



DOT LITIGATION NEWS

Office of the General Counsel

Paul M. Geier
Assistant General Counsel
for Litigation and Enforcement

Christopher S. Perry
Acting Deputy Assistant General Counsel
for Litigation and Enforcement

1200 New Jersey Avenue, S.E.
Washington, D.C. 20590

Telephone: (202) 366-4731
Fax: (202) 493-0154

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Supreme Court Litigation

Supreme Court Denies Flytenow Petition for Certiorari In Case About Flight Sharing Websites

On January 9, 2017, the Supreme Court denied the petition for certiorari filed by Flytenow, which sought to reverse a decision by the U.S. Court of Appeals for the District of Columbia Circuit, Flytenow, Inc. v. FAA (D.C. Cir. 14-1168). Flytenow is the operator of a website on which pilots could post information about upcoming flights to attract passengers willing to pay a pro rata share of the pilots' operating expenses. After the FAA determined that the pilots who solicit passengers on Flytenow are engaged in common carriage, and are therefore required to obtain a Part 119 certificate, which subjects them to heightened safety standards, Flytenow filed a petition for review in the D.C. Circuit contending that the FAA's determination was arbitrary and capricious. Specifically, Flytenow argued that the FAA's decision misconstrued various regulations that set forth the elements of common carriage and was contrary to legal precedent showing that expense-sharing should not be considered common carriage.

In denying Flytenow's petition for review, the D.C. Circuit held that even without applying any level of deference, it had no difficulty upholding the FAA's interpretation of its regulations under the plain language of those regulations. The court also rejected Flytenow's argument that the FAA's legal interpretation imposes an unconstitutional prior restraint on speech, because while the FAA's determination explained the possible consequences of speech, it did not prohibit it.

Flytenow had urged the Supreme Court to grant review to decide three questions related to the FAA's determination. First, Flytenow argued that under the principles of *Auer v. Robbins*, 519 U.S. 452 (1997), a court of appeals may not defer to an agency's interpretation of a common-law term contained in the agency's regulations. Second, Flytenow contended that review is warranted to determine whether the FAA's definition of "common carriage" conflicts with the common-law understanding of that term. Finally, Flytenow asserted that the FAA violated the First Amendment because the agency's legal interpretation amounted to a content-based restriction on internet communications.

<http://www.scotusblog.com/case-files/cases/flytenow-inc-v-federal-aviation-administration/>

Scenic America Seeks Supreme Court Review of FHWA Guidance on Digital Billboards

Last fall, the U.S. Court of Appeals for the D.C. Circuit rejected an appeal by Scenic America challenging the 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, 836 F.3d 42 (D.C. Cir. 2016). Scenic America has now petitioned the Supreme Court to review the D.C. Circuit's decision (Docket No. 16-739).

The HBA was enacted to "protect the public investment in [federally funded] highways, to promote the safety and recreational value of public travel, and to preserve natural

beauty.” FHWA administers the HBA, and for a State to receive its full allotment of federal highway funding, the HBA requires States to maintain “effective control of the erection and maintenance...of outdoor advertising signs, displays, and devices” in areas adjacent to federal interstate and primary highways. In order to maintain such “effective control,” a State must, among other things, enter into an agreement with FHWA, known as a federal-state agreement (FSA), that establishes standards for the “size, lighting and spacing” of “off-premise” signs adjoining federal interstate and primary highways in the State. In 2007, FHWA issued guidance advising that digital billboards were permitted under the HBA and implementing FSAs.

In 2013, Scenic America, an advocacy organization that “seeks to preserve and improve the visual character of America’s communities and countryside,” filed a lawsuit alleging that the 2007 guidance was de facto rulemaking and that FHWA did not follow the required rulemaking process pursuant to the Administrative Procedure Act. In addition, Scenic America argued that the FHWA violated the HBA and its HBA regulations. Both the District Court for the District of Columbia and the Court of Appeals for the D.C. Circuit upheld the guidance. Scenic America filed a petition for writ of certiorari seeking further review. The government’s response to the petition for writ of certiorari is due on April 12.

Midwest Fence Files Petition for Certiorari in DBE Program Challenge

On February 2, 2017, Midwest Fence Corporation filed a petition for a writ of certiorari seeking to overturn the Seventh Circuit’s decision in Midwest Fence

Corporation v. DOT, 840 F.3d 932 (7th Cir. 2016). Midwest Fence, a highway construction subcontractor, brought a constitutional challenge to the statute authorizing DOT’s Disadvantaged Business Enterprise (DBE) regulations, the regulations themselves, and their implementation by the Illinois Department of Transportation in the federal-aid highway program. Specifically, Midwest Fence argued that DOT’s DBE regulations are not narrowly tailored to meet the compelling interest of remedying racial discrimination, a requirement of the strict scrutiny analysis that the courts apply to federal laws that create racial classifications. In addition, Midwest Fence contended that the DBE regulations are unconstitutionally vague because they do not define “reasonable” for purposes of determining whether a prime contractor that has not met a DBE subcontractor goal has nonetheless made a good faith effort in seeking DBE subcontractors.

In a decision affirming the district court’s decision and upholding the constitutionality of the DBE program and regulations, the Seventh Circuit noted that the Eighth, Ninth, and Tenth Circuits have already found the DBE program constitutional on its face. In its analysis of the DBE program, the Seventh Circuit concluded that the program is narrowly tailored, because it requires states to meet as much as possible their overall DBE participation goals through race- and gender-neutral means. Moreover, the program prohibits the use of quotas and requires states to remain flexible as they administer the program over the course of the year. In addition, the Seventh Circuit was persuaded by the fact that the DBE program is limited in duration, since Congress has repeatedly reauthorized the program after taking period looks at the need for it. For these reasons, the Seventh

Circuit held that the DBE program survives strict scrutiny and upheld the district court's decision, which concluded the same.

Midwest Fence urges the Supreme Court to grant certiorari by arguing that there is a circuit split with respect to how narrow tailoring is defined in equal protection cases, the issue of when contract DBE goals become *de facto* quotas has not been decided by the Court, and the federal questions raised in the case are of profound national importance. The government's response to the petition for certiorari is due on April 10.

Motor Carrier Drivers Seek Supreme Court Review of Privacy Act Decision

On March 16, 2017, a group of motor carrier drivers sought certiorari review of the First Circuit's decision in a class action suit brought against DOT under the Privacy Act. On December 16, 2016, the U.S. Court of Appeals for the First Circuit had denied petitioner's request for *en banc* review of the Court's October 21, 2016 decision in Flock v. DOT, 840 F.3d 49 (1st Cir. 2016). The Court of Appeals had upheld the lower court's decision granting the government's motion to dismiss the Class Action Complaint for damages under the Privacy Act in Flock v. DOT, 136 F. Supp. 3d 138 (D. Mass. 2015).

Six commercial drivers filed the initial class action complaint on July 18, 2014, seeking damages under the Privacy Act, 5 U.S.C. 552a. Plaintiffs alleged that FMCSA unlawfully disseminated inspection reports to motor carrier employers containing violations that the Secretary had not determined to be serious driver-related safety violations, as defined in 49 U.S.C.

§ 31150, the authorizing statute for the Agency's Pre-employment Screening program (PSP). On September 30, 2015, the District Court granted the government's motion to dismiss, finding that the PSP statute was sufficiently ambiguous to support the Agency's interpretation, which was entitled to *Chevron* deference.

The First Circuit affirmed the district court's holding and 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.

Supreme Court Follows Recommendation of United States, Remands First Amendment Challenge to State Statute Banning Credit Card Surcharges

On March 29, 2017, the Supreme Court issued a decision in a First Amendment challenge to a New York state statute that bars merchants from imposing a "surcharge" for purchases made with credit cards. Expressions Hair Design, et al. v. Schneiderman, 581 U.S. ---, 2017 WL 1155913 (2017). The Court held that the U.S. Court of Appeals for the Second Circuit erred in holding that the statute regulated conduct rather than speech, and remanded for that court to determine in the first instance whether the statute survives First Amendment scrutiny. The Court's approach is consistent with the recommendation of the United States, which filed an *amicus* brief in support of neither party. The United States had an interest in the case because, among other things, the analysis the Court adopted might have had

significant ramifications for federal regulation of pricing and related activities. The case arises in the context of “swipe fees” that credit card issuers charge merchants each time a customer uses a credit card. Most merchants charge the same price regardless of the method of payment, meaning that the “swipe fees” are passed along to cash and credit customers alike. But some merchants prefer to pass along the “swipe fees” only to credit customers, by charging those customers a higher price.

Since 1974, federal law has allowed merchants to offer “discounts” to cash customers (by barring credit card issuers from using contract terms to prohibit such discounts). See 15 U.S.C. § 1666f(a). Between 1976 and 1984, however, federal law also prohibited merchants from imposing “surcharges” on credit purchases. Congress defined key terms in order to clarify the difference between an allowable “discount” and a prohibited “surcharge.” Under this regulatory scheme, merchants could not tag or post a single price for a product, and then charge credit customers more than that price. But merchants were permitted to tag or post separate cash and credit prices, and were also permitted to tag and post no prices at all while charging higher prices to credit customers. The statute did not prohibit merchants from referring to any these pricing systems as involving a “surcharge.”

After the federal “surcharge” ban expired in 1984, New York and several other states enacted similar prohibitions. New York’s statute makes it a misdemeanor for a merchant to “impose a surcharge on a holder who elects to use a credit card in lieu of payment by cash, check, or similar means.” (Unlike the expired federal ban, New York’s statute does not define “surcharge.”)

In 2013, a group of merchants challenged the New York statute in the U.S. District

Court for the Southern District of New York, alleging (among other things) that the statute infringed their First Amendment rights. The District Court ruled in favor of the challengers. See 975 F. Supp. 2d 430 (S.D.N.Y. 2013). The Second Circuit reversed. See 808 F.3d 118 (2d Cir. 2015). The Second Circuit first considered the statute as applied to the situation covered by the expired federal ban: merchants who post a single “sticker price,” and then charge a higher price to credit customers. The Second Circuit concluded that the statute in that context merely regulates conduct, rather than speech. The Second Circuit declined to rule on the constitutionality of any other potential application of the New York statute. The Fifth Circuit later followed the Second Circuit’s logic to uphold a similar Texas statute, while the Eleventh Circuit held that a similar Florida statute was contrary to the First Amendment. See Rowell v. Pettijohn, 816 F.3d 73 (5th Cir. 2016); Dana’s R.R. Supply v. Attorney Gen., Fla., 807 F.3d 1235 (11th Cir. 2015). The Supreme Court granted certiorari on September 29, 2016. The parties reprised their arguments from the Second Circuit. Petitioners argued that the statute regulates speech by requiring merchants to describe their pricing structure in a certain way, and that the statute does not withstand any level of First Amendment scrutiny. New York, in contrast, argued that the statute merely regulates conduct by prohibiting merchants from imposing a surcharge (even though the conduct is carried out through words). The United States filed an *amicus* brief in support of neither party. The United States argued that the New York statute is a regulation of speech, since it addresses the manner in which a merchant may present its pricing scheme to the public. The United States also pointed out, however, that a law that merely requires the disclosure of truthful information is subject to relatively-

lenient First Amendment scrutiny, and that expired federal surcharge ban (along with many other federal regulations) would be constitutional under this standard. The United States recommended that the Court remand the case to the Second Circuit so that Court can resolve certain factual questions while applying the appropriate legal principles. The case was argued on January 10, 2017.

Chief Justice Roberts wrote an opinion for the Court that was joined by four other justices. The Court agreed with the United States and the petitioners that the New York statute – at least as applied to a “single sticker” system – regulates speech rather than conduct, and that the Second Circuit erred in concluding otherwise. The Court then agreed with the United States, and remanded for the Second Circuit to analyze the statute as a speech regulation, noting that the parties disagreed on the appropriate level of scrutiny.

In a concurrence, Justice Breyer argued that instead of trying to distinguish regulations of speech from regulations of conduct, the Court should focus on the appropriate level of First Amendment scrutiny; he agreed that the case should be remanded for the Second Circuit to make that determination in the first instance. Justice Sotomayor (joined by Justice Alito) concurred in the judgment only. She argued that the Second Circuit should have certified questions about the statute’s applicability to the New York Court of Appeals before reaching any of the constitutional issues, and that the Supreme Court should have remanded with express instructions to certify.

<http://www.scotusblog.com/case-files/cases/expressions-hair-design-v-schneiderman/>

Supreme Court to Determine Limits of State Courts’ Exercise of Personal Jurisdiction in Railroad FELA Case

On January 13, 2017, the Supreme Court granted certiorari in BNSF Railway Co., v. Tyrell, et al. (No. 16-405) to determine whether the Federal Employers’ Liability Act (FELA) authorizes state courts to exercise general personal jurisdiction over a non-resident railroad that does business in the State. Two employees of BNSF Railway Co, separately sued the railroad under FELA for injuries they allegedly sustained while working for the railroad. Plaintiffs filed their lawsuits in the state of Montana even though they are not residents of Montana and the injuries did not occur in Montana. Furthermore, the plaintiffs did not allege any connection to Montana. BNSF sought to dismiss both cases for lack of personal jurisdiction because the railroad is incorporated in Delaware and its principal place of business is Texas. The plaintiffs, however, argued that the Montana state courts have general personal jurisdiction over BNSF because the railroad operates or does business in Montana.

The Montana Supreme Court held that the state trial courts could exercise personal jurisdiction over BNSF because the railroad does business within the State. A state court may exercise general personal jurisdiction over a corporation when the State is its place of incorporation or its principal place of business, or the corporation’s contacts with the State are continuous and systematic. In this case, the Montana Supreme Court relied upon a provision within FELA which allows cases to “be brought in a district court of the United States, in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall

be doing business at the time of commencing such action.” The court interpreted this language as providing for personal jurisdiction anywhere that a defendant does business.

The Montana Supreme Court chose not to apply the Supreme Court’s decision in Daimler AG v. Bauman, et al., 134 S. Ct. 746 (2014), which held that a state court may only exercise general personal jurisdiction over an out of state corporation “when the corporation’s affiliations with the State in which suit is brought are so constant and pervasive ‘as to render’ [it] essentially at home in the forum State.”

The United States filed an amicus brief in support of BNSF urging the Court to reverse the Montana Supreme Court. The United States argues that the Montana Supreme Court mistakenly interpreted FELA as providing state courts with the authority to exercise personal jurisdiction over a defendant doing business in the State. Instead, Congress intended for FELA to provide rules pertaining to venue and subject matter jurisdiction but not personal jurisdiction.

The United States bases its interpretation on the contention that the FELA provision at issue does not address service of process. Additionally, in applying the Supreme Court’s analysis in *Daimler*, the United States argues that the Montana Supreme Court cannot exercise general personal jurisdiction over BNSF, as it would be a violation of due process to assert general personal jurisdiction over a corporation in a state where the corporation does not have its principal place of business and is not “at home.”

Oral argument is scheduled for April 25, 2017. The briefs can be found at:

http://www.scotusblog.com/case-files/cases/bnsf-railway-co-v-tyrrell/?wpmp_switcher=desktop.

United States Files Amicus Brief in Supreme Court Case Regarding Intervenor and Article III Standing

On January 13, 2017, the Supreme Court granted certiorari in Town of Chester v. Laroe Estates, Inc. (No. 16-605), a case that presents the Court with the issue of whether intervenors participating in a lawsuit as of right under Federal Rule of Civil Procedure 24(a) must satisfy Article III standing requirements.

The case arose when Steven M. Sherman, a real estate developer, filed suit against the Town of Chester alleging a federal regulatory takings claim based a series of amendments to the local zoning laws as well as other conduct that frustrated his ability to begin development of a parcel of land that he planned to develop as a residential subdivision.

While trying to obtain zoning approval from the Town, Mr. Sherman entered into a purchase agreement with Laroe Estates to purchase three parcels of the subdivision once Mr. Sherman secured approval for the development. Laroe committed to making interim payments to Mr. Sherman while he pursued approval in exchange for a mortgage on the property. The proposed subdivision never received approval and Mr. Sherman defaulted on his repayment obligations to the property mortgage holder, who foreclosed on the property.

While the case was on remand to the district court on a separate issue of ripeness of Mr.

Sherman's takings claim, Laroe Estates moved to intervene as of right, contending that by virtue of its contract vendee status, it has an equitable title in the property, which it claims to be synonymous with true ownership under New York law. The district court denied Laroe's motion to intervene as of right, concluding that it lacked Article III standing under the U.S. Constitution to assert a takings claim against the Town. According to the district court, under circuit court precedent, contract vendees lack standing to assert a takings claim. The Second Circuit rejected the court's conclusion and held that Laroe does not need to have independent Article III standing to intervene where there is a genuine case or controversy between the existing parties in the underlying litigation, in this case Mr. Sherman and the Town of Chester.

There is a widely acknowledged split among the circuits on the question presented in this case. Ten federal circuits have ruled on this issue with three holding intervenors must have Article III standing and seven holding intervenors need not have Article III standing.

On March 3, 2017, the United States filed an amicus brief in support of Petitioner, the Town of Chester and siding with the minority of the courts, arguing that intervenors must establish standing in order to qualify for intervention as of right under Rule 24(a).

Specifically, the United States contends that the same basic principles that apply to plaintiffs, requiring them to demonstrate

Article III standing and maintain the requisite case and controversy at every stage of litigation, applies to intervenors. Furthermore, the United States argues that the most natural reading of Rule 24(a)(2) is best construed to require a threshold showing of standing for intervention as of right. The government contends that this approach promotes judicial efficiency and avoids the need to decide whether the Constitution itself requires a litigant to establish the elements of Article III standing in order to intervene as of right.

On March 27, 2017, the motion of the Acting Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument granted.

The case is scheduled to be argued on April 17, 2017.

The briefs in this case are available at <http://www.scotusblog.com/case-files/cases/town-of-chester-v-laroe-estates-inc/>

Departmental Litigation in Other Federal Courts

District Court Grants Judgment in Favor of AAR in Metrics and Standards Litigation

On February 13, 2017, the government filed a motion for entry of judgment in the U.S. District Court for the District of Columbia in Association of American Railroads v. Department of Transportation (D.D.C. 11-1499), requesting that the court sever the arbitration provision of Section 207 of the Passenger Rail Investment and Improvement Act of 2008 (PRIIA) and preserve FRA's ability to issue Metrics and Standards relating to Amtrak performance. On March 23, the District Court entered judgment in favor of AAR and held that PRIIA Section 207 is void and unconstitutional and vacated the Metrics and Standards.

Through PRIIA, Congress directed FRA and the National Railroad Passenger Corporation (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 it could also use 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 U.S. Court of Appeals for the District of Columbia Circuit previously struck down the Metrics and Standards as a violation of the Non-Delegation Doctrine by vesting rulemaking authority in a non-governmental entity, *i.e.* Amtrak. In 2015, the Supreme Court reversed and remanded, holding Amtrak is a governmental entity for purposes of the Non-Delegation Doctrine.

On remand from the Supreme Court, on September 9, 2016, the D.C. Circuit for a second time held that Section 207 was unconstitutional because it violated the Due Process Clause by giving Amtrak, "a self-interested entity[,] regulatory authority over its competitors." The court additionally found 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.

On September 9, 2016, the D.C. Circuit denied the government's petition for rehearing *en banc*. On February 1, 2017, the Department of Justice sent a letter to Congress to advise that the government had decided not to seek Supreme Court review of the D.C. Circuit's decision at that time. Instead, the letter stated the government intended to argue in the district court that, under the D.C. Circuit's decision, the arbitration provision should be severed from the rest of the statute. FRA and Amtrak could then jointly develop Metrics and Standards under the remaining provisions of Section 207, unencumbered by the arbitration provision.

DOT then sought to obtain a judgment from the District Court that would sever the arbitration provision of Section 207 and at the same time preserve the remaining portion of the statute that grants FRA and Amtrak the power to adopt Metrics and Standards. AAR opposed the government's motion, arguing that this was an attempt to

reverse the D.C. Circuit under the guise of a request to enter judgment.

The District Court agreed with AAR and found that it must give full effect to the D.C. Circuit's mandate and that it was not at liberty to review or change the D.C. Circuit's decision. Additionally, the District Court noted that the D.C. Circuit made it clear that Congress is the proper actor to remedy Section 207, not the courts. Thus, the District Court found that it had "no further role in making repairs to the PRIIA."

Pacific Gas and Electric Company Sentenced After Being Convicted of Knowingly and Willfully Violating Pipeline Safety Regulations

On January 26, 2017, the U.S. District Court for the Northern District of California sentenced Pacific Gas & Electric Company ("PG&E") for its criminal violations of PHMSA pipeline regulations, as well as its obstruction of a National Transportation Safety Board proceeding. 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.

On August 9, 2016, upon the completion of an eight-week trial, a criminal jury convicted PG&E on five counts of

knowingly and willfully violating PHMSA pipeline safety regulations, as well as one count of obstructing an NTSB investigation.

The court sentenced PG&E to pay the maximum statutory penalty allowable for each count under the Natural Gas Pipeline Safety Act of 1968 and for obstruction of justice. In addition to the monetary penalty, the Court sentenced PG&E to a five-year period of probation, required that it perform 10,000 hours of community service, and mandated that it pay for advertising in national media outlets to publicize its criminal conduct. PG&E is required to develop within the first six months of the five-year period of probation an "effective compliance and ethics program" that will prevent criminal conduct with respect to gas pipeline transmission safety, as well as a schedule for implementation of the program. During the probationary period, PG&E's pipeline operations will be supervised by a Compliance and Ethics Monitor. In addition, PG&E was ordered to complete 10,000 hours of community service, 2,000 of which must be completed by "high level" employees, and PG&E must spend an additional \$3,000,000 in advertising its criminal conduct in both the Wall Street Journal and the San Francisco Chronicle, among other news outlets. PG&E is not appealing its conviction.

Air Line Pilots Association and Labor Groups Seek Judicial Review of DOT Decision to Grant Norwegian Airs Foreign Air Carrier Permit

On January 12, 2017, the Air Line Pilots Association and several other entities representing the labor interests of pilots and flight attendants filed a petition for review in the United States Court of Appeals for the

District of Columbia Circuit (D.C. Cir. 17-1012).

The petition seeks judicial review of the Department's November 30, 2016, decision to grant Norwegian Air International Limited's request for a foreign air carrier permit, which enables it to conduct foreign scheduled and charter air transportation of persons, property, and mail pursuant to the U.S.-European Union-Norway-Iceland Air Transport Agreement (U.S.-EU Agreement).

Following Norwegian Air's request, numerous interested parties filed comments, both in support of and against the request. On April 12, 2016, DOT issued a tentative finding that Norwegian Air should be granted the foreign air carrier permit and initiated a show cause proceeding directing interested parties to show cause why the agency's tentative decision should not be made final. In general, the parties who filed comments against the grant of Norwegian Air's request argued that Norwegian Air's grant application was inconsistent with a provision of the U.S.-EU Agreement regarding labor standards. In addition, opponents asserted that the Department is required to conduct a public interest inquiry before it could grant Norwegian Air's request. On the other hand, proponents of Norwegian Air's request for a foreign air carrier permit contended that the Department was obligated to grant Norwegian Air's request if it satisfied the requirements of the U.S.-EU Agreement and U.S. law, with no additional public interest inquiry required. On November 30, 2016, the Department issued a decision that finalized its April 12, 2016, tentative decision to grant Norwegian Air's request for a foreign air carrier permit.

The certified records index was filed on March 3, 2017. Petitioner's opening

brief is due May 1, 2017. The government's response brief is due May 31, 2017, and the intervenors' brief is due June 7, 2017.

Petitioners' reply brief is due June 21, 2017.

Ninth Circuit Hears Challenge to FMCSA Mexican Truck Program

On March 15, 2017, the U.S. Court of Appeals for the Ninth Circuit heard oral arguments in International Brotherhood of Teamsters (IBT) et al. v. USDOT, et al. (9th Cir., Cons. Nos. 15-70754, 16-71137 and 16-71992).

Petitioners IBT, Advocates for Highway and Auto Safety (AHAS) and the Truck Safety Coalition challenge FMCSA's decision to implement the cross-border provisions of the North American Free Trade Act (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. Intervenor, Owner-Operator and Independent Drivers Association (OOIDA), joined the litigation adding a challenge to the agency's recognition of the equivalence of Mexican commercial driver licenses.

Petitioners challenge a government report to Congress required under DOT's pilot program statute at 49 U.S.C. §31315(c) as final agency action, arguing that the report served as the predicate for FMCSA's decision to accept applications from Mexican trucking companies seeking long haul authority. Petitioners assert that the report is invalid because it makes findings that are arbitrary, capricious or contrary to law, or fails to comply with statutory requirements, and that 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. In the report, FMCSA analyzes safety data from its three-year 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.”

Petitioner IBT had unsuccessfully challenged the sufficiency of the pilot program under § 31315(c) in *International Bhd. of Teamsters v. U.S. Dep’t of Transp.*, 724 F.3d 206, 210 (D.C. Cir. 2013) (Teamsters II), *cert. denied sub nom. Owner-Operator Indep. Drivers Ass’n v. Dep’t of Transp.*, 134 S. Ct. 922 (2014).

The government argues that that FMCSA met its obligation under the congressional mandate when it submitted its report to Congress. The OIG found that the Agency had sufficient safety monitoring in place and FMCSA regulatory oversight ensures the safety of every Mexico-domiciled carrier granted long haul authority.

A carrier that could not pass a pre-authorization safety audit was not allowed in the program and FMCSA was required to conduct a further safety audit of a carrier granted long-haul authority within 18 months after commencing operations. In response to the court’s question on what the agency would have done if it found that the pilot program participants were not operating safely, counsel stated that FMCSA would have addressed the safety problems before granting operating authority, but was nevertheless required by statute to be accepting and processing applications.

OOIDA Challenge to NAFTA Implementation is Fully Briefed in Fifth Circuit Court of Appeals

Appellate briefing in Owner Operator and Independent Drivers Association (OOIDA), et al. v. U.S. Department of Transportation (DOT), et al, (5th Cir. No. 16-60324), concluded on January 11, 2016, when petitioners filed their reply brief. The court has not yet scheduled oral argument.

The petitioners, OOIDA and three owner-operators of commercial vehicles, challenge FMCSA’s authority to issue operating authority registration to Mexico-domiciled motor carriers arguing that the agency failed to test the safety of such carriers as required by Congress. The challenge is substantially similar to the case pending in the Ninth Circuit, discussed above, and both sides have raised questions of the same argument.

Petitioners argue that DOT 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 improper reliance upon safety data from Mexico-domiciled motor carriers that were not representative of the types of carriers that would apply for registration.

In addition, Petitioners raise an argument previously addressed by the Court of Appeals for the D.C. Circuit in IBT, et al. v. FMCSA, 724 F.3d 206, 213 (D.C. Cir. 2013) and OOIDA et al. v. DOT, et al., 724 F.3d 230, 236 (D.C. Cir. 2013.). The D.C. Circuit upheld DOT’s recognition of Mexico’s *Licencia Federal de Conductor (LFC)* as being equivalent to the U.S.

commercial driver's license (CDL) pursuant to a 1991 memorandum of understanding (MOU) between the U. S. and Mexico. The D.C. Court rejected OOIDA's argument that statutory requirements passed subsequent to the 1991 MOU invalidate that international agreement. Petitioners now argue that the prior D.C. Circuit decisions did not create a permanent exemption to 49 U.S.C. § 31302. They assert that DOT was required to ask Congress for a permanent statutory exemption for LFC-holders in its Final Report on the pilot program, and that Congress must issue this exemption before LFC-holders could legally operate in the United States. Petitioners also argue that the pilot program failed to establish the safety equivalence of the LFC to the U.S. CDL.

The government's brief, filed December 7, 2016, argues that FMCSA's successful completion of the congressionally-mandated pilot program allowed the agency to begin processing applications from Mexico-domiciled motor carriers for authority to operate throughout the United States. Petitioners' challenge to a 1992 regulation requiring Mexican drivers to use their LFC when driving in the U.S. is time-barred and nevertheless, the regulation is consistent with statutory requirements.

Respondents' brief also addressed the unprecedented use of the regulatory and statutory protest process to challenge the agency's exercise of its statutory authority.

Petitioners' reply brief, filed January 11, 2017, asserts that the procedural path to this litigation, triggered by petitioners' filing protests to the proposed grant of operating authority to two Mexico-domiciled carriers, was the proper vehicle to challenge the report to Congress and the agency's lack of authority. They argue that non-compliance with the statutory and regulatory CDL

requirements is relevant to the protest challenging the fitness of the two carriers. On March 8, 2017 the government filed a 28(j) letter informing the court that the United States and Mexico recently finalized an update to the 1991 MOU. A ruling is expected in the coming months.

Suit Filed Challenging Grant of Immunity to Antitrust Laws for Joint Venture Between U.S. and Mexico

On February 14, 2017, ABC Aerolineas, S.A. de C.V., d/b/a Interjet (Interjet) filed a petition for review in the U.S. Court of Appeals for the D.C. Circuit challenging an aviation order issued by the Department in December 2016. In that order, DOT granted approval of, and antitrust immunity (ATI) for, the proposed alliance agreement between Delta Air Lines, Inc. (Delta) and Aerovias de Mexico (Aeromexico) for a joint venture between the U.S. and Mexico. The Department granted ATI based upon the conclusion that the joint venture would benefit the public by improving connectivity and reducing travel times between the two countries. However, the Department also concluded that several conditions would be attached to its grant of ATI to ensure sufficient competition in the affected market. Thus, in its order, DOT required Delta and Aeromexico to divest 24 slot pairs at Mexico City's Benito Juarez International Airport (MEX) and 4 slot pairs at New York City's John F. Kennedy International Airport (JFK). In addition, DOT limited the duration of the grant of ATI to five years.

In comments filed with the Department, Interjet raised various objections to the conditions that DOT decided to impose, contending, among other things, that Delta

and Aeromexico should be compelled to divest a larger number of slots at both MEX and JFK. However, in its decision, DOT rejected Interjet's arguments and concluded that Interjet was ineligible to receive divested slots at MEX, since Interjet already has over 26% of the slots at MEX, second only to Aeromexico, and that Interjet therefore did not need any further help in obtaining competitive access at that airport. Before the D.C. Circuit, Interjet contends that the Department's decision was arbitrary, capricious, and otherwise unlawful. The case is expected to be briefed in the coming months.

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 (NPRM), 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 NPRM. EPIC's previous lawsuit was dismissed as premature because a 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, that case is discussed elsewhere in this issue. 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 and denied Taylor's motion to hold his petition in abeyance. The administrative record has been submitted and both EPIC and Taylor have filed their opening briefs.

EPIC asserted that Public Law 112-95 requires the FAA to conduct rulemaking to integrate UAS into the national airspace system, and because privacy is a critical component of UAS integration, FAA's failure to promulgate privacy regulations indicates that FAA did not consider a critical aspect of the problem, as required by the Administrative Procedure Act. Taylor argued that the small UAS rule imposes restrictions on model aircraft in violation of Public Law 112-95, § 336.

Oral Argument Held in Challenges to FAA Interim Final Rule and Advisory Circular

On March 14, 2017, the U.S. Court of Appeals for the District of Columbia Circuit held oral argument in *Taylor v. Huerta* (D.C.

Cir. Case Nos. 15-1495, 16-1008, 16-1011). In those petitions for review, John A. Taylor, a model airplane operator, and the same petitioner identified in the small UAS rule litigation, filed three cases against the FAA in the D.C. Circuit, challenging: (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.

Fifth Circuit Affirms Preliminary Injunction in Love Field Access Dispute; D.C. Circuit Closes Out Related Litigation Against DOT

On February 2, 2017, the U.S. Court of Appeals for the Fifth Circuit affirmed a lower court's grant of a preliminary injunction requiring the accommodation of Delta Air Lines at Love Field Airport in Dallas, Texas. City of Dallas v. Delta Air Lines, et al., 847 F.3d 279 (5th Cir.). In related litigation, the D.C. Circuit issued final decisions dismissing challenges to guidance letters issued by DOT.

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

2015, describing its views as to the scope of some of the City's relevant legal obligations, including under the assurances the City made to the FAA in connection with federal airport improvement grants.

In June 2015, the City brought suit in federal district court against DOT, Delta, Southwest, and all other airlines serving Love Field or leasing gate space at the airport. The City challenged DOT's guidance letters, and also sought declaratory relief with respect to a variety of issues. 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 to the Fifth Circuit (DOT was not a party to that appeal).

In its decision affirming the preliminary injunction, the Fifth Circuit agreed with the District Court's interpretation of the relevant Lease language. The Court found it unnecessary to consider Southwest's argument that Delta was not a third-party beneficiary entitled to enforce the Lease, since the City – a party to the Lease – also requested that the Court grant an injunction in favor of either Delta or Southwest. In dissent, Judge Jones contended that the Court was wrong to skip over the third-party beneficiary issue. Southwest has petitioned for rehearing by the full Fifth Circuit, and the Court has asked Delta and the City to respond to that petition.

Separately, Southwest petitioned for review of each of DOT's two guidance letters in the

U.S. Court of Appeals for the D.C. Circuit. Southwest Airlines v. DOT (D.C. Cir. 15-1036); Southwest Airlines v. DOT (D.C. Cir. 15-1276). On August 9, 2016, the Court held that DOT's first letter was not a "final agency action" subject to judicial review. Southwest then moved to modify this decision to specify that the dismissal was "without prejudice" to a new challenge that it might like to file in certain circumstances. DOT opposed, and the Court denied the motion on November 3, 2016. On January 4, 2017, the Court dismissed the challenge to DOT's second letter (which the parties had agreed was appropriate), and again rejected Southwest's request that it specify that the dismissal was "without prejudice."

United States Appeals Court Of Federal Claims' Award Of \$135 million for Taking of Property at Dallas Love Field

Congress has long imposed restrictions on air carrier operations at Love Field under the Wright Amendment in order to support Dallas-Fort Worth International Airport. In 2006, the concerned parties (the cities of Dallas and Fort Worth, the DFW airport board, Southwest Airlines, and American Airlines) reached agreement (the Five Party Agreement) on resolving their disputes about the use of Love Field, including the demolition of the LTP terminal. The parties recognized the anticompetitive nature of their agreement and urged Congress to adopt legislation permitting it to go forward. Later that year, Congress responded by enacting the Wright Amendment Reform Act (WARA), which referenced the aforementioned agreement in phasing out existing restrictions and imposing others.

In order to ensure that Love Field did not expand, the concerned parties had agreed, and WARA included a provision, to cap the number of passenger gates permitted at the airport. Plaintiffs then filed a complaint alleging that these effected a taking of its private airline terminal and leasehold rights.

On April 19, 2016, the U.S. Court of Federal Claims (CFC) awarded Love Terminal Partners, L.P., and Virginia Aerospace, LLC just compensation in the amount of \$133.5 million for a taking of their leasehold rights and private terminal building at Dallas Love Field Airport. 126 Fed. Cl. 389 (2016). The CFC agreed with the Plaintiffs and found that WARA contained explicit language that precluded plaintiffs from using their property as a commercial airline terminal, which was the property's highest and best use. Thus, the CFC concluded that no economic value remained following WARA's enactment. In the alternative, the Court also concluded that WARA effected a regulatory taking under the *Penn Central* factors.

The United States appealed the CFC's decision and filed its opening brief on December 2, 2016 (Fed. Cir. Docket No. 16-2276). In its Brief, the United States argues that the CFC erred in holding that the *Penn Central* factors support the finding of a regulatory taking, as the plaintiffs did not have reasonable investment backed expectations in developing a terminal free from the Wright Amendment's restrictions. Additionally, the government argued that WARA did not cause an economic impact on plaintiffs' leases, as WARA actually loosened the restrictions of the Wright Amendment. The United States also argues that WARA did not effect a categorical physical taking, as WARA did not prohibit the use of the Plaintiffs' private airline terminal for a commercial airline terminal.

Finally, the government argued that even if WARA prohibited the use of the plaintiffs' terminal as a commercial airline terminal, that restriction did not destroy the entire value of plaintiffs' leasehold.

The appellees filed their Response Brief on March 2, 2017. Appellees once again argue that WARA codified the Five Party Agreement. Thus, when Congress passed WARA, that legislation prohibited them from using their leasehold as an airline terminal, which was the only economically beneficial use of its property. The Government's Reply Brief is due on April 6, 2017.

Detroit International Bridge Company Appeals In Ambassador Bridge Case

Litigation continues over the Detroit International Bridge Company's (DIBC) efforts to build an adjacent bridge to its Ambassador Bridge. DIBC, and its wholly-owned subsidiary Canadian Transit Company, originally filed a complaint in March 2010 against a number of defendants, including the U.S. Department of State, FHWA, the Government of Canada, the Windsor-Detroit Bridge Authority (an agency of Canada), and the U.S. Coast Guard. The lawsuit centers on DIBC's concern that a proposed new publically owned bridge between Detroit and Windsor, Ontario, called the New International Transit Crossing/Detroit River International Crossing (NITC/DRIC), would destroy the economic viability of DIBC's planned construction of its bridge, the New Span, adjacent to the DIBC-owned Ambassador Bridge. The Ambassador Bridge is the only existing bridge linking the Detroit area to Canada.

After filing an initial complaint that was voluntarily dismissed and a second amended complaint, the plaintiffs filed a Third Amended Complaint on May 29, 2013, alleging nine counts. After the parties filed and briefed dispositive motions, the district court granted federal defendants' motion to dismiss and motion for summary judgment in two opinions, respectively dated September 30, 2015 and June 21, 2016. Furthermore, in response to DIBC's motion for reconsideration of the September 2015 decision, the district court amended and expanded its ruling to state that plaintiffs lacked jurisdiction over the Administrative Procedure Act claim challenging the State Department's approval of the NITC/DRIC under Section Four of the International Bridge Act (IBA). On August 24, 2016, the district court issued a Federal Rule of Civil Procedure 54(b) 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, DIBC appealed from the district court to the U.S. Court of Appeals for the D.C. Circuit. On January 13, 2017, DIBC filed its opening brief, in which it claims that the district court erred in holding that Section Three of the IBA authorized the Secretary of State to approve "anything that purports to be an agreement between a State and Canada relating to an international bridge", and that Section Three of the IBA is an unconstitutional delegation of congressional power. Furthermore, DIBC argues that the district court erred in holding that the State Department's approval under Section Four of the IBA was not "agency action" reviewable under the APA. Finally, DIBC argues that the district court erred in treating this as a claim for "exclusivity" and therefore it should be reversed or at a

minimum DIBC is entitled to discovery on this claim.

On March 9, 2017, the Government filed its response brief, arguing that Section Three of the IBA is not an unconstitutional delegation of authority. Section Three deals with agreements between states and either Canada or Mexico regarding international bridges, and the legislative history of the IBA makes it clear that the State Department is to review bridge agreements. Even before the law was enacted, an executive order established that the Secretary of State would issue or deny permits for cross-border facilities depending on whether they'd serve the national interest.

Additionally, the Government argues that the district court did not err in determining that Michigan is an indispensable party for this claim, and therefore, dismissing the claim because Michigan cannot be joined due to state sovereign immunity. Furthermore, the Government contends that the issuance of the Section Four approval is not reviewable under the APA because it is a presidential action. Finally, the Government argues that the IBA does not promise that the Ambassador Bridge will be the only one between Detroit and Windsor, but rather just ensures the right to "construct, maintain, and operate a bridge."

On March 17, 2017, DIBC filed an unopposed motion requesting an eight-day extension until April 7, 2017 to file its reply brief. An oral argument date has not yet been scheduled.

PHMSA Asks D.C. Circuit to Reject Challenge to Outcome of Hazardous Materials Investigation

On December 7, 2016, PHMSA filed a brief in the U.S. Court of Appeals for the D.C. Circuit, asking the Court to dismiss a petition 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. DOT, No. 16-1259 (D.C. Cir.).

Plaintiff IQ Products 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 that there was no evidence of a violation. On September 24, 2015, IQ sued PHMSA in the U.S. District Court for the District of New Jersey to challenge the outcome of the investigation. After PHMSA moved to dismiss, the case was transferred to the D.C. Circuit.

In its brief, PHMSA listed four reasons why the case should be dismissed. First, IQ lacks standing, since it has not demonstrated that it suffered any injury as a result of PHMSA closing its investigation. Second, PHMSA’s decision to close its investigation without taking enforcement action was a discretionary decision that is not subject to judicial review (under the doctrine established by Heckler v. Chaney, 470 U.S. 821). Third, IQ’s claims are time-barred, since the Hazardous Materials Transportation Act requires that challenges to PHMSA decisions be filed within 60

days, and IQ did not even file its District Court petition until 315 days after PHMSA closed its investigation. Fourth, IQ’s claims are meritless, since PHMSA’s application of its highly-technical regulations was reasonable and entitled to deference, and did not amount to a legislative rule requiring notice-and-comment rulemaking.

Briefing is complete and oral argument is scheduled for May 15.

FAA and Santa Monica Settle Long-Standing Dispute; FAA Asks Court to Dismiss Third-Party Challenge to Settlement Agreement

On February 1, 2017, the U.S. District Court for the Central District California entered a Consent Decree incorporating a settlement agreement between the FAA and the City of Santa Monica. The settlement resolved two lawsuits related to the long-standing dispute over whether the City is obligated to maintain the airport property as an airport: one in which the City claimed that conditions on federal funds it received for airport improvement had expired in 2014, City of Santa Monica v. FAA (9th Cir. No. 16-72827), and another in which the City argued that certain Surplus Property Act restrictions had expired, City of Santa Monica v. United States (C.D. Cal. No. 13-cv-8046). The settlement also resolved a Notice of Investigation issued by the FAA with respect to notices to vacate that the City issued to fixed base operators at the airport. The settlement agreement permits the City to shorten the runway to 3500 feet, but otherwise requires it to operate the airport through the end of 2028.

On February 13, 2017, the National Business Aviation Association and other groups (collectively, “NBAA”) petitioned for review of the settlement agreement in the

U.S. Court of Appeals for the D.C. Circuit, claiming that the agreement was a final FAA order. On February 24, the FAA moved to dismiss the petition for review. The FAA argued that the settlement agreement was not a reviewable final agency action, because it had no force and effect until entered as a Consent Decree, and that the D.C. Circuit does not have jurisdiction to review a Consent Decree issued by a district court in the Ninth Circuit. NBAA subsequently moved for a stay of the settlement agreement while litigation is pending. FAA opposed that request, both because the case should be dismissed, and because NBAA's claims are meritless.

Seventh Circuit Denies Petition for Review of FMCSA's Electronic Logging Device Rule

On October 31, 2016, the U.S. Court of Appeals for the Seventh Circuit denied a petition filed by the Owner Operator Independent Drivers Association (OOIDA) and two drivers challenging an FMCSA rule concerning electronic logging devices (ELDs). In challenging the rule, petitioners raised multiple issues, all of which were rejected by the court. OOIDA v. U.S. Department of Transportation, 840 F.3d 879.

The ELD rule, published December 16, 2015, 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. Congress required adoption of the ELD rule as part of Moving Ahead for Progress in the 21st Century Act (MAP-21).

Applying principles of statutory construction, the court rejected the argument that the rule failed to comply with the statutory mandate because ELDs will not record drivers' hours of service "automatically," *i.e.*, without driver input - a level of technology that the court described as "breathtakingly invasive." The court next rejected the argument that the agency failed to satisfy a statutory requirement, ensuring that ELDs are not used to harass drivers. The court determined that the agency's interpretation of the statute was entitled to *Chevron* deference. The court next rejected the argument that the rule's cost benefit analysis was deficient, concluding that a cost-benefit analysis was not required, and even if required, the studies relied on were sufficient. The court rejected the argument that the agency failed to protect driver confidentiality as required by statute, finding the agency's actions sufficient. Finally, the court rejected petitioners' argument that required use of ELDs violates the Fourth Amendment. The court found it unnecessary to resolve whether the ELD mandate constituted a search or seizure; even if it did, the court found the required use of ELDs is reasonable under the pervasively regulated industry exception.

On January 11, 2017, the court denied petitioners' petition for rehearing and rehearing *en banc*.

Petition for Writ of Mandamus Dismissed Following Publication of Final Rule on Entry-Level Driver Training

On December 29, 2016, the D.C. Circuit issued an order granting the petitioners' unopposed motion for the voluntary dismissal of the Petition for Writ of

Mandamus in Advocates for Highway and Auto Safety v. Foxx (No. 14-1183).

The dismissal followed FMCSA's publication, on December 8, 2016, of a final rule establishing minimum training requirements for certain entry-level commercial motor vehicle operators.

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. 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 held the case in abeyance based upon the agency's representation that it was proceeding expeditiously to finish the rule.

FMCSA issued a first rule on December 8, 2016, which effectively mooted the case.

Owner-Operator Independent Drivers Association Challenges FMCSA's Medical Certification Integration Rule in the Eighth Circuit

On November 9, 2016, the Owner-Operator Independent Drivers Association (OOIDA) and Scott Mitchell filed a petition for review challenging the Medical Examiners Certification Integration Final Rule, 80 Fed. Reg. 22790 (April 23, 2015), and the corrections to that rule, 80 Fed. Reg. 35577 (June 22, 2015), in the United States Court of Appeals for the Eighth Circuit. OOIDA, et al. v. U.S. Department of Transportation, et al (No. 16-4159).

In its brief filed on January 18, 2017, OOIDA contends that when FMCSA promulgated its expanded Medical Examination Report (MER) Form and the Appendix A to 49 CFR 391: 1) FMCSA violated the notice and comment provisions of the Administrative Procedure Act (APA) when it added new advisory medical criteria to the CFR without notice and comment; 2) FMCSA did not properly consider the costs and benefits of expanding the medical examination form under 49 U.S.C. § 31136; and 3) FMCSA violated Public Law 113-45, which forbids the Secretary from implementing the screening of drivers for sleep disorders including sleep apnea unless the requirement is adopted pursuant to a rulemaking proceeding by including the advisory criteria in the Code of Federal Regulations. Petitioners claim that FMCSA violated the APA and 49 U.S.C. § 31136 when it expanded the MER form to include a more robust health history, including items related to sleep apnea without analysis as to the safety benefits or costs to the changes in the form and published Appendix A as advisory criteria. OOIDA contends that the expansion of the form has caused confusion among medical examiners, some of whom believe the evaluation and intervention for sleep apnea is now part of the certification criteria. Petitioners argue that the expansion in scope of the MER and Appendix A are de facto rules.

The Government's brief is due on April 12, 2017.

Second Challenge to MWAA's Use of Dulles Roll Road Revenue to Fund Construction of Metro Silver Line

A group of Dulles Toll Road users filed a class action complaint 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. 16-1307). This case is similar to Corr v. MWAA, 740 F.3d 295 (E.D. Va. 2014), a case that also challenged MWAA's use of Dulles Toll Road revenue to fund construction of the Silver Line Metro, but in this litigation, Plaintiffs are alleging constitutional violations, 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 5) MWAA's tolls exceed its authority under its enabling statutes and the APA. DOT was not a party in the *Corr* litigation, but in this case, Plaintiffs have named DOT as a defendant, primarily because former Secretary Mary Peters provided MWAA with a Certification in 2008 that MWAA's use of Dulles Toll Road revenue was consistent with airport purposes and thus consistent with its lease.

Plaintiffs originally filed this action in the District Court for the District of Columbia, but MWAA moved to have the case transferred to the Eastern District of Virginia. MWAA argued that transfer was appropriate because all of the previous cases raising similar issues (including Corr v. MWAA) were decided in state and federal courts in Virginia and because the case presents a greater matter of public concern to the residents of Virginia than to the residents of the District of Columbia. The D.C. District Court granted the motion and

transferred the action to the Eastern District of Virginia.

Plaintiffs filed a Motion for Summary Judgment primarily arguing that MWAA exercises federal authority (executive, legislative or both) in violation of the Constitution. Additionally, Plaintiffs argue that MWAA is violating its implementing statutes, the APA, and its lease by using toll road revenue for non "airport purposes," *i.e.*, construction of the Silver Line metro. Plaintiffs also challenge DOT's inaction to enforce provisions of its lease to operate Dulles International Airport.

In response, the Defendants, MWAA, DOT, and D.C. (who intervened in the case) filed motions to dismiss. MWAA first notes that with the exception of Plaintiffs' Compact Clause argument, all of the other issues mirror the issues presented in *Corr*. MWAA then argues that the court should dismiss the case because the state of Virginia is an indispensable party that is not part of the litigation, and thus the case should be dismissed for lack of a necessary party.

DOT also filed a Motion to Dismiss arguing that MWAA is not a federal entity exercising federal power. With regard to the APA claim, DOT first argues that the claim is not properly before the court. In the Amended Complaint, Plaintiffs' APA claim was fashioned as a challenge to DOT's 2008 Certification; however, in Plaintiffs' summary judgment motion, Plaintiffs argue that DOT violated the APA for not taking action to enforce the lease provisions. Additionally, DOT argues that the APA claim is time barred, as the statute of limitations has run on the APA claim. The District Court has scheduled a hearing on the Motions for April 20, 2017.

Groups Challenge Executive Order on Reducing Regulation and Controlling Regulatory Costs

On February 8, 2017, three organizations filed suit in the U.S. District Court for the District of Columbia, challenging Executive Order 13771, which directs federal agencies to identify two existing regulations to repeal for every new regulation proposed or issued, and to issue regulations during this fiscal year that (along with repealed regulations) have a combined incremental cost of \$0 or less. Public Citizen v. Trump, et al., No. 17-cv-253 (D.D.C.).

The plaintiffs – Public Citizen, the Natural Resources Defense Council, and the Communications Workers of America – contend that the Executive Order requires agencies to act in contravention of the Administrative Procedure Act and relevant substantive statutes. Plaintiffs claim that the Executive Order therefore violates separation of powers principles and the Take Care Clause of Article II of the Constitution. Plaintiffs also assert (among other things) that they have causes of action to enjoin agencies from complying with the Executive Order, and to enjoin the Office of Management and Budget (“OMB”) from implementing it. The complaint names as defendants the President, the United States, the acting director of OMB, and 14 agency officials, including the Secretary of Transportation and the heads of NHTSA, FMCSA, PHMSA, and FRA.

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

On November 28, 2016, DOT – along with intervenor All Aboard Florida Operations

LLC (“AAF”) – moved to dismiss two cases involving AAF’s passenger rail project connecting Miami and Orlando, on the grounds that the cases are moot. Indian River County v. DOT, et al. (D.D.C. 15-cv-460); Martin River County, v. DOT, et al. (D.D.C. 15-cv-632).

The cases concern DOT’s authority, pursuant to 26 U.S.C. § 142(m), to allow state and local governments to issue tax-exempt Private Activity Bonds (“PABs”) to investors to finance certain private transportation projects. In December 2014, DOT authorized a Florida state entity to issue up to \$1.75 billion in PABs on behalf of the Project. The allocation covered both Phase I of the Project (Miami to West Palm Beach) and Phase II (West Palm Beach to Orlando). Opponents of the project, including two counties located in Phase II, brought suit against DOT to vacate the PAB allocation. They alleged that the Project did not meet the statutory eligibility criteria, and that DOT violated the National Environmental Policy Act (“NEPA”) by not preparing an environmental impact statement before making the allocation. In June 2015, the Court denied plaintiffs’ motion for a preliminary injunction. In August 2016, the Court granted DOT’s and AAF’s motions to dismiss the challenges to the Project’s eligibility, while holding that the plaintiffs had stated NEPA claims.

On September 30, 2016, AAF applied to DOT for a new \$600 million PAB allocation that would cover only Phase I of the Project. AAF requested that DOT withdraw the existing \$1.75 billion allocation if it granted the new allocation. On November 22, 2016, DOT granted the new allocation and withdrew the existing allocation.

DOT and AAF subsequently moved to dismiss the pending lawsuits as moot, since

the challenged action – the December 2014 allocation – was no longer in place. Plaintiffs opposed, arguing that the Court should rule on the appropriateness of the now-withdrawn December 2014 allocation, based solely on the mere possibility that AAF might one day submit a new application for a Phase II allocation, and that DOT might grant that application in a way that plaintiffs thought improper under NEPA. Plaintiffs also moved for leave to seek “jurisdictional discovery”; DOT opposed that motion, which was eventually denied by the Court.

The motions to dismiss have been fully briefed since January 30, 2017. Over plaintiffs’ objection, the Court has stayed all briefing on plaintiffs’ motions for summary judgment pending resolution of the motions to dismiss.

United States Files Interlocutory Appeal in Case Challenging Carbon Dioxide Emissions

On September 10, 2015, a group of plaintiffs filed an amended complaint in the U.S. District Court for the District of Oregon against the United States and a host of federal agencies, including DOT, alleging that the United States has allowed and caused an increase in greenhouse gas emissions in Juliana v. United States, Case No. 6:15-cv-01517-TC (D. Or. Nov. 10, 2016). The plaintiffs are a number of named youth plaintiffs (acting by and through guardians) along with Earth Guardians (a tribe of young activists), and “future generations” by and through their Guardian Dr. James Hansen (a former NASA employee), and allege that unless the United States engages in immediate, meaningful action to phase out carbon dioxide emissions, the youth plaintiffs and future

generations “would live in a climate system that is no longer conducive to their survival.” The National Association of Manufacturers, the American Fuel & Petrochemical Manufacturers, and the American Petroleum Institute have intervened in the case.

The Amended Complaint asserts a number of constitutional claims on the basis of due process, equal protection, unenumerated rights under the Ninth Amendment, and the public trust doctrine. On November 17, 2015, the United States sought to dismiss the case on the grounds that plaintiffs lack standing because their alleged injuries are not particular to the plaintiffs and because these alleged injuries are not traceable to the United States. Furthermore, the United States sought dismissal on grounds that the Plaintiffs failed to state a claim under the Constitution, as no court has recognized a constitutional right to be free from carbon dioxide emissions.

The magistrate judge admitted that that this is a “relatively unprecedented lawsuit” and that “plaintiffs assert a novel theory somewhere between a civil rights action and NEPA/Clean Air Act/Clean Water Act suit to force the government to take action to reduce harmful pollution” but ultimately recommended against dismissal. First, the magistrate judge found that the Plaintiffs had standing even though their allegations of direct or threatened direct harm were shared by most of the population. Furthermore, the magistrate judge held that it was too early in the proceedings to determine whether the plaintiffs’ allegations involve a political question and noted that some of the plaintiffs’ allegations raise Constitutional violations that could be addressed by the court. Finally, the magistrate judge found that the validity of the plaintiffs’ constitutional claims could not be

determined on a motion to dismiss and stated a need for further evidence. The District Court Judge then adopted the magistrate judge's findings and recommendation to deny the United States and Intervenors' Motions to Dismiss.

On March 7, 2017, the United States filed a Motion to Certify Order for Interlocutory Appeal and a Motion to Stay the district court litigation pending a decision by the Court of Appeals for the Ninth Circuit.

DOCR Motion to Dismiss Granted in DBE Certification Challenge

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 of Transportation, various OMWBE officials, and the former Acting Director of DOT's Departmental Office of Civil Rights (DOCR) in the U.S. District Court for the Western District of Washington (W.D. Wash. 16-5582). In Orion Ins. Grp., CORP. v. Wash. State Office Of Minority & Women's Bus. Enters. 16-5582 RJB (W.D. Wash. Nov. 17, 2016), 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. In addition, the plaintiffs claim that OMWBE, DOT, and the named officials from both agencies violated 42 U.S.C. §§ 1983 and 2000d, 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 DOT and the Acting Director of DOCR in her official capacity. Shortly after briefing on the federal defendants' motion to dismiss was completed, the district court granted the motion and dismissed all claims against the Acting Director of DOCR in her individual capacity. In addition, the court dismissed all claims against DOT and the Acting Director of DOCR in her official capacity, except for the plaintiffs' equal protection claim. As a result, that claim and the plaintiffs APA claims remain pending.

District Court Denies Motion to Dismiss in Criminal Case Challenging DBE Program

On February 2, 2017, the United States District Court for the Western District of Pennsylvania denied a motion to dismiss in a white collar criminal case arising from an alleged fraud on the United States Department of Transportation's

Disadvantaged Business Enterprise Program (DBE Program) by Century Steel Erectors (CSE) and WMCC, Inc., and their principals. In United States of America v. Donald R. Taylor, Criminal No. 15-248 (W.D. Pa. Feb. 2, 2017), the Government charged one of the owners of CSE with fourteen separate criminal offenses, contending that he and CSE used WMCC, Inc., a DBE, as a “front” to obtain 13 federally funded highway construction contracts requiring DBE status, and that CSE performed the work on the jobs while it was represented to agencies and contractors that WMCC would be performing the work. The Government contends that WMCC did not perform a “commercially useful function” on the jobs as the DBE regulations require, and that CSE

personnel did the actual work, concealing from general contractors and government entities that CSE and its personnel were doing the work. The defendant moved to dismiss the indictment and to suppress evidence, contending among other things that DOT’s DBE program was unconstitutional and that DOT lacked the authority to promulgate its DBE regulations. The court denied the motion, and in so doing, agreed with other federal courts, which have upheld the validity of the DBE program over the past two decades, and concluded that the program satisfies constitutional standards under strict scrutiny. Adarand Constructors, Inc. v. Slater, 228 F.3d 1147, 1155 (10th Cir. 2000).

Recent Litigation News from DOT Modal Administrations

Federal Aviation Administration

Oral Argument Held in Flyers Rights Challenge to FAA Denial of Petition for Rulemaking on Seat Dimensions

On March 10, 2017, the U.S. Court of Appeals for the District of Columbia Circuit held oral argument in Flyers Rights Education Fund v. FAA (D.C. Cir. 16-1101), a case in which Flyers Right is challenging the FAA’s denial of its request that the agency promulgate regulations mandating a minimum seat width and pitch for commercial airlines. In addition to requesting that the FAA promulgate regulations regarding a minimum seat width and pitch for commercial airlines in its petition for rulemaking, Flyers Rights also requested that the agency prohibit any further reductions in seat size, width, pitch,

padding, and aisle width until a final rule is issued. Flyers Rights also requested that the FAA appoint an advisory committee or task force to assist and advise the agency in proposing standards for airline seats. The FAA denied the petition for rulemaking after concluding that the issues raised in the petition for rulemaking did not meet the criteria to pursue rulemaking, since they did not raise an immediate safety or security concern.

Flyers Rights contended that the FAA is required to consider passenger comfort and health, the agency’s denial of the petition for rulemaking was arbitrary and capricious. In addition, Flyers Rights also disputed the FAA’s conclusion that the issues identified in the petition for rulemaking did not raise an immediate safety or security concern.

In its response brief, the FAA argued that the decision whether to initiate a rulemaking is committed to the agency’s discretion. In this case, the FAA reasonably declined to

engaged in a rulemaking to regulate seat width or pitch, because the agency is responsible for ensuring aviation safety, and the petition for rulemaking generally did not identify issues concerning safety. With respect to the one safety issue identified in the petition, regarding the ability of passengers to move out of their seats quickly in case of an emergency, the FAA explained in its denial that evacuation demonstrations have been conducted at the seat pitches currently employed by the airlines. Moreover, the FAA also explained that its extensive data shows that seat pitch and width do no adversely affect evacuation times.

FAA Asks Eleventh Circuit to Dismiss Challenge to Letter Regarding Aviation Fuel Tax Policy

On March 22, 2017, the FAA filed a brief with the U.S. Court of Appeals for the Eleventh Circuit, contending that the Court may not review a Georgia county's challenge to an FAA letter concerning requirements for the use of aviation fuel tax revenues. See Clayton County, et al. v. FAA (11th Cir. 17-10210).

The case relates to a federal statute that provides that “[l]ocal taxes on aviation fuel” generally must be spent for aviation-related purposes, such as the costs of operating an airport. 49 U.S.C. § 47133(a). In 2014, the FAA issued a policy amendment clarifying that it interpreted the statute to apply whether or not the tax-levying entity was itself responsible for operating the federally-assisted airport. The FAA recommended that affected state and local governments submit an “action plan” detailing how they would bring themselves into compliance. The FAA agreed that an action plan could include a “reasonable transition period” of up to three years from the policy

amendment's effective date (i.e., until December 8, 2017), during which the FAA would exercise its discretion not to enforce the statute against any “non-sponsor” entity.

Clayton County, Georgia (along with other governmental entities within the county) imposes a general sales tax on aviation fuel sales at Hartsfield-Jackson Atlanta International Airport, a federally-assisted airport that is partially located within Clayton County, but is owned and operated by the City of Atlanta. Clayton County uses the proceeds of this tax for non-aviation purposes. After the FAA's 2014 policy amendment, Clayton County submitted an action plan. In September 2016, however, Clayton County submitted an “amended” action plan, and now argued that the FAA should allow it to spend aviation fuel tax revenues for non-aviation-related purposes, because it could no longer use those revenues for airport costs or other qualifying expenses. On November 17, 2016, the FAA's Chief Counsel wrote to Clayton County, reiterating the agency's existing position that “federal law prohibits all state and local governments from diverting aviation fuel tax revenues for any non-aviation related purpose.”

On January 13, 2017, Clayton County petitioned for review of the FAA Chief Counsel's letter. On March 8, the Court *sua sponte* asked the parties to brief the issue of whether the Chief Counsel's letter was a reviewable “final agency action.” In its response, the FAA argued that the letter was not a final agency action, as it did not meet either prong of the two-part test used to assess finality. First, the letter did not mark the consummation of the FAA's decisionmaking process, as it made no determination about whether Clayton County will be in compliance by the December 8 deadline, much less about what

the agency may do if Clayton County is not in compliance. Second, the letter did not determine any rights or obligations, and no legal consequences flowed from it.

Challenge to FAA Airworthiness Directive on Aircraft Engine Cylinders

In August 2016, the FAA issued a final airworthiness directive (AD) concerning certain aircraft engine cylinder assemblies. This AD was prompted by reports of multiple cylinder head-to-barrel separations and cracked and leaking aluminum cylinder heads. This situation could lead to failure of the engine, in-flight shutdown, and loss of control of the airplane. The AD addressed this issue by requiring removal of the affected cylinder assemblies, including overhauled cylinder assemblies, according to a phased removal schedule.

On October 11, 2016, Airmotive Engineering Corporation and Engine Components International Inc. filed a petition in the Court of Appeals challenging the final AD (No. 16-1356). In their opening brief, petitioners argued that the FAA's finding that the pertinent cylinder assemblies presented an unsafe condition was arbitrary and capricious. Specifically, petitioners argued that: (1) a failure of one cylinder in a multi-cylinder engine is unlikely to lead to an accident; (2) the FAA's analysis overstated the likelihood of cylinder failure; (3) the accidents that the FAA cited in support of its unsafe-condition finding were inapplicable to the cylinders at issue in this case; (4) the FAA's finding of an unsafe condition in this case was inconsistent with how the agency treated cylinder failures in the past; and (5) the FAA arbitrarily compared the failure rate of

cylinders at issue in this case with the lower failure rate of a completely different cylinder. The government response brief is due in mid-April.

Ninth Circuit Rules for FAA in Northern California Metroplex NEPA Challenge

On September 26, 2014, Petitioners sought review of FAA's August 6, 2014, Final Environmental Assessment/Finding of No Significant Impact and Record of Decision for the Northern California Optimization of Airspace & Procedures in the Metroplex (NorCal Metroplex), part of the Next Generation Air Transportation System (NextGen) Lyons, et. al. v. FAA, et. al. (9th Cir No. 14-72991). The NorCal Metroplex project takes advantage of the benefits of performance-based navigation by implementing area navigation (RNAV) procedures to help enhance the safety and efficiency of the airspace in the NorCal Metroplex. The project involves optimized procedures serving air traffic flows into and out of four Northern California airports: San Francisco International Airport (SFO), Oakland International Airport (OAK), Mineta San Jose International Airport (SJC), and Sacramento International Airport (SMF). In total, the General Study Area includes 11 entire counties and parts of 12 additional counties. Petitioners are residents of areas near SFO who allege that they have experienced "a dramatic and unreasonable increase in the amount of aircraft noise in their communities" as a result of the project.

Petitioners alleged the FAA failed to prepare an environmental impact statement as required by NEPA, relied on inadequate flight track information, and challenged the adequacy of FAA's analysis of noise and other impacts.

On December 21, 2016, one week after oral argument, the U.S. Court of Appeals for the Ninth Circuit issued an unpublished memorandum denying the petition for review. The Court determined the FAA conducted an “extensive, detailed, mathematical analysis of the anticipated noise impacts” (citing City of Mukilteo v U.S. Dep’t of Transp., 815 F.3d 632, 639 (9th Cir. 2016)) and the “FAA’s use of estimated future flights and flight tracks was not arbitrary and capricious. The very nature of modeling forecasts requires an agency to use reasonable estimates that it develops from its expertise.” The Court upheld as reasonable, the FAA assumption that its adoption of new procedures intended to enhance the safety and efficiency of air traffic would not result in increased flights within the Metroplex. Finally, the Court rejected the claim FAA failed to consider cumulative noise impacts, because FAA had incorporated all noise impacts, including cumulative impacts, into the no-action alternative.

Second Circuit Orders East Hampton Airport Restrictions Enjoined

The Second Circuit issued a decision in the Friends of East Hampton Airport (FOEHA) v. Town of East Hampton (No. 15-2465) directing the district court to issue a preliminary injunction preventing enforcement of three airport access restrictions that the Town of East Hampton enacted in the spring of 2015. Since the Town enacted the access restrictions without complying with the procedures of the Airport Noise and Capacity Act of 1990 (ANCA), 49 U.S.C. §§ 47521-47534, the Second Circuit held that the FOEHA could invoke the court’s equity jurisdiction to

enjoin enforcement of the restrictions. The Second Circuit also held that ineligibility for grants was not the sole remedy for a violation of ANCA as the Town had argued. In its analysis of the likelihood that FOEHA would prevail, the Second Circuit held that ANCA applied to all public airports, regardless of their funding eligibility. Because there was no dispute that the Town’s access restrictions were implemented without complying with ANCA procedures, the Second Circuit concluded that the access restrictions were pre-empted. The Town filed a petition for certiorari on March 6 and FOEHA’s response is due on April 5.

Eight Petitioners Challenge FAA’s Southern California (SoCal) Metroplex FONSI/ROD

A total of eight petitions for review have been filed challenging FAA’s August 31, 2016 Finding of No Significant Impact and Record of Decision (FONSI/ROD) for the Southern California Metroplex project. Three were filed in October 2016 in the U.S. Court of Appeals for the District of Columbia. Benedict Hills Estates Assoc. v. FAA (D.C. Cir. No. 16-1366); Donald Vaughn v. FAA (D.C. Cir. No. 16-1377); Santa Monica Canyon Civic Assoc. v. FAA (D.C. Cir. No. 16-1378). Four were filed in the U.S. Court of Appeals for the Ninth Circuit. City of Newport Beach v. FAA (9th Cir. No. 16-73458); City of Culver City v. FAA (9th Cir. No. 16-73474); City of Laguna Beach v. FAA (9th Cir. No. 16-73478); Stephen Murray v. FAA (9th Cir. No. 16-73479). One petitioner submitted a late-filed petition and a motion to intervene. County of Orange v. FAA (9th Cir. No. 16-73611).

The FAA complied with the requirements of NEPA and prepared an environmental assessment (EA) of the Southern California Metroplex project. The project consists of satellite-based departure and arrival procedures at six major airports (BUR, SNA, LAX, LGB, ONT, and SAN) and fifteen satellite airports throughout Southern California. The project involves improving flexibility and predictability of air traffic routes through increased use of performance based navigation. It is a key component in FAA's Next Generation Air Transportation System.

The EA found that the proposed project would cause no significant impacts to people, historic properties, parks or other applicable environmental resources. On August 31, 2016, the FAA completed the final EA for the SoCal Metroplex project and signed the FONSI/ROD. On Friday, September 2, 2016, the FAA issued the Notice of Availability (NOA) of the EA and FONSI/ROD through the Federal Register. The FAA is phasing implementation of the project. The petitioners have challenged the adequacy of the environmental review under NEPA.

Although the 60-day statute of limitations under 49 U.S.C. § 46110(a) expired, the County of Orange on November 10, 2016 filed a motion for leave to file a late petition and also moved for leave to intervene in the City of Newport Beach's challenge. The County asserted that it must intervene in order to ensure that its interests and that of its residents are adequately protected. FAA opposed the County's motion because the County planned to raise many of the same claims as Newport Beach and, rather than intervening, the County could inform the court of the potential effect of any ruling on its residents as *amicus curiae*. Further, FAA argued that should the court grant the

motion, the order should ensure that the County not enlarge the issues already properly brought before the court.

The D.C. Circuit granted the county's motion to intervene on January 27, 2017.

On November 18, 2016, FAA filed motions to transfer the petitions filed in the 9th Circuit to the D.C. Circuit as required by 28 U.S.C. §§ 2112(a)(1) & (5). The statutory provisions require consolidation in one court of appeals of petitions for review of the same agency order filed in two or more courts and filing of the administrative record in the court where proceedings with respect to the order were first instituted. The 9th Circuit granted FAA's motion and ordered the petitions transferred to the D.C. Circuit on January 6, 2017.

D.C. Circuit Dismisses Petition for Review of FAA/EASA Maintenance Annex Guidance

On January 25, 2017, the U.S. Court of Appeals for the District of Columbia Circuit issued a *per curiam* judgment denying a petition for review by the Aviation Suppliers Association (ASA), Aviation Suppliers Ass'n v. Huerta (No. 16-1202), which sought to enjoin the implementation of certain revisions to the Maintenance Annex Guidance (MAG), a document issued jointly by the FAA and the European Aviation Safety Agency (EASA) in accordance with the Agreement Between the United States of America and the European Community on Cooperation in the Regulation of Civil Aviation Safety.

The MAG sets forth guidance on complying with each authority's regulations by aircraft repair facilities that are certificated by both authorities.

The case arose as a result of a September 9, 2015 change to the MAG which clarified that new components received by FAA-certificated repair stations from U.S. production approval holders must be accompanied by an FAA Form 8130-3, Authorized Release Certificate, if those components are to be installed on a product or article for which a dual FAA/EASA release is to be issued. The revisions to the MAG were made to clarify guidance for compliance with European Union (EU) Commission Regulation No 1321/2014, Annex I, subpart E, M.A. 501. That regulation specifies, with very limited exceptions, that a repair facility installing a component on a product or article subject to European Union jurisdiction must ensure the component has been released to service on an EASA Form 1, or its equivalent. EASA, through the MAG, asserted that it would recognize FAA Form 8130-3 as an equivalent to EASA Form 1, as the FAA form is identical to the EASA form in all material aspects.

Petitioner challenged the revisions to the MAG asserting that the FAA could not impose such requirements without complying with the provisions of the Administrative Procedure Act (5 USC 551 *et seq.*) and that the agency's actions were *ultra vires*, and violated both the due process clause and the Paperwork Reduction Act (44 USC 3501 *et seq.*). The petitioner also asserted that the agency's actions were an unconstitutional infringement of Congress's authority under the Commerce Clause.

In its response, the FAA asserted that the MAG revisions did not cause the petitioner and its members any injury. The agency emphasized that any injury the petitioner and its members may have suffered is traceable not to any action by the FAA, but to EU regulations and that any action by the

Court to enjoin the MAG's provisions would have no effect on the petitioner because the EU regulation would continue to govern the documentation of parts installed on aircraft registered in the EU and other products and articles subject to EU jurisdiction. Accordingly, the agency argued that the petitioner has no standing to challenge the FAA and EASA's revision of the MAG and that any action by the Court could not provide the petitioner relief from compliance with the underlying EU regulatory requirement.

The Court, in an unpublished order, denied ASA's petition based on its determination that ASA lacked standing.

The Court cited its decision in Spectrum Five LLC v. Federal Communications Commission, 758 F.3d 254 (D.C. Cir 2014) which held that that the plaintiff lacked standing to challenge an agency order because redress of the alleged harm depended on action by "an international organization that is not regulated by our government and therefore not bound by this Court or the [agency]" and because the plaintiff failed to show that a favorable ruling would create a "significant increase in the likelihood" that its injury would be redressed.

The Court's order also noted, without further elaboration, that the Court lacked subject matter jurisdiction. On March 9, 2017, the Court denied the petitioner's petition for rehearing.

Plea for the Trees Challenges Runway Safety Area Project at Louisville Bowman Field

On February 13, 2017, residents of neighborhoods nearby Louisville Bowman

Field (LOU) and a local advocacy group, Plea for the Trees, filed a Petition for Review of a FONSI/ROD issued by the FAA on December 13, 2016. The FONSI/ROD covered an environmental assessment for a runway safety area project proposed by the airport sponsor, Louisville Regional Airport Authority (LRAA). The runway safety area project included the acquisition of avigation easements and trimming and removal of trees located on private property off-airport in an effort to remove obstructions to the navigable airspace and enable reinstatement of nighttime instrument procedures that the FAA had suspended several years prior.

The petition, filed in the Sixth Circuit Court of Appeals and styled Kaufmann, et al. v. Federal Aviation Administration, et al., No. 17-3152, alleges that the FAA violated NEPA, the National Historic Preservation Act (NHPA), and Section 4(f) of the U.S. Department of Transportation Act (DOTA). Petitioners also moved, on February 22, 2017, for emergency injunctive relief to prohibit LRAA from acquiring easements or trimming trees until final disposition of the case. The FAA and LRAA filed briefs opposing the petitioners' motion for injunctive relief on February 23, 2017. The court denied petitioners' motion on March 1, 2017 on the grounds that petitioners did not first move the agency for a stay per Rule 18 of the Federal Rules of Appellate Procedure, petitioners' delay in filing their petition and motion for stay, and petitioners' overall failure to satisfy the test for injunctive relief.

Prior to filing the current petition, petitioners previously sued the FAA and LRAA in the United States District Court for the Western District of Kentucky, Kaufmann, et al. v. Federal Aviation Administration, 3:16CV-801-DJH, also alleging violations of the NHPA and DOTA

and seeking injunctive relief against LRAA. The District Court granted the FAA's motion to dismiss for lack of subject matter jurisdiction on February 6, 2017.

City of Burien, Washington Challenges FAA's SEA North Flow Procedure

A Petition for Review was filed in the United States Court of Appeals for the Ninth Circuit on February 14, 2017 challenging the FAA's implementation of certain flight departure procedures at Seattle-Tacoma International Airport (SEA) and alleging failure by the FAA to conduct environmental review of alternative flight departure routes. These procedures were established in a Letter of Agreement ("LOA") between the Seattle Tracon and the Seattle Tower signed on July 26, 2017.

Petitioner in this case, City of Burien v. FAA, No. 17-70438, is an incorporated city located in King County, Washington. Petitioner claims that the procedures established in the LOA has resulted in significant noise impacts to its community. Petitioner had requested that the FAA cease operation of the procedures and conduct additional environmental review of alternative flight departure routes that would have fewer significant adverse impacts on the City and its residents.

Petitioner filed a Mediation Questionnaire on February 21, 2017. The parties are awaiting the scheduling of a settlement assessment conference by the Ninth Circuit. If mediation does not proceed or is not successful, Petitioner's opening brief is due May 5, 2017 and Respondent's answering brief is due June 5, 2017.

Georgetown Groups Challenge FAA's Departure Procedures At National Airport

A Petition for Review was filed in the U.S. Court of Appeals for the District of Columbia Circuit on August 24, 2015, challenging FAA's implementation of nine northern departure routes from National Airport (DCA).

The routes were approved in the FAA's December 12, 2013 Record of Decision (ROD), which was based upon a FONSI for the Washington D.C. Optimization of Airspace and Procedures in the Metroplex (D.C. Metroplex).

The D.C. Metroplex established 41 new and modified procedures in the greater Washington, D.C. area. The FAA is implementing the new flight procedures to take advantage of updated technologies as part of its ongoing modernization of airspace in the United States.

Petitioners in this case, Citizens Association of Georgetown, et al. v. FAA, et al. No. 15-1285 (D.C. Cir.), are a coalition of citizen groups from the Georgetown neighborhood. The challenge to the departure procedures is based on the procedures' alleged noise impacts to the Georgetown neighborhood. Petitioners claim the FAA's approval of the procedures violated NEPA, the National Historic Preservation Act, and Section 4(f) of the U.S. Department of Transportation Act, and request that the procedures be set aside.

The FAA and Petitioners participated in a court-ordered mediation, but were unable to resolve the dispute. On January 23, 2016, Petitioners filed their opening merits brief. Petitioners raise two arguments in support of

their request that the procedures be set aside. First, Petitioners allege the FAA did not subject certain components of the departure procedures to adequate environmental review. Second, Petitioners allege the FAA violated public notice requirements set forth in the Council on Environmental Quality's NEPA regulations and the FAA's Orders implementing NEPA.

Merits briefing is expected to be completed by April 7, 2017. The parties have already fully briefed the FAA's Motion to Dismiss for Timeliness and Petitioners' Motion to Supplement the Administrative Record. Both motions are pending before the merits panel. The Court has not yet ordered oral argument.

Third Circuit Denies BRRAM Petition for Review of FAA Approval of Frontier OpSpec

The Third Circuit affirmed the decision of the District Court for the District of New Jersey which dismissed a complaint by Bucks (County, PA) Residents for Responsible Airport Management (BRRAM) against FAA. BRRAM's complaint alleged that the FAA's categorically excluded decision to approve Operations Specifications (OpSpecs) for Frontier Airlines at Trenton Mercer County Airport, (Trenton, NJ) violated NEPA. The Third Circuit affirmed the district court's holding that it lacked jurisdiction over the challenge, because challenges of FAA final orders must be brought in a court of appeals. The Third Circuit also agreed with the District Court that if there was no final order as appellees contended, the District Court also lacked jurisdiction over their claim that FAA violated NEPA and any attempt to amend the complaint could not provide a basis for jurisdiction in the District Court.

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 challenging FAA's inaction rather than an FAA action. In response, 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. Moreover, BRRAM's petition was untimely filed. The District Court dismissed the complaint for lack of jurisdiction under 49 U.S.C. § 46110 and denied BRRAM's motion to amend the complaint.

Federal Highway Administration

Notice of Appeal Filed in Downtown Birmingham, AL Project

On January 17, 2017, plaintiffs in Johnathan Austin, et al. v ALDOT, et al., (N.D. Al. No. 15-1777) filed a Notice of Appeal to the U.S. Court of Appeals for the Eleventh Circuit (11th Cir. No. 17-10252). On November 17, 2016, the U.S. District Court for the Northern District Alabama, Magistrate Judge John E. Ott, issued a revised opinion and order granting Federal and State defendants' motions for summary judgment and denying plaintiffs' motion for summary judgment. The lawsuit is challenging the reconstruction of Interstate - 59/20 in downtown Birmingham, Alabama.

In 2011 the Alabama Department of Transportation (ALDOT) initiated a project to rehabilitate the CBD bridges on I 59/20 in downtown Birmingham. ALDOT initially investigated in-kind replacement of the existing bridge superstructures. The existing bridges are approximately one mile long. Early estimates for the construction of this project were in the \$120 to \$130 million range.

After further study and discussions with the City of Birmingham and Jefferson County Commission, ALDOT decided to pursue expanding the proposed project. The revised project scope included a reconstructing the interstate to add traffic capacity, to add interchange improvements to eliminate weaving elements and to construct ramps along I-59/20 between I-65 and the Red Mountain Expressway. The revised project also provided improved access to and from downtown Birmingham

using a combination of newly-located ramps and existing ramps.

The final project fully replaces the structurally deficient bridge along I-59/I-20 corridor and will improve traffic operations and access throughout the City of Birmingham's Central Business District (CBD). The total length of the project is approximately 3.5 miles. The 1.25 miles of structurally deficient bridge along I-59/I-20 in the CBD will be replaced with a segmental concrete bridge. The segmental concrete bridge will include 12-foot travel lanes and 10-foot inside and outside shoulders. To improve traffic operations in the CBD, auxiliary lanes will be constructed through the entire length of the project, for a distance of approximately 3.5 miles, and the existing ramps to I-59/I-20 from 18th Street North and 22nd Street North will be removed. The current estimated cost of the project is \$450 million. The project is currently under construction with a completion date set for 2021.

The appellant's brief is due April 6, 2017.

Fourth Circuit Court of Appeals Vacates Adverse Garden Parkway District Court Decision as Moot

On December 13, 2016, the U.S. Court of Appeals for the Fourth Circuit issued a decision in favor of North Carolina Department of Transportation (NCDOT) vacating an adverse district court decision. The court ruled that the litigation became moot when the highway project being challenged was removed from local and state transportation plans thus rendering it ineligible for Federal-aid funding. Catawba Riverkeeper Foundation v. N.C. Dep't of Transp., 843 F.3d 583 (4th Cir. 2016). The litigation centers on the Gaston East-West

Connector, a proposed 22-mile toll road project west of Charlotte. Two local environmental groups had filed suit to stop the project on the grounds that NCDOT and FHWA had improperly relied upon a single set of socioeconomic (SE) data (population and employment projections) in comparing future traffic forecasts for the Build and No-Build alternatives considered in the Environmental Impact Study (EIS) for the project. Plaintiffs asserted that defendants should have used two separate sets of SE data. In March 2015, the district court issued an opinion and order granting plaintiffs' motion for summary judgment, denying defendants' motions for summary judgment, and vacating the Record of Decision (ROD) for the project. Specifically, the court held that the agencies violated the National Environmental Policy Act (NEPA) by "using the same set of socioeconomic data that assumed construction of the Garden Parkway to assess the environmental impacts of the Build and No-Build alternatives." FHWA and NCDOT filed Motions for Reconsideration and a Motion to Supplement the Record with additional explanatory affidavits. The court denied both of the motions in an order it issued on September 10, 2015.

NCDOT appealed the decision relying upon two theories: First, NCDOT argued the matter became moot when State General Assembly and the local transportation planning authority removed the project from the State Transportation Improvement Plan (STIP) thus rendering it ineligible for Federal-aid funding. Alternatively, NCDOT argued that the District Court's decision should be reversed, because in concluding that the agencies had improperly relied upon a single set of socioeconomic data, the court ignored documentation in the record showing the agencies actually created and

used a second set of socioeconomic data for its indirect and cumulative effects analysis, and that the basis for choosing the methodology they used to do so is also documented in the record and entitled to judicial deference. The Fourth Circuit agreed that the loss of funding rendered the project moot and also that the proper course of action in light of the mootness was to direct the district court to vacate its decision. See Norfolk S. Ry. v. City of Alexandria, 608 F.3d 150, 161 (4th Cir. 2010). The Fourth Circuit rejected the Plaintiff/Appellee's argument that the decision should not be vacated because NCDOT "contributed to the mootness of which they now complain" when the State General Assembly changed its formula for prioritizing funding of transportation projects noting that Circuit "precedent counsels against conflating the actions of a state executive entity with those of a state legislature." Catawba Riverkeeper Foundation v. N.C. Dep't of Transp. at 590. Having found the matter moot, the Fourth Circuit did not opine on NCDOT's merits-based argument.

FHWA did not join in NCDOT's appeal and on June 7, 2016, plaintiffs filed an Application for Fee Award and Expenses under the Equal Access to Justice Act (EAJA) in the amount of \$323,609. Plaintiffs and FHWA have reached a settlement agreement for the payment of nominal attorney's fees.

Motion for Injunction Denied Pending Appeal in Ninth Circuit South Mountain case

On January 13, 2017, the Ninth Circuit denied Gila River Indian Community's (GRIC) motion for injunction pending appeal in the South Mountain litigation.

There are two plaintiffs in the South Mountain litigation, GRIC and Protecting Arizona's Resources and Children, et al. (PARC). Both plaintiffs lost in district court on the merits on August 19, 2016 and thereafter simultaneously filed a Notice of Appeal in the Ninth Circuit and a motion for injunction pending appeal in district court. PARC et al. and GRIC v. FHWA, Nos. 16-16605, 16-16586 (9th Cir. 2017). The District Court denied the motions for injunction pending appeal on October 26, 2016.

Following the District Court's Order denying PARC's and GRIC's motion for injunction pending appeal, PARC filed an emergency Motion for Injunction Pending Appeal in the Ninth Circuit on November 3, 2016, which was denied on November 21, 2016. Over one month after PARC filed its motion, GRIC filed a Motion for Injunction Pending Appeal in the Ninth Circuit on December 9, 2016, perhaps hoping a new Ninth Circuit "injunction panel" would rule differently than the one that ruled the previous month. The Ninth Circuit denied GRIC's motion in a two-page order on January 17, 2017, simply citing Winter v. Natural Res. Def. Council, Inc., 555 U.S. 7, 20 (2008), a Supreme Court case which sets forth the general standard for an injunction.

The Court also *sua sponte* consolidated the GRIC and PARC appeals, Nos. 16-16605 and 16-16586. Opening briefs by GRIC and PARC were filed in December and January. The appellants argue that the agencies violated applicable law by improperly limiting the purpose and need and excluding reasonable alternatives from their evaluation process and by improperly rejecting reasonable and prudent alternatives to the proposed highway. The appellants also argue that the agencies improperly allowed decades-old decisions to substitute for a

thorough evaluation under NEPA and Section 4(f) and violated applicable law by selecting a preferred alternative that unconstitutionally takes land held in trust by the US for the benefit of the community. Furthermore, the appellants claim that the agencies failed to adequately analyze impacts on the community and its members and improperly relied on incomplete and deficient data and ignored the concerns of EPA.

The Agencies filed consolidated answering briefs March 20, 2017, stating that they complied with NEPA and Section 4(f) and that FHWA considered and will avoid impacts on GRIC's well sites.

Plaintiffs Appeal to Seventh Circuit in Wisconsin NEPA Challenge

On January 6, 2017, plaintiffs in the Highway J. Citizen Group v. USDOT, (E.D. Wis.) case filed a notice of appeal of the district court's order of summary judgment in favor of defendants and an earlier order granting defendants' motion to strike extra-record documents. This follows the district court's denial of plaintiff's motion for summary judgement and granting of the defendant's motion of summary judgement on November 8, 2016.

Plaintiffs, who are the Highway J Citizens Group, Waukesha County Environmental Action League, and Jeffrey M. Gonyo filed suit and a motion for preliminary injunction in the United States District Court for the Eastern District of Wisconsin challenging FHWA's approval of a d-list categorical exclusion for the Wisconsin Highway 164 rehabilitation project. 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. 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 plaintiffs' recreational enjoyment of the area. Therefore, 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. Plaintiffs, however, claim that the new project will cause impacts similar to the previously abandoned project.

On November 8, 2016, the court denied plaintiffs' motion for summary judgment and granted the defendants' cross-motions for summary judgment, thus upholding FHWA's approval of the use of a categorical exclusion. In issuing the decision orally, the court found that the agencies did not arbitrarily determine that no significant impacts would result, that NEPA did not require the selection of a particular alternative, that the administrative record clearly showed adequate FHWA involvement rather than a mere "rubber-stamp" of state-generated documents as plaintiffs alleged, and that the public opposition to the project did not constitute substantial controversy on environmental

grounds. The judge spoke for approximately 75 minutes and her one-page written order entered judgment and referred to her oral decision for the discussion and analysis.

The decision followed closely on the heels of the court's September 27, 2016 denial of plaintiffs' motion for preliminary injunction. There, the court determined that there was no risk of imminent irreparable harm because project construction was not slated to begin for at least two more years.

FHWA Must Perform Additional NEPA Analysis

On October 31, 2016, Judge Norgle for the U.S. District Court for the Northern District of Illinois dismissed a case challenging the Tier Two Record of Decision (ROD) for the Illiana Project in Illinois and Indiana as moot because the administrative process is not complete. The court raised the issue of mootness *sua sponte*. Its rationale and findings are adverse to the Agency's position that the Tier Two ROD remained valid despite the court's prior remand of the Tier One ROD. See Openlands v. United States Dep't Transportation, 124 F. Supp. 3d 796, 799 (N.D. Ill. 2015).

The Illiana Project seeks to create a bi-state tolled expressway running east-west from I-55 near Wilmington, IL, to I-65 near Lowell, IN. Plaintiffs, three environmental and community groups represented by the Environmental Law & Policy Center, brought suits against both Tier One and Tier Two of the Project. In June of 2015, approximately one month after Plaintiff's filed their Tier Two complaint, Judge Alonso issued a decision in the Tier One case granting summary judgment for the plaintiffs and remanding the Tier One ROD to the agency for further NEPA analysis.

Plaintiffs argued that the Tier Two ROD must be withdrawn in light of the Tier One decision. Defendants requested a stay of the Tier Two litigation to allow time to address the deficiencies identified by the Tier One Court. FHWA argued that the reanalysis of Tier One may not require any changes to the Tier Two EIS and ROD, and the validity of the Tier Two ROD could not be determined until after the Tier One reanalysis was complete. The court initially granted a stay. However, it ultimately found that, because Tier Two relies on the incomplete Tier One conclusions, the Tier Two ROD is no longer effective. The opinion states that even if the Tier One reanalysis does not alter the Tier Two end product, Tier Two will be based on a new set of facts and a distinct administrative decision resulting from the reanalysis. Once it found the Tier Two ROD was no longer in effect, the court held that no case or controversy remains and dismissed the case as moot.

In its order, the court notes that defendants have presented conflicting information regarding the states' intentions for the future of the Project, pointing to an article containing a statement from Illinois that it is not pursuing the project. It also notes that the completion of the Tier One reanalysis has been significantly delayed as a result of state budgetary issues and states that it has no legal basis for an indefinite stay in the litigation. The Tier One reanalysis is currently under review by the FHWA project team and headquarters forecasting experts. Tier Two will likely require additional NEPA analysis before a new ROD could be issued.

FHWA's Motion to Dismiss Granted in Texas Uniform Relocation Act

On September 30, 2016, Judge Lamberth for the Western District of Texas granted FHWA's motion to dismiss Alamo Aircraft's Amended Complaint. Alamo Aircraft Ltd. v. City of San Antonio, No.15-784, 2016 WL 5720860, (W.D. Tex. Sept. 30, 2016). It also granted the City of San Antonio's (City) motion to dismiss. Plaintiff, Alamo Aircraft Ltd., is a business that leased several properties located within the boundaries of a City street-widening project on Southwest 36th Street between US Highway 90 and Growden Road (Project). After entering into an agreement for relocation benefits with the City, plaintiff claimed it was owed additional relocation entitlements under the Uniform Relocation Act (URA) and sought judicial review of the City's URA determinations. In addition to challenging the City's specific URA actions, plaintiff claimed that FHWA failed to properly monitor the City's implementation of relocation benefits and that the City was acting as an agent of FHWA because the Project received federal assistance. Plaintiff alleged jurisdiction was proper due to federal question jurisdiction.

The court first found that the URA does not confer a private right of action, and review of URA actions is limited to challenges brought under the Administrative Procedures Act. It then turned to the question of whether FHWA had taken a final action reviewable under the APA. The court rejected plaintiff's claims that either providing funding for the project or failing to monitor the City's URA actions more closely constitutes a final agency action. Finally, the court rejected plaintiff's argument that the City's final action is, by

extension, FHWA's final action. In doing so it cited the Ninth Circuit's determination that rendering financial assistance does not create a principal and agent relationship between FHWA and a project sponsor. See Eden Mem'l Park Ass'n v. United States, 300 F.2d 432, (9th Cir. 1962). The court reiterated this holding in its discussion of the City's motion to dismiss, rejecting plaintiff's argument that the URA converts state agencies into agents of the federal government when federal funding is provided.

Because the APA provided the only path to challenge FHWA's alleged actions and FHWA took no final action to trigger review under the APA, the court found it does not have jurisdiction over FHWA.

Pro-Se Action Against FHWA in Illinois

On November 1, 2016, a *pro se* plaintiff filed a Motion for a Temporary Restraining Order and Preliminary Injunction (TRO/PI). Plaintiff had previously filed a complaint on May 20, 2016, against DOT, Anthony Foxx, FHWA, the Illinois Department of Transportation (IDOT), the Kane County Department of Transportation, and the U.S. Department of Interior. Petzel v. Kane County Dept. of Transp. et al., No. 16-5435 (N.D. Ill. No. 16-5435). The litigation involves a *pro se* challenge to the proposed construction of the Bolz Road/ Longmeadow Parkway Bridge and Highway project in Kane County, Illinois.

On September 15, 2016, the federal defendants filed a Partial Motion to Dismiss on the grounds that plaintiff's complaint challenging the 2002 ROD and 2009 Reevaluation is barred by the statute of limitations, and that his complaint challenging the Environmental

Assessment/Reevaluation is not ripe for review because no Findings of No Significant Impact or other determination has been issued by the FHWA. The Motion for Partial Dismissal is still pending before the court.

In his preliminary relief motion for a TRO/PI, plaintiff alleges that utility work on the project has started, that IDOT has published a notice regarding its intent to commence condemnation proceedings to acquire additional right-of-way and that the Kane County Executive Committee has agreed to enter into numerous contracts for construction and construction engineering services. Plaintiff alleges immediate and irreparable harm as a result of these actions. The court has not yet ruled.

Favorable Decision in Appeal in Crosstown Parkway Extension Project

On February 3, 2017, the 11th Circuit Court of Appeals affirmed the District Court's decision granting final summary judgment to the FHWA. Conservation Alliance of St. Lucie County and Treasure Coast Environmental Defense Fund, Inc. v. US Department of Transportation, et al., (11th Cir. No. 15-15791).

The lawsuit challenged the Crosstown Parkway Extension project which proposed to construct a new six-lane bridge crossing over the North Fork of the St. Lucie River in the city of Port St. Lucie, St. Lucie County, Florida. Only 4(f) claims were asserted in the lawsuit. Neither Florida Department of Transportation nor the City of Port St. Lucie was named in the lawsuit. On May 12, 2014, Conservation Alliance of St. Lucie County and the Treasure Coast Environmental Defense Fund, Inc. (Indian Riverkeeper),

filed a complaint seeking declaratory and injunctive relief in the U.S. District Court of the Southern District of Florida. Named defendants were DOT, Anthony Foxx in his official capacity as Secretary of DOT, FHWA, Victor Mendez as Administrator of FHWA, and James Christian in his official capacity as Division Administrator for the FL Division of FHWA. The complaint challenged FHWA's decision to approve the construction of a six-lane bridge across the North Fork St. Lucie River Aquatic Preserve and Savannas Preserve State Park (the Preserves).

On November 5, 2015, the U.S. District Court for the Southern District of Florida issued a twelve-page order granting summary judgment in favor of the federal defendants and denying plaintiffs' motion for summary judgment. Final judgment was entered in favor of FHWA and against plaintiffs, and the case was ordered closed.

On December 29, 2015, plaintiffs filed a Notice of Appeal to the United States Court of Appeals for the Eleventh Circuit. On February 3, 2017, in a 34-page decision, the Appellate Court concluded that FHWA was not arbitrary or capricious in approving the selection of Alternative 1C as the preferred alternative for the project. The court found that FHWA made its calculus carefully, giving thoughtful consideration to a wide variety of factors, and that it worked with many agencies, even those that once opposed the project, to develop remediation plans that mitigate harms to the affected areas.

The court agreed with FHWA's "unambiguous" determination that there were no feasible or prudent alternatives to using 4(f) lands for the project. The court further found that FHWA acted well within its discretion in concluding that the

cumulative harms of plaintiffs' preferred alternative rendered it imprudent. The court disagreed with plaintiffs' heavy reliance on *Overton Park* and instead followed its prior rationale in the *Citizens for Smart Growth* case. The court also found that FHWA's approval of the selected alternative as the least harm alternative was neither arbitrary nor capricious and fully supported by the record. The court balanced the factors carefully and agreed with FHWA's decision, finding it to be a careful and thoughtful one. Finally, the court found that FHWA's planning included careful consideration of reasonable measures to mitigate harm.

First Amended and Substituted Complaint filed for Declaratory and Injunctive Relief in City of Clarendon case

On October 3, 2016, the City of Clarendon, Arkansas and Friends of the Historic White River Bridge at Clarendon filed their First Amended and Substituted Complaint for Declaratory and Injunctive Relief against FHWA, Greg Nadeau in his capacity as Administrator of FHWA, Arkansas State Highway Commission, Arkansas Highway and Transportation Department (AHTD), and Scott Bennett in his capacity as Director of AHTD. City of Clarendon, Arkansas and Friends of the Historic White River Bridge at Clarendon v. FHWA, et al., (E.D. Ark. No. 16-92).

The original complaint, filed on June 17, 2016, had only asserted claims under the provisions of the National Environmental Policy Act (NEPA) against FHWA and AHTD relating to the proposed demolition of the U.S. Highway 79 Bridge over the White River in Clarendon, Arkansas. The amended action added claims under the Endangered Species Act (ESA) against the

U.S. Fish & Wildlife Service (USFWS) and Keith Weaver, Manager of the Cache River National Wildlife Refuge. The complaint retains all of the previously filed NEPA claims against FHWA. The amended complaint also added three individuals as party plaintiffs - David W. Brown, James W. Warnock, and Dr. Dennis Yelvington.

Following the amended complaint, on October 13, 2016, the plaintiffs filed a Motion for a Preliminary Injunction. They requested an order prohibiting further actions toward proceeding with the demolition and removal of the bridge in Clarendon.

On October 26, 2016, the District Court conducted a status hearing on the motion. The day before the hearing, AHTD cancelled the project's November letting date and re-set it to January 2017. The court noted the project status was similar in timing to plaintiffs' original request for an injunction, which the court denied. With the state's resetting of the letting there again was no immediate planned action and, thus, no need for an emergency injunction. The plaintiffs were urged by the court to withdraw the motion and they did so. It is expected that plaintiffs will refile prior to any new letting date. The letting has now been re-set to sometime in April. In the interim FHWA, AHTD and plaintiffs are discussing various settlement possibilities.

Finally, FHWA is completing a project Reevaluation necessitated by the recent completion of an updated ESA consultation with USFWS. Once completed, Plaintiffs may yet again seek to amend their complaint.

New Chapter in the Bonner Bridge Litigation

On February 2, 2017, Save Our Sound OBX, Inc., Thomas Aschmoneit, Richard Ayella, David Hadley, Mark Haines, Jer Mehta, and Glenn Stevens filed a civil action against the North Carolina Department of Transportation (NCDOT), James H. Trogden, III in his official capacity as Secretary of NCDOT, FHWA, and John F. Sullivan in his official capacity as the North Carolina Division Administrator. Save Our Sound OBX, Inc., et al. v. North Carolina Department of Transportation, et al., (E.D.N.C. No. 17-4). Plaintiffs seek declaratory and injunctive relief halting construction of the Phase IIb portion of the Bonner Bridge project in the Outer Banks, North Carolina. Phase IIb included a proposal to build a jug-handle bridge along the Pamlico Sound just north of the town of Rodanthe in the Outer Banks.

The project at issue is part of the Parallel Bridge Corridor with NC 12 Transportation Management Plan Alternative (PBC/TMP Alternative) of the larger Bonner Bridge project previously litigated and settled; STIP Project No. B-2500. Phase I of the project included the replacement of the aging Bonner Bridge over Oregon Inlet for which construction has already started. Phase IIa consisted of an improvement in the existing NC 12 easement beginning at the southern end of Pea Island National Wildlife Refuge's South Pond and extending 2.4 miles south, including a 2.1 mile long bridge. A Record of Decision (ROD) for Phase IIa was issued in October 2013. Phase IIb, at issue in this lawsuit, includes NC-12 Rodanthe breach long term improvements and includes a jug-handle bridge which Plaintiffs complain of in their lawsuit.

An Environmental Assessment (EA) and Section 4(f) Evaluation was prepared for the Phase IIb portion in December, 2013. A revised EA was approved in May of 2016 and a ROD was issued in December, 2016. The Court selected this case for mediation on February 6, 2017. Answer is due April 10, 2017. Plaintiffs have indicated they intend to file for a preliminary injunction.

Lawsuit Seeks to Halt U.S. 70 Project in North Carolina

On December 29, 2016, the Sierra Club, represented by the Southern Environmental Law Center (SELC), filed a civil action against the North Carolina Department of Transportation (NCDOT), Nicholas Tennyson as Secretary of NCDOT, FHWA, and John F. Sullivan and the North Carolina Division Administrator. Sierra Club v. North Carolina Department of Transportation, et al., (E.D.N.C. No. 16-300). The plaintiff seeks declaratory and injunctive relief halting construction of the U.S. 70 Havelock Bypass project in Craven County, North Carolina.

The project proposes to build a bypass on the southwest side of Havelock and U.S. 70 beginning north of the Havelock city limit and extending south approximately 10 miles to north of the Craven-Carteret county line. It will be a four-lane, median-divided highway that will provide a high speed alternative to using U.S. 70 through Havelock, which is hampered by numerous traffic signals at intersecting side streets. The project will help improve freight and traffic movement along the U.S. 70 corridor, a major connection from the Morehead City Port to Raleigh. It will also assist economic development in eastern North Carolina's rural areas. The four-lane divided freeway will be a total of 10.3 miles with a 46-foot median and design speeds of 70 miles per

hour. An Environmental Impact Statement (EIS) was prepared for the project and FHWA's North Carolina Division approved the Record of Decision (ROD) on December 16, 2016. Construction is expected to begin sometime in the winter of 2017 with an anticipated completion date in 2021.

The plaintiff alleges a violation of Section 4(f) of the Department of Transportation Act. Namely, plaintiff argues that 4(f) prohibited defendants from approving the project, which plaintiff claims will use and negatively impact areas of the Croatan National Forest. Plaintiff also asserts three NEPA based claims: 1) Arbitrary and outdated assumptions were used to compare alternatives, 2) Failure to analyze direct, indirect and cumulative impacts of the project, and 3) Failure to prepare a supplemental EIS.

On March 6, 2017, FHWA and NCDOT filed answers to plaintiff's complaint, and on March 20, 2017, plaintiff filed an amended complaint.

FHWA-funded Project Subject to Suit in Massachusetts

On December 19, 2016, the U.S. District Court for the District of Massachusetts denied USDOT's motion to dismiss as moot and granted Plaintiffs' motion to remand the case to the Bristol County Superior Court in a Massachusetts Uniform Relocation Act case.

On January 10, 2014, Jean and Marsby Warters filed their initial complaint against the Commonwealth of Massachusetts, Department of Transportation (MassDOT) and attempted to reach a settlement agreement with the Massachusetts Attorney General's office until early 2016. Upon

information received during the settlement talks, Plaintiffs were granted leave to amend their complaint.

On August 25, 2016, Plaintiffs filed a civil action in Massachusetts Superior Court for monetary relief alleging violation of 49 CFR 24.102(h) and 49 CFR 24.102(d), against USDOT, FHWA, and MassDOT. Warters v. United States Department of Transportation, et al., Bristol County Superior Court (MA), Civ. No. BRCV2014-00043-B. This was an amended complaint. Plaintiffs alleged that the Commonwealth and MassDOT failed to comply with 49 CFR 24.102(h) when they acted in a coercive manner to induce an agreement on the price to be paid for the temporary easement and by repeatedly ignoring plaintiffs' requests for a meeting to discuss compensation issues; that the total easement area described in the Order of Taking underestimated the actual area taken in the easement; and that the Commonwealth and MassDOT failed to take into account the value of allowable damages and therefore failed to offer just compensation for the easement contrary to 49 CFR 24.102(d). The only factual allegations specific to FHWA set forth in the Amended Complaint is that the MassDOT project was or is funded in part by federal aid through FHWA.

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.). They also demand a trial by jury on all issues.

On September 16, 2016, DOT filed a notice of removal in U.S. District Court for the District of Massachusetts. On October 17,

2016, plaintiffs filed a motion to remand the action back to state court. On October 21, 2016, USDOT moved to dismiss the action, claiming lack of subject-matter jurisdiction. On November 8, 2016, Plaintiffs voluntarily dismissed USDOT in the state court action.

On December 19, 2016, the district court denied DOT's motion to dismiss as moot, since plaintiffs voluntarily dismissed DOT in the state court action before the district court reached its final decision. The district court then granted plaintiffs motion to remand the case back to the Bristol County Superior Court because there was no longer any federal issue in the case.

FHWA Faces a Civil Action in New Hampshire

On September 9, 2016, NIMCO Real Estate Associates et al., filed a civil action in the United States District Court for the District of New Hampshire against Gregory Nadeau as Administrator for FHWA, the City of Nashua, and New Hampshire Department of Transportation (NHDOT) alleging violations of the Fifth and Fourteenth Amendments, the Uniform Relocation Act of 1970, 42 USC Chapter 61, 49 CFR 24, and 42 USC § 1983, regarding the Broad Street Parkway Project. NIMCO Real Estate Assoc., LLC, et al. v. Gregory G. Nadeau, et al., (D.N.H. 16-406).

The complaint alleges a broad range of issues including allegations that FHWA failed or neglected to insure proper management of the acquisition and relocation process and to properly oversee and require NHDOT and the City to comply with regulations. Additionally, plaintiffs claim that FHWA allowed NHDOT and the City to treat plaintiffs in a disparate manner from the treatment of other landowners whose property was taken for the Project

and that FHWA directly insisted that funds not be released to provide relocation benefits.

Plaintiffs request (1) FHWA require NHDOT and the City to cease all efforts to evict, displace or claim money damages from the plaintiffs under the Purported Lease or otherwise; (2) provide Plaintiffs proper relocation benefits; and (3) such other relief as those court determines is mete and just.

On January 3, 2017, FHWA filed a Motion to Dismiss arguing that the Uniform Relocation Assistance and Real Property Acquisition Policies Act does not confer a private right of action and that plaintiffs' complaint alleges no jurisdictional basis for review under the Administrative Procedure Act.

Favorable Decision in Booth (formerly June) Case on Federal Tort Claims Now on Appeal

On September 30, 2016, the U.S. District Court for the District of Arizona granted the United States' motion for summary judgement in one of several interrelated Federal Tort Claims Act (FTCA) cases concerning the failure of certain 3-cable median barriers installed by ADOT in the Phoenix metropolitan area. Booth (formerly June) v. US, (D. Ariz. 11-901). The case was on remand from the U.S. Supreme Court following the decision in United States v. June, 153 S. Ct. 1625 (2015) to determine whether the Plaintiff (Booth) was entitled to equitable tolling of his claim. Previously, the District Court decided against Booth on the grounds that the FTCA's 2-year statute of limitations was not subject to tolling and therefore his late-filed claims were "forever barred."

The court noted to invoke the doctrine of equitable tolling, a plaintiff must show (1) that he has been pursuing his rights diligently, and (2) that some *extraordinary circumstances* stood in his way preventing him from submitting a timely claim. In a fact-intensive analysis, the court found that Booth failed to satisfy either of these requirements as the evidence he submitted showed that he, through counsel, knew that FHWA had exposure to liability within the statutory time limit but failed to file his claim until well after its expiration. Furthermore, it rejected Booth's argument that FHWA "concealed" critical information about his claim by refusing to make its employees available to be deposed since he didn't make a formal request for such testimony until after the time limits had expired, nor did he show that the FHWA concealed any information from him during that period.

This is the first decision applying equitable tolling to the facts of a FTCA case in FHWA post the Court's decision in *Wong/June*. On November 14, 2016, Plaintiff filed a Notice of Appeal filed (8th Cir. 16-17084). Petitioner's opening brief is due March 22, 2017 and the Government's response brief due April 21, 2017.

Federal Motor Carrier Safety Administration

Fifth Circuit Dismisses Second Challenge to ELD Rule for Lack of Jurisdiction

On November 28, 2016, Mr. Trescott filed a petition for review in the U.S. Court of Appeals for the Fifth Circuit challenging the Agency's Final Rule on Electronic Logging Devices (ELD), published on December 16,

2015. Mr. Trescott had filed a petition for reconsideration of the Final Rule and then attempted to intervene in OOIDA's Seventh Circuit challenge to the Final Rule discussed elsewhere in this issue. However, in January 2016, Mr. Trescott withdrew his petition for reconsideration following the Seventh Circuit's denial of his intervention request.

On November 21, 2016, almost a year after FMCSA published the final rule, Mr. Trescott filed another challenge to the ELD rule, but this time in the Court of Appeals for the Fifth Circuit. The U.S. Department of Justice filed a motion to dismiss for lack of jurisdiction because Mr. Trescott filed his petition well after the 60 day time period required by the Hobbs Act. On February 2, the Court issued an order dismissing the case for lack of jurisdiction.

Extension of Time Granted for Petitioner to Inform Court of Successor Counsel in Motor Carrier Safety Case

On October 28, 2016, Spencer Bros., LLC filed for an emergency stay and review of FMCSA's denial of its petition for review of its safety rating in the Court of Appeals for the First Circuit, Spencer Bros., LLC v. FMCSA, (No. 16-2310). The court denied the emergency stay request.

In December, petitioner filed a motion to transfer the case to the district court. The government opposed, and petitioner filed a reply. Petitioner's attorneys then moved to withdraw, and the court ordered that Petitioner inform the court of successor counsel. On February 14, the court granted Petitioner's motion for an extension of time until March 15 to inform the court of new counsel and until March 24 to file its opening brief.

On March 22, the court issued further order providing the Plaintiff time until April 15 to return with counsel or have his petition dismissed.

Plaintiffs Appeal Grant of Summary Judgment Dismissing Challenges to FMCSA's Pre-Employment Screening Program

On November 22, 2016, Plaintiffs filed a notice of appeal in the U.S. Court of Appeals for the District of Columbia Circuit of the lower court's decision in the consolidated cases of Owner Operator and Independent Drivers Association (OOIDA) v. DOT and Flock v. DOT, 2016 WL 5674626 (D.D.C. Sept. 30, 2016). The single issue raised by appellants is the question of whether plaintiffs established standing on the record below, including the administrative record filed by the government.

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.

Plaintiffs argued that FMCSA (1) failed to remove plaintiffs' records of violations related to citations that had been dismissed by a judge or administrative tribunal and (2) 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. 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 the plaintiffs failed to establish

that the release of PSP reports resulted in an adverse effect on the drivers' employment or employment opportunities.

The District Court judge granted the government's motion for summary judgment and dismissed the consolidated lawsuits, finding that the court lacked subject-matter jurisdiction because plaintiffs failed to demonstrate an injury-in-fact sufficient to support standing. Relying upon Hancock v. Urban Outfitters, Inc., 830 F.3d 511 (D.C. Cir. 2016), and 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.

Appellants' opening brief is due April 7, 2017.

Seventh Circuit Court of Appeals Dismisses Appeal in Imminent Hazard Case

On December 15, 2016, the U.S. Court of Appeals for the Seventh Circuit held that D N D International, Inc. ("D N D") did not have standing to appeal a decision of FMCSA's Assistant Administrator in D N D International, Inc. v. FMCSA, (No. 14-3755). The Court held that since D N D already received all of the relief it sought, the rescission of the Imminent Hazard Order and Revocation of Operating Authority, D N D lacked standing under Article III of the Constitution to seek an appeal of the Assistant Administrator's decision. The Court explained that D N D's argument challenging the Assistant Administrator's interpretation of the ten-day hearing provision in the imminent hazard statute was merely a request for an advisory opinion,

which is not an actual controversy over which the courts have jurisdiction.

Petitioner argued that the imminent hazard statute, at 49 U.S.C. § 521(b)(5), requires that the Department of Transportation hold a hearing, and issue a decision, within ten days of the issuance of an imminent hazard order, regardless of whether a carrier requests a hearing. Petitioner also argued that due process requires that FMCSA warn a carrier that FMCSA is considering an imminent hazard order prior to issuing the order. Finally, Petitioner argued that it had standing to appeal the Assistant Administrator's November 25, 2014 decision, despite the fact that the decision affirmed the rescission of the imminent hazard order, because appellant remained subject to the Federal Motor Carrier Safety Regulations as a lessor of commercial motor vehicles.

FMCSA argued that D N D lacked standing to bring the appeal under Article III of the U.S. Constitution because it was not "aggrieved" or "adversely affected" by FMCSA's November 25, 2014 decision, which was the final agency order in this case. FMCSA also argued that Petitioner waived its argument that a decision should have been issued within ten days of the issuance of the imminent hazard order, and that FMCSA's interpretation of the ambiguous ten-day language in the imminent hazard statute was permissible. Further, FMCSA argued that the imminent hazard statute's post-deprivation hearing requirement satisfies due process because swift government action to protect human life is necessary in these circumstances.

Motion to Dismiss Filed in High-Risk Motor Carrier Case

On February 15, 2017, the United States filed a motion to dismiss in Flat Creek Transportation, LLC v. FMCSA et al., (No. 16-00876 (M.D. AL)), a case brought by a motor carrier of property seeking to preclude the FMCSA from performing a compliance review or any other compliance action involving the company.

The plaintiff, Flat Creek Transportation, a motor carrier subject to the Federal Motor Carrier Safety Regulations, filed a complaint seeking a declaratory judgment and injunctive relief against the Department on November 7, 2016 in the U.S. District Court for the Middle District of Alabama. Relying on the Administrative Procedure Act, Flat Creek alleges that FMCSA's previous and proposed future conduct is arbitrary and capricious, an abuse of discretion or otherwise not in accordance with law, based on FMCSA's performance of compliance reviews and issuance of notice of violations to Flat Creek over a course of several years. The plaintiff seeks to enjoin anticipated future FMCSA safety inspections and possible regulatory sanctions.

The Alabama U.S Attorney's Office moved to dismiss on the grounds that the court lacks subject matter jurisdiction pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure. Specifically, plaintiff's complaint fails to allege that plaintiff has suffered a concrete and particularized injury or that there is currently a final agency action that would be subject to review by the District Court. Plaintiff therefore lacks standing and the case must be dismissed for lack of subject matter jurisdiction. The government also argues that plaintiff seeks an improper "obey the law" injunction, which runs afoul of the Eleventh Circuit's

admonition that it "will not countenance injunctions that merely require someone to 'obey the law.'" Hughey v. JMS Development Corp., 78 F.3d 1523, 1531 (11th Cir. 1996).

Lastly, the government argues that if and when final agency action occurs, plaintiff has an adequate remedy in the Court of Appeals, which has exclusive jurisdiction under the Hobbs Act, 28 U.S.C. § 2342(3)(A) and 49 U.S.C. § 521(9). On February 15, 2017, pursuant to local practice, the Court ordered plaintiffs to file a response to the motion to dismiss on or before March 13, 2017.

District Court Dismisses Complaint for Declaratory and Injunctive Relief

On September 12, 2016, the U.S. District Court for the Northern District of Illinois dismissed Navigation Group, Inc.'s Complaint for Declaratory and Injunctive Relief that was filed against FMCSA in Navigation Group, Inc. v. Mulcare, et al., (No. 16-cv-06565).

On or around June 2, 2016, FMCSA issued a written Demand to Inspect and/or Copy Records ("Demand Letter") to Navigation Group, Inc. in furtherance of FMCSA's investigation of the Illinois motor carrier's safety posture. Navigation Group, Inc. failed to fully comply with the Demand Letter, so FMCSA issued an Operations Out-of-Service Order and Order Suspending Operating Authority Registration (the "Order") to the carrier on June 16, 2016, pursuant to the authority in 49 U.S.C. §§ 521(b)(2)(E) and 525. On June 17, 2016, FMCSA rescinded the Order.

On June 23, 2016, Navigation Group, Inc. filed a Complaint for Declaratory and Injunctive Relief against FMCSA. On June 30, 2016, Navigation Group, Inc. filed a Motion for Preliminary Injunctive Relief against FMCSA.

In its filings, the motor carrier argued that FMCSA's practice of issuing out-of-service orders without pre-deprivation notice and an opportunity to be heard and/or a prompt post-deprivation hearing after issuance of such an order violated the Due Process Clause of the Fifth Amendment to the U.S. Constitution. On July 7, 2016, FMCSA informed Navigation Group that it had completed its investigation of the motor carrier. On July 12, 2016, Navigation Group, Inc. withdrew its Motion for Preliminary Injunctive Relief.

On August 25, 2016, FMCSA implemented revised policies and procedures regarding the issuance of Operations Out-of-Service Orders pursuant to 49 U.S.C. § 521(b)(2)(E) and Orders suspending or revoking a motor carrier's operating authority pursuant to 49 U.S.C. § 525. On September 8, 2016, FMCSA and Navigation Group, Inc. filed a joint Stipulation to Dismiss the Complaint ("Stipulation"). In the Stipulation, Navigation Group, Inc. stated that FMCSA's revised policies and procedures remedied the due process concerns raised in its Complaint.

Kansas District Court Dismisses Breach of Contract Case

On January 30, 2017, TransAm Trucking, Inc. and FMCSA filed a joint stipulation of dismissal, and the U.S. District Court for the District of Kansas dismissed the lawsuit with prejudice in TransAm Trucking, Inc. v. FMCSA (No. 14-02015). TransAm filed the lawsuit in January 2014, alleging that the

Agency had breached a 2013 settlement agreement with the motor carrier. In July 2016, the court granted FMCSA's motion to dismiss two of the three counts in plaintiff's complaint but allowed a substantive due process claim to move forward. Following an initial production of documents by FMCSA and the exchange of interrogatories in December, the parties entered into a settlement agreement on January 27.

Under the terms of the settlement agreement, FMCSA agreed to provide TransAm with a letter confirming certain information contained in FMCSA's information systems relating to TransAm. In exchange, TransAm agreed to release any and all claims relating to the prior 2013 settlement agreement and FMCSA's 2012 investigation of TransAm, and any claims for attorney's fees, costs, or expenses.

Federal Railroad Administration

State Sponsors of Intercity Passenger Rail Challenge FRA Guidance

On October 6, 2016, the North Carolina Department of Transportation (NCDOT) filed a petition for review in the D.C. Circuit, challenging the Federal Railroad Administration's (FRA) guidance entitled "Guidance for Safety Oversight and Enforcement Principles for State-Sponsored Intercity Passenger Rail Operations" (Guidance). The next day, on October 7, the Capitol Corridor Joint Powers Authority (CCJPA) also petitioned the D.C. Circuit for review of the Guidance. The D.C. Circuit issued an order consolidating the cases on October 12, 2016. North Carolina Department of Transportation and Capitol Corridor Joint Powers Authority v. Federal

Railroad Administration, et al. (No. 16-1352). Both petitions for review assert FRA issued the Guidance without observance of the procedures required by law. They further allege the Guidance is arbitrary, capricious, an abuse of discretion, and in excess of FRA's statutory authority.

The Guidance clarifies FRA's existing policies relating to intercity passenger rail (IPR) operations sponsored by state agencies and state authorities (providers). First, the Guidance explains FRA seeks a single entity or organization as a point of contact for IPR operations to address regulatory safety, compliance, and enforcement matters for those operations. Second, the Guidance provides FRA will generally consider Amtrak to be the contact for most FRA regulatory matters if: (1) the IPR operation is conducted under the umbrella of Amtrak's National Intercity Passenger Rail System (Amtrak's National System), with Amtrak providing regulatory safety-related services and the provider's role primarily focused on service planning, marketing, and funding of the IPR route; (2) Amtrak is responsible for operating the trains; and (3) Amtrak is responsible for the train equipment's regular inspection and maintenance. Finally, the Guidance maintains if an IPR operation is not considered to be integrated in Amtrak's National System, then the providers of the IPR routes must work with FRA to identify how they will ensure FRA's safety-related requirements are met.

On February 10, 2017, NCDOT and CCJPA (collectively, the Petitioners) filed a joint opening brief. In their brief, the Petitioners argue that the D.C. Circuit should vacate the Guidance because FRA failed to follow the Administrative Procedure Act's (APA) notice and comment procedures. First, the Petitioners allege that the Guidance is a legislative rule, requiring notice and

comment, because it relies on FRA's general legislative authority, rather than a specific statutory directive. Second, the Petitioners argue that notice and comment were necessary under the APA because the Guidance is not an interpretive rule, a policy statement, or a procedural rule. Finally, the Petitioners argue that even if the Guidance was an interpretive rule, a policy statement or a procedural rule, FRA's Rules of Practice require notice and comment.

On February 17, the D.C. Circuit granted AAR's motion for an extension of time. The court's order also revised the briefing schedule for the case. The Association of American Railroads (AAR) filed an amicus brief on the issue of the finality and reviewability of FRA determinations. The Government's brief is due on April 3. The Petitioners' reply brief is due on April 17.

Railcar Manufacturer Contests Railworthiness Directive

On December 13, 2016, American Railcar Industries, Inc. (ARI) petitioned the U.S. Court of Appeals for the District of Columbia Circuit to review FRA's September 30, 2016 Railworthiness Directive No. 2016-01 (RWD) and its November 18, 2016 Revised Railworthiness Directive No. 2016-01 (Revised RWD). American Railcar Industries, Inc. v. FRA, et al. (D.C. Cir. No. 16-1420). FRA issued the RWD and the Revised RWD based on its finding that, as a result of non-conforming welding practices, certain tank cars ARI and ACF Industries, LLC (ACF) had manufactured between 2009 and 2015 could be in an unsafe operating condition and could result in the release of hazardous materials.

The RWD and the Revised RWD (collectively, the Directives) require the

inspection and testing of particular welds on DOT specification general purpose 111 tank cars, which were built to the ARI and ACF 300 stub sill design and equipped with a two-piece cast sump and bottom outlet valve (BOV) skid. FRA issued the Directives to ensure public safety, ensure compliance with the Hazardous Materials Regulations (HMR), and ensure the railworthiness of the tank cars. The Directives require tank car owners to: (1) identify tank cars in their fleet covered by the Directives; and (2) ensure the appropriate inspection and testing of certain welds (the sump and BOV skid groove attachment welds) on the identified tank cars have no flaws that could result in the loss of tank integrity.

ARI had voluntarily dismissed its original petition for review of the Directives, which had been filed with the D.C. Circuit on November 28, 2016, because it had previously submitted a request to FRA to reconsider or withdraw the Directives. FRA had maintained ARI's original petition for review was not ripe because the issue was still pending before the agency. On December 12, 2016, ARI withdrew its request for FRA's reconsideration of the Directives, and it subsequently filed its second petition for review with the D.C. Circuit. On December 14, ARI filed a motion with the court to withdraw its first petition for review, and on January 5, 2017, the D.C. Circuit granted ARI's motion.

On March 6, 2017, ARI filed its opening brief. ARI first argues that the Directive violates both the APA and the HMR because it contains invalidly promulgated legislative rules that substantially change existing regulation and mandate new testing requirements. Second, ARI questions whether FRA was arbitrary and capricious in issuing the Directives because they allege they were not supported by the record, they

failed to provide substantial evidence supporting their conclusions, and they failed to provide a rational connection between the facts and their conclusions. Third, ARI questions whether FRA exceeded its authority when it issued the Directives and imposed inspection and testing requirements unauthorized by law or regulations. Finally, ARI questions whether the actual testing criteria imposed by FRA are arbitrary and capricious.

FRA's response brief is due April 5, 2017 and ARI's reply brief is due April 19, 2017. While an oral argument date has not yet been scheduled, the court indicated in its briefing schedule order that an argument date would be set on the court's fall calendar.

MBTA and Amtrak Resolve Cost Sharing Dispute

On March 1, 2017, the Massachusetts Bay Transportation Authority (MBTA), Amtrak, and the Northeast Corridor Infrastructure and Operations Advisory Commission filed a Stipulation of Dismissal of Claims Without Prejudice. The case arises from a complaint MBTA filed against Amtrak and NECC on January 27, 2016. MBTA v. National Railroad Passenger Corporation (D. Mass. No. 16-cv-10120). MBTA challenged the constitutionality of the NECC, established under the Passenger Rail Investment and Improvement Act, 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 MBTA should pay Amtrak nearly \$28.8 million.

In its complaint, MBTA alleged the cost sharing policy conflicts with the existing Attleboro Line Agreement between MBTA and Amtrak, which covers the same track usage rights and states MBTA is not responsible to Amtrak for any fiscal compensation. MBTA therefore alleged Amtrak's demand for payment of \$28.8 million constituted a breach of contract and a violation of the implied covenant of good faith and fair dealing. MBTA also alleged the NECC violated 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 alleged the cost sharing policy constituted a rule, and since the policy was issued without notice and comment rulemaking, it must be set aside in violation of the Administrative Procedure Act.

On November 9, 2016, Amtrak, MBTA and the NECC filed a joint motion to stay the litigation due to their involvement in settlement discussions, and on December 9, 2016, the court granted the motion. On December 14, the parties filed a joint status report, informing the court that Amtrak and MBTA were negotiating a term sheet regarding Amtrak's operation over the MBTA-owned track and were also working to resolve Amtrak's counterclaim relating to unpaid invoices. The status report advised the court Amtrak would dismiss its

counterclaim once a resolution was reached. The parties asked the court to extend the stay of litigation until February 1, 2017, and the court granted the motion. Amtrak and MBTA subsequently reached a resolution of Amtrak's counterclaim, and on January 18, 2017, Amtrak filed a stipulation to dismiss that claim with prejudice.

On February 1, Amtrak and MBTA filed a second joint status report, advising the court the parties had agreed to a term sheet regarding Amtrak's access to and operation over the MBTA-owned track, and MBTA and Amtrak were in the process of finalizing an Agreement. The parties requested the court extend the litigation stay until March 1, 2017 to allow the parties to execute a final agreement to settle MBTA's claims.

Court Dismisses FRA FOIA Case

On February 17, 2017, the U.S. District Court for the District of Columbia dismissed a Freedom of Information Act (FOIA) complaint the Center for Biological Diversity (CBD) filed against the Federal Railroad Administration (FRA). Center for Biological Diversity v. Federal Railroad Administration (D.D.C. No. 16-cv-2308). CBD, a nonprofit organization, filed suit on November 11, 2016 to compel FRA to produce documents responsive to CBD's FOIA request, in which it sought information pertaining to FRA's decision to allow the Alaska Railroad Corporation to transport liquid natural gas via rail.

Since CBD filed suit, FRA conducted additional searches for responsive records and released, on a rolling basis, more than one thousand pages of documents to CBD. After receiving all of the responsive records, CBD decided against disputing the validity of FRA's searches or any of the redacted material. Because the case became moot, on

February 17, CBD and FRA filed a stipulation of dismissal with the court.

Federal Transit Administration

Fifth Circuit Affirms Denial of Preliminary Injunction in Challenge to Removal of Confederate Monuments by City of New Orleans

On March 6, 2017, the U.S. Court of Appeals for the Fifth Circuit affirmed the denial of a preliminary injunction in a case involving the relocation of certain Confederate and other monuments in New Orleans. Monumental Task Committee, et al. v. Chao, et al., 2017 WL 892492 (5th Cir. Mar. 6, 2017). The lawsuit stems from a decision by the City of New Orleans to remove four monuments, including three honoring Confederate leaders. The plaintiffs assert a variety of claims against the City. They also contend that because the monuments have allegedly become an integral part of a federally-funded streetcar network, DOT violated Section 4(f) of the Department of Transportation Act and the National Historic Preservation Act.

On January 26, 2016, the U.S. District Court for the Eastern District of Louisiana denied the plaintiffs' motion for a preliminary injunction, holding that the plaintiffs had failed to show irreparable harm and were unlikely to succeed on the merits of their claims. See 157 F. Supp. 3d 573 (E.D. La. 2016). As to the claims against DOT, the District Court held (among other things) that plaintiffs demonstrated no nexus between any federally-funded transportation project and the removal of the monuments.

Plaintiffs appealed the denial of the preliminary injunction. Federal appellees

argued in their appeal response 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 federal appellees 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, federal appellees argue that this federal inaction did not constitute impermissible segmentation. The Fifth Circuit held oral argument on September 28, 2016.

In upholding the lower court's decision, the Fifth Circuit found no evidence that the Court erred in denying the preliminary injunction and found that Appellants failed to put forth even a *prima facie* showing of why a federal court should interfere in a local political process. Additionally, on March 8, 2017, after the Fifth Circuit had issued its decision, the District Court granted the City of New Orleans' motion for partial summary judgment, and dismissed the plaintiffs' claims with regard to the Liberty Place Monument.

Court Denies Request for a Preliminary Injunction in Challenge to LA Metro Westside Project

On January 17, 2017, the U.S. District Court for the Central District of California denied a request by the Beverly Hills Unified School District (BHUSD) for a preliminary

injunction, which would have prevented FTA from proceeding with Section 2 project approvals and activities for the Los Angeles Metro Westside Project prior to completion of the Supplemental Environmental Impact Statement (SEIS) and Section 4(f) Evaluation. See Beverly Hills Unified School District (BHUSD), et al. v. FTA, et al., No. CV-12-09861-GW-SS (C.D. Cal. January 17, 2017).

The case involves the proposed Los Angeles County Transportation Authority (LA Metro) Westside Project, which would extend the existing LA Metro Purple Line by approximately 9 miles west from the Wilshire/Western Station to a new terminus at a new Westwood/VA Hospital Station in Santa Monica. BHUSD does not want the Westside Project tunnel alignment underneath the Beverly Hills High School due to concerns regarding methane gas and potential construction impacts.

On August 12, 2016, the Court upheld FTA's Record of Decision (ROD) for the LA Metro Westside Project, but required a limited scope SEIS and a Section 4(f) analysis. The Court refused to vacate the ROD and found that "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' with respect to 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) a third was "FTA's failure in its disclosure obligations regarding the incomplete nature of the information concerning the seismic analysis"; and 4) the last was "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.

BHUSD appealed the denial of the preliminary injunction to the U.S. Court of Appeals for the Ninth Circuit (No. 17-55080). On January 25, 2017, the Ninth Circuit denied BHUSD’s emergency motion for an injunction pending appeal. Briefing in the Ninth Circuit is scheduled to be completed by the end of March 2017.

Court Grants FTA Motion for Reconsideration in Challenge to Suburban Maryland Purple Line Project

On November 22, 2016, the U.S. District Court for the District of Columbia granted in part the defendants’ motions to alter or amend the court’s Order of August 3, 2016, which granted summary judgment in part to plaintiffs challenging the proposed Purple Line light rail project in the Maryland suburbs of Washington, D.C. See Friends of the Capital Crescent Trail v. Federal Transit Administration, 2016 WL 6901994 (D.D.C. Nov. 22, 2016).

The plaintiffs originally filed suit in 2014 seeking declaratory and injunctive relief for alleged violations of National Environmental Policy Act, 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 the August 3 summary judgment decision, the Court vacated the Record of Decision (ROD) for the Purple Line Project, and remanded the matter for preparation of a Supplemental Environmental Impact Statement (SEIS) to review the effects and impacts of the Washington Metropolitan Area Transit Administration’s (WMATA) ridership issues as they relate to the Project.

In the motions to alter or amend, the Federal Transit Administration (FTA) and the Maryland Transit Administration (MTA) argued that (1) ordering an SEIS was erroneous as the level of supplemental review is left to the discretion of the agency; and (2) the Court erroneously failed to consider remanding to the agency without vacating the ROD. The Court agreed that the initial decision as to whether an SEIS is necessary should generally be left to the agency, not the reviewing court. However, the Court held that vacatur was proper, citing FTA and MTA’s purported disregard of new information regarding WMATA’s ridership issues.

Following the Order of November 22, 2016, FTA considered a detailed MTA technical report assessing the potential effects of WMATA’s ridership issues on the Purple Line Project. On December 13, 2016, FTA issued a re-evaluation memorandum concluding that “the determinations and effect findings in FTA’s Final EIS and ROD

for the Project remain valid, and changes in Metrorail ridership do not represent ‘[n]ew information or circumstances...’ under 23 CFR § 771.130 or 23 USC § 139(l)(2).” On December 16, 2016, FTA and MTA filed renewed motions for summary judgment. A decision on those motions is pending.

Ninth Circuit Affirms District Court Decision in Favor of FTA and LACMTA

On December 6, 2016, the U.S. Court of Appeals for the Ninth Circuit affirmed the District Court’s grant of summary judgment in favor of the FTA and the Los Angeles County Metropolitan Transportation Authority (LACMTA or Metro) in a case involving the Los Angeles Metro’s Regional Connector Project (the “Project”). Japanese Village, LLC v. Federal Transit Administration, 843 F.3d 445 (9th Cir. 2016).

The 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.

The Ninth Circuit rejected Japanese Village’s challenges to the adequacy of the January 2012 Final Environmental Impact Statement (FEIS) mitigation plan for noise, vibration, and building subsidence impacts. The Court also affirmed the lower Court’s finding that the FEIS off-street parking analysis was sufficient to pass muster.

The Ninth Circuit also rejected co-appellant Today IV/Bonaventure Hotel’s claims, holding that FTA was not arbitrary or capricious in finding that Closed-Faced

Tunnel Boring Machine construction was not a feasible alternative for a portion of the Project. Finally, the Court ruled that Metro’s application for noise ordinance variances to accommodate nighttime construction did not require the preparation of a Supplemental EIS.

Separately, on October 27, 2016, Today’s IV/Bonaventure Hotel filed a motion for an order of contempt in District Court against a Metro engineer and Metro’s counsel, or in the alternative, for an award of sanctions and a referral to the United States Attorney (hereafter, the “Contempt Motion”). While FTA is a named party, no allegations against FTA were made. The Contempt Motion alleges that in the Metro staff’s January 27, 2016 declaration filed with the U.S. District Court in support of Metro’s reply brief, Metro staff and counsel committed perjury in stating that Metro’s construction plan would allow for hotel access at all times. Briefing on the Contempt Motion is complete and a hearing on the Contempt Motion is currently scheduled for March 20, 2017.

Lawsuits Challenging FTA’s Categorical Exclusion on Albuquerque BRT Project are Dismissed

On February 21, 2017, two lawsuits filed against FTA and the City of Albuquerque in connection with a Bus Rapid Transit project known as Albuquerque Rapid Transit (ART) were dismissed with prejudice.

The first lawsuit, Maria Bautista, et al. v. City of Albuquerque, et al., was filed in state court by residents and businesses located along the route of the project. The plaintiffs alleged the governmental defendants did not comply with Section 106 of the National

Historic Preservation Act on the project which runs along Highway 66 (Central Avenue) in Albuquerque and that the project would also violate local and state law. The plaintiffs requested an injunction against the construction of the project, and argued that the defendants should be required to comply with federal environmental requirements and state funding law.

The case was removed to federal court and consolidated with a second federal lawsuit which also challenged the ART project.

The second lawsuit, Coalition of Concerned Citizens to MakeARTSmart, et al. v. FTA, USDOT, et al. (D.N.M. No.1:16-cv-00252), was filed in federal court by Albuquerque residents and local business owners. The plaintiffs alleged the defendants did not comply with Section 106 of the National Historic Preservation Act; that FTA's decision to issue a documented Categorical Exclusion under 23 C.F.R. §771.118(d) on the ART project, instead of a decision based on an Environmental Assessment or Environmental Impact Statement, 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 be required to conduct an Environmental Assessment or Environmental Impact Statement on the proposed project, that FTA should be declared in violation of the National Historic Preservation Act, and requested an injunction to halt construction of the project until an appropriate environmental analysis could be completed.

On July 26, 2016, the U.S. District Court for the District of New Mexico denied the plaintiffs' motion for a Preliminary Injunction.

As a result of this decision, the City of Albuquerque commenced construction on the project. The plaintiffs immediately appealed the District Court's decision to the U.S. Court of Appeals for the Tenth Circuit.

After an expedited briefing schedule, the Tenth Circuit on December 13, 2016, upheld the District Court's decision and remanded the case back to the District Court. See 843 F.3d 886 (10th Cir. 2016). Prior to a scheduled status conference on February 17, 2017, counsel for the plaintiffs notified USDOJ counsel that the cases would be dismissed. Subsequently, on February 21, 2017, a Joint Stipulation of Voluntary Dismissal was filed by the parties.

Maritime Administration

MARAD Settles Case with Port of Anchorage Contractor

On January 6, 2017, MARAD entered into a settlement agreement with Integrated Concepts and Research Corporation (ICRC), MARAD's former contractor on the Port of Anchorage Intermodal Expansion Project (the Project). The Civilian Board of Contract Appeals (CBCA) entered the settlement as a stipulated award on January 17, 2017. The settlement resolves all outstanding claims between the parties related to the Project including resolving all claims in Integrated Concepts and Research Corporation v. Department of Transportation, CBCA 5441.

MARAD contracted with ICRC to serve as the prime contractor for 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. In September

2012, MARAD and ICRC settled a series of claims filed by ICRC before the CBCA related to additional costs and unpaid profit that MARAD allegedly owed. The current CBCA claim arose out of the performance of the prior settlement. ICRC sought 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 sought reimbursement for legal fees incurred defending a lawsuit filed by the Municipality of Anchorage against ICRC in March 2013.

**Court Dismisses Gender
Discrimination, Retaliation, and
Age Discrimination
Claims Brought Against U.S.
Merchant Marine Academy**

On November 16, 2016, the U.S. District Court for the Eastern District of New York dismissed gender and age discrimination claims brought against the U.S. Merchant Marine Academy (USMMA) by plaintiff Edith Angioletti. In the case, Edith Angioletti v. Anthony Foxx, Secretary, U.S. Department of Transportation (E.D.N.Y. No. 14-CV-5848), the plaintiff claimed that the USMMA discriminated against her on the basis of gender, in violation of Title VII of the Civil Rights Act of 1964 (Title VII), and age, in violation of the Age Discrimination in Employment Act (ADEA), when the USMMA failed to hire her for a permanent position at the conclusion of her two-year term appointment. The plaintiff claimed that the USMMA also retaliated against her in violation of Title VII.

A jury was selected and a trial commenced on November 14, 2016. The presiding judge, the Honorable Leonard D. Wexler, informed the jury that it would hear and decide the plaintiff's Title VII claims but that the court would decide the ADEA claim. At the conclusion of evidence, the court entertained the USMMA's Rule 50 motion to dismiss the Title VII claims, and Judge Wexler granted the motion. In so ruling, Judge Wexler decided that the plaintiff had established no evidence that she had been discriminated against based on her gender or retaliated against other than her own suppositions. Judge Wexler noted that the permanent position for which the plaintiff felt she was entitled was subject to veterans' preference Federal hiring guidelines and the individual selected for the positions was a female disabled veteran.

Judge Wexler also granted the USMMA's Rule 52 motion to dismiss the ADEA claim. He held that the plaintiff had failed to raise any inference of age discrimination, noting that the only evidence the plaintiff proffered were comments she made when she referred to herself as an "old broad." Judge Wexler further noted the plaintiff was 59 years old when the USMMA first hired her and, as a result, any inference of age discrimination is weakened by her being a member of the protected class when hired.

The Plaintiff has since filed a Notice of Appeal in the Second Circuit.

**MARAD Involved in CERCLA and
Other Environmental Litigation**

MARAD is actively involved in several matters arising under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) from the construction and repair of vessels during World War II and/or the disposal of

vessels. The defense of these CERCLA matters is very document intensive and MARAD has conducted an extensive historical records search. MARAD has also retained an expert to assist in determining the agency's historic liability, responding to requests for information, and preparing mediation statements.

Portland Harbor Superfund Site: The Portland Harbor Superfund Site, located in Portland, Oregon, was listed on the National Priorities List (NPL) due to concerns of contamination from the historical industrial, marine, commercial, defense, and municipal practices for over 100 years at the site. EPA has identified 156 potentially responsible parties (PRPs), including MARAD and U.S. Navy. The parties are participating in a managed arbitration to determine the parties' respective shares of liability for the necessary cleanup at the site.

Kaiser Company Inc. Indemnification Request: By letter dated June 25, 2015, one of the PRPs, CIL&D, LLC f/k/a Kaiser Company, Inc. (Kaiser), requested that MARAD indemnify it for any and all response costs concerning the Portland Harbor Superfund Site, pursuant to shipbuilding and ship repair contracts entered into between 1942 and 1947 by Kaiser with predecessor agencies of MARAD and the General Services Administration. On November 23, 2015, MARAD responded to the tender letter wherein MARAD advised Kaiser that it failed to submit a valid claim under the Contract Disputes Act and failed to provide sufficient information regarding the basis for its request. Following initial communications regarding the tender, Kaiser has not pursued the matter.

Consolidated Tribes and Bands of the Yakama Nation, v. Air Liquide America

Corp. et al. Legal Action: Additionally, the Yakama Nation recently brought an action in Consolidated Tribes and Bands of the Yakama Nation, v. Air Liquide America Corp. et al., Case 3:17-cv-00164 (D. Oregon), against several of the Portland Harbor PRPs, including the United States, seeking recovery of past and future response costs and asserting damages to natural resources arising from defendants' activities at Portland Harbor. MARAD will work with DOJ in defending this new action.

Gowanus Canal Superfund Site: The Gowanus Canal Superfund Site includes a 100 foot-wide, 1.8 mile long canal in Brooklyn, New York, that empties into the New York Harbor and is bounded by several communities. The canal was built in the mid-1800s and was used as a major industrial transportation route.

Manufactured gas plants, paper mills, tanneries, and chemical plants operated along the canal and contamination flows into the canal from combined sewer system (sanitary waste and rainwater) overflows. The site also contained shipbuilding/repair operations from the WWI-era through the early 1980's.

The site was added to the NPL and EPA has identified 30 PRPs, including MARAD and Navy. The private PRPs are participating in a formal and binding arbitration, which is expected to last several years. The Federal PRPs were not asked to join the mediation or to help define the mediation process rules. Nevertheless, MARAD and Navy have advised EPA that the Federal parties may be interested in settling out early.

National Highway Traffic Safety Administration

Judicial Challenge to Phase 2 Medium and Heavy-Duty Fuel Efficiency Rule

On December 22, 2016, the Truck Trailer Manufacturers Association, Inc. (TTMA) filed a petition for review in the U.S. Court of Appeals for the D.C. Circuit of the latest medium- and heavy-duty fuel efficiency rule adopted by NHTSA, along with EPA's greenhouse gas emission rule. Truck Trailer Manufacturers Association, Inc. v. United States Environmental Protection Agency, et al., (D.C. Cir. No. 16-1430). The final rule, "Greenhouse Gas Emissions and Fuel Efficiency Standards for Medium- and Heavy-Duty Engines and Vehicles—Phase 2," was published in the Federal Register at 81 Fed. Reg. 73,478 (October 15, 2016). On January 23, 2017, several states and environmental groups filed motions to intervene as respondents, which the court granted on March 10, 2017.

The petitioners argue that the final rule exceeds the statutory authority of EPA and NHTSA to regulate trailers under the Clean Air Act and the Energy Independence and Security Act. Further, the petitioners contend that the agencies utilized unrealistic assumptions and incomplete data in performing the cost/benefit analyses. The petitioners claim that the agencies failed to account adequately for the additional weight of the mandated aerodynamic devices, which would increase greenhouse gas emissions and fuel consumption and would displace cargo resulting in additional trips. Finally, the petitioners allege that the final rule's warranty requirements are arbitrary and capricious.

The agencies each filed a certified index to the administrative record on March 8, 2017. The Court has not yet set a briefing schedule.

Court Orders Plaintiffs to Show Cause in New Lawsuit Seeking to Compel Action on Petition for Rulemaking

On November 23, 2016, the Center for Auto Safety, Consumer Watchdog, and Joan Claybrook filed a civil action against NHTSA in the United States District Court for the District of Columbia seeking declaratory and injunctive relief declaring NHTSA's failure to act on a January 13, 2016 petition for rulemaking unlawful, and ordering NHTSA to issue a decision on the petition within thirty days. Center for Auto Safety, et al. v. NHTSA (D.D.C. No. 16-cv-02325).

The petition for rulemaking at issue sought to require the use of certain automatic emergency braking (AEB) technologies in passenger motor vehicles. On January 18, 2017, and as published in the Federal Register on January 25, 2016, NHTSA denied the petition. In the denial, NHTSA cited steps it has taken to incentivize the installation of AEB technologies, including the expansion of the New Car Assessment Program (NCAP), seeking public comment on NCAP revisions, and voluntary commitments secured from light-vehicle manufacturers in March 2016 to install certain AEB technologies on vehicles.

After NHTSA denied the petition, the court ordered the plaintiffs to show cause why the case should not be dismissed as moot. However, on March 9, 2017, the plaintiffs filed a notice of dismissal pursuant to Rule 41(a)(1)(A)(i).

District Court in FOIA Case Rules that Blogger is a Representative of the News Media and is Entitled to Statutory Fee Waiver

On December 31, 2016, the U. S. District Court for the District of Columbia denied the Department's motion for summary judgment and granted the plaintiff's cross-motion for summary judgment in Liberman v. U.S. Department of Transportation (D.D.C. No. 15-cv-1178).

Ellen Liberman filed a lawsuit in July 2016, challenging NHTSA's decision to deny her request to be considered a "representative of the news media," which would entitle her to reduced fees for processing requests filed under FOIA.

Under FOIA, when records are not sought for commercial use and the requester is a representative of the news media, the fees that the agency can assess are limited to the cost of document duplication.

The Department argued that Ms. Liberman 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 Ms. Liberman and SRS have a commercial interest in the NHTSA records requested, and the materials that Ms. Liberman publishes in *The Safety Record* are advertisements, not news as defined by FOIA.

Ms. Liberman 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 found that Ms. Liberman was a representative of the news media after finding that *The Safety Record* satisfied the five statutory criteria for being deemed a news-media entity.

The court therefore concluded that Ms. Liberman is entitled to a FOIA fee waiver as "a representative of the news media" so long as the particular FOIA request that Ms. Liberman submitted did not seek records for commercial use. The Court then determined that Ms. Liberman's document request did not seek records for commercial use. The court found that records requested by a news-media entity in its dissemination capacity are not sought for commercial use, that *The Safety Record's* close association with SRS did not convert its news-dissemination activity into a commercial use, and that Ms. Liberman's representation that she seeks records only for publication in *The Safety Record* was sufficient to demonstrate that she does not seek records for commercial use.

The court further concluded that *The Safety Record* is an entity that qualifies as "a representative of the news media" within the meaning of the fee-waiver provision, and that a news-media entity's journalistic activities are not properly characterized as a "commercial use[.]" even if those publishing activities ultimately further the financial interests of that entity or its parent company.

Pipeline and Hazardous Materials Safety Administration

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 its reply to PHMSA's opposition.

The court granted the parties' request for an expedited briefing schedule, which concluded on September 30, 2016. In its briefs, 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 that 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 took place on October 31, 2016 in New Orleans; the parties are awaiting a decision from the Fifth Circuit panel.

Oral Argument Held in OPA Suit; Related Suit Filed

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. No. 17-cv-10031) (filed Jan. 5, 2017). 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 this issue on 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 arguments was held on December 8, 2016. On March 2, 2017, the Court issued an order noting inconsistencies in NWF's briefs, and asking NWF to file a memorandum clarifying its claims. NWF filed the memorandum on March 15, 2017; the Court has scheduled a conference to discuss it.

Second, NWF claims that PHMSA's approval of response plans for Enbridge's Line 5 violated the National Environmental Policy Act and the Endangered Species Act. NWF originally raised these claims in National Wildlife Federation v. Administrator of PHMSA (E.D. Mich. 16-cv-11727), but dismissed that suit after learning that it did not challenge the currently-operative PHMSA approvals. NWF then re-filed similar claims in No. 17-cv-10031. The Department's answer to that complaint is due on April 17, 2017.

PHMSA FOIA Lawsuit Dismissed

On March 10, 2017, the Environmental Defense Center ("EDC") voluntarily dismissed a FOIA lawsuit against PHMSA. See Envtl. Defense Ctr. v. PHMSA (C.D.

Cal. 15-cv-9433). The case stemmed from two FOIA requests that EDC submitted in May 2015, in the aftermath of an oil spill in Santa Barbara County, California. When EDC had not received the requested documents by December 2015, it filed suit. PHMSA released all responsive documents by March 2016. In August 2016, EDC sent a letter asking questions about redactions PHMSA had made. PHMSA responded, explaining that it had redacted pipeline infrastructure information that could help terrorists or other bad actors intent on attacking the nation's pipeline system, and that such information is exempt from disclosure under 5 U.S.C. § 552(b)(7)(F). After receiving PHMSA's letter, EDC eventually decided that it did not wish to challenge PHMSA's redactions further, and dismissed its suit.

Challenges Filed Against PHMSA Interim Final Rule Regarding Underground Natural Gas Storage

On March 17 and March 20, 2017, the State of Texas and two industry groups petitioned for review of a PHMSA Interim Final Rule regarding the underground storage of natural gas. See Texas v. PHMSA (5th Cir. 17-60189); Am. Gas Ass'n v. DOT (D.C. Cir. 17-1095); Interstate Nat. Gas Ass'n of Am. (D.C. Cir. 17-1096). The December 2016 Interim Final Rule created minimum federal safety standards for underground facilities that store natural gas, as mandated by the PIPES Act of 2016. The Interim Final Rule adopted – with some modifications – Recommended Practices issued by the American Petroleum Institute.

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