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DOT LITIGATION NEWS

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Highlights

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Supreme Court Litigation

Supreme Court Reviews Constitutionality of FRA/Amtrak Metrics and Standards

On June 23, 2014, the Supreme Court granted the Petition for a Writ of Certiorari filed by the United States requesting the Court to review the D.C. Circuit's decision striking down Section 207 of The Passenger Rail Investment and Improvement Act of 2008 (PRIIA). The United States filed its opening brief in Association of American Railroads v. USDOT (No. 13-1080) on August 14, 2014.

Section 207 of PRIIA required FRA and Amtrak jointly to develop metrics and standards to evaluate the performance and service quality of Amtrak's intercity passenger trains. The Association of American Railroads (AAR) filed suit alleging that Section 207 violated the Constitution's Due Process Clause and non-delegation doctrine. The U.S. District Court for the District of Columbia upheld Section 207, Ass'n of Amer. Railroads v. USDOT, 865 F. Supp. 2d 22 (D.D.C. 2012), but the U.S. Court of Appeals for the District of Columbia Circuit reversed, striking down Section 207 as unconstitutional, Ass'n of Amer. Railroads v. USDOT, 721 F.3d 666 (D.C. Cir. 2013), *petition for cert. filed*, 82 U.S.L.W. 3533 (U.S. Mar 10, 2014) (No. 13-1080).

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

The question presented to the Supreme Court by the United States is whether Section 207 of PRIIA effects an unconstitutional delegation of legislative power to a private entity. In its brief, the United States asserted that the government retained sufficient control over the development and application of the performance metrics and standards to avoid nondelegation concerns. Specifically, the United States maintained that: (1) Congress may condition the effectiveness of regulatory provisions on the involvement or approval of private entities; (2) by providing for a government-appointed arbitrator to resolve disputes, Congress ensured that governmental entities would have the last word about the development of the metrics and standards; and (3) any sanction against a freight railroad must be based on a determination by the Surface Transportation Board that the railroad failed to satisfy an independent statutory obligation, not the metrics and standards. The United States further argued that Amtrak should not be considered a "private" entity for purposes of nondelegation analysis. AAR filed its response brief on September 22, and the United States filed its reply brief on October 22. Oral argument is scheduled for December 8.

The briefs in the case are available at http://www.scotusblog.com/case-

files/cases/department-of-transportation-v-association-of-american-railroads/.

Supreme Court to Hear FHWA Federal Tort Claims Act Case

On June 30, 2014, the U.S. Supreme Court granted certiorari in United States v. June (No. 13-1075), an appeal of June v. United States, 550 Fed.Appx. 505 (9th Cir. 2013). The Court will review a decision by the U.S. Court of Appeals for the Ninth Circuit based on the Circuit's en banc decision in Wong v. Beebe, 732 F.3d 1030 (9th Cir. 2013), that the two-year limitations period of the Federal Tort Claims Act (FTCA) is not jurisdictional and is subject to equitable tolling. The Court also granted certiorari in Wong.

June involves an administrative FTCA claim that was untimely filed with FHWA. On February 19, 2005, Andrew Booth was killed in a car accident on an interstate highway in Arizona when the vehicle in which he was traveling as a passenger crossed a cable median barrier and crashed into oncoming traffic. More than five years later, a conservator acting for decedent's minor son presented a claim under FTCA to FHWA. The claim was denied as untimely pursuant to 28 U.S.C. § 2401(b), which requires that claims be presented to the appropriate Federal agency within two years of the claim's accrual.

The conservator then filed suit in the U.S. District Court for the District of Arizona against the United States under the FTCA. The government moved to dismiss for lack of jurisdiction, arguing that plaintiff failed to file a claim with FHWA within two years of accrual and that, therefore, the suit was barred. The government also argued that the FTCA's two-year limitations period is not subject to equitable tolling. The district court granted the government's motion and dismissed the case, explaining that "[a] tort action against the United States accrues 'when a plaintiff knows or has reason to know of the injury which is the basis of his action.'" Further, the district court rejected the plaintiff's request for equitable tolling, finding that because the FTCA's timing requirements are jurisdictional, they are not subject to equitable tolling.

On appeal to the Ninth Circuit, the court was scheduled to hear oral argument in October 2013 when it issued an en banc decision in Wong, 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. The court drew no distinction between the two FTCA timing requirements in holding that in light of Wong, the FTCA's two-year limitations period is not jurisdictional and is subject to equitable tolling.

On September 9, 2014, the government filed its Supreme Court opening briefs in June and Wong. In both cases, the government argues that the Ninth Circuit's holding that the FTCA two-year limitations period is non-jurisdictional cannot be squared with the FTCA statute's text, structure, history, and purpose. Further, it does not follow the Supreme Court's precedents. Oral arguments in the Supreme Court are scheduled for December 10 in both June and Wong.

The briefs in the case are available at http://www.scotusblog.com/case-files/cases/united-states-v-june/.

United States Files Supreme Court Amicus Brief in Alabama's Appeal of 4-R Act Decision

On September 16, 2014, the United States filed an amicus brief supporting neither party in Alabama Department of Revenue v. CSX Transportation, Inc. (No. 13-553), the State of Alabama's appeal of a decision of the U.S. Court of Appeals for the Eleventh Circuit holding that an Alabama sales and use tax scheme improperly discriminates against railroads. CSX Transp., Inc. v. Ala. Dep't of Revenue, 720 F.3d 863 (11th Cir. 2013).

The Court first considered this tax scheme in CSX Transportation, Inc. v. Alabama Department of Revenue, 131 S. Ct. 1101 (2011), ruling that a railroad may challenge a state's non-property tax as discriminatory under the Railroad Revitalization and Regulatory Reform Act of 1976 (4-R Act) even if the discriminatory element arises from an exemption from the otherwise generally applicable tax, rather than from the tax itself. The case arose out of the 4-R Act's catch-all provision, which forbids a State from imposing "another tax that discriminates against a rail carrier." 49 U.S.C. § 11501(b)(4). CSX challenged Alabama's tax scheme, which exempted railroad competitors, but not railroads, from a generally applicable sales and use tax on its purchase of diesel fuel. Consistent with the position taken by the United States in its amicus brief, the Court found that a state non-property tax "that applies to railroads but exempts their interstate competitors is subject to challenge under subsection (b)(4) as a 'tax that discriminates against a rail carrier,'" but the Court's decision was limited and did not address whether Alabama's taxes actually discriminated against CSX or other railroads. The Court remanded the case for the lower courts to decide the case on the merits.

On remand, the district court upheld the tax. CSX Transp,, Inc. v. Ala. Dep't of Revenue, 892 F. Supp. 2d 1300 (N.D. Ala. 2012). The district court looked beyond the sales and use tax and noted that motor carriers pay a motor fuels tax on their purchases of diesel fuel. When comparing the sales and use tax and the motor fuels tax, the district court found that rail carriers and motor carriers pay essentially the same amount of tax. The Eleventh Circuit reversed and found that Alabama's tax was discriminatory. The court arrived at this decision by comparing the railroads to their competitors and found that Alabama had not justified the exemptions for the railroads' competitors. Furthermore, the Eleventh Circuit refused to consider whether Alabama's motor fuels tax justified the exemption because it would be too difficult and expensive for the court to evaluate Alabama's broader tax scheme.

Alabama filed a petition for certiorari, requesting that the Supreme Court essentially answer the questions that it did not address in the first case. Alabama requests that the Court determine what is the proper comparison class under subsection (b)(4) of the 4-R Act: whether a railroad should be compared to its competitors or to a larger "commercial and industrial class." On January 27, 2014, the Supreme Court invited the United State to file an amicus curiae brief, and on May 27, the United States filed its brief, concluding that Alabama's petition for a writ of certiorari should be denied. The United States reasoned that: (1) the petition presents only the comparison class question for review and that issue may have been waived in the district court proceeding and (2) the issues of alternative and complementary taxes were litigated in the lower courts but were not

presented for the Supreme Court's review. Therefore, the United States maintained that the case was not a suitable vehicle for review.

Nonetheless, the Supreme Court granted Alabama's petition and directed the parties to brief an additional question that had been posed by the United States – when resolving a claim of unlawful tax discrimination, should a court consider other aspects of the State's tax scheme, rather than focusing solely on the challenged provision.

The amicus brief that the United States filed supported neither party. The United States agreed with the Eleventh Circuit's finding that comparison classes may vary depending on the type of discrimination that is alleged by the railroad and that a comparison class of competitors was appropriate in this case. However, the United States disagreed with the Eleventh Circuit's position that it could restrict its analysis to the challenged sales and use tax and that it did not have to consider Alabama's alternative and comparable motor-fuels taxes on diesel fuel. The United States maintained that a State can justify differential treatment of railroads under one tax by showing that the comparison class is subject to alternative and comparable state taxes that do not apply to the railroad. The United States concluded that the appropriate disposition of the case is a remand so that the lower court(s) may consider the significance of the motor-fuels taxes as a justification for differential treatment of railroads and motor carriers under the sales and use tax.

Oral argument is scheduled for December 9. The briefs in the case are available at http://www.scotusblog.com/case-files/cases/alabama-department-of-revenue-v-csx-transportation-inc/.

Supreme Court Reviews Federal Circuit Decision Permitting Disclosure of Sensitive Security Information under Whistleblower Statute

On May 19, 2014, the Supreme Court granted certiorari in DHS v. MacLean (No. 13-894), in which the United States seeks review of the decision of the U.S. Court of Appeals for the Federal Circuit. This case arose after Robert MacLean, a federal air marshal, received notice from TSA that for a particular period of time, it would not deploy federal air marshals on overnight flights from Las Vegas. MacLean informed his supervisor and the DHS Office of Inspector General that he did not personally think this decision was in the best interest of public safety. MacLean was not satisfied with the responses that he received and then revealed the TSA deployment plans to the news media in an effort to "create a controversy" that would force TSA to change the plans. TSA eventually learned that MacLean was the source of the media report and removed him from his position as a federal air marshal for disclosing SSI (sensitive security information) without authorization.

MacLean challenged his removal before the MSPB, alleging that TSA violated 5 U.S.C. § 2308(b)(8)(A). That section, a provision of the Whistleblower Protection Act (WPA), prohibits an agency from taking a personnel action against an employee for disclosing certain types of information when the employee "reasonably believe[d] that the information showed a violation of any law, rule, or regulation" or "gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety." However, that section does not apply if the

employee's disclosure was "specifically prohibited by law." The MSPB rejected MacLean's argument, reasoning that because he had "disclosed information that is specifically prohibited from disclosure by a regulation promulgated pursuant to an express legislative directive from Congress to TSA," the "disclosure was 'specifically prohibited by law'" for purposes of section 2302(b)(8)(A).

MacLean sought Federal Circuit review of the MSPB decision. On April 26, 2013, the Federal Circuit vacated the MSPB decision and remanded the case to the MSPB for further proceedings. DHS v. MacLean, 714 F.3d 1301 (Fed. Cir. 2013). The Federal Circuit reached this decision because it concluded that the disclosure was "not specifically prohibited by law." The Federal Circuit looked to the law, not the regulations, because it found that "in order to fall under the 'specifically prohibited by law' proviso," a "disclosure must be prohibited by statute rather than by regulation."

In its brief to the Supreme Court, the United States first argued that under Chrysler Corp. v. Brown, 441 U.S. 281 (1979), the phrase "by law" is presumed to include both statutes and substantive regulations unless there is a "clear showing" of contrary congressional intent. And, considering the regulations in question arguably had the force and effect of law, were substantive rather than procedural in nature, and were affirmatively required by Congress, the United States asserted that this presumption should be upheld. Next, the United States maintained that even if the phrase "by law" referred only to statutory restrictions, MacLean's disclosure would still have been "specifically prohibited by law" under 49 U.S.C. § 114(r)(1). This section expressly "prohibit[s]" public disclosure of three categories of information, including information that, in the judgment of TSA, would be "detrimental to the security of transportation" if disclosed. Further, the brief noted that because Congress enacted section 114(r)(1) against a backdrop that already included SSI regulations promulgated by the TSA — including the regulation that MacLean allegedly violated, which designates air-marshal-deployment information as SSI — the enactment of this section represented Congress's approval of TSA's preexisting nondisclosure regulations. Finally, the United States emphasized that allowing federal employees to disclose SSI to the public based on their own "idiosyncratic personal judgments" would generate serious risks to public safety and would circumvent internal reporting procedures implemented by Congress that allow employees to voice concerns to the agency's Inspector General or the Office of Special Counsel, which operate independently of the agency.

In response, MacLean argued that TSA cannot use its own regulations to create exceptions to the WPA. Specifically, MacLean highlighted that the WPA uses the phrase "law, rule, or regulation" more than twenty times, but, as mentioned above, disclosure can only be punished if it is prohibited "by law"; therefore, MacLean asserted that Congress deliberately omitted the term "regulation" from the prohibition, and it should accordingly be read to only apply to disclosure prohibited "by law." Moreover, MacLean noted that the prohibition also extends to information "specifically required by Executive order to be kept secret in the interest of national defense or the conduct of foreign affairs." Thus, if the phrase "by law" were to be read broadly, the second exception for Executive orders would be rendered superfluous. In Maclean's view, restricting the prohibition

to cover only statutory restrictions would comport with one of the primary purposes of the whistleblower protections, namely, to prevent agencies from retaliating against employees who expose dangerous agency practices. MacLean also contended that section 114(r) merely allows TSA "to prescribe regulations prohibiting the disclosure of information" and consequently does not represent a specific prohibition. Further, while MacLean agreed with the United States that the WPA strikes a "considered balance" between the revelation of governmental misdeeds and the need to keep some information secret, MacLean argued that the Executive can still bar employees from revealing potentially injurious information through its classification system and TSA could also persuade Congress to statutorily expand the scope of prohibited information.

The Court has scheduled oral argument for November 4. The briefs in the case are available at http://www.scotusblog.com/case-files/cases/department-of-homeland-security-v-maclean/.

U.S. Files Supreme Court Amicus Brief in First Amendment Challenge to Local Sign Ordinance

On September 22, 2014, the United States filed a brief as amicus curiae supporting the petitioner in Reed v. Town of Gilbert (No. 13-502), 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. The brief includes discussion of 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 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 directional signs toward the Sunday service. Its signs fall under the category of "temporary directional signs" under the Town ordinance. As such, the Church's signs can 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 can only be displayed twelve hours before, during, and one hour after the service. By contrast, ideological and political signs have many fewer restrictions; they may typically be much larger and can be posted for much 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. The Ninth Circuit affirmed in a 2-1 decision, holding that the ordinance was content-neutral and should be upheld under the application of intermediate scrutiny. Reed

v. Town of Gilbert, 707 F.3d 1057 (9th Cir. 2013). The panel majority decided that the Town was not discriminating against speech on the basis of viewpoint and that the Town's ordinance advanced legitimate safety and aesthetic interests. Judge Watford dissented, arguing that the Town failed to show how such interests were advanced by distinguishing between political, ideological, and temporary directional signs.

The Supreme Court granted the Church's petition for a writ of certiorari on July 1, 2014. The United States filed a brief in support of the Church, contending that the Town's signage ordinance violates the First Amendment. In the brief, the government contended that the ordinance would not survive either strict or intermediate scrutiny, although if the Court finds 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 cannot stand, the government argues, because there is no indication here that the Church's signs cause 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 distinguished the Town's ordinance from the provisions of the HBA, which is appropriately tailored to address safety and aesthetic interests. DOT implements the HBA in consultation with the states, and every state, under penalty of a reduction in federal highway funds, has enacted sign controls that comply with the Act. Although this case does not directly present questions about the HBA or its constitutionality, the HBA is distinguishable from the Town ordinance because the HBA is much more limited in its applicability, restricting signs only in places near certain federally funded highways. These arguments are consistent with the United States' position in other cases, including City of Ladue v. Gilleo, 512 U.S. 43 (1994), in which the Court struck down a city ordinance prohibiting homeowners from displaying virtually any signs on their property. In that case, the United States had also filed a brief distinguishing the HBA and explaining the appropriate balance that statute strikes between speech, safety, and aesthetic interests.

The Court is expected to hear the case later in its current term. The briefs in the case are available at http://www.scotusblog.com/case-files/cases/reed-v-town-of-gilbert-arizona/.

Supreme Court Considers Whether Changes to Interpretive Rules Require Notice and Comment

On August 20, 2014, the United States filed its opening brief in Perez v. Mortgage Bankers Association (No. 13-1041), a case that is important to the Department and to other federal agencies on a fundamental principle of administrative law. In particular, the case presents the question whether an agency must engage in notice-and-comment rulemaking when it changes an "interpretive rule" relating to an agency regulation.

The case arose out of litigation over whether the petitioner, the Secretary of Labor, was obligated to undertake notice and comment before changing interpretive rules relating to whether mortgage loan officers are exempt from the minimum wage and overtime requirements of the Fair Labor Standards Act of 1938 (FLSA), 29 U.S.C. § 201 *et seq*. In 1999 and 2001, the Labor Department issued opinion letters concluding that

mortgage loan officers are not FLSA-exempt. However, after the Labor Department revised its regulations, in 2006, the agency reversed course in another opinion letter, and in 2010, reversed course yet again, issuing a letter concluding that mortgage loan officers are exempt under the FLSA. The Labor Department had not provided notice and comment for any of these interpretations. The district court granted summary judgment to the government, concluding that notice and comment were not required, but the D.C. Circuit reversed. The D.C. Circuit held, under its rulings in Alaska Professional Hunters Association v. FAA, 177 F.3d 1030, 1034 (D.C. Cir. 1999), and Paralyzed Veterans of America v. D.C. Arena L.P., 117 F.3d 579 (D.C. Cir. 1997), that agencies must provide notice and comment for interpretive rules that modify a prior, definitive interpretation of the agency's regulations.

In its opening brief, the government argued that the Court should decide the case as a straightforward matter of statutory interpretation, and should conclude that notice and comment is not required for agency interpretive rules. The APA, 5 U.S.C. § 551 *et seq.*, states that an agency must provide public notice of a proposed rule, offer an opportunity for comment, and consider those comments before promulgating the rule. However, the APA also provides that the notice and comment requirement "does not apply" to "interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice." 5 U.S.C. § 553(b)(A). The government argued that this plain language of the APA dictates the outcome of this case. In so doing, the government contended that the Supreme Court should set aside the D.C. Circuit's contrary holdings in Alaska Professional Hunters and Paralyzed Veterans.

Moreover, the government argued that this result is the better one as a matter of policy and agency practice. Interpretive rules, as defined by the APA, are merely agency constructions of, or views on, the statutes that the agency administers; as such, they lack the force and effect of law. It would be unduly burdensome to put agencies to the task of requiring notice and comment for interpretations that lack the force and effect of law, and this would also create a disincentive for agencies to responsibly change incorrect or outdated interpretations.

The respondents filed their brief on October 9, and the Court has set the case for oral argument on December 1. The briefs in the case are available at http://www.scotusblog.com/case-files/cases/perez-v-mortgage-bankers-association/.

Supreme Court Denies Review of Decision Dismissing Challenge to the National Certified Medical Examiner Final Rule

On June 23, 2014, the Supreme Court denied the petition for writ of certiorari filed by the Owner-Operator Independent Drivers Association (OOIDA) seeking review of the decision by the U.S. Court of Appeals for the District of Columbia in Owner-Operator Independent Drivers Association v. USDOT, et al., 724 F.3d 230 (D.C. Cir. 2013), cert. denied, 134 S. Ct. 2841 (U.S. June 23, 2014) (No. 13-1126).

On June 18, 2012, OOIDA petitioned for review of FMCSA's National Registry of Certified Medical Examiners final rule, challenging the agency's decision not to

require commercial motor vehicle operators employed by Mexico-domiciled motor carriers to hold a medical certificate from a certified examiner listed on the National Registry. On July 26, 2013, the D.C. Circuit rejected all of petitioner's arguments and upheld that portion of the final rule specifying that the National Registry requirements do not apply to the medical certification of properly licensed Canadian and Mexican drivers. Referring to international agreements under which the United States recognized driver medical certificates issued in Canada and Mexico, the court stated that "absent some clear and overt indication from Congress," it will not construe a statute to abrogate existing international agreements even when the statute's text is not itself ambiguous.

On March 17, 2014, after the D.C. Circuit denied OOIDA's rehearing petition, OOIDA filed a petition for writ of certiorari seeking Supreme Court review of the decision. On May 19, the United States filed its brief in opposition to the petition arguing that the appellate court's decision was correct and that the decision did not conflict with Supreme Court precedent.

Departmental Litigation in Other Federal Courts

Ninth Circuit Rules in FAAAA Preemption Cases

On September 8, 2014, the Ninth Circuit issued its order and amended opinion in Campbell v. Vitran Express and Dilts v. Penske Logistics, LLC, 2014 WL 4401243 (9th Cir. 2014), interpreting the scope of 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 panel adopted the position set forth in the government's brief, filed at the court's invitation.

The cases were filed as class actions in state court by motor carrier employees who alleged that their employers failed to comply with California's meal and rest break requirements. Under generally applicable California law, which includes companies employing commercial motor vehicle operators, employees must typically be given a meal break of thirty minutes or longer after five hours on duty and must be given 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. Rest breaks are supposed to be provided during the middle of the work period to the extent practicable. Employers who fail to provide the requisite breaks are liable for civil penalties and must also provide an hour's worth of compensation to the employee for any meal or rest break that is not provided.

Plaintiffs in Dilts were appliance delivery drivers and installers who worked in California for Penske. They typically moved appliances from regional distribution centers by truck to local distribution centers or to customers, all within California. They alleged that they had not received the legally required meal and rest breaks and were consequently entitled to monetary and other relief under California law. Plaintiffs in Campbell were city and local drivers for Vitran Express who deliver cargo for Vitran's clients. They similarly alleged that they were not permitted to take meal and rest breaks and sought relief through a class action lawsuit. The defendants removed

both cases to federal district court. The district courts ruled in favor of the defendant carriers in both cases, concluding that the state meal and rest break requirements were preempted by the FAAAA. Plaintiffs appealed.

On appeal, the Ninth Circuit reversed, holding that the state meal and rest break laws remained valid under the FAAAA. In its amended opinion, the court began by applying the traditional presumption against preemption that attaches in cases like this one, involving longstanding areas of traditional state regulation for the protection of employees. As the court recognized, the FAAAA's preemption clause sweeps broadly and holds that "States may not enact or enforce a law . . . related to a price, route or service of any motor carrier . . . with respect to the transportation of property." 49 U.S.C. § 14501(c). Nonetheless, 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," and that "[s]uch laws are not preempted even if they raise the overall cost of doing business or require a carrier to re-direct or re-route some equipment."

Applying these principles, the court ruled that the California meal and rest break laws did not fall within the preemptive scope of the FAAAA. These state laws are generally applicable to myriad industries in California and were not of the type that Congress meant to preempt. Notwithstanding the motor carriers' arguments, 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. Furthermore, the carriers had failed to meet their burden to demonstrate that the state laws would compel the alteration of the carriers' routes, or have any resulting impact upon the carriers' operations.

Judge Zouhary wrote a concurring opinion, emphasizing that Penske failed to carry its burden of proof on its preemption defense, since it had not provided specific evidence of the real-world impact of the California law on the company's routes or services.

In reaching its decision, the Ninth Circuit followed the reasoning set forth in a brief filed by DOT at the court's request. In that brief, the Department similarly 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, since the California break requirements may be more disruptive to airline rates, routes, or services. The Ninth Circuit held in its opinion that DOT's interpretation of the FAAAA is persuasive authority, given the agency's expertise in these issues.

Summary Judgment for DOT in Constitutional Challenge to DBE Regulations

On March 30, 2014, the U.S. District Court for the District of Minnesota granted summary judgment in favor of DOT and the Minnesota Department of Transportation (MnDOT) in Geyer Signal, Inc. v. Minnesota Department of Transportation, et al., 2014 WL 1309092 (D. Minn. 2014), a facial and as-applied constitutional challenge to DOT's DBE regulations and their implementation by MnDOT in the federal-aid highway program. The court dismissed all of plaintiff's claims with prejudice.

Plaintiff Geyer Signal, Inc., a non-DBE highway construction subcontractor, challenged the constitutionality of the statute authorizing DOT's DBE regulations, the regulations themselves, and their implementation by MnDOT as a federal-aid highway fund recipient. DOT was an intervenor in the case. Plaintiff alleged, among other things, that (1) the federal DBE statute and regulations are unconstitutional because they are not sufficiently supported by the legislative record; (2) are vague because they do not define "reasonable" for purposes of when a prime contractor is entitled to reject a DBEs' bid on the basis of price alone; and (3) cause an overconcentration of subcontract awards to DBEs in various construction specialty areas, including landscaping and traffic control, plaintiff's areas of specialty. Plaintiff claimed that but for the race- and gender-conscious provisions of the DBE program, plaintiff would be able to compete for and win more subcontracts.

Additionally, plaintiff brought three as-applied challenges against MnDOT's implementation of the federal DBE program, alleging that MnDOT failed to support its implementation of the program with evidence of discrimination in its contracting, sets inappropriate goals for DBE participation, and failed to respond to overconcentration in the traffic control industry.

Addressing first the compelling interest arguments, the court found that Congress' consideration of discriminatory barriers to entry for DBEs as well as discrimination in existing public contracting establish a strong basis in the evidence for reauthorization of the DBE Program. Thus, the court rejected plaintiff's contention that the record before Congress must include strong evidence of race discrimination in construction contracting in Minnesota. The court also found that plaintiff failed to present affirmative evidence that minority-owned small businesses enjoy non-discriminatory access to and participation in highway contracts. Based on these findings, the court concluded that plaintiff had not met its burden of raising a genuine issue of material fact as to whether the government met its evidentiary burden in reauthorizing the DBE program.

The court then addressed plaintiff's contention that the DBE program is not narrowly tailored because it permits overconcentration. It rejected plaintiff's arguments here as well, finding that plaintiff failed to establish that program goals will always be fulfilled in a manner that creates overconcentration and that the program provides numerous avenues for recipients of federal funds to combat overconcentration. Finally, with respect to plaintiff's vagueness argument, the court held that plaintiff cannot maintain a facial challenge against the DBE program on this ground because its constitutional challenges

to the program are not based in the First Amendment.

As to plaintiff's as-applied challenges, the court rejected all three of plaintiff's claims against MnDOT over its implementation of the DOT's DBE program. First, after examining the competing testimony of the parties' experts, the court found that plaintiff's critiques of the methodology used by MnDOT in finding the existence of discrimination sufficient to support the DBE program only establish a different interpretation of the data and do not establish that MnDOT's interpretation was unreasonable. The court reached the same conclusion with respect to plaintiff's critiques of MnDOT's methodology for setting DBE participation goals.

Finally, with respect to plaintiff's overconcentration arguments, the court found that plaintiffs provided no authority for the proposition that the government must conform its implementation of the DBE program to every individual business' self-assessment of what industry group they fall into and what other businesses are similar. To require MnDOT to adjust its calculations based on such a challenge by a single business would place an impossible burden on the agency because an individual business could always make an argument that some of the other entities in the work area the government has grouped it into are not alike. For these reasons, the court found that plaintiff had failed to establish that MnDOT's implementation of the DBE program is not narrowly tailored.

DOT Moves to Dismiss Challenge to Airport Kiosk Accessibility Rule

On May 20, 2014, the Department moved to dismiss for lack of subject-matter jurisdiction the complaint of the National Federation of the Blind and two individuals challenging a final rule addressing the accessibility of automated kiosks at U.S. airports. Plaintiffs in National Federation of the Blind, et al. v. USDOT, et al. (D.D.C. 14-00085) raise four allegations: (1) that DOT does not have the statutory authority to regulate automated kiosks at airports; (2) that DOT improperly relied upon how much it would cost the airlines to install accessible automated kiosks; (3) that if DOT included the cost to install accessible automated kiosks as part of its analysis, it should have also considered other factors that are relevant to an "undue burden" analysis; and (4) that DOT improperly relied upon research conducted by DOT's contractor because the information was not disclosed to the public during the comment period.

In its motion to dismiss, the Department argues that judicial review of the kiosk accessibility rule is governed by 49 U.S.C. § 46110, which vests exclusive jurisdiction over review of certain "orders" of the Secretary in the courts of appeals, and that the rule is an "order" within the meaning of the statute. In response, plaintiffs contend that the term "order" does not encompass final rules that are the product of notice-and-rulemaking and that, therefore, jurisdiction over the case lies in district court.

The court has scheduled oral argument in the case for November 13, 2014.

Summary Judgment Briefs Filed in Illinois Challenge to DBE Program

On August 4, 2014, the parties filed cross-motions for summary judgment in Midwest Fence Corporation v. USDOT (N.D. Ill. No. 10-05627), a facial and as-applied constitutional challenge to the statute authorizing DOT's DBE regulations, the regulations themselves, and their

implementation by the Illinois Department of Transportation in the federal-aid highway program.

In its summary judgment motion, plaintiff Midwest Fence Corporation, a non-DBE highway construction subcontractor, argues, among other things, that (1) the DOT DBE statute and its implementing regulations are unconstitutional because the legislative record and statistical studies of the disparity between the hiring of DBE subcontractors and their availability do not establish that they support a governmental compelling interest; (2) DOT's DBE regulations are not narrowly-tailored on their face or as applied because, among other things, they force states to over-burden non-DBE specialty contractors by causing an overconcentration of subcontract awards to DBEs in construction specialty areas, including fencing, plaintiff's area of specialty; and (3) the DOT DBE regulations, are vague because they do not define "reasonable" for purposes of determining whether a prime contractor that has not met a DBE sub-contractor goal has nonetheless made a good faith effort in seeking DBE subcontractors.

In its summary judgment motion, DOT argued that (1) remedying race and gender discrimination is a well-recognized compelling interest for congressional action supported here by numerous hearings, reports, and studies demonstrating the strong basis in evidence for the program, including studies showing disparities between the availability and utilization of minority- and women-owned businesses in public contracting; (2) the DBE regulations are narrowly-tailored to meet the compelling interest of remedying race and gender discrimination in contracting because, among other things, the program is flexible at the recipient and contract level and is regularly reviewed, the program's DBE participation goals reflect the local availability of DBEs, and the program does not create an undue burden on third parties in general or on Midwest Fence in particular; and (3) the regulations provide sufficient guidance for states to determine whether a prime contractor that has not met a DBE sub-contractor goal has nonetheless made a good faith effort in seeking DBE subcontractors.

Review Sought of DOT Airline Discrimination Decision

On March 31, 2014, a petition for review was filed against the Secretary of Transportation in the U.S. Court of Appeals for the District of Columbia Circuit in a case involving the Department's authority with respect to complaints about discrimination in the carriage of airline passengers. In Gatt v. Foxx (D.C. Cir. 14-1040), the petitioner, Eldad Gatt, a citizen and resident of the State of Israel, sought to book passage on a Kuwait Airways flight between New York and London. The airline's website required Mr. Gatt to scroll through drop-down boxes of countries to select his passport-issuing country and nationality. There was no selection in those boxes for Israel, so Mr. Gatt was unable to purchase a ticket. He then filed an administrative complaint with the Secretary, contending that the airline had unlawfully discriminated against him on the basis of 49 U.S.C. § 40127, which prohibits foreign air carriers from discriminating "on the basis of race, color, national origin, religion, sex, or ancestry."

After an investigation, DOT sent a letter to Mr. Gatt declining to take further action against Kuwait Airways, and stating that the airline had not violated federal anti-discrimination laws. The Department's letter said that the airline's "policy is based on citizenship or passport status" and

therefore does not violate section 40127. Furthermore, the Department pointed out that Kuwait has no diplomatic relations with Israel and that Israeli passport holders may not obtain entry visas into Kuwait. DOT also noted that the airline is subject to the requirements of a 1964 Kuwait law, which forbids the airline from entering into transactions with persons of Israeli citizenship, residents of Israel, or those "working for or in the interest of Israel."

After Mr. Gatt filed his petition for review in the D.C. Circuit, the parties agreed to suspend briefing pending further administrative proceedings before the agency, thereby allowing the Department to reconsider its earlier decision and decide whether to pursue enforcement action. While the matter remained pending before the agency, Mr. Gatt filed a motion asking the court to proceed to merits briefing, contending that the agency had not formally vacated its decision denying relief to Mr. Gatt and that it had not committed to a specific date for a new decision on reconsideration. The Department opposed Mr. Gatt's motion, explaining that it was still in the process of re-investigating the matter and that merits briefing would be premature.

Environmental Groups Seek Order Prohibiting the Transport of Crude Oil in DOT-111 Tank Cars

On September 11, 2014, the Sierra Club and ForestEthics (collectively, Sierra Club) filed a petition for a writ of mandamus in the U.S. Court of Appeals for the Ninth Circuit (Ninth Circuit) in the case of Sierra Club, et al. v. USDOT (9th Cir. No. 14-72802). The writ of mandamus requests an order directing DOT to respond to a petition that the Sierra Club had previously submitted to the Department, seeking an emergency order banning the use of DOT-111 tank cars for the transport of Bakken crude oil (Bakken crude).

Two months earlier, on July 15, the Sierra Club had submitted its Petition to the Secretary of Transportation to Issue an Emergency Order Prohibiting the Shipment of Bakken Crude Oil in Unsafe Tank Cars (Petition) in response to a series of rail car derailments in which DOT-111 tank cars released significant quantities of crude oil. The administrative petition seeks an emergency order banning the use of DOT-111 tank cars for the shipment of Bakken crude as the tank cars are prone to puncture and require additional protections, such as head shields, tank jackets, and more robust top fitting protection.

The administrative petition explains that while the Department has issued several emergency orders and safety advisories addressing the movement of crude oil in DOT-111 tank cars, none of them required that the DOT-111 tank cars no longer be used for the transport of Bakken crude. Rather, they addressed operational controls and emergency preparedness. Due to the safety issues addressed in the administrative petition, the Sierra Club requested that DOT act expeditiously and respond within 30 days. While the Department did not respond to the Petition within 30 days, on August 1, the Department (through PHMSA and in consultation with FRA) issued a notice of proposed rulemaking (NPRM) to consider, among other issues, new safety standards for DOT-111 tank cars and the phase out of the use of DOT-111 tank cars for the transportation of crude oil.

Four days after filing its petition for a writ of mandamus, on September 15, the Sierra Club filed a motion to expedite the

resolution of the writ, asserting that if the Ninth Circuit did not expedite the matter, there may be irreparable harm to people and the environment. On September 17, DOT filed its opposition to the Sierra Club's motion, arguing that expedited review is not warranted because DOT has already taken significant action with respect to rail transportation safety, including issuance of emergency orders, safety advisories and an NPRM. DOT argued that while the Sierra Club asserts that irreparable harm to people and the environment could occur from the continued use of DOT-111 tank cars for the transport of crude oil, the harm envisioned by the Sierra Club is contingent on highly unlikely future events and does not justify the request for an expedited hearing. On September 22, the court denied the motion to expedite and ordered that DOT respond to the mandamus petition by November 21.

Recent Litigation News from DOT Modal Administrations

Federal Aviation Administration

Federal Circuit Denies Air Traffic Controllers' Request for Rehearing in Challenge to FAA's Personnel Reform Authority

Five months after it vacated the U.S. Court of Federal Claims' $50 million judgment for the nearly 8,000 FAA air traffic controllers who challenged the FAA's Personnel Reform authority through a Fair Labor Standards Act (FLSA) lawsuit, Abbey, et al v. United States, 745 F.3d 1363 (Fed. Cir. 2014), the U.S. Court of Appeals for the Federal Circuit also denied the plaintiffs' (appellees') petition for rehearing en banc.

In its petition, the air traffic controllers alleged the Federal Circuit erred by inferring an exception to the FLSA in its interpretation of FAA's Personnel Reform legislation, Pub. L. No. 104-50 (Appropriations Act) and Pub. L. No. 104-264 (Improvement Act). Specifically, the plaintiffs argued the flexibility mandate in Section 347 of the Appropriations Act did not meet the threshold for creating an exception to the requirement to pay overtime compensation (instead of credit hours and compensatory time) in the FLSA.

In its response, the government argued that not only did plaintiffs fail to make the requisite showing for rehearing en banc under Rule 35(a) of the Federal Rules of Appellate Procedure, their argument mischaracterized the panel's opinion entirely. Specifically, the government noted that the panel's decision turned on a determination of whether FAA reasonably interpreted its Personnel Reform legislation as allowing FAA to adopt existing title 5 provisions containing express exceptions to the FLSA. The panel did not infer an exception to the FLSA. But in so arguing, plaintiffs devoted nearly their entire brief to addressing a point asserted by neither FAA nor the panel.

On August 22, 2014, the Federal Circuit, per curiam, denied the plaintiffs' petition without comment and directed that the case be remanded to the Court of Federal Claims to litigate the remaining issue of whether FAA's compensatory time and credit hour policies are consistent with the title 5

exceptions to the FLSA on which the Federal Circuit held FAA is authorized to rely.

D.C. Circuit Upholds FAA's Termination of a Designated Pilot Examiner Appointment

On June 24, 2014, the U.S. Court of Appeals for the D.C. Circuit denied a challenge to the FAA's termination of a Designated Pilot Examiner (DPE) appointment. Pursuant to a risk assessment of all DPEs, the petitioner in Sheble v. Huerta, 755 F.3d 954 (D.C. Cir. 2014), was identified as administering an unusually large number of pilot examinations with a disproportionately high rate of passage. After an initial Special Emphasis Evaluation Designee (SEED) evaluation, remedial training, and two follow-up SEED evaluations, the SEED team authored a memorandum recommending the termination of petitioner's appointment. In December 2012, the manager of the local Flight Standards District Office informed petitioner by letter that his appointment was terminated for "not performing [his] duties under [his] designation in accordance with current FAA guidance and policy." The letter also briefly summarized five deficiencies noted by the SEED team in its final report.

Petitioner argued that the letter he received failed to cite the reasons for the termination "as specifically as possible," as required by the pertinent FAA Order. Rejecting this argument, the court compared the letter petitioner received to a sample termination letter provided in the Order and found them virtually identical. While noting that it may have been possible for FAA to more fully state its reasons, the court considered the sample letter to evince the level of specificity required. Moreover, even if the letter had fallen short of the required specificity, petitioner failed to demonstrate that he was prejudiced as a result. The court found that the feedback Petitioner received directly from the SEED evaluators adequately informed him of the deficiencies they identified.

Finally, the court rejected petitioner's other argument that a conflict-of-interest colored the termination. Although one of the SEED evaluators was engaged to another inspector with whom petitioner had "some negative history," the court found no evidence that the evaluator was improperly influenced and noted that the two other members of the SEED team concurred in the team recommendation. Accordingly, the court did not reach the FAA's argument that a conflict-of-interest claim may relate only to a financial conflict.

Court Finds Plaintiffs' Claims for Contribution and Indemnity Barred Under Montana and Utah Law, Denies Equal Protection Challenge

On June 16, 2014, the U.S. District Court for the District of Utah granted summary judgment to the United States on plaintiffs' claims for indemnity and contribution in Metro Aviation, Inc. v. United States, 2014 WL 2708630 (D. Utah 2014). Plaintiffs Metro Aviation, the owner and operator of a Beechcraft King Air 200 that crashed in Bozeman, Montana, and its insurers had received wrongful death claims from the estates of two passengers on the aircraft. Metro settled one of the claims out of court, whereas the other was settled after a lawsuit was filed in Montana state court. Subsequently, plaintiffs brought an action against the United States for indemnity or, in

the alternative, contribution for the amounts paid to the estates in settlement.

Initially, plaintiffs filed their lawsuit in the District of Montana. Because plaintiffs alleged that air traffic controllers in Utah negligently caused the crash, however, the court held that venue was improper in Montana under the Federal Tort Claims Act (FTCA) and transferred the case to the District of Utah on the United States' motion. The Department of Justice moved for summary judgment, arguing that neither Utah nor Montana law permitted claims for contribution or indemnity under the circumstances of this case.

The court readily agreed that Utah law would not permit such claims, but found the state of the law in Montana ambiguous. Therefore, it certified three questions to the Montana Supreme Court: (1) may a person who has settled a claim with a victim then bring an action for contribution against a joint tortfeasor even though the victim never filed an action; (2) where a defendant in a pending action enters into a settlement with the plaintiff in advance of trial, may the settling defendant bring a subsequent contribution action against a person who was not a party in the tort action; and (3) does Montana recognize a common law right of indemnity where the negligence of the party seeking indemnification was remote, passive, or secondary, compared to that of the party from whom indemnity is sought? After briefing and oral argument, the Montana Supreme Court answered "no" to each question. Rather, a tortfeasor acquires a right to contribution under Montana law only by making a joint tortfeasor "party to an action," and common law indemnity is available only to parties entirely free of negligence.

On the United States' renewed motion for summary judgment, the federal district court accordingly held that plaintiffs could not establish a claim for relief under either state's law. The court also rejected plaintiffs' argument that the Montana contribution statute violated the Equal Protection Clause of the Constitution. Because plaintiffs never attempted to join the United States in the state action, such as by removing the matter to federal court, plaintiffs lacked standing to pursue their argument. Additionally, to the extent that plaintiffs' argument was directed to the Montana Supreme Court's *interpretation* of the statute, the court found it procedurally inappropriate and an impermissible collateral attack.

After the court's ruling, only plaintiffs' claim for the value of the aircraft remains viable.

Court Limits Plaintiffs' Recoverable Damages Arising out of 2008 Crash

On July 1, 2014, the U.S. District Court for the Southern District of Florida granted the United States' motion for summary judgment with respect to the law applicable to plaintiffs' damages in In re Air Crash Near Rio Grande, P.R., on Dec. 3, 2008, 2014 WL 2957251 (S.D. Fla. 2014). The case arises from the 2008 crash of a Rockwell "Commander" 690B on approach to the San Juan International airport, killing the pilot, a domiciliary of the U.S. Virgin Islands, and his two charter passengers, both domiciliaries of Ohio.

Applying Puerto Rico's choice-of-law rules, the court held that the law of Puerto Rico, not Ohio, as plaintiffs argued, would determine plaintiffs' damages if the liability

of the United States were established. Significantly, Puerto Rico law does not permit recovery for lost future earnings unless plaintiffs can demonstrate economic dependence on the decedent at the time of death, which, in this case, potentially precluded the recovery of over twenty million dollars. Under a "dominant contacts" approach, the court found that Puerto Rico law had the strongest connection to the litigation because the crash occurred in Puerto Rico, the flight was to terminate in Puerto Rico, and the air traffic controllers whom plaintiffs alleged were negligent were in Puerto Rico.

On August 20, 2014, the court denied plaintiffs' motion for reconsideration. The court expressly rejected plaintiffs' argument that the "stark difference" between the states' laws militated in favor of Ohio law. Although acknowledging plaintiffs' maximum recovery was substantially reduced, the court found the paramount concern of Puerto Rico's choice-of-law rules to be the harmonization of the interstate system, rather than favoring one party over another. The court was also unpersuaded by plaintiffs' argument that the deceased passengers were flying to Puerto Rico to meet a return flight back to Ohio, and that their surviving family resided in Ohio.

The court's July 1, 2014, order denied summary judgment to the United States on the issue of liability. The trial in the case commenced on October 14, 2014.

Court Rejects "Startle Theory" of Causation, Grants Summary Judgment to United States

On August 22, 2014, the U.S. District Court for the Eastern District of Pennsylvania granted summary judgment to the United States and its co-defendant, Agusta Aerospace, finding that plaintiffs failed to establish the elements of duty and causation in its tort claims arising from an airplane crash. The plaintiffs' decedents in Turturro v. United States, 2014 WL 4188076 (E.D. Pa. 2014), a flight instructor and his student, were performing touch and goes at the Northeast Philadelphia airport in a Grumman AA-1C. While the Grumman was on final approach for Runway 33, an Agusta helicopter hovering east of Runway 33 requested permission to depart the airport area to the west. Once the Grumman had landed, the local controller confirmed that the Agusta had the Grumman in sight, and then cleared the helicopter on course, noting that the Grumman would be in a "left downwind departure." As the Grumman took off from Runway 33 and began its climb, the controller instructed it to "make right traffic." The Grumman immediately banked into what eyewitnesses described as an uncoordinated right turn at approximately 200 feet above the ground. The Agusta pilots, surprised by the Grumman's sudden turn, immediately arrested forward movement and stopped approximately one-half mile from the Grumman. The Grumman stalled and crashed, killing both occupants.

As to the liability of the United States, plaintiffs argued that the timing of the controller's instruction to "make right traffic" caused the Grumman pilots to believe that they had to immediately execute a right turn, at an allegedly dangerous phase of the flight. Then, "startled by the presence of a large Agusta helicopter in forward flight," the pilot allegedly yanked back on the controls and caused the aircraft to crash. The court rejected plaintiff's theory. First, the court found that there was no prohibition on air traffic controllers from issuing instructions to an aircraft during its

departure climb and rejected the implication that such an instruction necessarily conveys a sense of urgency. More importantly, however, the court held that plaintiffs did not demonstrate legal causation because there was no evidence that the Grumman pilots ever saw the Agusta, much less were startled by its presence, nor had plaintiffs established that an *actual* collision hazard existed. The court also granted summary judgment in favor of Agusta, holding that its pilots followed the controller's instructions, kept the Grumman in sight as instructed, and complied with all pertinent regulations. Plaintiffs have filed a notice of appeal.

Court of Federal Claims Finds 46 U.S.C. § 46110 Precludes Tucker Act Jurisdiction

On June 2, 2014, the U.S. Court of Federal Claims dismissed a complaint brought against the United States arising from the FAA's termination of a Designated Airworthiness Representative (DAR) appointment. In 2012, the Plaintiff in Pucciariello v. United States, 116 Fed. Cl. 390 (2014), had initially attempted to challenge the termination of his appointment in the U.S. District Court for the Southern District of Florida. The district court dismissed plaintiff's case for lack of subject matter jurisdiction, however, holding that 49 U.S.C. § 46110 vests exclusive jurisdiction to "affirm, amend, modify, or set aside any part of" such orders in the courts of appeals. Ostensibly because the time to proceed under section 46110 had already lapsed, plaintiff filed claims for damages, as well as injunctive and declaratory relief, in the U.S. Court of Federal Claims. Plaintiff argued that the court had jurisdiction under the Tucker Act, conferring jurisdiction where a substantive right to money damages against the United States other than tort liability exists, because the revocation of his appointment (1) breached a settlement agreement between him and the FAA and (2) violated the Takings Clause of the Fifth Amendment to the U.S. Constitution.

As to the question of jurisdiction, the court first adopted the holdings of numerous other federal courts that the termination of a designee appointment is unequivocally an "order" under section 46110. Thus, while acknowledging that both the settlement agreement and Takings Clause would ordinarily be sufficient to establish jurisdiction under the Tucker Act, it held that the more specific and exclusive jurisdictional authority granted by section 46110 precluded it from exercising jurisdiction in this case. Furthermore, to the extent that plaintiff's claims did not seek review of the order, but rather compensation for breaching the settlement agreement or a taking, the court considered such claims "inescapably intertwined" with the order's merits and alleged procedural impropriety. Because the court concluded it had no jurisdiction over plaintiff's damages claim, it also found itself without jurisdiction over the claims for injunctive or declaratory relief.

Independent of its dismissal on jurisdictional grounds, the court also found that plaintiff failed to state a claim upon which relief could be granted. As to the settlement agreement, which resolved a discrimination complaint filed with the EEOC by appointing plaintiff as a DAR in exchange for his retirement from FAA, the court concluded that no breach occurred. The agreement did not operate to strip FAA of its statutory authority to terminate a DAR appointment and, even if it had imposed an obligation on FAA to do so only "for cause," plaintiff did not allege facts plausibly casting doubt on FAA's stated

reasons for termination. The court also found that plaintiff failed to state a claim for a Fifth Amendment taking, because, as courts have repeatedly held, there is no constitutionally-protected property interest in designee appointments.

District Courts Reach Opposite Conclusions in Related FOIA Disputes

In August 2014, the U.S. District Courts for the District of Columbia and the Middle District of Florida issued opposite rulings on FAA's motions for summary judgment in two related FOIA cases. The plaintiff in Elkins v. FAA, 2014 WL 4243152 (D.D.C. 2014), and Elkins v. FAA (M.D. Fla. 12-2009), believing that he was the subject of unlawful aerial surveillance, submitted several requests under FOIA for radar data, air traffic control communications, and certain other records pertaining to aircraft he saw circling overhead at various times.

In the Middle District of Florida, plaintiff challenged the sufficiency of the FAA's search, as well as its withholding of documents under FOIA exemptions 6, 7(C), and 7(E), with respect to six FOIA requests. For each, FAA FOIA staff had contacted the air traffic control facilities responsible for the areas in which the subject aircraft were operating and obtained records responsive to plaintiff's requests. All but one set of responsive documents were subsequently coordinated with various federal law enforcement agencies, all of which requested that FAA withhold certain records in whole or in part under exemptions 7(A), (C), and/or (E).

Considering the six requests in the aggregate, the court held that the recorded communications between the aircraft and air traffic controllers were categorically exempt under exemption 6, which guards against "clearly unwarranted invasion[s] of personal privacy," because the identities of law enforcement agents could be ascertained from their recorded voices, i.e. by "put[ting] the records on the internet in order to solicit identifications." While the court acknowledged that plaintiff may have a personal interest in the records, it found no public interest weighing in favor of disclosure, as the FOIA requires.

The court similarly found the records protected under exemption 7(C), which more specifically protects against unwarranted invasions of privacy by the disclosure of records compiled for law enforcement purposes. Notably, while the recordings were made and kept by FAA in the ordinary course of business, the court found them "compiled for law enforcement purposes" because the information therein was essentially "produced" by law enforcement agencies while engaged in active investigations.

The court also held that FAA properly applied exemption 7(E) in withholding or redacting radar data and other records. Because these documents contained information about the type of aircraft used by law enforcement agencies, their call signs, registration numbers, transponder codes, geographic positions, altitudes and speeds, the court found that their release would "disclose techniques and procedures for law enforcement investigations . . . [that] could reasonably be expected to risk circumvention of the law." Finally, the court found no deficiencies in the manner by which FAA conducted its search for responsive records.

In the District of Columbia case, plaintiff challenged FAA's response to one other

FOIA request similarly seeking information concerning an aircraft circling over his home. The court first found that questions of fact precluded summary judgment with respect to the adequacy of the FAA's search. Specifically, the court considered plaintiff's request to include certain documents, i.e., records of agreement between the aircraft operator and FAA, which might not necessarily be found in an air traffic control facility, the only place where FAA conducted its search. The court was also unwilling to grant summary judgment to FAA with respect to its application of exemption 7(E), finding that the FAA inadequately documented the records so withheld. The court directed FAA to submit a Vaughn index and additional documentation to demonstrate the adequacy of its search.

Court Dismisses with Prejudice Water District's Quiet Title Action, District Appeals

On June 20, 2014, the U.S. District Court for the Central District of California agreed that it did not have jurisdiction over and dismissed with prejudice the East Valley Water District's quiet title action against the United States. Plaintiff in East Valley Water District v. San Bernardino International Airport Authority, et al. (C.D. Cal. No. 14-00138) brought a quiet title action against San Bernardino International Airport (SBIAA), a joint powers airport authority, and the United States alleging that SBIAA's 2006 construction of objects within a runway protection zone area (RPZ) resulted in the abandonment of avigation easements conveyed by the United States' 1999 quit claim deed to the airport authority. Having determined that plaintiff's claims presented only a federal question and that no diversity jurisdiction exists, plaintiff was ordered to show cause why the remaining state law claims should not be dismissed. Upon receipt of all parties' responses, the court acknowledged defendants' contention that the court cannot exercise supplemental jurisdiction over state law claims when the underlying federal claims have been dismissed for lack of subject matter jurisdiction. Nevertheless, consistent with plaintiff's request, on July 11, 2014, the court dismissed without prejudice each of plaintiff's remaining claims as to the San Bernardino International Airport. On July 15, 2014, the Water District filed its Notice of Appeal to the U.S. Court of Appeals for the Ninth Circuit. Briefing is scheduled for early next year.

The Water District owns approximately 22.5 acres of vacant land, a portion of which is subject to avigation easements created in July 1951 by a condemnation action brought by the United States to protect navigable airspace for Norton Air Force Base. Norton was closed in March 1994. By quitclaim deed, recorded December 1999, the United States granted certain real property, formerly part of the Base, to the airport authority. In the event the airport authority or any subsequent transferee failed to meet, comply, or observe any term, condition, reservation or restrictions, the United States retained a reversionary interest in the title, right of possession, and any other rights transferred by the deed.

Plaintiff alleges that the airport authority engaged in "substantial Federally-funded construction" in 2006 and cites to FAA's Advisory Circular for the definition of the RPZ. Plaintiff also contends the airport authority abandoned the avigation easements on May 15, 2012, when it approved the 2012 Airport Layout Plan (ALP), which depicts the new structures at the end of Runway 3. Finally, plaintiff asserts that "FAA's official

approval of the 2012 ALP on June 27, 2012" constituted the United States' affirmative approval to abandon the avigation easements, as well as the United States' abandonment of its reversionary interest in the avigation easements.

Court Orders Post-Argument Mediation in Challenge to New Commercial Service at Snohomish County Airport/Paine Field

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

On May 5, 2014, after the case had been briefed, the court sua sponte issued an Order to Show Cause why the petition should not be dismissed as moot based on news reports that negotiations between the airlines and Paine Field had ceased. Petitioners' brief was filed May 15, and respondent's brief was filed on May 23. Neither party believes the matter should be dismissed as moot. On June 9, the court ordered the parties to be prepared to discuss at oral argument whether the petitioners have standing, focusing on whether the petitioners' alleged injuries are "certainly impending." Oral argument in this case was heard June 18th in Seattle. On June 19, after no objections were raised by either party, the court stayed the appeal for a period not to exceed eighteen months, or until not later than December 18, 2015. The matter was referred to the Ninth Circuit Mediation Office to establish mutually acceptable conditions under which the parties may seek lifting the stay. The parties have met with the Circuit Mediator and reached agreement regarding conditions upon which the stay may be lifted. In the event that the airport sponsor (Snohomish County) provides the federal respondents with conclusive evidence of a viable funding arrangement for the construction of the terminal evaluated in FAA's December 2012 ROD and accompanying EA for Paine Field, as well as an estimated date on which that construction is expected to proceed, the parties shall notify the court within 30 days. Upon receipt of notice from the parties that this condition is satisfied, this court will lift its stay and consider the merits of the petition for review.

Briefs Filed, First Circuit Dispenses With Oral Argument in Case Challenging New Satellite-Based Departure Procedure at Boston Logan Airport

On August 5, 2013, three community associations representing Milton, Fairmont Hill, and Hyde Park, Massachusetts, and thirteen residents of Readville and Milton,

Massachusetts filed a petition for review pro se of FAA's Final Environmental Assessment, Finding of No Significant Impact and Record of Decision (FONSI/ROD) implementing an air traffic control Area Navigation (RNAV) standard instrument departure (SID) on Runway 33 Left (33L) at Boston-Logan International Airport (BOS or Logan) in the U.S. Court of Appeals for the First Circuit. The request for review in Fleitman, et al v. FAA (1st Cir. No. 13-1984) arose from an Environmental Assessment (EA) studying the proposed action. The purpose of the proposed action was to increase the efficiency of the air traffic control departure procedures at Logan and in the Boston TRACON's adjoining/overlying airspace by using NextGen technology. The EA studied the no action alternative and the proposed alternative. The proposed alternative overlays as closely as possible, given existing RNAV design criteria the Runway 33L conventional vector procedure (LOGAN SIX) until the first waypoint, then transitions to join the other RNAV routes from the other BOS runways. The Runway 33L RNAV SID is designed to remain within the historical jet tracks that depart Runway 33L. The conventional vector procedure, LOGAN SIX, will remain in use for non-RAV capable jet aircraft and turboprop aircraft.

On June 4, 2013, after completion of the EA, the FAA issued the FONSI/ROD finding that the proposed action did not result in a significant impact over the studied impact areas included in the EA and selected the proposed project for implementation.

On May 14, 2014, petitioners filed their brief in support of their petition for review. Petitioners' primary assertion was that there were "critical flaws" in the data used in environmental analysis that rendered it and the FONSI/ROD meaningless. To support this claim, petitioners' asserted a laundry list of deficiencies in the environmental assessment. Primarily, petitioners argued that FAA's noise analysis was incorrect, including a broad challenge to the DNL metric and the computer model (Integrated Noise Model) used in the noise analysis.

FAA filed its response brief on August 6, and pointed out that its environmental analyses supported its finding and that petitioners' myriad challenges lacked merit and weres "vague, perfunctory and completely unsupported." Petitioners filed a reply brief on September 19, again primarily challenging the agency's noise analysis. On September 30, the court submitted the case for review on the briefs; thus no oral arguments will be held.

Local Community Group Challenges FAA Decision Approving Runway Safety Area Improvements at JFK

On March 10, 2014, FAA issued a Final Environmental Assessment and Finding of No Significant Impact and Record of Decision (FONSI/ROD) approving amendment of the airport layout plan and potential federal funding to enhance the safety of Runway 4L/22R at New York City's John F. Kennedy International Airport (JFK). These actions will be completed, in part, to comply with Public Law 109-115, which directs that "not later than December 31, 2015, the owner or operator of an airport certificated under 49 U.S.C. 44706 shall improve the airport's runway safety areas to comply with the Federal Aviation Administration design standards required by 14 C.F.R. Part 139 …" On May , 2014, Eastern Queens

Alliance (EQA) filed a Petition for Review in the U.S. Court of Appeals for the Second Circuit challenging FAA's FONSI/ROD. Eastern Queens Alliance v. FAA (2d Cir. No. 14-1612).

A runway safety area (RSA) is a defined surface surrounding the runway that is prepared or suitable for reducing the risk of damage to aircraft in the event of undershoot, overrun, or excursion from the runway. RSA dimensional standards have increased over time. The predecessor to today's standard extended only 200 feet beyond the ends of the runway. Today, a standard RSA can be as large as 500 feet wide, extending 1,000 feet beyond each runway end. FAA increased these dimensions more than 20 years ago to accommodate larger and faster aircraft and to address higher safety expectations of aviation users.

The proposed project involved displacing the Runway 4L arrival threshold 460 feet to the north to provide 600 feet of required undershoot RSA, constructing 728 feet of new runway pavement on the north side of Runway 4L/22R to maintain adequate departure length on Runway 22R while providing the required 1,000 feet of overrun RSA, and rehabilitating and widening Runway 4L/22R from 150 to 200 feet. These proposed actions, alternatives, and environmental consequences were analyzed and disclosed in a draft environmental assessment (EA). A revised draft EA was re-circulated for public comment after the Port Authority of New York and New Jersey (Port Authority) modified the proposed action to eliminate the need to remove trees in Idlewild Park.

In June 2014, EQA asked FAA to administratively stay its decision. After a review of the claims raised by EQA, FAA denied the request for an administrative stay. EQA then requested that the court stay the action pending a full judicial review. FAA opposed this request, as did the Port Authority. The Port Authority operates JFK and was granted intervenor status. On August 5, the court denied EQA's request for a stay and ordered an expedited briefing schedule. EQA filed its opening brief on September 11. In its brief, EQA alleges FAA's decision violated the NEPA, the Clean Air Act, the Endangered Species Act, and Executive Orders on environmental justice and floodplains. EQA questions the FAA's decision regarding the impact of noise on the local population, FAA's noise model and raises concerns about wildlife and air quality.

Petitioners Challenge Airport Expansion at Hillsboro Airport, Again

On April 21, 2014, five individuals and Oregon Aviation Watch, an Oregon non-profit organization, filed a Petition for Review of FAA's Final Supplemental Environmental Assessment, Finding of No Significant Impact, and Record of Decision (FONSI/ROD) for the new parallel runway 12L/30R project at Hillsboro Airport (HIO) in the U.S. Court of Appeals for the Ninth Circuit. Barnes, et al. v. USDOT (9th Cir. No. 14-71180).

This project was the subject of previous litigation. In 2011, the Ninth Circuit remanded the matter to FAA to consider the environmental impact, if any, of increased demand resulting from the expansion project. Barnes v. USDOT, 655 F.3d 1124 (9th Cir. 2011). FAA conducted this analysis as part of the Final Supplemental Environmental Assessment and issued the FONSI/ROD on February 21, 2014.

On May 9, 2014, FAA received a Request for Administrative Stay from petitioners, which was denied on June 30. On July 1, petitioners filed an Emergency Motion for Injunction Pending Appeal. The Ninth Circuit, in an Order dated July 30, denied Petitioners' request. On August 11, petitioners filed their opening brief, arguing that FAA had violated NEPA by failing to complete an Environmental Impact Statement instead of an EA and by failing to take a hard look at the indirect impacts of increasing capacity at HIO, including the failure to disclose any baseline data on lead pollution, the failure to follow EPA protocol to fully account for lead pollution from aircraft, and the failure to re-evaluate the indirect impacts to water quality.

Citizens Challenge Northern California OAPM

On August 7, 2014, FAA's public notice announced the availability of the Northern California Optimization of Airspace and Procedures in the Metroplex (NorCal OAPM) Final Environmental Assessment (EA) and Finding of No Significant Impact/Record of Decision (FONSI/ROD). On September 26, four citizens filed a Petition for Review with the U.S. Court of Appeals for the Ninth Circuit challenging the FAA's Final EA/FONSI/ROD authorizing implementation of the Northern California OAPM. Petitioners in Lyons, et al. v. FAA (9th Cir. No. 14-72991) challenge FAA's conclusion that there are no significant noise impacts. The NorCal OAPM involves changes in aircraft flight routes and altitudes to improve the efficiency of the National Airspace System in the Northern California region. Specifically, FAA is implementing optimized standard arrival and departure instrument procedures serving air traffic flows into and out of four Northern California airports: San Francisco International Airport, Oakland International Airport, Mineta San Jose International Airport, and Sacramento International Airport.

FAA Approvals of New Operations at Trenton Airport Challenged, Agency Files Motion to Dismiss

Frontier Airlines is the holder of an Air Carrier certificate and Operation Specifications (OpSpecs) issued pursuant to 49 U.S.C. § 44705 and is authorized to conduct operations under 14 C.F.R. Part 121. In September 2012, Frontier applied to amend its OpSpecs to add service at Trenton-Mercer County Airport (Trenton). Frontier made this request to the Flight Standards District Office located in Indianapolis, Indiana (Indianapolis FSDO), which is primarily responsible for administering its Air Carrier certificate. In its request for amendment of its OpSpecs, Frontier indicated that it would conduct one daily departure and one daily arrival at Trenton. On September 25, 2012, the Indianapolis FSDO approved the amendment to Frontier's OpSpecs to permit it to operate to and from Trenton.

Prior to approving the OpSpec amendment, FAA was required to determine that Frontier was capable of operating safely at Trenton and to comply with NEPA. An amendment to a carrier's OpSpecs is normally subject to a categorical exclusion if the OpSpec does not significantly change the operating environment of the airport, absent extraordinary circumstances. While first-time jet service would be interpreted as significantly changing the airport environment, the Indianapolis FSDO determined that Trenton had previously had jet service until September 15, 2007. Thus,

the amendment to Frontier's OpSpecs qualified for a categorical exclusion.

Frontier presented FAA with information concerning the potential for extraordinary circumstances, including an Emissions Inventory Summary to enable FAA to make a determination that the OpSpec amendment would not violate the Clean Air Act. Finally, with only two flights per day, the change to the OpSpecs was unlikely to result in an increase in noise sufficient to warrant a full noise analysis.

Frontier began service between Trenton and Orlando International Airport on November 16, 2012. Since beginning service, Frontier increased its service at Trenton, adding additional flights and new destinations. Frontier has also requested and been granted OpSpecs amendments to permit it to operate to additional airports. While the proposed service to the new airports has included Trenton, the service to and from Trenton was not a part of the approval of these OpSpecs amendments.

On April 28, 2014, BRRAM, Inc. (Bucks Residents for Responsible Airport Management) and individuals purportedly living under the flight path at Trenton sued in the U.S. District Court for the District of New Jersey alleging violations of NEPA and the APA in the issuance of the OpSpec amendments. The defendants in BRRAM, Inc. v. FAA, et al. (D.N.J. 14-02686) are FAA, the Mercer County Board of Chosen Freeholders, and Frontier.

On August 18, 2014, FAA filed a Motion to Dismiss for lack of jurisdiction, arguing that the challenged actions are orders of the FAA Administrator subject to judicial review exclusively in the federal courts of appeals under 49 U.S.C. § 46110. Additionally, 49 U.S.C. § 46110 requires the petition for review to be filed not later than 60 days after the order is issued. There are approximately four orders being challenged, the latest of which was issued on June 25, 2013, more than 60 days before the challenge was initiated.

FAA Files Second Motion to Dismiss Tulsa Airport's Amended Complaint in Lawsuit for Noise Abatement Program Costs

On November 14, 2013, the Tulsa Airports Improvement Trust (TAIT), manager and operator of the Tulsa International Airport, for and on behalf of Cinnabar Service Company, filed suit against FAA in the U.S. Court of Claims seeking a reversal of FAA's decision on eligible airport development costs, a determination that certain payments are eligible for reimbursement under FAA's grant program, the Airport Improvement Program (AIP), and attorney fees. Tulsa Airports Improvement Trust 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 AIP. TAIT asserts it made payments for actual costs incurred as part of its Noise Abatement Program and should be reimbursed for these payments in the sum of $705,913, plus interest as applicable. In short, TAIT attempts to hold the United States responsible for standby costs that were a direct result of a decision TAIT and Cinnabar made. FAA filed a motion to dismiss the complaint on February 21, 2014. During briefing on FAA's motion to dismiss, TAIT filed a motion for leave to amend its complaint, which FAA did not oppose because of the procedural confusion that might arise from two competing (and pending) motions. The court granted TAIT's motion for leave to file its amended

complaint and denied FAA's motion to dismiss the original complaint as moot.

On September 8, 2014, FAA filed its second Motion to Dismiss, again contending that TAIT failed to articulate why its claim should not be dismissed. FAA asserted in the motion that TAIT's claim for disputed standby costs falls within the exclusive jurisdiction of the federal courts of appeals pursuant to 49 U.S.C. § 46110. In addition, FAA contended that costs claimed under TAIT's AIP grant were time-barred. Finally, FAA argued that TAIT failed to state a claim upon which relief may be granted because TAIT's complaint demonstrated it suffered no damages.

Federal Highway Administration

Sixth Circuit Win in the Detroit Bridge Case

On June 20, 2014, the U.S. Court of Appeals for the Sixth Circuit affirmed the U.S. District Court for the Eastern District of Michigan's grant of summary judgment to defendants in a challenge to the New International Trade Crossing (NITC), a proposed new bridge connecting Detroit and Windsor, Canada. Latin Americans for Social and Economic Development, et al. v. FHWA, et al., 756 F.3d 447 (6th Cir. 2014). Appellants, the Detroit International Bridge Company (Bridge Company), owner of the only existing bridge between Detroit and Windsor, and a group of local public interest groups, alleged that the Agency violated NEPA and that the Agency's environmental justice analysis was deficient.

As an initial matter, the Sixth Circuit addressed FHWA's argument that the Bridge Company lacked standing. FHWA argued that because the Bridge Company demonstrated injury solely to its economic interests, its alleged injuries did not fall within NEPA's zone of interests. The court rejected FHWA's argument, holding that while economic injury alone is not within NEPA's zone of interests, the Bridge Company had alleged sufficient environmental injuries.

The court rejected each of the Bridge Company's arguments related to the agency's selection of a Preferred Alternative, which included contentions that the agency (1) failed to consider a reasonable range of alternatives; (2) failed to ensure the Canadian environmental review process was consistent with NEPA; (3) acted in an arbitrary and capricious manner in its evaluation of the No Build Alternative; and (4) illegally eliminated the Second Span as an alternative in light of the Bridge Company's franchise over the Detroit River. The court analyzed the process the FHWA used to identify, evaluate, and select or reject fifty-one possible combinations of alternatives. The Court found the FHWA's use of standardized evaluation criteria demonstrated use of a reasoned deliberative process to select among the alternatives. It held the agency "considered a reasonable range of alternatives and did not act arbitrarily and capriciously when it considered, but rejected other alternatives in favor of the Preferred Alternative."

The court found the Bridge Company's argument that FHWA abrogated its NEPA responsibility to Canada lacked merit, noting that NEPA does not apply to the Canadian review process and that Canada reviewed the project under its own environmental review process.

The Bridge Company also asserted that FHWA did not seriously consider the No Build Alternative, an argument the court also rejected. The court found that FHWA used the No Build Alternative as a benchmark for comparison of the alternatives and assessed 24 different kinds of impacts in that comparison analysis. This assessment constituted the "hard look" as required under NEPA.

The Bridge Company's argument that FHWA's process was deficient because it did not consider the company's alleged franchise rights was also rejected. The Court found the asserted franchise rights have nothing to with the environment or NEPA and have no viable connection to the agency's NEPA process.

The Bridge Company's allegations regarding Purpose and Need asserted that (1) FHWA's traffic methodology was flawed; (2) the agency failed to consider an investment grade traffic forecast; and (3) redundancy is not a supportable rationale for the Purpose and Need. Again, the court rejected each argument and deferred to the agency's definition of Purpose and Need. The court rejected the Bridge Company's contention that FHWA's traffic data was flawed. The court pointed out that the Bridge Company relied on the same traffic data to support its own analysis. It also noted that FHWA's traffic methodologies are subject only to a reasonableness review. The agency produced four working papers on traffic models, considered over 24 reports on traffic models and projections, took into account the effects of economic downturn and the declining automobile industry in its forecasts, and provided testimony from several sources establishing the traffic forecasts were reasonable. The court found this information showed FHWA's reliance on its traffic models was not unreasonable.

The court also found that FHWA's failure to consider the investment grade traffic forecast was not an abuse of discretion, holding that it did not relate to the Purpose and Need and rather was related to the question of whether private investors would invest in the NITC project. The court accepted the FHWA's reliance on reports that existing crossings will reach capacity and a new crossing is needed.

The Bridge Company also challenged the project's Purpose and Need by asserting that redundancy is a false rationale and that the new crossing would not provide any redundancy. The Court also rejected this argument, reasoning that FHWA could reasonably conclude that a new crossing would provide redundancy by providing a crossing option to address any disruption at the Bridge Company's Ambassador Bridge.

Appellants also alleged that the agency's environmental justice (EJ) analysis was flawed. In considering the environmental justice argument, the court first noted that the public interest group parties did not provide any support that they had a right to mount an EJ challenge under NEPA. The court set this issue aside and still rejected the argument that FHWA "predetermined" the location of the NITC and targeted the Delray area south of downtown Detroit as the U.S. bridge terminus. It found that the administrative record demonstrated an extensive process leading up to the selection of the Delray location and a thorough EJ analysis once the location was identified as a potential site, including consultation with community leaders, nearly 100 public meetings, hearings, workshops, and small-group and one-on-one interviews to identify minority and low-income populations. In support of its finding, the court noted that FHWA subjected all alternatives to the same analysis and evaluation process and

thoroughly considered community impacts as part of the scoping process. It found that FHWA concluded the project would have a disproportionately high impact on minority and low-income population groups, but developed a proper community and mitigation enhancement plan.

Sixth Circuit Upholds Favorable Decision in Ohio River Bridges Case

On August 7, 2014, the U.S. Court of Appeals for the Sixth Circuit affirmed the judgment of the U.S. District Court for the Western District of Kentucky, which had previously granted summary judgment in favor of defendants, FHWA and the state departments of transportation of Kentucky and Indiana, on all claims in Coalition for the Advancement of Regional Transportation v. FHWA et al., 576 Fed. Appx. 477 (6th Cir. 2014). The decision closely tracks the district court's analysis of the issues.

This case challenged the Ohio River Bridge Project. The Project will construct two new bridges over the Ohio River in the Louisville Metro area. Plaintiffs alleged that FHWA violated NEPA, the Clean Water Act, Clean Air Act, Title VI of the Civil Rights Act, and Department of Transportation Act tolling statutes in approving the Second Final Supplemental Environmental Impact Statement (SFEIS) for the Project. On July 17, 2013, the district court issued a Memorandum Opinion and Order Sustaining all Motions for Summary Judgment by the Defendants, denying all remaining claims and motions by the Plaintiffs, and dismissing the case with prejudice.

Appellant, the Coalition for the Advancement of Regional Transportation (CART), appealed to the Sixth Circuit on September 13, 2013. CART claimed the lower court erred when it found for Defendants on all claims in summary judgment and when it refused to consider evidence outside of the administrative record brought forth by Plaintiffs. Briefing concluded in January 2014 and oral argument was held on June 25, 2014.

In affirming the district court, the court first found that, contrary to appellant's claims, the project's purpose and need statement was not arbitrary and capricious, nor was it too narrowly drawn. It found it to be reasonable because it was supported by a detailed study of existing traffic, safety, and other cross-river mobility problems, and described the use of extensive socio-economic data and state-of-the-art modeling of future travel conditions to project future transportation needs of the region. The court also disagreed with allegations that FHWA had "pre-committed" to the purpose and need statement and that the public comment period was a "sham process," finding the allegations to be vague, conclusory, and without support in the record.

The opinion next held that appellant's claim that FHWA did not adequately review a reasonable range of alternatives was unsupported and that appellant offered no record citation to identify an alleged option or alternative that was reasonable but ignored by the defendants. The court found FHWA's analysis of the alternatives to be reasonable and that the alternatives preferred by appellant were rationally eliminated.

Lastly, the court addressed plaintiff's allegations that the SFEIS was arbitrary and capricious because it did not address certain impacts, including greenhouse gas emissions, "ultra-fine" airborne particulates,

road runoff, tunnel spoil and bridge piers. The court found that defendants considered the potential environmental impacts of each proposed alternative and that FHWA fully discharged its duties under NEPA. The court found that greenhouse gas emissions were adequately considered, FHWA did not irrationally omit consideration of "ultra-fine" airborne particulates, that FHWA took the requisite "hard look" at the environmental impacts of road runoff, that tunnel spoil concerns were sufficiently addressed, and that defendants took a "hard look" at the environmental impacts regarding bridge piers.

The court also upheld the lower court's dismissal of Appellant's Title VI claim against the state DOTs.

Sixth Circuit Upholds FHWA's Floodplains Analysis in Kentucky Project

On March 12, 2014, the U.S. Court of Appeals for the Sixth Circuit affirmed the decision by U.S. District Court for the Western District of Kentucky granting summary judgment to FHWA. Karst Environmental Education and Protection, Inc. v. FHWA, 559 Fed. Appx. 421 (6th Cir. 2014). The district court concluded that FHWA had adequately addressed the impacts of a Bowling Green, Kentucky, highway project, and complied with NEPA's procedural requirements. Plaintiff, Karst Environmental Education and Protection (Karst Environmental) had raised numerous challenges to the FHWA's actions in the district court, but pursued only one on appeal - that FHWA failed to comply with federal law regarding the impact of 100-year floodplains associated with sinkholes in issuing the EIS.

Karst Environmental argued that NEPA, its implementing regulations, Executive Order 11988 and various Department of Transportation and FHWA regulations required FHWA to analyze and consider alternatives to 100-year floodplain impacts in the highway project area. More specifically, Karst Environmental claimed that FHWA ignored record evidence regarding sinkhole flooding, environmental impacts, and the work of other federal agencies and failed to identify 100-year floodplains as required by NEPA and implementing regulations. Plaintiff alleged that comments in response to the draft EIS made by Karst Environmental's co-founder, and statements made by individuals and organizations about sinkhole flooding during the environmental assessment process, put FHWA on notice of its argument. The court found the comments were vague and were not of sufficient clarity to alert FHWA that these concerns still needed to be assessed through a separate 100-year floodplains study by FHWA or that the law required FHWA to do so. The court concluded that Karst Environmental did not meet its "obligation of meaningful participation" in the administrative process by stating its position with clarity at a time when FHWA could have taken necessary corrective actions without undue delay. Accordingly, the court agreed with federal defendants that Karst Environmental did not raise the issue in sufficient detail in the administrative proceedings to preserve it for appeal and, therefore, forfeited the issue.

Partial Remand by Fourth Circuit in Bonner Bridge Appeal

On August 6, 2014, in a unanimous decision, the U.S. Court of Appeals for the Fourth Circuit affirmed in part and reversed in part the decision of the U.S. District Court for the Eastern District of North Carolina in

Defenders of Wildlife v. North Carolina Department of Transportation, 2014 WL 3844086 (4th Cir. 2014). The court remanded the 4(f) portion of the decision to the district court.

On September 16, 2013, the district court had found for defendants FHWA and NCDOT on all counts, granting summary judgment in their favor and dismissing the case. The district court concluded that defendants complied with both NEPA and Section 4(f) of the DOT Act with respect to the Bonner Bridge replacement project located in the Outer Banks of North Carolina. In their appeal, plaintiffs alleged that the district court erred in its determinations regarding: 1) whether defendants engaged in improper segmentation in violation of NEPA; 2) the applicability of the joint planning exception to Section 4(f); and 3) whether defendants complied with the substantive requirements of Section 4(f). The appellate court affirmed the district court's determination that defendants complied with NEPA, but reversed the district court's determination that a special exception, the joint planning exception, freed Defendants from complying with Section 4(f). That portion of the decision has been remanded for further proceedings.

With respect to their NEPA claim, plaintiffs argued that defendants violated the basic principles of NEPA and engaged in illegal 'segmentation' by issuing a ROD that disclosed only one initial segment of the Selected Alternative, a segment that would commit defendants to significant future construction of a road and bridges through a National Wildlife Refuge, while failing to disclose any specific plans for that construction. The appellate court found that nothing in NEPA prohibits defendants from authorizing only one part of the project provided that doing so does not commit them to a course of action that has not been fully analyzed. The court found no reason why defendants could not analyze the entire project in a single environmental document as was done in the project. Additionally, the court stated that defendants were not required to approve the entire project in a single ROD if their NEPA documents adequately analyzed and disclosed the impacts of the entire project, including those portions yet to be approved. The court further found defendants did not attempt to circumvent NEPA nor did they refuse to study "the overall impacts of the single overall project." Rather, defendants conducted a full, site-specific analysis, and the decision to implement the project one phase at a time did not violate NEPA. The court thus affirmed the district court's granting of summary judgment on the NEPA issue.

With respect to the Section 4(f) claims, the court took issue with FHWA's reliance on the joint planning exception (23 C.F.R. § 774.11(i)) for this case. The court stated that the exception has two conditions for its use: first, the transportation facility must be "formally reserved . . . before or at the same time" as the establishment of the Section 4(f) property, and second, the transportation facility and the Section 4(f) property must be concurrently or jointly planned or developed. The United States relied on documents and maps showing use and providing references to the road in the years closely following the issuance of the 1938 Executive Order that created the Pea Island National Wildlife Refuge to argue that the transportation facility was reserved at the time the refuge was created. The Fourth Circuit rejected Defendants' argument, finding that only evidence that sheds light on the status of NC 12 on or before April 12, 1938, the date of the Executive Order

establishing the Refuge, would be relevant and that there was no evidence that met this condition. The court also stated that even if the evidence showed the existence of the road at the same time the refuge was created, defendants did not provide evidence that there was "concurrent or joint planning or development" of NC 12 and the refuge. The court found defendants fell far short of demonstrating they should be entitled to summary judgment on this issue. Accordingly, the court reversed the district court's application of the joint planning exception and remanded the issue for further proceedings.

The court did not decide whether defendants met the substantive requirements of Section 4(f). It stated that since a Section 4(f) analysis is irrelevant if the joint planning exception applies, it would not engage in such an inquiry. The court instructed that should the district court determine the exception inapplicable, it must then examine the record to determine whether FHWA complied with the substantive requirements. To the extent the district court previously analyzed the substantive requirements, the appellate court expressly vacated that analysis with instructions to follow the legal framework set out in its opinion.

District Court Upholds FHWA's Outdoor Advertising Guidance

On June 20, 2014, the U.S. District Court for the District of Columbia granted the motions for summary judgment filed by the government and by the intervenor, the Outdoor Advertising Association of America (OAAA), in Scenic America, Inc. v. LaHood, et al., 2014 WL 2803084 (D.D.C. 2014). Scenic America's lawsuit challenged FHWA's 2007 guidance that permitted digital billboards under certain conditions. Scenic America claimed that the 2007 guidance substantively changed the lighting standards in the Federal/State Agreements (FSA) that the States must enforce to effectively control outdoor advertising. Accordingly, Scenic America argued that the FHWA should have used notice-and-comment rulemaking to promulgate substantive new regulations. The plaintiff claimed that FHWA, in issuing its 2007 guidance, violated both the Highway Beautification Act (HBA) and the APA. The court rejected all of Scenic America's arguments.

The HBA requires each State to sign an agreement with the Secretary that establishes the size, lighting and spacing standards for conforming signs (*i.e.*, legal off-premise advertising signs erected in commercial or industrial areas along the highways covered by the act). The FSAs were executed in the late 1960's and the early 1970's. Most FSAs include a phrase prohibiting "flashing, intermittent, or moving lights" on legal billboards. The court noted the change in outdoor-advertising technology since the FSAs were executed. The FHWA Division Offices began to receive proposals from the States to modify their State regulations to allow digital billboards as technology changed. The FHWA issued guidance to its Division Offices on the subject in September 2007. The document, entitled *Guidance On Off-Premise Changeable Message Signs*, stated that "Proposed [State] laws, regulations, and procedures that would permit [digital billboards] subject to acceptable standards…do not violate a prohibition against 'intermittent' or 'flashing' or 'moving' lights as those terms are used in the various FSAs…." The acceptable criteria included the duration of the signs' messages and the transition time between the messages. Electronic signs that had "stationary messages for a reasonably fixed

time" would not constitute a prohibited moving sign under the FSA.

The key question in the case was whether the 2007 guidance was a substantive rule or an interpretative rule. The court explained the difference as "[a] substantive rule…creates new law, whereas an interpretative rule simply explains existing law." The court did acknowledge that the difference was "the hazy boundary between substantive and interpretative rules, territory 'enshrouded in considerable smog.'" The court applied the U.S. Court of Appeals for the District of Columbia Circuit's four-factor test to determine if a rule is substantive or interpretative to navigate through the haze. The first factor is whether, in the absence of a rule, the federal agency has an adequate legislative basis to confer benefits or ensure the performance of duties. The judge found that the HBA regulations and the FSAs already provided FHWA with authority to accept or reject a State's proposal to permit digital billboards. The 2007 guidance just spelled out in detail the meaning of one particular provision in the FSA. The court noted that sometimes an interpretation can run 180 degrees counter to the plain meaning of a regulation, in which case the agency could be deemed to be trying to constructively amend the regulations without notice and comment rulemaking. This was not the case here; the FSAs did not ban digital billboards because there was no such thing when the FSAs were executed. The FHWA could interpret the FSAs to ban digital billboards, but it was not compelled to read them that way.

The court quickly disposed of the second and third factors in the test: whether the guidance was published in the C.F.R., or if FHWA invoked its legislative authority to issue the guidance. The court found that the answer was "no" for each of the above two factors. The fourth and final factor to be considered in determining if a rule is substantive or interpretative is whether it effectively amends a substantive rule. The court found that the 2007 guidance did not repudiate the FSAs nor was it irreconcilable with them. Therefore, the 2007 guidance is interpretative under D.C. Circuit's test.

Scenic America also argued that the 2007 guidance was improper substantive rulemaking and thus violated the APA because it significantly revised a definitive interpretation of the HBA that FHWA had maintained for years. Scenic America's argument was based upon the Alaska Hunters doctrine, a D.C. Circuit interpretation that holds an agency must still use notice-and-comment procedures if an interpretation significantly revises a previous definitive interpretation of a rule. This doctrine is currently the subject of a Supreme Court case, Perez v. Mortgage Bankers Association. See supra pp. 8-9. An interpretative rule is considered a significant revision of a previous interpretation if it cannot "reasonably be interpreted as consistent" with the prior interpretation. The court noted that there were differing earlier interpretations of the phrase "flashing, intermittent or moving" lights. A 1990 FHWA memorandum, for example, interpreted all off-premise variable message signs as violating the lighting provisions in the FSA. The court found that a 1996 FHWA memorandum was the most recent statement of FHWA's position on the subject before the 2007 guidance. The 1996 memorandum allowed tri-vision signs (signs that have three messages and slats that change in certain intervals) if State law and the State's interpretation of its FSA permitted such signs. The 1996 memorandum stated that "changeable message signs are acceptable for off-premise signs, regardless of the type of technology

used" (emphasis by court). The 2007 guidance did not significantly revise this position. In the court's words, it was "simpatico" with the 1996 position by FHWA.

The court rejected the remaining two counts in Scenic America's claim with brief discussion. Because the 2007 guidance did not create new lighting standards, the FHWA was not required to amend the FSA with each State to allow digital billboards. The 2007 guidance just reasonably interpreted terms in the existing FSA. Scenic America declined to bring an independent challenge to the validity of the interpretation *(i.e.*, that the interpretation was arbitrary and capricious), so the court held that "a loss on its first count also translates into a loss on its second." On Scenic America's last count, that the 2007 guidance established lighting standards for billboards that are inconsistent with "customary use," the court determined that the FSA established the customary use and the 2007 guidance merely interpreted those provisions.

Favorable Decision for FHWA in the West Tennessee Megasite and Solar Farm Projects Litigation

On August 6, 2014, the U.S. District Court for the Western District of Tennessee granted summary judgment in favor of FHWA in Bullwinkel v. U.S. Department of Energy, et al. (W.D. Tenn. No. 11-1082). FHWA's limited role in the projects at the heart of this lawsuit involved the construction of a welcome center, parking area, and interstate access. Plaintiff's overall and true concern dealt with DOE ARRA projects, which included a proposed West Tennessee Megasite and Solar Farm. Plaintiff's claims against all other defendants in this case had been dismissed, and FHWA was the last remaining defendant. Certain claims against FHWA had been dismissed as well, leaving the only remaining claims to be those brought pursuant to the APA, NEPA, and Farm Protection Policy Act (FPPA).

The court found plaintiff's arguments to be speculative and conclusory in regards to his assertion that FHWA's CE was in violation of NEPA. The court disagreed that the welcome center would cause significant impacts to growth and land use and stated that plaintiff provided no reasonable explanation for his suggestion that the construction of an interstate rest area would have such an effect. The court found that FHWA had reasonably considered the effect the project would have on growth and land use and that plaintiff failed to establish how FHWA's conclusions in regard to the CE were arbitrary or capricious.

Additionally, the court found plaintiff's attempt to enforce the FPPA untenable since the Act explicitly precludes enforcement through private suits. Furthermore, the court found that CEQ regulations the plaintiff attempted to rely upon to assert his claims did not apply to CEs.

In analyzing remaining claims under NEPA, the court found that FHWA met all legal standards and that plaintiff's claims failed. The court found ample evidence in FHWA's record demonstrating that FHWA considered all environmental effects of the project, specifically, impacts on wetlands, wastewater, stormwater, and air pollution. The court stated that FHWA's conclusions as to the welcome center's minimal impact on air and water were well supported and not arbitrary and capricious. Regarding indirect and cumulative impacts, the court found that FHWA did consider such effects

while being under no duty to do so. The court found FHWA was not required to address connected actions as plaintiff alleged. The court found FHWA adequately documented mitigation measures in its CE approval. Lastly, the court held that because DOE, not FHWA, had jurisdiction over the solar farm, FHWA had no obligation to "early coordinate" with DOE as plaintiff suggested.

Louisiana District Court Dismisses Complaint Alleging Violation of the Federal Aid Highways Act

On July 30, 2014, the U.S. District Court for the Western District of Louisiana granted federal, state, and local government defendants' motions to dismiss in Willis Knighton Medical Center et al., v. LaHood, et al., 2014 WL 3748541 (W.D. La. 2014). On May 6, 2013, Willis-Knighton Medical Center and Finish 3132 Coalition, L.L.C filed a civil complaint seeking a declaratory judgment and injunctive relief to stop federal, state, and local government sponsors of the LA 3132 Inner Loop Extension project from beginning the NEPA process after an initial Stage 0 feasibility study did not recommend advancing plaintiffs' preferred alternative for detailed consideration in a proposed Environmental Assessment (EA). Willis-Knighton Medical Center is a nonprofit corporation that owns and operates a retirement community located in the vicinity of Louisiana State Highway 3132 (LA 3132) near Shreveport, Louisiana. Finish 3132 Coalition, L.L.C. is an organization "formed for the purposes of promoting the completion of LA 3132 to the Port as originally planned."

The lawsuit concerns the LA 3132 Inner Loop Extension, which would extend the road roughly from an interchange with I-49 to the future location of I-69. Plaintiffs alleged flaws with the public hearing process associated with the Stage 0 feasibility study and with the alternative routes selected for consideration in the final Stage 0 Report. Specifically, plaintiffs alleged the open house-style public hearings associated with the Stage 0 Report did not allow attendees to speak to an audience of other attendees, which purportedly precluded a public exchange of information, thereby limiting and discouraging public participation in violation of 23 U.S.C. §§ 128, 134, and 135 and 23 C.F.R. § 771.111. Plaintiffs also alleged that the public meetings failed to adequately identify alternatives being considered in the Stage 0 feasibility study and improperly limited the choice of reasonable alternatives in violation of 40 C.F.R. § 1506.1. They asked the court to enjoin defendants from proceeding with a Stage 1 study and evaluation of alternatives until defendants conducted a town hall-style public hearing to present a revised Stage 0 feasibility study featuring a broader range of alternative routes.

The court held that it lacked subject matter jurisdiction under the APA, 5 U.S.C. § 702, because to date there has been no final federal agency action. The court further opined that none of the other statues or regulations cited by Plaintiffs, including the Federal Aid Highway Act, 23 U.S.C. § 101, *et seq.*, provide a private cause of action apart from the APA.

Adverse Decision, Settlement in FOIA Fee Waiver Case

On July 30, 2014, FHWA and Southern Environmental Law Center (SELC) settled a FOIA case originally filed on June 20, 2013. The settlement in Southern Environmental Law Center v. FHWA (N.D. Ga. No. 13-2073) was reached after an adverse ruling by

the court on cross-motions for summary judgment. Plaintiffs alleged that FHWA failed to comply with FOIA when the agency refused to grant the plaintiff's request for a fee waiver associated with their request for records.

SELC sought a fee waiver for a FOIA request for records relating to a transportation project in Georgia called the Northwest Corridor Managed Lane Project. SELC alleged that its FOIA request would contribute significantly to the public understanding of the operations or activities of FHWA. SELC also alleged that FHWA was untimely in issuing a decision on the fee waiver request and that, therefore, the fees must be waived as a matter of law under FOIA. Finally, SELC alleged that FHWA engaged in a pattern and practice of denying its fee waiver requests. The parties filed cross motions for summary judgment in the case.

The district court ruled on the cross motions for summary judgment. First, the court found that disclosure of the requested records is in the public interest and therefore directed FHWA to grant SELC's fee waiver request. Second, the court considered SELC's claim that the fee waiver denial decision by the agency was untimely and the waiver should therefore be granted. The court found that this claim was moot because it had already found that a fee waiver was appropriate. Finally, the court ruled that FHWA had not engaged in a pattern and practice of denying SELC's fee waiver requests.

Court Dismisses Alaskan Way Viaduct Challenge

On March 27, 2014, Elizabeth Campbell, a private citizen, filed a civil action for declaratory and injunctive relief arising under the APA alleging violations of NEPA against the FHWA, the Washington State Department of Transportation, and the City of Seattle. Campbell v. FHWA et al. (W.D. Wash. No. 14-454).

Plaintiff sought to (1) obtain a declaration that defendants' failure to conduct a reevaluation of the Alaskan Way Viaduct Replacement Project (AWV Project) after the tunnel boring machine ceased tunneling violates NEPA; (2) compel defendants to conduct a reevaluation of the AWV Project in light of all the new information and circumstances surrounding the delay due to the halting of tunneling; and (3) enjoin defendants from continuing with the AWV Project unless and until the court determines that the violations of law alleged in the complaint have been corrected.

FHWA filed a motion to dismiss for lack of subject matter jurisdiction, in part because FHWA had already completed a NEPA reevaluation related to the boring machine repair work. In June 2014, the other defendants filed a response in support of FHWA's motion to dismiss. Plaintiff failed to respond to the motion. Because plaintiff is pro se, the court gave the plaintiff another opportunity to respond and ordered that plaintiff respond to the motion to dismiss no later than July 25, 2014. Plaintiff did not respond by the required date, and accordingly, the court granted FHWA's motion to dismiss without prejudice.

Challenge to Arkansas Project Partially Dismissed

The City of Dardanelle, Arkansas, and the Yell County Wildlife Federation have challenged the approval of an intermodal project located along the Arkansas River, near the cities of Russellville and Dardanelle, in City of Dardanelle, et al. v.

USDOT (E.D. Ark. No. 14-98). The proposed project is for the construction of a slackwater harbor and an intermodal center. The facilities would serve as a regional transfer and distribution point for goods to be shipped to the rest of the country by rail, waterway, and interstate highway. The complaint alleges that in approving the Final Environmental Impact Statement (FEIS) and issuing the Record of Decision (ROD), defendants failed to comply with NEPA and its implementing regulations regarding the analysis of alternatives, direct, indirect and cumulative impacts, and potential mitigating measures. Further, plaintiffs allege violations of Section 4(f), the Endangered Species Act (ESA), the Clean Water Act and its implementing regulations, and the regulations of the Federal Emergency Management Agency. The named defendants include FHWA, the U.S. Army Corps of Engineers (Corps), the Arkansas Highway and Transportation Department (AHTD), and the River Valley Regional Intermodal Facilities Authority (Authority).

This project dates back to the 1990s. The Corps had prepared an Environmental Assessment (EA) in November 1999 and issued a Finding of No Significant Impact (FONSI) in January 2000 for the proposed slackwater harbor facility. The preferred site alternative was an 882-acre tract located on the eastern bank of the Arkansas River near Russellville in Pope County, Arkansas. This site is located across the river from the City of Dardanelle. The Corps' slackwater harbor EA did not include the proposed intermodal facilities. During this time, the State of Arkansas created the Authority to oversee the construction and the operation of the intermodal facility. The intermodal project and the slackwater harbor were the recipient of several Congressional earmarks. In 2000, the City of Dardanelle sued the Corps over its EA/FONSI asserting that the required analysis was lacking, especially as it did not include a study of the intermodal center.

In 2002, an EA was initiated by FHWA for the harbor's ancillary intermodal facilities with the Authority serving as Project Sponsor. Technical assistance was provided to the Authority by AHTD. Shortly after starting the NEPA process, FHWA determined that an EA was insufficient to address the Project's anticipated impacts. An EIS was then started to examine all of the Project's components with FHWA acting as the lead federal agency and the Corps serving as a cooperating agency. Following this decision, in 2003, the U.S. District Court for the Eastern District of Arkansas entered an injunction against the Corps halting the slackwater harbor project until an EIS was prepared. That injunction still remains in effect.

The Draft EIS for the Project was published in March 2006. Given the passage of time, a Supplemental Draft EIS was then completed and issued in August 2010. The Final EIS was approved on March 18, 2013. The ROD was signed and issued by FHWA on November 13, 2013. The site chosen for the project was the same one from the Corps' earlier EA. On February 19, 2014, the City of Dardanelle and the Yell County Wildlife Federation filed suit. The Corps filed a motion to dismiss asserting that it was not a proper party as it had not taken any final agency action. Federal defendants also jointly asserted that plaintiffs' claims brought under the ESA were premature as they had not issued the required 60-day notice letter prior to filing suit.

In support of its motion to dismiss, the Corps' brief recognized that a party may seek judicial review of an agency action

under the APA but only when such action constitutes a "final agency action." "Final agency action" is a term of art that requires two conditions be met. First, the action "must mark the 'consummation' of the agency's decisionmaking process," and "must not be of a merely tentative or interlocutory nature." Bennett v. Spear, 520 U.S. 154, 177-78 (1997) (citations omitted). Second, the action "must be one by which 'rights or obligations have been determined,' or from which 'legal consequences will flow.'" Id. at 178 (citations omitted). The brief pointed out that neither condition had been met with respect to the Corps. During the Project's NEPA process the Corps had served as a cooperating agency. While it had assisted FHWA in reviewing aspects of the Project, particularly in floodplain studies, and provided technical assistance, it had not yet issued its own ROD for the Project. Simply serving as a cooperating agency to FHWA on the EIS did not confer jurisdiction in this matter.

Plaintiffs alleged that the Final EIS and 2013 ROD constituted a final agency action within the purview of the APA against both FHWA and the Corps. Plaintiffs insisted that judicial review was proper on two grounds: (1) because the Corps, as a cooperating agency, prepared a Floodplain Analysis Report ("Floodplain Report") that was critical to the decision issued by FHWA in the Final EIS; and (2) so that plaintiffs could access all of the technical documents that the Corps considered in issuing its Report. Plaintiffs attempted to create a sliding scale of involvement for cooperating agencies and to assert that APA jurisdiction could be found against those agencies that provided extensive technical assistance or information that directly lead to the issuance of a ROD by another agency.

The court found plaintiffs' arguments lacking. It found that the APA and its case law required an either/or situation: either the cooperating agency had issued its own final decision or it had not. The court found that the Corps had not yet taken any final agency action as required by the APA. Accordingly, the Corps was not properly a party, and the court dismissed all the NEPA claims against the Corps.

The Corps and FHWA also asserted in the motion to dismiss that plaintiffs had failed to comply with the jurisdictional requirements of the ESA. In sum, plaintiffs had not sent either defendant the required 60-day notice letter. Plaintiffs conceded this claim, and the court dismissed the ESA claims filed against both federal defendants.

FHWA Seeks Summary Judgment in Buy America Case

In a December 21, 2012, memorandum, the FHWA clarified the scope of its long-standing general waiver for manufactured products under the FHWA's Buy America requirement, 23 U.S.C. § 313. This memorandum clarified that, consistent with past interpretations and practice, "predominately" steel and iron manufactured products are subject to Buy America requirements and identified those as materials that have 90% or more steel or iron content in them. The memorandum also clarified that off-the-shelf commercial products are not intended to be covered by the Buy America requirements.

On October 4, 2013, a coalition of businesses and associations requested the U.S. District Court for the District of Columbia to enjoin the December 2012 memorandum claiming that by establishing the 90% threshold and clarifying the applicability of Buy America to off-the-shelf

commercial products, FHWA had issued a substantive rulemaking that did not follow appropriate notice-and-comment procedures under the APA and rulemaking analysis under the Regulatory Flexibility Act. On April 4, 2014, the United States filed its Answer denying plaintiffs' allegations in United Steel, Paper and Forestry, Rubber Manufacturing, Energy, Allied Industrial and Service Workers International Union, et al., v. FHWA, et al. (D.D.C. No. 13-1301). In its motion for summary judgment, filed on July 11, 2014, the United States argued that the 2012 memorandum was an interpretive rule that did not require notice-and-comment and rulemaking analysis and that the memorandum was consistent with past interpretations and practices. Petitioners filed a reply and opposition motion on July 28 and the United States filed its reply on August 22.

Lawsuit Challenging Single Point Urban Interchange Project Continues

On September 30, 2014, the U.S. District Court for the Middle District of Florida in RB Jai Alai, LLC v. Secretary of Florida Department of Transportation, et al. (M.D. Fla. 13-1167) denied plaintiff's motion for a preliminary injunction against further construction of a single point urban interchange (SPUI) in Casselberry, Seminole County, Florida. This was plaintiff's second attempt at obtaining a preliminary injunction. The court held that plaintiff did not meet the legal standard for preliminary injunctions and failed to meet its burden of proof. Plaintiff filed its original Complaint for Declaratory and Emergency Injunctive Relief on August 1, 2013, challenging the proposal to build the SPUI and alleging NEPA violations. Plaintiff claims to own property and business in the area affected by the project.

The proposed project involves the intersection of SR 15/600 (US 17/92) at SR 436 located in the southwest region of Seminole County, FL. The SPUI will elevate 4 lanes of SR 15/600 (US 17/92) and SR 436. The project is approximately 0.65 miles in length along SR 15/600 (US 17/92). A northbound exit ramp will include a dedicated U-Turn lane under the bridge as well as the southbound exit ramp. The SPUI includes an elevated overpass over SR 436 as well as the addition of bike lanes, sidewalks and drainage improvements. A documented Categorical Exclusion (CE) was done in 2004 and a Reevaluation was completed in 2012. The project is a design-build project.

Plaintiff asserts that defendants' actions in advancing the project have been contrary to law, arbitrary and capricious, and an abuse of discretion under NEPA and the APA. It claims the CE and PD&E study conducted for the project are based on old and flawed traffic data. Plaintiff commissioned its own traffic study dated May 9, 2012, which produced different results indicating the flyover or elevated overpass is not needed. Plaintiff prefers an at grade intersection improvement referred to as the "Boulevard Plan." Plaintiff also asserts that the 2012 re-evaluation was flawed and inadequate due to relying on dated information.

On June 17, 2014, the court granted the defendants' motion to dismiss and denied plaintiff's request for certification of the administrative record and request to allow discovery. However, the court allowed plaintiff a final opportunity to amend its complaint to allege proper standing.

Plaintiff filed its second amended complaint on July 1, 2014. Defendants filed separate motions to dismiss plaintiff's second amended complaint, and on July 29, 2014, plaintiff filed a second motion for a preliminary injunction. Defendants opposed this motion. On September 19, 2014 the court denied FHWA's motion to dismiss plaintiff's second amended complaint and granted in part and denied in part FDOT's motion to dismiss. RB Jai Alai, LLC v. Secretary of Florida Department of Transportation, et al., 2014 WL 4683127 (M.D. Fla. 2014). The court found that plaintiff had standing to pursue its case, however, due to the six-year statute of limitations, any allegations against the 2004 CE were time barred. Remaining claims against the 2012 reevaluation will be allowed to proceed.

In its decision denying plaintiff's second motion for a preliminary injunction, the court discussed the background of the case, the timing of plaintiff's motion, the applicable legal standard, and its specific findings regarding the balance of harms, irreparable harm, and the public interest.

In discussing the timing of plaintiff's motion, the court noted at the outset that plaintiff had also filed a similar motion in a parallel state court lawsuit with no success. The court then found that plaintiff's delay in seeking its second preliminary injunction in the federal lawsuit was inexcusable. The court said plaintiff could have sought the injunction before construction on the project had started rather than waiting until six months afterwards. Additionally, the court noted that plaintiff waited nearly a year after its emergency motion was denied in state court and approximately eight months after the denial in the instant case to file again.

In discussing its findings, the court did not address the first prong of the four-pronged test for obtaining a preliminary injunction as it felt it did not need to reach the merits of plaintiff's allegations given that plaintiff failed to meet its burden as to the second, third, and fourth prerequisites for injunctive relief. The court went on to discuss the balance of harms and found that at best, plaintiff identified potential harms that, when balanced against the known harms to defendants, were insufficient to warrant the extraordinary remedy of an injunction. The court found that the balance of potential harms suggested by plaintiff was merely speculative at this juncture of the case and that it therefore failed to meet its burden. In discussing irreparable harm, the court found again that plaintiff failed to meet its burden. Plaintiffs incorrectly contended that the mere allegations of violations of NEPA were sufficient to carry the burden of clearly establishing irreparable harm. The court found that plaintiff was left with the alleged economic harm, which was not enough to prove irreparable harm. Lastly, the court discussed the public interest and found that the risk of environmental harm was refuted by FDOT's affidavit. The court found that plaintiff's prediction of a potential outcome – adverse economic impact on the area – was insufficient to outweigh the known harms to the public interest as proven by defendants. The court found that the public interest appears best served by the completion of the project, and accordingly, plaintiff again failed to meet its burden

Lawsuit Filed in Florida District Court against the Crosstown Parkway Extension Project

On May 12, 2014, Conservation Alliance of St. Lucie County and the Treasure Coast Environmental Defense Fund, Inc. (Indian

Riverkeeper) filed a complaint in the U.S. District Court of the Southern District of Florida challenging FHWA's decision to approve the construction of a six-lane bridge across the North Fork St. Lucie River Aquatic Preserve and Savannas Preserve State Park (the Preserves). Conservation Alliance of St. Lucie County et al., v. USDOT, et al., (S.D. Fl. No. 14-14192).

The Crosstown Parkway Extension project involves the use of two Section 4(f) resources, the Savannas Preserve and the Aquatic Preserve, including approximately fifteen acres of public park and conservation land, approximately eleven acres of wetlands, and 3.95 acres of upland forested habitat, and would require relocation of the Halpatiokee Canoe and Nature Trail, the only public access point to the Aquatic Preserve from the Savannas Preserve in the project area. The project area also includes three types of essential fish habitat and includes an area listed by the Florida Fish and Wildlife Commission as a "Biodiversity Hotspot" that contains "Priority Wetlands." The FEIS for the project was completed on November 14, 2013. The ROD was issued on February 24, 2014.

Plaintiffs assert that defendants violated the DOT Act and the APA when they considered and then approved the proposed project after (1) arbitrarily and capriciously eliminating feasible and prudent alternatives which avoid impacts to public preservation land and (2) failing to conduct all possible planning to minimize harm from the Proposed Project to the Preserves. Plaintiffs also assert defendants failed to consider all non-avoidance alternatives in their Least Harm Analysis. The complaint is solely based on Section 4(f) claims; no other environmental review claims have been asserted.

Complaint for Declaratory and Injunctive Relief Filed against Monroe Connector/Bypass

On June 23, 2014, plaintiffs Clean Air Carolina, North Carolina Wildlife Federation, and Yadkin Riverkeeper filed a new complaint seeking declaratory judgment and a preliminary injunction to halt progress on the Monroe Connector/Bypass. Clean Air Carolina, et al. v. North Carolina Department of Transportation, et al. (W.D.N.C. No. 14-338). FHWA and its North Carolina Division Administrator, in his official capacity, are among those named as defendants. Plaintiffs allege that defendants violated NEPA and the APA. The complaint concerns the Monroe Connector/Bypass, a proposed 20-mile toll road project east of Charlotte that would extend from U.S. 74 near I-485 in Mecklenburg County to US 74 between the towns of Wingate and Marshville in Union County. On May 15, 2014, FHWA published a combined Final Environmental Impact Statement/ Record of Decision (FEIS/ROD) for the project.

Plaintiffs allege in their complaint that defendants (1) conducted an arbitrary alternatives analysis rooted in flawed traffic forecasts and failed to adequately consider reasonable alternatives in light of these forecasts; (2) failed to adequately analyze and consider direct, indirect and cumulative impacts of the project as a result of a model flaw that inadequately considers transportation infrastructure; (3) misled the public and other agencies by making false statements regarding the project's purpose and anticipated impacts and refused to correct public misunderstandings; (4) engaged in pre-determined decision-making irreversibly

and irretrievably committing to a plan of action prior to completing NEPA analysis; (5) improperly issued a combined Final SEIS and ROD bypassing public comment on signification new information presented in the Draft SEIS; and (6) failed to supplement the SEIS in light of new information they obtained from plaintiffs subsequent to publication of the Draft SEIS. Based on these objections, plaintiffs seek a declaratory judgment that defendants violated NEPA, vacatur of the ROD, preliminary and permanent injunctive relief, and attorney's fees.

On August 18, 2014, federal and state defendants filed motions to change venue from the Western to the Eastern District of North Carolina, where plaintiffs' previous lawsuit challenging the same project had been filed. On September 2, state defendants filed their answer. Federal defendants' answer was filed on October 24. On September 3, plaintiffs filed their response to defendants' motions to change venue. Federal and state defendants argue venue in the Eastern District is proper and will promote judicial economy because the judge who presided over the previous challenge to the project is already familiar with much of the administrative record that will be at issue on this case. The record is not only voluminous, but contains appreciable amounts of technical traffic forecasting and land use modeling data and analysis. Plaintiffs assert that venue in the Western District is appropriate because the project is located there, as are two plaintiff organizations and other citizens opposed to the project. On September 15, federal and state defendants filed replies.

Federal Motor Carrier Safety Administration

Court of Appeals Dismisses Challenge to FMCSA's CSA Program

On June 17, 2014, in Alliance for Safe, Efficient and Competitive Truck Transportation, et al. v. FMCSA et al., 755 F.3d 946 (D.C. Cir. 2014), the U.S. Court of Appeals for the District of Columbia Circuit dismissed a petition for review brought by a group of trucking companies, transportation intermediaries, and trade associations challenging FMCSA's Compliance, Safety, Accountability (CSA) program and related Safety Measurement System (SMS). Petitioners asserted that a series of PowerPoint presentations on SMS posted on FMCSA's website in 2012 should have been subject to notice and comment rulemaking because they represented an "astonishing" change in agency policy. Petitioners further claimed that the PowerPoint materials constituted a de facto procedure for issuing a safety rating in violation of 49 U.S.C. § 31144 and that FMCSA abdicated its statutory obligation to provide uniform safety fitness standards, thereby exposing shippers to a patchwork of state tort law and placing the burden of assessing safety on shippers. Petitioners also argued that the use of allegedly flawed SMS methodology unfairly prejudices the ability of small carriers to compete in the market.

The court found that the PowerPoints were not astonishing and merely described SMS. The petition for review was untimely because it was filed more than two years after FMCSA's April 2010 Federal Register notice announcing SMS and more than one year after SMS implementation in December 2010. The court determined that the

agency's guidance in the PowerPoints was not a new, far-reaching, or astonishing reversal of agency policy as characterized by petitioners. The PowerPoint presentations stated that review of a motor carrier's official safety rating and insurance status in FMCSA data systems, as well as the carrier's prioritization status in SMS, provides "an informed, current and comprehensive picture of a motor carrier's compliance standing" and recommended that the public use such FMCSA information "to help make sound business judgments." This guidance was substantively no different than the guidance FMCSA provided in the 2010 Federal Register notice announcing SMS. Because the PowerPoint presentations did not amount to a rule, regulation, final order, change in policy, or substantive reconsideration or alteration of the SMS methodology, they were not subject to judicial review.

FMCSA Prevails in TRO Proceeding

On or about June 12, 2014, Cavalier Coach Corporation, a motor carrier of passengers, filed a Motion for an Ex Parte Temporary Restraining Order, Preliminary Injunction and Permanent Injunction in the U.S. District Court for the District of Massachusetts in Cavalier Coach Corporation v. Foxx, et al., (D. Mass. No. 14-12499). FMCSA had issued a proposed conditional safety rating to the motor carrier on April 30. Cavalier had submitted a request for upgrade on or about May 15 and sought a TRO to prevent the conditional safety rating from becoming final before FMCSA could complete its review of the upgrade request. A hearing was held on June 13, in which the court denied plaintiff's request for the TRO and preliminary injunction, finding that it had not shown irreparable harm. The parties filed a joint stipulation dismissing the case on August 12.

Briefing Completed in Tenth Circuit TransAm Trucking Case

On August 26, 2014, the parties completed briefing on the merits in TransAm Trucking, Inc. v. FMCSA (10th Cir. No. 14-9503). TransAm alleges that FMCSA failed to comply with an October 17, 2013, settlement agreement that resolved TransAm's previous Tenth Circuit petition for review, TransAm Trucking, Inc. v. FMCSA (10th Cir. No. 13-9572). In that case, TransAm challenged FMCSA's citation of a violation of 49 C.F.R. § 395.8(k)(1) and the resulting proposed "conditional" safety rating. Pursuant to the settlement agreement, FMCSA agreed to issue an amended compliance review that did not contain any reference to the violation or the proposed "conditional" safety rating. FMCSA removed the "conditional" rating from the compliance review, leaving the document as an unrated review. Because the initial investigation of TransAm had begun as a focused investigation, rather than a comprehensive compliance review applying the full safety rating methodology in 49 C.F.R. Part 385, Appendix B, the investigation could not have resulted in a "satisfactory" safety rating under FMCSA regulations. Therefore, removal of the "less than satisfactory" or "conditional" safety rating in the amended compliance review did not include an updated safety rating. TransAm had a current "satisfactory" safety rating, however, due to corrective action taken pursuant to 49 C.F.R. § 385.17.

TransAm claims that a "Compliance Review" by regulatory definition must contain a safety rating and that FMCSA's failure to issue TransAm an amended compliance review that contains a

"satisfactory" safety rating violates the settlement agreement. TransAm asserts its claim as an appeal under the APA and alleges that an email from FMCSA's Department of Justice counsel to TransAm's attorney stating that FMCSA had complied fully with the settlement agreement constitutes a "final order" within the meaning of the Hobbs Act, 28 U.S.C. § 2342, which governs judicial review of FMCSA's safety-related final actions. In the alternative, TransAm argues the case should be transferred to the district court pursuant to 28 U.S.C. § 2347(b)(3). FMCSA argues in response that there is no final order within the meaning of the Hobbs Act and that the court has no ancillary jurisdiction to enforce the settlement agreement. Without jurisdiction under the Hobbs Act, FMCSA further argues the court lacks jurisdiction under section 2347(b)(3) to transfer the case to the district court and that there is no issue of material fact that requires such a transfer. Finally, FMCSA argues that it fully complied with the settlement agreement. TransAm also filed a parallel action in the U.S. District Court for the District of Kansas, TransAm Trucking, Inc. v. FMCSA (D. Kan. No. 14-02015), which was stayed on April 28, 2014, pending a ruling by the Tenth Circuit.

District Court Consolidates Cases Challenging the Agency's Pre-Employment Screening Program

On April 29, 2014, the U.S. District Court for the District of Columbia District consolidated Owner-Operator Independent Drivers Asssociation, et al. v. USDOT, et al. (D.D.C. No. 12-1158) and Weaver, et al. v. FMCSA, et al., (D.D.C. No. 14-0548) after the U.S. Court of Appeals for the District of Columbia Circuit held in Weaver, et al. v. FMCSA, et al., 744 F.3d 142 (D.C. Cir. 2014), that it lacked Hobbs Act jurisdiction and transferred the case to the District Court. In both cases, OOIDA challenges 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). The lawsuits 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).

On June 2, the government filed a motion to dismiss based on (1) lack of plaintiffs' standing for violations no longer in PSP, (2) lack of jurisdiction on the FCRA claim because Congress did not waive sovereign immunity for such lawsuits, (3) failure to exhaust administrative remedies for one plaintiff, and (4) lack of an identifiable final agency action subject to APA review.

Safety Advocates and Teamsters Seek Writ of Mandamus Addressing Agency's Delay in Issuing Entry-Level Driver Training Rule

On September 18, 2014, Advocates for Highway and Auto Safety, the International Brotherhood of Teamsters, and Citizens for Reliable and Safe Highways petitioned the U.S. Court of Appeals for the District of Columbia Circuit for a writ of mandamus in Advocates for Highway & Auto Safety, et al. v. Foxx, et al, (D.C. Cir. No. 14-1183), alleging that FMCSA failed to promulgate a final regulation on entry-level driver training (ELDT) requirements for commercial motor vehicle operators within one year, as required by 49 U.S.C. § 31305 (MAP-21). MAP-21 directed the Agency to issue,

within one year of its enactment, final regulations establishing minimum ELDT requirements for an individual operating a commercial motor vehicle. The petitioners claim that the Agency's failure to issue final regulations on the topic by that date, October 1, 2013, constitutes an unreasonable delay, resulting in agency action "unlawfully withheld" and "not in accordance with law," in violation of the APA, 5 U.S.C. § 706. Petitioners request that the Court of Appeals compel the agency to publish proposed regulations on ELDT requirements within 60 days of the court's order and to issue a final rule within 120 days thereafter.

FMCSA Sued under FTCA for 2011 Motorcoach Crash, One Case Dismissed

On April 2, 2014, two plaintiffs filed a complaint against DOT, FMCSA, and FMCSA's Southern Service Center alleging gross negligence and seeking $36 million in damages under the Federal Tort Claims Act (FTCA) in connection with the May 31, 2011, Sky Express bus crash in which the plaintiffs suffered serious injuries. Plaintiffs in Chhetri, et al. v. United States (N.D. Ga. No. 14-00975) allege that one or more FMCSA employees, acting within the course and scope of their employment, were grossly negligent when they granted Sky Express a 10-day extension of the effective date of an unsatisfactory safety rating in violation of the regulatory requirements for such extension. Plaintiffs also allege that FMCSA did not have statutory authority to grant Sky Express a 10-day extension of the unsatisfactory safety rating.

On April 28, 2014, a second lawsuit arising from the May, 2011 Sky Express bus crash, Pornomo v. United States (E.D. Va. No. 14-301) similarly alleged that DOT and FMCSA were negligent in the wrongful death of plaintiff's father and seeking $3 million in damages.

In both cases, the Government has filed motions to dismiss asserting that plaintiffs' claims are barred by the FTCA's discretionary function exception and the FTCA's private liability analogue requirement.

Plaintiffs allege that the discretionary function exception to FTCA liability does not apply because FMCSA exceeded its authority under 49 U.S.C. § 31144(c)(2) when it failed to place Sky Express out of service on the 46th day after the agency issued a proposed unsatisfactory safety rating. Sky Express had requested a change in the safety rating based upon corrective action undertaken by the carrier, which included "a written description of corrective actions taken, and other documentation" for FMCSA to consider pursuant to 49 C.F.R. § 385.17(c). The FMCSA Field Administrator for the Southern Service Center determined that he could not decide whether to grant a carrier's request for change in rating solely based on the documentation submitted by the carrier and elected to consider other available information – in this case information collected during a second compliance review conducted to determine whether the corrective action was sufficient. Currently, a request for change in safety rating based upon corrective action will not stay the effective date (46th day) of a final Unsatisfactory safety rating that requires a carrier to cease operations under 49 C.F.R § 385.17(f). At the time of the crash, however, 49 C.F.R § 385.17(f) provided that "if the motor carrier has submitted evidence that corrective actions have been taken . . . and the FMCSA cannot make a final determination within the 45-day period, the

period before the proposed safety rating becomes final may be extended for up to 10 days at the discretion of the FMCSA."

On October 20, 2014, the U.S. District Court for the Eastern District of Virginia granted FMCSA's motion to dismiss the complaint in the Pornomo case for lack of subject matter jurisdiction under the FTCA based on the discretionary function exception. Pornomo v. United States, 2014 WL 5341021 (E.D. Va. 2014).

Commercial Drivers File Class Action for Alleged Privacy Act Violations under the Pre-employment Screening Program, FMCSA Moves to Dismiss

On July 18, 2014, six commercial motor vehicle drivers filed a class action complaint for damages against FMCSA in the U.S. District Court for the District of Massachusetts alleging violations of the Privacy Act, 5 U.S.C. § 552a. Plaintiffs in Flock, et al. v. USDOT, et al. (D. Mass. No. 14-13040) argue that FMCSA intentionally, willfully, and unlawfully disseminated to motor carrier employers through its Pre-Employment Screening Program (PSP) inspection reports containing driver safety violations that had not been determined by the Secretary to be "serious driver-related safety violations," as defined in 49 U.S.C. § 31150 (PSP authorizing statute).

Plaintiffs seek to certify a class of all drivers for which FMCSA prepared a PSP report for dissemination to potential employers for the two-year period immediately preceding the filing of the complaint. Plaintiffs claim that the $10.00 fee required to obtain a copy of a PSP report from NIC, FMCSA's contractor, is unauthorized under 49 U.S.C. § 31150 and imposes on them an economic burden, and further, that the unlawful PSP reports have diminished the economic value of their services as commercial motor vehicle drivers. Plaintiffs seek statutory damages of $1,000 per safety violation that was not certified as a "serious driver-related safety violation" for each of the plaintiff-drivers and members of the certified class.

On October 24, 2014, FMCSA filed a motion to dismiss plaintiffs' complaint. FMCSA argued first that plaintiffs have failed to allege injury caused by FMCSA's actions sufficient to establish their standing to sue the agency. Second, FMCSA argued that there can be no Privacy Act violation where, as here, the agency releases the safety records of a motor carrier driver only 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).

Tour Operator Sues FMCSA for Failure to Reinstate Operating Authority

On June 3, 2014, in Haines v. FMCSA, et al. (E.D. Mich. No. 14-12194), Roger Haines, the owner of Haines Tours located in Gladwell, Michigan, sued FMCSA, the Field Administrator for the 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 members of his family – including several children – to ride in the

luggage compartment of a motorcoach on a trip from Michigan to an amusement park in Ohio. The Imminent Hazard Order required that Haines immediately cease his tour bus operations.

Haines claims that he had been using the luggage compartment as a sleeper berth and FMCSA approved such use under 49 C.F.R. § 393.76, the regulation governing sleeper berths. In fact, Haines was cited in a 2010 Compliance Review for having a non-compliant sleeper berth in two of the three buses that the agency inspected. A letter from the FMCSA Assistant Administrator for Policy dated May 16, 2011, indicates that a sleeper berth can be located in a cargo compartment so long as it meets all of the requirements of 49 C.F.R. § 393.76, which include adequate ventilation and other safety features. Haines regained his authority to conduct intrastate operations in March 2012, and his authority to operate interstate on January 14, 2013, following FMCSA's determination that he was fit, willing, and able to comply with the Federal Motor Carrier Safety Regulations.

Haines's constitutional claims, based on violations of the right to due process and equal protection under the law, allege 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" as accorded to other tour bus operators under the Equal Protection Clause of the 14th Amendment to the Constitution. Haines alleges that the decision to vacate the rescission of the imminent hazard stemmed from personal animus flowing from his cooperation in media coverage of the situation.

Federal Railroad Administration

Ninth Circuit Rules in Favor of FRA in Hours of Service Laws Case

On May 8, 2014, the U.S. Court of Appeals for the Ninth Circuit denied the United Transportation Union's (UTU) petition for review of FRA's application of the "designated terminal" provision of the hours of service laws (HSL). United Transp. Union v. LaHood, et al., 750 F.3d 1109 (9th Cir. 2014).

In a May 18, 2012, letter to FRA, UTU claimed that the Union Pacific Railroad's (UP) establishment of a designated terminal at Big Rock/Wash, California would violate the existing collective bargaining agreement (CBA) with UP and sought an order from FRA to prevent the establishment of the proposed designated terminal. When FRA investigated UTU's claims, UP responded that the proposed designated terminal is to accommodate new service and that the CBA permits such a designated terminal to be established on a trial basis while negotiations continue or the matter is submitted to arbitration. In FRA's September 30 response letter to UTU, the agency agreed with UTU that the HSL require that the location of designated terminals be determined by reference to CBAs applicable to a particular crew assignment, but FRA pointed out that the agency lacks the statutory authority to make that determination. FRA's letter further stated that only a body duly constituted

under the Railway Labor Act (RLA) is authorized to render such a determination. On October 28, 2012, UTU filed a petition for review challenging FRA's decision.

In its decision, the Ninth Circuit found in FRA's favor and upheld FRA's conclusion that it lacked jurisdiction to resolve the dispute between UP and UTU because it was fundamentally an issue of contract interpretation, which is outside the scope of FRA's authority. The panel found that FRA can review a CBA to determine which terminals are designated terminals. FRA cannot, however, interpret a CBA to determine how a terminal should be designated. As the panel concluded that the dispute pertained to the interpretation of the CBA, it held that the dispute should be governed by the resolution procedures of the RLA, and was beyond the adjudicatory powers of FRA.

Federal Transit Administration

Court Issues Summary Judgment Order and Narrow Injunction in Los Angeles Regional Connector Light Rail Project

On May 29, 2014, the U.S. District Court for the Central District of California ruled on the parties' cross-motions for summary judgment in three NEPA challenges to segments of the Regional Connector Project, a 1.9-mile, mostly underground, light rail line connecting the existing Metro Blue, Gold, and Exposition lines through downtown Los Angeles, ruling in favor of FTA and the Los Angeles County Metropolitan Transportation Authority (LACMTA) on all claims, except one. Plaintiffs in Today's IV, Inc. v. FTA (C.D. Cal. No. 13-00378) (Today's IV), 515/555 Flower Associates, LLC v. FTA (C.D. Cal. 13-00453) (Flower Associates), and Japanese Village, LLC v. FTA (C.D. Cal. No. 13-00396) (Japanese Village) each filed lawsuits challenging FTA's Record of Decision (ROD) for the Project. Plaintiff in Japanese Village alleged that defendants failed to adequately evaluate the impacts from constructing and operating a light rail line under the Japanese Village Plaza in Little Tokyo. In Flower Associates and Today's IV, plaintiffs alleged that defendants failed to adequately evaluate tunneling alternatives to cut-and-cover construction along a segment of Flower Street in the Financial District.

The court rejected all but one of plaintiffs' claims. Today's IV, Inc., et al. v. FTA, 2014 WL 3827489 (C.D. Cal. 2014). On that one claim, the court held that FTA and LACMTA violated NEPA because their Final Environmental Impact Statement failed to evaluate the sequential excavation mining (SEM) and open-face tunneling alternatives to cut-and-cover construction in the Financial District. As a result, on September 12, 2014, the court issued a Remedy Order, which: (1) ordered FTA to further evaluate the SEM and open-face tunneling alternatives; (2) partially vacated the ROD with respect to FTA's approval of the cut-and-cover construction in the Financial District; and (3) issued a narrow injunction enjoining cut-and-cover construction in the Financial District. Pursuant to the Remedy Order, plaintiffs, FTA, and LACMTA filed competing proposed Final Judgments that further define the scope and procedure for lifting the narrow injunction and are awaiting the District Court's Final Judgment.

FTA Prevails on Summary Judgment in Challenge to Oregon Project, Plaintiff Appeals

On July 16, 2014, the U.S. District Court for the Western District of Washington ruled in FTA's favor on summary judgment in Our Money Our Transit v. FTA, 2014 WL 3543535 (W.D. Wash. 2014), a NEPA challenge to the Environmental Assessment (EA) and Finding of No Significant Impact for the Western Eugene Emerald Express project. The court held that (1) the project history demonstrated that the alternatives analysis (AA) process conducted by Lane Transit District (LTD) evaluated all reasonable alternatives and, that a proper EA has a less rigorous standard for alternative evaluations than what is required for an Environmental Impact Statement; (2) that the project's prior planning and AA actions show that the project purpose and need were the result of a long, careful and deliberate process and, therefore, was not unreasonable; (3) the project NEPA documents show that the potential environmental impacts were sufficiently analyzed; and (4) that the mitigation measures were sufficiently detailed and developed to a reasonable degree.

The project consists of adding 8.8-miles (round trip) bus rapid transit (BRT) service to two existing BRT lines in Eugene, Oregon. The new alignment, located within and primarily along existing public roadways, includes the construction of 5.9 miles of new BRT lanes and 13 new BRT stations. The project sponsor, LTD, expects to begin building the project in 2014-15 and to start operating it in 2017. FTA, which was initially the sole defendant named, was later joined by LTD.

On September 10, 2014, Our Money Our Transit appealed the district court decision to the U.S. Court of Appeals for the Ninth Circuit. Our Money Our Transit v. FTA (9th Cir. 14-35766). Opening briefs are due December 19, 2014, and January 19, 2015, respectively.

Cross-Motions for Summary Judgment Filed in Lawsuits Challenging Westside Subway Extension Project in Los Angeles

Beverly Hills Unified School District (School District) and City of Beverly Hills (City) filed lawsuits in the U.S. District Court for the Central District of California challenging FTA's Record of Decision (ROD) for the Westside Subway Extension Project, a 9-mile heavy rail subway that would operate from the existing Metro Purple Line to the West Los Angeles Veteran's Administration Hospital. Beverly Hills Unified School Dist. v. FTA (C.D. Cal. No. 12-09861); City of Beverly Hills v. FTA (C.D. Cal. No. 13-01144). The School District and City generally allege that FTA and the Los Angeles County Metropolitan Transportation Authority (LACMTA), the local project sponsor, (1) violated NEPA by failing to adequately review the safety and seismic impacts related to constructing and operating the Century City station and resulting alignment under the Beverly Hills High School; (2) violated Section 4(f) of the Department of Transportation Act by failing to evaluate the use of the Beverly Hills High School campus, which plaintiffs claim is a protected historic and recreational resource protected under Section 4(f); and (3) violated the Clean Air Act by failing to conduct a hot spot analysis of construction sites. On July 10, 2014, plaintiffs filed their respective motions for summary judgment. On August 17, FTA filed oppositions to the

plaintiffs' summary judgment motions, and filed its cross-motions for summary judgment. Briefing on the parties' cross-motions for summary judgment will be completed by November 13, and the District Court is scheduled to hear arguments on the cross-motions for summary judgment on December 4.

Lawsuit Filed Challenging Maryland Transit Administration's Purple Line

On August 26, 2014, three plaintiffs filed suit in the U.S. District Court for the District of Columbia seeking declaratory and injunctive relief for alleged violations of NEPA, the Federal-Aid Highway Act, the Endangered Species Act (ESA), and the Migratory Bird Treaty Act, related to a Final Environmental Impact Statement and Record of Decision for the Maryland Transit Administration's Purple Line, a proposed light rail project, approximately 16.2 miles in the length, that will connect major activity centers in Montgomery and Prince George's Counties in Maryland. Friends of the Capital Crescent Trail, et al. v. FTA, et al. (D.D.C. No. 14-01471).

The ESA allegations relate to the project's alleged potential effects on two types of amphipods (micro-crustaceans) living in Rock Creek Park. The Hay's Spring amphipod is the only listed endangered species in the District of Columbia, and the Kenk's amphipod is a candidate species for listing. As part of the NEPA review, a Section 7 consultation, under the ESA, was initiated with the U.S. Fish & Wildlife Service (FWS), an additional named defendant. FWS determined that the Purple Line Project, which crosses Rock Creek Park at the border of Chevy Chase, Maryland, would have no effect on either species.

Plaintiffs also allege that there are significant environmental impacts upon the Capital Crescent Trail. A portion of the Purple Line will be constructed within a railroad right-of-way known as the Georgetown Branch, which is included in the Capital Crescent Trail. In 1988, Montgomery County purchased the right-of-way from CSX with intentions to use it for a transit line and trail. In 1996, the County removed the tracks to maintain an interim trail for bicycle and pedestrian use, while working with the State of Maryland towards the development of both a permanent trail and transit facility. The Georgetown Branch is located adjacent to numerous homes in the Chevy Chase area.

New Lawsuit Challenges Minneapolis-Area Light Rail Line

On September 9, 2014, a complaint was filed against FTA challenging the Minneapolis-area Southwest Light Rail Transit project on NEPA grounds. Land Parks Alliance v. FTA, et al. (D. Minn. No. 14-3391). The proposed project is a 16-mile light rail line that would run from downtown Minneapolis through the communities of St. Louis Park, Hopkins, Minnetonka, and Eden Prairie. The Draft Environmental Impact Statement (DEIS) for the project was issued in October 2012. FTA anticipates issuing a Supplemental DEIS in 2015. Plaintiff, an environmental group, is unhappy with the project sponsor's preferred alternative, which was selected through a municipal consent process. The project sponsor, Metropolitan Council, is a co-defendant. Plaintiff is requesting an injunction to stop approval of design plans and funding until a Final Environmental

Impact Statement and Record of Decision are issued.

Maritime Administration

MARAD Prevails in Federal Circuit Contract Disputes Act/False Claims Act Case, Petition for Rehearing Filed

On July 15, 2014, the U.S. Court of Appeals for the Federal Circuit ruled completely for the government in Veridyne Corporation v. United States, 758 F.3d 1371 (Fed. Cir. 2014). The Court of Federal Claims had awarded quantum meruit of $1 million in unpaid invoices to Veridyne, notwithstanding the fact that the Claims Court found that Veridyne's entire $2.2 million contract claim was forfeited under the Special Plea in Fraud due to Veridyne's knowing submission of false invoices and a false claim under the Contract Disputes Act's (CDA). Veridyne did not appeal the forfeiture ruling, and the Federal Circuit reversed the Claims Court's quantum meruit award, holding that the claim forfeiture under the Special Plea in Fraud precluded any recovery by Veridyne. The Federal Circuit affirmed the lower court's finding that Veridyne's contract extension was obtained by fraud and affirmed the award of $1.3 million in False Claims Act (FCA) penalties, $11,000 each for all 127 invoices, and the award of $568,802 in damages under the CDA's antifraud provision for Veridyne's unsupported invoices. The court also affirmed that the same false act in a certified claim may be a source of liability under both the FCA and the CDA. Veridyne filed a petition for panel rehearing or rehearing en banc on August 28. No response is permitted unless ordered by the court, and to date, the court has not issued such an order.

Dismissal of All Counts in Maritime Security Program Challenge

On September 5, 2014, the U.S. District Court for the Eastern District of New York granted MARAD's motion to dismiss in Liberty Global Logistics LLC, et al. v. MARAD, 2014 WL 4388587 (E.D.N.Y. 2014). This case involved three Maritime Security Program (MSP) operating agreements (OAs). Under the Maritime Security Act of 2003, the Secretary of Transportation, in consultation with the Secretary of Defense, is required to establish a fleet of active, commercially viable, militarily useful, privately-owned vessels to meet national defense and other security requirements. The MSP supports the operation of 60 U.S.-flag vessels in the foreign commerce of the United States. Participating operators are required to make their ships and commercial transportation resources available upon request of the Secretary of Defense during times of war or national emergency.

Plaintiffs attempted to challenge on APA grounds (1) the award of MSP OA #108 to Argent Marine Management, (2) the transfer of MSP OA #98 from Wallenius Lines, Holding, Inc. to American International Shipping, LLC, and (3) the replacement of the vessel PATRIOT by OCEAN FREEDOM under MSP OA #67 and associated circumstances.

Conjoined with the APA challenges were counts asserting MARAD's failure to comply with FOIA requirements regarding materials sought in a series of plaintiffs' requests to underpin their APA claims. Liberty also challenged MARAD's right to redact business confidential information

from its FOIA responses because MARAD had released similar information in a different FOIA matter involving different entities.

On July 15, 2013, the government moved to dismiss all counts based on a series of jurisdictional arguments, including lack of subject matter jurisdiction, standing, and mootness. The court dismissed all twelve counts against the agency, largely on jurisdictional grounds. The court found that it lacked subject matter jurisdiction over a number of the counts because the Administrative Orders Review (Hobbs) Act, 28 U.S.C. § 2344, requires that challenges of a company's citizenship under 46 U.S.C. § 50501 be filed in the Court of Appeals for the Federal Circuit within sixty (60) days after the administrative actions became final. The court also ruled that Liberty lacked standing on some of its claims because it could not demonstrate that MARAD's approval of these MSP transfers caused Liberty's claimed injuries. The court held that the transfers of OAs were essentially private matters in the hands of the transferor owners, who, upon disapproval, merely could have kept their ships in the program. The court also agreed with the government's position that Liberty's claim as to OA #108 with the transfer to Argent was mooted by the change of citizenship priorities mandated by the National Defense Authorization Act for 2013, PL 112-239, 126 Stat. 1632 § 3508(c).

As to the FOIA claims, the court found that MARAD's alleged failure to produce documents was moot because the documents in question at the time the complaint had been filed had been turned over by the agency once they were discovered. The court refused to let Liberty identify additional documents that it now contended MARAD had failed to produce.

With respect to Liberty's claim of improper redactions, the court found that Liberty agreed that FOIA Exemption 4 protects trade secrets and commercial or financial information and the redactions in question would normally have been entitled to be redacted. The fact that MARAD had produced unredacted versions of similar documents pertaining to a different company pursuant to a different FOIA request was not a ground to find that these redactions were improper. The court found no case law to support Liberty's argument that MARAD's failure to redact other, allegedly similar information in response to a FOIA request of an unrelated party in an unrelated matter constituted a waiver of the right to redact the documents in this matter.

Anchorage Sues MARAD over Port of Anchorage Intermodal Expansion Project

On February 28, 2014, the Municipality of Anchorage (Anchorage) filed suit against MARAD in the U.S. Court of Federal Claims seeking unspecified damages for breach of contract in connection with the Port of Anchorage Intermodal Expansion Project (the Project). Municipality of Anchorage v. United States (Fed. Cl. No. 14-166). MARAD entered into a 2003 Memorandum of Understanding and a subsequent 2011 Memorandum of Agreement with Anchorage to facilitate construction of the Project. MARAD also contracted with Integrated Concepts and Research Corporation (ICRC) as a prime contractor. Construction began in 2008, but the contractors soon encountered significant difficulties. Subsequent studies showed that the Project design was unsuitable for the location, and the project has been on hold since 2011.

Anchorage's complaint focuses on MARAD's alleged failure to oversee ICRC, as allegedly required under a 2003 MOU and a 2011 MOA. The complaint also alleges that MARAD improperly settled contractor claims for equitable adjustment in 2012 and that MARAD breached duties owed to Anchorage as a third-party beneficiary under the MARAD-ICRC contract.

On June 27, 2014, the government moved to dismiss the case for lack of jurisdiction and failure to state a claim. Regarding jurisdiction, the government argued that Anchorage has not adequately shown that the 2003 MOU and 2011 MOA contemplated money damages if any party failed to fulfill its required duties and that no independent statutory source mandates money damages in this case. Without a demonstrated money-mandating source, the Court of Federal Claims lacks jurisdiction under the Tucker Act, 28 U.S.C. § 1491.

The government also makes several additional arguments demonstrating Anchorage's failure to state a claim. Specifically, the government argues that the 2003 MOU and 2011 MOA do not impose the duties Anchorage alleges were breached; that some of the alleged breaches occurred after the 2011 MOA expired with no survivability language, precluding the existence of a duty; and that Anchorage has no claim as a third-party beneficiary under the MARAD-ICRC contract because Anchorage has not alleged that MARAD breached the contract with ICRC.

Anchorage filed a Response on August 27, 2014, arguing that money damages can be presumed in this case and that MARAD owed Anchorage the duties alleged in the complaint under the 2003 MOA and the 2011 MOU. Anchorage, however, effectively conceded that it has no claim as a third-party beneficiary to the MARAD-ICRC contract.

National Highway Transportation Safety Administration

Court Affirms NHTSA Order on Recall Remedy

In a case of first impression, on March 31, 2014, the U.S. District Court for the Southern District of Ohio granted summary judgment to the United States in litigation over a recall remedy order NHTSA issued to Wildfire Motors. Snyder Computer Sys., Inc. v. USDOT, 2014 WL 1308757 (S.D. Ohio 2014). The litigation involves 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. Wildfire recalled the vehicles for noncompliance with the safety standard for motorcycle brake systems. The United States successfully argued that the court should review the NHTSA order based on the administrative record. This is significant because Wildfire sought de novo review, and there is precedent for holding a trial de novo in the context of a NHTSA recall order. To date, Wildfire has not complied with the court's order that Wildfire immediately carry out the terms of the NHTSA order, and the United States is seeking a contempt order and civil penalties.

Pipeline and Hazardous Materials Safety Administration

Court Dismisses Environmental Groups' NEPA Claims in Challenge to New Oil Pipeline, Plaintiffs Appeal

On August 18, 2014, the U.S. District Court for the District of Columbia dismissed the NEPA claims against PHMSA in Sierra Club, et al. v. U.S. Army Corps of Engineers, et al., 2014 WL 4066256 (D.D.C. 2014), a challenge by the Sierra Club and the National Wildlife Federation to the approval of Enbridge, Inc.'s Flanagan South tar sands crude oil pipeline (Flanagan South) by the U.S. Army Corps of Engineers and other federal agencies, including PHMSA. The suit alleged that the agencies had approved construction of the new pipeline without any environmental review or public notice as required by NEPA. Flanagan South would transport 600,000 barrels of tar sands crude from Illinois to Oklahoma.

On November 13, 2013, the court had denied plaintiffs' motion for preliminary injunction, ruling that plaintiffs had "significantly overstated the breadth of federal involvement in the pipeline project" and "failed to establish sufficiently that applicable federal statutes and regulations would require the extensive environmental review process that plaintiffs seek." The court also found that plaintiffs fell short of "demonstrating that irreparable harm will result if the current construction proceeds" and that "the balance of harms and public interest factors weigh in plaintiffs' favor."

In its August decision, the court dismissed the NEPA claims against PHMSA, holding that plaintiffs had failed to state a claim upon which relief could be granted because the 49 C.F.R. Part 194 Facility Response Plan required by the Oil Pollution Act (OPA) of 1990 had not yet been received by PHMSA and was not even due to be submitted until the time the new pipeline began operation after construction had been completed. The court also issued a merits opinion granting the government's motion for summary judgment on all other NEPA claims against the other federal defendants.

The plaintiffs' central argument was that NEPA required some agency of the federal government to conduct a comprehensive environmental impact review of the entire Flanagan South Pipeline project, including the impacts of oil spills. The court disagreed, concluding that given the federal defendants' limited permitting authority over only small segments of this private pipeline project, "none of the Federal agencies, alone or in combination, have authority to oversee or control the vast portions of the FS Pipeline that traverse private land." Given that the clear purpose of NEPA is "to foster excellent action" on the part of the federal government, "the Federal Defendants' restraint in not initiating an environmental impact review of the entire privately-constructed FS Pipeline is clearly in accordance with the purpose of the NEPA statute."

On August 21, 2014, plaintiffs filed a Notice of Appeal with the U.S. Court of Appeals for the District of Columbia Circuit. Sierra Club, et al. v. U.S. Army Corps of Engineers, et al. (D.C. Cir. No. 14-5205).

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