U.S. Department of Transportation

DOT LITIGATION NEWS

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Highlights

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The Federal Transit Administration and the Great Lakes St. Lawrence Seaway Development Corporation have no updates for this edition of the Litigation News.

Subject Matter Index

Glossary of Commonly Used Abbreviations

ALJ	Administrative Law Judge
APA	Administrative Procedure Act
CAA	Clean Air Act
CWA	Clean Water Act
DBE	Disadvantaged Business Enterprise
EA	Environmental Assessment
EIS	Environmental Impact Statement
ESA	Endangered Species Act
FONSI	Finding of No Significant Impact
NEPA	National Environmental Policy Act
NHPA	National Historic Preservation Act
ROD	Record of Decision
SEIS	Supplemental Environmental Impact Statement

Supreme Court Litigation

Supreme Court Declines to Review Dismissal of Complaints for Failure to Properly Serve the Government

On January 9, 2023, the U.S. Supreme Court denied a certiorari petition asking it to review a decision upholding the dismissal of employment discrimination complaints filed by former employees of FAA and the Department of Homeland Security (DHS) for failure to complete service. Morrissey v. Mayorkas, 143 S.Ct. 624 (2023).

Federal Rule of Civil Procedure 4(i) requires a plaintiff suing a federal agency (or federal official in his or her official capacity) to serve process on the agency (or official), the Attorney General, and the U.S. Attorney. Rule 4(m) provides that if service is not completed within 90 days of the filing of the complaint, the court must either "dismiss the action without prejudice or order that service be made within a specified time." Extensions are mandatory if "the plaintiff shows good cause for the failure" or if the plaintiff has served either the Attorney General or the U.S. Attorney.

Plaintiff Kelly Stephenson is a former air traffic controller who brought discrimination claims against FAA in federal district court. After the expiration of the 90-day deadline for completing service, the district court issued an order noting that Stephenson had not filed proof of service on the Attorney General or the U.S. Attorney; the court gave Stephenson fourteen additional days to complete service. Stephenson's counsel responded by filing an affidavit noting that he had served the agency, but saying nothing about serving the Attorney General or the U.S. Attorney. The court dismissed the complaint and denied Stephenson's motion for reconsideration, which gave no logical explanation for the service failure. Although the dismissal was without prejudice, the statute of limitations had run, and Stephenson was therefore barred from re-filing.

Stephenson's appeal was consolidated with a similar appeal from a DHS employee, and a split panel of the U.S. Court of Appeals for the District of Columbia Circuit affirmed. Morrissey v. Mayorkas, 17 F.4th 1150 (D.C. Cir. 2021). The court held that the district courts had not abused their discretion when dismissing the complaints, an option expressly provided for by Rule 4(m). While plaintiffs argued that a heightened standard should apply to dismissals that would bar re-filing because of the statute of limitations had run, the court found that this factor is just one of many that a district court may consider. The court disagreed with Fifth Circuit decisions applying a heightened standard. Judge Millett dissented, arguing that when a dismissal under Rule 4(m) would bar re-filing, the court must make the findings of "repeated misconduct or dilatoriness" required for dismissals under Rule 41(b). The court denied rehearing *en banc*.

In their certiorari petition, plaintiffs argued that the D.C. Circuit's holding was inconsistent with decisions of the Fifth Circuit and several other circuits. The United States opposed certiorari, arguing that the D.C. Circuit's decision was correct, that only the Fifth Circuit has adopted a conflicting rule, and that the conflict with the Fifth Circuit would be relevant in only a small subset of cases.

Supreme Court Requests Views of the United States in Railroad Preemption Case

On March 20, 2023, the U.S. Supreme Court requested the views of the United States in Ohio v. CSX Transp., Inc., No. 22-459 (U.S.), in which the State of Ohio seeks Supreme Court review of a decision of the Supreme Court of Ohio striking down on preemption grounds a state statute that prohibits, with certain exceptions, railroads from blocking railroad crossings for more than five minutes. In the Ohio Supreme Court's August 17, 2022, decision, the majority held that Ohio's blocked crossing statute is preempted by the Interstate Commerce Commission (ICC) Termination Act. 49 U.S.C. § 10101, *et seq.* In an opinion concurring only in the judgment, two justices concluded that the Ohio blocked crossing statute is preempted by the Federal Railroad Safety Act (FRSA), rather than the ICC Termination Act. 49 U.S.C. § 20101, *et seq.* Two justices dissented, concluding that while the FRSA is the applicable statute, the Ohio blocked crossing statute falls into one of the FRSA's safe harbors and is not preempted.

The state of Ohio filed a petition for certiorari on November 10, 2022. The focus of the petition is on local governments' need to implement blocked crossing statutes as a matter of public safety. The petition urges the Supreme Court to grant certiorari because federal courts of appeals and state high courts have relied upon conflicting rationales in challenges to state and local government attempts to regulate railroad crossings. The petition urges the Court to grant certiorari on two related questions. First, whether the ICC Termination Act preempts state laws that limit the amount of time trains may park on grade crossings. Second, whether the FRSA's savings clause permits States to enforce such laws, thus protecting those laws from preemption. CSX Transportation, Inc. filed an opposition to the petition for certiorari on February 16, 2023, primarily arguing that the Supreme Court should not grant certiorari because there is no conflict in the lower courts' ultimate holdings and there is no public policy reason that warrants the grant of certiorari.

The petition for certiorari and associated pleadings can be found here: https://www.supremecourt.gov/search.aspx?filename=/docket/docketfiles/html/public/22-459.html.

Departmental Litigation in Other Federal Courts

Sixth Circuit Grants DOT Motion to Vacate and Remand PHMSA Chief Safety Officer Decision

On January 27, 2023, the U.S. Court of Appeals for the Sixth Circuit granted DOT's motion to vacate and remand in Polyweave Packaging, Inc. v. USDOT, No. 21-4202 (6th Cir.). On July 22, 2022, the court had ordered briefing to be held in abeyance pending disposition of DOT's motion to vacate the underlying challenged agency decision and remand for further proceedings. The abeyance order followed a denial of petitioner's motion to consolidate this case with Polyweave Packaging, Inc. v. USDOT, 51 F.4th 675 (6th Cir. 2022), dismissed on October 20, 2022, and reported in the December 2022 DOT Litigation

News, pages 4-6, available at https://www.transportation.gov/mission/administrations/office-general-counsel/litigation-news-fall-2022.

In its motion to vacate and remand, DOT argued that vacatur and remand was appropriate because during the course of preparing its response brief to petitioner's opening brief, it determined that PHMSA's Chief Safety Officer, the official who issued the agency decision under review, was not properly appointed at the time that he issued that decision, in violation of the Appointments Clause in Article II of the Constitution. DOT informed the court that PHMSA's Chief Safety Officer has since been appointed by the Secretary of Transportation, who also ratified his prior appointment. Although PHMSA's Chief Safety Officer is now properly appointed under Article II, and thus empowered to issue agency decisions, DOT argued that the underlying decision must be vacated and the case remanded for further proceedings so that the petitioner can have its case reviewed by a properly appointed official.

This case involves a challenge to PHMSA's October 18, 2021, administrative appeal decision upholding a non-compromise order in an enforcement action finding that the company committed four violations of the hazardous materials regulations and assessing a civil penalty. On December 20, 2021, Polyweave Packaging, Inc. filed a petition for review, and on April 14, 2022, in its opening brief, presented the following three main arguments. First, Polyweave argued that PHMSA failed to satisfy the federal hazmat law's "knowingly" standard in proving Polyweave violated the hazardous materials regulations. Second, Polyweave argued the civil penalty assessed by PHMSA was improper because the statute of limitations for enforcement of any civil penalty against the company expired in 2020. Third, Polyweave argued PHMSA's administrative enforcement process deprived the company of its constitutional rights because the framework is structurally biased.

D.C. Circuit Denies Flyers Rights' Petition for Mandamus on Passenger Seat Size Rulemaking

On March 3, 2023, the U.S. Court of Appeals for the District of Columbia Circuit denied the petition for mandamus filed by Flyers Rights Education Fund, Inc. and Paul Hudson. The petition alleged that FAA's failure to initiate a rulemaking to establish minimum seat size and spacing standards for passenger safety of commercial aircraft by October 5, 2019, as required by Section 577 of the FAA Reauthorization Act of 2018, 49 U.S.C. § 42301 note, constituted "agency action 'unlawfully withheld' and 'not in accordance with law,' 5 U.S.C. §706," and entitles petitioners to a writ compelling FAA to issue such standards by a date certain. The D.C. Circuit held that Section 577 of the FAA Reauthorization Act requires FAA to promulgate only such minimum seat dimensions as are necessary for passenger safety. The court reasoned that Flyers Rights had not shown that new minimum seat dimensions were necessary for passenger safety. Flyers Rights Education Fund v Dickson, 61 F.4th 166 (D.C. Cir 2023). The court noted, however, that in October 2022, Flyers Rights had filed a new petition for rulemaking with FAA. This petition asks the agency to mandate several specific seat dimensions, and a collapsible footrest. FAA denied this latest petition on April 14, 2023. A summary of arguments made in the briefs and more details about the case can be found in the December 2022 DOT Litigation News,

pages 14-15, available at https://www.transportation.gov/mission/administrations/office-general-counsel/litigation-news-fall-2022.

One Challenge to Executive Order 13990 Rejected, Petitions for Rehearing in Another Denied

On April 5, 2023, the U.S. Court of Appeals for the Fifth Circuit vacated the preliminary injunction issued by the U.S. District Court for the Western District of Louisiana and dismissed the action for lack of jurisdiction in Louisiana, et al. v. Biden, et al., 64 F.4th 674 (5th Cir. 2023). In this case, thirteen states challenged Executive Order (EO) 13990, Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis, 86 Fed. Reg. 7037 (Jan. 20, 2021), which, in Section 5, created an Interagency Working Group on the Social Costs of Greenhouse Gases, and the Interagency Working Group's Technical Support Document, which provided interim estimates for the social cost of greenhouse gases. The injury that plaintiffs allege is from hypothetical future regulation possibly derived from these estimates. DOT is one of many agencies that participates in the Working Group and was named as a co-defendant in this litigation.

On February 11, 2022, the U.S. District Court for the Western District of Louisiana issued a broad preliminary injunction enjoining DOT and other federal agencies from relying upon Section 5 of EO 13990, 585 F. Supp. 3d 840 (W.D. La. 2022). In granting the injunction, the district court held that the plaintiff states have standing, plaintiffs' claim are reviewable under the APA, and plaintiffs are likely to succeed on the merits because the President exceeded his authority in issuing EO 13990, the interim estimates should have been issued through notice and comment procedures, and the interim estimates are arbitrary and capricious.

The government filed motions for a stay of the injunction pending appeal in the district court and the Fifth Circuit, which the district court denied and the Fifth Circuit granted. The Fifth Circuit subsequently denied the states' motion for *en banc* review. The states filed an application with the U.S. Supreme Court to vacate the Fifth Circuit's stay, which the Court denied without noted dissent on May 26, 2022.

In dismissing the action for lack of jurisdiction, the Fifth Circuit held that the plaintiff-states lack standing. Specifically, the court explained that because EO 13990 does not require any action from federal agencies and does not require states to implement the interim estimates established by the Interagency Working Group, plaintiffs failed to satisfy the injury-in-fact prong of standing.

In a similar case, Missouri, et al. v. Biden, et al., thirteen states challenged EO 13990 and the Interagency Working Group's Technical Support Document. On January 27, 2023, the U.S. Court of Appeals for the Eighth Circuit denied the appellant-States' petitions for rehearing *en banc* and for rehearing by the panel. The Eighth Circuit had previously affirmed the judgment of the U.S. District Court for the Eastern District of Missouri, 52 F.4th 362 (8th Cir. 2022), holding that the plaintiff states failed to allege a cognizable injury traceable to the publication of the interim estimates.

Court Blocks Northeast Alliance Between American and JetBlue

On May 19, 2023, the U.S. District Court for the District of Massachusetts issued a

decision permanently enjoining the Northeast Alliance between American Airlines and JetBlue Airways on the grounds that the alliance violates Section 1 of the Sherman Act. The ruling came in a lawsuit brought by the U.S. Department of Justice, several states, and the District of Columbia. United States, et al. v. Am. Airlines Group, Inc, 2023 WL 3560430 (D. Mass. 2023).

American and JetBlue established the Northeast Alliance in July 2020. The airlines agreed that they would coordinate scheduling, capacity, and network planning with respect to Boston Logan International Airport and three New York City area airports: John F. Kennedy International Airport, LaGuardia Airport, and Newark Liberty International Airport. The airlines also agreed to share revenues in a way that would make them indifferent as to whether passengers fly to or from these airports on an American plane or a JetBlue plane. In January 2021, DOT terminated its review of the alliance under 49 U.S.C. § 41720 after the airlines agreed to slot divestitures and made several other commitments. The agreement, however, did not affect the ability of DOT or the Justice Department to take any actions with respect to the alliance.

In September 2022, the Justice Department and its co-plaintiffs brought suit under Section 1 of the Sherman Act, which prohibits any "contract, combination in the form of trust or otherwise, or conspiracy, in restraint of" interstate commerce. 15 U.S.C. § 1. In its decision, which followed a month-long bench trial, the court ruled that the plaintiffs showed that the alliance violates this prohibition.

The court held that the alliance undermines competition in three main ways. *First*, the court found that JetBlue and American in many ways function as a single airline in Boston and New York City, where they previously competed rigorously. The court held that this decrease in competition is especially problematic because the markets are already highly concentrated, and because there are barriers to entry in the form of limited access to gates, slots, and runway timings. *Second*, the court held that the alliance has weakened JetBlue's status as a "maverick" competitor to the larger airlines, including outside of the Northeast. *Third*, the court noted that JetBlue and American have in many instances chosen to assign particular routes to only one of the carriers, a type of market allocation that has sometimes been held to be per se illegal. The court held that these anticompetitive effects are not outweighed by any procompetitive benefits. In particular, while JetBlue and American argued that the alliance strengthens them and helps them compete against other airlines, the court held that this is not the sort of "competition" the Sherman Act seeks to protect.

The court ordered that the airlines be permanently enjoined from continuing and further implementing the alliance, effective 30 days from the decision. The court ordered the parties to confer on the exact language of the injunction.

Court Dismisses One Challenge to DOT DBE Program; DOT Seeks Dismissal of Another Challenge

On March 31, 2023, the U.S. District Court for the Middle District of Florida dismissed on standing grounds an equal protection challenge to DOT's DBE program, which seeks to ensure non-discrimination in DOT-assisted highway, transit, and airport contracting. Bruckner v. Biden, 2023 WL 2744026 (M.D. Fla. Mar. 31, 2023). DOT

has also asked the U.S. District Court for the Middle District of Pennsylvania to dismiss a similar challenge to the DBE program. Mueller v. Carroll, No. 22-1576 (M.D. Pa.).

Recipients of DOT financial assistance are required to establish narrowly-tailored goals for participation in contracts by DBEs, which are businesses owned by socially and economically disadvantaged individuals. While individuals in certain groups are presumed to be disadvantaged, business owners of any race or gender may qualify.

Plaintiffs in the Florida case were Christian Bruckner, who identifies as a white, disabled male, and his company. They alleged that a provision of the Infrastructure Investment and Jobs Act reauthorizing the DBE program violated the equal protection component of the Fifth Amendment's Due Process Clause by imposing race and gender classifications. Plaintiffs moved for a preliminary injunction, and the government moved to dismiss. The court held a hearing on the motions on November 7, 2022, and then asked for supplemental briefing.

In its decision, the court noted that to defeat a motion to dismiss, equal protection plaintiffs must plausibly allege that the challenged program exposes them to unequal treatment that makes it more difficult to obtain a desired benefit. Plaintiffs did not meet this burden for two reasons. First, they failed to plausibly allege that they were able and ready to bid on DOT-funded projects. Second, they failed to plausibly allege that they would experience unequal treatment if they submitted a bid. The court stressed that not all DOT-funded contracts use race- or gender-conscious means. Recipients are required to use race- or gender-neutral means to the maximum extent possible; many recipients use *only* race- or gender-neutral means, while others use race- or gender-conscious means only on certain contracts. Thus, plaintiffs could only plead standing by plausibly alleging that "they are ready and able to bid on an identified contract, or set of contracts, that use discriminatory means." This they failed to do, and thus plaintiffs lacked standing to bring their action.

Plaintiffs in the Pennsylvania case are New Concept Staining (NCS) and its two owners, Cheryl Mueller and Marshall Walters. NCS applied to the Pennsylvania Department of Transportation (PennDOT) for DBE certification. PennDOT determined that NCS had not proven that it was an independent company majority-owned and controlled by Mueller (as it claimed), in light of significant involvement in the company by Walters and his companies. Plaintiffs sued PennDOT and DOT, asserting that PennDOT would have granted NCS's application if Walters was not White and that this purported discrimination was illegal.

Both DOT and PennDOT have moved to dismiss. DOT argues that plaintiffs lack standing to sue. Like the Florida plaintiffs, they fail to plausibly allege that NCS's lack of DBE status will have any negative impact on the company's opportunities, given the narrow scope of the DBE program. In addition, there are no facts suggesting that PennDOT denied the application because of Walters's race. PennDOT expressly cited the company's lack of independence as grounds for its decision, and Walters provided no information suggesting that he would meet the relevant economic criteria for DBE eligibility. DOT also argued that plaintiffs fail to state claims under 42 U.S.C. § 1981, Title VI, or the equal protection clause of the Due Process Clause of the Fifth Amendment, and points out that the DBE program has been

upheld by every court of appeals to have considered the question. The motions to dismiss are fully briefed as of April 11, 2023.

District Court Grants Summary Judgment for DOT in Title VII Case, Plaintiff Appeals

On February 15, 2023, plaintiff Cheryl Young, a former employee of DOT's Bureau of Transportation Statistics (BTS), filed an appeal in the U.S. Court of Appeals for the Ninth Circuit of a district court's December 19, 2022, decision granting the government's motion for summary judgment. Young v. Buttigieg, No. 23-15219 (9th Cir.). Young previously filed a formal complaint of discrimination with DOT in January 2009 alleging that she was subjected to disparate treatment on the basis of her race and age, and in reprisal for prior protected activity. The Equal Employment Opportunity Commission (EEOC) issued a final decision in favor of Young, concluding that she had established race, age, and reprisal discrimination by a preponderance of the evidence. Among other relief, the EEOC Administrative Judge (AJ) ordered DOT to restore Young to her former position in BTS and to pay her compensatory damages and her attorney's fees.

After DOT made payments of backpay, compensatory damages, and attorney's fees to Young in satisfaction of the AJ's order, Young filed an action in the U.S. District Court for the Northern District of California seeking *de novo* review of the discrimination claims that were previously adjudicated before the AJ due to her dissatisfaction with the agency's implementation of the AJ's order. In addition, she also added two new claims, a non-selection claim and a constructive removal claim. After the parties participated in settlement discussions in August 2022, Young agreed to dismiss with prejudice her *de novo* claims, and DOT agreed to dismiss with prejudice its counterclaim that sought to have the court order Young to return the amounts that DOT had previously paid to her as a result of the AJ's order.

DOT filed a motion for summary judgment on plaintiff's constructive removal and non-selection claims, the only remaining claims in the case. On December 19, 2022, the district court granted summary judgment in favor of the government on both claims. Young v. Buttigieg, No. 19-01411, 2022 WL 17812923 (N.D. Cal. Dec. 19, 2022). The court held that Young failed to meet the high bar for a constructive discharge claim because she continued to work for DOT for years after the inter-agency transfer that was the basis of her constructive discharge claim before she voluntarily retired from DOT. In addition, the court explained that Young failed to provide evidence that her working conditions were so intolerable that a reasonable employee would feel compelled to leave. Specifically, at the time of her retirement, she stated that she had been considering retirement and was waiting for a monetary incentive before doing so; in fact, Young was offered and accepted a monetary incentive when she retired. On the non-selection claim, the court held that even assuming Young established a prima facie case of discrimination when she was not hired for the specific position she desired when DOT was attempting to restore her to her previous position, DOT met its burden of providing a non-discriminatory reason for not reinstating her. Moreover, she failed to identify any evidence that DOT's reason was pretextual.

Young's opening brief was filed on May 26, and DOT's response brief is due on June 26.

Briefing Continues in Challenge to NHTSA's CAFE Standards for Model Years 2024–2026 Passenger Cars and Light Trucks

Briefing continues in litigation challenging a May 2022 NHTSA rule setting Corporate Average Fuel Economy (CAFE) Standards for Model Years 2024–2026 Passenger Cars and Light Trucks. *See* 87 Fed. Reg. 25,710 (May 2, 2022). The consolidated case, which is pending in the U.S. Court of Appeals for the District of Columbia Circuit, involves challenges from ten states and the American Fuel & Petrochemical Manufacturers (AFPM), who argue that the rule was excessively stringent, as well as a challenge from the National Resources Defense Council (NRDC), who contends that the rule was not stringent enough. Natural Resources Defense Council, et al. v. NHTSA, et al., No. 22-1080 (D.C. Cir.). Numerous intervenors and amici are also participating, with some in support of the petitioners and others defending the rule.

Petitioners challenging the rule as too stringent primarily argue that the agency's rulemaking analysis violated the Energy Policy and Conservation Act (EPCA), which provides NHTSA with the authority to set CAFE standards. Specifically, these petitioners contend that NHTSA improperly considered certain types of vehicles, such as electric vehicles, in the rulemaking analysis in violation of EPCA's prohibitions on doing so. Intervenors also contend that NHTSA's rulemaking inappropriately considered state regulations under Section 177 and 209 of the Clean Air Act, under the theory that those state regulations are preempted by federal law. NRDC argues that NHTSA underestimated the maximum feasible stringency of CAFE standards by not adequately considering the potential of high-compression ratio engine technologies for certain vehicle types, such as trucks.

NHTSA filed a response brief on March 21, 2023. In response to the state and AFPM petitioners, NHTSA explained the relevant EPCA framework for the CAFE analysis, demonstrating how the statutory constraints were not implicated by the agency's rulemaking process. The brief further explained the agency's longstanding position that the manner in which the CAFE analysis treated the contested vehicle types, such as electric vehicles and trucks, was consistent with the statutory requirements, furthered the goals of EPCA, and ensured the agency accurately analyzed the designs of vehicles in the real world. Intervenors and amici subsequently filed briefs in early April 2023 to support the agency's position and provide more insight on several issues.

The D.C. Circuit has indicated that oral argument will occur in September 2023. In light of the consolidated challenges to NHTSA's 2022 final rule, the D.C. Circuit is also holding in abeyance consolidated litigation over NHTSA's prior CAFE standard, The Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule for Model Years 2021-2026 Passenger Cars and Light Trucks, 85 Fed. Reg. 24,174 (Apr. 30, 2020). *See* Competitive Enterprise Institute v. NHTSA, No. 20-1145 (D.C. Cir.).

Challenge to Denial of Exemption for Pulsating Brake Lamps Briefed and Argued

On October 7, 2022, Intellistop Inc., a manufacturer of an aftermarket module designed to alter the function of existing

vehicle brake lamps, filed a petition for review in the U.S. Court of Appeals for the District of Columbia Circuit challenging FMCSA's denial of its exemption application, which Intellistop originally filed on December 14, 2020, and revised on February 21, 2021. Intellistop, Inc. v. USDOT, et al., No. 22-1260 (D.C. Cir.). The pending action follows an initial filing for a writ of mandamus by Intellistop, on September 7, 2022. Intellistop voluntarily dismissed the mandamus proceeding when FMCSA issued a substantive decision denying the company's exemption request on October 7, 2022.

FMCSA is authorized under 49 U.S.C. § 31315 to grant exemptions to the federal motor carrier safety regulations if the agency finds that the requested exemption "would likely achieve a level of safety that is equivalent to, or greater than" the level of safety achieved by application of the regulatory requirement. Intellistop submitted a request seeking an exemption from FMCSA regulations requiring that commercial motor vehicles be equipped and operated with brake lights that are "steady-burning." The regulation on its face, therefore, does not permit commercial motor vehicle operations using pulsating brake lamps. But Intellistop's requested exemption would permit all motor carriers to utilize pulsing brake light technology through use of a module manufactured by Intellistop installed to alter the function of the vehicle's brake lights.

In its October 7, 2022, decision, FMCSA determined that evidence and data submitted by Intellistop in support of its exemption application was inadequate to support a nationwide exemption available to all motor carriers.

Intellistop filed its opening brief on January 10, 2023. Intellistop argues that FMCSA's decision was arbitrary and capricious because existing research and comments received in the exemption proceeding demonstrate that the Intellistop module does more than achieve an equivalent level of safety, it actually improves safety. Intellistop also relies upon four other exemptions, requests FMCSA granted, to support its argument that its flashing light module improves highway safety and that thus, FMCSA was required to grant its exemption request. Intellistop also contends that FMCSA erred in concluding that the Intellistop module could be distinguished from the technology subject to the four other exemptions for the use of flashing brake light technology. Intellistop argues that FMCSA was incorrect in concluding that the exemption could not be properly implemented nationwide without any impediment to FMCSA's ability to adequately monitor application of the exemption.

In its brief filed on March 9, 2023, FMCSA contends that it properly determined that the requested exemption would not achieve an equivalent or greater level of safety than the status quo. Primarily, FMCSA argues that the statutory provision permitting the Department to grant exemptions is discretionary, not mandatory and that Intellistop failed to meet its burden in the exemption proceeding. Specifically, Intellistop failed to provide any safety data specific to its device to support its request. FMCSA also argues that it could not grant the exemption request because necessary data was unavailable, and FMCSA would not be able to adequately monitor an industry-wide exemption.

The D.C. Circuit held oral argument in the case on May 11.

United States Tells Court That Federal Aviation Act Does Not Preempt Design Defect Claims Regarding Military Aircraft

On February 8, 2023, the United States filed an *amicus* brief in the U.S. Court of Appeals for the Second Circuit, at the invitation of the court, arguing that the Federal Aviation Act and FAA's issuance of a type certificate do not preempt claims that manufacturers defectively designed a military helicopter involved in a fatal crash. Jones v. Goodrich, No. 20-2951 (2d Cir.).

The case arises from a crash of a U.S. Army helicopter in which two Army pilots died. The pilots' families brought state law design-defect claims against the manufacturers of the helicopter's engine and an engine component. Because the Army had contractually required the manufacturers to obtain an FAA type certificate, the defendants argued (among other things) that the claims were preempted. The district court agreed, holding that the claims were subject to field preemption in light of the Federal Aviation Act's regulation of aircraft design. Jones v. Goodrich, 422 F. Supp.3d 518 (D. Conn. 2019). The Second Circuit, after hearing oral argument, sought the views of FAA and the Department of Defense.

In its brief, the United States noted that it has taken the view that the Federal Aviation Act, by comprehensively regulating civil aircraft design standards, impliedly preempts attempts to invoke state law to impose different obligations on manufacturers of civil aircraft or components. But the United States argued that such preemption does not apply in the context of military aircraft, which are not subject to FAA design standards under the Act. The United States argued that even if the Army requires FAA certification as a matter of contract, the Federal Aviation Act does not itself require certification and therefore does not have any preemptive effect.

The United States contended that the proper framework for assessing the plaintiffs' design-defect claims is the government contractor defense established in Boyle v. United Technologies Corp., 487 U.S. 500 (1988), which bars design-defect claims related to military equipment in certain situations. The United States took no position on how this doctrine applies to this particular case.

On March 7, 2023, the parties filed supplemental briefs responding to the position of the United States.

Justice Department Sues to Block JetBlue-Spirit Deal

On March 7, 2023, the U.S. Department of Justice and several states sued JetBlue Airways and Spirit Airlines in the U.S. District Court for the District of Massachusetts, alleging that JetBlue's proposed purchase of Spirit may substantially lessen competition in violation of Section 7 of the Clayton Act. United States v. JetBlue Airways Corp., No. 23-10511 (D. Mass.).

JetBlue and Spirit announced in July 2022 that they had agreed that JetBlue would acquire Spirit for $3.8 billion. The Justice Department and its co-plaintiffs – California, the District of Columbia, Maryland, Massachusetts, New Jersey, New York, and North Carolina – argue that the acquisition would harm consumers in several ways. They argue, for example, that the deal would eliminate head-to-head competition between the two airlines on hundreds of routes, leading to higher prices, less innovation, and

fewer choices for consumers. They contend that the deal will allow for increased coordination among the remaining airlines. And they argue that the elimination of Spirit – the largest ultra-low-cost carrier in the United States – would particularly harm cost-conscious consumers. Plaintiffs seek a permanent injunction blocking the deal. Trial is scheduled to begin on October 16, 2023, and DOT is working with DOJ on responses to discovery requests.

DOT issued a statement on March 7 announcing that it fully supports the Justice Department's lawsuit. JetBlue and Spirit have filed a transfer application requesting that DOT allow them to combine and operate their international routes under one certificate, and DOT is investigating that transfer. The airlines also applied for an exemption that would permit them to operate under common ownership prior to the requested transfer; DOT denied that application as premature on March 24.

Environmental Groups Sue FAA Over SpaceX Starship Launches

On May 1, 2023, four environmental advocacy groups (Center for Biological Diversity, American Bird Conservancy, Surfrider Foundation, and Save RGV) and one cultural interest organization (The Carrizo/Comecrudo Nation of Texas, Inc.) filed a complaint in the U.S. District Court for the District of Columbia challenging FAA's issuance of a vehicle operator license to SpaceX for its Starship/Super Heavy operations at Boca Chica, Texas. Center for Biological Diversity, et al. v. FAA, No. 23-01204 (D.D.C.).

The agency's issuance of a vehicle operator license is a federal action subject to compliance with NEPA. Accordingly, FAA prepared a Programmatic Environmental Assessment (PEA) and FONSI/ROD in June 2022 that covered a series of launches planned by SpaceX. FAA issued a supplemental written re-evaluation in April 2023. Following completion of the written re-evaluation, FAA issued SpaceX a vehicle operator license authorizing one launch of the Starship/Super Heavy vehicle, which occurred on April 20, 2023, and was followed by the explosion of the vehicle.

The complaint contains a single cause of action alleging violation of NEPA and the APA because the launches will allegedly result in significant environmental impacts that require the preparation of an EIS rather than a PEA. Specifically, plaintiffs contend that the PEA failed to sufficiently consider or mitigate (1) potentially significant adverse impacts to climate, wildlife, including migratory birds, and publicly owned conservation, park, and recreation lands and (2) impacts resulting from anomalies, debris recovery efforts, and from road and beach closures such as impacts to cultural, social, and spiritual interests of the surrounding communities (*i.e.*, the Carrizo/Comecrudo Nation of Texas). In addition, the complaint alleges that the failure to supplement the prior analysis to address the April 20 launch also violates NEPA. Finally, the complaint alleges that FAA failed to consider reasonable alternatives, including an alternative with fewer annual operations.

Plaintiffs request declaratory and injunctive relief, including a declaration that the PEA violates NEPA, and vacatur and remand of the vehicle operator license. SpaceX moved to intervene in the case on May 19. FAA's answer is due on June 30.

Recent Litigation News from DOT Modal Administrations

Federal Aviation Administration

Ninth Circuit Upholds FAA Decision Approving Air Cargo Facility at San Bernardino International Airport

On February 24, 2023, the U.S. Court of Appeals for the Ninth Circuit amended its prior November 18, 2021, and October 11, 2022, opinions in Center for Community Action & Environmental Justice, et al. v. FAA, et al**.,** to make minor changes. In its November 18, 2021, opinion, a divided panel of the court denied the petition for review. 61 F.4th 633 (9th Cir.). The court denied petitions for rehearing *en banc* on December 20, 2022. The petition in this case sought review of FAA's FONSI and ROD approving federal actions to support an air cargo facility at San Bernardino International Airport. Petitioners the Center for Community Action and Environmental Justice, Sierra Club, Teamsters Local 1932, Shana Saters, and Martha Romero (collectively, Center for Community Action or CCA), and the State of California alleged that FAA's decision was arbitrary and capricious, and that FAA was required to prepare an EIS rather than an EA under NEPA.

The Ninth Circuit rejected petitioners' two main arguments. First, the court did not accept petitioners' argument that FAA failed to adequately study environmental impact by using study areas that did not conform to FAA's Order 1050.1F Desk Reference. The Ninth Circuit held that FAA's non-adherence to the Desk Reference could not alone serve as the basis for holding that FAA did not take a "hard look" at the environmental consequences of the Project. Instead, the court reasoned that petitioners must show that FAA's non-adherence to the Desk Reference had an impact on the sufficiency of the analysis in the environmental assessment apart from simply failing to follow certain Desk Reference instructions, which petitioners were unable to do.

Second, the court did not uphold petitioners' contention that FAA failed to consider sufficiently the cumulative impacts of the project. They argued that FAA only considered past, present, and reasonably foreseeable projects within the General Study Area and should have expanded its assessment to include an additional 80-plus projects. The court held that the record showed that FAA specifically accounted for the traffic generated by these 80-plus projects for purposes of identifying cumulative traffic volumes and that petitioners did not identify any potential cumulative impacts that FAA failed to consider.

Separately, the court found insufficient the State of California's primary argument that FAA needed to prepare an EIS because a California Environmental Impact Report prepared under the California Environmental Quality Act (CEQA) found that the proposed project could result in significant impacts on air quality, greenhouse gas, and noise. California argued FAA should have considered the CEQA findings regarding these impacts. The thresholds discussed in the CEQA analysis that California cited were established by the South Coast Air Quality Management District (SCAQMD). The court noted that under SCAQMD's own assessment, construction of the air cargo

facility would comply with federal and state air quality standards. California also argued that FAA should have refuted the CEQA findings regarding greenhouse gas impacts. However, the court found that California did not refute the EA's rationale for why it found no significant impact of greenhouse gas emissions and did not articulate what environmental impact may result from construction emissions that exceeded the SCAQMD threshold. The panel also rejected California's noise concerns. Ultimately, the court concluded that California failed to raise a substantial question as to whether construction of the air cargo facility may have a significant effect on the environment so as to require the preparation of an EIS.

In a dissent, Judge Rawlinson wrote that the case reeked of environmental racism and agreed with the petitioners that the difference between California's conclusion of significant environmental impacts of the Project under CEQA and FAA's conclusion of no significant impact could be explained by FAA's failure to take the requisite "hard look" at the project as required by NEPA. Judge Rawlinson wrote that the EA was deficient in numerous ways and that this EA would not prevail if the project were located near the home of the multibillionaire owner of Amazon.

Partial Remand with Dissent in Challenge to the Replacement Terminal at Bob Hope "Hollywood Burbank" Airport

On March 29, 2023, in City of Los Angeles v. FAA, 2023 WL 2671021 (9th Cir.), the U.S. Court of Appeals for the Ninth Circuit upheld, in part, FAA's decision approving a terminal replacement project at the Bob Hope "Hollywood Burbank" Airport. The majority of the court denied the City's petition for review with one exception. The majority determined that the analysis of construction noise and cumulative impacts in FAA's EIS was deficient because it relied upon the flawed assumption that construction equipment would not be operating simultaneously. The majority remanded the matter for reconsideration of these impacts. A dissenting justice disagreed with the remand and opined that the majority should have deferred to FAA's assumption, which was reasonable. Otherwise, the dissenting judge joined the opinion of the majority.

As background, in 1981, the Burbank Glendale Pasadena Airport Authority (BGPAA), which owns and operates Bob Hope Airport, proposed to replace the terminal because it no longer complied with FAA safety standards. The project was controversial, and over the next three decades, it attracted considerable federal and state court litigation.

Following a 1999 state court decision, the BGPAA and the City of Burbank agreed to terms that, among other things, would let the BGPAA build a 14-gate replacement terminal between 232,000 and 355,000 square feet in size. Because the project involved federal actions with potentially significant impacts, the agency prepared an EIS. In 2021, FAA issued the Final EIS and ROD. The City of Los Angeles, which is adjacent to the airport, filed a petition for review challenging the decision

The City of Los Angeles raised two major objections concerning the adequacy of the EIS. First, it contended that the EIS failed to include a "detailed statement" of "alternatives to the proposed action." Los Angeles argued that FAA improperly eliminated certain alternatives because they were not approved pursuant to the agreement between the BGPAA and the City of Burbank. The panel denied the petition on

this ground, reasoning that FAA drafted an adequate purpose and need statement and then narrowed the range of alternatives for detailed study based on rational considerations. The court also found that Los Angeles failed to identify any reasonable alternative that FAA should have studied. The court held that FAA properly eliminated other alternatives such as a new airport, a remotely located landside facility, and a southeast terminal alternatives during the alternatives screening process based on rational considerations that were independent of any agreement between the Burbank-Glendale-Pasadena Airport Authority and the City of Burbank.

Second, Los Angeles challenged the sufficiency of FAA's analysis of environmental impacts in the EIS, including construction-related impacts. Here, the Ninth Circuit held that FAA did not take a hard look at noise impacts from terminal construction because its analysis rested on an unsupported and irrational assumption that construction equipment would not be operated simultaneously. Because the court found that FAA failed to take a hard look at construction noise impacts and based its cumulative impacts analysis on its inadequately considered conclusions about construction noise, the panel granted the petition on these limited grounds. The court found the rest of Los Angeles's objections to FAA's impact analysis meritless. On remand, the panel directed FAA to address the deficiency in its construction noise analysis, the resulting deficiency in its cumulative impacts analysis, and the resulting deficiency in its environmental impacts analysis.

In a dissenting opinion, Judge Bumatay wrote that the majority should have deferred to FAA's assumptions about noise effects, which were reasonable. Judge Bumatay agreed with the majority insofar as it rejected the remainder of the City's petition.

Court Upholds Van Nuys Airport and Hollywood Burbank Airport Departure Procedures

On October 5, 2022, in Save Our Skies LA v FAA, (9th Cir. No. 20-73314) the U.S. Circuit Court of Appeals for the Ninth Circuit denied the petition for review and upheld FAA's orders making editorial changes to departures procedures at Van Nuys and Burbank airports. In this case, an association of residents challenged several FAA orders implementing and revising departure procedures at the Van Nuys and Burbank airports. The specific procedures at issue were changes to the HARYS FOUR departure procedure at Van Nuys Airport and the SLAPP TWO departure procedure at the Burbank Airport. Petitioners contended that FAA failed to analyze the procedures sufficiently, in violation of NEPA, the APA, and section 4(f) of the Department of Transportation Act of 1966. Petitioners argued that FAA should have prepared an EA instead of relying upon a categorical exclusion (CE).

The Ninth Circuit held that because FAA's airspace amendments to the HARYS FOUR's and SLAPP TWO were purely editorial in nature and made no substantive change in the flight path of any aircraft, the use of a CE was appropriate. Further, the court found that the changes did not implicate extraordinary circumstances, so FAA did not err in relying on the CE for its edits. For similar reasons, the court found that petitioners were incorrect in arguing that FAA's amendments violated Section 4(f) of the Department of Transportation Act.

In addition, FAA addressed petitioners' attempt to challenge the original HARYS

FOUR and SLAPP TWO airspace procedures, which had been implemented several years before the 2020 amendments. Petitioners contended that the 60-day statute of limitations established in 49 U.S.C. § 46110 did not apply for three reasons. First, petitioners argued that a timely challenge to one order should allow a petitioner to challenge any related earlier orders. The court held that the text of 49 U.S.C. § 46110 foreclosed this argument.

Second, petitioners argued that the hundreds of days it let pass before challenging the prior orders should be excused under the reasonable grounds exception in 49 U.S.C. § 46110. The court held that the statutory "reasonable grounds" exception did not apply.

Third, petitioners alleged that the time limitation should not apply because FAA failed to comply with NEPA in making prior amendments to these airspace procedures. The court determined that FAA's alleged violations of NEPA regarding prior amendments to these airspace procedures did not toll the statute of limitations for filing the petition. The court reasoned that petitioners could not attempt to circumvent the strict time limits imposed by 49 U.S.C. § 46110 simply by invoking the APA. The court concluded that the petition of review of HARYS ONE and SLAPP ONE was untimely, and it dismissed the petition on this ground insofar as it challenged those orders.

Ninth Circuit Grants Partial Mandamus for Review of Amended LAX Flight Procedures

In an unpublished March 9, 2023, order in City of Los Angeles, et al. v Dickson, No. 71581 (9th Cir. 2023), the U.S. Court of Appeals for the Ninth Circuit granted in part and denied in part the City of Los Angeles' motion to enforce the court's 2021 judgment requiring proper environmental review of amendments to flight procedures at Los Angeles International Airport (LAX). 2021 WL 2850586 (9th Cir.).

In October 2022, the City of Los Angeles filed a motion to enforce the Ninth Circuit's 2021 judgment remanding amended arrival flight routes at LAX to FAA for proper environmental review. The City argued that FAA's delay in completing the environmental review was unreasonable because FAA had provided no details concerning its plans and did not initiate consultation under the NHPA and section 4(f) of the Department of Transportation Act until May 2022, ten months after the court issued the mandate in the case.

FAA contended in opposition that the court lacked jurisdiction because the issuance of the August 2021 mandate marked the end of the court's jurisdiction. Alternatively, FAA argued that mandamus relief is extraordinary and was unwarranted here because FAA is diligently complying with the court's decision.

In the March 2023 order, the court found that it had jurisdiction. It reasoned that it had "inherent power to enforce [our] judgment [citation omitted]." The court indicated that the Supreme Court has long recognized the jurisdiction of a court is not exhausted by the rendition of a judgment, but instead continues until that judgment is satisfied. Furthermore, the court relied upon its authority under the All Writs Act (28 U.S.C. § 1651) to issue all writs necessary and appropriate to aid its jurisdiction. The court construed the motion to enforce as a petition for mandamus, by which it had the authority to compel unreasonably delayed agency action and to require compliance with a previously issued decision.

In weighing whether mandamus relief was appropriate, the court looked at the six-factor test established in Telecommunications Research. & Action Center V. FCC, 750 F.2d 70 (D.C. Cir. 1984): (1) whether the delay is reasonable; (2) whether Congress has provided a timetable for agency action; (3) whether the delay impacts health and safety; (4) the agency's priorities; (5) the interests at stake; and (6) agency impropriety. The court looked at these factors for guidance only, finding a lesser showing necessary to justify mandamus relief where a court is dealing with an agency's failure to respond to the court's own mandate.

The court found that the reasonableness of the delay and impacts on health and safety factors were relevant. While a nineteen-month delay in complying with the August 2021 mandate could not yet be considered egregious, FAA had not explained what actions it had taken to comply with the prior decision other than sending initial consultation letters in May 2022.

The court noted that the third factor considers whether human health and welfare are at stake and that longer delays are acceptable in economic regulation cases. The court found that the amended flight routes implicated human welfare because of the noise generated by air traffic, among the other environmental impacts to people, historic districts, parks, and other protected properties within Los Angeles. It reasoned that while the LAX flight procedures do not raise the same health concerns as toxic pesticides, they are not purely economic decisions. The court was also mindful that it had denied vacatur of the amended procedures in the initial case because of the "cost, safety, and potential environmental consequences."

Ultimately, the court held that some mandamus relief was appropriate. The court denied the City's requests to set a six-month deadline and require status reports every forty-five days. Instead, it required FAA to file with the court a timeline for conducting its environmental review and consultation and status reports every ninety days.

As background, the litigation began in June 2018 when the City, joined by intervenor Culver City, challenged FAA's approval of amendments to three LAX arrival routes. In the initial case, the Ninth Circuit concluded that FAA had not completed the necessary environmental review and consultations. City of Los Angeles et al. v Dickson, No 19-71581, 2021 WL 2850586 (9th Cir. July 8, 2021). For more information about the earlier case, see the December 2021 DOT Litigation News, pages 17-18, available at https://www.transportation.gov/administrations/office-general-counsel/litigation-news-fall-2021.

Court Upholds Revocation of UPS First Officers' Airline Transport Pilot Certificate

On December 29, 2022, 23 days after hearing oral argument, the U.S. Court of Appeals for the District of Columbia Circuit denied a petition for review challenging an order of the National Transportation Safety Board (NTSB), upholding FAA's order revoking petitioner's airline transport certificate for three violations of the federal aviation regulations: leaving his crewmember station (Section 91.105), threatening and interfering with the captain in the performance of his duties (Section 121.580), and operating an aircraft in a careless and reckless manner (Section 91.13(a)). Brown v Nolen, 2022 WL 17986261 (D.C Cir. Dec. 29, 2022). The challenge was brought by petitioner first officer Brown and is unusual in that it stemmed from a confrontation between petitioner and the captain of the flight concerning petitioner's performance on

takeoff of a United Parcel Service (UPS) cargo flight.

Petitioner had argued that (1) FAA failed to investigate the alleged threat or interview any of the witnesses, who had provided three different versions of events; (2) because the testimony is virtually the entire case, the judge's credibility determinations – made only on remand, 17 months after he had actually observed the testimony – "arbitrarily and capriciously favor[ed]" the witnesses for FAA; (3) full consideration of the variant testimony leaves insufficient substantial evidence to support key findings, credibility determinations aside, and establishes no violation; and (4) the ultimate sanction of revocation is unsupported by the facts and is based on the judge's acceptance of the FAA expert's assessment of petitioner's performance on takeoff, which the complaint did not allege and was found irrelevant by the ALJ and NTSB.

FAA responded that: (1) NTSB's reliance on the ALJ's credibility determinations are firmly within the responsibility of a trial judge, and deference thereto was appropriate, notwithstanding the time lapse between the implicit and explicit credibility findings; (2) NTSB's factual findings were supported by substantial evidence, and NTSB correctly found violations of regulations prohibiting threats to crew members and leaving a duty station mid-flight; (3) NTSB properly deferred to the choice of revocation because FAA's conclusion that petitioner lacked qualifications to keep his airline transport pilot certificate was grounded in fact and law; and (4) NTSB properly sustained the ALJ's denial of petitioner's spoliation motion because the captain's choice to not unplug the cockpit voice recorder was consistent with the CVR's purpose and requirements of governing regulations and, even if improper, formed no basis to sanction FAA for the captain's action.

The court found none of petitioner's arguments persuasive. It determined there was no basis for disturbing the ALJ's credibility determinations and held that there was substantial evidence to support the NTSB's affirmance of the ALJ's factual findings. The court also held that the regulations the NTSB determined that Brown had violated "plainly follow[ed] from the ALJ's factual findings[;]" and the court found the NTSB properly deferred to FAA's choice of sanction. Finally, the court concluded that there was no error in the NTSB's affirmance of the ALJ's spoliation ruling, noting Brown identified no authority for a non-party like the flight captain to preserve records relevant to the revocation proceeding; and even assuming such a duty, the court found the flight captain's reason for not disabling the cockpit voice recorder for the rest of the flight was reasonable.

The violations arose on November 27, 2016, while petitioner was serving as first officer and flying pilot on a cargo flight from Sydney, Australia, to Shenzhen, China. After takeoff, the captain attempted to address petitioner's early rotation of the aircraft (*i.e.*, bringing the nose up) on takeoff, but petitioner's reaction to the critique was hostile and threatening. The captain missed a radio call during the exchange. When petitioner stormed out of the cockpit without accomplishing procedures for positive exchange of control, the captain barred him from reentering, relying on a relief pilot as the second flying pilot for the remainder of the flight. The captain and the relief pilot discussed pulling the circuit breaker to the cockpit voice recorder (CVR) to preserve the exchange with petitioner, but that would have disabled the voice recorder for the duration of the flight. The captain decided to leave the

voice recorder connected. The flight landed at its intended destination in China without further incident.

Petitioner appealed FAA's revocation order, denying the allegations therein and asserting affirmative defenses. At the conclusion of the July 2019 hearing, the ALJ, without making credibility determinations, but based on limited findings of fact, found the allegations proven, and affirmed the revocation.

On administrative appeal, NTSB rejected petitioner's arguments as to evidentiary rulings (including denial of his spoliation motion arising from failure to unplug the CVR to preserve the evidence of the incident), found FAA's expert testimony as to takeoff performance irrelevant, and rejected petitioner's assertion of the stale complaint rule. NTSB did, however, agree with petitioner's claim that the ALJ erred in failing to make express credibility determinations and findings of fact as to petitioner's leaving his seat and the cockpit.

On remand, the ALJ made credibility determinations and findings of fact supporting all three violations. In its order on remand, NTSB affirmed the ALJ's conclusions, found that revocation of petitioner's airline transport pilot certificate was appropriate, and affirmed FAA's order of revocation.

Briefing Completed, Argument Heard in Flyers Rights' Appeal of FOIA Decision on Boeing 737 Max Re-Certification Records

On January 17, 2023, FAA filed its response brief in Flyers Rights Education Fund, Inc. et al. v FAA, No 21-5257 (D.C. Cir.). The U.S. Court of Appeals for the District of Columbia Circuit heard oral argument in the case on April 20. This is an appeal of a district court decision holding that FAA correctly withheld Boeing 737 MAX re-certification records as confidential commercial information under Exemption 4 of FOIA in its response to appellants' November 2019 FOIA. Flyers Rights Education Fund, Inc., et al. v. FAA, 2021 WL 4206594 (D.D.C. Sept. 16, 2021).

In the decision on appeal, the U.S. District Court for the District of Columbia found the re-certification records to be "confidential" as defined by Exemption 4. The court rejected plaintiffs' arguments that FAA's general statements about its commitment to transparency qualified as an assurance that it would release specific proprietary documents to the public and that the records should be released as necessary to enable outside experts to assess the safety of the 737 MAX's design change.

In their opening brief, appellants argued that: (1) that the district court erred in finding that the information could be withheld under Exemption 4 because FAA's public statements promising complete transparency as to the ungrounding process put Boeing on notice that FAA would disclose the information Boeing submitted; (2) the "means of compliance," developed and used to demonstrate compliance, instead of published standards, were binding public policy and could not be held confidential without allowing Boeing to create a body of "secret law"; (3) certain withheld records had been generated by FAA; and (4) some of the information in the withheld records was reasonably segregable.

In its response brief, FAA argued that: (1) FAA's commitment to transparency during the 737 MAX return to service process did not constitute a promise to release Boeing's proprietary certification data to the public; (2) Boeing's "means of compliance" are not secret law, but instead are Boeing's

proprietary methods for complying with regulatory requirements; (3) appellant's "secret law" argument also fails because the "secret law" concept is not cognizable under Exemption 4; (4) the withheld FAA-generated records contain confidential commercial information FAA originally received from Boeing; and (5) FAA segregated and released all non-exempt information.

Summary Judgment Briefing in FOIA Case Challenging Exemption 4 Withholdings of NATCA Collective Bargaining Communications

The parties have completed summary judgment briefing in Smolen v. FAA, No. 22-44 (S.D.N.Y.), a challenge by an air traffic controller to FAA's withholding of National Air Traffic Controllers Association (NATCA) confidential commercial or financial information under Exemption 4 of FOIA. The withheld information, portions of draft Memoranda of Understanding (MOUs) relating to negotiations between FAA and NATCA, relate to negotiations between FAA and NATCA about the transfer of the Newark International Airport (EWR) area from the New York TRACON to the Philadelphia Air Traffic Control Tower.

FAA moved for summary judgment on December 2, 2022. In its brief, FAA argued, among other things, that the withheld material constitutes NATCA's confidential, commercial or financial information, noting that the U.S. Court of Appeals for the Second Circuit has recognized that a labor union's negotiation positions in labor-management controversies were intended to fall within the scope of Exemption 4. In addition, FAA argued that the disclosure of this material would cause significant harm to NATCA's commercial interests by undermining its ability to represent its members effectively in collective bargaining negotiations. Finally, FAA argued that plaintiff's allegation regarding the inadequacy of FAA's search for records responsive to his FOIA request were barred because he failed to exhaust administrative remedies with regard to that claim. FAA maintained in any event that claim failed on the merits because FAA's search for responsive documents was adequate and reasonably calculated to locate all responsive records.

In his January 10, 2023, opposition and cross motion, plaintiff contends that the withheld portions of the draft MOUs are not exempt from disclosure pursuant to FOIA Exemption 4 because NATCA is a non-profit labor union and, therefore, the withheld information does not constitute NATCA's commercial information. Plaintiff also argues that FAA's search was inadequate, that FAA acted in bad faith, and that FAA's transfer of the EWR area airspace failed to comply with Section 804 of the FAA Modernization and Reform Act of 2012, Pub. L. No. 112-95, as amended by Section 510 of the Reauthorization Act of 2018, Pub. L. No. 115–254 (Section 804).

On March 15, FAA filed its reply, in which the agency reasserted its position that it properly withheld certain portions of the draft MOUs in accordance with Exemption 4 and that plaintiff's adequacy of search claim was barred and lacked merit because of FAA's numerous searches for responsive documents. Furthermore, FAA argued that plaintiff's allegations that FAA acted in bad faith were devoid of merit and insufficient to rebut the presumption of good faith accorded to agency declarations. Finally, FAA argued that plaintiff's disagreement with FAA's determination that Section 804 of the FAA Modernization and Reform Act of 2012 did not apply to FAA's EWR transfer and had no

bearing on the merits of the FOIA case or on whether FAA conducted an adequate search.

Plaintiff filed his reply brief on April 11.

More information about the case can be found in the December 2022 DOT Litigation News, pages 20-21, available at https://www.transportation.gov/mission/administrations/office-general-counsel/litigation-news-fall-2022.

Updated Status of Litigation Related to October 2018 Lion Air Tragedy

The parties have reached settlement on all but one of the claims in the five lawsuits filed on behalf of the 189 persons on board a Lion Air Boeing 737 MAX 8 that crashed in the Java Sea off the coast of Indonesia on October 29, 2018, killing all 189 persons on board. In re: Lion Air Flight JT 610 Crash, No. 18-7686 (N.D. Ill.). The accident aircraft had, as part of its flight control system, the Maneuvering Characteristics Augmentation System (MCAS). FAA grounded the Boeing 737 MAX 8 following a second accident and later returned it to service after an extensive review and several changes to the aircraft, including changes related to MCAS. The last remaining claim, Chandra, No. 19-1552, is in the early stages of damages discovery. FAA anticipates a bench trial under the Death on the High Seas Act on damages later this year or in the first quarter of 2024.

After FAA received multiple administrative claims, five lawsuits were filed on November 19, 2018, and consolidated in the U.S. District Court for the Northern District of Illinois. In re: Lion Air Flight JT 610 Crash, No. 18-7686 (N.D. Ill.). The complaints contained counts against the United States alleging negligence in design, certification, Organization Designation Authorization oversight, and training.

On December 28, 2019, the litigation was continued through February 28, 2020, "to allow the parties to continue to engage in mediations," with a Boeing status report ordered two months thereafter; in each subsequent minute order continuing the stay, another such status report was ordered. All orders to date approving motions for dismissal pursuant to settlement have included a dismissal of all claims, with prejudice and without costs, against all defendants, including the United States.

According to Boeing's Fourteenth Status Report on Remaining Individual Actions, filed April 18, 2022, "The parties, the Court, and the mediator . . . have worked together to settle as many cases as possible," settling "all claims for 186 of the 189 persons on board the Lion Air flight JT610 aircraft," leaving three claims in which, "[d]espite their best, good-faith efforts, the parties . . . have been unable to reach settlements," further stays are unlikely to lead to additional settlements, and a new approach is indicated. In one case, Sethi, Boeing and plaintiff agreed to a concurrently- filed stipulation and proposed case schedule enabling a damages-only bench trial under the Death on the High Seas Act. Because no agreement as to how to proceed had been reached in the other two cases (Chandra, No. 19-1552, and Smith, No. 19-7091), Boeing requested that the court set a status conference to discuss a schedule to brief motions to decide "governing law and availability of a jury trial for those two claims." Subsequently, the parties settled Sethi and Smith, leaving Chandra as the last remaining claim.

Environmental Groups Challenge Air Tour Management Plan for California National Parks

On March 13, 2023, two environmental groups, Public Employees for Environmental Responsibility (PEER), and an individual, filed a petition for review challenging the FAA and National Park Service (NPS) ROD approving the Air Tour Management Plan for Golden Gate National Recreation Area, Muir Woods National Monument, San Francisco Maritime National Historical Park, and Point Reyes National Seashore. Marin Audubon Society, et al. v. FAA, et al., No. 23-1067 (D.C. Cir.). In particular, petitioners are challenging the agencies' use of a categorical exclusion, rather than an EA or EIS, to comply with the NEPA requirements under the National Parks Air Tour Management Act of 2000 (NPATMA).

The NPATMA requires operators wishing to conduct commercial air tours over national parks, or over tribal lands within or abutting national parks, to apply to FAA for authority to conduct such tours. NPATMA further requires FAA, in cooperation with the NPS, to establish air tour management plans for parks or tribal lands for which applications are submitted. The objective of an air tour management plan is to develop acceptable and effective measures to mitigate or prevent the significant adverse impacts of commercial air tour operations on the natural and cultural resources, visitor experiences, and tribal lands of national parks.

Federal Highway Administration

Fourth Circuit Rules in Favor of FHWA in Mid-Currituck Bridge Litigation; Project Opponents Seek Rehearing

On February 23, 2023, the U.S. Court of Appeals for the Fourth Circuit affirmed the district court's favorable summary judgment ruling for the FHWA and the North Carolina Department of Transportation (NCDOT) in Mid-Currituck Bridge Concerned Citizens, et al. v. North Carolina Dep't of Transp., et al., 60 F.4th 794 (4th Cir.). Appellants North Carolina Wildlife Federation and the Mid-Currituck Bridge Concerned Citizens had filed suit seeking declaratory and injunctive relief to stop construction of the Mid-Currituck Bridge project, which was proposed as a two-lane bridge that would provide a second crossing of the Currituck Sounds from the mainland to the Outer Banks of North Carolina.

Plaintiffs appealed from a December 13, 2021, order of the U.S. District Court for the Eastern District of North Carolina. The district court had granted a motion for summary judgment in favor of NCDOT and FHWA. North Carolina Wildlife Fed'n, et al. v. North Carolina Dep't of Transp., et al., 2021 WL 5893973 (E.D.N.C. 2021). The district court found that FHWA and NCDOT properly determined that an SEIS was not required and that the alternatives analysis for the project was not arbitrary and capricious.

Appellants claimed that FHWA and NCDOT violated NEPA because the agencies did not prepare an SEIS as required due to the new information that appellants described as significant. Appellants argued that changes to traffic forecasts, growth and development

patterns, and sea level rise projections were significant, and that the public should have been afforded an opportunity to provide input on the NEPA alternatives in light of the changes. Finally, appellants argued that the project's no-build scenario was flawed and prevented a valid comparison of alternatives because it presumed project construction.

The Fourth Circuit affirmed summary judgment in favor of FHWA and NCDOT, rejecting the appellants' claims. The court found that FHWA and NCDOT's acknowledgement of updated information since the filing of the FEIS satisfied the "hard look" review required by NEPA and did not merit an SEIS. The court found that the determination by the agencies, which concluded there was no need for an SEIS, was not arbitrary and capricious, because that conclusion rested on documented consideration of the collective impact of traffic congestion, growth and development, and the effects of sea level rise changes on the utility of the bridge. The court also discounted appellants' claim that the no-build alternative was tainted with a build assumption and therefore invalid. The court noted the appropriate reliance by FHWA and NCDOT on local land use plans to calculate base-line development in its no-build and build alternatives. In doing so, the court upheld the methodology of beginning with a build baseline that assumed bridge construction and then working backwards to remove induced growth associated with the bridge to develop a valid no-build scenario.

On April 5, 2023, appellants filed a petition for panel rehearing and rehearing *en banc* on the grounds that the court "misapprehended" both the facts and the law of the case. Appellants assert that FHWA and NCDOT should have prepared an SEIS because updated information concerning traffic forecasts, development rates, and sea level projections need only bear on the project in a way that is relevant to environmental concerns. They also assert that the decision to forego an SEIS prohibited the public from reviewing the project alternatives before the final decision was made. Finally, appellants contend that the court's decision rests on errors of fact, reasserting that the decision to begin with a build assumption and then develop a no-build scenario was improper. They also argue the resulting analysis failed to account for induced housing development.

The court denied appellants' petition for panel rehearing and rehearing *en banc* on April 21.

Preliminary Injunction Motion Denied in New NEPA Lawsuit over Extension of Virginia I-495 Express Lanes, Case Voluntarily Dismissed

On March 16, 2023, the Northern Virginia Citizens Association, Inc. filed a complaint for declaratory and injunctive relief seeking to enjoin the FHWA and Virginia Department of Transportation (VDOT) from any further construction on any portion of the I-495 Express Lanes Northern Extension Project. Northern Virginia Citizens Association, Inc. v. Federal Highway Administration, et al., No. 23-356 (E.D. Va.). Plaintiff argues that FHWA and VDOT violated NEPA by failing to prepare a supplemental EA or an EIS for design changes disclosed after the FONSI was issued and by unlawfully delegating environmental review to a self-interested private party, the design build contractor selected for the project. Plaintiff contends that terms of a cited agreement grant a VDOT contractor and its subsidiaries the power to make change in the project design without reporting to or oversight by FHWA or VDOT

On April 7, 2023, the U.S. District Court for the Eastern District of Virginia denied plaintiff's motion for a preliminary injunction. The court issued a one sentence Order decreeing that the motion for a preliminary injunction was denied for the reasons stated during the court's hearing on the motion: plaintiff failed to show a clear likelihood of success on the merits and did not provide any expert testimony about the environmental impacts of the proposed design changes. On May 11, plaintiff voluntarily dismissed the case.

Summary Judgment Granted in NEPA Categorical Exclusion Lawsuit Involving Bayfront Parkway Project in Pennsylvania

On December 29, 2022, the U.S. District Court for the Western District of Pennsylvania granted a motion for summary judgment filed by the FHWA and Pennsylvania Department of Transportation (PennDOT) and denied a cross-motion for summary judgment by plaintiffs in NAACP et al. v. FHWA, et al., No. 20-362 (W.D. Pa.). On December 15, 2020, the NAACP Erie Unit 2262 and Citizens for Pennsylvania's Future filed a civil action against FHWA and PennDOT alleging violations of the APA, NEPA, and Executive Order (E.O.) 12898 over the Bayfront Parkway Project in Erie, Pennsylvania, which had been designated as a categorical exclusion (CE).

In their complaint, plaintiffs alleged that FHWA violated NEPA and the APA by approving the CE classification for the project. The plaintiffs argued that classifying the project as a CE was arbitrary and capricious because the project will significantly impact planned growth and travel patterns by adding capacity to the Bayfront Parkway and reconfiguring three major intersections. In addition, plaintiffs challenged the CE designation by arguing that the project raises issues of controversy on environmental grounds and that a CE could not be approved without additional environmental studies. Plaintiffs also alleged that PennDOT had failed to hold a public hearing regarding the project.

In their motion for summary judgment, plaintiffs argued that the FHWA's approval of the CE was arbitrary and capricious because the record does not contain documentation that the project does not induce significant impacts to planned growth or land use for the area; does not have significant impacts on travel patterns; does not involve significant, air, noise, or water quality impacts; and does not otherwise, either individually or cumulatively, have any significant environmental impacts. In addition, plaintiffs argued that the project involves "substantial controversy on environmental grounds," which they alleged meant that a CE could not be approved without additional environmental studies.

The court rejected each of the arguments made by plaintiffs in their motion for summary judgment. The court found that FHWA's findings that the project will not have a significant impact on planned growth, land use, travel patterns, and water resources were supported by the record. The court also found that FHWA and PennDOT properly considered the project's impacts related to climate change, EJ, air quality, and noise, and that there was no substantial controversy on environmental grounds. Finally, the court found that PennDOT was not legally obligated to hold a public hearing, as the project qualified as a CE.

District Court Grants FHWA Motion to Dismiss in US 50 Round Hill Pines Project Case

On February 14, 2023, the U.S. District Court for the District of Nevada granted FHWA's Motion to Dismiss in Tahoe Cabin, LLC v. FHWA, et al., No. 22-175 (D. Nev.), 2023 WL 2021289. Plaintiffs, three homeowners in the nearby Sunset Sierra Lane neighborhood, filed a complaint challenging FHWA's EA and FONSI for the US 50 Round Hill Pines Project. The Central Federal Lands Highway Division, in cooperation with the Forest Service Lake Tahoe Basin Management Unit, Nevada Department of Transportation, and the Tahoe Regional Planning Agency, undertook the project, which is intended to improve safety for visitors entering and exiting the Round Hill Pines Resort from U.S. Highway 50. In their complaint, plaintiffs alleged violations of NEPA and the APA, asserting that the EA/FONSI had failed to take a hard look at the human environmental impacts of the project, especially the safety issues for their neighborhood should the project be completed.

FHWA's motion to dismiss asserted that the complaint was time barred, as it was not filed within 150 days after publication of notice of the FONSI in the Federal Register in accordance with 23 U.S.C. § 139(l). Plaintiffs asserted several defenses to the dismissal motion. They argued that the court should disregard the statute of limitations because equitable estoppel or equitable tolling applied. Additionally, plaintiffs asserted that, given the equitable tolling, the FHWA's motion should be examined as a motion for a failure to state a claim, not as a jurisdictional motion. Plaintiffs also argued that the government waived the statute of limitations defense.

The court agreed with FHWA that plaintiffs did not timely file their complaint within the 150-day required period and rejected the plaintiffs' counterarguments. The court agreed that the deadline was subject to equitable tolling arguments, but found that equitable tolling did not apply in this matter. The court instead found that plaintiffs had not pursued their rights diligently, as the FONSI that triggered the 150-day period was publicly available in the Federal Register. The court also rejected plaintiff's arguments regarding equitable estoppel. Specifically, the court found that there were no actions by the government to induce plaintiffs into failing to act, there was no fraudulent concealment or misrepresentation by the government, and there were no promises made to plaintiffs regarding the project. Finally, the court found that FHWA had timely raised the statute of limitations defense.

Court Dismisses Challenge to Phase 2 of the Complete Streets Loop Project in Richmond, Indiana

On February 1, 2023, the U.S. District Court for the Southern District of Indiana dismissed with prejudice claims against FHWA regarding Phase 2 of the Complete Streets Loop Project in Richmond, Indiana. Parker v. FHWA, et al., No. 22-291 (S.D. Ind.). Plaintiff, a business owner in the Downtown Historic District of Richmond, had previously filed a lawsuit alleging deficiencies in FHWA's Section 106 review under the NHPA. The court dismissed that initial case on November 21, 2022, ruling that Section 106 of the NHPA does not create a private right of action.

On January 12, 2023, the same plaintiff filed what was titled an Amended Complaint, reiterating the previously made argument that

FHWA failed to comply with Section 106 of the NHPA. While the court interpreted the document as a motion for leave to amend the initial Compliant, it nonetheless denied the motion as futile, holding that the motion did not address the court's earlier holding that the NHPA does not include any private right of action. Accordingly, the court dismissed the claim against FHWA with prejudice.

Plaintiffs Voluntarily Dismiss Compliant in Historic Nice Bridge Case

On October 14, 2022, three bike and trail advocacy organizations voluntarily dismissed, without prejudice, their compliant in the U.S. District Court for the District of Maryland that sought to enjoin the demolition of the historic Governor Harry W. Nice Memorial Bridge/Senator Thomas "Mac" Middleton Bridge (Historic Nice Bridge). Potomac Heritage Trail Ass'n, et al. v. Dep't of Transportation, et al., No. 22-02482 (D. Md.). Plaintiffs alleged that the USDOT, FHWA, and Maryland Transportation Authority failed to adequately consider the impacts of replacing the Historic Nice Bridge with a new bridge under NEPA, the NHPA, Section 6(f) of the Land and Water Conservation Fund Act, Section 4(f) of the Department of Transportation Act of 1966, and the Maryland Environmental Policy Act. Plaintiffs alleged that defendants had promised to construct a bridge with a separated and protected 10-foot path for pedestrian and bicycle traffic in the Section 4(f) evaluation and FONSI but instead chose to build the new bridge without the separate path. Plaintiffs also alleged that defendants never appropriately considered the environmental impact of demolishing the Historic Nice Bridge.

On September 28, 2022, plaintiffs filed a motion for a temporary restraining order and preliminary injunction, seeking to enjoin the demolition of the Historic Nice Bridge. On October 11, the district court denied the motion for a temporary restraining order and preliminary injunction. Potomac Heritage Trail Ass'n, et al. v. USDOT, et al., 2022 WL 7051160 (D. Md.). The court found that plaintiffs failed to prove they would be likely to succeed on the merits or likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tipped in their favor, or that an injunction would be in the public interest.

Following the denial of the motion for a temporary restraining order and preliminary injunction, plaintiffs dismissed their complaint.

Briefing Completed for Lawsuit Challenging Alabama BUILD Grant Project

On December 19, 2022, a group of local property owners filed their motion for summary judgment against the Alabama Department of Transportation (ALDOT) and FHWA; on February 1, 2023, FHWA filed a cross-motion for summary judgment. This case was initiated on February 6, 2020, when plaintiffs filed their lawsuit alleging that defendants violated NEPA by improperly designating the highway project at issue as a CE and improperly segmenting the subject project from a larger limited access highway project. Eyster, et. al. v. Alabama Dept. of Transp., et al., No. 20-172 (N.D. Ala.). Plaintiffs allege economic harm, mainly devaluation of portions of land surrounding the project, which plaintiffs own in trust.

In 2014, FHWA approved the project as a CE; however, part of the proposed

development did not come to pass, and the project stalled for several years. In 2018, the City of Decatur pursued the project with funding from a 2018 BUILD grant. ALDOT revived the project and proposed a revised design. A NEPA reevaluation was approved in 2019, concluding that no new significant impacts existed.

In their motion for summary judgment, the plaintiffs allege that FHWA violated NEPA by failing to study the project with an EIS or EA. Specifically, they argue that the project should have originally been classified as an EA or EIS, because of various project impacts. They also allege the project was improperly segmented from broader plans that ALDOT had to widen the corridor. Plaintiffs further argue that, when the City of Decatur later revived the project with BUILD grant funding, the nature of the project changed enough to warrant a new environmental study rather than a re-evaluation of the original CE. Finally, plaintiffs argue that FHWA should have prepared a Section 4(f) analysis to study potential impacts on the nearby Wheeler National Wildlife Refuge.

FHWA argues that the original CE classification was appropriate in light of FHWA criteria for CE classification and the minimal project impacts. FHWA also notes that the project does not use any of the Wildlife Refuge property and, therefore, does not require a Section 4(f) analysis. FHWA also points out that the project has independent utility and is not improperly segmented, and that the re-evaluation properly concluded the CE remained valid because the project served the same essential function and the minor design changes proposed since the CE was approved resulted in reduced environmental impacts.

Further, FHWA argues that the case is moot because the project was substantially completed by the time it filed its reply brief, and the new intersection was anticipated to be open to traffic by March 2023. Plaintiffs counter that the case is not moot because there are remedies the court may still render if it finds defendants violated NEPA.

Complaint Filed in Proposed Eisenhower Drive Extension Project in Pennsylvania

On February 27, 2023, the Lower Susquehanna Riverkeeper Association filed a lawsuit against FHWA pertaining to the proposed Eisenhower Drive Extension Project located in York and Adams counties in Pennsylvania. Lower Susquehanna Riverkeeper Ass'n v. FHWA, et al., No. 23-343 (M.D. Pa.). On January 3, 2023, FHWA issued a FONSI for the project.

Plaintiff alleges that FHWA violated NEPA by predetermining the location of the roadway extension involved in the project prior the completion of an EIS, or otherwise failing to adequately consider alternatives to the project. Plaintiff also alleges that FHWA violated NEPA by failing to prepare a full EIS and to take the requisite hard look under NEPA.

Lawsuit Filed in Interconnecting Gulfport Project

On November 17, 2022, The National Council of Negro Women (NCNW), the Education, Economics, Environmental Climate and Health Organization (EEECHO), Healthy Gulf, and the Sierra Club filed a complaint against USDOT in the U.S. District Court for the Southern District of Mississippi. NCNW, et al. v. Buttigieg, et al., No. 22-314 (S.D. Miss.). Plaintiffs seek

declaratory and injunctive relief to stop construction of the Interconnecting Gulfport Project in Gulfport, Mississippi.

The purpose of the Interconnecting Gulfport Project is to provide transportation infrastructure that will improve the flow of vehicular traffic around the I-10 and US 49 interchange and that will encourage existing and support new commercial and economic growth. The FHWA Mississippi Division signed an EA and FONSI for the project on September 14, 2022, and the project is being funded through a Better Utilizing Investments to Leverage Development (BUILD) grant awarded to the City of Gulfport.

The complaint asserts four causes of the action. First, plaintiffs allege that USDOT violated NEPA and the APA by approving the project with an EA rather than an EIS. Second, plaintiffs allege that the EA lacked analysis of direct, indirect, and cumulative environmental impacts. Plaintiffs specifically point to an alleged failure to produce and use induced traffic growth analysis, cost-benefit analysis, and analysis of the effects arising from induced growth and impacts to wetlands, including Wetlands of National Significance. Third, plaintiffs allege that USDOT failed to consider a range of reasonable alternatives. Finally, plaintiffs allege that USDOT failed to adequately respond to comments regarding several issues including traffic forecasting and induced development.

On February 3, 2023, FHWA filed its answer to the complaint.

Lawsuit Filed Over Frank J. Wood Bridge Improvement Project

On February 27, 2023, the National Historic Trust for Historic Preservation in the United States, Historic Bridge Foundation, Friends of the Frank J. Wood Bridge, and Waterfront Maine filed a lawsuit alleging violations of NEPA and Section 4(f) of the Department of Transportation Act against FHWA and the Maine Department of Transportation (MaineDOT). National Trust for Historic Preservation, et al. v. Buttigieg, et al., No. 23-80 (D. Maine).

The project at issue is the Frank J. Wood Bridge Improvement Project, which is located between the towns of Brunswick and Topsham in Maine. The project was the subject of previous litigation: in 2021, the U.S. District Court of Maine dismissed allegations that FHWA and MaineDOT violated Section 4(f) and NEPA by selecting the replacement alternative for the bridge over the rehabilitation alternative. On January 4, 2022, the U.S. Court of Appeals for the First Circuit affirmed the district court's holding in part and vacated it in part. The court affirmed the district court's dismissal in all respects except as to its remand to the district court with instructions to remand to FHWA "for the strictly limited purpose of allowing the agency to further justify use of the service-life analysis and/or to decide whether a 53% price differential [between the replacement and rehabilitation alternatives] represents a cost of extraordinary magnitude under 23 C.F.R. § 774.17." FHWA and MaineDOT accordingly prepared a Section 4(f) reevaluation, which concluded that the rehabilitation alternative was not feasible because its 53% cost differential amounts to a cost of extraordinary magnitude.

In the instant case, plaintiffs allege that the FHWA and MaineDOT violated Section 4(f) by failing to select a feasible and prudent avoidance alternative, *i.e.*, the rehabilitation alternative. Plaintiffs argue that dismissing the rehabilitation alternative through the Section (4)f reevaluation was arbitrary, capricious, an abuse of discretion, and lacks support in the record. Additionally, plaintiffs allege that FHWA and MaineDOT violated NEPA by failing to prepare an SEIS to include current cost estimates comparing the rehabilitation versus replacement alternatives.

On April 7, 2023, plaintiffs filed a motion for preliminary injunction. Plaintiffs claim that the bridge faces imminent harm given the commencement of construction activities and that injunctive relief is necessary to preserve the status quo.

On April 28, FHWA filed its motion in opposition to plaintiffs' motion for preliminary injunction. In response to plaintiffs' NEPA argument, FHWA contested that plaintiffs failed to demonstrate a likelihood of success on the merits because their dispute over project cost is a non-environmental concern that does fall within NEPA's ambit. FHWA also argued that the claims were dismissed by the district court in the previous case and the dismissal was affirmed by the First Circuit, so res judicata precluded the NEPA arguments. As to the Section 4(f) claims regarding the SEIS, FHWA argued that (1) the SEIS was developed in response to the First Circuit's specific instructions on remand regarding cost estimates, which FHWA appropriately interpreted to mean that its charge was to apply the pre-existing cost estimates, not use new information; and (2) the cost estimates used by plaintiffs were inaccurate. FHWA also argued that plaintiffs' claims of irreparable injury were too speculative and that plaintiffs failed to demonstrate that the balance of equities or the public interest were in their favor. FHWA finally argued that an injunction would significantly delay the construction schedule, resulting in additional costs to the State of Maine.

In their May 12 reply to MaineDOT's and FHWA's motions in opposition, plaintiffs argued that their NEPA arguments are based on new information about the cost of the replacement bridge, which they claimed FHWA was obligated to consider. Plaintiffs also contested FHWA's claim that this new information on alleged increased construction costs does not constitute information relevant to environmental concerns and pressed their argument that FHWA failed to consider evidence that construction costs had escalated. Plaintiffs further stated that they faced an irreparable injury because construction of the new bridge is soon approaching, which they claimed would mean that the demolition of the historic bridge would be inevitable.

Lawsuit Filed Over Impacts of I-495 and I-270 Expansion Project in Maryland and Virginia

On October 11, 2022, the Maryland Chapter of the Sierra Club, Friends of Moses Hall, National Trust for Historic Preservation in the United States, and Natural Resources Defense Council filed a complaint in the U.S. District Court for the District of Maryland regarding the FHWA and Maryland Department of Transportation (MDOT) plan to widen and add toll lanes to I-495 and I-270 between McLean, Virginia, and Gaithersburg, Maryland. Maryland Chapter of the Sierra Club, Inc., et al. v. FHWA, et al., No. 22-2597 (D. Md.).

Plaintiffs allege that FHWA and MDOT violated NEPA by failing to disclose and explain information about MDOT's traffic modeling. Plaintiffs further allege that the project's objective of widening of highways and adding tolls will create traffic bottlenecks that may increase concentrations of particulate matter. They also argue that the air pollution would increase in neighborhoods where EJ communities live, that the toll lanes may disturb graves at the Morningstar Tabernacle No. 88 Moses Hall and Cemetery, and that the toll lanes may impact Plummers Island, a nearby site eligible for listing on the National Register of Historic Places. Plaintiffs contend that FHWA and MDOT violated Section 4(f) of the Department of Transportation Act and the NHPA by deferring the 4(f) adverse-effect determination for Morningstar Moses Cemetery until after the ROD was issued, failed to consider the cumulative harmful effects to Morningstar Moses Cemetery, and violated Section 4(f) because the determination of least overall harm to Plummers Island was arbitrary.

On December 23, 2022, the Northern Virginia Citizens Association, Inc. filed a complaint against FHWA and MDOT challenging the same project. Northern Virginia Citizens Ass'n v. FHWA, et al., No. 22-3336 (D. Md.). This complaint alleges that FHWA and MDOT violated NEPA when they failed to take a hard look at the environmental impacts and alternatives to flyover ramps that the project plans to construct in Virginia.

On February 28, 2023, the two cases were consolidated, due to their shared similar facts.

Federal Court Proceedings Initiated in I-81 Viaduct Project

On November 21, 2022, a group of plaintiffs filed a lawsuit against FHWA and NYSDOT in the U.S. District Court for the Northern District of the New York, challenging the I-81 Viaduct project. Renew 81 for All, et al. v. FHWA, et al., No. 22-1244 (N.D.N.Y.). The project is located within the municipalities of Syracuse, North Syracuse, Cicero, East Syracuse, and DeWitt in Onondaga County, New York. The project's purpose is to address structural deficiencies and non-standard highway features, while creating an improved transportation corridor through the City of Syracuse.

Plaintiffs allege that NYSDOT and FHWA violated NEPA when they based the EIS for the project on inaccurate traffic projections that failed to account for the forecasted additional traffic; when they failed to consider the cumulative impacts of the project; when they improperly segmented the NEPA review by only reviewing highway work and not other impacts; and when they failed to take a "hard look" at the environmental impacts posed by the project. Plaintiffs also allege that FHWA and NYSDOT violated the requirements of Section 4(f) of the Department of Transportation Act and 23 C.F.R. § 658.11.

Federal Motor Carrier Safety Administration

Challenge to Denial of Exemption for Pulsating Brake Lamps Briefed and Argued

See Intellistop v. USDOT, No. 22-1260 (D.C. Cir.), supra at 8.

Federal Railroad Administration

Fifth Circuit Vacates and Remands Case Involving Challenge to FRA's Decision to Not Expand Automated Track Inspection Waiver

On March 15, 2023, the U.S. Court of Appeals for the Fifth Circuit vacated and remanded FRA's March 21, 2022, decision dismissing the request of BNSF Railway Company (BNSF) to expand an existing track inspection waiver to two new territories under the railroad's automated track inspection (ATI) program. BNSF Rwy. Co. v. FRA, et al., 62 F.4th 905 (5th Cir.).

The existing waiver provides limited, conditional relief from certain aspects of 49 C.F.R. § 213.233(b) and (c) of FRA's Track Safety Standards (TSS), allowing BNSF to partially replace required visual track inspections by track inspectors with inspections using autonomous geometry inspection systems. The Railroad Safety Advisory Committee (RSAC) is currently tasked with developing a consensus recommendation for incorporating ATI technology into FRA's TSS. The RSAC task is designed to examine the feasibility of using a combination of visual inspections and ATI technologies to maximize the effectiveness of railroads' track inspection programs. In its decision letter, FRA concluded that given the ongoing RSAC task related to ATI, FRA would not be justified in granting the expanded relief requested by BNSF.

BNSF petitioned for review of FRA's decision in the Fifth Circuit. In its opening brief, BNSF argued that FRA acted arbitrarily in denying its expanded waiver request because (1) an expanded waiver would increase safety, (2) FRA had ignored that BNSF met the conditions required to expand its original waiver and provided no explanation for its change in position, and (3) FRA's reason for denying the waiver was irrational and insufficient. The Association of American Railroads and the National Association of Manufacturers filed amicus briefs in support of BNSF.

The government's brief argued that (1) FRA reasonably denied BNSF's waiver petition in order to pursue a nationally uniform approach to railroad safety, (2) FRA's waiver denial did not prevent BNSF from using ATI technology, (3) BNSF did not demonstrate that FRA improperly relied on RSAC's review of the issue, (4) FRA did not change its policy towards the use of ATI when it denied BNSF's expanded waiver request, and (5) if the court were to find against FRA, it should only remand the case to the agency for further consideration. The Brotherhood of Maintenance of Way Employes Division/IBT filed an intervenor brief, emphasizing that BNSF was not precluded from using ATI technology. In its reply brief, BNSF primarily asserted that FRA's "newly-manufactured uniformity rationale" was not a basis to uphold its waiver denial, and it maintained that the Fifth Circuit should vacate the waiver denial and direct FRA to grant BNSF's waiver expansion request.

In its decision, the Fifth Circuit found that FRA's justification for dismissing BNSF's expanded waiver petition was insufficient, especially in light of the fact that one of FRA's statutory mandates is to prioritize safety. The court went on to state that because BNSF made safety arguments that ATI is safer and more efficient than visual inspections alone, FRA is "duty-bound" to provide a further explanation as to why the ATI technology should not be expanded to two additional territories. Accordingly, the Fifth Circuit vacated and remanded the

decision for reconsideration by the agency, retained jurisdiction over the matter, and directed FRA to issue its new decision by June 23, 2023.

Maritime Administration

District Court Rules in Center for Biological Diversity v. MARAD

On March 31, 2023, the U.S. District Court for Eastern District of Virginia issued an Order and corresponding Memorandum Opinion granting in part and denying in part the parties' cross motions for summary judgment in Center for Biological Diversity v. MARAD, 2023 WL 2746028 (Mar. 31, 2023), in which plaintiff alleged violations of the ESA arising from grants under the America's Marine Highways Program (Program). Specifically, plaintiff alleged that MARAD awarded grants for the expansion of vessel traffic on rivers, bays, and coastal areas without engaging in a programmatic consultation and/or project-specific consultations with the U.S. Fish and Wildlife Service and/or the National Marine Fisheries Service to ensure that the actions of the AMH program did not jeopardize endangered or threatened species or impair their critical habitats under Section 7 of the ESA (16 U.S.C. § 1536(a)(2)). The complaint sought a declaratory judgment that the Program is in violation of the ESA and an order directing MARAD to initiate ESA Section 7 consultation for the James River Expansion Project and initiate a programmatic consultation for the program per a schedule established by the court.

In its March 25, 2022, memorandum in support of the motion, plaintiff argued that because the implementing regulations for the ESA require consultation on "programs," defendants were required to conduct a programmatic consultation for the Program. Plaintiff also argued that MARAD failed to conduct Section 7 consultation for specific grant projects funded under the Program, such as the James River Container Expansion Project.

In their April 25, 2022, memorandum in support of their response and cross motion for summary judgment, defendants argued that the establishment of the Program was not an "action" as defined by the ESA's implementing regulations and therefore did not require Section 7 consultation. Defendants further argued that plaintiff's claim regarding the James River Container Expansion Project is not redressable, and therefore, plaintiff does not have standing to raise the claim. Additionally, defendants argued that MARAD was not required to consult for the Project due to MARAD's "no effect" determination for the Atlantic Sturgeon.

In its March 31 decision, the court first held that plaintiff had standing to challenge MARAD's failure to engage in Section 7 consultation for James River Container Expansion Project because "MARAD retains discretion to make changes to the grant" and therefore, the violation is redressable. Specifically, the court explained that under the executed grant agreement, MARAD may "recover funds [from the grant awardee] on the basis of a later audit or other review" up to three years from the date of submission of the final expenditure report. Because the date of reimbursement was February 10, 2020, and plaintiff's complaint was filed on October 12, 2021, within the three-year period, the court held that MARAD retained discretion to modify the award.

Additionally, the court held that MARAD violated the ESA by failing to consult on the James River Container Expansion

Project. The court reviewed the agency action under the APA's arbitrary and capricious standard, holding that MARAD's "no effect" determination for the Atlantic Sturgeon under the ESA was not supported by the evidence in the record and instead "runs counter to the evidence before the agency." The court concluded, based on the record, that the "addition of a third barge on the river, one meant explicitly to increase traffic on the James, 'may affect' the sturgeon living there," thus requiring Section 7 consultation. As such, the court ordered that the parties meet and confer and submit to the court a proposed schedule for consultation by April 14, 2023. At a May 2 status hearing, the court ordered additional briefing, with the government's brief due by May 16. In the government's brief, MARAD explained that pursuant to the ESA and its implementing regulations, engaging in informal consultation is one of a number of methods of compliance with Section 7 of the ESA, and the court did not order MARAD to engage in formal consultation, nor could it do so based on the record that was before the court.

Regarding plaintiff's programmatic consultation claim, the court concluded that the Program is not the kind of program that constitutes a discrete agency action under the ESA that would trigger consultation. The court explained that while MARAD's issuance of grants under the Program individually warrant consultation, it does not mean that collectively they warrant programmatic consultation. Moreover, the court noted that the ESA implementing regulations describe programmatic consultation as voluntary and do not impose a requirement to conduct such a consultation. As such, the court held that MARAD was not required to conduct a programmatic consultation for the Program as a whole.

The court further concluded that plaintiff's claim regarding programmatic consultation fails under the ripeness doctrine because it is not fit for judicial review, and MARAD's failure to engage in a programmatic consultation on the implementation of the Program does not enact hardship on the plaintiff. Here, the court explained that MARAD's implementing regulations for the Program "remain too disconnected from potential impacts to endangered species." As such, the consequences to ESA-listed species from the requirements outlined in the regulations are difficult to discern. Because of the broad requirements of the Program, coupled with the fact that MARAD is required to comply with environmental laws when individual projects are executed, the court found that any challenge to the Program's implementing regulations is not ripe for review.

Litigation with Matson over Replacement Vessels in the Maritime Security Program 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 must 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 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 appealed the district court's determination that it lacked jurisdiction with respect to the APL GUAM. Matson Navigation Co. v. USDOT, et al., Nos. 20-5219 & 20-5261 (D.C. Cir.). That appeal was dismissed as moot on July 15, 2021, after MARAD approved the replacement of the APL GUAM with another vessel, the CMA CGM HERODOTE.

With respect to the APL SAIPAN, MARAD issued a new decision on August 3, 2020. Matson challenged the new decision and principally argued 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, the government sought a voluntary remand in April 2021 due to a recognition that some reasoning in the new decision was incorrect. On June 22, 2021, APL filed an initial application to replace the APL SAIPAN with the CMA CGM DAKAR and later notified MARAD that the DAKAR will not operate to the Northern Mariana Islands. On August 3, 2021, the district court granted MARAD's motion and remanded the matter to MARAD for further consideration. On October 4, 2021, MARAD found that the APL SAIPAN did not meet the age-eligibility requirement of the MSP statute. And finally, on June 15, 2022, MARAD approved the CMA CGM DAKAR as a replacement vessel. Matson challenged MARAD's decision in both the district court and the D.C. Circuit. Matson Navigation Co. v. USDOT, et al., No. 22-1975 (D.D.C.); No. 22-5224 (D.C. Cir.). The district court determined it lacked jurisdiction and denied Matson's preliminary injunction motion. 2022 WL 3576208.

As noted, MARAD also approved the CMA CGM HERODOTE as a replacement vessel for the APL GUAM, and APL began operating the HERODOTE instead of the GUAM in the MSP on May 18, 2021. Matson filed another petition for review in the D.C. Circuit and another APA action in the district court challenging MARAD's approval of the CMA CGM HERODOTE to

replace the GUAM. Matson Navigation Co. v. USDOT, et al., No. 21-1137 (D.C. Cir.); Matson Navigation Co. v. USDOT, et al., No. 21-01606 (D.D.C.). On July 29, 2021, the D.C. Circuit granted the parties' joint motion to hold the case in abeyance pending proceedings in the district court. On August 30, 2021, the government filed a motion to dismiss that case on the ground that the Hobbs Act confers exclusive jurisdiction to the courts of appeals to review MARAD's order on the HERODOTE. The court dismissed the case for lack of jurisdiction on August 4, 2022. Matson Navigation Co. v. USDOT, et al., 2022 WL 3139004 (D.D.C. Aug. 4, 2022). Matson appealed the decision. Matson Navigation Co. v. USDOT, et al., No. 22-5212 (D.C. Cir.).

On October 13, 2022, the D.C. Circuit granted the parties' motion to consolidate the cases pending before the court.

Matson filed its opening brief on November 23. In its brief, Matson argues that the court should reverse the district court's orders holding that it lacks jurisdiction over Matson's challenges filed in that court because the MARAD Orders approving the HERODOTE and the DAKAR as replacement vessels were authorized by 46 U.S.C. § 53105(f), which is not one of the statutes covered by the Hobbs Act's grant of jurisdiction to the courts of appeals. The fact that the Orders referenced 46 U.S.C. § 50501, which is listed in the Hobbs Act, does not alter the forum for review because section 50501 does not direct or authorize the action taken in the Orders. Matson further argues that should the court of appeals retain jurisdiction, the court should vacate the Orders as arbitrary and capricious and contrary to law because the vessels are not replacement vessels and cannot engage in domestic trade, and the Orders authorize unlawful domestic trade in the Northern Mariana Islands. In its response brief, MARAD argued that the Court of Appeals has exclusive jurisdiction to review the orders, that the vessels are appropriate replacement vessels, and that one vessel does not trade to the Northern Marianas and the other does not carry cargo that is reserved for coastwise vessels.

The court heard oral argument on April 11, 2023.

Briefing Completed in Challenge to Approval of Time Charter

On May 6, 2022, American Cruise Lines, Inc. (ACL) filed a petition for review in the U.S. Court of Appeals for the Second Circuit, challenging a MARAD determination that a proposed charter between River 1, LLC and Viking USA, Ltd is a time charter, rather than a bareboat charter. American Cruise Lines, Inc. v. United States, No. 22-1029 (2d Cir.). The difference is significant practically and legally. Practically, a bareboat charter gives complete control of the vessel to the charterer, with the vessel owner retaining only legal title. In a time charter, the vessel owner retains operational control of the vessel, while the time charterer has to right to direct where the vessel goes and what cargo or passengers are picked up. Legally, pursuant to 46 U.S.C. § 56101, transfer of ownership or control of a vessel owned by U.S. citizens to a non-citizen requires MARAD approval. However, the charter of a vessel to a non-citizen is automatically approved under MARAD's regulations, except for bareboat charters of U.S.-owned or -controlled vessels for operation by non-citizens in the coastwise (*i.e.*, domestic) trade. 46 C.F.R. § 221.13(a).

On October 22, 2019, Edison Chouest Offshore (ECO) requested that MARAD

confirm that a proposed long-term charter party between ECO affiliate River 1, LLC (both wholly owned by U.S. citizens) to Viking USA, LLC (organized under U.S. law, but wholly owned by non-citizens) was a time charter subject to the automatic regulatory approval. River 1 proposed to build a river cruise vessel and time charter it to Viking USA for operation on the Mississippi River. In a December 19, 2019, letter, MARAD staff confirmed to ECO that the proposed charter was a time charter.

In the 2021 National Defense Authorization Act, Congress included a provision requiring that MARAD: (1) publish on its website a "detailed summary" of a request for confirmation that a charter for a passenger vessel is subject to MARAD's automatic regulatory approval; (2) allow public comment; and (3) publish on its website a "final decision on the request." Pub. L. 116-283, sec. 3502(b) (Jan. 1, 2021). Congress made the provision retroactive to requests made in fiscal year 2020, when MARAD issued its advice on the ECO-Viking charter. MARAD published the required summary on July 30, 2021. On March 18, 2022, after considering the comments, MARAD confirmed its initial conclusion that the proposed charter is a time charter, which ACL now challenges. River 1 and Viking USA have intervened as defendants.

ACL filed its opening brief on December 9, arguing that MARAD's decision was arbitrary and capricious for several reasons. ACL first argued that the charter is a bareboat charter because Viking "absorbs" all of ECO's costs and business risks. This argument is based on the fact that the periodic charter hire (*i.e.*, payments) made by Viking will cover ECO's costs of operating the vessel. Second, ACL argued that Viking essentially controlled crewing for the vessel, as the charter provided Viking the right to require ECO to replace the vessel manager (who, among other things, provides for crewing the vessel) for poor performance that was not cured, and could exercise this right "*ad infinitem*," until the vessel was crewed by persons selected by Viking. Third, ACL claimed that an advance payment of charter hire that ECO would use to construct the vessel was improper and transferred control to Viking. Fourth, ACL argued that clauses that prohibited ECO from engaging the river cruise business in competition with Viking, and allowing Viking to review Choust's books and records, were improper.

The government filed its response brief on April 6, 2023. In that brief, the government explained that the express charter's terms provided for ECO to pay the vessel's operating expenses, maintain the vessel, and hire and control the vessel's crew and operations. Moreover, a charter hire rate that is sufficient to cover a vessel's operating costs is normal. Viking's ability to request that the vessel manager be replaced for cause, despite the hypothetical "*ad infinitem*" assertion, still left ECO with the right and responsibility to crew the vessel. All operational control of the vessel, aside from the time charter's traditional right to designate ports of call, remained with ECO pursuant to the charter. Viking's payment of advance charter hire did not give Viking any ownership interest in the vessel or confer any rights to control the vessel. The prohibition on ECO from competing with Viking's river cruise business terminated upon ECO's delivery of the vessel to Viking, after which ECO (which does not operate cruise vessels) could compete. Viking's right to review ECO books and records did not cede any control to Viking, as it was limited to records concerning operating expenses, which can change with inflation and other factors and are important for calculating the annual charter hire.

ACL filed its reply brief on May 11, 2023.

Environmental Groups Seek Review of Texas Oil Terminal License

On January 19, 2023, Citizens for Clean Air & Clean Water in Brazoria County, Texas Campaign for the Environment, Turtle Island Restoration Network, Sierra Club, and the Center for Biological Diversity petitioned the U.S. Court of Appeals for the Fifth Circuit to review MARAD's November 21, 2022, ROD and July 29, 2022, EIS for the licensing of the Sea Port Oil Terminal (SPOT). Citizens for Clean Air & Clean Water in Brazoria County, et al v. USDOT, et al., No. 23-60027. On February 17, SPOT Terminal Services LCC and Enterprise Products Operating LLC filed an unopposed motion for leave to intervene in the matter, which the court granted.

In their opening brief filed on May 10, petitioners argue that MARAD's decision to license the SPOT deepwater crude export terminal violates the Deepwater Port Act (DWPA) and NEPA on the following grounds: (1) the decision violates NEPA's "hard look" requirement by failing to analyze the terminal's oil spill impacts, omitting a risk assessment of a range of foreseeable spill sizes and locations, failing to evaluate oil spill impacts on species and habitat, and failing to analyze air quality impacts; (2) the decision's alternatives analysis failed to review a smaller-sized project as an alternative that could meet the basic purpose and need for the project at lesser environmental impact and erroneously concluded that the "no action" alternative would have the same or worse impacts than the Project as proposed; (3) the decision ignored expert evidence that SPOT's addition of export capacity would induce new production for export that would not otherwise occur and thus failed to account for SPOT's harm to the marine environment, frontline communities, and climate; (4) the decision violates the DWPA's non-discretionary requirement to complete licensing review within 356 days; (5) the decision violates DWPA licensing criteria by omitting determination of whether allowing SPOT's new export capacity would advance domestic energy sufficiency.

Respondents' brief is due June 8.

National Highway Traffic Safety Administration

United States Files Antitrust Lawsuit against Google, Seeks Damages on behalf of NHTSA and Other Federal Agencies

On January 24, 2023, the United States and several States filed a civil antitrust lawsuit against Google for alleged violations of the Sherman Act relating to Google's digital advertising technology products, seeking equitable relief and monetary damages. United States, et al. v. Google LLC, No. 23-108 (E.D. Va.). NHTSA engages in paid media campaigns to further its mission, and in doing so, uses through contractors Google's digital advertising technology products. The United States seeks damages on behalf of NHTSA and the following other agencies: the U.S. Census Bureau; Centers for Medicare and Medicaid Services; certain Department of Defense Agencies (U.S. Air Force, U.S. Army, U.S. Navy); U.S. Postal Service; and Department of Veterans Affairs. The court denied Google's February 17, 2023, motion to transfer the case to the Southern District of New York on March 10, and denied Google's March 27 motion to dismiss for failure to state a claim April 28, 2023. A March 31 scheduling order adopted

the United States' discovery proposal treating NHTSA and the other agencies noted above as parties for purposes of discovery. Under that order, fact discovery must conclude by September 8, 2023, expert discovery must conclude by January 12, 2024, and a pretrial conference will be held January 18, 2024.

Pipeline and Hazardous Materials Safety Administration

Court Issues Decision in Challenge to PHMSA Pipeline Valve Rule

On May 16, 2023, the U.S. Court of Appeals for the District of Columbia Circuit partially vacated a PHMSA rule that requires the installation of rupture-mitigation valves on certain pipelines. GPA Midstream Ass'n, et al. v. USDOT, et al., 2023 WL 3471113 (D.C. Cir. 2023). The ruling only affects gathering lines, which transport gas or hazardous liquids short distances from production sites to central collection points. PHMSA's rule remains fully in force with respect to transmission lines, which transport materials longer distances.

The challenged rule required (among other things) that operators of certain newly constructed or entirely replaced pipelines install remote-controlled or automatic shut-off valves or equivalent technologies. The rule applied to transmission lines and certain gathering lines. PHMSA issued the rule to prevent the catastrophic loss of life, property damage, and environmental harm that could result from ruptures on these types of pipelines. 87 Fed. Reg. 20940 (Apr. 8, 2022).

GPA Midstream Association and American Petroleum Institute petitioned for review to challenge the inclusion of gathering lines. They argued that when Congress mandated that PHMSA issue valve requirements for transmission lines, it impliedly took away the agency's authority to issue such requirements for gathering lines. In the alternative, they argued that the rule was procedurally defective with respect to gathering lines.

The court rejected the claim that PHMSA lacked authority to apply the rule to gathering lines, holding that the Congressional mandate for a transmission line valve rule did not affect PHMSA's general authority to prescribe minimum safety standards for pipeline transportation and facilities. The court, however, held that that the rule was procedurally deficient with respect to gathering lines because: (1) the proposed rule and preliminary regulatory impact analysis did not expressly discuss the costs, benefits, or practicality of applying valve requirements to gathering lines; and (2) the final rule did not adequately explain why applying the requirements to gathering lines was appropriate.

Petition for Review of PHMSA Administrative Enforcement Decision Filed in the Eleventh Circuit

On December 15, 2022, Metal Conversion Technologies, LLC (MCT), filed a petition for review in the U.S. Court of Appeals for the Eleventh Circuit challenging PHMSA's July 25, 2022, administrative appeal decision upholding a non-compromise order in an enforcement action finding that the company committed four violations of the hazardous materials regulations and assessing a civil penalty. Metal Conversion Technologies, LLC v. PHMSA, No. 22-14140 (11th Cir.). On January 31, 2023, the court issued an order directing the parties to address whether the petition for review is timely. The Department filed its response on February 14,

2023, explaining that the petition for review was filed well beyond the 60-day filing deadline in 49 U.S.C. § 5127(a) and that the late filing was not explained in the petition. In its response to the court's jurisdictional question, MCT argued that the 60-day filing deadline in 49 U.S.C. § 5127(a) is not jurisdictional and so is subject to tolling, and that MCT is entitled to postponement or tolling of the statute's 60-day deadline for appeal.

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