U.S. Department of Transportation

DOT LITIGATION NEWS

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Supreme Court Litigation

AAR Files Petition for Certiorari Seeking Review of D.C. Circuit Ruling that Proper Remedy Is to Sever Statute in Amtrak Metrics and Standards Litigation

On January 22, 2019, the Association of American Railroads ("AAR") filed a petition for a writ of certiorari asserting that the Passenger Rail Investment and Improvement Act of 2008 ("PRIIA"), the statute that grants FRA and Amtrak joint rulemaking authority over establishing metrics and standards, violates due process and the separation of powers principle and that the constitutional defects cannot be cured by severing the arbitration provision in the statute. The Government's brief in opposition is due on April 26.

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

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

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

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

The district court agreed with AAR and entered judgment on March 23, 2017 in favor of 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.

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 PRIIA and to leave the balance of Section 207 intact. AAR v. DOT, 896 F.3d 539 (D.C. Cir.). The ruling allows FRA and Amtrak to adopt new metrics and standards. AAR filed a petition for rehearing en banc on August 31, 2018, which the D.C. Circuit denied on October 24. AAR's petition for writ certiorari was filed thereafter in January 2019.

Takings Case Regarding Private Terminal at Dallas Love Field Marches Forward to Supreme Court

In May 2018, the Court of Appeals for the Federal Circuit issued a significant decision in Love Terminal Partners, et al., v. United States, an appeal by the United States of a ruling that the Wright Amendment Reform Act ("WARA"), a federal statute involving Dallas Love Field, amounted to a taking of property. 889 F.3d 381. In April 2016, the Court of Federal Claims ("CFC") entered judgment in favor of the plaintiffs and awarded just compensation in the amount of $133.5 million. 97 Fed. Cl. 355. The Federal Circuit reversed the CFC's judgment and held that WARA did not constitute a physical or a regulatory taking.

Congress has long imposed restrictions on air carrier operations at Love Field under the Wright Amendment to support Dallas-Fort Worth International Airport. In 2006, the concerned parties (the cities of Dallas and Fort Worth, the DFW airport board, Southwest Airlines, and American Airlines) reached agreement (the Five-Party Agreement) on resolving their disputes about the use of Love Field, including providing for the demolition of plaintiffs' private 6-gate terminal at Love Field. The parties urged Congress to adopt legislation permitting the Five-Party Agreement to go forward. Later that year, Congress responded by enacting WARA, which referenced the aforementioned agreement and phased out existing restrictions and imposing others. In addition, to ensure that Love Field did not expand, the concerned parties had agreed, and WARA included a provision, to cap the number of passenger gates permitted at the airport. In July 2008, Love Terminal Partners, L.P. and Virginia Aerospace, LLC , owners of the private terminal, then filed a complaint in the CFC alleging that WARA effected a taking of their private airline terminal and leasehold rights for which they should be compensated.

The Court of Appeals decision includes a lengthy discussion of regulatory takings and the standards under both Penn Central and Lucas. The Federal Circuit pointed out that the plaintiffs needed to show that their property had value in the regulatory environment that existed before WARA and that the enactment of WARA diminished their property value. The plaintiffs had been unsuccessful in operating the 6-gate terminal, and the Court noted that "between [the

plaintiffs'] acquisition of the sublease in 1999 and the enactment of WARA in 2006, plaintiffs suffered a net income loss of roughly $13 million. And at no point during that time…did revenue exceed plaintiffs' carrying costs…." Thus, the Court found that "[h]ere there can be no regulatory taking because plaintiffs have not demonstrated or even attempted to demonstrate, that their ability to use their property for commercial air passenger service under the pre-WARA regulatory regime had any value." 889 F.3d at 1343. Essentially, WARA had no adverse economic impact on the plaintiffs' property.

In addition, the Federal Circuit found that there was no physical taking of the plaintiffs' private terminal because WARA did not codify the Five-Party Agreement in its entirety and specifically did not codify the portions of the Agreement in which the City of Dallas agreed to acquire and demolish plaintiffs' terminal. In reaching this decision, the Court found it notable that WARA explicitly provides that federal funds should not be used to remove the plaintiffs' gates, an indication that the federal government was distancing itself from Dallas' intended action.

Plaintiffs have filed a Petition for Writ of Certiorari focusing upon the Federal Circuit's regulatory takings analysis and asks the Court to consider two issues: whether the Federal Circuit was correct in finding that there was no regulatory taking because prior to the enactment of WARA, Plaintiffs' costs exceed its revenue and in finding that the Plaintiffs did not have reasonable investment-backed expectations that there would be a change in the regulatory environment. The government's Opposition to the Petition for Writ of Certiorari is due on April 15.

Railroad Taxation Case Pending in the Supreme Court for the Third Time

The Alabama Department of Revenue and CSX Transportation, Inc. are before the Supreme Court a third time to determine whether Alabama's state sales and use tax discriminates against railroads and thus violates the Railroad Revitalization and Regulatory Reform Act ("4-R Act"). CSX Transp., Inc. v. Alabama Dep't of Revenue, No. 18-612 (S. Ct.). Alabama applies a sales and use tax on diesel fuel purchased by railroads but exempts fuel purchased by motor carriers and water carriers. Thus, CSX argues that Alabama is discriminating against railroads.

In the first case before the Supreme Court, the Court determined that the catch-all provision did allow CSX to challenge Alabama's sales and use tax and remanded the case for further proceedings. 562 U.S. 277 (2011). In 2013, the case made its way back to the Court, and the Court determined that the proper comparison class was the railroad's competitors, the motor carriers and the water carriers and that a roughly equivalent tax imposed on a competitor could justify different tax treatment. 135 S. Ct. 1136 (2015). The Court once again remanded the case. On remand, the District Court found that Alabama's tax was not discriminatory because Alabama had justified the exemption for motor carriers and water carriers. The Court found that motor carriers paid a roughly equivalent motor fuels tax. As for the water carriers, Alabama argued that if it applied the sales and use tax to interstate water carriers, it could be in violation of the Commerce Clause. Thus, the Court found that the threat of Commerce Clause litigation justified the State's decision to continue the

sales and use tax exemption for water carriers' purchases of fuel.

The Court of Appeals for the Eleventh Circuit affirmed the district court's holding with regard to motor carriers but reversed with regard to water carriers. The Eleventh Circuit held that future litigation risk was not sufficient to justify discrimination against the railroads. 888 F.3d 1163. The State of Alabama filed a Petition for Writ of Certiorari regarding the water carriers' issue, and CSX filed a conditional cross-petition seeking review of the motor carrier issue if the Court ultimately grants certiorari. The Court has requested the views of the United States.

Court Hears Oral Argument in Hobbs Act Jurisdictional Channeling Case

On March 25, 2019, the Court heard oral argument in PDR Network, LLC v. Carlton & Harris Chiropractic, No. 17-1705. This case arose out of an alleged violation of the Telephone Consumer Protection Act of 1991 ("TCPA"), which generally prohibits the use of faxes to send "unsolicited advertisements." Petitioner publishes the Physicians' Desk Reference and sent a fax to Carlton & Harris Chiropractic offering a free version of the reference. The TCPA allows for private rights of action to enforce the TCPA, and Carlton & Harris filed a class action lawsuit arguing that petitioners violated the TCPA by sending an "unsolicited advertisement."

PDR Network moved to dismiss the case because the fax was offering a free product. Petitioners argued that since the product was not offering anything for sale, it was not an "unsolicited advertisement." Carlton & Harris responded by pointing to an Order by the Federal Communications Commission ("FCC") stating that "unsolicited advertisements" could include "free goods or services that are part of an overall marketing campaign to sell property, goods, or services." The District Court then conducted a Chevron analysis and interpreted the TCPA as only prohibiting faxes with a commercial aim and found that the FCC's Order supported this interpretation. On appeal, the Court of Appeals for the Fourth Circuit reversed and found that the Hobbs Act precluded the District Court from considering the validity of the FCC Order. In addition, the Fourth Circuit held that the FCC Order was clear and that faxes promoting free goods qualify as "unsolicited advertisements."

The Supreme Court granted certiorari limited to the question of whether the Hobbs Act required the district court in this case to accept the FCC's interpretation of the TCPA. The United States participated as amicus curiae in support of Carlton & Harris and argued that the Hobbs Act provides the courts of appeals with exclusive jurisdiction to determine the validity of certain FCC orders. The government argued that the Hobbs Act's jurisdiction channeling provisions preclude parties from collaterally attacking agency orders in private litigation in state or district courts, outside of the procedures established by the Hobbs Act.

DOT was an active participant in the briefing and preparation for oral argument, because the Hobbs Act contains judicial review provisions that are applicable to several DOT operating administrations: FMCSA, FRA, NHTSA, and MARAD.

Supreme Court to Revisit Constitutionality of Warrantless Blood Draws in Drunk Driving Prosecutions

On January 11, 2019, the Supreme Court granted certiorari in Mitchell v. Wisconsin (No. 18-6210), a case with important implications for prosecutions for driving under the influence of alcohol ("DUI"). Mitchell seeks to overturn his DUI conviction, which was based on the results of a post-arrest blood draw taken at a hospital, while he was unconscious and unable to give consent. Mitchell argues that the State has attempted to "create a new per se exception to the warrant requirement for blood tests of unconscious motorists suspected of drunk driving." The case poses the question whether an implied consent statute authorizing a blood draw from an unconscious motorist provides an exception to the Fourth Amendment warrant requirement.

The Supreme Court last considered implied consent statutes in Birchfield v. North Dakota, 136 S. Ct. 2160 (2016), where it held that a warrant is generally required before conducting a blood test in DUI cases, but a warrant is not required for a breath test. The difference, the Court noted, is that "breath tests do not implicate significant privacy concerns." Blood tests, on the other hand, "are significantly more intrusive, and their reasonableness must be judged in light of the availability of the less invasive alternative of a breath test." The Court also stated that "[n]othing prevents the police from seeking a warrant for a blood test when there is sufficient time to do so in the particular circumstances or from relying on the exigent circumstances exception to the warrant requirement when there is not." Furthermore, as a preview of the issue now raised in Mitchell, the Court noted that it "ha[d] no reason to believe" that it is "common" in the DUI context for the suspect to be so intoxicated as to be unable to consent to a blood draw, and that even in such cases, "the police may apply for a warrant if need be."

Previously, in Missouri v. McNeely, 569 U.S. 141 (2013), the Court held that the Fourth Amendment warrant requirement is not automatically waived in drunk-driving cases. The Court reasoned that the mere fact of metabolization of alcohol in the bloodstream does not present a *per se* exigent circumstance that justifies an exception to the warrant requirement. Instead, the Court held that the reasonableness of warrantless blood draws "must be determined case by case based on the totality of the circumstances."

Petitioner filed his brief on February 25, 2019 and respondent filed its brief on March 27, 2019. The case is set for oral argument on April 23, 2019.

Supreme Court Considers Whether to Eliminate Seminole Rock and Auer Deference

On March 27, 2019, the Supreme Court heard oral argument in Kisor v. Wilkie (No. 18-15), in which it is considering whether to overrule the deference doctrine established by Bowles v. Seminole Rock & Sand Co., 325 U.S. 410 (1945) and Auer v. Robbins, 519 U.S. 452 (1997). Those cases provide that an agency's interpretation of its own ambiguous regulation is controlling unless plainly erroneous or inconsistent with the regulation. In Kisor, a veteran who claimed certain benefits from the Department of Veterans Affairs ("VA") sought review in the U.S. Court of Appeals for the Federal Circuit, arguing that the VA's denial of benefits was

inconsistent with one of the agency's regulations. The Federal Circuit held that the regulation was ambiguous, and deferred to the VA's interpretation under Seminole Rock and Auer. The veteran then petitioned the Supreme Court for certiorari, and asked the Court to overrule Seminole Rock and Auer.

Petitioner argues, among other things, that Seminole Rock and Auer deference is inconsistent with the Administrative Procedure Act ("APA"), incentivizes agencies to write vague regulations, and does not comport with separation of powers principles. The United States (on behalf of the VA) argues that Seminole Rock and Auer should be clarified and narrowed, but not overruled. The United States contends that Seminole Rock and Auer raise serious concerns: the basis for deference to agency interpretations of regulations is unclear, such deference is in tension with the APA's distinction between legislative and interpretative rules, and overly broad deference can have harmful practical consequences.

The United States proposes clarifying that courts should only defer to an agency's interpretation of its regulation when: (1) the court has determined that the regulation is ambiguous after using all the traditional tools of interpretation; (2) the agency's interpretation falls reasonably within the zone of ambiguity identified; (3) the agency's interpretation does not conflict with its prior views, and is not a novel interpretation that disrupts settled expectations; (4) the agency's interpretation implicates its expertise; and (5) the agency's interpretation is given by officials who can be said to speak for the agency. The United States argues that with these limitations in place, *stare decisis* counsels against overruling Seminole Rock and Auer. The Supreme Court is expected to issue a decision by the end of its term in June 2019.

Departmental Litigation in Other Federal Courts

United States Argues That Patients' Claims Against Air Ambulance Carriers Are Not Preempted

On March 19, 2019, the U.S. Court of Appeals for the Tenth Circuit heard oral argument in Scarlett, et al. v. Air Methods Corp., No. 18-1247 (10th Cir.). In its brief, the United States argued that the Airline Deregulation Act of 1978 ("ADA") does not preempt implied contract claims brought by a class of patients against two air ambulance carriers.

The plaintiff class includes individuals who were transported by air ambulance, and who later received bills for allegedly exorbitant amounts. The patients brought suit in federal district court against the air ambulance carriers, claiming 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 carriers to collect only a reasonable amount. The carriers moved to dismiss, arguing that the patients' claims were barred by the ADA, which preempts any state law "related to a price, route, or service of an air carrier." 49 U.S.C. § 41713(b)(1). The patients disagreed that the ADA applied, contending that the carriers were not covered by the statute, and noting that the Supreme Court has held that the ADA in any event 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). In the alternative, the patients argued that any application of the ADA to preempt their claims would be unconstitutional. The United States intervened to defend the ADA's constitutionality and to offer its views on the proper application of the ADA.

The District Court granted the carriers' motion to dismiss. Scarlett v. Air Methods Corp., No. 16-2723, 2018 WL 2322075 (D. Colo. May 22, 2018). On the key preemption issue, the District Court held that the parties had not reached actual agreements (either in writing or impliedly through their conduct), that the patients could therefore rely only on state law equitable principles, and that the ADA prohibited enforcement of such principles against the carriers. The patients appealed to the Tenth Circuit.

In its appellate brief, the United States agreed with the District Court that the carriers are covered by the ADA and that the ADA presents no constitutional problems, but disagreed with the District Court's preemption analysis. The United States noted that while state law equitable principles are generally preempted by the ADA, the carriers rely on the exact same equitable principles to contend that the patients are obligated to pay for the services they received. And the United States contended that if the carriers rely on state equitable principles as the basis for their compensation, they cannot at the same time prevent their patients from relying on those same principles to argue that the carriers' charges are unreasonable. See Dan's City Used Cars v. Pelkey, 569 U.S. 251, 265 (2013) (rejecting a similar attempt by a party to "have it both ways").

FMCSA Decision Regarding Preemption of California's Meal and Rest Break Rules Challenged in the Ninth Circuit

On December 21, 2018, FMCSA granted petitions filed by the American Trucking Association and the Specialized Carriers & Rigging Association seeking a determination that California's Meal and Rest Break Rules ("MRB Rules"), as applied to property-carrying commercial motor vehicle ("CMV") drivers subject to FMCSA's hours-of-service (HOS) regulations, are preempted under 49 U.S.C. § 31141. Federal law provides for preemption of state laws on CMV safety that are more stringent than Federal regulations and (1) have no safety benefit; (2) are incompatible with Federal regulations; or (3) would cause an unreasonable burden on interstate commerce.

California's MRB Rules generally require that drivers be given a 30-minute meal break every five hours, as well as an additional 10-minute rest break every four hours. The Federal hours-of-service regulations impose daily limits on driving time for truck drivers operating a CMV in interstate commerce, and require long-haul truck drivers to take at least 30 minutes off duty no later than eight hours after coming on duty. In its December 21 decision, FMCSA determined that California's MRB Rules are laws on CMV safety, are more stringent than the Agency's HOS regulations, have no safety benefits that extend beyond those already provided by the Federal Motor Carrier Safety Regulations, are incompatible with the Federal HOS regulations, and cause an unreasonable burden on interstate commerce. 83 Fed. Reg. 67470 (Dec. 28, 2018).

On December 27, 2018, in International Brotherhood of Teamsters, et al., v. FMCSA, No. 18-73488, the International Brotherhood of Teamsters ("IBT") Local 2785 and an individual member filed a petition for review in the U.S. Court of Appeals for the Ninth Circuit, seeking judicial review of FMCSA's December 21 preemption determination. On February 6, 2019, two additional petitions for review were filed by the International Brotherhood of Teamsters Local 848, and the California Labor Commissioner. IBT, et. al v. FMCSA, et al., No. 19-70323; Labor Commissioner for the State of California v. FMCSA, No. 19-70329. On February 19, 2019, in Duy Ly, et al. v. FMCSA, et al., No. 19-70413, two individual drivers filed a fourth petition for review in the Ninth Circuit. On March 6, the parties filed a joint motion to seek consolidation of the cases; the motion is pending before the Court.

Sixth Circuit Hears Oral Argument in Appeal of Highway Beautification Act Case

On January 30, 2019, the Sixth Circuit heard oral argument in Thomas v. Schroer, No. 17-6238 (6th Cir.), the State of Tennessee's appeal of a ruling on the constitutionality of the Tennessee Billboard Regulation and Control Act ("Billboard Act"), which provides for effective control of outdoor signs as required by the Highway Beautification Act ("HBA"). The Plaintiff, William H. Thomas, Jr., a billboard operator, challenged the State's denial of a permit for a non-commercial billboard displaying his thoughts and ideas, on property he owns, at a location in violation of the Billboard Act's sign spacing restrictions. The Billboard Act allows the display of signs along designated highways in commercial and industrial areas, subject to restrictions on size, spacing, and lighting contained in an agreement with FHWA. Had the sign been deemed an "on premises" sign, providing information about

the sale of, or activities on the property on which it is located, it would have been excepted from the restrictions.

The U.S. District Court for the Western District of Tennessee found that the Tennessee Billboard Act is an unconstitutional, content-based regulation of speech because the "content of the message" on the sign determined whether it meets the on-premises exception. See Thomas v. Schroer, 248 F. Supp. 3d 868 (W.D. Tenn. 2017).

On appeal to the Sixth Circuit, the United States submitted an amicus brief to protect its interests in highway safety and aesthetics, which are furthered through the sign regulations set forth in the HBA, implementing regulations, and related state laws. The Government stated that it has a strong interest in ensuring that these provisions are correctly interpreted and subjected to appropriate First Amendment review. In the amicus brief and at oral argument, the Government argued that the Court should uphold the on-premises exception in the Tennessee Billboard Act as a permissible, content-neutral regulation of speech based on the nexus of the sign to the property, not its content. Moreover, the Government argued its compelling interests in traffic safety and aesthetics justifies the legitimate and balanced restrictions in the HBA and parallel state law provisions.

Labor Union Challenges Pilot Program to Test Automated Track Inspection Methodologies

On February 21, 2019, the Brotherhood of Maintenance of Way Employees Division/IBT ("BMWED") filed a second petition for review in the U.S. Court of Appeals for the District of Columbia Circuit against the Federal Railroad Administration ("FRA") and the Department of Transportation (collectively, the Government), challenging FRA's approval of BNSF Railway Company's ("BNSF") test program to evaluate automated track inspection technologies (Test Program) and the temporary suspension of the regulation covering the frequency of visual track inspections, as necessary to carry out the Test Program. Bhd. of Maintenance of Way Employees Division/IBT v. FRA, et al., No. 19-1048 (D.C. Cir.).

On November 5, 2018, FRA issued a notice in the *Federal Register*, granting a petition from BNSF to suspend 49 C.F.R.§ 213.233(c), which establishes the frequency of visual track inspections that are required by FRA's Track Safety Standards, to allow BNSF to conduct the Test Program and test new automated track inspection methodologies. FRA's decision to approve the Test Program was made pursuant to 49 C.F.R. § 211.51(a), which allows FRA to temporarily suspend the compliance of a substantive rule if (1) the suspension is necessary to conduct an FRA-approved test program, (2) the suspension is limited in scope and application, and (3) the suspension is conditioned on the observance of standards sufficient to assure safety. On November 16, BMWED filed a petition for reconsideration with FRA, requesting that the agency reconsider its decision pursuant to FRA's waiver procedures and/or revoke the suspension of 49 C.F.R. § 213.233(c).

While BMWED's petition for reconsideration was pending before FRA, on November 30, BMWED filed a complaint in the U.S. District Court for the District of Columbia. Bhd. of Maintenance of Way Employees Division/IBT v. FRA, et al., No. 18-2790 (D.D.C), challenging FRA's decision to suspend the frequency of visual

track inspections while BNSF conducted the Test Program. In response to the Government's argument that the district court lacked jurisdiction over the case under the Hobbs Act, on December 13, BMWED voluntarily dismissed the complaint. On that same day, BMWED filed a petition for review in the D.C. Circuit, alleging that FRA's November 5, 2018, decision to suspend 49 C.F.R. § 213.233(c) while BNSF conducted its Test Program was arbitrary, capricious, and not supported by substantial evidence. Maintenance of Way Employees Division/IBT v. FRA, et al., No. 18-1331 (D.C. Cir.).

While the case was pending before the D.C. Circuit, on February 8, 2019, FRA denied BMWED's petition for reconsideration. In its decision, FRA first concluded that it had followed the proper procedures when granting BNSF's Test Program under 49 C.F.R. § 211.51, and it further concluded that it was not required to comply with its waiver procedures set forth under 49 C.F.R. Part 211, Subpart C. Second, FRA explained that the suspension of 49 C.F.R. § 213.233(c) is necessary for BNSF to conduct its Test Program so it can determine the effectiveness of new track inspection methodologies. Third, FRA described how the Test Program contains conditions to ensure safety during the suspension of the regulation regarding the frequency of track inspections. Finally, FRA confirmed how the Test Program's suspension of 49 C.F.R. § 213.233(c) is limited in scope and application. Separately on February 8, 2019 FRA asked BMWED, AAR and BNSF to address whether a stay of BNSF's automatic track inspection program that had been granted during the government shutdown in January, should be maintained, modified or rescinded.

After FRA denied BMWED's petition for reconsideration, on February 21, 2019, BMWED filed an unopposed motion for the dismissal of its petition for review, and the D.C. Circuit granted its motion on February 27. Also on February 21, BMWED filed its second petition for review with the D.C. Circuit, requesting that the court vacate FRA's February 8, 2019 denial of BMWED's petition for reconsideration, as well as FRA's decision to allow the suspension of 49 C.F.R. § 213.233(c) while BNSF conducts its Test Program. Comments on the stay issue pending before FRA. Briefing on the merits will begin in May.

FAA Employees File Challenge Related to Government Shutdown

On January 9, 2019, several Federal Government employees, including an FAA employee, filed an action related to the then-ongoing lapse in appropriations. Hardy v. Trump, No. 19-51 (D.D.C.). The plaintiffs claimed that the Anti-Deficiency Act is unconstitutional and that the Government's actions in excepting them during the lapse in appropriations violated the 13th Amendment, 5th Amendment, and several statutory provisions, including the Fair Labor Standards Act ("FLSA"). The plaintiffs sought an order to prohibit the Government from requiring employees to work during the lapse, and prohibiting the Government from restricting employees' ability to obtain outside employment.

Two days later, on January 11, the National Air Traffic Controllers Association ("NATCA"), a bargaining unit which represents "employees employed by the [FAA], including air traffic controllers assigned to terminal and en route air traffic control facilities," filed a separate action on behalf of its members. NATCA v. United States, No. 19-62 (D.D.C.). The NATCA plaintiffs claimed that, even during a lapse in

appropriations, the failure to pay air traffic controllers violated both the FLSA and procedural due process.

A third lawsuit, filed by the National Treasury Employees Union, NTEU v. United States, No. 19-50 (D.D.C.), was consolidated with Hardy and NATCA. The plaintiffs in all three cases filed motions for temporary restraining orders ("TRO") and preliminary injunctions ("PI"). During a hearing on January 15, the Court denied the plaintiffs' TRO motions and set an expedited briefing schedule for the PI motions, with a hearing on the PI motions scheduled for January 31.

After the lapse in appropriations temporarily ended on January 26, the Court converted the hearing scheduled on January 31 to a status conference. At the status conference, the Court tentatively set an expedited briefing schedule in anticipation of another lapse in appropriations beginning on February 16 in the event Congress was unable to pass an appropriations bill after the temporary funding bill expired.

On February 15, Congress enacted appropriations for all agencies through the remainder of the fiscal year – *i.e.*, through September 30, 2019. NATCA voluntarily dismissed its case on the same day, but the Hardy and NTEU plaintiffs decided to proceed with their lawsuits based on their argument that their claims are not moot because of the "capable of repetition but evading review" exception to mootness.

On March 19, the government filed a motion to dismiss, and plaintiffs' oppositions are due on April 9. The government's reply brief is due on April 23, and the Court has scheduled oral argument to be heard on May 8.

Motion to Dismiss Granted in Favor of FTA and Maryland in Purple Line II

On March 1, 2019, the U.S. District Court for the District of Columbia ruled in favor of the Federal Transit Administration ("FTA") and the State of Maryland in Friends of the Capital Crescent Trail v. FTA, No. 17-1811 (D.D.C.), which challenged FTA's execution of the Purple Line Full Funding Grant Agreement ("FFGA") under 49 U.S.C. § 5309 and alleged environmental, conservation, aesthetic, and recreational injuries that would result from the project's necessary closure of the Capital Crescent Trail. Setting important precedent for FTA, the Court held that the plaintiffs could not challenge an FFGA under section 5309 because the alleged environmental injuries did not fall within the zone of interests of the Federal Transit Act. The Court also held that the plaintiffs' claims under Section 4(f) and the National Historic Preservation Act were barred by the statute of limitations and that the post-ROD implementation activities of the Purple Line project did not constitute final agency action reviewable under the Administrative Procedure Act. This lawsuit was the second unsuccessful lawsuit challenging the Project. The prior lawsuit Friends of the Capital Crescent Trail v. FTA, No. 14-1471 (D.C. Cir.), was a challenge to FTA's National Environmental Policy Act ("NEPA") determination for the Project. The plaintiffs recently filed an action against the U.S. Army Corps of Engineers in Maryland for its 404 permit for the Project.

Court Denies EAJA Fees Claim in Purple Line I

On March 1, 2019, the U.S. District Court for the District of Columbia denied the plaintiffs' motion for an award of attorneys' fees and

costs under the Equal Access to Justice Act ("EAJA") after the D.C. Circuit reinstated FTA's Record of Decision. Plaintiffs claimed they were entitled to $152,000 and argued that they should be granted time and expenses reasonably expended on the phase of the litigation in which plaintiffs contend they "unquestionably prevailed." The plaintiffs primarily relied on the District Court's first summary judgment ruling which held that FTA "wholly failed to evaluate the significance of the documented safety issues and decline in WMATA's [Washington Metropolitan Area Transit Authority's] ridership." However, the Court distinguished between agency remands that qualify for fees and those that do not, noting that "[w]hen a court retains jurisdiction, the civil action remains ongoing, and any fee motion must await final judgment . . . [which] will not be entered until proceedings on remand conclude, and the determination of the prevailing-party status properly awaits the sequel."

In this case, the D.C. Circuit reinstated the Record of Decision in Friends of the Capital Crescent Trail v. FTA, No. 14-1471 (D.C. Cir.), and the "final judgment afforded the plaintiffs none of the relief they were seeking." As such, the Court held that because the plaintiffs were not a "prevailing party" on any claim asserted in the action, they were not entitled to the requested award.

D.C. Circuit Dismisses Challenge to Extension of Compliance Date for DOT Mishandled Airline Baggage Reporting Rule

On November 27, 2018, the U.S. Court of Appeals for the District of Columbia Circuit dismissed a challenge to DOT's extension of the compliance date for a rule that made changes to the way airlines report mishandled baggage, wheelchairs, and scooters, holding that the petitioner did not have reasonable grounds for missing the statutory deadline for filing a challenge. Paralyzed Veterans of Am. v. USDOT, 909 F.3d 438 (D.C. Cir.). The case related 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. Congress included a provision in the FAA Reauthorization Act of 2018 that moved the compliance date forward by four weeks, to December 4, 2018. In the meantime, Plaintiffs filed suit in the District Court, contending that the extension amounted to a legislative rule requiring notice-and-comment rulemaking procedures, and was arbitrary and capricious. The District Court transferred the case to the D.C. Circuit pursuant to 49 U.S.C. § 46110, which provides the Courts of Appeals with exclusive jurisdiction over DOT actions taken under certain aviation statutes. Plaintiffs asked the D.C. Circuit to transfer the case back to the District Court. DOT opposed that request, and asked the Court to dismiss the case as untimely since Plaintiffs did not challenge the extension within 60 days as required by 49 U.S.C. § 46110.

In its decision, the D.C. Circuit denied Plaintiffs' request to transfer the case back to the District Court, holding that the Courts of Appeals had exclusive jurisdiction under 49 U.S.C. § 46110, which applies to (among other things) DOT actions taken under certain "Part A" statutory provisions. The

Court held that the challenged extension was supported by two Part A provisions, and rejected Plaintiffs' contention that the result should change based on DOT's mistaken citation to two other Part A provisions.

The D.C. Circuit also held that Plaintiffs did not have reasonable grounds for missing the filing deadline, and therefore dismissed the case. While Plaintiffs claimed that they had delayed filing so they could communicate with DOT and Congress about a possible resolution, the Court held that Plaintiffs' inaction was not reasonable since DOT gave them no indication that the extension might be revised or rescinded.

Court Dismisses Challenge to DOT Actions Related to Brightline Passenger Rail Project in Florida

On December 24, 2018, the U.S. District Court for the District of Columbia granted summary judgment in favor of DOT in a lawsuit brought by opponents of the Brightline passenger rail project (formerly known as All Aboard Florida, and soon to be re-branded as Virgin Trains USA). The Court held that DOT properly allocated tax-exempt bond authority for the project, and that FRA's environmental review of the project complied with applicable law. Indian River County v. USDOT, 348 F. Supp. 3d 17 (D.D.C.).

The Brightline Project is a private passenger railroad that will connect Miami and Orlando. FRA 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, the project sponsor had already issued $600 million in PABs to fund Phase I (Miami to West Palm Beach).

In its decision, the Court rejected each of the three claims brought by the remaining Plaintiffs – a county located in Phase II and its emergency services district. (Several other plaintiffs had settled with the project sponsor and dismissed their claims). First, the Court agreed with DOT that the Project was a "surface transportation project which receives Federal assistance under title 23, United States Code," and was therefore eligible for an allocation of PAB authority under 26 U.S.C. § 142(m)(1)(A). While Plaintiffs argued that the provision should apply only to highway projects, the Court rejected that contention on the basis of the plain statutory text. The Court also held that the Project received Title 23 funding when the Florida Department of Transportation used such funding, after planning for the Project commenced, to improve grade crossings along the Project corridor.

Second, the Court rejected Plaintiffs' argument that any PABs issued by the Project would only be tax-free if the issuance was approved by every county along the Project corridor. The Court held that the statute relied on by Plaintiffs – 26 U.S.C. § 147(f)(2)(A) – is satisfied where the State approves the issuance of PABs, and that further local approvals are not required.

Third, the Court held that FRA's environmental review process complied with the National Environmental Policy Act. Plaintiffs had argued that FRA failed to adequately analyze a myriad of potential environmental effects of the Project, and failed to consider alternatives to the proposed route. The Court analyzed each of these contentions in depth, and concluded that

FRA, through its extensive review process, had taken the required "hard look" at the Project's environmental impacts.

Plaintiffs have appealed to the U.S. Court of Appeals for the D.C. Circuit. Plaintiffs' opening brief is due May 7.

Court Holds That Plaintiffs Have Not Demonstrated Standing to Challenge "2 for 1" Executive Order

On February 8, 2019, the U.S. District Court for the District of Columbia held that a group of plaintiffs had not established that they have standing to challenge 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 Court thus denied the plaintiffs' motion for partial summary judgment. Public Citizen, Inc. v. Trump, 2019 WL 498528 (D.D.C. Feb. 8, 2019). At the same time, the Court held that the plaintiffs had plausibly alleged standing, and so denied the Government's motion to dismiss.

The plaintiffs 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 order to establish standing under their principal theory, the plaintiffs must show both that the Executive Order is causing agencies to delay or withdraw rules that the agencies would otherwise issue, and that those delays and withdrawals are causing injury to the plaintiffs' members. To attempt to meet this burden, the plaintiffs have focused on four specific rules, including a proposed NHTSA rule on vehicle-to-vehicle ("V2V") communications, and a withdrawn proposal for a rule on airline baggage fee reporting. In denying the plaintiffs' summary judgment motion, the Court held that there were disputed factual issues about whether the Executive Order was the cause of any of the four delays or withdrawals, and whether those delays and withdrawals were causing injury to the plaintiffs' members. In denying the Government's motion to dismiss, however, the Court held that the plaintiffs had plausibly alleged both types of causation, at least with respect to the V2V rulemaking.

The Court has permitted the plaintiffs to file a limited number of interrogatories and requests for admission with respect to the standing issue. After the plaintiffs served proposed requests in early March, the Court ordered them to serve revised requests by April 8, with the defendants' responses due May 8.

Group Seeks to Compel DOT to Issue Proposed Rule Regarding Accessible Airplane Lavatories

On November 29, 2018, Paralyzed Veterans of America ("PVA") filed a mandamus petition with the U.S. Court of Appeals for the Tenth Circuit, seeking to compel DOT to issue a proposed rule governing the

availability of accessible lavatories on single-aisle aircraft. In re Paralyzed Veterans of Am., No. 18-1465 (10th Cir.).

DOT has long required twin-aisle aircraft to include lavatories that are accessible to disabled passengers. In 2016, DOT formed a negotiated rulemaking committee to address several issues, including the availability of accessible lavatories on single-aisle aircraft. The committee eventually reached a consensus on the lavatory issue. DOT has indicated in its Significant Rulemaking Report that it intends to issue a Notice of Proposed Rulemaking by December 2019.

In its mandamus petition, PVA claims that Congress required DOT to issue an NPRM by July 2017, and asks that the Tenth Circuit compel DOT to act. The Court sua sponte dismissed the petition for lack of jurisdiction, but reinstated it upon PVA's petition for panel rehearing. DOT's response to the mandamus petition is due April 22, 2019.

Two Putative Class Action Cases 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 FAA's decision to abolish existing applicant hiring inventories (sometimes called lists or registers) was motived 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. In 2018, 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 October 23, 2018, Plaintiff filed a Third Amended Complaint which the FAA answered on November 5, 2018.

On November 12, Plaintiff filed a motion seeking class certification, which the FAA opposed in a brief filed on December 22; the motion is pending before the Court.

In another case filed in the Northern District of Texas based on the FAA's use of the same biographical assessment in the ATCS hiring process, Lucas Johnson, a 2013 graduate of a CTI filed a class action complaint on September 12, 2018 alleging discrimination on the basis of race in the ATCS hiring process. Johnson v. DOT (N.D. Tex. 18-2431). 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 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.

On December 5, 2018, Johnson filed an amended complaint, which was substantially similar to his initial complaint. On March 8, the FAA filed a motion to dismiss, or in the alternative, a motion to transfer venue to the U.S. District Court for the District of Columbia.

FAA Slots Orders at JFK and LaGuardia Airports Challenged

On November 15, 2018, two petitions for review challenging two FAA orders regarding slots at JFK and LaGuardia airports were filed. Exhaustless Inc. v. Federal Aviation Administration, Nos. 18-1303, 18-1304 (D.C. Cir.). The petitioner claims that the FAA violated its order authority in 49 U.S.C. § 106(f)(3)(B)(i) in issuing the LGA and JFK slots orders. In addition, the petitioner claims that the LGA and JFK slots orders do not comply with the requirements of the Administrative Procedure Act ("APA"), the Airline Deregulation Act ("ADA"), and the Regulatory Flexibility Act.

On February 1, 2019, the petitioner filed its opening brief. The petitioner argued that the FAA orders exceed the FAA's authority under 49 U.S.C. § 106(f)(3)(B)(i), which states the FAA Administrator lacks authority to issue economically significant regulations without the Secretary of Transportation's express prior approval. In addition, the petitioner argued that the orders contravene the ADA, which requires the Secretary to prevent unfair or anticompetitive practices in air transportation.

The petitioner also claimed the orders are anticompetitive for several reasons. First, the orders favor incumbents rather than allowing open competition for all slots among all airlines. Second, the petitioner contended that the FAA's practice of handing out slots for free effectively sets the price of supplier congestion to $0, which is (1) contrary to 49 U.S.C. § 40101(a)(12)(B), which requires the FAA to rely on "actual and potential competition" to set price, route, and quality of air transportation services; and (2) arbitrary and capricious because the FAA's own study shows that the true cost of airport congestion-related delays exceeds $30,000,000,000 each year. Finally, the petitioner claimed that the orders are stifling innovation, specifically its proposed market-based solution to manage airport congestion.

The petitioner also claimed that the FAA violated the APA and the Regulatory

Flexibility Act, and that the FAA has unreasonably delayed in phasing out the high density rule and in implementing a permanent solution.

On March 18, the government filed a response brief arguing that the petition should be denied for lack of standing and other arguments on the merits. The petitioner filed a reply brief on April 1. Oral argument is scheduled for May 13.

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. Plaintiff seeks injunctive relief in the form of requiring PHMSA 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. Plaintiff also seeks the recovery of attorneys' fees and costs for the alleged violations.

On November 8, 2018, the government responded to the Complaint by filing a Motion to Dismiss for lack of jurisdiction and for failure to state a claim upon which relief can be granted. The government's position rests on numerous legal grounds. First, the government argues that the Courts of Appeals have exclusive jurisdiction over the issues raised in the Complaint. Specifically, the government argues that, despite how Plaintiff has styled the Complaint, it does not seek to compel agency action, but rather it challenges PHMSA's regulations. As such, the issues in the case fall squarely under 49 U.S.C. § 60119(a)(1)'s judicial review provision and must be brought in the courts of appeal.

Second, the government argues that even if Circuit Court jurisdiction is not exclusive, Plaintiff has no viable claim under the Administrative Procedure Act ("APA") due to the availability of direct review in the courts of appeals. The Complaint invoked district court jurisdiction based on the APA. APA review, however, is only available in the absence of "other adequate remedy in a court." 5 U.S.C. § 704. Section 704's "other adequate remedy" provision applies equally to cases seeking to compel agency action. And, even if Plaintiff's claims are not to compel agency action under Section 706(1), which the government asserts they are not, the "other adequate remedy" provision still applies because Plaintiff's claims are properly viewed as a challenge to final agency action; PHMSA has acted to cause examinations of certain pipelines (or failed to cause examinations on certain pipelines altogether), which is the action which Plaintiff must challenge. The availability of direct review in the circuit courts forecloses review in the district courts. Finally, the government argues that Plaintiff has not properly alleged Article III standing because Plaintiff has not pled any facts that tie its alleged injuries – aesthetic harms and health concerns from potential leaks – to PHMSA's

purported failure to "cause" pipeline examinations.

On December 12, 2018, Plaintiff filed its opposition to the government's Motion to Dismiss. Plaintiff argues that its claims do not fall within the purview of 49 U.S.C. § 60119, which requires review of substantive challenges to Pipeline Safety Act ("PSA") regulations in the courts of appeals. Rather, Plaintiff asserts that its Complaint is a failure to act case under 5 U.S.C. § 706(1) of the APA and is properly before the district court. Plaintiff also argues that the Complaint alleges sufficient facts to support standing at the initial pleading stage.

The government filed a reply brief on January 25, 2019 and on March 6, the Court heard oral argument on the Motion to Dismiss.

FAA Implementation of D.C. Circuit Decision Regarding Small UAS Registration Challenged Again

On December 10, 2018, Robert C. Taylor, the owner of a small UAS, filed an amended complaint to revive his case after the district court granted the government's motion to dismiss his original complaint for lack of standing on November 26, 2018. Taylor v. FAA, No. 18-35 (D.D.C.).

The plaintiff's brother, John A. Taylor, previously challenged the FAA's small UAS registration requirement in D.C. Circuit. Taylor v. Huerta, 856 F.3d 1089 (D.C. Cir. 2017). After the D.C. Circuit vacated the small UAS registration requirement to the extent it applied to certain model aircraft that met the definition and operational requirements of section 336 of the FAA Modernization and Reform Act of 2012, the plaintiff and his brother filed several suits in the U.S. District Court for the District of Maryland and the U.S. District Court for the District of Columbia challenging the FAA's implementation of the D.C. Circuit's decision. On December 12, 2017, FAA's authority to require registration for small UAS was restored with the enactment of the National Defense Authorization Act for Fiscal Year 2018.

In his original complaint, filed on January 5, 2018, the plaintiff alleged that the FAA illegally maintained the UAS registration database from December 21, 2015 to December 11, 2017. Specifically, he alleged (i) Privacy Act violations; (ii) a violation of the Little Tucker Act; (iii) generalized constitutional violations; and (iv) unjust enrichment. In addition to seeking declaratory relief, the plaintiff also requested that the Court certify the matter as a class action.

The plaintiff's amended complaint is substantially similar to his original complaint and he again seeks to certify the matter as a class action. On February 15, 2019, FAA filed a motion to dismiss the amended complaint. In addition, the parties filed a motion to stay consideration of class certification pending the Court's resolution of the motion to dismiss; the Court granted FAA's motion to stay.

The plaintiff filed his opposition to FAA's motion to dismiss on April 2, and FAA plans to file a reply brief in support of its motion to dismiss.

District Court Dismisses FACA Challenge Related to 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, found that limited jurisdictional discovery was appropriate, 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. Thereafter, the government filed a supplemental memorandum in support of its motion to dismiss.

On December 10, 2018, the District Court granted the government's motion to dismiss finding that no FACA committee was established or utilized. The Court found that the government's responses to the eight interrogatories revealed that there was never any evidence that a group was asked to provide "group advice or recommendations." Thus the Court found that it lacked subject-matter jurisdiction over plaintiff's FACA claims.

District Court Issues Decision in UCR Plan Board Registration Fees Litigation

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

On February 4, 2019, the District Court granted Plaintiffs' Motion for Summary Judgment in part and Defendants' Cross-Motion for Summary Judgment in part. The Court found that while the Board had complied with certain aspects of the Sunshine Act, the Board violated the Sunshine Act by using boilerplate descriptions for the subject matter of its meetings and by failing to provide notice of subcommittee meetings. In addition, the Court dismissed Plaintiff's allegations that the UCR Plan violated the UCR Plan Agreement by delaying the start of the 2018 registration period. The Court found that the issue was moot because the Board had since opened the 2018 registration period and also found that Plaintiffs have no private right of action to enforce the UCR Plan Agreement.

The parties could not agree upon appropriate attorneys' fees and costs. Thus, Plaintiffs' Motion for Fees is due on April 8, and the UCR Plan Board's Opposition is due on May 10.

Ninth Circuit Affirms DOCR DBE Decision

On December 19, after hearing oral argument on December 3, the Ninth Circuit affirmed a decision by the U.S. District Court for the Western District of Washington, which among other things, upheld a DOCR decision regarding the denial of DBE certification for Orion Insurance Group ("Orion"), an insurance company. Orion Ins. Grp. v. Washington's Office of Minority & Women's Bus. Enterprises, et al., 2018 WL 6695345 (9th Cir. Dec. 19, 2018).

In their complaint initially filed in the U.S. District Court for the Western District of Washington, Orion and its owner sought to challenge a decision by the Washington State OMWBE to deny its application for certification in the Disadvantaged Business Enterprise ("DBE") program and DOCR's upholding of that denial. The plaintiffs challenged DOCR's decision to uphold OMWBE's denial decision under the Administrative Procedure Act ("APA"). In addition, the plaintiffs claimed that OMWBE, DOT, and the named officials from both agencies violated 42 U.S.C. §§ 1983 and 2000d, their Equal Protection rights under the U.S. Constitution, and various Washington state statutes and the Washington state constitution. The plaintiffs also purported to allege all claims against all the named officials in both their official and individual capacities.

On November 17, 2016, the district court granted DOT's motion to dismiss all claims against the Acting Director of DOCR in her individual capacity and all claims against DOT and the Acting Director of DOCR in her official capacity, except with respect to the plaintiffs' equal protection claims and the APA claims, which the government did not include in its motion to dismiss. On August 7, 2017, the district court granted the federal defendants' motion for summary judgment and dismissed all remaining claims against the federal defendants, holding that DOCR's decision to affirm OMWBE's denial of Orion's application for DBE certification was substantially supported by the record. The court also dismissed all claims against the state defendants.

On September 20, 2017, Orion and its owner filed an appeal in the Ninth Circuit. Orion Ins. Grp. v. Washington's Office of Minority & Women's Bus. Enterprises, et al., No. 17-35749 (9th Cir.). The plaintiffs-appellants argued that the district court erred by dismissing some of the claims against the federal defendants based on sovereign immunity grounds, by denying them the opportunity for discovery, by granting the federal and state defendants summary judgment when there were genuine issues of material fact, and by disposing of the case without a trial, to which the plaintiffs-appellants contend they were entitled.

In affirming the lower court decisions in full, the Ninth Circuit held that the district court correctly dismissed appellants' claims against the Acting Director of DOCR in her individual capacity because the district court lacked personal jurisdiction, since the Acting Director did not have sufficient "minimum contacts" with Washington State under International Shoe. The Ninth Circuit held that the district court correctly dismissed appellants' discrimination claims under 42 U.S.C. § 1983 because the federal defendants did not act "under color of state law" as

required by the statute and correctly dismissed appellants' claims under 42 U.S.C. § 2000d because the DBE program does not qualify as a "program or activity" within the meaning of the statute. In addition, the Ninth Circuit also held that the district court correctly dismissed appellants' claims for damages because the United States had not waived sovereign immunity on those claims.

With respect to the APA claims, the Court upheld DOCR's decision, which affirmed Washington State's decision to deny Orion DBE certification, because DOCR's decision was supported by substantial evidence and consistent with federal regulations. Moreover, the Court held that the district court did not err when it granted summary judgment to the federal defendants on appellants' equal protection claims because the federal defendants did not discriminate against appellants, did not intend to discriminate against appellants, and did not treat appellants differently from similarly situated individuals.

After the appellants' petition for rehearing en banc was denied, they indicated that they would file a petition for certiorari.

Challenge of FMCSA Denial of Reconsideration Request Filed in the Ninth Circuit

On October 1, 2018, Steve Valentinetti, the owner and operator of AMI Coaches, a motor carrier, filed a petition for review in the U.S. Court of Appeals for the 9th Circuit seeking judicial review of an FMCSA order dismissing his petition for reconsideration of an FMCSA final order. Valentinetti v. DOT, No. 18-72706 (9th Cir.). In November 2013, FMCSA conducted a compliance review of AMI Coaches and identified a number of violations, resulting in a proposed "unsatisfactory" safety rating. AMI Coaches was ordered to cease all transportation operations on December 29, 2013 after the "unsatisfactory" safety rating became final.

Between 2014 and 2015, Valentinetti submitted multiple requests for a safety rating upgrade based on corrective actions pursuant to 49 C.F.R. § 385.17. Each of these requests were denied due to the insufficiency of the corrective actions purportedly taken to address the safety violations identified during the November 2013 compliance review. After his last § 385.17 request was denied on March 23, 2015, Valentinetti sought administrative review of the denial under § 385.15. After receiving submissions from both Valentinetti and the agency, the FMCSA Assistant Administrator issued a decision on December 2, 2015, denying Valentinetti's petition for administrative review.

In his decision, the Assistant Administrator concluded that Valentinetti failed to demonstrate that the agency erred or abused its discretion in denying his § 385.17 safety rating upgrade request. In the December 2 final order, the Assistant Administrator noted that the order constituted final agency action and informed Valentinetti of his right to seek judicial review. However, instead of seeking judicial review, Valentinetti filed a petition for reconsideration under 49 C.F.R. § 386.64 on December 14, 2015, seeking FMCSA's reconsideration of the December 2 final order. On August 31, 2018, FMCSA denied this request by concluding that the provisions of Part 386 are not applicable to a safety rating proceeding under Part 385.

Valentinetti, who is proceeding pro se, filed a petition for review in the Ninth Circuit seeking review of FMCSA's August 31, 2018 order. Valentinetti filed his opening brief on January 28, 2019 and FMCSA's response brief is due on April 1.

Recent Litigation News from DOT Modal Administrations

Federal Aviation Administration

Howard County, Maryland Challenges New BWI Routes and BWI Cargo Facility Improvements

On November 14, 2018, Howard County, Maryland filed a petition for review in the U.S. Court of Appeals for the Fourth Circuit seeking to challenge several alleged FAA final orders regarding the implementation of air traffic procedures at BWI Airport. Howard County, Maryland v. FAA, et al., No. 18-2360 (4th Cir.). The petition also claims that FAA failed to perform certain non-discretionary duties.

On July 18, 2018, Howard County filed an administrative petition asking FAA to reverse its decisions to implement "New Routes" at BWI Airport. Among other claims, Howard County claimed that the New Routes were implemented in violation of federal environmental statutes and FAA policy. Howard County incorporated Maryland's June 26, 2018 administrative petition into its administrative petition. On September 18, 2018, FAA sent a letter in response to this request indicating that FAA would not reply. This letter and the underlying administrative petition form part of the basis for Howard County's judicial petition.

Howard County's judicial petition identifies several alleged final orders that are the subject of its judicial petition. The first order is FAA's September 28 letter responding to Howard County's July 18, 2018 administrative petition. The second order is an email from the Deputy Regional Administrator of the Eastern Region discontinuing conversations with the BWI Community Roundtable. The next three orders are statements in BWI Community Roundtable Meeting Minutes allegedly indicating that FAA made certain decisions at BWI Airport to: (1) abandon noise abatement procedures in federal or state law, (2) impose significant noise impacts in violation of FAA Order 1050.1F, or (3) eliminate vectoring as a primary means of air traffic control changes without notice and comment. The final order is FAA's implementation of a departure procedure published in 2016.

All of the orders are challenged 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, Section 106 of the National Historic Preservation Act, and FAA's own regulations. Further, the petition contends that some of the decisions were conducted without required notice and comment under Section 553 of the Administrative Procedure Act (related to rulemaking).

The petitioner filed its opening brief on March 28, and FAA's response brief is due on April 29.

On January 14, 2019, Howard County, Maryland filed a petition for review in another case challenging FAA's October 23, 2018 approval of cargo facility improvements at BWI Airport. Howard County, Maryland v. FAA, No. 19-1062 (4th Cir.). The cargo facility improvements and Written Re-Evaluation, which is being challenged in this case, were requested by the Maryland Aviation Administration, and the State will join the lawsuit as a respondent. The petitioner claims that FAA's decision was made in violation of the National

Environmental Policy Act, Section 4(f) of the Department of Transportation Act, and the National Historic Preservation Act, as well as FAA policy and regulations.

In 1998, the FAA issued a Finding of No Significant Impact based on an Environmental Assessment which considered cargo facility improvements at BWI. At the time, the airport sponsor, the Maryland Aviation Administration, only partially completed those improvements. In 2017, the FAA issued a Written Re-Evaluation which validated the 1998 Environmental Assessment and authorized additional components of the original project to proceed. The FAA's 2018 Re-Evaluation, which is challenged by Howard County, authorized still more of the original project to proceed, with some minor refinements. Even though the project will expand the cargo parking area and allow for more cargo operations, the FAA determined the environmental impacts are consistent with what was originally evaluated in the 1998 Environmental Assessment, and that no other factors warranted a Supplemental Environmental Assessment. The FAA's 2018 Written Re-Evaluation/Record of Decision incorporated an extensive Technical Report which demonstrated that the environmental conditions at BWI have not substantially changed and the proposed action will not lead to significant environmental impacts.

Howard County has longstanding concerns about noise at BWI and presumably opposes the project because it will increase cargo capacity and is expected to result in an increase in cargo aircraft operations.

On January 15, 2019, Howard County filed a petition requesting an administrative stay of its decision to approve the cargo facility improvements.

On February 25, FAA issued a denial of Howard County's petition for an administrative stay. On the same day, FAA filed the certified index to the administrative record and a motion to dismiss the suit as untimely filed. On March 4, Howard County filed a motion to suspend briefing on the merits pending the Court's decision on the FAA's motion to dismiss. Howard County filed its opposition to the motion to dismiss on March 7, and the FAA filed its reply brief in support of its motion to dismiss on March 14. On March 8, the Court granted Howard County's motion to suspend briefing on the merits pending resolution of the motion to dismiss.

FAA Letter Regarding Certification of Airport Obstruction Lighting Systems Challenged

On August 30, 2018, International Tower Lighting (ITL) filed a petition for review in the U.S. Court of Appeals for the District of Columbia Circuit challenging a FAA "Dear Industry" letter. Int'l Tower Lighting, LLC v. FAA, et al., No. 18-1229 (D.C. Cir.)

In June 2018, Airport Engineering issued a "Dear Industry" letter that purports to invalidate the certification of certain airport obstruction lighting systems when a part within such a system is replaced with a part made by an entity other than the original manufacturer, i.e., non-Original Equipment Manufacturer ("non-OEM") produced parts.

The letter addresses the interpretation of various advisory circulars ("AC") including that AC that deals with certification. Certification, however, is only mandatory in the first instance for those entities acquiring such systems with Airport Improvement Program ("AIP") grants or passenger facility charge ("PFC") revenue, whereas ITL's case

addresses non-AIP or PFC cases. ITL alleges that FAA's action was arbitrary and capricious and that FAA failed to provide notice or an opportunity to comment. According to ITL, contrary to their reading of the industry letter, there is no "continuing certification" that can be invalidated.

On February 21, 2019, ITL voluntarily dismissed its petition.

FAA Part 16 Decision Challenged in the Ninth Circuit

On January 14, 2019, the City of Casa Grande filed a petition for review in the U.S. Court of Appeals for the Ninth Circuit challenging a FAA Part 16 decision which affirmed that the City is in violation of its airport sponsor grant assurance obligations. City of Casa Grande v. FAA, No. 19-70137 (9th Cir.).

On January 12, 2016, Luther Kurtz and Skydive Coastal California d/b/a Phoenix Area Skydiving (the original complainants) filed a complaint with the FAA against the City of Case Grande under 14 CFR Part 16 claiming that the City of Casa Grande violated Grant Assurances 22, *Economic Nondiscrimination*, and 23, *Exclusive Rights*. The City of Casa Grande is the owner and operator of Casa Grande Municipal Airport in Arizona. Kurtz and Skydive Coastal alleged that they were economically unjustly discriminated against by the City when the City refused to allow a Parachute Drop Zone on the airport. They further argued that the City created an exclusive right by preventing their skydiving business from having offices at the airport. On review of the pleadings and evidence presented by both parties, the Director determined that the City is in violation of its federal obligations under the grant assurances and that, with proposed mitigation measures, the airport can safely accommodate an on-airport Parachute Drop Zone. The Associate Administrator affirmed the Director's Decision in a Final Agency Decision issued on November 19, 2018.

The petitioner's opening brief is due on April 4, 2019, and the respondent's answering brief is due on May 6, 2019.

Center for Biological Diversity Files FOIA Case

On September 16, 2018, the Center for Biological Diversity filed an action against the Department of State, the FAA, and EPA in connection with a FOIA request. Ctr. for Biological Diversity v. Dep't of State, No. 18-2139 (D.D.C.).

This is a FOIA case where the plaintiff seeks documents regarding "U.S. aircraft emission standards and U.S. participation in the 2016 ICAO CO2 rulemaking process, including but not limited to all records of communications between all United States officials, the Boeing Company and/or any other aircraft manufacturer or airline, and ICAO."

FAA deemed the underlying FOIA request as not perfected because it was overly-broad and no response was provided. The parties engaged in a scoping discussion after the complaint was filed in district court, and reached an agreement. Initially, the parties had agreed to a rolling production starting in January. However, due to the lapse in appropriations, the parties have agreed to a rolling production to begin in late March 2019.

Federal Tort Claims Act Case Filed Against FAA After Fatal Crash

On November 13, 2018, the U.S. District Court for the Northern District of Alabama granted the FAA's motion for summary judgment in Christopher v. United States, No. 17-178 (N.D. Ala.). The plaintiff filed this Federal Tort Claims Act ("FTCA") suit on behalf of the estate of a pilot who was killed in a plane crash. The plaintiff's decedent and his co-worker were two pilots who were completing pilot-in-command proficiency checks in accordance with FAA regulations when the plane crashed. The Pilot Proficiency Examiner ("PPE") who was conducting the proficiency checks for the two pilots was also killed in the crash. The PPE was hired by a third party to conduct proficiency checks for the two pilots.

The plaintiff contended that the PPE, who was authorized by the FAA to administer proficiency checks to pilots, was negligent and caused the crash. As a result of the PPE's designation from the FAA, the plaintiff argued that the PPE was converted from a private person into a Government employee, therefore rendering the United States responsible for his actions under the FTCA. As a separate basis for the United States' liability, the plaintiff claims that the FAA was negligent in not terminating the PPE's designation because of a series of unrelated incidents.

The government filed a motion for summary judgment, in which it argued that the United States could not be liable for the PPE's actions and alleged negligence because he was not an FAA employee. In addition, the government argued that the United States cannot be held liable for its management of the PPE's designation, because such actions fall within the FTCA's discretionary function exception.

In granting summary judgment in favor of the government, the Court held that the PPE was not an employee of the FAA, nor was the PPE under the control or supervision of the FAA, such that United States could be held liable for the PPE's alleged negligence.

Federal Highway Administration

Opponents of I-630 Road-Widening Project in Little Rock Appeal Denial of TRO

On September 20, 2018, Plaintiffs in Wise, et al. v. DOT, et al., No. 18-466 (E.D. Ar.) filed a Notice of Appeal seeking to challenge the district court's July 27, 2018 decision denying plaintiffs' motion for a temporary restraining order ("TRO") to halt the I-630 road-widening project in Little Rock, Arkansas. Wise, et al. v. DOT, et al., No. 18-3016 (8th Cir.). Plaintiffs are a group of individuals who regularly use or live near the proposed construction on I-630.

On July 18, 2018, in an attempt to halt the project, plaintiffs filed a motion for a TRO against the U.S. Department of Transportation("DOT"), Federal Highway Administration ("FHWA") and Arkansas Department of Transportation ("ARDOT") ("Defendants"). In their complaint, 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 the National Environmental Policy Act ("NEPA") and the Administrative Procedure Act ("APA").

The court conducted a full-day hearing on the TRO motion on July 23, 2018, at which both parties presented witness testimony. On July

27, the district court issued an order denying Plaintiffs' motion for a TRO after concluding 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. The Court held that FHWA's CE determination was appropriate pursuant to the terms of a 2009 Memorandum of Agreement regarding Categorical Exclusions and that the Project appeared to qualify as a CE under the terms of 23 C.F.R. 771.117(c)(22) since the road-widening will take place within existing operational right-of-way.

On September 17, 2018, Defendants filed Answers to the Complaint. On September 20, 2018, Plaintiffs filed a Notice of Appeal and on December 20, 2018, Plaintiffs/Appellants filed their opening brief. In their brief, Appellants argue that the District Court erred in finding the Project would occur within existing operational right-of-way, because the new lanes will require new clear zone. They further argue that even if the Project were built entirely within operational right-of-way, it still does not qualify for CE classification because of the potential for significant impacts to the environment in terms of air quality and noise. Defendants filed their response briefs on March 26, 2019.

Fourth Circuit Affirms Grant of Summary Judgment in Favor of FHWA

On January 23, 2019, in a published opinion, the U.S. Court of Appeals for the Fourth Circuit affirmed the district court's grant of summary judgment in FHWA's favor in Save Our Sound OBX, Inc., et al v. N.C. DOT, et al., No. 17-04 (E.D. N.C.). 914 F.3d 213 (4th Cir. 2019). On June 4, 2018, the United States District Court for the Eastern District of North Carolina 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 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. The Fourth Circuit decision ensures that the project will move forward to completion.

Court Orders Stay and Closes Case in Challenge of Florida SR 7 Project

On February 5, 2019, the Court issued an Order staying City of West Palm Beach v. U.S. Army Corps of Eng'r, et al., No. 18-80885 (S.D. Fla.) while the Army Corps of Engineers permit, which is one of the subjects of the challenge, remains suspended. In addition, the Court Clerk was directed to close the case and deny any pending motions as moot and the parties were ordered to file monthly status reports.

On September 12, 2017, the City of West Palm Beach, Florida 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. Plaintiff is a city government that owns property adjacent to the proposed roadway expansion, which provides drinking water to some 130,000 residents in the area. The complaint 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 challenged, on environmental grounds, various actions taken by the Defendants, including the Army Corps of Engineers issuance of a permit which authorized discharge of fill material over 59.7 acres of non-tidal wetlands for the Project.

On November 09, 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 03, 2018, after the Defendants' motion to transfer was granted, the case was transferred to the Southern District of Florida. On July 13, 2018, Federal Defendants filed a motion to dismiss for lack of jurisdiction and failure to state a claim.

On September 24, 2018, due to changed circumstances relating to the Project, the Army Corps decided to suspend the permit it had issued for the Project pending further action by the State. After the Defendants notified the Court, on September 25, 2018, of the permit suspension, the Court ultimately issued the February 5 order staying the case pending the Army Corps' suspension of its permit, closing the case, and dismissing all pending motions as moot. The parties were also ordered to file monthly status reports during the Army Corps' suspension of the permit.

Court Grants Partial Dismissal In Challenge of I-73 Corridor Project in South Carolina

On January 30, 2019, Judge Bruce Hendricks for the U.S. District Court for the District of South Carolina issued an order denying in part and granting in part the Defendant's Motion for Partial Dismissal. The Plaintiff originally brought suit in December 2017 to challenge the planned Interstate 73 ("I-73") project in South Carolina, alleging violations of NEPA, the Clean Water Act (CWA), and the APA. South Carolina Coastal Conservation League v. USACE et al., No. 17-03412 (D.S.C.). The proposed corridor project, which is approximately 80 miles in length and has been separated into two portions, will provide a direct link from North Carolina and states north to the Grand Strand (Myrtle Beach area). 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.

In ruling on the government's motion to dismiss, the Court dismissed Plaintiff's claim related to the alleged failure of FHWA and the Army Corps to act and Plaintiff's claim that FHWA and the Army Corps violated 40 C.F.R. § 1502.22. In addition, the Court also dismissed Plaintiff's alternative Clean Water Act claims brought pursuant to APA Section 706. The Court denied the motion to dismiss with respect to Plaintiff's claim related to the Army Corps' alleged violation of the Clean Water Act Section 404 and Plaintiff's claim that EPA violated section 404 of the Clean Water Act.

Federal Motor Carrier Safety Administration

On Remand, Government Moves to Dismiss Plaintiffs' Challenge to FMCSA's Pre-employment Screening Program (PSP)

In Owner-Operator Independent Drivers Association (OOIDA), et al. v. U.S. Department of Transportation, et al., No. 12-1158 (D.D.C.), the Government moved to dismiss the plaintiffs' amended complaint, after the D.C. Circuit remanded the case back

to the district court after affirming in part and reversing in part the district court's decision to grant summary judgment in favor of FMCSA.

On January 12, 2018, in Owner-Operator Independent Driver Association (OOIDA), et. al v. U.S. Department of Transportation, et al., 879 F.3d 339 (D.C. Cir. 2018), the D.C. Circuit affirmed in part, and reversed in part, summary judgment granted 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 dismissed the case because the plaintiffs could not demonstrate harm as a result of the maintenance or dissemination of the information. 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, the district court granted the remaining plaintiffs leave to amend their complaint to seek damages under the FCRA. The plaintiffs alleged that FMCSA failed to comply with provisions of the FCRA that apply only to a "consumer reporting agency," which is defined as a "person" that regularly engages in the practice of assembling information on consumers "for the purpose of furnishing consumer reports to third parties," 15 U.S.C. § 1681a(f).

On October 10, 2018, the Government moved to dismiss the amended complaint for failure to state a claim upon which relief can be granted because the FMCSA is not a consumer reporting agency within the meaning of the FRCA. The Government contended that FMCSA is charged with ensuring safety in motor carrier transportation, and maintains the federal database at issue in this case for the purpose of ensuring transportation safety, and not for the purpose of furnishing consumer reports to any third parties.

The Government also argued that the district court should dismiss the amended complaint because even if FMCSA were deemed to be a "consumer reporting agency" subject to the FCRA's substantive provisions at issue in the case, the United States has not waived its sovereign immunity with respect to the damages provision on which plaintiffs rely. The Government explained that while the United States may waive its sovereign immunity by statute, such a waiver must be express and unequivocal. The Government further argued, however, that FCRA's language, structure, and history provide ample evidence that Congress did not unmistakably intend to impose monetary liability on the United States and, therefore, the FCRA does not unambiguously waive the United States' sovereign immunity. The district court has not rendered a decision.

FMCSA Motion to Dismiss Granted in Motor Carrier's Challenge of Compliance Review and Civil Penalty Under the Federal Tort Claims Act

On December 18, 2018, the District Court granted FMCSA's motion to dismiss in Senn Freight Lines, Inc., v. United States, No. 18-227 (D.S.C.). In a complaint filed in the U.S. District Court for the District of South Carolina, pursuant to the Federal Tort Claims Act ("FTCA"), Senn Freight alleged that FMCSA conducted a compliance review and negligently cited the company for financial responsibility and driver record violations. Senn Freight contended that 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. Senn Freight sought money damages of $212,400 for its increased insurance premium and its payment of the civil penalty.

FMCSA filed a motion to dismiss, arguing 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 lacked subject matter jurisdiction to consider Senn Freight's claims. Moreover, because Senn Freight failed to file his suit within the 60-day filing period provided under the Hobbs Act, its claims were time-barred. FMCSA argued that the Court also lacked jurisdiction over Senn Freight's claims regarding the civil penalty because Senn Freight failed to exhaust its administrative remedies.

In granting FMCSA's motion to dismiss, the Court agreed with the agency's argument that although Senn Freight's claims were styled as FTCA claims, that the motor carrier was essentially attempting to challenge FMCSA actions that may only be challenged in the courts of appeals under the Hobbs Act.

Senn Freight has filed an appeal of the Court's decision in the Fourth Circuit. Senn Freight's opening brief is due on April 1.

Motor Carrier Files Untimely Challenge of FMCSA Civil Penalty in Wrong Court

On November 28, 2018, Michael Bryson, who is the owner and operator of Bryson Trading Co., Inc., a motor carrier, filed a complaint in the U.S. District Court for the District of Massachusetts seeking to challenge a civil penalty assessed by FMCSA. Bryson, et al. v. United States, No. 18-12463 (D. Mass.). In addition, Plaintiffs also filed a motion for preliminary injunction asking the Court to stay an FMCSA order that would prohibit Bryson Trading from operating in interstate commerce and have its registration suspended on February 13, 2019 for failure to pay a $2,710 civil penalty.

The civil penalty in question was the result of a roadside inspection of Bryson Trading that a Connecticut Inspector conducted on or around June 25, 2013. Michael Bryson, a commercial motor vehicle driver for Bryson Trading, was cited by the Connecticut Inspector for driving while holding a hand-held telephone. As a result, FMCSA issued Bryson Trading a Notice of Claim for violating 49 C.F.R. § 392.82(a)(2) for "allowing or requiring a driver to use a hand-held mobile telephone while driving a [commercial motor vehicle,] and proposed a civil penalty of $2,710 for the violation.

Although Bryson Trading denied the alleged violation and sought administrative review of the civil penalty, Bryson Trading failed to respond to the FMCSA Regional Field Administrator's objection to Bryson Trading's hearing request and motion urging the Assistant Administrator to issue a final agency order regarding the civil penalty.

On April 6, 2018, the Assistant Administrator issued an order noting Bryson Trading's failure to respond and provided the carrier with 30 additional days to file a response to the Regional Field Administrator's objection. After Bryson Trading failed to file anything further, FMCSA entered a final agency order on October 10, 2018, pursuant to 49 U.S.C. § 521, finalizing the assessment of the $2,710 civil penalty and ordering Bryson Trading to pay the civil penalty. On December 31, 2018, after receiving no payment from Bryson Trading, FMCSA issued the carrier an order to show cause informing Bryson Trading that the civil penalty was due and that failure to pay it in full would cause Bryson Trading to be prohibited from operating in interstate commerce and that its registration would be suspended on February 13, 2019.

Plaintiffs ultimately paid the civil penalty in full on February 4, 2019, and FMCSA rescinded the order to cease operations, but Plaintiffs are proceeding with the litigation. On February 13, 2019, FMCSA filed a motion to dismiss arguing that the District Court lacks jurisdiction over Plaintiffs' claims because under 49 U.S.C. § 521(b)(9), challenges of FMCSA civil penalties are heard exclusively in the courts of appeals. Moreover, such petitions for judicial review must be filed within 30 days of FMCSA's final order. In this case, FMCSA issued its final order on October 10, 2018, and Plaintiffs did not file their complaint until November 28, 2018, beyond the 30-day statutory filing period. Therefore, FMCSA argued that even if Plaintiffs had filed in a court of appeals, the Court would still lack jurisdiction over Plaintiffs' claims because they were untimely filed. In addition, because Plaintiffs paid the civil penalty in full on February 4 and FMCSA rescinded the order to cease operations before it became effective, FMCSA also argued that the case should be dismissed for mootness.

The case is fully briefed and pending before the District Court.

Federal Railroad Administration

D.C. Circuit Defers Judgment on Motions to Dismiss in Labor Unions' Challenge to the Certification of Mexican Locomotive Engineers and Conductors

On February 5, 2019, the U.S. Court of Appeals for the District of Columbia Circuit deferred judgment on the motions to dismiss that had been filed by the Federal Railroad Administration ("FRA") and the Department of Transportation (collectively, the Government) and Kansas City Southern Railway ("KCSR") and the Texas Mexican Railway Company (collectively, the Intervenors). The D.C. Circuit referred the motions to the merits panel, and the parties will address the jurisdictional arguments they raised in their motions to dismiss in their briefs on the merits.

This case originated with a petition for review that was filed with the D.C. Circuit on September 4, 2018, by 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) against 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 unspecified administrative actions they now seek to challenge 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.

On October 22, 2018, the Government and the Intervenors filed separate motions to dismiss, alleging that the Labor Unions failed to identify a final agency action that is subject to the court's review. On November 1, the Labor Unions filed a response in opposition to the motions to dismiss, arguing that they were unable to specify FRA's final order or decision because FRA granted KCSM an unofficial waiver of its locomotive engineer and conductor certification programs without making the associated documents public. On November 8, the Government and the Intervenors filed reply briefs, reiterating that the Labor Unions could point to no final agency action.

On February 6, 2019, the D.C. Circuit set a briefing schedule in the case in which the Labor Unions' opening brief was due on March 18. On March 8, the Labor Unions filed a motion seeking the full administrative record and requesting an extension of the briefing schedule. The Court suspended the briefing schedule on March 14, pending further order of the Court.

Federal Transit Administration

DOJ Settles False Claims Act Case Against Concrete Subcontractor and Its Employees

In January 2019, Universal Concrete Products Corporation ("UCP") and its President/co-owner Donald Faust, Jr. agreed to pay $1 million to settle a False Claims Act case, in which the government alleged that UCP falsified test records for concrete paneling installed on Phase II of the Dulles Metrorail Project (the "Project"), a 23-mile extension of Washington, D.C.'s existing Metrorail system, known as the "Silver Line." United States ex rel. Davidheiser v. Universal Concrete Products Corp. et al., No. 16-316 (E.D. Va.).

The case was originally filed as a qui tam action in 2016, and was later unsealed in May 2018 after the United States decided to intervene in the case. On July 9, 2018, the U.S. Attorney's Office for the Eastern District of Virginia filed a civil complaint against UCP, its President/co-owner, Donald Faust, Jr., and its Quality Control Manager, Andrew Nolan, for alleged violations of the False Claims Act. The underlying allegations stem from UCP's work as a subcontractor hired to produce precast concrete paneling for the Silver Line. From approximately October 2015 through June 2016, Nolan and UCP quality control employees working

under his supervision allegedly falsified test records to make it appear as though air content for the concrete paneling was within the acceptable range. Nolan also allegedly falsified test records knowing that the prime contractor for the Project would reject the concrete had prime contractor known that the air content in the concrete fell below an acceptable level.

The Silver Line project is under construction by the Metropolitan Washington Airports Authority ("MWAA"). Upon completion, the Silver Line 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 Silver Line. The TIFIA loan is administered by DOT, and the Federal Transit Administration ("FTA") provides project management oversight. Direct FTA funding also contributes to construction of one of the station stops on the Silver Line, where UCP concrete panels were installed.

In a related criminal proceeding, United States v. Nolan, No. 18-292 (E.D. Va.), Nolan pled guilty to one count of conspiracy to commit wire fraud, and was sentenced on December 7, 2018.

Briefing Completed in NEPA Challenge to Walk Bridge Replacement Project

On December 20, 2018, the parties filed their final reply briefs in Norwalk Harbor Keeper v. U.S. DOT, et al., No. 18-91 (D. Conn.), in support of their pending cross-motions for summary judgment.

Plaintiffs Norwalk Harbor Keeper and its President, Fred Krupp, sued FTA, DOT, CTDOT, and Matt Welbes and Elaine Chao in their official capacities. Plaintiffs are challenging FTA's EA and FONSI for the Walk Bridge Replacement Project in Norwalk, Connecticut. 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 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. Replacement of the bridge will also involve a permit from the U.S. Coast Guard.

In its motion for summary judgment, the Federal Defendants made three points. First, Defendants argue that FTA exceeded its obligation to take a "hard look" at environmental consequences of the proposed activity under NEPA. Second, the Federal Defendants argue that the record shows that FTA provided multiple opportunities for public comment, considered all relevant factors, conducted reasonable analyses, and made good faith decisions at every stage of the environmental review. Finally, Federal Defendants argue that the record also shows that FTA did not improperly segment the environmental review, that the FONSI, which incorporated the EA, satisfies NEPA's procedural requirements.

Plaintiffs' brief asserts that the Defendants have failed to fulfill their duty to the public to take a "hard look" at the potential

environmental consequences of the Project arguing four main points: (1) Defendants failed to adopt a reasonable Purpose and Need, (2) failed to study a reasonable range of alternatives, (3) failed to meaningfully respond to Plaintiffs' public comments, and (4) unlawfully segmented the environmental review of the Project.

Federal Defendants' reply brief argue that the Plaintiffs' Opposition to the Federal Defendants' motion for summary judgment misrepresents Federal Defendants' arguments and the record. The record demonstrates that FTA and CTDOT exceeded the requirements of NEPA and acted consistently with United States Coast Guard ("USCG") bridge permitting regulations. FTA and CTDOT reasonably concluded, based on information available, that maintaining or improving navigation of the river below the Walk Bridge was a need of the Walk Bridge Replacement Project ("Project"). FTA and CTDOT also reasonably concluded, based on information available, that the USCG would likely find that a low-level fixed bridge would not qualify as a "reasonable restriction on navigation" and, therefore, that the USCG would be unlikely to issue a bridge permit for a low-level fixed bridge.

Briefing Continues in Litigation Over LA Metro Westside Section 2 Project

On March 8, 2019, the Federal Transit Administration (FTA) filed its cross-motions, brief, and statements of undisputed facts and conclusions of law and statements of genuine disputes in Beverly Hills Unified School District v. FTA, et al., No. 18-716 (C.D. Cal.). Plaintiff filed its motion for summary judgment and its statement of undisputed facts and conclusions of law on February 8, 2019. The Beverly Hills Unified School District (BHUSD) is challenging FTA's November 22, 2017 Supplemental Record of Decision (ROD)/Final Supplemental Environmental Impact Statement (FSEIS) for Section 2 of the LACMTA Westside Purple Line Extension (WPLE) Project. 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 alleged that FTA violated NEPA, Section 4(f), and predetermined the outcome 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 is the second lawsuit by the same set of defendants challenging the project.

FTA's reply brief is due on April 10 and oral argument on the parties' motions for summary judgment is scheduled for June 4, 2019.

Mediation Conference Scheduled in Sharks NEPA Lawsuit

A mediation/settlement conference has been scheduled for March 29, 2019, in Sharks Sports & Entertainment LLC v. FTA, No. 15-4060 (N.D. Cal.), in connection with the

BART Silicon Valley Phase II Extension Project (Project). Sharks Sports and Entertainment LLC ("SSE") alleges NEPA violations and 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-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 Diridon Station is proposed to interconnect several modes of transit, including BART, Caltrain, light-rail, the Altamont Express, Amtrak and the planned High Speed Rail. SSE owns and operates the San Jose Sharks, a professional hockey team in the NHL, and is also the parent company that manages the SAP Center. The SAP Center, an 18,000-seat regional multipurpose event center is located adjacent to the planned Diridon Station.

SSE alleges that FTA's NEPA review was improper because an eight-story parking facility was improperly omitted from the project. SSE alleges the parking facility, as noted in previous Draft and Final EIS documents, would serve to mitigate the adverse environmental impacts the Project will cause to the area. SSE's complaint focuses on "FTA's conclusion 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. SSE contends that this determination was not properly studied and was prejudged. SSE is seeking an injunction, prohibiting the FTA from obligating funds to the Project and for it to take no further action on the project, until FTA has complied with the NEPA provisions.

FTA's Answer to the complaint is due by April 10, 2019, and the administrative record is scheduled to be filed on April 8, 2019. SSE also filed a separate lawsuit under the Freedom of Information Act (FOIA) on September 29, 2018, Sharks Sports & Entertainment LLC v. FTA, No. 18-5988 (N.D. Cal.). The FOIA lawsuit seeks documents that will be part of the administrative record in the NEPA litigation.

Court Issues Partial Summary Judgment for DOJ in ADA Litigation Over the Middletown Road Station in the Bronx

On March 5, 2019, the Court granted partial summary judgment in favor of the United States in Bronx Independent Living Services v. Metro. Transp. Auth., et al., No. 16-5023 (S.D.N.Y.).

The case involves the Metropolitan Transportation Authority ("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 Americans with Disabilities Act ("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 because MTA refused to install an elevator.

A citizen's group, Bronx Independent Living Services, filed the complaint in June 2016 against the MTA and the New York City Transit Authority alleging ADA violations. The Department of Justice intervened in the lawsuit in support of the plaintiff.

In its decision, the Court ruled that MTA's renovation of the Middletown Road station was an alteration that triggered ADA's requirement to install an elevator, unless it is technically not feasible to do so. The Court concluded that when a public transit authority alters a station in a way that affects its "usability," the public transit authority must follow 49 C.F.R. § 37.43(a)(1) which requires the installation of an elevator where technically feasible regardless of cost. The Court rejected the MTA's argument that the governing regulation permitted it to avoid installing an elevator based on cost considerations.

The remaining issue will be whether it is feasible to install an elevator.

Maritime Administration

District Court Issues Decision in Favor of MARAD in Suits in Admiralty Act Case

On February 15, 2019, the U.S. District Court for the District of Maine issued a decision in favor of MARAD in a case involving the Maine Maritime Academy ("MMA"). Fitch v. United States, No. 17-195 (D. Maine). In the decision, the Court held that MMA is not an agent of the United States under the Suits in Admiralty Act.

Plaintiff, Ms. Fitch, a cook aboard the MARAD supplied training vessel STATE OF MAINE, alleges that she was injured while serving as a member of the crew. She filed an action against MMA and Sodexo Operations LLC with claims of unseaworthiness and under the Jones Act. In response, MMA filed a motion claiming that under the Suits in Admiralty Act ("SIAA"), it was the legal agent of MARAD and therefore, it should be dismissed from the lawsuit and the United States substituted as a defendant. This unsuccessful novel legal theory would have had significant impacts to MARAD's School Ship program.
Together with DOJ, MARAD filed an opposition to MMA's assertions. In its holding in favor of the government, the court concluded that the contract between MARAD and MMA does not create an agency arrangement, "given that the Government is not contracting with MMA to perform a specific task on its behalf but rather is supporting an overall shared educational objective." In addition, given that MAA retains considerable control over the operation of the training ship, the Court found that for purposes of the SIAA, MMA was not an agent of MARAD.

MARAD still has potential liability as the ship owner. Therefore, discovery is still ongoing.

MARAD's Approval of Maritime Security Program Replacement Vessels Challenged Again

On November 27, 2018, Matson Navigation Company filed a complaint in the U.S. District Court for the District of Columbia seeking administrative review of MARAD's

approval of two replacement vessels (APL GUAM and APL SAIPAN) for operation by APL under the Maritime Security Program (MSP). Matson Navigation Co., Inc. v. Dep't of Transp., et al, No. 18-2751 (D.D.C.).

This action follows a similar action that Matson filed in the D.C. Circuit pursuant to the Hobbs Act, which was dismissed for lack of jurisdiction. The complaint alleges that: (1) MARAD's approvals of the replacement vessels were arbitrary and capricious because APL's replacements carry cargo to Saipan (which is subject to the coastwise laws), and were thus ineligible for the MSP, and (2) MARAD acted arbitrarily and capriciously by paying the full MSP stipend for the replacement vessels without deducting pro rata amounts for days the replacements carried cargo to or from Guam and Saipan.

Matson asks the Court to vacate MARAD's replacement decisions and again enjoin MARAD from approving these vessels as replacements. It also asks the Court to enjoin MARAD from making any further MSP payments, or alternatively, "reduce the MSP subsidies pro rata."

MARAD filed an answer on February 28, 2019 and the Administrative Record was filed on March 15, 2019. On March 22, Matson filed a motion for summary judgment. MARAD's cross-motion for summary judgment and opposition to Matson's motion is due on April 19.

National Highway Traffic Safety Administration

NHTSA Nears Resolution of FOIA Litigation After Producing Tesla Data

After the U.S. District Court for the District of Columbia issued a decision, without prejudice, denying both the government's and plaintiff's motions for summary judgment in a Freedom of Information Act ("FOIA") case, Quality Control Sys., Corp. v. DOT, No. 17-1266 (D.D.C.), NHTSA asked Tesla whether it wished to provide additional justification for continued withholding of responsive documents under FOIA Exemption 4, relating to Confidential Business Information. The material at issue in the case included mileage and airbag deployment data that served as the basis for a diagram used in a NHTSA closing investigation report.

Tesla declined to offer any additional justification for withholding. Accordingly, in October 2018, NHTSA decided to rescind any grant of confidential treatment for the categories of information in this case, pursuant to its procedures in 49 CFR Part 512. Tesla did not petition for reconsideration of the decision. Because the information was no longer considered confidential business information, the agency no longer needed to withhold it under FOIA Exemption 4. In November 2018, NHTSA produced the information that was the subject of this litigation to the plaintiff, including providing a redacted spreadsheet containing requested calculations. The parties are proceeding with additional steps directed toward the resolution of the case.

New FOIA Lawsuits Filed on Fuel Economy Standards

On December 19, 2018, the Environmental Defense Fund ("EDF") filed a FOIA lawsuit against DOT in the U.S. District Court for the District of Columbia. Environmental Defense Fund v. DOT, No. 18-03004. The lawsuit concerns FOIA requests for material pertaining to the Safer Affordable Fuel-Efficient Vehicle ("SAFE") Rule. On August 24, 2018, NHTSA published the notice of proposed rulemaking for the SAFE rule, which proposed to establish new fuel economy standards for model year 2021 through 2026 passenger car and light truck vehicles, as well as to amend corporate average fuel economy standards for 2021 model year vehicles. In addition, on August 17, 2017, NHTSA granted a petition for rulemaking from the Truck Trailer Manufacturers Association, who sought revisions to an October 2016 final rule establishing fuel efficiency standards for medium and heavy-duty vehicles. The FOIA requests at issue in EDF's lawsuit arise from requests for records relating to these two rules.

EDF submitted three FOIA requests to DOT in September and October 2018, primarily seeking the communications and scheduling materials from a number of OST and NHTSA personnel pertaining to the fuel economy standards. Subsequently, EDF filed the instant lawsuit seeking the requested records. DOT filed its answer on February 13, 2019.

Similarly, on January 24, 2019, the State of New York filed a separate FOIA lawsuit against the EPA and NHTSA in the U.S. District Court for the Southern District of New York. State of New York v. EPA and NHTSA, No. 19-00712 (S.D.N.Y.). The case arose from a set of September 5, 2018 FOIA letter requests, which New York sent to both the Environmental Protection Agency (EPA) and NHTSA. The letters sought information pertaining to both third-party and internal communications regarding Executive Order 13132 as it applied to the SAFE rule. New York alleges that the records were sought to facilitate an understanding of the agencies' consideration of federalism in promulgating the proposed rules.

On April 1, DOT is scheduled to meet with the U.S. District Court judge and EDF for a scheduling conference.

PEER Files FOIA Claim Regarding Its Petition for Rulemaking

On January 3, 2019, Public Employees for Environmental Responsibility (PEER) filed a FOIA action to obtain NHTSA materials that relate to the agency's decision to deny Plaintiff's petition for rulemaking and for records concerning the agency's review of keyless ignition systems. Public Employees for Environmental Responsibility v. NHTSA et al, No. 19-00013 (D.D.C.). PEER's petition for rulemaking, filed in September of 2017, NHTSA to promulgate a rule that would require the equipping of carbon monoxide detectors in all new motor vehicles, as well as the installation of built-in engine cut-off devices in vehicles. NHTSA denied PEER's rulemaking petition on January 28, 2018.

NHTSA Deploys New Online Portal Addressing Data Collection Issues Raised in District Court Lawsuit

On February 4, 2016, the Center for Auto Safety ("CAS") filed suit against the Secretary and the Department in the United

States District Court for the District of Columbia alleging that the Department had failed to publish online copies of certain vehicle manufacturers' communications and searchable indices of those communications, as required by statute. Center for Auto Safety v. Chao, No. 16-192 (D.D.C.).

Before 2012, manufacturers were required by 49 U.S.C. § 30166(f) to submit their communications to dealers and other owners or purchasers about defects and noncompliances in their vehicles and equipment. The Moving Ahead for Progress in the 21st Century Act ("MAP-21") imposed two additional requirements, starting October 1, 2012: (1) that each manufacturer provide an index of the communications it submits; and (2) that DOT publicly post online the communications and indices submitted to it.

CAS alleges that DOT's failure to publish the communications and indices constitutes agency action unlawfully withheld or contrary to law in violation of the Administrative Procedure Act ("APA"). Accordingly, CAS requested that the Court declare DOT's inaction unlawful and order the Department to publish the communications and indices as required.

Shortly after CAS filed its lawsuit, NHTSA published Enforcement Guidance Bulletin 2016-01 in the Federal Register (81 FR 16270). In this bulletin, NHTSA stated that it already made available on its website documents related to recalls, defect investigations, and customer satisfaction campaigns and expressly announced its intention to publicly post on its website all manufacturer communications submitted to NHTSA pursuant to 49 U.S.C. § 30166(f) since MAP-21 was enacted. Since publishing the bulletin, NHTSA has been uploading the communications and indices it has received to its website. CAS agreed to stay the case while NHTSA continued to upload the submissions it has in its possession, updating the Court with status reports in the meantime. The case remains stayed while these periodic updates are filed.

While the case has been stayed, NHTSA developed a partially automated system (Phase I) to allow it to process incoming submissions more efficiently and clear its existing backlog faster. NHTSA then developed an online submission portal (Phase II) for manufacturers to use going forward. The portal has been successfully rolled out to a small number of manufacturers so far, and NHTSA is working to deploy the portal to manufacturers more broadly. NHTSA is encouraging manufacturers to use the portal to compile their submissions more efficiently and for NHTSA to review and publish them more quickly.

Pipeline and Hazardous Materials Safety Administration

District Court Issues Split Decision in Challenge to PHMSA Approval of Oil Spill Response Plans

On March 29, 2019, the U.S. District Court for the Eastern District of Michigan issued a split decision in the National Wildlife Federation's challenge to PHMSA's approvals of certain oil spill response plans. Nat'l Widlife Fed. v. Sec'y of the Dep't of Transp., No. 17-10031, 2019 WL 1426310 (E.D. Mich. Mar. 29, 2019).

The Clean Water Act requires operators of certain facilities, including pipelines, to prepare oil spill response plans. PHMSA is responsible for reviewing and approving plans submitted by operators of pipelines

(other than pipelines seaward of the coast line). NWF sued PHMSA in 2017 to challenge approvals of spill response plans submitted by Enbridge that cover the company's Line 5 in Michigan and Wisconsin. Enbridge intervened, and the parties all moved for summary judgment.

In its decision, the Court granted summary judgment to PHMSA and Enbridge on three issues. First, the Court held that PHMSA reasonably treats each pipeline as a single facility, and rejected NWF's argument that PHMSA is obligated to treat each pipeline segment crossing a waterway as a separate facility requiring a separate plan. Second, the Court rejected NWF's contention that Enbridge's plans failed to properly calculate the "worst case discharge." Third, the Court rejected NWF's argument that the plans did not contain the types of information required by the Clean Water Act.

The Court, however, granted summary judgment to NWF on two other issues. The Court held that PHMSA's administrative record did not adequately explain its determinations that Enbridge's plans met the requirements of the Clean Water Act. And the Court held that before approving the plans, PHMSA should have engaged in environmental review pursuant to the National Environmental Policy Act, and consultation with federal environmental agencies pursuant to the Endangered Species Act. The Court remanded the plan approvals to PHMSA for further consideration consistent with its opinion. The Court did not vacate the approvals, and PHMSA's current approvals of Enbridge's plans remain in effect.

Challenge Filed Against PHMSA's Inventory of Alaska's Upper Cook Inlet Pipeline Facilities

On January 25, 2019, Hilcorp Alaska, LLC, Kenai Beluga Pipeline, LLC, and Harvest Alaska, LLC filed a Petition for Review in the U.S. Court of Appeals for the District of Columbia, challenging a report published by PHMSA on October 31, 2018 titled "Inventory of Upper Cook Inlet Pipeline Facilities and Identification of Regulators." Hilcorp Alaska, LLC et al. v. DOT et al., 19-1016 (D.C. Circuit). The purported final agency action at issue is a report that provides a detailed inventory of pipelines and pipeline facilities located in the waters of the Cook Inlet, Alaska, as well as a description and identification of the various federal and state regulators with oversight over the pipelines and pipeline facilities. Such a designation triggers PHMSA's regulatory oversight over certain gathering pipelines located within the waters of the Alaska's Upper Cook Inlet.

On February 28, 2019, Petitioners filed a non-binding statement of the issues wherein the issues were presented as follows: (1) whether PHMSA's classification of the waters of Alaska's Upper Cook Inlet [as offshore for purposes of PHMSA's regulations] is inconsistent with the Pipeline Safety Laws, and (2) whether PHMSA violated the Administrative Procedure Act ("APA"), 5 U.S.C. § 706(2), in its classification of the waters of Alaska's Upper Cook Inlet and its classicization of Petitioners pipeline facilities located in those waters, in a manner that disregards applicable legal authority, and in doing so acted in an arbitrary and capricious manner.

PHMSA and Petitioners are engaged in settlement negotiations in a companion administrative enforcement action where the

same legal questions are at issue. On March 7, 2019, the court granted Petitioners' unopposed motion to hold the case in abeyance.

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