U.S. Department of Transportation

DOT LITIGATION NEWS

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Supreme Court Litigation

Supreme Court Holds That Maine Motor Carrier Law Is Preempted

On February 20 the United States Supreme Court in, Rowe v. New Hampshire Motor Transport Association (Supreme Court No. 06-457) held that several provisions of a Maine law restricting the delivery of tobacco products to minors are preempted by a provision of the Federal Aviation Administration Authorization Act of 1994.

The 1994 Act prohibits State regulations "related to a price, route, or service" of motor carriers. That provision is modeled after a similar provision set forth in the Airline Deregulation Act of 1978 that preempts State laws or regulations related to an air carrier's "price, route or service." The Supreme Court, in Morales v. TWA, 504 U.S. 324 (1992), broadly interpreted the preemptive effect of the ADA. The United States, in an amicus brief, urged that the Maine ordinances were preempted under a similarly broad reading.

Relying upon Morales the Court held that the challenged provisions of the Maine regulation are preempted because "the effect of the regulation is that carriers will have to offer tobacco delivery services that differ significantly from those that, in the absence of the regulation, the market might dictate." The Court concluded that "to interpret . . . federal law to permit these, and similar, state requirements could easily lead to a patchwork of state service-determining laws, rules and regulations" contrary to the purpose of the 1994 Act.

The Maine laws specifically (1) required retailers of tobacco to use only delivery services that required a signature and valid identification from the addressee of packages of tobacco products, and (2) imputed to the carriers knowledge of the contents of packages containing tobacco products when the outside of the packages are properly marked (in accordance with other provisions) to indicate the presence of tobacco products.

The State of Maine had argued unsuccessfully before the U.S. Court of Appeals for the First Circuit that the Federal preemption provisions applied only to economic regulations rather than to public health laws like those the State argued were here at issue, and that Maine's laws did not "relate to" a rate, route or service because they either did not reference motor carriers or because they did not have any significant effect on the operations of such carriers.

The First Circuit rejected that argument, as did the Supreme Court. The Supreme Court's decision held that Federal preemption is not limited to State economic regulation, that there is no implied "public health" exception in the statute, and that the Maine laws either directly regulated motor carriers or had a

forbidden significant effect on their commercial operations. As noted, the Supreme Court's decision affirmed that holding conclusively.

The decision has significant implications for the aviation industry as well as the trucking industry because it re-affirms the broad sweep of the ADA as expressed in Morales and American Airlines v. Wolens, 513 U.S. 219 (1995), and because it holds that any exceptions to the preemption provision must be found in the language of the statute itself.

The Supreme Court's decision is available at:

http://www.supremecourtus.gov/opinions/07pdf/06-457.pdf

The United States' amicus brief on the merits is available at:

http://www.usdoj.gov/osg/briefs/2007/3mer/1ami/2006-0457.mer.ami.pdf

Supreme Court Holds Railroads Have Right to Challenge State Property Taxation Methodologies under the 4-R Act

On December 4 the Supreme Court in CSX Transportation, Inc. v. Georgia State Board of Equalization (Supreme Court No. 06-1287) held that the Railroad Revitalization and Regulatory Reform Act ("4-R Act"), which generally protects railroads from unreasonable or discriminatory property taxation rates imposed by States, provides a basis for a railroad to challenge in Federal district court a State's chosen methodology for the valuation of railroad property that is subject to State taxation.

The issue presented in the case was a recurring one: whether a Federal district court in determining the "true market value" of railroad property for purposes of analyzing discriminatory taxation practices must accept the valuation method or valuation methodology chosen by the State. The Court's decision conclusively establishes that district court's have the authority under section 306 of the 4-R Act to analyze valuation methodologies.

The Court's decision reverses a more restrictive reading of the 4-R Act by the U.S. Court of Appeals for the Eleventh Circuit, and resolves an issue that the Court declined to reach twenty years earlier and on which the Federal Circuit courts had split. The decision endorses the arguments set forth in the United States' amicus brief, which urged the Court to broadly interpret the 4-R Act and to reverse the Eleventh Circuit's decision. Chief Justice Roberts, writing for a unanimous Court, concluded that the Eleventh Circuit's more restrictive reading of the 4-R Act "would eviscerate the statute by forcing courts to defer to the valuation estimate of the State, when discriminatory taxation by States was the very evil the Act aimed to ban."

The proper application of the 4-R Act, which originally was enacted to address and remedy State taxation practices that were unfair and discriminatory to railroads, has been of great importance to DOT and FRA. At our request the United States has previously participated

in a number of 4-R Act cases, and has argued for an expansive application of the remedial terms of that statute. The United States filed an amicus brief in the CSX case arguing, consistent with the Court's ultimate holding, that the 4-R Act does reach unfair State property taxation methodologies.

The Supreme Court's decision is available at:

http://www.supremecourtus.gov/opinions/07pdf/06-1287.pdf

The United States' merits brief is available at:

http://www.usdoj.gov/osg/briefs/2007/3mer/1ami/2006-1287.mer.ami.pdf

Supreme Court Seeks Views of the United States in Airport "Takings" Case

On January 7 the Supreme Court asked the Solicitor General to provide the views of the United States concerning whether the Court should grant a pending certiorari petition in Clark County, Nevada v. Vacation Village, Inc. (Supreme Court Certiorari Petition No. 07-373). The petition seeks review of a Ninth Circuit decision holding that landowners adjacent to McCarran Airport in Las Vegas have an ownership interest in 500 feet of navigable airspace above the landowner's property, and that any local zoning ordinance restricting the use of that space in order to ensure safe aviation operations is a per se taking that requires compensation to the landowner under the Nevada Constitution. FAA encourages airports to adopt such ordinances in conjunction with airport development projects. The Ninth Circuit found that no compensable taking had occurred under the Fifth Amendment of the U.S. Constitution, but concluded that Federal law did not preempt a separate finding of a taking under the Nevada Constitution.

Clark County is the proprietor of McCarran, which is the Las Vegas, Nevada airport. The county has used various means to obtain operational control over the airspace needed for safe take-offs and landings, including the use of avigation easements and zoning ordinances that set height limitations for areas in close proximity to airport runways.

Two more recent ordinances affected a corporate property owner who ultimately brought suit alleging that Clark County had thereby "taken" the airspace above the owner's land. Ordinance 1221 imposes a height limit expressed as a "slope surface" on objects over 35 feet high within 10,000 feet along a runway centerline. Ordinance 1198 limits development within runway protection zones to uses such as parking lots and landscaping. The landowner allegedly had planned to build a large hotel-casino but claimed it was prevented from doing so because of these two ordinances. The Federal District Court agreed with respect to Ordinance 1221 and awarded the property owner approximately $10 million in damages, fees, and prejudgment interest.

On appeal, the Ninth Circuit examined a recent decision of the Nevada Supreme Court involving virtually identical facts, McCarran International Airport v.

Sisolak, 137 P.3d 1110 (Nev. 2006). In that case the Nevada court had determined that (1) under state law property owners have an ownership right to the airspace above their land up to 500 feet, and (2) because Ordinance 1221 preserved the unconditional right of aircraft to fly in that airspace it amounted to a physical invasion – a per se regulatory taking – under both Federal and State Constitutions.

The Ninth Circuit disagreed with the Sisolak determination that any per se taking had occurred under the U.S. Constitution, and noted that under Federal law allegations of regulatory takings are analyzed under a case-by-case balancing approach that assesses the character and economic impact of the regulation, as well as the extent of any interference with investment-backed expectations.

The Ninth Circuit noted, however, that States may adopt takings standards more stringent than those appropriate under Federal law. The Ninth Circuit then held that it was bound by the Nevada Supreme Court's view that under the Nevada Constitution a per se taking occurred every time an aircraft flew through airspace extending 500 feet above a landowner's property.

The reasoning underlying the Ninth Circuit's holding would also require payments to other landowners adjacent to the airfield. There are seven to ten lawsuits pending against the County that could result in substantial compensation to these additional landowners based upon the Ninth Circuit's decision.

The Department is working with the Solicitor General's Office in formulating the position the United States will take in the case.

The Ninth Circuit's decision is available on-line at:

http://www.ca9.uscourts.gov/coa/newopinions.nsf/E1AD8CF1047CF7138825733300551050/$file/0516173.pdf?openelement

Supreme Court Considers Virtual Representational Res Judicata Issue in FAA FOIA Case

On January 11 the Supreme Court agreed to review a decision of the U.S. Court of Appeals for the District of Columbia Circuit in Taylor v. Sturgell, (Supreme Court No. 07-371), an FAA FOIA case that raises unique res judicata issues and a form of privity known as "virtual representation."

Virtual representation arises in cases where there has been successive litigation, and where a non-party to the initial case is adequately represented by a party in the first case such that the non-party in the subsequent case is held to be bound by the original judgment.

The case was originally brought in a U.S. District Court in Wyoming by Greg Herrick, an aircraft mechanic and commercial pilot who restores vintage aircraft, and who is the Executive Director of the Antique Aircraft Association. Herrick had filed a request under the Freedom of Information Act (FOIA), 5 U.S.C. 552 seeking to have

FAA release the plans for an antique F-45 aircraft manufactured by a predecessor of Fairchild Corporation (Fairchild) that Herrick had bought and wished to restore. The FAA, supported by Fairchild, denied the request after determining that the plans were non-disclosable trade secrets. The Wyoming district court and the U.S. Court of Appeals for the Tenth Circuit upheld FAA's determination.

After losing in the Tenth Circuit, petitioner Brent Taylor, who Herrick had hired to restore the aircraft at issue, filed his own FOIA request with FAA seeking the same plans that had been denied to Herrick. FAA similarly denied that request.

Thereafter Taylor, represented by the same attorney who had represented Herrick in the Tenth Circuit proceeding, appealed the FAA's denial to the U.S. District Court for the District of Columbia. The district court granted summary judgment in favor of the FAA and Fairchild.

The U.S. Court of Appeals for the District of Columbia Circuit upheld that decision, finding that Herrick served as Taylor's virtual representative because (1) the two parties had an identity of interests, (2) Taylor's interest was adequately represented by Herrick, and (3) the parties had a close relationship. Moreover, Taylor's claims were barred by res judicata because the first case resulted in a final judgment on the merits by the 10th Circuit and Taylor's claim in the subsequent lawsuit was the same as Herrick's in the first suit.

The issue before the Supreme Court is whether, given the "public right" nature of FOIA claims, and the "close associate" relationship between Taylor and Herrick deriving from their work on the same aircraft, it comports with due process and principles of res judicata to bar petitioner from litigating anew Herrick's failed FOIA claim.

The United States brief is due to be filed with the Court by March 19.

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

http://pacer.cadc.uscourts.gov/docs/common/opinions/200706/05-5279a.pdf

Departmental Litigation in Other Federal Courts

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 (OOIDA) 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. The two petitions were then consolidated in the Ninth Circuit.

The petitioners allege that the Demonstration Project, under 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 specifically on the entry of Mexican trucks into the United States. The petitioners also alleged that DOT's 2008 appropriation bars expenditure of funds on the Project. The Department contends that it has met or exceeded all statutory requirements for the program and that the DOT 2008 appropriation only bars expenditure of funds on future demonstration programs involving Mexican motor carriers.

Oral argument in the case, Sierra Club v. DOT, (9th Cir. No. 07-73415), was heard on February 12. 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.

Second Circuit Hears Preemption Challenge to New York Passenger Bill of Rights Legislation

On March 5, the United States Court of Appeals for the Second Circuit heard arguments in Air Transport Association, Inc. v. Cuomo, (2d Cir. No. 07-5771), a case in which ATA is arguing that New York State's recently-enacted passenger bill of rights legislation addressing aircraft take-off delays is preempted by Federal law.

The United States is not a party in the litigation. However, on March 3 the Department issued a clarification to an Advanced Notice of Proposed Rulemaking (ANPRM) published last November. The ANPRM proposed new Departmental regulations that, if finalized, would prescribe Federal protections for airline passengers who experience lengthy tarmac delays. In the "Regulatory Notices" section of the ANPRM the Department had stated that any final rule would not preempt State law, and that therefore consultation with States was unnecessary under the provisions of Executive Order 13132. That statement had been utilized by the State of New York before the Second Circuit to bolster its argument that the New York statute was not preempted.

The Department's March 3 clarification explained that while new Departmental

rules addressing tarmac delays would not separately preempt similar State rules, that is so only because States already lack the authority to promulgate such rules since the Airline Deregulation Act currently 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 Department's clarification cited the recent Supreme Court decision in the Rowe case, discussed above in "Supreme Court Litigation," for that proposition.

The Department's clarification was relied upon by ATA during the Second Circuit argument in support of its argument that the New York statute is, in fact, Federally preempted. We are now awaiting the court's decision.

D.C. Circuit Refuses to Overturn Hours of Service Interim Rule

On January 23, the U.S. Court of Appeals for the District of Columbia Circuit in Owner-Operator Independent Drivers Assoc. v. FMCSA, (D.C. Cir. No. 06-1035), denied Public Citizen's motion to enforce the court's order that had vacated the 11-hour driving limit and 34-hour restart provision of FMCSA's motor carrier hours-of-service regulation. The court struck down the two provisions in a July 2007 decision holding that the agency violated the Administrative Procedure Act by failing to allow comment on the methodology of the crash-risk model that the agency used to justify an increase in the maximum daily and weekly hours that truck drivers could drive and work. The court also held that the agency failed to provide an explanation for critical elements of that methodology. (The court rejected separate challenges by OOIDA to the agency's revised sleeper berth rule and the non-extendable 14-hour on-duty rule.)

FMCSA sought a one-year stay of the effective date of the court's ruling. The court denied FMCSA's request, but did extend the effective date by three months through December 27.

On December 17, FMCSA issued an interim final rule (IFR) addressing the court's concerns and reinstating the two provisions. Petitioner Public Citizen responded with a motion that effectively asked the court to overturn the agency's IFR. The court denied the motion, but explained that its denial did not prejudice Public Citizen's right to file a new lawsuit challenging the merits of the IFR. Public Citizen has not challenged the IFR, and the statutory deadline for such a challenge has passed. FMCSA is receiving comments on the IFR and intends to issue a final rule before the end of the year.

The D.C. Circuit's July 2007 opinion is available at:

http://pacer.cadc.uscourts.gov/docs/common/opinions/200707/06-1035a.pdf.

FMCSA's 2007 IFR is available at:

http://www.fmcsa.dot.gov/rules-regulations/administration/rulemakings/Interim/E7-24238-HOS-IFR-12-17-07.PDF.

Information concerning FMCSA's 2005 rule, including the rule itself, is available at:

http://www.fmcsa.dot.gov/rules-regulations/topics/hos/hos-2005.htm.

Eleventh Circuit Review Sought of Decision that Forum Non Conveniens Dismissals Are Available in Cases Brought under the Montreal Convention

Plaintiffs have sought review before the U.S. Court of Appeals for the Eleventh Circuit of the September 27 district court decision in In re: West Caribbean Airways, S.A. (S.D. Fla. No. 06-22748-civ-Ungaro) holding 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.

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.

The court held that a dismissal, under the doctrine of forum non conveniens (FNC) is available under the Montreal Convention. The Florida court had asked for the views of the United States and we previously filed a brief arguing that dismissals based on the inconvenience of the forum are proper under the Convention.

The courts are split on this issue. 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 the 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 inapplicable in actions brought under it. That court specifically declined to address whether the same result would obtain under the Montreal Convention.

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The district court's September 27 decision, consistent with arguments

advanced in the United States' brief, concludes that an FNC motion is procedural in nature and that the Montreal Convention specifically contemplates that the forum in which a suit has been brought is free to apply its own procedural rules. In a subsequent ruling the district court dismissed the action holding that Florida was not, in fact, a convenient forum.

The United States is in the process of deciding whether it will appear as an amicus party in the Eleventh Circuit proceedings. Any amicus brief would be due in mid-April.

Briefing to Begin in LAX Rates and Charges Case

On March 6, the Department filed a "Joint Proposed Format and Schedule for the Submission of Briefs" in response to an order issued by the Court of Appeals for the D.C. Circuit in the consolidated case of Alaska Airlines, Inc. v. DOT, (D.C. Cir. No. 07-1209). The case includes five consolidated petitions seeking review of the Department's Final Decision and Refund Order resolving two complaints that challenged the reasonableness of increased terminal charges at Los Angeles International Airport.

The schedule proposes that the twenty-one petitioning airlines and airport operator file their opening briefs 40 days after the scheduling order is issued, with supporting intervenor briefs by the Air Transport Association and Airports Council International – North America due fifteen days later. The Department's brief would be due fifty days after the petitioners' opening briefs, and the normal page limit would be increased so that the Department can adequately respond to the multiple briefs that would be filed. Reply briefs would be due 40 days later.

As previously reported, between June 15 and August 9, seven U.S. airlines, twenty-one foreign airlines, and the City of Los Angeles World Airports ("LAWA") each filed several Petitions for Review, cross-Petitions and motions to intervene in the Court of Appeals seeking review of the Department's Final Decision and Refund Order issued June 15. The Petitions and cross-petitions challenge both the Final Decision and Refund Order issued by the Department.

The Department's Final Decision found that the new and increased maintenance and operations fees imposed by LAWA are reasonable and not unjustly discriminatory; however, LAWA's imposition of a market-based methodology for terminal fees at one domestic terminal was not reasonably applied because it was not based on an objective determination of market value.

The decision also found that LAWA's new fee methodology to capture common area (e.g., lobby and restroom) costs at two domestic terminals was reasonable because it was cost-based, but was nevertheless unjustly discriminatory because it was unreasonably applied to some airlines at the airport and not to others. The Final Decision also determined that domestic carriers may challenge fees imposed upon them as holdover tenants after their leases have expired.

In addition to seeking review of the Department's Final Decision, three of the Petitions for Review also seek review of the Department's subsequent Refund Order, issued on July 13, which implemented the Final Decision. The Refund Order directed LAWA to refund the complaining carriers a total of $7.7 million in fees paid under protest by the complaining carriers while the case was pending.

The consolidated case is Alaska Airlines, Inc. v. DOT, (D.C. Cir. No. 07-1209, 07-1223, 07-1273, 07-1276, 07-1318). No date has been set for or oral argument, and we expect the Court to act soon on the joint briefing proposals the parties have submitted.

Department Argues that Flight Attendants Challenge to Virgin America Order Can Only Be Heard in D.C. Circuit

On October 5, the Department filed a motion to transfer the petition for review filed by the Association of Flight Attendants – CWA ("AFA") in Association of Flight Attendants – CWA v. DOT, (9th Cir.. No. 07-72960), from the U.S. Court of Appeals for the Ninth Circuit to the U.S. Court of Appeals for the D.C. Circuit. Our motion argues that the Ninth Circuit is not a proper venue.

On July 27 the AFA, a labor union representing certain flight attendants in the U.S., filed a petition seeking review of the Department's Final Order 2007-5-11, issued May 18, which granted Virgin America, Inc. 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 has moved to intervene in support of the Department's decision.

The Department's motion to transfer the case to the D.C. Circuit argues that AFA is an unincorporated association that resides in and has its principal place of business in the District of Columbia. The controlling venue provision of 49 U.S.C. § 46110 requires suit in "the circuit in which the person resides or has its principal place of business. . . ." We therefore argued that the case can only proceed in the District of Columbia.

AFA has opposed the motion and argues that the Ninth Circuit is a proper venue because the union "does business" in the Ninth Circuit. AFA also argues that the statute allowes it to choose its forum.

The Department's Final Order granting the certificate of public convenience and necessity resulted from Virgin America's application for authority filed in 2005, which was initially denied and then subsequently approved on March 20, by the Department, after substantial revision by Virgin America. Virgin America began commercial flight operations in the U.S. on August 8.

Briefing is stayed pending a decision on the Department's motion to transfer.

American Airlines Seeks Review of Department's Order Instituting Proceeding on Service in U.S.-Colombia Market

On January 22, American Airlines, Inc. ("American"), filed a petition seeking judicial review by the U.S. Court of Appeals for the District of Columbia Circuit of the Department's Instituting Order (Order 2007-11-23) and Order on Reconsideration (Order 2007-12-21), issued November 26 and December 21, respectively, which instituted the 2007/2008 U.S. Colombia Combination Frequency Allocation Proceeding. The case before the D.C. Circuit is American Airlines, Inc. v. DOT, (D.C. Circuit No. 08-1025). Spirit Airlines and Delta Airlines have moved to intervene in the judicial proceeding..

The Department's Orders invited interested U.S. carriers to file applications for certificate or exemption authority to serve the U.S.-Colombia market. American's petition challenges the Department's decision to reexamine whether American should retain seven of its currently allocated weekly U.S.-Colombia air service frequencies, previously retained for the Miami-Baranquilla market, but not being used by American at the time of the Instituting Order. American also challenges the Department's decision to determine which other U.S. carriers the seven frequencies should be allocated to, if not to American.

On April 26, prior to the issuance of the Orders, Spirit had unsuccessfully applied to the Department for reallocation of 14 weekly frequencies currently held, but not being used by American for the U.S.-Colombia market.

American also challenges the Department's order on reconsideration that denied American's request that Order 2007-11-23 be vacated insofar as it placed in issue the possible reallocation of seven of American's 42 U.S.-Colombia combination frequencies. The Department denied American's request because American failed to use the seven frequencies as proposed. American was put on notice in Order 2007-8-28 of the Department's intent to reexamine the service allocation if American did not use its frequencies as it previously announced.

The Department's Orders reflect a new understanding between the governments of the United States and the Republic of Colombia ("2007 Understanding") relating to air service in the restricted U.S.-Colombia market. The 2007 Understanding, among other things, resulted in the removal of frequency limitations for scheduled combination services to Baranquilla, Colombia. The 2007 Understanding also increased the number of overall frequencies between the United States and Colombia by 21 additional frequencies.

On March 10 the Department filed a motion that asks the D.C. Circuit to dismiss American's petition. Our motion argues that the Orders American seeks review of are interlocutory in nature and are therefore not final agency action from which a petition for review can be taken. We are awaiting the court's decision on that motion.

Department Seeks Summary Judgment in ACDBE Litigation

On December 6, the Department filed a motion for summary judgment in The Grove, Inc. v. DOT, (D.D.C. No. 07-01591), which is pending in the U.S. District Court for the District of Columbia. The case was brought by an airport concessionaire owned by a woman, and seeks review under the Administrative Procedure Act of the final decision of the Department's Office of Civil Rights, which affirmed a decision by the State of Washington's Office of Minority and Women's Business Enterprises denying certification to The Grove to operate as an Airport Concessionaire Disadvantaged Business Enterprise ("ACDBE") at Seattle Tacoma International Airport.

The Department upheld the State denial on the basis that the female owner failed to demonstrate that she is economically disadvantaged. Specifically, the final decision found that The Grove failed to meet its burden of proving that: (1) its owner's assets fell below the $750,000 regulatory threshold; (2) its owner's capital contribution to purchase the firm was "real and substantial"; and (3) the business was independent. The Department also moved for summary judgment on the claim that the Department violated The Grove's equal protection under the Fifth Amendment to the Constitution when it affirmed the state's denial of The Grove's ACDBE application.

On January 22, The Grove filed a cross-motion for summary judgment and opposition to the Department's motion. The Grove argued that it properly established its eligibility, that the State's grounds for denial were insufficient, and that the Department relied on grounds not specified in the State decision.

We are awaiting the court's decision.

Recent Litigation News from DOT Modal Administrations

Federal Aviation Administration

FAA Prevails on Emergency Motions as Airspace Redesign Cases Continue

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 (Airspace Redesign). This project updates the airspace in the NY/NJ/PHL Metropolitan Area. Once fully implemented, the FAA will improve efficiencies in the system resulting in a reduction of delays by up to 20% compared to taking no action. The redesigned airspace includes changes to procedures at LaGuardia, JFK, Philadelphia, Newark Liberty and Teterboro. The FAA is in the first stage of implementation. On December 19, 2007, the FAA began using new

departures dispersal procedures at PHL and EWR.

We are currently facing twelve legal challenges to the Airspace Redesign in two jurisdictions. Nine cases currently are before the D.C. Circuit, and three are before the Second Circuit. One case filed in the U.S. District Court for New Jersey was dismissed on December 14, 2007.

On December 18, 2007, we filed a Certified Index to our Administrative Record for all cases pending in the D.C. Circuit. The administrative record contains approximately 8,000 documents and covers nine years of work on the part of the FAA. Summaries of the most active cases are set forth below.

In County of Rockland, NY, v. FAA, (D.C. Cir. No. 07-1363), petitioners allege the FAA's ROD violates NEPA, Section 4(f) and the APA. On November 28, we moved to consolidate this case with Friends of Rockefeller State Park Preserve, (D.C. Cir. No. 07-1437) and the related challenge to our Presumed to Conform List (County of Delaware, PA v. DOT, (D.C. Cir. No. 07-1385). Rockland County opposed the motion to consolidate these cases. The motion to consolidate is now fully briefed, and we are awaiting a ruling from the Court.

In County of Delaware, PA, v. DOT, (D.C. Cir. No. 07-1493), the County of Delaware, PA and several officials and individuals filed a petition also seeking review of our ROD. On December 5, the U.S. Court of Appeals for the Third Circuit, where the action was originally filed, granted our motion to transfer the case, together with 6 others, to the D.C. Circuit. On September 18, the County of Delaware sought an administrative stay from the FAA. We denied that request on October 5, finding the County had failed to address irreparable harm or a balancing of the harms. The County had further failed to show a likelihood of success on the merits concerning their arguments that the FAA failed to comply with the Clean Air Act, failed to adequately address cumulative impacts under NEPA, and failed to comply with DOT Section 4(f) as it relates to the John Heinz Wildlife Refuge. On December 10, the County sought a stay of implementation of the new departure dispersal headings at PHL. We opposed this request and on December 18, the D.C. Circuit denied the County's request for a stay. On December 19, the FAA began using two of the three dispersal headings for west-flow departures at PHL. The FAA also began using dispersal headings for east-flow departures at PHL.

In City of Elizabeth v. FAA, (D.C. Cir. No. 07-1498), the same parties that challenged the FEIS in U.S. district court filed a separate petition for review of the ROD. This case was also originally filed in the Third Circuit but then was transferred to the D.C. Circuit. On December 19, Newark Airport began using the fanned (also called dispersed) departure headings for Runway 22L/R. The very same day the City asked the FAA to halt implementation of these fanned departure procedures at EWR and requested a response by 5:00 pm on December 20. The FAA acknowledged the request but stated that a response would not be provided until January 8, 2008. On December 21, the City asked

the D. C. Circuit to issue a stay. The United States vigorously opposed this request and on December 21, the D.C. Circuit denied the motion without prejudice to any subsequent filing if the City "was not satisfied with the FAA's disposition of the motion for stay pending before it."

On January 8 the FAA sent a detailed letter by fax transmission to the City of Elizabeth's attorney denying its request for an administrative stay of the fanned departure headings for Runway 22L/R at Newark. On January 18, as we anticipated, the city renewed its motion for a stay pending judicial review. The city specifically asks the D.C. Circuit to halt the new fanned departure headings for Runway 22L/R at Newark. Our opposition was filed on February 4.

The City's renewed motion is similar to the original motion, although the City also argues an alleged failure by FAA to follow its mitigation plan (premised on the fact that the FAA is not currently implementing the night-time ocean routing mitigation measure for Newark). On February 15, the D.C. Circuit denied the motion for stay pending judicial review.

In Town of New Canaan, Conn. v. DOT, (2d Cir. No. 07-4834), the Town of New Canaan together with ten other municipalities in Connecticut and New York filed their own petition seeking review of the ROD. On December 12, the United States petitioned the Second Circuit to transfer all challenges to the Airspace Redesign project to the D. C. Circuit. The motion is pending but is unopposed.

The municipalities in this lawsuit are also members of the Alliance for Sensible Airspace Planning. On February 8, attorneys for the Alliance asked the FAA to prepare a supplement to the FEIS, arguing that the "demand management measures" at JKF and Newark contain significant new information. The Alliance claims this raises issues as to the FAA's compliance with NEPA and the CAA. The FAA is evaluating their request.

City of Elizabeth v. FAA, (D. N.J. No. 07-4240 (D.N.J.)), is a challenge to the FAA's Final Environmental Impact Statement (FEIS). The complaint was filed on September 4, one day before the FAA signed the ROD. On December 14, the district court dismissed the complaint for lack of jurisdiction and denied the pending request for a preliminary injunction and a TRO. The United States believes an appeal is unlikely. The City still has a pending petition for review in the D.C. Circuit.

On the challenge to the Presumed to Confirm Clean Air Act issue, County of Delaware, PA v. DOT, (D.C. Cir. No. 07-1385). on September 26, the county together with additional petitioners, filed a petition for review challenging the FAA's Presumed to Conform (PTC) List. The petition appears to be a collateral attack on FAA's final decision since the agency partially relied on the PTC list to determine compliance with the Clean Air Act (CAA).

On October 2, the county requested that the FAA stay implementation of the PTC list and the FAA denied this request on November 23. On November 13, the agency filed a certified index to the

administrative record. In mid-November, the petitioners sought an emergency stay. The United States opposed that request and cross moved to dismiss. On December 11, the Court denied Delaware County's request to stay implementation of the PTC List. The court did not rule on the pending motion to dismiss.

Petitioners have opposed the United States' motion to consolidate this case with Rockland County and Friends of Rockefeller State Park Preserve.

Second Circuit Lifts Temporary Stay Following Oral Argument in Florida Airport Relocation Project

In Natural Resources Defense Council, v. FAA, (2d Cir., No. 06-5267-ag), petitioners challenge FAA's approval of the relocation of the Panama City Bay County International Airport (PFN) from its current location in Panama City, Florida, to a new location in western Bay County in the panhandle of Florida.

Briefing on the merits of the case was completed on June 18, and the parties were awaiting an order scheduling oral argument before the Second Circuit. At the time the briefing was completed, the airport sponsor was still awaiting a Clean Water Act Section 404 permit allowing the filling of wetlands, which was the last remaining hurdle preventing the onset of construction. The Army Corps of Engineers issued the 404 permit on August 16. As time passed and no date for oral argument was forthcoming, the airport sponsor began making plans to begin construction of the airport. On October 25 the airport sponsor sent a notice to petitioners of its intent to commence construction in 30 days, with the potential for filling of wetlands to begin an additional 30 days after the start of physical alteration at the site.

In order to prevent the filling of wetlands, on November 29, petitioners Friends of PFN and NRDC filed an emergency motion for a stay pending appeal. Their claims focused on the irreparable injury that they argued would occur if the airport sponsor were permitted to begin filling wetland prior to a decision on the merits of the case.

The Second Circuit issued a temporary administrative stay on November 29 pending oral argument on the motion for emergency stay. On December 14 in response to the Court's issuance of the temporary administrative stay, the Army Corps of Engineers suspended the 404 permit for the project, indicating its intention to be consistent with the Court's order.

Oral argument on the emergency motion for stay pending appeal was held on December 17. At the end of the argument, the panel indicated its intent to issue an order partially lifting the administrative stay that was entered on November 29.

Later that day, the Court issued an order permitting certain construction activities to commence that would not impact wetlands. In addition, the Army Corps of Engineers' 404 permit allowing wetland impacts was still under suspension. In an effort to prevent the airport sponsor from an unnecessary

delay in commencing full construction, the Court agreed to an expedited hearing on the merits of the case. Oral argument on the merits of the case was therefore set for January 23.

At oral argument, the airport sponsor again expressed its concern about the monetary and other damages it would suffer from a continued delay of commencement of full construction activities, including the filling of wetlands on site. Following oral argument the court, on January 25, vacated the stay. On February 1 the Army Corps of Engineers reinstated the wetland permit for the project, thereby removing all impediments to the airport sponsor's ability to commence full construction activities.

However, opponents to the project took their fight to the next available forum, suing the Army Corps of Engineers under the Clean Water Act, the Endangered Species Act, and the National Environmental Policy Act in the United States District Court for the Middle District of Florida, in Jacksonville, Florida. Florida Clean Water Network v. Grosskrueger, (M.D. Fla. No. 3:08-cv-00120-TJC-TEM). The project's opponents filed a complaint, a motion for a temporary restraining order, and a motion for a preliminary injunction on February 4.

The district court immediately held a telephonic oral argument on February 4, and denied the requested TRO. Oral argument on the request for PI was held on February 14. Shortly after concluding the oral argument the District Court issued a brief order denying the requested PI.

At this time, the Corps will still need to file an answer to the complaint, and the Court has not yet issued a schedule for summary judgment briefing. The airport sponsor intends to initiate full construction activities in the near future.

D.C. Circuit Finds FAA Advisory Circular to Be A Final Reviewable Order Unsupported By Substantial Evidence

On December 11, the U.S. Court of Appeals for the District of Columbia Circuit in Safe Extensions, Inc. v. FAA, (D. C. Cir. No. 06-1412) ruled that Advisory Circular 150/5345-42F, Specification For Airport Light Bases, Transformer Housings, Junction Boxes, and Accessories, which imposes a freestanding torque test on adjustable airport runway light bases, was a final reviewable order under 49 U.S.C. § 46110(a). The Court (Henderson, Tatel, Kavanaugh) also held that the agency's administrative record did not contain substantial evidence to support the agency's ultimate decision. As a result, the imposition of a freestanding torque test in the circular was held to be arbitrary and capricious and the petition was granted.

Safe Extensions, which manufactures bases that house lights that illuminate airport runways and taxiways, challenged the advisory arguing that it was arbitrary and capricious agency action violative of the Administrative Procedure Act. Essentially, the company argued that the circular, which revised a prior agency issuance on the same subject, did not promote air safety

and placed the products it makes at an unfair competitive disadvantage.

The United States argued that the court lacked jurisdiction over the petition for three reasons. First, we argued that the Circular was neither an order under section 46110(a), nor an agency action reviewable under the APA. Second, we argued that the manufacturer lacked prudential standing to challenge the circular. Third, we argued that matters covered by the circular were committed to agency discretion by law and were therefore unreviewable. The United States alternatively argued on the merits that the FAA acted reasonably in imposing different technical requirements and tests on two competing light base technologies, especially given that one had a long history of reliability in the field that the other lacked.

The Court's decision applied its prior holdings in Dania Beach v. FAA, 485 F.3d 1181(D.C. Cir. 2007) and Bensenville v. FAA, 457 F.3d 52, 68 (D.C. Cir. 2006), which stand for the proposition that agency actions are reviewable orders under section 46110 of title 49 so long as they are final, mark the consummation of the agency's decision-making process and determine rights or obligations or give rise to legal consequences.

The court proceeded to find that SAFE had prudential standing and a substantial interest in the order. In addition, the court noted that there were reasonable grounds to permit SAFE to challenge changes made in the AC prior to the current version. Having disposed of the FAA's jurisdictional arguments, the court turned to the merits and held that the determinations in the circular were only supported by the agency's unsupported assertion and that these did not amount to substantial evidence. The Court found that the FAA record provided no evidence substantiating the change made in the advisory circular.
The D.C. Circuit's decision is available at:

http://pacer.cadc.uscourts.gov/docs/common/opinions/200712/06-1412a.pdf

Compliance with D.C. Circuit Dania Beach Order Questioned

On May 11, the U.S. Court of Appeals for the District of Columbia Circuit in City of Dania Beach, Florida v. FAA, (D.C. Cir. No. 05-1328) ruled that an FAA letter providing a new interpretation of the Fort Lauderdale-Hollywood International Airport's noise compatibility program was a final reviewable order of the FAA, and that, as a result, the agency was required to undertake a NEPA environmental analysis before issuing the interpretation.

The FAA's letter changed the runway use procedures at Fort Lauderdale-Hollywood International Airport in light of increasing congestion at the air field. The City of Dania Beach argued before the D.C. Circuit that the new procedures would route more jet aircraft onto two previously restricted runways, thus increasing noise, soot, and exhaust fumes over residential areas. They contended that the FAA made this change without engaging in the required environmental review process.

The United States argued that the letter was not reviewable, because it merely explained the existing procedures and did not actually change the manner in which the runways would be used.

The D.C. Circuit disagreed. The FAA's letter, in the court's view, provided new "marching orders" about how air traffic will be managed at the airport. As a result, the court concluded that the FAA letter was final action requiring review under section 4(f) of the Department of Transportation Act, 49 U.S.C. § 303(c), and an environmental assessment under the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4321 et seq.

In implementing the court's order, the FAA went back to the status quo ante, while the agency proceeded with a NEPA review. This allowed the agency to proceed with a secondary runway use to relieve congestion under a general communication plan with the County of Broward. The court had discussed the possibility of seeking specific permission from the county before any use of the runways. Based on existing documents, however, that had not been presented to the court, the FAA maintained, with Department of Justice concurrence, that the blanket communication was sufficient.

On January 11, the FAA received a letter from opposing counsel questioning the agency's specific compliance. Specifically, the letter questioned: (1) FAA's interpretation of status quo ante; and (2) whether FAA had sufficiently briefed air traffic controllers about the limitations of the court order.

FAA responded on February 1, explaining the agency's compliance with the court's order. The explanation set forth the status quo ante as it existed, based on the new documents, and explained FAA's compliance. The agency also explained how the directions to follow the court's order were carried through from management in D.C. to the air traffic controllers in Florida. FAA has heard nothing further from opposing counsel.

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

http://pacer.cadc.uscourts.gov/docs/common/opinions/200705/05-1328a.pdf

Township Challenges Logan Airport's Boston Overflight Noise Study

On December 14, the Town of Marshfield, Massachusetts filed a petition seeking review of the FAA's categorical exclusion Record of Decision adopting the Boston Overflight Noise Study. Town of Marshfield v. FAA, (1st Cir. No. 07-0280). The Study approved implementation of noise abatement arrival and departure procedures for turbojet aircraft at Boston Logan International Airport.

These procedures will reduce noise for residents of some of the communities to the northeast and southeast of the airport. The town of Marshfield, however, would receive additional noise and overflights from aircraft arrivals at the airport. The town also maintains that special properties, including schools, parks, historic properties and

conservation areas, are under the new flight path and would be adversely affected.

On February 22, the town sought a judicial stay before the First Circuit. Marshfield claims that FAA's decision not to prepare an environmental assessment or an environmental impact study, and instead to rely on a categorical exclusion violated NEPA. Briefing has yet to begin and no date has as yet been set for oral argument.

Federal Highway Administration

Maryland District Court Dismisses Challenges to Construction of the Inter-County Connector

On November 8, Judge Alexander Williams of the U.S. District Court for the District of Maryland issued a decision in Audubon Naturalist Society v. DOT, (D. Md. No. 8:06-cv-03386-RWT), reported at 524 F. Supp2d 642, that upheld the government's environmental decisions approving the construction of the Intercounty Connector (ICC).

In the 106 page decision Judge Williams found that the extensive administrative record supported the government's decision to approve the project and that there was no legal or equitable basis to prevent the construction of the ICC from moving forward. On January 7, the Sierra Club and the Environmental Defense filed a notice of appeal with the U.S. Court of Appeals for the Fourth Circuit.

The Environmental Defense Fund (ED), Sierra Club (SC), Audubon Society, and local individuals originally filed two lawsuits in December 2006 against DOT and FHWA in the U.S. District Courts for the District of Marylandand for the District of Columbia in an attempt to stop construction of the ICC project. Plaintiffs challenged the adequacy of the Record of Decision (ROD) authorizing the ICC and alleged violations of the National Environmental Policy Act (NEPA), Section 109 of the Federal Aid to Highways Act (FAHA), the Clean Water Act (CWA), the Clean Air Act (CAA), Section 4(f) of the DOT Act and other statutes and regulations.

The D.C. case was transferred to Maryland and the cases were consolidated. In reaching its decision rejecting each of the plaintiffs' challenges, the district court considered over 1,000 pages of pleadings and a 200,000 page administrative record filed by the parties. Additionally several hearings were held in September 2007. The State of Maryland also participated as an intervenor in the consolidated cases.

The $2.4 billion ICC project will be a controlled access multi modal electronic toll highway with eight interchanges, extending approximately 18 miles from I-370/I-270 near the Shady Grove Metrorail Station to U.S. 1 between Beltsville and Laurel, Maryland. The ICC will follow a route that represents a significant departure from prior rejected iterations. A comprehensive $370 million package of mitigation and

stewardship activities is a condition of funding the project. The study, completed in anticipation of the project, was conducted with unprecedented public involvement including an interactive website.

This appeal to the Fourth Circuit only addresses Judge Williams' findings with respect to the Clean Air Act, the Federal Aid to Highway Act and certain NEPA rulings. The Audubon Society, the major plaintiff in the Maryland case, and the individual Maryland plaintiffs, have not appealed the decision and therefore their Section 4(f) and the Clean Water Act allegations, as well as certain NEPA claims that only they raised, will not be part of the appeal.

The State of Maryland is currently proceeding with construction of the project.

The district court's decision is available online at:

http://www.mdd.uscourts.gov/Opinions152/Opinions/06-3386%20Memo%20Op%20DENY%20PL%20MSJ.pdf

Sixth Circuit Narrowly Upholds FHWA in Hiring Practices Dispute

On November 21, the U.S. Court of Appeals for the Sixth Circuit in City of Cleveland v. FHWA, (6th Cir. No. 06-3611) upheld the FHWA determination that Cleveland's local hiring preference lawviolated FHWA contracting statute and regulation. The Sixth Circuit's decision affirmed the judgment of the District Court in its January 13, 2006, grant of FHWA's motion for summary judgment.

This case arose after the FHWA informed the Ohio DOT that FHWA was withdrawing funds for the Kinsman Road project in Cleveland, Ohio, because Cleveland's local hiring preference violated the provisions of 23 C.F.R. §635.117(b) by imposing a local hiring preference that discriminated against non-Cleveland, Ohio residents.

Cleveland's local hiring ordinance requires that 20% of the total hours of work performed by construction workers on City projects are to be performed by residents of the City. Under the ordinance failure to do so could result in a stiff bonding penalty that would be levied against the contractor on future contracts.

In its decision, the Sixth Circuit Court rejected the argument that Cleveland lacked standing, and held that the city had standing to challenge the FHWA's funding decision because Cleveland suffered an injury in fact when FHWA forbade ODOT to provide previously committed Federal funds to the Kinsman Project. The court also rejected FHWA's argument that as a subgrantee to ODOT, Cleveland lacked independent standing to challenge FHWA's funding decision.

However, on the merits the court held that provisions set forth at 23 USC § 112(b) provided FHWA with discretionary authority to effectuate the Act's purposes, including determining whether all contract requirements were set forth in the advertised specifications.

The Court rejected FHWA's interpretation that 23 USC § 112(b)'s competitive bidding language prohibited a contracting requirement for local hiring preferences, such as the Cleveland ordinance, inserted after bidding had ended. However, because Cleveland inserted the local hiring preference requirement after the contract was advertised and bid, the court upheld FHWA's decision that the contract violated the statute by not including the local hiring preference in the advertised specification.

The court upheld only one of FHWA regulatory arguments. The Court rejected FHWA's argument that the local hiring preference violated FHWA's regulations at 23 CFR § 635.110(b) as a noncompetitive contract provision. However, the Court upheld as reasonable FHWA's determination that the ordinance violated the 23 CFR § 635.110(b) regulation because the bond penalty provision of the local hiring preference "could discourage" contractors who had once failed to meet the local hiring preference "from submitting subsequent bids because they uniquely would be required to provide a twenty percent bond." Slip Op. at 13-14.

The court held that the Cleveland ordinance did not violate 23 CFR § 635.112(d) because the regulation dealt only with bidding procedures, and the ordinance was not a bidding procedure. Also the regulation was not, in the court's view, demonstrably contrary to Federal Requirements. The court stated, "[a]lthough the FHWA has discretionary authority to decline to approve contracts that may not reflect the efficient use of federal dollars, the FHWA has not demonstrated that local hiring preference styled in the manner of the [Cleveland hiring preference] are impermissible per se due to their conflict with federal law." Slip Op. at 14.

The court also rejected FHWA's argument that 23 CFR §635.117(b) prohibits local hiring preferences such as the Cleveland ordinance, because the exact wording of the regulation only prohibited discrimination against out-of-state workers, and not the in-state, non-Cleveland, Ohio, residents targeted in this case.

The court ultimately upheld FHWA's decision that the Cleveland local hiring preference violated 23 USC § 112(b) and 23 CFR § 635.110(b), and so violated the Common Rule provisions that state subgrants must not violate Federal statutes and regulations. Finally, the court also determined that FHWA's decision to withdraw Federal funds from the Kinsman Road project did not violate the "clear statement" rule set forth in Pennhurst State Sch. & Hospital v. Halderman, 451 U.S. 1 (1981), because 23 U.S.C. § 112(b) fairly apprised States that any contract specification, regardless of its substantive viability under the federal regulations, cannot be "imposed as a condition precedent to the award of a contract . . . unless such requirement or obligation . . . is specifically set forth in the advertised specifications." 23 USC § 112(b)(1), as cited in Slip Op. at 18.

Therefore, despite disagreeing with elements of the district court's opinion supporting FHWA, the Sixth Circuit affirmed the lower court's judgment and upheld FHWA's decision to withdraw

Federal funding from the Kinsman Road project.

The Sixth Circuit's decision is available at:

http://www.ca6.uscourts.gov/opinions.pdf/07a0460p-06.pdf

D.C. District Court Upholds Cincinnati Commuter Project

On January 8, the U.S. District Court for the District of Columbia in Rivers Unlimited v. DOT, (D.D.C. No. 1:06-cv-01775-JR) granted summary judgment in favor of FHWA and the Ohio Department of Transportation in a case involving a dispute concerning a new transportation project designed to improve commuting between downtown Cincinnati and its east-lying suburbs.

To meet the need of the project, two highway options were considered: (1) a new bridge across the Little Miami River; and (2) expansion of the existing river crossing. The Ohio DOT chose to tier the environmental process and exclude Option 2 at the conclusion of Tier 1. As a result, plaintiffs launched four attacks upon the Tier 1 FEIS. Their first claim was that the exclusion of Option 2 from the FEIS runs afoul of the NEPA requirement that an EIS assess alternatives to a proposed plan that would also meet the project's purpose and need. Their second claim was that FHWA substantively erred in finding that the new bridge would not result in a constructive use of the Little Miami River under Section 4(f). The third and fourth claims were, respectively, that the agency failed to perform a new EIS in response to new information, and that the agency used a faulty gas price in conducting its environmental assessment. The district court rejected each of these claims.

The Little Miami River is designated as a valuable resource under the Wild and Scenic Rivers Act. The plaintiffs alleged that the proposed bridge would constitute a constructive use by substantially impacting the current visual and aural characteristics of the river. However, the Court ruled that the agency's determination of no constructive use must be upheld because the river was already disturbed by man-made distractions such as sewage overflow pipes, clearings for farmland, and other semi-industrial uses. The Court also noted that because the river was classified as a recreational river, (the lowest classification under the Wild and Scenic Rivers Act) it deserved the least amount of protection.

Plaintiffs also alleged that FHWA's assessment of noise levels was arbitrary and capricious because the agency classified the Little Miami River as a Class B rather than a Class A receptor. The Court disagreed, and ruled that FHWA's assessment of noise levels was done according to its established procedures and as a result, was entitled to substantial deference.

The court also rejected the allegation that a new EIS was required. Plaintiffs had argued that significant new information submitted by the NPS indicated that more careful noise sampling procedures would yield lower levels of noise pollution (thereby rendering the river as a Class A receptor)

than previously suggested by the Ohio and FHWA. The court rejected this, holding that a report suggesting that the Little Miami is in fact quieter than FHWA concluded does not qualify as significant new information requiring a new EIS.

Plaintiffs finally alleged that the modeling price of $1.13/gallon used for the project was unrealistic and argued that its use violated the requirement that an EIS be based on accurate data. The court again disagreed, and ruled that while FHWA may have based its calculations on unrealistic estimations, those calculations did not skew the analysis in the agency's favor.

Indiana District Court Upholds FHWA's Tiered EIS

FHWA's first important legal test of a tiered Environmental Impact Statement (EIS) resulted in a December 10 grant of summary judgment in Hoosier Environmental Council v DOT, (S.D. Ind. No. 1:06-cv-1442). The case involved a proposed 142 mile, new-location highway from Indianapolis to Evansville, Indiana, a part of the national I-69 project that will eventually stretch from the Canadian to the Mexican border.

The plaintiffs, three environmental groups and several individuals, brought suit in October 2006 against the FHWA, the U.S. Fish and Wildlife Service, and the Indiana Department of Transportation (INDOT), claiming alleged violations of the National Environmental Policy Act (NEPA), the Endangered Species Act (ESA), the Clean Water Act, and Section 4(f).

The Tier 1 EIS winnowed nineteen possible route alternatives down to five basic corridors (with some variations) for the interstate highway between Indianapolis and Evansville. Based upon three core goals, the FHWA chose alternative 3C, a 2000 foot wide corridor that passes near Bloomington and further south traverses a planned national wildlife refuge. Six separate Tier 2 EISs will determine the actual location of the highway within six smaller segments of the corridor.

The plaintiffs claimed that by using a tiered approach FHWA avoided decisions on key environmental issues, which the court acknowledged was a danger unless there is strong coordination among agencies. However, the district court held that a tiered approach was "an accepted and useful tool that can enable agencies to navigate efficiently and responsibly through large highway projects." The court noted that the "art of effective tiering is to find the appropriate level of detail at each level" and went on to conclude that it was "impractical and unnecessary to require a site-specific analysis for each alternative considered in a project the size of Interstate 69."

The court did warn that is was possible, if not probable, that more detailed field studies on the chosen alternative could force FHWA and INDOT to reconsider previously rejected alternatives because of serious impacts. The level of detail for a tiered document, however, was adequate in the court's view for FHWA to select the alternative it did.

On the ESA counts, the court, after a lengthy discussion of the endangered Indiana bat, found that the amended 2006 Biological Opinion (BO) was sufficient for Tier 1. The BO was, the court noted, an evolving document that will be reevaluated at the Tier 2 level.

On the Clean Water Act counts, the court found that the coordination between FHWA and the Corps of Engineers was sufficient for Tier 1 purposes. The court noted that the Corps would still have to make a determination that Alternative 3C was the least environmentally damaging alternative as well as issue section 404 permits at the Tier 2 EIS level.

Finally, the court also determined that FHWA complied with section 4(f). Although the selected alternative runs through a prime 4(f) resource, the Patoka River National Wildlife Refuge, the court accepted the joint planning exception to 4(f) and found a longstanding agreement by the State and Federal agencies that the highway would run throughthe refuge.

The plaintiffs have not appealed the decision.

Work on the Tier 2 EISs for I-69 is proceeding quickly for three sections. In fact, the FHWA issued a Record of Decision for the southernmost section on December 12. A notice for the Federal Register is being prepared to institute the 180 day statute of limitation for filing a lawsuit against the Tier 2 Section 1 ROD.

Buffalo Federal-Aid Highway Project Challenged in New York District Court

In Buffalo Niagra Riverkeeper, Inc v. FHWA (W.D. N.Y.) the plaintiffs are seeking to prevent a federal-aid highway project from proceeding pending compliance with NEPA, the NHPA, and Section (f).

The complaint was filed by several citizens groups, which include members of the Buffalo City Council, alleging that the EIS for the relevant highway project failed to adequately address adverse impacts of the project and failed to meet section 4(f) requirements, and that the Federal and State agencies failed to comply with the National Historic Preservation Act and various State laws.

The highway project is in the vicinity of the Buffalo inner harbor area, and is a central component of the City's urban redevelopment efforts around the waterfront. Construction is scheduled to begin in the spring. FHWA expects the plaintiffs to seek a preliminary injunction in an attempt to forestall that construction.

Denton Texas Federal-Aid Highway Project Challenged in Texas District Court

Highland Village Parents Group v. FHWA, (E.D. Tex., No. 4:07-cv-00548-RAS) was filed on December 10 against FHWA and several Departmental officials. The complaint seeks to enjoin construction of a federal-aid highway project in Denton County, Texas,

pending compliance with NEPA and Section 4(f). The Plaintiff is the Highland Village Parents Group (HVPG). The group has also sued the Texas Department of Transportation and its officials.

The subject project will provide a new segment of FM 2499 from FM 407 to FM 2181 in Denton County. The new roadway will be approximately 4.7 miles in length and will pass through or abut the City of Highland Village, the Town of Copper Canyon, unincorporated Denton County land, the Town of Corinth, and U.S. Corps of Army Engineers (USACE) land and water associated with the Poindexter and Hickory Creek Branches of Lewisville Lake. Since the project does take USACE lands, a 4(f) analysis was completed. Also, the USACE served as a participating agency on this EA.

The FONSI was issued in June 2005. In July of 2006 the public notice of the approval was published in the Federal Register. This notice was published in order to take advantage of the Congressionally-created statute of limitation in 23 U.S.C. § 139(l), which, in the circumstances of this case, required any judicial challenge to the final agency action to be brought by or before January 27, 2007.

Following the issuance of the FONSI, the Texas Department of Transportaion did make several minor design changes to the construction plans, changes that normally occur during the design phase of a highway or bridge project. The design changes were reviewed by the FHWA in a re-evaluation completed and approved in October 2007.

The changes triggered an internal FHWA analysis to ascertain if there were any changes or impacts to the environment from the design changes or the passage of time that might require a supplemental NEPA study and documentation. 23 C.F.R. § 771.129. The re-evaluation found that the FONSI remained valid and that no new or renewed NEPA scrutiny was required. However, we anticipate that the plaintiff will argue that the re-evaluation reopened the EA/FONSI for legal challenge. If so, this will be the first legal challenge to a project that utilized the statute of limitations provisions of 23 U.S.C. § 139(l).

The United States filed a motion to dismiss in January, arguing that the challenge is time-barred.

Federal Railroad Administration

D.C. Circuit Hears Argument in Engineers' Action against FRA, LERB, and Union Pacific Railroad

On May 18, 2006 Mr. C.L. Daniels, a former Union Pacific Railroad Company (UP) locomotive engineer, and the Brotherhood of Locomotive Engineers and Trainmen filed a complaint in the U.S. District Court for the District of Columbia, Daniels v. Union Pacific Railroad Co., (D.D.C. No. 1:06-CV-00939). The complaint named FRA, FRA's Locomotive Engineer Review Board (LERB), and UP and alleged that the defendants committed constitutional torts against Mr. Daniels. In particular,

the complaint alleged that UP, acting under color of Federal law through FRA's locomotive engineer certification regulations, revoked Mr. Daniels' locomotive engineer certification without a pre-deprivation hearing or a prompt post-deprivation hearing, in violation of the Due Process Clause of the Constitution. The complaint further alleged that FRA and the LERB (the Federal defendants) acquiesced in UP's denial decision and were biased against Mr. Daniels in denying his petitions for administrative review.

Meanwhile, on May 19, 2006, one day after filing in the District Court, Mr. Daniels filed an administrative appeal to the FRA Administrator from the FRA's Administrative Hearing Officer's (AHO) adverse ruling pertaining to the denial of his re-certification. The FRA Administrator issued his decision on July 31, 2006, affirming the AHO's decision. The Administrator's decision constituted final agency action.

On August 24, 2006, the Federal defendants filed a dispositive motion to dismiss the lawsuit in the District Court on the grounds of (i) sovereign immunity, (ii) the plaintiffs' failure to exhaust their administrative remedies, and (iii) the exclusive jurisdiction of the Court of Appeals under the Hobbs Act for appeals of final administrative orders. (UP also moved to dismiss the lawsuit on the ground that it was not a state actor or engaged in state action). On March 29, 2007, the District Court granted the defendants' motions and dismissed the case. The District Court dismissed the plaintiffs' claims against the Federal defendants for failure to exhaust their administrative remedies. The District Court also dismissed the plaintiffs' claims against the Federal defendants because it found that the Hobbs Act deprived it of jurisdiction to decide Constitutional claims as to the application or enforcement of Federal regulations that were not attacked as per se unconstitutional. Finally, the District Court dismissed all claims against UP, as it found that it was not a State actor.

On April 12, 2007, plaintiffs filed an appeal with the U.S. Court of Appeals for the District of Columbia, Daniels v. Union Pacific Railroad Co., (D.C. Cir. No. 07-5114). The Federal defendants and UP then moved for summary affirmance of the District Court's decision. On September 27, the D.C. Circuit denied the defendants' respective motions for summary affirmance and set the case for full briefing on the merits. Briefing was completed on January 31, focused primarily on (i) whether the District Court lacked subject matter jurisdiction over the plaintiffs' claims because the plaintiffs failed to properly exhaust their administrative remedies before the FRA, (ii) whether the District Court lacked subject matter jurisdiction over the claims because the Hobbs Act provides that the Court of Appeals has exclusive jurisdiction over final actions of the Secretary of Transportation, and (iii) whether UP's roll in issuing locomotive engineer certifications converts it into a state actor. On March 13, the Court heard oral argument in the case, focusing on those three issues. The Court of Appeals has not yet issued a final decision.

Union Challenges FRA Responses to FOIA Request and Petitions for Rulemaking

On November 13, a United Transportation Union local, and other named plaintiffs, filed a lawsuit, United Transportation Union Local 418 v. Boardman, (N.D. Iowa No. C 07-4100MWB), against the FRA Administrator, the Secretary of Transportation, and the United States, in the United States District Court for the Northern District of Iowa. The lawsuit alleges that FRA failed to comply with various statutory and regulatory requirements related to responding to three petitions for rulemaking and a Freedom of Information Act request. Plaintiffs seek a declaratory judgment and a mandatory injunction. It appears that the Department was not served notice of the filing until December 3, 2007.

The United States responded to the lawsuit on March 5, filing a motion to dismiss, or in the alternative a motion for summary judgment. The United States contends that the district court has no jurisdiction in this matter, because FRA has fully and properly responded to the Freedom of Information Act request, and each of the petitions for rulemaking. Therefore, the claims involved in the lawsuit are moot, with the exception of the claim for the waiver of fees associated with the Freedom of Information Act request, as to which the United States contends the court also lacks jurisdiction because plaintiffs had failed to exhaust their administrative remedies. The District Court has not yet ruled on the Motion to Dismiss.

National Highway Traffic Safety Administration

D.C. Circuit Dismisses Public Citizen Challenge to Tire Pressure Monitoring System Rule on Standing Grounds

On January 22 the U.S. Court of Appeals for the District of Columbia Circuit in Public Citizen, Inc. v. Mineta, (D.C. Cir. No. 05-1188) dismissed Public Citizen's challenge to NHTSA's Tire Pressure Monitoring System Rule after concluding that Public Citizen lacked standing to prosecute the action. Neither Public Citizen nor the Federal government raised standing issues initially, but the D.C. Circuit raised the issue and eventually scheduled a rare second oral argument limited solely to the standing issue.

This litigation originally encompassed the consolidation of two groups of petitions for review: (1) petitions for review of the Tire Pressure Monitoring System (TPMS) rule, and (2) a petition seeking review of NHTSA's denial of an administrative petition for rulemaking on tire reserve load (TRL).

On June 15, the D.C. Circuit issued its first opinion in the case. There the Court first held that a challenge to the denial of a petition for rulemaking under the National Traffic and Motor Vehicle Safety Act, as amended, can only be heard in the district court, rather than a court of appeals. Accordingly, the court dismissed the petition seeking review of

NHTSA's denial of the petition for rulemaking, finding that the D.C. Circuit lacked jurisdiction.

Second, as to the challenge to the TPMS rule, the Court held that the tire company petitioners, which were not regulated by the rule, lacked standing to challenge it. The court therefore dismissed their petitions.

Third, the court ordered more briefing addressing whether Public Citizen had standing to challenge the rule. Thereafter the court issued an order setting forth a supplemental briefing schedule relating to the standing issue. Standing had been raised by intervenor Alliance of Automobile Manufacturers (Alliance) but not by the United States.

In order to establish standing the court's order specifically required Public Citizen to demonstrate whether NHTSA's TPMS Rule created a substantial increase in the risk of death, physical injury, or property loss and whether the ultimate risk of harm to which Public Citizen's members might be exposed would be "substantial" and sufficient "to take a suit out of the category of the hypothetical." Public Citizen also was required to show causation by demonstrating a substantial probability that automakers would not adopt safety standards more stringent than NHTSA specified, and that consumers on their own would not check their tires so as to prevent injuries to others and consumers would pay attention to the warning lights.

On January 22, the D.C. Circuit issued its second opinion, which dismissed Public Citizen's petition. The Court agreed with the Alliance that Public Citizen had not met its burden regarding the rules' requirements on replacement tires. When replacement tires that are incompatible with the TPMS system are installed, the rule did not require that the system warn the operator of low tire pressure; instead, the rule required that the TPMS indicate that incompatible tires had been installed. The Court noted that Public Citizen proposed two alternatives to address replacement tires but made no attempt to demonstrate the difference in risk between the TPMS standard and the list proposal.

Public Citizen had also argued that the 20 minute potential lag time between an actual under-inflation situation and the activation of a dashboard warning was, in Public Citizen's view, inconsistent with the TREAD Act. Public Citizen had argued for closer to a one minute time period. The court, however, noted Public Citizen's admission that it was difficult to quantify the risks between the two approaches and stated that Public Citizen's attempts to do so were simplistic and unreliable. By contrast, the court credited NHTSA's declarations as a more accurate depiction of commuting and driving patterns and deemed Public Citizen's statistics unreliable.

Finally, Public Citizen had argued that the minimum trigger to activate the warning light for under-inflation under the TPMS rule – 25 per cent below placard pressure measure – also violated the TREAD Act. Public Citizen attempted to demonstrate injury in fact relating to this allegation by quantifying the increased risk of injury from the 25% below placard pressure standards as

adopted compared to the minimum pressure in Tire & Rim Association (T&RA) tables. According to the tire industry submissions, this pressure is set as the minimum tire pressure required to safely carry a car operating at its maximum load. Public Citizen argued that there was an increase in risk between the trigger in NHTSA's rule and a trigger based on the T&RA tables.

The court found two statistical flaws in Public Citizen's argument. First, it was based in part on data that included recalled tires. The court credited the NHTSA declarants for explaining that recalled tires must be omitted from any tire-failure data, because the recalled tires typically contain a performance defect. Second, the court concluded that Public Citizen had overstated the risk of using NHTSA's 25% below placard standard as opposed to the T&RA table pressure standard. Public Citizen's statistician had estimated that 58% of cars would benefit from Public Citizen's preferred standard. However, as the court noted, these same statistics also indicated that 39% of cars would benefit from the standard as adopted. The court criticized Public Citizen's analysis for attempting to take all of the benefits while ignoring all of the costs.

Neither the court's January 22 decision, nor its earlier June 8 decision reached the merits of the NHTSA rule.

The June 8 decision is available online at:

http://pacer.cadc.uscourts.gov/docs/common/opinions/200706/05-1188a.pdf

The January 22 decision is available online at:

http://pacer.cadc.uscourts.gov/docs/common/opinions/200801/05-1188b.pdf

Ninth Circuit Remands NHTSA's CAFE Rule for Light Trucks and NHTSA Seeks Rehearing

On November 15 the U.S. Court of Appeals for the Ninth Circuit in Center for Biological Diversity v. NHTSA (9th Cir. No. 06-71891) remanded NHTSA's final rule setting corporate average fuel economy (CAFE) standards for light trucks. Notably, the decision did not vacate the NHTSA rule, which will therefore remain in effect during the remand proceeding.

NHTSA's rule was challenged by the Center for Biological Diversity, the Sierra Club, Public Citizen, Environmental Defense, Natural Resources Defense Fund, the State of Minnesota, and a coalition of twelve States and cities (including California, the State and City of New York, and the District of Columbia). The Ninth Circuit panel's decision found that the light truck rule was arbitrary and capricious and contrary to requirements of the Energy Policy and Conservation Act of 1975 because (1) NHTSA's marginal cost benefit analysis failed to monetize the value of carbon emissions, (2) the rule failed to set a fleet-wide backstop fuel economy level for manufacturers, (3) the rule failed to close the existing "SUV loophole" because it did not revise passenger automobile/light truck definitions so as to include SUV's within

the category of passenger vehicles, and (4) the rule did not set fuel economy standards for certain vehicles in the 8,500 to 10,000 gross vehicle weight range.

The court also held that NHTSA's Environmental Assessment (EA) was inadequate, and that the petitioners had raised a substantial question as to whether the light truck rule may have a significant impact on the environment, thereby requiring the agency to prepare an Environmental Impact Statement (EIS), rather than an EA. On remand the court ordered NHTSA to prepare an EIS and "to promulgate new standards consistent with this opinion as expeditiously as possible and for the earliest model year practicable."

Since the ruling, new legislation, the Energy Independence and Security Act of 2007, P. L. 110-140, has gone into effect that substantially revises NHTSA's responsibilities for issuing CAFE standards and that imposes the new standards beginning with model year 2011, which was the last model year covered by the remanded rule.

Additionally, on February 6, NHTSA sought rehearing by the full court of the panel's decision to order NHTSA to perform an EIS for its CAFE standard rulemaking, noting that there is conflicting law both within the Ninth Circuit and outside the Circuit as to whether a court may order an agency to perform an EIS instead of an EA. On February 15 the panel ordered the petitioners to respond to NHTSA's rehearing motion by March 7. A response to a rehearing petition can be filed only if ordered by the court, and such an order typically indicates that at least some judges on the court might be inclined to grant rehearing.

The Ninth Circuit's November 2007 opinion is available at:

http://www.ca9.uscourts.gov/ca9/newopinions.nsf/775202DBA504085C88257393007B9729/$file/0671891.pdf?openelement.

NHTSA's Final Rule is available at:

http://frwebgate2.access.gpo.gov/cgi-bin/waisgate.cgi?WAISdocID=608335319654+2+0+0&WAISaction=retrieve.

California District Court Holds DOT CAFE Standards Do Not Preempt California Emissions Regulations

On December 11, the United States District Court for the Eastern District of California in Central Valley Chrysler-Jeep, Inc. v. Goldstone, (E.D. Cal., 04-6663), rejected a challenge brought by motor vehicle manufacturers and dealers to California's greenhouse gas (GHG) emission standards for passenger cars, light-duty trucks, and medium duty passenger vehicles.

The central issue in the case was whether California's GHG emission regulations are preempted under the Energy Policy and Conservation Act (EPCA), which authorizes NHTSA's adoption of Corporate Average Fuel Economy (CAFE) standards. The Court held that California's GHG regulations are not preempted by EPCA and, if a waiver of Clean Air Act (CAA)

preemption were to be granted by EPA, can co-exist with NHTSA's CAFE standards. Subsequently, however, EPA announced that it would deny California's request for a CAA waiver for these regulations. An EPA waiver denial would prevent California's regulations, and any such regulations adopted by other states, from going into effect.

The United States was not a party to this case and did not intervene or participate in the case as an amicus. As reported in the last issue of Litigation News, the United States is considering participating in the appeal of a similar ruling by the U.S. District Court for the District of Vermont that rejected auto industry preemption arguments regarding Vermont's GHG emission regulations, which are identical to California's. That case is Green Mountain Chrysler Plymouth Dodge Jeep v. Crombie, (D. Vt. Nos. 05-302, 05-304).

DOT and California Seek Summary Judgment in CAFE Preemption FOIA Suit

DOT (and co-defendants OMB and EPA) together with the State of California filed cross-motions for summary judgment in California v. NHTSA, (N.D. Calif. No. 07-02055), a suit filed in the U.S. District Court for the Northern District of California appealing agency decisions denying FOIA requests filed by the State of California. 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 CO_2 emissions and documents related to certain meetings regarding the standard.

The government's summary judgment brief argues that the agencies have demonstrated that all relevant documents were properly withheld under one or more of FOIA's exemptions. The Department has provided responsive, non-exempt documents to the requester, and has submitted an index of the documents that the Department asserts are exempt from disclosure.

Federal Transit Administration

District Court Rules Against FTA in Rochester School Bus Case

On January 24, Judge David G. Larimer of the U.S. District Court for the Western District of New York granted a partial summary judgment motion in favor of the Rochester-Genesee Regional Transportation Authority (RGRTA) in its complaint contesting an FTA administrative determination that RGRTA is operating school bus services in violation of 49 U.S.C. Section 5323(f) and FTA's regulations at 49 CFR Part 605. RGRTA v. FTA, (W.D. N.Y. No. 07 CV 6378T).

Judge Larimer unexpectedly employed a very narrow interpretation of FTA's authorizing statute. Specifically, the court ruled that RGRTA is not operating "school bus transportation that exclusively transports students and

school personnel in competition with a private school bus operator" (emphasis added*)* so long as the routes in question "from an objective standpoint" are "genuinely open" to the general public. Thus, Judge Larimer found it immaterial that the routes are designed primarily to serve high schools in Rochester.

The Court then proceeded to find FTA's administrative decision to be arbitrary and capricious under the Administrative Procedure Act and effectively squelched the efforts of Laidlaw Transit, Inc. — the private school bus operator that intervened in the suit — to protect its own interests and investments in school bus service Laidlaw has provided in metropolitan Rochester over the past several years.

FTA and the Justice Department are in the process of analyzing whether to appeal the decision to the U.S. Court of Appeals for the Second Circuit. FTA is also considering instituting a rulemaking to amend its regulations at Part 605, specifically to strengthen the protections for private school bus operators.

Manhattan Residents Challenge Relocation of Proposed Second Avenue Subway Entrance

On February 4 residents of two apartment buildings in Manhattan brought a NEPA action in the U.S. District Court for the Southern District of New York against the Department, FTA, and the Metropolitan Transportation Authority (MTA). 325 East 72nd Street Corp. v. DOT, (S.D.N.Y. No. 08-Civ.-1127). Plaintiffs challenge a proposed change in the entrance location to the 72nd Street station along the planned Second Avenue Subway line (Phase I). The proposed line is the subject of a Full Funding Grant Agreement between FTA and MTA.

FTA issued its latest NEPA determination in an April 2004 Record of Decision. At that time MTA had planned to locate the station at the corner of 72nd Street and 2nd Avenue. Plaintiffs allege that MTA now intends to relocate the station to a space along 72nd Street between 1st and 2nd Avenues – in front of plaintiffs' apartment buildings – and that MTA has begun the process of acquiring the property needed for the new location before completing the environmental review process.

Other 72nd Street residents filed a separate action in New York State court against MTA, seeking to stop MTA's property acquisition process under New York State eminent domain and environmental laws.

FTA recently wrote to MTA to remind the transit system of its NEPA obligations, and MTA intends to respond with assurances of NEPA compliance, hopefully addressing any actions it has taken to date relating to property acquisition.

FTA Awaits Decision in Delaware Riverkeeper Case

On December 13 the U.S. District Court for the Eastern District of Pennsylvania heard oral argument in The Delaware Riverkeeper and American Littoral

Society v. Simpson, (E.D. Pa. No. 2:07-cv-02489). The litigation seeks to enjoin the Lehigh and Northampton Transportation Authority (LANTA) and the Easton Parking Authority from constructing – and FTA from funding – a 5-story, 555-space parking garage and bus transfer facility with a privately constructed 7-story, 147-unit condominium development on top, on a parking lot next to a highway along the Delaware River in downtown Easton. The complaint alleges violations of NEPA and Executive Order 11988 (Floodplain Management).

Shortly after the complaint was filed, FTA revoked its original Categorical Exclusion determination, and ordered LANTA to prepare and circulate for public comment an Environmental Assessment (EA). Oral argument took place shortly after the public hearing on the EA. Plaintiffs argued, in support of their injunction request, that there had been "procedural harm" when the parking authority continued to solicit bids for the project pending completion of the NEPA process, and that but for the fact that the bids were two times above the estimated cost of the project, the authority would have gone forward with construction before completing the NEPA process.

FTA argued that because it has not completed its NEPA review, the case against FTA is not ripe for adjudication.

Attorneys representing the other defendants also moved to dismiss on a variety of grounds. The project is indefinitely on hold as it has gone well over budget. In all likelihood, the local agencies will have to redesign or relocate the project and prepare a new EA covering the changes.

Maritime Administration

Injunction Sought Against MarAd LNG Port Decision

On February 15, Atlantic Sea Island Group LLC (ASIG) filed a complaint against MarAd in the U.S. District Court for the District of Columbia in Atlantic Sea Island Group LLC v. Connaughton, (D.D.C., No. 08-00259) seeking to enjoin the agency'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 gas (LNG) port in waters off the coasts of New York and New Jersey.

Under the terms of the licensing statute, once a State is designated as "adjacent," 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 the project under the terms of the statute because the port will be connected by pipeline to New York.

In its complaint ASIG alleges that the authority to make "adjacent State" 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.

Litigation Continues Concerning Suisun Bay National Defense Reserve Fleet

In Natural Resources Defense Council v. DOT, (E.D. Cal. No. 2:07-CV-2320-GEB-GGH) the Natural Resources Defense Council as well as two other environmental plaintiffs have sued MarAd 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.

On December 6, NRDC amended its previously-filed complaint to add a Clean Water Act count to the existing NEPA and RCRA claims. The United States has answered the amended complaint and requested a stay concerning the NEPA portion of the litigation pending the completion of the environmental assessment process later this year. MarAd has committed not to do any in-water hull cleaning of SBRF vessels until the NEPA process is completed. In the interim, settlement discussions are continuing.

ACT Appeals Dismissal of Cargo Preference Suit 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 In America Cargo Transport, Inc. v. United States, (W.D. Wash. No. C05-393 JLR).

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.

Able UK Secures Required Local Permits to Dismantle MarAd Vessels

In October 2007, Able U.K. successfully reacquired its local planning permits and licenses from the Hartlepoole Borough Council (HBC) authorizing it to recycle obsolete ships at its U.K. facility. Able U.K. is in the process of reapplying for its national waste management licensing from the UK Environmental Agency (UKEA) which would permit the recycling work to begin on Maritime Administration vessels in the near future.

After over two years of litigation, in 2006 the U.S. District Court for the District of Columbia dismissed on summary judgment Basel Action Network v. Maritime Administration, (D.D.C. No. 03CV2000), a complaint that sought to enjoin MarAd from exporting from moorings on the James River in Virginia thirteen vessels from the National Defense Reserve Fleet for dismantling and recycling in the United Kingdom. Plaintiff's contended that the export of these vessels, containing PCBs, violated the Toxic Substances Control Act ("TSCA"), the Resource Conservation and Control Act ("RCRA"), the National Maritime Heritage Act ("NMHA"), the Administrative Procedure Act, and the National Environmental Policy Act of 1969 ("NEPA").

In an October 2, 2003 decision, the district court had previously allowed four of the thirteen vessels to depart the United States after finding that the plaintiffs did not have a likelihood of success on the merits with respect to the TSCA, APA, and NMHA issues.

Those four vessels were transported to the United Kingdom to be recycled at the facility of Able U.K. in Teesside. Although Able U.K. had the necessary approvals for recycling the vessels at the time MarAd awarded the contract, it subsequently lost those recycling approvals as a result of litigation in the U.K. Since that time Able U.K. has been attempting to regain the necessary approvals.

After a vote in October 2006 by the HBC, which resulted in refusal to approve Able U.K.'s applications, and which was contrary to the strong, nearly unanimous recommendation for approval by HBC's own planning review committee, MarAd entered into contractual discussions with Able U.K. Those discussions resulted in a 2007 modification that limited the recycling of obsolete ships under the original contract to only the four ships currently in the UK. The additional tonnage (approximately equivalent to nine vessels) specified in the original contract have already been disposed of by MarAd at U.S. domestic facilities.

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