



DOT LITIGATION NEWS

Office of the General Counsel

Paul M. Geier
Assistant General Counsel
for Litigation

Peter J. Plocki
Deputy Assistant General Counsel
for Litigation

Washington, D.C. 20590

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

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Supreme Court Litigation

Supreme Court Holds that Secured Creditors Have Right to “Credit Bid”

On May 29, the Supreme Court decided RadLAX Gateway Hotel, LLC v. Amalgamated Bank, 132 S. Ct. 2065 (2012), ruling in favor of Amalgamated in an important case involving the ability of a secured creditor to “credit bid.” The Court held that a Chapter 11 bankruptcy plan may not be confirmed over the objection of a secured creditor if the plan provides for the sale of collateral free and clear of the creditor’s lien but does not permit the creditor to “credit bid” at the sale. DOT and other federal agencies are often secured creditors in bankruptcy proceedings, so a contrary result would have exposed the United States to the risk of receiving less than the maximum value for its security interests. Though the government was not a party in this case, the Solicitor General’s Office filed an amicus brief in support of Amalgamated’s position based on the recommendation of DOT and various other federal agencies.

In this case, the debtors obtained a loan from Amalgamated in order to finance a hotel purchase and renovation, and construction of a parking structure. The loan was secured with a blanket lien on all of the debtors’ assets. After running out of funds mid-way through the project, the debtors filed for Chapter 11 relief under the bankruptcy code. At the time they filed their Chapter 11 bankruptcy petition, the debtors owed at least \$120 million on the loans. In addition, more than \$15 million in mechanics’ liens had been asserted against debtors’ properties. Subsequently, the debtors sought to confirm a Chapter 11 plan that proposed

to sell substantially all of the debtors’ assets, but prohibited Amalgamated from bidding for the property using the debt it was owed to offset the purchase price, a practice known as “credit bidding.” The ability to credit bid helps to protect a creditor against the risk that its collateral will be sold at a depressed price.

As a result of Amalgamated’s objection to their proposed plan, the debtors sought to confirm under a statutory exception pursuant to 11 U.S.C. § 1129(b)(2)(A). The bankruptcy court and the U.S. Court of Appeals for the Seventh Circuit found that the debtors’ plan did not fully comply with the requirements for the exception because it proposed to sell an encumbered asset free and clear of a lien without permitting the lienholder to credit bid. In upholding the Seventh Circuit, the Supreme Court concluded that the debtors’ plan was not “fair and equitable” with respect to secured claims like Amalgamated’s and, accordingly, did not meet the statutory requirements of the bankruptcy code’s exception that permits confirmation of non-consensual plans. Noting that “this is an easy case,” Justice Scalia wrote the opinion for the 8-0 majority. Justice Kennedy took no part in the case.

The Court’s opinion can be found at <http://www.supremecourt.gov/opinions/11pdf/11-166.pdf>.

Supreme Court Considers Whether a Floating House is a “Vessel” Subject to Maritime Jurisdiction

On October 1, the Supreme Court heard oral arguments in Lozman v. City of Riviera Beach (No. 11-626). The issue in this case

is whether the U.S. District Court for the Southern District of Florida correctly exercised maritime jurisdiction over an in rem proceeding brought against a floating house. The petitioner, Fane Lozman, owned the structure and used it as his place of residence. Lozman on at least two occasions had the floating house towed from one location to another within the state of Florida. However, he did not use the structure as a means of water transportation. In 2006, Lozman moved to a municipal marina owned by the City of Riviera, Florida. The structure was moored to a dock by cables, received power from land, and had no motive power or steering of its own. In June 2007, the Riviera Beach City Council adopted revised dockage agreements that included new requirements for the residents at the Riviera Beach marina. By April 2009, Lozman had not signed the revised agreement and was also past due on his dockage fees. In response, the City of Riviera Beach filed an in rem proceeding against the floating house in the U.S. District Court for the Southern District of Florida for trespass and to foreclose on a maritime lien for the unpaid dockage.

The City filed a claim pursuant to the Federal Maritime Lien Act, which provides that repairs performed on a “vessel” generate a maritime lien. The word “vessel” includes “every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water.” The district court looked to Eleventh Circuit precedent in Board of Commissioners of the Orleans Levee Dist. v. M/V Belle of Orleans, 535 F.3d 1299 (11th Cir. 2008) and Miami River Boat Yard v. 60’ Houseboat, 390 F.2d 596 (5th Cir. 1968). In Belle of Orleans, the Eleventh Circuit held that “a watercraft is not ‘capable of being used’ for maritime transport in any meaningful sense if it has

been permanently moored or otherwise rendered practically incapable of transportation or movement.” 535 F.3d at 1310. Furthermore, in Miami River Boat Yard, the court held that a houseboat was capable of transportation even if it could only move by towing. 390 F.2d at 597. Because Lozman’s floating house was capable of being towed, as demonstrated by Lozman’s previous moves within Florida, the district court found that the structure was capable of being used as a means of transportation on water. Thus, the floating house constituted a vessel, and the district court exercised jurisdiction over the case.

Lozman appealed the decision, and the U.S. Court of Appeals for the Eleventh Circuit affirmed the district court’s decision. The Eleventh Circuit agreed with the district court’s analysis and reliance upon precedent and found that the floating house was a vessel and thus subject to maritime jurisdiction.

Lozman sought certiorari, asking the Supreme Court to determine “[w]hether a floating structure that is indefinitely moored receives power and other utilities from shore and is not intended to be used in maritime transportation or commerce constitutes a “vessel” under 1 U.S.C. § 3, thus triggering federal maritime jurisdiction.” The Court granted certiorari on February 21. The Solicitor General filed an amicus brief on May 15 in support of the Petitioner. The government’s amicus brief argued that vessel status should be based in significant part upon a structure’s purpose or function, as indicated by objective criteria, including whether it remains essentially stationary while it is in use, and is therefore not practically capable of being used for maritime transportation.

The briefs in the case can be found at http://www.americanbar.org/publications/prview_home/11-626.html. The opinion below is reported at 649 F.3d 1259 (11th Cir. 2011).

Supreme Court Denies Certiorari in Preemption Challenge to California's Regulation of Vessel Fuels

On June 25, 2012, the Supreme Court denied certiorari in Pacific Merchant Shipping Association v. Goldstene (No. 10-1555), a case arising out of California's attempt to regulate the conduct of seagoing vessels by placing restrictions upon their use of sulfur fuels. In an endeavor to reduce air pollution, the California Air Resources Board (CARB) imposed Vessel Fuel Rules covering vessels calling at California ports. Vessels subject to the regulations must switch to low-sulfur fuels once they are within twenty-four miles of California's coast. CARB's limits on fuel sulfur content are scheduled to become increasingly stringent within the next several years.

The petitioner, the Pacific Merchant Shipping Association (PMSA), is a non-profit mutual benefit membership corporation whose members are both United States- and foreign-flagged vessels subject to the CARB regulations. PMSA sought injunctive and declaratory relief against the CARB fuel regulations in federal district court in California, arguing that CARB's regulations are preempted under the Submerged Lands Act (SLA), 43 U.S.C. § 1301 et seq., and are also invalid under the Supremacy and Commerce Clauses of the federal Constitution, insofar as the regulations purported to regulate conduct more than three miles from California's coast. The district court denied PMSA's

motion for summary judgment, but certified its decision for appellate review under 28 U.S.C. § 1292(b).

The U.S. Court of Appeals for the Ninth Circuit granted permission to appeal and affirmed the district court's ruling. The Ninth Circuit recognized that this case involves a unique and far-reaching attempt by a state to regulate conduct beyond its borders. Furthermore, the Ninth Circuit recognized the Supreme Court's decision in United States v. Locke, 529 U.S. 89 (2000), which held as preempted under the Ports and Waterways Safety Act of 1972 (PSWA) certain parts of a Washington statute setting various requirements for the operation of oil tankers. In that case, the Supreme Court had recognized that the federal government had exercised supreme authority over maritime commerce and navigation since the Founding, and determined that Washington's regulations impermissibly intruded into the federal sphere. Nonetheless, the Ninth Circuit held that it was appropriate to apply a presumption against preemption of CARB's vessel fuel regulations in this case, given California's interest in public health and safety.

The Ninth Circuit held that the SLA did not preempt California's regulations because that statute was primarily directed at the ownership of "submerged lands" and the natural resources contained within them. Furthermore, the court rejected PMSA's constitutional and maritime arguments. The court noted that Annex VI of the International Convention for the Prevention of Pollution from Ships also set sulfur limitations for seagoing vessels in a geographic area overlapping with the CARB regulations. However, the Ninth Circuit performed a "balancing test" and decided that California's health and safety interests outweighed any concerns in this case about

disrupting “uniformity” in foreign relations and trade.

PMSA filed its petition for writ of certiorari on June 23, 2011, arguing that the Supreme Court should grant certiorari to address concerns about field preemption and the Supremacy and Commerce Clauses, and to curb California’s attempt to regulate maritime conduct beyond the borders set by the SLA. The Court later invited the Solicitor General to file a brief expressing the views of the United States on whether certiorari should be granted.

DOT worked with the Solicitor General to help determine the Government’s views. On May 25, 2012, the Government filed its brief expressing the view that certiorari should be denied, for several reasons. First, the SLA did not preempt the CARB regulations, because that statute dealt with the allocation of title to submerged lands, rather than the authority of a state to regulate conduct on the surface of the water above those submerged lands. Second, PMSA did not adequately raise, and the courts below therefore did not squarely address, various issues presented in the petition, including the effect of the regulations upon vessel design and operation under PWSA. Third, the interlocutory nature of the case made it premature to address some of the broader questions in the petition, including the Commerce Clause issues. Fourth, the practical impact of the Ninth Circuit’s ruling appeared to be limited in scope, since the CARB regulations would be overtaken by federal standards (via Annex VI) by early 2015.

Although the Government opined that certiorari should be denied, it nonetheless contended in its brief that the Ninth Circuit had erred in applying a presumption against preemption in this case. No such

presumption was appropriate, the Government asserted, since the case involves maritime commerce, an issue of primarily federal concern.

The opinion below is reported at 639 F.3d 1154 (9th Cir. 2011).

Supreme Court Invites Views in Preemption Challenge to Port’s Limitations on Motor Carrier Operations

On March 26, 2012, the Supreme Court invited the Solicitor General to file a brief expressing the views of the United States in American Trucking Associations, Inc. v. City of Los Angeles (No. 11-798). The case arises out of a decision in 2008 by the Port of Los Angeles (the Port), an independent division of the City of Los Angeles, to require “concession agreements” with motor carriers that operate drayage trucks on Port property. Drayage trucks obtain cargo from ships in marine terminals and transport them relatively short distances to customers or to other means of transportation. Although the Port itself does not contract for drayage services, it develops and leases terminals to shipping lines and other companies that use drayage services in the course of their operations.

The Port developed the concession agreements as part of a “Clean Truck Program,” adopted in response to community concerns and litigation about environmental damage and other harms that could result from the Port’s expansion. As part of that program, the Port banned certain high-polluting trucks, imposed fees on terminal operators for the use of other high-emission trucks, and adopted other measures aimed at reducing environmental harm. The Port also decided to prohibit motor carriers

who failed to sign the concession agreements from operating drayage trucks on Port property.

The concession agreements, which were signed by over 600 motor carriers by spring 2010, contained various provisions, including the following: (1) an employee-driver provision, requiring a gradual transition to 100% employee drivers for drayage trucks, rather than using independent owner-operators; (2) a plan for off-street parking for permitted trucks; (3) truck maintenance requirements; (4) posting of placards on permitted trucks with a telephone number for members of the public to call with concerns about drayage trucks, emissions, and safety; and (5) a demonstration of financial capability to meet the terms of the concession agreements.

The case has a lengthy and complicated procedural history. ATA, a national motor carrier association, filed suit in federal district court seeking injunctive relief. ATA contended that certain provisions of the concession agreements were preempted by the Federal Aviation Administration Authorization Act (FAAAA), 49 U.S.C. § 14501 *et seq.* That statute, as the Ninth Circuit explained in the decision from which certiorari is sought, contains various provisions that restrict states “from undermining federal deregulation of interstate trucking.” ATA v. City of Los Angeles, 660 F.3d 384, 395 (2011). In particular, FAAAA forbids a state from enacting a law “related to a price, route, or service of any motor carrier . . . with respect to the transportation of property.” 49 U.S.C. § 14501(c)(1). The statute contains an exception for measures falling within state safety regulatory authority. *Id.* § 14501(c)(2)(A).

The district court denied a preliminary injunction, and ATA appealed. Before the Ninth Circuit, the United States filed a brief as amicus curiae supporting ATA’s position, arguing that the concession agreements were preempted by FAAAA. Furthermore, the United States rejected the theory that the “market participant” doctrine applied to save the concession agreements from being invalidated. That doctrine distinguishes between impermissible state regulation and permissible exercises of state purchasing authority. However, as the United States’ brief noted, the Port was not a purchaser in the market for drayage services.

The Ninth Circuit reversed and remanded. On remand, the district court granted a preliminary injunction against certain provisions of the concession agreements, but denied it as to other provisions. In a second appeal, the Ninth Circuit reversed in part. The district court then held a bench trial and ruled in the Port’s favor, denying a permanent injunction and holding that the five disputed provisions of the concession agreements, as noted above, were either not preempted by FAAAA or were saved by the statute’s safety exception or the market participant doctrine.

On appeal for the third time, the Ninth Circuit held that the employee-driver provision was preempted by FAAAA and that no exception applied. However, the court upheld the other four main provisions as beyond the scope of FAAAA or as covered by the safety exception or market participant doctrine. Judge Randy Smith filed a vigorous dissenting opinion.

ATA filed its petition for writ of certiorari on December 22, 2011. Before the Supreme Court, ATA is challenging the Ninth Circuit’s decision upholding the concession agreement provisions relating to financial

capability, maintenance, off-street parking, and placards. (By contrast, the Port has not sought review of the Ninth Circuit's adverse ruling on the employee-driver provision.) ATA continues to press several arguments. First, ATA argues that the concession agreements are preempted by FAAAA. As the Supreme Court ruled in Rowe v. N.H. Motor Transp. Ass'n, 552 U.S. 364 (2008), FAAAA sweeps broadly to preempt state measures "having a connection with, or reference to, carrier rates, routes or services." The concession agreements, ATA contends, fall within this rule, and the Ninth Circuit's decision runs counter to the Supreme Court's direction that the FAAAA preemption provision should be read broadly. Second, ATA argues that no market participant exception is available under FAAAA and would not apply in any event, since the Port does not act as a

purchaser in the market for drayage services. Third, ATA contends that barring access by federally licensed motor carriers to Port property effectively suspends those carriers' federal registrations, in violation of the Supreme Court's decision in Castle v. Hayes Freight Lines, Inc., 348 U.S. 61 (1954).

The Court has invited the Solicitor General to file a brief expressing the views of the United States on whether certiorari should be granted. DOT is in the process of working with the Solicitor General to help determine the Government's views.

The opinion below is reported at 660 F.3d 384 (9th Cir. 2011).

Departmental Litigation in Other Courts

D.C. Circuit Upholds DOT Airline Passenger Consumer Protection Rule

On July 24, the U.S. Court of Appeals for the District of Columbia Circuit ruled in favor of DOT in Spirit Airlines, Inc., et al. v. DOT, 687 F.3d 403 (D.C. Cir. 2012), Spirit Airlines' and Allegiant Air's challenge to DOT's April 2011 air passenger consumer protection rule. Southwest Airlines intervened in the case in support of the petitioners.

At issue in this case were three provisions of the most recent air passenger consumer protection rule that (1) end the practice of permitting sellers of air transportation to exclude government taxes and fees from the

advertised price ("Full Fare Advertising Rule"), (2) prohibit the sale of nonrefundable tickets by requiring airlines to hold reservations at the quoted fare without payment or cancel without penalty for at least 24 hours after the reservation is made if the reservation is made one week or more prior to a flight's departure ("Refund Rule"), and (3) prohibit post purchase baggage fee increases after the initial ticket sale ("Post-Purchase Price Rule.")

The court upheld DOT's rule in all respects and denied the petitions for review. In an opinion authored by Judge David Tatel, and joined by Judge Karen Henderson, the court upheld the Full Fare Advertising Rule, explaining that it was reasonable for DOT to now enforce its long-standing rule (dating from 1984) to require that airlines actually

add the taxes to the base fare and disclose the total price and that DOT's decision to do so was supported by substantial evidence in the administrative record. The court also held that it was reasonable for DOT to require that the total, final price of a ticket be the most prominently listed figure to prevent airlines from confusing consumers about the total cost of their travel. The court further held that the Full Fare Advertising Rule squared fully with the First Amendment as a permissible disclosure requirement.

The court upheld the Refund Rule as well. The court explained that DOT's rule properly regulates cancellation policies on the basis of a finding that existing airline cancellation and refund practices were deceptive and unfair, a regulation "plainly allowed" by DOT's unfair and deceptive practices statute. The court also explained that DOT's findings in this regard were supported by substantial evidence.

Finally, in upholding the Post-Purchase Price Rule, the Court characterized as "ridiculous" the airlines' contention that DOT had failed to give adequate notice of the scope and general thrust of the proposed rule, thereby rendering it procedurally unlawful. The court also held that it was not arbitrary or capricious for DOT to find that when consumers purchase airline tickets, they assume that the price they pay for extra bags at the airport will be the price advertised when they bought their ticket. The court thus explained that it was reasonable for DOT to conclude that increasing the price of "these very commonly purchased and practically necessary services (like the ability to

carry bags onto the flight)" amounted to an unfair consumer practice.

Senior Judge Randolph wrote a separate opinion that dissented from the majority opinion to the extent that it upheld the Full Fare Advertising Rule's prohibition on sellers of air transportation from "prominently" displaying government taxes and fees. He otherwise joined the balance of the majority's opinion.

The D.C. Circuit's opinion is available at [http://www.cadc.uscourts.gov/internet/opinions.nsf/B3C8FBE2AB1F6A9185257A45004EE709/\\$file/11-1219-1385164.pdf](http://www.cadc.uscourts.gov/internet/opinions.nsf/B3C8FBE2AB1F6A9185257A45004EE709/$file/11-1219-1385164.pdf).

Sixth Circuit Rules that Detroit International Bridge Company is not a "Federal Instrumentality"

On September 24, the U.S. Court of Appeals for the Sixth Circuit affirmed a district court decision and agreed with the United States that the Detroit International Bridge Company (DIBC), the owner of the only bridge connecting the Detroit area to Canada, is not a "federal instrumentality." The plaintiff-appellee in Commodities Export Company v. Detroit International Bridge Company, No. 11-1750, 2012 WL 4329326 (6th Cir. Sept. 24, 2012), owned property near DIBC's Ambassador Bridge and filed suit against the City of Detroit and the United States after DIBC unilaterally condemned city streets around its property, thereby cutting off the property and effecting a regulatory taking against Commodities Export Company (CEC). DIBC claimed it had the power to condemn the streets under a 2008 Michigan Supreme Court

decision holding that DIBC was immune from Detroit's zoning ordinances for the limited purpose of facilitating commerce over the Ambassador Bridge because it was a federal instrumentality. (The United States was not a party to this state court litigation.) CEC claimed that the City should be held liable for failing to enforce its own ordinances and demanded that the United States take a position on DIBC's federal-instrumentality status and control DIBC's actions. DIBC intervened in the case below, and the United States cross-claimed against DIBC, arguing that DIBC was not a federal instrumentality and that it had misappropriated that status.

The district court granted summary judgment for the United States, and the Sixth Circuit affirmed. After concluding that the district court had properly exercised its jurisdiction over the United States' cross claim and that it was not bound to follow the Michigan Supreme Court's decision, the appellate court held that DIBC is not a federal instrumentality. The court considered a number of indicia in reaching this decision: 1) whether the entity was created by the government; 2) whether it was established to pursue governmental objectives; 3) whether government officials handle and control its operations; and 4) whether the officers of the entity are appointed by the government. The court concluded that DIBC bore none of these characteristics, contrasting it to government-created entities such as Amtrak and noting that DIBC has been a frequent adversary of the United States in litigation. Accordingly, the court concluded that DIBC's congressional authorization to

operate the Ambassador Bridge and thus facilitate international commerce was not enough to make DIBC a federal instrumentality.

Court Affirms DOT Decision in Appeal of DBE Certification Denial

On September 7, the U.S. District Court for the Eastern District of New York granted DOT's motion for summary judgment in Beach Erectors, Inc. v. DOT, et al., No. 10-5741, 2012 WL 3887209 (E.D.N.Y. Sept. 7, 2012). This case arose after Beach Erectors applied for and was denied certification as a Disadvantaged Business Enterprise (DBE) by a New York transit agency. Beach Erectors appealed that denial to DOT's Office of Civil Rights (DOCR), but DOCR affirmed the state agency's decision. Pursuant to DOT regulations, only small businesses owned and controlled by socially and economically disadvantaged individuals can be certified as DBEs.

Beach Erectors filed an action in district court seeking judicial review of DOCR's decision under the Administrative Procedure Act. In addition, Beach Erectors asserted an Equal Protection claim. DOT and Beach Erectors filed cross-motions for summary judgment.

In considering the parties' cross-motions, the district court rejected Beach Erectors' claim that DOCR's decision was arbitrary and capricious. Specifically, the court found that DOCR's decision regarding Beach Erectors' socially and economically disadvantaged owner's lack of the

requisite technical experience necessary to control the firm was fully supported by and rationally connected to evidence in the administrative record. Moreover, the court held that DOCR's decision adequately reflected its examination of the relevant data and articulated a satisfactory explanation for its action. With respect to the Equal Protection claim, the court concluded that Beach Erector's claim was fatally defective because it failed to identify any similarly-situated comparator that was treated differently than it had been. Accordingly, the court granted DOT's motion for summary judgment.

Lawsuits Filed over the Columbia River Crossing Project

In July 2012, three lawsuits were filed in the U.S. District Court for the District of Oregon challenging the Record of Decision (ROD) jointly issued by FTA and FHWA on December 7, 2011, related to the Columbia River Crossing (CRC) project. Coalition for a Livable Future v. FHWA, et. al. (D. Or. No. 12-1180); Hayden Island Livability Project v. Ditzler, et. al. (D. Or. No. 12-1181); Thompson Metal Fab, Inc. v. DOT, et. al. (D. Or. No. 12-0081). The CRC project is a joint FTA/FHWA project that involves the replacement of the Interstate 5 bridge over the Columbia River connecting Oregon and Washington, the construction of area freeway/road interchange improvements, the construction of a new light rail transit line that would extend the existing Portland metro light rail to Vancouver, Washington, and the construction of park and ride lots. The

lawsuits allege an insufficiently broad alternatives analysis in the project's environmental impact statements and the insufficiency of the environmental analysis overall, violation of the Endangered Species Act, violation of the Clean Air Act, and violation of Environmental Justice requirements. The alleged NEPA violation in the Thompson lawsuit primarily regards failure to evaluate economic harm, particularly as it relates to plaintiff's business. Additionally, an intervenor, Greenberry Industrial, LLC, filed a complaint on August 30, 2012, with similar allegations to Thompson's. The three cases have been consolidated, and FTA and FHWA are in the process of assembling the administrative record. Last month, the President identified the CRC project as one of the infrastructure projects of national importance to be "fast-tracked" for approval.

Lawsuit Filed over Light Rail Project in Seattle

On July 13, a complaint was filed in U. S. District Court for the Western District of Washington challenging the Record of Decision issued by FTA and FHWA on November 16, 2011, relating to the East Link Light Rail Transit project. Building a Better Bellevue, et. al. v. DOT, et. al. (W.D. Wash. No. 12-1019). The project will connect Seattle's existing North-South light rail alignment East across Lake Washington to the cities of Bellevue and Redmond. The FHWA portion of the project includes conversion of highway lanes to transit and approval of bridge expansion. The lawsuit, brought by two citizens groups, challenged the NEPA process on the

East Link Light Rail project proposed by the regional transit agency, Central Puget Sound Transit Authority. The plaintiffs contend, among other things, that the purpose and need in the Environmental Impact Statement was too narrowly drafted so as to exclude other transit mode alternatives and that the Section 4(f) analysis and determination were flawed. Defendants' answer to the complaint and the NEPA administrative record were filed with the court on September 7. Pursuant to a stipulated schedule, final briefing is to be completed by January 25, 2013.

Efforts to Resolve FOIA Suit Regarding Drone Certification and Authorization

DOT has engaged in extensive negotiations with Electronic Frontier Foundation (EFF) about a rolling production of documents responsive to EFF's broad-scale FOIA request that is the subject of EFF's suit against the Department, Electronic Frontier Foundation v. DOT (N.D. Cal. No. 12-0164). EFF, a nonprofit organization, filed a FOIA request in 2011 with FAA for documents concerning FAA's

certification and authorization of unmanned aircraft systems (UAS), sometimes commonly referred to as "drones," in the national airspace. In particular, EFF sought records associated with (1) certificates of authorization (COAs), issued to public entities, like police departments and state universities; and (2) special airworthiness certificates (SACs), issued to private entities, including the manufacturers of UAS. To facilitate the document production, in April 2012, DOT provided EFF with lists containing the names and some basic information about the holders of COAs and SACs. Furthermore, DOT has continually produced UAS records to EFF on a rolling basis over the past several months. DOT has already produced records associated with over three hundred COAs and over two dozen SACs and continues to work with EFF to identify and produce records responsive to EFF's FOIA request.

Recent Litigation News from DOT Modal Administrations

Federal Aviation Administration

FAA Wins Challenge to Its Partial Dismissal of Complaint Concerning Enclosed Marine Trash Transfer Station near LaGuardia Airport

In a June 12, decision, the U.S. Court of Appeals for the Second Circuit issued a short, summary order in Paskar and Friends of LaGuardia Airport, Inc. v. FAA (Paskar II) No. 11-2720, 2012 WL 2096513 (2d Cir. June 12, 2012), finding in FAA's favor only thirteen days after oral argument. The petitioners originally filed an administrative complaint with FAA under 14 C.F.R. part 16 against the City of New York and the Port Authority of New York and New Jersey alleging that the City's construction of the North Shore Marine Transfer Station raised grant assurance compliance issues relating to air safety at LaGuardia Airport. FAA dismissed petitioners' complaint against the City of New York (but not the Port Authority) with prejudice on May 24, 2011, because the City was not a proper respondent under Part 16 (i.e., it is not responsible for noncompliance with the grant assurances nor has it signed any grant contracts). The petitioners filed a petition for review of the partial dismissal under 49 U.S.C. § 46110, challenging FAA's determination that the City of New York was not a proper respondent in the administrative proceeding. Oral argument was held on May 30, 2012.

In its decision, the court agreed with FAA's position and found that the agency's factual findings were supported

by substantial evidence, and that FAA's application of the law to the facts was neither arbitrary nor capricious, nor an abuse of discretion. The court noted that "[t]he City is not a signatory or party to the grant agreements, nor is it a proper Part 16 "respondent" as defined in 14 C.F.R. § 16.3, as the City is not a "sponsor, proprietor, or operator" of the airport. The court stated that although the City owns the land upon which LaGuardia sits, "the Port Authority is the operator of LaGuardia and leases the land from the City. The City does not qualify as a sponsor under the terms of the grant agreement, statute, or regulations because it is not an agency that receives financial assistance from the FAA." The Court agreed that the City was also not a "proprietor" because ownership alone is not sufficient to warrant proprietor status, and the City does not "operate" the airport.

FAA's Office of Airports proceeded with its 14 C.F.R. part 16 investigation of the Port Authority's alleged noncompliance with its grant assurances and issued its initial decision on September 26. Another case Paskar brought against FAA regarding the waste transfer facility, Paskar and Friends of LaGuardia Airport v. DOT (Paskar I) (2d Cir. No. 10-4612), is still pending. The Second Circuit's decision in Paskar II can be found at http://www.ca2.uscourts.gov/decisions/isysquery/8330b217-0825-41c8-a525-115905a58332/1/doc/11-2720_so.pdf#xml=http://www.ca2.uscourts.gov:80/isysquery/8330b217-0825-41c8-a525-115905a58332/1.

Third Circuit Upholds FAA's Approval of Philadelphia International Airport Capacity Enhancement Program

On July 6, the U.S. Court of Appeals for the Third Circuit in Township of Tincum, et al. v. DOT, 685 F.3d 288 (3rd Cir. 2012), dismissed this action against the FAA's Record of Decision for a plan, known as a Capacity Enhancement Program, that would expand and re-configure Philadelphia International Airport by adding a third parallel runway, extending an existing runway, and making various terminal and airfield improvements, including re-locating the air traffic control tower. This project was on the Secretary's top priority list, and FAA used streamlining procedures to facilitate the environmental review process. Among other actions, the plan requires the City of Philadelphia to purchase 72 homes and 80 businesses located in Tincum Township in order to relocate a UPS facility currently on airport property.

The court found no merit to Petitioners' allegations that the FAA violated NEPA and Section 47106(a)(1) of the Airports Airway and Improvement Act (AAIA). In making their NEPA arguments, the Petitioners relied exclusively on comments made by EPA about FAA's air quality modeling and analysis. EPA had been involved throughout the process, but made late comments criticizing some of FAA's methodology. Petitioners argued that EPA's comments were entitled to greater deference than FAA's methodology because EPA was the agency with expertise in the Clean Air Act and had certain responsibilities under NEPA. The court disagreed,

noting that "the EPA's comments do not carry the force of law and do not warrant Chevron style deference." FAA should take EPA's comment seriously, but need not follow them "slavishly." The court then addressed the five claims of technical error and held in favor of FAA applying the arbitrary and capricious standard.

Under the AAIA, the Petitioners alleged that FAA failed to demonstrate that the project was reasonably consistent with existing plans of public agencies for development of areas surrounding the airport. In making this determination, FAA relied on existing policy and case law to determine that the project was reasonably consistent with the plans set forth by the local Metropolitan Planning Organization. The court dismissed this claim, finding FAA's determination was "neither arbitrary nor capricious."

The Petitioners requested a rehearing en banc on July 20. That request was denied without opinion on August 8.

City of Warwick Challenge of T.F. Green Airport Improvement Program Dismissed

On May 10, the U.S. Court of Appeals for the District of Columbia Circuit dismissed City of Warwick, Rhode Island v. DOT (D.C. Cir. No. 11-1448), a petition for review challenging FAA's September, 2011 Record of Decision for the T.F. Green Airport Improvement Program (AIP). The dismissal was prompted by a motion from the City of Warwick to dismiss the case with prejudice based on a settlement agreement between the City and the

Rhode Island Airport Corporation (RIAC), the airport's operator. FAA is not a party to the settlement agreement. The agreement includes provisions for re-locating a ball field, preserving local historic cemeteries, and monitoring water quality.

T.F. Green Airport (PVD), located in Warwick, Rhode Island, is the busiest airport in the state. The purpose of the T.F. Green AIP is to enhance both the safety and efficiency of PVD in order to allow the airport to more fully meet its current and anticipated demand for aviation services. In order to meet these goals, the T.F. Green airport improvement program includes safety enhancements to be made to the runway safety area of PVD's crosswind runway and a 1534 foot extension of PVD's primary runway.

**FAA Victory in Challenge
Concerning Airport Sponsor
Authority to Deny Lease
Agreement to Airport
Demolition Business**

On July 19, the U.S. Court of Appeals for the Eleventh Circuit ruled in FAA's favor in BMI Salvage and Blueside Services v. FAA, No. 11-12583, 2012 WL 2924025 (11th Cir. July 19, 2012), finding that FAA's interpretation of aeronautical activities is entitled to deference and upholding the FAA's determination that appellants' activities did not constitute aeronautical activities.

In 2005, BMI and Blueside filed a complaint with FAA alleging that Miami-Dade County engaged in unjust discrimination in violation of Grant Assurance 22 (Economic

Nondiscrimination) in connection with their leases for airport property at Opa-Locka Airport. BMI ran an aircraft salvage operation; its sister company, Blueside, was interested in establishing a fixed-base operation (FBO) at the airport. FAA initially determined that there was no grant assurance violation, and that decision was appealed. Thereafter, the court reversed and remanded to the agency. (BMI I). On remand, FAA concluded that salvage and demolition are not aeronautical activities, and BMI did not engage in an aeronautical activity covered by Grant Assurance 22. FAA further concluded that other leaseholders BMI identified were not similarly situated to BMI and Blueside as required to establish unjust economic discrimination. Oral argument was held on May 22.

The court in its decision stated that an agency's interpretation of its own regulations is "controlling unless plainly erroneous or inconsistent with the regulation," citing Auer v. Robbins, 519 U.S. 452, 461 (1997). The court noted that in determining that BMI's salvage and demolition operations were not aeronautical activities, FAA provided three reasons to support its finding that demolition and salvage were not aeronautical activities. First, FAA explained that the official agency definition of aeronautical activity did not include salvage and demolition. According to the official definition, aeronautical activities are those required for operation of an aircraft. Demolition and salvage are not necessary for the operation of an aircraft. Second, FAA noted that the list of activities that would qualify as aeronautical, although not exhaustive, showed the agency's intent to focus on the "direct relationship to the

operation of aircraft." Salvage and demolition, however, had no such relationship. FAA recognized that "the receipt of aircraft onto the leasehold for demolition, along with a reasonable time period after the aircraft is last parked under its own power, is an aeronautical activity," but "the lengthy business of disassembling the aircraft after that flight is not." Third, FAA drew an analogy to manufacturing aircraft or aircraft parts, which it did not consider aeronautical activities. FAA noted that the aircraft manufacturing was often done on off-airport property.

The court concluded that FAA's interpretation of salvage and demolition as non-aeronautical activity is reasonable. The court further recognized that not every action involving an aircraft is deemed aeronautical and that the FAA is entitled to draw a line between what is aeronautical activity and what is not. Because FAA's interpretation was not plainly erroneous or inconsistent with the statute, the court concluded that the FAA's finding that demolition is non-aeronautical is entitled to deference. The court disagreed with BMI and Blueside that its prior decision in BMI I constitutes the law of the case. The court pointed out that its previous opinion merely held that FAA's determinations had been insufficiently supported. Thus, the court's opinion in BMI I gave FAA the opportunity to obtain additional evidence and make adequate findings to enable appellate review and was not a binding legal conclusion about FAA's interpretation of its own regulation under the law of the case doctrine.

The court found that because FAA's definition of aeronautical activities is

entitled to deference, FAA properly dismissed BMI's Part 16 complaint; because BMI did not engage in any aeronautical activity, it was not subject to Grant Assurance 22's provisions or protections. The court noted that FAA does not dispute that Blueside would be covered by Grant Assurance 22 because its FBO operations are an aeronautical activity. Nevertheless, FAA properly dismissed Blueside's complaint because, even applying Grant Assurance 22, the evidence in the record shows that Blueside was not similarly situated to other FBOs at the airport.

The court's decision can be found at <http://www.ca11.uscourts.gov/unpub/ops/201112583.pdf>.

Fourth Circuit Affirms Dismissal of Complaint Claiming Negligence in Improper Issuance of Airworthiness Certificate

On March 12, the U.S. Court of Appeals for the Fourth Circuit in Holbrook v. United States, 673 F.3d 341 (4th Cir. 2012), affirmed a district court's dismissal of a complaint in which plaintiffs alleged that an FAA inspector improperly issued a standard airworthiness certificate for an imported Alouette Model II SE-3130 helicopter.

The helicopter was excessed by the German military and purchased by an entity in the United States. Once imported, FAA issued an airworthiness certificate for the helicopter based on documentation submitted by the owner, who subsequently leased the helicopter to the plaintiffs in 2004. The plaintiffs intended to use the helicopter in their flight instruction business.

In 2006, FAA launched a comprehensive review of all Alouette II helicopter certifications. The agency decided to reverse its certification decision on a number of the Alouette helicopters because they were originally manufactured for military customers and never intended for civil certification. FAA suspended the standard airworthiness certificate in August 2007, and Holbrook subsequently sued the government, claiming that the agency's initial decision to certify the helicopter was negligent and that his reliance on the decision caused him to suffer financial harm. The district court found that the allegations fell within the discretionary function exception to the Federal Tort Claims Act, 28 U.S.C. § 2680(a).

On appeal, Holbrook did not take issue with the regulatory scheme implemented by FAA or its decision to suspend the airworthiness certificate. He asserted that the FAA inspector who first certified the helicopter acted outside the bounds of discretion by applying the wrong regulatory requirements. According to Holbrook, the FAA inspector mistakenly evaluated the used helicopter's certification application under 14 C.F.R. § 21.183(c), which Holbrook argued applied only to new imported aircraft, instead of § 21.183(d), which he alleged was the proper regulatory provision for used imported aircraft. Holbrook pointed to an excerpt from the agency's internal guidance that suggested only "new" imported aircraft fell under paragraph (c) and that "used" aircraft were to be evaluated under paragraph (d). He further alleged that even if the inspector's application of § 21.183(c) was correct, the inspector violated FAA policy and procedure

when he adjudged an "Attestation" from the French government as sufficient documentation for certification instead of an "Export Certificate of Airworthiness."

The Fourth Circuit dove into the technical aspects of aircraft certification and determined that the FAA inspector's decision to certify the helicopter under § 21.183(c) was not improper. In rejecting Holbrook's argument, the court centered its analysis on the plain language of paragraph (c) and also stated, "[i]f select passages from a lengthy and complex order could serve as the basis for government tort liability, the FAA would be hobbled by the specter of litigation as it worked to promote aircraft safety. The price of circulating internal guidance should not be an exponential increase in exposure to a tort suit." The court also rejected Holbrook's argument that the FAA inspector erroneously applied paragraph (c) in certifying the helicopter, finding that the regulation did not require applicants to submit specific language or documents to establish that the aircraft conforms to its type design and that the FAA inspector had discretion to evaluate the documents submitted in determining whether an airworthiness certificate should be issued.

As for FAA's reversal of the inspector's certification decision, the court unequivocally stated that the agency "must be free to engage in certification error-correction without the threat of an FTCA suit." The court noted that FAA's safety mission, as authorized by Congress, cannot be infringed upon by tort law. "To bind the FAA to its original certification decisions through tort law's deterrent power would

contravene Congress' delegation of broad authority in this area to the FAA, crimp the FAA's leeway for reexamination afforded by [statute], and thereby constrain the Administrator's ability to protect the lives of pilots, attendants, and passengers in the air."

Seventh Circuit Affirms Summary Judgment in Aviation Weather FTCA Case

On July 18, the U.S. Court of Appeals for the Seventh Circuit affirmed summary judgment in favor of the United States in an aviation weather case, LeGrande v. United States, 687 F.3d 800 (7th Cir. 2012). The plaintiff, a Southwest Airlines flight attendant, was injured when the airliner flew into severe turbulence. She claimed \$25 million for her disfiguring injuries and blamed FAA's air traffic controllers at the Cleveland Air Route Traffic Control Center for not warning the pilots of turbulence.

In the district court, the United States and the Plaintiff filed cross-motions for summary judgment. The district judge granted the United States' motion and denied the Plaintiffs', ruling that the controllers at the Cleveland Center were not negligent. The court found that there was no evidence that the controllers knew, or should have known, that severe turbulence was in the flight path of the airliner. The weather products that were disseminated to the controllers, including PIREPs and Center Weather Advisories, did not forecast or report severe turbulence along that flight path. The controllers had no more information about turbulence than the pilots had from their own dispatcher and publicly

available weather reports. Further, there was no evidence that the controllers failed to disseminate the weather products that were provided to them or in any way failed to comply with the standards of FAA Order 7110.65.

The district judge also ruled that FAA had no duty to provide the forecast in a Meteorological Impact Statement (MIS) to the controllers or the pilots. The MIS is a long-range forecast created for air traffic planning purposes only, primarily used by Traffic Management Units. In this case, an MIS did forecast "isolated severe turbulence," but it was over an area covering four states, 10,000 feet of vertical airspace, and a 12-hour period. The airline captain testified that he was not permitted to use an MIS for operation purposes. The judge noted that if the meteorologist believed that notice to pilots and controllers of the threat of severe turbulence was warranted, he would have issued a Center Weather Advisory.

The appellate court affirmed the district court, holding that the controllers had no duty to broadcast any turbulence forecast contained in an MIS. The court noted that the long-range, general forecast in the MIS was "far too indefinite to be of assistance to pilots."

On appeal, plaintiff also blamed the National Weather Service meteorologist, arguing that he failed to advise air traffic controllers of the forecast for severe turbulence that was contained in the MIS. The appellate court ruled that the plaintiff could not add new arguments against the NWS because her administrative claim contained allegations against FAA only, not the NWS.

D.C. Circuit Rejects FAA Defense in EAJA Fee Petition for Review

On April 17, the U.S. Court of Appeals for the District of Columbia Circuit granted the petition for review Green Aviation Management Co., LLC v. FAA, 676 F.3d 200 (D.C. Cir. 2012), a challenge to a decision of the FAA Administrator affirming an Administrative Law Judge's (ALJ) denial of petitioner's application for the award of attorney's fees associated with a civil penalty enforcement matter.

Following preliminary civil penalty enforcement proceedings and before any hearing on the merits, FAA withdrew a civil penalty complaint against Green Aviation LLC (Green). The ALJ then dismissed the case with prejudice as he was required to do under the FAA's regulations, 14 C.F.R. § 13.215. Thereafter, Green sought attorney's fees under the Equal Access to Justice Act (EAJA), arguing that it was the prevailing party because the dismissal was with prejudice. The ALJ denied the application, and Green appealed to the Administrator, who also denied the award of attorney's fees under EAJA. The Administrator determined that Green was not the prevailing party for the purposes of EAJA under the principles set forth in Buckhannon Board and Care Home, Inc. v. West Virginia Dept of Health and Human Services, 532 U.S. 598 (2001). Specifically, the Administrator held that where, as here, a dismissal with prejudice is obtained through the nondiscretionary application of a regulation, it lacks the "judicial

imprimatur" that is the hallmark of a decision on the merits.

Green argued, among other things, that Buckhannon should not be extended to apply to the meaning of "prevailing party" under EAJA's administrative provision, 5 U.S.C. § 504(a)(1), because policy concerns in the administrative context differ from those in civil actions such as the one at issue in Buckhannon. Alternatively, Green contended that the ALJ's dismissal of the proceeding with prejudice satisfies Buckhannon because it resulted in a "court-ordered change" in the relationship between the parties. Specifically, Green noted that under the doctrine of res judicata, a dismissal with prejudice prevents FAA from initiating another administrative action based on the same set of facts.

In response, FAA contended that because courts have consistently applied Buckhannon to the "prevailing party" requirement in EAJA's civil action provision, 28 U.S.C. § 2412(d)(1)(A), and there are no relevant distinctions between that provision and EAJA's administrative provision, Buckhannon should apply to administrative EAJA and control Green's request for attorney's fees. FAA argued that Green is not a prevailing party under Buckhannon because the relief granted was entirely the result of FAA's voluntary withdrawal of its complaint and the operation of a mandatory procedural rule, 14 C.F.R. § 13.215, which unambiguously states that when the agency attorney withdraws the complaint, the ALJ "shall dismiss the proceedings . . . with prejudice." Accordingly, FAA contended that the ALJ had no discretion in dismissing the proceeding and thus the change in the

legal relationship between the parties lacked the judicial or quasi-judicial imprimatur necessary to confer prevailing party status.

In its decision, the court agreed with FAA that Buckhannon should apply to the meaning of “prevailing party” under EAJA’s administrative provision, noting that it had previously applied Buckhannon in an administrative setting and that the Supreme Court in Buckhannon had rejected the relevance of the policy arguments that Green urged. However, in applying Buckhannon, the court determined that Green had satisfied the two relevant criteria for establishing whether it was the “prevailing party”: whether there is a judgment in favor of the party seeking fees and whether the judicial pronouncement is accompanied by judicial relief.

The court held that there was clearly a judgment in favor of the party seeking fees and a judicial pronouncement. The only real question for the court was whether the ALJ’s order granted judicial relief. The court stated that Buckhannon’s FAA’s focus on the ALJ’s lack of discretion in dismissing the proceeding with prejudice misconstrued Buckhannon. What was important was not the fact that the ALJ lacked discretion, but the fact that the ALJ’s dismissal order, non-discretionary or otherwise, had res judicata effect and was thus not a mere formality or a housekeeping measure. The court remanded the case to the FAA Administrator to determine whether the FAA’s complaint against Green was substantially justified under EAJA, and if not, to determine the amount of fees to which green is entitled.

The D.C. Circuit’s opinion is available at [http://www.cadc.uscourts.gov/internet/opinions.nsf/8655A6C6090B70D0852579E30050C7C1/\\$file/11-1260-1369185.pdf](http://www.cadc.uscourts.gov/internet/opinions.nsf/8655A6C6090B70D0852579E30050C7C1/$file/11-1260-1369185.pdf).

District Court Finds Air Tour Operator, not FAA Inspector, Responsible for 2009 Helicopter Crash, Plaintiffs Appeal

The U.S. District Court for Hawaii in Shull v. United States, No. 10-00556, 2012 WL 1492347, (D. Haw. Apr. 26, 2012), cleared an FAA inspector of all negligence allegations stemming from the 2009 crash of a Eurocopter AS350FX helicopter owned by air tour operator Sunshine Helicopters, Inc. The crash occurred after the helicopter’s engine quit in flight during a commercial pilot competency check ride. On board the helicopter at the time of the crash were the pilot and an FAA inspector. Both were seriously injured but survived. The helicopter was destroyed.

Sunshine Helicopters, Inc. and the pilot brought negligence actions against the United States alleging that the FAA inspector mishandled the helicopter’s fuel control lever when he initiated a simulated engine failure maneuver, causing the engine to flame out. The plaintiffs further alleged that the inspector initiated the maneuver in a tree-covered precipitous area that was not suitable for an emergency landing, contrary to established protocol for simulated engine failures.

The United States vigorously disputed the allegations and contended that a defective fuel control unit, not the FAA inspector’s conduct, caused the engine

failure. Diagnostic tests conducted during discovery revealed that the fuel control unit was miscalibrated, which, according to expert testimony, was a result of faulty test rigs at the overhaul facility. The court agreed and further found that Sunshine Helicopters employees knew that the helicopter's fuel control lever was "sensitive" because the engine quit unexpectedly on several different occasions. Yet, the company did not adequately investigate the problem.

The court found that the FAA inspector's conduct was reasonable, noting that even the pilot testified that the FAA inspector did not mishandle the fuel control lever. Concerning the plaintiffs' contention that the inspector initiated simulated engine failure in an area not suitable for landing, the court, after reviewing testimony and photographs, disagreed, and concluded that the area selected was relatively flat pastureland that was clear of trees.

The plaintiffs moved for reconsideration and a new trial, which the court denied. Plaintiffs appealed the judgment in favor of the United States to the U.S. Court of Appeals for the Ninth Circuit (No. 12-16652).

Federal Highway Administration

District Court Rejects NEPA Challenge to Detroit River International Crossing, Plaintiffs Appeal

On April 5, the U.S. District Court for the District of Eastern Michigan granted

DOT's Motion to Affirm FHWA's environmental approval of the New International Trade Crossing (NITC), also known as the Detroit River International Crossing, a proposed new bridge linking the Detroit area to Canada. The suit challenging FHWA's approval, Latin Americans for Social and Economic Development, et al. v. FHWA, et al., 858 F. Supp. 2d 839 (E.D. Mich. 2012), was filed by six Detroit-area community groups and the Detroit International Bridge Company (DIBC). DIBC owns and operates the Ambassador Bridge, the only existing bridge between the Detroit area and Canada. Plaintiffs alleged, among other things, that the project's Environmental Impact Statement lacked a reasonable range of alternatives, did not adequately compare the preferred alternative to others, and inadequately addressed environmental justice issues related to low-income and minority populations of Detroit's Delray neighborhood. Plaintiffs sought to enjoin any action taken in reliance on the environmental review of the project and to disqualify DOT from acting as the lead agency on any future review based on the allegation that FHWA had impermissibly acted as an advocate for the new bridge.

The court rejected all of plaintiffs' challenges to the environmental review of the project. The court found that the review demonstrated a careful and deliberate process regarding the identification of the project's purpose and need and the selection of the preferred alternative for the location of the project. The court held the FHWA "considered a reasonable range of alternatives and did not act arbitrarily and capriciously when it considered, but rejected, other alternatives in favor of

the preferred alternative.” In considering plaintiffs’ environmental justice arguments, the court rejected the claim that FHWA “predetermined” the location of the bridge and targeted the minority Delray area. It found that the record showed an extensive process leading up to the selection of Delray and a thorough environmental justice analysis once the location was identified as a potential site, including the development of a community enhancement and mitigation plan.

On May 3, plaintiffs appealed the district court’s decision to the U.S. Court of Appeals for the Sixth Circuit. (6th Cir. 12-1556).

FHWA Wins Challenge to Charlottesville Interchange Project

On May 29, the U.S. District Court for the Western District of Virginia granted FHWA’s Motion for Summary Judgment in Coalition to Preserve McIntire Park, et al. v. Mendez, 862 F. Supp. 2d 499 (W.D. Va. 2012), upholding FHWA’s section 4(f) determinations and decision not to prepare an Environmental Impact Statement (EIS) in connection with the Route 250 Bypass Interchange Project in Charlottesville. The plaintiffs had contended that the interchange Project would compromise or destroy portions of McIntire Park and would adversely affect other natural and historic features found therein and nearby. The court found that FHWA acted within the scope of its authority, was not arbitrary or capricious, and followed proper procedures in making its section 4(f) determinations. Furthermore, the court

concluded that FHWA’s Environmental Assessment (EA) was a proper review of the Interchange Project’s cumulative effects and alternative design proposals and that the analyses contained within it have been sufficiently and rationally performed.

The court rejected the plaintiffs’ contention that FHWA violated section 4(f) of the DOT Act, which imposes substantive limits on the Secretary’s discretion to approve federally-funded projects that use certain protected lands or resources. Specifically, the court found that FHWA’s section 4(f) determination to reject an avoidance alternative was reasonable in light of that plan’s inability to meet the Interchange Project’s purpose and need and its failure to adequately ensure the safety of non-motorized traffic and pedestrians passing through the intersection. Moreover, the court found that FHWA’s 4(f) determination was supported by sufficient evidence in the administrative record and that “there is no doubt that [the necessary procedural steps] were followed.”

In addition, the court also rejected the plaintiffs’ challenges to FHWA’s decision to prepare a Finding of No Significant Impact in lieu of an EIS and the sufficiency of FHWA’s EA. The court found that FHWA’s decision that an EIS was unnecessary was based on an evaluation of the Interchange Project’s cumulative effects that was “well-reasoned and sufficiently thorough to merit being upheld.” Furthermore, the court distinguished a recent decision of the U.S. Court of Appeals for the Fourth Circuit that found deficiencies in an EIS that FHWA prepared in connection with another project. Specifically, the court

distinguished that Fourth Circuit case and found that in this case, FHWA's EA contained sufficient evidence to show that FHWA engaged in an objective analysis of the reasonable alternatives that it developed or which were proposed to it. The court noted that "the NEPA process 'involves an almost endless series of judgment calls,' but '[t]he line-drawing decisions...are vested in the agencies, not the courts.'"

FHWA Wins Summary Judgment in \$3.4B Seattle Area Bridge Project

On July 25, the U.S. District Court for the Western District of Washington granted summary judgment to federal (DOT/FHWA) and state (WSDOT) defendants in Coalition for a Sustainable 520 v. DOT, et al., No. 11-1461, 2012 WL 3059404 (W.D. Wash. July 25, 2012). Plaintiff challenged the NEPA and Section 4(f) approvals for the Washington SR520, I-5 to Medina Bridge Replacement Project.

The court held that the agencies took the "requisite hard look at the environmental consequences of the proposed project" and that the FEIS and ROD fulfilled "both the letter and the spirit of NEPA." The court found that "elimination of the 4-Lane Alternative from consideration after the DEIS was neither arbitrary, capricious, nor an abuse of discretion." The court also found that "the cumulative effects section, while fairly brief, is adequate, in large part because there are so few other future projects which would have incremental impact to be considered as cumulative to this project . . . there was little to add to the analysis of impacts of the project itself,

which were extensively discussed in other sections of the FEIS."

The court also determined that FHWA complied with Section 4(f). The court found that "Section 4(f) does not require that the agency 'circle back' to reconsider an option that it has already ruled out as imprudent" and "[i]nstead, the . . . inquiry should focus on means of impact minimization that are 'compatible with the alternative . . . deemed feasible and prudent under 4(f),' " quoting SHHAIR v. FAA, 651 F.3d 202, 213, 214 (1st Cir. 2011).

The court also found that "plaintiff's claims under the Clean Air Act are without merit." Plaintiff alleged that defendants violated the Clean Air Act by failing to analyze "hot spots" for carbon monoxide (CO) at congestion "choke points" along SR 520. The court found that the agencies chose three "worst-case" intersection locations to model for "hot spots." The court held that "Plaintiff's allegation of violation of the Clean Air Act amounts to no more than a disagreement with the choice of locations to be monitored for CO. Such disagreement over methodology does not give rise to a claim under NEPA."

In addition, the court dismissed the state law claims against WSDOT based on Eleventh Amendment immunity. The favorable decision allows the State to proceed with construction of the proposed \$3.4B Washington State project to replace structurally deficient bridges, widen SR 520 (from I-5 to Medina) from 4-lanes to 6-lanes (HOV lanes), and include bicycle and pedestrian lanes.

Texas District Court Rules in Houston Grand Parkway Suit

On August 22, the U.S. District Court for Southern District of Texas ruled on the parties pending motions for summary judgment in Sierra Club v. U.S. Army Corps of Engineers, FHWA, et al. (S.D. Tex. No. 11-03063). The court ruled that the U.S. Army Corp of Engineers (USACE) had failed to properly consider cumulative impacts of the Grand Parkway Segment E project in the Houston, Texas area. However, the court also found that FHWA and the Texas Department of Transportation (TxDOT) were not required to prepare a Supplemental EIS on the project nor would an injunction be issued while USACE was completing the reconsideration of the project's cumulative impacts. Thus, the project is free to continue construction.

The Grand Parkway (SH 99) is a proposed 180+ mile circumferential scenic highway traversing seven counties and encircling the Greater Houston region. Segment E of SH 99 is a proposed 15.2-mile, four-lane, controlled access toll road with intermittent frontage roads from IH10 (W) to US 290 (Northwest Freeway) through Harris County.

The Sierra Club argued that USACE improperly issued a Section 404 permit for the highway project and that USACE and FHWA had failed to take into account the potential indirect and cumulative impacts of the Segment E project on the area's USACE flood control dams – particularly the Addicks Dam. Sierra Club claimed that the construction of the Segment E project and the resulting developmental impacts

could lead to the catastrophic failure of the dam. Sierra Club also sought a ruling that the FHWA/TxDOT had violated NEPA in not considering the project's indirect and cumulative impacts on the dams and that both agencies should be required to complete new environmental studies. Finally, the plaintiff sought an injunction halting the project during the completion of the new studies.

In its ruling, the court specifically found that FONSI issued by USACE, and its conclusion that there were “no unacceptable impacts” at Addicks, violated NEPA as the conclusion was “not based on a review of cumulative effects and reasonably foreseeable future development.” The court found that USACE had only considered the effects of the project itself on the Addicks Dam and Reservoir but had not considered the impacts of resulting development in the area. The court noted that USACE relied extensively on the FEIS prepared by FHWA, but that this document did not address the impacts on the dam from development caused by the project.

Additionally, the court found that FHWA was not required to complete a SEIS. It noted that “[t]he new circumstance must present a *seriously* different picture of the environmental impact of the proposed project from what was previously envisioned.” While the court noted that there was some new information, the previously conducted indirect and cumulative analysis studies were still sufficient and there were no “seriously” different developments since the FEIS.

Finally, the court found it was not “appropriate” to enter an injunction at this time. It noted the costs that would

be incurred with shutting down the project in mid-construction, the problems with the Corps' analysis that the court has identified involved future development and the cumulative impact of that development with Segment E, there was no irreparable injury at this time, and that any impacts on the Addicks Dam could be addressed through future mitigation.

FHWA Wins Challenge to Southern California Truck Expressway

On June 29, the U.S. District Court for the Central District of California granted summary judgment to FHWA and all other defendants on all Clean Air Act (CAA) and NEPA claims, and denied plaintiffs' motions for summary judgment in NRDC, et al. v. DOT, et. al. (C.D. Cal. No. 09-08055).

California DOT (Caltrans) provided an EIS and Record of Decision on FHWA's behalf to build a new road, SR-47, a 1.7 mile high capacity truck expressway to carry diesel trucks between Terminal Island, at the Los Angeles and Long Beach port complex, and the I-405. Caltrans acted on FHWA's behalf under a SAFETEA-LU provision allowing states to act for FHWA on certain NEPA decisions. The case was the first challenge to such a decision for FHWA by a state DOT. FHWA adopted the Caltrans' CAA conformity determination regarding SR-47.

NRDC and other plaintiffs challenged the Caltrans decision under NEPA documents to build SR-47 and the FHWA decision to approve CAA project-level conformity for the road,

including a PM2.5 hot spot analysis. FHWA adopted the Caltrans CAA Conformity decision.

The plaintiffs challenged the decision to conduct the analysis using the North Long Beach Monitoring Station PM2.5 data, a location within a mile to a half-mile of multiple roads with similar traffic and environmental conditions to the project. Plaintiffs' argued that the location of the monitor, 5 miles from the immediate location of the SR-47, was too far from the project location to be reasonable. The court accepted FHWA's reasoning that the qualitative analysis used here was based on a wider geographic area than the area immediately adjacent to the proposed road. The court also noted that SR-47 would not increase traffic, but would move traffic from local streets to an expressway to reduce congestion and enable fewer emissions due to the higher overall vehicle speeds. The court found that FHWA acted reasonably within its discretion, and followed the EPA Guidance. The court agreed with FHWA that no localized modeling of PM2.5 was required, even though a computerized modeling of CO was required. Overall, the court found the CAA analysis to reflect a thorough consideration of the potential effects of the project, and the project's "no-build" alternative.

The court also rejected plaintiff's NEPA claims. The court found that Caltrans did prepare an adequate EIS, in the analysis of CAA emissions, and that NEPA does not impose more stringent requirements than the CAA. The court found that the Caltrans decision not to explicitly evaluate the 2006 revised NAAQS for PM2.5 was reasonable.

The court allowed the plaintiffs' to raise claims against the Health Risk Assessment that were not explicitly raised during the NEPA comment period, since the claim involved information already released in the NEPA decision. However, the court found the conformity determination was in accord with the Health Risk Assessment and that the assessment overall met the NEPA requirements. The Court found that contrary to plaintiffs' claims, the PM2.5 conformity determination was conducted as part of the NEPA process, in accordance with NEPA regulations. The court found that the Traffic Impact Analysis satisfied NEPA, with careful consideration of the cumulative growth-inducing aspects of the project. The court ruled that the decision properly considered reasonable alternatives, including Caltrans' consideration of on-dock rail, and how the zero emissions mass container transit technologies related to on-dock rail. Finally, the court found that Caltrans properly disclosed the project's cumulative greenhouse gas emissions, using a qualitative approach, and reasonably decided that the project would not have a significant impact on climate change.

Plaintiffs appealed the district court's decision to the U.S. Court of Appeals for the Ninth Circuit on August 8. (9th Cir. No. 12-56467).

Court Grants FHWA's Motion to Dismiss in NEPA Assignment Case

On September 11, three days before a scheduled hearing on the matter, the U.S. District Court for the Northern

District of California granted FHWA's Motion to Dismiss in Center for Biological Diversity, et al. v. FHWA, et al. No. 12-2172, 2012 WL 3999858 (N.D. Cal. Sept. 11, 2012), which involves the Willits Bypass, a highway project in Mendocino County, California. The dismissal with prejudice was premised primarily on the language of 23 U.S.C. § 327, the Surface Transportation Project Delivery Pilot Program, commonly known as "NEPA Assignment."

The court's decision first noted that plaintiffs' opposition to FHWA's motion had "acknowledged" that any claims based on FHWA's 2006 Final Environmental Impact Statement and Record of Decision were barred by the applicable statute of limitations, 23 U.S.C. § 139(1). With regard to NEPA Assignment, the court held that any environmental decision-making subsequent to the July 1, 2007, Memorandum of Understanding between FHWA and the California Department of Transportation (Caltrans), by which FHWA had assigned, and Caltrans had assumed, "all of the USDOT Secretary's responsibilities under NEPA" for the Willits Bypass Project, was Caltrans' sole responsibility. "[T]he statute implementing [NEPA Assignment] provides that '[a] State that assumes responsibility ... shall be *solely responsible and solely liable* for carrying out, in lieu of the Secretary, the responsibilities assumed ... until the program is terminated'"

This case is one of two in California in which FHWA has been named as a defendant despite an assignment of authority to Caltrans. FHWA has also filed a Motion to Dismiss in the other

case, Samuels, et al. v. FHWA, et al. (C.D. Cal. No. 12-4287). This second case involves a Caltrans decision made pursuant to the so-called CE Assignment statute, 23 U.S.C. § 326.

Preliminary Injunction Sought in Challenge to Ohio Bridge Project

On September 19, the Coalition for the Advancement of Regional Transportation (CART) filed a Motion for Preliminary Injunction in U.S. District Court for the Western District of Kentucky in The National Trust for Historic Preservation, et. al. v. FHWA, et. al. (W.D. Ky. No. 10-0007). This lawsuit was initially filed in September 2009 in the District of Columbia by the National Trust for Historic Preservation and River Fields, Inc., a Louisville preservation advocacy group in opposition to the Louisville Southern Indiana Ohio River Bridge Project. In January 2010, the case was transferred to the Kentucky District Court. The States of Kentucky and Indiana were allowed to intervene as defendants in the suit in September 2011. In March 2011, the litigation was stayed by the Court pending completion of a Supplemental Final Environmental Statement (SFEIS) as requested by all parties. The SFEIS was completed on April 20, 2012, and FHWA issued the Revised Record of Decision on June 20.

Earlier in September 2012, plaintiffs The National Trust for Historic Preservation and River Fields filed their Amended Complaint, while CART filed a new Complaint for Declaratory and Injunctive Relief in the case. CART then filed their motion for preliminary

injunction requesting an expedited hearing on September 19.

According to the memorandum supporting their motion, CART's request for a preliminary injunction was precipitated by Defendant INDOT's announcement on September 13 that Indiana was accelerating their contract letting for the project. As a result, the contracts and the award of a tree clearing contract on October 25 would begin prior to the court's review of the case and cause irreparable harm to the plaintiffs. The motion specifically requests the Court to "enjoin the Defendants from entering into contracts or committing public funds to construction on the A-15 route." The A-15 route is the east end bridge section of the project and is the most controversial component of the project.

CART alleges that the preliminary injunction is necessary because the plaintiff's will ultimately prevail on the merits of their suit and the accelerated letting of contracts prior to the court's review will, among other things, jeopardize Indiana bat habitat in violation of the Endangered Species Act, pollute waters of Harrod's Creek in violation of the Clean Water Act, and allow construction prior to the defendants' compliance with the Federal Aid Highway Act and against the public policy expressed in 23 U.S.C. §301.

Appeal Filed in 3-Cable Median Barrier FTCA Case

On September 24, plaintiffs appealed an August 24 decision of the U.S. District Court for the District of Arizona in Dunlap v. United States, No. 11-01360, 2012 WL 3641408 (D. Ariz. Sept. 24,

2012), which granted summary judgment to the United States based on the 2-year FTCA statute of limitations.

In Dunlap, the District Court had determined that the FTCA statute of limitations is a non-jurisdictional claim processing rule, but encouraged parties to brief whether plaintiffs' claim was timely filed within the 2-year FTCA statute of limitations. Plaintiffs argued that under FTCA 2401(b), an action is timely *either* "if the administrative claim is presented to the agency within two years of accrual"; *or* "the action is filed within 6 months of the date of mailing . . . of notice of final denial of the claim." Citing numerous cases, the District Court disagreed with plaintiffs and found that "plaintiffs were required both to present their administrative claims to the agency within two years of accrual and to file this action within six months of the final denial of their claims." The District Court held that since "Plaintiffs did not present administrative claims until . . . almost five years after the collision, this action is time barred."

Dunlap (9th Cir. No. 12-17138) is one of three similar 3-cable-median barrier FTCA claims currently pending in the 9th Circuit. The other two cases are June v. United States (9th Cir. No. 11-7776) and Keller v. United States (9th Cir. No. 12-16817). Appellants in June and Keller are challenging Arizona District Court decisions that dismissed plaintiffs' claims based on lack of subject matter jurisdiction because plaintiffs failed to file a claim within the 2-year FTCA statute of limitations. The fourth 3-cable median barrier claim -- DeVries v. United States (D. Ariz. No. 11-01822) -- was voluntarily dismissed by plaintiff.

New NEPA Challenge to Utah Highway Project

On September 21, plaintiff Moyle Petroleum Company, filed a complaint in the U.S. District Court for the District of Utah. Plaintiff in Moyle Petroleum Co. v. LaHood, et al. (D. Utah No. 12-00901) alleges multiple violations of NEPA, most of which relate to alleged economic harm to plaintiff resulting from the Bangerter 600 West Project located in Draper, Utah, south of Salt Lake City. The project will reduce congestion and improve safety on the exit ramps from Interstate 15 onto Bangerter Highway and at the intersection of 200 West and Bangerter Highway in Draper, the main east-west road serving the southern end of the Salt Lake Valley west of I-15, providing an important link between I-15 and I-80. The FHWA Utah Division issued a Record of Decision on March 7, 2012.

New NEPA Challenge to Los Angeles Bikeway

On May 17, a group of individuals brought suit against FHWA alleging violations of NEPA and the APA arising from the Exposition Boulevard Bikeway Project (Bikeway), which would run for approximately four miles between Los Angeles and Santa Monica, California. Plaintiffs in Samuels, et al. v. FHWA, et al. (C.D. Cal. No. 12-04287) all of whom own property along the Bikeway's proposed alignment, allege that FHWA and Caltrans violated NEPA and the APA by "deciding to fund" the Bikeway and by not issuing an environmental assessment or environmental impact statement for the project.

This is the second lawsuit filed against this project in the past two years. In 2010, most of the same plaintiffs brought suit against FHWA and Caltrans, but that Complaint was dismissed after Caltrans withdrew the NEPA categorical exclusion (CE) it had issued under the authority of 23 U.S.C. § 326 (CE Assignment) and the FHWA-Caltrans Memorandum of Understanding implementing CE Assignment within California. The current lawsuit arises from a new CE issued by Caltrans in November 2011.

As with the larger California NEPA Assignment program, under CE Assignment Caltrans is "solely responsible and solely liable" for any decisions made pursuant to federal environmental laws and regulations and must accept the federal court jurisdiction over the case. While FHWA had no role in the NEPA decision made for the Bikeway, plaintiffs appear to attempt to sidestep this point by tying both of the counts in their Complaint to FHWA's authorization of Federal-aid funding for the project.

New NEPA Challenge to Indiana Highway Project

On July 2, a pro se plaintiff filed a Complaint in the U.S. District Court for the Southern District of Indiana against Secretary Ray LaHood, Administrator Victor Mendez, Indiana Division Administrator Robert Talley, and various state and county officials. The plaintiff in Moody v. LaHood, et al. (S.D. Ind. No. 12-0907) is challenging the proposed design and construction of the North Main Street Rehabilitation Project in the City of Franklin, Indiana. The plaintiff alleges that the defendants violated NEPA, Section 4(f), and Section 106.

The purpose of the North Main Street Rehabilitation Project is to address roadway and storm drainage problems within the City of Franklin, Indiana. The plaintiff alleges that the defendants violated NEPA by issuing a Categorical Exclusion for the project when an Environmental Assessment should have been developed. Plaintiff further alleges that the defendants failed to consider a historic property as part of the Section 106 and 4(f) process.

New NEPA Challenge to North Carolina Highway

On August 28, plaintiffs in Catawba Riverkeeper, et. al., v. N.C. DOT, et. al. (W.D.N.C. No. 12-559) filed a new complaint and sought a declaratory judgment and preliminary injunction to halt progress on the Gaston East-West Connector, a proposed \$930 million, 22-mile toll road project that would extend from I-85 west of Gastonia in Gaston County to I-485 near the Charlotte-Douglas Airport in Mecklenburg County. FHWA published a Final Environmental Impact Statement (FEIS) for the project on December 21, 2010, and issued a Record of Decision (ROD) for the project on March 1, 2012.

Plaintiff's assert four bases for relief in their complaint: 1) defendants failed to adequately assess and disclose direct and indirect environmental impacts, particularly effects on environmental justice communities; 2) defendants' alternatives analysis was deficient in scope and analysis as a result of flawed traffic analysis; 3) defendants prepared the FEIS in bad faith and failed to respond to public comments; and 4) defendants failed to prepare a Supplemental EIS in light of new

information, including a May 2012 decision of the U.S. Court of Appeals for the Fourth Circuit invalidating the NEPA analysis for the Monroe Connector/Bypass project. (The proposed Monroe Connector/Bypass is located on the other side of Charlotte from the Gaston East-West Connector.)

Based on these objections the plaintiffs seek a declaratory judgment that Defendants violated NEPA, a vacation of the ROD, preliminary and permanent injunctive relief, and attorney's fees.

Federal Motor Carrier Safety Administration

Seventh Circuit Denies Attorney Fees in EOBR Litigation

On April 2, the U.S. Court of Appeals for the Seventh Circuit declined to award attorneys' fees and costs to the petitioners in Owner-Operator Independent Drivers Association, et al. v. FMCSA, 675 F.3d 1036 (7th Cir. 2012). Petitioners' motion for fees and costs under the Equal Access to Justice Act (EAJA) followed the Seventh Circuit's August 2011 decision vacating FMCSA's 2010 Electronic On-Board Recorder (EOBR) rule due to the agency's failure to adequately address driver harassment pursuant to 49 U.S.C. § 31137(a). See 656 F.3d 580 (7th Cir. 2011).

Petitioners had sought attorney's fees in the amount of \$325,028 and expenses of \$9,679, arguing that they were prevailing parties in the underlying litigation, FMCSA's position in the litigation was not substantially justified,

the hours expended by petitioners' counsel in the proceeding were reasonable, and that petitioners were entitled to an hourly rate above the \$125 statutory rate under EAJA due to "an increase in the cost of living" and "a special factor, such as the limited availability of qualified attorneys for the proceedings involved."

In the opposition to petitioners' motion, FMCSA argued that petitioners are ineligible for any fees or expenses because OOIDA, the real party in interest with respect to fees, has a net worth that exceeds the statutory net worth limitations for eligibility under EAJA. FMCSA further argued that fees should not be awarded because the United States' position in the litigation was substantially justified. Alternatively, FMCSA argued that the fees should be reduced because petitioners (a) are ineligible for a fee enhancement based on expertise; (b) incorrectly calculate a cost-of-living increase; (c) may not recover fees for claims unaddressed and unrelated to the claim on which they succeeded; and (d) claim excessive and vague attorney time.

In reaching its decision, the court focused on the proposition that EAJA awards should be available where attorneys' fees would have deterred litigation against the government, but not where such deterrence does not exist. In this case, because OOIDA, not the individual plaintiffs, was liable for the attorneys' fees, the necessary deterrence to litigation did not exist. Accordingly, the Court declined to award fees because "the purpose of the EAJA would not be served by awarding fees to the individual petitioners. Financial considerations

would not have deterred the individual drivers from pursuing this action, because they are not liable for payment of the attorneys' fees even if no fees are awarded by [the] court."

OOIDA Seeks Review of National Registry of Certified Medical Examiners Rule

On June 18, the Owner-Operator Independent Drivers Association (OOIDA) petitioned for review of the final rule issued by FMCSA establishing a National Registry of Certified Medical Examiners. In its statement of issues in Owner-Operator Independent Drivers Association v. DOT, et al. (D.C. Cir. No. 12-1264), OOIDA raises the issue of whether FMCSA's decision not to require commercial motor vehicle operators for Mexico-domiciled motor carriers to hold a medical certificate issued by a certified medical examiner listed in the National Registry of Certified Medical Examiners (1) exceeds the statutory authority of the Secretary under 49 U.S.C. § 31149(c)(1)(B), (2) is an exemption not created in compliance with 49 U.S.C. § 31315(b) and the implementing regulations under 49 C.F.R. part 300, and (3) is arbitrary, capricious, and otherwise not in accordance with law under 5 U.S.C. § 706.

Motor Carrier Trade Association Seeks Review of FMCSA's CSA Program

On July 16, the Alliance for Safe, Efficient and Competitive Truck Transportation (ASECTT), four other trade associations, and twelve independent companies sought review of

several FMCSA documents regarding the agency's Compliance, Safety, Accountability (CSA) program and the Safety Measurement System (SMS) used to assess a carrier's roadside compliance record. Petitioners in Alliance for Safe, Efficient and Competitive Truck Transportation, et al. v. FMCSA et al. (D.C. Cir. No. 12-1305) filed a statement of issues that characterizes the public presentations and materials published on the FMCSA website as a "final rule and/or regulation" subject to challenge under the APA and the Hobbs Act. Petitioners allege that FMCSA promulgated a "legislative rule" without notice and comment rulemaking in violation of the APA.

The petition follows a similar action filed by the same attorney for petitioners, who represented the National Association of Small Trucking Companies (NASTC) in a challenge to the public display of SMS data in December 2010. See Nat'l Ass'n of Small Trucking Cos., et al. v. FMCSA, et al., No. 10-1402 (D.C. Cir.). The NASTC case was settled pursuant to a joint agreement of the parties. NASTC is one of the petitioners in the July 16 petition, and the statement of issues also contends that FMCSA's display of SMS data is in violation of the settlement agreement in that case.

OOIDA Challenges Violations Reporting in FMCSA's Pre-employment Screening Program

On July 13, the Owner-Operator Independent Drivers Association (OOIDA) joined by four commercial truck drivers, filed a complaint for

declaratory and injunctive relief and damages against the Department and FMCSA in Owner-Operator Independent Drivers Association v. DOT, et al. (D.D.C. No. 12-1158). OOIDA challenges the accuracy of information in the agency's Motor Carrier Management Information System (MCMIS) and Pre-employment Screening Program (PSP), which draws driver safety information from MCMIS. The complaint alleges violations of 49 U.S.C. § 31150, the Fair Credit Reporting Act, 15 U.S.C. § 1681 *et seq.*, the Privacy Act, 5 U.S.C. § 552a *et seq.*, and the Administrative Procedure Act, 5 U.S.C. § 706(2)(A) & (D), based on FMCSA's failure to remove records of violations from MCMIS and PSP following dismissal of an associated citation by a State court or prosecutor. OOIDA also alleges that, because the Secretary failed to designate individual violations as "serious driver violations" within the meaning of 49 U.S.C. § 31150(a)(3) and (d), FMCSA may not report violations under PSP unless designated as an out-of-service violation under existing Federal regulations.

On September 17, the government filed a motion to dismiss arguing that the District Court lacks jurisdiction under the Hobbs Act, 28 U.S.C. § 2342, and controlling precedent in Daniels v. Union Pac. R.R. Co., 530 F.3d 936, (D.C. Cir. 2008). Plaintiffs purport to challenge FMCSA final agency action, interpretation, and application of 49 U.S.C. § 31150. The Hobbs Act establishes exclusive jurisdiction in the court of appeals on challenges to the validity of, among other things, certain rules, regulations, and final orders issued by the Secretary of Transportation, including chapter 311 of Title 49.

OOIDA filed its opposition to the government's motion to dismiss on October 19.

Briefs Filed in ATA and Safety Advocates Challenge FMCSA's Final Hours-of-Service Rule

On July 24, American Trucking Associations, Inc. (ATA) and a group of truck safety advocates (Safety Advocates) filed their opening briefs in American Trucking Associations, Inc. v. FMCSA and Public Citizen, et al v. FMCSA (D.C. Cir. Nos. 12-1092 & 12-1113), two consolidated cases challenging various provisions of FMCSA's December 2011 driver hours-of-service rule. The Owner-Operator Independent Drivers Association intervened in ATA's suit in support of ATA. ATA intervened in the Safety Advocates suit in support of FMCSA.

Safety Advocates challenge the agency's support for the 11-hour driving period, the 34-hour restart, and the agency's alleged failure to comply with Congress's mandate that the agency "ensure...the operation of commercial motor vehicles does not have a deleterious effect on the physical condition of the operators." ATA challenged the new requirement that the 34-hour restart period be used no more than one time per week and include two night-time periods. ATA also contests the 30-minute break requirement.

On September 24, the government filed its response brief. The government's brief emphasized that FMCSA reasonably chose to limit the 34-hour restart requirement, retain the 11-hour daily driving limit, and impose an off-

duty break requirement. The government also argued that Safety Advocates had waived their objections to the 34-hour rule by not raising them before the agency during the rulemaking process. Additionally, the government argued that given the extremely technical nature of the agency's analysis and the level of explanation given in the rulemaking documents, the court should give deference to FMCSA's determinations in the final rule.

Petitioners filed their reply briefs on October 24.

Federal Railroad Administration

District Court Upholds Metrics and Standards for Intercity Passenger Rail Service, Plaintiff Appeals

On May 31, the U.S. District Court for the District of Columbia upheld the FRA/Amtrak Metrics and Standards for intercity passenger rail operations against a challenge by the Association of American Railroads (AAR). In Association of American Railroads v. DOT, No. 11-1499, 2012 WL 1949010 (D.D.C. May 31, 2012), the court squarely rejected AAR's contention that Section 207 of The Passenger Railroad Investment and Improvement Act of 2008 (PRIIA) violated the Constitution, granting summary judgment to DOT.

Section 207 required FRA and Amtrak to jointly develop metrics and standards to evaluate the performance and service quality of Amtrak's intercity passenger trains. AAR alleged that Section 207

violated the Constitution's Due Process Clause and the non-delegation principle by delegating rulemaking authority to Amtrak, a private entity. AAR's claim was based in part on the fact that when Congress created Amtrak, it declared that Amtrak was not a department, agency or instrumentality of the government. The district court's decision found neither claim to be meritorious.

AAR argued that Amtrak's role in developing the Metrics and Standards violates the Due Process Clause because Amtrak is a private entity that has a financial interest in the new standards, thereby contaminating the regulatory process with the potential for bias. The court rejected this claim, relying upon a 1995 decision of the Supreme Court, Lebron v. Nat'l R.R. Passenger Corp., 513 U.S. 374 (1995), which found that Amtrak is part of the government for the purpose of individual rights guaranteed against the government by the Constitution. AAR's second argument was that Congress unconstitutionally delegated lawmaking authority to Amtrak, a private entity, when it gave Amtrak joint responsibility to issue the Metrics and Standards. The court rejected this claim as well concluding that Amtrak's role, even if it were deemed a private entity as claimed by AAR, met constitutional requirements because FRA retains ultimate control over the promulgation of the Metrics and Standards, the Surface Transportation Board is responsible for their enforcement and the government exercises structural control over Amtrak.

On June 22, AAR appealed the Court's final judgment to the U.S. Court of Appeals for the District of Columbia

Circuit. AAR filed its opening brief on October 9, 2012, once again arguing that Section 207's delegation of legislative and rulemaking authority to Amtrak violates the Constitution's separation-of-powers principle and that Section 207's delegation of legislative and rulemaking authority to Amtrak violates the Fifth Amendment's Due Process Clause. Briefing in the case is expected to be completed in November 2012.

The Chlorine Institute Seeks D.C. Circuit Review of FRA's Positive Train Control Final Rule

On July 13, The Chlorine Institute, Inc. (CI) sought review in the U.S. Court of Appeals for the District of Columbia Circuit of FRA's final rule relating to Positive Train Control Systems (PTC Final Rule). In The Chlorine Institute, Inc. v. FRA, et al. (D.C. Cir. No. 12-1298), CI, whose members include shippers of chlorine by rail, has identified four specific challenges to FRA's PTC Final Rule. First, CI contends that FRA acted in an arbitrary and capricious manner by eliminating the 2008 baseline provision for determining the routes on which PTC must be installed. Second, CI maintains that FRA acted in an arbitrary and capricious manner by eliminating the two qualifying tests provisions in the PTC Final Rule. Third, CI asserts that FRA acted in an arbitrary and capricious manner by improperly allowing the Association of American Railroads (AAR) to influence the substance of the PTC Final Rule in favor of AAR's interests and to the detriment of the interests of CI. Finally, CI alleges that FRA acted in an arbitrary and capricious

manner by yielding to the political pressures of the present House of Representatives' Committee on Transportation and Infrastructure, which disagreed with the positive train control legislation that was championed by the former Committee on Transportation and Infrastructure, by eliminating the 2008 baseline provision and the two qualifying tests provisions in the PTC Final Rule.

Judicial Watch Challenges FRA's Response to Its FOIA Request

On February 29, Judicial Watch, Inc. (Judicial Watch) filed suit against DOT in the U.S. District Court for the District of Columbia to compel compliance with a FOIA request for FRA's records related to NEPA alternative analyses for the California High Speed Rail project. Judicial Watch, Inc. v. DOT (D.D.C. No. 12-00324). On April 13 and May 30, FRA released responsive documents responsive to Judicial Watch's FOIA request. FRA withheld several documents and redacted others pursuant to the deliberative process privilege in FOIA Exemption (b)(5). Because FRA had appropriately completed the processing of Judicial Watch's FOIA request, on June 29, FRA moved for summary judgment. On July 16, Judicial Watch filed an opposition to FRA's motion, as well as a cross motion for summary judgment, asserting that certain documents were improperly withheld by FRA. On August 10, FRA filed an opposition to Judicial Watch's cross motion and a reply in support of its motion, arguing in support of FRA's redactions and withholdings. The court has not yet ruled on the motions.

Relying on Department of Interior v. Klamath Water Users Protective Association, 532 U.S. 1 (2001) (Klamath), Judicial Watch argued that FRA failed to prove that the California High Speed Authority (Authority) is an “agency” for purposes of the FOIA deliberative process “inter-agency or intra-agency memorandums or letters” exemption, 5 U.S.C. § 552 (b)(5). FRA countered that the U.S. Court of Appeals for the District of Columbia Circuit has held that its application of the “consultant corollary” survived the U.S. Supreme Court’s decision in Klamath. See National Institute of Military Justice v. Dep’t of Defense, 512 F.3d 677, 680 (2008), cert. denied, 555 U.S. 1084 (2008).

FRA therefore argued that under the “consultant corollary” principle, the withheld or redacted records at issue qualify as “intra-agency” for purposes of invoking FOIA Exemption (b)(5) because they include communications or draft documents between the Authority and FRA that support internal FRA decision-making with respect to the environmental review process for the California High Speed Rail project. The Authority and FRA are co-lead agencies, as defined by 40 C.F.R. § 1501.5, governing the necessary series of environmental impact reports /environmental impact statements required under NEPA and the California Environmental Quality Act.

In its briefs, FRA further argued that it has the ultimate decision-making responsibility under NEPA, and a more restrictive interpretation of the “consultant corollary” would undermine the ability of FRA (and all federal agencies with NEPA responsibilities) to

complete EISs without exposing the agency’s decision-making process to the type of premature scrutiny against which FOIA Exemption (b)(5) was designed to protect. Moreover, FRA asserted that the Authority was not seeking a government benefit at the expense of other applicants, but rather was providing its experts’ opinions and consultant support to FRA so that FRA could complete the required federal and state environmental reviews. While the Authority was receiving grant funds from FRA, the competitive element of the grant-making process had long since ended.

Federal Transit Administration

Court Hears Cross-Motions for Summary Judgment in Honolulu High-Capacity Transit Corridor Project Case

On August 21, the U.S. District Court for the District of Hawaii heard cross-motions for summary judgment in Honolulutraffic.com, et al. v. FTA, et al., (D. Haw. No. 11-00307). Plaintiffs, opponents of the Honolulu High-Capacity Transit Corridor Project (Project), a project proposed for FTA New Starts funding, filed suit against the FTA, DOT, and the City and County of Honolulu alleging that the defendants failed to comply with NEPA, Section 4(f) of the DOT Act, and Section 106 of the National Historic Preservation Act. After about two hours of argument, the Court took all motions under advisement. The rail transit project has been a major issue in the current Mayoral election campaign, where one

of the named plaintiffs, Ben Cayatano, is running for Mayor of Honolulu on an anti-rail platform.

The proposed project is a twenty-mile, steel on steel, elevated rapid rail running between downtown Honolulu and the western suburb of Kapolei. Plaintiffs include a group that favors High Occupant/Toll (HOT) lanes over rapid rail as a principal means to address freeway congestion on Oahu, another group that favors bus rapid transit, a former governor who favors light rail, and an assortment of environmentalists and native Hawaiians seeking to protect their own interests in disparate natural, aesthetic, historic, and cultural resources.

On August 24, in Kaleikini v. Yoshioka, 283 P.3d 60 (Haw. 2012), a related state court case in which FTA was not a party, the Hawaii Supreme Court held, among other things, that the City and County of Honolulu (City) violated state historic preservation laws by approving the Project before completing an archaeological inventory survey (AIS) for the entire Project. Prior to Project approval, the City entered into a programmatic agreement that outlined a phased approach for completing the AIS. Under that phased approach, the City would complete the AIS on a section-by-section basis and commence construction in those sections for which an AIS had been completed. In a unanimous decision, the Court reversed a lower court decision and found that the City's phased approach for AIS violated Hawaii state law—the City should have completed the AIS for the entire Project prior to approving the Project. The Hawaii Supreme Court vacated the lower court's decision and remanded the

case to the lower court for further proceedings. It is uncertain when the lower court will hold further proceedings. In light of the Kaleikini opinion, the City has halted most ground disturbing construction activities and has made the completion of an AIS for the entire Project a priority.

Maritime Administration

False Claims Act and Contract Disputes Act Counterclaims Granted

On July 6, the Court of Federal Claims issued its decision in Veridyne, Inc. v. United States, 105 Fed. Cl. 765 (Fed. Cl. 2012), a suit that arose from MarAd's decision to end its contract with Veridyne after a September 2004 DOT IG report found a five-year contract extension of the contract had been obtained by fraud in 1998. Veridyne brought suit for approximately \$3 million in unpaid invoices, unbilled indirect costs, and various alleged breach damages. An eight-day trial ended on January 19.

The government raised fraud as defense and raised counterclaims for common law fraud, the False Claims Act (FCA), the forfeiture statute, and the Contract Disputes Act (CDA). During seven years of litigation, the government overcame motions for summary judgment on two of Veridyne's original claims totaling more than \$743,000.

In its decision, the court rejected the government's common law fraud arguments but found that Veridyne's proposal for the contract extension

constituted an FCA violation. The Court imposed the maximum FCA penalty of \$11,000 for each invoice submitted under the fraudulently obtained contract extension for a total of \$1,397,000 in FCA penalties.

The court then found that Veridyne's final invoices and subsequent CDA claim contained amounts the government had proven were unsupported and contained numerous false statements. The court then held that Veridyne's remaining claim was forfeited under the forfeiture statute, but also held the contractor was entitled to recover in *quantum meruit*, \$1,068,636, the amount of funding that remained on the task orders for the services that had been rendered and accepted. (During trial, the court granted the government's Motion for Partial Summary Judgment limiting plaintiff's potential recovery to the funds remaining on the contract.) In addition, under the CDA's anti-fraud provision, the court imposed another \$568,802 in penalties, the amount of the claim the government proved was unsupported.

In conclusion, the court held that Veridyne must pay the difference between the total penalties imposed, \$1,965,802, and the amount of *quantum meruit* allowed, \$1,068,636, plus interest. The decision denied the government any costs.

After the decision, the government petitioned the court to amend its decision to allow the costs of review allowed under the CDA's anti-fraud provision. The court agreed to consider such a petition, and on August 30, the government submitted a petition for \$357,000, the costs incurred to review the final invoices. Plaintiff has opposed

the petition, and a decision is pending. The government is considering whether to appeal the court's decision to allow *quantum meruit* recovery of a forfeited claim.

District Court Denies Request for Declaratory Relief and Writ of Mandamus Related to USMMA Admission Denials

On July 5, the U.S. District Court for the Eastern District of New York denied a request for declaratory judgment and for the issuance of a writ of mandamus in Domine, et al. v. Kumar, et al., No. 12-2993, 2012 WL 2583262 (E.D.N.Y., July 6, 2012), in which three plaintiffs sought review of the decision of the U.S. Merchant Marine Academy (Academy) denying them Academy admission, requesting declaratory relief and a writ of mandamus compelling the Secretary to enroll them as members of the Class of 2016. The matter was filed on June 14, 2012, and heard on an expedited basis, since the Class of 2016 had to report for Indoctrination at the Academy on July 5.

Plaintiffs argued that, as residents of Wisconsin who were found to be qualified candidates for appointment to the Academy and who were placed on Wisconsin's alternates list, they were entitled by law to fill the vacancies for the Wisconsin allocation, prior to the selection of candidates on a national alternates list to fill those vacancies.

In response, the government argued that, in filling vacancies after candidates from various jurisdictions decline appointments, it has a policy of transitioning on April 1 from an alternate

list by jurisdiction (in order of merit) to a national alternate list (in order of merit) for the purpose of ensuring that it can fill open slots by the nationally recognized college acceptance deadline of May 1. While the language of the statute and regulations is ambiguous, the government explained that the Academy (like other federal service academies) makes the transition to the national alternate list on April 1 in order to ensure it call fill its incoming class by the May 1 date.

On July 3, after a full briefing and oral argument the previous day, the court issued an oral decision concluding that the DOT's interpretation of the statute and its own regulations was reasonable and that plaintiffs had failed to demonstrate entitlement to declaratory relief or the drastic remedy of a writ of mandamus. Accordingly, the court denied plaintiffs' application in its entirety. The court issued its written decision on July 5, emphasizing that an agency's interpretation of its regulations is "controlling unless plainly erroneous or inconsistent with the regulation," neither of which was the case in this matter. No appeal has been taken from this decision.

Pipeline and Hazardous Materials Safety Administration

District Court Dismisses Suit Alleging DOT Violated Pipeline Safety Act, Grants Leave to Amend

On July 25, the U.S. District Court for the Northern District of California dismissed the complaint in City and County of San Francisco v. DOT (N.D. Cal. No. 12-00711), an action brought against DOT and PHMSA for alleged violations of the Pipeline Safety Act (the Act), but granted the plaintiff leave to amend. The plaintiff alleged that the federal defendants violated the Act by (1) failing to ensure that certified state authorities, including the California Public Utilities Commission (CPUC), are satisfactorily enforcing compliance with the minimum federal pipeline safety standards, (2) failing to take appropriate action to achieve adequate enforcement of federal standards to the extent state authorities are not, and (3) disbursing federal funds to the CPUC without determining whether it is effectively carrying out its pipeline safety program. Filed under the citizen's suit provision of the Act, 49 U.S.C. § 60121, plaintiffs sought declaratory judgment, injunctive relief, and attorney's fees.

The suit relates to the September 9, 2010, rupture in San Bruno, California of a 30-inch intrastate natural gas transmission pipeline operated by Pacific Gas & Electric. The ensuing explosion resulted in eight fatalities, multiple injuries, and the destruction of 38

homes. The National Transportation Safety Board investigated the incident and issued findings, recommendations, and conclusions in August 2011. The ruptured line is regulated by CPUC under delegated authority from PHMSA through its state certification.

The government moved to dismiss the complaint, arguing that the citizen's suit provision of the Act does not authorize an action for injunctive relief against the government for failing to properly administer the Act, also known as a mandamus claim. The court accepted the government's position, which was based on a Supreme Court decision rejecting a similar attempt to characterize mandamus relief as permissible under the citizen's suit provision of the Endangered Species

Act. The court, however, granted the plaintiff leave to amend the complaint in order to make a claim under the APA. The plaintiff filed an amended complaint on August 13, in which it alleged the same conduct by DOT and PHMSA violated the APA. The government has moved to dismiss the complaint, and a hearing on the motion is scheduled for November 8.

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