U.S. Department of Transportation

DOT LITIGATION NEWS

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Supreme Court Litigation

Supreme Court Expands Upon the Application of FOIA Exemption 5 to Draft Documents

On March 4, 2021, the Supreme Court held that Exemption 5 of the Freedom of Information Act (FOIA) protects from disclosure in-house draft biological opinions, even if the drafts contain the agencies' last views about a proposal. U.S. Fish and Wildlife Service, et al., v. Sierra Club, 2021 WL 816352 (2021). DOT had submitted its views on the case to the Justice Department. This case arose out of a FOIA request submitted by the Sierra Club to the U.S. Fish and Wildlife Service and the National Marine Fisheries Service for records generated during the EPA's rulemaking process concerning cooling water intake structures. When an agency action might adversely affect a protected species, the Endangered Species Act requires the agency to consult with the U.S. Fish and Wildlife Service and the National Marine Fisheries Service (collectively "Services"). The consultation process results in the Services' preparation of a biological opinion, which discusses whether the agency's action will jeopardize an endangered species. EPA engaged in this consultative process with the Services, and the Services completed draft biological opinions, which concluded that the proposed rule would jeopardize certain species. The EPA and the Services continued to consult with another, and eventually, EPA revised its proposed rule, which ultimately led the Services to conclude that the revised rule would not harm any endangered species. In response to Sierra Club's FOIA request, the Services withheld the draft biological opinions that were based upon the initial version of the proposed rule pursuant to Exemption 5's deliberative process privilege. Sierra Club challenged the withholding and argued for release of the draft biological opinions. Sierra Club argued that while the documents were labeled as drafts, the documents represented the Services' final opinion on the EPA's prior version of the proposed rule.

The Court ultimately found that the draft biological opinions were both pre-decisional and deliberative. The Court noted that "[w]hat matters, then, is not whether a document is last in line, but whether it communicates a policy on which the agency has settled." In addition, the Court found that the draft biological opinions reflected the Services preliminary view and were not a final decision. "To be sure, a draft biological opinion might carry a practical consequence if it prompts the action agency to change its proposed rule…But many documents short of a draft biological opinion could prompt an agency to alter its rule." Thus, "[t]o determine whether the privilege applies, we must evaluate not whether the drafts provoked a response from the EPA but whether the Services treated them as final." Ultimately, the Court noted that the consultative process worked as it should have: "The Services and the EPA consulted about how the rule would affect aquatic wildlife until the EPA settled on an approach that would not jeopardize any protected species."

Justice Breyer, joined by Justice Sotomayor, dissented. In their view, "the Services' Draft Biological Opinions reflect 'final' decisions

regarding the 'jeopardy' the EPA's then-proposed actions would have caused." Thus, the draft biological opinions would not be covered by Exemption 5.

Departmental Litigation in Other Federal Courts

Ninth Circuit Adopts FOIA Consultant Corollary in *En Banc* Decision

On March 2, 2021, the U.S. Court of Appeals for the Ninth Circuit, sitting *en banc,* issued a decision interpreting FOIA's Exemption 5 as including the "consultant corollary" and found that "intra-agency" includes "at least in some circumstances, documents prepared by outside consultants hired by the agency to assist in carrying out the agency's functions." Rojas v. FAA, 989 F.3d 666 (9th Cir. 2021).

In 2014 and 2015, FAA used a biographical assessment as a selection tool for hiring applicants interested in becoming air traffic controllers. APTMetrics, FAA's contractor, created the biographical assessment, which was a computerized test designed to measure certain characteristics, such as self-confidence, stress tolerance, and teamwork. Plaintiff, Jorge Rojas, applied for an air traffic controller position but was rejected based upon his responses to the biographical assessment. Mr. Rojas then submitted a FOIA request seeking documents related to the biographical assessment, including documents created by APTMetrics. Mr. Rojas challenged the adequacy of FAA's search and three documents that FAA withheld under Exemption 5. FAA withheld the documents under the attorney work product doctrine because the documents had been prepared by APTMetrics at the request of FAA's Office of Chief Counsel in anticipation of litigation. The U.S. District Court for the Central District of California upheld FAA's application of the consultant corollary, but the Ninth Circuit reversed and declined to adopt the consultant corollary. FAA sought rehearing *en banc*, which the Court granted on January 20, 2020.

In a 7-4 opinion, the court joined six other circuits by adopting the consultant corollary. The main question for the court was whether documents created by FAA's contractor were "intra-agency" memoranda or letters and thus protected from disclosure. Looking to FOIA's context and purpose, the majority found that Exemption 5 seeks to shield privileged communications from disclosure to protect the internal decision-making process and allow frank discussion and candor. In light of this, the court could not imagine that Congress intended for Exemption 5 to only apply to communications authored by agency employees. In the majority's view, Congress had a broad understanding of "intra-agency," and thus "a fair reading of the term 'intra-agency'" encompasses a consultant hired by an agency to perform work in a capacity similar to that of an employee of that agency. However, the consultant must not represent its own interests when it advises a federal agency. In the court's view, the inquiry must be applied on a document-by-document basis, and the relevant inquiry is "whether the consultant acted in a capacity functionally equivalent to that of an agency employee in creating the document or documents the agency seeks to withhold." After conducting an *in camera* review of the three documents at issue, the court found Exemption 5 and the attorney work-product doctrine to apply to two documents, but remanded the third

document, as FAA's declarations and Vaughn Index did not provide enough information for the court to make a determination on that document.

With regard to the adequacy of FAA's search, the court relied upon Supreme Court precedent in finding that FAA properly limited its search to records in FAA's possession and that FAA was not required to search APTMetric's records. However, the court found that FAA's declarations failed to provide sufficient information about how the search was conducted. The court remanded the case to the district court for further proceedings regarding the adequacy of FAA's search and the application of Exemption 5 to the third document at issue.

Ninth Circuit Holds That Airline Deregulation Act Does Not Preempt California Meal and Rest Break Requirements for Flight Attendants

On February 23, 2021, a panel of the U.S. Court of Appeals for the Ninth Circuit — disagreeing with the position urged by the United States in an *amicus* brief — held that the Airline Deregulation Act of 1978 (ADA) does not preempt application of California's meal and rest break requirements to flight attendants. The holding was part of a ruling that largely upheld a lower court decision in favor of a class of flight attendants alleging that Virgin America violated various California labor law provisions. Bernstein v. Virgin America, 990 F.3d 1157 (9th Cir. 2021).

The ADA's preemption provision bars enforcement of state laws "related to a price, route, or service of an air carrier," 49 U.S.C. § 41713(b)(1), and has been interpreted by the Supreme Court to extend broadly, including to any state law with a "significant impact" on airline prices, routes, and services. In its *amicus* brief, the United States argued that applying California's meal and rest break requirements to flight attendants would have just such an impact. The United States contended that because FAA regulations contemplate that flight attendants will be on-duty and on-call to perform critical safety tasks during flights, the off-duty breaks required by California can only be taken between flights. The United States argued, moreover, that such breaks would have serious impacts on the airlines' complex flight scheduling system.

The Ninth Circuit panel held that the question was controlled by Dilts v. Penske Logistics, 769 F.3d 637 (9th Cir. 2014), which held that a parallel motor carrier preemption provision did not preempt the same California break requirements as applied to short-haul, intrastate delivery truck drivers. The United States had argued in its brief that Dilts was distinguishable because California's break requirements have a much more significant impact in the airline context than in the trucking context. But the Ninth Circuit panel declined to analyze the differences between the two industries, instead simply noting that the "language of the ADA's preemption clause is virtually identical to the language of" the preemption provision in Dilts, and holding that "the reasoning of Dilts thus applies with equal force." The panel also held that the California break requirements are not impliedly preempted by the Federal Aviation Act or FAA's safety regulations.

The remainder of the Ninth Circuit panel's opinion was also largely favorable to the plaintiff flight attendants. The court held that: (1) the Dormant Commerce Clause does not bar the application of any of the California labor provisions at issue; (2) the various California provisions cover the entire class of California-based flight attendants,

including non-residents; and (3) the district court's class certification was proper. The court held, however, that Virgin America did not violate California's minimum wage requirements and that Virgin America was not subject to heightened penalties.

On April 23, 2021, both plaintiffs and defendants petitioned for panel rehearing or rehearing *en banc*.

Ninth Circuit Denies Petition for Review of FMCSA Preemption of California Meal and Rest Break Rules

On January 15, 2021, the Ninth Circuit unanimously denied four petitions for review filed by the California Labor Commissioner, the International Brotherhood of Teamsters (IBT), two IBT Local Chapters, and several drivers, as well as an intervenor. International Brotherhood of Teamsters, et al., v. FMCSA, 986 F.3d 841 (9th Cir. 2021). The Ninth Circuit held (1) FMCSA's reading of 49 U.S.C. § 31141 that California's Meal and Rest Break Rules (MRB Rules) were "on commercial motor vehicle safety" was reasonable under Chevron U.S.A., Inc v. NRDC, 467 U.S. 837 (1984); (2) FMCSA's determination that California's MRB Rules were more stringent than existing federal regulations was correct; and (3) FMCSA's conclusion that California's rules placed an unreasonable burden on interstate commerce was reasonable. On March 25, the court denied petitioners' March 1 requests for rehearing or rehearing *en banc*.

The case involved four petitions for review of FMCSA's December 21, 2018, decision to preempt California's MRB Rules as applied to property-carrying commercial motor vehicle (CMV) drivers subject to FMCSA's hours-of-service (HOS) regulations under 49 U.S.C. § 31141. Under federal law, FMCSA has authority to preempt state laws "on commercial motor vehicle safety" if the state laws 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. 49 U.S.C. § 31141(c). FMCSA determined on December 21, 2018, that California's MRB rules are laws on CMV safety, are more stringent than the agency's HOS regulations, have no safety benefits that extend beyond those already provided by the Federal Motor Carrier Safety Regulations, are incompatible with the federal HOS regulations, and cause an unreasonable burden on interstate commerce. 83 Fed. Reg. 67,470 (Dec. 28, 2018).

Petitioners argued that FMCSA lacked authority to preempt California's MRB rules because the rules, which are generally applicable in the labor market, did not specifically target CMV safety. The Ninth Circuit rejected this argument, finding reasonable under Chevron FMCSA's interpretation that a law on CMV safety is any law that "imposes requirements in an area of regulation that is already addressed by a regulation promulgated under § 31136," which uses parallel language to section 31141.

Petitioners also contended that FMCSA's decision was arbitrary and capricious because California's MRB Rules were not more stringent than federal rules. The court disagreed, finding that FMCSA "faithfully interpreted" California's rules as more stringent than federal law.

Petitioners finally argued that FMCSA's determination failed to demonstrate that the regulations either (1) provide no additional safety benefit; (2) are incompatible with federal regulations; or (3) would

unreasonably burden interstate commerce. The court found that FMCSA reasonably determined that the rules unreasonably burden interstate commerce because the record showed they decreased productivity by decreasing drivers' available duty hours. The court declined to address the safety benefit or incompatibility questions.

On March 12, 2020, the State of California filed a separate lawsuit challenging FMCSA's related decision finding that California's MRB Rules are preempted with respect to *passenger*-carrying motor vehicles subject to the HOS regulations. California, et al. v. FMCSA, No. 20-70706 (9th Cir.) (challenging 85 Fed. Reg. 3469 (Jan. 21, 2020)). The Ninth Circuit has agreed to hold this case in abeyance until the new administration has had time to review the case.

State of Washington Seeks Review of FMCSA Preemption of State Meal and Rest Break Rules for Truck Divers; Ninth Circuit Stays Proceedings

On November 17, 2020, FMCSA granted a petition filed by the Washington Trucking Associations and determined that Washington's Meal and Rest Break Rules (MRB Rules) as applied to property-carrying commercial motor vehicles subject to FMCSA's hours of service (HOS) regulations are preempted under 49 U.S.C. § 31141. Federal law provides for preemption of state laws on commercial motor vehicle (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.

Washington's MRB rules require a thirty-minute meal period for every five consecutive hours of driving as well as a ten-minute rest break for every four additional hours. The federal HOS regulations require long-haul truck drivers to take a break from driving of at least 30 minutes after 8 hours of driving time if they wish to continue driving. FMCSA determined that Washington's MRB rules are laws on CMV safety, are more stringent than the agency's HOS regulations, have no safety benefits that extend beyond those already provided by the Federal Motor Carrier Safety Regulations, are incompatible with the federal HOS regulations, and cause an unreasonable burden on interstate commerce. 85 Fed. Reg. 73,335 (Nov. 17, 2020).

On December 18, 2020, Washington filed a petition for review in the U.S. Court of Appeals for the Ninth Circuit. Washington v. FMCSA, et al., No. 20-73730 (9th Cir.). The State is seeking judicial review of FMCSA's November 17 preemption decision. The State also filed a request with FMCSA to stay enforcement of the decision. On March 3, 2021, the Ninth Circuit issued an order staying the proceedings to allow the new administration time to review the case. Federal respondents submitted a status report on May 3.

Challenge to FMCSA's Hours of Service Final Rule Held in Abeyance in D.C. Circuit

On September 16, 2020, a group of petitioners including Advocates for Highway and Auto Safety, International Brotherhood of Teamsters, Citizens for Reliable and Safe Highways, and Parents Against Tired Truckers filed a petition for review in the U.S. Court of Appeals for the District of Columbia Circuit challenging FMCSA's

final rule titled "Hours of Service of Drivers," published in the Federal Register on June 1, 2020 (85 Fed. Reg. 33,396), and FMCSA's August 25, 2020, denial of petitioners' joint petition for reconsideration of the rule. Advocates for Highway and Auto Safety, et al. v. USDOT, et al., No. 20-1370 (D.C. Cir.).

On February 19, 2021, the court agreed to hold the case in abeyance until the new administration has had time to review the case.

Ninth Circuit Vacates and Remands FRA's Withdrawal of Train Crew Staffing Regulation

On February 23, 2021, the U.S. Court of Appeals for the Ninth Circuit issued its decision 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), challenging 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., 2021 WL 686122 (9th Cir. 2021). In its decision, the Ninth Circuit vacated the withdrawal and remanded the matter to FRA.

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. 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 Ninth Circuit. Between July 18 and July 29, the states individually petitioned the court 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. The Association of American Railroads (AAR) intervened in all of the cases. On August 19, the government filed a motion to consolidate the four petitions for review, which the court 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 jointly 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.

The court held oral argument on October 5, 2020, and issued its decision on February 23, 2021. As a threshold matter in the decision, the court dismissed the labor unions' petition for review for lack of jurisdiction because they do not have their principal offices within the Ninth Circuit. However, this dismissal did not affect the end result because the court found it did have jurisdiction over the states—California, Washington, and Nevada. As such, the court addressed the merits of the case.

The court held that the withdrawal order both failed to comply with the Administrative Procedures Act's notice-and-comment requirements and was arbitrary and capricious. The court concluded that notice and an opportunity for comment were not afforded because while the NPRM signaled that FRA was considering generally mandating a two-person crew minimum, in the words of the court, "[t]here was nothing in the NPRM to put a person on notice that the FRA might adopt a national one-person crew limit." The court also concluded that the withdrawal order was factually arbitrary and capricious, in essence, because it did not adequately answer the safety concerns related to crew size identified by commenters and the NPRM itself. In the court's view, there was insufficient evidence in the record to support what the court called "a national one-person crew limit" established by the withdrawal order.

The court also analyzed whether the preemption statement in the withdrawal did, in fact, have preemptive force, and concluded it did not, because the withdrawal did not adequately explain "why state regulations addressing local hazards cannot coexist with the Order's ruling on crew size." The court also said that although FRA asserted state laws could impede innovation, "this is not a safety consideration."

The court did not resolve whether FRA's decision was untimely because the decision was issued more than twelve months after

publication of the NPRM in the Federal Register, as argued by Washington and CPUC.

Judge Christen filed a concurrence, explaining that she would have vacated the withdrawal order solely on the basis that it did not provide adequate notice and comment, and would not have reached whether the withdrawal negatively preempted state laws or whether FRA's withdrawal order was arbitrary and capricious.

On April 8, AAR filed a petition for panel rehearing or rehearing *en banc*.

Briefing Completed, Oral Argument Held in Challenge to Risk Reduction Program Final Rule

On January 19, 2021, the parties completed briefing in litigation brought by 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 that challenges 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.). The U.S. Court of Appeals for the District of Columbia Circuit heard oral argument on March 9, 2021.

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.

On October 5, 2020, the petitioners filed their opening brief, in which they challenged: (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.

On December 11, 2020, the government filed its brief, in which it defended the content of the RRP final rule, with a focus on the information protection provision and the performance-based standards, and its process for developing the RRP final rule. On January 19, 2021, the petitioners filed their reply brief, which reiterated the arguments raised in their opening brief. Oral argument was held on March 9.

California High-Speed Rail Litigation Stayed Pending Settlement Talks

On March 23, 2021, the U.S. District Court for the Northern District of California

granted a request of the parties in California, et al. v. DOT, et al., No. 19-02754 (N.D. Cal.), to stay the litigation pending their efforts to reach a negotiated settlement of all claims in this challenge to FRA's decision to terminate a $929 million grant for the construction of high-speed rail in California.

On May 16, 2019, FRA terminated Cooperative Agreement No. FR-HSR-0118-12, as amended, between FRA and the California High-Speed Rail Authority (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 at that time. With the grant of the parties' stay request, settlement discussions have now resumed.

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State, Environmental Group, and Industry Challenges to NHTSA/EPA SAFE Part One Rule on Hold

Litigation challenging NHTSA and EPA's "Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule Part One: One National Program [SAFE I]" has been placed in abeyance by 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.). One of the first actions taken by the new Administration was to issue Executive Order 13990, "Protecting Public Health and the Environment and Restoring Science To Tackle the Climate Crisis," directing executive agencies to immediately review and address as

appropriate certain regulatory actions, with the SAFE I rule specifically identified by name. Accordingly, NHTSA and EPA moved to hold the related litigation in abeyance while they conducted the required review process. The court granted the motion to hold the case in abeyance, over an opposition by a group of states led by Ohio that is intervening in support of the rule, with status reports required every 90 days.

The litigation consists of ten 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 it determined were related to fuel economy standards.

When the abeyance was granted, merits briefing had been completed, but oral argument had not yet been scheduled. Related litigation in the U.S. District Court for the District of Columbia remains stayed pending disposition of the D.C. Circuit case. California, et al. v. Buttigieg, et al., No. 19-02826 (D.D.C.).

In addition to the consolidated litigation, on March 18, 2021, the Chesapeake Bay Foundation (CBF) filed a Petition for Review in the D.C. Circuit challenging NHTSA's denial of a Petition for Reconsideration of the SAFE I rule. Chesapeake Bay Foundation, Inc. v. NHTSA, No. 21-1091 (D.C. Cir.). This litigation arose out of a petition for reconsideration of the SAFE I rule that CBF submitted to NHTSA on November 8, 2019, which the agency denied on January 19, 2021. On April 12, 2021, the D.C. Circuit issued an order holding this litigation in abeyance as well, with an additional requirement for periodic status updates.

Challenges to NHTSA and EPA's SAFE Part Two Rule Held in Abeyance

Litigation challenging NHTSA and EPA's Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule for Model Years 2021-2026 Passenger Cars and Light Trucks (SAFE II Rule) remains ongoing in the U.S. Court of Appeals for the District of Columbia Circuit. Competitive Enterprise Institute (CEI) v. NHTSA, No. 20-1145 (D.C. Cir.). The litigation involves eight consolidated petitions for review, brought by several States, local jurisdictions, and non-governmental organizations challenging aspects of both EPA's and NHTSA's rulemaking. Pursuant to a scheduling order, petitioners' briefs were filed on January 14, 2021, and *amicus* briefs in support of petitioners were filed on January 21, 2021.

On February 19, 2021, the agencies moved to hold the litigation in abeyance and suspend the remainder of the briefing schedule to facilitate the implementation of Executive Order 13990, which directs the federal agencies to immediately review and consider suspending, revising, or rescinding a number of regulations, including the SAFE II Rule. Oppositions to this motion were filed on March 1 by the public interest group petitioners, as well as the state and local government petitioners. Each of these oppositions contested the government's request for an indefinite abeyance, and instead requested a six-month extension of the briefing schedule. On March 8, the agencies filed a reply in support of their request for an abeyance. This reply emphasized the appropriateness of an indefinite abeyance in light of both the agencies' ongoing review of the underlying rule and the D.C. Circuit's typical practice.

The court granted the motion for abeyance on April 2.

In accordance with the existing briefing schedule, merits briefs were filed by groups of petitioners challenging the agencies' standards as insufficiently stringent. These briefs were filed by groups consisting of the National Coalition for Advanced Transportation, public interest group petitioners, and the state and local government petitioners. The National Coalition for Advanced Transportation petitioners claim that the final rule's treatment of electric vehicles and related technologies demonstrates that the final rule was arbitrary and capricious. Petitioners contend that the agencies significantly overstated electric vehicle costs, arbitrarily downplayed consumer acceptance of electric vehicles and growth in the electric-vehicle market, that the final rule's treatment of compliance credits and advanced technology incentives is unreasonable, and that the agencies failed to consider the safety benefits of electric vehicles compared to internal combustion engine vehicles. In addition, the public interest organization petitioners aver that the final rule disregarded air pollution impacts, incorporated significant errors in the calculation of costs and benefits in the regulatory alternatives, that NHTSA's reliance on different fuel-economy projections for fleetwide standards and minimum domestic passenger-car standards was arbitrary and unlawful, and that the agencies violated several environmental statutory requirements. Likewise, the state and local government petitioners argue that the EPA's greenhouse gas standards violate numerous aspects of the Clean Air Act, including by abdicating EPA's standard-setting responsibility to NHTSA. These petitioners also contend that NHTSA's own fuel economy standards violate the statutory directives of the Energy Policy and Conservation Act, as well as incorporate flawed cost-benefit analyses of the various sets of alternative standards.

In addition, CEI's opening brief argued that the agencies arbitrarily failed to adequately assess the proposals for less stringent standards, arbitrarily overstated the health risks of particulate matter, and as a procedural issue, contended that the reports on particulate matter of the Clean Air Scientific Advisory Committee should be added to the rulemaking record.

In addition to the consolidated litigation, on March 18, 2021, the Union of Concerned Scientists (UCS) filed a Petition for Review in the D.C. Circuit challenging NHTSA's denial of a Petition for Reconsideration of the SAFE II Rule. Union of Concerned Scientists v. NHTSA, No. 21-1094 (D.C. Cir.). This litigation arose out of a petition for reconsideration of the Final Rule that UCS submitted to NHTSA on June 12, 2020, seeking in particular that NHTSA reconsider the standards promulgated by the rulemaking. The agency denied this petition on January 19, 2021. On April 29, the court granted the parties' joint motion to hold the case in abeyance, ordering that the government file status reports at 90-day intervals beginning July 28.

New Challenges to NHTSA's Latest Action on CAFE Civil Penalty Rate

On January 14, 2021, NHTSA issued an interim final rule in response to a petition for rulemaking from the Alliance for Automotive Innovation regarding an increase to the civil penalty rate applicable to automobile manufacturers that fail to meet applicable corporate average fuel economy (CAFE) standards. Under the interim final rule, the increase from $5.50 to $14 would go into

effect beginning with Model Year 2022, instead of Model Year 2019.

The parties involved in the previous rounds of litigation on this issue have sued again in two cases in the Second Circuit (brought by the Natural Resources Defense Council, the Sierra Club, and a coalition of states led by New York) and one in the Ninth Circuit (brought by Tesla). NRDC, et al. v. NHTSA, No. 21-139 (2d Cir.); New York, et al. v. NHTSA, No. 21-339 (2d Cir.); Tesla, Inc. v. NHTSA, No. 21-70367 (9th Cir.). Tesla's case was subsequently transferred to the Second Circuit. The government filed a motion to hold these cases in abeyance pending NHTSA's reconsideration of the rule, pursuant to Executive Order 13990, and consistent with the government's approach in the SAFE I and SAFE II cases discussed above. However, environmental and state petitioners moved for expedited review of the case, while Tesla moved for summary vacatur. The court granted the government's motion to hold the case in abeyance on April 6. In the same order, the court also denied the motions for summary vacatur and for expedited briefing.

LNG by Rail Rule the Subject of Multiple Legal Challenges; Cases Held in Abeyance

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, the other by a coalition of attorneys general from fourteen states and the District of Columbia. On February 24, 2021, the government filed an unopposed motion to hold the now consolidated case in abeyance for six months pending PHMSA's implementation of Executive Order 13990, *Protecting Public Health and the Environment and Restoring Science To Tackle the Climate Crisis*, 86 Fed. Reg. 7037 (Jan. 20, 2021). The Executive Order provides that agencies shall "consider suspending, revising, or rescinding" regulations promulgated between January 20, 2017, and January 20, 2021, that are or may be inconsistent with, or present obstacles to, protecting the environment and reducing greenhouse gas emissions. The White House has published a list of agency actions that will be reviewed in accordance with the Executive Order, and the LNG by Rail final rule is one of them.

PHMSA published its LNG by Rail final rule on July 24, 2020. This final rule modified the Hazardous Materials Regulations (49 C.F.R. 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).

The seven environmental groups seeking review of the rule are Earthjustice, Sierra Club, Center for Biological Diversity, Clean Air Council, Delaware Riverkeeper Network, Environmental Confederation of Southwest Florida, and Mountain Watershed Association. The other suits were filed by a coalition of attorneys general representing California, Delaware, Illinois, Maryland, Massachusetts, Michigan, Minnesota, New Jersey, New York, Oregon, Pennsylvania, Rhode Island, Vermont, 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. The Ninth Circuit transferred the Puyallup Tribe's case to the D.C. Circuit, which consolidated the three cases. Sierra Club, et al. v. USDOT, et al., Nos. 20-1317, 20-1318, 20-1431, & 21-1009 (D.C. Cir.).

The coalitions of environmental groups and state attorneys general 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 made 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.

On January 8, 2021, the Puyallup Tribe filed another petition in the D.C. Circuit for judicial review of PHMSA's denial of its administrative appeal of the LNG by Rail final rule. (On August 20, 2020, the Puyallup Tribe filed an administrative appeal with PHMSA, and PHMSA issued a denial of that appeal on November 13, 2020.) The Puyallup Tribe challenges PHMSA's denial of the administrative appeal on the same grounds that it challenges the LNG by Rail final rule. The D.C. Circuit consolidated this petition with the other three cases.

On February 24, PHMSA filed an unopposed motion to hold the case in abeyance for six months pending its implementation of Executive Order 13990. The court granted the motion on March 16 and directed PHMSA to file status reports at 90-day intervals starting on June 14.

Recent Litigation News from DOT Modal Administrations

Federal Aviation Administration

D.C. Circuit Dismisses Challenge to FAA's Boeing 737 MAX Airworthiness Directive

On March 8, 2021, the U.S. Court of Appeals for the District of Columbia Circuit dismissed FlyersRights.org's December 7, 2020, petition for review of the FAA airworthiness directive (AD) permitting the Boeing 737 MAX to return to service. Flyers Rights Education Fund, Inc. v. FAA, et al., No. 20-1486 (D.C. Cir.). The AD, a final rule issued after notice and comment, mandates corrective actions to address an unsafe condition related to flight control software that contributed to two crashes of the 737 MAX. Since the FAA issued its AD, several foreign civil airworthiness authorities have mandated the same software update to return the 737 MAX to service, and many U.S. and foreign airlines, including one of the accident airlines, have resumed operations with the airplane.

Claiming skepticism over efficacy of the corrective actions and contending that FAA's issuance of the AD and Ungrounding Order were based on "secret data," FlyersRights had sought to compel FAA to provide all information the agency analyzed in its

review, including company risk calculations and test methods. However, much of the information that FlyersRights sought is proprietary. FlyersRights's Freedom of Information Act litigation as to similar information awaits decision on cross-motions for summary judgment by the U.S. District Court for the District of Columbia. Flyers Rights Education Fund, Inc., v. FAA, No. 19-03749 (D.D.C.). Meanwhile, 737 MAX document production continues in a FOIA case brought by Linda Rugg. Rugg v. FAA, No. 20-00071 (D.D.C.).

On December 23, 2020, FlyersRights filed an Emergency Motion for Stay Pending Review of the AD and Ungrounding Order. On January 14, 2021, the court denied that motion.

The court dismissed the petition for review for lack of standing, holding that FlyersRights had "not demonstrated that the orders on review create a clear and substantial increase in the risk of harm" resulting in failure to support finding an injury in fact. Similarly, the court held that petitioners' allegation of increased financial burden to avoid flying on the 737 MAX were insufficient to establish standing because that injury was not fairly traceable to the challenged agency action.

Fifth Circuit Denies Former Airman's Petition for Review of Federal Air Surgeon's Withdrawal of Medical Certificate

On November 18, 2020, the U.S. Court of Appeals for the Fifth Circuit denied the petition for review in Stevens v. FAA, 829 Fed. Appx. 690 (5th Cir. 2020). Petitioner Joel Colby Stevens had sought review of the Federal Air Surgeon's November 19, 2019, withdrawal of an authorization for a special issuance second-class medical certificate previously issued to him.

On November 7, 2018, Stevens was granted an authorization for a special issuance second-class medical certificate. Such an authorization is a restricted medical certificate granted at the agency's discretion when an airman not meeting the medical standards for unrestricted medical certification under 14 C.F.R. part 67 demonstrates to the satisfaction of the Federal Air Surgeon that the issuance of a restricted medical certificate would not endanger public safety. The Federal Air Surgeon also has discretion to withdraw an authorization for special issuance. In FAA's letter withdrawing petitioner's authorization, the Federal Air Surgeon noted that petitioner had refused a pre-employment drug test, which is a disqualifying condition under FAA's medical standards in 14 C.F.R. §§ 67.107(b)(1) and (2), 67.207(b)(1) and (2), and 67.307(b)(1) and (2).

In Stevens's December 26, 2019, petition for review, he advanced four claims: (1) the Federal Air Surgeon failed to articulate a satisfactory explanation for withdrawing the authorization and failed to rationally connect the facts found with the choices made; (2) petitioner was denied adequate notice and an opportunity to be heard before the Federal Air Surgeon withdrew his authorization; (3) the withdrawal violated the APA because the withdrawal occurred without providing notice in writing of the facts or conduct warranting the action and an opportunity to demonstrate compliance; and (4) the withdrawal failed to provide a proper evaluation of petitioner's medical qualifications, in violation of the Pilot's Bill of Rights. FAA refuted petitioner's claims.

In its *per curiam* opinion, the court found that the Federal Air Surgeon's decision was

supported by substantial evidence, did not violate the APA or petitioner's due process rights, and did not violate the Pilot's Bill of Rights. Petitioner filed a petition for panel rehearing and rehearing *en banc*, which the court denied on February 4, 2021.

Pilot Denied Review of Certificate Suspension for Violating Visual Flight Rules

The Sixth Circuit Court of Appeals, in an unpublished January 4, 2021, decision, denied the petition for review of Paul Fullerton, leaving in place 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). Fullerton v. FAA, 840 Fed. Appx. 840 (6th Cir. 2021). Petitioner had claimed that substantial evidence did not support the NTSB's finding and that the ALJ had made an erroneous evidentiary ruling against petitioner.

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.

On April 9, 2020, petitioner filed for review of the NTSB's decision in the Sixth Circuit. After the parties fully briefed the issues to the court, the court issued its decision on January 4, 2021, finding as an initial matter that petitioner's failure to raise any objection to the ALJ's evidentiary ruling in the preceding below barred him from raising it on judicial review. The court found that the NTSB's decision was supported by substantial evidence and denied the petition.

Briefing Completed in City of Los Angeles Challenge to 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. The court on November 17 denied without prejudice FAA's motion to dismiss for lack of jurisdiction, denied FAA's motion for summary affirmance because Los Angeles's arguments were sufficiently substantial to merit consideration by a merits panel, and denied Los Angeles's motion to stay the proceedings. Los Angeles filed its opening brief on December 23, FAA filed its response brief on March 16, 2021, and Los Angeles filed its reply brief on April 4.

Briefing Ongoing in Sacramento's Challenge to 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, 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 filed for review one day late, but claims reasonable grounds for the delay because FAA refused to enter into a tolling agreement and because of the COVID-19 pandemic's effects on the City's regular operations. The City's opening brief was filed January 5, 2021, with a motion to take

judicial notice of various health studies on the deleterious effects of aircraft noise, which FAA opposed in a cross-filed motion to strike. Both motions were deferred to the merits panel. FAA filed its response brief on March 9, and the City filed its reply brief on March 29.

Briefing Ongoing in Arapahoe County's Challenge to 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, 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 FONSI/ROD for the Denver Metroplex Project.

Petitioners filed their opening brief on November 23, 2020, FAA filed its brief on February 19, 2021, and petitioners filed their reply brief on March 12. The court has scheduled oral argument for May 6.

Mediation Ongoing in Scottsdale's Challenge to 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. After the City filed statement of intent to use a deferred joint appendix, FAA has used a series of unopposed motions to extend the briefing schedule to accommodate mediation. Though the City's opening brief is currently due on May 12, 2021, FAA hopes to establish a Performance Based Navigation (PBN) working group before that date, which would allow negotiation of an indefinite stay of the litigation.

Advocates for Japanese-American Internment Camp Survivors and Their Descendants Appeal Dismissal of Claims against FAA

On September 30, 2020, the Tule Lake Committee, a nonprofit corporation representing interests of survivors and descendants of internees at the Tule Lake Relocation Center in Modoc County, California, a World War II internment camp for Americans of Japanese descent, appealed from a district court decision for FAA. Tule Lake Committee v. FAA, et al., No. 20-16955 (9th Cir.).

On April 2, 2020, Tule Lake Committee 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 had submitted an unsuccessful offer to purchase the airport, asserted 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, FAA's Western Pacific Region Airports Division issued a letter stating that FAA had no objection to the proposed sale of the airport from the City to the Tribe.

In response to separate dismissal motions by FAA, the City, and the Tribe, plaintiff filed an opposition to each. After a September 21, 2020, hearing on the motions, the district court on September 25 dismissed the case with prejudice. Plaintiff appealed on September 30.

In its opening brief, filed February 8, 2021, appellant argues that the district court erroneously held that no federal-question jurisdiction under 28 U.S.C. § 1331 exists as to the claim against the City and the Tribe and that, if federal-question jurisdiction exists, the district court erred in dismissing the state law claims against the City and the Tribe under the supplemental jurisdiction statute, 28 U.S.C. § 1367. On March 30, FAA advised the court that it would not file an answering brief because appellant had

abandoned its appeal with respect to its claims against FAA.

Briefing Complete in Ninth Circuit Review of Regency Air Drug- and Alcohol-Testing Case

In Regency Air LLC v. Dickson, et al., No. 20-72084 (9th Cir.), Regency Air petitions for review of an FAA decision assessing a $15,600 civil penalty for violations of DOT and FAA regulations regarding drug- and alcohol-testing requirements for safety-sensitive employees.

In September 2017, the Assistant Chief Counsel for Enforcement (Complainant) had sought a $17,400 civil penalty for violations of FAA and DOT drug- and alcohol-testing regulations arising from Regency's failures (1) to ensure two contract mechanics and one direct employee were subject to testing per 14 C.F.R. part 120, subparts E and F; and (2) to obtain, or make a documented good faith effort to obtain, the drug- and alcohol-testing history from the prior employers of a safety-sensitive employee it hired. In April 2019, a DOT Administrative Law Judge (ALJ) (a) found unproven one alleged contractor mechanic violation under the dual-employee exception, 14 C.F.R. § 120.7(i), which allows an employer to use a contract employee not included under its drug- and alcohol-testing program to perform a safety sensitive function, but only if that contract employee was included under the contractor's FAA-mandated drug- and alcohol-testing program and performing a safety-sensitive function within the scope of the employment with the contractor; (b) found proven the remaining violations regarding failure to include aircraft maintenance personnel in a drug- and alcohol-testing program and failure to obtain drug- and alcohol-testing history; and (c) assessed a civil penalty of $11,900 (given fewer violations and perceived mitigating factors).

Regency appealed the violations found and civil penalty, and Complainant appealed the penalty mitigation. In his May 27, 2020, Final Order, the Administrator (1) affirmed the violations found, finding no merit to Petitioner's claim that it did not commit the violations found and rejecting Petitioner's claim that the Complaint provided insufficient notice of the violations attributed to the "friend" who performed safety-sensitive maintenance work for Petitioner "without any compensation"; and (2) granted Complainant's penalty-mitigation appeal, finding that the ALJ inappropriately reduced the sanction for violations found based on factors that were not mitigating and assessing a civil penalty of $15,600. On July 16, 2020, Regency petitioned for review.

Regency's October 2020 opening brief argued that (1) the Complaint failed to give it due notice of the case against it, thus denying it due process; (2) 14 C.F.R. §§ 120.35 and 120.39(b) are unconstitutionally vague and ambiguous and violate due process; (3) 14 C.F.R. § 40.2 also is void for vagueness and violates due process; and (4) the penalty decision merits no deference.

Respondents' December 9, 2020, brief asserts that (1) the Complaint put Regency on notice of the allegations and Regency fully litigated them; (2) the cited regulations' plain text gave Regency sufficient notice of its obligations; (3) section 40.25's plain text gave Regency sufficient notice of its obligations; and (4) the penalty was appropriate.

Regency filed its reply brief on February 23, 2021, and oral argument is scheduled for May 12.

Argument Held in Review of FAA Cease and Desist Order against Operator of World War II-Era Aircraft Flights

Arguments were heard February 26, 2021, in the bid of petitioners Warbird Adventures and Thom Richard to overturn FAA's emergency 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 petitioners that carrying people in N977WH for compensation was a violation of section 91.315, petitioners operated N977WH carrying a person for compensation. FAA initiated an 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. On August 14, FAA filed its opposition, to which Petitioners replied on August 17. On August 21, the court denied petitioners' emergency motion for a partial stay. With briefing concluded December 30, and oral argument held on February 26, 2021, the parties await the court's decision.

FAA Seeks Dismissal of Tribe's Challenge to 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. The most recent filing by the federal defendants, in response to plaintiffs' notice that defendants Nextera Energy, Inc., and Defendant Westar Energy/Evergy "commenced full electrical generation operations of the contested project sometime" in late 2020, concludes that "Plaintiffs now fail to state a claim against FERC because they are not alleging an action or inaction by the agency, and that, if Plaintiffs believe a claim remains against FERC, exclusive jurisdiction for "all matters inhering in the controversy" lies "in the courts of appeals." The parties await the court's order as to dismissal.

Atlantic Beechcraft Services Challenges FAA Order Affirming Dismissal of Grant Assurance Violation Claim

In a petition for review filed February 2, 2021, Atlantic Beechcraft Services challenges a December 10, 2020, FAA decision that affirmed a determination, issued pursuant to 14 C.F.R. Part 16, dismissing Atlantic Beechcraft's allegations that the City of Fort Lauderdale had violated certain assurances made to FAA as a condition of receiving FAA airport grants. Atlantic Beechcraft Servs. v. FAA, No. 21-1047 (D.C. Cir.).

The issues that Atlantic has raised include whether FAA's Grant Assurance 23 (no exclusive rights) permits airport operator City of Fort Lauderdale to grant an exclusive right to its major tenant, Sheltair, that prevents petitioner, a competitor of Sheltair's major tenant Banyon, from performing maintenance services in competition with those that Banyan provides.

Petitioner's brief is due May 5, respondent's brief is due June 4, and petitioner's reply brief is due June 25, 2021.

Palm Beach County Seeks Review of FAA Affirmance in Economic Discrimination Case

In a petition for review filed March 10, 2021, Palm Beach County and the City of Atlantis, Florida, challenge a January 10, 2021, final decision that affirmed a determination, in a 14 C.F.R. Part 16 action, that the County violated 49 U.S.C. § 47107(a) and its federal obligations under Grant Assurance 22, Economic Nondiscrimination, by imposing unreasonable and unjustly discriminatory restrictions on the operation of certain aircraft. Palm Beach County, et al. v. FAA, No. 21-10771 (11th Cir.). Petitioners assert that, as a result of the decision, county residents might experience aircraft noise and safety impacts. Captain Errol Forman, a former airline Boeing 727 captain and Complainant in the action that resulted in the order, has moved to intervene. Petitioners' opening brief is due June 1.

Port Authority of New York and New Jersey Challenges FAA Part 16 Decision

In a March 11, 2021, petition for review, the Port Authority of New York and New Jersey (PANYNJ) challenged an FAA final order, issued January 11, 2021, affirming in part and remanding in part a determination in a 14 C.F.R. Part 16 action. The Director of the FAA Office of Airport Compliance and Management Analysis found that PANYNJ violated Grant Assurances 22 and 25, relating to Economic Nondiscrimination and Airport Revenues, in operating Newark Liberty International Airport. Port Authority of New York and New Jersey v. FAA, No. 21-1086 (D.C. Cir.). PANYNJ asserts that the final order "is arbitrary and capricious and/or contrary to law." On April 26, the parties filed a joint motion to hold the case in abeyance to allow PANYNJ to undertake its corrective action plan and for FAA to complete additional administrative proceedings.

FAA Remote Identification Rule for Drones Challenged at D.C. Circuit

On March 12, 2021, Petitioners Tyler Brennan and RaceDayQuads LLC filed a petition for review of FAA's "Remote Identification of Unmanned Aircraft" final rule, published January 15, 2021. Brennan, et al. v. Dickson, No. 21-1087 (D.C. Cir.). The rule became substantially effective on March 16, 2021, with the earliest compliance date on September 17, 2022. The court has not yet set a briefing schedule.

Five Cases Challenge FAA FONSI/ROD in South-Central Florida Metroplex Project

FAA issued a FONSI/ROD for the South-Central Florida Metroplex project on October 15, 2020. The project includes 106 Standard Instrument Departures (SIDs) and Standard Terminal Arrivals (STARs) with 11 Area Navigation (RNAV) transition routes (T-routes) in a study area containing 21 airports. On December 11 and 14, 2020, five petitions for review of the FAA final order were filed on behalf of seven local governments, two residents, and one nonprofit corporation. City of North Miami v. FAA, No. 20-14656 (11th Cir.); Village of Indian Creek, et al. v. FAA, No. 20-14662 (11th Cir.); Village of Biscayne Park v. FAA, No. 20-14674 (11th Cir.); City of North Miami Beach, et al. v. FAA, No. 20-14677 (11th Cir.); and Town of Bay Harbor Islands v. FAA, No. 20-14689 (11th Cir.).

FAA is implementing the Next Generation Air Transportation System (NextGen), its plan to modernize the National Airspace System through 2025. NextGen intends to develop and implement new technologies, integrate existing technologies, and adapt air traffic management, which would evolve from primarily ground-based to satellite-based systems and achieve greater efficiency. The process involves RNAV, Required Navigation Performance (RNP) air traffic routes, SIDs, STARs, T-routes, and Standard Instrument Approach Procedures (SIAPs) that use emerging technologies and aircraft navigation capabilities. As part of the transition to NextGen, FAA is implementing a mid-term step, the Project. The FONSI/ROD defines a Metroplex as "a geographic area that includes several commercial and general aviation airports in close proximity serving a large metropolitan area" and explains that the Project would

address "airspace congestion, airports in close geographical proximity, and other . . . factors that reduce efficiency in busy Metroplex airspace" by expanding use of "RNAV-based standard instrument procedures to high and low altitude RNAV routes," thus more efficiently using limited airspace and increasing FAA's ability to "safely manage future increases in operations."

On May 11, 2020, FAA released a draft Environmental Assessment (EA) for public comment. Its purpose was to help FAA decide if the Project's implementation would cause significant impacts or have significant effects on the quality of the environment, thus requiring an Environmental Impact Statement (EIS) to more comprehensively and thoroughly analyze such impacts. The EA was corrected on May 12 and updated on May 20 and 21; and, on July 8, 2020, the public comment period was extended from the original 61 days to 75 days. On October 15, 2020, FAA issued the FONSI and approved the Project by a ROD, concluding that the Project would have no significant impacts.

Petitioner North Miami asserts that "FAA failed to properly evaluate and take into consideration the 3,239 comments received to the Draft EA, analyze the significant impacts arising from the project, and . . . conduct the proper environmental assessments prior to issuance of its FONSI and ROD." It argues that FAA predetermined the outcome of the environmental review, failed to appropriately address single-event noise exposure level limits resulting from the new and modified procedures, should have conducted an EIS, failed to consider sufficiently the air traffic impacts to petitioners associated with other airports in its cumulative impact analysis, and incorrectly concluded that the Metroplex project would not significantly affect minority and low income populations.

Petitioner Village of Indian Creek and Surfside (the Towns), as well as Charles W. Burkett, claim that FAA had increased aircraft noise incrementally over the Towns so the Project's noise impacts would not be "significant" and, though the current RNAV routes had wreaked havoc on the Towns, the proposed RNAV routes would cause even more harm to the health and well-being of the Towns' residents.

Petitioners City of North Miami Beach, Village of North Bay Village, Friends of Biscayne Bay, and Maureen Harwitz claim that (1) the Project includes flight path changes to route many low-flying departures from MIA "over the sensitive Biscayne Bay aquatic preserve system and nearby parks, schools, and communities," prompting submission of many "comments and evidence identifying" the "Project's potentially significant environmental impacts," errors in and omissions from the EA, and the FAA's obligation to prepare a more comprehensive EIS and (2) FAA's final order (a) flouted mandatory environmental review requirements by disregarding "Biscayne Bay's protected status (and species), environmental sensitivity, and ecological importance," as well as the "Project's potential impacts on noise, water quality, air quality, wildlife, recreation, socioeconomic conditions, environmental justice, and resources protected by Section 4(f) of the Department of Transportation Act"; (b) failed to properly "avoid, mitigate, and minimize" the impacts of the Project; (c) failed to properly "respond to comments from other agencies and the general public"; (d) predetermined the result of its review of MIA departure procedure changes; and (e) failed to prepare an EIS.

Petitioner Town of Bay Harbor Islands (the Town) argues that (1) the Project has resulted and will result in significantly increased noise over the Town and other densely populated communities; (2) that FAA failed to properly analyze the environmental impact of hundreds of daily low-level (2,000 to 6,000 feet) flights above a conservation area; (3) that the 3,239 comments received during the comment period could not have received serious consideration given that, after promising an 8- to 12-month review, FAA reviewed them in less than three months before issuing a final order that made no revisions to any of the flight patterns at issue; (4) the EA did not analyze or consider cumulative noise impacts or analyze such impacts, instead citing the July 2020 regulatory change by the Council on Environmental Quality that allowed FAA to benefit from more lax rules than those in effect when the EA was published; and (5) the EA's adequacy and result were predetermined and all the events before FONSI/ROD amounted to a futile exercise.

Petitioner Village of Biscayne Park did not include specific allegations in its petition for review.

On April 6, the court issued an order consolidating the five cases and extending the briefing schedule, with appellants' opening brief due on May 19, FAA's answering brief due July 22, and appellants' reply brief due August 19.

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.). FTI 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. FTI's opening brief was filed January 25, 2021, FAA's answering brief was filed on March 26, and FTI's reply brief was filed on April 16.

Airman Challenges Withdrawal of Special Issuance Medical Certificate

In a petition for review that questions FAA's delegation to third parties the responsibility to promulgate rules, methodologies, and thresholds for ethyl sulfate (EtS) and ethyl glucuronide (EtG) testing, petitioner Charles Erwin challenges the Federal Air Surgeon's September 2020 Final Order that affirmed withdrawal of Erwin's May 2017 special issuance medical certificate by the Aerospace Medical Certification Division (AMCD). Erwin v. FAA, No. 20-1443 (D.C. Cir.).

Petitioner has a clinical diagnosis of substance dependence. Such diagnosis rendered Petitioner ineligible for unrestricted medical certification. However, in May 17 2017, the AMCD granted petitioner an authorization for a special issuance medical certificate that was conditioned on his undergoing random alcohol testing and total abstinence from alcohol and mood-altering chemicals. The authorization advised petitioner that it was subject to withdrawal if he failed to comply with its conditions. In December 2017, petitioner tested positive for alcohol, and on January 9, 2018, AMCD withdrew the authorization. FAA's regulations governing special issuance medical certificates, 14 C.F.R. § 67.401, provide a process to seek reconsideration of the withdrawal of an authorization within 60 days after service of the withdrawal letter. In a March 9, 2018, letter to the FAA, petitioner requested reconsideration of the January 2018 withdrawal of the authorization. Although section 67.401(i)(3) states that a written final decision either affirming or reversing the withdrawal "will be issued" within 60 days of the receipt of a request for reconsideration, FAA did not issue a final decision until September 11, 2020, after petitioner had filed for mandamus relief to compel the issuance of a final decision on his request for reconsideration. Erwin v. FAA, et al., No. 20-661 (W.D. Okla.). Meanwhile, after undergoing further medical evaluation, petitioner was granted a new authorization for a special issuance certificate on January 13, 2019. The Federal Air Surgeon's letter explained that he based his decision to affirm the January 2018 withdrawal on petitioner's medical history and the need for petitioner to undergo further evaluation so as to not endanger public safety; however, the letter also states that the affirmance of the January 2018 withdrawal did not impact Erwin's ability to exercise airman privileges under the new January 2019 Authorization, which was based on consideration of Erwin's new application for airman medical certification and additional records demonstrating evidence of recovery.

In his February 25, 2021, corrected brief, petitioner asserts that FAA (1) disregarded its own findings that the positive alcohol test resulted from his consumption of food cooked in alcohol; (2) ignored the record evidence that he had remained abstinent, that consuming alcohol-prepared food can produce positive EtS tests, and that low-level positive EtG tests are unreliable; (3) has delegated to third parties the promulgation of rules, methodologies, and thresholds for EtG and EtS testing, which produces disparate results for similarly situated airmen; and (4) provided no rationale in deciding to affirm the January 2018 withdrawal and instead simply recited the procedural history. As to standing, Petitioner claims that (1) the new January 2019 authorization requires

continued monitoring and other requirements until January 31, 2024; (2) NTSB Safety Recommendation A-07-43 suggests that FAA might begin lifetime monitoring for airmen now under special issuance authorizations; and (3) had FAA not affirmed the January 2018 withdrawal (along with its reliance upon the December 2017 positive test result), petitioner would still have had his previous employment contract, rather than the "last chance contract"—including "onerous termination provisions" not in his prior contract—that his employer compelled him to sign.

FAA filed its answering brief on March 18, and petitioner filed his reply brief on April 8.

Presidential Aviation Seeks Review of FAA Civil Penalty for Records and Airworthiness Violations

In a petition for review filed with the U.S. Court of Appeals for the Eleventh Circuit on December 30, 2020, Presidential Aviation (Presidential) seeks review of the FAA Administrator's November 3, 2020, Decision and Order assessing a $36,750 civil penalty for Presidential's failure to record a mechanical discrepancy (in violation of 14 C.F.R. § 135.65(b)) and subsequent operation of an unairworthy aircraft (in violation of 14 C.F.R. §§ 135.25(a)(2) & 91.7(a)). Presidential Aviation, Inc. v. FAA, No. 20-14841 (11th Cir.)

Presidential holds an air carrier certificate with operations specifications issued under 14 C.F.R. parts 135 and 91. On October 21, 2014, petitioner operated civil aircraft N180NL, a Dassault Mystere Falcon 50EX, on a series of flights that began with an extradition flight operation under part 135 out of El Dorado International Airport in Bogota, Colombia. However, when the aircraft landing gear failed to retract on initial takeoff from El Dorado Airport and an "AUTO SLATS" light illuminated, the aircraft returned to El Dorado Airport. While on the ground, petitioner's flight crew, in consultation with petitioner's remotely located Director of Maintenance, cleaned grease off of a proximity switch, verified that the light was extinguished, but took no other action. Petitioner did not make a record of the discrepancy before again departing El Dorado Airport. Thereafter, petitioner operated the aircraft on two flights under part 135, then two flights under part 91. When the aircraft owner learned of the earlier mechanical issues with the aircraft, he told the flight crew that he wanted the mechanical irregularities written up and maintenance personnel to check the problem. The aircraft landing gear failed the subsequent functional check by maintenance personnel and required replacement of the proximity sensor.

In an October 2019 Initial Decision, an Administrative Law Judge (ALJ) found all of the violations alleged in the Complaint issued by the Assistant Chief Counsel for Enforcement (Complainant) but imposed a lesser civil penalty than sought for the violations found. Both petitioner and Complainant appealed the ALJ's decision to the Administrator.

The Administrator denied petitioner's appeal in its entirety, finding (1) that there was no basis in the regulatory text for petitioner's claim that it was not required to record the mechanical irregularity before performing maintenance to address it; and (2) that Presidential's continued operation of the aircraft on each of the four flights after departing El Dorado Airport constituted a separate operation of an unairworthy aircraft. As to Complainant's cross-appeal, the Administrator agreed that the ALJ did not properly apply FAA's sanction policy, but disagreed about the "experience" aggravating

factor, affirming the ALJ's finding that Complainant had not presented evidence of Presidential's flight time to establish its experience. Based on *de novo* application of the FAA's sanction policy, the Administrator determined that a total civil penalty of $36,750 was appropriate and imposed it.

Petitioner's opening brief is due May 10, 2021, and FAA's brief 30 days after that.

Former Designated Pilot Examiner Seeks Review of FAA Order Terminating His Appointment

In a petition for review filed August 7, 2020, David Roy Blomgren asks that the U.S. Court of Appeals for the Ninth Circuit to review FAA's June 11, 2020, final order upholding the termination for cause of his appointment as a Designated Pilot Examiner. Blomgren v. FAA, et al., No. 20-72351 (9th Cir.). The May 7, 2020, termination for cause notification cited performance deficiencies, misconduct, and inability to work constructively with FAA or the public.

In his May 2020 administrative appeal of the termination, Blomgren asserted that he had engaged in no conduct justifying termination for cause, the termination was instigated by a disgruntled Certified Flight Instructor Instrument (CFII) check ride applicant who failed the oral portion of his examination, and no specific facts or evidence were provided to support the factors cited, thus denying him due process.

Mediation sessions conducted in September and November 2020 produced no settlement. Petitioner's opening brief was due on April 14, but on April 13, petitioner moved to voluntarily dismiss his case. The court granted the motion to dismiss on April 15.

Status of Litigation Related to October 2018 Lion Air Tragedy

On October 29, 2018, a Boeing 737 MAX 8 crashed in the Java Sea off the coast of Indonesia, killing all 189 persons on board. The Boeing 737 MAX 8 was being operated by Lion Air as Lion Air Flight JT 610. The accident aircraft had, as part of its flight control system, the Maneuvering Characteristics Augmentation System. FAA grounded 737 MAX 8 in March 2019 following a second accident and recently lifted the grounding after an extensive review and several changes to the aircraft.

After FAA received multiple administrative tort claims filed by survivors of deceased passengers, five lawsuits were filed against FAA in the U.S. District Court for the Northern District of Illinois and consolidated with existing JT 610 litigation. In re: Lion Air Flight JT 610 Crash, No. 18-07686 (N.D. Ill.). Three cases have been served on the United States (Chandra, originally No. 19-1552, served January 6, 2021; Komar, originally No. 19-5217, served January 13, 2021; and Liyanah, originally No. 19-5220, served January 13, 2021). The complaints contain counts against the United States alleging negligence in design, certification, Organization Designation Authorization oversight, and training. Currently, litigation is stayed while Boeing continues to settle the pending lawsuits, with a status report to the court due on May 7, 2021.

Federal Highway Administration

District Court Grants FHWA Motion for Summary Judgement in Challenge to Maine Bridge Project

On February 3, 2021, the U.S. District Court for the District of Maine in Friends of the Frank J. Wood Bridge v. Chao, No. 19-408 (D. Me.) granted summary judgment in favor of FHWA in a challenge to FHWA's Finding of No Significant Impact (FONSI) associated with the replacement of the Frank J. Wood Bridge and its determination that no feasible and prudent avoidance alternative existed to the use of Section 4(f) resources, including use of the historic bridge located in Brunswick, Maine. The court found that the record adequately supported FHWA's use of the Service Life Cost methodology and deferred to the agency's expertise in determining that the cost of rehabilitating the bridge rendered it not prudent. Plaintiffs filed a notice of appeal to the U.S. Court of Appeals for the First Circuit on April 8.

In their motion for summary judgment, plaintiffs had 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.

FHWA Moves for Summary Judgement in South Carolina NEPA Challenge

On November 4, 2020, federal defendants, including FHWA, asked the U.S. District Court for the District of South Carolina to grant them summary judgment in a challenge to the planned I-73 corridor project in South Carolina. South Carolina Coastal Conservation League v. USACE, et al., No. 17-03412 (D.S.C.).

Federal defendants argued that FHWA and the U.S. Army Corps of Engineers complied with NEPA and that plaintiff's NEPA claims regarding the 2008 FEISs are time-barred. In addition, federal defendants argue that they properly concluded that 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. FHWA also argued that there is no significant new information relevant to I-73's potential environmental impacts. FHWA argued that 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. FHWA claimed that 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.

Plaintiff filed a combined response to Defendants' Motions for Summary Judgment and Reply to its Motion for Summary Judgment on February 19, 2021. Plaintiff argues FHWA and the Corps did not make reasoned decisions in determining whether new information about I-73 required a supplemental EIS. Plaintiff claims that the record lacks analysis regarding new wetland and stream impacts and noise mitigation. Plaintiff also argues the Corps violated the Clean Water Act in Issuing a Section 404 permit and that EPA arbitrarily failed to veto the Corps permit. Federal and state defendants each filed replies to their Cross Motions for Summary Judgment on April 15, 2021.

Plaintiff's August 3, 2020, Motion for Summary Judgment argued that federal defendants violated NEPA when they concluded that no supplemental EIS was required for the project. Plaintiff also argued 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, plaintiff alleged that the Corps violated the Clean Water Act when issuing a permit and that it failed to independently evaluate practicable alternatives. Lastly, plaintiff argued that the Corps did not apply the presumption that less damaging practicable alternatives exist and that EPA arbitrarily failed to veto the Corps' permit.

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

Plaintiffs Seek Summary Judgment in Mid-Currituck Bridge Project

On February 5, 2021, plaintiffs in North Carolina Wildlife Federation, et al v. North Carolina Department of Transportation, et al., No. 19-00014 (E.D.N.C.), filed a Motion for Summary Judgment regarding the planned Mid-Currituck Bridge project in North Carolina. The proposed corridor project will provide a second crossing of the Currituck Sound in the Outer Banks, North Carolina. Plaintiffs argue that defendants, including FHWA, violated NEPA and the APA when they concluded that no supplemental EIS was required and approved the ROD for the planned project. Plaintiffs

argue that the agencies violated NEPA by not preparing a supplemental EIS due to alleged significant new information including new traffic forecasts, updated growth and development projections, updated sea level rise projections, and updated alternative and emerging vacation trends in the area. Plaintiffs also argue that the agencies violated NEPA by failing to objectively analyze a full range of reasonable alternatives and failed to fairly compare the alternatives. Finally, plaintiffs allege that the agencies violated NEPA by failing to account for the growth inducing impact of the proposed toll bridge. Federal defendants filed their Cross Motion for Summary Judgment on April 1.

Federal Defendants Seek Dismissal of NEPA Categorical Exclusion Lawsuit Over Florida Bridge Project

On February 26, 2021, federal defendants filed a motion to dismiss in McClash, et al. v. Florida DOT, et al., No. 20-543 (M.D. Fla.), in which the *pro se* plaintiffs, several local residents, allege defendants violated NEPA by improperly designating the Cortez Bridge replacement project as a Categorical Exclusion (CE) and demonstrating inappropriate bias in selecting a fixed bridge to replace the existing draw bridge in the vicinity of Sarasota, Florida. Plaintiffs allege the 65-foot clearance of the proposed fixed bridge replacement is too low to permit their sailboats from traversing under the bridge and that its approaches will traverse a historic neighborhood resulting in environmental impacts that warrant more detailed study than the CE provided. Plaintiffs seek declaratory and permanent injunctive relief.

The motion to dismiss seeks dismissal of federal defendants FHWA and the FHWA Administrator from the suit for lack of subject matter jurisdiction under Fed. R. Civ. P. 12(b)(1) and 12(b)(6), because Florida DOT (FDOT) approved the project CE after assuming NEPA assignment pursuant to 23 U.S.C. § 327. Under the terms of both 23 U.S.C. § 327 and the December 2016 NEPA Assignment Memorandum of Understanding between FHWA and FDOT, FDOT is solely responsible for the NEPA decision-making associated with the Cortez Bridge replacement project.

NEPA Categorical Exclusion Lawsuit Filed Over Bayfront Parkway Project in Pennsylvania

On December 15, 2020, the NAACP Erie Unit 2262 and Citizens for Pennsylvania's Future filed a civil action against FHWA and the Pennsylvania Department of Transportation (PennDOT) alleging violations of the APA, NEPA, and Executive Order 12898 - Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations. NAACP, et al. v. FHWA, et al., No. 20-362 (W.D. Pa.). The project at issue is the Bayfront Parkway Project in Erie, Pennsylvania. The project has been designated as a Categorical Exclusion (CE).

The project seeks to improve the pedestrian, bicycle, transit, and passenger vehicle connection of the Erie Central Business District and adjacent neighborhoods to the waterfront property north of the Bayfront Parkway, reduce crashes on the Bayfront Parkway, improve congestion, and improve traffic operations and efficiency. In February 2020, FHWA concurred on the project scope and the proposed level of NEPA documentation—Environmental Assessment (EA). On March 31, 2020, PennDOT requested that the project be reclassified as a

CE. On June 15, 2020, FHWA approved PennDOT's CE application for the project.

Plaintiffs allege that FHWA violated NEPA and the APA by approving the CE classification for this project. Plaintiffs argue that classifying the project as a CE is inappropriate because the project will significantly impact planned growth and travel patterns by adding capacity to the parkway and reconfiguring three major intersections. In addition, plaintiffs challenge the CE designation by arguing that this project raises issues of controversy on environmental grounds and that the project will significantly impact two bodies of water, a hazardous waste site, greenhouse gas emissions, wetlands, and air quality. According to plaintiffs, these potential impacts were not adequately evaluated. Plaintiffs also argue that the project fails to satisfy its stated purpose related to improving pedestrian and bicycle connections between downtown Erie and the Bayfront.

In addition, plaintiffs argue that PennDOT and FHWA violated the APA and E.O.12898 by failing to adequately consider the project's impact to Environmental Justice (EJ) communities. Plaintiffs argue that PennDOT's EJ evaluation failed to properly analyze the makeup, vulnerabilities, and challenges that the adjacent EJ communities face beyond recognizing that the neighborhoods adjacent to the Bayfront Parkway are home to many people of color. Plaintiffs argue that the project will have a disproportionately high and adverse impact on the adjacent EJ community by limiting mobility and exacerbating adverse health impacts, noise impacts, and air quality impacts. Consequently, plaintiffs argue, PennDOT's EJ determination is arbitrary and capricious.

Plaintiffs seek a declaratory judgment finding that defendants violated NEPA and the Federal Aid Highway Act. Plaintiffs ask that the project be enjoined and the matter remanded to FHWA and PennDOT for further consideration under NEPA and the Federal Aid Highway Act. Finally, plaintiffs request an award of court cost and attorney fees. FHWA and PennDOT filed answers to the complaint in March 2021.

Federal Motor Carrier Safety Administration

Tenth Circuit Denies Petition Challenging FMCSA Final Order

On March 9, 2021, the U.S. Court of Appeals for the Tenth Circuit ruled in favor of FMCSA in a challenge to the agency's decision to suspend petitioner, KP Trucking, from conducting operations. KP Trucking, LLC v. USDOT, et al., --- Fed. Appx. ---, 2021 WL 868493 (10th Cir. 2021). FMCSA issued its decision after finding that KP Trucking continued another trucking company's operations under a new identity in order to avoid the previous company's civil penalty, suspension, and poor compliance history. KP Trucking sought review in 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 operations 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.

In denying KP Trucking's Petition for Review, the court found that FMCSA had substantial evidence to reasonably conclude that KP Trucking was merely continuing Eagle Iron & Metal's business for an improper purpose. The court determined that substantial evidence existed for the finding of continuity of Eagle Iron & Metal and KP Trucking's operations because both companies had common owners, used the same set of drivers, vehicles, shippers, telephone numbers, mailing and email addresses, and management, and were also located in proximity to one another. The court also found that substantial evidence existed for the finding of an improper purpose, based on the fact that KP Trucking quickly restored its operating authority, which had previously been suspended due to its failure to carry liability insurance, once Eagle Iron & Metal's operations were suspended. By operating under the KP Trucking name, the company was able to skirt Eagle Iron & Metal's civil penalties, suspension, and poor compliance history.

Fifth Circuit Denies Mandamus Petition Demanding FMCSA Publish Petition for Exemption from Drug Testing Requirements

On February 12, 2021, in In re: Cargo Transporters, Inc., et al., No. 21-60095 (5th Cir.), the U.S. Court of Appeals for the Fifth Circuit denied a mandamus petition filed by a group of commercial motor vehicle carriers that demanded the FMCSA publish for notice and comment the carriers' 2020 petition for exemption. On August 21, 2020, petitioners filed a petition for exemption pursuant to 49 C.F.R. § 381.300 requesting they be allowed to use hair testing in lieu of urine testing to meet the drug testing requirements in 49 C.F.R. Part 382. Petitioners had filed a similar petition in 2017, which the FMCSA had published but had not decided. On February 8, 2021, petitioners filed a mandamus petition demanding FMCSA publish the 2020 petition. Petitioners' attorneys argued incorrectly that the August 2020 petition was a petition for rulemaking pursuant to 49 C.F.R. Part 389, not an exemption petition under 49 C.F.R. Part 381. The Fifth Circuit denied the mandamus petition, noting that under section 5204(a) of the FAST Act, the FMCSA Administrator can treat multiple similar rulemaking petitions as a single petition for the purposes of notice. Fixing America's Surface Transportation Act, Pub. L. No. 114-94, 129 Stat. 1312, 1535 (2015). Treating the petitions as petitions for rulemaking, the court determined that the agency's public notice of the 2017 petition satisfied the notice requirement for the 2020 petition.

District Court Dismisses Hazardous Materials Carrier Suit Alleging Civil Rights Violations

On January 28, 2021, the U.S. District Court for the District of New Hampshire dismissed a complaint against FMCSA and DOT officials for lack of subject matter jurisdiction under the Hobbs Act, 23 U.S.C. § 2342. Spencer v. Doran, 2020 WL 4904826 (D.N.H. Aug. 20, 2020). In their December 2018 complaint, William Spencer and Spencer Bros, LLC alleged civil rights violations and common law torts against employees of FMCSA and DOT in their individual capacities, as well as New Hampshire state officials and the State of

New Hampshire. An FMCSA compliance review found the carrier committed hazardous materials violations. FMCSA then reported them to the New Hampshire State Police and issued an Unsatisfactory Safety Rating and Order to Cease Operations. After the U.S. District Court for the District of New Hampshire dismissed all claims against the state defendants, plaintiffs filed a second amended complaint in September 2019. In addition to due process violations under Fifth and Fourteenth Amendments, plaintiffs alleged that Federal defendants violated the Racketeering Influenced Corrupt Organizations Act (RICO) by acting in concert to commit mail fraud and obstruction of justice.

The federal defendants filed a motion to dismiss the second amended complaint and argued, *inter alia*, that because plaintiffs' due process and RICO allegations were based on findings from the compliance review, jurisdiction was in the Courts of Appeals, not the district courts in accordance with the Hobbs Act, 28 U.S.C. § 2342(3)(A).

The court granted the federal defendants' motion on January 28, 2021. The court agreed that plaintiffs' claims were premised on the alleged invalidity of FMCSA's final agency order and thus fell within the exclusive jurisdiction of Courts of Appeals under the the Hobbs Act. Plaintiffs filed a notice of appeal to the U.S. Court of Appeals for the First Circuit on February 11.

Federal Railroad Administration

Labor Unions File Second Challenge to Certification of Mexican Locomotive Engineers and Conductors

On November 19, 2020, the Brotherhood of Locomotive Engineers and Trainmen and the Transportation Division of the International Association of Sheet Metal, Air, Rail and Transportation Workers filed a petition for review, requesting that the D.C. Circuit review the Federal Railroad Administration's order approving a modified Program of Certification for Locomotive Engineers and Remote Control Operators (Part 240 Program) submitted by Kansas City Southern Railway (KCSR). Bhd. of Locomotive Eng'rs and Trainmen, et al. v. FRA, et al., No. 20-1461 (D.C. Cir.). KCSR's Part 240 Program describes the procedures for KCSR's certification of locomotive engineers from Kansas City Southern de Mexico (KCSM) to operate freight trains for KCSR over a limited stretch of track within the United States.

As background, on September 4, 2018, the same petitioners filed a petition for review with the D.C. Circuit that challenged FRA's previous approval of a modified locomotive engineer certification program under a passive approval process that permitted FRA approval of a modified locomotive engineer certification program without any formal written notice of approval. The D.C. Circuit granted this petition for review with respect to the modified program, and in a decision issued on August 28, 2020, it vacated and remanded FRA's approval of the modified program. Bhd. of Locomotive Eng'rs and Trainmen, et al. v. FRA, et al., 972 F.3d 83 (D.C. Cir. 2020). The court directed FRA to

offer a fuller explanation of the agency's reasoning for its previous approval or take new agency action, and FRA decided to proceed by taking new agency action. Accordingly, KCSR re-submitted a substantially similar modified program describing its procedures for certification of locomotive engineers from KCSM, and after requesting and considering comments from the labor unions on the modified program, FRA approved the modified program on October 9, 2020, in a letter containing a detailed explanation of the rationale for approving the program.

On December 16, 2021, KCSR filed a motion for leave to intervene in the case, and the D.C. Circuit granted KCSR's motion on January 5. Petitioners filed their opening brief on February 22, 2021. In their brief, petitioners argued that KCSR's amended Part 240 program failed to discharge KCSM's independent obligation to submit and comply with a locomotive engineer certification program for the engineers it employs. Petitioners further argued that substantive deficiencies existed in KCSR's amended Part 240 program, including: (1) an abbreviated training protocol for KCSM locomotive engineers; (2) a failure to ensure KCSM engineers can communicate in English when operating in the U.S.; and (3) a failure to ensure KCSM's compliance with FRA's Hours of Service laws.

On April 13, the court granted the government's unopposed motion to hold the case in abeyance to allow new agency officials sufficient time to become familiar with the issues in the case and directed that the FRA file a status report on June 14 and thereafter at 60-day intervals.

Labor Unions Seek Review of Final Rule that Amends FRA's Brake System Safety Standards and Codifies Waivers

On February 3, 2021, the Transportation Division of the International Association of Sheet Metal, Air, Rail and Transportation Workers and the Brotherhood of Locomotive Engineers and Trainmen sought review in the U.S. Court of Appeals for the District of Columbia Circuit of FRA's final rule concerning miscellaneous amendments to the brake system safety standards and the codification of certain waivers (Brakes final rule), which was issued on December 11, 2020. Transp. Div. of the Int'l Ass'n of Sheet Metal, Air, Rail and Transp. Workers, et al. v. FRA, et al., No. 21-1049 (D.C. Cir.). In the Brakes final rule, FRA revised its regulations governing brake inspections, tests, and equipment, including (1) extending the amount of time freight rail equipment can be left "off-air" before requiring a new brake inspection; (2) incorporating relief from various provisions in long-standing waivers related to end-of-train devices, helper service, and brake maintenance; and (3) modifying the existing brake-related regulations to improve clarity and remove outdated or unnecessary provisions.

In their petition for review, petitioners contend the Brakes final rule is invalid for the following reasons: (1) FRA violated 49 U.S.C. § 103(c) by issuing a relaxed regulation when FRA is required to "utilize the highest safety standards in its administration of railroad safety"; (2) FRA violated 49 U.S.C. § 20103(b) by initiating the regulation in 2018, but not promulgating the final rule until December 11, 2020; and (3) FRA failed to provide an opportunity for parties to petition for reconsideration in violation of 49 C.F.R. § 211.29.

On April 9, the court granted FRA's unopposed motion to hold the case in abeyance to allow new agency officials sufficient time to become familiar with the issues in the case. The court directed the parties to file motions governing further proceedings by May 18.

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). This action followed 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, and oral argument is scheduled for May 10, 2021. Matson Navigation Co. v. USDOT, et al., Nos. 20-5219 & 20-5261 (D.C. Cir.).

With respect to the APL SAIPAN, MARAD issued a new decision on August 3, 2020. Matson challenged the new decision and principally argues that the APL SAIPAN is too old to be eligible as a replacement vessel for the Maritime Security Fleet. Matson Navigation Co. v. USDOT, et al., No. 20-2779 (D.D.C.). After further review, MARAD is seeking a voluntary remand due to a recognition that some reasoning in the new decision is

incorrect. Matson and APL's responses to MARAD's Motion for Voluntary Remand were filed on April 23, 2021. MARAD's Reply in Support of its Motion for Voluntary Remand was filed on May 3.

National Highway Traffic Safety Administration

NHTSA Resolves One FOIA Lawsuit and Another is Filed

NHTSA recently concluded a FOIA lawsuit filed by the California Air Resources Board (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 filed the lawsuit against NHTSA and EPA, seeking responses to FOIA requests submitted to both agencies for materials pertaining to the SAFE Vehicles Rule Part One: One National Program, 84 Fed. Reg. 51,310 (Sept. 27, 2019). In fall 2020, the agencies responded to the FOIA, and in turn, the merits portion of the case was dismissed. In January 2021, the parties agreed to settle for a nominal amount CARB's remaining attorneys' fees claims against both agencies. Accordingly, the parties filed a final status report with the court and the case is now dismissed in full.

On November 10, 2020, FairWarning Inc. filed a complaint in the U.S. District Court for the District of Columbia to compel production of records in response to a December 12, 2019, FOIA request seeking materials regarding NHTSA's proposed guidelines to minimize driver distraction from hand-held portable and aftermarket electronic devices. FairWarning, et al. v. NHTSA, No. 20-3236 (D.D.C.). Prior to the litigation, NHTSA conducted searches for several responsive custodians, but had not yet substantively responded to the request. After answering the complaint on December 10, NHTSA provided a final response and production in response to the FOIA request on April 9, 2021. The parties remain engaged in follow-up discussions regarding the response.

Pipeline and Hazardous Materials Safety Administration

Fifth Circuit Dismisses Challenge to PHMSA Pipeline Safety Violation Decision Pending Settlement Discussions

On March 10, 2021, the U.S. Court of Appeals for the Fifth Circuit dismissed a challenge by Enlink Midstream, LLC to a PHMSA decision finding a pipeline safety violation and ordering compliance. Enlink Midstream, LLC v. USDOT, et al., No. 21-60084 (5th Cir.). The dismissal was issued in light of ongoing settlement negotiations between the parties, and was without prejudice to either party requesting reinstatement within 180 days.

The case involves a July 2020 PHMSA order finding Enlink in violation of 49 C.F.R. § 195.452(f)(6), which directs pipeline operators to identify certain preventative and mitigative (P&M) measures to protect high consequence areas in their integrity management plans, and directing Enlink to take certain corrective measures to address the noncompliance, including an analysis of the necessity of installing Emergency Flow Restricting Devices (EFRD).

On August 20, 2020, Enlink filed an administrative Petition for Reconsideration of the PHMSA Final Order. In its Petition, Enlink raised five grounds for

reconsideration: (1) that it did not violate section 195.452(f)(6); (2) that the Final Order improperly applied the standard of conduct required by the regulation; (3) that PHMSA did not provide fair notice of the compliance expectations under the cited regulations; (4) that PHMSA did not carry the burden of proof; and (5) that the Compliance Order should be withdrawn because it is ambiguous and impermissibly broad. The Petition centered on the notion that operators must perform the EFRD analysis only if the general risk analysis required by another section of the integrity management regulations first identifies a need for additional P&M Measures. In its Decision on the Petition for Reconsideration, PHMSA rejected this interpretation of the integrity management regulations and found nothing in the text of the regulation that indicates that either the evaluation of leak detection systems or the analysis of the need for EFRDs are contingent on the results of the general risk analysis.

Enlink's argument in the alternative was that PHMSA failed to provide it with fair notice of how the agency interpreted the regulation at issue. PHMSA also rejected this argument. Specifically, PHMSA found that the plain language of the regulation is unambiguous and petitioner had fair notice of the requirements by reading the text itself. Further, there was no evidence that PHMSA had ever adopted a position consistent with Enlink's assertion. On the contrary, prior PHMSA enforcement decisions and guidance are consistent with PHMSA's application of the regulation in the present matter. Accordingly, PHMSA found that by reviewing the regulations as well as other public statements issued by PHMSA, Enlink, if acting in good faith, could have identified with ascertainable certainty the standards with which PHMSA expected it to conform. Enlink's contention that it did not have fair notice was therefore rejected by PHMSA.

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