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Office of the General Counsel

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Happy 20th Anniversary

With this issue of the *DOT Litigation News*, the Office of the General Counsel marks the publication's twentieth anniversary. Those who produced the first issue on May 23, 2001, probably did not give much thought to whether the publication might still exist in twenty years, or about the number and range of cases it might cover two decades later. The inaugural issue ran fourteen pages and reported sixteen cases. Among its highlights were Supreme Court cases involving the constitutionality of DOT's Disadvantaged Business Enterprise programs, "English only" driver's license regulations, and warrantless arrests for seat belt law violations. The issue also covered environmental challenges to highway projects, a challenge to an airworthiness directive, FOIA and False Claims Act cases, and a challenge to Coast Guard regulations.

Two decades later, the *DOT Litigation News* has become a chronicle of important developments in transportation law, covering cases in the U.S. Supreme Court and the lower federal courts affecting all modes of transportation. The number and diversity of the matters reported has grown substantially - the 53-page Spring 2020 issue covers 64 cases. Administrative Procedure Act challenges to DOT actions and environmental challenges to a range of projects and programs continue to be common, while the number of cases involving such matters as federal preemption of state laws and DOT funding of various infrastructure projects has increased, as has the number of matters before the Supreme Court. This diversity remains a constant and reflects the diversity of expertise of DOT's litigators. And the growth in the number of cases reported underscores the importance of communicating and sharing our knowledge among one another.

Without contributions of case discussions provided by each legal office within DOT, this publication would not be possible. As well, appreciation is due the editors in the Office of Litigation and Enforcement who have prepared the *DOT Litigation News* for publication over the years and who produced this issue while handling a substantial additional workload in support of the Department's pandemic response efforts. We dedicate this Anniversary Edition to all who have contributed to the publication through the years. We hope that the *DOT Litigation News* will continue to be an instructive guide to DOT litigation and a useful resource for our readers. We welcome your comments and suggestions as we begin our third decade.

Highlights

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Supreme Court Litigation

Supreme Court Denies Certiorari in Aviation Preemption Case

On January 13, 2020, the U.S. Supreme Court denied certiorari in a case involving the question of whether, and to what extent, state law aircraft design defect claims are impliedly preempted by the Federal Aviation Act and the FAA's activities thereunder. Avco Corp. v. Sikkelee, 140 S. Ct. 860 (2020). The United States had recommended that the Court deny certiorari.

The plaintiff in the case is the wife of a pilot who died in a crash of a general aviation aircraft. She filed suit in 2007 against the plane's manufacturer and others, asserting state law tort claims based on an allegation that the crash was caused by a design defect.

The U.S. Court of Appeals for the Third Circuit has twice reversed District Court rulings holding the plaintiff's claims to be preempted. First, the Third Circuit held that although the Federal Aviation Act preempts state law standards of care in cases involving "in-air operations," it does not do so in products liability cases. Sikkelee v. Precision Airmotive Corp., 822 F.3d 680 (3d Cir. 2016). After remand, the Third Circuit held that it would not have been impossible for the manufacturer to use the plaintiff's preferred design while complying with FAA rules, since it could have sought the FAA's approval for a design change. Sikkelee v. Precision Airmotive Corp., 907 F.3d 701 (3d Cir. 2018). The manufacturer asked the Supreme Court to review both rulings.

Upon the invitation of the Court, the United States filed a brief arguing that the Third Circuit had erred in allowing plaintiff to assert design defect claims based on an alleged violation of a state law standard of care. The United States noted that the parties do not dispute that the allegedly-defective design feature was specified in the engine's FAA-approved type certificate, and argued that "where, as here, the FAA has determined that an engine design satisfies the federal safety standard, a plaintiff's attempt to invoke state law to impose different or higher obligations on the manufacturer is impliedly preempted under principles of both field and conflict preemption." The United States nevertheless argued that the case did not warrant the Court's review at this time. Among other things, the United States pointed to the absence of a direct circuit split, and to the fact that the manufacturer will have another chance to make a showing of conflict preemption in the District Court.

Tennessee Seeks Supreme Court Review in State Highway Beautification Act Case

On April 3, 2020, the State of Tennessee filed a Petition for Writ of Certiorari seeking Supreme Court review of the U.S. Court of Appeals for the Sixth Circuit's decision striking down the Tennessee Billboard Regulation and Control Act ("Billboard Act"), which provides for effective control of outdoor signs as required by the Highway Beautification Act ("HBA"). Bright v. Thomas, No. 19-1201 (S. Ct.).

Plaintiff William Thomas, a billboard operator, challenged the Tennessee's denial of a permit for a non-commercial billboard displaying his thoughts and ideas, on property he owns, at a location in violation of the Billboard Act's sign spacing restrictions. The Billboard Act allows the display of signs

along designated highways in commercial and industrial areas, subject to restrictions on size, spacing, and lighting contained in an agreement with FHWA. Had the sign been deemed an "on premises" sign, providing information about the sale of, or activities on, the property on which it is located, it would have been excepted from the restrictions.

The U.S. District Court for the Western District of Tennessee found that the Billboard Act is an unconstitutional, content-based regulation of speech because the "content of the message" on the sign determined whether it meets the on-premises exception. See Thomas v. Schroer, 248 F. Supp. 3d 868 (W.D. Tenn. 2017).

On appeal to the Sixth Circuit, the United States submitted an amicus brief to protect its interests in highway safety and aesthetics, which are furthered through the sign regulations set forth in the HBA, implementing regulations, and related state laws. The government stated that it has a strong interest in ensuring that these provisions are correctly interpreted and subjected to appropriate First Amendment review. In the amicus brief and at oral argument, the government argued that the court should uphold the on-premises exception in the Billboard Act as a permissible, content-neutral regulation of speech based on the nexus of the sign to the property, not its content. Moreover, the government argued its compelling interests in traffic safety and aesthetics justifies the legitimate and balanced restrictions in the HBA and parallel state law provisions.

The Sixth Circuit held that the Billboard Act "has the effect of disadvantaging the category of non-commercial speech that is probably most highly protected: the expression of ideas." The Sixth Circuit also held that the Billboard Act "is not narrowly tailored to further a compelling interest and thus is an unconstitutional restriction on non-commercial speech." Finally, the Sixth Circuit further affirmed the district court's ruling that the Billboard Act is unconstitutional because there was no indication that the on-premises exception was severable from the rest of the BB Act. Thomas v. Bright, 937 F.3d 721 (6th Cir. 2019).

The State of Tennessee filed a Petition for Rehearing, which the Sixth Circuit denied on November 6, 2019. Tennessee then filed a Petition for Writ of Certiorari on April 3, 2020. Plaintiff Thomas' Opposition to the Petition is due by May 22, 2020. The Petition can be found here: https://www.supremecourt.gov/Search.aspx?FileName=/docket/docketfiles/html/public\19-1201.html.

D.C. Circuit Upholds DOT's Grant of Tax-Exempt Bond Authority to Passenger Rail Project, Florida County Seeks Supreme Court Review

On December 20, 2019, the U.S. Court of Appeals for the District of Columbia Circuit upheld DOT's grant of tax-exempt bond authority to the Brightline passenger rail project (also known as Virgin Trains USA, and formerly known as All Aboard Florida) and rejected challenges to FRA's environmental review process. Indian River County v. USDOT, 945 F.3d 515 (D.C. Cir. 2019). On May 18, 2020, appellant Indian River County sought Supreme Court review of the ruling.

The project is a private passenger railroad that will connect Miami and Orlando. FRA conducted an environmental review of the project and issued its Record of Decision on

December 15, 2017. On December 20, DOT authorized the issuance of $1.15 billion in tax-exempt Private Activity Bonds ("PABs") to fund Phase II of the Project between West Palm Beach and Orlando. A group of project opponents brought a variety of claims against DOT, and the district court granted summary judgment to DOT in all respects. Indian River County v. USDOT, 348 F. Supp. 3d 17 (D.D.C. 2018). All plaintiffs except Indian River County settled with the project sponsor before the decision.

On appeal, the D.C. Circuit upheld DOT's determination that the project is a "surface transportation project which receives Federal assistance under title 23, United States Code" and is therefore eligible for an allocation of PAB authority under 26 U.S.C. § 142(m)(1)(A). The court held that Indian River County's interests were within the "zone of interests" protected by the eligibility requirements, but rejected the County's claim on the merits. The court determined that DOT had reasonably found that the project "receives Federal assistance under title 23" since Title 23 funds had been used to upgrade rail-highway crossings along the project corridor. The court held that DOT had reasonably interpreted the statute to extend eligibility to any "project which – in whole or part – benefits from assistance under Title 23," regardless of whether the project sponsor was the recipient of title 23 funds. Applying that interpretation, the court held that the project has "indisputably gained significant benefits" from the crossing upgrades. The court further concluded that it was "eminently reasonable" for DOT to determine that the statute authorizes PABs to be used for an entire project even if title 23 funds were spent on only part of the project. In its certiorari petition, Indian River County argues that the D.C. Circuit inappropriately deferred to DOT's interpretation under Skidmore v. Swift & Co., 323 U.S. 134 (1944).

The D.C. Circuit also held that "the environmental review process conducted by FRA was thorough and it complied fully with the commands of" NEPA. Rejecting Indian River County's assertions, the court held that the Environmental Impact Statement "includes a thorough discussion of pedestrian safety" and "takes a 'hard look' at noise impacts." Indian River County does not seek Supreme Court review of that holding.

The D.C. Circuit's opinion is here: https://www.cadc.uscourts.gov/internet/opinions.nsf/91D25A09FA6C72CD852584D600578965/$file/19-5012-1821042.pdf.

Departmental Litigation in Other Federal Courts

D.C. Circuit Upholds Termination of Essential Air Service Eligibility for Hagerstown, Maryland

On April 7, 2020, the U.S. Court of Appeals for the District of Columbia Circuit rejected a challenge to DOT's decision to terminate the eligibility of Hagerstown, Maryland for Essential Air Service ("EAS") subsidies. Bd. of County Comm'rs of Washington County, Md. v. USDOT, 955 F.3d 96 (D.C. Cir. 2020).

Under the EAS program, DOT gives subsidies to airlines that fly to certain small airports. A location must satisfy several statutory eligibility requirements in order to benefit from subsidies. One requirement is that a location must have an average of at least 10 enplanements per day during each fiscal year. DOT may waive this requirement if the location "demonstrates to the Secretary's satisfaction that the reason" for its noncompliance is "a temporary decline in enplanements." 49 U.S.C. § 41731(e).

Hagerstown Regional Airport has received subsidized service from several carriers; most recently, Southern Airways Express provided service to and from Baltimore-Washington International Airport and Pittsburgh International Airport. Hagerstown, however, was out of compliance with the 10-enplanement requirement in Fiscal Years 2013, 2014, 2015, and 2017. DOT granted waivers for each of those years.

Hagerstown was again out of compliance in Fiscal Year 2018, and again asked for a waiver. This time, however, DOT denied the waiver and terminated Hagerstown's eligibility. DOT determined that Hagerstown had not shown to DOT's satisfaction that the reason for its sustained noncompliance was a "temporary decline in enplanements." In particular, DOT noted that Hagerstown had been out of compliance for five of the six years the 10-enplanement requirement had been in existence, that several service changes had not allowed it to come into compliance, and that its close proximity to three major airports would make it difficult to recover enplanements.

The court held that DOT's decision was reasonable. It noted that DOT had acknowledged various pieces of evidence submitted by Hagerstown, but had ultimately concluded that this evidence was outweighed by "the airport's unsatisfactory past record and the unfortunate fact that the airport is so close to three major hubs." The court held that this determination was entitled to "considerable deference" because it involved two "policy-laden" considerations: "whether to grant a waiver excusing a violation of a standard," and how to "make a prediction about future facts" within the field of DOT's expertise.

The court also rejected Hagerstown's other arguments. For example, the court disagreed with Hagerstown's contention that DOT's denial of a waiver was arbitrary in light of DOT's prior grants of waivers. The court noted that "[a]pparently 'no good deed goes unpunished'" and that Hagerstown was essentially claiming an entitlement to a perpetual waiver. It held that "the Department was entitled to credit Hagerstown's explanations and predictions less after another year of noncompliance."

The court's opinion is here: https://www.cadc.uscourts.gov/internet/opinions.nsf/D417D413D50F53B98525854300528C59/$file/19-1210-1837007.pdf.

D.C. Circuit Upholds Denials of Rulemaking Petitions on International Airline Change Fees and Delay Compensation

On February 4, 2020, the U.S. Court of Appeals for the District of Columbia Circuit denied a challenge by Flyers Rights and its president to DOT's denial of a petition for rulemaking they filed with the agency, which had asked DOT to issue regulations limiting the fees charged by airlines for making changes to international itineraries. Flyers Rights Educ. Fund v. USDOT, 2020 WL 1919497 (D.C. Cir. 2020).

On May 5, 2020, the same court denied a challenge by Flyers Rights to DOT's denial of another rulemaking petition. That petition had asked DOT to further regulate the way airlines give passengers notice of their potential entitlement to compensation for delays under the Montreal Convention. Flyers Rights Educ. Fund v. USDOT, 2020 WL 2123397 (D.C. Cir. 2020).

In denying the first petition regarding change fees, DOT concluded that the requested rule would be inconsistent with the obligations of the United States under its bilateral Open Skies agreements, which generally provide that prices for air travel are set by market forces rather than government regulation. The court found no error in DOT's conclusion, and rejected counterarguments made by Flyers Rights. The court also held that the president of Flyers Rights had standing to bring the challenge.

In denying the second petition regarding delay compensation, DOT determined that airlines were complying with their notice obligations under the Montreal Convention by including certain language in their contracts of carriage, and that Flyers Rights had not presented sufficient evidence of consumer confusion to warrant a rulemaking. DOT also noted that it was engaged in a separate rulemaking – since completed – addressing many of the concerns raised by Flyers Rights. The court held that the airline contracts of carriage in the record "amply support[] the Department's conclusion that the airlines have satisfied their notice obligations under the Montreal Convention" and noted that DOT has discretion to determine whether a particular "quantum of evidence of consumer confusion" is sufficient to require rulemaking. The court observed that DOT's position was further strengthened by its separate rulemaking. The court also held that Flyers Rights may assert associational standing on behalf of the individuals it identifies as its "members."

The court's opinion in the second petition is here: https://www.cadc.uscourts.gov/internet/opinions.nsf/DBB2B8455AFCE0688525855F004D761C/$file/19-1071-1841305.pdf.

D.C. Circuit Upholds PHMSA Rule for Oil Spill Response Plans and Information Sharing

On March 17, 2020, the U.S. Court of Appeals for the District of Columbia Circuit denied the Petition for Review filed by Union Pacific Railroad ("UP") challenging certain provisions of a 2019 PHMSA final rule addressing oil spill response plans and information sharing for high-flammable trains, *Hazardous Materials: Oil Spill Response Plans and Information Sharing for High-Flammable Trains*. In Union Pacific Railroad Co. v. PHMSA, 953 F.3d 86 (D.C. Cir. 2020), UP had argued that PHMSA's final rule violated the FAST Act provision that requires PHMSA to establish security and confidentiality protections, including protections from the public release of proprietary information or security-sensitive

information, to prevent the release to unauthorized persons of information provided by Class I railroads under the Act. UP claimed that PHMSA had failed to include such protections for information on high-hazard flammable trains that railroads provide to state emergency response commissions because the final rule implemented the proposed information-sharing requirements with no protections beyond a provision allowing railroads to "indicate" information they "believe is security sensitive or proprietary and exempt from public disclosure" so that the information could be covered by state confidentiality laws. According to UP, such a designation has no effect under federal law.

PHMSA argued in response that the information required by the rule is neither sensitive nor confidential business information under federal law and that by instructing railroads to identify submitted information that they regard as confidential, PHMSA satisfied the requirements of the FAST Act, noting that petitioner had not even attempted to refute the agency's conclusions that the information is not protected by federal law or that its disclosure would not cause harm.

In a split decision, the panel majority rejected UP's arguments, holding that the protections chosen by the agency were in fact a type of security and confidentiality protection aimed at protecting against inadvertent public disclosure of information and thus were sufficient to meet the requirements of the Act. The fact that PHMSA chose to rely on state law confidentiality protections was "no surprise" given that the authorizing statute "weaves state institutions into its program." In addition, the court found that during the rulemaking, the railroads failed to contradict PHMSA's finding that requiring them to flag confidential information when submitted to the states was sufficient to ensure confidentiality and security. UP "provided not a mote of evidence" to the contrary, leading the court to conclude that "[n]either before the agency nor in this court, can the agency be asked to make silk purse responses to sow's ear arguments."

The dissent argued that the FAST Act required the railroads' information to be protected by federal, not state, law, and that PHMSA's only task was to determine how it should be protected under federal law. The fact that the railroads might have failed to submit evidence of the need for such protection was, therefore, irrelevant.

The court's opinion is here: https://www.cadc.uscourts.gov/internet/opinions.nsf/2FCE4024634464C08525852E004F7FAB/$file/19-1075-1833846.pdf.

D.C. Circuit Upholds FAA Slots Orders at JFK and LaGuardia Airports

On March 27, 2020, the U.S. Court of Appeals for the District of Columbia Circuit denied the petition for review filed by Exhaustless, Inc. seeking to vacate FAA's May 24, 2019, decision dismissing Exhaustless' petition for rulemaking related to FAA's New York City area runway slot orders. Exhaustless, Inc. v. FAA, 2020 WL 1918260 (D.C. Cir.). In its May 21, 2018, petition for rulemaking, Exhaustless petitioned FAA to (1) terminate all existing New York City area slots by removing the current airport designations under the International Air Transportation Association Worldwide Slot Guidelines for Newark Liberty International Airport (EWR), New York LaGuardia Airport (LGA), and John F. Kennedy International Airport (JFK); (2) designate EWR, LGA, and JFK as "Level A2OS – slot controlled" in accordance with a

new standard created by Exhaustless; and (3) allow Exhaustless to manage the slot volumes at EWR, LGA, and JFK.

Having determined that the petition for rulemaking filed by Exhaustless did not address an immediate safety concern and therefore did not meet the criteria to pursue rulemaking at this time, FAA dismissed the petition in accordance with 14 CFR § 11.73(e).

On February 12, 2020, the court issued an order canceling the previously-scheduled oral argument noting that it would decide the case on the briefs. In its March 27 decision, the court held that review of an agency's decision to deny a petition for rulemaking is highly deferential and that FAA's decision to deny the petition for rulemaking for failure to state an "immediate safety concern" was an adequate reason for denial.

D.C. Circuit Upholds Denial of Attorney's Fees in Purple Line Litigation

On April 24, 2020, the U.S. Court of Appeals for the District of Columbia Circuit affirmed the denial of attorney's fees sought by a group of plaintiffs who unsuccessfully challenged FTA's environmental review process for the Maryland Purple Line light rail project. Fitzgerald, et al. v. FTA, et al., No. 19-5138 (D.C. Cir.).

In 2017, the D.C. Circuit ruled in FTA's favor on the merits, holding that its environmental review process was fully consistent with the National Environmental Policy Act. Friends of Capital Crescent Trail v. FTA, 877 F.3d 1051 (D.C. Cir. 2017). The plaintiffs subsequently sought attorney's fees from FTA under the Equal Access to Justice Act ("EAJA"). The plaintiffs argued that although they ultimately lost the case, they qualified for fees under EAJA as "prevailing parties" because the district court in the middle of the litigation had remanded to FTA for further explanation with respect to a single claim. The district court held that the plaintiffs were not prevailing parties, and the D.C. Circuit agreed. The D.C. Circuit held that because the plaintiffs did not obtain any of the relief they sought in their complaint, they had not succeeded on a "significant issue in the litigation."

Tenth Circuit Dismisses Mandamus Petition Concerning Accessible Airplane Lavatories

On January 16, 2020, the U.S. Court of Appeals for the Tenth Circuit dismissed as moot a mandamus petition in which Paralyzed Veterans of America ("PVA") sought to compel DOT to issue a proposed rule governing the accessibility of lavatories on single-aisle aircraft. In re Paralyzed Veterans of Am., No. 18-1465 (10th Cir.). The dismissal followed DOT's issuance of the proposed rule on December 16, 2019. *Accessible Lavatories on Single-Aisle Aircraft: Part 1*, 85 Fed. Reg. 27 (Jan. 2, 2020). The court had previously stayed the case to allow DOT to issue the proposed rule by December 2019, consistent with DOT's longstanding and publicly-announced plans.

DOT has long required twin-aisle aircraft to include lavatories that are accessible to passengers with disabilities. In 2016, DOT formed a negotiated rulemaking committee to address several issues, including the accessibility of lavatories on single-aisle aircraft. The committee eventually reached a consensus on the lavatory issue.

In its mandamus petition, PVA claimed that Congress required DOT to issue a proposed rule governing lavatory accessibility on

single-aisle planes by July 2017, and asked that the Tenth Circuit compel DOT to act. In its response to the petition, DOT noted that it had publicly announced that it intended to issue a proposed rule by December 2019, and explained why issuance before that date would be practically impossible.

After the court held the proceeding in abeyance to permit DOT to carry out its plans, PVA asked the court to take the proceeding out of abeyance, asserting that the rule DOT intended to propose would not address accessible lavatories. The court denied that request.

After DOT issued the proposed rule, PVA contended the case was not moot, again taking issue with the proposal's substance. The Tenth Circuit rejected that contention, holding that DOT had complied with its duty to issue a proposed rule, and that PVA's "objections concern how [DOT] accomplish[ed] that duty, which is not the proper purview of mandamus relief."

PHMSA Urges Sixth Circuit to Reverse Ruling Regarding Approval of Oil Spill Response Plans for Pipelines

On April 9, 2020, the U.S. Court of Appeals for the Sixth Circuit held oral argument in appeals by PHMSA and Enbridge Energy, L.P. from a lower court ruling requiring PHMSA to engage in certain environmental review processes before approving oil spill response plans for certain Enbridge pipelines. Nat'l Wildlife Fed. v. Sec'y of the Dep't of Transp., Nos. 19-1609, 19-1610 (6th Cir.). The case was argued for PHMSA by Jeffrey Clark, the Assistant Attorney General for the Department of Justice's Environment and Natural Resources Division.

The Clean Water Act ("CWA") requires operators of certain facilities, including pipelines, to prepare oil spill response plans. PHMSA is responsible for reviewing and approving plans submitted by operators of pipelines (other than pipelines seaward of the coast line). The National Wildlife Federation ("NWF") sued PHMSA in 2017 to challenge approvals of spill response plans submitted by Enbridge that cover the company's Line 5 in Michigan and Wisconsin. Enbridge intervened, and the parties all moved for summary judgment.

In its decision, the District Court granted summary judgment to PHMSA and Enbridge on three issues. Nat'l Wildlife Fed. v. Sec'y of the Dep't of Transp., 373 F. Supp. 3d 634 (E.D. Mich. 2019). First, the court held that PHMSA reasonably treats each pipeline as a single facility, and rejected NWF's argument that PHMSA is obligated to treat each pipeline segment crossing a waterway as a separate facility requiring a separate plan. Second, the court rejected NWF's contention that Enbridge's plans failed to properly calculate the "worst case discharge." Third, the court rejected NWF's argument that the plans did not contain the types of information required by the CWA.

The court, however, granted summary judgment to NWF on two other issues. The court held that PHMSA's administrative record did not adequately explain its determinations that Enbridge's plans met the requirements of the CWA. And the court held that before approving the plans, PHMSA should have engaged in environmental review pursuant to NEPA, and consultation with federal environmental agencies pursuant to the Endangered Species Act ("ESA"). The court remanded the plan approvals to PHMSA for further consideration consistent with its opinion. The court did not vacate the

approvals, and PHMSA's current approvals of Enbridge's plans remain in effect.

PHMSA and Enbridge appealed with respect to the NEPA and ESA ruling. In its brief to the Sixth Circuit, PHMSA argued that the District Court erred when it found that PHMSA was required to consult with a wildlife agency under the ESA in order to ensure that oil spill response plans would not be likely to jeopardize endangered or threatened species. The CWA requires operators of certain facilities, including pipelines to prepare oil spill response plans for approval by PHMSA. The CWA does not, however, grant PHMSA discretion to either disapprove or require changes to those plans. Instead, PHMSA is required by law to approve plans that meet certain specified criteria set forth in the CWA. Relying on Supreme Court precedent, PHMSA argued that the consultation duty of the ESA does not attach when an agency is required by statute to take action once certain triggering events occur. If an operator's oil spill response plan includes the statutorily mandated criteria, PHMSA has no discretion to disapprove or change the Plan; it must approve it.

In addition, PHMSA argued that the District Court erred when it found that PHMSA's review of oil spill response plans triggers review under NEPA. PHMSA's argument is again premised on the fact that the CWA does not grant PHMSA discretion to disapprove oil spill response plans that meet the statutory criteria or to implement alternatives to those Plans. Again citing to Supreme Court precedent, the government argued that NEPA analysis is not required where an agency lacks discretion to prevent environmental effects by taking alternative action, or where an agency acts to fulfill a mandatory statutory duty based on enumerated criteria. Because PHMSA must approve an oil spill response plan that meets certain statutory mandated criteria, the District Court erred in holding that PHMSA was required to undertake NEPA analysis during its review of oil spill response plans.

Briefing Completed in Challenge to FMCSA Preemption Decision on California's Meal and Rest Break Rules, New Lawsuit Filed Challenging Related Decision

In February 2020, the parties completed briefing in International Brotherhood of Teamsters, et al., v. FMCSA, No. 18-73488 (9th Cir.). The case involves four petitions for review of FMCSA's decision issued on December 21, 2018, preempting California's Meal and Rest Break Rules ("MRB rules") as applied to property-carrying commercial motor vehicle ("CMV") drivers subject to FMCSA's hours-of-service ("HOS") regulations under 49 U.S.C. § 31141.

Federal law provides for preemption of state laws on CMV safety that are more stringent than federal regulations and (1) have no safety benefit; (2) are incompatible with federal regulations; or (3) would cause an unreasonable burden on interstate commerce. In its December 21 decision, FMCSA determined that California's MRB rules are laws on CMV safety, are more stringent than the agency's HOS regulations, have no safety benefits that extend beyond those already provided by the Federal Motor Carrier Safety Regulations, are incompatible with the federal HOS regulations, and cause an unreasonable burden on interstate commerce. 83 Fed. Reg. 67470 (Dec. 28, 2018).

Four groups of petitioners argued that FMCSA did not have authority to review California's MRB rules because those laws did not specifically target commercial motor

vehicle safety. They also contended that FMCSA erred when it declared California's laws preempted and that FMCSA applied the wrong legal standard or otherwise drew the wrong inferences from the record.

The government argued that FMCSA properly exercised its statutory authority in determining that California MRB rules are preempted, as applied to operators of property-carrying CMVs subject to federal HOS regulations. The government's brief explained that California's laws cover the same subject matter as, and are more stringent than, federal safety regulations promulgated under 49 U.S.C. § 31136. The government further contended that California's laws met all three of the preemption criteria because the state laws did not provide any measurable safety benefit compared to federal regulations, were incompatible with the federal interest in ensuring drivers have substantial flexibility to take breaks, and unduly burdened interstate commerce.

On February 7, 2020, the Ninth Circuit indicated that the court was considering the case for oral argument in San Francisco on a date to be determined in June, July. or August.

On March 12, 2020, the State of California filed a separate lawsuit challenging FMCSA's related decision finding that the California's meal and rest break requirements are preempted with respect to *passenger*-carrying motor vehicles subject to the HOS regulations. California, et al. v. FMCSA, No. 20-70706 (9th Cir.) (challenging 85 Fed. Reg. 3469 (Jan. 21, 2020)). California's opening brief is due June 1, and FMCSA's brief is due June 30.

NHTSA Continues Defense of Rule on Fuel Economy Civil Penalty Rate in Second Circuit

Briefing is complete in the litigation in the U.S. Court of Appeals for the Second Circuit challenging NHTSA's July 2019 rule retaining the rate used in calculating civil penalties for violations of Corporate Average Fuel Economy ("CAFE") standards without making an adjustment for inflation, and the court has scheduled oral argument for June 1, 2020. The two consolidated petitions for review were filed in August 2019 by a group of states and the District of Columbia, the Natural Resources Defense Council, and the Sierra Club. New York, et al. v. NHTSA, No. 19-2395 (2d Cir.). The Alliance for Automotive Innovation (formerly two separate organizations, the Association of Global Automakers and the Alliance of Automobile Manufacturers) have intervened in support of the government in the litigation. The Institute for Policy Integrity at the New York University School of Law ("IPI") and Tesla moved to participate in the case as amici in support of petitioners.

Petitioners argue that the Second Circuit already decided this issue when — in a previous case involving largely the same petitioners — it vacated a NHTSA rule that would have indefinitely delayed the increase in the CAFE civil penalty rate (from $5.50 to $14) that was enacted during the previous Administration. Natural Resources Defense Council v. NHTSA, 894 F.3d 95 (2d Cir. 2018). In petitioners' view, the CAFE civil penalty rate is a civil monetary penalty that NHTSA is required to adjust under the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015 (the Inflation Adjustment Act). Moreover, they argued that NHTSA was time-barred from applying the statutory exception it invoked, determining

that an inflation adjustment would not be appropriate for the CAFE civil penalty rate because making the otherwise required adjustment would have a negative economic impact, and, in any event, NHTSA's attempt to use the exception was arbitrary and capricious. Finally, petitioners argued that NHTSA's rule failed to comply with NEPA.

IPI's argument was similar to that in its petition for reconsideration that remains pending before NHTSA. In its brief, IPI argues that economic principles support petitioners' argument that the CAFE civil penalty rate is covered by the Inflation Adjustment Act, and further contends that NHTSA's analysis ignored forgone benefits. Tesla argued that making the inflation adjustment serves the purpose of the CAFE program and would provide significant economic benefits, while not making the inflation adjustment would be a disincentive to innovation.

NHTSA responded, in line with the rationale set forth in the rule, that the Inflation Adjustment Act does not cover the CAFE civil penalty rate and, thus, no inflation adjustment to that rate was required. In the alternative, NHTSA argued that, even if the inflation adjustment statute applied, NHTSA properly invoked the "negative economic impact" statutory exception and reasonably determined that making the inflation adjustment would have a "negative economic impact." Lastly, NHTSA provided sufficient evidence and analysis under NEPA in determining that there would be no significant environmental impact. The Alliance for Automotive Innovation echoed these arguments in its brief. Petitioners filed their reply briefs on February 28, 2020, reiterating their arguments and attempting to rebut NHTSA's points.

Circuit Court Challenges to DOT's SAFE Vehicles Final Rules Move Forward, District Court Cases Stayed

On February 4, 2020, the U.S. Court of Appeals for the District of Columbia Circuit denied petitioners' motion to stay the ongoing litigation challenging DOT and EPA's "Safer Affordable Fuel-Efficient ("SAFE") Vehicles Rule Part One: One National Program," denied the federal government's motion to expedite the litigation, and ordered the parties to submit a proposed briefing schedule by March 5, 2020. Union of Concerned Scientists, et al. v. NHTSA, et al., No. 19-1230 (D.C. Cir.). A week later, in light of this order and in the interest of judicial economy, the U.S. District Court for the District of Columbia vacated the motion hearing it had previously scheduled on the federal government's motion to dismiss or, in the alternative, to transfer to the D.C. Circuit, and stayed the related cases before it. California, et al. v. Chao, et al., No. 19-02826 (D.D.C.). The parties jointly submitted a proposed briefing schedule in the D.C. Circuit litigation and are awaiting the Court's scheduling decision.

The D.C. Circuit litigation consists of eight consolidated petitions brought by a number of states, cities, environmental organizations, and other entities. Certain automakers, states in favor of the rule, and fuel and petrochemical manufacturers have intervened in support of the federal government.

On August 24, 2018, NHTSA and EPA jointly published a proposed rule, entitled "The Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule for Model Years 2021–2026 Passenger Cars and Light Trucks." The agencies proposed new and amended

greenhouse gas ("GHG") and Corporate Average Fuel Economy ("CAFE") standards for model year 2021 to 2026 light duty vehicles. EPA also proposed to withdraw the waiver it had previously granted to California for the state's GHG and Zero Emissions Vehicle programs under Section 209 of the Clean Air Act. Additionally, NHTSA proposed regulatory text implementing its statutory authority to set nationally applicable fuel economy standards and preempting state and local programs. On September 19, 2019, the agencies published the rule at issue in the litigation, finalizing EPA's decision to withdraw California's waiver under the Clean Air Act and NHTSA's preemption of state and local laws and regulations related to fuel economy standards.

A rule finalizing the GHG and CAFE standards was issued on March 31, 2020, and published in the Federal Register on April 30. On May 1, the Competitive Enterprise Institute and four individuals filed a petition for review in the D.C. Circuit against NHTSA and EPA challenging the April 30 final rule. Competitive Enterprise Inst., et al, v. NHTSA, et al., No. 20-1145 (D.C. Cir.). The petition states that "[t]he grounds for this lawsuit, inter alia, are that, contrary to law, the agencies failed to adequately consider the adverse traffic safety impacts of their chosen fuel economy standards."

Court Dismisses Challenges to Executive Order 13771

On December 20, 2019, and April 2, 2020, the U.S. District Court for the District of Columbia granted summary judgment to the government in two challenges to Executive Order 13771, holding that the plaintiffs lacked standing to sue. Public Citizen v. Trump, 2019 WL 7037579 (D.D.C. 2019); California v. Trump, 2020 WL 1643858 (D.D.C. 2020).

Executive Order 13771 generally directs federal agencies to identify two existing regulations to repeal for every new regulation proposed or issued, and generally requires that the costs of certain new regulations stay within certain budgets. Public Citizen and other organizations filed suit in February 2017, asserting that the Executive Order requires agencies to act unlawfully. California, Oregon, and Minnesota filed a similar challenge in April 2019. The suits named as defendants the President and a variety of agency officials, including the Secretary of Transportation.

Plaintiffs' principal theory of standing was that the Executive Order had caused agencies to repeal existing rules or delay the issuance of new rules, and that these repeals and delays had caused injury to plaintiffs' members. Plaintiffs focused on a number of examples, including a purported delay in NHTSA's issuance of a final rule on vehicle-to-vehicle communications, and FHWA's repeal of a greenhouse gas performance measure.

The court held that neither set of plaintiffs demonstrated that the Executive Order had caused any delays or repeals. As relevant to DOT, the court held that DOT's declarations and discovery responses showed that substantive considerations, rather than the Executive order, led to the timing of the NHTSA rulemaking process and to FHWA's repeal of the performance measure.

The decisions follow two earlier rulings in the Public Citizen case: a February 2018 ruling dismissing plaintiffs' complaint for lack of standing but allowing them to amend, and a February 2019 ruling that the amended complaint plausibly alleged – but did not prove – standing. Public Citizen v. Trump,

297 F. Supp. 3d 6 (D.D.C. 2018); Public Citizen v. Trump, 361 F. Supp. 3d 60 (D.D.C. 2019).

Settlement Conference Held in Litigation over California High-Speed Rail Grant Termination

On March 5, 2020, the State of California and the California High-Speed Rail Authority ("CHSRA") (collectively, "Plaintiffs") and federal defendants participated in a settlement conference in a case involving FRA's decision to terminate an agreement that obligated approximately $929 million for the construction of high-speed rail in California. California, et al. v. DOT, et al., No. 19-02754 (N.D. Cal.). The settlement conference occurred after the parties exchanged settlement offers on February 14 and settlement conference statements on February 20, respectively. The parties were unable to reach a settlement.

On May 16, 2019, FRA terminated Cooperative Agreement No. FR-HSR-0118-12, as amended (the "Agreement"), between FRA and CHSRA while also de-obligating the approximately $929 million obligated by the Agreement. The Agreement funded final design and construction activities related to the First Construction Segment, a 119-mile section of new high-speed rail infrastructure (the "Project"), which CHSRA proposed as part of a larger state-wide system. Congress appropriated the Agreement funds in the Consolidated Appropriations Act, 2010 (Pub. L. 111-117), for FRA's competitive grant program, the High-Speed Intercity Passenger Rail Program. FRA has another cooperative agreement with CHSRA that provided approximately $2.5 billion from the American Recovery and Reinvestment Act of 2009 (Pub. L. 111-5). FRA has not made any final decision related to that agreement.

FRA terminated the Agreement because of CHSRA's failure to comply with the terms of the Agreement and its failure to make reasonable progress to deliver the Project. Specifically, FRA found that CHSRA failed to submit essential deliverables, as required by the Agreement, and failed to demonstrate its ability to complete the Project, as defined by the Agreement. FRA's decision was preceded by a February 19, 2019, Notice of Intent to Terminate the Agreement (the "Notice"). In the Notice, FRA described its basis for the proposed termination and provided CHSRA with an opportunity to respond in writing. CHSRA provided a written response on March 4, 2019. After considering the record, including the March 4 response, FRA terminated the Agreement and de-obligated the funds.

In their complaint, plaintiffs argue that FRA's decision was arbitrary and capricious and in violation of the APA. Plaintiffs also request that the court enjoin FRA from "reobligating or otherwise transferring the funds to other activities, programs, or recipients." On May 22, the parties filed a stipulation with the court in which FRA agreed that any action to re-obligate, transfer, or award the funds would only occur through a Notice of Funding Opportunity ("NOFO"). Plaintiffs agreed not to move for a temporary restraining order or preliminary injunction unless and until the government issues such a NOFO.

The government filed its answer to plaintiff's complaint on July 22, 2019, and provided plaintiffs with the administrative record on November 21, 2019.

New Lawsuit over Response to 737 MAX-Related FOIA Requests

On February 13, 2020, Accountable.US sued DOT to compel a response to four FOIA

requests that the organization had filed on December 30, 2019, seeking documents related to the Department's decision to the ground the Boeing 737 MAX aircraft. Accountable.US v. USDOT, No. 20-412 (D.D.C.). DOT filed its Answer to the Complaint on March 16, 2020, and the Office of the Secretary and FAA are in the process of searching for and producing responsive records.

Recent Litigation News from DOT Modal Administrations

Federal Aviation Administration

D.C. Circuit Dismisses Maryland's Challenge to DCA Flight Paths

On March 10, 2020, the U.S. Court of Appeals for the District of Columbia Circuit dismissed the State of Maryland's challenge to FAA's amendment of flight paths at Reagan Washington National Airport ("DCA"), holding that the challenge was time-barred. Maryland v. FAA, 952 F.3d 288 (D.C. Cir. 2020).

In 2015, FAA amended three air-traffic procedures used by aircraft arriving from the northwest along the Potomac River into Washington Reagan National Airport ("DCA"). The amendments accomplished two goals: updating the procedures to take advantage of improved technology in low-visibility conditions and moving more aircraft traffic over the river rather than over Virginia or Maryland. These amendments were categorically excluded from further review under the NEPA, and FAA did not seek public comment or input before approving the new procedures. FAA informed Maryland (and others) of the changes at a community roundtable meeting in December 2015, where FAA said it would be willing to work with the community in the future to address noise concerns. Over the following three years, FAA met with that group and with a similar community roundtable at Baltimore-Washington Marshall International Airport and received letters from the Governor of Maryland asking FAA to make changes to address noise. FAA made no firm commitments for a specific change during that time.

In 2018, Maryland filed a petition for review in the D.C. Circuit alleging that the amended air-traffic procedures shifted flights – and therefore noise – to the airspace over Maryland and were approved in 2015 in violation of NEPA and other federal environmental laws. The relevant cause of action under 49 U.S.C. § 46110(a) provides 60 days to petition for review of an FAA order. The statute permits late filing if the court finds that the petitioner had "reasonable grounds" for delay. Maryland conceded it had missed the 60-day deadline (by nearly 3 years), but argued it had "reasonable grounds" to believe that the FAA's conciliatory statements at public meetings led Maryland to reasonably believe that a change was imminent and litigation would be unnecessary.

The court held that Maryland's challenge was untimely. The court noted that Maryland filed more than 900 days after the last of the FAA's actions and rejected Maryland's

contention that its communications with the FAA during that long period gave it "reasonable grounds" for its late filing. The court acknowledged that it had previously excused a late-filed challenge to flight routes in City of Phoenix v. Huerta, 869 F.3d 963 (D.C. Cir 2017). But the court emphasized that its decision in City of Phoenix was based on unique circumstances in which the FAA was involved in "near constant engagement" with the petitioner and made statements which would have "led reasonable observers to think the FAA might fix the noise problem without being forced to do so by a court." The court observed that Maryland's communications with FAA, in contrast, were "almost entirely self-initiated" and "sporadic" and that FAA's own statements "never suggested that it intended to amend the challenged procedures further." The court made clear that while "City of Phoenix incrementally expanded 'reasonable grounds,' it did not open the floodgates to petitions filed years after final agency action."

The court's opinion is here: https://www.cadc.uscourts.gov/internet/opinions.nsf/05FFBD75E8ECEB018525855B004FAB71/$file/19-1044-1840825.pdf.

D. C. Circuit Grants Mandamus Petition Over National Park Air Tour Management Plans

On May 1, 2020, the U.S. Court of Appeals for the District of Columbia Circuit granted a petition for a writ of mandamus filed by Public Employees for Environmental Responsibility and Hawaii Coalition Malama Pono. In Re Public Employees for Environmental Responsibility, No. 19-1044 (D.C. Cir.). Petitioners sought to compel FAA and the National Park Service ("NPS") to comply with the requirements of the National Parks Air Tour Management Act of 2000 at seven National Parks throughout the continental United States and Hawaii.

Under the statute, FAA and NPS are required to establish air tour management plans to govern the commercial air tours over certain National Parks. Alternatively, the agencies can enter into voluntary agreements with the operators at each covered National Park regarding the air tour operations at that National Park. Since the statute was enacted, FAA and NPS have entered into voluntary agreements with the operators at two covered National Parks. However, the agencies have not been able to establish any air tour management plans because they have been unable to resolve issues related to the environmental analysis that is a major component of those plans.

Petitioners filed a mandamus petition seeking to compel FAA and NPS to comply with the statute at seven covered National Parks, including two popular National Parks in Hawaii with large numbers of air tours. In granting the mandamus petition, the court acknowledged the agencies' efforts over the years, but criticized the agencies for having little to show for their efforts after almost two decades. The court found that granting mandamus relief was warranted in this case because the agencies' failure to meet the statutory requirements was due primarily to interagency conflict, as opposed to financial or personnel shortages. In addition, the court declined to permit the agencies to implement the proposal they filed with the court in response to this litigation. The court explained that the agencies' proposed timeline was too long, the proposal only covered seven out of the twenty-three outstanding parks, and the agencies had already missed some of their target deadlines.

The court ordered FAA and NPS to file with the court, within 120 days, a plan for bringing all twenty-three remaining covered parks into compliance within two years. If the agencies anticipate that it will take them longer than two years, they must offer specific, concrete reasons in the plan to explain why. The court will retain jurisdiction to approve the plan and will monitor the agencies' progress. After the plan is approved, the agencies are required to file progress updates with the court every 90 days until they have satisfied their statutory obligations.

Ninth Circuit Affirms Dismissal of Challenge to FAA-Santa Monica Airport Settlement

On January 3, 2020, the U.S. Court of Appeals for the Ninth Circuit affirmed the dismissal of a challenge to FAA's settlement of long-running litigation with the City of Santa Monica, California regarding the Santa Monica Airport. Rosen v. United States, 798 Fed. App'x 92 (9th Cir. 2020).

The January 2017 settlement ended years of disputes and litigation between FAA and the City regarding whether the City has an obligation to continue to operate the airport. The settlement required the City to keep the airport open until 2028 and permitted it to immediately shorten the runway. Plaintiff is a pilot who alleged, among other things, that in agreeing to the settlement FAA had failed to comply with various requirements that apply to the release of an airport sponsor's obligations.

The Ninth Circuit agreed with the district court that plaintiff lacked standing to sue. It held that: (1) plaintiff had not plausibly alleged an injury from the runway shortening; (2) his other alleged injuries would not occur – if ever – until the closing of the airport in 2028 or later; and (3) any injuries would not be redressed, since invalidating the settlement would merely return the parties to the prior status quo, in which the City's obligations were disputed.

FAA Seeks Rehearing in FOIA Consultant Corollary Case

On April 24, 2019, the U.S. Court of Appeals for the Ninth Circuit reversed the district court's grant of summary judgment for FAA in this FOIA case challenging FAA's withholding of certain requested documents related to biographical data and attorney-client communications pertaining to an air traffic control specialist. In Rojas v. FAA, 17-55036 (9th Cir.), the court rejected FAA's reliance on the consultant corollary as a basis for FOIA Exemption 5 withholdings and held that FAA's search had been inadequate. On August 1, FAA filed a petition for panel rehearing or rehearing *en banc*. The court ordered appellant to file a response to the petition, which appellant filed on October 11.

On January 30, 2020, the court voted to vacate the three-judge panel decision and decide the case *en banc*. Oral argument was scheduled for March 11, but on March 5, the court postponed the argument. No new date has been set.

Motion to Dismiss Deferred, Briefing Ongoing in Challenge to BWI Cargo Facility Improvements

On January 14, 2019, Howard County, Maryland filed a petition for review challenging FAA's October 23, 2018, approval of cargo facility improvements at BWI Marshall Airport. Howard County, Maryland v. FAA, No. 19-1062 (4th Cir.). The cargo facility improvements and Written Re-Evaluation, which is being challenged in this case, were requested by the Maryland

Aviation Administration, and Maryland has joined the lawsuit as a respondent. The petitioner claims that FAA made its decision in violation of NEPA, Section 4(f) of the Department of Transportation Act, and the National Historic Preservation Act, as well as FAA policy and regulations.

FAA moved to dismiss the petition for review as untimely, and the court initially stayed merits briefing in the case pending resolution of the motion to dismiss. Subsequently, the court referred resolution of the motion to dismiss to the merits panel, and merits briefing has been completed pending the court's decision on FAA's October 25 motion to file a surreply brief, which the court also deferred to the merits panel. Oral argument had been set for March 17, 2020, but on March 13 for health and safety reasons, the court cancelled all its arguments for the week of March 16 and advised that they would be re-scheduled for a later date.

Spirit Airlines Sues Over Runway Slots at Newark Liberty International Airport

On November 25, 2019, Spirit Airlines filed a petition for review of the "Notice of Submission Deadline for Schedule Information for Newark Liberty International Airport for the Summer 2020 Scheduling Season" published in the Federal Register by DOT and FAA on October 2, 2019. Spirit Airlines v. FAA, No. 19-1248 (D.C. Cir.). The agency action at issue is a routine, seasonal notice published twice a year based on the IATA Calendar of Coordination Activities. The notice generally invites carriers to submit schedule requests for consideration by FAA, which is responsible for administering runway slots at airports designated as IATA Level 3 (JFK) and for facilitating runway schedules at airports designated as IATA Level 2 (EWR, ORD, LAX, SFO). The notice also includes information concerning any constraints at each of the airports.

For the summer 2020 season, FAA issued the notice for EWR separate from the other airports due to certain policy and legal concerns related to Southwest's announced exit from the airport. The notice set forth that, consistent with prior policy statements, FAA would not be "backfilling" operations conducted by Southwest in peak periods, to the extent such operations exceeded the scheduling limits for the summer 2020 schedule season, while the agency works to review impacts on performance and works with DOT to review the competitive impacts. FAA has been working to seek voluntary cooperation from carriers to de-peak schedules and reduce operations in certain over-subscribed hours at EWR to get the number of arrivals and departures in each 30-minute period within the scheduling limits for purposes of performance and in the interest of maintaining Level 2 status. Spirit is one of the carriers that sought to absorb all the times previously operated by Southwest at EWR, which Southwest had originally obtained through a competitive proceeding when the airport was Level 3 slot controlled. Spirit challenges FAA's summer 2020 scheduling notice and FAA's decision not to give all of Southwest's times to Spirit. Petitioner's brief was filed on March 16, 2020, and respondent's brief was filed on May 15. Petitioner's reply brief is due on June 5.

District Court Issues Final Judgment in Challenge to Drone Advisory Committee Proceedings, Plaintiff Files Interlocutory Appeal

On July 26, 2019, the U.S. District Court for the District of Columbia granted plaintiff's

consent motion to enter final judgment as to all claims in Electronic Privacy Information Center v. FAA, et al., No. 18-833 (D.D.C.), allowing plaintiff Electronic Privacy Information Center ("EPIC") to file an interlocutory appeal of the court's partial dismissal of its complaint. EPIC claims that FAA's Drone Advisory Committee violated open meeting requirements and public record access requirements when the parent and subcommittee records were not made available to the public, and their meetings were not publicly open.

Defendants filed a motion to dismiss, which was granted in part. The court dismissed EPIC's claim that subcommittee meetings were subject to the Federal Advisory Committee Act open meeting and public record access requirements. However, the court found that it could not grant defendants' motion to dismiss regarding the public access record requirements pertaining to the parent committee since the record was not clear whether all parent committee records had been made publicly available. FAA was required to compare those documents that had been made available to the parent committee with those made available to the public. Upon review, FAA found there were documents that were required to be made available to the public that were not, and FAA provided them to EPIC and posted them on the FAA website.

On September 4, 2019, EPIC filed a notice of appeal pertaining to the court's decision relating to the subcommittee obligations. Electronic Privacy Information Center v. Drone Advisory Committee, et al., No. 19-5238 (D.C. Cir.). The appeal has been fully briefed, and the court held oral argument on May 12, 2020.

City of Los Angeles Challenges Shift in Flights Departing Burbank Airport

On December 12, 2019, the City of Los Angeles sought judicial review of a letter from an FAA attorney explaining that a "southerly shift" in the median flight tracks of some departing operations from Bob Hope (Hollywood-Burbank) Airport was not the result of any action taken by FAA. City of Los Angeles v. FAA, et al., No. 19-73164 (9th Cir.). Los Angeles alleges that FAA either took an action not reviewed under NEPA or failed to take action required by law to ensure compliance with assigned flight procedures.

In the summer of 2019, in response to citizen complaints about aircraft noise south of Burbank Airport, the airport's contractor conducted a study that concluded that the median flight tracks of some aircraft departing to the south had drifted farther to the south (by about 1/3 nautical mile) over the past couple of years. FAA has not independently verified this consultant's report, but its own data suggests that the shift is real. Many possible variables, including changing climate and the volume of traffic, help to explain the shift. The City of Los Angeles wrote to FAA asking what actions the agency had taken to cause this, to which FAA responded on November 29, 2019, that it had done nothing to cause this. The Benedict Hills Neighborhood Association has intervened on the side of the City, expressing an interest in preserving a settlement agreement that it reached with FAA in early 2018 to implement new departure procedures from Burbank to the south.

The parties are currently engaged in court-supervised mediation, and the next mediation

conference is scheduled for May 21, 2020. Under the current briefing schedule, petitioner's opening brief is due by July 1, petitioner-intervenors' brief is due by July 31, and respondents' answering brief is due by August 31.

Multiple Challenges to FAA's FONSI at San Bernardino International Airport

In Center for Community Action & Environmental Justice, et al. v. FAA, et al., Nos. 20-70272, 20-70464 (9th Cir.), petitioners filed a petition for review of FAA's Finding of No Significant Impact and Record of Decision ("FONSI/ROD") for an air cargo facility at San Bernardino International Airport. The San Bernardino International Airport Authority proposed to construct an Air Cargo Facility at its airport to accommodate the unmet demand for air cargo facilities in San Bernardino. An environmental assessment was prepared and signed by FAA on December 20, 2019. FAA issued its FONSI/ROD on December 23, approving the project. On January 29, 2020, two environmental groups, one labor union, and two individuals filed a petition for review in the Ninth Circuit alleging that FAA's decision was arbitrary and capricious, and demanded that FAA prepare an Environmental Impact Statement. On February 20, the State of California filed its petition for review on the same basis. Petitioners also named the airport and the developer as respondents in their petitions.

On February 28, the airport and developer moved to dismiss themselves as respondents based on lack of jurisdiction under 49 U.S.C. § 46110. They then moved to intervene in the action based on their direct and substantial interest in the relief sought by petitioners in the appeal. The Ninth Circuit granted both motions on April 23.

Petitioners' opening briefs are due June 22, respondents' answering brief is due July 22, respondent-intervenors' briefs are due August 5, and petitioners' optional reply briefs are due within 28 days after service of respondents' answering brief.

Environmental Challenge to FAA's FONSI at Trenton-Mercer Airport

In Trenton Threatened Skies, Inc., et al. v. FAA, No. 19-3669 (3rd Cir.), petitioners seek review of FAA's September 20, 2019, Finding of No Significant Impact and Record of Decision ("FONSI/ROD") for the Runway Protection Zones and Obstruction Mitigation Project at Trenton-Mercer Airport ("TTN").

Mercer County, New Jersey proposed to conduct a runway protection zone and obstruction mitigation project at TTN to enhance the safety of aircraft operations by removing identified obstructions consistent with FAA's airport design standards. An environmental assessment was prepared and approved in a Record of Decision signed by FAA on September 20, 2019. On November 18, 2019, petitioners, a neighborhood group and three named individuals, filed a petition for review in the Third Circuit alleging, among other things, that FAA segmented its review of projects at TTN and was required to prepare an Environmental Impact Statement. Petitioners' opening brief is due July 10, 2020, and FAA's response brief is due September 8.

Former Airman Challenges Withdrawal of Medical Certificate

Petitioner in Stevens v. FAA, No. 19-60934 (5th Cir.), seeks review of the Federal Air

Surgeon's November 19, 2019, withdrawal of an authorization for a special issuance second-class medical certificate issued to petitioner. Petitioner was granted an authorization for a special issuance second-class medical certificate on November 7, 2018. Such an authorization is a restricted medical certificate granted at the agency's discretion when an airman, who does not meet the medical standards for unrestricted medical certification under 14 C.F.R. part 67, demonstrates to the satisfaction of the Federal Air Surgeon that the issuance of a restricted medical certificate would not endanger public safety. The Federal Air Surgeon also has discretion to withdraw an authorization for special issuance. In FAA's letter withdrawing petitioner's authorization, the Federal Air Surgeon noted that petitioner had refused a pre-employment drug test, which is a disqualifying condition under FAA's medical standards in 14 C.F.R. §§ 67.107(b)(1) and (2), 67.207(b)(1) and (2), and 67.307(b)(1) and (2). Petitioner asserts in his petition for review that FAA failed to respond to his request for agency reconsideration of its decision and that the agency's decision to withdraw his authorization was arbitrary and capricious and in violation of his Fifth Amendment right to due process. Petitioner's opening brief was filed on March 23, 2020, and FAA's response brief was filed on April 22. Petitioner's reply brief was filed on May 13.

Settlement Negotiations in Long-Standing Collective Action Case Filed by FAA Flight Service Specialists

In Breen, et al. v. Chao, No. 05-654 (D.D.C.), a case brought by former FAA Flight Service Specialists who were removed from federal service as part of the agency's 2005 outsourcing of the Automated Flight Service Stations, plaintiffs allege that the outsourcing and resulting reduction in force was an attempt to terminate older workers. In May 2017, the court denied in part and granted in part FAA's Motion for Summary Judgment. The court granted the motion on disparate impact and dismissed those claims from the case. The court denied the motion on disparate treatment, and those claims will proceed to trial.

On March 27, 2018, the court granted plaintiffs' motion to reinstate 241 previously dismissed plaintiffs from the case. Plaintiffs had argued prior counsel misled them about the nature of their participation in the case, and the court agreed. In addition, on March 21, 2019, the court granted plaintiffs' motion to reinstate or join an additional 211 plaintiffs, and denied, without prejudice, a motion to join 114 new plaintiffs who had not previously been a part of the case nor previously sought to join the case.

The trial on liability only was set to begin on March 2, 2020. However, after a status conference held on January 22, the court ordered the parties into mediation. Mediators have been assigned through the District Court's Mediation Program, and a full-day mediation was held on February 18, 2020. Plaintiffs are currently considering the consequences of a settlement proposal as it pertains to them individually. A joint status report is due on or before June 30.

Two FOIA Cases Seek Boeing 737 MAX Documents

In Flyers Rights Education Fund, Inc., et al. v. FAA, No. 19-03749 (D.D.C.), plaintiffs seek a response from FAA to FOIA requests seeking records regarding 1) all software changes, including MCAS, that Boeing has submitted to the FAA for 737 MAX since October 28, 2018; 2) all software changes for

the Boeing 737 MAX, including MCAS, that were proposed, required, or requested by the FAA since October 29, 2019; and 3) the solutions or fixes to the flaws in the MCAS that were proposed by Boeing or any government agency or submitted to the FAA, JATR, or TAB by Boeing. Plaintiffs also seek to enjoin the FAA from lifting the grounding order until its experts (Captain Sullenberger, among others) can review the technical data they are seeking under FOIA. The court denied plaintiffs' request for a preliminary injunction and has processed this case like a FOIA challenge, setting up a production schedule for the requested documents.

In Rugg v. FAA, No. 20-00071 (D.D.C.), plaintiff seeks a response from FAA to FOIA requests seeking records regarding 737 MAX certification documents and documents related to the aircraft's grounding and MCAS. The requestor is also part of a class of plaintiffs suing Boeing and Southwest Airlines for damages related to the 737 MAX. The parties filed a joint motion to stay the case until May 22, pending scoping discussions. FAA's answer is due on June 1.

Federal Highway Administration

Eighth Circuit Denies Plaintiff's Motion for Injunctive Relief in Arkansas Highway Expansion Case

On December 6, 2019, the U.S. Court of Appeals for the Eighth Circuit affirmed the U.S. District Court for the Eastern District of Arkansas' denial of injunctive relief to a group of individuals attempting to stop work on the I-630 project in Little Rock, Arkansas. Wise, et al. v. USDOT, et al., No. 18-3016 (8th Cir. 2019). The appellants, George Wise and four other Little Rock citizens, filed their initial lawsuit on July 19, 2018, two days after construction began, to stop the work to widen 2.5 miles of I-630 from six to eight lanes. The Eighth Circuit held that the district court properly denied plaintiffs' petition for injunctive relief because they had failed to demonstrate that their claim was likely to succeed on the merits. Appellants argued that FHWA had improperly classified the project as a Categorical Exclusion ("CE") under 23 C.F.R. § 771.117(c)(22), which applies to projects that take place "entirely within the existing operational right-of-way" and that the project's environmental impacts in terms of noise and air quality constitute unusual circumstances that render it unsuitable for classification as a CE even if the project might otherwise qualify as a CE.

Appellants' argument that the project exceeded the bounds of the existing operational right-of-way was premised on the idea that operational right-of-way is limited to travel lanes, shoulders, and clear zones (land adjoining the shoulder of a road in which an errant vehicle may recover). In support of this theory, appellants cited explanatory text accompanying the notice of the final rule implementing 23 C.F.R. § 771.117(c)(22), which states that "a project within the operational right-of-way that requires the creation of new clear zones or extension of clear zone areas beyond what already exists would not qualify" for categorical exclusion. 79 Fed. Reg. 2107, 2113 (Jan. 13, 2014). Federal appellees argued that this understanding of operational right-of-way was overly narrow and failed to account for other text in the regulation that explains that operational right-of-way includes any land disturbed for an existing transportation facility or is maintained for a transportation purpose, including features like mitigation areas and landscaping.

The Eighth Circuit agreed that appellants'

proposed definition was overly narrow stating, "[t]o interpret [the explanatory text of the final rule] consistently with the regulation, we conclude that the explanatory text does not apply when the new or extended clear zones are built within the 'existing operational right-of-way' as defined by the regulation." The court summarily rejected appellants' alternative argument that potentially significant project impacts on noise and air quality rendered the project unsuitable for classification as a CE. The court held that plaintiffs had not shown how FHWA's CE classification was arbitrary, capricious, an abuse of discretion or otherwise not in accordance with the law.

Before reaching the merits of the case, the court rejected the state appellees' argument that the case was moot because construction is nearly complete and federal appellees' argument that the court lacked jurisdiction because appellants were appealing the denial of a motion for temporary restraining order, not a motion for a preliminary injunction.

The Eighth Circuit's opinion is here: https://ecf.ca8.uscourts.gov/opndir/19/12/183016P.pdf.

The project is currently more than 70% complete. Since the case has been remanded to the district court, the parties have filed and the court has approved a joint scheduling motion for filing an administrative record and motions for summary judgment. On April 3, 2020, FHWA filed the administrative record. Plaintiff's motion for summary judgment is due on May 25.

Court Denies Plaintiff's Motion to Compel Completion of the Administrative Record

On February 21, 2020, the court in South Carolina Coastal Conservation League v. USACE, et al., No. 17-03412 (D.S.C.) denied in part and granted in part plaintiff's Motion to Compel Completion of the Administrative Record. The court denied the request to compel defendants to include pre-decisional deliberative materials in the record and denied the request to compel a privilege log. The court found the record should be supplemented with a Southern Environmental Law Center's July 11, 2017, letter and FHWA's July 19, 2017, response.

Plaintiff is challenging a planned Interstate 73 ("I-73") corridor project in South Carolina that will provide a direct link from North Carolina and states north to the Grand Strand (Myrtle Beach area). The I-73 corridor project is approximately 80 miles in length. The project has been separated into two portions. The Southern portion of the project runs from I-95 near Dillon, South Carolina to the Grand Strand/Myrtle Beach area. The Northern portion of the project runs from I-95 to Hamlet, North Carolina.

New NEPA Categorical Exclusion Lawsuit Filed over Alabama Highway

On February 6, 2020, a group of local property owners filed a civil action against the Alabama Department of Transportation ("ALDOT"), FHWA, and the Alabama FHWA Division Administrator alleging that defendants violated NEPA by improperly designating the highway project at issue as a Categorical Exclusion ("CE") and improperly segmenting the subject project from a larger limited access highway project. Eyster, et. al. v. Alabama Dept. of Transp., et al., No. 20-00172 (N.D. Ala.). Plaintiffs allege economic harm, mainly devaluation of portions of land surrounding the project, which plaintiffs own in trust. Plaintiffs seek declaratory and permanent injunctive relief.

The project at issue consists of a new overpass bridge and interchanges on Highway 20 in Decatur, Alabama. The project was initially proposed to provide easier and safer access to a proposed development near the project area and in 2014, FHWA approved the project as a CE. However, the proposed development fell through, and the project stalled for several years. In 2018, ALDOT revived the project and proposed a revised design, moving the north interchange slightly westward to avoid some right of way impacts. A Reevaluation, approved in 2019, concluded that no new significant impacts existed and validated the prior 2014 CE. FHWA filed its Answer in on April 27, 2020.

New Environmental Challenges Filed in Little Missouri River Crossing

On December 27, 2019, a group of land owners filed a Complaint for Injunctive and Declaratory Relief alleging violations of NEPA, the National Historic Preservation Act, Section 4(f), and the APA. Short, et al. v. FHWA, et al., No. 19-00285 (D.N.D.). Plaintiffs are challenging the Final Environmental Impact Statement/Record of Decision for the Little Missouri River Crossing Project in western North Dakota. The project is approximately 8.3 miles long and includes a new crossing of the Little Missouri River. The project is currently undergoing final design.

Plaintiffs allege that the Environmental Impact Statement ("EIS") failed to disclose and analyze all impacts to the environment and reasonable alternatives. Plaintiffs further allege that the public involvement process was inadequate because FHWA provided only sixty days to comment and failed to respond to comments in sufficient detail. In addition, plaintiffs argue that FHWA failed to determine whether plaintiffs' ranch is eligible for inclusion in the National Register of Historic Places and refused to allow plaintiffs to become a consulting party during the Section 106 process. Finally, plaintiffs allege that FHWA erred in determining that a Forest Service Management Area was not a Section 4(f) resource.

Billings County, North Dakota, has filed Motion to Intervene. Billings County is the project sponsor and signed the Final Environmental Impact Statement as a joint lead agency. The federal defendants' answer is due on May 26, 2020.

Federal Motor Carrier Safety Administration

Ninth Circuit Denies Petition for Review of FMCSA Order

On November 25, 2019, in Valentinetti v. USDOT, 785 Fed. Appx. 488 (9th Cir. 2019), the U.S. Court of Appeals for the Ninth Circuit denied a petition for review filed by Steve Valentinetti. In December 2018, petitioner, who proceeded *pro se*, sought review of a December 2, 2015, FMCSA final order denying his request for review of an unsatisfactory safety rating and the agency's subsequent order dismissing his petition for reconsideration. The Ninth Circuit held that petitioner failed to demonstrate that FMCSA's final order was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law. In addition, the court declined to review an equal protection claim on the basis of alleged racial discrimination that petitioner raised for the first time in his opening brief. Lastly, the court found that petitioner had waived any challenge to FMCSA's order dismissing his

petition for reconsideration because he failed to address that order in his opening brief.

DOT Officials Move to Dismiss Hazardous Materials Carrier Suit Alleging Civil Rights Violations

On December 18, 2019, in Spencer, et al. v. FMCSA, et al., No. 18-01191 (D.N.H.), federal defendants moved to dismiss plaintiffs' amended complaint. In December 2018, William Spencer and Spencer Bros, LLC sued employees of FMCSA and OIG in their individual capacities, as well as New Hampshire state officials and the State of New Hampshire, alleging civil rights violations and common law torts. The allegations against the DOT officials arose from a compliance review in which FMCSA found hazardous materials violations by the carrier, reported them to the New Hampshire State Police, and issued an Unsatisfactory Safety Rating and Order to Cease Operations. The U.S. District Court for the District of New Hampshire dismissed all claims against the state defendants. Plaintiffs filed a second amended complaint in September 2019 that alleged deprivation of due process under the Fifth and Fourteenth Amendments and that federal defendants violated the Racketeering Influenced Corrupt Organizations Act ("RICO") by acting in concert to commit mail fraud and obstruction of justice.

The federal defendants' motion to dismiss the second amended complaint argued that because plaintiffs' due process and RICO allegations in the second amended complaint involved findings from the compliance review, jurisdiction was in the courts of appeals under the Hobbs Act, 28 U.S.C. § 2342(3)(A). Federal defendants also argued that plaintiffs' second amended complaint did not state a claim under Bivens and that the common-law torts alleged were not cognizable under the Federal Tort Claims Act ("FTCA") because the federal government did not waive sovereign immunity with respect to claims of defamation and libel and because plaintiffs failed to exhaust their administrative remedies under the FTCA. Federal defendants further argued that plaintiffs failed to establish that federal defendants' actions were sufficient to establish the existence of an enterprise within the meaning of the RICO statute and that plaintiffs failed to allege a pattern of racketeering activity.

Plaintiffs filed their brief in opposition to the motion to dismiss on February 24, 2020, the federal defendants filed their reply brief on April 6, and plaintiffs filed their surreply brief on May 13.

FMCSA Seeks Affirmance of Dismissal of Challenge to Pre-employment Screening Program

On March 25, 2020, FMCSA asked the U.S. Court of Appeals for the District of Columbia Circuit to affirm the dismissal of a challenge to the agency's Pre-employment Screening Program for commercial motor vehicle drivers. Mowrer, et al. v. USDOT, et al., No. 19-5321 (D.C. Cir.).

Plaintiffs originally asserted claims under the APA and Fair Credit Reporting Act ("FCRA"), arguing that FMCSA (1) failed to remove from a federal database the drivers' records of violations related to citations that had been dismissed by a judge or administrative tribunal; and (2) improperly delegated to the states its responsibility to ensure that motor carrier safety data was "accurate, complete, and timely." In a prior appeal, the D.C. Circuit affirmed the District Court's decision in part and reversed in part. Owner-Operator Independent Driver Association, et. al v. USDOT, et al., 879 F.3d

339 (D.C. Cir. 2018). The D.C. Circuit upheld the dismissal of the plaintiffs' APA claims and the FCRA damages claims of three drivers. However, the D.C. Circuit remanded the case to the district court on the limited grounds that two drivers adequately pled an Article III injury under the FCRA's damages provision.

On remand, the district court agreed with the government that FMCSA is not a "consumer reporting agency" within the meaning of the FCRA and dismissed the claims of the two remaining drivers. In their appeal of that decision, appellants argue that the FCRA applies to the government's handling of safety data and that the district court should have allowed appellants to pursue claims on remand brought under the Privacy Act. FMCSA contends that the district court correctly held that FMCSA does not act as a "consumer reporting agency" for purposes of the FCRA when it provides information gathered for safety purposes to prospective employers, and that in any event the FCRA's damages provisions do not waive the federal government's sovereign immunity. FMCSA also argues that the district court did not abuse its discretion in denying the plaintiffs' motion to amend their complaint to add Privacy Act claims.

Motor Carrier Files Petition for Review of Unsatisfactory Safety Rating

On January 24, 2020, Sorreda Transport LLC filed a petition for review in the U.S. Court of Appeals for the First Circuit challenging a final FMCSA order that upheld the motor carrier's Unsatisfactory safety rating. Sorreda Transport LLC v. USDOT, No. 20-1125 (1st Cir.). Sorreda Transport asks the court to set aside FMCSA's final order as arbitrary and capricious under the APA.

FMCSA conducted a compliance review of Sorreda Transport in August 2019, which resulted in a proposed Unsatisfactory safety rating. Following Sorreda Transport's request for administrative review, FMCSA's Assistant Administrator issued a final agency order on November 26, 2019, upholding the Unsatisfactory safety rating. The Assistant Administrator found that Sorreda Transport failed to demonstrate by a preponderance of the evidence that FMCSA erred in citing the challenged violations relating to the carrier's maintenance of driver qualification files and failure to require its drivers to use an electronic logging device.

Sorreda Transport filed its opening brief on May 15, and the government's brief is due on June 15.

Motor Carrier Seeks Review of FMCSA Order, Court Denies Stay Request

On January 17, 2020, in KP Trucking LLC v. USDOT, et al., No. 20-9508 (10th Cir.), petitioner sought review in the U.S. Court of Appeals for the Tenth Circuit of FMCSA's December 18, 2019, final order determining that KP Trucking was the reincarnation of another trucking company, Eagle Iron & Metal. On January 17, petitioner also filed a motion asking the Tenth Circuit to stay enforcement of the operations out-of-service and record-consolidation order pending the court's review of FMCSA's December 18 final order. The court denied petitioner's request for a stay on February 19, 2020. Petitioner opening brief is due on May 26, and the government's answering brief is due on June 24.

The agency's December 18 final order denied KP Trucking's petition for administrative review of an operations out-of-service and record-consolidation order issued on

October 9, 2019. In denying the petition for administrative review, FMCSA determined that a substantial continuity existed between Eagle Iron & Metal and KP Trucking and that the evidence showed a commonality of drivers, vehicles, operations, shippers, addresses, and phone numbers sufficient to support a finding that KP Trucking was the reincarnation of Eagle Iron & Metal. The agency further found that KP Trucking was the reincarnation of Eagle Iron & Metal for the improper purpose of avoiding FMCSA orders, negative compliance history, and payment of a civil penalty.

Court Dismisses Suit Against DOT Alleging Governmental Failure to Regulate Rideshare Companies

On November 22, 2019, in Mendel v. Chao, et al., No. 19-3244 (N.D. Cal.), the U.S. District Court for the Northern District of California dismissed plaintiff's complaint naming 31 defendants and alleging illegal conduct in connection with the rideshare services provided by Uber and Lyft. Plaintiff, proceeding *pro se*, worked as a driver for Uber and Lyft and, on June 7, 2019, filed the complaint that alleged more than 30 causes of action against rideshare companies and federal and state officials. The federal defendants included two federal court judges and officials from DOT, the Department of Justice, and the Federal Trade Commission. While the gravamen of the complaint was governmental failure to regulate rideshare companies, the alleged violations included antitrust, unfair competition, the Dormant Commerce Clause, minimum wage laws, the 14th Amendment, and others. The district court found that the complaint violated Fed. R. Civ. P. 8 because it failed to set forth a short and plain statement with simple, concise, and direct allegations. The court dismissed the complaint without prejudice and granted plaintiff leave to file an amended complaint that does not exceed 30 double-spaced pages, including attachments and exhibits within 60 days of the court's November 22 order.

Plaintiff filed a notice of appeal to the U.S. Court of Appeals for the Ninth Circuit before the district court dismissed all the defendants from the case. Consequently, the Ninth Circuit dismissed the appeal for lack of jurisdiction on January 23, 2020. Plaintiff then filed an Amended Complaint on April 30, and the federal defendants filed a Motion to Dismiss on May 8. Plaintiff's opposition to the motion to dismiss is due on May 29, and a case management conference is scheduled for June 2.

Small Business in Transportation Coalition Files Action Against FMCSA Regarding Three Exemption Requests

On April 1, 2020, a trucking industry trade group, the Small Business in Transportation Coalition, filed an action in the U.S. District Court for the District of Columbia against FMCSA regarding three exemption requests. Small Bus. in Transp. Coal. v. USDOT, No. 20-883 (D.D.C.). Between February and September 2019, plaintiff submitted three exemption requests to FMCSA seeking exemptions from regulatory requirements regarding electronic logging devices ("ELDs"), hours-of-service ("HOS") requirements, and broker bond financial responsibility. In its complaint, plaintiff claimed that FMCSA had unreasonably delayed issuing a decision on its ELD exemption request and had unreasonably delayed publishing its HOS and broker bond exemption requests in the Federal Register to seek comments, as required by statute. In addition to seeking a declaratory judgment against FMCSA, plaintiff also sought an

order requiring FMCSA to issue a decision regarding the ELD exemption request and to issue decisions regarding the HOS and broker bond exemption requests after publishing them in the Federal Register and seeking comments on the requests.

Before FMCSA's answer or other responsive pleading was due, on April 27, 2020, plaintiff filed a motion for preliminary injunction regarding its broker bond exemption request. Plaintiff asserted that in an attempt to confuse and prevent potential commenters from submitting comments on the broker bond exemption request, FMCSA had combined the docket for the broker bond exemption request with the docket for the ELD exemption request. In its motion, plaintiff sought to have the court order FMCSA to: (1) publish the broker bond exemption request "in a conspicuous location where the public can easily view and access it"; (2) assign a new, unique docket number to the broker bond exemption request; and (3) restart the 30-day comment period. The court set a briefing schedule, directing FMCSA to file its response by noon on May 5, and plaintiff to file its reply by noon on May 8.

After reviewing plaintiff's motion, FMCSA discovered that due to a drafting error, the Federal Register notice for the plaintiff's broker bond exemption request had included the wrong docket number. As a result, FMCSA agreed to take several remedial steps. Specifically, FMCSA agreed to: (1) request a new docket number for the plaintiff's broker bond exemption request; (2) publish a correction notice in the Federal Register with the new docket number; and (3) restart the 30-day comment period. However, despite obtaining all the relief it sought in its motion, plaintiff refused to withdraw its motion.

On May 5, FMCSA filed a combined opposition to the motion for preliminary injunction and motion to dismiss. As an initial matter, FMCSA argued that the district court lacks jurisdiction over plaintiff's claims because all of plaintiff's exemption requests are authorized under statutory provisions that are subject to judicial review pursuant to the Hobbs Act, 28 U.S.C. § 2342(3)(A), which vests the courts of appeals with exclusive jurisdiction over challenges to FMCSA actions taken pursuant to those statutory provisions. FMCSA further argued that even if the court were to reach the merits of plaintiff's motion for preliminary injunction, the motion should be denied as moot because the agency had already given plaintiff all the relief it sought in its motion.

On the same day that FMCSA filed its combined opposition and motion to dismiss, the court issued an order directing plaintiff to file a response within 24 hours indicating whether defendants had taken the actions requested in plaintiff's motion. The court indicated that it was inclined to deny the motion as moot if defendants had, in fact, taken the three actions requested in plaintiff's motion, and the next day it did so for that reason. In addition, the court ordered plaintiff to file a response to FMCSA's motion to dismiss by May 20, and FMCSA to file a reply by June 1.

Federal Railroad Administration

Supplemental Briefing Completed in Labor Unions' Challenge to Mexican Locomotive Engineer and Conductor Certifications

Following oral argument on December 5, 2019, before the U.S. Court of Appeals for the District of Columbia Circuit, petitioners,

the Brotherhood of Locomotive Engineers and Trainmen and the Transportation Division of the International Association of Sheet Metal, Air, Rail and Transportation Workers (collectively, the "Labor Unions"), and respondents, FRA and DOT, filed supplemental briefs in a case that challenges unspecified actions FRA took that allegedly authorized and permitted Kansas City Southern de Mexico ("KCSM") to operate freight trains in the United States for the Kansas City Southern Railway ("KCSR"). Bhd. of Locomotive Eng'rs and Trainmen, et al. v. FRA, et al., No. 18-1235 (D.C. Cir.).

The petition for review, which was filed on September 4, 2018, asserts that KCSM is a Mexican railroad and that prior to July 9, 2018, it only provided railroad transportation in Mexico. The petition for review further contends that KCSM's operations in Laredo, Texas, do not comply with FRA's railroad safety laws and regulations, including the regulations governing the qualification and certification of locomotive engineers and conductors pursuant to 49 C.F.R. Parts 240 and 242. The Labor Unions allege that because FRA took the unspecified administrative actions they now challenge without public notice or other published documentation, they are unable to cite to or attach a copy of the document(s) that memorializes FRA's final agency action.

On October 22, the government and intervenors KCSR and the Texas Mexican Railway Company filed separate motions to dismiss, alleging that the Labor Unions failed to identify a final agency action that is subject to the court's review. On February 5, 2019, the D.C. Circuit deferred judgment on the motions to dismiss and referred the motions to the merits panel.

On July 5, 2019, the government filed its brief on the merits, requesting that the court dismiss or deny the petition for review. In the brief, the government re-asserted its jurisdictional arguments raised in its motion to dismiss, maintaining that the petition failed to identify a specific agency action under review, and the Labor Unions failed to identify any reviewable final agency action. The government also argued that the Labor Unions' claims were meritless because FRA did not act beyond its authority and did not violate any applicable statutory and/or regulatory provisions.

The D.C. Circuit held oral argument on December 5. On December 9, the court ordered the government to file the full administrative record relating to FRA's approval of KCSR's modified Part 240 engineer certification program, FRA's determination that KCSR's Part 242 conductor certification program was sufficient to permit KCSR to certify KCSM conductors, and FRA's alleged decision to allow for the assignment of KCRS's brake-test waiver to KSCM.

On December 20, the government filed the administrative record with the court. Because the court's order raised the questions of (1) whether FRA made any decisions regarding KCSR's Parts 240 and 242 Programs, as well as any alleged assignment of KCSR's brake-test waiver to KCSM and (2) whether those decisions were reviewable final agency action under the Hobbs Act, 28 U.S.C. § 2344, the government also filed a motion for leave to submit a supplemental brief to address those issues.

On December 26, the Labor Unions filed a request for an order clarifying the status of the government's supplemental filing, contending that the status of that filing was uncertain because the court issued no order addressing the government's motion for leave to file the supplemental brief. The

Labor Unions also sought authorization to file a supplemental reply brief, as well as the court's acknowledgment that no other post-argument briefs would be permitted. On January 6, 2020, intervenors filed a response to the Labor Unions' request to file a supplemental reply brief. In their response, intervenors requested that if the D.C. Circuit allowed the Labor Unions to file a supplemental brief, it should also give intervenors an opportunity to respond to the Labor Unions' brief.

On January 7, the court issued an order granting the government's request to file its supplemental brief and allowing the Labor Unions to file a supplemental brief. The court did not permit intervenors to also file a supplemental reply brief. On January 28, the Labor Unions filed their supplemental reply brief, in which they addressed issues related to the Hobbs Act that were raised in the government's supplemental filing.

Briefing Continues in Challenge to FRA's Withdrawal of Its Train Crew Staffing Regulation

On March 3, 2020, FRA and DOT filed their brief on the merits in litigation brought by the Transportation Division of the International Association of Sheet Metal, Air, Rail and Transportation Workers and the Brotherhood of Locomotive Engineers and Trainmen (collectively, the "Labor Unions"), as well as the California Public Utilities Commission ("CPUC"), the State of Washington, and the State of Nevada (collectively, the "states"), which challenges FRA's withdrawal of a notice of proposed rulemaking ("NPRM") that proposed a minimum requirement of two train crewmembers for most railroad operations. Transp. Div. of the Int'l Ass'n of Sheet Metal, Air, Rail and Transp. Workers, et al. v. FRA, et al., No. 19-71787 (9th Cir.) (companion cases: Nos. 19-71802, 19-71916, 19-71918).

On March 15, 2016, FRA issued an NPRM that proposed regulations establishing minimum requirements for the size of train crew staffs, depending on the type of operation. FRA received nearly 1,600 comments from industry stakeholders and individuals, and it also held a public hearing. After studying the issue in depth and performing outreach to industry stakeholders and the general public, FRA ultimately concluded that no regulation of train crew staffing is necessary or appropriate. In issuing the withdrawal, FRA explained that it could not provide conclusive data to suggest whether one-person crew operations are generally more safe or less safe than multiple-person crew operations. In withdrawing the NPRM, FRA also provided notice of its affirmative decision that no regulation of train crew staffing is necessary for railroad operations to be conducted safely and that FRA intends to negatively preempt any state laws concerning train crew size.

On June 16, 2019, the Labor Unions filed their petition for review in the U.S. Court of Appeals for the Ninth Circuit. Between July 18 and July 29, the states individually petitioned the Ninth Circuit for review of the withdrawal, contesting a statement in the withdrawal that FRA's affirmative decision not to regulate train crew size is intended to preempt all state laws attempting to regulate train crew staffing in any manner. On August 8, the Association of American Railroads ("AAR") moved to intervene in all of the cases, and the Ninth Circuit granted AAR's motion on August 14. On August 19, the government filed a motion to consolidate the four petitions for review, which the Ninth Circuit granted on October 22.

The Labor Unions and the states filed their opening briefs on December 4. Although they filed separate briefs, they all focused on the following general assertions: (1) FRA's decision to withdraw the NPRM was arbitrary and capricious because it was unsupported by, and contrary to, the evidence produced and considered during the rulemaking; (2) FRA had no authority to preempt state action regarding minimum crew size without issuing a regulation covering the subject of the preempted state action; and (3) FRA failed to provide notice or an opportunity to comment on the potential deregulation and preemption of state action. The State of Washington and CPUC also argued that FRA's decision was untimely because the decision was issued more than twelve months after publication of the NPRM in the Federal Register.

On December 11, California, Colorado, Delaware, the District of Columbia, Illinois, Massachusetts, Minnesota, Mississippi, New Jersey, New York, Oregon, Virginia, and Wisconsin filed an amicus brief in support of the Labor Unions and the States, which maintained that FRA's decision to withdraw the NPRM ran counter to research on safe train operations.

In its brief on the merits, the government argued that: (1) based on the available evidence, FRA reasonably determined that minimum crewmember regulations could not be justified because the record evidence does not establish that two-person crews are safer; (2) FRA reasonably exercised its broad statutory and regulatory authority to propose rules addressing railroad safety, withdraw rules it had proposed, and preempt state laws; and (3) FRA's decision to withdraw the NPRM and preempt state laws regulating train crew size complied with notice-and-comment rulemaking requirements.

AAR filed its Intervenor Brief on March 24, 2020, and the optional reply briefs for the Labor Unions and the states are due on July 14, 2020.

Labor Unions Seek Review of Risk Reduction Program Final Rule

On April 10, 2020, the Transportation Division of the International Association of Sheet Metal, Air, Rail and Transportation Workers, the Brotherhood of Locomotive Engineers and Trainmen, and the Academy of Rail Labor Attorneys sought review in the U.S. Court of Appeals for the District of Columbia Circuit of FRA's Risk Reduction Program final rule, which was issued on February 18, 2020. Transp. Div. of the Int'l Ass'n of Sheet Metal, Air, Rail and Transp. Workers, et al. v. FRA, et al., No. 20-1117 (D.C. Cir.). This final rule implemented Section 103 of the Rail Safety Improvement Act of 2008, which mandated that FRA issue a regulation requiring certain railroads to implement a railroad risk reduction program ("RRP") after obtaining FRA's approval.

The RRP final rule requires Class I freight railroads and railroads with inadequate safety performance to implement an RRP, supported by an RRP Plan reviewed and approved, and later audited for compliance, by FRA. The rule also requires railroads to consult, using good faith and best efforts, with directly affected employees (including labor organizations) as part of their development of their RRP Plans. The RRP final rule protects certain RRP information from use in court proceedings for damages involving personal injury, wrongful death, or property damage.

In their petition for review, petitioners raise the following issues: (1) whether FRA violated 49 U.S.C. § 103(c) by allegedly stating that "RRP is subject to minimum

Federal standards"; (2) whether FRA violated 49 U.S.C. § 20103(b) by promulgating the RRP final rule 5 years after issuance of the NPRM and 12 years after the enactment of Section 103 of the RSIA; (3) whether it was arbitrary, capricious, an abuse of discretion, or otherwise contrary to law for FRA to establish performance-based and flexible standards in the RRP final rule; and (4) whether it was arbitrary, capricious, an abuse of discretion, otherwise contrary to law, or in violation of 49 U.S.C. § 103(c) for FRA to rely on a study conducted to determine whether it would be in the public interest to withhold certain RRP information, including a railroad's assessment of its safety risks and its statement of mitigation measures, from discovery and admission into evidence in proceedings for damages involving personal injury and wrongful death. The case is expected to be briefed in the coming months.

Federal Transit Administration

Sharks Files Motion for Summary Judgment in BART Silicon Valley Litigation

On February 21, 2020, Sharks Sports and Entertainment LLC ("SSE") filed a motion for summary judgment in Sharks Sports & Entertainment LLC v. FTA, No. 18-4060 (N.D. Cal.). SSE alleges NEPA violations in challenging FTA's Final Supplemental Environmental Impact Statement/Subsequent Environmental Impact Report ("SEIS/SEIR") and its Record of Decision in connection with the BART Silicon Valley Phase II Extension Project. Prior to the certification of the administrative record ("AR"), the court took the unusual step of allowing SSE to conduct discovery in an APA case. Ultimately, the court refused to add any of the additional documents SSE obtained through discovery to the AR. But the court required FTA to supplement the AR to include those documents that were referenced in the SEIS/SEIR, but not initially included in the AR. The motion for summary judgment is based on the expanded AR.

The project includes a six-mile extension of the BART system from the Berryessa/North San Jose Station through downtown San Jose, terminating near the Santa Clara Caltrain Station. As part of the project, the Diridon Station is proposed to interconnect several modes of transit, including BART, Caltrain, light-rail, the Altamont Express, Amtrak, and the planned High Speed Rail. SSE owns and operates the San Jose Sharks, a National Hockey League team, and is also the parent company that manages the SAP Center. The SAP Center, an 18,000-seat regional multipurpose event center, is located adjacent to the planned Diridon Station.

SSE alleges that FTA's NEPA review was improper because an eight-story parking facility was improperly omitted from the project. SSE alleges the parking facility, as noted in previous Draft and Final EIS documents, would serve to mitigate the Project's adverse environmental impacts on the area. SSE's complaint and summary judgment motion focus on "FTA's conclusion that the Diridon Station will function as a destination station" and, therefore, would not need the same amount of parking as other stops along the route. SSE contends that this issue was not properly studied and was prejudged.

The project has been selected for funding under FTA's Expedited Project Delivery Pilot Program. SSE is seeking an injunction prohibiting FTA from obligating funds to the Project and for it to take no further action on the project until FTA has complied with NEPA. FTA filed its response and cross-motion for summary judgment on March 27,

2020, and SSE filed its reply brief in support of its motion for summary judgment on April 17. On April 20, the court vacated the hearing on the motion for summary judgment that had been scheduled for May 14 and determined that the matter will be decided on the briefs without oral argument.

SSE also filed a separate Freedom of Information Act (FOIA) lawsuit related to the Project on September 29, 2018. Sharks Sports & Entertainment LLC v. FTA, No. 18-5988 (N.D. Cal.). The FOIA lawsuit seeks documents that are part of the AR in the NEPA litigation and has been stayed pending SSE's review of the AR. A case management conference that was scheduled for April 22, 2020 has been continued to July 1.

Court Grants Summary Judgment for FTA in Los Angeles Westside Section 2 NEPA Litigation

On May 18, 2020, following a hearing on summary judgment motions, the U.S. District Court for the Central District of California adopted as final its May 15 tentative rulings in favor of defendants FTA and Los Angeles County Metropolitan Transportation Authority ("LACMTA") in Beverly Hills Unified School District v. FTA, et al., No. 18-716 (C.D. Cal.). The court granted FTA and LACMTA's motions for summary judgment and denied record-related sanctions against LACMTA. The parties had filed simultaneous supplemental summary judgment briefs on April 17, 2020, and response briefs on May 4. At the end of the hearing, Beverly Hills Unified School District ("BHUSD") requested an injunction pending appeal. The court directed the parties to work on a joint order.

BHUSD challenged FTA's November 22, 2017, NEPA and Section 4(f) Supplemental Record of Decision (ROD)/Final Supplemental Environmental Impact Statement ("FSEIS") for Section 2 of the LACMTA Westside Purple Line Extension ("WPLE") Project. The City of Beverly Hills also filed a similar complaint on May 9, 2018. City of Beverly Hills v. FTA, et al., No. 18-3891 (C.D. Cal.). Both BHUSD and the City alleged that FTA violated NEPA, Section 4(f), and predetermined the outcome in its NEPA and Section 4(f) determination. However, the City's lawsuit is stayed due to settlement discussions.

The WPLE Project would extend the existing L.A. Metro Purple Line by approximately 9 miles west from the Wilshire/Western Station to a new terminus at a new Westwood/VA Hospital Station in Santa Monica. The underground extension will include seven new stations spaced in approximately 1-mile intervals. The WPLE Project is divided into three phases. Section 1 of the WPLE Project is under construction. The subject of the BHUSD litigation is Section 2 - a 2.6-mile heavy-rail underground extension of the Metro Purple Line from Wilshire/La Cienega station in the City of Beverly Hills westward to the Century City area of Los Angeles. LACMTA has started construction for Section 2 of the WPLE Project.

In its summary judgment decision, the court held that FTA and LACMTA satisfied NEPA's arbitrary and capricious standard by briefly discussing why an alternative construction staging area was eliminated. The court determined that even if the hard look standard is the applicable NEPA standard, FTA and LACMTA took the necessary "hard look." The court found that the extra-record materials produced by defendants were not new rationalizations, but "insight into the efforts and analysis they undertook" in reaching the conclusion that the construction Staging Area 1 is

inappropriate or infeasible. The court took judicial notice that Beverly Hills High School is closed due to COVID-19 and encouraged the parties to "act with all appropriate haste … to accomplish as much construction activity … adjacent to, or impacting upon, the high school … during this unusual situation."

The court had issued an earlier tentative ruling in June, 2019 stating that the court would rule in defendants' favor for most of the NEPA issues, including the analysis for methane risk, and Section 4(f), but the court required further briefing on supplementation and injunctive relief related to construction Staging Area 1. As part of Defendant LACMTA's briefing on the supplementation issue, LCMTA submitted additional documents regarding the availability of the 1950 Avenue of the Stars property/Construction Staging Area 1 ("Staging Area 1"). The court permitted BHUSD to conduct limited discovery on the availability of Staging Area 1, and plaintiff filed a motion for sanctions against LACMTA alleging bad faith for not previously providing the additional documents related to Staging Area 1. However, the court's tentative ruling denies plaintiff's request for sanctions.

Maritime Administration

Litigation Concludes in Personal Injury Case Involving U.S.-Owned Training Vessel

The United States settled litigation with plaintiff Janis Fitch on January 17, 2020, approximately five months after the U.S. District Court for the District of Maine dismissed the United States from this seaman's personal injury case involving a U.S.-owned training vessel lent to Maine Maritime Academy ("MMA"). Plaintiff in Maine Maritime Academy v. Fitch, No. 17-195 (D. Me.), a cook employed by Sodexo, was injured aboard the Training Ship STATE OF MAINE during its 2016 summer training cruise. On May 31, 2017, MMA filed a complaint for declaratory judgment, asking the court to declare that Sodexo, and not MMA, was plaintiff's employer for the purposes of maritime liability, and that Sodexo had a contractual obligation to indemnify MMA. In response, plaintiff filed a complaint alleging her rights under the Jones Act and the general maritime law against both MMA and Sodexo. On January 18, 2018, after significant discovery and motions practice, plaintiff moved to amend her complaint to include the United States as a defendant. The complaint was amended in response to MMA's claim that MMA was the agent of the United States for the purposes of the Suits in Admiralty Act ("SIAA").

On June 7, 2018, MMA moved to dismiss plaintiff's complaint on the basis that under the SIAA, MMA was the agent of the United States, and therefore, suit could only be filed against the United States. After extensive briefing, the court held that MMA was not an agent of the United States under the SIAA at the time of plaintiff's injury. In its holding in favor of the United States, the court concluded that the contract between MARAD and MMA does not create an agency arrangement "given that the government is not contracting with MMA to perform a specific task on its behalf but rather is supporting an overall shared educational objective." In addition, given that MMA retains considerable control over the operation of the training ship, the court found that for purposes of the SIAA, MMA could not be considered an agent of MARAD and remained a proper defendant in the case.

Following the court's decision that MMA was not the agent of the United States, a limited bench trial was held on plaintiff's status as a "seaman" under Admiralty law and the identity of her employer. In a detailed decision, the court found that plaintiff was indeed a seaman and her employer was an MMA contractor, Sodexo. Plaintiff then settled with Sodexo.

On September 27, 2019, with plaintiff's consent, the court dismissed the United States from the case. On October 6, 2019, plaintiff's attorney moved for the order dismissing the United States to be set-aside. Plaintiff's motion to set-aside revealed that plaintiff's attorney had mistakenly believed that the court had determined that MMA had operational control of the ship and was therefore the owner *pro hac vice* of the vessel. However, upon review of the order and hearing the MMA's intent to renew its motion to dismiss on the basis it was not the owner of the vessel, plaintiff's counsel realized they had made a mistake. On December 16, 2019, the court granted the motion to set aside.

After settling a trial date, the court ordered that the parties hold a settlement meeting. All parties reached a settlement in January 2020. The parties filed a stipulation of dismissal, with prejudice, of all claims on April 7, 2020, concluding the litigation.

District Court Issues Favorable Summary Judgment Ruling in Seaman's Injury Litigation

On January 30, 2020, the court in Shaw v. United States, No. 18-06243 (N.D. Cal.), a seamen's injury case, granted the government's motion for summary judgment, reaffirming the agency status of ship managers employed by the United States to manage public vessels.

On October 12, 2018, plaintiff, a seaman on the Ready Reserve ship ALGOL, filed a complaint against the United States, the ship manager, Ocean Duchess, Inc. ("ODI"), and a related company, Ocean Shipholdings, Inc. ("OSI"), over an injury he sustained when a line parted on the ALGOL on May 27, 2018. The complaint alleged: (1) negligence under the Jones Act, 46 U.S.C. § 30104; (2) unseaworthiness; and (3) failure to pay maintenance, cure, and wages under maritime law. Plaintiff also made a claim of gross negligence against ODI and OSI, as well as a claim for attorneys' fees and punitive damages against ODI and OSI. While ODI was the actual ship manager, OSI was an affiliated company that provides some services to OSI.

In response, the United States filed a motion to dismiss ODI and OSI arguing that under the Suits in Admiralty Act, the only proper defendant was the United States, not its agents. On January 18, 2019, the court denied the motion to dismiss, holding that the complaint sufficiently alleged that ODI and OSI were acting outside the scope of their agency relationship with the United States when plaintiff was injured.

After significant fact discovery, the United States filed a motion for summary judgement to dismiss ODI and OSI from the case. In holding for the United States, the court made several key findings, including the following: 1) the indemnification provision of the Ship Manager Contract does not alter the ODI's agency relationship with the United States; and 2) that while not an agent of the United States, OSI's activities in reference to the ALGOL and for OSI did not create a duty of care that inured to plaintiff and allowed a cause of action against ODI.

The United States continues to remain a defendant in this case, with further proceedings on the remaining issues anticipated in the coming months.

Port of Anchorage Litigation Continues with Mini-Trial on Port Improvement Agreements

A mini-trial was held in San Francisco in the Port of Anchorage litigation on February 18 and 19, 2020. Anchorage v. United States, No. 14-00166 (Fed. Cl.). The unusual proceeding was ordered by the court to examine the financial arrangements between Anchorage, Alaska and the United States related to a port improvement project in Anchorage. This issue is relevant to the question of whether the agreements between the Port of Anchorage and the United States are actionable agreements within the jurisdiction of the Court of Federal Claims.

In 2003, Congress authorized MARAD to administer federal and non-federal funds for developing and modernizing the Port of Anchorage. Pub. L. No. 108-7, § 626 (Feb. 20, 2003). On March 17, 2003, to carry out the statute, the Municipality of Anchorage and MARAD entered a Memorandum of Understanding ("MOU") to outline the responsibilities of each party in administering the project. The Project experienced significant construction difficulties in 2009. Subsequent evaluation revealed both design and construction defects that rendered parts the Project unusable.

On February 28, 2014, the Municipality of Anchorage filed a lawsuit against the United States in the Court of Federal Claims. The complaint alleged that MARAD failed to fulfill its obligations to Anchorage in administering the Port of Anchorage Intermodal Expansion Project under the 2003 MOU and a subsequent 2011 Memorandum of Agreement.

The mini-trial stemmed from the government's motion for summary judgment filed on June 6, 2019. In its motion, the United States asserted that Anchorage could not demonstrate any evidence of consideration, or that MARAD promised through the 2003 MOU to undertake the duties that Anchorage alleged were breached. Instead, the government argued that MARAD's duty and authority to participate in the project came from the law requiring MARAD to administer the Project, thus precluding Anchorage's contractual claim.

In response, Anchorage argued that the government in fact received valuable consideration in the form of federal appropriations, military benefits, and project experience. Anchorage also argued that the statutory authority cited by the government merely provided funding for the project and that MARAD could not use that funding or undertake activity on the project without the direction provided by Anchorage through the 2003 MOU.

Supplemental Briefing on Jurisdiction in Maritime Security Program Dispute

On May 31, 2019, the parties in Matson Navigation Co. v. DOT, No. 18-02751 (D.D.C.), filed cross-motions for summary judgment in this challenge to MARAD's approval of two replacement vessels for participation in the Maritime Security Program ("MSP"). The current case follows a similar action that Matson filed in the D.C. Circuit pursuant to the Hobbs Act, which was dismissed for lack of jurisdiction.

In its summary judgment brief, Matson argued that MARAD's approvals of the replacement vessels were arbitrary and capricious because the replacements carry cargo to Saipan and were thus ineligible for the MSP. Matson alternatively argued that MARAD acted arbitrarily and capriciously by paying the full MSP stipend for the replacement vessels without deducting pro rata amounts for days the replacements carried cargo to or from Guam and Saipan. Matson asked the court to vacate MARAD's replacement decisions and enjoin MARAD again from approving these vessels as replacements. It also asked the court to enjoin MARAD from making any further MSP payments, or alternatively, "reduce the MSP subsidies pro rata."

The United States responded with several sequential arguments. First, the Government argued that the D.C. Circuit's prior dismissal of Matson's Hobbs Act petition deprives the District Court of jurisdiction. The Government next argued that transportation to Saipan does not make the vessels ineligible to participate in the MSP. Finally, the Government argued that Matson's requested remedies were inappropriate and that the proper remedy would be vacatur and remand to the agency.

On April 17, 2020, the court ordered the parties to submit supplemental briefs addressing whether the courts of appeals have exclusive jurisdiction or concurrent jurisdiction with the district courts to review an agency action made pursuant to multiple statutory provisions, including one that triggers exclusive jurisdiction in the courts of appeals and another that does not. The parties filed simultaneous supplemental briefs on May 15. The court has scheduled a telephonic oral argument for May 21.

National Highway Traffic Safety Administration

Ninth Circuit Denies SEMA's Mandamus Petition Regarding Replica Car Exemption

On October 17, 2019, the Specialty Equipment Market Association ("SEMA") filed a petition for a writ of mandamus against DOT and NHTSA in the U.S. Court of Appeals for the Ninth Circuit seeking an order compelling NHTSA to implement an exemption for low-volume replica motor vehicle manufacturers authorized in the Fixing America's Surface Transportation Act of 2015 ("FAST Act"). In re Specialty Equipment Market Association, No. 19-72623 (9th Cir.). SEMA, a trade association of manufacturers, distributors, retailers, and other motor vehicle enthusiasts, alleged that DOT and NHTSA had unlawfully withheld or unreasonably delayed agency action to implement the replica vehicle program, and that its members and others had incurred economic damage as a result of the inaction or delay.

Section 24405 of the FAST Act (Pub. L. No. 114-94) directs NHTSA to exempt up to 325 replica vehicles per year that are produced by a low-volume manufacturer from the Federal Motor Vehicle Safety Standards. A "replica vehicle" is generally defined as one that is intended to replicate the body of another motor vehicle produced at least 25 years prior, and a "low volume manufacturer" is generally defined as a manufacturer whose annual worldwide production is not more than 5,000 motor vehicles. The FAST Act directed that "regulations as may be necessary to implement" this exemption should be completed within one year. In its petition, SEMA asked the court to issue a writ of mandamus compelling NHTSA either to

issue a final implementing rule within 120 days or to conclude that no regulations were necessary to implement the program and permit low volume manufacturers to begin producing replica vehicles within 60 days.

DOT and NHTSA filed a response to SEMA's petition on December 20, 2019, arguing that new regulations are warranted to implement the replica vehicle program, and that NHTSA published a Notice of Proposed Rulemaking in January 2019 seeking public comment on how the agency would implement the program. Because NHTSA is actively engaged in the rulemaking, and because a writ of mandamus is an extraordinary remedy not appropriate in these circumstances, DOT and NHTSA asked the court to deny the petition. SEMA filed a reply on January 6, 2020. The Ninth Circuit initially set an oral argument date for early May 2020, but later canceled oral argument and determined that it would decide the case on the basis of the parties' briefs.

On May 8, the court denied SEMA's petition, holding that because the requested rulemaking is now underway, SEMA could not satisfy the standard for granting mandamus relief. The court encouraged NHTSA to complete the rulemaking process in a reasonably timely manner.

Abeyance Lifted, Briefing Ongoing in Challenge to Phase 2 Medium- and Heavy-Duty Fuel Efficiency Rule

On December 26, 2019, in litigation brought by the Truck Trailer Manufacturers Association, Inc. ("TTMA") challenging the trailer provisions of EPA and NHTSA's joint rule, "Greenhouse Gas Emissions and Fuel Efficiency Standards for Medium- and Heavy-Duty Engines and Vehicles—Phase 2," the U.S. Court of Appeals for the District of Columbia Circuit lifted the abeyance order in place since 2017 and set a briefing schedule. Truck Trailer Mfrs. Ass'n, Inc. v. EPA, No. 16-1430 (D.C. Cir.). Several states and environmental groups have intervened as respondents in support of the federal government.

On February 10, 2020, TTMA filed its brief, arguing that EPA lacks statutory authority to regulate emissions from trailers because the Clean Air Act allows EPA to set emissions standards only for "self-propelled vehicles," which trailers are not. TTMA also argues that NHTSA's fuel economy standards for trailers are not severable from EPA's emissions standards for trailers, and that the entire trailer standards program must therefore be vacated. Furthermore, TTMA contends that NHTSA independently lacks statutory authority to regulate the fuel economy of trailers because the Energy Independence and Security Act of 2007 authorizes NHTSA to regulate the "fuel economy" of certain "vehicle[s]," but trailers are not "vehicles" and do not have "fuel economy."

As the litigation advances, the EPA trailer provisions continue to be stayed. TTMA has not sought a stay of the NHTSA provisions. The federal government filed its brief on April 21, 2020. The intervenors' briefs from public health and environmental organizations and the states are due May 12. Petitioner's reply brief is due June 2. The administrative processes are continuing concurrently: on August 17, 2017, NHTSA granted TTMA's petition for rulemaking, and EPA notified TTMA that it would be reconsidering the trailer portions of the final rule.

NHTSA Resolves Data Collection Lawsuit in District Court

NHTSA negotiated and finalized a settlement in the lawsuit filed by the Center for Auto Safety ("CAS") against DOT in the U.S. District Court for the District of Columbia alleging that the DOT had failed to publish online copies of certain vehicle manufacturers' communications and searchable indices of those communications, as required by statute. Center for Auto Safety v. Chao, No. 16-192 (D.D.C.). As a result of the settlement, CAS voluntarily dismissed the case on January 13, 2020.

Under the terms of the settlement, NHTSA agreed to take two actions, both of which it has completed. First, NHTSA agreed to send an email to all motor vehicle and motor vehicle equipment manufacturers that have previously submitted to NHTSA electronic communications about defects or noncompliance, reminding them of their statutory obligation to submit these communications — with compliant indexes — to NHTSA, and encouraging them to do so using NHTSA's Manufacturer Communications Portal. The email also informed the manufacturers that if they submitted any communications to NHTSA after October 1, 2012, that were not accompanied by a fully compliant index at the time of submission, they must expeditiously resubmit these communications with a compliant index.

Second, NHTSA posted a message on the vehicle safety search landing page of its website, notifying the public that some manufacturer communications may not be available on NHTSA's website at this time, but might become available on the website in the future.

These actions were in addition to NHTSA's prior efforts to educate manufacturers on the submission requirements, to make tens of thousands of manufacturer communications publicly available, and to develop and deploy a web portal facilitating manufacturers' submissions. NHTSA continues to review, process, and publish manufacturer submissions of their communications and indexes, in compliance with applicable statutory provisions.

FOIA Litigation Continues Over SAFE Vehicles Rule

Litigation continues in the April 2019 lawsuit brought by the California Air Resources Board ("CARB") against NHTSA and the EPA in the U.S. District Court for the District of Columbia regarding a September 2018 FOIA request. Cal. Air Res. Bd. v. NHTSA, No. 19-00965 (D.D.C.). CARB's FOIA request sought twelve categories of records, modeling information, and data pertaining to the SAFE Vehicles Rule NPRM. CARB filed a motion for summary judgment on October 7, 2019. The motion argued that NHTSA failed to perform reasonable searches for two sections of the FOIA request that sought information concerning electrification and modeling issues. CARB's motion also sought production of two draft documents under another portion of the request, which NHTSA withheld in full as deliberative documents exempt from disclosure under Exemption 5. In addition, CARB's motion challenged EPA's redactions applied to two deliberative emails.

Subsequently, on December 17, 2019, NHTSA and EPA filed a joint cross-motion for summary judgment and response to CARB's motion. In this filing, the agencies defended the scope of the searches performed in response to CARB's request and set forth the justifications for the redactions and

withholdings applied to the production. In its opposition, filed on February 6, 2020, CARB dropped its challenge to one of NHTSA's searches for modeling information, acknowledging the search was reasonable. However, CARB maintained its challenges to the search for electrification records, as well as NHTSA's and EPA's withholdings and redactions of records. CARB primarily argued that the redacted and withheld material either consisted of non-deliberative, factual information or had lost any otherwise exempt status through its incorporation into the published analysis in the NPRM for the SAFE Vehicles Rule.

NHTSA and EPA filed a reply to this briefing on March 9, 2020, in which the agencies demonstrated the good faith manner in which they responded to the request, articulated the nature in which the withheld or redacted material remained deliberative despite the publication of the NPRM, and further described the reasonable steps taken in searching for materials. CARB later filed a notice with the court regarding the finalization of the SAFE Vehicles Rule fuel economy standards, discussed above, and contended that this development provided further demonstration of CARB's entitlement to FOIA relief. The agencies plan to respond in early May 2020.

Pipeline and Hazardous Materials Safety Administration

Court Dismisses Lawsuit Alleging That PHMSA Failed to Cause Pipeline Examinations

On April 15, 2020, the U.S. District Court for the District of Montana granted summary judgment to PHMSA in a lawsuit brought by WildEarth Guardians ("WildEarth"), which alleged that PHMSA had failed to cause the annual examination of pipelines on federal lands as required by the Mineral Leasing Act ("MLA"). WildEarth Guardians v. Chao, et al., 2020 WL 1875472 (D. Mont. 2020).

The lawsuit concerns a provision of the MLA providing that "at least once a year, the Secretary of the Department of Transportation shall cause the examination of all pipelines and associated facilities on Federal lands." 30 U.S.C. § 185(w)(3). The Secretary has delegated that responsibility to PHMSA (and its predecessor agencies). For over four decades, PHMSA has stated publicly that it complies with this mandate through its pipeline safety regulations, which require pipeline operators to examine their pipelines. WildEarth, however, alleged that PHMSA was not in compliance since the regulations do not cover certain pipelines which Congress has carved out from PHMSA's pipeline safety jurisdiction (including production lines and some rural gathering lines).

WildEarth sued under the APA to compel PHMSA to take action that it had allegedly "unlawfully withheld." 5 U.S.C. § 706(1). PHMSA argued that this claim was improper, since PHMSA in fact had acted (by issuing regulations), and WildEarth's actual claim was that PHMSA's action was insufficient. PHMSA argued, moreover, that any challenge to the sufficiency of its regulations could only be brought in a court of appeals under 49 U.S.C. § 60119(a).

The court agreed with PHMSA. It noted that it is well-established that a plaintiff can bring a "failure to act" claim under the APA only when it alleges that an agency has failed to take a discrete, non-discretionary duty. In contrast, when an agency has taken an action that a plaintiff believes to be legally insufficient, the appropriate recourse is to challenge that action as "arbitrary,

capricious, an abuse of discretion, or otherwise not in accordance with law" under a separate provision of the APA. 5 U.S.C. § 706(2)(A). The court concluded that WildEarth's claims fit into this second category, since PHMSA has taken steps "to address its statutory obligation," and WildEarth "challenges, in effect, the scope and details" of these steps. The court therefore concluded that "no genuine failure to act exists," and granted summary judgment in favor of PHMSA.

United States and California Sue Plains Pipeline in Connection with Refugio Oil Spill; Plains Agrees to $46 Million Settlement

On March 13, 2020, the United States and several California agencies sued Plains All American Pipeline, L.P. and a subsidiary in the U.S. District Court for the Central District of California, asserting violations of federal and state law stemming from a May 2015 oil spill near the Refugio State Beach in Santa Barbara County, California. United States, et al. v. Plains All American Pipeline, L.P., et al., No. 20-2415 (C.D. Cal.). The same day, the parties lodged a proposed consent decree under which Plains would pay $46 million and be subject to an array of injunctive relief.

The complaint alleges that Plains violated numerous PHMSA safety regulations, including requirements concerning integrity management, control room management, and training. The complaint also alleges that Plains failed to cooperate with PHMSA's investigation. In addition, the complaint alleges violations of the Clean Water Act, the Oil Pollution Act, and several California statutes.

Under the proposed consent decree, Plains would pay $24 million in civil penalties, including $14.5 million associated with its alleged violations of PHMSA regulations. Plains would also pay $22 million to remedy natural resources damages, in addition to amounts it has already spent. Plains would be subject to injunctive relief ensuring important changes to its pipeline integrity management program, valve maintenance and leak detection measures, and control room procedures.

The Justice Department has published notice of the proposed consent decree and requested public comment. After reviewing any comments, the United States will request that the court enter the Consent Decree or take other action.

PHMSA Seeks Dismissal of Declaratory Judgement Action Regarding Utah Pipeline

On December 10, 2019, PHMSA asked the U.S. District Court for the District of Utah to dismiss a *pro se* action seeking an order declaring that the Paradox Pipeline is a rural gathering line exempt from regulation, rather than a transmission line subject to regulation. Ahmad v. PHMSA, No. 19-82 (D. Utah).

The Paradox Pipeline is regulated by the Utah Public Service Commission ("Utah PSC"), which classifies the pipeline as an intrastate natural gas transmission pipeline subject to its oversight under state regulations that mirror PHMSA regulations. Plaintiff claims to have an interest in the pipeline.

On December 10, 2019, PHMSA filed a Motion to Dismiss the complaint on the following grounds: (1) plaintiff lacks Article III standing; (2) the United States has not waived its sovereign immunity; and (3) PHMSA's actions under 49 U.S.C. § 60119 are reviewable only in the Court of Appeals for the District of Columbia Circuit or the Ninth Circuit, where plaintiff resides.

On December 20, 2019, plaintiff filed an opposition to PHMSA's motion to dismiss, arguing that his claim is actually a claim under section 702 of the APA and that section 702 waives the government's sovereign immunity for suits seeking equitable relief. Plaintiff next argued that he has alleged sufficient facts to demonstrate standing, namely that he is the person who determined that the Paradox Pipeline is not a transmission line and that he has requested PHMSA to make the same determination. Finally, plaintiff asserted that his claims are in the proper court because his claims are not about challenging final agency action, a case that can only be brought in a court of appeals, but about forcing PHMSA to determine that the pipeline is not a transmission line.

On January 8, 2020, PHMSA filed a reply brief, asserting that plaintiff's opposition entirely recasts his complaint and alleges for the first time that PHMSA failed to respond to some unspecified demand that it make a determination that the pipeline is not a transmission line. Even if the court permits plaintiff to amend his complaint with the new claims first asserted in his opposition, PHMSA argued that he still lacks Article III standing because he has not pled any facts to show that PHMSA's alleged failure to respond to his request is adversely affecting some concrete interest personal to him. PHMSA also argued that plaintiff failed to properly invoke the APA's limited waiver of sovereign immunity, which requires him to show that the agency action allegedly withheld or delayed is something the law requires the agency to undertake. Finally, PHMSA argued that not only is a response to the unspecified request not legally required, it is legally superfluous because the pipeline is an intrastate pipeline regulated by the Utah PSC, not by PHMSA.

The court has not scheduled oral argument.

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