



U.S. Department of  
Transportation

# DOT LITIGATION NEWS

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**October 14, 2008**

**Volume No. 8**

**Issue No. 2**

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## **Supreme Court Litigation**

### **Supreme Court Reverses D.C. Circuit's Virtual Representation Decision in FAA FOIA Case**

On June 12 the Court in Taylor v. Sturgell, (Supreme Court No. 07-371), an FAA Freedom of Information Act (FOIA) appeal, ruled that the doctrine of "virtual representation" could not be used to bar a FOIA lawsuit seeking the same documents that had been unsuccessfully sought in an earlier case litigated by the same attorney.

"Virtual representation" had been utilized by several Federal Circuit Courts in cases where there had been successive litigation, and where a non-party to the initial case was held to have been adequately represented by a party in the first case such that in the subsequent case the non-party was bound by the original judgment.

The Taylor case involved successive attempts by two parties to secure from the FAA plans for a 1936 F-45 Fairchild aircraft. The FAA's second denial of the FOIA request was dismissed by the U.S. District Court for the District of Columbia, which held that the parties in the two cases were so closely associated that virtual representation barred re-litigation of a second FOIA denial. The district court's decision was upheld by a D.C. Circuit Court decision that the Supreme Court has now reversed.

The case was originally brought in a U.S. District Court in Wyoming by Greg Herrick, an aircraft mechanic and commercial pilot who restores vintage aircraft, and who is the Executive Director of the Antique Aircraft Association. Herrick had filed a request under FOIA, 5 U.S.C. 552, seeking to have FAA release the plans for an antique F-45 aircraft manufactured by a predecessor of Fairchild Corporation that Herrick had bought and wished to restore. The FAA, supported by Fairchild, denied the request after determining that the plans were non-disclosable trade secrets. The Wyoming district court and the U.S. Court of Appeals for the Tenth Circuit upheld FAA's determination.

After losing in the Tenth Circuit, petitioner Brent Taylor, who Herrick had hired to restore the aircraft at issue, filed his own FOIA request with the FAA seeking the same plans that had been denied to Herrick. FAA similarly denied that request. Thereafter Taylor, represented by the same attorney who had represented Herrick in the Tenth Circuit proceeding, appealed the FAA's denial to the U.S. District Court for the District of Columbia. The district court granted summary judgment in favor of the FAA and Fairchild applying a virtual representation rationale.

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

The Supreme Court rejected the use of this virtual representation theory, holding that the preclusive effects of a judgment in a federal-question case decided by a federal court should instead be determined by established grounds for nonparty preclusion. The Court sent the case back to the lower courts to apply these more traditional principles in evaluating the relationship between the two parties. The Supreme Court's decision is available at:

<http://www.supremecourtus.gov/opinions/07pdf/07-371.pdf>

The United States brief, which had argued in favor of affirming the D.C. Circuit's decision, is available at:

<http://www.usdoj.gov/osg/briefs/2007/3mer/2mer/2007-0371.mer.aa.pdf>

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

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

### **Supreme Court Will not Review Ninth Circuit's Decision Affirming Compensation to Property Owners for Height Restrictions at Las Vegas Airport**

On June 23 the Court denied a certiorari petition seeking review of a decision by the U.S. Court of Appeals for the Ninth Circuit in Clark County, Nevada v. Vacation Village, Inc. (Supreme Court Certiorari Petition No. 07-373). The Ninth Circuit decision held that landowners have an ownership interest in the navigable airspace above the landowner's property, and that a local zoning ordinance imposing height restrictions in order to ensure safe aviation operations at McCarran International Airport in Las Vegas constituted a per se taking that requires compensation to the landowner under the Nevada Constitution.

On January 7 the Supreme Court asked the Solicitor General to provide the views of the United States concerning whether the Court should grant the then-pending certiorari petition. The United States ultimately filed a brief on May 23 urging the Court not to take the case but also cautioning against any expansive application of the holding of the Ninth Circuit holding in the context of other airport takings fact patterns.

The Ninth Circuit's decision held that landowners adjacent to McCarran Airport in Las Vegas have an ownership interest in 500 feet of navigable airspace above the landowner's property, and that any local zoning ordinance restricting the use of that space in order to ensure

safe aviation operations is a per se taking that requires compensation to the landowner under the Nevada Constitution. FAA encourages airports to adopt such ordinances in conjunction with airport development projects. The Ninth Circuit found that no compensable taking had occurred under the Fifth Amendment of the U.S. Constitution, but concluded that Federal law did not preempt a separate finding of a taking under the Nevada Constitution.

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

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

On appeal, the Ninth Circuit examined a then-recent decision of the Nevada Supreme Court involving virtually identical facts, McCarran International Airport v. Sisolak, 137 P.3d 1110 (Nev. 2006). In that case the Nevada court had determined that (1) under state law property owners have an ownership right to the airspace above their land up to 500 feet, and (2) because Ordinance 1221 preserved the unconditional right of aircraft to fly in that airspace it amounted to a physical invasion – a per se regulatory taking – under both Federal and State Constitutions.

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

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

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

<http://www.ca9.uscourts.gov/coa/newopinions.nsf/E1AD8CF1047CF7138825733>

[300551050/\\$file/0516173.pdf?openelement](http://300551050/$file/0516173.pdf?openelement)

The United States brief urging the Supreme Court not to hear the case is available at:

<http://www.usdoj.gov/osg/briefs/2007/2pet/6invt/2007-0373.pet.ami.inv.pdf>

### **Court Seeks Views of the United States Concerning Whether Review Should Be Granted in FELA Case**

On June 16 the Supreme Court issued an order inviting the Solicitor General to file an amicus brief setting forth the views of the United States concerning whether a pending certiorari petition should be granted in Weldon v. Norfolk Southern Ry. Co., (Supreme Court Cert. Petition No. 07-1152). At issue is an Ohio statutory provision that prioritizes asbestos cases so that only those cases involving presently-redressible injuries will be scheduled for trial.

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

FELA assures railroad employees a safe work place and gives them and their

families the right to recover compensation if injured during the course of railroad employment. Under FELA, injured employees can seek compensation for wage loss, future wage loss, medical expenses and treatments, pain and suffering, and for partial or permanent disability. By statute FELA is also applicable to Jones Act causes of action brought by merchant mariners. There have been a substantial number of claims filed under FELA seeking recoveries based on workers' exposure to asbestos.

DOT has no regulations addressing the scope or application of FELA, nor does the Department have any programs directly dealing with the statute. However, since FELA relates directly to claims brought against railroads and, through amendments to the Jones Act, also extends to maritime vessels, the Department has a general interest in its fair application of the statute.

As a general matter FELA preempts States from imposing substantive barriers to recovery that differ from the terms of FELA. See Napier v. Atlantic Coast Line Ry. Co., 272 U.S. 605, 613 (1926). However the statute also recognizes the "concurrent power and duty of both Federal and state courts to administer the rights conferred by the statute . . . ." Minneapolis & St. Louis Ry. Co. v. Bombolis, 241 U.S. 211, 218 (1916). And as the Ohio Supreme Court observed, "FELA cases adjudicated in state courts are subject to state procedural rules." All of this presupposes, then, that procedures will differ as between FELA cases brought in State courts and those brought in Federal courts, and that State procedural

differences are not preempted by Federal law unless the State procedures in application impose what amounts to more onerous substantive standards than are applicable in Federal courts.

We have been working with the Department of Justice in preparing the United States' amicus brief responding to the Court's invitation.

## **Departmental Litigation in Other Federal Courts**

### **Airport Slot Auction Plans Generate Administrative and Judicial Challenges**

Historically, DOT and FAA have addressed the problem of congestion and delays at certain major airports by, inter alia, limiting the number of permissible flight operations ("slots"). The agency has distributed the right to operate at such airports via various methods, usually by grandfathering existing carriers and reserving a few slots for new entrants and small community service.

The Department has also allowed airlines to buy, sell, trade, or lease slots in a secondary market. More recently, as part of an Administration effort to emphasize market forces in addressing congestion and allocating scarce resources more efficiently, the FAA has decided to use auctions to lease a relatively small number of slots at the major New York City area airports (JFK, Newark (EWR), and LaGuardia (LGA)). FAA premises its statutory authority to conduct these auctions on its authority to procure and otherwise manage agency property. This has led to disputes in a number of venues.

Earlier this year FAA limited operations at JFK and EWR, and stated that it

planned to lease new or returned slots at these two airports by conducting auctions. 73 Fed. Reg. 3510 (January 18, 2008), 9838 (February 14, 2008), 29550 (May 21, 2008). Accordingly, on August 5 the FAA solicited bids for the lease of two unallocated slots at EWR in an auction that was scheduled to take place on September 3. 73 Fed. Reg. 46136 (August 7, 2008).

The FAA's notice advised all parties that protests regarding the agency's authority to conduct the auction and disputes concerning any other issues related to the auction process were to be filed with the FAA Office of Dispute Resolution for Acquisition (ODRA), an independent office within the FAA Office of Chief Counsel with jurisdiction over agency procurement and property management matters.

Protests from the Air Transport Association, individual airlines, the proprietor of the major New York City area airports (the Port Authority of New York and New Jersey) and the New York Aviation Management Association were quickly filed with ODRA. Dkt. Nos. 08-ODRA-00452, et al. The protesters contended that the FAA lacked authority to conduct such auctions, that auctions would violate various Federal fiscal statutes such as the

Anti-Deficiency Act and the current agency appropriations act, and that any decision to proceed with the auction while the issue of whether the FAA has authority to conduct auctions was under consideration in ongoing rulemaking proceedings essentially denied protesters' due process rights.

The FAA countered that its statutory authority to acquire, manage, and dispose of property authorized auctions of slot leases, that such auctions did not violate Federal fiscal laws, and that any due process claims should be addressed only at the conclusion of the pending rulemakings.

The protesters argued that the September 3 auction should be suspended pending ODRA's ruling on their protests, and FAA strongly argued against any suspension. However, on August 28 ODRA agreed to suspend the September 3 auction and at the same time committed to expeditious resolution of the merits of the agency case.

On September 30 ODRA issued its decision. ODRA dismissed the protests filed by ATA, the Port Authority and the New York Aviation Management Association, holding that those organizations lacked standing to challenge the auction since none of the organizations could have bid on the slots. ODRA refused to reach the issue of whether the slots were property, for purposes of FAA's Acquisition Management System, concluding that that issue could only be resolved by a Federal court. However, ODRA went on to conclude that there were no deficiencies in the slot auction notice and that FAA's Acquisition

Management System authorized the agency to dispose of property rights by way of a lease, and also authorized the use of a competitive process to determine who the lessee should be. As a result, the ODRA decision removed the suspension order that had precluded the September 3 auction from going forward. As of this writing, the auction has not been re-scheduled.

Apart from the ODRA protest, on August 11, the ATA filed a petition for review in the U.S. Court of Appeals for the District of Columbia Circuit challenging an FAA August 6 notice announcing the planned September 3 auction. ATA v. FAA (D.C. Cir. No. 08-1262). The Port Authority of New York and New Jersey and Delta Air Lines moved to intervene in the case on September 3.

On October 6, following issuance of the ODRA decision the Port Authority of New York and New Jersey filed its own petition for review in the U.S. Court of Appeals for the District of Columbia Circuit. Port Authority of New York and New Jersey v. FAA (D.C. No. 08-1319). The Port Authority's petition challenges the ODRA decision, the August 6 notice that is the subject of ATA's petition, and FAA's September 16 notice setting forth the auction procedures that would be used for auctions allocating slots at LaGuardia, John F. Kennedy International and Newark Liberty airports.

No briefing schedule has as yet been set by the D.C. Circuit in either the ATA or the Port Authority proceedings.

Contemporaneous with the ODR proceeding several legislators had requested that the Government Accountability Office provide a legal opinion regarding the authority of FAA to auction airport arrival and departure slots. On September 30, shortly after ODR issued its opinion, GSA released its opinion letter. In it GSA concluded that FAA currently lacks the authority to auction slots under either its property disposition authority or its user fee authority. Unlike the ODR opinion GSA reached the issue of whether slots were property, and concluded that they were not within the meaning of FAA's statutory authority. Insofar as the decision concluded that FAA lacks the authority to auction slots it is otherwise at loggerheads with the ODR decision that FAA has such authority.

Separately, on August 4 the Port Authority proposed to reject any flight at its airports that used a slot obtained at auction and sought comments on that proposal. DOT filed comments stating that the Port Authority lacked authority to bar operations by any air carrier otherwise authorized to use Port Authority airports, and that the proposed prohibition would violate various Federal statutory provisions and the commitments made in return for Federal funds. FAA also argued that the proposed ban would be expressly preempted under various statutory provisions, including 49 U.S.C. § 41713(a)(4)(A), which broadly provides that State or local governments "may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route or service of an air carrier . . . ." The FAA's comments also argued that the

proposed ban was not within the authority of any airport proprietor.

On August 26 the FAA separately initiated an enforcement proceeding pursuant to 14 C.F.R. Part 16 to officially determine whether the proposed ban of any airline using slots obtained at auction would violate Federal law and grant assurances. FAA No. 16-08-09. The Port Authority responded in the administrative proceeding in a September 27 filing defending the proposed ban.

In related actions, the FAA on October 6 issued two rules relating to congestion management at New York airports: one for LaGuardia and a separate rule for JFK and Newark airports. Both rules were published in the Federal Register on October 10: 73 Fed. Reg. 60544 (JFK/Newark) and 73 Fed. Reg. 60574 (LaGuardia). They provide for a continuation of caps on the operations at the airports, assignment of the majority of slots to existing operators, and an annual auction of a limited number of slots in each of the first five years of the rule. Auction proceeds will be used to mitigate congestion and delay in the New York area.

On October 10, the same day the FAA rules were published in the Federal Register, the Port Authority filed a petition for review of the rules in the U.S. Court of Appeals for the District of Columbia Circuit. Port Authority of New York and New Jersey v. FAA, (D.C. Cir. No. 08-1329).



### **ATA Challenges DOT/FAA Rates and Charges Policy Amendment**

On September 5, the Air Transport Association filed a petition seeking review of the July 14 DOT and FAA amendment to the "Policy Regarding the Establishment of Airport Rates and Charges" in Air Transport Association, Inc. v. DOT (D.C. Cir. No. 08-1293). DOT adopted three amendments to the 1996 Rates and Charges Policy to provide greater flexibility to operators of congested airports to use landing fees to provide incentives to air carriers to operate at the airport at less congested times or to use alternate airports to meet regional air service needs.

Among other things, the amendments clarify the 1996 Policy by explicitly acknowledging that airport operators are authorized to establish a two-part landing fee structure consisting of both an operation charge and a weight-based charge, in lieu of the standard solely weight-based charge. The amendment expands the ability of the operator of a congested airport to include in the airfield fees of such airport a portion of the airfield costs of other, underutilized airports owned and operated by the same proprietor.

The amendment also permits the operator of a congested airport to charge users of the airport a portion of the cost of airfield projects under construction.

No briefing schedule has, as yet, been set.

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

A collection of interest groups, including the Sierra Club, Public Citizen, and the Teamsters, petitioned for review of the Department's one-year Mexican Truck NAFTA Demonstration Project in the U.S. Court of Appeals for the Ninth Circuit and asked the court for an emergency stay of the Project. Shortly thereafter, the Owner Operator Independent Drivers Association (OOIDA) sought judicial review and an emergency stay of the Project in the U.S. Court of Appeals for the District of Columbia Circuit. Both courts denied the emergency stay motions, agreeing with DOT that the petitioners had not met the legal requirements for such emergency relief, and the two petitions were then consolidated in the Ninth Circuit.

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

The Department contends that it has met or exceeded all statutory requirements for the program, and that the DOT 2008 appropriations act only bars expenditure

of funds on future demonstration programs involving Mexican motor carriers. In August, DOT announced a two-year extension of the Project, which had been set to conclude on September 6, 2008.

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

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

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

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

[http://www.fmcsa.dot.gov/rules-regulations/administration/rulemakings/rule-programs/rule\\_making\\_details.asp?ruleid=203&year=2007&cat=notice](http://www.fmcsa.dot.gov/rules-regulations/administration/rulemakings/rule-programs/rule_making_details.asp?ruleid=203&year=2007&cat=notice).

### **United States Considers Participation in Litigation Challenging Los Angeles and Long Beach Ports' Mandatory Concession Agreements**

The United States is considering whether to participate as an amicus party in litigation commenced by the American Trucking Associations challenging implementation of mandatory concession agreements at the Ports of

Long Beach and Los Angeles. The litigation, now pending in the U.S. Court of Appeals for the Ninth Circuit, American Trucking Assoc. v. City of Los Angeles (9th Cir. No. 08-56503), challenges the legality of the orders adopted by the Long Beach Harbor Board and the Los Angeles Harbor Board instructing the two ports to deny access to any truck wishing to provide drayage services if the operator of the truck has not entered into an approved concession agreement. The ATA principally argues that the order is preempted under provisions of the Federal Aviation Administration Authorization Act ("FAAAA"), which preempts State or local regulations "related to a price, route, or service of any motor carrier." 49 U.S.C. § 14501(c)(2)(A).

The cities of Los Angeles and Long Beach own and operate their respective ports, which are adjacent to each other. Early this year the two Harbor Boards adopted orders instructing port terminal operators to deny access in the ports as of October 1 "to any Drayage Truck unless such Drayage Truck is registered under a concession" granted by the relevant Port. While the mandatory concession agreements for each Port have a number of parallel conditions, the Los Angeles concession agreement requires motor carriers to eliminate the use of independent contractors by the end of 2013. Independent "owner operators" comprise the vast majority of truckers providing drayage services at the Ports. ATA's complaint alleges that, due to the close proximity of the two ports, a ban on owner-operator operations at one port effectively bans such operations at both ports.

Los Angeles and Long Beach have defended their respective orders arguing that their principle aim is to ensure safety and to address environmental concerns. As such, they argue that the orders, and the mandatory concession agreements, are permissible under the public safety exception to the FAAAA.

A California district court previously refused to enjoin the effectiveness of the orders. Similarly, the Ninth Circuit has refused to stay the orders. Briefing is proceeding before the Ninth Circuit under an expedited schedule.

The United States is actively considering participating in the litigation as an amicus. Any amicus brief is currently due to be filed by October 15.

### **Department's Brief Defends LAX Rates and Charges Decision**

On August 19, the Department filed its responsive brief in the U.S. Court of Appeals for the D.C. Circuit in Alaska Airlines, Inc. v. DOT, (D.C. Cir. No. 07-1209). The case involves five consolidated petitions filed by the Los Angeles Airport Authority and carriers at the airport. They seek review of the Department's Final Decision and Refund Order resolving two administrative complaints that challenged the reasonableness of new fee methodologies and increased terminal charges at Los Angeles International Airport.

The Department argued in its brief that it correctly determined that the use of a

fair market value (FMV) methodology is acceptable to establish airport terminal rates under the applicable statutory language and the Department's airport rates and charges policy so long as that value is determined objectively. The Department also argued that FMV could be based on opportunity costs, but that any foregone opportunity analysis needed to be based on other potential aeronautical uses. The Department further argued that the particular market value methodology imposed by the airport, however, was unreasonable because it was not based on an objective determination of FMV, but rather, was established by the airport in-house.

The Department's brief contends that even though the airport's rentable area methodology in general is reasonable, it unjustly discriminated against the complaining carriers. The "rentable area" methodology assesses terminal fees on common use space, such as corridors, restrooms, and stairwells, which previously were not included in calculating fees. The Department argued that, while the methodology is not unreasonable, it was unjustly discriminatory as applied because the same methodology was not used to calculate the terminal fees of other long-term carriers who made similar use of terminal common areas, but were ultimately charged radically different fees.

Finally, the Department argued that the air carriers were not barred from challenging the fee increase under a "written agreement" exclusion found in the rates and charges statute. The Department argued that holdover tenancies, such as those under which the

airline petitioners were operating, did not qualify as “written agreements” pursuant to the statutory exclusion because the agreements did not contain express terms denoting schedules of fees, methodologies, or charges for an express term and containing standard and customary airport airline lease clauses.

No date has been set for oral argument.

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

On July 18 the United States filed an amicus brief in Eid v. Alaska Airlines, Inc. (9th Cir. No. 06-16457) urging that under the Tokyo and Warsaw Conventions the pilot of an aircraft has wide discretion to reasonably react to in-flight passenger disruptions free from potential civil liability. While the underlying facts in the case involved a flight prior to the effectiveness of the Montreal Convention, the United States’ brief argued that the same result would occur under that Convention.

The Ninth Circuit invited the United States to submit a brief setting forth the government’s views as to the proper application of the Convention on Offences and Certain Other Acts Committed on Board Aircraft (“Tokyo Convention”) and the Convention for the Unification of Certain Rules Relating to International Transportation by Air (“Warsaw Convention”).

At issue in the litigation is an in-flight disturbance that occurred on September

29, 2003 on an international flight from Vancouver, British Columbia to Las Vegas, Nevada. When the disruption occurred in the First Class section of the plane the captain diverted the aircraft to Reno, Nevada, ordered the disembarkation of nine first class passengers of Egyptian descent, and then contacted local police officials who, after interviewing the disembarked passengers, ultimately determined not to arrest them.

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

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

While there is little available precedent concerning the proper application of the “reasonableness” standard under the Tokyo Convention, the brief points out that authorities in analogous areas equate reasonable activity with activity that is neither arbitrary nor capricious. The brief argues that this approach is consistent with the Tokyo Convention, which establishes a standard that is

deferential to decisions by the aircraft commander. That deference is based on a recognition that a pilot might have to act quickly even when only limited information was available, and that he should not be penalized for doing so even if that information later proved to be erroneous. The approach is also consistent, the brief pointed out, with U.S. Statutory law, case law interpreting those statutory provisions, and guidance issued FAA.

We are now awaiting the Ninth Circuit's decision.

### **Department Defends Order Prohibiting the Township of Tinicum, Pennsylvania from Charging Landing Fees**

On July 30 the Department filed its responsive brief in support of its Declaratory Order, issued March 19, determining that the Township of Tinicum, Delaware County, Pennsylvania, could not impose a privilege fee on air carriers for the use of runways at Philadelphia International Airport ("PHL") that are located within Tinicum's borders. Township of Tinicum v. DOT (3d Cir. 08-1830).

Tinicum had enacted an ordinance levying a charge of three cents per thousand pounds maximum landed weight on aircraft users landing on PHL runways located within the Township's boundaries. The Township claimed that the fees were needed to compensate it for costs purportedly attributable to Tinicum, such as operation and maintenance of sewers, roadways and supporting police and fire functions. A prior agreement between the City of

Philadelphia and Tinicum had compensated Tinicum for certain costs relating to PHL. That agreement expired last year and negotiations to renew the agreement broke down, leaving Tinicum without any agreement for compensation from the City of Philadelphia.

A state court suit against Frontier Airlines, and later amended to include other carriers at PHL, had been filed by Tinicum, removed to federal district court, and then stayed in order to allow the Department to institute a proceeding to determine the legality of the fee. The Department's decision ultimately determined that the privilege fee is unlawful.

Our brief defended the conclusions reached in the Department's decision, arguing that the fee is unlawful under the Anti-Head Tax Act ("AHTA"), 49 U.S.C. § 40116(c). The brief refutes Tinicum's argument that the fee is permissible under amendments to the AHTA by pointing out that under the precodification version of the law no municipality could impose taxes on aircraft "unless" they landed in its jurisdiction. As codified in 1994, section 40116(c) now states that a municipality may impose taxes "only if" the aircraft landed in the jurisdiction. Tinicum argued before DOT and in court that the codification changed the law from a restraint to an authorization to tax "if" the aircraft lands in its jurisdiction. The Department argues in our brief that the codification act in fact expressly directed that it was not intended to make any substantive change to the law and also expressly directed that it may not be construed to make a substantive change to the law.

More generally, our brief argues that the Department correctly determined that the privilege fee is in essence a landing fee and a prohibited head tax under 49 U.S.C. § 40116(b) and that, in any event, only a State or political subdivision that owns or operates an airport may impose landing fees, which Tinicum is not. The brief also defended the Department's conclusion that Tinicum's imposition of the fee on foreign air carriers would not be consistent with the international obligations of the United States.

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

No date has been set for oral argument.

### **American Airlines Files Second Petition Seeking Review of Order Awarding Service in U.S.-Colombia Market**

On June 16, American Airlines, Inc. filed a petition in the U.S. Court of Appeals for the District of Columbia Circuit seeking review of the Department's final order awarding service frequencies in the U.S.-Colombia market resulting from the 2007/2008 U.S.- Colombia Combination Frequency Allocation Proceeding (DOT-OST-2007-0006). The new case is American Airlines v. DOT, (D.C. Circuit No. 08-1222). Both Delta and Spirit Airlines intervened in support of the Department, as they did in support of the first petition for review.

As previously reported, on January 22, American filed a previous petition for

review challenging the Department's Instituting Order and Order on Reconsideration, which invited interested U.S. carriers to file applications for certificate or exemption authority to serve the U.S. - Colombia market. American Airlines, Inc. v. DOT, (D.C. Circuit No. 08-1025). That order set forth the Department's decision to reexamine whether American should retain seven of its previously allocated weekly U.S.-Colombia air service frequencies, retained for the Miami-Baranquilla market, but not being used by American at the time of the Instituting Order. American also challenges the Department's decision to determine which other U.S. carriers the seven frequencies should be allocated to.

On March 10, the Department filed a motion to dismiss the initial petition for review as premature, arguing that American had sought review of an interlocutory order that was not final agency action. On May 19, the court issued an order referring to the merits panel the issues raised in the Department's motion to dismiss.

In its latest petition for review, American challenges the Department's final decision (Order 2008-5-27), issued May 21, which awarded the U.S.-Colombia service frequencies to carriers other than American.

On June 20, American moved to consolidate its latest petition for review with its earlier case. The Department did not oppose the motion. The court has issued a briefing schedule pursuant to which American's brief will be due on November 17, and DOT's brief will be due on December 17.

## **Second Circuit Holds New York Air Passenger Consumer Protection Law to Be Preempted**

On March 25, the U.S. Court of Appeals for the Second Circuit in Air Transport Association, Inc. v. Cuomo, (2d Cir. No. 07-5771), held that New York's recently enacted passenger bill of rights legislation is preempted by Federal law. ATA had argued for that outcome in its challenge to the legislation, which prescribed steps that New York required airlines to take when their flights experienced take-off delays at New York airports.

The United States was not a party in the litigation. However, on March 3 the Department issued a relevant clarification to an Advanced Notice of Proposed Rulemaking published last November. The ANPRM proposed new Departmental regulations that, if finalized, would prescribe Federal protections for airline passengers who experience lengthy tarmac delays.

In the "Regulatory Notices" section of the ANPRM the Department previously had stated that any final rule would not preempt State law, and that therefore consultation with States was unnecessary under the provisions of Executive Order 13132. That statement had been utilized by the State of New York before the Second Circuit to bolster its argument that the New York statute was not preempted.

The Department's March 3 clarification explained that while new Departmental rules addressing tarmac delays would not separately preempt similar State

rules, that is so only because States already lack the authority to promulgate such rules since the Airline Deregulation Act. 49 U.S.C. § 41713(a)(4)(A), currently provides that a State "may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of an air carrier." The Department's clarification cited the Supreme Court's recent expansive application of "price, route and service" preemption in Rowe v. New Hampshire Motor Transport Assoc. in support of that position.

The Second Circuit's short *per curiam* decision held that the New York statute is preempted under the analysis offered by the Department in the revised ANPRM statement.

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

[http://www.ca2.uscourts.gov:8080/isysnative/RDpcT3BpbnNcT1BOXDA3LTU3NzEtY3Zfb3BuLnBkZg==/07-5771-cv\\_opn.pdf#xml=http://www.ca2.uscourts.gov:8080/isysquery/irl110f/1/hilite](http://www.ca2.uscourts.gov:8080/isysnative/RDpcT3BpbnNcT1BOXDA3LTU3NzEtY3Zfb3BuLnBkZg==/07-5771-cv_opn.pdf#xml=http://www.ca2.uscourts.gov:8080/isysquery/irl110f/1/hilite)

The Supreme Court's decision in Rowe v. New Hampshire Motor Transport Assoc. is available on-line at:

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

The United States' *amicus* brief in Rowe, explaining our expansive view of the preemption provision, is available on-line at:

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

**United States' Brief to the  
Eleventh Circuit Argues that  
Forum Non Conveniens  
Dismissals Are Available Under  
the Montreal Convention**

On May 14 the United States filed an amicus brief in In re: West Caribbean Airways, S.A. (11th Cir. No. 07-15830) arguing that the Montreal Convention, to which the United States is a signatory, allows a district court to determine whether to dismiss an international aviation negligence action in circumstances where it is argued that the United States is not the most convenient forum in which to bring suit. Such motions are brought under the doctrine of forum non conveniens.

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

With the exception of the Ninth Circuit, most Federal courts under both the Montreal Convention and the previously-applicable Warsaw Convention have applied the doctrine of forum non conveniens to determine whether the action should proceed in the United States or be transferred to the courts of another country participating in the Convention. See, e.g., Air Crash Disaster Near New Orleans, Louisiana on July 9, 1982, 821 F.2d 1147, 1162 (5th Cir. 1987) (applying FNC but

denying motion to dismiss); In re Air Crash Off Long Island New York, on July 17, 1996, 65 F. Supp.2d 207, 214 (S.D.N.Y. 1999) (denying motion to dismiss after applying FNC criteria); In re Disaster at Riyadh Airport Saudi Arabia on Aug. 19, 1980, 540 F. Supp. 1141 (D.C. Cir. 1982) (granting FNC motion to dismiss).

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

Our brief to the Eleventh Circuit argues that the district court properly followed the majority rule and properly rejected the Ninth Circuit approach. We are now awaiting the court's decision.

**Eighth Circuit Upholds  
Constitutionality of Federal  
Railroad Safety Act Amendment  
Clarifying Scope of Federal  
Preemption**

On July 2 the U.S. Court of Appeals for the Eighth Circuit in a 2 to 1 decision in Lundeen v. Canadian Pacific Railway Co. (8th Cir. 04-03220) upheld the constitutionality of newly-revised provisions of the Federal Railroad Safety Act (FRSA) clarifying the scope of



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

The provision at issue, which is retroactive to the date of the 2002 Minot, North Dakota derailment, was aimed at reversing prior decisions in the district court and the U.S. Court of Appeals for the Eighth Circuit, which had held that any actions seeking damages related to the derailment in which hazardous gasses were released were preempted by Federal law even if it could be shown that the railroad had failed to adhere to the required Federal safety standards. In reversing the district court decision the Eighth Circuit agreed with the views expressed in an amicus brief filed by the United States last October that the statute is constitutional.

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

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

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

## **Multiple Challenges Filed to DOT Drug Testing Amendments**

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

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

Notable changes in the amended rules include (1) requiring specimen validity testing (i.e., to ensure that samples are in fact adulterated), (2) requiring direct observation of specimen collections when testing is part of return-to-duty or follow-up testing (i.e., for individuals who have previously tested positive or refused to be tested), and (3) imposing a requirement to remove all clothing from the area between the waist and knees to demonstrate to the observer that no prosthetic device is used. The amendments were scheduled to take effect August 25, 2008.

Petitions for reconsideration were filed contending, inter alia, that DOT had not specifically proposed to mandate direct observation for return-to-duty or follow-up testing and that direct observation

required special training. On these grounds the parties sought a postponement of the effective date of these changes.

On August 13, BNSF Railway Co. and seven rail industry unions filed a petition for review of these amendments in the U.S. Court of Appeals for the D.C. Circuit. The petition alleged that the changes violated the Fourth Amendment to the Constitution, were arbitrary and capricious under the Administrative Procedure Act, and that DOT had not provided proper opportunity for notice and comment under the APA with respect to mandatory direct observation. Burlington Northern-Santa Fe Ry. v. DOT, (D.C. Cir. No. 08-1264).

On August 20, the International Brotherhood of Teamsters filed a petition for review of the same rules in the same court making the same legal claims. Int'l Brhd. of Teamsters v. DOT, (D.C. Cir. No. 08-1276).

On August 22 the Air Line Pilots Association, International and the Transportation Trades Department, AFL-CIO filed a petition for review of the same rules in the U.S. Court of Appeals for the Ninth Circuit. They alleged only generalized violations of the Constitution and other law. Air Line Pilots Assoc. v. DOT, (9th Cir., No. 08-73665).

On August 26 DOT postponed the effective date of mandatory direct observation rule as it would have applied to follow-up and return-to-duty testing, specifically proposed this rule change, and sought comments. 73 Fed. Reg. 50222. Assuming the rule is not

changed following review of comments, the effective date of this provision will be November 1. DOT declined to make any other changes.

The Department has moved to consolidate the two D.C. Circuit cases and to transfer the Ninth Circuit case to the D.C. Circuit.

### **Briefing in D.C. Circuit Begins in Flight Attendants' Challenge to Virgin America Order**

On April 21, the U.S. Court of Appeals for the Ninth Circuit granted the Department's motion and transferred to the U.S. Court of Appeals for the D.C. Circuit the petition for review filed by the Association of Flight Attendants – CWA (“AFA”) in Association of Flight Attendants – CWA v. DOT, (9th Cir. No. 07-72960).

As previously reported, on October 5, 2007, the Department filed a motion for transfer, arguing that the Ninth Circuit was not the proper venue because the petitioner is an unincorporated association that resides in and has its principal place of business in the District of Columbia. The Ninth Circuit agreed that under applicable venue requirements only the D.C. Circuit could hear the case. The new case is Association of Flight Attendants – CWA v. DOT, (D.C. Cir. No. 08-1165). Virgin America has intervened in the transferred case.

The AFA is a labor union representing certain flight attendants in the United States. AFA seeks review of the Department's Final Order 2007-5-11, issued May 18, which granted Virgin

America, Inc. a certificate of public convenience and necessity under 49 U.S.C. § 41102 to engage in interstate scheduled air transportation of persons, property, and mail. AFA contends that Virgin America has not satisfied the U.S. citizenship requirements of 49 U.S.C. § 41102.

The petitioner's opening brief was filed on September 29, and the Department's responsive brief is due October 29. No date has been set for oral argument.

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

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

The parties have argued that the Florida law is preempted on a number of grounds, including that it constitutes an impermissible intrusion by the State of Florida into the area of foreign affairs, that it is unconstitutional under the Commerce Clause, and that it seeks to regulate air carriers contrary to the provisions of the Airline Deregulation Act ("ADA"). The ADA, as codified at 49 U.S.C. § 41713(a)(4)(A), provides

that "States may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route or service of an air carrier . . . ."

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

The court held a hearing on September 25, and on September 30 issued a 53-page decision denying Florida's motion to dismiss the case and instead granting plaintiffs' request for a preliminary injunction precluding enforcement of the Florida statute. The court determined that the Florida statute was likely unconstitutional since it appears to be preempted expressly under the Supremacy Clause and provisions of the ADA, and impliedly by the United States' over-arching Federal jurisdiction over all foreign affairs matters. The court noted that the Florida statute "include[s] extraordinary expensive registration and bonding requirements, exorbitant fines and a felony conviction for those who fail to comply with the law" and that these "constitute little more than an attempt to impose economic sanctions on travel to designated foreign governments, particularly the Republic of Cuba." The court concluded that "the right and power to impose such sanctions, and to establish foreign policy, remains, under our Federal Constitution, solely within the exclusive domain of the Congress of the United States and the President, and not within the aegis of the State of

Florida under the guise of consumer protection.”

A representative from the Department of Justice appeared at the argument and informed the court that the United States is weighing whether to participate in the litigation on the merits, and that we should know whether we will in fact participate by October 31.

### **Air Carrier Seeks Review of DOT Order Revoking Certificate**

On June 4, in Boston-Maine Airways Corp. v. Peters, (D.C. Cir. No. 08-1212), Boston-Maine Airways sought review in the U.S. Court of Appeals for the District of Columbia Circuit of DOT's decision to revoke the air carrier's certificate of public convenience and necessity. DOT revoked this carrier's certificate based on the fact that the carrier had on numerous occasions submitted intentionally falsified financial information to DOT to support its requests to receive authority to conduct scheduled passenger service using larger aircraft, that the carrier's senior management knew or should have known of these falsifications, that the carrier's actual financial resources could not meet DOT's financial fitness requirements for such authority, and that the carrier's overall financial condition was extremely poor.

Boston and Maine's opening brief was filed on September 15. Our responsive brief is due to be filed on October 15. No date has been set for oral argument.

### **Complaint Seeks Compensation for Loss of Gates at Dallas Love Field**

Love Terminal Partners (LTP) has filed a complaint against the United States in the U.S. Court of Federal Claims in Love Terminal Partners v. United States, (Ct. Fed. Claims No.1:08-cv-00536-MMS) seeking compensation for the proposed demolition of a passenger terminal facility owned by LTP on 26.8 acres of land at Love Field in north Dallas, Texas.

Operations at Love Field have for years been restricted by Congress under the Wright Amendment. In 2006 Congress enacted the Wright Amendment Reform Act, which phased out some Love Field operational restrictions but, in order to ensure that the airport did not expand, also reduced the number of gates permitted at the air field. That reduction, LTP alleges, resulted in the demolition of its facility. LTP's complaint seeks payment of just compensation that LTP argues is due as a result of this alleged taking of its property.

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

### **Federal Aviation Administration**

#### **Santa Monica Challenges FAA Decision Suspending Jet Ban at City Airport, Administrative Proceeding Continues**

The City of Santa Monica, California, is the proprietor of a small airport (SMO) whose operations have long been a source of local opposition. Some thirty years ago the City enacted both flight restrictions, to control noise, and a ban on jets, on the basis of alleged safety concerns. In subsequent private litigation courts upheld the noise-related restraints but rejected the jet ban, finding that the jets at issue were as safe, or safer, than other aircraft that continued to use the airport. Santa Monica Airport Association v. City of Santa Monica, 481 F. Supp. 927 (C.D. Cal. 1979), *aff'd*, 659 F.2d 100 (9th Cir. 1981).

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

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

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

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

ordinance pending the close of the administrative proceeding.

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

On May 27 the FAA issued a determination in the Part 16 proceeding concluding that the City's ordinance violated Federal statutes and the City's grant assurances; it recommended entry of a permanent cease and desist order. Santa Monica requested an administrative hearing, which is now scheduled for October; thereafter the hearing officer will make a decision (expected in mid-December), which may also be appealed administratively.

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

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

**New York/New  
Jersey/Philadelphia  
Metropolitan Area Airspace  
Redesign Faces Twelve Legal  
Challenges; Results of GAO's  
Investigation**

In County of Rockland, New York v. FAA (D.C. Cir. No. 07-1363 and consolidated cases), the FAA has prevailed in its strategy to transfer all twelve challenges to the Airspace Redesign project to the U.S. Court of Appeals for the District of Columbia Circuit and to consolidate those challenges.

In May, the Court issued a briefing schedule. Petitioners' (73 in all) 120-page opening brief was filed on August 29, 2008. Senator Dodd's Office and Senator Specter's Office have filed an amici brief on behalf of the petitioners.

The FAA's response to Petitioners' brief is due December 12, 2008.

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

In its final report, the GAO found that the project complied with applicable environmental requirements and that the methodology used to assess operational and noise impacts was reasonable. While finding FAA's methodology to be reasonable, GAO did offer comments and recommendations aimed at improving airspace redesign projects. Specifically, GAO made four recommendations (two for the current airspace redesign and two for future airspace redesign projects). DOT/FAA has until the end of October to respond to the recommendations in the report.

As to issues concerning the FAA's compliance with legal requirements, GAO explored NEPA's requirements to provide a reasonable purpose and need statement, evaluate reasonable

alternatives, consider the project's environmental effects, provide adequate public participation, and consider environmental justice matters. GAO used court precedent and the judicial standard of review for agency actions to determine that the FAA's actions were not "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." Stating that the bar for satisfying the statute and environmental justice concerns is a low one, GAO found no reason to second guess the approach followed by the FAA.

FAA's methodology to assess operational and noise impacts was also found to be reasonable based on FAA's guidance, standards from the aviation community, and the opinion of independent aviation noise experts. FAA used the noise modeling tool and metrics specified in its guidance. Further, according to experts, the FAA used experienced contractors, the best available modeling tools, and appropriate data.

By way of background, on September 5, 2007, the FAA issued a Record of Decision (ROD) for the much anticipated New York/New Jersey/Philadelphia Metropolitan Area Airspace Redesign. The redesign project addresses existing and future delays by reducing complexities and increasing efficiencies in this congested airspace. The project does not increase capacity. Once fully implemented (in late 2011), Airspace Redesign should reduce delays by up to 20% compared to taking no action.

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

### **D. C. Circuit to Consider Challenge to FAA's Denial of "Age-60" Waiver Petitions**

On August 5, the United States filed its brief in Adams v. FAA, (D.C. Cir. No. 07-1180). The case involves consolidated petitions filed by more than 100 pilots employed by Part 121 air carriers, seeking review of the FAA's denial of their petitions requesting an exemption from the FAA's former "Age-60" rule, which provided that "[n]o person may serve as a pilot on an airplane engaged in operations under [Part 121] if that person has reached his 60th birthday." 14 C.F.R. 121.383.

Prior to the court's order setting a briefing schedule, the FAA moved to dismiss the petitions as moot in light of the enactment of the Fair Treatment for Experienced Pilots Act (the "Act"), 49 U.S.C. § 44729, on December 13, 2007. The Act provides that pilots for Part 121 carriers can continue to serve as pilot-in-command until age 65 and expressly states that the FAA's Age-60 rule "shall cease to be effective" on and after the date of enactment. The court denied the

FAA's motion and ordered inclusion of the issue in the briefs on the merits.

In the brief filed on behalf of the FAA, the Department of Justice renewed the argument that the express provisions of the Act make the pending petitions moot and that they should therefore be dismissed. The brief also pointed out that the petitioners had filed requests for reconsideration, which were still pending, making the petitions premature. To counter the petitioners' extensive arguments concerning the constitutionality of the Act, the brief argued that the court lacked jurisdiction to hear those issues. Specifically, the brief argued that since the FAA's review statute, 49 U.S.C. § 46110, grants exclusive jurisdiction to the court of appeals to review FAA "orders," and that such jurisdiction does not extend to direct challenges to a statute, where, as here, the statute was not part of the agency's decision-making.

The case has not yet been set for argument.

### **Eleventh Circuit Denies Petition for Review in Banner Towing Case**

On August 26, the U.S. Court of Appeals for the Eleventh Circuit issued an unpublished decision in Aerial Banners, Inc., v. FAA, (11th Cir. No. 08-10042) denying Aerial Banner, Inc.'s petition for review of the FAA's order canceling its certificate of waiver that had authorized the company's banner-towing operations.



The case is noteworthy because it is the first judicially reviewed case dealing with the FAA's discretionary authority to issue and cancel certificates of waiver from regulatory compliance under 14 CFR § 91.903.

The case arose out of the FAA's December 14, 2007 cancellation of waiver. Banner towing operations are generally prohibited under 14 C.F.R. § 91.311 unless the FAA has granted the operator a certificate of waiver. The FAA based the cancellation of Aerial Banners' certificate of waiver on nine safety-related incidents involving Aerial Banners' operations between 2003 and 2007.

The Eleventh Circuit found that the FAA's issuance of the certificate of waiver to Aerial Banners was discretionary under the language of the FAA's statute, regulation, and policy. In so holding the court relied on 49 U.S.C. § 44701(f), which provides that the Administrator may grant an exemption from air safety regulations "if the Administrator finds the exemption is in the public interest." Likewise, 14 C.F.R. § 91.903(a) provides that the Administrator may issue a waiver of certain safety rules "if the Administrator finds that the proposed operation can be safely conducted under the terms of the certificate of waiver." Lastly, FAA Order 7210.3U, chapter 18 provides for the discretionary issuance and cancellation of certificates of waiver.

The court characterized Aerial Banners' argument regarding the FAA's cancellation of its certificate of waiver as one based on a substantive abuse of discretion. The court stated that it could

grant the petition for review only if the FAA in cancelling the certificate of waiver "relied on improper factors, failed to consider important relevant factors, or committed a clear error of judgment that lacks a rational connection between the facts found and the choice made."

Aerial Banners argued that the FAA made a clear error of judgment because its decision to cancel Aerial Banners' certificate of waiver lacked a rational connection to the facts. In Aerial Banners' opinion, the facts cited by the FAA in its cancellation letter did not demonstrate a threat to aviation safety. In this regard, Aerial Banners argued that the nine safety-related incidents the FAA cited in its cancellation letter were trivial and attributable to pilot error, for which Aerial Banners argued it was not responsible.

The court methodically pointed out the errors in Aerial Banners' analysis of the record, including the fact that in some instances Aerial Banners' actions and that of its pilots were contrary to the express provisions of its certificate of waiver. The court then concluded that the FAA had a right to hold Aerial Banners "strictly liable" for noncompliance with the provisions of the certificate of waiver.

The FAA has requested that the court publish the decision.

### **Hawaii District Court Rejects "Negligent Approval" Theory**

On May 2, U.S. District Court for the District of Hawaii granted the

Government's motion to dismiss the Federal Tort Claims Act ("FTCA") complaint in Safari Aviation, Inc. v. United States, (D. Hawaii No. 07-00078 (ACK)).

According to the complaint, Safari Aviation, Inc. ("Safari") entered into a contract with Village Air, Inc. ("Village") for Village to provide air transport services to American Samoa under Village's Part 135 air carrier certificate. Although the FAA had amended Village's certificate to authorize operations to American Samoa, Village had not obtained the necessary economic authority for such operations from the Department of Transportation. After Village realized that it lacked the requisite economic authority, it ceased operations for Safari.

The essence of Safari's claim was that the FAA should not have issued the amended Part 135 authority without first determining whether Village's economic authority permitted it to operate to American Samoa. The court rejected Safari's claims on several grounds, two of which are significant.

First, the court noted that the FTCA waives the government's sovereign immunity only under certain circumstances. Here, the question was whether a private person, under like circumstances, could be held liable under Alaskan law. In answering this question in the negative, the court rejected Safari's contention that the government could be held liable under the Alaska Good Samaritan law (no physical damage or injury), negligence per se (no statutory authority or supporting case law), negligent licensing

by a state agency (applies only to agencies, not to private persons as required by the FTCA), and public policy (no actionable duty has extended to private persons).

Second, the court held that Safari's claims were in the nature of negligent misrepresentation and interference with contract, both of which are expressly barred by exceptions to the FTCA. 28 U.S.C. § 2680. Based on this analysis, the court concluded that Safari's only remedy was against Village, and dismissed the complaint.

### **Parties Challenge FAA Implementation of Changes in Runway Use Procedures at Boston Logan International Airport**

Nine individual plaintiffs have filed a complaint against the FAA related to the increased use of Runway 33L for departure aircraft at the Boston Logan International Airport (Logan Airport) in Avellaneda v. FAA (D. Mass. No. 08-10718-DPW). The litigants claim that the FAA implemented changes in a preferential runway use program regarding runway 33L without conducting environmental review under the National Environmental Policy Act (NEPA). The lawsuit was filed on April 30, and seeks declaratory, injunctive and other equitable relief.

Prior to filing the lawsuit, two of the current litigants wrote to the FAA regarding their concerns that runway use procedures had, in their view, been unlawfully implemented at the airport without required NEPA review. As

evidence of this assertion, the parties described experiencing a significant increase in noise over their communities between 2006 and 2007.

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

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

FAA filed an answer and affirmative defenses to the complaint on September 3. The agency plans to file a motion to dismiss, or in the alternative, to transfer to the Court of Appeals in the near future.

## **Second Lawsuit Filed in Airport Owners' Dispute over Neighboring Airports**

The dispute in Menard v. FAA, (5th Cir. Nos. 07-60592 and 08-60746) stems from a longstanding conflict between the owners of two small, turf runways in Berryville, Texas that are located approximately 200 yards from each other. Petitioners Lonny and Roxann Menard own Paradise Point, an airport consisting of a 30 x 1,900 foot turf runway, oriented east-west. The neighboring airport is part of Aero Estates. Its turf runway is 60 x 3,200 feet and lies parallel, but southwest of Paradise Point. The west end of the Paradise runway is approximately 200 yards north of the east end of the Aero Estates runway.

The FAA issued a conditional determination to Aero Estates to allow it to re-activate its previously closed airport. The agency also issued a conditional determination to change the status of Paradise Point from public use to private use. The determinations were both conditioned on Paradise Point and Aero Estates dividing up the air traffic using the runways. Traffic using the northern Paradise Point airport was to approach from, and leave to, the north, and traffic using the southern Aero Estates airport was to approach from, and leave to, the south. The conditions also specified that runway users must use different airport traffic pattern altitudes for each airport.

Both these actions have been challenged in the August 3 lawsuit filed by petitioners. First, the petitioners

maintain that FAA's two June 2007 airspace determinations were arbitrary and capricious. Second, they maintain that they were denied an opportunity to be heard, because their letters were not distributed adequately and DVDs, purporting to show flying conditions at Aero Estates, were not included in the administrative record.

The FAA has argued in the United States' brief that its actions were lawful for a number of reasons. First, the brief urges that petitioners knew that one action on one airport would affect the other airport. Further, the brief points out that the FAA considered the Menards' submissions and included them in the administrative record. The Menards were provided with notice of FAA's airspace study, they had the opportunity to comment, and, in fact, did submit comments. Finally, the brief argues that their arguments as to due process violations were not substantiated.

On August 13, the Menards filed a second challenge, this time to the FAA's aeronautical study issued on June 18. At present, the grounds for their case are not known, as a simple one-paragraph petition for review is all that thus far has been filed with the Fifth Circuit.

### **Sixth Circuit Holds Cincinnati's Refusal to Approve Commuter Service to Lunken Airport Complies with Federal Law**

On August 7 the Sixth Circuit in Flamingo Express, Inc. v. FAA, (6th No. 07-4226) agreed with a prior FAA decision and held that the City of

Cincinnati's refusal to allow commuter air services at Cincinnati's Lunken Airport did not violate Federal law.

Flamingo, a Part 135 operator, challenged the FAA's final agency decision (FAD), which upheld a Director's Determination (DD) and found the City of Cincinnati to be in compliance with its grant assurances. Flamingo had sought to operate scheduled commuter air service with seating for up to 30 passengers at Cincinnati's Lunken Airport. Flamingo and the City were not able to agree on a proposal.

At the time Flamingo submitted its application for the expanded service, the airport's operating certificate would have permitted scheduled operations in aircraft of 30 seats or less. However, Flamingo never obtained necessary FAA approvals for the commuter service, a precondition for the sponsor's Federal obligation to accept such service. While the application was pending, the City applied to FAA for a reclassification of its operating certificate, which did not allow Lunken Airport to serve scheduled commuter operations in aircraft having between 10 and 30 seats. The airport successfully secured that reclassification from FAA. Flamingo then filed a complaint with FAA alleging, in part, that the City had violated its grant agreements by failing to allow Flamingo to conduct requested commuter service, and seeking reclassification from FAA.

In its DD and FAD, the agency found the City to be in compliance since Flamingo had not taken sufficient steps to demonstrate actual intent to operate the requested commuter service, and

since FAA would not expect an airport to maintain a certain classification level based on unsubstantiated and unrealistic proposals.

The court upheld the FAA's FAD, finding that the City had not violated its Federal obligations by refusing to approve Flamingo's proposed scheduled service, and noting that Flamingo had attempted to "sidestep" both FAA's policy (requiring certain FAA findings and approvals prior to the sponsor being required to ensure reasonable access through its operating certificate classification) and its factual findings.

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

<http://www.ca6.uscourts.gov/opinions.pdf/f/08a0280p-06.pdf>

### **FAA Prevails in Challenge to Approval of Centerfield Taxiway at Boston Logan International Airport**

In a June 23 decision issued by the First Circuit in Town of Winthrop, et al. v. FAA, 535 F.3d 1 (1st Cir. 2008) the FAA prevailed on a challenge to its decision to approve a centerfield taxiway at Boston Logan International Airport (Logan).

Massachusetts Port Authority had proposed construction of runway 14-32 and a centerfield taxiway between and parallel to existing taxiways R/W 4L-22R and R/W 4R-22L at Logan. The FAA issued a record of decision in August 2002 approving the runway project but deferring a decision on the

centerfield taxiway project as a result of comments on the proposed centerfield taxiway from neighboring residents and towns about noise, air pollution, and capacity. The FAA committed to conduct an additional evaluation of taxiway operations to assess potential beneficial operational procedures that would preserve or improve the operational and environmental benefits of the centerfield taxiway.

As a result of the studies, following issuance of the 2002 ROD, the FAA issued a draft written reevaluation of the FEIS for comment in June 2006, then prepared a final written reevaluation and issued a ROD approving the taxiway project in April 2007. The written reevaluation stated that the centerfield taxiway would not increase airport capacity. The FAA also concluded that the written reevaluation complied with the mitigation commitment to assess potential beneficial operational procedures. Finally, the FAA found that there were no substantial changes since the 2002 ROD, and therefore no additional environmental documentation was necessary.

In June 2007, petitioners filed a complaint, alleging NEPA violations, relating to the adequacy of the environmental impact statement regarding air quality, noise, and alternatives. They also challenged the decision not to supplement the original environmental impact statement based on new information, and whether the administrative record reflected the entire record before the FAA at the time of the final decision.

The FAA's position was that it had fully complied with NEPA and other applicable laws. FAA argued that all of the data it studied demonstrated that there were only positive effects from the Taxiway, and that all matters, including consideration of ultra-fine particulate matter, had been addressed.

In its June 23 decision the Court stated that the FAA had taken into account all concerns, including potential adverse environmental impacts and issues relating to ultra-fine particulate matter, had applied appropriate methodologies, and did not act arbitrarily or capriciously in issuing its final order. The court therefore denied the petition for review.

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

<http://www.ca1.uscourts.gov/pdf/opinions/07-1953-01A.pdf>

### **Trenton-Mercer Airport ROD Withdrawn and Third Circuit Challenge Dismissed**

On June 6, 2006, the Board of Supervisors of Lower Makefield Township and Bucks Residents for Responsible Airport Management challenged FAA's April 2006 issuance of a FONSI/ROD for the construction of a new replacement terminal and other capital projects included in the Capital Improvement Plan at Trenton Mercer Airport in Board of Supervisors of Lower Makefield Township v. FAA, (3rd Cir. No. 06-2929).

The associated Environmental Assessment evaluated the construction

of a replacement, 2-gate terminal building, taxiway improvements, additional parking spaces, demolition and removal of the existing Tennis Center, and the construction of a storage and maintenance building. These projects would enable the airport to meet existing and potential future aviation needs and to meet FAA guidelines and policies with respect to airside and landside facilities.

The petitioners alleged that the FONSI/ROD failed to consider, or consider adequately, the environmental impacts and the purpose and need for the project. Specifically, they argued that FAA failed to consider the potential increased overflights affecting their community and the resulting noise and pollution. They claimed that the FONSI/ROD arbitrarily limited the scope of FAA review. Petitioners requested that the court direct FAA to conduct a full environmental impact study and to prepare an environmental impact statement.

In April 2008, the sponsor advised FAA that it had no current plans to proceed with the terminal project. As a result, on June 9, the FAA issued an order withdrawing its February 2006 FONSI/ROD. On June 24 FAA and petitioners jointly filed a joint motion to dismiss the pending litigation over the terminal replacement project and on June 30, the Third Circuit granted the motion.

### **Puerto Rico District Court Dismisses Bivens Complaint for Lack of Jurisdiction**

On June 5 the U.S. District Court for the District of Puerto Rico granted the FAA's motion for summary judgment and dismissed the complaint in Diaz Aviation Corporation. v. FAA, (D. Puerto Rico, No. 06-2102 (FAB)). The complaint was brought against the FAA and several employees of the Flight Standards Service.

Plaintiff Diaz Aviation Corporation ("Diaz Aviation") and its owner, Sixto Diaz-Saldana, alleged that the FAA and its employees had violated their Fifth and Fourteenth Amendment rights in connection with the revocation of Diaz Aviation's air carrier certificate. The controversy began in 2005 when the FAA's Principle Operations Inspector assigned to Diaz Aviation advised Diaz-Saldana that Diaz Aviation could not operate unless the company updated its operations and training manuals. Although Diaz Aviation submitted revised manuals, which received initial approval, Diaz-Saldana later withdrew the revisions, contending that the original manuals satisfied the requirements of the FAA regulations.

Still maintaining that the original manuals were adequate, Diaz-Saldana notified the FAA that Diaz Aviation intended to resume operations and requested the necessary inspections. On February 12, 2007, the FAA issued an Emergency Order of Suspension against Diaz Aviation's air carrier certificate. The suspension was sustained by an Administrative Law Judge of the

National Transportation Safety Board ("NTSB") and, thereafter, by the full NTSB. There was no further review of the NTSB's decision.

In the District Court, Diaz Aviation asserted a Bivens-type claim, alleging injury in connection with the suspension of its air carrier certificate, and also alleging that it was deprived of its property without due process of law. In general, the complaint alleged that the defendant FAA employees had suspended the certificate improperly, had tried to intimidate Diaz Aviation, and had a "hidden agenda" to eliminate small carriers such as Diaz Aviation.

The FAA moved for summary judgment, arguing that the district court lacked subject matter jurisdiction because the Constitutional claims were "inescapably intertwined" with a review of the FAA's order of suspension, a matter within the exclusive jurisdiction of the court of appeals under 49 U.S.C. Section 46110. In granting the FAA's motion, the court held that "it is clear that section 46110 precludes this court from considering their [the plaintiffs'] claims because the complaint goes directly to the merits of a previous adjudication by the FAA and the NTSB."

Citing Merritt v. Shuttle, Inc., 187 F.3d 263 (2d Cir. 1999), the court concluded that the complaint concerned the circumstances of the suspension and the motivations and actions of the FAA employees and that it was "crystal clear" that the plaintiffs were "seeking to obtain a new adjudication over the merits of the FAA's order of suspension . . . ." Accordingly, the court dismissed

the complaint with prejudice for lack of subject matter jurisdiction.

## **Federal Highway Administration**

### **Missouri Township Denied Standing to Sue FHWA**

On April 22, the U.S. District Court for the Eastern District of Missouri, reviewed on remand from the Eighth Circuit Court of Appeals, the standing of the a small city to challenge an FHWA and State determination in City of Clarkson Valley v. Peters, (E.D. Mo. No. 04cv301). The court on remand determined that the plaintiffs lacked standing to challenge the DOT and the Missouri Department of Transportation decision to build sound walls along a Missouri highway.

In 2004, plaintiffs filed a lawsuit challenging the final decision of DOT and the Missouri Department of Transportation to build sound walls along a highway located within the City of Clarkson Valley, Missouri. DOT and Missouri filed a motion to dismiss, arguing that plaintiffs lacked standing because there was no case or controversy, there was insufficient injury to invoke procedural review under the Administrative Procedure Act ("APA"), and plaintiffs did not fall within the class of persons protected by the National Environmental Policy Act ("NEPA").

The district court "den[ied] the motion as premature" and noted that "[t]he parties will be allowed to develop the record" and that the court would "decide

the issue of standing when the facts of this case are properly before the court."

In motions for summary judgment, DOT and Missouri argued both that plaintiffs lacked standing and that the decision concerning the highway had complied with NEPA. The district court granted Defendants' motion for summary judgment, however, in its order the district court indicated that "the factual record was [still] insufficient to determine whether Clarkson Valley met the requirements for Constitutional] standing."

Plaintiffs appealed the district court's decision to the U.S. Court of Appeals for the Eighth Circuit. After extensive briefing and argument, the Eighth Circuit remanded the case to the district court to decide whether the City had standing. In its opinion, the Eighth Circuit reemphasized that "it is the party invoking federal jurisdiction – in this case, the City – that bears the burden of proving the elements of standing as 'an indispensable part of the plaintiff's case.'" In addition, the court indicated that "[a]s part of its proof, the City, suing under the APA, must not only show the injury . . . but 'must also show [that] the injury complained of falls within the zone of interests sought to be protected by the statutory provision[s] of NEPA.'"

On remand, the District Court analyzed the standing issue under the criteria set forth in Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992). There the Supreme Court set forth three standing criterion: a plaintiff must demonstrate that (1) it has suffered a concrete and particularized injury that is either actual



or imminent (“injury in fact”), (2) the injury is fairly traceable to the defendant (“causation”), and (3) it is likely that a favorable decision will redress that injury (“redressability”).

The City of Clarkson Valley asserted that it would suffer a number of economic and non-economic injuries as a result of defendants’ decision to build sound walls. However, the district court concluded that since the City had failed to suggest any time frame in which these alleged injuries would occur, the injuries were too remote and speculative to support constitutional standing. In addition, the district court concluded that the City was not an organization entitled to sue on behalf of its citizens, and that even if the City were such an organization, it was not the proper representative of those citizens in this case. Finally, the district court determined that City cannot sue the Federal government under the doctrine of parens patriae, which allows States to sue to protect citizen interests under certain circumstances.

### **New Jersey District Court Denies Preliminary Injunction in Historic Bridge Case**

On February 21, the District Court denied plaintiff’s motion for summary judgment in Citizens for Rational Coastal Development v. FHWA (D. N.J. No. 07-4551), a case involving a challenge to the demolition and replacement of an historic bridge connecting the towns of Sea Bright and Highland, New Jersey.

The litigation involves consolidated complaints filed by the town of Sea Bright and other plaintiffs challenging FHWA decisions under National Environmental Policy Act, Federal Aid Highway Act Section 4(f), and the National Historic Preservation Act. In its decision refusing to enjoin the project the court found that the plaintiffs had failed to establish irreparable harm, had not shown either a likelihood of success on the merits, or that the equities at issue balanced in their favor.

Importantly, the court upheld FHWA’s use of a programmatic section 4(f) statement for replacement of historic bridges. This is now the second case upholding use of the programmatic 4(f) statement for historic bridges. Despite the fact that this project was processed with a Categorical Exclusion and programmatic 4(f) statement, the administrative record reflected decades of study and analysis and included an analysis of the criteria for a programmatic statement and how this project comported with that criteria. It appears the extensive record heavily influenced the court in FHWA’s favor.

### **Ohio Lawsuit Challenges FHWA Decision to Build Access Road to Medical Facility**

On March 28, an organization entitled Dot.com Investment Holdings and two individuals filed a complaint in the U.S. District Court for the Southern District of Ohio, in Dot.com Investment Holdings v. U.S. Army Corps of Engineers (S.D. Ohio. No. 3:08-CV-110). The complaint names the Army Corps of Engineers, FHWA, the

Secretaries of DOT and HUD, and the City of Springfield, Ohio and challenges a decision by the Federal government to construct a new \$280 million dollar medical facility in the City of Springfield, Ohio. In addition to the medical facility, the project will include the relocation of an access road to the facility and new signals.

The complaint, insofar as it relates to FHWA, alleges that the approval of the access road (1) violated NEPA by failing to consider reasonable alternatives; (2) constituted an irreversible and irretrievable commitment of resources; (3) violated Section 106 of the National Historic Protection Act (NHPA) by avoiding or mitigating the adverse effects of the road on historic properties; (4) violated Section 106 of the NHPA by failing to include consulting parties in the approval process; and (5) violated Section 4(f) of the Federal-Aid Highway Act by failing to conduct a 4(f) analysis.

### **Vermont District Court Denies Request for Attorneys Fees in Vermont Chittenden Highway Case**

On March 21, the U.S. District Court in Vermont denied a petition seeking attorney fees from the FHWA and other Federal defendants under the Equal Access to Justice Act in Senville v. Peters (D. Vt. No. 2:03-CV-279). The court held that the position of the agency in the litigation was substantially justified and based on that finding the petition was denied. The Federal defendants also argued that the fee charged was excessive, and that special circumstances mitigated against a fee

award. In view of the court's holding the Judge did not need to reach those issues.

The project at issue, Chittenden County Circumferential Highway, has a long history dating back to the early 1980's as a demonstration project in which NEPA processing was delegated to the State of Vermont. The district court enjoined the project in 2004, finding that the agency improperly adopted the EIS prepared by the State since it failed to adequately consider cumulative impacts, and failed to fully consider secondary impacts, failed to meet the requirements of an adequate discussion under section 4(f) of the Federal-Aid Highway Act. The court also determined that a subsequent environmental assessment failed to adequately consider alternatives.

In determining that FHWA was nevertheless substantially justified in its position, the court concluded that the agency prevailed on most counts, and that this project was unique with respect to its compliance under NEPA. Additionally, the Court found the FHWA requirements with respect to environmental assessments were in certain respects ambiguous.

### **New Complaint Challenges Texas Toll Road Project**

On February 26 a complaint was filed in the U.S. District Court for the Western District of Texas, San Antonio Division, against FHWA, Texas DOT's Executive Director and the Alamo Regional Mobility Authority Executive Director. The suit, Aquifer Guardians in Urban Areas v. FHWA (W.D. Tex. No. 08-154), was filed by a local environmental

group, the Aquifer Guardians in Urban Areas (AGUA) and an anti-toll group, Texans United for Reform and Freedom (TURF), and seeks to enjoin construction of a toll project on U.S. 281 in San Antonio, Texas. The complaint alleges noncompliance with NEPA and the Endangered Species Act (ESA) and challenges FHWA's decision in an Environmental Assessment to issue a Finding of No Significant Impact (FONSI).

The project will construct several additional lanes on U.S. 281 in San Antonio, Texas, from Loop 1604 north to Borgfeld Drive, a distance of some 7.5 miles. This area is rapidly expanding and urbanizing, and as presently configured U.S. 281 is unable to meet traffic demands. The alternative selected in the EA calls for the construction of an expressway facility with grade-separated, full-access controlled, and tolled through-travel lanes with adjacent parallel non-tolled, partial-access controlled lanes.

This project was the subject of a prior suit by AGUA in December, 2005. At that time, after reviewing the complaint and the EA on a portion of the current project, the Texas State DOT requested that FHWA allow them to pursue a comprehensive study on the entire 7.5 length of U.S. 281. In January of 2006, the FHWA Texas Division notified the State DOT that it agreed with its request and subsequently FHWA withdrew the prior environmental approvals on U.S. 281. These actions led to a dismissal of the earlier lawsuit.

The State DOT began the new studies in January of 2006, and presented a new

EA for consideration by FHWA in May 2007. The FONSI for this project was issued in August of 2007. A 23 U.S.C. 139(l) notice was issued in the Federal Register. Plaintiffs filed this action on the last possible date.

The area surrounding the project is environmentally sensitive since it overlies the Edwards Aquifer, which is a prime source for drinking water in this area of Texas. However, the road expansion project was thoroughly studied and the project impacts were exhaustively reviewed before the FHWA Texas Division approved the current FONSI. In their new complaint plaintiffs allege that the project should have been studied in an Environmental Impact Statement, that the decision violated the ESA, and that additional NEPA violations occurred, such as failure to conduct an adequate indirect and cumulative impact studies.

### **Complaint Challenges Kentucky Bridge Project**

On May 19, a complaint was filed in River Fields, Inc. v. Peters (W.D. Ky. No. 08-CV-264), against the Secretary, the FHWA Administrator, the FHWA Kentucky Division Administrator, and the Kentucky Transportation Cabinet challenging FHWA's environmental decision approving a bridge replacement project over Herrod's Creek in Louisville, Jefferson County, Kentucky.

Plaintiffs are a local historic preservation group, River Fields, Inc., which seeks to enjoin construction of the project. Their complaint for declaratory and injunctive relief alleges violations of NEPA,

Section 4(f) of the Federal-Aid Highway Act, and the National Historic Preservation Act. Plaintiffs specifically challenge FHWA's decision to process the project as a Categorical Exclusion, after five years of study and a full Section 4(f) evaluation.

### **Complaint Challenges Bridge Project in Florida**

On June 16, a complaint was filed in Miccosukee Tribe of Indians of Florida v. United States (S.D. Fla. No. 08-2170) seeking a writ of mandamus requiring the United States to undertake review of a joint project of the United States Army Corps of Engineers, the State of Florida and DOT.

The complaint alleges FHWA noncompliance with Section 4(f) of the Federal-Aid Highway Act in connection with the minor relocation of the Tamiami Trail into Everglades National Park as set forth in the Tamiami Trail Modification Limited Reevaluation Report and Environmental Assessment issued by the U.S. Army Corps of Engineers in April of 2008. FHWA's only action in the project involves a Federal transfer of lands held by the U.S. Department of Interior to the State of Florida. That action would be taken pursuant to statutory provisions set forth in 23 U.S.C. § 317, and would be considered a categorical exclusion under 23 C.F.R. Section 771.117(c)(5).

The complaint challenges a restoration project in the Everglades National Park. The DOI and USACE originally approached FHWA to execute a Federal Land transfer for the project. Plaintiffs

appear to allege that Section 4(f) applies since the Tamiami Trail is a Federally funded highway and since FHWA's land transfer is necessary for the project to advance. However, FHWA's action does not involve funding, nor does it utilize a resource protected by Section 4(f).

### **New York District Court Denies Preliminary Injunction in Bridge Replacement Case**

On September 12, the U.S. District Court for the Southern District of New York in Concerned Citizens of Chappaqua v. DOT, (S.D.N.Y. No. 08-civ-7325) denied a request for a temporary restraining order and preliminary injunction.

This case involves replacement of an historic bridge in Chappaqua, New York. The project was processed under a programmatic 4(f) statement and a categorical exclusion (CE) under NEPA. The FHWA, the New York State Department of Transportation, and the New York State Historical Preservation Office (SHPO) executed a memorandum of understanding under Section 106 of the National Historic Preservation Act (NHPA) providing for the demolition of the bridge and a recording of the bridge's historic features.

The plaintiffs challenged the use of a CE and the programmatic 4(f) statement. The court, however, upheld use of both processes, finding that the agency did not act arbitrarily or capriciously in determining that there would be no significant environmental impacts, and

that it demonstrated compliance with the use of the programmatic statement.

The court noted that the plaintiffs challenge regarding a failure to consult with the SHPO regarding modifications to the project after execution of the MOU raised a serious issue. However, the court ultimately determined that the record, including an affidavit from the SHPO, indicated that the modifications did not change the SHPO opinion, and so supported the FHWA's finding that the MOU remained valid. Ultimately, the Court found that plaintiffs failed to show a likelihood of success on the merits, and denied the requested preliminary injunction.

Construction on the project began while the lawsuit was pending.

## **Federal Railroad Administration**

### **BNSF Seeks D.C. Circuit Review of FRA Waiver Decision**

On August 11, BNSF Railway Company (BNSF) filed a Petition for Review in Burlington Northern/Santa Fe Ry. v. DOT (D.C. Cir. No. 08-1263) challenging a June 12 decision by the FRA Safety Board to grant a waiver request filed by the City of Seattle, Washington. The City's request sought a waiver of the notification requirements contained in 49 CFR Part 222, in order to continue pre-existing locomotive horn sounding requirements beyond June 24, 2008.

On September 26 the United States filed a motion seeking the dismissal of the

petition, arguing that the petition is premature since a BNSF petition for reconsideration is currently pending before FRA.

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

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

### **D.C. Circuit Upholds District Court Dismissal of Engineer Certification Challenge**

On May 18, 2006, Mr. C.L. Daniels, a former Union Pacific Railroad Company (UP) locomotive engineer, and the Brotherhood of Locomotive Engineers and Trainmen filed suit in the U.S. District Court for the District of Columbia against the FRA, FRA's Locomotive Engineer Review Board (LERB), and UP, in Daniels v. Union Pacific Railroad Co. (D.D.C. No. 1:06-

CV-00939). The complaint alleges that UP, acting under color of Federal law through FRA's locomotive engineer certification regulations, revoked Mr. Daniels' locomotive engineer certification without a pre-deprivation hearing or a prompt post-deprivation hearing, in violation of the Due Process Clause of the Constitution. The complaint further alleges that FRA and the LERB acquiesced in UP's denial decision and were biased against Mr. Daniels in denying his petitions for administrative review.

On May 19, 2006, one day after filing his complaint in the district court, Mr. Daniels filed an administrative appeal seeking review by the Administrator of a decision by FRA's Administrative Hearing Officer (AHO) pertaining to the denial of his re-certification. The FRA Administrator issued his decision on July 31, 2006, affirming the AHO's decision. The Administrator's decision constituted final agency action.

On August 24, 2006, the Federal defendants filed a dispositive motion to dismiss the lawsuit in the District Court on the grounds of (i) sovereign immunity, (ii) the plaintiffs' failure to exhaust their administrative remedies, and (iii) the exclusive jurisdiction of the Court of Appeals under the Hobbs Act for appeals of final administrative orders. Defendant UP separately moved to dismiss the lawsuit on the ground that it was not a State actor or engaged in State action.

On March 29, 2007, the district court granted the defendants' motions and dismissed the case. The district court dismissed the plaintiff's claims against

the Federal defendants for failure to exhaust administrative remedies and also because it found that the Hobbs Act deprived the court of jurisdiction to decide Constitutional claims as to the application or enforcement of Federal regulations which were not attacked as per se unconstitutional. Finally, the district court dismissed all claims against UP, agreeing that it was not a state actor.

On April 12, 2007, plaintiffs filed a notice of appeal with the U.S. Court of Appeals for the District of Columbia, Daniels v. Union Pacific Ry. Co. (D.C. Cir. No. 07-5114). The Federal defendants and UP moved for summary affirmance of the District Court's decision. On September 27, 2007, the D.C. Circuit denied those motions and set the case for briefing on the merits.

Briefing was completed on January 31, 2008, and it focused primarily on (i) whether the district court lacked subject matter jurisdiction over the claims because the plaintiffs failed to properly exhaust their administrative remedies before the FRA, (ii) whether the district court lacked subject matter jurisdiction over the claims because the Hobbs Act provides that the Court of Appeals has exclusive jurisdiction over final actions of the Secretary of Transportation, and (iii) whether UP's roll in issuing locomotive engineer certifications converts it into a state actor. On March 13 the Court heard oral argument in the case, focusing on those three issues.

On July 1, the court issued a decision upholding the District Court's dismissal for lack of subject matter jurisdiction based on the Hobbs Act. While the Defendants won the appeal, the decision

includes dicta relating to the application of FRA's locomotive engineer qualification regulations (Part 240). Most importantly, the Court of Appeals does not appear to give a great deal of credence to FRA's argument that a demotion is not a revocation. In the decision, the Court of Appeals points out that Part 240 does not mention demotions at all. It then goes on to state that the Plaintiffs' demotions resulted in the loss of their Class 1 certifications and that the only way that certifications can be "lost" under Part 240 is by revocation.

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

<http://pacer.cadc.uscourts.gov/docs/commopinions/200807/07-5114-1125069.pdf>

### **Engineer Seeks D.C. Circuit Review of Certification Decision**

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

Petitioners seek review of FRA's February 1 denial of Mr. Hensley's appeal from a decision by an FRA administrative hearing officer (AHO)

upholding a temporarily change in the status of Mr. Hensley's locomotive engineer certification from a Class 1 locomotive engineer certification to a Class 3 student engineer certification.

On May 20, the petitioners filed a consent motion asking the court to hold the case in abeyance pending the D.C. Circuit's decision in the Daniels case, discussed in the previous entry. The court granted that motion on June 18. The Court's order directed the parties to file motions to govern future proceedings in the case within 30 days of the decision Daniels.

On July 1, as discussed in the previous entry, the Court decided the Daniels case. Since that time the parties have been meeting to discuss possible settlement of the case. On August 12 the court granted a consent motion, and agreed to hold the case in abeyance while such discussions continue.

### **Iowa District Court Dismisses FOIA and APA Challenge**

On June 24, the U.S. District Court for the Northern District of Iowa, Western Division, granted a motion for summary judgment in favor of FRA in United Transportation Union v. Boardman, (N.D. Iowa No. 5:07-cv-04100 MWB), a case involving the timing of responses to petitions for rulemaking and Freedom of Information Act (FOIA) requests. The court found that the Plaintiff's APA and FOIA claims were moot and dismissed the complaint under Rule 12(b)(1).

In relation to a separate pending litigation, two attorneys—Harry Zanville

and Charles Collins—filed one FOIA request and three petitions for rulemaking on behalf of “the interests of railway workers, property owners, railroad corporation shareholders, and members of the public.” The FOIA request, received by the FRA on February 20, 2007, requested information and documents under at least twenty-six separate items in six categories. Shortly thereafter, FRA responded by letter with an assigned file number and an indication that backlogged requests may result in a delayed response.

On November 15, 2007, Plaintiffs United Transportation Board Local 418, Burlington System Division of the Brotherhood of Maintenance of Way Employees, Burlington Northern System Federation of the Brotherhood of Maintenance of Way Employees, and William Dhana, filed a complaint in the U.S. District Court for the Northern District of Iowa, Western Division, against FRA Administrator Joseph H. Boardman and DOT Secretary Mary E. Peters. Plaintiffs requested that the court enter declaratory and injunctive relief relating to alleged failures in handling the three rulemaking petitions and the FOIA request and sought copies of rulemaking petitions including those that might be filed in the future.

Prior to receiving notice of the Iowa complaint, the FRA on December 10, 2007, responded to the FOIA request with a letter asking Zanville to prioritize his request and indicate any willingness to pay applicable fees. Zanville responded in a letter dated December 16, 2007, restating his request for documents, but providing no

prioritization. The FRA then responded to Zanville’s FOIA request in a letter dated February 5, 2008, explaining its position further and providing some documents at no charge. In three separate letters to Zanville dated February 20, 2008, the FRA denied the petitions for rulemaking.

The United States thereafter filed a motion to dismiss or, alternatively, for summary judgment on March 5, 2008, arguing that the Iowa complaint should be dismissed under Federal Rule of Civil Procedure 12(b)(1) for lack of subject matter jurisdiction since plaintiffs lack standing to bring this lawsuit and since the claims, in any event, were moot in light of the response sent by FRA.

The court’s June 24 order granted FRA’s motion. The court agreed that plaintiffs’ request in the complaint for “each and every petition for rulemaking” is not justiciable, because the claim was not ripe. According to the court, while “the proper recourse for a party aggrieved by delay that violates a statutory deadline is to apply for a court order compelling agency action,” that does not mean plaintiffs can seek to compel agency action regarding yet-to-be filed petitions for rulemaking. The issues concerning the petitions were also not, in the court’s view, justiciable, because “DOT finally acted on the petition by denying it. . . . As a result, Plaintiffs’ APA claim asking the court to order the Defendants to rule on the petitions for rulemaking has ‘los[t] its life,’ and is moot.”



## **National Highway Traffic Safety Administration**

### **D.C. Circuit Upholds NHTSA's TREAD Disclosure Decision**

On July 22, the U.S. Court of Appeals for the District of Columbia Circuit issued a decision in Public Citizen, Inc., v. Peters, (D.C. Cir. No. 06-5304), upholding NHTSA's decision that the Transportation Recall Enhancement, Accountability, and Documentation (TREAD) Act's disclosure provision, 49 U.S.C. § 30166(m)(4)(C), is not a FOIA Exemption 3 statute that precludes the release of Early Warning Reporting (EWR) information.

The litigation involved the confidentiality of EWR information submitted by manufacturers under a rule adopted by NHTSA pursuant to the TREAD Act. NHTSA published a companion rule establishing class determinations that some categories of EWR information are confidential based on Exemption 4 of the FOIA, but did not include all categories of EWR information. FOIA Exemption 4 exempts confidential commercial or financial information from disclosure to the public.

Litigation challenging the rule was instituted in March of 2004 in the U.S. District Court for District of Columbia. Public Citizen challenged the class determinations and sought to have them set aside with the goal that all EWR information would be publicly available.

The Rubber Manufacturers Association (RMA) intervened, contending that all EWR information, including EWR data not covered by a class determination (e.g., claims regarding deaths), was exempt from disclosure based on the disclosure provision in the TREAD Act and Exemption 3 of the FOIA. Exemption 3 precludes the public disclosure of information if the operating statute expressly requires information to be withheld, or establishes criteria or identifies information for withholding. NHTSA rejected both positions.

The district court issued two opinions. In the first, the court found that NHTSA had the authority to make the class determinations of confidentiality, but had failed to follow proper notice and comment procedures when it did so. It remanded the matter back to NHTSA. Public Citizen, Inc. v. Mineta, 427 F.Supp.2d 7 (D.D.C. 2006). In a subsequent decision, the court rejected RMA's contention that the TREAD Act generally precluded NHTSA from releasing EWR data. Public Citizen, Inc. v. Mineta, 444 F.Supp.2d 12 (D.D.C. 2006). RMA appealed.

In its July 22 decision the D.C. Circuit, consistent with NHTSA's position, held that the TREAD Act's disclosure provision was not a withholding statute under FOIA Exemption 3 because the provision's plain language does not specifically exempt certain matters from disclosure as required by Exemption 3. The court of appeals also noted that its decision did not end the FOIA analysis, as the question of whether certain categories of EWR information are protected from disclosure under FOIA Exemption 4 remains.

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

<http://pacer.cadc.uscourts.gov/docs/comm/mon/opinions/200807/06-5304-1128839.pdf>

### **Ninth Circuit Revises 2007 CAFE Decision to No Longer Require an EIS**

On August 18, the U.S. Court of Appeals for the Ninth Circuit in Center for Biological Diversity v. NHTSA, (9th Cir. No. 06-71891), withdrew its November 2007 decision that had set aside NHTSA's 2006 light truck corporate average fuel economy (CAFE) rule and replaced it with a new opinion that is identical to the earlier opinion in all but one significant respect: the new opinion leaves to NHTSA's discretion the level of environmental review – Environmental Assessment with a finding of no significant impact or Environmental Impact Statement – necessary to support the 2006 rule. That aspect of the new opinion essentially grants the relief sought by NHTSA's rehearing petition, which the court dismissed as moot in light of the new opinion.

The original opinion had required NHTSA to perform an EIS. The balance of the 2007 opinion, including the court's rejection of a number of the technical, economic, and environmental underpinnings of NHTSA's standards, was not challenged in our rehearing petition and remains part of the substituted opinion. The new decision,

like the original version, does not vacate the NHTSA rule.

NHTSA's rule was challenged by the Center for Biological Diversity, the Sierra Club, Public Citizen, Environmental Defense, Natural Resources Defense Fund, the State of Minnesota, and a coalition of twelve States and cities (including California, the State and City of New York, and the District of Columbia). The balance of the Ninth Circuit panel's decision found that the light truck rule was arbitrary and capricious and contrary to requirements of the Energy Policy and Conservation Act of 1975 because (1) NHTSA's marginal cost benefit analysis failed to monetize the value of carbon emissions, (2) the rule failed to set a fleet-wide backstop fuel economy level for manufacturers, (3) the rule failed to close the existing "SUV loophole" because it did not revise passenger automobile/light truck definitions so as to include SUV's within the category of passenger vehicles, (4) the rule did not set fuel economy standards for certain vehicles in the 8,500 to 10,000 gross vehicle weight range, and (5) that EA that NHTSA prepared for the rule, and its finding of no significant impact, was inadequate.

Since the November 2007 ruling, new legislation has gone into effect that substantially revises NHTSA's responsibilities for issuing CAFE standards and that requires new standards beginning with model year 2011, which was the last model year covered by the remanded rule. NHTSA is currently engaged in a rulemaking to promulgate those new standards and is

preparing an Environmental Impact Statement for the rulemaking.

The Ninth Circuit's August 2008 opinion is available at:

[http://www.ca9.uscourts.gov/ca9/newopinions.nsf/332E8E54355AC490882574A90059B933/\\$file/0671891.pdf?openelement](http://www.ca9.uscourts.gov/ca9/newopinions.nsf/332E8E54355AC490882574A90059B933/$file/0671891.pdf?openelement).

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

[http://www.ca9.uscourts.gov/ca9/newopinions.nsf/775202DBA504085C88257393007B9729/\\$file/0671891.pdf?openelement](http://www.ca9.uscourts.gov/ca9/newopinions.nsf/775202DBA504085C88257393007B9729/$file/0671891.pdf?openelement).

NHTSA's Final Rule is available at:

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

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

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

with the position DOT has taken on EPCA preemption of such state standards in NHTSA's 2006 light truck CAFE standard rulemaking and in litigation over that rulemaking in Center for Biological Diversity v. NHTSA, discussed above.

The District Court's holding was predicated on the assumption that EPA would grant a waiver of Clean Air Act preemption to California for its identical GHG standards. Subsequently, however, EPA denied California's request for a waiver for these regulations. An EPA waiver prevents California's regulations, and any such regulations adopted by Vermont or any other state, from going into effect. Accordingly, the government's brief argues that the court lacks jurisdiction over the case because it does not present a live controversy. The brief also argues that in any event the District court's preemption analysis was flawed.

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

The District Court's opinion is available at:

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

### **California Court Upholds Withholding of Some CAFE- Related Documents in FOIA Suit, Orders In Camera Review of Others**

On June 4, the U.S. District Court for the Northern District of California in California v. NHTSA, (N.D. Calif. No. 07-02055) held that DOT (and co-defendants OMB and EPA) properly withheld some of the documents that are the subject of this FOIA litigation in which the State of California seeks documents related to NHTSA's statements in the preamble to its light truck CAFE standard regarding the preemptive effect of the standards on State requirements limiting CO<sub>2</sub> emissions. The request also sought documents related to certain meetings regarding the standard.

The court also ordered the government to produce the balance of the documents for in camera inspection and ordered the parties to re-brief the issue of segregability of factual content in documents withheld based on the deliberative process privilege.

### **Federal Transit Administration**

#### **Reconsideration Motion Denied in Delaware Riverkeeper Case**

On September 5, the U.S. District Court for the Eastern District of Pennsylvania denied plaintiffs' motion for reconsideration in The Delaware Riverkeeper and American Littoral Society v. Simpson, (E.D. Pa. No. 2:07-

cv-02489), a suit against FTA, the Lehigh and Northampton Transportation Authority (LANTA), and the Easton Parking Authority that alleged violations of NEPA and Executive Order 11988 (Floodplain Management) related to the potential construction of a transit center in downtown Easton on the banks of the Delaware River.

The court had dismissed the challenge brought by plaintiffs Delaware Riverkeeper and the American Littoral Society in March 2008 as "not ripe for adjudication" given the fact that FTA rescinded its environmental determination for the proposed project in July 2007.

Planning and environmental work are ongoing for the project. FTA has no word yet whether plaintiffs will appeal the decision.

### **Maritime Administration**

#### **Injunction Sought Against MARAD LNG Port Decision**

On February 15, Atlantic Sea Island Group LLC (ASIG) filed a complaint against MARAD in the U.S. District Court for the District of Columbia seeking to enjoin the agency's decision designating New Jersey as an "adjacent coastal State" for purposes of consideration of ASIG's application for a federal license to construct and operate a liquefied natural (LNG) gas port in waters off the coasts of New York and New Jersey.

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

In its suit, Atlantic Sea Island Group LLC v. Connaughton, (D.D.C., No. 08-00259), ASIG alleges that the authority to make such designations resides in the Coast Guard, not MARAD, and that in any event, MARAD's decision was untimely, contrary to the substantive standard governing such decisions, and not supported by record evidence.

The government has filed briefs opposing the preliminary injunction request. The matter is still pending before the District Court, which has yet to schedule a hearing on plaintiff's motion.

### **Ninth Circuit Rejects Longstanding EPA Clean Water Act Exception for Vessel Discharges**

On July 23, the U.S. Court of Appeals for the Ninth Circuit affirmed a 2006 District Court decision that vacated EPA's longstanding regulatory exemption of ballast water and other discharges incidental to normal vessel operations from the Clean Water Act's (CWA) National Pollutant Discharge Elimination System (NPDES) permitting requirements. The District Court also ordered EPA to issue permitting regulations by September 2008, although

it recently extended that due date to December 19, 2008.

The case, Northwest Environmental Advocates v. EPA, (9th Cir. No. 06-17187), was brought by a coalition of environmental groups and Great Lakes States whose primary concern is the introduction of aquatic nuisance species through the discharge of ballast water by vessels operating in U.S. waters. DOT was not a party, but it assisted EPA and the Justice Department in briefing the remedies phase of the district court proceeding and the appeal of the district court decision.

The plaintiff-appellees argued that the exemption exceeded EPA's authority under the CWA, which requires that the discharge of pollutants, including invasive species, into U.S. waters is subject to NPDES permitting requirements and does not generally except discharges from commercial vessels. EPA contended that the district court lacked jurisdiction over the case because Congress had vested exclusive jurisdiction over such cases in the courts of appeal and that, in any event, the judicial review of the 1973 regulation was barred by the applicable six-year statute of limitations.

On the merits, EPA argued that it had reasonably construed the CWA in exempting incidental vessel discharges from the Act's permitting requirements and that even if that were not the case, Congress through subsequent legislation had acquiesced in the exemption.

The Ninth Circuit rejected EPA's arguments. The court narrowly construed the judicial review provisions

relied upon by EPA that provide for exclusive jurisdiction in the courts of appeals. It held that the case had been properly brought in district court because the subject matter of the suit did not fall within those direct review provisions cited by EPA.

The court then held that plaintiffs' challenge to the 1973 regulation was timely because EPA's denial of their petition to repeal the regulation amounted to an application of that regulation that restarted the six-year limitations period.

On the merits, the court held that the plain language of the CWA could not be construed to allow a blanket exemption for incidental vessel discharges and that subsequent acts of Congress, while showing that Congress was aware of the exemption, did not rise to the level of acquiescence in the exemption.

The Ninth Circuit's July 2008 opinion is available at:

[http://www.ca9.uscourts.gov/ca9/newopinions.nsf/1B1275291668F0348825748F00481607/\\$file/0374795.pdf?openelement](http://www.ca9.uscourts.gov/ca9/newopinions.nsf/1B1275291668F0348825748F00481607/$file/0374795.pdf?openelement).

### **Environmental Litigation Continues Concerning Suisun Bay Reserve Fleet**

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

National Defense Reserve Fleet in Suisun Bay, California. National Resources Defense Council v. DOT (E.D. Calif. No. 2:07-CV-2320-GEB-GGH).

On December 6, 2007, the NRDC amended its complaint to add a Clean Water Act count to the existing NEPA and RCRA claims. DOT has answered the amended complaint and sought a stay on the NEPA portion of the litigation pending the completion of the environmental assessment process later this year. MARAD has committed not to conduct any in-water hull cleaning of SBRF vessels until the NEPA process is completed. Settlement discussions are also continuing with the plaintiffs. In the mean time, thousands of documents have been produced and more continue to be reviewed for production.

In a matter related to the NRDC suit referenced above, the California State Water Board on August 27 sent a 60-day notice of intent to sue the Department for violations of the Clean Water Act and the California State equivalent of the Clean Water Act and well as failing to comply with directives of the Water Board.

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

American Cargo Transport ("ACT"), an operator of ocean going vessels registered in the United States, has filed a notice of appeal with the U.S. Court of Appeals for the Ninth Circuit seeking to reverse the district court's decision in In America Cargo Transport, Inc. v. United

States, (W.D. Wash. No. C05-393 JLR). Separately ACT has also challenged the district court's decision denying recovery of attorneys fees under the Equal Access to Justice Act.

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

ACT's amended complaint specifically named two Federal agencies as defendants: the Agency for International Development ("AID") – the agency statutorily charged with the obligation to arrange shipment of certain government impelled relief cargo, and MARAD – the agency statutorily charged with administering the cargo preference laws of the United States. DOJ's early representation in the case did not take into account the competing policy concerns of the two named Federal defendant agencies.

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

The United States thereafter successfully sought dismissal of the underlying

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

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

### **United States Settles Jones Act Claim**

The United States has entered into a settlement agreement that disposes of pending litigation in Cabezas v. United States, (N.D. Cal. No. C05-02095 MJJ) in return for the payment of approximately \$290,000 by the United States.

The litigation involved a personal injury claim under the Jones Act resulting from plaintiff's loss of part of his thumb while working to secure a ceremonial flag on the CAPE ORLANDO. Damages were awarded in the amount of \$375,376 reduced by 30% for contributory negligence.

The district court premised its finding of negligence and unseaworthiness on the fact the Government had not conducted a job hazard analysis before allowing Mr. Cabezas to raise the flag.

MARAD has been concerned that the determination that a job hazard analysis was called for in this factual circumstance could set a dangerous precedent since the task that resulted in the injury was performed by the plaintiff on his own initiative – he was not ordered to do it. In fact, raising the flag in the manner performed by the bosun was discussed with the Chief Mate who did not consider this method a good idea.

### **Settlement Reached in Searex Bankruptcy**

After successfully obtaining a ruling from the Bankruptcy Judge, MARAD has agreed to accept a settlement under which MARAD will receive \$2 million from the Settlement Fund and Phoenix would receive about \$400,000. A consent motion relating to this settlement has been approved by the bankruptcy court. .

On April 21, 1997 MARAD provided Title financing to Searex to construct four vessels, which were being built by Ingalls shipyard in Pascagoula, MS. In mid-1999, one vessel was delivered. On January 18, 2000, Searex filed for protection under the Bankruptcy Code. In the fall of 2000, Ingalls Shipyard, the entity constructing the vessels chopped-up the three partially constructed vessels destroying MARAD's collateral. In March 2001, MARAD paid-off on its Guarantee. Later in 2001, the Chapter 7 trustee sued Ingalls for the damages caused by its destruction of the three vessels. In August 2007, a compromise was reached wherein Ingalls paid \$4 million to settle the lawsuit. The bankruptcy estate netted \$2,484,000.

The Chapter 7 trustee filed an interpleader to determine who should receive the Settlement Fund. MARAD and Phoenix were secured creditors and filed cross motions for summary judgment. On April 24, 2008, the bankruptcy court heard almost 2 hours of arguments before granting MARAD's summary judgment motion finding MARAD as the senior creditor.

### **Contractor Seeks Recovery in Claims Court Action**

In Veridyne, Inc. v. United States (Ct. Fed. Claims No. 1:07-cv-00647-CCM), a contractor that previously was providing logistics support services to MARAD pursuant to a contract which had been awarded under the 8(a) program has sought recovery of funds allegedly due.

During the course of the contract MARAD examined the legality of the relationship and curtailed further payments after determining the contract was void ab initio. Veridyne then filed a complaint in the Court of Federal Claims seeking \$2,407,157.67, including outstanding invoices, overhead and general administrative expense, legal fees, wind-down costs and lost profits.

Veridyne filed a motion for partial summary judgment and the United States answered with a cross-motion for summary judgment. After oral argument, the court denied Veridyne's motion and partially granted the United States' cross-motion, ruling for the government as to as to Count 3, a claim for breach, wind-down costs and lost



profits because the Government chose not to order additional services under an IDIQ contract.

Discovery has commenced, document production has occurred and depositions will begin soon. Veridyne has also renewed its motion for summary judgment.

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