U.S. Department of Transportation

DOT LITIGATION NEWS

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Highlights

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The Great Lakes St. Lawrence Seaway Development Corporation has no updates for this edition of the DOT 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 Considers Whether to Eliminate Chevron Deference

The U.S. Supreme Court has granted certiorari in two cases to consider whether to eliminate or narrow Chevron deference. Loper Bright Enterprises v. Raimondo (No. 22-451) (U.S.); Relentless, Inc. v. Dep't of Commerce (No. 22-1219) (U.S.). The Court will hear argument in the two cases on January 17, 2024, and is expected to issue a decision by June.

Under the doctrine described in Chevron U.S.A. v. NRDC, 467 U.S. 837 (1984), a federal court will defer to an agency's interpretation of a statute it administers if: (1) the statute does not unambiguously answer the interpretive question; (2) the agency's interpretation is reasonable; and (3) the agency has used sufficiently formal or otherwise statutorily proper procedures to issue the interpretation. Chevron deference is based on an understanding that when Congress enacts an ambiguous statute and gives an agency authority to implement the statute, Congress has delegated interpretive authority to the agency.

The two cases before the Court involve the Magnuson-Stevens Fishery Conservation and Management Act, which seeks to prevent overfishing and to promote conservation. The Act directs the Commerce Department to review and approve fishery management plans to issue implementing regulations. The petitioners challenged agency rules, adopted in connection with these plans, that require fishing vessel owners to pay for monitors who collect data during fishing trips. Both Courts of Appeals upheld the rules under Chevron. One court held that the statute was ambiguous as to the agency's authority to enact the rule and that the agency's interpretation was reasonable. Loper Bright Enterprises v. Raimondo, 45 F.4th 359 (D.C. Cir. 2022). The other held that the agency's interpretation was reasonable but declined to decide whether the statute was ambiguous. Relentless, Inc. v. Dep't of Commerce, 62 F.4th 621 (1st Cir. 2023).

In its brief in Loper Bright, the United States argues that Chevron provides a clear and appropriately bounded framework for judicial review, gives appropriate weight to agency expertise, encourages national uniformity in federal law, and keeps the courts out of policymaking. The United States also contends that *stare decisis* counsels against overruling Chevron, especially since Congress has declined to eliminate Chevron and overruling Chevron would cause significant disruption to private reliance interests. And the United States rebuts petitioners' argument that Chevron violates Article III of the Constitution and the APA by taking away courts' authority to interpret statutes: it explains that a court deferring under Chevron still engages in statutory interpretation and concludes that Congress delegated interpretive authority to the agency.

Justice Jackson is recused in Loper Bright. On October 13, after briefing was completed in that case, the Court granted certiorari in Relentless, in which none of the justices are recused.

The Loper Bright briefs can be found here: https://www.supremecourt.gov/search.aspx?filename=/docket/docketfiles/html/public/22-451.html. The Relentless briefs can be

found here: https://www.supremecourt.gov/search.aspx?filename=/docket/docketfiles/html/public/22-1219.html.

Supreme Court Denies Petition for Certiorari in States' Challenge to Executive Order 13990

On October 10, 2023, the U.S. Supreme Court denied a petition for certiorari filed by the State of Missouri and twelve other states challenging Executive Order 13990 and the Interagency Working Group's Technical Support Document, which provided interim estimates for the social cost of greenhouse gases. Missouri, et al. v. Biden, et al., (No. 22-1248) (U.S.). The States had filed the petition on June 25, 2023, after the U.S. Court of Appeals for the Eighth Circuit denied their 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, holding that the States failed to allege a cognizable injury traceable to the publication of the interim estimates. Missouri, et al. v. Biden, et al., 52 F.4th 362 (8th Cir. 2022), *aff'g* 558 F. Supp. 3d 754 (E.D. Mo. 2021).

In a similar case, thirteen states challenged Executive Order 13990 and the Interagency Working Group's Technical Support Document. 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. Louisiana, et al. v. Biden, et al., 64 F.4th 674 (5th Cir. 2023), *rev'g* 585 F. Supp. 3d 840 (W.D. La. 2022). In dismissing the action for lack of jurisdiction, the Fifth Circuit held that the 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 Working Group, the plaintiffs failed to satisfy the injury-in-fact prong of standing.

United States Files Amicus Brief in Supreme Court Railroad Preemption Case

On November 21, 2023, the United States filed an amicus brief, at the invitation of the U.S. Supreme Court, expressing its views regarding the petition for certiorari filed by the State of Ohio in Ohio v. CSX Transportation, Inc., No. 22-459 (U.S.). Ohio's petition, filed on November 10, 2022, seeks review of a Supreme Court of Ohio decision that struck down a state statute that prohibits railroads from blocking railroad crossings for more than five minutes, with certain exceptions.

In the Supreme Court of Ohio's August 17, 2022, decision, the majority held that Ohio's blocked crossing statute is preempted by the Interstate Commerce Commission Termination Act (ICCTA). 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 ICCTA. 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 focus of Ohio's petition is on local governments' need to implement blocked crossing statutes as a matter of public safety. The petition urges the Court to grant certiorari because the 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 ICCTA preempts state laws that limit the amount of time trains may park on grade crossings, and second, whether the FRSA's savings clause permits states to enforce such laws, thus protecting those laws from preemption. CSX filed an opposition to the petition on February 16, 2023, primarily arguing that the 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.

On March 20, 2023, the Court requested the views of the United States. In its amicus brief, the United States urges the Court to deny certiorari because the Supreme Court of Ohio correctly decided that Ohio's blocked crossing statute is preempted by ICCTA. Moreover, all federal courts of appeals and state courts of last resort that have considered blocked crossing statutes similar to Ohio's statute have found these laws to be preempted by federal law, whether by ICCTA, the FRSA, or both.

With respect to the FRSA, the United States explains that while it is disputed whether the FRSA is applicable to the preemption analysis, Ohio's blocked crossing statute is clearly preempted by ICCTA because it directly regulates rail transportation, which falls within the exclusive jurisdiction of the Surface Transportation Board under ICCTA. In any event, even if the FRSA is applicable, Ohio's statute is preempted by the FRSA and does not fall within either of the FRSA's two exceptions. Ohio's statute fails to fall within the first exception because FRA has promulgated regulations that cover – or "substantially subsume" – the subject matter of Ohio's blocked crossing statute. Ohio's statute also fails to fall within the second exception because it does not address an essentially local hazard, is incompatible with FRA's safety regulations, and unreasonably burdens interstate commerce.

The briefs in the case can be found here: https://www.supremecourt.gov/search.aspx?filename=/docket/docketfiles/html/public/22-459.html.

Settlement Reached in Oregon Sacred Site, Religious Freedom Case

On October 5, 2023, the federal defendants reached a settlement with plaintiffs in Slockish, et al. v. USDOT, et al., No. 22-31 (U.S.), a case arising from the destruction of a Native America religious site during work on a federally aided highway-widening project along US-26 in Clackamas County, Oregon in 2008. As part of the settlement, plaintiffs dismissed their pending petition for certiorari before the U.S. Supreme Court, which plaintiffs had filed on October 3, 2022, seeking review and reversal of the U.S. Court of Appeals for the Ninth Circuit's November 2021 decision dismissing their claims as moot.

Plaintiffs, a group of Yakima Indian Nation members, primarily argued that the destruction of their sacred site and associated artifacts by the highway's construction, known as the "Wildwood-Wemme" project, violated the Religious Freedom Restoration Act (RFRA) because it prevented them from practicing their religious ceremonies at that location.

On June 11, 2018, the U.S. District Court for Oregon dismissed the RFRA claim. Slockish v. FHWA, 2018 WL 2875896 (D. Or. 2018). The court held that the plaintiffs had not established "substantial burden" under RFRA by showing "they are being coerced to act contrary to their religious beliefs under the threat of sanction or that a governmental benefit is being conditioned upon conduct that would violate their religious beliefs," as is the requirement in the Ninth Circuit. In February 2021, the district court granted summary judgment on plaintiffs' remaining claims. Slockish v. FHWA, 2021 WL 683485 (D. Or. 2021).

Plaintiffs appealed to the U.S. Court of Appeals for the Ninth Circuit. On November 24, 2021, the court dismissed plaintiff's appeal as moot. The Ninth Circuit found that any effective relief would require modification of the highway owned by the Oregon Department of Transportation, which the federal defendants lack the authority to do and which the court could not order because the Oregon Department of Transportation had already been dismissed from the case. Slockish v. USDOT, 2021 WL 5507413 (9th Cir. 2021). Plaintiffs filed a motion for panel rehearing and petition for rehearing *en banc*, which the Ninth Circuit denied on May 6, 2022.

The settlement agreement will allow plaintiffs to reconstruct their religious site in cooperation with the Bureau of Land Management and recommence their religious practices on federal land within the highway easement area, in accordance with site plans approved by the Oregon Department of Transportation. It also requires, among other things, that plaintiffs be notified of any future widening projects in the area.

Departmental Litigation in Other Federal Courts

D.C. Circuit Rejects Challenge to Denial of Exemption for Pulsating Brake Lamps

On July 7, 2023, the U.S. Court of Appeals for the D.C. Circuit issued an opinion denying Intellistop, Inc's, petition for review of FMCSA's denial of its application for a regulatory exemption. Intellistop v. USDOT, 72 F.4th 344 (D.C. Cir. 2023). Intellistop, a manufacturer of an aftermarket module designed to alter the function of existing vehicle brake lamps, requested an exemption that would have permitted all motor carriers to utilize pulsing brake light technology by altering the function of the vehicle's original brake lights.

Motor carriers that equip their vehicles with the Intellistop device risk violating an FMCSA regulation requiring "steady burning" brake lights, under 49 C.F.R. part 393. Intellistop therefore applied for an industry-wide exemption that would allow any motor carrier to use its product. 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. 49 U.S.C. § 31315(b)(1). Here, the agency concluded that Intellistop had not met its burden of demonstrating that the exemption would

meet this standard, and it therefore denied Intellistop's request.

In a unanimous *per curiam* opinion, the court held that FMCSA acted reasonably and adequately with a sufficient explanation for its decision. The court rejected Intellistop's argument that FMCSA ignored or mischaracterized prior studies finding that flashing or pulsing brake lights have potential safety benefits. The court noted that FMCSA acknowledged these potential benefits and that FMCSA reasonably concluded that the studies did not address a lack of evidence about whether widespread adoption of Intellistop's device would cause driver confusion. The court held that FMCSA reasonably distinguished prior exemptions that involved *additional* flashing lights rather than a device that pulses a vehicle's *existing* brake lights. The court also noted that FMCSA was reasonably concerned that Intellistop's device would take vehicles out of compliance with the Federal Motor Vehicle Safety Standards promulgated by NHTSA and that it would be difficult to monitor whether the device was installed by manufacturers, distributors, dealers, rental companies, or motor repair businesses in violation of the "make inoperative" prohibition of 49 U.S.C. § 30122.

Intellistop did not pursue any additional judicial relief through either a petition for or rehearing or rehearing *en banc*, or by seeking Supreme Court review.

Second Circuit Holds That Federal Aviation Act Does Not Preempt Design Defect Claims Regarding Military Aircraft

On November 21, 2023, the U.S. Court of Appeals for the Second Circuit held 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 because the Act's design standards do not apply to military aircraft. Jones v. Goodrich, 2023 WL 8045773 (2d Cir. 2023). The decision adopted the arguments of the United States, which filed an amicus brief at the request of the court.

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, invited FAA and the Department of Defense to weigh in.

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 Federal Aviation 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 court agreed with the United States, holding that "Congress did not intend for military aircrafts to fall within the [Federal Aviation Act's] preempted 'field of air safety" and that "the Army's ad-hoc contract negotiations cannot extend the scope of the field Congress intended to occupy."

The United States contended that the proper framework for assessing 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. The court remanded to the district court for consideration of whether and how the doctrine applies to this case.

Oral Argument Heard in Challenge to NHTSA's CAFE Standards for Model Years 2024–2026 Passenger Cars and Light Trucks

On September 14, 2023, a panel of judges from the U.S. Court of Appeals for the D.C. Circuit heard a lengthy oral argument about the 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, Natural Resources Defense Council, et al. v. NHTSA, et al., No. 22-1080 (D.C. Cir.), 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. Numerous intervenors and amici are also participating, with some in support of the petitioners and others defending the rule.

Chief Judge Srinivasan and Judges Katsas and Pan presided over the oral argument. The argument primarily focused on two issues: whether NHTSA improperly considered certain types of vehicles, such as electric vehicles, in its rulemaking analysis, contrary to the statutory provisions of the Energy Policy and Conservation Act (EPCA), and whether NHTSA failed to adequately consider the potential of high-compression ratio (HCR) engine technologies for certain vehicle types, such as trucks. NHTSA defended the rule in both respects, arguing that its consideration of electric vehicles was permissible and that its consideration of the HCR technology was reasonable.

In light of the consolidated challenges to NHTSA's 2022 final rule, the D.C. Circuit is also continuing to hold 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). Competitive Enterprise Institute v. NHTSA, No. 20-1145 (D.C. Cir.).

Briefing Completed in Petition for Review of Texas Oil Terminal License

Briefing has been completed in Citizens for Clean Air & Clean Water in Brazoria County, et al v. USDOT, et al., No. 23-60027 (5th Cir.), in which 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 petition 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). 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; and (5) the decision violates DWPA licensing criteria by omitting a determination of whether allowing SPOT's new export capacity would advance domestic energy sufficiency.

Respondents filed their answering brief on July 10, 2023, asserting that the petition for review should be denied. Respondents argue that the government complied with NEPA when it took the requisite hard look at (1) the risk of an oil spill from the project, (2) the project's effect on protected Gulf species, including the Rice's whale, and (3) the Project's potential impacts to air quality. Respondents further argue that the agencies complied with NEPA because the agencies were not required to analyze the petitioners' preferred alternative of a small capacity facility and that the agencies appropriately evaluated the no-action alternative. Lastly, respondents argue that MARAD complied with the DWPA. As a threshold matter, respondents argue that the petitioners do not fall within the zone of interest protected by Section 5 of the DWPA. However, even if the petitioners did fall within the zone of interest, respondents argue that MARAD was not required to deny the application within the Act's timeline. Additionally, respondents argue that MARAD reasonably determined that the Port is in the national interest and consistent with national energy-sufficiency goals.

Intervenors, SPOT Terminal Services, LLC and Enterprise Products Operating LCC, filed their brief on July 17, 2023. Intervenors argue that petitioners have not established an Article III injury-in-fact and therefore do not have standing. Intervenors further argue that the government satisfied NEPA's hard look requirement when it considered (1) a range of oil-spill sizes and locations, including a worst-case spill, (2) the impacts of most likely spills on species, (3) the potential impacts, including cumulative impacts, on the Rice's whale, and (4) the evaluation of the project's ozone impacts through an analysis of ozone precursors. Additionally, intervenors argue that the agencies alternatives analysis satisfied NEPA requirements because the agencies were not

required to consider the reduced capacity alternative and because the no-action alternative was based on reasonable predictions drawn from current conditions. Lastly, intervenors argue that the court lacks jurisdiction over the petitioners' DWPA timeline claim and that the DWPA does not compel vacatur.

Petitioners filed their reply brief on July 31, 2023. Petitioners assert that they have adequately established Article III standing because members of petitioners' organization could directly face injury from the proposed project. For the NEPA hard look claims, petitioners reiterate the arguments from their initial brief and reemphasize that the agencies did not consider (1) probable oil spill sizes and impacts, (2) oil spill impacts on species, including the Rice's whale, and (3) the proposed project's total ozone impacts. Petitioners further argue that they adequately raised a smaller capacity alternative in their comments on the SPOT EIS and that the agencies did not appropriately evaluate the no action alternative. Petitioners argue that they are within the DWPA's "zone of interest" because they comprise a class Congress authorized to sue under the DWPA as they participated in the administrative proceeding and are adversely affected by the agency's decision. Lastly, petitioners reiterate their assertion that MARAD failed to determine whether the project "will be good for national energy sufficiency." As such, petitioners request the court to vacate the ROD and the FEIS and remand to MARAD.

The court heard oral argument in the case on November 8, 2023.

Briefing Begins in Multiple Legal Challenges to the LNG by Rail Rule

The U.S. Court of Appeals for the D.C. Circuit recently removed from abeyance a group of consolidated cases challenging PHMSA's July 2020 Liquefied Natural Gas (LNG) by Rail Rule and issued a scheduling order to set the briefing schedule. Sierra Club, et al. v. USDOT, et al., Nos. 20-1317, 20-1318, 20-1431, & 21-1009 (D.C. Cir.).

PHMSA published its LNG by Rail final rule on July 24, 2020. This final rule modified the Hazardous Materials Regulations (49 CFR parts 171-180) to authorize the transportation of liquefied natural gas by rail in DOT-113 specification tank cars, subject to certain operational controls (including route restrictions and stronger, thicker outer tanks).

On August 18, 2020, a pair of petitions for review of the LNG by Rail final rule were filed in the D.C. Circuit, one by a coalition of seven environmental groups, the other by a coalition of attorneys general from fourteen states and the District of Columbia.

Subsequently, the Puyallup Indian Tribe of Washington State petitioned the U.S. Court of Appeals for the Ninth Circuit for judicial review of the LNG by Rail final rule. The Ninth Circuit transferred the Puyallup Tribe's case to the D.C. Circuit.

On January 8, 2021, the Puyallup Tribe filed another petition with the D.C. Circuit for judicial review of PHMSA's denial of its administrative appeal of the LNG by Rail final rule. The D.C. Circuit has consolidated the four cases.

On February 24, 2021, PHMSA filed an unopposed motion to hold the case in abeyance for six months pending its

implementation of Executive Order 13990. The court granted an indefinite abeyance on March 16, 2021, and directed PHMSA to file status reports at 90-day intervals starting on June 14, 2021. On May 17, 2023, the petitioners filed a joint motion to lift the abeyance, which the court granted on July 18, 2023.

On September 1, 2023, the government filed a letter with the court notifying it that PHMSA published the LNG by Rail Suspension final rule, which suspends the LNG by Rail final rule from October 31, 2023, until PHMSA completes a companion rulemaking or until June 30, 2025, whichever is earlier.

Petitioners filed their opening briefs on October 13, 2023. In their briefs, petitioners argue that PHMSA: (1) violated its duty under the Hazardous Materials Transportation Act to ensure safe transportation of hazardous materials; (2) violated the APA by introducing a newly-designed tank car in the final rule that was not a logical growth of the NPRM; (3) violated NEPA by not preparing an EIS given the possible catastrophic consequences of LNG by rail transportation, by introducing an unforeseeable selected alternative (a newly-designed tank car) without providing an opportunity for public comment, and by failing to take a "hard look" at the final rule's environmental impacts and its disparate impact on the Tribe; and (4) violated the National Historic Preservation Act and other requirements by failing to engage in meaningful government-to-government consultation with the Tribe.

The government's brief is due January 12, 2024, and the petitioners' reply briefs are due February 20.

On Remand, FRA Issues New Decision on BNSF Petition to 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.). On June 21, 2023, FRA issued a new decision (June 2023 decision letter), in which it again concluded that expanding BNSF's existing waiver is unjustified at this time. Also on June 21, the Fifth Circuit directed the parties to file simultaneous letter briefs, addressing what action the court should take in light of FRA's June 2023 decision letter. The parties completed the letter briefing on July 14.

BNSF's 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 original 2022 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. 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 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 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, and retained jurisdiction over the matter.

On remand, FRA reconsidered BNSF's expansion request and requested additional data and information relating to the implementation of its ATI program. In its June 2023 decision letter denying the expansion of BNSF's waiver, FRA explained that the public interest and railroad safety still favor addressing ATI issues through the RSAC process and that BNSF had not provided data demonstrating that expanding the use of ATI would increase railroad safety.

At the Fifth Circuit's direction, the parties filed letter briefs addressing FRA's new decision. BNSF again argued that the new decision was unlawful. FRA maintained that the decision was lawful and that the court should take no further action or, in the alternative, should order full briefing and arguments. On August 18, 2023, BNSF filed a new petition for review, challenging FRA's June 2023 decision letter; the court filed the petition in the existing case docket. The parties await further direction from the court.

INGAA Challenges PHMSA 2022 Gas Transmission Rule in the D.C. Circuit

On July 10, 2023, a large industry trade group, the Interstate Natural Gas Association of America (INGAA), filed a petition for review of PHMSA's August 2022 final rule enhancing the safety of gas transmission pipelines. 87 Fed. Reg. 52,224 (Aug. 24, 2022). This followed a lengthy administrative reconsideration proceeding. The case is INGAA v. PHMSA, (D.C. Cir. No. 23-1173).

Petitioner challenges five discrete, technical requirements of the final rule. These deal

with new regulations on corrosive constituents in the gas stream, immediate repair criteria for anomalies, the safety factor for allowing dent anomaly assessment using engineering critical assessment, and the direct examination step of stress corrosion cracking direct assessment.

INGAA filed its opening brief on December 5, 2023, arguing that PHMSA's rule should be set aside because PHMSA failed to: (1) provide a cost-benefit analysis on certain aspects of the rule; (2) consider the recommendations of the Technical Pipeline Safety Standards Committee; (3) provide adequate notice of two requirements in the rule; and (4) explain why the benefits of the challenged standards justify their cost as required by statute.

PHMSA's response brief is due January 4, 2024, with any reply brief by petitioner due January 25.

Court Dismisses Challenge to DOT Disadvantaged Business Enterprise Program; New Challenge Filed

On September 7, 2023, the U.S. District Court for the Middle District of Pennsylvania dismissed a constitutional challenge to DOT's Disadvantaged Business Enterprise (DBE) program, which seeks to ensure non-discrimination in DOT-assisted highway, transit, and airport contracting. Mueller v. Carroll, 2023 WL 5804323 (M.D. Pa. 2023). On October 26, 2023, a new constitutional challenge to the same program was filed in the U.S. District Court for the Eastern District of Kentucky. Mid-America Milling Co., et al. v. USDOT, et al., No. 23-72 (E.D. Ky.).

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 Pennsylvania case were 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 Ms. Mueller (as it claimed) in light of significant involvement in the company by Mr. Walters and his companies. Plaintiffs sued PennDOT and DOT, asserting that PennDOT would have granted NCS's application if Mr. Walters was not White and that this purported discrimination was illegal.

In its decision granting DOT's and PennDOT's motions to dismiss, the court held that plaintiffs lacked Article III standing because an injunction prohibiting DOT and PennDOT from considering race in the certification process would not redress their alleged injuries. The court noted that PennDOT's denial of NCS's application was based not on race, but on NCS's failure to demonstrate that the company's purported owner—Ms. Mueller—in fact owned a majority of the company and exercised independent control over it. The court held that it would not "interpose to short-circuit the certification process or arbitrarily excuse plaintiffs from evidentiary burdens all other applicants must bear."

Plaintiffs in the Kentucky case are Mid-America Milling Company and Bagshaw Trucking, two companies based in Indiana that allege that they bid on contracts for

federally funded surface transportation projects. Plaintiffs contend that they are unable to compete on an equal footing with DBEs and that the program discriminates on the basis of race and gender in violation of the equal protection component of the Due Process Clause of the Fifth Amendment.

District Court Rules in Center for Biological Diversity v. MARAD; Parties Appeal to Fourth Circuit

On August 4, 2023, after finding that MARAD violated Section 7 of the ESA for failure to consult on the FY2018 James River Project Grant issued under the U.S. Marine Highway Program (Program) and ordering supplemental briefing on proposed remedies, the U.S. District Court for the Eastern District of Virginia ordered MARAD to initiate an ESA Section 7 consultation within 120 days. Center for Biological Diversity v. MARAD et al., No. 21-132 (E.D. Va.).

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 (NMFS) to ensure that the actions of the 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 programmatic consultation on the Program per a schedule established by the court.

On March 31, 2023, the court issued an Order and corresponding Memorandum Opinion granting in part and denying in part the parties' cross motions for summary judgment. The court first held that plaintiff had standing to challenge MARAD's failure to engage in Section 7 consultation for the 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.

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.

On May 2, the court ordered supplemental briefing on the questions of whether the required Section 7 consultation should be informal or formal, and whether the court should retain jurisdiction pending completion of the consultation.

On May 16, 2023, the government filed supplemental briefing regarding remedy. The government argued that MARAD intends to comply with the court's order regarding Section 7 consultation by engaging in informal consultation, which is consistent with the ESA and the implementing regulations. The government further argued that the court cannot require MARAD to engage in formal consultation because (1) the court did not conclude that the project is likely to adversely affect the Atlantic sturgeon and (2) the responsibility to make an effects determination rests with the action agency, which can, depending on the determination, require concurrence from NMFS. As such, the court may neither direct the substance of MARAD's determination (*i.e.*, whether the grant is likely to adversely affect Atlantic sturgeon) nor supervise the step-by-step actions taken by MARAD to comply with the Court's order to consult for the FY2018 James River project (i.e., whether to engage in informal or formal consultation).

Plaintiff filed its supplemental brief on May 30. Plaintiff argued that based on the available facts, MARAD cannot make a valid not likely to adversely affect determination and therefore the court should order formal consultation. Plaintiff further argued that should the court allow informal consultation, a biological assessment should be required.

The government filed their reply on June 6, 2023. The government reiterated that requiring formal consultation for this matter is outside of the court's authority. The government further argued that the preparation of a biological assessment is not legally required for informal consultation.

On August 4, 2023, the court ordered MARAD to initiate Section 7 consultation on the FY2018 James River grant within 120 days. Responding to the parties' arguments in their additional briefing, the Court declined to order MARAD to engage in formal consultation. It also declined to order MARAD to prepare a biological assessment at this time, reasoning that doing so would prejudge the manner in which MARAD may comply with its consultation requirements.

The court concluded that it was appropriate to retain jurisdiction over the matter given that MARAD has outlined a multi-stage process to comply with the court's initial consultation order. As such, the court ordered MARAD to submit periodic status reports to the court. MARAD requested initiation of informal consultation with NMFS on September 29, 2023, and MARAD submitted its first status report on October 2, 2023. Subsequent status reports are required to be submitted every 60 days thereafter, until terminated upon further order from the court.

In mid-October, both parties appealed the district court's decision to the U.S. Court of Appeals for the Fourth Circuit. Center for Biological Diversity v. MARAD, et al., No. 23-2033 (4th Cir.).

Three Suits Challenge Environmental Review of the Manhattan Central Business District Tolling Program

Three lawsuits have been filed over a first-in-the-nation congestion pricing program in New York City. Two lawsuits have been filed in the U.S. District Court for the District of New Jersey challenging the environmental review of the Manhattan Central Business District (CBD) Tolling Program. The first lawsuit was filed on July 21, 2023, by the State of New Jersey, New Jersey v. USDOT, et al., No. 23-3885 (D. N.J.), and the second lawsuit was filed on November 1, 2023, by the Mayor of Fort Lee, New Jersey and a Fort Lee resident, Sokolich, et al. v. USDOT, et al., No. 23-21728 (D. N.J.). The third lawsuit was filed on November 22, 2023, in the U.S. District Court for the Southern District of New York by two pro se litigants who live in Manhattan. Chan, et al. v. USDOT, et al., No. 23-10365 (S.D.N.Y.).

The CBD Tolling Program creates a congestion pricing program in certain parts of Manhattan by tolling vehicles entering or remaining in the Manhattan CBD. The CBD tolling program seeks to reduce the number of vehicles entering the Manhattan CBD, reduce the daily vehicle-miles traveled in the Manhattan CBD, and generate revenue for transportation improvements in the Metropolitan Transit Authority's Capital Plan or successor plans. Some roadways within the Manhattan CBD are part of the National Highway System and receive federal funding. In order to toll these roadways, FHWA, through their Value Pricing Pilot Program (VPPP), must evaluate the potential effects of the CBD tolling program in accordance with NEPA. In June 2019, the CBD Tolling program was submitted to FHWA for review. On May 12, 2023, FHWA issued an EA, and on June 23, 2023, FHWA issued a FONSI.

Plaintiff in the first lawsuit filed its motion for summary judgment on November 10. Plaintiff argues that defendants violated NEPA and the APA by (1) failing to prepare an EIS; (2) failing to consider the extent of direct, indirect, and cumulative effects of the program in New Jersey and propose adequate mitigation measures; (3) failing to adequately consider the impacts of certain

traffic pattern shifts leading to noise and air pollution and limiting the analysis to a subset of New Jersey counties and propose adequate mitigations; (4) failing to consider the impact on New Jersey communities with environmental justice concerns; (5) failing to consider a reasonable range of alternatives; and (6) failing to afford New Jersey and its transportation agencies a meaningful opportunity to engage in the consultation process. Plaintiff further argues that defendants violated the Clean Air Act and the APA by failing to conduct a transportation conformity analysis for New Jersey's State Implementation Plan and failing to provide New Jersey a reasonable opportunity for consultation on the project's transportation conformity.

The government's response brief is due December 15.

The second lawsuit is a putative class action on behalf of commuters to New York City who will allegedly be subjected to increased costs, inconvenience, and negative health impacts as a result of the CBD Tolling Program. Plaintiffs propose two classes: (1) the Inconvenience, Traffic, and Expense Class; and (2) the Asthma/Respiratory Distress Class. Like the initial lawsuit, this lawsuit alleges that FHWA failed to properly conduct an environmental assessment that considered impacts to New Jersey. Plaintiffs request that the court vacate FHWA's EA and FONSI and order a new assessment, in addition to other injunctive relief (*e.g.*, institution of a medical monitoring program).

The third lawsuit was filed by two New Yorkers who live in Battery Park City (BPC), which is within the CBD, and also names as plaintiffs "Does 1-200." Plaintiffs allege, among other things, that FHWA failed to adequately consider the tolling program's alleged impacts on BPC, such as increased traffic and pollution.

Briefing schedules have not been set for the two later-filed cases.

Briefing Completed in Former BTS Employee's Ninth Circuit Appeal in Title VII Case

On September 28, 2023, briefing was completed in the appeal of a Title VII case filed by Cheryl Young, a former employee of the Bureau of Transportation Statistics (BTS). 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 when she was reassigned to a new position within BTS. 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, No. 19-1411, 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.

On December 19, 2022, the district court granted summary judgment in favor of the government on Young's constructive removal and non-selection claims, the two remaining claims in the case. 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. 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. On February 15, 2023, Young filed a notice of appeal in the U.S. Court of Appeals for the Ninth Circuit.

In her opening brief, filed on May 26, 2023, Young argued that she was constructively discharged because her position was targeted to receive the voluntary retirement incentive, leaving her to decide between accepting the retirement incentive offer or facing another potential reassignment. In support of her non-selection claim, she claimed that DOT hired two younger candidates instead of reserving certain of their responsibilities for the position the agency had set aside for her reinstatement.

In its July 25, 2023, response brief, DOT argued that the district court correctly held that no reasonable fact-finder could conclude that Young meets the high bar of showing that she faced discriminatory working conditions that were objectively intolerable to establish her constructive discharge claim because she remained working at DOT for over six years after the job reassignment she alleged was discriminatory. In addition, she voluntarily opted to apply for an incentive payment to retire. Further, she failed to establish a prima facie case of age discrimination in support of her non-selection claim; she offered no evidence that DOT denied her a position for which was qualified or that a substantially younger and inferior candidate was selected over her. Alternatively, DOT argued that the Ninth Circuit could affirm the district court's grant of summary judgment in favor of the government because Young failed to comply with mandatory administrative presentment requirements for her constructive discharge and non-selection claims, which are not "reasonably related" to the allegations of discrimination she previously raised before the EEOC.

Recent Litigation News from DOT Modal Administrations

Federal Aviation Administration

D.C. Circuit Affirms FAA Decision Withholding Boeing 737 MAX Recertification Records Under FOIA

On June 30, 2023, the U.S. Court of Appeals for the D.C. Circuit affirmed the district court's favorable summary judgment ruling for the FAA in Flyers Rights Education Fund, Inc., et al. v FAA, 71 F.4th 1051 (D.C. Cir. 2023). The court determined that FAA properly withheld Boeing 737 MAX recertification records as confidential commercial information under Exemption 4 in its response to Flyers' Rights November 2019 request for documents under the Freedom of Information Act (FOIA). The court held as follows with respect to four principal issues: (1) generic promises by FAA to be transparent about the recertification process for the Boeing 737 MAX fell "far short of an explicit representation that FAA would disclose the disputed documents" to the public; (2) the means of compliance developed and used by Boeing to demonstrate compliance with certification standards was not a body of law (and expressing doubts that the "secret law doctrine" is within the scope of Exemption 4); (3) FAA comments incorporating Boeing's confidential commercial information were protected under Exemption 4 despite being authored by the agency; and (4) FAA met its burden of showing that it had disclosed reasonably segregable material by submitting detailed, nonconclusory declarations and a *Vaughn* index indicating that FAA segregated and released non-exempt information. For more information, see the Spring 2023 DOT Litigation News, pages 18-19, available at Litigation News Spring 2023 | US Department of Transportation.

FAA Prevails in Challenge to Amazon Air Cargo Facility in Lakeland, Florida

On October 12, 2023, the U.S. Court of Appeals for the Eleventh Circuit denied the petition for review in Lowman v. FAA, 83 F.4th 1345 (11th Cir. 2023). In this case, five owners of residential property in or near Lakeland, Florida challenged an FAA FONSI/ROD for approval of an Airport Layout Plan (ALP) for a Phase II Amazon Air Cargo Facility Development at the Lakeland-Linder International Airport.

This case concerns a FONSI/ROD that the FAA issued, based upon an EA, for proposed expansion of an Amazon air cargo facility at Lakeland-Linder International Airport (Phase II development). FAA's previous consideration of proposed Phase I airport development was part of petitioners' larger arguments. In 2015, the airport proposed amending its airport layout plan to add Phase I development consisting of three Maintenance, Repair, and Overhaul (MRO) service hangars and a cargo facility. While FAA was conducting its environmental review of Phase I, Amazon approached the airport about bringing its air cargo operations to the airport and developing a facility at the location designated for the MRO/air cargo project. In July 2018, the airport notified FAA about the proposed Amazon project and sought FAA's concurrence that, while the Amazon facility would require a different

orientation and result in additional operations as compared to the project assessed in the EA, the environmental impacts from the proposed air cargo project for Amazon were not significant and were sufficiently considered in the EA. FAA validated the new information, which included a new noise analysis, and determined that there would be no significant impacts and that no additional environmental review was needed. After a draft EA was issued for public review and comment, FAA issued a Final EA and FONSI/ROD approving the Phase I project. The Amazon air cargo facility, which became known as "Phase I," became operational in 2020.

In January 2020, before Phase I construction was completed, Amazon exercised its option under a ground lease with the airport to seek expansion of the air cargo facility. This required the airport to seek further FAA approval of the Phase II development project. FAA issued a FONSI/ROD approving Phase II in October 2021, after analyzing an EA prepared by the airport and considering public comments on the Draft EA. Petitioners filed a timely petition for review in December 2021 alleging that the Phase II ROD was arbitrary and capricious and not in accordance with the law. More detailed information about the history and background of the case, see the Fall 2022 DOT Litigation News, pages 16-17, available at Litigation News Fall 2022 | US Department of Transportation.

The Eleventh Circuit found in the agency's favor on the merits although it was not persuaded by the government's threshold arguments—lack of standing and failure to exhaust administrative remedies. Specifically, the court ruled that there was no improper segmentation of various actions, and that cumulative impacts and air quality impacts were properly analyzed under NEPA.

With regard to the argument that various actions (including the approval of Phase I and Phase II projects and the application of categorical exclusions for two discrete airport projects) were improperly segmented, the court noted that "the fact that a series of projects have been approved over a set period of time is not enough—without other evidence—to prove that an agency was improperly segmenting its review process in contravention of NEPA."

As to cumulative impacts, the court found that "the FAA's analysis was rigorous and detailed, and covered all of the factors that we have identified as necessary to include," citing to its recent decision for the FAA in litigation related to the South-Central Florida Metroplex initiative. Finally, as to air quality, the court held that "FAA did what it was required to do under NEPA and its regulations interpreting NEPA."

Court Upholds FAA Determination That Operation of a Vintage WWII Civil Aircraft for Paid Flight Instruction Violated FAA Regulations

On July 6, 2023, the U.S. Court of Appeals for the Eleventh Circuit issued an unpublished opinion denying the petition for review filed by Warbird Adventures, Inc. (Warbird). Warbird Adventures, Inc., v. FAA, 2023 WL 4363998 (11th Cir. 2023) (per curiam), *reh'g denied* (Aug. 7, 2023). Warbird's petition challenged FAA's decision that Warbird's operation of a vintage WWII aircraft for paid flight instruction violated 14 C.F.R. § 91.315. The only issue Warbird raised on appeal was whether section 91.315 prohibits providing flight instruction in an aircraft classified as a

limited category aircraft for compensation or hire. Warbird did not contest the civil penalty of $5,500 that FAA imposed for the violation.

Because limited category aircraft were originally produced for military combat during World War II and do not have standard airworthiness certificates, FAA restricts the operation of such aircraft under 14 C.F.R. § 91.315 as follows: "No person may operate a limited category civil aircraft carrying persons or property for compensation or hire."

In 2014, FAA's Office of the Chief Counsel issued an interpretation of 14 C.F.R. § 91.315 expressly stating that section 91.315's prohibition on carrying persons for compensation included carrying a flight student. Although Warbird had a copy of the 2014 interpretation, it also had a 2016 letter from an FAA inspector stating that § 91.315 did not prohibit paid flight instruction. In a 2019 encounter between Warbird's owner and two other FAA inspectors, the FAA inspectors advised Warbird that the 2016 inspector's letter was not the agency's position, the 2014 interpretation remained the agency's authoritative interpretation of section 91.315, and Warbird's operation might be in violation of the regulation. Nevertheless, on January 31, 2020, Warbird operated its P-40 Warhawk, a vintage plane from World War II classified as a limited category aircraft, carrying a person for compensation for the purpose of providing flight instruction. This operation was the basis for the decision from which Warbird sought judicial review.

In support of its petition, Warbird maintained, as it did in the administrative proceeding below, that section 91.315 did not prohibit carrying persons for compensation for the purpose of providing flight instruction. Warbird argued that (1) FAA's interpretation was not entitled to deference because it was inconsistent with prior agency pronouncements; (2) FAA's interpretation was incorrect as a matter of law because the original text of the 1946 regulation used the term "passengers" instead of the current term "persons;" and (3) FAA treated flight instruction differently in other regulations, and thus, the ordinary meaning of "carry" did not include flight instruction.

FAA countered that the plain language of the regulation prohibited the carriage of all persons in limited category aircraft for compensation, including persons paying for flight instruction. FAA noted that while some FAA regulations concerning the carriage of persons or property for compensation provide an exception for flight instruction, section 91.315 contains no exception. Further, the history of section 91.315 shows that the agency specifically changed the regulation to expand the prior prohibition of carrying "passengers" to the broader prohibition of carrying "persons." Lastly, the FAA argued that if the court found section 91.315 ambiguous, FAA's interpretation was entitled to deference.

The court did not reach the arguments regarding the FAA's interpretation. It concluded that section 91.315 is unambiguous and that Warbird's operation violated the regulation because a pilot giving flight instruction to a student is carrying a person for the purpose of the regulation. Finding no basis for reversing the FAA's decision, the court denied Warbird's petition.

Eighth Circuit Dismisses Pilot's Challenge to NTSB Dismissal of Appeal from an FAA Emergency Order of Suspension

On August 4, 2023, the U.S. Court of Appeals for the Eight Circuit dismissed for lack of Article III standing a commercial pilot's petition for review challenging the NTSB's dismissal of her appeal of the FAA's emergency order of suspension. McNaught v. Nolen, 76 F.4th 764 (8th Cir. 2023)

The case arose from an emergency order issued by FAA on July 14, 2022, suspending petitioner Amy McNaught's commercial pilot certificate until such time as she complied with FAA's request that she produce her pilot logbooks and other specified documents for inspection in accordance with 14 C.F.R. § 61.51(i)(1).

McNaught appealed the FAA's emergency order to the NTSB on July 22, 2022. Three days later, on July 25, 2022, McNaught complied with the FAA's request to inspect her logbooks, and FAA subsequently terminated her suspension. The ALJ denied FAA's motion to dismiss the appeal as moot and held an emergency hearing on the merits. After the ALJ ruled in FAA's favor on the merits, McNaught appealed to the full Board, alleging, among other things, that the ALJ's findings were erroneous.

The NTSB did not reach the merits of the case, finding that FAA's termination of McNaught's suspension rendered the entire case moot. The NTSB therefore found that it lacked jurisdiction, granted the FAA's motion to dismiss, and vacated the ALJ's decision. McNaught subsequently petitioned for review of the decision.

McNaught claimed that the NTSB erred in dismissing her case as moot because, even though FAA had terminated her suspension, the record of her suspension would be included in the Pilot Records Database (PRD). McNaught argued that the record of the enforcement action would "automatically disqualif[y]" her from future employment opportunities. McNaught also asserted that various purported evidentiary and legal errors by the ALJ necessitated the reversal of the ALJ's decision, and that the NTSB erred in not considering her arguments.

The court agreed with FAA's arguments on appeal that McNaught's petition presented a question of standing, rather than mootness, because the case concerned whether McNaught could demonstrate sufficient injury at the time she filed her petition for review in federal court to justify review by an Article III court. The court further noted that the mere fact that McNaught had statutorily-conferred standing before the NTSB under 49 U.S.C. §§ 44709(f) and 46110(a) did not confer her standing in federal court, where she had to independently satisfy Article III standing requirements.

The court stated that the "standing inquiry in this case comes down to whether McNaught has plausibly alleged an injury in fact," which is "'an invasion of a legally protected interest' that is 'concrete and particularized' and 'actual or imminent, not conjectural or hypothetical.'" Turning to McNaught's asserted injury, that her 14-day suspension would harm her prospects for future employment, the court held that McNaught had not "shown with particularity how her brief suspension for noncompliance with a records request would harm her job prospects," finding that she asserted only in "broad generalities" that her suspension would lead to "automatic disqualification" for jobs. The court concluded that without

more specific allegations or evidence of future harm, McNaught's "alleged harms based on how unspecified employers might interpret a brief suspension is 'too speculative for Article III purposes.'"

The court rejected McNaught's claim of reputational harm – that the mere inclusion of her suspension in the PRD would harm her reputation as a pilot sufficiently to establish standing. The court found that McNaught relied on "vague, blanket statements of reputational harm," *i.e.*, that the suspension was a "permanent stain on her record," which fell "well short of establishing the 'concrete and particularized' injury required for standing." The court further noted that the specific structure of the PRD vitiated McNaught's claims of reputational harm, as the PRD may only be accessed by potential employers for limited purposes when an individual pilot consents for the employer to view their records.

Court Upholds Challenge to FAA Denial of Petition for Discretionary Review of No Hazard Determination for San Diego County Wind Turbines

On August 15, 2023, the U.S. Court of Appeals for the Ninth Circuit granted the petition for review in Backcountry Against Dumps v. FAA, 77 F.4th 1260 (9th Cir. 2023). In this case, petitioners challenged FAA's denial of their petition for discretionary review of FAA's "no hazard" determination for 72 wind turbines associated with the Campo Wind Project (Project) in Campo, San Diego County, California, for failure to meet the requirements of 14 C.F.R. § 77.37. The court agreed with the petitioners' argument that section 77.37 and FAA's internal operating procedures (FAA Order 7400.2 6-3-17(c)) required FAA to provide personalized notice of the No Hazard Determination to petitioners. The court also found that the failure to receive such notice had prejudiced petitioners. The court vacated the FAA's October 15, 2021, denial of the 2021 petition for discretionary review and remanded the 2021 petition back to the FAA for consideration on the merits.

Court Grants Summary Judgment to FAA in FOIA Case Challenging Exemption 4 Withholdings of NATCA Collective Bargaining Communications

On June 2, 2023, the U.S. District Court for the Southern District of New York granted the FAA's motion for summary judgment and denied the plaintiff's cross-motion for summary judgement in Smolen v. FAA, 2023 WL 3818105 (S.D.N.Y. 2023). In this case, an air traffic controller challenged FAA's withholding of portions of draft Memoranda of Understanding (MOUs) relating to negotiations between FAA and the National Air Traffic Controllers Association (NATCA) about the transfer of the Newark International Airport (EWR) area from the New York Terminal Radar Approach Control Facility to the Philadelphia Air Traffic Control Tower as confidential commercial or financial information under Exemption 4 of FOIA. The court ruled in favor of FAA, holding that FAA appropriately applied the exemption. Under Exemption 4, courts apply a tripartite test to determine whether the records are: (1) a trade secret or commercial or financial in character; (2) obtained from a person (other than the U.S. government); and (3) privileged or confidential.

In applying this test, the court first reasoned that information regarding the terms under which represented employees were willing to offer their services is of the kind that would have commercial value to a company in the

business of offering labor services, noting that Exemption 4 is not limited to quintessential commercial information such as sales statistics or inventories. Second, the court found the redacted information, which contained NATCA's proposals and FAA's counter-proposals, qualified as "obtained from a person," explaining that proposals proffered, accepted, and/or accepted with compromise by both teams during a negotiation session made it difficult if not impossible to segregate NATCA proposals from FAA proposals. Third, the court found that FAA offered evidence that NATCA treats its draft MOUs and negotiation positions as confidential and does not share them with its members in order to avoid setting unrealistic expectations and that the FAA treated NATCA's draft negotiation proposals as confidential, which is the "customary practice in the Air Traffic Organization and union negotiations." The court determined that the documents qualified as confidential because FAA met its burden of showing that the disclosure of this material would cause foreseeable, significant harm to NATCA's commercial interests by undermining its ability to represent its members effectively in collective bargaining negotiations. Finally, the court ruled that plaintiff did not exhaust his administrative remedies with respect to his challenges to the adequacy of FAA's search because he did not include those arguments in his administrative appeal. More information about the case, see the Spring 2023 DOT Litigation News, pages 19-20, available at Litigation News Spring 2023 | US Department of Transportation.

Briefing Completed for Environmental Group Challenge to Air Tour Management Plan for California National Parks

On October 10, 2023, the parties completed briefing in a lawsuit challenging the FAA and National Park Service (NPS) decision 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.). Oral argument is scheduled for January 19, 2024.

Two environmental groups (Marin Audubon Society and Watershed Alliance of Marin), Public Employees for Environmental Responsibility (PEER), and an individual filed this case in March 2023. 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.

The Air Tour Management Plan sets the number of air tours permitted over the parks, as well as conditions and restrictions to mitigate their impacts (e.g., times they can fly, specific routes and altitudes, and the types of aircraft). FAA and NPS concluded

that the Plan would cause no significant environmental impacts.

Petitioners' main argument in their brief is that the use of a Categorical Exclusion (CATEX) violates the National Park Air Tour Management Act (NPATMA) because NPATMA specifically refers to preparation of an EA or EIS under NEPA. Petitioners argue that the agencies' use of a CATEX was arbitrary and capricious. In addition, petitioners believe extraordinary circumstances exist and therefore the use of a CATEX violates NEPA.

The FAA/NPS briefs contended that NPATMA does not eliminate the agencies' discretion to rely on a CATEX. The agencies followed the normal process to comply with NEPA. The Act's plain text neither mandates a particular level of NEPA review nor forbids the agencies from applying a categorical exclusion. The Act only requires that the agencies "each sign the environmental decision document required by" NEPA. The Act's structure and purpose reinforce the agencies' discretion to apply a categorical exclusion.

For more background, see the Spring 2023 DOT Litigation News, page 21, available at Litigation News Spring 2023 | US Department of Transportation.

Briefing Schedule Pending in Environmental Groups Challenge to SpaceX Starship Launches

On June 30, 2023, FAA answered the complaint in Center for Biological Diversity, et al. v. FAA, No. 23-01204 (D.D.C.). This lawsuit by 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.) challenges FAA's issuance of a vehicle operator license to SpaceX for its Starship/Super Heavy operations at Boca Chica, Texas. Space X intervened, and the agency filed the administrative record on September 29, 2023. On November 27, the parties filed a joint status report in which defendants note they are preparing a supplement to the record and plaintiffs note they intend to file a motion for leave to file a supplemental complaint.

Plaintiffs allege that FAA violated the APA and NEPA by preparing a programmatic EA (PEA) rather than an EIS because the launches will allegedly cause significant environmental impacts. Plaintiffs assert that the PEA failed to adequately 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). For more information, see the Spring 2023 DOT Litigation News, pages 11-12, available at Litigation News Spring 2023 | US Department of Transportation.

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 on interlocutory appeal to the U.S. Court of Appeals for the Seventh Circuit on the issue of whether claimant is limited to a bench trial against Boeing under the Death on the High Seas Act. As background, 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. The complaints contained counts against the United States alleging negligence in design, certification, Organization Designation Authorization oversight, and training.

County Airport Challenges Grant Enforcement Decision Requiring Access for Helicopter Air Tour Operators

Yavapai County, Arizona filed a petition for review in the U.S. Court of Appeals for the Ninth Circuit against FAA's decision requiring the County to afford access to two helicopter air tour operators. County of Yavapai, Arizona, et.al., v. FAA, et.al., No. 23-1421 (9th Cir.).

The FAA decision required the County, as owner and operator of Sedona-Oak Creek Airport, to permit Dakota Tours and Solid Edge access to conduct helicopter tour operations jointly at the airport. The County believed the operations would be unsafe because Dakota Tours lacked a certificate to provide commercial, non-scheduled aircraft operations under 14 C.F.R. part 135. The County reasoned further that Solid Edge could not safely operate with a non-Part 135 certificated operator. The Associate Administrator for Airports found that the County could not deny access to the airport based upon whether an operator possessed a Part 135 certificate. The Associate Administrator further found that the operations could be safely conducted and upheld the Director's Determination that the County's denial of access was unreasonable and violated Grant Assurance 22, Economic Nondiscrimination.

Solid Edge's motion to intervene is pending. FAA filed its Certified Index to the Administrative Record on August 25, 2023. The Ninth Circuit issued a briefing schedule with Petitioner's brief due October 2. The briefing schedule has been suspended while the parties participate in court-ordered mediation.

Elk Grove Village Challenges FAA Letter Advising Village to Work with City of Chicago on Update of O'Hare Fly Quiet Program

On October 9, 2023, Elk Grove Village, Illinois (Elk Grove) filed a petition for review of FAA's August 31, 2023, letter advising Elk Grove to work with the City of Chicago concerning the City's update of its nighttime runway rotation program at O'Hare International Airport, known as the Fly Quiet Program. The lawsuit was filed in the U.S. Court of Appeals for the D.C. Circuit. Elk Grove Village, Illinois v. FAA, et.al., (D.C. Cir. No. 23-1283). Elk Grove is located next to the airport. The petition seeks to compel FAA to analyze the alternative preferred by Elk Grove as a reasonable alternative and study which departure headings are most suitable in the environmental review process.

As background, the City of Chicago Department of Aviation and the O'Hare Noise Compatibility Commission have been working for years to update the Fly Quiet Program. FAA preliminarily approved the City's proposal from a technical and safety standpoint. In a letter to FAA, Elk Grove requested FAA consider another alternative. FAA responded by advising Elk Grove to work with the City. Elk Grove decided to challenge the FAA's response.

Trademark Infringement Challenge to the FAA's Use of "FAADroneZone"

On August 23, 2023, plaintiff Eric Hanscom, the registered owner of the "Drone Zone" trademark, filed a complaint against FAA in the U.S. District Court for the Southern District of California for trademark infringement (citing 15 U.S.C. § 1114) and unfair competition/false designation of origin (citing 15 U.S.C. § 1125(a)). Hanscom v FAA, No. 23-1550 (S.D. Cal.). The complaint primarily alleges three claims: (1) FAA's use of "FAADroneZone" infringes plaintiff's registered "Drone Zone" trademarks and service marks; (2) FAA's use of "FAADroneZone" will confuse and deceive the public into believing that the FAA's services are services associated with plaintiff or that there is otherwise a connection/affiliation between the two parties; and (3) FAA's use of "FAADroneZone" with knowledge that plaintiff owns, has used, and continues to use, his trademarks constitutes intentional conduct by FAA to make false designations of origin and false descriptions about its services. Plaintiff is seeking a temporary/permanent injunction of the FAA's use of "FAADroneZone" as well as a finding of willful infringement and resulting treble damages, actual damages (including for lost profits and goodwill), attorney's fees, and costs of suit.

Federal Highway Administration

Settlement Reached in Oregon Sacred Site, Religious Freedom Case

See Slockish, et al. v. USDOT, et al., No. 22-31 (U.S.), *supra* at 3.

Lawsuits Filed Challenging Environmental Review of the Manhattan Central Business District Tolling Program

See , New Jersey v. USDOT, et al., No. 23-3885 (D. N.J.); Sokolich, et al. v. USDOT, et al., No. 23-21728 (D. N.J.); Chan, et al. v. USDOT, et al., No. 23-10365 (S.D.N.Y.). *supra* at 14.

Summary Judgment Granted in NEPA Case Involving the Burlington Champlain Parkway Project

On May 17, 2023, the U.S. District Court for the District of Vermont granted FHWA's motion for summary judgment in case brought by Friends of Pine Street challenging the NEPA procedures for the Champlain Parkway project in Burlington, Vermont. Friends of Pine Street d/b/a Pine Street Coalition v. Shepherd, et al., No. 19-95 (D. Vt.).

On January 13, 2010, FHWA issued its ROD for the project, summarizing the results of a 2009 Final Supplemental Environmental Impact Statement (FSEIS). FHWA issued a

re-evaluation in 2017 and again in 2019. On June 6, 2019, plaintiff filed suit challenging the 2009 FSEIS as functionally obsolete and legally stale, requiring a supplemental or new EIS. The compliant specifically identified environmental justice concerns not addressed in the 2009 FSEIS. The court granted a voluntary remand to permit additional consideration of environmental impacts. In October 2019, FHWA rescinded the 2010 ROD due to concerns about the review of environmental justice factors. In July 2020, FHWA completed a Limited Scope Draft Supplemental Environmental Impact Statement (LSDSEIS) focusing on environmental justice concerns, which was released in final form in August 2021. FHWA then issued a ROD in final form on January 22, 2022, causing resumption of the litigation.

In granting FHWA's motion for summary judgment, the court held that the environmental review process, including the LSDSEIS, was appropriate. The court further held that FHWA conducted appropriate additional outreach to environmental justice communities and that FHWA satisfied the "hard look" requirement of NEPA.

Summary Judgment Granted in Challenge to Decatur, Alabama Project

On July 21, 2023, the U.S. District for the Northern District of Alabama granted FHWA's motion for summary judgment in a case concerning a new overpass and interchange on SR-20 near Decatur, Alabama. Eyster, et al., v. FHWA, et al., No. 20-172 (N.D. Ala.). The Alabama Department of Transportation (ALDOT) originally sponsored the project and FHWA approved it as a categorical exclusion (CE) in 2014. Several years after ALDOT stopped pursing the project, the City of Decatur revived it using a BUILD grant. FHWA then conducted a NEPA re-evaluation of the existing CE and on October 8, 2019, signed the re-evaluation, finding that the 2014 CE designation remained valid.

Plaintiffs, two trustees and representatives of property interests in the vicinity of the project, filed suit on February 6, 2020, alleging that defendants violated NEPA by inappropriately classifying the project as a CE in 2014 and approving the re-evaluation in 2019. Plaintiffs further alleged that defendants should have conducted a Section 4(f) analysis to account for alleged impacts to the nearby Wheeler National Wildlife Refuge.

The court granted FHWA's motion for summary judgment, finding that the claimed economic injuries are not within NEPA's zone of interests. The district court adopted a stance held by the Third, Ninth, and D.C. Circuits that a plaintiff cannot obscure economic interests by alleging only an environmental injury to maintain standing under NEPA. The court noted that plaintiffs were not natural persons but trustees and partners who brought the action on behalf of corporate entities that own lands near the project and opined that such entities are not capable of using land or appreciating the character and beauty of the lands. The court further noted that plaintiffs have commercial rather than conservation purposes, as the lands appeared to be used for farming purposes. The court further found that the claimed environmental injuries are pretextual proxies for their economic injuries and found that Congress did not intend to allow NEPA claims to be brought for the purpose of maintaining the market value of land that is being used for commercial purposes. The court concluded that plaintiffs failed to

establish that they suffered an injury-in-fact within NEPA's zone of interests and therefore lacked standing.

The court further held that it lacked jurisdiction because the lawsuit had become moot after project construction concluded in March 2023 and the facility opened to traffic on June 1, 2023. The court rejected arguments that it could grant relief by ordering restrictions on traffic or ordering demolition of the new overpass, as neither would cure the claimed injuries. The court also observed that the only case law supporting these kinds of extreme remedies suggest that they would only be appropriate where an agency acted in bad faith, which did not occur here.

On August 1, 2023, plaintiffs filed a motion to amend the court's judgment under Federal Rule of Civil Procedure 59(e). On September 8, the court denied the motion, finding that it raised arguments already litigated and presented evidence that could have been raised at the summary judgment stage.

FHWA Motion for Summary Judgment Granted in NEPA Lawsuit Involving Proposed I-405 Project in Washington State

On July 25, 2023, the U.S. District Court for the Western District of Washington granted FHWA's motion for summary judgment in Canyon Park Business Center Owners' Assoc. v. Buttigieg, et al., 2023 WL 4743363 (W.D. Wash.), dismissing all of plaintiff's NEPA claims with prejudice. Plaintiff had filed a complaint on December 21, 2021, against FHWA and the Washington State Department of Transportation (WSDOT) raising NEPA claims relating to environmental documents prepared in anticipation of an Express Toll Lane Improvement project located along four miles of I-405 in Bothell, Washington. Plaintiff alleged that the traffic analysis was flawed, the EA/FONSI analyzed an insufficient range of alternatives, and that an EIS should have been prepared rather than an EA/FONSI.

On March 4, 2022, federal defendants moved to dismiss the complaint, and on June 28, the court granted federal defendants' motion to dismiss for failure to establish Article III standing. The court allowed plaintiffs thirty days to amend their complaint, and plaintiffs filed an amended complaint on July 27.

On March 31, 2023, FHWA and WSDOT filed motions for summary judgment. In granting those motions with prejudice, the court found that plaintiff had not raised any question or doubt as to whether FHWA and WSDOT appropriately relied on growth projects and had not shown that the agencies failed to select the proper traffic analysis tools. The court further held that WSDOT and FHWA did not act arbitrarily or capriciously in preparing an EA, rather than an EIS, or in finding that the project would have no significant impact on the human environment. The court also found no NEPA violation when the EA and FONSI were not supplemented following the issuance of a separate FEIS by the City of Bothell, noting that nothing in the FEIS altered the scope or impact of the project, FHWA and WSDOT took information in the FEIS into account in their EA/FONSI, and nothing in the administrative record indicated that any potential significant environmental impact was not evaluated.

Motion to Dismiss Granted in Part in I-95 Providence Viaduct Bridge Case

On July 27, 2023, the U.S. District Court for the District of Columbia granted in part and denied in part FHWA's motion to dismiss for lack of standing in Narragansett Indian Tribe v. Pollack et. al., 2023 WL 4824733 (D.D.C.).

The Narragansett Tribe initiated litigation when FHWA made the determination to replace the I-95 Providence Viaduct Bridge in Providence, Rhode Island. The construction site of the bridge is geographically located near the Providence Covelands Archaeological District (RI 935). The Tribe attaches religious and cultural significance to the Covelands. On March 31, 2017, the Tribe initially sued FHWA, the Rhode Island Department of Transportation (Rhode Island DOT), the Rhode Island Historical Preservation and Heritage Commission, and the Advisory Council on Historic Preservation (ACHP) in the District of Rhode Island. The Tribe challenged the Rhode Island DOT's refusal to transfer properties according to a programmatic agreement (PA) entered into pursuant to Section 106 of the NHPA for the I-95 Providence Viaduct Bridge Project of Rhode Island. The U.S. District Court for the District of Rhode Island dismissed this first complaint, and this dismissal was affirmed by the U.S. Court of Appeals for the First Circuit.

On March 29, 2019, after the PA had been terminated, the Tribe filed another complaint in the District of Rhode Island alleging that the termination constituted arbitrary and capricious agency action under the APA. The case was transferred to the District Court for the District of Columbia. The district court granted FHWA's motion to dismiss for a lack of standing, finding that it was unable to discern how the Tribe's alleged harm would be redressed by a determination against just FHWA.

In a third complaint, filed August 3, 2022, plaintiffs allege that FHWA did not properly withhold highway funding from the State of Rhode Island for failing to execute the first PA. Plaintiffs further allege that FHWA's decision to terminate the first PA and execute a second PA without consulting the Tribe was arbitrary and capricious. The Tribe also alleges that FHWA failed to provide a sufficient rationale for terminating the first PA and failed to adequately address ACHP comments. Plaintiffs are asking the court to find that FHWA violated NHPA and the APA and to enjoin the agency from taking further action in implementing the Viaduct project or in transferring the mitigation properties contrary to the first PA. Plaintiffs also request damages for the alleged destruction of sites of cultural and religious significance to the Tribe.

The court granted in part and denied in part FHWA's motion to dismiss for lack of standing, holding that the Tribe lacked standing to challenge FHWA's termination of the initial PA but demonstrated standing to challenge the execution of the second PA. In holding that the Tribe lacked standing to challenge the termination of the first PA, the court reasoned that the Tribe did not sufficiently demonstrate that the termination was caused by FHWA rather than independent actions of Rhode Island and that the Tribe's procedural injury (*i.e.*, that FHWA failed to provide a proper summary of its reasoning for terminating the PA) was not redressable. In holding that the Tribe demonstrated standing to challenge the execution of the second PA, however, the court reasoned that the Tribe adequately

alleged a procedural injury in FHWA's failure to consult the Tribe in developing the second PA and adequately pled that proper consultation could have resulted in alternative mitigation measures that would be adequate to address the harm to historic, Tribal properties.

Plaintiff Voluntarily Dismisses Case Regarding USA Parkway Project

On September 11, 2023, the U.S. District Court for the District of Nevada issued an order granting plaintiff's motion for voluntarily dismissal without prejudice. Alt v. United States, et al., 2023 WL 5846872 (D. Nev.).

The lawsuit concerned the possessory interests of the Stockton Flat Allotment. In 1998, plaintiff purchased the Allotment and secured grazing rights. By 2009, the Bureau of Land Management (BLM) eliminated the possessory interests because the contract for the base property that had been assigned to the Allotment expired. In July 2010, defendants and the Nevada Department of Transportation issued an EA for the USA Parkway Project. Construction on the project was completed in August 2017, and a portion of the project was built through the Allotment.

On August 12, 2021, plaintiff filed a petition for writ of prohibition seeking to stop the Department of the Interior's Office of Hearings and Appeals from rendering a decision related to plaintiff's grazing preference. FHWA was not a party to this action. The court dismissed all state law claims with prejudice, holding that they were not legally cognizable. The court, however, granted leave to file an amended complaint, stating that plaintiff could amend only to assert a claim under the APA. On June 10, 2022, plaintiff filed a complaint against the United States, USDOT, FHWA, and the BLM alleging civil rights violations under 42 U.S.C. §§ 1983 and 1985, violations of the Fifth and Fourteenth Amendments, and claims for breach of trust, concert of action, and abuse of power.

On October 3, 2022, defendants filed a motion to dismiss arguing that plaintiff's failure to allege a claim under the APA warranted dismissal of the amended complaint with prejudice. On November 7, plaintiff filed a motion to dismiss or, in the alternative, to submit a second amended complaint. The court granted plaintiff's motion to voluntarily dismiss the case without prejudice, so the plaintiff could file a claim with the Department of the Interior.

Amended Complaint Filed Regarding SR 299 Project in California

On June 6, 2023, Friends of Calwa and the Fresno Building Healthy Communities filed an amended compliant regarding the SR 299 project in South Fresno, California. Friends of Calwa v. California Dep't of Transp., et al., No. 23-207 (E.D. Cal.).

The original complaint, filed on March 8, 2023, challenged a project to reconstruct and expand two interchanges connecting California State Route 99 to local roadways in South Fresno. The California Department of Transportation (Caltrans) had issued an Environmental Impact Report, which also served as an EA for the project. The complaint alleged that defendants failed to prepare an EIS, failed to adequately consider the full extent of direct, indirect, and cumulative effects of the project; and failed to provide for public participation.

The amended complaint alleges that FHWA and Caltrans violated the Clean Air Act by failing to conduct adequate public and interagency consultation on transportation conformity and by failing to conduct a quantitative hot-spot analysis for PM2.5 and PM10. The amended complaint also removes the NEPA claims in the original complaint against FHWA.

Lawsuit Filed Over Old Hammond Highway Project in Louisiana

On April 28, 2023, plaintiffs in Donahue, et al. v. City of Baton Rouge, et al., No. 22-706 (M.D. La.), served an amended complaint adding USDOT, FHWA, and the Louisiana Department of Transportation and Development as parties to ongoing litigation regarding the Old Hammond Highway project, which would widen the existing highway. Defendants also include the City of Baton Rouge, the Parish of East Baton Rouge, and the project contractor.

Plaintiffs raise twelve constitutional claims and one claim under the APA, including (1) that their civil rights were violated under 42 U.S.C. § 1983 when the defendants allegedly performed an unconstitutional taking; (2) that defendants have violated and continue to violate plaintiffs' rights against unreasonable seizures of property; (3) that defendants deprived plaintiffs of their property without substantive and procedural due process; and (4) that defendants conspired to deprive the plaintiffs of equal protection under the law. Plaintiffs further allege six claims under Louisiana State law, including civil conspiracy and fraud. Plaintiffs also allege that defendants implemented policies that deviated from design standards mandated by law and that the project's right-of-way acquisition process did not confirm to the requirements of the Relocation Assistance and Real Property Acquisition Policies Act of 1970 (Uniform Act).

Federal Motor Carrier Safety Administration

D.C. Circuit Rejects Challenge to Denial of Exemption for Pulsating Brake Lamps

See Intellistop v. USDOT, 72 F.4th 344 (D.C. Cir. 2023), *supra* at 4.

Federal Railroad Administration

United States Files Amicus Brief in Supreme Court Railroad Preemption Case

See Ohio v. CSX Transportation, Inc., No. 22-459 (U.S.), *supra* at 2.

On Remand, FRA Issues New Decision on Petition to Expand BNSF's Automated Track Inspection Waiver

See BNSF Rwy. Co. v. FRA, et al., 62 F.4th 905 (5th Cir.), *supra* at 9.

Lawsuits Concerning Changes to Locomotive Engineer Certification Program Remain in Abeyance After FRA Action

On June 27, 2023, FRA issued a letter approving modifications to the Kansas City Southern Railway Company (KCS) locomotive engineer certification program. The approval followed a KCS lawsuit challenging FRA's March 4, 2022, letter

noting deficiencies in KCS's program. That lawsuit, Kansas City S. Rwy. Co., et al. v. FRA, et al., No. 22-1924 (8th Cir.), is currently in abeyance. On August 28, 2023, KCS filed a new lawsuit putatively seeking review of the June 2023 letter, Kansas City S. Rwy. Co., et al. v. FRA, et al., No. 23-2955 (8th Cir.). The parties jointly moved to hold the new case in abeyance as well because the parties continue to discuss issues related to KCS's certification program, including the merger of KCS with Canadian Pacific Railway Company, which may eliminate the need for judicial review of FRA's prior letters regarding KCS's certification program. The court consolidated the two cases, granted the joint motion on September 11, 2023, and is holding the consolidated case in abeyance, with status reports required every 60 days.

KCS's petitions for review follow two earlier lawsuits in the U.S. Court of Appeals for the D.C. Circuit that concerned earlier versions of the same certification program. In 2018, two labor unions (the Brotherhood of Locomotive Engineers and Trainmen and the Transportation Division of the International Association of Sheet Metal, Air, Rail and Transportation Workers) filed a lawsuit alleging that FRA had unlawfully allowed locomotive engineers employed by Kansas City Southern de Mexico (KCSM) to operate on KCS's territory in the United States by, among other things, approving a prior version of KCS's locomotive engineer certification program that addressed the training of Mexican engineers. In a 2020 decision, the D.C. Circuit granted this petition for review in part, on the grounds that FRA's approval of the certification program had been granted under a passive approval process that permitted approval without any formal written notice or explanation of the approval. The court vacated and remanded the matter to FRA. Bhd. of Locomotive Eng'rs and Trainmen, et al. v. FRA, et al., 972 F.3d 83 (D.C. Cir. 2020). KCS subsequently re-submitted a substantially similar certification program, again including a detailed description of its procedures for certifying locomotive engineers from KCSM. After requesting and considering comments from the labor unions on the modified program, FRA approved the modifications to the program in an October 2020 letter, which included a detailed explanation for the approval.

The labor unions filed a new petition for review in November 2020 challenging FRA's approval of KCS's 2020 program submission. After briefing had begun, the government moved to voluntarily remand the case on the grounds that the agency had initiated an administrative review to re-evaluate the approval of KCS's 2020 program submission and that a new agency action at the conclusion of that review would likely moot the case. The D.C. Circuit granted the motion in September 2020, remanding the case to FRA for further agency proceedings.

On March 4, 2022, FRA sent KCS a letter notifying KCS that it had completed a review of KCS's program, as submitted in 2020, and concluded that the program did not conform with FRA's certification program regulations in 49 CFR Part 240. FRA explained that the review had been initiated in response to recommendations from an audit by the Department of Transportation's Office of Inspector General, as well as the issues raised by the labor unions in their lawsuit. FRA found that many sections of KCS's program lacked sufficient detail and that the section establishing procedures for the training of Mexican engineers was unnecessary, as Mexican engineers should be trained under the general provisions for individuals who had not been previously certified to be locomotive engineers. FRA's March 4 letter instructed KCS to submit a revised program

addressing the noted deficiencies. On September 26, 2022, KCS submitted revisions to its part 240 program, which FRA approved on June 27, 2023.

Federal Transit Administration

Florida Sues DOT, FTA, and DOL Over Labor Certification Process

On October 4, 2023, the State of Florida filed a complaint in the U.S. District Court for the Southern District of Florida against DOT, FTA, and DOL alleging that DOL's application of protective arrangements under 49 U.S.C. § 5333(b) to the State of Florida is unconstitutional. Florida v. Buttigieg, et. al., No. 23-61890 (S.D. Fla.). Section 5333(b) requires that recipients of federal funds agree to "provisions that may be necessary for … the continuation of collective bargaining rights." 49 U.S.C. § 5333(b)(2)(B). Florida argues that the provision is vague and that DOL's application of the provision prevents the State from enacting "reasonable regulations" governing its collective bargaining process, thus potentially resulting in the loss of access to hundreds of millions of dollars in FTA funds under the Bipartisan Infrastructure Law. The complaint seeking preliminary and permanent injunctive and declaratory relief.

Transit agencies across Florida receive federal grant funds under 49 U.S.C. chapter 53 to operate, maintain, and construct transit systems. These funds are subject to certain federal requirements such as 49 U.S.C. § 5333(b) (commonly known as Section 13(c) arrangements due to a prior version of the statute). Before FTA may award federal funds, DOL must first certify that the interests of employees affected by the assistance are protected under arrangements the Secretary of Labor concludes are fair and equitable. Out of the six topic areas that the statute covers, the State takes issue with the requirement under 49 U.S.C. § 5333(b)(2)(B), which states that grant agreements "shall include provisions that may be necessary for … the continuation of collective bargaining rights."

On May 9, 2023, Governor DeSantis signed SB 256, which reformed collective bargaining in Florida to ensure public employees in the state make a "conscious and deliberate decision regarding their constitutional right to participate or not in a union." The law also requires the support of 60% of its employees before a union may act as their exclusive bargaining agent. When enacting SB 256, the Florida legislature anticipated that DOL might find that it conflicts with 49 U.S.C. § 5333(b) and thus granted a state agency the authority to waive the new provisions until the current collective bargaining agreement expired. DOL, however, found the scope of that waiver insufficient under the federal statute because it did not extend for the life of the federally-funded project. Affected Florida transit agencies sought another waiver from the state agency, which it conditionally granted until DOL or a court of competent jurisdiction issued a final decision as to whether SB 256 (and the related waivers) violated 49 U.S.C. § 5333(b). The state agency asserts that it granted the waivers at issue to preserve access to the hundreds of millions of dollars in federal funding before the fiscal year ended. The State then filed suit to resolve the conflict between SB 256 and 49 U.S.C. § 5333(b).

The complaint alleges violations of the Spending Clause and the APA. In Count I, the State alleges section 5333(b) violates the Spending Clause's requirement that any condition attached to funding under the Spending Clause is unambiguous. Under the

federal statute, the State alleges that DOL's "broad authority" to decide what arrangements are "fair and equitable" to "protect the interest of employees affected by" 49 U.S.C. chapter 53 is unlawfully ambiguous. The State further alleges that the standard for denying funding applications under the law is so vague that it is unreviewable under the APA. In Count II, the State alleges that if Congress intended to prevent Florida from incrementally reforming collective bargaining in the state, the APA required it to use more precise language than "the continuation of collective bargaining agreements." In addition, the State argues that DOL's decision on the waiver process is arbitrary and capricious due to sparse reasoning and the failure to meaningfully consider the Spending Clause. The State seeks to enjoin defendants from withholding grants from Florida transit agencies under section 5333(b) and declare section 5333(b) unconstitutional, both facially and as applied to Florida, or in the alternative, either hold DOL's decision on the state's waiver provisions unlawful under the APA or declare that SB 256 complies with 49 U.S.C. § 5333(b).

Maritime Administration

Briefing Completed in Petition for Review of Texas Oil Terminal License

See Citizens for Clean Air & Clean Water in Brazoria County, et al v. USDOT, et al., No. 23-60027 (5th Cir.), *supra* at 6.

District Court Rules in Center for Biological Diversity v. MARAD; Parties Appeal to Fourth Circuit

See Center for Biological Diversity v. MARAD, et al., No. 23-2033 (4th Cir.); Center for Biological Diversity v. MARAD et al., No. 21-132 (E.D. Va.), *supra* at 12.

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 challenging 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 D.C. 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. 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. 21-1606 (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. 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 D.C. Circuit heard oral argument on April 11, 2023, and on August 15, issued a decision that did not reach the merits of the cases, holding instead that under the Hobbs Act, it lacked jurisdiction over the petitions for review of MARAD's HERODOTE and DAKAR decisions. Matson Navigation Co. v. USDOT, et al., 77 F.4th 1151 (D.C. Cir. 2023). The court reasoned that under the Hobbs Act it only has jurisdiction over petitions filed by a "party aggrieved" by MARAD's decisions. Matson did not participate at all with respect to MARAD's HERODOTE decision. And because MARAD denied Matson's request to formally intervene in the DAKAR administrative vessel replacement proceeding, it was not a party to those proceedings. The court concluded that Matson was not a "party aggrieved" under the Hobbs Act in either administrative proceeding and that, accordingly, the D.C. Circuit lacked Hobbs Act jurisdiction. The court then held that because it lacked jurisdiction under the Hobbs Act, the district court's decisions dismissing the cases filed in that court based on the Hobbs Act were erroneous, and it remanded them back to the district court for decision on the merits.

The cases are now proceeding in the district court. Matson Navigation Co. v. USDOT, et al., Nos. 21-1606 & 22-1975 (D.D.C.). Matson moved for summary judgment on November 6, arguing, as in earlier stages of the litigation, that neither the DAKAR nor the HERODOTE was a proper replacement vessel and that, in any event, the orders authorize the vessels to engage in unlawful domestic trade in the Northern Mariana Islands. MARAD refuted these arguments in its response and cross-motion for summary judgment filed on December 6. Matson's reply is due on January 5, 2024, and MARAD's reply is due February 2. The district court has scheduled a hearing on the motions for April 12.

National Highway Traffic Safety Administration

Oral Argument Heard in Challenge to NHTSA's CAFE Standards for Model Years 2024–2026 Passenger Cars and Light Trucks

See Natural Resources Defense Council, et al. v. NHTSA, et al., No. 22-1080 (D.C. Cir.), *supra* at 6.

Pipeline and Hazardous Materials Safety Administration

Briefing Begins in Multiple Legal Challenges to the LNG by Rail Rule

See Sierra Club, et al. v. USDOT, et al., Nos. 20-1317, 20-1318, 20-1431, & 21-1009 (D.C. Cir.), *supra* at 8.

INGAA Challenges PHMSA 2022 Gas Transmission Rule in the D.C. Circuit

See INGAA v. PHMSA, (D.C. Cir. No. 23-1173), *supra* at 10.

Belle Fourche and Bridger Pipeline Companies to Pay $12.5 Million in Penalties and Improve Compliance after Pipeline Spills in Montana and North Dakota

Belle Fourche Pipeline Company and Bridger Pipeline LLC – affiliated subsidiaries of True Companies, Inc., the owner and operator of a network of crude oil pipelines – together agreed to pay a $12.5 million civil penalty to resolve claims under the Pipeline Safety Act, Clean Water Act, and North Dakota state laws relating to two crude oil pipeline accidents the occurred in Montana and North Dakota.

In 2015, Bridger's Poplar Pipeline ruptured where it crosses under the Yellowstone River near Glendive, Montana. The pipeline had been buried under the river and became exposed due to river scour, resulting in a rupture. In 2016, Belle Fourche's Bicentennial Pipeline ruptured in Billings County, North Dakota. The pipeline was located on a steep hillside near a creek feeding into the Little Missouri River. The pipeline ruptured when there was land movement on the slope. Belle Fourche's control room failed to detect the spill until it was reported by a local landowner.

On May 2, 2022, PHMSA, EPA, and the State of North Dakota filed suits against the two companies for violations of the pipeline safety regulations and other federal and state laws. United States v. Bridger Pipeline LLC, No. 22-00043 (D. Mont.); United States v. Belle Fourche Pipeline Co., No. 22-00089 (D.N.D.).

In the Bridger litigation, on July 8, 2022, Bridger filed a motion to dismiss for failure to state a claim and a separate motion to dismiss for lack of subject-matter jurisdiction. Bridger argued, among other things, that PHMSA's claims were barred by the statute of limitations. On July 29, 2022, the government filed a combined response in opposition to Bridger's motions. The government argued, among other things, that PHMSA's pipeline safety regulations impose a continuing obligation to meet certain requirements and that Bridger continued to be out of compliance within the limitations period. Bridger filed its reply on August 19, 2022. In the second case, Belle Fourche filed

an answer on July 14, 2022, and the court set a trial date for February 24, 2025.

Following briefing, the government and the True Companies participated in mediation in Bismarck, North Dakota regarding both cases. On September 27, 2022, the parties reached an agreement in principle and jointly moved the courts in both cases to stay the case for 90 days. The motion was granted and extended several times until the parties reached agreement on the terms of a consent decree. After a public notice and comment period, on October 2, 2023, the North Dakota District Court granted the motion to enter the consent decree resolving the Belle Fourche case in part. The Belle Fourche case will be fully resolved upon approval of the remediation plan by the State of North Dakota. All of the claims in the Bridger litigation were resolved in the consent decree, and upon Bridger's payment of the agreed upon penalty, the parties will move the Montana court to dismiss the litigation.

In addition to the $12.5 million civil penalty, the companies are required to implement specific compliance measures including meeting control room operation requirements, conducting employee training, implementing water crossings and geotechnical evaluation programs, and updating their integrity management program.

Petition for Review of PHMSA Administrative Enforcement Decision Dismissed, Rehearing Denied

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 is subject to equitable tolling, and that MCT is entitled to postponement or tolling of the statute's 60-day deadline for appeal.

On July 27, 2023, the court issued an unpublished opinion dismissing MCT's petition for review as untimely. On September 7, 2023, MCT filed a petition for panel rehearing and rehearing *en banc* of the court's decision. On October 12, 2023, the court denied MCT's petitions.

Challenge to Explosive Reclassification in Fifth Circuit

On August 21, 2023, MCR Oil Tools (MCR) filed an appeal in U.S. Court of Appeals for the Fifth Circuit following PHMSA's final administrative action denying MCR's appeal of an explosives approval classification of their product as a regulated flammable solid, rather than an unregulated material. MCR Oil Tools v. DOT, No. 23-60458 (5th Cir.) MCR seeks relief on the ground that the PHMSA's final agency action is arbitrary, capricious, and an abuse of discretion within the meaning of the APA and is otherwise

contrary to law and unsupported by substantial evidence.

MCR Oil Tools utilizes a binary thermite mixture in various capacities and has contended for a number of years that mixture should be unregulated. Following research on the properties of thermites and their risks in transportation, PHMSA adopted an interim policy concerning the appropriate hazmat classification of thermites. While thermites meet PHMSA's regulatory definition for explosives and pyrotechnic substances, PHMSA determined that thermites that could pass certain exclusion tests could be reclassified as flammable solids instead of explosives. Several companies have been issued Class 4 flammable solid classification approvals for thermites.

In February 2022, MCR Oil Tools submitted a request for an explosives approval classification to PHMSA. MCR had previously been shipping their product unregulated and sought to continue to do so. PHMSA issued MCR an explosive classification approval for MCR's product as a flammable solid, which requires MCR to ship their product as a hazardous material. MCR submitted a reconsideration request, which PHMSA reviewed and denied. MCR then submitted an appeal from that reconsideration request, which the Deputy Administrator reviewed and denied.

On November 1, 2023, the Fifth Circuit granted MCR's unopposed motion to stay further proceedings until PHMSA makes a final determination about whether another MCR product is hazardous as well.

Court Issues Mixed Decision in PHMSA Reverse FOIA Case

On September 29, 2023, the U.S. District Court for the District of Columbia issued a mixed decision on PHMSA's motion to dismiss a "reverse FOIA" claim brought by Sunoco Pipeline, a pipeline operator that is seeking to block PHMSA's public release of certain pipeline safety information. Sunoco Pipeline, L.P., v. USDOT, No. 21-1760 (D.D.C.). The decision rejected one of Sunoco's two theories, but allowed the other to proceed. The court subsequently granted PHMSA's motion to voluntary remand the matter to the agency to allow for reconsideration, including with respect to additional issues not previously considered.

The lawsuit challenges PHMSA's decision that it could provide FOIA requesters with an unredacted version of a Notice of Probable Violation that PHMSA issued to Sunoco in 2019. Sunoco claims that the Notice quotes confidential, security-sensitive commercial information that was included in a report that it provided to PHMSA. The information concerns the consequences of a potential accident along Sunoco's Mariner East pipeline in Pennsylvania. PHMSA consulted with Sunoco about whether it could release the document, and it ultimately rejected Sunoco's arguments and told Sunoco that it intended to release the document. Sunoco sued to block the release, and PHMSA agreed not to release the document until the District Court resolves the litigation.

Sunoco claimed that PHMSA should be compelled to withhold the NOPV because the redacted information is covered by two FOIA exemptions: Exemption 7(F), which covers law enforcement information that would endanger safety if released, and Exemption 4, which covers trade secrets or confidential financial or commercial information. The court rejected the first theory, because agencies are not prohibited from releasing Exemption 7(F) information if they choose (PHMSA disputes that Exemption 7(F) even applies). But the court allowed the second

theory to proceed, holding that Sunoco had plausibly alleged that the NOPV contained information covered by Exemption 4 and protected from disclosure by the Trade Secrets Act.

On November 2, the court granted PHMSA's motion for a voluntary remand to allow for agency reconsideration. The remand will allow PHMSA to consider, among other things, the requirements of the FOIA Improvement Act of 2016. That statute provides in relevant part that even if information is covered by a FOIA exemption, an agency may only withhold the information if it "reasonably foresees that disclosure would harm an interest protected by an exemption" or if "disclosure is prohibited by law." 5 U.S.C. § 552(a)(8)(A)(i). Because PHMSA concluded in its initial decision that no FOIA exemption applied, it did not consider the impact of this requirement.

PHMSA Administrative Enforcement Action Challenged on Constitutional Grounds

On June 23, 2023, gh Package Product Testing & Consulting, Inc. (gh Package) filed suit in the U.S. District Court for the Southern District of Ohio seeking declaratory relief in connection with a pending PHMSA civil penalty proceeding alleging violations of the Hazardous Materials Regulations. gh Package Product Testing & Consulting, Inc. v. Buttigieg, et al. No. 23-00403 (S.D. Ohio). The probable violations relate to package test reports reviewed by PHMSA and a facility compliance inspection occurring on August 20, 2020, July 20, 2021, and July 22, 2021. gh Package requested a hearing by an ALJ, which is currently scheduled for the week of July 15, 2024.

The lawsuit challenges the DOT and PHMSA administrative proceedings on various constitutional grounds. Among its various claims, gh Package alleges that the appointments of the ALJ and Chief Safety Officer (CSO) violate the Appointments Clause and the Take Care Clause of Article II of the Constitution because they are protected by multi-layered tenure protection. In addition, gh Package alleges that DOT's administrative proceedings violate Article III of the Constitution by vesting decision-making authority in a non-Article III fact finder and that DOT's administrative proceedings deprive gh Package of its Seventh Amendment right to a jury trial on civil penalty claims. Moreover, gh Package alleges that DOT's administrative proceedings deprive gh Package of its Fifth Amendment right to due process of law because the CSO is a member of the PHMSA executive team and is a biased adjudicator who would be unlikely to rule against his colleagues. Finally, gh Package claims that DOT's purported rescission of due process safeguards in a memo issued by former DOT General Counsel Steven Bradbury (and in codifying regulations) was unlawful, and DOT's new enforcement guidelines do not adequately ensure due process of law.

On August 28, 2023, gh Package filed a motion for preliminary injunction to halt the underlying enforcement case. On September 18, 2023, PHMSA filed its opposition to gh Package's motion for preliminary injunction and a memorandum in support of its motion to dismiss.

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