components satisfied the FARs. The district court allowed Sikkelee to proceed on another claim, in which she alleged that Lycoming failed to report known defects to FAA.

On appeal to the Third Circuit, Sikkelee contends that her claims are not preempted and that even if she cannot proceed with her claims under state law standards of care, she may nonetheless obtain a state law remedy for the violation of a federal standard. She contends that the FARs themselves provide

the appropriate design standards, which the jury should consult with the aid of expert testimony. She also argues that FAA's issuance of a type certificate is relevant to, but not dispositive of, the inquiry into design defects. By contrast, Lycoming contends that federal statutes and the FARs preempt any state law standard of care and that the district court correctly found the issuance of a type certificate to be controlling as to the adequacy of the aircraft design. In Lycoming's view, when FAA issues a type certificate, only a limited category of claims, based on conduct or omissions after the certificate is issued, may proceed for aircraft design defect claims.

The court requested FAA's views on a variety of issues in this case relating to the scope of preemption under the federal aviation laws and regulations. In particular, the court asked whether the government continued to adhere to the views that it expressed in an amicus brief filed in the Tenth Circuit two decades ago in Cleveland v. Piper Aircraft Corp., 985 F.2d 1438 (10th Cir. 1993). In that case, which also involved an airplane crash, the government broadly argued that FAA has exclusive authority over matters of aviation safety.

In its brief to the Third Circuit, the government reaffirmed the main positions that it had taken in the Cleveland brief, contending that the Federal Aviation Act of 1958 impliedly preempts the field of aviation safety with respect to substantive standards of safety. The federal government has a pervasive role in regulating all aspects of aircraft safety, and to carry out this role, Congress established a multi-step process for federal approval of aircraft, engines, and propellers. A manufacturer must first obtain a "type certificate" from FAA, demonstrating that the product is of a design that meets federal standards. The

manufacturer must then obtain a production certificate to duplicate or mass produce the aircraft. Finally, FAA issues an airworthiness certificate for each aircraft produced, indicating that the product conforms to the type certificate and is, after inspection, in safe condition to operate. Although FAA has discretion in various respects as to how much direct control it exercises over the type certificate process, and how much authority it delegates to approved manufacturer designees, the decision to approve a type design ultimately rests with FAA.

The government went on to explain in its brief that, although federal standards of care displace state law standards in the area of aircraft design, that does not necessarily preempt all state law remedies for aircraft design defects. Such a result would be inconsistent with the savings clause in the FAA Act, 49 U.S.C. § 40120, which preserves common law remedies, and with the passage of the General Aviation Revitalization Act of 1994 (GARA), § 2, Pub. L. No. 103-298, 108 Stat. 1552 (1994), which set in place a statute of repose for claims against aircraft manufacturers, and which therefore contemplated that at least some types of claims against manufacturers could proceed. The government's Cleveland brief also indicated that state law remedies may be available for violations of federal design standards.

The government also contended that conflict preemption principles determine the role that a type certificate plays in the adjudication of an aircraft design defect claim. Such a claim is preempted to the extent that the claimant is challenging an aspect of the product's design that FAA expressly approved, as shown in the type certificate, underlying data sheet, or other form of FAA approval incorporated into the

type certificate by reference. On the other hand, the design defect claim would not be preempted if it is based upon a design aspect that FAA left to the manufacturer's discretion. In that case, the claim would be decided on the merits by reference to federal aviation standards, with the type certificate and other FAA approvals or guidance to be considered by the factfinder. The government also asserted that the views of DOT and FAA are entitled to substantial weight on these questions, in light of agency expertise on matters of aviation safety. Finally, the government argued that FAA's delegation of certain approval authority to manufacturers, pursuant to the agency's regulatory regime, does not alter the preemption analysis, particularly since the decision to approve a type design is ultimately one for FAA.

On October 2, 2015, both Sikkelee and Lycoming filed supplemental briefs in response to the government's brief. Sikkelee disagreed with the government's preemption analysis, while Lycoming contended that the government had accurately characterized the broad preemptive scope of federal law with respect to aircraft design defect claims.

### **DOT Finds Airline Unreasonably Discriminated by Denying Carriage Based on Passenger's Citizenship**

On September 30, 2015, DOT issued a decision concluding that Kuwait Airways Company (KAC) engaged in unreasonable discrimination when it denied carriage to an Israeli citizen seeking to travel on KAC's flight between New York's John F. Kennedy International Airport (JFK) and London Heathrow Airport (LHR). This matter originally arose in a complaint filed with the Department's Office of Aviation

Enforcement and Proceedings in late 2013, the response to which was challenged in the U.S. Court of Appeals for the District of Columbia Circuit in Gatt v. Foxx (D.C. Cir. 14-1040). In his complaint to DOT, Eldad Gatt, an Israeli citizen, claimed that he had been unable to purchase a ticket on that flight because of his Israeli citizenship and nationality. He alleged that when he went to purchase a ticket on KAC's website, it required him to choose both his passport-issuing country and his nationality, but that there was no option to select Israel. Thus, Mr. Gatt claimed that KAC's conduct violated the provisions of 49 U.S.C. § 40127, which prohibits KAC and other carriers from "subject[ing] a person in air transportation to discrimination on the basis of race, color, national origin, religion, sex, or ancestry."

After an investigation, DOT issued a determination in early 2014 concluding that KAC had not engaged in unlawful discrimination. That determination was based on the rationale that the carrier's conduct rested upon a permissible ground, i.e., Mr. Gatt's citizenship, rather than his membership in a protected class under section 40127. In its letter, DOT noted that KAC had argued that it was subject to the requirements of Kuwaiti law, which effectively forbade the carrier from doing business with or providing service to Israeli passport holders. Thus, the Department declined to take further action against the carrier. Mr. Gatt then filed a petition for review in the D.C. Circuit in March 2014, seeking an order vacating DOT's determination on the ground that it was legally incorrect and was otherwise arbitrary and capricious.

After Mr. Gatt filed his petition for review, the parties agreed to suspend briefing pending further administrative proceedings

before the agency, thereby allowing the DOT to reconsider its earlier decision and decide whether to pursue further enforcement action. On January 15, 2015, the court denied Mr. Gatt's request to proceed to briefing on the merits and continued to hold the case in abeyance while the agency reconsidered the matter.

On September 30, 2015, after conducting further investigation, DOT issued its letter to KAC, concluding that the refusal to carry Mr. Gatt constituted "unreasonable discrimination" under 49 U.S.C. § 41310. As DOT noted, the prohibition against unreasonable discrimination in section 41310 was derived from other well-established legal frameworks, including the Federal Aviation Act of 1958, the Civil Aeronautics Act of 1938, and the Interstate Commerce Act (ICA) of 1887, which required common carriers to provide service without "unreasonable prejudice or disadvantage." The courts have applied this principle to cases involving discrimination against passengers, particularly on the basis of race. In this instance, KAC's arguments about the prohibitions in Kuwaiti law against carrying Israeli citizens were insufficient to overcome the prohibition against unreasonable discrimination, particularly since Mr. Gatt's travel between JFK and LHR did not involve travel into Kuwait or to another country in which Mr. Gatt would not have been allowed to disembark based on the laws of that country. KAC's permit to provide scheduled foreign air transportation reinforced its obligation to comply with U.S. law, including section 41310. DOT also pointed out that KAC's conduct may violate U.S. anti-boycott laws and regulations, which are designed to prohibit and/or penalize cooperation with international economic boycotts in which the United States does not participate. The Kuwait law

at issue here was enacted pursuant to the Arab League boycott against persons doing business with Israel, and U.S. policy has opposed such economic boycotts. Because the agency decided in Mr. Gatt's favor under section 41310, it found it unnecessary to reach the question of whether KAC's conduct also violated the anti-discrimination provisions of section 40127.

Based on this determination, DOT explained that it expected KAC to come into compliance with U.S. law with respect to carriage of passengers like Mr. Gatt, and requested that the carrier provide an outline of how it planned to do so. In particular, DOT explained that, to avoid enforcement action, it expected KAC to sell tickets to and transport Israeli citizens between the U.S. and any third country where they are allowed to disembark based on the laws of that country.

On October 13, 2015, KAC sent a letter to the Department requesting reconsideration of its decision, contending that DOT has misapplied the law and that the decision would have impermissible effects "on a global scale." Furthermore, KAC asked DOT to clarify whether its decision was a final agency action, or was instead simply a preliminary determination or guidance document. On October 22, DOT responded to KAC's letter, stating that the September 30 determination was a final agency action and that the Department found no basis for reconsidering its decision. Furthermore, DOT explained that it was directing KAC to cease and desist from refusing to transport Israeli citizens between the United States and any third country where they are allowed to disembark based on the laws of that country and said that DOT would pursue further administrative and/or judicial action if KAC failed to comply.

The Department's September 30 ruling, KAC's October 13 letter, and the Department's October 22 response can be found at <http://www.transportation.gov/airconsumer/latest-news>.

### **Delta Air Lines Dismisses Action Challenging Initiation of Proceeding Involving U.S.-Japan Route Award**

On July 1, 2015, the U.S. Court of Appeals for the District of Columbia Circuit granted the motion for voluntary dismissal filed by Delta Air Lines in Delta Air Lines, Inc. v. USDOT (D.C. Cir. 15-1055). The case involved DOT's allocation to U.S. airlines of the limited daily "slot pairs" available for flights between U.S. airports and Haneda Airport in Tokyo, Japan. In October 2014, American Airlines and Hawaiian Airlines asked DOT to reallocate a slot pair that had been awarded to Delta for service between Seattle and Haneda on the grounds that Delta was operating the route infrequently. On December 15, 2014, DOT instituted an administrative proceeding to determine whether such a reallocation was appropriate. Delta moved for reconsideration. It argued that DOT lacked authority to consider reallocation because the original award to Delta specified that the slot pair would automatically revert to DOT if not used for 90 days, and Delta had not left the slot pair unused for 90 days. DOT denied the requested relief, and Delta petitioned for review of DOT's initiation of the proceeding and its reconsideration decision. The case was held in abeyance pending the completion of administrative proceedings.

On March 27, 2015, DOT tentatively decided that Delta should retain the slot pair, but should be subject to a requirement that it maintain year-round daily service. DOT also tentatively decided that if Delta did not

meet this strengthened condition, the slot pair would be reallocated to American for service between Los Angeles and Haneda. Delta objected to the proposed new conditions. It argued, among other things, that the requirement for daily service was arbitrary, capricious, overbroad, and inconsistent with DOT's past practice.

On June 15, 2015, DOT issued a Final Order adopting its tentative conclusions in full. DOT explained in detail why it disagreed with Delta's argument that it lacked the authority to consider allocation in light of the 90-day dormancy condition, as well as Delta's arguments against the imposition of strengthened conditions. On June 17, 2015, Delta informed DOT that it did not believe it was commercially feasible to comply with the strengthened conditions and that it would be returning the slot pair to DOT and dismissing its pending lawsuit.

### **Love Field Access Dispute Leads to Three Lawsuits**

DOT is currently involved in three lawsuits arising from attempts by Delta Air Lines to maintain service at Love Field airport in Dallas, Texas. The airport has a unique history. In 1979, Congress passed the Wright Amendment, which sought to protect the newly-constructed Dallas-Ft. Worth International Airport by generally prohibiting passenger air service between Love Field and destinations outside of Texas and the immediately adjoining states. In 2006, the Wright Amendment Reform Act phased out those restrictions, but capped the number of gates at Love Field.

Prior to 2014, Delta was using gate space at Love Field pursuant to a sublease with American Airlines. When American agreed to divest its Love Field gates as part of the settlement of an antitrust suit challenging its

merger with U.S. Airways, Delta's sublease was terminated. Delta asked the other airlines leasing space at Love Field, as well as the City of Dallas (the airport's owner), to accommodate its continued operation of five daily roundtrip flights. Southwest Airlines – which leases 16 of the airport's 20 gates, and has subleased an additional two gates – opposed Delta's requests. The City of Dallas asked DOT for guidance. DOT responded by sending two guidance letters, dated December 17, 2014 and June 15, 2015, describing its views as to the scope of some of the City's relevant legal obligations, including under the assurances the City made to the FAA in connection with federal airport improvement grants.

Southwest has petitioned for review of each of DOT's two letters in the U.S. Court of Appeals for the District of Columbia Circuit. Southwest Airlines v. DOT (D.C. Cir. 15-1036); Southwest Airlines v. DOT (D.C. Cir. 15-1276). A motion to dismiss the first petition arguing that the challenged letter is nonbinding agency guidance is pending.

Separately, the City of Dallas has brought suit in federal district court in Dallas against DOT, Delta, Southwest, and all other airlines serving Love Field or leasing gate space at the airport. City of Dallas v. Delta Air Lines, Inc., et al. (N.D. Tex. 15-2069). The City challenges DOT's guidance letters and seeks declaratory relief with respect to a variety of issues. Delta and Southwest have brought counterclaims against the City and crossclaims against one another, and Delta has brought crossclaims against United. Delta, Southwest, and the City have all moved for preliminary injunctive relief, and the court held a three-day hearing on those motions from September 28 to 30, 2015. DOT has moved to dismiss the claims against it on the grounds that the letters are not final agency actions and that even if they

were, they could only be challenged in the Court of Appeals. DOT has also asked the Court to stay the case during the pendency of an FAA administrative proceeding addressing Delta's Love Field service.

### **Multiple Judicial and Administrative Challenges to the High Hazard Flammable Train Final Rule Filed**

On May 1, 2015, PHMSA and FRA issued a final rule for the safe transportation of flammable liquids by rail. The rule focuses on safety improvements that are designed to prevent accidents, mitigate consequences in the event of an accident, and support emergency response efforts.

Between May 11 and May 15, five petitions for review were filed by entities ranging from environmental groups to shippers seeking judicial review of the final rule in several courts of appeals. In addition, railroads and other entities with various interests filed administrative appeals seeking agency reconsideration of the final rule.

The issues raised by the judicial and administrative petitioners overlap significantly and include the applicability of the rule's definition of a high hazard flammable train, the timetable for phasing out structurally deficient tank cars, the electronically controlled pneumatic brakes requirement, the retrofitting timetable, and the lack of a requirement for enhanced thermal protection.

Since the only petitions for review filed within ten days of the issuance of the final rule were both filed in the U.S. Court of Appeals for the District of Columbia Circuit, the other three petitioners who had filed in other courts were required to re-file their petitions in the D.C. Circuit. See 28 U.S.C. § 2112. As of June 30, all five petitions for review had been filed in the D.C. Circuit. The court has since consolidated all five petitions. By November 23, the parties to the litigation must file proposed briefing formats to the D.C. Circuit. The administrative appeals are currently still pending before PHMSA and FRA.

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

### **Federal Aviation Administration**

#### **Court Dismisses Flight Attendants' Petition for Review of PED Notice**

On May 8, 2015, the U.S. Court of Appeals for the District of Columbia Circuit dismissed the petition for review in Association of Flight Attendants v. Huerta, 785 F.3d 710 (D.C. Cir. 2015), a challenge by the Association of Flight Attendants (AFA) to FAA Notice N8900.240,

Expanded Use of Passenger Portable Electronic Devices, which was issued to FAA aviation safety inspectors to provide guidance on the use and stowage of portable electronic devices (PEDs) aboard commercial and other aircraft.

AFA contended that the portion of the Notice allowing small PEDs to remain secured (rather than stowed) during takeoff and landing was arbitrary, capricious, contrary to existing regulations, and improperly promulgated without notice and comment as required by the APA. FAA

argued that the court lacked jurisdiction over the petition for review because the Notice was an internal, non-binding guidance document not intended to be a legislative rule, and consequently did not constitute final agency action.

The court agreed with FAA, finding that because the Notice did not determine any rights or obligations, or produce legal consequences, it did not constitute final agency action and was therefore unreviewable.

### **Third Circuit Affirms Grant of Summary Judgment for FAA in Case Alleging Controller Error**

On October 9, 2015, the U.S. Court of Appeals for the Third Circuit affirmed a district court grant of summary judgment in favor of FAA in Turturro, et al. v. United States, et al. (3d Cir. No. 14-3834). The case, on appeal from the U.S. District Court for the Eastern District of Pennsylvania, involved the crash of a trainer airplane and the deaths of a student and instructor. The aircraft stalled during a right turn during departure. Plaintiffs claimed that an air traffic controller breached her duty of care by clearing a helicopter for departure in the direction of the trainer aircraft and then instructing the trainer to turn right onto a potentially conflicting path with the helicopter. Plaintiffs also claimed that the helicopter pilots were negligent in making a westerly departure and inadequately communicating their intentions.

The Third Circuit agreed with the district court that the helicopter pilots were not negligent in the manner of their departure and that while the controller made several errors in phraseology, the two aircraft were never in imminent danger of a collision and

the claimed “startle reaction” by the student pilot was “speculation” and not the cause of the trainer aircraft’s stall.

### **Challenge to Failure to Reimburse Tulsa Airport for Alleged Eligible Claims to Proceed as Petition for Review**

Tulsa Airports Improvement Trust (TAIT) v. United States (Fed. Cl. No. 13-906) involves a claim by TAIT alleging that FAA failed to reimburse TAIT for alleged eligible claims under the Airport Improvement Program (AIP). On June 1, 2015, after the U.S. Court of Claims transferred the case to the U.S. Court of Appeals for the Tenth Circuit, the Tenth Circuit directed the parties to file simultaneous briefs addressing whether the appeal should proceed as a petition for review of an agency order.

On June 30, FAA filed a brief arguing that the matter should proceed as a petition for review and that jurisdiction in the case would be under 49 U.S.C. § 46110. FAA explained that TAIT filed its complaint well after the expiration of section 46110’s 60-day limitations period and thus would need to show that it had “reasonable grounds” for failing to file within 60 days of FAA’s final order. TAIT filed its memorandum brief on the same day, asserting that no final order was issued by FAA concerning TAIT’s request for reimbursement and that FAA was required to provide TAIT with the opportunity for a hearing per 49 U.S.C. § 47111(d). TAIT argued in the alternative that if the court determined that the FAA letter constituted a final order, the court has jurisdiction to review the order. Although it was not provided for in the court’s order, TAIT filed a response to FAA’s brief to emphasize its view that the agency’s action was a withholding of a grant payment and



subject to the hearing requirements under section 47111(d).

On July 13, the court ordered the matter to proceed as a petition for review for procedural purposes, without deciding whether it had jurisdiction. TAIT's opening brief is due on November 20, 2015.

### **FAA Files Answer in Challenge to East Hampton, N.Y. Noise Restrictions and FAA Enforcement Posture; Related Suit Filed against Town**

FAA filed an answer on July 22, 2015, and an amended answer on August 11, asserting several affirmative defenses, in Friends of the East Hampton Airport, Inc., et al. v. FAA (E.D.N.Y. No. 15-00441). In their complaint, plaintiffs (primarily aircraft operators at East Hampton Airport) seek to invalidate a 2005 settlement agreement and to compel FAA enforcement of grant assurances and the Airport Noise and Capacity Act of 1990 (ANCA) against the airport sponsor, the Town of East Hampton. FAA filed an administrative record, and the briefing schedule has not been set. Motions to intervene by the Town and by the other party to the 2005 settlement agreement, the Committee to Stop Airport Expansion, are pending.

On April 21, 2015, the same plaintiffs filed suit against the Town challenging three recently-adopted local airport access restrictions: (1) a nighttime curfew; (2) an extended nighttime curfew for noisy aircraft; and (3) a one-trip per week limit for noisy aircraft. The case is Friends of the East Hampton Airport, Inc., et al. v. the Town of East Hampton (E.D.N.Y. No. 15-02246). Plaintiffs moved for a temporary restraining order to prevent the restrictions from going

into effect, and the court construed that motion as one for a preliminary injunction.

The court preliminarily enjoined the one-trip limit but denied the motion with respect to the other two restrictions, which have since become effective. In reaching its decision, the court held that ANCA does not displace the proprietor exception under the Airline Deregulation Act, and then analyzed the restrictions under the reasonable, non-arbitrary, and non-discriminatory standard of the proprietor exception. Dicta in the opinion suggests that ANCA provides few enforcement remedies aside from terminating grant eligibility, but the court expressly left open the question of whether FAA has authority under 49 U.S.C. § 47533(3) to enjoin access restrictions.

On July 22, the Town filed a notice of appeal to the U.S. Court of Appeals for the Second Circuit challenging the preliminary injunction of the one-trip limit, and on August 4, plaintiffs filed a notice of cross-appeal challenging the denial of preliminary injunction on the other restrictions. That case is Friends of the East Hampton Airport, Inc., et al. v. Town of East Hampton (2d Cir. No. 15-2334). The Town's opening brief is due on November 4, 2015.

### **Privacy Group Challenges Small UAS NPRM**

On March 31, 2015, the Electronic Privacy Information Center (EPIC), a non-profit organization, filed a petition for review in the U.S. Court of Appeals for the District of Columbia Circuit. Electronic Privacy Information Center v. FAA (D.C. Cir. 15-1075). In its petition, EPIC seeks judicial review of the FAA's February 23, 2015, small unmanned aircraft systems (UAS) notice of proposed rulemaking (NPRM) and FAA's November 26, 2014, denial of

EPIC's petition for rulemaking, which requested that FAA initiate a rulemaking to address privacy issues in connection with UASs.

In denying EPIC's petition for rulemaking, FAA explained that the issue raised in EPIC's petition was not an immediate safety concern. FAA also noted that it had begun a rulemaking to address small UASs and that the agency would consider EPIC's comments as part of that rulemaking process. Shortly thereafter, in February 2015, FAA issued an NPRM entitled "Operating and Certification of Small Unmanned Aircraft Systems" as part of its effort to safely integrate small UASs into the national airspace. With respect to the privacy concerns regarding the operation of small UASs, FAA explained that the issue was beyond the scope of its proposed rule.

On May 15, 2015, FAA filed a motion to dismiss arguing that EPIC's petition for review should be dismissed for lack of jurisdiction for two reasons. First, with respect to EPIC's challenge to the NPRM, under 49 U.S.C. § 46110, the court has jurisdiction only to review agency orders that are final. To be deemed final and reviewable under section 46110, "an agency disposition 'must mark the consummation of the agency's decisionmaking process,' and it 'must determine rights or obligations or give rise to legal consequences.'" Safe Extensions, Inc. v. FAA, 509 F.3d 593, 598 (D.C. Cir. 2007). The NPRM, by definition, is not final, since its purpose is to give the public notice of and an opportunity to comment on the agency's proposed course of action. Second, with respect to EPIC's challenge to FAA's denial of its rulemaking request, EPIC failed to challenge FAA's denial letter within the 60-day limitation period pursuant to section 46110. FAA denied EPIC's request on November 26,

2014, and EPIC did not file its petition for review until March 31, 2015.

In response to FAA's motion to dismiss, EPIC argued that FAA's November 2014 letter was an interim decision that did not become a denial of its request until the issuance of the NPRM, which did not address the privacy concerns raised in EPIC's petition for rulemaking. Specifically, EPIC claimed that because FAA's denial letter stated that EPIC's comments would be considered in the agency's anticipated rulemaking on small UASs, the letter did not deny EPIC's request. Rather, it was only upon FAA's decision not to address privacy concerns in the small UAS NPRM that FAA finally denied EPIC's rulemaking request.

On August 13, 2015, the court referred the FAA's motion to dismiss to the merits panel, and set a schedule for briefing on the merits. EPIC filed its opening brief on September 28, 2015. In addition to reasserting the arguments it made in its response to FAA's motion to dismiss, EPIC also claims that FAA has unlawfully failed to address privacy issues with respect to UASs. Specifically, EPIC argues that FAA was obligated, pursuant to the 2012 FAA Modernization Act, to consider privacy issues in the agency's integration of UASs into the national airspace. Further, EPIC asserts that FAA failed to provide a reasoned explanation for denying EPIC's rulemaking petition by declining to address privacy issues in the February NPRM on small UASs. The FAA's response brief is due on November 4, 2015.

## **Aviation Authority Seeks Review of Decision on Tampa International Airport Passenger Facility Charges**

On July 24, 2015, the Hillsborough County Aviation Authority (HCAA) petitioned the U.S. Court of Appeals for the District of Columbia Circuit for review of FAA's denial of the authority to collect Passenger Facility Charges (PFC) at the \$4.50 level for the HCAA's Automated People Mover Project at Tampa International Airport. Hillsborough County Aviation Authority v. FAA (D.C. Cir. No. 15-1238). In FAA's May 29 decision, the project was approved for collection at the \$3.50 level.

Under 49 U.S.C. § 40117(b)(4), FAA may authorize collection at a higher \$4.00 or \$4.50 PFC level if the "airport that has more than .25 percent of the total number of annual boardings in the United States, that the project will make a significant contribution to improving air safety and security, increasing competition among air carriers, reducing current or anticipated congestion, or reducing the impact of aviation noise on people living near the airport" and "that the project cannot be paid for from funds reasonably expected to be available for the programs referred to in" 49 U.S.C. § 48103.

In its PFC application, HCAA argued that the people mover would make such a significant contribution. FAA disagreed, finding that the application failed to demonstrate that the automated people mover project would rise to that level.

### **Petitioners Challenge FAA's Northern California Metroplex**

On May 22, 2015, petitioners in Lyons, et al. v. FAA, et al. (9th Cir. No. 14-72991) filed

their opening brief in this petition for review of FAA's August 6, 2014, Final Environmental Assessment/Finding of No Significant Impact and Record of Decision for the Northern California Optimization of Airspace & Procedures in the Metroplex (NorCal Metroplex), part of the Next Generation Air Transportation System (NextGen). The purpose of the NorCal Metroplex project is to take advantage of the benefits of performance-based navigation by implementing area navigation (RNAV) procedures to help enhance the safety and efficiency of the airspace in the NorCal Metroplex. The project involves optimized procedures serving air traffic flows into and out of four Northern California airports: San Francisco International Airport (SFO), Oakland International Airport (OAK), Mineta San Jose International Airport (SJC), and Sacramento International Airport (SMF). The action did not require any ground disturbance or increase the number of aircraft operations within the Nor Cal Metroplex airspace area. In total, the General Study Area includes 11 entire counties and 12 additional counties. Petitioners are residents of areas near SFO who allege that they have experienced "a dramatic and unreasonable increase in the amount of aircraft noise in their communities" as a result of the project.

Petitioners' brief primarily raises issues under NEPA. Petitioners challenge the failure to prepare an environmental impact statement, claim FAA relied on inadequate flight track information, and challenge the adequacy of FAA's analysis of noise and other impacts. Petitioners moved to supplement the record with post-decision material on August 7, 2015. FAA opposed the motion to supplement, and the court denied petitioners' motion on August 21.

### **City of Phoenix and Neighborhood Association Seek Review of Departure Procedures for Sky Harbor International Airport**

Two petitions for review have been filed in the U.S. Court of Appeals for the District of Columbia Circuit challenging FAA's September 18, 2014, implementation of area navigation (RNAV) departure procedures in the Phoenix airspace. The City of Phoenix, the owner of Phoenix Sky Harbor International Airport, filed the first petition on June 1, 2015, and a group of Phoenix historic neighborhood associations filed a second, similar petition on July 31.

FAA implemented the Phoenix RNAV procedures using legislative categorical exclusion 1 from the 2012 FAA Modernization and Reform Act, section 213(c)(1). Before implementing the procedures, FAA conducted an environmental analysis as required by NEPA and determined that no extraordinary circumstances existed that would preclude the use of a categorical exclusion. However, residents of some Phoenix residential areas are filing noise complaints.

Petitioners in both cases, City of Phoenix v. Huerta, et al. (D.C. Cir. 15-1158) and Story Preservation Assoc., et al. v. FAA, et al. (D.C. Cir. 15-1247), state that the issues to be raised in their cases include whether FAA violated NEPA, the National Historic Preservation Act, and Section 4(f).

On September 17, FAA filed motions to dismiss in both cases, arguing that the petitioners failed to comply with the 60-day deadline set forth in 49 U.S.C. § 46110(a) for challenging an order of the FAA Administrator issued under that

statute. FAA has also filed a motion to consolidate the two cases.

### **Georgetown University and Neighborhood Groups Challenge FAA's DC Metroplex Project**

On August 24, 2015, a group of petitioners including Georgetown University and non-profit neighborhood groups representing seven neighborhoods of Washington, D.C. filed a petition for review in the U.S. Court of Appeals for the District of Columbia Circuit seeking review of FAA's decision to implement certain satellite based area navigation arrival and departure procedures at Reagan National Airport (DCA). The petition in Citizens Association of Georgetown, et al v. FAA, et al. (D.C. Cir. No. 15-1285) alleges that FAA implemented these procedures without complying with NEPA or addressing public comments. FAA issued the Final Environmental Assessment and Finding of No Significant Impact/Record of Decision for the Optimization of Airspace Procedures in the DC Metroplex (OAPM), which includes these procedures at DCA, on December 12, 2013. The DC OAPM Metroplex project is part of the larger initiative to establish the Next Generation Air Transportation system. On October 13, 2015, FAA filed a motion to dismiss the case, arguing that the petitioners failed to comply with the 60-day deadline set forth in 49 U.S.C. § 46110(a) for challenging an order of the FAA Administrator issued under that statute.

## **Federal Highway Administration**

### **Court Grants in Part Motion to Dismiss Detroit Bridge Lawsuit**

On September 30, 2015, the U.S. District Court for the District of Columbia Circuit in Detroit International Bridge Company, et al. v. Government of Canada, et al. (D.D.C. 10-476) granted in part and denied in part Defendants' Motion to Dismiss the Detroit International Bridge Company's (DIBC) complaint claiming violation of its alleged exclusive franchise right to own and operate a bridge between Windsor, Ontario, and Detroit.

Plaintiffs allege nine counts in this complaint against defendants, which included the State Department, FHWA, the Government of Canada, the Windsor-Detroit Bridge Authority, and the U.S. Coast Guard. The complaint centered around DIBC's concern that a proposed new publicly-owned bridge between Detroit and Windsor, the New International Transit Crossing (NITC), would destroy the economic viability of DIBC's planned construction of its bridge, the New Span, adjacent to the DIBC-owned Ambassador Bridge, which is located two miles from the proposed NITC site.

Among DIBC's objections to the construction of the NITC were claims that it would constitute a taking of DIBC's private property rights without payment of just compensation in violation of the Fifth Amendment, that the State Department violated the APA by granting the project's Presidential Permit and approving the Crossing Agreement between Canada and the State of Michigan, and that defendants violated the Equal Protection Clause by using the regulatory approvals process to

discriminate against DIBC in favor of the NITC project. A count against the Coast Guard (Count 4) – that the Coast Guard had impermissibly rejected DIBC's application for a navigation permit for the new DIBC bridge – was dismissed last year and is currently on appeal to the U.S. Court of Appeals for the District of Columbia Circuit.

The court granted defendants' motion to dismiss on seven of the eight counts that were before it. The court dismissed Count 1, which alleged that the Crossing Agreement is invalid because it violates the foreign compact clause of the Constitution, because the court found that Congress' delegation of power in the International Bridge Act to the State Department was governed by an intelligible principle. The court dismissed for failure to state a claim Counts 2 and 3, which claimed that DIBC has an exclusive franchise right in both the United States and Canada to construct, maintain, and operate an international bridge between Detroit and Windsor and that DIBC's statutory and contractual right to build the New Span is being violated by the planned construction of the NITC. The court dismissed Count 5, alleging that defendants' support of the construction of the NITC and actions to prevent DIBC from building the New Span constitute an unconstitutional taking of plaintiffs' private property rights, for lack of jurisdiction because there is no applicable exception to Tucker Act jurisdiction in this case and DIBC must therefore seek relief in the U.S. Court of Federal Claims. The court dismissed Count 6, which alleged that the State Department's decision to grant a Presidential Permit for the NITC violated the APA, because it found that the issuance of this permit constituted presidential action, which is unreviewable under the APA. The court dismissed Count 8, in which DIBC alleged that the State Department and/or the

United States acted contrary to law and in excess of statutory authority by granting the NITC a Presidential Permit and by approving the Crossing Agreement, because DIBC did not cite an instance where defendants acted in excess of delegated powers or contrary to specific statutory prohibitions. Finally, the court dismissed Count 9, which alleged that the defendants violated the Equal Protection Clause by using the regulatory approvals process to discriminate against DIBC in favor of the NITC project, because it agreed with defendants that DIBC is not similarly situated to the proponents of the NITC and it has not been subject to differential treatment.

The court denied defendants' motion to dismiss Count 7, DIBC's claim that the State Department improperly approved the Crossing Agreement for the proposed public bridge because the Agreement violated Michigan law, holding that DIBC had standing to bring this claim. The parties will submit summary judgment briefs on this remaining count.

### **Court Rules for FHWA in Challenge to Modeling Used for North Carolina's Monroe Connector**

On September 10, 2015, the U.S. District Court for the Eastern District of North Carolina granted federal and state defendants' motion for summary judgment, denied plaintiffs' motions for summary judgment, and denied plaintiffs' motions for a temporary restraining order and a preliminary injunction in Clean Air Carolina, et al. v. North Carolina DOT, et al. (E.D.N.C. No. 14-863). This lawsuit is the second round of litigation challenging the Monroe Connector/Bypass, a proposed 20-

mile four-lane toll road project east of Charlotte, North Carolina and is a companion case to Catawba Riverkeeper Foundation, et al. v. North Carolina Department of Transportation, et al. (E.D.N.C. No. 15-29). This case, like Monroe I and Catawba Riverkeeper, focuses on the adequacy of the build and no-build models used in the indirect and cumulative effects analysis and the agencies' decision to rely upon one set of socioeconomic data for the traffic forecasting used to evaluate alternatives. In addition, the court's opinion evaluates and upholds the FHWA's decision to issue a combined Final Environmental Impact Statement (FEIS) and Record of Decision (ROD).

In the earlier lawsuit (Monroe I), plaintiffs had challenged the project on a number of grounds, the most significant of which was a claim that the no-build model used in the indirect and cumulative effects analysis (ICE) was tainted with Build assumptions. The district court ruled in favor of federal and state defendants, but the U.S. Court of Appeals for the Fourth Circuit reversed and remanded, concluding that the project's inclusion in travel time to employment, one factor used in developing the No Build model, did indeed taint the No Build model, thus invalidating the baseline for alternatives analysis and rendering the NEPA analysis arbitrary and capricious.

FHWA rescinded the ROD for the project and developed a Supplemental Environmental Impact Statement (SEIS) to revisit the no-build model, to clarify the underlying assumptions regarding the data used in the modeling for the ICE analysis, and to determine the reasonableness of using a single set of socioeconomic (SE) data for the traffic forecasting used to evaluate alternatives. During the course of the SEIS, the expert who had previously developed the

No Build model for the ICE analysis re-ran the model removing the project from the travel time to employment factor and concluded there was effectively no difference. The agencies determined the small differences in projected growth between the Build and No Build scenarios was reasonable based on a study finding that transportation infrastructure in the area had limited potential to stimulate growth and on findings that local growth was driven by other factors including the quality of schools and housing.

The agencies then considered whether the SE data developed from the Build model for the ICE analysis differed enough from the No Build data to warrant re-running traffic forecasting projections with the new SE data. Sensitivity tests comparing traffic forecasts using the original SE data to traffic forecasts using the newer Build model-based SE data revealed small differences that NCDOT and FHWA's North Carolina Division, in consultation with FHWA headquarters, determined did not merit full new traffic forecasts using two sets of SE data. The agencies conducted another round of sensitivity testing to determine whether traffic forecasting should be revisited with new SE data the local metropolitan planning organization (MPO) was developing as part of a routine five-year update. Again, in consultation with forecasting and modeling experts in FHWA headquarters, the agencies determined the differences were not significant enough to warrant re-running the traffic forecasts when the MPO's new data set was finalized and approved just weeks before the FEIS was ready for signature. Consequently, FHWA issued a combined FEIS/ROD for the project relying on the same single set of SE data for traffic forecasting that had been used for analysis in Monroe I.

Suing FHWA and NCDOT a second time (Monroe II), plaintiffs alleged defendants violated NEPA and the APA in four fundamental ways: (1) defendants' alternatives analysis was arbitrary and capricious; (2) defendants' analysis of environmental impacts was arbitrary and capricious; (3) defendants fostered a climate of misinformation and thereby undermined the NEPA process; and (4) defendants' issuance of a combined FEIS and ROD violated 42 U.S.C. § 4332a(b).

The court first rejected plaintiffs' allegations that the agencies' alternatives analysis was inadequate. The court noted that the agencies conducted sensitivity testing to compare new data to existing data and verified actual current travel speeds in the project corridor thus reasonably concluding the need for the project remained valid. The court held that the agencies' reliance on previous explanations for eliminating certain alternatives was not arbitrary and capricious, since the basis for eliminating those alternatives remained valid. Noting the plaintiffs' expert's criticisms of agency data and the agencies' responses to those criticisms, the court recognized that its role in NEPA is not to referee expert disputes. The court found plaintiffs failed in their burden to show the traffic computations were unreasonable. Finally, the Court rejected plaintiffs' argument that its recent ruling in Catawba Riverkeeper invalidated the agencies' use of a single set of SE data for traffic forecasting in this case. In so doing, it noted that here, unlike in Catawba Riverkeeper, the baseline dataset for project analysis represented a No Build scenario and that the agencies added anticipated induced growth caused by the project to create a separate Build set of data for the ICE land use analysis.

The court next rejected plaintiffs' argument that defendants failed to adequately analyze environmental impacts because they did not account for the growth-inducing impact of the project and failed to properly analyze the cumulative impacts of the project. Specifically, the court held that plaintiffs' argument that the agencies' analysis improperly assumed growth in the region would continue even in the absence of the highway project amounted to a mere difference of opinion. The court held that in this case the agency had a rational basis for developing its No Build scenario, which was reflected in the administrative record. The court also upheld the agencies' decision to use older data anticipated to conservatively overestimate environmental impacts after having first compared the older data to newly available data, which indicated a slower rate of growth in wake of the 2008 recession. Finally, the court rejected plaintiffs' allegation that reasonably foreseeable projects outside of the watershed comprising the project study area should also have been considered as part of the ICE analysis.

The court also rejected plaintiffs' allegations that defendants had fostered a climate of misinformation and undermined the NEPA process. It held that the agency statements plaintiffs cited did not provide contradictory information, but merely discussed the project's potential to relieve congestion. In addition, the court rejected plaintiffs' claim that the agencies had a duty to correct misstatements that third parties made about the project.

Plaintiffs had argued issuance of a combined FEIS/ROD was improper in light of new socioeconomic data issued by the MPO since publication of the draft document and in light of opposition to the project. The court first held the agencies had properly

concluded that the standard for determining whether to issue a separate FEIS and ROD is the same for determining whether a supplemental EIS is required – whether significant new circumstances present a seriously different picture of the environmental impact of the proposed project from what was previously envisioned. Second, the court held the agencies' sensitivity testing provided a rational basis for deciding that the MPO's new 2014 SE data would not change their conclusions regarding traffic forecasting for the project and thus did not present a seriously different picture of the project's impacts that would warrant a separate FEIS and ROD. Third, the court held that the controversy plaintiffs cited was insufficient to warrant a separate FEIS and ROD because the statutory text providing for combined documents does not provide for an exception based on controversies. The court noted that even if separate documents were not issued, the combined FEIS/ROD contained agency responses to comments plaintiffs submitted after publication of the DEIS.

Plaintiffs filed a Notice of Appeal to the U.S. Court of Appeals for the Fourth Circuit on September 15, 2015. On September 16, plaintiffs filed a Motion for Injunction Pending Appeal with the district court. Their brief includes argument that the court's recent opinion in favor of FHWA and NCDOT is premised on factual error. Defendants' filed their opposition to plaintiffs' motion on October 13.

### **Court Rules against FHWA in Challenge to Modeling for North Carolina's Garden Parkway**

On September 10, 2015, the U.S. District Court for the Eastern District of North



Carolina denied FHWA's Motion for Reconsideration and Motion to Supplement the Record with additional explanatory affidavits in Catawba Riverkeeper Foundation, et al. v. North Carolina DOT, et al. (E.D.N.C. No. 15-29). In March of this year, the court had granted plaintiffs' motion for summary judgment, denied defendants' motions for summary judgment, and vacated the ROD for the Garden Parkway (Gaston) project. The opinion's key holding found that the traffic modeling conducted for the FEIS was deficient as a matter of law because it did not employ two separate sets of socioeconomic (SE) data.

Plaintiffs challenged the project - the Garden Parkway, a proposed 22-mile toll road project west of Charlotte, North Carolina - in a number of respects, including the adequacy of the alternatives and impacts analyses and the agencies' candor with the public throughout the NEPA process. However, the court's summary judgment opinion was solely decided on the agencies' reliance on one set of SE data for the build and no-build traffic projections, which were used to assess the environmental impacts of the build and no-build alternatives.

The court's original opinion extensively quoted from the Fourth Circuit opinion in an earlier, related case, North Carolina Wildlife Federation v. North Carolina Department of Transportation, 677 F.3d 596 (4th Cir. 2012) (Monroe I). In Monroe I, the Fourth Circuit found that the agencies had violated NEPA by failing to disclose that only one set of SE data had been used. The appellate court never specifically held that one set of data was legally insufficient, but it did express concerns about this practice. The district court held that, as a matter of law, the agencies use of one set of SE data was unreasonable and that the use of a gravity

model in the FEIS' indirect and cumulative analysis was also unreasonable.

In FHWA's Motion for Reconsideration and in the Motion to Supplement, the agency provided the court a full explanation of the modeling process. The explanatory affidavits explained how the use of the build traffic data forecasts, to determine impacts of no-build or build scenarios, were properly utilized by the agencies' experts. FHWA also provided the court the opportunity to review its factual findings, some of which were not borne out by the record. However, the Court, after noting the governing legal standards for supplementation and reconsideration, held that its original decision was not clearly erroneous or manifestly unjust and, accordingly, denied defendants' motions for reconsideration.

### **Pennsylvania Roundabouts Case Dismissed, Notice of Appeal Filed**

On September 11, 2015, plaintiffs in Maiden Creek Associates, LP, et al. v. USDOT, et al. (3rd Cir. No. 15-3224) filed a Notice of Appeal of an August 20 order of the U.S. District Court for the Eastern District of Pennsylvania granting defendants' Motion to Dismiss and denying plaintiffs' Motion for Leave to File an Amended Complaint.

This case involved a challenge to the Categorical Exclusion for the Route 222 Corridor Improvement Project in Berks County, Pennsylvania. Plaintiff Maiden Creek Associates (MCA) owns commercially-zoned property in the vicinity of the project on which it proposes to develop a shopping center. MCA claimed that a planned roundabout would prevent development of its property and that a signalized intersection would provide safer access. Plaintiff Board of Supervisors of Maiden Creek Township claimed that the

proposed roundabout would adversely affect current and future businesses in the area.

The district court found that plaintiffs' original complaint did not establish standing because some of the allegations made by plaintiffs involve injuries to third parties and because the alleged harm centers on economic concerns and design disputes. The court denied plaintiffs' motion to file an amended complaint, finding that amendment would be futile because the added allegations of injury still did not meet the requirements of standing.

### **Court Vacates Record of Decision in Wisconsin Route 23 Case**

This case, 1000 Friends of Wisconsin, Inc. v. USDOT, et al. (E.D. Wis. No. 11- 545), involves a challenge to the ROD approving the Wisconsin 23 project. The project would expand a 19-mile section of Wisconsin Route 23 in rural northeast Wisconsin from two lanes to four. Plaintiffs originally filed suit in June 2011. The parties requested that the action be stayed to permit further administrative action. A limited scope supplemental environmental impact statement was prepared, and on March 17, 2014, FHWA issued a ROD. The litigation resumed.

On May 22, 2015, the district court vacated the ROD and remanded the matter to the agencies. The court found that although the administrative record provided a general discussion of traffic modeling and forecasting, it did not contain a comprehensive explanation of how the models were applied to arrive at the traffic projections. Accordingly, the court found that the neither the court nor the public are able to intelligently assess whether those projections are flawed. The court further found that there was insufficient information

to indicate that defendants revisited their traffic projections in light of recently updated population projections. Therefore, defendants could not show that they made a reasoned decision as to whether the updated population data required reconsideration of the traffic projections.

The court did reject plaintiff's challenge to the traffic demand model itself, holding that despite plaintiff's contention that the model has a high margin of error when applied to rural roads such as Highway 23, plaintiff had not pointed to any more accurate methodology. The court also found that defendants adequately evaluated alternatives, including passing-lane alternatives. In addition, the court found that defendants adequately considered induced travel and responded to comments from other state agencies.

On remand, the court ordered the agencies to prepare a document that explains exactly how they arrived at the projections of future traffic volumes that appear in the Environmental Impact Statement (EIS). The court also ordered the agencies to consider whether updated population data will significantly change the traffic projections that appear in the EIS and if so, whether that affects the agencies' consideration of reasonable alternatives.

### **Court Rules against FHWA and Florida DOT in Challenge to the Issuance of a Categorical Exclusion**

On June 30, 2015, the U.S. District Court for the Middle District of Florida denied FHWA and FDOT motions for summary judgment and granted summary judgment for plaintiffs in RB Jai Alai, LLC v. Secretary of Florida DOT, et al. (M.D. Fla. No. 13-1167). The lawsuit challenged the construction of a

single-point urban interchange project (referred to by plaintiffs and the court as the “Flyover Project”) in Seminole County, Florida that proposes to change the existing at grade intersection to an above grade elevated highway overpass, correcting existing deficiencies and improving system linkage. The project was approved as a Categorical Exclusion (CE) in 2004, and two subsequent limited scope reevaluations had been done to address design changes. The court, after raising the issues on its own, ruled that the project should not have been classified as a CE and that the 6-year statute of limitations was reopened each time the project was reevaluated. The court determined that the classification of the project as a CE and the failure to complete an Environmental Assessment or Environmental Impact Statement was arbitrary and capricious.

Plaintiffs had alleged that defendants violated NEPA by failing to adequately consider the project’s environmental impacts and that defendants’ 2012 reevaluation failed to address new and changed circumstances to traffic and land use patterns, contaminated sites, and impacts to wetlands. Defendants moved for summary judgment on several grounds: (1) plaintiffs lacked standing to challenge the project under NEPA; (2) plaintiffs’ claims were moot due to the substantial completion of the project; (3) plaintiffs’ claims were barred by the APA’s six year statute of limitation, or in the alternative, laches; and (4) the project was properly classified as a CE.

The court considered both constitutional and statutory standing and held that by way of a sworn affidavit, plaintiffs asserted health and safety concerns along with diminution of enjoyment concerns sufficient to meet the constitutional requirement of injury and proximate causation. The court also

discussed statutory standing, which required plaintiffs to fall within NEPA’s “zone of interest” where plaintiffs’ interests could not be marginally related or inconsistent with the purposes of the statute. Despite the fact that plaintiffs only asserted economic injuries, the court found that the nexus between plaintiffs’ harm and the environment should be read broadly to include quality of life, economic growth, aesthetic concerns, and public health and safety, among other things, and thus affirmed that they had standing to sue.

Turning to mootness and timeliness, despite its acknowledgment that the project was 80% complete and that 96% of federal funds had already been disbursed, the court found that it was capable of providing meaningful relief and held that the case was not moot. The court dismissed defendants’ statute of limitations argument, holding that the limitations period was reopened when defendants conducted a reevaluation of the CE and citing public policy as its rationale. Additionally, the court cited a recent Supreme Court opinion dismissing laches as an argument for barring legal relief where a federal statute contains an explicit statute of limitations, as does the APA. The court found that because plaintiffs brought their claims within the limitations period, their lawsuit was timely.

Finally, turning to the merits, the court held that a CE was the improper classification for the project. The court found that the initial classification of the project as a CE violated NEPA’s procedures and that defendants’ affirmance of the project as a CE in 2012 was not beyond the court’s review due to the running of the statute of limitations. The court found that the project was not similar in scope to those types of projects cited to by defendants in their briefs or any other included in subsection (d) of 23 C.F.R. §

771.117. The court also found that the vast majority of case law supported its conclusion that the project was not the type of major federal action that can be categorically excluded. The court focused on the scope of the project rather than the purpose in determining that this project should not have been a CE.

### **Court Finds against FHWA in Illiana Corridor Project**

On June 16, 2015, the U.S. District Court for the Northern District of Illinois granted summary judgment for the plaintiffs in Openlands, et al. v. USDOT (N.D. Ill. No. 13-04950). The lawsuit challenged the NEPA EIS Tier 1 of the Illiana Corridor Project. The court held that FHWA's approval of the FEIS/ROD was arbitrary and capricious and remanded the ROD for further action consistent with the court's opinion.

The court found that the NEPA analysis was flawed because the baseline socioeconomic forecasts used to evaluate the "no-build" alternative assumed the proposed project would be built. The proposed project was referenced in an appendix to the no-build forecasting report. Plaintiffs, three not-for-profit environmental organizations with members in the project area, argued that the reference to the potential construction of the Illiana was evidence that the project was included in the no-build forecast. Defendants clarified that the project was merely listed as an example of a project that could address the anticipated level of growth in the area and the project was not included in any no-build forecasts, as was clearly stated in the EIS. The court rejected defendants' argument and held that the no-build forecast "may or does include the 'build' condition." The opinion went on to say that this flawed no-build analysis had a

ripple effect that invalidated both the project's purpose and need and the analysis of direct impacts due to increased traffic on existing roads.

The court also found that the indirect impacts analysis failed to acknowledge the cost of improvements to existing roads in order to accommodate traffic induced by the Illiana. Finally, the court found that the EIS failed to discuss conflicts between the proposed action and the metropolitan planning organizations' (MPOs) long-range plans. Both MPOs in the project area used policy-driven forecasts for the project area. Because these policy-based forecasts did not reflect actual development and travel behavior, the project team used market-driven forecasts over the objection of the MPOs. The court found that the use of different forecasts created a condition that was inconsistent with the MPOs' vision for the area, and the EIS was flawed because it failed to acknowledge this inconsistency.

In a favorable holding for FHWA, the court stated that though it may have been "unwise" for the project team to reject the MPOs forecasts, the EIS articulated a reasonable explanation for the decision to use market-based forecasting, and the court upheld the use of these forecasts. The court also rejected plaintiffs' contention that the EIS ignored relevant data from the Census Bureau and found that plaintiffs' Section 4(f) challenge was not ripe.

### **Settlement Reached in Bonner Bridge Case**

On June 15, 2015, the Department of Justice approved the proposed settlement of the Bonner Bridge litigation. This approval finalized an agreement between all parties to the litigation pending in of the U.S. Court of Appeals for the Fourth Circuit. The

agreement allows the North Carolina Department of Transportation (NCDOT) to proceed with the replacement of the aging Herbert C. Bonner Bridge over Oregon Inlet (phase 1 of the project), while further studying options for the remaining phases of the project. Oregon Inlet separates the northern end of Hatteras Island from mainland North Carolina. The settlement outlines interim steps that will be taken by NCDOT prior to both the federal and state lawsuits against the project being dismissed.

On September 16, 2013, the U.S. District Court for the Eastern District of North Carolina had granted summary judgment in favor of defendants FHWA and NCDOT, dismissing the case. The district court concluded that the Bonner Bridge replacement project complied with NEPA and Section 4(f) of the Department of Transportation Act. Plaintiffs North Carolina Defenders of Wildlife and the National Wildlife Refuge Association appealed to the U.S. Court of Appeals for the Fourth Circuit and alleged that the district court erred in determining whether improper segmentation in violation of NEPA had occurred, whether Section 4(f) was followed as a whole and in particular, whether the joint planning exception to Section 4(f) applied to the project. On August 6, 2014, the Fourth Circuit affirmed the district court's determination that Defendants complied with NEPA, but reversed the district court's determination that the joint planning exception applied. Defenders of Wildlife, et al. v. North Carolina Dept. of Transp., et al., 762 F.3d 374 (4th Cir. 2014). The joint planning exception was remanded for further proceedings.

Settlement talks commenced once the appellate decision was issued. The parties formally entered the Fourth Circuit's

mediation program, thus staying any petition for rehearing. A mediation meeting took place on February 25, 2015, and discussions continued thereafter, culminating into the settlement agreement. The lengthy agreement outlines actions and covenants required of the parties before and after dismissal of the lawsuits.

### **Appellate Briefs Filed in Indiana I-69 Case**

The parties have filed appellate briefs in Citizens for Appropriate Rural Roads, Inc., et al., v. Foxx, et al. (7th Cir. No. 15-1554), an appeal of an order of the U.S. District Court for the Southern District of Indiana denying plaintiff's Motion for Summary Judgment and granting defendants' Motions for Summary Judgment. This case involves a 27-mile section (Section 4) of the I-69 Project from U.S. 231 near Crane, Indiana, to State Route 37 south of Bloomington, Indiana. The project is currently under construction and is slated to open to traffic in 2015. Because this was a large and complex project with a wide range of potential alternatives, the NEPA analysis was divided into two tiers. A Tier 1 ROD was issued for the entire six-section I-69 project in April, 2007, and a Tier 2 ROD for Section 4 was issued in September 2011.

The district court dismissed several of plaintiff's claims in September, 2012 and entered summary judgment on their remaining claims in March 2014. Plaintiffs filed a motion for reconsideration in April, 2014, which the district court denied on January 14, 2015. The court held that plaintiff's challenge to the Tier 1 ROD was barred by the statute of limitations. The court further found that claims alleging violations of NEPA had been waived, that FHWA and Indiana DOT acted reasonably in deciding not to issue a Supplemental EIS,

that a fraud on the court claim was not cognizable, that additional discovery on Clean Air Act claims was unwarranted.

In its brief to the Seventh Circuit, appellant contends that the agencies (1) did not adequately consider the potential effects of the project on air pollution because they analyzed those effects using 2004 fleet data rather than 2009 data, (2) failed to consider an alternative route that was proposed during public comment would reduce the effects of the project on Indiana's karst, a unique landscape where water has dissolved the bedrock to form a system of caves and sinkholes, (3) violated NEPA by failing to consider the potential effects of the project on the Indiana bat, an endangered species, and (4) engaged in conspiracy, fraud, and bad faith. Appellants also argue that the district court abused its discretion when it denied their requests for discovery, subpoenas, and an evidentiary hearing.

Defendants argue (1) that they did not use the 2009 data because it had not yet been quality assured, (2) that they reviewed and rejected the alternative route because it fell outside the corridor identified during Tier 1 and because the environmental benefits of the alternative were not significant enough to justify going outside the Tier 1 corridor, (3) that they consulted repeatedly with the U.S. Fish and Wildlife Service and correctly concluded that the project is not likely to jeopardize the continued existence of the Indiana bat, and (4) that appellant's allegations of conspiracy, fraud, and bad faith are false and completely unsupported by any admissible evidence. Finally, defendants argue that the district court's discovery decision was well within its discretion and should be affirmed, especially where, as here, judicial review is properly limited to the administrative record.

### **Court Denies Plaintiff's Reconsideration Motion in Challenge to Houston Project, Summary Judgment Briefing Proceeds**

On June 8, 2015, the U.S. District Court for the Southern District of Texas denied plaintiffs' Motion for Reconsideration of its March 9, 2015, decision granting in part and denying in part FHWA's Motion to Dismiss in Crabb, et al., v. FHWA (S.D. Tex. No. 11-848). This case is a challenge to a 38-mile project in Houston, Texas. FHWA and Texas DOT (TxDOT) issued an EIS for the project in 2010 and engaged in subsequent reevaluations of the Final EIS in March 2011, July 2012, October 2012, and August 2013. The last reevaluation studied the project's noise impacts and how they might be mitigated, as well as the project's interim design elements. Plaintiffs sued the agencies challenging the noise impact and Section 4(f) evaluations.

On March 9, 2015, the court dismissed for lack of subject matter jurisdiction claims that defendants violated the Federal-aid Highway Act, citing agency deference under the APA as its rationale. The court also dismissed (without leave to amend) NEPA claims for failure to sufficiently plead or show evidence of the allegations. Further, the court dismissed the plaintiff's due process claim because none of the specified statutes or regulations created any protected rights or interests, and thus, plaintiffs failed to state a claim. Finally, the court ruled that plaintiffs' allegations that FHWA and TxDOT failed to consider impacts to nearby parks under 23 U.S.C. § 138 and 49 U.S.C. § 303 could proceed.

One interesting note about the decision was plaintiffs' argument that other noise

abatement measures not selected by FHWA and TxDOT could achieve better noise-reduction results and that 23 C.F.R. § 772.13(g)(2) required measures that would reduce noise the most. The court found that FHWA regulations do not require that all affected neighborhoods receive abatement measures or that the implemented measures be the most effective.

On March 19, plaintiffs filed a Motion for Reconsideration that alleged that new evidence and intervening changes in the law required reconsideration, that the court's memorandum and opinion contained clear errors of law, and that the court's ruling dismissing some of their claims was manifestly unjust. On June 8, the court denied the motion for reconsideration and upheld the prior decision. In its opinion, the court first noted that the Federal Rules of Civil Procedure do not recognize a general motion for reconsideration. However, the court also noted that under Rule 54(b), it "retains the power to revise an interlocutory order before entering judgment adjudicating the parties' claims, rights, and liabilities." After finding the first three bases lacking, it dealt with the fourth grounds for relief to prevent manifest injustice. Essentially, plaintiffs argued that its counsel was inept or confused by the applicable legal standards or by the prior orders entered in the case. The court recognized that the counsel making this argument was also the lawyer moving for reconsideration and an owner of property she claims is adversely affected by the highway project. The court held that "[t]he negligence or erroneous strategy choices of a party's attorney or the party herself, which contributed to the court's dismissal of the party's claims, do not amount to manifest injustice." Following the court's rulings, the only remaining claims were those brought under Section 4(f).

On June 26, plaintiffs filed their Motion for Summary Judgment on the Section 4(f) claims. The primary grounds for the remaining claims were that the Revised Record of Decision for the 290 Project lacked a discussion or documentation of a 4(f) proximity impact evaluation for the Houston Memorial Park and Arboretum and that there was no indication that defendants discussed this issue with the city council.

On July 24, federal defendants filed a Response and Cross-Motion for Summary Judgment. The briefing argued that FHWA's motion should be granted and plaintiffs' denied because plaintiffs lack standing and the Project does not use, actually or constructively, any Section 4(f) property. On August 8, plaintiffs filed their response and reply brief. They attached to their brief a number of documents and materials, including affidavits, which had not been included in FHWA's administrative record.

On August 28, federal defendants responded by filing a motion to strike the extra-record materials. Plaintiffs responded on September 18, asking the court to permit the materials.

### **Court Denies Preliminary Injunction in NEPA Challenge to Virginia Avenue Tunnel Project**

On April 7, 2015, the U.S. District Court for the District of Columbia Circuit denied a preliminary injunction motion seeking to stop the reconstruction of the Virginia Avenue rail tunnel in Southeast Washington, D.C. Committee of 100 on the Federal City v. Foxx, 87 F. Supp. 3d 191 (D.D.C. 2015). The reconstruction project – which is being carried out and funded by the tunnel's private owner, CSX Transportation – seeks

to modernize and transform the century-old tunnel that is part of CSX's eastern seaboard freight rail corridor. FHWA, working with the D.C. Department of Transportation (DDOT), analyzed the environmental impacts of the project in connection with certain actions it took for the project, including its approval of the short-term closure of ramps off Interstate 695. A non-profit group has challenged that environmental analysis by suing FHWA, DDOT, and other agencies under the NEPA and other statutes. Plaintiff alleges, among other things, that DDOT predetermined the outcome of the environmental review process by engaging in certain negotiations with CSX and that FHWA was aware of this predetermination.

In its decision denying the motion for a preliminary injunction, the court held that plaintiff was not likely to succeed on the merits of any of its claims and that the balance of the equities and the public interest favored the defendants. With respect to the predetermination claim, the court held that DDOT had not made an "irreversible and irretrievable commitment of resources" to the project by generally pledging support for the project, or by agreeing to issue permits *if and when* the environmental review process ended up favoring the project. The court held, moreover, that even if DDOT had somehow predetermined the outcome of the process, there was no evidence that FHWA – the agency bound by NEPA – had not conducted its own independent review.

Since issuing its preliminary injunction decision, the district court has denied plaintiff's motions for an alteration of the decision in light of new facts, Committee of 100 on the Federal City v. Foxx, 2015 WL 3377835 (May 26, 2015), and for reconsideration of the decision in light of a

recent Supreme Court decision. Both the district court and the U.S. Court of Appeals for the D.C. Circuit also denied plaintiff's motions for an emergency stay pending appeal. Committee of 100 on the Federal City v. Foxx, 2015 WL 4072321 (D.C. Cir. May 27, 2015). Plaintiff has now withdrawn its appeal. On October 23, the district court denied plaintiff's motion for permission to supplement the record and conduct discovery. Construction of the project is underway.

### **Court Denies Motion for Preliminary Injunction against Virginia Interchange Project**

On June 8, 2015, the U.S. District Court for the Western District of Virginia denied plaintiffs' Motion for a Preliminary Injunction in Rio Associates v. Layne (W.D. Va. No. 15-12). The ruling follows a court hearing held on June 1, 2015, in Charlottesville, Virginia. Although the court found that plaintiffs, two commercial entities, had standing, it found that they had not met the burden for obtaining a preliminary injunction (PI).

The PI request dealt with three highway projects on Route 29 (U.S. 29) in Charlottesville, Virginia – the construction of a Grade-Separated Interchange at Rio Road and Route 29, the widening of Route 29 for about 1 mile in length, and a state funded project to construct an extension of Berkmar Drive over the Rivanna River (referred to collectively as the Route 29 Solutions projects). The Rio Road and the Route 29 widening projects were each approved with a CE. The Virginia Department of Transportation (VDOT) had consolidated construction of the three projects into one Design-Build contract.



The court found that plaintiffs had not demonstrated a substantial likelihood of prevailing on the merits. Specifically, the court found that there was no project segmentation and that the use of a CE for the Rio Road GSI was permitted under FHWA regulations. 23 C.F.R. § 771(d). Additionally, the court held that plaintiffs had not shown that the balance of equities tipped in their favor or that the public interest favored the issuance of an injunction.

### **Court Consolidates Two Challenges to the AZ South Mountain Freeway Project, Denies Motion for Preliminary Injunction**

The U.S. District Court for Arizona consolidated two new lawsuits challenging FHWA's NEPA and Section 4(f) approvals for the proposed \$1.9B AZ South Mountain Freeway Project: Protecting Arizona's Resources and Children (PARC), et al. v. FHWA, et al. (D. Ariz. No. 15-00893) (filed May 19, 2015) and Gila River Indian Community (GRIC) v. FHWA, et al. (D. Ariz. No. 15-01219) (filed June 30, 2015). The proposed project is a new 22-mile freeway in the southwestern portion of the Phoenix metropolitan area that will impact the South Mountains – a Section 4(f) Park resource and a traditional cultural property for the GRIC and other Native American Tribes.

The PARC Complaint alleges 20 counts, including violations of NEPA, Section 4(f), and the Clean Air Act. The allegations include: (1) predetermination; (2) limited “study area”; (3) inadequate purpose and need; (4) inadequate range of alternatives; (5) inadequate consideration of the “no action” alternative; (6) failure to adequately consider avoidance alternatives under

Section 4(f); (7) failure to “undertake all possible planning to minimize harm” under Section 4(f); (8) inadequate consideration of “constructive use” under Section 4(f); (9) inadequate consideration of impacts to children's health; (10) inadequate consideration of Mobile Source Air Toxics (MSATs); (11) inadequate consideration of truck traffic; (12) inadequate consideration of impacts re: transportation of hazardous materials; (13) inadequate consideration of arterial street impacts and local traffic patterns; (14) through (16) inadequate mitigation measures; (17) inadequate consideration of air quality; (18) inadequate response to comments; (19) inadequate consideration of impacts on wells; and (20) inadequate consideration of cumulative, direct and indirect impacts. On July 28, 2015, the court denied PARC's request for preliminary injunction because plaintiffs failed to demonstrate a likelihood of immediate and irreparable harm.

The GRIC Complaint alleges similar NEPA and Section 4(f) violations identified in the PARC complaint. The only new allegation by GRIC is “[f]ailing to select as the Preferred Alternative a freeway alignment that the FHWA and ADOT had the authority to build.” GRIC alleges that FHWA and co-defendant Arizona Department of Transportation have no authority to build the selected alternative because “the agencies would need to acquire three wells held in trust by the United States for the benefit of the Community.” Both PARC and GRIC seek declaratory judgment, injunctive relief, and attorneys' fees.

Plaintiffs' Summary Judgment briefs are due by January 15, 2016. A hearing is scheduled for April 21, 2016.

## **Complaint Challenges Tier Two of Illiana Corridor Project**

On May 21, 2015, plaintiffs in Openlands, et al. v. USDOT, et al. (N.D. Ill. No. 15-4529) challenged the Tier 2 ROD for the Illiana Project, alleging NEPA, Section 4(f), and APA violations. The complaint names USDOT, FHWA, Secretary Foxx, Administrator Mendez, IL Division Administrator Catherine Batey, the Illinois and Indiana Departments of Transportation, and the heads of both state agencies as defendants. Plaintiffs are three not-for-profit environmental organizations with members in the project area. The same plaintiff groups filed a complaint against Tier 1 of the Project. (See discussion of Openlands, et al. v. USDOT (N.D. Ill. No. 13-04950) earlier in this edition.) In that case, the court found against the defendants and remanded the ROD for further action consistent with the court's opinion.

With respect to their NEPA/APA claim, plaintiffs allege several deficiencies, including a flawed analysis of the purpose and need for the project that was based on inflated population, employment, and traffic forecasts; a failure to adequately explain inconsistencies with the MPOs long range plans; a flawed fiscal constraint determination; a failure to rely on up-to-date studies and information; a failure to take a hard look at the environmental impacts of the Project; improper use of the tiered environmental review process to purposefully delay consideration of impacts; and a failure to withdraw the ROD in the face of new evidence. Plaintiffs' Section 4(f) claim alleges that defendants failed to adequately address the Project's constructive use of MNTP and Alternative Route 66 and failed to consider reasonable, prudent, and feasible alternatives to avoid constructive use of those properties.

FHWA filed its Answer to the complaint on September 24, 2015.

## **Environmental Group Challenges West Waukesha Project in Wisconsin**

On July 2, 2015, plaintiffs in Waukesha County Environmental Action League, et al. v. USDOT, et al., (E.D. Wis. No. 15-801) challenged the "West Waukesha Bypass Project," which is intended to improve the safety and efficiency of the arterial connection between the Wisconsin State Highway 59/County X intersection and I-94 on Waukesha's west side. It is the last piece of a long-planned circumferential route around Waukesha. The corridor has safety issues and design deficiencies including narrow lanes, lack of shoulders, sharp curves, and steep hills. As traffic increases, safety and operations on this corridor will continue to deteriorate. The selected alternative widens existing County TT to four lanes and includes new alignment at the southern portion of the project.

The complaint alleges that the agencies predetermined the decision to build the project and defined the purpose and need so narrowly that only one alternative could be chosen. It alleges that serious consideration was not given to alternatives and that the decision improperly relies on Wisconsin DOT guidelines to evaluate traffic and safety rather than empirical data. It alleges that improper consideration was given to indirect and cumulative effects, cumulative impacts, floodplains, water quality, and wooded uplands. The complaint further alleges that mitigation measures are highly speculative and undefined, that defendants failed to implement a non-native species monitoring and eradication plan, and that defendants failed to adequately explain the

bases for its assumptions regarding traffic projections and safety matters. It also alleges that defendants failed to adequately respond to public comments, failed to comply with Section 4(f), and failed to hold a public hearing in the manner required by 23 U.S.C. § 128(a).

The Federal Defendants filed their Answer on September 25, 2015.

## **Federal Motor Carrier Safety Administration**

### **District Court Dismisses Suit Challenging Release of Driver Violation Reports**

On September 30, 2015, the U.S. District Court for the District of Massachusetts granted the government's motion to dismiss in Flock, et al. v. USDOT, et al. (D. Mass. No. 14-13040), a class action complaint for damages under the Privacy Act brought by six commercial drivers. Plaintiffs alleged that FMCSA's release of driver violation reports under the Pre-employment Screening Program (PSP) was unlawful because the reports included driver violations that did not qualify as serious driver-related safety violations under 49 U.S.C. § 31150, the statute authorizing PSP.

The government had argued that plaintiffs failed to allege injury sufficient to establish standing to sue the agency or to support a Privacy Act claim. The court disagreed, finding that at the pleading stage of the litigation, the complaint adequately alleged "an adverse effect sufficient to meet the constitutional standing requirement." The court did not reach the issue of whether the complaint adequately alleged injury sufficient to state a Privacy Act claim.

FMCSA further argued that there could be no Privacy Act violation where, as here, the agency only releases the safety records of a motor carrier driver with the driver's consent and pursuant to the routine uses articulated in Statement of Records Notices that comply with Privacy Act requirements under 5 U.S.C. § 552a(b)(3). The interpretation of the congressional intent and language in 49 U.S.C. § 31150 was integral to this argument. The statute states that the Secretary "shall provide persons conducting pre-employment screening services for the motor carrier industry electronic access to the following reports contained in the Motor Carrier Management Information System (MCMIS): (1) Commercial motor vehicle accident reports, (2) Inspection reports that contain no driver-related safety violations and (3) Serious driver-related safety violation inspection reports." 49 U.S.C. § 31150(a). FMCSA interpreted the statute as setting a floor, rather than a ceiling, for the types of inspection reports that could be released, arguing that the agency's reasonable interpretation was due Chevron deference. The government argued that the agency always had the authority to release a driver's entire safety record with the driver's consent under the Privacy Act and that Congress did not indicate that section 31150 limited this longstanding authority.

Plaintiffs argued that the court should not grant Chevron deference where the language in a statute is clear and unambiguous and that the plain language in section 31150 clearly limits the Secretary to establishing an electronic access program limited to serious driver violations.

The court accepted the government's position that section 31150 did not limit the agency's pre-existing authority to release driver records with the driver's consent under the Privacy Act, providing a floor

rather than a ceiling to the types of violations that the agency could release under PSP. The court examined the language of the statute and found that Congress did not clearly express its intent to either prohibit release of information in addition to the categories listed in the statute, nor did it express the intent to “require” the stated categories, but “permit” the release of additional information. The court further found that language expressing either of these options would have been “easy enough to draft.” As such, the court concluded that the statute was susceptible of at least two rational interpretations and was therefore ambiguous.

Having found that Congress did not establish its intent unambiguously, the court then held that the agency’s interpretation was entitled to Chevron deference. The court determined that the agency’s reading of the statute was “not manifestly contrary to the wording or purpose of the statute” as drafted, that it was not “arbitrary or capricious, and that “while a contrary reading [was] entirely plausible, the construction adopted by the agency [was] rational and coherent, and in keeping with its statutory authority to promote highway safety.”

### **District Court Dismisses Tour Operator’s Challenge to Refusal to Reinstate Operating Authority, Plaintiff Appeals**

On April 27, 2015, the U.S. District Court for the Eastern District of Michigan dismissed with prejudice the complaint filed in Haines v. FMCSA, et al. (E.D. Mich. No. 14-14438), finding that no part of the challenged order was final agency action. On May 27, Haines filed a notice of appeal

to the U.S. Court of Appeals for the Sixth Circuit.

Appellant Roger Haines is the owner of Haines Tours located in Gladwell, Michigan. He sued FMCSA, the Field Administrator for FMCSA’s Midwestern Service Center, and the FMCSA Administrator, alleging that the agency and its officials violated the APA and his constitutional rights by exceeding the bounds of their statutory authority and imposing restrictions on his operation “beyond that required to abate the hazard.” FMCSA had issued an imminent hazard order to Haines Tours in June 2011 after Michigan law enforcement officials notified FMCSA that Haines had allowed six family members – including several children – to ride in the luggage compartment of a motor coach on a trip from Michigan to an amusement park in Ohio. The Imminent Hazard Order required that Haines immediately cease tour bus operations. Haines regained his authority to conduct intrastate operations in March, 2012 and his authority to operate interstate in January, 2013, following FMCSA’s determination that his motor carrier operation was fit, willing, and able to comply with the Federal Motor Carrier Safety Regulations.

Haines alleges constitutional violations of the right to due process and equal protection under the law and that the agency failed to orderly adjudicate its determination that Haines posed an imminent hazard to public safety, failed to allow him to appeal the determination vacating the rescission order on June 16, 2011, and from 2011 to 2012 was unresponsive to Haines’s attempts to “open a dialogue” concerning the agency’s determinations. Haines alleges that the agency violated his right to “similar treatment” accorded to other tour bus

operators under the Equal Protection Clause of the 14th Amendment to the Constitution.

On March 9, 2015, the agency filed a motion to dismiss, which argued that the district court lacked subject matter jurisdiction under the APA because the suit sought money damages where none were available, the case was moot, and Haines never exhausted his administrative remedies. The agency further argued that any claims Haines might bring under the Federal Tort Claims Act did not fall within the government's limited waiver of sovereign immunity and that plaintiff's untimely filed and incorrectly pled constitutional tort claims against a federal agency and its employees in their official capacities are not authorized under Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388 (1971).

In a response brief filed March 25, Haines argued that the court had subject-matter jurisdiction to hear the case because the claimed damages were "restitution" under Bowen v. Massachusetts, 487 U.S. 879 (1988). Haines also argued that he had valid claims under Bivens and that the court should grant him leave to amend the complaint to change his section 1983 claims to Bivens claims. On April 8, the agency filed its reply and responded to Haines' motion to amend, arguing that Haines' APA claims were compensatory in nature and that allowing Haines to amend his complaint to include time-barred Bivens claims would be futile.

Following the district court's dismissal, Haines filed a notice of appeal to the U.S. Circuit Court of Appeals for the Sixth Circuit. Haines v. FMCSA, et al. (6th Cir. No. 15-1624). On August 14, 2015, Haines filed a brief arguing that the statute of limitations of his Bivens claims should have

been tolled during the pendency of the June 2014 complaint under Michigan law and that the district court erred in ruling that amendment to the complaint would have been futile and that the court did not have subject matter jurisdiction over his APA claims because he claimed monetary damages and failed to exhaust administrative remedies. On September 14, the government filed its response arguing that the Bivens claims should be barred by the Michigan statute of limitations because Haines failed to raise the issue in the district court, that the proper judicial avenue for review of this now moot claim would have been the court of appeals under the Hobbs Act and 49 U.S.C. § 521(b)(9), and that allowing petitioner to amend his complaint to include Bivens claims remained futile.

### **Court Dismisses Challenge to Increased Broker Bond; Court of Appeals Suit Pending**

On July 15, 2015, the U.S. District Court for the Middle District of Florida, in Association of Independent Property Brokers and Agents, Inc. (AIPBA) v. Foxx, et al. (M.D. Fla. No. 15-00038), dismissed with prejudice a constitutional challenge to MAP-21's increased \$75,000 financial security requirement for all FMCSA-regulated property brokers (general property and Household Goods (HHG)). AIPBA filed its complaint in the district court on January 23, 2015, while waiting for resolution of AIPBA v. Foxx, et al. (11th Cir. No. 13-15238), related litigation challenging the agency's October 1, 2013 Final Rule implementing the MAP-21 \$75,000 broker financial responsibility requirement. AIPBA's district court complaint asked the court to declare (1) that the \$75,000.00 bond amount in amended 49 U.S.C. § 13906 is not rationally related to a

legitimate government purpose, (2) that amended section 13906 is an unlawful violation of AIPBA's substantive due process rights under the Fifth Amendment, (3) that amended section 13906 is unconstitutional, and (4) that enforcement of amended section 13906 is unconstitutional.

AIPBA, comprised of small and mid-sized independent property brokers, asserts that the MAP-21 amendment to section 13906 increasing the required financial security for regulated brokers and freight forwarders was intended to drive these smaller entities out of business. FMCSA broker and freight forwarder operating authority is contingent on the requisite bond or trust fund being in effect. Prior to MAP-21, FMCSA regulations required \$10,000 in financial security for general property brokers and \$25,000 for HHG brokers.

On May 1, 2015, FMCSA moved to dismiss AIPBA's complaint, asserting that the substantive due process challenge should be decided under the "rational basis" test. FMCSA argued that plaintiff, in alleging that "Congress increased the amount of the required bond to fight fraud in the property broker industry," identified a conceivable rational basis for the new broker bond amount. Second, the agency argued that it identified several additional rational bases for the statutory increase, including carrying out the National Transportation Policy at 49 U.S.C. § 13101 and protection of shippers and motor carriers. Finally, FMCSA argued that an increase in the bond requirement to account for inflation or other market condition changes is a rational exercise of the government's authority.

In response to FMCSA's motion to dismiss, AIPBA argued that it stated a cause of action for a Fifth Amendment substantive due process violation and thus dismissal was

not appropriate at this stage of the litigation. AIPBA acknowledged that "[t]he rational basis test is deferential to the legislature," but argued that the standard requires that economic regulations not be arbitrary.

In its July 15 decision, the district court assessed plaintiff's constitutional challenge under the rational basis test, holding that "a law will be upheld as constitutional if it is rationally related to a legitimate government purpose." In dismissing AIPBA's complaint, the court found that AIPBA failed to meet its burden to show that the \$75,000 requirement lacked a rational basis and that the increase in the "security requirement was a rational means by which Congress could accomplish its objective" of alleviating fraud in the property broker industry. Additionally, the court dismissed plaintiff's argument that Congress's true motivation for increasing the amount of the broker bond was anticompetitive collusion. The court found that congressional motivation was irrelevant as long as there was a conceivable rational basis for the increase.

On June 18, 2015, FMCSA filed its brief in the related Eleventh Circuit litigation, AIPBA v. Foxx, et al., challenging its October 1, 2013, rule implementing the \$75,000 broker financial responsibility requirement. AIPBA had filed its opening brief in February 2014, after which the court granted AIPBA's motion to hold the matter in abeyance pending AIPBA's application to FMCSA seeking exemption from the financial responsibility requirement. On March 31, 2015, FMCSA denied AIPBA's exemption application, and the court reset the briefing schedule.

AIPBA had argued that FMCSA violated the APA in issuing its rule without notice and comment. FMCSA had found that notice

and comment was “unnecessary” pursuant to the “good cause” exception to the APA’s notice and comment requirement. FMCSA argued that AIPBA lacked standing to challenge the regulation arguing that “any injuries arising from the increased \$75,000 security requirement do not result from the agency’s new rule but rather from [MAP-21] . . . .” FMCSA further argued that AIPBA failed to allege or otherwise establish that its asserted injury can be redressed through an APA challenge. On the merits, FMCSA argued that notice and comment were unnecessary where the agency was merely amending its rule to conform to a statutory change. In its brief, the agency indicated that “the conforming rule is precisely the type of regulation that the APA exempts from notice-and-comment procedures as unnecessary” and that “by increasing a property broker’s financial security requirement from \$10,000 to \$75,000, FMCSA simply codified the statutory increase enacted by Congress.”

### **Mandamus Petition Held in Abeyance Pending Negotiated Rulemaking Proceedings**

On March 10, 2015, the U.S. Court of Appeals for the District of Columbia Circuit in Advocates for Highway and Auto Safety, et al. v. Foxx, et al. (D.C. Cir. 14-1183) held this petition for writ of mandamus in abeyance to permit DOT to engage in a negotiated rulemaking and issue, by September 30, 2016, final entry-level driver training (ELDT) regulations pursuant to MAP-21, Pub. L. No. 112-141, § 32304, 126 Stat. 405, 791 (2012). The court further directed the agency to provide an update within 90 days on its rulemaking progress and the parties to file motions to govern further proceedings by December 31, 2015.

Petitioners, Advocates for Highway and Auto Safety, the International Brotherhood of Teamsters, and Citizens for Reliable and Safe Highways, alleged that FMCSA failed to promulgate a final ELDT regulations for commercial motor vehicle operators within one year, as required by MAP-21, 49 U.S.C. § 31305. Petitioners sought mandamus relief in September 2014, contending that FMCSA had unduly delayed the issuance of final ELDT rules. On January 5, 2015, DOT/FMCSA filed its response, informing the court that the agency had begun a negotiated rulemaking that would take more than 180 days and requesting that the petition be either dismissed or held in abeyance. In its reply, petitioner argued that initiation of a negotiated rulemaking did not eliminate the need for the court to issue a writ of mandamus, especially in light of the agency’s failure to act on this requirement for over ten years.

The agency’s first status report to the court was submitted on June 9, 2015, informing the court that six negotiated rulemaking sessions had taken place beginning in February and concluding on May 29, 2015. The agency’s next step is to produce a report making recommendations on how to proceed with the ELDT rulemaking. Once the report is produced, FMCSA will issue a notice of proposed rulemaking, receive comments, and write a final rule. FMCSA is on schedule to complete the final rule by September 30, 2016, which is the time frame proposed in the agency’s response to the mandamus petition.

### **Opening Briefs Filed in Challenge to DOT’s Implementation of NAFTA Trucking Provisions**

On September 11, 2015, International Brotherhood of Teamsters (IBT), Advocates

for Highway and Auto Safety (AHAS), and the Truck Safety Coalition, submitted their opening brief to the U.S. Court of Appeals for the Ninth Circuit in International Brotherhood of Teamsters, et al. v. USDOT, et al. (9th Cir. 15-70754), a petition for review of FMCSA's decision to accept applications from Mexican trucking companies seeking authority to operate between Mexico and points throughout the United States.. On September 25, the Owner-Operator Independent Drivers Association, Inc., (OOIDA) filed its intervenor brief supporting petitioners.

FMCSA's decision followed its issuance of a report to Congress detailing the results of the agency's three-year pilot program that evaluated the ability of Mexican trucking companies to safely operate in the United States beyond the commercial zones adjacent to the U.S.-Mexico border. Based on the Pilot Program and other data from motor carriers that did not participate in the Pilot Program but were owned or operated in the United States by persons domiciled in Mexico, FMCSA concluded in the Final Report that "Mexico domiciled motor carriers, conducting long-haul operations beyond the commercial zones of the United States, operate at a level of safety that is equivalent to, or greater than, the level of safety of U.S. and Canada-domiciled motor carriers operating within the United States." The United States-Mexico Cross-Border Long-Haul Trucking Pilot Program was part of FMCSA's implementation of the NAFTA cross-border long-haul trucking provisions. The Pilot Program, which began October 14, 2011, and concluded on October 10, 2014, was designed and implemented to address the safety concerns raised by Congress and embodied in legislative restrictions and prerequisites to the agency's ability to issue long-haul operating authority to Mexico-domiciled motor carriers.

Petitioners argue that the FMCSA's Final Report and the conclusions drawn therein are unlawful because (1) the Pilot Program failed to constitute a valid "test" of whether granting long-haul operating authority to Mexico-domiciled carriers will result in an equivalent level of safety, a test mandated by Congress and required to take place prior to the agency obligating or expending funds on granting such authority, (2) the Pilot Program did not have sufficient participants to yield statistically valid findings and therefore the Final Report and the agency's conclusions on the success of the Pilot Program failed to comply with the Pilot Program requirements in 49 U.S.C. §31315(c), and (3) FMCSA's conclusion violates the APA's prohibition on agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," or that is taken "without observance of procedure required by law." Intervenor OOIDA challenges the factual predicate for FMCSA's conclusion that the Pilot Program established the comparative safety of Mexican-domiciled motor carriers, as well as the legal authority of Mexico-based drivers to operate commercial motor vehicles within the United States without holding a valid commercial driver's license (CDL) issued under federal standards. OOIDA essentially argues that statutory provisions establishing CDL requirements in the United States supersede the Memorandum of Understanding entered between the United States and Mexico, recognizing the equivalency of the Mexico commercial license to the U.S. CDL requirements. OOIDA has unsuccessfully raised this issue in prior litigation. See Int'l Brotherhood of Teamsters et al. v. Federal Motor Carrier Safety Administration, 724 F.3d 206 (D.C. Cir. 2013); OOIDA et al. v. USDOT, et al., 724 F.3d 230 (D.C. Cir. 2013), cert. denied, OOIDA v. DOT, 2014 U.S. LEXIS 4307 (June 23, 2014).



## **FMCSA Seeks Summary Judgment in Challenge to Pre-employment Screening Program**

On July 31, 2015, the government filed a motion for summary judgment with the U.S. District Court for the District of Columbia, in Owner Operator and Independent Driver Association (OIDA), et al. v. USDOT, et al. and Fred Weaver Jr., et al. v. FMCSA, et al. (D.D.C. Nos. 12-1158 and 14-0548). The summary judgment motion accompanied the government's opposition to plaintiffs renewed motion for discovery. The government argues that the court must resolve the issue of plaintiffs standing before it can address whether discovery beyond the administrative record is justified. Even if the court should find standing, the government argues that plaintiffs have nevertheless failed to establish a basis for discovery beyond the scope of the administrative record.

In March 2015, the district court denied the government's motion to dismiss without prejudice, pending filing and review of the administrative record. The court held that APA litigation is integrally tied to the record and it could not rule on issues raised in the motion to dismiss, including standing, because they were "inextricably intertwined with the defendants' interpretation of the statute." The consolidated lawsuits, brought by OOIDA and commercial drivers, challenge the agency's use of violation data recorded in the Motor Carrier Management Information System (MCMIS) and released to employers under the agency's Pre-employment Screening Program (PSP), established pursuant to 49 U.S.C. § 31150. Plaintiffs focus on FMCSA's failure to remove records of violations related to citations that have been dismissed by a judge or administrative tribunal. Plaintiffs

allege that the agency has violated the APA and the Fair Credit Reporting Act (FCRA) by allowing violations related to dismissed citations to remain in its MCMIS database and to be included in PSP reports.

The government filed the certified index to the administrative record on April 30, 2015, and subsequently supplemented the record per the agreement of the parties. On June 12, plaintiffs renewed its motion seeking discovery (dismissed by the court without prejudice prior to the filing of the record). In response to the motion for discovery, the government filed both its opposition and a motion for summary judgment, largely based on plaintiffs' lack of standing.

To establish Article III standing, a plaintiff must demonstrate an injury-in-fact, a causal connection between the injury and the conduct complained of, and a likelihood "that the injury will be redressed by a favorable decision." FMCSA argued that not one of the five individual plaintiffs can show that he has suffered or will suffer an injury as a result of FMCSA's inclusion of adjudicated citations in its MCMIS database and release of such information through the PSP program. The agency published a Federal Register notice in June 2014, announcing changes to its policy on including adjudicated violation in PSP reports, and changes to MCMIS and related State IT systems, creating a new field that would allow the States and FMCSA to input and record favorable adjudications related to violations cited during roadside inspections. These violations would no longer be released in a PSP report, eliminating the possibility of any future injury to plaintiffs under the PSP. For three of the five plaintiffs, their PSP reports were never requested or released to prospective employers. The remaining two plaintiffs had PSP reports issued to employers with

their permission but fail to allege any adverse consequences or injury as a result. The government therefore argued that plaintiffs lack a real and concrete injury that is fairly traceable to defendants' conduct and redressable by a decision of the court.

### **Motor Carrier Challenges Procedures for Imminent Hazard Orders**

On September 24, 2015, the U.S. Court of Appeals for the Seventh Circuit heard oral arguments in DND International, Inc. v. FMCSA (7th Cir. 14-3755), a motor carrier's challenge to the meaning of the requirement that opportunity for administrative review of an imminent hazard order shall occur not later than 10 days after the issuance of the order.

DND International Inc. (DND) is a motor carrier of property based in Illinois. On April 1, 2014, FMCSA's Midwest Service Center served an Imminent Hazard Out-of-Service Order on DND based on violations of hours of service requirements and unsafe driving. Both the statute, 49 U.S.C. § 521(b)(5), and regulation, 49 C.F.R. § 386.72(b)(4)(A), governing imminent hazard orders provide that opportunity for administrative review "shall occur not later than 10 days after issuance of such order." FMCSA received DND's request for administrative review of the Imminent Hazard Order on April 7, six days after issuance of the order. A hearing before an administrative law judge commenced on April 10 and continued to April 16, 2014. On April 16, the administrative law judge issued his Initial Decision, finding that FMCSA violated DND's due process rights by failing to complete the hearing within ten days of the issuance of the Imminent Hazard Order; that FMCSA proved some of the

hours of service violations; and that FMCSA did not establish that DND's operations posed an imminent hazard to safety. The FMCSA Field Administrator sought administrative review of the administrative law judge's decision.

On review, the agency decisionmaker affirmed the ALJ's decision, finding that the Field Administrator failed to demonstrate that DND's operations were an imminent hazard to safety. The decisionmaker reversed the ALJ decision concerning the violation of DND's due process rights, finding that DND's right to due process was not violated when the hearing could not be completed within ten days of issuance of the imminent hazard order. The decisionmaker further held that when a carrier requests review of an imminent hazard order, the hearing must start within ten days of the hearing request.

On December 23, 2014, DND filed an appeal of the November 25, 2014 "Decision on Petition for Review Modifying Administrative Law Judge's Initial Decision in Part and Affirming Administrative Law Judge's Initial Decision in Part" in the U.S. Court of Appeals for the Seventh Circuit. In its opening brief, Appellant argued that the imminent hazard statute, at 49 U.S.C. § 521(b)(5), requires that the Department of Transportation hold a hearing, and issue a decision, within ten days of the issuance of an imminent hazard order, regardless of whether a carrier requests a hearing. Appellant also argued that due process requires that FMCSA warn a carrier that FMCSA is considering an imminent hazard order prior to issuing the order. Finally, appellant argued that it had standing to appeal the November 25, 2014, decision, despite the fact that the decision affirmed the rescission of the imminent hazard order.

In response, FMCSA argued that appellant lacks standing to bring the appeal under Article III of the Constitution because it was not “aggrieved” or “adversely affected” by FMCSA’s November 25, 2014 decision, which was the final agency order in this case. FMCSA also argued that appellant waived its argument that a decision should have been issued within ten days of the issuance of the imminent hazard order and that FMCSA’s interpretation of the ambiguous ten-day language in the imminent hazard statute was permissible. Further, FMCSA argued that the imminent hazard statute’s post-deprivation hearing requirement satisfies due process because swift government action to protect human life is necessary in these circumstances.

### **Suit Seeks Review of Regulatory Guidance Concerning Attenuator Truck Crashes**

On May 22, 2015, the Owner-Operator Independent Drivers Association, Inc. (OOIDA) and Kuehl Trucking, LLC filed a petition in the U.S. Court of Appeals for the Eighth Circuit seeking review of FMCSA’s “Regulatory Guidance Concerning Crashes Involving Vehicles Striking Attenuator Trucks Deployed at Construction Sites,” 80 Fed. Reg. 15,913 (Mar. 26, 2015), which states that crashes involving motorists striking the rear of attenuator trucks are not reportable “accidents” within the meaning of 49 C.F.R. § 390.5 for the motor carrier that controls the attenuator truck. Attenuator trucks are highway safety vehicles equipped with crash cushions intended to reduce the risks of injuries and fatalities resulting from crashes in construction work zones. The guidance recognizes that these vehicles will be struck from time to time while the impact attenuators are deployed and provides that covered crashes may be removed from a

motor carrier’s record in FMCSA’s Safety Measurement System (SMS). The SMS uses roadside performance and crash data to quantify a carrier’s relative safety performance and generate percentile ranks. The agency uses the percentile ranks to prioritize carriers for safety interventions.

Petitioners in Owner-Operator Independent Drivers Association, et al. v. USDOT, et al. (8th Cir. No. 15-2090) allege that the guidance is a final rule subject to judicial review under the Hobbs Act, 28 U.S.C. § 2342(3)(a), is invalid because the agency issued it without following notice-and-comment rulemaking procedures as required by the APA, and was arbitrary and capricious, an abuse of discretion or otherwise not in accordance with law. Petitioners assert standing based upon the contention that when the agency removes covered crashes from the safety performance records of motor carriers that operate attenuator trucks, the SMS percentiles of these operators will improve. Because the SMS is a relative system, petitioners, who do not operate attenuator trucks, argue their own SMS percentiles will necessarily worsen and they will be subject to “extra scrutiny.” In their reply brief, petitioners also assert they have standing to bring a facial pre-enforcement challenge to a final rule under Abbott Laboratories v. Gardner, 387 U.S. 145 (1967).

FMCSA argues that petitioners lack Article III standing because they have not shown any actual or impending injury from the guidance, and none of their claimed injuries would be redressed by the guidance. At best, petitioners can only posit the theoretical possibility that their SMS percentiles will worsen. In fact, the effect of the removal of attenuator truck crashes from the universe of reportable accidents is de minimis on the percentile of any one carrier.

Further, the guidance is not a “rule, regulation, or final order” reviewable under the Hobbs Act, was not subject to notice-and-comment requirements, and was not arbitrary or capricious.

### **Affiliated Canadian Carriers Seek Review of FMCSA Out-of-Service and Record Consolidation Order**

On August 24, 2015, three related Canadian-based motor carriers filed a petition in the U.S. Court of Appeals for the Ninth Circuit seeking review of the FMCSA Chief Safety Officer’s decision denying its request for review of a Field Administrator’s denial of its petition seeking rescission of an out-of-service and record consolidation order under 49 C.F.R. § 386.73. Petitioners in [643273 Alberta Ltd, et al. v. Van Steenburg](#) (9th Cir. No. 15-72634) also seek a stay of the record consolidation order.

On February 27, 2015, the Regional Field Administrator (RFA) for the Western Service Center issued an operations out-of-service and record consolidation order against petitioners. Under 49 C.F.R. § 386.73, FMCSA officials may issue these orders to consolidate the safety records of motor carriers based upon evidence that the motor carrier is operating under a new identity or as an affiliated entity in order to evade compliance with an FMCSA order or other FMCCSA action or negative history and that the carriers have such commonality of ownership and operations as to be, in essence, the same motor carrier operation.

Following receipt of the out-of-service and record consolidation order, petitioners jointly submitted a petition for administrative review challenging the record consolidation order under 49 C.F.R. § 385.73(g) and a separate petition for

rescission under 49 C.F.R. § 386.73(h). The petition for review is limited to contesting factual or procedural errors in issuance of the order and is served on the Chief Safety Officer. The petition for rescission is based on a carrier’s submission of evidence that it has taken corrective action to address the deficiencies underlying the order and is served on the Field Administrator who issued the order.

On May 8, 2015, the RFA denied the petition for rescission. Petitioners sought review of the RFA’s decision before the Chief Safety Officer. On July 22, the Chief Safety Officer denied the petition for review of the RFA’s decision and on August 24, petitioners filed their petition for review of this final agency action in the Ninth Circuit. Approximately one week later, the Chief Safety Officer denied Petitioner’s initial request for administrative review of the orders and upheld the out-of-service and record consolidation order.

On September 14, 2015, Petitioners filed a second petition for review in the Ninth Circuit challenging the FMCSA Chief Safety Officer’s final agency action denying its petition for review of the underlying record consolidation order and out-of-service order. The Ninth Circuit docketed the second petition with the first petition and characterized it as an “Amended Petition.” Petitioner’s opening brief is due November 12, and FMCSA’s response is due December 14.

### **Passenger Motor Carrier Seeks Review of Safety Rating Decision**

On December 23, 2014, Silverado Stages, Inc., a passenger motor carrier, filed a petition for review of the FMCSA Chief Safety Officer’s decision dismissing Silverado’s request for administrative

review of its safety rating under 49 C.F.R. § 385.15. Petitioner in Silverado Stages, Inc. v. FMCSA, et al. (D.C. Cir. No. 14-1298) seeks review and removal of violations and other information recorded in a July, 2014 compliance review that diminishes the carrier's percentile rankings in FMCSA's Safety Measurement System (SMS).

FMCSA conducted the compliance review following an April 2014 crash involving a FedEx tractor trailer and a Silverado motorcoach, resulting in multiple fatalities. While several violations were noted, the compliance review resulted in a Satisfactory safety rating for Silverado. On October 14, 2014, Silverado filed a request for administrative review under 49 C.F.R. § 385.15 concerning violations cited and commercial motor vehicle inspections conducted and recorded in the compliance review. Silverado requested removal of alleged erroneous information from the compliance review and from FMCSA's public Safety Measurement System (SMS) website. In the October 24, 2014, decision, the Chief Safety Officer dismissed Silverado's request, finding that when a motor carrier alleges errors in calculating its safety rating, the only relief provided under section 385.15 is an upgrade of the carrier's safety rating; review is therefore limited to alleged errors that affect the safety rating. Because Silverado received a Satisfactory safety rating, the highest rating available, no further relief was possible. The Chief Safety Officer further held that challenges to the impact of compliance review data on a carrier's SMS scores are not within the subject matter jurisdiction of a 49 C.F.R. § 385.15 request for administrative review.

In its opening brief filed June 15, 2015, Silverado argues that FMCSA's dismissal of its section 385.15 petition denies a right of adjudication of violations used by FMCSA

in its SMS and posted on its public website. Silverado further contends that FMCSA failed to follow the APA when it effectively exempted violations that appear on its public website from any pre- or post-violation challenge and unlawfully assessed sanctions against carriers by consciously driving away affected carriers' business. Silverado also argues that FMCSA's use of warning triangles on its SMS website, which Silverado argues are intended by FMCSA for public use in selecting motor carriers, effectively sanction carriers by depreciating the value of the carrier's operating license in violation of the APA, and is unlawful because FMCSA never promulgated a rule or issued a policy statement authorizing the widespread use of the alerts. Silverado asks the court to vacate and set aside the decision on review and to remand the proceeding with instructions to FMCSA to vacate the violations challenged and all warning triangles appearing on Silverado's SMS public records now or in the future.

FMCSA filed its response brief on July 22, arguing that Silverado lacks standing to challenge the dismissal of its section 385.15 petition because it was not injured by the dismissal given that FMCSA assigned Silverado the highest possible rating and there is was no further relief the Agency could grant in a section 385.15 proceeding. FMCSA also argues that Silverado's challenges to SMS, including its claims that FMCSA acts unlawfully when it publishes violation information and triangular alerts on the SMS website, are beyond the scope of the instant case. Additionally, FMCSA's publication via SMS of violation information and associated alerts is not a final order, rule, or regulation and is thus not reviewable under the Hobbs Act.

In its reply brief filed August 5, Silverado asserts that it has standing based on its

specific allegation that FMCSA's posting of erroneous violations has caused potential customers to take their business elsewhere and FMCSA's use of warning triangles amplifies such harm by warning the public that Silverado will be targeted for further safety intervention. Silverado argues that the appeal rests upon the improper denial of Silverado's section 385.15 petition, which it contends was an arbitrary and capricious action.

FMCSA and Silverado participated in court sponsored mediation on October 21, 2015. Oral argument is scheduled for December 9.

## **Federal Railroad Administration**

### **D.C. Circuit Grants Association of American Railroads' Petition for Review in Challenge to Hours of Service Laws Interpretation**

On July 10, 2015, a panel of the U.S. Court of Appeals for the D.C. Circuit granted the Association of American Railroads' (AAR) petition for review challenging an FRA interpretation of the Hours of Service Laws (HSL), vacated FRA's letter ruling, and remanded the case to FRA for further proceedings. Association of American Railroads v. FRA, et al. (D.C. Cir. 14-1207). The D.C. Circuit concluded that FRA had not adequately explained the basis for its decision, nor had FRA supported its decision with facts that appeared in the record. In its opinion, the Court stated that FRA may be able to justify its interpretation of the HSL on remand.

The HSL limit the hours that certain railroad employees may work to prevent fatigue and promote safety. In this case, AAR

approached FRA in late 2013 to discuss the applicability of the HSL to the testing of the Ultra Cab II, a cab signal system onboard the locomotive that receives and interprets railroad signal information from electrical circuits in the railroad tracks. AAR contended that the Ultra Cab II had a "self test" mechanism that was technically simplified and could be conducted within a matter of minutes. Thus, AAR argued that the testing of this system does not require signal expertise and does not have an impact upon safety, and employees performing this test should not be subject to the strictures of the HSL. However, FRA decided to the contrary, issuing a letter in which it concluded that the Ultra Cab II test is covered signal work under the HSL.

AAR filed a petition for review in the D.C. Circuit in the fall of 2014, contending that the agency's decision was legally erroneous, and that its conclusions about the Ultra Cab II test were arbitrary and capricious. According to AAR, the testing of a signal system is outside the scope of the HSL, which covers those "engaged in installing, repairing or maintaining signal systems." 49 U.S.C. § 21101(4). Furthermore, AAR argued that the agency had set aside its prior policy guidance on the HSL, and had misunderstood the simplicity of the Ultra Cab II test.

FRA maintained that testing fits easily within the statutory definition of signal work subject to the HSL and explained that the agency had consistently taken this position for the past four decades. Furthermore, FRA argued that AAR had mischaracterized the decision below and the agency's prior guidance materials, since FRA, in this instance, had merely declined to depart from its longstanding position that cab signal testing is covered by the HSL. The agency also explained that it had carefully

considered the factual record and determined, based on FRA's expertise, that the Ultra Cab II test is more complicated than AAR suggested and that the performance of the test presented legitimate safety concerns.

The court agreed with the parties on the threshold question of jurisdiction, concluding that the agency's letter was final and reviewable, since the agency did not anticipate any further consideration of the matter and expected to enforce the interpretation contained in the letter against the railroads. However, the court concluded on the merits that the agency's decision was insufficient. In particular, the court noted that the agency relied on its 2011 consideration of a cab signal system operated by the Southeastern Pennsylvania Transportation Authority, but had not adequately demonstrated in the record the linkage between those two proceedings, or that the two proceedings involved the same system. The court explained that the agency would have an opportunity on remand to demonstrate an adequate basis for its decision.

### **Short Line Railroad Association Challenges FRA's Training Standards**

On July 27, 2015, the American Short Line and Regional Railroad Association (ASLRRA) filed a petition for review in the U.S. Court of Appeals for the District of Columbia Circuit, challenging FRA's November 7, 2014, final rule entitled "Training, Qualification, and Oversight for Safety-Related Railroad Employees" and FRA's June 1 response denying a petition for reconsideration of the final rule. American Short Line and Regional Railroad Association v. Federal Railroad

Administration, et al., (D.C. Cir. No. 15-1240). ASLRRA's petition for review maintains that the final rule and the decision on its petition for reconsideration are (1) in excess of FRA's statutory authority, (2) arbitrary, capricious and an abuse of discretion within the meaning of the APA, and (3) otherwise contrary to law.

The final rule sets forth minimum training standards for each type of safety-related railroad employee and requires that railroads and contractors submit to FRA training plans to ensure safety-related railroad employees are qualified to measurable standards. As part of the training program, most employers will need to conduct periodic oversight of their employees to determine compliance with federal railroad safety laws, regulations, and orders applicable to those employees. The final rule also requires most railroads to conduct annual written reviews of their training programs to close performance gaps and stresses greater use of structured on-the-job training and interactive training.

In its initial filings, ASLRRA described the issues to be raised in its petition for review as (1) whether FRA was arbitrary and capricious by failing to establish a blanket exemption for short line railroads with less than 400,000 labor hours and by failing to establish an exclusion that would permit short line railroads from using existing training programs; (2) whether FRA undertook an adequate analysis of the cost burden to short line railroads, as required under the Regulatory Flexibility Act; (3) whether FRA exceeded its statutory authority by requiring ASLRRA to monitor and track the use of any template training program it makes available and to notify the users of any updates to the program; and (4) whether FRA exceeded its statutory authority by requiring railroads to engage in

mandatory periodic oversight of railroad contractors.

On September 23, the D.C. Circuit issued the briefing schedule for this case. ASLRRRA's brief is due on November 2; the Government's brief is due on December 2; and ASLRRRA's reply brief is due on December 16.

## **Federal Transit Administration**

### **Court Finds in Favor of FTA and L.A. Metro in Crenshaw Litigation**

On September 23, 2015, the U.S. District Court for the Central District of California entered judgment in favor of FTA and the Los Angeles County Metropolitan Transportation Authority (Metro) on cross motions for summary judgment in Crenshaw Subway Coalition v. Los Angeles County Metropolitan Transportation Authority (C.D. Cal. No. 11-9603 consolidated with No. 12-1672). The Crenshaw project is an 8.5-mile light-rail line that connects the Metro Green Line to the Exposition Line in Los Angeles. Plaintiff asserted that the Environmental Impact Statement/Report (EIS/R) was inadequate under both NEPA and the California Environmental Quality Act (CEQA) because it failed to evaluate an alternative to the project's at-grade segment on Crenshaw Boulevard. Plaintiff also challenged the adequacy of analysis of the impact of the at-grade alignment on the local community on Environmental Justice grounds. Finally, the Crenshaw Subway Coalition argued that Metro violated a California anti-discrimination statute.

In its decision, the court found in favor of FTA and Metro on all NEPA and CEQA claims. Although the court acknowledged

that the Crenshaw at-grade segment is part of a bigger project and failure to adequately analyze a segment is not the same as failure to analyze an alternative, the court did conduct an analysis regarding the segment since the parties had briefed the underground segment as if it were an alternative. The court concluded that the administrative record was adequate and that there was support for determining that the underground segment would not be feasible and did not require further analysis. Quoting from FTA's Response to Comments, the court stated that "the cost of constructing a fully grade-separated project along the entire length of Crenshaw Boulevard would be beyond the scope of the approved Metro budget for the project and financially infeasible [and] is not required by Metro's policies or general criteria." The court went on to also do an Environmental Justice analysis and similarly found that the administrative record was adequate and acknowledged that for a more transit-dependent population to receive more transit service, they may have to bear more construction and Project-related impacts. The court also indicated that Metro's Grade Crossing Policy does not adversely impact minority and low income communities. Finally, the court determined that additional evidence is required for it to rule on the state discrimination claim against Metro.

### **Summary Judgment Granted for Defendants in Baltimore Red Line Case; Decision Appealed**

On March 30, 2015, the U.S. District Court for the District of Maryland granted defendants' motion for summary judgment in Cutonilli v. FTA, et al., No. 13-02373, 2015 WL 1431251, (D. Md. Mar. 30, 2015), in which plaintiff alleged that FTA and the Maryland Transit Administration failed to



evaluate all reasonable alternatives to the Baltimore Red Line project, including plaintiff's hybrid alternative mixing heavy rail and bus rapid transit.

The district court found that twelve alternatives were studied in detail, including two alternatives that incorporated heavy rail, and that Mr. Cutonilli's proposal was substantially similar to another hybrid alternative studied. The court also found that the record adequately demonstrated scientific consideration of ridership, travel patterns, construction costs, and environmental impacts of the reasonable alternatives considered. Further, the record demonstrated that Mr. Cutonilli's comments received significant attention and individualized responses.

On June 29, 2015, plaintiff appealed to the U.S. Court of Appeals for the Fourth Circuit (Case No. 15-1725). On August 20, FTA advised the court that the Governor of Maryland cancelled the project on June 25, arguably mooting the appeal.

### **Motion to Dismiss Filed in Challenge to New Orleans Streetcar Project**

On June 12, 2015, USDOT, FTA, and the Federal Emergency Management Administration filed a motion to dismiss in response to a complaint filed by two non-profit organizations, Bring Our Streetcars Home, Inc. and People's Institute for Survival and Beyond, Inc., and eleven individuals, that seeks injunctive and mandamus relief in connection with a streetcar project in New Orleans. The complaint in Bring Our Streetcars Home, Inc., et al. v. USDOT, et al. (E.D. La. No. 15-0060) was filed on January 12, 2015. The New Orleans Regional Transit

Authority, originally a co-defendant in this action, was dismissed by plaintiffs shortly after the filing of the complaint.

The complaint alleges that FTA and USDOT failed to comply with the requirements of NEPA, Section 106 of the National Historic Preservation Act (NHPA), and Section 4(f) of the DOT Act in connection with a streetcar project currently being constructed by the New Orleans Regional Transit Authority on Rampart Street in New Orleans.

The motion to dismiss argues that the court cannot exercise subject matter jurisdiction over any of plaintiffs' claims unless the federal government has sufficient involvement in the streetcar project. Since the project is being completed without federal funding or any other federal involvement, there is no basis for the court to exercise subject matter jurisdiction over the federal defendants under NEPA, the NHPA, or Section 4(f). Therefore, plaintiffs' complaint should be dismissed.

Alternatively, the motion to dismiss argues that even if the court were to determine that it had jurisdiction to hear plaintiffs' claims, plaintiffs have failed to state a claim under NEPA, the NHPA, or Section 4(f). Citing Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007), the motion points out that the plaintiffs' allegations do not rise above "the speculative level" and do not even "create a suspicion of a legally cognizable right of action." Therefore, because plaintiffs have failed to state a cognizable claim, their claims against the federal defendants should be dismissed.

## **Appellate Briefs Filed in Regional Connector Case; One Plaintiff Settles**

On September 3, 2015, FTA filed its brief in Japanese Village v. FTA and Today's IV, Inc. (Bonaventure) v. FTA, et al. (9th Cir. Nos. 14-56837 & 14-56873). Japanese Village filed its opening brief on May 27, and Bonaventure filed its opening brief on June 18. The cases originated in the U.S. District Court for the Central District of California, challenging the Environmental Impact Statement (EIS) and Record of Decision (ROD) for the Regional Connector project in Los Angeles. The district court granted FTA and co-defendant Los Angeles County Metropolitan Transportation Authority (Metro) motions regarding all of Japanese Village's claims and all but one of Bonaventure's claims on May 29, 2014. With regard to the single claim in which the court found in Bonaventure's favor, the district court entered a partial injunction requiring additional analysis of two Flower Street tunneling method alternatives before construction along that section of the line can begin.

In its appellate brief, Bonaventure took issue with the conclusion by FTA and Metro that certain tunneling methods were infeasible, attacked the adequacy of some mitigation measures, and asserted that Metro's determination that some night-time work would be required changed the scope of work to the extent that it a Supplemental EIS is required. FTA responded that its analysis and conclusions about the feasibility of tunneling options are sufficient and supported, that of the impacts of the work on Flower Street met the requirements of NEPA, that mitigation measures were designed to allow for the refinement challenged by Bonaventure, and that the

night-time construction is included in the original EIS with no substantial change to scope or impact. In its appellate brief, Japanese Village argued that the agencies failed to adequately examine noise and vibration impacts or building subsidence. FTA responded that the agencies conducted close examination of impacts, adequate mitigation, and even additional mitigation requested by Japanese Village.

A third plaintiff in the district court litigation, Flower Associates, recently settled with Metro. The settlement terms resolved both the state and federal claims raised by Flower Associates.

## **Maritime Administration**

### **Ninth Circuit Affirms District Court, Denies Petition for Rehearing in Constitutional Challenge to Jones Act**

On July 30, 2015, the U.S. Court of Appeals for the Ninth Circuit affirmed a district court decision dismissing for lack of standing a constitutional challenge to the Jones Act. In Novak v. United States, 795 F.3d 1012 (9th Cir. 2015), former Hawaii state lawmaker John Carroll, representing six individuals and a corporation who reside in Hawaii, filed a class action suit against the federal government alleging that the Jones Act violates the Commerce Clause by restricting shipping between states to American-owned and manned ships and hurting Hawaiian businesses and residents by inflating the cost of goods. The U.S. District Court for the District of Hawaii granted the United States' motion to dismiss the case on jurisdictional grounds, holding that plaintiffs lacked standing to sue. On appeal, the Ninth Circuit affirmed, holding that plaintiffs did

not meet their burden to show causation or redressability, two requisite elements for Article III standing. The panel further held that although it was possible that plaintiffs could establish standing if they amended their complaint, any amendment would be futile because plaintiffs' Commerce Clause challenge to the Jones Act would fail on the merits. The panel held that an amended complaint would be subject to dismissal for failure to state a claim because the enactment of the Jones Act was not beyond the authority assigned to Congress under the Commerce Clause. The panel also rejected plaintiffs' claim alleging that the Jones Act violated protections guaranteed under the Due Process Clause of the Fifth Amendment. Finally, the panel held that the district court did not violate plaintiffs' procedural due process by ruling on the government's motion to dismiss without an oral hearing. Appellants then moved for panel and *en banc* rehearing of the decision, and on September 30, the court denied the rehearing petition.

### **MARAD Utilizes Technology Assisted Review for Anchorage Discovery**

As part of the ongoing discovery in Anchorage v. United States, 2015 WL 273206 (Fed. Cl. 2015), MARAD has worked with DOJ Trial Counsel and the DOJ Office of Litigation Support to utilize Technology Assisted Review for the first time in MARAD litigation. Due to the breadth of the case, MARAD identified more than 30 custodians over a period of 11 years that may have possessed relevant information. By running search terms against the data possessed by the custodians, MARAD identified 660,000 possibly relevant documents, but a manual review of those documents was not feasible given the

resources available for the case. MARAD therefore engaged with DOJ to support a Technology Assisted Review (TAR) process for the case. In this process, a case specific computer algorithm is developed and then used to identify the relevant documents within the full set of 660,000 documents. Through an iterative computer process, the algorithm narrows the documents which need to be reviewed by litigation attorneys. The TAR process algorithm has identified approximately 25% of the documents (165,000) as responsive, with approximately 20,000 documents that need to be individually reviewed. The TAR process allowed MARAD to fulfill its discovery obligations for a large volume of data without over-extending the government's limited litigation resources.

### **National Highway Traffic Safety Administration**

#### **Court Enters Consent Decree in Recall Remedy Order Case**

On August 12, 2015, the U.S. District Court for the Southern District of Ohio entered a Consent Decree in two consolidated actions, Snyder Computer Systems, Inc. d.b.a. Wildfire Motors v. USDOT (S.D. Ohio No. 12-1140) and United States v. Snyder Computer Systems, Inc. d.b.a. Wildfire Motors (S.D. Ohio No. 13-311). These cases involve a November 2012 NHTSA order requiring Wildfire to repurchase three-wheeled motorcycles from owners after Wildfire failed to adequately repair the noncompliant vehicles in a recall. In addition to modifying certain aspects of the November 2012 NHTSA Order, the Consent Decree required Wildfire to deposit funds for the vehicle buyback in an escrow account, appoint a receiver to administer the

recall, and pay a \$100,000 civil penalty. Wildfire also agreed that it will not manufacture or import into the United States for commercial resale any motor vehicle for a three year period.

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

### **Ninth Circuit Upholds Dismissal of San Francisco's Citizens Suit**

On July 30, 2015, the U.S. Court of Appeals for the Ninth Circuit upheld a California district court's dismissal of a citizens suit brought by the City and County of San Francisco (City) against PHMSA. City and County of San Francisco v. USDOT, 796 F.3d 993 (9th Cir. 2015). Initially filed in February 2012, the suit 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 ruptured pipeline was operated by Pacific Gas & Electric, which is regulated by the California Public Utilities Commission (CPUC) under delegated authority from PHMSA through a state certification process.

In the original complaint, the City alleged that the federal defendants had violated the Pipeline Safety Act (PSA) by (1) failing to ensure that certified state authorities, including the CPUC, were 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 were not, and (3) disbursing federal funds to the CPUC without determining whether it was

effectively carrying out its pipeline safety program. The City sought declaratory judgment and injunctive relief.

The district court granted the federal defendants' motion to dismiss, agreeing that an action for injunctive relief against the government for failing to properly administer the PSA (a mandamus claim) was not authorized by the citizen 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 had violated the APA.

On February 28, 2013, the district court dismissed the amended complaint, without leave to amend, and entered judgment for DOT and PHMSA. On appeal, the Ninth Circuit held, in a unanimous opinion authored by the Chief Judge, that the PSA's citizen suit provision does not provide a cause of action to challenge PHMSA's regulatory actions and that the City could not obtain review under the APA.

### **Briefs Filed in Appeal of PHMSA Order Upholding FMCSA HAZMAT Emergency Order**

The parties filed their opening briefs in National Distribution Services, Inc. v. USDOT et al. (D.C. Cir. No. 14-1254), a petition for review of the PHMSA Chief Safety Officer's (CSO) decision upholding FMCSA's issuance of an Emergency Order under 49 U.S.C § 5121(d) and 49 C.F.R. § 109.17. Petitioner requests that the PHMSA decision be set aside

National Distribution Services, Inc. (National), a California motor carrier, transports hazardous material, including

gasoline, ethanol, and other fuels, in cargo tanks. In May 2014, a cargo tank used to transport flammable hazardous material exploded at National's Corona, California facility during a welding repair. The explosion killed one worker and seriously injured another. Following an investigation of National's motor carrier and hazardous material operations, FMCSA determined that violations of DOT hazardous material regulations and unsafe conditions and practices constituted an imminent hazard. FMCSA issued an Emergency Restriction/Prohibition Order and Out-of-Service Order on August 14, 2014. FMCSA found that National was conducting unauthorized welded repairs on DOT specification cargo tanks, and the unauthorized welded repair to a cargo tank that had not been purged of flammable hazardous material resulted in the May catastrophic explosion. FMCSA also determined that federal regulations prohibited the operation of most of National's cargo tanks as DOT specification cargo tanks due to the lack of required testing and inspection and unauthorized welded repairs. FMCSA ordered specific cargo tanks out-of-service until they were brought into compliance with regulatory requirements and prohibited National from conducting unauthorized welded repairs on DOT specification cargo tanks.

National requested administrative review of the Emergency Order. On October 3, 2014, the PHMSA CSO issued a decision finding that National had committed extensive violations of the DOT hazardous materials regulations and was engaged in unsafe practices. The CSO held that there was sufficient evidence to support FMCSA's finding of an imminent hazard as defined by 49 C.F.R. § 109.1. The CSO also found that the totality of the evidence raised serious concerns regarding the integrity of the cargo

tanks owned, leased, and/or operated by National, further holding that the Emergency Order was not overly broad in prohibiting the filling, transporting, or operating of National's cargo tanks and prohibiting National from conducting welded repairs to any DOT specification cargo tank or permitting any other person to conduct unauthorized welded repairs. National filed a motion for reconsideration of the CSO's decision, which the CSO denied on October 23, 2014.

National filed its petition for review in the U.S. Court of Appeals for the D.C. Circuit on November 20, 2014. In its opening brief filed on March 26, 2015, National argues that the PHMSA CSO's conclusion that its cargo tanks constitute an imminent hazard was erroneous and that the imminent hazard should have been limited to the potential for an explosion caused by repairs to cargo tanks that had not been properly cleaned and purged. National further argues that the CSO's findings are not supported by substantial evidence and misapply the definition of imminent hazard in 49 U.S.C. § 5102(5) and 49 C.F.R. § 109.1. National further contends that FMCSA did not meet its burden of establishing that the condition of National's tanks constituted an imminent hazard or that the Out-of-Service Order was narrowly tailored to abate the alleged hazard. National requests the court set aside the PHMSA decision.

PHMSA filed its response brief on April 27, 2015, arguing that the CSO reasonably concluded that National's use of cargo tanks that were not tested and repaired in compliance with DOT hazardous materials requirements posed an imminent hazard. The voluminous evidence submitted by FMCSA supported the CSO's conclusions that National was directing unauthorized welding repairs at its facility that posed an

imminent hazard and was transporting hazardous material in cargo tanks that were not properly tested, inspected, or repaired, which also constituted an imminent hazard. PHMSA argues that the May 2014 explosion reflected a general practice of routinely ordering unregistered employees to perform unauthorized welded repairs on cargo tanks and failing to properly test or inspect the cargo tanks while continuing to use them to transport hazardous materials. The relevant regulations, in 49 C.F.R. §§ 180.407(a), (g)(1)(iv), and 180.413(b), make clear that this kind of noncompliance implicates the structural integrity of the tanks and bars them from being used to transport hazardous materials. Relying on PHMSA precedent defining “imminent hazard” under 49 U.S.C. § 5102(5) and 49 C.F.R. § 109.1, the CSO properly relied on the presumption that a packaging that is not authorized for the transportation of hazardous material in commerce presents a risk of death, serious illness, severe personal injury, or a substantial endangerment to health, property, or the environment from a rupture of the package itself or from the release of its hazardous contents. PHMSA further argues that FMCSA’s emergency order was narrowly tailored to abate the imminent hazard created by National’s widespread pattern of regulatory violations, involving at least 85% of its fleet and systemic lack of safety controls.

In its reply brief filed May 26, 2015, National argues that the presumption that unauthorized cargo tanks are hazardous is insignificant, contending that whether a hazardous condition exists is only one factor in determining whether something constitutes an imminent hazard under the statute and regulations. National also argues that PHMSA failed to address the second required factor - whether the hazardous condition presents an imminent risk.

National argues that if the violations presented a hazardous condition, FMCSA could have taken less extreme measures to ensure compliance. National ultimately concedes that the hazardous conditions that resulted in the catastrophic incident constituted an imminent hazard and FMCSA was justified in prohibiting any entity from conducting welded repairs to tanks that are not properly purged.

On September 4, 2015, the court ordered the proceedings held in abeyance pending court-sponsored mediation, which began on October 22.

### **Pipeline Operator Seeks Review of Technical Standards Update Rule**

On April 1, 2015, Magellan Midstream Partners, LP, and several affiliates petitioned for review of a PHMSA final rule entitled “Pipeline Safety: Periodic Updates of Regulatory References to Technical Standards and Miscellaneous Amendments.” Magellan Midstream Partners, LP, et al. v. PHMSA (D. C. Cir. No. 15-1077). The final rule, which updates various industry standards incorporated by reference into the DOT pipeline safety regulations, was published on January 5, 2015, and became effective on March 6, 2015. Magellan filed a comment during the rulemaking proceeding, approximately one year after the comment period closed, questioning PHMSA’s decision to omit a provision of a previously-adopted industry standard (API 653) involving above-ground petroleum storage tank inspections and the intervals between re-inspections. Magellan asserts that conducting tank inspections would be costly in the absence of using risk-based inspection intervals. On May 26, 2015, the court granted a motion to hold the case in abeyance pending settlement discussions. The court has directed the parties to file

status reports every 60 days beginning July 27, 2015.

### **Trade Group Petitions for Review of Final Pipeline Rule**

On June 4, 2015, the Interstate Natural Gas Association of America (INGAA) petitioned for review of a final rule issued by PHMSA entitled “Pipeline Safety: Miscellaneous Changes to Pipeline Safety Regulations.” INGAA v. USDOT, et al. (D. C. Cir. No. 15-1161). The final rule makes various changes to the pipeline safety regulations, including changes affecting post-construction inspections, leak surveys, and pressure testing of components fabricated by

welding. INGAA also filed an administrative Petition for Reconsideration with PHMSA.

On July 17, 2015, the court issued an Order to Show Cause why the case should not be dismissed for lack of jurisdiction due to the pendency of INGAA’s administrative Petition for Reconsideration. On August 17, INGAA filed a response, seeking to have the case held in abeyance until the agency acts upon the administrative Petition for Reconsideration. On August 31, DOT filed its reply brief, arguing that the lawsuit should be dismissed because it is “incurably premature.”

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