USDOT (E.D. Ark. No. 14-98). The proposed project is for the construction of a slackwater harbor and an intermodal center. The facilities would serve as a regional transfer and distribution point for goods to be shipped to the rest of the country by rail, waterway, and interstate highway. The complaint alleges that in approving the Final Environmental Impact Statement (FEIS) and issuing the Record of Decision (ROD), defendants failed to comply with NEPA and its implementing regulations regarding the analysis of alternatives, direct, indirect and cumulative impacts, and potential mitigating measures. Further, plaintiffs allege violations of Section 4(f), the Endangered Species Act (ESA), the Clean Water Act and its implementing regulations, and the regulations of the Federal Emergency Management Agency. The named defendants include FHWA, the U.S. Army Corps of Engineers (Corps), the Arkansas Highway and Transportation Department (AHTD), and the River Valley Regional Intermodal Facilities Authority (Authority).

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

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

The Draft EIS for the Project was published in March 2006. Given the passage of time, a Supplemental Draft EIS was then completed and issued in August 2010. The Final EIS was approved on March 18, 2013. The ROD was signed and issued by FHWA on November 13, 2013. The site chosen for the project was the same one from the Corps' earlier EA. On February 19, 2014, the City of Dardanelle and the Yell County Wildlife Federation filed suit. The Corps filed a motion to dismiss asserting that it was not a proper party as it had not taken any final agency action. Federal defendants also jointly asserted that plaintiffs' claims brought under the ESA were premature as they had not issued the required 60-day notice letter prior to filing suit.

In support of its motion to dismiss, the Corps' brief recognized that a party may seek judicial review of an agency action

under the APA but only when such action constitutes a "final agency action." "Final agency action" is a term of art that requires two conditions be met. First, the action "must mark the 'consummation' of the agency's decisionmaking process," and "must not be of a merely tentative or interlocutory nature." Bennett v. Spear, 520 U.S. 154, 177-78 (1997) (citations omitted). Second, the action "must be one by which 'rights or obligations have been determined,' or from which 'legal consequences will flow.'" Id. at 178 (citations omitted). The brief pointed out that neither condition had been met with respect to the Corps. During the Project's NEPA process the Corps had served as a cooperating agency. While it had assisted FHWA in reviewing aspects of the Project, particularly in floodplain studies, and provided technical assistance, it had not yet issued its own ROD for the Project. Simply serving as a cooperating agency to FHWA on the EIS did not confer jurisdiction in this matter.

Plaintiffs alleged that the Final EIS and 2013 ROD constituted a final agency action within the purview of the APA against both FHWA and the Corps. Plaintiffs insisted that judicial review was proper on two grounds: (1) because the Corps, as a cooperating agency, prepared a Floodplain Analysis Report ("Floodplain Report") that was critical to the decision issued by FHWA in the Final EIS; and (2) so that plaintiffs could access all of the technical documents that the Corps considered in issuing its Report. Plaintiffs attempted to create a sliding scale of involvement for cooperating agencies and to assert that APA jurisdiction could be found against those agencies that provided extensive technical assistance or information that directly lead to the issuance of a ROD by another agency.

The court found plaintiffs' arguments lacking. It found that the APA and its case law required an either/or situation: either the cooperating agency had issued its own final decision or it had not. The court found that the Corps had not yet taken any final agency action as required by the APA. Accordingly, the Corps was not properly a party, and the court dismissed all the NEPA claims against the Corps.

The Corps and FHWA also asserted in the motion to dismiss that plaintiffs had failed to comply with the jurisdictional requirements of the ESA. In sum, plaintiffs had not sent either defendant the required 60-day notice letter. Plaintiffs conceded this claim, and the court dismissed the ESA claims filed against both federal defendants.

FHWA Seeks Summary Judgment in Buy America Case

In a December 21, 2012, memorandum, the FHWA clarified the scope of its long-standing general waiver for manufactured products under the FHWA's Buy America requirement, 23 U.S.C. § 313. This memorandum clarified that, consistent with past interpretations and practice, "predominately" steel and iron manufactured products are subject to Buy America requirements and identified those as materials that have 90% or more steel or iron content in them. The memorandum also clarified that off-the-shelf commercial products are not intended to be covered by the Buy America requirements.

On October 4, 2013, a coalition of businesses and associations requested the U.S. District Court for the District of Columbia to enjoin the December 2012 memorandum claiming that by establishing the 90% threshold and clarifying the applicability of Buy America to off-the-shelf

commercial products, FHWA had issued a substantive rulemaking that did not follow appropriate notice-and-comment procedures under the APA and rulemaking analysis under the Regulatory Flexibility Act. On April 4, 2014, the United States filed its Answer denying plaintiffs' allegations in United Steel, Paper and Forestry, Rubber Manufacturing, Energy, Allied Industrial and Service Workers International Union, et al., v. FHWA, et al. (D.D.C. No. 13-1301). In its motion for summary judgment, filed on July 11, 2014, the United States argued that the 2012 memorandum was an interpretive rule that did not require notice-and-comment and rulemaking analysis and that the memorandum was consistent with past interpretations and practices. Petitioners filed a reply and opposition motion on July 28 and the United States filed its reply on August 22.

Lawsuit Challenging Single Point Urban Interchange Project Continues

On September 30, 2014, the U.S. District Court for the Middle District of Florida in RB Jai Alai, LLC v. Secretary of Florida Department of Transportation, et al. (M.D. Fla. 13-1167) denied plaintiff's motion for a preliminary injunction against further construction of a single point urban interchange (SPUI) in Casselberry, Seminole County, Florida. This was plaintiff's second attempt at obtaining a preliminary injunction. The court held that plaintiff did not meet the legal standard for preliminary injunctions and failed to meet its burden of proof. Plaintiff filed its original Complaint for Declaratory and Emergency Injunctive Relief on August 1, 2013, challenging the proposal to build the SPUI and alleging NEPA violations. Plaintiff claims to own property and business in the area affected by the project.

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

Plaintiff asserts that defendants' actions in advancing the project have been contrary to law, arbitrary and capricious, and an abuse of discretion under NEPA and the APA. It claims the CE and PD&E study conducted for the project are based on old and flawed traffic data. Plaintiff commissioned its own traffic study dated May 9, 2012, which produced different results indicating the flyover or elevated overpass is not needed. Plaintiff prefers an at grade intersection improvement referred to as the "Boulevard Plan." Plaintiff also asserts that the 2012 re-evaluation was flawed and inadequate due to relying on dated information.

On June 17, 2014, the court granted the defendants' motion to dismiss and denied plaintiff's request for certification of the administrative record and request to allow discovery. However, the court allowed plaintiff a final opportunity to amend its complaint to allege proper standing.

Plaintiff filed its second amended complaint on July 1, 2014. Defendants filed separate motions to dismiss plaintiff's second amended complaint, and on July 29, 2014, plaintiff filed a second motion for a preliminary injunction. Defendants opposed this motion. On September 19, 2014 the court denied FHWA's motion to dismiss plaintiff's second amended complaint and granted in part and denied in part FDOT's motion to dismiss. RB Jai Alai, LLC v. Secretary of Florida Department of Transportation, et al., 2014 WL 4683127 (M.D. Fla. 2014). The court found that plaintiff had standing to pursue its case, however, due to the six-year statute of limitations, any allegations against the 2004 CE were time barred. Remaining claims against the 2012 reevaluation will be allowed to proceed.

In its decision denying plaintiff's second motion for a preliminary injunction, the court discussed the background of the case, the timing of plaintiff's motion, the applicable legal standard, and its specific findings regarding the balance of harms, irreparable harm, and the public interest.

In discussing the timing of plaintiff's motion, the court noted at the outset that plaintiff had also filed a similar motion in a parallel state court lawsuit with no success. The court then found that plaintiff's delay in seeking its second preliminary injunction in the federal lawsuit was inexcusable. The court said plaintiff could have sought the injunction before construction on the project had started rather than waiting until six months afterwards. Additionally, the court noted that plaintiff waited nearly a year after its emergency motion was denied in state court and approximately eight months after the denial in the instant case to file again.

In discussing its findings, the court did not address the first prong of the four-pronged test for obtaining a preliminary injunction as it felt it did not need to reach the merits of plaintiff's allegations given that plaintiff failed to meet its burden as to the second, third, and fourth prerequisites for injunctive relief. The court went on to discuss the balance of harms and found that at best, plaintiff identified potential harms that, when balanced against the known harms to defendants, were insufficient to warrant the extraordinary remedy of an injunction. The court found that the balance of potential harms suggested by plaintiff was merely speculative at this juncture of the case and that it therefore failed to meet its burden. In discussing irreparable harm, the court found again that plaintiff failed to meet its burden. Plaintiffs incorrectly contended that the mere allegations of violations of NEPA were sufficient to carry the burden of clearly establishing irreparable harm. The court found that plaintiff was left with the alleged economic harm, which was not enough to prove irreparable harm. Lastly, the court discussed the public interest and found that the risk of environmental harm was refuted by FDOT's affidavit. The court found that plaintiff's prediction of a potential outcome – adverse economic impact on the area – was insufficient to outweigh the known harms to the public interest as proven by defendants. The court found that the public interest appears best served by the completion of the project, and accordingly, plaintiff again failed to meet its burden

Lawsuit Filed in Florida District Court against the Crosstown Parkway Extension Project

On May 12, 2014, Conservation Alliance of St. Lucie County and the Treasure Coast Environmental Defense Fund, Inc. (Indian

Riverkeeper) filed a complaint in the U.S. District Court of the Southern District of Florida challenging FHWA's decision to approve the construction of a six-lane bridge across the North Fork St. Lucie River Aquatic Preserve and Savannas Preserve State Park (the Preserves). Conservation Alliance of St. Lucie County et al., v. USDOT, et al., (S.D. Fl. No. 14-14192).

The Crosstown Parkway Extension project involves the use of two Section 4(f) resources, the Savannas Preserve and the Aquatic Preserve, including approximately fifteen acres of public park and conservation land, approximately eleven acres of wetlands, and 3.95 acres of upland forested habitat, and would require relocation of the Halpatiokee Canoe and Nature Trail, the only public access point to the Aquatic Preserve from the Savannas Preserve in the project area. The project area also includes three types of essential fish habitat and includes an area listed by the Florida Fish and Wildlife Commission as a "Biodiversity Hotspot" that contains "Priority Wetlands." The FEIS for the project was completed on November 14, 2013. The ROD was issued on February 24, 2014.

Plaintiffs assert that defendants violated the DOT Act and the APA when they considered and then approved the proposed project after (1) arbitrarily and capriciously eliminating feasible and prudent alternatives which avoid impacts to public preservation land and (2) failing to conduct all possible planning to minimize harm from the Proposed Project to the Preserves. Plaintiffs also assert defendants failed to consider all non-avoidance alternatives in their Least Harm Analysis. The complaint is solely based on Section 4(f) claims; no other environmental review claims have been asserted.

Complaint for Declaratory and Injunctive Relief Filed against Monroe Connector/Bypass

On June 23, 2014, plaintiffs Clean Air Carolina, North Carolina Wildlife Federation, and Yadkin Riverkeeper filed a new complaint seeking declaratory judgment and a preliminary injunction to halt progress on the Monroe Connector/Bypass. Clean Air Carolina, et al. v. North Carolina Department of Transportation, et al. (W.D.N.C. No. 14-338). FHWA and its North Carolina Division Administrator, in his official capacity, are among those named as defendants. Plaintiffs allege that defendants violated NEPA and the APA. The complaint concerns the Monroe Connector/Bypass, a proposed 20-mile toll road project east of Charlotte that would extend from U.S. 74 near I-485 in Mecklenburg County to US 74 between the towns of Wingate and Marshville in Union County. On May 15, 2014, FHWA published a combined Final Environmental Impact Statement/ Record of Decision (FEIS/ROD) for the project.

Plaintiffs allege in their complaint that defendants (1) conducted an arbitrary alternatives analysis rooted in flawed traffic forecasts and failed to adequately consider reasonable alternatives in light of these forecasts; (2) failed to adequately analyze and consider direct, indirect and cumulative impacts of the project as a result of a model flaw that inadequately considers transportation infrastructure; (3) misled the public and other agencies by making false statements regarding the project's purpose and anticipated impacts and refused to correct public misunderstandings; (4) engaged in pre-determined decision-making irreversibly

and irretrievably committing to a plan of action prior to completing NEPA analysis; (5) improperly issued a combined Final SEIS and ROD bypassing public comment on signification new information presented in the Draft SEIS; and (6) failed to supplement the SEIS in light of new information they obtained from plaintiffs subsequent to publication of the Draft SEIS. Based on these objections, plaintiffs seek a declaratory judgment that defendants violated NEPA, vacatur of the ROD, preliminary and permanent injunctive relief, and attorney's fees.

On August 18, 2014, federal and state defendants filed motions to change venue from the Western to the Eastern District of North Carolina, where plaintiffs' previous lawsuit challenging the same project had been filed. On September 2, state defendants filed their answer. Federal defendants' answer was filed on October 24. On September 3, plaintiffs filed their response to defendants' motions to change venue. Federal and state defendants argue venue in the Eastern District is proper and will promote judicial economy because the judge who presided over the previous challenge to the project is already familiar with much of the administrative record that will be at issue on this case. The record is not only voluminous, but contains appreciable amounts of technical traffic forecasting and land use modeling data and analysis. Plaintiffs assert that venue in the Western District is appropriate because the project is located there, as are two plaintiff organizations and other citizens opposed to the project. On September 15, federal and state defendants filed replies.

Federal Motor Carrier Safety Administration

Court of Appeals Dismisses Challenge to FMCSA's CSA Program

On June 17, 2014, in Alliance for Safe, Efficient and Competitive Truck Transportation, et al. v. FMCSA et al., 755 F.3d 946 (D.C. Cir. 2014), the U.S. Court of Appeals for the District of Columbia Circuit dismissed a petition for review brought by a group of trucking companies, transportation intermediaries, and trade associations challenging FMCSA's Compliance, Safety, Accountability (CSA) program and related Safety Measurement System (SMS). Petitioners asserted that a series of PowerPoint presentations on SMS posted on FMCSA's website in 2012 should have been subject to notice and comment rulemaking because they represented an "astonishing" change in agency policy. Petitioners further claimed that the PowerPoint materials constituted a de facto procedure for issuing a safety rating in violation of 49 U.S.C. § 31144 and that FMCSA abdicated its statutory obligation to provide uniform safety fitness standards, thereby exposing shippers to a patchwork of state tort law and placing the burden of assessing safety on shippers. Petitioners also argued that the use of allegedly flawed SMS methodology unfairly prejudices the ability of small carriers to compete in the market.

The court found that the PowerPoints were not astonishing and merely described SMS. The petition for review was untimely because it was filed more than two years after FMCSA's April 2010 Federal Register notice announcing SMS and more than one year after SMS implementation in December 2010. The court determined that the

agency's guidance in the PowerPoints was not a new, far-reaching, or astonishing reversal of agency policy as characterized by petitioners. The PowerPoint presentations stated that review of a motor carrier's official safety rating and insurance status in FMCSA data systems, as well as the carrier's prioritization status in SMS, provides "an informed, current and comprehensive picture of a motor carrier's compliance standing" and recommended that the public use such FMCSA information "to help make sound business judgments." This guidance was substantively no different than the guidance FMCSA provided in the 2010 Federal Register notice announcing SMS. Because the PowerPoint presentations did not amount to a rule, regulation, final order, change in policy, or substantive reconsideration or alteration of the SMS methodology, they were not subject to judicial review.

FMCSA Prevails in TRO Proceeding

On or about June 12, 2014, Cavalier Coach Corporation, a motor carrier of passengers, filed a Motion for an Ex Parte Temporary Restraining Order, Preliminary Injunction and Permanent Injunction in the U.S. District Court for the District of Massachusetts in Cavalier Coach Corporation v. Foxx, et al., (D. Mass. No. 14-12499). FMCSA had issued a proposed conditional safety rating to the motor carrier on April 30. Cavalier had submitted a request for upgrade on or about May 15 and sought a TRO to prevent the conditional safety rating from becoming final before FMCSA could complete its review of the upgrade request. A hearing was held on June 13, in which the court denied plaintiff's request for the TRO and preliminary injunction, finding that it had not shown irreparable harm. The parties filed a joint stipulation dismissing the case on August 12.

Briefing Completed in Tenth Circuit TransAm Trucking Case

On August 26, 2014, the parties completed briefing on the merits in TransAm Trucking, Inc. v. FMCSA (10th Cir. No. 14-9503). TransAm alleges that FMCSA failed to comply with an October 17, 2013, settlement agreement that resolved TransAm's previous Tenth Circuit petition for review, TransAm Trucking, Inc. v. FMCSA (10th Cir. No. 13-9572). In that case, TransAm challenged FMCSA's citation of a violation of 49 C.F.R. § 395.8(k)(1) and the resulting proposed "conditional" safety rating. Pursuant to the settlement agreement, FMCSA agreed to issue an amended compliance review that did not contain any reference to the violation or the proposed "conditional" safety rating. FMCSA removed the "conditional" rating from the compliance review, leaving the document as an unrated review. Because the initial investigation of TransAm had begun as a focused investigation, rather than a comprehensive compliance review applying the full safety rating methodology in 49 C.F.R. Part 385, Appendix B, the investigation could not have resulted in a "satisfactory" safety rating under FMCSA regulations. Therefore, removal of the "less than satisfactory" or "conditional" safety rating in the amended compliance review did not include an updated safety rating. TransAm had a current "satisfactory" safety rating, however, due to corrective action taken pursuant to 49 C.F.R. § 385.17.

TransAm claims that a "Compliance Review" by regulatory definition must contain a safety rating and that FMCSA's failure to issue TransAm an amended compliance review that contains a

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

District Court Consolidates Cases Challenging the Agency's Pre-Employment Screening Program

On April 29, 2014, the U.S. District Court for the District of Columbia District consolidated Owner-Operator Independent Drivers Asssociation, et al. v. USDOT, et al. (D.D.C. No. 12-1158) and Weaver, et al. v. FMCSA, et al., (D.D.C. No. 14-0548) after the U.S. Court of Appeals for the District of Columbia Circuit held in Weaver, et al. v. FMCSA, et al., 744 F.3d 142 (D.C. Cir. 2014), that it lacked Hobbs Act jurisdiction and transferred the case to the District Court. In both cases, OOIDA challenges the agency's use of violation data recorded in the Motor Carrier Management Information System (MCMIS) and released to employers under the Agency's Pre-employment Screening Program (PSP). The lawsuits focus on FMCSA's failure to remove records of violations related to citations that have been dismissed by a judge or administrative tribunal. Plaintiffs allege that the agency has violated the APA and the Fair Credit Reporting Act (FCRA).

On June 2, the government filed a motion to dismiss based on (1) lack of plaintiffs' standing for violations no longer in PSP, (2) lack of jurisdiction on the FCRA claim because Congress did not waive sovereign immunity for such lawsuits, (3) failure to exhaust administrative remedies for one plaintiff, and (4) lack of an identifiable final agency action subject to APA review.

Safety Advocates and Teamsters Seek Writ of Mandamus Addressing Agency's Delay in Issuing Entry-Level Driver Training Rule

On September 18, 2014, Advocates for Highway and Auto Safety, the International Brotherhood of Teamsters, and Citizens for Reliable and Safe Highways petitioned the U.S. Court of Appeals for the District of Columbia Circuit for a writ of mandamus in Advocates for Highway & Auto Safety, et al. v. Foxx, et al, (D.C. Cir. No. 14-1183), alleging that FMCSA failed to promulgate a final regulation on entry-level driver training (ELDT) requirements for commercial motor vehicle operators within one year, as required by 49 U.S.C. § 31305 (MAP-21). MAP-21 directed the Agency to issue,

within one year of its enactment, final regulations establishing minimum ELDT requirements for an individual operating a commercial motor vehicle. The petitioners claim that the Agency's failure to issue final regulations on the topic by that date, October 1, 2013, constitutes an unreasonable delay, resulting in agency action "unlawfully withheld" and "not in accordance with law," in violation of the APA, 5 U.S.C. § 706. Petitioners request that the Court of Appeals compel the agency to publish proposed regulations on ELDT requirements within 60 days of the court's order and to issue a final rule within 120 days thereafter.

FMCSA Sued under FTCA for 2011 Motorcoach Crash, One Case Dismissed

On April 2, 2014, two plaintiffs filed a complaint against DOT, FMCSA, and FMCSA's Southern Service Center alleging gross negligence and seeking $36 million in damages under the Federal Tort Claims Act (FTCA) in connection with the May 31, 2011, Sky Express bus crash in which the plaintiffs suffered serious injuries. Plaintiffs in Chhetri, et al. v. United States (N.D. Ga. No. 14-00975) allege that one or more FMCSA employees, acting within the course and scope of their employment, were grossly negligent when they granted Sky Express a 10-day extension of the effective date of an unsatisfactory safety rating in violation of the regulatory requirements for such extension. Plaintiffs also allege that FMCSA did not have statutory authority to grant Sky Express a 10-day extension of the unsatisfactory safety rating.

On April 28, 2014, a second lawsuit arising from the May, 2011 Sky Express bus crash, Pornomo v. United States (E.D. Va. No. 14-301) similarly alleged that DOT and FMCSA were negligent in the wrongful death of plaintiff's father and seeking $3 million in damages.

In both cases, the Government has filed motions to dismiss asserting that plaintiffs' claims are barred by the FTCA's discretionary function exception and the FTCA's private liability analogue requirement.

Plaintiffs allege that the discretionary function exception to FTCA liability does not apply because FMCSA exceeded its authority under 49 U.S.C. § 31144(c)(2) when it failed to place Sky Express out of service on the 46th day after the agency issued a proposed unsatisfactory safety rating. Sky Express had requested a change in the safety rating based upon corrective action undertaken by the carrier, which included "a written description of corrective actions taken, and other documentation" for FMCSA to consider pursuant to 49 C.F.R. § 385.17(c). The FMCSA Field Administrator for the Southern Service Center determined that he could not decide whether to grant a carrier's request for change in rating solely based on the documentation submitted by the carrier and elected to consider other available information – in this case information collected during a second compliance review conducted to determine whether the corrective action was sufficient. Currently, a request for change in safety rating based upon corrective action will not stay the effective date (46th day) of a final Unsatisfactory safety rating that requires a carrier to cease operations under 49 C.F.R § 385.17(f). At the time of the crash, however, 49 C.F.R § 385.17(f) provided that "if the motor carrier has submitted evidence that corrective actions have been taken . . . and the FMCSA cannot make a final determination within the 45-day period, the

period before the proposed safety rating becomes final may be extended for up to 10 days at the discretion of the FMCSA."

On October 20, 2014, the U.S. District Court for the Eastern District of Virginia granted FMCSA's motion to dismiss the complaint in the Pornomo case for lack of subject matter jurisdiction under the FTCA based on the discretionary function exception. Pornomo v. United States, 2014 WL 5341021 (E.D. Va. 2014).

Commercial Drivers File Class Action for Alleged Privacy Act Violations under the Pre-employment Screening Program, FMCSA Moves to Dismiss

On July 18, 2014, six commercial motor vehicle drivers filed a class action complaint for damages against FMCSA in the U.S. District Court for the District of Massachusetts alleging violations of the Privacy Act, 5 U.S.C. § 552a. Plaintiffs in Flock, et al. v. USDOT, et al. (D. Mass. No. 14-13040) argue that FMCSA intentionally, willfully, and unlawfully disseminated to motor carrier employers through its Pre-Employment Screening Program (PSP) inspection reports containing driver safety violations that had not been determined by the Secretary to be "serious driver-related safety violations," as defined in 49 U.S.C. § 31150 (PSP authorizing statute).

Plaintiffs seek to certify a class of all drivers for which FMCSA prepared a PSP report for dissemination to potential employers for the two-year period immediately preceding the filing of the complaint. Plaintiffs claim that the $10.00 fee required to obtain a copy of a PSP report from NIC, FMCSA's contractor, is unauthorized under 49 U.S.C. § 31150 and imposes on them an economic burden, and further, that the unlawful PSP reports have diminished the economic value of their services as commercial motor vehicle drivers. Plaintiffs seek statutory damages of $1,000 per safety violation that was not certified as a "serious driver-related safety violation" for each of the plaintiff-drivers and members of the certified class.

On October 24, 2014, FMCSA filed a motion to dismiss plaintiffs' complaint. FMCSA argued first that plaintiffs have failed to allege injury caused by FMCSA's actions sufficient to establish their standing to sue the agency. Second, FMCSA argued that there can be no Privacy Act violation where, as here, the agency releases the safety records of a motor carrier driver only with the driver's consent and pursuant to the routine uses articulated in Statement of Records Notices that comply with Privacy Act requirements under 5 U.S.C. § 552a(b)(3).

Tour Operator Sues FMCSA for Failure to Reinstate Operating Authority

On June 3, 2014, in Haines v. FMCSA, et al. (E.D. Mich. No. 14-12194), Roger Haines, the owner of Haines Tours located in Gladwell, Michigan, sued FMCSA, the Field Administrator for the Midwestern Service Center, and the FMCSA Administrator, alleging that the agency and its officials violated the APA and his constitutional rights by exceeding the bounds of their statutory authority and imposing restrictions on his operation "beyond that required to abate the hazard." FMCSA had issued an imminent hazard order to Haines Tours in June 2011, after Michigan law enforcement officials notified FMCSA that Haines had allowed six members of his family – including several children – to ride in the

luggage compartment of a motorcoach on a trip from Michigan to an amusement park in Ohio. The Imminent Hazard Order required that Haines immediately cease his tour bus operations.

Haines claims that he had been using the luggage compartment as a sleeper berth and FMCSA approved such use under 49 C.F.R. § 393.76, the regulation governing sleeper berths. In fact, Haines was cited in a 2010 Compliance Review for having a non-compliant sleeper berth in two of the three buses that the agency inspected. A letter from the FMCSA Assistant Administrator for Policy dated May 16, 2011, indicates that a sleeper berth can be located in a cargo compartment so long as it meets all of the requirements of 49 C.F.R. § 393.76, which include adequate ventilation and other safety features. Haines regained his authority to conduct intrastate operations in March 2012, and his authority to operate interstate on January 14, 2013, following FMCSA's determination that he was fit, willing, and able to comply with the Federal Motor Carrier Safety Regulations.

Haines's constitutional claims, based on violations of the right to due process and equal protection under the law, allege that the agency failed to orderly adjudicate its determination that Haines posed an imminent hazard to public safety, failed to allow him to appeal the determination vacating the rescission order on June 16, 2011, and, from 2011 to 2012, was unresponsive to Haines's attempts to "open a dialogue" concerning the Agency's determinations.

Haines alleges that the agency violated his right to "similar treatment" as accorded to other tour bus operators under the Equal Protection Clause of the 14th Amendment to the Constitution. Haines alleges that the decision to vacate the rescission of the imminent hazard stemmed from personal animus flowing from his cooperation in media coverage of the situation.

Federal Railroad Administration

Ninth Circuit Rules in Favor of FRA in Hours of Service Laws Case

On May 8, 2014, the U.S. Court of Appeals for the Ninth Circuit denied the United Transportation Union's (UTU) petition for review of FRA's application of the "designated terminal" provision of the hours of service laws (HSL). United Transp. Union v. LaHood, et al., 750 F.3d 1109 (9th Cir. 2014).

In a May 18, 2012, letter to FRA, UTU claimed that the Union Pacific Railroad's (UP) establishment of a designated terminal at Big Rock/Wash, California would violate the existing collective bargaining agreement (CBA) with UP and sought an order from FRA to prevent the establishment of the proposed designated terminal. When FRA investigated UTU's claims, UP responded that the proposed designated terminal is to accommodate new service and that the CBA permits such a designated terminal to be established on a trial basis while negotiations continue or the matter is submitted to arbitration. In FRA's September 30 response letter to UTU, the agency agreed with UTU that the HSL require that the location of designated terminals be determined by reference to CBAs applicable to a particular crew assignment, but FRA pointed out that the agency lacks the statutory authority to make that determination. FRA's letter further stated that only a body duly constituted

under the Railway Labor Act (RLA) is authorized to render such a determination. On October 28, 2012, UTU filed a petition for review challenging FRA's decision.

In its decision, the Ninth Circuit found in FRA's favor and upheld FRA's conclusion that it lacked jurisdiction to resolve the dispute between UP and UTU because it was fundamentally an issue of contract interpretation, which is outside the scope of FRA's authority. The panel found that FRA can review a CBA to determine which terminals are designated terminals. FRA cannot, however, interpret a CBA to determine how a terminal should be designated. As the panel concluded that the dispute pertained to the interpretation of the CBA, it held that the dispute should be governed by the resolution procedures of the RLA, and was beyond the adjudicatory powers of FRA.

Federal Transit Administration

Court Issues Summary Judgment Order and Narrow Injunction in Los Angeles Regional Connector Light Rail Project

On May 29, 2014, the U.S. District Court for the Central District of California ruled on the parties' cross-motions for summary judgment in three NEPA challenges to segments of the Regional Connector Project, a 1.9-mile, mostly underground, light rail line connecting the existing Metro Blue, Gold, and Exposition lines through downtown Los Angeles, ruling in favor of FTA and the Los Angeles County Metropolitan Transportation Authority (LACMTA) on all claims, except one. Plaintiffs in Today's IV, Inc. v. FTA (C.D. Cal. No. 13-00378) (Today's IV), 515/555 Flower Associates, LLC v. FTA (C.D. Cal. 13-00453) (Flower Associates), and Japanese Village, LLC v. FTA (C.D. Cal. No. 13-00396) (Japanese Village) each filed lawsuits challenging FTA's Record of Decision (ROD) for the Project. Plaintiff in Japanese Village alleged that defendants failed to adequately evaluate the impacts from constructing and operating a light rail line under the Japanese Village Plaza in Little Tokyo. In Flower Associates and Today's IV, plaintiffs alleged that defendants failed to adequately evaluate tunneling alternatives to cut-and-cover construction along a segment of Flower Street in the Financial District.

The court rejected all but one of plaintiffs' claims. Today's IV, Inc., et al. v. FTA, 2014 WL 3827489 (C.D. Cal. 2014). On that one claim, the court held that FTA and LACMTA violated NEPA because their Final Environmental Impact Statement failed to evaluate the sequential excavation mining (SEM) and open-face tunneling alternatives to cut-and-cover construction in the Financial District. As a result, on September 12, 2014, the court issued a Remedy Order, which: (1) ordered FTA to further evaluate the SEM and open-face tunneling alternatives; (2) partially vacated the ROD with respect to FTA's approval of the cut-and-cover construction in the Financial District; and (3) issued a narrow injunction enjoining cut-and-cover construction in the Financial District. Pursuant to the Remedy Order, plaintiffs, FTA, and LACMTA filed competing proposed Final Judgments that further define the scope and procedure for lifting the narrow injunction and are awaiting the District Court's Final Judgment.

FTA Prevails on Summary Judgment in Challenge to Oregon Project, Plaintiff Appeals

On July 16, 2014, the U.S. District Court for the Western District of Washington ruled in FTA's favor on summary judgment in Our Money Our Transit v. FTA, 2014 WL 3543535 (W.D. Wash. 2014), a NEPA challenge to the Environmental Assessment (EA) and Finding of No Significant Impact for the Western Eugene Emerald Express project. The court held that (1) the project history demonstrated that the alternatives analysis (AA) process conducted by Lane Transit District (LTD) evaluated all reasonable alternatives and, that a proper EA has a less rigorous standard for alternative evaluations than what is required for an Environmental Impact Statement; (2) that the project's prior planning and AA actions show that the project purpose and need were the result of a long, careful and deliberate process and, therefore, was not unreasonable; (3) the project NEPA documents show that the potential environmental impacts were sufficiently analyzed; and (4) that the mitigation measures were sufficiently detailed and developed to a reasonable degree.

The project consists of adding 8.8-miles (round trip) bus rapid transit (BRT) service to two existing BRT lines in Eugene, Oregon. The new alignment, located within and primarily along existing public roadways, includes the construction of 5.9 miles of new BRT lanes and 13 new BRT stations. The project sponsor, LTD, expects to begin building the project in 2014-15 and to start operating it in 2017. FTA, which was initially the sole defendant named, was later joined by LTD.

On September 10, 2014, Our Money Our Transit appealed the district court decision to the U.S. Court of Appeals for the Ninth Circuit. Our Money Our Transit v. FTA (9th Cir. 14-35766). Opening briefs are due December 19, 2014, and January 19, 2015, respectively.

Cross-Motions for Summary Judgment Filed in Lawsuits Challenging Westside Subway Extension Project in Los Angeles

Beverly Hills Unified School District (School District) and City of Beverly Hills (City) filed lawsuits in the U.S. District Court for the Central District of California challenging FTA's Record of Decision (ROD) for the Westside Subway Extension Project, a 9-mile heavy rail subway that would operate from the existing Metro Purple Line to the West Los Angeles Veteran's Administration Hospital. Beverly Hills Unified School Dist. v. FTA (C.D. Cal. No. 12-09861); City of Beverly Hills v. FTA (C.D. Cal. No. 13-01144). The School District and City generally allege that FTA and the Los Angeles County Metropolitan Transportation Authority (LACMTA), the local project sponsor, (1) violated NEPA by failing to adequately review the safety and seismic impacts related to constructing and operating the Century City station and resulting alignment under the Beverly Hills High School; (2) violated Section 4(f) of the Department of Transportation Act by failing to evaluate the use of the Beverly Hills High School campus, which plaintiffs claim is a protected historic and recreational resource protected under Section 4(f); and (3) violated the Clean Air Act by failing to conduct a hot spot analysis of construction sites. On July 10, 2014, plaintiffs filed their respective motions for summary judgment. On August 17, FTA filed oppositions to the

Karst Environmental Education and Protection, Inc. v. FHWA, 559 Fed. Appx. 421 (6th Cir. 2014) (Sixth Circuit upholds FHWA's floodplains analysis in Kentucky project), page 31.

Land Parks Alliance v. FTA, et al. (D. Minn. No. 14-3391) (new lawsuit challenges Minneapolis-area light rail line), page 51.

Latin Americans for Social and Economic Development, et al. v. FHWA, et al., 756 F.3d 447 (6th Cir. 2014) (Sixth Circuit win in the Detroit bridge case), page 28.

Liberty Global Logistics LLC, et al. v. MARAD, 2014 WL 4388587 (E.D.N.Y. 2014) (dismissal of all counts in maritime security program challenge), page 52.

Lyons, et al. v. FAA (9th Cir. No. 14-72991) (citizens challenge Northern California OAPM), page 26.

Metro Aviation, Inc. v. United States, 2014 WL 2708630 (D. Utah 2014) (court finds plaintiffs' claims for contribution and indemnity barred under Montana and Utah law, denies equal protection challenge), page 17.

Midwest Fence Corporation v. USDOT (N.D. Ill. No. 10-05627) **(**summary judgment briefs filed in Illinois challenge to DBE program), page 13.

Municipality of Anchorage v. United States (Fed. Cl. No. 14-166) (Anchorage sues MARAD over Port of Anchorage Intermodal Expansion Project), page 53.

National Federation of the Blind, et al. v. USDOT, et al. (D.D.C. 14-00085) (DOT moves to dismiss challenge to airport kiosk accessibility rule), page 13.

Our Money Our Transit v. FTA, 2014 WL 3543535 (W.D. Wash. 2014) (FTA prevails on summary judgment in challenge to Oregon project, plaintiff appeals), page 50.

Owner-Operator Independent Drivers Association v. USDOT, et al., 724 F.3d 230 (D.C. Cir. 2013), cert. denied, 134 S. Ct. 2841 (U.S. June 23, 2014) (No. 13-1126) (Supreme Court denies review of decision dismissing challenge to the national certified medical examiner final rule), page 9.

Owner-Operator Independent Drivers Asssociation, et al. v. USDOT, et al. (D.D.C. No. 12-1158) (district court consolidates cases challenging the agency's pre-employment screening program), page 45.

Perez v. Mortgage Bankers Association (No. 13-1041) (Supreme Court considers whether changes to interpretive rules require notice and comment), page 8.

Pornomo v. United States, 2014 WL 5341021 (E.D. Va. 2014) (FMCSA sued under FTCA for 2011 motorcoach crash, one case dismissed), page 46.

Pucciariello v. United States, 116 Fed. Cl. 390 (2014) (Court of Federal Claims finds 46 U.S.C. § 46110 precludes Tucker Act jurisdiction), page 20.

RB Jai Alai, LLC v. Secretary of Florida Department of Transportation, et al. (M.D. Fla. 13-1167) (lawsuit challenging single point urban interchange project continues), page 40.

Reed v. Town of Gilbert (No. 13-502) (U.S. files Supreme Court amicus brief in First Amendment challenge to local sign ordinance), page 7.

Scenic America, Inc. v. LaHood, et al., 2014 WL 2803084 (D.D.C. 2014) (district court upholds FHWA's outdoor advertising guidance), page 33.

Sheble v. Huerta, 755 F.3d 954 (D.C. Cir. 2014) (D.C. Circuit upholds FAA's termination of a Designated Pilot Examiner appointment), page 17.

Sierra Club, et al. v. U.S. Army Corps of Engineers, et al., 2014 WL 4066256 (D.D.C. 2014) (court dismisses environmental groups' NEPA claims in challenge to new oil pipeline, plaintiffs appeal), page 55.

Sierra Club, et al. v. USDOT (9th Cir. No. 14-72802) (environmental groups seek order prohibiting the transport of crude oil in DOT-111 tank cars), page 15.

Snyder Computer Sys., Inc. v. USDOT, 2014 WL 1308757 (S.D. Ohio 2014) (court affirms NHTSA order on recall remedy), page 54.

Southern Environmental Law Center v. FHWA (N.D. Ga. No. 13-2073) (adverse decision, settlement in FOIA fee waiver case), page 36.

Today's IV, Inc., et al. v. FTA, 2014 WL 3827489 (C.D. Cal. 2014) (court issues summary judgment order and narrow injunction in Los Angeles Regional Connector light rail project), page 49.

TransAm Trucking, Inc. v. FMCSA (10th Cir. No. 14-9503) (briefing completed in Tenth Circuit TransAm trucking case), page 44.

Tulsa Airports Improvement Trust v. United States (Fed. Cl. No. 13-906) (FAA files second motion to dismiss Tulsa airport's amended complaint in lawsuit for noise abatement program costs), page 27.

Turturro v. United States, 2014 WL 4188076 (E.D. Pa. 2014) (court rejects "startle theory" of causation, grants summary judgment to United States), page 19.

United States v. June (No. 13-1075) (Supreme Court to hear FHWA Federal Tort Claims Act case), page 3.

United Steel, Paper and Forestry, Rubber Manufacturing, Energy, Allied Industrial and Service Workers International Union, et al., v. FHWA, et al. (D.D.C. No. 13-1301) (FHWA seeks summary judgment in Buy America case), page 39.

United Transportation Union v. LaHood, et al., 750 F.3d 1109 (9th Cir. 2014) (Ninth Circuit rules in favor of FRA in hours of service laws case), page 48.

Veridyne Corporation v. United States, 758 F.3d 1371 (Fed. Cir. 2014) (MARAD prevails in Federal Circuit Contract Disputes Act/False Claims Act case, petition for rehearing filed), page 52.

Weaver, et al. v. FMCSA, et al., (D.D.C. No. 14-0548) (district court consolidates cases challenging the agency's pre-employment screening program), page 45.

Willis Knighton Medical Center et al., v. LaHood, et al., 2014 WL 3748541 (W.D. La. 2014) (Louisiana district court dismisses Complaint alleging violation of the Federal Aid Highways Act), page 36.