



**U.S. Department of  
Transportation**

# **DOT LITIGATION NEWS**

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**October 31, 2018**

**Volume No. 18**

**Issue No. 2**

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## **Supreme Court Litigation**

### **Stipulated Dismissal Filed in Supreme Court Detroit Bridge Litigation**

On October 3, 2018, the parties filed a stipulated dismissal and withdrawal of a pending petition for writ of certiorari that had previously been filed by the Detroit International Bridge Company (DIBC) in a case arising out of DIBC's efforts to build a bridge adjacent to the Ambassador Bridge, which joins Detroit and Windsor, Ontario. Detroit Int'l Bridge Co. v U.S. Dep't of State, et al., No. 18-161 (S. Ct.). The petitioners sought review of a decision of the U.S. Court of Appeals for the D.C. Circuit, which ruled in favor of the United States and denied rehearing in early 2017. 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 the D.C. Circuit affirmed. In so doing, the court rejected DIBC's contentions that the State Department acted unlawfully in

approving the Crossing Agreement between Michigan and Canada for the NITC/DRIC, because such action was outside the bounds of the International Bridge Act (IBA). In a unanimous opinion, the D.C. Circuit concluded that "[a]lthough Congress has authorized the private maintenance and operation of the Ambassador Bridge and funded aspects of the [New] Span project from federal funds, its enactments do not vest in the Company public rights beyond those that Congress specified." DIBC "pointed to nothing to show that Congress intended the Ambassador Bridge to be perpetually profitable for its owners."

In a petition for writ of certiorari filed on August 7, 2018, DIBC urged the Supreme Court to hear the case on the merits, persisting in its arguments and contending that the case presents important questions about the appropriate role of the federal government and state governments in negotiating compacts or other agreements with foreign powers. Before the United States filed a responsive brief, the parties filed a letter and stipulated dismissal with the Supreme Court on October 3, 2018. In those submissions, the parties advised the Court that the withdrawal of the cert petition would permit the parties to have ongoing discussions about outstanding issues.

### **Supreme Court Requests Views of the United States in Case Involving the Airline Deregulation Act and Two Federal Labor Statutes**

On February 15, 2018, the Airline Service Providers Association (ASPA) and the Air Transport Association of America, Inc. (A4A) filed a petition for a writ of certiorari

in the Supreme Court seeking appeal of a decision of the U.S. Court of Appeals for the Ninth Circuit. The petitioners are associations of third-party service providers and American airlines, respectively, whose members operate at Los Angeles Airport (LAX). Airline Service Providers Ass'n v. Los Angeles World Airports, No. 17-1183 (S. Ct.).

The City of Los Angeles requires that all third-party service providers operating at LAX execute a license agreement as a condition of being retained or hired by airlines to provide services at LAX. These agreements impose certain conditions on the third-party service providers, including section 25, which requires the third-party service providers to execute a “labor peace” agreement with any employee organization that demands one. If such an agreement is not finalized within sixty days, the dispute must be submitted to mediation, and if such mediation is unsuccessful, to binding arbitration. Any labor peace agreement that results from this process must include “binding and enforceable” provisions that prohibit picketing, boycotting, work stoppages, or “any other economic interference.”

The petitioners initially brought suit in the United States District Court for the Central District of California, contending that section 25 is preempted by two federal labor statutes, the National Labor Relations Act (NLRA) and the Railway Labor Act (RLA), as well as the Airline Deregulation Act (ADA). The district court held that both ASPA and A4A lacked standing to assert a claim that section 25 violates the ADA, but the court proceeded to address the merits of the ADA claim and concluded that section 25 is not preempted by the ADA. In addition to dismissing the complaint without leave to amend, the district court dismissed the labor

law preemption claims for failure to state a claim.

On appeal, the Ninth Circuit held that APSA has standing to pursue all of its claims, and as a result, found it unnecessary to evaluate A4A’s standing. 873 F.3d 1074 (9th Cir. 2017). On the merits, the Ninth Circuit applied the two-prong test articulated in Cardinal Towing & Auto Repair, Inc. v. City of Bedford, 180 F.3d 686 (5th Cir. 1999), to hold that the City was acting as a market participant, rather than as a regulator, in imposing the labor peace agreement set forth in section 25. First, the court concluded that City satisfied the “efficient procurement of goods and services” prong, because the City, as the operator of LAX, is participating directly in a market for goods and services. Second, the court concluded that the City’s actions independently qualify as market participation under the Cardinal Towing test. Specifically, the court held that the City’s decision to adopt the labor peace requirements was narrowly tied to the City’s specific proprietary problem of service disruptions at LAX. The court also held that Congress did not intend the NLRA, RLA, or ADA to preempt the City’s adoption of section 25, because the City took that action as a market participant.

Judge Tallman filed a dissenting opinion in which he concluded that because section 25 forces third-party service providers either to lose the right to do business at LAX or be forced to negotiate a labor peace agreement with any union asking for one under the threat of binding arbitration, in contravention of the NLRA, it compels a result that “Congress deliberately left to the free play of economic forces.” With respect to the market participant exception to preemption and whether it applies to the City’s adoption of section 25, the dissent concluded that section 25 did not simply reflect the City’s

proprietary interest in preventing work stoppages. In addition, the dissent noted that section 25 is not limited in scope or duration, since it applies to any third-party service provider operating at LAX as long as it wants to remain licensed to do business at LAX.

Briefing on the petition for certiorari was completed on May 11, 2018. On June 4, 2018, the Supreme Court invited the Solicitor General to file a brief expressing the views of the United States. The Solicitor General is expected to file an amicus brief in the coming months.

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

### **DOT Gains Victory in D.C. Circuit in Challenge to Delta-Aeromexico Joint Venture**

On August 14, 2018, a panel of the U.S. Court of Appeals for the D.C. Circuit issued a ruling in the Department's favor in two consolidated cases filed by ABC Aerolineas, S.A. de C.V., d/b/a Interjet (Interjet). Interjet, a Mexican air carrier, filed these petitions for review challenging aviation orders issued by the Department in late 2016 and early 2017. ABC Aerolineas, S.A. de C.V. v. DOT, Nos. 17-1056, 17-1115 (D.C. Cir.). In those orders, DOT granted approval of, and antitrust immunity (ATI) for, an alliance agreement between Delta Air Lines, Inc. (Delta) and Aerovias de Mexico (Aeromexico) for a joint venture between the U.S. and Mexico. The Department concluded that the joint venture would benefit the public by improving connectivity and reducing travel times between the two countries. However, the Department also ruled that several conditions would be attached to its grant of ATI to ensure sufficient competition in the affected markets. Thus, DOT required Delta and Aeromexico to divest 24 slot pairs, or takeoff and landing authorizations, at Mexico City's Benito Juarez International Airport (MEX) and 4 slot pairs at New York City's John F. Kennedy International Airport (JFK). In addition, DOT limited the duration of the grant of ATI to five years. DOT also ruled that Interjet was ineligible to receive divested slots at MEX, since Interjet already has over 26% of the slots at that airport, second only to Aeromexico, and therefore did not need any further help in obtaining competitive access at MEX.

Before the D.C. Circuit, Interjet argued that the Department's decision to exclude Interjet from MEX remedy slots was arbitrary, capricious, and otherwise unlawful. In addition, Interjet argued that DOT overstepped its bounds and undercut the primacy of Mexican authorities with respect to slot allocation and enforcement at MEX. The court heard oral argument in the case on February 26, 2018.

In a unanimous opinion written by Chief Judge Garland, the court held that DOT's decision to exclude Interjet from the MEX slot remedy was reasonable and well within the Department's discretion to condition the grant of ATI. As the panel recognized, the exclusion of Interjet served the purpose of allowing new entrants, or incumbents with a limited presence at MEX, to offer new and enhanced services. That would in turn help to place competitive discipline on the joint venture and improve options for consumers. Allowing Interjet to obtain more slots would be counterproductive and would worsen the barriers to entry at the airport, as Interjet did not contest DOT's factfindings about its dominant position at MEX. In addition, the panel agreed with DOT that the conditions of the ATI grant were consistent with those imposed by Mexican authorities, and that DOT had not punished Interjet for its commercial success, but had instead tailored the remedy to the circumstances at MEX.

### **D.C. Circuit Rules that Proper Remedy Is to Sever Statute in Amtrak Metrics and Standards Litigation**

On July 20, 2018, the U.S. Court of Appeals for the D.C. Circuit granted the Government's appeal, reversing a district

court decision, and ruling in a 2-to-1 decision that the proper constitutional remedy was to sever the binding arbitration provision in Section 207(d) of the Passenger Rail Investment and Improvement Act of 2008 (PRIIA) and to leave the balance of Section 207 intact. Ass'n of Am. R.Rs. v. DOT, No. 17-5123 (D.C. Cir.). The effect of this ruling is to revive the provisions of Section 207 requiring FRA and the National Railroad Passenger Corporation (Amtrak) to develop metrics and standards, without reviving the previously adopted metrics and standards themselves.

Through PRIIA, Congress directed FRA and Amtrak to “jointly develop” Metrics and Standards for “measuring the performance and service quality of intercity passenger train operations.” The Metrics and Standards were to provide Amtrak with an internal evaluation tool it could also use to assess whether freight railroads violated their statutory duty to provide preference to Amtrak in the use of rail lines, junctions, and crossings. The D.C. Circuit initially struck down the Metrics and Standards as a violation of the Non-Delegation Doctrine by vesting rulemaking authority in a non-governmental entity, *i.e.*, Amtrak. Ass'n of Am. R.Rs. v. DOT, 721 F.3d 666 (D.C. Cir. 2013).

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

The Court also found an arbitration provision, provided in PRIIA to resolve disputes between FRA and Amtrak over the formulation of the Metrics and Standards (but never invoked), violated the Appointments Clause because the arbitrator would be a principal officer of the United States, not appointed by the President with the advice and consent of the Senate.

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

The Government then sought to obtain a judgment from the District Court that would sever the arbitration provision of Section 207, and at the same time preserve the remaining portion of the statute that grants FRA and Amtrak the power to adopt Metrics and Standards. The Association of American Railroads (AAR) opposed the Government’s motion, arguing that this was an attempt to reverse the D.C. Circuit under the guise of a request to enter judgment.

The District Court agreed with AAR and entered judgment on March 23, 2017 for AAR, concluding that it must give full effect to the D.C. Circuit’s mandate and that it was not at liberty to review or change the D.C. Circuit’s decision. In addition, the District Court noted that the D.C. Circuit made it

clear that Congress is the proper actor to remedy Section 207, not the courts. The D.C. Circuit's July 20, 2018, decision rejected these conclusions and granted the relief sought by the government.

AAR filed a petition for rehearing *en banc* on August 31, 2018, which the D.C. Circuit denied on October 24.

### **D.C. Circuit Upholds DOT Decision to Grant Norwegian Air's Petition for a Foreign Carrier Permit**

On May 11, 2018, the D.C. Circuit issued a decision in *Air Line Pilots Ass'n v. Chao*, No. 17-1012 (D.C. Cir.), upholding 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).

The Air Line Pilots Association (ALPA) and the other petitioners argued that DOT misinterpreted a provision of the U.S.-EU Agreement in making the decision to grant Norwegian Air's request for a foreign air carrier permit. In addition, the petitioners claimed that DOT failed to make a proper public interest determination as required by statute. Finally, the petitioners asserted 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 Court found that the petitioners had standing to challenge the Secretary's decision, because it concluded that the Secretary's authorization of Norwegian's entry into the market harmed

the petitioners' members by exposing them to potential job loss, wage and hour cuts, and other competitive pressures. On the merits, the Court easily concluded that the language of the international agreement and statutory provision upon which the Secretary relied to grant NAI's request for a foreign air carrier permit clearly did not require the Secretary to deny NAI's request as the petitioners argued. With respect to the international agreement, the Court agreed with the government and held that the Secretary correctly decided to grant NAI's request because Articles 4 and 6 *bis* of the U.S.-EU Agreement required the Secretary to do so, provided that certain criteria were met as they were in this case. In addition, the Court also agreed with the government that a separate provision of the U.S.-EU Agreement, Article 17 *bis*, which the petitioners relied upon in contending that the Secretary failed to take into consideration labor-related factors, merely contained aspirational principles and not mandatory language. The Court also noted that the Office of Legal Counsel, the State Department Legal Advisor, and the European Commission's Directorate General for Mobility and Transport agreed with the Secretary's interpretation of the international agreement.

The Court found that the language of the statutory provision upon which the Secretary relied to grant NAI's request was equally clear and supported the Secretary's decision to grant NAI a foreign air carrier permit. Specifically, the Court concluded that the statute provides two paths to authorization of a foreign air carrier permit: if the Secretary finds the carrier to be fit, willing, and able, the Secretary must find either that the carrier is qualified and designated by its home country under an agreement with the United States or that the transportation will be in the public interest. Since the Secretary found that NAI



was fit, willing, and able and the carrier was qualified and designated by Ireland, its home country, under the international agreement, the Secretary was not required to make a public interest determination, as the petitioners argued.

Judges Rogers and Sentelle wrote separate concurring opinions. In her concurring opinion, Judge Rogers concurred that the petitioners had Article III standing to challenge the Secretary's decision and concurred that the plain text of the statute did not require the Secretary to make a public interest finding in approving NAI's permit application. Judge Rogers wrote that although she concurred that Article 17 *bis* of the international agreement did not provide an independent basis for denying a permit application, it does play a role in the permit approval process, such that it can provide a basis for the Secretary to impose conditions on an applicant in approving an application for a foreign air carrier permit. In his concurring opinion, Judge Sentelle wrote that although he concurred in the opinion of the court, he disagreed with the basis upon which the Court found that the petitioners had standing.

On July 13, 2018, the petitioners voluntarily dismissed a petition for review filed in the D.C. Circuit, [Air Line Pilots Ass'n v. Chao](#), No. 17-1245, in which they sought to challenge the Department's decision to issue Norwegian Air UK a foreign air carrier permit under the same grounds as the ones decided in this case. The Norwegian Air UK petition was stayed pending the court's resolution of the Norwegian Air International case.

### **D.C. Circuit Upholds FAA Small UAS Rule and Denies Two Challenges to the Rule**

On June 19, 2018, the U.S. Court of Appeals for the D.C. Circuit dismissed the Electronic Privacy Information Center's (EPIC) petition for review of the FAA's Small Unmanned Aircraft System Final Rule, [Elec. Privacy Info. Ctr. v. FAA](#) (EPIC), No. 16-1297 (D.C. Cir.), because EPIC failed to establish standing for its challenge. The court did not reach the merits. The court also deconsolidated the [EPIC](#) case from [Taylor v. FAA](#), No. 16-1302 (D.C. Cir.), another challenge to the small UAS rule, which the court had previously consolidated with [EPIC](#).

In a decision issued on July 6, 2018, the court denied the [Taylor](#) petition for review on all grounds. The court agreed with the FAA that the promulgation of part 101 in the rulemaking did not exceed the statutory authority of section 336 of the FAA Modernization and Reform Act of 2012, and also agreed with the FAA that it does not subject section 336 model aircraft to the full weight of the FAA's pre-existing statutory and regulatory regime. The court also stated that the FAA is well within its statutory authority to regulate non-336 recreational model aircraft under part 107.

EPIC and Taylor challenged FAA's small UAS rule, part 107, issued by the Secretary and the Administrator. The small UAS rule provides the regulatory framework to enable the operation of small UAS (less than 55 pounds) in the national airspace system. EPIC previously sued FAA on the small UAS notice of proposed rulemaking (NPRM), alleging that FAA was statutorily required to include privacy regulations in the small UAS rule, and that the agency erred by not addressing privacy in that

rulemaking. EPIC's previous lawsuit was dismissed as premature because an NPRM is not a final agency action subject to judicial review. Elec. Privacy Info. Ctr. v. FAA, 821 F.3d 39 (D.C. Cir. 2016).

In its current petition, EPIC again challenged the omission of privacy regulations from the small UAS rule and argued that FAA is statutorily required to address privacy with regard to small UAS.

Taylor, who also sought judicial review of the small UAS rule, argued that the small UAS rule exceeds the FAA's statutory authority to the extent that it regulates hobbyists who do not satisfy all the criteria specified in section 336 of the FAA Modernization and Reform Act of 2012, Public Law 112-95 (the Act). He further asserted that the FAA has exceeded its authority by regulating operations that are not in "air commerce" in so much as the final rule regulates low-altitude small UAS operations. Taylor also argued that the notification to airports and the FAA-created B4UFLY app used to assist in that notification violates the Paperwork Reduction Act (PRA), although petitioner failed to file comments on the NPRM, and none of the other commenters raised this issue.

In dismissing EPIC's petition for review for lack of standing, the court first concluded that EPIC failed to establish "associational" standing because EPIC focused its evidence on concerns about privacy invasions from drone delivery services. Because such operations are not authorized under the small UAS rule, the injury to EPIC's members was not caused by the rule or by FAA's alleged failure to address privacy concerns in the rule. In addition, the court held that EPIC's general allegations about the proliferation of drone operations in the areas where EPIC's members live and travel were too attenuated

to satisfy the usual standing requirement that the threatened injury be certainly impending. The court also summarily dismissed EPIC's assertion of organizational standing because EPIC failed to identify record evidence or to submit evidence on that issue.

The court denied Taylor's claims that the part 107 rule was arbitrary and capricious for a variety of reasons, the most important being that the court did not believe that the FAA acted unreasonably or unconstitutionally with respect to any of Taylor's particular challenges to the rule. Lastly, the court disagreed with petitioner's assertion that the notice requirement of part 101 violated the PRA. In rejecting that assertion, the court stated that the notice requirement of part 101 stems from the Congressional requirement in section 336 and therefore the PRA is inapplicable. It also noted that the agency followed appropriate PRA procedures for the B4UFLY application.

### **District Courts Issue Decisions in Air Ambulance Preemption Cases**

In recent months, three U.S. District Courts have issued decisions in class actions brought by patients concerning the prices charged by air ambulance carriers. Stout v. Med-Trans Corp., 313 F. Supp. 3d 1289 (N.D. Fla. May 2, 2018); Scarlett v. Air Methods Corp., No. 16-2723, 2018 WL 2322075 (D. Colo. May 22, 2018); Wray v. PHI Air Medical LLC, No. 18-432, Dkt. No. 34 (D. Ariz. Jul. 9, 2018). The cases raise questions about whether the patients' claims are preempted by the Airline Deregulation Act of 1978 ("ADA"), and if so whether such preemption is constitutional. The United States intervened and filed a brief in each case defending the constitutionality of the ADA.

The ADA preempts any State law “related to a price, route, or service of an air carrier.” 49 U.S.C. § 41713(b)(1). The Supreme Court has held that the provision extends to State laws “having a connection with, or reference to,” air carrier prices, routes, or services, Morales v. Trans World Airlines, Inc., 504 U.S. 374, 384 (1992), and that it covers common law rules in addition to statutes and regulations, Northwest, Inc. v. Ginsberg, 134 S. Ct. 1422, 1429-30 (2014). The Court has held, however, that the provision does not preempt contract claims seeking recovery “solely for [an] airline’s alleged breach of its own, self-imposed undertakings.” Am. Airlines, Inc. v. Wolens, 513 U.S. 219, 228 (1995). And the Court has noted that even a term that State law automatically implies in every contract is not preempted if the parties may “contract around” that term. Ginsburg, 134 S. Ct. at 1433.

In these three cases, the plaintiffs are individuals who were transported by air ambulance, and who later received bills for allegedly exorbitant amounts. The patients claim that because they and the carriers did not enter into express contracts and did not discuss the price of the services they received, state law provides that they entered into implied contracts allowing the carrier to collect only a reasonable amount.

The carriers have moved to dismiss, contending that these claims are preempted by the ADA. The patients argue that the ADA does not bar enforcement of the parties’ implied contractual agreement. In the alternative, the plaintiffs contend that any application of the ADA to preempt their claims would be unconstitutional.

In its briefs, the United States argued that if the ADA preempts any of the patients’ claims, that does not present any constitutional problems. The United States

did not take a definitive position on the question of whether the patients’ claims are preempted, as that question is dependent on interpretation of state law and may be fact-dependent. The United States noted, however, that if a patient and a carrier were deemed to have entered into an implied contract under the relevant State law, then State law rules supplying missing essential terms (such as the price) would likely not be preempted, since the parties could have “contracted around” those rules by executing an express contract containing the missing terms. And the United States pointed out that if a patient and a carrier did not enter in a contract, and the carrier attempted to seek payment by relying on State law principles of “unjust enrichment” or “quasi-contract,” the patient could equally rely on the same body of law for identification of the proper measure of damages. Cf. Dan’s City Used Cars v. Pelkey, 569 U.S. 251, 265 (2013).

In Stout and Scarlett, the District Courts granted motions to dismiss the plaintiffs’ claims as preempted by the ADA. Both courts held that the claims did not fall within the Wolens exception for contract enforcement, and that the preemption of the plaintiffs’ claims was not unconstitutional. The plaintiffs in Scarlett have appealed to the U.S. Court of Appeals for the Tenth Circuit. The United States remains a party on appeal, and is scheduled to file a brief in November. In Wray, the District Court denied the carrier’s motion to dismiss, holding that the plaintiffs had sufficiently alleged that the carrier had voluntarily undertaken to charge only a reasonable price. The Court noted that it agreed with the analysis presented by the United States on the preemption question. The case is proceeding in the District Court.

### **Fourth Circuit Upholds MWAA's Use of Dulles Toll Road Revenue to Fund Construction of Metro Silver Line**

On October 22, 2018, the U.S. Court of Appeals for the Fourth Circuit affirmed the U.S. District Court for the Eastern District of Virginia's dismissal of a constitutional challenge to the Metropolitan Washington Airports Authority's (MWAA) use of Dulles Toll Road revenue to partially fund construction of the Silver Line Metrorail Project in Kerpen v. MWAA, No. 17-1735 (4th Cir.). Plaintiffs filed a class action complaint against Metropolitan Washington Airports Authority (MWAA), the Department, and the Secretary of Transportation challenging MWAA's use of Dulles Toll Road tolls to pay for the Metro Silver Line expansion. Kerpen v. MWAA, No. 16-1307 (E.D. Va.). This case is similar to Corr v. MWAA, 740 F.3d 295 (E.D. Va. 2014), a case that also challenged MWAA's use of Dulles Toll Road revenue to fund construction of the Silver Line Metro, but in this litigation, Plaintiffs are alleging constitutional violations, including 1) that MWAA is not a valid interstate entity because the District of Columbia is not a "state" for purposes of the Compact Clause; 2) MWAA exercises federal legislative power in violation of Article I of the Constitution; 3) MWAA exercises federal executive power in violation of Article II of the Constitution; 4) MWAA's Dulles Toll Road tolls violate drivers' due process; and 5) MWAA's tolls exceed its authority under its enabling statutes and the APA. Although DOT was not a party in the Corr litigation, it did file an amicus brief and participate in oral argument. In this case, Plaintiffs have named DOT as a defendant, primarily because former Secretary Mary Peters provided MWAA with a Certification in 2008 that

MWAA's use of Dulles Toll Road revenue was consistent with airport purposes and thus consistent with its lease.

In affirming the District Court's dismissal, the Fourth Circuit agreed that MWAA is not a federal entity. The Court found that MWAA was not created by the federal government but by Virginia and the District of Columbia and is therefore, "a textbook example of an interstate compact." In addition, the Court held that MWAA is not controlled by the federal government, as the President only appoints three of MWAA's 17 board members. Because MWAA is not a federal entity, the Court found this to be fatal to the appellants' claim under the APA.

Next, the Court held that MWAA does not violate the non-delegation doctrine because MWAA's authority arises from Virginia and the District of Columbia, and not the federal government. However, the Court noted that even if some of MWAA's power comes from the federal government, the Transfer Act is sufficiently detailed and thus serves an "intelligible principle." Finally, the Fourth Circuit noted that both the Transfer Act, which approved the creation of MWAA, and the lease allow MWAA to spend airport revenues for the capital and operating costs of Dulles International Airport. The Court relied heavily upon DOT's 2008 certification that MWAA was complying with the terms of the lease and found that "[t]he Secretary's approval in this case is entitled to 'great weight.'" Not only did the Court defer to the Secretary's certification, but the Court also found the certification to be "plainly reasonable."

## **DOT Asks D.C. Circuit to Dismiss Challenge to Extension of Compliance Date for Mishandled Airline Baggage Reporting Rule**

On September 7, 2018, the U.S. Court of Appeals for the District of Columbia Circuit heard oral argument in 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., et al. v. DOT, No. 17-1272, 18-5016 (D.C. Cir.).

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 was arbitrary and capricious. Plaintiffs first filed in the District Court, which held that it lacked jurisdiction over the case pursuant to 49 U.S.C. § 46110, which provides that the U.S. Courts of Appeals have exclusive jurisdiction over challenges to DOT actions taken in whole or in part under certain aviation statutes.

In the D.C. Circuit, Plaintiffs have asked the Court to transfer the case back to the District Court, arguing that the extension was not issued under one of the statutes enumerated in 49 U.S.C. § 46110. DOT has opposed that request, and has asked the Court to dismiss the case as untimely; while 49 U.S.C.

§ 46110 requires challenges to be brought within 60 days, Plaintiffs did not even file their District Court complaint until 132 days after DOT issued the challenged extension.

On October 5, the FAA Reauthorization Act of 2018, Pub. L. No. 115-254, was enacted. Section 441 of the Act provides that “[t]he compliance date” of the rule at issue here “shall be effective not later than 60 days after the enactment of this Act” – i.e., December 4, 2018. On October 26, DOT published guidance to affected airlines in the Federal Register regarding the compliance date for the rule in light of section 441.

## **Trial in Unprecedented Climate Change Case Stayed**

In Fall 2015, Plaintiffs brought this challenge in the U.S. District Court for the District of Oregon against the United States and a host of federal agencies, including DOT, alleging that the United States has allowed and caused an increase in greenhouse gas emissions. Juliana, et al., v. United States, No. 15-1517 (D. Or.). Plaintiffs are a number of named youth plaintiffs (acting by and through guardians) along with Earth Guardians (a tribe of young activists), and “future generations” by and through their Guardian Dr. James Hansen (a former NASA employee), and allege that unless the United States engages in immediate, meaningful action to phase out carbon dioxide emissions, the youth plaintiffs and future generations “would live in a climate system that is no longer conducive to their survival.”

The Amended Complaint asserts a number of constitutional claims on the basis of due process, equal protection, unenumerated rights under the Ninth Amendment, and the public trust doctrine. On November 17, 2015, the United States sought to dismiss the case on the grounds that Plaintiffs lack

standing because their alleged injuries are not particular to the Plaintiffs and because these alleged injuries are not traceable to the United States. Furthermore, the United States sought dismissal on grounds that Plaintiffs failed to state a claim under the Constitution, as no court has recognized a constitutional right to be free from carbon dioxide emissions. The magistrate judge recommended against dismissal, and the District Court Judge adopted the magistrate judge's findings and recommendation to deny the United States' and Intervenors' Motions to Dismiss. Juliana v. U.S., 217 F. Supp. 3d 1224 (D. Or. 2016).

Since then, the United States has filed both Motions for Summary Judgment and for Judgment on the Pleadings, but the District Court has not ruled on those motions. In response to the government's prior attempts to stop this case from proceeding to trial, the Ninth Circuit has denied mandamus on two occasions, 884 F.3d 830 (9th Cir. 2018), 895 F.3d 1101 (9th Cir. 2018), and the Supreme Court also denied the government's original request for a stay. In that order, the Supreme Court stated that "[t]he government's request for relief is premature and is denied without prejudice. The breadth of respondents' claims is striking, however, and the justiciability of those claims presents substantial grounds for difference of opinion. The District Court should take these concerns into account in assessing the burdens of discovery and trial, as well as the desirability of a prompt ruling on the Government's pending dispositive motions."

Trial was scheduled to begin on October 29. However, the government again sought to stay the proceedings by filing a writ of mandamus to the U.S. District Court for the District of Oregon, or in the alternative, a petition for certiorari on October 18. On October 19, the Supreme Court granted the

government's motion to stay discovery and the trial pending the resolution of a writ of mandamus, which is currently pending. On October 24, the district court vacated the trial date and associated deadlines.

### **Government Seeks Dismissal of Challenge to Executive Order on Reducing Regulation and Controlling Regulatory Costs**

On May 14, 2018, the Government asked the U.S. District Court for the District of Columbia to dismiss the Second Amended Complaint in Public Citizen v. Trump, No. 17-253 (D.D.C.). The case is a challenge to Executive Order 13771, which (among other things) directs federal agencies to identify two existing regulations to repeal for every new regulation proposed or issued.

The plaintiffs – Public Citizen, the Natural Resources Defense Council, and the Communications Workers of America – contend that the Executive Order requires agencies to act in contravention of the Administrative Procedure Act and relevant substantive statutes. Plaintiffs claim that the Executive Order therefore violates separation of powers principles and the Take Care Clause of Article II of the Constitution. Plaintiffs also assert 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 February 2018, the Court dismissed the First Amended Complaint. The Court held that the plaintiffs did not have standing to

sue, as they had not shown that the Executive Order had caused them or their members to suffer any injury.

The Court permitted the plaintiffs to file an amended complaint. The Government has again moved to dismiss, and has again argued that the plaintiffs lack standing. Among other things, the Government has argued that the plaintiffs have not shown that the Executive Order has caused the delay of any new regulation, or that vacating the Executive Order would cause any agency to issue new regulations.

The Government's motion to dismiss and the plaintiffs' motion for summary judgment have been fully briefed since July. The Court has not scheduled oral argument.

### **Two Class Action Complaints Filed Alleging Discriminatory Hiring Process for Air Traffic Controllers**

In Brigida v. DOT, No. 15-2654 (D. Ariz.), Andrew Brigida, a graduate of the Air-Traffic Collegiate Training Initiative (CTI), filed a purported class action lawsuit on behalf of himself and other graduates of CTI who applied for air traffic control specialist (ATCS) positions in 2014, claiming that the Agency's decision to abolish existing applicant hiring inventories (sometimes called lists or registers) was motivated by an attempt to increase the number of minority and female ATCS hires, and that the decision violated Title VII of the Civil Rights Act of 1964. Plaintiff also alleges these decisions violate the purported class's Fifth Amendment right to equal protection by depriving it of a protected interest without due process. Moreover, Plaintiff's complaint centers on the FAA's use of a biographical assessment in the hiring of ATCS, contending that it was discriminatory.

On July 15, 2016, with the enactment of the FAA Extension, Safety, and Security Act of 2016, Pub. L. No. 114-190, § 2106, 130 Stat. 615, 620, Congress decided that the FAA's use of a biographical assessment when hiring ATCS would not be applicable to certain categories of applicants. Earlier this year, the FAA determined that it would stop using a biographical assessment for all categories of applicants in its hiring of ATCS.

The U.S. District Court for the District of Arizona dismissed plaintiff's equal protection claim, struck his request for equitable relief, and transferred the case to the U.S. District Court for the District of Columbia, No. 16-2227 (D.D.C.). Plaintiff filed a request for reconsideration of the dismissal of the equal protection claim, or in the alternative, sought the restoration of his equitable relief request. The D.C. District Court reinstated Plaintiff's claim for equitable relief, and on September 7, 2018, Plaintiff filed a Third Amended Complaint which the Agency answered on September 21, 2018. In addition, Plaintiff filed a motion seeking limited discovery on the issue of class certification. The Agency filed an opposition on September 24, 2018.

On October 12, 2018, the Court issued an order on a number of issues in the case. First, the court sua sponte struck the Third Amended Complaint because Brigida failed to comply with Rule 15(a)(2), as he never sought leave to amend the complaint and "the record does not establish that he obtained the consent of the defendant." The Court required Brigida to file within 10 days a motion seeking leave to amend. The Court also admonished Brigida for reasserting his equal protection claim, because the court had not granted reconsideration of the dismissal of that claim. Importantly, the court denied Brigida's motion for precertification discovery, because he did not meet his

burden to show the relevance of any discovery. The Court also directed Brigida to file a motion for class certification by November 12, and indicated that it would address all other issues after resolving the motion.

On September 12, 2018, Lucas Johnson, a 2013 graduate of a CTI, filed a class action complaint in the Northern District of Texas, Johnson v. DOT (N.D. Tex. 18-2431), alleging discrimination on the basis of race in the ATCS hiring process. Prior to filing his district court action, Johnson had also filed administrative individual and class action complaints before the EEOC, alleging that he and those “similarly situated” to him were discriminated against through FAA’s implementation of biographical assessments in 2014 and 2015 as part of the ATCS hiring process. Johnson applied for an ATCS position in February 2014 and March 2015, but failed the biographical assessment portion of the applications. As a result, Johnson did not advance to the next step of the hiring process. Johnson and the putative class alleged the changes to the ATCS hiring process violated Title VII because they were designed to favor minority applicants in order to increase diversity among ATCS.

After Johnson’s administrative claim was dismissed by the EEOC, on September 12, 2018, he filed his class action complaint. In his complaint, Johnson now appears to only be challenging the FAA’s implementation of the 2014 biographical assessment. However, he has defined the purported class to include all ATCS applicants, not just CTI graduates, who met the minimum qualifications but were alleged to have been “improperly screened” by the agency’s use of the 2014 biographical assessment.

### **Eleventh Circuit Denies Clayton County Petition for Review**

On April 24, 2018, the Eleventh Circuit issued a unanimous published decision in Clayton Cnty. V. FAA, No. 17-10210 (11th Cir.), rejecting Clayton County’s contention that an FAA letter regarding a November 2014 aviation fuel tax policy amendment set forth a “new interpretation” of 49 U.S.C. § 47133.

In November 2014, FAA issued an aviation fuel tax policy amendment confirming that the proceeds from taxes on aviation fuel must be used for airport purposes, regardless of whether or not the municipal government imposing the tax was an airport sponsor. FAA afforded municipalities that filed an action plan by December 8, 2015, a 3-year grace period for compliance. The petitioners, Clayton County, Georgia, and the city and municipal government entities within the county, timely filed an action plan. On September 13, 2016, the petitioners sent a letter to FAA that they characterized as an “amended” action plan, asserting that FAA should allow them to spend aviation fuel tax proceeds for non-airport purposes because they are not airport sponsors. Two days later, the petitioners sent a separate letter to FAA requesting that they be permitted to offset the diverted tax revenue. The FAA Chief Counsel responded on November 17, 2016 to both letters and advised that local taxes on aviation fuel must be used on aviation-related purposes and offered to meet to discuss permissible offsets. The Chief Counsel stated that his letter was an advisory response and did not constitute final agency action.

On January 13, 2017, petitioners filed a petition for review of the Chief Counsel’s November 17, 2016, letter, which they characterized as a final decision by FAA. In



the early stages of the litigation, the Court questioned whether the FAA's November 17, 2016 letter constituted "final agency action" that is reviewable by the Court under the Administrative Procedure Act. The Court ultimately determined that it would decide the jurisdictional question after briefing on the merits.

In its decision, the Court held that the FAA's November 17, 2016, letter merely restated the interpretation established by the 2014 policy amendment, and because the letter merely restated the agency's existing interpretation of § 47133, it did not carry any legal consequences. The Court also rejected Clayton County's argument that the letter amounted to a determination that the FAA would take enforcement action. The Court noted that an agency does not issue a final agency action by merely observing that a regulated entity may potentially be violating the law, and emphasized that the FAA would have to take further action before Clayton County faced any consequences. Finally, the Court pointed out that Clayton County could have (but did not) challenge the FAA's statutory interpretation within 60 days of the issuance of the 2014 policy clarification, and can challenge that interpretation if the FAA brings a future enforcement action.

### **Plaintiff Voluntarily Dismisses Federal Tort Claims Act Suit Concerning the Failure of a Three- Cable Median Barrier**

On May 30, 2018, Nicole Borkowski filed a lawsuit in the U.S. District Court for Arizona against the United States under the Federal Torts Claims Act (FTCA) alleging negligence by FHWA for its involvement in the installation of a certain three-cable median barrier on Interstate 10 in Arizona that failed to prevent her accident.

Borkowski v. United States of America, No. 18-01634. The case is the latest in a string of similar ones pursued by Plaintiff's counsel that are currently pending in the District Court for Arizona and the U.S. Court of Appeals for the Ninth Circuit involving the same median barrier design.

Borkowski was injured on September 15, 2015, in a collision with another vehicle that crossed over the freeway median and through the cable barrier, striking her vehicle head-on. On August 29, 2017, Borkowski filed an administrative claim seeking \$5,000,000 for her injuries. On February 28, 2018, after her claim was deemed denied, she filed the present case in district court. Borkowski advanced the same theory of negligence as in the other cases pursued by her counsel: that FHWA was negligent in approving the use of and reimbursement for the low-tension 3-cable median barrier in question, which had not been fully crash tested as required by FHWA rule and policy, and failed to stop the errant vehicle that hit her.

On October 9, 2018, the United States filed a motion to dismiss based primarily on the FTCA's discretionary function exception. On October 19, before her response to the government's motion to dismiss was due, Borkowski decided to voluntarily dismiss her suit with prejudice.

### **Plaintiffs Challenging Delay of FHWA GHG Measure Stipulate to Dismissal of Suit**

On June 13, 2018, the U.S. District Court for the Southern District of New York approved a joint stipulation of dismissal filed by the Department of Justice (DOJ) and Clean Air Carolina, Natural Resources Defense Council (NRDC), and U.S. Public Interest Research Group in Clean Air Carolina, et al. v. U.S.

Dep't. of Trans., No. 17-05779. NRDC filed a civil action for declaratory relief alleging that FHWA's failure to provide notice and comment of its "suspension" of the greenhouse gas (GHG) measure contained in FHWA's third performance measures final rule (PM 3 Final Rule) was a violation of the Administrative Procedure Act (APA). The parties agreed that the case was moot after FHWA published a final rule repealing the GHG measure on May 31, 2018.

The plaintiffs challenged FHWA's decision to delay the effective date of the GHG measure pending the agency's reconsideration of the GHG measure. 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 alleged that FHWA took these actions without proper public notice or an opportunity for public comment in violation of the APA. They further argued that the FHWA decisions to "suspend" the measure were arbitrary and capricious, an abuse of discretion, and made without observing procedure required by law. Plaintiffs sought 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. After FHWA issued a final regulation after notice and comment, which repealed the GHG measure, the Plaintiffs agreed to stipulate to dismissal of their suit.

### **On Remand, District Court Denies Plaintiffs' Attempt to Expand the Scope of Their Challenge to FMCSA's Pre-employment Screening Program (PSP)**

In Owner Operator and Independent Drivers Association (OOIDA), et. al v. U.S. Department of Transportation, et al., No. 12-1158, the U.S. District Court for the District of Columbia denied two Motions for Leave to Amend the Complaint filed by the plaintiffs that sought to expand the scope of the case beyond the issues remanded by the U.S. Court of Appeals for the D.C. Circuit on January 12, 2018 in Owner Operator and Independent Driver Association (OOIDA), et. al v. U.S. Department of Transportation, et al., No. 16-5355.

The D.C. Circuit affirmed in part, and reversed in part, summary judgment granted previously by the district court upholding the Agency's Pre-employment Screening Program (PSP) for commercial motor vehicle drivers. In the district court, plaintiffs argued that FMCSA (1) failed to remove from a federal database the drivers' records of violations related to citations that had been dismissed by a judge or administrative tribunal and (2) improperly delegated to the states its responsibility to ensure that motor carrier safety data was "accurate, complete, and timely," in violation of the Administrative Procedure Act (APA) and the Fair Credit Reporting Act (FCRA). The district court had dismissed the case because the plaintiffs could not demonstrate that maintenance or dissemination of the drivers' information had harmed them.

The D.C. Circuit upheld the district court's dismissal of the plaintiffs' APA claims and the FCRA damages claims of three drivers. However, the D.C. Circuit remanded the case

to the district court on the limited grounds that two drivers adequately pled an Article III injury under the FCRA's damages provision.

On remand, OOIDA and the two drivers sought to amend their complaint to reassert their APA claims, and on June 22, 2018, the district court denied the motion, holding that OOIDA was no longer a party and that the D.C. Circuit's mandate barred the remaining plaintiffs from reasserting their APA claims. On September 24, 2018, the plaintiffs filed a renewed motion for leave to amend their complaint, which limited their claims for relief to damages under the FCRA. The district court granted plaintiffs' motion and the plaintiffs served their amended complaint on September 27, 2018.

### **Eighth Circuit Denies Owner-Operator Independent Drivers Association's (OOIDA) Petition for Rehearing of the Dismissal of Challenge to FMCSA's Medical Certification Integration Rule**

On April 2, 2018, the Eighth Circuit denied OOIDA's petition for rehearing *en banc* in OOIDA v. DOT, No. 16-4159, which sought review of the Court's dismissal for lack of standing its challenge to FMCSA's Medical Certification Integration Rule. In its petition for rehearing, OOIDA contended that 1) it has standing based on its injury-in-fact and can establish that standing prior to the effective date of the rule; 2) the Court's standing analysis ignored the failure to provide notice and comment; 3) the Court overlooked associational standing; and 4) the Court brushed aside Petitioners' affidavits without analysis.

On March 15, 2018, the Agency argued in response that further review is not warranted because the Court invoked the correct legal

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

This case arose from Petitioners' challenge to the agency's Medical Examiners Certification Integration Final Rule, 80 Fed. Reg. 22790 (April 23, 2015), and the corrections to that rule, 80 Fed. Reg. 35577 (June 22, 2015). The Final Rule requires that medical examiners use a revised Medical Examination Report (MER) Form to assess commercial motor vehicle driver qualifications, adds questions to the driver health history section of the MER form, and removes Advisory Guidance for medical examiners previously located at the end of the form. Based on comments, the agency retained the advisory guidance from the MER form without substantive change but relocated it to an appendix following 49 C.F.R. Part 391 (Appendix A).

Petitioners raised a myriad of issues in the petition for review of the final rule, filed on November 9, 2016, including that the expanded scope of the MER Form and Appendix A are *de facto* rules issued without notice and comment. In response, the Agency asserted *inter alia* that the Court lacked jurisdiction because petitioners failed to show an injury that is fairly traceable to the rule, and therefore lack standing. The Court agreed with the Agency and dismissed the petition for review on January 5, 2018.

### **District Court Requires Government to Respond to Interrogatories in Challenge Against President's Infrastructure Council**

On July 25, 2017, Food & Water Watch (FWW), a non-profit organization that focuses on corporate and government accountability related to food and water, filed a complaint in the U.S. District Court for the District of Columbia against the President, the Department of Commerce, and DOT, alleging that the Presidential Advisory Council on Infrastructure (Infrastructure Council) is subject to and is in violation of the Federal Advisory Committee Act (FACA). Food and Water Watch, Inc. v. Trump, No. 17-1485 (D.D.C.). On July 19, 2017, the President issued an Executive Order establishing the Council within the Department of Commerce; however, soon thereafter, the President announced that he would not move forward with the Council. Even so, Plaintiff alleges that a de facto infrastructure advisory committee has been operating in violation of FACA.

The Court held a hearing in June 2018 and ordered the government to respond to eight interrogatories related to whether any meetings occurred involving non-government individuals in which recommendations or advice regarding infrastructure policy were proposed by or on behalf of a group. The government responded to the interrogatories and identified no meeting that was responsive to the Court's interrogatories. Thus, the government filed a supplemental motion in support of its motion to dismiss that is pending before the Court.

### **After Briefing Completed, Parties Enter Into Settlement Negotiations in Cargo Airlines Case**

On May 20, 2016, the Cargo Airline Association (CAA) filed a petition for review challenging FAA's Airworthiness Directive (AD) 2016-07-07, which applies to the Boeing Company Model 757 aircraft. Cargo Airline Ass'n v. FAA, No. 16-1148 (D.C. Cir.). The AD was prompted by fuel system reviews conducted by the manufacturer and requires modifications to the fuel quantity indication system (FQIS) wiring to prevent development of an ignition source inside the center fuel tank. FAA issued this AD to prevent ignition sources inside the center fuel tank which, in combination with flammable fuel vapors, could result in a fuel tank explosion and consequent loss of the airplane. This AD was preceded by a notice of proposed rulemaking published March 1, 2012, and a supplemental notice of proposed rulemaking (SNPRM) published February 23, 2015, which included alternative actions for cargo aircraft and extended the compliance time.

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

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

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

After briefing was completed and the case was set for oral argument on September 28, the parties entered into settlement negotiations. After the parties filed a letter notifying the court of the parties' pending settlement negotiations, the court issued an order on September 26, holding the case in abeyance pending the settlement negotiations.

### **Parties Reach Settlement Agreement in Suit Seeking \$130 Million for Personal Injuries and Wrongful Death**

On January 12, 2018, in Olivas, et al. v. United States, et al., No. 15-2882 (S.D. Cal.), the parties attended mediation and reached a tentative settlement agreement, which the U.S. District Court for the Southern District of California approved on May 24, 2018. On October 3, 2018, the court granted the parties' joint motion to dismiss with prejudice.

This case arose from a motorcoach accident involving Scapadas Magicas that occurred on February 3, 2013, in San Bernardino,

California. On December 21, 2015, thirteen passengers who had been injured or killed filed suit pursuant to the Federal Tort Claims Act (FTCA) seeking a combined total of \$130 million in compensation for personal injuries and wrongful death. At that time, Scapadas Magicas was a for-hire passenger motor carrier operating primarily between Tijuana, Mexico and various locations in California. Plaintiffs alleged that FMCSA was negligent in issuing the motorcoach a Commercial Vehicle Safety Alliance decal after an October 2012 inspection and that FMCSA was negligent while conducting a January 2013 compliance review.

### **DOJ Files False Claims Act Suit Against Concrete Subcontractor in Dulles Silver Line Project**

On July 9, 2018, the U.S. Attorney's Office for the Eastern District of Virginia filed a civil complaint against Universal Concrete Products Corporation ("UCP"), and two individuals, Donald Faust, Jr., president and co-owner, and Andrew Nolan, quality control manager, for alleged violations of the False Claims Act ("FCA"), arising from work performed on the Dulles Corridor Metrorail Project (the "Dulles Project"). United States ex rel. Davidheiser v. Universal Concrete Products Corp. et al., No. 16-316 (E.D. Va.). The FCA imposes liability on individuals who defraud the government by knowingly making a false statement material to a false or fraudulent claim. The original complaint against the defendants had been filed as a qui tam action under seal in 2016 and was unsealed in May of 2018.

UCP was hired as a subcontractor to produce precast concrete paneling for the Dulles Project, a 23-mile extension of Washington, D.C.'s existing Metrorail system, which is under construction in two phases by the

Metropolitan Washington Airports Authority (“MWAA”). Upon completion, the Dulles Project will be operated by the Washington Metropolitan Area Transit Authority. The Federal government loaned MWAA approximately \$1.2 billion in Transportation Infrastructure and Innovation Act (“TIFIA”) funds to design and build the Dulles Project. The TIFIA loan is administered by DOT, and FTA provides project management oversight.

On March 28, 2016, Nathan Davidheiser (the “Relator”) filed the underlying action under seal. The Relator alleged, among other things, that UCP’s precast concrete failed to comply with required air content specifications, and that Defendants defrauded the United States by submitting false quality control records and fraudulent monthly invoices to FTA and DOT to hide its sub-par concrete.

Defendants’ answer is due in early November.

In a related criminal proceeding, United States v. Nolan, No. 18-292 (E.D. Va.), one of the Defendants in the FCA case, pled guilty to one count of conspiracy to commit wire fraud on August 3, 2018, and is currently awaiting sentencing.

### **D. C. Circuit Rejects NBAA Challenge of Santa Monica Settlement Agreement**

On June 12, 2018, the U.S. Court of Appeals for the D.C. Circuit ruled in the FAA’s favor and dismissed a petition for review challenging the FAA/Santa Monica settlement agreement, which resolved the long-standing dispute between the City of Santa Monica and the FAA over the City’s obligation to operate the Santa Monica Municipal airport. The petition for review

was filed by the National Business Aviation Association (NBAA) and several other entities. Nat’l Bus. Aviation Ass’n, et al., v. Huerta, No. 17-1054 (D.C. Cir.).

The settlement agreement resolved two lawsuits, both filed by the City of Santa Monica, and a Notice of Investigation, issued by the FAA. The agreement allows the City to shorten the airport’s runway from 4,973 feet to 3,500 feet and permits the City to close the airport in December 2028. The agreement was approved by a Consent Decree entered by the District Court for the Central District of California.

The D.C. Circuit held that the settlement agreement was not a “final agency order,” and therefore, was not reviewable under 49 U.S.C. § 46110(a). The Court rejected the petitioners’ argument that FAA was escaping judicial review through “procedural trickery.” The court found there is nothing unusual or untoward about parties seeking to settle litigation through a consent decree, and such a decree was plainly reviewable in the Ninth Circuit.

The Court did, however, conclude that the petitioners had standing. It held that if the settlement was a final order, then the Court would have “exclusive jurisdiction” to determine its lawfulness under 49 U.S.C. § 46110(c). The Court stated there was a “significant possibility” that any decision invalidating the settlement agreement would also unravel the consent decree, thus redressing any harms flowing from each and providing the petitioners with Article III standing.

On July 24, 2018, the same challengers brought a new lawsuit in the U.S. District Court for the District of Columbia. Nat’l Bus. Aviation Ass’n v. Elwell, No. 18-1719 (D.D.C.). The plaintiffs purport to challenge

the Settlement Agreement under the doctrine created by Leedom v. Kyne, 358 U.S. 184 (1958), which allows challenges to non-final agency actions in certain extreme circumstances. FAA has moved to dismiss the new case, arguing that the plaintiffs cannot meet the very difficult requirements for Leedom claims. FAA contends that the plaintiffs had an alternative means of seeking review because they could have – as expressly noted by the D.C. Circuit – intervened in the underlying litigation to challenge the Consent Decree. FAA also argues that the plaintiffs have not shown that the FAA exceeded its authority in entering into the settlement. Briefing on the motion to dismiss was completed on October 30.

### **PHMSA Seeks Summary Judgment on Challenge to Its Approval of Oil Spill Response Plans**

On June 5, 2018, PHMSA asked the U.S. District Court for the Eastern District of Michigan to grant it summary judgment in a case brought by the National Wildlife Federation (“NWF”), which challenges the agency’s approval of oil spill response plans for the Line 5 oil pipeline operated by Enbridge. Nat’l Wildlife Fed. v. Secretary of DOT, No. 17-10031 (E.D. Mich.).

Under the Clean Water Act (as amended by the Oil Pollution Act of 1990), operators of certain facilities are required to submit plans with information about how they would respond to an oil spill. PHMSA is responsible for reviewing plans submitted by oil pipeline operators, and has approved plans for Enbridge’s Line 5, which runs through Wisconsin and Michigan. NWF alleges that: (1) PHMSA’s approvals were arbitrary and capricious; and (2) before approving the plans, PHMSA was required to prepare an

Environmental Impact Statement pursuant to the National Environmental Policy Act (“NEPA”), and consult with the U.S. Fish and Wildlife Service pursuant to the Endangered Species Act (“ESA”).

PHMSA asserts that the claims are meritless. In its summary judgment briefs, PHMSA explains that it carefully reviewed Enbridge’s plans and determined that they contained all of the information required by the Clean Water Act. PHMSA also notes that because the Clean Water Act *mandates* that it approve any plan that meets the statutory criteria, PHMSA lacks the kind of discretion necessary to trigger obligations under NEPA or the ESA.

The parties’ cross-motions for summary judgment have been fully briefed since August. The Court has not scheduled oral argument.

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

### **Federal Aviation Administration**

#### **Long-standing Collective Action Case Filed by FAA Flight Service Specialists Continues**

In this collective action case brought by former FAA Flight Service Specialists who were removed from federal service as part of the Agency's 2005 outsourcing of the Automated Flight Service Stations, the Plaintiffs allege that the outsourcing and resulting reduction in force (RIF) was the Agency's attempt to eliminate older workers. Breen, et al., v. Chao, No. 05-654 (D.D.C.). Plaintiffs contend that the Automated Flight Service Stations that were targeted for outsourcing to be operated by contractors were largely staffed by Flight Service Specialists who were eligible or close to being eligible for retirement; therefore, the Plaintiffs claim they were subjected to discrimination on the basis of age.

In May 2017, the Court denied in part and granted in part the Agency's Motion for Summary Judgment. The Court granted the Agency's motion on Plaintiffs' disparate impact claim and denied the Agency's motion on Plaintiffs' disparate treatment claim. On March 27, 2018, the Court granted Plaintiffs' motion to reinstate 241 previously-dismissed plaintiffs from the case based on Plaintiffs' argument that their former counsel misled them about the nature of their participation in the case. As a remedy the Court allowed the 241 plaintiffs to rejoin the collective action. The Court's reasoning leaves open the possibility that additional plaintiffs, who are similarly situated as the

previously-dismissed plaintiffs, could move to be reinstated in the case.

On May 3, 2018, the Court issued an order directing previously-dismissed plaintiffs whose claims had not been reinstated to provide written notice to Plaintiffs' counsel by July 31, 2018 to seek reinstatement in the case. On July 27, 2018, Plaintiffs moved to join 113 additional prospective plaintiffs, and on August 10, Plaintiffs' counsel moved to reinstate 214 previously-dismissed plaintiffs. The FAA filed an opposition on August 23, arguing that Plaintiffs had not shown "good cause" under Rule 16 to modify the Scheduling Order and allow additional parties to join the lawsuit. In their reply, Plaintiffs suggested that the Court should consider certification of a class action as the best means of providing finality as to the number of plaintiffs in the case. The Plaintiffs' motion to join prospective additional plaintiffs and motion to reinstate previously-dismissed plaintiffs are both pending before the court.

With respect to discovery-related issues, the Court issued an order on July 17, reopening discovery for the limited purpose of permitting expert reports and testimony on the issue of whether the FAA's RIF process was consistent with the A-76 requirements and the practices of other agencies conducting A-76 competitions. On July 19, the parties filed a stipulation with the court, in which the FAA would agree to search for and produce documents responsive to six document requests propounded by Plaintiffs; the stipulation is pending the Court's approval.



## **Flyers Rights Again Challenges FAA Denial of Rulemaking Petition**

In 2015, Flyers Rights Education Fund petitioned the FAA to initiate a rulemaking related to seat sizes and spacing on aircraft. FAA denied the petition, and Flyers Rights appealed the decision to the U.S. Court of Appeals for the D.C. Circuit. On July 28, 2017, the Court issued a decision granting, in part, Flyers Rights' petition for review challenging FAA's denial of its petition for rulemaking. Flyers Rights Ed. Fund, Inc. v. FAA, 864 F.3d 738 (D.C. Cir. 2017). The proceeding was remanded back to the FAA for a properly reasoned disposition of Flyers Rights' petition and the safety concerns about the adverse impact of decreased seat dimensions and increased passenger size on aircraft emergency egress.

On July 2, 2018, the FAA denied Flyers Rights' petition for rulemaking, and on August 24, Flyers Rights filed a petition for review in the D.C. Circuit of FAA's latest denial of its rulemaking petition. Flyers Rights Ed. Fund v. FAA, No. 18-1227 (D.C. Cir.). Simultaneously, Flyers Rights also filed a request for reconsideration in the rulemaking docket, of the FAA denial.

After DOJ notified counsel for Flyers Rights that it could not pursue both an administrative reconsideration of the FAA denial and a judicial challenge of the denial, Flyers Rights filed a notice in the rulemaking docket which withdrew its request for reconsideration. Flyers Rights also indicated that it would voluntarily dismiss and refile its petition for review, which was incurably premature due to its administrative request for reconsideration. Because Flyers Rights had not dismissed its petition for review by October 5, when dispositive motions were due, the FAA filed a motion to dismiss for

lack of jurisdiction. That motion is fully briefed and is pending before the court.

## **FAA Revocation of Pilot and Flight Instructor Certificates Affirmed**

On August 31, 2018, the U.S. Court of Appeals for the Ninth Circuit issued a decision affirming the NTSB's decision in Administrator v. El Khoury & Abbassi, NTSB Order No. EA-5811 (May 8, 2017), which upheld the FAA's revocation of petitioner's pilot and flight instructor certificates. Abbassi v. NTSB, 736 Fed. Appx. 174 (9th Cir. 2018).

The FAA revoked Mr. Abbassi's airline transport pilot (ATP) and flight instructor certificates for making, or causing to be made, intentionally false entries in a student pilot's logbook in violation of 14 C.F.R. § 61.59(a)(2). Mr. Abbassi appealed the FAA's revocation order to the NTSB, which affirmed the FAA's order in its entirety. Mr. Abbassi then petitioned for review of the NTSB's decision. The narrow question before the Ninth Circuit was whether the NTSB properly held that the false entries in the student pilot's logbook were made in reference to a material fact. Mr. Abbassi did not dispute the NTSB's finding that the entries were false nor challenge the NTSB's conclusion that he made the entries with knowledge of their falsity.

The Ninth Circuit originally set this matter for oral argument in Pasadena, California on August 29, 2018, but later issued an order cancelling the oral argument and issued a decision two days later.

## **Denial of Bid Protest Challenged in the D.C. Circuit**

On May 28, 2018, Leader Communications, Inc., (LCI) filed a petition for review challenging an FAA Administrator's order

denying its bid protest in the acquisition of support services for the Office of Security and Hazardous Materials Safety. Leader Commc'ns, Inc. v. FAA, No. 18-1147 (D.C. Cir.).

After a series of six protests of the award decisions under a previous solicitation for related services, in 2017, the FAA issued a new solicitation for support services. LCI was eliminated from consideration for award due to noncompliance with font-size requirements resulting in its submitting a longer proposal than the submissions by compliant offerors. To avoid the twelve-point font requirement, LCI surrounded the text of much of its proposal with black outlines, alleging that the text was a graphic, illustration, or chart, which is subject to an eight-point font-size limitation. The Contracting Officer invited LCI to revise the formatting of its proposal in order to comply with the font-size requirement, but LCI declined. LCI's protest (and its two supplemental protests) focused on the font-size issue but included many additional grounds.

The Administrator denied the protest on December 26, 2017, finding that LCI failed to demonstrate that it had a substantial chance of award.

LCI has filed its opening brief and FAA's response brief is due on November 20.

### **Skydive Operator's Challenge of FAA Part 16 Decision Dismissed For Untimely Filing**

On June 5, 2018, the U.S. Court of Appeals for the Fourth Circuit denied a petition for review filed by Skydive Myrtle Beach, a commercial skydiving operator, that was seeking to challenge FAA's decision on its

Part 16 complaint against Horry County Department of Airports, the operator of the Grand Strand Airport. Skydive Myrtle Beach, Inc. v. Horry Cnty. Dep't of Airports, et al., 735 Fed. Appx. 810 (4th Cir. 2018).

The petitioner's Part 16 complaint alleged that the operator of the Grand Strand Airport violated Grant Assurance 22, *Economic Nondiscrimination*, and Grant Assurance 19, *Operation and Maintenance*, by attempting to restrict the landing area and by unreasonably reporting and characterizing incidents involving Skydive Myrtle Beach as safety concerns. The Airport countered that Skydive's operations were unsafe and that the restricted landing area was necessary for safety.

FAA initially found the Airport in compliance and actually instructed the airport to take additional measures to address safety concerns with Skydive Myrtle Beach. On appeal to the Associate Administrator, Skydive Myrtle Beach argued that FAA's initial findings were arbitrary and capricious and violated due process. According to Skydive Myrtle Beach, FAA improperly relied upon 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*. The Associate Administrator upheld FAA's initial finding, holding that its decision was ultimately supported by reliable, probative, and substantial evidence.

Skydive Myrtle Beach challenged the FAA's final decision in the Fourth Circuit. Because Skydive Myrtle Beach filed its petition for review more than 60 days after the FAA issued its final decision, FAA filed a motion to dismiss the petition for review for lack of jurisdiction. The court deferred

consideration of the jurisdictional issue pending briefing on the merits.

In denying Skydive Myrtle Beach's petition for review, the Fourth Circuit did not reach the merits, holding that the petition was untimely. The court found that the decision was issued on the date that FAA mailed and emailed it to the petitioner, and the petitioner did not file its petition for review until 109 days later, rendering the petition untimely. The court also found no reasonable grounds that excused the filing delay, and specifically referenced petitioner's "special appreciation for deadlines" in light of an "excoriating" email that petitioner sent to the FAA in which petitioner complained about the FAA's delay in issuing its decision.

### **FAA Motion to Dismiss Granted in Henderson City-County Airport Runway Extension Case**

On June 21, 2018, the U.S. Court of Appeals for the Sixth Circuit granted the FAA's motion to dismiss in Kushino, et al. v. FAA, No. 18-3084 (6th Cir.). The petitioners, absentee owners of a 180-acre farm located adjacent to the Henderson City-County Airport in Henderson, Kentucky, filed a petition for review challenging a September 2, 2016, Finding of No Significant Impact for a 1000-foot runway extension and an associated roadway realignment project. Petitioners alleged that: (1) the FAA provided inadequate notice of the draft Environmental Assessment (EA); (2) the EA failed to evaluate all reasonable alternatives; (3) the EA failed to adequately analyze potential wetlands impacts; and (4) an Environmental Impact Statement should have been prepared.

The court granted the FAA's motion to dismiss on timeliness grounds.

### **Pro Se Challenge to Santa Monica Settlement Agreement Dismissed**

On July 5, 2018, the U.S. District Court for the Central District of California dismissed an action against the United States, FAA and the City of Santa Monica, in which Barry Rosen was seeking to invalidate the consent decree and settlement agreement between the FAA and the City of Santa Monica for alleged violations of the Surplus Property Act, the Administrative Procedure Act, the National Environmental Policy Act (NEPA), and various state laws. Rosen v. U.S., No. 17-7727 (C.D. Cal.). The pro se complaint alleges the FAA lacked statutory authority to enter into the settlement agreement on the theory that only the General Services Administration (or its predecessor) possessed authority to release covenants imposed under the Surplus Property Act. The NEPA claim is based upon the alleged failure by the City and FAA to perform environmental studies on various impacts of the settlement agreement. The remaining federal claims are variations on the first two.

The court granted the FAA's motion to dismiss for lack of standing, holding that the plaintiff had failed to allege any concrete or particularized injury traceable to any of the federal claims or that any such injury was sufficiently redressable for purposes of standing. The court also found that the plaintiff's motion for summary judgment was rendered moot, and it denied plaintiff leave to further amend the complaint. In doing so, the court stated that "[b]ecause Plaintiff has already amended his complaint three times and still fails to establish the threshold standing requirement, the Court determines that amendment would be futile." Plaintiff has filed an appeal in the Court of Appeals for the Ninth Circuit, No. 18-56059.

### **City of Burien, WA Files Another Appeal in the Ninth Circuit**

The Seattle TRACON and the Seattle Tower entered into a Letter of Agreement to streamline turboprop departures during a north flow out of SeaTac Airport on July 26, 2016. The local community of Burien, Washington began complaining of increased noise over the houses in the area soon after. On February 14, 2017, the city filed a lawsuit in the Ninth Circuit against the FAA.

In response to the litigation, FAA withdrew the use of the process needed for the procedure on March 24, 2017. The FAA then undertook a NEPA study and released the preliminary analysis for public comment. After the public comment period ended on July 5, 2017, the FAA released its Final Categorical Exclusion on April 16, 2018.

The City of Burien voluntarily dismissed its earlier petition and filed a new petition for review of the Final Categorical Exclusion on June 11, 2018. City of Burien v. FAA, No. 18-71705 (9th Cir.). The Administrative Record was filed on August 20, and the City's opening brief is due on November 29.

### **D.C. Circuit Hears Oral Argument in Challenge to the Southern California Metroplex Project**

On October 18, 2018, the U.S. Court of Appeals for the D.C. Circuit heard oral argument in Vaughn v. FAA, No. 16-1377 (D.C. Cir.), a case involving a challenge to the Southern California Metroplex project. On August 31, 2016, FAA approved for implementation (via a Finding of No Significant Impact and Record of Decision) the Southern California Metroplex project. The SoCal Metroplex project consists of 153 satellite-based departures, arrivals and other procedures at six major

airports (Burbank, John Wayne, Los Angeles, Long Beach, Ontario, and San Diego) and 15 satellite airports. The project, which involves improving flexibility and predictability of air traffic routes through increased use of performance based navigation, is a key component in FAA's Next Generation Air Transportation System. The procedures were implemented in phases November 2016 through April 2017.

In October and November 2016, nine Southern California petitioners filed eight petitions for review challenging the FAA's September 2, 2016, Finding of No Significant Impact and Record of Decision for the Southern California Metroplex project. The petitions, which were filed in the Courts of Appeals for the Ninth Circuit and D.C. Circuit, allege violations of the National Environmental Policy Act. The petitions have been consolidated in the D.C. Circuit. Through mediation, FAA has tentatively reached settlements with five petitioners. The litigation with the remaining four petitioners was the subject of the recent argument before the D.C. Circuit.

### **Oral Argument Scheduled in Challenge to Runway Project at the Ravalli County Airport**

The U.S. Court of Appeals for the Ninth Circuit scheduled oral argument in Informing Citizens Against Run v. FAA, No. 17-71536 (9th Cir.) for December 6, 2018 in Seattle, Washington. The petitioner seeks review of the FAA's Finding of No Significant Impact and Record of Decision in connection with a new runway project at the Ravalli County Airport in Hamilton, Montana.

The parties attempted to settle the case through mediation, but withdrew from the court's mediation program after they were

not able to reach a settlement after two mediation sessions.

### **Mandamus Petition Filed Seeking FAA Action Related to National Parks in Hawaii and Other States**

On February 14, 2018, Public Employees for Environmental Responsibility and Hawaii Coalition Malama Pono filed a Petition for Writ of Mandamus in the U.S. Court of Appeals for the D.C. Circuit seeking to compel the FAA to prepare Air Tour Management Plans or Voluntary Agreements for seven national park units throughout the continental U.S. and Hawaii. In re: Pub. Emp. for Envtl. Responsibility, et al., No. 18-1044 (D.C. Cir.). The same petitioners previously filed suit in the U.S. District Court. See No. 17-2045 (D.D.C.).

The petitioners claim the FAA has failed to develop these plans pursuant to the National Park Air Tour Management Act of 2000, 49 U.S.C. § 40128. According to the petitioners, the plans would ensure environmental review, public participation, and mitigation or prevention of impacts on the natural and cultural resources and visitor experience in the covered parks. The petitioners contend that in addition to not developing the plans, the FAA has permitted thousands of flights over the covered parks under Interim Operating Authority.

The court initially scheduled oral argument for November 1, but has since issued an order indicating that the court will decide the case on the record and briefs, without oral argument.

### **Challenge of Terminal Expansion Project at Paulding Northwest Atlanta Airport**

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

Prior to filing their petition for review, the petitioners filed an administrative request for reconsideration of the written re-evaluation with the FAA. On December 27, 2017, the Court issued an Order to Show Cause as to why the case should not be dismissed for lack of jurisdiction while Petitioners' administrative request for reconsideration was pending with the FAA.

After the FAA denied Petitioners' request for reconsideration, Petitioners filed a second petition challenging the FAA's denial of their request for reconsideration, Louie v. Elwell, No. 18-1022 (D.C. Cir.), and moved the Court to consolidate the two cases. On March 22, 2018, the Court dismissed the first petition (17-1228) and denied the motion to consolidate the cases.

FAA's response brief is due on November 8, 2018.

## **State of Maryland Files Challenge to FAA's Aircraft Approach Plans for National Airport**

On June 26, 2018, the State of Maryland filed a petition for review challenging three 2015 changes to approach procedures for Runway 19 at Ronald Reagan Washington National Airport. Maryland v. Elwell, No. 18-1173 (D.C. Cir.). The challenge to the three air traffic control procedures is based on the FAA's alleged non-compliance with the National Environmental Policy Act, Section 4(f) of the U.S. Department of Transportation Act, and Section 106 of the National Historic Preservation Act. The changes to the approach procedures were not analyzed as part of the D.C. Metroplex Environmental Assessment. The effect of the changes was to shift south-flow arrivals to the east, moving the flight tracks from over Virginia to over the Potomac River.

In addition to its petition for review, Maryland also filed an administrative petition requesting that a supplemental EA be prepared to analyze the impact of the DC Metroplex procedures at BWI.

The FAA filed a motion to dismiss the petition as untimely because it was filed outside of the 60-day statute of limitations under 49 U.S.C. § 46110. Briefing is complete on the FAA's motion to dismiss and is pending before the D.C. Circuit.

### **FAA Part 16 Decision Challenged in the Sixth Circuit**

On March 14, 2018, a group of landowners filed a petition for review in the U.S. Court of Appeals for the Sixth Circuit to challenge a Part 16 Final Agency Decision. Boggs v. FAA, No. 18-3242 (6th Cir.). The petitioners allege that the FAA's Part 16 decision is not

supported by substantial evidence and erroneous on the issue of whether the standard for summary judgment has been met.

In October 2016, the Petitioners filed a complaint with the FAA against the City of Cleveland under 14 C.F.R Part 16 claiming violations of several grant assurances related to the alleged harm to their property resulting from operations at Cleveland Hopkins International Airport (CLE). CLE is owned and operated by the City of Cleveland, Ohio. In 1999, the airport embarked on a runway replacement and extension project. As part of that project, Runway 6R/24L was extended towards the petitioners' property. In 2000, the FAA issued a Record of Decision (ROD), which incorporated findings from an environmental review required under the National Environmental Policy Act. The ROD covered the runway replacement and extension project and concluded that no residential structures would need to be relocated for the proposed development.

The petitioners argue that their property is shown on the airport layout plan and, therefore, is dedicated airport property, is a hazard to navigation, and has diminished in value as a result of the runway extension. In their complaint, the petitioners requested that the FAA find that the City is in non-compliance with the enumerated grant assurances. This would, in turn, provide support for the Petitioners' argument that, *inter alia*, the City is required to purchase their property. The Final Agency Decision affirmed an Order of the Director granting the City's Motion for Summary Judgment and dismissing the Part 16 complaint.

The Government filed a response brief on October 17, and the case is currently pending before the court.

### **A4A Challenges FAA Part 16 Decision on Port of Portland's Use of Airport Revenue on Stormwater Management Fees**

On June 5, 2018, Air Transport Association of America, Inc., (A4A) filed a petition for review of the FAA's Final Agency Decision in its Part 16 complaint, which asserted that the Port of Portland's use of airport revenues is contrary to federal law. Air Transp. Ass'n v. FAA, No. 18-1157 (D.C. Cir.). The Port of Portland, which operates Portland International Airport, uses airport revenue to pay its combined sewer/stormwater/water bill to the City of Portland. The combined bill breaks out certain charges that represent the costs of managing stormwater on public property and the cost to the City's utility of participating in a Superfund response group. A4A asserted that because these costs are not incurred on the airport's behalf and do not directly benefit the airport, federal law prohibits the Port from paying them with airport revenue.

On August 17, 2017, the FAA issued a Director's Determination concluding that the Port's payment of these fees to the City is permissible, and not in violation of 49 USC §§ 47107(b) or 47133, Grant Assurance 25, *Airport Revenues*, or inconsistent with the FAA's *Policy and Procedures Concerning the Use of Airport Revenue (Revenue Use Policy)*. On May 15, 2018, the FAA issued a Final Agency Decision upholding the Director's Determination and affirming it was not unlawful for the Port of Portland to pay its stormwater bill even though a component of the bill included charges for management of stormwater on nonairport public property and an assessment to cover the utility's share of CERCLA response costs at a Superfund Site.

FAA's response brief is due November 13; the Port of Portland, which intervened in support of the FAA, is filing a brief by November 30; and A4A's Reply Brief is due on December 21. Oral argument has not been set.

### **District Court Denies Repair Station's Mandamus Petition Seeking to Compel FAA Revision of Press Release; Litigation on the Merits Continue in the D.C. Circuit**

On October 9, 2018, the U.S. District Court for the Northern District of Texas granted the FAA's motion to dismiss in Kornitzky Grp. LLC v. FAA, No. 18-492 (N.D. Tex.), a mandamus action seeking to order the FAA to reword a press release about an emergency order of revocation.

The Plaintiff held an FAA issued certificate that was revoked on an emergency basis for falsification of records required to be kept under the Federal Aviation Regulations (FAR). Concomitant with the Emergency Order of Revocation, the FAA issued a press release announcing the Emergency Order and describing the allegations contained in the Order. The Plaintiff alleges the press release was factually inaccurate and seeks an order from the Court compelling the Agency to withdraw the press release and issue a revised press release.

The Plaintiff has until December 9, 2018 to appeal the district court's dismissal of the mandamus petition.

Kornitzky Group's litigation on the merits of the FAA's revocation of its certification is ongoing in the D.C. Circuit. On June 8, 2018, Kornitzky Group, LLC, d/b/a AeroBearings LLC, filed a petition for review in the D.C. Circuit seeking review of the NTSB's May 11,

2018 decision and order in NTSB Order No. EA-5840, partially reversing the ALJ's decision and affirming FAA's emergency order that revoked AeroBearings's repair station certificate for intentional falsification of maintenance records and performing maintenance without adequate data in violation of FAA regulations. Kornitzky Grp. v. Elwell, No. 18-1160 (D.C. Cir.).

Petitioner was a part 145 repair station that repaired turbine engine bearings. The case arose from anonymous complaints which alleged that petitioner was performing maintenance beyond its capabilities. A subsequent reinspection revealed that petitioner did not have the technical data to support the work it was performing. Further investigation after the reinspection revealed intentional falsification of maintenance records. On March 1, 2018, the FAA issued an emergency order revoking petitioner's air agency certificate for performing work without appropriate data and intentionally falsifying approvals for return to service, which cited data that did not support the scope of work performed.

On appeal, the ALJ dismissed the FAA's intentional falsification charges and modified the sanction for maintenance violations to a suspension pending compliance. The NTSB reversed the ALJ's decision and affirmed the FAA's emergency order of revocation, based on petitioner's intentional falsification of maintenance records in violation of 14 C.F.R. § 145.12(a), and for performing maintenance without adequate in violation of 14 C.F.R. §§ 43.13(a), 145.201(b), 145.201(c)(1), and 145.201(c)(2).

The FAA's response brief is due on November 16.

### **Oral Argument Scheduled in Challenge of FAA Revocation of Pilot Certificate**

On April 16, 2018, Jeffrey Siegel filed a petition for review in the U.S. Court of Appeals for the D.C. Circuit seeking review of the NTSB's April 11, 2018, final order in Administrator v. Siegel, NTSB Order No. EA-5838, which affirmed the FAA's revocation of Mr. Siegel's private pilot certificate for operating a civil aircraft within the United States with knowledge that marijuana was carried in the aircraft in violation of 14 C.F.R. § 91.19(a). Siegel v. FAA, No. 18-1102 (D.C. Cir.). The D.C. Circuit scheduled oral argument for December 12, 2018.

On February 9, 2018, the FAA issued an emergency order revoking Mr. Siegel's private pilot certificate for operating an aircraft knowing that marijuana was carried on board in violation of § 91.19(a). The marijuana on board the aircraft was in the form of three chocolate bars labeled as having been lab tested to 100 mg of THC. Mr. Siegel denied knowing there were marijuana edibles on the aircraft at the time he operated it; he also challenged the sufficiency of the FAA's pleading and the appropriateness of the sanction. On appeal before the NTSB, the Board concluded that Mr. Siegel was not credible when he denied knowledge of the presence of the marijuana edibles on the aircraft at the time he operated it. The NTSB also found that the FAA's pleading gave Mr. Siegel sufficient notice of the factual and legal basis for the charges against him and that the sanction was consistent with agency policy.

### **Challenge of FAA Revocation of Commercial Pilot Certificate Pending**

On November 6, 2017, Peter DeCruz filed a petition for review in the U.S. Court of Appeals



for the D.C. Circuit seeking review of the FAA's revocation of his commercial pilot certificate. DeCruz v. Elwell, No. 17-1230 (D.C. Cir.). The FAA revoked Mr. DeCruz's commercial pilot certificate for operating as an air carrier without holding an air carrier certificate, economic authority, or operations specifications, in violation of 14 C.F.R. §§ 119.5(g), 119.5(i), and 119.33(a)(2) & (3); and for his serving as a pilot of an air carrier operation without completing the pilot training and competency checks required by 14 C.F.R. §§ 135.293(a) & (b), 135.297(a), 135.299(a), 135.341(a), and 135.343.

The NTSB affirmed the FAA's revocation of his certificates, finding that Mr. DeCruz acted as an air carrier because his flight operations met the four elements of common carriage and because he provided both the aircraft and the pilot services for the flight in question.

The issues before the Court are (1) whether the NTSB's finding that Mr. DeCruz operated as an air carrier without an air carrier certificate is supported by substantial evidence and is consistent with law, precedent, and policy; (2) whether the NTSB properly held the ALJ's evidentiary rulings were not an abuse of discretion; and (3) whether the FAA violated Mr. DeCruz's constitutional right to due process.

The D.C. Circuit initially scheduled oral argument on September 13, 2018, but the court subsequently issued an order indicating it would decide the case on the basis of the record and presentations in the briefs pursuant to Fed. R. App. 34(a)(2) and D.C. Cir. Rule 34(j). The parties are awaiting the court's decision.

## **Federal Highway Administration**

### **Plaintiffs File Supplemental Complaint in Challenge to SR 520 Floating Bridge Replacement Project in Seattle, Washington**

On September 19, 2018, the U.S. District Court for the Western District of Washington granted the Plaintiffs' and FHWA's stipulated motion to file a supplemental complaint and an amended case management schedule in a case concerning the SR 520 Floating Bridge Replacement Project ("SR 520") in Seattle, Washington. Montlake Community Club, et al., v. Daniel M. Mathis, et al., No. 17-1780 (W.D. Wash.). The Montlake Community Club, Montlake LLC, Stelter Montlake, LLC, and BTF Enterprises, Inc. filed the original complaint on November 28, 2017. Both the original and supplemental complaint name Daniel M. Mathis, in his official capacity as Division Administrator for the Washington Division of the FHWA, the FHWA, and Roger Millar, in his official capacity as Washington Secretary of Transportation, as defendants. The Plaintiffs are owners or otherwise have an interest in the Montlake Market, a neighborhood grocery store that will be subject to condemnation as a result of SR 520.

FHWA issued a NEPA ROD for the SR 520 project in 2011; in 2012, the NEPA FEIS and ROD were upheld in Coalition for a Sustainable 520 v. DOT, et al., No. 11-1461 (W.D. Wash. 2012).

In October 2016, FHWA completed a NEPA reevaluation for the SR 520 project following design changes that involved reconfiguring a planned freeway "lid" near the Montlake Interchange ("2016 Reevaluation"). FHWA

determined that the project changes analyzed in the 2016 Reevaluation, including acquiring the parcel of land containing the Montlake Market, did not result in new significant impacts which would require a supplemental EIS. FHWA published a Statute of Limitations Notice for the 2016 Reevaluation which passed on May 11, 2017.

The initial complaint filed in November 2017, claimed that FHWA and Washington DOT (“WSDOT”) “failed to issue a supplemental environmental impact statement or otherwise analyze the significant adverse impacts that demolishing the Montlake Market as part of the SR 520 project would have.” Following this complaint, FHWA prepared another NEPA reevaluation in July 2018 (“2018 Reevaluation”) to analyze the impacts that would specifically result from demolishing the Montlake Market. The 2018 Reevaluation concluded that the demolition of the Montlake Market would not result in any new significant impacts and that the original NEPA decision remained valid. The lawyers for WSDOT (with agreement from FHWA and the assigned Assistant U.S. Attorney) encouraged the Plaintiffs to amend their original complaint to address the 2018 Reevaluation to move the litigation timeline along before planned construction in the area of the Montlake Market which is currently scheduled for late 2019.

In the supplemental complaint filed September 19, 2018, the Plaintiffs argue: (1) that neither the 2011 FEIS, the 2016 Reevaluation, nor the 2018 Reevaluation take the “hard look” required by NEPA, and FHWA has “failed to issue a supplemental environmental impact statement analyzing the significant adverse impacts” that would result from condemning the Montlake Market; (2) that FHWA must revise the ROD because condemnation and demolition of

Montlake Market is a substantial change to the project not reflected in the 2011 ROD in violation of 23 C.F.R. § 771.127(b); and (3) that FHWA and WSDOT violated Section 106 of the National Historic Preservation Act by seeking a noise variance for nighttime construction that would adversely impact the Montlake Historic District.

FHWA filed an Answer to the Plaintiffs’ supplemental complaint on October 19, 2018.

### **U.S. District Court Rules in Favor of FHWA in Case Involving the Willits Bypass Project**

On March 30 and April 2, 2018, the U.S. District Court for the Northern District of California granted federal and state Defendants’ Motions for Summary Judgment in Coyote Valley Band of Pomo Indians of California, et al. v. DOT, et al, No. 15-04987 (N.D. Cal.), a NEPA Assignment/tribal consultation case. 2018 WL 1569714; 2018 WL 1587212.

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

G2G consultation has been to facilitate discussions and negotiations between Caltrans and the tribes.

The Plaintiffs argued that FHWA failed to engage in G2G consultation. The U.S. District Court found the record in the case amply demonstrated that FHWA had conducted adequate G2G consultation. The Court noted G2G meetings continued after the Plaintiffs filed their case and pointed to a letter from the Advisory Council on Historic Preservation, which concluded Caltrans and FHWA had negotiated in good faith and tried to understand and respond to tribal concerns. The Plaintiffs also argued that FHWA had improperly failed to reassume project responsibilities when requested to do so by the Coyote Valley tribe. The Court rejected this argument, concluding the FHWA-Caltrans NEPA Assignment memorandum of understanding in effect at the time of the request gave FHWA discretion to decide whether to reassume such responsibilities.

This was the second lawsuit over the project. See Ctr. for Biol. Diversity, et al. v. Cal. Dep't. Trans., et al., No. 12-02172 (N.D. Cal.) (ruling in favor of Caltrans and U.S. Army Corps of Engineers).

### **Settlement Reached in Mid County Parkway Case**

The parties reached a settlement in Ctr. for Biol. Diversity, et al. v. FHWA, et al., No. 17-56080 (9th Cir.). This case concerned the Mid County Parkway Project, which would construct a \$1.6 billion, 16-mile east-west freeway between Interstate 215 and California State Route 79 in Riverside County, California. FHWA retained responsibility for the project under the NEPA Assignment program for California and issued a Record of Decision in 2015.

In May 2017, the U.S. District Court for the Central District of California ruled in favor of FHWA and project sponsor Riverside County Transportation Commission (RCTC). The Court held that all but two of the arguments the Plaintiffs raised in their motion for summary judgment were not properly before the Court because they had not been administratively exhausted. Regarding the other two arguments -- an alleged deficient description of the project route and an allegedly unsatisfactory consideration of the range of alternatives -- the Court ruled in favor of FHWA and RCTC. 2017 WL 2375706.

On July 27, 2017, Plaintiffs filed an appeal to the Ninth Circuit. Appellants and RCTC entered settlement negotiations shortly thereafter and the case was entered in the Court's mediation program. The negotiations continued until June 29, 2018, when appellants and RCTC signed a final settlement agreement under which RCTC agreed to pay appellants \$250,000 in attorneys' fees and add certain mitigation measures to the project (*e.g.*, providing sound-reducing windows for homes along the project corridor and purchasing land for mitigation of impacts to wildlife habitat). The Federal government was not a party to the agreement, except FHWA's limited role of determining whether the additional mitigation measures are eligible for Federal-aid funding.

On July 3, 2018, the parties filed a Joint Stipulation to Dismiss the litigation. Under the terms of the Stipulation, each side will bear its own costs. Pursuant to the current memorandum of understanding between FHWA and the California Department of Transportation (Caltrans) governing NEPA Assignment, any further environmental decision-making will be Caltrans' responsibility.

### **Seventh Circuit Affirms Summary Judgment in Favor of FHWA in Wisconsin State Highway 164 Case**

On June 5, 2018, the United States Court of Appeals for the Seventh Circuit affirmed the entry of summary judgment in favor of FHWA. Highway J. Citizens Group, U.A, et al. v. DOT, et al., 891 F.3d 697 (7th Cir. 2018). This case concerned the Wisconsin state highway 164 rehabilitation project (“the project”), which proposes to reconstruct approximately 7.5 miles of the rural two-lane arterial road and improve safety by widening existing lanes, adding auxiliary and turn lanes in certain areas, adjusting vertical grade, imposing clear zones (e.g., tree removal) to improve sight distances, and adding bicycle accommodations along the roadway shoulder.

Highway J Citizens Group, Waukesha County Environmental Action League, and Jeffrey M. Gonyo (“the Plaintiffs”) filed suit and a motion for preliminary injunction challenging FHWA’s approval of a “d list” categorical exclusion for the project. The Plaintiffs claimed that the project would diminish the aesthetic beauty of the Kettle Moraine, damage the natural environment (including wetlands vital to the habitat of plant and animal species), reduce air quality, impinge on Plaintiffs-appellants’ recreational enjoyment of the area, and generate substantial controversy on environmental grounds. Therefore, they argued that an environmental assessment or a full impact statement should have been prepared. They also claimed that by signing a state-drafted environmental report without producing a separate written analysis of the project’s impacts, the FHWA abdicated its duty to independently evaluate the state’s work. After the U.S. District Court for the Eastern District of Wisconsin entered summary

judgment in favor of the federal and state defendants, the plaintiffs filed an appeal in the Seventh Circuit.

The Seventh Circuit agreed with the District Court’s conclusion that the agency was reasonable in determining that a categorical exclusion applied to the project. The Court emphasized the deferential standard of judicial review and noted that the validity of the categorical exclusion regulation itself was not being litigated. In rejecting the argument that the agency should have written a separate analysis, the Court said it was unnecessary for the agency to add to the state produced 141-page environmental report (which the administrative record showed that FHWA significantly contributed to). The Court offered as analogues the examples of judges signing search warrants and appellate judges who join opinions written by others: “They think and read but often find that the papers speak for themselves.”

In addressing the argument that cumulative effects should have been analyzed, the Seventh Circuit noted that the cumulative effects had already been considered when FHWA classified highway rehabilitations of this scope as a categorical exclusion (subject to certain constraints identified elsewhere in the regulation). The Court also broadly observed that including all cumulative effects in all environmental reviews is infeasible, and it summarized part of the decision in Kleppe v. Sierra Club, 427 U.S. 390 (1976), as stating that “although cumulative effects matter, the agency has discretion to consider when and how they are considered.” Finally, the Court found that even if “substantial controversy on environmental grounds” was present, the environmental report itself was an adequate response to that controversy. Therefore, it held that “appropriate environmental studies” were completed as required by 23 C.F.R. § 771.117(b).

### **U.S. District Court Dismisses Longmeadow Parkway Bridge Project Case for Want of Prosecution**

On September 21, 2018, the U.S. District Court for the Northern District of Illinois granted the Federal Defendants' Motion to Dismiss for Want of Prosecution in the case Petzel, et al., v. Kane Cnty. DOT, et al., No. 16-05435 (N.D. Ill.). In May 2016, Geoffrey Petzel filed a complaint challenging the proposed construction of the Longmeadow Parkway Bridge and Highway project in Kane County, Illinois, on the grounds that the State and Federal defendants violated NEPA, the APA, Section 4(f), and the Land and Water Conservation Fund Act. Petzel filed an amended complaint, which added claims under the Endangered Species Act.

On August 7, 2018, the U.S. District Court for the Northern District of Illinois granted the Federal Defendants' Partial Motion to Dismiss the Amended Complaint, dismissing most of the Endangered Species Act claims. 2018 WL 3740629. On August 9, 2018, the Court granted a motion by Plaintiff's Attorney to withdraw as counsel. The Court set a status hearing for September 21, 2018 to allow Plaintiff time to retain a new attorney. At the status hearing, Plaintiff conceded that he was not in discussions with any attorneys. The Judge indicated her unwillingness to grant an extension of time under these circumstances. The Assistant U.S. Attorney moved for dismissal, which the Judge granted.

Construction on two sections of the Project is complete. Two more sections are under construction, with most of the remaining sections scheduled for construction next year.

### **U.S. Court of Appeals for the First Circuit Affirms the Dismissal of Complaint Against FHWA in Narragansett Indian Tribe Case**

On August 30, 2018, the U.S. Court of Appeals for the First Circuit entered judgment on behalf of Federal Highway Administration, Rhode Island Department of Transportation, Advisory Council on Historic Preservation, and Rhode Island Historical Preservation & Heritage Commission ("the Defendants"), affirming the district court's dismissal of the complaint. Narragansett Indian Tribe v. Rhode Island Department of Transportation, et al., 903 F.3d 26 (1st Cir. 2018).

On March 31, 2017, the Narragansett Indian Tribe ("the Tribe") brought suit against the Defendants to enjoin further construction on the I-95 Providence Viaduct Bridge replacement project. The U.S. District Court for the District of Rhode Island dismissed the Tribe's complaint on the ground that the statutes on which the Tribe relied to sustain its action, the APA, National Historic Preservation Act (NHPA), and the Declaratory Judgment Act, did not create private rights of action or waive the government's sovereign immunity. Therefore, the Tribe's complaint did not demonstrate that it was entitled to relief. 2017 WL 4011149 (D.R.I. 2017).

On appeal, the Tribe contended that the federal government waived its sovereign immunity, on the ground that the NHPA implicitly creates a private right of action that is broad enough to encompass the Tribe's claims, and that the creation of such a cause of action necessarily waives the federal government's sovereign immunity. The U.S. Court of Appeals held that nothing in NHPA, either expressly or implicitly, waives the

federal government's sovereign immunity and affirmed the decision of the district court.

### **Lawsuit Filed Challenging the VTrans Colchester HES NH 5600(14) Project in Vermont**

On July 2, 2018, Plaintiffs Vallee, Inc., WESCO, Inc., and Timberlake Associates, L.L.P. filed a complaint against the Vermont Agency of Transportation ("VTrans") and the Federal Highway Administration ("FHWA"), collectively the "Defendants." R.L. Vallee Inc. et al. v. Vermont et al., No. 18-00104 (D. Vt.).

This case concerns the VTrans Colchester HES NH 5600(14) Project ("the Project"). The Project proposes to: construct a diverging diamond interchange; widen the existing roadway for new turn lanes; and install new traffic signals, lighting, and signage. These transportation improvements were designed to increase safety, reduce traffic congestion, and improve traffic flow. In July 2013, VTrans submitted documentation demonstrating the relatively low level of impacts from the Project and requested that FHWA classify the Project as a categorical exclusion (CE) under NEPA. FHWA reviewed and approved the CE request in December 2013.

The Plaintiffs' complaint challenges the Defendants' CE determination for the Project under NEPA and the APA, seeking declaratory and injunctive relief. In the complaint, the Plaintiffs allege that the Defendants "violated NEPA by failing to conduct a 'hard look' at the environmental consequences." The Plaintiffs assert that the Defendants misclassified the Project as a CE, in part, because it will: (1) completely redesign the interchange and substantially impact travel and traffic patterns; (2) result in

significant environmental impacts; (3) potentially degrade water quality; and (4) impact more than 18,000 square feet of wetlands. The Plaintiffs also claim that FHWA's alleged failure to re-evaluate the CE request was arbitrary and capricious under the APA.

The Federal Defendants filed an Answer on October 11, 2018.

### **Plaintiffs Appeal District Court's Denial of their Motion for a Temporary Restraining Order in Case Involving I-630 Construction**

On September 19, 2018, Plaintiffs filed a Notice of Appeal to the United States Court of Appeals for the Eighth Circuit. Wise, et al. v. DOT, et al., No. 18-03016 (8th Cir.). This case concerns a construction project along I-630, which proposes to widen a six-lane highway to eight lanes within the existing right-of-way.

On July 18, 2018, the Plaintiffs, a group of individuals who regularly use or live near the proposed construction on I-630, filed a complaint for declaratory judgment, a temporary restraining order, and a preliminary and permanent injunction against DOT, FHWA and the Arkansas Department of Transportation ("ARDOT") ("Defendants"). The Plaintiffs alleged that Defendants improperly classified a project widening a 2.5 mile length of I-630 near Little Rock as a Categorical Exclusion ("CE") and failed to adequately analyze various environmental impacts in violation of NEPA and the APA. Wise, et al. v U.S. Dep't. of Trans., et al., No. 18-00466, (E.D. Ark.).

At an all-day TRO hearing that occurred on July 23, 2018, the Plaintiffs argued that the Defendants misclassified the project as a CE,

and should have prepared an Environmental Assessment (EA) or Environmental Impact Statement (EIS) instead. Federal Defendants argued that the CE determination was appropriately made under the terms of a Memorandum of Agreement (MOA) between the FHWA Arkansas Division and ARDOT, which specifically recognizes widening projects as a permissible type of CE under the terms of the agreement.

On July 27, 2018, the U.S. District Court for the Eastern District of Arkansas issued an Order denying Plaintiffs' motion for a Temporary Restraining Order (TRO) to stop construction of the road widening project along I-630. The Court found the MOA to be valid and held that Plaintiffs failed to show "a probability of success in establishing that the Defendants' decision to classify the I-630 project as a CE was arbitrary, capricious, an abuse of discretion, or otherwise in violation of the law." The Court also found that an MSAT analysis for the project was not necessary, as Plaintiffs had contended, because the project was properly classified as a CE. The Court held that each of the relevant factors to be considered in deciding whether to issue injunctive relief – likelihood of success on the merits, the potential for irreparable harm to the movants, balance of harms, and public interest – weighed in favor of Defendants.

Federal and State Defendants filed their Answers to the underlying Complaint on September 17, 2018.

### **U.S. District Court for the Middle District of Tennessee Dismisses Pellissippi Parkway Extension Case**

On April 11, 2018, the U.S. District Court for the Middle District of Tennessee dismissed Citizens Against the Pellissippi Parkway

Extension, Inc. et al v. U.S. Dep't. of Trans., et al., No. 02-0549 (M.D. Tenn.) pursuant to Federal Rule of Civil Procedure 41(a)(1)(A)(ii). The order came after the parties informed the Court that all matters between the parties have been stipulated and compromised.

In 2002, Plaintiffs Citizens Against the Pellissippi Parkway Extension, Inc. (CAPPE), filed a lawsuit against the USDOT, the FHWA and Tennessee DOT. The lawsuit asked for a declaratory judgment and preliminary and permanent injunctive relief against further planning, financing, contracting, property acquisition and construction by Defendants for the Pellissippi Parkway Extension. Plaintiffs also claimed that Defendants failed to comply with the National Environmental Policy Act by failing to prepare an Environmental Impact Statement (EIS).

In 2002, the Federal Defendants voluntarily suspended federal-aid funding for the project, and therefore, filed a motion to dismiss based on mootness. On July 17, 2002, the District Court granted Plaintiff's motion for Preliminary Injunction. In light of the Preliminary Injunction, Federal Defendants withdrew the FONSI and in September 2002, Federal Defendants filed a motion requesting that the court remand the matter to the agency. In October 2002, the District Court denied federal Defendants' motion for voluntary remand and Motion to Dismiss. Federal Defendants appealed to the United States Court of Appeals for the Sixth Circuit. In July 2004, the Court of Appeals reversed the judgment of the District Court and remanded the case to the District Court with instructions to vacate or modify the preliminary injunction. In August 2004, the District Court modified the Preliminary Injunction to allow federal and state

Defendants to reconsider and reissue the relevant NEPA documents.

The Preliminary Injunction was unmodified in all other respects. The case was then administratively closed to be reopened by either party. A Draft EIS was approved in April 2010. The Final EIS was approved in September 2015. On August 31, 2017, the FHWA signed the Record of Decision signifying the completion of the NEPA process. On January 11, 2018, FHWA, Tennessee DOT and CAPPE filed a stipulation of dismissal and agreement on attorney fees.

### **U.S. Court of Appeals Denies Motion for Preliminary Injunction Against FHWA in Bonner Bridge Case**

On July 3, 2018, the United States Court of Appeals for the Fourth Circuit issued an Order denying appellants' motion for an injunction pending appeal. Save Our Sound OBX, Inc., et al. v. N.C. DOT, et al., No. 18-1649 (4th Cir.); Save Our Sound OBX, Inc., et al v. N.C. DOT, et al., No. 17-04 (E.D. N.C.).

The appellants are seeking to appeal a June 4, 2018, decision of the United States District Court for the Eastern District of North Carolina, in which the court ruled in favor of FHWA on all claims in a challenge to the Bonner Bridge Phase IIb (NC 12 Rodanthe Bridge) in the Outer Banks, North Carolina; the court held that FHWA did not violate NEPA or Section (4).

Appellants appeal various rulings issued by the District Court. They seek review by the Fourth Circuit of an order denying their motion to compel completion of the administrative record, or in the alternative,

production of extra-record evidence; an order denying in part their motion to amend their complaint; the order and judgment granting defendants' and defendant-intervenors' motions for summary judgment and denying plaintiffs' motion; and all other rulings or orders that are inextricably intertwined with or otherwise necessary to ensure meaningful review of the above-stated orders.

Appellants sought and were denied a preliminary injunction pending appeal. Because no preliminary injunction has been issued, the project may now advance to construction with an estimated completion date in 2020 at an approximate cost of \$145.33 million dollars.

Oral argument is tentatively scheduled for December 11-13, 2018.

### **Plaintiffs File Amendment to Complaint in Southeast Extension Project Case**

On June 25, 2018, Sound Rivers, Inc., Center for Biological Diversity, and Clean Air Carolina filed a first amended complaint adding defendants to their civil action. Sound Rivers, Inc., et al. v. U.S. FWS, et al., No. 18-97, (E.D.N.C.). Plaintiffs seek declaratory and injunctive relief and allege that the defendant agencies, including FHWA and the U.S. Fish and Wildlife Service, violated the APA, NEPA, and the Endangered Species Act (ESA) in issuing the Biological Opinion (BO) and approving the Record of Decision (ROD) for the Southeast Extension project in North Carolina.

The Southeast Extension project proposes to extend the Triangle Expressway from the NC 55 Bypass in Apex, North Carolina to US 64/US 264 (I-495) in Knightdale, completing the 540 Outer Loop around the greater



Raleigh area. The project seeks to fulfill transportation, social/economic demands, and mobility needs in southeast Wake County. The project, which would link the towns of Apex, Cary, Clayton, Garner, Fuquay-Varina, Holly Springs and Raleigh, is anticipated to ease congestion on several highly-used area roadways. The estimated cost of the project is approximately 2.2 billion dollars.

The Draft Environmental Impact Statement (DEIS) was issued in November 2015. The Final Environmental Impact Statement (FEIS) was approved in December 2017. The BO was issued in April 2018 and the ROD was approved June 2018. The current schedule projects design-build contracts to begin to be awarded starting in the fall/winter of 2018.

Plaintiffs assert numerous claims for relief against the defendant agencies. Claims lodged against the transportation agencies include environmental justice, failure to analyze climate changing greenhouse gases, failure to analyze impacts to wildlife and habitat and to present the impacts of different alternatives in a comparative format, failure to analyze mobile source air toxics, failure to analyze impacts to wetlands, streams and ecological function, failure to disclose how impacts to streams and wetlands will be mitigated, and deficient analysis of indirect and cumulative impacts and alternatives.

Plaintiffs have submitted their 60-day notice of filing additional claims pursuant to the ESA. After FHWA filed an Answer on August 14, 2018, Plaintiffs filed a motion for leave to file a second amended complaint, which is still pending.

### **U.S. District Court Dismisses Plaintiff's Complaint in White River National Wildlife Refuge Bridge Case**

On Wednesday, June 27, 2018, the U.S. District Court for the Eastern District of Arkansas dismissed the plaintiffs' complaint, and request to amend, with prejudice. City of Clarendon, et al. v. FHWA, et al., No. 16-092, (E.D. Ark.).

The plaintiffs originally sought preliminary and permanent injunctive relief prohibiting the demolition and removal of the 1930's era U.S. Highway 79 Bridge spanning the White River in Clarendon, Arkansas. This bridge structure and its western approach ran through the White River National Wildlife Refuge (Refuge). The removal of the bridge and a portion of the highway was a part of a larger overall project to upgrade U.S. Highway 79 in the Clarendon area. In 2007, the U.S. Fish and Wildlife Service (USFWS) agreed with the Arkansas DOT (ARDOT) to permit a new bridge and highway to transit the Refuge. However, USFWS required the current bridge and highway, through the Refuge, be removed by no later than November 2017. The demolition of the bridge was the last phase of the overall replacement project. A new bridge and highway structure were completed earlier in 2016.

The court dismissed the Plaintiff's APA, NEPA, ESA, and Section 4(f) claims on the ground that the parties had stipulated that the federal government and the state DOT had complied with all the applicable NEPA and ESA requirements along with the applicable DOT regulations. The Court denied the Plaintiff's motion to file a new supplemental action, which would add additional defendants, on the ground that allowing a

new filing at this stage would be prejudicial to the defendants. Plaintiffs did not appeal. Plaintiffs did file an action against ARDOT in state court but that matter has also been dismissed. The project to remove the bridge is underway.

### **U.S. District Court Denies Plaintiffs' Motion for a Preliminary Injunction in the Rocky Flats National Wildlife Refuge Case**

On August 9, 2018, the U.S. District Court for the District of Colorado denied Plaintiffs' motion for a preliminary injunction (PI) seeking to halt the opening of the Rocky Flats National Wildlife Refuge (Refuge) to the public. Rocky Mountain Peace & Justice Ctr., et al. v. U.S. Fish and Wildlife Serv., et al., No. 18-01017 (D. Colo.). The requested PI would have also halted the construction of public trails on the Refuge, a portion of which are likely to be constructed by FHWA's Central Federal Lands.

Plaintiffs argued that the PI was warranted on grounds that the construction violated the ESA and NEPA. On the ESA claims, the court held that Plaintiffs had failed to establish standing and dismissed those claims without prejudice. On the NEPA claims, the court held that the Plaintiffs had failed to show irreparable harm. Specifically, the court found that the Plaintiffs could not demonstrate that irreparable injury was "likely" in the absence of an injunction. The Court noted that "Regulatory action often involves managing the levels of risk, and plaintiffs have not shown a basis to claim that agencies are required to eliminate every added risk of plutonium exposure or that such mitigation would even be possible."

### **Plaintiff Voluntarily Dismisses Claims After Denial of His Request for a Preliminary Injunction**

On August 14, 2018, the Plaintiff in Poole v. Oregon, No. 18-01175 (D. Or.) voluntarily dismissed his claims against all defendants without prejudice shortly after the court denied his request for a preliminary injunction against the City of Salem's proposed zoning ordinance at the heart of the case.

The Plaintiff, John Poole, brought this action on July 2, 2018, arguing that the City of Salem, Oregon and various state and federal agencies failed to perform the review required by Section 106 of the National Historic Preservation Act (NHPA) before enacting zoning changes in Salem. The zoning changes were enacted pursuant to a new commercial construction project, the State Street Corridor Plan.

The U.S. District Court for the District of Oregon denied the Plaintiff's motion for a temporary restraining order and preliminary injunction because the Plaintiff failed to provide adequate responses to serious questions going to the merits of his NHPA claim. In particular, the Court determined that the Plaintiff failed to explain the absence of a private right of action in NHPA.

### **Settlement Reached in Challenge to Construction of a Bypass in Havelock, North Carolina**

On April 13, 2018, the North Carolina Department of Transportation (NCDOT) and the Sierra Club entered into a settlement agreement that resolved a challenge to a proposed bypass on the southwest side of Havelock, North Carolina and U.S. 70.

Sierra Club v. North Carolina Dep't of Transp., et al., No. 16-300, (E.D.N.C.).

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

The agreement, which allows NCDOT to proceed with proposed project, outlines actions, covenants and obligations to be fulfilled by NCDOT both prior to and after dismissal of the lawsuit, as well as plaintiff's covenants and obligations.

As part of the agreement, NCDOT will transfer over \$5 million to the North Carolina Coastal Land Trust (CLT) to establish a Croatan Protection Fund to be used only for real property or conservation easement acquisition. NCDOT will also transfer \$2 million dollars to the CLT to establish a Revolving Loan Fund. In addition, NCDOT committed to placing a conservation easement on an approximately 226-acre parcel of land currently owned by NCDOT. Funds paid as part of the agreement will be borne by the State. Plaintiffs filed a Motion for Voluntary Dismissal on May 1, 2018.

**FHWA files Motion to Dismiss for Lack of Jurisdiction in Florida SR 7 Project**

On July 13, 2018, Federal Defendants filed a motion to dismiss for lack of jurisdiction and failure to state a claim in City of West Palm Beach v. U.S. Army Corps of Engineers et al., No. 18-80885 (S.D. Fla.).

The City of West Palm Beach, Florida first filed this suit 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. The complaint was filed against the U.S. Army Corps of Engineers, the United States Fish and Wildlife Service, the United States Department of the Interior, the Federal Highway Administration, and the U.S. Environmental Protection Agency (collectively "Defendants"). The complaint alleges various claims including allegations that FHWA and USACE violated NEPA/APA in failing to prepare an EIS; USACE and EPA violated the CWA/APA in failing to select the least environmentally damaging alternative corridor for the Project; USACE, FHWA, and USFWS violated Section 7 of the ESA by failing to prepare an accurate Biological Opinion; and the Defendants violated the ESA in failing to reinstate the Section 7 consultation process to protect federally listed species in the area.

On November 9, 2017, Defendants filed a motion to transfer the case from the District of Columbia to the Southern District of Florida pursuant to 28 U.S.C. §1404(a). On July 3, 2018, the case was transferred to the Southern District of Florida.

On July 16, 2018, FHWA, EPA, and USACE filed a motion to dismiss claims asserted

against those agencies. Specifically, FHWA argued that the Plaintiff's claims against the agency should be dismissed for lack of jurisdiction, because they are time-barred pursuant to 23 U.S.C. § 139(l). In addition, pursuant to a NEPA assignment MOU, the Florida DOT assumed responsibility for SR 7 project, including responsibility for the environmental review, and therefore, the Plaintiff failed to state a claim against FHWA for which relief can be granted. The motion to dismiss is fully briefed and pending a decision.

### **FHWA Files Motion to Dismiss in Myrtle Beach Project case**

On April 20, 2018, FHWA filed a Partial Motion to Dismiss for Failure to State a Claim in the case, South Carolina Coastal Conservation League v. USACE et al., No. 17-03412 (D.S.C.). This case concerns the planned Interstate 73 ("I-73") project in South Carolina, which proposes to provide a direct link from North Carolina and states north of North Carolina to the Grand Strand (Myrtle Beach area). The I-73 Corridor project is approximately 80 miles in length and has been separated into two portions. The Southern portion of the project runs from I-95 near Dillon, South Carolina to the Grand Strand/Myrtle Beach area. The Northern portion of the project runs from I-95 to Hamlet, North Carolina.

The Plaintiff brought suit in December 2017, alleging violations of NEPA, the Clean Water Act (CWA), and the APA. With respect to the NEPA and APA claims, Plaintiffs alleged that Defendants failed to take a hard look at the environmental impacts of the Project; failed to consider a reasonable range of alternatives; failed to consider significant changes; and failed to prepare a Supplemental Environmental Impact

Statement. The Plaintiff also alleged that the Defendants violated Section 4(f) of the Department of Transportation Act of 1966, and in violation of CWA and APA, failed to select a suitable alternative, failed to require appropriate avoidance and minimization impacts; issued a permit that will degrade U.S. water systems; and failed to object to the issuance of the 404 Permit.

FHWA's Partial Motion to Dismiss and a Motion to Intervene filed by the Myrtle Beach Area Chamber of Commerce are currently pending before the court.

### **U.S. District Court for Oregon Dismisses Plaintiffs' Religious Freedom Claim Against FHWA**

On June 11, 2018, the U.S. District Court for Oregon adopted in part the Findings and Recommendations of the magistrate judge, which dismissed the Plaintiffs' Religious Freedom Restoration Act (RFRA) claim against FHWA and the other federal defendants. Slockish, et al., v. U.S. Fed. Hwy Admin., No. 08-01169 (D. Or.).

The Plaintiffs, a small local group of Yakima Tribe members, brought suit alleging the destruction of a Native American religious site in 2008 by a federally-funded highway-widening project along US-26 in Clackamas County, Oregon. The Plaintiffs argued that the destruction of their sacred site and associated artifacts by the highway's construction violated the RFRA because it prevented them from practicing their religious ceremonies at that location.

The magistrate judge rejected the Plaintiffs' claim, finding that Plaintiffs had not established "substantial burden" under RFRA by showing "they are being coerced to act contrary to their religious beliefs under

the threat of sanction or that a governmental benefit is being conditioned upon conduct that would violate their religious beliefs,” as is the requirement in the Ninth Circuit. In addition, the magistrate found that Plaintiff also failed to establish standing because they did not have a cognizable injury under the statute. The Plaintiffs sought review of the magistrate’s decision.

The U.S. District Court for Oregon agreed with the magistrate’s conclusion regarding “substantial burden,” but disagreed with the magistrate’s conclusion as to standing. The Court found that the magistrate conflated the Plaintiffs’ success on the merits of the claim with the question of standing to bring it in the first place and, in this case, Plaintiffs met all the requirements for standing—a concrete and particularized injury, traceable to the Defendants, that is redressable by the court. Nonetheless, the Court held that the Plaintiffs failed to establish a prima facie case by failing to demonstrate “substantial burden,” and as a result, dismissed the case.

The Plaintiffs have indicated in the media and elsewhere that they intend to appeal the dismissal to the Ninth Circuit.

## **Federal Motor Carrier Safety Administration**

### **Oral Argument Scheduled in Appeal from Dismissal of Case Challenging Compliance Reviews**

The U.S. Court of Appeals for the Eleventh Circuit scheduled oral argument in Flat Creek Transportation, LLC v. FMCSA, et. al, No. 17-14670 (11th Cir.), for January 18, 2019.

Flat Creek Transportation initially filed a complaint in the U.S. District Court for the Middle District of Alabama, alleging that

FMCSA’s anticipated future compliance review investigation would be arbitrary and capricious and not in accordance with law, and seeking declaratory and injunctive relief. While the case was pending in the district court, FMCSA completed its compliance review, which resulted in a Satisfactory safety rating, the highest possible safety rating. On September 20, 2017, the district court granted the government’s motion to dismiss based on lack of subject matter jurisdiction under the Hobbs Act, 28 U.S.C. § 2342.

On appeal to the Eleventh Circuit, Flat Creek Transportation contended that future compliance reviews will be biased and result in harm to it. FMCSA argued that the district court’s dismissal should be affirmed because (1) Flat Creek has not suffered an injury-in-fact, (2) Flat Creek’s speculative future injury is not redressable, (3) the district court correctly found that it lacks jurisdiction under the Hobbs Act, and (4) there is no final agency action under the Administrative Procedure Act.

### **In Challenge to Unified Carrier Registration (UCR) Plan Board’s Decision to Delay the Start of UCR Registration for 2018, D.C. Circuit Appeal Voluntarily Dismissed and Litigation Continues in District Court**

On May 29, 2018, the U.S. Court of Appeals for the District of Columbia Circuit granted a motion for voluntary dismissal of an appeal filed by 12 Percent Logistics and the Small Business in Transportation Coalition in 12 Percent Logistics, et al. v. UCR Plan Board, et al., No. 17-5287. The petitioners sought review of the district court’s denial of their second and third requests for injunctive relief

in 12 Percent Logistics, et al. v. UCR Plan Board, et al., No. 17-2000 (D.D.C.).

On September 27, 2017, the plaintiffs, who purport to act on behalf of motor carriers adversely impacted by UCR Plan Board's decision to delay the start of UCR registration for 2018 to allow DOT approval of reduced UCR fees, filed a complaint for declaratory and injunctive relief and a motion for temporary restraining order (TRO). They alleged that the UCR Plan Board violated the Sunshine Act and the Administrative Procedure Act by failing to give adequate notice of its September 14, 2017, meeting, at which the Board decided to postpone registration to an unspecified date after October 1, 2017. They also alleged that the UCR Plan Board failed to comply with the provisions of the UCR Agreement when it postponed the start of the 2018 registration period without amending the Agreement.

The district court denied a TRO and injunctive relief on October 18, 2017. Plaintiffs filed an amended complaint on November 3, 2017, and filed a second and third request for injunctive relief on November 17 and December 12, 2017, which the district court denied on December 1, and December 13, 2017.

Plaintiffs' appealed the district court's denials to D.C. Circuit, and also sought an injunction pending appeal. The D.C. Circuit denied the request for an injunction pending appeal on March 7, 2018, explaining that plaintiffs did not satisfy the stringent requirements for such relief, and plaintiffs subsequently moved to voluntarily dismiss the appeal on May 11, 2018.

The case, however, continues in district court, and on January 29, 2018, the district court partially granted plaintiffs' request for an injunction pending appeal and enjoined

the UCR Plan Board from holding subcommittee meetings without first complying with the notice requirements of the Sunshine Act. On March 1, 2018, the district court entered a scheduling order for the parties to file cross-motions for summary judgment. In its Motion for Summary Judgment, filed on June 15, 2018, the UCR Plan Board argued that it has largely complied with the Sunshine Act and that the plaintiffs lack standing to allege breach of the UCR agreement. Summary Judgment briefing concluded in July 2018, and the district court's decision is pending.

### **FMCSA Moves to Dismiss Lawsuit Filed Pursuant to the Federal Tort Claims Act (FTCA)**

On June 13, 2018, FMCSA filed a motion to dismiss in Senn Freight Lines, Inc., v. United States, No. 18-226 (D.S.C.). In a complaint filed in the U.S. District Court for the District of South Carolina, pursuant to the FTCA, Senn Freight alleges that the Agency conducted a compliance review and negligently cited the company with financial responsibility and driver record violations. Senn Freight contends there was no factual basis for these violations and that the Agency improperly downgraded its safety rating to "Conditional" and issued a \$17,400 civil penalty. Senn Freight further claims that FMCSA's negligence resulted in the company incurring increased insurance premiums totaling \$195,000. Accordingly, Senn Freight seeks recovery of the combined increased insurance and civil penalty payments totaling \$212,400.

The Agency's motion to dismiss argues that although Senn Freight's claims are styled as FTCA claims, they are actually an attempt to challenge the compliance review and the resulting civil penalties. As a result, under the Hobbs Act, 28 U.S.C. § 2342(3)(A), the

district court does not have subject matter jurisdiction to consider Senn Freight's claims. Moreover, Senn Freight's claims are time-barred under the Hobbs Act and Senn Freight also failed to exhaust its administrative remedies. On September 13, 2018, the district court granted the parties' joint motion to suspend all discovery deadlines, pending a decision on the Agency's motion to dismiss.

## **Federal Railroad Administration**

### **Labor Unions Challenge Certification of Mexican Locomotive Engineers and Conductors**

On September 4, 2018, the Brotherhood of Locomotive Engineers and Trainmen and the Transportation Division of the International Association of Sheet Metal, Air, Rail and Transportation Workers (collectively, the Labor Unions) filed a petition for review in the U.S. Court of Appeals for the District of Columbia Circuit (D.C. Circuit) against FRA and the Department of Transportation (collectively, the Government), challenging unspecified actions FRA took that authorized and permitted Kansas City Southern de Mexico (KCSM) to operate freight trains in the United States for the Kansas City Southern Railway (KCSR). Bhd. of Locomotive Eng'rs and Trainmen, et al. v. FRA, et al., No. 18-1235 (D.C. Cir.).

The petition for review maintains that KCSM is a Mexican railroad and that prior to July 9, 2018, it only provided railroad transportation in Mexico. The petition for review further contends that KCSM's operations in Laredo, Texas do not comply with FRA's railroad safety laws and regulations, including the regulation governing the qualification and

certification of locomotive engineers and conductors pursuant to 49 C.F.R. parts 240 and 242. The Labor Unions allege that because FRA took the challenged administrative actions without public notice or other published documentation, they are unable to cite to or attach a copy of the document(s) that memorializes FRA's final agency action.

The Government filed a Motion to Dismiss on October 22, alleging that the petitioners failed to identify a final agency action that is subject to the court's review.

### **DOT Seeks Dismissal of All Aboard Florida/Brightline Challenge**

On August 22, 2018, DOT moved for summary judgment in the latest lawsuit brought by opponents of the All Aboard Florida/Brightline passenger rail project. The suit challenges DOT's allocation of tax-exempt authority for the project, as well as the sufficiency of the environmental review conducted by FRA. Martin County v. DOT, No. 18-333 (D.D.C.).

The All Aboard Florida/Brightline Project is a private passenger railroad that will connect Miami and Orlando. FRA has conducted an environmental review of the Project, and issued its Record of Decision on December 15, 2017. On December 20, 2017, DOT authorized the issuance of \$1.15 billion in tax-exempt Private Activity Bonds ("PABs") to fund Phase II of the Project between West Palm Beach and Orlando (the "Phase II PAB Allocation"). Pursuant to a prior DOT allocation, All Aboard Florida has already issued \$600 million in PABs to fund Phase I (Miami to West Palm Beach).

Plaintiffs are opponents of the Project, including two counties located in Phase II. They bring three claims. First, they contend

that FRA's environmental review process under the National Environmental Policy Act ("NEPA") failed to adequately examine the Project's potential environmental impacts. Second, they contend that the Project is not eligible for a PAB allocation under 26 U.S.C. § 142(m). Third, they assert that the Phase II PAB Allocation has not received purportedly-required local approvals.

In its motion for summary judgment, DOT disputed each of these claims. DOT explained that FRA's environmental review process was comprehensive and thorough, and responded to each of the plaintiffs' attempts to find fault with that process. DOT also argued that the plaintiffs fall outside the "zone of interests" protected by the statutory PAB eligibility requirements, that the plaintiffs therefore cannot attempt to enforce those requirements, and that the project is any event eligible. Finally, DOT argued that it has no role in determining compliance with the Internal Revenue Code's local approval requirements, and that the plaintiffs' interpretation of those requirements in any event is inconsistent with the Treasury Department's implementing regulations.

The same plaintiffs brought earlier lawsuits challenging another DOT PAB allocation. See Indian County v. Rogoff, 110 F. Supp. 3d 59 (D.D.C. 2015) (denying preliminary injunction); Indian River County v. Rogoff, 201 F. Supp. 3d 1 (D.D.C. 2016) (dismissing some claims); Indian River County v. Rogoff, 254 F. Supp. 3d 15 (D.D.C. 2017) (dismissing remaining claims as moot).

Briefing on the parties' cross-motions for summary judgment is complete. The Court has not scheduled oral argument.

## **Federal Transit Administration**

### **Plaintiffs Seek Leave to Amend Complaint to Add State Law Claims in NEPA Challenge to Walk Bridge Replacement Project**

By letter dated September 18, 2018, shortly before cross motions for summary judgment were to be filed in Norwalk Harbor Keeper v. DOT, et al., No. 18-91 (D. Conn.), Plaintiffs' counsel requested that Defendants consent to deem the complaint to include allegations sufficient to invoke the Court's supplemental jurisdiction for its challenge to the Environmental Assessment/Environmental Impact Evaluation (EA/EIE) as inadequate and arbitrary and capricious under Connecticut state law. Defendants indicated that plaintiffs would need to seek leave to file an amended complaint to add their newly alleged state law claims under the Connecticut Environmental Policy Act (CEPA). In light of this development and Plaintiffs' planned motion for leave to amend the complaint, Defendants sought a brief extension of time to file a motion for summary judgment. By order entered September 26, 2018, the Court granted defendants' motion for an extension and reset the dispositive motion briefing schedule.

Plaintiffs Norwalk Harbor Keeper and its President, Fred Krupp, sued FTA, DOT and Connecticut DOT (Conn DOT), and Matt Welbes and Elaine Chao, in their official capacities. Plaintiffs are challenging FTA's Environmental Assessment (EA) and Finding of No Significant Impact (FONSI) for the Walk Bridge Replacement Project in Norwalk, Connecticut (the "Project"). The selected Project is a vertically lifting moveable bridge to replace the existing swing railroad bridge on the Northeast Corridor over the Norwalk River (the Walk



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

According to the complaint, Plaintiff Norwalk Harbor Keeper is a nonprofit corporation dedicated to safeguarding the ecological, recreational, aesthetic, and commercial integrity of the Norwalk River. Plaintiff Fred Krupp is a member of Norwalk Harbor Keeper and serves as the President of its Board of Directors. The Plaintiffs allege that FTA and Conn DOT failed to consider a fixed bridge at the level of the existing bridge (“Existing Level Fixed Bridge”) as an alternative in the Environmental Assessment developed under NEPA, which Plaintiffs allege would promote resiliency, shorten construction time, significantly reduce construction costs, and otherwise reduce environmental impacts. The complaint raises questions about the decision to build a moveable bridge versus a fixed bridge; alleges that the Purpose and Need under the EA improperly screens out consideration of an existing level fixed bridge alternative and was without a rational basis; that the EA was defective for failing to utilize actual existing water traffic, and therefore, that the Environmental Assessment fails to study a reasonable range of alternatives. Plaintiffs are also challenging the cost differential between a fixed bridge and a moveable bridge. The Plaintiffs also contend that the Project does not qualify as a

resiliency project and that the environmental review involved impermissible segmentation. The Plaintiffs are requesting that FTA and Conn DOT issue new environmental documents and to postpone funding the project until a new environmental review is complete. Replacement of the bridge will also involve a permit from the U.S. Coast Guard.

The parties filed cross motions for summary judgment on October 16, 2018. Response briefs are due November 6, and reply briefs are due November 20.

### **Sharks Sue Over Parking And Related FOIA Request**

On July 6, 2018, Sharks Sports and Entertainment LLC (SSE) filed a complaint seeking declaratory judgement and injunctive relief, Sharks Sports & Entertainment LLC v. FTA, No. 18-04060 (N.D. Cal.), relating to the BART Silicon Valley Phase II Extension Project (Project). The lawsuit challenges FTA’s Final Supplemental Environmental Impact Statement/Subsequent Environmental Impact Report dated February 2018 and the Record of Decision dated June 4, 2018.

The Project includes a six (6) mile extension of the BART system from the Berryessa/North San Jose Station through downtown San Jose, terminating near the Santa Clara Caltrain Station. As part of the Project, the proposed Diridon Station will interconnect several modes of transit, including BART, Caltrain, light-rail, the Altamont Express, Amtrak and the planned High Speed Rail. SSE is the parent company that manages the SAP Center, an 18,000-seat regional multipurpose event center, that is located adjacent to the planned Diridon Station. SSE also owns and operates the San Jose Sharks, a professional hockey team in the National Hockey League.

SSE alleges that FTA's NEPA review was inadequate because an eight-story parking facility was improperly omitted from the project. SSE claims that, as noted in previous Draft and Final EIS documents, a parking facility would serve to mitigate the adverse environmental impacts the Project will cause to the area. SSE contends that by concluding "that the Diridon Station will function as a destination station..." and therefore, not need the same amount of parking as other stops along the route, FTA made a prejudgment without adequate analysis. SSE is seeking an injunction, prohibiting the FTA from obligating funds to the Project and taking any further action on the project, until FTA has complied with the NEPA provisions.

FTA is currently assembling the administrative record. FTA's Answer to the complaint is due by February 6, 2019.

In connection with a FOIA request related to the Diridon Station project, on September 29, 2018, SSE filed a complaint seeking injunctive relief and attorney's fees, Sharks Sports & Entertainment LLC v. FTA, No. 18-5988 (N.D. Cal.). SSE filed a FOIA request seeking documents related to its NEPA case associated with the BART San Jose Diridon Station which is part of the Santa Clara Valley Transportation Authority Phase II Extension Project. The Plaintiffs contend that it submitted a FOIA request on March 15, 2018, and that in its response FTA indicated a number of documents were privileged. FTA denied the Plaintiffs' administrative appeal dated September 6, 2018, claiming deliberative process privilege. In the FOIA litigation, SSE is seeking copies of the privileged documents, which it alleges were improperly withheld.

### **District Court orders FTA to Supplement the Administrative Record for the LA Metro Westside Section 2 Project**

On January 26, 2018, the Beverly Hills Unified School District (BHUSD) filed a complaint in U.S. District Court for the Central District of California seeking declaratory and injunctive relief in a challenge of FTA's November 22, 2017 Supplemental Record of Decision (ROD)/Final Supplemental Environmental Impact Statement (FSEIS) for Section 2 of the Los Angeles County Metropolitan Transit Authority (LACMTA) Westside Purple Line Extension (WPLE) Project. Beverly Hills Unified School District v. FTA, et al., No. 18-0716 (C.D. Cal.). The City of Beverly Hills also filed a similar complaint on May 9, 2018. The City of Beverly Hills v. FTA, et al., No. 18-3891 (C.D. Cal.). Both BHUSD and the City allege that FTA violated NEPA, Section 4(f), and predetermined the outcome of its NEPA and Section 4(f) determination.

The WPLE Project would extend the existing L.A. Metro Purple Line by approximately 9 miles west from the Wilshire/Western Station to a new terminus at a new Westwood/VA Hospital Station in Santa Monica. The underground extension will include seven new stations spaced in approximately 1-mile intervals. The WPLE Project is divided into three phases. Section 1 of the WPLE Project is under construction. The subject of the BHUSD litigation is Section 2 -- a 2.6-mile heavy-rail underground extension of the Metro Purple Line from Wilshire/La Cienega station in the City of Beverly Hills westward to the Century City area of Los Angeles. LACMTA has started construction for Section 2 of the WPLE Project. This lawsuit is the second one challenging the project by the same set of defendants.

On May 2, 2018, BHUSD filed a motion to compel completion and supplementation of the administrative record and production of a privilege log. The dispute over the administrative record has occurred over several months and included two hearings. On September 21, the Court issued an Amended Order which requires FTA to complete and supplement the FTA Administrative Record for the WPLE Project Supplemental ROD/Final SEIS. The Court also ordered Defendants to produce a privilege log.

### **NEPA and ADA Case Withdrawn Over the Canarsie Project in New York City**

On August 16, 2018, Plaintiffs voluntarily withdrew their complaint in 14th St. Coal., et al. v. Metro. Transp. Auth., et al., No. 18-2925 (S.D.N.Y.), after FTA filed a Motion to Dismiss arguing the case was not ripe for judicial review, since an Environmental Assessment under the National Environmental Policy Act (NEPA) is currently underway for an alternate service plan. FTA had previously issued two Categorical Exclusions related to two grants for the Project.

This suit was filed by a citizens' group on April 3, 2018 against the Metropolitan Transportation Authority (MTA), the New York City Transit Authority, the New York City Department of Transportation (NYCDOT), and the Federal Transit Administration (FTA) alleging violations of NEPA and the Americans with Disabilities Act (ADA) in connection with MTA's Canarsie Project. In their complaint, the Plaintiffs expressed concerns with the project, which involves approximately \$1 billion in FTA-funded repairs and improvements to the Canarsie Tube—a

subway tunnel below the East River that was severely damaged with flood water during Hurricane Sandy. As part of the project, MTA plans to shutdown the tunnel for 18 months beginning in April 2019 to perform repairs, which will impact approximately 400,000 daily riders.

MTA, in coordination with NYCDOT, plans to provide alternative transit service to mitigate the impacts to its daily riders and the local community. MTA's alternative service plan involves converting portions of the Williamsburg Bridge and 14th Street in Manhattan to dedicated bus lanes during peak hours for the 18-month period. The Plaintiffs attacked this portion of MTA's and NYCDOT's plan as a violation of NEPA, alleging that an appropriate level of NEPA analysis was not completed. The Plaintiffs also attacked portions of improvements scheduled for the subway line, such as the replacement of staircases, as violating the ADA.

After FTA issued a Finding of No Significant Impact for the Canarsie Project on September 13, 2018, the Plaintiffs filed an environmental lawsuit challenging the project in New York State Supreme Court. The Court immediately rejected a request for a temporary injunction which would halt the project.

### **ADA Litigation Over the MTA's Middletown Road Station in the Bronx**

On February 14, 2018, the U.S. Department of Justice intervened in a lawsuit in U.S. District Court for the Southern District of New York on behalf of the Plaintiff, Bronx Independent Living Services, against the Metropolitan Transportation Authority (MTA) and the New York City Transit

Authority, alleging violations of the Americans with Disabilities Act (ADA). Bronx Indep. Living Servs. v. Metro. Transp. Auth., et al., No. 16-5023 (S.D.N.Y.).

The case involves MTA's overhaul and renovation of its Middletown Road Station, which is a nearly 100-year old elevated subway station that does not have elevators and is inaccessible to individuals with wheelchairs. The project involved a complete shutdown of the station for several months for renovations, including the demolition and replacement of the station's staircases. The project did not include the installation of elevators.

MTA applied for funding from FTA to pay for the renovations. Given the scope of work at the station, including the replacement of the station's staircases, FTA treated the renovation as an "alteration" under the ADA, which triggered an analysis as to whether additional vertical access, including the installation of elevators, was feasible under 49 C.F.R. § 37.43(a)(1). MTA asserted that the installation of elevators was not feasible, and FTA disagreed based on its own engineering analysis. As a result, FTA did not fund the station project. However, a citizen's group filed a complaint in June 2016 for ADA violations and DOJ decided to intervene in support of the Plaintiff. The case currently is in discovery, which is scheduled to conclude in December 2018.

### **DOJ Files Opposition to EAJA Fees in Purple Line Case**

On June 12, 2018, DOJ filed its Motion in Opposition to Plaintiff's Request for Attorney's Fees under the Equal Access to Justice Act in Friends of the Capital Crescent Trail v. FTA, No. 14-1471 (D.D.C.) (Purple

Line D). In the original case, which challenged FTA's Record of Decision for the Purple Line Project in Maryland, the Court initially ordered that the ROD be vacated and that FTA conduct a Supplemental Environmental Impact Statement (SEIS). Upon appeal, the D.C. Circuit reinstated the ROD and indicated that the original EIS was adequate; however, in the intervening time prior to the appeal decision, FTA conducted a Re-evaluation. Citing to the Reevaluation, the Plaintiffs are claiming they are entitled to approximately \$152,000 in attorney's fees under the Equal Access to Justice Act. Briefing of the fee petition was completed in June 2018 and the parties are awaiting a decision.

## **Maritime Administration**

### **Court of Appeal Dismisses Matson's Petition for Review in Maritime Security Program Suit**

On July 17, 2018, the U.S. Court of Appeals for the D.C. Circuit issued an opinion dismissing a petition for review filed by Matson Navigation Company that challenged MARAD's decision to allow replacement of two vessels in the Maritime Security Program (MSP). Matson Navigation Co. v. DOT, 895 F.3d 799 (D.C. Cir. 2018).

Matson challenged MARAD's approvals of requests by APL Lines, Inc. (APL) to replace two container ships serving the Middle East with two geared container ships serving Guam and Saipan. MARAD approved those transfers on October 22, 2015, and December 20, 2016, respectively. Matson, a competitor in the Guam routes, filed an administrative appeal on February 17, 2017, asserting that the geared container vessels were not eligible replacements and that APL's service to Guam would unfairly compete with Matson's

preexisting service because APL received MSP payments for the vessels. On April 7, 2017, MARAD denied Matson's administrative appeal due to a lack of standing, also noting that Matson's appeal lacked substantive merit.

Matson filed its petition for review under the Hobbs Act in the D.C. Circuit on June 2, 2017. Matson claimed the Court of Appeals had jurisdiction to review the approvals, because the MSP statute provides that vessel must be owned or operated by a U.S. citizen, as defined by section 2 of the Shipping Act of 1916 (46 U.S.C. § 50501), to be eligible for the MSP fleet; section 50501 is specifically identified in the Hobbs Act. Matson contended that since MARAD had to make a determination about the vessels' citizenship in approving APL's replacement requests, the case should be reviewed by the Court of Appeals pursuant to the Hobbs Act.

The Government's motion to dismiss for lack of jurisdiction was referred to the merits panel.

On the merits, Matson argued that APL's replacement vessels were not eligible to participate in the MSP because they carry government cargo to Saipan. Under Matson's reading of several statutory provisions, this trade is prohibited for MSP vessels. Matson also argued that the administrative record did not support MARAD's conclusion that the vessels were commercially viable.

In response, the government argued that the appellate court lacked Hobbs Act jurisdiction in this case, and identified other procedural defects with Matson's petition, including that its claims would be untimely if Hobbs Act jurisdiction applied. Regarding the merits, the Government disputed Matson's interpretation of the statutes and argued that the vessels' carriage of Government cargo to

Saipan does not impact their eligibility to participate in the MSP. The Government also argued that the administrative record contained sufficient evidence to support MARAD's determination that the vessels would be commercially viable.

In its July 17 opinion, the Court first held that, because MARAD's October 2015 approval expressly found that APL was a Section 2 citizen, it was subject to review under the Hobbs Act, but the Court nonetheless lacked jurisdiction because Matson filed its petition long after the Hobbs Act's 60-day deadline. The Court then held that it also lacked jurisdiction to review MARAD's December 2016 approval because the approval did not mention Section 2, or explicitly determine that APL was a Section 2 citizen, and thus was not issued "pursuant to" Section 2.

### **Port of Anchorage Mediation Unsuccessful**

On May 1-3, 2018, the parties in Anchorage, a Municipal Corp. v. U.S., No. 14-166 (Fed. Cl.) engaged in a mediation session in Boston, MA, to attempt to resolve the 4-year-old litigation. Unfortunately, the mediation was unsuccessful, and the parties restarted the discovery schedule. Discovery is now scheduled to end December 14, 2018.

### **National Highway Traffic Safety Administration**

#### **Second Circuit Vacates Indefinite Delay of NHTSA Rule on CAFE Civil Penalty Rate**

On April 23, 2018, the U.S. Court of Appeals for the Second Circuit granted a petition for review in the cases consolidated as Nat'l

Resources Defense Council, Inc. v. NHTSA, No. 17-2780 (2d Cir.) and vacated NHTSA's rule indefinitely delaying an increase to the civil penalty rate for violations of Corporate Average Fuel Economy (CAFE) standards. In an opinion issued more than two months later on June 29, 2018, the Court explained that NHTSA exceeded its statutory authority in indefinitely delaying a rule previously implemented pursuant to a clear Congressional directive and violated the Administrative Procedure Act (APA) by failing to provide notice-and-comment.

In December 2016, NHTSA issued a final rule that delayed the inflationary increase in the CAFE civil penalty—from \$5.50 to \$14, plus any additional annual inflationary adjustments for CAFE violations—to model year 2019. Subsequently, NHTSA delayed the effective date of the December 2016 rule for several months, until July 2017, when the effective date of the December 2016 rule was delayed indefinitely. A group of States and environmental groups filed petitions for review challenging NHTSA's indefinite delay of the December 2016 rule.

With the Court's vacatur of the indefinite delay, the December 2016 rule is currently in effect: the CAFE civil penalty rate is \$5.50 and, without any subsequent action, it will increase to \$14 in model year 2019. On April 2, 2018, NHTSA published an NPRM proposing to retain the current civil penalty rate of \$5.50 with no upward inflationary adjustment based on the agency's tentative determination that the inflationary adjustment statute does not apply to the CAFE civil penalty rate.

As a threshold matter, the Court held that both State Petitioners (the States of California, Maryland, New York, Pennsylvania, and Vermont) and Environmental Petitioners (the Center for

Biological Diversity, the National Resources Defense Council, and the Sierra Club) had standing to challenge the indefinite delay rule and did so in a timely manner. In doing so, the Court reasoned that the statutory provision requiring a petition for review to "be filed not later than 59 days after the regulation is prescribed" means that the clock does not start running until the rule is published in the Federal Register; the rule being available for public inspection does not suffice. Regardless, the Court observed that the 59-day deadline is a claim-processing rule subject to equitable tolling, not a statute of limitations that would deprive the Court of jurisdiction to hear the challenge.

On the merits, the Court held that NHTSA did not have the statutory authority to indefinitely delay its previous inflation adjustment, because Congress' directive to make the required adjustments pursuant to a specific schedule was clear and did not confer NHTSA with any discretion regarding the timing of the adjustments. Moreover, the statute's stated purpose and legislative history run counter to authorizing an agency to indefinitely delay implementation. The Court rejected NHTSA's arguments that the Agency's decision to reconsider the increased civil penalty rate requires indefinite delay, that its authority to indefinitely delay the adjustment is encompassed by its general statutory authority to administer CAFE, and that it possesses inherent authority to delay the effective date of the rule.

The Court also concluded that NHTSA violated the APA by issuing the indefinite delay without notice-and-comment. The Court rejected NHTSA's claim that it had good cause to dispense with notice-and-comment. Specifically, the Court reasoned that any imminent need to indefinitely delay the adjustment was of the Agency's own making, and the public and industry's

responses to NHTSA's action demonstrated the need for an opportunity to comment in advance. NHTSA's subsequent notice-and-comment for the April 2018 NPRM did not cure the Agency's failure to follow the required procedures before the delay was instituted.

### **Southern District of New York Rules DOT May Not Restrict Testimony by Former Employee**

In Koopmann et al v. U.S. Department of Transportation et al, No. 18-03460 (S.D.N.Y.) Plaintiffs brought a challenge under the Administrative Procedure Act against a DOT determination that a former NHTSA employee could not testify in a class action against Fiat Chrysler Automobiles (FCA). The underlying class action alleged that FCA had committed securities fraud by making various representations in SEC filings and other public pronouncements that the company was complying with its legal obligations when its management was aware that FCA was violating statutes enforced by NHTSA. The class action plaintiffs sought to take the deposition of a former NHTSA employee who had participated in an investigation into FCA's failure to provide replacement parts, perform effective repairs or repair vehicles in a timely fashion in safety recalls. The former employee was served with a subpoena for his testimony and NHTSA considered the request pursuant to the Department's Touhy regulations.

NHTSA denied the request, noting that the regulations apply on their face to former employees (49 C.F.R. § 9.3). The denial then explained that the testimony was unnecessary because the NHTSA investigation had already generated a voluminous public record, including docket submissions, a transcript of a public hearing, a formal

consent order between Chrysler and NHTSA, a \$105 million fine, and other public documents. Similarly, as the employee involved was not in a position to interact with FCA management, the public record was far more relevant than the testimony of a single investigator. Finally, the denial also stated that the former employee was prohibited from testifying under 49 C.F.R. part 9 unless an exception applied. After examining the exceptions in 49 C.F.R. § 9.9 and finding that none applied, the agency found that allowing the testimony would not be in the interests of DOT as allowing it would divert agency resources and potentially have a chilling effect on the activities of investigators in the future.

Plaintiffs brought suit in the Southern District of New York, alleging the denial was "arbitrary, capricious, an abuse of discretion, and in excess of DOT statutory jurisdiction" because the underlying statute authorizing DOT's Touhy regulations applied only to current and not former employees. After consideration of cross-motions for summary judgment, the Court ruled in plaintiff's favor and set aside the DOT decision.

The Court concluded that the text, structure, and purpose of 5 U.S.C. § 301 (aka the "Housekeeping Statute") dictated that DOT could not apply regulations implementing that statute to former employees. In particular, the Court noted that the "Housekeeping Statute" did not expressly authorize agencies to limit the testimony of former employees. Although § 9.3 of Part 9 had been amended by DOT in 1993 to encompass both present and former employees, this amendment, in the Court's view, exceeded DOT's authority. Applying Chevron, the Court noted that 5 U.S.C. § 301 was unambiguous on its face and did not authorize agencies to restrict the activities of former employees. Further, the court found

that that structure and the history of the “Housekeeping Statute” dictated the same result. Finally, the Court observed that “the few courts to have considered the issue presented here have all reached the very same conclusion.”

### **Court Requests Additional Briefing in FOIA Case Seeking Tesla Information**

On October 1, the U.S. District Court for the District of Columbia issued a decision denying without prejudice both the government’s and plaintiff’s Motions for Summary Judgment in Quality Control Sys., Corp. v. DOT, No. 17-1266 (D.D.C.). This case stems from NHTSA’s investigation of Tesla’s automated driving systems after a May 2016 Tesla Model S collided with a tractor trailer. As part of the investigation, NHTSA requested an array of data from Tesla, and Tesla provided detailed information from Tesla vehicles in operation. Ultimately, NHTSA did not identify defects in the design or performance of Tesla’s automated driving systems. In addition, in the closing report, NHTSA found that the crash rate for Tesla vehicles dropped by almost 40 percent after Autosteer installation and included a diagram depicting this finding.

Quality Control Systems (QCS) then submitted a FOIA request for the underlying mileage and airbag deployment data that served as the basis for the diagram. NHTSA identified responsive records but withheld the documents under exemptions 4 and 5.

In its decision, the District Court noted that through summary judgment briefing, the parties have narrowed the dispute to 2 issues: 1) whether exemption 4 applies to the four categories of data that QCS requests and 2)

whether an excel file that includes NHTSA’s calculations for the diagram is deliberative and thus protected by exemption 5. The four categories of data consist of (1) the mileage of each vehicle at the time of the last data retrieval; (2) the mileage of each vehicle at the time the Autosteer software was installed on the vehicle; (3) data reflecting whether each vehicle experienced any airbag deployments before the Autosteer software was installed; and (4) data reflecting whether each vehicle experienced any airbag deployments after the Autosteer software was installed.

With regard to the first issue, the Court noted that NHTSA’s Motion for Summary Judgment and Tesla’s declaration attached to NHTSA’s Motion focused on why exemption 4 protected disclosure of Tesla’s database as a whole, rather than on the four specific categories of data that Plaintiff seeks. Thus, the Court found that it was “unable to determine whether any of the four specific categories of data – segregated from the other data in the database – constitute confidential information protected by FOIA exemption 4.” In addition, with respect to NHTSA’s excel file, the court stated that it needs additional information to determine whether the file that NHTSA used to calculate the diagram reflects deliberative judgment or is “simply raw data (and basic mathematical calculations).” Slip op. at 13. The parties filed a joint status report on October 19, 2018 that proposes a schedule for further proceedings.



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

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

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

During the administrative proceedings, Centurion argued that the regulation requires maps to be "current," but the Notice of Probable Violation (NOPV) alleged the maps were not "accurate." Centurion argued that its maps were current. Centurion also argued that its temporary markings before excavation began should have been considered to be accurate because the company marked the location of another operator's 8-inch line believing it to be their line. This other line was directly above Centurion's 8-inch line, which was damaged during excavation. Centurion also argued that its markings, although on another line that

was not its own and was not the line damaged during excavation, were in the area of excavation and therefore were accurate. PHMSA's Order rejected Centurion's arguments.

On April 4, 2018, the parties filed a joint stipulation to stay further proceedings pending settlement negotiations. As a result, Centurion has not filed its opening brief in the litigation, and the parties continue to work toward a settlement of all claims.

### **U-Haul Drops Suit Against DOT for Refusal to Release Certain Information Under Touhy Regulations**

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

The government filed an Answer on March 19, 2018. On May 7, 2018, U-Haul filed a stipulation of dismissal, without prejudice, of its claims against the DOT. As a result, the court entered an order on that same day dismissing the case.

## **PHMSA Sued for Alleged Violations of Mineral Leasing Act**

On August 14, 2018, WildEarth Guardians (WildEarth) filed suit against DOT/PHMSA in the U.S. District Court for the District of Montana, alleging that PHMSA has failed to comply with the Mineral Leasing Act (MLA) by not “causing the examination of all [oil and gas] pipelines and associated facilities on Federal lands” at least once a year and causing “the prompt reporting of any potential leaks or safety problems” on such lands. WildEarth Guardians v. Chao, et al., 18-110 (D. Mont.).

Specifically, Plaintiff alleged that PHMSA violated, and continues to violate certain provisions of the MLA because PHMSA’s regulations exempt certain pipelines from federal oversight, and the MLA provides no such exemption. Plaintiffs seek injunctive relief in the form of requiring PHMSA, and other named defendants, to identify all oil and gas pipelines and associated facilities on federal lands, catalogue when they were last examined, and ensure that each segment and associated facility is examined at least annually going forward. Plaintiffs also seek the recovery of attorneys’ fees and costs for the alleged violations.

The government’s Motion to Dismiss is due on November 8, 2018.

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