U.S. Department of Transportation

DOT LITIGATION NEWS

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June 12, 2024 Volume No. 24 Issue No. 1

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

Petition for Certiorari Denied in Railroad Preemption Case

On January 8, 2024, the Supreme Court denied the State of Ohio's petition for certiorari in Ohio v. CSX Transp., Inc. No. 22-459 (U.S.). The United States had filed an *amicus* brief, at the invitation of the Supreme Court, urging the Court to deny Ohio's petition.

Ohio sought Supreme Court review on November 10, 2022, of the Supreme Court of Ohio's decision striking down a state statute that prohibited railroads from blocking railroad crossings for more than five minutes, with certain exceptions. In that August 17, 2022, decision, the majority held that Ohio's blocked crossing statute was preempted by the Interstate Commerce Commission Termination Act (ICCTA). In an opinion concurring only in the judgment, two justices concluded that the Ohio statute was 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 was on local governments' need to implement blocked crossing statutes as a matter of public safety and urged the Supreme Court to grant certiorari because the federal courts of appeals and state high courts have relied upon conflicting rationales in challenges of state and local government attempts to regulate railroad crossings. The petition urged 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. 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 for certiorari on February 16, 2023, primarily arguing that the Supreme Court should not grant certiorari because there was no conflict in the lower courts' ultimate holdings and there was no public policy reason that warrants the grant of certiorari.

On March 20, 2023, the Supreme Court requested the views of the United States. In its *amicus* brief, the United States urged the Court to deny certiorari because the Supreme Court of Ohio correctly decided that Ohio's blocked crossing statute was 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 explained that while it is disputed whether the FRSA is applicable to the preemption analysis, Ohio's blocked crossing statute was clearly preempted by ICCTA because it directly regulated rail transportation, which falls within the exclusive jurisdiction of the Surface Transportation Board under ICCTA. In any event, even if the FRSA was applicable, Ohio's statute was preempted by the FRSA and did not fall within either of the FRSA's two exceptions. Ohio's statute failed 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 failed to fall within the second exception because it did not address an essentially local hazard, was incompatible with FRA's safety regulations, and unreasonably burdened interstate commerce. The petition for certiorari and associated pleadings can be found here: https://www.supremecourt.gov/search.aspx?filename=/docket/docketfiles/html/public/22-459.html.

Supreme Court Decides Challenge to Development Impact Fees

On April 12, 2024, the U.S. Supreme Court unanimously held that the Fifth Amendment's Takings Clause does not distinguish between legislative and administrative land-use permit conditions. Sheetz v. County of El Dorado, California, (No. 22-1074) (U.S.). Petitioner Sheetz had sought review of decisions of the California trial and appellate state courts that exempted legislative, non-discretionary development fees that are generally applicable to a broad class of property owners from the U.S. Supreme Court's "unconstitutional conditions" doctrine. That doctrine requires an "essential nexus" between a fee or building condition and a "legitimate state interest." See Nollan v. California Coastal Comm'n, 483 U.S. 825 (1987); Dolan v. City of Tigard, 512 U.S. 374 (1994); Koontz v. St. Johns River Water Mgmt. Dist., 570 U.S. 595 (2013). The California courts reasoned that the unconstitutional-conditions doctrine applies only to conditions imposed on an individual and discretionary basis, and not to fees imposed on a broad class of property owners through legislative action.

The United States filed an *amicus* brief on December 20, 2023, expressing its views that a generally applicable legislative development fee that is unconnected to any dedication of real property is not subject to the parcel-specific "nexus" and "rough proportionality" requirements adopted by the U.S. Supreme Court in Nollan, Dolan, and Koontz. The United States argued that the unconstitutional-conditions doctrine applied only where the government obtains a real-property interest, or its monetary equivalent, as a condition of a land permit.

The Supreme Court unanimously held that the Takings Clause does not distinguish between legislative and administrative permit conditions, but instead prohibits legislatures and agencies alike from imposing unconstitutional conditions on land-use permits. The Court based its conclusion on the text of the Takings Clause, which focuses on the prohibited act and not the identity of the actor who performs it, as well as the historical absence of a special exemption for legislatively imposed exactions. Further, the Court's physical-takings cases apply a *per se* rule requiring just compensation to takings effected by legislation and administrative action alike.

Justices Sotomayor, Gorsuch, and Kavanaugh filed concurring opinions.

The briefs in the case can be found here: https://www.supremecourt.gov/docket/docketfiles/html/public/22-1074.html.

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

On February 9, 2024, Metal Conversion Technologies, LLC (MCT) sought Supreme Court review of a decision of the U.S. Court

of Appeals for the Eleventh Circuit dismissing MCT's challenge to a PHMSA order as untimely. Metal Conversion Technologies, LLC v. PHMSA, No. 23-870 (U.S.).

On December 15, 2022, MCT filed a petition for review in 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 was 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 was entitled to postponement or tolling of the statute's 60-day deadline for appeal.

On July 27, 2023, the Eleventh Circuit issued an unpublished opinion dismissing MCT's petition for review as untimely, holding that 49 U.S.C. § 5127(a), which prescribes a 60-day time limit for filing a petition for review of certain orders of the Department of Transportation, is a mandatory claim-processing rule not subject to equitable tolling.

On September 7, MCT filed a petition for panel rehearing and rehearing *en banc* of the court's decision. On October 12, the court denied MCT's petitions. On February 9, 2024, MCT filed a petition for a writ of certiorari, requesting that the Supreme Court review this case. The government filed its brief in opposition on May 15, arguing that the Eleventh Circuit's decision does not warrant review because it was correct and does not conflict with the decision of any other courts of appeals with respect to section 5127 or any other statute.

Departmental Litigation in Other Federal Courts

Fifth Circuit Denies Petition for Review of Texas Oil Terminal License

On April 5, 2024, the U.S. Court of Appeals for the Fifth Circuit held that the United States adequately considered the environmental consequences of the Seaport Oil Terminal (SPOT), a deepwater port in the Gulf of Mexico, before approving its license. Citizens for Clean Air & Clean Water in Brazoria County v. USDOT, 98 F.4th 178 (5th Cir. 2024). Several environmental groups petitioned for review of MARAD's November 21, 2022, ROD and July 29, 2022, EIS. SPOT Terminal Services LCC and Enterprise Products Operating LLC intervened to defend MARAD's decisions.

In their opening brief filed on May 10, 2023, petitioners argued that MARAD's decision to license the SPOT deepwater crude export

terminal violated the Deepwater Port Act (DWPA) and NEPA on the following grounds: (1) the decision failed to adequately analyze the terminal's oil spill and air quality impacts; (2) the decision's alternatives analysis failed to review a smaller-sized project as an alternative 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; (4) the decision violated the DWPA's non-discretionary requirement to complete licensing review within 356 days; and (5) the decision violated 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. Respondents argued 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 argued that the agencies complied with NEPA because the agencies were not required to analyze petitioners' preferred alternative of a small capacity facility and that the agencies appropriately evaluated the no-action alternative. Lastly, respondents argued that petitioners did not fall within zone of interested protected by the DWPA's timing requirements, and that MARAD in any event complied with the DWPA.

Intervenors, SPOT Terminal Services, LLC and Enterprise Products Operating, LCC, filed their brief on July 17, 2023. Intervenors argued that petitioners did not establish an Article III injury-in-fact and therefore did not have standing. Intervenors further argued that the government satisfied NEPA's hard look requirement, that the government adequately analyzed, alternatives, that the court lacked jurisdiction over the petitioners' DWPA timeline claim, and that the DWPA does not compel vacatur.

Petitioners filed their reply brief on July 31, 2023. The court heard oral argument in the case on November 8, 2023.

The court issued its opinion on April 4, 2024. The court found that petitioners had standing, which the United States had not contested, but intervenors had. The court then rejected petitioners' NEPA arguments. First, the court found that the agencies adequately considered oil-spill risk from the project and appropriately analyzed "risks of worst-case oil spills in several situations that the agency considered 'reasonably foreseeable.'" The court also rejected petitioners' argument that that the EIS was required to follow a specific format, instead explaining that "NEPA does not require that an EIS strictly adhere to a formal structure." The court then found that the agencies were not required to supplement its analysis based on a new study about Rice's whales because the agencies rationally concluded that the new study didn't alter any of the conclusions of the FEIS. The court found that the air quality analysis in the FEIS was "sufficient and aligned with government regulations," and that the recent downgrade in the region's ozone nonattainment status did not alter that conclusion because "the FEIS determined that SPOT would not increase the severity of any existing ozone-standard violation in any area." The court also found that the agencies' method of analyzing cumulative effects was reasonable and noted that even if petitioners would prefer a different methodology, "courts are

not in a position to decide the propriety of competing methodologies."

Next, the court turned to the government's alternatives analysis. The court, assuming that petitioners raised a challenge to the alternatives analysis before the agency, found that the challenge failed on the merits because NEPA only requires "the consideration of 'alternatives relevant to the applicant's goals,' which the agency may not define." The court also found that the agencies' no-action alternative analysis was reasonable and that, though reasonable minds may disagree with the conclusions the agency reached, "the court's task here is not to ensure that the agency makes the best decision, but only that the decision is informed."

Finally, the court turned to petitioners' Deepwater Port Act claims. The court accepted the United States's argument that petitioners lacked statutory authority to challenge the agencies' alleged exceedance of statutory timelines because the citizen-suit provision of the Act is intended to address substantive decisions made by the agency. The statutory deadlines, on the other hand, are administrative and for the applicant's benefit. With respect to petitioners' argument that MARAD did not make the requisite finding that the port would be consistent with the nation's energy-sufficiency goals, the court found that the agency's decision was rational and based on consideration of the relevant factors. The court explained that "[e]ven if these conclusions were brief, they were based on consultations with the agency's experts and a detailed review of the record," so the determination was not arbitrary and capricious.

Ninth Circuit Orders Dismissal of Long-Running Climate Change Lawsuit Against Government

On May 1, 2024, the U.S. Court of Appeals for the Ninth Circuit issued a writ of mandamus directing a district court in Oregon to dismiss Juliana v. United States, a climate change lawsuit brought by youth activists against the federal government. In re United States, No. 24-684 (9th Cir.). The district court dismissed the case the same day, ending nine years of litigation.

Plaintiffs included several young people, an environmental organization, and "Future Generations." They filed this action in 2015 against various federal agencies and officials (including DOT), alleging that the federal government was violating their constitutional rights by continuing to allow fossil fuel use and thereby contributing to climate change. They sought declaratory relief and an injunction requiring the federal government to phase out fossil fuel emissions and draw down carbon dioxide in the atmosphere.

After several years of litigation, the Ninth Circuit in January 2020 ordered the case dismissed for lack of Article III standing. Juliana v. United States, 947 F.3d 1159 (9th Cir. 2020). The court held that although plaintiffs had established that they had suffered injuries caused by federal policies, those injuries were not redressable by a judicial decision. Specifically, the court held that "it is beyond the power of an Article III court to order, design, supervise, or implement the plaintiffs' requested remedial plan," since "any effective plan would necessarily require a host of complex policy decisions entrusted, for better or worse, to the wisdom and discretion of the executive and legislative branches."

The Ninth Circuit denied rehearing *en banc* in February 2021. Although the court had ordered the case dismissed, plaintiffs moved the district court for leave to amend their complaint. The district court granted that motion in June 2023, and it then denied the government's motions to dismiss the amended complaint and to certify its orders for immediate appeal. The government filed a mandamus petition in the Ninth Circuit, arguing that the district court was not complying with the Ninth Circuit's mandate.

In its order granting mandamus, the Ninth Circuit held that its mandate unambiguously required the district court to dismiss the case, and it rejected the district court's conclusion that the mandate had left room for amendment. The Ninth Circuit also held that there had been no intervening change in law that would justify departure from the mandate, noting that a Supreme Court case relied on by the district court was only about retrospective monetary relief and had nothing to do with the kinds of prospective declaratory relief sought by plaintiffs. The Ninth Circuit ordered the district court to dismiss the case, without leave to amend.

U.S. District Courts in Texas and Kentucky Strike FHWA's Final Rule Requiring States to Set Declining Targets for Greenhouse Gas Emissions

On March 27 and April 1, 2024, respectively, the U.S. District Courts for the Northern District of Texas and the Western District of Kentucky held invalid an FHWA rule that requires all states to take affirmative steps to set declining targets for greenhouse gas emissions, with the goal of reducing on-road mobile source emissions. Texas, et al. v. USDOT, et al., 2024 WL 1337375 (N.D. Tex. Mar. 27, 2024); Kentucky, et al. v. FHWA, et al., 2024 WL 1402443 (W.D. Ky. Apr. 1, 2024).

On December 7, 2023, FHWA published a final rule establishing a performance measure for greenhouse gas emissions on the National Highway System (NHS) as part of the Transportation Performance Management (TPM) program. The rule required states and Metropolitan Planning Organizations (MPOs) to measure GHG emissions on their NHS roadways and establish declining targets for GHG emissions. The rule did not require states or MPOs to set specific targets. The rule also did not penalize states and MPOs for not achieving their targets. But "[b]y providing consistent and timely information about on-road mobile source emissions on the NHS, the [rule] has the potential to increase public awareness of GHG emissions trends, improve the transparency of transportation decisions, enhance decision-making at all levels of government, and support better informed planning choices to reduce GHG emissions or inform tradeoffs among competing policy choices." 88 Fed. Reg. 85,364, 85,365 (Dec. 7, 2023).

Texas filed its lawsuit challenging the legality of the rule in the Northern District of Texas on December 19, 2023, alleging that the rule was (1) in excess of DOT's statutory authority, (2) arbitrary and capricious under the APA, and (3) in violation of the Constitution's Spending Clause. FHWA argued that the rule was authorized by 23 U.S.C. § 150(c), which directs FHWA to establish measures for assessing "performance" of federal highways and does not define the boundaries of "performance." FHWA read section 150(c)(3)(A)(ii)(IV)-(V) as including "environmental performance," given the statutory goal of promoting

environmental sustainability set forth in section 150(b)(6).

The Texas district court held that the rule exceeded DOT's statutory authority to establish performance measures for carrying out the TPM program. In particular, the Texas Court held that the plain language of the statute and related provisions in title 23 limited DOT's authority to establish performance measures under the TPM program to those that focus on effectiveness in facilitating travel, commerce, and national defense—not the environmental performance of vehicles using the NHS. The court also held that the national goals of the Federal-aid highway program, which the performance measures are designed to support, indicate that the performance of the NHS does not include environmental performance. Among other considerations, the court looked to dictionary definitions of "performance," express definitions of other statutory terms (including "Interstate System" and "highway"), and the provisions neighboring section 150(c)(3)(A)(ii)(IV)-(V), which it viewed as "uniformly focused on the physical condition of transportation infrastructure." The court vacated and remanded the rule, which invalidated the rule nationwide.

The District Court for the Western District of Kentucky likewise found that the rule exceeded DOT's statutory authority and further held that the rule was arbitrary and capricious in violation of the APA. The court reasoned that to allow the rule to take effect would displace the states' role in setting their own targets based on their sovereign priorities. The court further found that DOT's rationale for the rule—seeking to reduce GHG emissions and serving as an informational tool for state policymakers in making NHS-related decisions—was not supported by the evidence before the agency. The court entered declaratory judgment on behalf of Kentucky and the other 20 plaintiff states and ordered supplemental briefing on the proper scope of remedy. On April 22, FHWA and plaintiff states filed a joint status report in lieu of supplemental briefing in which plaintiff states agreed not to seek a permanent injunction because FHWA agreed to abide by the declaratory judgment.

The government has filed notices of appeal in both cases.

District Court Blocks JetBlue-Spirit Merger

On January 16, 2024, the U.S. District Court for the District of Massachusetts ruled in favor of the United States and several states in an antitrust suit against JetBlue Airways and Spirit Airlines, holding that the two airlines' proposed merger violated Section 7 of the Clayton Act. United States v. JetBlue Airways Corp., 2024 WL 162876 (D. Mass. 2024).

JetBlue and Spirit announced in 2022 that they had agreed that JetBlue would acquire Spirit for $3.8 billion. The Justice Department and several states sued in March 2023 to block the merger, invoking section 7 of the Clayton Act, which prohibits mergers and acquisitions with effects that may substantially lessen competition. DOT issued a statement the same day announcing that it fully supported the lawsuit, and it later produced extensive records in response to a JetBlue subpoena. The court held a 17-day bench trial in the fall of 2023.

In its decision, the court held that the merger would eliminate direct competition between JetBlue and Spirit on certain routes, end the unique role played by Spirit in competing

with other airlines, and take away the unique, low-fare consumer option provided by Spirit. The court acknowledged that other airlines would likely replace Spirit in a timely fashion and that a combined JetBlue-Spirit would more effectively compete with the largest airlines. But the court ultimately concluded that plaintiffs had proven that the merger would substantially lessen competition in at least one market. The court permanently enjoined the merger.

JetBlue and Spirit appealed to the U.S. Court of Appeals for the First Circuit, but on March 4, 2024, the airlines announced that they had terminated their merger agreement, and they then dismissed their appeal.

Briefing Concludes in Multiple Legal Challenges to PHMSA's LNG by Rail Rule

On March 21, 2024, briefing concluded in consolidated cases before the U.S. Court of Appeals for the D.C. Circuit challenging PHMSA's July 2020 Liquefied Natural Gas (LNG) by Rail Rule. 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).

The rule was challenged by three groups of petitioners: a coalition of seven environmental groups, a coalition of attorneys general from fourteen states and the District of Columbia, and the Puyallup Indian Tribe of Washington State.

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. On May 17, 2023, the petitioners filed a joint motion to lift the abeyance, which the court granted over PHMSA's objections on July 18, 2023.

On September 1, 2023, the government filed a letter with the court notifying it that PHMSA had issued a new rule suspending the LNG by Rail final rule 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 argued that PHMSA: (1) violated its duty under the Hazardous Materials Transportation Act (HMTA) 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 (NHPA) and other requirements by failing to engage in meaningful government-to-government consultation with the Tribe.

The government filed its response brief on January 12, 2024. In its response brief, the government responded to safety (HMTA) and environmental (NEPA) concerns raised by petitioners by highlighting evidence in the administrative record — including testing data for similar tank car designs and discussions of the mutually reinforcing contributions of existing PHMSA regulatory requirements and railroad operating practices — supporting its conclusion that rail tank car transportation of LNG will not be adverse to safety and environmental protection (and would in fact be safer and better for the environment than transportation of LNG by other methods). The government responded to APA notice concerns by explaining how a particular tank car feature adopted in the final rule (a thicker outer shell resulting in a new suffix in the DOT specification number assigned) was a relatively minor variation on the proven DOT 120W tank car specification that had been proposed in the NPRM. Lastly, the government responded to NHPA and Tribal consultation concerns by noting that PHMSA's extensive good-faith efforts to engage the Tribe to discuss their concerns more than satisfied any pertinent legal obligations.

The petitioners filed their reply briefs on March 21, 2024. The court has not yet scheduled oral argument.

Briefing Completed, Oral Argument Held in INGAA Challenge to PHMSA 2022 Gas Transmission Rule

On March 21, 2024, briefing concluded in litigation before the U.S. Court of Appeals for the D.C. Circuit on an industry challenge to PHMSA's August 2022 final rule enhancing the safety of gas transmission pipelines. INGAA v. PHMSA, No. 23-1173 (D.C. Cir.). The court heard oral argument on May 16, 2024.

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, 87 Fed. Reg. 52,224 (Aug. 24, 2022), following a lengthy administrative reconsideration proceeding. The 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.

The government filed its response brief on February 26, 2024. That brief responded to petitioners' arguments by highlighting administrative record evidence demonstrating that the provisions being challenged were added at the request of petitioners during PHMSA's mandatory advisory committee meeting for the proposed rulemaking. PHMSA responded to petitioners' cost-benefit analysis arguments by referencing controlling precedent evincing that agency cost-benefit analyses

need not employ quantified cost and benefit data for each unique provision of a rulemaking as urged by petitioners.

The Pipeline Safety Trust (via its counsel, Earthjustice) filed an *amicus* brief in support of the final rule on March 4, 2024, providing the court additional historical context animating PHMSA's policy decisions in the rulemaking. Petitioner filed its reply brief on March 18, 2024. The court heard oral argument before a panel consisting of Judges Pan, Wilkins, and Walker on May 16, 2024.

United States Weighs in on Pipeline Dispute Between the Bad River Band and Enbridge

On April 8, 2024, the United States filed an *amicus* brief at the invitation of the U.S. Court of Appeals for the Seventh Circuit addressing a lawsuit filed by the Bad River Band against Enbridge Energy in relation to an Enbridge oil pipeline. Bad River Band of the Lake Superior Tribe of Chippewa Indians v. Enbridge Energy, Inc., Nos. 23-2309, 23-2467 (7th Cir.). The United States argued, among other things, that the Band's public nuisance claim against Enbridge is barred by the Pipeline Safety Act, which gives PHMSA the exclusive authority to regulate the safety of interstate pipelines.

Enbridge operates Line 5, an oil pipeline running from northwest Wisconsin to southeast Michigan. Easements allowed Line 5 to cross property owned by the Bad River Band on its reservation in Wisconsin, but those easements expired in 2013 and the Band refused to consent to their renewal. Enbridge continued to operate the pipeline, and the Band sued Enbridge. The district court ruled in June 2023 that Enbridge was trespassing on the Band's property, and it ordered Enbridge to remove the pipeline from the Band's property by June 2026. The court also ruled that Enbridge was creating a "public nuisance" because there was an imminent risk that Line 5 would rupture at one location, and it ordered Enbridge to adopt an operational plan to mitigate that risk.

Both sides appealed to the Seventh Circuit, which held oral argument on February 8, 2024. In its *amicus* brief, the United States argued that the district court properly found that Enbridge is trespassing on the Band's property. But the United States argued the district court erred in granting relief for that trespass, both by awarding too little monetary restitution, and by issuing injunctive relief without considering all the relevant factors, including the effect of an injunction on the obligations of the United States under a pipeline treaty with Canada.

Finally, the United States argued that the Pipeline Safety Act displaces the Band's federal common law nuisance claim, which sought injunctive relief to reduce the risk of a pipeline rupture due to erosion. The United States noted that federal common law cannot be invoked to address an issue that is the subject of a federal statute. And the United States argued that the risk of a pipeline rupture is comprehensively addressed by the Pipeline Safety Act, which requires PHMSA to issue pipeline safety regulations and gives it a variety of other tools to address threats to people, the environment, and property.

The Band and Enbridge filed responses to the United States' brief on April 29.

DOT Moves to Dismiss Challenge to DOT Disadvantaged Business Enterprise Program and Opposes Preliminary Injunction

On January 16, 2024, DOT asked the U.S. District Court for the Eastern District of Kentucky to dismiss a constitutional challenge to DOT's Disadvantaged Business Enterprise (DBE) program, which seeks to ensure non-discrimination in DOT-assisted highway and transit contracting. Mid-America Milling Co. v. USDOT, No. 23-72 (E.D. Ky.). On January 26, 2024, DOT opposed the plaintiffs' motion for a preliminary injunction.

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 are groups are presumed to be disadvantaged, business owners of any race or gender may qualify. Funding recipients must meet their goals to the maximum extent practicable using race- and gender-neutral means. If a recipient cannot meet its goal solely using such means, then it sets DBE goals on certain project contracts. Prime contractors on these contracts must demonstrate good faith efforts to use DBE subcontractors but cannot be penalized for failing to meet the goal.

The plaintiffs are Mid-America Milling Company and Bagshaw Trucking, two companies based in Indiana. Plaintiffs contend that they are unable to compete for federally-funded contracts 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. They seek broad preliminary and permanent injunctive relief.

In its motion to dismiss, DOT argued that the plaintiffs lack standing to sue for two reasons. First, they do not plausibly allege that the DBE program has injured them. Second, eliminating the race- and gender-based presumptions of disadvantage—the only components of the program that make racial or gender classifications—would not help plaintiffs, who do not allege that they meet the race- and gender-neutral requirements for DBE status (such as the requirement that a business's owner not have a net worth exceeding a certain amount). DOT also argued that the vague complaint fails to plead a valid claim for relief and that the plaintiffs failed to sue any of the state and local entities that certify DBEs and work with contractors on federally-funded projects.

In its opposition to the preliminary injunction motion, DOT argued that the DBE program survives strict scrutiny and that plaintiffs therefore are unlikely to prevail on their equal protection challenge. DOT contended that there is a strong basis in evidence that the program is necessary to remedy past intentional discrimination and that the program is narrowly tailored to that goal. DOT also repeated its standing arguments and asserted that any injunction should only apply to these two plaintiffs.

The court held a hearing on the preliminary injunction motion on April 24, 2024.

Multiple Petitions Seek Review of FRA Train Crew Size Final Rule

On April 2, 2024, FRA announced a final rule addressing Train Crew Size Safety Requirements, and the rule was published in the Federal Register on April 9. The rule

includes a general requirement that most railroad operations must have a minimum of two crew members, effective June 10, except for certain identified one-person train crew operations. The final rule includes requirements for railroads seeking to continue existing one-person train crew operations, as well as a special approval process for railroads seeking to initiate new one-person train crew operations.

Between April 8 and April 12, six railroads filed petitions for review challenging the final rule in the Fifth, Seventh, Eighth, and Eleventh Circuit Courts of Appeal. BNSF Rwy. Co. v. FRA, et al., No. 24-60173 (5th Cir.); Texas & Northern R.R. Co. v. FRA, et al., No. 24-60183 (5th Cir.); Indiana R.R. Co. v. FRA, et al., No. 24-1550 (7th Cir.); Union Pac. R.R. Co. v. FRA, et al., No 24-1736, (8th Cir.); Nebraska Central R.R. Co. v. FRA, et al., No 24-1774 (8th Cir); Florida East Coast Rwy. LLC v. FRA, et al., No. 24-11076 (11th Cir.). The petitions assert that the rule is arbitrary, capricious, an abuse of discretion, and otherwise contrary to law, all in violation of the APA.

Because petitions for review were filed in multiple circuits within ten days of the final rule's issuance, on April 22, and pursuant to 28 U.S.C. § 2112, the government filed a notice with the Judicial Panel on Multidistrict Litigation, which initiated the Panel's process of randomly selecting one of the four circuit courts to hear the six consolidated petitions. On April 24, the Panel selected the Eleventh Circuit to hear the six petitions. On April 26, the Association of American Railroads filed an additional petition for review in the U.S. Court of Appeals for the District of Columbia Circuit, which will also be transferred to the Eleventh Circuit and consolidated. Association of American Railroads v. FRA, et al., No. 24-1097 (D.C. Cir.).

On May 8, the International Association of Sheet Metal, Air, Rail and Transportation Workers – Transportation Division filed a motion to intervene in support of FRA. On May 20, the parties filed a joint motion requesting a modified briefing schedule agreed to by the parties. Both motions remain pending before the court for decisions.

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

Seven lawsuits challenging the environmental review of a first-in-the-nation congestion pricing program in New York City – the Manhattan Central Business District (CBD) Tolling Program – have been filed in three U.S. District Courts. Two of the la8wsuits have been filed in the District of New Jersey, four have been filed in the Southern District of New York, and one has been filed in the Eastern District of New York.

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 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 its 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.

The first lawsuit was filed on July 21, 2023, by the State of New Jersey in the U.S. District Court for the District of New Jersey. New Jersey v. USDOT, et al., No. 23-3885 (D. N.J.). New Jersey alleges that FHWA 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 congestion pricing 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. New Jersey further alleges that FHWA violated the CAA 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. In a two-day hearing on April 3 and 4, the court heard argument on the parties' cross motions for summary judgment.

The second lawsuit was filed on November 1, 2023, by the Mayor of Fort Lee, New Jersey and a Fort Lee resident, also in the District of New Jersey. Sokolich, et al. v. USDOT, et al., No. 23-21728 (D. N.J.). This 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 EA 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). This case has been stayed pending the outcome in the first lawsuit.

The third lawsuit was filed on November 22, 2023, in the U.S. District Court for the Southern District of New York by two litigants who live in Battery Park City (BPC), which is within the Manhattan CBD. Chan, et al. v. USDOT, et al., No. 23-10365 (S.D.N.Y.). 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. Plaintiffs filed a motion for summary judgment on March 18, 2024, and the government filed a motion for summary judgment on April 1.

On January 4, 2024, several plaintiffs filed a fourth lawsuit against DOT and FHWA, among others, in the U.S. District Court for the Eastern District of New York. Mulgrew, et al. v. USDOT, et al., No. 24-81 (E.D.N.Y.). Plaintiffs include the United Federation of Teachers (UFT), Local 2, which represents New York City school teachers and paraprofessionals, nurses employed in New

York City hospitals, and New York City Department of Education employees, several UFT members residing in Staten Island and other locations, and the Staten Island Borough President. The complaint alleges four causes of action: (1) violation of NEPA for failure to prepare an adequate environmental review that considers all environmental impacts of the proposed action, and to provide for public comment and participation in the public review process; (2) violation of NEPA for failure to reevaluate the EA based on the Traffic Mobility Review Board's recommendations regarding the toll rates by vehicle, time of day, credits, discounts, and exemptions, released in November 2023; (3) violation of the Dormant Commerce Clause by imposing an impermissible burden on interstate commerce; and (4) violation of the fundamental right to travel. On January 26, 2024, plaintiffs filed an Amended Complaint that added a fifth cause of action: violation of the New York State Constitution, Green Amendment, which grants New Yorkers the right to "clean air and water, and a healthful environment." In February 2024, the court transferred the case to the U.S. District Court for the Southern District of New York. On March 18, the government filed a motion to dismiss, arguing that plaintiffs NEPA claims are time-barred and plaintiff's claims regarding FHWA's re-evaluation of the final tolling schedule are unripe.

A fifth lawsuit, a putative class action, was filed against DOT and FHWA, among others, in U.S. District Court for the Southern District of New York on January 18, 2024. New Yorkers Against Congestion Pricing Tax, et al. v. USDOT, et al., No. 24-367 (S.D.N.Y). Plaintiffs, a group of community-based organizations and a cross-section of citizens representing various communities in New York City, allege they will suffer negative environmental and socioeconomic consequences if congestion pricing is implemented. The complaint alleges several causes of action, including violation of NEPA for failure to prepare an adequate environmental review that considers all environmental impacts of the proposed action, failure to provide for public comment and participation in the public review process, and failure to reevaluate the EA based on the November 2023 Traffic Mobility Review Board's recommendations regarding the toll rates by vehicle, time of day, credits, discounts, and exemptions. In addition, the complaint alleges a violation of the New York Administrative Procedure Act for failure to assess congestion pricing's impact on job retention and creation, as well as economic impacts upon small businesses. The putative class seeks the completion of an EIS that examines impacts upon the small business putative class, the class of commuters to the CBD, the class of New York City residents living close to areas of increased traffic congestion, and residents of the CBD reliant upon mass transit. Plaintiffs request class certification and an order vacating and setting aside FHWA's EA and FONSI and directing the agency to complete an EIS. On January 30, 2024, several plaintiffs filed a Notice of Voluntary Dismissal, without prejudice, against all defendants. On March 18, 2024, the government filed a motion to dismiss, claiming that plaintiffs' NEPA claims are time-barred and plaintiffs' claims regarding FHWA's re-evaluation of the final tolling schedule are unripe.

A sixth lawsuit was filed against DOT and FHWA, among others, in U.S. District Court for the Eastern District of New York on May 1, 2024. Town of Hempstead, et al. v. USDOT, et al., No. 24-3263 (E.D.N.Y.). Plaintiffs, the Town of Hempstead and the

Hempstead Town Supervisor, allege that congestion pricing violates the U.S. Constitution and New York State Constitution. The Complaint further alleges that congestion pricing constitutes a major question subject to the Major Questions Doctrine.

On May 17, 2024, the court heard arguments on the pending motions in all three cases in the Southern District of New York, including the summary judgment motions in Chan and the motions to dismiss in Mulgrew and New Yorkers Against Congestion Pricing.

On May 31, a seventh congestion pricing lawsuit was filed. Trucking Association of New York v. MTA, et al., No. 24-04111 (S.D.N.Y.). Plaintiff filed this lawsuit only against MTA and TBTA; USDOT and FHWA are not defendants. The complaint sets forth three causes of action: (1) the tolling program violates the Commerce Clause because it is not a fair approximation of use and is excessive in relation to the benefit conferred; (2) the tolling program violates the Constitutional right to travel; and (3) the tolling program is preempted by federal law because it has a significant effect on the prices, routes, and services of commercial trucks. One day earlier, on May 30, plaintiff filed a motion for preliminary injunction to prevent the implementation of the congestion pricing program, which is set to begin June 30, 2024.

On June 5, New York Governor Kathy Hochul directed MTA to pause implementation of the CBD Program under state law. The courts have ordered briefing on whether the Governor's action moots the cases.

Airlines Seek Review of DOT's Ancillary Fee Rule

On May 10, 2024, Airlines for America, Alaska Airlines, American Airlines, Delta Air Lines, Hawaiian Airlines, JetBlue Airways, and United Airlines filed a petition for review of DOT's ancillary fee rule in the U.S. Court of Appeals for the Fifth Circuit. Airlines for America, et al. v. USDOT, No. 24-60231 (5th Cir.). The final rule requires air carriers and ticket agents to clearly disclose baggage and cancellation fees – known as ancillary or "junk" fees – whenever fare and schedule information is provided for flights to, within, or from the United States. 89 Fed. Reg. 34,620 (Apr. 30, 2024). Petitioners challenge the rule on grounds that it exceeds the Department's statutory authority, is arbitrary and capricious in violation of the APA, is an abuse of discretion, and is otherwise contrary to law. DOT's administrative record is due June 24.

Lawsuit Filed Over SkyWest Charter's Commuter Air Carrier Application

On April 15, 2024, SkyWest Charter, LLC (SWC) sued DOT in the U.S. District Court for the District of Utah for the Department's alleged failure to act on SWC's pending commuter air carrier application. SkyWest Charter, LLC v. USDOT, No. 24-00036 (D. Utah). This case involves an APA claim and, in the alternative, a claim seeking mandamus. The APA claim alleges that DOT's failure to adjudicate the application amounts to an agency action "unlawfully withheld or unreasonably delayed" in violation of 5 U.S.C. § 706(1) and has caused the company and small communities undue harm. SWC further alleges that DOT's inaction is "arbitrary and capricious" because DOT has

not treated similarly situated entities in a similar fashion. The mandamus claim alleges that SWC has exhausted all other avenues of relief and requests that the court order DOT to issue a final decision on its application within 60 days. DOT's response to the complaint is due June 14, 2024.

Recent Litigation News from DOT Modal Administrations

Federal Aviation Administration

Third Circuit Upholds FAA Approval of Terminal Expansion Project at Trenton-Mercer Airport

On January 4, 2024, the U.S. Court of Appeals for the Third Circuit denied the petition for review in Trenton Threatened Skies v FAA, 90 F.4th 122 (3rd Cir. 2024). Petitioners in this case are Trenton Threatened Skies, Inc., the Borough of Yardley, Pennsylvania, the Township of Lower Makefield, Pennsylvania, a property owners association, and numerous individuals. The lawsuit challenged FAA's March 2022 FONSI/ROD approving Mercer County's proposed terminal expansion project at Trenton-Mercer Airport (TTN). The project was intended to demolish and rebuild TTN's aging existing terminal, which is too small to accommodate the current and forecasted demand at the airport and does not meet the Americans with Disabilities Act or fire safety standards. In addition, the existing terminal earned the lowest possible level of service, Level F, under Airport Cooperative Research Program criteria. In the EA, FAA determined that the terminal expansion would afford passengers a higher level of service and would not induce additional operations. The project allowed passengers to board using four contact gates, rather than the current configuration of two contact gates and hard-standing areas. The expanded terminal space will also allow for TSA screening lanes, ticket counters, expanded baggage facilities, and boarding areas.

The court denied the petition for review on the merits, finding based on the administrative record that the agency reasonably concluded that the new terminal would not induce growth because the forecasts of future air traffic predicted a substantial increase in usage regardless of whether a new terminal was constructed. In reaching this conclusion, the court reasoned that the air traffic forecasts approved by FAA considered multiple growth considerations such as national trends, FAA's Terminal Area Forecast, and local socioeconomic conditions, each of which supported FAA's conclusion.

Similarly, the court agreed with FAA that the project would not increase the number of gates compared to the existing configuration. The court noted that petitioners' argument that the gates would increase stemmed from a prior EA for an earlier project. Moreover, the court reasoned that petitioners were foreclosed from raising claims such as increasing gates not identified in their petition for review.

The court found in FAA's favor on petitioners' remaining claims: (1) that FAA's decision was arbitrary and capricious; (2) that FAA failed to consider the cumulative impacts of past actions; (3) that

the agency unlawfully segmented its review of interconnected and interdependent projects in approving the expansion of the terminal; (4) that the environmental justice analysis was unreasonable; (5) that FAA failed to meet alleged requirements under NEPA for health risk assessment; and (6) that the agency relied on false premises or inaccurate or false information.

The Third Circuit denied petitioners' petition for rehearing and rehearing e*n banc* on April 10, 2024.

Court Dismisses for Lack of Standing Petition by Town of Milton Challenging Boston Logan Runway Use Procedure

On November 30, 2023, the U.S. Court of Appeals for the First Circuit dismissed for lack of standing a June 30, 2023, petition for review filed by the Town of Milton, Massachusetts contesting FAA's FONSI and ROD approving a new Area of Navigation procedure for runway 4L at Boston Logan International Airport based upon a final EA. Town of Milton v. FAA, 87 F.4th 91 (1st Cir. 2023). Petitioner argued that the EA, FONSI, and ROD were "arbitrary and capricious, an abuse of discretion, and in violation of law." Specifically, petitioner contended that the EA/FONSI/ROD significantly understated and under analyzed the noise impacts that the new procedure would have on Milton. The court held oral argument on September 7, 2023, with questioning focused on the issue of standing.

In its opinion, the court agreed with FAA's argument that Milton was improperly attempting to repurpose harm to its residents as harm to its interests. The court also categorically rejected the idea that a municipality can base standing on reallocating resources to address citizen concerns, as that conduct "simply represents a policy preference to prioritize one government function over another." And on that score, the court further agreed that a municipality cannot rely on associational standing principles to make the type of "resource diversion" argument available to mission-driven organizations.

On January 1, 2024, Milton filed a petition for rehearing or rehearing *en banc*. The United States was not required to file a response and did not do so. The court denied the petitions on April 4, and Milton did not seek Supreme Court review.

Ninth Circuit Rejects Challenge to FAA's Mandatory Revocation of Pilot Certificate for Using Aircraft to Distribute Marijuana in Alaska

On April 22, 2024, the U.S. Court of Appeals for the Ninth Circuit denied a pilot's petition for review challenging FAA's revocation of his pilot certificate, which had been previously affirmed by the NTSB. Fejes v. FAA, 2024 WL 1710662 (9th Cir. April 22, 2024).

Fejes owned an Alaska company licensed by the State of Alaska to operate a marijuana cultivation facility. On at least three occasions, Fejes utilized an aircraft to distribute marijuana within Alaska, which is legal under Alaska law. However, the distribution of marijuana is punishable under federal law by a term of imprisonment of more than one year under 21 U.S.C §181. Fejes was eventually reported to FAA because he violated Alaska regulations by inaccurately reporting on his manifests that he was using his vehicle rather than his aircraft to transport marijuana.

The case arose from an immediately effective FAA order of revocation issued on August 21, 2018, revoking Fejes' private pilot certificate under 49 U.S.C § 44710(b)(2). Section 44701(b)(2) states that FAA "shall issue an order revoking" any airman certificate issued by FAA if the agency finds that the airman "knowingly carried out an activity punishable, under a law of the United States or a State related to a controlled substance (except a law related to simple possession of a controlled substance), by death or imprisonment for more than one year," "an aircraft was used to carry out or facilitate the activity," and "the individual served as an airman, or was on the aircraft, in connection with . . . the activity."

The court rejected Fejes' argument that the FAA lacked jurisdiction to revoke his pilot certificate because Congress allegedly could not constitutionally authorize an administrative agency to regulate intrastate commerce such as the distribution of marijuana solely within Alaska. The court found that under the Commerce Clause and Supreme Court precedent, Congress may regulate (1) "the use of the channels of interstate commerce," (2) the protection of "instrumentalities of interstate commerce," and (3) "activities having a substantial relation to interstate commerce." The court also found that (1) navigable airspace is a "channel of interstate commerce," (2) aircraft are "instrumentalities of interstate commerce," and (3) even if the foregoing were not true, the Supreme Court has held the cultivation of marijuana, even for purely personal use, has a "substantial relation to interstate commerce."

The court also rejected Fejes' arguments that: (1) his statutorily-prohibited conduct was exempt under a regulatory exception, (2) FAA could have used its prosecutorial discretion to decline to pursue revocation of his pilot certificate, (3) under 49 U.S.C. § 44710(b)(2) a conviction a crime under federal or state law was necessary, and (4) that in light of internal Justice Department prosecutorial guidance, FAA was required to establish that Fejes knew his conduct was punishable by law.

Drone Operator in the Philadelphia Area Held in Civil Contempt of District Court Order

On February 9, 2024, the United States filed a complaint in the U.S. District Court for the Eastern District of Pennsylvania against Michael DiCiurcio alleging that defendant operates unauthorized small, unmanned aircraft systems (UAS or drones) in controlled airspace near Philadelphia International Airport and over people and traffic in the city of Philadelphia in violation of federal aviation law and regulations, and contrary to agency guidance. United States v. DiCiurcio, No. 24-00612 (E.D. Pa. 2024). The complaint also claims that the defendant frequently posts images of himself on YouTube operating drones in the Philadelphia area and solicits payments from viewers. In the complaint, the United States requested a permanent injunction and a civil penalty of $182,004 based on past operations. After a hearing, on February 29, 2024, the court granted the government's motion for a preliminary injunction. Following a second hearing on April 24, the court held defendant in civil contempt for violating the preliminary injunction order. The court asked the government to submit a letter brief to the court outlining the authority for seizing defendant's drones. The court noted in its contempt order that defendant's continued operation of drones, including on the very morning of the contempt hearing, involves "a serious aviation safety matter."

Oral Argument Held in Challenge to Air Tour Management Plan for California National Parks

Oral argument was held on January 19, 2024, 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.). The recording of the oral argument can be found here: cadc.uscourts.gov/recordings/recordings2023.nsf/F8F23B77B604363985258AAC006900BB/$file/23-1067.mp3. The court's ruling is anticipated in the second half of 2024 or early 2025.

Two environmental groups (Marin Audubon Society and Watershed Alliance of Marin), Public Employees for Environmental Responsibility, and an individual filed this case in March 2023. The National Parks Air Tour Management Act (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. The 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.

For more information about the case, see the Fall 2023 DOT Litigation News, available at https://www.transportation.gov/sites/dot.gov/files/2024-03/Fall%202023%20DOT% 20Litigation%20News.pdf.

Ninth Circuit to Hear Appeal of Decision Holding King County, Washington in Violation of the Surplus Property Act for Restrictions on Services for Immigration Flights

On February 10, 2020, the United States sued King County and King County Executive Dow Constantine in the U.S. District Court for the Western District of Washington challenging the legality of King County Executive Order PFC-7-1-EO (EO), which provides that King County International Airport (also known as Boeing Field) shall not support the transportation and deportation of immigration detainees in the custody of U.S. Immigration and Customs Enforcement (ICE), either traveling within or arriving or departing the United States or its territories. King County issued the EO on April 23, 2019. It also directs King County officials to "ensure that all future leases, operating permits, and other authorizations for commercial activity at King County International Airport contain a prohibition against providing aeronautical or non-aeronautical services to enterprises engaged in the business of deporting immigration detainees (except for federal government aircraft), to the maximum extent permitted by applicable law." The EO has the purpose and effect of prohibiting ICE contractors from using King County Airport as a terminal for flights to remove individuals from the United States or transport immigration detainees within the country. As a result of the EO, fixed base operators at Boeing Field and other airports in the Seattle area advised ICE contractors that they would no longer service ICE flights. The contractor was accordingly

forced to relocate these flights to Yakima, Washington, creating significant operational challenges and additional costs for ICE.

The lawsuit challenged the EO as, among other things, unlawful under principles of intergovernmental immunity and as repudiating obligations undertaken by King County in the instrument that transferred ownership of Boeing Field from the United States to King County (Instrument of Transfer) under the Surplus Property Act of 1944, Public Law 78-457, as amended, subsequently recodified at 49 U.S.C. §§ 47151 - 47153.

On March 30, 2023, the district court granted summary judgment to the United States, holding that the EO violates both the terms of the Instrument of Transfer and principles of intergovernmental immunity. The court held the EO invalid and enjoined its enforcement. United States v King County, Washington, F.Supp.3d 1134 (W.D. Wash. 2023). King County timely appealed to the U.S. Circuit Court of Appeals for the Ninth Circuit, United States v King County, Washington, No. 23-35362 (9th Cir.). The parties have briefed the case and the court has scheduled oral argument on July 9, 2024.

Environmental Groups File Motion for Leave to Supplement Complaint in Challenge to SpaceX Starship Launches

On December 15, 2023, in Center for Biological Diversity, et al. v. FAA, No. 23-01204 (D.D.C.), plaintiff environmental advocacy groups (Center for Biological Diversity, American Bird Conservancy, Surfrider Foundation, and Save RGV) and one cultural interest organization (the Carrizo/Comecrudo Nation of Texas, Inc.) filed a motion for leave to file a supplemental complaint with two new causes of action. FAA responded by recommending that plaintiffs refile and seek to amend rather than supplement the complaint. Space X, which has intervened as a party, opposed the motion on procedural grounds. Plaintiffs replied to the opposition, and the matter is pending with the court for decision.

The existing complaint challenges FAA's issuance of a vehicle operator license to Space X for its Starship/Super Heavy operations at Boca Chica, Texas. Plaintiffs claim that FAA violated the APA and NEPA by issuing a programmatic environmental assessment (PEA) rather than an EIS because the launches will allegedly cause significant environmental impacts. In their supplemental complaint, plaintiffs first allege that FAA violated the APA and NEPA by failing to supplement the PEA to address the information from the April 20, 2023, launch explosion and changes to the launch site before the November 18, 2023, launch. The FAA validated the PEA based upon a November 15, 2023, written re-evaluation, which considered additional information about the launch site. Following completion of the written re-evaluation, FAA modified the existing vehicle operator license to SpaceX authorizing the second launch of the Starship/Super Heavy vehicle. SpaceX then launched the vehicle for the second time on November 18, 2023.

Second, plaintiffs claim that the U.S. Fish and Wildlife Service violated the APA by issuing an arbitrary and capricious addendum to the biological opinion prepared as part of FAA's consultation with the Service under Section 7 of the ESA before the November 18, 2023, launch. Specifically, plaintiffs allege that the Service failed to adequately analyze the effects of the first launch's explosion on the surrounding habitats and endangered and threatened species.

For more information, see the Fall 2023 DOT Litigation News, pages 23-24, available at https://www.transportation.gov/sites/dot.gov/files/2024-03/Fall%202023%20DOT%20Litigation%20News.pdf.

Discovery on Liability Initiated in Last Lion Air Claim while Seventh Circuit Considers Interlocutory Appeal on Jury Trial Issue

Boeing has settled all but two of the claims in five lawsuits filed on behalf of the 189 persons on board a Lion Air Boeing 737 Max 8 who were killed when it crashed in the Java Sea off the coast of Indonesia on October 29, 2018. In re Lion Air Flight JT 610 Crash, No. 18-7686 (N.D. Ill.). In the remaining case to which the United States is a party, Chandra, No. 19-1552, discovery is underway in the U.S. District Court for the Northern District of Illinois while the U.S. Court of Appeals for the Seventh Circuit decides an interlocutory appeal on the issue of whether the claimants are limited to a bench trial under the Death on the High Seas Act (DOHSA). The appeal has been briefed and is pending for decision. The district court amended its order determining that the DOHSA applies and mandates a bench trial to certify the issue of the jury trial right for interlocutory appeal. See 2023 WL 3653217 (N.D. Ill., May 25, 2023).

Pending the appeal, the district court granted discovery on the issue of liability based upon Boeing's denial that it is the sole proximate cause of the Lion Air crash. For additional information about the case, see the Fall 2023 DOT Litigation News, page 24, available at https://www.transportation.gov/sites/dot.gov/files/2024-03/Fall%202023%20DOT%20Litigation%20News.pdf.

Culver City and City of Malibu Challenge FAA's Decision on Amendments to Three Arrival Procedures into Los Angeles International Airport

On April 17 and 19, 2024, Culver City and the City of Malibu, California, filed petitions for review challenging FAA's February 2024 Final Categorical Exclusion/ROD approving amendments to three arrival procedures for Los Angeles International Airport in April 2024. City of Culver City v. FAA, et al., No. 24-2477 (9th Cir.); City of Malibu v. FAA, et al., No. 24-2503 (9th Cir.). This is the third challenge to these procedures, which FAA initially approved in 2018. The first lawsuit was decided in 2021, when the U.S. Court of Appeals for the Ninth Circuit granted the petition for review, filed by the City of Los Angeles and Culver City, challenging the sufficiency of the supporting environmental review and consultation under NEPA, the NHPA, and Section 4(f) of the DOT Act. The court remanded the case to the agency for further study without vacating the procedures. City of Los Angeles et al. v Dickson, 2021 WL 2850586 (9th Cir. July 8, 2021). The second case arose on October 17, 2022, when the City of Los Angeles filed a motion for a writ of mandamus to enforce the 2021 judgment, alleging that the FAA had failed to timely comply with the court's order. On March 9, 2023, in an unpublished order, the Ninth Circuit granted the writ to the extent of ordering FAA to expedite its review and provide progress reports. FAA completed its obligations under the court order and posted the Final Categorical Exclusion/ROD on FAA's community engagement website on February 20, 2024.

Additional information about the prior litigation is available in the December 2023 DOT Litigation News Update, page 26, at

https://www.transportation.gov/sites/dot.gov/files/2024-03/Fall%202023%20DOT% 20Litigation%20News.pdf.

Environmental Group Challenges FAA Decision to Modify Special Use Airspace for Mountain Home Range Complex

On January 16, 2024, the Oregon Natural Desert Association (ONDA) filed a petition for review in the U.S. Court of Appeals for the Ninth Circuit challenging FAA's decision to modify special use airspace (SUA) designated for military use at the Mountain Home Range Complex in Oregon, Nevada, and Idaho. FAA made its decision after adopting the Air Force's EIS. Oregon Natural Desert Ass'n. v. FAA, et al., No. 24-297 (9th Cir.).

This lawsuit stems from a request by the Air Force for FAA to modify four military operating areas in the SUA to accommodate low-altitude military flight training. The Air Force was the lead and FAA a cooperating agency for the preparation of the EIS. The ONDA claims the EIS does not adequately identify the purpose and need, take a hard look at impacts, adopt meaningful mitigation measures, or adequately engage the public. ONDA and other plaintiffs separately sued the Air Force in the U.S. District Court for the District of Oregon over the EIS.

During mediation, the ONDA requested a stay of the Ninth Circuit proceeding against FAA while ONDA and the two other organizations pursue their claims against the Air Force in the District court. The Ninth Circuit mediator decided to administratively close the case for the remainder of the 2024 calendar year, without prejudice to either party to terminate the closure. No further filings will occur, and the parties will provide an update in six months. The district court case against the Air Force is ongoing.

Pittsfield Charter Township Opposes Runway Extension Project at Ann Arbor Municipal Airport

On December 15, 2023, Pittsfield Charter Township, Michigan and the Committee for Preserving Community Quality, Inc. filed a petition for review of FAA's October 16, 2023, FONSI/ROD in the U.S. Court of Appeals for the District of Columbia Circuit. Pittsfield Charter Township, Michigan and Committee for Preserving Community Quality, Inc. v. FAA, et.al., No. 23-1336 (D.C. Cir.). The petition contests the sufficiency of the EA for the proposed extension of runway 6/24, relocation of runway lights, and revised air traffic procedures at Ann Arbor Municipal Airport in Ann Arbor, Michigan. The Michigan Department of Transportation is a respondent because the runway extension project is being funded under the Michigan State Block Grant program. Petitioners' brief is due June 17, 2024, respondents' brief is due July 16, 2024, and petitioners' reply brief is due August 6, 2024.

Town of East Haven and Save the Sound Dispute Runway Extension and Terminal Replacement at Tweed New Haven Airport

On February 14, 2024, the Town of East Haven, Connecticut and Save the Sound, Inc. filed a petition for review in the U.S. Court of Appeals for the District of Columbia Circuit challenging FAA's FONSI)/ROD approving runway extension, terminal replacement, and parking projects at Tweed New Haven Airport. Save the Sound, Inc., et al. v. FAA, et al., No. 24-1028 (D.C. Cir.). FAA issued the FONSI/ROD approving the projects

based upon an EA on December 21, 2023. Petitioners challenge the sufficiency of FAA's analysis of cumulative impacts, specifically related to flooding and impacts to waterways and water quality. Further, they challenge the sufficiency of FAA's alternatives analysis, consideration of public comments, and cooperation with other federal agencies. FAA filed the administrative record on May 6, 2024.

Federal Highway Administration

U.S. District Courts in Texas and Kentucky Strike FHWA's Final Rule Requiring States to Set Declining Targets for Greenhouse Gas Emissions

Texas, et al. v. USDOT, et al., 2024 WL 1337375 (N.D. Tex. Mar. 27, 2024); Kentucky, et al. v. FHWA, et al., 2024 WL 1402443 (W.D. Ky. Apr. 1, 2024), supra at 6.

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

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.); Mulgrew, et al. v. USDOT, et al., No. 24-81 (E.D.N.Y.); New Yorkers Against Congestion Pricing Tax, et al. v. USDOT, et al., No. 24-367 (S.D.N.Y); Town of Hempstead, et al. v. USDOT, No. 24-3263 et al., (E.D.N.Y.); *supra* at 11.

FHWA Wins Summary Judgment in NEPA Challenge to Maine Bridge Project, Plaintiffs Appeal

On January 4, 2024, the U.S. District Court for the District of Maine granted summary judgment in favor of FHWA and MaineDOT plaintiffs in National Trust for Historic Preservation, et al. v. Buttigieg, et al., No. 23-80 (D. Maine). On January 4, plaintiffs appealed the lower court's decision. National Trust for Historic Preservation v. Buttigieg, No. 24-1138 (1st Cir.).

The project at issue is the Frank J. Wood Bridge Improvement Project located between the towns of Brunswick and Topsham, Maine. The project has been subject to controversy since inception and has a robust procedural posture including two separate complaints, a Motion for Preliminary Injunction, and two previous appeals to the First Circuit. In its most recent decision, the district court was unpersuaded by plaintiff's NEPA and Section 4(f) arguments challenging the defendants' decision to not supplement its initial EA and defendants' reliance on initial cost estimates to determine that the bridge rehabilitation alternative was not a feasible and prudent alternative.

In their opening brief, filed on May 24, 2024, appellants argue that the scope of the First Circuit's previous remand did not preclude FHWA from considering construction cost increases for the replacement bridge in determining whether rehabilitation of the existing bridge was a feasible and prudent alternative and that FHWA's refusal to consider those costs and again choose the replacement alternative was arbitrary and capricious.

District Court Dismisses Uniform Act Claims Against FHWA; Plaintiffs Appeal to Fifth Circuit

On March 4, 2024, *pro se* plaintiffs in Serna v. City of Colorado Springs, et. al., No. 24-50019 (5th Cir.) appealed a decision of the U.S. District Court for the Western District of Texas in favor of FHWA and the Colorado Department of Transportation arising from the City of Colorado Springs' condemnation of plaintiffs' real estate for a public works project, the Westside Avenue Action Plan. Defendants also include El Paso County, the State of Colorado, the City of Colorado Springs, El Paso County Local Agency, and the El Paso County Commissioners.

The original complaint, filed on October 15, 2021, alleged, *inter alia*, that plaintiffs are owed benefits under the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 (URA). On August 26, 2022, the district court dismissed without prejudice the claims against FHWA under the URA for lack of subject matter jurisdiction.

On August 24, 2023, plaintiffs filed a Motion to Reopen Judgment under Rule 60 of the Federal Rules of Civil Procedure arguing that the district court failed "to complete mandatory duties under 28 USC Section 1631" by refusing to transfer the case to the District of Colorado. On November 9, 2023, the district court denied plaintiffs' motion, holding that it did not err in failing to transfer the case to remedy the lack of personal jurisdiction when the complaint lacked subject matter jurisdiction.

Plaintiffs' appeal, which named FHWA as an appellee but failed to address the lack of subject matter jurisdiction, argued that the district court erred by not transferring, the case pursuant to 28 U.S.C. § 1631.

On February 28, 2024, *pro se* plaintiffs filed a subsequent lawsuit in Serna v. Turner, et. al., No. 23-02579 (D. Colo.), against FHWA, Magistrate Judge Maritza Dominguez Braswell, and Chief Tenth Circuit Judge Jerome Holmes, among others, again arising from the City of Colorado Springs' condemnation of plaintiffs' real estate for the Westside Avenue Action Plan. Plaintiffs allege that FHWA violated their property rights under the URA by failing to exercise oversight over Colorado Springs' condemnation process. Plaintiffs seek injunctive relief against FHWA "requiring that the agency enforce the certification requirement" against the project.

Court Grants Motion to Dismiss in FOIA Case Requesting FHWA Employee Communications

On May 8, 2024, the U.S. District Court for the Eastern District of Washington granted the FHWA's motion to dismiss in Sharpe v. FHWA, 2024 WL 2064051 (E.D. Wash. May 8, 2024). In this case, plaintiff requested via email "[a]ll emails, texts, Teams, or Zoom messages and any and all other written communications" between several FHWA employees as well as all emails, Microsoft Teams messages, cellphone text messages, and audio or video recordings that another FHWA employee created over a time frame of nearly two years. After FHWA informed plaintiff that neither request constituted a proper FOIA request for failure to reasonably describe the records sought, plaintiff responded in another email requesting "all emails and Microsoft Teams messages" between two employees over a time frame of nearly two years. FHWA then denied plaintiff's request to appeal on the grounds

that he had not submitted a valid FOIA request. Plaintiff refused opportunities to narrow his request and filed a complaint for injunctive relief on February 9, 2024. FHWA filed a motion to dismiss.

The court agreed with FHWA that plaintiff's request for information was not a proper FOIA request because it was impermissibly vague, noting that it lacked "any limiting subject matter and cannot be said to 'reasonably describe' the information sought." The court reasoned that fulfilling plaintiff's request would be unduly burdensome as an agency need only make "reasonable efforts" to search for electronic records. 5 U.S.C. § 552(a)(3)(C). The court was careful to clarify that a request is not unreasonable simply because it would produce a great deal of documents. Rather, plaintiff's requests were flawed because they provided no limiting subject matter and were likely to produce records not responsive to "whatever Plaintiff's desired research point may be."

Voluntary Remand in Challenge to South Fresno Interchange Project

On June 6, 2023, Friends of Calwa and Fresno Building Healthy Communities filed an amended complaint regarding the SR 299 interchange reconstruction project in South Fresno, California. Friends of Calwa v. California Department of Transportation, et al., No. 23-00207 (E.D. Cal.). The amended complaint alleges that FHWA and DOT violated the CAA and its implementing regulations by failing to conduct adequate public and interagency consultation on transportation conformity and by failing to conduct a quantitative hot-spot analysis for particulate matter, specifically, PM2.5 and PM10.

On December 4, 2023, FHWA filed a Motion for Voluntary Remand to allow the public and interagency consultation partners an opportunity to review the underlying documents supporting its October 3, 2022, air quality conformity determination, based on which FHWA will reassess its conformity determination, including whether any follow-on analyses should be developed. On December 21, 2023, the court granted FHWA's unopposed motion.

Parties File Supplemental Briefs in Louisiana Takings Litigation

On October 17, 2023, federal defendants filed a motion for judgment on the pleadings in Perrin, et al. v. United States, No. 17-60L, (Fed. Cl.), a suit alleging a Fifth Amendment takings claim against the U.S. Department of Interior, U.S. Geological Survey, and FHWA for 2016 flood damage allegedly aggravated by the I-12 bridge in Tangipahoa Parish. In 1984, the same group of plaintiffs represented by the same counsel filed suit against the Louisiana Department of Transportation and Development (LaDOTD) alone for damage arising from a 1983 flood. The litigation lasted until 2002, when the Louisiana Supreme Court ruled in favor of plaintiffs, upholding an award of $200 million in damages. During that litigation, in response to LaDOTD's argument that it was effectively a contractor that merely followed the federal governments' directions and plans to build the I-12 bridge, plaintiffs had argued that the State was not the contractor for the federal government and that "the State selected, designed, constructed, owns and maintains the highway."

Federal defendants seek judgment on the pleadings on the grounds that plaintiffs have failed to state a claim upon which relief can be granted, or in the alternative, because the court lacks subject matter jurisdiction over

plaintiffs' claims. Defendants argue that the court should dismiss the complaint because it is premised on the uncoerced actions of an independent third party, LaDOTD. Plaintiffs filed a motion in opposition to defendants' motion on November 1, 2023, and defendants filed a reply brief on December 6, 2023.

The court heard oral arguments on the cross motions on December 15, 2023. Following that hearing, the court ordered supplemental briefing on the issue of "whether taking judicial notice of state court proceedings would convert the government's Rule 12(c) motion for judgment on the pleadings into a motion for summary judgment, and if so, what the consequences of that would be for our proceeding." On January 16, 2024, plaintiffs filed their supplemental brief arguing that taking notice of the state litigation goes beyond the pleadings and therefore converts the motion for a judgment on the pleadings to a motion for summary judgment. Plaintiffs also argue that in asking the court to take judicial notice of plaintiffs statement that LaDOTD, and not federal agencies, were primarily responsible for the design and construction of the I-12 bridge, federal defendants are not asking the court to take judicial notice of an adjudicative fact, but to make a legal finding that plaintiffs should be estopped by their position in previous litigation from arguing that federal defendants are liable for negligent design and construction of the I-12 bridge in the present lawsuit. On February 20, federal defendants filed their supplemental brief arguing that the court may take judicial notice of state court proceedings without converting the government's motion into a motion for summary judgment and that plaintiffs had a reasonable opportunity to present material relevant to the government's motion and do not identify any information for which discovery is necessary.

The court's decision is pending. In the meantime, on April 22, federal defendants filed an unopposed motion to stay class certification pending resolution of federal defendant's motion for judgment on the pleadings. The court issued an order granting the motion the same day.

Court Grants Plaintiffs' Motion to Compel Production of Privilege Log

On November 17, 2022, the National Council of Negro Women, the Education, Economics, Environmental Climate and Health Organization, Healthy Gulf, and the Sierra Club, filed a complaint against the Secretary of Transportation and USDOT in the U.S. District Court for the Southern District of Mississippi seeking declaratory and injunctive relief to stop construction of the Interconnecting Gulfport Project (Project) in Gulfport, Mississippi. Nat'l Council of Negro Women, et al. v. Buttigieg, et al., No. 22-314 (S.D. Miss.). The purpose of the Project is to provide transportation infrastructure that will improve the flow of vehicular traffic around the Interstate 10 and US 49 interchange and that will encourage existing and support new commercial and economic growth. The FHWA Mississippi Division signed an EA and FONSI for the project on September 14, 2022. The Project is funded through a U.S. DOT BUILD Grant awarded to the City of Gulfport.

The complaint asserts four causes of the action. First, plaintiffs allege that USDOT violated NEPA and the APA by approving the Project with an EA rather than an EIS. Plaintiffs assert that the "Airport Road Extension" portion of the Project meets the requirement for significance set forth by CEQ in 40 C.F.R. § 1508.28, therefore requiring an EIS. Next, plaintiffs allege that the EA lacked analysis of direct, indirect, and cumulative environmental impacts. Plaintiffs

specify a failure to produce and use induced traffic growth analysis, cost-benefit analysis, and analysis of the effects arising from induced growth and impacts to wetlands, including Wetlands of National Significance. Third, plaintiffs allege USDOT failed to consider a range of reasonable alternatives. Finally, plaintiffs allege USDOT failed to adequately respond to comments regarding several issues including traffic forecasting and induced development.

On July 14, 2023, federal defendants filed the administrative record for the project. The record includes 702 documents comprising approximately 18,428 pages. On July 21, plaintiffs filed a motion to compel production of a privilege log arguing that production of a privilege log is required. On August 18, federal defendants filed a motion in opposition arguing that production of a privilege log runs counter to the presumption of regularity that federal agencies enjoy and that production of a privilege log is not necessary because courts have recognized that the types of pre-decisional, deliberative documents not included in the record are "not part of the administrative record to begin with, so they do not need to be logged as withheld from the administrative record." Oceana, Inc. v. Ross, 920 F.3d 855, 865 (D.C. Cir. 2019) (cleaned up).

On March 26, 2024, the court issued an order granting plaintiffs' motion. In reaching its decision, the court stated that "[n]o authority binds the Court to either order or decline to order a privilege log in an APA record review case under 5 U.S.C. § 706, and there is no prevailing consensus in the persuasive authority." The court explained that "requiring Defendants to produce a privilege log does not undermine the limited nature of APA record review because it does not expand the record but does allow oversight into whether the 'whole record' is before the Court." Federal defendants submitted the privilege log on June 4.

The U.S. Army Corps of Engineers has not yet issued a permit for the Project under Section 404 of the CWA. Construction on the Project cannot begin until the permit is issued.

Lawsuit Filed in Florida Concerning Contracting Exclusions Connected to Miami Bridge Collapse

On March 18, 2024, Linda Figg, FIGG Group, Inc., and several affiliated FIGG companies filed suit against FHWA in the U.S. District Court for the Northern District of Florida alleging that FHWA's proposal to debar Linda Figg and ten of her companies as affiliates of a previously debarred company, FIGG Bridge Engineers, Inc. (FBE), and the time spent in the proposed debarment proceedings violates the APA and their substantive due process rights under the Fifth Amendment. Figg, et al. v. FHWA, No. 24-00129 (N.D. Fla.).

The Complaint describes the underlying facts presented by the NTSB's investigation of a March 2018 bridge collapse in Miami at Florida International University. The Complaint notes that NTSB's investigation found that that FBE's bridge design calculation errors were a probable cause of the bridge collapse and that FBE's failure to identify the significance of structural cracking was a contributing factor.

On January 19, 2021, FHWA debarred FBE for nine years based on the NTSB's findings, with a debarment ending on July 20, 2029. On September 27, 2023, FHWA proposed to debar Ms. Figg and the bridge companies she owns based on their affiliation

with FBE for the same period of debarment as FBE. FHWA has not made a final decision on the proposal to debar, and because this is only a proposal, FHWA does not have in place an exclusion for Ms. Figg and the FIGG affiliated companies.

The Complaint alleges three counts of APA and constitutional violations. The first count alleges that the proposals to debar are unlawful acts based on an argument that the Nonprocurement Common Rule suspension and debarment regulations, 2 C.F.R. §§ 180.630 & 180.800, do not allow affiliation debarment absent evidence of a wrongful act by a contractor. The second count alleges that FHWA's proposed debarments violate plaintiffs' substantive due process rights as "arbitrary and capricious conduct in violation of Plaintiffs' rights under the Fifth Amendment to the United States Constitution." The third count alleges that FHWA's continued proposal to debar proceedings is unreasonably delayed because the proceedings continue beyond the thirty days after the plaintiffs' initial response to FHWA, claiming a violation of the direct federal spending suspension and debarment regulations within the Federal Acquisition Regulations.

Plaintiffs seek remedies including (1) declaring that the FHWA proposal to debar proceedings exceed FHWA's authority and are a violation of plaintiffs' Fifth Amendment Due Process rights, (2) vacating the proposed debarment, and (3) permanently enjoining FHWA from debarring plaintiffs. Alternatively, plaintiffs request that the court order FHWA to issue a decision on a date certain and any other relief the court deems appropriate.

Federal Motor Carrier Safety Administration

Two Drivers Dismiss Cases Challenging FMCSA's Denial of Requests to Remove Violations from the Drug and Alcohol Clearinghouse

On January 29, 2024, William Johnson, *pro se*, dismissed his petition for review in Johnson v. FMCSA, No. 23-2900 (8th Cir.). In February 2023, petitioner's employer reported to the Drug and Alcohol Clearinghouse that petitioner had violated FMCSA's regulations by refusing a DOT drug test. Petitioner submitted a petition for correction to FMCSA, pursuant to 49 C.F.R. § 382.717, arguing that he did not refuse to take the drug test and requesting that the violation be removed. FMCSA denied his petition on the ground that challenges to the accuracy of test refusals and other violations cannot be adjudicated under section 382.717. FMCSA also informed petitioner that if he wished to challenge the accuracy of the violation, he could do so pursuant to the Privacy Act.

On August 21, 2023, petitioner filed a petition for review in the U.S. Court of Appeals for the Eighth Circuit seeking review of FMCSA's denial of his petition for correction. FMCSA filed a brief on December 5, arguing that the agency properly denied petitioner's request under section 382.717 and reiterating that drivers wishing to contest the accuracy of test results and test refusals may do so in accordance with the Privacy Act procedures set forth at 49 C.F.R. part 10, subpart E.

Shortly after FMCSA filed its brief, petitioner submitted a request to FMCSA

challenging the violation under the Privacy Act. FMCSA resolved petitioner's Privacy Act request, and petitioner moved to voluntarily dismiss the case on January 29, 2024.

On September 27, 2023, Jabril Ibrahim, *pro se*, dismissed claims against USDOT in Ibrahim v. Labcorp, et al., No. 23-00589 (D. Md.). The case stemmed from a 2020 failed DOT drug test and plaintiff's subsequent termination. On March 3, 2023, plaintiff filed suit in the U.S. District Court for the District of Maryland against Labcorp, the company that processed his drug test specimen, D.E.N. United General Construction, his former employer that terminated him and reported the violation to the Clearinghouse, and DOT/FMCSA for denying his petition challenging the drug test result and seeking removal of the violation under section 382.717. Plaintiff sought removal of the violation from his Clearinghouse record and $600,000 in compensatory and punitive damages.

On September 15, 2023, FMCSA filed a motion to dismiss arguing that the district court lacked subject matter jurisdiction because the Hobbs Act, 28 U.S.C. § 2342(3)(A), vests exclusive jurisdiction to review final agency decisions issued under section 382.717 in the courts of appeals. The agency also argued that plaintiff could not seek money damages under the APA and that he had not exhausted all administrative remedies under the Federal Tort Claims Act. On September 27, 2023, plaintiff filed a motion to voluntarily dismiss DOT/FMCSA from the case.

FMCSA Files Appellate Brief in Suit Against FMCSA for $150 Million

FMCSA filed its response brief in Harris v. USDOT, FMCSA, et al., No. 23-5091 (D.C. Cir.) on April 11, 2024. This case began in the Superior Court of the District of Columbia in May 2022 when Abram Harris, *pro se*, filed a complaint alleging myriad claims against FMCSA, including fraud, abuse of process, and obstruction of justice, as well as violations of the Federal Tort Claims Act, False Claims Act, and the Racketeer Influenced and Corrupt Organization Act. Mr. Harris' claims against FMCSA stemmed from a September 2021 compliance investigation of a trucking company that he owned that resulted in FMCSA assessing civil penalties and placing him out of service. Mr. Harris seeks $150 million in damages and lost wages.

In July 2022, the D.C. Superior Court dismissed plaintiff's complaint, and a few days later, Mr. Harris filed a notice of appeal with the District of Columbia Court of Appeals. In August 2022, while the state court appeal was pending, the United States removed the matter to the U.S. District Court of the District of Columbia (Harris v. USDOT, FMCSA, et al., No. 22-2383 (D.D.C.)). The district court dismissed the case on March 13, 2023, finding that it lacked jurisdiction over the claims presented and that, even were jurisdiction present, the allegations taken as true failed to state any plausible claim. Mr. Harris appealed the decision to the U.S. Court of Appeals for the District of Columbia.

The United States moved for summary affirmance on July 31, 2023. The D.C. Circuit denied the motion on October 25, 2023, and ordered the parties to address in

their briefs whether a civil case may be removed to federal district court under 28 U.S.C. § 1442 after dismissal and while an appeal is pending before a state appellate court. The D.C. Circuit also appointed private counsel as *amicus curiae* to assist the court. Appellant filed an opening brief on December 13, 2023, arguing that the United Stated erred in removing the case to federal district court under 28 U.S.C. § 1442 while the appeal was pending in state court. The United States' brief, filed on April 11, 2024, argued that that case was properly removed and that the district court did not err in dismissing the case for lack of subject matter jurisdiction and implausibility.

Appellant filed a reply brief on May 6. The brief for the court-appointed *amicus curiae* was filed on June 3, and appellant's and appellees' replies are due on June 24.

DOT Seeks Judicial Enforcement of FMCSA's Household Goods Regulations

On March 29, 2024, the Department of Justice, on behalf of the Secretary, filed a complaint in the U.S. District Court for the Central District of California against USA Logistics, Inc., a household goods motor carrier, to recover civil penalties pursuant to 49 U.S.C. § 14702 for the carrier's multiple alleged violations of FMCSA's consumer protection regulations. Buttigieg v. USA Logistics, Inc., No. 24-2573 (C.D. Cal.). As a motor carrier for the transportation of property, USA Logistics must obtain and maintain operating authority registration pursuant to chapter 139 of title 49 of the U.S. Code. In addition, household goods carriers such as USA Logistics are required to meet and maintain a minimum financial security requirement. FMCSA revokes operating authority registration for carriers that fail to meet or maintain this requirement, and carriers that operate without operating authority registration are liable for a civil penalty of not less than $37,400 for each unauthorized transportation of household goods.

On July 25, 2023, FMCSA revoked USA Logistics' operating authority registration for failure to maintain and/or provide FMCSA with evidence of sufficient financial responsibility. Following that revocation of its authority, USA Logistics continued to operate as a household goods carrier on at least four occasions. In the complaint, the Secretary seeks a civil penalty of $37,400 per violation for a total civil penalty of $149,600.

On April 16, 2024, USA Logistics filed an answer to the complaint. The case is in the early stages of discovery.

Federal Railroad Administration

Petition for Certiorari Denied in Railroad Preemption Case

Ohio v. CSX Transportation, Inc., No. 22-459 (U.S.), *supra* at 1.

Multiple Petitions Seek Review of FRA Train Crew Size Final Rule

BNSF Rwy. Co. v. FRA, et al., No. 24-60173 (5th Cir.); Texas & Northern R.R. Co. v. FRA, et al., No. 24-60183 (5th Cir.); Indiana R.R. Co. v. FRA, et al., No. 24-1550 (7th Cir.); Union Pac. R.R. Co. v. FRA, et al., No 24-1736, (8th Cir.); Nebraska Central R.R. Co. v. FRA, et al., No 24-1774 (8th Cir); Florida East Coast Rwy. LLC v. FRA, et al., No. 24-11076 (11th Cir.); Ass'n of Am. Railroads v. FRA, et al., No. 24-1097 (D.C. Cir.), *supra* at 11.

Union Pacific Challenges FRA's Process for Approving Engineer and Conductor Certification Programs

On April 16, 2024, the Union Pacific Railroad Company (UP) filed a petition for review in the U.S. Court of Appeals for the Eighth Circuit seeking review of a February 22, 2024, letter from FRA that acknowledged UP's submission of its locomotive engineer and conductor certification programs under 49 C.F.R. parts 240 and 242. Union Pac. R.R. Co. v. FRA, et al., No. 24-1793 (8th Cir.). Additionally, the FRA letter stated that although the agency endeavored to complete its review within 30 days, due to the complexity of the review, approval might take longer and would only come in the form of a written confirmation of approval.

UP's petition contends that FRA has changed its certification approval process, citing regulations in parts 240 and 242 that provide that unless a submitting railroad is notified otherwise, its submitted programs will be considered to have been approved after 30 days. UP requests that the court set aside FRA's February 22 letter and hold that UP's programs were approved by operation of law after 30 days had passed.

Pursuant to an expedited briefing schedule agreed to by the parties, UP filed its opening brief on May 22. UP argues that FRA's letter is final agency action and therefore subject to judicial review and that the railroad is aggrieved because FRA's action prevents it from changing its operations. In addition, UP contends that FRA's action either violates the agency's part 240 and 242 regulations or unlawfully attempts to amend or rescind them.

FRA's response brief due July 8, and UP's reply brief due July 22.

FRA Awaits Fifth Circuit Ruling on Automated Track Inspection Waiver Decision

On March 21, 2024, FRA announced that the Track Standards Working Group of the Railroad Safety Advisory Committee (RSAC) was unable to reach a consensus on recommendations that would incorporate automatic track inspection (ATI) technology into FRA's Track Safety Standards (TSS), and that FRA is considering how to proceed. Litigation concerning the denial of a request by BNSF Railway Company (BNSF) to expand an existing track inspection waiver to two new territories under the railroad's ATI program remains pending before the U.S. Court of Appeals for the Fifth Circuit. BNSF Rwy. Co. v. FRA, et al., No. 22-60217 (5th Cir.).

BNSF's existing waiver provides limited, conditional relief from certain aspects of 49 C.F.R. § 213.233(b) and (c) of FRA's TSS, allowing BNSF to partially replace required visual track inspections by track inspectors with inspections using autonomous geometry inspection systems. The RSAC task was 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 an initial 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 that initial decision. In its briefs and during oral argument, 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 (BMWED) filed an intervenor brief, emphasizing that BNSF was not precluded from using ATI technology.

In its decision, BNSF Rwy. Co. v. FRA, 62 F.4th 905 (5th Cir. 2023), the court found that FRA's justification for dismissing BNSF's expanded waiver petition was insufficient, especially because 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. On June 21, 2023, FRA issued a new decision (June 2023 decision letter), in which it again concluded that expanding BNSF's existing waiver was unjustified at that time. In its June 2023 decision, FRA explained that the public interest and railroad safety still favored addressing ATI issues in a comprehensive manner 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, the Fifth Circuit should order full briefing and arguments before the court. On August 18, 2023, BNSF filed a new petition for review, attaching FRA's June 2023 decision letter; the court filed the petition in the existing case docket.

After the government updated the court in March 2024 that the Track Standards Working Group had been unable to reach a consensus on recommendations, BNSF wrote the court and again asserted that FRA's rationales for denying an expanded ATI waiver were insufficient and, consequently, the court should order FRA to grant BNSF's expanded waiver petition. In subsequent letters, the government and BMWED reiterated that the court should evaluate the merits of the June 2023 decision only after full party briefing.

The parties await further direction from the court.

Federal Transit Administration

Dispositive Motions Filed in Florida Suit Against Labor Certification Process

In December 2023, the government filed a motion to dismiss, or in the alternative, for summary judgment in Florida v. Buttigieg, et al. No. 23-61890 (S.D. Fla.). Plaintiff, the State of Florida, subsequently filed its own motion for summary judgment in January 2024. Florida filed this lawsuit against DOT, FTA, and the U.S. Department of Labor (DOL) on October 4, 2023, alleging that DOL's application of protective arrangements under 49 U.S.C. § 5333(b) to the State of Florida is unconstitutional. 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 chapter 53 of title 49 of the U.S. Code 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).

It its motion to dismiss, the government initially argues that plaintiff lacks standing to sue either DOT or DOL. First, the government argues that DOT has no control over the actions giving rise to the Florida's alleged injury, as it is a program under DOL's exclusive control. Additionally, the government argues that Florida has no standing to sue DOL because Florida has suffered no cognizable injury, as no Florida transit agency has lost federal funding. The government rebuts Florida's argument that it is being coerced into accepting FTA grants with "unascertainable conditions" by arguing that Florida fails to state with any specificity how Section 13(c) is coercive, and thus exceeds Congress's spending authority.

In the alternative, the government moved for summary judgment because Florida failed to establish that Section 13(c) exceeds Congress's authority under the Spending Clause. Florida argued the statute violated the Spending Clause because Section 13(c) lacks sufficient clarity required of any condition attached to federal funding. However, the government points out that Section 13(c) does not require transit agencies to interpret the statute to inform their expenditure of funds. If the transit agency receives federal funds, then DOL has already determined the required protective arrangements have been met, and thus, Section 13(c) is satisfied. Plaintiff's APA claims should fail because for the same reason - there is no interpretation of Section 13(c) required at the state level.

Florida contends it has suffered an injury for purposes of standing by its need to accept or reject an "unascertainable funding offer" from the federal government, and it is inconsequential that no transit agency has lost funding because the State's "coerced acquiescence" is a "present and continuous infringement on state sovereignty." Another alleged basis for injury is Florida's inability to enforce its sovereign prerogatives since it must either waive portions of the recent state law or lose millions in federal funding. Plaintiffs argue DOT is a proper party because it must enforce DOL's determination under Section 13(c) of what is fair and equitable to award grant applications. Regarding the Spending Clause, plaintiff argues that Congress, not DOL, must speak "unambiguously" through the statute and that DOL's implementation of Section 13(c) does more than simply fill in gaps. Under the APA, Florida argues there is nothing plain or clear about DOL's interpretation of the

statute, and thus, the court must apply an interpretation that resolves all ambiguities in favor of plaintiff.

The Amalgamated Transit Union International and the Transit Workers Union of America have jointly sought to intervene in the matter.

Maritime Administration

Fifth Circuit Denies Petition for Review of Texas Oil Terminal License

Citizens for Clean Air & Clean Water in Brazoria County v. USDOT, 98 F.4th 178 (5th Cir. 2024), *supra* at 3.

Second Circuit Affirms MARAD Determination on Foreign Transfer Approval

On March 15, 2024, the U.S. Court of Appeals for the Second Circuit unanimously affirmed MARAD's determination that the time charter of a cruise vessel to a non-citizen for operation on the Mississippi River was subject to MARAD's blanket, regulatory foreign transfer approval. American Cruise Lines, Inc. v. United States, F.4th 283 (2d Cir. 2024).

Petitioner American Cruise Lines Viking USA, LLC challenged MARAD's finding that a proposed charter arrangement between a U.S. subsidiary of Viking Travel Co., which operates popular ocean and river cruises outside of the United States, and River 1, LLC, a subsidiary of Edison Chouest Offshore, a U.S. company, for operation of cruise vessels on the lower Mississippi River, is a time charter, rather than a bareboat charter. Under the proposed arrangement, Chouest would construct a cruise ship that Viking would then charter for cruises. Chouest employees would operate the vessel, while Viking employees would manage onboard passenger entertainment operations. Petitioner also argued that MARAD failed to follow the notice and comment procedures applicable to cruise vessel time charter determinations under section 3502(b) of the National Defense Authorization Act of Fiscal Year 2021 (2021 NDAA).

The court reviewed MARAD's decision pursuant to 28 U.S.C. § 2342(3)(A), which grants circuit courts original jurisdiction, upon petition, to review transfer orders issued by MARAD. The court found that petitioners had standing, which intervenors River 1 and Viking challenged, because they asserted injuries in the form of increased competition and an inadequate opportunity to comment on the proposed action, which a favorable court decision would have redressed. MARAD did not dispute petitioner's standing to challenge the time charter determination. After reviewing the black letter maritime and Second Circuit case law distinguishing between bareboat charters and time charters, the court found that MARAD's determination that the proposed charter was a valid time charter and not a bareboat charter was reasonable. The court further found that, given the deference afforded to an agency for reasonable interpretations of its own regulations, MARAD's reliance on its analogous American Fisheries Act regulations limiting non-citizen control of fishing vessels was not impermissible. The court concluded that MARAD did not act in an arbitrary and capricious manner in confirming that the arrangement constituted a valid time charter and was not an impermissible transfer of control of a vessel to a non-citizen.

With respect to compliance with the notice and comment requirements of the 2021 NDAA, the court determined that MARAD "fully complied" with the procedural requirements of section 3502(b). In particular, the court noted that the summary of the transaction that MARAD published on its website and MARAD's subsequently-published consideration of comments were detailed enough to satisfy the procedural requirements of the NDAA 2021.

National Highway Traffic Safety Administration

Court Dismisses *Pro Se* Plaintiff's Lawsuit Seeking Damages and Other Relief Related to NHTSA's Denial of Petition for Rulemaking

On December 13, 2023, plaintiff Eddie Fray filed a complaint against Secretary Pete Buttigieg and numerous NHTSA personnel related to the agency's denial of his petition for a rulemaking that provided technological concepts to address vehicular hyperthermia. Fray v. Buttigieg, et al., No. 23-03708 (D.D.C.). Plaintiff contended, among other things, that provisions in the Infrastructure Investment and Jobs Act intended to address the issue are not as effective as what he had proposed in his petition. Plaintiff asserted claims in tort, and under the Fifth Amendment's Due Process Clause, the APA, the Sunshine Act, and criminal statutes. He sought relief that included exemplary damages of $100 billion.

Defendants moved to dismiss, arguing that plaintiff had no right of action to pursue his criminal claims, that the Sunshine Act did not apply, that plaintiff failed to plead exhaustion under the FTCA (and that such claims are barred by sovereign immunity), and that he failed to state a due process claim upon which relief could be granted. Defendants also argued that even if plaintiff's complaint could be read to allege a claim under the APA, plaintiff did not have standing and otherwise could not show that NHTSA's decision was arbitrary, capricious, or contrary to law.

The court granted defendants' motion to dismiss on April 24, 2024, finding the court lacks jurisdiction over plaintiff's criminal, tort, and APA claims. The court found that plaintiff brought two claims over which it did have jurisdiction, but those claims were also dismissed: plaintiff's due process claim was not supported by a cognizable vested right, and the Sunshine Act does not apply to the defendants.

Distributors of Pulsing Brake Lights Challenge NHTSA Investigation

On October 25, 2023, Williams & Lake, LLC and Brakes Plus, NWA, Inc., filed an action in the U.S. District Court for the Western District of Arkansas seeking a preliminary injunction that would bar NHTSA from notifying plaintiffs' motor vehicle dealer customers that plaintiffs' product could not be installed in manner consistent with federal law. Brakes Plus, NWA, Inc., et. al. v. USDOT, et. al., 23-05185 (W.D. Ark.).

Williams & Lake and Brakes Plus sell a device that when installed in a motor vehicle causes the vehicle's center high mounted stop lamp (CHMSL) to pulse rapidly three times when the vehicle's brake is depressed. Williams & Lake and Brakes Plus sell these devices primarily to motor vehicle dealers who install the device in connection with the sale of a vehicle. On July 26, 2023, NHTSA sent letters to Williams & Lake and Brakes

Plus requiring the companies provide their list of customers, explaining that installation of their products took motor vehicles out of compliance with Federal Motor Vehicle Safety Standard (FMVSS) No. 108, and informing the companies that installation of the product by motor vehicle dealers is prohibited by the National Traffic and Motor Vehicle Safety Act's prohibition on making equipment installed in compliance with an FMVSS inoperative in 49 U.S.C. § 31022. Federal Motor Vehicle Safety Standard No. 108, Lamps, Reflective Devices, and Associated Equipment, 49 C.F.R. § 571.108, requires brake lights to be steady burning. After NHTSA declined to extend the deadline for the companies to provide their customer information past October 25, 2023, Williams & Lake and Brakes Plus filed suit.

In their brief filed in support of their motion for preliminary injunction, plaintiffs argued that NHTSA's July 26, 2023, letter constituted final agency action, that NHTSA's statements regarding their product's compliance with FMVSS No. 108 were arbitrary and capricious, and that NHTSA's interpretation of FMVSS No 108 was an amendment to the standard. DOT filed a response brief arguing that plaintiffs lacked standing and that their claims are not ripe. DOT argued that plaintiffs are not likely to succeed on the merits of their claims given the lack of final agency action and because NHTSA's action was not subject to notice-and-comment rulemaking, contrary to law, or arbitrary or capricious. Additionally, DOT argued that plaintiffs failed to demonstrate irreparable harm and injunctive relief was inappropriate based on the balance of equities and public interest. The court held a hearing on the preliminary injunction on December 4, 2023.

Pipeline and Hazardous Materials Safety Administration

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

Metal Conversion Technologies, LLC v. PHMSA, No. 23-870 (U.S.), *supra* at 2.

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

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

Briefing Concludes and Oral Argument Heard in INGAA Challenge to PHMSA 2022 Gas Transmission Rule before the D.C. Circuit

INGAA v. PHMSA, (D.C. Cir. No. 23-1173), *supra* at 9.

United States Weighs in on Pipeline Dispute Between the Bad River Band and Enbridge

Bad River Band of the Lake Superior Tribe of Chippewa Indians v. Enbridge Energy, Inc., Nos. 23-2309, 23-2467 (7th Cir.), *supra* at 10.

Voluntary Dismissal of Industry Challenge to PHMSA's Gas Gathering Final Rule

On May 22, 2024, industry trade group GPA Midstream voluntarily withdrew its petition to the D.C. Circuit for judicial review of PHMSA's November 2021 Gas Gathering Final Rule. GPA Midstream Ass'n v. PHMSA, No. 22-1070 (D.C. Cir.). On June 3, the court issued an order terminating the proceeding.

GPA Midstream had filed its petition for judicial review on May 2, 2022. However, on June 16, 2022, PHMSA and GPA Midstream jointly moved the court to place the proceeding in abeyance during the term of a PHMSA-issued enforcement discretion granting gas gathering pipeline operators affected by the final rule an extra year (until May 17, 2024) to come into compliance with the final rule. In return, GPA Midstream agreed to voluntarily withdraw its petition on expiration of that enforcement discretion.

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 regarding classification of another MCR product, a Radial Cutting Torch (RCT), which uses the B15 mixture as fuel to produce a stream of superheated plasma used to cut metal pipe. On April 24, 2024, MCR's counsel requested that that PHMSA exercise enforcement discretion during the administrative appeal process if the agency classifies RCT as an explosive.

On May 10, 2024, PHMSA determined that the RCT was an unapproved explosive that was not authorized for transportation and denied MCR's application for a classification approval for the RCT. After confirming that PHMSA would not voluntarily stay enforcement, on May 14, MCR's counsel filed a motion for an immediate judicial stay of PHMSA's denial and requested a decision from the Fifth Circuit by May 21. PHMSA's brief in opposition was filed on May 20, and MCR's reply was filed on May 21. On May 23, the Fifth Circuit issued an order referring the motion for stay to the next merits panel available on an expedited basis, and on May 24, the court issued an administrative stay. The court has also set an expedited briefing schedule for the parties' briefs on the merits. MCR's brief is due on June 13, PHMSA's brief is due on June 26, and MCR's reply is due on July 1. The case is calendared for oral argument on July 9. At MCR's request, the court put the B15 mixture litigation back into abeyance on May 30, pending the outcome of the RCT litigation.

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