



# **DOT LITIGATION NEWS**

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## **Supreme Court Litigation**

### **Midwest Fence Petition for Certiorari Denied in DBE Program Challenge**

On June 26, 2017, the Supreme Court denied a petition for writ of certiorari filed by Midwest Fence Corporation. Midwest Fence Corp. v. DOT, No. 16-975, 137 S. Ct. 2292 (2017). The petition sought to overturn the Seventh Circuit's decision in Midwest Fence Corp. v. DOT, 840 F.3d 932 (7th Cir. 2016). Midwest Fence, a highway construction subcontractor, brought a constitutional challenge to the statute authorizing DOT's Disadvantaged Business Enterprise (DBE) regulations, the regulations themselves, and their implementation by the Illinois Department of Transportation in the federal-aid highway program.

In its decision affirming the district court's decision and upholding the constitutionality of the DBE program and regulations, the Seventh Circuit noted that the Eighth, Ninth, and Tenth Circuits have already found the DBE program constitutional on its face. In its analysis of the DBE program, the Seventh Circuit concluded that the program is narrowly tailored, because it requires states to meet as much as possible their overall DBE participation goals through race- and gender-neutral means. Moreover, the program prohibits the use of quotas and requires states to remain flexible as they administer the program over the course of the year.

In addition, the Seventh Circuit was persuaded by the fact that the DBE program is limited in duration, since Congress has repeatedly reauthorized the program after taking periodic looks at the need for it. For

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

Midwest Fence filed a petition for a writ of certiorari and argued that there is a circuit split with respect to how narrow tailoring is defined in equal protection cases and the federal questions raised in the case are of profound national importance. In its response brief, the federal government argued that the Seventh Circuit correctly held, in accordance with decisions of the Eighth and Ninth Circuits, narrow-tailoring analysis is appropriate even though a state's program complies with federal regulations. Further, the Seventh Circuit also did not break with other circuits by holding that a state agency's compliance with federal regulations forecloses any as-applied challenge to the state's own program, but rather, simply concluded that Midwest Fence had failed to substantiate its argument with evidence.

### **Supreme Court Declines to Review FHWA Guidance in Digital Billboards Case**

Last fall, the U.S. Court of Appeals for the D.C. Circuit rejected an appeal by Scenic America challenging the Federal Highway Administration's (FHWA) 2007 guidance memorandum advising that digital billboards were permitted under the Highway Beautification Act (HBA) and implementing state agreements. Scenic America v. DOT, 836 F.3d 42 (D.C. Cir. 2016). Scenic America petitioned the Supreme Court to review the D.C. Circuit's decision (Docket No. 16-739). On October 16, 2017, the Supreme Court denied certiorari, but Justice

Gorsuch (joined by Chief Justice Roberts and Justice Alito) issued a Statement regarding the denial of certiorari. Scenic America, Inc. v. DOT, No. 16-739, 2017 WL 4581902 (2017).

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

In 2013, Scenic America, an advocacy organization that “seeks to preserve and improve the visual character of America’s communities and countryside,” filed a lawsuit alleging that the 2007 guidance was de facto rulemaking and that FHWA did not follow the required rulemaking process pursuant to the Administrative Procedure Act (APA). In addition, the plaintiff argued that the FHWA violated the HBA and its HBA regulations. Both the District Court for the District of Columbia and the Court of Appeals for the D.C. Circuit upheld the guidance. Scenic America filed a Petition for Writ of Certiorari seeking review of whether FHWA was entitled to Chevron

deference and whether the D.C. Circuit’s decision conflicts with Chevron, an argument that Plaintiffs did not previously raise and that the D.C. Circuit never discussed.

In the Supreme Court’s statement accompanying the denial of certiorari, Justice Gorsuch essentially highlighted what he believes to be a cert-worthy issue: whether “Chevron-type deference” applies to an agency’s interpretation of its contracts. In Justice Gorsuch’s view, the D.C. Circuit deferred to FHWA’s interpretation of a disputed contractual term in this case. However, the Court ultimately denied certiorari because “this particular case also comes with some rather less significant and considerably more fact-bound questions...that would...only complicate [the Court’s] effort to reach the heart of the matter, for these attendant questions include ‘difficult and close’ jurisdictional issues that would have to be settled first.”

Materials in this case are available at: <http://www.scotusblog.com/case-files/cases/scenic-america-inc-v-department-transportation/>

### **Supreme Court Denies Certiorari in Illinois Motor Carrier Preemption Case**

On June 26, 2017, the Supreme Court denied review of the Seventh Circuit’s decision that the federal motor carrier preemption statute did not preempt the provisions of the Illinois Wage Payment Collection Act (IWPCA), which assists employees in seeking redress for an employer’s wrongful withholding of employee benefits, and requires employee consent before salary deductions.

BeavEx, Inc. v. Costello, No. 15-1305, 137 S. Ct. 2289 (2017). The motor carrier preemption statute, the Federal Aviation Administration Authorization Act (FAAAA), preempts state laws “related to a price, route or service of any motor carrier... with respect to the transportation of property.” 49 U.S.C. § 14501(c)(1).

The Seventh Circuit determined that the indirect impact of IWPCA on carrier prices was too tenuous or remote to be preempted by the FAAAA. Therefore, the court concluded that the FAAAA did not preempt the IWPCA claim, reasoning that IWPCA regulates a labor input, it affects a motor carrier only in its capacity as an employer, and thereby regulates a carrier’s relationship with its workforce rather than its customers. Costello v. BeavEx, Inc., 810 F.3d 1045 (7th Cir. 2016).

In its petition for certiorari, BeavEx argued that the Seventh Circuit erred when it held that the FAAAA did not preempt Illinois wage laws that require motor carriers to treat and pay all drivers as “employees” rather than independent contractors. BeavEx contended that state laws that force motor carriers into certain business models are distinctly “related to price, route or service,” and thus preempted by the FAAAA.

In its amicus curiae brief, submitted at the invitation of the Court, the government argued that the petition for certiorari should be denied because the Seventh Circuit correctly held that IWPCA is not preempted by the FAAAA. The government reasoned that IWPCA was not preempted because it was a law of general application that affects motor carriers only in their capacity as employers. Thus, under the “significant impact” analysis, requiring an employer to secure an employee’s written consent before making deductions from an employee’s

compensation had only a tenuous or remote impact on carrier operations or prices. The employer had failed to show that classification of drivers as employees would have any substantial effect on the employment relationship, or that such classification would trigger other obligations under federal or state employment law. Consequently, the government argued, the case was a poor vehicle for certiorari.

Materials in this case are available at: <http://www.scotusblog.com/case-files/cases/beavex-inc-v-costello/>

### **Certiorari Denied in East Hampton Airport Noise Restrictions Case**

On June 26, 2017, the Supreme Court denied review of the Second Circuit’s decision that the Airport Noise and Capacity Act (ANCA) preempted local laws implemented by the Town of East Hampton to minimize aircraft noise at the East Hampton Airport. East Hampton v. Friends of East Hampton Airport, No. 16-1070, 137 S. Ct. 2295 (2017). East Hampton enacted three local laws restricting flights at the East Hampton Airport, including a mandatory curfew, a curfew for “noisy aircraft,” and a prohibition on noisy aircraft from using the airport for more than one trip per week during peak season. In adopting these ordinances, East Hampton did not comply with ANCA, contending that it was not subject to ANCA because it received no federal funds.

The Second Circuit held that although the East Hampton Airport did not recently receive federal funds or impose passenger facility charges in connection with the airport, the local laws enacted by East Hampton were subject to ANCA because based on the plain language, statutory

findings, legislative history, and implementing regulations, it was clear that Congress intended for ANCA to apply comprehensively and mandatorily to all public airport proprietors. Specifically, the Second Circuit noted that Congress promulgated ANCA based on findings that uncoordinated and inconsistent restrictions on aviation in response to community noise concerns could impede the national air transportation system, and therefore, noise policy must be carried out at the national level. The court recognized that equity jurisdiction allowed the plaintiffs to bring a claim for injunctive relief for violations of the ANCA. Friends of the East Hampton Airport, Inc. v. Town of East Hampton, 841 F.3d 133 (2d Cir. 2016).

In its petition, East Hampton argued that equitable relief should be unavailable because the ANCA's sole remedy for non-compliance is withholding of federal funding. Moreover, East Hampton contended that the text and structure of the ANCA show that the section at issue has no preemptive scope beyond airports that receive federal grants or impose passenger facility charges. The Supreme Court denied review of East Hampton's petition, leaving the Second Circuit decision in play.

The Department did not file an amicus brief in this case. However, in a related case, Friends of East Hampton Airport v. FAA, No. 15-CV-0411(JS)(ARL), 2016 WL 792411, at \*1 (E.D.N.Y. Feb. 29, 2016), plaintiffs sought injunctive and declaratory relief against the FAA with respect to the East Hampton Airport. In 2005, the FAA and Committee to Stop Airport Expansion entered into a settlement agreement in which the FAA agreed not to enforce certain grant assurances, including a public use grant assurance after December 2014. The plaintiffs contended that FAA exceeded its

statutory authority by entering the settlement agreement; East Hampton relied on the settlement to avoid compliance with the FAA grant assurances. This case was stayed pending the appeal and petition for certiorari in the East Hampton case discussed above, and was ultimately dismissed.

Materials in this case are available at:

<http://www.scotusblog.com/case-files/cases/town-east-hampton-new-york-v-friends-east-hampton-airport-inc/>

### **Supreme Court Declines to Hear Case on FMCSA Electronic Logging Device Final Rule**

On June 12, 2017, the Supreme Court denied a petition for a writ of certiorari concerning FMCSA's final rule requiring most interstate commercial motor vehicle operators to install electronic logging devices (ELDs) in their vehicles to record engine run time, approximate location, and driver's driving time needed to demonstrate compliance with the FMCSA hours of service regulations. Owner-Operator Indep. Drivers Ass'n, Inc. v. DOT, No. 16-1228, 137 S. Ct. 2246 (2017).

The Seventh Circuit held that the final agency rule issued in 2015, mandating and prescribing requirements for ELDs, was valid. First, the court held that the ELDs prescribed by the agency function "automatically" within the meaning of the statute. Second, the court held that when defining "harassment," DOT sought sufficient input, considered administrative factors, and provided a reasonable definition of the term to ensure that the devices are not used to encourage a driver to drive when their ability is impaired or in violation of the hours of service rules. The court further ruled that the agency provided sufficient



treatment of confidentiality concerns of drivers regarding the use of ELDs.

Finally, the court held that petitioner's claims that the ELD mandate was an unconstitutional "search" and "seizure" failed because even if the ELDs constituted a search or seizure, it was reasonable under the Fourth Amendment's exception for "pervasively regulated industries." In these industries, reasonable expectations of privacy are diminished because an individual who operates such a business has voluntarily chosen to subject himself to pervasive government regulation. Owner-Operator Indep. Drivers Ass'n, Inc. v. DOT, 840 F.3d 879 (7th Cir. 2016). The Seventh Circuit further denied a petition for rehearing en banc.

In its certiorari petition, OOIDA argued that the "pervasively regulated industry" exception to the Fourth Amendment ought to apply to the administrative inspection of business premises, not persons via use of ELDs. OOIDA contended that the Seventh Circuit extended the regulated industry exception to include the warrantless use of ELDs to support the ordinary needs of law enforcement by extending administrative searches to persons. Second, OOIDA argued that the ELD Rule was not a constitutionally adequate substitute for a warrant.

The Department of Transportation waived the filing of an opposition brief, and the Court did not request that the government file a brief.

## **Certiorari Denied in Class Action Seeking Privacy Act Damages**

On June 19, 2017, the Supreme Court denied a petition for a writ of certiorari seeking review and reversal of the October 21, 2016 decision in Flock v. DOT, 840 F.3d 49 (1st Cir. 2016). Flock v. DOT, No. 16-1151, 137 S. Ct. 2268 (2017). In Flock, the U.S. Court of Appeals for the First Circuit upheld the lower court's decision, 136 F. Supp. 3d 138 (D. Mass. 2015), dismissing the Class Action Complaint for damages under the Privacy Act.

The initial Complaint filed by six commercial drivers on July 18, 2014 challenged FMCSA's practice of disseminating driver inspection records to motor carrier employers for pre-employment screening purposes, when the reports improperly contained violations that the Secretary had not determined to be serious driver-related safety violations, as defined in 49 U.S.C. § 31150, the authorizing statute for the Agency's Pre-employment Screening program (PSP). On September 30, 2015, the District Court granted the government's motion to dismiss, finding that the PSP statute was sufficiently ambiguous to support deference under Chevron U.S.A. Inc. v. Natural Res. Defense Council, Inc., 467 U.S. 837 (1984), to the Agency's reasonable construction of the PSP statute.

The Agency argued that it viewed the statutory requirement to disclose serious driver-related violations as establishing a floor rather than a ceiling for the types of violations that could be released to employers for pre-employment screening purposes. The Agency had authority to issue driver inspection records to an employer with the driver's permission under the Privacy Act and the PSP statute provided no indication that Congress intended to limit

this longstanding authority. On appeal, petitioners argued that the inclusion of non-serious violations in PSP reports violates the Privacy Act because it “is neither relevant nor necessary to accomplish the specifically defined purpose of the PSP program (set forth in 49 U.S.C. § 31150(c)).”

The Court of Appeals held that the agency’s interpretation, allowing the disclosure of non-serious driver-related violations was reasonable and comported with its statutory mandate to enhance motor carrier safety, agreeing with the finding of sufficient ambiguity to support Chevron deference. The Court further ruled that the driver consent form was not coercive or ambiguous.

On petition to the Supreme Court, petitioners argued that the First Circuit erred in finding the ambiguity required for Chevron deference based on congressional silence where the statute expressly authorized the agency to do one thing but did not expressly forbid it from doing another. They argued that this reliance on congressional silence conflicts with holdings in other Circuits, that the government’s position was improperly asserted for the first time in litigation and that notice of intent to release the violation records was not adequately identified in the Systems of Records Notice published on the PSP. In opposition to the cert petition, the United States argued that Section 31150 does not prohibit FMCSA from disclosing non-serious driver safety violations with driver consent. In fact, Section 31150 says nothing at all about such disclosures. It specifies only that FMCSA “shall provide ... electronic access” to three other categories of records. 49 U.S.C. 31150(a). At the very least, the statute is ambiguous and the court of appeals properly accorded Chevron deference to FMCSA’s reasonable

interpretation. The Supreme Court’s denial of the petition for a writ of certiorari leaves standing the First Circuit’s affirmance of FMCSA’s interpretation and implementation of the PSP statute.

Materials in this case are available at: <http://www.scotusblog.com/case-files/cases/flock-v-department-transportation/>

### **Supreme Court Rules for Railroad in FELA Case**

On May 30, 2017, the Supreme Court reversed the Montana Supreme Court and held that the Federal Employees Liability Act (FELA), 45 U.S.C. § 56, did not confer personal jurisdiction over out-of-state railroads in all cases involving employee injuries. The Court affirmed prior precedent that the Fourteenth Amendment’s Due Process Clause does not permit a State to hail an out-of-state corporation before its courts when the corporation is not “at home” in the State and the injury occurred elsewhere. BNSF Ry. Co. v. Tyrrell, No. 16-405, 137 S. Ct. 1549 (2017).

The case arose from alleged injuries sustained by Nelson and Tyrrell while working for BNSF. Although their alleged injuries did not arise from or relate to work performed in Montana, their suits were filed in Montana state court. BNSF is incorporated in Delaware and has its principal place of business in Texas. The Montana Supreme Court held that Montana courts could exercise general personal jurisdiction over BNSF under FELA section 56, and in the alternative, general personal jurisdiction under Montana law for “persons found within” the State.

In its amicus curiae brief filed in support of the petitioner, the government argued that

FELA does not authorize a state court adjudicating a claim under the Act to exercise personal jurisdiction over a defendant that is doing business in the State but is not a resident. The government further contended that the Montana state court's exercise of personal jurisdiction, based on the state long-arm statute, violates the Due Process Clause of the Fourteenth Amendment.

In the majority opinion authored by Justice Ginsburg, the Court agreed with the government's amicus brief, holding the disputed provision of FELA only concerned venue, not personal jurisdiction. The Court clarified that the "paradigm" forums in which a corporate defendant is "at home" are the corporation's place of incorporation and principal place of business. The Court further held that the Due Process Clause's limitations apply to all state court assertions of general jurisdiction over nonresident defendants, regardless of the type of claim asserted or business enterprise sued.

Justice Sotomayor wrote a decision concurring in part and dissenting in part, arguing that general jurisdiction would be proper in a forum state that was neither a corporate defendant's place of incorporation or principal place of business, but where affiliations were sufficiently "continuous and systematic."

Materials in this case are available at: [http://www.scotusblog.com/case-files/cases/bnsf-railway-co-v-tyrrell/?wpmw\\_switcher=desktop](http://www.scotusblog.com/case-files/cases/bnsf-railway-co-v-tyrrell/?wpmw_switcher=desktop).

## Certiorari Denied in Federal Maritime Lien Act Case

On June 26, 2017, the Supreme Court denied certiorari in a case that concerned the validity of a maritime lien. Bulk Juliana, Ltd. v. World Fuel Services PTE, Ltd., No. 16-26, 137 S. Ct. 2290 (2017). The Federal Maritime Lien Act (FMLA) authorizes a charterer to procure necessities for a vessel, and enables the person providing necessities, such as fuel for the vessel, to encumber the vessel with a maritime lien in the event of nonpayment, and bring a civil action in rem to enforce the lien. 46 U.S.C. § 31341-42.

The controversy arose from a charter-party's contract with World Fuel Services (the Supplier) for delivery of fuel to the vessel, while in Singapore. When payment was never remitted, the Supplier commenced this in rem admiralty suit against the vessel in U.S. district court pursuant to the choice-of-law provision in the contract. The case concerned a charter-party's contracting authority to bind the vessel with a maritime lien provision against the vessel, as well as a dispute as to whether the choice-of-law provision incorporated both U.S. common law and U.S. statutory provisions, including the FMLA. World Fuel Servs. Singapore Pte, Ltd. v. Bulk Juliana M/V, 822 F.3d 766 (5th Cir. 2016).

In its amicus curiae brief, the government contended that review was unwarranted because the question of extraterritorial application of the FMLA was not passed upon in the court of appeals, and the case did not implicate the geographic scope of the FMLA itself. Additionally, the brief rejected the petitioners' arguments for review based on the choice-of-law clause's incorporation of the FMLA because the parties did not dispute that Singapore law



governed the question of the contract's formation, and petitioners did not argue below that the contract did not validly incorporate the choice-of-law provision to obtain a maritime lien under the FMLA.

Materials in this case are available at:

<http://www.scotusblog.com/case-files/cases/bulk-juliana-ltd-v-world-fuel-services-singapore-pte-ltd/>

### **Certiorari Denied in Pro Se Motor Carrier Case**

On May 30, 2017, the Supreme Court denied review of the Fifth Circuit's decision to deny a pro se litigant's petition for direct review under the Hobbs Act, 28 U.S.C. § 2342, when the petition was filed more than sixty days after the challenged rule was issued. *Trescott v. DOT*, No. 16-60785, 136 S. Ct. 2418 (2016). The Hobbs Act allows direct review of rules, regulations, and final orders of the Department and other agencies by a court of appeals. Section 2344 of Title 28 requires a party aggrieved by a final order, within sixty days after its entry, to file a petition for review in the court of appeals where venue lies. *Trescott* challenged the Department's final rule regarding electronic logging devices, alleging that the described device does not satisfy the statutory definition of "automatic" and restricts drivers' individual liberties by enforcing commercial vehicle regulations when drivers are off duty. *Trescott* filed a petition for review in the Fifth Circuit, but the petition was denied as untimely.

In his certiorari petition, *Trescott* argued that the sixty-day time limit for filing the petition should be extended to afford him sufficient due process rights because he was a pro se litigant. *Trescott* also argued that the time limits of the Hobbs Act should not apply to

the Electronic Logging Device rule promulgated by the Department because the Department did not satisfy statutory requirements.

The Department of Transportation waived the filing of an opposition brief, and the Court did not request the government's views.

### **Certiorari Denied in Title VII Case**

On March 6, 2017, the Supreme Court denied a petition for a writ of certiorari in this case, concerning a Title VII discrimination claim submitted by an individual who failed to obtain a Cooperative Research and Development Agreement (CRADA) with the Volpe Center. *Tyree v. Chao*, No. 16-7080, 137 S. Ct. 1242 (2017). *Tyree* filed a complaint for discrimination on the basis of sex, race, or national origin by the Department for failure to grant a the CRADA.

The First Circuit upheld the district court's grant of the Department's motion for summary judgment. Under the three-step burden-shifting framework to analyze Title VII discrimination, the court concluded that although *Tyree* met her burden of proving a prima facie case of discrimination, the Department proffered a legitimate non-discriminatory reason for failing to execute the CRADA.

Finally, under the third step of the burden-shifting framework, the court found that *Tyree* failed to produce evidence to create a genuine issue of fact with respect to whether the Department's reason was a pretext and whether the real reason was discrimination. The court held that the description of the circumstances of the CRADA application would not allow a reasonable fact-finder to conclude it stemmed from discriminatory

animus. Tyree v. Foxx, 835 F.3d 35 (1st Cir. 2016).

In its opposition brief, the Department argued that no reasonable fact-finder could conclude that the proffered reason was pretext, Title VII did not apply to educational benefits, and the theory of recovery was too speculative to be upheld.

### **Supreme Court Rules on Intervenor Standing**

On June 5, 2017, the Supreme Court held that a litigant seeking to intervene as of right, pursuant to Federal Rule of Civil Procedure 24(a)(2), must meet Article III standing requirements if the intervenor seeks relief that the plaintiff has not requested. Town of Chester v. Laroe Estates, Inc., No. 16-605, 137 S. Ct. 1645 (2017). This ruling, which resolves a circuit split, was largely consistent with the government's amicus brief, which argued that the same basic principles, requiring Article III standing for co-plaintiffs that seek to take some step that would expand the range of claims or defenses, applied with respect to intervenors.

The Second Circuit reversed the district court's denial of Laroe's motion to intervene in a lawsuit about a regulatory takings claim, on the ground that Laroe lacked standing to bring a similar takings claim. The Second Circuit held that Article III standing was not

required for an intervenor of right. The court held that there was no additional standing requirement upon a proposed intervenor where the existence of a case or controversy had already been established in the underlying litigation. Moreover, the court held that so long as the intervenor sought relief that did not differ substantially from the relief sought by the plaintiff, whether the intervenor had an independent cause of action was not relevant to the right to intervene pursuant to Rule 24(a)(2).

In a unanimous decision authored by Justice Alito, the Court held that the principle that at least one plaintiff must have standing to seek each form of relief requested in the complaint also applied to intervenors of right. For all relief sought, there must be a litigant with standing, whether that litigant joins the lawsuit as a plaintiff, a co-plaintiff, or an intervenor of right. Therefore, an intervenor of right must demonstrate Article III standing when seeking additional relief beyond that which the plaintiff requests. This includes cases in which both the plaintiff and the intervenor seek separate money judgments in their own names.

Materials in this case are available at:

<http://www.scotusblog.com/case-files/cases/town-of-chester-v-laroe-estates-inc/>

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

### **D.C. Circuit Grants the State of Maryland's Motion for Stay Pending Appeal in Purple Line I**

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 Record of Decision (ROD) for the Purple Line. 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 reinstate the ROD and execute a Full Funding Grant Agreement (FFGA) with Maryland for the Purple Line project, which will connect two Maryland suburbs, as well as allow riders to transfer from the Washington Metro system. Fitzgerald v. FTA, No. 17-5132 (D.C. Cir.) (Purple Line I).

The Plaintiffs originally filed suit in 2014 seeking declaratory and injunctive relief for alleged violations of the National Environmental Policy Act (NEPA), the Federal-Aid Highway Act, the Endangered Species Act, and the Migratory Bird Treaty Act associated with the Purple Line project, which is a proposed light rail transit line that will connect major activity centers in Montgomery and Prince Georges Counties in Maryland. On August 3, 2016, the Court vacated the Record of Decision (ROD) for the Purple Line Project and remanded the matter for preparation of a Supplemental Environmental Impact Statement (SEIS) to review the effects and impacts of the Washington Metropolitan Area Transit Administration's (WMATA) ridership issues as they relate to the Project.

On May 29, 2017, the Court entered its Final Judgment in the case, granting summary

judgment in favor of FTA as to all of Plaintiffs' claims but one – vacating the Project's ROD on the basis that FTA failed to take a "hard look" at the potential impact that WMATA's ridership and safety issues could have on the Purple Line Project. The Plaintiff subsequently filed an atypical Rule 59(e) motion to seek "clarification or confirmation" of the breadth of the further environmental review the district court separately required.

Both FTA and the State of Maryland filed timely notices appealing the Court's Final Judgment, the Plaintiffs noticed their cross-appeal, and the case is currently on appeal in the United States Court of Appeals for the District of Columbia Circuit. The appeals have been fully briefed, and oral argument is scheduled for November 1.

### **U.S. District Court Denies TRO and Preliminary Injunction in Purple Line II**

On September 5, 2017, the Plaintiffs in Purple Line I filed a second lawsuit in response to FTA and Maryland executing a Full Funding Grant Agreement for the Purple Line project, citing the FTA's failure to comply with the requirements of 49 U.S.C. § 5309, the statute authorizing the grant. Friends of the Capital Crescent Trail v. FTA, No. 17-1811 (D.D.C.) (Purple Line II). On September 22, 2017, after a hearing by all parties and FTA's compliance with an order to produce documents supporting its findings, the District Court issued an order denying plaintiffs' Motion for a Temporary Restraining Order and Motion for a Preliminary Injunction.

The plaintiffs alleged environmental, conservation, aesthetic, and recreational injuries as a result of the closure of the Capital Crescent Trail, while construction activities are ongoing for the Purple Line project and filed for a temporary restraining order and subsequently, a preliminary injunction in another attempt to stop the project from moving forward. The defendants have challenged the Court's jurisdiction, as well as the plaintiff's standing. Without ruling on either issue, the Court denied the TRO and PI motions, but did request additional documentation from the defendants related to statutory fact finding. The additional documents were provided on October 2, 2017.

### **Government Appeals District Court Judgment in Metrics and Standards Litigation**

On October 19, the Government filed its opening brief in an 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.).

Through PRIIA, Congress directed FRA and the National Railroad Passenger Corporation (Amtrak) to "jointly develop" Metrics and Standards for "measuring the performance and service quality of intercity passenger train operations." The Metrics and Standards were to provide Amtrak with an internal evaluation tool it could also use to assess whether freight railroads had violated their statutory duty to provide preference to Amtrak in the use of rail lines, junctions, and crossings. The U.S. Court of Appeals for the D.C. Circuit struck down the Metrics and Standards as a violation of the Non-Delegation Doctrine by vesting rulemaking

authority in a non-governmental entity, *i.e.*, Amtrak. In 2015, the Supreme Court reversed and remanded, holding that Amtrak is a governmental entity for purposes of the Non-Delegation Doctrine. 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 additionally found an arbitration provision, provided in PRIIA to resolve disputes between FRA and Amtrak over the formulation of the Metrics and Standards (but never invoked), violated the Appointments Clause because the arbitrator would be a principal officer of the United States, not appointed by the President with the advice and consent of the Senate.

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

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. 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. Additionally, the District Court noted that the D.C. Circuit made it clear that Congress is the proper actor to remedy Section 207, not the courts. Thus, the District Court found that it had "no further role in making repairs to the PRIIA."

In its opening brief, the government made the same points 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.

### **Decision Issued in Challenges to FAA Interim Final Rule and Advisory Circular on UAS**

On March 14, 2017, the U.S. Court of Appeals for the District of Columbia Circuit held oral argument in Taylor v. Huerta, 856 F.3d 1089 (D.C. Cir.). In this case, John A. Taylor, a model airplane operator, and the same petitioner identified in the small unmanned aircraft system (UAS) rule litigation, sought review against the FAA in the D.C. Circuit, challenging: (1) an Interim Final Rule (IFR) establishing a web-based registration process by which small unmanned aircraft owners can satisfy the aircraft registration requirements; (2) a Clarification and Request for Information related to UAS registration; and (3) Advisory Circular (AC) 91-57A, which provides guidance to persons operating

model aircraft and refers to FAA restrictions on aircraft operating within the Washington, D.C., Flight Restricted Zone, and Special Flight Rules Area. The IFR and Clarification and Request for Information challenges present similar issues and were briefed together by the government. The petitioner argued that the IFR is outside of FAA's authority, claiming the following: (1) "model aircraft" are not "aircraft" subject to FAA's regulatory authority because Congress created a class of unmanned aircraft called "model aircraft" that are not aircraft; (2) the IFR is not consistent with section 336 of the FAA Modernization and Reform Act of 2012 although Congress also requires, by statute, for all aircraft to be registered and registration is not a new requirement; (3) the IFR is arbitrary and capricious; and (4) FAA's decision to proceed through an interim final rule rather than through notice-and-comment rulemaking was not justified by good cause notwithstanding the agency's argument that an unprecedented number of unmanned aircraft were purchased over the 2015 holiday season and into 2016. The government disputed each of these points.

On May 10, 2017, the court issued a decision vacating the UAS registration rule to the extent that it applies to model aircraft operating in accordance with sec. 336 of the FAA Modernization and Reform Act of 2012 (Pub. L. 112-95) (FMRA). The court found that the rule requiring modelers to register under part 48 violated the statutory prohibition (in section 336 of the FMRA) on promulgating rules/regulations regarding model aircraft. However, the vast majority of model aircraft purchases do not qualify as modelers under Section 336. FAA, through its website, has advised the hundreds of thousands of model aircraft owners who do not qualify for an exception under Section 336 that they must register their aircraft with



FAA. FAA has set up a refund and record deletion procedure for those who do qualify as modelers under Section 336.

### **Small Unmanned Aircraft Registration: Challenge with Respect to Agency Implementation of D.C. Cir. Decision**

On August 3, 2017, Robert C. Taylor, represented by John A. Taylor (petitioner in UAS registration litigation in D.C. Circuit), filed a complaint and motion for interim relief the U.S. District Court for the District of Maryland seeking relief regarding model aircraft registration deletion and refund of model aircraft registration fees. Taylor v. Huerta, No. 17-2191 (D. Md.).

The relief requested substantially mirrors that sought in the unsuccessful motion for contempt in Taylor v. Huerta, Cons. No. 15-1495, 16-1008, 16-1011 (D.C. Cir.), discussed above in this issue. In response to this latest challenge, the government opposed the motion, arguing that the court lacks jurisdiction over the matter, Plaintiff is unlikely to succeed on the merits, and that Plaintiff failed to demonstrate an actual and imminent irreparable injury.

Plaintiff subsequently filed an amended complaint, reframing the claims in his initial complaint to allege constitutional violations and adding Privacy Act claims. A hearing on the interim relief took place August 23, 2017. The court denied Plaintiff's motion. Further, during the hearing, the court asked Defendant to provide a letter brief (no more than 3 pages) by September 1, 2017, identifying the deficiencies in Plaintiff's amended complaint.

Plaintiff further amended his complaint on September 15, 2017, by dropping the

Privacy Act claim and restating the constitutional claims. These revisions do not change the theme of his argument which is that the FAA's interpretation of the D.C. Circuit's decision Taylor v. Huerta is unlawful. The government's position throughout the briefing has been that the court lacks jurisdiction to hear this matter and further, that Taylor is not entitled to any relief. Briefing is expected to be completed in November 2017.

### **Further Challenge Filed to Implementation of D.C. Cir. Decision on Small UAS Registration**

On June 12, 2017, Plaintiffs filed a class action complaint in Arkansas seeking (a) a refund of the proposed class members' registration fees; (b) the destruction of all records associated with each proposed class member; (c) removal any reference to proposed class members' registrations; and (d) payment of proposed class members' costs and fees in accordance with the Equal Access to Justice Act. Reichert v. Huerta, No. 17-389 (E.D. Ark.).

The proposed class includes "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. The class complaint arises from the May 19, 2017 decision in Taylor v. Huerta, 856 F.3d 1089 (D.C. Cir. 2017), in which the D.C. Circuit vacated the small unmanned aircraft registration requirement to the extent that it applied to certain model aircraft that meet the definition and operational requirements of section 336 of the FAA Modernization and Reform Act of 2012, Public Law 112-95 (now also provided in 14 CFR part 101), which is discussed above in this issue.

Since the D.C. Circuit's ruling, on July 3, 2017, the date of the formal mandate, the FAA published on its website, the process by which owners of model aircraft operated in compliance with section 336 may seek reimbursement of the \$5 registration fee and delete their registration. Additionally, to comply with the court's order in Taylor v. Huerta, 856 F.3d 1089 (D.C. Cir. 2017), the FAA will not use the identifying information from model aircraft owners whose registrations have been deleted. On October 20, 2017, FAA filed a motion to dismiss for lack of jurisdiction. Plaintiff's response is due by November 3, 2017, and the government's reply brief is due by November 13, 2017.

### **Fifth Circuit Dismisses OOIDA Challenge to FMCSA Mexican Truck Program**

On August 8, 2017, the U.S. Court of Appeals for the Fifth Circuit denied petitioner's motion for rehearing of the Court's June 6, 2017 dismissal for lack of jurisdiction of the petition in Owner-Operator Indep. Drivers Ass'n, Inc. v. DOT, No. 16-60324 (5th Cir.).

The petitioners, OOIDA and three owner-operators of commercial vehicles, challenged FMCSA's authority to issue operating authority registration to Mexico-domiciled motor carriers, asserting that the agency failed to test the safety of such carriers as required by Congress. The challenge mirrored the issues raised and denied on the merits by the U.S. Court of Appeals for the Ninth Circuit, in Int'l Bhd. of Teamsters v. DOT, Cons. Nos. 15-70754, 16-71137, 16-71992 (9th Cir. 2017), also discussed in this issue.

OOIDA filed protests to the agency's proposed grant of operating authority registration to two Mexico-domiciled motor carriers, arguing that the agency lacked authority to issue such registration because it had not established the safety of Mexican carriers in general based on the pilot program that concluded in October 2014. FMCSA denied the protests on both procedural grounds and the merits of the protest, which failed to challenge the fitness of the specific carriers. OOIDA filed a motion for reconsideration arguing that it had complied with the procedural requirements for the protest.

On March 23, 2016, FMCSA issued a letter to OOIDA stating that there was no provision for filing a motion for reconsideration to the agency's denial of the protests and that FMCSA's December 2015 denials were the final orders of the agency. OOIDA filed its petition in the Fifth Circuit under the Hobbs Act, within 60 days of the agency's March 2016 letter, but approximately five months from petitioner's December 28, 2015 receipt of the protest denials.

In its June 6 opinion, the Court dismissed OOIDA's petition, concluding that the court lacked jurisdiction because OOIDA had not filed a timely appeal to the agency's order denying their protests to the grants of operating authority. The Court stated that the subsequent March 23 letter did not actually "order" anything, but rather refused to even "consider the motion for reconsideration submitted on [the Association's] behalf." The Court therefore held that OOIDA's motion for reconsideration of the denials did not toll the 60-day statutory time-period for filing an appeal.

On August 7, the Court denied petitioners' motion to recall the mandate (necessary for the court's exercise of jurisdiction) and on August 8, it denied their petitions for panel rehearing and rehearing en banc.

### **Ninth Circuit Rejects Challenge to FMCSA Mexican Truck Program**

On June 29, 2017, the U.S. Court of Appeals for the Ninth Circuit denied consolidated petitions for review in Int'l Bhd. of Teamsters v. DOT, Cons. Nos. 15-70754, 16-71137, 16-71992 (9th Cir.). A petition for rehearing and rehearing en banc filed by intervenor, Owner-Operator and Independent Drivers Association (OOIDA), is pending. 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. Intervenor, OOIDA, joined the litigation adding 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, 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 petitions, petitioners also challenged FMCSA's issuance of long haul operating authority to a Mexico-domiciled motor carrier.

The FMCSA report analyzed safety data from the three-year cross-border pilot program, concluding that "Mexico domiciled motor carriers, conducting long-haul operations beyond the commercial zones of the United States, operate at a level of safety that is equivalent to, or greater than, the level of safety of U.S. and Canada-domiciled motor carriers operating within the United States."

In its Opinion, the Ninth Circuit held that the Pilot Program Report was not a final agency action subject to review under the APA, finding 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. The Court concluded that the Pilot Program report was not subject to judicial review and dismissed the petition challenging it.

Concerning the consolidated petitions, the Court found that FMCSA's grant of long-haul operating authority to a specific Mexico-domiciled motor carrier and the Agency's denial of the Teamster's challenge to that grant of authority were reviewable final agency actions. The Court held, however, 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 that FMCSA's conclusions in the Report were unsupported because the Agency relied on too small of a sample.

The Court further found that the plain language of the statute only required the Agency to apply requirements on sample size to the design of the pilot program plan, not to its results. The Court stated that the statute entrusts the Agency with evaluating the pilot program results and commits to the Agency's discretion the decision on whether to grant long-haul authority to Mexico-domiciled carriers based on such evaluation. The Court held that where, as here, the statute does not establish a benchmark against which to measure an agency's exercise of discretion, arbitrary and capricious review does not apply.

Finally, the Court held that OOIDA's argument that FMCSA exceeded its statutory authority in granting long-haul operating authority to a Mexico-domiciled carrier without first requiring that carrier's drivers obtain a U.S. driver's license could not be considered as it was identical to the issue previously litigated and rejected on its merits in Int'l Bhd. Of Teamsters v. U.S. DOT, 724 F.3d 206, 210-11 (D.C. Cir. 2013). OOIDA subsequently filed a petition for rehearing and rehearing en banc arguing that the court improperly applied the doctrine of issue preclusion to the CDL issue. Per the Court's order, the government responded to Intervenor's petition for rehearing on September 28, arguing that the Court properly applied the correct legal standard governing issue preclusion, and correctly held that issue preclusion barred intervenor's challenge to this longstanding regulation, making further review unwarranted.

### **D.C. Circuit Rejects Challenge to Outcome of PHMSA's Hazardous Materials Investigation**

On June 8, 2017, the U.S. Court of Appeals for the D.C. Circuit denied a petition for review challenging PHMSA's finding that certain WD-40 aerosol products were not in violation of PHMSA regulations governing the transportation of hazardous materials. IQ Prods. Co. v. DOT, 2017 WL 4231130 (D.C. Cir.).

Petitioner IQ Products formerly manufactured products for the WD-40 Company. After that relationship became embroiled in litigation, IQ embarked on a multi-year effort to convince PHMSA to find WD-40's products in violation of PHMSA regulations. PHMSA conducted an extensive, multi-phase investigation, but eventually determined that there was no evidence of a violation. On September 24, 2015, IQ sued PHMSA in the U.S. District Court for the District of New Jersey, to challenge the outcome of the investigation. After PHMSA moved to dismiss, the case was transferred to the D.C. Circuit.

In its decision, the D.C. Circuit – citing to the Supreme Court's decision in Heckler v. Chaney, 470 U.S. 821 (1985) and the D.C. Circuit's own decision in Crowley Caribbean Transport, Inc. v. Peña, 37 F.3d 671 (D.C. Cir. 1994) – held that PHMSA's decision not to take action against WD-40 was an unreviewable exercise of enforcement discretion. IQ Products had argued that PHMSA's determination that there was no evidence of a violation was a legal determination that could be reviewed despite being announced in a non-enforcement decision, but PHMSA pointed out in its brief that the Crowley decision specifically held otherwise. The D.C.



Circuit also rejected the claim that PHMSA was required to respond to certain letters sent by IQ Products, holding that IQ Products had cited no legal authority compelling a response.

IQ Products petitioned for rehearing en banc; the Court denied that petition on August 10, 2017.

### **D.C. Circuit Rules in Favor of Petitioners Challenging Flight Procedures for Phoenix Sky Harbor International Airport**

On August 29, 2017, the U.S. Court of Appeals for the District of Columbia 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. City of Phoenix v. Huerta, No. 15-1158, 2017 WL 3708094 (D.C. Cir.).

Two petitions for review were filed in the D.C. Circuit challenging FAA's 2014 implementation of area navigation (RNAV) departure procedures in the Phoenix airspace. The City of Phoenix, the owner of Phoenix Sky Harbor International Airport, filed the first petition on June 1, 2015, and a group of Phoenix historic neighborhood associations filed a second, similar petition on July 31. On FAA's motion, the court consolidated the two cases.

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 the FAA had consulted with the City of Phoenix Aviation Department during development of the procedures, the City raised new objections and demanded that the FAA return to the old routes.

In its decision, the court rejected the FAA's argument that the petition for review was untimely, finding that while the petitioners had missed the 60-day deadline for seeking review, the petitioners had reasonable grounds for their delay. On the merits, the Court found that the FAA violated the National Historic Preservation Act by failing to notify all consulting parties of its determination that no historic structures would be adversely affected by noise. In addition, the Court found that the FAA violated NEPA because FAA did not have sufficient support for its finding that the procedures were eligible for legislatively-created expedited the NEPA review. The court based this finding on its determination that FAA did not involve or notify local citizens and community leaders about the proposed flight path changes and therefore did not have sufficient evidence to determine whether extraordinary circumstances existed that would preclude the use of the expedited review.

Finally, the court found that the FAA did not fulfill its duty under Section 4(f) of the Transportation Act to consult with the City in assessing whether the new routes would substantially impair the City's parks and historic sites, and also found that the FAA did not gather enough information to conclude that the routes would not substantially impair these protected areas. The Court vacated the FAA's September 18, 2014, order implementing the procedures and remanded the matter to FAA for further



proceedings. Judge Sentelle dissented from the opinion, arguing that petitioners had not demonstrated “reasonable grounds” under prior D.C. Circuit precedent to excuse their late filing. FAA is considering its options to seek a panel rehearing or a rehearing en banc.

### **Decision Issued in Flyers Rights Challenge to FAA Denial of Petition for Rulemaking on Seat Dimensions**

On March 10, 2017, the U.S. Court of Appeals for the District of Columbia Circuit held oral argument in Flyers Rights Educ. Fund v. FAA, No. 16-1101, 864 F.3d 738 (D.C. Cir.), a case in which Flyers Rights challenged the FAA’s denial of its request that the agency promulgate regulations mandating a minimum seat width and pitch for commercial airlines. The FAA denied the petition after concluding that the issues raised in the petition for rulemaking did not meet the criteria to pursue rulemaking, since they did not raise an immediate safety or security concern.

Before the D.C. Circuit, Flyers Rights contended that the FAA is required to consider passenger comfort and health, and that denial of the petition for rulemaking was arbitrary and capricious. In addition, Flyers Rights also disputed the FAA’s conclusion that the issues identified in the petition for rulemaking did not raise an immediate safety or security concern. In its response brief, the FAA argued that the decision whether to initiate a rulemaking is committed to the agency’s discretion. In this case, the FAA reasonably declined to engage in a rulemaking to regulate seat width or pitch, because the agency is responsible for ensuring aviation safety, and the petition for rulemaking generally did not identify issues concerning safety. The FAA

also explained that its extensive data shows that seat pitch and width do not adversely affect evacuation times.

On July 28, 2017, the D.C. Circuit issued a decision in this case, remanding the matter to the FAA for further action with respect to safety-related egress concerns pertaining to seat and passenger size. In its decision, the court acknowledged that its review of agency decisions not to engage in rulemaking is “extremely limited” given the broad discretion agencies have to manage its resources to execute its responsibilities. The court considers whether an agency used “reasoned decision-making” in denying the petition and will overturn an agency’s decision “only for compelling cause, such as plain error of law or a fundamental change in the factual premises previously considered by the agency.”

Consequently, the court stated that its review would examine whether the FAA explained and the record supports, the facts and policy it relied on in denying the petition. The court further explained that while the record pertaining to the denial for a petition for rulemaking need not be as substantial as the record for a rulemaking, the record must nonetheless include the information relied on for the denial. The court could not determine whether the agency used reasoned decision-making to deny the petition because the information the agency relied up on was not in the record.

The court found that the FAA “failed to provide a plausible evidentiary basis for concluding that decreased seat sizes combined with increased passenger sizes have no effect on emergency egress.” In particular, the court questioned the government’s position that the reports of the evacuation demonstrations were proprietary

to the applicants performing them because “the Administration has given no reasoned explanation for withholding the tests in their entirety, and it has declined to file them under seal or in redacted form.”

Regarding petitioner’s concerns regarding passenger health and comfort, the court held that FAA reasonably declined to initiate rulemaking. In this instance, the court found that the FAA’s statement that it would continue to monitor seat designs and effects on safety and health constituted a regulatory-effort and resource-allocation judgment that falls within the agency’s province. Although the court remanded the matter for further consideration, it did not require FAA to promulgate a regulation mandating seat pitch or width.

### **Fifth Circuit Denies Rehearing in Love Field Access Dispute, Leaving Preliminary Injunction in Place**

On June 9, 2017, the U.S. Court of Appeals for the Fifth Circuit denied a petition for rehearing en banc that Southwest Airlines filed following a panel decision affirming a preliminary injunction requiring the accommodation of Delta Air Lines at Love Field Airport in Dallas, Texas. City of Dallas v. Delta Air Lines, No. 16-10051 (5th Cir.).

Prior to 2014, Delta was using gate space at Love Field pursuant to a sublease with American Airlines. When American agreed to divest its Love Field gates as part of the settlement of an antitrust suit challenging its merger with U.S. Airways, Delta’s sublease was terminated. Delta asked the other airlines leasing space at Love Field, as well as the City of Dallas (the airport’s owner), to accommodate its continued operation of five daily roundtrip flights. Southwest Airlines – which leases 16 of the airport’s 20 gates,

and has subleased an additional two gates – opposed Delta’s requests. The City of Dallas asked DOT for guidance.

DOT responded by sending two guidance letters, dated December 17, 2014 and June 15, 2015, describing its views as to the scope of some of the City’s relevant legal obligations, including under the assurances the City made to the FAA in connection with federal airport improvement grants. In June 2015, the City sued 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 on January 8, 2016, the Court ordered that Delta be accommodated during the pendency of the litigation.

Among other things, the Court held that Delta was likely to succeed on its claims that Southwest’s Lease required it to share gate space with Delta if it was not fully utilizing its gates at the time of Delta’s accommodation request. Southwest appealed, and a Fifth Circuit panel affirmed the preliminary injunction in February 2017. Following the Fifth Circuit’s denial of rehearing, the case has been remanded to the District Court, which has set a schedule for further proceedings.

Southwest separately challenged DOT’s two guidance letters; the U.S. Court of Appeals for the D.C. Circuit dismissed those cases in August 2016 and January 2017, on the grounds that the letters were not reviewable final agency actions.

### **Federal Circuit Schedules Oral Argument in Appeal of United States Court of Federal Claims' Award of \$135 Million For Taking of Property at Dallas Love Field**

Congress has long imposed restrictions on air carrier operations at Love Field under the Wright Amendment 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 lease terminal, then filed a complaint alleging that these effected a taking of private airline terminal and leasehold rights.

On April 19, 2016, the U.S. Court of Federal Claims (CFC) awarded Love Terminal Partners, L.P., and Virginia Aerospace, LLC just compensation in the amount of \$133.5 million for a taking of their leasehold rights and private terminal building at Dallas Love Field Airport. Love Terminal Partners v. United States, 126 Fed. Cl. 389 (2016). The CFC agreed with the Plaintiffs and

found that WARA contained explicit language that precluded plaintiffs from using their property as a commercial airline terminal, which was the property's highest and best use. Thus, the CFC concluded that no economic value remained following WARA's enactment. In the alternative, the Court also concluded that WARA effected a regulatory taking under the Penn Central factors.

The United States appealed the CFC's decision and briefing was completed in April 2017. Love Terminal Partners, L.P. v. United States, No. 16-2276 (Fed. Cir.). Oral argument is scheduled for December 6, 2017.

### **Fifth Circuit Rejects PHMSA's \$2.6 Million Fine for Pipeline Safety Violations that Caused Major Crude Oil Spill**

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

On July 6, 2016, ExxonMobil filed a Motion to Stay the effective deadlines of the compliance order items pending judicial review of the petition. This stay had the potential to buy ExxonMobil a year or more

to continue to operate outside of compliance with the order. The court denied ExxonMobil's Motion only two days after the company filed its reply to PHMSA's opposition.

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

On August 14, 2017, the court issued its opinion and ruled in favor of Exxon on five of the six challenged violations from the underlying case. The court remanded the remaining violation to PHMSA, directing the agency to reevaluate the fine levied against Exxon in light of the court's dismissal of the other violations that were the subject of Exxon's petition for review.

The court specifically rejected PHMSA's assertion that its interpretation of the regulation at issue is entitled to deference under Auer v. Robbins, 519 U.S. 452 (1997). The court found that the language of the relevant regulation was not ambiguous and therefore PHMSA's interpretation of the term "consider" in the regulations did not warrant Auer deference. Further, the court held that even if the

regulatory text was ambiguous, PHMSA's interpretation of the regulatory text still fell short of warranting Auer deference because Exxon did not have fair notice of the agency's interpretation that it sought to enforce in the underlying case. This conclusion was the holding of the concurring opinion issued in the case.

Having found that PHMSA was not entitled to Auer deference, the court held that Exxon's actions to "consider" a specific-safety risk were reasonable and that PHMSA's decision with regard to five of the six challenged violations from the underlying case was arbitrary and capricious.

### **Oral Argument Scheduled in Challenge to Ruling Relying on Supreme Court precedent in Spokeo, Inc. v. Robins**

The U.S. Court of Appeals for the D.C. Circuit has scheduled oral argument for November 8, 2017 in Owner-Operator and Indep. Drivers Ass'n, Inc. v. DOT, No. 16-5355 (D.C. Cir.). Appellants, OOIDA and five commercial drivers, challenge the lower court's dismissal for lack of standing in OOIDA v. DOT, 2016 WL 5674626 (D.D.C.).

In the lower court, appellants challenged the agency's use of violation data recorded in the Motor Carrier Management Information System (MCMIS), an FMCSA database containing driver and motor carrier safety information. The drivers' safety records were subject to release to prospective employers, with the driver's consent, under the Agency's Pre-employment Screening Program (PSP). Appellants 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 APA and the Fair Credit Reporting Act (FCRA). Noting that only two plaintiffs could even establish that an employer had requested their PSP records during the relevant time period, the lower court found that plaintiffs failed to establish that the release of PSP reports resulted in an adverse effect on the drivers’ employment or employment opportunities. Also, no future risk of harm existed due to changed agency policy, which provided a process for ensuring that violations favorably adjudicated or dismissed would not be released under PSP.

The district court granted the government’s motion for summary judgment, finding a lack of subject-matter jurisdiction based on plaintiffs’ failure to demonstrate an injury-in-fact sufficient to support standing. The court cited Spokeo, Inc. v. Robins, 136 S. Ct. 1540 (2016) and other precedent to conclude that plaintiffs did not establish concrete and particularized harm because they failed to demonstrate that the maintenance or dissemination of the allegedly incomplete data had harmed them in any way.

On November 22, 2016, appellants filed a notice of appeal in the U.S. Court of Appeals for the District of Columbia Circuit on the sole issue of standing. They argue that their past records of safety violations remain in FMCSA’s database archive, therefore establishing a continuing material risk of harm to their statutory rights under motor carrier safety statutes, the FCRA, and the Privacy Act. Appellants assert that the allegedly inaccurate records pose an imminent threat to the drivers’ business

reputation and employment prospects even though the records are no longer releasable under PSP. Appellants argue that the maintenance of allegedly inaccurate information, absent any release, is sufficient to establish the concrete and particularized injury necessary to support standing for redress of a statutory FCRA violation.

In its responsive brief, the government concedes standing for the appellants who had PSP reports released to employers, and recommends remand for two of the five appellants for the lower court’s consideration of other jurisdictional issues. This position was based on the Solicitor General’s Supreme Court briefing in Spokeo, which stated that dissemination of allegedly incorrect information established a statutory FCRA violation sufficient to establish standing, despite the failure to allege past harm. The government argues that the lower court properly dismissed the claims of the remaining three appellants, who cannot establish a statutory FCRA violation based on allegedly incorrect information that had never been released. In its Reply, appellants maintain their position that “incorrect” information in the MCMIS archives is sufficient to support a statutory FCRA violation, absent any release, due to the risk of future harm.

### **Briefing Completed 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 United States Court of Appeals for the District of Columbia 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).

Following Norwegian Air's request, numerous interested parties filed comments, both in support of and against the request. On April 12, 2016, DOT issued a tentative finding that Norwegian Air should be granted the foreign air carrier permit and initiated a show cause proceeding directing interested parties to show cause why the agency's tentative decision should not be made final. On November 30, 2016, the Department issued a decision that finalized its April 12, 2016, tentative decision to grant Norwegian Air's request for a foreign air carrier permit.

ALPA and the other petitioners argue that DOT misinterpreted a provision of the European Union-United States Air Transport Agreement in making the decision to grant Norwegian Air's request for a foreign air carrier permit. In addition, the petitioners claim that DOT failed to make a proper public interest determination as required by statute. Finally, the 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 the petitioners failed to establish Article III standing, because the 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 considered 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.

Briefing was completed on July 28, 2017, and oral argument has not been scheduled.

### **Briefing Completed in Suit Challenging Antitrust Immunity for Joint Venture Between U.S. and Mexico**

The parties have completed briefing in two consolidated cases filed in early 2017 in the U.S. Court of Appeals for the D.C. Circuit 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, Cons. Nos. 17-1056, 17-1115 (D.C. Cir.). In those orders, DOT granted approval of, and antitrust immunity (ATI) for, the proposed alliance agreement between Delta Air Lines, Inc. (Delta) and Aerovias de Mexico (Aeromexico) for a joint venture between

the U.S. and Mexico. The Department granted ATI based upon the conclusion that the joint venture would benefit the public by improving connectivity and reducing travel times between the two countries. However, the Department also 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 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 that Interjet 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 decisions were arbitrary, capricious, and otherwise unlawful. Interjet contends that DOT failed to demonstrate how providing slots to Interjet would have harmed competition at MEX. In addition, Interjet contends that the Department's decisions are contrary to basic antitrust principles about how successful market competitors should not be punished for their success, and that other carriers should not have been made eligible for MEX slots in light of their existing slot portfolio. Finally, Interjet argues that DOT is undercutting the primacy of Mexican authorities with respect to slot allocation and enforcement at MEX.

In response, DOT argued in its brief that the Department is not allocating or policing MEX slots, but is simply attaching appropriate conditions to its approval of the Delta-Aeromexico alliance, consistent with

its broad statutory authority. In addition, the Department contends that its decision to make Interjet ineligible for MEX slots was a reasonable decision aimed at improving competition by making the slots available to low-cost carriers that had not already achieved a dominant position at that airport. The case is expected to be argued in the coming months.

### **NBAA's Challenge to the FAA Santa Monica Settlement Continues**

Litigation continues in the National Business Aviation Association's challenge of the validity of the January 30, 2017, settlement agreement reached between the FAA and the City of Santa Monica over the City's airport. City of Santa Monica v. FAA, No. 16-72827 (9th Cir.). On May 4, the D.C. Circuit motions panel issued an order denying NBAA's motion for a stay and injunction which sought to cease implementation of the settlement agreement. The Court referred the FAA's motion to dismiss to the merits panel. The Court also granted the City of Santa Monica's motion to intervene and set a briefing schedule for the parties.

The NBAA filed its initial brief on August 16 and advanced primarily procedural challenges. It argued the settlement violated the Airport Noise and Capacity Act and NEPA. It claimed the 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 the 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. The FAA and the City of Santa Monica assert that the D.C. Circuit lacks jurisdiction to hear NBAA's claims and that they are meritless on numerous other grounds. The FAA's response brief is due in late October. Briefing is scheduled to be completed in December 2017.

### **OIDA Challenges FMCSA's Medical Certification Integration Rule in the Eighth Circuit**

In September 2017, the parties submitted Rule 28(j) letters to the U.S. Court of Appeals for the Eighth Circuit in Owner-Operator Indep. Drivers Ass'n, Inc. v. DOT, No. 16-4159 (8th Cir.) concerning the impact of FMCSA's withdrawal of its advance notice of proposed rulemaking (ANPRM) regarding obstructive sleep apnea (OSA) (82 Fed. Reg. 37038 (Aug. 8, 2017)). As of May 10, 2017, the petition challenging the Medical Examiners Certification Integration Final Rule, 80 Fed. Reg. 22790 (April 23, 2015), and the corrections to that rule, 80 Fed. Reg. 35577 (June 22, 2015), had been fully briefed. Oral argument is scheduled for November 15, 2017.

The Final Rule requires that medical examiners use a revised Medical Examination Report (MER) Form to assess commercial motor vehicle (CMV) 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 49C.F.R. Part 391 (Appendix A).

Petitioners argue that the expanded scope of the MER Form and Appendix A are de facto rules issued without notice and comment. In their opening and reply briefs, they contend that the expanded MER form and revised Appendix A issued in the Final Rule: 1) violated the APA because it added new advisory medical criteria without notice and comment; 2) failed to consider the costs and benefits of expanding the MER form; and 3) violated Public Law 113-45, which prohibits the Secretary from implementing driver screening for sleep disorders, including sleep apnea, unless the requirement is adopted pursuant to a notice and comment rulemaking.

The government asserts that the court lacks jurisdiction because petitioners fail to show an injury that is fairly traceable to the rule, and therefore lack standing. Additionally, petitioner's challenge does not fall within Hobbs Act jurisdiction because it challenges advisory guidance that is not an FMCSA rule, regulation, or a final order within the meaning of 28 U.S.C. 2342(3)(A). On the merits, FMCSA argues that it satisfied APA requirements for notice and comment on the proposed MER form, which was included in the Notice of Proposed Rulemaking.

Petitioners not only had the opportunity to challenge the proposed changes, but did so, through comments in the rulemaking and a subsequent petition for reconsideration. The Agency further argues that the challenged Advisory Guidance, which the agency adopted in 2000 and relocated to Appendix A without substantive change, is not a legislative rule to which APA procedures apply. Finally, FMCSA satisfied Public Law No. 113-45 by engaging in notice and comment rulemaking for the revised MER Form.

On September 8, 2017, OOIDA submitted supplemental authority to the Court under Federal Rule of Appellate Procedure 28(j). In its letter, petitioners allege that FMCSA and FRA's withdrawal of their advance notice of proposed rulemaking (ANPRM) on obstructive sleep apnea (82 Fed. Reg. 37038 (Aug. 8, 2017)) indicates that FMCSA plans to address screening for this disorder absent notice and comment rulemaking in violation of Public Law No. 113-45. FMCSA responded on September 15, 2017, clarifying that determinations regarding medical qualification of drivers, including untreated obstructive sleep apnea, are made under long-standing physical qualification standards for respiratory dysfunction, and, contrary to petitioners' suggestion, the agency did not withdraw the ANPRM in order to circumvent the regulatory process.

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

On March 22, 2017, the FAA filed a brief with the U.S. Court of Appeals for the Eleventh Circuit, contending that the Court may not review a Georgia county's challenge to an FAA letter concerning requirements for the use of aviation fuel tax revenues. Clayton County v. FAA, No. 17-10210 (11th Cir.).

The case relates to a federal statute that provides that "[l]ocal taxes on aviation fuel" generally must be spent for aviation-related purposes, such as the costs of operating an airport. 49 U.S.C. § 47133(a). In 2014, the FAA issued a policy amendment clarifying that it interpreted the statute to apply whether or not the tax-levying entity was itself responsible for operating the federally-assisted airport. The FAA recommended that affected state and local governments

submit an "action plan" detailing how they would bring themselves into compliance. The FAA agreed that an action plan could include a "reasonable transition period" of up to three years from the policy amendment's effective date (*i.e.*, until December 8, 2017), during which the FAA would exercise its discretion not to enforce the statute against any "non-sponsor" entity.

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

On January 13, 2017, Clayton County petitioned for review of the FAA Chief Counsel's letter. On March 8, the Court sua sponte asked the parties to brief the issue of whether the Chief Counsel's letter was a reviewable "final agency action." In its response, the FAA argued that the letter was not a final agency action, as it did not meet either prong of the two-part test used to assess finality. Bennett v. Spear (95-813)



520 U.S. 154 (1997). First, the letter did not mark the consummation of the FAA's decision-making process, as it made no determination about whether Clayton County will comply by the December 8 deadline, much less about what the agency may do if Clayton County is not in compliance. Second, the letter did not determine any rights or obligations, and no legal consequences flowed from it. On May 10, 2017, the Court ordered the issue raised by its jurisdictional question to be carried with the case.

On May 15, Clayton County filed its opening brief contending that the Chief Counsel's letter was arbitrary and capricious, contrary to law, and constituted final agency action. Clayton County claimed that the statutory provisions underlying the November 2016 letter do not apply to the taxes imposed by them. This was based, in part, on the fact that Clayton County does not operate an airport, and claimed it has no ability to spend the tax revenues for qualifying airport purposes. Additionally, Clayton County alleged FAA's aviation fuel tax policy interpretation was inconsistent with prior FAA statements, federalism, and the Tenth Amendment.

The FAA's Answering Brief was filed on July 21, 2017. The FAA contended that the Chief Counsel's letter is not a final order, because it does not mark the consummation of the FAA's decision-making process or impose legal consequences on Clayton County. Accordingly, FAA argued there is no right to judicial review under 49 U.S.C. § 46110(a). FAA further contended that even if the letter was a final order, FAA reasonably interpreted the statutory limitations on the use of revenues from local taxes on aviation fuel.

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 agency's interpretation of the aviation fuel tax revenue use statute is incorrect. The case is now fully briefed. Oral argument has not been scheduled.

### **Skydive Myrtle Beach Appeals FAA Final Agency Decision to Fourth Circuit**

Skydive Myrtle Beach, Inc., a commercial skydiving operator, filed a Part 16 complaint against Horry County Department of Airports, the operator of Grand Strand Airport. 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 the 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, the 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 U.S. Court of Appeals for the Fourth Circuit. Skydive Myrtle Beach, Inc. v. Horry Cnty. Dep't of Airports and FAA, No. 16-2337 (4th Cir.). 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 the FAA. FAA filed its response brief on September 11, 2017, and Skydive filed a reply on October 10, 2017.

### **Oral Argument Held in Detroit International Bridge Company Appeal of Ambassador Bridge Case**

On September 14, 2017, the U.S. Court of Appeals for the D.C. Circuit held oral argument in Detroit Int'l Bridge Co. v Gov't of Canada, No. 16-5270 (D.C. Cir.), 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.

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. The parties filed their briefs in early 2017. On appeal, DIBC contends, among other things, that the State Department acted unlawfully in approving the Crossing Agreement between Michigan and Canada for the NITC/DRIC, on the ground that such action was outside the bounds of the International Bridge Act (IBA).

The government has argued in response that it acted lawfully and that the IBA does not promise that the Ambassador Bridge will be the only one between Detroit and Windsor, but rather just ensures the right to "construct, maintain, and operate a bridge." The case is expected to be decided in the coming months.

### **5th Circuit Reverses Lower Court in \$660 Million FCA Case Involving Guardrails**

On September 29, 2017, the United States 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, L.L.C., "Trinity." United States ex rel. Harman v. Trinity Industries Inc., No. 15-41172 (5th Cir.). Trinity had appealed a lower court's judgment that awarded to the

Relator, Joshua Harman, \$663,360,750, which consisted of \$575,000,000 in trebled damages and \$138,360,750 in civil penalties for 16,771 false claims – plus an additional \$19,012,865 in attorney’s fees. The case arose out of claims by Harman that Trinity had defrauded FHWA and the government 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 on such projects. The Fifth Circuit reversed the lower court’s decision in a lengthy opinion, finding that the government had not been defrauded because there was no proof that the alleged fraudulent conduct by Trinity was material to FHWA’s decision to approve reimbursable payments to the states for installation of Trinity’s devices.

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. 12-00089 (E.D. Tex.). The government declined to intervene and the case was unsealed on January 23, 2013. After an initial mistrial, a second jury returned its verdict on October 20, 2014 and Trinity subsequently noticed its appeal on August 28, 2015.

Harman alleged, among other things, that the Defendants made false claims for payment each time Trinity sold the ET-Plus guardrail end terminal system with 4-inch guide channels (ET-Plus). The ET-Plus was designed and patented by the Texas Transportation Institute (TTI), and Trinity manufactures the device under an exclusive license from TTI. Harman alleged that the ET-Plus crash tests indicated that the barriers were not compliant, and that Trinity made secret changes to the documents and then hid them from FHWA.

FHWA independently reviewed Harman’s allegations alongside TTI’s crash test documentation. FHWA subsequently issued a memorandum concluding that the ET-Plus was properly crash tested back in 2005 and had remained eligible for Federal-aid reimbursement ever since. Given FHWA’s unwavering position that the ET-Plus was and remained eligible for federal reimbursement, the court concluded that Trinity’s alleged misstatements to FHWA were not material to its payment decisions. The other evidence in the record, viewed most favorably to Harman, was insufficient to overcome this “very strong evidence.” 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.”

### **FRA Settles Case with Railcar Manufacturer**

On August 17, 2017, American Railcar Industries, Inc. (ARI), a railcar manufacturer, and FRA entered into a settlement agreement to resolve the claims in American Railcar Industries, Inc. v. FRA, No. 16-1420 (D.C. Cir.). Also on August 17, the parties filed a joint stipulation of dismissal in the D.C. Circuit. The D.C. Circuit issued a per curiam order, dismissing the case on August 18.

The litigation arose from ARI’s challenge of FRA’s September 30, 2016, Railworthiness Directive No. 2016-01 (RWD) and its November 18, 2016, Revised Railworthiness Directive No. 2016-01 (Revised RWD) (collectively, the Directives). FRA issued the Directives based on its finding that, as a result of non-conforming welding practices,

certain tank cars ARI and ACF Industries, LLC (ACF) had manufactured between 2009 and 2015 could be in an unsafe operating condition that could result in the release of hazardous materials. The Directives require the inspection and testing of particular welds on DOT specification general purpose 111 tank cars, which were built to the ARI and ACF 300 stub sill design and equipped with a two-piece cast sump and bottom outlet valve (BOV) skid.

On March 6, 2017, ARI filed its opening brief. ARI first argued that the Directives violated both the APA and the Hazardous Materials Regulations (HMR) because they contained invalidly promulgated legislative rules that substantially changed existing regulations and mandated new testing requirements. Second, ARI questioned whether FRA was arbitrary and capricious in issuing the Directives because they alleged they were not supported by the record, they failed to provide substantial evidence supporting their conclusions, and they failed to provide a rational connection between the facts and their conclusions. Third, ARI questioned whether FRA exceeded its authority when it issued the Directives and imposed inspection and testing requirements unauthorized by law or regulations. Finally, ARI questioned whether the actual testing criteria imposed by FRA were arbitrary and capricious.

On April 5, 2017, the Government filed its brief. First, the Government argued that FRA issued the Directives in accordance with the APA's procedural requirements because notice and comment were not required, and even if notice and comment were required, ARI could not show any prejudice from any alleged lack of notice and comment. Second, the Government argued the evidence in the record amply supported FRA's conclusion that the ARI

and ACF 300 stub sill design tank cars may be in an unsafe operating condition.

ARI filed its reply brief on April 19, arguing that: (1) the Revised Directive was effectively a new rule and thus required notice and comment and (2) the record did not demonstrate that the Directives' testing requirements were necessary.

The settlement agreement entered into by the parties provides for the inspection of certain tank cars targeted by the Directives by the end of 2017. The remaining cars are to be inspected at their next scheduled qualification required by the HMR, but no later than December 31, 2025. The agreement also sets forth the inspection requirements and inspection procedures for the tank cars. Finally, the agreement preserves FRA's ability to act if new information comes to light, which demonstrates a heightened safety risk with the tank cars, as well as ARI's right to challenge such action.

### **Environmental Groups and States Petition Second Circuit to Set Aside NHTSA Decision on CAFE Civil Penalties**

On September 7, 2017, the Center for Biological Diversity, the National Resources Defense Council, and the Sierra Club filed a petition for review in the U.S. Court of Appeals for the Second Circuit. Their petition requests that the Court set aside what the petitioners classify as a final rule that indefinitely delayed the effective date of an earlier final rule that increased the civil penalty rate for violations of Corporate Average Fuel Economy (CAFE) standards. On September 8, 2017, the States of California, Maryland, New York, Pennsylvania, and Vermont jointly filed

their own petition of review on the same issue. The cases are consolidated as National Resources Defense Council, Inc. v. NHTSA, No. 17-2780 (D.C. Cir.).

Pursuant to the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015, NHTSA adjusted its civil penalty amounts for inflation—including by increasing the penalty for violations of CAFE standards from \$5.50 per tenth of a mile per gallon to \$14—in an interim final rule that was published in July 2016 and went into effect on August 4, 2016. In a final rule issued in December 2016, in response to an industry petition for reconsideration, NHTSA delayed the increase in the CAFE civil penalty, plus any additional annual inflationary adjustments for CAFE violations, to model year 2019.

Upon further consideration, NHTSA published a notice in the Federal Register on July 12, 2017 seeking comment on the appropriate inflationary adjustment, 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. The comment period closed on October 10, 2017. Because NHTSA is reconsidering the appropriate penalty level, NHTSA also issued a notice in the Federal Register—the notice challenged by the petitioners— indefinitely delaying the effective date of the December 2016 final rule. In this notice, NHTSA also announced that the civil penalty will remain \$5.50 until these issues are resolved.

On October 24, the petitioners in both cases filed motions for summary vacatur of the indefinite delay of the increased CAFE civil penalty, or in the alternative, a stay pending

judicial review. The two motions, which make substantially similar arguments, claim that NHTSA lacked the authority to delay the increased CAFE civil penalty, and furthermore, that NHTSA violated the APA by delaying the increased penalty without notice and comment. The government’s response to the petitioners’ motions is due on November 3, 2017 and the petitioners’ replies are due on November 13, 2017.

### **Court Hears Argument on Challenge to Executive Order on Reducing Regulation and Controlling Regulatory Costs**

On August 10, 2017, the U.S. District Court for the District of Columbia heard oral argument in a challenge to Executive Order 13771, which directs federal agencies to identify two existing regulations to repeal for every new regulation proposed or issued. Public Citizen v. Trump, No. 17-253 (D.D.C.).

The argument pertained to a motion to dismiss filed by the Government on May 12, and a summary judgment motion filed by the plaintiffs on May 15. The plaintiffs – Public Citizen, the Natural Resources Defense Council, and the Communications Workers of America – contend that the Executive Order requires agencies to act in contravention of the APA 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 acting

director of OMB, and 14 agency officials, including the Secretary of Transportation and the heads of NHTSA, FMCSA, PHMSA, and FRA.

In its motion to dismiss, the Government argues that the plaintiffs lack standing to challenge the Executive Order, pointing out (among other things) that the plaintiffs rely on speculative suggestions that hypothetical future agency actions might cause injury to them and their members. Similarly, the Government notes that if agencies do take future actions that the plaintiffs believe to be unlawful, they can attempt to challenge those specific actions at that time. The Government also contends that the Executive Order -- which repeatedly specifies that its directives apply only “to the extent permitted by law” -- does not violate separation of powers principles, and that the plaintiffs cannot state a claim under the Take Care Clause.

### **DOT Moves to Dismiss Challenge to Extension of Compliance Date for Mishandled Airline Baggage Reporting Rule**

On September 15, 2017, DOT filed a motion asking the U.S. District Court for the District of Columbia to dismiss 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.

In its motion to dismiss, DOT argues that the District Court lacks 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 argues that because the extension of the compliance date was issued under Part A, the District Court may not hear the case.

### **Lawsuits Filed in the Southern District of New York and Northern District of California Challenging GHG Rule on APA Grounds**

On July 31, 2017, Clean Air Carolina, Natural Resources Defense Council (NRDC), and U.S. Public Interest Research Group, 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).



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 the FHWA 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. Because of these two rulemaking actions, the government filed a motion to dismiss, arguing that the case is now moot and should be dismissed. Briefing on the motion will be completed in early November 2017.

### **Non-Profit Challenges President’s Infrastructure Council**

On July 25, 2017, Food & Water Watch, 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 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 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. Additionally, 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.

### **Court Dismisses Challenges to Allocation of Private Activity Bond Authority to the All Aboard Florida/Brightline Rail Project**

On May 10, 2017, the U.S. District Court for the District of Columbia dismissed two cases involving the All Aboard Florida/Brightline passenger rail project connecting Miami and Orlando, on the grounds that the cases are moot. Indian River County v. DOT, 2017 WL 1967351 (D.D.C.).

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

On September 30, 2016, All Aboard Florida ("AAF") applied to DOT for a new \$600 million PAB allocation that would cover only Phase I of the Project. AAF requested that DOT withdraw the existing \$1.75 billion allocation if it granted the new allocation. On November 22, 2016, DOT granted the new allocation and withdrew the existing allocation. DOT and AAF then moved to dismiss the pending lawsuits as moot, since the challenged action – the December 2014 allocation – was no longer in place. Plaintiffs opposed, arguing that the Court should rule on the appropriateness of the now-withdrawn December 2014 allocation, based solely on the mere possibility that AAF might one day submit a new application for a Phase II allocation, and that DOT might grant that application in a way that plaintiffs thought violated NEPA. In its decision dismissing the cases as moot, the Court concluded that there was no reasonable expectation that DOT would make a new Phase II allocation in a way plaintiffs thought improper. The Court noted that AAF might not submit a new application, that DOT might not grant any such application, and that DOT might take a different position with respect to whether an environmental impact statement was required. The Court also emphasized that whether NEPA required an environmental impact statement would depend on the specific facts of any future allocation.

## **Ninth Circuit Grants Temporary Stay of District Court Proceedings During Consideration of Interlocutory Appeal in Case Challenging Carbon Dioxide Emissions**

On September 10, 2015, a group of plaintiffs filed an amended complaint in the U.S. District Court for the District of Oregon against the United States and a host of federal agencies, including DOT, alleging that the United States has allowed and caused an increase in greenhouse gas emissions. Juliana v. United States, No. 15-1517 (D. Or.).

The plaintiffs are a number of named youth plaintiffs (acting by and through guardians) along with Earth Guardians (a tribe of young activists), and “future generations” by and through their Guardian Dr. James Hansen (a former NASA employee), and allege that unless the United States engages in immediate, meaningful action to phase out carbon dioxide emissions, the youth plaintiffs and future generations “would live in a climate system that is no longer conducive to their survival.” The National Association of Manufacturers, the American Fuel & Petrochemical Manufacturers, and the American Petroleum Institute initially intervened in the case but have since withdrawn from the case.

The Amended Complaint asserts a number of constitutional claims on the basis of due process, equal protection, unenumerated rights under the Ninth Amendment, and the public trust doctrine. On November 17, 2015, the United States sought to dismiss the case on the grounds that plaintiffs lack standing because their alleged injuries are not particular to the plaintiffs and because these alleged injuries are not traceable to the

United States. Furthermore, the United States sought dismissal on grounds that the Plaintiffs failed to state a claim under the Constitution, as no court has recognized a constitutional right to be free from carbon dioxide emissions.

The magistrate judge admitted that this is a “relatively unprecedented lawsuit” and that “plaintiffs assert a novel theory somewhere between a civil rights action and the NEPA/Clean Air Act/Clean Water Act suit to force the government to take action to reduce harmful pollution” but ultimately recommended against dismissal. First, the magistrate judge found that the Plaintiffs had standing even though their allegations of direct or threatened direct harm were shared by most of the population. Furthermore, the magistrate judge held that it was too early in the proceedings to determine whether the plaintiffs’ allegations involve a political question and noted that some of the plaintiffs’ allegations raise Constitutional violations that could be addressed by the court.

Finally, the magistrate judge found that the validity of the plaintiffs’ constitutional claims could not be determined on a motion to dismiss and stated a need for further evidence. The District Court Judge then adopted the magistrate judge’s findings and recommendation to deny the United States and Intervenors’ Motions to Dismiss.

The District Court denied the United States’ Motion to Certify Order for Interlocutory Appeal and a Motion to Stay the district court litigation pending a decision by the Court of Appeals for the Ninth Circuit, which led the United States to file a Petition for Writ of Mandamus in the Ninth Circuit on June 9, 2017. The Ninth Circuit issued a temporary stay of the District Court

proceedings but has yet to issue a decision on the mandamus petition.

### **Appeal Filed from District Court Decision on Use of Dulles Toll Road Revenue to Fund Construction of Metro Silver Line**

A group of Dulles Toll Road users filed a class action complaint against the 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 (4th Cir.), a case that also challenged MWAA's use of Dulles Toll Road revenue to fund construction of the Silver Line Metro, but in this litigation, Plaintiffs are alleging constitutional violations, including 1) that MWAA is not a valid interstate entity because the District of Columbia is not a "state" for purposes of the Compact Clause; 2) MWAA exercises federal legislative power in violation of Article I of the Constitution; 3) MWAA exercises federal executive power in violation of Article II of the Constitution; 4) MWAA's Dulles Toll Road tolls violate drivers' due process; and 5) MWAA's tolls exceed its authority under its enabling statutes and the APA.

DOT was not a party in the Corr litigation, although DOT did file an amicus brief in the 4th Circuit appeal. However, in this case, Plaintiffs have named DOT as a defendant, primarily because in 2008 former Secretary Mary Peters provided MWAA with a Certification stating 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, 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. Section 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.

The Plaintiffs have 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 but is not appealing the dismissal of their claims against DOT and the Secretary. The parties' response briefs are due on November 13, 2017.

## **District Court Decision Dismissing DBE Case Appealed to the Ninth Circuit**

On July 1, 2016, Orion Insurance Group (Orion), an insurance company, and its owner filed suit against the Washington State Office of Minority & Women's Business Enterprises (OMWBE), the Department of Transportation, various OMWBE officials, and the former Acting Director of DOT's Departmental Office of Civil Rights (DOCR) in the U.S. District Court for the Western District of Washington. Orion Ins. Grp., Corp. v. Wash. State Office of Minority & Women's Bus. Enters., No. 16-5582 (W.D. Wash.). Orion and its owner sought to challenge a decision by the Washington State OMWBE denying its application for certification in the Disadvantaged Business Enterprise (DBE) program and DOCR's upholding of that denial.

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

In the lawsuit, the plaintiffs challenged DOCR's decision to uphold OMWBE's denial decision under the APA. In addition, the 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. The plaintiffs also purported to

allege all claims against all the named officials in both their official and individual capacities.

The federal defendants filed a motion to dismiss, which was granted. As a result, the court dismissed 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' equal protection claim. On April 24, 2017, the federal defendants filed a motion for summary judgment seeking dismissal of the 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 the plaintiffs' equal protection claims after finding that they failed to provide any evidence that the federal defendants' application of the DBE regulations was done with an intent to discriminate or done with racial animus. Moreover, the plaintiffs also offered no evidence that application of the regulations created a disparate impact on mixed-race individuals such as Orion's owner.

The plaintiffs filed an appeal in the Ninth Circuit on September 20, 2017. The opening brief is due on December 20 and the government's response brief is due on January 19. An optional reply brief is due 21 days following the filing of the response brief.



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

### **Federal Aviation Administration**

#### **Challenge to FAA's Denial of a Petition for Exemption Regarding Operating Certificate Requirements**

Great Lakes Aviation filed a petition for review in the Tenth Circuit Court of Appeals 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. While Great Lakes offered to voluntarily follow most part 121 requirements, it specifically sought relief from the more stringent pilot qualifications and flight and duty requirements of part 121. In denying the petition, the FAA stated that, although couched as a definitional exemption, Great Lakes effectively requested an exemption from all part 121 regulations as they apply to Great Lakes' operations. Since 1995, the FAA has required operations in aircraft with more than 9 passenger seats to be conducted under part 121, and a reversal of that requirement would not achieve an equivalent level of safety or be in the public interest.

Furthermore, such an exemption would contravene Congress's intent in Pub. L. 111-216 to increase pilot qualification requirements for air carrier operations. The FAA found that training flight crews in accord with part 121 standards is not

equivalent to using pilots that meet part 121 qualifications. Although cognizant of the public interest arguments concerning air service to small communities, the FAA was not persuaded that these positive effects outweigh a lack of equivalent level of safety. The administrative record was filed September 19, 2017. Petitioner filed its brief on October 27, 2017, and the agency's response is due on November 26, 2017.

#### **Petition for Review of FAA Determination of No Hazard and Denial of Review of Petition for Discretionary Review of Determination**

On August 30, 2017, Hawaiian Airlines, Inc. filed a petition for review in the D.C. Circuit Court of Appeals. Hawaiian Airlines, Inc. v. FAA, No. 17-1199 (D.C. Cir.). This petition relates to an agency response to 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 Honolulu International airport. The initial determinations of no hazard were issued July 7, 2015 and the extensions were issued March 3, 2017.

Sponsors, persons who provided substantive aeronautical comments on a proposal in an

aeronautical study, or persons who have a substantive aeronautical comment on a proposal but were not given an opportunity to comment during the study process, may petition the FAA for discretionary review of a determination or extension of a determination. The petition must explain its aeronautical basis and must include new information or facts not previously considered or presented during the aeronautical study.

In response to the Hawaiian Airlines petition for discretionary review of the FAA OEG determinations, the FAA determined that, with respect to four of the determinations, the extensions were not properly issued and the original determinations remained in place, at the time the petition for discretionary review was filed – as such, Hawaiian Airlines’ petition to the FAA was untimely under part 77.

With respect to the determinations regarding the five other cranes, the FAA upheld its initial decision granting the extension of the determinations of no hazard because: (1) Hawaiian Airlines failed to provide new facts; (2) Hawaiian Airlines was afforded an opportunity to comment on the initial study and in fact did comment; (3) every obstacle is not per se a hazard; (4) the discretionary review does not include review of determinations outside of the determinations made under part 77; (5) the statute upon which part 77 is based does not require the FAA to consider environmental and economic impacts in evaluating an obstruction; and (6) the FAA followed its negotiation procedures. Briefs have not yet been filed on appeal.

### **Seventh Circuit Denies Petition for Review in Lithium Ion Battery Shipping Violations Case**

On July 20, 2017, the Court of Appeals for the Seventh Circuit denied National Power’s petition for review and affirmed the FAA Administrator’s decision assessing a \$66,000 civil penalty for the company’s violations of the hazardous materials regulations (HMRs). The petition was filed October 26, 2016 and oral argument was held April 20, 2017. Nat’l Power Corp. v. FAA, 864 F.3d 529 (7th Cir.).

This case arose from an enforcement action charging National Power with violations of the HMRs in connection with its offering for transportation by air eleven shipments containing untested lithium ion batteries between the dates of January 8, 2010 and March 25, 2010. Each of the eleven shipments was improperly packaged, certified for shipment by an untrained individual, lacked emergency response information, and did not have the requisite approval from PHMSA to be shipped.

National Power challenged the Administrator’s decision on the grounds that: (1) it did not “knowingly” violate the HMRs within the meaning of 49 U.S.C. § 5123(a) because it did not intentionally or willfully violate the regulations; (2) substantial evidence did not support the FAA’s finding that the lithium ion batteries were untested because the batteries did not differ significantly from a previously tested model; and (3) the FAA’s assessment of the \$66,000 civil penalty was arbitrarily and capriciously imposed.

The Seventh Circuit held that: (1) a company does not need to act willfully or intentionally in order to be liable for a civil

penalty and, therefore, the Administrator's interpretation of "knowingly" in 49 U.S.C. § 5123(a) accorded with the plain language of the statute; (2) the Administrator did not abuse his discretion by finding National Power "knowingly" violated the charged regulations given the factual circumstances of the case; (3) substantial evidence supported the Administrator's finding that the lithium ion batteries offered by National Power were untested; and (4) the Administrator did not abuse his discretion by assessing a \$66,000 civil penalty.

### **Oral Argument Scheduled in Challenge to FAA Airworthiness Directive on Aircraft Engine Cylinders**

On August 11, 2016, the FAA issued a final airworthiness directive (AD) concerning certain aircraft engine cylinder assemblies. This AD was prompted by reports of multiple cylinder head-to-barrel separations and cracked and leaking aluminum cylinder heads. This situation could lead to failure of the engine, in-flight shutdown, and loss of control of the airplane. The AD addressed this issue by requiring removal of the affected cylinder assemblies, including overhauled cylinder assemblies, according to a phased removal schedule.

On October 11, 2016, Airmotive Engineering Corporation and Engine Components International, Inc. filed a petition in the D.C. Circuit Court of Appeals challenging the final AD. Airmotive Eng'g Corp. v. FAA, No. 16-1356 (D.C. Cir.). In their opening brief, petitioners argued that the FAA's finding that the pertinent cylinder assemblies presented an unsafe condition was arbitrary and capricious.

Specifically, petitioners argued that: (1) a failure of one cylinder in a multi-cylinder

engine is unlikely to lead to an accident; (2) the FAA's analysis overstated the likelihood of cylinder failure; (3) the accidents that the FAA cited in support of its unsafe-condition finding were inapplicable to the cylinders at issue in this case; (4) the FAA's finding of an unsafe condition in this case was inconsistent with how the agency treated cylinder failures in the past; and (5) the FAA arbitrarily compared the failure rate of cylinders at issue in this case with the lower failure rate of a completely different cylinder. Oral argument is scheduled for December 4, 2017.

### **City of Burien, Washington Challenges FAA's Sea-Tac Airport North Flow Procedure**

A petition for review was filed in the United States Court of Appeals for the Ninth Circuit on February 14, 2017 challenging the FAA's implementation of an automated heading for turboprops at Seattle-Tacoma International Airport (SEA) during a north flow departure and alleging failure by the FAA to conduct environmental review of alternative flight departure routes. City of Burien v. FAA, No. 17-70438 (9th Cir.). These procedures were established in a Letter of Agreement ("LOA") between the Seattle Tracon and the Seattle Tower signed on July 26, 2017.

Petitioner in this case, the City of Burien, is an incorporated city located in King County, Washington. Petitioner claims that the procedures established in the LOA have resulted in significant noise impacts to its community. Petitioner had requested that the FAA cease operation of the procedures and conduct additional environmental review of alternative flight departure routes that would have fewer significant adverse impacts on the City and its residents.

The parties entered into mediation in early 2017. On March 25, 2017, the FAA rescinded the provision of the LOA automating turboprop turns during a north flow departure. The FAA then completed a preliminary environmental analysis which it released for public comment from June 8 to July 5. The FAA is still reviewing the public comments received and has met with the City of Burien to discuss alternatives on July 25 and September 14, 2017. Mediation continues between the parties.

### **Briefing Complete in Georgetown Groups Challenge to FAA's Departure Procedures at National Airport**

A petition for review was filed in the U.S. Court of Appeals for the District of Columbia Circuit on August 24, 2015, challenging FAA's implementation of nine northern departure routes from Reagan National Airport (DCA). Citizens Ass'n of Georgetown v. FAA, No. 15-1285 (D.C. Cir.). The routes were approved in the FAA's December 12, 2013 Record of Decision (ROD), which was based upon a FONSI for the Washington D.C. Optimization of Airspace and Procedures in the Metroplex (D.C. Metroplex). The D.C. Metroplex established 41 new and modified procedures in the greater Washington, D.C. area. The FAA is implementing the new flight procedures to take advantage of updated technologies as part of its ongoing modernization of airspace in the United States.

The Petitioners in this case are a coalition of citizen groups from the Georgetown neighborhood. The challenge to the departure procedures is based on the procedures' alleged noise impacts to the Georgetown neighborhood. Petitioners claim

the FAA's approval of the procedures violated NEPA, the National Historic Preservation Act, and Section 4(f) of the U.S. Department of Transportation Act, and request that the procedures be set aside. The FAA and Petitioners participated in a court-ordered mediation, but were unable to resolve the dispute. On January 23, 2017, Petitioners filed their opening merits brief. Petitioners raise two arguments in support of their request that the procedures be set aside. First, Petitioners allege the FAA did not subject certain components of the departure procedures to adequate environmental review. Second, Petitioners allege the FAA violated public notice requirements set forth in the Council on Environmental Quality's NEPA regulations and the FAA's Orders implementing NEPA.

Merits briefing was completed on May 10, 2017. The parties have already fully briefed the FAA's Motion to Dismiss for Timeliness and Petitioners' Motion to Supplement the Administrative Record. Both motions are pending before the merits panel. The Court has not yet scheduled oral argument.

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

The Third Circuit affirmed the decision of the U.S. District Court for the District of New Jersey which dismissed a complaint by Bucks (County, PA) Residents for Responsible Airport Management (BRRAM) against FAA. BRRAM v. FAA, No. 15-2393 (3d Cir.). BRRAM's complaint alleged that the FAA's decision to use a categorical exclusion to approve Operations Specifications (OpSpecs) for Frontier Airlines at Trenton Mercer County Airport, (Trenton, NJ) violated NEPA. The Third Circuit affirmed the district court's

holding that it lacked jurisdiction over the challenge, because challenges of FAA final orders must be brought in a court of appeals. The Third Circuit also agreed with the district court that if there was no final order, the district court also lacked jurisdiction over BRRAM's claim that FAA violated NEPA and any attempt to amend the complaint could not provide a basis for jurisdiction in the district court.

In addition, while the challenge to FAA's approval to Frontier's Operations Specifications to operate at Trenton Mercer Airport was pending in the Third Circuit, Allegiant Airlines announced it would also seek approval to operate at Trenton. FAA approved the change to Allegiant's Operations Specifications to allow operations at Trenton on November 2, 2016. Because of the issues with timeliness in BRRAM's earlier challenge to the approval of Frontier's Operations Specifications, FAA served the Cat Ex and ROD on counsel for BRRAM the next day and BRRAM timely challenged the decision. BRRAM v. FAA, No. 16-4355 (3d Cir.).

BRRAM's arguments in the Allegiant case largely repeat its arguments in its untimely Frontier petition. It argues that FAA improperly restricted its environmental analysis of noise impacts to the number of flights Allegiant proposed as its initial service plan and failed to consider the cumulative impacts of potential future increases in Allegiant's operations. BRRAM also alleged that FAA failed to make a determination that no extraordinary circumstances existed before categorically excluding the action.

In response, FAA has argued that BRRAM is factually wrong. FAA considered the 20-year forecast of all air carrier traffic in making its determination that approving

Allegiant's Operations Specifications would not individually or cumulatively create a significant impact. FAA's Record of Decision discusses why FAA determined that no extraordinary circumstances existed. The case has been fully briefed and oral argument is scheduled for November 15.

### **FAA Challenged on Montana Runway Project**

The FAA completed a draft Environmental Assessment (EA) for a new runway project at the Ravalli County Airport in Hamilton, Montana. After a public comment period and revisions to the EA, the agency finalized the EA and signed a Finding of No Significant Impact and Record of Decision (FONSI/ROD) on January 27, 2017.

FAA published the Final EA and FONSI/ROD on March 29, 2017. Informing Citizens Against Runway Airport Expansion (ICARE) then filed a Petition for Review in the U.S. Court of Appeals for the Ninth Circuit on May 26, 2017, challenging the adequacy of the Final EA and FONSI/ROD.

The case, Informing Citizens Against Runway Airport Expansion v. FAA, No. 17-71536 (9th Cir.), was submitted and accepted for mediation. While discussions proceed, a briefing schedule has been set.

Petitioner's opening brief is due November 14, 2017; FAA's response brief is due February 15, 2018; and Petitioner's optional reply brief is due March 15, 2018.



## **Ninth Circuit Rules for FAA in Hillsboro, Oregon NEPA Challenge**

The Ninth Circuit previously reviewed a runway project located at the Hillsboro Airport (HIO) in Oregon (Barnes v. DOT, 655 F.3d 1124 (9th Cir.)) and determined "that remand [was] necessary for the FAA to consider the environmental impact of increased demand resulting from the HIO expansion project, if any." The airport is owned and operated by the Port of Portland. In order to address the court's concerns, the FAA completed three aviation forecasts: a constrained forecast, an unconstrained forecast, and a remand forecast (unconstrained forecast plus the results of a user survey). FAA then issued a Supplemental Environmental Assessment (SEA) that was again challenged by the Petitioners.

The Ninth Circuit issued its opinion denying the petition for review on August 3, 2017. Barnes v. FAA, No. 14-71180, 865 F.3d 1266 (9th Cir.). The panel held that the SEA and FONSI/ROD that had concluded the project complied with NEPA and the Airport and Airway Improvement Act (AAIA) were not arbitrary and capricious and were completed in accordance with the law. Petitioners filed a Petition for Panel Rehearing on August 17, 2017, which the court denied on September 5, 2017.

## **Sixth Circuit to Hear Challenge Against Somerset-Pulaski County Airport Board and FAA**

SPA Rental, LLC, filed a Part 16 complaint with the FAA against the Somerset-Pulaski County Airport Board. Under 14 CFR part 16, a person or entity directly and substantially affected by an airport sponsor's alleged noncompliance with grant

assurances may file a complaint with the FAA.

SPA argued in its Part 16 complaint that the airport sponsor of Lake Cumberland Regional Airport violated Grant Assurance 22, Economic Nondiscrimination; Grant Assurance 23, Exclusive Rights; and Grant Assurance 24, Fee and Rental Structure. SPA alleged that the Airport unjustly discriminated against it in favor of another entity when the sponsor amended its minimum standards and offered the other entity more favorable lease terms. The Airport replied that it was only amending the minimum standards to attract more business and seek services that SPA did not provide. The amended minimum standards provided for insurance and rental fee incentives for tenants who provided certain services.

In a Director's Determination, the FAA found that the Airport did not violate the grant assurances. SPA appealed this determination to the Associate Administrator, arguing that the Director failed to recognize the discriminatory nature of the leases between it and another fixed base operator. SPA also argued that the Director failed to find that the amended minimum standards violated the grant assurances. In the Final Agency Decision, the Associate Administrator rejected these claims and affirmed the Director's Determination.

SPA then appealed the Final Agency Decision to the Court of Appeals for the Sixth Circuit. SPA Rental, LLC v. Somerset-Pulaski County Airport Board, No. 16-3989 (6th Cir.). SPA filed its opening brief on June 12, 2017. SPA argued that 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.

FAA's response brief was filed on September 5, 2017. SPA filed a reply brief on September 22, 2017. The Court has not scheduled oral arguments.

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

On February 13, 2017, residents of neighborhoods nearby Louisville Bowman Field (LOU) and a local advocacy group, Plea for the Trees, filed a Petition for Review of a FONSI/ROD issued by the FAA on December 13, 2016. The FONSI/ROD covered an environmental assessment for a runway safety area project proposed by the airport sponsor, Louisville Regional Airport Authority (LRAA). The runway safety area project included the acquisition of aviation easements and trimming and removal of trees located on private property off-airport in an effort to remove obstructions to the navigable airspace and enable reinstatement of nighttime instrument procedures that the FAA had suspended several years prior.

The petition, filed in the Sixth Circuit Court of Appeals, Kaufmann v. FAA, No. 17-3152 (6th Cir.), alleges that the FAA violated NEPA, the National Historic Preservation Act (NHPA), and Section 4(f) of the U.S. Department of Transportation Act. Petitioners also moved, on February 22, 2017, for emergency injunctive relief to prohibit LRAA from acquiring easements or

trimming trees until final disposition of the case. The FAA and LRAA filed briefs opposing the petitioners' motion for injunctive relief on February 23, 2017. The court denied petitioners' motion on March 1, 2017, on the basis of petitioners' failure to first ask the agency for a stay per Rule 18 of the Federal Rules of Appellate Procedure, petitioners' delay in filing their petition and motion for stay, and petitioners' overall failure to satisfy the test for injunctive relief.

Petitioners' opening brief was filed on May 24, 2017, along with a request to supplement the Administrative Record. The FAA objected to this request as pertaining to an aviation easement executed well after the FONSI/ROD was issued. Petitioners argue that the easement is evidence that the sponsor has expanded the scope of the project. FAA and LRAA filed answering briefs on July 24, 2017. Petitioners' reply was filed on August 7, 2017. Oral argument is scheduled for December 5, 2017.

### **Eight Petitioners Challenge FAA's Southern California (SoCal) Metroplex FONSI/ROD**

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

Laguna Beach v. FAA, No. 16-73478 (9th Cir.); Stephen Murray v. FAA, No. 16-73479 (9th Cir.). One petitioner submitted a late-filed petition and a motion to intervene. County of Orange v. FAA, No. 16-73611 (9th Cir.).

The petitioners have challenged the adequacy of the FAA's environmental review – the FAA prepared an environmental assessment (EA) of the project – 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, the FAA completed the Final EA for the SoCal Metroplex project and signed the Finding of No Significant Impact/Record of Decision (FONSI/ROD). On Friday, September 2, 2016, the FAA issued the Notice of Availability (NOA) of the EA and FONSI/ROD through the Federal Register. The FAA is phasing implementation of the project.

On November 18, 2016, FAA filed motions to transfer the petitions filed in the Ninth Circuit to the D.C. Circuit as required by 28 U.S.C. §§ 2112(a)(1) & (5). The statutory provisions require consolidation in one court of appeals of petitions for review of the same agency order filed in two or more courts and filing of the administrative record in the court where proceedings with respect to the order were first instituted. “The purpose of [Section] 2112(a) is ‘to provide a mechanical rule easy of application to avoid confusion and duplication by the courts.’” Westinghouse Elec. Corp. v. U.S. Nuclear Regulatory Comm’n, 598 F.2d 759, 766 (3d Cir. 1979) (quoting NLRB v. Bayside Enters., 514 F.2d 475, 476 (1st Cir. 1975)).

On January 6, 2017, the Ninth Circuit granted FAA's motion and ordered the

petitions transferred to the D.C. Circuit, which consolidated all the petitions on March 3, 2017. Briefing schedules have been continued while mediation is ongoing. Since that time, the parties have engaged in further discussions about the possibility of resolving the case.

### **Complaint Filed Over Tour Management Plans and Voluntary Agreements in the National Park Air Tour Management Act**

On October 4, 2017, two advocacy groups, Public Employees for Environmental Responsibility and Hawaii Island Coalition Malama Pono, filed suit against the FAA in U.S. District Court alleging violations of the National Park Air Tour Management Act (NPATMA) and NEPA and seeking declaratory and injunctive relief. Pub. Employees for Env'tl. Responsibility v. FAA, No. 17-2045 (D.D.C.). Plaintiffs' claims are based on FAA's alleged failure to develop Air Tour Management Plans or Voluntary Agreements, as provided by NPATMA, since the Act came into effect in 2000 and was amended in 2012, and on the granting of interim operating authority (IOA) to existing operators.

Plaintiffs seek injunctive relief requiring the 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.

NPATMA, 49 U.S.C. § 40128, was enacted in 2000 and provides that “[t]he Administrator, in cooperation with the Director [of the National Park Service], shall establish an air tour management plan for any national park or tribal land for which such a plan is not in effect whenever a person applies for authority to conduct a commercial air tour operation over the park.” The stated objective of an Air Tour Management Plan is to “develop acceptable and effective measures to mitigate or prevent the significant adverse impacts, if any, of commercial air tour operations upon the natural and cultural resources, visitor experiences, and tribal lands.” Air Tour Management Plans are subject to review under NEPA. Park units with 50 or fewer annual overflights are exempt from the Act.

The Act also prescribes that “the Administrator shall grant interim operating authority under this subsection to a commercial air tour operator for commercial air tour operations over a national park or tribal lands for which the operator is an existing commercial air tour operator.” Interim Operating Authority (IOA) may be modified under certain circumstances and automatically “terminate[s] 180 days after the date on which an air tour management plan is established for the park or tribal lands.”

The FAA and the National Park Service have encountered many obstacles, predominantly related to environmental review, in their efforts to implement Air Tour Management Plans, and to date, no Air Tour Management Plans have been completed. Congress subsequently amended the Act as part of the FAA Modernization and Reform Act of 2012. The amendments authorize, as an alternative to Air Tour Management Plans, the execution of Voluntary Agreement with air tour operators

which are designed to “address the management issues necessary to protect the resources of such park and visitor use of such park without compromising aviation safety or the air traffic control system.” Voluntary Agreements do not require discrete environmental review under NEPA. Voluntary Agreements have been successfully executed with air tour operators at Big Cypress National Preserve and Biscayne National Park (both in Florida) and several others are in various stages of development.

The Complaint argues that plaintiffs’ members have been injured by the FAA’s failure to implement Air Tour Management Plans or Voluntary Agreements for the identified park units and that the court, through the APA, can compel the Agency to act. Plaintiffs also allege that the FAA has violated the NPATMA by failing to enter into plans or agreements at these parks and NEPA by not preparing an Environmental Impact Statement to review the grant of interim operating authority to existing air tour operators. In support of the NEPA claim, Plaintiffs argue that the alleged violation arises from the FAA’s “multiple and repeated grants of interim operating authority,” suggesting that the FAA renews IOA annually.

Plaintiffs seek a declaratory judgment that the FAA has violated the APA, NPATMA, and NEPA; an order requiring the FAA to develop Air Tour Management Plans or Voluntary Agreements within two years for all identified park units; an order enjoining any air tour operations over parks at which no Management Plan or Voluntary Agreement is completed within the two-year period; and attorneys’ fees and litigation expenses. FAA’s response to the Complaint is due on December 15, 2017.

## Federal Highway Administration

### Seventh Circuit Dismisses State of Wisconsin Appeal

On June 20, 2016, the State of Wisconsin appealed an adverse decision rendered by the United States District Court for the Eastern District of Wisconsin denying its request to reinstate the record of decision for the Wisconsin Route 23 project, which would widen parts of the Route 23 highway to four lanes. 1000 Friends of Wisconsin, Inc. v. DOT, 2016 WL 1718382 (E.D. Wis.). When the State of Wisconsin appealed the lower court's decision, FHWA did not join as a party.

On June 19, 2017, the Seventh Circuit ruled that because FHWA did not join the appeal, the Wisconsin Department of Transportation (WIDOT) did not have standing. The Seventh Circuit accordingly dismissed WIDOT's appeal. 1000 Friends of Wisconsin, Inc. v. DOT, 860 F.3d 480 (7th Cir.). As a result, WIDOT seeks FHWA support in preparing a limited scope supplement to the original Wisconsin Route 23 Environmental Impact Statement. WIDOT believes a limited scope supplement is the most expedient way to a deliverable project. FHWA is currently working with WIDOT to correct the deficiencies that were identified in the lower court's decision.

### Oral Argument Scheduled in Ninth Circuit Appeal in Federal Tort Claims Case

On September 30, 2016, the U.S. District Court for the District of Arizona granted the United States' motion for summary judgment in one of several interrelated Federal Tort Claims Act (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. United States, No. 11-901 (D. Ariz.). The case was on remand from the U.S. Supreme Court following the decision in United States v. June, 135 S. Ct. 1625 (2015) to determine whether the Plaintiff (Booth) was entitled to equitable tolling of his claim. Previously, the District Court decided against Booth on the grounds that the FTCA's 2-year statute of limitations was not subject to tolling and therefore his late-filed claims were "forever barred."

In its latest decision, 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 the FHWA concealed any information from him during that period.

On November 14, 2016, Plaintiff filed a Notice of Appeal in the Ninth Circuit. Booth v. United States, No. 16-17084 (9th Cir.). Briefing is complete and oral argument is set for December 6, 2017.

### **Ninth Circuit Affirms Lower Court in Litigation Involving Median Barriers in Arizona**

On August 21, 2017, U.S. Court of Appeals for the Ninth Circuit affirmed the order of the U.S. District Court for Arizona granting summary judgment in favor of the Federal Defendants. Dunlap v. United States, No. 16-015630, 2017 WL 3588417 (9th Cir.). This is another of the related FTCA cases involving the alleged failure of certain low-tension 3-cable median barriers on the National Highway System (NHS) in Arizona installed under a Federal-Aid project.

On appeal, Plaintiff had argued that the remand by the Ninth Circuit after the Supreme Court's decision in United States v. Wong, 135 S. Ct. 1625 (2015), the companion case to United States v. June, which made equitable tolling allowable under the FTCA, implied that he be given a second chance to argue for equitable tolling since it was not allowed under Ninth Circuit law at the time, and that the District Court erred in not permitting him to do so. The Ninth Circuit flatly disagreed, holding that its order "includes no conclusions, implied or otherwise, regarding the merits of Dunlap's equitable tolling argument" and that "[n]othing in the Supreme Court's decision in Wong mandates further consideration of equitable tolling in a case

such as this, where not only was the Plaintiff not barred from arguing equitable tolling in the first instance, but was actively encouraged by the trial court to do so." Thus, the district court's order reaffirming summary judgment will stand, bringing this long-running litigation to an end.

### **Lower Court Sides with Defendants in Another Litigation Involving Arizona's Median Barriers**

On August 29, 2017, the U.S. District Court for Arizona granted summary judgment in favor of FHWA in Keller v. United States, No. 11-02345, 2017 WL 3719878 (D. Ariz.). The case was remanded by the Ninth Circuit following the Supreme Court's decision in United States v. Wong, 135 S. Ct. 1625 (2015), for further proceedings on whether equitable tolling should apply to the Plaintiff's claim, which was filed after the 2-year statute of limitations in 28 U.S.C. § 2401(b) expired. This is one of several related Federal Tort Claims Act (FTCA) cases involving the alleged failure of certain low-tension 3-cable median barriers on the National Highway System (NHS) in Arizona installed under a Federal-Aid project.

The Plaintiff's daughter, Amanda Keller, was killed on September 7, 2007 when her vehicle crossed the median of Interstate 10 and collided with an oncoming vehicle. Plaintiff filed her administrative claim December 16, 2010 alleging negligence by FHWA in approving and funding the median barrier in question, which FHWA denied as untimely. She brought suit and sought to have her claim equitably tolled on the grounds that FHWA concealed critical information about her claim that prevented her from timely filing. The Court noted that to invoke the doctrine of equitable tolling, a Plaintiff must show (1) that she has been

pursuing her rights diligently, and (2) that some extraordinary circumstances stood in her way preventing her from submitting a timely claim. The Court concluded that Keller failed to meet either element since her attorney, whose knowledge is imputed to her, knew about FHWA's potential liability as far back as November 2006, and there was no evidence that FHWA attempted to conceal any critical information that would have prevented her from filing on time.

Plaintiff filed an appeal with the Ninth Circuit on October 26, 2017.

### **Further FTCA Litigation Involving Arizona Median Barriers**

On May 3, 2017, Kenneth Clark filed a lawsuit against the United States under the Federal Tort Claims Act (FTCA) alleging negligence by FHWA in the funding of a certain three-cable median barrier on Arizona State Route 202. Clark v. United States, No. 17-01337 (D. Ariz.). The barrier failed to prevent a cross-over accident on October 4, 2014, in which Plaintiff was severely injured.

On October 3, 2016, the Plaintiff filed his administrative claim seeking compensation for his injuries. FHWA denied that claim on November 3, 2016 on the following grounds: 1) FHWA does not own or operate the highway, nor the equipment in question; 2) there is no legal duty owed by FHWA that it breached in its decision to authorize Federal reimbursement for the equipment; 3) FHWA's actions did not cause or contribute to the injuries suffered by the Plaintiff; and that, even if FHWA was negligent, FHWA's actions are covered by the discretionary function exemption to the FTCA which prevents suit.

FHWA filed a Motion to Dismiss Clark's lawsuit for lack of subject matter jurisdiction on September 12, 2017 on the grounds that the challenged conduct is covered by the discretionary function exemption and the complaint fails to identify a tort for which a private person could be found liable under Arizona law (private party analogue). Motion briefing will be completed in the coming weeks.

### **Ninth Circuit Hears Challenge to South Mountain Freeway in Arizona**

The U.S. Court of Appeals for the Ninth Circuit heard the merits of the South Mountain Freeway litigation on October 19, 2017. PARC and GRIC v. FHWA, Nos. 16-16605, 16-16586 (9th Cir.). The lawsuit challenges the approval of the South Mountain Freeway (a 22-mile, 8-lane new alignment near Phoenix, Arizona) and raises several NEPA claims and a claim under Section 4(f) of the Department of Transportation Act. The appeal is brought by Protecting Arizona's Resources and Children, et al. (PARC) and Gila River Indian Community (GRIC) following the District Court of Arizona's grant of summary judgment in favor of FHWA and Arizona Department of Transportation (ADOT) on all counts.

The South Mountain Freeway will complete "Loop 202" from I-10 Maricopa Freeway to I-10 Papago Freeway and will address regional transportation demand, existing congestion and traffic delays, and future deficiencies based on historical and projected growth in the area. The project has been in the Maricopa Association of Governments (MAG)'s Regional Transportation Plan (RTP) since the 1980s, but was stalled for various political and

funding reasons over the years. FHWA signed the Record of Decision in March 2015.

In June 2015, Plaintiffs PARC and GRIC filed separate lawsuits in Federal District Court, which were eventually consolidated. Plaintiffs claimed Defendants failed to comply with NEPA and section 4(f) in approving the project. GRIC also raised a unique argument with respect to three wells held in trust by the Bureau of Indian Affairs, claiming that FHWA and ADOT must avoid the wells and that the Agencies did not demonstrate they could do so.

On August 19, 2016, the U.S. District Court of Arizona granted summary judgment in favor of FHWA and ADOT on all counts, finding that the Agencies had not violated NEPA or Section 4(f). PARC and GRIC v. FHWA, Nos. 15-00893 and 15-01219, 2016 WL 5339694 (D. Ariz.). Specifically, the Court found the Agencies' discussion of purpose and need in the Final Environmental Impact Statement (FEIS) was reasonable and the Agencies' reliance on MAG's RTP to develop the purpose and need was proper. The Court also upheld the alternatives analysis, including the underlying growth assumptions of the "no-build" alternative.

The Court found that all environmental impacts, including impacts to GRIC, children's health, mobile source air toxics, truck traffic, and hazardous materials transportation were sufficiently analyzed, and that the mitigation analysis was also adequate. Finally, the Court granted summary judgment for defendants on the section 4(f) claims, finding no error in the Agencies' determination that no feasible and prudent avoidance alternative existed to the use of the South Mountain Park and Preserve, and that all possible planning to minimize harm had been conducted.

Following the loss, Plaintiffs appealed to the Ninth Circuit. Plaintiffs separately sought injunctions pending appeal at the District Court and later in the Ninth Circuit. All motions for injunctions pending appeal were denied. Opening briefs were filed in January through March 2017. The Ninth Circuit held oral argument on October 19, 2017 in San Francisco, CA. A decision is expected in the coming months.

### **District Court Rules in Favor of FHWA in Mid County Parkway NEPA, Section 4(f) Case**

On May 11, 2017, U.S. District Court Judge George Wu ruled in favor of Defendants FHWA and the Riverside County Transportation Commission (RCTC) on all counts in Center for Biological Diversity v. FHWA, No. 16-00133 (C.D. Ca.). This lawsuit was brought by a coalition of environmental groups against the Mid County Parkway (MCP) Project, which would construct a \$1.4 billion 16-mile east-west freeway between Interstate 215 and State Route 79 in Riverside County, California. The MCP is a "retained" project under the NEPA Assignment Program (23 U.S.C. § 327), which means that FHWA, not Caltrans, is responsible for the environmental review and its defense. FHWA issued a Record of Decision for the project in August 2015.

Plaintiffs' complaint alleged FHWA violated NEPA, Section 4(f) of the Department of Transportation Act (section 4[f]), and the APA. With regard to NEPA, Plaintiffs claimed FHWA: 1) too narrowly defined purpose and need; 2) studied too narrow a range of alternatives; 3) failed to fully and adequately disclose and evaluate the project's environmental impacts; 4) used

an improper no-build baseline for traffic projections, i.e., that the baseline figures used in traffic modeling were “based on growth projections that assume the existence of the [MCP];” and 5) failed adequately to respond to comments. Plaintiffs also claimed the MCP Project “would constructively use section 4(f) resources including schools and parks.” (In their subsequent motion for summary judgment Plaintiffs failed to raise several of these allegations, including the traffic modeling issue, waiving those claims.)

Judge Wu’s decision held that all but two of the arguments Plaintiffs raised by way of their motion for summary judgment were not properly before the Court because they had not been administratively exhausted. For the two remaining claims (an allegedly deficient description of the project route and an allegedly unsatisfactory consideration of the range of alternatives), the Court ruled on the merits in favor of FHWA and RCTC.

Although Plaintiffs had commented on many topics during the NEPA process, Judge Wu found most of the claims in their complaint only vaguely supported – at best – in the administrative record.

As for the two claims the Court let stand, 1) a deficient project description and 2) an inadequate range of alternatives, Judge Wu ruled in favor of FHWA and RCTC. Citing to case law in the Ninth and Third Circuits, the Court had “no difficulty in concluding that FHWA’s description of the route of the MCP was sufficient and clear enough to the public, and did not run afoul of [the Council on Environmental Quality’s NEPA regulations] or violate the principles announced in” Supreme Court or Ninth Circuit precedent. On July 27, 2017, Plaintiffs filed a Notice of Appeal to the

United States Court of Appeals for the Ninth Circuit. Briefs are due in early 2018.

### **U.S. District Court Grants Summary Judgment in Favor of FHWA & Idaho DOT in Case Challenging Use of Modelling in NEPA**

On August 29, 2017, the U.S. District Court for Idaho granted summary judgment in favor of FHWA and the Idaho Department of Transportation (IDT) in Paradise Ridge Defense Coalition v. Hartman, No. 16-00374 (D. Id.). This litigation involves the US-95 Thorncreek Road to Moscow Project in Latah County, Idaho, which involves realigning approximately 5.85 miles of US-95 immediately south of Moscow, Idaho to improve safety and increase capacity.

In the case, Plaintiff alleged that FHWA violated section 706 of the APA in its decision approving the preferred alternative—the “E-2 Alternative”—because the analysis in its Environmental Impact Statement (EIS) did not meet the requirements of NEPA and Executive Order 11990 (Protection of Wetlands). The Court heard oral argument on July 24, 2017 and took the competing motions for summary judgment under advisement. The Court subsequently ruled in favor of FHWA/IDT on all claims. One of the central issues in the case was the crash prediction methodology that the agencies in part relied on to determine the safest alternative. The Court disapproved of the methodology’s result and implied that had it been the only consideration the decision would have been arbitrary and capricious, but that the other “engineering judgement” factors considered provided adequate justification.



## Two Groups File Environmental Claims for Colorado I-70 Project

On July 9 and 10, 2017, two groups filed separate lawsuits against the FHWA for its approval of the I-70 East, Phase I project (“Central 70”) located in north Denver and Aurora, Colorado. Zeppelin v. FHWA, No. 17-01661 (D. Colo.) & Sierra Club v. Chao, No. 17-01679 (D. Colo.). The project is the first phase of improvements to a 12-mile stretch of the freeway to remedy worsening safety, mobility, and congestion issues. FHWA and the Colorado Department of Transportation (CDOT) published the FEIS for the project in January 2016 and issued a ROD selecting the “PCL Alternative” on January 19, 2017. Construction of the project is expected to begin in March 2018. The project website is <http://www.i-70east.com/>

Litigation by these two groups against the project has been anticipated for some time. The first group is comprised of five individual plaintiffs led by local developer Kyle Zeppelin. The Zeppelin plaintiffs claim six violations of NEPA and one of Section 4(f) of the Department of Transportation Act (Section 4(f)) based on alleged segmentation of drainage components in the analysis, and inadequate analysis of impacts from hazardous materials that will be disturbed during construction. The second group is a consortium of four non-profit interest groups led by the Sierra Club.

The Sierra Club plaintiffs claim ten violations of NEPA, six of the Clean Air Act, and one of the Federal-Aid Highway Act (23 U.S.C. §109(h)), based on alleged flaws in the air quality and transportation conformity analyses and findings. The substance of the allegations against FHWA boil down to three issues: 1) whether the

City of Denver’s flood-control project that benefits the freeway is a “connected action” under NEPA and should have been analyzed as such in the FEIS; 2) whether FHWA’s analysis of hazardous materials disturbance during construction was adequate; and 3) whether FHWA’s analysis of air quality impacts, transportation conformity, and associated ramifications for human health was adequate and legal.

Plaintiffs seek various declaratory and injunctive relief to vacate the Record of Decision and require FHWA to correct the alleged deficiencies in the environmental analysis before proceeding, as well as attorney’s fees. The cases were assigned to the Hon. Wiley Y. Daniel. The State of Colorado was not named in the complaint but was granted intervention on September 11, 2017. Shortly thereafter, the cases were consolidated into a single docket in response to FHWA’s unopposed motion to do so. The parties have agreed to and lodged a Joint Case Management Plan with the court setting dates for preliminary pleadings, production of the administrative record, and opening briefs which are due this Spring. Deadlines for requesting preliminary injunctions are also included in the plan, and the Zeppelin plaintiffs filed their request for preliminary injunction on September 15<sup>th</sup>. FHWA and CDOT filed their opposition as well as Motions to Dismiss on jurisdictional and constitutional (standing) grounds, and await Zeppelin’s reply and the court’s ruling. Sierra Club’s request is scheduled to be filed in November.

Based on the current schedule, the parties anticipate a final ruling on the merits sometime in 2018.



### **District Court Dismisses Lawsuit brought by Narragansett Indian Tribe against FHWA**

On September 11, 2017, the U.S. District Court for the District of Rhode Island entered judgment on behalf of FHWA and the Rhode Island Department of Transportation (RIDOT), granting their motions to dismiss Plaintiff's complaint for lack of subject matter jurisdiction. Narragansett Indian Tribe by & through Narragansett Indian Tribal Historic Pres. Office v. Rhode Island Dep't of Transp., No. 17-125, 2017 WL 4011149 (D.R.I.). The Court stated that the Plaintiff's claims directed at the Federal government failed because there has been no waiver of sovereign immunity. Neither the Declaratory Judgment Act (DJA) nor the National Historic Preservation Act (NHPA) provides an expression of a waiver. The only other basis Plaintiffs alleged for jurisdiction was under the APA. The APA obviates Plaintiff's reliance on it as a jurisdictional action because it "only provides for review of federal agency action." The Court concluded that the "Plaintiff's complaint is devoid of any assertion that Federal Defendants' final agency action caused Plaintiff harm. Accordingly, Federal Defendants' Motion to Dismiss under Rule 12(b)(1) of the Federal Rules of Civil Procedure is granted." The court dismissed claims against the State of Rhode Island, finding that the NHPA does not provide for a private right of action on NHPA claims.

By way of background, on March 31, 2017, the Narragansett Tribe, by and through the Narragansett Indian Tribe Historic Preservation Office (NITHPO), filed suit regarding the I-95 Providence Viaduct Bridge Project against the Rhode Island

Department of Transportation and FHWA. The complaint alleged that RIDOT, pursuant to the Programmatic Agreement (PA) executed by the parties, had acquired title to Tribal Historic Properties (Properties) specified therein. RIDOT, in alleged violation of the PA, now refused to transfer title to NITHPO, unless it waived its sovereign immunity and executed a covenant within the deeds that the properties shall be subject to the laws of Rhode Island. Plaintiff refused to accept that condition and the lawsuit followed thereafter.

On September 28, 2017, the Plaintiff filed its appeal with the U.S. Court of Appeals for the First Circuit.

### **Historical Society Files Suit Claiming Historic Home Should Have Been Protected**

On July 19, 2017, Camden County Historical Society filed a civil action for declaratory and monetary relief alleging violation of section 106, more specifically the National Historic Preservation Act (NHPA), 36 CFR § 800 et seq., against the USDOT, FHWA, and the New Jersey Department of Transportation (NJDOT). Camden County Historical Society v. New Jersey Dep't of Transp., No. 17-05270 (D.N.J.).

The historic property at issue is the Harrison-Glover House (Harrison House), which was demolished on March 3, 2017, to make way for a federally funded highway reconstruction project in Bellmawr, New Jersey. The project involved a major reconstruction of the intersections of Federal Highway 295 and State Highway 42.

Plaintiff alleges that Defendants unilaterally and arbitrarily concluded that the Harrison

House was not eligible for inclusion on the National Register of Historic Places (National Register) and manipulated the results of the survey and evaluation that were conducted to determine the Harrison House's eligibility. Plaintiff further alleges that FHWA and USDOT violated the APA, 5 U.S.C. § 706(2)(a), by delegating its obligations under Section 106 to NJDOT. Plaintiff argues that FHWA and USDOT violated the APA by: 1) failing to adequately supervise NJDOT; 2) failing to minimize the adverse impacts of the project to a historic site; and 3) permitting NJDOT to continue to act as an agency official when it failed to carry out the proper obligations under section 106.

Plaintiff sets forth five claims for relief in which two are federal claims and three are state law claims: 1) Violation of the NHPA as Against All Defendants; 2) Violation of the APA as Against the Federal Defendants; 3) Fraudulent Concealment of Evidence Against NJDOT; 4) Conspiracy to Commit Tort as Against All Defendants; and 5) Negligent Spoliation of Evidence as Against All Defendants. Plaintiff seeks both declaratory and monetary relief against USDOT and FHWA.

### **Western District of Kentucky Grants FHWA's Motion to Dismiss in FTCA Case**

On July 26, 2017, the U.S. District Court for the Western District of Kentucky entered judgment on behalf of the USDOT and Kentucky Transportation Cabinet (KYTC), granting their motions to dismiss Plaintiff's complaint for lack of subject matter jurisdiction and failure to state a claim in Martin v. DOT, No. 11600124 (W.D. Ky.). Plaintiff, appearing pro se, sought \$100 million in damages under the Federal Tort

Claims Act (FTCA) as a result of the design and construction of the I-65 widening project abutting her property. The Plaintiff alleged a broad range of issues, such as asserting that the speed limit on nearby roads is too high, that the road location prevents her from opening a hotel or restaurants, and that there are Federal actions she thinks should be undertaken, such as removal of fourteen phone poles east of the I-65 interchange.

Under the FTCA, the Federal government waives its sovereign immunity in order to provide a remedy for the negligent or wrongful conduct committed by a Federal employee. In this case however, the Court concluded that DOT was immune because the alleged tort was committed by either State employees or State contracted employees. The Court held that the existence of Federal funding, standing alone, was insufficient to establish liability.

Regarding whether a State retains sovereign immunity, the Court noted three exceptions: 1) the State consents to suit; 2) Congress has abrogated a State's sovereign immunity by statute; and 3) injunctive relief is sought to prevent future constitutional violations. In this case, the Court concluded that KYTC was immune because it did not consent to be sued, no statutory waiver applied, and Plaintiff only sought monetary relief.

The Court dismissed the case because neither the Federal government nor the State government waived sovereign immunity, and because no exceptions applied. It is currently unknown whether Plaintiff will appeal.

## **West Palm Beach Files Suit Against Federal Agencies Claiming Environmental Concerns**

On September 14, 2017, Plaintiff City of West Palm Beach, Florida filed a complaint in the U.S. District Court for the District of Columbia 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. 17-01871 (D.D.C.). The complaint names the U.S. Army Corps of Engineers, the U.S. Fish and Wildlife Service, the U.S. Department of the Interior, FHWA, and EPA as defendants (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.

Plaintiff alleges violations of NEPA, the Clean Water Act (CWA), the Endangered Species Act (ESA), 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; relied on an overly narrow analysis of the purpose and need for the project; and failed to provide adequate and accurate information in the EA to inform the public of the full scope of the project’s potential environmental effects.

Plaintiff’s CWA/APA claim alleges that Defendants failed to select the a suitable alternative; failed to require appropriate avoidance and minimization impacts; issued a permit that will degrade U.S. water systems; failed to provide adequate Aquatic Resources of National Importance (ARNI) protection; approved an insufficient

mitigation plan; failed to perform a public interest review and improperly weighed benefits of the project against its impacts; and failed to condition the permit properly.

Finally, Plaintiff alleges two violations pursuant to ESA section 7. First, that Defendants failed to consider negative impacts on the snail kite and the wood stork; failed to consider all available data, failed to articulate the level of “take”; and failed to condition the Biological Opinion to minimize impacts on the federally listed species in the area. The second violation under the ESA is USFWS’ failure to reinstate consultation regarding the snail kite and the red-cockaded woodpecker. Briefs are due on November 17, 2017.

## **Date Set for Hearing in Case Involving Longmeadow Parkway Bridge and Highway Project**

On September 5, 2017, the U.S. District Court for the Northern District of Illinois granted the pro se Plaintiff-intervenor’s (a group known as Stop Longmeadow) motion for an extension to file an amended complaint. Petzel v. Kane County Dep’t of Transp., No. 16-5435 (N.D. Ill.). This case involves the Longmeadow Parkway Bridge and Highway Project (Project) in Kane County, Illinois, which spans approximately 5.6 miles. (This represents the second time the Plaintiff has amended the complaint in this matter.) The Court had previously denied a NEPA challenge to the Record of Decision back 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. A new judge was assigned and the briefing schedule has been set in this matter and a hearing is set for November 17, 2017.

## **Federal Motor Carrier Safety Administration**

### **District Court Dismisses Complaint Seeking Injunctive Relief to Stop Compliance Reviews**

On September 20, 2017 the U.S. District Court in Flat Creek Transp., LLC v. FMCSA, No. 16-00876 (M.D. Ala.), granted the government's motion to dismiss based on lack of subject-matter jurisdiction. On November 7, 2016, Plaintiff Flat Creek Transportation filed a complaint seeking declaratory and injunctive relief under the APA, alleging that FMCSA's past and anticipated future performance of compliance review investigations were arbitrary and capricious and not in accordance with law.

Plaintiff sought to enjoin an anticipated compliance review, filing an emergency

preliminary injunction when the review was scheduled for March 2017. The Court denied the request for emergency relief and the compliance review resulted in a Satisfactory safety rating for Flat Creek. Based on this rating, the government filed a motion to dismiss arguing that plaintiff alleged no injury that would support standing, the matter was moot, and the court therefore lacked jurisdiction. The Court granted the motion and dismissed the matter finding that plaintiff lacked standing necessary to support jurisdiction.

### **Declaratory Judgement Sought on "Off-Road" Vehicle Involved in a Fatal Crash**

On August 1, 2017, Unique Railroad Contractors d/b/a Krause Brothers Construction filed a complaint for declaratory judgement in the U.S. District Court for the District of North Dakota in Unique R.R. Contractors, Inc. d/b/a Krause Bros. Constr. v. FMCSA, No. 17-159 (D. N.D.).

Plaintiff, a construction company that hauls sand, gravel, and dirt for a local farmer's cooperative, seeks an FMCSA determination on whether the Federal Motor Carrier Safety Regulations apply to plaintiff's vehicle, a tractor-trailer reconfigured for off-road use, that only operates on public highways when it crosses a State road to get from one part of the farmer's cooperative to another. Plaintiff relies on agency guidance providing that "off-road construction equipment which, by its design and function is obviously not intended for use, nor is it used on a public road in furtherance of a transportation purpose" is not a commercial motor vehicle for purposes of application of the FMCSA safety regulations.

The vehicle was involved in a crash on the public road and North Dakota State Police cited the company for commercial vehicle and driver violations and placed the vehicle out-of-service. On September 6, the Court granted a joint motion for a stay of the proceedings until December 1, to allow plaintiff to exhaust its administrative remedies through the filing of a DataQs request seeking review and correction of the North Dakota post-crash inspection report.

## **Federal Railroad Administration**

### **Case Challenging FRA Guidance for State Sponsors of Intercity Passenger Rail Held in Abeyance**

On July 12, 2017, the Government filed an unopposed motion in the D.C. Circuit to hold in abeyance the consolidated cases in North Carolina Dep't of Transp. and Capitol Corridor Joint Powers Authority v. FRA, No. 16-1352 (D.C. Cir.), which challenged FRA's "Guidance for Safety Oversight and Enforcement Principles for State-Sponsored Intercity Passenger Rail Operations" (Guidance), pending the final resolution of petitions for reconsideration of FRA's System Safety Program (SSP) rule, which is mentioned as an example in the Guidance. The Government's motion reiterated that while the Government maintains that the Guidance is consistent with the current SSP rule, the completion of FRA's review and outreach process for the SSP rule could result in changes to the rule that resolve some of the objections to the Guidance in the litigation matter. On July 19, the D.C. Circuit ordered that the case be held in abeyance pending further order of the court and ordered the Government to file a status report by December 14, 2017.

The case consists of petitions for review filed by the North Carolina Department of Transportation and the Capitol Corridor Joint Powers Authority (collectively, the Petitioners) on October 6 and October 7, 2016, respectively, that challenge FRA's Guidance. The D.C. Circuit issued an order consolidating the cases on October 12, 2016. Both petitions for review assert FRA issued the Guidance without observance of the procedures required by law. They further allege the Guidance is arbitrary, capricious, an abuse of discretion, and in excess of FRA's statutory authority.

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

On February 10, 2017, the Petitioners filed a joint opening brief. In their brief, the



Petitioners argued that the D.C. Circuit should vacate the Guidance because FRA failed to follow the APA notice and comment procedures. First, the Petitioners alleged that the Guidance is a legislative rule, requiring notice and comment, because it relies on FRA's general legislative authority, rather than a specific statutory directive. Second, the Petitioners argued that notice and comment were necessary under the APA because the Guidance is not an interpretive rule, a policy statement, or a procedural rule. Finally, the Petitioners argued that even if the Guidance were an interpretive rule, a policy statement or a procedural rule, FRA's Rules of Practice require notice and comment. The Association of American Railroads (AAR) filed an amicus brief on the issue of the finality and reviewability of FRA determinations on March 3, 2017.

On April 3, 2017, the Government filed its brief. In its brief, the Government argued that the D.C. Circuit should not vacate the Guidance because it is not final agency action. FRA argued that the Guidance does not determine or create legal obligations, rights or consequences and there is no evidence in the record demonstrating the Guidance is binding or final. The Government also argued that the Guidance is not subject to notice and comment because it is not a legislative rule, but rather a policy statement. On April 17, Petitioners filed a reply brief, reasserting the Guidance is final agency action and a legislative rule that requires notice and comment.

## **Federal Transit Administration**

### **Ninth Circuit Dismisses Beverly Hills Unified Schools District (BHUSD)'s Injunction Request for LA Metro Westside Project**

On August 8, 2017, the Ninth Circuit dismissed Beverly Hills Unified School District's (BHUSD's) appeal, requesting an injunction for the Los Angeles Westside Purple Line Extension Section 2 Project ("Westside Project"), Beverly Hills Unified School Dist. v. FTA, No. 17-5580 (9th Cir.). Oral arguments were previously held on July 14, 2017, to determine whether the U.S. District Court's denial of BHUSD's Motion for a Preliminary Injunction (PI) should be upheld. BHUSD had alleged that FTA violated NEPA and predetermined the outcome by executing the Full Funding Grant Agreement (FFGA) and allowing the Los Angeles County Transportation Authority (LA Metro) to proceed with a design/build contract prior to completion of the Supplemental Environmental Impact Statement (SEIS).

The Ninth Circuit held it only had jurisdiction over the question of predetermination if BHUSD had properly challenged a final agency action. The Court determined that the FTA Full Funding Grant Agreement (FFGA) and Design/Build contracts did not involve an "irreversible and irretrievable commitment of resources," and thus were neither "major Federal actions" under NEPA nor final agency actions.

The case involves the proposed LA Metro Westside Project, which would extend the existing LA Metro Purple Line by approximately nine miles west from the Wilshire/Western Station to a new terminus

at a new Westwood/VA Hospital Station in Santa Monica. BHUSD is seeking to challenge the Westside Project Section 2's tunnel alignment underneath the Beverly Hills High School due to concerns regarding methane gas and potential construction impacts.

BHUSD previously challenged the Westside Project FEIS in U.S. District Court. Beverly Hills Unified School District v. FTA, No. 12-9861 (C.D. Cal. 2013). On August 12, 2016, the U.S. District Court upheld FTA's Record of Decision (ROD) for the LA Metro Westside Project, but required a limited scope SEIS and a Section 4(f) analysis. The 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." The Beverly Hills High School is a Section 4(f) historic and recreational resource, and the Court required FTA to analyze "use" of the Beverly Hills High School due to "incorporation of land" by the Westside Project tunnel.

The District Court also found that "FTA did not make substantive decisions that were demonstrably wrong . . . Rather, the problems arose from the agency's

procedural deficiencies and/or questions as to the sufficiency of its analysis." FTA is working with LA Metro to complete a limited scope SEIS and 4(f) document. The Court is retaining jurisdiction over the ongoing SEIS and 4(f) processes.

## **Maritime Administration**

### **Motion to Dismiss Filed in Portland Harbor CERCLA Case**

The Yakama Nation recently brought an action in Confederated Tribes and Bands of the Yakama Nation v. Air Liquide America Corp., No. 17-00164 (D. Or.), against several potentially responsible parties, including the United States, seeking recovery of past and future response costs and asserting damages to natural resources arising from defendants' activities at Portland Harbor. The Federal defendants filed a motion to dismiss part of the Yakama Nation's second claim for relief insofar as it seeks a declaratory judgment under CERCLA for reasonable costs assessing the injury, loss, or destruction of natural resources and to stay any remaining claims pending the outcome of the prior Portland Harbor litigation. In response, the Yakama Nation filed an amended complaint and on September 22, 2017, the Federal Government filed its revised motion to dismiss.

### **Matson Challenges Maritime Security Program Vessel Substitution**

On June 2, 2017, Matson Navigation Company filed a petition for review in 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 government filed a motion to dismiss for lack of jurisdiction under the Hobbs Act on July 18, 2017. On September 28, 2017, the court referred the motion to the merits panel for a ruling.

The petition 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. 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.

The Government must file its index to the Administrative Record by November 13, 2017. Matson's opening brief is also due on November 13, 2017.

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

On November 16, 2016, the U.S. District Court for the Eastern District of New York dismissed gender and age discrimination claims brought against the U.S. Merchant Marine Academy (USMMA) by plaintiff

Edith Angioletti. In the case, Angioletti v. Foxx, No. 14-5848 (E.D.N.Y.), the plaintiff claimed that the USMMA discriminated against her on the basis of gender, in violation of Title VII of the Civil Rights Act of 1964 (Title VII), and age, in violation of the Age Discrimination in Employment Act (ADEA), when the USMMA failed to hire her for a permanent position at the conclusion of her two-year term appointment. The plaintiff claimed that the USMMA also retaliated against her in violation of Title VII.

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

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

weakened by her being a member of the protected class when hired.

The Plaintiff filed an appeal in the Second Circuit. The appeal has been fully briefed and the decision is pending.

## **National Highway Traffic Safety Administration**

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

In ongoing litigation challenging the latest medium- and heavy-duty fuel efficiency rule adopted by NHTSA, along with EPA's greenhouse gas emission rule, the Truck Trailer Manufacturers Association, Inc. (TTMA) recently filed a motion for stay of EPA's requirements. Truck Trailer Mfrs. Ass'n, Inc. v. EPA, No. 16-1430 (D.C. Cir.). In its September 25, 2017 motion, TTMA argues that if EPA's trailer standards remain in effect during the pendency of judicial review they will cause TTMA's members immediate and irreparable harm and will result in little if any emissions benefits while increasing accidents and fatalities. On October 12, 2017, the government filed a response in which EPA did not oppose the relief that TTMA sought in its stay motion. On October 27, 2017, the court granted TTMA's motion for a stay of the EPA rule and the government's earlier filed motion to otherwise hold the case in continued abeyance. The parties were ordered to file status reports in 90-day increments, beginning on January 25, 2018.

These motions follow EPA and NHTSA filing a series of motions to hold this case in abeyance to consider TTMA's request for reconsideration of the final rulemaking. NHTSA received two letters from TTMA

requesting reconsideration of the final rulemaking, one of April 4, 2017 and a supplemental letter on June 26, 2017. NHTSA considered TTMA's letters as a petition for rulemaking pursuant to its procedural regulations. On August 17, 2017, NHTSA granted TTMA's petition for rulemaking. On the same day, EPA sent TTMA a similar letter stating that it would revisit the trailer portions of the final rule.

The petitioners filed a petition for review on December 22, 2016 in the U.S. Court of Appeals for the D.C. Circuit of the final rule, "Greenhouse Gas Emissions and Fuel Efficiency Standards for Medium- and Heavy-Duty Engines and Vehicles—Phase 2," which was published in the Federal Register at 81 Fed. Reg. 73,478 (October 15, 2016). On January 23, 2017, several states and environmental groups filed motions to intervene as respondents, which the court granted on March 10, 2017.

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

### **Groups Seek to Compel NHTSA Rulemaking on Rear Seat Belt Reminder Systems**

On August 16, 2017, Kids and Cars, Inc. and the Center for Auto Safety filed suit against NHTSA in the United States District Court for the District of Columbia for failure 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. 17-01660 (D.D.C.). MAP-21 required NHTSA to “initiate a rulemaking proceeding” by October 1, 2014 and to finalize the rule by October 1, 2015. The plaintiffs 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 none of the prerequisites were satisfied for these methods. Accordingly, the plaintiffs allege that NHTSA has unlawfully withheld and unreasonably delayed action required by law, in violation of the APA. The plaintiffs request that the Court require NHTSA to promulgate a final rule within a year.

The Department informed the plaintiffs that the complaint should have been filed in appellate court, rather than district court. Upon further review, the plaintiffs agreed, voluntarily dismissed the case, and have stated an intention to file a mandamus petition in the appellate court. In the meantime, the plaintiffs requested that NHTSA consider negotiating a schedule to promulgate the rule.

### **Suit Filed Over Tesla Vehicle Data**

On June 28, 2017, Quality Control Systems Corp. (“QCS”), a provider of statistical research services, filed a Complaint for Injunctive Relief against the U.S. Department of Transportation in the United

States District Court for the District of Columbia. Quality Control Sys. Corp. v. DOT, No. 17-01266 (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 time limit.

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.

NHTSA answered the complaint on August 22, 2017, asserting as affirmative defenses that QCS’s claims were moot and that the complaint fails to state a claim upon which relief could be granted. Briefing on summary judgment is expected to be completed in late November 2017.

### **Partial Motion for Summary Judgment Filed in FOIA Case**

On May 12, 2016, Plaintiff Nathan Atkinson filed a FOIA lawsuit against the Department. 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, Mr. 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 agreed that it did not search all sources likely to contain responsive records, and remanded the initial FOIA



request for further processing. NHTSA then produced additional documents to the Plaintiff on a rolling basis.

In an effort to move forward with the case, on July 28, 2017, NHTSA provided Plaintiff with a re-run production containing bates labeled pages of the prior productions as well as additional unredacted material and documents. On July 28, 2017, NHTSA also produced an accompanying Vaughn index detailing which documents were withheld under which FOIA Exemptions and its justification for the withholdings. On August 28, 2017, NHTSA produced additional documents that a custodian had located, as well as a supplemental Vaughn index to accompany that production. 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 United States provided a detailed explanation of NHTSA's search for responsive records. With respect to Exemption 5, records were withheld under the deliberative process privilege and the United States explained NHTSA's complex, multi-layered process through which it makes determinations with respect to investigations of motor vehicle defects to support its argument that materials were appropriately withheld under Exemption 5. With respect to Exemption 6, the United States argued the Agency properly redacted information that could be used to identify individuals who make complaints or claims regarding their vehicles and that release of the information would be an unwarranted invasion of personal privacy. Finally, the United States argued that NHTSA had provided all reasonably segregable records to the Plaintiff.

Also in October 2017, the United States moved for additional time to file a motion

for summary judgment with respect to the withholdings under FOIA Exemption 4. Ford Motor Company, whose documents were granted confidential treatment for the purposes of Exemption 4, indicated that it 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 Court allowed the United States until November 27, 2017 to file its motion for summary judgment on Exemption 4.

## **Pipeline and Hazardous Materials Safety Administration**

### **PHMSA Asks Court to Dismiss Claims Related to Approval of Spill Response Plans; Continues to Defend Related Suit**

PHMSA is currently defending two related suits filed by the National Wildlife Federation (NWF) in connection with obligations under the Oil Pollution Act (OPA). Nat'l Wildlife Fed'n v. Secretary of DOT, No. 15-13535 (E.D. Mich.); Nat'l Wildlife Fed'n v. Administrator of PHMSA, No. 17-10031 (E.D. Mich.). The suits raise two sets of claims.

First, NWF alleges that although PHMSA has approved oil spill response plans that cover segments of pipelines crossing inland waters such as lakes, rivers, and streams, the Secretary of Transportation never delegated authority over such plans to PHMSA. Thus, NWF claims that the Secretary has failed to carry out 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; that second round of briefing was completed by July 2017. The Department argues that NWF's claims are moot in light of the Secretary's August 18, 2016 ratification of PHMSA's prior approvals, which eliminated any perceived uncertainty about PHMSA's authority. The Department also contends that NWF lacks standing, since it cannot show that it or its members have been injured by the fact that response plans were approved by PHMSA rather than by the Secretary personally. Finally, the Department strongly disagrees with NWF on the merits, because PHMSA had previously been delegated authority applicable to all portions of a covered pipeline, even those that cross inland waters. The court has not yet issued an opinion or scheduled oral argument.

NWF also claims 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 scheduled to begin as soon as November 2017.

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

On March 17 and March 20, 2017, the State of Texas and two industry groups petitioned for review of a PHMSA Interim Final Rule regarding the underground storage of natural gas. Texas v. PHMSA, No. 17-60189 (5th Cir.); American Gas Ass'n v. DOT, No. 17-1095 (D.C. Cir.); Interstate Nat. Gas Ass'n of Am. v. DOT, No. 17-1096 (D.C. Cir.). The December 2016 Interim Final Rule created minimum federal safety standards for underground facilities that store natural gas, as mandated by the PIPES Act of 2016. The Interim Final Rule adopted – with some modifications – Recommended Practices issued by the American Petroleum Institute. The case is being held in abeyance until 30 days after PHMSA issues a Final Rule.

### **Challenge Filed Against PHMSA Administrative Ruling Confirming Corrective Action Ordered in Response to North Dakota Oil Spill**

On June 20, 2017, Belle Fourche Pipeline Company filed a petition for review in the U.S. Court of Appeals for the Tenth Circuit, challenging a PHMSA decision upholding a Corrective Action Order issued after a crude-oil spill from a Belle Fourche pipeline in December 2016, near Belfield, North Dakota. Belle Fourche Pipeline Co. v. PHMSA, No. 17-9529 (10th Cir.).

The incident resulted in a spill of 12,615 barrels of crude oil into the Ash Coulee Creek and surrounding areas, making it one of the most significant pipeline spills in North Dakota history. On July 31, 2017 counsel participated in a court-ordered mediation conference call. The court's

mediator has subsequently issued several extensions of litigation deadlines.

### **PHMSA Jurisdictional Claim Challenged in the D.C. Circuit**

On January 6, 2017, ONEOK Hydrocarbon, et al (ONEOK) filed petitions for review (Petition) in the D.C. Circuit, challenging three Notice of Proposed Violations (NOPVs) issued by PHMSA in 2012 as a result of an explosion and other regulatory violations at ONEOK's natural gas liquids facility in Bushton, Kansas. ONEOK Hydrocarbon, LP v. DOT, No. 17-1006 (D.C. Cir.). ONEOK was assessed fines totaling \$731,900. At issue in the case is PHMSA's assertion of statutory authority to regulate ONEOK's Bushton Plant pipeline facilities. ONEOK argues that the plant meets the refining facility exemption of the PIPES Act under 49 U.S.C. § 60101(a)(22). PHMSA disagrees with ONEOK's position and PHMSA's assertion of jurisdiction over the pipeline facilities was upheld after an administrative hearing. ONEOK filed a petition for reconsideration with PHMSA on one of the three NOPVs, and that petition remains pending. The parties to the litigation jointly filed a motion to hold the case in abeyance pending resolution of the petition for reconsideration pending with PHMSA.

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