



DOT LITIGATION NEWS

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Supreme Court Litigation

United States Files Amicus Brief Addressing Constitutionality of Implied Consent Laws in Drunk Driving Prosecutions

On March 22, 2016, the United States filed its brief as amicus curiae in the Supreme Court in Birchfield v. North Dakota, et al. (No. 14-1468), a set of cases involving important constitutional questions about state implied consent laws applicable to prosecutions arising out of drunk driving offenses. DOT and NHTSA assisted the Solicitor General's Office in developing the arguments presented in the government's brief.

The Court is considering three different cases involving the constitutionality of chemical tests relating to alcohol-impaired driving offenses. In Birchfield, the petitioner was arrested after driving his car into a ditch, failed field sobriety tests, and had a preliminary breath test indicating that his blood alcohol content (BAC) was well above the legal limit. Following his arrest, the officer read a state implied-consent advisory stating that Birchfield was required to consent to a chemical test and that refusal was punishable by law in the same way as a driving under the influence (DUI) offense. Birchfield refused to take a blood test and was charged with violating the state implied-consent statute. The trial court denied his motion to dismiss the charge on Fourth Amendment grounds, and he entered a conditional guilty plea. The state supreme court affirmed his conviction, concluding that the implied consent statute was reasonable under a constitutional balancing between Birchfield's privacy interests and the public interest in combating drunk driving.

In Bernard v. Minnesota (No. 14-1470), the petitioner was arrested at a boat launch when he was identified as the person who drove a truck into a river. Officers detected signs that he had been drinking, which he admitted, but he refused to do a field sobriety test. Bernard also refused to consent to a breath test and was charged under the state's test refusal statute. He contended that the refusal charge deprived him of due process by penalizing him for failing to submit to an unreasonable warrantless search. The Minnesota Supreme Court disagreed, concluding that a breath test is a lawful search incident to arrest.

In Beylund v. Levi (No. 14-1507), the petitioner was arrested after a traffic stop when the officer smelled alcohol and noticed an empty container in the vehicle. The petitioner refused to perform field sobriety tests and was arrested. He consented to a blood test, which showed that his BAC level was about three times the legal limit. An administrative officer suspended his driving privileges for two years, finding probable cause of DUI from the evidence from the traffic stop and chemical test. The state courts refused to grant Beylund's appeal of that decision, concluding that the implied consent statute was constitutional and that Beylund had not been subjected to any unconstitutional "condition" on his right to drive.

Each of the three petitioners sought review in the Supreme Court, contending that the states' use of criminal sanctions to enforce implied-consent laws is unconstitutional. In its amicus brief, the government disagreed with that contention and supported the positions of the states. At the outset, the government explained the substantial federal

interest in these issues, particularly from the perspective of DOT and NHTSA. As the brief explained, NHTSA “conducts research and develops traffic safety programs, endorses chemical-testing requirements and criminal penalties for drivers who refuse to comply.” Furthermore, motor vehicle crashes cause over 32,000 fatalities per year, and nearly a third of fatal crashes involve drivers who were legally impaired by alcohol. Thus, DOT and NHTSA work actively to find ways to address the problem of drunk driving and to assist state authorities in finding ways to enhance enforcement efforts directed at impaired driving. Furthermore, as to other federal interests relating to this case, the government pointed out that in the National Park System, it is a criminal offense to refuse a chemical test requested by an officer with probable cause to believe that a driver is impaired.

In reaching its conclusion that the implied consent laws at issue in this case pass constitutional muster, the government advanced several arguments. First, the government argued that states may validly use criminal sanctions to enforce a driver’s legal obligations. All 50 states have conditioned permission to drive on the requirement of consent to chemical testing. The Supreme Court has routinely held that such implied consent laws are constitutionally valid, most recently, in Missouri v. McNeely, 133 S. Ct. 1552 (2013). Such laws, which DOT and NHTSA have long supported, allow law enforcement to obtain the most reliable evidence of intoxication and help to eliminate the need for forced, nonconsensual blood draws, which states typically seek to avoid so as to prevent dangerous confrontations between suspects and police officers.

Second, these state implied consent laws do not impose any unconstitutional conditions upon drivers. Conditioning a drivers’ license upon consent to perform a chemical test is constitutionally reasonable, and the “unconstitutional conditions” doctrine only applies where the imposed condition is not connected to the benefit being conferred. No such circumstance exists here because the benefit of driving is closely connected to the condition of consent to a chemical test that helps to ensure that drivers are not impaired.

Third, the criminal sanctions imposed here are reasonable and proportionate to the offense “because they involve only the level of sanctions necessary to eliminate drunk drivers’ incentive to refuse compliance with implied-consent obligations.” It is too tempting for suspects to simply refuse a chemical test if there is no threat of criminal punishment for such a refusal. Moreover, it does not suffice to contend, as petitioners do, that states could use other methods to prosecute drunk drivers, because state authorities need a wide array of strategies and enforcement options at their disposal to combat drunk driving.

Finally, the government argued that even if there were constitutional problems with respect to implied-consent provisions generally, states may impose criminal penalties for refusal to take a breath test when probable cause of intoxication is established. Warrantless breath tests are constitutionally acceptable, when based upon probable cause, because the intrusion of a breath test is minimal, particularly when compared to blood tests.

Oral argument in this case is scheduled for April 20, 2016.

Departmental Litigation in Other Federal Courts

Ninth Circuit Issues Ruling on Preemption Case Challenging Accessibility of Airline Ticket Kiosks

On January 19, 2016, almost five years after petitioner National Federation of the Blind appealed a decision of the U.S. District Court for the Northern District of California dismissing a suit challenging the accessibility of United Airlines' ticket kiosks, the U.S. Court of Appeals for the Ninth Circuit affirmed the District Court's dismissal in National Federation of the Blind v. United Airlines, 2016 WL 229979 (9th Cir. 2016).

On April 25, 2011, the U. S. District Court for the Northern District of California dismissed National Federation of the Blind v. United Air Lines, 2011 WL 1544524 (N.D. Cal. 2011) , a suit that challenged the accessibility of United Airlines' ticket kiosks on the ground that they violated California disability law because the kiosks were not accessible to the blind. At the court's request, the United States filed a Statement of Interest brief arguing that the plaintiff's claims were preempted under the Air Carrier Access Act (ACAA) and the Airline Deregulation Act (ADA). The court agreed with the views of the United States and found field preemption under the ACAA because DOT had adopted a regulation addressing kiosk accessibility, thereby pervasively regulating this area. Further, the court ruled that airport ticket kiosks are "services" under the ADA, and thus plaintiff's claims are expressly preempted because the ADA prevents states from adopting a law or regulation related to the price, route or service of an air carrier.

In May 2011, plaintiff appealed, and briefing was completed in November 2011. The court held oral arguments on November 8, 2012. After oral arguments, the Supreme Court granted certiorari in Northwest, Inc. v. Ginsberg, 134 S. Ct. 1422 (2014), an ADA preemption case that petitioner relied upon in its brief. In response, the Ninth Circuit vacated submission of the case pending the issuance of a decision in Ginsberg. The Supreme Court issued a decision in Ginsberg in April 2014, and on January 19, 2016, the Ninth Circuit affirmed the district court's decision.

The Ninth Circuit found that petitioner's state law claim was impliedly field preempted by the ACAA and DOT's regulation on kiosk accessibility. The court found that DOT's regulation was pervasive and occupied the field of kiosk accessibility. While the Ninth Circuit agreed with the district court on the issue of field preemption, two judges in the three judge panel departed from the district court in finding that petitioner's state law claims were not expressly preempted under the ADA. Adhering to Ninth Circuit precedent, the court reiterated its narrow definition of what constitutes a "service" under the ADA and found that United's kiosks did not fall within the definition of "service." Judge Kleinfeld filed a concurring opinion and agreed with the court's implied field preemption analysis, but did not join the part of the opinion concerning express preemption. Judge Kleinfeld noted that the court's decision on implied preemption controlled the outcome of the case, and thus, the discussion on express preemption should be viewed as dicta.

Litigation over Discrimination by Kuwait Airways Concludes

DOT recently concluded litigation in two cases arising out of Kuwait Airways Corporation's (KAC) refusal to transport Israeli citizens seeking to travel on the carrier's flights between New York's John F. Kennedy International Airport (JFK) and London Heathrow Airport (LHR). In Gatt v. Foxx (D.C. Cir. No. 14-1040), the U.S. Court of Appeals for the District of Columbia Circuit issued an order on January 14, 2016, dismissing a petition for review filed against DOT, and in Kuwait Airways Corporation v. USDOT (D.C. Cir. No. 15-1429), on February 29, 2016, the circuit court also dismissed a petition for review on the stipulation of the parties.

These cases originally arose on a complaint filed with the Department's Office of Aviation Enforcement and Proceedings in late 2013. In that complaint, Eldad Gatt, an Israeli citizen, claimed that he had been unable to purchase a ticket on a flight between JFK and LHR because of his Israeli national origin. He alleged that when he went to purchase a ticket on KAC's website, it required him to choose both his passport-issuing country and his nationality, but that there was no option to select Israel. Thus, Gatt claimed that KAC's conduct violated the provisions of 49 U.S.C. § 40127, which prohibits KAC and other carriers from "subject[ing] a person in air transportation to discrimination on the basis of race, color, national origin, religion, sex, or ancestry."

After an investigation, DOT issued a determination in early 2014, concluding that KAC had not engaged in unlawful discrimination. That determination was based on the rationale that the carrier's conduct rested upon a permissible ground, *i.e.*, Gatt's citizenship, rather than his

membership in a protected class under section 40127. In its letter, DOT noted that KAC had argued that it was subject to the requirements of Kuwaiti law, which effectively forbade the carrier from doing business with or providing service to Israeli passport holders. Thus, the Department declined to take further action against the carrier. Gatt then filed a petition for review in the D.C. Circuit in March 2014, seeking an order vacating DOT's determination on the ground that it was legally incorrect and was otherwise arbitrary and capricious.

After Gatt filed his petition for review in the D.C. Circuit, the parties agreed to suspend briefing pending further administrative proceedings before the agency, thereby allowing the Department to reconsider its earlier decision and decide whether to pursue further enforcement action. On January 15, 2015, the court denied Mr. Gatt's request to proceed to briefing on the merits and continued to hold the case in abeyance while the agency reconsidered the matter.

On September 30, 2015, after conducting further investigation, DOT issued its decision, concluding that KAC's refusal to carry Mr. Gatt constituted "unreasonable discrimination" under 49 U.S.C. § 41310. As DOT noted, the prohibition against unreasonable discrimination in section 41310 was derived from other well-established legal frameworks, including the Federal Aviation Act of 1958, the Civil Aeronautics Act of 1938, and the Interstate Commerce Act (ICA) of 1887, which required common carriers to provide service without "unreasonable prejudice or disadvantage." The courts have applied this principle to cases involving discrimination against passengers, particularly on the basis of race.

In this instance, DOT concluded that KAC's arguments about the prohibitions in Kuwaiti law against carrying Israeli citizens were insufficient to overcome the prohibition against unreasonable discrimination, particularly since Gatt's travel between JFK and LHR did not involve travel into Kuwait or to another country in which Gatt would not have been allowed to disembark based on the laws of that country. KAC's permit to provide scheduled foreign air transportation reinforced its obligation to comply with U.S. law, including section 41310. DOT also pointed out that KAC's conduct may violate U.S. anti-boycott laws and regulations, which are designed to prohibit and/or penalize cooperation with international economic boycotts in which the U.S. does not participate. The Kuwait law at issue here was enacted pursuant to the Arab League boycott against persons doing business with Israel, and U.S. policy has opposed such economic boycotts. Because the agency decided in Gatt's favor under section 41310, it found it unnecessary to reach the question of whether KAC's conduct also violated the anti-discrimination provisions of section 40127. Based on this determination, DOT explained that it expected KAC to come into compliance with U.S. law with respect to carriage of Israeli passengers and requested that the carrier provide an outline of how it planned to do so. In particular, DOT explained that, to avoid enforcement action, it expected KAC to sell tickets to and transport Israeli citizens between the United States and any third country where they are allowed to disembark based on the laws of that country.

On October 13, 2015, KAC sent a letter to the Department requesting reconsideration of its decision, contending that DOT misapplied the law. Furthermore, KAC asked DOT to clarify whether its decision

was a final agency action or was instead simply a preliminary determination or guidance document. On October 22, DOT responded to KAC's letter, stating that the September 30 determination was a final agency action and that the Department found no basis for reconsidering its decision. Furthermore, DOT explained that it was directing KAC to cease and desist from refusing to transport Israeli citizens between the U.S. and any third country where they are allowed to disembark based on the laws of that country and said that DOT would pursue further administrative and/or judicial action if KAC failed to comply. KAC filed an administrative Petition for Review of Staff Action on November 2, 2015, asking DOT's leadership to overturn the decision set forth in the September 30 letter signed by a DOT Assistant General Counsel. In a letter dated November 9, DOT's General Counsel responded to KAC to explain that further review of the Department's September 30 decision was unnecessary, that the September 30 decision was a final agency action, and that the Department expected KAC to cease and desist from its unlawful conduct.

After reaching this decision, in November 2015, DOT and Gatt filed motions to govern further proceedings in Gatt's pending case in the D.C. Circuit. Although Gatt wished to continue with his challenge to DOT's initial decision that KAC's conduct was not discriminatory, DOT argued that Gatt's case should be dismissed. DOT argued that Gatt's case had become moot as a result of DOT's reconsideration and September 30, 2015 decision, which superseded the determinations that Gatt had challenged.

Additionally, on November 24, 2015, KAC filed a petition for review in the D.C. Circuit seeking to overturn DOT's September 30 decision as unlawful under the APA. Gatt

filed a motion to intervene in KAC's suit on December 16, 2015, contending that the outcome of his suit against DOT would be affected by the court's disposition of the issues in KAC's case. Both DOT and KAC opposed Gatt's motion. DOT contended that Gatt's own suit was moot in light of DOT's superseding decision of September 30, 2015, ruling that KAC had engaged in unlawful discrimination against Gatt in denying him a ticket for travel between JFK and LHR and that Gatt could not resuscitate his moot claim by intervening in the KAC suit. On January 14, 2016, the D.C. Circuit granted DOT's motion to dismiss Gatt's case, concluding that the decision he was challenging, *i.e.*, the initial letter in which DOT ruled that KAC had not violated the law had been superseded by DOT's September 30, 2015 decision to the contrary.

After KAC filed its suit against DOT, in December 2015, the carrier publicly announced plans to terminate passenger service between JFK and LHR and said that it was doing so for commercial reasons. After further discussions, the parties determined that this change in conditions had mooted the underlying dispute in KAC's case against DOT. Thus, the parties stipulated to a dismissal of the case on February 26, 2016, and the court issued an order of dismissal on February 29.

The Department's September 30 ruling, KAC's October 13 letter, and the Department's October 22 response can be found at this link: <http://www.transportation.gov/airconsumer/latest-news>.

Government's Response Brief Filed in Appeal of District Court Decision Upholding Constitutionality of DBE Program

On October 24, 2015, the government filed its response brief in Midwest Fence Corporation v. USDOT (7th Cir. No. 15-1827), a constitutional challenge to the statute authorizing DOT's Disadvantaged Business Enterprise (DBE) regulations, the regulations themselves, and their implementation by the Illinois Department of Transportation in the federal-aid highway program.

Midwest Fence Corporation, a non-DBE highway construction subcontractor, challenges the DOT's DBE regulations and their implementation by arguing that DOT's DBE regulations are not narrowly-tailored to meet the compelling interest of remedying racial discrimination, a requirement of the strict scrutiny analysis that the courts apply to laws that create racial classifications. Additionally, appellant argued that the DBE regulations are unconstitutionally vague because they do not define "reasonable" for purposes of determining whether a prime contractor that has not met a DBE sub-contractor goal has nonetheless made a good faith effort in seeking DBE subcontractors.

In its appellate brief, DOT argued that the DBE regulations are narrowly-tailored to meet the compelling interest of remedying race and gender discrimination in contracting because the program allows race-conscious remedies only as a last resort, is of limited duration, provides states extensive flexibility in implementation, requires states to set both their annual overall goal and individual contract goals for DBE participation based on local market

data, limits the burden placed on third parties, and is neither over-inclusive nor under-inclusive. In response to appellant's vagueness argument, DOT argued that its regulations provide sufficient guidelines and examples by which States can assess whether a prime contractor made good faith efforts toward meeting individual contract goal requirements, instructing states to consider the quality, quantity, and intensity of the efforts that the bidder has made, and to review the performance of other bidders in meeting the contract goal.

The court heard oral argument in the case on January 12, 2016. A decision is expected later this year.

Motions to Govern Further Proceedings Filed in Judicial Challenges to the High Hazard Flammable Train Final Rule

On May 1, 2015, PHMSA and FRA issued a final rule requiring enhanced safety standards for tank cars transporting crude oil to ensure the safe transportation of flammable liquids by rail. The rule focuses on safety improvements that are designed to prevent accidents, mitigate consequences in the event of an accident, and support emergency response efforts.

After the rule was issued, multiple judicial and administrative challenges to the rule were filed. The judicial challenges were eventually consolidated in the D.C. Circuit, American Petroleum Institute v. United States (D.C. Cir. No. 15-1131). The issues raised by the judicial and administrative petitioners overlap significantly and include the applicability of the rule's definition of a high hazard flammable train, the timetable for phasing out structurally deficient tank cars, the electronically controlled pneumatic

(ECP) brakes requirement, the retrofitting timetable, and the lack of a requirement for enhanced thermal protection.

In November 2015, PHMSA and FRA denied the administrative petitions. Shortly thereafter, the petitioners and the government filed a joint motion proposing a briefing schedule and proposed briefing formats. While that motion was pending, on December 4, 2015, President Obama signed into law the Fixing America's Surface Transportation Act (FAST Act). Because certain provisions of the FAST Act addresses the issue of safe transportation of flammable liquids by rail, the petitioners and the government filed a joint motion requesting a 60-day stay to consider the FAST Act's impact on the rule and the litigation. Among other things, the FAST Act requires additional study and testing to be completed in connection with ECP braking. By December 4, 2017, the Secretary is required to make a determination, based on the results of the study and testing, about whether the ECP braking requirement is justified.

On February 8, 2016, the D.C. Circuit granted the stay motion and ordered the parties to file motions to govern further proceedings by March 1. On or around March 1, three of the seven petitioners filed motions to voluntarily dismiss their petitions. In their motions to govern further proceedings, the four remaining petitioners indicate that the only issue they intend to pursue is the ECP braking requirement. However, they urge the court to stay the litigation pending the Secretary's determination regarding the ECP braking requirement pursuant to the FAST Act. The government filed a reply on March 15 arguing that the ECP braking issue was rendered unripe by the FAST Act and, thus,

should be dismissed rather than held in abeyance.

D.C. Circuit Hears Argument in Love Field Access Dispute; District Court Issues Preliminary Injunction in Related Litigation

The Department continues to be involved in three lawsuits arising from attempts by Delta Air Lines to maintain service at Love Field airport in Dallas, Texas. The airport has a unique history. In 1979, Congress passed the Wright Amendment, which sought to protect the newly-constructed Dallas-Ft. Worth International Airport by generally prohibiting passenger air service between Love Field and destinations outside of Texas and the immediately adjoining states. In 2006, the Wright Amendment Reform Act phased out those restrictions, but capped the number of gates at Love Field at twenty gates.

Prior to 2014, Delta was using gate space at Love Field pursuant to a sublease with American Airlines. When American agreed to divest its Love Field gates as part of the settlement of an antitrust suit challenging its merger with U.S. Airways, Delta's sublease was terminated. Delta asked the other airlines leasing space at Love Field, as well as the City of Dallas (the airport's owner), to accommodate its continued operation of five daily roundtrip flights. Southwest Airlines – which leases 16 of the airport's 20 gates, and has subleased an additional two gates – opposed Delta's requests. The City of Dallas asked DOT for guidance. DOT responded by sending two guidance letters, dated December 17, 2014 and June 15, 2015, describing its views as to the scope of some of the City's relevant legal obligations, including under the assurances the City

made to the FAA in connection with federal airport improvement grants.

Southwest has petitioned for review of each of DOT's two letters in the U.S. Court of Appeals for the District of Columbia Circuit. Southwest Airlines v. USDOT (D.C. Cir. No. 15-1036); Southwest Airlines v. USDOT (D.C. Cir. No. 15-1276). On February 12, 2016, the D.C. Circuit heard argument in the first of those proceedings. The judge's questions focused primarily on DOT's argument that because the challenged letters are nonbinding agency guidance rather than final agency actions, the Court does not have jurisdiction over Southwest's challenges. The Court has stayed the second proceeding pending resolution of the first.

Separately, the City of Dallas brought suit in the U.S. District Court for the Northern District of Texas against DOT, Delta, Southwest, and all other airlines serving Love Field or leasing gate space at the airport. City of Dallas v. Delta Air Lines, Inc., et al. (N.D. Tex. No. 15-2069). The City challenged DOT's guidance letters, and also sought declaratory relief with respect to a variety of issues. Delta and Southwest brought counterclaims against the City and crossclaims against one another, and Delta brought crossclaims against United Airlines.

Delta, Southwest, and the City all moved for preliminary injunctive relief, and the Court held a three-day hearing on those motions on September 28-30, 2015. On January 8, 2016, the Court issued a preliminary injunction requiring Southwest to continue to accommodate Delta during the pendency of the litigation. Among other things, the Court held that Delta was likely to succeed on its claims that Southwest's lease required it to share gate space with Delta if it was not fully utilizing its gates at the time of Delta's

accommodation request. Southwest has appealed the preliminary injunction decision to the U.S. Court of Appeals for the Fifth Circuit, and the district court has stayed further proceedings pending that appeal. The district court has not ruled on DOT's motion to dismiss the claims against it. Briefing is underway in the Fifth Circuit and is expected to conclude by the end of May 2016.

DOT Moves to Dismiss Challenges to the Allocation of Private Activity Bond Authority to the All Aboard Florida Passenger Rail Project

On January 19, 2016, DOT and intervenor All Aboard Florida Operations LLC (AAF) filed, in the U.S. District Court for the District of Columbia, motions to dismiss in two related cases involving AAF's passenger rail project connecting Miami and Orlando (the Project) in Indian River County, et al. v. USDOT, et al. (D.D.C. No. 15-460); Martin County, et al. v. USDOT, et al. (D.D.C. No. 15-632).

Both cases concern DOT's authority, pursuant to 26 U.S.C. § 142(m), to allow state and local governments to issue tax-exempt Private Activity Bonds (PABs) to private investors to finance certain transportation projects. In December 2014, DOT authorized a Florida state entity to issue up to \$1.75 billion in PABs on behalf of the Project. Opponents of the project, including two counties along the route, have

brought suit against DOT to vacate the PAB authorization. They allege that the Project did not meet the statutory eligibility criteria under 26 U.S.C. § 142(m), and that DOT violated the NEPA by not preparing an environmental impact statement before making the authorization.

In May 2015, the Court denied the plaintiffs' motions for preliminary injunctive relief, finding that they had not met their burden of demonstrating Article III standing to sue. After plaintiffs obtained limited jurisdictional discovery from AAF relevant to the standing issue, DOT and AAF moved again to dismiss. DOT and AAF repeat the standing argument on which they prevailed at the preliminary injunction stage: they contend that an order vacating the PAB allocation would not make it substantially less likely that AAF would complete the Project (AAF insists that it would find alternative financing), and that even a favorable decision for plaintiffs would therefore be unlikely to redress the injuries plaintiffs claim they will suffer from the Project. DOT and AAF also argue that plaintiffs' claims should be dismissed on the merits, because the Project was in fact eligible under the PAB statute and because the PAB allocation was not a "major Federal action" requiring the preparation of an environmental impact statement. Briefing on the motions to dismiss was completed on February 29, 2016.

Recent Litigation News from DOT Modal Administrations

Federal Aviation Administration

Ninth Circuit Rules for FAA in Paine Field Airport NEPA Case

On March 4, 2016, the U.S. Court of Appeals for the Ninth Circuit denied the petition for review in City of Mukilteo v. USDOT, 2016 WL 852918 (9th Cir. 2016). The Ninth Circuit held that the scope of FAA's environmental analysis was not arbitrary and capricious and that FAA was permitted under its enabling statute to express a preference for a certain outcome, *i.e.*, advocating for commercial service at Paine Field. The court determined that FAA had performed its NEPA obligations in good faith.

This case began on January 31, 2013, when the Cities of Mukilteo and Edmonds, Washington; Save Our Communities; and two individuals petitioned for review of FAA's Finding of No Significant Impact/Record of Decision (FONSI/ROD) for the Amendment to the Operations Specifications for Air Carrier Operations, Amendment to a Federal Aviation Regulations Part 139 Certificate, and Modification of the terminal building at Snohomish County Airport/Paine Field, Everett, Washington. Snohomish County Airport/Paine Field is approximately 20 miles north of Seattle. The Airport is owned and operated by Snohomish County under the County Executive and the County Council. Two airlines, Allegiant and Horizon, asked FAA to issue amendments to their operations specifications to allow scheduled commercial air service to and from Paine Field. The proposed service

would require an amendment to the Airport's existing Part 139 operating certificate as well. In response to this request, the Airport proposed to construct, using federal funding, a modular terminal building to accommodate passengers.

FAA began preparation of an Environmental Assessment (EA) in 2009 to analyze potential impacts of these proposed federal actions under NEPA. In 2012, two and a half years and approximately 4,000 public comments later, FAA released its Final EA and FONSI/ROD. Based upon a thorough analysis, the FAA determined that an environmental impact statement was not required. After the petition for review was filed and briefing completed in 2013, oral arguments were heard in June 2014. The matter was stayed soon after oral arguments due to the possibility that the terminal would not be built due to lack of funding. FAA requested that the stay be lifted in September 2015 when a private entity, Propeller Inc., agreed to fund the terminal. The Ninth Circuit lifted the stay and determined in their denial of the Petition for Review that this small change to the original project description did not warrant a supplemental EA.

D.C. Circuit Denies Challenge to Exclusion of All-Cargo Operations from New Flightcrew Rest Requirements Rule

In a *per curiam* opinion issued on March 24, 2016, the U.S. Court of Appeals for the District of Columbia Circuit denied a petition for review of FAA's decision to exclude all-cargo operations from a final rule establishing new flightcrew member duty and rest requirements for passenger

operations in Independent Pilots Association v. FAA (D.C. Cir. No. 11-1483). Pursuant to Section 212 of the Airline Safety and Federal Aviation Administration Extension Act of 2010, FAA issued Flightcrew Member Duty and Rest Requirements, 77 Fed. Reg. 330 (Jan. 4, 2012), to specify limitations on the hours for flight and duty time allowed for pilots in order to address problems related to pilot fatigue. FAA decided to exclude all-cargo operations from the rule because the costs of including them, according to a cost-benefit analysis it had completed, would significantly outweigh the benefits. Petitioner Independent Pilots Association argued that the statutory text precluded FAA from considering costs, while FAA argued that it may consider costs because the statute directs FAA to consider a list of twelve factors as well as “any other matters the Administrator considers appropriate.” Applying Chevron deference, the court found that even if the statute is ambiguous, FAA’s interpretation that the statutory text allows consideration of costs was reasonable, noting that rulemaking agencies typically consider costs when deciding whether to regulate, and it has only found agencies to be barred from considering costs when Congress has expressly prohibited it. The court also found that because FAA properly considered all relevant factors, its cost-benefit analysis was not arbitrary or capricious.

D.C. Circuit Upholds Reinstatement of FAA’s Certificate Revocation Order

On March 22, 2016, the U.S. Court of Appeals for the D.C. Circuit denied a petition for review of an NTSB pilot and mechanic certification revocation order in Lauterbach v. Huerta, 2016 WL 1104793 (D.C. Cir. 2016).

Dennis Lauterbach is a former certified aircraft mechanic and pilot who fraudulently sold helicopter rotor blades with maintenance records he had altered by whitening out entries labeling the blades unrepairable scrap. On September 28, 2015, Lauterbach petitioned for review of a final NTSB order that reinstated FAA’s 2013 permanent revocation order after appeal of an ALJ’s grant of summary judgment in his favor, thereby permanently revoking his pilot and mechanic certificates. FAA’s 2013 permanent revocation order was compelled by Lauterbach’s criminal conviction under 18 U.S.C. § 38(a)(1)(C) for the same fraud. Asserting various preclusion doctrine, double jeopardy, and due process arguments, Lauterbach contended that this revocation was barred by an earlier administrative action in which FAA and Lauterbach reached a settlement resulting in only a temporary revocation of Lauterbach’s mechanic’s certificate and no action as to his pilot’s certificate.

The D.C. Circuit, however, found that “Subsection (A) of the statute [49 U.S.C. § 44726(b)(1)(A)] plainly authorizes revocation of any airman certificate after a qualifying conviction, even if the FAA unsuccessfully pursued a prior subsection (B) administrative action based on the events underlying the conviction.” The court explained that, contrary to Lauterbach’s claims, “[r]evocation of airman certificates in those circumstances is a civil, remedial measure aimed at protecting public safety that does not offend principles of preclusion, double jeopardy, or due process.”

Court Stays Aviation Authority Challenge to Tampa International Airport Passenger Facility Charges

In December 2015 and January 2016, FAA and the Hillsborough County Aviation Authority (HCAA) participated in court-sponsored mediation in Hillsborough County Aviation Authority v. FAA (D.C. Cir. No. 15-1238), HCAA's petition for review of FAA's denial of the authority to collect Passenger Facility Charges (PFCs) at the \$4.50 level for the HCAA's Automated People Mover Project at Tampa International Airport. HCAA has agreed to submit a new application for PFC approval that combines several projects to satisfy the "significant contribution" threshold, under 49 U.S.C. § 40117(b)(4), to collect at the \$4.50 level. The parties jointly moved to stay litigation while FAA considers the new application.

Briefing Underway in Tulsa Airport Reimbursement Challenge

After transfer from the U.S. Court of Federal Claims, the U.S. Court of Appeals for the Tenth Circuit ordered a claim by the Tulsa Airports Improvement Trust (TAIT) alleging that FAA failed to reimburse TAIT for alleged eligible claims under the Airport Improvement Program (AIP) to proceed as a petition for review in Tulsa Airports Improvement Trust v. FAA (10th Cir. No. 15-5009).

TAIT filed its opening brief on December 4, 2015. TAIT asserted that FAA's December 31, 2012, letter is not a final order concerning TAIT's request for reimbursement because FAA did not follow the hearing requirements under 49 U.S.C. § 47111 for withholding payment. TAIT requested the court to compel FAA to follow

the procedures in the statute. TAIT argued in the alternative that if FAA's December 31, 2012, letter denying payment constitutes a final order, FAA's decision was arbitrary, capricious, and unsupported by the record. FAA filed its response brief on February 18, 2016. FAA argued that its December 31, 2012, letter is a final order, TAIT's petition for review is untimely, and the court should not address the merits of TAIT's claim. TAIT originally filed its claim in the Court of Federal Claims in November 2013, which was nearly a year after FAA's order. FAA asserted that TAIT did not file within the statutory 60-day review period and that pursuing a legal challenge in the wrong court is not "reasonable grounds" for untimely filing under 49 U.S.C. § 46110(a), which governs judicial review of FAA orders.

Addressing the merits, FAA refuted TAIT's claim that FAA unlawfully refused to provide a hearing under section 47111(d) because that section does not apply. FAA explained that "withholding" under § 47111(d) means holding back a payment because an airport sponsor failed to comply with the terms of an AIP grant. At issue is whether TAIT's claimed costs were allowable, not TAIT's compliance. FAA found that TAIT sought delay costs, which are not allowable for reimbursement under AIP.

FAA Brief Filed in Northern California Metroplex Challenge

On October 9, 2015, respondent FAA filed its response brief and supplemental excerpts of record in Lyons, et al. v. FAA, et al. (9th Cir. No. 14-72991), a petition for review of FAA's August 6, 2014, Final Environmental Assessment/Finding of No Significant Impact and Record of Decision for the Northern California Optimization of

Airspace & Procedures in the Metroplex (NorCal Metroplex), part of the Next Generation Air Transportation System (NextGen).

Besides arguing that petitioners' claims were without substance, FAA contended in its brief that petitioners had waived their "predetermination" and cumulative impacts analysis objections, as well as their objection that the Environmental Assessment's comparison between the action and the no-action alternatives was skewed by FAA's assumption that air traffic will increase at the same rate under both alternatives, because neither petitioners nor anyone else had raised these objections during the administrative process. FAA also argued that petitioners' complaint that FAA's noise determinations were "based on unreliable data and guesswork as to where planes would actually fly" was meritless. FAA's brief cited to its development of "an extensive database using radar records to determine existing flight tracks, and then used reasonable and established modeling techniques to determine the likely flight corridors that would result from the proposed new procedures. Those data, along with extensive data on the expected aircraft fleet, number of flights, runway use, terrain and other factors, were analyzed pursuant to FAA's established model for determining the cumulative effects of multiple route changes and their effect on noise levels over a large geographic area (the NIRS model)."

As background, the purpose of the NorCal Metroplex project is to take advantage of the benefits of performance-based navigation by implementing area navigation (RNAV) procedures to help enhance the safety and efficiency of the airspace in the NorCal Metroplex. The project involves optimized procedures serving air traffic flows into and out of four Northern California airports: San

Francisco International Airport (SFO), Oakland International Airport (OAK), Mineta San Jose International Airport (SJC), and Sacramento International Airport (SMF). The action involved no airport-related development, land acquisition, construction, ground disturbance, or increase in the number of aircraft operations within the NorCal Metroplex airspace area. In total, the General Study Area includes 11 entire counties and parts of 12 additional counties. Petitioners are residents of areas near SFO who allege that they have experienced "a dramatic and unreasonable increase in the amount of aircraft noise in their communities" as a result of the project.

Petitioners' opening brief, filed on May 22, 2015, primarily raised issues under NEPA. Petitioners challenged the failure to prepare an environmental impact statement, claim FAA relied on inadequate flight track information, and challenge the adequacy of FAA's analysis of noise and other impacts. Petitioners moved to supplement the record with post-decision material on August 7, 2015. FAA opposed the motion to supplement, and the court denied petitioners' motion on August 21.

Federal Highway Administration

Court of Appeals Affirms Dismissal of Claims against FHWA in Rhode Island Case

On February 10, 2016, the U.S. Court of Appeals for the First Circuit affirmed the district court's dismissal based on mootness of the complaint in Town of Portsmouth v. Mendez, et al., 2016 WL 524256 (1st Cir. 2016). This matter arose from the replacement and restoration of an aging

bridge spanning the Sakonnet River that connects the communities of Tiverton and Portsmouth, Rhode Island. The Record of Decision (ROD) and the Final Environmental Impact Statement (FEIS) did not include the collection of tolls as a way to finance the bridge. In September 2012, the toll-free bridge was open for usage. During the same year, the Rhode Island General Assembly enacted legislation allowing tolling on the bridge as a way to reduce the cost of upkeep and maintenance of the bridge. The following year, a reevaluation of the FEIS was issued along with a revised ROD authorizing the use of tolls. Thereafter, the State implemented tolls on the bridge.

Plaintiff filed a two-count complaint against the Rhode Island Turnpike and Bridge Authority, Rhode Island Department of Transportation, and FHWA seeking an injunction and declaratory relief, attorney fees, and general relief. The town alleged that the tolls violated the NEPA and the anti-tolling provision of Sections 129 and 301 of Title 23. The district court denied the injunction, determining that plaintiff was unlikely to prevail on the merits, in that Sections 129 and 301 did not provide a private right of action and the court lacked jurisdiction to grant an injunction under the Federal Tax Injunction Act, 28 U.S.C. § 1341.

Subsequently, plaintiff filed a motion for summary judgment seeking a favorable ruling on the anti-tolling claim. However, before the motion was decided, the General Assembly prohibited the collection of tolls on the bridge. Following the enactment of the legislation, the town filed a motion for restitution for the previous tolls collected, but stated the claim was contingent upon the granting of the summary judgment motion. Defendants filed a motion to dismiss all

claims, which was granted due to the new statute rendering the claims moot. Plaintiff appealed the dismissal.

In assessing the district court's dismissal, the appeals court reviewed the mootness decision de novo. Considering the existing law at the time of their review, the appeals court affirmed the district court's finding that the injunctive relief claim was moot since the state's removal of the tolls eliminated any continuing conduct to enjoin. Similarly, the court declared the declaratory relief claim would not survive a mootness challenge considering the controversy of the toll collection is neither immediate nor real. The town relied on the voluntary cessation exception to revive the moot claims; however, the court did not find any basis to apply the exception. The court did not apply the exception given that the U.S. Supreme Court has not applied the exception to state legislatures, and the appeals court did not find any reason to conclude the state legislature repealed the tolls with the intention of making the litigation moot.

The appeals court determined the restitution claim, unlike the claims for injunctive and declaratory relief, might not be moot for purposes of Article III jurisdiction. Although the claim might not be moot, the restitution claim would fail on the merits since the town lacks a private right of action and did not adequately allege the claim in the district court. The court barred restitution for lack of a private right of action because neither the anti-tolling provision of Section 301 of Title 23 nor NEPA provides a private right of action. Additionally, the court denied relief because the town's restitution claim was contingent on the moot claims of injunctive and declaratory relief. Therefore, the appeals court affirmed the judgment of the district court.

Court Rules in Favor of Defendants on Highway Project in Alabama

On January 19, 2016, the U.S. District Court for the Middle District of Alabama ruled in favor of FHWA and the Alabama Department of Transportation on all counts in the challenge against the Northern Beltline Project. Black Warrior Riverkeeper, Inc. v. Alabama DOT, 2016 WL 233672 (M.D. Ala. No. 11-267).

On April 12, 2011, Black Warrior Riverkeeper, Inc., by and through its counsel, Southern Environmental Law Center, filed suit against the Alabama Department of Transportation (ALDOT); ALDOT Director John R. Cooper, FHWA, and FHWA Alabama Division Administrator Mark Bartlett. Plaintiff is a non-profit corporation whose stated mission is to protect and restore the Black Warrior River. It sought preliminary and permanent injunctive relief to require defendants to comply with NEPA and stay any further actions developing the Northern Beltline until a Supplemental Environmental Impact Statement (SEIS) is prepared.

The Northern Beltline Project (the Project), originally conceived in the 1960s, entails the construction of a new 52-mile controlled-access highway from Interstate 59/20 west of Birmingham, Alabama to Interstate 59 northeast of Birmingham. The Project's purpose is to increase cross-region accessibility and to stimulate economic development. The Final Environmental Impact Statement (FEIS) was signed in June 1997, and the Record of Decision (ROD) was signed in August, 1999. A Project reevaluation commenced in April 2002. The initial focus of the reevaluation was limited to a 23-mile segment, from approximately two miles west of I-65 to I-59 northeast of Birmingham, the approved eastern terminus,

the "Initial Segment." In 2004, shortly after the Project was added to the Appalachian Development Highway System as Corridor X-1, ALDOT decided to advance a smaller, approximately 2-mile segment located between State Route (SR) 75 and SR 79 (SR 75-79 Segment). In January 2005, approximately \$8 million was allocated to the Project for right-of-way acquisition for the SR 75-79 segment. The reevaluation for this segment was approved in August 2006. FHWA completed another reevaluation of this two-mile long segment in March 2012. In issuing the Section 404 Permit for this segment, the first phase of the Project, the U.S. Army Corps of Engineers relied upon FHWA's environmental documentation, primarily the 2012 Reevaluation. Based on the issuance of the 404 Permit and the 2012 Reevaluation approval, FHWA authorized construction, and initial construction activities started in February 2014. Construction is still occurring.

Plaintiff's complaint alleged that defendants authorized funds and advanced construction of the Northern Beltline in violation of NEPA and the APA. Specifically, plaintiff argued that by issuing a reevaluation for only a small section of the Project, defendants improperly segmented the project in violation of NEPA and the CEQ's and FHWA's implementing regulations. In addition, plaintiff argued that completing a reevaluation rather than an SEIS for the entire Project constituted an unlawfully withheld or unreasonably delayed action in violation of section 706 of the APA.

The court ruled in favor of defendants, on all grounds, in a 126-page decision. The opinion addressed each of plaintiff's claims in detail, but the two most noteworthy holdings for FHWA were the court's determinations that defendants did not improperly segment the project and that

defendants did not violate the APA or NEPA by issuing the reevaluation for a two mile section of the 52 mile-long Project before determining whether an SEIS was required.

Defendants argued in their Motion for Summary Judgment that more time was required to study changes in the western section of the beltline before it could be determined whether an SEIS is necessary. Plaintiff countered that in light of the 2012 reevaluation and all other information about the impacts of the project available at that time, defendants should have concluded that changes in both the eastern and western sections of the beltline entailed environmental impacts significant enough to merit an SEIS for the entire beltline. The court ruled in favor of defendants, holding that plaintiff's claim that FHWA failed to issue an SEIS for the entire project is not justiciable as a failure to act claim, as such a decision is not a discrete, non-discretionary action that FHWA failed to take despite being legally required to do so. The court further opined that section 706(1) is not a back door through which a plaintiff may invite a court to substitute its judgment for that of the agency or to compel the agency to deploy its lawful discretion in a way preferred by the plaintiff.

Plaintiff also alleged that defendants improperly segmented the eastern and western halves of the Project by focusing its reevaluation on the two-mile segment of the Project in the east. Plaintiffs argued that this course of action effectively and impermissibly limited the range of alternative pathways for the western half of the Project. The court rejected the argument that the reevaluation of the two-mile eastern segment restricted consideration of alternatives for other reasonably foreseeable transportation improvements, and, in

addition, held that plaintiff failed to meet its burden of showing that the challenged project otherwise lacked logical termini and had no independent utility or would be unusable or an unreasonable expenditure of funds even if additional transportation improvements in the area were made.

The complaint had also challenged the Section 404 permit that the U.S. Army Corps of Engineers issued for the Project under the Clean Water Act, 33 U.S.C. § 1251, *et seq.* The court denied plaintiff's motion for summary judgment against the Corps on all grounds and granted the Corp's motion for summary judgment in all respects.

Notice of Settlement and Final Order in Florida Documented Categorical Exclusion Case

On January 29, 2016, federal and state defendants reached a settlement agreement with plaintiffs in the matter of RB Jai Alai, LLC, et al. v. Secretary of the Florida DOT, et al. (M.D. Fla. No. 13-1167). Plaintiffs and defendants filed a Notice of Settlement requesting dismissal of the action and vacatur of the court's June 30, 2015, Order granting summary judgment to the plaintiffs See 112 F. Supp. 3d 1301 (M.D. Fla. 2015). On February 2, 2016, the court issued an Order granting the parties' stipulated request for an order of dismissal. The court also vacated its June 30, 2015, order granting summary judgment in favor of the plaintiffs.

Plaintiffs commenced their lawsuit in the U.S. District Court for the Middle District of Florida on August 1, 2013, asserting claims related to the review and approval of the U.S. 17-92 Interchange at S.R. 436 (the Interchange). The lawsuit challenged the Interchange project, which proposed to

change the existing at-grade intersection to an above-grade elevated highway overpass, correcting existing deficiencies and improving system linkage. The project was approved as a categorical exclusion (CE) in 2004 and two subsequent limited scope reevaluations had been done to address design changes. The court, after raising the issues sua sponte, ruled that the project should not have been classified as a CE and that the 6-year statute of limitations was reopened each time the project was reevaluated.

Plaintiffs specifically alleged that defendants violated NEPA by failing to adequately consider the project's environmental impacts and that defendants' 2012 reevaluation failed to address new and changed circumstances to traffic and land use patterns, contaminated sites, and impacts to wetlands. On June 30, 2015, the court denied the FHWA and Florida Department of Transportation (FDOT) motions for summary judgment and granted summary judgment in favor of plaintiffs. The parties then commenced settlement discussions, which have now culminated in a settlement agreement.

The stipulated settlement includes reimbursement of plaintiffs' fees and costs in the amount of \$700,000, dismissal of the lawsuit with prejudice, and vacatur of the Summary Judgment Order dated June 30, 2015. The agreement also provides that FDOT, at its sole cost and expense, will install and maintain four signs along U.S. 17-92 or S.R. 436 that will contain content related to the presence of RB Jai Alai at that location. FDOT has also agreed to consider a request by RB Jai Alai to discharge stormwater into the stormwater basins for its stormwater runoff, after demonstration that one or more of the stormwater retention basins associated with the Interchange has

excess capacity not needed for any planned or projected improvements by FDOT and can accommodate additional stormwater runoff without resulting in any adverse environmental impacts or violation of regulatory requirements.

District Court Vacates FHWA Buy America Policy

On December 22, 2015, the U.S. District Court for the District of Columbia granted plaintiffs' motion for summary judgment and denied defendant's motion for summary judgment in United Steel, Paper & Forestry, Rubber, Manufacturing, Energy, Allied Industries & Service Workers International Union, et al. v. FHWA, 2015 WL 9412105 (D.D.C. 2015), a case that challenged FHWA's issuance of a 2012 Memorandum defining "predominately" steel and iron manufactured products as those that have more than 90 percent steel or iron and waiving Buy America requirements for miscellaneous off-the-shelf steel and iron products. The court vacated the 90 percent threshold exemption for manufactured steel and iron products and the miscellaneous off-the-shelf steel and iron products waiver and remanded the waivers to FHWA for further proceedings consistent with the court's opinion.

In December 2012, FHWA issued a two-page memorandum (the 2012 Memorandum) reminding FHWA Divisions that the Buy America requirements did not apply to manufactured steel and iron products that were not predominately steel and iron products. The 2012 Memorandum defined predominately steel and iron manufactured product as a product that has more than 90 percent steel and iron. The 2012 Memorandum also stated that miscellaneous steel and iron products used in common off-the-shelf products were intended to be

covered by the manufactured products waiver and, therefore, were not subject to Buy America requirements.

Plaintiffs filed suit against the FHWA on October 4, 2013. Plaintiffs included a workers union whose members produce steel and iron products, six individual manufacturers of steel and/or iron products, and an association of steel and iron products manufacturers. In their complaint, they alleged that both the 90-Percent Threshold and the Miscellaneous Products Exemption violated the APA and the Regulatory Flexibility Act. Specifically, plaintiffs asserted (1) that both the 90-Percent Threshold and the Miscellaneous Products Exemption are “substantive” rules that should have been subject to notice and comment rulemaking under Section 553 of the APA, (2) that both the 90-Percent Threshold and the Miscellaneous Products Exemption are arbitrary and capricious, are not in accordance with law, and did not observe procedure required by law, in violation of Section 706 of the APA, and (3) that FHWA failed to publish the regulatory flexibility analyses required by the Regulatory Flexibility Act.

In summary judgment briefing and argument, FHWA asserted that the 90-Percent Threshold is an interpretive rule, derived from the word “predominately” used in a 1997 Memorandum. FHWA emphasized that 90 percent was a reasonable figure between the extreme positions of 100 percent and 50 percent. Additionally, FHWA argued that the 90 percent threshold was selected using its best judgment based on almost 40 years of experience and technical expertise in this area.

As to the Miscellaneous Off-the-Shelf Products Waiver, FHWA asserted that the waiver for “miscellaneous” off-the-shelf

steel and iron products was merely an extension of the existing manufactured products waiver because it relies on that same rationale of administrative difficulty in tracing the products’ origins.

The court found that the 90-Percent Threshold was a substantive rule for which FHWA was required to seek notice and comment under the APA for two main reasons. First, the 90-Percent Threshold could not reasonably be understood to interpret the word “predominately” as used in the 1997 Memorandum. The court held that this percentage threshold cannot be derived from the 1997 document and that the meaning of the word “predominantly” does not compel or logically justify the threshold. Second, the court stated that numerical-based rules are susceptible to arbitrary selection and, when an agency arbitrarily selects a number, the agency engages in a legislative function. The court further noted that the 2012 Memorandum does not explain why 90 percent was chosen as the threshold value to mean “predominantly.” Absent any record support, the court found it impossible to draw a distinction between 90 per percent and other numbers. The court also found that the purported connection between the term “predominately” used in the 1997 Memorandum and the 90-Percent Threshold is “simply too attenuated to represent an interpretation.”

For largely the same reasons, the court also found that the 90-Percent Threshold is arbitrary and capricious under section 706 of the APA. The court found that FHWA’s path to the 90-Percent Threshold could not “reasonably be discerned” and that nothing in the administrative record would support the conclusion that the 90-Percent Threshold was the product of “reasoned analysis.”

The court also rejected FHWA's contention that the Miscellaneous Off-the-Shelf Products Waiver was an interpretive rule. The court ruled that the waiver cannot reasonably be read to derive from the 1983 regulations because the exemption for non-steel manufactured products was based on the fact that such products were made of "various materials" and were "difficult to trace." The court noted, however, that the 2012 Memorandum does not tie the waiver to either of those rationales. Thus, this waiver cannot be said to "flow fairly from" the 1983 regulations. Furthermore, the court concluded that the exemption had the effect of rolling back the blanket "all steel products" coverage under the 1983 regulations, since products that are made of 100 percent steel, but otherwise meet the loose definition of an "off the shelf" product, are no longer subject to Buy America. The court found this to be contrary to the broad protection afforded to steel products under the 1983 regulations. Because the agency adopted a new position inconsistent with existing regulations, the court found that the waiver was a substantive rule, which should have been subject to notice and comment rulemaking under section 553 of the APA and violated section 706 of the APA because it was "not in accordance with law" and "without observance of procedure required by law."

In conclusion, the court stated that its holding concerning the Miscellaneous Off-the-Shelf Products Waiver should not be construed as a criticism of the substance of the waiver or FHWA's purpose in adopting it. It stated that the waiver is quite sensible, but even in adopting sensible rules FHWA must follow proper procedures.

Appellees' Response Brief Filed in Tennessee Litigation

On January 28, 2016, appellants in Bullwinkel v. U.S. Department of Energy, et al. (6th Cir. No. 14-6200) filed their opening brief. Federal appellees' brief was filed on February 12, 2016. State Appellees have filed their response briefs. The projects at the heart of the lawsuit are Department of Energy (DOE) projects. FHWA's limited involvement includes approval via a Categorical Exclusion (CE) of a welcome center, parking area, and interstate access off of Interstate 40 in Haywood County, between Jackson and Memphis, Tennessee, for the solar energy farm.

In his complaint filed in the U.S. District Court for the Western District of Tennessee, plaintiff Gary Bullwinkel alleged that FHWA's use of a CE was contrary to NEPA and the Council on Environmental Quality's implementing regulations, as well as FHWA's NEPA regulations. Plaintiff claimed that FHWA's actions were arbitrary, capricious, and an abuse of discretion in violation of the APA.

Plaintiff, appearing on his own behalf, appealed the judgment entered in favor of defendants in August 2014. The State of Tennessee filed a Motion to Dismiss or Stay the appeal on November 4, 2014, which the court denied on August 26, 2015. Appellant filed his opening brief on November 9, 2015, and raised the following arguments with respect to his FHWA-related claims: (1) FHWA (and defendants Tennessee Valley Authority (TVA), DOE, the U.S. Army Corps of Engineers, and the state defendants) improperly segmented the NEPA analysis for the TVA Megasite Solar Farm project and other West Tennessee Megasite infrastructure projects; (2) federal defendants failed to require, consider, and

provide a Title VI analysis and documentation on the same projects; and (3) FHWA's use of a CE was a violation of FHWA's regulations. Federal appellees' filed their brief on February 12, 2016. Federal appellees argued that DOE reasonably determined that TVA's Megaside program and the Solar Farm project were not connected actions, that FHWA reasonably determined that a CE was proper for the Welcome Center proposal, and that the District Court properly dismissed Bullwinkel's Title VI claims.

Appellate Briefing Completed, Oral Argument Scheduled in Lawsuit Challenging Modeling in North Carolina's Monroe Connector Case

Appellate briefing in Clean Air Carolina v. North Carolina DOT (4th Cir. No. 15-2091) concluded on January 11, 2016, when Plaintiff/Appellants filed their reply brief. The court has scheduled oral argument for May 12, 2016.

This appeal follows a September 10, 2015 favorable decision for FHWA. The U.S. District Court for the Eastern District of North Carolina issued an opinion and order granting Federal and State defendants' motion for summary judgment, denying plaintiffs' motions for summary judgment, and denying plaintiffs' motions for a temporary restraining order and a preliminary injunction. Clean Air Carolina, et al. v. North Carolina DOT, et al., 2015 WL 5307464 (E.D.N.C. Sept. 10, 2015). This lawsuit is the second round of litigation challenging the Monroe Connector/Bypass, a proposed 20-mile four-lane toll road project east of Charlotte, North Carolina, and is a companion case to Catawba Riverkeeper Foundation, et al. v. North Carolina DOT, et al., 2015 WL 1179646

(E.D.N.C. Mar. 13, 2015). This case focuses on the adequacy of the build and no-build models used in the indirect and cumulative effects analysis and the agencies' decision to rely upon one set of socioeconomic data for the traffic forecasting used to evaluate alternatives. In addition, the opinion evaluates and upholds the FHWA's decision to issue a combined Final Supplemental Environmental Impact Statement (FSEIS) and Record of Decision (ROD).

On appeal, Plaintiffs raise three claims, each pertaining to the federal and state defendant agencies' choice and use of data. First, plaintiffs argue that defendants improperly relied upon outdated traffic forecasts that did not reflect recent changes in population growth and traffic speeds. Plaintiffs argue that doing so violated NEPA because it resulted in the agencies dismissing various project alternatives that could have been viable if studied in the light of the updated data. Second, they argue that defendants improperly relied upon a single set of socioeconomic (SE) data (population and employment figures) for both the build and no-build traffic forecasts, resulting in an invalid comparison of project alternatives that violates NEPA. Third, plaintiffs argue that FHWA's decision to issue a combined FSEIS and ROD violated NEPA because doing so deprived the public of the opportunity to comment upon revised SE data the local metropolitan planning organization published after the Draft Supplemental Environmental Impact Statement had been circulated for comment.

In response to the first argument, the agencies argue that during the SEIS process they did not rely upon old traffic forecasts but rather conducted real-time speed measurements along the U.S. 74 corridor and used these measurements to confirm the

project need and purpose and to re-visit the alternatives analysis. Next, the agencies argue that their decision to rely upon a single set of SE data representing the no-build scenario was appropriate and entitled to judicial deference because they developed a second set of SE data during the indirect and cumulative effects analysis, conducted sensitivity tests on the build traffic forecasts using the new SE data, and only then determined the differences were so small that it would not be necessary to re-run the traffic forecast for the build model with the second set of data. Finally, the agencies argue that the decision to issue a combined FSEIS/ROD was reasonable and entitled to judicial deference because the combined FSEIS/ROD documents considered the new SE data, determined that the decline in growth projection essentially meant that previously predicted growth would be delayed by ten years, and determined that this change did not rise to the level of new information that would result in significant environmental impacts not evaluated in the SEIS.

Summary Judgment for FHWA Granted, Appeal Filed in Crosstown Parkway Litigation

On November 5, 2015, the U.S. District Court for the Southern District of Florida granted summary judgment in favor of the federal defendants and denied plaintiffs' motion for summary judgment in plaintiffs' challenge to the Crosstown Parkway project. Conservation Alliance of St. Lucie County v. USDOT, et al., 2015 WL 7351544 (S.D. Fla. 2015). On December 30, plaintiffs appealed the district court's decision. Conservation Alliance of St. Lucie County v. USDOT, et al. (11th Cir. No. 15-15791).

In May, 2014, Conservation Alliance of St. Lucie County and the Treasure Coast Environmental Defense Fund, Inc. (Indian Riverkeeper) filed a Complaint seeking Declaratory and Injunctive Relief in the U.S. District Court of the Southern District of Florida. 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 Final Environmental Impact Statement for the project was completed in November, 2013. The and Record of Decision was issued in February 2014. On March 16, 2015, plaintiffs filed their Motion for Summary Judgment.

In its November 5 Order, the court recognized that FHWA applied its 4(f) rules, which it noted "seem reasonably consistent with Overton Park and entitled to deference," found that the agency's determination that plaintiffs' preferred alternative would be imprudent was reasonable and supported by the record, and found "nothing arbitrary and capricious in the FHWA [least harms] findings." The court found that the lengthy, comprehensive, and collaborative process detailed in the administrative record contained no indication of any lack of commitment to the protection and preservation of the River and Preserve. The result of such collaboration was noted as a desirable result by the Court.

North Carolina DOT Appeals Adverse Garden Parkway Decision

On February 19, 2016, the North Carolina DOT (NCDOT) filed an appeal of the district court's adverse ruling in Catawba Riverkeeper Foundation, et al. v. North Carolina DOT, et al. (4th Cir. No. 15-2285).

This appeal follows adverse decisions against FHWA and NCDOT in the Garden Parkway (Gaston) project litigation. In March of 2015, the U.S. District Court for the Eastern District of North Carolina granted plaintiffs' motion for summary judgment, denied defendants' motions for summary judgment, and vacated the Record of Decision (ROD) for the project in Catawba Riverkeeper Foundation, et al. v. North Carolina DOT, et al., 2015 WL 1179646 (E.D.N.C. 2015). The court held that the agencies violated NEPA by "using the same set of socioeconomic data that assumed construction of the Garden Parkway to assess the environmental impacts of the Build and No-Build alternatives." On April 10, 2015, FHWA filed a Motion for Reconsideration and a Motion to Supplement the Record with additional explanatory affidavits. On September 10, 2015, the court denied both motions.

In its appeal, NCDOT makes two arguments. First, NCDOT argues the matter has become moot since the project was removed from the Federal-approved State Transportation Improvement Plan (STIP). Consequently, the proper course of action is for the Fourth Circuit to remand the case to the district court with orders to vacate its decision. Alternatively, NCDOT argues that the district court's decision should be reversed because in concluding that the agencies had improperly relied upon a single set of socioeconomic data, the court ignored

documentation in the record showing the agencies actually created and used a second set of socioeconomic data for its indirect and cumulative effects analysis, which is entitled to judicial deference. Federal defendants decided not to join in the appeal.

Summary Judgment and Reconsideration Briefing in Detroit Bridge Lawsuit; Dismissal Considered in Related Appeal

Following the September 30, 2015, decision of the U.S. District Court for the District of Columbia in Detroit International Bridge Company, et al. (DIBC) v. U.S. Department of State, et al. (D.D.C. No. 10-476) granting in part and denying in part defendants' Motion to Dismiss, the parties have engaged in summary judgment briefing on the remaining count of the complaint, and plaintiff has sought partial reconsideration of the court's dismissal of the other counts. DIBC's complaint claims violation of its alleged exclusive franchise right to own and operate a bridge between Windsor, Ontario, and Detroit. Meanwhile, the U.S. Court of Appeals for the District of Columbia Circuit has issued an Order to Show Cause why DIBC's appeal of the District Court's earlier dismissal of the count in plaintiff's complaint claiming that the U.S. Coast Guard had impermissibly rejected DIBC's application for a navigation permit for the new DIBC bridge should not be dismissed in light of the Coast Guard's grant of that permit.

Plaintiffs alleged nine counts in its complaint against defendants, which include the State Department, FHWA, the Government of Canada, the Windsor-Detroit Bridge Authority, and the Coast Guard. The complaint centered around DIBC's concern that a proposed new publicly-owned bridge

between Detroit and Windsor, the New International Transit Crossing (NITC), would destroy the economic viability of DIBC's planned construction of its bridge, the New Span, adjacent to the DIBC-owned Ambassador Bridge, which is located two miles from the proposed NITC site.

Among DIBC's objections to the construction of the NITC were claims that it would constitute a taking of DIBC's private property rights without payment of just compensation in violation of the Fifth Amendment, that the State Department violated the APA by granting the project's Presidential Permit and approving the Crossing Agreement between Canada and the State of Michigan, and that defendants violated the Equal Protection Clause by using the regulatory approvals process to discriminate against DIBC in favor of the NITC project. A count against the Coast Guard (Count 4) – that the Coast Guard had impermissibly rejected DIBC's application for a navigation permit for the new DIBC bridge – was dismissed in 2014 and is currently on appeal to the D.C. Circuit.

In its September 30 decision, the district court dismissed all remaining counts of the complaint except Count 7, holding that contrary to the government's argument, DIBC had standing to claim that the State Department improperly approved the Crossing Agreement for the proposed public bridge because the Agreement violated Michigan law. On December 22, the United States sought summary judgment on Count 7, arguing that the State Department reasonably concluded that the Agreement was consistent with U.S. foreign policy interests and that it was not arbitrary and capricious for the State Department to rely on opinions of the offices of Michigan's Governor and Attorney General confirming the legality of the Crossing Agreement

under Michigan law, which, in any event, were correct. Plaintiffs' arguments to the contrary, in the government's view, are simply an attempt to transform an intra-state political question into a justiciable federal controversy. In their cross-motion for summary judgment and opposition to the government's summary judgment motion filed on January 27, 2016, plaintiffs argue that the Agreement is illegal under Michigan law and that the Foreign Compact Clause of the U.S. Constitution does not permit the State Department to approve an agreement between a state and a foreign power that is contrary to the state's law.

On February 12, plaintiffs filed their motion for partial reconsideration of the district court's September 30 decision, focusing on Counts 2, 3, 6, and 9 of the complaint. Counts 2 and 3, which claimed that DIBC has an exclusive franchise right in both the United States and Canada to construct, maintain, and operate an international bridge between Detroit and Windsor and that DIBC's statutory and contractual right to build the New Span is being violated by the planned construction of the NITC, were dismissed for failure to state a claim. Count 6, which alleged that the State Department's decision to grant a Presidential Permit for the NITC violated the APA, was dismissed because the court found that the issuance of this permit constituted presidential action, which is unreviewable under the APA. Count 9, which alleged that the defendants violated the Equal Protection Clause by using the regulatory approvals process to discriminate against DIBC in favor of the NITC project, was dismissed because the court found that DIBC is not similarly situated to the proponents of the NITC and it has not been subject to differential treatment.

Oral argument was held before the D.C. Circuit on October 19, 2015, in Detroit International Bridge Company, et al. v. Government of Canada, et al. (D.C. Cir. No. 15-5086), DIBC's appeal of the district court's dismissal of plaintiffs' claims that the Coast Guard had unlawfully withheld issuance of the navigation permit for DIBC's proposed new bridge. During the argument, the parties addressed the recent agreement by the City of Detroit to sell rights to the use of riverfront parkland to DIBC that would allow construction of the bridge on the U.S. side of the Detroit River. The Coast Guard had delayed processing of DIBC's permit application pending such an agreement. After oral argument, the court ordered the parties to advise the court of the parties' progress in obtaining the property rights and issuing the permit. On March 15, 2016, the Coast Guard advised the court that it had issued the permit conditioned on DIBC obtaining all necessary additional federal, state, and Canadian government approvals for construction of the bridge, and on March 17, the court issued an Order to Show Cause why DIBC's appeal should not be dismissed in light of the Coast Guard's grant of that permit.

New Lawsuit Filed Against Highway Project in California

On January 22, 2016, a coalition of environmental groups filed a lawsuit against FHWA, Administrator Gregory Nadeau, and California Division Administrator Vincent Mammano. The new case, Center for Biological Diversity, et al. v. FHWA, et al. (C.D. Ca. No. 16-133), involves the Mid-County Parkway Project (MCP Project), which would construct a new 16-mile east-west freeway between Interstate 215 and State Route 79 in Riverside County, California. FHWA issued a Record of Decision in August 2015. Most of the same

plaintiffs are currently in state-court litigation against the local project sponsor, the Riverside County Transportation Commission, under the California Environmental Quality Act.

Plaintiffs allege that FHWA violated NEPA, Section 4(f) of the Department of Transportation Act, and the APA. Plaintiffs claim FHWA violated NEPA because it: (1) too narrowly defined purpose and need; (2) studied too narrow a range of alternatives; (3) failed to fully and adequately disclose and evaluate the project's environmental impacts; (4) used an improper no-build baseline for traffic projections, *i.e.*, that the baseline figures used in traffic modeling were "based on growth projections that assume the existence of the [MCP]"; and (5) failed adequately to respond to comments. Plaintiffs also claim the MCP Project "would constructively use Section 4(f) resources including schools and parks." Plaintiffs' Complaint reflects comment letters they submitted during the NEPA process.

Lawsuit filed in Alabama on Central Business District Project

On October 13, 2015, a group of individual plaintiffs filed a civil action against the Alabama Department of Transportation (ALDOT), ALDOT Director John R. Cooper, FHWA, and Mark Bartlett, the FHWA Alabama Division Administrator. Plaintiffs in Austin v. Alabama DOT, et al. (N.D. Ala. No. 15-1777) seek declaratory and injunctive relief halting construction of the I-59/I-20 Corridor Improvements in downtown Birmingham, Alabama.

Plaintiffs assert two NEPA-based claims: (1) improper approval of the Environmental Assessment (EA) and Finding of No

Significant Impact (FONSI) and (2) failure to perform an Environmental Impact Statement (EIS). Essentially, plaintiffs claim that the EA failed to take a hard look at the project's impacts and that the project scope and impacts dictate that an EIS should have been required.

ALDOT initiated a project to rehabilitate the Central Business District (CBD) bridges on Interstate 59/20 in downtown Birmingham. ALDOT initially investigated in-kind replacement of the existing bridge superstructures. The existing bridges are approximately one mile long. After further study and discussions with the City of Birmingham and Jefferson County Commission, ALDOT decided to expand the project. The expanded project included a structure with additional capacity, interchange improvements to eliminate weaving sections, and ramps along I-59/20 between I-65 and Red Mountain Expressway. It also provided improved access to and from downtown Birmingham using a combination of newly-located ramps and existing ramps.

ALDOT prepared an EA for the project. FHWA's Alabama Division issued a FONSI on June 25, 2015. The FONSI's environmental commitments require ALDOT to install lighting, sidewalks, pavers and landscaping underneath the mainline bridges in downtown. This area can then be utilized by the City of Birmingham to install additional project elements to facilitate the public's use of this space.

Contract-based Complaint against FHWA Filed in Montana State Court

On January 20, 2016, plaintiffs Myron and Beverly Kovash, individually and as owners of Yellowstone Gifts and Sweets, filed a Complaint in Montana state court against the U.S. Department of Transportation and Riverside Contracting, Inc. (Riverside) in Kovash, et al., v. USDOT, et al. (Mont. 16-10). The United States was properly served on February 16, 2016 and filed a notice to remove the case to federal court on the same day.

The underlying construction project is a \$9.8 million dollar road repair project in the City of Gardiner, Montana providing improved access to Yellowstone National Park. Riverside was awarded the construction contract on February 27, 2015. The project is scheduled to be completed on August 15, 2016.

The Complaint alleges that Yellowstone Gifts and Sweets is a third party beneficiary of the contract between the USDOT and Riverside. The Complaint includes one count against USDOT: the agency breached its duty to Yellowstone Sweets and Gifts as a third party beneficiary of the contract by failing to oversee the contract and ensure that the construction was being performed in accordance with the contract's terms and conditions, which included limiting the disruption to businesses.

Plaintiff alleges that as a result of the USDOT breach it suffered a loss in its business revenue during 2015. The United States' Notice of Removal indicated that the case should be removed to a federal district court if the claim is \$10,000 or less;

otherwise, the case must be removed to the Court of Federal Claims.

Contract Disputes Act Case Filed against FHWA in Court of Federal Claims

On January 11, 2016, Kiewit Infrastructure West Co. (Kiewit), a national construction company, filed a complaint against FHWA's Western Federal Lands Highway Division. Kiewit Infrastructure West Co., v. U.S.A., (Fed. Cl. No. 16-45). This case arises from a dispute under the Contract Disputes Act. Plaintiff is seeking judicial review of a final decision by the Contracting Officer denying claims involving a constructive change to a contract for a highway construction project in Alaska.

The underlying construction project was a \$41 million dollar road repair project on Prince of Wales Island in Southeast Alaska awarded in August 2012. This project was delivered with a design build contract and was completed in December 2014. Plaintiff claims that the purchase of wetland mitigation credits in order to fill in some of the waste areas is a change that is compensable under the contract. The Contracting Officer found that the contract fairly and accurately described the contractor's responsibility for purchasing the wetland credits.

The Complaint alleges that plaintiff is entitled to recover pursuant to the Changes and Differing Site Conditions clauses of the contract.

Federal Motor Carrier Safety Administration

D.C. Circuit Denies Carrier Challenge to Public Display of Violations

On January 15, 2016, the U.S. Court of Appeals for the District of Columbia Circuit denied Silverado Stages, Inc.'s (Silverado) challenge to the public display of allegedly erroneous violations in Silverado Stages, Inc. v. FMCSA, et al., 809 F.3d 1268 (D.C. Cir. 2016). The court found that FMCSA reasonably interpreted 49 C.F.R. § 385.15 to permit only those petitions that seek review of a carrier's safety rating. Carriers with Satisfactory safety ratings may seek review of individual violations cited during a compliance review through the DataQs system, rather than the 49 CFR § 385.15 review process. The court noted in a footnote that FMCSA should "work to ensure that motor carriers receive appropriate responses to their DataQs requests in a timely fashion." Carriers that do not receive timely responses to their DataQs requests may ask the district court to compel agency action.

The court also found that Silverado's argument that FMCSA failed to comply with notice-and-comment procedures and imposed impermissible sanctions on Silverado by citing it for certain safety violations properly belonged in the district court under the D.C. Circuit's decision in Weaver v. FMCSA, 744 F.3d 142 (D.C. Cir. 2014). Therefore, the court lacked authority to hear Silverado's safety violations challenge.

Silverado, a passenger motor carrier, filed this petition for review in response to the FMCSA Chief Safety Officer's decision

dismissing Silverado's request for administrative review of its Satisfactory safety rating under 49 C.F.R. § 385.15. Silverado challenged FMCSA's Final Order, arguing that it was harmed by the allegedly erroneous violations posted on its SMS profile and that it had no other venue in which to challenge the violations. Silverado sought review and removal of violations and other information recorded in a July, 2014 compliance review that it claimed diminished its percentile rankings in FMCSA's Safety Measurement System (SMS).

The compliance review underlying the petition was conducted following an April 4, 2014, crash involving a FedEx tractor trailer and a Silverado motorcoach that resulted in multiple fatalities. While several violations were noted, the compliance review resulted in a Satisfactory safety rating for Silverado. On October 14, 2014, Silverado filed a request for administrative review under 49 C.F.R. § 385.15 concerning violations cited and commercial motor vehicle inspections conducted and recorded in the compliance review. Silverado requested removal of alleged erroneous information from the compliance review and from FMCSA's public SMS website. In the October 24, 2014, decision, the Chief Safety Officer dismissed Silverado's request, finding that when a motor carrier alleges errors in calculating its safety rating, the only relief provided under section 385.15 is an upgrade of the carrier's safety rating; review is therefore limited to alleged errors that affect the safety rating. Because Silverado received a Satisfactory safety rating, the highest rating available, no further relief was possible.

Silverado argued that FMCSA's dismissal of its section 385.15 petition denies a right of adjudication of violations used by FMCSA

in its SMS and posted on its public website. Silverado further contended that FMCSA failed to follow the APA when it effectively exempted violations that appear on its public website from any pre- or post-violation challenge and unlawfully assessed sanctions against carriers by consciously driving away affected carriers' business.

FMCSA argued that Silverado lacked standing to challenge the dismissal of its section 385.15 petition because it was not injured by the dismissal, given that FMCSA assigned Silverado the highest possible rating and there was no further relief the agency could grant in a section 385.15 proceeding. FMCSA also argued that Silverado's challenges to SMS, including its claims that FMCSA acts unlawfully when it publishes violation information and triangular alerts on the SMS website, are beyond the scope of the instant case.

Dismissal Affirmed in One Appeal Related to May 2011 Sky Express Crash, Oral Argument Held in Other Appeal

On February 25, 2016, the U.S. Court of Appeals for the Fourth Circuit in Pornomo v. United States, 2016 WL 757999 (4th Cir. 2016), affirmed a Virginia district court decision and held that the discretionary function exception to the Federal Tort Claims Act precluded claims based on the FMCSA's grant of a 10-day extension of the effective date of a passenger carrier's final "unsatisfactory" safety rating under 49 C.F.R. § 385.17(f) and on the agency's adoption of regulations that allowed for the ten-day extension even though, in 2012, FMCSA rescinded this 10-day extension provision to make the regulations "consistent with the policy and the statutory

language” of 49 U.S.C. § 31144(c)(2) and (4).

On December 16, 2015, the U.S. Court of Appeals for the Eleventh Circuit held oral argument in Chhetri v. United States, (11th Cir. No. 15-10644). The arguments and issues on appeal in Chhetri are substantially similar to the arguments in the Pornomo case. We are still awaiting a decision in Chhetri.

Both claims arise from the May 31, 2011, Sky Express crash. The complaints alleged that DOT and FMCSA were negligent under the FTCA and sought \$36 million and \$3 million in damages, respectively. Appellants alleged that one or more FMCSA employees, acting within the course and scope of their employment, were negligent when they granted Sky Express a 10-day extension of the effective date of an unsatisfactory safety rating in violation of regulatory requirements and beyond the scope of the agency’s statutory authority. The crash occurred during the 10-day extension period.

Sixth Circuit Affirms District Court’s Dismissal of Tour Operator’s Challenge to Refusal to Reinstate Operating Authority

On February 18, 2016, the U.S. Court of Appeals for the Sixth Circuit upheld the district court’s dismissal in Haines v. FMCSA, et al. (6th Cir. 15-1624). The Sixth Circuit upheld the district court’s dismissal because the complaint failed to state a claim for relief under the APA, but the court rejected the district court’s reasoning that it did not have jurisdiction over Haines’ claims because he failed to exhaust his administrative remedies. Specifically, the court held that 49 U.S.C. §

521(b) and 49 C.F.R. § 386 did not require administrative exhaustion and that Haines could have challenged the agency’s actions in the circuit court without exhausting his administrative remedies. The court also held that Haines’ argument on appeal regarding tolling the statute of limitations for his Bivens claims was barred because he failed to raise it before the district court. Furthermore, the court upheld the district court’s rejection of Haines’ motion to amend the complaint to include a cause of action under Bivens because there was an adequate alternative remedy for Haines’ claims under FMCSA’s regulatory regime.

Appellant Roger Haines is the owner of Haines Tours, located in Gladwell, Michigan. He sued FMCSA, the Field Administrator for FMCSA’s 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 family members – including several children – to ride in the luggage compartment of a motor coach on a trip from Michigan to an amusement park in Ohio. The Imminent Hazard Order required that Haines immediately cease tour bus operations. Haines regained his authority to conduct intrastate operations in March 2012 and his authority to operate interstate in January 2013, following FMCSA’s determination that his motor carrier operation was fit, willing, and able to comply with the Federal Motor Carrier Safety Regulations.

Eleventh Circuit Dismisses Challenge to Financial Responsibility Rule for Lack of Standing

On March 18, 2016, the U.S. Court of Appeals for the Eleventh Circuit, in Association of Independent Property Brokers and Agents, Inc. v. Foxx, et al. (11th Cir. No. 13-15238), dismissed the Association of Independent Property Brokers and Agents' (AIPBA) APA challenge to an October 1, 2013, FMCSA final rule establishing a \$75,000 financial responsibility amount for regulated brokers and freight forwarders. FMCSA issued the October 1 final rule pursuant to the 2012 Moving Ahead for Progress in the 21st Century Act (MAP-21), which directed the Secretary to increase the amount of financial responsibility for these regulated entities to a minimum of \$75,000. AIPBA had alleged that FMCSA violated the APA in issuing the subject rules without notice and comment rulemaking. The court did not reach that issue, however, holding instead that it had no subject matter jurisdiction over the case because, as FMCSA had argued, AIPBA lacked Article III standing to challenge the agency's regulation.

In reaching its decision, the court indicated that "[t]o establish standing, a party must demonstrate an injury in fact, causation, and redressability." The court noted that AIPBA's asserted injury is the "increased burden" associated with property brokers being required to hold \$75,000 in financial security, as opposed to \$10,000 prior to MAP-21. The court held that this alleged injury could not be redressed even if it granted AIPBA's petition for review and ordered notice and comment rulemaking. Given that the \$75,000 requirement, the basis of AIPBA's alleged injury, was a

statutory minimum, FMCSA could not mandate a financial responsibility amount less than \$75,000 and hence AIPBA's "asserted injury could not be redressed even if [the Court] were to determine that FMCSA failed to comply with the APA."

Challenge to Implementation of Mexican Motor Carrier Provisions Fully Briefed

On November 25, 2015, the government filed its response brief to the U.S. Court of Appeals for the Ninth Circuit in International Brotherhood of Teamsters, et al. v. USDOT, et al. (9th Cir. 15-70754). On February 8, 2016, petitioners, International Brotherhood of Teamsters (IBT), Advocates for Highway and Auto Safety (AHAS) and the Truck Safety Coalition, and intervenor, the Owner-Operator Independent Drivers Association, Inc. (OOIDA) filed their respective reply briefs.

Petitioners challenge an FMCSA report to Congress, mandated by 49 U.S.C. § 31315(c), alleging that the report constitutes final agency action as the predicate for FMCSA's decision to accept applications from Mexican trucking companies seeking authority to operate between Mexico and points throughout the United States. In its report, FMCSA analyzes safety data from its 2011 cross-border Pilot Program and concludes that "Mexico domiciled motor carriers, conducting long-haul operations beyond the commercial zones of the United States, operate at a level of safety that is equivalent to, or greater than, the level of safety of U.S. and Canada-domiciled motor carriers operating within the United States." The Pilot Program was implemented to address safety concerns posed by Congress and embodied in legislation restricting the

agency's ability to expend funds to issue long-haul operating authority to Mexico-domiciled motor carriers prior to the completion of a pilot program testing the safety of the Mexico-domiciled carriers.

Petitioners argue that FMCSA's report and the conclusions drawn therein are unlawful because (1) the Pilot Program failed to constitute a valid "test" of the safety of Mexico-domiciled carriers as mandated by Congress, (2) the Pilot Program did not have sufficient participants to yield statistically valid findings and therefore failed to comply with the pilot program requirements in 49 U.S.C. § 31315(c), and (3) FMCSA's conclusions in the report constitute final agency action that is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.

The government argues in its brief that the reporting requirement in section 31315(c)(5) contains no provision for judicial review. Rather, the statutory requirement provides a means for the agency to present its findings to Congress and suggest legislative and regulatory changes. Courts recognize that Congressional reporting requirements are a managerial tool and Congress, not the courts, should determine whether a report is inadequate. The government concludes that the report is not a reviewable agency action under the APA and falls outside the court's jurisdiction under the Hobbs Act, the judicial review statute that petitioners rely on.

Even if the report were subject to judicial review, the government argues that the Pilot Program was fully consistent with the statutory requirements in section 31315(c). Specifically, the Pilot Program was designed to include a reasonable number of participants and to yield statistically valid findings. This is all that the statute requires.

Petitioner IBT had previously raised the issue of sufficiency of the pilot program under section 31315(c) in International Brotherhood of Teamsters v. USDOT, 724 F.3d 206, 210 (D.C. Cir. 2013). There, the D.C. Circuit held that the design of the Pilot Program complied with statutory requirements and "[w]hether Mexico-domiciled trucking companies ultimately avail themselves of the opportunity [to participate in the pilot program] is outside the agency's control." Id. at 216.

To compensate for the limited number of Pilot Program participants, the agency conducted an independent analysis of the safety records of the more than 1,000 Mexico-domiciled and Mexican-owned motor carriers with long-haul operating authority in the United States. This analysis confirmed that these carriers also operated no less safely than U.S. and Canadian carriers.

The government argued that intervenor OOIDA's challenge to the commercial driver's license regulation is both time barred and meritless. Intervenor argues that a 1992 regulation requiring drivers from Mexico to use a Mexican commercial driver's license when driving in the United States was superseded by a 1998 statute. If accepted, this argument would impact almost all motor carriers from Mexico and Canada operating in the United States. The government argues that this challenge fails for several reasons. First, it is beyond the scope of the petition for review. An intervening party may not raise an issue that has not been brought before the Court by another party to the litigation. Second, the argument is time-barred, as the regulation that intervenor challenges and the statute it asserts superseded the regulation both date from the 1990s and therefore fall outside the 60-day time limit of the Hobbs Act.

OOIDA unsuccessfully raised this issue in the prior litigation, in which the D.C. Circuit held that the CDL statute and the law requiring the Pilot Program, “reflect Congress’s decision to allow Mexican truckers with Mexican commercial drivers’ licenses to drive on U.S. roads.” 724 F.3d at 213. The government argues that the intervening party is barred by collateral estoppel from asserting that the D.C. Circuit’s holding was erroneous.

In their replies, both petitioners and intervenor argue that the cases relied upon by the government concern reports to Congress that had no legal consequences and were thus not subject to judicial review. By contrast, they argue that the FMCSA report in this matter carries legal consequences and alters rights and obligations, and that submission of the report to Congress was a legal prerequisite to FMCSA issuing authority to Mexico-domiciled carriers to perform long-haul operations beyond U.S. commercial zones.

Cross-Motions for Summary Judgment Pending in Challenge to Pre-employment Screening Program

On October 23, 2015, plaintiffs filed their opposition to the government’s motion for summary judgment and cross motion for summary judgment in Owner Operator and Independent Driver Association (OOIDA), et al. v. USDOT, et al., and Fred Weaver Jr., et al. v. FMCSA, et al., (D.D.C. Nos. 12-1158 and 14-0548). On summary judgment, the government argued that the court must resolve the issue of plaintiffs’ standing before it can address plaintiffs’ motion for discovery beyond the administrative record. On January 4, 2016, the government filed its

reply and opposition to plaintiffs’ summary judgment motion.

The consolidated lawsuits, brought by OOIDA and five commercial drivers, challenge 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), established pursuant to 49 U.S.C. § 31150. Plaintiffs 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) by its practice of allowing violations related to dismissed citations to remain in its MCMIS database and be included in PSP reports.

In response to plaintiffs’ renewed motion for discovery, the government filed its opposition and a motion for summary judgment, largely based on plaintiffs’ lack of standing. The government argued that plaintiffs are unable to establish Article III standing, which requires that a plaintiff demonstrate: (1) an injury-in-fact; (2) a causal connection between the injury and the conduct complained of; and (3) a likelihood “that the injury will be redressed by a favorable decision.” None of the individual plaintiffs can show that they have suffered or will suffer an injury as a result of FMCSA’s inclusion of adjudicated citations in its MCMIS database and release of such information through the PSP program. The court is aware that, in June 2014, FMCSA announced a significant change to its policy on use of adjudicated violations in PSP reports, and changes that would allow the States and FMCSA to input and record favorable adjudications of violations cited during roadside inspections. These

violations would no longer be released in a PSP report, eliminating the possibility of any future injury to plaintiffs resulting from the inclusion of such violations in a PSP report. The policy only applied prospectively to violations recorded during inspections occurring on or after August 23, 2014.

The government also noted that PSP reports were never requested or released to prospective employers for three of the five plaintiffs. The remaining two plaintiffs had PSP reports issued to employers with their consent, but failed to allege any adverse consequences or injury as a result of these reports. In sum, the government argues that plaintiffs lack a real and concrete injury, which is fairly traceable to defendants' conduct and redressable by a decision of the court, and their Complaint should therefore be dismissed.

In the event the court finds support for plaintiffs' standing, the government argued that plaintiffs' claims fail on the merits. The APA does not provide for plaintiffs' far-reaching challenge to defendants' administration of the MCMIS and PSP, and plaintiffs fail to identify a final agency action, or any agency failure to take a discrete, required action, which upon review would provide for the relief they seek.

The government pointed to the recent decision in Flock v. USDOT, 2015 WL 5822624 (D. Mass. 2015), appeal docketed on November 3, 2015 (1st Cir. No. 15-2310), where the district court dismissed a purported class action challenging the PSP program. The court held that the PSP statute was sufficiently ambiguous to support the Agency's interpretation, which was entitled to Chevron deference. Plaintiffs in that case challenged the release of "non-serious" driver-related violations as a willful

violation of the Privacy Act. The Flock ruling bolsters defendants argument that the agency has not exceeded its statutory authority in making available safety records to prospective employers, and their interpretation of the relevant statute is reasonable, consistent with Congressional intent, and entitled to deference.

OOIDA Challenges Electronic Logging Device Rule

On December 11, 2015, the Owner-Operator Independent Drivers Association (OOIDA) filed a petition in the U.S. Court of Appeals for the Seventh Circuit challenging FMCSA's electronic logging device (ELD) rule. Owner-Operator Independent Drivers Association v. DOT (7th Cir. 15-3756). The rule requires motor carriers whose drivers must record their hours of service (HOS) to use ELDs, prescribes technical standards that ELDs must meet, addresses drivers' and carriers' obligations in connection with supporting documents, and provides technical and procedural provisions aimed at protecting drivers from harassment by motor carriers based on information available through an ELD or related technologies.

OOIDA had challenged a previous FMCSA rule that required use of electronic monitoring devices to track HOS by a limited population of drivers, and the court vacated that rule, finding that the agency failed to address the issue of driver harassment, a factor the Agency was required to address by statute. Owner-Operator Indep. Drivers Ass'n, et al. v. FMCSA, 656 F.3d 580 (7th Cir. 2011). As a result of subsequent events, including changes in available technology, information obtained through public outreach, and congressional enactment of an ELD mandate as part of MAP-21, the current rule differs significantly from that

considered by the court in the earlier litigation.

Passengers in 2013 California Bus Crash Sue Agency over Inspections

On December 21, 2015, thirteen individuals sued FMCSA pursuant to the Federal Tort Claims Act (FTCA) in Olivas, et al. v. United States, et al. (S.D. Cal. 15-2882). Plaintiffs seek a combined total of \$130 million in compensation for personal injuries and wrongful death. The claims arise from a motorcoach accident involving Scapadas Magicas that occurred on February 3, 2013, in San Bernardino, California. At that time, Scapadas Magicas was a for-hire passenger motor carrier operating primarily between Tijuana, Mexico and various locations in California. Plaintiffs allege that FMCSA failed to exercise due care in its implementation and enforcement of its safety regulations. Specifically, they allege that FMCSA was negligent in issuing the motorcoach a Commercial Vehicle Safety Alliance decal after an October 2012 inspection and that FMCSA was negligent in not inspecting all of the carrier's buses in a January 2013 compliance review. Both the inspection and compliance review were conducted pursuant to FMCSA's policies and procedures. On March 16, 2016, FMCSA filed a motion to dismiss, arguing that the court lacks jurisdiction because of the FTCA's discretionary function exception and plaintiffs' failure to satisfy the private party analogue.

Federal Railroad Administration

Short Line Railroad Association's Challenge to FRA's Training Standards Held in Abeyance

On October 13, 2015, the U.S. Court of Appeals for the District of Columbia Circuit granted the American Short Line and Regional Railroad Association's (ASLRRRA) October 8, 2015, unopposed motion to suspend the briefing schedule in American Short Line and Regional Railroad Association v. FRA, et al. (D.C. Cir. No. 15-1240) to permit the parties to discuss a possible resolution of the case.

The petition for review that ASLRRRA filed with the court on July 27, 2015, challenges FRA's November 7, 2014, final rule entitled "Training, Qualification, and Oversight for Safety-Related Railroad Employees" and FRA's June 1 response denying a petition for reconsideration of the final rule. ASLRRRA's petition maintains that the final rule and the decision on its petition for reconsideration are (1) in excess of FRA's statutory authority; (2) arbitrary, capricious and an abuse of discretion within the meaning of the APA; and (3) otherwise contrary to law.

The final rule sets forth minimum training standards for each type of safety-related railroad employee and requires that railroads and contractors submit training plans to FRA to ensure safety-related railroad employees are qualified to measurable standards. As part of the training program, most employers will need to conduct periodic oversight of their employees to determine compliance with federal railroad safety laws, regulations, and orders applicable to those employees. The final

rule also requires most railroads to conduct annual written reviews of their training programs to close performance gaps and stresses greater use of structured on-the-job training and interactive training.

In its initial filings, ASLRRRA described the issues to be raised in its petition for review as (1) whether FRA was arbitrary and capricious by failing to establish a blanket exemption for short line railroads with less than 400,000 labor hours and by failing to establish an exclusion that would permit short line railroads from using existing training programs; (2) whether FRA undertook an adequate analysis of the cost burden to short line railroads, as required under the Regulatory Flexibility Act; (3) whether FRA exceeded its statutory authority by requiring ASLRRRA to monitor and track the use of any template training program it makes available and to notify the users of any updates to the program; and (4) whether FRA exceeded its statutory authority by requiring railroads to engage in mandatory periodic oversight of railroad contractors.

Federal Transit Administration

Baltimore Red Line Lawsuit Dismissed

On December 3, 2015, the U.S. Court of Appeals for the Fourth Circuit dismissed Cutonilli v. FTA, et al., 623 F. App'x 616 (4th Cir. 2015), involving the Baltimore Red Line, on mootness grounds.

Plaintiff originally filed suit in the U.S. District Court for the District of Maryland seeking declaratory and injunctive relief, alleging that defendant federal and state agencies failed to evaluate all reasonable

alternatives for the project, including plaintiff's hybrid alternative mixing heavy rail and bus rapid transit. The district court ultimately granted summary judgment, Cutonilli v. FTA, et al., 2015 WL 3953502 (D. Md. 2015), and plaintiff appealed. FTA filed an informal response brief advising the Fourth Circuit that, on June 25, 2015, the Maryland Governor cancelled the project. Following the Fourth Circuit's decision and remand, the district court dismissed the action.

Challenge to Minnesota Light Rail Project Dismissed

On February 25, 2016, the U.S. District Court for the District of Minnesota granted the Metropolitan Council's motion to dismiss in Opus Woods Conservation Association and SFI Ltd. Partnership 54 v. Metropolitan Council, 2016 WL 755617 (D. Minn. 2016). Nearby property owners had challenged a proposed light rail route that would connect downtown Minneapolis with the southwestern Twin Cities area. Plaintiffs alleged that the project sponsor (1) violated NEPA by selecting a design and initiating a municipal consent process required by state law prior to the Record of Decision publication and without conducting an Section 4(f) analysis of the two nearby properties pursuant to Section 4(f) of the DOT Act, and (2) violated Section 4(f) by failing to consider the properties as 4(f) resources. The property at issue is 49 acres of open space that consists of wooded areas, trails, and wetlands. The proposed light rail route would follow a trail through part of the open space and a station would require the rerouting of a small portion of the trail.

The court found that NEPA anticipates some preapproval with state and local bodies pursuant to 40 C.F.R. § 1506.1(d), and the

participants in the state-required municipal consent process understand the design may change after consent is given. Therefore, the project sponsor's compliance with municipal consent did not show irreversible commitment to a particular route.

Plaintiffs also asserted that the court should recognize an implied cause of action under Section 4(f) based on the language in 23 C.F.R. § 774.9(a), which states that Section 4(f) properties shall be evaluated as early as practicable when alternatives to the proposed action are under study. The court dismissed this claim for lack of jurisdiction, stating that no separate cause of action exists besides that created by the APA, and thus, plaintiffs could not bring such a claim until after final agency action. FTA was dismissed from the original action because the NEPA analysis was still in progress and thus there was no final agency action.

Dismissal in San Diego Mid-Coast Corridor Case

On March 2, 2016, the U.S. District Court for the Southern District of California dismissed Friends of Rose Canyon v. FTA, et al. (S.D. Cal. No. 15-0197). Previously, on February 1, 2016, Friends of Rose Canyon (FORC) and the San Diego Association of Governments (SANDAG) signed a settlement agreement. Although FTA was not a party to the settlement agreement, once the terms of the agreement were satisfied, the parties agreed to stipulate to dismissal of the FTA litigation with prejudice. The settlement terms have now been satisfied and the court dismissed the case pursuant to the stipulation. The case arose when, on December 22, 2014, FORC, a non-profit organization, challenged in California state court the California state and federal environmental reviews and related determinations for the Mid-Coast Corridor

Transit Project (Project), a 10.9-mile extension of the Trolley Blue Line from the Old Town Transit Center in downtown San Diego to the University Towne Center Transit Center. On January 29, 2015, FTA removed the state court case to the U.S. District Court for the Southern District of California. In the complaint, FORC alleged that SANDAG, the local Project sponsor, violated the California Environmental Quality Act and that SANDAG and FTA violated NEPA and Section 4(f) of the DOT Act by, among other things, failing to adequately evaluate the Project's environmental impacts to the Rose Canyon Open Space Park, deferring mitigation, and failing to avoid the Park.

Federal Government's Motion to Dismiss Denied in New Orleans Streetcar Lawsuit

On December 29, 2015, the U.S. District Court for the Eastern District of Louisiana denied a motion to dismiss in Bring Our Streetcars Home, Inc., et al. v. USDOT, et al., 2015 WL 9478139 (E.D. La. 2015). The complaint was filed against DOT, FTA, and the Federal Emergency Management Administration by two non-profit organizations, Bring Our Streetcars Home, Inc. and People's Institute for Survival and Beyond, Inc., and eleven individuals, seeking injunctive and mandamus relief in connection with a streetcar project in New Orleans. The complaint alleges that FTA and DOT failed to comply with the requirements of NEPA, Section 106 of the National Historic Preservation Act, and Section 4(f) of the DOT Act regarding a streetcar project currently under construction on Rampart Street by the New Orleans Regional Transit Authority.

Because the Rampart streetcar project is not being constructed with federal funds, the federal defendants contended in their motion to dismiss that the plaintiffs' complaint should be dismissed for lack of subject matter jurisdiction pursuant to Federal Rule of Civil Procedure 12(b)(1) or, in the alternative, for failure to state a claim upon which relief can be granted pursuant to Federal Rule of Civil Procedure 12(b)(6).

The court's order denying the federal defendants' motion to dismiss under Rule 12(b)(1) found that the plaintiffs' claims are not "so attenuated and unsubstantial as to be absolutely devoid of merit" or "frivolous" as to merit dismissal for lack of subject matter jurisdiction. In addition, the court determined that the federal defendants' motion to dismiss under Rule 12(b)(6) should be denied because exhibits attached to the motion were not referred to in the plaintiff's complaint. Under Rule 12(b)(6) case law, a court may generally not consider matters outside the complaint. Therefore, the federal defendants' motion failed to establish why the plaintiffs' allegations regarding the amount of federal involvement are, as a matter of law, insufficient to state a claim upon which relief can be granted.

On February 2, 2016, the federal defendants filed an answer and asserted affirmative defenses to the complaint. The parties are currently conducting discovery.

Court Finds Deficiencies in EIS for Westside Extension

On February 1, 2016, the U.S. District Court for the Central District of California issued a tentative 217-page ruling in Beverly Hills Unified School District v. FTA et al. (C.D. Cal. No. 12-09861). The ruling granted in part and denied in part plaintiff's motion for summary judgment, finding that FTA did

not take the requisite "hard look" NEPA requires in certain aspects, and denying plaintiff's claims of NEPA deficiency in other aspects. It upheld the agencies' analysis of one Section 4(f) property and rejected the analysis of another. It also upheld the agencies' Clean Air Act analysis. Specifically, the court concluded that (1) FTA failed to assess the risk of surface explosions arising from tunneling through gassy ground; (2) that it failed to disclose "key" seismic issue uncertainties; (3) that it failed to issue a supplemental draft EIS and a supplemental final EIS to allow public comment on new seismic information; (4) that, contrary to the agencies' conclusion, tunneling under a the Beverly Hills High School was still a "use" under FTA's Section 4(f) regulations; and (5) that FTA failed to explain how NOx emissions can exceed significance thresholds without having any local health impacts.

The court denied plaintiff's claims in all other respects. The court held that the agencies analyzed a reasonable range of alternatives, did not predetermine that the station required tunneling under the high school, and did not arbitrarily or capriciously reject the City of Beverly Hills' three late proposed alternatives. The court held that, contrary to plaintiffs' arguments, NEPA did not require the agencies to identify every unidentified oil and gas well before they made a decision on the route. Further, it upheld the agencies' decision to use the regional Clean Air Act air quality thresholds as the significance thresholds under NEPA.

The disputed project in this case would extend the existing Metro Purple Line by approximately nine miles west from the Wilshire/Western Station to a new terminus at a new Westwood/VA Hospital Station in Santa Monica. The entirely underground

extension traverses one of the most densely populated areas of Los Angeles and will include seven new stations spaced in approximately one-mile intervals. Total daily boardings are estimated to reach up to 49,300 per day. The project is divided into three phases. Phase 1 is under construction, with a Full Funding Grant Agreement awarded and partially disbursed. Procurement for the Phase 2 design-build contractor is underway.

The ruling concluded that a remand for additional investigation and explanation may be required and invited the parties to separately brief the court on suitable remedies.

Preliminary Injunction Denied in Lawsuit against USDOT, FTA, and City of New Orleans Involving Confederate Monuments, Plaintiffs Appeal

On January 26, 2016, the U.S. District Court for the Eastern District of Louisiana denied plaintiffs' motion for a preliminary injunction in Monumental Task Committee, Inc., et al. v. Foxx, et al. (E.D. La No. 15-06905). On February 5, plaintiffs appealed the decision to the U.S. Court of Appeals for the Fifth Circuit.

Previously, on December 17, 2015, Monumental Task Committee, Inc., a non-profit organization, and several other Louisiana non-profit organizations filed a complaint against DOT, FTA, New Orleans Regional Transit Authority, and the City of New Orleans seeking injunctive and declaratory relief to enjoin defendants from removing, damaging, or adversely impacting four Confederate monuments in the City of New Orleans. Just prior to the filing of the complaint, the City of New Orleans passed

an ordinance directing the removal of the four Confederate monuments.

The complaint alleges that the monuments, which are listed or eligible for listing in the National Register of Historic Places, have become an integral part of the network of streetcars planned, funded, constructed, and maintained by the defendants. In addition to state law claims, the complaint specifically alleges that in connection with six streetcar projects that have been planned, funded, constructed, and maintained by the New Orleans Regional Transit Authority, the City of New Orleans, DOT, and FTA failed to comply with Section 106 of the National Historic Preservation Act, Section 4(f) of the DOT Act, and that the failure of DOT and FTA to recognize the nature and scope of its undertakings were actions under the APA that were arbitrary, capricious, an abuse of discretion, or not in accordance with law.

DOT and FTA filed an opposition to plaintiffs' request for a preliminary injunction, stating that three of the New Orleans streetcar projects identified in the complaint did not receive federal funding and that three other streetcar projects, which did receive federal funding, have no legal, factual, or causal nexus to the Confederate monuments.

Regional Connector Appeal Hearing to be Rescheduled, District Court Injunction Dissolved

On November 4, 2015, the U.S. Court of Appeals for the Ninth Circuit agreed to expedite the oral argument in Japanese Village v. FTA and Today's IV, Inc. (Bonaventure) v. FTA, et al. (9th Cir. Nos. 14-56837 & 14-56873). Argument was scheduled for April 7, 2016, but on February 22, 2016, the court canceled that date

pending rescheduling. Briefing in the case is completed. A third plaintiff in the district court litigation, Flower Associates, settled with the Los Angeles County Metropolitan Transportation Authority (LACMTA). The settlement terms resolved both the state and federal claims by Flower Associates.

The cases originated in the U.S. District Court for the Central District of California. Plaintiffs challenge the Environmental Impact Statement (EIS) and Record of Decision (ROD) for the Regional Connector project in Los Angeles. The court granted FTA's and LACMTA's motions regarding all of Japanese Village's claims and all but one of Bonaventure's claims on May 29, 2014. With regard to the single claim in which the court found in Bonaventure's favor, the district court entered a partial injunction requiring additional analysis of two Flower Street tunneling method alternatives before construction along that section of the line can begin.

In the remaining district court matter, Today's IV, Inc. (Bonaventure) v. FTA, et al., 2016 WL 741685 (C.D. Cal. 2016), on February 5, 2016, the court found no violation of NEPA and dissolved the injunction, and determined that allegations of new NEPA violations needed to be heard in a new action. On December 16, 2015, FTA and LACMTA had completed the required supplemental NEPA analysis, a Final Supplemental Impact Statement (FSEIS), as it related to the remaining claims by the Hotel Bonaventure, one of the plaintiffs. The district court considered arguments by FTA, LACMTA, and Bonaventure about whether the limited injunction against construction activities on Flower Street dissolved and/or was satisfied by the completion of the FSEIS. FTA and LACMTA argued that the injunction automatically dissolved because, by its own

terms, it applied "unless and until" the supplemental NEPA analysis was complete. Bonaventure argued that the injunction required action by the court before it could be dissolved. Further, Bonaventure argued that the FSEIS was insufficient to dissolve the injunction, the injunction had been violated, and FTA and LACMTA had committed new NEPA violations in the FSEIS.

National Highway Traffic Safety Administration

Court Enters Consent Order of Forfeiture in Vehicle Import Attempt Case

On December 21, 2015, the U.S. District Court for the District of South Carolina entered a Consent Order of Forfeiture in United States v. Two Land Rover Defenders (D.S.C. No. 14-2093). This case involved two Land Rover Defenders that the Claimant, Geoffrey Wattiker, attempted to import into the United States. The vehicles were seized by U.S. Customs and Border Protection (CBP) on the basis that the vehicles did not comply with certain Federal Motor Vehicle Safety Standards and did not qualify for the exemption for vehicles twenty-five years or older. After more than two years of attempts to recover the vehicle by Mr. Wattiker, he ultimately agreed to a settlement during a mediation session in early December. Under the terms of the settlement, Mr. Wattiker is permitted to retain the vehicle body assemblies, but must remove the vehicles' engines, transmissions, and drive shafts and return them to CBP for disposal.

Pipeline and Hazardous Materials Safety Administration

Appeal of PHMSA Order Upholding FMCSA HAZMAT Emergency Order Proceeds to Oral Argument

On October 22, 2015, court-sponsored mediation commenced in National Distribution Services, Inc. v. USDOT et al. (D.C. Cir. No. 14-1254), a petition for review of the PHMSA Chief Safety Officer's (CSO) decision upholding FMCSA's issuance of an Emergency Order under 49 U.S.C § 5121(d) and 49 C.F.R. § 109.17. Mediation was not successful, and the mediator informed the court that the matters should proceed to oral argument, which the court has scheduled for May 20, 2016.

National Distribution Services, Inc. (National), a California motor carrier, transports hazardous material, including gasoline, ethanol, and other fuels, in cargo tanks. In May 2014, a cargo tank used to transport flammable hazardous material exploded at National's Corona, California facility during a welding repair. The explosion killed one worker and seriously injured another. Following an investigation of National's motor carrier and hazardous material operations, FMCSA determined that violations of DOT hazardous material regulations and unsafe conditions and practices constituted an imminent hazard. FMCSA issued an Emergency Restriction/Prohibition Order and Out-of-Service Order on August 14, 2014. FMCSA found that National was conducting unauthorized welded repairs on DOT specification cargo tanks, and the

unauthorized welded repair to a cargo tank that had not been purged of flammable hazardous material resulted in the May catastrophic explosion. FMCSA also determined that federal regulations prohibited the operation of most of National's cargo tanks as DOT specification cargo tanks due to the lack of required testing and inspection and unauthorized welded repairs. FMCSA ordered specific cargo tanks out-of-service until they were brought into compliance with regulatory requirements and prohibited National from conducting unauthorized welded repairs on DOT specification cargo tanks.

National requested administrative review of the Emergency Order. On October 3, 2014, the PHMSA CSO issued a decision finding that National had committed extensive violations of the DOT hazardous materials regulations and was engaged in unsafe practices.

National filed its petition for review in the U.S. Court of Appeals for the D.C. Circuit on November 20, 2014. In its opening brief filed on March 26, 2015, National argues that the PHMSA CSO's conclusion that its cargo tanks constitute an imminent hazard was erroneous and that the imminent hazard should have been limited to the potential for an explosion caused by repairs to cargo tanks that had not been properly cleaned and purged. National further contends that FMCSA did not meet its burden of establishing that the condition of National's tanks constituted an imminent hazard or that the Out-of-Service Order was narrowly tailored to abate the alleged hazard. National requests the court set aside the PHMSA decision.

PHMSA filed its response brief on April 27, 2015, arguing that the CSO reasonably concluded that National's use of cargo tanks

that were not tested and repaired in compliance with DOT hazardous materials requirements posed an imminent hazard. The voluminous evidence submitted by FMCSA supported the CSO's conclusions that National was directing unauthorized welding repairs at its facility that posed an imminent hazard and was transporting hazardous material in cargo tanks that were not properly tested, inspected, or repaired, which also constituted an imminent hazard. PHMSA argues that the May 2014 explosion reflected a general practice of routinely ordering unregistered employees to perform unauthorized welded repairs on cargo tanks and failing to properly test or inspect the cargo tanks while continuing to use them to transport hazardous materials.

D.C. Circuit Dismisses Challenge to PHMSA Rule as “Incurably Premature”

On November 23, 2015, the U.S. Court of Appeals for the D.C. Circuit issued an order dismissing the petition for review filed by the Interstate Natural Gas Association of America (INGAA) in INGAA v. USDOT (D.C. Cir. No. 15-1161). INGAA's petition challenged a portion of a March 2015 PHMSA rule that clarified the language of safety requirements related to pipeline components.

INGAA filed the petition even though PHMSA had not yet acted on INGAA's earlier-filed request for administrative reconsideration. After PHMSA informed the court that this sequence rendered the petition “incurably premature,” the court ordered INGAA to show cause why the petition should not be dismissed. INGAA responded by arguing that there was uncertainty about whether the “incurably premature” doctrine applied to petitions filed under the Pipeline Safety Act and by

suggesting that the court should hold the case in abeyance pending PHMSA's decision on the reconsideration request. PHMSA, in turn, argued that abeyance would serve no purpose, since the court has repeatedly held – regardless of the substantive statute involved – that if a party seeks judicial review while it is also seeking administrative reconsideration, its judicial petition is *incurably* premature.

The court agreed with PHMSA and dismissed the petition. It held that a party “may not simultaneously seek agency rehearing and judicial review of the same agency order,” and that a “petition for review filed while a request for agency rehearing is pending is incurably premature, and in effect a nullity.”

INGAA filed a second petition for review after PHMSA denied its request for reconsideration. INGAA v. USDOT (D.C. Cir. No. 15-1343). That proceeding has been held in abeyance pending PHMSA's consideration of INGAA's request that it create an exception for components put into service during a certain time period.

PHMSA Seeks Dismissal of OPA Suit

On October 8, 2015, the National Wildlife Federation (NWF) filed suit against DOT seeking declaratory and injunctive relief in the U.S. District Court for the Eastern District of Michigan, claiming that DOT has failed to promulgate certain regulations under the Clean Water Act, as amended by the Oil Pollution Act of 1990 (OPA). Plaintiff in National Wildlife Federation v. DOT (E.D. Mich. No. 15-13535) alleges that DOT has failed to carry out a non-discretionary duty to issue regulations implementing OPA's spill

response plan requirements for what NWF calls “transportation-related inland offshore facilities” and that DOT has not reviewed any such spill response plans to determine if they meet the OPA requirements. NWF does not deny that PHMSA has issued spill response plan regulations covering inland pipelines and reviewed plans for those facilities, but claims that no regulations cover the portions of those pipelines crossing rivers, lakes, or other navigable waters.

On January 11, 2016, DOT filed a motion to dismiss the group’s Amended Complaint for lack of subject-matter jurisdiction or, in the alternative, to transfer the case to the U.S. Court of Appeals for the District of Columbia Circuit. DOT’s motion relies on the well-established rule that when a court has exclusive jurisdiction to review a particular agency action, it also has exclusive jurisdiction over a suit seeking to compel the agency to take that action. DOT argues that because only the D.C. Circuit can hear challenges to OPA regulations, and because NWF’s claims are based on its assertion that DOT has failed to issue such regulations, only the D.C. Circuit has jurisdiction over NWF’s claims. DOT’s motion also notes that it strongly disagrees with NWF on the merits because PHMSA’s existing regulations apply to all portions of a covered pipeline, even those that cross inland waters.

PHMSA Moves to Dismiss Third-Party Challenge to Outcome of Hazardous Materials Investigation

On February 25, 2016, PHMSA filed a motion to dismiss in IQ Prods. Co. v. USDOT, et al. (D.N.J. No. 15-7070). Plaintiff IQ Products Company (IQ) formerly manufactured “WD-40” aerosol

products for the WD-40 Company (WDFC). After that relationship became embroiled in litigation, IQ embarked on a multi-year effort to convince PHMSA to find WDFC’s products in violation of PHMSA regulations governing the transportation of hazardous materials. PHMSA conducted an extensive, multi-phase investigation, but eventually determined that there was no evidence of a violation. On September 24, 2015, IQ brought this action, in the U.S. District Court for the District of New Jersey, to challenge the outcome of the investigation.

PHMSA moved the court to dismiss the case on the basis of two fundamental flaws. *First*, to the extent that the outcome of PHMSA’s investigation is judicially-reviewable at all, IQ could only challenge it by filing a petition for review in the court of appeals within 60 days (i.e., by January 2015). IQ’s lawsuit is therefore filed in the wrong court, and too late. *Second*, IQ lacks constitutional standing because it does not plausibly allege that DOT’s actions have caused it any injury, let alone an injury that could be redressed in this litigation. PHMSA also argues that even if the case is not otherwise dismissed, venue is not appropriate because the case has no connection to New Jersey.

Environmental Group Files FOIA Suit for Pipeline Accident Records

On December 7, 2015, the Environmental Defense Center (EDC) filed suit against PHMSA, claiming that the agency had violated FOIA by failing to produce any documents related to certain requests filed by the group. Environmental Defense Center, et al. v. PHMSA (C. D. Cal. No. 15-09433). On May 19, 2015, an oil pipeline in Southern California – Plains All American Pipeline’s “Line 901” – ruptured and caused a major oil spill in Santa

Barbara. On May 22, the EDC submitted a FOIA request to PHMSA seeking certain information about Line 901. On May 27, EDC submitted a second FOIA request to PHMSA seeking certain information about two other oil pipelines in Southern California.

In December 2015 and January and March 2016, PHMSA released four sets of records responsive to these requests, completing its response. PHMSA filed an Answer on March 25, 2016.

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