



# DOT LITIGATION NEWS

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## **Supreme Court Litigation**

### **Supreme Court Holds that a Floating Home is not a “Vessel” Subject to Maritime Jurisdiction**

On January 15, 2013, the Supreme Court decided Lozman v. City of Riviera Beach, 133 S. Ct. 735 (2013), a dispute over the definition of a “vessel” under federal maritime law. The Court ruled in favor of Petitioner Lozman and held that his floating home was not a vessel and thus not subject to maritime jurisdiction. The Solicitor General filed an amicus brief in support of Lozman after considering the views of DOT and other interested federal agencies.

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

The City filed a claim pursuant to the Federal Maritime Lien Act, which provides that repairs performed on a “vessel” generate a maritime lien. The word “vessel” includes “every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water.” The district court looked to Eleventh Circuit precedent in Miami River Boat Yard v. 60’ Houseboat, 390 F.2d 596 (5th Cir. 1968), which held that a houseboat was “capable” of transportation even if it could only move by towing. Because Lozman’s houseboat was capable of being towed, as demonstrated by Lozman’s previous moves within Florida, the district court found that the houseboat was capable of being used as a means of transportation on water. Thus, the houseboat constituted a vessel, and the district court exercised jurisdiction over the case. Lozman appealed the decision, and the United States Court of Appeals for the Eleventh Circuit affirmed the district court’s decision. The Eleventh Circuit agreed with the district court’s analysis and reliance upon precedent and interpreted the word “capable” broadly. Since Petitioner’s houseboat was capable of being towed, it was capable of being used as a means of transportation and was thus a vessel.

The Supreme Court reversed the decision of the Eleventh Circuit, holding that the Eleventh Circuit’s definition of a vessel was too broad. Justice Breyer, writing for a seven-Justice majority, found that under the Eleventh Circuit’s interpretation, structures such as “a wooden washtub, a plastic dishpan . . . or Pinocchio (when inside the whale)” would be vessels. In reversing the decision of the Eleventh Circuit, the Supreme Court focused upon

the definition of “transportation” and whether the structure was capable of being used *as a means of transportation on water*. In other words, the structure must be capable of transporting persons or things over water. Ultimately, the Court held that while the Petitioner’s houseboat could float on water, no reasonable observer would consider the houseboat as practically capable of transporting persons or things over water: Petitioner’s houseboat had no steering mechanism, had an unraked hull and rectangular bottom 10 inches below the water, had no capacity to generate or store electricity, and lacked self-propulsion. Justice Sotomayor issued a dissenting opinion, joined by Justice Kennedy. The dissent agreed with much of the Court’s reasoning but given the underdeveloped record, argued that the case should be remanded for further proceedings in order to learn more about the houseboat’s capabilities.

The Court’s opinion can be found at [http://www.supremecourt.gov/opinions/12pdf/11-626\\_p8k0.pdf](http://www.supremecourt.gov/opinions/12pdf/11-626_p8k0.pdf).

### **Supreme Court Hears Oral Argument in Constitutional Challenge to Warrantless Blood Draw**

On January 9, 2013, the Supreme Court heard argument in Missouri v. McNeely (No. 11-1425), a case involving the scope of the protection afforded under the Fourth Amendment of the U.S. Constitution to individuals stopped for driving under the influence of alcohol (DUI). The Department assisted in the government’s submission of a brief in this case as amicus curiae.

This case arose out of a DUI traffic stop in Missouri. A state highway patrolman stopped McNeely’s vehicle for a speeding violation at around 2:00 a.m. The patrolman observed that McNeely had bloodshot eyes, slurred his speech, and smelled of alcohol. After McNeely performed poorly on field-sobriety tests, the patrolman arrested him for DUI. McNeely would not consent to a breath test. However, the patrolman believed, from reading a traffic safety publication, that it was legally permissible to subject a DUI suspect to a nonconsensual, warrantless blood draw. Thus, the patrolman drove McNeely to a hospital and ordered a medical professional to draw his blood for alcohol testing. The patrolman never sought a warrant.

McNeely’s blood was drawn for testing less than half an hour after the traffic stop. An analysis of the blood sample showed that his blood-alcohol content was above the legal limit. The trial court granted McNeely’s motion to suppress the results of the blood test, ruling that the Fourth Amendment, as well as Missouri law, did not permit the blood draw absent consent, a warrant, or exigent circumstances beyond those present in this case.

The Missouri Supreme Court reached the same result, in a decision reported at 358 S.W.3d 65 (2012). Citing the U.S. Supreme Court’s decision in Schmerber v. California, 384 U.S. 757 (1966), the Missouri Supreme Court ruled that the Fourth Amendment requires “special facts” to demonstrate exigency for a warrantless blood draw. That was not the case here, because the mere fact that alcohol diminishes in the bloodstream over time does not alone give rise to an exigency that necessarily threatens the destruction of evidence.

The State of Missouri petitioned for a writ of certiorari on May 22, 2012. The Supreme Court granted the petition on September 25, 2012.

The United States filed an amicus brief supporting the State of Missouri, arguing that the warrantless, nonconsensual blood draw was constitutionally permissible. The government argued that the Supreme Court's decisions, including Schmerber, made clear that the Fourth Amendment analysis turns upon whether the warrantless intrusion is reasonable under the circumstances, based upon a consideration of whether the individual's privacy interests outweigh the government's interest in obtaining evidence before it is lost or destroyed. In the context of a DUI traffic stop, the evidence, namely, the blood-alcohol content, is destroyed or diminished over time as the alcohol dissipates in the bloodstream. This concern would be amplified if the officer were required to take additional time to seek out a prosecutor or judge, and to take other steps necessary toward the procurement of a warrant. The government also argued that it would be inappropriate to decide whether exigent circumstances exist on a case-by-case basis, and that the States' interest in law enforcement counseled in favor of a bright-line rule that broadly permits warrantless, nonconsensual blood draws in DUI cases. The government cited evidence compiled by the National Highway Traffic Safety Administration (NHTSA), an operating administration of DOT, demonstrating the frequency of DUI, the number of accidents and fatalities it causes, and related information. Finally, in making these arguments, the government recognized that blood draws of the type at issue in this case should only be conducted

in appropriate medical environments by trained individuals.

The briefs in the case can be found at <http://www.scotusblog.com/case-files/cases/missouri-v-mcneely/>.

### **Supreme Court Hears Oral Argument in Preemption Challenge Involving Nonconsensual Towing**

On March 20, 2013, the Supreme Court heard oral argument in Dan's City Used Cars, Inc. v. Pelkey (No. 12-52), a case involving the preemption of state laws in the motor carrier context. DOT worked closely with the Solicitor General's office to determine the government's views as amicus curiae.

This case arose out of a state court lawsuit in New Hampshire. Pelkey sued Dan's City, a tow truck operator, for harm resulting from the towing of his vehicle without consent. Pelkey's car was towed from his landlord's property during a snowstorm, while he was suffering from medical problems. He did not learn that his vehicle was towed until returning from the hospital, where he had his foot amputated and had suffered a heart attack. Pelkey's lawyer then tried to arrange for the return of the car from Dan's City, but was unsuccessful; the car was disposed of without any compensation to Pelkey.

Pelkey filed suit in New Hampshire Superior Court, alleging that Dan's City's conduct in connection with the disposition of his car constituted negligence and violated the state's consumer protection statute. Among other things, Pelkey contended that Dan's City had not followed statutory procedures for the

handling of a towed vehicle and had made misstatements about the value and condition of the car. The trial court granted summary judgment to Dan's City, concluding that Pelkey's claims were preempted by the Federal Aviation Administration Authorization Act (FAAAA), 49 U.S.C. § 14501 *et seq.*, which forbids a state from enacting a law "related to a price, route, or service of any motor carrier . . . with respect to the transportation of property." 49 U.S.C. § 14501(c)(1). In the trial court's judgment, Pelkey's lawsuit constituted an attempt to enforce a state law related to motor carrier "services," which the FAAAA preempts.

The Supreme Court of New Hampshire reversed. It ruled that Pelkey's state law claims were not preempted by the FAAAA, for two reasons. First, the court ruled that the claims were not "with respect to the transportation of property" under the federal statute, but instead, were claims with respect to the collection of a debt. The state laws forming the basis for Pelkey's claims merely permitted Pelkey to attempt to recover the value of his lost property. Second, the relevant state laws were not "related to a price, route, or service of any motor carrier" under the FAAAA. The state law claims instead related to conduct after the towing had occurred.

From that decision, the Petitioner sought a writ of certiorari, which the Supreme Court granted on December 7, 2012.

The United States filed an amicus brief in support of Pelkey, arguing that the FAAAA does not preempt his state law claims. First, the government argued that a presumption against preemption applies in this context, which involves localized concerns about issues (like towing and

debt collection) which are typically within the province of the states. Second, the claims did not involve Dan's City's conduct as a "motor carrier" and were not "with respect to the transportation of property," because the claims involved the collection of a debt after the transportation had occurred. Third, Pelkey's common law claim was not preempted because the FAAAA, which preempts a state "law, regulation, or other provision having the force and effect of law," extends to positive enactments and other exercises of government regulatory power, not state common law. Finally, the absence of a federal remedy supports the view that Congress did not intend to displace state common law claims of the type that Pelkey raised.

The briefs in the case can be found at <http://www.scotusblog.com/case-files/cases/dans-city-used-cars-inc-v-pelkey/>.

### **Supreme Court Grants Certiorari in Preemption Challenge to Port's Limitations on Motor Carrier Operations**

On January 11, 2013, the Supreme Court granted certiorari in American Trucking Associations, Inc. v. City of Los Angeles (No. 11-798), a case that involves important issues about the preemption of state measures affecting the motor carrier industry. Although the government is not a party in this case, DOT has worked extensively with the Solicitor General's office to determine the government's views as amicus curiae. Oral argument in the case is scheduled for April 16, 2013.

The case arises out of a decision in 2008 by the Port of Los Angeles (the Port), an



independent division of the City of Los Angeles, to require “concession agreements” with motor carriers that operate drayage trucks on Port property. Drayage trucks obtain cargo from ships in marine terminals and transport them relatively short distances to customers or to other means of transportation. Although the Port itself does not contract for drayage services, it develops and leases terminals to shipping lines and other companies that use drayage services in the course of their operations.

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

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

to meet the terms of the concession agreements.

The case has a lengthy and complicated procedural history. The American Trucking Associations (ATA), a national motor carrier association, filed suit in federal district court seeking injunctive relief. ATA contended that certain provisions of the concession agreements were preempted by the Federal Aviation Administration Authorization Act (FAAAA), 49 U.S.C. § 14501 *et seq.* That statute, as the Ninth Circuit explained in the decision from which certiorari is sought, ATA v. City of Los Angeles, 660 F.3d 384 (9th Cir. 2011), contains various provisions that restrict states “from undermining federal deregulation of interstate trucking.” In particular, FAAAA forbids a state from enacting a law “related to a price, route, or service of any motor carrier . . . with respect to the transportation of property.” 49 U.S.C. § 14501(c)(1). The statute contains an exception for measures falling within state safety regulatory authority. *Id.* § 14501(c)(2)(A).

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

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

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

ATA filed its petition for writ of certiorari on December 22, 2011. Before the Supreme Court, ATA is challenging the Ninth Circuit's decision upholding the concession agreement provisions relating to financial capability, maintenance, off-street parking, and placards. (By contrast, the Port has not sought review of the Ninth Circuit's adverse ruling on the employee-driver provision.) ATA continues to press several arguments. First, ATA argues that the concession agreements are preempted by FAAAA. As the Supreme Court ruled in Rowe v. N.H. Motor Transp. Ass'n, 552 U.S. 364 (2008), FAAAA sweeps broadly to preempt state measures "having a connection with, or reference to, carrier rates, routes or services." The concession agreements, ATA contends, fall within this rule, and the Ninth Circuit's decision runs

counter to the Supreme Court's direction that the FAAAA preemption provision should be read broadly. Second, ATA argues that no market participant exception is available under FAAAA and would not apply in any event, since the Port does not act as a purchaser in the market for drayage services. Third, ATA contends that barring access by federally licensed motor carriers to Port property effectively suspends those carriers' federal registrations, in violation of the Supreme Court's decision in Castle v. Hayes Freight Lines, Inc., 348 U.S. 61 (1954).

At the Supreme Court's invitation, on November 30, 2012, the Solicitor General filed a brief in this case expressing the views of the United States on whether certiorari should be granted. In its brief, the government argued that the Ninth Circuit erred in concluding that the "market participant" doctrine spared the concession agreements from preemption, because the Port did not act in a proprietary capacity with respect to drayage truck operators, with whom the Port does not contract. However, the government contended that certiorari should be denied, since this fact-bound determination did not warrant further review. Furthermore, the government contended that there were additional considerations that counseled against the grant of certiorari on the other questions presented in ATA's petition, since the record was insufficient to demonstrate whether the Port would actually bar access to its facilities for noncompliance with the concession agreements.

Notwithstanding the views stated in the government's brief, the Supreme Court granted the petition on January 11, 2013, limited to the questions about the "market participant" and Castle issues.

DOT was actively involved with the Solicitor General's office in preparing the government's amicus brief on the merits. In that brief, the government made several arguments in support of reversal. First, the FAAAA does not preempt states and municipalities from adopting arms-length agreements with motor carriers pursuant to proprietary powers, since such contractual arrangements do not carry "the force and effect of law" within the meaning of the FAAAA. Second, notwithstanding that general principal, in this case, the Port is not actually acting through legitimate proprietary powers, since the concession agreements are more regulatory than proprietary in character, and the Port does not actually have contractual agreements with the drayage providers who are subject to the concession agreements. Finally, under Castle, a state may not bar federally authorized motor carriers from gaining access to the Port as punishment for past violations of law. However, Castle permits state authorities from restricting access to the state's "critical infrastructure" for noncompliance with valid state laws, including safety requirements. In this case, the record is insufficient to determine whether the Port would actually bar access to Port facilities as punishment for a past, cured infraction, so the case should be remanded for further consideration of that issue.

The briefs in the case can be found at <http://www.scotusblog.com/case-files/cases/american-trucking-associations-inc-v-city-of-los-angeles/>.

### **Airlines Seek Supreme Court Review of Decision Upholding USDOT Airline Passenger Consumer Protection Rule**

On October 3, 2012, Spirit Airlines, Allegiant Air, and Southwest Airlines filed a petition for a writ of certiorari in the Supreme Court in Spirit Airlines, Inc., et al. v. USDOT (No. 12-656). The airlines' petition seeks review of the July 24, 2012, decision of the U.S. Court of Appeals for the District of Columbia Circuit in favor of DOT, Spirit Airlines, Inc., et al. v. USDOT, 687 F.3d 403 (D.C. Cir. 2012), in which the airlines had challenged DOT's April 2011 air passenger consumer protection rule.

At issue in the case below were provisions of the most recent DOT air passenger consumer protection rule that (1) end the practice of permitting sellers of air transportation to exclude government taxes and fees from the advertised price (Airfare Advertising Rule), (2) prohibit the sale of nonrefundable tickets by requiring airlines to hold reservations at the quoted fare without payment or cancel without penalty for at least 24 hours after the reservation is made if the reservation is made one week or more prior to a flight's departure (24-Hour Rule), and (3) prohibit post purchase baggage fee increases after the initial ticket sale (Post-Purchase Price Rule). The D.C. Circuit upheld DOT's rule in all respects.

The airlines seek further review of the Airfare Advertising Rule and 24-Hour Rule (the airlines do not seek Supreme Court review of the Post-Purchase Price Rule). The airlines argue, among other things, that the Airfare Advertising Rule violates the First Amendment by mandating "total cost" advertising and by



restricting the airlines' truthful speech about the share of each ticket that consists of government taxes and fees. The airlines also argue that DOT exceeded its statutory mandate to prohibit unfair or deceptive practices in the industry by implicitly "reregulating" the airline industry - and with allegedly only scant evidence in the rulemaking record - in requiring full-fare advertising and by, under the 24-Hour Rule, supposedly "prohibiting" non-refundable tickets.

The United States filed a brief in opposition on February 27, 2013. The government argues that the D.C. Circuit's decision is correct and does not conflict with any Supreme Court decision or decision of any other court of appeals. The government maintains that the Airfare Advertising Rule constitutes a reasonable exercise of DOT's longstanding authority to prevent consumer confusion in airfare advertising and is consistent with the First Amendment. Moreover, the 24-Hour Rule does not violate the Airline Deregulation Act of 1978. That rule does not prohibit nonrefundable tickets. Rather, consistent with DOT's statutory authority, the rule only requires airlines to hold reservations without payment, or allow cancellation without penalty, for 24 hours. The government also maintains that the D.C. Circuit correctly found sufficient evidence to support DOT's underlying rulemaking, and that even if it did not, such a claim would not warrant review by the Court.

The D.C. Circuit's opinion is available at

[http://www.cadc.uscourts.gov/internet/opinions.nsf/B3C8FBE2AB1F6A9185257A45004EE709/\\$file/11-1219-1385164.pdf](http://www.cadc.uscourts.gov/internet/opinions.nsf/B3C8FBE2AB1F6A9185257A45004EE709/$file/11-1219-1385164.pdf).

### **Supreme Court Seeks Government's Views in Appeal of Defamation Verdict against Airline for Reporting Pilot's Suspicious Behavior**

On January 7, 2013, the Supreme Court invited the Solicitor General to file a brief expressing the views of the United States in Air Wisconsin Airlines Corp. v. Hoeper (No. 12-315). The case arises out of an incident in which Air Wisconsin reported to TSA that William Hoeper, one of its pilots, presented a potential threat to airline safety. Hoeper was in Virginia for his fourth attempt to take a certifying test for a new class of aircraft, understanding that a fourth failure would result in his termination. Hoeper experienced difficulty during the test and left the session angrily. An Air Wisconsin employee subsequently booked Hoeper on an afternoon return flight from Dulles to Denver. Upon learning about the incident and Hoeper's status as a Federal Flight Deck Officer (FFDO) authorized to carry a firearm onto commercial aircraft, Air Wisconsin officials decided to report the incident to TSA. TSA officials at Dulles pulled Hoeper off of the aircraft, which had already left the gate, and questioned him before determining that he posed no threat. He was allowed to fly out on a later flight.

Hoeper brought several claims against Air Wisconsin in Colorado state court, including a claim of defamation based upon Air Wisconsin's report to TSA. Air Wisconsin defended this claim on the basis of 49 U.S.C. § 44941, a provision of the Aviation and Transportation Security Act that provides immunity to airlines and their employees that report to TSA any suspicious transaction relevant to a threat to aircraft or passenger safety. The

statutory immunity provision contains an exception, however, for statements made with knowledge of falsity or reckless disregard as to truth or falsity. The trial court denied Air Wisconsin's motion for summary judgment and later its motion for a directed verdict under the immunity provision. The jury then found in Hoeper's favor on the defamation claim, awarding him \$1.4 million in damages.

Air Wisconsin appealed the jury verdict to the Colorado Appeals Court and then to the Colorado Supreme Court, at each stage pressing its argument for statutory immunity. The Colorado Supreme Court held that, as a matter of Colorado law, ATSA immunity is a question of law for the court, and the trial court erred by assigning the immunity question to the jury. The Colorado Supreme Court held the error harmless, however, determining upon its own independent review of the record that Air Wisconsin was not entitled to statutory immunity. The court held that Air Wisconsin's statements, describing Hoeper as mentally unstable and possibly armed, were made based upon limited

factual knowledge. Thus, the statements were made with recklessness as to their truth or falsity. The court suggested that a report may have been warranted, but that the statements exaggerated the facts known at the time to such a degree to warrant the denial of immunity. The court also held, in a subsequent First Amendment analysis, that the statements were not protected as opinion or as substantially true.

Air Wisconsin filed its petition for writ of certiorari on September 11, 2012, arguing that the Supreme Court should grant certiorari to determine the proper application of the ATSA immunity provision, and to address whether the First Amendment requires independent appellate review of a statement's falsity in defamation cases. The Court has invited the Solicitor General's Office to file a brief expressing the views of the United States on whether certiorari should be granted. USDOT is working with the Solicitor General's office and other interested agencies to help determine the government's views.

## **Departmental Litigation in Other Courts**

### **Summary Judgment Granted for USDOT in Lawsuit Challenging Light Rail Project in Seattle**

On March 7, 2013, the U.S. District Court for the Western District of Washington granted summary judgment for the defendants and denied the plaintiff's Summary Judgment Motion in Building a Better Bellevue, et. al. v. USDOT, et. al., 2013 WL 865843 (W.D. Wash. Mar. 7, 2013). The July 2012 complaint challenged the Record of Decision issued

by FTA and FHWA in November 2011 relating to the East Link Light Rail Transit project in Seattle. The project will connect Seattle's existing North-South light rail alignment east across Lake Washington to the cities of Bellevue and Redmond. The FHWA portion of the project includes conversion of highway lanes to transit and approval of bridge expansion. The lawsuit, brought by two citizens groups, challenged the NEPA process on the East Link Light Rail project proposed by the regional transit agency, Central Puget Sound Transit Authority. The plaintiffs contended,

among other things, that the statement of purpose and need in the Environmental Impact Statement was too narrowly drafted so as to exclude other transit mode alternatives and that the Section 4(f) analysis and determination were flawed. The court found that the defendants fully complied with NEPA.

### **First of Three Plaintiffs Dismissed in Cases Challenging Columbia River Crossing Project**

On March 12, 2013, the U.S. District Court for the District of Oregon granted federal defendants' motion for summary judgment in the first complaint challenging the Columbia River Crossing Project, Thompson Metal Fab, Inc., v. USDOT, et al., 2013 WL 992668 (D. Or. Mar. 12, 2013). Plaintiff Thompson Metal Fab (Thompson) is a local Vancouver, Washington, metal fabrication manufacturer. The defendants in this suit include the USDOT, FHWA, FTA, and officials from each organization. The court also denied a motion to intervene by another local metal fabricator, Greenberry International, LLC (Greenberry). In addition, the court granted both Oregon and Washington State DOTs' motions to intervene in the cases.

The Columbia River Crossing Project is a bridge, transit, highway, and bicycle and pedestrian project designed to improve safety and mobility in the Interstate 5 (I-5) corridor between Portland and Vancouver. The \$3.4 billion dollar undertaking has been named a "Project of National or Regional Significance" in accordance with President Obama's Executive Order 13604.

Thompson alleged that USDOT violated NEPA by failing to account for impacts to navigable waters. The Court agreed with federal defendants that Thompson's interests in the Columbia River are purely economic and therefore outside of NEPA's "zone of interests." Relying on established Ninth Circuit precedent, the court reiterated that "[i]t is well settled that the zone of interests protected by NEPA is environmental." Thompson attempted to equate its use and exploitation of natural resources with activities meant to protect or preserve the environment. The court rejected Thompson's attempt, finding that Thompson does not have any interest in the local environment. As a result, the court held that Thompson lacks prudential standing and granted federal defendants' motion for summary judgment. The court denied Greenberry's motion to intervene for the same reasons. Greenberry also filed its motion to intervene after the statute of limitations had run, but argued a relation-back theory; however, the court did not address this argument since it found Greenberry also did not have standing based upon its assertion of purely economic harms.

### **Court Affirms DOT Decision in Appeal of DBE Certification Denial**

On February 4, 2013, the U.S. District Court for the Eastern District of Michigan granted DOT's Motion for Summary Judgment in Richmond Transport, Inc. v. Departmental Office of Civil Rights, 2013 WL 425357 (E.D. Mich. Feb. 4, 2013). This case arose after Richmond Transport, Inc., and two affiliated firms applied for and were denied certification as a Disadvantaged Business Enterprise (DBE)

by the Michigan Department of Transportation. The three Michigan trucking firms appealed the denials to USDOT's Office of Civil Rights (DOCR), but DOCR affirmed the state agency's decision. Pursuant to USDOT regulations governing the DBE program, only small businesses owned and controlled by socially and economically disadvantaged individuals can be certified as DBEs.

Richmond Transport and the two affiliated firms filed an action in district court seeking judicial review of DOCR's decision under the Administrative Procedure Act. In addition, the firms asserted due process and Equal Protection claims.

In granting USDOT's Motion for Summary Judgment, the district court found that there was sufficient evidence in the administrative record to support DOCR's determination, which was neither arbitrary nor capricious. Specifically, the court found that DOCR's decision regarding the socially and economically disadvantaged owners' lack of the requisite technical experience necessary to control the three firms was fully supported by and rationally connected to evidence in the administrative record. With respect to the due process and Equal Protection claims, the court concluded that the plaintiffs failed to establish the essential elements of those claims.

### **DOT Files Response to TRO Motion in DBE Appeal**

On February 11, 2013, Rebar International, Inc., a firm certified as a Disadvantaged Business Enterprise (DBE) in Washington State, filed an action in the U.S. District

Court for the Western District of Washington seeking judicial review of a remand decision by the Departmental Office of Civil Rights (DOCR). Rebar International, Inc. v. Departmental Office of Civil Rights, et al. (W.D. Wash. No. 13-242). This case arose as the result of a decertification proceeding that the Washington State Office of Minority and Women's Business Enterprises (OMWBE) initiated against Rebar.

After finding reasonable cause to believe that Rebar may not be eligible to continue participating as a DBE, FHWA directed OMWBE, the state certifying agency, to initiate decertification proceedings against Rebar. OMWBE convened a show cause review hearing, but failed to conduct an independent investigation and to prosecute the matter as it is required to pursuant to the DBE program regulations. As a result, the Certification Committee chairing the show cause review hearing found that OMWBE failed to meet its burden of proof and determined that Rebar should not be decertified.

Pursuant to the DBE program regulations, FHWA appealed the Certification Committee's decision to DOCR. Upon reviewing the administrative record, DOCR decided to remand the matter back to the State with instructions for OMWBE to prosecute the case and to further develop the record.

Rebar is seeking judicial review of DOCR's remand decision under the Administrative Procedure Act and an Order permanently enjoining the remanded hearing. Pending the court's disposition of Rebar's petition, Rebar filed a motion seeking to temporarily enjoin the remanded hearing from taking place. On March 11,

2013, DOT filed a response to Rebar's motion for temporary injunctive relief. We are awaiting a decision from the court on Rebar's motion.

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

### **Federal Aviation Administration**

#### **Briefs Filed in Second Challenge to Cape Cod Wind Turbine Project**

On December 17, 2012, the Town of Barnstable, Massachusetts and the Alliance to Protect Nantucket Sound filed a joint brief in the U.S. Court of Appeals for the District of Columbia Circuit in support of their petition for review of FAA's "no hazard" decisions in connection with the development of a wind energy project known as Cape Wind. Town of Barnstable, et al. v. FAA (D.C. Cir. Nos. 12-1362 & 1363). Intervenor Cape Wind Associates, LLC, proposes to build 130 wind turbines in Nantucket Sound, south of Cape Cod. Because of the 440 foot height of the proposed turbines, Cape Wind Associates was required to notify FAA to allow the agency to make a determination of whether the turbines would be a hazard to air navigation under its regulations and applicable guidance. The same project and the FAA's prior no hazard determinations were vacated by the court and remanded to the FAA. Town of Barnstable v. FAA, 659 F.3d 28 (D.C. Cir. 2011) (Cape Wind I).

In their joint brief, the petitioners' primary argument is that FAA again ignored the

guidance in the applicable FAA Order. Specifically, petitioners contend that FAA's determination that there is no adverse aeronautical effect because the turbines, either singly or collectively, are not deemed an "obstruction" under either the regulations or the Order violates applicable law (49 U.S.C. § 44718(b)) as well as the court's remand. Asserting that FAA "thumbed its nose" at the court, petitioners claim that the agency failed to perform a substantive safety analysis of the impact of the turbines, particularly with regard to flight under visual flight rules. Petitioners also argued that the FAA's no hazard determinations were arbitrary and capricious because the agency did not address all of the potential electromagnetic radiation effects on nearby radar facilities and relied on "limited and unproven mitigation measures."

FAA filed its opposition brief on January 29, 2013, and pointed out that the FAA Order relating to obstruction evaluations had been clarified since the decision in Cape Wind I to make it unequivocal that an analysis of adverse aeronautical effect is required only (a) if the proposed structure first exceeds a particular obstruction standard or (b) if it has a physical or electromagnetic radiation effect on the operation of air navigation facilities. In applying this guidance, FAA pointed out that the 440 foot turbines did not exceed



any obstruction standard at the proposed location and that extensive study and analysis, in addition to upgraded equipment since the Cape Wind I decision, showed there was no adverse electromagnetic radiation effect on the radar. Further, out of deference to the court, FAA explained that it had undertaken a study of the impact on aircraft operating under visual flight rules, even though such a study was not required because neither of the threshold requirements for such a study had been met.

In their reply brief, the petitioners dismissed the significance of the changes in the language of the FAA Order and the equipment upgrade and reiterated their opening arguments. The crux of the matter is whether the FAA can establish a threshold that must be met before it is required to engage its resources in a broader analysis of aeronautical impact.

The case has not yet been scheduled for argument.

### **Cities, Community Group, and Individuals Challenge Snohomish County Airport/Paine Field Improvements**

On January 31, 2013, the Cities of Mukilteo and Edmonds, Washington, Save Our Communities, and two individuals sued USDOT and FAA in the U.S. Court of Appeals for the Ninth Circuit challenging the Finding of No Significant Impact/Record of Decision (FONSI/ROD) for the Amendment to the Operations Specifications for Air Carrier Operations, Amendment to a Federal Aviation Regulations Part 139 Certificate, and

Modification of the terminal building at Snohomish County Airport/Paine Field, Everett, Washington. City of Mukilteo v. USDOT (9th Cir. No. 13-70385). Snohomish County Airport/Paine Field is approximately 20 miles north of Seattle. The Airport is owned and operated by Snohomish County under the County Executive and the County Council. Two airlines, Allegiant and Horizon, asked FAA to issue amendments to their operations specifications to allow scheduled commercial air service to and from Paine Field. The proposed service would require an amendment to the Airport's existing Part 139 operating certificate as well. In response to this request, the Airport proposed to construct a modular terminal building to accommodate passengers. The Airport may seek federal funding for the terminal. FAA prepared an Environmental Assessment (EA) to analyze potential impacts of these proposed federal actions under NEPA. During the public comment period, both the City of Mukilteo and Save Our Communities filed lengthy comment letters. Based upon the EA, FAA determined that an environmental impact statement was not required and issued a FONSI/ROD.

Petitioners' brief is due April 22, 2013, and Respondents' brief is due May 21, 2013.

### **Greater Orlando Aviation Authority Challenges Interim Guidance on Runway Protection Zones**

On November 23, 2012, the Greater Orlando Aviation Authority (GOAA) filed Greater Orlando Aviation Authority v. FAA (11th Cir. No. 12-15978C), a Petition for Review in the U.S. Court of Appeals for the Eleventh Circuit seeking judicial

review of FAA's Interim Guidance on Runway Protection Zones (RPZ), issued September 27, 2012, and Advisory Circular (AC) 150/5300-13A, Airport Design, issued September 28, 2012.

The updated AC addresses FAA's standards and recommendations for airport design, which includes those for RPZs. The AC describes general RPZ dimensions and location and states that "it is desirable to clear the entire RPZ of all above-ground objects." Where clearing the RPZ is not possible, the AC lists land uses within RPZs that do not require further evaluation by FAA and directs the sponsor to the Interim Guidance for guidance on other land uses. The Interim Guidance further clarifies FAA policy on land uses within RPZs pending the development of final guidance, which will be published in a land use AC. The guidance lists land uses within RPZs that require coordination with FAA's Airport Planning and Environmental Division (APP-400) when those land uses are the result of an airfield project, a change in the critical design aircraft that increases the dimensions of the RPZ, a new or revised instrument approach procedure that increases the RPZ dimensions, or a new or reconfigured local development proposal in the RPZ. The Interim Guidance also describes APP-400's process of documenting alternatives to such new potential land uses. This process requires FAA to document and analyze alternatives that could avoid introducing the land use into the RPZ, minimize the impact of the land use on the RPZ, and/or mitigate the risk of the land use to people and property on the ground.

According to GOAA's Civil Appeals Statement, filed December 26, 2012, GOAA seeks judicial review of several issues: (1) whether the AC is arbitrary and

capricious with regard to the RPZ standards contained therein "because it provides no objective standard or guidelines for the agency to follow in reviewing applications to expand roadways or rail" within RPZs; (2) whether the court should "remand the matter to FAA for further investigation and explanation" as to the basis of the AC's RPZ standards; (3) whether FAA may adopt an AC without using the rulemaking process under 14 C.F.R. Part 11; (4) whether the AC is arbitrary and capricious because it "preclude[s] new or expanded roadways and new or expanded rail" within RPZs; (5) whether FAA's enforcement of the AC is arbitrary and capricious because it "preclude[s] new or expanded roadways and new or expanded rail" within RPZs; (6) whether the AC's RPZ standards are arbitrary and capricious as applied to GOAA; and (7) whether the AC is arbitrary and capricious "as applied to the review and/or preclusion of new or expanded roadways or rail" in RPZs because it is "not supported by substantial evidence." GOAA believes the Interim Guidance and AC could have an adverse impact on planned construction and development projects at Orlando International Airport (MCO) and Orlando Executive Airport, including a rail corridor and planned expansion of a roadway crossing through an RPZ at MCO.

On February 14, 2013, GOAA filed a Joint Motion for a 90-day stay of the proceedings to allow for settlement discussions. This motion was granted on February 25 and suspends all deadlines in the suit until May 15, 2013.

### **District Court Grants Summary Judgment for United States in FTCA Case**

On February 8, 2013, the United States District Court for the Western District of Oklahoma granted the government's motion for summary judgment filed in Hartman, et al. v. United States, 2013 WL 500973 (W.D. Okla. Feb. 8, 2013). This case was brought under the Federal Tort Claims Act (FTCA) and arose out of the 2008 crash of a Cessna Citation jet after a collision with a flock of American White Pelicans shortly after takeoff from Wiley Post Airport in Oklahoma City. Two pilots and three passengers were killed when the aircraft became uncontrollable as a result of its impact with these large birds. Plaintiffs' main theory was that an air traffic controller at the Oklahoma City Terminal Radar Approach Control facility (TRACON) should have warned the pilots about the presence of birds along their route of flight. However, plaintiffs' experts were unable to discover or produce any convincing evidence that the birds were shown on the controller's radar display. The government's expert produced ample evidence that the birds were not displayed on the scope through a detailed explanation of the operation of the radar system and of the settings used by controllers. In order to reduce visual clutter on the display, which would make it difficult for controller to see tracked targets, the Standard Terminal Automation Replacement System (STARS) computer filters out radar returns that do not meet certain criteria, including speed and reflected radar energy. The judge found that "there is no legitimate dispute that at the time of the bird strike involving the subject aircraft, [the controller] had no information from any source indicating the

possible presence of birds along the aircraft's intended flight route."

As an alternative finding, the judge ruled that the choice of air traffic control radar equipment and the manner in which it is configured and operated are discretionary functions of the FAA. Therefore, under the discretionary function exception to FTCA liability, the United States could not be held liable to plaintiffs based upon these choices.

Finally, the court also devoted significant attention to the failure of plaintiffs' counsel to follow the rules concerning responses to motions for summary judgment. Although counsel's shortcomings were not the substantive basis for the court's holding, the following excerpt from the opinion would be useful to keep in mind: "Plaintiffs' response to FAA's motion is deficient and unworkable since no attempt is even made to tie plaintiffs' list of questions [concerning undisputed facts] to particular statements of fact submitted by FAA. The court is under no obligation to search the record for a genuine issue of material fact."

### **Federal Highway Administration**

#### **Fourth Circuit Reverses Summary Judgment Decision for FHWA**

On May 3, 2012, the U.S. Court of Appeals for the Fourth Circuit in North Carolina Wildlife Federation v. North Carolina Department of Transportation, 677 F.3d 596 (4th Cir. 2012), vacated an October 24, 2011, district court judgment in favor of FHWA and remanded the case

to the district court for further proceedings consistent with its opinion. The original lawsuit asserted that the FHWA and the North Carolina Department of Transportation (NCDOT) acted arbitrarily and capriciously and thereby violated NEPA by approving the Monroe Connector/Bypass, a proposed new twenty-mile, controlled access toll road near Charlotte, North Carolina. Specifically, appellants alleged that “the Agencies violated NEPA by: 1) failing to analyze the project’s environmental impacts; 2) conducting a flawed alternatives analysis; and 3) presenting materially false and misleading information to other agencies and the public.”

The court opined that the agencies violated NEPA by failing to disclose in NEPA documentation critical assumptions underlying data furnished by the local Metropolitan Planning Organization for use as a no-build scenario and mischaracterized data regarding the no-build scenario in responses to comments, thereby providing the public with erroneous information. The court rejected explanations in the administrative record of why the agencies concluded the no-build model for the indirect and cumulative effects analysis was reasonable. It further held that factual clarifications and amplifying explanations presented in the appellate briefs constituted after-the fact disclosures that could not cure any harms incurred during the NEPA process. In a footnote, the court explained that it did not address other alleged NEPA violations raised in the appeal, “because on remand, when the Agencies reevaluate the Impact Statement, they will have the opportunity to provide full public disclosure and all necessary explanations of their process.”

On July 3, 2012, FHWA rescinded the ROD for the project. FHWA and NCDOT continue to review the project in accordance with the court’s opinion.

### **Sixth Circuit Upholds Dismissal of Settled Matter on Mootness Grounds**

On December 10, 2012, the U.S. Court of Appeals for the Sixth Circuit affirmed the district court’s order dismissing plaintiffs lawsuit against the State of Kentucky, FHWA, and U.S. Army Corps of Engineers. The plaintiffs in McGehee, et al. v. U.S. Army Corps of Engineers, 2012 WL 6097344 (6th Cir. 2012), initially filed suit in federal district court challenging Kentucky DOT’s condemnation of their property for the construction of a road. The plaintiff’s claimed violations of the National Historic Preservation Act, Clean Water Act, and NEPA. On September 6, 2011, State defendants and plaintiffs reached a settlement agreement, and on September 8, the district court entered an order declaring that the settlement agreement mooted all pending motions, including a motion by federal defendants to dismiss the claims against them for lack of jurisdiction. On January 4, 2012, defendants filed a motion to dismiss because the conditions specified in the district court’s original order had been satisfied, and on January 9, 2012, the district court entered an order dismissing the action as settled. On February 3, 2012, plaintiffs filed a notice of appeal arguing that the district court’s dismissal order must be vacated because it prevented plaintiffs from responding to defendants’ motion to dismiss. The Court of Appeals denied plaintiffs motion and affirmed the district court’s dismissal order because the

settlement order the parties entered into rendered the underlying controversy moot.

**Opening and Response Briefs  
Filed in Appeal of NEPA  
Challenge to New Detroit River  
Bridge**

On November 30, 2012, appellees filed their opening briefs in Latin Americans for Social and Economic Development, et al. v. FHWA, et al. (6th Cir. 12-1556), an appeal of a decision of the U.S. District Court for the District of Eastern Michigan granting DOT's Motion to Affirm FHWA's environmental approval of the New International Trade Crossing (NITC), a proposed new bridge linking Detroit to Windsor, Canada. The suit was filed by the Detroit International Bridge Company (DIBC) and a coalition of six Detroit-area community groups. DIBC owns and operates the Ambassador Bridge, a toll bridge that is the only existing bridge between the Detroit area and Canada, and seeks to build its own new bridge adjacent to the Ambassador Bridge (the Second Span). DIBC and the community group coalition each filed separate briefs.

The district court had determined that FHWA's environmental review of the project demonstrated a careful and deliberate process regarding the identification of the project's purpose and need and the selection of the preferred alternative for the location of the project. The court held that FHWA "considered a reasonable range of alternatives and did not act arbitrarily and capriciously when it considered, but rejected, other alternatives in favor of the preferred alternative." In considering plaintiffs' environmental justice arguments, the court rejected the claim that FHWA "predetermined" the

location of the bridge and targeted the minority Delray area.

On appeal, DIBC argued, among other things, that the project's Environmental Impact Statement did not adequately compare the preferred alternative to others. In particular, DIBC claimed that FHWA had impermissibly rejected the alternative of a bridge at the site of DIBC's proposed Second Span due to Canada's objections to such a bridge and had arbitrarily rejected the "no build" alternative. DIBC also argued that FHWA failed to take a hard look at traffic forecast data that contradicted the agency's data and arbitrarily reasoned that DIBC's proposed Second Span would not provide sufficient redundancy for cross-border transportation in the region. The community group appellees argued that FHWA improperly eliminated alternatives that would have no disparate impact on minority neighborhoods and failed to follow its own environmental justice procedures in analyzing the impacts of the NITC on the low-income and minority populations of Detroit's Delray neighborhood, where the U.S. side of the bridge would be built.

In its response brief, filed on February 25, 2013, the government first argued that DIBC lacked prudential standing because the crux of its case is its alleged injury to its economic interests, which are not within NEPA's zone of interests. As to the merits, the government argued that it took a hard look at the need for the project and gave serious consideration to the alternatives, including the "no build" alternative and an alternative bridge at the site of DIBC's proposed Second Span. The government also argued that it reasonably relied on its experts' traffic forecasts and that the need for redundancy was well-supported by the administrative



record. Regarding the environmental justice claims, the government contended that the Executive Order that instructs federal agencies to conduct an environmental justice analysis does not create a cause of action and that, in any event, environmental justice implications of the NITC for the Detroit community where the bridge would be built were thoroughly considered after ample community input was received.

The court has not yet set a date for oral argument.

### **Appellant's Brief Filed in White Buffalo Case**

White Buffalo Construction, Inc. v. United States (Fed. Cir. 12-5045) is a challenge to a termination for default of a construction contract awarded in August, 1998 to White Buffalo Construction, Inc. (White Buffalo). FHWA later converted the termination for default to a termination for convenience. However, in October 2007, White Buffalo filed a complaint at the United States Court of Federal Claims (COFC), claiming that FHWA breached its duty of good faith and fair dealing, and seeking costs, lost profits, and attorney's fees. The COFC found that FHWA did not act in bad faith when it terminated White Buffalo's contract and the court agreed with the government's position related to costs associated with pre-termination work that White Buffalo had completed. White Buffalo Construction, Inc. v. United States, 101 Fed. Cl. 1 (2011). White Buffalo filed a notice of appeal to the United States Court of Appeals for the Federal Circuit in January 2012.

White Buffalo filed its opening appellate brief on January 29, 2013. White Buffalo raised six issues in its appeal to the Federal

Circuit: (1) that the trial court erred as a matter of law in finding that FHWA's conversion of its default termination to a termination for convenience mooted the Appellant's claims in cases filed prior to the conversion; (2) that the trial court failed to conduct a de novo review of the contracting officer's default termination; (3) that the trial court erred in its failure to apply an evidentiary presumption when the government did not produce certain witnesses that White Buffalo claims were under the government's control, not available to the White Buffalo, and would have testified favorably for White Buffalo; (4) that the trial court's determination that the government did not act in bad faith was clearly erroneous; (5) that the trial court's rejection of Appellant's testimony regarding its profit margin was clearly erroneous; and (6) that the trial court's failure to include a subcontractor's claim in the final judgment was the result of a mathematical error.

### **Petition for Review of Buy America Waiver**

On February 19, 2013, eight entities comprised of a workers union and various steel and iron manufacturing corporations petitioned the U.S. Court of Appeals for the District of Columbia Circuit for judicial review of a December 21, 2012, memo issued by FHWA that clarified the scope of a long-standing general waiver for manufactured products under the FHWA's Buy America requirement in 23 U.S.C. § 313. A substantial question exists as to whether the Court of Appeals had jurisdiction over this claim. The briefing schedule in United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, et al. v. FHWA, et al.

(D.C. Cir. No. 13-1036) has not yet been issued.

### **Louisiana District Court Dismisses Complaint Alleging Violation of the Federal-Aid Highways Act**

On November 16, 2012, the U.S. District Court for the Western District of Louisiana granted defendants' motions to dismiss in Willis-Knighton Medical Center, et al. v. LaHood, et al. (W.D. La. No. 12-2838). On November 5, 2012, the Willis-Knighton Medical Center and Finish 3132 Coalition, LLC, filed a complaint against FHWA seeking to enjoin construction of Forbing Ridge Road, an access road in the vicinity of a retirement center owned by the Willis-Knighton Medical Center. Forbing Ridge Road is not funded with any federal-aid dollars, and no decisions regarding the planning, design, or construction of the road called for any approvals from FHWA. Forbing Ridge Road is, however, in the vicinity of the proposed federal-aid project Louisiana 3132 Inner Loop Extension, and plaintiffs alleged that construction of Forbing Ridge Road essentially foreclosed consideration of one project alternative that might otherwise be selected. While the bulk of the complaint focused on alleged violations of state law by the State defendants and the contractors who will build Forbing Ridge Road, plaintiffs alleged FHWA violated 23 U.S.C. §§ 128, 134, and 135 (the Federal-Aid Highways Act (FAHA)) by permitting the Inner Loop project to proceed despite an inadequate alternatives analysis that prematurely discounted an alternative preferred by plaintiffs and an allegedly flawed public hearing process. Plaintiffs failed to specifically allege FHWA violated NEPA.

In granting defendants' motions to dismiss, the court noted that the FAHA does not provide a private cause of action and that plaintiffs failed to allege a violation of federal law. The court held that plaintiffs' argument that the court should exercise supplemental jurisdiction over plaintiffs' state law claims also failed. On December 13, 2012, plaintiffs filed a Motion for a New Trial and/or Rehearing pursuant to Fed. R. Civ. P. 59, asserting that they had sufficiently alleged FHWA violated federal law. Defendants responded with separate motions in opposition. FHWA emphasized that even if plaintiffs had sufficiently articulated a violation of NEPA, plaintiffs had failed to state a valid claim, because the Environmental Assessment for the project had not been completed yet, and as a result, there is no final agency action for a challenge under the Administrative Procedures Act. On January 7, 2013, the court issued an order denying plaintiffs' motion for a new trial or reconsideration.

### **Court Grants FHWA Motion to Dismiss Title VI Claim in Challenge to Zoo Interchange Project**

On January 29, 2013, the U.S. District Court for the Western District of Wisconsin granted FHWA's Motion to Dismiss plaintiffs' Title VI claim in Milwaukee Inner-City Congregations Allied for Hope, et al. v. Gottlieb, et al. (W.D. Wis. No. 12-00556). The plaintiffs attempted to bring a Title VI challenge as an alleged NEPA violation, arguing that defendants could not have fulfilled their obligations under NEPA because of a lack of Title VI compliance. The court rejected plaintiffs' arguments, noting they cited no authority in support of their attempt to use NEPA to enforce Title VI. Citing NEPA's

procedural nature, the court acknowledged that even if an agency action violated a duty imposed by a different statute, it would not violate the duties imposed by NEPA. The court dismissed the claim, stating that plaintiffs cannot use NEPA to obtain judicial review of a Title VI disparate impact claim they would otherwise be unable to bring.

The lawsuit, filed in August 2012, challenges the expansion and reconstruction of the Zoo Interchange in the Milwaukee Metropolitan area and was brought by two local community groups, Milwaukee Inner-City Congregations Allied for Hope and the Black Health Coalition of Wisconsin. Plaintiffs have focused on the lack of a transit component in the selected alternative, the lack of transit options in the area, and the perceived disparate impact the advancement of highway projects over transit projects has on minority communities.

There are three remaining counts pending against the state and federal defendants. All three are alleged NEPA violations: 1) inadequate analysis of project impacts and effects in the EIS; 2) inadequate analysis of alternatives in the EIS; and 3) failure to supplement the EIS based on a water diversion plan proposed subsequent to the approval of the FEIS.

Plaintiffs filed a motion for preliminary injunction to stop construction on the project on February 6, and FHWA filed its response on February 25. Summary judgment briefing is scheduled to begin in June 2013.

### **Court Grants Government's Motion to Dismiss in Tidewater Case**

On December 10, 2012, the Court of Federal Claims granted the government's motion and dismissed without prejudice in Tidewater Contractors, Inc. v. United States, 107 Fed. Cl. 779 (Fed. Cl. 2012). The case involves a contract dispute arising from a contract awarded on May 1, 2009, to Tidewater Contractors, Inc. (Tidewater). In this case, plaintiff Tidewater alleged that the government breached a contract involving a project to pave a road in Oregon and sought damages of \$374,274, plus interest and attorney's fees, and injunctive relief. FHWA moved to dismiss the complaint, asserting that the court lacked subject matter jurisdiction because the contracting officer had not issued a decision pursuant to the Contract Disputes Act of 1978 (CDA), 41 U.S.C. § 7103(f)(2)(B) (Supp. V 2012), when Tidewater filed its complaint.

The court held that under the CDA, it lacked subject matter jurisdiction to decide the allegations in the complaint because the contracting officer had not yet issued a final decision at the time plaintiff filed its complaint. The court found that FHWA notified Tidewater on March 26, 2012, that the contracting officer anticipated issuing a final decision by September 1, 2012. Thus, at the time the complaint was filed on April 20, 2012, FHWA had timely notified Tidewater of the deadline for issuing the contracting officer's final decision. In addition, the court held that because the contracting officer had not issued a final decision regarding Tidewater's claim, nor had the claim been "deemed denied," since FHWA expressly reserved the right to issue a decision by

September 1, 2012, the court lacked jurisdiction to hear Tidewater's complaint.

### **Court Agrees with DOT that the Uniform Act Does Not Provide a Private Right of Action**

On December 18, 2012, the U.S. District Court for the Eastern District of Virginia granted the federal defendant's motion to dismiss in Clear Sky Car Wash, LLC, et al. v. City of Chesapeake, et al., 2012 WL 6607142 (E.D. Va. Dec. 18, 2012). The lawsuit was filed on April 11, 2012, by Clear Sky Car Wash, LLC, against the DOT, the Virginia Department of Transportation, the City of Chesapeake, and Greenhorne & O'Mara (Consulting Engineers) and its employees. The suit alleged violations of the Uniform Relocation Assistance and Real Property Acquisition Policies Act (Uniform Act) and various provisions of the U.S. Constitution.

Property formerly owned by Clear Sky Car Wash was acquired by the City of Chesapeake by eminent domain in March 2012 as part of the U.S. Route 17/Dominion Boulevard Improvement Project. The City's numerous attempts to reach an agreement on just compensation were unsuccessful. The suit alleged that the appraisals and appraisal review process were improper and that the sum of \$2.15 million paid for the parcel is not just compensation. In addition, the suit alleged that relocation benefits were not provided to the plaintiff and that the 5<sup>th</sup> and 14<sup>th</sup> Amendments to the Constitution entitled them to certain pre-deprivation rights.

The court agreed with the federal defendants that the Uniform Act does not provide a private right of action concerning

the land acquisition policies in subchapter III of the Act. In addition, the court also agreed that the relocation assistance provisions in subchapter II of the Act may only be reviewed under the APA, which requires final agency action and exhaustion of administrative remedies. The court found that there was no final agency action concerning relocation benefits sufficient to trigger jurisdiction under the APA.

With regard to the constitutional claims, the court rejected plaintiff's argument that Clear Sky was entitled certain pre-deprivation rights under the 5<sup>th</sup> and 14<sup>th</sup> Amendments and explained that Clear Sky had no constitutionally protected property interest in benefits described in the Uniform Act. Similarly, the court held that the plaintiff failed to plead specific facts sufficient to support Clear Sky's claim of an equal protection violation under the 14<sup>th</sup> Amendment and that the factual allegations in the complaint tended to show that defendants had a rational basis for their actions. Claims brought against the State and city defendants under 42 U.S.C. §§ 1983, 1985, and 1988, and Virginia common law principles of breach of contract and equitable estoppel were also dismissed for failure to state a claim upon which relief can be granted.

### **Court Rules in Favor of Plaintiffs in Idaho Lawsuit**

On February 7, 2013, one day after oral argument on the merits, the U.S. District Court for the District of Idaho granted in part and denied part federal defendants' motion for summary judgment in Idaho Rivers United v. U.S. Forest Service, et al., 2013 WL 474851 (D. Idaho Feb. 7, 2013), which involved the Idaho Transportation Department's (ITD) decision to grant permits to Exxon Mobil

and its Canadian subsidiary to transport very large and heavy loads across Idaho over U.S. Highway 12. In its decision, the court first held that the case was moot for purposes of granting plaintiffs' request for an injunction, as all the oversize loads had already made the journey to Canada. The court also held that since the federal defendants had made no decision regarding the oversize loads, there had been no "final agency action" to review under the APA. However, the court went on to deny federal defendants' motion "to the extent it seeks dismissal or summary judgment on the claims that [they] erroneously concluded that they lacked jurisdiction to review ITD's approval of the mega-load permits" and granted plaintiffs' motion on the same point.

The court's decision turned in large part on its interpretation of one Ninth Circuit case, Montana Air Chapter No. 29 v. Fair Labor Relations Authority, 898 F.2d 753 (9th Cir. 1990), which allowed federal court review of an agency's decision that it lacked jurisdiction or authority to take enforcement action. federal defendants argued that Montana Air was overruled by the Supreme Court in Norton v. S. Utah Wilderness Alliance, 542 U.S. 55 (2004) (SUWA), which held that a federal court may not enter an order compelling compliance by an agency, absent a discrete agency obligation to act. The Court distinguished Montana Air on the grounds that it involved "a denial" whereas SUWA involved "a failure to act."

For USDOT, this case began on June 15, 2011, when plaintiff Idaho Rivers United, a regional conservation organization, filed an Amended Complaint adding FHWA to litigation originally brought against the U.S. Forest Service (USFS). The case arose from a private venture under which

Exxon Mobil and its Canadian subsidiary, Imperial Oil, would transfer oversize loads, labeled "mega-loads" due to extreme size and weight (in excess of 500,000 pounds), of oil extraction and mining equipment from barges docked at the Port of Lewiston, Idaho, to commercial trucks for transport on US Route 12 (US 12) in Idaho. The oversize loads would continue through Montana and then travel north to the Kearsarge Oil Sands in Canada.

The Amended Complaint included two allegations against FHWA: 1) that the agency breached its duty to enforce the terms of the highway easement deed for US 12, which was conveyed to the ITD by the USFS via federal land transfer; and 2) that FHWA violated its mandatory duties to ensure that federal projects are properly maintained in accordance with a Corridor Management Plan funded by a FHWA grant pursuant to 23 U.S.C. § 162 and FHWA's National Scenic Byways Interim Management Policy.

The ITD permitted approximately 200 oversized loads for transport along US 12. Approval by FHWA is not required for this use of US 12, per 23 U.S.C. § 127 and 23 C.F.R. Part 658. Currently, there are no federal-aid funded projects along US 12 in Idaho. FHWA recently learned that Exxon Mobil completed the transport of its oversized loads at the end of February 2012 by breaking them down and transporting via an alternate route.

On March 9, 2012, the Court dismissed those counts alleging FHWA had a mandatory duty under 23 U.S.C. § 116(c) to protect the US 12 corridor, but left standing those counts alleging FHWA had "erroneously concluded [it] lacked the [discretionary] authority to take enforcement action" against the ITD. The



USFS, which was sued under the Wild and Scenic Rivers Act and USFS regulations, also received a split ruling based on the same distinction between those counts alleging a “mandatory” agency duty to act and those alleging an erroneous agency conclusion that it lacked authority to take enforcement action.

The decision does not have an immediate effect on FHWA, as it does not compel action by the agency.

### **Court Dismisses Personal Capacity Claims against Secretary LaHood and FHWA Administrator Mendez**

On October 15, 2012, pro se plaintiff Ray Elbert Parker filed suit against Secretary LaHood, Administrator Mendez, William Euille, Mayor of the City of Alexandria, and Gregory Whirley, Commissioner of the Virginia Department of Transportation (VDOT) in their individual capacities. The case arises out of VDOT’s acquisition of the Hunting Towers Complex in 2001 by eminent domain as part of the Woodrow Wilson Bridge Project. The Hunting Towers Complex consisted of three buildings, one of which was demolished in connection with the Woodrow Wilson Bridge Project, which has been completed. VDOT is currently in the process of selling the two remaining buildings. The complaint alleged “reverse discrimination, denial of individual and class constitutional and civil rights, and gentrification of the City of Alexandria by Federal and Local Government and by VDOT” in violation of the Constitution and various statutes, including 42 U.S.C. §§ 1983 and 4601. The suit further alleged that the proposed sale of Hunting Towers would result in evictions or rent increases that would force

current residents to relocate, thus creating an obligation under the Uniform Relocation Assistance and Real Property Acquisition Policies Act to provide prospective relocation assistance and payments. The plaintiff sought \$2,000,000 in punitive damages, prospective damages, relocation assistance, as well as declaratory and injunctive relief preventing the VDOT sale of Hunting Towers.

On January 31, 2013, the U.S. District Court for the Eastern District of Virginia granted the federal defendant’s motion to dismiss the case in Parker v. Euille, et al., 2013 WL 428455 (E.D. Va. Jan. 31, 2013). The court found that Mr. Parker lacked standing on the basis that he suffered no concrete or actual injuries to date from the prospective sale of Hunting Towers or as a result of the Woodrow Wilson Bridge project. Mr. Parker still resides in Hunting Towers and has neither been displaced nor evicted; therefore, his alleged injuries are prospective and conditional on future events that may never transpire. In addition, the court held that no causal connection exists between the alleged injury and any personal acts undertaken by any of the defendants. Lastly, the court determined that Mr. Parker’s claim was not ripe because VDOT has not sold Hunting Towers and there is no evidence that plaintiff will be subject to the injuries he claimed.

### **Settlement in Case Challenging Caltrans Approval of Los Angeles Bikeway**

Following a mediation session in Los Angeles on September 25, 2012, the parties reached a tentative settlement in Samuels, et al. v. FHWA, et al. (C.D. Cal. No. 12-04287). This settlement was

finalized in an agreement signed by the plaintiffs and the City of Los Angeles on October 31, 2012. The litigation involved the federally assisted, locally sponsored Exposition Boulevard Bikeway Project (Bikeway) to be located alongside a new light rail line in Los Angeles. The California Department of Transportation (Caltrans) issued a CE for the project under assignment, per 23 USC § 326. The project sponsor is the City of Los Angeles. FHWA, Caltrans, the City of Los Angeles, and the LA County Metropolitan Transportation Authority were all named as defendants in the lawsuit, which was brought by six homeowners whose properties abut the proposed alignment of the path.

The settlement included two main points: 1) an agreement between plaintiffs and the City, to be finalized after local public outreach by the City, as to the location of access points to the bike path and 2) the provision by the City of sound wall for all of plaintiffs' properties (eight parcels in all, all in a row). These terms would be in the form of a private settlement agreement between plaintiffs and the City enforceable under State contract law in State court. The agreement included a provision under which plaintiffs agreed to dismiss the lawsuit with prejudice as to all parties. There was no provision regarding attorneys' fees.

This lawsuit had alleged violations of NEPA and the APA arising from the Bikeway, which would run for approximately four miles between Los Angeles and Santa Monica, California. In their complaint, plaintiffs alleged that FHWA and Caltrans violated NEPA and the APA by "deciding to fund" the Bikeway and by not issuing an environmental assessment or

environmental impact statement for the project.

This was the second lawsuit filed against this project in the past two years. In 2010, most of the same plaintiffs brought suit against FHWA and Caltrans, but that Complaint was dismissed after Caltrans withdrew the NEPA CE it had issued under assignment.

### **Partial Settlement Reached in Challenge to Ohio River Bridges Project**

On January 4, 2013, two plaintiffs in The National Trust for Historic Preservation, et. al. v. FHWA, et. al. (W.D. Ky. No. 10-00007) entered into a settlement agreement with the Indiana Department of Transportation and the Kentucky Transportation Cabinet. Plaintiffs National Trust for Historic Preservation and River Fields, Inc., filed a joint motion with the state defendants to dismiss the case with prejudice, which was granted by the U.S. District Court for the Western District of Kentucky. The last remaining plaintiff, Coalition for the Advancement of Regional Transportation (CART), and FHWA were not parties to the settlement, though FHWA did not object to the filing of the joint motion to dismiss.

This lawsuit was initially filed in September 2009 in the District of Columbia by the National Trust for Historic Preservation and River Fields, Inc., a Louisville preservation advocacy group in opposition to the Louisville Southern Indiana Ohio River Bridge Project. In January 2010, the case was transferred to the Kentucky District Court. The States of Kentucky and Indiana were allowed to intervene as defendants in the

suit in September 2011. In March 2011, the litigation was stayed by the court pending completion of a Supplemental Final Environmental Impact Statement (SFEIS) as requested by all parties. The SFEIS was completed on April 20, 2012, and FHWA issued the Revised Record of Decision (RROD) on June 20.

Briefing with CART continues in the case, with the briefing scheduled to conclude in April 2013. In its motion for summary judgment, filed in early January, CART argued that defendants improperly joined the work on two bridges to create a single megaproject. CART claims the bridges should have been treated as separate projects because they had independent utility, impacted separate local environment systems, and addressed different factors of Purpose and Need. They argue that the result is a procedural deficiency that invalidates the NEPA study. CART failed to address several claims raised in its complaint.

The states and FHWA filed their responses in opposition and cross motions for summary judgment in February 2013. FHWA first argued that CART lacks standing because the injury alleged is too vague, is not connected to FHWA's approval of the RROD, and the harm cannot be redressed by the lawsuit. Next, the agency argued that the scope of the SFEIS analysis complied with NEPA because consideration of a transit alternative was not required and work on the two bridges are connected actions that should be analyzed in a single NEPA process. Finally, FHWA addressed CART's claim that the project violates the Federal-Aid Highway Act. FHWA argued that tolling was permissible because the bridge will not be designated as part of the Interstate System and because 23 U.S.C. §

129(a)(1)(C) permits tolling in this instance.

CART is seeking to amend its complaint, which all defendants have opposed. No hearing date has been set yet, and the Judge expressed during a February 15 status conference a desire to have the case concluded by May 2013.

### **State and University Defendants Dismissed in Tennessee Megaproject Project Case**

On April 8, 2011, Gary Bullwinkel, a pro se plaintiff, filed a complaint for Temporary Restraining Order, Preliminary Injunction, and Permanent Injunction against U.S. Department of Energy (DOE), FHWA, USDOT, Tennessee Valley Authority, U.S. Army Corps of Engineers, the State of Tennessee, the University of Tennessee, and Chickasaw Electric Cooperative. Bullwinkel v. U.S. Department of Energy, et al., 2013 WL 392466 (W.D. Tenn. Jan. 31, 2013). Plaintiff is a resident and landowner in Fayette County, Tennessee, who seeks to halt the construction of the proposed West Tennessee Megaproject, an industrial development project, and the West Tennessee Solar Farm/Welcome Center and associated transmission lines. The projects lie in Fayette and Haywood Counties in western Tennessee. FHWA's limited involvement in this project includes approval of a categorical exclusion under NEPA of a welcome center, parking area, and interstate access off of Interstate 40 in Haywood County between Jackson and Memphis, Tennessee, for the solar energy farm. The lawsuit claims violations by the federal agencies of NEPA and Title VI.

Since the filing of his lawsuit, plaintiff has made numerous attempts to request that a preliminary injunction be put into place, that the administrative record be supplemented, and that his complaint be amended. With the exception of amending his complaint once, all of his requests have been denied.

On January 31, 2013, the U.S. District Court for the Western District of Tennessee granted Motions to Dismiss filed by the State of Tennessee, the State Official Defendants, and the University of Tennessee Defendants. DOE and FHWA are the last remaining defendants in the litigation. There are pending motions to dismiss filed by both DOE and FHWA that have not yet been ruled upon.

### **Briefing Completed on Motion to Dismiss NEPA Challenge to Utah Highway Project**

On February 19, 2013, the FHWA filed its final brief supporting its Motion to Dismiss the complaint in this NEPA action in the U.S. District Court for the District of Utah. The original motion was filed on November 26, 2012. Plaintiff in Moyle Petroleum Co. v. LaHood, et al. (D. Utah No. 12-901) alleges multiple violations of NEPA resulting from the Bangerter 600 West Project located in Draper, Utah, south of Salt Lake City. The project will reduce congestion and improve safety on the exit ramps from Interstate 15 onto Bangerter Highway and at the intersection of 200 West and Bangerter Highway in Draper, the main east-west road serving the southern end of the Salt Lake Valley west of I-15, providing an important link between I-15 and I-80. The FHWA Utah Division issued a Record of Decision on March 7, 2012.

In its motion to dismiss, FHWA argued that plaintiff, which operates a gas station in the project corridor, lacked standing to sue under NEPA as the harms it alleged were purely economic and therefore outside the “zone of interests” protected by the statute. The Utah Department of Transportation, also named as a defendant, filed a brief joining FHWA’s motion.

### **Court Grants Plaintiffs’ Motion for Leave to File a Second Amended Complaint in Detroit River Bridge Case**

On February 11, 2013, the U.S. District Court for the District of Columbia granted the plaintiffs’ Motion to file a Second Amended Complaint in Detroit International Bridge Company, et al. v. U.S. Coast Guard, et al. (D.D.C. No. 10-476). The plaintiffs, the owners of the Ambassador Bridge, the only bridge connecting Detroit, Michigan, and Windsor, Canada, are challenging the proposed New International Trade Crossing (NITC) Bridge connecting the two cities.

FHWA had been one of several co-defendants in the case until November 2011, when plaintiffs voluntarily dismissed their case on mootness grounds as to all defendants except the U.S. Coast Guard. The plaintiffs have sought Coast Guard approval for their own new bridge (the New Span) to be built adjacent to the Ambassador Bridge. The plaintiffs dismissed their claims because they believed that the Michigan legislature had taken action that prohibited the NITC from proceeding, thereby rendering their claims moot. However, as a result of a 2012 Crossing Agreement between the Governor of Michigan, Michigan DOT, the Michigan

Strategic Fund, and the Government of Canada, and because the state department has commenced its review of the presidential Permit application for the NITC, the plaintiffs assert in their motion that their claims against FHWA and the other defendants are no longer moot.

The plaintiffs seek declaratory and injunctive relief against the defendants for violating their alleged franchise rights to construct a new bridge across the Detroit River by proposing the NITC. Plaintiffs believe that they are the only entities that have authority to construct a bridge in the area pursuant to the Boundary Waters Treaty of 1909. Plaintiffs also argue that the defendants have violated their right to build a new span by: (1) delaying approvals needed to build the New Span; (2) accelerating approvals for the NITC; and (3) approving the NITC without a demonstrated need over and above the New Span. The plaintiffs further allege that the defendants have violated the Takings Clause of the Fifth Amendment by favoring the NITC over the New Span without just compensation. Finally, plaintiffs allege that the State Department has been improperly delegated the authority to approve the Crossing Agreement in violation of rights granted to the plaintiffs by an Act of Congress.

### **Scenic America Challenges FHWA Guidance on Commercial Electronic Variable Signs**

Scenic America, a national nonprofit organization concerned with scenic conservation, filed suit on January 23, 2013, over the FHWA's 2007 guidance on commercial electronic variable message signs (CEVMS). In Scenic America Inc. v.

USDOT, et al. (D.D.C. No. 13-93), Scenic America alleges that the guidance is de facto rulemaking and that FHWA did not follow the required rulemaking process pursuant to the Administrative Procedure Act (APA). In addition, the plaintiff argues that the FHWA violated the Highway Beautification Act (HBA) and its HBA regulations.

The HBA at 23 U.S.C. § 131(d) requires each State to sign an agreement with the Secretary that establishes the size, lighting and spacing standards for conforming signs (i.e., legal off-premise advertising signs erected in commercial or industrial areas). Most such agreements, executed in the late 1960's and early 1970's, included a provision dealing with moving, flashing, or intermittent lighting on conforming billboards. The FHWA issued its *Guidance on Off-Premise Changeable Message Signs* in September 2007. That guidance stated that a Division Administrator could allow a State to permit CEVMS as conforming signs if the signs met several criteria.

Scenic America contends that the 2007 guidance violates the conditions of the Federal-State agreements because many agreements have a prohibition against moving or intermittent lighting on conforming signs. The plaintiff contends that the FHWA should have undertaken notice and comment rulemaking pursuant to the APA before it issued its CEVMS guidance. The plaintiff argues that the FHWA violated the HBA by not amending the individual Federal-State agreements to allow CEVMS within a State. Finally, Scenic America maintains that the CEVMS lighting standards are not consistent with customary use, which was established at the time of the execution of the Federal-



State agreement, thereby violating the HBA.

## **Federal Motor Carrier Safety Administration**

### **Ninth Circuit Rejects Challenge to FMCSA Unsatisfactory Safety Rating**

On February 7, 2013, the U.S. Court of Appeals for the Ninth Circuit dismissed in part and denied in part a challenge by Multistar Industries, Inc., d/b/a Multifrost, Inc., (Multistar) to FMCSA's assignment to Multistar of an unsatisfactory safety rating in Multistar Industries, Inc. v. USDOT, et al., 2013 WL 452874 (9th Cir. 2013). Multistar, a for-hire motor carrier engaged in the business of transporting hazardous materials, had filed a motion for interlocutory injunctive relief to enjoin FMCSA from implementing a proposed unsatisfactory safety rating and for a temporary stay of FMCSA's order to cease operations. The court granted Multistar's motion for a temporary stay pending the court's further ruling.

Multistar asserted two principal challenges before the appeals court. First, Multistar argued FMCSA misapplied certain Hazardous Material Regulations as to two of the violations listed in Multistar's compliance review. Second, Multistar argued FMCSA acted arbitrarily or capriciously and violated Multistar's due process rights by denying Multistar's petition for administrative review of the proposed safety rating without providing a substantive response to the challenged violations.

In a unanimous opinion, the court dismissed Multistar's first challenge and denied Multistar's second challenge. As to the first challenge, the court found FMCSA did not rely on or otherwise incorporate the contested violations in issuing the unsatisfactory safety rating, and, therefore, no final agency action existed as to these violations. The court dismissed Multistar's substantive claims because the Hobbs Act and Administrative Procedure Act limits its review to final agency actions.

The court denied Multistar's second challenge, finding that Multistar did not have a cognizable due process claim. FMCSA's assignment of an unsatisfactory safety rating to Multistar was not based on the violations contested in Multistar's petition for administrative review. Whether FMCSA addressed the merits of Multistar's petition, therefore, had no bearing on the deprivation of Multistar's property interests, and FMCSA was not obligated under 49 C.F.R. § 385.15 to address the merits of an allegation that would not affect the agency's final action. Finally, the court found that Multistar could not claim that denial of its administrative review petition deprived the carrier of a forum to address the contested violations. If and when the violations became the basis for an adverse order, Multistar could seek an upgrade of its safety rating under 49 C.F.R. § 385.17(a). On February 13, the court lifted its temporary stay, and Multistar was placed out-of-service.

### **Ninth Circuit Grants FMCSA's Motion to Dismiss Petition for Review**

On December 14, 2012, the U.S. Court of Appeals for the Ninth Circuit dismissed the

petition for review and motion for a temporary stay in Eldar Enterprises, Inc., et. al v. USDOT, et al., No. 12-73092 (9th Cir. Dec. 14, 2012). Eldar Enterprises, Inc., and Anything Anywhere, Inc., two separate for-hire moving companies, had jointly filed a petition for review and motion for a temporary stay of two FMCSA Final Agency Orders issued in separate civil penalty cases, each of which imposed a \$25,000 civil penalty for transporting household goods in interstate commerce without required operating authority registration. The court dismissed the case for lack of jurisdiction under 49 U.S.C. § 521(b)(9) and 49 C.F.R. § 386.67(a), which provide a 30-day time limit for filing a petition for review of an FMCSA final order. Petitioners did not file their petition for review until 64 days after FMCSA issued the final orders, and therefore their petition was untimely.

### **OOIDA Challenges FMCSA Administrator Letter as Final Agency Action**

On December 21, 2012, the Owner-Operator Independent Driver Association (OOIDA) filed a petition for review in Owner-Operator Independent Driver Association v. Ferro, et al. (D.C. Cir. No. 12-1483). OOIDA challenges a letter from FMCSA Administrator Ferro dated October 23, 2012, which was sent in response to OOIDA's June 12, 2012, letter requesting the Agency's position on matters related to the recently-amended Fatigue Out of Service Criteria (OOSC) issued April 2012 by the Commercial Vehicle Safety Alliance (CVSA). OOIDA alleges that the letter constitutes a "new rule or new interpretation of an existing rule, established without notice and comment, that materially changes what had

historically been the agency's policy" on fatigued drivers.

On February 11, 2013, the Department of Justice, on behalf of FMCSA, filed a motion to dismiss, arguing that the letter does not constitute a new rule, interpretation, or final agency action under the Hobbs Act and that OOIDA is attempting to challenge the CVSA criteria as a rulemaking, an issue already resolved by the D.C. Circuit in the case of National Tank Truck Carriers, Inc. v. FHWA, 170 F.3d 203 (D.C. Cir. 1999), which dismissed a similar challenge arguing that the CVSA OOSC were rules improperly issued absent notice and comment. On February 25, OOIDA filed its opposition to the motion to dismiss and a cross-motion for summary reversal of the letter. OOIDA argues that the agency's position on fatigue was established in agency hours of service rulemakings that rejected application of performance-based fatigue indicators as under the hours of service rule.

### **Oral Arguments Held in Challenges to Mexican Long-Haul Trucking Pilot Program**

On December 6, 2012, a panel of the U.S. Court of Appeals for the District of Columbia Circuit heard oral arguments in two separate petitions for review of FMCSA's Mexican Long-haul Trucking Pilot Program: Owner-Operator Independent Driver Association v. USDOT (D.C. Cir. No. 11-1251) and International Brotherhood of Teamsters, et al. v. USDOT (D.C. Cir. No. 11-1444). The court had ordered that the cases be argued on the same day before the same panel, but did not consolidate them for briefing or argument. The panel consisted of Judges Henderson, Rogers, and Kavanaugh.

Both the International Brotherhood of Teamsters (IBT) and the Owner-Operator Independent Driver Association (OOIDA) challenged FMCSA's authority and compliance with statutory requirements in the agency's implementation of the program. The IBT petitioners alleged that FMCSA's decision to proceed with the program was arbitrary and capricious because (1) FMCSA allows Mexican commercial motor vehicles to enter the United States when they do not comply with certification requirements in the Motor Vehicle Safety Act, (2) the program is not designed to produce statistically valid findings, (3) FMCSA's determination that acceptance of Mexican vision standards for Mexican drivers will achieve an equivalent level of safety is unsupported by the record and contrary to the Agency's long-standing position, (4) the program improperly grants credit to Mexico-domiciled carriers that participated in the prior demonstration project, and (5) the program does not ensure that U.S. motor carriers will receive reciprocal access to Mexican roadways. Additionally, IBT argued that FMCSA failed to adhere to applicable NEPA requirements during the planning of the pilot program and before the decision to proceed with the program.

OOIDA challenged FMCSA's authority to (1) issue operating authority to Mexican carriers under existing statutory standards, (2) approve commercial motor vehicle operation in the United States by drivers holding commercial licenses not issued by a U.S. state, (3) accept medical certification for drivers that had not been issued by medical examiners listed on the FMCSA registry, (4) conduct the pilot program allegedly without making equivalence determinations under 49 U.S.C. § 31315(b), (5) allegedly exempt Mexican carriers from DOT drug and

alcohol testing requirements, and (6) proceed with the pilot program when FMCSA allegedly has not determined the equivalent level of safety provided by certain Mexican laws.

The United States' briefs challenged the standing of both the IBT petitioners and OOIDA. In the IBT case, the government also argued that the pilot program's requirements are consistent with all motor carrier safety statutes and regulations, including the Federal Motor Vehicle Safety Standards and the vision testing standards, that credit is properly being given to prior demonstration project participants, that the pilot program is designed to yield statistical valid results, and that Mexico does grant comparable authority to U.S. carriers. The government also argued that FMCSA complied with NEPA when it properly limited its NEPA review, reasonably declined to study the petitioner's proposed alternatives, and conducted a timely NEPA review.

In response to OOIDA, the government additionally argued (1) that the pilot program requires Mexico-domiciled carriers to comply with all existing laws and regulations governing their operations outside the commercial zones, plus additional requirements unique to the program, (2) that the pilot program's requirements are consistent with all motor carrier safety statutes and regulations, including those controlling commercial driver's licenses, medical testing, and drug specimen collection, and (3) that petitioner's remaining arguments lack merit.

During the IBT argument, the court largely focused on the issue of standing. The government argued that petitioners had not made a showing of increased risk of injury

to an identifiable member and that their economic and competitive standing arguments were equally flawed because petitioners did not show that IBT members compete with pilot participants; and lastly, even if such harm exists, it must be attributed to the political branches committed to opening the border under the North American Free Trade Agreement (NAFTA), not to DOT or FMCSA. Judge Rogers asked numerous questions concerning the failure of IBT to allege a particularized injury to any IBT driver or assert that any IBT driver competed directly with the Mexican carriers. She closely questioned IBT on how it was alleging a particularized injury and implied that travelling on the same roads as Mexico-domiciled trucks may not be sufficient.

Judge Kavanaugh inquired at length into the FMVSS standards and certificate requirement under the Motor Carrier Safety Act for trucks “imported” or “introduced into interstate commerce” in the United States. He inquired into the meaning of “import” and how that meaning was achieved and the meaning of “introduce into interstate commerce.” The government argued that “import” applied to goods (including trucks) that are imported for sale or long-term use in the United States and did not apply to Mexican (or Canadian) trucks crossing the border to deliver or pick up goods in the United States.

OOIDA’s counsel argued that under the NAFTA, the United States must provide national treatment by requiring Mexican carriers and drivers to comply with all U.S. regulations. He argued that the agency does not have statutory authority to issue operating authority under section 13902 because Mexican carriers do not meet the

fit, willing, and able standard, which requires compliance with all U.S. laws and motor carrier safety regulations. Judge Kavanaugh appeared interested in OOIDA’s argument that the single licensing scheme enacted in 1998 required commercial drivers to have only one license, issued by a U.S. state, and not by Mexico or Canada. Also discussed were the issues of whether Congress’ intent in 49 U.S.C. § 31302 was to exclude Canadian and Mexican drivers and whether this statute abrogated the 1991 MOU with both Mexico and Canada.

The government argued that Congress, when abrogating an international agreement, must understand the consequences and articulate a clear and unambiguous understanding of its intent to abrogate an international agreement. Moreover, laws governing the operation of long-haul Mexican motor carriers in the United States that were enacted after 1998 indicate that Congress recognized the validity of Mexico’s commercial driver’s license in the United States. Government counsel emphasized to the court that OOIDA’s reading of the statute would result in closing the border to all Mexican and Canadian commercial drivers, which would have an enormous impact on commerce with these neighboring countries.

### **D.C. Circuit Hears Oral Arguments in Hours of Service Challenges**

On March 15, 2013, the U.S. Court of Appeals for the District of Columbia Circuit heard oral arguments in American Trucking Associations, Inc. v. FMCSA and Public Citizen, et al v. FMCSA (D.C. Cir. Nos. 12-1092 & 12-1113), consolidated

cases challenging various provisions of FMCSA's December 2011 driver hours-of-service rule. ATA intervened in the Public Citizen suit in support of FMCSA.

In Public Citizen's petition for review, Public Citizen and a group of truck safety advocates (Safety Advocates) challenge the agency's support for the 11-hour driving period, the 34-hour restart (which allows drivers who have reached their weekly driving limit to drive again after 34 hours), and the agency's alleged failure to comply with Congress's mandate that the agency "ensure . . . the operation of commercial motor vehicles does not have a deleterious effect on the physical condition of the operators." ATA challenged the new requirement that the 34-hour restart period be used no more than one time per week and include two night-time periods. ATA also contests the 30-minute break requirement.

The government challenges the standing of all the petitioners to seek review of the rule. On the merits, the government argues that FMCSA reasonably chose to limit the 34-hour restart requirement, retain the 11-hour daily driving limit, and impose an off-duty break requirement. The government also argues that Safety Advocates waived their objections to the 34-hour rule by not raising them during the rulemaking process. Lastly, the government argues that given the extremely technical nature of the agency's analysis and the level of explanation given in the rulemaking documents, the court should give deference to FMCSA's determinations in the final rule.

In the argument, questioning by Judges Brown, Griffith, and Randolph focused on the Safety Advocates standing and their possible waiver of their challenge to the 34-

hour rule, and on whether the agency choices challenged by ATA were within the bounds of agency discretion under the deferential standard of review that the court must apply.

### **Briefs Filed in OOIDA Challenge to FMCSA National Registry Rule**

On October 5, 2012, Owner-Operator Independent Driver Association (OOIDA) filed its opening brief in Owner-Operator Independent Driver Association v. USDOT, et al. (D.C. Cir. No. 12-1264), a suit challenging FMCSA's decision not to require foreign commercial motor vehicle operators entering the United States with commercial licenses issued in Mexico and Canada to hold a medical certificate from a certified examiner listed on the National Registry of Certified Medical Examiners.

In its opening brief, OOIDA argues that (1) respondents have no authority to exempt Mexican drivers from the requirement to have a current and valid medical certificate issued by an individual listed on the National Registry of Medical Examiners, (2) respondents' statutory responsibilities are not circumscribed by prior international agreements, (3) to the extent that such pre-existing international agreements conflict with respondents' statutory responsibilities respecting medical certification of drivers, the statutory responsibilities abrogate any obligations created by the agreements, and (4) there is no support for the proposition that Congress intended to exempt Canadian and Mexican drivers from the statutory requirements for driver medical certificates. OOIDA cited its challenge to FMCSA's United States-Mexico Cross-Border Long-Haul Trucking Pilot Program as a related case, claiming that both cases were



challenging Respondents' determination to permanently exempt both Mexico and Canada-domiciled drivers from the medical certification requirements that apply to drivers licensed in the United States. The court denied OOIDA's motion seeking to consolidate this challenge with the pending cases that challenge FMCSA's Mexican pilot program.

The government's brief in response, filed on November 19, contended that Congress must clearly manifest its intent to abrogate an international agreement with a subsequent statute. Neither the statute requiring the National Registry nor its legislative history manifests any intent to abrogate the pre-existing agreements with Canada and Mexico.

The case has been scheduled for oral argument on May 6, 2013, before Chief Judge Garland, Circuit Judge Brown, and Senior Circuit Judge Sentelle.

### **Briefs Filed in Trucking Groups' Challenge to FMCSA's CSA Program**

On December 4, 2012, the Alliance for Safe, Efficient and Competitive Truck Transportation (ASECTT), along with four other trade associations and twelve independent companies, filed the opening brief in Alliance for Safe, Efficient and Competitive Truck Transportation, et al. v. FMCSA, et al. (D.C. Cir. No. 12-1305), a petition for review of documents posted on FMCSA's website regarding its Compliance, Safety, Accountability program (CSA) that provided information about the CSA and the Safety Measurement System (SMS). In their brief, petitioners characterize a PowerPoint presentation and various informational handouts as

constituting new rules, regulations, and final orders that were issued without notice and comment. Petitioners argue that the documents constitute new rules because they contain policy statements that reflect a significant change in FMCSA's policy regarding CSA. Specifically, petitioners assert that shippers, brokers, and others are being urged to utilize CSA, and in particular the SMS data, when making business decisions. Petitioners also assert that the posted materials represent new standards and constitute a de facto procedure for issuing a safety rating, which was not established pursuant to notice and comment rulemaking. Petitioners further contend the documents are final orders and final agency action because they purportedly contain statements wherein the agency equates SMS data and methodology as a "new, co-equal element of a safety fitness determination." Petitioners believe this is a departure from the agency's established policy that SMS scores are not a safety rating, which is therefore subject to review as final action. Finally, petitioners argue that FMCSA abdicated its statutory obligation to provide uniform safety fitness standards, thereby exposing shippers to a patch-work of state tort law and placing the burden of assessing safety on shippers.

FMCSA filed its response brief on January 14, 2013, arguing the court lacks appellate jurisdiction because the PowerPoint presentation and various handouts do not change or interpret prior policy, impose a legal obligation, deny a legal right, or fix a legal relationship. Nowhere in the challenged documents does FMCSA assert that SMS data is equal to a safety rating. On the contrary, FMCSA provided clear direction in the documents that SMS data is not a safety rating. Additionally, FMCSA's suggestion that shippers, brokers, and others in industry may find SMS data

useful when making business decisions is not a policy or new position for the agency. For nearly a decade, FMCSA recommended that public users could access SafeStat, the safety data system predating CSA/SMS, and use the information to make business decisions. Accordingly, because the documents do not amount to a rule, regulation, final order, or change in agency policy subject to rulemaking, the documents are not subject to judicial review.

Oral argument has not yet been scheduled.

## **Federal Railroad Administration**

### **D.C. Circuit Hears Oral Argument in AAR's Metrics and Standards Appeal**

On February 19, 2013, the U.S. Court of Appeals for the District of Columbia Circuit heard oral argument in Association of American Railroads v. USDOT (D.C. Cir. No. 12-5204), an appeal of a decision of the U.S. District Court for the District of Columbia upholding the constitutionality of Section 207 of The Passenger Railroad Investment and Improvement Act of 2008 (PRIIA), which required FRA and Amtrak to jointly develop metrics and standards to evaluate the performance and service quality of Amtrak's intercity passenger trains. AAR alleged that Section 207 violated the Constitution's Due Process Clause and non-delegation doctrine. The district court found neither claim to be meritorious.

In its briefing and argument to the D.C. Circuit, AAR argued that Congress unconstitutionally delegated lawmaking

authority to Amtrak, a private entity, when it gave Amtrak joint responsibility to issue the Metrics and Standards. AAR's claim was based in part on the fact that when Congress created Amtrak, it declared that Amtrak was not a department, agency or instrumentality of the government. AAR contended that Amtrak's role in developing the Metrics and Standards violates the Due Process Clause because Amtrak is a private entity that has a financial interest in the new standards, thereby contaminating the regulatory process with the potential for bias.

FRA argued, in response, that the statute does not violate the non-delegation doctrine because: (1) FRA's role as co-author of the metrics and standards ensured more than sufficient government involvement and oversight; (2) there is pervasive federal involvement and oversight in Amtrak's activities; and (3) the Surface Transportation Board (STB) cannot impose relief against a railroad for failing to satisfy the metrics and standards. In addition, FRA argued that the statute readily withstands scrutiny under the relaxed Due Process Clause standard for rulemakings, regardless of Amtrak's public or private status, for substantially the same reasons as the non-delegation claim.

The D.C. Circuit panel, comprised of Judge Brown and Senior Judges Williams and Sentelle, focused most of their questioning on the non-delegation doctrine issue and the private versus governmental attributes of Amtrak.

### **Briefs Filed in The Chlorine Institute's Challenge to FRA's Positive Train Control Final Rule**

On October 29, 2012, The Chlorine Institute (CI) filed its opening brief in the U.S. Court of Appeals for the District of Columbia Circuit in The Chlorine Institute, Inc. v. FRA, et al. (D.C. Cir. No. 12-1298). CI, whose members include shippers of chlorine by rail, seeks review of FRA's final rule relating to Positive Train Control Systems (PTC Final Rule). The Rail Safety Improvement Act of 2008 (RSIA) mandates the nationwide implementation of positive train control (PTC) systems - systems designed to prevent train-to-train collisions, over-speed derailments, incursions into established work zones and the movement of a train through a switch left in the wrong position - by Class I railroads and railroads providing intercity or commuter rail passenger transportation by December 31, 2015.

In its opening brief, CI argued that FRA was arbitrary and capricious when it eliminated the two qualifying test provisions in the PTC Final Rule. Second, CI argued that when FRA eliminated the two-qualifying test provisions in the PTC Final Rule, it disregarded a statutory provision of the RSIA, which requires that any PTC implementation plan (PTCIP) provide for the implementation of PTC systems in a manner that addresses areas of greater risk before areas of lesser risk (section 20157(a)(2)). Finally, CI claimed that FRA acted in an arbitrary and capricious manner by eliminating the 2008 baseline provision for determining the rail routes on which PTC must be installed.

On November 28, FRA filed its response brief, challenging CI's arguments on multiple grounds. First, FRA asserted that CI lacked standing to challenge the PTC Final Rule because it failed to prove that any of its members suffered an injury in fact. Second, FRA argued that even if CI has standing, it waived its argument that the PTC Final Rule conflicts with section 20157(a)(2) of the RSIA because that argument was not raised during the rulemaking proceedings before FRA. FRA also argued that the elimination of the two-qualifying tests did not violate section 20157(a)(2) of the RSIA because nothing in the provision requires that FRA employ a particular methodology when assessing the merits of a PTCIP. Finally, FRA maintained that its decisions to abolish the two-qualifying tests and to consider cost factors were rationally based on several grounds and were therefore not arbitrary and capricious.

Oral argument before Judges Henderson, Brown, and Kavanaugh is scheduled for April 4.

### **Federal Transit Administration**

#### **Court Rules on Cross-Motions for Summary Judgment in Honolulu Rail Transit Project Lawsuit, Plaintiffs Appeal**

On November 1, 2012, the U.S. District Court for the District of Hawaii issued its order on cross-motions for summary judgment in Honolulutraffic.com, et al. v. FTA, et al., 2012 WL 5386595 (D. Haw. Nov. 1, 2012), a lawsuit challenging the Record of Decision (ROD) FTA issued for the Honolulu Rail Transit Project (Project),

a 20-mile, elevated, rapid rail system running between downtown Honolulu and the western suburb of Kapolei. In its order, the court ruled in favor of FTA and the City and County of Honolulu (City), the Project sponsor, on the vast majority of plaintiffs' claims. The court denied all of plaintiffs' NEPA and National Historic Preservation Act challenges. The court held, however, that FTA and the City violated Section 4(f) of the Department of Transportation Act by (1) failing to make adequate efforts to identify all above-ground traditional cultural properties before issuing the ROD, (2) making a "no use" determination without adequately addressing why claimed alterations to Mother Waldron Park's historic setting did not amount to a constructive use, and (3) failing to include an analysis in the Final Environmental Impact Statement of whether the Beretania Tunnel alternative was prudent and feasible.

The court held a remedies hearing on December 12, and on December 27 issued a judgment and partial injunction remanding the matter to FTA to comply with the November 1 order, but without vacating the ROD. The court also enjoined defendants from construction and real estate acquisition activities in the last phase of the Project while the additional NEPA work is completed, but did not enjoin activities in the other phases of the Project. The injunction on the last phase of the Project will be lifted once FTA and the City complete a Supplemental EIS and issue a NEPA determination. To that end, FTA and the City are now working to complete additional environmental evaluations required by the November 1 order.

On January 11, 2013, plaintiffs filed a Notice of Appeal indicating that they would be appealing the judgment and partial

injunction and all underlying orders to the U.S. Court of Appeals for the Ninth Circuit. Honolulutraffic.com, et al. v. FTA, et al. (9th Cir. 13-15277). Defendants did not appeal the district court's decision.

### **Summary Judgment Motions Denied in Lawsuit Challenging Crenshaw/LAX Transit Corridor Project**

On March 13, 2013, the U.S. District Court for the Central District of California issued an order denying without prejudice the parties' motions and cross-motions for summary judgment in Crenshaw Subway Coalition, et al. v. FTA, et al. (C.D. Cal. 12-01672). The plaintiff community groups in this case challenge the Record of Decision (ROD) issued by FTA for the Crenshaw/LAX Transit Corridor Project (Project) on the grounds that FTA allegedly violated NEPA by failing to adequately identify and evaluate Project impacts, alternatives, and mitigation measures. The Project is an 8.5-mile light rail line extending from the existing Metro Exposition Line at Crenshaw and Exposition Boulevards south to the Metro Green Line's Aviation Boulevard/LAX Station.

In its Motion for Summary Judgment (MSJ) and in subsequent supporting filings, plaintiffs made the following four arguments: (1) the Environmental Impact Statement (EIS) failed to adequately evaluate and disclose the community and safety impacts of some street level portions of the approved light rail line; (2) FTA and the Los Angeles County Metropolitan Transportation Authority (LACMTA), the Project sponsor and co-defendant, failed to identify adequate measures to mitigate the Project's visual,

safety, and construction noise and traffic impacts; (3) FTA failed to supplement the EIS after plaintiff presented new information related to significant traffic impacts at a particular intersection and visual impacts from the introduction of fencing that were not previously evaluated; and (4) FTA and LACMTA failed to evaluate the reasonable alternative of undergrounding portions of approved street level light rail line.

FTA, in its Opposition to Plaintiff's MSJ and Cross-MSJ, denied that it violated NEPA in any way and argued that the administrative record supported all of the ROD findings, including those related to Project alternatives, impacts, and mitigation measures. Co-defendant LACMTA filed its own opposition and cross-motion.

In its order denying all the motions, the court admonished the parties for filing too many motions, but permitted the parties to seek summary judgment again provided that parties on each side file their motions jointly, meet and confer before the filing of motions, and attach a copy of a transcript of the meet and confer conference to their moving papers.

### **Lawsuits filed on Regional Connector Light Rail Project in Los Angeles**

In January 2013, three lawsuits were filed in the U.S. District Court for the Central District of California, challenging the Record of Decision (ROD) issued by FTA for the Regional Connector Project. Today's IV, Inc. v. FTA, et al. (C.D. Cal. No. 13-00378) (Today's IV); Japanese Village, LLC v. FTA, et al. (C.D. Cal. No. 13-00396) (Japanese Village); 515/555

Flower Associates, LLC v. FTA, et al. (C.D. Cal. 13-00453) (Flower Associates). The Regional Connector Project is a 1.9-mile light rail project connecting the existing Metro Blue, Gold, and Exposition lines through downtown Los Angeles. The Today's IV and Flower Associates lawsuits primarily allege that FTA and the Los Angeles County Metropolitan Transportation Authority (LACMTA), the project sponsor, violated NEPA by failing to adequately consider alternatives to and impacts from cut-and-cover construction along Flower Street. The Japanese Village lawsuit alleges that FTA and LACMTA violated NEPA by failing to review impacts related to constructing and operating an underground light rail line under the Japanese Village Plaza. Answers are due in April 2013.

### **Lawsuits filed on Westside Subway Project in Los Angeles**

On November 16, 2012, the Beverly Hills Unified School District (School District) filed a lawsuit in the U.S. District Court for the Central District of California challenging the Record of Decision (ROD) issued by FTA for the Westside Subway Extension Project. Beverly Hills Unified School District v. FTA, et al. (C.D. Cal. No. 12-09861) (BHUSD). The Westside Subway Extension Project is a 9-mile heavy rail subway that would operate from the existing Metro Purple Line to the West Los Angeles VA Hospital. This lawsuit challenges the ROD on the grounds that FTA and LACMTA allegedly violated NEPA by failing to adequately review the safety and seismic impacts related to tunneling under the Beverly Hills High School and by selecting the Century City Constellation Boulevard Station location over an alternate station location. The lawsuit also alleges that FTA and



LACMTA failed to adequately review use of the Beverly Hills High School campus, which the School District claims is a historic and recreational resource under Section 4(f) of the Department of Transportation Act. On February 15, 2013, the City of Beverly Hills filed its own lawsuit alleging the same claims the School District made in its lawsuit. City of Beverly Hills v. FTA, et al. (C.D. Cal. No. 13-01144) (City). FTA recently filed its answer to the complaint in the BHUSD lawsuit, but has not filed an answer yet in the City lawsuit.

### **Lawsuit Filed on Green Line Extension Project in Boston**

On January 18, 2013, a complaint was filed in the U.S. District Court for the District of Massachusetts challenging the Finding of No Significant Impact (FONSI) issued by FTA on July 9, 2012, relating to the Boston Green Line Extension (GLX) project. Wood, et al. v. Massachusetts Department of Transportation, et al. (D. Mass. No. 13-10115). The Massachusetts Department of Transportation (MassDOT) and the Massachusetts Bay Transportation Authority (MBTA) are jointly proposing to build the GLX, an approximately 4.3-mile, seven station extension of the existing MBTA Green Line light rail transit (LRT) route from a relocated Lechmere Station in Cambridge to College Avenue in Medford. Also included in GLX is a separate one-mile LRT branch line from the relocated Lechmere Station to Union Square in Somerville. GLX will operate on the exclusive right of way of the MBTA Commuter Rail System, adjacent to existing commuter rail service. The project will include five at-grade stations and one elevated station, three miles of at-grade guideway, 1.3 miles of elevated guideway, reconstruction of 11 bridge structures, and

purchase of 24 LRT vehicles. The lawsuit, brought by two individuals and a citizen advisory group, challenged the NEPA process on the GLX project. Among the plaintiffs contentions is that the FONSI did not adequately identify and analyze all relevant environmental and socioeconomic impacts of the project. They also allege that the FONSI does not adequately mitigate the public engagement violations under Title VI and the American with Disabilities Act.

### **Maritime Administration**

#### **Ship Owner Seeks Judicial Review of MarAd's Denial of Loan Refinance Application**

On July 17, 2012, American Petroleum Tankers Parent, LLC, (APT) filed an action in the U.S. District Court for the District of Columbia seeking APA review and emergency relief in the nature of mandamus in connection with APT's application for a loan guarantee under the Federal Ship Financing Program. APT had submitted its application for a loan guarantee under the Program, better known as the "Title XI" program, with MarAd on August 30, 2010. The application requested a \$470 million loan guarantee, which would cover the cost of refinancing five vessels already owned by APT. APT intended to use the loan guarantees to refinance its existing debt, which it had incurred to construct these same five vessels.

In American Petroleum Tankers Parent, LLC v. United States, et al. (D.D.C. No. 12-1165), APT sought an order from the court requiring MarAd to act on APT's

application by August 31, 2012. The parties subsequently entered into a stipulation in which MarAd agreed to issue a decision approving or denying APT's pending application on or before August 31, and APT withdrew its motion seeking emergency relief. APT also purported to amend its pending application shortly thereafter.

MarAd denied APT's application on August 1, 2012, because, among other things, the application was economically unsound and would exhaust available program resources. MarAd did not consider APT's purported amendments to its application. However, MarAd offered APT the opportunity to have the application reviewed again with the proposed changes, and APT requested such review. MarAd denied APT's amended application on November 9, 2012. Subsequently, APT filed a supplemental complaint on December 10, 2012, alleging MarAd's decisions were arbitrary, capricious, or an abuse of discretion, and that the Secretary's and Credit Council's involvement in the application process was contrary to law. (The Credit Council consists of the heads of several of the Department's operating administrations, and reviews all Departmental loan applications to ensure consistent credit policies and management practices across all Departmental credit programs.)

On January 18, 2013, the government filed a motion to dismiss the entire action for lack of subject matter jurisdiction and failure to state a claim upon which relief may be granted. In that motion, the government has argued that MarAd's Title XI decisions are unreviewable by the court because MarAd's decisions are committed to agency discretion, and therefore, the APA does not provide the relief APT seeks.

Additionally, the government has maintained that the Secretary has statutory authority to require the Credit Council's involvement in the application process and that no statute or regulation prevents either the Secretary or the Credit Council from advising MarAd on APT's application. In response, APT asserts that MarAd's Title XI decisions are, in fact, reviewable, and that nothing prevents a court from reviewing the decisions for abuse of that discretion and their compliance with the law under the APA. APT also contends that the Secretary and Credit Council are not to be a part of the MarAd Title XI process.

### **Liberty Global Logistics Challenges MarAd's Administration of the Maritime Security Program**

On January 23, 2013, Liberty Global Logistics, LLC, filed a complaint in the U.S. District Court, for the Eastern District of New York pursuant to the APA and FOIA alleging that MarAd's actions "directly harmed Plaintiffs by denying Plaintiffs the opportunity to be awarded one of the transferred Maritime Security Program (MSP) Operating Agreements and otherwise to be awarded one or more of the affected MSP Operating Agreements." Liberty Global Logistics, LLC v. United States (E.D.N.Y. No. 13-0399). Plaintiff challenges MarAd's approval of a 2007 transfer of an agreement to American International Shipping, LLC, and the 2009 award of an agreement to Argent Marine Operations, Inc. Liberty claims that American Shipping, LLC, and Argent Marine Operations were not eligible vessel operators under the Maritime Security Act of 2003.

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

### **District Court Dismisses Suit Alleging DOT Violated Pipeline Safety Act and APA**

On February 28, 2013, the U.S. District Court for the Northern District of California dismissed the amended complaint in City and County of San Francisco v. USDOT, 2013 WL 772652 (N.D. Cal. Feb. 28, 2013), an action brought against DOT and PHMSA for alleged violations of the Pipeline Safety Act (PSA) and the APA. The suit relates to the September 9, 2010, rupture in San Bruno, California, of a 30-inch intrastate natural gas transmission pipeline operated by Pacific Gas & Electric. The ensuing explosion resulted in eight fatalities, multiple injuries, and the destruction of 38 homes. The National Transportation Safety Board investigated the incident and issued findings, recommendations, and conclusions in August 2011. The ruptured line is regulated by the California Public Utilities Commission (CPUC) under delegated authority from PHMSA through its state certification.

In the original complaint, framed as a “citizen’s suit” under the PSA, plaintiff had alleged that the federal defendants violated the PSA by (1) failing to ensure that certified state authorities, including the CPUC, are satisfactorily enforcing compliance with the minimum federal pipeline safety standards, (2) failing to take appropriate action to achieve adequate enforcement of federal standards to the extent state authorities are not, and (3) disbursing federal funds to the CPUC

without determining whether it is effectively carrying out its pipeline safety program. The plaintiff sought declaratory judgment and injunctive relief.

Without a hearing, the court granted the federal defendants’ motion to dismiss the original complaint, agreeing with their position that an action for injunctive relief against the government for failing to properly administer the PSA, known as a mandamus claim, is not authorized by the citizen’s suit provision of the PSA. The court, however, granted the plaintiff leave to amend in order to make a claim under the APA. The plaintiff filed an amended complaint alleging the same conduct by DOT and PHMSA violated the APA. A hearing on the government’s motion to dismiss the amended complaint was held December 20, 2012, in San Francisco.

On February 28, 2013, the court issued its decision dismissing the amended complaint, without leave to amend, and entered judgment for DOT and PHMSA. The court agreed that the APA does not provide a vehicle for the plaintiff to challenge the general adequacy of the defendants’ action. In this case, the plaintiff was unable to allege DOT or PHMSA had failed to take a discrete, non-discretionary action required by statute. Furthermore, the court found the plaintiff’s attempt to recast the same facts into a theory that defendants acted arbitrarily and capriciously under the APA added nothing of substance and must also be dismissed.

### **Lawsuit Filed over Authority to Regulate Kansas NGL Pipeline Facility**

On December 3, 2012, ONEOK Hydrocarbon, L.P., and its affiliates

(ONEOK) filed a complaint in the U.S. District Court for the Northern District of Oklahoma seeking a declaratory judgment that its natural gas liquids (NGL) pipeline facility in Bushton, Kansas, was not subject to the jurisdiction of the Pipeline Safety Act (49 U.S.C. § 60101 et seq.). The plaintiff in ONEOK Hydrocarbon, L.P. v. USDOT, et. al. (N.D. Okla. 12-660) alleged that the existence of an unregulated fractionation plant located on the grounds of the Bushton facility served to exempt the entire facility from the Secretary's authority over pipeline facilities used in the transportation and storage of hazardous liquids. ONEOK also sought a temporary restraining order (TRO) and a preliminary injunction (PI) to prevent PHMSA from inspecting any part of the facility prior to a ruling on its complaint.

On December 5, 2012, DOT prepared and filed an extensive response to ONEOK's motion for a TRO and PI, and on December 6, 2012, an evidentiary hearing was held in Tulsa, Oklahoma, before a U.S. magistrate judge. On December 7, 2012, the magistrate issued a Report and Recommendation (R&R) denying ONEOK's motions for a TRO and a PI on the ground that conducting an inspection would not result in irreparable harm to ONEOK. On December 10, 2012, the Article III judge issued a Minute Order staying the inspection during the period in which ONEOK could file an objection to the R&R. On December 21, 2012, ONEOK filed an objection to the R&R and DOT replied and filed a motion to dismiss on various grounds. DOT argued that the courts of appeals, not the district courts, had jurisdiction over review of PHMSA actions under the PSA, that ONEOK was seeking improper pre-enforcement review, and that there was no final agency action by

the agency upon which judicial review could be based.

On March 25, 2013, ONEOK filed a petition for review with the D.C. Circuit Court of Appeals to preserve its ability to seek direct appellate court jurisdiction under 49 U.S.C. § 60119(a) should the district court grant the Department's motion to dismiss ONEOK Hydrocarbon, L.P. v. USDOT, et. al. (D.C. Cir. No. 13-1040). Proceedings are currently in abeyance in both forums to allow the parties to review the results of a site visit conducted by PHMSA personnel on February 13, 2013. This site visit was conducted for the purpose of determining the appropriate demarcation points between the regulated and unregulated portions of the facility enabling the commencement of an administrative enforcement proceeding that would confirm PHMSA's authority to inspect and regulate such facilities and lead to dismissal of the litigation.

### **Bridger Pipeline Seeks Review of Enforcement Action**

On February 15, 2013, Bridger Pipeline, LLC (Bridger) filed a petition for review in the U.S. Court of Appeals for the Tenth Circuit seeking review of a PHMSA order finding that Bridger had committed four violations of the Pipeline Safety Regulations, 49 C.F.R. Part 195, and assessing a reduced civil penalty of \$63,800. Bridger Pipeline, LLC v. PHMSA (10th Cir. No. 13-9517). Specifically, PHMSA found that Bridger failed to review its Operations and Maintenance (O&M) manual at the required intervals; failed to demonstrate that it reviewed the work performed by its personnel to determine the effectiveness of its procedures used in normal operations and maintenance, within the required

intervals; failed to demonstrate it had performed reviews of the work performed by its personnel and contractors to evaluate responses to abnormal operations to determine the effectiveness of abnormal operating procedures; and failed to demonstrate that it performed post-accident

reviews no later than 45 days after the four accidental hazardous liquid releases on its Poplar pipeline were no longer considered emergencies, as required by the company's O&M Manual.



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