U.S. Department of Transportation

DOT LITIGATION NEWS

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Highlights

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Supreme Court Litigation

Certiorari Denied in Challenge to Use of Passenger Facility Charges for O'Hare Modernization Plan

On October 5, the Supreme Court issued an order denying a petition for certiorari filed in St. John's United Church of Christ v. Babbitt (Supreme Court Cert. Petition No. 08-1447) seeking review of the decision of the U.S. Court of Appeals for the District of Columbia Circuit in St. John's United Church of Christ v. FAA, 550 F.3d 1168 (D.C. Cir. 2008). St. John's United Church of Christ, owners of a religious cemetery that will be relocated as part of the O'Hare Modernization Plan, and others petitioned for review of an FAA order authorizing city to impose $1.3 billion in Passenger Facility Charges (PFCs) on airport passengers to pay for runway construction and land acquisition needed for the modernization. The Church claimed that the order violated the Religious Freedom Restoration Act (RFRA) and that it was arbitrary and capricious. The Court of Appeals panel unanimously held that St. John's lacked standing to challenge the authorization under the RFRA because the Church had not established that elimination of the PFCs would prevent the alleged harm to the Church, the relocation of the cemetery, and thus could not show that their success on the merits would likely redress their alleged injury. Additionally, the court held that FAA's authorization complied with statutory and regulatory requirements, and thus was not arbitrary and capricious.

St. John's and two of its members sought Supreme Court review of the appellate court's RFRA standing decision, claiming that certiorari was warranted because the Court of Appeals' standing decision conflicted with the Supreme Court's decisions in Utah v. Evans, 536 U.S. 452 (2002) and *Franklin v. Massachusetts*, 505 U.S. 788 (1992). Petitioners argued that, consistent with Evans and Franklin, given the strong likelihood that Chicago would comply with any decision by FAA (or by the Court of Appeals) that the Petitioners were entitled to substantive protection under RFRA, the Court of Appeals should have recognized presumptive redressability for purposes of standing.

The government argued that the Petitioners' disagreement with the Court of Appeals' application of settled legal principles to the facts of this case did not warrant the Court's review.

The D.C. Circuit opinion can be found at: http://pacer.cadc.uscourts.gov/docs/common/opinions/200812/07-1362-1154962.pdf.

Certiorari Denied in Railroads' Challenge to Eighth Circuit Decision Upholding Constitutionality of Federal Rail Safety Act Amendments

On May 18, the Supreme Court denied a petition for certiorari filed in Canadian Pacific Railway Co. v. Lundeen (Supreme Court Cert. Petition No. 08-871) seeking review of the decision of the U.S. Court of Appeals for the Eighth Circuit in Lundeen v. Canadian Pacific Railway Co. (8th Cir. 04-03220). The Eighth Circuit's 2 to 1 decision upheld

the constitutionality of newly-revised provisions of the Federal Railroad Safety Act (FRSA) clarifying the scope of Federal rail preemption.

The Eighth Circuit sought the views of the United States, and, rather than filing an amicus brief, the federal government intervened in the case and argued in support of the constitutionality of the statutory enactment.

The statutory provisions, which previously had been held unconstitutional by a Minnesota district court based on separation of powers concerns, amend 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 a Federal railroad safety standard.

The District Court concluded that the statute is unconstitutional because it applies retroactively to the date of the 2002 Minot, North Dakota derailment and was specifically 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 by the United States that the statute is constitutional and does not impermissibly attempt to reverse a final judicial decision, thereby avoiding separation of power concerns.

In response to the certiorari petition, the government argued that the Court should decline to hear the case and that the Eighth Circuit's decision correctly found the statute constitutional.

The Eighth Circuit's decision is available at: http://www.ca8.uscourts.gov/opinions/opinions.html. (After the site loads, then search for "Lundeen" in the "party name" search field.)

U.S. Supports Certiorari in FAA Air-traffic Controller Employment Law Case

On September 29, the United States filed its response to a petition for certiorari in Filebark v. DOT (Supreme Court Cert. Petition No. 08-1415) in which the Department agreed with petitioners that the case should be heard by the Court. The original complaint in this case was filed by bargaining unit employees of the Albuquerque Air Route Traffic Control Center (ARTCC) in 2003 seeking an upgrade of the facility. Petitioners had claimed that the Albuquerque ARTCC was misclassified and sought to contest FAA's facility level classification through use of the Administrative Procedures Act (APA) and the Civil Service Reform Act (CSRA). The complaint was amended in October 2004 to include supervisory employees of the facility. The U.S. District Court for the District of Columbia dismissed the claims of the bargaining unit controllers in 2006, holding that the CSRA

precluded bargaining unit employees from filing suit with regard to any matter that could be the basis of a grievance under an applicable collective bargaining agreement. In 2008, the District Court dismissed the claims of the non-bargaining unit controllers on the basis that the CSRA precluded any civil action related to federal employment, except those forms of judicial review expressly authorized by the CSRA. The U.S. Court of Appeals for the District of Columbia Circuit affirmed the District Court's ruling, essentially finding that the CSRA precluded appeal of the petitioners' claims.

This case implicates two broad issues in federal employment law: first, whether 5 U.S.C. § 7121(a)(1) establishes a right to seek a judicial remedy for grievances covered by the negotiated grievance procedure in a collective bargaining agreement; and second, whether the CSRA precludes federal employees from using the APA as a basis for employment related relief.

The United States' response to the petition for certiorari acknowledged that the case presents "a recurring question of substantial importance on which there is a direct conflict among the courts of appeals." Consequently, it signaled its agreement that review by the Court would be appropriate.

The government also indicated its agreement with the decision by the D.C. Circuit to reject petitioners' claims. The response pointed to Supreme Court precedent limiting federal employee relief to that explicitly provided by the CSRA itself. The response argues that the "integrated scheme of administrative and judicial review" provided by the CSRA reflects a "'manifestation of a considered congressional judgment' that employees do not have a general right to judicial review of workplace complaints." The brief argues that while FAA is largely exempt from the CSRA, its personnel management system closely parallels the CSRA and, together with the applicable sections of the CSRA, "is as fully comprehensive as the system created by the CSRA itself."

The United States' brief also rejects the petitioners' interpretation of 5 U.S.C. § 7121(a)(1) as allowing for judicial relief for matters covered under a collective bargaining agreement's grievance procedure. On the contrary, the 1994 technical amendments relied on by petitioners could not be read to create an implicit right that reversed well-settled law. The response noted that the "integrated scheme" created by the CSRA foreclosed an "implied right to judicial review." Reviewing applicable legislative history and case law, the government concluded that if Congress intended to create such a right it would have done so explicitly.

We are awaiting the Court's ruling on the petition for certiorari.

The D.C. Circuit's decision is available at:
http://pacer.cadc.uscourts.gov/docs/common/opinions/200902/08-5163-1164927.pdf.

Supreme Court Invites Views of the United States in National Traffic and Motor Vehicle Safety Act Preemption Case

On October 5, 2009, the Supreme Court entered an order in Williamson v. Mazda Motor Company of America, Inc. (Supreme Court Cert. Petition No. 08-1314) inviting the Solicitor General to file briefs expressing the views of the United States. The petition seeks review of a decision by a California state court of appeals holding that Federal Motor Vehicle Safety Standard (FMVSS) No. 208 preempts a state common law tort action involving a lap seatbelt in a minivan.

The petition seeks certiorari to resolve what petitioners claim are conflicts among appellate courts as to the scope of Geier v. American Honda Motor Company, Inc., 529 U.S. 861 (2000), and related cases. In Geier, the Supreme Court addressed the preemptive effect of the National Traffic and Motor Vehicle Safety Act, as amended (Safety Act) and FMVSS No. 208 involving vehicle airbags. The Safety Act requires that the NHTSA issue FMVSSs (regulations drafted in terms of minimum safety performance requirements) to which manufacturers of motor vehicles and equipment must conform and certify compliance. In Geier, plaintiff suffered severe injuries in an accident while driving a 1987 Honda Accord that had manual seat belts and a warning light, instead of a driver-side airbag. Plaintiff claimed that Honda was negligent in not equipping the Accord with a driver's side airbag. The Supreme Court affirmed summary judgment in favor of Honda and held that a rule of state tort law imposing a duty to install airbags in cars such as Honda's was preempted because it stood as an obstacle to the variety and mix of devices that FMVSS No. 208 required and to the phase-in that FMVSS No. 208 deliberately imposed.

Williamson involves a couple and their daughter who were traveling in a 1993 Mazda MPV minivan. The father was the driver, wearing a lap/shoulder seatbelt. Their daughter was seated directly behind him in the middle row, also wearing a lap/shoulder seatbelt. The mother was seated in the right-hand inboard seat of the middle row, but wore only a lap seatbelt, as FMVSS No. 208 permitted at the time. The mother died from serious injuries incurred in a vehicle collision. The California appellate court affirmed the trial court's dismissal of plaintiffs' state law tort claims against Mazda. Plaintiff contended that Mazda negligently failed to install a lap/shoulder seatbelt in the minivan's right-hand, middle row inboard seat. In its decision, the appellate court noted that Geier is binding on it, but distinguishable because it dealt with passive restraints. Nonetheless, the court found persuasive the holdings of other courts that have found that FMVSS No. 208 preempts "lap seatbelt only" state common law actions involving the inboard seating positions of rear seats. The court concluded that to the extent that plaintiffs contend that Mazda is liable for failing to install a lap/shoulder seatbelt in the middle row inboard seat, their claim was barred. The California

Supreme Court subsequently declined discretionary review.

Williamson's petition for certiorari contends, among other things, that: (a) Geier is limited to cases involving 1984 regulations implementing passive restraint devices in front seating positions; (b) FMVSS No. 208's seatbelt provisions are not part of a comprehensive policy scheme; and (c) NHTSA's decision to make lap/shoulder seatbelts optional in the middle row inboard seat was based not on safety concerns, but on cost-benefit considerations. Accordingly, a state action alleging that all rear seating positions should have been equipped with lap/shoulder belts in 1993 would not stand as an obstacle to federal seatbelt regulations issued in 1989 and would therefore not be preempted.

Mazda's opposition brief contends that there are no court conflicts justifying a grant of certiorari. Among other things, Mazda contends that the FMVSS No. 208 seatbelt regulations are, in fact, part of a comprehensive regulatory scheme, no different than the regulations' passive restraint provisions at issue in Geier.

The California Court of Appeal's decision (as modified following denial of rehearing on November 18, 2008) is reported at: Williamson v. Mazda Motor Co. of America, Inc., 167 Cal.App.4th 905, 84 Cal.Rptr.3d 545 (2008).

Supreme Court Holds that City Tax on Tankers is Unconstitutional

On June 16, the Supreme Court in Polar Tankers v. Valdez, 129 S. Ct. 2277 (2009), held that a tax imposed by the City of Valdez on tanker vessels serving its port is unconstitutional under the Tonnage Clause of the Constitution. The decision reversed a decision of the Supreme Court of Alaska upholding the tax. The United States decided against participating in the case as an amicus, but we monitored the case closely because of its potential impact on interstate and foreign maritime commerce.

Petitioner Polar Tankers argued that the tax was unconstitutional under both the Tonnage Clause and the Commerce Clause of the Constitution for two basic reasons. First, through a series of exemptions and alternative tax structures that shield other forms of property from the City's personal property tax, Polar Tankers argued that the Valdez tax discriminated against tankers since it apparently applied only, or virtually only, to such vessels. As such, it did not appear to be a legitimate property tax. Rather, Polar Tanker argued, it was a tax on tonnage masquerading as a property tax.

Second, Polar Tanker argued that through the use of an expansive apportionment formula, the City in effect imposed the tax on tankers for days those vessels were not using, and had no nexus to, the Valdez port facilities. Polar Tankers argued that this approach

is contrary to principles of fair apportionment and violates the Tonnage Clause and the Commerce Clause for that reason as well.

The Tonnage Clause of the Constitution, Art. I, § 10, cl. 2, provides that "No State shall, without the Consent of Congress, lay any Duty of Tonnage." As Polar Tankers noted in its brief, the Tonnage Clause supplements the Import-Export Clause, which denies States the authority to impose taxes or duties on imports or exports. As such, the Tonnage Clause is broad enough to preclude a State from collecting as a vessel charge that which it is also precluded from collecting as a tax or duty imposed on an import or export. Clyde Mallory Lines v. Alabama, 296 U.S. 261, 265-66 (1935) ("the prohibition against tonnage duties has been deemed to embrace all taxes and duties regardless of their name or form, and even though not measured by the tonnage of the vessel, which operate to impose a charge for the privilege of entering, trading in, or lying in a port").

The attempt by the City of Valdez to secure tax revenue from the tanker fleet that utilizes its harbor for loading petroleum shipments is generically a recurring transportation problem. Historically, States and localities have often attempted to treat the carriers that deliver the nation's passengers and goods as captive audiences for purposes of local taxation policies, particularly in the area of discriminatory personal property taxation. Those practices, both in the maritime sector and in other transportation sectors (see, *e.g.*, the discussion of Tinicum Township v. DOT below) have prompted both statutory provisions and judicial holdings founded on Constitutional provisions, which collectively recognize that States and localities cannot be allowed to engage in unfair or discriminatory taxation of the instrumentalities of interstate commerce.

The Supreme Court's opinion can be found at: http://www.supremecourtus.gov/opinions/08pdf/08-310.pdf.

Departmental Litigation in Other Federal Courts

D.C. Circuit Upholds DOT Drug Testing Rule

On May 15, the U.S. Court of Appeals for the District of Columbia Circuit in Burlington Northern-Santa Fe Railway v. DOT, 566 F.3d 200 (D.C. Cir. 2009), upheld an amendment to the Department's drug testing rules that requires direct observation of specimen collections in return-to-duty and follow-up testing of individuals who had previously tested positive and were trying to return to their safety-sensitive positions.

The Department has long administered a comprehensive drug testing program for transport industry personnel in safety-sensitive positions. In recent years, however, 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.

Notable changes in the amended rules included (1) requiring specimen validity testing to ensure that samples are not, 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 on November 1, 2008.

In August, 2008, BNSF Railway Co. and nine transportation industry unions filed three petitions for review alleging that the second and third changes violated the Fourth Amendment to the Constitution and were arbitrary and capricious under the Administrative Procedure Act. These cases were consolidated in the U.S. Court of Appeals for the D.C. Circuit. The court stayed the requirement related to mandatory direct observation pending a ruling on the merits and ordered expedited briefing.

The petitioners' consolidated brief contended that the greater intrusion represented by the changes violated the Fourth Amendment under applicable precedent and that DOT had also contravened the APA by proceeding without substantial evidence in support of its basic contention that those subject to the changes had a heightened incentive to cheat. The government's brief stressed that direct observation applied only to employees that had already violated the rules and had thereby demonstrated their disregard for public safety. Such employees had a greater incentive to cheat on the tests (because they would generally lose their jobs in the event of another positive result), which was demonstrated by the fact that they tested positive for drug use at far higher rates on these tests. The brief also stressed that these employees now had access to a wide variety of substances and devices that were marketed specifically for the purpose of

evading accurate testing. In these circumstances, the government interest in ensuring public safety through an effective testing program both outweighed the increased intrusion posed by the regulatory amendments and was supported by substantial evidence of record.

The court found substantial evidence to support the new provisions, including the increased incentive of those who have already tested positive to cheat, the availability of cheating devices, and the inadequacy of previous rules to detect such devices. The court concluded that the amendments also passed the balancing test used to assess the constitutionality of drug testing in the transportation industry. On the one hand, the government's interest in transportation safety is "compelling" under a long line of precedent, and the amendments at issue furthered that interest. On the other hand, the court held that the privacy interests at stake were diminished in the context of an extensively regulated industry and particularly by the prior violations of the drug testing rules committed by the affected individuals.

The rule went into effect on August 31.

The court's decision is available at: http://pacer.cadc.uscourts.gov/docs/common/opinions/200905/08-1264-1181010.pdf.

The final rule is available at: http://www.gpo.gov/fdsys/pkg/FR-2008-06-25/pdf/E8-14218.pdf.

Third Circuit Upholds Department's Decision on Tinicum Landing Fees

On September 14, the U.S. Court of Appeals for the Third Circuit in Tinicum Township v. DOT, 2009WL2914488 (3d Cir. 2009), upheld the Department's March, 2008 Declaratory Order that determined that the petitioner, the Township of Tinicum, 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.

Tinicum had enacted an ordinance levying a charge of three cents per thousand pounds maximum landed weight on aircraft landing on PHL runways located within the Township's boundaries and claimed that the fees were needed to compensate it for airport-related costs it purportedly incurred. The Department had concluded that the fee was unlawful under the Anti-Head Tax Act (AHTA), 49 U.S.C. § 40116(c).

Tinicum nonetheless argued that the 1994 re-codification of Title 49 changed the law in a manner that would allow a local government to impose charges whenever an aircraft lands in its jurisdiction. The Department argued that this was clearly not the case under prior law, that Tinicum's reading of the codified provisions did not support that outcome and that, in any event, the express Congressional directive in the 1994 codification act was that codification could not be construed to cause a substantive change in Title 49. The court agreed. The court also

rejected Tinicum's argument that the plain text of the statute functioned as a savings clause.

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

The court's decision is available at: http://www.ca3.uscourts.gov/opinarch/081830p.pdf.

D.C. Circuit Upholds Department's Virgin America Citizenship Order

On May 1, the U.S. Court of Appeals for the District of Columbia Circuit in Association of Flight Attendants – CWA v. DOT, 564 F.3d 462 (D.C. Cir. 2009), upheld the Department's Final Order issued May, 2008, which concluded that Virgin America, Inc. had demonstrated that it is a citizen of the United States and granted the carrier 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. Petitioner Association of Flight Attendants (AFA), a labor union representing certain flight attendants in the United States, had contended that Virgin America had not satisfied the U.S. citizenship requirements of 49 U.S.C. § 41102. Virgin America intervened and also participated in the oral argument.

The Department first argued that AFA lacked standing to challenge the citizenship of Virgin America because it had not shown that its interests in ensuring that domestic airline employees retain their jobs had an adequate nexus to the Department's citizenship determination. The court agreed and found that AFA lacked standing where the only evidence supporting the causation prong of the standing test were unsubstantiated allegations by the union's members that Virgin America's certification and entry into the domestic aviation market at least partially caused other airlines to reduce flights and cut back flight attendant working hours.

Because the court dismissed the AFA petition on standing grounds, it did not reach the merits of the Department's decision, which the Department argued had properly concluded under the totality of circumstances standard that Virgin America demonstrated that it is under the actual control of U.S. citizens.

The court's decision is available at: http://pacer.cadc.uscourts.gov/docs/common/opinions/200905/08-1165-1178613.pdf.

D.C. Circuit Issues Opinion in Challenge to LAX Rates and Charges Decision

On August 7, the U.S. Court of Appeals for the District of Columbia Circuit issued its opinion in the consolidated case of Alaska Airlines, Inc. v. DOT, 575 F.3d 750 (D.C. Cir. 2009). This case involves five consolidated petitions for review filed by the Los Angeles Airport Authority and certain carriers at the airport who challenged the Department's Final Decision and Refund Order resolving two administrative complaints over the reasonableness of new fee methodologies and increased

terminal charges at Los Angeles International Airport (LAX). The court granted each petition in part, denied each petition in part, and remanded the matter to DOT for further proceedings.

The court ruled that increased maintenance and operations fees imposed by the airport were not unjustly discriminatory as between long-term and short-term tenants with leases, but directed the Department on remand to explain why an airport may use fair market value to set non-airfield (i.e., terminal) rates but not airfield rates. The court also remanded to the Department the issue of whether, in establishing the fair market value for base rent for non-airfield space, the airport could only base it on other, potential aeronautical uses. The court agreed with the Department's requirement that fair market value be established objectively, through an independent appraisal. The court did, however, hold that the Department unlawfully placed the burden of persuasion on the airport operator to justify its use of different methods for determining rentable space for the long and short-term tenants.

The court further disagreed with the Department's determination that the 60-day time limit in its statute is a jurisdictional bar to complaints filed after that time-frame. The court remanded to the Department the question whether the 60-day filing requirement should be tolled for certain of the short-term tenants who filed their complaints after the 60-day timeframe. The court also directed the Department to consider on remand the airlines' claims, not addressed in the Final Decision, of whether LAX has monopoly power and, if so, how that affects the airport operator's methods for calculating the rent to be paid by the complaining carriers.

The Department will initiate further proceedings shortly on the issues remanded by the court.

The opinion of the D.C. Circuit is available at: http://pacer.cadc.uscourts.gov/docs/common/opinions/200908/07-1209-1200177.pdf.

Ninth Circuit Challenge to Mexican Truck NAFTA Demonstration Project Dismissed as Moot

On April 20, the U.S. Court of Appeals for the Ninth Circuit in Sierra Club v. DOT (9th Cir. No. 07-73415) dismissed as moot two judicial challenges to FMCSA's Mexican Truck Demonstration Project in light of a provision of the 2009 Omnibus Appropriations Act that de-funded the Project. The court had ordered the parties to file briefs addressing the impact of the Act on the challenges, which had been pending since the court heard oral argument in the case in February 2008. The United States and a coalition of groups that brought one of the challenges, which included the Sierra Club, Public Citizen, and the Teamsters, had argued that the legislation rendered the case moot. The group that brought the other pending challenge, the Owner Operators Independent Drivers Association, had argued that the case was not moot because the funding ban could be temporary.

On the merits, the petitioners had alleged that the Demonstration Project, pursuant to which a limited number of Mexican trucks were allowed to operate beyond zones along the U.S.-Mexico border, violated 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 barred expenditure of funds on the Project.

The Department contended that it had met or exceeded all statutory requirements for the program and that the DOT 2008 appropriations act only barred expenditure of funds on future demonstration programs involving Mexican motor carriers.

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.

Ninth Circuit Holds that California Ports Concession Agreements are Likely Preempted, District Court Injunction Issued on Remand is Appealed

On March 20, the U.S. Court of Appeals for the Ninth Circuit in American Trucking Associations v. City of Los Angeles, 559 F.3d 462 (9th Cir. 2009), held that the mandatory concession agreements implemented by the ports of Los Angeles and Long Beach that, among other things, barred owner-operated motor carriers from serving the ports, are likely preempted by federal law because they regulate or relate to motor carriers' prices, routes, or services. Further, the court found that parts of the concession agreements, including those relating to owner-operated motor carriers, financial disclosures, and an on-street parking ban, likely do not come within the motor vehicle safety exception to the motor carrier preemption provision at issue. Accordingly, the court reversed a district court decision that had denied an American Trucking Associations (ATA) request for a preliminary injunction against implementation of the agreements and sent the case back to the district court for issuance of an appropriate preliminary injunction as quickly as possible.

The United States filed an amicus brief in this case supporting ATA's position that certain provisions of the agreements, including the owner-operator provisions, were preempted. The United States' brief explained that the concession agreements were preempted under the Federal Aviation Administration Authorization Act, which generally prohibits state or local regulations "related to a price, route, or service of any motor carrier," 49 U.S.C. § 14501(c)(2)(A), and did not fall within the statute's public safety exception to the prohibition on state regulation. The United States also relied on the Supreme Court's expansive holding in Rowe v. New Hampshire Motor Transport Association, 128 S. Ct. 989 (2008), in support of the argument that the public health purpose raised by the ports did

not fall within the safety exception of the preemption statute.

On remand, the district court enjoined some but not all of the concession agreement provisions. On May 14, ATA again appealed the district court's ruling. The appeal has been briefed and is scheduled for oral argument on November 4, 2009. The United States is not participating in this stage of the case.

On April 15, in a related action, the U.S. District Court for the District of Columbia in Federal Maritime Commission v. City of Los Angeles (D.D.C. No. 08-1895) denied FMC's request for a preliminary injunction prohibiting the Ports of Los Angeles and Long Beach from working together under a cooperative agreement pursuant to which the ports were implementing their mandatory concession agreements. The District Court considered whether the plans would reduce competition and thus cause an unreasonable increase in transportation costs and decrease in transportation services, in violation of the Shipping Act of 1984. The court held that FMC had not demonstrated that it was likely to prevail on that issue or that implementation of the plans pending a decision on the merits of the case would result in irreparable harm. FMC had previously issued an order administratively determining that the two ports likely violated the Shipping Act by agreeing to mandate that motor carriers obtain port-issued access licenses, a requirement that the Commission concluded was concerted activity that illegally discriminated against the carriers. As contemplated under the Shipping Act, the FMC filed a motion for preliminary injunction in the U.S. District Court for the District of Columbia in November, 2008 asking the court to enjoin the effectiveness of the agreement filed with the Commission by the two ports.

The case was dismissed on July 24 upon FMC's own motion and per stipulation with the defendants.

The Ninth Circuit's March 20 opinion is available at: http://www.ca9.uscourts.gov/datastore/opinions/2009/03/20/0856503.pdf.

Eleventh Circuit Holds that Forum Non Conveniens Dismissals Are Available Under the Montreal Convention

On October 9, the United States Court of Appeals for the Eleventh Circuit issued its opinion in Pierre-Louis v. Newvac Corp., 2009WL3210644 (11th Cir. 2009), holding, in agreement with the United States and the district court, that the forum non conveniens doctrine applies in Montreal Convention cases. The panel also held that the District Court did not abuse its discretion in invoking the doctrine in this particular instance and thus affirmed the judgment of the District Court.

The United States filed an amicus brief in this case 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 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 an 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).

The Eleventh Circuit's opinion can be found at: http://www.ca11.uscourts.gov/opinions/ops/200715828.pdf.

Court Rejects Environmental Groups' CERCLA Claims against DOT

On February 25, the U.S. District Court for the Northern District of California in Sierra Club v. Johnson, 2009WL2413094 (N.D. Cal. 2009), held that it lacked jurisdiction over plaintiffs' claims that the DOT failed to discharge their obligations under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) by failing to require regulated entities to establish and maintain evidence of financial responsibility.

The CERCLA requirement has been in effect since 1987. FMCSA has regulations that comply with the CERCLA requirement, but while other DOT administrations such as FRA and PHMSA have regulations addressing financial responsibility, those regulations were adopted pursuant to statutory authority other than CERCLA.

In its motion for summary judgment, the United States argued that the court lacked jurisdiction to entertain plaintiffs' nondiscretionary citizen suit for a number of reasons. First, plaintiffs did not have standing to sue agencies such as DOT because they did not allege any injury caused by the agency's inaction under section 108(b) of CERCLA, 42 U.S.C. § 9608(b). Second, plaintiffs' claim that the agencies failed to publish a notice of priority by December 11, 1983, as allegedly required under section 108(b), is time-barred by the six-year statute of limitations in 28 U.S.C. § 2401(a). Third, plaintiffs' claim that the

agencies failed to promulgate financial assurance regulations under section 108(b) is not properly before the court as a nondiscretionary duty claim because the agencies have full discretion over when to promulgate the regulations. Finally, plaintiffs' claim that the agencies failed to timely implement section 108(b) regulations is neither a nondiscretionary matter nor ripe for review.

In its decision, the Court found that plaintiffs had not established that they suffered an injury that is fairly traceable to DOT's action or inaction and is likely to be redressed by an order in their favor. The Court noted that DOT only has Section 108(b) authority over transportation-related facilities, including transportation-related pipelines, while EPA has authority over all other facilities. The Court stated that plaintiff's member declarations did not address DOT's assertion that it is not responsible for financial assurance requirements for the particular mine pipeline at issue because it is not related to transportation. The Court further stated that the plaintiffs did not point to any evidence of involvement of a transportation-related facility at the other facilities in question. Instead, the Court stated that the plaintiffs just made a circular argument that injury from the leaking of hazardous substances from pipelines is sufficient to demonstrate injury in fact from transportation-related facilities. Thus the Court ruled that plaintiffs did not establish any injury due to DOT's inaction regarding financial assurance regulations for transportation-related facilities.

The Court denied the government's motion with respect to EPA. Subsequently, EPA entered into a settlement agreement with the plaintiffs.

Air Canada, DOT Settle Suit Seeking TRO against Sports Team Charter Ban

On September 9, Air Canada filed suit against DOT in the U.S. District Court for the District of Columbia seeking a temporary restraining order and preliminary and permanent injunctions to prevent DOT from stopping the carrier's professional sports team charter operations, including those serving National Hockey League teams, that operate both internationally and between U.S. cities. The domestic legs of such charters can under certain circumstances be considered cabotage, the carriage of passengers or freight for hire between two domestic points by a foreign carrier, which is generally prohibited by U.S. law. Air Canada's suit, Air Canada v. LaHood (D.D.C. No. 09-1718), was prompted by letters from DOT offering the view that the carrier's sports team charter operations likely violated DOT's cabotage restrictions and counseling the carrier to cancel any future contracts for such charters.

On September 18, Air Canada and DOT signed an agreement settling the lawsuit. Under the settlement, Air Canada agreed to dismiss its lawsuit and implement a series of monitoring, reporting, and security measures to ensure that cabotage violations will not occur on such flights and that the airline will conduct the same level of security screening that is required of U.S. private

charter carriers. DOT agreed not to prevent Air Canada from commencing National Hockey League charter flights for the 2009/2010 season or negotiating or entering into new contracts with respect to that season, while reserving its right to bring an enforcement action for any violations of U.S. cabotage rules. The agreement was subsequently modified to allow Air Canada to provide season-long charter services to the Toronto Raptors of the National Basketball Association.

Florida District Court Holds That State Statute Imposing Burdens on Travel to Cuba Is Preempted by Federal Law

On April 14, the U.S. District Court for the Southern District of Florida in ABC Charters, Inc. v. Bronson, 2009 WL 1010435 (S.D. Fla. 2009), held that a Florida statute imposing burdens on parties offering transportation services to Cuba is unconstitutional and preempted by federal law. The case was brought by Florida-based charter operators who, as indirect air carriers, provide charter transportation between the United States and Cuba. Their complaint challenged a Florida law, the Florida Sellers of Travel Act, which imposed various regulatory requirements on indirect air carriers offering such charter services. The United States, at the invitation of the court, filed a brief in the case arguing that the Florida law is preempted under statutes and regulations administered by the State Department relating to U.S. international relations and travel to Cuba and under the Airline Deregulation Act administered by DOT, which precludes States from regulating the prices, routes, or services of air carriers. The court's April 14 order quotes a significant portion of the United States' brief and explicitly adopts in full the positions set forth in the brief. The court had denied Florida's motion to dismiss the case and granted plaintiffs' request for a preliminary injunction precluding enforcement of the Florida statute on September 30, 2008.

Parties Settle Latest Challenge to Driver Hours-of-Service Rule

On October 26, FMCSA and four petitioners that sought review in the U.S. Court of Appeals for the District of Columbia Circuit of FMCSA's December, 2008 driver hours of service rule filed a joint motion to hold the case in abeyance pending the agency's publication of a new proposed hours-of-service rule. In a settlement reached by the parties, FMCSA agreed to develop a Notice of Proposed Rulemaking, submit it to the Office of Management and Budget within nine months of the settlement, and publish a new Final Rule within 21 months of the settlement. Petitioners in Public Citizen v. FMCSA (D.C. Cir. No. 09-1094) sought review of the 2008 rule on March 9, 2009, and allege that the rule is arbitrary and capricious because, among other things, it increases the number of hours that drivers may drive, fails to take into account impacts of cumulative fatigue, and does not ensure driver health. The challenged provisions of the rule were set aside by the D.C. Circuit in two previous cases and were twice re-issued by FMCSA.

D.C. Circuit Hears Challenge to New Rates and Charges Rules

On October 15, the U.S. Court of Appeals for the District of Columbia Circuit heard oral argument in Air Transport Association v. DOT (D.C. Cir. No. 08-1293), a challenge to the July, 2008 DOT and FAA amendment to the 1996 "Policy Regarding the Establishment of Airport Rates and Charges." The Air Transport Association (ATA) challenge focuses on three amendments to the 1996 Policy (two modifications and one clarification). These amendments are intended to provide greater flexibility to operators of congested airports to use landing fees as incentives for air carriers to use the airport at less congested times or to use alternate airports to meet regional air service needs.

ATA filed its opening and reply briefs on January 30 and April 2, respectively; DOT/FAA filed a responsive brief on March 2, and intervenor Airports Council International-North America filed its brief in support of the new rules on March 19.

Appeal of District Court Decision Upholding Vermont's Greenhouse Gas Emissions Regulations Held in Abeyance

On June 5, the U.S. Court of Appeals for the Second Circuit granted a joint motion of the parties to hold in abeyance Green Mountain Chrysler Plymouth Dodge Jeep v. Crombie (2d Cir. No. 07-4342), the automobile industry's appeal of a decision of the U.S. District Court for the District of Vermont holding that the Energy Policy and Conservation Act (EPCA) does not preempt Vermont's greenhouse gas (GHG) emissions standards for automobiles. The industry parties had agreed to put their case on hold as part of the Administration's agreement on future Corporate Average Fuel Economy (CAFE) standards announced on May 19. NHTSA promulgates CAFE standards under EPCA. The United States is not a party in this case, but filed an amicus brief in the appeal and participated at oral argument contending that that the court lacked jurisdiction over the case because it did not present a live controversy. 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. Without an EPA waiver, California's regulations, and any such regulations adopted by Vermont or any other state, could not go into effect. (After the circuit court's decision, EPA, upon reconsideration of its earlier waiver decision, granted the California waiver.) It is expected that the industry will seek dismissal of their case after new CAFE standards are issued later this year.

A similar case challenging California's GHG standards, Central Valley Chrysler-Jeep v. Goldstene (9th Cir. 08-17378), has been stayed until April 15, 2010. The United States did not participate in the California case.

The Vermont district court's opinion is available at: http://www.vtd.uscourts.gov/Cases/05cv302.html.

U.S. Opposes Love Field Takings Claim

On August 18, the Court of Federal Claims heard oral argument in Love Terminal Partners v. United States (Fed. Cl. No. 08-00536), in which Love Terminal Partners (LTP) seeks compensation for an alleged taking of their property (a passenger terminal facility and other structures at Love Field in Dallas, Texas) through federal legislation.

Congress has long imposed restrictions on air carrier operations at Love Field under the Wright Amendment. Concerned parties (the cities of Dallas and Ft. Worth, the DFW airport board, and Southwest Airlines, American Airlines) in 2006 reached agreement on resolving their disputes about the use of Love Field and urged Congress to adopt legislation permitting their agreement to go forward. Later that year, Congress responded by enacting the Wright Amendment Reform Act (WARA), which phased out existing restrictions and imposed others. In order to ensure that Love Field did not expand, the concerned parties had agreed, and WARA included a provision, to cap the number of passenger gates permitted at the airport. LTP alleges broadly that these restrictions took its property. The complaint seeks $120 million as just compensation.

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

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

On reply, the government countered that because the statute was directed at Dallas and other third parties, any impact on the plaintiff was secondary and did not amount to a taking under applicable precedent. The government also contended that the District Court misread WARA. Alternatively, if WARA compels the parties to carry out the terms of their agreement, the government pointed out that the terms of that agreement also (1) required Dallas to exercise its eminent domain authority to condemn the passenger terminal and to pay for this out of fees imposed on airport users, and (2) forbade use of federal funds for the demolition. This

approach therefore required that any liability for taking plaintiffs' property rested with Dallas and not the federal government.

Citizen Group and Property Owner Challenge Plans for Dulles Metrorail Extension

On August 6, a citizen advocacy group and a corporate landowner of property adjacent to Route 267 in Reston, Virginia filed suit in the U.S. District Court for the District of Columbia seeking to enjoin construction of the Dulles Metrorail extension to Dulles International Airport and Loudon County. Plaintiffs in Parkridge 6, LLC and Dulles Corridor Users Group v. DOT (D.D.C. 09-01478) allege 15 separate violations of the FTA, FHWA, and FAA authorization statutes, the Virginia constitution, the Virginia Public-Private Partnership Act, and violations of certain lease agreements concerning the right-of-way in the vicinity of the project. The voluminous complaint contains numerous critical suppositions and public policy suggestions concerning the transportation network of Northern Virginia.

On September 24, DOT moved to join a motion to transfer the case to the U.S. District Court for the Eastern District of Virginia. Originally filed by the Metropolitan Washington Airports Authority (MWAA) and the Virginia Department of Transportation (VDOT), the motion is based on the facts that the suit is an attempt to stop a massive construction project located *in toto* in Virginia; the project will be governed primarily by Virginia law; and the plaintiffs, MWAA, VDOT, and their officers and principals are all based in Virginia. Additionally, the median time for disposition of a civil suit by trial in the District of the District of Columbia is significantly longer than the median time for disposition of a civil suit by trial in the Eastern District of Virginia. DOT also joined in MWAA's and VDOT's motion for a stay of the proceedings pending the court's ruling on the motion to transfer.

Recent Litigation News from DOT Modal Administrations

Federal Aviation Administration

Court Upholds FAA Approval For New Airport in Panama City, Florida

On May 1, the U.S. Court of Appeals for the Second Circuit in National Resources Defense Council v. FAA, 564 F.2d 549 (2d Cir. 2009), denied a petition for review of a Record of Decision (ROD) issued by FAA approving the relocation of the existing Panama City-Bay County International Airport (PFN) to a new site in West Bay, Florida. Petitioners National Resources Defense Council, Defenders of Wildlife, and Friend of PFN argued against the airport's relocation based on claims that FAA had violated certain parts of NEPA and the Airport and Airways Improvement Act (AAIA).

In rejecting petitioners' claim under the AAIA, the Second Circuit noted that, while FAA acknowledged that a new airport at the proposed site would have a significant adverse effect on some natural resources, no other prudent alternative existed. Additionally, the court rejected petitioners' NEPA claims, finding that FAA's analysis in the Environmental Impact Statement (EIS) regarding identification of alternatives, indirect and cumulative impacts, and supplementation "was not arbitrary, capricious, an abuse of discretion or otherwise contrary to law."

The ROD issued by the FAA was contingent upon the airport securing a permit from the Army Corps of Engineers, pursuant to section 404 of the Clean Water Act. That has not yet been obtained, and, accordingly, the project cannot at this time move forward pursuant to the FAA's ROD.

The Second Circuit's opinion is available at: http://www.ca2.uscourts.gov/decisions/isysquery/70bd6ac4-0bc0-4fac-99b3-d662db6f4baa/1/doc/06-5267-ag_opn.pdf#xml=http://www.ca2.uscourts.gov/decisions/isysquery/70bd6ac4-0bc0-4fac-99b3-d662db6f4baa/1/hilite/.

Ninth Circuit Rejects Challenge to Procedures at McCarran International Airport

On June 12, the U. S. Court of Appeals for the Ninth Circuit denied the petition for review in City of Las Vegas v. FAA, 570 F.3d 1109 (9th Cir. 2009). In its petition, the City of Las Vegas and others challenged FAA's Supplemental Environmental Assessment, Finding of No Significant Impact (FONSI), and ROD approving the Modification of the Four-Corner Post Plan for McCarran International Airport in Las Vegas, Nevada. In the FONSI/ROD, FAA modified the Four-Corner Post Plan by reinstating a right turn RNAV (area navigation) departure procedure for eastbound planes. RNAV procedures are one element of the Next Generation Air Transportation System.

Petitioners argued that FAA failed to comply with the APA, (NEPA, and the Clean Air Act. In particular, petitioners argued that FAA failed to take a hard look at a waiver of design criteria for the

flight path that occurred after publication of the Draft SEA (DSEA). They further alleged that because FAA did not adequately consider the post-DSEA modification, it failed to take a hard look at the safety risks of the path or its noise and air quality impacts.

The Ninth Circuit found that FAA did take a hard look at the safety of the proposed flight path. The court also found that the Final SEA did account for the modifications to the flight path that would have had some impact on the noise and air quality analysis. The Court found that FAA was not required to produce a supplemental environmental assessment to analyze the impact of the waiver and post-DSEA modifications to the flight path as the modifications were not significant.

Petitioners also argued that FAA should have conducted a full general conformity analysis under the Clean Air Act. The Ninth Circuit found that FAA was entitled to rely on the language in the preamble of the EPA's General Conformity regulations to conclude that the proposed action was exempt from review as de minimis and did not necessitate an applicability analysis or full conformity determination.

The decision can be found at: http://www.ca9.uscourts.gov/datastore/opinions/2009/06/12/07-70121.pdf.

The audio file of the Ninth Circuit oral argument can be accessed by entering the docket number where indicated on the following webpage: http://www.ca9.uscourts.gov/media.

FAA Prevails in Litigation Involving the New York/New Jersey/Philadelphia Metropolitan Area Airspace Redesign

On June 10, the U.S. Court of Appeals for the District of Columbia Circuit dismissed in part and denied in part the claims made by petitioners against the FAA's ROD for the New York/New Jersey/Philadelphia Metropolitan Area Airspace Redesign Project. In County of Rockland v. FAA, 2009 WL 1791347 (D.C. Cir 2009), the court held that the ROD complied with the NEPA, section 4(f) of the DOT Act, and the Clean Air Act. The court held that the FAA's EIS was "procedurally sound and substantively reasonable." The Court declined to issue an opinion on many of petitioners' arguments, indicating that it had "considered and found no merit in the petitioners' other arguments." Petitioners subsequent filed three separate requests for rehearing or rehearing en banc of the court's decision. On August 19, the requests were denied without opinion. At least one Petitioner, the State of Connecticut, has indicated its intent to seek Supreme Court review of the decision.

The purpose of the New York/New Jersey/Philadelphia Metropolitan Area Airspace Project is to redesign the airspace to increase its efficiency and reliability to reduce delays while maintaining or increasing the safety of the National Airspace System. In September 2007, the FAA issued its decision to proceed with this project. The project combines high and low altitude airspace to create more efficient

arrival and departure routes and anticipates full integration of the airspace by 2012. Once fully implemented, the project will reduce delays by up to 20% compared to taking no action, reduce noise exposure to over 600,000 individuals, and reduce fuel burn.

The project includes changes to procedures at LaGuardia, JFK, Philadelphia, Newark Liberty International, 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).

This project represents several firsts for the agency. First, this is the largest airspace redesign undertaken to date. The project covers over 31,000 square miles of airspace over the entire state of New Jersey and portions of Connecticut, Delaware, New York and Pennsylvania. Second, FAA had a record number of lawsuits filed against this project. There were thirteen separate lawsuits in three judicial circuits and one district court with 73 named Petitioners. Third, this project lays the foundation for the FAA's transition to Next Generation Air Transportation System. Finally, this project was subject to scrutiny in Congress and was the subject of a report by the Government Accountability Office (GAO). The GAO found the FAA complied with NEPA and related requirements in conducting the airspace redesign project.

Ninth Circuit Upholds FAA's Interim Suspension of Jet Ban at Santa Monica Airport

On May 8, the U.S. Court of Appeals for the Ninth Circuit in United States v. City of Santa Monica, 2009WL1295333 (9th Cir. 2009), upheld a district court order enjoining enforcement of the City of Santa Monica's ordinance banning FAA Category C and D aircraft from operating at Santa Monica Airport (SMO). These categories encompass most of the jets operating at SMO. FAA had successfully sought the district court order after the City advised the agency that it would not comply with an interim FAA order that barred enforcement of the ordinance while the agency reviewed the ordinance in an administrative proceeding. The Ninth Circuit held that FAA was likely to prevail on the merits in the ongoing administrative proceeding, that the balance of equities tipped in the agency's favor to avoid air traffic disruptions, that this outcome preserved that status quo, and that the safe history of these aircraft at SMO and the FAA's oversight of aviation safety made the injunctive relief granted in the public interest. The court also dismissed as moot a separate petition for review filed by the City that had directly challenged FAA's interim order.

The City proposed to ban FAA Category C and D aircraft (aircraft categorized by wingspan and approach speed) in 2002. 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. 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. FAA promptly revived its proceeding and barred enforcement of the ordinance during the pendency of that proceeding. When the City advised that it would not comply with the FAA order, the agency obtained injunctive relief in federal district court because such orders by statute remain in effect "by their own terms" until superseded by appellate court order. United States v. City of Santa Monica (C.D. Cal. No. 08-02695).

In its petitions for review, the City argued that FAA lacked 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 also contended that as proprietor of SMO it may act to preserve safety at the airport, that it was acting consistent with FAA airport standards, and that the agency's attempts to force it to accept the aircraft in question violated the Tenth Amendment to the Constitution.

FAA countered that the District Court properly enforced its orders, the merits of which are reviewable only in federal appellate court, and that FAA has the authority to preserve the status quo during the pendency of administrative proceedings. 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 will not be 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.

The audio file of the oral argument before the Ninth Circuit can be accessed by entering the docket number where indicated on the following webpage: http://www.ca9.uscourts.gov/media

The Ninth Circuit's opinion is found at: http://www.ca9.uscourts.gov/datastore/memoranda/2009/05/08/08-55869.pdf.

FAA Successfully Defends Challenge to Supplemental EIS for Special Use Airspace and the Realistic Bomber Training Initiative

On February 5, the U.S. Court of Appeals for the Fifth Circuit denied a petition for review of a Supplemental EIS (SEIS) supporting a decision to modify and enlarge an existing instrument route and create the Lancer Military Operations Area by consolidating and expanding three existing military operations areas. The court in Davis Mountains Trans-Pecos Heritage Association v. FAA, 2009WL270176 (5th Cir. 2009), stated that the FAA's decision was not arbitrary or capricious and that it was satisfied that the SEIS adequately

addressed the concerns raised in the challenge to FAA's original EIS, which had resulted in a remand to the Air Force and FAA to address those concerns.

The decision can be found at: http://www.ca5.uscourts.gov/opinions/unpub/07/07-60595.0.wpd.pdf.

D.C. Circuit Dismisses Challenge to Slot Auction Rules after Rescission by FAA

On October 14, the U.S. Court of Appeals for the District of Columbia Circuit in Air Transport Association v. FAA (D.C. Cir. No. 08-1262) granted FAA's unopposed motion to dismiss consolidated petitions for review challenging slot auctions rules adopted by the agency in October, 2008 to address aviation congestion management in the New York City area. The motion was filed in the wake of FAA's October 9 rescission of the challenged rules, which had been stayed by the court in December, 2008. The Port Authority of New York and New Jersey, the Air Transport Association, and the International Air Transport Association had filed separate petitions seeking judicial review of the FAA rules.

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"). In 2008, the FAA limited operations at JFK and Newark and stated that it planned to lease new or returned slots at these two airports by conducting auctions.

Challenges to FAA's rule and to its auction notice were filed by numerous parties, including the Air Transport Association, individual airlines, and the proprietor of the major New York City area airports (the Port Authority of New York and New Jersey). All challenges were consolidated in the U.S. Court of Appeals for the District of Columbia Circuit. Collectively, petitioners argued that FAA had no authority to auction slots, and that its decision to do so violated the APA and denied petitioners due process because the legality of ordering slot auctions was pending in ongoing FAA rulemakings.

Stay Requests Denied in D.C. Circuit Case Challenging the Sufficiency of Environmental Review for Runway Expansion at Fort Lauderdale Airport

On February 13, the Cities of Dania Beach and Hollywood, Florida and two Dania Beach residents sought review in the U.S. Court of Appeals for the D.C. Circuit of FAA's ROD that approved the extension of Fort Lauderdale Airport's runway 9R/27L and other associated airport projects based on FAA's Final EIS prepared pursuant to NEPA. Petitioners in these consolidated cases, City of Dania Beach v. FAA (D.C. Cir. Nos. 09-1064 & 09-1067), allege that FAA's decision to allow for expansion of the Fort Lauderdale Airport is legally flawed under NEPA, the DOT Act, Executive Order 11,990, Department of Transportation Order 5660.1A (DOT Order 5660.1A), and the Airport and Airway Improvement Act (AAIA).

FAA's Final EIS was issued in June of 2008. FAA's ROD was subsequently issued on January 9, 2009. The alternative selected (B1b) was similar to the sponsor's proposed project (B1c). However, it did not require measures agreed to in an interlocal agreement between the sponsor and the City of Dania Beach. FAA determined that the measures were more appropriately implemented via the Part 150 noise analysis process or a separate runway use agreement. Further, the alternative selected was not the environmentally preferred alternative; nor was it the operationally superior alternative. However, due to unique concerns with other alternatives, FAA determined that they were not practicable and selected the B1b alternative.

Petitioners requested both an administrative stay before the agency and a judicial stay before the court. In this request and motion, petitioners raised several issues, including (1) whether FAA reasonably conducted its NEPA analysis using reasonably accurate aviation forecasts and assumptions, (2) whether FAA reasonably limited its section 4(f) analysis to impacts on two local parks to the year 2020, (3) whether FAA reasonably selected an alternative with more wetland impacts than other analyzed alternatives under Executive Order 11,990, (4) whether FAA reasonably selected an alternative with more environmental impacts than other analyzed alternatives under Section 47106(c) of the AAIA, and (5) whether FAA reasonably selected an alternative that does not mandate measures agreed to by the sponsor in interlocal agreements with the City of Dania Beach under section 47106(a)(5) of the AAIA.

The requests for an administrative stay and a judicial stay were denied on April 3 and April 30, respectively. In denying the judicial stay request, the court stated that petitioners had failed to meet the stringent standards required for such a stay. Following the filing of the administrative record, petitioners filed a Motion to Complete the Administrative Record. FAA filed its opposition to this motion on September 25. The court had set a briefing schedule, with petitioners' opening brief being due on October 13. Since the filing of the motion concerning the administrative record, however, the court has suspended the briefing schedule.

In Eminent Domain Action at Half Moon Bay Airport, District Court Holds State Preempted From Taking Lands Transferred Under the Surplus Property Act

On February 26, the U.S. District Court for the Northern District of California granted the FAA's motion for summary judgment in Montara Water and Sanitary District v. County of San Mateo, 598 F. Supp. 2d 1070 (N.D. Cal. 2009). The court held that that states are preempted from taking lands transferred under the Surplus Property Act and found that FAA was the rightful owner of the well sites at issue in the case.

In May 2007, Montara Water and Sanitary District (Water District) filed an eminent domain action in California Superior Court to take three well sites

located on Half Moon Bay airport in San Mateo County, California. San Mateo County gained possession of the Half Moon Bay Airport property from the Federal government in 1947 through the Surplus Property Act of 1944. The original deed directed the property to be used for "public airport purposes, and only for such purposes." It also required FAA approval of any transfer of the property. The original transfer document plainly stated that non-aeronautical use would be limited at the airport if the use interfered with airport operations or conflicted with airport use. For more than 40 years, the Water District and its predecessors had access to the well sites through a revocable permit issued by the County. The revocable encroachment permit allowed for early termination of the permit if the airport needed the sites for aeronautical purposes.

Prior to the filing of the eminent domain action, FAA expressed in writing its objection to the sale or transfer of the well sites. The transfer or taking of the well sites would damage the County's ability to develop the property for airport purposes. The well sites are critically located in areas suitable for aircraft storage, aircraft maintenance, or a fixed base operator. In addition, the airport would lose more land than just the well sites. More land would be consumed by set backs for a perimeter fence and three access right-of-ways. In addition, the wells are a source of much needed revenue for the airport.

In April 2008, FAA filed a motion to intervene in the state eminent domain action, which was granted. FAA then removed the case to federal district court and filed a motion for summary judgment in an attempt to have the case dismissed.

The Water District has made a timely appeal of the district court decision. Montara Water and Sanitary District v. County of San Mateo (9th Cir. 09-15822). The Water District filed its brief on August 10. On September 22, the briefing schedule was suspended pending the outcome of settlement discussions by the parties.

Court Grants Summary Judgment to FAA in $300 Million Wrongful Death Case Arising from Corporate Jet Accident

On June 9, the United States District Court for the Southern District of California granted the United States' Motion for Summary Judgment in several wrongful death lawsuits that arose out the crash of a Cessna Citation 550 corporate jet that occurred at the Palomar Airport on January 24, 2006. In re Palomar Crash of January 24, 2006, 2009WL3241531 (S.D. Cal. 2009). The early-morning accident occurred before the air traffic control tower had opened in the final few moments of the flight. Radar data indicated that the aircraft was too high and traveling too fast for a safe landing, and according to the cockpit voice recorder, upon touchdown, the pilots thought that they would not be able to stop the aircraft by the runway end. With little runway left, the pilots attempted to get airborne and execute a "go around," but the aircraft ran off the runway, struck a navigational aid, and

plummeted down a hill. All aboard were killed.

Although not admissible in court, the NTSB report on the accident attributed the probable cause of the accident to a series of incorrect decisions by the captain. The NTSB did not attribute any contributing factors to FAA. Nevertheless, FAA received wrongful death claims from the estates of all four victims and a property damage claim from the aircraft hull insurer, all of which led to the consolidated district court litigation. Plaintiffs made several allegations, all tied to the placement of the FAA owned and operated navigational aid struck by the airplane. Notably, plaintiffs alleged that FAA had, contrary to its own guidance, placed the aid too close to the runway end, creating safety hazard that the airplane would have cleared had the aid been properly placed. In addition, plaintiffs alleged that FAA had incorrectly calculated the acceptable runway safety area and failed to follow its own rules about how to measure runway safety areas. The claims against the United States exceeded $300 million.

The United States filed a motion to dismiss on grounds that all of the allegations fell within the discretionary function exception to the Federal Tort Claims Act, 28 U.S.C. § 2380(h). The plaintiffs had attempted to circumvent the exception by setting forth allegations that the FAA had mandatory policies relating to the placement of the navigation aid and runway safety areas and subsequently failed to follow it in this case. In a November 2008 decision, the court disagreed with plaintiffs and granted the government's motion to dismiss with one exception: plaintiffs had put forth expert testimony that the aid was placed too close to the runway end according to internal orders, despite FAA testimony to the contrary. Finding a factual issue, the court denied the government's motion as to that claim.

After further discovery, the United States filed a motion for summary judgment alleging that the calculated distance relied upon by plaintiffs was from an outdated FAA order that had since been revised and that the reason why such aids are placed at a distance is to protect airport personnel and maintenance workers from jet blasts, not to ensure a safe clearing distance for airplanes. The court agreed with the United States and granted the government's motion.

Plaintiff Ends Challenge to New Runway Use Procedures at Boston Logan International Airport after Case is Transferred to Court of Appeals

On September 30, the court in Avellaneda v. FAA (D. Mass. No. 08-10718) granted plaintiffs' motion to transfer the case, in which plaintiffs claim that FAA unlawfully implemented changes in a preferential runway use program regarding runway 33L at Boston Logan International Airport without conducting an environmental review under NEPA. The court ordered that the case be transferred to the U.S. Court of Appeals for the First Circuit, consistent with the argument made by FAA in a motion to dismiss that under

the Federal Aviation Act, only the courts of appeals, and not the district courts, have jurisdiction over such cases. FAA had also argued that there was no federal action requiring review under NEPA. The remaining motions (to dismiss and to compel discovery) were denied as moot in light of the transfer. Subsequently, plaintiffs counsel advised FAA that they would be filing a motion to voluntarily dismiss the case.

Latest Developments in NATCA Fair Labor Standards Act Litigation

Abbey v. United States (Fed. Cl. No. 07-2726) is a challenge by more than 7,000 plaintiffs alleging numerous violations by FAA of the Fair Labor Standards Act (FLSA). The principal challenge is to the agency's authority to provide compensatory time and credit hours in lieu of overtime pay. The court previously granted plaintiffs' partial motion for summary judgment with respect to compensatory time and credit hours. Subsequently, plaintiffs amended their complaint, and the government has filed an answer to the amended complaint. Discovery in the case is ongoing. In addition, the government filed a motion requesting the court to certify the partial summary judgment ruling for an interlocutory appeal, which plaintiffs opposed. On October 14, the court denied the government's motion on timeliness grounds.

This case was brought in May, 2007 by the National Air Traffic Controllers Association on behalf of 7,438 named plaintiffs who alleged that the government violated the FLSA by: (1) improperly calculating the FLSA regular pay rate; (2) improperly paying compensatory time; (3) failing to compensate plaintiffs for pre-shift and post-shift work activities; and (4) failing to compensate plaintiffs for time spent off duty bidding for work and leave schedules.

Federal Highway Administration

Second Circuit Affirms Denial of Attorney Fees in Vermont Environmental Case

On June 10, the U.S. Court of Appeals for the Second Circuit Court in Senville v. Madison, 2009WL1608513 (2d Cir. 2009), affirmed a district court decision that a single erroneous factual finding did not constitute an abuse of discretion by the district court in denying plaintiffs' motion for fees. In the March, 2008 district court opinion, FHWA prevailed in a petition for attorney fees under the Equal Access to Justice Act (EAJA) because the court determined that the FHWA position in the Vermont litigation had been substantial justified.

The underlying project, Chittenden County Circumferential Highway, was on the Secretary's initial list of priority projects. The project also has a long history dating back to the early 1980's as a demonstration project in which the NEPA processing was delegated to the State of Vermont. The 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, failed to fully consider secondary impacts, and failed to meet the requirements of an adequate discussion under section 4(f) of the DOT Act. That decision also held that a subsequent environmental assessment failed to adequately consider alternatives.

In determining that no EAJA fees were due the district court concluded that the agency prevailed on most counts and that this project was somewhat unique with respect to compliance under NEPA. Additionally, the court found the FHWA requirements with respect to environmental assessments somewhat ambiguous. In considering all of these factors the court held that FHWA's litigation position was substantially justified and no EAJA fees were awardable.

The Second Circuit's opinion can be found at: http://www.ca2.uscourts.gov/decisions/isysquery/85e1c1ed-c57a-4707-9027-b045a8ed9bd3/3/doc/08-2005-cv_so.pdf#xml=http://www.ca2.uscourts.gov/decisions/isysquery/85e1c1ed-c57a-4707-9027-b045a8ed9bd3/3/hilite/.

District Court Grants Summary Judgment to FHWA in Challenge to Sonoma Project, Ninth Circuit Denies Motion for Stay Pending Appeal

On March 5, the U.S. District Court for the Northern District of California granted summary judgment in favor of FHWA in Rohnert Park Citizens to Enforce California Environmental Quality Act (RPCEC) v. DOT, 2009WL595384 (N.D. Cal. 2009). RPCEC challenged FHWA's approval of the Wilfred Avenue Interchange Project on US Route 101 in Rohnert Park, Sonoma County, California with a FONSI in November 2006. The case centered on RPCEC's argument that FHWA failed fully to evaluate the cumulative impacts of a proposed casino. The District Court found FHWA had properly considered the impacts of the casino, especially given the speculative nature of the latter project.

On April 14, RPCEC appealed the decision to the U.S. Court of Appeals for the Ninth Circuit in Rohnert Park Citizens to Enforce California Environmental Quality Act v. DOT (9th Cir. No. 09-15750). As framed by RPCEC, the issue on appeal concerns whether the FONSI properly took into account the cumulative impacts of the interchange project combined with the casino/hotel project.

Caltrans had intended to start construction on the highway project by mid-May, but decided to await the results of RPCEC's motions for injunctive relief, the first of which was filed with the Ninth Circuit on May 7. The Court denied that motion the following day "without prejudice to its renewal following presentation to the district court." RPCEC filed for "emergency" relief in District Court a week later. On May 19, the District Court denied the motion. RPCEC then re-filed for "emergency" relief in the Ninth Circuit, arguing that allowing construction to proceed during the appeals process would render any new NEPA document subsequently required by that court a "post hoc

rationalization." After briefing by both parties but without a hearing, the Ninth Circuit denied RPCEC's motion on June 4. Caltrans began construction of the project shortly after the Ninth Circuit ruled on RPCEC's motion.

RPCEC filed its opening brief on the merits on July 29. FHWA filed its response on September 14, and RPCEC filed its reply on October 13. No oral argument has been scheduled.

District Court Grants Summary Judgment for FHWA in Challenge to Everglades Park Project, Plaintiff Appeals to Eleventh Circuit

On February 25, the U.S. District Court for the Southern District of Florida granted the FHWA's motion for summary judgment and dismissed with prejudice Miccosukee Tribe of Indians v. Peters (S.D. Fla. No. 08-21703), a challenge to an Everglades Restoration Project involving US Highway 41, the Tamiami Trail, in Everglades National Park between Miami and Naples, Florida. Plaintiff, a federally-recognized Indian Tribe, had alleged that FHWA violated Section 4(f) of the DOT Act by failing to complete a full 4(f) assessment even though FHWA's only involvement in the Everglades Restoration Project was to serve as the land transferring agent between the National Park Service (NPS) and the Florida Department of Transportation under 23 U.S.C. § 317. In granting summary judgment and dismissing the case, the court upheld the Secretary's decision to transfer parkland when FHWA determined that the land was reasonably necessary for the right of way of a highway as part of the Everglades Restoration Project. The court rejected plaintiff's claim that because the overall project was not a transportation project, the Secretary had no authority to transfer the parkland on behalf of the NPS to the state DOT.

On April 22, plaintiff appealed the District Court's decision to the U.S. Court of Appeals for the Eleventh Circuit. Miccosukee Tribe of Indians v. United States (11th Cir. No. 09-11891) is fully briefed and awaiting the scheduling of oral argument. The court granted the government's motion to have the case consolidated for oral argument with Endangered Species Act and NEPA cases filed by the tribe that involve the same project. These cases were filed against other U.S. government agencies and are still being briefed.

FHWA Wins District Court Challenge to Kentucky Bridge Project

On July 23, the U.S. District Court for the Western District of Kentucky granted FHWA's Motion for Summary Judgment and dismissed River Fields, Inc. v FHWA, 2009 WL 2222901 (W.D. Ky. 2009). The lawsuit challenged FHWA's decision to approve the Harrod's Creek Bridge Project, a 225 foot Bridge Replacement project near Louisville, Kentucky. On May 19, 2008, River Fields, Inc., a Louisville citizens group, filed a complaint against FHWA challenging the decision to approve the project as a categorical exclusion under NEPA, with a full section 4(f) analysis.

The court found that the FHWA's use of a categorical exclusion was not a violation of NEPA in this project because FHWA considered all reasonable alternatives. Included in the alternatives analysis was plaintiff's preferred alternative for an enhanced one lane bridge. The court found that FHWA did not abuse it's discretion in choosing the alternative to widen the Harrod's Creek Bridge in order to improve safety. Finally, the court ruled that the defendants did not violate section 4(f) by using the regulatory programmatic 4(f) procedures and that FHWA used all possible planning to minimize harm.

Plaintiff's appealed the District Court decision to the U.S. Court of Appeals for the Sixth Circuit in River Fields, Inc. v FHWA (6th Cir. 09-5879). They also sought an injunction pending appeal, but withdrew their appeal when the Sixth Circuit denied their request for the injunction.

FHWA Wins Challenge to Medford Interchange Project in Oregon

On February 24, the U.S. District Court for the District of Oregon ruled in Pearson v. DOT, 2009WL464469 (D. Or. 2009) that plaintiffs' environmental claims are barred by laches and even if not barred, that the government would prevail on the merits of the case. Plaintiffs did not appeal.

Plaintiffs lost on their environmental claims because they waited too long after the defendants issued the June, 2004 ROD and began construction in 2006 to challenge the decision. By the time the Plaintiffs filed the lawsuit in February, 2007, the project was nearly 30% complete and more than $20 million had been expended. Plaintiffs did not seek a preliminary injunction and, following briefing and supplementation of the administrative record in fall 2007, did not pursue the case again until October 2008. Construction on the project was ongoing throughout the litigation, and project completion was anticipated by the end of 2009. The court found that plaintiffs were not diligent in pursuing their claims and that defendants had been prejudiced by the delay. Accordingly, the court held that laches barred plaintiffs' claims.

The court also held that plaintiffs' NEPA and section 4(f) claims failed on the merits. Under NEPA, the court found that the Final EIS properly evaluated a reasonable range of alternatives and adequately analyzed cumulative impacts. In discussing cumulative impacts, the court stated that NEPA does not require that defendants consider every possible project in evaluating cumulative impacts. The court upheld the agency's reliance on traffic modeling, which plaintiffs had repeatedly attacked as inherently flawed. The court found that "plaintiffs have not shown defendants' computer simulations of traffic patterns were so flawed as to be unreasonable."

In what may be an issue of first impression, the court also upheld use of a condensed format for the FEIS. This format is outlined in an FHWA Technical Advisory on preparation of NEPA documents, but is not specifically addressed in FHWA or Council on Environmental Quality NEPA

regulations. The court found that the FEIS was not perfect, since the FEIS referenced the Draft EIS for full discussion of certain issues. However, the court found that the Final EIS was adequate under NEPA to allow plaintiffs to determine the scope of the project and to formulate their objections to the project.

Under section 4(f), the court found that the section 4(f) analysis considering park land was adequate.

FHWA Wins Wage Dispute in Public-Private Partnership Contract Challenge

In Affiliated Construction Trades Foundation v. DOT, 2009 WL 3188694 (D. W.Va. 2009), the AFL-CIO challenged aspects of the public-private partnership (P3) contracts for the King Coal Highway in West Virginia. In this case, the contract was awarded as sole source contract to Nicewonder as the owner of the mine, with FHWA approval of this contracting method. One of plaintiffs' contentions was that the Federal-aid Highway Act (FAHA) prohibited award of a sole source contract. In a September, 2007 decision, the court found that FHWA could approve a sole source contract. However, the court ruled that highway projects under the FAHA required project employees to be paid in accordance with the Davis-Bacon Act. The court did not consider the issue of standing at that time.

On September 30, 2009 the District Court ruled that the plaintiff asserted an injury in fact but was not able to show an actual injury because it (the Trades Council) failed to show a casual connection between failing to pay Davis-Bacon wages and the plaintiff's loss of revenue. Further, the Court held that there is no private right of action for back wages in a contract that has been determined not to call for work that, under the FAHA, requires the payment of prevailing wages in accordance with the provisions of the Davis-Bacon Act. The court entered judgment in favor of FHWA under the APA and the FAHA. It furthered ordered that the action against the federal defendant is dismissed with prejudice.

FHWA Wins Shenandoah Valley I-81 Challenge

On September 3, the U.S. District Court for the Western District of Virginia granted summary judgment in favor of FHWA and the Commonwealth of Virginia in Shenandoah Valley Network v. FHWA, 2009WL2905564 (W.D. Va. 2009). The project involves improvements to all 325 miles of I-81 in Virginia. Plaintiffs' 2007 complaint challenged FHWA's Tiered NEPA process of decision making as flawed by unlawfully limiting the consideration of alternatives. The court ruled against plaintiffs' allegations.

The court rejected plaintiffs' argument that FHWA should have awaited the completion of Virginia's Freight Rail Study before issuing the tier 1 ROD. The court held that "[t]here is nothing in NEPA and no precedent that suggests that the defendants were required to wait for a state agency to complete its completely separate study before issuing

a ROD." The court also rejected the plaintiffs' arguments that issuing a tier 1 SOL notice violated the Constitution's 5th Amendment due process clause. The court found that the "decision to invoke the 180-day statute of limitations appears to be not an attempt to bar judicial review of future studies and future decisions, but merely to establish a limitations period during which parties could challenge Tier 1 final agency actions, including decisions relating to mode choice and corridor location." In addition, the court stated that "[i]t was appropriate for FHWA to invoke the 180-day statute of limitations because the detailed work in Tier 2 can be accomplished effectively only if that work can rely on certain key decisions made, including those regarding mode choice and corridor location, in the Tier 1 FEIS and ROD." The court also found that the statute of limitations notice was not facially deficient and that its content complied with FHWA's SAFETEA-LU Guidance regarding such notices for tiered NEPA documents. Finally, the court concluded that the administrative record established that the requirements of constitutional due process were met.

Court Upholds NEPA Decision on U.S. Route 220 Virginia Project

On July 20, the U.S. District Court for the District of West Virginia granted summary judgment to FHWA in Virginians for Appropriate Roads v. Capka, 2009WL2160454 (W.D. Va. 2009). Virginians for Appropriate Roads, Virginia Forest Watch, and two individuals in 2007 filed a complaint alleging that FHWA violated NEPA by refusing to evaluate alternatives, including access management techniques, to proposed improvements to U.S. Route 220 in Virginia. The complaint also alleged that FHWA violated NEPA by approving the project prematurely and without proper consideration of both air and noise impacts. Finally, the complaint alleged that FHWA violated the Federal-Aid Highway Act by failing to make a determination that the project is in the best overall public interest.

On consideration of summary judgment motions, the court ruled against each of plaintiffs' arguments. On July 20, 2009, the Court granted defendants' motion for summary judgment and denied plaintiff's motion for summary judgment. The court found that FHWA's consideration of alternative designs for the I-73 project was reasonable and thorough and complied with NEPA's requirements. Next, the court found that it was reasonable for FHWA to interpret Congressional intent as favoring an Interstate design. Additionally, the court found that FHWA's decision to not carry forward the plaintiffs' preferred Access Management Alternative for more detailed analysis was "within the bounds of reasoned decision-making." Further the court disagreed with plaintiff's argument that in light of the ROD's acknowledgment that funding for the I-73 project was unknown and uncertain and that FHWA anticipated construction to proceed in operationally independent phases as funding became available, and that construction may not begin for many years, if ever, "FHWA should have considered the reasonable alternative of postponing finalizing the

EIS in order to ensure that there is a full NEPA review of the impacts and alternatives to the project that is ultimately approved and funded for construction." Finally, the court found that any delays due to the phased nature of the I-73 Project's construction are properly characterized as only temporary or construction-related and that FHWA's decision to not specifically evaluate the impact of phased construction was within the bounds of reasoned decision-making.

Plaintiffs subsequently filed a Motion to Alter or Amend Judgment. Defendants opposed the motion and filed a reply brief. On August 11, the court denied Plaintiff's Motion to Alter or Amend Judgment.

FHWA Loses Environmental Challenge in Alaska

On February 13, the U.S. District Court for the District of Alaska in Southeast Alaska Conservation Council v. FHWA (D. Alaska No. 06-0009) entered a declaratory judgment that the Final EIS supporting FHWA's decision to approve construction for the Juneau Access Improvement Project violates NEPA. In addition, the court vacated the ROD issued for the project by FHWA's Alaska Division. The Forest Service granted a right-of-way easement in May, 2006, and the court remanded the decision to grant the easement to the Forest Service in light of the court's order. The court further enjoined all construction on the project, as well as all activities that are dependent upon the issuance of a valid EIS, until the defendants demonstrate full compliance with NEPA.

In April, 2006, the Alaska Division Administrator approved the project to build a 50.8 mile two-lane highway from the end of the existing highway in Juneau, Alaska to a new ferry terminal that would be constructed just north of the Katzehin River delta. Plaintiffs sought a declaratory judgment finding that the EIS for the project violated NEPA by failing to consider a reasonable alternative for improving transportation using the existing ferry system, without new construction. FHWA argued that it had adequately addressed this alternative in the "no action" alternative. The court disagreed with FHWA and stated that the "no action" alternative indicated a reduced level of ferry service rather than an improvement in the level of ferry service, which would have served as an alternative to a road. The court concluded that an alternative "which improved ferry service using existing ferries and terminals was 'both reasonable and obvious' and should have been analyzed in the Final EIS. [FHWA's] failure to do so renders the Final EIS inadequate" under NEPA because the EIS failed to satisfy NEPA's requirements to consider or properly reject proposed alternatives. The court did not make a ruling on any other claims raised by plaintiffs because it already determined that the EIS did not satisfy NEPA's requirements.

FHWA has decided not to appeal this decision, but the State of Alaska has appealed to the U.S. Court of Appeals for the Ninth Circuit.

FHWA Loses Wisconsin Environmental Challenge

On September 14, the court in Highway J Citizens Group and Waukesha County Environmental Action League (WEAL) v. DOT, 2009WL2983073 (E.D. Wis. 2009), ruled against the FHWA in an environmental challenge to the FHWA's decision to approve the Highway 164 Project. Plaintiff alleged that defendants' decisions violated NEPA, the Federal Aid Highway Act, and the Clean Water Act. The court rejected FHWA's argument that the case was moot because three of the eight sections of the project had already been built, leaving the ultimate relief of ordering the road dismantled unlikely. The court determined that for a case to be moot, the determining fact was the possibility of relief, and not the likelihood of relief.

The court ruled for plaintiffs on several NEPA grounds. First, the court found that FHWA's discussion of indirect effects was conclusory, with only a summary of land use plans and survey responses, and without an explanation of how the regional and local plans were interpreted. The court remanded the case to allow FHWA to provide data and support for any conclusions that the project would not substantially influence development as an indirect effect. Second, the court found the discussion of cumulative impacts flawed because the decision assumed that the area would continue to urbanize whether or not new highways were built. The court found such assumptions unhelpful for informed decision making and ordered FHWA on remand to study and quantify the contribution of past, present, and reasonably foreseeable future transportation projects to urbanization and its associate effects. In addition, the court ordered FHWA to incorporate air quality into its discussion of indirect effects and cumulative impacts because the expansion project would have a damaging indirect effect and cumulative impact on air quality in the region. Third, the court found the alternatives analysis unreasonable because the conclusions to remove alternatives from analysis were not the result of expertise or careful study. On remand, the court required FHWA to elaborate on the reasons to dismiss an alternative, or study an alternative in detail. Under the Clean Water Act, the court held that because the EIS discussion of reasonable alternatives was deficient, the U.S. Army Corps of Engineers' decisions with respect to the permits that it issued must be vacated and the matter remanded to the Corps for reconsideration.

The court upheld a few FHWA's positions. The court held that certain new information did not compel preparation of a Supplemental EIS. The court ruled that the Federal Aid Highway Act did not require any separate analysis of air quality distinct from the NEPA analysis.

The court's final procedural holding found FHWA's interpretation of the requirements of the public hearing regulation to be unreasonable. The FHWA held a public meeting for this project using the "open house" format that is used throughout the country. The court ruled that the format used did not meet traditional expectations where audience members would be allowed to publicly express their views. The court

ruled that FHWA's interpretation of its regulations on public hearings was not entitled to deference because its interpretation was unreasonable. The court reasoned that a public meeting required an opportunity for the public to make their views generally known to the agency and the community. The court did not consider that the presence of agency officials and a court reporter to satisfy the public hearing requirements. The court also referred to a House Public Works Committee report from 1970 that interpreted the provisions of 23 U.S.C. § 128(a) to mean that "town hall" type meetings satisfied the public hearing requirements. Ultimately, the court's ruling rendered the 2002 ROD invalid and remanded the case.

Court Grants Stay in San Antonio Toll Road Case

Motions to dismiss had been pending in a challenge to a toll road project on US 281 in San Antonio, Texas, Aquifer Guardians in Urban Areas v. FHWA (W.D. Tex. No. 08-00154). On February 5, the court found moot plaintiff's arguments against the FHWA FONSI on US 281 projects because FHWA has already withdrawn its finding and ordered Texas DOT to complete an EIS for any US 281 corridor project, with work on the projects stopped while the EIS is being completed. The court ordered the cases administratively closed and stayed in consideration of the continuing environmental review processes. Once these processes are complete, the case may be reopened upon application for further relief by any party.

Summary Judgment Motions Filed in Challenge to Winston-Salem Project

On May 29, plaintiffs filed their motion for summary judgment in North Carolina Alliance for Transportation Reform, Inc., v. FHWA (M.D.N.C. No. 08-570). Plaintiffs challenge the environmental review supporting the FHWA decision to approve construction on the Winston-Salem Northern Beltway, from US 158 southwest of Winston-Salem to US 311 southeast of Winston-Salem in Forsyth County, North Carolina (Western and Eastern sections). FHWA filed a cross motion for summary judgment and responses in opposition to plaintiffs' motion for summary judgment on July 8. Plaintiffs filed their response on August 10, and FHWA filed final replies on September 9. No oral arguments have been held.

Motion for Preliminary Injunction Filed in Florida Bridge Challenge

In 2007, a citizen's group challenged the Indian Street Bridge Project, a 4.25 mile highway improvement project near Stuart and Palm City, Florida. The complaint in Citizens for Smart Growth v. FHWA (S.D. Fla. No. 08-14122) claimed that FHWA's decision to support the project violated NEPA, section 4(f) of the DOT Act, and a variety of water and wildlife conservation laws. On September 14, 2009, while awaiting decisions on the cross motions for summary judgment filed in the case, plaintiff filed a motion for preliminary injunction. The court

heard argument on the preliminary injunction on October 1.

Federal Defendants File Summary Judgment Motions in FOIA Case Seeking Documents Relating to South Carolina Project

On July 13, FHWA joined the other federal defendants in filing a response in opposition to plaintiff's Motion for Partial Summary Judgment and a Cross Motion for Summary Judgment in South Carolina Coastal Conservation League v. FHWA (D.S.C. No. 08-2492), a suit alleging that FHWA had violated the FOIA by refusing to release records and denying a request for a fee waiver relating to the proposed marine container terminal and highway project in Charleston, South Carolina.

The Conservation League submitted a FOIA request through the Southern Environmental Law Center to the FHWA South Carolina Division to gain discovery of FHWA, SCDOT, Port Authority, and Army Corps of Engineers communications regarding the port project. FHWA's action on I-26 continues to be in development, with all FHWA records in the form of drafts and a few attorney client communications. The Division decided to withhold the records as privileged or confidential. The FHWA issued the Final Agency Decision regarding the League's FOIA appeal of the Division's decision on September 12, 2008.

FHWA Seeks Partial Summary Judgment in Challenge to South Lawrence Trafficway Project

On March 4, FHWA filed a Motion for Partial Summary Judgment in Prairie Band Pottawatomie Nation v. FHWA (D. Kan. No. 08-2534). The complaint challenges FHWA's 2008 decision to approve the South Lawrence Trafficway (SLT) in Lawrence, Kansas. Plaintiffs allege violations of NEPA, the Clean Water Act, the National Historic Preservation Act, section 4(f) of the DOT Act, and the American Indians Religious Freedom Act. Plaintiff's response was filed on May 26, and FHWA's reply was filed on June 18.

Under NEPA, plaintiff attacks the project's purpose and need statement, the alternatives analysis, the disclosure of project impacts and effectiveness of mitigation measures, and the response to public comments. Plaintiff challenges the FHWA decision to not supplement an EIS prepared by the Army Corps of Engineers. Under section 4(f), plaintiffs allege that FHWA failed to demonstrate that there are no feasible and prudent alternative to using section 4(f) resources and failed to engage in all possible planning to minimize harm to those resources. Concerning the American Indian Religious Freedom Act, plaintiff alleges that the SLT will cause "unnecessary interference with American Indian religious practices." Plaintiff did not specify how FHWA violated the National Historic Preservation Act.

Summary Judgment Motions Filed in Sierra Club Challenge to FHWA Approval of Saint Croix River Crossing Project

On July 22, the parties completed briefing of cross motions for summary judgment, in Sierra Club North Star Chapter v. DOT (D. Minn. No. 07-2593), a challenge to FHWA's 2006 decision to approve the Saint Croix River Crossing Project in Minnesota. The complaint alleges violations of numerous statutes, including the Wild and Scenic Rivers Act (WSRA), NEPA, and section 4(f) of the DOT Act. With regard to the WSRA, the Sierra Club asserts that FHWA's approval of the project was arbitrary and capricious by failing to follow the law to "remove the existing bridge and restore [the existing] transportation corridor to natural conditions." Under NEPA, the Sierra Club challenges the alternatives FHWA considered to constructing a new four-lane bridge and alleges that FHWA did not adequately identify the project's indirect and cumulative impacts. Concerning section 4(f), the Sierra Club alleges that FHWA did not minimize harms to the Saint Croix National Scenic River.

Summary Judgment Filed in Washington State Lane Widening Case

In October, 2008, the Prairie Protection Association and two area residents filed a complaint challenging the FHWA's decision to use an Environmental Assessment (EA) to approve the widening of a two lane road to a four lane road over 8.2 miles. The complaint in Hamilton v. DOT (E.D. Wash. No. 08-328) alleges that the FONSI for road widening in the "Bigelow Gulch/Forker Road" project was improper because a full EIS was not completed. Without a full EIS, plaintiffs allege that the EA violates NEPA by failing to: 1) evaluate a reasonable range of alternatives, 2) adequately analyze wetland impacts, 3) properly examine cumulative impacts, and 4) take a "hard look" at project environmental impacts. The complaint also alleges that FHWA violated section 4(f) by failing to: 1) analyze feasible and prudent alternatives, 2) apply a totality of the impacts analysis, and 3) minimize impacts to section 4(f) resources.

Plaintiffs filed a Motion for Summary Judgment on June 26. The court issued an Order Granting a Motion to Stay until September 30 while the parties attempted settlement via voluntary mediation. On August 27, the parties entered mediation, but were unsuccessful in reaching settlement.

Dismissal Sought of Challenge to Oregon Highway Widening Project

On May 21, the federal defendants in Hereditary Chief Wilbur Slockish v. FHWA (D. Or. No. 08-1169) filed a motion to dismiss plaintiffs' amended complaint based on mootness, standing, failure to cite a waiver of sovereign immunity in relation to plaintiffs' monetary claims, and failure to state a claim. Briefing on the motion to dismiss was completed in August 2009. Plaintiffs' amended complaint seeks declaratory and injunctive relief on a

highway widening project on Oregon's Mt. Hood. Plaintiffs include a Hereditary Chief of the Klickitat/Cascade Tribe and a Hereditary Chief of the Cascade Tribe (a confederated tribe within the Yakama Indian Nation), their respective Tribes, area residents, the Cascade Geographic Society, and the Mount Hood Sacred Lands Preservation Alliance. In addition to FHWA, defendants include the Bureau of Land Management (BLM), the Advisory Council on Historic Preservation (ACHP), and the Director of the Oregon Department of Transportation (ODOT).

The complaint alleges that FHWA and ODOT violated the National Historic Preservation Act by failing to properly take into account the project's affect on alleged historic resources and failing to consult with the plaintiffs regarding alleged traditional cultural properties (TCP's) and other alleged historic resources, including a burial cairn and a stone toll booth. The complaint further alleges that FHWA violated section 4(f) of the DOT Act by failing to evaluate all prudent and feasible alternatives, and by failing to undertake all possible planning to minimize harm to the Wildwood National Recreation Area, the A.J. Dwyer Scenic Area, a historic stone toll booth, the Third Priority Barlow Road segment, and Native American TCP properties in the Mt. Hood area.

In addition, the complaint alleges the ACHP failed to adequately advise FHWA and ODOT regarding their NHPA responsibilities and that BLM violated the NHPA and NEPA by issuing a permit to cut trees, and granting right-of-way to ODOT. Moreover, the complaint alleges that the federal defendants: 1) breached their fiduciary duties to the Klickitat/Cascade Tribe and Cascade Tribe; 2) denied due process to several of the plaintiffs; and 3) violated the public trust by allowing an alleged rock burial cairn to be vandalized.

Plaintiffs request declaratory relief, preliminary injunctive relief, permanent injunctive relief, and compensatory and punitive damages and attorneys fees based on the allegations stated above. Plaintiffs raised no objection during the environmental review process and did not seek to enjoin construction, which was substantially complete at the time their original complaint was filed. The project was subsequently completed during the 2009 summer construction season.

Conservation League Challenges Charleston Marine Terminal and Interstate Project

On July 21, an amended complaint in South Carolina Coastal Conservation League v. United States Army Corps of Engineers, Charleston District (D.S.C. No. 07-3802) was filed to add FHWA as a defendant to the lawsuit. Plaintiff challenges the decision by FHWA and the Army Corps of Engineers to approve construction of a new $1.2 billion marine container terminal and access highway linking the terminal to I-26, Charleston, South Carolina (Charleston Terminal Project). The complaint alleges that FHWA and the Corps violated NEPA and the APA in connection with the proposed

construction of the Charleston Terminal Project.

Plaintiff challenges the Corps' decision to limit the scope of the EIS to two segments of the overall project, although analysis of traffic impacts revealed that construction of those components could not proceed as planned unless the project included the widening of portions of I-26. Further, the complaint alleges that FHWA has delayed issuance of a final decision on 1-26 and interchange components and is, therefore, a necessary party due to its responsibility as a cooperating agency in the participation of the EIS and its jurisdiction over the interchange modification and I-26 widening components of the overall project.

Plaintiff originally moved to join FHWA as a defendant on January 23, 2009. The court denied plaintiff's motion on June 2. Plaintiffs' responded to the court's decision by filing the amended compliant against FHWA as a defendant.

The above lawsuit is in addition to a 2008 FOIA lawsuit filed by the Conservation League related to the same project and reported above.

Virginia HOT Lanes Challenged by Pro Se Plaintiff

On August 18, a pro se plaintiff challenged a Virginia High Occupancy Toll (HOT) Lanes project in West v. FHWA (E.D. Va. No. 09-923). The project is slated to build HOT lanes on the I-95/I-395 corridor in Northern Virginia from Spotsylvania County to the Eads Street/Pentagon Reservation interchange. Specifically, the plaintiff challenges the Northern Section from Prince William County to Pentagon Reservation in Arlington. Plaintiff alleges that the defendants unlawfully narrowly defined and segmented to the point of allowing the Northern Section of the project to be deemed a Categorical Exclusion. Plaintiff seeks an order requiring the appropriate NEPA documentation for the entire project in the form of an EIS or FONSI, and the appropriate traffic, economic and cumulative impact studies, in addition to a full consideration of alternatives.

Arlington County Challenges Decision on I-95/I-395 Project

On August 19, the County Board of Arlington, Virginia filed a complaint in the U.S. District Court for the District of Columbia against FHWA's decision to deem a portion of an I-95/I-395 project to be categorically excluded from environmental review. County Board of Arlington v. DOT (D.D.C. No. 09-01570) involves the I-95/I-395 corridor in Northern Virginia from Spotsylvania County to Eads Street/Pentagon Reservation interchange. Specifically, the Northern Section from Prince William County to Pentagon Reservation in Arlington is in controversy. Plaintiff alleges that the project, based upon a 2006 public-private partnership agreement, was unlawfully narrowly defined and segmented to the point of allowing the Northern Section of the project to be deemed a Categorical Exclusion. Plaintiff challenges FHWA's January 9, 2009 announcement that it did not need to examine the environmental impacts of the Northern

Section. The County alleges violations of NEPA and the Clean Air Act in FHWA's failure to properly consider air quality impacts, impacts on historical neighborhoods, effects on HOV lanes, and impacts on minority and vulnerable communities and facilities near the project.

Sierra Club Files NEPA Challenge to Texas Grand Parkway Toll Road

On March 9, the Sierra Club challenged the construction of a segment of the Grand Parkway toll project near Houston, Texas based on alleged violations of NEPA in the ROD for the project. In Sierra Club v. FHWA (S.D. Tex. No. 09-0692), plaintiff claims that the EIS on the project was insufficient in addressing environmental impacts on the Katy Prairie and that FHWA was arbitrary and capricious in issuing the ROD.

The Grand Parkway, officially known as State Highway 99 (SH 99), is a proposed 180-plus mile circumferential scenic highway traversing seven counties and encircling the Greater Houston region. Segment E of SH 99 is a proposed 15.2-mile, four-lane, controlled access toll road with intermittent frontage roads through Harris County. The EIS was approved in November, 2007. The Texas Division issued a ROD approving the project in June, 2008.

The complaint sets out six NEPA allegations: 1) inadequate and unlawful alternatives analysis; 2) failure to properly assess impacts on hydrology, drainage, floodways and floodplains; 3) failure to disclose significant impacts and indirect effects on wetlands; 4) failure to disclose significant air impacts and safety risks; 5) failure to properly disclose noise impacts; and 6) failure to consider indirect, secondary and cumulative impacts. The complaint seeks a Supplemental EIS plus attorneys' fees and costs.

Environmental Suit Seeks to Halt New Detroit-Windsor Bridge

On May 14, six Detroit-area community groups and the Detroit International Bridge Company (DIBC) filed suit against FHWA alleging that the agency violated NEPA and the APA, section 4(f) of the DOT Act, and the National Historic Preservation Act (NHPA) in its environmental review supporting the Detroit River International Crossing (DRIC), a new highway bridge connecting Detroit and Windsor, Ontario. DIBC owns and operates the Ambassador Bridge, the only existing bridge linking the Detroit area to Canada.

The complaint in Latin Americans for Social and Economic Development v. FHWA (D.D.C. No. 09-897) alleges, among other things, that the project's Final EIS relied upon erroneous traffic data and is otherwise not supported by the record, lacked a reasonable range of alternatives and did not adequately compare the preferred alternative to others, improperly segmented DRIC from a nearby transportation project and otherwise inadequately addressed effects of other projects in the area, inadequately addressed environmental

justice issues related to low-income and minority populations of Detroit's Delray neighborhood, and inadequately addressed air quality impacts on Delray and Southwest Detroit.

The 4(f) claim is based on the allegation that DRIC construction would be on protected parkland, recreational areas, and historic sites, despite the existence of feasible and prudent alternatives, and that FHWA failed to engage in all possible planning to minimize harm, including the consideration of less harmful alternatives. The NHPA claim is based on FHWA's alleged failure to fully document DRIC's impact on sites eligible for listing in the National Register of Historic Places and to consider alternatives that would have minimized or eliminated such impacts.

Plaintiffs seek to enjoin any action taken in reliance on the DRIC ROD and seek to disqualify FHWA and the Department from acting as the lead agency on the DRIC EIS based on the allegation that FHWA, and specifically the FHWA Michigan Division Administrator, co-defendant James Steele, have impermissibly acted as advocates for DRIC. On July 10, the government moved to transfer the suit from the U.S. District Court for the District of Columbia to the U.S. District Court for the Eastern District of Michigan. The motion argues that the case should be transferred because the issues raised therein are primarily local, Detroit-area issues only tenuously connected to the District of Columbia.

Pro Se Complaint Filed Against Detroit-Windsor Bridge Project

On July 27, Ann Arbor, Michigan resident Dietrich Bergmann filed a pro se complaint in the U.S. District Court for the District of Columbia against FHWA regarding the Detroit River International Crossing (DRIC) project. In Bergmann v. FHWA (D.D.C. No. 09-01378), plaintiff raises multiple environmental and river management claims, focusing on the consideration of non-highway options. The NEPA allegations claim that FHWA violated NEPA by failing to update their traffic studies when the economic downturn decreased in traffic. Plaintiff further alleges that Defendants did not look at all the available reasonable alternatives in the area and that the Defendants should have addressed light rail and heavy rail alternatives – claiming those would have been less costly and more environmentally friendly than the preferred alternative selected. Plaintiff's section 4(f) claim alleges that Defendants failed to address highway traffic management and non-highway alternatives which would have negated the need to build the DRIC. Plaintiff recently amended his complaint to add NEPA and section 4(f) allegations concerning the widening of I-94, a separate Detroit-area project.

Detroit Bridge Company Seeks to Prevent Release of Bridge Inspection Report

On September 25, the Detroit International Bridge Company (DIBC) filed suit against FHWA in the U.S. District Court for the Eastern District of

Michigan seeking to prevent FHWA's release of a 2007 inspection report for DIBC's Ambassador Bridge, the only existing bridge linking the Detroit area to Canada. On September 28, DIBC sought a temporary restraining order (TRO) against the release of the report. FHWA had received a request for the report from a Member of Congress, treated the request as a FOIA request, and determined that the report was releasable under FOIA. DIBC objected to the report's release on national security grounds. FHWA released the report to the Member of Congress prior to the filing of the TRO request, but agreed not to further release the report until the court ruled on the TRO request. On October 13, the court in Detroit International Bridge Company v. FHWA (E.D. Mich., No. 09-13805) denied the TRO request, finding that plaintiff had failed to satisfy any of the criteria for the issuance of such an injunction. Plaintiff filed an amended complaint on October 20.

Historical Society Challenges 11th Street Bridge Project in Washington, DC

On February 24, the Capitol Hill Restoration Society filed a complaint against FHWA in the U.S. District Court for the District of Columbia challenging the 11th Street Bridge Project in Washington, DC. Capitol Hill Restoration Society v. LaHood (D.D.C. No. 09-00367) involves a project that will reconstruct and reconfigure the interchange connecting the Southeast/Southwest Freeway and the Anacostia Freeway over the Anacostia River. New ramps east of the Anacostia River would link the Anacostia Freeway to the east ends of the 11th Street Bridges providing a link to the Freeway that had previously been missing. A bridge dedicated to local traffic would be separated from the bridge carrying Freeway traffic. The Freeway bridge would carry eight lanes of traffic and the local bridge would carry four lanes with the potential that two of those lanes be designed for future streetcar use.

The complaint alleges that FHWA violated NEPA, the Clean Air Act, the Due Process Clause, section 4(f), and the Federal-aid Highway Act when defendants approved the project and published a Statute of Limitations Notice. Specifically, plaintiffs seek an order that the project approval is unlawful and not eligible for federal funding.

New Lawsuit Filed against Ohio River Bridges Project

On September 4, the Kentucky and Indiana Ohio River Bridges Project was challenged in National Trust for Historic Preservation and River Fields, Inc. v. FHWA (D.D.C. No. 09-01695). The Ohio River Bridge Project, designated as a priority project, is a joint undertaking by the Indiana Department of Transportation (INDOT) and the Kentucky Transportation Cabinet (KYTC) to construct two new bridges over the Ohio River in the Louisville Metro area. A new I-65 six-lane bridge would increase I-65 capacity in Louisville. The new six-lane I-265 Bridge would close the existing eight-mile gap in the I-265 beltway between I-71 in Kentucky and SR-62 in Indiana.

Funding for the project has not yet occurred, although the project is included in Kentucky regional planning documents.

Alaska Seawall and Viaduct Project Challenged

On September 14, a pro se citizens group filed a complaint against FHWA in Campbell v. Jilik (W.D. Wash. No. 09-01305) challenging FHWA's decision to approve the southern portion of the Alaskan Way Viaduct and Seawall Replacement project, separately entitled the S. Holgate Street to King Street Viaduct Replacement Project. Plaintiffs claim violations of NEPA and the Washington State environmental law, SEPA. The NEPA allegations include charges that FHWA should have prepared an EIS rather than an environmental assessment and that FHWA impermissibly segmented NEPA review. Plaintiffs allege that the FHWA decision for the Viaduct Replacement Project predetermines the selection of an alternative under the larger Alaskan Way Viaduct and Seawall Replacement Project. Plaintiffs also challenge the adequacy of FHWA's cumulative impacts and alternatives analysis.

Federal Railroad Administration

D.C. Circuit Dismisses NCDOT Challenge to FRA Jurisdictional Determination

On February 13, the U.S. Court of Appeals for the District of Columbia Circuit granted the government's motion to dismiss the petition for review in North Carolina Department of Transportation v. FRA (D.C. Cir. No. 08-1308), which challenged a July, 2008 letter from an FRA Assistant Chief Counsel finding that the North Carolina Department of Transportation (NCDOT) is a railroad carrier within the meaning of the railroad safety laws and is therefore subject to FRA's jurisdiction. Specifically, FRA found that NCDOT provides railroad transportation because it contracts out the rail operations for two intercity passenger rail operations in North Carolina, and it contracts out the maintenance work for the rail equipment that is operated on those lines. Additionally, it finances the rail operations on the lines, and it is in charge of the overall operations at a maintenance facility where the railcars that are operated on the lines undergo maintenance. FRA found that those facts demonstrated that NCDOT is providing railroad transportation and is a railroad carrier subject to the agency's jurisdiction.

NCDOT's petition for review asserted that FRA's jurisdictional determination was arbitrary and capricious because it lacked factual and legal support and departed from the agency's precedent and practice regarding states that own, but do not operate, rail facilities, or that subsidize intercity rail operations, without providing a reasonable explanation for that departure.

In November, 2008, FRA filed a motion to dismiss the petition for review for lack of jurisdiction. The motion asserted that the challenged jurisdiction determination was not reviewable final

agency action as it was simply a preliminary assessment of the agency's view of the law. Additionally, FRA contended that because NCDOT filed its petition for review while it had pending before FRA a request for reconsideration of FRA's determination, even if that determination had been final agency action, the reconsideration request rendered if non-final and NCDOT's petition for review premature. The court agreed with FRA that FRA's jurisdiction determination was not final agency action subject to judicial review and dismissed the case without reaching FRA's alternative argument.

Engineer Seeks D.C. Circuit Review of Certification Decision

On August 27, a Union Pacific Railroad Company 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. Petitioners in Smith v. FRA (D.C. Cir. No. 09-1230) seek review of FRA's June 30, 2009 denial of the engineers appeal from a decision by the LERB dismissing his petition for review on the grounds that the petition was incomplete. The parties are currently waiting for the D.C. Circuit to issue a scheduling order in the case.

National Highway Traffic Safety Administration

2011 CAFE Standards Challenged in Ninth Circuit

On April 3, the Center for Biological Diversity sought review of NHTSA's Corporate Average Fuel Economy (CAFE) standards for model-year 2011 passenger vehicles and light trucks in the U.S. Court of Appeals for the Ninth Circuit. After the Administration announced that it would issue new CAFE standards for 2011 and later model years, and while the case was under consideration for inclusion in the Circuit Mediation Program, the parties requested that the Circuit Mediator hold the case in abeyance pending the new CAFE rulemaking. The Circuit Mediator granted that request. The case, Center for Biological Diversity v. NHTSA (9th Cir. No. 09-70972), remains held in abeyance at least until the next assessment conference, currently scheduled for November 17.

Roof Crush Standards Challenged in Sixth Circuit

On June 30, the National Truck Equipment Association (NTEA) petitioned the U.S. Court of Appeals for the Sixth Circuit for review of NHTSA's May 12, 2009, final rule upgrading Federal Motor Vehicle Safety Standard No. 216, Roof Crush Resistance. This rule was adopted to reduce the risk of death and injuries during rollover vehicle crashes. In comments submitted during the rulemaking, the NTEA

opposed certain regulatory requirements that would affect its members.

On October 2, the court in National Truck Equipment Association v. NHTSA (6th Cir. 09-3812) granted NHTSA's consent motion for a stay of the briefing schedule. The court agreed to hold the briefing schedule in abeyance pending development of NHTSA's response to comments the NTEA made during the agency's rulemaking process, as well as resolution of reconsideration petitions currently pending before NHTSA.

Federal Transit Administration

FTA Wins Dismissal of Challenge to Waiver for King County Metro; Decision is Appealed

On May 5, the U.S. District Court for the District of Columbia granted FTA's motion to dismiss United Motorcoach Association v. Welbes, 614 F. Supp. 2d 1 (D.D.C. 2009), a challenge to the Federal Transit Administrator's decision to grant a waiver to King County Metro under the FTA charter service regulations (49 C.F.R. part 604), thereby allowing the grantee to provide charter service to the Seattle Mariners' baseball games throughout the 2008 season. The plaintiff contended that the decision was arbitrary, capricious, and an abuse of the Administrator's discretion. The court dismissed the case on mootness and ripeness grounds. Plaintiff appealed the decision to the U.S. Court of Appeals for the District of Columbia Circuit on June 9, United Motorcoach Association v. Rogoff (D.C. Cir. No. 09-5211), and FTA filed a motion for summary affirmance on July 24, which is currently pending.

Maritime Administration

Appeal of MARAD Win in LNG Port Litigation Dismissed

On July 2, the Atlantic Sea Island Group LLC (ASIG) voluntarily moved to dismiss its appeal of a decision of the U.S. District Court for the District of Columbia denying ASIG's motion for a preliminary injunction against MARAD'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. The U.S. Court of Appeals for the District of Columbia Circuit granted the motion and dismissed the case, Atlantic Sea Island Group LLC v. Caponiti (D.C. Cir. 08-5525), on July 10.

Once a State is designated as an "adjacent coastal State," 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 complaint in Atlantic Sea Island Group LLC v. Connaughton (D.D.C.,

No. 08-00259), ASIG alleged 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. While the court found that it had jurisdiction over the case, it rejected all of ASIG's merits arguments.

MARAD Wins Dismissal of Third Party Complaint in EPA Dispute Over Vessel Export Agreement, Plaintiff Appeals

Plaintiff in Potomac Navigation v. MARAD (D. Md. No. 08-717) purchased a former MARAD/Navy vessel at a maritime lien admiralty foreclosure sale. That vessel was transferred more than ten years ago to a private, non-profit entity at the direction of Congress. The non-profit organization failed to pay its wharf charges and the Maryland Port Authority brought a maritime lien action. Plaintiff sought to export the vessel to Greece, but was halted by EPA because the vessel has PCBs, and such export thus would have violated the Toxic Substances Control Act (TSCA). Plaintiff then filed a third party action against the United States in the pending EPA case arguing that the donated vessel should have had the PCBs removed by the Navy or MARAD and that MARAD was liable under TSCA, the Comprehensive Environmental Response, Compensation & Liability Act (CERCLA), and various tort laws. The government filed a Motion to Dismiss the third party complaint, which was granted on April 29. The court held that the Government was not a potentially responsible party under CERCLA, that there were no ongoing violations under TSCA, and that the Government did not owe any duty to Potomac, thereby dismissing Potomac's claim in its entirety. Potomac has appealed the decision to the U.S. Court of Appeals for the Fourth Circuit in United States v. Potomac Navigation (4th Cir. No. 09-1747). The government has filed a motion to dismiss the appeal for lack of jurisdiction.

Court Grants Partial Summary Judgment for MARAD in CERCLA Case

On March 5, the U.S. District Court for the Western District of Washington granted in part the government's summary judgment motion in Iron Partners LLC v. MARAD, 2009WL577539 (W.D. Wash. 2009). Plaintiff seeks past and future damages for response costs under CERCLA and various state laws as a result of alleged contamination on Plaintiff's property. Plaintiff alleges that the contamination found is the result of shipbuilding activities during World War II by the U.S. Maritime Commission, MARAD's predecessor. In its ruling, the court dismissed all but the CERCLA claim against MARAD. MARAD has also filed a cross-claim against co-defendant Kaiser for contribution since Kaiser was the operator of the World War II shipbuilding yard. The interested parties are engaged in settlement discussions.

Claims Court Grants MARAD Partial Summary Judgment in Veridyne Contract Dispute

The Court of Federal Claims in Veridyne, Inc. vs. United States (Fed. Cl. No. 06-00150), a contracting dispute, has granted the government's Motion to Amend its Answer and Counterclaims to add additional fraud counts under the Contract Disputes Act.

Veridyne was engaged in providing logistics support services to MARAD pursuant to a contract that had been awarded under the 8(a) program. A series of events occurred that caused MARAD to examine the legality of the relationship and curtail further payments after determining the contract was void ab initio.

Veridyne filed suit 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 then filed a motion for partial summary judgment, and the government filed a cross-motion for summary judgment. After oral argument, the court denied Veridyne's motion and partially granted the government's cross-motion as to, a claim for breach, wind-down costs, and lost profits because the government chose not to order additional services under an IDIQ contract.

As to the remaining issues in the case, discovery has commenced. Veridyne has served the agency with interrogatories and document requests on the new issues; several depositions have been postponed due to briefing regarding discovery disputes.

Recent Developments in NRDC Suisun Bay Reserve Fleet Litigation

The National Resources Defense Council and two other environmental plaintiffs sued DOT under NEPA, the Resource Conservation Recovery Act, and the Clean Water Act with respect to the operation of 57 non-retention vessels moored at the National Defense Reserve Fleet site in Suisun Bay, California in Arc Ecology California Regional Water Quality Control Board, SF Region v. DOT (E.D. Cal. No. 07-2320). Discovery is complete; approximately 85,000 pages of documents were produced. On September 9, MARAD filed its motion for summary judgment with regard to plaintiffs' Clean Water Act and RCRA claims. Plaintiffs' motions for summary judgment were filed shortly thereafter. Oppositions and replies were filed on September 29 and October 6, respectively; a hearing is scheduled for November 9.

MARAD had committed not to do any in-water hull cleaning and not to remove any SBRF vessels until a NEPA process was completed. The NEPA analysis has now been completed, and a FONSI was issued on August 31. Concurrently, MARAD is working with the only commercial dry-dock in the Bay area to seek vessel cleaning services. On August 31, MARAD's contractor delivered a final Stormwater Pollution Prevention Plan that contains Best Management Practices designed to reduce or eliminate many of the

discharges from the SBRF vessels. On September 3, MARAD filed a Notice of Intent with the plaintiff Water Board for regulatory coverage under the State's existing general permit for stormwater discharges. On September 10 the Regional Water Quality Control Board rejected MARAD's application for coverage.

Coalition for a Sustainable Delta Sues Over Suisun Bay Reserve Fleet

In another case concerning the Suisun Bay Reserve Fleet, MARAD was sued in the U.S. District Court for the Eastern District of California by the Coalition for a Sustainable Delta and Kern County Water Board. Plaintiffs in Coalition for a Sustainable Delta v. United States (E.D. Cal., No. 09-00480) allege that MARAD violated the Endangered Species Act (ESA) through the operations of the Suisun Bay Fleet. Several other federal agencies were also included in the complaint for various actions conducted in the Delta. The suit, which pertains to the Delta Smelt as well as several other listed species, has been consolidated with four other lawsuits regarding the Fish & Wildlife Service's biological opinion per the ESA regarding the Delta Smelt. A motion to sever MARAD and the other agency claims from the other suits has been filed. MARAD has several defenses to the claim.

Recent Developments in Southern Scrap Contracting Dispute

Southern Scrap owns a Maritime Administration-qualified ship recycling facility situated on the Industrial Canal in New Orleans, Louisiana. During Hurricane Gustav, in September 2008, vessels at the Southern Scrap facility broke free from their moorings and collided with a bridge. A U.S. Coast Guard report subsequently identified deficiencies with the Southern Scrap mooring plans and ordered that the facility undertake remedial measures.

MARAD disqualified Southern Scrap from bidding in the agency's vessel recycling program pending revision of the Southern Scrap Technical Compliance Plan (TCP) to address the mooring issues revealed during the hurricane. On November 12, Southern Scrap filed a complaint in U.S. District Court in Louisiana, Southern Scrap Material Co. v. MARAD (E.D. La. No. 08-4881), and on the same day Southern Scrap filed its revised TCP.

The government successfully moved for transfer of the case filed on the ground that the suit was a bid protest over which the Court of Federal Claims (COFC) had exclusive jurisdiction. During the 120 days between the issuance of the transfer order and the actual transfer, Southern Scrap withdrew its original suit to enable a protest to the GAO, and the court dismissed the suit over the government's objections. Notwithstanding the dismissal, the district court transferred the case to the COFC on June 1. The COFC judge made numerous attempts to

engage the parties and eventually scheduled a conference call. Counsel for Southern Scrap did not appear and failed to respond to any of the telephone calls from the Court. After explaining the situation, the DOJ attorney asked that the case, Southern Scrap Recycling v. United States (Fed. Cl. No. 09-376C), be dismissed with prejudice, and the judge did so.

Lawsuits Attack Implementation of Cargo Preference Act

In Maersk Line, Ltd. v. Vilsack (E.D. Va. No. 09-747), an ocean carrier operating U.S.-flagged vessels filed suit under the APA and the Declaratory Judgment Act contending that MARAD, USDA, and USAID were not complying with the cargo preference laws with respect to the proper allocation of cargoes to U.S.-flag liner vessels. The Act requires that specified percentages of U.S. government cargo, such as food commodities, shipped to foreign countries be transported in various types of U.S.-flagged vessels. A material disagreement existed between USAID and MARAD as to the interpretation of the cargo preference laws and their application. In order to provide time for the government to resolve this interagency dispute, an interim settlement was reached wherein Maersk agreed to dismiss its suit without prejudice and USAID agreed to abide by MARAD'S classification of vessels as liners, dry bulk carriers, and tankers from July 10, 2009 until the government resolved the interagency disagreement. The settlement agreement was then challenged in Liberty Shipping Group LLC v. United States (E.D.N.Y. No. 09-3161), in which plaintiff alleged that USAID and MARAD were unlawfully excluding Liberty's vessels from pending and future tenders for ocean transportation of bagged U.S. food cargo. The court granted plaintiff's TRO request, which allowed it to bid on an August tender. That case and a companion case, Sealift Inc. v. United States (E.D.N.Y. No. 09-3441), have been voluntarily dismissed without prejudice. On September 4, MARAD, USDA, and USAID signed a memorandum of understanding (MOU) that addresses how they will administer and comply with the Cargo Preference Act. The MOU was published in the Federal Register on September 15 together with implementing procedures that became effective on October 1, 2009. The agencies are now engaged in a rulemaking process to arrive at a permanent resolution of the matter.

Federal Motor Carrier Safety Administration

Tenth Circuit Rejects U.S. View on the Effect of Regulatory Endorsement on Motor Carrier Insurance Policies

On September 3, the U.S. Court of Appeals for the Tenth Circuit, sitting en banc, held that FMCSA's endorsement on motor carrier insurance policies established a suretyship and that the underlying policy thus is not the primary or first source of payment for injured parties, but the last source available only if there is no other source of payment.

In so ruling in Carolina Casualty Insurance Co. v. Yeates, 2009WL2809387 (10th Cir. 2009), the court rejected, without commenting on, the views of the United States, participating in the case as amicus curiae.

Interstate motor carriers must meet minimum levels of financial responsibility in order to provide protection to members of the public injured or killed by the negligence of the carriers. Most trucking firms maintain liability insurance policies, at least one of which under FMCSA rules must have an "endorsement" attached (the MCS-90 form) that nullifies certain limitations in the policy that might otherwise prevent payment to injured parties. The most common such limitation is the failure of the policy to list specific motor vehicles.

In this case, a motor carrier held two liability insurance polices, only one of which listed a particular truck as covered; the other did not, and it also excluded coverage for vehicles not specifically listed, but this second policy was also subject to the MCS-90 endorsement. A truck not specifically listed in the second policy was involved in an accident, and the insurance company whose policy expressly covered the vehicle paid the injured party the amount fixed as the minimum by FMCSA regulation. The insurance company whose policy was subject to the MCS-90 endorsement (Carolina Casualty) then brought an action seeking a declaratory judgment that it was not liable for any payment on the grounds that the MCS-90 endorsement attached to its policy only served to render it a surety for payment of the federally prescribed amount. The company argued that since that sum had already been paid, the suretyship engendered by the MCS-90 did not come into effect and the company was under no further obligation.

The original Tenth Circuit panel ruled against Carolina Casualty. Under circuit precedent, the MCS-90 simply waived limitations contained in underlying insurance policies, making them primary sources of payment, and did not establish a suretyship as between insurance companies. Empire Fire & Marine Ins. Co. v. Guaranty National Ins. Co., 860 F.2d 357 (10th Cir. 1989). Carolina Casualty sought rehearing en banc to overturn applicable precedent, arguing that it was wrongly decided and that it was also the minority view among federal appellate courts. The Tenth Circuit agreed to consider the matter en banc and invited DOT to submit an amicus brief.

In January 2009 the federal government submitted a brief asserting that the MCS-90 endorsement by its terms amended the underlying policy to render it the primary source of coverage and to nullify its limitations. Both the endorsement's language and the policy behind it (encouraging prompt payment of judgments arising out of vehicular accidents) in the government's view compelled rejection of the declaratory judgment sought by Carolina Casualty. A holding that the endorsement creates a suretyship would provide incentives to delay payment of these judgments and in this case would allow the insurance company to evade liability altogether. The government also observed that the MCS-90 endorsement did not allocate

ultimate responsibility among insurance companies, and this case did not in any event present that question because there was no dispute among such companies before the court.

On September 3, the court issued a decision that agreed with Carolina Casualty's view. The court ruled that the MCS-90 endorsement rendered the underlying policy a suretyship, under which the obligation to pay a judgment would be triggered when (1) the policy otherwise excluded coverage for the accident and (2) the motor carrier's other insurance coverage, if any, was inadequate to satisfy the federally mandated minimum amount. The decision mentions the existence of the government's brief but not its content.

The Tenth Circuit found support for its conclusion on several grounds. First, all of the financial responsibility options under FMCSA rules operate to provide a source of payment in the same way -- as a suretyship -- that make the resort to the endorsement unnecessary. Second, the MCS-90 guarantees a specific source of payment of judgments without altering the terms of the language in the underlying policy as between the insurance company and the motor carrier, so that the latter must reimburse the former for any payments made that would otherwise be excluded under the policy. That is emblematic of a suretyship. By contrast, the Empire Fire approach overrode the provisions of the insurance policy and exposed the insurer to greater liability than it bargained for. The Court also noted that almost every other circuit, save one, had declined to follow Empire Fire and instead had reached the conclusion it now embraced.

The decision is available at: http://www.ca10.uscourts.gov/opinions/07/07-4019.pdf.

Court Affirms Constitutionality of Motor Carrier Preemption Statute

In a May 18 decision in Executive Transportation System, L.L.C. v. Louisville Regional Airport Authority, 2009WL1405154 (W.D. Ky. 2009), the U.S. District Court for the Western District of Kentucky affirmed the constitutionality of 49 U.S.C. § 14501(a)(1)(C), which prohibits state and local governments from regulating "the authority to provide intrastate or interstate charter bus transportation."

In the underlying case, plaintiffs alleged that State and local authorities in Kentucky exceeded their authority by requiring plaintiffs to obtain certain permits to operate limousine and pre-arranged ground transportation, including transportation to and from the Louisville International Airport. As part of its defense, the defendant airport authority claimed that 49 U.S.C. § 14501(a)(1)(c) was unconstitutionally vague because the term "charter bus transportation" is not defined in federal law.

The government intervened in the case for the purpose of defending the constitutionality of the statute. The government's brief argued that (1) the Airport Authority lacked rights under the Due Process Clause to assert a vagueness challenge to the statute; (2) the vagueness doctrine does not apply to federal preemption provisions; and (3)

the statute is not unconstitutionally vague because the meaning of "charter bus transportation" can be derived from the ordinary meaning of the term, the legislative history of the statute and related DOT regulations, as well as the Airport Authority's own regulations.

While the court rejected several of government's arguments, the court found that section 14501(a)(1)(C) was not unconstitutionally vague as the term "charter bus" was not "totally incomprehensible" and because when Congress fails to define a specific term "a court may presume that Congress intended the term's ordinary meaning to attach."

On June 1, the Airport Authority filed a motion for reconsideration, but it did not raise any new arguments. The government filed a brief in response on June 16, and the Airport Authority filed a reply on June 23. A decision on the motion for reconsideration is pending.

Consent Decree Entered in DOT's First Judicial Action to Enforce Motor Carrier Financial Responsibility Requirements

On May 6, the U.S. District Court for the District of South Dakota entered a consent decree in LaHood v. Action Carrier, Inc. (D.S.D. No. 08-4185) that would permanently enjoin Action Carrier and all its employees, officers, and agents from operating at any time it was not compliant with FMCSA regulations. The decree was the culmination of a November, 2008 complaint filed by FMCSA seeking declaratory and injunctive relief to halt Action Carrier's ongoing operations.

Federal law requires interstate motor carriers to secure and retain operating authority from DOT. A basic condition of this authority is proof of financial responsibility, which is usually satisfied via liability insurance. The interstate motor carrier in this case repeatedly refused to cease operations despite the revocation of operating authority and imposition of fines by FMCSA for failure to maintain required liability insurance coverage. This is the first time since obtaining motor carrier oversight responsibility in 1995 that FMCSA has brought a court action to enforce the federal regulatory regime.

The court immediately granted the government's motion for a temporary restraining order, which accompanied the complaint, and scheduled further proceedings on the request for a preliminary injunction. The parties in December, 2008 stipulated to the issuance of a preliminary injunction against further carrier operations pending the outcome of the litigation. In April 2009, the parties agreed to resolve the litigation through the consent decree. In the meantime, Action Carrier failed to file an answer or otherwise respond to the complaint, and as a result on December 19, the government moved for entry of a default judgment. That motion is still pending and the carrier has yet to file a responsive pleading.

FMCSA Defends Challenge to Application of Safety Regulations to Mobile Cranes

On April 27, Midwest Crane & Rigging, Inc. filed a petition for review in the U.S. Court of Appeals for the Tenth Circuit challenging an FMCSA decision that the Federal Motor Carrier Safety Regulations (FMCSRs) apply to Midwest Crane's self-propelled cranes even though they did not transport passengers or property. The FMCSRs set standards for a wide array of subjects related to the maintenance and operation of "commercial motor vehicles" (CMVs) operated in interstate commerce. These include periodic inspections, drug and alcohol testing regimes, and hours of service restrictions. Applicable statutory and regulatory provisions define a CMV as a vehicle above a certain weight "used in commerce to transport passengers or property."

Midwest Crane operates very large self-propelled cranes in which the crane mechanism is permanently secured to a truck chassis. Following an inspection, a regional FMCSA office charged Midwest Crane in an enforcement action with violating various FMCSRs and recommending a civil penalty. Midwest defended principally on the ground that the FMCSRs did not apply because its cranes were not CMVs because they did not transport passengers or property. The crane mechanism was not separate from the vehicle and thus was not property in the respondent's view.

The FMCSA final administrative decision dismissed existing agency guidance on the point because it was merely a one-line conclusory statement without rational explanation or legal analysis. The FMCSA decisionmaker was persuaded, however, by a federal district court decision holding that similarly "unitized" vehicles were subject to the FMCSRs. The court had reasoned that it was unrealistic to consider the vehicular components (motor, transmission, wheels and tires, brakes, etc.) and the equipment components (the crane mechanism) as inseparable or undifferentiated because one had nothing to do with the other. The court found that permanently attaching the two components enhanced the safety of transporting the equipment and that removing the resulting vehicle from the ambit of federal safety regulations would be extremely and unacceptably ironic.

In its brief to the Tenth Circuit in Midwest Crane & Rigging v. FMCSA (10th Cir. No. 09-9520), Midwest Crane advanced the same contention that its self-propelled cranes were not CMVs within the jurisdiction of FMCSA. The government's brief, filed on October 13, relied not only upon the district court opinion used by the agency, but also demonstrated to the court that the federal agencies administering the FMCSRs (starting with the Interstate Commerce Commission roughly 70 years ago) have never restricted their application of the FMCSRs to commercial vehicles that can transport property separate from trucks. The critical distinction instead has been the extent to which such vehicles operate on public roadways. This case has implications for the safety regulation of a wide array of other similarly-designed heavy trucks used in

the construction and utility industries, among others.

Pipeline and Hazardous Materials Safety Administration

U.S. Brings First Judicial Action for Violation of a Pipeline Corrective Action Order

On March 31, the Justice Department filed a complaint on behalf of PHMSA and EPA in the U.S. District Court for the District of Alaska against BP Exploration (Alaska), Inc. (BPXA), an operator of oil and gas pipelines on the Alaskan North Slope. The complaint in United States v. BP Exploration (Alaska), Inc. (D. Alaska No. 09-00064) alleges that BPXA failed to timely comply with a PHMSA Corrective Action Order requiring the company to take certain remedial actions to reduce safety risks in the aftermath of a large oil spill from a BP pipeline in March 2006. The complaint also sets out several Clean Water Act and Clean Air Act claims on behalf of EPA. The EPA claims also arose from the March 2006 spill and another spill later that year. PHMSA, EPA, and DOJ have been working together closely on the case.

Substantive settlement discussions were initiated in April and are continuing. The defendant has produced thousands of documents, and the government has prepared its initial disclosures and a draft consent decree.

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