



DOT LITIGATION NEWS

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Supreme Court Litigation

Supreme Court Rules on Constitutionality of Implied Consent Laws in Drunk Driving Prosecutions

On June 23, 2016, the Supreme Court issued a ruling in Birchfield v. North Dakota, ___ U.S. ___, 136 S.Ct. 2160 (No. 14-1468, June 23, 2016), upholding the constitutionality of state implied consent laws for chemical testing of breath, and in particular, holding that states may criminalize the refusal to submit to a breath test where the defendant is arrested for driving under the influence of alcohol (DUI). The Court heard oral argument in the case on April 20, 2016. The Department and the National Highway Traffic Safety Administration (NHTSA) assisted the Solicitor General's Office in developing the arguments presented in the government's brief supporting the states in defending the constitutionality of the implied consent laws at issue.

The Court considered three cases involving the constitutionality of chemical tests relating to alcohol-impaired driving offenses, and associated penalties for the refusal to submit to such tests. Implied consent laws allow a state to condition the privilege of driving on its roads with a driver's implied consent to submit to chemical testing when law enforcement has arrested a driver for drunk driving. Implied consent laws further allow the state to impose penalties for refusal to submit to the testing, including fines, administrative sanctions (e.g. license suspension or revocation), and criminal sanctions (e.g. jail time comparable to or, sometimes, exceeding the penalty for drunk driving).

Justice Alito authored the Court's opinion, in which the Court held that warrantless breath tests, but not warrantless blood tests, incident to arrest for drunk driving are permissible under the Fourth Amendment as searches incident to arrest. The Court relied in part on the difference in privacy interests involved between breath and blood tests. While the physical intrusion is nearly negligible in breath tests, blood tests are significant, involving piercing of the skin and providing the government with a sample from which additional information about the individual can be extracted. The Court also analyzed government interests in obtaining the blood alcohol content (BAC), noting that the government has a "paramount interest" in preserving safety and a compelling interest in deterring drunk driving. The Court also acknowledged that states must have the ability to impose serious sanctions to ensure compliance with BAC testing, particularly with respect to the most serious drunk driving offenders.

The Court further held that while only breath testing to obtain BAC is permissible as a search incident to arrest, states may still conduct blood testing by obtaining a warrant or relying on special facts that support the exigent circumstances exception to the warrant requirement. Accordingly, states may not criminally punish a driver for refusal to submit to warrantless blood testing.

Justice Sotomayor, joined by Justice Ginsburg, concurring in part, and dissenting in part, would have found all warrantless tests for BAC impermissible under the Fourth Amendment unless there were exigent circumstances in a particular case.

Justice Thomas, concurring in part and dissenting in part, would have gone further than the majority and, under the exigent circumstances exception to the warrant requirement, would have permitted warrantless breath and blood draws following a lawful drunk driving arrest.

The Court's opinion can be found at https://www.supremecourt.gov/opinions/15pdf/14-1468_8n59.pdf.

Supreme Court Considering Granting Certiorari for Challenge to FAA Legal Interpretations Related to Expense-Sharing Flights

On June 24, 2016, Flytenow, a website operator, filed a petition for writ of certiorari in the Supreme Court in Flytenow, Inc. v. FAA (No. 16-14), challenging two legal interpretations related to expense-sharing flights arranged through an Internet platform operated by the petitioner. Flytenow's website provided a platform through which FAA-certified pilots could offer available space on flights and accept a pro rata share of the operating expenses from passengers who were registered with Flytenow's website. Pilots using the Flytenow website would determine the time, date, and destination for the flights and could accept or reject any request made by a potential passenger.

The FAA legal interpretations at issue concluded: 1) Part 61, which governs pilots, provides that private pilots may not carry passengers or property for "compensation" or act as a pilot in command for compensation or hire, except, in part, when the private pilot accepts from a passenger his or her pro-rata share of expenses; 2) FAA has consistently interpreted the expense-sharing exception to require the

pilot and the passenger to share a bona fide "common purpose" for the travel and there is no common purpose if the pilot is transporting the passenger to a destination where the pilot has no particular business to conduct; 3) notwithstanding the limited Part 61 exception for pilots, expense-sharing remains "compensation" when analyzing whether the operation involves "common carriage" for which a Part 119 certificate is required; and 4) although pilots participating in expense-sharing websites choose the destination of the flight, they are holding out to the public to transport passengers for "compensation" in the form of a reduction in operating expenses that the pilots would have incurred for the flight.

On December 18, 2015, the U.S. Court of Appeals for the District of Columbia Circuit denied Flytenow's petition for review to set aside FAA's legal interpretations. The court found that the interpretations were consistent with the relevant statutory and regulatory provisions and did not violate Flytenow's constitutional rights.

In its petition for certiorari to the Supreme Court, Flytenow argues that no deference should be given to FAA legal interpretations of "common carriage" because this is an interpretation of a common law term, not an interpretation of statutory or regulatory language, and the D.C. Circuit erred in granting FAA's interpretation of Auer deference. Moreover, Flytenow argues that the common law definition of "common carriage" excludes Flytenow's cost-sharing model.

Flytenow further argues that FAA's interpretations are content-based restrictions on Internet communications in violation of the First Amendment. Flytenow alleges that pilots have lawfully communicated the time and location of their travel plans with

prospective passengers since the beginning of general aviation using a variety of different communication means.

The Solicitor General waived filing a response to the petitioner's request for certiorari. However, the Court is considering granting Flytenow's petition and has ordered the government's response,

which has not yet been filed. Oral argument has not been scheduled.

The petition for certiorari can be found at <http://www.scotusblog.com/wp-content/uploads/2016/07/16-14-Cert-Petition.pdf>.

Departmental Litigation in Other Federal Courts

D.C. Circuit Again Strikes Down Amtrak Metrics and Standards

On April 29, 2016, the U.S. Court of Appeals for the District of Columbia Circuit once again struck down Section 207 of the Passenger Rail Investment and Improvement Act of 2008 (PRIIA), the foundation for the Amtrak Metrics and Standards adopted on May 12, 2010. Association of American Railroads v. DOT (D.C. Cir. No. 12-5204).

Through PRIIA, Congress directed the Federal Railroad Administration (FRA) and Amtrak to jointly develop metrics and standards for "measuring the performance and service quality of intercity passenger train operations." The Metrics and Standards were to provide Amtrak with an internal evaluation tool that could also be used to assess whether freight railroads had violated their statutory duty to provide preference to Amtrak in the use of rail lines, junctions, and crossings. The D.C. Circuit previously struck down the Metrics and Standards as a violation of the nondelegation doctrine by vesting rulemaking authority in a non-governmental entity, *i.e.* Amtrak. The Supreme Court in 2015 reversed and remanded, holding that Amtrak was a governmental entity for purposes of the Non-Delegation Doctrine.

On remand from the Supreme Court, the D.C. Circuit held that the Metrics and Standards violated the Due Process Clause by giving Amtrak, "a self-interested entity[,] regulatory authority over its competitors." The court additionally found that an arbitration provision, provided in PRIIA to resolve disputes between FRA and Amtrak over the formulation of the Metrics and Standards but never invoked, violated the Appointments Clause because the arbitrator would be a principal officer of the United States not appointed by the President with the advice and consent of the Senate.

The D.C. Circuit decision first analyzed whether AAR's claims were properly preserved. The court concluded that the due process claim was properly preserved because the "freight operators raised the argument . . . at every stage of their litigation – in their complaint and in each brief, from summary judgment to their prior appeal before this panel to their appeal to the Supreme Court." The court held that AAR failed to preserve its arbitration clause claim, "never so much as hint[ing] at this argument until their first brief filed in [the D.C. Circuit,]" but the court determined that the claim was within the scope of its appellate authority based on a combination of factors: "the government's failure to object, the extensive briefing, the purely

legal character of the [issue], and the significant structural constitutional rights at stake.” Finally, the court did not rule on AAR’s arguments about the constitutionality of Amtrak’s board, expressing no opinion on the preservation or merits of those issues.

On the merits, accepting the Supreme Court’s holding that Amtrak is a governmental entity for present purposes, the D.C. Circuit held that PRIIA Section 207 violates the Due Process Clause because it gives a self-interested entity (Amtrak) regulatory authority over its competitors (the freight operators). The court relied on the Supreme Court’s decision in Carter v. Carter Coal Co., 298 U.S. 238 (1936). The D.C. Circuit read Carter Coal as prohibiting a delegation of regulatory authority to any self-interested entity.

The D.C. Circuit also held that the arbitrator, to be appointed by the Surface Transportation Board (STB) to resolve disputes between Amtrak and FRA over the formulation of the Metrics and Standards, violated the Appointments Clause. Assuming the appointment of a governmental arbitrator, the court held that the arbitrator would be an Officer of the United States, with authority to “render a final decision regarding the content of the metrics and standards.” The court then concluded that the arbitrator would be a principal officer because he or she would not be directed or supervised “by others who were appointed by Presidential nomination with the advice and consent of the Senate.” The arbitrator’s appointment by the STB would thus violate the Appointments Clause, which requires all principal officers to be appointed by the President with the advice and consent of the Senate.

The government petitioned the D.C. Circuit for rehearing and rehearing en banc on June 27, 2016, contending that the D.C. Circuit opinion misread Carter Coal. In the government’s view, the Carter Coal Court was primarily concerned with regulatory delegation to a purely private entity, a concern that was mooted in this case when the Supreme Court held that Amtrak is a governmental entity for purposes of the constitutionality of the Metrics and Standards. The government also argued that the arbitrator would have served as an inferior officer, resolving any Appointments Clause concerns.

The court denied the rehearing petition in summary orders issued on September 9, 2016. The United States is considering whether to file a petition for writ of certiorari.

D.C. Circuit Dismisses Challenge to DOT Guidance Letter in Love Field Access Dispute; Fifth Circuit Hears Argument in Related Litigation

On August 9, 2016, the U.S. Court of Appeals for the District of Columbia Circuit dismissed a challenge, brought by Southwest Airlines, to the Department’s guidance letter concerning the obligations of the City of Dallas to accommodate airlines wishing to serve Love Field Airport in Dallas, Texas. Southwest Airlines Co. v. DOT, ___ F.3d ___, 2016 WL 4191190 (D.C. Cir.).

The lawsuit arose from attempts by Delta Air Lines to maintain service at Love Field. The airport has a unique history. In 1979, Congress passed the Wright Amendment, which sought to protect the newly-constructed Dallas-Fort Worth International Airport by generally prohibiting passenger air service between Love Field and

destinations outside of Texas and the immediately adjoining states. In 2006, the Wright Amendment Reform Act phased out those restrictions, but capped the number of gates at Love Field.

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

Southwest petitioned for review of each of the Department's two letters in the D.C. Circuit. Southwest Airlines v. DOT (D.C. Cir. 15-1036); Southwest Airlines v. DOT (D.C. Cir. 15-1276). In its August 9, 2016 decision, the court held that the Department's first letter was not a "final agency action" subject to judicial review. The court held that the Federal Aviation Administration (FAA) had initiated an administrative proceeding to consider the same issues addressed by the letter, thereby confirming that the letter was "not the agency's final word on the issues at hand."

The D.C. Circuit had stayed Southwest's second proceeding pending resolution of the

first. Following the dismissal of the first case, both parties have informed the court that the second case should also be dismissed.

Separately, the City of Dallas brought suit in June 2015 in federal district court against the Department, Delta, Southwest, and all other airlines serving Love Field or leasing gate space at the airport. City of Dallas v. Delta Air Lines, Inc., et al. (N.D. Tex. 15-cv-2069). The City challenged the Department's guidance letters, and also sought declaratory relief with respect to a variety of issues. Delta and Southwest brought counterclaims against the City and crossclaims against one another, and Delta brought crossclaims against United Airlines.

Delta, Southwest, and the City all moved for preliminary injunctive relief, and on January 8, 2016, the court ordered that Delta be accommodated during the pendency of the litigation. Among other things, the court held that Delta was likely to succeed on its claims that Southwest's lease required it to share gate space with Delta if it was not fully utilizing its gates at the time of Delta's accommodation request. Southwest appealed the preliminary injunction decision to the U.S. Court of Appeals for the Fifth Circuit, which heard oral argument on September 26, 2016. The federal district court has stayed further proceedings pending the appeal, and has not ruled on the Department's motion to dismiss the claims against it.

Judicial Challenges to the High Hazard Flammable Train Final Rule Held in Abeyance

On June 10, 2016, the U.S. Court of Appeals for the District of Columbia Circuit ordered that the consolidated challenges to the

Pipeline and Hazardous Materials Safety Administration (PHMSA) and Federal Railroad Administration (FRA) High Hazard Flammable Train Final Rule be held in abeyance pending further order of the court.

After the rule was issued on May 1, 2015, multiple judicial and administrative challenges to the rule were filed. The judicial challenges were eventually consolidated in the D.C. Circuit. American Petroleum Institute v. United States (D.C. Cir. No. 15-1131). During the course of litigation, on December 4, 2015, President Obama signed into law the Fixing America's Surface Transportation Act (FAST Act), certain provisions of which addressed the issue of safe transportation of flammable liquids by rail.

On or around March 1, 2016, three of the seven petitioners filed motions to voluntarily dismiss their petitions, but the four remaining petitioners indicated that they intended to pursue a challenge to the electronically controlled pneumatic (ECP) braking requirement. However, the petitioners urged the court to stay the litigation pending the Secretary of Transportation's determination regarding the ECP braking requirement pursuant to the FAST Act. The government filed a reply on March 15, 2016 arguing that the ECP braking issue was rendered unripe by the FAST Act and, thus, should be dismissed rather than held in abeyance.

The court sided with the petitioners and held the case in abeyance pending further order. The government is directed to file status reports at 180-day intervals beginning 180 days from the date of the order. The parties are directed to file motions to govern further proceedings within 30 days of the Secretary's final determination whether the applicable ECP brake system requirements

are justified, pursuant to the FAST Act, Pub. L. No. 114-94, §7311(c)(2).

Court Partially Dismisses Challenges to Allocation of Private Activity Bond Authority to the All Aboard Florida Rail Project

On August 16, 2016, the U.S. District Court for the District of Columbia partially granted motions to dismiss filed by the Department and by intervenor All Aboard Florida Operations LLC (AAF) in two cases involving AAF's passenger rail project connecting Miami and Orlando (the "Project"). Indian River County, et al. v. DOT, et al., ___ F. Supp. 3d ___, 2016 WL 4385776 (D.D.C.).

Both cases concern the Department's authority, pursuant to 26 U.S.C. § 142(m), to allow state and local governments to issue tax-exempt Private Activity Bonds (PABs) to investors to finance certain private transportation projects. In December 2014, the Department authorized a Florida state entity to issue up to \$1.75 billion in PABs on behalf of the Project. Opponents of the project, including two counties along the route, have brought suit against the Department to vacate the PAB allocation. They allege that the Project did not meet the statutory eligibility criteria under 26 U.S.C. § 142(m), and that the Department violated the National Environmental Policy Act (NEPA) by not preparing an environmental impact statement before making the allocation.

In its decision, the court dismissed the challenges to the Project's eligibility for an allocation, holding that the plaintiffs' alleged injuries did not fall within the "zone of interests" protected by the governing statute. The Court noted that 26 U.S.C.

§ 142 was intended to “support the development and construction of certain kinds of projects with significant public benefits,” and was not intended to protect “those who would claim that public safety or other related interests would be impaired by a bond allocation to an ineligible project.” The court also held that plaintiffs had met their burden of demonstrating Article III standing, and that plaintiffs had stated claims that the Department’s PAB allocation was a “major Federal action” subject to NEPA and related procedural statutes.

Motion to Dismiss Filed in FOIA Case

On July 15, 2016, the United States filed its partial motion to dismiss in Cause of Action v. Eggleston (D.D.C. No. 16-cv-871), a case that poses questions about the scope of review of documents that are produced to requestors pursuant to the Freedom of Information Act (FOIA).

The plaintiff, Cause of Action, a nonprofit organization, filed suit in May 2016 against the Department and numerous other Executive Branch agencies, as well as W. Neil Eggleston, in his official capacity as White House Counsel. Cause of Action is suing to compel the production of documents pursuant to its FOIA requests to the defendant agencies, by which it sought work calendars, records of travel with the President, and other materials. In so doing, Cause of Action challenges the validity of a memorandum issued in 2009 by then-White House Counsel Gregory Craig, which discussed how agencies should consult with the White House in the course of making FOIA productions that involve White House equities. Cause of Action contends that the guidance provided to agencies in this memorandum is inconsistent with FOIA and has added an additional layer of FOIA

review that has in turn caused impermissible delays in agency FOIA productions.

The Department, along with the other defendants, moved to dismiss on the grounds that Cause of Action had failed to adequately allege a “pattern and practice” claim under FOIA, and that the complaint was otherwise insufficient in various respects. In particular, the defendants pointed out that agencies routinely coordinate on FOIA productions and that White House review is appropriate in various circumstances, for example, where the documents originated with the White House or implicate a presidential privilege. The Department and the other defendants filed a reply on their motion to dismiss on August 25, 2016, and the court’s ruling is expected in the coming weeks.

DOCR Decision to Uphold Denial of DBE Certification Challenged

On July 1, 2016, an insurance company called Orion Insurance Group (Orion) and its owner filed suit against the Washington State Office of Minority & Women’s Business Enterprises (OMWBE), the Department, various OMWBE officials, and the former Acting Director of the Department’s Departmental Office of Civil Rights (DOCR) in the U.S. District Court for the Western District of Washington. Orion Insurance Group v. Washington’s Office of Minority & Women’s Business Enterprises (W.D. Wash. 16-cv-5582). Orion and its owner sought to challenge a decision by the Washington State OMWBE to deny its application for certification in the Disadvantaged Business Enterprise (DBE) program and DOCR’s upholding of that denial.

After reviewing Orion's DBE application, OMWBE determined that Orion's owner was not socially and economically disadvantaged, a prerequisite of DBE certification. Orion filed an administrative appeal of OMWBE's denial decision with DOCR. Based on a review of the record submitted by OMWBE and supplemented by Orion, DOCR upheld OMWBE's decision to deny Orion DBE certification.

In the lawsuit, the plaintiffs challenge DOCR's decision to uphold OMWBE's denial decision under the Administrative Procedure Act (APA). In addition, the plaintiffs claim that OMWBE, the Department, and the named officials from both agencies violated 42 U.S.C. §§ 1983 and 2000(d), their Equal Protection rights under the U.S. Constitution, and various Washington state statutes, and the Washington state constitution. The plaintiffs also purport to allege all claims against all the named officials in both their official and individual capacities.

The state defendants filed an answer to the complaint on August 1, 2016. On October 11, 2016, the federal defendants filed a motion to dismiss all claims against the Acting Director of DOCR in her individual capacity, and all claims, except the APA claims, against the Department and the Acting Director of DOCR in her official capacity. The plaintiffs' response to the federal defendants' motion to dismiss is due on October 31, 2016.

Office of Aviation and Enforcement Proceeding's Rule on E-Cigarettes Challenged in the D.C. Circuit

On April 28, 2016, the Competitive Enterprise Institute and other parties filed a petition for review in the U.S. Court of

Appeals for the District of Columbia Circuit of the Department's final rule prohibiting the use of e-cigarettes on flights. Competitive Enterprise Inst. v. DOT (D.C. Cir. 16-1128). The petitioners challenged the Department's reliance on its statutory authority and various studies published after the issuance of the notice of proposed rulemaking in promulgating the rule.

First, the petitioners argued that the plain meaning of the term "smoking" found in 49 U.S.C. § 41706, on which DOT relied for the rule, unambiguously refers to the combustion of tobacco products, and therefore, the Department was arbitrary in extending the statutory prohibition against smoking on flights to the use of e-cigarettes. Second, the petitioners contended that the Department was arbitrary and capricious in relying upon the Secretary's authority to ensure that air carriers provide "safe and adequate" transportation as a source of authority for the rule, because the health effects of secondhand exposure to e-cigarettes are purportedly minimal. Further, the petitioners contended that the Department improperly relied upon studies that were published after the issuance of the notice of proposed rulemaking. Finally, the petitioners challenged the Department's reliance on 49 U.S.C. § 41712, because it was not included as a source of authority for the rule in the notice of proposed rulemaking.

On October 7, 2016, the Department filed a response brief arguing that because the term "smoking" is not defined by Congress in 49 U.S.C. § 41706, the agency is entitled to deference in including the use of e-cigarettes in its definition of the term in its regulations. As a result, the final rule on the prohibition of e-cigarette use on flights should be upheld as a reasonable exercise of the Secretary's authority to prohibit "smoking"

on aircraft. Moreover, the Secretary's authority under 49 U.S.C. § 41702 is broad enough to permit the Secretary to regulate quality of service and to ensure passenger comfort aboard aircraft. The agency was acting according to this authority when it rationally concluded that allowing e-cigarettes on aircraft would cause passenger discomfort. With respect to the studies that the final rule relied upon, those studies expanded on and confirmed the proposed rule's conclusion that secondhand exposure to e-cigarettes is potentially harmful. Therefore, although the studies were published after the close of the rule's

comment period, they merely provided support for the same conclusion that was made available for comment in the proposed rule. Finally, due to the procedural issue identified by the petitioners with respect to 49 U.S.C. § 41712, which prohibits unfair and deceptive practices, the Department is no longer relying upon that provision as a basis of authority for the rule.

The petitioners' reply brief is due on November 4, 2016.

Recent Litigation News from DOT Modal Administrations

Federal Aviation Administration

Third Circuit Rules on Preemption of State Law Tort Claims Against Aircraft Manufacturer

On April 19, 2016, the United States Court of Appeals for the Third Circuit issued its decision in Sikkelee v. Precision Airmotive Corp., 822 F.3d 680 (3rd Cir. 2016), a case with important implications about the scope of preemption of state law tort claims for aircraft design defects.

The case arose from an airplane crash in 2005 in which the plaintiff's husband was killed. The decedent, David Sikkelee, was piloting a Cessna aircraft that crashed shortly after takeoff. The plaintiff, Jill Sikkelee, filed suit in the U.S. District Court for the Middle District of Pennsylvania, asserting state law claims against seventeen defendants alleged to have played a role in a defect that Sikkelee claims was the cause of the crash. In particular, Sikkelee contended

that the carburetor's bowl screws had become loose and caused the engine to lose power, and that the design was defective. At the present stage of the case, the dispute focuses on Sikkelee's claims against Lycoming, the company that originally manufactured the engine that was installed on the aircraft that crashed, notwithstanding that the engine was manufactured several decades earlier and had been overhauled before the accident.

The district court granted Lycoming's motion for summary judgment in most respects, concluding that federal law preempted Sikkelee's state law claims. The court held that Sikkelee was essentially trying to prove that the aircraft engine and carburetor violated specific provisions in the Federal Aviation Regulations (FARs) relating to aircraft and apparatus design. But in the district court's view, FAA's approval process, and the agency's issuance of a "type certificate" for the engine design, was conclusive of the agency's determination that the engine and its components satisfied the FARs. The

district court allowed Sikkelee to proceed on another claim, in which she alleged that Lycoming failed to report known defects to FAA.

On appeal to the Third Circuit, the United States filed a brief as amicus curiae, contending that the Federal Aviation Act of 1958 impliedly preempts the field of aviation safety with respect to substantive standards of safety. The federal government has a pervasive role in regulating all aspects of aircraft safety, and Congress established a multi-step process for federal approval of aircraft, engines, and propellers.

The government went on to explain that although state law remedies may be available for violations of federal design standards, conflict preemption principles determine the role that a type certificate plays in the adjudication of an aircraft design defect claim. Such a claim is preempted to the extent that the claimant is challenging an aspect of the product's design that FAA expressly approved, as shown in the type certificate, underlying data sheet, or other form of FAA approval incorporated into the type certificate by reference. The government also asserted that the views of the Department and FAA are entitled to substantial weight on these questions, in light of agency expertise on matters of aviation safety. Finally, the government argued that FAA's delegation of certain approval authority to manufacturers, pursuant to the agency's regulatory regime, does not alter the preemption analysis, since the decision to approve a type design is ultimately one for FAA.

The Third Circuit, while recognizing the critical importance of FAA approval process, nonetheless held that FAA approval does not preempt all aircraft design and manufacturing claims under state

law. Instead, the court concluded that aircraft product liability claims like the ones that Sikkelee had presented could proceed under a state law standard of care, subject to traditional conflict preemption principles. In the court's view, principles of federalism, along with the presumption against preemption of state law, militated against preemption except where Congress expresses a "clear and manifest intent" to preempt, and it had not done so here.

In so doing, the court distinguished its prior holding in Abdullah v. American Airlines, 181 F.3d 363 (3rd Cir. 1999), in which the court held that federal law (in-flight seatbelt regulations) preempted a state law tort claim for negligence for a flight crew's alleged failure to warn passengers that the flight would encounter severe turbulence. That case, the Sikkelee court explained, involved preemption of claims that related to "in-flight operations," which are expressly and broadly covered by FAA regulations. Here, the court concluded, the issue was different, as FAA manufacture and design regulations were essentially "procedural," rather than setting forth "a general standard of care." The court also held that the General Aviation Revitalization Act of 1994 supported its conclusion, since the intent of that statute was to bar "long-tailed" liability suits against manufacturers of older aircraft and parts, implying that Congress expected that such state law "suits were and are otherwise permitted."

The Third Circuit denied rehearing on June 7, 2016. On September 6, 2016, the manufacturer filed its petition for writ of certiorari. The petitioner contends that the Third Circuit's ruling is contrary to the will of Congress in establishing FAA aircraft approval process, and in setting forth a detailed federal scheme for the review and approval of aircraft designs. The

Department is working with the Solicitor General's Office in the consideration of the briefs filed at the certiorari stage.

D.C. Circuit Affirms Civil Penalty Assessed Against Unruly Passenger

On June 10, 2016, the U.S. Court of Appeals for the District of Columbia Circuit denied a petition for review by Brian Wallaesa, who sought to overturn a civil penalty assessed against him by the FAA. Wallaesa v. FAA, 824 F.3d 1071 (D.C. Cir 2016).

The case arose from an incident aboard a Southwest Airlines flight from Baltimore to Las Vegas. Wallaesa harassed another passenger on the flight and, after flight crew intervention, was placed in an arm bar and forcefully subdued by an off-duty FBI agent on board the flight. In the proceedings below, FAA alleged that Wallaesa violated 14 C.F.R. §§ 121.317(f), 121.317(k), and 121.580 when he: failed to keep his seat belt fastened when the "Fasten Seat Belt" sign was lit; failed to comply with instructions given to him by crewmembers to keep his seat belt fastened, and interfered with crewmembers in the performance of their duties. FAA sought a civil penalty of \$5,500. An Administrative Law Judge (ALJ) of the Department affirmed the FAA's complaint but reduced the civil penalty to \$3,300.

Wallaesa appealed to the D.C. Circuit. After the parties fully briefed the issues, the court appointed amicus curiae "for the limited purpose of presenting arguments in favor of [Wallaesa's] position concerning whether FAA has authority to impose civil penalties on passengers under 49 U.S.C. § 46301(a)(5)(A)."

The court denied the petition for review. First, the court rejected Amicus's argument

that FAA lacks authority to proscribe the non-violent passenger conduct regulated by 14 C.F.R. § 121.580. The court cited its decision in Bargmann v. Helms, 715 F.2d 638 (D.C. Cir. 1983) in which it determined that the "proper scope [of 49 U.S.C. § 44701(a)(5)] . . . must comport with the broad language in which Congress couched its delegation of authority[,] and that "[t]he Act, by its terms, empowers the Administrator to promulgate regulations reasonably related to safety in flight." The court determined that disruptive behavior need not be violent to interfere with crewmember duties. Applying Bargmann, the court determined that § 121.580 reasonably related to safety in flight, and that FAA acted within the bounds of its statutory mandate when it prohibited behavior that puts at risk the safety of flight. Further, the court rejected Wallaesa's argument that FAA lacks authority to impose civil penalties on passengers, concluding that the ordinary meaning of "individual" as found in § 46301(a)(5)(A) applies, and that passengers "naturally fall within that understanding."

The court then rejected Wallaesa's other arguments. Regarding his claim that FAA unlawfully added charges that he violated the seatbelt rules, the court found that the three separate notifications of the additional charges that Wallaesa received, through an Amended Notice of Proposed Civil Penalty (NOPCP), a Final NOPCP, and a complaint, constituted "more than adequate notice" under both the Due Process Clause and the APA. The Court also found that substantial evidence supported the findings that Wallaesa both violated the seat belt rules and the interference rule.

Regarding Wallaesa's affirmative defense that he suffered from a medical condition that contributed to his behavior, the court

noted that Wallaesa had the burden to prove it, but that he “failed to introduce any evidence beyond his self-serving, uncorroborated testimony.” Finally, the court corrected Wallaesa’s misunderstanding regarding the purpose of FAA Order 2150.3B, noting that the order sets forth FAA’s general policy applied in selecting the types of sanctions and specific sanction amounts to be imposed in legal enforcement actions. The court found that the \$3,300 penalty that the ALJ imposed was “based upon his analysis of sanctions imposed in past cases involving similar violations” and not on the guidance in FAA Order 2150.3B.

Tulsa Airport Reimbursement Case Dismissed in Tenth Circuit

On October 14, 2016, the U.S. Court of Appeals for the Tenth Circuit dismissed a petition for review as untimely in which Tulsa Airports Improvement Trust (TAIT) alleged that FAA failed to reimburse TAIT for alleged eligible claims under the Airport Improvement Program (AIP). Tulsa Airports Improvement Trust v. FAA, 2016 WL 5957290 (10th Cir. Oct. 14, 2016).

The case involved an FAA December 31, 2012, letter which found that TAIT’s delay costs were not allowable for reimbursement under AIP. The case originated in the Court of Federal Claims as a breach of contract action, filed on November 14, 2013, but on the Department’s motion that court transferred the case to the Tenth Circuit as a petition for review. In both forums the Department contended that the December 31, 2012 letter constituted final agency action, and therefore TAIT’s claims were untimely, since their Court of Federal Claims action was filed more than 60 days after the letter was issued. 49 U.S.C. § 46110(a).

TAIT argued in its brief before the Tenth Circuit that the relevant decision for which it sought review was FAA’s refusal to grant TAIT a hearing under 49 U.S.C. § 47111, based on FAA’s alleged withholding of grant payments. TAIT argued in the alternative that if FAA’s December 31, 2012, letter denying payment constitutes a final order, FAA’s decision was arbitrary, capricious, and unsupported by the record.

FAA, in its response, reiterated its view that its December 31, 2012, letter was a final order, and that TAIT’s petition for review was untimely. FAA refuted TAIT’s claim that FAA unlawfully refused to provide a hearing under 49 U.S.C. § 47111(d) because that section does not apply. FAA explained that “withholding” under 49 U.S.C. § 7111(d) means holding back a payment because an airport sponsor failed to comply with the terms of an AIP grant.

The court ruled in FAA’s favor, holding that the petition was not timely filed. The court first determined that the general review petition statute, 49 U.S.C. § 46110(a) applied, rather than section 47111, which specifically allows a person to petition for review of an agency’s decision to withhold payment due under a grant agreement. Focusing on the phrase “due under a grant agreement,” the court found that since FAA disallowed the costs at issue, they were not costs “due” that had been withheld, and the general review statute therefore applied.

The court next determined that FAA’s December 31, 2012, letter was a final order under section 46110 because it marked the consummation of FAA’s decisionmaking process. Finally, because section 46110 requires a petition for review to be filed within 60 days after the agency order is issued, TAIT’s initial suit filed on November 14, 2013, was untimely by over

eight months. The court noted that TAIT had not established any reasonable grounds to justify its delay. Therefore, the court dismissed the petition.

City of Santa Monica Appeals of FAA's Final Decision Regarding Grant Assurance Obligations

On August 25, 2016, the City of Santa Monica filed a petition for review of FAA's Final Agency Decision and Order issued on August 15, 2016. City of Santa Monica v. FAA (9th Cir. No. 16-72827). The City seeks review of FAA's decision in the 14 CFR Part 16 case affirming the Director's Determination that the duration of the City's grant assurance obligations extends to August 27, 2023.

The 14 CFR Part 16 complaint was filed in July 2014 by the National Business Aviation Association and others against the City of Santa Monica. The Director's Determination was issued on December 4, 2015, and the City appealed, contending that the Director's Determination was arbitrary and capricious, and an abuse of discretion. The Associate Administrator issued the Final Agency Decision and Order and found the Director did not err in concluding that the City, by entering into a 2003 Amendment to a 1994 Grant Agreement, extended the City's grant assurance obligations from August 2014 to August 2023.

The U.S. Court of Appeals for the Ninth Circuit established a briefing schedule under which the City's opening brief is due November 14, 2016, and FAA's brief is due December 13, 2016.

BRRAM Appeals Dismissal of NEPA Challenge

The U.S. Court of Appeals for the Third Circuit is considering an appeal of a challenge to FAA's approval of Operations Specifications (OpSpecs) for Frontier Airlines to operate from Trenton Mercer County Airport, Trenton, New Jersey. BRRAM v. FAA (3rd Cir. No. 15-2393). The New Jersey District Court had previously dismissed Bucks [County, PA] Residents for Responsible Airport Management's (BRRAM) challenge on May 19, 2015.

BRRAM sued FAA in district court alleging violations of NEPA when it approved OpSpecs to permit Frontier to operate at Trenton. Frontier's initial service proposal was for two flights per week and was eligible for a Categorical Exclusion. Trenton has had a history of attracting carrier service and losing it within a few years. Shortly after Frontier began service at Trenton, it rapidly increased its service to approximately 60 flights per week. BRRAM complained to FAA about the increase in service, but waited over a year to challenge the OpSpecs approval in court.

FAA moved to dismiss BRRAM's action, relying upon 49 U.S.C § 46110, which vests exclusive jurisdiction over challenges to FAA actions in the circuit courts of appeals and provides for a 60-day challenge period. BRRAM argued that in approving Frontier's OpSpecs, FAA only approved two flights per week, thus they were challenging FAA's inaction rather than an FAA action. In reply, FAA asserted that pursuant to the Airline Deregulation Act, once FAA approved OpSpecs that permitted a carrier to operate from an airport, the number of flights operated was a business decision by the carrier and additional FAA approval was

not required. Without an FAA approval, there was no major federal action requiring NEPA review.

After the district court's dismissal, BRRAM filed an appeal with the Third Circuit, putting forth the same arguments as below. The case has been fully briefed. The Third Circuit recently notified the parties that it would not hold oral argument, and a decision is pending.

FAA Part 157 Advisory Determination Challenge Dismissed after Mediation in 11th Circuit

On April 25, 2016, Key West Seaplane Adventures, LLC (KWSA) filed a petition for Review under 49 U.S.C. § 46110(a) in the U.S. Court of Appeals for the Eleventh Circuit challenging FAA's advisory determination that KWSA's proposed private seaplane base was objectionable on the basis it would have an adverse effect on navigable airspace. Key West Seaplane Adventures, LLC v. FAA (11th Cir. No. 16-11884).

KWSA planned to open a private seaplane base on Stock Island, Florida, which is about two nautical miles west of Naval Air Station Key West Boca Chica Field and one nautical mile east of Key West International Airport. FAA completed a review of the proposed project and issued an objectionable determination under Part 157. During FAA review, the United States Navy objected to the KWSA proposal in the strongest possible terms, explaining that "[t]he extreme close proximity of the two existing [airfields] already presents an inherent safety risk to aviators and the surrounding population." According to the Navy, introducing a third airplane base in the region would "eliminate any safety margin" for pilots navigating the

airspace around Stock Island, where the "close proximity and high tempo operations of the existing airfields already leave little room for error."

FAA participated in a mediation session with the petitioner. The petitioner later filed an unopposed motion to dismiss the case, which was granted in September 2016. KWSA may file a new proposal under Part 157.

Mediation Ordered in Challenge to Reagan National Airport Flight Procedures

FAA and the petitioners (including a number of citizens' groups near the Georgetown neighborhood) are participating in court-ordered mediation in a case challenging FAA decisions to permanently implement certain new flight departure routes and procedures at Ronald Reagan Washington National Airport. Citizens Association of Georgetown, et al. v. FAA, et al. (D.C. Cir. No. 15-1285).

FAA issued a Record of Decision (ROD) and Final Environmental Assessment on December 12, 2013, for the Washington D.C. Optimization of Airspace and Procedures in the Metroplex (OAPM) that established 41 new and modified procedures in the larger Washington, D.C. area. FAA is implementing new flight procedures that take advantage of updated technologies as part of its ongoing modernization of airspace in the United States. The petitioners challenged six OAPM procedures and two other procedures that were published on June 25, 2015, based on procedure proximity to the Georgetown neighborhood.

FAA filed a Motion to Dismiss on October 15, 2015, arguing that a final order of FAA

must be challenged within 60 days and that FAA's final order was the ROD and not the published procedures. The petitioners filed an Opposition to the Motion to Dismiss on February 8, 2016, arguing that the published flight procedures should be considered the final order and that reasonable grounds existed to delay filing because they were not provided appropriate notice to comment on the 2013 Environmental Assessment and ROD.

In addition to the mediation process in this case, in October 2015, a Reagan National Community Noise Working Group was established to engage broad-based community participation to identify practical aircraft noise solutions and recommendations to FAA.

Airport Tenant Seeks Review of Decision on Grant Compliance

On August 29, 2019, SPA Rental, LLC, a fixed based operator (FBO), filed a petition for review in the U.S. Court of Appeals for the Sixth Circuit. SPA Rental, LLC v. Somerset-Pulaski City Airport (6th Cir. No. 16-3989). In its petition, SPA Rental challenges FAA's August 8, 2016, final agency decision under 14 C.F.R. Part 16, which found the Somerset-Pulaski County Airport Board (the Sponsor) is in compliance with its federal obligations.

As a condition for receiving federal financial assistance under the AIP, airport sponsors must agree to 39 grant assurances. In its Part 16 complaint, SPA Rental alleged that the Sponsor violated Grant Assurances 22 (Economic Nondiscrimination), 23 (Exclusive Rights), and 24 (Fee and Rental Structure) when it offered a financial incentive to increase aircraft maintenance services at the Lake Cumberland Regional Airport (the Airport) and established new

minimum standards for aircraft maintenance. Although SPA Rental's operations were limited to aircraft sales and refurbishing, and it declined to change its business model to include aircraft maintenance and inspections, it objected to the Sponsor's incentives for a new FBO located at the Airport. On September 1, 2015, FAA issued a Director's Determination concluding that: (1) the Sponsor was in compliance with its grant assurances because sponsors may take action to increase airport revenue generation; (2) the different fee and incentive structures were reasonable for different types of airport businesses; and (3) the minimum standards were reasonable and uniformly applied. SPA Rental appealed the Director's Determination to the Associate Administrator for Airports arguing that the Director misinterpreted the law and misapplied the facts. In his Final Agency Decision, which is now subject to judicial review under 49 U.S.C. § 46110, the Associate Administrator affirmed the Director's Determination. A briefing schedule has not been set.

City of Phoenix and Neighborhood Association Seek Review of Departure Procedures for Sky Harbor International Airport

Two petitions for review have been filed in the U.S. Court of Appeals for the District of Columbia Circuit challenging FAA's September 18, 2014, implementation of area navigation (RNAV) departure procedures in the Phoenix airspace. The City of Phoenix, the owner of Phoenix Sky Harbor International Airport, filed the first petition on June 1, 2015, and a group of Phoenix historic neighborhood associations filed a second, similar petition on July 31.

FAA implemented the Phoenix RNAV procedures using legislative Categorical Exclusion (CE) 1 from the 2012 FAA Modernization and Reform Act, section 213(c)(1). Before implementing the procedures, FAA conducted an environmental analysis as required by NEPA and determined that no extraordinary circumstances existed that would preclude the use of a CE. However, residents of some Phoenix residential areas are filing noise complaints.

The petitioners in both cases, City of Phoenix v. Huerta, et al. (D.C. Cir. 15-1158) and Story Preservation Assoc., et al. v. FAA, et al. (D.C. Cir. 15-1247), state that the issues to be raised in their cases include whether FAA violated NEPA, the National Historic Preservation Act, and Section 4(f).

On September 17, 2015, FAA filed motions to dismiss in both cases, arguing that the petitioners failed to comply with the 60-day deadline set forth in 49 U.S.C. § 46110(a) for challenging an order of an FAA Administrator issued under that statute. FAA also filed a motion to consolidate the two cases. The court granted FAA's motion to consolidate the cases. However, in December of 2015, the court declined to rule on FAA's motion to dismiss, instead deferring consideration of the motion to the merits panel. FAA filed its merits brief in opposition to the petitions for review, addressing both the merits and again asserting the jurisdictional arguments, on July 21, 2016. The petitioners' reply briefs were filed two weeks later. At this time, FAA is waiting for the court to set a date for oral argument.

Two Challenges to Small UAS Rule Filed in D.C. Circuit

Two different petitioners have challenged FAA's Small Unmanned Aircraft System Final Rule (small UAS rule), issued by the Secretary and the Administrator on June 21, 2016, in the U.S. Court of Appeals for the District of Columbia Circuit. Electronic Privacy Information Center (EPIC) v. FAA (D.C. Cir. No. 16-1297); Taylor v. FAA (D.C. Cir. No. 16-1302). The small UAS rule provides the regulatory framework to enable the operation of small unmanned aircraft systems (less than 55 pounds) in the national airspace system.

On August 22, 2016, EPIC filed its petition for review. EPIC previously sued FAA on the Operation and Certification of Small Unmanned Aircraft Systems notice of proposed rulemaking, alleging that FAA was statutorily required to include privacy regulations in the small UAS rule, and that the agency erred by not addressing privacy in that rulemaking. EPIC's previous lawsuit was dismissed as premature because a Notice of Proposed Rulemaking (NPRM) is not a final agency action subject to judicial review. In its current petition, EPIC again challenges the omission of privacy regulations from the small UAS rule and argues that FAA is statutorily required to address privacy with regard to small UAS.

John Taylor filed a second petition for review of the small UAS rule on August 28, 2016. Taylor is also currently suing FAA on the registration rule, arguing that the agency erred by requiring UAS hobbyists to register with FAA. With regard to the small UAS rule, Mr. Taylor's petition for review was accompanied by a motion to hold his small UAS rule lawsuit in abeyance pending the outcome of the registration litigation.

The D.C. Circuit sua sponte consolidated the EPIC and Taylor petitions. Taylor has filed a petition to hold his case in abeyance pending the outcome of the registration litigation, and the government responded saying that, while it does not oppose that motion, it cannot identify Taylor's injury with regard to the small UAS rule. Taylor filed a reply arguing that his injury is that, in the future, FAA may interpret section 336 in a way that he finds unfavorable.

The administrative record has been submitted but the briefing schedule is not yet available.

John Taylor Files Additional Challenges to FAA Interim Final Rule and Advisory Circular

John A. Taylor, a model airplane operator, and the same petitioner identified in the small UAS rule litigation, has filed three cases against the FAA in the U.S. Court of Appeals for the District of Columbia Circuit. Taylor v. FAA (D.C. Cir. Case Nos. 15-1495, 16-1008, 16-1011). In these cases Taylor challenges: (1) an Interim Final Rule (IFR) establishing a web-based registration process by which small unmanned aircraft owners can satisfy the aircraft registration requirements; (2) a Clarification and Request for Information related to UAS registration; and (3) Advisory Circular (AC) 91-57A, which provides guidance to persons operating model aircraft and refers to FAA restrictions on aircraft operating within the Washington, D.C., Flight Restricted Zone, and Special Flight Rules Area.

The IFR and Clarification and Request for Information challenges present similar issues and were briefed together by the government. The petitioner argued that the IFR is outside of FAA's authority, claiming

the following: (1) "model aircraft" are not "aircraft" subject to FAA's regulatory authority because Congress created a class of unmanned aircraft called "model aircraft" that are not aircraft; (2) the IFR is not consistent with section 336 of the FAA Modernization and Reform Act of 2012 although Congress also requires, by statute, for all aircraft to be registered and registration is not a new requirement; (3) the IFR is arbitrary and capricious; and (4) FAA's decision to proceed through an interim final rule rather than through notice-and-comment rulemaking was not justified by good cause notwithstanding the agency's argument that an unprecedented number of unmanned aircraft were purchased over the 2015 holiday season and into 2016. The government disputed each of these points.

Regarding the challenge to AC 91-57A, the petitioner acknowledged that his challenge is untimely, but nonetheless argued that the circular was a legislative rule that required notice-and-comment rulemaking under the APA. The government argued that even if the court were to reach the merits of this issue, the AC merely reiterates, rather than establishes, FAA's restrictions on model aircraft operations in the Washington, D.C., Special Flight Rules Area. Therefore, the AC did not require notice-and-comment rulemaking.

All briefs have been submitted. Oral argument has not yet been scheduled.

Flyers Rights Education Fund Seeks Review of FAA's Denial of Petition for Rulemaking

On March 29, 2016, Flyers Rights Education Fund, Inc., and Paul Hudson filed a petition for review in the U.S. Court of Appeals for the District of Columbia Circuit, challenging

FAA's denial of FlyersRights.org's petition for rulemaking. Flyers Rights Education Fund, Inc. v. FAA (D.C. Cir. Case No. 16-1101).

On August 26, 2015, FlyersRights.org, a non-profit airline consumer organization, filed a petition for rulemaking requesting that FAA regulate minimum seat width and seat pitch for commercial airlines and create an advisory committee to advise FAA on seat and passenger space rules and standards. FlyersRights.org highlighted the health and safety implications of reduced seat space, including the potential to develop deep vein thrombosis and delays in evacuations during an emergency. On February 1, 2016, FAA denied the petition, noting that the issues identified in the petition relate to passenger health and comfort and do not raise an immediate safety or security concern.

On review in the D.C. Circuit, the petitioners' initial brief, filed on August 16, 2016, argued that "the airlines' radical shrinkage of seat sizes and pitch" was a fundamental change that raised immediate safety concerns about evacuation, and that FAA erred by not addressing those concerns. Further, the petitioners argued that FAA mistakenly asserted that issues of passenger health and comfort fall outside FAA's regulatory jurisdiction. The government's reply brief, filed on September 30, 2016, argued that the decision to initiate a rulemaking is largely left to the agency's discretion and in this case, the agency reasonably declined to pursue the rulemaking sought by the petitioner. The government then reiterated the bases for the original rulemaking petition denial: evacuation demonstrations at seat pitches currently employed by airlines demonstrated that seat pitch and width does not adversely affect evacuation times,

contrary to petitioners' asserted safety concerns; and FAA is not required by law to consider passenger comfort and health. Petitioners' reply brief is due October 31, 2016.

Challenge to Maintenance Annex Guidance under the EU/US Bilateral Agreement

Aviation Suppliers Association, Inc., an association representing the aircraft parts distribution industry, filed a petition for review in the U.S. Court of Appeals for the District of Columbia Circuit challenging a provision in the Maintenance Annex Guidance (MAG), a document jointly issued by FAA and the European Aviation Safety Agency (EASA). Aviation Suppliers Association, Inc. v. FAA (D.C. Cir. Case No. 16-1202).

A routine update to the MAG provided that, to comply with EASA regulatory requirements, a repair station in the United States must use FAA Form 8130-3 to ensure the airworthiness of a part used to repair a European Union-registered aircraft. Previously, the guidance said that repair stations "should" use the same form. The petitioner argued that this language change violated the Paperwork Reduction Act, the APA, and the Due Process Clause.

The court denied the petitioner's request for summary reversal and set a briefing schedule. The petitioner filed its opening brief on October 25, 2016.

Petition for Review of Airworthiness Directive

On May 20, 2016, Cargo Airline Association (CAA) filed a petition for review in the U.S. Court of Appeals for the

District of Columbia Circuit, challenging Airworthiness Directive (AD) 2016-07-07. Cargo Airline Association v. FAA (D.C. Cir. No. 16-1148). The AD, issued March 21, 2016, applies to The Boeing Company Model 757 aircraft and was prompted by fuel system reviews conducted by the manufacturer. The AD requires modifications to the fuel quantity indication system (FQIS) wiring to prevent development of an ignition source inside the center fuel tank. FAA issued this AD to prevent ignition sources inside the center fuel tank which, in combination with flammable fuel vapors, could result in a fuel tank explosion and consequent loss of the airplane. All aircraft equipped with a flammability reduction means (FRM) are excluded from undergoing the FQIS wiring modification.

This AD was preceded by a notice of proposed rulemaking published March 1, 2012, and a supplemental notice of proposed rulemaking (SNPRM) published February 23, 2015, which included alternative actions for cargo aircraft and extended the compliance time.

The petitioner argues that FAA's finding of an unsafe condition in support of the AD was contrary to FAA guidance and policy, arbitrary and capricious, and unsupported by substantial evidence in the record. Further, the petitioner alleges FAA failed to sufficiently consider the operational aspects of all-cargo operations and perform a full cost-benefit analysis in support of the AD.

The petitioner filed its opening brief on October 20, 2016. The government's reply brief is due November 21, 2016. Oral argument has not yet been scheduled.

Friends of East Hampton Airport Suit Against FAA Stayed

On March 11, 2016, the Eastern District of New York District Court stayed a declaratory judgment action filed by the Friends of East Hampton Airport (FOEHA) against FAA. Friends of East Hampton Airport v. FAA (E.D.N.Y. No. 15-cv-441).

FOEHA sought a declaratory judgment that FAA must enforce certain airport grant assurances and provisions of the Airport Noise and Capacity Act against the East Hampton, New York Airport, because of the Town of East Hampton's efforts to limit access to the airport. There is a long history of animus toward the airport by year-round residents of the area. In 2005, FAA settled a lawsuit challenging an Airport Layout Plan approval for East Hampton Airport. In the settlement, FAA agreed not to enforce certain grant assurances, specifically the assurance that the airport must be open to the public on reasonable terms without unjust discrimination past December 31, 2014. The airport has stopped taking grants from FAA and the remainder of the assurances will expire in 2017.

In addition to the suit against FAA, FOEHA has also sued the Town of East Hampton challenging the access restrictions enacted in the spring of 2015. As part of that suit, FOEHA sought a temporary restraining order (TRO) prohibiting the town from enforcing its access restrictions. The district court enjoined only one of the four restrictions. FOEHA v. East Hampton, 152 F. Supp. 3d 90 (E.D.N.Y. 2016). Both parties appealed that decision to the U.S. Court of Appeals for the Second Circuit. No. 15-2334. FAA did not participate in that appeal, and the Second Circuit's decision is pending.

The case against FAA has been stayed until the Second Circuit rules in the FOEHA v. East Hampton case because the Second Circuit's opinion in that case could resolve the issues in the FOEHA v. FAA case.

City of Pensacola Files Declaratory Judgment Action

On May 10, 2016, the City of Pensacola, Florida (City), the owner and operator of the Pensacola International Airport, filed a Declaratory Judgment action in the United States District Court for the Northern District of Florida against the Emerald Coast Utilities Authority (ECUA) and the FAA seeking, in essence, to quiet title to two potable water wells located on airport property. City of Pensacola v. Emerald Coast Utilities Authority (N.D. Fla. No. 16-cv-203). FAA was named as a necessary party defendant in the action.

The City alleges that a transfer agreement executed in 1981 between the City and ECUA for the entirety of the City's water infrastructure did not include the airport wells and that the City could not have transferred the wells without FAA approval. FAA filed a Motion to Dismiss on August 29, 2016, arguing lack of subject matter jurisdiction and failure to state a claim. The court held a hearing on the motion to dismiss on September 8, 2016, took the matter under advisement, and granted a 30-day stay to afford the parties an opportunity to engage in settlement discussions. A settlement conference was held on October 5, 2016.

Federal Highway Administration

FHWA Wins in D.C. Circuit Appeal of Guidance on Digital Billboards

On September 6, 2016, the U.S. Court of Appeals for the D.C. Circuit rejected an appeal by Scenic America challenging Federal Highway Administration's (FHWA) 2007 guidance memorandum advising that digital billboards were permitted under the Highway Beautification Act (HBA) and implementing state agreements. Scenic America v. DOT, 2016 WL 4608153 (D.C. Cir. Sept. 6, 2016).

Scenic America filed suit in the U.S. District Court for the District of Columbia on January 23, 2013, contending that the 2007 guidance was de facto rulemaking and that FHWA did not follow the required rulemaking process pursuant to the APA. In addition, the plaintiff argued that the FHWA violated the HBA and its HBA regulations.

The district court granted summary judgment to the government on June 20, 2014, ruling that the 2007 guidance memorandum did not require notice-and-comment rulemaking because it was an interpretive rule rather than a substantive rule, and because it did not reverse FHWA's prior position on the matter. In addition, the court ruled that the memorandum was consistent with the HBA and its implementing regulations and state agreements.

On appeal, the D.C. Circuit characterized the issues as follows: (1) whether the guidance was a legislative, not interpretive rule that required notice-and-comment rulemaking under the APA; and 2) whether

the guidance created a new standard “not consistent with customary use” as required by the HBA. The government argued in favor of affirming the district court’s ruling on both questions and additionally renewed its argument that Scenic America lacked standing, an argument the district court previously denied.

Regarding the first claim, the circuit court ruled that Scenic America lacked standing. The redressability prong of Article III standing was absent because, even if the court vacated the 2007 guidance, Scenic America did not show that the construction of digital billboards would be eliminated or even lessened. The states could still pursue construction of such billboards and FHWA Divisions could permit such construction.

The circuit court held that Scenic America had standing to bring its second claim because the purported harm could be redressed. If the court determined that the 2007 guidance ran afoul of the customary use provision of the HBA, it could repudiate FHWA’s interpretation and provide relief to Scenic America. The court, however, held that FHWA’s interpretation of the lighting terms in the state agreements was reasonable and not contrary to customary use.

Multiple Rulings Resolve Detroit Bridge Litigation in District Court

Following rulings on several motions, all issues before the U.S. District Court for the District of Columbia in Detroit International Bridge Company (DIBC) v. Government of Canada, 2016 WL 3460307 (D.D.C. June 21, 2016) involving U.S. government defendants have been resolved.

The plaintiffs alleged nine counts in their complaint against defendants, which include the State Department, FHWA, the

Government of Canada, the Windsor-Detroit Bridge Authority, and the Coast Guard. The complaint centered on DIBC’s concern that a proposed new publicly owned bridge between Detroit and Windsor, the New International Transit Crossing (NITC), would destroy the economic viability of DIBC’s planned construction of its bridge, the New Span, adjacent to the DIBC-owned Ambassador Bridge, which is located two miles from the proposed NITC site.

Among DIBC’s objections to the construction of the NITC were claims that it would constitute a Taking of DIBC’s private property rights without payment of just compensation in violation of the Fifth Amendment, that the State Department violated the APA by granting the project’s Presidential Permit and approving the Crossing Agreement between Canada and the State of Michigan, and that defendants violated the Equal Protection Clause by using the regulatory approvals process to discriminate against DIBC in favor of the NITC project. Over the last several months, the court has issued several rulings that have resolved all outstanding issues in the government’s favor.

Count 4 of the complaint alleged that the Coast Guard had impermissibly rejected DIBC’s application for a navigation permit for the new DIBC bridge. This claim was dismissed in 2014 and was appealed to the U.S. Court of Appeals for the District of Columbia Circuit on March 27, 2015. On March 15, 2016, the Coast Guard issued the permit in dispute. On April 4, 2016, the D.C. Circuit remanded the case to the district court with orders to dismiss count 4 as moot, and the district court dismissed the count on April 7, 2016.

On February 12, 2016, the plaintiffs moved for reconsideration of the district court’s September 30, 2015, order dismissing all but

count 7 of the complaint. The court denied the motion for reconsideration on May 26, 2016, ruling that the plaintiffs had not met the standard for reconsideration under Rule 54(b).

The parties filed cross-motions for summary judgment on the remaining count 7, which were fully briefed by May 5, 2016. On June 21, 2016, the court granted the government's motion and denied the plaintiffs' motion. The sole issue before the court was whether the State Department acted arbitrarily, capriciously, or contrary to law, in violation of the APA, when it approved the Crossing Agreement for the NITC, which was executed by the Government of Canada, Governor of Michigan, Michigan DOT, and Michigan Strategic Fund. The plaintiffs alleged that the Crossing Agreement was unlawful under Michigan law and, therefore, the State Department lacked authority, or alternatively acted arbitrarily, when relying on Michigan's view that the Crossing Agreement was legally executed.

In its opinion, the court first found that the State of Michigan was an indispensable party that could not be joined due to Eleventh Amendment sovereign immunity. This provided sufficient grounds to dismiss count 7. However, in light of the lengthy litigation history, the court proceeded to address the merits arguments to avoid the need for future remand. The court then determined that the State Department was not required to determine the validity of the Crossing Agreement under either the Constitution or the International Bridge Act of 1972, and that the State Department acted reasonably in relying on the views of the Michigan Attorney General verifying the validity of the Crossing Agreement. For these reasons, the court held that the plaintiffs' APA claims failed as a matter of

law and granted summary judgment in favor of the defendants.

Following this ruling, on June 24, 2016, the plaintiffs filed a motion for leave to file a fourth amended complaint, which the court denied on July 11, 2016. The court ruled that the amended complaint, which would be filed more than three years after the third amended complaint, would raise a Separation of Powers argument that the court had already identified as futile in a prior opinion, and a fourth amended complaint would prejudice the defendants.

Finally, on August 24, 2016, over plaintiffs' objections, the court ordered an entry of final judgment on all but counts 2 and 3 (which are only against Canadian defendants and have been stayed pending resolution of similar claims in Canadian court).

On September 22, 2016, the plaintiffs filed a notice of appeal to the D.C. Circuit from the entry of judgment. Detroit International Bridge Company v. Government of Canada (D.C. Cir. No. 16-5270). A briefing schedule has not yet been set.

Sixth Circuit Affirms District Court's Grant of Summary Judgment in Tennessee Litigation

On May 24, 2016, the U.S. Court of Appeals for the Sixth Circuit affirmed the district court's judgment dismissing claims against numerous federal and state entities and officials, including FHWA, regarding several related Department of Energy American Recovery and Reinvestment Act projects. Bullwinkel v. DOE (6th Cir. No. 14-6200).

Plaintiff Gary Bullwinkel filed a pro se complaint in the U.S. District Court for the

Western District of Tennessee on April 8, 2011, challenging the approval and construction of a solar farm and adjoining facilities. FHWA issued a Categorical Exclusion (CE) for a welcome center, parking area, and interstate access off of I-40 in Haywood County between Jackson and Memphis, TN for the solar farm, which Bullwinkel challenged as contrary to NEPA regulations and arbitrary, capricious, and an abuse of discretion under the APA. On August 6, 2014, the District Court granted FHWA's summary judgment motion, holding that FHWA did not violate NEPA or the APA in issuing the CE at issue.

On appeal, Bullwinkel argued that the District Court erred in granting summary judgment in favor of FHWA because FHWA acted arbitrarily and capriciously in determining that the Welcome Center qualified for a CE from formal NEPA review. The Sixth Circuit disagreed and found that summary judgment was properly granted to FHWA because FHWA reasonably determined that the Welcome Center qualified as a rest area under 23 C.F.R. § 771.117(d)(5) and that it would not have a significant impact on the environment. The opinion also affirmed the district court's dismissal of claims against the other defendants on various grounds.

Fourth Circuit Affirms Favorable Decision for North Carolina's Monroe Connector/Bypass Project

On June 9, 2016, the U.S. Court of Appeals for the Fourth Circuit issued an unpublished, *per curiam* opinion affirming a grant of summary judgment in favor of the FHWA and North Carolina Department of Transportation (NCDOT) in a challenge to the Monroe Connector/Bypass in Charlotte, North Carolina. Clean Air Carolina v.

NCDOT, 651 F. App'x 225 (4th Cir. 2016).

Clean Air Carolina, the North Carolina Wildlife Federation, and Yadkin Riverkeeper (the conservation groups) filed suit in 2010 in the Eastern District of North Carolina, challenging the NEPA process supporting the Monroe Connector/Bypass, a proposed 20-mile four-lane toll road project east of Charlotte. After the district court granted summary judgment to the agencies on May 3, 2012, the Fourth Circuit reversed and remanded, concluding that the project's inclusion in travel time to employment, one factor used in developing the no-build model, tainted the no-build model. This invalidated the baseline for alternatives analysis and rendered the NEPA analysis arbitrary and capricious.

In response, FHWA rescinded the Record of Decision (ROD) for the project and developed a Supplemental Environmental Impact Statement (SEIS) to revisit the no-build model, to clarify the underlying assumptions regarding the data used in the modeling for the Indirect and Cumulative Effects analysis, and to determine the reasonableness of relying upon a single set of socioeconomic data – that is, population and employment projections – for the traffic forecasting used to evaluate alternatives.

After the ROD was reissued, the conservation groups again filed suit, arguing that FHWA and NCDOT had violated NEPA and the APA in four ways: (1) the alternatives analysis was arbitrary and capricious; (2) the environmental impact analysis was arbitrary and capricious; (3) the agencies undermined NEPA by fostering a climate of misinformation; and (4) the agencies should not have issued a combined final SEIS and Record of Decision (ROD). The district court again granted summary judgment to the agencies on September 10,

2015, ruling that the agencies had met all of the requirements of NEPA and the APA.

The Fourth Circuit rejected each of the conservation groups' arguments and affirmed "the reasoning of the thorough district court opinion" on each point. Specifically, the court noted that the agencies' new no-build analysis properly excluded the existence of the project and then compared the corrected no-build model to an updated build model based on current data. The court also found that the agencies properly acknowledged updated socioeconomic projections showing slower regional population growth, which were released after the draft SEIS had been published, and reasonably concluded that because the new data suggested projected growth would reach the same ultimate level though over a longer period of time, it did not rise to the level of significant new information which would have warranted publication of a separate SEIS and ROD. The opinion may be the first appellate court decision upholding the Department's challenged use of a combined final environmental impact statement (FEIS) and ROD.

Favorable Decision in South Mountain Litigation in Arizona Appealed to the Ninth Circuit

The plaintiffs appealed a grant of summary judgment in favor of FHWA and Arizona Department of Transportation (ADOT) in a lawsuit challenging the approval of the South Mountain Freeway, a 22-mile, 8-lane new construction in southwestern Phoenix, Arizona. Gila River Indian Community v. FHWA (9th Cir. No 16-16605).

The South Mountain Freeway would complete "Loop 202" from I-10 Maricopa

Freeway to I-10 Papago Freeway. The project has been in the Maricopa Association of Governments' Regional Transportation Plan since the 1980s, but was stalled for various political and funding reasons over the years. In March 2015, FHWA signed the Record of Decision (ROD) selecting the Preferred Alternative.

In June 2015, plaintiffs Protecting Arizona's Resources and Children (PARC) and Gila River Indian Community (GRIC) filed separate lawsuits in federal district court, which were eventually consolidated. The plaintiffs alleged that the defendants failed to comply with NEPA and Section 4(f), that the agencies failed to consider feasible and prudent alternatives to avoid the South Mountain Park Preserve (SMPP), a Section 4(f) property, and that they failed to conduct all possible planning to minimize harm. GRIC also raised a unique argument with regard to three wells held in trust by the Bureau of Indian Affairs, claiming that FHWA and ADOT must avoid the wells and that current schematics demonstrate the agencies cannot avoid them.

On August 19, 2016, the federal district court found in favor of the defendants on all counts. The court held the plaintiffs had "not established that the Agencies' analysis and approval of the Freeway Project violated NEPA or Section 4(f)." Regarding purpose and need, the court found the agencies' discussion of purpose and need in the FEIS was reasonable and did not create a preordained outcome, and the agencies' reliance of the metropolitan planning organization's Regional Transportation Plan to develop the purpose and need of the project was proper and, in fact, required by federal law, adding strength to FHWA's concept of linking planning and NEPA. Similarly, the court held the alternatives screening process and analysis demonstrated

“extensive work was performed to develop reasonable alternatives, thoroughly screen the alternatives, and more fully study those that survived the screening process.”

In an area that FHWA has litigated frequently in recent cases – what growth assumptions comprise the “no-build” alternative – the plaintiffs had claimed that, by assuming the same employment and population growth would occur in the Study Area with or without the project, the agencies’ comparison of the no-build alternative with the preferred alternative was flawed. The court, however, found the federal defendants’ reliance on the U.S. Court of Appeals for the Ninth Circuit precedent, Laguna Greenbelt, Inc. v. U.S. Dept. of Transportation, 42 F.3d 517 (9th Cir. 1994) to be persuasive. “As in Laguna Greenbelt, the need for the Freeway Project . . . is to alleviate existing congestion in addition to future congestion resulting from projected growth.” The court also noted that the administrative record demonstrated that growth in the Study Area is expected to continue with or without the project and that, since the Study Area is already highly developed, it is not dependent on the project to induce growth. Accordingly, this is a fact-based application of induced growth under Ninth Circuit precedent. Other circuits, such as the U.S. Court of Appeals for the Fourth Circuit, have ruled differently under similar fact patterns.

The federal district court also found in favor of the defendants regarding analysis of impacts to GRIC, noting that the agencies did in fact consider and discuss impacts to the community with respect to social conditions, environmental justice, displacement and relocation, air quality, and noise among several other impacts. Similarly, the court found the agencies’ analyses of impacts on children’s health,

mobile source air toxics (MSATs), truck traffic, and hazardous materials transportation sufficient. The court deferred to the agencies’ expertise that a 15 percent level of design was adequate to address mitigation in NEPA, and also found that the agencies’ substantial discussion of mitigation measures, including wildlife connectivity, was not a “mere listing” as the plaintiffs contended. The court found the defendants’ NEPA analysis and determination of conformity with the National Ambient Air Quality Standards under the Clean Air Act were enough to satisfy Executive Order 13045 on Children’s Health and Safety, while noting that the Executive Order did not in and of itself create a legal right of action.

The court also granted summary judgment for the defendants on the Section 4(f) claims. The court found no error in the agencies’ rejection of the No-Action alternative based on its failure to meet purpose and need. Finally, with respect to the GRIC wells, the court found no NEPA violation, noting that the agencies did consider the impact to the GRIC wells in compliance with NEPA, and ADOT has a contractual obligation to avoid the wells during construction. The court also noted the mechanism of re-evaluations and supplemental environmental impact statements established in 23 C.F.R. §§ 771.129 and 771.130, if avoidance of the wells would result in significant environmental impacts not previously evaluated.

Both PARC and GRIC have appealed to the Ninth Circuit. Simultaneously, the plaintiffs also filed a motion for injunction pending appeal in the U.S. District Court of Arizona. ADOT and FHWA filed oppositions to the motions for an injunction on September 19 and 20, 2016, respectively, arguing that the

balance of equities and public interest favor allowing the project to proceed as scheduled and that the plaintiffs failed to demonstrate a likelihood of success on the merits. The federal district court has yet to rule on the injunction. FHWA and ADOT are currently preparing to proceed with litigation in the Ninth Circuit.

Appeal Continues in Crosstown Parkway Litigation

Briefing has been completed in the U.S. Court of Appeals for the Eleventh Circuit in an appeal challenging the record of decision (ROD) issued by FHWA for the Crosstown Parkway Extension. Conservation Alliance of St. Lucie County, Inc. v. U.S Department of Transportation (11th Cir. No. 15-15791).

The Crosstown Parkway Extension project involves the use of two Section 4(f) Resources, the Savannas Preserve and the Aquatic Preserve, including approximately 15 acres of public park and conservation land, approximately 11 acres of wetlands and 3.95 acres of upland forested habitat, and would require relocation of the Halpatiokee Canoe and Nature Trail, the only public access point to the Aquatic Preserve from the Savannas Preserve in the project area. The project area also includes three types of essential fish habitat, and includes an area listed by the Florida Fish and Wildlife Commission as a "Biodiversity Hotspot" that contains "Priority Wetlands." The FEIS for the project was completed on November 14, 2013, and the ROD was issued on February 24, 2014.

On May 12, 2014, Conservation Alliance of St. Lucie County, Inc. and the Treasure Coast Environmental Defense Fund, Inc. (Indian Riverkeeper), filed a complaint seeking Declaratory and Injunctive Relief in the U.S. District Court of the Southern

District of Florida. The plaintiffs argued that the ROD did not make the necessary showing that no feasible and prudent alternatives were available to the use of Section 4(f) resources. On November 5, 2015, the district court granted summary judgment in favor of the federal defendants, ruling that the ROD complied with all necessary Section 4(f) requirements.

On appeal, the plaintiffs renewed their argument that FHWA did not meet the standard necessary to approve the use of Section 4(f) resources. The government's response made three arguments. First, FHWA properly determined that the plaintiffs' preferred alternative was not prudent. Second, FHWA's selected alternative was not arbitrary or capricious. Third, the FHWA's conclusion that the selected alternative would cause the least overall harm was in compliance with Section 4(f) and was not arbitrary or capricious. The City of Port St. Lucie filed an amicus brief in support of the Department and FHWA.

The Eleventh Circuit determined that oral argument will be necessary but has not yet set an argument date.

Lawsuit Continues in Alabama on Central Business District Project

The parties have completed summary judgment briefing in a case challenging a project to rehabilitate the central business district (CBD) bridges on Interstate 59/20 in downtown Birmingham, Alabama. Austin v. Alabama Department of Transportation (N.D. Ala. No. 15-cv-1777).

Alabama Department of Transportation (ALDOT) initially investigated in-kind replacement of the existing bridge superstructures, but after further study and

discussions with the City of Birmingham and Jefferson County Commission, ALDOT decided to include a structure with additional capacity, interchange improvements to eliminate weaving sections and ramps along I-59/20 between I-65 and Red Mountain Expressway. The expanded project also provided improved access to and from downtown Birmingham using a combination of newly located ramps and existing ramps. ALDOT prepared an Environmental Assessment for the project. FHWA's Alabama Division issued a Finding of No Significant Impacts (FONSI) on June 25, 2015.

On October 13, 2015, a group of individual plaintiffs filed suit in district court, seeking declaratory and injunctive relief halting construction of the I-59/I-20 Corridor Improvements, in downtown Birmingham, Alabama. The plaintiffs asserted two NEPA based claims: 1) Improper Approval of the Environmental Assessment (EA) and the FONSI; and 2) Failure to Perform an Environmental Impact Statement (EIS). Essentially, the plaintiffs claim that the EA failed to take a hard look at the project's impacts and that the project's scope and impacts dictate that an EIS should have been required.

FHWA and ALDOT each filed motions for summary judgment on June 17, 2016, defending the sufficiency of the NEPA and EIS process. The plaintiffs filed their reply on August 19, 2016, and the parties await the court's ruling.

Contract-based Complaint against FHWA Dismissed

On June 8, 2016, the U.S. District Court for the District of Montana dismissed a contract complaint against the FHWA for lack of jurisdiction. Kovash v. U.S. Department of

Transportation, 2016 WL 3212487 (D. Mont. June 8, 2016). Plaintiffs Myron and Beverly Kovash, individually and as owners of Yellowstone Gifts and Sweets, filed a complaint in Montana state court against the Department and Riverside Contracting, Inc. (Riverside). The plaintiffs alleged that FHWA failed to properly oversee construction on a road repair project in Gardiner, Montana, breaching a duty to the plaintiffs as third-party beneficiaries to the government contract. The case was removed to federal court on February 16, 2016. The court then dismissed the complaint against the Department without prejudice because the Court of Federal Claims was the proper forum for the plaintiffs' claims. With the dismissal of the federal defendant, the case was remanded to state court for further proceedings.

Pro Se Plaintiff Files Lawsuit Against Kentucky Project

On April 29, 2016, Peppy Martin, a pro se plaintiff, filed an action in the Circuit Court of Hart County, Kentucky alleging various issues connected to the I-65 widening project. Named defendants were the Department, the Kentucky Transportation Cabinet (KYTC) and the Hart Circuit Court. On July 22, 2016, the case was removed to federal court. Martin v. U.S. Department of Transportation (W.D. Ky. No. 16-cv-124).

The complaint alleges a broad range of issues including allegations that the speed limit on nearby roads should be lower, that the road location prevents her from opening a hotel or restaurants, and that there are federal grants for actions Martin thinks should be undertaken such as removal of 14 phone poles east of the I-65 interchange. Plaintiff seeks an award of \$100 million in damages from the defendants.

The Department has alerted the court that no proper service of the complaint has been made. On August 15, 2016, plaintiff filed a motion to remand the case back to Hart County Circuit Court alleging, among other things, that there is no federal issue in the case. Plaintiff also filed a motion for summary judgment. The Department has argued in response that due to improper service, the Court has no current jurisdiction over the case and, therefore, the plaintiffs' motion should be denied. KYTC has also entered an appearance in federal court and has opposed the plaintiffs' motion for summary judgment.

Lawsuit Filed in Arkansas Seeking to Prevent Bridge Demolition

On June 17, 2016, the City of Clarendon, Arkansas, and Friends of the Historic White River Bridge at Clarendon filed a civil action against FHWA, in addition to Arkansas state agencies, seeking preliminary and permanent injunctive relief prohibiting the demolition and removal of the U.S. Highway 79 Bridge over the White River in Clarendon, Arkansas. They also requested the immediate issuance of a temporary restraining order (TRO). Clarendon v. FHWA (E.D. Ark. No. 16-cv-92).

The removal of the current bridge is a part of a larger overall project to upgrade U.S. Highway 79 in the Clarendon area. The FHWA completed an Environmental Assessment in 2000, completed a re-evaluation and section 4(f) document in 2005 and then issued a FONSI on December 20, 2006. The western side to the bridge roadway is in the White River National Wildlife Refuge. The U.S. Fish and Wildlife Service (FWS), as part of its agreement with Arkansas State Highway and Transportation Department (AHTD) to permit the new roadway and bridge, is requiring that the

current roadway and bridge be removed by no later than November 2017. The demolition project letting was initially set by AHTD for late June 2016.

The plaintiffs' complaint alleges that FHWA has failed to comply with NEPA, because the agency has not updated the project studies with the necessary evaluations of the impacts and effects of the project that are necessitated by "new circumstances and information." Specifically, in September 2013, the plaintiffs note FWS published a final rule listing the Rabbitsfoot mussel as a threatened species. In April 2015, the FWS published a final rule designating critical habitat for the Rabbitsfoot mussel, including an area near this project.

Upon filing the complaint, the plaintiffs sought an immediate temporary restraining order (TRO) hearing. The hearing was conducted by the court via telephone on June 20, 2016. After argument, the court denied the TRO, noting that the planned contract letting did not rise to the level of irreparable harm. The court granted the plaintiffs 30 days to revise their request for a TRO. The plaintiffs indicated they would review and revise their complaint and injunction request.

Following the TRO ruling, on June 28, 2016, the plaintiffs sent FHWA and AHTD a notice-of-intent (NOI) letter under the Endangered Species Act (ESA). The letter stated that unless consultation under the ESA with FWS was undertaken, an additional claim would be filed. FHWA has been consulting with FWS and a response to the plaintiffs' NOI letter was prepared detailing FHWA's ongoing consultation process with FWS. AHTD is working on a re-evaluation with FHWA.

FHWA filed its answer on September 12, 2016. The court also permitted the plaintiffs additional time to file an amended complaint.

Motion for Preliminary Injunction Denied in Lawsuit in Wisconsin

On August 19, 2015, the plaintiffs Highway J Citizens Group, Waukesha County Environmental Action League, and Jeffrey M. Gonyo filed a complaint and a motion for preliminary injunction challenging FHWA's approval of a d-list Categorical Exclusion for the Wisconsin Highway 164 rehabilitation project. Highway J. Citizens Group, U.A., v. U.S. Department of Transportation, 2016 WL 5390880 (E.D. Wis. Sept. 27, 2016).

The project will reconstruct approximately 7.5 miles of the rural two-lane arterial road and improve safety by widening existing lanes, adding auxiliary and turn lanes in certain areas, adjusting vertical grade, imposing clear zones (e.g., tree removal) to improve sight distances, and adding bicycle accommodations along the roadway shoulder. The plaintiffs primarily claim that the project will diminish the aesthetic beauty of the Kettle Moraine, damage the natural environment of the area (including wetlands vital to the habitat of plant and animal species), reduce air quality, and impinge on the plaintiffs' recreational enjoyment of the area. Therefore, the plaintiffs argue that an EA or EIS should have been prepared.

In 2009, litigation among the same parties resulted in vacatur of a 2002 ROD approving a four-lane expansion of WIS 164 in the same general location. After the decision, the state canceled that project and eventually restarted the environmental review process, resulting in a final d-list Categorical Exclusion approval on April 10,

2015. The primary difference between the two projects is that the current one will not add capacity to the roadway. The plaintiffs, however, claim that the new project will cause impacts similar to the previously abandoned project.

On September 27, 2016, the court issued a decision denying the plaintiffs' motion for preliminary injunction. The court first found that some of the plaintiffs' allegations of harm concerned economic losses, many of which related to the plaintiffs' possession, use, and enjoyment of their real property—these losses could be compensated by money damages. The court further noted that NEPA is not intended to protect against economic losses. Upon addressing the plaintiffs' allegations of environmental harm, the court found that the harm must threaten to occur before a final decision on the merits. In finding that there was no risk of irreparable injury, the court relied upon the defendants' representations in prior filings that construction would not commence for at least another one to two years. The parties have already briefed motions for summary judgment. Therefore, the court was confident that a final decision on the merits would occur prior to the start of construction. Because the plaintiffs did not demonstrate irreparable harm, the court declined to address whether the plaintiffs' claims had a reasonable likelihood of success on the merits.

Lawsuit Filed Over Order of Taking in Massachusetts

On January 10, 2014, Jean and Marsby Warters, pro se plaintiffs, filed a civil action in Massachusetts Superior Court, against the Massachusetts Department of Transportation (MassDOT), alleging that the Order of Taking issued by MassDOT for a temporary easement of the Warters' property for a

project, was inadequate. After unsuccessful attempts at settlement with MassDOT, the court granted the plaintiffs leave to amend their original complaint. On August 25, 2016, the plaintiffs filed an Amended Complaint, adding the Department and FHWA as defendants. The case was removed to federal court on September 16, 2016. Warters v. DOT (D. Mass. 16-cv-11892).

MassDOT initiated a federal-aid construction and alteration project along State Highway Route 6, which included a stretch of roadway in front of 46 Huttleston Ave. in Fairhaven, on the plaintiffs' property. MassDOT notified the plaintiffs that they intended to take a temporary easement and provided the plaintiffs with an appraisal and issued an Order of Taking. The plaintiffs did not agree with the appraisal amount.

In their complaint, the plaintiffs allege that MassDOT and FHWA (since the project is a federal-aid project) violated 49 C.F.R. § 24.102, 23 C.F.R. § 710.203, and the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 (URA), by failing to adequately assess damages when determining the amount to be paid for a temporary easement on their property. The plaintiffs request (1) an award of damages in the amount of \$9,057.00; (2) interest on those damages; (3) professional fees (appraiser, surveyor, attorney fees, etc.); and (4) other costs (any compensable expenses born by the plaintiffs to bring this lawsuit, such as, but not limited to, court fees, postage, etc.).

The plaintiffs filed a motion to remand on October 17, 2016, arguing that the removal was untimely. The defendants are preparing to file a response and a Motion to Dismiss.

Federal Motor Carrier Safety Administration

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

On May 12, 2016, in Chhetri v. United States, 823 F.3d 577 (11th Cir. 2016), the U.S. Court of Appeals for the Eleventh Circuit issued a decision affirming the district court's holding that the discretionary function exception to the Federal Tort Claims Act (FTCA) precluded claims based on the Federal Motor Carrier Safety Administration's (FMCSA) grant of a ten-day extension of the effective date of a passenger carrier's final "unsatisfactory" safety rating under 49 C.F.R. § 385.17(f) and claims based on the agency's adoption of regulations that allowed for the ten-day extension. On August 10, 2016, the appellants filed a petition for a writ of certiorari to the U.S. Supreme Court.

On February 25, 2016, the U.S. Court of Appeals for the Fourth Circuit in Pornomo v. United States, 814 F.3d 681 (4th Cir. 2016), affirmed a district court decision dismissing a similar case based on the discretionary function exception to the FTCA. The appellant in that case did not file a petition for a writ of certiorari.

Both claims arise from the May 31, 2011, Sky Express crash. The complaints alleged that the Department and FMCSA were negligent under the FTCA and sought \$36 million and \$3 million in damages, respectively. The appellants alleged that one or more FMCSA employees, acting within the course and scope of their employment, were negligent when they granted Sky Express a ten-day extension of

the effective date of an unsatisfactory safety rating in violation of regulatory requirements and beyond the scope of the agency's statutory authority. The crash occurred during the ten-day extension period.

Subsequently, in 2012, FMCSA rescinded this ten-day extension provision to make the regulations "consistent with the policy and the statutory language" of 49 U.S.C. § 31144(c)(2) and (4).

First Circuit Rejects Appeal of Dismissal of Class Action Seeking Privacy Act Damages

On October 21, 2016, the U.S. Court of Appeals for the First Circuit ruled in the government's favor in Flock v. DOT, 2016 WL 6135471 (1st Cir. Oct. 21, 2016), an appeal of the lower court's September 30, 2015, decision granting the government's motion to dismiss the Class Action Complaint for damages under the Privacy Act.

The district court held that FMCSA's release of driver safety violations under the Pre-employment Screening Program (PSP) did not violate the Privacy Act. The district court further ruled that the complaint alleged an adverse effect sufficient to meet the constitutional standing requirement but did not reach the issue of whether the alleged injury was sufficient to support standing under the Privacy Act.

The appellants presented several issues for review before the First Circuit. First, the appellants argued that the district court erred in ruling that FMCSA's interpretation of 49 U.S.C. § 31150 was entitled to Chevron deference because there was no ambiguity in the plain language of the statute and that

Congress' intent in limiting the categories of violations that could be released was clear from the statutory and regulatory background. And even if ambiguity could be found, Chevron deference was not appropriate because the agency reversed its pre-litigation interpretation of section 31150 and that interpretation conflicts with the agency's obligations under the Privacy Act. The appellants also asserted that the reduction in economic value of plaintiff-driver services caused by release of PSP reports disclosing violations that do not qualify as "serious driver-related violations" alleges economic or pecuniary harm sufficient to support actual damages under the Privacy Act, and that the \$10.00 fee that drivers must pay for receipt of their reports through the PSP also qualifies as actual damages under the Privacy Act.

The government's brief, filed on March 30, 2016, argued (1) that the plaintiffs did not sufficiently allege an injury-in-fact sufficient to support Article III standing under the Privacy Act; (2) the complaint failed to state a claim because disclosure of driver safety violations with driver consent does not violate the Privacy Act; and (3) FMCSA reasonably interpreted section 31150 as permitting disclosure of additional driver safety information with driver consent through PSP and under the Privacy Act, consistent with the agency's safety mission.

In its ruling, the court assumed without deciding that the appellants had adequately pled standing. The court then held that section 31150 was sufficiently ambiguous to allow Chevron deference, and that the agency's interpretation, allowing the disclosure of non-serious driver-related violations, comported with its statutory mandate to enhance motor carrier safety. Therefore, the agency's actions did not violate the APA. The court further ruled

that the driver consent form was not coercive or ambiguous.

Court Grants Summary Judgment to Defendants in Challenges to FMCSA's Pre-employment Screening Program

On September 20, 2016, The U.S. District Court for the District of Columbia granted the defendants' motion for summary judgment and dismissed the consolidated suit Owner Operator and Independent Driver Association (OOIDA) v. U.S. Department of Transportation, 2016 WL 5674626 (D.D.C. Sept. 30, 2016). The court held that the plaintiffs failed to demonstrate an injury-in-fact sufficient to support standing and that the court therefore lacked subject-matter jurisdiction.

The consolidated lawsuits, brought by OOIDA and five commercial drivers, challenged the agency's use of violation data recorded in the Motor Carrier Management Information System (MCMIS), a database containing information on commercial drivers' safety records including accident reports and other safety violations. The plaintiffs challenged FMCSA's failure to remove records of violations related to citations that had been dismissed by a judge or administrative tribunal and further alleged that FMCSA had improperly delegated to the states its responsibility to ensure that motor carrier safety data was "accurate, complete, and timely," in violation of the APA and Fair Credit Reporting Act. The government sought summary judgment on a standing argument before discovery commenced.

In its decision, the district court acknowledged the significant facts in the administrative record presented by the

government in support of the plaintiffs' lack of standing. Specifically, in June 2014, FMCSA announced changes to the MCMIS that would allow states and FMCSA to input favorable adjudications of violations. Dismissed and favorably-adjudicated violations would not be included in PSP reports, eliminating the possibility of any future injury to the plaintiffs. Further, records from the PSP contractor established that PSP reports were never requested or released to prospective employers for three of the five plaintiffs. The remaining two plaintiffs had PSP reports issued to employers with their consent, but failed to allege any adverse consequences or injury as a result of these reports.

Relying upon Hancock v. Urban Outfitters, Inc., 830 F.3d 511 (D.C. Cir. 2016), applying the Supreme Court's recent decision in Spokeo, Inc. v. Robins, 136 S. Ct. 1540 (2016), the district court held that a concrete injury did not exist where the plaintiffs have merely identified a statutory violation that resulted in no harm. Noting that only two plaintiffs could even establish that an employer had requested their PSP records during the relevant time period, the court found that neither these plaintiffs nor the others made any claim that the release of PSP reports resulted in an adverse effect on their employment or employment opportunities. The district court therefore granted the government's motion for summary judgment with respect to the standing argument and dismissed the cases for lack of subject matter jurisdiction.

Challenge to FMCSA's Electronic Logging Device Rule Awaiting Decision

On September 13, 2016, oral argument was held in OOIDA v. U.S. Department of

Transportation (7th Cir. 15-3756). In challenging the current rule, OOIDA raised multiple issues, including claims that the agency failed to comply with the MAP-21 mandate, the agency failed to ensure that Electronic Logging Devices (ELDs) are not used to harass drivers, the rule's cost benefit analysis was deficient, and the rule violates the Fourth Amendment. Subsequently, the U.S. Court of Appeals for the Seventh Circuit granted OOIDA's motion to file a supplemental brief and the government was granted an opportunity to file a response. No decision has been issued by the court as of the date of this publication.

The ELD rule requires motor carriers whose drivers must record their hours of service (HOS) to use ELDs, prescribes technical standards that ELDs must meet, addresses drivers' and carriers' obligations in connection with supporting documents, and provides technical and procedural provisions aimed at protecting drivers from harassment by motor carriers based on information available through an ELD or related technologies.

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

Eighth Circuit Dismisses Petition for Review of Guidance Concerning Attenuator Truck Crashes

On August 2, 2016, the U.S. Court of Appeals for the Eighth Circuit issued a decision dismissing the petition for review in OOIDA v. U.S. Department of Transportation 831 F.3d 961 (8th Cir. 2016). The Owner-Operator Independent Drivers Association, Inc. (OOIDA) and Kuehl Trucking, LLC, challenged FMCSA's "Regulatory Guidance Concerning Crashes Involving Vehicles Striking Attenuator Trucks Deployed at Construction Sites," 80 Fed. Reg. 15,913 (March 26, 2015). The guidance states that crashes involving motorists striking the rear of attenuator trucks are not reportable "accidents" within the meaning of 49 C.F.R. § 390.5 for the motor carrier that controls the attenuator truck. OOIDA and Kuehl Trucking alleged that the guidance should have been issued by notice-and-comment rulemaking and was arbitrary and capricious.

The court dismissed the case because OOIDA and Kuehl Trucking failed to identify any injury that would give them Article III standing. OOIDA and Kuehl Trucking argued that the guidance injures them because it allows operators of attenuator trucks to remove crashes from their records in FMCSA's Safety Measurement System (SMS). The SMS uses roadside inspection and crash data to quantify a carrier's relative safety performance and generate percentile ranks. The agency uses the percentiles to prioritize carriers for safety interventions. OOIDA and Kuehl Trucking argued that because the SMS ranks carriers against each other, any improvement to the percentiles of attenuator truck operators would necessarily impact Kuehl Trucking's percentile. A worse

percentile would increase the likelihood that Kuehl would receive interventions from FMCSA.

The court noted that carriers in the SMS are divided into safety event groups, and to establish an injury, Kuehl Trucking had to show that the guidance would cause the percentiles of carriers in Kuehl Trucking's safety event group to improve. Kuehl Trucking did not meet its burden to show that any carrier in its safety event group would benefit from the guidance. Therefore, Kuehl Trucking did not show that the guidance would affect its own SMS percentile.

Ninth Circuit Consolidates Challenges to Mexico-Domiciled Carrier Authority

On July 21, 2016, the U.S. Court of Appeals for the Ninth Circuit granted petitioners' motion to consolidate International Brotherhood of Teamsters (IBT) et al. v. U.S. Department of Transportation, et al., Nos. 16-71137 and 16-71992, filed respectively on April 20, 2016 and June 21, 2016, with IBT, et al. v. U.S. Department of Transportation, et al. (9th Cir. No.15-70754), filed a year earlier and fully briefed as of February 8, 2016. The 2015 and 2016 petitions for review challenge FMCSA's decision to implement the cross-border provisions of the North American Free Trade Agreement (NAFTA) by issuing operating authority registration to qualified Mexico-domiciled motor carriers allowing them to conduct long-haul operations beyond the commercial zones of the United States.

The initial petition alleged that a government report to Congress required under the Department's pilot program

statute at 49 U.S.C. § 31315(c), was final agency action, and served as the predicate for FMCSA's decision to accept applications from Mexican trucking companies seeking long haul authority. In the report, FMCSA analyzes safety data from its 2011 cross-border pilot program and concludes that "Mexico domiciled motor carriers, conducting long-haul operations beyond the commercial zones of the United States, operate at a level of safety that is equivalent to, or greater than, the level of safety of U.S. and Canada-domiciled motor carriers operating within the United States." The petitioners argue that the report is invalid on various grounds, and that the respondents' stated intention to accept applications from Mexico-domiciled carriers seeking long-haul authority is contrary to law in the absence of a valid pilot program report.

Congress, in Section 6901(a) of the U.S. Troop Readiness, Veterans' Care, Katrina Recovery, and Iraq Accountability Appropriations Act of 2007, Pub. L. 110-28, 121 Stat. 112, 183, restricted use of appropriated funds for issuing such operating authority until the Department had conducted a pilot program to test the safety of the Mexico-domiciled motor carriers. The petitioner, IBT, had unsuccessfully challenged the sufficiency of the pilot program under § 31315(c) in International Brotherhood of Teamsters v. U.S. Department of Transportation, 724 F.3d 206, 210 (D.C. Cir. 2013) (Teamsters II), cert. denied sub nom. Owner-Operator Independent Drivers Association v. U.S. Department of Transportation, 134 S. Ct. 922 (2014).

In its November 2015 brief, the government argued inter alia that the report is not a reviewable agency action under the APA, is not subject to the court's jurisdiction under

the Hobbs Act, 28 U.S.C. § 2342(3), and the case should therefore be dismissed. The petitioner filed the subsequent petitions in response to these jurisdictional issues. The later-filed petitions challenge FMCSA's denial of the petitioners' protest to the application of Trajosa SA de CV (Trajosa), a Mexico-domiciled motor carrier, and subsequent grant of authority to Trajosa, similarly arguing that FMCSA lacks authority to issue such operating authority based on its failure to satisfy the congressional restrictions in section 6901(a).

The government did not oppose the motion for consolidation and the parties agreed to limit the supplemental briefing to the jurisdictional issue. On August 10, 2016, the petitioners filed its supplemental opening brief, arguing that the consolidated petitions cure the jurisdictional issue and restating the prior arguments challenging the agency's authority.

The government's response brief, filed August 22, 2016, acknowledged that the court has jurisdiction over the third petition for review, but argued that the petitions should nevertheless be denied. The pilot program and FMCSA's report to Congress evaluating the program satisfied all statutory requirements and demonstrated that the participants operated safely. The agency was thus required to begin processing applications from Mexico-domiciled motor carriers under 49 U.S.C. § 13902(a). The petitioners did not raise any reason for concern regarding the safety of Trajosa or its ability to comply with the statutory and regulatory requirements as outlined in 49 U.S.C. § 13902(a)(5), the Secretary thus had no basis on which to deny Trajosa's request for registration. The petitioners filed their reply brief on September 9, 2016. Oral argument has not yet been scheduled.

Challenge to Mexico-Domiciled Carrier Authority Filed in Fifth Circuit

On May 24, 2016, the Owner-Operator and Independent Drivers Association (OOIDA) and three OOIDA members filed a petition in the U.S. Court of Appeals for the Fifth Circuit in OOIDA v. Foxx, No. 16-60324, seeking review of FMCSA's denial of protests filed by OOIDA opposing the grant of long haul operating authority to Andres Agustin Laborin and Autotransportes de Carga CA Unidas, Mexico-domiciled motor carriers seeking long-haul operating authority beyond the commercial zones of the United States. OOIDA is an intervenor in International Brotherhood of Teamsters v. U.S. Department of Transportation (9th Cir. 15-70754), discussed above, which raises similar issues and has been fully briefed.

In November 2015, OOIDA submitted a consolidated protest to these grants of operating authority to FMCSA. As the basis for the protest, OOIDA argued that (1) FMCSA had not satisfied the statutory requirements to expend funds to grant operating authority to Mexico-domiciled motor carriers, including the applicants, because the recently-concluded pilot program did not have an adequate number of participants to establish statistically significant safety data; (2) FMCSA did not have authority to permanently exempt Mexico-based drivers from the commercial driver license requirements in 49 U.S.C. §§ 31302, 31308, and 31310; and (3) that the data used by FMCSA to establish the safety performance of U.S. and Canadian motor carriers is not reliable and provides no basis to establish the safety equivalence of the Mexico-domiciled carriers.

In decisions issued on December 23, 2015, FMCSA denied the protest to the grant of operating to each of the Mexico-domiciled motor carriers citing procedural deficiencies in the protest and based on OOIDA's failure to allege or provide evidence that either carrier was not fit to provide the relevant transportation or to comply with the applicable requirements. OOIDA filed a motion for reconsideration of the decisions, which FMCSA rejected based on the lack of any regulatory or statutory provision for requesting reconsideration of a protest decision. OOIDA filed its petition for review within 60 days from the date of the FMCSA letter rejecting the motion for reconsideration.

On October 5, 2016, OOIDA filed its opening brief focusing on two main issues. First, the petitioners argue that the Department lacks authority to grant operating authority registration because the pilot program failed to adequately test the safety of Mexico-domiciled motor carriers due to an insufficient number of participants and the improper reliance upon safety data from Mexico-domiciled motor carriers that were not representative of the types of Mexican carriers that would apply for registration.

The petitioners' second argument revisits arguments raised by OOIDA in IBT v. FMCSA, 724 F.3d 206, 213 (D.C. Cir. 2013) and OOIDA v. U.S. Department of Transportation, 724 F.3d 230, 236 (D.C. Cir. 2013), which unsuccessfully challenged the Department's recognition of the Mexican Licensia Federal de Conductor (LFC) as equivalent to the U.S. commercial driver's license (CDL) in light of the statutory requirement that all commercial drivers in the United States hold a CDL issued under standards prescribed in U.S. law, 49 U.S.C. §§ 31302 and 31308. The petitioners

present the arguments previously rejected by the U.S. Court of Appeals for the District of Columbia Circuit and present new arguments as well. The petitioners argue that the prior D.C. Circuit decisions on this issue did not create a permanent exemption to 49 U.S.C. § 31302 and that the Department was required to ask Congress for a permanent statutory exemption for LFC-holders in the Final Report, and Congress must issue such exemption before LFC-holders could operate in the United States. The petitioners also argue that the pilot program failed to establish the safety equivalence of the LFC to the U.S. CDL.

The government's response brief is due on November 4, 2016.

Court Denies Motion to Dismiss in 2013 California Bus Crash Suit

On May 3, 2016, the U.S. District Court for the Southern District of California denied the government's March 16, 2016, motion to dismiss in Olivas, et al. v. United States (S.D. Cal. 15-cv-2882), holding that discovery would be necessary to determine whether the plaintiffs' claims are barred by the private party analogue requirement of the Federal Tort Claims Act (FTCA). The judge failed to make any rulings regarding the discretionary function argument.

On December 21, 2015, thirteen individuals sued FMCSA pursuant to the FTCA, seeking a combined total of \$130 million in compensation for personal injuries and wrongful death. The claims arise from a motor coach accident involving Scapadas Magicas that occurred on February 3, 2013, in San Bernardino, California. At that time, Scapadas Magicas was a for-hire passenger motor carrier operating primarily between Tijuana, Mexico and various locations in California. The plaintiffs allege that FMCSA

failed to exercise due care in its implementation and enforcement of its safety regulations. Specifically, they allege that FMCSA was negligent in issuing the motor coach a Commercial Vehicle Safety Alliance decal after an October 2012 inspection and that FMCSA was negligent in not inspecting all of the carrier's buses in a January 2013 compliance review. Both the inspection and compliance review were conducted pursuant to FMCSA's policies and procedures. Discovery in the case is ongoing.

Kansas District Court Grants in Part, Denies in Part, Motion to Dismiss Breach of Contract Case

On July 19, 2016, the United States District Court for the District of Kansas in TransAm Trucking, Inc. v. FMCSA (D. Kan. No. 14-cv-2015) issued an order granting FMCSA's motion to dismiss two of the three counts in the plaintiff's amended complaint, and denying FMCSA's motion to dismiss the third count.

TransAm alleges that FMCSA failed to comply with an October 17, 2013, settlement agreement that resolved a prior petition for review issued by the U.S. Court of Appeals for the Tenth Circuit. TransAm Trucking, Inc. v. FMCSA (10th Cir. No. 13-9572). Under the settlement agreement, FMCSA agreed to issue TransAm an "amended Compliance Review" that removed a reference to a proposed "Conditional" safety rating. Although the agreement did not mention including any safety rating on the "amended Compliance Review," TransAm contends that FMCSA failed to comply with the agreement by declining to provide an "amended Compliance Review" containing a "Satisfactory" safety rating.

The court found that TransAm's Little Tucker Act and APA claims were barred by sovereign immunity and dismissed these claims for lack of subject matter jurisdiction. As to the remaining count, TransAm alleges that FMCSA's failure to comply with the settlement agreement violates the plaintiff's substantive due process rights. FMCSA argued in its motion to dismiss that interests which are "deeply rooted in this Nation's history and tradition and implicit in the concept of ordered liberty" plainly are not implicated by the case as required to prevail on a substantive due process claim.

The court's decision stated that the court was "not entirely convinced that defendant did not comply with the settlement agreement" but that it was "not prepared to make such a finding" at this time. FMCSA filed an answer to the amended complaint on August 2, 2016, as well as a motion for judgment on the pleadings, arguing that TransAm's breach of contract claim cannot support a substantive due process case. The parties are conducting discovery.

On January 22, 2016 the Tenth Circuit dismissed a parallel proceeding for lack of jurisdiction under the Hobbs Act, 28 U.S.C. § 2342(3)(A).

Estate of Firefighter Killed While Driving Water Truck Sues FMCSA under the FTCA

On August 26, 2016, FMCSA was served a complaint in Estate of Jesse Austin Trader v. United States (D. Ore. No. 16-cv-01385). The case relates to an August 6, 2013, accident, which killed a young man working as a firefighter at the Big Windy Complex near Grants Pass, Oregon. The complaint alleges that the U.S. government, including the Department, Bureau of Land

Management (BLM), and U.S. Department of Agriculture, was negligent in causing the accident. BLM contracted with private parties for equipment used in fighting the Big Windy Complex fire, including the vehicle involved in the fatal accident. The plaintiff also names two private party defendants, who owned the vehicle in question. The complaint demands \$5,000,000. FMCSA denied an administrative claim received in the matter in July 2015.

Neither the administrative claim nor the complaint alleges any actions on the part of the Department or FMCSA, which led to the accident. The accident report and complaint refer to "USDOT Level 1 inspections" performed by the private-party defendants as part of the procurement process, and inspections performed on-site prior to the accident, but there is no indication that any of the Department's staff were involved. FMCSA's information systems do not contain any records of either private-party defendants.

Petition for Writ of Mandamus Held in Abeyance Following Negotiated Rulemaking

On October 11, 2016, the D.C. Circuit issued an order denying the petitioner's motion to take the case out of abeyance in Advocates for Highway and Auto Safety v. Foxx (D.C. Cir. 14-1183). The petitioners initiated this case by filing a petition for writ of mandamus in September 2014, seeking to compel FMCSA to issue a final rule on Entry Level Driver Training Requirements (ELDTs). FMCSA then initiated a negotiated rulemaking process to obtain the views of stakeholders and to seek to develop consensus on the issues for consideration in the rulemaking process. The notice of

proposed rulemaking was published on March 7, 2016, and the D.C. Circuit has held the case in abeyance based upon the agency's representation that it is proceeding expeditiously to finish the rule.

On August 19, the petitioners moved to take the case out of abeyance, contending that FMCSA was impermissibly delayed in issuing the rule. The Department opposed the motion, and later filed a status report with the court on September 30, 2016. In so doing, the Department explained that the draft final rule had been submitted to the Office of Information and Regulatory Affairs (OIRA) for review, and that FMCSA remains in close communication with OIRA during the review process to complete the rule as quickly as possible. Pursuant to the court's October 11 order denying the motion to take the case out of abeyance, the Department will file periodic updates to the court about the progress of the ELDT rule.

Federal Railroad Administration

MBTA Challenges Constitutionality of Northeast Corridor Infrastructure and Operations Advisory Committee

On January 27, 2016, the Massachusetts Bay Transportation Authority (MBTA) filed a complaint against Amtrak and the Northeast Corridor Infrastructure and Operations Advisory Commission (NECC). MBTA v. National Railroad Passenger Corporation (D. Mass. No. 16-cv-10120). MBTA challenges the constitutionality of the Northeast Corridor Commission, established under the Passenger Rail Improvement Act of 2008 (PRIIA), and the Commission's authority to mandate a cost sharing policy that required MBTA to pay Amtrak \$28.8

million more than previously agreed for infrastructure use and improvements.

The NECC, made up of voting representatives from Amtrak, the Department, and the states comprising the northeast corridor, is charged with “develop[ing] a standardized policy for determining and allocating costs, revenues, and compensation for Northeast Corridor commuter rail passenger transportation . . . that use Amtrak facilities or services or that provide such facilities or services to Amtrak.” The NECC adopted such a policy on September 17, 2015, part of which determined that MBTA should pay Amtrak nearly \$28.8 million.

In its complaint, MBTA alleges that the cost sharing policy is in conflict with an existing Attleboro Line Agreement between MBTA and Amtrak, which covers the same track usage rights and states that MBTA is not responsible to Amtrak for any fiscal compensation. MBTA therefore alleges that Amtrak’s demand for payment of \$28.8 million constitutes a breach of contract and violation of the implied covenant of good faith and fair dealing. MBTA also alleges that the NECC violates the Appointments Clause, the Separation of Powers, and the Due Process Clause due to the inclusion of commission members appointed by state governors. Finally, MBTA alleges that the cost sharing policy constitutes a rule, and since the policy was issued without notice-and-comment rulemaking, it must be set aside in violation of the APA.

On August 23, 2016, the Department of Justice, representing the Department’s NECC members, filed a motion to dismiss or, in the alternative, stay. The government’s primary argument is that PRIIA identified the STB as the exclusive forum for disputes over compensation

resulting from the cost sharing policy. Any appeal from an STB decision would be heard in the Courts of Appeals. The government argues that, together, these statutory provisions deny the district court jurisdiction over MBTA’s claims. Briefing on the motion to dismiss is completed and a decision is expected in the coming weeks.

Federal Transit Administration

Injunction Denied, Hearing Held on Regional Connector Appeal

On August 1, 2016, the U.S. Court of Appeals for the Ninth Circuit heard oral argument in Japanese Village v. FTA and Today’s IV, Inc. (Bonaventure) v. FTA. (9th Cir. Nos. 14-56837 & 14-56873).

The Regional Connector Project (Project) is an approximately 1.9 mile underground rail extension project, running under the heart of downtown Los Angeles. The Project will connect three different Los Angeles Metro lines, allowing riders a one-seat, no-transfer ride between the City’s East and West sides.

Prior to the hearing, the appellants, Japanese Village, filed an emergency motion to stay the pending appeal, which was briefed and also heard on August 1, 2016. The appellants argued that the Regional Connector Project’s construction activities may cause building subsidence. The appellees, FTA, and Los Angeles County MTA, argued that Project mitigation measures avoid the alleged injury. On August 19, 2016, the court denied Japanese Village’s motion to stay, concluding in its opinion that the appellants failed to demonstrate urgency and irreparable injury.

For the underlying appeal, Japanese Village argued that Project revisions to mitigation

measures for temporary construction impacts (noise, parking, subsidence, access) require remand and a supplemental NEPA analysis. The Federal Transit Administration (FTA) argued that the approved EIS allows for the mitigation measure revisions and that the very revisions were requested by Appellants. A ruling on the appeal is expected in the next few months.

Argument Before Fifth Circuit on Appeal of Denial of Motion for a Preliminary Injunction

On September 28, 2016, oral argument was held before the U.S. Court of Appeals for the Fifth Circuit in Monumental Task Committee v. Foxx (5th Cir. No. 16-30107).

In the U.S. District Court for the Eastern District of Louisiana, the plaintiffs alleged, inter alia, in their motion for a preliminary injunction that four Confederate monuments, which are listed or eligible for listing on the National Register of Historic Places, had become an integral part of the network of streetcars planned, funded, constructed, and maintained by the defendants and that the defendants failed to comply with Section 106 of the National Historic Preservation Act and the Department's Section 4(f) law. The plaintiffs further alleged that the failure of the Department and FTA to recognize the nature and scope of its undertakings with respect to the Confederate monuments were actions that, under the APA, were arbitrary, capricious, an abuse of discretion, or not in accordance with law.

The district court denied the plaintiffs' motion for a preliminary injunction on January 26, 2016, to prevent the defendants from removing or relocating four

Confederate monuments in New Orleans, Louisiana. The plaintiffs appealed the court's decision on February 5, 2016.

The government argued in its appeal brief that three of the New Orleans streetcar projects identified in the complaint did not receive federal funding and, consequently, federal environmental laws were not triggered and that three other streetcar projects, which did receive federal funding, have no legal, factual, or causal nexus to the Confederate monuments. The government further argued that even if there were a nexus, the district court did not have subject matter jurisdiction over one of the six streetcar projects since the 150-day statute of limitations had expired. In addition, for the three streetcar projects which did not receive federal funding, the government argued that this federal inaction did not constitute impermissible segmentation under NEPA.

Oral argument was held on September 28, 2016.

Court Grants Department's Motion for Summary Judgment in Louisiana Streetcar Case

On March 22, 2016, the U.S. District Court for the Eastern District of Louisiana granted the government's motion for summary judgment in Bring Our Streetcars Home, Inc. v. U.S. Department of Transportation, 2015 WL 9478139 (E.D. La. 2015).

On January 12, 2015, two non-profit organizations, Bring Our Streetcars Home, Inc. and People's Institute for Survival and Beyond, Inc. along with eleven other individuals, filed a complaint in the district court against the Department, FTA, FEMA, and the New Orleans Regional Transit

Authority (RTA) requesting injunctive and mandamus relief in connection with a streetcar project in New Orleans. The complaint alleged that the Department and FTA failed to comply with the requirements of the NEPA, Section 106 of the National Historic Preservation Act, and the Department's Section 4(f) law in connection with a streetcar project currently under construction by the New Orleans Regional Transit Authority on Rampart Street in New Orleans, Louisiana.

Since the uncontested facts in the case showed that FTA had not approved any applications for funding related to the Rampart Spur project, the court concluded that there was not sufficient involvement from the federal defendants to trigger NEPA or other federal environmental requirements. The plaintiffs argued in their motion for summary judgment that material facts needed to meet their burden of proof at trial were unavailable because insufficient discovery had been undertaken. The federal defendants responded that the plaintiffs did not comply with the technical requirements of Federal Rule of Civil Procedure 56(d), which requires parties to show by affidavit or declaration that they cannot present facts essential to justify their opposition. The federal defendants further responded that the plaintiffs had failed to diligently pursue discovery. After a review of the record, the court found the plaintiffs did not diligently pursue discovery and, therefore, they were not entitled to relief under Rule 56(d).

Court Denies Beverly Hills' Request to Vacate NEPA Decision for LA Metro Westside Project

On August 12, 2016, the U.S. District Court for the Central District of California in Beverly Hills Unified School District v.

FTA, 2016 WL 4445770 (C.D. Cal. Aug. 12, 2016) upheld FTA's NEPA Record of Decision (ROD) for the Los Angeles County Metropolitan Transit Authority (LA Metro) Westside Project, but required a limited scope Supplemental EIS and a Section 4(f) analysis.

The LA Metro Westside Project would extend the existing LA Metro Purple Line by approximately nine miles west from the Wilshire/Western Station to a new terminus at a new Westwood/Veterans' Affairs Hospital Station in Santa Monica. The plaintiffs (the City of Beverly Hills and the Beverly Hills High School) do not want the Westside Project tunnel alignment underneath the Beverly Hills High School due to concerns regarding methane and construction impacts.

The court refused to vacate the ROD and found that the "Plaintiffs did not prevail on the majority of their claims against the FTA." The court identified four principal errors: 1) "one was 'relatively minor' (*i.e.*, whether FTA 'crossed its t's and dotted its i's re[garding] potential surface hazards arising from tunneling through 'gassy ground'"; 2) "another was limited to the sufficiency of the FTA's analysis as to the health impacts of nitrogen oxides in a limited number of construction areas which would only temporarily exceed applicable thresholds"; 3) "FTA's failure in its disclosure obligations regarding the incomplete nature of the information concerning the seismic analysis"; and 4) "the inadequate Section 4(f) analysis as to the use of the Beverly Hills High School campus." The Beverly Hills High School is a Section 4(f) historic and recreational resource, and the court required FTA to analyze "use" of the Beverly Hills High School due to "incorporation of land" by the Westside Project tunnel.

The court also found that “FTA did not make substantive decisions that were demonstrably wrong Rather, the problems arose from the agency’s procedural deficiencies and/or questions as to the sufficiency of its analysis.” FTA is working with LA Metro to complete a limited scope SEIS and 4(f) document.

Summary Judgment Granted in the Maryland Purple Line Litigation

On August 3, 2016, the U.S. District Court for the District of Columbia granted the plaintiffs’ motion for summary judgment (in part) in Friends of the Capital Crescent Trail v. FTA, 2016 WL 4132188 (D.D.C. Aug. 3, 2016). In the court’s decision, the Judge vacated the Record of Decision (ROD) for the Purple Line Project and remanded the matter for preparation of a SEIS.

The plaintiffs originally filed suit in 2014 seeking declaratory and injunctive relief for alleged violations of NEPA, the Federal-Aid Highway Act, the Endangered Species Act, and the Migratory Bird Treaty Act. The Purple Line is a proposed light rail transit line, approximately 16.2 miles in length, which will connect major activity centers in Montgomery and Prince Georges Counties in Maryland.

In granting the motion, the court held that the FTA and the Maryland Transit Administration failed to engage in a satisfactory analysis which examined the potential effects of the Washington Metropolitan Transit Authority’s (WMATA) safety issues on future Purple Line ridership. WMATA lines and the proposed Purple Line intersect at four locations.

On August 23, 2016, in response to the court’s opinion, FTA, and the State of Maryland filed a Motion to Alter or Amend

the court’s Order, arguing that (1) ordering an SEIS was judicial error as the level of supplemental review is left to the discretion of the agency; and (2) vacating the ROD without considering remand without vacatur was also judicial error, as the court failed to consider a test for injunctive relief prior to issuing the injunction. A decision on the Motion to Alter or Amend is pending.

Lawsuits Challenges FTA’s Categorical Exclusion on Albuquerque BRT Project

On April 4, 2016, two lawsuits were filed against the Department, FTA, the City of Albuquerque, New Mexico, and their officials in connection with a proposed bus rapid transit project (ART) in Albuquerque, New Mexico.

The first case is Maria Bautista v. City of Albuquerque (Second Judicial District, Bernalillo County, NM No. D-202-CV-2016-02115) which was filed in state district court by individuals and businesses located along the route of the proposed project. The plaintiffs allege that the governmental defendants did not comply with Section 106 of the National Historic Preservation Act on the proposed project which runs along Highway 66 (Central Avenue) in Albuquerque and that the proposed project would also violate local and state law. The plaintiffs requested an injunction against the construction of the project and requested the defendants to comply with federal environmental requirements and state funding laws. The plaintiffs also seek a declaratory ruling that the actions of the Mayor and the City in advancing the ART project are unconstitutional and void.

The second case is Coalition of Concerned Citizens to MakeARTSmart v. FTA

(D.N.M. No. 16-cv-252), which was filed in federal court by unincorporated organizations comprised of residents who reside along the route of the proposed project. The plaintiffs here allege that the defendants did not comply with Section 106 of the National Historic Preservation Act, that FTA's decision to issue a documented Categorical Exclusion (CE) under 23 C.F.R. § 771.118(d) on the ART project, instead of a decision based on an Environmental Assessment (EA) or EIS was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law, and that the City's actions were in violation of state and local law. The plaintiffs requested that FTA's documented CE on the proposed project be set aside, that FTA should be required to conduct an EA or EIS on the proposed project, that FTA should be declared in violation of the National Historic Preservation Act, that the City should be enjoined from advancing the project until an appropriate environmental analysis has been completed, and that a declaration be issued showing the City to be in violation of state and local law.

The City of Albuquerque subsequently removed the Bautista case to federal court and it was consolidated with the Coalition case.

After a two-day hearing on July 24-25, 2016, on the plaintiffs' motion for a preliminary injunction, the court agreed with the government defendants' arguments that the plaintiffs had failed to meet any of the four factors under Federal Rule of Civil Procedure 65 for a preliminary injunction and the court denied the motion on July 26, 2016. The plaintiffs filed an immediate appeal of the court's decision to the U.S. Court of Appeals for the Tenth Circuit. Coalition of Concerned Citizens to MakeARTSmart v. FTA (10th Cir. No. 16-

2192) Pending a briefing by the parties on the merits of the issue, the Tenth Circuit granted plaintiffs' motion for an emergency injunction against the project on July 28, 2016. After a review of the parties' arguments, the emergency injunction was lifted by the Tenth Circuit on August 19, 2016. As a result of the decision, the City of Albuquerque is moving forward with construction of the ART project.

The Tenth Circuit will be reviewing this appeal on an expedited basis. The appellants filed their initial brief on September 14, 2016, and the response brief of the appellees was filed on October 4, 2016.

New Lawsuit Challenges Metro Silver Line Project

A new putative class action complaint was filed against Metropolitan Washington Airports Authority (MWAA), the Department, and the Secretary of Transportation, challenging MWAA's use of Dulles Toll Road tolls to pay for the Metro Silver Line expansion. Kerpen v. MWAA, (E.D. Va. No. 16-cv-1307). The plaintiffs allege various defects with MWAA and the Silver Line funding structure, including 1) that MWAA is not a valid interstate entity because the District of Columbia is not a "state" for purposes of the Compact Clause; 2) MWAA exercises federal legislative power in violation of Article I of the Constitution; 3) MWAA exercises federal executive power in violation of Article II of the Constitution; 4) MWAA's Dulles Toll Road tolls violate drivers' due process; and 4) MWAA's tolls exceed its authority under its enabling statutes and the APA. The answer deadline is currently stayed pending a decision on intervention by the Commonwealth of Virginia and the District of Columbia.

Maritime Administration

Court Dismisses Merchant Marine Academy FOIA Claim

On June 6, 2016, the U.S. District Court for the Eastern District of New York dismissed a lawsuit filed under the Freedom of Information Act (FOIA) based upon the stipulation of the parties, ending two years of litigation. The case, United States Merchant Marine Academy Alumni Association and Foundation v. U.S. Department of Transportation (E.D.N.Y. No. 14-cv-5332), arose out of a series of eleven FOIA requests submitted to the Department and the Maritime Administration (MARAD) from 2013 to 2014. The plaintiff, AAF, is an alumni foundation for the United States Merchant Marine Academy (USMMA), a United States Service Academy in Kings Point, New York, operated by MARAD that trains Merchant Marine officers to serve the nation's marine transportation and defense needs in peace and war. Through its FOIA requests, AAF sought documents on a wide variety of subjects relating to the operation and management of USMMA, and AAF filed suit in late 2014 to compel the production of those documents.

The Department and MARAD continued to produce responsive documents after the filing of the lawsuit, and ultimately produced an extensive set of documents, totaling over 55,000 pages of material, to AAF. The Department also produced a detailed Vaughn index explaining the basis for the material that was withheld or redacted under FOIA. After production was completed, AAF and the Department agreed to settle the lawsuit and to agree to a dismissal with prejudice, with both sides to bear their own attorney's fees and other

costs associated with the litigation and underlying FOIA requests.

Contractor Files Claim over Port of Anchorage Project

On August 12, 2016, Integrated Concepts and Research Corporation (ICRC) filed a notice of appeal in the Civilian Board of Contract Appeals (CBCA), seeking payment on a February 24, 2016, claim for \$10,060,746.63 plus interest. ICRC v. U.S. Department of Transportation (CBCA No. 5411). MARAD contracted with ICRC to serve as the prime contractor for the Port of Anchorage Intermodal Expansion Project (the Project) between 2003 and 2012. After the Project suffered significant design and construction difficulties, MARAD chose not to extend ICRC's performance in 2012. At the same time, MARAD defended a series of claims filed by ICRC before the CBCA related to additional costs and unpaid profit that MARAD allegedly owed. In September 2012, the parties settled the outstanding litigation, and MARAD paid ICRC an additional \$11.3 million.

The current CBCA claim arises out of the prior settlement. ICRC seeks payment for approximately \$9.9 million in unpaid overhead costs incurred during contract performance that were not quantified until the completion of an audit by the Defense Contract Audit Agency in August 2013. In addition, ICRC seeks reimbursement for legal fees incurred defending a lawsuit filed by the Municipality of Anchorage against ICRC in March 2013. ICRC alleges that MARAD is liable for payment of all of these costs notwithstanding a partial release executed together with the September 2012 settlement. ICRC filed its complaint on September 9, 2016, and after receiving an extension, MARAD's response is due November 4, 2016.

National Highway Traffic Safety Administration

Summary Judgment Briefing in FOIA Case Involving Whether Blog is a Representative of the News Media

On March 31, 2016, the Department filed its combined reply in support of its motion for summary judgment and opposition to the plaintiff's cross-motion for summary judgment in Lieberman v. U.S. Department of Transportation, (D.D.C. No. 15-cv-1178). Summary judgment briefing was completed on April 20, 2016, when the plaintiff Ellen Lieberman filed her reply.

This case involves Lieberman's challenge to NHTSA's decision to deny her request to be considered a "representative of the news media" entitling her to reduced fees for processing requests filed under FOIA. The Department argued that Lieberman is not entitled to status as a "representative of the news media" because The Safety Record blog, the publication for which she writes, does not exist separately from its for-profit owner Safety Research and Strategies, Inc. (SRS). The agency argued that Lieberman and SRS have a commercial interest in the NHTSA records requested, and the materials that Lieberman publishes in The Safety Record are advertisements, not news as defined by FOIA. Lieberman argued she is entitled to be treated as a "representative of the news media" because The Safety Record creates and disseminates news and because, under FOIA, journalistic activity is by definition not commercial. The court held oral argument in this case on October 25, 2016.

Pipeline and Hazardous Materials Safety Administration

Jury Convicts Pacific Gas and Electric Company of Knowingly and Willfully Violating Pipeline Safety Regulations

On August 9, 2016, upon the completion of an eight-week trial, a criminal jury in the U.S. District Court for the Northern District of California convicted Pacific Gas & Electric Company ("PG&E") on five counts of knowingly and willfully violating PHMSA pipeline safety regulations, as well as one count of obstructing a National Transportation Safety Board ("NTSB") investigation. United States v. Pacific Gas & Elec. Co., No. 14-cr-175 (N.D. Cal.).

The charges stemmed from an investigation following the explosion in 2010 of a PG&E natural gas transmission pipeline in San Bruno, California, which killed eight people and destroyed 38 homes. Prosecutors charged that PG&E had knowingly and willfully violated PHMSA's integrity management regulations, which specify how pipeline operators must identify, prioritize, assess, evaluate, repair, and validate the integrity of pipelines located in certain highly-populated areas. At trial, prosecutors presented evidence of a variety of violations. For example, the jury heard evidence that PG&E knowingly and willfully failed to identify and evaluate certain threats to the safety of its pipelines, and knowingly and willfully failed to prioritize certain pipeline segments as high-risk. A PHMSA official testified as an expert witness for the prosecution at trial. Prior to trial, PHMSA gathered and reviewed thousands of pages of

documents involving complex issues and claims of privilege.

In addition to convicting PG&E on the pipeline safety and obstruction charges, the jury acquitted PG&E on six record-keeping counts. PG&E has moved for a judgment of acquittal. Sentencing will occur after the Court resolves that motion.

D.C. Circuit Denies Appeal of PHMSA Order Upholding FMCSA's Imminent Hazard Emergency Order

On June 8, 2016, the U.S. Court of Appeals for the District of Columbia Circuit unanimously denied National Distribution Services, Inc.'s (National) petition for review of the PHMSA Chief Safety Officer's (CSO) decision upholding FMCSA's issuance of an imminent hazard emergency order under 49 U.S.C. § 5131(d) and 49 C.F.R. § 109.17 in National Distribution Services, Inc. v. U.S. Department of Transportation, 650 F. App'x. 32 (D.C. Cir. 2016).

In May 2014, a cargo tank used to transport flammable hazardous material exploded at National's Corona, California facility during a welding repair. The explosion killed one worker and seriously injured another. Following an investigation, FMCSA issued an Emergency Restriction/Prohibition Order and Out-of-Service Order on August 14, 2014. FMCSA found that National was conducting unauthorized welded repairs on the Department's specification cargo tanks, and the unauthorized welded repair to a cargo tank that had not been purged of flammable hazardous material resulted in May's catastrophic explosion. FMCSA also determined that federal regulations prohibited the operation of most of

National's cargo tanks as the Department's specification cargo tanks due to the lack of required testing and inspection and unauthorized welded repairs. FMCSA ordered specific cargo tanks out-of-service until they were brought into compliance with regulatory requirements and prohibited National from conducting unauthorized welded repairs on the Department's specification cargo tanks.

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

In its petition, National argued that PHMSA's CSO lacked sufficient evidence to support the Final Agency Order, and that the Emergency Order was overly broad in putting its entire fleet of cargo tank motor vehicles out of service. The court disagreed with both arguments.

The court found that the evidence demonstrated that (1) at least eleven of National's in-use cargo tanks had unauthorized repairs; (2) at least thirty-five, and as many as forty-two, cargo tanks lacked proper tests and/or inspections; and (3) National was involved in the unauthorized repairs. The court stated that "National exhibit[ed] a flagrant, and essentially fleet-wide, disregard for the hazardous material regulations," supporting PHMSA's conclusion that there was an imminent risk of harm from that hazard, and that in light of the totality of the evidence before the agency, PHMSA had substantial evidence for its imminent hazard finding.

The court also found National's argument that the Emergency Order was overbroad to

be without merit. The court found that the Emergency Order aimed to eliminate any risk from National's use of cargo tanks with unauthorized repairs and inadequate inspection records and was consistent with the regulations prohibiting cargo tank operations absent up-to-date testing and inspection records. The court also noted that FMCSA had already demonstrated its willingness to partially rescind the order once National provided testing records and made the cargo tanks available for inspection, but that National failed to demonstrate that it had taken the actions listed in the order and that the actions resulted in abatement of the imminent hazard. The court held that the requirement for narrow tailoring of emergency orders to abate the imminent hazard does not require the agency to use the least restrictive means available to it.

Finally, although holding that the record was more than ample to support the PHMSA Decision upholding the Emergency Order, the court cautioned that while it was able to discern the path followed by PHMSA and FMCSA in reaching their conclusions and issuing the orders in this case, under the APA PHMSA's CSO's Decision itself should have clearly explained the connection between the evidence received, the facts found, and the conclusions reached, including the CSO's reliance on a presumption that a packaging which is not authorized for the transportation of a hazardous material in commerce presents a risk of death, serious illness, severe personal injury, or a substantial endangerment to health, property, or the environment from a rupture of the package itself or from the release of contents which are hazardous.

National's Petition for Rehearing, filed on July 25, 2016, was denied on August 1, 2016.

District Court Dismisses Petition for Review of Final Order and Constitutional Claims

Sam Droganes and Premium Fireworks sought review of a final order of the PHMSA Chief Counsel assessing \$2,450 in administrative penalties, and also raised a variety of other claims, including a Bivens action, in Droganes v. U.S. Department of Transportation (E.D. Ky. No. 16-cv-2013). This case was dismissed on August 5, 2016. 2016 WL 4184004.

On July 6, 2012, the Chief Counsel ordered Premium Fireworks (PF) to pay \$2,450 for two violations of the Hazardous Materials Regulations (HMR). The respondent appealed that decision on August 5, 2012. On December 31, 2012, the Chief Safety Officer affirmed the Chief Counsel's Order. PF filed a Bivens complaint in the U.S. District Court for the Eastern District of Kentucky, which was served upon the Department in January 2016.

On April 8, 2016, the government filed a Motion to Dismiss which included an alternative Motion for Summary Judgment, based on a declaration of facts submitted by the PHMSA attorney who handled the civil case. After full briefing, the court dismissed the complaint without oral argument.

PHMSA Seeks Summary Judgment in OPA Suits

PHMSA is currently defending two related suits filed by the National Wildlife Federation (NWF) in connection with obligations under the Oil Pollution Act (OPA). National Wildlife Federation v. Secretary of Transportation (E.D. Mich. No. 15-cv-13535) (filed October 8, 2015); National Wildlife Federation v.

Administrator of PHMSA (E.D. Mich. 16-cv-11727) (filed May 16, 2016). The suits raise two sets of claims.

First, NWF alleges that although PHMSA has approved oil spill response plans that cover segments of pipelines crossing inland waters such as lakes, rivers, and streams, the Secretary of Transportation never delegated authority over such plans to PHMSA. Thus, NWF claims that the Secretary has failed to carry out his purported duty to personally review and approve these plans, and that that PHMSA's approval of response plans covering Enbridge's Line 5 was unlawful to the extent the plans included water-crossing segments.

NWF filed a Motion for Summary Judgment on these issues June 22, 2016, and the Department filed a response and its own Motion for Summary Judgment on August 22, 2016. The Department argues that NWF's claims are moot in light of the Secretary's August 18, 2016 ratification of PHMSA's prior approvals, which eliminated any perceived uncertainty about PHMSA's authority. The Department also contends that NWF lacks standing, since it cannot show that it or its members have been injured by the fact that response plans were approved by PHMSA rather than by the Secretary personally. Finally, the Department strongly disagrees with NWF on the merits, because PHMSA had previously been delegated authority applicable to all portions of a covered pipeline, even those that cross inland waters. Oral argument is currently scheduled for December 8, 2016.

Second, NWF claims that PHMSA's approval of the response plan for Line 5 violated the National Environmental Policy Act and the Endangered Species Act. PHMSA has filed the administrative

record with respect to these claims, which have not yet been briefed.

PHMSA Obtains Transfer to D.C. Circuit of Challenge to Outcome of Hazardous Materials Investigation

On July 14, 2016, the U.S. District Court for the District of New Jersey issued an order transferring to the U.S. Court of Appeals for the District of Columbia Circuit, a lawsuit in which a former manufacturer of "WD-40" aerosol products challenges PHMSA's finding that those products are not in violation of PHMSA regulations governing the transportation of hazardous materials. IQ Prods. Co. v. U.S. Department of Transportation (D.N.J. No. 15-cv-7070).

IQ Products (IQ) formerly manufactured products for the WD-40 Company (WDFC). After that relationship became embroiled in litigation, IQ embarked on a multi-year effort to convince PHMSA to find WDFC's products in violation of PHMSA regulations. PHMSA conducted an extensive, multi-phase investigation, but eventually determined there was no evidence of a violation. On September 24, 2015, IQ sued PHMSA in district court to challenge the outcome of the investigation.

PHMSA moved to dismiss on two principal grounds. First, to the extent the outcome of PHMSA's investigation is judicially-reviewable at all, IQ can only pursue a challenge in the Court of Appeals. Second, IQ lacks constitutional standing because it does not plausibly allege that the Department's actions have caused it any injury, let alone an injury that could be redressed by a court.

Following a conference in which a U.S. Magistrate Judge expressed her preliminary

views as to the merits of the Department's arguments, the parties agreed that transfer to the D.C. Circuit would be appropriate. IQ Products is scheduled to file its brief in that court by November 7, 2016, while PHMSA's brief is due by December 7, 2016. IQ Prods. Co. v. U.S. Department of Transportation (D.C. Cir. No. 16-1259).

PHMSA Seeks to Uphold \$2.6 Million Fine for Pipeline Safety Violations that Caused Major Crude Oil Spill

On June 27, 2016, ExxonMobil Pipeline Company filed a Petition for Review in ExxonMobil Pipeline Company v. U.S. Department of Transportation (5th Cir. No. 16-60448), seeking review of PHMSA's Final Order dated October 1, 2015, and Decision on Reconsideration dated April 1, 2016. The petition seeks to vacate both the Final Order and Decision, which resulted from PHMSA investigation into an accident that occurred in Mayflower, Arkansas on March 29, 2013, on the ExxonMobil's Pegasus Pipeline. The Order and Decision found nine violations of the pipeline safety regulations, assessed a civil penalty of \$2,630,400, and ordered compliance actions.

On July 6, 2016, ExxonMobil filed a Motion to Stay the effective deadlines of the compliance order items pending judicial review of the petition. This stay had the potential to buy ExxonMobil a year or more to continue to operate outside of compliance with the order. The court denied ExxonMobil's Motion only two days after the company filed their reply to PHMSA's opposition.

The court granted the parties' request for an expedited briefing schedule, which concluded on September 30, 2016. In its briefings, ExxonMobil claimed that: (1) the company evaluated the Pegasus Pipeline for seam susceptibility in compliance with the integrity management regulations, contrary to agency findings; (2) PHMSA's Final Order and Decision include a novel interpretation of the regulations for which ExxonMobil had no notice; and (3) the compliance order and penalty exceeded the agency's authority. PHMSA's response argued the agency's findings are neither arbitrary nor capricious, and that the agency provided adequate and fair notice its interpretation of the integrity management regulations. Oral argument is set for October 31, 2016.

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