



# 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 Upholds Constitutionality of FRA/Amtrak Metrics and Standards**

On March 9, 2015, the Supreme Court in DOT v. Association of American Railroads, 135 S. Ct. 1225 (2015), unanimously reversed the U.S. Court of Appeals for the District of Columbia Circuit and held that Congress did not violate the Constitution's non-delegation doctrine in authorizing FRA and Amtrak to jointly develop on-time performance metrics and standards because, for purposes of that doctrine, Amtrak is a federal governmental entity. Section 207 of the Passenger Rail Investment and Improvement Act (PRIIA) required FRA and Amtrak to jointly develop metrics and standards to evaluate the performance and service quality of Amtrak's intercity passenger trains. The Association of American Railroads (AAR) challenged Section 207 as violating the Constitution's Due Process Clause and non-delegation doctrine because Amtrak, AAR argued, is a private entity.

The D.C. Circuit's decision relied heavily upon a provision in Amtrak's enabling legislation stating that Amtrak "is not a department, agency, or instrumentality of the United States Government" in finding that Amtrak is a private corporation and thus cannot be given regulatory power under Section 207. The Supreme Court, however, noted that "[c]ongressional pronouncements, though instructive as to matters within Congress' authority to address, are not dispositive of Amtrak's status as a government entity for purposes of separation of powers analysis under the Constitution." The Court relied upon a previous case involving Amtrak, Lebron v. National

Railroad Passenger Corp., 513 U.S. 374 (1995), holding that Lebron "teaches that, for purposes of Amtrak's status as a federal actor or instrumentality under the Constitution, the practical reality of federal control and supervision prevails over Congress' disclaimer of Amtrak's governmental status." Looking at Amtrak's ownership and corporate structure, the Court pointed out that the federal government controls most of Amtrak's stock and that eight of Amtrak's nine Board members are appointed by the president and confirmed by the Senate. Furthermore, the Court noted that not only is Amtrak required to pursue public objectives mandated by statute, but that Amtrak is also financially dependent upon substantial federal subsidies. Therefore, the Court ultimately found that because "Amtrak was created by the Government, is controlled by the Government, and operates for the Government's benefit," Amtrak acted as a governmental entity in issuing the metrics and standards.

The Court vacated the D.C. Circuit's decision and remanded the case to identify any additional issues that are properly preserved. The Court's opinion noted that there are "substantial questions respecting the lawfulness of the metrics and standards—including questions implicating the Constitution's structural separation of powers and the Appointments Clause...." Justice Alito joined the majority opinion but wrote a concurring opinion discussing a number of constitutional questions that arise from the Court's decision that Amtrak is part of the federal government. Justice Thomas also agreed with the Court's decision to vacate and remand the case for further consideration, but did not join the majority's analysis "because it fails to fully

correct the errors that require [the Court] to vacate the Court of Appeals' decision." Justice Thomas "wrote separately to describe the framework that...should guide [the] resolution of delegation challenges and to highlight serious constitutional defects in PRISA that are properly presented for the lower courts' review on remand."

The Court's opinion is available at: [http://www.supremecourt.gov/opinions/14pdf/13-1080\\_f29g.pdf](http://www.supremecourt.gov/opinions/14pdf/13-1080_f29g.pdf).

### **Supreme Court Holds that Changes to Interpretive Rules Do Not Require Notice and Comment**

On March 9, 2015, the Supreme Court issued its decision in Perez v. Mortgage Bankers Association, 135 S. Ct. 1199 (2015), a case that is important to the Department and to other federal agencies on a fundamental principle of administrative law - whether an agency must engage in notice-and-comment rulemaking when it changes an "interpretive rule" relating to an agency regulation. The Court adopted the approach set forth in the Solicitor General's brief, concluding that notice and comment is not required for interpretive rules.

The case arose out of litigation over whether the petitioner, Labor Secretary Thomas E. Perez, was obligated to undertake notice and comment before changing interpretive rules relating to whether mortgage loan officers are exempt from the minimum wage and overtime requirements of the Fair Labor Standards Act of 1938 (FLSA), 29 U.S.C. § 201 *et seq.* In 1999 and 2001, the Labor Department issued opinion letters concluding that mortgage loan officers are not FLSA-exempt. However, after the Labor Department revised its regulations, in 2006, the agency reversed course in another

opinion letter, and in 2010, reversed course yet again, issuing a letter concluding that mortgage loan officers are not exempt under the FLSA. The Labor Department had not provided notice and comment for any of these interpretations. The district court granted summary judgment to the government, concluding that notice and comment were not required, but the U.S. Court of Appeals for the District of Columbia Circuit reversed. The D.C. Circuit held, under its rulings in Alaska Professional Hunters Association v. FAA, 177 F.3d 1030 (D.C. Cir. 1999), and Paralyzed Veterans of America v. D.C. Arena, L.P., 117 F.3d 579 (D.C. Cir. 1997), that agencies must provide notice and comment for interpretive rules that modify a prior, definitive interpretation of the agency's regulations.

The Supreme Court granted certiorari on June 16, 2014, and the government filed its brief on August 20, 2014, contending that notice and comment is not legally required for interpretive rules, and that a contrary decision would be burdensome for agencies that seek to change incorrect or outdated interpretations. The court heard argument on December 1, 2014.

In a 9-0 decision, the Court ruled in the government's favor. In an opinion written by Justice Sotomayor, the court concluded that when an agency issues or amends interpretive rules, which are intended to advise the public about how the agency construes its regulations, and which lack the force and effect of law, the agency is not required to provide notice and comment to the public. The Court reached this result under a straightforward application of the APA, which explicitly states that notice and comment requirements do not apply to interpretive rules, as opposed to "legislative" rules that carry the force and effect of law.

5 U.S.C. § 553(b)(A). In so doing, the Court reaffirmed the principle announced in Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519 (1978), that the APA sets forth the limits of judicial review of the “procedural correctness” of executive agency action, and that the courts cannot impose any additional procedural obligations. The Court’s decision therefore displaced the D.C. Circuit’s Paralyzed Veterans doctrine.

Justices Scalia, Thomas, and Alito wrote separate concurring opinions to address concerns about some of the administrative law principles that formed the basis of the Court’s decision. In particular, the three Justices expressed concern about the continuing viability of so-called Seminole Rock or Auer deference, under which the Court has held for several decades that agencies should typically be afforded a high degree of deference in the interpretation of their own regulations. See Auer v. Robbins, 519 U.S. 452 (1997); Bowles v. Seminole Rock & Sand Co., 325 U.S. 410 (1945). The three Justices expressed their willingness to revisit, and perhaps to set aside, this form of deference in another case, in part due to the separation of powers concerns that arise from having the same branch of government formulating and interpreting regulations.

The Court’s opinion is available at: [http://www.supremecourt.gov/opinions/14pdf/13-1041\\_0861.pdf](http://www.supremecourt.gov/opinions/14pdf/13-1041_0861.pdf).

### **Supreme Court Reverses Eleventh Circuit in Railroad Taxation Case**

On March 4, 2015, the Supreme Court issued its opinion in Alabama Department of Revenue, et al. v. CSX Transportation, Inc., 135 S. Ct. 1136 (2015), reversing the Court

of Appeals for the Eleventh Circuit’s decision that Alabama’s sales and use tax violated the Railroad Revitalization and Regulatory Reform Act (4-R Act) because it discriminated against railroads. This case arose out of the 4-R Act’s catch-all provision, which forbids a State from imposing “another tax that discriminates against a rail carrier.” 49 U.S.C. § 11501(b)(4). CSX challenged Alabama’s tax scheme, which exempted railroad competitors, but not railroads, from a generally applicable sales and use tax on its purchase of diesel fuel.

The Supreme Court’s decision tracked the arguments in the United States’ amicus brief. While the Court agreed with the Eleventh Circuit that the railroads’ competitors (motor carriers and water carriers) are a proper comparison class pursuant to the 4-R Act, the Court found that the Eleventh Circuit erred in refusing to consider Alabama’s overall tax scheme to determine whether Alabama could justify the disparate treatment by pointing to other taxes that are placed upon motor carriers. In response to the Eleventh Circuit’s decision to “decline to undertake the Sisyphean burden of evaluating the fairness of the State’s overall tax structure to determine whether a single tax exemption causes a state’s sales tax to be discriminatory,” Justice Scalia noted that “[i]f the task of determining when [there are roughly comparable taxes] is ‘Sisyphean’...it is a Sisyphean task that the statute imposes.” 135 S. Ct. at 1144. Thus, the Court remanded the case to Eleventh Circuit to consider whether Alabama’s excise tax as applied to motor carriers is roughly equivalent to Alabama’s sales and use tax as applied to railroads. Finally, with regard to water carriers, the Court noted that the Eleventh Circuit should determine whether Alabama has provided a justification for

exempting water carriers from the sales and use tax on diesel fuel.

Justice Thomas wrote a dissent, joined by Justice Ginsburg, in which he opined that a tax exemption scheme must target or single out railroads in comparison to commercial and industrial taxpayers in order to violate the 4-R Act's catch-all provision.

The Court's opinion is available at: [http://www.supremecourt.gov/opinions/14pdf/13-553\\_1b82.pdf](http://www.supremecourt.gov/opinions/14pdf/13-553_1b82.pdf).

### **Supreme Court Hears FHWA Federal Tort Claims Act Case**

On December 10, 2014, the U.S. Supreme Court heard oral arguments in United States v. June (No. 13-1075) and a companion case, United States v. Wong (No. 13-1074). The government filed petitions for certiorari in the two cases to seek review of an en banc decision by the U.S. Court of Appeals for the Ninth Circuit in Wong v. Beebe, 732 F.3d 1030 (9th Cir. 2013). In the Wong case, the Ninth Circuit found that the six-month limitations period of the Federal Tort Claims Act (FTCA) to file an action after an administrative FTCA claim is finally denied is not jurisdictional and is subject to equitable tolling. Based on its decision in Wong, the Ninth Circuit decided that the two-year limitations period of the FTCA, which was the subject of June v. United States, 550 Fed. Appx. 505 (9th Cir. 2013), is also not jurisdictional and is subject to equitable tolling. The Supreme Court granted certiorari in both cases on June 30, 2014.

June involves an administrative FTCA claim that was untimely filed with FHWA. On February 19, 2005, Andrew Booth was killed in a car accident on an interstate highway in Arizona when the vehicle in

which he was traveling as a passenger crossed a cable median barrier and crashed into oncoming traffic. More than five years later, a conservator acting for decedent's minor son presented a claim under FTCA to FHWA. The claim was denied as untimely pursuant to 28 U.S.C. § 2401(b), which requires that claims be presented to the appropriate Federal agency within two years of the claim's accrual.

The conservator then filed suit in the U.S. District Court for the District of Arizona against the United States under the FTCA. The government moved to dismiss for lack of jurisdiction, arguing that plaintiff failed to file a claim with FHWA within two years of accrual and that, therefore, the suit was barred. The government also argued that the FTCA's two-year limitations period is not subject to equitable tolling. The district court granted the government's motion and dismissed the case, explaining that "[a] tort action against the United States accrues 'when a plaintiff knows or has reason to know of the injury which is the basis of his action.'" Further, the district court rejected the plaintiff's request for equitable tolling, finding that because the FTCA's timing requirements are jurisdictional, they are not subject to equitable tolling.

On appeal to the Ninth Circuit, the court was scheduled to hear oral argument when it issued an en banc decision in Wong, which held that the FTCA's other timing requirement (six month deadline for filing an action in court after the agency has denied a claim) is not jurisdictional and is subject to equitable tolling. In December 2013, in an unpublished memorandum decision, the Ninth Circuit reversed the district court's decision in June and remanded. The court drew no distinction between the two FTCA timing requirements in holding that in light of Wong, the FTCA's



two-year limitations period is not jurisdictional and is subject to equitable tolling.

On September 9, 2014, the government filed its Supreme Court opening briefs in June and Wong. In both cases, the government argues that the Ninth Circuit's holding that the FTCA two-year limitations period is non-jurisdictional cannot be squared with the FTCA statute's text, structure, history, and purpose. Further, it does not follow the Supreme Court's precedents. Briefing was completed on December 3, 2014, and the two cases are currently pending before the Court.

The briefs in the case are available at <http://www.scotusblog.com/case-files/cases/united-states-v-june/>.

### **Supreme Court Hears First Amendment Challenge to Sign Ordinance**

On January 12, 2015, the Supreme Court heard oral argument in Reed v. Town of Gilbert, Arizona (No. 13-502), a case presenting questions about the scope of First Amendment protection afforded to a church that posts signs to direct people to its Sunday services. The case has a potential impact on the Department's implementation of the Highway Beautification Act of 1965, 23 U.S.C. § 131 (HBA).

The petitioners, Good News Community Church and Pastor Clyde Reed, filed suit in federal district court challenging municipal sign restrictions imposed by the respondent, the Town of Gilbert, Arizona. Those who seek to post signs within town limits must ordinarily obtain a permit, subject to several exceptions set forth in the ordinance. Those exceptions include (1) ideological signs,

which relate messages or ideas for noncommercial purposes; (2) political signs, e.g., those for political candidates; and (3) temporary directional signs relating to a qualifying event, which direct passersby to gatherings for religious, community, and charitable events. The Church, which meets on Sunday mornings at rented spaces in elementary schools, posts small signs around the community with the Church's name, contact information, and the direction of the Sunday service. Its signs fall under the category of "temporary directional signs" under the Town ordinance. As such, the Church's signs can be no more than 6 feet tall; no more than four such signs may be displayed on a single property; and the Church's signs can only be displayed for twelve hours before the service, during the service, and one hour afterward. By contrast, ideological and political signs have many fewer restrictions; they may be much larger and can be posted for longer periods, or, in the case of ideological signs, without any time restriction.

The Church filed suit contending that the Town's ordinance unconstitutionally restricted free speech. The district court denied a preliminary injunction and, in a later proceeding, granted summary judgment for the Town, concluding that the ordinance did not violate the First Amendment. The Ninth Circuit affirmed in a 2-1 decision, holding that the ordinance was content-neutral and that the ordinance should be upheld under the application of intermediate scrutiny. Reed v. Town of Gilbert, Arizona, 707 F.3d 1057 (9th Cir. 2013). The panel majority decided that the Town was not discriminating against speech on the basis of viewpoint, and that the Town's ordinance advanced legitimate safety and aesthetic interests. Judge Watford dissented, arguing that the Town failed to show how such interests were advanced by distinguishing

between political, ideological, and temporary directional signs.

The Supreme Court granted the Church's petition for a writ of certiorari on July 1, 2014. The United States filed a brief in support of the Church, contending that the Town's signage ordinance violates the First Amendment. In its brief, the government contended that the ordinance would not survive either strict or intermediate scrutiny, although if the Court finds it necessary to decide that question, intermediate scrutiny should apply when a sign regulation is based upon safety and aesthetic interests. In this case, the ordinance cannot stand, the government argues, because there is no indication here that the Church's signs cause any greater safety concern or visual blight than political or ideological signs, which are subject to fewer restrictions under the Town ordinance. The government's brief also distinguished the Town's ordinance from the provisions of the HBA, which DOT implements in consultation with the states, and which is much more limited in its applicability. The Solicitor General's Office advanced these points at the January 12, 2015, oral argument.

The briefs in the case are available at: <http://www.scotusblog.com/case-files/cases/reed-v-town-of-gilbert-arizona/>.

### **Supreme Court Holds that Disclosure of Sensitive Security Information is Protected by Whistleblower Act**

On January 21, 2015, the Supreme Court decided DHS v. MacLean, 135 S. Ct. 913 (2015), affirming the Federal Circuit and holding that a federal air marshal's disclosure of sensitive security information (SSI) was protected under the

Whistleblower Protection Act (WPA) because the disclosure was not "specifically prohibited by law." Two Justices dissented. This case involved a federal air marshal, Robert MacLean, who revealed TSA deployment plans to the news media. After learning that MacLean was the source of the media reports, TSA removed him from his position as a federal air marshal for disclosing SSI without authorization, as prohibited by TSA regulations. A provision of the WPA prohibits an agency from taking personnel action against an employee for disclosing certain types of information when the employee "reasonably believe[d] that the information showed a violation of any law, rule, or regulation" or "gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety." 5 U.S.C. § 2302(b)(8)(A). Section 2302(b)(8)(A), however, does not apply if the employee's disclosure was "specifically prohibited by law."

MacLean challenged his removal before the MSPB, alleging that TSA violated section 2308(b)(8)(A). The MSPB rejected MacLean's argument, reasoning that because he had "disclosed information that is specifically prohibited from disclosure by a regulation promulgated pursuant to an express legislative directive from Congress to TSA," the "disclosure was 'specifically prohibited by law'" for purposes of section 2302(b)(8)(A). MacLean sought Federal Circuit review of the MSPB decision, and the Federal Circuit vacated the MSPB decision and remanded the case to the MSPB for further proceedings. DHS v. MacLean, 714 F.3d 1301 (Fed. Cir. 2013). The Federal Circuit reached this decision because it concluded that the disclosure was "not specifically prohibited by law." The Federal Circuit looked to the statute, not the regulations, because it found

that “in order to fall under the ‘specifically prohibited by law’ proviso,” a “disclosure must be prohibited by statute rather than by regulation.” On May 19, 2014, the Supreme Court granted the United States’ petition for certiorari on the question of whether MacLean’s disclosure was “specifically prohibited by law.”

The Supreme Court affirmed the Federal Circuit’s decision, holding that MacLean’s disclosure was not “specifically prohibited by law” under the WPA. In so holding, the Court first determined that TSA’s regulations were not “law” under section 2302(b)(8)(A). This determination rests on three grounds. First, the Court found that Congress repeatedly used the phrase “law, rule, or regulation” throughout section 2302, but only used the word “law” in section 2302(b)(8)(A). Applying the interpretive canon that Congress acts intentionally when it omits language included elsewhere, the Court concluded that Congress meant to exclude rules and regulations in section 2302(b)(8)(A), particularly because Congress used “law” and “law, rule, or regulation” in close proximity (in the same sentence) and because Congress used “law, rule, or regulation” repeatedly (including nine times in section 2302 alone). Second, the Court noted that section 2302(b)(8)(A) creates a second exception for disclosures “required by Executive Order to be kept secret in the interest of national defense or the conduct of foreign affairs” and that it would be unusual for the first exception to include action taken by executive agencies, when the second exception requires action by the President himself. Third, the Court found that interpreting the word “law” to include rules and regulations could defeat the purpose of the WPA, as an agency could insulate itself from section 2302(b)(8)(A) by issuing a regulation prohibiting all whistleblowing.

The Court then determined that MacLean’s disclosure was also not prohibited by section 114(r)(1), which expressly “prohibit[s]” public disclosure of three categories of information, including information that, in the judgment of TSA, would be “detrimental to the security of transportation” if disclosed. The Court reasoned that this provision does not prohibit any information disclosure, but only authorizes TSA to “prescribe regulations.” The Court further observed that while section 114(r)(1) imposes a legislative mandate, it also gives TSA substantial discretion to decide whether to prohibit any particular disclosure. The Court’s analysis specifically rejected the Government’s reliance on Administrator, FAA v. Robertson, 422 U.S. 255 (1975), which held that the Federal Aviation Act of 1958 was a statute specifically exempting disclosure of certain information under FOIA, even though it gave FAA a “broad degree of discretion” in deciding whether to disclose or withhold information. The Court reasoned that there is a distinction between statutes giving an agency discretion to prohibit the disclosure of information and statutes that exempt information from mandatory disclosure. The Court concluded, therefore, that only TSA regulations prohibited MacLean’s disclosure, not section 114(r)(1).

Finally, the Court acknowledged that the Government had legitimate concerns that providing whistleblower protection to MacLean would “gravely endanger public safety” by making SSI confidentiality dependent on the “idiosyncratic judgment” of each TSA employee, but that those legitimate concerns must be addressed by Congress or the President, not the Court.

Justice Sotomayor, joined by Justice Kennedy, dissented. While Justice Sotomayor agreed both with the majority’s



conclusion that the WPA does not encompass disclosures prohibited only by regulation and the majority's distinction between statutes that prohibit information from being disclosed and statutes that exempt information from other-applicable disclosure requirements, she disagreed with the Court's conclusion that section 114(r)(1) does not prohibit MacLean's disclosure.

The case will now be remanded to the MSPB. The Supreme Court's decision determined that MacLean is eligible for protection under the WPA. On remand, the MSPB will determine whether MacLean reasonably believed that his disclosure was evidence of a substantial and specific danger to public health or safety.

The Court's opinion is available at: [http://www.supremecourt.gov/opinions/14pdf/13-894\\_e2qg.pdf](http://www.supremecourt.gov/opinions/14pdf/13-894_e2qg.pdf).

### **Supreme Court Denies Cert in Detroit Bridge NEPA Case**

On February 23, 2015, the Supreme Court denied the petition for writ of certiorari in Detroit International Bridge Company v. Nadeau, et al. (No. 14-657), in which petitioner Detroit International Bridge Company (DIBC), owner of the only existing bridge between Detroit and Windsor, Canada, sought review of a decision of the U.S. Court of Appeals for the Sixth Circuit affirming the U.S. District Court for the Eastern District of Michigan's grant of summary judgment to defendants in a NEPA challenge to the New International Trade Crossing (NITC), a proposed new bridge connecting Detroit and Windsor, Canada. Latin Americans for Social and Economic Development, et al. v. FHWA, et al., 756 F.3d 447 (6th Cir. 2014).

In its petition, DIBC urged the Court to grant certiorari because the Administrative Record for the NEPA review of the NITC failed to show the actual basis for FHWA's decision to approve the project: that FHWA either simply adopted the decision of a foreign government, Canada, without review or adopted that decision based on documents not included in the Administrative Record, thereby avoiding meaningful judicial review. Additionally, DIBC argued that FHWA had eliminated the "no build alternative" solely because that alternative would have resulted in the construction of a privately-owned bridge by DIBC, which FHWA rejected simply because it prefers government ownership and control of any new bridge between Detroit and Windsor.

The United States waived the filing of an opposition brief, and the Court did not request the government's views.

### **Dulles Toll Road Users Seek Supreme Court Review of Silver Line Funding Mechanism**

On January 12, 2015, the Supreme Court requested the views of the United States in Corr, et al., v. Metropolitan Washington Airports Authority (No. 13-1559). In Corr, the U.S. Court of Appeals for the Fourth Circuit upheld the Metropolitan Washington Airport Authority's (MWAA) use of toll road revenues to fund the Silver Line Metrorail expansion in Corr, et al., v. Metropolitan Washington Airports Authority, 740 F.3d 295 (4th Cir. 2014), and on June 20, 2014, petitioners filed a petition for writ of certiorari with the Supreme Court. While the Fourth Circuit upheld MWAA's use of toll road revenues to fund the Silver Line based upon Virginia state law, petitioners focus their petition on a

constitutional separation-of-powers argument.

After losing in the district court, petitioners originally filed their appeal in the U.S. Court of Appeals for the Federal Circuit. MWAA filed a motion to dismiss, arguing that the Federal Circuit lacked jurisdiction over the appeal because MWAA is not a federal instrumentality, a requirement for claims brought under the Little Tucker Act. The Federal Circuit ordered the parties to brief the case on the merits. However, the Federal Circuit ultimately transferred the case to the Fourth Circuit after finding that MWAA was not a federal instrumentality.

Petitioners now seek to appeal the Federal Circuit's decision and request the Court to consider whether "MWAA exercises sufficient federal power to mandate separation-of-powers scrutiny for purposes of a suit seeking injunctive relief and invoking the Little Tucker Act to seek monetary relief" and "whether the [Metropolitan Washington Airports Act of 1986] violates the separation of powers, including the Executive Vesting, Appointments, and Take Care Clauses of Article II, by depriving the President of control over MWAA, an entity exercising...Executive Branch functions pursuant to federal law." Petitioners argue that MWAA is a federal instrumentality and also that MWAA exercises federal power and thus it is subject to separation of powers scrutiny. Furthermore, Petitioners claim that MWAA violates the Constitution's separation of powers because the President does not control MWAA's Board of Directors.

MWAA had initially waived its right to respond to the petition, but the Court requested a response from MWAA. MWAA's opposition argues that MWAA is

an interstate compact entity that is not subject to Article II. Furthermore, MWAA argues that not only did the Federal Circuit correctly find that MWAA is not a federal instrumentality but also notes that the Federal Circuit lacked jurisdiction under the Little Tucker Act for other reasons. Finally, MWAA argues that Petitioners waived their Article II challenge because they did not raise the issue in their Opening Brief before the Fourth Circuit.

### **Motor Carrier Seeks Supreme Court Review of Ninth Circuit Preemption Decision**

On January 6, 2015, Penske Logistics, LLC filed a petition for a writ of certiorari in a case decided by the Ninth Circuit involving the federal motor carrier deregulation statute, the Federal Aviation Administration Authorization Act of 1994 (FAAAA or the Act), 49 U.S.C. § 14501(c). The case, Penske Logistics, LLC v. Dilts (No. 14-801), presents important questions about the preemption of state employment laws in the trucking industry.

The case was filed by appliance delivery drivers who alleged that their employers denied them meal and rest breaks required by California law. Under California law, employees must usually receive a thirty-minute meal break after five hours on duty and must receive a second meal break after working for more than ten hours. Furthermore, employees must generally be given ten minutes of rest for every four hours on duty. Employers who fail to provide the requisite breaks are liable for civil penalties and must also provide an hour's worth of compensation to the employee for any meal or rest break that is not provided.

The district court ruled in favor of the carriers, concluding that the state break requirements were preempted by the FAAAA. The court held that the federal deregulation statute sweeps broadly in its preemptive scope and the state break laws had an impermissible effect upon the “price, route or service of motor carriers” under section 14501(c).

On appeal, the Ninth Circuit held that the state break laws remained valid under the FAAAA. The court applied the traditional presumption against preemption in cases involving longstanding areas of state regulation for the protection of employees. As the court recognized, the FAAAA’s preemption clause sweeps broadly, but the court also pointed out that the Supreme Court, in cases like Rowe v. New Hampshire Motor Transport Association, 552 U.S. 364 (2008), had held that the FAAAA preemption provision is not boundless and does not apply to state laws that have “only a tenuous, remote, or peripheral” impact upon motor vehicle prices, routes or services. By contrast, the panel concluded, “generally applicable background regulations that are several steps removed from prices, routes, or services, such as prevailing wage laws or safety regulations, are not preempted, even if employers must factor those provisions into their decisions about the prices that they set, the routes that they use, or the services that they provide.” The court went on to determine that “[s]uch laws are not preempted even if they raise the overall cost of doing business or require a carrier to re-direct or re-route some equipment.”

Applying these principles, the court ruled that the California meal and rest break laws did not fall within the preemptive scope of the FAAAA. These state laws are generally applicable to myriad industries in California

and were not of the type that Congress meant to preempt. Notwithstanding the motor carriers’ arguments, the state laws did not have an impermissible impact upon routes or services; the carriers were simply compelled to “hire a sufficient number of drivers and stagger their breaks for any long period in which continuous service is necessary.” Such measures, while undoubtedly increasing the cost of doing business, do not run afoul of the FAAAA. Furthermore, the carriers had failed to meet their burden to demonstrate that the state laws would compel the alteration of the carriers’ routes, or have any resulting impact upon the carriers’ operations. Judge Zouhary wrote a concurring opinion, emphasizing that Penske failed to carry its burden of proof on its preemption defense, since it had not provided specific evidence of the real-world impact of the California law on the company’s routes or services.

In reaching its decision, the Ninth Circuit followed the reasoning set forth in a brief filed by the Department at the court’s request. In that brief, the Department similarly contended that the state law was not preempted and that the Department deserved deference in light of its expertise on these issues. In so doing, the Department pointed out that the result might be different in other cases, particularly under the parallel provisions of the Airline Deregulation Act, since the California break requirements may be more disruptive to airline rates, routes, or services. The Ninth Circuit held in its opinion that DOT’s interpretation of the FAAAA is persuasive authority, given the agency’s expertise in these issues.

In its cert petition, Penske contends that the Ninth Circuit misapplied Supreme Court precedent on the FAAAA and ADA and that its decision is inconsistent with that of other circuits. In particular, Penske argues that

the Ninth Circuit erred in concluding that a state law is not preempted unless it “binds” the carrier to a particular price, route, or

service. In Penske’s view, that is an unduly narrow interpretation of the FAAAA’s preemptive scope.

## **Departmental Litigation in Other Federal Courts**

### **District Court Upholds Constitutionality of DOT DBE Regulations and Their Application in Illinois Highway Contracting**

On March 24, 2015, the U.S. District Court for the Northern District of Illinois granted the motions for summary judgment of DOT, the Illinois Department of Transportation (IDOT), and the Illinois State Toll Highway Authority (Tollway) in Midwest Fence Corp. v. USDOT, et al. (N.D. Ill. 10-5627), a facial and as-applied constitutional challenge to DOT’s DBE regulations and their implementation by the IDOT in the federal-aid highway program, and to the Tollway’s independent DBE program.

Plaintiff, a non-DBE fencing and guardrail subcontractor, alleged that DOT’s DBE regulations violated the equal protection guarantees of the Fifth and Fourteenth Amendments. The district court rejected plaintiff’s arguments, finding that DOT’s regulations pass constitutional muster under the Supreme Court’s strict scrutiny standard for racial classifications because they are narrowly tailored to serve a compelling government interest. In evaluating the existence of a compelling government interest, the court looked to cited evidence of discrimination and its effects documented in the legislative history of the Moving Ahead for Progress in the 21st Century Act and in the report of DOT’s expert witness. Based on that evidence and plaintiff’s failure to present evidence that no remedial action is necessary, the court concluded that there

continues to be a compelling interest for DOT’s DBE Program in highway contracting.

As to the narrow tailoring prong of the strict scrutiny test, the court examined various specific provisions of the DBE regulations and found that those provisions ensure that the DBE Program meets the Supreme Court’s standards for narrow tailoring. Specifically, the court cited provisions of the DBE regulations that (1) require federal fund recipients to exhaust race- and gender-neutral means to meet their DBE participation goals before turning to race- and gender-conscious means, (2) allow recipients to apply for exemptions or waivers releasing them from program requirements under certain circumstances, (3) allow prime contractors to comply with program requirements by demonstrating good-faith efforts to hire DBE subcontractors, (4) establish a goal-setting process that results in DBE participation goals that are closely tied to the relevant labor market, and (5) minimize the program’s burden on non-DBEs by allowing the presumption of social and economic disadvantage for minorities and women to be rebutted and allowing those not presumptively disadvantaged to show that they are disadvantaged. The court rejected plaintiff’s primary argument that the Program unduly burdens non-DBE subcontractors, finding that the fact that innocent parties might bear some of the burden of a DBE program is insufficient to prove that the program is not narrowly

tailored. Additionally, the court noted that the program's authorizing legislation is of limited duration, forcing Congress to periodically re-examine the need for the program and that legislative history and DOT's expert testimony show that the program is not overinclusive.

Turning to IDOT's implementation of DOT's DBE regulations, the court found that while IDOT may rely on the compelling interest established for the DOT program with respect to its DBE goals on federal-aid highway projects, it must establish its own compelling reason to apply its program to state-funded projects. And as part of the narrow-tailoring analysis, the court noted that IDOT must establish a demonstrable need for the implementation of the DOT DBE program within Illinois. The court concluded that IDOT had presented evidence of discrimination in highway contracting sufficient to establish a compelling interest in applying its program to state-funded projects and a demonstrable need for the DOT DBE program. The court went on to approve of IDOT's DBE goal-setting methodology, holding that it is consistent with DOT's regulations and Seventh Circuit precedent, and found that plaintiff failed to present credible, particularized rebuttal evidence such as a neutral explanation for the under-utilization of DBEs or contrasting statistical data. Finally, the court analyzed IDOT's implementation of the various DOT DBE regulations it cited as ensuring that the federal DBE Program is narrowly tailored and found that IDOT's program is consistent with every one of those provisions. Accordingly, the court concluded that IDOT's DBE program is narrowly tailored.

As to the Tollway's independent DBE program, the court found that it had much in common with the federal program and that it

satisfied strict scrutiny for many of the same reasons.

### **UAS-Related FOIA Suit Dismissed**

On December 5, 2014, the district court entered an order in Electronic Frontier Foundation v. DOT (N.D. Cal. 12-164, 12-5581), dismissing the case with prejudice upon the stipulation of the parties. Plaintiff Electronic Frontier Foundation (EFF) filed suit in January 2012 seeking to compel the production of documents pursuant to its FOIA request to DOT. In that request, EFF sought agency records relating to the approval of unmanned aircraft systems (UAS), or "drones." EFF later filed a second lawsuit in the same court on its follow-up FOIA request to the agency, seeking similar records for a later period of time, and that case was administratively joined with the first. As the cases went forward, DOT provided responsive documents to EFF on a rolling basis, including the Certificates of Authorization (COAs) granted for the operation of unmanned aircraft in the national airspace. In total, DOT produced documents associated with over 700 COAs in response to EFF's FOIA requests.

### **D.C. Circuit Holds Suit over Airline Discrimination Complaint in Abeyance**

On January 15, 2015, the U.S. Court of Appeals for the District of Columbia Circuit issued an order in which it continued to hold in abeyance the matter presented in Gatt v. Foxx (D.C. Cir. 14-1040), pending the Department's administrative reconsideration of the petitioner's complaint. This suit began as a petition for review filed on March 31, 2014, against the Secretary of Transportation. The petitioner, Eldad Gatt,



a citizen and resident of the State of Israel, sought to book passage on a Kuwait Airways flight between New York and London. The airline's website required Mr. Gatt to scroll through drop-down boxes of countries to select his passport-issuing country and nationality. There was no selection in those boxes for Israel, so Mr. Gatt was unable to purchase a ticket. He then filed an administrative complaint with the Secretary contending that the airline had unlawfully discriminated against him under 49 U.S.C. § 40127, which prohibits foreign air carriers from discriminating "on the basis of race, color, national origin, religion, sex, or ancestry." In response to an inquiry by DOT about Mr. Gatt's complaint, Kuwait Airways said that Kuwaiti law prohibits the carrier from entering into contracts with Israeli citizens and that they could not transport Mr. Gatt to or from the United States on Kuwait Airways. After further investigation, DOT sent a letter to Mr. Gatt declining to take further action against Kuwait Airways and stating that the airline had not violated federal anti-discrimination laws. The Department's letter said that the airline's "policy is based on citizenship or passport status" and therefore does not violate section 40127.

After Mr. Gatt filed his petition for review in the D.C. Circuit, the parties agreed to suspend briefing pending further administrative proceedings before the agency, thereby allowing the Department to reconsider its earlier decision and decide whether to pursue further enforcement action. However, while the matter remained pending before the agency, Mr. Gatt filed a motion asking the court to proceed to merits briefing. The Department opposed Mr. Gatt's motion, explaining that it was still in the process of re-investigating the matter and that briefing would be premature. The court ruled in the government's favor in the

January 15 order, and the suit will proceed in the D.C. Circuit after the administrative proceedings have concluded.

### **District Court Transfers Challenge to Airport Kiosk Accessibility Rule**

On January 28, 2015, the U.S. District Court for the District of Columbia agreed with the Department that plaintiffs in National Federation of the Blind, et al. v. USDOT, et al., 2015 WL 349156 (D.D.C. 2015), had filed their challenge to a DOT final rule addressing accessibility of automated kiosks at U.S. airports in the wrong court and transferred the case to the U.S. Court of Appeals for the D.C. Circuit. Plaintiffs raised four allegations: (1) that DOT does not have the statutory authority to regulate automated kiosks at airports; (2) that DOT improperly relied upon how much it would cost the airlines to install accessible automated kiosks; (3) that if DOT included the cost to install accessible automated kiosks as part of its analysis, it should have also considered other factors that are relevant to an "undue burden" analysis; and (4) that DOT improperly relied upon research conducted by DOT's contractor because the information was not disclosed to the public during the comment period.

DOT filed a motion to dismiss for lack of subject-matter jurisdiction, arguing that the final rule constitutes a final order under 49 U.S.C. § 46110 and thus the plaintiffs were required to file their challenge in a court of appeals. Furthermore, DOT argued that under section 46110, plaintiffs challenge was untimely, as section 46110 requires challenges to be brought within 60 days of the order being issued. The district court agreed with DOT that the final rule is an "order" under section 46110, but transferred the case to the D.C. Circuit for the appellate court to determine whether plaintiffs can

provide a reasonable ground for filing the case outside of the 60 day time period.

### **Answer Filed in Government-Wide FOIA Case**

On November 3, 2014, the United States filed its answer to the complaint in Cause of Action v. IRS (D.D.C. 14-1407), a FOIA case in which plaintiff, Cause of Action, a public advocacy organization, filed suit against DOT and eleven other agencies seeking to compel the production of documents responsive to its FOIA requests. Cause of Action seeks documents relating to White House coordination with the defendant agencies on the processing of FOIA requests involving White House equities. DOT, along with the other agencies, is producing responsive documents on a rolling basis.

### **Court Orders Production of Merchant Marine Academy Documents in Response to FOIA Request**

On February 9, 2015, the U.S. District Court for the Eastern District of New York held a status hearing and issued an order for the production of documents under FOIA in United States Merchant Marine Academy Alumni Association and Foundation v. DOT, et al. (E.D.N.Y. No. 14-5332). The case arises out of eleven FOIA requests submitted to DOT and MARAD from 2013 to 2014 relating to the United States Merchant Marine Academy (USMMA). Through those requests, the Alumni Association and Foundation (AAF) sought documents on a variety of subjects, including the selection process for the USMMA Superintendent, fundraising for the Academy, and other management decisions. AAF filed this suit against DOT

and MARAD in September 2014, asking the court to compel the production of responsive documents and seeking other forms of relief. DOT and MARAD filed an answer to the complaint in January 2015 and have been producing documents to AAF on a rolling basis, having completed production on five of the eleven FOIA requests by the time the answer was filed. At the February 9, 2015, status hearing, the magistrate judge issued a minute order directing DOT and MARAD to complete production of documents in response to all eleven FOIA requests by the end of May 2015.

### **Southwest Airlines Seeks Review of DOT Letter Concerning Love Field**

On February 13, 2015, Southwest Airlines Co. (Southwest) sought review in the U.S. Court of Appeals for the District of Columbia Circuit of a December 17, 2014, letter from DOT General Counsel Kathryn B. Thomson to the City Attorney for the City of Dallas, Texas regarding Delta Air Lines' (Delta) service to Dallas' Love Field. Southwest Airlines Co. v. USDOT (D.C. Cir. 15-1036).

The litigation is rooted in the unique history of Love Field. When Dallas and Fort Worth decided in the 1960s to create Dallas/Fort Worth International Airport (DFW), they agreed to eliminate passenger service at their existing airports, including Love Field. Southwest, however, obtained court rulings allowing it to continue to operate intrastate passenger flights from Love Field. After the passage of the Airline Deregulation Act in 1978, Southwest planned to add interstate service at Love Field.

The federal Wright Amendment, enacted in 1980, generally prohibited passenger air service between Love Field and destinations outside of Texas and the immediately

adjoining states of Louisiana, Arkansas, Oklahoma, and New Mexico (with some exceptions). These provisions were later amended to allow flights to Alabama, Kansas, Mississippi, and Missouri.

In 2006, five interested parties – Dallas, Fort Worth, Southwest, American Airlines, and DFW’s operating board – agreed to seek repeal of the Wright Amendment, subject to certain conditions. Congress incorporated the terms of this agreement in the Wright Amendment Reform Act of 2006, which, among other things, provided that: (1) direct flights to locations outside of the 9-state “perimeter” would be permitted beginning in 2014; (2) carriers could immediately offer through service and ticketing to destinations outside the perimeter; and (3) the number of gates at Love Field would be capped at 20.

The December 17 letter from Kathryn Thompson to the City Attorney of Dallas references previous telephone conversations regarding a request by Delta for long-term accommodation of its five daily departures at Love Field and the policy of the City of Dallas regarding reasonable air carrier access. Southwest’s petition for review alleges that the letter was arbitrary and capricious, an abuse of discretion, and otherwise not in accordance with law, in excess of statutory authority, and without observance of procedures required by law. On March 16, 2015, Delta moved to intervene in support of DOT.

### **Environmental Groups Seek Review of DOT Bakken Crude Order**

On December 2, 2014, the Sierra Club and ForestEthics petitioned the U.S. Court of Appeals for the Ninth Circuit for review of the Department’s November 7, 2014, letter denying their administrative petition to issue an Emergency Order prohibiting the shipment of Bakken crude oil in DOT-111 tank cars. Petitioners in Sierra Club, et al. v. United States, et al. (9th Cir. 14-73682) allege that DOT failed to consider the Secretary’s past findings that the surge in rail shipments of Bakken crude poses imminent hazards and emergency unsafe conditions, the number of rail accidents and oil spills likely to occur during the time it will take to stop shipping Bakken crude in the most hazardous tank cars through rulemaking, Canada’s more expeditious phase out of the most hazardous tank cars, and the safety hazards of allowing the industry to more than double the crude oil fleet before removing the most dangerous tank cars from crude-by-rail shipping. The petition for review followed petitioners’ voluntary dismissal of their mandamus petition against DOT that had sought a decision on their Emergency Order petition to the Department and had been pending when the Department issued its November 7 letter.

Petitioners sought an expedited briefing and argument schedule, but on January 20, 2015, the court, through the Circuit Mediator, vacated the briefing schedule previously established by the court and ordered the case held in abeyance until May 15, 2015, or the issuance of DOT’s final tank car standards and phase out of DOT-111 tank cars, whichever occurs first.

## **Recent Litigation News from DOT Modal Administrations**

### **Federal Aviation Administration**

#### **Sixth Circuit Denies Petition for Review of Designated Airworthiness Representative Termination**

On December 23, 2014, the U.S. Court of Appeals for the Sixth Circuit denied the petition for review in Burdue v. FAA, 774 F.3d 1076 (6th Cir. 2014). Bradley Burdue contested the termination of his appointment as a Designated Airworthiness Representative (DAR), which FAA had withdrawn after it determined that Burdue had performed multiple inspections outside of his authorized geographic area, including inspections on aircraft owned by himself and his wife. FAA concluded that these actions were a conflict of interest and did not reflect the care, judgment, and integrity expected of a designee. Burdue appealed his termination within FAA and also filed a Bivens complaint in district court, claiming a violation of his Fifth Amendment right to due process. The district court action was stayed after FAA moved to dismiss the complaint, arguing that the district court did not have jurisdiction over what was, in effect, an appeal of an agency order subject to the exclusive jurisdiction of the courts of appeal under 49 U.S.C. § 46110.

The Sixth Circuit rejected Burdue's contention that FAA's termination of his designation was not an "order," noting that the word "order" has been broadly applied in connection with section 46110. Having concluded that its jurisdiction was proper, the court denied the petition, holding that the FAA's termination of a designee's

appointment is committed to agency discretion by law because the underlying statute, 49 U.S.C. § 44702(d)(2), gives the FAA Administrator unfettered discretion to terminate a designation "for any reason." The court wrote that if such broad discretion were measured by the usual "abuse of discretion" standard, "FAA could only have abused its discretion . . . if it terminated Burdue outside of the space-time continuum."

Although the court denied the petition because of the breadth of the Administrator's discretion, it inexplicably agreed that Burdue's Bivens claims— involving the same agency action—were appropriately brought in the district court and held that they may be adjudicated "because they fall outside the circuit-court exclusivity provision of § 46110(c) and are not otherwise an impermissible collateral attack on the merits of [Burdue's] termination."

#### **Second Circuit Denies Local Community Group Challenge of FAA's Approval of JFK Runway Safety Area Improvements**

On December 23, 2014, the U.S. Court of Appeals for the Second Circuit issued a "Summary Order" that denied the petition for review in Eastern Queens Alliance v. FAA, 589 Fed. Appx. 19 (2d Cir. 2014), in which petitioner challenged an FAA decision approving runway safety area improvements at New York City's John F. Kennedy International Airport (JFK). In its review of the FAA's environmental assessment and issuance of a finding of no significant impact and record of decision, the court considered: "whether the agency

took a ‘hard look’ at the possible effects of the proposed action” and “if the agency has taken a hard look...whether the agency’s decision was arbitrary or capricious.” The court ruled that each of Eastern Queens Alliance’s (EQA) objections had either been forfeited because it had not been brought to the agency’s attention during the public comment period or was unfounded based on the court’s review of the record.

On March 10, 2014, FAA issued a Final Environmental Assessment and Finding of No Significant Impact and Record of Decision (FONSI/ROD) approving amendment of the airport layout plan and potential federal funding to enhance the safety of Runway 4L/22R at JFK. These actions will be completed, in part, to comply with Public Law 109-115, which directs that “not later than December 31, 2015, the owner or operator of an airport certificated under 49 U.S.C. 44706 shall improve the airport’s runway safety areas to comply with the Federal Aviation Administration design standards required by 14 C.F.R. Part 139 ...” On May 16, 2014, EQA filed a Petition for Review in the U.S. Court of Appeals for the Second Circuit challenging FAA’s FONSI/ROD.

A runway safety area (RSA) is a defined surface surrounding the runway that is prepared or suitable for reducing the risk of damage to aircraft in the event of undershoot, overrun, or excursion from the runway. RSA dimensional standards have increased over time. The predecessor to today’s standard extended only 200 feet beyond the ends of the runway. Today, a standard RSA can be as large as 500 feet wide, extending 1,000 feet beyond each runway end. FAA increased these dimensions more than 20 years ago to accommodate larger and faster aircraft and

to address higher safety expectations of aviation users.

The proposed project involved displacing the Runway 4L arrival threshold 460 feet to the north to provide 600 feet of required undershoot RSA, constructing 728 feet of new runway pavement on the north side of Runway 4L/22R to maintain adequate departure length on Runway 22R while providing the required 1,000 feet of overrun RSA, and rehabilitating and widening Runway 4L/22R from 150 to 200 feet. These proposed actions, alternatives, and environmental consequences were analyzed and disclosed in a draft environmental assessment (EA). A revised draft EA was re-circulated for public comment after the Port Authority of New York and New Jersey (Port Authority) modified the proposed action to eliminate the need to remove trees in Idlewild Park.

In June 2014, EQA asked FAA to administratively stay its decision, which FAA denied. EQA then requested that the court stay the action pending a full judicial review. FAA opposed this request, as did the Port Authority. On August 5, the court denied EQA’s request for a stay and ordered an expedited briefing schedule. EQA filed its opening brief on September 11. In its brief, EQA alleged FAA’s decision violated NEPA, the Clean Air Act, the Endangered Species Act, and Executive Orders on environmental justice and floodplains. EQA questioned FAA’s decision regarding the impact of noise on the local population, FAA’s noise model and raised concerns about wildlife and air quality. The FAA filed its response brief on October 27 and pointed out EQA’s assertions were contrary to and unsupported by FAA’s well-documented findings and that FAA’s thorough analysis had used standards and methodologies repeatedly upheld by the



courts. FAA emphasized that its conclusion was thoroughly explained in the FONSI/ROD and EA and amply supported by the record.

### **First Circuit Denies Challenge to New Satellite-Based Departure at Boston Logan Airport**

On December 19, 2014, the U.S. Court of Appeals for the First Circuit denied the petition for review in Fleitman, et al v. FAA (1st Cir. No. 13-1984), in which three community associations representing Milton, Fairmont Hill, and Hyde Park, Massachusetts, and thirteen residents of Readville and Milton, Massachusetts challenged FAA's Final Environmental Assessment, Finding of No Significant Impact and Record of Decision (FONSI/ROD) implementing an air traffic control Area Navigation (RNAV) standard instrument departure (SID) on Runway 33 Left (33L) at Boston-Logan International Airport (BOS or Logan). The petitioners' primary allegation in their opening brief was that there were "critical flaws" in the data used in the environmental analysis that rendered it and the FONSI/ROD meaningless. To support this claim, petitioners asserted numerous alleged deficiencies in the environmental assessment.

In its response brief filed, FAA pointed out that its environmental analyses supported its finding and that petitioners' myriad challenges lacked merit and were "vague, perfunctory and completely unsupported." The case was submitted to the court for decision on the briefs on September 30, 2014.

With regard to the petitioners' challenge of the FAA's noise methodology, the court

stated that an agency is "entitled to select its own methodology as long as that methodology is reasonable." The court held that despite petitioners' numerous challenges, they failed to show that the FAA's choice of methodology in this instance was unreasonable. The court likewise rejected petitioners' other challenges with respect to range of alternatives, cumulative noise impact, noise impact on public parks, burden on low-income or minority populations, air quality impact, and community involvement.

The court concluded that after a careful review of the administrative record, petitioners failed to show that FAA's action was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." To the contrary, the court found that the record indicates "with conspicuous clarity that the FAA was cognizant of, and complied with, its responsibilities under the applicable statutes and regulations."

### **Court of Claims Agrees with FAA that Suit for Grant Reimbursement Belongs in Court of Appeals**

On November 14, 2013, the Tulsa Airports Improvement Trust (TAIT), manager and operator of the Tulsa International Airport, for and on behalf of Cinnabar Service Company, filed suit against FAA in the U.S. Court of Claims seeking a reversal of FAA's decision on eligible airport development costs, a determination that certain payments are eligible for reimbursement under FAA's grant program, the Airport Improvement Program (AIP), and attorney fees. Tulsa Airports Improvement Trust v. United States (Fed. Cl. No. 13-906) involves a claim by TAIT alleging that FAA failed to reimburse TAIT for alleged eligible claims under the

AIP. On September 8, 2014, FAA filed a motion to dismiss.

On February 10, 2015, the U.S. Court of Claims denied FAA's motion to dismiss for lack of subject matter jurisdiction and failure to state a claim upon which relief can be granted, but, pursuant to 28 U.S.C. § 1631, transferred the case to the U.S. Court of Appeals for the Tenth Circuit.

FAA contended in its Motion to Dismiss that the Court of Claims lacked jurisdiction because 49 U.S.C. § 46110, and alternatively 49 U.S.C. § 47111, vests exclusive jurisdiction in the U.S. Courts of Appeals. In addition, FAA contended that costs claimed under TAIT's AIP grant were time-barred. FAA also argued that TAIT failed to state a claim upon which relief may be granted because TAIT's complaint demonstrated it suffered no damages. FAA relied on Pucciariello v. United States, 116 Fed. Cl. 390 (2014), in support of its argument that the Court of Claims did not have jurisdiction. TAIT countered that the Court has jurisdiction premised on the Tucker Act. TAIT attempted to distinguish Pucciariello and asserted that Pucciariello, as an unpublished case, should be afforded no precedential value except as to the parties in that case.

Oral argument was conducted telephonically on January 15, 2015. The court's questions to both parties during oral argument focused primarily on the issue of jurisdiction under 49 U.S.C. §§ 47111 and 46110. The court raised the possibility that these statutes could displace the court's jurisdiction and require transfer to a Court of Appeals. The court asked TAIT's counsel whether TAIT had a preference between the Tenth Circuit or the D.C. Circuit Court of Appeals. TAIT expressed a preference for the Tenth Circuit.

In its opinion, the court found that all three prerequisites of 28 U.S.C. § 1631 permitting transfer of a case were satisfied. As to the first prerequisite, the transferor court lacks jurisdiction, the court held that the Court of Claims lacks subject matter jurisdiction to adjudicate TAIT's claims due to the displacement of jurisdiction under the Tucker Act by either 49 U.S.C. § 47111 or 49 U.S.C. § 46110. Regarding the second prerequisite, the action could have been brought in the transferee court at the time it was filed, the court held that TAIT's claims could have been filed in either of two federal courts of appeals. Finally, as to the third prerequisite, transfer is in the interest of justice, the court found that transfer would be in the interest of justice because TAIT has not yet had an opportunity to have its claims heard on the merits and because the Courts of Appeals were specifically designated by Congress as the appropriate fora for adjudication of claims of the type raised by TAIT.

The court did not determine whether TAIT's claim was time barred or the precise date on which TAIT's claim accrued, explaining that resolution of the time-barring issue could be taken up by the Court of Appeals. In addressing FAA's assertion that TAIT failed to state a claim upon which relief can be granted, the court confirmed that TAIT adequately stated a claim.

The court concluded its Opinion and Order by denying FAA's motion to dismiss for lack of subject matter jurisdiction and for failure to state a claim upon which relief can be granted and transferred the case to the U.S. Court of Appeals for the Tenth Circuit.

### **Briefing Completed in Ninth Circuit Appeal of Order Dismissing Quiet Title Claim against FAA**

Briefing has been completed in City of Santa Monica v. United States, et al. (9th Cir. No. 14-55583), an appeal of a February, 2014 decision of the U.S. District Court for the Central District of California dismissing a lawsuit against the FAA brought under the Quiet Title Act (QTA) by the City of Santa Monica (City). In that lawsuit, the City sought an order declaring that the restrictive covenants contained in a 1948 deed were no longer in effect. The deed in question was granted by the United States and covered land that now forms the majority of Santa Monica Municipal Airport (SMO). The deed contains several covenants that require the City to continue to operate the land as an airport and provides an option to the United States to revert the land if the City elects not to do so. The provisions of the deed run with the land.

The district court dismissed the claim on the ground that the City's suit was outside the QTA's 12-year statute of limitation. The court held the limitations period began to run when the City first had notice of the federal interest in 1948, when the City accepted and attested to the deed. The court held that a subsequent settlement agreement entered into by the City and FAA in 1984 on an unrelated matter did not constitute an abandonment of the federal interest. The court further held that the City's actions in seeking multiple releases from the SPA covenants for certain discrete parcels further evidenced the City's awareness of the federal interest. The court ruled that even notice of a claim eventually found to be invalid is enough to commence the limitations period.

The City also brought several constitutional claims based on the FAA's asserted interest in the land, including takings claims and violations of due process. The court dismissed these claims as unripe, given the City was still operating SMO and the FAA had taken no action against the City.

The City's argument on appeal is based largely on the fact that prior to the transfer through the 1948 deed, the United States leased the land in question from the City. During the lease, the United States made significant improvements on the land, including the addition of a new 5,000 foot runway. The United States transferred its leasehold interest to the City prior to the expiration of the lease. The City accepted the transfer in accordance with the 1948 deed, which included restrictions on the property and a "reversion clause." The City argues, however, that because the United States only had a leasehold interest in the land and did not own it, the land could not legally revert back to the United States. According to the City, since that is not possible, there is no way the City could have had notice. FAA argues in its brief that the deed is clear and express that title transfers to the United States if the covenants are not upheld. Moreover, even if the FAA's position is incorrect on the merits, the language of the deed's reversion clause and the subsequent actions of the City, in seeking releases of certain parcels, demonstrate that the City had notice of the United States' interest and that notice was enough to commence the limitations period.

### **Briefing in Flytenow Challenge to FAA's Common Carriage Designation in Commercial Pilot Licenses Dispute**

The parties have filed their opening briefs in Flytenow, Inc. v. FAA (D.C. Cir 14-1168), a petition for review of an August 13, 2014, FAA determination that pilots who post on Flytenow's website, on which pilots post information about upcoming flights to attract passengers willing to pay a pro rata share of the pilots' operating expenses, are engaged in common carriage and therefore must obtain a Part 119 certificate, which subjects them to heightened safety standards.

In its brief, Flytenow argued that FAA's decision was arbitrary and capricious because it misconstrued various regulations that set forth the elements of common carriage and was contrary to legal precedent showing that expense sharing should not be considered common carriage. Flytenow also offered statutory and constitutional arguments against FAA's decision: that the decision violated the APA because it constitutes a change in interpretation of a substantive rule promulgated without notice-and-comment rulemaking, unlawfully restricted private communications over the Internet, and violated the First and Fifth Amendments to the Constitution.

FAA filed its response brief on March 11, 2015, arguing that its interpretation of its own rules in this case was reasonable and consistent with relevant regulations. FAA also argued that a legal interpretation Flytenow cited to support its claim that the agency has for decades considered expense-sharing pilots as *not* engaged in common carriage was issued by an FAA regional counsel and thus does not represent the

views of the FAA's Office of the Chief Counsel or the FAA Administrator. FAA also noted that the court is barred from considering Flytenow's additional statutory and constitutional challenges to the decision because Flytenow did not raise them before the agency. However, FAA added that even if these challenges were not barred, they would fail because they are meritless for several reasons. First, under the Supreme Court's recent decision in Perez v. Mortgage Bankers Association (reported above), notice-and-comment rulemaking was not required for this decision because it was an interpretation of an interpretive, not substantive, rule. Second, FAA does have statutory authority to define and regulate common carriers and therefore may inquire into whether a pilot has held herself or himself out in such a way, on the Internet or by any other means. Third, FAA's decision does not violate the free speech guarantees of the First Amendment because offers to engage in illegal transactions – in this case, pilots advertising flights for which they lack the required certificate – are not protected speech. Finally, the decision violates neither the equal protection nor the due process clause of the Fifth Amendment because FAA has a rational basis for imposing heightened safety standards on expense-sharing pilots who hold themselves out to the public, and FAA's inquiry into the "holding out" element of common carriage as applied to Flytenow pilots was not unconstitutionally vague because the FAA clearly laid out its reasoning in the legal interpretation it provided to Flytenow.

### **Initial Briefing Complete in Remand of Air Traffic Controllers' FLSA Lawsuit**

Pursuant to the remand order in which the U.S. Court of Appeals for the Federal

Circuit vacated a \$50 million judgment for the nearly 8,000 FAA air traffic controllers, the government and the plaintiffs submitted briefs to the U.S. Court of Federal Claims on the issue of whether FAA's compensatory time and credit hour policies are consistent with the title 5 exceptions to the Fair Labor Standards Act (FLSA) on which the Federal Circuit held that FAA is authorized to rely. In Abbey, et al v. United States (Fed. Cl. 07-272), the government moved for summary judgment, and plaintiffs filed a cross motion for summary judgment. Plaintiff's reply brief was filed on February 20, 2015.

In its briefs, the government argued that FAA's compensatory time and credit hour policies are effectively identical to the title 5 exceptions set forth in 5 U.S.C. § 5543 and 5 U.S.C. § 6121, *et seq.* with respect to determining eligibility for FLSA overtime, compensatory time, or credit hours. Regarding compensatory time, the government showed that for air traffic controllers working a traditional or compressed work schedule, FLSA (cash) overtime is the default form of compensation and that only at their election will air traffic controllers receive compensatory time in lieu of FLSA overtime. In other words, eligibility for compensatory time at FAA is identical to the eligibility requirements in 5 U.S.C. § 5543. With respect to credit hours, the government acknowledged that while some air traffic controllers accrued more than 24 credit hours pursuant to an agreement between the FAA and their union, the question of whether the FAA's policies were consistent with title 5 requires fidelity to the statutory definition of credit hours. Specifically, the government showed that the term "overtime hours," when used with respect to flexible schedule programs under sections 6122 through 6126 of title 5, means "all hours in excess of 8 hours in a day or 40 hours in a

week which are officially ordered in advance, but does not include credit hours." Because the credit hours at issue were, by definition, voluntarily worked by the plaintiffs and, thus not "officially ordered in advance," the plaintiffs did not work FLSA overtime and are not entitled to FLSA overtime compensation for those hours.

Despite challenging FAA's compensatory time policies since 2007, plaintiffs conceded the issue in this briefing and did not move for summary judgment on compensatory time. With respect to credit hours, plaintiffs argued that because FAA allowed air traffic controllers to accrue more than 24 credit hours, its policies were not identical to title 5 and thus violated the FLSA. In this regard, plaintiffs' argument did not turn on whether the subject hours of work constituted overtime under the 5 U.S.C. § 6121 definition, but rather on the credit hour accrual limitation in 5 U.S.C. § 6126. In so arguing, plaintiffs conceded individual credit hour balances of less than 25 did not constitute an FLSA violation, but argued that those balances greater than 24 constituted an FLSA violation.

The plaintiffs also moved for summary judgment regarding FLSA overtime calculations, methodology, and liquidated damages. Relying on the version of plaintiffs' methodology most favorable to the FAA, and exclusive of liquidated damages, plaintiffs argued they are owed \$6,883,907 under the default two-year statute of limitations and \$13,620,280 under a three-year statute of limitations. The government countered those arguments and calculations and also argued that, as before, damages should be bifurcated to the extent the government's motion for summary judgment is not granted.



## **FAA Sues Southwest Airlines for Civil Penalties**

On November 3, 2014, the Department of Justice, on behalf of FAA, filed an action against Southwest Airlines to recover civil penalties from the air carrier for multiple violations of FAA regulations. The case filed in the U.S. District Court for the Western District of Washington, United States v. Southwest Airlines, Co. (W.D. Wash. 14-1693), involves three separate types of maintenance violations by Southwest. The first two categories of violations relate to approximately 44 un-airworthy aircraft that Southwest flew prior to and throughout 2009. The third category of violations involves Southwest flying two aircraft in 2012 with parts that had been improperly altered.

According to FAA regulations, air carriers such as Southwest must operate in compliance with "appropriate operations specifications." FAA issues Airworthiness Directives, which are legally enforceable rules, when it determines that a product has an unsafe condition and that condition is likely to exist or develop in other products of the same design. Operating an aircraft that does not meet the requirements of an Airworthiness Directive makes an aircraft un-airworthy and is against the law. Aircraft operators must comply with an applicable Airworthiness Directive unless they request and receive FAA approval of an Alternative Method of Compliance (AMOC). Moreover, even if an air carrier does not perform maintenance on its aircraft directly, the air carrier is ultimately responsible for ensuring that the maintenance was performed properly and that the aircraft is airworthy upon return to service.

Beginning in 2002, FAA issued several Airworthiness Directives related to

maintaining the safe operation of the fuselages of Boeing 737 aircraft. Southwest, which operates a fleet of Boeing 737s, was obliged to comply with these Airworthiness Directives or to obtain an AMOC. FAA authorized Southwest to follow a Boeing Service Bulletin as an AMOC to the fuselage Airworthiness Directives. Southwest directed Aviation Technical Services, Inc. (ATS), an aircraft maintenance, repair, and overhaul company, to perform major alterations and maintenance on Southwest aircraft pursuant to the Boeing Service Bulletin. Between 2006 and 2009, ATS performed maintenance on Southwest aircraft. However, ATS did so improperly with regard to requirements related to fasteners and shoring on approximately forty-four of these aircraft. FAA alleges that because of the improperly performed maintenance, when Southwest subsequently operated these aircraft in passenger service, it violated numerous FAA regulations.

In 2008, FAA issued an Airworthiness Directive requiring air carriers to perform inspections of and modifications to aircraft gray water drain masts. Gray water drain masts allow waste water from the galley and lavatory sinks of aircraft to flow overboard. After Southwest performed the required inspection and maintenance on two aircraft, Southwest discovered the modification had not been performed properly. Nevertheless, Southwest continued to operate these two aircraft in passenger service without correcting the error for several days.

On July 28, 2014, FAA notified Southwest of the alleged regulatory violations arising from the improper maintenance of its aircraft and proposed civil penalties. After the parties failed to settle the proposed civil penalties, the Justice Department initiated

this action to recover the civil penalties on behalf of the FAA.

On November 25, 2014, Southwest filed a motion for partial summary judgment claiming that the government had breached a tolling agreement by failing to notify Southwest before filing this action. Southwest claimed that in exchange for agreeing to toll the statute of limitations for some of the alleged violations, the government agreed to give Southwest advance notice before filing an action against it. As a result, Southwest argued that the government's failure to give notice before filing this action was a material breach of the tolling agreement, and therefore, some of the government's claims were now barred by the statute of limitations.

On January 6, 2015, the district court denied Southwest's motion, concluding that because there were genuine issues of material fact regarding the nature of the bargaining process leading to the tolling agreement, the matter could not be decided on summary judgment.

During a status conference on March 17, 2015, the district court set a trial date for March 14, 2016.

### **Aircraft Engine Manufacturer Seeks Review of Engine Test Exemption Denial**

On December 8, 2014, International Aero Engines, LLC (IAE) filed a petition for review in the U.S. Court of Appeals for the Second Circuit challenging FAA's denial of its petition for an exemption and its petition for reconsideration of that denial. International Aero Engines, LLC v. FAA (2d Cir. No. 14-4522). IAE is working with

Pratt & Whitney on the type certification of a new commercial aircraft engine. As part of the type certification process, IAE asked FAA to allow it to conduct a modified turbine blade containment test in lieu of the test specified in 14 C.F.R. § 33.94(a)(1). In essence, the usual containment test is based on a blade that breaks at its "root," meaning that the full blade is involved in the test. IAE argued that its blade design, using titanium, was novel and unusual and warranted a test using less than the full blade. IAE noted that FAA had previously approved such a modified test for a competing manufacturer, using a composite turbine blade. IAE is asking the court to order the FAA to reconsider the denial of its exemption request. No briefing schedule has been set, and the matter is being held in abeyance until April 13, 2015, to allow the parties to determine whether there is a resolution other than litigating the petition for review.

### **Challenge to FAA's Airspace Determination on Proposed Hospital Heliport**

On December 29, 2014, Johnson County Hospital in Tecumseh, Nebraska, filed a Petition for Review in the U.S. Court of Appeals for the Eighth Circuit challenging FAA's determination under 14 C.F.R Part 157 that the proposed Private Use Hospital Heliport was "objectionable." Johnson County Hospital v. FAA (8th Cir. No. 14-3900). The FAA determination under review was issued on October 27, 2014, and stated that the proposed heliport would have a substantial adverse effect on the safe and efficient use of navigable airspace by aircraft with respect to the safety of persons and property on the ground. On motion of the petitioner, the Eighth Circuit issued an order on February 4, 2015, holding this

petition for review in abeyance for sixty days. If the petition has not been dismissed at the end of the sixty days, the petitioner will be required to file a written report outlining the status of the matter.

### **Operators and Community Interest Group Challenge Settlement Agreement and Seek Enforcement of Airport Noise and Capacity Act**

On January 29, 2015, several plaintiffs filed suit against FAA seeking to invalidate a 2005 Settlement Agreement and to compel enforcement of the Airport Noise and Capacity Act of 1990 (ANCA) at East Hampton Airport on the South Shore of New York's Long Island. The suit, Friends of the East Hampton Airport, Inc., et al. v. FAA (E.D.N.Y No. 15-00441), was brought by several helicopter charter operators, a local users group, Friends of East Hampton Airport, Inc., and the Helicopter Association International, Inc.

According to the complaint, a prior lawsuit sought to stop expansion of East Hampton Airport and challenged the legality of FAA's approval of East Hampton's 2001 airport layout plan. The complaint alleges that settlement of this lawsuit resulted in an agreement in which FAA agreed not to enforce grant assurance 22 relating to airport access on fair and reasonable terms.

According to the complaint, FAA provided written responses to questions posed by U.S. Representative Timothy Bishop in which FAA interpreted the 2005 Settlement Agreement as relieving East Hampton from compliance with ANCA's requirement in proposing new airport noise and access restrictions, unless East Hampton wished to remain eligible to receive future federal airport funding.

Plaintiffs have brought the complaint challenging the validity of the settlement agreement. According to plaintiffs, the provisions of grant assurance 22 are mandated by statute and the United States had no authority to compromise them. Plaintiffs also seek a declaration that the sponsor is still required, Settlement Agreement notwithstanding, to comply with ANCA. Plaintiffs argue the Settlement Agreement never addressed ANCA and that FAA has an obligation to enforce it. FAA's response is due on April 6.

### **Federal Highway Administration**

#### **Ninth Circuit Rules in Favor of Caltrans, FHWA in NEPA Assignment-Clean Air Act Case**

On October 30, 2014, a unanimous panel of the U.S. Court of Appeals for the Ninth Circuit affirmed the judgment of the U.S. District Court for the Central District of California in Natural Resources Defense Council, et al. v. FHWA, et al., 770 F.3d 1260 (9<sup>th</sup> Cir. 2014), holding that the California Department of Transportation (Caltrans), under NEPA Assignment (23 U.S.C. § 327), did not violate NEPA in approving the SR 47 Truck Expressway Project (SR 47 Project) at the Ports of Los Angeles and Long Beach. The panel also affirmed that FHWA, in issuing a project-level air quality conformity determination, which cannot be assigned to a State, had not violated the provisions of the Clean Air Act (CAA).

The SR 47 Project is a proposed alternate route for truck container traffic from the Ports of Los Angeles and Long Beach, California. Caltrans issued a NEPA Record

of Decision for the project in 2009. Plaintiffs filed suit on November 4, 2009, challenging FHWA's determination that the SR-47 project conformed to the purpose of the California State Implementation Plan and would not cause new violations of the CAA standards for PM<sub>10</sub> and PM<sub>2.5</sub>, worsen violations, or delay timely attainment of the standards. FHWA's determination included a PM<sub>2.5</sub> project-level hot spot analysis using a qualitative methodology consistent with EPA's 2006 guidance. Plaintiffs challenged the decision to conduct the analysis using the North Long Beach Monitoring Station PM<sub>2.5</sub> 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, five miles from the immediate location of the SR-47, was too far from the project location to be reasonable. The lawsuit raised similar claims against Caltrans under NEPA.

The district court ruled in favor of FHWA and Caltrans on June 29, 2012, accepting FHWA's reasoning that the qualitative analysis used 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 also found that FHWA acted reasonably within its discretion, and followed the EPA Guidance. The court agreed with FHWA that no localized modeling of PM<sub>2.5</sub> was required, even though a computerized modeling of CO was required. Overall, the court found the CAA analysis (and Caltrans' NEPA analysis) to reflect a thorough consideration of the potential effects of the Project and the project's "no-build" alternative.

On appeal, the Ninth Circuit held that under the qualitative air quality conformity guidelines in place at the time, the term "any area" did not mean every point immediately adjacent to the proposed highway and that the word "area" as used in the CAA and regulations is ambiguous. The court held that the regulations themselves did not resolve the issue and gave Auer deference to the applicable EPA and USDOT guidance documents. On the NEPA issues, the court held that although the conformity determination was based on the 1997 National Ambient Air Quality Standards (NAAQS), the agencies had nonetheless adequately discussed whether the project would permit attainment of the 2006 updated NAAQS. (It should be noted that the court made no attempt to distinguish between the federal and state actions, but instead attributed both to "the Defendants.")

### **Court Determines that State Project in Alabama is Not a Major Federal Action that Triggers NEPA**

On February 4, 2015, the U.S. District Court for the Middle District of Alabama entered an order denying plaintiffs' request for a Preliminary Injunction (PI) in City of Eufaula, et al. v. Alabama DOT, 2015 WL 404534 (M.D. Ala. 2015). This order follows from the court's ruling on December 29, 2014, denying plaintiffs' request for a Temporary Restraining Order (TRO) (2014 WL 7369783). The court found that the widening project of US 431 in the City of Eufaula was not a "Major Federal Action" and that NEPA and the other federal laws and regulations cited by plaintiffs did not apply in state funded construction project. The case has been dismissed.

On December 4, 2014, the City of Eufaula, Alabama, the Eufaula Heritage Association,

the Alabama Trust for Historic Preservation, and the National Trust for Historic Preservation, filed a civil action against the Alabama Department of Transportation (ALDOT), John R. Cooper, ALDOT Director, FHWA, and Mark Bartlett, the FHWA Division Administrator. Plaintiffs' complaint sought preliminary and permanent injunctive relief to prohibit a state funded widening project on .8 miles of US 431 in Eufaula. As the project was imminent, a TRO was also requested.

US 431 is a major route from the Atlanta area to Florida Panhandle beaches and is four lanes from Interstate 85 in Opelika to the Florida line, about 150 miles, except for the 0.8-mile stretch through the historic district, known as North Eufaula Avenue. The street is divided by a large median lined with live oak trees that form a canopy in front of the historic homes. The state's project planned to cut three feet from each side of the median and trim some live oaks to provide four lanes of traffic. This section of US 431 is the busiest stretch of two-lane road in the state, averaging 21,000 vehicles per day. State officials say it will have minimum impact on the nearly 700 buildings in the historic district and will relieve backlogs of beach traffic on spring and summer weekends. Plaintiffs say it will damage the value of the homes and curtail tourism that is important to the small town's economy.

In November 2014, the state let a \$1.3 million dollar contract using only state funds. This .8 mile segment was advanced solely by the state without FHWA participation. The project had a start date in mid-December. The completion date was scheduled for early April 2015.

Prior to the current project, in 2005, ALDOT and FHWA had prepared an

Environmental Assessment (EA) to evaluate a potential bypass of US 431 around Eufaula. The EA was completed using federal funds and was approved by FHWA in January, 2005. Over the past 30 years, Federal funds had been used on US 431 widening projects both south and north of the present state project. However, this widening project on N. Eufaula Avenue had never used any federal funds, nor had the current widening project ever been studied or reviewed by FHWA.

Plaintiffs, represented by the Eufaula City Attorney and by the Southern Environmental Law Center (SELC), claimed that the defendants were violating NEPA, Section 4(f), and the National Historic Preservation Act (Section 106), by allowing this project to proceed without federal approval. They asserted, due to the past federal involvement on nearby US 431 widening projects and the 2005 US 431 Bypass Study, that the current project had been federalized. Thus, NEPA and all other applicable federal requirements applied. Plaintiffs also asserted that the project had been unlawfully segmented. Finally, plaintiffs contended that the city, not the state, owned the median.

In its opinion, the court found that NEPA's procedural protections and those of Section 4(f) and Section 106 apply to "major Federal actions significantly affecting the quality of the human environment." The court also noted that ". . . major federal actions need not be federally funded to invoke NEPA requirements. Sw. Williamson Cnty. Cmty. Ass'n, Inc. v. Slater, 243 F.3d 270, 279 (6th Cir. 2001) (cases cited). In effect, major federal action means that the federal government has actual power to control the project. Ross v. Fed. Highway Admin., 162 F.3d 1046, 1051 (10th Cir. 1998)." While finding there was no specific litmus test to



determine when a project was federalized, the court, citing Slater, found that these issues require a “situation-specific and fact-intensive analysis.” Slater, 243 F.3d at 281. The court noted that the “fact-intensive analysis” is normally completed on a case-by-case basis. However, in looking at case law, the court discerned several factors to use in framing the examination of the issue.

First is pretext - that is, whether a State labeled its project as a purely state project only after federal agencies rejected the proposed environmental studies.

Second is the degree of the federal government’s involvement. That is, the federal government may be involved in a number of stages in a highway-development project including “the programming, location, design, preliminary engineering, and right of way acquisition stages.” Scottsdale Mall v. Indiana, 549 F.2d 484, 489 (7th Cir. 1977). The more federal involvement in the project the more likely that courts will find there to be a “Major Federal Action.”

The third factor employed by the court is whether the project segment at issue forms part of a larger coherent federal project. A coherent project could be based on the type of project, whether there was federal funding involved on the other segments, or how close in time different projects are designed or approved. The “underlying idea” from these cases is whether the project at issue “was conceptualized as a single unit rather than a series of discrete projects.”

The court, citing to its TRO ruling, again held that Plaintiffs had not shown the required federal participation or project involvement so as to “federalize” the project. The court, in utilizing its three factors, found that 1) there was no pretext

here as the project had never been submitted to FHWA for study or funding consideration – it had always only existed as a state planned and funded project; 2) there was a lack of any federal involvement as the federal government did not approve the location, conduct an engineering study, plan with the State, or exercise other forms of control over the 0.8 mile stretch; and finally, 3) the widening of US 431 in this section was a discrete project and was not part of an overall coherent project developed and overseen by the federal government. Given these facts the court denied plaintiffs’ request for both the TRO and a PI.

In its brief seeking the PI, the plaintiffs also raised a segmentation issue. The plaintiffs argued that the court erred by failing to use segmentation analysis as an alternative test for whether a state project is actually a major federal action. The court noted its disagreement. It found that, while the circuits seemed to be split, the segmentation test is required only if the court already has found a major federal action. The court reached this conclusion for two main reasons. First, the plain language of section 771.111, which suggests that segmentation is a test for federal agencies to ensure they conduct a “meaningful” and “full[]” evaluation – only after they have authority and control over a project. Second, after citing the definition for major federal action found in 40 CFR § 1508.18, the court stated that the segmentation test does help answer the question as to whether there is enough federal involvement on a project to establish the potential for federal control or responsibility. The court found this question to truly be the “heart of the issue”. Thus, the court did not accept the plaintiffs proposed test for segmentation determination. However, the court still discussed the segmentation factors and found, even if the test were required, the plaintiffs still did not

meet their burden of proving a substantial likelihood of success on the merits.

The case has now been dismissed without prejudice. The project is underway and is nearing completion.

### **Court Dismisses Case Challenging Tolling Plan for Sakonnet River Bridge in Rhode Island**

On December 3, 2014, the U.S. District Court for the District of Rhode Island granted federal and state defendants' motion to dismiss on mootness grounds in a lawsuit against the agencies' tolling plan for the Sakonnet River Bridge. Town of Portsmouth, et al. v. Lewis, et al., 2014 WL 6792065 (D.R.I. 2014). This matter arose from the replacement of a bridge spanning the Sakonnet River, connecting the towns of Portsmouth and Tiverton, Rhode Island. A 2003 Final Environmental Impact Statement initially dismissed tolling as an alternative, and the Record of Decision (ROD) selected a toll-free replacement alternative. The bridge neared completion in 2012 and was opened to traffic. The State subsequently determined that it should consider tolling as a means to reduce the financial burden of maintenance and upkeep of the structure. A reevaluation was prepared and subjected to public review in March 2013. A revised ROD was issued finding that all-electronic tolling would not require the preparation of a Supplemental Environmental Impact Statement (SEIS). The State then announced the implementation of a tolling structure for the bridge.

In April 2013, the town of Portsmouth filed suit claiming violations of NEPA in the failure to prepare an SEIS and that the imposition of tolls would violate sections 129 and 301 of Title 23. Plaintiffs sought a

preliminary injunction (PI) prohibiting the imposition of tolls. Oral argument on the PI was heard in June 2013, and the court issued a bench decision denying the PI, determining that the plaintiffs were unlikely to prevail on the merits in that Sections 129 and 301 did not provide a private right of action and that the court lacked jurisdiction to grant an injunction under the Federal Tax Injunction Act, 28 U.S.C. § 1341. Plaintiffs filed a Notice of Appeal to the U.S. Court of Appeals for the First Circuit, but in the interim, the state legislature eliminated the toll structure and established a "voluntary toll" of ten cents while establishing a commission to determine whether tolls should be imposed. Plaintiffs withdrew their appeal, and the court on its own motion held all proceedings in abeyance, pending the final action of the legislature.

In June 2014, the legislature acted in passing legislation prohibiting tolling on the new bridge. Plaintiffs, however, filed a motion for summary judgment seeking a ruling that the defendants violated NEPA and Section 129 in their action to attempt tolling and collecting tolls in the interim. Additionally, they sought discovery and attorney fees to be awarded from the toll collections that occurred during the interim period. Defendants filed a motion to dismiss and for a protective order. The protective order was granted and the court issued its final order, dismissing the case on mootness grounds and dismissing all claims against the government, including attorney fees.

On December 29, plaintiffs filed a notice of appeal to the First Circuit.

## **Court Grants Summary Judgment for Plaintiff in Garden Parkway Lawsuit**

On March 13, 2015, the U.S. District Court for the Eastern District of North Carolina in Catawba Riverkeeper, et. al. v. North Carolina DOT, et. al. (E.D.N.C. No. 5-29) granted plaintiffs' motion for summary judgment, denied defendants' motions for summary judgment, and vacated the Record of Decision (ROD) for the Gaston East-West Connector, also known as the Garden Parkway, a proposed 22-mile toll road project west of Charlotte, North Carolina.

Plaintiffs, the Catawba Riverkeeper Foundation and Clean Air Carolina, filed a complaint seeking declaratory and injunctive relief alleging that FHWA and the North Carolina Department of Transportation (NCDOT) violated NEPA because they used only a single set of socioeconomic (SE) data in comparing the build alternative to the no-build alternative for the project and thus effectively compared building the road to building the road. Plaintiffs also asserted that defendants should have used data generated by the modeling for the indirect and cumulative effects analysis to re-run and refine the build model used to compare the build and no-build scenarios for the traffic-forecasting associated with the alternatives analysis. The complaint was originally filed in the U.S. District Court for the Western District of North Carolina.

The parties completed briefing in August 2013 and presented oral arguments on November 21, 2014. Neither party at any point in the litigation had petitioned for a change of venue. However on December 30, 2014, the court sua sponte issued an order transferring the case to the Eastern District of North Carolina. The court noted in its transfer order that plaintiffs' complaint

in this matter is similar in terms of content, claims for relief, and legal theory, particularly with respect to traffic forecasting and indirect and cumulative effects analysis, to both the complaints they filed challenging the Monroe Connector/Bypass in Clean Air Carolina, et al. v. North Carolina DOT, et al. (W.D.N.C. No. 14-338). Citing the recently issued change of venue order in that case, the court held that considerations of judicial economy outweighed the deference that ordinarily attaches to a plaintiff's choice of forum in light of the extraordinary overlap between this case and the Monroe Connector/Bypass case and the experience of the transferee judge with this complicated field of facts and law. Finally, the court opined that transfer would avoid the potential for conflicting decisions from coordinate courts.

The new district court decided the cross-motions for summary judgment on one issue: the agencies' reliance on one set of SE data for the build and no-build traffic projections, which were used to assess the environmental impacts of the build and no-build alternatives. Plaintiffs asserted in their briefing that the use of one set of SE data, for both the build and no-build conditions in the quantitative Indirect and Cumulative Effects (ICE) report and the Final EIS, corrupted the entire NEPA process. Defendants acknowledged the use of one set of underlying SE data in the project's NEPA documentation and in the briefs filed with the court. FHWA and the NCDOT, through their experts, maintained that the use of this one data set did not corrupt the analysis of the baseline for the no-build alternative. The documentation in the administrative record set out how different future traffic projections were created for the build and no-build scenarios. It also described how the agencies' experts had considered re-running forecasts for the no-build scenario

using the future scenario SE data generated by the ICE analysis and how they had decided that doing so was unnecessary, especially given the relatively small differences between the original SE data and the data generated in the ICE analysis. Consequently, defendants argued that their decision to rely upon one set of SE data was a carefully considered and reasonable judgment and was, therefore, entitled to judicial deference.

The court rejected defendants' arguments. The court framed the issue as whether the agencies' use of the same underlying SE data satisfied NEPA's procedural requirements. It found that this question was one of a matter of law. The court's opinion extensively quoted from the Fourth Circuit opinion in a related case, North Carolina Wildlife Federation v. North Carolina DOT, et al., 677 F.3d 596 (4th Cir. 2012) (Monroe I), which concerned the Monroe Connector/Bypass project, also located in the Charlotte area. In Monroe I, the Fourth Circuit found that the agencies had violated NEPA by failing to disclose that only one set of SE data had been used. The appellate court never specifically held that one set of data was legally insufficient, but it did readily express its concerns. The district court here clearly picked up on those concerns. Finally, the court opined that no injunctive relief was warranted at this time because the order vacated the ROD and the agencies were specifically prohibited from taking any action that would have an adverse environmental impact or limit the choice of alternatives until a new ROD is issued.

### **Court Grants FHWA's Motion to Stay in Intermodal Center Case in Arkansas**

On November 18, 2014, the district court in City of Dardanelle, et al. v. USDOT (E.D. Ark. No. 14-98) denied plaintiffs' motion to reconsider the dismissal of the U.S. Army Corps of Engineers (Corps) in light of new information about the Corps' involvement. At the same time, the court granted FHWA's request to stay a decision in the case based on FHWA's decision to re-evaluate the Final Environmental Impact Statement (FEIS) due to the changes in the project's design. In its order, the court required FHWA to file project status reports on January 7, 2015, and March 20, 2015.

The City of Dardanelle and the Yell County Wildlife Federation challenged the approval of an intermodal project located along the Arkansas River, near the cities of Russellville and Dardanelle. The proposed project is for the construction of a slackwater harbor and an intermodal center. The facilities would serve as a regional transfer and distribution point for goods to be shipped to the rest of the country by rail, river, and by interstate. The Complaint alleges that in approving the FEIS and issuing the Record of Decision (ROD), defendants failed to comply with the NEPA and its implementing regulations regarding the analysis of alternatives, direct, indirect and cumulative impacts, and potential mitigating measures. Further, plaintiffs allege violations of Section 4(f), the Endangered Species Act (ESA), the Clean Water Act and its implementing regulations, and the regulations of the Federal Emergency Management Agency. The named defendants include the FHWA, the Corps, the Arkansas Highway and Transportation Department (AHTD), and the

River Valley Regional Intermodal Facilities Authority (Authority).

This project dates back to the 1990s. The Corps had prepared an Environmental Assessment (EA) in November 1999, and issued a Finding of No Significant Impact (FONSI) in January, 2000 for the proposed slackwater harbor facility. The preferred site alternative was an 882-acre tract located on the eastern bank of the Arkansas River near Russellville in Pope County, Arkansas. This site is located across the river from the City of Dardanelle. The Corps' slackwater harbor EA did not include the proposed intermodal facilities. During this time, the State of Arkansas created the Authority to oversee the construction and the operation of the intermodal facility. The intermodal project and the slackwater harbor were the recipient of several Congressional earmarks. In 2000, the City of Dardanelle sued the Corps over its EA/FONSI asserting that the required analysis was lacking, especially as it did not include a study of the intermodal center.

In 2002, an EA was initiated by FHWA for the harbor's ancillary intermodal facilities with the Authority serving as Project Sponsor. Technical assistance was provided to the Authority by AHTD. Shortly after starting the NEPA process, FHWA determined that an EA was insufficient to address the Project's anticipated impacts. An EIS was then started to examine all of the Project's components with FHWA acting as the lead federal agency and the Corps serving as a cooperating agency. Following this decision, in 2003, the U.S. District Court entered an injunction against the Corps halting the slackwater harbor project until an EIS was prepared. That injunction still remains in effect.

The Draft EIS for the Project was published in March 2006. Given the passage of time, a Supplemental Draft EIS was then completed and issued in August 2010. The Final EIS was approved on March 18, 2013. The ROD was signed and issued by FHWA on November 13, 2013. The site chosen for the project was the same one from the Corps' earlier EA. On February 19, 2014, plaintiffs filed suit. Defendants answered in May 2014, except the Corps filed a motion to dismiss asserting that it was not a proper party as it had not issued any final agency action nor had it adopted the FHWA FEIS. As of this date, no 404 Permits have been requested by the Project Sponsor. The federal defendants also jointly asserted that plaintiffs' claims brought under the ESA were premature as they had not issued the required 60-day notice letter prior to filing suit.

After exchanges of briefs, the District Court heard oral argument on August 28, 2014. Upon conclusion of the hearing, the court held that the Corps, acting in this matter as only a cooperating agency under the NEPA regulations, was not a proper party. The Corps was dismissed without prejudice as were the claims against the Federal defendants brought under the ESA. FHWA then filed its administrative record in the case on October 16, 2014.

During the preparation of the administrative record materials, FHWA learned that the Corps had altered the design of the slackwater harbor prior to the issuance of the FEIS. FHWA also discovered that the Corps had filed a Federal Register notice adopting the FEIS in May 2014. The Corps filed a notice with the District Court advising of the adoption on October 16, 2014. The Corps argued that the dismissal was still proper as it had not issued its own decision for the harbor project. Plaintiffs



filed a motion to reconsider the earlier dismissal on October 27, 2014. The Corps filed its response on November 3, 2014, with the plaintiffs' reply filed on November 7, 2014. Due to the changes in the harbor design made by the Corps, FHWA regulations required that a reevaluation be completed to determine if there were any new significant impacts caused by the project. On November 17, 2014, FHWA filed a motion seeking a stay of the court action until the reevaluation could be completed.

### **Parties Enter into Mediation in the Aftermath of the Bonner Bridge Appeal Decision**

The parties in Defenders of Wildlife v. North Carolina DOT, et al. (E.D.N.C. No. 11-35) have formally entered the U.S. Court of Appeals for the Fourth Circuit's mediation program. This action stays any petition for rehearing until 30 days after the mediation office informs the court that mediation has concluded. A mediation meeting was held in Washington, D.C. on February 25, 2015. The parties are currently finalizing the terms of a settlement.

On August 6, 2014, in a unanimous decision, the Fourth Circuit affirmed in part, reversed in part, and remanded the 4(f) portion of the decision back to the U.S. District Court for the Eastern District of North Carolina. Defenders of Wildlife v. North Carolina DOT, et al., 762 F.3d 374 (6th Cir. 2014). On September 16, 2013, the district court had found for Defendants, FHWA and NCDOT, on all counts, granting summary judgment in their favor and dismissing the case. The district court concluded that defendants complied with both NEPA and Section 4(f) of the Department of Transportation Act of 1966

with respect to the Bonner Bridge replacement project located in the Outer Banks of North Carolina. In their appeal, plaintiffs alleged that the district court erred in its determinations regarding: 1) whether defendants engaged in improper segmentation in violation of NEPA; 2) the applicability of the joint planning exception to Section 4(f); and 3) whether defendants complied with the substantive requirements of Section 4(f). The appellate court affirmed the district court's determination that defendants complied with NEPA, however it reversed the district court's determination that a special exception, the joint planning exception, freed Defendants from complying with Section 4(f). That portion of the decision was remanded for further proceedings.

### **Parties Await District Court Ruling on Single Point Urban Interchange Project**

In early October 2014, defendants FHWA and Florida DOT filed answers to plaintiffs' second amended complaint in RB Jai Alai, LLC v. Secretary of Florida Department of Transportation, et al. (M.D. Fla. No. 13-1167). The parties filed summary judgment motions in November and December 2014 and now await a ruling.

This case arises out of a challenge filed by RB Jai Alai, LLC to the proposal to build a single point urban interchange (SPUI) in Casselberry, Seminole County, Florida and alleges NEPA violations. Plaintiff RB Jai Alai is a Florida limited liability company and claims to own property and business in the area affected by the project.

The proposed project involves the intersection of SR 15/600 (US 17/92) at SR 436 located in the southwest region of

Seminole County. The SPUI will elevate 4 lanes of SR 15/600 (US 17/92) and SR 436. The project is approximately 0.65 miles in length along SR 15/600 (US 17/92). A northbound exit ramp will include a dedicated U-Turn lane under the bridge as well as the southbound exit ramp. The SPUI includes an elevated overpass over SR 436 as well as the addition of bike lanes, sidewalks, and drainage improvements. A Type 2 Categorical Exclusion (CE) was done in 2004, and a Reevaluation was completed in 2012.

Plaintiff asserts that defendants' actions in advancing the project have been contrary to law, arbitrary and capricious, and an abuse of discretion under NEPA and the APA. It claims that the CE and State environmental study conducted for the project were based on old and flawed traffic data. Plaintiff's own 2012 traffic study produced different results indicating the flyover or elevated overpass was not needed. Plaintiff prefers an at grade intersection improvement referred to as the "Boulevard Plan." Plaintiff also asserts that the 2012 Reevaluation was flawed and inadequate due to relying on dated information.

On September 30, 2014, the court denied plaintiffs' motion for preliminary injunction. The parties proceeded to file summary judgment motions in November and December 2014. In its motion for summary judgment, FHWA first argued that plaintiffs lack standing to pursue their claims because only vague, generalized allegations had been asserted throughout the litigation. Second, FHWA argued that FHWA and the Florida Department of Transportation (FDOT) had reasonably considered the project's impacts on surrounding sites with known or suspected contamination. Regarding this claim, FHWA contended that it had properly made a factual determination based on the

evidence before it, relied upon expert analysis, and adequately explained its decision. Third, FHWA argued that FHWA and FDOT had properly addressed wetland impacts and considered land use plans surrounding the project. These impacts and uses were clearly documented in the administrative record. Lastly, FHWA argued that both FHWA and FDOT made reasonable predictions of future traffic trends by properly relying upon available evidence and expert analysis.

### **Briefing in Second Lawsuit Challenging the Monroe Connector Bypass**

On November 14, 2014, the U.S. District Court for the Western District of North Carolina granted motions of defendants FHWA and the North Carolina Department of Transportation (NCDOT) in this challenge to the Monroe Connector/Bypass project to change venue to the Eastern District of North Carolina. Clean Air Carolina, et al. v. North Carolina DOT, et al. (W.D.N.C. No. 14-338). On December 5, 2014, the U.S. District Court for the Eastern District of North Carolina issued an order assigning the case to the same judge who had presided over the first challenge to the Monroe Connector/Bypass project. Plaintiffs filed their Motion for Summary Judgment on January 23, 2015, and federal and state defendants filed their Cross-Motions for Summary Judgment on February 26, 2015. Briefing is scheduled to conclude on April 30, 2015.

Plaintiffs, Clean Air Carolina, North Carolina Wildlife Federation, and Yadkin Riverkeeper, had filed a complaint seeking a declaratory judgment and a preliminary injunction to halt progress on the Monroe Connector/Bypass, a proposed 20-mile toll

road project east of Charlotte, North Carolina.

The same plaintiffs had previously challenged the project in a lawsuit filed in the Eastern District of North Carolina. In that case, the district court granted summary judgment in favor of FHWA in November 2011, but on appeal, the U.S. Court of Appeals for the Fourth Circuit reversed the decision in May 2012, holding that the agency had failed to adequately disclose underlying assumptions regarding the project's no-build model and did not properly respond to public concerns about these assumptions. FHWA, on its own initiative, rescinded the project's Record of Decision (ROD) and began work on a Supplemental Environmental Impact Statement (SEIS) addressing the issues raised in the Fourth Circuit's adverse decision. On May 15, 2014, FHWA published a combined Final Environmental Impact Statement/Record of Decision (FEIS/ROD) for the project. The present lawsuit, filed on June 23, 2014, challenges this new agency decision, but raises many matters that were also at issue in the prior litigation, including the adequacy of the project's traffic forecasting, its analysis of indirect and cumulative effects, and the sufficiency of the alternatives analysis.

In granting the change of venue the Court acknowledged the fact that the proposed project lies within the jurisdiction of the Western District and noted the great weight generally afforded to a plaintiff's choice of forum. However, it held that the factor of judicial economy weighed heavily in favor of transfer and in this case trumped the plaintiffs' choice of forum factor. The court's order states, "[t]he administrative record in this case is burdensome, and the pertinent facts are unique and highly technical. Becoming familiar with those

facts would require substantial time and effort – time and effort that has already been expended by the Eastern District of North Carolina. It makes little sense to have this Court reexamine those facts now." Clean Air Carolina, et al. v. North Carolina DOT et al. (W.D.N.C. No. 14-338).

The assignment of the case to the Eastern District cleared the path for summary judgment filings. Plaintiffs advance four arguments in their motion for summary judgment. First, they assert that the project's alternatives analysis is arbitrary and capricious because it fails to account for recent changes in relevant traffic and growth data and because only one set of socioeconomic data was employed to estimate traffic forecasts for the build and no-build scenarios. Second, they allege that the environmental impacts analysis for the project is arbitrary and capricious because it fails to account for a number of reasonably foreseeable road projects in the study area and the dampening effect future congestion in the project would have under the no-build scenario. Third, plaintiffs argue that defendants misled the public by failing to correct misunderstandings about the project. Finally, plaintiffs aver that defendants improperly issued a combined FEIS and ROD for the project despite the existence of significant new information that warranted issuing separate documents and an additional opportunity for public comments.

Defendants rebut the allegations that they violated NEPA by issuing a combined FEIS and ROD and by improperly relying upon a single set of socioeconomic data for traffic forecasting by citing to the express analysis of both issues in the administrative record and arguing that in light of the hard looks at both issues, the agencies' conclusions are entitled to judicial deference. Specifically, defendants explain that the agencies

considered re-running the future build traffic forecast with a second set of socioeconomic data developed as part of the indirect and cumulative effects analysis for the project, but determined doing so was not necessary based on the results of a sensitivity analysis. The agencies conducted a similar sensitivity analysis on a draft set of new socioeconomic data that the local metropolitan planning organization made available shortly after publication of the Draft SEIS for the project. The analysis acknowledges that the new data indicates the rate of growth in the area slowed, but concludes this essentially means that previously predicted growth will simply be delayed by approximately ten years. The agencies argue that consequently, the new socioeconomic data, which was approved in final form just 29 days prior to publication of the combined FEIS ROD, does not constitute significant new information that would have warranted issuing the documents separately.

Defendants rebut the allegation that their traffic forecasts fail to account for recent changes in traffic patterns and improvements by citing real-time traffic data that shows current traffic speeds in the study area are below the desired threshold speed even with the benefit of recent road improvements. Defendants argue that the indirect and cumulative effects analysis for the project is thorough and, if anything, slightly overstates the potential environmental impacts under the build scenario and properly accounts for projects that were reasonably foreseeable. Finally, defendants deny that they misled the public, citing responses to comments regarding the project's need and purpose and effects in NEPA documents located in the administrative record.

### **Legal Challenge Filed, Preliminary Injunction Sought against the Virginia Avenue Tunnel Project**

On November 12, 2014, a community group filed a lawsuit and motion for preliminary injunction in the U.S. District Court for the District of Columbia against Secretary Foxx, Victor Mendez, as FHWA Administrator, and Matthew Brown, Acting Director of the District of Columbia Department of Transportation (DDOT) challenging the Virginia Avenue Tunnel (VAT) Project in Washington, DC. Plaintiffs in Committee of 100 on the Federal City v. Foxx, et al. (D.D.C. No. 14-1903) also named as defendants Gina McCarthy, EPA Administrator; General James Amos, Commandant of the U.S. Marine Corps; Sally Jewell, Secretary of the Interior; Jon Jarvis, Director of the National Park Service; and Vincent Gray, Mayor of the District of Columbia.

The Virginia Avenue Tunnel is owned by CSX, the project sponsor, and is located in the Capitol Hill neighborhood of Washington, DC. The tunnel and rail lines running through Washington, DC are part of CSX's eastern seaboard freight rail corridor, which connects Mid-Atlantic and Midwest states. The Project involves the complete reconstruction of the tunnel, which was built over 100 years ago, and will transform the tunnel into a two-track configuration and provide the necessary vertical clearance to allow double-stack intermodal container freight train operations. The project is funded by CSX; no Federal-aid funds are being used for the Project. The FHWA approvals granted include the short-term closure of I-695 ramps located at 6th and 8th Streets SE and the occupancy of a portion of the 11th Street Bridge right-of-way located



on Interstate 695 (I-695) to accommodate the construction of the Project.

The suit alleges various violations of NEPA including predetermination, inadequate impacts analyses, and an unlawfully narrow range of alternatives. The suit also alleges that FHWA should have awaited the results of a Comprehensive Rail Plan Study that is scheduled to be initiated by the District of Columbia in 2015. Plaintiff's predetermination argument is based on two things: first, a 2010 memorandum of Agreement (MOA) between CSX and DDOT intended to resolve potential conflicts on a number of projects in DC, including the VAT Project; and second, the fact that DDOT issued an occupancy permit for the VAT Project in 2012. The suit alleges that DDOT and Mayor Gray did not comply with the District of Columbia Environmental Policy Act in violation of D.C. Code. Lastly, the suit challenges yet-to-be-issued permits and approvals by EPA, NPS, the Marine Corps, DOI, and various District of Columbia agencies.

Federal defendants filed their opposition to plaintiff's motion for a preliminary injunction on December 15, 2014, and their answer on January 20, 2015. The court held a preliminary injunction hearing on February 20.

At the preliminary injunction hearing, federal defendants argued that plaintiff had not demonstrated that a preliminary injunction was justified because plaintiff's predetermination and NEPA segmentation claims were meritless, plaintiff's cumulative impacts claim was not supported by the record, FHWA had analyzed a reasonable range of alternatives, the Environmental Impact Statement properly considered reasonably foreseeable impacts, and the Final Environmental Impact Statement

relied on accurate information. Further, federal defendants argued that plaintiff's speculative concerns about possible future activities fail to "substantiate the claim of irreparable injury" with evidence of irreparable harm. Finally, federal defendants argued that the balance of harms and public interest did not favor a preliminary injunction because a preliminary injunction would harm the public and CSX and would be adverse to the public interest in the safe, secure, environmentally-superior, and efficient movement of freight in this country.

### **Lawsuit Filed against Grade-Separation Interchange Project at Rio Road in Virginia**

On March 6, 2015, Rio Associates, LP and Mimosa, LLC filed a civil action against Aubrey L. Layne, Jr., Secretary of the Virginia Department of Transportation (VDOT), Charles A. Kilpatrick, VDOT Commissioner, Anthony R. Foxx, Secretary U.S. DOT, Gregory G. Nadeau, Acting Administrator FHWA, and Irene Rico, FHWA Virginia Division Administrator. Plaintiffs in Rio Associates v. Layne, et al. (W.D. Va. No. 15-12) seek preliminary and permanent injunctive relief prohibiting further actions in regards to various upgrade projects on US 29 in Albemarle County, Virginia.

Plaintiffs are apparently the owners of the Albemarle Square shopping center and the Wendy's restaurant located on US 29 in the project area. Plaintiffs seek a temporary and permanent injunction to stop a grade-separation interchange project at Rio Road, an extension of presently existing Berkmar Drive, and widening of US 29 from the Polo Grounds to Towncenter Drive. The lawsuit claims that the projects, known collectively



as part of the Route 29 Solutions, violates NEPA because the projects were improperly segmented and that projects were all approved using Categorical Exclusions (CE) in lieu of an Environmental Assessment (EA) or Environmental Impact Statement (EIS). The suit claims that an EA or EIS was needed as the interchange and other projects will have a significant impact on stormwater runoff quantity and quality, as well as impacts on neighboring properties and bodies of water, including the Rivanna River. Finally, the suit also asserts that proceeding with the right-of-way acquisition, without the required studies, is in violation of the Virginia Constitution.

According to the suit, FHWA sent a March 2014 letter to the state directing VDOT to submit a supplemental EIS on the proposed US 29 Western Bypass and other US 29 projects. The lawsuit further alleges that VDOT decided to abandon the planned US 29 Bypass project and segmented the remaining projects without completing the required environmental studies. "In so doing, VDOT rejected the [FHWA] recommendation to do a supplemental [study] and instead abandoned the Route 29 bypass and impermissibly restated the project as a package of individual projects to minimize their environmental impacts," the suit states.

The estimated \$84 million Rio Road interchange project is slated to be built in conjunction with an extension of Berkmar Drive from Towncenter Drive to Hilton Heights Road and a widening project including both sides of US 29 between Polo Grounds Road and Towncenter Drive. These projects are all part of a \$231 million slate of Route 29 Solutions projects that include a number of other later planned improvements. The Rio Road interchange will construct a grade-separation in its

connection with US 29, which involves digging two through-lanes in both directions more than 20 feet below the existing road level and buttressing two-lane exit/entrance ramps on each side with retaining walls. The construction will require the road be closed to through-traffic for about 100 days during the summer of 2016. During that time, a variety of detours will be required for traffic wishing to cross US 29 via Rio.

### **Legal Challenge to Route 222 Roundabouts in Pennsylvania**

A complaint for declaratory and injunctive relief against the Route 222 Roundabouts project in Pennsylvania has been filed in the U.S. District Court for the Eastern District of Pennsylvania. Maiden Creek Associates, L.P., et al. v. USDOT, et al. (E.D. Pa. No. 15-242). The Route 222 Roundabouts Project is an improvement project along SR 222 in the Township of Maidencreek. The project includes the widening of SR 222 from one traffic lane in each direction to a five lane cross section with two lanes in each direction and a center turn lane, improvements to the existing traffic signal including turn lanes on the intersection approaches, and the construction of dual lane roundabouts.

Plaintiffs allege that the approved Categorical Exclusion (CE) for the project was based on inaccurate information supplied by the Pennsylvania Department of Transportation and without adequate study and investigation, and the finding and conclusions contained in the CE are arbitrary, capricious and an abuse of defendants' discretion. Plaintiffs also allege that in submitting and approving the CE, defendants failed to consider important aspects of the environmental issues associated with the Project, ignored material information supplied by plaintiffs, and

disseminated completely inaccurate information that is so implausible that it could not be ascribed to a difference in view or the product of agency expertise. Plaintiffs seek to 1) obtain an “injunction” that compels defendants to withdraw the CE; 2) enjoin defendants from proceeding with the funding and construction of the Project; 3) enjoin defendants from taking any other action which in any way supports or furthers funding or construction of the Project unless and until defendants have remedied their violations of NEPA; and (4) compel defendants to prepare an Environmental Impact Statement before allowing any further consideration of the Project.

## **Federal Motor Carrier Safety Administration**

### **District Courts Dismiss Lawsuits Related to May 2011 Sky Express Crash, Cases Appealed**

On October 20, 2014, the U.S. District Court for the Eastern District of Virginia granted the United States’ motion to dismiss the complaint in Pornomo v. United States, 2014 WL 5341021 (E.D. Va. 2014), for lack of subject matter jurisdiction based on the discretionary function exception under the Federal Tort Claims Act (FTCA). Plaintiff noticed his appeal of the District Court’s decision on December 18 and filed his opening brief in the U.S. Court of Appeals for the Fourth Circuit on February 17, 2015. The government’s response brief in Pornomo v. United States (4th Cir. 14-2391) is due on April 22.

In a separate but related lawsuit, the U.S. District Court for the Northern District of Georgia similarly granted the United States’ motion to dismiss the complaint in Chhetri,

et al. v. United States (N.D. Ga. No. 14-975) for lack of subject matter jurisdiction based on the discretionary function exception under the FTCA. Plaintiffs filed their notice of appeal to the U.S. Court of Appeals for the Eleventh Circuit on February 13, 2015. Chhetri, et al. v. United States (11th Cir. 15-10644).

Plaintiff Jonatan Pornomo is the Administrator of the Estate of Sie Giok Giang, who was killed in the May 31, 2011, Sky Express crash. The plaintiff’s complaint, filed on April 28, 2014, alleged that DOT and FMCSA were negligent under the FTCA and sought \$3 million in damages. Plaintiff alleged that one or more FMCSA employees, acting within the course and scope of their employment, were negligent when they granted Sky Express a 10-day extension of the effective date of an unsatisfactory safety rating in violation of regulatory requirements and beyond the scope of the Agency’s statutory authority. Plaintiff has identified the issues on appeal as whether the lower court erred in granting Defendant’s motion to dismiss, where there were conflicting material jurisdictional facts in dispute, and where the District Court did not hear oral argument or hold an evidentiary hearing. Plaintiff further asserts that the lower court erred in ruling that the discretionary function exception to the federal government’s liability under the FTCA barred plaintiff’s action, where the evidence before the District Court established that FMCSA failed to comply with clear mandatory directives under federal statute and Agency regulations.

In the Chhetri case, plaintiffs alleged that one or more FMCSA employees, acting within the course and scope of their employment, were grossly negligent when they granted Sky Express a 10-day extension of the effective date of an unsatisfactory

safety rating in violation of the regulatory requirements for such extension. Plaintiffs also alleged that FMCSA did not have statutory authority to grant Sky Express a 10-day extension of the unsatisfactory safety rating.

On appeal, Pornomo argues that the discretionary function exception to FTCA liability does not apply because FMCSA exceeded its authority under 49 U.S.C. § 31144(c)(2) when it failed to place Sky Express out of service on the 46th day after the agency issued a proposed unsatisfactory safety rating. Prior to the May 2011 crash, FMCSA had conducted a compliance review of Sky Express, which resulted in the proposed unsatisfactory safety rating. Sky Express had requested an upgrade of the proposed safety rating based upon corrective action taken by the carrier and had included “a written description of corrective actions taken, and other documentation” for FMCSA to consider pursuant to 49 C.F.R. § 385.17(c). The FMCSA Field Administrator for the Southern Service Center determined that he could not decide whether to grant the carrier’s request for change in rating solely based on the documentation submitted and elected to grant the carrier a 10 day extension and consider other available information – in this case, information collected during a second compliance review conducted to determine whether the corrective action was sufficient.

At the time of the crash, 49 C.F.R. § 385.17(f) provided that “if the motor carrier has submitted evidence that corrective actions have been taken . . . and the FMCSA cannot make a final determination within the 45-day period, the period before the proposed safety rating becomes final may be extended for up to 10 days at the discretion of the FMCSA.” Currently, however, a request for change in safety rating based

upon corrective action will not stay the effective date (46th day) of a final Unsatisfactory safety rating that requires a carrier to cease operations under 49 C.F.R. § 385.17(f).

### **District Court Denies Motion to Dismiss MCMIS Challenge**

On March 10, 2015, the U.S. District Court for the District of Columbia issued an order denying without prejudice the government’s motion to dismiss in Owner Operator and Independent Driver Association, et al. v. USDOT, et al. and Weaver, et al. v. FMCSA, et al. (D.D.C. Nos. 12-1158 and 14-0548). These consolidated lawsuits, brought by the Owner Operator and Independent Driver Association (OOIDA) and commercial drivers, challenge the agency’s use of violation data recorded in the Motor Carrier Management Information System (MCMIS) and released to employers under the agency’s Pre-employment Screening Program (PSP). The lawsuits focus on FMCSA’s failure to remove records of violations related to citations that have been dismissed by a judge or administrative tribunal. Plaintiffs allege that the agency has violated the APA and the Fair Credit Reporting Act (FCRA) by its practice of allowing violations related to dismissed citations to remain in its MCMIS database.

In denying the motion to dismiss, the District Court noted that “the district judge sits as an appellate tribunal” in actions brought under the APA. Accordingly, the APA litigation is integrally tied to the administrative record, which has not been filed in this case. Applying the standard for a motion to dismiss for failure to plead a claim on which relief can be granted, the court was required to accept all factual allegations in the complaint as true, “even if

doubtful in fact.” The court held that it could not rule on issues raised in the motion to dismiss, including standing, which it found was “inextricably intertwined with the defendants’ interpretation of the statute.” Noting that “the defendants’ interpretation may ultimately prove correct and the defendants have done all that they are required to do by statute in providing a mechanism to challenge certain information in the MCMIS,” the court found that it “lack[ed] any way to determine if that interpretation is reasonable or arbitrary on the record before it.” Consequently, the court denied the defendants’ motion without prejudice, pending filing and review of an administrative record.

In a footnote, the court also rejected the government’s argument that it lacked jurisdiction over the FCRA claim, arguing that Congress did not waive sovereign immunity for such lawsuits, citing to a recent Seventh Circuit case, Bormes v. United States, 759 F.3d 793 (7th Cir. 2014), holding that the FCRA contains an express waiver of sovereign immunity. The court noted that the D.C. Circuit had not yet ruled on this issue.

### **D.C. Circuit Rules on ELDT Rule Mandamus Petition**

On March 10, 2015, a panel of the U.S. Court of Appeals for the District of Columbia Circuit issued its ruling on the petition for writ of mandamus in Advocates for Highway and Auto Safety, et al. v. Foxx, et al. (D.C. Cir. 14-1183), a case relating to the rulemaking on entry level driver training requirements (ELDTs) for commercial motor vehicle operators. The petitioners, including consumer advocacy groups and labor organizations, sought mandamus relief in the D.C. Circuit in September 2014, contending that FMCSA had unduly delayed

in issuing final ELDT rules. The petitioners argued that the Department had been obligated by statute to examine ELDT issues since 1991, and in the interim, had failed to meet statutory deadlines for completing the ELDT rule, most recently, the fall 2013 deadline established by the 2012 Moving Ahead for Progress in the 21st Century Act. On January 5, 2015, the Department filed its response, arguing that mandamus relief was unwarranted since FMCSA had retained a convenor in late 2014 to begin a negotiated rulemaking process. That process, which will include the petitioners in the lawsuit and various other stakeholders, is expected to narrow the issues relevant to the rulemaking and to collect data on driver training issues. Through this process, the Department explained to the court that it expected to issue a final ELDT rule by September 2016. In its March 10 order, the panel held the petition in abeyance to permit the Department to proceed to issue a final rule by its target date of September 2016. In so doing, the panel required the Department to provide an update within 90 days on its progress on the regulations and directed the parties to file motions to govern further proceedings by December 31, 2015. One judge on the panel would have denied the petition.

### **Court Orders Post-Argument Mediation in Tenth Circuit TransAm Trucking**

On January 22, 2015, a panel of the U.S. Court of Appeals for the Tenth Circuit heard oral argument in TransAm Trucking, Inc. v. FMCSA (10th Cir. No. 14-9503), in which petitioner alleges that FMCSA failed to comply with an October, 2013 settlement agreement that resolved TransAm’s previous Tenth Circuit petition for review. During oral argument, the panel questioned whether



it could reopen the prior case that gave rise to the now disputed settlement agreement and invited the parties to submit supplemental authorities on that issue pursuant to Federal Rule of Appellate Procedure 28(j). TransAm and FMCSA agreed in their subsequent submissions to the court, filed January 28 and February 9, respectively, that it was unlikely that the court could reopen the prior case under the standard in Calderon v. Thompson, 523 U.S. 538 (1998), which requires “extraordinary circumstances” for a court to recall its mandate. On February 12, 2015, the court ordered the Office of Circuit Mediation to contact the parties to explore settlement. A mediation conference occurred on March 20. In its previous Tenth Circuit petition for review, TransAm challenged FMCSA’s citation of a violation of 49 C.F.R. § 395.8(k)(1) and the resulting proposed “conditional” safety rating. Pursuant to the settlement agreement, FMCSA agreed to issue an amended compliance review that did not contain any reference to the violation or the proposed “conditional” safety rating. FMCSA removed the “conditional” rating from the compliance review, leaving the document as an unrated review. Because the initial investigation of TransAm had begun as a focused investigation, rather than a comprehensive compliance review applying the full safety rating methodology in 49 C.F.R. Part 385, Appendix B, the investigation could not have resulted in a “satisfactory” safety rating under FMCSA regulations. Therefore, removal of the “less than satisfactory” or “conditional” safety rating in the amended compliance review did not include an updated safety rating. TransAm had a current “satisfactory” safety rating, however, due to corrective action taken pursuant to 49 C.F.R. § 385.17.

TransAm now claims that a “Compliance Review” by regulatory definition must

contain a safety rating and that FMCSA’s failure to issue TransAm an amended compliance review that contains a “satisfactory” safety rating violates the settlement agreement. TransAm asserts its claim as an appeal under the APA and alleges that an email from FMCSA’s Department of Justice counsel to TransAm’s attorney stating that FMCSA had complied fully with the settlement agreement constitutes a “final order” within the meaning of the Hobbs Act, 28 U.S.C. § 2342, which governs judicial review of FMCSA’s safety-related final actions. In the alternative, TransAm argues the case should be transferred to the district court pursuant to 28 U.S.C. § 2347(b)(3). FMCSA argues in response that there is no final order within the meaning of the Hobbs Act and that the court has no ancillary jurisdiction to enforce the settlement agreement. Without jurisdiction under the Hobbs Act, FMCSA further argues that the court lacks jurisdiction under section 2347(b)(3) to transfer the case to the district court and that there is no issue of material fact that requires such a transfer. Finally, FMCSA argues that it fully complied with the settlement agreement. TransAm also filed a parallel action in the U.S. District Court for the District of Kansas, TransAm Trucking, Inc. v. FMCSA (D. Kan. No. 14-02015), which was stayed on April 28, 2014, pending a ruling by the Tenth Circuit.

### **FMCSA Argues for Dismissal in Privacy Act Class Action**

On February 12, 2015, the U.S. District Court for the District of Massachusetts heard oral argument on FMCSA’s motion to dismiss for failure to state a claim and lack of subject matter jurisdiction in Flock, et al. v. USDOT, et al. (D. Mass. No. 14-13040). Six commercial motor vehicle drivers filed this class action seeking damages and



declaratory relief for alleged violations of the Privacy Act, 5 U.S.C. § 552a, based on FMCSA's release of non-serious driver safety violations under its Pre-Employment Screening Program (PSP). The government argued that plaintiffs have failed to allege injury caused by FMCSA's actions sufficient to establish standing to sue the agency or to support a Privacy Act claim. FMCSA further argued that there can be no Privacy Act violation where, as here, the agency only releases the safety records of a motor carrier driver with the driver's consent and pursuant to the routine uses articulated in Statement of Records Notices that comply with Privacy Act requirements under 5 U.S.C. § 552a(b)(3).

The lawsuit and the motion to dismiss turn on the interpretation of the congressional intent and language in 49 U.S.C. § 31150, the PSP authorizing statute. The statute states that the Secretary "shall provide persons conducting pre-employment screening services for the motor carrier industry electronic access to the following reports contained in the Motor Carrier Management Information System (MCMIS): (1) Commercial motor vehicle accident reports, (2) Inspection reports that contain no driver-related safety violations, and (3) Serious driver-related safety violation inspection reports." 49 U.S.C. § 31150(a). FMCSA interpreted the statute as setting a floor, rather than a ceiling, for the types of inspection reports that could be released, arguing that the agency's reasonable interpretation was due Chevron deference. FMCSA also relied on the Supreme Court's discussion of the term "shall" in Massachusetts Trustees of Eastern Gas & Fuel Associates v. United States, 377 U.S. 235, 244 (1964), where the Court stated that while "shall" plainly denotes a minimum . . . the word does not of linguistic necessity denote a maximum." The argument that the

statute set a floor for the types of violations that may be released for purposes of pre-employment screening was further bolstered by the fact that the agency always had the authority to release a driver's entire safety record with the driver's consent under the Privacy Act. Section 31150 did not limit that authority.

Plaintiffs argue that Chevron deference may not be granted where the language in a statute is clear and unambiguous and that the plain language in section 31150 directs the Secretary to establish an electronic access program limited only to serious driver violations. Plaintiffs further argue that the agency intentionally and willfully disseminated reports containing driver safety violations that had not been determined by the Secretary to be "serious driver-related safety violations," and in so doing exceeded the statutory authority provided in the statute, and violated 5 U.S.C. § 552a(e)(1) and (6).

Plaintiffs seek to certify a class of all drivers for which FMCSA prepared a PSP report for dissemination to potential employers for the two-year period immediately preceding the filing of the complaint. Plaintiffs claim that the \$10 fee required to obtain a copy of a PSP report from NIC, FMCSA's contractor, is not authorized under 49 U.S.C. § 31150 and imposes on them an economic burden, and further, that the unlawful PSP reports have diminished the economic value of their services as commercial motor vehicle drivers. Plaintiffs seek statutory damages of \$1,000 per safety violation that was not certified as a "serious driver-related safety violation" for each of the plaintiff-drivers and members of the class. The class has not been certified, and FMCSA further argued that the de minimis \$10 fee is not sufficient to support plaintiffs' claim for damages and

that plaintiffs do not otherwise allege actual economic harm.

The Court took the matter under advisement.

### **Teamsters Seek Review of FMCSA Decision to Accept Mexican Truck Company Applications for Cross-Border Operating Authority**

On March 10, 2015, the International Brotherhood of Teamsters, Advocates for Highway and Auto Safety, and the Truck Safety Coalition sought review of FMCSA's decision to accept applications from Mexican trucking companies seeking authority to operate between Mexico and points throughout the United States. FMCSA's decision followed its issuance of a report to Congress detailing the results of its three-year pilot program that evaluated the ability of Mexican trucking companies to safely operate in the United States beyond the commercial zones adjacent to the U.S.-Mexico border. Petitioners in International Brotherhood of Teamsters, et al. v. USDOT, et al. (9th Cir. 15-70754) ask the court to set aside the report and FMCSA actions based on the report. Petitioners' opening brief is due on May 29, and the government's response brief is due on June 29.

### **Passenger Motor Carrier Seeks Review of Safety Rating Decision**

On December 23, 2014, Silverado Stages, Inc., a passenger motor carrier, filed a petition for review of the FMCSA Chief Safety Officer's decision dismissing Silverado's request for administrative review of its safety rating under 49 C.F.R. § 385.15. Petitioner in Silverado Stages, Inc. v. FMCSA, et al. (D.C. Cir. No. 14-1298) seeks review and removal of violations and other information recorded in a July, 2014

compliance review that negatively impacts the carrier's scores in FMCSA's Safety Measurement System (SMS).

FMCSA conducted the compliance review following an April 2014 crash involving a FedEx tractor trailer and a Silverado motorcoach, resulting in multiple fatalities. The compliance review resulted in a Satisfactory safety rating for Silverado. On October 14, 2014, Silverado filed a request for administrative review under 49 C.F.R. § 385.15 concerning violations cited and commercial motor vehicle inspections conducted and recorded in the compliance review. Silverado requested removal of alleged erroneous information from the compliance review and from FMCSA's public SMS website. In the October 24, 2014 decision, the Chief Safety Officer dismissed Silverado's request, finding that when a motor carrier alleges errors in calculating its safety rating, the only relief provided under section 385.15 is an upgrade of the carrier's safety rating; review is therefore limited to alleged errors that affect the safety rating. Because Silverado received a Satisfactory safety rating, the highest rating available, no further relief was possible. The Chief Safety Officer further held that challenges to the impact of compliance review data on a carrier's SMS scores are not within the subject matter jurisdiction of a 49 C.F.R. § 385.15 request for administrative review.

On January 28, 2015, Silverado identified the issues before the court as whether FMCSA acted arbitrarily, capriciously, and without substantial evidence, and in violation of its own rules, regulations, and the APA when it rejected petitioner's Request for Administrative Review as untimely, refusing to consider the merits of the allegations concerning erroneous information resulting in financial and

reputational harm. Additionally, Silverado seeks review of whether FMCSA's "spontaneous and unreviewable safety rating website findings of fact and narrative" constitute agency adjudicatory action requiring notice and an opportunity for hearing under the APA and whether FMCSA's confidential and undisclosed safety rating algorithm, promulgated without notice and an opportunity to comment, constitutes an unlawful agency rule or policy statement under the APA. Lastly, Silverado seeks review of whether FMCSA's policy of immediately auditing bus companies involved in fatal accidents, regardless of such bus companies' culpability, is an agency policy subject to public disclosure under the APA. Petitioner requests that FMCSA be ordered to immediately expunge all negative commentary and erroneous entries on the FMCSA SMS website related to the carrier.

Petitioner's opening brief is due on April 6, respondent's brief is due on May 6, and petitioner's reply brief is due on May 20.

### **AIBPA Files New Lawsuit Challenging the MAP-21 Requirement on Broker Bonds**

On January 23, 2015, a trade association challenged MAP-21's \$75,000 financial security requirement for FMCSA-regulated property brokers in Association of Independent Property Brokers and Agents, Inc. v. Foxx, et al. (M.D. Fla. No. 15-00038). The Association of Independent Property Brokers and Agents (AIPBA) is comprised of small and mid-sized independent property brokers who assert that the MAP-21 amendment to 49 U.S.C. § 13906, increasing the required financial security for regulated brokers and freight forwarders, was intended to drive these

smaller entities out of business. FMCSA broker and freight forwarder operating authority is contingent on the requisite bond or trust fund being in effect. In this new complaint, plaintiff asks the court to declare that the \$75,000.00 bond amount in amended 49 U.S.C. § 13906 is not rationally related to a legitimate government purpose and that it is an unlawful violation of AIPBA's substantive due process rights under the Fifth Amendment. AIPBA asserts that the amended provision and enforcement of that provision is unconstitutional.

AIPBA's complaint is substantially similar to one that it filed in 2013 in the Middle District of Florida, which the court dismissed without prejudice on November 12, 2013. Shortly thereafter, on November 14, AIPBA filed a petition for review of the agency's October 1, 2013, Final Rule on Broker and Freight Forwarder Financial Security (78 Fed. Reg. 60,226) in Association of Independent Property Brokers and Agents, Inc. v. Foxx, et al. (11th Cir. No. 13-15238). On March 31, 2014, the court granted AIPBA's motion to suspend the appellate briefing schedule pending the agency's response to an administrative request for an exemption under 49 U.S.C. § 13541 that AIPBA filed with FMCSA. In its request, AIPBA seeks an exemption for all FMCSA-regulated brokers and freight forwarders from MAP-21's \$75,000 requirement. FMCSA denied the request on March 31, 2015.

### **Tour Operator Renews Lawsuit for Failure to Reinstate Operating Authority**

On November 12, 2014, the U.S. District Court for the Eastern District of Michigan dismissed the complaint in Haines v.

FMCSA, et al. (E.D. Mich. No. 14-12194), without prejudice, for failure to prosecute based on plaintiff's failure to effect service. Plaintiff re-filed his complaint on November 19, 2014, in Haines v. FMCSA, et al. (E.D. Mich. No. 14-14438) and on January 9, 2015, served the new complaint on FMCSA. Plaintiff Roger Haines is the owner of Haines Tours located in Gladwell, Michigan. He is suing FMCSA, the Field Administrator for the Midwestern Service Center, and the FMCSA Administrator, alleging that the agency and its officials violated the APA and his constitutional rights by exceeding the bounds of their statutory authority and imposing restrictions on his operation "beyond that required to abate the hazard." FMCSA issued an imminent hazard order to Haines Tours in June 2011 after Michigan law enforcement officials notified FMCSA that Haines had allowed six members of his family – including several children – to ride in the luggage compartment of a motorcoach on a trip from Michigan to an amusement park in Ohio. The Imminent Hazard Order required that Haines immediately cease his tour bus operations.

Haines claims that he had been using the luggage compartment as a sleeper berth and FMCSA approved such use under 49 C.F.R. § 393.76, the regulation governing sleeper berths. FMCSA, however, cited plaintiff's motorcoach company for having a non-compliant sleeper berth in two of the three buses inspected during a 2010 compliance review. FMCSA, in a letter issued by the Assistant Administrator for Policy on May 16, 2011, indicated that a sleeper berth can be located in a cargo compartment so long as it meets all of the requirements of 49 C.F.R. § 393.76, which include adequate ventilation and other safety features.

Haines regained his authority to conduct intrastate operations in March, 2012 and his authority to operate interstate on January, 2013, following FMCSA's determination that he was fit, willing, and able to comply with the Federal Motor Carrier Safety Regulations.

Haines alleges constitutional violations of the right to due process and equal protection under the law and that the agency failed to orderly adjudicate its determination that Haines posed an imminent hazard to public safety, failed to allow him to appeal the determination vacating the rescission order on June 16, 2011, and, from 2011 to 2012, was unresponsive to Haines's attempts to "open a dialogue" concerning the agency's determinations. Haines alleges that the agency violated his right to "similar treatment" accorded to other tour bus operators under the Equal Protection Clause of the 14th Amendment to the Constitution.

## **Federal Railroad Administration**

### **Briefs Filed in Challenge to Hour of Service Laws Interpretation**

On February 25, 2015, the Department filed its response brief in Association of American Railroads v. FRA (D.C. Cir. 14-1207), a case arising out of FRA's interpretation of the Hours of Service Laws (HSL). The HSL limit the hours that certain railroad employees may work to prevent fatigue and promote safety. In this case, the Association of American Railroads (AAR) approached FRA to discuss the applicability of the HSL to the testing of the Ultra Cab II, a cab signal system onboard the locomotive that receives and interprets railroad signal information from electrical circuits in the

railroad tracks. AAR contended that the Ultra Cab II had a “self test” mechanism that was technically simplified and could be conducted within a matter of minutes. Thus, AAR argued that the testing of this system does not require signal expertise and does not have an impact upon safety, and employees performing this test should not be subject to the strictures of the HSL. However, FRA decided to the contrary, issuing a letter in which it concluded that the Ultra Cab II test is covered signal work under the HSL.

AAR filed a petition for review in the D.C. Circuit in the fall of 2014, contending that the agency’s decision was legally erroneous and that its conclusions about the Ultra Cab II test were arbitrary and capricious. According to AAR, the testing of a signal system is outside the scope of the HSL, which covers those “engaged in installing, repairing or maintaining signal systems.” 49 U.S.C. § 21101(4). Furthermore, AAR argued that the agency had set aside its prior policy guidance on the HSL and had misunderstood the simplicity of the Ultra Cab II test.

In its response brief, FRA contended that testing fits easily within the statutory definition of signal work subject to the HSL and explained that the agency had consistently taken this position for the past four decades. Furthermore, FRA argued that AAR had mischaracterized the decision below and the agency’s prior guidance materials, since FRA in this instance had merely declined to depart from its longstanding position that cab signal testing is covered by the HSL. The agency also explained that it had carefully considered the factual record and determined, based on FRA’s expertise, that the Ultra Cab II test is more complicated than AAR suggested and that the performance of the test presented legitimate safety concerns.

The court has scheduled oral argument in this case for May 7, 2015.

## **Federal Transit Administration**

### **Court Dismisses FTA in Minnesota Light Rail Case, Retains Jurisdiction over Project Sponsor**

On March 6, 2015, the U.S. District Court for the District of Minnesota dismissed FTA in Lake and Parks Alliance of Minneapolis v. FTA, et al., 2015 WL 999945 (D. Minn. 2015), a challenge to the Southwest Light Rail Project (SWLRT Project) in Minneapolis, Minnesota. The SWLRT Project is a proposed 16-mile light rail line from downtown Minneapolis to Eden Prairie that would pass through the Cities of St. Louis Park, Hopkins, and Minnetonka. It will be part of an integrated system of transitways, including connections to the METRO Blue Line, the Northstar Commuter Rail line, major bus routes and proposed future transitways. The Metropolitan Council (Met Council) is the project sponsor. The court heard oral argument on the defendants’ motions to dismiss on February 25, 2015. The court retained jurisdiction over the claims against the Met Council.

Plaintiff has challenged the environmental review and other planning-related activities undertaken by FTA and the Met Council in connection with the proposed Project. Specifically, plaintiff alleges that FTA and the Met Council have not completed the environmental review required by federal and state laws prior to obtaining municipal consent from the local governments along the proposed route.



FTA argued in its briefs that plaintiff had not demonstrated that it would suffer irreparable harm as a result of FTA's actions. Furthermore, because the environmental review is ongoing and there is no administrative record upon which to review FTA's action, plaintiff lacked evidence to support its motions. Finally, FTA argued that the Met Council is allowed to obtain municipal consent prior to completion of the NEPA process and thus, no predetermination has occurred. FTA and the Met Council are currently working on a Supplemental Draft Environmental Impact Statement, so there is no final agency action under the APA.

In its decision, the court agreed with the FTA that the plaintiff could not proceed against the agency since there has been no final agency action. However, the court determined that there is still an issue as to whether the Met Council violated NEPA when it executed its municipal consent process by improperly limiting choices available during the remaining stages of environmental review under NEPA.

### **Appellant's Brief Filed in Our Money Our Transit Case**

On February 3, 2015, appellant filed its opening brief with the U.S. Court of Appeals for the Ninth Circuit in Our Money Our Transit v. FTA (9th Cir. 14-35766). Appellant's motion to expedite the hearing was denied by the Ninth Circuit on February 26, 2015. The case originated in the U.S. District Court for the Western District of Washington and challenged the Environmental Assessment (EA) and Finding of No Significant Impact (FONSI) for the Western Eugene Emerald Express project. On July 16, 2014, the district court ruled in FTA's favor on summary judgment on the briefs.

The project consists of adding 8.8-miles (round trip) bus rapid transit (BRT) service to two existing BRT lines in Eugene, Oregon. The new alignment, located within and primarily along existing public roadways includes the construction of 5.9 miles of new BRT lanes and 13 new BRT stations. The litigation focused primarily on four alleged NEPA deficiencies: the EA did not evaluate another viable build alternative; the EA purpose and need was too narrowly crafted; the EA did not sufficiently evaluate all potential environmental impacts; and the mitigation was not sufficiently detailed since the project was awarded a "mitigated FONSI."

Appellant argues in its opening brief that FTA violated NEPA by failing to take a "hard look" at the project. Specifically, appellant claims that FTA's EA and FONSI do not make a "convincing statement" of why the effects on traffic congestion and other human environment will not be significant, omit consideration of relevant factors, and fail to assess the magnitude of several impacts. Appellant also argues that FTA violated NEPA by analyzing only the "no-action" alternative and that appellant's preferred alternative is feasible and would meet the purpose and need.

### **Motion for Summary Judgment Filed in Baltimore Red Line Litigation**

On August 25, 2014, FTA and the Maryland Transit Administration (MTA) filed a joint motion for summary judgment in Cutonilli v. FTA, et al. (D. Md. No. 13-02373), which involves the Baltimore Red Line Project, a proposed, 14.1-mile light rail transit line from the Centers for Medicare & Medicaid Services in Baltimore County to the Johns Hopkins Bayview Medical Center campus in

Baltimore City. Significant federal funding of the project is anticipated.

In the complaint, plaintiff seeks declaratory and injunctive relief, alleging that the agencies failed to evaluate all reasonable alternatives, specifically plaintiff's hybrid alternative of heavy rail for the east side of the corridor and bus rapid transit for the west side. Plaintiff did not plead any specific injury, other than the alleged deficient review.

In support of the motion for summary judgment, FTA and MTA argue that, based upon the administrative record, the agencies properly considered and rejected plaintiff's proposed alternative, ensured the scientific integrity of the environmental review, and engaged in a public participation process that complied with NEPA. Specifically, the agencies contend that the record demonstrates that MTA, the project sponsor, studied twelve alternatives in detail, including two alternatives that incorporated heavy rail. Plaintiff's proposal is substantially similar to another hybrid alternative that was studied, where the heavy rail component was eliminated because of capital costs and the need for grade separation. Additionally, plaintiff's proposal requires the heavy rail component to share a tunnel with the existing Baltimore Metro system, which is not feasible. The agencies also contend that the record adequately demonstrates scientific consideration of ridership, travel patterns, construction costs, and environmental impacts of the reasonable alternatives considered, and that that plaintiff's comments received significant attention and individualized responses.

### **Partial Motion to Dismiss Filed in Litigation over Maryland's Purple Line**

On February 17, 2015, FTA filed a partial motion to dismiss in Friends of the Capital Crescent Trail, et al. v. FTA, et al. (D.D.C. No. 14-01471). The case involves the Maryland Transit Administration's Purple Line, a proposed, 16.2 mile light rail project, which will connect major activity centers in Montgomery and Prince Georges Counties in Maryland. Significant federal funding of the project is anticipated.

The complaint raises numerous allegations, including claims related to the potential effects on two types of amphipods (micro crustaceans) living in Rock Creek Park. The Hay's Spring amphipod is a listed endangered species (the only listed endangered species in the District of Columbia) and the Kenk's amphipod is a candidate species for listing. As part of the NEPA review for the project, the U.S. Fish and Wildlife Service (FWS) determined that the project, which crosses Rock Creek Park at the border of Chevy Chase, Maryland, would have no effect on either species.

Also alleged in the complaint were significant impacts upon the Capital Crescent Trail. A portion of the Purple Line Project will be constructed within a railroad right-of-way known as the Georgetown Branch, which is included in the Capital Crescent Trail. In 1988, Montgomery County purchased the right-of-way from CSX with intentions to use it for a transit line and trail. In 1996, the County removed the tracks to maintain an interim trail for bicycle and pedestrian use, while working with the State of Maryland towards the development of both a permanent trail and transit facility. The Georgetown Branch is

located adjacent to numerous homes in the Chevy Chase area.

The motion seeks dismissal of plaintiffs' critical habitat and recovery plan claims, which allege that FWS failed to designate a critical habitat, and develop a recovery plan, for the Hay's Spring amphipod. Specifically, defendants argue that plaintiffs failed to provide the requisite 60-day notice under the Endangered Species Act's (ESA) citizen-suit provision, and therefore, the court lacks jurisdiction. Plaintiffs did file a Notice of ESA Violation within the 60 days, but the notice made no reference to the critical habitat and recovery plan claims.

### **Environmental Challenge to New Orleans Streetcar Project**

On January 12, 2015, two non-profit organizations, Bring Our Streetcars Home, Inc. and People's Institute for Survival and Beyond, Inc., and eleven individuals filed a complaint in the U.S. District Court for the Eastern District of Louisiana against FTA, USDOT, FEMA, and the New Orleans Regional Transit Authority (RTA) requesting injunctive and mandamus relief in connection with a streetcar project in New Orleans. The complaint in Bring Our Streetcars Home, Inc., et al. v. USDOT, et al. (E.D. La No. 15-0060) alleges that FTA and USDOT failed to comply with the requirements of NEPA, section 106 of the National Historic Preservation Act, and section 4(f) of the DOT Act in connection with a streetcar project currently under construction by RTA on Rampart Street in New Orleans.

A Temporary Restraining Order (TRO) hearing was held on January 16, 2015. Although none of the federal defendants had been served, FTA and the other federal defendants voluntarily appeared at the TRO

hearing. After the hearing, the court ruled that plaintiffs were unable to establish all of the necessary elements for a TRO and denied the requested relief. A hearing on plaintiffs' request for a preliminary injunction had been scheduled for March 16, but after plaintiffs dismissed RTA from the case, the federal defendants requested a status conference with the court to determine whether plaintiffs' requests for preliminary and permanent injunctive relief had become moot. After hearing arguments on this issue, the court agreed with the federal defendants' position, and the scheduled hearing on a preliminary injunction was cancelled.

### **Lawsuit Filed Challenging Mid-Coast Corridor Transit Project in San Diego**

On December 22, 2014, Friends of Rose Canyon (FRC), a non-profit organization, filed a lawsuit in California state court challenging the California state and federal environmental reviews and related determinations for the Mid-Coast Corridor Transit Project (Project), a 10.9-mile extension of the Trolley Blue Line from the Old Town Transit Center in downtown San Diego to the University Towne Center Transit Center. On January 29, 2015, FTA removed the state court case to the U.S. District Court for the Southern District of California. In Friends of Rose Canyon v. FTA, et al. (S.D. Cal. No. 15-0197), FRC alleges that the San Diego Association of Governments (SANDAG), the local Project sponsor, violated the California Environmental Quality Act and that SANDAG and FTA violated NEPA and Section 4(f) of the DOT Act by, among other things, failing to adequately evaluate the Project's environmental impacts to the

Rose Canyon Open Space Park, deferring mitigations, and failing to avoid the Park.

## **Maritime Administration**

### **Veridyne Civil Fraud Case Successfully Concluded**

On October 1, 2014, the U.S. Court of Appeals for the Federal Circuit denied appellant's petition for rehearing en banc in Veridyne Corporation v. United States, 758 F.3d 1371 (Fed. Cir. 2014). Veridyne did not seek Supreme Court review of the Federal Circuit's decision. On July 15, 2014, the Federal Circuit had affirmed the U.S. Court of Federal Claims' ruling that Veridyne's entire \$2.2 million contract claim was forfeited due to Veridyne's knowing submission of false invoices and a false claim under the Contracts Disputes Act. The Federal Circuit also reversed the Claims Court's finding that Veridyne was entitled to a quantum meruit award for the work it performed and affirmed the award to the government of \$568,802 in damages as well as \$11,000 in penalties for each of the 127 fraudulent invoices submitted by Veridyne.

### **MARAD Wins Partial Dismissal in Port of Anchorage Suit**

On January 22, 2015, the U.S. Court of Federal Claims granted in part and denied in part MARAD's motion to dismiss in Anchorage v. United States, 2015 WL 273206 (Fed. Cl. 2015). Anchorage filed suit against MARAD seeking unspecified damages for breach of contract in connection with the Port of Anchorage Intermodal Expansion Project (the Project) based on a 2003 Memorandum of Understanding and a subsequent 2011

Memorandum of Agreement between MARAD and Anchorage. Anchorage alleged three causes of action: (1) MARAD failed to adequately oversee the Project contractor, Integrated Concepts & Research Corp. (ICRC), as allegedly required under the 2003 MOU and 2011 MOA; (2) MARAD improperly settled contractor claims for equitable adjustment in 2012; and (3) MARAD breached duties owed to Anchorage as a third-party beneficiary under the MARAD-ICRC contract.

On June 27, 2014, the government moved to dismiss the case for lack of jurisdiction and failure to state a claim, and the court heard oral argument on November 5, 2014. Regarding jurisdiction, the government argued that Anchorage did not adequately show that the 2003 MOU and 2011 MOA contemplated money damages for breach and that no independent statutory source mandated money damages in this case. Without a demonstrated money-mandating source, the Court of Federal Claims lacks jurisdiction under the Tucker Act, 28 U.S.C. § 1491. The court denied the motion to dismiss on this ground, finding that the 2003 MOU and 2011 MOA were not cooperative agreements, and therefore, the court could presume that the agreements contemplated money damages for breach.

In its motion to dismiss, the government also argued that the 2003 MOU and 2011 MOA do not impose the duties Anchorage alleges were breached, that some of the alleged breaches occurred after the 2011 MOA expired with no survivability language, precluding the existence of a duty, and that Anchorage has no claim as a third-party beneficiary under the MARAD-ICRC contract because Anchorage has not alleged that MARAD breached the contract with ICRC. The court granted MARAD's motion with respect to the final argument, agreeing

that Anchorage could not bring a breach of contract claim as a third-party beneficiary without any allegation that MARAD breached the MARAD-ICRC contract. With respect to the remaining issues, the court found that there were factual disputes regarding the proper interpretation of the MOU and MOA, as well as whether the 2011 MOA continued as an implied-in-fact contract after the express termination date. The court therefore concluded that these issues warranted discovery and denied the government's motion to dismiss.

The government filed its answer on February 5, and discovery began on March 11. A trial will likely be scheduled for summer 2016.

### **MARAD Successfully Resists Transfer under F.R.C.P. 45 and Quashes Subpoena**

In addition to the Court of Federal Claims litigation discussed above, the Municipality of Anchorage has also sued the prime contractor on the Port of Anchorage Intermodal Expansion Project (the Project), ICRC, together with numerous subcontractors, in the U.S. District Court for the District of Alaska. Although MARAD is not a party to that case, Anchorage v. Integrated Concepts & Research Corp., et al. (D. Alaska No. 13-00063), many of the parties have sought to obtain evidence in MARAD's possession, based on MARAD's role in the overall Project.

On October 22, 2014, PND Engineers, one of the defendants in the District of Alaska litigation, issued a subpoena to MARAD demanding numerous documents related to a post-construction study that evaluated whether the initial design was suitable for the location (Suitability Study). MARAD

and PND engaged in discussions over several weeks, during which MARAD offered to produce some documents related to the Suitability Study but maintained that it should not be required to produce a large volume of documents (80 GB) that were also in the possession of other parties to the litigation. The parties were unable to agree on the proper scope of the subpoena, and on November 14, 2014, MARAD filed a motion to quash in the U.S. District Court for the District of Columbia, arguing that PND's subpoena was unduly burdensome and requesting an award of costs if the court compelled production of the documents.

In response, PND filed a motion to transfer MARAD's motion to quash to the District of Alaska, where the underlying litigation is pending. Rule 45 of the Federal Rules of Civil Procedure was amended significantly in December 2013 with respect to procedures for third-party subpoenas. Previously, subpoenas would issue from the court in the district where the third-party was located. After the rule change, the court managing the underlying litigation issues the subpoena, but any motions regarding the subpoena are heard in the district where compliance was required (here the District Court for the District of Columbia.). The new rule also provided that any motion regarding the subpoena could be transferred to the issuing court if the parties agreed or if the court where compliance is required finds "exceptional circumstances."

Since the rule change went into effect, the few reported decisions on this issue have granted motions to transfer, with a low bar for finding "exceptional circumstances." However, no opinion had yet been issued where the Federal Government was the third-party being subpoenaed. In response to PND's transfer motion, MARAD argued that the circumstances in this case did not



warrant a transfer. MARAD further argued that the court should be especially hesitant to require the federal government to litigate third-party subpoenas in distant jurisdictions based on the cumulative impact on public resources.

The court held a hearing on MARAD's motion to quash and PND's motion to transfer on February 18, 2015. The court orally denied PND's transfer motion, finding MARAD's arguments persuasive. The court then orally granted MARAD's motion to quash with respect to the 80 GB of data that PND can equally obtain from other parties to the litigation.

## **National Highway Traffic Safety Administration**

### **United States Files Statement of Interest in Takata Air Bag Litigation**

NHTSA learned of an emergency motion filed by plaintiffs in litigation then pending in the U.S. District Court for the District of South Carolina that, if granted, would have impeded NHTSA's ongoing defect investigation into Takata air bag inflators. Ten vehicle manufacturers have recalled around 17 million vehicles that use Takata air bag inflators because of the risk that the inflator may rupture when the vehicle's air bag is inflated. The plaintiffs sought to require the defendants, Takata and Honda, to preserve all inflators removed either through the recalls or from accident vehicles. Such a broad preservation order would have halted testing of inflators, which provides critical information about the nature and scope of the defect and the adequacy of the replacement inflators being installed in recalled vehicles.

The Department of Justice filed a statement of interest in opposition to the motion on behalf of NHTSA. The statement of interest was supported by a declaration by the Director of NHTSA's Office of Defects Investigation. The court explained in its February 17, 2015, order denying the motion that the United States' statement of interest "effectively establishes that the public interest would not be served by granting" the motion.

These South Carolina cases, Lyon v. Takata Corp. et al. (D.S.C. 14-04485) and Sujata v. Takata Corp. et al. (D.S.C. 15-00112), are just two of over 90 lawsuits relating to Takata air bag inflators currently pending. Most of the lawsuits have now been transferred by the Panel on Multidistrict Litigation to the U.S. District Court for the Southern District of Florida. In re: Takata Airbag Products Liability Litigation (S.D. Fla. MDL No. 2599).

To address the issues that arose in the South Carolina cases and to minimize NHTSA's future involvement in private litigation over Takata inflators, NHTSA issued a Preservation Order and Testing Control Plan on February 25, 2015. That administrative order balances the need for ongoing inflator testing with the interests of private litigants. It requires Takata to preserve inflators and other evidence and to allocate inflators for testing, including testing by vehicle manufacturers and plaintiffs' experts or consultants. The order also ensures that NHTSA has access to information on any inflator testing, including the results of the testing.

## **Pipeline and Hazardous Materials Safety Administration**

### **District Court Dismisses FTCA and Bivens Claims against Agency and Inspectors**

On March 6, 2015, the U.S. District Court for the District of Kansas granted the federal and individual defendants' motion to dismiss in Garrett's Worldwide Enterprises, LLC, et al. v. PHMSA, et al. (D. Kan. No. 14-2281). On June 10, 2014, plaintiffs brought a complaint under the Federal Tort Claims Act (FTCA) alleging that PHMSA brought two enforcement actions against Garrett's Worldwide Enterprises (GWE) in retaliation for owner Eric Garrett publicly criticizing the agency. They also brought claims against three individual inspectors in their official capacities alleging misconduct during the course of the investigations. The plaintiffs subsequently filed an amended complaint on September 9, 2014, bringing claims against the inspectors in their individual capacities under Bivens. PHMSA moved to substitute the United States for the individuals acting in their individual capacities and filed a motion to dismiss all claims.

The court found that it did not have subject matter jurisdiction over GWE under the FTCA because it had not submitted the requisite administrative claim. Although Garrett had originally submitted an

administrative claim on behalf of himself, several family members, and GWE, PHMSA rejected that claim as improperly filed and instructed Garrett to file a separate claim for each claimant. The court found that since Garrett failed to object to that rejection and then subsequently filed a claim in his name alone, GWE did not satisfy the FTCA's requirement that it first present an administrative claim. The court also found that it lacked subject matter jurisdiction over any of the claims predicated on the first enforcement action because they occurred more than two years before Garrett submitted his administrative claim.

The court dismissed all other claims against PHMSA, finding that the defendants' investigatory conduct fell within the FTCA's discretionary function exception. The court observed that even if PHMSA had acted with retaliatory intent, as alleged, the discretionary function exception nonetheless applies even where that discretion is abused.

With respect to the Bivens claims brought against the inspectors in their individual capacities, the court found that Congress provided specific procedures for the plaintiffs to challenge PHMSA's enforcement actions under the APA and 49 U.S.C. § 5127. As a result, the court declined to recognize a Bivens claim in this case and dismissed the claims for lack of subject matter jurisdiction.

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