



**U.S. Department of
Transportation**

DOT LITIGATION NEWS

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Supreme Court Litigation

Court Will Not Review Ohio FELA Decision

On January 12, the Supreme Court denied the petition for certiorari in Weldon v. Norfolk Southern Ry. (Supreme Court Cert. Petition No. 07-1152). The petition had sought review of a decision by the Supreme Court of Ohio holding that an Ohio statutory provision that prioritizes asbestos cases so that only those cases involving presently-redressible injuries will be scheduled for trial is not preempted by provisions of the Federal Employers' Liability Act ("FELA").

In a December 5 amicus brief filed at the invitation of the Court the United States urged the Court not to take the case. We argued that the Ohio decision was correctly decided and that there was no reason for the Supreme Court to review the case.

In its decision the Ohio Supreme Court held that the Ohio statute sets forth procedural rules that are not preempted by either FELA, 45 U.S.C. § 51 et seq., or the Locomotive Boiler Inspection Act ("LBIA"), 49 U.S.C. § 20701 et seq., which, as the Ohio Supreme Court noted, has been held to supplement the provisions of FELA. 875 N.E.2d 919, 923 (Ohio 2007) citing Urie v. Thompson, 337 U.S. 163, 188 (1949).

FELA assures railroad employees a safe work place and gives them and their families the right to recover compensation if injured during the course of railroad employment. Under FELA, injured employees can seek compensation for wage loss, future wage loss, medical expenses and treatments, pain and suffering, and for partial or permanent disability.

There have been a substantial number of claims filed under FELA seeking recoveries based on workers' exposure to asbestos. DOT has no regulations addressing the scope or application of FELA, nor does the Department have any programs directly dealing with the statute. However, since FELA allows claims to be brought against railroads and, through amendments to the Jones Act, also extends to maritime vessels, the Department has a general interest in ensuring the fair application of the provisions of the statute.

FELA, by its terms, preempts States from imposing substantive barriers to recovery that differ from the terms set forth in FELA. See Napier v. Atlantic Coast Line Ry., 272 U.S. 605, 613 (1926). However, the statute also recognizes the "concurrent power and duty of both Federal and state courts to administer the rights conferred by the

statute” Minneapolis & St. Louis Ry. v. Bombolis, 241 U.S. 211, 218 (1916). And, as the Ohio Supreme Court observed, “FELA cases adjudicated in state courts are subject to state procedural rules.” As the United States’ amicus brief pointed out, this presupposes, that procedures will differ as between FELA cases brought in State courts and those brought in Federal courts, and that State procedural differences are not preempted by Federal law unless the State procedures in application impose what amounts to more onerous substantive standards than are applicable in Federal courts. Our brief concluded that such was not the case concerning the Ohio statute, and that imposing a prioritizing system on asbestos claims is not only procedural in nature, but also is consistent with an analogous prioritizing system imposed by Federal courts when they adjudicate FELA claims.

The United States’ amicus brief is available at:

<http://www.usdoj.gov/osg/briefs/2008/2pet/6invt/2007-1152.pet.ami.inv.pdf>

Railroads Seek Supreme Court Review of Eighth Circuit’s Decision Upholding Constitutionality of Amendments to Federal Rail Safety Act

On January 8, a petition for certiorari was filed in Canadian Pacific Railroad Co. v. Lundeen, (Supreme Court Cert. Petition No. 08-871) seeking review of the decision of the U.S. Court of

Appeals for the Eighth Circuit in Lundeen v. Canadian Pacific Railway Co. (8th Cir. 04-03220). The Eighth Circuit’s 2 to 1 decision upheld the constitutionality of newly-revised provisions of the Federal Railroad Safety Act (FRSA) clarifying the scope of Federal rail preemption.

The Eighth Circuit sought the views of the United States, and, rather than filing an amicus brief the Federal government intervened in the case and argued in support of the Constitutionality of the statutory enactment.

The statutory provisions, which previously had been held unconstitutional by a Minnesota district court based on separation of powers concerns, amends the preemption provisions of the FRSA to clarify that even in circumstances where the Department has preempted State rail safety jurisdiction, a private action seeking damages may nonetheless be brought alleging that a railroad violated a Federal railroad safety standard. On October 10 the Eighth Circuit denied a rehearing motion, again with one dissent.

The basis for the district court’s decision that the statute is unconstitutional relates to the fact that it applies retroactively to the date of the 2002 Minot, North Dakota derailment, and specifically was aimed at reversing prior decisions in the district court and the U.S. Court of Appeals for the Eighth Circuit, which had held that any actions seeking damages related to the derailment in which hazardous gasses were released were preempted by Federal law even if it

could be shown that the railroad had failed to adhere to the required Federal safety standards. In reversing the district court decision the Eighth Circuit agreed with the views expressed by the United States last October that the statute is constitutional and does not attempt to reverse a final judicial decision.

Oppositions to the certiorari petition by the respondents and the United States are due to be filed in mid-February.

The Eighth Circuit's decision is available at the following site.

<http://www.ca8.uscourts.gov/opinions/opinions.html>

(After the site loads, then search for "Lundeen" in the "party name" search field.)

Supreme Court Will Decide Alaska Tonnage Clause Case

On December 12, the Supreme Court granted certiorari in Polar Tankers v. Valdez, Alaska, (Supreme Court No. 08-310). The petition sought review of a decision by the Supreme Court of Alaska upholding a tax imposed by the City of Valdez on tanker vessels serving the port. Petitioner Polar Tankers argues that the tax is unconstitutional under the Tonnage Clause and the Commerce Clause of the Constitution for two basic reasons.

First, through a series of exemptions and alternative tax structures that shield other forms of property from the City's personal property tax, Polar Tanker argues that the Valdez tax discriminates

against tanker vessels since it apparently applies only, or virtually only, to such vessels. As such it does not appear to be a legitimate property tax. Rather, Polar Tanker argues, it is a tax on tonnage masquerading as a personal property tax.

Second, through the use of an expansive apportionment formula the City, it is argued, in effect, imposes the tax on tanker vessels for days as to which those vessels are not using, and have no nexus to, the Valdez port facilities. Polar Tankers argues that that approach is contrary to principles of fair apportionment and violates the Tonnage Clause and the Commerce Clause for that reason as well.

The Tonnage Clause of the Constitution, Art. I, § 10, cl. 2, provides that "No State shall, without the Consent of Congress, lay any Duty of Tonnage." As Polar Tankers points out in its brief, the Tonnage Clause supplements the Import-Export Clause, which denies States the authority to impose taxes or duties on imports or exports. As such, the Tonnage Clause is broad enough to preclude a State from collecting as a vessel charge that which it is also precluded from collecting as a tax or duty imposed on an import or export. Clyde Mallory Lines v. Alabama, 296 U.S. 261, 265-66 (1935) ("the prohibition against tonnage duties has been deemed to embrace all taxes and duties regardless of their name or form, and even though not measured by the tonnage of the vessel, which operate to impose a charge for the privilege of entering, trading in, or lying in a port").

The attempt by the City of Valdez to secure tax revenue from the tanker fleet that utilizes its harbor for loading petroleum shipments is generically a recurring transportation problem. Historically, States and localities have often attempted to treat the carriers that deliver the nation's passengers and goods as captive audiences for purposes of local taxation policies, particularly in the area of discriminatory personal property taxation. Those practices, both in the maritime sector and in other transportation sectors, have prompted both statutory provisions and judicial holdings founded on Constitutional

provisions, which collectively recognize that States and localities cannot be allowed to engage in unfair or discriminatory taxation of the instrumentalities of interstate commerce.

Polar Tanker's brief on the merits was filed with the Court on February 2. The United States has decided against participating in the case as an amicus, but we are monitoring the case closely because of its potential impact on interstate and foreign maritime commerce.

Departmental Litigation in Other Federal Courts

United States Offers Views Concerning Scope of Tokyo and Montreal/Warsaw Conventions in In-Flight Disruption Case

On July 18 the United States filed an amicus brief in Eid v. Alaska Airlines, Inc. (9th Cir. No. 06-16457) arguing before the U.S. Court of Appeals for the Ninth Circuit that under the Tokyo and Warsaw Conventions the pilot of an aircraft has wide discretion to reasonably react to in-flight passenger disruptions free from potential civil liability. While the underlying facts in the case involved a flight prior to the effectiveness of the Montreal Convention on November 4, 2003, the United States' brief argued that the same result would occur under that Convention as well.

The Ninth Circuit invited the United States to submit a brief setting forth the government's views as to the proper application of the Convention on Offences and Certain Other Acts Committed on Board Aircraft ("Tokyo Convention") and the Convention for the Unification of Certain Rules Relating to International Transportation by Air ("Warsaw Convention"). At issue in the litigation is an in-flight disturbance that occurred on September 29, 2003 on an international flight from Vancouver, British Columbia to Las Vegas, Nevada. When the disruption occurred in the First Class section of the plane the captain diverted the aircraft to Reno, Nevada, ordered the disembarkation of nine first class passengers of Egyptian descent, and then contacted local police officials who, after interviewing the disembarked passengers, ultimately determined not to arrest them.

The nine passengers subsequently filed a complaint against Alaska Airlines in the U.S. District Court for Nevada, alleging delay under Article 19 of the Warsaw Convention. The complaint also alleged various State law claims for defamation, intentional infliction of emotional distress and invasion of privacy.

The United States' brief pointed out that under the Tokyo Convention the crew of an aircraft is immunized from liability when its actions are "reasonable" in the context of an in flight passenger disruption. We urged that the availability of the Tokyo Convention defense involves a determination of the standard to be used in determining what are "reasonable grounds to believe that a person . . . is about to commit . . . an offence"

While there is little available precedent concerning the proper application of the "reasonableness" standard under the Tokyo Convention, the brief points out that authorities in analogous areas equate reasonable activity with activity that is neither arbitrary nor capricious. The brief argues that this approach is consistent with the Tokyo Convention, which establishes a standard that is deferential to decisions by the aircraft commander. That deference is based on a recognition that a pilot might have to act quickly even when only limited information is available, and that the pilot should not be penalized for doing so even if that information later proved to be erroneous. The approach is also consistent, the brief pointed out, with U.S. Statutory law, case law interpreting those statutory provisions, and guidance issued by the FAA.

The case was originally argued on April 18, 2008 but following that argument, on April 23 an order was issued by the Ninth Circuit inviting the United States to give its views on the treaty issues raised in the case. Following the United States' July 18 brief responsive briefs were filed by other parties and intervenors. We are now awaiting the Ninth Circuit's decision.

United States Files Amicus Brief Challenging California Ports' Mandatory Concession Agreements

On October 20, the United States filed an amicus brief in support of plaintiffs in American Trucking Ass'ns. v. City of Los Angeles, (9th Cir. No. 08-56503). The litigation seeks to halt implementation of mandatory concession agreements for motor carriers serving the Ports of Long Beach and Los Angeles.

ATA challenges the legality of the local orders instructing the ports to deny access to any drayage truck if the operator has not entered into an approved concession agreement. The State of California, the National Industrial Transportation League, and the National Association of Waterfront Employers also submitted amicus briefs, while the Natural Resources Defense Council, the Sierra Club, and the Coalition for Clean Air have joined as defendant-intervenors.

The United States' amicus brief agrees that the concession agreements are preempted under the Federal Aviation

Administration Authorization Act ("FAAAA"), which generally prohibits State or local regulations "related to a price, route, or service of any motor carrier." 49 U.S.C. § 14501(c)(2)(A). The United States rejected the cities' argument that the agreements fall within the statute's public safety exception to the prohibition on State regulation. The United States also relied on the Supreme Court's expansive holding in Rowe v. New Hampshire Motor Transport Assn., 128 S. Ct. 989 (2008), in support of our argument that the public health purpose raised by the ports does not fall within the safety exception of the preemption statute.

The Ninth Circuit has scheduled oral argument for March 4, in Pasadena, California.

In a related action, the Federal Maritime Commission issued an order administratively determining that the two ports likely violated the Shipping Act of 1984 by agreeing to mandate that motor carriers obtain port-issued access licenses, a requirement that the Commission concluded was concerted activity that illegally discriminated against the carriers. As contemplated under the Shipping Act, the FMC filed a motion for preliminary injunction in the U.S. District Court for the District of Columbia on November 17, 2008 asking the court to enjoin the effectiveness of the agreement filed with the Commission by the two ports. Argument was heard on December 5.

Briefing Begins in Challenge to New Rates and Charges Rules

Briefing has begun in Air Transport Association, Inc. v. DOT and FAA, (D.C. Cir. No. 08-1293), the Air Transport Association (ATA) challenge to the July 14, 2008 DOT and FAA amendment to the "Policy Regarding the Establishment of Airport Rates and Charges" (June 21, 1996). ATA's brief was filed on January 30, DOT/FAA's brief is due March 2, 2009, intervenor ACI-NA's brief is due March 19, and ATA's reply brief is due April 2. Oral argument has not yet been scheduled.

ATA's challenge focuses on three amendments to the 1996 Rates and Charges Policy (two modifications and one clarification). These amendments are intended to provide greater flexibility to operators of congested airports to use landing fees to provide incentives to air carriers to use the airport at less congested times or to use alternate airports to meet regional air service needs.

Challenge to Mexican Truck NAFTA Demonstration Project Briefed and Argued in Ninth Circuit

A collection of interest groups, including the Sierra Club, Public Citizen, and the Teamsters, petitioned for review of the Department's one-year Mexican Truck NAFTA Demonstration Project in the U.S. Court of Appeals for the Ninth Circuit and asked the court for an emergency stay of the Project. Shortly thereafter, the Owner Operator

Independent Drivers Association (OIDA) sought judicial review and an emergency stay of the Project in the U.S. Court of Appeals for the District of Columbia Circuit. Both courts denied the emergency stay motions, agreeing with DOT that the petitioners had not met the legal requirements for such emergency relief, and the two petitions were then consolidated in the Ninth Circuit.

The petitioners allege that the Demonstration Project, pursuant to which a limited number of Mexican trucks may operate beyond zones along the U.S.-Mexico border, violates various statutory requirements that Congress has imposed on this project specifically, on such projects generally, and broadly on the entry of Mexican trucks into the United States. The petitioners also alleged that DOT's 2008 appropriations act bars expenditure of funds on the Project.

The Department contended that it had met or exceeded all statutory requirements for the program, and that the DOT 2008 appropriations act only barred expenditure of funds on future demonstration programs involving Mexican motor carriers. In August, DOT announced a two-year extension of the Project, which had been set to conclude on September 6, 2008.

Oral argument in the case, Sierra Club v. DOT, (9th Cir. No. 07-73415), was heard on February 12, 2008. We are still awaiting the court's decision.

The audio file of the oral argument can be accessed by entering the docket

number where indicated on the following webpage:

<http://www.ca9.uscourts.gov/ca9/media.nsf/Media%20Search?OpenForm&Seq=2>.

Information concerning the Department's Mexican Truck NAFTA Demonstration Project is available at:

http://www.fmcsa.dot.gov/rules-regulations/administration/rulemakings/rule-programs/rule_making_details.asp?ruleid=203&year=2007&cat=notice.

District Court Enjoins Florida Law Restricting Air Services to Cuba; United States Weighs Possible Participation

A number of parties with Federal authority to provide charter air operations between the United States and Cuba have filed a complaint in the U.S. District Court for the Southern District of Florida in ABC Charters, Inc. v. Bronson (S.D. Fla. No. 08-21865). The complaint challenges a Florida law, the Florida Sellers of Travel Act, which imposes various regulatory requirements on indirect air carriers offering charter services between the United States and Cuba.

The parties have argued that the Florida law is preempted on a number of grounds, including that it constitutes an impermissible intrusion by the State of Florida into the area of foreign affairs, that it is unconstitutional under the Commerce Clause, and that it seeks to regulate air carriers contrary to the

provisions of the Airline Deregulation Act (“ADA”). The ADA, as codified at 49 U.S.C. § 41713(a)(4)(A), provides that “a state may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route or service of an air carrier”

The Florida district court previously requested briefing by the parties on Federal issues raised in the litigation and the United States has been considering whether to participate in the litigation to address such issues.

The court held a hearing on September 25, and on September 30 issued a 53-page decision denying Florida’s motion to dismiss the case and instead granting plaintiffs’ request for a preliminary injunction precluding enforcement of the Florida statute. The court determined that the Florida statute is likely unconstitutional since it appears to be preempted expressly under the Supremacy Clause and provisions of the ADA, and impliedly by the United States’ over-arching Federal jurisdiction over all foreign affairs matters.

The court noted that the Florida statute “include[s] extraordinary expensive registration and bonding requirements, exorbitant fines and a felony conviction for those who fail to comply with the law” and that these “constitute little more than an attempt to impose economic sanctions on travel to designated foreign governments, particularly the Republic of Cuba.” The court concluded that “the right and power to impose such sanctions, and to establish foreign policy, remains, under our Federal Constitution, solely within

the exclusive domain of the Congress of the United States and the President, and not within the aegis of the State of Florida under the guise of consumer protection.”

Following the issuance of the district court’s decision denying Florida’s motion and refusing to grant injunctive relief the United States filed a short statement stating that we would not participate further at that time but would consider doing so when the court decided the merits. In late December the plaintiffs filed a motion for summary judgment. Florida’s response to the motion is currently due to be filed on February 12. The Department of Justice is considering whether the United States should file a statement of interest expressing our view on the issues raised by the summary judgment motion.

**DOT Files Amicus Brief in
Appeal of District Court
Decision Upholding Vermont’s
Greenhouse Gas Emissions
Regulations**

The United States has filed an amicus brief in the U.S. Court of Appeals for the Second Circuit in the automobile industry’s appeal of a decision of the U.S. District Court for the District of Vermont holding that the Energy Policy and Conservation Act (EPCA) does not preempt Vermont’s greenhouse gas emissions (GHG) standards for automobiles. NHTSA promulgates Corporate Average Fuel Economy (CAFE) standards under EPCA.

The District Court’s holding was predicated on the assumption that EPA

would grant a waiver of Clean Air Act preemption to California for its identical GHG standards. Subsequently, however, EPA denied California's request for a waiver for these regulations. An EPA waiver prevents California's regulations, and any such regulations adopted by Vermont or any other state, from going into effect. Accordingly, the government's brief argued that the court lacked jurisdiction over the case because it did not present a live controversy. The brief also argued that the district court failed to take into account the EPCA preemption analysis articulated by NHTSA in its 2006 light truck CAFE standard rulemaking

In an Executive Order issued on January 26, President Obama has ordered EPA to reconsider whether it should now grant the waiver requested by California, and EPA has commenced its reconsideration process.

The United States was not a party to this case, Green Mountain Chrysler Plymouth Dodge Jeep v. Crombie, (2d Cir. No. 07-4342), and did not participate in the case as an amicus at the District Court stage. Briefing before the Second Circuit has been completed.

The court has set oral argument for March 19.

The District Court's opinion is available at:

<http://www.vtd.uscourts.gov/Cases/05cv302.html>

D.C. Circuit Hears Challenge to LAX Rates and Charges Decision

On December 11, oral argument was held in the U.S. Court of Appeals for the D.C. Circuit in Alaska Airlines, Inc. v. DOT, (D.C. Cir. No. 07-1209). The case involves five consolidated petitions filed by the Los Angeles Airport Authority and carriers at the airport who sought review of the Department's Final Decision and Refund Order resolving two administrative complaints that challenged the reasonableness of new fee methodologies and increased terminal charges at Los Angeles International Airport.

As previously reported, the Department had argued in its brief that it correctly determined that the use of a fair market value methodology is acceptable to establish airport terminal rates under the applicable statutory language and Department policy so long as that value is determined objectively; and where based on opportunity costs, the foregone opportunity analysis needed to be based on other potential aeronautical uses. At oral argument, the Department argued that the particular market value methodology imposed by the airport authority was unreasonable because it was not objectively-based.

The Department also argued that while the airport's rentable area methodology in general is reasonable, it unjustly discriminated against the complaining carriers because the same methodology was not used to calculate the terminal fees of other long-term carriers who

made similar use of terminal space, but were charged radically different fees.

Finally, the Department argued that the seven complaining air carriers were not barred from challenging the fee increase under a "written agreement" exclusion found in the rates and charges statute because the holdover tenancies under which the airlines operated did not contain express terms denoting schedules of fees, methodologies, or equivalent charges.

We are now awaiting the court's decision.

Eleventh Circuit to Decide Whether Forum Non Conveniens Dismissals Are Available Under the Montreal Convention

On May 14 the United States filed an amicus brief in the United States Court of Appeals for the Eleventh Circuit in In re: West Caribbean Airways, S.A. (11th Cir. No. 07-15830) arguing that the Montreal Convention, to which the United States is a signatory, allows a district court to determine whether to dismiss an international aviation negligence action in circumstances where it is argued that the United States is not the most convenient forum in which to bring suit. Such motions are brought under the doctrine of forum non conveniens. Oral argument, originally scheduled for January 2009, was postponed by the court after one of the judge's on the announced panel recused himself. Argument will be re-scheduled sometime this spring.

The case involves an air crash in which foreign passengers were killed and where the foreign aircraft crashed en route in a flight from Panama to Martinique. The only ties to the United States in the case are the fact that an organization that was involved in securing the aircraft used for the foreign operations is located within the State of Florida.

With the exception of the Ninth Circuit, most Federal courts under both the Montreal Convention and the previously-applicable Warsaw Convention have applied the doctrine of forum non conveniens to determine whether an action should proceed in the United States or be transferred to the courts of another country participating in the Convention. See, e.g., Air Crash Disaster Near New Orleans, Louisiana on July 9, 1982, 821 F.2d 1147, 1162 (5th Cir. 1987) (applying FNC but denying motion to dismiss); In re Air Crash Off Long Island New York, on July 17, 1996, 65 F. Supp.2d 207, 214 (S.D.N.Y. 1999) (denying motion to dismiss after applying FNC criteria); In re Disaster at Riyadh Airport Saudi Arabia on Aug. 19, 1980, 540 F. Supp. 1141 (D.C. Cir. 1982) (granting FNC motion to dismiss).

In contrast to the many Federal courts applying FNC in Warsaw Convention cases, the United States Court of Appeals for the Ninth Circuit, in Hosaka v. United Airlines, 305 F.3d 989 (9th Cir. 2002), cert. denied, 537 U.S. 1227 (2003), has held that the doctrine is incompatible with the intent of the contracting parties to the Warsaw Convention and therefore is not available in actions brought under it.

That court specifically declined to address whether the same result would obtain under the Montreal Convention.

Our brief to the Eleventh Circuit argues that the district court properly followed the majority rule and properly rejected the Ninth Circuit approach.

Third Circuit Hears Challenge to Department's Decision on Tinicum Landing Fees

On January 6 the U.S. Court of Appeals for the Third Circuit heard oral argument in Tinicum Township v. DOT (3d Cir. 08-1830), a challenge to the Department's March 19, 2008 Declaratory Order, determining that the Petitioner, Township of Tinicum, Delaware County, Pennsylvania, could not impose a privilege fee on air carriers for the use of runways at Philadelphia International Airport ("PHL") that are located within Tinicum's borders.

Tinicum had enacted an ordinance levying a charge of three cents per thousand pounds maximum landed weight on aircraft users landing on PHL runways located within the Township's boundaries. The Township claimed that the fees were needed to compensate it for costs incurred that purportedly related to airport related expenses, such as operation and maintenance of sewers, roadways and supporting police and fire functions. The Department's decision concluded that the fee is unlawful under the Anti-Head Tax Act ("AHTA"), 49 U.S.C. § 40116(c).

Tinicum argued before DOT and in court that re-codification of Title 49 changed

the law in a manner that would allow a local government to impose charges whenever an aircraft lands in its jurisdiction. The Department argued that this was clearly not the case under prior law, that Tinicum's reading of the codified provisions did not support that outcome and that, in any event, the express Congressional directive in the 1994 codification act was that codification could not be construed to cause a substantive change in Title 49.

The Air Transport Association and Airports Council International-North America also filed intervenor briefs in support of the Department's order.

We are now awaiting the court's decision.

D.C. Circuit Hears Argument in Flight Attendants' Challenge to Virgin America Order

On February 5, the U.S. Court of Appeals for the District of Columbia Circuit heard arguments in Association of Flight Attendants – CWA v. DOT, (D.C. Cir. No. 08-1165). In its petition for review, AFA, a labor union representing certain flight attendants in the United States, seeks review of the Department's Final Order 2007-5-11, issued May 18, which concluded that Virgin America, Inc. had demonstrated that it is a citizen of the United States and which granted the carrier a certificate of public convenience and necessity under 49 U.S.C. § 41102 to engage in interstate scheduled air transportation of persons, property, and mail. AFA contends that Virgin America has not satisfied the U.S.

citizenship requirements of 49 U.S.C. § 41102. Virgin America intervened and also participated in the oral argument.

The Department argued that a labor union such as AFA lacks Article III standing to challenge the citizenship of Virgin America. Specifically, we argued that AFA lacked prudential standing because it had not shown that its interests in ensuring that domestic airline employees retaining their jobs had an adequate nexus to the Department's citizenship determination.

The Department also argued that it properly concluded under the totality of circumstances standard that Virgin America demonstrated that it is under the actual control of United States citizens. The Department further argued that its order is consistent with the record of the proceeding, and that all documents relied upon by the Department were provided by Virgin America and were made available to all parties, including AFA. Therefore, the Department urged that if the court reaches the merits of the dispute it must uphold the agency's decision.

We are now awaiting the court's decision.

DOT Drug Testing Amendment Stayed Pending Appeal

On November 12, the U.S. Court of Appeals for the District of Columbia Circuit stayed an amendment to the Department's drug testing rules that would require direct observation of specimen collections in return-to-duty and follow-up testing of individuals who

had previously tested positive and were trying to return to their safety-sensitive positions.

In 1991 Congress directed the Department to establish a comprehensive drug testing program for transport industry personnel in safety-sensitive positions. By statute the program's provisions must be consistent with testing procedures and standards established by the Department of Health and Human Services (HHS) for Federal employee testing.

In recent years there has been increasing evidence of a proliferation of products available to subvert the testing process by various means, including the use of prosthetic devices worn on the body. DOT in June of 2008 amended its drug testing rules to address these issues. 73 Fed. Reg. 35961 (June 25, 2008).

Notable changes in the amended rules include (1) requiring specimen validity testing (i.e., to ensure that samples are not in fact adulterated), (2) requiring direct observation of specimen collections when testing is part of return-to-duty or follow-up testing (i.e., for individuals who have previously tested positive or refused to be tested), and (3) imposing a requirement to remove all clothing from the area between the waist and knees to demonstrate to the observer that no prosthetic device is used. The amendments were initially scheduled to take effect August 25, but in response to petitions for reconsideration DOT postponed the effective date of the direct observation requirement in order to invite and consider comments on whether it should adopt this change. On October 22 the Department again

adopted this requirement and made it effective on November 1.

On August 13, BNSF Railway Co. and seven rail industry unions filed a petition for review in the U.S. Court of Appeals for the D.C. Circuit. The petition alleged that the second and third changes violated the Fourth Amendment to the Constitution, and were arbitrary and capricious under the Administrative Procedure Act. Burlington Northern-Santa Fe Ry. v. DOT, (D.C. Cir. No. 08-1264). On August 20, the International Brotherhood of Teamsters filed a petition for review of the same rules in the same court making the same legal claims. Int'l Brhd. of Teamsters v. DOT, (D.C. Cir. No. 08-1276). On August 22 the Air Line Pilots Association, International and the Transportation Trades Department, AFL-CIO filed a petition for review of the same rules in the U.S. Court of Appeals for the Ninth Circuit. Air Line Pilots Assoc. v. DOT, (9th Cir., No. 08-73665). The Department moved to consolidate the two D.C. Circuit cases and to transfer the Ninth Circuit case to the D.C. Circuit, which motions were granted.

The petitioners on October 24 asked the Department to stay the effective date of the amendments. While that request was pending they petitioned the D.C. Circuit to grant the same relief while the litigation was pending. DOT declined to issue a stay on October 30. On October 31 the court granted an administrative stay of the direct observation provision to give itself more time to consider the pleadings, and on November 12 the court stayed the effectiveness of the rule change pending

a decision on the merits and expedited briefing.

The petitioners' consolidated brief contended that the greater intrusion represented by the changes in the rule violated the Fourth Amendment under applicable precedent, and that DOT had also contravened the APA by proceeding without substantial evidence in support of its basic contention that those subject to the changes had a heightened incentive to cheat.

On January 12, the government filed its brief supporting the amendments. The brief stressed that direct observation applied only to employees who had already violated the rules, usually by testing positive, and had thereby demonstrated their disregard for public safety. Such employees, the brief argued, had a greater incentive to cheat on the tests (because they would generally lose their jobs in the event of another positive result), which was demonstrated by the fact that they tested positive for drug use at far higher rates on these tests.

Moreover, and unlike in the past, these employees now had access to a wide variety of substances and devices that were marketed specifically for the purpose of evading accurate testing. In these circumstances, the brief argued, the government interest in ensuring public safety through an effective testing program both outweighed the increased intrusion posed by direct observation and the other amendments and was supported by substantial evidence of record.

Oral argument has not yet been scheduled.

D.C. Circuit Dismisses Challenge to DOT Order Revoking Certificate of Air Carrier

On February 4 the U.S. Court of Appeals for the District of Columbia Circuit issued an unpublished judgment dismissing the petition for review in Boston-Maine Airways Corp. v. Peters, (D.C. Cir. No. 08-1212). In its petition Boston-Maine Airways had sought review of DOT's decision revoking the air carrier's certificate of public convenience and necessity. The case had been set for oral argument on January 13, but in an order issued on January 5 the court determined that the matter would be decided based on the arguments set forth in the parties' briefs.

DOT revoked this carrier's certificate based on the fact that the carrier had on numerous occasions submitted intentionally falsified financial information to DOT to support its requests to receive authority to conduct scheduled passenger service using larger aircraft, that the carrier's senior management knew or should have known of these falsifications, that the carrier's actual financial resources could not meet DOT's financial fitness requirements for such authority, and that the carrier's overall financial condition was extremely poor.

The D.C. Circuit's judgment held that the fact that the carrier's former general counsel had knowingly submitted falsified information to the Department was sufficient to uphold the

Department's decision. As a result, the court did not reach the other bases for the Department's revocation order or the other issues raised in the petition for review.

American Airlines Withdraws Petitions Seeking Review of Orders Awarding Service in U.S.-Colombia Market

On December 17, the U.S. Court of Appeals for the District of Columbia Circuit granted American Airlines' motion to dismiss with prejudice its petitions seeking review of two Department orders relating to the award of service frequencies in the U.S.-Colombia market resulting from the 2007/2008 U.S.- Colombia Combination Frequency Allocation Proceeding (DOT-OST-2007-0006). The cases were American Airlines v. DOT, (D.C. Circuit No. 08-1025, 08-1222). American's petition had challenged the Department's decision to award certain Colombian frequencies to Delta Airline and Spirit Airlines.

Complaint Seeks Compensation for Alleged Taking at Dallas Love Field

In Love Terminal Partners v. United States, (Ct. Fed. Claims No.1:08-cv-00536-MMS) Love Terminal Partners (LTP) has filed a complaint against the United States in the U.S. Court of Federal Claims seeking compensation for an alleged taking of LTP's property (a passenger terminal facility and other structures on 26.8 acres of land at Love

Field in Dallas, Texas) through Federal legislation.

Congress has restricted the geographic scope of air carrier operations at Love Field for years under the Wright Amendment. In 2006 Congress enacted the Wright Amendment Reform Act (WARA), which phased out some of these restrictions and imposed others. In order to ensure that the airport did not expand, the WARA also capped the number of passenger gates permitted at the air field. LTP alleges broadly that these restrictions have taken its property. The complaint seeks \$120 million as just compensation.

On November 20, the Federal government filed a motion to dismiss for failure to state a claim. The motion points out that the WARA does not mandate any physical occupation or appropriation of plaintiffs' property and thus does not qualify as a physical taking. Neither does the legislation place meaningful restrictions on the use of plaintiffs' property, and thus, we argued, it does not amount to a regulatory taking. The motion also contends that any frustration of plaintiffs' business expectations as the result of WARA is merely derivative or tangential to the law's restriction on operations at Love Field, and therefore as a matter of law is not a taking.

The plaintiffs opposed and cross-moved for summary judgment with respect to their passenger terminal. They contend that WARA incorporates the terms of an agreement among public and private parties in Texas (including the cities of Dallas and Ft. Worth, Southwest Airlines and American Airlines) that

deprives their leasehold of all economic use and requires the demolition of their passenger terminal. The plaintiffs rely heavily upon a district court decision to that effect, in an antitrust case brought by LTP against these same Texas parties. The government's reply is due February 23.

Environmental Groups Complaint Charges DOT and EPA with Failure to Follow CERCLA Requirements

In Sierra Club v. Johnson, (N.D. Calif. No. C 08-01409 WHA) several environmental groups have alleged that the Department and EPA have failed to discharge their obligations under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) by failing to require regulated entities to establish and maintain evidence of financial responsibility.

The CERCLA requirement has been in effect since 1987. FMCSA has regulations that comply with the CERCLA requirement but while other DOT administrations, such as FRA and the PHMSA have regulations addressing financial responsibility, those regulations were adopted pursuant to statutory authority other than CERCLA.

Cross motions for summary judgment are pending. In the United States' motion, we have argued that the court lacks jurisdiction to entertain plaintiffs' nondiscretionary citizen suit for a number of reasons. First, plaintiffs do not have standing to sue agencies such as DOT because they have not alleged

any injury caused by the agency's inaction under section 108(b) of CERCLA, 42 U.S.C. § 9608(b). Second, plaintiffs' claim that the agencies failed to publish a notice of priority by December 11, 1983, as required under section 108(b), is time-barred by the six-year statute of limitations in 28 U.S.C. § 2401(a). Third, plaintiffs' claim that the agencies failed to promulgate financial assurance regulations under section 108(b) is not properly before the court as a nondiscretionary duty claim because the agencies have full discretion over when to promulgate the regulations. Finally, plaintiffs' claim that the agencies failed to timely implement section 108(b) regulations is neither a nondiscretionary matter nor ripe for review.

We are now awaiting the court's decision

**United States Considers
Participation in Kentucky
Litigation Raising
Constitutionality of Federal
Preemption Statute**

The United States is considering whether to participate in a pending case, Executive Transportation System, L.L.C. v. Louisville Regional Airport Authority, (WD Ky. No. 3:06-CV-143-S), which raises issues concerning the constitutionality of preemption provisions administered by DOT and codified at 49 U.S.C. § 14501.

Executive Transportation Systems is a business that, since 1999, has provided ground transportation services to individuals and business, including transportation to and from Louisville International Airport. Executive Transportation claims that the defendants, Louisville Regional Airport Authority (LRAA), the Louisville/Jefferson County Metro Government, and the Kentucky Transportation Cabinet, illegally have sought to license Executive Transportation's interstate and intrastate prearranged transportation and charter bus services.

Executive Transportation argues that Federal law, 49 U.S.C. § 14501, expressly preempts states and their subdivisions from regulating such services. Executive Transportation also alleges violations of the Commerce Clause and Supremacy Clause of the Constitution as well as violations of the Equal Protection Clause.

As one of its defenses to the complaint the defendants have challenged the constitutionality of 49 U.S.C. 14501. They claim the provision is unconstitutionally vague because Congress failed to define the term "charter bus."

The United States has acknowledged the challenge to the constitutionality of the statute and has filed notice with the Court that it is reviewing the challenge to determine if intervention is appropriate.

Recent Litigation News from DOT Modal Administrations

Federal Aviation Administration

Briefing Completed and Argument Scheduled in New York/New Jersey/Philadelphia Metropolitan Area Airspace Redesign Challenge

In County of Rockland, New York v. FAA (D.C. Cir. No. 07-1363, and 11 consolidated cases), a number of parties have challenged FAA's Airspace Redesign project addressing congestion in the New York City/Newark/Philadelphia metropolitan area. The 73 petitioners in the consolidated cases filed a 120-page opening brief on August 29. The Offices of Senator Dodd and Senator Specter filed an amici brief on behalf of the petitioners. The FAA filed its response defending the project on January 12. In its brief, the FAA argued that it had fully complied with NEPA, general conformity requirements under the Clean Air Act, and DOT Section 4(f). The D.C. Circuit has scheduled oral argument for May 11.

By way of background, on September 5, 2007, the FAA issued a Record of Decision (ROD) for the much anticipated New York/New Jersey/Philadelphia Metropolitan Area Airspace Redesign. The redesign project addresses existing and future delays by reducing complexities and increasing efficiencies in this congested airspace. The project does not increase capacity, it merely reallocates it more efficiently. Once fully implemented (in late 2011),

the Airspace Redesign is projected to reduce delays by up to 20% compared to the situation were no action taken.

The project includes changes to procedures at LaGuardia, JFK, Philadelphia, Newark Liberty International and Teterboro Airports. The project will cause some individuals to experience increased noise, but will reduce the overall number of individuals exposed to 45 dB DNL or higher noise levels by 619,023. In addition, when the project is fully implemented, there will be no significant noise increases (defined as a 1.5 dB or greater increase within the 65 dB DNL).

On August 29, 2008, the Government Accountability Office (GAO) released its final report on the project, entitled "FAA Airspace Redesign: An Analysis of the New York/New Jersey/Philadelphia Project." GAO initiated its investigation of the project in June 2007 at the request of U.S. Representatives Jerry Costello, Rob Andrews (New Jersey) and Joe Sestak (Pennsylvania). GAO was directed to examine: (1) whether the FAA followed legal requirements in conducting its environmental review; (2) the extent to which our methodology for assessing operational and noise impacts was reasonable; and (3) whether the project will meet projected costs and time frames.

In its final report, the GAO found that the project complied with applicable environmental requirements and that the methodology used to assess operational and noise impacts was reasonable.

While finding FAA's methodology to be reasonable, GAO did offer comments and recommendations aimed at improving airspace redesign projects. As to issues concerning the FAA's compliance with legal requirements, GAO explored NEPA's requirements to provide a reasonable purpose and need statement, evaluate reasonable alternatives, consider the project's environmental effects, provide adequate public participation, and consider environmental justice matters. GAO ultimately concluded, using a judicial standard of review, that the FAA's actions were not "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."

Stating that the bar for satisfying the statute and environmental justice concerns is necessarily a deferential one, GAO found no reason to second guess the approach followed by the FAA.

Finally, as to the third question, GAO found the lack of a detailed implementation plan and project costs prevented it from determining if the FAA would meet the projected time frames and costs of implementation.

Santa Monica Challenges FAA Decision Suspending Jet Ban at City Airport; Administrative Proceeding Continues

The City of Santa Monica, California, is the proprietor of a small airport (SMO) whose operations have long been a source of local opposition. Some thirty years ago the City enacted both flight restrictions, to control noise, and a ban

on jets, on the basis of alleged safety concerns. In subsequent private litigation courts upheld the noise-related restraints but rejected the jet ban, finding that the jets at issue were as safe, or safer, than other aircraft that continued to use the airport. Santa Monica Airport Association v. City of Santa Monica, 481 F. Supp. 927 (C.D. Cal. 1979), aff'd, 659 F.2d 100 (9th Cir. 1981).

In 2002 the City proposed to ban FAA Category C and D aircraft (aircraft categorized by wingspan and approach speed), which encompasses most of the jets operating at SMO. The City asserted that these aircraft could not operate safely at the airport, which had residential areas in close proximity and no runway safety zones. The FAA began an administrative proceeding pursuant to 14 C.F.R. Part 16 to determine whether the City would thereby violate Federal law and grant assurances it had undertaken in return for federal funding.

Discussions between Santa Monica and the FAA led to suspension of this proceeding for years. In March of 2008, however, the City voted to enact the ordinance barring future operations. The FAA promptly issued an Order to Show Cause why the prior proceeding should not embrace the new ordinance and be expedited. When Santa Monica refused to stay enforcement of its ban during the now-revived administrative proceedings, the FAA on April 23 issued an interim cease and desist order that barred enforcement of the ordinance pending completion of those proceedings and that invited the City to comment on the agency's action. The City advised

that it would not comply with the FAA order.

The next day the FAA brought suit in Federal district court to enforce its order, which by statute “remains in effect under its own terms” until superseded by the agency or a federal court of appeals. United States v. City of Santa Monica (C.D. Cal., No.CV08-02695). On April 28 the district court enforced the order and issued a temporary restraining order against the City.

On May 12 the FAA rejected the arguments advanced by Santa Monica against the issuance and extension of the agency’s interim cease and desist order and issued a supplemental cease and desist order that continued to bar enforcement of the ordinance pending the outcome of the administrative proceeding. On May 15 the district court entered a preliminary injunction requiring the City to comply with the FAA orders and not to enforce its ordinance pending the close of the administrative proceeding.

Santa Monica both appealed from the district court’s action and petitioned for direct review of the FAA’s order in the U.S. Court of Appeals for the Ninth Circuit. The City sought vacation of the preliminary injunction and dissolution of the cease and desist orders so that it could enforce its ordinance immediately. The City’s request for a stay of the district court orders during the litigation was denied by the appellate court.

On May 27 the FAA issued an initial determination in the Part 16 proceeding that the City’s ordinance violated Federal statutes and the City’s grant

assurances; it recommended entry of a permanent cease and desist order. Santa Monica requested an administrative hearing, which is scheduled for mid-March. The hearing officer is expected to issue a decision in mid-May, which may also be appealed administratively.

In its brief to the Ninth Circuit the City argued that the FAA lacked authority to issue binding cease and desist orders before the conclusion of administrative proceedings, and that the district court was wrong not to consider this question before it enforced the agency’s cease and desist orders. Santa Monica also contended that as proprietor of SMO it may act to preserve safety at the airport, that it is acting consistent with FAA airport standards, and that the agency’s attempts to force it to accept the aircraft in question violate the Tenth Amendment to the Constitution.

The FAA countered that the district court properly enforced agency orders, the merits of which are reviewable only in Federal appellate court, and that the FAA has the authority to preserve the status quo during the pendency of administrative proceedings. The FAA also emphasized its exclusive power to determine matters of aviation safety, and urged that there was no factual basis for any safety concern regarding the jet aircraft at issue. Finally, the agency pointed out that the merits of the ordinance are not properly before the court until the completion of the administrative process, but that the City’s arguments on proprietary and police powers and the Tenth Amendment were baseless in any event.

Oral argument was heard on November 19, before Judges Pregerson, Rymer, and Korman. The panel questioned the City at length as to why it was in a hurry to have its ban become operational. The panel did not seem inclined to permit the ban to take effect during the pendency of the administrative proceedings. We are still awaiting the court's decision.

Attempts to mediate the Part 16 administrative proceeding were not successful. The discovery process ended January 22, 2009. The parties will exchange witness lists and written testimony in February, and the hearing is to be held March 16-20. Post-hearing briefs will be filed in April and the hearing officer's decision is anticipated in mid-May. That decision will be subject to appeal to the FAA's Associate Administrator for Airports.

The audio file of the oral argument before the Ninth Circuit can be accessed by entering the docket number where indicated on the following webpage:

<http://www.ca9.uscourts.gov/media>

Planned Airport Slot Auctions Stayed by D.C. Circuit

On December 8, the U.S. Court of Appeals for the District of Columbia Circuit stayed the FAA's proposed slot auctions for LaGuardia, John F. Kennedy and Newark Liberty International airports, which were scheduled to take place on January 12. Separate motions to stay the auctions had been filed by the Port Authority of New York and New Jersey, the Air

Transport Association and Continental Airlines.

The slot auctions were authorized by rules adopted by the FAA on October 10 to address aviation congestion management in the New York City area. The Port Authority, the Air Transport Association and the International Air Transport Association previously filed separate petitions seeking judicial review of the FAA's rules in the D.C. Circuit.

Historically, DOT and FAA have addressed the problem of congestion and delays at certain major airports by, inter alia, limiting the number of permissible flight operations ("slots"). In 2008 the FAA limited operations at JFK and Newark, and stated that it planned to lease new or returned slots at these two airports by conducting auctions.

Challenges to the FAA's rule and to its auction notice were filed by numerous parties, including the Air Transport Association, individual airlines, and the proprietor of the major New York City area airports (the Port Authority of New York and New Jersey). All challenges were consolidated in the U.S. Court of Appeals for the District of Columbia Circuit in ATA v. FAA (D.C. Cir. No. 08-1262.). Collectively, the petitioners have argued that the FAA has no authority to auction slots, and that its decision to do so violated the APA and denied petitioners due process because the legality of ordering slot auctions was pending in ongoing FAA rulemakings.

Latest Developments in NATCA Fair Labor Standards Act Litigation

Abbey v. United States, (Fed. Cl. No.07-2726) is a challenge by more than 7,000 plaintiffs alleging numerous violations by the FAA of the Fair Labor Standards Act. The principal challenge is to the Agency's authority to provide compensatory time and credit hours in lieu of overtime pay. The court previously granted the plaintiff's partial motion for summary judgment with respect to compensatory time and credit hours. On November 21 the court issued an order requiring any motion seeking summary judgment on remaining issues in the case to be filed by July 16, with response due on August 5 and replies by August 19.

The case was brought on May 1, 2007 by the National Air Traffic Controllers Association, on behalf of 7,438 named plaintiffs who alleged that the government violated the FLSA by: (1) failing to properly calculate the FLSA regular pay rate; (2) improper payment of compensatory time; (3) failing to compensate plaintiffs for pre-shift and post-shift work activities; and (4) failing to compensate plaintiffs for time spent off duty bidding for work and leave schedules.

Use of Passenger Facility Charges for O'Hare Modernization Program Upheld

On December 19 the U.S. Court of Appeals for the District of Columbia Circuit in St. John's United Church of

Christ v. FAA, (D.C. Circuit, No. 07-1362) upheld FAA's decision allowing the use of Passenger Facility Charges (PFCs) for funding of the O'Hare Modernization Program.

Petitioner St. John's United Church had challenged FAA's September 4, 2007 decision approving the authorization to collect and use more than \$ 1.2 billion on the program arguing that the approval violated the Religious Freedom Restoration Act (RFRA). Specifically the petitioners asserted that part of the project – runway construction necessitating the relocation of a cemetery – would “substantially burden” petitioner's exercise of religion and would not further “a compelling governmental interest.” Petitioners also argued that FAA's decision failed to comply with statutory and regulatory requirements for approval of PFCs, including requirements for adequate justification.

In its decision the D.C. Circuit did not reach the merits of the RFRA claim, finding that petitioners had failed to establish Article III standing since they did not demonstrate that construction of the cemetery relocation aspects of the project were contingent on PFC funding. The court also found that FAA's authorization of PFCs was neither arbitrary nor capricious, and that contrary to petitioner's claim, the FAA's finding of “adequate justification” for each of the disputed projects was not unreasonable. The court agreed with the FAA that under relevant regulations there is no requirement to show an alternate financial plan in the event that PFC revenues are not made available.

The opinion of the D.C. Circuit is available at:

<http://pacer.cadc.uscourts.gov/docs/comm/mon/opinions/200812/07-1362-1154962.pdf>

FAA Prevails in Challenge to Overflight Noise Study for Boston Logan International Airport

On December 18 the U.S. Court of Appeals for the First Circuit in Town of Marshfield v. FAA, (1st Cir. No. 07-2820) upheld the Boston Overflight Noise Study (BONS) Phase 1 for Boston Logan International Airport (Logan).

As part of its 2002 Record of Decision approving Runway 14/32 at Logan, the FAA committed to conduct a study to evaluate proposals to enhance existing or develop new measures to abate noise from aircraft overflights. The FAA stated that noise abatement proposals would be implemented to the extent feasible prior to completion of the study. The FAA issued a report identifying proposals that could be implemented in the near term, called "phase 1 measures." Measures that required more study and potentially detailed environmental analysis were deferred to later phases of the study.

In October 2007, based upon a documented categorical exclusion, the FAA adopted certain of the measures to reroute aircraft that increased use of Logan's approaches and departures over the ocean. Petitioners then filed suit in the First Circuit, challenging, among other things, the use of a categorical

exclusion to satisfy NEPA requirements. The case was briefed and there was no oral argument.

On December 18, the First Circuit issued a decision and order upholding the FAA's decision and denying the petition for review. The court found that while neither side had shed much light upon why the FAA used the Noise Integrated Routing System computer model, in this case the court concluded that FAA's categorical exclusion was "not implausible." The court agreed with the FAA that there was no requirement under NEPA to consider the cumulative effects of the measures that might be adopted during phase 2 or later phases because this would be speculative and the phase 1 measures had independent utility.

Turning to other laws, the court found that there was no violation for failure to consult under the National Historic Preservation Act. The agency documented its finding that there was no potential for effects on historic properties and the preservation officer did not object. Finally, there was no violation of the Federal Advisory Committee Act because there was no evidence that the FAA manages and controls either the Citizens Advisory Committee or the Boston/Technical Advisory Committee.

The First Circuit's decision is available at:

<http://www.ca1.uscourts.gov/cgi-bin/getopn.pl?OPINION=07-2820P.01A>

Challenge to FAA Approval of Danbury Airport Noise Compatibility Program Dismissed for Lack of Standing

On October 31 the U.S. Court of Appeals for the Second Circuit in Kroposki v. FAA (2d Cir. No. 07-1496) dismissed on standing grounds a petition that had sought review of FAA's acceptance of Noise Exposure Maps (NEMs) and approval of a Noise Compatibility Program ("NCP") under 14 CFR Part 150 for Danbury Municipal Airport, located in Danbury, Connecticut.

Petitioners contended, among other things, that the NEMs did not comply with Part 150 because the airport sponsor failed to certify that the maps represented existing and forecast conditions as of the date that they were submitted in 2006. We maintained that petitioners lacked standing and that the NEM and NCP met requirements under Part 150.

The case was briefed, and oral argument took place on October 22. Shortly thereafter, on October 31, the Second Circuit issued a summary order denying the petition for review for lack of standing.

While petitioners alleged that they had standing because they were injured due to the proximity of their homes to the airport, the court found that petitioners' injuries were not traceable to FAA approval of the NCP because the noise was not attributable to the approved noise abatement measures. As to alleged changes in flight procedures the court

found that FAA was not the proper defendant because it did not approve any changes to flight patterns in the NCP.

The court also concluded that petitioners had failed to show any procedural injury because the record reflected that they had opportunities to comment on both the NEM and the NCP. Moreover, the court noted that petitioners alleged that failures on the part of the City of Danbury to adhere to procedural requirements directly caused their injuries. However, petitioners could not show that their injuries were traceable to the FAA if these injuries were the result of independent actions by a party not before the court.

The Second Circuit's decision is available at:

<http://www.ca2.uscourts.gov:8080/isysquery/irl707f/1/doc>

Oral Argument Scheduled in Challenge to Realistic Bomber Training Initiative

The Air Force issued a Record of Decision (ROD) adopting its preferred alternative to modify and enlarge an existing instrument route and create the Lancer Military Operations Area by consolidating and expanding three existing military operations areas. The FAA adopted the final EIS and, on December 11, 2001, issued a Non-Rulemaking Decision Document, approving the actions. A challenge resulted in a remand to the Air Force and the FAA to address certain concerns.

In fulfilling the court's order, a Supplemental EIS was prepared, and that was challenged in 2007 in Davis Mountains Trans-Pecos Heritage Assoc. v. FAA (5th Cir. No. 07-60595).

The case has been fully briefed, and oral argument took place on February 2. FAA is hopeful that the case will be dismissed for failure to file a petition for review within 60 days after issuance of the ROD.

Ninth Circuit Hears Arguments in Challenge to Procedures at McCarran International Airport

On October 22, the U.S. Court of Appeals for the Ninth Circuit heard oral argument in City of Las Vegas v. FAA (9th Cir. No. 07-70121). The case is a challenge by the City of Las Vegas and others to the Modification of the Four-Corner Post Plan for McCarran International Airport in Las Vegas. In the ROD, the FAA modified the Four-Corner Post Plan by reinstating a right turn departure procedure for eastbound planes.

The FAA prepared a supplemental Environmental Assessment and issued a FONSI/ROD on November 14, 2006. Petitioners argue that the FAA failed to comply with NEPA and the Clean Air Act. Petitioners requested a stay of the FONSI/ROD and later moved the court for an emergency stay. Both were denied.

In their brief, petitioners argued that the FAA's analysis failed to incorporate results of a flight procedure waiver, failed to provide opportunities for public

input, lacked a full general conformity analysis, underestimated noise impacts, and lacked a complete description of the no action alternative and the project description. In its opposition brief, the FAA rebutted each of those claims citing ample evidence in the administrative record that the FAA incorporated the impacts of the waiver, performed the necessary and complete air quality and noise analyses, exceeded public involvement requirements, and properly described the alternatives and project description.

At the October 22 oral argument the court focused on understanding the petitioner's arguments, applicability of the flight procedure waiver and its impact on the environmental analysis.

We now await the court's decision.

The audio file of the Ninth Circuit oral argument can be accessed by entering the docket number where indicated on the following webpage:

<http://www.ca9.uscourts.gov/media>

FAA Moves to Dismiss Challenge to Alleged Changes in Runway Use Procedures at Boston Logan International Airport

Nine individual plaintiffs have filed a complaint against the FAA related to the increased use of Runway 33L for departure aircraft at the Boston Logan International Airport in Avellaneda v. FAA (D. Mass. No. 08-10718-DPW). The litigants claim that the FAA unlawfully implemented changes in

runway use procedures resulting in increased use of runway 33L without conducting an environmental review under the National Environmental Policy Act (NEPA). The lawsuit was filed on April 30, 2008, and seeks declaratory, injunctive and other equitable relief.

Prior to filing the lawsuit, two of the current litigants wrote to the FAA regarding their concerns that runway use procedures had, in their view, been unlawfully implemented at the airport without required NEPA review. As evidence of this assertion, the parties described experiencing a significant increase in noise over their communities between 2006 and 2007.

In fact, a new runway (Runway 14/32) was commissioned at Logan Airport in November 2006 as part of an airport improvement project that was the subject of an Environmental Impact Statement (EIS) and Record of Decision (ROD). As mitigation for potential noise impacts from operation of the new runway, the FAA established in its ROD a limitation on use of the new runway to instances where there were specific northwest wind conditions. This mitigation measure was anticipated to have the result of maintaining runway use at levels proportionately equivalent to those experienced in 2000.

Responding to the plaintiffs' letter, New England Region Administrator Amy Corbett wrote that "other than the required 10-knot wind restriction on the use of R/W 32, the air traffic control tower at Logan made no changes in policy or procedure from 2006 to 2007 regarding runway configuration selection." Therefore, the FAA takes the

position that there is no Federal action requiring review under NEPA.

FAA filed an answer to the complaint on September 3. Subsequent to that, on November 7, 2008, the FAA filed a motion to dismiss based on jurisdictional grounds, arguing that jurisdiction lies only in the Court of Appeals to review FAA orders and that the matter did not involve final agency action. After efforts to mediate proved unsuccessful, the FAA filed a second motion to dismiss on similar grounds.

FAA Prevails in Challenge To Conditional Airspace Determinations Concerning Adjacent Airports

On November 10 the U.S. Court of Appeals for the Fifth Circuit denied the petition for review in Menard v. FAA, (5th Cir. Nos. 07-60592 and 08-60746). The litigation stems from a longstanding conflict between the owners of two small, turf runways in Berryville, Texas that are located approximately 200 yards from each other.

Petitioners Lonny and Roxann Menard own Paradise Point, an airport consisting of a 30 x 1,900 foot turf runway, oriented east-west. The neighboring airport is part of Aero Estates. Its turf runway is 60 x 3,200 feet and lies parallel, but southwest of Paradise Point. The west end of the Paradise runway is approximately 200 yards north of the east end of the Aero Estates runway.

In June 2007 the FAA issued two conditional determinations, one each for the two airports. The determinations

allowed both to operate, provided their respective users maintained a divided air traffic pattern. Traffic using the northern Paradise Point airport was to approach from, and leave to, the north, and traffic using the southern Aero Estates airport was to approach from, and leave to, the south. The orders also required the users of the respective airports to use different altitudes to approach and depart the airspace, to use the Common Traffic Advisory Frequency, and to operate only during the daytime under visual flight rules.

The Menards allege that FAA's airspace determinations are arbitrary and capricious. Second, they argued that they were denied an opportunity to be heard, because their letters were not distributed adequately and DVDs, purporting to show flying conditions at Aero Estates, were not included in the administrative record.

In its November 10 decision the court held that the petitioners did not show that the orders were arbitrary and capricious, that the FAA's air safety determination was unlawful, or that due process was denied. The court reasoned that record amply supported the FAA's conclusion that both airports can operate safely and efficiently if they abide by certain traffic patterns.

The court agreed with the FAA that, notwithstanding the .25 nautical mile buffer zone recommended in FAA Procedures for Handling Airspace Matters, FAA Order 7400.2F, the orders at issue were consistent with FAA's authority to establish non-standard traffic patterns, assign special traffic pattern altitudes, and develop special

operating procedures to mitigate potential airspace conflicts. The court also concluded that FAA had authority to revise its past determinations and past FAA orders did not create any entitlement to airspace around Paradise Point.

On August 13, the Menards filed a second challenge, Menard v. FAA, this time attacking the FAA's revision to the previously-issued orders. However, on January 13, the Menards moved to dismiss the case based on the decision in the first case.

D.C. Circuit Dismisses Challenge to First-Ever Agency List of Actions Presumed to Conform Under the Clean Air Act

On February 13, the U.S. Court of Appeals for the District of Columbia Circuit dismissed the petition for review in County of Delaware v. DOT (D.C. Cir. No. 07-1385) on standing grounds. Petitioners, some of whom are also challenging the NY/NJ/PHL Area Airspace Redesign project (County of Rockland, supra) and others of whom are contesting the right turn at McCarran International Airport (City of Las Vegas, supra) filed the petition for review seeking to invalidate the FAA's list of actions presumed to conform under the general conformity provisions of the Clean Air Act. The D.C. Circuit's decision concluded that even though the petitioners had articulated the particularized interest required for standing, they had not demonstrated any nexus between that alleged injury and FAA's decision, nor had they demonstrated that a favorable decision

by the D.C. Circuit would in any respect redress that alleged injury.

Under EPA regulations, Federal actions must conform to State plans for achieving national ambient air quality standards. However, Federal agencies are not required to prepare analyses or documentation for actions that are de minimis and exempt or presumed to conform. This lawsuit specifically attacked the practice of treating air traffic control activities as presumed to conform.

Until recently, the FAA relied upon statements in the preamble to the general conformity rule indicating that air traffic actions were de minimis and exempt. "Federal actions which are de minimis should not be required by this rule to make an applicability analysis." In addition to the de minimis matters specifically set forth, EPA has taken the position that illustrations of de minimis actions include "[a]ir traffic control activities and adopting approach, departure, and enroute procedures for air operations." 58 Fed. Reg. 63214, 63249.

However, several years ago EPA headquarters staff advised that air traffic actions are not exempt. Based upon data from prior environmental studies and EPA air quality protocols, which do not require analysis above the mixing height, the FAA then added air traffic actions to the list of actions presumed to conform. The FAA documented and published its list of actions, after affording opportunities for public review and comment, pursuant to EPA regulations implementing general conformity requirements.

In their challenge petitioners first argued that the presumed to conform list is a final order subject to the D.C. Circuit's jurisdiction. Second, they contend that EPA exceeded its authority under the Clean Air Act by allowing presumptions of conformity. Third, they state that the FAA failed to adequately justify a presumption for air traffic actions below the mixing height.

The Government responded that: (1) petitioners lacked standing because the list of actions presumed to conform was not the sole basis for the finding of conformity in either of the cases cited, (2) EPA acted within its authority, and (3) there was ample justification.

Since the D.C. Circuit's decision dismissed the case on standing grounds it did not reach any of the arguments on the merits.

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

<http://pacer.cadc.uscourts.gov/common/opinions/200902/07-1385-1162766.pdf>

Federal Highway Administration

New Complaint Filed Challenging Winston-Salem Project

On August 18 FHWA was served with a new complaint in N.C. Alliance for Transportation Reform, Inc., v. FHWA, (M.D. N.C. No. 1:08-cv-570). The

case concerns the Winston-Salem Northern Beltway, from US 158 southwest of Winston-Salem to US 311 southeast of Winston-Salem in Forsyth County, NC (Western and Eastern sections).

In a prior complaint filed in 1999 in the U.S. District Court for the Middle District of North Carolina (No. 1:99CV00134), the plaintiffs alleged that FHWA and the North Carolina DOT violated NEPA and the N.C. Environmental Policy Act in connection with the proposed Beltway around Winston-Salem. The previous lawsuit concerned only the western portion of the project, and resulted in an injunction against both FHWA and NCDOT preventing the agencies from moving forward in any way with the project until new environmental studies were completed. The Order enjoining Defendants was issued in June of 1999 and also resulted in an order awarding attorney's fees due to a finding of bad faith.

After the previous lawsuit, NCDOT and FHWA decided to combine the western and eastern sections of the Beltway in their new environmental studies. A new record of decision was signed in February of 2008. NCDOT and FHWA thereafter filed a motion to dissolve the 1999 injunction order. We are still awaiting a ruling on the motion to dissolve.

Due to the short statute of limitations on the new ROD, plaintiffs have now filed their new complaint challenging construction of all sections of the Beltway.

Summary Judgment Motions Pending in Florida Bridge Project Challenge

On April 20, 2007, Citizens for Smart Growth Inc., Odias Smith and Kathie Smith, jointly filed a civil action seeking declaratory and injunctive relief under the Administrative Procedure Act, 5 U.S.C. § 701. The case, Citizens for Smart Growth v. FHWA, (S.D. Fla. No. 07-14122CIV), involves a challenge to the Indian Street Bridge Project, a 4.25-mile highway improvement project near Stuart and Palm City, Florida. The plaintiffs challenge whether the Florida Department of Transportation (FDOT) and FHWA violated NEPA and Section 4(f) of the Transportation Act. Plaintiffs also allege violations of other environmental laws, including the Clean Water Act, Endangered Species Act and Magnuson Fishery Conservation and Management Act.

In an order dated June 4, the court granted FHWA's and Florida's motion to dismiss count 4 of the Complaint, thereby eliminating the Endangered Species and Clean Water Act counts, since plaintiffs had failed to file the prerequisite "60 day notice letter" prior to filing suit. On September 23, the court issued a ruling granting in part and denying in part plaintiffs' motion to supplement the administrative record. The court denied their request to supplement the record with declarations, but granted their request to supplement the record with additional planning documents. Summary judgment motions and cross motions for summary judgment have been filed. We are now waiting the court's ruling.

FOIA Challenge Seeks Documents Relating to South Carolina Project

In S.C. Coastal Conservation League v. FHWA, (D. S.C. No. 2:08-cv 2492-PMD), the South Carolina Coastal Conservation League, through the Southern Environmental Law Center (SELC), filed a FOIA complaint on July 10, challenging FHWA's responses to SELC's requests for production of documents related to a proposed container terminal and highway project in Charleston, South Carolina.

On November 26, FHWA provided SELC segregated documents with full and partial redactions of approximately 10,000 pages, in accordance with a final agency decision and the various privileges, primarily the deliberative process privilege, as authorized by 5 U.S.C. §552(b). The agency is continuing to withhold documents and/or portions of documents identified under FOIA Exemption 5.

Motion to Dismiss Pending In Challenge to San Antonio Project

Aquifer Guardians in Urban Areas v. FHWA, (W.D. Tex. No. 5-08-cv-00154-FB) involves the construction of a toll project on US 281 in San Antonio, Texas, from Loop 1604 north to Borgfeld Drive, a distance of some 7.5 miles. Plaintiffs challenge whether FHWA properly complied with NEPA and the ESA in approving the subject project with an EA/FONSI. Plaintiffs claim several NEPA violations (failure

to conduct an adequate indirect and cumulative impact studies, failing to take into account the Loop 1604 project), as well as failure to recognize impact on the area's endangered species (i.e., Golden-cheeked Warbler and several karst invertebrates).

On October 6, 2008, FHWA filed a motion to dismiss the complaint. On November 10, FHWA filed an amended/supplemental motion to dismiss and in the alternative, a motion to remand, so as to present the court with a recent letter from the Texas Division Administrator requiring Texas to complete an EIS on this project and also prohibiting the San Antonio district office from having any supervisory role in the production of the EIS. As of this date the court has not ruled on the motions.

Motion to Dismiss Pending in Challenge to Sonoma Interchange Project

On September 6, 2007, a group called Rohnert Park Citizens to Enforce CEQA filed a complaint in the U.S. District Court for the Northern District of California against the California Department of Transportation (Caltrans), the United States Department of Transportation, and the Federal Highway Administration (FHWA). Rohnert Park Citizens v. California, (N.D. Ca. No. 3:07-cv-04607-TEH)

The case involves the Wilfred Avenue Interchange Project on U.S. Route 101 in Rohnert Park, Sonoma County, California. The project would cover a distance of 1.6 miles and involves

modifying the interchange and realigning and widening of US 101 from four to six lanes. The new lanes would be reserved for High Occupancy Vehicles. The project was processed with an Environmental Assessment/Finding of No Significant Impact (EA/FONSI).

The complaint stated three causes of action: one against FHWA and Caltrans and two State-law claims against Caltrans alone. With regard to FHWA, plaintiffs alleged the agency violated NEPA by not preparing an environmental impact statement for the project, which they claim “has the potential to affect the quality of the human environment.” Plaintiffs also claim that even if FHWA had not prepared an EIS in the first place, it should have “recirculated [the EA] or prepared a supplemental EIS for the project” in light of “significant new circumstances and/or information relevant to environmental concerns....” These new circumstances and information appear to be tied to alleged significant environmental impacts associated with the proposed Graton Rancheria Casino and Hotel Project, “an approximately 762,000 square foot gaming and entertainment facility in the project vicinity proposed by the Federated Indians of Graton Rancheria.” To date, the casino remains merely a proposed project.

The parties exchanged cross-motions for summary judgment in the fall of 2008. The Court heard oral argument on the matter on December 8. We are now awaiting the court’s decision.

Motions to Dismiss Pending in Tamiami Trail Challenge

Miccosukee Tribe of Indians v. Peters, (S.D. Fla. No. 08-21703 CV-Ungaro) is a challenge to the U.S. Army Corps of Engineers Tamiami Trail (U.S. Hwy 41) modification project in Everglades National Park between Miami and Naples, Florida.

Plaintiffs allege that FHWA violated Section 4(f) of the Transportation Act by failing to complete a full 4(f) assessment, even though FHWA’s only involvement in the project was to serve as the land transferring agent between the National Park Service, Florida Department of Transportation under 23 U.S.C. § 317.

The complaint was filed in the Southern District of Florida, Miami Division, on June 16, 2006, by the Miccosukee Tribe of Indians of Florida, a Federally-recognized Indian Tribe. The complaint seeks a writ of mandamus that would require defendants to undertake review of that portion of the project that would relocate a small section and bridge on the Tamiami Trail in aide of restoration. Plaintiffs also seek declaratory and injunctive relief.

The project is a restoration project of the Everglades National Park. The DOI and USACE approached FHWA to execute a Federal Land transfer for the project. Plaintiffs appear to allege that Section 4(f) applies since the Tamiami Trail is a Federally aided highway and our land transfer is necessary for the project to advance. However, FHWA is not otherwise involved in the project.

Motions for summary judgment were filed by both sides in the litigation on January 16, 2009.

South Carolina District Court Rules Against FHWA in South Carolina Environmental Challenge

Friends of Congaree Swamp, South Carolina Wildlife Federation v. FHWA, (D. S.C. No: 3:06-cv-02538MJP) is a challenge to the State Road 601 Bridge Replacement Project, southeast of Columbia, S.C. The project will replace an existing bridge over the Congaree floodplains, in Richland and Calhoun Counties, S.C. Plaintiffs argue that FHWA and the South Carolina DOT did not comply with requirements of section 4(f) and NEPA when they planned the reconstruction of the bridge.

The project is near and/or adjacent to the authorized boundary of the Congaree National Park. The Park Service is in the process of acquiring property for the congressionally mandated park expansion, which will allegedly bring the 601 bridge replacement within the Park boundary.

Oral argument on cross motions for summary judgment was heard on September 9, and on September 30, the court granted plaintiff's motion for summary judgment, ruling that in its current form, the Environmental Assessment for the project violates NEPA and fails to demonstrate that the defendant's took the "hard look" required by that statute. The court enjoined the defendants' from further

action on the bridge project until these deficiencies have been resolved, either in a modified EA or an EIS.

We have filed a motion for clarification since there was no ruling in the order on the 4(f) issue.

Complaint Challenges Louisville Historic Bridge Restoration Project

River Fields, Inc. v FHWA, (W.D. Ky. No. 3:08-cv-264) is a challenge to the Harrod's Creek Bridge Project, a 225 foot bridge replacement project near Louisville, Ky. Plaintiffs, who are landowners and a public interest group, allege that the Kentucky DOT and FHWA violated NEPA and section 4(f) as well as section 106 of the National Historic Preservation Act in approving the project. The project was processed through NEPA under a categorical exclusion with a full 4(f) analysis. Plaintiffs' complaint was filed on August 20.

The Harrod's Bridge Project is a badly needed bridge replacement project on River Road in a Louisville historic District. The bridge is presently one lane and handles two lanes of traffic on a narrow and curved section of River Road. Due to its disrepair there are weight restrictions on the bridge, and several areas where the concrete is missing, exposing steel supports. When complete the project will add an additional lane and will be reconstructed to its original historic appearance. The State Historic Preservation Officer has concurred with FHWA findings and entered into a memorandum of

agreement regarding the preservation of the bridge. Dispositive motions have not yet been filed by either side.

Complaint Challenges FHWA Approval of South Lawrence Trafficway

On October 24, a complaint was filed in the U.S. District Court in Kansas in Prairie Band Pottawatomie Nation v. FHWA, (D. Kan. No. 08-2534). The complaint challenges FHWA's decision to approve the South Lawrence Trafficway ("SLT") in Lawrence, Kansas. The Record of Decision for this project is dated May 2, 2008. A statute of limitations notice was published in the Federal Register on May 15, 2008.

Plaintiffs allege violations of NEPA, the Clean Water Act, the National Historic Preservation Act, Section 4(f), and the American Indian Religious Freedom Act.

Under NEPA plaintiffs claim that the project's purpose and need statement is "unreasonable, vague and inconsistent with prior statements" concerning the purpose and need for the project; that FHWA failed to consider all reasonable alternatives; that the agency failed to adequately "identify, disclose, and study" the impacts of the project "the effectiveness of [mitigation] measures"; that the agency failed to adequately respond to public comments; and also failed to supplement an EIS prepared by the U.S. Army Corps of Engineers.

With regards to section 4(f), plaintiffs allege that FHWA failed to demonstrate that there are no feasible and prudent

alternatives to using Section 4(f) resources and failed to engage in all possible planning to minimize harm to those resources.

Concerning the American Indian Religious Freedom Act, plaintiffs allege that the SLT will cause "unnecessary interference with American Indian religious practices." Plaintiffs did not specify how FHWA violated the National Historic Preservation Act.

This project has been the subject of past litigation. Northern Crawfish Frog v. FHWA, 858 F. Supp. 1503 (D. Kan. 1994) and Ross v. FHWA, 972 F. Supp. 552 (D. Kan. 1997), aff'd, 162 F.3d 1046 (10th Cir. 1998).

Dispositive Motions Pending in Pearson and Sea Bright Litigation

In June 2004, the FHWA Oregon Division Administrator approved the Record of Decision (ROD) for the South Medford Interchange Project. Located on I-5 in Medford, Oregon, this interchange is now approximately 75% complete and scheduled to open in Spring 2009. Plaintiffs filed suit on February 22, 2007. Pearson v. DOT, (D. Or. No. 07-00272). The State of Oregon was not named in the complaint but subsequently intervened as a defendant. Plaintiffs have not requested a preliminary injunction and construction continues on the project.

In their complaint, plaintiffs alleged that FHWA did not adequately consider cumulative impacts or traffic impacts, follow formatting requirements, present

a readable and understandable NEPA document or use best available science. Additionally, plaintiffs allege that FHWA violated Section 4(f).

After the administrative record was filed in June 2007, plaintiffs contended that it was incomplete. Following briefing on this issue, FHWA and the Oregon Department of Transportation (ODOT) were ordered by the court on December 19, 2007 to search for additional documents that plaintiffs contends should be part of the record. FHWA and ODOT filed their responses in January 18, 2008, indicating that no additional responsive documents were located.

Plaintiffs filed a motion for record review on October 15, 2008. (The judge in this case specified that a motion for record review should be used instead of a motion for summary judgment.) FHWA filed its response on December 5. FHWA and DOJ attorneys toured the project site on December 15. Oral argument was held in Portland on January 14, and the parties are awaiting the judge's decision.

Citizens Groups Challenge Buffalo, New York Waterfront Development Project

A complaint has been filed seeking to prevent a federal-aid highway project in the Buffalo, New York area from proceeding. In Buffalo Niagara Riverkeeper, Inc v. FHWA (W.D. N.Y. No. 98CV00375), several citizens groups and members of the Buffalo city council allege that the EIS for the highway project failed to adequately address adverse impacts, the section 4(f)

statement failed to meet the requirements of law, and the Federal and State agencies failed to comply with the National Historic Preservation Act. The plaintiffs allege that the agencies also failed to comply with similar State laws.

The highway project is in the vicinity of the Buffalo inner harbor area, which is a central component of the City's efforts at urban redevelopment and use of the waterfront for urban revitalization. Cross motions for summary judgment were filed in December with responses filed on January 16. No date has been set for oral argument on the motions.

Plaintiffs Appeal EAJA Decision Supporting FHWA

In an opinion in Senville v. Peters, (D. Vt. No. 2:03CV279) issued on March 21, 2008, Chief Judge William Sessions of the Federal District Court of Vermont denied a petition for attorney fees under the Equal Access to Justice Act (EAJA). The Court held that the position of the agency in the litigation was substantially justified and based on that finding the petition was denied. The plaintiffs have filed an appeal and all briefs have been filed in the Second Circuit. We await argument and a decision by the Circuit Court.

This underlying project, Chittenden County Circumferential Highway (CCCH), was on the Secretary's initial list of priority projects. The project also has a long history dating back to the early 1980's as a demonstration project in which the NEPA processing was delegated to the state of Vermont. The court enjoined the project in 2004

finding that the agency improperly adopted the EIS prepared by the State since it failed to adequately consider cumulative impacts, and failed to fully consider secondary impacts, and also failed to meet the requirements of an adequate discussion under section 4(f). That decision also held that a subsequent environmental assessment failed to adequately consider alternatives.

In determining that no EAJA fees were due the district court concluded that FHWA was substantially justified in its position. The court found that the agency prevailed on most counts and that this project was somewhat unique with respect to compliance under NEPA. Additionally, the court found the FHWA requirements with respect to environmental assessments somewhat ambiguous. In considering all of these factors the court held that FHWA's litigation position was substantially justified and no EAJA fees were awardable.

Union Challenges Public-Private Partnership Contract in Wage Dispute

In Affiliated Construction Trades Foundation v. DOT, (D. W.Va. No. 2-041344), the AFL-CIO has sued DOT challenging aspects of the public-private partnership (P3) contracts for the King Coal Highway in West Virginia. Issues are: 1) Validity of a public private partnership (23 U.S.C. 112 and 23 C.F.R. section 635, et. seq.); and 2) Applicability of prevailing Federal wage rates (Davis Bacon Act). The district court ruled for the Department on the public/private partnership issue but

against us on Davis-Bacon. Pending before the court are the Department's proposed Davis Bacon remedies.

The union organizations specifically challenged the validity of a public private partnership under FHWA statutes and regulations, including 23 U.S.C. 112 and 23 C.F.R. part 635, and the applicability of prevailing Federal wage rates (under the Davis Bacon Act). In a decision issued September 5, 2007, the district court upheld the P3 contracts. The court found that the administrative record adequately supported the agency's decision to enter into a negotiated contract without engaging in a competitive bidding process. The court also found that FHWA's public interest finding was supported by the record and deferred to it. The court concluded that the agency's contention that the project was cost-effective, and unusual and unlikely to recur, was supported by the record.

However, the court also found that the contracts had improperly failed to include measures to implement the Davis-Bacon wage rates and that this violated Federal law. The opinion highlighted the importance of the Davis-Bacon Act in the use of negotiated contracts. In citing FHWA's Emergency Relief Manual, the court stated that "Davis-Bacon wage rates on Federal-aid construction contracts apply for all ER [presumably emergency relief] contracts. This provision cannot be waived by the FHWA. Davis-Bacon Act Requirements may be waived only by executive order of the President."

FHWA has filed a brief proposing Davis-Bacon remedies which the court has yet to respond to.

Sierra Club Challenges FHWA Approval of Saint Croix River Crossing Project

On June 5, 2007, in Sierra Club North Star Chapter v. DOT, (D. Minn. No. 07-2593), the Sierra Club challenged FHWA's 2006 decision to approve the Saint Croix River Crossing Project in Minnesota. The complaint alleges violations of the Wild and Scenic Rivers Act ("WSRA"), the Organic Act, the General Authorities Act, NEPA, and section 4(f). With regard to the WSRA, the Sierra Club asserts that FHWA's approval of the project was arbitrary, capricious, an abuse of discretion, and not in accordance with law because, among other things, the proposed project does not "remove the existing bridge and restore [the existing] transportation corridor to natural conditions." In support of its NEPA counts, the Sierra Club asserts that FHWA did not adequately consider alternatives to constructing a new four-lane bridge south of Stillwater, Minnesota, and that FHWA did not adequately identify the indirect and cumulative impacts of the proposed project. In alleging violations of Section 4(f), the complaint asserts that the proposed project does not minimize harm to the Saint Croix National Scenic Riverway.

This project has been the subject of past litigation. See Sierra Club North Star Chapter v. Pena, 1 F.Supp.2d 971 (D. Minn. 1998). The FHWA's motion for

summary judgment is now due to be filed in March, 2009.

FHWA Challenged on Tiered Environmental Decision on Virginia I-81

In Shenandoah Valley Network v. FHWA, (D. Va. No. 3:07-cv-00066-nkm), the Shenandoah Valley Network, the Coalition for Smarter Growth, the Sierra Club, the National Trust for Historic Preservation and other local groups have challenged the FHWA's decision to approve the first portion of the environmental decision on improvements to I-81 in Virginia. The complaint was filed on December 17, 2007. While not named as a party, the Commonwealth of Virginia intervened as a party defendant.

I-81 in Virginia extends 325 miles in a southwest to northeast direction in western Virginia from the Tennessee border north to the West Virginia border. On March 21, 2007, FHWA and VDOT issued a Tier 1 Final Environmental Impact Statement (FEIS) and a Tier 1 Record of Decision followed on June 6, 2007. Conceptual-level improvements to the entire 325-mile length of I-81 in Virginia were evaluated in the Tier 1 EIS as well as improvements to Norfolk Southern's Shenandoah and Piedmont rail lines in Virginia.

The EIS concluded that improvements to I-81 are necessary to address existing and future capacity and safety conditions. The Tier 1 environmental documents also developed improvement concepts that will be advanced in Tier 2, identified the location of the corridor

where alignments will be studied in Tier 2, identified projects with independent utility and logical termini that will be studied in Tier 2, identified the types of Tier 2 NEPA documents to be completed, and evaluated potential impacts associated with conceptual-level improvements along the entire 325-mile I-81 corridor. The actual impacts of individual projects will be analyzed in detail during Tier 2 as they are advanced.

The improvement concepts considered during Tier 1 included: a no build concept, transportation system management, four rail concepts, five roadway concepts, five combination concepts, and five separated lane concepts. The concept that is being advanced to Tier 2 is a non-separated variable lane highway facility that involves constructing no more than two general purpose lanes in each direction along I-81.

After settling one count of the complaint, two counts remain in the litigation. The remaining counts allege that the Tier 1 ROD was premature in light of VDOT's mandate from the Virginia General Assembly to study multi-state rail as a means of diverting traffic off of I-81, and that plaintiffs' due process rights were violated as a result of the alleged ambiguity of claims barred by the Tier 1 statute of limitations. In support of the latter claim, the plaintiffs argue that the Tier 1 ROD fails to specify whether, and to what extent, FHWA intends to rely on decisions made in the Tier 1 ROD to preclude consideration of alternatives during the Tier 2 stage.

FHWA concluded summary judgment briefing of the remaining counts on January 30. Oral argument has not yet been scheduled.

Georgetown Trolley Track Rehabilitation Halted in Environmental Challenge

In McGuirl v. Peters, (D. D.C No.04-1465(JR)), a group of plaintiffs in 2004 challenged certain administrative actions of DOT in connection with a project presently under development to repair and/or rehabilitate the trolley tracks on O & P Streets, NW, in Washington, DC in the city's Historic District of Georgetown.

The complaint sought to stop the repair/rehabilitation project relating to the subject trolley tracks. On January 25, 2008, Judge Robertson ordered that all proceedings in this case be stayed pending final agency action. The order denied, without prejudice, various other motions. FHWA is awaiting completion of a Section 4(f) Evaluation.

NEPA Challenge to Improvements to U.S. Route 220 Virginia Project

In Virginians for Appropriate Roads v. Capka, (W.D. Va. No. 7:07cv00587), Virginians for Appropriate Roads and Virginia Forest Watch, along with two individuals, in 2007 filed a complaint alleging that FHWA violated NEPA by refusing to evaluate alternatives, including access management techniques, to proposed improvements to U.S Route 220 in Virginia. The

complaint also alleges that FHWA violated NEPA by approving the project prematurely, and without proper consideration of both air and noise impacts. Finally, the complaint alleges that FHWA violated the Federal-Aid Highway Act by failing to make a determination that the project is in the best overall public interest.

The case is now being briefed in summary judgment motions.

Washington State Road-Widening Environmental Assessment Challenged

On October 23, several Spokane County area residents and the Prairie Protection Association filed a complaint in the U.S. District Court for the Eastern District of Washington, in Hamilton v. DOT, (E.D. Wash. No. 2:08-cv-00328-RHW).

The complaint alleges that the FHWA and the other Federal defendants violated the APA and NEPA by approving the widening of a two lane road in an Environmental Assessment, with a Finding of no Significant Impact. The complaint alleges that a full Environmental Impact Statement should have been completed. The decision at issue authorizes construction of the \$58 million "Bigelow Gulch/Forker Road" project. The proposed project would widen and realign an existing two-lane road to a four-lane road (with alternating gravel medians and two-way left turn pockets and paved shoulders) over 8.2 miles.

The complaint alleges that FHWA approval of the road widening and

realignment violated NEPA by failing to: 1) evaluate a reasonable range of alternatives, 2) adequately analyze wetland impacts, 3) properly examine cumulative impacts, and 4) take a "hard look" at project environmental impacts. The complaint also alleges that FHWA violated Section 4(f) by failing to: 1) analyze feasible and prudent alternatives, 2) apply a "totality of impacts" analysis, and 3) minimize impacts to Section 4(f) resources.

FHWA filed an answer to the complaint on December 23.

Federal Railroad Administration

North Carolina Department of Transportation Seeks Review of FRA Jurisdiction Determination

On September 22, the North Carolina Department of Transportation (NCDOT) filed a petition for review in N.C. DOT v. FRA, (D.C. Cir. No. 08-1308), challenging a July 23, jurisdiction decision made by FRA. In the jurisdiction determination, FRA notified NCDOT that it is a railroad carrier within the meaning of the railroad safety laws and is therefore subject to FRA's jurisdiction.

Specifically, FRA found that NCDOT provides railroad transportation because it contracts out the rail operations for two intercity passenger rail operations in North Carolina, and it contracts out the maintenance work for the rail equipment that is operated on those lines. Additionally, it finances the rail

operations on the lines, and it is in charge of the overall operations at a maintenance facility where the railcars that are operated on the lines undergo maintenance. Those facts demonstrate that NCDOT is providing railroad transportation and is a railroad carrier subject to FRA's jurisdiction.

NCDOT's petition for review focuses on several issues. First, NCDOT asserts that FRA's jurisdiction determination is arbitrary and capricious because FRA failed to comply with the Administrative Procedure Act. Second, NCDOT contends that FRA was arbitrary and capricious in determining that NCDOT is a railroad carrier because of the absence of factual and legal support for its determination. Finally, NCDOT maintains that FRA arbitrarily and capriciously departed from its own precedent and practice regarding states that own, but do not operate, rail facilities or that subsidize intercity rail operations without providing a reasonable explanation for that departure.

On November 13, FRA filed a motion to dismiss the petition for review for lack of jurisdiction. The motion asserts that the challenged jurisdiction determination is not reviewable final agency action as it was simply a preliminary assessment of the agency's view of the law. Alternatively, FRA contends that at the time that NCDOT filed the petition for review, it had pending before FRA a request for reconsideration of the same decision for which it sought review in the D.C. Circuit, and that this renders FRA's decision non-final and NCDOT's petition for review premature.

Briefing for the motion to dismiss was complete on December 2, and the parties are currently waiting for a ruling from the Court.

Engineer Seeks D.C. Circuit Review of Certification Decision

On April 1, 2008, Mr. K.L. Hensley, a Union Pacific Railroad Company (UP) locomotive engineer, and the Brotherhood of Locomotive Engineers and Trainmen filed a petition for review in the U.S. Court of Appeals for the District of Columbia Circuit against FRA and FRA's Locomotive Engineer Review Board (LERB), seeking a review of a final agency action under FRA's locomotive engineer qualification regulations. The case is Hensley v. FRA (D.C. Cir. No. 08-1143).

Petitioners seek review of FRA's February 1 denial of Mr. Hensley's appeal from a decision by an FRA administrative hearing officer (AHO) upholding a temporary change in the status of Mr. Hensley's locomotive engineer certification from a Class 1 locomotive engineer certification to a Class 3 student engineer certification.

On May 20, the petitioners filed a consent motion asking the court to hold the case in abeyance pending the D.C. Circuit's decision in Daniels v. Union Pacific R.R. (D.C. Cir. No. 07-5114) because the Daniels case involved issues substantially similar to those raised in Hensley. The court granted that motion on June 18. The court's order directed the parties to file motions to govern future proceedings in the case within 30 days of the Daniels decision.

On July 1, 2008, the court decided the Daniels case. The court's decision in Daniels upheld the district court's dismissal for lack of subject matter jurisdiction based on the Hobbs Act. While the defendants won the appeal, the decision includes dicta relating to the application of FRA's locomotive engineer qualification regulations (Part 240). Most importantly, the D.C. Circuit does not appear to give a great deal of credence to FRA's argument that a demotion is not a revocation. In the decision, the panel points out that Part 240 does not mention demotions at all. It then goes on to state that the plaintiffs' demotions resulted in the loss of their Class 1 certifications and that the only way that certifications can be "lost" under Part 240 is by revocation.

On July 31, 2008 and September 26, 2008, FRA filed consent motions to continue to hold the case in abeyance to allow the parties to meet and discuss a possible resolution of the case. The court granted both motions.

Petitioners maintained that the Daniels decision either resolved the issues in Hensley or at least supported their position in Hensley. While FRA did not agree that the Daniels decision resolved the issues in Hensley, the agency ultimately decided to conduct a rulemaking addressing the issues in the case.

On September 26, FRA therefore filed a motion requesting that the court continue to hold the case in abeyance pending the completion of the rulemaking. On September 30, the court ordered that the case continue to be held in abeyance

pending further order. It also directed FRA to file status reports at 90-day intervals, beginning on December 29.

On December 23, FRA issued a notice of proposed rulemaking (NPRM) that proposes revisions to the FRA regulations governing the qualification and certification of locomotive engineers. The NPRM (i) addresses the unanticipated consequences arising from the practice of reclassifying a person's locomotive engineer certificate, (ii) clarifies the grounds upon which a railroad may revoke a locomotive engineer's certification, and (iii) proposes certain certification program updates.

The Federal Register published the NPRM on December 31. Pursuant to the September 30 Order, on December 29, FRA filed a status report with the Court, reporting on the status of the rulemaking.

D.C. Circuit Dismisses BNSF Railway's Petition That Had Sought Review of FRA Waiver Decision

On December 19, the U.S. Court of Appeals for the District of Columbia Circuit issued an order of dismissal finding BNSF Railway Company's petition for review in Burlington Northern-Santa Fe Ry. v. DOT (D.C. Cir. No. 08-1263) "incurably premature." BNSF had filed the petition challenging a June 12, decision by the FRA Safety Board to grant a waiver request filed by the City of Seattle, Washington. The City's request sought a waiver of the notification requirements

contained in 49 CFR Part 222, in order to continue pre-existing locomotive horn sounding requirements beyond June 24, 2008.

The BNSF petition raised two arguments. First, it contended that FRA exceeded its statutory authority under 49 U.S.C. § 20153 by accepting Seattle's waiver request over the objection of BNSF. BNSF stated that, by accepting the waiver request, FRA has allowed the City to continue in effect a pre-rule quiet zone even though the City's request did not comply with the requirements of §20153(d) or FRA's regulations that implement the requirements of §20153(c).

Second, BNSF asserted that FRA's consideration and subsequent grant of the waiver request constituted an arbitrary and capricious action, due to the City's failure either to obtain railroad consent to the waiver request, or in the alternative, to explain why railroad consent would not likely contribute significantly to public safety.

On September 26, the United States filed a motion seeking the dismissal of the petition, arguing the request for review was premature because BNSF had filed a petition for reconsideration that was pending before FRA at the time that BNSF sought review from the court. The court's December 19 order granted that motion.

National Highway Traffic Safety Administration

Sixth Circuit Upholds NHTSA's Decision Denying Exemption from Trailer ABS Requirements

On December 10, the U.S. Court of Appeals for the Sixth Circuit in InterModal Technologies, Inc. v. Peters (6th Cir. No. 07-2196) affirmed a district court decision upholding NHTSA's decision not to issue an exemption for a trailer braking system that does not meet applicable Federal requirements.

NHTSA's decision denied an application for an exemption filed by InterModal Technologies, Inc. InterModal had applied for a temporary exemption from certain requirements of Federal Motor Vehicle Safety Standard 121 governing air brake systems on trailers. Under the standard, a trailer must be equipped with an antilock braking system that satisfies the detailed and technical regulatory definition of an ABS. A trailer also must be equipped with an exterior indicator light that activates when the ABS malfunctions. InterModal specifically sought an exemption from the exterior warning light requirement.

NHTSA denied InterModal's application because the trailer at issue was equipped with a device known as the MSQR-5000 instead of a system that satisfies the definition of an ABS. Even assuming the MSQR-5000 qualified as an ABS under the standard, the agency denied the application because it did not otherwise satisfy the requirements for a temporary exemption.

In its December 10, opinion, the Sixth Circuit upheld the denial based on the threshold issue of whether the MSQR-5000 satisfies the definitional requirement of an ABS. The court did not reach issues relating to whether the trailer satisfied other requirements for a temporary exemption. The agency argued, and the court agreed, that even if InterModal could satisfy the other criteria for a temporary exemption from the warning-light requirement, it still could not market a trailer equipped with an MSQR-5000 because the device itself does not qualify as an ABS under the standard. In order to satisfy the regulatory definition of an ABS, a system must control the degree of rotational wheel slip during braking. "Wheel slip" means "the proportional amount of wheel/tire skidding relative to the forward motion (velocity) of the vehicle." A locked wheel has 100 per cent wheel slip, while a freely rotating wheel has none.

The court recognized that Standard 121 requires an ABS to prevent and react to wheel lockup, a performance standard NHTSA concluded the MSQR-5000 did not meet since the MSQR-5000 ceases to operate when a wheel is locked. Also, the MSQR-5000 cannot release a locked wheel by venting sufficient air from the brake chamber. The court concluded that NHTSA had ample basis to conclude that the MSQR-5000 does not meet the threshold definition of an ABS, and thus InterModal could not prevail.

The Sixth Circuit's opinion is available on-line at:

<http://www.ca6.uscourts.gov/opinions.pdf/08a0442p-06.pdf>

California Court Upholds Withholding of Most CAFE- Related Documents in FOIA Suit

On December 22, a Magistrate Judge of the U.S. District Court for the Northern District of California issued a report and recommendation in California v. NHTSA, (N.D. Calif. No. 07-02055) finding that DOT properly withheld most of the documents still at issue in this FOIA litigation in which the State of California has sought documents related to NHTSA's statements in the preamble to its light truck CAFE standard regarding the preemptive effect of the standards on State requirements limiting CO₂ emissions. The FOIA request also sought documents related to certain meetings regarding the standard.

Neither DOT nor California filed objections to the report and recommendation, and we subsequently released the 37 pages and partial pages of documents that the court had found could not be exempted from disclosure.

Federal Claims Court Voids NHTSA Decision in Contracting Dispute

The U.S. Court of Federal Claims recently issued an opinion in e-Management Consultants, Inc. v. United States, (Fed. Cl. Case No. 08-680). This case concerned a challenge by plaintiff e-Management Consultants, Inc. to NHTSA's determination to override a stay of performance of a contract with Centech Group, Inc. for information technology services while e-Management's protest concerning the

contract was pending before the Government Accountability Office.

On September 24, NHTSA issued a memorandum setting forth a written determination lifting a stay of performance of the contract pursuant to the Competition in Contracting Act. On September 25, e-Management filed a complaint and motion for declaratory and injunctive relief seeking relief from NHTSA's decision to override the CICA stay of contract performance. On October 2, the court held a hearing on e-Management's motion. Following the submission of supplemental papers and a supplemental hearing, on October 8, Judge Emily Hewitt issued a decision granting a declaratory judgment in favor of e-Management, voiding NHTSA's override determination. The Court denied e-Management's motion for injunctive relief.

The opinion is available on-line at:

<http://www.uscfc.uscourts.gov/sites/default/files/HEWITT.EMANAGEMENT101408.pdf>

Federal Transit Administration

Ninth Circuit Upholds FTA Funding Decision for Tahoe City Intermodal Terminal

On December 9 the U.S. Court of Appeals for the Ninth Circuit in Tahoe Tavern Property Owners Association v. U.S. Forest Service, (9th Cir. No. 07-6006) affirmed a district court decision

that previously upheld a challenge to the construction of an intermodal transit center in Tahoe City, California, that would be financed with FTA grant funds. The plaintiffs alleged violations of Section 4(f) of the DOT Act of 1966, the National Environmental Policy Act (NEPA), and the California Environmental Quality Act (CEQA).

Because the transit center is proposed to be located on Forest Service land, the U.S. Forest Service is a co-defendant with FTA, even though the claims against the Federal defendants primarily concerned Section 4(f).

Waiver for King County Metro Challenged

United Motorcoach Association v. Simpson, (D.D.C. No.1:08-cv-01648) is a challenge to the Federal Transit Administrator's decision to grant a waiver to King County Metro under the FTA charter service regulations (49 CFR Part 604), thereby allowing the grantee to provide charter service to the Seattle Mariners' baseball games throughout the 2008 season. The plaintiff contended that the decision was arbitrary, capricious, and an abuse of the Administrator's discretion. The United States filed a motion for summary judgment on January 2.

Bankruptcy Court Approves Asset Sales for Two Transit Grantees

In In re: BBW Enterprises, Inc., Capitol Bus Company, Rohrer Tour & Charter Company, Inc., Dauphcor, Inc., B.B. and W. Associates, (Bankr. M.D. Pa. Nos. 1-

08-02576-MDF; 1-08-02577-MDF; 1-08-02578; 1-08-02579-MDF; 1-08-02580 (Jointly Administered)), a Chapter 11 bankruptcy involving two Federal Transit Administration grantees under the Over-the-Road-Bus (OTRB) program, the U.S. Bankruptcy Court for the Middle District of Pennsylvania has issued an order approving the sale of all of the assets owned by Capitol Bus Company d/b/a Capitol Trailways to Carl R. Bieber, Inc. t/a Bieber Tourways. This approval resolves a Chapter 11 bankruptcy proceeding begun in July 2008.

Both companies are FTA grantees. The U.S. Attorney's Office for the Middle District of Pennsylvania had previously filed an objection to the proposed sale requesting that the court condition the sale upon FTA approval of the transfer. The court's order included the requested condition since the vehicles in question contain FTA-funded lifts.

Maritime Administration

United States Seeks Summary Affirmance in MARAD LNG Port Litigation

On December 8, the U.S. District Court for the District of Columbia denied a motion of Atlantic Sea Island Group LLC (ASIG) for a preliminary injunction against MARAD's decision designating New Jersey as an "adjacent coastal State" for purposes of consideration of ASIG's application for a federal license to construct and operate a liquefied natural (LNG) gas port in waters off the coasts of New York and New Jersey.

The court also granted the government's motion to dismiss the case.

Once a State is designated as an "adjacent coastal State," a project may not proceed without the approval of the Governor of that State and could become subject to certain conditions sought by the Governor. New York is already a designated State for this project because the port will be connected by pipeline to New York.

In its complaint in Atlantic Sea Island Group LLC v. Connaughton, (D.D.C., No. 08-00259) ASIG alleged that the authority to make such designations resides in the Coast Guard, not MARAD, and that in any event, MARAD's decision was untimely, contrary to the substantive standard governing such decisions, and not supported by record evidence. While the court found that it had jurisdiction over the case, it rejected all of ASIG's merits arguments.

ASIG appealed the decision to the U.S. Court of Appeals for the D.C. circuit, Atlantic Sea Island Group LLC v. Caponiti, (D.C. Cir. No. 08-5525), and the United States intends to file a motion seeking summary affirmance of the district court's decision on February 12.

NRDC Suisun Bay Reserve Fleet Litigation

The National Resources Defense Council as well as two other environmental plaintiffs have sued the Department of Transportation under the National Environmental Policy Act and the Resource Conservation Recovery

Act with respect to the operations of the National Defense Reserve Fleet in Suisun Bay, California in National Resources Defense Council v. DOT (E.D. Calif. No. 2:07-CV-2320-GEB-GGH). On December 6, 2007, the NRDC amended its complaint to add a Clean Water Act count to the existing NEPA and RCRA claims.

DOT has answered the amended complaint and there is an agreement to stay the NEPA portion of the litigation pending completion of the environmental assessment process later this year. The Maritime Administration has committed not to do any in-water hull cleaning of SBRF vessels until the NEPA process is completed.

Settlement discussions are continuing with the plaintiffs, who are at present allowing negotiations between MARAD and the California State Water Quality Board in the below referenced matter, to take the lead in this matter. Thousands of documents have been produced and more continue to be reviewed for production. A site inspection of the vessels was held the week of January 12, and went well.

In California State Water Quality Control Board Intervention, (E.D. Calif. No. 2:07-CV-2320-GEB-GGH), a matter related to the NRDC suit, the State Water Board has filed a notice of intent to sue the Department for violations of the Clean Water Act and the California State equivalent of the Clean Water Act and well as for failing to comply with directives of the Water Board dated August 27, 2008. Without opposition from the United States, the State Water Board has intervened in the NRDC case.

The United States, with the assistance of a private contractor, is preparing the necessary documentation to obtain coverage for the fleets' operations under an existing California General Permit for Clean Water Act discharges. Discussions are also continuing with respect to whether California regulators will allow in-water hull cleaning. At present, they will only allow hull cleaning in drydock.

ACT Appeals Dismissal of Cargo Preference Suit and EAJA Denial to Ninth Circuit

American Cargo Transport ("ACT"), an operator of ocean going vessels registered in the United States, has filed a notice of appeal with the U.S. Court of Appeals for the Ninth Circuit seeking to reverse the district court's decision in America Cargo Transport, Inc. v. United States, (W.D. Wash. No. C05-393 JLR). Separately ACT has also challenged the district court's decision denying recovery of attorney's fees under the Equal Access to Justice Act.

In its district court complaint, ACT alleged that it was deprived of its right to carry U.S. preference cargo, which, consistent with the Cargo Preference Act of 1954, codified in section 901(b) of the Merchant Marine Act, 1936, 46 App. U.S.C. § 1241(b), is statutorily reserved in substantial part for carriage on vessels flying the U.S. flag.

ACT's amended complaint specifically named two Federal agencies as defendants: the Agency for International Development ("AID") – the agency statutorily charged with the obligation to

arrange shipment of certain government impelled relief cargo, and MARAD – the agency statutorily charged with administering the cargo preference laws of the United States. DOJ’s early representation in the case did not take into account the competing policy concerns of the two named Federal defendant agencies.

DOT objected to the litigation strategy of the United States in a December, 2005 letter to the Department of Justice. After two years of deliberation DOJ in September of 2007 decided that AID had, in fact, acted contrary to MARAD’s regulations when it allowed foreign carriage of a full vessel load of AID cargo in circumstances where the U.S. flag vessel offered by ACT was available to carry the cargo.

The United States thereafter successfully sought dismissal of the underlying complaint, arguing that the matter is now moot and has been resolved in ACT’s favor for future cases. The district court also dismissed ACT’s motion seeking attorney fees, holding that ACT had not substantially prevailed in the litigation as required by the Equal Access to Justice Act.

Both decisions were appealed by ACT to the U.S. Court of Appeals for the Ninth Circuit. American Cargo Transport, Inc. v. United States (9th Cir. No. 08-35010). Briefing has been completed and we are awaiting the Ninth Circuit’s decision in each appeal.

Recent Developments in Southern Scrap Contracting Dispute

Southern Scrap owns a Maritime Administration-qualified ship recycling facility situated on the Industrial Canal in New Orleans, Louisiana. During Hurricane Gustav, in early September 2008, vessels at the Southern Scrap facility broke free from their moorings and allided with a bridge. A U.S. Coast Guard report subsequently identified deficiencies with the Southern Scrap mooring plans and ordered that the facility undertake remedial measures.

MARAD disqualified Southern Scrap from bidding in the agency’s vessel recycling program pending revision of the Southern Scrap Technical Compliance Plan (“TCP”) to address the mooring issues revealed during the hurricane. On November 12, Southern Scrap filed a complaint in U.S. District Court in Louisiana, Southern Scrap Material Co. v. MARAD, (E.D. La. No. 08-4881) and on the same day Southern Scrap filed its revised TCP.

On November 14, MARAD notified Southern Scrap that its TCP was acceptable and reinstated its eligibility to participate in the MARAD ship recycling program. Accordingly, it is the Agency’s position that many of the points plaintiff relied on in its complaint are moot.

Southern Scrap subsequently submitted offers but they proposed the use of an unidentified facility that was not included in Southern Scrap’s approved TCP. These offers were rejected.

Southern Scrap has since these actions filed an amended complaint and a motion for preliminary injunction seeking to prohibit MARAD from debarring any contractor, particularly Southern Scrap, from the ship disposal program as well as challenging certain aspects of the solicitations. MARAD has opposed the motion for preliminary injunction. MARAD has also filed a motion to dismiss and a motion to transfer contending that bid protest matters are now the exclusive jurisdiction of the Federal Court of Claims. A hearing was held on January 28.

Concurrently Southern Scrap also has three pending appeals at the Civilian Board of Contract Appeals. These were filed since the contracting officer had not issued a final decision within 60 days. MARAD has filed a motion to dismiss two of these appeals on the grounds that they were filed prematurely because the contractor subsequently amended its request for an equitable adjustment tolling the time for a final decision.

Claims Court Grants MARAD Partial Summary Judgment in Veridyne Contract Dispute

The Court of Federal Claims in Veridyne, Inc. vs. United States, (U.S. Court of Federal Claims No. 1:06-CV-00150), a contracting dispute, has granted MARAD's motion for partial summary judgment.

Veridyne was engaged in providing logistics support services to MARAD pursuant to a contract that had been awarded under the 8(a) program.

Unfortunately a series of events occurred that caused MARAD to examine the legality of the relationship and curtail further payments after determining the contract was void ab initio.

Veridyne filed suit in the Court of Federal Claims seeking \$2,407,157.67, including outstanding invoices, overhead and general administrative expense, legal fees, wind-down costs and lost profits. Veridyne then filed a motion for partial summary judgment and the government filed a cross-motion for summary judgment. After oral argument, the court denied Veridyne's motion and partially granted the government's cross-motion as to count 3, a claim for breach, wind-down costs and lost profits, because the government chose not to order additional services under an IDIQ contract.

As to the remaining issues in the case, discovery has commenced, document production has occurred and depositions will begin soon. Veridyne's renewed motion for summary judgment was denied. The government is seeking leave to amend its answer and add counterclaims for fraud discovered in the invoices submitted by Veridyne.

Third Party Complaint Filed Against MARAD in EPA Dispute Over Vessel Export Agreement

EPA brought an action against Potomac Navigation to prevent its export to Greece of the vessel SANCTUARY because the vessel contains prohibited amounts of polychlorinated biphenyls (PCBs). Potomac Navigation obtained

the vessel at an admiralty sale brought by the Port of Baltimore against the SANCTUARY for unpaid maritime liens. The vessel was donated by the Maritime Administration in 1989 to a charitable organization in Baltimore.

Potomac Navigation has filed a third party complaint against the Maritime Administration and the Navy as former owners of the SANCTUARY asserting damages under CERCLA and TSCA. Potomac Navigation v. MARAD (D. Md. No. WMN 08-CV-717).

A motion to dismiss has been filed.

United States Ensures Obsolete Vessel Will Be Sunk as a Reef

The VANDENBERG is a vessel donated by the Maritime Administration to the State of Florida for use as an artificial reef. The State of Florida thereafter donated the vessel to the City of Key West. Key West hired a contractor to prepare the vessel for reefing and that contractor contracted with Collannas shipyard to prepare the vessel for movement from Virginia to Florida. Collannas claimed that it was not paid for the work that it was performing and commenced a maritime lien action in the Eastern District of Virginia for the sale of the vessel. Collannas v. Key West: (E.D. Va. No. 2:08 CV 160).

The United States intervened in the action to ensure that the sale order conformed to the statutory restrictions on the use of the vessel. The sale order was appropriately modified restricting the use of the vessel to reefing or recycling in the United States. The City

of Key West was the high bidder at the sale.

Federal Motor Carrier Safety Administration

U.S. Responds to Tenth Circuit's Invitation to Address the Effect of Regulatory Endorsement on Motor Carrier Insurance Policies

Interstate motor carriers must maintain liability insurance policies providing a fixed minimum level of financial protection for the public. At least one such policy for every carrier must have an "endorsement" attached (the MCS-90 form) that nullifies certain limitations in the policy that might otherwise prevent payment to injured parties. The most common such limitation is the failure of the policy to list specific motor vehicles. The Court has invited DOT to file an amicus brief in this lawsuit, which would address the precise effect of that endorsement.

Carolina Casualty Ins. Co. v. Yeates, (10th Cir. No. 07-4019) presents a fact pattern where a motor carrier held two liability insurance policies, only one of which listed a particular truck as covered; the other did not, and it also excluded coverage for vehicles not specifically listed. That truck was involved in an accident and the insurance company whose policy expressly covered the vehicle paid the injured party the amount fixed as the minimum by FMCSA regulation. The other insurance company (Carolina

Casualty) then brought an action seeking a declaratory judgment that it was not liable for any payment on the grounds that the MCS-90 endorsement attached to its policy only served to render it a surety for payment of the federally prescribed amount. The company argued that since that sum had already been paid, the suretyship contemplated by the MCS-90 did not come into effect and the company was under no further obligation.

The Tenth Circuit ruled against Carolina Casualty. The court held that under circuit precedent the MCS-90 simply waived limitations contained in policies, but did not establish a suretyship as between insurance companies. Empire Fire & Marine Ins. Co. v. Guaranty National Ins. Co., 860 F.2d 357 (10th Cir. 1989). Carolina Casualty sought rehearing *en banc*, arguing that the panel decision was wrongly decided and was based on a minority view among Federal appellate courts. The Tenth Circuit agreed to consider the matter *en banc* and invited the United States to submit an *amicus* brief.

On January 29 the Federal government submitted a brief asserting that the MCS-90 endorsement, by its terms, amends the underlying policy so as to render it the primary source of coverage and to nullify any contrary limitations. The brief argues that both the endorsement's language and the policy underlying it (encouraging prompt payment of judgments arising out of vehicular accidents) compel rejection of the declaratory judgment sought by Carolina Casualty, which would allow the insurance company to evade liability for

payment of a judgment greater than the amount already paid.

The government's brief also observed that the MCS-90 endorsement does not allocate ultimate responsibility among insurance companies, and this case does not in any event present that question. Oral argument is not yet scheduled.

DOT Brings First Judicial Action to Enforce Motor Carrier Financial Responsibility Requirements

Federal law requires interstate motor carriers to secure and retain operating authority from DOT. A basic condition of this authority is proof of financial responsibility, which is usually satisfied by the carrier procuring liability insurance. The interstate motor carrier in Peters v. Action Carrier, Inc., (D. S.D., No. 08-4185) repeatedly refused to cease operations despite the revocation of operating authority and imposition of fines by FMCSA for failure to maintain required liability insurance coverage.

On November 20, the agency filed a complaint in district court seeking declaratory and injunctive relief to halt Action Carrier's ongoing operations. This is the first time since obtaining motor carrier oversight responsibility in 1995 that FMCSA has brought affirmative litigation to enforce the federal regulatory regime. On the same day that the complaint was filed the court granted the government's motion for a temporary restraining order, and scheduled a hearing on the request for a preliminary injunction. The parties later jointly moved to postpone the hearing,

and on December 30 stipulated to the issuance of a preliminary injunction against further carrier operations pending the outcome of the litigation.

In the meantime Action Carrier failed to file an answer or otherwise respond to the complaint, and as a result on December 19 the government moved for entry of a default judgment. That motion is still pending and the carrier has yet to file a responsive pleading.

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