



U.S. Department of
Transportation

DOT LITIGATION NEWS

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A Special Note From the Editors

Thank you for your interest in DOT Litigation News! We are proud to share this new issue, the 35th of our semiannual publication. Many thanks to everyone throughout the Department of Transportation for contributing to the success of our efforts over nearly two decades. In this issue, we are proud to add a new feature, a **Subject Matter Index**, to assist our readers in locating interesting case developments. The **Subject Matter Index** can be found at the end of the case summaries, before the Alphabetical Index of Cases. As you will see, we are reporting on matters as wide-ranging in scope as the First Amendment, Preemption, Administrative Law and Civil Procedure, and much more – including, of course, the broad variety of cases involving the Department’s core efforts on transportation safety, efficiency, and innovation. We look forward to continuing our work in the coming year to report these developments to our readers throughout the transportation law community. Happy reading!



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Supreme Court Litigation

Relator Seeks Supreme Court Review in FCA Guardrail Case

Last fall, the U.S. Court of Appeals for the Fifth Circuit reversed a jury verdict in a False Claims Act (FCA) case brought against Trinity Industries, Inc. and Trinity Highway Products, LLC (Trinity). U.S. ex rel. Harman v. Trinity Industries Inc., 872 F.3d 645 (5th Cir. 2017). On February 12, 2018, the Relator, Joshua Harman, filed a Petition for Writ of Certiorari requesting the Supreme Court to review the materiality standard that should be applied under the FCA.

Harman brought the underlying FCA action under seal in the U.S. District Court for the Eastern District of Texas on March 6, 2012. United States ex rel. Harman v. Trinity Industries, Inc., No. 12-89 (E.D. Tex.). The FCA imposes liability on individuals who defraud the government by knowingly making a false statement material to a false or fraudulent claim.

Harman alleged, among other things, that Defendants defrauded FHWA and the government by making false claims in connection with guardrail end caps manufactured by Trinity that were submitted to FHWA for approval on federal-aid highway projects and sold to states for installation. Harman alleged that the guardrail crash tests indicated that the barriers were not compliant with FHWA regulations, and that Trinity made secret changes to the documents and then hid them from FHWA.

In the District Court, after an initial mistrial, a second jury returned its verdict in favor of the Relator and awarded \$663,360,750, which consisted of \$575,000,000 in treble damages and \$138,360,750 in civil penalties for 16,771 false claims – plus an additional \$19,012,865 in attorney’s fees. The Fifth Circuit reversed the lower court’s decision in a lengthy opinion relying upon Univ. Health Servs., Inc. v. U.S. ex rel. Escobar, 136 S. Ct. 1989 (2016), finding that the government had not been defrauded. Given FHWA’s position that the ET-Plus was and remained eligible for federal reimbursement, the Fifth Circuit concluded that Trinity’s alleged misstatements to FHWA were not material to its payment decisions. The court concluded its opinion reversing the lower court by noting that “[w]hen the government, at appropriate levels, repeatedly concludes that it has not been defrauded, it is not forgiving a found fraud—rather it is concluding that there was no fraud at all.”

When the case was pending in the District Court, the government declined to intervene and is not a party to the case. Respondents waived their right to respond to the Petition for Writ of Certiorari. Congressman H. Morgan Griffith from the state of Alabama filed an amicus brief in support of the Relator. This case has been conferenced for April 13, 2018.

Departmental Litigation in Other Federal Courts

D.C. Circuit Rules in Favor of Defendants in Purple Line I

On December 19, 2017, the U.S. Court of Appeals for the D.C. Circuit ruled in favor of DOT, FTA, and the State of Maryland in a challenge to FTA's environmental analysis of the Maryland Purple Line project, which will connect a number of Maryland suburbs, as well as allow riders to transfer from the Washington Metro system. Friends of the Capital Crescent Trail v. FTA, 877 F.3d 1051 (D.C. Cir. 2017) (Purple Line I). Oral argument was previously held on November 1, 2017, to determine whether the District Court's decision to vacate FTA's Record of Decision (ROD) and order the agency to conduct a Supplemental Environmental Impact Statement (SEIS) should be upheld. The original complaint filed by the Friends of the Capital Crescent Trail challenged FTA's ROD for the Purple Line project and its failure to complete an SEIS related to safety and ridership issues associated with the Washington Metropolitan Area Transit Authority (WMATA).

The D.C. Circuit held that FTA was not required to conduct an SEIS related to WMATA safety and ridership issues. The Court indicated that the District Court should have given deference to FTA as to whether these issues constituted new information warranting an SEIS. In addition, the Court found that FTA's "Scenarios Report," which evaluated impacts under the National Environmental Policy Act (NEPA) of hypothetical WMATA ridership fluctuations, was exactly the type of analysis that implicates substantial agency expertise. The Court further indicated that FTA's treatment of

Plaintiff's additional declarations as late-filed comments was appropriate. Finally, the Court affirmed the District Court's rulings in favor of FTA and Maryland on all other issues, including holding that it was appropriate for FTA to use a "funneling approach" that narrowed the alternatives to the preferred alternative and the "no-build" alternative in the FEIS.

The Purple Line II litigation remains in the U.S. District Court, where the complaint challenges both additional NEPA issues and the execution of the Full Funding Grant Agreement (FFGA). This related case is discussed in more detail below.

Previously, on July 19, 2017, the D.C. Circuit granted the State of Maryland's motion for a stay pending appeal of the District Court's order vacating the ROD and reinstated the ROD. The District Court's decision to vacate the ROD had previously prevented the use of federal funds and halted the project. The Court of Appeals decision enabled FTA to execute an FFGA with Maryland for the Purple Line project.

Defendants File Motions to Dismiss in Purple Line II

On March 1, 2018, FTA and the State of Maryland filed motions to dismiss the amended complaint in Friends of the Capital Crescent Trail v. FTA, No. 17-1811 (D.D.C) (Purple Line II), which challenged the execution of the Purple Line FFGA under 49 U.S.C. § 5309 and alleged the same environmental, conservation, aesthetic, and recreational injuries as previously challenged in Purple Line I, as discussed above. FTA and MTA originally moved to dismiss the complaint on December 5, 2017,

but withdrew their motions in light of the substantial changes made between the original and amended complaints, the latter of which was filed on December 26, 2017. Plaintiffs filed an amended complaint after the U.S. Court of Appeals for the D.C. Circuit issued its decision in Purple Line I. The original complaint for Purple Line II was filed on September 5, 2017, shortly after FTA and the State of Maryland executed the FFGA for the Purple Line. The District Court, on September 22, 2017, issued an order denying Plaintiffs' Motion for a Temporary Restraining Order and Motion for Preliminary Injunction that would have delayed construction on the project.

In its motion to dismiss, FTA argues that Plaintiffs lack Article III standing to challenge the FFGA under section 5309 and that Plaintiffs' alleged injuries fall outside of the zone of interests protected by Section 5309 of the Federal Transit Act. Further, FTA argues that Plaintiffs' claims under Section 4(f) and the National Historic Preservation Act lack merit, because, among other things, they are barred by the statute of limitations and the doctrine of claim preclusion. Finally, FTA argues that post-ROD implementation activities of the Purple Line project do not constitute final agency action reviewable under the Administrative Procedure Act.

Plaintiffs filed responses to the motions to dismiss on March 29, 2018. Defendants' reply briefs are due April 18, 2018.

Oral Argument Held in Amtrak Metrics and Standards Litigation

On March 5, 2018, the U.S. Court of Appeals for the D.C. Circuit held oral argument in the Government's appeal of a March 2017 adverse District Court ruling

that struck down as unconstitutional Section 207 of the Passenger Rail Investment and Improvement Act of 2008 (PRIIA). Association of Am. R.Rs. v. DOT, No. 17-5123 (D.C. Cir.). During the oral argument, the D.C. Circuit focused its questions on both the substantive issue of whether the unconstitutional portion of the statute could be severed from the remainder of the statute, and whether it was appropriate for the Court to address the question of severance in light of the procedural history.

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 violated their statutory duty to provide preference to Amtrak in the use of rail lines, junctions, and crossings. The D.C. Circuit initially 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. Association of Am. R.Rs. v. DOT, 721 F.3d 666 (D.C. Cir. 2013).

In 2015, the Supreme Court reversed and remanded, holding that Amtrak is a governmental entity for purposes of the Non-Delegation Doctrine. DOT v. Association of Am. R.Rs., 135 S. Ct. 1225 (2015). On remand from the Supreme Court, on April 29, 2016, the D.C. Circuit for a second time held that Section 207 was unconstitutional. Association of Am. R.Rs. v. DOT, 821 F.3d 19 (D.C. Cir.). This second ruling concluded that Section 207 violated the Due Process Clause by giving Amtrak, "a self-interested entity regulatory authority over its competitors." The Court

also 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.

The Government 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. The Association of American Railroads (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 entered judgment on March 23, 2017 for AAR, concluding 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. In addition, 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."

On October 19, 2017, the Government, in its opening brief, made the same points it made before the District Court and argued that the D.C. Circuit should sever the arbitration provision, yet retain the remaining portion of Section 207. A ruling from the D.C. Circuit is expected in the coming months.

Department Files Amicus Brief to Protect Highway Safety and Aesthetics

On March 5, 2018, the United States, with substantial input from DOT and FHWA, filed a brief as amicus curiae in support of the appellant, John Schroer, Commissioner of Tennessee Department of Transportation, in Thomas v. Schroer, No. 17-6238 (6th Cir.). The case concerns the constitutionality of the Tennessee Billboard Regulation and Control Act ("Billboard Act"), which provides for effective control of outdoor signs as required by Federal law. Consistent with the Highway Beautification Act (HBA), the Billboard Act generally precludes the display of signs along designated highways, but it allows "on premises" signs that provide information about the property on which they are located. The State of Tennessee is appealing an adverse decision of the U.S. District Court for the Western District of Tennessee finding that the Tennessee Billboard Act is an unconstitutional, content-based regulation of speech. See Thomas v. Schroer, 248 F. Supp. 3d 868 (W.D. Tenn. 2017). The United States submitted an amicus brief to protect its interests in highway safety and aesthetics, which are furthered through the sign regulations set forth in the federal

HBA, implementing regulations, and related state laws. The Government has stated it has a strong interest in ensuring that these provisions are correctly interpreted and subjected to appropriate First Amendment review. The amicus brief asks the Court to uphold the on-premises exception in the Tennessee Billboard Act as a permissible, content-neutral regulation of speech. Moreover, the brief argues that the Government's interests in traffic safety and aesthetics justifies the legitimate and balanced restrictions in the HBA and parallel state law provisions.

United States Files Briefs in Air Ambulance Preemption Disputes

In February and March 2018, the United States intervened and filed briefs in two class actions brought by patients concerning the prices charged by air ambulance carriers. Scarlett v. Air Methods Corp., No. 16-2723 (D. Colo.); Stout v. Med-Trans Corp., No. 17-115 (N.D. Fla). These cases raise questions about whether the patients' claims are preempted by the Airline Deregulation Act of 1978 ("ADA"), Pub. Law 95-504, and if so, whether such preemption is constitutional.

The ADA preempts any State law "having the force and effect of law related to a price, route, or service of an air carrier." 49 U.S.C. § 41713(b)(1). The Supreme Court has held that the provision extends to State laws "having a connection with, or reference to," air carrier prices, routes, or services, Morales v. Trans World Airlines, Inc., 504 U.S. 374, 384 (1992), and that it covers common law rules in addition to State statutes and regulations, Northwest, Inc. v. Ginsberg, 134 S. Ct. 1422, 1429-30 (2014). The Court has held, however, that the provision does not preempt contract claims seeking recovery "solely for [an] airline's

alleged breach of its own, self-imposed undertakings." Am. Airlines, Inc. v. Wolens, 513 U.S. 219, 228 (1995). The Court has also noted that even a term that State law automatically implies in every contract is not preempted if the parties may "contract around" that term. Ginsburg, 134 S. Ct. at 1433.

Here, Plaintiffs are individuals who were transported by air ambulance (or whose family members were transported), and who later received bills for allegedly exorbitant amounts. The patients claim that because they and the carriers did not enter into express contracts and did not discuss the price of the services they received, state law provides that they entered into implied contracts allowing the carrier to collect only a reasonable amount. The patients claim that the amounts billed are unreasonable, and that the carriers have therefore breached their implied contractual obligations.

The carriers have moved to dismiss, contending that these claims are preempted by the ADA, because they are "related to" their prices, and because they never voluntarily agreed to charge only a price that a court determined to be reasonable. The patients argue that air ambulance operators are not "air carriers" covered by the ADA, and that in any event the ADA would not bar enforcement of the parties' implied contractual agreement. In the alternative, Plaintiffs contend that any application of the ADA to preempt their claims would be unconstitutional under the Fifth Amendment's Due Process Clause and other constitutional provisions.

In its briefs, the United States argued that air ambulance operators are "air carriers" covered by the ADA, and that the patients' claims are "related to" the carrier's prices. In addition, it argued that if the ADA

preempts any of the patients' claims, that does not present any constitutional problems.

The United States did not take a definitive position on the question of whether the patients' claims are preempted, as that question is dependent on interpretation of state law and may be fact-dependent. The United States noted, however, that if a patient and a carrier were deemed to have entered into an implied contract under the relevant State law, then State law rules supplying missing essential terms (such as the price) would likely not be preempted, provided that the parties could have "contracted around" those rules by executing an express contract containing the missing terms. And the United States pointed out that if a patient and a carrier did not enter into a contract, and the carrier attempted to seek payment by relying on State law principles of "unjust enrichment" or "quasi-contract," the patient could equally rely on the same body of law for identification of the proper measure of damages. Cf. Dan's City Used Cars, Inc. v. Pelkey, 569 U.S. 251, 265 (2013) (holding, in case applying motor carrier preemption provision modeled on ADA, that a motor carrier "cannot have it both ways" in relying on a body of state law to its benefit while also arguing that a claim against it under the same state law is preempted).

Oral Argument Held on Challenge to DOT Decision to Grant Norwegian Air's Petition for a Foreign Carrier Permit

On January 12, 2017, the Air Line Pilots Association (ALPA) and several other entities representing the labor interests of pilots and flight attendants filed a petition for review in the U.S. Court of Appeals for

the D.C. Circuit, Air Line Pilots Ass'n v. Chao, No. 17-1012 (D.C. Cir.). 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).

ALPA and the other petitioners argue that DOT misinterpreted a provision of the U.S.-EU Agreement in making the decision to grant Norwegian Air's request for a foreign air carrier permit. In addition, Petitioners claim that DOT failed to make a proper public interest determination as required by statute. Finally, Petitioners assert that DOT was arbitrary and capricious for failing to impose certain labor-related restrictions on the foreign air carrier permit issued to Norwegian Air.

As an initial matter, the Government argued that Petitioners failed to establish Article III standing, because Petitioners' claims about the harms caused by the grant of the foreign air carrier permit to Norwegian Air are unsupported and too speculative. On the merits, the Government argued that the Department properly determined that Norwegian Air met the statutory requirements for a foreign air carrier permit. Moreover, under the EU-U.S. Agreement, the Department was required to recognize as valid the Irish aviation authorities' determinations of Norwegian Air's fitness and to give reciprocal effect to those determinations. As a result, the Department was not required to make a public interest determination. Finally, the Department noted that in deciding to grant the permit, it took into account the totality of the record regarding Norwegian Air's application,

including the carrier's voluntary commitment to take steps to address concerns about the potential hiring and employment practices affecting its operations in U.S. markets.

The D.C. Circuit heard oral argument on February 23, 2018. During the argument, the panel asked questions about the government's statutory argument and Petitioners' standing to challenge the Department's decision to grant Norwegian Air a foreign air carrier permit. A decision from the D.C. Circuit is expected in the coming months.

D.C. Circuit Hears Argument in Challenge to DOT Approval of Delta-Aeromexico Joint Venture

On February 26, 2018, a panel of the U.S. Court of Appeals for the D.C. Circuit held oral argument in two consolidated cases filed by ABC Aerolineas, S.A. de C.V., d/b/a Interjet (Interjet). Interjet, a Mexican air carrier, filed these petitions for review challenging aviation orders issued by the Department in late 2016 and early 2017. ABC Aerolineas, S.A. de C.V. v. DOT, Nos. 17-1056, 17-1115 (D.C. Cir.). In those orders, DOT granted approval of, and antitrust immunity (ATI) for, an 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 concluded that the joint venture would benefit the public by improving connectivity and reducing travel times between the two countries. However, the Department also ruled that several conditions would be attached to its grant of ATI to ensure sufficient competition in the affected markets. Thus, DOT required Delta and Aeromexico to divest 24 slot pairs or takeoff

and landing authorizations, 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. DOT also ruled that Interjet was ineligible to receive divested slots at MEX, since Interjet already has over 26% of the slots at that airport, second only to Aeromexico, and therefore did not need any further help in obtaining competitive access at MEX.

Before the D.C. Circuit, Interjet has argued in its briefs that the Department's decision to exclude Interjet from MEX remedy slots was arbitrary, capricious, and otherwise unlawful. In addition, Interjet argues that DOT is overstepping its bounds and undercutting the primacy of Mexican authorities with respect to slot allocation and enforcement at MEX. In response, DOT has argued that the Department is not allocating or policing MEX slots, but is simply attaching appropriate conditions to its approval of the Delta-Aeromexico alliance to ensure adequate competition and promote the public interest, consistent with its broad statutory authority. A decision is expected in the coming months.

Expedited Briefing Underway as Environmental Groups and States Challenge NHTSA Decision on CAFE Civil Penalty Rate

On February 16, 2018, the U.S. Court of Appeals for the Second Circuit denied Petitioners' motions for summary vacatur of the indefinite delay of the increased civil penalty rate for violations of Corporate Average Fuel Economy (CAFE) standards, or in the alternative, for a stay of the delay in the cases consolidated as Nat'l Resources Defense Council, Inc. v. NHTSA, No. 17-

2780 (2d Cir.). Petitioners (the Center for Biological Diversity, the National Resources Defense Council, the Sierra Club, and the States of California, Maryland, New York, Pennsylvania, and Vermont) had filed the motions on October 24, 2017, arguing that NHTSA lacked the authority to delay the increased CAFE civil penalty rate, and furthermore, that NHTSA violated the APA by delaying the increased penalty without notice and comment. On November 17, 2017, the government responded, arguing that a summary decision would be extraordinary and unwarranted here, where NHTSA has the inherent authority to reconsider its previous decision, and that notice and comment was impracticable and not required for this type of procedural decision. Petitioners replied to the government's response on December 1, 2017, providing further support for their initial arguments.

This case stems from a challenge to NHTSA's decision to indefinitely delay the effective date of a final rule issued in December 2016, in response to an industry petition for reconsideration. In the December 2016 final rule, NHTSA delayed the inflationary increase in the CAFE civil penalty, plus any additional annual inflationary adjustments for CAFE violations, to model year 2019.

The indefinite delay of the 2016 final rule was accompanied by a notice in the Federal Register seeking comment on the appropriate inflationary adjustment to the CAFE penalties, including whether NHTSA should invoke a statutory exception for "negative economic impact" to adopt an adjusted penalty less than \$14. This notice also sought comment on whether NHTSA used the correct base year to calculate the adjusted penalty.

Although the Court denied the motions for summary vacatur or stay, the Court did grant Petitioners' request to expedite the proceedings. The Court also requested sua sponte that the parties brief specific procedural issues on jurisdiction and standing. Petitioners filed their opening briefs on March 6, 2018. Their arguments align closely with the arguments they previously made in their motions. Specifically, Petitioners argue that NHTSA lacked the authority—from Congress or its inherent authority—to indefinitely delay its CAFE civil penalty decision. Regardless, Petitioners argue that notice and comment would have been required for such a decision.

The government and intervenors filed response briefs on March 27, 2018 arguing that the Petitioners lack standing and failed to file their petitions for review until after the statutory deadline. On the same date, NHTSA issued an NPRM proposing to keep the current civil penalty rate in place with no upward inflationary adjustment.

Petitioners' reply briefs are due April 3, 2018 and oral argument is scheduled for April 12, 2018.

Motion to Dismiss Filed in Cases Challenging GHG Rule

On November 3, 2017, the Department filed a motion to dismiss as moot a lawsuit filed on July 31, 2017 by Clean Air Carolina, Natural Resources Defense Council (NRDC), and U.S. Public Interest Research Group. NRDC filed a civil action for declaratory relief alleging that FHWA's failure to provide notice and comment of its "suspension" of the greenhouse gas (GHG) measure contained in FHWA's third performance measures final rule (PM 3 Final Rule) was a violation of the APA. Clean Air

Carolina v. DOT, No. 17-05779 (S.D.N.Y.). On September 20, 2017, eight states, led by California, filed a similar suit in the U.S. District Court for Northern California. California v. DOT, No. 17-05439 (N.D. Cal., filed September 20, 2017). The parties filed a stipulation of voluntary dismissal on November 20, 2017.

On February 13, 2017, FHWA announced that it would delay the effective date of the PM 3 Final Rule. On March 21, 2017, FHWA further delayed the effective date to May 20, 2017. On May 19, 2017, FHWA announced that the majority of the PM 3 Final Rule would become effective on May 20, 2017 with the exception of the GHG measure, which would be delayed pending the completion of further rulemaking. For each of these delays, FHWA indicated that there was good cause to delay the effective date without notice and comment.

Plaintiffs allege that FHWA took these actions without proper public notice or an opportunity for public comment in violation of the APA. They further argue that FHWA's decisions to "suspend" the measure were arbitrary and capricious, and abuse of discretion, and made without observing procedure required by law. Plaintiffs seek declaratory relief that FHWA's decisions violated the APA, an order vacating FHWA's decision to suspend the GHG measure, attorney's fees, and other relief.

On September 28, 2017, FHWA announced its decision to reinstate the GHG measure effective on that date. In addition, on October 5, 2017, FHWA issued a Notice of Proposed Rulemaking seeking comments on the agency's proposal to rescind the GHG measure. A Final Rule is expected in the coming months.

Court Rules that it Lacks Jurisdiction Over Challenge to Extension of Compliance Date for Mishandled Airline Baggage Reporting Rule

On December 21, 2017, the U.S. District Court for the District of Columbia, agreeing with arguments advanced by DOT, ruled that it lacked jurisdiction over a challenge to DOT's extension of the compliance date for a rule making changes to the way airlines report mishandled baggage, wheelchairs, and scooters. Paralyzed Veterans of Am. v. DOT, No. 17-1539 (D.D.C.).

The case relates to a rule issued by DOT in October 2016, which changed the data air carriers are required to report regarding mishandled baggage and also required carriers to collect and report separate statistics for mishandled wheelchairs and scooters used by passengers with disabilities. DOT originally set the compliance date for the rule as January 1, 2018. After receiving feedback about the challenges carriers were facing in implementing the rule, DOT, in March 2017, extended the compliance date to January 1, 2019. Plaintiffs contend that the extension amounted to a legislative rule requiring notice-and-comment rulemaking procedures, and that it was arbitrary and capricious.

DOT moved to dismiss, arguing that the District Court lacked jurisdiction over the case pursuant to 49 U.S.C. § 46110, which provides that the U.S. Courts of Appeals have exclusive jurisdiction over challenges to DOT actions taken in whole or in part under certain aviation statutes, including Part A of Subtitle VII of Title 49. DOT argued that the extension of the compliance date was issued under Part A, and that the

District Court therefore lacked jurisdiction. Plaintiffs argued that because DOT had inadvertently omitted a reference to the most-relevant Part A provisions, and had instead cited two other provisions within Part A, the extension could not be considered to have been issued under Part A.

In its decision, the Court agreed with DOT that the extension was issued under Part A, and transferred the case to the U.S. Court of Appeals for the D.C. Circuit. It noted that the mistakenly omitted Part A provisions clearly applied, explained in detail that there was no evidence that DOT had not acted in good faith, and noted that its ruling “avoid[ed] the untenable result of a district court exercising jurisdiction over a challenge to a rule that all parties agree could have been—and which the record suggests should have been—promulgated under statutory authority that would trigger direct review in the court of appeals.”

In the D.C. Circuit, Plaintiffs have asked the Court to transfer the case back to the District Court. DOT has opposed that request, and has asked the Court to dismiss the case as untimely; while 49 U.S.C. § 46110 requires challenges to be brought within 60 days, Plaintiffs did not even file their District Court complaint until 132 days after DOT issued the challenged extension.

DOT and City of Dallas Settle Claims in Love Field Litigation

On March 29, 2018, pursuant to a settlement agreement, the U.S. District Court for the Northern District of Texas dismissed claims that the City of Dallas had brought against DOT and FAA in a case involving airline access to Love Field Airport. City of Dallas v. Delta Air Lines Inc., 15-2069 (N.D. Tex.).

Prior to 2014, Delta Airlines 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 the assurances the City made to FAA in connection with federal airport improvement grants.

Southwest challenged DOT’s two guidance letters by filing petitions for review in the U.S. Court of Appeals for the D.C. Circuit. That Court dismissed the challenges, holding that the letters were not reviewable final agency actions. Southwest Airlines Co. v. DOT, 832 F.3d 270 (D.C. Cir. 2016).

In the meantime, 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 sought declaratory relief with respect to a variety of issues. Delta, Southwest, and the City all moved for preliminary injunctive relief, and the Court ordered in January 2016 that Delta be accommodated during the pendency of the litigation. City of Dallas v. Delta Airlines, Inc., 2016 WL 98604 (N.D. Tex. Jan. 8, 2016). 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, and the U.S. Court of Appeals for the Fifth Circuit affirmed the preliminary injunction in February 2017. City of Dallas v. Delta Airlines, Inc., 847 F.3d 279 (5th Cir. 2017). The Fifth Circuit denied Southwest's motion for rehearing *en banc* in June 2017, and the case was remanded to the District Court.

Upon remand, DOT moved to dismiss the claims against it. It argued, among other things, that its letters were only subject to review – if anywhere – in a Court of Appeals, and that the letters were in any event not final agency actions (as specifically held by the D.C. Circuit).

Under the terms of the settlement, the City dismissed its claims against DOT, and FAA will dismiss a related administrative investigation. The settlement does not preclude DOT or FAA from taking any future action.

Federal Circuit Holds Oral Argument in Appeal of United States Court of Federal Claims' Award of \$133 Million For Taking of Property at Dallas Love Field

On December 6, 2017, the U.S. Court of Appeals for the Federal Circuit held oral argument in the appeal by the United States of a ruling that a federal statute involving Dallas Love Field amounted to a taking of property. Love Terminal Partners, L.P. v. United States, No. 16-2276 (Fed. Cir.).

Congress has long imposed restrictions on air carrier operations at Love Field under the

Wright Amendment 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 providing for the demolition of one of the leased terminals at Love Field.

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. 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, owners of the leased terminal, then filed a complaint in the U.S. Court of Federal Claims alleging that WARA effected a taking of a private airline terminal and leasehold rights for which they should be compensated.

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. Love Terminal Partners, L.P. v. U.S., 126 Fed. Cl. 389 (2016). The CFC agreed with 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 factors described by Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104 (1978).

The United States appealed the CFC's decision and briefing was completed in April 2017.

Challengers to MWAA's Use of Dulles Toll Road Revenue to Fund Construction of Metro Silver Line Attempt to Remove DOT From the Case

On February 8, 2018, the U.S. Court of Appeals for the Fourth Circuit rejected an attempt by a group of Dulles Toll Road users to remove the Department as a party in Kerpen v. MWAA, No. 17-1735 (4th Cir.), in which they appeal the dismissal of their challenge to the use of toll revenues to pay for the Metro Silver Line expansion. DOT and the other respondents filed merits briefs in the case on March 19, 2018.

Plaintiffs 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, No. 16-1307 (E.D. Va.). 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. Although DOT was not a party in the Corr litigation, it did file an amicus brief and participate in oral argument. 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.

On May 30, 2017, the United States District Court for the Eastern District of Virginia issued a lengthy, 46-page opinion dismissing the case with prejudice. Kerpen v. MWAA, No. 16-1307, 2017 WL 2334987 (E.D. Va. May 30, 2017). The court rejected all of plaintiffs' claims ruling that MWAA, formed as a result of an interstate compact between Virginia and the District of Columbia, does not violate the Compact Clause of the Constitution; and further, that MWAA is not a federal instrumentality exercising federal power in violation of Article II of the Constitution. The court also gave little credence to plaintiffs' claims that the collection of tolls on the Dulles Toll Road was an illegal exaction in violation of the Due Process Clause or 42 U.S.C. § 1983 or that MWAA's use of toll road revenues for the Silver Line Metro Project and improvement of roads surrounding the Dulles Corridor violated federal law or the lease agreement between MWAA and the Federal Government.

Plaintiffs appealed the decision to the Fourth Circuit and filed their opening brief on October 16, 2017. Plaintiffs continue to argue that MWAA exercises federal power in violation of the Constitution.

Plaintiffs/Appellants are not appealing the dismissal of their claims against DOT and the Secretary and thus attempted to remove DOT from the case caption and as parties to the appeal. The Fourth Circuit denied the motion because the “Appellants have cited no authority allowing removal of opposing parties from a case on appeal based on their strategic decision not to pursue certain claims for relief....”

MWAA and DOT filed response briefs on March 19. MWAA and DOT argue that the District Court properly dismissed the case because MWAA is not part of the Federal Government and does not assert federal powers. In addition, MWAA and DOT argue that MWAA’s use of Dulles Toll Road revenue to fund construction of the Silver Line Metrorail Project does not violate the Metropolitan Washington Airports Act of 1986.

Ninth Circuit Considers Interlocutory Appeal in Case Challenging Carbon Dioxide Emissions

On March 7, 2018, the U.S. Court of Appeals for the Ninth Circuit denied the United States’ Petition for a Writ of Mandamus asking the court to dismiss Juliana v. U.S., No. 17-71692 (9th Cir.). In Fall 2015, Plaintiffs brought this challenge 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. 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 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 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 recommended against dismissal, and the District Court Judge adopted the magistrate judge’s findings and recommendation to deny the United States’ and Intervenors’ Motions to Dismiss. Juliana v. U.S., 217 F. Supp. 3d 1224 (D. Or. 2016).

In denying the United States’ mandamus petition, the Ninth Circuit held that the United States had not satisfied the five mandamus factors and found that the issues raised in the mandamus petition would be better addressed through the ordinary course of litigation. The United States had argued, in part, that mandamus was necessary to obtain relief from potentially burdensome discovery, as Plaintiffs have served numerous federal agencies with both document and deposition requests. However, the Ninth Circuit was unpersuaded by this argument because the parties were utilizing the meet and confer

process and the District Court had yet to issue any order compelling discovery. Thus, the Court found that the United States' request was premature but noted that the United States can seek mandamus relief if they are aggrieved by a future discovery order.

Court Grants Motion to Dismiss Challenge to Executive Order on Reducing Regulation and Controlling Regulatory Costs

On February 26, 2018, the U.S. District Court for the District of Columbia granted the Government's motion to dismiss a challenge to Executive Order 13771, which directs federal agencies to identify two existing regulations to repeal for every new regulation proposed or issued. The Court concluded that Plaintiffs had not plausibly alleged facts that, if accepted as true, would establish that they had standing to sue. Public Citizen v. Trump, No. 17-253 (D.D.C.).

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 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 director of OMB, and 14 agency officials, including the

Secretary of Transportation and the heads of NHTSA, FMCSA, PHMSA, and FRA.

In its decision, the Court rejected each of Plaintiffs' standing theories. For example, the Court addressed Plaintiffs' contention that the Executive Order had delayed the issuance of new rules that would have benefitted their members. The Court held that Plaintiffs failed to plausibly allege that certain of the rules would have been issued in the absence of the Executive Order, and failed to plausibly allege that any delay of other rules had caused their members a substantially-increased risk of harm. The Court also addressed Plaintiffs' assertion that the Executive Order harms them as organizations by forcing them to choose between advocating for new regulations (to address their policy priorities), or refraining from such advocacy (to protect existing regulations). The Court noted that Plaintiffs did not allege that they had actually declined to advocate for new regulations, and held that in any event that type of self-inflicted harm would not convey standing.

The Court has given Plaintiffs until April 2, 2018 to file a motion seeking leave to amend their complaint.

Small Unmanned Aircraft Registration: Two Related Challenges with Respect to Agency Implementation of D.C. Cir. Decision

On December 18, 2017, Robert C. Taylor voluntarily dismissed a complaint and motion for a temporary restraining order or preliminary injunction in the U.S. District Court for the District of Maryland, which had sought equitable relief for model aircraft registration deletion and refund of model aircraft registration fees. Taylor v. Huerta,

No. 17-2191 (D. Md.) Taylor was represented by John A. Taylor, the petitioner in Taylor v. Huerta, 856 F.3d 1089, in which the U.S. Court of Appeals for the D.C. Circuit vacated FAA's small unmanned aircraft registration requirement to the extent it applied to certain model aircraft that met the definition and operational requirements of section 336 of FAA Modernization and Reform Act of 2012.

The District Court denied Plaintiff's motion for TRO or PI, but permitted him to file an amended complaint, which he did on September 15, 2017. On December 12, 2017, after the government's motion to dismiss was fully briefed, the National Defense Authorization Act (NDAA) was signed into law. The NDAA included a provision which restored FAA's small unmanned aircraft registration requirement that was vacated by the D.C. Circuit. On December 18, 2017, Plaintiff voluntarily dismissed his case.

On January 5, 2018, Plaintiff filed a new complaint in the D.C. District Court, Taylor v. FAA, No. 18-35, in which he alleges violations of the Privacy Act and the constitutional right to privacy, unjust enrichment, and illegal exaction on behalf of himself and a class of similarly-situated plaintiffs based on FAA's implementation of the D.C. Circuit's decision. Several days later, Plaintiff filed a motion for class certification. On February 8, 2018, the court granted the government's motion to stay briefing on class certification pending the government's motion to dismiss.

On March 13, 2018, the government filed a motion to dismiss arguing, among other things, that Plaintiff lacks standing because at the time the complaint was filed, FAA's authority to require registration for all small unmanned aircraft operators had been

restored by the NDAA. As a result, FAA's decision regarding how to implement the D.C. Circuit's decision, which vacated in part the small unmanned aircraft registration requirement, was no longer necessary or in effect. In addition, Plaintiff failed to state a claim on which relief could be granted for all of his claims, because after the NDAA was enacted, all small unmanned aircraft owners, including Plaintiff, are required to register their aircraft.

Plaintiff filed his opposition to the government's motion to dismiss on March 27, 2018 arguing Plaintiff has standing, the Court has subject matter jurisdiction, and Plaintiff has stated claims upon which relief may be granted.

Further Challenge Related to Implementation of D.C. Circuit Decision on Small UAS Registration Dismissed

On June 12, 2017, in the Eastern District of Arkansas, another case was filed related to the D.C. Circuit's May 19, 2017 decision in Taylor v. Huerta, 856 F.3d 1089, which vacated the small unmanned aircraft registration requirement for certain model aircraft. Reichert v. Huerta, No. 17-389. The proposed class for the new litigation included "model aircraft owners" who registered model aircraft in accordance with the process provided by the Registration and Marking Requirements for Small Unmanned Aircraft (the Registration IFR), 14 CFR part 48.

On July 3, 2017, FAA published on its website, the process by which qualifying model aircraft owners could seek reimbursement of the \$5 registration fee and delete their registration. In addition, to comply with the D.C. Circuit Court's order

in Taylor v. Huerta, FAA announced that it would not use the identifying information from model aircraft owners whose registrations have been deleted.

On December 12, 2017, after the government filed a motion to dismiss and Plaintiffs filed an opposition to the government's motion, the National Defense Authorization Act (NDAA) was signed into law. The NDAA included a provision which restored the small unmanned aircraft registration requirement that was vacated by the D.C. Circuit.

After FAA published a set of Questions and Answers on its website clarifying the registration obligations for unmanned aircraft owners who had registered their aircraft but had not requested deletion of their information and a refund, Plaintiffs voluntarily dismissed the Eastern District of Arkansas case.

Oral Argument Heard on Challenges to Small Unmanned Aircraft System Final Rule

Electronic Privacy Information Center (EPIC) and John Taylor (the same petitioner who challenged the Registration IFR) challenged FAA's Small Unmanned Aircraft System Final Rule (small UAS rule), issued by the Secretary and the Administrator. Electronic Privacy Information v. FAA, Nos. 16-1297, 16-1302 (D.C. Cir.) The small UAS rule provides the regulatory framework to enable the operation of small UAS (less than 55 pounds) in the national airspace system. EPIC previously sued FAA on the small UAS 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 rulemaking. EPIC's previous lawsuit was dismissed as premature because an 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 also seeks judicial review of the small UAS rule. In his brief, Taylor argues that the small UAS rule exceeds the FAA's statutory authority to the extent that it regulates hobbyists who do not satisfy all the criteria specified in section 336 of the FAA Modernization and Reform Act of 2012, Public Law 112-95 (the Act). He further asserts that the FAA has exceeded its authority by regulating operations that are not in "air commerce" in so much as the final rule regulates low-altitude small UAS operations. Taylor also argues that the notification to airports and the FAA-created B4UFLY app used to assist in that notification violates the Paperwork Reduction Act although Petitioner failed to file comments on the NPRM, and none of the other commenters raised this issue.

The agency's response brief argues that EPIC lacks standing in this case because it has not suffered any programmatic harm as a result of the small UAS rule and its members cannot show an imminent risk of their privacy being violated by a small UAS operated under the small UAS rule. The brief also explains that EPIC's arguments are meritless because (1) the Act did not require the FAA to address privacy, and (2) since the FAA is a safety agency with a safety mission that does not include privacy between individuals, it was not arbitrary and capricious for the agency to decline to regulate this area in the small UAS rule. EPIC's reply continues to attempt to stretch the FAA's authority by expanding the

definition of hazard such that it would reach to privacy-related harm. EPIC argues that because the agency is directed under Section 333(b) of Pub. L. 112-95 to determine which types of UAS create a hazard to users of the NAS or the public, that the term hazard must be interpreted in an all-encompassing manner. With respect to standing, EPIC counters that the FAA has caused it harm by impairing its privacy protection advocacy, which includes public education about privacy risks associated with small UAS operations. EPIC also counters that its members can show injury because members' declarations assert that drone surveillance will necessarily increase simply because of such members' proximity to test sites.

Regarding Taylor, the agency's response brief argues that Taylor lacks standing to raise his arguments about modelers operating under Section 336 because the small UAS rule did not impose any restrictions on those operations. All the rule did was exempt Section 336 operations from the small UAS rule and prohibit such operations from endangering the safety of the NAS, which the agency was permitted to do by Section 336(b). With regard to Taylor's arguments about non-336 hobbyist operations, the brief explains that there is no statutory basis as to why the agency cannot regulate non-336 hobbyists in the same manner as any other small UAS. Taylor's reply includes arguments similar to those provided in his opening brief.

The Department filed a notice of supplemental authority with the court after the National Defense Authorization Act for 2018 (NDAA) was enacted, which restored the requirements of the small UAS registration rule to its state prior to the D.C. Circuit's decision vacating the portion of the rule applicable to model aircraft operated in accordance with Section 336.

The D.C. Circuit heard oral argument on January 25, 2018 at American University. The panel was Judges Sentelle and Randolph (by phone), and Chief Judge Garland.

D.C. Circuit Rules on Challenge to FMCSA's Pre-employment Screening Program (PSP)

On January 12, 2018, in Owner Operator and Independent Driver Association (OOIDA) v. DOT, No. 16-5355, the U.S. Court of Appeals for the D.C. Circuit affirmed in part, and reversed in part, summary judgment granted by the District Court in favor of FMCSA upholding the agency's Pre-employment Screening Program (PSP) for commercial motor vehicle drivers. The District Court ruled that it lacked subject matter jurisdiction because the individual drivers and OOIDA failed to demonstrate an injury-in-fact sufficient to support standing. On appeal, OOIDA and the drivers argued that the Court erred in granting the government's motion for summary judgment.

Under the agency's PSP, commercial motor vehicle driver safety data contained in the agency's Motor Carrier Management Information System (MCMIS) may be disclosed to prospective employers, with the driver's consent. In the District Court, Plaintiffs argued that FMCSA (1) failed to remove the drivers' 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 Administrative Procedure Act and the Fair Credit Reporting Act (FCRA). Citing Spokeo, Inc. v. Robins, 136 S. Ct. 1540 (2016), the Court concluded that Plaintiffs did not establish concrete and

particularized harm because they failed to demonstrate that the maintenance or dissemination of the allegedly incomplete data harmed them.

On appeal, OOIDA and the drivers argued inter alia that the agency's maintenance of allegedly inaccurate information, absent any release in a PSP report, is sufficient to establish the concrete and particularized injury necessary to support standing for redress of a statutory FCRA violation. In response, the government conceded standing for the two individual drivers who had PSP reports released to employers, but argued that the Court properly dismissed the claims of the remaining three drivers who could not establish a statutory FCRA violation based on allegedly incorrect information that had never been disseminated.

The D.C. Circuit upheld the District Court's dismissal as to the drivers whose PSP reports were not disseminated, holding that the mere existence of the inaccurate information within MCMIS did not satisfy the "concrete injury" requirement to establish Article III standing. However, the D.C. Circuit remanded the claims of the drivers whose PSP reports were released, holding that the dissemination of the incorrect information to a potential employer was sufficient to establish standing. The D.C. Circuit also determined that none of the drivers had standing to seek prospective relief and explained that the risk of future disclosure of inaccurate information was eliminated by procedural modifications FMCSA made to the PSP in August 2014.

No party petitioned for rehearing. The mandate issued on March 8, 2018.

Ninth Circuit Denies Rehearing Petition in Mexican Truck Litigation

On December 20, 2017, the U.S. Court of Appeals for the Ninth Circuit denied the petition for panel rehearing and rehearing en banc in Int'l Bd. of Teamsters v. DOT, Nos. 15-70754, 16-71137, 16-71992 (9th Cir.). The case arose when Petitioners IBT, Advocates for Highway and Auto Safety (AHAS) and the Truck Safety Coalition challenged FMCSA's decision to implement the cross-border provisions of the North American Free Trade Agreement (NAFTA) by issuing operating authority registration to qualified Mexico-domiciled motor carriers allowing them to conduct long-haul operations beyond the commercial zones of the United States. The Owner Operator and Independent Driver Association (OOIDA) intervened in the litigation and added a challenge to the agency's recognition of the equivalence of Mexican commercial driver licenses.

Petitioners challenged as final agency action a government report to Congress required under DOT's pilot program statute at 49 U.S.C. § 31315(c), arguing that the report served as the predicate for FMCSA's decision to accept applications from Mexican trucking companies seeking long haul authority. Petitioners asserted that the report's findings were arbitrary, capricious or contrary to law, that the report failed to comply with statutory requirements, and that Respondents' stated intention to accept applications from Mexico-domiciled carriers seeking long-haul authority was contrary to law in the absence of a valid pilot program report. In separately filed and consolidated cases, Petitioners also challenged FMCSA's issuance of long-haul operating authority to a Mexico-domiciled motor carrier.

On June 29, 2017, a panel of the Ninth Circuit had ruled in DOT and FMCSA's favor, holding that the Pilot Program Report was not a final agency action subject to review under the APA. The Court concluded that the report to Congress did not change the legal situation because FMCSA could have lawfully declined to issue permits despite completing the pilot program. In addition, the Court held that FMCSA's grant of long-haul operating authority to a specific Mexico-domiciled motor carrier and the agency's denial of the Teamsters' challenge to that grant of authority were reviewable final agency actions, but held that FMCSA's decision to grant such authority based on its evaluation of the pilot program results was committed to the agency's discretion by law and therefore was not subject to APA review. The Court rejected the Teamsters' argument relating to the adequacy of FMCSA's Report and rejected Petitioners' remaining arguments as well.

OOIDA Petitions for Rehearing of Eighth Circuit's Dismissal of Challenge to FMCSA's Medical Certification Integration Rule

On February 20, 2018, in OOIDA v. DOT, No. 16-4159 (8th Cir.), the Owner Operator Independent Drivers Association (OOIDA) filed a petition for rehearing *en banc* seeking review of the Court's dismissal for lack of standing on its challenge to FMCSA's Medical Certification Integration Rule. In its petition for rehearing, OOIDA contended that 1) it has standing based on its injury-in-fact and can establish that standing prior to the effective date of the rule; 2) the Court ignored the agency's violation of its procedural rights because it did not provide notice and comment; 3) the Court overlooked associational standing; and 4)

the Court brushed aside Petitioners' affidavits without analysis.

On March 15, 2018, the Agency argued in response that further review is not warranted because the Court invoked the correct legal standard for establishing Article III standing, and correctly applied that standard to hold that petitioners failed to establish that the final rule caused the harm they alleged. The Agency also pointed out that even if Petitioners had standing to sue, further review would not affect the ultimate outcome of this case because the record reflects that the Agency did, in fact, solicit and consider comments on the rule and because the Agency's rulemaking fully satisfied the applicable legal requirements.

Previously, on January 5, 2018, the Court dismissed the case for lack of standing. In dismissing the case, the U.S. Court of Appeals for the 8th Circuit ruled that the harm the petitioners alleged was not fairly traceable to the final rule they challenged. In reaching this decision, the Court explained that the affidavit provided by an OOIDA employee was not sufficient because it pre-dated the effective date of the final rule, that Petitioners merely alluded to future injury in its opening brief without providing any specific proof, and that petitioners failed to bring up procedural standing until the reply brief.

This case arose from Petitioners' challenge to the agency's 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). The Final Rule requires that medical examiners use a revised Medical Examination Report (MER) Form to assess commercial motor vehicle driver qualifications, adds questions to the driver health history section of the MER form, and

removes Advisory Guidance for medical examiners previously located at the end of the form. Based on comments, the agency retained the advisory guidance from the MER form without substantive change but relocated it to an appendix following 49 C.F.R. Part 391 (Appendix A).

Petitioners raised a myriad of issues, including that the expanded scope of the MER Form and Appendix A are de facto rules issued without notice and comment. In response, the agency asserted *inter alia* that the Court lacked jurisdiction because petitioners failed to show an injury that is fairly traceable to the rule, and therefore lack standing.

DOT Files Brief in Challenge to Airworthiness Directive on Boeing 757 Aircraft

On March 16, 2018, DOT filed its response brief in a case pending in the U.S. Court of Appeals for the D.C. Circuit challenging FAA's issuance of an Airworthiness Directive (AD) relating to Boeing 757 aircraft. Cargo Airline Ass'n v. FAA, No. 16-1148 (D.C. Cir.).

On May 20, 2016, Cargo Airline Association (CAA) filed a petition for review challenging Airworthiness Directive (AD) 2016-07-07, which applies to the Boeing Company Model 757 aircraft and was prompted by fuel system reviews conducted by the manufacturer. The AD requires modifications to the fuel quantity indication system (FQIS) wiring to prevent development of an ignition source inside the center fuel tank. FAA issued this AD to prevent ignition sources inside the center fuel tank which, in combination with flammable fuel vapors, could result in a fuel tank explosion and consequent loss of the airplane. This AD was preceded by a notice

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

In reaching its determination, FAA relied on proprietary information from Boeing in determining the level of risk presented by the wiring on the affected aircraft. Thus, after suit was filed, the parties jointly moved to hold the case in abeyance so as to explore the possibility of FAA releasing the underlying proprietary information to Petitioner pursuant to an appropriate nondisclosure agreement or protective order.

The parties ultimately signed a nondisclosure agreement, pursuant to which FAA produced materials containing the Boeing proprietary information to CAA.

CAA argues on appeal that FAA's finding of an unsafe condition in support of the AD was contrary to FAA guidance and policy, arbitrary and capricious, and unsupported by substantial evidence in the record. Further, CAA alleges that FAA failed to sufficiently consider the operational aspects of all-cargo operations and to perform a full cost-benefit analysis in support of the AD. In response, DOT and FAA contend that the AD is well supported by the evidentiary record and was promulgated squarely within FAA's authority and expertise on matters of aviation safety.

In addition, DOT and FAA argued that they properly considered the costs and benefits of the AD and appropriately handled Boeing's proprietary data in reaching conclusions about the unsafe condition. The case is expected to be argued in the coming months.

D.C. Circuit Considering Whether to Compel NHTSA Rulemaking on Rear Seat Belt Reminder

On October 30, 2017, Kids and Cars, Inc. and the Center for Auto Safety refiled their suit against NHTSA - this time in the U.S. Court of Appeals for the D.C. Circuit - for allegedly failing to issue a rule required by MAP-21 to provide a safety belt use warning system for rear seats. Kids and Cars, Inc. v. Chao, No. 17-1229 (D.C. Cir.). The petition for a writ of mandamus alleges that MAP-21 required NHTSA to “initiate a rulemaking proceeding” by October 1, 2014 and to finalize the rule by October 1, 2015. Petitioners acknowledge that MAP-21 provided ways to either extend the deadline to publish a final rule or to decline to publish a final rule entirely, but they contend that the prerequisites for these options were not satisfied. Accordingly, Petitioners allege that NHTSA has unlawfully withheld and unreasonably delayed action required by law, in violation of the APA. They request that the Court require NHTSA to promulgate a final rule within a year.

On November 30, 2017, the Court ordered the Department to respond to the mandamus petition. The Department filed its response in opposition to the petition for a writ of mandamus on February 2, 2018. In its response, the Department noted that MAP-21 does not require the Department to promulgate a rear seat belt reminder system standard. Indeed, the Department cannot promulgate such a standard if it would not be practicable, would not meet the need for motor vehicle safety, or cannot be stated in objective terms, as required by the National Traffic and Motor Vehicle Safety Act. The Department also noted that MAP-21 did not establish a deadline for publishing an NPRM (as Congress has expressly required in other

instances, including other MAP-21 provisions); rather MAP-21 directed the Department to “initiate a rulemaking proceeding,” which the Department contends it did - prior to the statutory deadline - when it sought to undertake a study regarding the effectiveness of rear seat belt reminder systems in 2013. As for the final rule, the Department believes it has exercised the statutory option to extend the deadline by repeatedly and publicly updating its rulemaking schedule and referring the relevant Congressional committees to its regulatory agenda, which includes its anticipated publication dates. The Department also highlighted the extraordinary nature of a mandamus remedy and challenged Petitioners’ standing.

In their reply, filed February 28, 2018, Petitioners contend that a study is not a rulemaking proceeding and that NHTSA has still not initiated a rulemaking proceeding under MAP-21. Petitioners also challenge the Department’s view that it has extended the deadline to publish the final rule as authorized by MAP-21 because the Department did not send its letters to the relevant Congressional committees until after the deadline had already passed and did not satisfy the statutory requirements to explain why the deadline could not be met and establish a new deadline. The D.C. Circuit case is now fully briefed, and the Parties are waiting for the Court to issue a decision on the petition.

The case was originally filed in District Court. Kids and Cars, Inc. v. Chao, No. 17-01660 (D.D.C.). The Department informed Plaintiffs that the complaint should have been filed in appellate court, rather than district court. Upon further review, Plaintiffs agreed and voluntarily dismissed the case before refiled it as a mandamus petition in the appellate court.

D.C. Circuit Rules in Government's Favor in Detroit Bridge Litigation

On November 21, 2017, the U.S. Court of Appeals for the D.C. Circuit ruled in favor of the United States in a case arising out of the Detroit International Bridge Company's (DIBC) efforts to build an adjacent bridge to the Ambassador Bridge, which joins Detroit and Windsor, Ontario. Detroit Int'l Bridge Co. v Gov't of Canada, No. 16-5270 (D.C. Cir.). DIBC and its wholly-owned subsidiary, Canadian Transit Company, originally filed suit 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. DIBC contended that a proposed new publicly 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 several years of litigation, the District Court ruled in favor of the federal defendants, and DIBC appealed. DIBC contended, among other things, that the State Department acted unlawfully in approving the Crossing Agreement between Michigan and Canada for the NITC/DRIC, because such action was outside the bounds of the International Bridge Act (IBA). In response, the government argued that it acted lawfully and that the IBA does not promise that the Ambassador Bridge will be the only bridge between Detroit and Windsor, but rather, just confers the right to "construct, maintain, and operate a bridge."

In a unanimous opinion, the D.C. Circuit ruled in the government's favor. The Court concluded that "[a]lthough Congress has authorized the private maintenance and operation of the Ambassador Bridge and funded aspects of the [New] Span project from federal funds, its enactments do not vest in the Company public rights beyond those that Congress specified." DIBC "pointed to nothing to show that Congress intended the Ambassador Bridge to be perpetually profitable for its owners." The Court also held that DIBC's remaining arguments lacked merit and affirmed the District Court's dismissal of various counts in the complaint, as well as the grant of summary judgment in the government's favor on a remaining count.

DIBC filed a rehearing petition on January 5, 2018. At the Court's direction, the government filed a response to the rehearing petition on February 8, 2018, arguing that DIBC had failed to meet its substantial burden to demonstrate that rehearing is warranted. The Court summarily denied rehearing on March 6, 2018.

Opponents of All Aboard Florida/Brightline Project Bring New Lawsuit Against DOT

On February 13, 2018, local opponents of the All Aboard Florida/Brightline passenger rail project filed a new lawsuit challenging DOT's most recent allocation of tax-exempt bond authority for the project. Martin County v. DOT, No. 18-333 (D.D.C.). The All Aboard Florida/Brightline Project is a private passenger railroad that will connect Miami and Orlando. DOT has conducted an environmental review of the Project, and issued its Record of Decision on December 15, 2017. On December 20, 2017, DOT authorized the issuance of \$1.15 billion in

tax-exempt Private Activity Bonds (“PABs”) to fund Phase II of the Project between West Palm Beach and Orlando (the “Phase II PAB Allocation”). Pursuant to a prior DOT allocation, All Aboard Florida has already issued \$600 million in PABs to fund Phase I (Miami to West Palm Beach). Plaintiffs are opponents of the Project, including two counties located in the Phase II area.

Plaintiffs bring three claims. First, they contend that the National Environmental Policy Act (“NEPA”) required DOT to conduct an environmental review process before issuing the Phase II PAB allocation, and that DOT’s process failed to adequately examine the Project’s potential environmental impacts. Second, they contend that the Project is not eligible for a PAB allocation under relevant statutory provisions. Third, they assert that the Phase II PAB Allocation has not received purportedly-required local approvals.

The same plaintiffs brought earlier lawsuits challenging another DOT PAB allocation. Martin County v. DOT, No. 15-632 (D.D.C.); Indian River County v. Rogoff, No. 15-460 (D.D.C.). In those cases, the Court denied the plaintiffs’ request for a preliminary injunction. Indian River County v. Rogoff, 110 F. Supp. 3d 59 (D.D.C. 2015). The Court later dismissed claims – identical to the second claim brought here – that the Project was not eligible for a PABs allocation, holding that the interests asserted by the plaintiffs fell outside the “zone of interests” protected by the statutory eligibility criteria. Indian River County v. Rogoff, 201 F. Supp. 3d 1, 20-21 (D.D.C. 2016). The Court also held that the plaintiffs stated a claim that DOT violated NEPA by making the prior PAB allocation prior to issuing a Record of Decision. Id. at 14-20. The Court eventually dismissed the

cases as moot after DOT withdrew the challenged allocation at AAF’s request. Indian River County v. Rogoff, 254 F. Supp. 3d 15 (D.D.C. 2017).

Non-Profit Forges Ahead with Challenge Against President’s Infrastructure Council

On July 25, 2017, Food & Water Watch (FWW), a non-profit organization that focuses on corporate and government accountability related to food and water and has an interest in infrastructure projects related to water, filed a complaint in the U.S. District Court for the District of Columbia against the President, the Department of Commerce, and DOT alleging that the Presidential Advisory Council on Infrastructure (Infrastructure Council) is subject to and is in violation of the Federal Advisory Committee Act (FACA). Food and Water Watch, Inc. v. Trump, No. 17-1485 (D.D.C.). The President issued an Executive Order establishing the Council within the Department of Commerce on July 19, 2017; however, Plaintiff alleges that the Council has been in operation since January 2017. FACA requires “advisory committees” to comply with certain requirements, such as filing a charter prior to meeting or taking any action, giving the public notice of meetings, and making certain documents available to the public. Plaintiff asks the court to find that the President’s Infrastructure Council is an advisory committee under FACA and that all of its actions should be null and void because of its non-compliance with FACA’s requirements.

The government filed a Motion to Dismiss on October 16, 2017 arguing that the court lacks jurisdiction because the Plaintiff does

not have standing. In addition, the government argues that the Plaintiff's claims are moot because the President has decided not to establish an infrastructure council as evidenced by the revocation of the Executive Order establishing the Infrastructure Council. In response, FWW filed an Amended Complaint citing a number of news articles as support for the alleged existence of the Infrastructure Council. The government renewed its arguments for dismissal based upon plaintiff's lack of standing, the court's lack of jurisdiction, and mootness. The District Court has not yet issued a decision.

Court Dismisses Claims Related to PHMSA's Approval of Spill Response Plans; PHMSA Continues to Defend Related Suit

PHMSA has prevailed on summary judgment in a suit filed by the National Wildlife Federation (NWF) in connection with obligations under the Oil Pollution Act (OPA). Nat'l Wildlife Fed'n v. DOT, No. 15-13535 (E.D. Mich.).

NWF alleged that although PHMSA 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 her purported duty to personally review and approve these plans, and that PHMSA's approval of response plans covering Enbridge's Line 5 was unlawful to the extent the plans included water-crossing segments.

The parties briefed this issue in 2016, and oral argument was held on December 8, 2016. Because of inconsistencies in NWF's

legal theories, however, the Court asked the Parties to file a new set of briefs. The second round of briefing was completed in July 2017. The Department argued 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 contended that NWF lacks standing, since NWF 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 disagreed with NWF on the merits because PHMSA had previously been delegated authority applicable to all portions of covered pipelines, even those that cross inland waters.

On December 12, 2017, the court issued a decision denying NWF's motion for summary judgment and granting PHMSA's cross-motion for summary judgment, holding that NWF lacked Article III standing. The court found that NWF could not make a "plausible case" that the claimed procedural errors made any difference in the results of the approval process, and therefore could not show that its members were injured by those alleged procedural errors. Thus, NWF lacked Article III standing to pursue its claims and the case was dismissed. NWF did not appeal.

PHMSA continues to defend a related suit filed by the same Plaintiffs. Nat'l Wildlife Fed'n v. PHMSA, No. 17-10031 (E.D. Mich.). The related suit remains pending and raises similar, but not identical, claims. In this case, NWF alleges that PHMSA's approval of response plans for Enbridge's Line 5 violated NEPA and the Endangered Species Act. Summary judgment briefing on these issues is currently stayed pending

resolution of NWF's motion to supplement the administrative record. PHMSA has filed an opposition to NWF's motion.

Oral Argument Held in Case Challenging Letter Regarding Aviation Fuel Tax Policy

On March 9, 2018, oral argument was held before the U.S. Court of Appeals for the Eleventh Circuit in a case involving a Georgia county's challenge to an FAA letter concerning requirements for the use of aviation fuel tax revenues. Clayton County v. FAA, No. 17-10210 (11th Cir.).

In deciding this case, the Court is considering whether FAA's November 2016 letter regarding the use of aviation fuel taxes is a final agency determination. The letter at issue is a non-binding, advisory letter that, among other things, reiterates the agency's 2014 interpretation of a federal statute that provides that "local taxes on aviation fuel or the revenues generated by an airport that is the subject of Federal assistance" generally must be spent for certain aviation-related purposes, such as the costs of operating an airport.

On March 8, 2017, the Court sua sponte asked the parties to brief the issue of whether the FAA's November 17, 2016 letter constitutes "final agency action" that is reviewable by the Court under the Administrative Procedure Act. FAA responded that the letter was not final agency action; Petitioners responded that the letter was final and reviewable. On May 10, 2017, the Eleventh Circuit determined that it would decide the jurisdictional question after briefing on the merits.

On May 15, 2017, petitioners filed their opening brief contending that FAA Chief

Counsel's letter regarding the use of aviation fuel taxes was arbitrary and capricious, contrary to law, and final agency action. Petitioners claim that the statutory provisions underlying the November 2016 letter do not apply to the taxes imposed by the petitioners.

FAA filed its Answering Brief on July 21, 2017. Airlines For America (A4A) filed an amicus curiae brief on July 25, 2017, in support of FAA. Clayton County filed its reply brief on August 18, 2017. As in its opening brief, Clayton County argued that the letter is a judicially reviewable final agency action, and that the letter's interpretation of the aviation fuel tax revenue use statute is incorrect.

A Consent Motion for Continuance to Hold Appeal in Abeyance was filed on February 28, 2018. The Motion requested that the matter be held in abeyance through July 1, 2018, because of a pending Georgia Bill proposing to exempt aviation fuel from local sales taxes. The Court issued an Order on March 1 denying the Motion. The Georgia legislature on the same day passed a tax bill that did not contain an aviation fuel tax exemption. The Court's decision is expected in the coming months.

Parties Reach Agreement Regarding Flight Procedures for Phoenix Sky Harbor International Airport

The City of Phoenix, the owner of Phoenix Sky Harbor International Airport, and a group of Phoenix historic neighborhood associations filed petitions challenging FAA's 2014 implementation of area navigation (RNAV) departure procedures in the Phoenix airspace. City of Phoenix v. Huerta, No. 15-1158 (D.C. Cir.). FAA

implemented the Phoenix RNAV procedures pursuant to the expedited environmental review mandated by the 2012 FAA Modernization and Reform Act, section 213(c)(1). Before implementing the procedures, FAA conducted an environmental analysis as required by NEPA and determined that no extraordinary circumstances existed that would preclude expedited review. However, residents of some Phoenix residential areas filed noise complaints. Although FAA consulted with the City of Phoenix Aviation Department during development of the procedures, the City raised new objections and demanded that FAA return to the old routes.

On August 29, 2017, the U.S. Court of Appeals for the D.C. Circuit issued an opinion and order vacating FAA's September 18, 2014 order implementing new flight routes and procedures at Phoenix Sky Harbor International Airport. The Court held that (1) Petitioners had reasonable grounds for their delay in filing and a decision on the merits is appropriate, (2) FAA did not fulfill its obligation under the National Historic Preservation Act to consult with certain stakeholders in the affected area, (3) FAA's finding that new routes were not likely to be highly controversial on environmental grounds was arbitrary and capricious, (4) FAA's consultation with the city was arbitrarily confined and insufficient under the Transportation Act, and (5) it was unreasonable for FAA to rely on guidelines in 49 CFR Part 150 that apply to historic sites where a quiet setting is not a generally recognized purpose and attribute of the historic properties.

FAA and petitioners have reached an agreement that provides for noise relief to Petitioners in two steps: first, near-term changes to west-flow departures; and,

second, the development of performance-based navigation procedures with the intent of approximating, to the extent practicable, the pre-September 2014 flight tracks. On November 30, 2017, the parties filed a joint motion with the D.C. Circuit to modify the order consistent with the agreement. The Court amended its order on February 7, 2018, applying it only to departure procedures at Phoenix and delaying the issuance of the mandate until June 15, 2018. FAA has begun the process of developing new departure procedures to comply with the first step of the agreement.

Briefing Complete in NBAA's Challenge to FAA Santa Monica Settlement; Pro Se Individual Challenges Settlement in Separate Action

On December 4, 2017, final briefs were filed in the case brought by the National Business Aviation Association (NBAA) to challenge the validity of the January 30, 2017 settlement agreement reached between FAA and the City of Santa Monica over the City's airport. NBAA v. Huerta, No. 17-1054 (D.C. Cir.). Oral argument has been set for May 14, 2018.

On May 4, 2017, a motions panel of the U.S. Court of Appeals for the D.C. Circuit issued an order denying NBAA's motion for a stay and injunction, which sought to cease implementation of the settlement agreement. The Court also referred FAA's motion to dismiss to the merits panel and granted the City of Santa Monica's motion to intervene.

The NBAA filed its initial brief on August 16, 2017 and advanced primarily procedural challenges. It argued the settlement violated the Airport Noise and Capacity Act and NEPA. It claimed FAA failed to follow

proper procedures in allegedly releasing airport property which was arguably subject to the Surplus Property Act and grant assurances imposed under the Airport Improvement Act.

The NBAA also argued that FAA failed to consult with the Department of Defense prior to releasing the property allegedly subject to the Surplus Property Act and raised several other violations.

In response, FAA argued that the settlement agreement is not a reviewable FAA Order and the Consent Decree is not reviewable in this Court. Further, vacatur of the settlement would not redress Petitioners' asserted injuries. With respect to the merits, FAA argued that the settlement agreement was a valid exercise of the Department's authority to compromise matters contested in litigation and that Petitioners' arguments have additional errors.

An individual has also challenged the settlement agreement by filing an action against the United States, FAA, and the City of Santa Monica in the U.S. District Court for the Central District of California. Rosen v. U.S., No. 17-7727 (C.D. Cal.). The pro se complaint alleges violations of the Surplus Property Act, the Administrative Procedure Act, the National Environmental Policy Act, and various state laws. Plaintiff has amended his complaint three times, and has now obtained counsel. Defendants' responses to the complaint are currently due in April.

Oral Argument Scheduled in Skydive Myrtle Beach's Appeal

The U.S. Court of Appeals for the Fourth Circuit scheduled oral argument on May 8, 2018 in the pending case involving Skydive Myrtle Beach's complaint against Horry

County Department of Airports, the operator of Grand Strand Airport, and the FAA's resolution of that complaint. Skydive Myrtle Beach, Inc. v. Horry Cnty. Dep't of Airports and FAA, No. 16-2337 (4th Cir.).

Under 14 CFR Part 16, a person or entity directly and substantially affected by a federally funded airport sponsor's alleged noncompliance with grant assurances may file a complaint with FAA. In its Part 16 complaint, Skydive alleged that the Airport violated its grant assurances by attempting to restrict the landing area and by unreasonably reporting and characterizing incidents involving Skydive as safety concerns. These allegations were considered under Grant Assurance 22, Economic Nondiscrimination and Grant Assurance 19, Operation and Maintenance. In a Director's Determination, FAA found that the Airport did not violate the grant assurances. Skydive appealed this determination to the Associate Administrator, arguing that FAA improperly relied on facts and conclusions that were not raised by the pleadings; were not part of the administrative record; and were biased, unsubstantiated, self-serving statements submitted ex parte. In a Final Agency Decision, the Associate Administrator found that the Director did not err and that the Airport was in compliance with grant assurances.

Skydive appealed the Final Agency Decision to the Fourth Circuit. Skydive filed the petition for review more than one month after the deadline.

FAA filed a motion to dismiss the untimely appeal, and on June 2, 2017, the Court deferred consideration of the motion pending a review of the merits of the case. Skydive filed an opening brief on July 12, 2017, asserting the same arguments that it

raised on appeal with FAA. FAA filed its response brief on September 11, 2017, and Skydive filed a reply on October 10, 2017.

District Court Decision Dismissing DBE Case on Appeal to the Ninth Circuit

On September 20, 2017, an insurance company called Orion Insurance Group (Orion) and its owner filed an appeal in the U.S. Court of Appeals for the Ninth Circuit of a decision by the U.S. District Court for the Western District of Washington, which dismissed their case 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), Orion Ins. Grp., Corp. v. Wash. State Office of Minority & Women's Bus. Enters., No. 17-35749 (9th Cir.). In the District Court, 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. The plaintiffs challenged DOCR's decision to uphold OMWBE's denial decision under the Administrative Procedure Act (APA). In addition, Plaintiffs claimed 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. Plaintiffs also purported to allege all claims against all the named officials in both their official and individual capacities.

Initially, the federal defendants filed a motion to dismiss seeking dismissal of all

claims against the Acting Director of DOCR in her individual capacity and all claims against DOT and the Acting Director of DOCR in her official capacity, except for the plaintiffs' APA claim. On November 17, 2016, the District Court granted the motion to dismiss except with respect to Plaintiffs' equal protection claims. The federal defendants subsequently filed a motion for summary judgment seeking dismissal of all remaining claims against the federal defendants, including the plaintiffs' APA and equal protection claims. On August 7, 2017, the District Court granted the federal defendants' motion for summary judgment and dismissed all remaining claims against the federal defendants, holding that DOCR's decision to affirm OMWBE's denial of Orion's application for DBE certification was substantially supported by the record. The court also dismissed all claims against the state defendants.

In their opening brief in the Ninth Circuit, filed on December 20, 2017, Plaintiffs-Appellants argued that the District Court erred by dismissing some of the claims against the federal defendants based on sovereign immunity grounds, by denying them the opportunity for discovery, by granting the federal and state defendants summary judgment when there were genuine issues of material fact, and by disposing of the case without a trial, to which the Plaintiffs-Appellants contend they were entitled.

In its response brief, the government urged the Ninth Circuit to uphold the District Court's decision that DOCR's decision was not arbitrary and capricious because that decision was supported by substantial evidence in the administrative record. In addition, the government argued that the District Court correctly denied Petitioners' request for discovery and to supplement the

record with extra-record materials, because Petitioners failed to satisfy any of the four narrow exceptions to the general rule that in a judicial challenge to an agency action under the APA, the court limits its review to the administrative record. Furthermore, the court properly decided to grant summary judgment in favor of the government on the APA claim for the same reason. The government also argued that the District Court correctly dismissed certain claims against the federal defendants based on sovereign immunity grounds.

Petitioners' reply brief is due on April 12.

Cause of Action FOIA Lawsuit Dismissed

On January 31, 2018, the United States settled and dismissed litigation arising out of a series of Freedom of Information Act (FOIA) requests made by Cause of Action (COA), a nonprofit organization. Cause of Action v. Eggleston, No. 16-871 (D.D.C.). COA filed suit in May 2016 against DOT and numerous other Executive Branch agencies, as well as W. Neil Eggleston, in his official capacity as White House Counsel. COA sued to compel the production of documents pursuant to its FOIA requests to the defendant agencies, by which it sought work calendars, records of travel with the President, and other materials. In so doing, COA challenged the validity of a memorandum issued in 2009 by then-White House Counsel Gregory Craig, which discussed how agencies should consult with the White House in the course of making FOIA productions that involve White House equities. COA contended that the guidance provided to agencies in this memorandum was inconsistent with FOIA and added an excessive layer of FOIA

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

On December 15, 2016, the District Court granted the government's partial motion to dismiss the complaint, agreeing with the government's contention that COA had failed to adequately allege a "pattern and practice" claim for repeated violations of FOIA, and that the complaint was otherwise insufficient in various respects. In particular, the court concluded that "the FOIA requests [that the Office of White House Counsel] allegedly reviewed plausibly implicate records that either come from the White House or could reasonably call for White House input to determine the applicability of FOIA exemptions."

After DOT and other defendant agencies completed production of responsive documents relating to the surviving portion of COA's case, the parties stipulated to a dismissal of the lawsuit with prejudice, with both sides to bear their own fees and costs.

New York Times FOIA Lawsuit Dismissed

On February 5, 2018, DOT settled litigation arising out of a FOIA request made by The New York Times. The New York Times Co. v. DOT, No. 17-7510 (S.D.N.Y.). The Times submitted its FOIA request to DOT in March 2017 seeking documents reflecting communications between the Executive Office of the President and DOT officials relating to certain high-speed rail projects in Florida, California and Nevada. After the suit was filed, DOT completed its production of responsive documents in October 2017. The parties stipulated to a dismissal of the lawsuit with prejudice, with both sides to bear their own fees and costs.

Recent Litigation News from DOT Modal Administrations

Federal Aviation Administration

D.C. Circuit Rules in Government's Favor on Challenge to FAA Airworthiness Directive on Aircraft Engine Cylinders

On August 11, 2016, 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 for review in the U.S. Court of Appeals for the D.C. Circuit challenging the final AD. Airmotive Eng'g Corp. v. FAA, No. 16-1356 (D.C. Cir.). In their opening brief, petitioners argued that FAA's finding that the pertinent cylinder assemblies presented an unsafe condition was arbitrary and capricious. FAA contended in turn that the AD was appropriately grounded and necessary for safety.

Oral argument was held before the D.C. Circuit on December 4, 2017. In a decision issued on February 23, 2018, the Court denied the petition for review. The Court found that FAA's application of the risk methodology in Order 8040.4A was proper

and supported by substantial evidence in the record. The Court further ruled that FAA's findings of fact are conclusive when supported by substantial evidence (in other words, not arbitrary or capricious). FAA provided substantial evidence that cylinder failure results in a 20% reduction in engine power, and that this condition constitutes a "hazardous" risk, regardless of FAA guidance in a different context that defines partial power failure as only a "minor" event. The Court similarly rejected Airmotive's challenges to the sufficiency of the evidence supporting FAA's determination that the in-flight fire and asymmetric drag risks are hazardous.

The Court also rejected Airmotive's claim that the use of comparative information – that is, the comparison of OEM cylinders with Airmotive cylinders – runs afoul of a purported requirement that ADs be based on an individualized determination. The Court found the use of comparative information is proper and relevant here because the Airmotive cylinders are a replacement part and 14 CFR § 39.5(b) requires FAA to determine whether the unsafe condition "is likely to exist or develop in other products of the same type design."

D.C. Circuit Dismisses Challenge to FAA's Departure Procedures at National Airport

The U.S. Court of Appeals for the D.C. Circuit held oral argument on January 11, 2018 in a case challenging FAA's implementation of nine northern departure routes from Reagan National Airport (DCA). Citizens Ass'n of Georgetown v. FAA, No. 15-1285 (D.C. Cir.). Petitioners

are a coalition of citizen groups from the Georgetown neighborhood.

The D.C. Circuit issued a decision on March 27, 2018 dismissing Petitioners' petition as untimely. Under Federal law, petitions seeking review of FAA actions must be filed within 60 days of the agency's final order unless the petitioner had "reasonable grounds" for delay. In this case, the Court held that FAA's final action was its approval of the new routes in December 2013, not its later publication of the route charts in June 2015. Accordingly, since Petitioners' petition was filed more than a year and a half after FAA's December 2013 approval and publication of the FONSI/ROD, its petition was untimely. Further, the Court held that Petitioners did not have "reasonable grounds" for delay as actual notice is not required, FAA satisfied its notice obligations through publication in local newspapers, and there was no evidence that FAA collaborated to withhold information.

Hawaiian Airlines Case Held in Abeyance Pending Anticipated Resolution

On February 2, 2018, the U.S. Court of Appeals for the D.C. Circuit granted a consent motion to hold Hawaiian Airlines, Inc. v. FAA, No. 17-1199 in abeyance pending the anticipated resolution of the matter. The case involves Hawaiian Airlines' April 3, 2017, petition to FAA for discretionary review of FAA Obstruction Evaluation Group (OEG) determinations provided in accordance with 14 CFR part 77, Safe, Efficient Use, and Preservation of the Navigable Airspace. The determinations for which Hawaiian Airlines sought FAA discretionary review extended initial determinations of no hazard for nine

permanent 320 foot AGL container cranes on the north side of Sand Island, approximately 1.93-2.56 NM east of the Daniel K. Inouye International Airport in Honolulu (HNL). The initial determinations of no hazard were issued July 7, 2015 and the extensions were issued March 3, 2017.

The proposed resolution would involve lowering a radio tower near HNL, which, according to Hawaiian, is an impediment to the efficiency of its operations. The resolution rests on the finalization of a Memorandum of Understanding (MOU) between the Hawaiian Department of Transportation (HDOT) and the owner of a radio tower stipulating that HDOT will pay for the relocation of the upper FM portion of the radio tower. The MOU would also require HDOT to escrow money for the ultimate relocation of the lower portion of the tower.

The parties will update the court every 60 days via a status report prepared by Hawaiian on the progress of the resolution.

Briefs Filed in Case Challenging FAA's Denial of a Petition for Exemption Regarding Operating Certificate Requirements

Great Lakes Aviation filed a petition for review in the U.S. Court of Appeals for the Tenth Circuit that arises out of FAA's denial of a petition for exemption from 14 CFR § 110.2. Great Lakes Aviation v. FAA, No. 17-9538 (10th Cir.). The exemption would have permitted Great Lakes to operate its BE-1900D aircraft fleet with 19 seats and apply the operating requirements of 14 CFR part 135 instead of part 121.

Great Lakes filed its opening brief on October 27, 2017. It argues FAA's denial of

its petition for exemption was erroneous. On appeal, Great Lakes contends “no evidence” supports FAA’s determination that the aircraft cannot be operated under the same hour requirements as an aircraft with fewer seats. It cites two studies it contends support its assessment that the certification standards applicable to airline transport pilots (ATPs) do not ensure safety. Great Lakes also argues granting the petition would have been in the public interest.

FAA submitted its response brief on December 15, 2017. FAA stated its regulations concerning scheduled passenger service have distinguished aircraft with nine or fewer passenger seats from aircraft with more seats since 1995, and Great Lakes has not challenged the validity of this distinction. Instead, Great Lakes seeks what it termed an “exemption” from the requirements that unequivocally apply to its operation because it seeks to mix and match regulations from different kinds of air carrier operation categories. In response, FAA contended that such a varying framework would be inimical to public safety. FAA also stated that Great Lakes failed to present the studies they cited for consideration earlier, and that the studies are irrelevant. Based on the foregoing points, FAA contended it did not abuse its discretion in denying the petition for exemption.

In its reply brief filed January 12, 2018, Great Lakes challenges FAA’s assertion that FAA could not grant an exemption from the statutory requirement that requires part 121 pilots to hold an ATP certificate. Great Lakes bases this argument on FAA’s authority to issue exemptions in general, under 49 U.S.C. § 44701(f). Great Lakes also disputes FAA’s contention that Great Lakes waived the opportunity to introduce new data concerning training as a substitute for the 1500-hour qualification requirement

that applies to airmen who seek to operate under part 121 with an ATP certificate. Great Lakes bases this argument on the fact that it raised concerns about the requirement via a comment the Regional Airline Association submitted on its behalf in response to FAA’s 2012 Notice of Proposed Rulemaking that proposed the requirement. In addition, citing testimony to Congress from 2009 and various studies, Great Lakes generally asserts that FAA did not prove that its decision to deny the exemption was based on sufficient facts concerning the 1500-hour requirement. It also states FAA incorrectly applied its two-prong standard of review for exemptions, which 14 CFR § 11.81 sets forth: petitioners seeking exemption must include (1) a showing that the petitioner can ensure an equivalent level of safety under the exemption, and (2) verification that granting the exemption is in the public interest. In this regard, Great Lakes contends FAA erred by not analyzing each prong of the standard. Lastly, Great Lakes contends FAA erred in determining that a grant of exemption from 14 CFR § 110.2, which defines “domestic” and “commuter” operation, would infringe on safety.

Oral argument is expected in the coming months.

Third Circuit Issues Decision in Trenton Airport Case

FAA issued Operations Specifications to Allegiant Airlines to use Trenton Mercer Airport as a regular airport for scheduled service after categorically excluding the action from a more detailed environmental review. In *BRRAM v. FAA*, No. 16-4355 (3d Cir.), Bucks County, PA Residents for Responsible Airport Management (BRRAM) contended that the categorical exclusion of the action was improper.

BRRAM also contended that FAA did not properly account for noise impacts and considered an unreasonably low level of service in making its decision.

The U.S. Court of Appeals for the Third Circuit cancelled oral argument scheduled for November 15, 2017 and decided the case on briefs, issuing an unpublished decision on January 19, 2018. The Court held that FAA did not act arbitrarily and capriciously in determining that there were no extraordinary circumstances precluding its reliance on a categorical exclusion instead of preparing a more detailed environmental analysis of Allegiant's request to amend its Operating Specifications.

Sixth Circuit Affirms Agency Decision in Case Against Somerset-Pulaski County Airport Board and FAA

In a decision issued on March 7, 2018, the U.S. Court of Appeals for the Sixth Circuit affirmed FAA's final decision that no unjust discrimination occurred when the Somerset-Pulaski County Airport Board created an incentive program to attract maintenance providers who offer airworthiness inspections to the public. SPA Rental, LLC v. Somerset-Pulaski County Airport Board, No. 16-3989 (6th Cir.). The Court agreed with FAA that the proper standard for unjust discrimination is whether the party who has allegedly been discriminated against is "similarly situated" to an alleged favored party. The Court noted that this standard is "informed directly" in the text of Grant Assurance 22 as well as its statutory counterpart, 49 U.S.C. § 47107(a)(5). In summary, the Court found that, because SPA, an aircraft seller, and the alleged favored party, a maintenance provider, are

not similarly situated, no unjust discrimination occurred.

SPA Rental, LLC, filed a Part 16 complaint against Somerset-Pulaski County Airport Board alleging that the Airport violated Grant Assurance 22, Economic Nondiscrimination; Grant Assurance 23, Exclusive Rights; and Grant Assurance 24, Fee and Rental Structure. In its complaint, SPA argued that the lease terms offered to it by the airport were unreasonable and discriminatory.

The lease in question offered certain insurance and rental fee incentives to tenants. However, in order to obtain them, the tenant had to provide certain services. SPA argued that because it does not provide those services, the lease was discriminatory and unfairly benefited its competitors. According to the Airport, the incentives were permissible and were designed to promote more business and facilitate growth.

In the Director's Determination, the Director found no violations. On appeal to the Associate Administrator, SPA argued that the Director failed to recognize the discriminatory nature of the leases and improperly failed to find that the minimum standards that the airport sought to impose violated the grant assurances. The Associate Administrator rejected these claims and upheld the decision.

SPA appealed the Final Agency Decision to the Sixth Circuit. In its opening brief, SPA argued that the Associate Administrator's conclusions were arbitrary and capricious because the Administrator 1) ignored the massive financial disparity between the lease offered to SPA and that executed by its competitor; 2) failed to acknowledge that the Airport's demanded reduction of SPA's

hangar space was unreasonable because it constituted a de facto ouster of SPA or a sham lease; and 3) failed to recognize that the incentive program unfairly prejudiced those not in the targeted business.

Sixth Circuit Dismisses Petition for Lack of Standing

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 FAA on December 13, 2016. The petition, filed in the U.S. Court of Appeals for the Sixth Circuit, Kaufmann v. FAA, No. 17-3152 (6th Cir.), alleges that FAA violated NEPA, the National Historic Preservation Act (NHPA), and Section 4(f) of the U.S. Department of Transportation Act.

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 aviation easements and trimming and removal of trees located on private off-airport property in an effort to remove obstructions to the navigable airspace and enable reinstatement of nighttime instrument procedures that FAA had suspended several years prior.

Oral Argument was held on December 5, 2017, and on January 22, 2018, the Court dismissed the petition for lack of standing. The Sixth Circuit held that the relief requested by Petitioners (remand back to FAA) would not redress their alleged injuries because the sponsor had withdrawn its request for federal funding for the project. A remand to FAA would not preclude the sponsor from carrying out the project as planned. The court also held that

Petitioners failed to state a claim against the airport authority because, in the absence of federal funding, the project was not “federalized.”

FAA’s Finding of No Significant Impact For Runway Extension Challenged

On January 19, 2018, the absentee owners of a 180-acre farm located adjacent to the Henderson City-County Airport in Henderson, Kentucky, filed a petition for review in the U.S. Court of Appeals for the 6th Circuit Court challenging a September 2, 2016, Finding of No Significant Impact for a 1000-foot runway extension and an associated roadway realignment project. Kushino v. FAA, No. 18-3084 (6th Cir.). Petitioners allege that: (1) newspaper publication of the notice of availability of the draft Environmental Assessment (EA) was insufficient; (2) the EA failed to evaluate all reasonable alternatives; (3) the EA failed to adequately analyze potential wetlands impacts; and (4) an Environmental Impact Statement should have been prepared.

On February 13, 2018, FAA moved to dismiss the case on timeliness grounds. The motion has been fully briefed and a decision is expected in the coming months.

Case Filed in D.C. Circuit Alleging FAA Failed to Enforce Final Order

On December 1, 2017, First Aviation Services, Inc. and Piedmont Propulsion Systems, LLC filed a complaint in the D.C. Circuit claiming FAA failed to enforce a “final agency order” that required issuance of Instructions for Continued Airworthiness (ICA). First Aviation Serv. Inc. v. FAA, No. 17-1254 (D.C. Cir.).

The document being cited as the “final agency order” is a letter to First Aviation, not an order to the entity required to produce the ICA. Accordingly, on January 18, 2018 FAA filed a motion to dismiss arguing that the court should dismiss the case for lack of a final agency order. Further, FAA argued that even if the Court found that Petitioner did challenge a final agency order, the challenge was too late – outside of the 60-day window in which Petitioner should have filed.

U.S. Appeals U.S. Court of Federal Claims Decision in FLSA Case

On November 6, 2017, the U.S. filed a notice of appeal with the U.S. Court of Appeals for the Federal Circuit appealing the U.S. Court of Federal Claim’s September 8, 2017 judgment. Abbey v. U.S., No. 18-1150 (Fed. Cir.). The government’s opening brief is due April 4, 2018.

This case was initiated in the U.S. Court of Federal Claims in 2007 by approximately 8,000 individual air traffic control specialists (ATCS) alleging FAA violations of the FLSA for providing compensatory time and credit hours in lieu of cash payment for FLSA overtime.

In March 2014, the U.S. Court of Appeals for the Federal Circuit reversed the decision of the U.S. Court of Federal Claims and upheld FAA’s authority to adopt policies that could serve as exceptions to the FLSA, as long as its policies are within the “authorization” of their title 5 counterparts. Upon remand, the U.S. Court of Federal Claims determined the Agency’s comp time policies were within the authorization of title 5, but that its credit hour policies, as modified by negotiated agreements with NATCA, were not consistent with title 5.

The liability issues in the case have been resolved, but the parties still have a dispute about damages, specifically whether the government is entitled to a damages “offset” for certain credit hours used by plaintiffs. On March 31, 2017, the Court of Federal Claims denied the Agency’s request to file new payroll record evidence of damages offsets. On September 5, 2017, the Court entered final judgment pursuant to the parties’ stipulation of damages. The parties stipulated to \$7.064 million dollars in damages for 7,912 plaintiffs. With liquidated damages, the total amount is \$14.128 million dollars. The Agency’s agreement to these stipulated amounts was not a waiver of its right to appeal the rulings of the Court of Federal Claims.

FAA Settles with Some Petitioners in Challenge to FAA’s Southern California (SoCal) Metroplex FONSI/ROD

Eight petitions for review were filed and consolidated challenging FAA’s August 31, 2016, FONSI/ROD for the Southern California Metroplex project. Benedict Hills Estates Assoc. v. FAA, No. 16-1366 (D.C. Cir.). Petitioners challenged the adequacy of FAA’s environmental review under NEPA. 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, FAA completed the Final EA for the SoCal Metroplex project and signed the FONSI/ROD. On September 2, 2016, FAA issued the Notice of Availability (NOA) of the EA and FONSI/ROD through the Federal Register. FAA is phasing implementation of the project.

Through mediation, FAA has settled with several Petitioners. The remaining

Petitioners filed their opening brief on March 16, 2018. In addition, an amicus brief was filed by the City of Los Angeles in support of Petitioners on March 23, 2018. FAA's opposition brief is due May 16, 2018. Oral argument has not been set.

Petition for Mandamus Seeks to Compel FAA to Prepare Tour Management Plans or Voluntary Agreements for Seven National Parks

On February 14, 2018, Public Employees for Environmental Responsibility and the Hawaii Coalition Malama Pono filed a Petition for Mandamus in the U.S. Court of Appeals for the D.C. Circuit. Pub. Employees for Env'tl. Responsibility v. FAA, No. 18-1044 (D.C. Cir.) The same Petitioners previously filed suit in U.S. District Court for the District of Columbia. Petitioners seek to compel FAA to prepare Air Tour Management Plans or Voluntary Agreements for seven national park units throughout the continental U.S. and Hawaii. The Court has not yet directed FAA to respond to the petition nor has it set a briefing schedule for the case.

In the previous case filed in U.S. District Court, Pub. Employees for Env'tl. Responsibility v. FAA, No. 17-2045 (D.D.C.), FAA filed a Motion to Dismiss for lack of jurisdiction on December 14, 2017. Instead of filing a response, Plaintiffs filed a Notice of Dismissal on January 19, 2018.

Plaintiffs seek injunctive relief requiring FAA to complete a Management Plan or Voluntary Agreement for certain National Park Units (including Volcanoes (HI), Haleakalā (HI) Lake Mead (AZ/NV), Muir Woods (CA), Glacier (MT), Great Smoky Mountains (NC/TN) and Bryce Canyon

(UT)) within two years and further relief enjoining all air tour operations over park units for which no Management Plan or Agreement has been finalized by the end of that two-year period.

Court Dismisses Challenge to Reevaluation of 2010 Supplemental Environmental Assessment as Premature

Six Paulding County, Georgia, residents filed a Petition for Review on October 26, 2017, challenging a written reevaluation of a 2010 Supplemental Environmental Assessment for a terminal area expansion project at Paulding Northwest Atlanta Airport in Dallas, Georgia. Louie v. Huerta, No 17-1228 (D.C. Cir.). Petitioners allege that the project is connected to the proposed introduction of commercial service and should be considered as a part of an ongoing comprehensive environmental assessment undertaken as part of a settlement with the same petitioners in 2013. Petitioners also argue that the data and analysis in the 2010 Supplemental Environmental Assessment is no longer valid and otherwise inaccurate.

On December 27, 2017, the Court issued an Order to Show Cause as to why the case should not be dismissed for lack of jurisdiction while Petitioners' request for reconsideration is still pending with FAA. Petitioners' response to the Order was filed on January 26, 2018. FAA's response resulted in a second petition for review filed on January 23, 2018. Louie v. Huerta, No. 18-1022. This second case challenges FAA's denial of Petitioners' request for reconsideration. Petitioners have moved the court to consolidate the two cases.

On March 22, 2018, the Court dismissed the petition for review in both cases holding that

a party may not simultaneously seek agency reconsideration and judicial review of the same order.

FAA Files Complaint Alleging Lease Violations

On December 19, 2017, FAA filed a Complaint against John W. Dawson, Jr., Gary A. Dawson, and Rodney P. Dawson for their violation of the terms of a lease involving a 1000-foot clear zone around a VORTAC, a navigational aid system. U.S. v. Dawson, No. 17-501 (M.D. Ga.). The violation occurred when the Defendants installed a 1200' metal irrigation system within the clear zone. Due to its proximity to the VORTAC and the resulting loss of integrity of the VORTAC signal, FAA shut down the facility on February 9, 2017. The facility remains shut down as of the date of this report.

FAA had leased a parcel of land from Slade Farms LLC through September 2023 and installed a VORTAC on the land. The lease was recorded in the public records of Pulaski County, Georgia. In July 2016, Slade Farms LLC sold the subject property to Defendants. At the time the conveyance was recorded, an Assignment of the FAA lease was also executed and recorded, and the terms of the FAA lease were assumed by Defendants. After their acquisition of the subject property, despite the terms of the lease and instructions from FAA about the appropriate Obstruction Evaluation (OE) process, the Defendants installed the irrigation system within the clear zone without FAA approval.

After numerous contacts between FAA and Defendants, Defendants submitted the required documents for completion of the OE study. On May 18, 2017, FAA issued a Notice of Presumed Hazard, and offered

Defendants a mitigating clear zone distance of 500 feet from the VORTAC. FAA gave Defendants sixty days to comply with the proposed mitigation. In August 2017, after the expiration of the OE deadline, FAA traveled to the site and took measurements. The irrigation system was within 500 feet of the VORTAC, and appeared to not have been moved since FAA last visited the site. FAA filed a suit to enforce the terms of the lease, which requires a 1000-foot clear zone.

Federal Highway Administration

Oral Argument Held in Ninth Circuit Appeal in Federal Tort Claims Case

Oral argument was held before the U.S. Court of Appeals for the Ninth Circuit on December 6, 2017 in Booth v. U.S., No. 16-17084 (9th Cir.).

The case was on remand from the U.S. Supreme Court following the decision in United States v. June, 135 S. Ct. 1625 (2015), which ruled that claims under the Federal Tort Claims Act (FTCA) were subject to equitable tolling. The purpose of the remand was to determine whether Booth was entitled to equitable tolling of his claim. Before the Supreme Court's review, the District Court decided against Booth on the ground that the FTCA's 2-year statute of limitations was not subject to tolling and therefore his late-filed claims were "forever barred."

In a September 30, 2016 decision following remand, the U.S. District Court for the District of Arizona granted the United States' motion for summary judgment in one of several interrelated FTCA cases concerning the failure of certain 3-cable

median barriers installed by the Arizona Department of Transportation (ADOT) in the Phoenix metropolitan area. Booth v. U.S., No. 11-901 (D. Ariz.). The District Court held that Booth was not entitled to equitable tolling. The court noted that 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 did not make a formal request for such testimony until after the time limits had expired, nor did he show that FHWA concealed any information from him during that period.

Ninth Circuit Affirms District Court Decision Upholding South Mountain Freeway in Arizona

On December 8, 2017, the U.S. Court of Appeals for the Ninth Circuit affirmed the U.S. District Court of Arizona's ruling in favor of FHWA and the Arizona Department of Transportation (ADOT) in the South Mountain Freeway (Loop 202) litigation. PARC and GRIC v. FHWA, Nos. 16-16605, 16-16586 (9th Cir.). Plaintiffs Protecting Arizona's Resources and Children, et al. (PARC) and Gila River Indian Community (GRIC) originally challenged the approval of the South Mountain Freeway, a 22-mile, 8-lane new alignment near Phoenix in

federal district court. The lawsuit raised several claims under the National Environmental Policy Act (NEPA) and Section 4(f) of the Department of Transportation Act. The GRIC Plaintiffs also challenged the agencies' ability to avoid three wells held in trust by the Bureau of Indian Affairs (BIA). On August 19, 2017, the District Court granted summary judgment in favor of FHWA and ADOT on all counts and Plaintiffs timely appealed. Oral argument was held in the Ninth Circuit on October 19, 2017.

In affirming the lower court decision, the Ninth Circuit held that the agencies complied with NEPA and Section 4(f). Specifically, the court found that the agencies' purpose and need statement complied with NEPA under the deferential standard of the Administrative Procedure Act. Similarly, the agencies' "multivariable screening process to evaluate reasonable alternatives over the course of thirteen years" complied with NEPA. Regarding assumptions underlying the no-build alternative, the court concluded the analysis was not arbitrary or capricious "[b]ecause Appellees explained the basis for their decision to rely upon the socioeconomic projections of the [Maricopa County Association of Governments] report and disclosed their reliance on the projections."

Concerning the remainder of the NEPA claims, the court ruled that the agencies' discussion of hazardous materials was sufficient, noting that the agencies had determined the probability of a spill was low. It also found the agencies adequately considered impacts to children's health, citing deference to agency judgment in technical scientific analysis and the air quality analyses conducted by the agencies here. Similarly, the discussion on Mobile Source Air Toxics (MSATs) complied with

NEPA because the analysis conformed to FHWA guidance and the agencies explained their rationale for why a near-roadway emissions analysis was unnecessary. Concerning the Section 4(f) claims, the Ninth Circuit held the agencies permissibly determined there was no feasible and prudent alternative to use of the South Mountain Park and Preserve (SMPP) and that the agencies conducted all planning to minimize harm to the SMPP, in accordance with Section 4(f)'s requirements.

Finally, with respect to the GRIC wells, the court acknowledged that the design and construction contract required the contractor to avoid and preserve the well properties, and that NEPA provided a mechanism to conduct a reevaluation or supplemental EIS if avoidance of the wells would result in significant environmental impacts not previously evaluated.

Plaintiffs File Appeal in Challenge to Thorncreek Road in Latah County, Idaho

On January 25, 2018, the Paradise Ridge Defense Coalition filed its appeal of the judgment rendered on August 29, 2017 by the U.S. District Court of Idaho ruling in favor of FHWA on all claims in a challenge to the US-95 Thorncreek Road to Moscow project in Latah County, Idaho. Paradise Ridge Defense Coalition v. Hartman, No. 17-35848 (9th Cir.). The project involves realigning approximately 5.85 miles of US-95 immediately south of Moscow, Idaho to improve safety and increase capacity. FHWA and Idaho DOT prepared an EIS for the project and signed a ROD selecting alternative "E-2" on March 21, 2016.

The plaintiff is a consortium of land owners and other stakeholders that reside near or

use Paradise Ridge, a topographical feature that the highway will run close to when built. Their appeal essentially realleges all the same arguments as before—four related to NEPA, one to EO 11990 (Protection of Wetlands), and one to 23 CFR § 711.125 (Prior Concurrence)—to attempt to show that the EIS is "inadequate" and "misleading." They claim that FHWA 1) failed to take a hard look at the projected traffic safety benefits of the project; 2) predetermined the outcome of the NEPA analysis; 3) unreasonably constrained the range of alternatives; 4) failed to evaluate the effectiveness of mitigation measures for invasive weeds; 5) violated EO 11990 by failing to avoid impacts to wetlands; and 6) violated § 711.125 by failing to obtain prior concurrence from its Headquarters. The main focus of plaintiff's brief is on its first claim and the statistical method used to calculate the number of projected crashes for each alternative, which they say is fundamentally flawed. The plaintiff seeks reversal and remand, vacatur of the ROD, and attorney's fees.

FHWA's answering brief is due April 11, 2018.

Fifth Amendment Takings Case Filed in U.S. Court of Federal Claims

On January 13, 2017, Levi Robertson and a group of similarly situated individuals filed a Fifth Amendment takings suit in the U.S. Court of Federal Claims alleging that design flaws in an I-12 bridge constructed over the Tangipahoa River in Louisiana in 1975 resulted in \$200 million in flood damage to a class of plaintiffs residing within the Tangipahoa flood plain following heavy rains in March and August of 2016. Robertson v. U.S., No. 17-60L (Fed. Cl.).

The suit names as Defendant “the United States of America through the actions of the Department of the Interior, United States Geological Survey, and Federal Highway Administration.”

The same Plaintiff represented by the same counsel previously filed a lawsuit against the Louisiana Department of Transportation and Development (LDOTD) for damage to largely the same group of properties arising from flooding that occurred in 1983. Plaintiffs prevailed against the State, and the Louisiana Supreme Court affirmed a judgment of approximately \$200 million. However, the State Legislature did not authorize payment so Plaintiffs received nothing. The United States was not named as a party and did not participate in that lawsuit. In the prior litigation, Plaintiffs alleged that the LDOTD “designed and constructed the I-12 bridge over the Tangipahoa River in a negligent and improper manner.” The courts specifically rejected LDOTD’s argument that it was a contractor who merely followed the federal government’s plan and specifications for the construction of Interstate 12.

Federal Defendants filed their Motion to Dismiss and Reply on May 19, 2017, arguing that the complaint is barred by the six-year statute of limitations since Plaintiffs were aware of all relevant facts underlying their theory as early as 1983. Plaintiffs filed their Motion in Opposition on July 19, 2017, arguing the statute of limitations does not bar their claim, because the flooding at issue is intermittent in nature and that fact was not known until new floods occurred in 2016. Oral argument occurred on October 12, 2017. Federal Defendants’ Motion to Dismiss remains pending before the Court.

D.C. Circuit Rejects Challenge to EPA’s Hot-Spot Conformity Guidance

On October 24, 2017, the U.S. Court of Appeals for the D.C. Circuit dismissed the Sierra Club’s petition challenging the Environmental Protection Agency’s (EPA) Transportation Conformity Guidance for Quantitative Hot-spot Analyses in PM_{2.5} and PM₁₀ Nonattainment and Maintenance Areas (EPA-420-B-15-084, Nov. 2015) in Sierra Club v. Environmental Protection Agency, No. 16-1097 (D.C. Cir.). Although FHWA was not a party to the lawsuit, the challenge included attempts to enjoin three Federal-Aid highway projects as part of the suit: the South Mountain Freeway Project in Phoenix, Arizona; the I-70 East Project in Denver, Colorado; and the I-710 Freight Corridor Project in Los Angeles, California. Accordingly, FHWA provided support to the Department of Justice’s defense of EPA.

Appeal Filed in First Circuit by Narragansett Indian Tribe

The Narragansett Indian Tribe filed a complaint against the Rhode Island Department of Transportation and FHWA to enjoin further construction of the I-95 Providence Viaduct Bridge replacement project and to enforce the terms of a Programmatic Agreement in relation to the project among the Narragansett Indian Tribe and Defendants. Narragansett Indian Tribe v. Rhode Island Dep’t of Transp., No. 17-1951 (1st Cir.). The Complaint claims that it “arises under” the Administrative Procedure Act and Section 106 of the National Historic Preservation Act (NHPA) but states no separate claim under either statute.

On September 11, 2017, the District Court granted the Department's motion to dismiss for lack of jurisdiction because NHPA does not create an implied private right of action and because the Narragansett Indian Tribe failed to challenge any final agency action as required by the APA. Narragansett Indian Tribe v. Rhode Island Dep't of Transp., No. 17-125, 2017 WL 4011149 (D.R.I. 2017)

On September 26, 2017, the Plaintiffs filed a timely notice of appeal in the U.S. Court of Appeals for the First Circuit. Narragansett Indian Tribe v. Rhode Island Dep't of Transp., No. 17-1951 (1st Cir.)

On February 12, 2018, Appellees filed a response to the appeal. FHWA is awaiting a decision.

Court Partially Dismisses Claims in Challenge to I-70 in Colorado

On July 9 and 10, 2017, two groups filed separate lawsuits against FHWA for its approval of the I-70 East, Phase I project ("Central 70 project") located in north Denver and Aurora, Colorado. Zeppelin v. FHWA, No. 17-1661 (D. Colo.) and Sierra Club v. Chao, No. 17-1679 (D. Colo.). The cases were consolidated and involve challenges to the Central 70 project, a \$1.2 billion mega-project to improve a 12-mile stretch of freeway in the heart of the Denver metro area.

On September 15, 2017, the contingent of Plaintiffs led by local developer, Kyle Zeppelin (the "Zeppelin Plaintiffs"), requested a preliminary injunction against the Central 70 project in part on grounds that it was necessary to halt the progress and accompanying harms of an allegedly "connected action" being pursued by the City of Denver while the case was heard. The city project in question is an assortment

of storm water system improvements that will provide flood protection for a large swath of the city when complete, including the below grade section of the new freeway, and is being funded in part with state monies contributed by CDOT for that purpose. The city is not a party to the case. FHWA opposed the request arguing that Plaintiffs were not likely to succeed on the merits of those claims—one of the requirements to get a preliminary injunction—because (1) there was no "federal action" on the city's project to give the court jurisdiction under the APA, and (2) the evidence showed that the city would continue to pursue its project regardless of whether FHWA or CDOT were enjoined on theirs. FHWA simultaneously filed a Motion to Dismiss for lack of subject matter jurisdiction and standing based on the same defects. The Court subsequently requested supplemental briefing on various jurisdictional questions and held an evidentiary hearing on the matter on November 3, 2017. In its order, the Court agreed with FHWA's second argument, finding that the Zeppelin Plaintiffs failed to show that an injunction against FHWA or CDOT would stop the city from moving forward with its project and redress their injuries, and they therefore lacked standing on those claims.

Accordingly, on November 9, 2017, the Court dismissed three of the Zeppelin Plaintiffs' seven claims against FHWA and denied the related motion for a preliminary injunction.

On February 6, 2018, the Court approved the Zeppelin Plaintiffs' voluntary dismissal of their remaining claims with prejudice. The claims by the Sierra Club Plaintiffs, however, are still before the Court.

FHWA Awaits Decision on Motion to Transfer in Lawsuit Filed By City of West Palm Beach

On September 12, 2017, Plaintiff, the City of West Palm Beach, Florida filed a Complaint in the U.S. District Court for D.C. challenging the Environmental Assessment (“EA”) and Finding of No Significant Impact (“FONSI”) for the State Road 7 Project. City of West Palm Beach v. U.S. Army Corps of Engineers, No. 17-1871 (D.D.C.). The complaint names the U.S. Army Corps of Engineers (USACE), the United States Fish and Wildlife Service (USFWS), the United States Department of the Interior, FHWA, and the U.S. Environmental Protection Agency (EPA) (collectively “Defendants”). Plaintiff is a city government that owns property adjacent to the proposed roadway expansion, which provides drinking water to some 130,000 residents in the area.

The complaint alleges a broad range of issues including allegations that FHWA and USACE violated NEPA/APA in failing to prepare an EIS; USACE and EPA violated the CWA/APA in failing to select the least environmentally damaging alternative corridor for the Project; USACE, FHWA, and USFWS violated Section 7 of the ESA by failing to prepare an accurate Biological Opinion; and that Defendants further violated the ESA in failing to reinstate the Section 7 consultation process to protect federally listed species in the area.

On November 9, 2017, Defendants filed a motion to transfer the case from the D.C. District Court to the Southern District of Florida pursuant to 28 U.S.C. § 1404(a). Plaintiff’s opposed the motion on November 24, 2017 and Defendants replied to the opposition motion on December 1, 2017.

Defendants are awaiting a ruling by the Court before filing an answer.

Motion to Dismiss Filed in Case Involving Longmeadow Parkway Bridge and Highway Project

On October 16, 2017, Federal Defendants filed a Partial Motion to Dismiss Plaintiff-intervenor’s Complaint on the grounds of statute of limitations, mootness, failure to state a claim, lack of standing, and failure to comply with the 60-day notice provision of the Endangered Species Act. Petzel v. Kane County Dep’t of Transp., No. 16-5435 (N.D. Ill.). The Motion is pending before the U.S. District Court for the Northern District of Illinois.

Previously, on September 5, 2017, the Court granted the pro se Plaintiff-intervenor’s (a group known as Stop Longmeadow) motion for an extension to file an amended complaint.

This case involves the Longmeadow Parkway Bridge and Highway Project (Project) in Kane County, Illinois, which spans approximately 5.6 miles. The Court previously denied a NEPA challenge to the Record of Decision for this project in 2004. However, due to lack of funding, construction did not begin at that time.

FHWA issued a Reevaluation Environmental Assessment on July 26, 2016, and the Plaintiff filed a new complaint soon thereafter. On September 15, 2016, the Defendants (DOT, FHWA, Illinois Department of Transportation, Kane County Department of Transportation, and the U.S. Department of Interior) filed their motions to dismiss based upon statute of limitations and ripeness. On November 1, 2016, the Plaintiff filed a Motion for a Temporary

Restraining Order and Preliminary Injunction. FHWA signed a Finding of No Significant Impact on November 22, 2016. On April 15, 2017, Stop Longmeadow filed an Emergency Motion for Temporary Restraining Order (TRO) and a Motion to Intervene. The Court granted the TRO and Motion to intervene on April 17, 2017.

On April 28, 2017, the Court denied Stop Longmeadow's motion to extend the TRO. The project is currently under construction and two of the five segments are open to traffic.

Lawsuit Alleging Personal Injury and Violation of Americans with Disabilities Act Dismissed

On August 10, 2017, Plaintiff Darryl Dean filed a civil action in the U.S. District Court for the Eastern District of Louisiana for personal injuries and damage sustained to his vehicle after striking a pothole. Dean v. City of New Orleans, No. 17-7672 (E.D. La.). Plaintiff named the "United States Department of Highways," the City of New Orleans, and the New Orleans Department of Public Works as defendants and claims that Defendants violated the Americans with Disabilities Act of 1990, 42 U.S.C. § 12101, by allegedly failing to properly maintain Moss Street in New Orleans. On August 11, 2017, the Court granted Plaintiff's motion to proceed in forma pauperis.

Counsel for City Defendants filed a 12(b)(6) Motion to Dismiss for failure to state a claim on September 11, 2017, and Plaintiff filed a response on September 26, 2017. On December 5, 2017, the Court issued an Order dismissing without prejudice Plaintiff's claim against the City of New Orleans, noting Plaintiff had failed to allege that the City had treated his situation

differently than others because of his disability. The Department filed a 12(b)(1) Motion to Dismiss for lack of subject matter jurisdiction on November 16, 2017, arguing Plaintiff's complaint amounted to a tort suit, for which he had not filed a prerequisite administrative tort claim with the agency. Plaintiff filed a response on December 6, 2017, and the Department's Motion to Dismiss was granted on January 16, 2018.

Cross-Motions Filed in Suit Involving Bonner Bridge in Outer Banks, NC

On February 2, 2017, Save Our Sound OBX, Inc. and several individual plaintiffs 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. v. North Carolina Dep't of Transp., No. 17-4 (E.D.N.C.). 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 IIb, at issue in this lawsuit, includes NC-12 Rodanthe breach long term improvements and the jug-handle bridge that Plaintiffs complain of in their lawsuit.

The administrative record was filed on July 7, 2017. On January 10, 2018, Plaintiffs filed their motion and memorandum in support for summary judgment. Defendants filed their response and cross motion on February 21, 2018.

Motion to Dismiss for Failure to State a Claim Filed in Case Involving I-73 Corridor Project

On December 19, 2017, Plaintiff South Carolina Coastal Conservation League through the Southern Environmental Law Center, filed a Complaint in the U.S. District Court of South Carolina challenging the U.S. Army Corps of Engineers (USACE) Section 404 permit and associated Record of Decision (ROD), the Corps' Environmental Assessment (EA), FHWA's Reevaluation, and Section 4(f) for the I-73 project. South Carolina Coastal Conservation League v. USACE, No. 17-3412 (D.S.C.).

The planned Interstate 73 project in South Carolina is a proposed corridor project that will provide a direct link from North Carolina and states north to the Grand Strand (Myrtle Beach area). The I-73 Corridor project is approximately 80 miles in length. The project has been separated into two portions. The Southern portion of the project runs from I-95 near Dillon, South Carolina to the Grand Strand/Myrtle Beach area. The Northern portion of the project runs from I-95 to Hamlet, North Carolina.

Plaintiff alleges violations of NEPA, CWA, and the APA. With respect to their NEPA/APA claim, Plaintiffs allege that Defendants failed to take a hard look at the environmental impacts of the Project; failed to consider a reasonable range of alternatives; failed to consider significant changes; and failed to prepare a Supplemental

Environmental Impact Statement. Plaintiff also alleges violation of Section 4(f) of the Department of Transportation Act of 1966. Plaintiff's CWA/APA claim alleges that Defendants failed to select a suitable alternative, failed to require appropriate avoidance and minimization impacts, issued a permit that will degrade U.S. water systems, and failed to object to the issuance of the 404 Permit.

FHWA's Motion to Dismiss for Failure to State a Claim was filed on February 20, 2018. The motion is expected to be fully briefed in the coming weeks.

Oral Argument Held in FHWA California U.S. 101 Case

On February 23, 2018, the U.S. District Court for the Northern District of California held oral argument in the case, Coyote Valley Band of Pomo Indians of California v. DOT, No. 14-4987 (N.D. Cal.).

This case involves the Willits Bypass Project on U.S. 101 in Willits, California, the initial two-lane configuration of which opened to traffic in November 2016. FHWA issued a Record of Decision for the project in 2006; however, all subsequent NEPA decision-making was assigned to Caltrans pursuant to 23 U.S.C. § 327 (NEPA Assignment). FHWA has been leading government-to-government (G2G) consultation over the project among FHWA, California Department of Transportation (Caltrans), and several tribes, including both plaintiffs, for several years. FHWA's role did not, however, change Caltrans' responsibilities under the NEPA Assignment. Since 2011, Caltrans has issued at least three NEPA reevaluations for the project. FHWA's role in G2G consultation has been to facilitate

discussions and negotiations between Caltrans and the tribes.

This is the second lawsuit over the project. FHWA was named in the first suit, Center for Biological Diversity v. Federal Highway Admin., No. CV 12-2 172-NJV (2012), but was dismissed by the Court under § 327. Caltrans prevailed in the previous lawsuit against the remaining Defendants.

FHWA also filed motions to dismiss in the current action, but ultimately the Court allowed the case to go forward to the extent Plaintiffs' claims were based on an alleged failure to engage in a government-to-government consultation process under the National Historic Preservation Act, but only if such claims involved actions or inactions that may have occurred from February 18, 2015 to the present. The February 18, 2015, date refers to a G2G consultation meeting among FHWA, Caltrans, and the Coyote Valley Tribe at the tribe's offices in Lake County, California, at which the tribe claims to have asked FHWA to re-assume environmental responsibility for the Willits Bypass Project.

FHWA expects a decision in the case within the next few weeks.

New Lawsuit Filed Against Highway Project in Northern California

On January 5, 2018, a coalition of environmental groups filed a lawsuit against the Caltrans, the National Marine Fisheries Service (NMFS), FHWA, and FHWA's Executive Director. Friends of Del Norte v. California Dep't. of Transp., No. 18-129 (C.D. Cal.). The lawsuit involves the "197/199 Safe STAA Access Project" (197/199 Project) in Del Norte County,

California, near the Oregon border. The proposed project is to improve seven spot locations on State Route 197 and US Route 199 in Del Norte County so that two STAA trucks (i.e., oversize vehicles authorized by the Surface Transportation Assistance Act of 1982, Pub. L. 97-424) passing in opposite directions can be accommodated on the roadway at the same time.

Under the FHWA-Caltrans Memorandum of Understanding implementing the Surface Transportation Project Delivery Program, 23 U.S.C. § 327 (327 MOU), Caltrans assumed responsibility for all environmental decision-making related to the project. Under 23 U.S.C. § 327(e), Caltrans is "solely responsible and solely liable for carrying out, in lieu of the Secretary, the responsibilities assumed" under the program, also known as "NEPA Assignment." Under this authority, Caltrans issued an Environmental Assessment/Finding of No Significant Impact/Section 4(f) Evaluation (EA/FONSI) for the project in 2013, which was challenged in court by many of same the plaintiffs in the present action. In 2015, after the Court granted Plaintiffs' motion for a preliminary injunction, Caltrans agreed to re-initiate consultation for coho salmon with NMFS under the Magnuson-Stevens Fisheries Conservation Act (MSFCA), stipulated to dismissal of the case, and agreed to pay Plaintiffs \$100,000 in attorneys' fees and costs.

The new lawsuit includes most of the same claims as the earlier one: that in approving the project Caltrans violated the Administrative Procedure Act (APA), the National Environmental Policy Act (NEPA), the Endangered Species Act (ESA), the MSFCA, and Section 4(f), and that NMFS violated the ESA and the MSFCA. The new lawsuit, however, adds two significant

claims. Plaintiffs allege that the project “crosses state boundaries” and, therefore: 1) Caltrans exceeded its authority under NEPA Assignment by issuing a FONSI; and 2) for its part, FHWA violated the APA by failing to reassume responsibility for the project.

Under § 3.3.2 of the 327 MOU, Caltrans may not assume NEPA responsibility for “[a]ny project that crosses State boundaries.” Plaintiffs, alleging the 197/199 Project crosses into Oregon, cite the language in Caltrans’ EA/FONSI stating the “action area” includes the entire SR 197 corridor, and US 199 from its junction with SR 197 to its junction with Interstate-5 at Grants Pass, Oregon. FHWA is reviewing the claims.

U.S. District Court Rules in Favor of Plaintiffs in Case Involving Colorado C-470 Expansion Project

On November 9, 2017, the U.S. District Court for the District of Colorado issued an adverse decision against FHWA and CDOT in regards to the noise analysis contained in the C-470 project Revised EA and FONSI and remanded the matter to FHWA and CDOT for further consideration in accordance with the order. Highlands Ranch Neighborhood Coalition v. Carter, No. 16-1089 (D. Colo). The lawsuit involves the C-470 Expansion Project, which includes widening C-470 by adding managed, tolled express lanes in the southwest Denver metropolitan area.

The Court determined that FHWA and CDOT failed to provide a rational basis and failed to show they took into consideration relevant factors in deciding which noise validation methodology to use because the administrative record did not show that decision-making process. FHWA and

CDOT included all relevant documents related to the noise analysis for this project in the administrative record, but the Court found that the administrative record did not contain sufficient support for the decision to apply one part of CDOT’s noise guidance over another to validate the noise model. The court limited its adverse decision to the noise analysis at issue. The Court also determined that the lack of a public hearing on noise readings following the FONSI did not result in any harm to the Plaintiff and therefore, the Plaintiff’s challenge to the lack of additional public comment/involvement failed.

The Plaintiffs filed a motion for reconsideration with the U.S. District Court on December 8, 2017. The motion asked the judge to void the FONSI, stop project construction, and to reverse its ruling on the public hearing issue. FHWA and CDOT filed a response opposing the motion for reconsideration on January 11, 2018. While waiting for an opinion on the motion, FHWA and CDOT continue to work to comply with the November 9, 2017 U.S. District Court Order and project construction is ongoing.

Challenge to SR 520 Floating Bridge Mega Project in Seattle

On November 28, 2017, the Montlake Community Club, Montlake LLC, Stelter Montlake, LLC, and BTF Enterprises, Inc. filed a lawsuit in the U.S. District Court for the Western District of Washington against the Division Administrator for the Washington Division of FHWA, FHWA, and the Washington Secretary of Transportation. Montlake Community Club v. Mathis, No.17-1780 (W.D. Wash.). The lawsuit involves the SR 520 Floating Bridge Replacement Project in Seattle, Washington (“SR 520 Project”).

FHWA issued a NEPA ROD for the SR 520 Project in 2011 and in 2012, the NEPA FEIS and ROD were upheld in Coalition for a Sustainable 520 v. U.S. Dep't of Transp., et al., Case No. 11-1461 (W.D. Wash. 2012). No appeal was filed.

FHWA completed a NEPA reevaluation for the SR 520 Project in October 2016 ("2016 Reevaluation") which analyzed project changes related to design refinements that led to a reconfiguration of a planned freeway "lid" in the Montlake Interchange area in Seattle ("Montlake lid"). FHWA determined that the project changes analyzed in the 2016 Reevaluation did not result in new significant impacts which would require a supplemental EIS. FHWA published a Statute of Limitations Notice for this reevaluation, which passed on May 11, 2017.

Plaintiffs are owners or otherwise have an interest in the "Montlake Market" business, which will be subject to condemnation as a result of SR 520 Project construction and permanent project changes related to the reconfiguration of the Montlake lid. Plaintiffs claim that FHWA and WSDOT have "failed to issue a supplemental environmental impact statement or otherwise analyze the significant adverse impacts that demolishing the Montlake Market as part of the SR 520 project would have." Plaintiffs seek an order to enjoin FHWA and WSDOT from "implementing their decision to close the Montlake Market" and to require FHWA and WSDOT "to prepare a supplemental draft EIS and supplemental final EIS that corrects the deficiencies identified by the Court." Plaintiffs originally raised these NEPA claims in association with a lawsuit filed in State court challenging the closing of the Montlake Market. On September 5, 2017, the King County Superior Court in the State

of Washington determined that it did not have subject matter jurisdiction to hear the matters regarding compliance with NEPA, "as jurisdiction is exclusive in federal court."

FHWA filed its answer to the complaint denying all claims on February 1, 2018 and continues to examine where additional NEPA analysis may be necessary.

Federal Motor Carrier Safety Administration

Carrier Appeals Order Dismissing Challenge to Compliance Reviews

On February 26, 2018, in Flat Creek Transportation, LLC v. FMCSA, No. 17-14670, FMCSA filed its brief in the U.S. Court of Appeals for the 11th Circuit responding to Flat Creek's appeal of the District Court's order dismissing its complaint.

Flat Creek filed a complaint in the U.S. District Court for the Middle District of Alabama on November 7, 2016, seeking declaratory and injunctive relief, alleging that FMCSA's anticipated future compliance review investigation was arbitrary and capricious and not in accordance with the law. While the case was pending, FMCSA completed its compliance review of Flat Creek, which resulted in a Satisfactory safety rating. On September 20, 2017, the District Court granted the government's motion to dismiss, holding that it lacked jurisdiction under the Hobbs Act, 28 U.S.C. § 2342.

Although Flat Creek received the highest possible safety rating from FMCSA, it is pursuing an appeal to prevent FMCSA from conducting any future compliance reviews,

contending that such reviews will be biased and result in harm to Flat Creek.

FMCSA argues on appeal that the District Court decision should be affirmed because (1) Flat Creek has not suffered an injury-in-fact, (2) Flat Creek's speculative future injury is not redressable, (3) the District Court correctly found that it lacks jurisdiction under the Hobbs Act, and (4) there is no final agency action under the Administrative Procedure Act.

Unified Carrier Registration (UCR) Plan Board's Decision to Delay the Start of UCR Registration for 2018 Challenged in Federal Court

On September 27, 2017, 12 Percent Logistics and the Small Business in Transportation Coalition filed a complaint for declaratory and injunctive relief and a motion for temporary restraining order (TRO) in the U.S. District Court for the District of Columbia. 12 Percent Logistics, v. UCR Plan Board, No. 17-2000. Plaintiffs purport to act on behalf of motor carriers adversely impacted by that UCR Plan Board's decision to delay the 2018 registration period because DOT was in the process of approving reductions of UCR fees. Plaintiffs allege that the UCR Plan Board violated the Sunshine Act and the Administrative Procedure Act by failing to give adequate notice of its September 14, 2017 meeting at which the Board decided to postpone the registration period. The District Court denied a TRO and injunctive relief on October 18, 2017; however, the court instructed the UCR Plan Board to immediately publish the draft minutes and recordings of the unnoticed September 14 Board meeting and to announce the availability of the materials at the October 26, 2017 Board meeting.

Plaintiffs filed an amended complaint on November 3, 2017 and filed a second and third request for injunctive relief on November 17 and December 12, 2017, which the District Court denied on December 1, and December 13, 2017.

On December 27, 2017, plaintiffs noticed an appeal from the District Court's denials of their second and third requests for injunctive relief and asked the District Court to issue an injunction pending appeal. Plaintiffs subsequently filed the appeal in the U.S. Court of Appeals for the D.C. Circuit, and on January 29, 2018, also sought an injunction pending appeal from the D.C. Circuit. 12 Percent Logistics v. UCR Plan Board, No. 17-5287. The D.C. Circuit denied the request for injunction pending appeal on March 7, 2018, explaining that plaintiffs did not satisfy the "stringent requirements" for such relief.

On January 29, 2018, the District Court partially granted plaintiffs' request for an injunction pending appeal and enjoined the UCR Plan Board from holding subcommittee meetings without first complying with the notice requirements of the Sunshine Act; the injunction is to remain in effect until the D.C. Circuit resolves Plaintiffs' appeal from the court's denial of their second and third requests for injunctive relief. On March 1, 2018, the District Court entered a scheduling order for both sides to file cross-motions for summary judgment. Plaintiffs' Motion for Summary Judgment is due on April 10.

North Dakota District Court Dismisses Action for Declaratory Judgment

On January 19, 2018, in Unique R.R. Contractors, Inc. d/b/a Krause Bros. Constr. (Unique Railroad) v. FMCSA, No. 17-159,

Unique Railroad and FMCSA filed a joint stipulation of dismissal, and the U.S. District Court for the District of North Dakota dismissed the lawsuit without prejudice on January 22, 2018.

Plaintiff, a construction company that hauls sand, gravel, and dirt for a local farmer's cooperative, sought an order declaring that its vehicle was off-road motorized construction equipment and not a commercial motor vehicle under the Federal Motor Carrier Safety Regulations. The vehicle is a modified tractor-trailer whose modifications include flotation tires that may not be used at speeds over 30 mph. The vehicle crosses a public road only to reach different parts of the farming cooperative.

The vehicle was involved in a crash on the public road and the North Dakota State Police cited the company for commercial vehicle and driver violations and placed the vehicle out of service.

On September 6, 2017, the Court granted a joint motion for stay of the proceedings to allow the plaintiff to exhaust its administrative remedies through the filing of a request in FMCSA's DataQs system seeking review and correction of the North Dakota inspection report.

Following discussions with FMCSA, the State withdrew the inspection report and associated violations on the basis that the vehicle was off-road motorized construction equipment, not a commercial motor vehicle, based on the facts presented in plaintiff's DataQs request.

Agency Moves for Summary Judgment in Suit Seeking \$130 Million for Personal Injuries and Wrongful Death

On December 1, 2017, in Olivas v. U.S., No. 15-2882, the government filed a motion for summary judgment, arguing that (1) the U.S. District Court for the Southern District of California lacks subject matter jurisdiction because Plaintiff's claims lack a private party analogue under California's Good Samaritan law and (2) the claims are precluded under the discretionary function exception to the Federal Tort Claims Act (FTCA). The parties will attend a case management conference on April 12, 2018 to update the Court on potential resolution of the case.

On December 21, 2015, thirteen individuals filed suit pursuant to the FTCA seeking a combined total of \$130 million in compensation for personal injuries and wrongful death. The claims arise from a motorcoach accident involving Scapadas Magicas that occurred on February 3, 2013, in San Bernardino, California. At that time, Scapadas Magicas was a for-hire passenger motor carrier operating primarily between Tijuana, Mexico and various locations in California. Plaintiffs allege that FMCSA was negligent in issuing the motorcoach a Commercial Vehicle Safety Alliance decal after an October 2012 inspection and that FMCSA was negligent in not inspecting all the carrier's buses in a January 2013 compliance review.

Federal Railroad Administration

FRA and American Short Line and Regional Railroad Association Resolve Challenge to FRA's Training Standards Rule

On February 26, 2018, the U.S. Court of Appeals for the D.C. Circuit dismissed a challenge the American Short Line and Regional Railroad Association (ASLRRA) filed against FRA, No. 15-1240 (D.C. Cir.). The parties filed a joint stipulation of dismissal with the D.C. Circuit on February 13, 2018.

The litigation arose from ASLRRA's challenge to FRA's November 7, 2014 final rule entitled "Training, Qualification, and Oversight for Safety-Related Railroad Employees" and FRA's June 1, 2017, response denying a petition for reconsideration of the final rule.

ASLRRA's petition maintained that the final rule and the decision on its petition for reconsideration were: (1) in excess of FRA's statutory authority, (2) arbitrary, capricious and an abuse of discretion within the meaning of the Administrative Procedure Act, and (3) otherwise contrary to law.

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

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

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

On October 8, 2015, ASLRRA filed an unopposed motion to hold the case in abeyance to permit the parties to discuss a possible resolution of the case. The U.S. Court of Appeals for the D.C. Circuit granted the motion. Thereafter, the parties engaged in settlement discussions.

On May 3, 2017, based on concerns raised by ASLRRA and the National Railroad Construction and Maintenance Association (NRC), FRA published a notice in the Federal Register extending the compliance dates in the Training Rule by one year. On May 22, 2017, ASLRRA timely filed a second petition for reconsideration of the Training Rule, requesting that FRA extend the compliance dates for another year. On December 20, 2017, FRA issued a notice of

proposed rulemaking, which would grant ASLRRRA's second petition for reconsideration and would extend the compliance dates in the Training Rule by another year.

Federal Transit Administration

U.S. Court of Claims Rules for FTA in Contract Dispute

On February 22, 2018, the U.S. Court of Federal Claims issued a decision in favor of FTA in Harmonia Holdings Group, LLC v. U.S., No. 17-1534C, following a hearing on January 17, 2018. Harmonia Holdings Group, LLC's (Harmonia) case was a post-award bid protest challenging FTA's third evaluation of its 2016 web services solicitation on the General Services Administration's (GSA) schedule and a third decision by FTA to award the contract to Optimal Solutions and Technologies, Inc. (OST). The decision was also the second one on this procurement from the U.S. Court of Federal Claims.

Harmonia filed this bid protest with the Court on October 17, 2017, challenging FTA's decision to award to OST on numerous grounds. The original contract was awarded to OST in July 2016, but Harmonia successfully challenged that award in front of the General Accounting Office (GAO). The GAO sustained the protest and directed FTA to reevaluate the bids. A reevaluation occurred and OST again won the contract. Harmonia then filed two protests with the U.S. Court of Federal Claims, both of which were eventually dismissed as moot based on further FTA corrective action.

Harmonia again protested FTA's decision to award the contract to OST. There have been

a total of five different protests on this procurement. OST has continued to perform under the original contract.

The latest protest as summarized by the Court was "that the Agency's price and technical evaluations were erroneous, that OST's assumptions regarding its price quotation 'took exception to the material terms of the RFQ [Request for Proposals]', rendering OST's proposal invalid, and that FTA's best-value determination was flawed." Procedurally, the Court had before it motions and cross-motions filed, briefed and argued by all three parties to this proceeding; OST was also a party to the action.

In a detailed decision, the Court determined that FTA was reasonable in its selection of OST and ruled against Harmonia. The Court gave deference to the agency in the procurement process, including ruling that it was appropriate for FTA to consider OST's performance on the current contract. In ruling in FTA's favor, the Court found that FTA's price and technical evaluations were reasonable, as was its best-value determination.

The Court's ruling effectively ends nearly two years of protests by Harmonia, thereby, allowing FTA to continue its contract with OST for web support services, a critical agency system.

Prior to this third evaluation and as part of its corrective action, FTA invited proposers to submit revised price quotations. Only Harmonia and OST submitted price quotations in the third evaluation and FTA again selected OST. FTA also performed new technical evaluations using the original technical proposals, which resulted in both OST and Harmonia receiving lower technical ratings, but Harmonia once again

received a lower technical score than OST. However, the third evaluation did result in a less expensive overall procurement for the services. The original decision was filed under seal, but has since been published with minimal redactions.

New Complaint Filed Against FTA Related to Beverly Hills Westside Project

On January 26, 2018, the Beverly Hills Unified School District (BHUSD) filed a new complaint for declaratory and injunctive relief, Beverly Hills Unified School District v. FTA, No. 18-0716 (C.D. Cal.) relating to the Beverly Hills Westside Project. The lawsuit challenges FTA's November 22, 2017 Supplemental Record of Decision (ROD)/Final Supplemental Environmental Impact Statement (FSEIS) for Section 2 of the Los Angeles County Metropolitan Transportation Authority (LACMTA) Westside Purple Line Extension (WPLE) Project. Plaintiffs allege violations of NEPA and raise other claims.

The WPLE Project would extend the existing Los Angeles 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. The underground extension will include seven new stations spaced in approximately 1-mile intervals. The WPLE Project is divided into three phases. Phase 1 of the WPLE Project is under construction, with the Full Funding Grant Agreement (FFGA) executed and partially disbursed. The subject of the new FTA and Beverly Hills litigation is a Court ordered new National Environmental Policy Act (NEPA) document relating to Phase 2. Phase 2 of the WPLE Project is a 2.6-mile heavy-rail underground extension of the Metro Purple

Line from Wilshire/La Cienega station in the City of Beverly Hills westward to the Century City area of Los Angeles. The groundbreaking ceremony for construction of Phase 2 was February 23, 2018.

In a previously filed case, Plaintiffs challenged the WPLE Project's FEIS. See, Beverly Hills Unified School District v FTA, No. 12-9861 (C.D. Cal. 2013). In a decision issued on August 12, 2016, the Court upheld FTA's 2012 ROD for the WPLE Project but required a limited scope SEIS and a Section 4(f) analysis. The District 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." 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.

After issuance of the August 2016 Order, the Court retained jurisdiction and required periodic joint status reports by the Parties. On November 22, 2017, FTA issued the FSEIS/ROD as directed by the Court. On December 27, 2017, the Court dismissed the

original case but allowed Plaintiffs to file a new challenge to the FSEIS/ROD.

Unlike the earlier case, the new lawsuit has been brought only by the Beverly Hills Unified School District, not the City of Beverly Hills, and is against both LACMTA and FTA, not just FTA. The complaint focuses on allegations of predetermination in the NEPA process and raises other issues. Plaintiff is requesting an injunction to stop the project and stop funding. Plaintiff is still unhappy that the alignment will go under Beverly Hills High School and have an impact on the campus future Master Plan. Plaintiff is also concerned about proposed construction staging near recreational school ball fields.

FTA is currently assembling the administrative record and its answer is due April 30, 2018.

New Bridge Case Against FTA Filed in Connecticut Concerning Resiliency Project

On January 17, 2018, the Department, FTA, and Connecticut DOT (Conn DOT), as well as the Secretary of Transportation and the FTA Executive Director, were sued in Federal Court by the Norwalk Harbor Keeper and its President, Fred Krupp, Norwalk Harbor Keeper v. DOT, No. 18-91 (D. Conn.). FTA's filed an Answer with affirmative defenses on March 29, 2018.

The lawsuit challenges FTA's Environmental Assessment (EA) and Finding of No Significant Impact (FONSI) for the Walk Bridge Replacement Project in Norwalk, Connecticut (the "Project"). The Project is a vertically lifting moveable bridge to replace the existing swing railroad bridge on the Northeast Corridor over the

Norwalk River (the Walk Bridge – Bridge No. 04288R). The Walk Bridge was built in 1896 and carries four tracks of the New Haven Line (NHL) of the Metro-North Railroad commuter service. It is used for intercity and high-speed passenger service by the National Railroad Passenger Corporation (Amtrak), in addition to freight service by CSX and Providence & Worcester Railroad. The Project was selected for funding as a resiliency project after Hurricane Sandy. The Norwalk River is a federally maintained and designated navigable waterway.

According to the allegations in the Complaint, Plaintiff Norwalk Harbor Keeper is a 501(c)(3) tax exempt Connecticut nonprofit corporation dedicated to safeguarding the ecological, recreational, aesthetic, and commercial integrity of the Norwalk River. Plaintiff Fred Krupp is a member of Norwalk Harbor Keeper and serves as the President of its Board of Directors. Plaintiffs allege that FTA and Conn DOT failed to consider a fixed bridge at the level of the existing bridge ("Existing Level Fixed Bridge") as an alternative in the EA, which Plaintiffs allege would promote resiliency, shorten construction time, significantly reduce construction costs, and otherwise reduce environmental impacts. The complaint raises questions about choosing a moveable bridge versus a fixed bridge; alleges that the Purpose and Need under the EA improperly screens out consideration of an existing level fixed bridge alternative and was without a rational basis; that the EA was defective for failing to utilize actual existing water traffic; and therefore, that the EA failed to study a reasonable range of alternatives. Plaintiffs are also challenging the cost differential between a fixed bridge and a moveable bridge.

Replacement of the bridge will also involve a permit from the U.S. Coast Guard. Plaintiffs are requesting that FTA and Conn DOT issue new environmental documents and not fund the project until a new environmental review is complete. Tangentially in the complaint, Plaintiffs allege that the project does not really qualify as a resiliency project and that the environmental review involved impermissible segmentation.

Maritime Administration

Oral Argument Scheduled in Maritime Security Program Suit

On June 2, 2017, Matson Navigation Company filed a petition for review in the U.S. Court of Appeals for the D.C. Circuit, challenging MARAD's decision to allow a substitution of two vessels in the Maritime Security Program (MSP). Matson Navigation Co. v. DOT, No. 17-1144 (D.C. Cir.). The court allowed APL Marine Services, the operator of the vessels at issue, to intervene on September 15, 2017. On September 28, 2017, the Court referred the government's motion to dismiss to the merits panel.

Matson challenges MARAD's decision to allow APL Lines, Inc. (APL) to substitute two vessels under its MSP contracts with MARAD. In 2015 and 2016, APL requested permission to remove two container ships serving the Middle East from their MSP slots and replace them with two geared container ships serving Guam and Saipan. MARAD approved those transfers on October 22, 2015, and December 20, 2016, respectively. Matson, a competitor in the Guam routes, filed an administrative appeal on February 17, 2017, asserting that the vessels were not eligible for substitution

and that APL's newly subsidized service to Guam would unfairly compete with Matson's preexisting service. On April 7, 2017, MARAD denied Matson's administrative appeal due to a lack of standing. MARAD also noted that the substance of Matson's appeal lacked merit.

Before the D.C. Circuit, Matson argues that APL's substituted vessels are not eligible to participate in the MSP because they carry government cargo to Saipan. Under Matson's reading of several statutory provisions, this trade is prohibited for MSP vessels. Matson also argues that the administrative record did not provide sufficient evidence to support MARAD's conclusion that the vessels were commercially viable.

The government's brief in response reiterated its argument that the D.C. Circuit lacks Hobbs Act jurisdiction in this case. The government also identified other procedural defects with Matson's petition, including that its claims would be untimely if Hobbs Act jurisdiction applied. Regarding the merits, the government disputed Matson's interpretation of the MSP statutes and argued that the vessels' carriage of government cargo to Saipan does not impact their eligibility to participate in the MSP. The government also argued that the administrative record contained sufficient evidence to support MARAD's determination that the vessels would be commercially viable.

The case is fully briefed and oral argument is scheduled for April 12, 2018. The panel will consider the motion to dismiss and the merits briefs.

Anchorage and MARAD Move to Mediate Port of Anchorage Case

On March 15, 2018, the parties in Anchorage, a Municipal Corp. v. U.S., No. 14-166 (Fed. Cl.) submitted a joint motion to stay remaining discovery and allow the Parties to attempt to resolve the case through mediation. The Parties are planning a mediation session in the near future.

In 2003, MARAD and the Municipality of Anchorage (Anchorage) entered into a Memorandum of Understanding (MOU) establishing a relationship for the purpose of expanding the Port of Anchorage. Under the MOU, MARAD administered the funding by contracting with Integrated Concepts and Research Corporation (ICRC) as the primary contractor responsible for undertaking the project. Pursuant to the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU), signed into law on August 10, 2005, all funds for the Port of Anchorage Intermodal Expansion Project (the Project), whether Federal or nonfederal, were transferred to MARAD to be administered by the Administrator.

Construction on the Project began in 2008, but the contractors encountered significant difficulties. Subsequent studies showed that the Project design was unsuitable for the location, which resulted in the significant construction difficulties encountered. In 2011, multiple subcontractors filed claims against ICRC for equitable adjustment resulting from the difficult conditions. ICRC, in turn, filed a claim against MARAD asserting the subcontractor's claims and other claims. After several months of negotiation, MARAD settled all contractor claims.

On February 28, 2014, Anchorage filed suit against MARAD in the U.S. Court of Federal Claims, seeking unspecified damages for breach of contract in connection with the Project. Anchorage's complaint against MARAD seeks unspecified compensation for the damage it has suffered resulting from the project suspension and MARAD's subsequent settlement with the contractor. After the court granted in part the government's motion to dismiss on January 22, 2015, Anchorage has still pursued its two remaining causes of action: (1) MARAD breached its contractual obligations under the MARAD-Anchorage MOU; and (2) MARAD breached its implied duty of good faith and fair dealing under the MOU by settling the contractor claims without Anchorage's consent. After staying the case while Anchorage concluded a parallel case against ICRC and its subcontractors in the U.S. District Court for the District of Alaska, Anchorage and the government began discovery in early 2017 with extensive document production and depositions.

Second Circuit Affirms Dismissal of Gender Discrimination, Retaliation, and Age Discrimination Claims Brought Against U.S. Merchant Marine Academy

On December 28, 2017, the Second Circuit affirmed the District Court's dismissal of gender discrimination, retaliation, and age discrimination claims brought against the U.S. Merchant Marine Academy (USMMA). Angioletti v. Chao, No. 17-606 (2d Cir.).

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. Plaintiff claimed that the USMMA also retaliated against her in violation of Title VII.

The Second Circuit held that the District Court did not err when it granted the Department's Motion for Judgment as a Matter of Law on Plaintiff's Title VII claim. The Court reasoned that the Department put forth extensive evidence indicating that Plaintiff was not selected because a number of qualified veterans applied for the position and Plaintiff failed to rebut that evidence.

The Second Circuit also held that the District Court correctly rendered judgment in favor of the Department on Plaintiff's ADEA claim. Again, the Court reasoned that Plaintiff failed to rebut the Department's assertion that Plaintiff was not hired because of mandatory veterans' preference requirements.

The District Court allowed the jury to hear and decide Plaintiff's Title VII claims but held 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 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 Plaintiff felt she was entitled was subject to veterans' preference Federal hiring guidelines and the individual selected for the position was a female disabled veteran.

Judge Wexler also granted the USMMA's Rule 52 motion to dismiss the ADEA claim. He held that Plaintiff had failed to raise any inference of age discrimination, noting that as evidence Plaintiff only proffered comments she made when she referred to herself as an "old broad." Judge Wexler further noted 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.

National Highway Traffic Safety Administration

Motion for Summary Judgment Filed in Tesla Vehicle Data Case

On June 28, 2017, Quality Control Systems Corp. ("QCS"), a provider of statistical research services, filed a Complaint for Injunctive Relief against the Department in the D.C. District Court. Quality Control Sys. Corp. v. DOT, No. 17-1266 (D.D.C.). The case stems from a February 24, 2017 FOIA request for data underlying a closing report issued by NHTSA in the Tesla Autopilot investigation, Preliminary Evaluation (PE) 16-007. In the Complaint, QCS alleges that NHTSA wrongfully withheld records when it did not respond to the FOIA request by the statutory deadline.

Shortly after the complaint was filed, NHTSA responded to QCS, stating that the requested records were being withheld under FOIA Exemption 4 because they contain information related to trade secrets or commercial or financial information.

On October 25, 2017, the United States filed a motion for summary judgment, arguing that NHTSA's search was reasonably calculated to locate all responsive records

and that the records were exempt from disclosure under FOIA Exemptions 4, 5, and 6. On November 29, 2017, QCS filed a cross-motion for partial summary judgment and an opposition, arguing that the agency failed to demonstrate that Tesla submitted the disputed information in the manner required by the agency's confidentiality regulations, that the agency did not show the information qualifies for confidential treatment under Exemption 4, and that the agency failed to demonstrate that a file at issue was entitled to "deliberative process" protection under Exemption 5.

The agency filed its reply in support of its motion for summary judgment and opposition to QCS's cross-motion for summary judgment on December 27, 2017. The agency argued that Tesla submitted its request for confidential treatment in accordance with 49 C.F.R. Part 512. The agency also argued that the plaintiff misunderstood the information that is confidential and asserted that the agency met its burden under FOIA Exemption 4 by explaining how release of the information contained in the Access database is likely to cause Tesla to suffer substantial competitive harm. QCS filed its reply on January 29, 2018, arguing that that limited scope of information it is seeking is not exempt under FOIA Exemption 4 and that the agency is relying upon the potential competitive harm of disclosing data that is not at issue in this case. It further argued that material withheld on the basis of FOIA Exemption 5 is not exempt because the agency employee did not "cull" or "select" data as part of his analysis and, as such, disclosure of the file would not reveal any protected deliberative process. The motion is fully briefed and the parties are awaiting a decision from the Court.

Settlement in FOIA Case

On December 13, 2017 NHTSA and Plaintiff Nathan Atkinson filed a stipulation of settlement and dismissal to resolve a FOIA case. The lawsuit stemmed from a FOIA request that Atkinson submitted in December 2013 to NHTSA. NHTSA had responded to the FOIA request and Atkinson appealed. Prior to receiving the final decision on the appeal from NHTSA, Atkinson filed suit in U.S. District Court. Atkinson v. DOT, No. 16-907 (D.D.C.). NHTSA issued a final decision on the appeal shortly after the lawsuit was filed, granting the appeal in part and denying it in part. NHTSA then produced additional documents to the Plaintiff on a rolling basis.

After providing a rerun production and a supplemental production, as well as Vaughn indices detailing which documents were withheld under which FOIA Exemptions and why, the United States moved for partial summary judgment on September 11, 2017 on the issues of adequacy of the search and the appropriateness of withholdings under FOIA Exemptions 5 and 6. The Court allowed the United States until November 27, 2017 to file its motion for summary judgment on Exemption 4. A manufacturer wanted to review the documents withheld by NHTSA under Exemption 4 in order to determine whether it could waive confidential treatment for some or all of the documents at issue, or whether it would provide additional justification describing how release of the material would be likely to cause it to suffer substantial competitive harm. The manufacturer waived confidential treatment for the majority of the documents at issue. The agency then produced the documents for which confidential treatment was waived.

Pipeline and Hazardous Materials Safety Administration

Challenge Filed Against PHMSA Administrative Ruling Assessing Fines Against an Operator for Violations of the Pipeline Safety Regulations

On November 1, 2017, Centurion Pipeline LP (Centurion) filed a petition for review in the U.S. Court of Appeals for the Fifth Circuit, challenging a Final Order and Decision on a Petition for Reconsideration Affirming the Final Order (Order). Centurion Pipeline LP v. PHMSA, No. 17-60775 (5th Cir.). Centurion was assessed fines totaling \$122,400. At issue in the case are PHMSA's findings that Centurion violated the pipeline safety regulations by failing to maintain maps that accurately mark the location of its pipeline and by failing to provide correct temporary markings in the area of excavation activity before the activity began. PHMSA found that Centurion's violations resulted in damage to its pipeline during excavation activities by a third party.

During the administrative proceedings, Centurion argued that the regulation requires maps to be "current," but the Notice of Probable Violation (NOPV) alleged the maps were not "accurate." Centurion argued that its maps were current. Centurion also argued that its temporary markings before excavation began should have been considered to be accurate because

the company marked the location of another operator's 8-inch line believing it to be their line. This other line was directly above Centurion's 8-inch line, which was damaged during excavation. Centurion also argued its markings, although on another line that was not its own and was not the line damaged during excavation, were in the area of excavation and therefore were accurate. PHMSA's Order rejected Centurion's arguments. Centurion has until May 9, 2018 to file its opening brief on appeal.

U-Haul Files Suit Against DOT for Refusal to Release Certain Information Under Touhy Regulations

On January 1, 2018, U-Haul International Inc. and U-Haul Co. of Pennsylvania (U-Haul) filed suit against DOT and the Department of Justice in the U.S. District Court for the District of Columbia. U-Haul Int'l Inc., v. DOJ, No. 18-57 (D D.C.). At issue in the case are decisions by PHMSA, DOT's Office of the Inspector General, and DOJ to deny U-Haul's requests for certain information and testimony. Specifically, U-Haul seeks certain physical evidence and testimony related to the explosion of a food truck in Philadelphia on July 1, 2014, which killed two people and injured eleven others. U-Haul is a defendant in a lawsuit filed in state court related to the explosion and argues that the evidence sought is necessary for its defense in the state court action.

The government filed an Answer on March 19, 2018.

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