U.S. Department of Transportation

DOT LITIGATION NEWS

Office of the General Counsel

Paul M. Geier *Paul M. Geier*
Assistant General Counsel for Litigation and Enforcement

Peter J. Plocki *Peter J. Plocki*
Deputy Assistant General Counsel for Litigation and Enforcement

1200 New Jersey Avenue, S.E.
Washington, D.C. 20590

Telephone: (202) 366-4731
Fax: (202) 493-0154

November 24, 2020 Volume No. 20 Issue No. 2

Highlights

Table of Contents

Table of Contents

Supreme Court Litigation

Supreme Court Declines to Review D.C. Circuit Ruling Upholding DOT's Grant of Tax-Exempt Bond Authority to Florida Rail Project

On October 5, 2020, the U.S. Supreme Court denied a petition for a writ of certiorari in litigation involving the Brightline/All Aboard Florida passenger rail project. Indian River County v. USDOT, 2020 WL 5882262 (Oct. 5, 2020). In so doing, the Court let stand a ruling by the U.S. Court of Appeals for the District of Columbia Circuit that upheld DOT's grant of tax-exempt bond authority to the Project.

The Project is a private passenger railroad that will connect Miami and Orlando. On December 20, 2017, DOT authorized the issuance of tax-exempt Private Activity Bonds ("PABs") to fund Phase II of the Project between West Palm Beach and Orlando. Indian River County and other Project opponents brought suit to challenge that allocation. The district court granted summary judgment to DOT, and the D.C. Circuit affirmed. Indian River County v. USDOT, 348 F. Supp. 3d 17 (D.D.C. 2018), aff'd, 945 F.3d 515 (D.C. Cir. 2019).

Indian River County's cert petition focused on one aspect of the D.C. Circuit's decision: its ruling upholding 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 D.C. Circuit held 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.

In its cert petition, Indian River County argued that the D.C. Circuit's ruling was erroneous, and that the D.C. Circuit had improperly deferred to DOT's interpretations under Skidmore v. Swift & Co., 323 U.S. 134 (1944). The County contended that "the lower federal courts are in disarray over Skidmore" and that this case presented the Court with an opportunity to address that purported "disarray."

In its brief in opposition, DOT argued that the D.C. Circuit properly held that DOT's statutory interpretation was persuasive and consistent with the text. DOT noted, moreover, that it was not clear that the D.C. Circuit "relied on a meaningful form of deference at all," since "the court's opinion makes clear that it would have reached the same result regardless." DOT thus contended that the case was not a proper vehicle for examining any supposed inconsistency in the lower courts' application of Skidmore.

Supreme Court Denies Certiorari in Challenge to FAA Settlement of Santa Monica Airport Litigation

On October 16, 2020, the U.S. Supreme Court declined to review the dismissal by the U.S. Court of Appeals for the Ninth Circuit of a challenge to FAA's settlement of litigation with the City of Santa Monica, California regarding the Santa Monica Airport. Rosen v. United States, 2020 WL 6037246 (Oct. 16, 2020).

The January 2017 settlement ended years of disputes 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. The 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 district court ruled that plaintiff lacked standing to sue, and the Ninth Circuit affirmed. Rosen v. United States, 2018 WL 6016280 (July 5, 2018), aff'd, 798 Fed. App'x 92 (9th Cir. 2020).

In his cert petition, plaintiff sought review of the Ninth Circuit's standing ruling and of several additional issues. The United States waived its right to file a brief in opposition.

Supreme Court Denies Certiorari in Tennessee Highway Beautification Act Case

On July 9, 2020, the U.S. Supreme Court denied the State of Tennessee's Petition for Writ of Certiorari seeking 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, 2020 WL 3865256 (July 9, 2020).

Plaintiff William Thomas, a billboard operator, challenged 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 Billboard 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 filed an Opposition on May 22, and Tennessee filed a Reply on June 5. Tennessee then filed a supplemental Brief on June 18 notifying the Court of Tennessee's repeal and replacement of Tennessee's Billboard Act. Tennessee argued that the repeal did not render the case moot. In response, Thomas argued that the change in Tennessee's law made the case a poor vehicle for Supreme Court review. There is also a similar case pending in the Sixth Circuit involving the State of Kentucky's Billboard Act. L.D. Mgmt. v. Gray, No. 20-5547 (6th Cir.).

Departmental Litigation in Other Federal Courts

Ninth Circuit Hears Argument in Challenge to FMCSA Preemption of California Meal and Rest Break Rules; Briefing Completed in Related Case

On November 16, 2020, the U.S. Court of Appeals for the Ninth Circuit heard oral argument in a set of challenges to FMCSA's December 2018 decision preempting California's Meal and Rest Break rules (MRB rules), pursuant to 49 U.S.C. § 31141, as applied to property-carrying commercial motor vehicle (CMV) drivers subject to FMCSA's hours-of-service (HOS) regulations. Int'l Bhd. of Teamsters, et al. v. FMCSA, No. 18-73488 (9th Cir.). Briefing has also been completed in a challenge to an FMCSA decision preempting the California MRB rules as applied to *passenger*-carrying CMV drivers subject to the HOS regulations. California v. FMCSA, No. 20-70706 (9th Cir.).

Section 31141 authorizes FMCSA to preempt 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 two decisions, 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 FMCSA regulations, are incompatible with the federal HOS regulations, and cause an unreasonable burden on interstate commerce. 83 Fed. Reg. 67,470 (Dec. 28, 2018) (property carriers); 85 Fed. Reg. 3469 (passenger carriers) (Jan. 21, 2020).

Four groups of petitioners challenged the first FMCSA decision, related to property-carrying CMVs, arguing that FMCSA did not have authority to review California's MRB rules because those laws did not specifically target CMV 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. In its brief and at oral argument, FMCSA explained that California's laws cover the same subject matter as FMCSA safety regulations, and defended its other conclusions.

California also challenged FMCSA's second decision, related to passenger-carrying

CMVs. California filed its opening brief on July 31, 2020, raising many of the same arguments as the challengers in the other cases. FMCSA filed an answering brief on September 30, and California filed a reply brief on November 20. The court has not scheduled oral argument.

FMCSA's Hours of Service Rule Challenged in D.C. Circuit

On September 16, 2020, Advocates for Highway and Auto Safety, the International Brotherhood of Teamsters, Citizens for Reliable and Safe Highways, and Parents Against Tired Truckers sought review in the U.S. Court of Appeals for the District of Columbia Circuit of FMCSA's Hours of Service of Drivers final rule, published in the Federal Register on June 1, 2020 (85 Fed. Reg. 33,396) and of FMCSA's August 25, 2020, denial of petitioners' joint petition for reconsideration of the rule. Advocates for Highway and Auto Safety, et al. v. FMCSA, et al., No. 20-1370 (D.C. Cir.).

State, Environmental Group, and Industry Challenges to NHTSA/EPA SAFE Vehicles One National Program Rule Continue

Litigation challenging DOT and EPA's "Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule Part One: One National Program" remains ongoing in the U.S. Court of Appeals for the District of Columbia Circuit. Union of Concerned Scientists, et al. v. NHTSA, et al., No. 19-1230 (D.C. Cir.). The litigation consists of eight consolidated petitions brought by a number of states, cities, environmental organizations, and other entities seeking vacatur of EPA's decision to withdraw California's waiver for its greenhouse gas and zero emissions vehicle programs under the Clean Air Act, and NHTSA's preemption of state and local laws and regulations related to fuel economy standards. Automakers, states in favor of the rule, and fuel and petrochemical manufacturers have intervened in support of the federal government.

On June 29, 2020, the state and local government petitioners and the public interest petitioners filed their brief jointly. They argued that EPA's partial withdrawal of California's 2013 waiver regarding greenhouse gas and zero-emission-vehicle standards was unlawful for three reasons. First, the agency lacked authority to withdraw the waiver. Second, EPA's determination that the California standards were not needed to meet "compelling and extraordinary conditions," as required by the statute, was unlawful. And third, EPA's reliance on NHTSA's preemption decision was unlawful. Petitioners also argued that EPA's determination that other states cannot adopt or enforce the California standards was similarly unlawful, arguing again that EPA exceeded its authority and that its interpretation was contrary to the relevant statutory provision.

With respect to NHTSA's preemption provisions, petitioners argued that it should be reviewed by the district court first, and the D.C. Circuit lacks jurisdiction to review it. Assuming the D.C. Circuit has jurisdiction, however, petitioners argued that NHTSA lacked authority to pronounce upon preemption and, in any event, erred in interpreting the Energy Policy and Conservation Act (EPCA) to expressly and impliedly preempt greenhouse gas and zero-emission-vehicle standards. Additionally, petitioners argued that NHTSA violated NEPA.

On June 26, 2020, industry petitioners (power companies and companies involved

with electric vehicles, including Tesla) filed a separate short brief with similar arguments, emphasizing the industry's reliance interests in the agencies' previous positions, the technology-forcing design of the statutory scheme, and the statute's allowance for California to act as a laboratory for innovation.

A variety of parties—including former DOT Secretaries and EPA Administrators, members of Congress, other state and local government representatives, national park organizations, Lyft, medical associations, scientists, and academics—submitted amicus briefs in support of petitioners in early July with a myriad of arguments.

The federal government's response was filed September 9. The agencies argued that the D.C. Circuit has jurisdiction to review NHTSA's preemption regulations and should uphold them. Moreover, NHTSA had authority under EPCA to issue the regulations, and the court should defer to NHTSA's interpretation as to its authority. As explained in the challenged rule, EPCA both expressly and impliedly preempted state and local greenhouse gas emission standards and zero-emission-vehicle mandates. And NEPA did not apply to NHTSA's action.

With respect to EPA, the agencies argued that EPA lawfully withdrew California's 2013 waiver. EPA had the authority to reconsider and withdraw waivers it previously granted and did so properly in the challenged instance. Moreover, EPA has the authority to interpret the provision regarding whether other states can adopt or enforce the California standards, and the agency did so reasonably here.

Two amicus briefs were filed on September 16 in support of the agencies: one from the U.S. Chamber of Commerce and one from the Urban Air Initiative. The Chamber's brief highlighted the breadth of the statutory preemption provision and the underlying congressional goals, while the Urban Air Initiative's brief focused primarily on the costs and benefits at issue.

Intervenors for respondents filed their briefs on September 21 and 22. The automakers and fuel and petrochemical manufacturers provided further support for the agencies' arguments, and the states supporting the rule argued that the equal sovereignty doctrine and the Constitution counsel against petitioners.

Petitioners' reply briefs were filed on October 13. Oral argument has not been scheduled yet. Related litigation in the U.S. District Court for the District of Columbia remains stayed pending a decision in the D.C. Circuit case. California, et al. v. Chao, et al., No. 19-02826 (D.D.C.).

Several Sets of Petitioners Challenge DOT/EPA SAFE Vehicles Rule

On April 30, 2020, NHTSA and EPA jointly published The Safer Affordable Fuel Efficient (SAFE) Vehicles Final Rule for Model Years 2021-2026 Passenger Cars and Light Trucks, 85 Fed. Reg. 24,174 (Apr. 30, 2020). In the Final Rule, the agencies established new and amended greenhouse gas (GHG) and Corporate Average Fuel Economy (CAFE) standards for model year 2021 to 2026 light duty vehicles. This Final Rule followed an NPRM published by the agencies on August 24, 2018. *See* The Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule for Model Years 2021-2026 Passenger Cars and Light Trucks, 83 Fed. Reg. 42,986 (Aug. 24, 2018). Under the rule, EPA amended its GHG standards for model years

2021 and later, while NHTSA both amended its existing fuel-economy standard for model year 2021 and set new standards for 2022 to 2026 model year vehicles. These new standards will increase in stringency by 1.5 percent a year from model year 2020 levels.

On the day of the Final Rule's publication, April 30, 2020, the Competitive Enterprise Institute (CEI), along with several individuals, filed the first petition for review of the rule in the U.S. Court of Appeals for the District of Columbia Circuit, challenging the standards set by the rule as excessively stringent. Competitive Enter. Inst. v. NHTSA, No. 20-1145 (D.C. Cir.). Subsequently, numerous other sets of petitioners filed their own petitions for review, challenging both the stringency of the standards and other substantive aspects of the rule. In total, the consolidated litigation involves nine petitions for review spanning 66 petitioners. The petitioners fall predominantly into three categories: one group comprised primarily of state and local government entities, public interest organizations, and alternative energy and transportation parties, that challenges the rule as insufficiently stringent; a second group, which includes CEI, challenges the rule as excessively stringent; and a third group, identified as the Clean Fuels Development Coalition, challenges the Final Rule's treatment of renewable fuels and flex-fuel vehicles. In addition to the petitioners, five motions to intervene have been filed on behalf of the Alliance for Automotive Innovation, several state and local governments, a group of public interest organizations, Ingevity Corporation, and a group of five automakers who seek to intervene solely with respect to remedy issues. The agencies opposed the five automakers' motion to intervene, arguing that the intervenors failed to articulate an injury in fact that supports standing, due to their expressed interest in only opining on issues relating to the remedy. Briefing has now concluded on this motion and the court has not yet ruled on the intervention request.

Merits briefing in this litigation will not begin until 2021, with petitioners' opening brief due January 14, the government's response brief due April 14, intervenors' briefs due April 28, and petitioners' reply brief due June 1. However, there has been briefing on issues related to the agencies' administrative records in August and September 2020. Two groups of petitioners moved for the supplementation of the record. First, a group of state and local governmental entities and public interest organizations moved for the supplementation of the administrative record with multiple materials pertaining to the interagency review process for the Final Rule. The agencies filed an opposition to this request, predominantly arguing that the material remained deliberative and ineligible for inclusion in an administrative record. Second, CEI and associated petitioners moved for the incorporation of three documents regarding evaluations of particulate matter into the administrative record. While the agencies agreed to supplement the record to incorporate one of the documents, they opposed the addition of the rest, contending those materials were not actually considered during the course of the rulemaking.

Second Circuit Vacates NHTSA Rule on CAFE Civil Penalty Rate

After oral argument was held on June 1, 2020, the U.S. Court of Appeals for the Second Circuit issued a decision on August 31 vacating 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. New

York, et al. v. NHTSA, 974 F.3d 87 (2d Cir. 2020). Under the decision, NHTSA's December 2016 rule would go into effect, raising the CAFE civil penalty rate from $5.50 to $14, to be followed by subsequent annual adjustments.

The court held that the CAFE civil penalty rate is a "civil monetary penalty" required to be adjusted under the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015. The court found no ambiguity in the statutory term "civil monetary penalty," ruling that the term had a "settled legal meaning" by the time the statute was enacted in 2015. In addition, the court held that NHTSA's reconsideration of the "negative economic impact" of the increase was untimely. The court concluded that any such reconsideration, to the extent one was permitted, must have been done by the time of the next required inflation adjustment. Because the court concluded that NHTSA was not authorized to undertake the reconsideration at the time it did so, the court did not reach the merits of NHTSA's analysis of the negative economic impact of the increase.

Petitioners in the case were a group of states and the District of Columbia, the Natural Resources Defense Council, and the Sierra Club. The Alliance for Automotive Innovation (formerly two separate organizations, the Association of Global Automakers and the Alliance of Automobile Manufacturers) intervened in support of the federal government in the litigation. The Institute for Policy Integrity at New York University School of Law and Tesla filed amicus briefs in support of petitioners.

Ninth Circuit Holds *En Banc* Rehearing in FAA FOIA Consultant Corollary Case

On September 22, 2020, an *en banc* panel of the U.S. Court of Appeals for the Ninth Circuit heard oral argument 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. On April 24, 2019, the court had reversed the district court's grant of summary judgment for FAA, rejecting FAA's reliance on the consultant corollary as a basis for FOIA Exemption 5 withholdings and holding that FAA's search had been inadequate. Rojas v. FAA, 17-55036 (9th Cir.). On August 1, 2019, 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* without ordering additional briefing.

Sixth Circuit Reverses Ruling Against PHMSA in Challenge to Approval of Spill Response Plans

On June 5, 2020, the U.S. Court of Appeals for the Sixth Circuit ruled in favor of PHMSA in a challenge to the agency's approval of two pipeline oil spill response plans. Reversing a lower court ruling, the court held that PHMSA is not required to prepare an Environmental Impact Statement or consult with wildlife agencies before approving such plans. Nat'l Wildlife Fed. v. Sec'y of Transp., 960 F.3d 872 (6th Cir. 2020).

Under regulations implementing the Clean Water Act (as amended by the Oil Pollution Act of 1990), operators of certain oil

pipelines are required to prepare plans for responding to a "worst case discharge" of oil, and to submit those plans to PHMSA for review. *See* 33 U.S.C. § 1321(j)(5); 49 C.F.R. Part 194. The National Wildlife Federation (NWF) challenged PHMSA's approval of two plans submitted by Enbridge covering its Line 5 pipeline in Michigan and Wisconsin. NWF argued, and the district court agreed, that before approving the plans, PHMSA was required to consult with federal wildlife agencies under the Endangered Species Act (ESA) and to conduct an environmental review under NEPA.

The Sixth Circuit reversed, holding that the ESA and NEPA do not apply to PHMSA's response plan approvals. It is well-established that the ESA and NEPA do not apply to non-discretionary actions that an agency is required to take by law. The court held that PHMSA's plan approvals easily fall into this category because the Clean Water Act mandates that PHMSA approve any plan that meets certain statutory requirements. The court rejected NWF's contention that PHMSA's approvals are "discretionary" merely because the agency must exercise some judgment in determining whether the statutory requirements have been met. The court's ruling is consistent with the long-standing position of PHMSA and of other federal agencies charged with reviewing and approving plans for other types of facilities.

United States and California Sue Plains Pipeline over 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 published notice of the proposed consent decree and requested public comment. After reviewing the comments, the United States filed a complete settlement package with the district court on August 19, 2020. On October 14, the court entered the consent decree as the final judgment in the case.

DBE Seeks Judicial Review of DOCR Certification Decision

On May 11, 2020, ROR Fleet Services, LLC, a company that was denied DBE certification

by the Georgia Department of Transportation (GDOT), filed an action in the U.S. District Court for the Northern District of Georgia seeking judicial review of DOCR's decision to affirm GDOT's denial of the company's application for Disadvantaged Business Enterprise (DBE) certification. ROR Fleet Servs., LLC v. USDOT, No. 20-2028 (N.D. Ga.). Plaintiff is a software company headquartered in Woodstock, Georgia, that applied for DBE certification in July 2019. After consideration of ROR Fleet Services' DBE application and materials, GDOT concluded that ROR Fleet Services failed to meet the eligibility requirements for ownership and control and denied the company DBE certification application.

In January 2020, ROR Fleet Services filed an appeal of GDOT's determination with DOCR, arguing that GDOT erroneously applied the applicable DBE regulations in making its decision to deny ROR's application for DBE certification. After reviewing the record that was before GDOT and ROR's appeal and related materials, DOCR affirmed GDOT's decision with respect to the issue of ownership. Specifically, DOCR concluded that there was no evidence that ROR Fleet Services' majority owner, who is also the socially and economically disadvantaged owner, had a significant financial investment in the company as required by the DBE regulations.

In its complaint, ROR Fleet Services alleges that DOCR's decision is arbitrary, capricious, and otherwise in violation of the APA. DOT filed its answer on July 21. Pursuant to the briefing schedule approved by the court, DOT filed the administrative record on September 25, ROR's opening brief in support of its complaint is due on November 20, DOT's brief in response and in opposition is due on January 15, 2021, and ROR's reply brief is due on February 5.

Cause of Action Will Not Seek Summary Judgment in FOIA Suit

In a joint status report filed on October 2, 2020, the Cause of Action Institute, the plaintiff in a FOIA lawsuit filed against DOT and a number of other federal agencies, Cause of Action Institute v. Dep't of the Interior, No. 19-1507 (D.D.C), indicated that it will not challenge responses provided by DOT and all of the other federal agencies that have provided responses to Cause of Action's FOIA request. In addition, Cause of Action informed the court that it would not be proceeding to summary judgment against DOT or those federal agencies. The State Department, which is the only agency still in the process of completing its response to the FOIA request, will continue to provide the court with periodic status reports on its progress.

On May 23, 2019, the Cause of Action Institute filed an action under FOIA in the U.S. District Court for the District of Columbia against DOT, almost a dozen other federal agencies, the Office of Management and Budget, and the Council of the Inspectors General on Integrity and Efficiency. Cause of Action sought the production of documents in response to its October 29, 2018, FOIA requests filed with each of the defendant agencies and entities seeking records related to each agency or entity's implementation of the "foreseeable harm" standard, which is codified in the FOIA Improvement Act of 2016, 5 U.S.C. § 552(a)(8)(A)(i)(I). Under this standard, an agency may invoke a FOIA exemption to withhold records only if it reasonably foresees that disclosure would harm an interest protected by the exemption. In addition, Cause of Action also sought all communications between each agency or entity, the DOJ Office of Information Policy,

the White House, and Congress regarding the "foreseeable harm" standard.

On November 18, 2019, DOT produced all non-privileged, non-exempt responsive records to the requester. As of October 2020, all the federal agencies, with the exception of the State Department and the Council of the Inspectors General on Integrity and Efficiency, have completed their productions of responsive records.

Recent Litigation News from DOT Modal Administrations

Federal Aviation Administration

Fourth Circuit Dismisses as Untimely Challenge to BWI Cargo Facility Improvements

On July 1, 2020, the U.S. Court of Appeals for the Fourth Circuit dismissed Howard County, Maryland's petition for review challenging FAA's October 23, 2018, approval of cargo facility improvements at BWI Marshall Airport. Howard County, Maryland v. FAA, 818 Fed Appx. 224 (4th Cir. 2020). The cargo facility improvements and Written Re-Evaluation challenged in this case were requested by the Maryland Aviation Administration, and Maryland joined the lawsuit as a respondent. The petitioner claimed that FAA made its decision in violation of NEPA, Section 4(f) of the DOT 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 was 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 was 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. The court subsequently removed the oral argument from its calendar, denied FAA's motion to file a surreply brief, and dismissed the petition review, holding that the petition was not filed within 60 days of the agency's issuance of its decision, as required by 49 U.S.C. § 46110(a), and that the County had failed to show reasonable grounds for delay.

D.C. Circuit Rejects Michigan Airport Challenge to No-Hazard Determination for Proposed Wind Turbines Project

On November 20, 2020, the U.S. Court of Appeals for the D.C. Circuit denied a petition for review of Tuscola Area Airport Authority and several other petitioners challenging FAA's June 19, 2019, decision affirming earlier determinations of no hazard for the proposed construction of 68 wind turbines in the vicinity of the Tuscola Area Airport in east-central Michigan. The decision also covered a separate petition for review involving FAA's November 13, 2019, affirmance of determinations of no hazard for six additional wind turbines that the court later consolidated with the initial petition. Tuscola Area Airport Authority, et al., v. FAA, Nos. 19-1153 & 19-1258 (D.C. Cir.).

FAA will make a determination of hazard if the proposed structure would have a substantial adverse effect affecting a significant volume of flights. FAA's hazard determinations do not themselves permit or prevent construction, but the determinations may affect local zoning decisions or insurance contracts. Here, FAA's conducted an aeronautical study that analyzed the effects on landing and departures conducted with and without instruments, and the altitudes at which aircraft must fly. The study revealed that the wind turbines might produce clutter on an air traffic controller's scope and that the turbines might require raising the minimum descent altitude for a rarely used instrument approach procedure. FAA found that the construction would not have a substantial adverse effect affecting a significant volume of flights according to its internal procedures.

In the lawsuit, Tuscola's primary arguments were that FAA failed to act according to its congressional mandate and failed to provide a reasoned explanation for its administrative decision (*e.g.*, upholding the underlying determinations of hazard). Specifically, Tuscola claimed that FAA has failed to adequately ensure the safe and efficient use of the navigable airspace in the vicinity of the Tuscola Area Airport. FAA contended that the 74 determinations of no hazard were made consistent with 14 C.F.R. part 77 (Safe, Efficient Use, and Preservation of the Navigable Airspace) and with policies and practices reflected in its internal orders (FAA Order No. JO 7400.2L; April 27, 2017).

The court held that FAA reasonably concluded that the turbines would not have a substantial adverse effect on aeronautical safety due to the low quantity of flights that the turbines would affect and the distance of the turbines from the regular traffic pattern of the airport. In addition, the court found that contrary to petitioners' arguments, FAA is not required to consider local economic impacts or grant assurances when determining whether a structure will affect aeronautical safety.

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 the shift. 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.

After court-supervised mediation efforts were unsuccessful, petitioners moved to stay the case pending FAA's responses to a FOIA request related to the subject matter of the litigation. On September 9, 2020, FAA urged the court to deny petitioners' stay request and dismiss the petition for review because it did not challenge a reviewable order. Briefing on the motion to dismiss and the stay request was completed on September 18.

Environmental Challenge to 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. On October 23, 2020, after petitioners' motion for a second extension of the briefing schedule was denied, petitioners filed an unopposed motion to dismiss their petition for review.

Sacramento Seeks Review of Airspace Procedure Amendments

On July 21, 2020, the City of Sacramento petitioned for review of FAA's May 21, 2020, publication of five RNAV airspace procedure amendments at Sacramento International Airport. City of Sacramento v. FAA, No. 20-72150 (9th Cir.). Petitioner alleges that FAA violated NEPA, the FAA Reauthorization Act of 2018, Vision 100 – Century of Aviation Reauthorization Act of 2003, the Noise Control Act, the Federal Aviation Act of 1958, the Federal Aviation Act, and Section 4(f) of the DOT Act. Specifically, the petition alleges that the original iteration of the procedures as part of the 2014 Northern California Metroplex project concentrated flight tracks above three neighborhoods in the City, causing increased noise pollution and the risk of bird strikes, and that FAA should have prepared an environmental assessment rather than a categorical exclusion for the five procedure amendments. FAA maintains that it amended the five procedures to take into account magnetic north variation changes without changing existing flight tracks. Consequently, in accordance with FAA policy, FAA was not required to conduct any environmental review beyond the categorical exclusion.

Petitioner's opening brief is due December 4. FAA's response brief is due January 22, 2021, with petitioner's optional reply brief due February 22. Petitioner filed its petition for review one day late, but claims reasonable grounds for the delay because the FAA refused to enter into a tolling agreement and because of the COVID-19 pandemic's effects on the City's regular operations.

Arapahoe County Seeks Review of Denver Metroplex Project

On March 20, 2020, the Arapahoe County Public Airport Authority and the Board of County Commissioners of Arapahoe County sought review in the U.S. Court of Appeals for the District of Columbia Circuit of FAA's Finding of No Significant Impact and Record of Decision (FONSI/ROD) for the Denver Metroplex project, alleging, among other things, that an Environmental Impact Statement was required, that FAA should not have proposed and implemented any changes in arrival and departure procedures before completion of various congressionally mandated studies, and that FAA committed numerous errors in violation of the National Historic Preservation Act. Arapahoe County Public Airport Authority, et al., v. FAA; Board of County Commissioners of Arapahoe County, et al., v. FAA, Nos. 20-1075 & 20-1085 (D.C. Cir.)

FAA began evaluating changes to the airspace in the Denver Metropolitan area several years ago. After extensive community outreach sessions and internal analysis, FAA released a draft Environmental Assessment (EA) in 2019 for public comment. The EA analyzed changes to the Denver Metroplex. FAA held 12 public workshops before closing the public comment period on June 6, 2019. After revising the EA, FAA released a Final EA for additional comment on November 18 and closed the public comment period on December 20. On January 24, 2020, FAA issued its Final Environmental Assessment and Finding of No Significant Impact and Record of Decision for the Denver Metroplex Project.

The parties have proposed the following briefing schedule: (1) petitioners' joint opening brief, due November 22; (2) respondent's answer brief, due February 5, 2021; and (3) petitioners' joint reply brief, due February 26, 2021.

Scottsdale Challenges FAA Inaction on New Phoenix SkyHarbor Air-Traffic Procedures

On March 10, 2020, the City of Scottsdale, Arizona, sought review in the U.S. Court of Appeals for the District of Columbia Circuit of FAA's January 2020 announcement that it had no immediate plans to implement new air-traffic procedures at Phoenix SkyHarbor International Airport and neighboring airports. City of Scottsdale v. FAA, No. 20-1070 (D.C. Cir.). Following the D.C. Circuit's decision in City of Phoenix v. FAA, 869 F.3d 963 (D.C. Cir. 2017), as amended, 881 F.3d 932 (D.C. Cir. 2018), FAA reached an agreement with the City of Phoenix that included a commitment to do public outreach about the proposed air-traffic procedures that had been the subject of the litigation. As part of that outreach process, FAA sought public comment in 2019 on preliminary designs for additional changes to the Phoenix airspace that were broader than the western departure corridors challenged in Phoenix. In January 2020, FAA announced that it had satisfied all public outreach commitments that it made in the agreement with the City of Phoenix and that it was taking no additional agency actions at that time. The City of Scottsdale, which believed it would benefit from some of FAA's proposals and wanted them to move forward, alleges that FAA's decision to take no additional actions is subject to review under NEPA and other environmental and special-use statutes.

FAA and the City of Scottsdale met over the summer of 2020 to discuss the matter, and the case is currently in the D.C. Circuit's mediation program. The court has stayed the start of merits briefing until January 2021

while the parties attempt to mediate the dispute.

Flight School Seeks Judicial Review of FAA Flight Test Order

On July 27, 2020, Flight Training International, Inc. (FTI) filed a petition for review of a change to FAA Order 8900.1 pertaining to administration of practical tests in a type rated aircraft by FAA inspectors and designees. Flight Training International, Inc. v. FAA, No. 20-60676 (5th Cir.). FTA also filed an emergency motion for a stay pending review by the court. FAA filed a response the following day consenting to a 30-day stay of the enforcement of the FAA Order to allow time for further briefing, if necessary. The same day, the court stayed the FAA Order until August 29, 2020.

The revision to FAA Order 8900.1 directs that a practical test administered in an aircraft requiring a type rating must result in issuance of both the class rating and the type rating. The revision was made after FAA learned that a Principal Operations Inspector for FTI had approved an Airline Transport Pilot (ATP) Certification curriculum in 2014 that, despite being conducted in a full-flight simulator representing an aircraft requiring a type rating, resulted in issuance of only a multiengine class rating and not the appropriate type rating, even though the practical test for the two are the same. Therefore, if an applicant satisfactorily passes the ATP practical test in a B737, they have also passed the practical test for a type rating and therefore are entitled to it in accordance with 14 C.F.R. § 61.13(a)(4).

The parties subsequently moved to stay further proceedings in the court and enforcement of the FAA Order until October 3, 2020, so that they could explore the possibility of settlement through the court's Circuit Mediation Program. The court granted the motion on August 10, staying both proceedings and enforcement of the Order.

After mediation failed to resolve the issue, the parties filed a joint motion to stay enforcement of the FAA Order against FTI until the issuance of a decision by the court. The parties also filed a joint motion to expedite briefing and argument in order to limit the duration of the stay. On October 14, the court granted the joint motion to stay enforcement, but denied the joint motion to expedite the appeal. The court has not yet issued a briefing schedule.

Pilot Seeks Review of Certificate Suspension for Violating Visual Flight Rules

Petitioner Paul Fullerton seeks review of an NTSB decision (NTSB Order No. EA-5866), issued on February 13, 2020, affirming the 90-day suspension of his commercial pilot certificate for violating FAA regulations in connection with his operation of a passenger-carrying flight under visual flight rules (VFR). Petitioner claims that substantial evidence does not support the NTSB's finding and that the ALJ made an erroneous evidentiary ruling against petitioner. Fullerton v. FAA, No. 20-3402 (6th Cir.).

On the morning of the flight in question, an FAA inspector was conducting observations from Mackinac County Airport in St. Ignace, Michigan, when he saw an aircraft flying across the Straits of Mackinac. The aircraft was below cloud ceiling minimums applicable to operations under visual flight rules (VFR,) at an altitude that would not have allowed the aircraft to reach land in the event of engine failure, in violation of FAA regulations. With the aid of binoculars, he was able to identify the profile as consistent

with a Piper PA-32-260, which was the same type of aircraft petitioner flew for Great Lakes Air, a part 135 operation that petitioner owned. The FAA inspector could not discern the N-number of the aircraft. But after he watched the aircraft descend for a landing at Mackinac Island, he contacted the airport manager at Mackinac Island, who confirmed to the inspector that Petitioner had just landed and was off-loading passengers. Petitioner admitted that he had operated a passenger flight for Great Lakes Air to Mackinac Island that day and had landed at around the time the inspector observed an aircraft landing there. But petitioner denied that the aircraft the inspector observed operating contrary to FAA regulations was the aircraft petitioner was operating that day. The ALJ credited the FAA inspector's version of events over petitioner's and found ample circumstantial evidence to establish that petitioner was operating the aircraft that the FAA inspector observed violating FAA regulations. The Board affirmed the ALJ's decision, denied petitioner's appeal, and affirmed the 90-day suspension of his commercial pilot certificate. Petitioner subsequently sought review of the NTSB's decision in the Sixth Circuit. Petitioner has filed his opening brief with the court, and FAA has filed its answering brief. Petitioner's reply brief was filed on October 6, 2020.

Operator of FAA World War II-Era Aircraft Flights Seeks Review of FAA Cease and Desist Order

Petitioners Warbird Adventures and Thom Richard seek review of the FAA's emergency cease and desist order issued on July 28, 2020, ordering them to immediately cease and desist conducting flight instruction flights for compensation in their limited category World War II-era aircraft because such operations violate a long-standing FAA regulation. Warbird Adventures, et al. v. FAA, No. 20-1291 (D.C. Cir.). Petitioners claim that the FAA's regulatory interpretation is arbitrary, capricious, and contrary to law.

Petitioners operate a Curtiss-Wright model P-40N aircraft (N977WH), which is a limited category aircraft that was originally produced for the military for combat purposes. FAA regulations impose certain limitations on the operation and use of such aircraft, including 14 C.F.R. § 91.315, which provides that "[n]o person may operate a limited category civil aircraft" if that aircraft is "carrying persons or property for compensation or hire." The only way to lawfully conduct operations for compensation in limited category aircraft is through an exemption under 14 C.F.R. § 11.81. Despite FAA's informing petitioner that carrying people in N977WH for compensation was a violation of section 91.315, petitioners operated N977WH carrying a person for compensation. FAA initiated legal enforcement action against each petitioner in connection with this operation; both actions are currently pending administrative adjudication before the agency. Despite the pending enforcement actions and FAA repeatedly informing petitioners that their flight instruction flights in N977WH for compensation were contrary to regulation, petitioners continued to advertise upcoming flights in N977WH for compensation to the general public starting on July 28, 2020. In light of petitioners' past violations and their apparent intent to continue violating FAA safety regulations, FAA issued an emergency cease and desist order, which petitioners now challenge in the D.C. Circuit.

On August 10, petitioners filed an emergency motion for partial stay to allow them to continue using N977WH to carry persons for compensation for the limited purpose of providing flight instruction. The FAA filed

its opposition to petitioners' emergency motion on August 14, to which Petitioners replied on August 17. On August 21, the court denied petitioners' emergency motion for a partial stay. Pursuant to the court's briefing schedule, petitioners filed their opening brief on November 9. Respondent's brief is due December 9, and petitioners' reply brief is due December 30.

FAA Prevails in Challenge to Settlement of Santa Monica Airport Litigation

On October 9, the U.S. District Court for the District of Columbia dismissed a challenge, brought by the National Business Aviation Association (NBAA), to FAA's settlement with the City of Santa Monica regarding the Santa Monica Airport. Nat'l Business Aviation Ass'n, Inc. v. FAA, No. 18-1719, 2020 WL 5995101 (D.D.C. 2020). The January 2017 settlement ended years of disputes 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.

NBAA initially challenged the settlement agreement in the U.S. Court of Appeals for the D.C. Circuit, arguing 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 D.C. Circuit held, however, that the settlement agreement was not a reviewable final agency action since it did not take effect until entered as a consent decree in an action between FAA and the City then pending in the U.S. District Court for the Central District of California. Nat'l Business Aviation Ass'n, Inc. v. Huerta, 737 Fed. Appx. 1 (D.C. Cir. 2018). NBAA then brought a new challenge in federal district court under the doctrine set forth in Leedom v. Kyne, 358 U.S. 184 (1958), which allows for judicial review of non-final or otherwise non-reviewable agency actions in very exceptional circumstances. In the October 9 decision dismissing that challenge, the court held that the NBAA did not meet one of the prerequisites for a Leedom claim: the requirement that there be "no alternative procedure for review" of the plaintiff's claim. Specifically, the court noted that the NBAA could have moved to intervene in the Central District of California to raise its arguments against the settlement and consent decree.

FAA Seeks Dismissal of Claims in Kobe Bryant Accident Litigation

In Altobelli v. United States, No. 20-8954 (C.D. Cal.), Island Express Helicopters, operator of the Kobe Bryant accident flight, has filed a third party wrongful death claim alleging Air Traffic Control negligence in handling the accident flight. The two air traffic controllers who worked the flight were sued in state court in their individual capacities. In September 2020, the United States was substituted as the third-party defendant, and the case was removed to the U.S. District Court for the Central District of California. On October 19, the United States moved to dismiss, arguing that the state court lacked jurisdiction over plaintiff's claims, which should have been brought under the Federal Tort Claims Act, and that, therefore, the district court also lacked jurisdiction under derivative jurisdiction doctrine.

Tribe Seeks Review of No-Hazard Determination for Kansas Wind Turbines

On May 18, 2020, two plaintiffs, a representative of a Native American Tribe and another individual, filed a class action

complaint and a motion for a temporary restraining order (TRO) against FAA, the Federal Energy Regulatory Commission, the U.S. Army Corps of Engineers, the Department of Justice, and various private entities developing a proposed wind farm project in Corning, Kansas, alleging violations of NEPA, the Endangered Species Act, and the Indian Religious Freedom Act. Mattwaoshshe, of the Sovereign Kickapoo Indian Nation, et al. v. Nextera Energy, Inc., et al., No. 20-01317 (D.D.C.). Plaintiffs allege that FAA failed to conduct a sufficient environmental review and a Section 7 consultation for its issuance of 140 no-hazard determinations for proposed wind turbines under 14 C.F.R. Part 77.

Federal defendants filed a response to the TRO motion and cross-motion to dismiss on June 2. The court denied the motion for a TRO on June 16 and also ordered the parties to show cause why the case should not be transferred to the U.S. District Court for the District of Kansas, where the private defendants and the project reside. That order was briefed, and on July 2, the court declined to transfer the case. The court has also granted multiple requests by plaintiffs to amend their complaint, necessitating refiling of the federal defendants' motion to dismiss. The private parties have also since filed motions to dismiss, and those motions have been fully briefed. There has been additional briefing on the need for an administrative record given the allegations in the case.

FAA Sued over Sale of Airport Property on Site of Former Japanese Internment Camp

On April 2, 2020, the Tule Lake Committee, a nonprofit corporation representing the interests of survivors and descendants of internees at the Tule Lake Relocation Center in Modoc County, California, a World War II Japanese internment camp, filed a complaint in the U.S. District Court for the Eastern District of California alleging that FAA violated the National Historic Preservation Act, the APA, and a federal land patent when the agency issued a letter in August 2018 that did not object to the sale of Tule Lake Municipal Airport property by the City of Tulelake to the Modoc Nation. Tule Lake Committee v. FAA, et al., No. 20-00688 (E.D. Cal.). Plaintiff, which submitted an unsuccessful offer to purchase the airport, asserts various other claims against the City, the Tribe, and their individual members, also named as defendants.

The Tule Lake Relocation Center is designated as a historic landmark by the State of California and as a National Historic Landmark by the National Park Service. FAA also determined in 2014 that a portion of the Relocation Center property occupied by the Tule Lake Municipal Airport was eligible for listing in the National Register of Historic Places. The City of Tulelake acquired the airport from the United States under a 1951 land grant patent and owned the airport until it transferred ownership to the Modoc Tribe of Oklahoma in 2018. The County of Modoc, California, has leased the airport from the City and operated it since 1974. The County is the airport sponsor for the purpose of applying for and receiving FAA grant funds. In August 2018, the FAA's Western Pacific Region Airports Division issued a letter stating that the FAA had no objection to the proposed sale of the airport from the City to the Tribe.

On July 6, FAA filed a motion to dismiss the complaint for lack of subject matter jurisdiction. The City and Tribe also filed separate motions to dismiss. On September 4, plaintiff filed three separate oppositions to the motions. On September 15, FAA filed its reply. The court held a hearing on the

motions on September 21, and on September 25, the court dismissed the case against FAA with prejudice. On September 30, plaintiff filed a notice of appeal. Tule Lake Committee v. FAA, et al., No. 20-16955 (9th Cir.).

Federal Highway Administration

Eighth Circuit Affirms Favorable NEPA Decision for FHWA

On December 6, 2019, the U.S. Court of Appeals for the Eighth Circuit affirmed the U.S. District Court's 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., 943 F.3d 1161 (8th Cir. 2019). 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) because the project exceeded the bounds of the existing operational right-of-way, an argument 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). Federal appellees argued this understanding of operational right-of-way is overly narrow and fails to account for other text in the regulation that explains 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. 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.

Prior to 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.

After the court issued its mandate for the case, the matter resumed proceedings on the merits before the U.S. District Court for the Eastern District of Arkansas. Wise, et al v. USDOT, et al., No. 18-000466 (E.D. Ark.). Plaintiffs filed a motion for summary judgment on May 26, 2020. In their brief in support of their motion, plaintiffs acknowledge that project construction is complete, but argue that the case is not moot because there are still remedies the court can fashion, such as requiring the agency to perform additional studies under NEPA or developing mitigation measures. Plaintiffs assert they are not only challenging the decision to classify the I-630 widening project as a CE, but also the process in general by which the FHWA's Arkansas Division evaluates projects for classification as CEs. Defendants' motions for summary judgment were file on November 20. Plaintiffs' response is due on January 8, 2021.

Federal Circuit Reverses Ruling for FHWA in Contract Disputes Act Case

On August 26, 2020, the U.S. Court of Appeals for the Federal Circuit reversed a U.S. Court of Federal Claims ruling in favor of FHWA in Kiewit Infrastructure West Co. v. United States, 972 F.3d 1322 (Fed. Cir. 2020). This case arises out of a $41 million-dollar design build construction contract awarded by FHWA's Western Federal Lands Highway Division to construct a road in the Tongass National Forest in Alaska. The project was completed in December 2014. Plaintiff, Kiewit Infrastructure West Co. (Kiewit), a national construction company, claimed that the presence of wetlands, which required wetland mitigation in government-provided material source/waste sites, constituted a constructive change to its highway construction contract. The Court of Federal Claims found that the contract did not provide that wetland mitigation was unnecessary at government-provided material source/waste sites. Moreover, the court held that a reasonable inspection of the sites would have revealed the presence of wetlands. Kiewit filed a notice of appeal on July 8, 2019, seeking reversal of the lower court decision denying Kiewit's Contract Disputes Act claim of constructive change. The Federal Circuit reversed, finding that the contractor reasonably concluded from the contract that it would not need to perform any wetlands analysis at the sites. The Federal Circuit remanded the case to the Court of Federal Claims, where FHWA will challenge plaintiff's $490,386 claim for damages.

District Court Grants FHWA's Motion to Dismiss NEPA Claim

On May 6, 2020, the U.S. District Court for the Middle District of North Carolina granted FHWA's motion to dismiss with prejudice in Williams v. Resler, et. al., 2020 WL 2198524 (M.D.N.C. May 6, 2020). The court also dismissed without prejudice all claims against the North Carolina Department of Transportation (NCDOT) for Mr. Williams' failure to serve the complaint on NCDOT within the timeframe allowed. Plaintiff did not file an appeal.

The lawsuit challenged the selection of the preferred alternative for the East End Connector Project, which is intended to provide direct freeway connection between the Durham Freeway (NC 147) and US 70. The project is approximately 3.6 miles long and will feature three lanes of traffic in each direction with additional auxiliary lanes in several spots. FHWA issued a Finding of No Significant Impact (FONSI) for the project in February 2011. Construction began in 2015 and is planned to be completed by November 2020.

The complaint generally alleged that by approving the FONSI for the Project, FHWA and NCDOT violated NEPA, Title VI of the Civil Rights Act of 1964, Executive Order 12898 (relating to Environmental Justice), and the Uniform Relocation Assistance and Real Property Acquisition Act of 1970 (URA). The complaint sought $50 million in damages. The court held that: (i) plaintiff "may not pursue direct litigation against FHWA under Title VI;" (ii) plaintiff's NEPA and environmental justice claims are "time-barred and must be dismissed" under the APA; and (iii) plaintiff failed to allege "sufficient facts to support … a claim" under the URA, which does not create "individually enforceable rights."

Pennsylvania District Court Upholds Categorical Exclusion and Section 4(f) Determination for Bridge Replacement Project

On August 20, 2020, the U.S. District Court for the Eastern District of Pennsylvania granted FHWA's motion for summary judgment and dismissed all of plaintiffs' claims with prejudice in Delaware Riverkeeper Network, et al. v. Pennsylvania Department of Transportation, 2020 WL 4937263 (E.D. Pa. Aug. 20, 2020). The case involved a bridge replacement project that was classified as a Categorical Exclusion (CE) and an individual Section 4(f) Evaluation that was prepared as the action called for the use of a contributing element to the Ridge Valley Historic District.

Plaintiffs alleged multiple violations of 23 C.F.R. § 771.117 and 23 C.F.R. § 774 and asked the court to remedy the violations by remanding the matter for further consideration of a one-lane rehabilitation alternative and preparation of an Environmental Impact Statement (EIS). Specifically, plaintiffs challenged the adequacy and scope of the purpose and need, the degree of impacts to environmental resources, the degree of controversy on environmental grounds, the degree of impact to historic properties, and the availability of a feasible and prudent avoidance alternative. The court held that FHWA's extensive environmental studies met the requisite hard look standard under NEPA and properly documented that no feasible and prudent alternative existed under Section 4(f) of the Department of Transportation Act.

Plaintiffs Appeal Favorable CE Determination in Vermont Project

On July 8, 2020, the U.S. District Court for the District of Vermont granted defendants' cross-motion for summary judgment, denied plaintiffs' motion for summary judgment and motion to reopen oral argument. R.L. Vallee, et al., v. Vermont Agency of Transp., et al., 2020 WL 4689788 (2020). The court reasoned that the case presented a single issue: whether FHWA's decision to proceed with construction of a Double Crossover Diamond (DCD), a type of intersection developed to reduce delay from left-turning traffic at highway interchanges, qualifies for a CE, or whether FHWA should have prepared an environmental impact statement before taking action. The court found that the decision of the Vermont Agency of Transportation and FHWA to consider the DCD project for CE status reflected a reasonable interpretation of the regulations and was not arbitrary or capricious.

Plaintiffs' complaint alleged that the project was misclassified as a CE because, among other things, it (1) results in a complete interchange redesign that will have substantial effect on travel and traffic patterns; (2) was designed, in part, to accommodate and promote growth; (3) will result in significant environmental impacts; (4) has potential to degrade water quality; and (5) will impact more than 18,000 square feet of wetlands.

On June 17, 2020, while the decision on the summary judgment motion was pending, plaintiffs filed a motion to reopen oral argument, seeking to introduce newly-uncovered extra-record evidence concerning events commencing in 2018 that they asserted "bears on the question of whether all 'indirect effects' were properly considered" in issuing the documented CE at issue in this

matter. The court ruled that the issue before the court is whether the FHWA decision in 2013 was arbitrary or capricious. Subsequent events, as alleged by plaintiffs, could not have formed the basis for the 2013 decision.

On August 11, plaintiffs filed an appeal with the U.S. Court of Appeals for the Second Circuit. R.L. Vallee, Inc., et al. v. Vermont Agency of Transportation, et al., No. 20-2665 (2d Cir.). On September 28, the parties participated in a mediation under the Second Circuit's Civil Appeals Mediation Program, but could not resolve the case. As required by local rule, appellants have reinstated their appeal, and the parties are preparing to brief the matter.

Little Rock District Court Denies Plaintiffs' Motion for Preliminary Injunction; Plaintiffs Appeal

On September 3, 2020, the U.S. District Court for the Eastern District of Arkansas issued an order ruling in favor of FHWA and denying plaintiffs' motion for a preliminary injunction in Little Rock Downtown Neighborhood Assn, et al. v. FHWA, et al., 2020 WL 5259385 (E.D. Ark. Sept. 3, 2020). Plaintiffs filed their motion for a preliminary injunction on July 10, 2020, in order to stop the I-30 Crossing Project. The project proposes to widen a 7.3-mile section of Interstate 30 passing through downtown Little Rock and replace and expand the current structurally deficient I-30 bridge crossing the Arkansas River. Plaintiffs alleged 14 violations of NEPA and claims of infringed procedural rights, including failure to consider a host of issues relating to direct, indirect, and cumulative effects, failure to adequately consider public comments, failure to circulate the final Environmental Assessment (EA) and Finding of No Significant Impact (FONSI), and depriving the public of the opportunity to comment on project design changes made after the FONSI was issued.

After considering written briefs and hearing oral argument and witness testimony at a hybrid hearing featuring in-person and virtual appearances, the court found that plaintiffs had standing to challenge the project but ruled in favor of federal and state defendants on all four prongs of the test for a preliminary injunction: likelihood of prevailing on the merits, irreparable harm, balance of equities, and public interest.

After holding that plaintiffs failed to demonstrate a likelihood of prevailing on the merits, the court determined that plaintiffs failed to demonstrate that they would suffer irreparable harm before a decision on the merits. A merits hearing is scheduled for October 20, 2020, which is approximately when heavy construction is set to begin. The court noted that while a violation of NEPA itself can be evidence of environmental harm, in this case plaintiffs had not shown they were likely to prove defendants violated NEPA.

In finding that the balance of equities weighed in favor of defendants, the court cited the testimony of an Arkansas DOT project manager who explained that the State has already spent $100 million on the project and that, if an injunction were to issue, 40 construction workers could lose their jobs and Arkansas DOT (and ultimately the Arkansas taxpayers) would face penalty payments of $32,000 per day and $21 million in demobilization costs. In addition, the court noted that defendants had shown that even a slight delay resulting from an injunction could mean pushing back construction months because some of the work must take place before ambient temperatures fall too

low and other work on the bridge had been scheduled to occur when the Arkansas River is flowing at its highest point of the year. Finally, the court found that defendants had demonstrated public interest weighed in their favor because the public is likely to benefit from the reduced congestion and improved safety the project is intended to provide to the thousands of citizens who use I-30 every day.

On September 14, 2020, plaintiffs filed a Notice of Appeal to the U.S. Court of Appeals for the Eighth Circuit. Little Rock Downtown Neighborhood Assn, et al. v. FHWA, et al., No. 20-2910 (8th Cir.). Plaintiffs contemporaneously filed a motion for an injunction pending the appeal in the district court. The court denied the motion on September 16, and on September 24, plaintiffs sought an injunction pending appeal and an expedited appeal from the Eighth Circuit. The Eighth Circuit denied plaintiffs' motion on October 8, and on November 9, plaintiffs filed a motion to dismiss their appeal, which the court granted on November 10. Meanwhile, in the district court, plaintiffs filed their motion for summary judgment on September 30, and defendants filed their cross motion for summary judgment on October 21. A hearing on the merits was held on November 12.

Court Denies Motion for TRO against FHWA Non-Procurement Suspension of Bridge Designer

On August 17, 2020, the U.S. District Court for the District of Columbia denied plaintiffs' application for a Temporary Restraining Order (TRO) seeking to enjoin FHWA from enforcing a non-procurement suspension of Figg Bridge Engineers, Inc. and its Engineer of Record, Mr. W. Denney Pate. Figg Bridge Engineers, Inc., et al. v. FHWA, et al., 2020 WL 4784722 (D.D.C. Aug. 17, 2020). The suspension arose from the collapse of the Florida International University (FIU) pedestrian bridge while under construction on March 15, 2018, which resulted in six deaths and injuries to ten other persons. The bridge construction was partially funded by a Transportation Investment Generating Economic Recovery grant to FIU, which was administered through the Florida Department of Transportation's Local Agency Program.

On November 22, 2019, the National Transportation Safety Board (NTSB) issued an Accident Report, which found that the probable cause of the bridge collapse was load and capacity calculation errors made by Figg in its design. Contributing to the collapse was the inadequate peer review of those calculations performed by Figg's subcontractor. Further contributing to the collapse was the failure of the Engineer of Record to identify the significance of structural cracking observed during construction and the failure to obtain an independent peer review of the remedial plan to address the cracking. The bridge collapsed during implementation of the remedial plan onto public traffic, which had not been diverted.

The court held that plaintiffs failed to show a substantial likelihood of success on the merits of their APA claim that FHWA failed to demonstrate "immediate action" was needed to protect the public interest, rejecting the argument that the delay between the NTSB report and the suspension issued on July 14, 2020, cast serious doubt on that need. The court further held that neither plaintiff made adequate showings of irreparable harm caused by the suspension and that the public interest weighs in favor of denying the TRO due to a "credible public safety interest."

On October 7, 2020, the court granted the Parties' Consent Motion for Extension of Time to File Defendants' Response to Plaintiffs' Complaint until December 8.

Court Grants FHWA Motion to Dismiss in NEPA Assignment Case

On April 9, 2020, the U.S. District Court for the Northern District of California granted FHWA's Motion to Dismiss in Friends of Del Norte, et al., v. California Dept. of Transp., et al., 2020 WL 1812175 (N.D. Cal. Apr. 9, 2020). Pursuant to 23 U.S.C. § 327, the Surface Transportation Project Delivery Program (commonly referred to as "NEPA Assignment"), the California Department of Transportation (Caltrans) issued a Finding of No Significant Impact (FONSI) for the project in 2013 and a re-evaluation of that FONSI in August 2017. FHWA made no environmental decisions regarding the project.

The court found that the plaintiffs' primary argument – that NEPA Assignment should not apply because the project would have effects in Oregon and, therefore, is a "cross-border" project ineligible for assignment under the FHWA-Caltrans NEPA Assignment MOU – unpersuasive. The court granted plaintiffs' leave to amend their complaint by May 8, 2020, but plaintiffs have failed to do so. Caltrans and the National Marine Fisheries Service (NMFS) remain as defendants in the case, which has yet to be briefed on the merits. Plaintiffs' January 2018 complaint named Caltrans, FHWA, and NMFS as defendants and alleged violations of the NEPA and the Endangered Species Act. In mid-2018, the court stayed all proceedings in the case pending settlement negotiations among the parties, primarily Caltrans and plaintiffs. Those negotiations proved fruitless, the parties agreed to a briefing schedule in mid-2019, and FHWA filed its summary judgment motion in July 2019.

The project at issue, the 197/199 Safe STAA Access Project, consists of a series of spot improvements to State Route 197 and U.S. Route 199 near the Smith River in Del Norte County, California, to accommodate large trucks permitted under the provisions of the Surface Transportation Assistance Act of 1982. The project area runs alongside the Smith River, the only federally-designated Wild and Scenic River in California.

District Court Denies Plaintiffs' Motion for TRO and Preliminary Injunction in Idaho Pedestrian Trail Case

The U.S. District Court for the District of Idaho denied plaintiffs' Motion for a Temporary Restraining Order on June 12, 2020 and denied plaintiffs' Motion for a Preliminary Injunction on June 30, 2020, in Sawtooth Mountain Ranch LLC, et al., v. FHWA, et al., 2020 WL 3549159 (D. Idaho June 30, 2020). Plaintiffs allege violations of the Endangered Species Act and the Clean Water Act in the approval and construction of a non-motorized, multipurpose 4.5-mile trail that would serve pedestrians, bicyclists, and equestrians in south-central Idaho between the City of Stanley and Redfish Lake. FHWA's Western Federal Lands Highway Division designed and is constructing this trail in partnership with the U.S. Forest Service, which is also a named defendant in this litigation. Construction was scheduled to begin on June 16, 2020. On June 10, 2020, plaintiffs filed a Motion for a Temporary Restraining Order and Preliminary Injunction requesting that construction of a pedestrian trail within an easement on plaintiff's property be prohibited on the grounds that

immediate and irreparable injury, loss, or damage would result to plaintiffs.

FHWA Seeks Summary Judgment in NEPA and Section 4(f) Challenge

On July 31, 2020, FHWA filed a cross motion for summary judgment in Friends of the Frank J. Wood Bridge v. Chao, No. 19-408 (D. Me.), a challenge to FHWA's Finding of No Significant Impact (FONSI) associated with the replacement of the Frank J. Wood Bridge and determination that no feasible and prudent avoidance alternative existed to the use of Section 4(f) resources, including use of the historic bridge.

In their motion for summary judgment, plaintiffs argued that FHWA violated NEPA and Section 4(f) by rejecting the rehabilitation alternatives and by conducting an Environmental Assessment (EA) rather than and Environmental Impact Statement (EIS). Specifically, plaintiffs alleged that FHWA improperly evaluated the construction and service life cost of the various alternatives by inflating the construction and maintenance cost of the rehabilitation alternative and using an unproven service life cost analysis instead of the more popular life cycle cost analysis. In addition, plaintiffs claimed that FHWA was required to prepare an EIS rather than an EA due to an alleged "controversy" surrounding FHWA's use of the former cost estimate methodology, rather than the latter cost estimate methodology, a choice plaintiffs believe improperly overestimates the significant future cost that would accompany rehabilitation.

FHWA's summary judgment brief explained that the agency thoroughly considered various alternatives, compared legitimate side-by-side cost estimates and projections, and evaluated the extent to which each alternative met the purpose and need of the project. Based on that analysis, FHWA found that rehabilitation of the bridge was not a "prudent and feasible" alternative under Section 4(f). And the agency's EA thoroughly explored potential environmental issues presented by the project, allowed for full public participation, and resulted in a well-supported FONSI. Moreover, plaintiffs' "controversy" argument is deficient as it does not relate to an environmental controversy as required by the NEPA regulation.

Plaintiffs Seek Summary Judgment in I-73 Proposed Corridor Project

On August 3, 2020, plaintiffs in South Carolina Coastal Conservation League v. U.S. Army Corps of Engineers, et al., No. 17-03412 (D.S.C.), filed a Motion for Summary Judgment arguing that federal defendants, including FHWA, violated NEPA when they concluded that no supplemental EIS was required for the planned I-73 project in South Carolina, a proposed corridor project that will provide a direct link from North Carolina and states to the north to the Grand Strand (Myrtle Beach area). Plaintiffs also argue that the plan to toll I-73 is a substantial change that is not addressed in the FEIS and that substantial new information has emerged bearing on environmental concerns. Additionally, plaintiffs allege that the Corps violated the Clean Water Act when issuing a permit and that it failed to independently evaluate practicable alternatives. Lastly, plaintiffs argue that the Corps did not apply the presumption that less damaging practicable alternatives exist and that EPA arbitrarily failed to veto the Corps' permit.

In their Combined Cross Motion for Summary Judgment filed on November 4, federal defendants argue that FHWA and the Corps complied with NEPA and that

plaintiff's NEPA claims regarding the 2008 FEISs are time-barred. Additionally, federal defendants argue that they properly concluded the a supplemental EIS was not required and that there is no final agency action authorizing tolls on I-73 in South Carolina, depriving the court of jurisdiction over that claim. Additionally, FHWA argues that there is no significant new information relevant to I-73's potential environmental impacts. Wetland impacts from I-73 overall have decreased, calculated changes are due to changes in wetland delineation, and plaintiffs "new" reports present no new information. Additionally, the effects of increased truck traffic were considered in the re-evaluation and were not determined to be significant, induced development resulting from the project is not new, and economic development is one of the project purposes. Federal defendants also argued that the Corps complied with the Clean Water Act, that the Corps can and should rely on FHWA's NEPA records and that it reasonably did so here, and that the EIS was not biased against upgrading existing roads. Lastly, federal defendants argued that the Corps reasonably found that SCDOT's proposed project was the least damaging practicable alterative and that plaintiff's claims against EPA are baseless.

Alaskan Indian Tribes Challenge Ambler Access Road Project ROD

On October 19, 2020, the governing bodies of six federally-recognized Indian Tribes and a Tribal consortium challenged numerous federal agencies' decisions pertaining to the Ambler Access Road's environmental documents. Alatna Village Council, et al. v. Padgett, et al., No. 20-00253 (D. Alaska). The complaint challenges the federal agencies' approvals of the entire route under NEPA and the Clean Water Act. The complaint also challenges the subsistence evaluation under the Alaska National Interest Lands Conservation Act (ANILCA), the historic property review and consultation process under section 106 of the National Historic Preservation Act, government-to-government consultations with Tribes, and the authority of the temporarily-appointed Department of the Interior Assistant Secretary to approve the Record of Decision (ROD). The Bureau of Land Management (BLM) was the lead federal agency for the 211-mile route Environmental Impact Statement (EIS), and BLM and the Army Corps of Engineers issued a joint EIS and ROD. The National Park Service (NPS) and DOT issued an economic and environmental analysis, in lieu of an EIS per ANILCA, and selected a route across 18 miles of the Gates of the Arctic National Park and Preserve.

The Section 106 claim is the only claim relevant to FHWA's involvement and asserts that the agencies improperly excluded landscape-level historic properties from the process, unlawfully determined the Area of Potential Effects, and failed to properly consult with Tribes. The project's Section 106 process was led by BLM in coordination with NPS and the Corps and resulted in a Programmatic Agreement.

Federal Motor Carrier Safety Administration

First Circuit Upholds Unsatisfactory Carrier Safety Rating

On November 9, 2020, the U.S. Court of Appeals for the First Circuit upheld an FMCSA enforcement decision assigning Sorreda Transport, LLC an Unsatisfactory safety rating. Sorreda Transport LLC v. USDOT, 2020 WL 6557558 (Nov. 9, 2020). 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 its failure to require its drivers to use an electronic logging device. Sorreda Transport then filed a Petition for Review asking the First Circuit to set aside FMCSA's final order as arbitrary and capricious under the APA. The parties completed briefing in August 2020, and on September 22, the court removed the case from the oral argument calendar, noting that it would issue a decision on the briefs. The court ultimately held that FMCSA's findings were supported by substantial evidence, and thus, the Unsatisfactory safety rating was not arbitrary or capricious.

Oral Arguments Held in Challenge to Pre-employment Screening Program

On September 9, 2020, the U.S. Court of Appeals for the District of Columbia Circuit heard oral arguments in Mowrer, et al. v. USDOT, et al., No. 19-5321 (D.C. Cir.). The issues before the court were (1) whether the district court correctly dismissed plaintiffs' suit for failing to state a claim because FMCSA was not acting as a "consumer reporting agency" within the meaning of the Fair Credit Reporting Act (FCRA); (2) whether the FCRA's damages provisions waive the federal government's sovereign immunity; and (3) whether the district court erred by denying plaintiffs' motion to amend their complaint to add claims under the Privacy Act.

Plaintiffs originally asserted claims under the APA and FCRA, arguing that FMCSA 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 improperly delegated to the states their 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 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 ground 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 argued 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 argued that the district court did not abuse its discretion in denying plaintiffs'

motion to amend their complaint to add Privacy Act claims.

Briefing Completed in Motor Carrier Challenge to FMCSA Final Order

On June 29, 2020, the parties completed briefing in in KP Trucking LLC v. USDOT, et al., No. 20-9508 (10th Cir.). The petitioner, KP Trucking, 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.

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.

Small Business in Transportation Coalition Files Multiple Extraordinary Motions in Suit Regarding 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 decisions regarding the HOS and broker bond exemption requests after publishing them in the Federal Register and seeking comments.

On April 27, 2020, before FMCSA's answer or other responsive pleading was due, plaintiff filed a motion for preliminary injunction. On May 5, FMCSA filed a combined opposition to the motion for preliminary injunction and motion to dismiss. FMCSA argued that the district court lacked 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. The court denied the motion for preliminary injunction

and ordered SBTC to respond to the motion to dismiss.

SBTC filed a response to the motion to dismiss, contending that the Hobbs Act does not vest the appellate court with exclusive jurisdiction. While the motion to dismiss was still pending, SBTC noticed depositions of three senior FMCSA officials, including the Deputy Administrator. The court stayed all discovery pending briefing and a ruling on a motion for discovery. On June 26, 2020, SBTC filed a motion for a preliminary injunction requesting permission to take the depositions of three senior FMCSA officials, contending that evidence critical to SBTC's claims could only be obtained through deposition. The court denied the motion three days later. SBTC immediately filed another motion properly styled as a motion for discovery on June 29, 2020, essentially requesting the same relief as in the motion for preliminary injunction.

On July 28, before the parties completed briefing on the motion for discovery, plaintiff filed a motion for leave to file an amended complaint seeking to add new claims against the government. These claims were for the government's alleged failure to suspend the HOS rules nationwide in response to protests occurring in cities across the nation following the death of George Floyd and for failure to arrest protesters interfering with interstate transportation. On August 5, before the court could take any action on the motion for leave to amend, SBTC filed a motion for writ of mandamus, asking the court to order the Secretary to suspend the HOS regulations and to order DOT's Office of Inspector General to arrest protesters around the country. FMCSA filed an opposition to both motions on August 11, and the court denied the motion for writ of mandamus.

On September 24, in the interest of justice and judicial efficiency, the court granted SBTC's motion to file a second amended complaint, noting that the court's jurisdiction is in question and that no additional amendments beyond that granted in its order would be entertained. The court set a briefing schedule and indicated that it will rule on the substance of FMCSA's motion to dismiss. FMCSA filed a motion to dismiss the second amended complaint on October 8. SBTC filed its response on November 6.

Federal Railroad Administration

D.C. Circuit Remands Case Involving Labor Unions' Challenge to Mexican Locomotive Engineer and Conductor Certifications

On August 28, 2020, the U.S. Court of Appeals for the District of Columbia Circuit issued its decision in litigation brought by the Brotherhood of Locomotive Engineers and Trainmen and the Transportation Division of the International Association of Sheet Metal, Air, Rail and Transportation Workers challenging unspecified actions FRA took that allegedly authorized 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., 972 F.3d 83 (D.C. Cir. 2020). In its decision, the court vacated and remanded FRA's approval of KCSR's modified Part 240 engineer certification program.

The petition for review, which was filed on September 4, 2018, asserted 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

contended that KCSM's operations in Laredo, Texas, did 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. Petitioners alleged that because FRA took the unspecified, challenged administrative actions without public notice or other published documentation, the agency is unable to cite to or attach a copy of the document(s) memorializing FRA's final agency action.

On October 22, 2018, the government and intervenors KCSR and the Texas Mexican Railway Company filed separate motions to dismiss, alleging that petitioners 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 that petitioners failed to identify any reviewable final agency action. The government also argued that petitioners' claims were meritless because FRA did not act beyond its authority and did not violate any applicable statutory or regulatory provisions.

The court held oral argument on December 5, 2019, and issued its decision on August 28, 2020. In its decision, the court held that one of the challenged actions—FRA's approval of KCSR's modified Part 240 engineer certification program—was a final agency action reviewable under the Hobbs Act. The court concluded that the program was approved thirty days after KCSR submitted it and that FRA did not inform KCSR of any defects. The court called this process, established by FRA's conductor certification regulations, a "passive approval." The court further found that although the unions did not receive formal notice at the time of the passive approval, they eventually received notice when KCSM engineers were certified under KCSR's new program and began operating trains from the border to the nearby rail yard in Laredo, under FRA observation. The court vacated and remanded FRA's approval of the engineer certification program based on its finding that FRA provided no written reasoning for its approval of the modified program, as the program was approved passively under FRA's regulations. Judge Tatel dissented in part, contending that the court lacked jurisdiction because, due to FRA's failure to provide notice of its passive approval of the modified program, there was no entry of FRA's final decision for purposes of the Hobbs Act.

Ninth Circuit Hears Argument in Challenge to FRA's Withdrawal of Its Train Crew Staffing Regulation

On October 5, 2020, the U.S. Court of Appeals for the Ninth Circuit heard oral argument in litigation brought by two labor unions (the Transportation Division of the International Association of Sheet Metal, Air, Rail and Transportation Workers and the Brotherhood of Locomotive Engineers and Trainmen), 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). The oral argument focused principally on the preemptive effect of FRA's withdrawal on state laws addressing crew staffing.

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 conducting outreach to industry stakeholders and the general public, FRA ultimately concluded that no regulation of train crew staffing is necessary or appropriate and on May 29, 2019, the agency withdrew the NPRM. In issuing the withdrawal, FRA explained that it could not provide conclusive data to suggest whether one-person crew operations are generally safer 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 the decision would 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 the 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. On August 8, the Association of American Railroads (AAR) moved to intervene in all 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, 2019. 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 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, 2019, 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, filed on March 3, 2020, 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, to withdraw rules it had proposed, and to preempt state laws; and (3) FRA's decision to withdraw the NPRM and to preempt state laws regulating train crew size complied with notice-and-comment requirements.

The American Short Line and Regional Railroad Association (ASLRRA) filed an amicus brief on March 10, and AAR filed its Intervenor Brief on March 24. Both briefs supported the government's position. On July 14, the labor unions and the States filed three separate reply briefs.

During oral argument on October 5, 2020, the judges' questions focused on (1) the petitioners' claims related to the timing of the withdrawal, specifically, the appropriate remedy for any violation of rulemaking time limits and the impact of such timing on the effectiveness of public notice and comment; (2) the significance of AAR's allegations of improper venue and forum shopping by the Labor Unions; (3) public notice that withdrawal and preemption was a possible outcome of the rulemaking; and (4) the practical safety and operational effects of the withdrawal.

Briefing Begins in Labor Unions' Challenge to Risk Reduction Program Final Rule

On October 5, 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 filed their opening brief in litigation challenging FRA's Risk Reduction Program (RRP) 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.). In their brief, petitioners challenge (1) the timing of the final rule, which was allegedly promulgated nine years after the advance notice of proposed rulemaking; (2) the absence of a fatigue management plan requirement in the final rule; (3) the information protection provisions in the final rule, the reliance on a final study report produced by Baker Botts in FRA's development of these provisions, and the omission from the administrative record of certain communications related to this report; and (4) the inclusion of performance-based standards in the final rule, based on petitioners' allegations of FRA's inadequate oversight and monitoring of the railroad industry.

The RRP final rule, which implemented Section 103 of the Rail Safety Improvement Act of 2008, 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 the 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.

The government's brief is due on December 4, and petitioners' reply brief is due on December 28.

Litigation over Safety Guidance for State-Sponsored Passenger Rail Operations Concludes

On June 29, 2020, the U.S. Court of Appeals for the District of Columbia Circuit granted petitioners' voluntary motion to dismiss litigation brought by the North Carolina Department of Transportation (NCDOT) and the Capitol Corridor Joint Powers Authority (CCJPA) alleging that FRA's "Guidance for Safety Oversight and Enforcement Principles for State-Sponsored Intercity Passenger Rail Operations" (Guidance), which was issued on August 11, 2016, was "promulgated without observance of procedures required by law and is arbitrary and capricious, an abuse of discretion, and in excess of the FRA's statutory authority." North Carolina Dep't of Transp., et al. v. FRA, No. 16-1352 (D.C. Cir.). Petitioners agreed to the voluntary dismissal after FRA rescinded the Guidance on April 2, 2020.

The Guidance stated that FRA would continue to recognize state-sponsored intercity passenger rail (IPR) operations as part of Amtrak's National Network for purposes of FRA regulation if Amtrak operated the trains and maintained the passenger equipment. States that contracted with providers other than Amtrak would need to identify a party to fulfill the regulatory and administrative responsibilities for the state in Amtrak's absence. The Guidance cited the System Safety Program (SSP) rule as an example, explaining how state sponsors of IPR included in Amtrak's National Network would be covered by Amtrak's SSP and that state sponsors of IPR that contracted with a party other than Amtrak would need to develop their own SSP.

In their petition for review, petitioners raised the following issues: (1) whether FRA violated the APA by issuing its Guidance without notice and comment; and (2) whether the Guidance is arbitrary and capricious, unsupported by substantial evidence, and not in accordance with law because the Guidance (a) made state sponsors that only fund IPR responsible for their contractors' regulatory compliance, without providing a reasoned explanation; (b) imposed disparate regulatory obligations on state sponsors of IPR, depending upon whether Amtrak provides the rail service; and (c) failed to provide objective criteria under which state sponsors of IPR can determine their statutory and regulatory obligations. The government responded to the petition by describing the Guidance as a restatement of FRA's safety oversight policies and practices which did not create any new legal obligations, rights, or consequences. The government also argued that the Guidance was neither final agency action nor subject to the APA's notice and comment requirements. AAR intervened and filed an amicus brief in support of its position that the Guidance was final agency action.

On March 4, 2020, FRA published a final rule that amended the SSP requirements in 49 C.F.R. Part 270 by clarifying the roles and responsibilities of each passenger rail operation in ensuring compliance with Part 270. FRA rescinded the Guidance on April 2, 2020, based on the changes to Part 270 in the final rule. Petitioners' voluntary dismissal followed.

California Seeks to Supplement the Administrative Record in High-Speed Rail Litigation

On September 22, 2020, the State of California and the California High-Speed Rail Authority (CHSRA) transmitted a letter to the federal defendants in California, et al. v. DOT, et al., No. 19-02754 (N.D. Cal.),

alleging that the administrative record in this case, a challenge to FRA's decision to terminate a $929 million grant for the construction of high-speed rail in California, was incomplete. In the letter, plaintiffs identified eleven categories of records and a number of specific documents that they believe should have been included in the record, which was provided to plaintiffs on November 21, 2019.

On May 16, 2019, FRA terminated Cooperative Agreement No. FR-HSR-0118-12, as amended, 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 (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 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 (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, 2019, 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 plaintiffs' complaint on July 22, 2019. On March 5, 2020, the parties participated in a settlement conference after exchanging settlement offers and settlement conference statements. The parties were unable to reach a settlement.

Federal Transit Administration

District Court Rules for FTA in BART Silicon Valley Litigation, Plaintiff Appeals

On August 8, 2020, the U.S. District Court for the Northern District of California denied the motion for summary judgment of plaintiff Shark's Sports and Entertainment LLC's (SSE) and granted FTA's cross-motion for summary judgment in Sharks Sports & Entertainment LLC v. FTA, et al., 2020 WL 4569467 (N.D. Cal. Aug. 8, 2020). SSE alleged 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 six-mile

BART Silicon Valley Phase II Extension Project. SSE's main allegation centered around the omission from the project of an eight-story parking facility at Diridon Station. SSE owns and operates the San Jose Sharks, a professional hockey team in the NHL and is 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 alleged that the parking facility, as noted in the Draft and Final Environmental Impact Statement (EIS), would serve to mitigate the adverse environmental impacts that the Project will have on the area. SSE argued that FTA did not properly analyze the parking needs at the Diridon Station, "failing to take the 'hard look' required and using improper scientific principles in analyzing the data."

Relying heavily on Japanese Village, LLC v. FTA, 843 F.3d 445 (9th Cir. 2016), the court rejected SSE's arguments and granted summary judgment for FTA. The court quoted the Ninth Circuit in Japanese Village, noting that "[t]here are no NEPA thresholds for determining the significance of parking impacts, and [the plaintiff] has not cited any cases in which a court has found an EIS inadequate for failure to consider increased demand on an existing parking structure." Additionally, the court rebuffed SSE's claims that an unconstrained parking analysis was the only way to properly analyze an area's parking needs. The court stated that if "[SSE's] scientific integrity argument were correct, every environmental impact statement that implicated parking demand would run afoul of NEPA in the absence of an unconstrained study. This does not align with the Ninth Circuit's analysis."

Ultimately, the court determined that "the Final SEIS/SEIR contains the requisite 'hard look' at spillover parking around Diridon Station," and it "considered the Extension Program's impact on existing parking, the availability of new parking, various factors that would reduce the demand for parking, and modeling that projected the mode-of-access and ridership at Diridon Station." Moreover, the court held that the "Final SEIS/SEIR provides the reasonably thorough discussion that NEPA requires."

On September 23, 2020, SSE filed a Notice of Appeal to the U.S. Court of Appeals for the Ninth Circuit. Sharks Sports & Entertainment LLC v. FTA, et al., 20-16842 (9th Cir.). Appellant's opening brief is due February 1, 2021, appellees' answering brief is due March 3, and appellant's optional reply brief is due 21 days after service of the answering brief.

Maritime Administration

Litigation with Matson over Vessels in U.S.-Saipan Trade Continues

On November 27, 2018, Matson Navigation Company filed an action in the U.S. District Court for the District of Columbia seeking administrative review of MARAD's approval of two replacement vessels (APL GUAM and APL SAIPAN) for operation by APL under the Maritime Security Program (MSP). Matson Navigation Co. v. USDOT, et al., No. 18-2751 (D.D.C.). This action follows a similar action that Matson filed in the U.S. Court of Appeals for the District of Columbia Circuit pursuant to the Hobbs Act, which was dismissed for lack of jurisdiction. Matson Navigation Co. v. USDOT, et al., 895 F.3d 799 (D.C. Cir. 2018). The D.C. Circuit determined that it lacked jurisdiction with respect to the APL GUAM because Matson filed its petition after the Hobbs Act's 60-day time limit for such challenges.

Matson's principal argument in the district court was that MARAD's approvals were arbitrary and capricious because the replacement vessels carry cargo to Saipan. Matson claimed that the vessel eligibility requirements of the Maritime Security Act require that, to be eligible for the MSP, a vessel operate *exclusively* in the foreign trade, without any participation in coastwise trade. According to Matson, the Commonwealth of the Northern Mariana Islands, a U.S. territory that includes Saipan, is subject to the coastwise laws, which require that cargo moving between U.S. ports be carried on vessels that are built in the United States and are 75%-owned by U.S. citizens, requirements that the APL replacement vessels do not meet.

On June 12, 2020, the district court concluded that it lacked jurisdiction with the respect to MARAD's approval of the APL GUAM. Matson Navigation Co. v. USDOT, et al., 466 F. Supp. 3d 177 (D.D.C. 2020). With respect to the APL SAIPAN, the court stated that it could not determine from the administrative record how MARAD interpreted the MSP eligibility statute, or if MARAD considered the issue of whether the vessel was ineligible for the MSP because it called on Saipan. Accordingly, on June 30, 2020, the court issued a second opinion and an order vacating MARAD's approval of the APL SAIPAN and remanding the matter to MARAD for its consideration, in the first instance, of several legal issues, and after resolution of those issues, whether the APL SAIPAN is eligible for the program. Matson Navigation Co. v. USDOT, et al., 2020 WL 3542220 (D.D.C. June 30, 2020).

Matson has appealed the district court's determination that it lacks jurisdiction with respect to the APL GUAM. To facilitate the appeal, the district court issued an opinion and order holding that its order was a final judgment pursuant to 28 U.S.C. § 1291 and entered judgment with respect to the APL GUAM pursuant to Rule 54(b) of the Federal Rules of Civil Procedure. Matson Navigation Co. v. USDOT, et al., 2020 WL 4816460 (D.D.C. Aug. 19, 2020). Appellant filed its opening brief November 17. Appellee's brief is due on December 17, and appellee's reply brief is due on January 7, 2021. Matson Navigation Co. v. USDOT, et al., Nos. 20-5219 & 20-5261 (D.C. Cir.).

With respect to the APL SAIPAN, on August 3, MARAD determined that, under the Maritime Security Act's plain language, a vessel need operate only in the foreign trade, and not *exclusively* in the foreign trade, to be eligible for inclusion in the program. Thus, while other provisions of the MSA provide for deducting from monthly stipend payments amounts for days that an MSP vessel operates in the coastwise trade, such operation does not render a vessel ineligible for the program. Accordingly, MARAD reinstated its approval with respect to the APL SAIPAN.

On September 30, 2020, Matson filed a new APA lawsuit in the U.S. District Court for the District of Columbia challenging MARAD's August 3 reinstatement of its 2016 approval of the APL SAIPAN as a replacement vessel. Matson Navigation Co. v. USDOT, et al., No. 20-2779 (D.D.C.). The complaint has five counts. Two counts allege that the APL SAIPAN is barred from participating in the U.S.-Saipan trade by the Jones Act and by the Covenant between the Northern Mariana Islands and the U.S. by which the Northern Mariana Islands became a U.S. territory. One count alleges that the SAIPAN is too old to be eligible as a replacement vessel for the Maritime Security Fleet. One count alleges that MARAD failed to consider anew all the replacement-vessel eligibility factors on remand. Finally, one count alleges that

Matson was wrongfully denied a right to intervene in the administrative proceedings. On that same day, Matson filed a protective petition for review under the Hobbs Act in the D.C. Circuit to preserve its rights in the event the district court determines that jurisdiction lies exclusively in the court of appeals. Matson Navigation Co. v. USDOT, et al., No. 20-1395 (D.C. Cir.).

Court Grants Summary Judgment for USMMA in APA Litigation

On July 7, 2020, the U.S. District Court for the Eastern District of New York granted summary judgment in favor of defendants United States, DOT, and U.S. Merchant Marine Academy (USMMA) and denied summary judgment for plaintiff Benjamin Sell in Sell v. United States, et al., 2020 WL 3791847 (E.D.N.Y. July 7, 2020), finding that Sell's disenrollment did not violate the APA.

Sell started at USMMA in July 2015 as a member of the Class of 2019. During his first two years, Sell failed four courses, failed three out of six Physical Fitness Assessments, and incurred numerous demerits. Sell continued to perform poorly during his 2nd Class (junior) year, failing three additional classes. Further, one of his professors discovered that Sell had plagiarized two writing assignments and reported him for an Honor Code violation.

After being found guilty of cheating by the Honor Board, then-Superintendent Helis set Sell back to the Class of 2020. The next day, the Commandant recommended that Sell appear before an Executive Board to determine his suitability to remain at the Academy, citing his plagiarism, academic issues, and physical fitness failures. Sell received a notice of the hearing, which included the scope of what the Board would consider, the burden of proof (placed on Sell to demonstrate sufficient cause for retention), and his rights prior to and at the hearing. At the hearing, Sell gave opening and closing statements, responded to questions from the Board, and presented a character witness.

The Executive Board unanimously recommended to now-Superintendent Buono that Sell be dis-enrolled. In making the recommendation, the Board noted his poor academic record, his repeated physical fitness failures, his cheating, and his avoidance of leadership responsibilities. The Superintendent accepted the recommendation and dis-enrolled Sell on November 20, 2018. Sell appealed to the Maritime Administrator, who affirmed the decision. Sell filed suit on May 23, 2019, claiming that USMMA's conduct violated the APA because it was arbitrary and capricious and deprived him of his Fifth Amendment procedural and substantive due process rights.

Sell offered three reasons that USMMA's conduct was arbitrary and capricious: (1) no basis for convening a hearing under USMMA policy; (2) improper to convene a hearing when he had or was still remediating conduct raised in the hearing; and (3) improper to dis-enroll him when Superintendent Helis declined to do so.

In its decision, the court first addressed the arbitrary and capricious standard, noting that a court should not "substitute its judgment for that of an agency," especially with regard to the USMMA, "as '[f]ew decisions properly rest so exclusively within the discretion of the appropriate government officials [as] the selection, training, discipline and dismissal of the future officers of the military and Merchant Marine.'" The court then rejected Sell's three arguments. First, it held that USMMA policy specifically provides for a

suitability hearing when a student has failures in academics, honor, and physical fitness. The court further held that the Academy "was well within its right to scrutinize Sell's entire record for suitability when that record includes numerous and repeated transgressions for which prior measures, including probation, setback, and remediation, apparently did not spur a behavioral turnaround." Finally, the court held that, based on a review of Sell's entire record, it was "hardly inappropriate for Superintendent Buono to dole out harsher punishment than Sell received when each predicate infraction was considered separately."

The court next addressed Sell's claim that he was denied procedural due process, holding that Sell was provided all of his constitutionally required process. Specifically, the court noted that he received a Notice that included all the charges against him and his rights, had over a month to prepare his defense, presented his case to the Board without a time limitation, and did not argue that he was denied any of the rights set forth in the Notice. Most notably, the court rejected Sell's argument that due process requires that USMMA bear the burden of proof in a suitability hearing as it does in a disciplinary hearing, holding that USMMA "need only afford Sell a hearing, apprise him of the charges against him, and give him an opportunity to present a defense to meet the constitutional procedural requirements," which it did.

Finally, the court addressed Sell's substantive due process claim, noting that he would have to prove that USMMA's conduct "'was arbitrary or irrational or motivated by bad faith.'" Sell contended that the Commandant's reasons for recommending a suitability hearing were pretextual because USMMA policy did not permit calling such a hearing, and he had already been punished for each infraction. Having already noted that a suitability hearing was permissible and that USMMA had a right to evaluate Sell's overall suitability, the court found no evidence that the Commandant's reasons for recommending the hearing were based on an improper motive.

National Highway Traffic Safety Administration

D.C. Circuit Stays Trailer Fuel Efficiency Rule While Weighing Decision in Judicial Challenge

The Truck Trailer Manufacturers Association's (TTMA) challenge to 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" in the U.S. Court of Appeals for the District of Columbia Circuit was fully briefed as of June 2, 2020, and oral argument was held on September 15. Truck Trailer Mfrs. Ass'n, Inc. v. EPA, No. 16-1430 (D.C. Cir.).

The federal government filed its brief on April 21, arguing that NHTSA reasonably exercised its discretion to conclude that the Energy Independence and Security Act (EISA) authorized it to promulgate fuel efficiency standards for trailers. Specifically, EISA's use of the term "vehicle" was ambiguous, and NHTSA reasonably interpreted it to encompass trailers. Likewise, the Clean Air Act authorized EPA to regulate greenhouse gas emissions from tractor-trailer vehicles: trailers are covered by the statute's definition of "motor vehicles," and trailer manufacturers are covered by the statute's definition of "manufacturers." If the court disagrees with one of the agencies' arguments, however, the

agencies' respective portions of the rule function independently and are severable, as expressly intended by the agencies. Several states and environmental and public health groups intervened as respondents in support of the federal government, filing briefs on May 12 further supporting the agencies' positions.

TTMA filed its reply brief on June 2, reiterating its arguments that EPA lacked statutory authority to regulate emissions from trailers, NHTSA independently lacks statutory authority to regulate the fuel economy of trailers, and NHTSA's trailer standards are not severable from EPA's, so the entire trailer standards program must be vacated.

On August 26, TTMA moved to stay NHTSA's trailer rules, arguing that it was likely to prevail on the merits, essentially for the reasons argued in its merits brief. Moreover, TTMA argued that its members would be irreparably harmed without a stay, no parties would be harmed by a stay, and the public interest favors a stay. NHTSA opposed the stay, disputing that TTMA was likely to prevail on the merits for the reasons explained in its merits brief. NHTSA argued that TTMA's failure to meet that threshold requirement outweighed any other equitable concern in favor of a stay.

On September 29, two weeks after oral argument, the court concluded that TTMA satisfied the stringent requirements for a stay pending court review and stayed the compliance dates for NHTSA's fuel efficiency regulations to the extent they apply to truck trailers, pending further order of the court. The court had previously stayed EPA's trailer provisions, and that stay remains in effect as well. In the meantime, the agencies' administrative processes are still underway: on August 17, 2017, NHTSA granted TTMA's petition for rulemaking, and EPA notified TTMA that it would reconsider the trailer portions of the final rule.

DOT and NHTSA Win Summary Judgment in FOIA Case and Make Progress in Other FOIA Litigation Concerning the SAFE Vehicles Rule

In June 2020, DOT and NHTSA prevailed at summary judgment in a FOIA lawsuit pertaining to the SAFE Vehicles Rule. In April 2019, the California Air Resources Board (CARB) filed a lawsuit against NHTSA and EPA in the U.S. District Court for the District of Columbia regarding a September 2018 FOIA request. Cal. Air Res. Bd. v. EPA, et al., 2020 WL 2934914 (D.D.C. June 3, 2020). The request sought twelve categories of materials, modeling information, and data pertaining to the SAFE Vehicles Rule Notice of Proposed Rulemaking.

CARB filed a motion for summary judgment in October 2019, the agencies filed responses and cross-motions for summary judgment in December 2019, and all parties completed scheduled briefing on the motions in March 2020. CARB's summary judgment motion contested NHTSA's and EPA's withholding and redaction of several documents under an exemption for deliberative material, as well as the adequacy of searches conducted by NHTSA. The parties subsequently engaged in briefing on a Notice of Development that CARB filed in April 2020, after the agencies published The Safer Affordable Fuel Efficient (SAFE) Vehicles Final Rule for Model Years 2021-2026 Passenger Cars and Light Trucks, 85 Fed. Reg. 24,174 (Apr. 30, 2020).

On June 3, 2020, the court granted the agencies' summary judgment motion in full and denied CARB's summary judgment motion in full. The court upheld the exempt status of the withheld materials, holding that the materials and redactions reflected both pre-decisional and deliberative material that was properly withheld by each agency. In addition, the court also affirmed the sufficiency of NHTSA's search, determining that the agency's search "was reasonably calculated to uncover all responsive documents" and supported a finding that NHTSA acted in good faith in responding to the request. CARB did not appeal the summary judgment order.

In addition, DOT and NHTSA recently completed the substantive phase of a second FOIA lawsuit filed by CARB in the U.S. District Court for the District of Columbia. Cal. Air Res. Bd. v. EPA, et al., No. 20-01293 (D.D.C.). CARB's Complaint, filed on May 15, 2020, sought responses from NHTSA and EPA to FOIA requests sent to the respective agencies in December 2019. CARB transmitted similar FOIA requests to each agency, seeking certain materials pertaining to SAFE Vehicles Rule Part One: One National Program, 84 Fed. Reg. 51,310 (Sept. 27, 2019). While each agency had acknowledged the requests, neither had transmitted final FOIA responses by the commencement of the lawsuit.

Pursuant to an agreed schedule, both agencies completed searches and provided final responses to the FOIA request on September 24, 2020. Neither agency located any materials responsive to CARB's specific requests. Following these responses, the parties filed a stipulation of dismissal on September 30, 2020, which memorialized the conclusion of the substantive aspects of the FOIA litigation. Although the merits phase of the litigation has now concluded, the collateral issue of CARB's claim for fees and costs remains outstanding. The parties remain in discussion regarding any such claim for fees and costs and have moved for a deadline of January 6, 2021, to confer on this matter.

Finally, litigation continues with the Environmental Defense Fund (EDF) in a December 2018 lawsuit seeking records from three separate FOIA requests submitted by EDF to the Office of the Secretary (OST) in the fall of 2018. Envtl. Def. Fund v. USDOT, No. 18-03004 (D.D.C.). The FOIA requests seek emails and calendar materials from numerous OST and NHTSA personnel pertaining to the SAFE Vehicles Rule, as well as Phase 2 fuel economy standards for heavy-duty trucks. Thus far, DOT has completed eighteen rolling productions, filed eleven joint status reports, and attended two status conferences. In total, DOT's production for these FOIA responses exceeds 25,000 pages of materials. In July 2020, the parties agreed to a narrowing of EDF's request for outstanding records. Accordingly, DOT completed its final production on July 28, 2020, apart from materials pending consultation with other agencies. Pursuant to an agreed schedule, DOT is preparing a *Vaughn* index of redacted material.

Pipeline and Hazardous Materials Safety Administration

LNG by Rail Rule the Subject of Multiple Legal Challenges

PHMSA published its LNG by Rail final rule on July 24, 2020. This final rule modified the Hazardous Materials Regulations (49 CFR parts 171-180) to authorize the transportation of liquefied natural gas by rail in DOT-113

specification tank cars, subject to certain operational controls (including route restrictions and stronger, thicker outer tanks).

On August 18, 2020, a pair of petitions for review of the LNG by Rail final rule were filed in the U.S. Court of Appeals for the District of Columbia Circuit, one by a coalition of seven environmental groups (Earthjustice, Sierra Club, Center for Biological Diversity, Clean Air Council, Delaware Riverkeeper Network, Environmental Confederation of Southwest Florida, and Mountain Watershed Association), the other by a coalition of attorneys general from fourteen states (California, Delaware, Illinois, Maryland, Massachusetts, Michigan, Minnesota, New Jersey, New York, Oregon, Pennsylvania, Rhode Island, Vermont, and Washington) and the District of Columbia. Subsequently, the Puyallup Indian Tribe of Washington State petitioned the U.S. Court of Appeals for the Ninth Circuit for judicial review of the LNG by Rail final rule. (On September 24, another environmental group, the Damascus Citizens for Sustainability, filed a fourth, untimely petition for review with the D.C. Circuit, which that petitioner voluntarily dismissed on October 28.)

The coalitions of environmental groups and State attorneys general have each filed with the D.C. Circuit statements alleging that in issuing the LNG by Rail final rule, PHMSA (1) violated PHMSA's mandate under the Hazardous Materials Transportation Act to ensure the safe transportation of hazardous materials; (2) violated the APA by authorizing the transportation of LNG by Rail without adequate safety testing and pursuant to operational controls and a tank car specification not identified in the notice of proposed rulemaking; and (3) violated NEPA by failing to prepare an Environmental Impact Statement. The Puyallup Tribe's petition in the Ninth Circuit makes similar allegations, albeit with additional claims that PHMSA's rulemaking lacked meaningful consultation with the Tribe as contemplated by Executive Order 13175 ("Consultation and Coordination with Indian Tribal Governments") and would result in a disparate impact on the Tribe in violation of Executive Order 12898 ("Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations") and Title VI of the Civil Rights Act. The Ninth Circuit has transferred the Puyallup Tribe's case to the D.C. Circuit, which has consolidated the three cases. Sierra Club, et al. v. USDOT, et al., Nos. 20-1317, 20-1318, 20-1431 (D.C. Cir.). The court has not yet set a briefing schedule.

Subject Matter Index of Cases Reported in this Issue

Administrative Law and Civil Procedure

Airport Operations

Arapahoe County Public Airport Authority, et al., v. FAA; Board of County Commissioners of Arapahoe County, et al., v. FAA, Nos. 20-1075 & 20-1085 (D.C. Cir.) (Arapahoe County Seeks Review of Denver Metroplex Project), page 13

City of Los Angeles v. FAA, et al., No. 19-73164 (9th Cir.) (City of Los Angeles Challenges Shift in Flights Departing Burbank Airport), page 11

City of Sacramento v. FAA, No. 20-72150 (9th Cir.) (Sacramento Seeks Review of Airspace Procedure Amendments), page 12

City of Scottsdale v. FAA, No. 20-1070 (D.C. Cir.) (Scottsdale Challenges FAA Inaction on New Phoenix SkyHarbor Air-Traffic Procedures), page 13

Howard County, Maryland v. FAA, 818 Fed Appx. 224 (4th Cir. 2020) (Fourth Circuit Dismisses as Untimely Challenge to BWI Cargo Facility Improvements), page 10

Nat'l Business Aviation Ass'n, Inc. v. FAA, No. 18-1719, 2020 WL 5995101 (D.D.C. 2020) (FAA Prevails in Challenge to Settlement of Santa Monica Airport Litigation), page 16

Rosen v. United States, 2020 WL 6037246 (2020) (Supreme Court Denies Certiorari in Challenge to FAA Settlement of Santa Monica Airport Litigation), page 1

Trenton Threatened Skies, Inc., et al. v. FAA, No. 19-3669 (3rd Cir.) (Environmental Challenge to FAA's FONSI at Trenton-Mercer Airport), page 12

Tule Lake Committee v. FAA, et al., No. 20-00688 (E.D. Cal.) (FAA Sued over Sale of Airport Property on Site of Former Japanese Internment Camp), page 17

Tule Lake Committee v. FAA, et al., No. 20-16955 (9th Cir.) (FAA Sued over Sale of Airport Property on Site of Former Japanese Internment Camp), page 17

Tuscola Area Airport Authority, et al., v. FAA, Nos. 19-1153 & 19-1258 (D.C. Cir.), (Michigan Airport Challenges FAA No-Hazard Determination for Proposed Wind Turbines Project), page 10

Aviation Safety Regulation

Flight Training International, Inc. v. FAA, No. 20-60676 (5th Cir.) (Flight School Seeks Judicial Review of FAA Flight Test Order), page 14

Fullerton v. FAA, No. 20-3402 (6th Cir.), (Pilot Seeks Judicial Review of Certificate Suspension for Violating Visual Flight Rules), page 14

Warbird Adventures, et al. v. FAA, No. 20-1291 (D.C. Cir.) (Operator of FAA World War II-Era Aircraft Flights Seeks Review of FAA Cease and Desist Order), page 15

Constitutionality

Bright v. Thomas, No. 19-1201, 2020 WL 3865256 (July 9, 2020) (Supreme Court Denies Certiorari in Tennessee Highway Beautification Act Case), page 2

Contracts and Grants

California, et al. v. DOT, et al., No. 19-02754 (N.D. Cal.) (California Seeks to Supplement the Administrative Record in High-Speed Rail Litigation), page 32

Disadvantaged Business Enterprises

Environment (see also National Environmental Policy Act)

Federal Tort Claims Act and Other Tort Issues

Finality and Reviewability of Agency Action

Freedom of Information Act and Discovery

Fuel Economy

Hazardous Materials Safety

Highway Construction and Operation

Delaware Riverkeeper Network v. Pennsylvania Department of Transportation, 2020 WL 4937263 (E.D. Pa. Aug. 20, 2020) (Pennsylvania District Court Upholds FHWA's Categorical Exclusion Classification and Section 4(f) Determination for Bridge Replacement Project), page 20

Friends of Del Norte, et al., v. California Dept. of Transp., et al., 2020 WL 1812175 (N.D. Cal. Apr. 9, 2020) (Court Grants FHWA Motion to Dismiss in NEPA Assignment Case), page 23

Friends of the Frank J. Wood Bridge v. Chao, No. 19-408 (D. Me.), (FHWA Files Motion for Summary Judgment in NEPA and Section 4(f) Challenge), page 24

Little Rock Downtown Neighborhood Assn, et al. v. FHWA, et al., 2020 WL 5259385 (E.D. Ark. Sept. 3, 2020) (Little Rock District Court Denies Plaintiffs' Motion for Preliminary Injunction; Plaintiffs Appeal), page 21

Little Rock Downtown Neighborhood Assn, et al. v. FHWA, et al., No. 20-2910 (8th Cir.) (Little Rock District Court Denies Plaintiffs' Motion for Preliminary Injunction; Plaintiffs Appeal), page 21

R.L. Vallee, Inc., et al. v. Vermont Agency of Transportation, et al., No.18-104 (D. Vt.) (Plaintiffs Appeal Favorable CE Determination in Vermont Project), page 20

R.L. Vallee, Inc., et al. v. Vermont Agency of Transportation, et al., No. 20-2665 (2d Cir.) (Plaintiffs Appeal Favorable CE Determination in Vermont Project), page 20

South Carolina Coastal Conservation League v. U.S. Army Corps of Engineers, et al., No. 17-03412 (D.S.C.) (Plaintiffs Seek Summary Judgment in I-73 Proposed Corridor Project), page 24

Williams v. Resler, et. al., 2020 WL 2198524 (M.D.N.C. May 6, 2020) (District Court Grants FHWA's Motion to Dismiss NEPA Claim), page 19

Wise, et al v. USDOT, et al., No. 18-000466 (E.D. Ark.), (Eighth Circuit Affirms Favorable NEPA Decision for FHWA), page 18

Wise, et al v. USDOT, et al., 943 F.3d 1161 (8th Cir. 2019) (Eighth Circuit Affirms Favorable NEPA Decision for FHWA), page 18

Hobbs Act

Bhd. of Locomotive Eng'rs and Trainmen, et al. v. FRA, et al., No. 972 F.3d 83 (D.C. Cir.) (D.C. Circuit Remands Case Involving Labor Unions' Challenge to Mexican Locomotive Engineer and Conductor Certifications), page 28

Matson Navigation Co. v. USDOT, et al., 466 F. Supp. 3d 177 (D.D.C. 2020) (Litigation with Matson over Vessels in U.S.-Saipan Trade Continues), page 34

International and Treaty Issues

Bhd. of Locomotive Eng'rs and Trainmen, et al. v. FRA, et al., No. 972 F.3d 83 (D.C. Cir.) (D.C. Circuit Remands Case Involving Labor Unions' Challenge to Mexican Locomotive Engineer and Conductor Certifications), page 28

Maritime

Matson Navigation Co. v. USDOT, et al., Nos. 20-5219 & 20-5261 (D.C. Cir.) (Litigation with Matson over Vessels in U.S.-Saipan Trade Continues), page 34

Matson Navigation Co. v. USDOT, et al., 466 F. Supp. 3d 177 (D.D.C. 2020) (Litigation with Matson over Vessels in U.S.-Saipan Trade Continues), page 34

Matson Navigation Co. v. USDOT, et al., 2020 WL 3542220 (D.D.C. June 30, 2020) (Litigation with Matson over Vessels in U.S.-Saipan Trade Continues), page 34

Matson Navigation Co. v. USDOT, et al., No. 20-2779 (D.D.C.) (Litigation with Matson over Vessels in U.S.-Saipan Trade Continues), page 34

Sell v. United States, et al., No. 19-3105, 2020 WL 3791847 (E.D.N.Y.) (Court Grants Summary Judgment for USMMA in APA Litigation), page 36

Motor Carrier Registration and Operation

Advocates for Highway and Auto Safety, et al. v. FMCSA, et al., No. 20-1370 (D.C. Cir.) (Challenge to FMCSA's Hours of Service Final Rule Filed in D.C. Circuit), page 4

California, et. al, v. FMCSA, No. 20-70706 (9th Cir.) (Ninth Circuit Hears Argument in Challenge to FMCSA Preemption of California Meal and Rest Break Rules; Briefing Completed in Related Case), page 3

Int'l Bhd. of Teamsters, et. al v. FMCSA, No. 18-73488 (9th Cir.) (Ninth Circuit Hears Argument in Challenge to FMCSA Preemption of California Meal and Rest Break Rules; Briefing Completed in Related Case), page 3

KP Trucking LLC v. USDOT, et al., No. 20-9508 (10th Cir.) (Briefing Completed in Motor Carrier Challenge to FMCSA Final Order), page 27

Mowrer, et al. v. USDOT, et al., No. 19-5321 (D.C. Cir.) (Oral Arguments Held in Challenge to Pre-employment Screening Program), page 26

Small Bus. in Transp. Coal. v. USDOT, No. 20-883 (D.D.C.) (Small Business in Transportation Coalition Files Multiple Extraordinary Motions in Pending Action Against FMCSA Regarding Three Exemption Requests), page 27

Sorreda Transport LLC v. USDOT, 2020 WL 6557558, (First Circuit Upholds Unsatisfactory Carrier Safety Rating) (D.C. Cir. Nov. 9, 2020), page 25

National Environmental Policy Act

Alatna Village Council, et al. v. Padgett, et al., No. 20-00253 (D. Alaska) (Alaskan Indian Tribes Challenge Ambler Access Road Project ROD), page 25

Arapahoe County Public Airport Authority, et al., v. FAA; Board of County Commissioners of Arapahoe County, et al., v. FAA, Nos. 20-1075 & 20-1085 (D.C. Cir.) (Arapahoe County Seeks Review of Denver Metroplex Project), page 13

Pipeline Safety, Regulation, and Operation

Preemption

Railroad Safety and Operations

Standing

Little Rock Downtown Neighborhood Assn, et al. v. FHWA, et al., 2020 WL 5259385 (E.D. Ark. Sept. 3, 2020) (Little Rock District Court Denies Plaintiffs' Motion for Preliminary Injunction; Plaintiffs Appeal), page 21

Statute of Limitations

City of Sacramento v. FAA, No. 20-72150 (9th Cir.) (Sacramento Seeks Review of Airspace Procedure Amendments), page 12

Tax

Indian River County v. USDOT, 2020 WL 5882262 (Oct. 5, 2020) (Supreme Court Declines to Review D.C. Circuit Ruling Upholding DOT's Grant of Tax-Exempt Bond Authority to Florida Rail Project), page 1.

Transit Construction and Operation

Sharks Sports & Entertainment LLC v. FTA, et al., 20-16842 (9th Cir.), (District Court Rules for FTA on Cross-Motions for Summary Judgment in BART Silicon Valley Litigation, Plaintiff Appeals), page 33

Sharks Sports & Entertainment LLC v. FTA, 2020 WL 4569467 (N.D. Cal. Aug. 8, 2020) (District Court Rules for FTA on Cross-Motions for Summary Judgment in BART Silicon Valley Litigation, Plaintiff Appeals), page 33

Alphabetical Index of Cases Reported in this Issue