



U.S. Department of  
Transportation

# DOT LITIGATION NEWS

## Office of the General Counsel

Paul M. Geier  
Assistant General Counsel  
for Litigation

Peter J. Plocki  
Deputy Assistant General Counsel  
for Litigation

Washington, D.C. 20590

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

**March 31, 2011**

**Volume No. 11**

**Issue No. 1**

## Highlights

**Supreme Court holds that NHTSA  
seatbelt standard does not preempt  
state common law standard, page 2**

**Supreme Court decides Railroad  
Revitalization and Regulatory Reform  
Act case, page 3**

**United States seeks Supreme Court  
review of decision allowing non-  
pecuniary damages for Privacy Act  
violations, page 4**

**Supreme Court invites government's  
views on certiorari in case involving  
the preemptive scope of the  
Locomotive Inspection Act, page 5**

**Supreme Court denies certiorari in  
New York City hybrid taxi  
preemption case, page 6**

**Tenth Circuit decides preemption  
challenge to application of state liquor  
laws to air carrier, page 8**

## Table of Contents

Supreme Court Litigation	2
Departmental Litigation in Other Federal Courts	8
Recent Litigation News from DOT Modal Administrations	16
Federal Aviation Administration	16
Federal Highway Administration	28
Federal Motor Carrier Safety Administration	35
Federal Railroad Administration	39
Federal Transit Administration	41
Maritime Administration	43
Pipeline and Hazardous Materials Safety Administration	44
Saint Lawrence Seaway Development Corporation	45
Index of Cases Reported in this Issue	47

## Supreme Court Litigation

### **Supreme Court Holds that NHTSA Seatbelt Standard Does Not Preempt State Common Law Standard**

On February 23, 2011, the Supreme Court unanimously ruled that a Federal Motor Vehicle Safety Standard (FMVSS) that permitted the installation of a lap belt instead of a lap-and-shoulder belt in a particular minivan seating position, while allowing vehicle manufacturers the option of installing a lap-and-shoulder belt in that position, did not preempt a state common law tort action against the vehicle manufacture for not installing a lap-and-shoulder belt in that position. The decision in Williamson v. Mazda Motor of America (No. 08-1314) reversed a decision of an intermediate California state appellate court. In so ruling, the Court agreed with the position of the United States in the government's amicus brief filed in support of the petitioner, the family of a woman sitting in such a lap-belt-only seat when she was killed in an accident.

The 1989 version of FMVSS No. 208 required auto manufacturers to install lap-and-shoulder belts on rear seats next to a vehicle's doors or frames, but allowed the installation of either those belts or lap belts on rear-inner seats such as those next to a minivan's aisle. The Williamson family brought a tort suit claiming that Thanh Williamson died in an accident because the rear aisle seat of the Mazda minivan in which she was riding had a lap belt instead of a lap-and-shoulder belt. The State Court of Appeal affirmed the trial court's dismissal of the case, relying on Geier v. American Honda Motor Co., in which the

Court found that the 1984 version of FMVSS No. 208, which required installation of passive restraint devices, preempted a state tort suit against an auto manufacturer on a failure to install a particular passive restraint, airbags. The Court in Geier found preemption notwithstanding a provision of the National Traffic and Motor Vehicle Safety Act (Safety Act) that saves state common law actions from preemption because that provision does not displace ordinary conflict preemption principles, and the particular claim at issue in Geier conflicted with a significant safety-related objective of the 1984 standard – providing auto manufacturers, and therefore consumers, with a choice among different kinds of passive restraints.

The Williamson Court agreed with the position of the United States and petitioner. It distinguished the 1984 standard at issue in Geier from the 1989 standard. The Court acknowledged that the 1989 standard offered manufacturers a choice of belts to install and that the tort suit here would effectively restrict that choice. But in this case, the reason for offering a choice was not related to a safety goal such as increasing consumer acceptance of alternative safety devices as was the case in Geier. Here, manufacturers were given a choice because DOT determined that the safer option, lap-and-shoulder belts, were not cost effective. The court rejected that rationale as a basis for conflict preemption, noting that many federal safety standards embody a cost-effectiveness judgment. To infer preemptive intent from the mere existence of such a cost-effectiveness judgment would transform all such

standards into maximum standards, eliminating the possibility that the agency seeks only to set forth a minimum standard that could be supplemented through state tort law. Such a reading cannot be reconciled with the Safety Act's savings clause. The court also noted that the Solicitor General represented that DOT's regulation does not preempt in this case, that DOT has not expressed inconsistent views on this subject, and that, as in Geier, "the agency's own views should make a difference."

The Court's opinion is available at <http://www.supremecourt.gov/opinions/10pdf/08-1314.pdf>.

The briefs associated with the case are available at <http://www.abanet.org/publiced/preview/briefs/nov2010.shtml#williamson>.

### **Supreme Court Holds that Railroad May Challenge State Non-property Tax Exemption as Discriminatory under Railroad Revitalization and Regulatory Reform Act**

On February 22, 2011, the Supreme Court ruled that a railroad may challenge a State's non-property tax as discriminatory under the Railroad Revitalization and Regulatory Reform Act of 1976 (4-R Act) even if the discriminatory element arises from an exemption from the otherwise generally applicable tax rather than from the tax itself.

The decision in CSX Transportation, Inc. v. Alabama Department of Revenue (No. 09-520) reversed and remanded a decision of the U.S. Court of Appeals for the Eleventh Circuit and resolved a split in the circuits regarding the 4-R Act's catch-all provision, which forbids a State from imposing "another tax that discriminates against a rail

carrier." 49 U.S.C. § 11501(b)(4). In so ruling, the Court agreed with the position of the United States in the government's amicus brief filed in support of the petitioner, CSX. Justice Thomas wrote a dissent, which was joined by Justice Ginsberg.

The Court based its decision on the explicit language of the 4-R Act. First, the Court analyzed the meaning of the term "another tax" as used in subsection (b)(4) of the 4-R Act. Looking to the ordinary definition, the Court found that "another tax" is expansive and refers to any form of tax a State might impose, except taxes on property addressed in subsections (b)(1) – (b)(3). In applying this expansive definition of "another tax," the Court also included tax exemptions in this category. Second, the Court turned to determining whether a tax "discriminates" against a railroad because the State grants exemptions to a railroad's competitors. Again, the Court looked to the ordinary definition of "discrimination" and stated that "[d]iscrimination" is the "failure to treat all persons equally when no reasonable distinction can be found between those favored and those not favored." Based upon this definition, the Court found that a State tax that exempts a railroad's competitors may in fact discriminate. Thus, the Court found that a State non-property tax "that applies to railroads but exempts their interstate competitors is subject to challenge under subsection (b)(4) as a 'tax that discriminates against a rail carrier.'" The Court noted its limited decision and consequently that it did not address whether Alabama's taxes actually discriminate against CSX or other railroads.

The Court also responded to Alabama's reliance upon the Court's decision in Department of Revenue of Oregon v. ACF Industries. The Court stated that its analysis

in ACF Industries did not apply because in that case, the Court analyzed a property tax, and the Court was constrained by the statutory text provided in subsections (b)(1) – (3). The Court did note that its decision created a division between the treatment of property tax exemptions and non-property tax exemptions. However, the Court said that, for reasons that elude the Court, Congress drew a sharp line between property taxes and other taxes.

Justice Thomas' dissent agreed that subsection (b)(4) allows a railroad to challenge a non-property tax. However, Justice Thomas would have applied a different definition of "discrimination." The dissent argues that to discriminate, a tax exemption scheme must target or single out railroads in comparison to general commercial and industrial taxpayers. Because CSX would not be able to satisfy the dissent's discrimination standard, the dissent would have found in favor of Alabama.

The Court's opinion is available at <http://www.supremecourt.gov/opinions/10pdf/09-520.pdf>.

The briefs associated with the case are available at <http://www.abanet.org/publiced/preview/briefs/nov2010.shtml#csx>.

### **United States Seeks Supreme Court Review of Ninth Circuit Decision Allowing Non-pecuniary Damages for Violations of the Privacy Act**

On February 14, 2011, the United States sought Supreme Court review of the decision of the U.S. Court of Appeals for the Ninth Circuit in FAA, et al. v. Cooper (No. 10-1024) in which the court held that the term "actual damages" as used in the

Privacy Act is not limited to pecuniary damages. The Ninth Circuit's decision deepened an existing circuit court conflict that now spans four circuits.

This case arose out of an investigation by the DOT and Social Security Administration (SSA) Inspectors General of Stanmore Cooper and other individuals who held FAA airman certificates notwithstanding the fact that they were receiving disability payments from the SSA for conditions that would render them ineligible to hold such certificates. Following a guilty plea to a Federal misdemeanor for making or delivering a false official writing to a Federal agency and the revocation of his FAA airman certificate, Cooper filed suit against DOT, FAA, and SSA alleging violations of the Act by these agencies in the course of their investigation when they exchanged information about Cooper.

In August 2008, the U.S. District Court for the Northern District of California granted summary judgment in favor of the government. The court held that the exchange and disclosure of Cooper's information was a breach of the Privacy Act, but that the damages he sought under the Act – damages for the mental anguish he allegedly suffered as a result of the violations of the Act – did not fall under the "actual damages" element of the Act, which only includes pecuniary damages. Without addressing the other elements of a cause of action under the Privacy Act, the district court dismissed the complaint.

Cooper appealed, and in February 2010, the Ninth Circuit found that the Act authorizes damages for non-pecuniary as well as pecuniary damages. The court concluded that the intent of Congress in enacting the Privacy Act was "to extend recovery beyond pure economic loss." The court came to this

conclusion after considering the text of other sections of the Privacy Act, the purposes of the Act, and decisions interpreting the words “actual damages” under the Fair Credit Reporting Act, which Congress passed in a contemporaneous timeframe. The Ninth Circuit also rejected the argument that the government’s waiver of sovereign immunity through the Privacy Act should be narrowly construed, with damages limited to economic loss.

The United States petitioned for panel rehearing or, in the alternative, rehearing en banc, and on September 16, 2010, both were denied with eight judges dissenting. Writing for the dissenting judges, Judge O’Scannlain, concluded that “[t]he effect of today’s order [denying rehearing en banc] is to open wide the United States Treasury to a whole new class of claims without warrant.”

In its petition for certiorari, the government noted the well-established canon that requires any ambiguity in the scope of a waiver of sovereign immunity be construed narrowly in the government’s favor. The petition contended that contrary to this canon, the Ninth Circuit broadly construed the Privacy Act’s waiver for “actual damages” against the United States to include nonpecuniary damages, even though the court acknowledged that the term does not unequivocally express a waiver for such damages. The petition argued that this error deserves Supreme Court review because it dramatically increases the government’s exposure to Privacy Act damages in the Nation’s largest geographic circuit and extends an existing division among the courts of appeals: whereas the Sixth and Eleventh Circuits have correctly concluded that the Privacy Act does not subject the government to liability for non-pecuniary harm, the Fifth Circuit and now the Ninth Circuit have both held the opposite.

The government’s petition for certiorari is available at <http://www.justice.gov/osg/briefs/2010/2pet/7pet/2010-1024.pet.aa.pdf>.

The Ninth Circuit opinion and the dissent to its en banc denial are available at: <http://www.ca9.uscourts.gov/datastore/opinions/2010/09/16/08-17074.pdf>.

### **Supreme Court Invites Government’s Views on Certiorari in Case Involving the Preemptive Scope of the Locomotive Inspection Act**

The Supreme Court has requested the views of the United States on whether to grant certiorari in John Crane, Inc. v. Atwell (No. 10-272), in which petitioner seeks review of a Pennsylvania Superior Court decision holding that the Locomotive Inspection Act (LIA) did not preempt state common law tort claims seeking damages for alleged asbestos exposure. Atwell v. John Crane, Inc., 986 A.2d 888 (Pa. 2009).

The LIA states that “[a] railroad carrier may use or allow to be used a locomotive or tender on its railroad line only when the locomotive or tender and its parts and appurtenances – (1) are in proper condition and safe to operate without unnecessary danger of personal injury; (2) have been inspected as required under this chapter and regulations prescribed by the Secretary of Transportation under this chapter; and (3) can withstand every test prescribed by the Secretary under this chapter.” 49 U.S.C. § 20701. In Napier v. Atlantic Coast Line R.R. Co., the Supreme Court determined that the LIA occupied the field of regulating locomotive equipment and extended to “the design, the construction, and the material of every part of the locomotive and tender and of all appurtenances.” 272 U.S. 605, 611

(1926). Since Napier, many courts have held that the scope of the LIA encompasses state common law claims.

Mr. Atwell was a railroad pipefitter, and in the course of his duties for the railroad, he installed asbestos-containing packing and gaskets manufactured by JCI to prevent leaks on locomotives and boilers after they had been brought into the railroad maintenance shop for servicing and repairs. After working approximately 40 years in this environment, he was diagnosed with lung cancer caused by asbestos exposure and ultimately died as a result of his illness. Mr. Atwell brought suit in Pennsylvania state court alleging injury from his exposure to asbestos. In response, JCI argued that the LIA preempted Mr. Atwell's claims and moved to dismiss the case. The Pennsylvania trial court denied the motion and a jury subsequently found that Mr. Atwell was exposed to asbestos through JCI products and that the exposure caused his lung cancer. JCI appealed the judgment to the Pennsylvania Superior Court. Again, relying on Napier and the line of recent decisions finding state common law claims against manufacturers preempted by the LIA, JCI argued that the plaintiff's claims were preempted by the LIA because the statute occupied the field of locomotive safety. The Superior Court disagreed with JCI's preemption argument and, citing the Pennsylvania Supreme Court's decision in Norfolk & Western Ry. v. Pa. Pub. Util. Comm'n, 413 A.2d 1037 (Pa. 1980), found that "state tort law, especially in strict liability cases, occupies one of the interstices not covered by Congressional command." Atwell v. John Crane Inc., 986 A.2d 888, 894 (Pa. 2009). Although, the Superior Court recommended that the Pennsylvania Supreme Court hear the case, it declined to do so.

On August 23, 2010, JCI petitioned the Supreme Court for certiorari citing to the apparent conflict between the decisions of the Pennsylvania state courts and those of other jurisdictions. JCI continues to argue that the LIA occupies the field of locomotive safety and preempts the state common law tort claim of a railroad employee who has sued a manufacturer for causing an asbestos-related disease. JCI contends that the state court's decision conflicts with the Supreme Court's decision in Napier v. Atlantic Coast Line R.R. Co., 272 U.S. 605 (1926), and with a group of recent cases from other jurisdictions holding that the LIA preempts finding state common law claims against manufacturers. The executor of Mr. Atwell's estate argues that the holding in Napier was overturned by the enactment and subsequent amendment, in 2007, of the Federal Railroad Safety Act (FRSA). Furthermore, Mr. Atwell argues that neither the LIA nor the FRSA is applicable to general workplace safety issues occurring in railroad repair shops.

There are two similar cases pending before the Supreme Court on petitions for certiorari, Griffin Wheel Co. v. Harris (No. 10-253) and Kurns v. Railroad Friction Prod. (No. 10-879). These cases also raise preemption questions under the LIA and the Safety Appliance Acts. At present, the Supreme Court has not requested the views of the United States on these cases.

### **Supreme Court Denies Certiorari in New York City Hybrid Taxi Preemption Case**

On February 28, 2011, the Supreme Court denied the City of New York's petition for certiorari in Metropolitan Taxicab Board of Trade v. City of New York (No. 10-618), in which the U.S. Court of Appeals for the

Second Circuit affirmed an order of the U.S. District Court for the Southern District of New York enjoining New York City taxicab regulations (the TLC regulations) on the ground that they are preempted by the Energy Policy and Conservation Act (EPCA), 49 U.S.C. § 32901 *et seq.* The case was brought by a group of taxicab owners. The district court had also held that the TLC regulations were preempted by the Clean Air Act (CAA), but the circuit court declined to reach that issue after finding EPCA preemption.

Under EPCA, NHTSA administers the Corporate Average Fuel Economy (CAFE) program. The New York City Taxicab & Limousine Commission (TLC) had promulgated regulations to promote the purchase of hybrid and clean diesel taxicabs by taxicab operators by reducing the rates at which the taxicab owners may lease other vehicles to taxi drivers and increasing those rates with respect to hybrid vehicles.

At the Second Circuit's invitation, the United States filed an amicus brief in which it supported reversal of the district court on the ground that the TLC regulations are not preempted. In its brief, the United States argued that the Second Circuit did not need to determine whether the TLC regulations are "related to" fuel economy standards within the meaning of the EPCA (or CAA) preemption clause. Instead, the government contended that the issue was the antecedent question of whether the City of New York has adopted or enforced regulations of the type that Congress sought to preempt under EPCA or the CAA, particularly since the regulation of taxi services had been the

subject of pervasive local regulation for decades prior to passage of EPCA and the CAA in the 1960s and 1970s.

The Second Circuit rejected the arguments of the City and the United States and held that the TLC regulations were "based expressly on the fuel economy of a leased vehicle" and thus "plainly fall within the scope of the EPCA preemption provision." In its petition for a writ of certiorari, the City argued that the TLC regulations are not preempted by EPCA because they are not regulations "related to" fuel economy standards. The City also argued that Congress did not intend to preempt state and local governments from adopting incentive programs to promote the purchase of fuel-efficient vehicles and that, under the Court's preemption jurisprudence, the TLC regulations do not have the purpose or effect of regulating fuel economy.

The taxicab owners argued in their opposition brief that the Second Circuit's interpretation of EPCA's preemption clause was correct and did not conflict with any other court decision. The taxicab owners argued that the TLC regulations are "related to" federal fuel economy standards because they have the purpose and effect of regulating vehicle fuel economy and imposed what they termed a "*de facto* mandate" to taxicab operators to purchase fuel-efficient and low emission vehicles.

## Departmental Litigation in Other Courts

### **Tenth Circuit Finds State Regulation of Airline Alcohol Service Preempted, Remands for 21<sup>st</sup> Amendment Analysis**

On December 3, 2010, the U.S. Court of Appeals for the Tenth Circuit issued its decision in US Airways v. O'Donnell, 627 F.3d 1318 (10<sup>th</sup> Cir. 2010), an appeal of a district court decision holding that New Mexico could subject US Airways to State alcoholic beverage regulations if the airline serves alcoholic beverages on flights into and out of the State. The Tenth Circuit reversed the district court, holding that New Mexico's regulations are impliedly preempted, and remanded the case to allow the district court to conduct a 21st Amendment balancing of New Mexico's core powers and the federal interests underlying uniform aviation regulation pursuant to the Federal Aviation Act.

New Mexico's attempt to regulate the airline came after a US Airways passenger, who was served alcohol on a flight to New Mexico, caused a car accident with multiple deaths a few hours after landing. The State regulations include a training regime for flight attendants serving alcoholic beverages on board. The United States filed an amicus brief in the case supporting US Airways, as did ten former Secretaries of Transportation.

Appellant and the United States argued that New Mexico's alcoholic beverage regulations as applied to an airline are preempted by the Airline Deregulation

Act (ADA), which bars State and local regulations related to airline "prices, routes, and services." They also argued that the New Mexico regulations are preempted because on-board alcohol service and flight attendant training is within the field of aviation safety reserved exclusively to the Federal Aviation Administration, which has its own alcohol service and training requirements. Finally, appellant and the government argued that the 21st Amendment's grant of power to the states to regulate alcohol, if implicated at all, does not save the New Mexico law because, under the circumstances of this case, the federal interest in airline competition and uniformity of safety regulation outweighs the State's interest.

The Tenth Circuit reversed the district court based on several findings. First, the court determined that regulation of an airline's alcoholic beverage service implicated the field of airline safety. Second, the court found that New Mexico's regulatory scheme extended beyond the narrow field of alcoholic beverage services because it prescribed training and certification requirements for flight attendants and other airline crew members serving alcoholic beverages on aircraft. Third, the court noted that flight attendant and crew member training programs and certification requirements were already extensively regulated by federal aviation safety law. Fourth, the court found that the field of aviation safety has never been traditionally occupied by the states and has long been dominated by federal

interests. For these reasons, the court concluded that the Federal Aviation Act was intended to centralize aviation safety regulation under a comprehensive, uniform, and exclusive system of federal regulation in the field of air safety, to the exclusion of state regulations like those at issue here. The court did not decide the issue of express preemption under the ADA, an issue of first impression in the Tenth Circuit and one on which other circuits are split.

The next step of the court's analysis required consideration of the parties' 21<sup>st</sup> Amendment analyses to determine whether New Mexico's prerogatives under the Amendment could override the preemptive effect of federal aviation safety regulation. New Mexico argued that because the case involved a core power of the state, licensing, a balancing under the 21st Amendment was not required. The court disagreed, holding that a balancing may be conducted out of concern that a state exercising its 21st Amendment power might violate the Supremacy Clause when state regulation conflicts with federal law. Accordingly, the Tenth Circuit remanded the case to allow the district court to conduct the balancing of federal and state interests.

The Tenth Circuit's opinion is available at <http://www.ca10.uscourts.gov/opinions/09/09-2271.pdf>.

### **Government Seeks Panel Rehearing or Rehearing En Banc in Federal Railbanking Program Takings Case**

On February 28, 2011, the United States filed a combined petition for panel

rehearing and rehearing en banc of the U.S. Court of Appeals for the Federal Circuit's decision in Ladd v. United States, 630 F.3d 1015 (Fed. Cir. 2010). In this case, a Federal Circuit panel reversed the trial court and held that the Surface Transportation Board (STB)'s issuance of a Notice of Interim Trail Use (NITU) amounts to a physical taking.

This case arose out of the federal railbanking program, which promotes the preservation of railroad corridors by creating recreational trails for public use along abandoned railroad rights-of-way. When a railroad seeks permission from the STB to abandon service on a rail line containing a federally granted right-of-way, qualified parties may petition the STB to assume responsibility for management and maintenance of a recreational trail along the right-of-way. If the railroad is willing to negotiate a trail agreement with that party, the STB issues the two parties a NITU, which delays abandonment of the rail line for 180 days and authorizes conversion of the right-of-way for use by the general public as a trail if an agreement is reached. Pursuant to the NITU, interim trail use is subject to the restoration of rail service at any time and the STB retains jurisdiction of the right-of-way for future railroad use.

The Ladds are property owners along a 76.2 mile rail line in Arizona near the United States-Mexico border. Through federal and private conveyances, a rail carrier acquired the right to use a 100 feet wide, 76.2 mile strip of the Ladds' land to build and operate a railroad and had done so since 1903. According to the Ladds, they retained fee simple estates in the portions of their land

underlying the rail line. In October 2005, the rail carrier filed a petition with the STB to initiate abandonment proceedings for the 76.2 mile rail line. The STB issued a NITU after a trail operator petitioned the STB and the rail carrier indicated its willingness to enter into trail use negotiations with the trail operator. The NITU suspended abandonment proceedings and authorized a 180-day period for the two parties to negotiate a trail use agreement. However, the parties did not reach a trail use agreement and a recreational trail was not established.

The Ladds filed a suit against the United States in the Court of Federal Claims alleging a violation of the Takings Clause of the Fifth Amendment. They argued that the NITU had forestalled or taken their state law reversionary property interests, and pursuant to two prior Federal Circuit railbanking cases, a taking of their property occurred when the STB issued the NITU. The court concluded that no taking had occurred and granted the government's Motion for Summary Judgment. In dismissing the case, the court concluded that "[a] physical taking cannot have occurred in these circumstances, where neither the NITU nor another aspect of the federal abandonment process has resulted in construction of a trail for public use."

The Ladds appealed and a Federal Circuit panel reversed the lower court's decision. The panel found that the issuance of a NITU amounts to a taking because the NITU is the government action that blocks the landowners' state law reversionary property interests. The panel based its decision on two of its prior decisions in which the Federal

Circuit held that a takings claim accrues for purposes of the statute of limitations when a NITU is issued. In its petition for panel rehearing or, in the alternative, rehearing en banc, the United States urges the Federal Circuit to apply established Supreme Court takings jurisprudence and to affirm the trial court's judgment.

The Federal Circuit's opinion is available at <http://www.ca9.uscourts.gov/images/stories/opinions-orders/10-5010.pdf>.

### **Fourth Circuit Upholds Dismissal of Challenge to Dulles Metrorail Extension**

On March 21, 2011, the U.S. Court of Appeals for the Fourth Circuit upheld a lower court decision dismissing the claims of Parkridge 6, LLC challenging the Washington Metrorail extension to Dulles International Airport. Plaintiffs/appellants had alleged fifteen violations of the FTA, FHWA, and FAA authorization statutes, the Virginia constitution, the Virginia Public-Private Partnership Act, and the terms of the Metropolitan Washington Airport's Authority's (MWAA) lease of the Dulles access right-of-way from DOT. The defendants/appellees in the case were DOT, FAA, FHWA, FTA, the Virginia Department of Transportation (VDOT), and MWAA. In its decision in Parkridge 6, LLC et al. v. DOT, et al., 2011 WL 971530 (4th Cir. 2011), the Fourth Circuit affirmed the U.S. District Court for the Eastern District of Virginia, holding that the petitioner lacked both constitutional and prudential standing to sue the federal government and that the

court lacked jurisdiction to hear a claim that alleged that VDOT and MWAAs violated the state FOIA statute.

### **Court Dismisses Arlington County Environmental Challenge to I-95 Hot Lanes**

On February 9, 2011, the U.S. District Court for the District of Columbia dismissed without prejudice County Board of Arlington v. DOT, et al. (D.D.C. No. 10-01570). Arlington County, Virginia, filed this suit in August, 2009 against the Department, FHWA, the Virginia Department of Transportation (VDOT), and four federal and state officials alleging violations of NEPA, the Clean Air Act, the Federal-Aid-Highway Act, Title VI of the Civil Rights Act, the 5<sup>th</sup> and 14<sup>th</sup> Amendments of the U.S. Constitution, and sections of the Commonwealth of Virginia Constitution arising from the approval of the construction of a proposed HOV/HOT lane highway project in Northern Virginia. What sets this case apart from the usual environment suit is the fact that the County took the virtually unprecedented step of naming Secretary LaHood, FHWA Administrator Mendez, and the former Secretary of VDOT as defendants in both their personal capacity as well as in their official capacity. The County amended its complaint in August 2010, naming Edward Sundra, an FHWA Virginia Division employee, in his personal and official capacity. The amended complaint also sought personal monetary damages from all the individual defendants.

In 2006, VDOT entered into a public private partnership that was approved by FHWA for the funding, construction and operation of new toll lanes and associated major infrastructure modifications along the length of the I-95/I-395 corridor from Spotsylvania County to the Pentagon interchange in Arlington County. The complaint alleges that FHWA improperly defined the Project in a manner unrelated to the reality of its geographic and environmental scope. The complaint states that FHWA illegally issued a Categorical Exclusion (CE) for the Project, exempting it from full NEPA and Clean Air Act review requirements. The complaint alleges that in doing so, defendants ensured that the full environmental and public health impacts along with the potential degradation of the existing transportation system in the corridor and the disparate impact of the Project on minority and low-income communities would not be adequately analyzed and disclosed to the public. With respect to the Project's impacts on minority communities, the County also alleged violations of federal civil rights laws. Arlington sought to stay further implementation of this agreement pending a full and comprehensive environmental, public health, and transportation review of the Projects impact.

On December 13, 2010, the government filed a motion to dismiss the individual capacity claims, arguing qualified immunity defenses and also noting that Secretary LaHood and Administrator Mendez were not in office at the time the CE was issued. On February 2, 2011, Virginia announced that it would initiate a new Hot Lanes Project that would not

traverse Arlington County or the City of Alexandria. The County, citing this change in circumstances, moved to stay the litigation. On February 9, 2011, the Court denied the motion as moot and dismissed the complaint without prejudice and stated that the matter will be dismissed with prejudice on March 28, 2011, unless either party moves to reinstate. On February 11, 2011, Plaintiff submitted a Notice of Voluntary Dismissal. On March 25, 2011, the government filed a motion requesting a ruling on the merits of its pending motion to dismiss, stating that the individual federal defendants seek vindication of their right to dismissal of the personal capacity claims so there is no doubt that the claims against them are baseless. Arlington County has indicated that it opposes the relief requested in the government's motion.

### **Court Rules against U.S. on Love Field Takings Claim**

On February 11, 2011, the Court of Federal Claims denied the government's motion to dismiss and granted the plaintiffs' motion for partial summary judgment in Love Terminal Partners v. United States, 2011 WL 613263 (Fed. Cl. 2011), in which Love Terminal Partners (LTP) seeks compensation for an alleged taking of their property (a passenger terminal facility and other structures at Love Field in Dallas, Texas) through federal legislation.

Congress has long imposed restrictions on air carrier operations at Love Field under the Wright Amendment in order to support Dallas-Ft.Worth International Airport (DFW). In 2006, the concerned

parties (the cities of Dallas and Ft. Worth, the DFW airport board, Southwest Airlines, and American Airlines) reached agreement on resolving their disputes about the use of Love Field, including the demolition of the LTP terminal. The parties recognized the anticompetitive nature of their agreement and urged Congress to adopt legislation permitting it to go forward. Later that year, Congress responded by enacting the Wright Amendment Reform Act (WARA), which referenced the aforementioned agreement in phasing out existing restrictions and imposing others. In order to ensure that Love Field did not expand, the concerned parties had agreed, and WARA included a provision, to cap the number of passenger gates permitted at the airport. LTP alleges that these restrictions took its property. The complaint seeks \$120 million as just compensation.

In November 2008, the federal government filed a motion to dismiss for failure to state a claim. The motion pointed out that WARA does not mandate any physical occupation or appropriation of plaintiffs' property and thus did not qualify as a physical taking. The motion denied that the legislation placed meaningful restrictions on the use of plaintiff's property, and thus it did not amount to a regulatory taking. The motion also contended that any frustration of plaintiff's business expectations as the result of WARA is merely derivative of or tangential to the law's restriction on operations at Love Field, and therefore as a matter of law did not amount to a taking.

The plaintiffs opposed the government's motion and cross-moved for summary judgment with respect to their passenger terminal. They argued that WARA incorporates the aforementioned agreement among public and private parties in Texas and, in fact, compels them to comply with the terms of the agreement, including the demolition of the LTP passenger terminal. The plaintiffs relied heavily upon a district court decision to that effect in an antitrust case brought by LTP against these same Texas parties.

On reply, the government countered that the District Court in the private antitrust case had misread WARA. Alternatively, if WARA compels the parties to carry out the terms of their agreement, the government pointed out that the terms of that agreement also (1) required Dallas to exercise its eminent domain authority to condemn the passenger terminal and to pay for this out of fees imposed on airport users, and (2) forbade use of federal funds for the demolition. This approach therefore required that any liability for taking plaintiffs' property rested with Dallas and not the federal government.

In its February 11 decision, the court ruled that WARA had indeed incorporated the 2006 agreement of the airlines and the cities of Dallas and Ft. Worth. This act, in the Court's view, transformed the agreement's provisions from contractual obligations to federal mandates, so that WARA required Dallas to demolish plaintiffs' terminal and to adhere to the remaining terms of the agreement. Finally, the Court concluded that under WARA, Dallas had simply acted as the agent of

the United States, which as the principal remained liable for the payment of just compensation.

Plaintiffs have sought in excess of \$100 million in compensation. The court has not yet determined the amount of compensation due to plaintiffs, only ruling on the liability issues at this time.

The Court of Federal Claims' decision is available at [http://www.uscfc.uscourts.gov/sites/default/files/SWEENEY\\_LOV\\_ETERMINAL021111.pdf](http://www.uscfc.uscourts.gov/sites/default/files/SWEENEY_LOV_ETERMINAL021111.pdf).

### **New York DBE Applicant Challenges Denial of DBE Certification**

On January 20, 2011, a New York metal subcontractor and installer filed an action in the U.S. District Court for the Eastern District of New York seeking review of DOT's determination that it was not eligible to participate in New York's Disadvantaged Business Enterprise (DBE) program. DOT's DBE program is intended to ensure nondiscrimination in the award and administration of DOT-assisted contracts in the Department's highway, transit, airport, and highway safety financial assistance programs. While the DBE program is administered by FTA, FHWA, FAA, and state transportation agencies, a DBE applicant who is denied DBE certification may file an administrative appeal with DOT's Office of Civil Rights (DOCR).

In the complaint filed in Beach Erectors, Inc. v. DOT, et al. (E.D.N.Y. 10-5741), the plaintiff claims that DOCR's decision to uphold the state agency's

denial of DBE certification to it was "arbitrary, capricious, unsupported by substantial evidence, and inconsistent with [DOT] regulations." Among other forms of relief, the plaintiff seeks an order vacating DOCR's decision and requiring DOCR to grant it immediate DBE status. The government filed its answer to the complaint on March 25.

### **FHWA and FTA Defend Against Tenants' Lawsuit**

On September 3, 2010, a Complaint for Declaratory and Injunctive Relief and Eviction Trial De Novo was filed against FHWA, FTA, and other parties in the U.S. District Court for the Central District of California. Gaxiola et al. v. City of Los Angeles, et al. (C.D. Cal. No. 10-06632) appears to be a pro se lawsuit by several low-income persons displaced from their residences in the "Pickle Works Building," which is in the footprint of the FHWA-approved First Street Viaduct Widening Project and the FTA-funded Los Angeles County Metropolitan Transportation Authority East Side Light Rail project. Plaintiffs allege violations of the First, Fourth, Fifth, and Fourteenth Amendments, the Fair Housing Act, the Uniform Relocation Act, Title VIII of the Civil Rights, and the Administrative Procedure Act. The lead plaintiff, Gaxiola, as well as other tenants, were evicted from the Pickle Works building. Plaintiffs are seeking injunctive and declaratory relief, and compensatory damages. Federal defendants filed a timely Answer in November 2010, denying all of plaintiff's claims.

### **Court Requests Views of the United States in Airline Preemption Case**

On February 7, 2011, the U.S. District Court for the Northern District of California issued a Request for Input from the U.S. Department of Transportation in National Federation of the Blind, et al. v. United Air Lines (N.D. Cal. No. 10-04816). The complaint alleges that United Air Lines (United) is violating California's Unruh Civil Rights Act and the Disabled Persons Act because its automated ticketing kiosks located in California airports are not accessible to blind customers. The court's request specifically asks the Department whether its Air Carrier Access Act (ACCA) regulations preempt application of California state law as to requiring blind-accessible ticketing kiosks at airports and whether the Airline Deregulation Act (ADA) preempts state anti-discrimination laws related to airline service as to blind patrons regarding kiosks.

In 2008, the Department considered requiring air carriers to provide accessible kiosks. As part of a notice of proposed rulemaking regarding amendments to the ACAA regulations, the Department requested comments on whether the final rule should require automated kiosks and if so, what accessibility standards should apply. 73 Fed. Reg. 27,619. However, the Department did not receive sufficient information to determine the cost and technical issues that would be involved with this requirement. Thus, the Department stated its intent to seek

further comments about automated kiosks through a forthcoming supplemental notice of proposed rulemaking. As an interim measure, the final rule requires air carriers, whose kiosks are not accessible, to provide equivalent service to passengers with disabilities, but does not require air carriers to provide automated kiosks that are accessible to persons with disabilities. 14 C.F.R. § 382.57.

On December 27, 2010, United filed a Motion to Dismiss, arguing that the plaintiffs' claims are preempted by the ACAA and the ADA. Specifically, United argues that the ACAA occupies the field of nondiscrimination against disabled passengers in all aspects of commercial air travel. Furthermore, United argues that the Department considered and rejected imposing requirements for automated kiosks to be accessible, and thus conflict preemption forecloses plaintiffs' claims. Finally, United argues that the ADA expressly preempts state regulation of airline "services."

Plaintiffs argue that the Federal Aviation Act of 1958 contains a savings clause which applies to the Air Carrier Access Act. The savings clause states that "[n]othing in this Act shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this Act are in addition to such remedies." Thus, pursuant to this savings clause, plaintiffs contend that their claims are not preempted. Furthermore, plaintiffs argue that automated kiosks are not a "service" under the ADA, as the Ninth Circuit previously held that "service" "refers to such things as the frequency

and scheduling of transportation, and to the selection of markets to or from which transportation is provided." Charas v. Trans World Airlines, 160 F.3d 1259, 1265-66 (1998) (en banc). Plaintiffs also argue that even if automated kiosks are "services," the effects are "too remote, tenuous, or peripheral." Morales v. Trans World Airlines, 504 U.S. 374, 390 (1992).

### **DOT Mediates Settlement of O'Hare Expansion Project Suit**

On March 14, 2011, Secretary LaHood announced a settlement of a suit brought by United Air Lines and American Airlines against the City of Chicago (City) over the completion of the O'Hare Modernization Program (OMP), a multi-year, multi-billion dollar project designed to increase capacity and upgrade facilities at Chicago's primary airport, which plays a critical role in ensuring the safety and efficiency of air travel throughout the United States. DOT was not a party to the state court action, United Air Lines, et al. v. City of Chicago (Ill. Cir. Ct. Cook County, Ch. Div. 11-2081), but Secretary LaHood, supported by a team of legal, policy, and program officials from OST and FAA, was instrumental in mediating the dispute and crafting the terms of the settlement.

The airlines' suit alleged that under their Use Agreement with the City, which defines the airlines' rights and obligations in connection with their use of O'Hare, the City may not proceed with the OMP or its financing without first obtaining the airlines' approval. The airlines sought a declaratory

judgment that the City is contractually obligated to obtain such approvals before commencing construction or issuing bonds to finance construction. They also sought to enjoin the City from commencing construction or issuing bonds pending adjudication on the merits of the declaratory judgment claims. The City contended that the Use Agreement allows the City to proceed with the OMP without the airlines' approval and moved to dismiss the case.

The \$1.7 billion settlement agreement reached by the parties with the assistance of DOT provides for the construction of a new south runway and the completion of a second runway, taxiways, and other facilities that will be of immediate use and will eventually enable the remaining north runway phase of the OMP. The airlines agreed to fund \$298 million of

this phase of the project through General Aviation Revenue Bonds and that the remaining portions will be funded through Passenger Facility Charges and FAA Airport Improvement Program funding coupled with bonds backed by these revenue sources. The City and the carriers agreed that they would begin negotiations on the remaining phases of the OMP no later than March 1, 2013. Under the terms of the settlement, United and American agreed to dismiss their lawsuit, and the City agreed to withdraw its notice to proceed with capital projects without approval from the airlines. As part of the agreement, the airlines will approve all of the projects covered by the agreement.

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

### **Federal Aviation Administration**

#### **D.C. Circuit Affirms FAA's Decision Invalidating City of Santa Monica's Jet Ban**

On January 21, 2011, the U.S. Court of Appeals for the District of Columbia Circuit issued its decision in City of Santa Monica v. FAA, 631 F.3d 550 (D.C. Cir. 2011), denying the petition for review. This petition arose out of years of disagreement between the City of Santa Monica (the City) and the FAA over the City's attempt to ban certain

categories of aircraft from using the Santa Monica airport. The City maintained that the operation of these aircraft, primarily small general aviation jets, was dangerous because of the limited overrun areas at the end of the runways and the close proximity of houses and businesses to the airport. The FAA's position was that these aircraft could operate safely and that banning them would violate the terms of the contractual assurances the City had made when it accepted federal funds under the Airport Improvement Program (AIP). Specifically, the City was required to make the airport available for

public use without unjust discrimination to all types of aeronautical use.

In 2008, the City formally adopted an ordinance barring certain aircraft, which the FAA immediately challenged. In May 2008, the FAA issued a "director's determination," which concluded, *inter alia*, that the ordinance breached the City's obligations under its AIP grant assurances. Thereafter, the City requested a hearing, and the FAA appointed a Hearing Officer to consider the dispute. His decision was issued in May 2009. Both the City and the FAA appealed portions of the Hearing Officer's decision, which resulted in a final agency decision in July 2009. In its final decision, the FAA held that the City's ordinance violated the AIP grant assurances and was preempted by federal law. The City petitioned for review.

On review, the court declined to consider the issue of preemption because it was able to decide the case on other grounds. The court held that the FAA's analysis of the aviation safety issues at the Santa Monica airport was rationally based on substantial evidence in the record and that there was a rational connection between the facts found and the FAA's conclusions. The court went on to hold that the City's ordinance was discriminatory on its face, thus, the core issue in connection with the AIP assurances was whether such discrimination was "unjust." In concluding that it was, the court noted that the evidence showed a substantial period of safe operation of the banned aircraft at Santa Monica, that past experience showed a greater risk of overruns and undershoots by other

categories of aircraft, and that any safety concerns could be mitigated through the installation of an Engineered Materials Arresting System (EMAS), which the City had repeatedly rejected. Accordingly, the court denied the petition for review.

The D.C. Circuit's opinion is available at [http://www.cadc.uscourts.gov/internet/opinions.nsf/3C0CBF7CB6985EDB8525781F00551E74/\\$file/09-1233-1289151.pdf](http://www.cadc.uscourts.gov/internet/opinions.nsf/3C0CBF7CB6985EDB8525781F00551E74/$file/09-1233-1289151.pdf).

### **D.C. Circuit Affirms FAA Decision Approving Runway Expansion at Fort Lauderdale International Airport**

On December 28, 2010, the U.S. Court of Appeals for the District of Columbia Circuit affirmed the FAA's decision approving runway expansion at Fort Lauderdale-Hollywood International Airport (FLL).

FLL no longer has the capacity to meet existing or future demand without substantial delays. The airport owner, Broward County, sought several improvements, including expansion of the southern runway to 8,600 feet. After considering several alternatives and completing an environmental impact statement process, FAA issued a Record of Decision (ROD).

Petitioners in *City of Dania Beach, et al. v. FAA*, 628 F.3d 581 (D.C. Cir. 2010), argued that FAA was required to select a different alternative because it had the fewest environmental impacts of all alternatives studied in detail. Specifically, petitioners alleged that the

FAA's finding that there were no "possible and prudent" alternatives violated the Airport and Airway Improvement Act (AAIA), 49 U.S.C. § 47106(c)(1)(B), that its finding there were no "prudent and feasible" alternatives violated section 4(f) of the Department of Transportation Act, and that its finding there were no "practical alternatives" violated Executive Order 11990. The alternative selected by the FAA was predicted to cause significant noise impacts to 1051 households and destroy 15.41 acres of wetlands while the one preferred by the City would cause such significant noise impacts to 285 households and destroy 15.40 acres of wetlands.

Broward County intervened, arguing that petitioners lacked standing and that the FAA decision is not a "final order." Broward County argued that the challenged actions were not final because they merely determined grant eligibility and did not actually approve a grant. Intervenor also argued that a favorable decision would not redress petitioners' alleged injuries because the airport would proceed with construction of the approved project without federal grant funding.

The D.C. Circuit disagreed with intervenor's standing arguments. Regarding redressability, the court held that the airport expansion could only proceed if FAA approved a new Airport Layout Plan (ALP). Consequently, a determination that the FAA violated 49 U.S.C. § 47106(c)(1)(B) would redress petitioners injury because an FAA determination under this statutory provision is necessary for ALP approval. In addition, because FAA did in fact

unconditionally approve a new ALP, the court held there was a final order subject to judicial review.

The first issue relating to 49 U.S.C. § 47106(c)(1)(B) is whether or the term "prudent" must have the same meaning as it does in section 4(f) of the DOT Act. Deferring to FAA's interpretation of the word "prudent," the court agreed with FAA that the word "prudent" did not have the same meaning under 49 U.S.C. § 47106(c)(1)(B) as it does under section 4(f) of the DOT Act. Because the range of resources protected under the AAIA - natural resources, including fish and wildlife, natural, scenic, and recreation assets, water and air quality, or other factors affecting the environment - is broader than that protected under section 4(f) - parks, recreation areas, and wildlife or waterfowl refuges that have been declared significant - FAA's interpretation was not arbitrary or capricious.

Finally, the court agreed with FAA's determinations that section 4(f) of the DOT Act did not apply to the area known as Brooks Park and that there was no "practicable alternative" to construction in wetlands.

On March 2, 2011, the D.C. Circuit denied the City of Dania Beach's motions for panel rehearing and rehearing en banc. Petitioners have until May 31, 2011 to file a petition for a writ of certiorari to the U.S. Supreme Court.

The D.C. Circuit's opinion is available at [http://www.cadc.uscourts.gov/internet/opinions.nsf/7E8AB9E0628FB2C285257807005C6E7A/\\$file/09-1064-1285049.pdf](http://www.cadc.uscourts.gov/internet/opinions.nsf/7E8AB9E0628FB2C285257807005C6E7A/$file/09-1064-1285049.pdf).

## **Second Circuit Upholds FAA's Decision that Westchester County Did Not Violate its Grant Assurance Obligations**

On November 2, 2010, the U.S. Court of Appeals for the Second Circuit issued a summary order in 41 North 73 West, Inc. (AVITAT) v. DOT, 2010 WL 4318655 (2d Cir. 2010), denying the petition for review. Petitioner Avitat challenged the FAA's final agency decision finding that Westchester County did not violate its federal grant assurance obligations because it permitted small aircraft Fixed Base Operators (FBO) to sell jet fuel in a limited capacity. The FAA determined that such sales were in compliance with the airport's federal grant obligations concerning economic discrimination, exclusive rights, and its fee and rental structure.

Avitat is a larger-class FBO at the Westchester County Airport servicing larger general aviation (GA) aircraft. Two other FBOs serving the airport, Westair and Panorama, are limited FBOs that service smaller GA aircraft, including small jet aircraft. Avitat has a lease enabling it to dispense and sell jet fuel to any sized aircraft. The Westair and Panorama leases included the right to sell jet fuel to smaller aircraft under certain conditions if approved by the County. Avitat objected to the disparity in jet fuel selling rights for competitive reasons.

The grant assurances require the County to make its airport available as an airport for public use on reasonable terms and without unjust discrimination to all

types, kinds, and classes of aeronautical activities, including commercial aeronautical activities offering services to the public at the airport. In addition, each FBO at the airport must be subject to the same rates, fees, rentals, and other charges as are uniformly applicable to all other FBOs making the same or similar uses of such airport and utilizing the same or similar facilities.

On appeal, Avitat argued that the FAA: 1) applied an incorrect standard of review; 2) erroneously applied a "similarly situated" test to find that the County did not engage in unjust discrimination; 3) lacked substantial evidence to find that the County had not granted an exclusive right to the small FBOs and 4) erred in finding that the County maintained a proper fee structure under Grant Assurance 24.

Avitat also challenged the FAA's standard of review by insisting that section 557(b) of the Administrative Procedure Act applied to the FAA's Part 16 process. The Court disagreed, noting that "[s]ection 557 applies only to an adjudication required by statute to be determined on the record after opportunity for an agency hearing." The court stated that "[h]ere, the regulations would only have granted *the County* an opportunity for a formal hearing and only if there had been a finding of noncompliance by the agency." Thus, Avitat's argument failed because the standard of section 557(b) did not apply in this case.

Avitat argued that it was not required to be "similarly situated" with the smaller aircraft FBOs. The court pointed out that Avitat failed to demonstrate that the

FAA committed a legal error and that the “similarly situated” definition “focuses our attention on those distinctions that are legitimate bases for discrimination, and those that are not.” Avitat also argued in the alternative that it was similarly situated. The court found that the FAA compared the entities’ purposes and services, as well as their leases. The FAA did not abuse its discretion in concluding that Avitat and the small aircraft FBOs were not similarly situated and thus could be treated differently.

Avitat claimed the County granted an exclusive right to the small aircraft FBOs when it gave them “subsidies” while allowing them to compete with Avitat in the sale of jet fuel. The Court found Avitat mistaken; no exclusive right was conferred because no party was excluded or debarred from exercising a like power, privilege, or right.

The Court also recognized and agreed with FAA’s position that acknowledged that unjust discrimination can result in the constructive grant of an exclusive right, but where the parties are not similarly situated, no such violation can occur. Avitat suggested that the small FBOs’ ability to sell jet fuel without paying market rent constituted an exclusive subsidy. The Court found no reason to disturb the FAA’s findings that there was no evidence that Avitat was subsidizing the small aircraft FBOs or that the small aircraft FBOs were Avitat’s competition.

Finally, the Court found Avitat’s arguments regarding fee and rental structure unavailing. The Court noted

Avitat’s failure to point to any credible evidence suggesting that the Airport was not self-sustaining and thus FAA’s conclusion that the County was not in violation of Grant Assurance 24 was proper.

The time to petition for rehearing and a writ certiorari has expired and the court has issued the final mandate.

### **Fifth Circuit Affirms Summary Judgment for FAA in Retaliation Case**

On November 3, 2010, the U.S. Court of Appeals for the Fifth Circuit issued a decision in Jones v. United States, et al., 625 F.3d 827 (5<sup>th</sup> Cir. 2010), affirming the district court’s grant of the government’s motion to dismiss for lack of subject matter jurisdiction. The appellant was an FAA employee who applied for appointment as a Designated Engineering Representative (DER) just prior to his departure from the FAA. When the FAA declined to appoint him as a DER, Jones claimed it was in retaliation for his Equal Employment Opportunity activity while he was employed at the FAA and filed suit in district court alleging Title VII violations. In the district court, the United States argued that Jones’ retaliation claim and the agency’s final decision concerning his DER appointment were inescapably intertwined and, thus, exclusive jurisdiction rested in the courts of appeals pursuant to 49 U.S.C. § 46110. The district court agreed and dismissed the complaint. On appeal, the Department of Justice withdrew its

reliance on section 46110 and argued for affirmance on other grounds.

The court reaffirmed the analysis of its recent decision in Ligon v. LaHood, et al., 614 F.3d 150 (5<sup>th</sup> Cir. 2010), and held that the Jones's complaint was, in effect, a collateral attack on the FAA's final order concerning his appointment as a DER and, therefore, was subject to the exclusive jurisdiction of the court of appeals under 49 U.S.C. § 46110. Accordingly, the judgment of the district court was affirmed.

### **Court Orders Release under FOIA of Aircraft Design Data**

On January 19, 2011, the U.S. District Court for the District of Columbia issued the latest decision in the case of Taylor v. Babbitt, et al., 2011 WL 159769 (D.D.C. 2011), an action brought under the Freedom of Information Act (FOIA) to obtain certain technical data from 1935 pertaining to the F-45 aircraft of the Fairchild Aircraft Corporation. (The lengthy history of this case, which is not related to the substance of any FOIA issue, is set forth in the district court's opinion. See also Taylor v. Sturgell, 553 U.S. 880 (2008). Because the Fairchild Corporation (Fairchild) asserted that it was the ultimate successor to Fairchild Aircraft Corporation and the drawings and data in question were trade secrets, the FAA withheld release of the records under FOIA exemption 4.

The district court rejected the FAA's arguments and ordered the release of the documents. First, the court held that the records were not trade secrets because they were no longer a secret. The

court's conclusion was based on a 1955 letter in which an intermediate Fairchild data owner authorized the FAA to "loan" the data for certain purposes, without any confidentiality restriction. That "authorization" remained outstanding until 1997, when Fairchild withdrew permission for disclosure in connection with another FOIA request for the same data. The court held that the secret status of the data could not be restored upon the revocation of the authorization disclosure some 40 years later; even if there was no evidence that the data had ever been disclosed. Second, the court held that to qualify as a trade secret, the data must be commercially valuable, and it is not. Although the court admitted that there was little guidance from the DC Circuit on the meaning of "commercially valuable," it reasoned that its essence rested in the concept of competitive advantage. The court concluded that the F-45 design data from 1935 was "obsolete" and, therefore, could not provide a competitive advantage. Accordingly, the data did not qualify for protection as a trade secret. The government has decided not to appeal.

### **Court Dismisses Tort Claim over Suspended Airworthiness Certificate**

On October 6, 2010, the U.S. District Court for the Southern District of West Virginia granted the government's motion to dismiss for lack of subject matter jurisdiction in Holbrook, et al. v. United States, 2010 WL 3943736 (S.D. W.Va. 2010). This case arose out of a claim under the Federal Tort Claims Act (FTCA) that the FAA was negligent in

having issued a standard airworthiness certificate for certain Allouette model helicopters. The helicopter in question was manufactured in France and imported into the United States in October 2000. An "Attestation" from the Groupement pour la Securite Aviation Civile accompanied the application for the issuance of a standard airworthiness certificate. The purpose of the Attestation was to assure that the aircraft had been manufactured in accordance with that country's type certificate and had been inspected by officials in the manufacturing country. Although the Attestation stated that the aircraft had been manufactured in compliance with FAA standards, it disclosed that it had not been inspected by French officials. Nevertheless, the FAA inspector assigned to the matter concluded that the documentation was adequate and issued a standard airworthiness certificate.

In 2007, the FAA began a review of the certification of Allouette helicopters and determined that the lack of an inspection by French officials made the aircraft ineligible for a standard airworthiness certificate. The FAA secured an emergency suspension of the helicopter's airworthiness certificate, effectively grounding the aircraft, which had been leased by the plaintiff. In 2009, the plaintiff filed a claim under the FTCA, asserting that he had been damaged by the negligent issuance of the standard airworthiness certificate and would not have entered into a costly lease if the FAA inspector had followed the regulations. Following the denial of his administrative claim, the plaintiff filed suit. The United States moved to dismiss for lack of subject matter

jurisdiction, arguing that the inspector's conduct was covered by the "discretionary function" exception to the FTCA.

The court agreed with the government and dismissed the complaint. The court wrote that in applying the airworthiness certificate rules, the inspector was confronted with regulations that set out several different choices, depending on the origin of the aircraft. The court agreed that the inspector's use of subsection (c) for imported aircraft was correct, in spite of the plaintiff's argument that subsection (c) applied only to new aircraft. More importantly, the court held that, for application of the discretionary function test, the inspector's arguably incorrect application of the requirements of subsection (c) was not relevant. The only question was whether the nature of the action taken was subject to a policy analysis. The court wrote that exercising judgment in connection with an assessment of aviation safety was precisely the type of policy decision the discretionary function exception was intended to protect.

### **Ninth Circuit Hears Argument in Challenge to EA/FONSI for Third Runway at Busiest General Aviation Airport in Oregon**

On February 9, 2011, the U.S. Court of Appeals for the Ninth Circuit heard oral argument in Barnes v. DOT (9<sup>th</sup> Cir. No. 10-70718), a challenge by three individuals to the adequacy of an environmental assessment and finding of no significant impact issued by the FAA

for a third runway and associated taxiways, the relocation of a helicopter pad, and associated infrastructure improvements at the Hillsboro, Oregon Airport. Petitioners claim that an environmental impact statement should have been completed for this work at the busiest general aviation airport in Oregon. Petitioners also argue that the FAA's decision violated the Administrative Procedure Act and that a public workshop did not fulfill the requirement to provide the opportunity for a public hearing under 49 U.S.C. § 47106. The case is now pending for decision.

### **Briefing in Historic Preservation Group Challenge to Replacement of Hangar at Bedford-Hanscom Field**

On December 17, 2010, local groups led by Safeguarding the Historic Hanscom Area's Irreplaceable Resources (SSHAIR) filed their opening briefing in the U.S. Court of Appeals for the First Circuit in SSHAIR v. FAA (1<sup>st</sup> Cir. No. 10-1972), a challenge to the validity of the FAA's decision to approve a request to modify the airport layout plan (ALP) for Bedford-Hanscom Field in Bedford, Massachusetts. The FAA filed its responsive brief on February 28, 2011. Hanscom Field is a small, general aviation airport with no commercial service operated by the Massachusetts Port Authority (Massport).

The FAA approved an alternative that allows the replacement of a hangar called Hangar 24 with a newer larger hangar capable of housing and servicing today's aircraft. Hangar 24 was

constructed in the 1930s in Savannah, Georgia. It was moved to Hanscom in 1948 and used by MIT for research until 2001. Local groups contend that Hangar 24 should be saved based on its historic qualities. The FAA, together with Massport and the State Historic Preservation Officer, entered into a memorandum of agreement that allows for the demolition of the building but requires Massport to take certain actions to document its historic qualities.

Petitioners allege that the FAA violated NEPA, section 4(f) of the DOT Act, and section 106 of the National Historic Preservation Act. The airport sponsor, Massport, was granted the right to intervene. The National Trust for Historic Preservation is participating as an amicus.

### **FAA "No Hazard" Determination for Proposed Cape Cod Wind Turbines Challenged**

On September 3, 2010, a petition for review was filed in the U.S. Court of Appeals for the District of Columbia Circuit challenging the FAA's "no hazard" determination in connection with the proposed construction of 130 wind turbines off the coast of Massachusetts. The project is known as "Cape Wind," and the petition for review was filed by the Town of Barnstable, Massachusetts. Town of Barnstable v. FAA (D.C. Cir. No. 10-1276). Thereafter, the Alliance to Protect Nantucket Sound filed a similar petition for review (D.C. Cir. No. 10-1307), and the court consolidated the cases. Cape Wind Associates, LLC, the

developer, filed a motion to intervene, which was granted.

On January 19, 2011, the petitioners filed a joint brief, arguing that the construction of the Cape Wind “wind farm” with 130 wind turbines, each 440 feet tall, would be a hazard because it would cause changes to both instrument and visual flight procedures; would increase delays at nearby airports; and would impair the capability of certain air traffic radar facilities. The petitioners maintained that the FAA had failed to follow its own order and the governing statute by ignoring the issue of whether the wind turbines would interfere with the navigable airspace, even if the structures were not deemed to be “obstructions.” They also argued that the FAA’s requirements to mitigate any adverse impact on radar capability were arbitrary and capricious because they were inadequate and were purportedly based on unproven technology.

In its responsive brief, filed on February 18, 2011, the FAA explained that, under the statute, if there were a determination that the proposed construction *may* result in an obstruction in the navigable airspace or *may* result in interference with the navigable airspace, then the agency must conduct an aeronautical study, which it did. The statute does not establish any requirement concerning the issues that such a study must address. In any event, the FAA’s aeronautical study did consider the impact of the Cape Wind project on the navigable airspace. More significantly, the FAA argued that the petitioners lacked standing because, regardless of the FAA’s hazard/no hazard determination, the FAA has no authority to either authorize or prevent

construction. In this case, Cape Wind obtained a lease for the project from the Department of the Interior, and there was no evidence that the lease was conditioned upon a no hazard determination from the FAA. However, the lease does require Cape Wind to comply with any mitigation measures; accordingly, the FAA acknowledged that the petitioners may have standing with regard to that aspect of the FAA’s determination.

### **Second Circuit Challenge to Blue Ribbon Panel Study of Enclosed Marine Trash Transfer Facility Adjacent to LaGuardia Airport**

On November 12, 2011, Kenneth Paskar and Friends of LaGuardia Airport filed a petition for review of a September 2, 2010 letter issued by FAA’s Director of Airport Safety and Standards transmitting to the New York City Department of Sanitation a September 2, 2010 Report, “Evaluation of the North Shore Marine Transfer Station and its Compatibility with Respect to Bird Strikes and Safe Air Operations at LaGuardia Airport.” Petitioners in Paskar, et al. v. DOT (2d Cir. No. 10-4612) seek review of the letter and the Report.

The Report was prepared by a blue-ribbon panel of bird hazard experts who examined the extent to which the proposed enclosed trash transfer facility, the “Marine Transfer Station” (MTS), if properly managed, would nonetheless constitute a wildlife attractant and would therefore be incompatible with safe airport operations at LaGuardia. In

2006, the City proposed refurbishing four closed transfer stations; one of them is located in Queens, less than one mile from LaGuardia Airport. The project garnered special attention after the "miracle on the Hudson River," during which a bird strike caused a US Airways flight taking off from LaGuardia to make an emergency landing in January of last year. The Report included recommendations for action by the NYC Department of Sanitation and concluded that the proposed MTS will be compatible with safe air operations so long as it is constructed and operated in accordance with the Report's recommendations. Construction of the facility is well underway.

On January 7, 2011, FAA filed a motion to dismiss asserting that the court lacked jurisdiction to consider the petition for review because FAA's letter was not an agency order. The motion noted that FAA was without authority to prevent the transfer facility from being built or to require particular modifications, regardless of whether FAA agreed with the conclusions of the panel. FAA argued that the petitioners could not now use the device of FAA's September 2, 2010 letter to challenge an FAA determination issued several years ago that the facility did not pose a hazard to air navigation. The motion further declared that any attempt by the petitioners to challenge that finding were far outside the 60-day statute of limitations prescribed by 49 U.S.C. § 46110. Finally, the motion contended that, even assuming that the petition for review challenged an order of the Secretary, petitioners did not demonstrate standing to pursue the challenge.

On January 18, 2011, petitioners filed their opposition to the motion to dismiss. Petitioners describe the FAA's transmittal letter as the "September 2 Endorsement" and contend that the letter and the Evaluation Report constitute an order under 49 U.S.C. § 46110. Petitioners also allege that they have an injury-in-fact and standing. On January 25, 2011, FAA filed a reply to petitioner's opposition. The reply reiterated that the Court was without jurisdiction since neither the letter nor the Report constitute an "order" reviewable under 49 U.S.C. § 46110 and requested that the petition for review be dismissed.

In a related matter, the petitioners filed a complaint against the Port Authority of New York and New Jersey, and the City of New York under 14 C.F.R. Part 16, the FAA's Rules of Practice for Federally-Assisted Airport Enforcement Proceedings. The complaint was dismissed without prejudice to refile upon correction of certain stated deficiencies. The deficiencies included improperly naming the City of New York as a party, failing to establish that the Friends of LaGuardia had standing, and asserting allegations and a request for relief outside the scope of Part 16.

### **FAA Challenged on Categorical Exclusion of Fixed Base Operator Development Area Proposal at Palm Beach International Airport**

On December 3, 2010, Donald Trump and Mar-A-Lago, LLC, an exclusive Palm Beach club owned by Mr. Trump, filed a petition for review of an FAA

action concerning Palm Beach International Airport, a commercial service airport that has a strong general aviation component in Palm Beach, Florida. Petitioners in Trump, et al. v. FAA (11<sup>th</sup> Cir. No. 10-15543) challenge the validity of the FAA's approval of a categorical exclusion under NEPA for a proposed 7.5 acre Fixed Base Operator development area at the airport. The categorical exclusion specifically prohibited any construction until other administrative actions were complete, including the final approval of the requested changes to the airport's Airport Layout Plan (ALP). The updated ALP has not yet been approved by the FAA. The petition for review stated only that the challenge was brought under 49 U.S.C. § 46110, without identifying any further basis for the challenge.

Shortly after the filing of the petition, the Court *sua sponte* sought the parties' views on a number of jurisdictional questions, including whether the order challenged is final, whether the petitioners have a substantial interest in the order, whether there are reasonable grounds for failing to file the petition within 60 days of the categorical exclusion's execution, and whether there were reasonable grounds for petitioners' failure to object to the categorical exclusion before the agency.

The FAA filed its response to the Court's jurisdictional questions on January 4, 2011. Subsequently, petitioners requested leave to file a supplemental response to the court's jurisdictional questions, which the FAA opposed. The FAA's opposition to the request and substantive response to

petitioner's arguments in its supplemental response were filed on February 18, 2011. The court has not yet taken any action based upon the initial jurisdictional arguments or the petitioners' request to supplement their response.

### **Tinicum Township Petitions for Review of FAA Decision to Approve the Capacity Enhancement Program at Philadelphia International Airport**

On February 23, 2011, a group of petitioners including the Township of Tinicum in Delaware County, Pennsylvania, sought review of the FAA's December 30, 2010, Record of Decision (ROD) approving a plan to expand and re-configure Philadelphia International Airport by adding a third parallel runway, extending an existing runway, and making various terminal and airfield improvements, including re-locating the air traffic control tower. The plan challenged in Township of Tinicum, et al. v. DOT (3<sup>rd</sup> Cir. No. 11-1472) requires the City of Philadelphia to purchase 72 homes and 80 businesses all located in Tinicum Township.

### **Warbird Sky Ventures Contests FAA Decision Finding Sumner County Regional Airport in Compliance with Federal Grant Obligations**

On September 13, 2010, Gina Moore filed a petition for review in the U.S. Court of Appeals for the Sixth Circuit challenging an FAA decision rejecting

her claim that the Sumner County Regional Airport Authority (SCRAA), the sponsor of the Sumner County Regional Airport, Gallatin, Tennessee, violated its Airport Improvement Program grant assurance agreement when it, among other things, denied petitioner the right to operate as a Commercial Aeronautical Service Provider (CASP) at the Airport. Petitioner in Gina Michelle Moore d/b/a Warbird SkyVentures, Inc. v FAA (6<sup>th</sup> Cir. No. 10-4117) is an individual who is the alter ego of Warbird Sky Ventures, which offers airplane rides and instruction to the public.

SCRAA has entered into grant assurance agreements with the FAA in order to receive federal grants under the Airport Improvement Program. These grant contracts require SCRAA to abide by grant assurances in accordance with 49 U.S.C. § 47107. SCRAA granted petitioner the authority to operate as a limited CASP in June, 2001 and withdrew that authority in June, 2004 because the CASP agreement expired. It was not renewed because the petitioner lacked the qualifications (among others, to occupy leased space on the airport) to operate as a CASP.

In November, 2007, petitioner filed a complaint with the FAA under 14 C.F.R. part 16, FAA's Rules of Practice for Federally Assisted Airport Enforcement Proceedings. In her complaint, petitioner claimed, among other things, that the SCRAA violated Grant Assurance No. 22, Unjust Discrimination, because it unjustly discriminated against her in favor of other tenants by not authorizing her to operate as a CASP and by unjustly

applying the airport's minimum standards against Petitioner; Grant Assurance No. 23, Exclusive Rights, in that it unlawfully granted an exclusive right to another operator; and Grant Assurance No. 5, Rights and Powers, in that it ceded its rights and powers in its review of Petitioner's application to be a CASP.

The FAA's Director of Airport Compliance issued a preliminary determination in February 2009, finding that SCRAA did not violate Grant Assurances No. 22 or 23, but that it did violate No. 5, Rights and Powers, because its processes and procedures lacked transparency and documentation, making them confusing in nature. In June 2009, the FAA accepted the Respondent's corrective action plan and the Respondent was found to be in compliance with 49 U.S.C. §47107(a) and Grant Assurance No. 5.

In March 2009, the petitioner appealed the Director's Determination to the Associate Administrator for Airports. On July 13, 2010, the Acting Associate Administrator issued a Final Decision and Order affirming the Director's determination and dismissing the petitioner's appeal. Moore then filed a petition for review of the agency's final order. The case was submitted on the briefs, without oral argument, and is pending for decision by the court.

## Federal Highway Administration

### Appeal Dismissed to Florida Bridge Project

On March 2, 2011, the U.S. Court of Appeals for the Eleventh Circuit dismissed as frivolous the appeal of FHWA's win in Citizens for Smart Growth, et al v. FHWA et al. (11<sup>th</sup> Cir. No. 10-12253). The case was a challenge to FHWA's decision to approve construction of the Indian Street Bridge Project in Martin County, Florida. The plaintiffs were landowners and citizens groups seeking to halt construction of the bridge alleging violations of NEPA and section 4(f) of the Department of Transportation Act. The U.S. District Court for the Southern District of Florida denied plaintiffs' motion for a preliminary injunction and granted FHWA's motion for summary judgment.

On appeal, the Eleventh Circuit issued an order to show cause why the district court's order should not be summarily affirmed in light of appellants' failure to challenge in their initial brief the denial of their motion for preliminary injunction. After considering the parties' responses to its order to show cause, the court declined to affirm the district court summarily, but dismissed the appellants' appeal as frivolous. The court based its dismissal on the appellants' failure to preserve a challenge to the district court's ruling on their motion for a preliminary injunction. In dismissing the appellants' appeal, the court found that the appellants had not placed any issues

before the court over which it had jurisdiction. However, the court noted that the appellants remain free to renew their motion for preliminary injunction before the district court.

### Summary Affirmance for FHWA in D.C. FOIA Case

On December 30, 2010, the U.S. Court of Appeals for the District of Columbia Circuit issued a per curiam order granting the government's motion for summary affirmance of the district court decision in Wilson v. DOT, 2010 WL 5479580 (D.C. Cir. 2010). The lawsuit arose from four separate FOIA requests. The U.S. District Court for the District of Columbia had granted FHWA's motion for summary judgment, ruling that, with respect to two FOIA requests, plaintiff failed to exhaust his administrative remedies, and with respect to the two remaining FOIA requests, DOT satisfied its FOIA obligations.

Plaintiff had requested copies of documents relating to FHWA employee surveys in 2007 and 2008 and all harassment, discrimination, and Equal Employment Opportunity (EEO) complaints directed at the FHWA Office of the Chief Financial Officer. Notwithstanding plaintiff's argument that FHWA improperly withheld responsive documents, the district court found that FHWA's declarations demonstrated that the agency: (1) conducted a reasonable search in response to plaintiff's FOIA requests; (2) reasonably interpreted the scope of plaintiff's FOIA requests; and (3) properly withheld individual names from

FHWA's EEO Counseling Log under FOIA Exemption 6.

The D.C. Circuit concluded that the district court properly determined that the agency's interpretation of one of the requests was reasonable. The court also concluded that the declarations supplied by the appellee "show beyond material doubt that it has conducted a search reasonably calculated to uncover all relevant documents under FOIA." The court also ruled that appellant failed to offer evidence of bad faith and is not entitled to discovery. The court further held that appellant forfeited any argument concerning the agency's redactions of certain records because appellant's motion in opposition to the motion for summary affirmance did not address that issue. Finally, the court found that appellant forfeited any arguments on reimbursement of court fees or referral to the Office of Special Counsel.

Appellant filed a petition for rehearing or for rehearing en banc, which was denied on March 15, 2011.

### **FHWA Wins New Mexico Contract Case**

On December 9, 2010, the U.S. Court of Federal Claims ruled in favor of the government on all contract claims in Delhur Industries, Inc. v. U.S., 95 Fed. Cl. 446 (Ct. Cl. 2010). Plaintiff, the prime contractor on the 7.68 mile long Sacramento River Road reconstruction project in Lincoln National Forest, outside of Alamogordo, New Mexico, sought \$1,981,669 in damages under the Contract Disputes Act based on allegations that it was required to

perform various types of work that were beyond contract specifications. A weeklong bench trial was held in Portland, Oregon in May 2010, during which the plaintiff abandoned certain smaller claims and reduced its overall claim amount to \$1,875,758.

The court held that the plaintiff was not entitled to any recovery on its claims because they were unsupported by any concrete facts. In presenting a modified total cost claim on the excess excavation claim, the plaintiff failed to demonstrate that it reasonably relied on the solicitation documents in formulating its bid. For this and the other claims, the plaintiff failed to provide evidence showing its damages were caused by the government, rather than its own mistakes, and failed to present any evidence of its actual costs to perform changed work. Finally, plaintiff presented no evidence that the delays it claimed to have experienced were excusable. Plaintiff has not filed a notice of appeal.

### **Environmental Challenge to Oregon Bridge Dismissed**

On October 27, 2010, the U.S. District Court for the District of Oregon dismissed an environmental challenge to the Oregon City Arch Bridge Rehabilitation Project in Maimone v. FHWA, et al. (D. Or. No. 10-00441). The complaint challenged the FHWA's decision that the bridge project met NEPA requirements as a Categorical Exclusion not needing detailed environment review. Plaintiff, a hair salon owner, claimed during the public participation process that the bridge

closure during construction would cause economic harms to her business. Plaintiff sought an Environmental Assessment of the project. The Oregon City Arch Bridge, a historic property, is seismically unstable and is one of the only routes into the downtown area.

After FHWA filed a motion to dismiss based on standing, given that plaintiff had not cited to any environmental harms, plaintiff amended her complaint to add noise and air quality concerns. However, there was nothing in the public participation process on these issues. At a summary judgment hearing on October 18, 2010, the Court indicated that plaintiff's failure to allege environmental harm during the NEPA process might make the case invalid pursuant to the Supreme Court's Public Citizen case requiring notice to the agency during the comment period. On October 25, 2010, the plaintiff filed an unopposed motion to dismiss the case. The Court granted that motion dismiss with prejudice on October 27, 2010.

### **DOT Maintains Senior Lien in SBX Bankruptcy**

On March 22, 2010, the South Bay Expressway Limited Partnership (SBX) filed for Chapter 11 bankruptcy in the U.S. Bankruptcy Court for the Southern District of California. SBX holds the toll road concession franchise with the California Department of Transportation for South Bay Expressway (the South Bay Project), a 9-mile toll road in eastern San Diego County. SBX received a loan from the Transportation Infrastructure Finance and Innovation Act (TIFIA) credit program for \$140

million in May 2003, along with other financing from private equity, a consortium of ten senior banks (the Senior Banks), and donated right-of-way.

SBX filed for bankruptcy primarily due to substantial construction-related claims against SBX by Otay River Constructors (ORC), as well as lackluster revenue performance. DOT, acting by and through the Federal Highway Administrator, filed a Proof of Claim with the bankruptcy court for the outstanding balance of the loan, including accrued interest. Pursuant to the TIFIA statute, 23 U.S.C. 603(b)(6), TIFIA's debt has been on par with the lien of the Senior Banks since SBX's bankruptcy filing. Although SBX is in bankruptcy, it is not in payment default on the TIFIA loan because the first TIFIA interest payment under the original loan is not due until June 30, 2012.

In a November 10, 2010 decision in In re SBX, 2010 WL 4688213 (Bankr. S. D. Cal. 2010) following an October, 2010 trial, DOT and the consortium of bank lenders for the South Bay Project prevailed against ORC on the issue of the priority of a \$145.5 million mechanic's lien claim filed by ORC. DOT and the banks have thus maintained their senior lien. A confirmation hearing is scheduled for April 14, 2011, and it is expected that a reorganized SBX will emerge from bankruptcy approximately 14 days thereafter.

### **FHWA Settles D.C. Environmental Challenge**

On October 27, 2010, the U.S. District Court for the District of Columbia granted dismissal with prejudice in McGuirl v. Peters (D.D.C. No. 04-01465) based on a settlement between FHWA and the plaintiffs.

The project challenged in this case involved rehabilitating O and P Streets from Wisconsin Avenue to 37<sup>th</sup> Street in Washington, D.C.'s Georgetown National Historic Landmark District. FHWA approved a Documented Categorical Exclusion (DCE) for this project because there would not be any significant effects on the environment.

On August 27, 2004, plaintiffs sued FHWA alleging that the agency violated NEPA by preparing a DCE instead of an EIS. They also alleged that FHWA failed to abide by the requirements of section 4(f) of the Department of Transportation Act by not satisfactorily considering the potential dangers to historic properties before approving the project. Finally, they alleged that FHWA did not comply with the National Historic Preservation Act by not taking into account the effects the undertaking would have on properties included in or eligible for inclusion in the National Register of Historic Places.

Early in the litigation, federal defendants moved to dismiss the complaint as there was no final agency decision on the issues raised and the matter was not ripe for judicial review. The court denied the motion, observing that the pendency of this litigation against the federal

defendants was "not retarding the development of the final agency decision that will make matters ripe for decision." Thus, the court stayed the matter pending a final agency decision, rather than dismissing it outright. The court ordered frequent status reports. On February 23, 2010, in its Final Status Report, defendants informed the court that the FHWA had approved the DCE and section 4(f) Evaluation.

After unsuccessful attempts to settle the lawsuit, the defendants prepared to file a motion to dismiss. However, on October 25, 2010, plaintiffs initiated discussions on a consent motion to dismiss, resulting in dismissal two days later.

### **Challenge to TIGER Grant Project in Washington State Settles**

On April 13, 2010, Citizens for Sensible Transportation Planning (CSTP) filed suit in the U.S. District Court for the Eastern District of Washington over a 3.7 mile TIGER grant project, which is part of a larger multi-phase project on U.S. 395 in Spokane, Washington. The plaintiff in Citizens for Sensible Transportation Planning. v. DOT, et al. (E.D. Wash. No. 10-00108) alleged that the defendants violated NEPA in approving a \$35 million grant under the TIGER discretionary grant program for the US 395 Project because FHWA should have prepared a supplemental final environmental impact statement (SFEIS) to analyze the impacts of Mobile Source Air Toxics (MSATs) on the residential community adjacent to the North Spokane Corridor Project.

When the environmental documents were first prepared for this project in 1997 and 2000, MSATs were not an environmental issue that FHWA analyzed. However, in 2007 and 2009, FHWA issued guidance on how to analyze MSATs. When the Washington Division conducted a checklist re-evaluation of the older NEPA documents in 2009, it failed to examine the MSAT impacts or application, believing the date of the original NEPA document controlled what should be evaluated.

As FHWA concluded that the TIGER Grant based re-evaluation should have included a review of MSAT impacts, in June 2010, FHWA worked with the Spokane Metropolitan Planning Organization and the Washington FHWA Division office to prepare an MSAT analysis for the proposed project. Based on this study, FHWA re-evaluated the prior NEPA environmental reviews, finding that there was no new significant impact that would require an SFEIS.

On August 13, 2010, the parties filed a stipulation of settlement, and on October 27, 2010, the court dismissed the case with prejudice and ordered that FHWA pay plaintiff's attorneys fees and costs totaling \$3,395.

### **FHWA Settles Arizona Negligence Case**

On October 19, 2010, the FHWA settled Melvin v. United States (D. Ariz. No. 08-1666), in which plaintiff had alleged Federal Tort Claims Act negligence in the FHWA approval of guardrail design on Arizona SR51, allegedly causing an accident that had injured plaintiff. The

Court dismissed the case on November 23, 2010, based on the settlement.

Prior to settlement, on June 18, 2010, the U.S. District Court for the District of Arizona granted partial summary judgment for FHWA. The court dismissed one count under the discretionary function exemption of the Federal Tort Claims Act, but found a genuine issue of material fact as to whether compliance with NCHRP Report 350 regarding median barrier design was mandatory or advisory. In the earlier ruling, the court found that the discretionary function exemption applied to Count 3 -- FHWA authorization of funds for the SR51 Cable Median Barrier Project -- because FHWA had discretion in determining whether to approve federal funding for the project.

### **Briefing in Fifth Circuit Challenge to Texas Parkway**

On July 16, 2010, plaintiffs appealed the May 19 decision of the U.S. District Court for the Southern District of Texas in Sierra Club v. FHWA, 2010 WL 889964 (S.D. Tex. 2010), to the U.S. Court of Appeals for the Fifth Circuit (5<sup>th</sup> Cir. No. 10-20502). The district court upheld FHWA's issuance of a Record of Decision approving Segment G of the Grand Parkway project in Houston, Texas. The case involves the proposed Grand Parkway (State Highway 99) project, which is envisioned as a 180-mile-long loop highway around Houston. Segment E is a 13.9-mile segment located between I-10 and US 290 about 25 miles northwest of downtown Houston.

On November 19, 2007, FHWA approved a detailed FEIS for Segment E, which was based on 15 years of public meetings, studies and analysis. FHWA signed a Record of Decision (“ROD”) on June 24, 2008, selecting one of the Build alternative routes.

The district court denied Sierra Club’s motion for summary judgment and granted the federal defendants’ and state defendants’ motions for summary judgment. The court concluded that, as required by NEPA, the FHWA took “a hard look at the environmental consequences of the alternatives” and provided “an explanation of the alternatives sufficient to permit a reasoned choice among different courses of action.”

On appeal, the Sierra Club has asserted in briefs filed on November 8, 2010 and February 11, 2011, that: (1) the Purpose and Need statement was a post hoc justification for the construction of Segment E and that the FEIS data reveals that the primary reason for the construction of Segment E is to induce growth; (2) FHWA relied on inaccurate data and outdated data in analyzing impacts to floodplains and thus failed to comply with both NEPA and Executive Order 11998; (3) the wetlands analysis did not comply with NEPA requirements; and, (4) the district court erred when it denied Sierra Club’s motion for leave to file an amended complaint. Sierra Club did not challenge the district court’s conclusions that the FEIS’s assessment of air and noise impacts was adequate. Nor did it challenge the district court’s conclusion that the FEIS’s assessment of cumulative impacts was adequate.

In its brief filed January 12, 2011, FHWA argued that FHWA and TxDOT took the required “hard look” at the environmental consequences of the proposed Grand Parkway Segment E. The FEIS and ROD considered and explained the project’s purpose and need and the alternatives considered with sufficient detail and clarity to permit a reasoned choice among different courses of action. Further, FHWA asserts that none of Sierra Club’s contentions seriously calls into question the FHWA’s compliance with the applicable guidance or the methodology, data, and conclusions of the FEIS.

### **New Environmental Challenge to Virginia Interchange**

On February 22, 2011, a citizen’s group filed a new lawsuit, Coalition to Preserve McIntire Park v. Mendez (W.D. Va. No. 11-00015), challenging a proposed interchange to improve the intersection of the Route 250 Bypass and McIntire Road in Charlottesville, Virginia. Plaintiffs allege that the process by which the Defendants prepared and approved the Environmental Assessment’s Finding of No Significant Impact for the project violated NEPA and section 4(f) of the Department of Transportation Act. Specifically, they allege that: (1) FHWA was required by federal law to select an alternative alignment that would have had no or lesser impact on the Park and the nearby historic resources; (2) the scope of its environmental review was far too narrow; and (3) federal law required the FHWA to prepare an Environmental Impact Statement for the project.

Plaintiffs seek a declaration that FHWA has violated NEPA and Section 4(f) and an injunction preventing the use of federal funds on the project.

### **Environmental Challenge Filed against South Carolina Bridge**

On September 13, 2010, the Friends of Congaree Swamp challenged the FHWA's decision to approve construction of bridges and causeways over the Congaree Swamp on State Highway 601 in South Carolina. Plaintiffs in Friends of Congaree Swamp v. FHWA (D. S.C. No. 10-02394) challenge whether FHWA and the South Carolina Department of Transportation (SCDOT) complied with 49 U.S.C. § 303, section 4(f) of the Department of Transportation Act, and NEPA in planning the construction of bridges and causeways on State Highway 601 when FHWA issued a Revised Environmental Assessment (EA) Finding of No Significant Impact (FONSI).

Plaintiffs, consisting of several South Carolina environmental groups, allege 4(f) and NEPA violations against both SCDOT and FHWA in connection with the 601 bridge construction project. The original bridge was built in the 1940s and is in serious need of repair. The bridge replacement project is within the Congaree River floodplain and near and adjacent to the authorized boundary of the Congaree National Park. In 2006, the Plaintiffs sued the same Defendants over the initial EA and FONSI. Plaintiffs prevailed in that initial suit. The Court found that the initial EA was conclusory and did not take the required hard look at the project's impacts on the

surrounding area. Following additional studies and more coordination with the Plaintiffs and the public, the impacts were re-evaluated in a new EA, and the FONSI was reissued. Plaintiffs are not satisfied with the bridge design and want the entire crossing to be spanned with one long bridge, which would double the project costs.

On October 7, 2010, the Plaintiffs filed a Motion for Preliminary Injunction, which was argued on December 15, 2010. On December 17, 2010, the parties and the court agreed to a stipulated construction and expedited briefing schedule.

### **FHWA Sued over Ohio Railroad Crossing Project**

On October 8, 2010, a proposed grade crossing improvement project in Macedonia, Ohio was challenged in the U.S. District Court for the Northern District of Ohio in Schneider v. DOT, et al. (N.D. Oh. No. 10-02297). The Highland Road Grade Separation Project proposes to reconstruct Highland Road at an elevated profile to create a separate grade crossing on the Norfolk Southern Railroad. Plaintiff alleges that the process by which defendants prepared and approved the Categorical Exclusion for the project violated NEPA, section 4(f) of the Department of Transportation Act, and the Federal Aid Highway Act and seeks a declaratory judgment to that effect. Plaintiff also seeks preliminary and permanent injunctive relief prohibiting the FHWA Ohio Division Administrator from authorizing the release of funds to the State of Ohio in connection with the project until such

time that the defendants assess the social and economic effects of the project by completing an updated environmental review.

### **Environmental Challenge to Kentucky Highway**

On October 5, 2010, an environmental group challenged FHWA's decision to approve construction of the new I-65 interchange and highway to connect US 31W, US 68 and I-65, known as the US 68 Connector Project, in Karst Environmental Education and Protection, Inc. v. FHWA (W.D. Ky. No. 10-00154). Plaintiff alleges that FHWA violated 42 U.S.C. § 4332 and NEPA in planning the construction of the highway and interchange when issuing an Environmental Impact Statement (EIS) and Record of Decision (ROD). Specifically, plaintiff alleges that defendants violated NEPA by failing to utilize updated information and data, to adequately consider alternatives, and to take a "hard look" at direct, indirect, and cumulative impacts. Plaintiff has asked the court to set aside the EIS and the ROD.

### **Federal Motor Carrier Safety Administration**

#### **Oral Argument Held in Challenge to FMCSA Electronic On-Board Recorder Rule**

On February 7, 2011, the U.S. Court of Appeals for the Seventh Circuit heard oral argument in Owner-Operator Independent Drivers Ass'n, Inc., et al. v.

DOT, et al. (7th Cir. No. 10-2340), a petition for review challenging FMCSA's Final Rule on "Electronic On-Board Recorders for Hours-of-Service Compliance" (Final Rule). The Final Rule, published on April 5, 2010, at 75 Fed. Reg. 17,208, amends the Federal Motor Carrier Safety Regulations (FMCSRs) to incorporate new performance standards for electronic on-board recorders (EOBRs) installed in commercial motor vehicles manufactured on or after June 4, 2012. Additionally, the Final Rule mandates that motor carriers demonstrating serious noncompliance with the hours of service rules will be subject to mandatory installation of EOBRs under the new performance standards. FMCSA plans to begin issuing remedial directives mandating installation of EOBRs in June of 2012.

In support of its petition for review, the Owner-Operator Independent Drivers Association (OOIDA) argues that: (1) the Final Rule fails to heed the statutory mandate to ensure that EOBRs will not be used to harass vehicle operators; (2) the benefits of EOBRs are illusory and do not support FMCSA's cost benefit analysis; and (3) mandating EOBRs violates drivers' Fourth Amendment rights.

In response, FMCSA argues that it ensured that EOBRs will not be used to harass vehicle operators. In particular, the agency carefully considered privacy issues associated with EOBRs. FMCSA rejected proposals that would have resulted in more intrusive monitoring of drivers' activities. Second, the agency argues that it carefully analyzed the costs and benefits of EOBRs. In particular,

automatic tracking of driving time by EOBRs will significantly improve hours-of-service compliance by ensuring accurate hours-of-service recordkeeping. Third, FMCSA argues that the Fourth Amendment does not apply to EOBRs, which track commercial motor vehicles being operated on public roads. Moreover, even if the Fourth Amendment applies to EOBR use, such a warrantless search would be constitutional under the established exception for highly regulated industries. Finally, FMCSA argues that OOIDA's case should be dismissed on ripeness and/or standing grounds. FMCSA action under the Final Rule will not occur until at least June 2012. Accordingly, the court should not review the rule at this time as the rule has caused no potential harm to any carriers.

### **Parties Settle Litigation Challenging FMCSA's CSA Enforcement Model**

On November 29, 2010, the National Association of Small Trucking Companies, the Expedite Alliance of North America, and Air & Expedited Motor Carriers Association sought review of FMCSA's new enforcement model, Compliance, Safety, Accountability (CSA) in National Ass'n of Small Trucking Companies, et al. v. FMCSA (D.C. Cir. No. 10-1402). Petitioners also sought an emergency stay, urging the court to halt FMCSA's implementation of CSA. On December 10, the U.S. Court of Appeals for the District of Columbia Circuit denied petitioners' stay motion, which enabled FMCSA to begin implementing CSA on December 12, 2010.

The CSA Operational Model is a major new FMCSA safety initiative to increase the efficiency and effectiveness of FMCSA's compliance and enforcement program. CSA has three major components: (1) a new, more comprehensive Safety Measurement System (SMS) for identifying high risk motor carriers; (2) a broader array of compliance interventions to promptly address unsafe behavior; and (3) a new safety fitness determination methodology that will be implemented through notice and comment rulemaking. CSA's comprehensive SMS system and its broader array of compliance interventions will allow the investigators to touch a far greater number of carriers in a more targeted and efficient manner. Petitioners argued that the development and implementation of the enforcement model, including SMS, should have been subject to notice and comment rulemaking.

On March 4, 2011, the parties executed a settlement agreement in which petitioners' agreed to dismiss the suit and FMCSA agreed to modify the disclaimer language on the SMS website, replacing the "Alert" status with the symbol  and revising the footnote definition of the  symbol on the Legend portion of the SMS website. FMCSA agreed to make these changes to the website by March 25, 2011. On March 9, the Petitioners filed a Stipulation of Dismissal.

## **Affirmative Litigation Enforcing FMCSA Out-of-Service Orders**

In three separate cases, the Department of Justice (DOJ) initiated affirmative litigation on behalf of DOT requesting that the Court enjoin defendants from operating unsafe commercial motor vehicles in interstate commerce.

In Secretary of Transportation v. James D. Benge dba JDB Transport, et al. (S.D. Ohio No. 10-00802), DOJ sought a temporary restraining order (TRO) against defendant James Benge and two of his drivers. Benge had continued to operate his tractor and trailer despite receiving four vehicle out-of-service (OOS) orders over the course of several months in 2010. The OOS orders were based on severe and extensive brake system defects, cracked frames and axle mounts, and non-functioning brake and turn signal assemblies. On August 19, 2010, FMCSA issued an Imminent Hazard OOS order directing JDB Transport to cease operating the vehicles until all necessary repairs were performed. Mr. Benge continued to operate the vehicles. On November 19, 2010, U.S. District Court Judge Michael R. Barrett issued a TRO, which the court subsequently converted to a preliminary injunction on December 7, 2010. At a status hearing held on February 7, 2011, the Court informed Mr. Benge that he must submit all necessary paperwork documenting the required repairs before May 1, 2011, or the Court will entertain FMCSA's request for a permanent injunction. A further status hearing is scheduled for June 22, 2011.

In LaHood v. Garcia and East Valley Travel & Tours (D. Ariz. No. 10-02315), DOJ sought an injunction against Mario A. Garcia and East Valley Travel & Tours requiring that it cease all commercial motor carrier operations. FMCSA had taken enforcement action against Mr. Garcia in July 2010 when he attempted to operate buses belonging to a passenger carrier that had been placed out-of-service based on an unsatisfactory safety rating. FMCSA had denied Garcia's application for operating authority for East Valley Travel & Tours, the entity intended to supplant the unsatisfactory-rated carrier. Garcia and East Valley Travel continued to operate two commercial motor vehicles transporting passengers between Mexico and the United State without the required operating authority. On December 9, 2010, the Court issued an order approving a consent decree executed by the parties. Under the consent decree, Mario Garcia and East Valley Travel & Tours are permanently enjoined from conducting motor carrier operations in interstate or foreign commerce without valid and active FMCSA operating authority and from contracting passenger transportation with any other unauthorized motor carriers. Garcia is also permanently enjoined from submitting new applications for motor carrier operating authority in any name or for any entity unless the application is accurate and discloses the applicant's affiliations with other motor carrier operations.

In LaHood v. RLT Tours, LLC et al. (M.D. Pa. No. 11-0073), DOJ on behalf of DOT sought injunctive relief against an interstate motor carrier of passengers that continued to operate after being

ordered to cease operations. RLT Tours transports daily commuters between Tobyhanna, PA (Pocono Mountains) and New York, NY. A September 2010 FMCSA compliance review rated RLT Tours' safety management as unsatisfactory. RLT Tours failed to take necessary steps to improve its safety rating and was consequently ordered to cease operations, effective November 5, 2010. The order to cease also revoked the motor carrier's operating authority registration. RLT Tours continued to transport passengers in interstate commerce without operating authority and in defiance of the Order to Cease.

The district court action for injunctive relief was initiated on January 11, 2011, and was resolved by a court order stipulated by the parties on February 16, 2011. The court ordered RLT Tours and its owners to cease operations of commuter passenger bus service between Tobyhanna and New York City. The order further provided that RLT Tours and Lucky and Lady Travel, LLC, another bus company incorporated by defendants, will be dissolved and that RLT and Lucky and Lady must file an "Out of Business" MCS-150 with FMCSA. The order enjoined the defendant owners from contracting or arranging transportation of passengers with other unauthorized bus companies. Defendant-owners further agreed to personally pay a civil penalty based on their role in providing bus services without proper operating authority. RLT Tours, to the extent allowable by law, remains liable for a civil penalty of approximately \$30,000 pursuant to final agency orders of FMCSA. Failure to comply with the injunctive order may

result in additional fines or imprisonment for defendants.

### **Moving Company Settles Civil Penalty Appeal**

Air 1 Moving and Storage, Inc. (Air 1) filed a petition for review in the U.S. Court of Appeals for the Ninth Circuit seeking review of an FMCSA final order that imposed civil penalties against Air 1 totaling \$27,030 and a subsequent final order denying Air 1's motion for reconsideration. The petitioner in Air 1 Moving & Storage, Inc. v. DOT, et al. (9<sup>th</sup> Cir. No. 10-72797) also sought a stay of FMCSA's enforcement of the final order. The civil penalties were based on Air 1 engaging in interstate transportation of household goods without proper operating authority and its use of a driver who did not possess a valid commercial driver license.

On December 3, 2010, FMCSA entered into a settlement agreement with Air 1 resolving its petition for review. Under the settlement, Air 1 is required to pay the full \$27,030 penalty, but is permitted to pay the penalty in monthly installment payments provided it makes each of its payments as required. On December 13, 2010, the court dismissed the petition for review.

## **Federal Railroad Administration**

### **Oral Argument Held in Challenge to FRA's Jurisdiction over the Port of Shreveport-Bossier**

On March 1, 2011, the U.S. Court of Appeals for the Fifth Circuit heard oral argument in Port of Shreveport-Bossier v. FRA (5<sup>th</sup> Cir. No. 10-60324), a challenge to FRA's determination that the Port of Shreveport-Bossier (the Port) is subject to FRA's safety jurisdiction. The Port's petition for review contests a February 22, 2010, determination in which FRA found that the Port is a railroad carrier within the meaning of the railroad safety laws and regulations and is therefore subject to FRA's jurisdiction.

Although FRA's statutory jurisdiction extends to all railroad carriers, FRA has chosen as a matter of policy not to impose its regulations on certain categories of operations, such as "plant railroads." "Plant railroads" are railroads whose entire operations are confined to an industrial installation that is not part of the general railroad system of transportation (general system).

The Port asserts that its rail operation is a plant railroad and that FRA's jurisdiction determination is contrary to FRA's regulations and an improper attempt to expand its jurisdiction outside of the rulemaking process. FRA argues that the Port provides railroad transportation because it switches rail cars in service for fourteen different

tenants, rather than for its own purposes or industrial processes, which characterizes operation on the general system.

### **FRA Reaches Agreement in Litigation Regarding Its Positive Train Control Final Rule**

On March 2, 2011, FRA and the Association of American Railroads (AAR) reached an agreement in the matter of Association of American Railroads v. FRA, et al. (D.C. Cir. No. 10-1198) and jointly petitioned the U.S. Court of Appeals for the District of Columbia Circuit to hold the case in abeyance while FRA issues new Notices of Proposed Rulemaking (NPRM) that will address FRA's final rule on positive train control (PTC), which is the subject of the litigation. On March 3, 2011, the D.C. Circuit granted the joint petition, directed that the case be held in abeyance, removed the case from the March 7, 2011, oral argument calendar, and directed the parties to file status reports at 60-day intervals, beginning 60 days from the date of the court's order.

AAR sought review of two specific aspects of FRA's PTC final rule. First, AAR maintained that FRA acted in an arbitrary and capricious manner by adopting 2008 (the year that the implementing statute was passed) as a baseline for determining the routes on which PTC must be installed. Second, AAR argued that FRA acted in an arbitrary and capricious manner by mandating that a PTC screen be visible to each member of the train crew.

In its opposition brief, FRA argued that it has statutory authority to require PTC installation beyond the basic system required by the statute. Moreover, FRA asserted that the year 2008 is a reasonable starting baseline in determining which additional lines should be equipped with PTC. While traffic changes will occur in subsequent years, the PTC final rule provides that 2008 lines need not be PTC-equipped if they do not meet the requirements of two additional tests (the alternative route analysis and the residual risk analysis). FRA also argued that the joint-visibility requirement is a performance standard, with a number of possible technical solutions (*e.g.*, a single large screen, a swivel screen, a heads up display, a personal device, or two screens). FRA maintained that the PTC Final Rule does not mandate a second display.

The agreement entered into between FRA and AAR provides that FRA will publish an NPRM that will address the 2008 baseline provision that is at issue in the appeal. FRA will also issue a separate NPRM that addresses other aspects of the PTC final rule not raised in the litigation. The agreement further provides that upon the conclusion of the 2008 baseline rulemaking, the parties will determine whether to file a joint motion to dismiss the petition for review with prejudice or to advise the Court that they are unable to resolve all of the issues in the petition for review.

### **D.C. Circuit Dismisses Petition for Review of Metrics and Standards for Intercity Passenger Rail Service**

On November 24, 2010, the U.S. Court of Appeals for the District of Columbia Circuit dismissed Association of American Railroads v. FRA, et al. (D.C. Cir. No. 10-1154) on the ground that it lacked jurisdiction over the case. The Association of American Railroads (AAR) had filed a petition for review in the D.C. Circuit on July 2, 2010, challenging Metrics and Standards for measuring the performance and service quality of intercity passenger train operations developed by FRA jointly with Amtrak pursuant to Section 207 of the Passenger Rail Investment and Improvement Act of 2008 (PRIIA). In its petition for review, AAR raised the following issues: (1) whether section 207 of PRIIA is unconstitutional; and (2) whether the Metrics and Standards are a product of arbitrary and capricious decision-making in violation of the Administrative Procedure Act because they are not the product of reasoned agency decision-making and they are not supported by substantial evidence in the rulemaking record.

The government filed a motion to dismiss the petition for review for lack of jurisdiction on August 23, 2010, arguing that the case should have been filed in a federal district court. On September 3, AAR filed a response to the motion to dismiss in which it did not object to the dismissal of the case without prejudice, should the court determine that it is without jurisdiction. In its decision, the D.C. Circuit stated

that it was granting the government's motion because AAR had not addressed or refuted the government's arguments for dismissal.

## **Federal Transit Administration**

### **Hearing on Challenge to Second Avenue Subway Project Ancillary Facility**

On March 24, 2011, the U.S. District Court for the Southern District of New York heard cross-motions for summary judgment in one of the New York City Second Avenue Subway cases. FTA is defending a lawsuit challenging the design of an ancillary facility on the Second Avenue Subway project, an undertaking by the New York Metropolitan Transportation Authority (MTA) and the New York City Transit Authority (NYCTA) to construct an approximately 8.5 mile two-track rail line extending the length of Manhattan's East Side Corridor. The case, 233 East 69th Street Owners Corp. v. DOT, et al. (S.D.N.Y. No. 10-00491), concerns allegations that FTA was required to do a supplemental environmental impact statement on the design of the ancillary facility, which is planned to be located next to plaintiff's residential building. The case was initially placed on a suspense calendar pending FTA's determination as to whether supplemental review under NEPA was required. Based on technical analysis developed by FTA and MTA, FTA determined in September 2010 that no supplemental environmental assessment

or supplemental environmental impact statement was required, and since that time the case has been fully briefed.

### **Owner and Residents of Manhattan Apartment Building File Two Lawsuits over Second Avenue Subway**

On November 30, 2010, the owner and residents of an Upper East Side apartment building named "Yorkshire Towers" filed a lawsuit related to a September 30, 2010, request under the Freedom of Information Act (FOIA) for documents related to the environmental review of the Second Avenue Subway project. Yorkshire Towers Co. LP and Yorkshire Towers Tenants Ass'n v. FTA, et al. (S.D.N.Y. No. 10-8973). The suit was also filed against the Metropolitan Transportation Authority (MTA) and the MTA's subsidiary, the Capital Construction Company (MTACCC), pursuant to the New York Freedom of Information Law. The complaint seeks to compel the release of "specified records and materials" underlying the December 2009 supplemental environmental assessment for the first minimum operable segment of the Second Avenue Subway, now well along in construction. FTA provided its response to the FOIA request in early December 2010 and filed an answer to the complaint in early February 2011.

On February 16, 2011, the same owner and residents of Yorkshire Towers filed suit against FTA in Yorkshire Towers Co. LP and Yorkshire Towers Tenants Ass'n v. DOT, et al. (S.D.N.Y. No. 11-01058). The complaint alleges that

FTA's supplemental environmental assessment concerning the location of an entrance to the East 86<sup>th</sup> Street station did not adequately consider the environmental effects of the station entrances or of alternative station entrances. The complaint also alleges that the project sponsor, the MTA, failed to comply with the New York State Environmental Quality Review Act concerning the station design. Finally, the complaint seeks injunctive relief that would prevent MTA from expending public funds on the station entrance pursuant to New York General Municipal Law Section 51.

### **Court Issues Decision in Environmental Justice Challenge to Minnesota Light-Rail Project**

On January 27, 2011, the U.S. District Court for the District of Minnesota ruled in The St. Paul Branch of the NAACP v. DOT, et al. (D. Minn. No. 10-147), denying plaintiff's request to enjoin construction of the Central Corridor Light Rail Transit project in Minneapolis or its Record of Decision (ROD), stating that there are "significant public benefits to the CCLRT [Central Corridor Light Rail Transit] project." However, the court did find the Final Environmental Impact Statement (FEIS) "inadequate insofar as it fails to address the loss of business revenues as an adverse impact of the construction of the CCLRT." FTA was ordered to supplement its analysis of business interruption impacts. With regard to all the other allegations in the complaint related to the inadequacy of the FEIS, the court found in the government's favor. Those

allegations concerned cumulative impacts of prior projects (the building of I-94 and urban gentrification in the 1970's), displacement of existing businesses and residents, and requisite scope. The requisite scope issue related to the omission of the infill stations from the ROD and their addition in a subsequent Environmental Assessment (EA), essentially an allegation of impermissible segmentation. On all these issues, the court ruled in DOT's favor. With regard to the business revenue issue, the court distinguished the cases the government relied on for the proposition that the FEIS did not need to evaluate loss of business revenue during construction since it is solely economic harm. The court found that the plaintiffs are "within the 'zone of interests'" and that the CCLRT will produce "substantial environmental impacts in the Corridor where the plaintiffs live." The court found that the record supports the conclusion that "these environmental impacts will be connected to economic impacts," resulting in lost business revenue, which is "directly related to the environmental impacts (i.e., physical disruption of the environment)." The court wants these impacts to be evaluated and appropriate mitigation measures adopted, and found the FEIS deficient until the impacts are addressed.

In response to the court's decision, FTA is undertaking a supplemental EA on the narrow issue of potential business revenue losses during construction. The draft EA was issued on March 1, 2011, starting a thirty day public comment period. Additionally, on February 25, 2011, the plaintiffs filed for attorney's fees.

## Maritime Administration

### Ninth Circuit Affirms Dismissal of Cargo Preference Act Suit

On November 5, 2010, the United States Court of Appeals for the Ninth Circuit affirmed the decision of the district court dismissing plaintiff's claims in America Cargo Transport, Inc. v. United States (9<sup>th</sup> Cir. Nos. 08-35010 & 08-3527). America Cargo Transport (ACT), a U.S.-flag carrier, had brought suit in the U.S. District Court for the Western District of Washington when the Agency for International Development (AID) rejected ACT's bid to carry a full shipload lot of Food for Peace program cargo without MarAd's concurrence. In the district court case, the Department of Justice belatedly accepted MarAd's view of the law, which coincided with plaintiff's arguments, and agreed that MarAd's concurrence was necessary. On the basis of the Justice Department's position that only MarAd can make a determination that a U.S.-flag vessel is not available for a full shipload lot of cargo, the district court dismissed ACT's suit as moot, and ACT appealed.

First addressing ACT's request for declarative and injunctive relief, the Ninth Circuit held that where there is no reasonable expectation that the alleged violation will recur, and where interim relief or events have completely and irrevocably eradicated the effects of the alleged violation, the case is moot. Because the shipment at issue had already been completed, ACT's claim for injunctive relief was moot as well. Although the fact that the government changed its policy and agreed with ACT

certainly affected the litigation, there was no basis to suggest it was a transitory litigation posture. The court presumed that the government was acting in good faith. The specific question that gave rise to the suit — the need for consultation with MarAd — was resolved in ACT's favor. Because the suit no longer presented a concrete case or controversy, the Ninth Circuit affirmed the district court's dismissal of ACT's claims for declaratory and injunctive relief as moot.

As to ACT's claims for money damages, the court noted that as a general rule, the United States, as sovereign, is immune from suit save as it consents to be sued, and the terms of its consent to be sued in any court define that court's jurisdiction to entertain the suit. Whether the United States has waived sovereign immunity in connection with shipping under the Food for Peace program was a question of first impression for the Ninth Circuit. The text of the Suits in Admiralty Act (SAA) makes clear that the waiver of sovereign immunity applies only where a private party would be liable under admiralty law for the same conduct. ACT's alleged injury was that AID wrongly rejected ACT's bid in violation of the federal laws governing cargo preference and food safety. But those laws—the Cargo Preference Act (CPA) and the Food Security Act (FSA) — regulate only the government's conduct. Because a private party could not be liable under either the CPA or FSA, the statutory waiver of the SAA was inapplicable here. Because a private party would not have been subject to the CPA or FSA or their implementing regulations — and because ACT would therefore have no claim against a private party in the

government's shoes — the government did not waive sovereign immunity under the SAA. Accordingly, the Ninth Circuit affirmed the district court's dismissal of the SAA claim for damages.

As to attorney fees, to be a prevailing party under the Equal Access to Justice Act (EAJA), a litigant must achieve a material alteration of the legal relationship of the parties, and the alteration must be judicially sanctioned. The Ninth Circuit agreed with the district court that ACT did not qualify as a "prevailing party" under EAJA because its regulatory victory was the result of the government's voluntary behavior, not judicial action.

### **Court Rules in Hawaii Superferry Bankruptcy Case**

On February 28, 2011, the U.S. District Court for the Eastern District of Virginia issued decisions in United States, et al. v. ALAKAI (O.N. 1182234) (E.D. Va. No. 10-232) and United States, et al. v. HUAKAI (O.N.1215902), 2011 WL 7819274 (E.D. Va. 2011), on claims against the U.S. Marshal's sale proceeds of the two former Hawaii Superferries, ALAKAI and HUAKAI. Most significantly, the court ruled that a large second preferred mortgage is subordinate to MarAd's first preferred mortgage. Having foreclosed on the vessels, which defaulted on Government guaranteed loans for \$140 million, MarAd purchased both vessels by credit bid at a September 2010 Marshal's sale for \$25 million each. Although no cash is deposited with the court on a credit bid, MarAd nevertheless is responsible for paying in cash those preferred

maritime liens that precede its first preferred mortgage. Shipbuilder Austal USA, LLC, claimed about \$30 million on the basis of its second preferred mortgage for construction period financing, arguing that its mortgage should be entitled to recovery *pari passu* with MarAd's first preferred mortgage. Austal's claim was dismissed with prejudice. Of lesser significance, Hornblower Marine Services, Inc.'s claim for payment of wages, which gives rise to a maritime lien that has priority over a preferred mortgage, was approved. The court found that, although Hornblower was not the vessel owner, it nevertheless paid the wages when the vessel owner failed to do so and was therefore entitled to a total of about \$42,000 from the proceeds of sale.

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

#### **Hazmat Packaging Supplier Challenges Civil Penalty in Eleventh Circuit**

On January 14, 2011, Air Sea Containers, Inc. (ASCI) sought review in the U.S. Court of Appeals for the Eleventh Circuit of a final action of the PHMSA Administrator that imposed civil penalties against ASCI for violations of the Hazardous Materials Regulations (HMR). The case, Air Sea Containers, Inc. v. PHMSA (11<sup>th</sup> Cir. No. 11-10142), arose out of a customer complaint about the hazmat packaging testing and certification activities of

ASCI. During the course of the investigation and on-site inspections of ASCI, PHMSA investigators determined that the lack of certain testing equipment and other resources at ASCI's testing facility would likely render ASCI incapable of performing the required testing in accordance with the applicable regulations. As such, PHMSA purchased samples of ASCI's packaging designs and sent them to an independent testing lab for design validation testing. The designs tested failed to meet the regulatory packaging testing requirements. Based on the evidence gathered and the lab results, PHMSA initiated a civil enforcement proceeding. ASCI requested an adjudicatory hearing before an ALJ. The ALJ issued a split decision that was appealed by both parties to the PHMSA Administrator. The Administrator imposed civil penalties against ASCI totaling \$30,170 for four violations of the packaging testing requirements of the HMR.

### **Review Sought of PHMSA Rule Prohibiting Butane Fuel Cells in Air Passengers' Checked Baggage**

On March 18, 2011, Liliputian Systems, Inc., sought review in the U.S. Court of Appeals for the District of Columbia Circuit of a portion of a January 19, 2011, PHMSA rule entitled "Harmonization with the United Nations Recommendations, International Maritime Dangerous Goods Code, and the International Civil Aviation Organization Technical Instructions for the Safe Transport of Dangerous Goods by Air." Petitioner describes the specific provision challenged in Liliputian

Systems, Inc. v. PHMSA (D.C. Cir. No. 11-1085) as revising the hazardous materials regulations to prohibit air passengers from placing spare butane fuel cell cartridges in checked baggage.

### **Saint Lawrence Seaway Development Corporation**

#### **Court Denies Preliminary Injunction against Work on Electrical Upgrade to Seaway Locks**

On November 17, 2010, the low bidder for an SLSDC procurement to upgrade the electrical distribution system for the Seaway's Eisenhower and Snell locks submitted a bid protest pre-filing notification to the U.S. Court of Federal Claims. Over one month later, on December 23, 2010, plaintiff filed a complaint requesting a declaratory judgment awarding it the contract. Shortly after filing its complaint in Dow Electric, Inc. v. United States (Fed. Cl. No. 10-883C), plaintiff sought a TRO to enjoin the SLSDC from proceeding with any further activity on the project, which had been ongoing since September 30, 2010. Following a status conference on January 6, 2011, the Court issued an order denying the motion, based on plaintiff's failure to show a likelihood of success on the merits and the fact that construction was already underway on the project. The briefing schedule concluded on February 25, during which the SLSDC argued that the claim should be dismissed for lack of jurisdiction because the court has no authority to award the contract to a specific bidder.

This case arose from a sealed bid procurement in which the solicitation required specific or equivalent materials. Although the plaintiff was the low bidder, the materials submitted in plaintiff's bid were not deemed equivalent, and its bid was thus nonresponsive. Plaintiff alleges that the court has authority to award it the contract based either on its original submittal or based on a subsequent offer to provide the materials specified in the solicitation.

**Index of Cases Reported in this Issue**

41 North 73 West (Avitat) v. Westchester County, 2010 WL 4318655 (2d Cir. 2010) (Second Circuit upholds FAA's decision that Westchester County did not violate its grant assurance obligations), page 19

233 East 69th Street Owners Corp. v. DOT, et al. (S.D.N.Y. No. 10-00491) (hearing on challenge to Second Avenue Subway project ancillary facility), page 41

Air 1 Moving & Storage, Inc. v. DOT, et al. (9<sup>th</sup> Cir. No. 10-72797) (moving company settles civil penalty appeal), page 38

Air Sea Containers, Inc. v. PHMSA (11<sup>th</sup> Cir. No. 11-10142) (hazmat packaging supplier challenges civil penalty in Eleventh Circuit), page 44

America Cargo Transport, Inc. v. United States, 625 F.3d 1176 (9<sup>th</sup> Cir. 2010) (Ninth Circuit affirms dismissal of Cargo Preference Act suit), page 43

Association of American Railroads v. FRA, et al. (D.C. Cir. No. 10-1154) (D.C. Circuit dismisses petition for review of metrics and standards for intercity passenger rail service), page 40

Association of American Railroads v. FRA, et al. (D.C. Cir. No. 10-1198) (FRA reaches agreement in litigation regarding positive train control final rule), page 39

Barnes v. DOT (9<sup>th</sup> Cir. No. 10-70718) (Ninth Circuit hears argument in challenge to EA/FONSI for third runway at general aviation airport in Oregon), page 22

Beach Erectors, Inc. v. DOT, et al. (E.D.N.Y. 10-5741) (New York DBE applicant challenges denial of DBE certification), page 13

Citizens for Sensible Transportation Planning v. DOT, et al. (E.D. Wash. No. 10-00108) (challenge to TIGER grant project in Washington State settles), page 31

Citizens for Smart Growth, et al v. FHWA et al. (11<sup>th</sup> Cir. No. 10-12253) (appeal dismissed in challenge to Florida bridge project), page 28

City of Dania Beach, et al. v. FAA, 628 F.3d 581 (D.C. Cir. 2010) (D.C. Circuit affirms FAA decision approving runway expansion at Fort Lauderdale International Airport), page 17

City of Santa Monica v. FAA, 631 F.3d 550 (D.C. Cir. 2011) (D.C. Circuit affirms FAA's decision invalidating City of Santa Monica's jet ban), page 16

Coalition to Preserve McIntire Park v. Mendez (W.D. Va. No. 11-00015) (new environmental challenge to Virginia interchange), page 33

County Board of Arlington v. DOT, et al. (D.D.C. No. 09-01570) (Court dismisses Arlington County environmental challenge to I-95 Hot Lanes), page 11

CSX Transportation, Inc. v. Alabama Department of Revenue (No. 09-520) (Supreme Court holds that railroad may challenge state tax exemption as discriminatory under 4-R Act), page 3

Delhur Industries, Inc. v. U.S., 95 Fed. Cl. 446 (Ct. Cl. 2010) (FHWA wins New Mexico contract case), page 29

Dow Electric, Inc. v. United States (Fed. Cl. No. 10-883C) (court denies preliminary injunction against work on electrical upgrade to Seaway locks), page 45

FAA, et al. v. Cooper (No. 10-1024) (United States seeks Supreme Court review of decision allowing non-pecuniary damages for Privacy Act violations), page 4

Friends of Congaree Swamp v. FHWA (D. S.C. No. 10-02394) (environmental challenge filed against South Carolina bridge), page 34

Gaxiola et al. v. City of Los Angeles, et al. (C.D. Cal. No. 10-06632) (FHWA and FTA defend against tenants' lawsuit), page 14

Gina Michelle Moore d/b/a Warbird SkyVentures, Inc. v FAA (6<sup>th</sup> Cir. No. 10-4117) (Warbird Sky Ventures contests FAA decision finding Sumner County Regional Airport in compliance with federal grant obligations), page 26

Holbrook, et al. v. United States, 2010 WL 3943736 (S.D. W.Va. 2010) (court dismisses tort claim over suspended airworthiness certificate), page 21

In re SBX, 2010 WL 4688213 (Bankr. S. D. Cal. 2010) (DOT maintains senior lien in SBX bankruptcy), page 30

John Crane, Inc. v. Atwell (No. 10-272) (Supreme Court invites government's views on certiorari in Locomotive Inspection Act preemption case), page 5

Jones v. United States, et al., 625 F.3d 827 (5<sup>th</sup> Cir. 2010) (Fifth Circuit affirms summary judgment for FAA in retaliation case), page 20

Karst Environmental Education and Protection, Inc. v. FHWA (W.D. Ky. No. 10-00154) (environmental challenge to Kentucky highway), page 35

Ladd v. United States, 630 F.3d 1015 (Fed. Cir. 2010) (government seeks panel rehearing or rehearing en banc in federal railbanking program takings case), page 9

LaHood v. Garcia and East Valley Travel & Tours (D. Ariz. No. 10-02315) (affirmative litigation enforcing FMCSA out-of-service order), page 37

LaHood v. RLT Tours, LLC et al. (M.D. Pa. No. 11-0073) (affirmative litigation enforcing FMCSA out-of-service order), page 37

Liliputian Systems, Inc. v. PHMSA (D.C. Cir. No. 11-1085) (review sought of PHMSA rule prohibiting butane fuel cells in air passengers' checked baggage), page 45

Love Terminal Partners v. United States, 2011 WL 613263 (Fed. Cl. 2011) (court rules against U.S. on Love Field takings claim), page 12

Maimone v. FHWA, et al. (D. Or. No. 10-00441) (environmental challenge to Oregon bridge dismissed), page 29

McGuirl v. Peters (D.D.C. No.04-01465) (FHWA settles D.C. environmental challenge), page 31

Melvin v. United States (D. Ariz. No. 08-1666) (FHWA settles Arizona negligence case), page 32

Metropolitan Taxicab Board of Trade v. City of New York (No. 10-618) (Supreme Court denies certiorari in New York City hybrid taxi preemption case), page 6

National Ass'n of Small Trucking Companies, et al. v. FMCSA (D.C. Cir. No. 10-1402) (parties settle litigation challenging FMCSA's CSA enforcement model), page 36

National Federation of the Blind v. United Airlines (N. D. Cal. No. 10-04816) (court requests views of the United States in airline preemption case), page 14

Owner-Operator Independent Drivers Ass'n, Inc., et al. v. DOT, et al. (7th Cir. No. 10-2340) (oral argument held in challenge to FMCSA electronic on-board recorder rule, page 35

Parkridge 6, LLC and Dulles Corridor Users Group v. DOT, 2011 WL 971530 (4th Cir. 2011) (Fourth Circuit upholds dismissal of challenge to Dulles Metrorail extension), page 10

Paskar, et al. v. DOT (2d Cir. No. 10-4612) (Second Circuit challenge to panel study of enclosed marine trash transfer facility adjacent to LaGuardia Airport), page 24

Port of Shreveport-Bossier v. FRA (5th Cir. No. 10-60324) ((oral argument held in challenge to FRA's jurisdiction over the Port of Shreveport-Bossier), page 39

Safeguarding the Historic Hanscom Area's Irreplaceable Resources v. FAA (1<sup>st</sup> Cir. No. 10-1972) (briefing in historic preservation group challenge to replacement of hangar at Bedford-Hanscom Field), page 23

Schneider v. DOT, et al. (N.D. Oh. No. 10-02297) (FHWA sued over Ohio railroad crossing project), page 34

Secretary of Transportation v. James D. Benge dba JDB Transport, et al. (S.D. Ohio No. 10-00802) (affirmative litigation enforcing FMCSA out-of-service order), page 37

Sierra Club v. FHWA (5<sup>th</sup> Cir. No. 10-20502) (briefing in Fifth Circuit challenge to Texas parkway), page 32

Taylor v. Babbitt, 2011 WL 159769 (D.D.C. 2011) (court orders release under FOIA of aircraft design data), page 21

The St. Paul Branch of the NAACP, et al. v. DOT, FTA, et al., 2011 WL 291858 (D. Minn. 2011) (court issues decision in environmental justice challenge to Minnesota light-rail project), page 42

Township of Tinicum, et al. v. DOT (3<sup>rd</sup> Cir. No. 11-1472) (Tinicum Township petitions for review of FAA decision to approve the capacity enhancement program at Philadelphia International Airport), page 26

Town of Barnstable v. FAA (D.C. Cir. No. 10-1276) (FAA "No Hazard" determination for proposed Cape Cod wind turbines challenged), page 23

Trump, et al. v. FAA (11<sup>th</sup> Cir. No. 10-15543) (FAA challenged on categorical exclusion of Fixed Base Operator development area proposal at Palm Beach International Airport), page 25

United Air Lines, et al. v. City of Chicago (Ill. Cir. Ct. Cook Cty, Ch. Div. 11-2081) (DOT mediates settlement of O'Hare expansion project suit), page 15

United States, et al. v. ALAKAI (O.N. 1182234) (E.D. Va. No. 10-232) and United States, et al. v. HUAKAI (O.N.1215902), 2011 WL 7819274 (E.D. Va. 2011) (court rules in Hawaii Superferry bankruptcy case), page 44

US Airways v. O'Donnell, 627 F.3d 1318 (10<sup>th</sup> Cir. 2010) (Tenth Circuit finds state regulation of airline alcohol service preempted, remands for 21<sup>st</sup> Amendment analysis), page 8

Williamson v. Mazda Motor Co. of America, Inc. (No. 08-1314) (Supreme Court holds that NHTSA seatbelt standard does not preempt state common law standard), page 2

Wilson v. DOT, 2010 WL 5479580 (D.C. Cir. 2010) (summary affirmance for FHWA in D.C. FOIA case), page 28

Yorkshire Towers Co. LP and Yorkshire Towers Tenants Ass'n v. FTA, et al. (S.D.N.Y. No. 10-8973) & Yorkshire Towers Co. LP and Yorkshire Towers Tenants Ass'n v. DOT, et al. (S.D.N.Y. No. 11-01058) (owner and residents of Manhattan apartment building file two lawsuits over Second Avenue Subway), page 41