U.S. Department of Transportation

DOT LITIGATION NEWS

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October 31, 2011 **Volume No. 11** **Issue No. 2**

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Supreme Court Litigation

Supreme Court Grants Review of Ninth Circuit Decision Allowing Non-pecuniary Damages for Violations of the Privacy Act

On June 20, 2011, the Supreme Court granted the United States' petition for certiorari in FAA v. Cooper (No. 10-1024). This case arose out of "Operation Safe Pilot," an investigation by the DOT Inspector General and the Social Security Administration (SSA) Inspector General that examined data on pilots in northern California to determine whether any of them had reported medical issues to the SSA that had not been disclosed to the FAA on the pilot's medical application. The data revealed that Stanmore Cooper was a pilot who had claimed disability from SSA based on his HIV status, but had failed to report that condition to the FAA. Thus, Mr. Cooper had falsified his pilot medical application on several occasions.

Following his indictment, Mr. Cooper pled guilty to a misdemeanor. He then sued FAA, DOT, and SSA for the improper disclosure of information under the Privacy Act and sought damages for mental and emotional distress. The U.S. District Court for the Northern District of California dismissed the complaint, holding that the exchange and disclosure of Mr. Cooper's information was a breach of the Privacy Act, but that Cooper had no "actual damages" as that term is used in the Act because it did not cover compensation for pure mental anguish. Cooper v. FAA, No. 07-1383, 2008 WL 8648952 (N.D. Cal. Aug. 22, 2008).

Mr. Cooper appealed, and the Ninth Circuit reversed. Cooper v. FAA, 622 F.3d 1016 (9th Cir. 2010). Although it noted a split in the circuits on the issue, the court concluded that the intent of Congress in enacting the Privacy Act was "to extend recovery beyond pure economic loss." The court came to this conclusion after considering the text of other sections of the Privacy Act, the purposes of the Act, and decisions interpreting the words "actual damages" under the Fair Credit Reporting Act, which Congress passed in a contemporaneous timeframe. The Ninth Circuit also rejected the argument that the government's waiver of sovereign immunity through the Privacy Act should be narrowly construed, with damages limited to economic loss.

The United States petitioned for panel rehearing or, in the alternative, rehearing en banc, which were both denied. However, eight judges of the court joined in a written dissent from the denial of en banc review. The United States petitioned for certiorari, and the Supreme Court granted the petition on June 20, 2011.

In its merits brief, the United States argues that because the Act's "actual damages" provision constitutes a limited waiver of the United States' sovereign immunity, the question is not whether the statutory text could be read to authorize claims of mental or emotional distress, but instead whether the statutory text clearly and unequivocally compels that conclusion because sovereign-immunity waivers must be narrowly construed in favor of the sovereign. That rule applies with special force when the extent of the United States' damages liability is at issue. In the government's view, the Act's text does not clearly and

unequivocally compel a conclusion that it authorizes claims of mental or emotional distress, leaving "actual damages" open to interpretation. Because a narrow construction of this term as including only pecuniary harm and excluding mental or emotional harm is reasonable, a court is required to respect Congress's exclusive authority over the public fisc by adopting that construction. The United States further argues that that even setting the sovereign immunity analysis aside, there is no evidence that Congress intended to expose the U.S. Treasury to significant new liability based on subjective and uncapped claims of mental or emotional distress.

Respondent's brief argues that traditional canons of statutory construction compel a reading of "actual damages" that includes damages for proven mental or emotional distress. The brief contends that dictionary definitions of "actual damages" contemporaneous with passage of the Privacy Act show that the term's meaning encompasses compensation for such damages. That meaning, in respondent's view, is confirmed by the traditional legal usage of the term, by other provisions of the Act, including its statement of purpose, and by the construction of the term in contemporaneous statutes and judicial opinions. Finally, respondent argues that because established principles of statutory construction show that Congress intended to provide compensation for proven mental or emotional distress, the sovereign immunity canon cannot be invoked to compel a reading of the Act that precludes such damages.

The Court is scheduled to hear oral argument in the case on November 30. The merits briefs in the case are available at http://www.americanbar.org/publications/preview_home/10-1024.html.

The Ninth Circuit opinion and the dissent to its en banc denial are available at: http://www.ca9.uscourts.gov/datastore/opinions/2010/09/16/08-17074.pdf.

Supreme Court Grants Certiorari in Case Involving the Preemptive Scope of the Locomotive Inspection Act

On June 6, 2011, the Supreme Court granted certiorari in Kurns v. Railroad Friction Products (No. 10-879) to review a decision of the U.S. Court of Appeals for the Third Circuit holding that the Locomotive Inspection Act (LIA) operated to preempt a state common law claim by a former railroad employee against manufacturers of locomotive parts. See Kurns v. A.W. Chesterton, Inc., 620 F.3d 392 (3d Cir. 2010). The state common law claim sought damages for asbestos exposure that allegedly occurred in the railroad maintenance shop environment. The question before the Court is whether the LIA preempts state common law claims by individuals who allege to have been exposed to asbestos-containing materials in the course of repairing locomotives at railroad maintenance facilities. The case presents the same issues as those raised in John Crane, Inc. v. Atwell (No. 10-272), in which the United States had urged the Court to grant review of a Pennsylvania Superior Court decision holding that the LIA did not preempt state common law tort claims seeking damages for alleged asbestos exposure. Atwell v. John Crane, Inc., 986 A.2d 888 (Pa. 2009).

The LIA states that "[a] railroad carrier may use or allow to be used a locomotive or tender on its railroad line only when the locomotive or tender and its parts and appurtenances – (1) are in proper condition

and safe to operate without unnecessary danger of personal injury; (2) have been inspected as required under this chapter and regulations prescribed by the Secretary of Transportation under this chapter; and (3) can withstand every test prescribed by the Secretary under this chapter." 49 U.S.C. § 20701. In Napier v. Atlantic Coast Line R.R. Co., the Supreme Court determined that the LIA occupied the field of regulating locomotive equipment safety and extended to "the design, the construction, and the material of every part of the locomotive and tender and of all appurtenances." 272 U.S. 605, 611 (1926). Since Napier, many courts have held that the scope of the LIA encompasses state common law claims.

The Kurns case arises out of asbestos-related injuries allegedly suffered by locomotive maintenance worker George Corson while he was employed by the Chicago, Milwaukee, St. Paul, & Pacific Railroad from 1947 to 1994. His employment required him to remove insulation from locomotive boilers and to install brake shoes on locomotives. It was alleged that he was repeatedly exposed to asbestos in the insulation and the brake shoes. He was diagnosed with malignant mesothelioma, an asbestos-related disease, in 2007 and died in 2008. Prior to his death, he brought suit against his railroad employer under the Federal Employers' Liability Act, 45 U.S.C. §§ 51-60, which included an allegation that the railroad had violated the LIA. Additionally, he sued numerous manufacturers under state common law alleging, among other things, that his asbestos-related injuries were caused by the negligence of various locomotive part manufacturers. Respondents Railroad Friction Products and A.W. Chesterton, Inc. are two manufacturers that successfully raised the defense of federal preemption under the LIA. Petitioners are Mr. Corson's widow and the executor of his estate.

The petitioners' brief on the merits argues that the field preempted by the LIA does not include state common law claims against manufacturers of locomotives and locomotive parts by workers injured in railroad maintenance facilities. They assert that the text of the LIA makes clear that it only regulates the "use" of a locomotive "on [a] railroad line" and locomotives are not in "use" under the terms of the statute when they are being serviced in railroad repair facilities. Moreover, petitioners contend that there is no basis for applying the LIA in this case because the events giving rise to Mr. Corson's exposure happened prior to the time when manufacturers became subject to the LIA. Prior to a series of amendments beginning in 1988 that broadened the scope of the LIA to include manufacturers of locomotives and locomotive parts, such manufacturers were not covered by the statute.

The United States filed an amicus brief in support of the petitioners. The United States takes the position in its brief that the LIA establishes a nationwide standard of care that preempts the field of safety for locomotives, tenders, and their parts and appurtenances used on railroad lines. However, Congress did not intend for the LIA to apply to locomotives that are not operational, such as locomotives undergoing repairs in a railroad maintenance facility. Therefore, the United States' amicus brief concludes that the Third Circuit incorrectly held that the preemptive scope of the LIA precludes all of petitioners' claims whether the locomotives Mr. Corson was servicing were in use or not in use. The United States' amicus brief also recognizes, however, that some of petitioners' claims

may be preempted under the principles of conflict preemption where the claims stand as an obstacle to the LIA's objective of uniform nationwide standards governing the safe use of locomotives. For instance, petitioners have alleged as part of their state common law claim that locomotive parts containing asbestos are unreasonably dangerous for any use. This type of claim would be preempted if it could result in different states imposing different rules governing when a locomotive is safe for use. However, petitioners also assert that respondents negligently failed to warn Mr. Corson how to protect himself while working with asbestos-containing products in the maintenance repair shop environment. This type of claim likely would not be preempted under conflict preemption analysis because it does not speak to the safe use of locomotives, tenders, or their parts and appurtenances. As a result, the United States suggests that the case be remanded to the Third Circuit to apply conflict preemption principles.

The Court is scheduled to hear oral argument in the case on November 9. The merits briefs in the case are available at http://www.americanbar.org/publications/preview_home/10-879.html.

Departmental Litigation in Other Courts

D.C. Circuit Sets Aside DOT Cease and Desist Letter against Indirect Air Carrier

On April 1, 2011, the U.S. Court of Appeals for the District of Columbia Circuit granted the Petition for Review in CSI Aviation Services, Inc. v. DOT, 637 F.3d 408 (D.C. Cir. 2011), in which petitioner CSI Aviation Services, Inc.'s (CSI), an air charter broker, sought review of a letter issued by DOT's Office of Aviation Enforcement and Proceedings warning CSI to cease and desist from further activity that would result in it engaging in indirect air transportation. The D.C. Circuit held that DOT's cease and desist letter constituted final agency action and was thus subject to judicial review. Furthermore, the court found that the case was not mooted by the fact that a rulemaking on this subject is forthcoming and that DOT granted CSI a temporary exemption. It then held that DOT failed to address and explain the critical issue of why the Federal Aviation Act requires a certificate of authority for air charter brokers, such as CSI, operating under GSA contracts.

The court relied upon Ciba-Geigy Corp. v. EPA, 801 F.2d 430, in finding that DOT's cease and desist letter was subject to judicial review without further factual development. In Ciba-Geigy, the court noted three factors in determining

whether an agency's action is reviewable: 1) whether the agency had taken a definitive legal position concerning its statutory authority, 2) whether the case presented a purely legal question of statutory interpretation, and 3) whether the agency's action imposed an immediate and significant practical burden on the petitioner. Id. at 435, 437. In applying these factors to this case, the court found that DOT issued a definitive statement of the agency's legal position in its letter to CSI. Furthermore, the court noted that the issue of whether an air charter broker is engaged in air transportation poses a legal question of statutory interpretation, and there are no disputed facts that would bear on this question. Finally, the court found that DOT imposed an immediate and significant burden on CSI. DOT's letter "cast a cloud of uncertainty over the viability of CSI's ongoing business" and caused the company to choose between compliance and the risk of future prosecution. 637 F.3d at 413.

In turning to the merits of the case, the court found that "DOT failed to explain why the Federal Aviation Act requires a certificate of authority for air charter brokers operating under GSA contract." 637 F.3d at 415. The court first turned to the statutory language of the Federal Aviation Act, which states that "an air carrier may provide air transportation only if the air carrier holds a certificate." 49 U.S.C. § 41101(a). In the court's analysis of the statutory provision, the court looked to the definition of "air transportation," which includes "interstate air transportation." Interstate air transportation is defined as the interstate "transportation of passengers or property by aircraft as a common carrier for compensation." 49 U.S.C. § 41102(a) (25). The court then applied the common law definition of "common carrier," which defines a common carrier as commercial transportation that "holds itself out to the public." 637 F.3d at 415. Because CSI's contract with the GSA is for charter service, and not open to the public, the court reasoned that CSI is not a "common carrier" and thus falls outside the scope of the Federal Aviation Act. Ultimately because the court "[could not] evaluate the challenged agency action on the basis of the record before [it], the proper course...is to remand to the agency for additional investigation or explanation." 637 F.3d at 416 (citing Fla. Power & Light Co. v. Lorion, 470 U.S. 729, 744 (1985)). While the court remanded this case, the court also noted that "[i]t appears to us that the law cannot support DOT's interpretation, but we leave open the possibility that the government may reasonably conclude otherwise in the future, after demonstrating a more adequate understanding of the statute." Id.

The D.C. Circuit's opinion is available at http://www.cadc.uscourts.gov/internet/opinions.nsf/3F89D4F2B90EFD2285257865004DF0E9/$file/09-1307-1301152.pdf.

Federal Circuit Denies Government's Petition for Panel Rehearing or Rehearing En Banc in Federal Railbanking Program Takings Case

On May 26, 2011, the U.S. Court of Appeals for the Federal Circuit denied

the United States' combined petition for panel rehearing and rehearing en banc of the U.S. Court of Appeals for the Federal Circuit's decision in Ladd v. United States, 630 F.3d 1015 (Fed. Cir. 2010).

The Ladds are property owners along a 76.2 mile rail line in Arizona near the United States-Mexico border. Through federal and private conveyances, a rail carrier acquired the right to use a 100 feet wide, 76.2 mile strip of land to build and operate a railroad and had done so since 1903. According to the Ladds, they retained fee simple estates in the portions of their land underlying the rail line. In October 2005, the rail carrier filed a petition with the STB to initiate abandonment proceedings for the 76.2 mile rail line. The STB issued a Notice of Interim Trail Use (NITU) after a trail operator petitioned the STB and the rail carrier indicated its willingness to enter into trail use negotiations with the trail operator. The NITU suspended abandonment proceedings and authorized a 180-day period for the two parties to negotiate a trail use agreement. However, the parties did not reach a trail use agreement and a recreational trail was not established.

The Ladds filed a suit against the United States in the Court of Federal Claims alleging a violation of the Takings Clause of the Fifth Amendment. They argued that the NITU had forestalled or taken their state law reversionary property interests, and pursuant to two prior Federal Circuit railbanking cases, Caldwell v. United States, 391 F.3d 1226 (Fed. Cir. 2004), and Barclay v. United States, 443 F.3d 1368 (Fed. Cir. 2006), a taking of their property occurred when the STB issued the NITU. The court concluded that no taking had occurred and granted the government's Motion for Summary Judgment. In dismissing the case, the court concluded that "[a] physical taking cannot have occurred in these circumstances, where neither the NITU nor another aspect of the federal abandonment process has resulted in construction of a trail for public use."

The Ladds appealed and a Federal Circuit panel reversed the lower court's decision. The panel found that the issuance of a NITU amounts to a taking because the NITU is the government action that blocks the landowners' state law reversionary property interests. The panel based its decision on Caldwell and Barclay, in which the Federal Circuit held that a takings claim accrues for purposes of the statute of limitations when a NITU is issued.

The United States filed a petition for panel rehearing or, in the alternative, rehearing en banc and urged the Federal Circuit to apply established Supreme Court takings jurisprudence and to affirm the trial court's judgment. The petition for panel rehearing was considered by the panel that heard the appeal, and the petition for rehearing en banc, response, and brief amicus curiae were referred to the circuit judges who are authorized to request a poll of whether to rehear the appeal en banc. Ultimately, the Federal Circuit denied both petitions. Three judges joined in a dissenting opinion. Senior Judge Robert Hodges, Jr. stated that in denying the petition for rehearing en banc, the Court "maintain[s] and perpetuate[s] an egregious legal error." 646 F.3d 910,

911 (Fed. Cir. 2011). Judge Hodges acknowledged the precedent set in Caldwell and Barclay, but stated that those cases "failed to consider the varying outcomes stemming from the issuance of an NITU, which could result in either a permanent, physical taking or a temporary, regulatory taking." Id. Judge Hodges noted that the Court's reluctance to consider the issue en banc may have been because neither party directly challenged the holdings in Caldwell and Barclay. Id.

Court Finds Preemption in State Law Challenge to Accessibility of Airline Ticket Kiosks, Plaintiffs Appeal

On April 25, 2011, the U. S. District Court for the Northern District of California issued a decision dismissing National Federation of the Blind, et al. v. United Airlines, 2011 WL 1544524 (N.D. Cal. Apr. 25, 2011), a suit that challenged the accessibility of United Airlines' ticket kiosks on the ground that they violated California disability law because the kiosks were not accessible to the blind. At the Court's request, the United States filed a Statement of Interest brief arguing that the plaintiffs' claims were preempted under the Air Carrier Access Act (ACAA) and the Airline Deregulation Act (ADA). The court agreed with the views of the United States and found field preemption under the ACAA because DOT had adopted a regulation addressing kiosk accessibility, thereby pervasively regulating this area. Further, the court ruled that airport ticket kiosks are "services" under the ADA, and thus the plaintiffs' claims are expressly preempted because the ADA prevents states from adopting a law or regulation related to the price, route or service of an air carrier. DOT has responsibility for issuing regulations to implement the ACAA and published a supplemental notice of proposed rulemaking (SNRPM) on September 19, 2011. The SNPRM seeks comments regarding the potential revision of DOT's regulation governing airport kiosks in light of advances in technology and the needs of passengers with disabilities such as the plaintiffs in this case.

On May 17, plaintiffs appealed the District Court's decision to the U.S. Court of Appeals for the Ninth Circuit. Plaintiffs filed their brief on August 25 and raised similar arguments to those raised before the court below, mainly that automated kiosks are not a "service" under the ADA and that the savings clause in the Federal Aviation Act of 1958 prevents plaintiffs' claims from ACAA preemption. United filed its response brief on October 11, and the United States filed an amicus brief supporting United on October 18. Both briefs raised similar arguments supporting preemption to those raised before the court below.

Court Dismisses Tenants' Challenge to FHWA and FTA Los Angeles Projects

On August 30, 2011, a U.S. Magistrate Judge issued a Report and Recommendation in Gaxiola et al. v. City of Los Angeles, et al. (C.D. Cal. No. 10-06632) recommending that the U.S. District Court issue an order granting judgment on the pleadings in

favor of defendants FHWA, FTA, Federal Highway Administrator Mendez, and Federal Transit Administrator Rogoff and dismissing plaintiffs claims against them for lack of subject matter jurisdiction. This case was a pro se lawsuit brought by several individuals displaced from their residences in the "Pickle Works Building," which is in the footprint of the FHWA-funded First Street Viaduct Widening Project and the FTA-funded Los Angeles County Metropolitan Transportation Authority East Side Light Rail project. Plaintiffs did not file an opposition to the Magistrate's Report and Recommendation. Accordingly, on September 30, the U.S. District Court Judge assigned to the case issued an Order and Judgment dismissing all claims against the federal defendants for lack of subject matter jurisdiction. The Judge also dismissed all claims against the City of Los Angeles, Caltrans and the other defendants in the case.

Plaintiffs had alleged violations of the First, Fourth, Fifth, and Fourteenth Amendments, the Fair Housing Act (FHA), the Uniform Relocation Act, the Civil Rights Statutes (42 U.S.C. §§ 1981, 1982, 1983, and 1985), and the Administrative Procedure Act. Plaintiffs sought injunctive and declaratory relief, and compensatory damages. Federal defendants filed a timely Answer in November 2010, denying all of plaintiff's claims.

In July 2011, the Magistrate had issued an Order to Show Cause why plaintiffs' claims under the Civil Rights Statutes and the FHA should not be dismissed as untimely. Federal defendants used the opportunity afforded by the Order to argue that all of the claims leveled against the United States should be dismissed on sovereign immunity grounds.

Republic Airlines Challenges DOT's Reallocation of Reagan National Airport Slot Exemptions to another Air Carrier

On January 25, 2011, Republic Airlines, Inc. (Republic) filed a petition for review in the U.S. Court of Appeals for the D.C. Circuit seeking review of DOT's determination that Republic's acquisition of Midwest Airlines, Inc. (Midwest), a carrier to which DOT had awarded two slot exemptions Reagan National Airport, constituted a transfer of slot exemptions prohibited by statute. The case is styled Republic Airlines, Inc. v. U.S. DOT (D.C. Cir. No. 11-1018).

At Reagan National, the total number of flights and the allocation of those flights among air carriers are determined by statute and regulation. Under the so-called "High Density Rule" (HDR), FAA has allocated "slots" to air carriers. A "slot" is simply a takeoff or landing authority. Congress has also authorized DOT to issue a certain number of slot "exemptions." Slot exemptions are special authorities to land and takeoff, to supplement the slots available under the HDR. The statute directs the Secretary to distribute slot exemptions under specified criteria. The statute also provides that no slot exemption "may be bought, sold, leased, or otherwise transferred by the carrier to which it is granted."

After Republic acquired Midwest, Midwest ceased all scheduled operations under its DOT and FAA certificates, and returned its aircraft to their lessor, the Boeing Company. DOT found that after Republic's acquisition of Midwest, its proposed continued use of Midwest's slot exemptions with its own Republic aircraft branded "Midwest" constituted an impermissible "transfer" under the statute. DOT subsequently reallocated the slot exemptions to another air carrier, Sun Country, following a competitive proceeding.

Republic contends that DOT's decision is arbitrary and capricious because it conflicts with the agency's own precedents, and because the agency's underlying decision did not discuss its DOT's earlier slot exemption transfer precedents. Republic seeks an order vacating DOT's underlying decision. Republic's opening brief was filed June 30. The government filed its brief on September 22, and the case is scheduled for oral argument on November 8.

Air Carriers Challenge Most Recent DOT Airline Passenger Consumer Protection Rule

On June 15, 2011, Spirit Airlines (Spirit) filed a petition for review in the U.S. Court of Appeals for the D.C. Circuit seeking review of certain provisions of an April 2011 DOT final rule designed to protect airline passengers from unfair and deceptive practices. On June 16, Allegiant Air (Allegiant) filed its own petition, challenging the same provisions. On July 8, Southwest Airlines filed an unopposed motion to intervene in the case, challenging only the portion of the final rule in connection with full-fare advertising. The Court has consolidated the petitions in a case styled Spirit Airlines, Inc. v. U.S. DOT (D.C. Cir. Nos. 11-1219, 11-1222). The Air Transport Association of America, Inc. and International Air Transport Association will participate as amicus curiae in support of the airlines. The American Society of Travel Agents, Inc. has intervened in support of DOT. The Interactive Travel Services Association will also participate as amicus curiae in support of DOT.

DOT's final rule, Enhancing Airline Passenger Protections, 76 Fed. Reg. 23,110 (Apr. 25, 2011), contains many new requirements to improve the air travel environment for consumers, expanding upon the passenger rights included in its first consumer rulemaking. In their petition for review, the airlines assert that the rule unlawfully: (1) ends the practice of permitting sellers of air transportation to exclude government taxes and fees from the advertised price; (2) prohibits the sale of nonrefundable tickets by requiring airlines to hold reservations at the quoted fare without payment or cancel without penalty for at least twenty-four hours after the reservation is made if the reservation is made one week or more prior to a flight's departure; (3) prohibits post purchase price increases, including increases in the price of ancillary products and services, after the initial ticket sale; (4) requires baggage fees be disclosed on e-ticket confirmations; and (5) mandates notification of flight schedule changes. The airlines contend that these provisions of DOT's final rule are arbitrary and capricious because they

allegedly interfere with airline pricing and services, impermissibly re-regulate airline business practices, and are not supported by the administrative record.

On July 6, Spirit and Allegiant sought an administrative stay from DOT of the effective date of the rule pending their petitions for review. On July 8, Southwest filed its own request with DOT to stay the rule's full-fare advertising provision pending judicial review. On July 20, DOT denied the airlines' respective stay requests, but granted in part the request of other entities (who are not parties to the litigation) to extend the effective date of certain provisions of the rule to allow more orderly implementation. All of the rule provisions at issue in this matter will now take effect on January 24, 2012.

Following DOT's stay request denial, on July 22, the airlines moved the Court to stay the challenged provisions of the final rule pending judicial review, which the government opposed. On September 19, the Court denied the airlines' motion to stay, and subsequently entered a briefing schedule. Opening briefing of the airlines and their various amici are due in November 2011. The government's brief is due December 29, with briefs of parties supporting DOT as either an intervenor or amicus curiae due in January 2012. Oral argument has not yet been scheduled

Recent Litigation News from DOT Modal Administrations

Federal Aviation Administration

First Circuit Upholds FAA's Decision to Allow Replacement of Hangar at Bedford-Hanscom Field

Local groups challenged the FAA's approval of an amendment to the Airport Layout Plan that allowed Massport, the operator of Bedford-Hanscom Field in Massachusetts, to remove the airport's Hangar 24 and replace it with a newer, larger hangar. Hangar 24 was last used in 2001 by MIT for various testing. It is eligible for listing as a historic property under Section 106 of the National Historic Preservation Act (NHPA) because of this activity. The FAA evaluated Massport's proposal to remove and replace the hangar using an environmental assessment (EA) and concluded there were no significant impacts. Removal of the hangar is a direct effect under the National Historic Preservation Act; therefore, FAA consulted with the State Historic Preservation Officer and executed a Memorandum of Agreement (MOA) with appropriate parties. The MOA requires Massport to salvage some parts of Hangar 24.

On July 12, 2011, the U.S. Court of Appeals for the First Circuit upheld FAA's decision, finding that it complied

with Section 4(f) of the DOT Act, Section 106 of the NHPA, and NEPA. The court in Safeguarding the Historic Hanscom Area's Irreplaceable Resources v. FAA, 651 F.3d 202 (1st Cir. 2011), conducted an in depth analysis of the 4(f) claims. It found that the governing standard for determining if an agency complied with 4(f) remains whether an alternative is prudent given the totality of the circumstances. In finding that the FAA properly rejected the other alternatives as "imprudent," the Court concluded that "prudence is largely a matter of safety and efficiency; and the FAA's determination that none of the three alternatives would be prudent was, on the record before it, well within the universe of reasonable outcomes. When that is true, it is not the place of a reviewing court to second-guess the agency." The court found that FAA had taken all steps to minimize harm, the second part of Section 4(f). Finally, the court found the FAA complied with all necessary steps under Section 106 and that the FAA's noise analysis was reasonable.

Ninth Circuit Remands FAA's Decision Approving Third Runway at Hillsboro Airport to Consider Potential Growth Inducing Effects

On August 25, 2011, a divided panel of the U.S. Court of Appeals for the Ninth Circuit (Judges Betty Fletcher, Paez, and Ikuta (dissenting)) issued an opinion holding that FAA's environmental assessment (EA) for the Hillsboro Airport (HIO) expansion projects failed to consider the environmental impact of increased demand resulting from the projects. Barnes v. DOT, 655 F.3d 1124 (9th Cir. 2011).

HIO, located in Hillsboro, Oregon, is the busiest general aviation airport in Oregon, and relative to total aircraft operations, is the second busiest airport in the state behind Portland International Airport. A 2005 Master Plan was prepared by the Port of Portland, sponsor of HIO, that identified facility improvements to enable HIO to continue serving as an effective general aviation reliever airport as activity levels increased. An EA was prepared to evaluate a third runway and associated taxiways, the relocation of a helicopter pad, and associated infrastructure improvements. The primary purpose of the project was to reduce congestion and delay at HIO in accordance with planning guidelines established by FAA.

FAA approved and issued the final EA and a finding of no significant impact on January 8, 2010. Petitioners, three citizens, filed a petition for review in the 9th Circuit pursuant to 49 U.S.C. 46110 challenging the adequacy of the EA and the public hearing that was offered.

In its August 25th opinion, the panel found that the hearing was adequate, the discussion of greenhouse gas emissions was adequate, and that a number of issues were either not properly raised in the comment period or were without merit. However, the majority also found that FAA failed to consider the environmental impact of increased demand resulting from the expansion at HIO. The court reasoned that the agency was aware that a new runway could induce growth based on two statements in the Statement of Work for the EA and

therefore that the failure to discuss the environmental impact was a flaw "so obvious" that there was no need for petitioners to point it out to preserve the issue for judicial review. The court emphasized that the EA's discussion of growth inducing effects consisted of three sentences, that no documents in the record actually discussed the impact of a third runway on aviation demand, and that no distinction was made in any documents between the use with the existing two runways and use with an additional runway. The court did not actually find that there were growth-inducing effects from this project, but rather that FAA did not document or clearly demonstrate that there were no such effects. The court found that previous decisions in the context of flight patterns and arrival paths were not controlling, granted the petition, and issued a remand to FAA with instructions to consider those indirect environmental impacts of the third runway pursuant to Council on Environmental Quality regulations.

The 9th Circuit's opinion can be found at http://www.ca9.uscourts.gov/datastore/opinions/2011/08/25/10-70718.pdf.

D.C. Circuit Vacates FAA "No Hazard" Determination for Proposed Cape Cod Wind Turbines

On October 28, 2011, the U.S. Court of Appeals for the District of Columbia Circuit in Town of Barnstable v. FAA (D.C. Cir. No. 10-1276) granted a petition for review challenging FAA's "no hazard" determination in connection with the proposed construction of 130 wind turbines off the coast of Massachusetts. The project is known as "Cape Wind," and the petition for review was filed by the Town of Barnstable, Massachusetts. The Alliance to Protect Nantucket Sound filed a similar petition for review (D.C. Cir. No. 10-1307), and the court consolidated the cases. Cape Wind Associates, LLC, the developer, filed a motion to intervene, which was granted.

On January 19, 2011, the petitioners filed a joint brief, arguing that the construction of the Cape Wind "wind farm" with 130 wind turbines, each 440 feet tall, would be a hazard because it would cause changes to both instrument and visual flight procedures; would increase delays at nearby airports; and would impair the capability of certain air traffic radar facilities. The petitioners maintained that FAA had failed to follow its own order and the governing statute by ignoring the issue of whether the wind turbines would interfere with the navigable airspace, even if the structures were not deemed to be "obstructions." They also argued that FAA's requirements to mitigate any adverse impact on radar capability were arbitrary and capricious because they were inadequate and were purportedly based on unproven technology.

In its responsive brief, filed on February 18, 2011, FAA explained that, under the statute, if there were a determination that the proposed construction *may* result in an obstruction in the navigable airspace or *may* result in interference with the navigable airspace, then the agency must conduct an aeronautical study, which it did. The statute does not establish any requirement concerning the issues that

such a study must address. In any event, FAA's aeronautical study did consider the impact of the Cape Wind project on the navigable airspace. More significantly, FAA argued that the petitioners lacked standing because, regardless of FAA's hazard/no hazard determination, FAA has no authority to either authorize or prevent construction. Thus, were FAA to find a hazard present in this case, it would not necessarily have any impact on the approval of the project by the Department of the Interior (DOI). Cape Wind had obtained a lease for the project from DOI, and there was no evidence that the lease was conditioned upon a no hazard determination from FAA.

The court rejected FAA's standing and merits arguments. On standing, the court concluded that the record demonstrated that a hazard determination likely would have a significant impact on DOI's decision to approve the project, and that, therefore, the granting of the petition for review could redress petitioners' alleged injuries. On the merits, the court agreed with petitioners that the FAA's No Hazard determination was arbitrary and capricious because it departed from the agency's own internal guidelines by focusing only on the height of the wind turbines and did not adequately explain why other circumstances, such as the forced re-routing of aircraft under certain weather conditions, would not result in the creation of a hazard.

The D.C. Circuit's opinion is available at http://www.cadc.uscourts.gov/internet/opinions.nsf/4804795E91B8FA5F85257937004EDC66/$file/10-1276-1338470.pdf.

Sixth Circuit Denies Petition for Review Alleging Unjust Discrimination by Sumner County Regional Airport Authority

On September 13, 2011, the U.S. Court of Appeals for the Sixth Circuit denied the petition for review in Gina Moore d/b/a Warbird Sky Ventures, Inc. v. FAA (6th Cir. No. 10-4117). This petition for review challenged FAA's final agency decision and order in a grant enforcement proceeding. Petitioner alleged that the Sumner County Regional Airport Authority, the sponsor of the Sumner County Regional Airport in Gallatin, Tennessee, violated its grant assurance agreement when it, among other things, denied petitioner the right to operate as a Commercial Aeronautical Service Provider (CASP) at the airport. She argued that FAA wrongly found that the airport sponsor had not unjustly discriminated against her. FAA argued that Moore was not treated differently than other tenants similarly situated at the airport when the airport would not renew her CASP agreement. Moore did not qualify to be a CASP because she neither had the requisite amount of insurance, nor the minimum amount of space necessary to conduct CASP operations, and she has been in constant violation of the airport's minimum standards. The court found that none of petitioners' arguments with respect to perceived errors in the administrative fact finding process, the alleged lack of notification of complaints about her misuse of common areas, the demand for her to increase her level of insurance, and the requirement that she operate with an executed lease

demonstrated that the airport sponsor's actions amounted to unjust discrimination.

Voluntary Dismissal in Challenge to Categorical Exclusion of Proposed Fixed Base Operator Development Area at Palm Beach International Airport

On May 11, 2010, the U.S. Court of Appeals for the Eleventh Circuit granted petitioners' voluntary motion to dismiss Trump, et al. v. FAA (11th Cir. No. 10-15543). In this case, Donald Trump and Mar-A-Lago, LLC, an exclusive Palm Beach club owned by Mr. Trump had challenged the validity of FAA's approval of a categorical exclusion under NEPA for a proposed 7.5 acre Fixed Base Operator development area at Palm Beach International Airport, a commercial service airport in Palm Beach, Florida that has a strong general aviation component.

Court Dismisses Constitutional Challenge to Fair Treatment for Experienced Pilots Act

On July 11, 2011, the U.S. District Court for the District of Columbia granted the government's motion to dismiss in Adams, et al. v. United States, et al., 2011 WL 2694552 (D.D.C. July 11, 2011). This action was brought by Grant Adams and a number of former airline pilots to challenge the Fair Treatment for Experienced Pilots Act (FTEPA), which extended the age limit for pilots flying for commercial airlines to age 65. Prior to this legislation, which was enacted in December 2007, the age limit was 60.

Under FTEPA, pilots who turned 60 before the effective date of the statute, but who had not yet reached age 65, could still fly for the airline if they were rehired. In that instance, the statute provided that they would be rehired without any prior seniority or commensurate seniority benefits. Further, the statute expressly abrogated the so-called "age 60 rule" and provided protection from liability under any employment law or regulation for employers that complied with its terms. The plaintiffs in this case, and in a number of similar cases brought in other courts, argued that these provisions were unconstitutional violations of the Due Process Clause, the Equal Protection Clause, the Takings Clause, and the Bill of Attainder Clause.

The district court, citing decisions in other cases, held that the plaintiffs had no claim under any of these provisions. The court found that the non-retroactivity provisions were not a violation of equal protection because it was rationally related to the desire of Congress to maintain calm in the labor market and to prevent the inevitable disruption that would be caused if an unemployed pilot were to return to work with all of his or her seniority benefits intact. The court also quickly rejected the other arguments. Because the age 60 rule had been in effect since 1959, the pilots had no expectation of being able to fly past age 60. Consequently, they had no "property interest" in flying until age 65 and no basis on which to assert either a takings or a due process claim. Finally, the court rejected the claim that

the FTEPA was a bill of attainder because it imposed no punishment. The statute does not bar the plaintiffs from being pilots; indeed, it allows them to act as pilots beyond age 60—something that was previously denied. And, it serves a legitimate, non-punitive, purpose of preserving labor calm.

The court dismissed the complaint in its entirety, and plaintiffs did not appeal.

Tinicum Township Files Opening Brief in Its Challenge to FAA's Approval of the Capacity Enhancement Program at Philadelphia International Airport

On September 9, 2011, a group of petitioners, including the Township of Tinicum in Delaware County, Pennsylvania, filed their opening brief challenging FAA's December 30, 2010, Record of Decision (ROD) that approved a plan (referred to as CEP) to expand and re-configure Philadelphia International Airport (PHL) by adding a third parallel runway, extending an existing runway, and making various terminal and airfield improvements, including re-locating the air traffic control tower. The plan challenged in Township of Tinicum, et al. v. DOT (3rd Cir. No. 11-1472) requires the City of Philadelphia to purchase 72 homes and 80 businesses, all located in Tinicum Township, in order to relocate a UPS facility.

Petitioners appear to allege that FAA violated NEPA and the Airports Airway and Improvement Act (AAIA). Relying heavily on comments made by the EPA, petitioners allege that FAA violated NEPA because of certain alleged inadequacies in its air quality analysis. The project is estimated to take 13 years to construct, and FAA has demonstrated that construction emissions either will be de minimus or will meet general conformity requirements under the Clean Air Act. Under the AAIA, petitioners allege that FAA failed to demonstrate that the project was consistent with existing plans of public agencies for development of areas surrounding the airport under 49 U.S.C. § 47106(a)(1). In making this determination, FAA relied on existing policy and case law to determine that the project was reasonably consistent with the plans set forth by the area's Metropolitan Planning Organization.

Second Circuit Challenges to Blue Ribbon Panel Study of Enclosed Marine Trash Transfer Facility Adjacent to LaGuardia Airport

On April 6, 2011, the U.S. Court of Appeals for the Second Circuit denied the government's motion to dismiss the petition for review in Paskar and Friends of LaGuardia Airport, Inc. v. DOT (2d Cir. No. 10-4612), in which petitioners seek review of a September 2, 2010, letter transmitting the "Evaluation of the North Shore Marine Transfer Station and its Compatibility with Respect to Bird Strikes and Safe Air Operations at LaGuardia Airport." The motion to dismiss argued that the court lacked jurisdiction to consider the petition for review because FAA's letter was not an agency order. The Second Circuit held that the September 2 letter is an order for

purposes of 49 U.S.C. § 46110. The Court did however raise, sua sponte, the question of whether it had jurisdiction under 46110(d) with respect to petitioner Friends of LaGuardia.

The Report at issue was prepared by a blue-ribbon panel of bird hazard experts who examined the extent to which the Marine Transfer Station (MTS), a proposed enclosed trash transfer facility, if properly managed, would nonetheless constitute a wildlife attractant and would therefore be incompatible with safe airport operations at LaGuardia. In 2006, the City proposed refurbishing four closed transfer stations; one of them is located in Queens, less than one mile from LaGuardia Airport. The project garnered special attention after the "miracle on the Hudson River," during which a bird strike caused a US Airways flight taking off from LaGuardia to make an emergency landing in January of last year. The Report included recommendations for action by the NYC Department of Sanitation and concluded that the MTS will be compatible with safe air operations so long as it is constructed and operated in accordance with the Report's recommendations. Construction of the facility is well underway.

Petitioners filed a memorandum of law regarding the court's jurisdiction on May 6 and their opening brief on May 31. Petitioners argued that the Panel Report's conclusion, that the MTS was compatible with safe air operations if properly mitigated, was arbitrary and capricious and not supported by substantial evidence. Petitioners challenged the Report's view that the MTS was fully-enclosed and was not located in the Runway Protection Zone (RPZ). Petitioners requested that the matter be remanded back to FAA with an order directing FAA to declare the MTS incompatible with safe air operations or, in the alternative, be remanded back to FAA for reconsideration of its determination and a review of potential hazards to air navigation and wildlife hazards to air operations.

The United States filed its brief on August 30. In its brief, the United States again argued the September 2 FAA letter transmitting the Panel Report is not a final order subject to review. The United States noted that construction of the facility has begun, and it is New York City, not FAA or the Port Authority, that is building the facility. The government claimed FAA is without authority to prevent the facility from being built. The United States also asserted that the petitioners do not have standing since the Panel Report and FAA's letter did not cause petitioners' alleged injuries, nor could a court redress those alleged injuries through an order directed at FAA. If the court deems FAA's letter is a final order, the United States asserted that the petition should be denied because FAA's letter is supported by substantial evidence. The United States argued that the MTS was fully enclosed and was not in the RPZ, and that FAA's action was consistent with FAA guidance and studies concerning enclosed trash facilities. Additionally, the United States negated the petitioners' claim that the Panel Report was a wildlife hazard assessment or a No Hazard Determination. The United States closed its brief with the view that the court could not direct FAA

to declare that the MTS was incompatible with safe operations.

Petitioners filed their reply brief on September 13, asserting again that the MTS is in the RPZ and is not a fully enclosed facility, and that it was improper for FAA to conclude that the facility was compatible with safe air operations, irrespective of any mitigating circumstances. Petitioners claimed that the Panel failed to follow FAA guidance in researching and drafting the Panel Report, and that the decision to gather two months of bird survey data was inadequate. Petitioners closed their brief with the assertion that the FAA failed to follow its statutory duty, its own regulations and guidance and failed to provide support for its decision, and again requested a remand.

In a related matter, the same petitioners filed an administrative complaint with FAA over the MTS against the Port Authority of New York and New Jersey, and the City of New York under 14 C.F.R. part 16, FAA's Rules of Practice for Federally-Assisted Airport Enforcement Proceedings. The complaint was originally dismissed on February 28, 2011, without prejudice to refiling upon correction of certain deficiencies, including improperly naming the City of New York as a respondent. The petitioners refiled the case on April 12, correcting some of the deficiencies, but again naming the City of New York as a respondent. The Director of the FAA Office of Airport Compliance and Management Analysis issued a Partial Dismissal Order and Notice of Docketing on May 24. The Director ordered that the City of New York was not properly named as a respondent in the proceeding and dismissed the City as a party, dismissed with prejudice the claim made in the complaint that the City is a properly named respondent, docketed the remaining portions of the complaint, and directed the Port Authority of New York and New Jersey to file an answer to the complaint within 20 days. The Port Authority answered the complaint, petitioners filed a reply and the Port Authority filed a rebuttal. The Office of Airports is proceeding with its investigation of the Port Authority's alleged noncompliance. On July 1, petitioners filed a petition for review of the partial dismissal, Paskar and Friends of LaGuardia Airport, Inc. v. FAA, et al. (2d Cir. No. 11-2720).

Aircraft Owner Groups Challenge FAA Rule Prohibiting Blocking of Electronic Aircraft Flight Data without Security Basis

On June 22, 2011, the National Business Aviation Association (NBAA) and the Aircraft Owners and Pilots Association (AOPA) filed a petition for review in the U.S. Court of Appeals for the District of Columbia Circuit, challenging FAA's decision not to block the release of real time, or near real time, aircraft flight data unless there is a valid security-related basis to do so. The data at issue in National Business Aviation Association, et al. v. FAA (D.C. Cir. No. 11-1241) is the Aircraft Situation Display to Industry (ASDI), which the FAA provides to certain Direct Subscribers. This data shows the position, call sign, altitude, speed, and destination of aircraft flying under the

Instrument Flight Rules and of aircraft receiving flight following under the Visual Flight Rules. ASDI data is provided in either real time or near real time (5 minute delay), depending on whether the subscriber has a specific need for real time data (such as an air carrier dispatcher) or has only a more general need and the use of near real time data is sufficient.

For a number of years, FAA has blocked flight data information in the ASDI feed upon request of the owner or operator of the aircraft. Under this system, the NBAA collected blocking requests and transmitted them to the FAA monthly. The NBAA also arranged for the Direct Subscribers to block the aircraft data, which allowed the owners and operators to track their own aircraft—something that could not be done if FAA filtered the data before transmitting it to the ASDI subscribers.

In March 2011, FAA proposed modifying the blocking program so that it would only filter the ASDI data for aircraft with a valid security concern demonstrated (a) by the certification of a verifiable threat to the safety or security of persons or property or (b) by satisfying the elements for a bona fide security concern under Treasury Regulation 1.132-5(m). 76 Fed. Reg. 12,209 (Mar. 4, 2011). FAA advised that it would no longer block aircraft data "upon request."

Following a comment period, FAA published its final revised policy on June 3, 2011, with an effective date of August 2, 2011. FAA explained that it was revising its policy because of the President's stated policy of open and transparent government embodied in his memorandum titled "Transparency and Open Government" and on the implementing directive from the Office of Management and Budget, which encouraged agencies to make discretionary disclosures of information. FAA also relied upon the decision in NBAA v. FAA, 686 F. Supp. 2d 80 (D.D.C. 2010), in which the court rejected a challenge to the FAA's release of a list of the registration numbers of the aircraft that had asked that their data be filtered from the ASDI feed. In that decision, the court held there was neither a privacy interest nor commercial significance in the list of registration numbers.

Petitioners contend that the FAA failed to provide an adequate explanation for its change in policy and that it is, therefore, arbitrary and capricious and violates the standards of the Administrative Procedure Act.

Briefing has been completed, and oral argument is scheduled for December 2, 2011.

Party in Dismissed Administrative Civil Penalty Action Seeks EAJA Fees

On July 13, 2011, Green Aviation LLC (Green) filed a petition for review in the U.S. Court of Appeals for the District of Columbia Circuit challenging an order of the FAA Administrator denying Green's appeal of the denial of its application for the award of attorney's fees under the Equal Access to Justice Act (EAJA). Following preliminary civil penalty enforcement proceedings

before an Administrative Law Judge (ALJ) and before any hearing on the merits, FAA withdrew a civil penalty complaint against Green. The ALJ then dismissed the case with prejudice as he was required to do under the FAA's regulations, 14 C.F.R. § 13.215. Thereafter, Green sought attorney's fees under EAJA, arguing that it was the prevailing party because the dismissal was with prejudice. The ALJ denied the motion, and Green appealed to the Administrator, who also denied the award of attorney's fees under EAJA.

In the decision that is under review in Green Aviation LLC v. FAA (D.C. Cir. No. 11-1260), the Administrator held that Green was not the prevailing party for the purposes of EAJA under the principles set forth in Buckhannon Board and Care Home, Inc. v. West Virginia Dept of Health and Human Services, 532 U.S. 598 (2001). Specifically, the Administrator held that where, as here, a dismissal with prejudice is obtained through the nondiscretionary application of a regulation, it lacks the "judicial imprimatur" that is the hallmark of a decision on the merits. Under the circumstances, the Administrator denied the award of attorney's fees.

Sightseeing Flight Operator Challenges FAA Order Setting Number of Glen Canyon Overflights

On September 10, 2010, American Aviation, Inc. and Larry Wright (collectively, American Aviation) filed a petition for review in the U.S. Court of Appeals for the Ninth Circuit challenging an FAA order that granted American Aviation Interim Operating Authority (IOA) to conduct 462 sightseeing flights over the Glen Canyon Recreation Area (Glen Canyon). The order was issued on July 14, 2010, following a fact-finding hearing in which American Aviation participated, along with other businesses providing sightseeing flights over Glen Canyon—Grand Canyon Airlines (Grand Canyon) and Westwind Aviation (Westwind). Purpose of the hearing was to develop the facts related to qualifying IOA operations for National Park overflights under 49 U.S.C. § 40128. The fact-finding hearing was undertaken to investigate Grand Canyon's complaint that American Aviation had exceeded the number of flights authorized by its IOA. The FAA order issued after the hearing confirmed that American Aviation had 462 IOA and reduced Grand Canyon's IOA to 4,638 and Westwind's to 2,446 IOA.

In its petition in American Aviation, Inc. et al. v. FAA (D.C. Cir. No. 10-72772), petitioners contend that their award of only 462 IOA was arbitrary and capricious and that the allocation set forth in the FAA order was contrary to the statutory requirements. The particular part of the statute at issue is the "look-back" provision, which permits the award of IOA based on the number of operations in the year prior to the enactment of the statute. Both Grand Canyon and Westwind obtained IOA substantially in excess of their actual operations during the look-back period because they claim to have purchased the IOA of operators who went out of business. FAA's position is that, during the hearing, American Aviation

expressly withdrew any claim to IOA in excess of the 462; consequently, it cannot raise the issue of its IOA allocation in this petition. With regard to the IOA allocations to Grand Canyon and to Westwind, FAA argues that those allocations were reasonable and were adequately explained in its order. Further, FAA asserts that even if its allocation to Grand Canyon and Westwind was flawed, American Aviation does not have a sufficient stake in the outcome to give it standing to raise the issue in a petition for review.

This matter has been fully briefed, and oral argument is scheduled for November 15.

Federal Highway Administration

Fifth Circuit Affirms Grant of Summary Judgment for FHWA in Challenge to Houston Grand Parkway Project

On August 2, 2011, the U.S. Court of Appeals for the Fifth Circuit affirmed the grant of summary judgment for FHWA by the U.S. District Court for the Southern District of Texas. This case, Sierra Club, v. FHWA, 2011 WL 3281328 (5th Cir. 2011), involved a challenge to a Record of Decision (ROD) issued by FHWA on a highway project in Texas. The project was Segment E of the Grand Parkway, which is located in Houston, Texas. The Grand Parkway (State Highway 99) is envisioned as a 180-mile-long loop highway around Houston. Segment E is a 13.9-mile segment located about 25 miles west of downtown Houston and is planned as a four-lane controlled access toll facility connecting Interstate Highway 10 with U.S. Highway 290.

Plaintiffs/appellants Sierra Club and Houston Audubon (Sierra Club) alleged that the proposed route of the Segment E tollway took it through the Katy Prairie, an area they asserted is environmentally sensitive. Specifically, Sierra Club's complaint alleged that the EIS for the project (1) contained an inadequate and unlawful alternatives analysis; (2) failed to assess properly the impacts of Segment E on hydrology, drainage, floodways, and floodplains; (3) failed to disclose significant impacts and indirect effects on wetlands; (4) failed to disclose significant air impacts, air toxics risks, and failed to consider greenhouse gas emissions; (5) failed to properly disclose noise impacts; and 6) failed to consider the project's indirect, secondary, and cumulative impacts in an environmentally sensitive area. Sierra Club sought an order requiring FHWA to prepare a supplemental EIS.

In November 2007, FHWA had approved an FEIS for Segment E after 15 years of public meetings, studies, and analysis. FHWA signed the original ROD in June 2008, selecting one of the Build alternatives. Following receipt of additional and new information regarding floodplains and wetlands impacts, FHWA completed a reevaluation and issued a revised ROD in June 2009. The district court denied Sierra Club's motion for summary judgment and granted the Defendants' motions for summary judgment. Sierra Club v. FHWA, 715 F.Supp.2d 721

(S.D. Tex. 2010). The court concluded that, as required by NEPA, FHWA took "a hard look at the environmental consequences of the alternatives" and provided "an explanation of the alternatives sufficient to permit a reasoned choice among different courses of action." Id. at 732.

On appeal, the Sierra Club asserted (1) the purpose and need statement was a post hoc justification for the construction of Segment E and that the FEIS data showed that the primary reason for the construction of Segment E was to induce growth; (2) FHWA relied on inaccurate data and outdated data in analyzing impacts to floodplains and thus failed to comply with both NEPA and Executive Order 11998; (3) the wetlands analysis did not comply with NEPA requirements; and (4) the District Court erred when it denied Sierra Club's motion for leave to file an amended complaint. In its appeal, Sierra Club did not challenge the District Court's conclusions that the FEIS's assessment of air and noise impacts was adequate. Nor did it challenge the conclusion that the FEIS's assessment of cumulative impacts was adequate.

The Fifth Circuit's opinion is noteworthy in its treatment of the EIS alternatives analysis and the EIS documentation and analysis of potential floodplain impacts. On the issue of the project's alternatives analysis, the court held that defendants thoroughly considered the possibility of not building Segment E and fully considered various alternative locations for the new highway, ultimately choosing one of the options with the least environmental impact. The purpose and need statement was therefore not so narrow that it foreclosed consideration of reasonable alternatives. Additionally, the court held that the purpose and need statement in the FEIS, as well as the data and analysis regarding traffic congestion, traffic safety, and induced development, was sufficient to permit defendants to consider reasonable alternatives to Segment E and to make a reasoned choice among the considered alternatives.

The court then addressed Sierra Club's argument that the agencies failed to comply with NEPA as the FEIS alternatives analysis relied on an allegedly inaccurate and outdated floodplain map that was subject to a separate, ongoing legal challenge. The court held that the FEIS's floodplain analysis satisfied the requirements of NEPA because it clearly explained that it relied on a map that was effective as of June, 2007 and because FHWA regulations require the use a National Flood Insurance Program map, which this map was, to determine whether a highway project will encroach on a floodplain. The court allowed that the FEIS could have disclosed that the map was the subject of ongoing litigation and possibly subject to revision, but the court declined to hold that this fact rendered defendants' reliance on the map arbitrary and capricious.

The Fifth Circuit affirmed the District Court opinion on all other points. On September 17, Sierra Club petitioned the Fifth Circuit for panel rehearing, and on October 3, the court denied the petition.

FHWA Wins Challenge to North Carolina Toll Road Project

On October 24, 2011, the U.S. District for the Eastern District of North Carolina upheld FHWA's decision to approve the Monroe Connector/Bypass, a new, twenty-mile toll road outside of Charlotte. The court in North Carolina Wildlife Federation v. North Carolina Department of Transportation, 2011 WL 5042075 (E.D.N.C. Oct. 24, 2011), found that FHWA and the North Carolina Department of Transportation had fully complied with NEPA requirements in approving the $800 million project.

The project at issue was the Monroe Connector/Bypass, a proposed new twenty-mile, controlled-access toll road extending from US 74 near I-485 in Mecklenburg County to US 74 between the towns of Wingate and Marshville in Union County. Plaintiffs sought to stop construction of the project.

Plaintiffs' complaint alleged that the defendants violated the NEPA by (1) failing to analyze the environmental impacts of the Monroe Connector/Bypass; (2) conducting a flawed analysis of alternatives; and (3) presenting materially false and misleading information to other agencies and the public. In support of these allegations, plaintiffs argued that flawed socioeconomic data undermined a meaningful comparison of the build and no-build alternatives and caused defendants to underestimate environmental impacts of the project. Specifically, plaintiffs argued that flawed data, and not ongoing projected regional population growth explained the small (1%) projected difference in impervious surface between the build and no-build scenarios in the Indirect and Cumulative Impacts Analysis. Plaintiffs relied heavily on case law containing general statements that whenever a road is built, additional traffic can reasonably be expected to follow.

FHWA submitted an administrative record of more than 30,000 pages and the parties each filed motions for summary judgment.

In their briefs, defendants acknowledged that a small portion of the socioeconomic data for the no-build model presumed construction of the project, but explained how prior to signing the ROD they responded to commenters' concerns about the no-build model and determined through consultation with the local jurisdictions that provided the data that the no-build model remained reasonable.

The court rejected all of plaintiffs' challenges to the project, observing that judicial review of NEPA compliance does not include "fly-specking the agency's decision-making process" but rather a determination that the data and methodology used by the agency are "simply...reasonable." FHWA met that test here. Specifically, the court ruled that FHWA had thoroughly examined the environmental impacts of the proposed toll road, including growth-inducing and indirect environmental impacts. The court also concluded that the state and Federal defendants had developed a reasonable Statement of Purpose and Need for the project and had considered a reasonable range of

alternatives, including the no-build alternative, rejecting arguments to the contrary made by the plaintiffs. Finally, the court rejected the plaintiffs' claims that the defendants had failed to address concerns of the U.S. Fish and Wildlife Service and had presented FWS with materially false and misleading information relating to forecasts of traffic volume and the anticipated growth-inducing effects of the project.

FHWA Wins Challenge to South Carolina Bridge Project

On April 28, 2011, the U.S. District Court for the District of South Carolina denied plaintiffs' Motion for Summary Judgment and granted defendants' Motion for Summary Judgment in Friends of Congaree Swamp v. FHWA, 786 F.Supp.2d 1054 (D.S.C. 2011). The court found that the Defendants fully complied with NEPA and Section 4(f) of the DOT Act. The court's ruling cleared the way for completion of a much needed bridge replacement project on State Highway 601 in rural South Carolina.

Plaintiffs, consisting of several South Carolina environmental groups, alleged 4(f) and NEPA violations against both SCDOT and FHWA in connection with the 601 bridge construction project. The original bridge was built in the 1940s and is in serious need of repair. The bridge replacement project is within the Congaree River floodplain and near and adjacent to the authorized boundary of the Congaree National Park.

In 2006, the plaintiffs sued the same defendants over the initial EA and FONSI. Plaintiffs prevailed in that initial suit when the Court found that the initial EA was conclusory and did not take the required hard look at the project's impacts on the surrounding area. Following additional studies and more coordination with the plaintiffs and the public, the impacts were re-evaluated in a new EA, and the FONSI was reissued. Plaintiffs were not satisfied with the bridge design and wanted the entire crossing to be spanned with one long bridge, which would double the project costs.

In this case, the court determined that FHWA and the South Carolina Department of Transportation (SCDOT) fully complied with 49 U.S.C. § 303, "Section 4(f)," and the National Environmental Policy Act (NEPA) when they analyzed the construction of bridges and causeways on state highway 601 and issued a Revised Environmental Assessment (EA) and Finding of No Significant Impact (FONSI). The court agreed with FHWA's determination that impacts from the project were not significant and thus did not require a full Environmental Impact Statement as urged by the plaintiffs, despite the fact that the project traversed a national park.

Plaintiffs did not appeal the court's decision, and construction of the project is now underway.

FHWA Wins Partial Dismissal of Challenge to Cleveland Inner Belt Bridge Project

On March 31, 2011, the U.S. District Court for the Northern District of Ohio granted in part and denied in part the

federal Defendants' Motion to Dismiss in Cronin v. FHWA, 2011 WL 1297294 (N.D. Ohio Mar. 31, 2011). The case was filed in 2009 by a Cleveland resident challenging the federal and state defendants' actions regarding the proposed Cleveland Inner Belt Bridge project.

Plaintiff raised three counts in his complaint. First, plaintiff alleged that the defendants violated 23 U.S.C. § 217(e) and (g) by not properly considering the bicycling public and denying bridge access to bicyclists. The court ruled that sections 217 (e) and (g) do not guarantee a right to any individual bicyclist. As such, the alleged violations were not reviewable by the court, and the court dismissed plaintiffs claim for lack of subject matter jurisdiction. Plaintiff also alleged that defendants' conduct violated several "federal transportation and environmental laws which required evaluating the interest of cyclist" under 23 C.F.R. §§ 652.5 and 450.300. Under the same reasoning used to dismiss the first claim, the court ruled that sections 652.5 and 450.300 do not provide a private of action. The court indicated that while consultation with bicyclists should be encouraged, such a policy does not create a private right of action, and the court thus dismissed this claim as well.

Plaintiff's second count alleged that defendants violated NEPA. The court held that plaintiff was not entitled to a private right of action pursuant to NEPA and dismissed this Count. The court did note that plaintiff should have brought this claim via the Administrative Procedure Act (APA).

Plaintiff's final count alleged that defendants violated the APA and re-alleged and incorporated Counts One and Two for the purpose of alleging Count Three. The court ruled that plaintiff's claims for relief under 23 U.S.C. § 217(e) and (g) as well as 23 C.F.R. §§ 652.5 and 450.300(a) were not entitled to review under the APA. The court reasoned that is was highly unlikely that Congress intended to allow bicyclists to sue the DOT and dismissed plaintiffs APA claims with respect to these provisions.

Plaintiff's NEPA claim under the APA was dismissed with respect to the state defendants and upheld with respect to the federal defendants. The court ruled that because FHWA issued the Record of Decision (ROD) from which plaintiff sought judicial review pursuant to the APA, the state defendants could not be held responsible for a violation of the APA. With regard to FHWA, plaintiffs allege that because Ohio DOT failed to provide pertinent information to FHWA, the Agency was unable to accurately evaluate the impact of the Inner Belt project in violation of NEPA. The court ruled that the plaintiff stated enough facts to state a claim to relief and that he is entitled to seek review of the ROD to determine if the agency decision violated NEPA pursuant to the APA.

Finally, the court denied the plaintiff's claim for monetary damages based on the doctrine of sovereign immunity.

Court Dismisses Challenge to Washington State Emergency Road Repair Project

On July 21, 2011, the U.S. District Court for the Western District of Washington granted FHWA's motion to dismiss in North Cascades Conservation Council v. FHWA, 2011 WL 2976913 (W.D. Wash. July 21, 2011). In this case, a group of plaintiffs challenged an Emergency Repairs on Federally Owned Roads (ERFO) project on the Suiattle River Road outside of Darrington, Washington. Plaintiffs in alleged that: (1) the project failed to comply with the Mt. Baker-Snoqualmie Land and Resource Management Plan, as amended by the Northwest Forest Plan; (2) the FHWA failed to disclose the environmental consequences of the proposed action; (3) the Categorical Exclusion (CE) issued by FHWA was arbitrary and capricious; (4) an Environmental Assessment (EA) or Environmental Impact Statement (EIS) was required; and (5) ERFO funds were not authorized for use on the project. Besides the North Cascades Conservation Council, the plaintiffs include the Pilchuck Audubon Society and William Lider, an individual.

FHWA issued a CE approving the ERFO project on the Suiattle River Road outside of Darrington, Washington. The Project is to repair two sites: one site washed out in 2003, and one in 2006. The U.S. Forest Service (USFS) originally issued an EA for the 2003 damage and contracted in 2006 to repair that site. The 2006 event cut off access to the site and the USFS terminated the contract. FHWA executed a CE for both sites and went out to contract in 2010 to fix the sites. The project involves relocating two sections of the road away from the river. Minimal work was done in 2010.

On May 26, the government moved to dismiss the case as moot because FHWA withdrew the CE that was the subject of the challenge and plans to prepare an EA that also will address additional damaged sites on the road.

Court Dismisses Challenge against Pittsburgh Civil Arena Project, Plaintiff Appeals

On September 9, 2011, the U.S. District Court for the Western District of Pennsylvania granted federal defendant's Motion to Dismiss for Lack of Subject Matter Jurisdiction in Preservation Pittsburgh v. Conturo, 2011 WL 4025731 (W.D. Pa. Sept. 9, 2011). On July 6, 2011, plaintiff Preservation Pittsburgh had filed a complaint contending that the demolition of Pittsburgh's Civic Arena was an integral part of a plan to redevelop the site using federal-aid highway funds from FHWA. Plaintiff alleged that the demolition was, therefore, inextricably related to a transportation project requiring approval of the FHWA in conformity with Section 106 of the National Historic Preservation Act, 16 U.S.C. §§ 470f, Section 4(f) of the DOT Act , 23 U.S.C. § 138, and NEPA, 42 U.S.C. § 4332(2). Plaintiff sought injunctive and declaratory relief arguing that the Sports and Exhibition Authority's premature demolition of the Civic Arena would evade the evaluations of alternatives to avoid or mitigate the

destruction of historic properties mandated by the aforementioned statues.

The court held that: (1) there was no evidence of federal involvement by FHWA and that the mere possibility of federal funding in the future is too tenuous to convert a local project into federal action; (2) there was no evidence that, even if there is future federal funding, the redevelopment will be a "major federal action"; (3) Section 4(f) of the DOT Act does not provide a private right of action; (4) a district court's review of an agency action or inaction under NEPA is available only through the APA; and (5) without a statutory duty requiring federal action, there is no "failure to act" sufficient to invoke "final agency action" review under the APA.

On September 9, 2011 plaintiff filed an Emergency Motion for an Injunction Pending Appeal, which the court denied. Plaintiff then filed a similar motion and an appeal with the U.S. Court of Appeals for the Third Circuit. The Third Circuit denied the stay motion, substantially for the reasons stated in the district court's opinion. On September 29, the federal defendants filed a Motion for Summary Affirmance.

FHWA Wins Dismissal of Challenge to Virginia's I-95 HOT Lanes

On September 14, 2011, the U.S. District Court for the District of Columbia granted federal defendants' Motion to Dismiss and dismissed plaintiff's Complaint with prejudice in West v. Horner, et al., 2011 WL 4071854 (D.D.C. Sept. 14, 2011). Pro se plaintiff Arthur West, a resident of the State of Washington and an occasional visitor to the Washington, D.C., metropolitan area, filed his initial Complaint on August 18, 2009. In the Complaint, Plaintiff claimed that the federal and state officials who approved the I-95/395 High Occupancy Toll Lanes Project failed to comply with NEPA by improperly issuing a Categorical Exclusion (CE) and not preparing an Environmental Impact Statement or an Environmental Assessment with a finding of no significant impact. He also asserted that the federal defendants improperly delegated NEPA authority in conducting their environmental review.

The Court found that FHWA has rescinded its approval and CE document for construction work on the Project and that the Virginia Department of Transportation (VDOT) has withdrawn its proposal for the Project. Therefore, the court held, there is no longer a live controversy for which the Court can grant any relief. The Court further opined that although plaintiff's claims regarding the Project are now moot, his proposed new claims regarding VDOT's new project suffer from the opposite problem: a lack of finality of the challenged action.

FHWA Wins Oregon Contract Case

On September 7, 2011, the U.S. Court of Federal Claims found that the government did not act in bad faith in terminating plaintiff's contract and awarded the exact amount recommended by the government in White Buffalo

Construction, Inc. v. United States, 2011 WL 4402355 (Fed. Cl. Sept. 7, 2011). Plaintiff, the prime contractor on the repair of 16 intermittent sites in the Siskiyou National Forest in southern Oregon under the Emergency Relief for Federally Owned Roads program was originally terminated for default in 1998. This default was converted to a termination for convenience in 2004. Plaintiff sought nearly $1.1million in damages under the Contract Disputes Act based on allegations that the government terminated its contract in bad faith and had not awarded it enough costs under the Contracting Officer's Decision for the termination for convenience. An eleven-day bench trail was held in Portland, Oregon in the summer of 2009, during which the focus of the evidence and testimony was primarily on the plaintiff's allegations that the government acted in bad faith throughout the performance of the contract.

Court Denies Motion to Dismiss in Illinois DBE Program Challenge

On June 27, 2011, the U.S. District Court for the Northern District of Illinois denied FHWA's motion to dismiss a Chicago guardrail and fencing company's constitutional challenge to FHWA's Disadvantaged Business Enterprise (DBE) Program. Plaintiff in Midwest Fence Corp. v. LaHood, et al, 2011 WL 2551179 (N.D. Ill. June 27, 2011) is a non-DBE contractor for the Illinois Department of Transportation (IDOT). The lawsuit challenges the constitutionality of the Federal disadvantaged business enterprise (DBE) program on its face and as applied by US DOT, FHWA, and IDOT. Essentially, plaintiff claims that the statute authorizing the DBE program is an unconstitutional delegation by Congress of legislative authority to the Secretary to establish and determine substantive rights based on race, ethnicity, and gender, in violation of the separation of powers clause and that it fails to articulate a compelling need for a race-based affirmative action program in violation of the equal protection guarantees in the Fifth and Fourteenth amendments. In addition, plaintiff claims the DBE regulations exceed the authority conferred by Congress in the authorizing statute, are not narrowly tailored because of the undue burden placed on non-DBE subcontractors, fail to tailor the preference accorded DBEs based on the relative degree of discrimination individual groups may have endured, encourages implementation of a quota program through vague good faith efforts standards, and improperly delegates Federal authority to State departments of transportation. The complaint also challenges the constitutionality of the State's local DBE program implemented on wholly state funded contracts.

The government moved to dismiss this case, arguing that plaintiff lacked standing and had failed to state a claim upon which relief could be granted. As to standing, the government argued that even if plaintiff successfully challenged the race-conscious presumptions that are afforded DBEs under the program, its alleged injuries from the program would not be redressed because the program could continue to operate without those presumptions and plaintiff had not

demonstrated that it was a sufficiently small business to qualify for participation in the modified program. Thus, any injury caused by plaintiff's alleged inability to compete with program participants would persist. The court rejected this argument, refusing to follow courts in other circuits that have adopted this standing analysis. Instead, the court expressed doubt that Congress envisioned that the program could operate without its race-conscious presumptions and concluded that even if the program did operate under such circumstances, the elimination of the presumptions would so reduce the number of firms qualifying for the program that firms like plaintiff's outside the program would likely be better able to compete for subcontracts.

The government also argued that plaintiff failed to state a claim upon which relief could be granted because courts have consistently affirmed the facial validity of DOT's DBE program in numerous constitutional challenges, and Congress, in renewing the program, has repeatedly found evidence of discrimination in highway contracting sufficient to establish a compelling interest in continuing the program. The court acknowledged the case law and evidence of a compelling interest cited by the government, and expressed serious doubt that plaintiff could prevail in its facial challenge to the federal program. However, the court concluded that plaintiff should have the opportunity to challenge the evidence of compelling interest that Congress relied upon.

DOT Intervenes in Constitutional Challenge to its DBE Regulations and Their Implementation in Federal-Aid Highway Contracting in Minnesota

On May 11, 2011, the U.S. District Court for the District of Minnesota granted DOT's motion to intervene as a defendant in a lawsuit challenging the constitutionality of the Department's Disadvantaged Business Enterprise (DBE) regulations and their implementation by the Minnesota Department of Transportation in federal-aid highway contracting. The case, Geyer Signal, Inc., et al. v. Minnesota DOT, et al. (D. Minn. 11-0321), was brought by a non-DBE highway construction subcontractor. Plaintiff alleges, among other things, that the federal DBE regulations are unconstitutional because they are not sufficiently supported by the legislative record and they cause an overconcentration of subcontract awards to DBEs in landscaping and traffic control work, plaintiff's areas of specialty. Plaintiff claims that but for the race and gender-conscious provisions of the DBE program, plaintiff would be able to compete for and win more subcontracts. In support of its motion to intervene, which was unopposed, the Department argued that it has an interest in the federal regulations at issue in the case, that its interest could be impaired by the outcome of the case, and that its interest is not adequately represented by the current parties.

Alaska Bridge Project Suit Is Settled

On July 5, 2011, the City of Anchorage, by and through the Port of Anchorage, challenged a new bridge project in Anchorage in City of Anchorage v. FHWA (D. Alaska No. 11-00138). After months of negotiations between plaintiff and the project proponent, the Alaska Department of Transportation & Public Facilities, regarding the project's selected alignment and right-of-way over plaintiff's property, a settlement agreement was reached on October 19, and the litigation was voluntarily dismissed with prejudice.

The Knik Arm Bridge and Toll Authority (a legislatively created entity under the Alaska Department of Transportation) worked jointly with FHWA in the development and evaluation of this project, which is proposed to be constructed through a public-private partnership. The purpose of the project is to further development of transportation systems in the upper Cook Inlet region by providing improved vehicular access and surface transportation connectivity between Anchorage and the Matanuska-Susitna Borough through the Port MacKenzie District.

The City challenged FHWA's Record of Decision (ROD) and alleges that: (1) the Final Environmental Impact Statement (FEIS) for the project failed to take a hard look at the financial impacts to the Port of Anchorage's operations; (2) FHWA violated the Administrative Procedure Act by not describing the mitigation measures for the project as required by 23 C.F.R. §§ 771.125 and 771.109; (3) the FEIS/ROD's selected alternative is inconsistent with the project's purpose and need; and (4) FHWA failed to adequately coordinate with the Maritime Administration.

Suit over Ohio Railroad Crossing Project Settles

On October 6, 2011, the U.S. District Court for the Northern District of Ohio issued an order approving plaintiff's Notice of Voluntary Dismissal in Schneider v. U.S. DOT, et al. (N.D. Ohio No. 10-02297). This litigation involved a challenge to the Highland Road Grade Separation Project in Macedonia, Ohio. Plaintiff alleged that defendants violated NEPA, Section 4(f) of the DOT Act, and the Federal Aid Highway Act. Plaintiff, a local business owner, agreed to dismiss his complaint based upon a settlement agreement which provided that the state defendants would re-design an access road to the plaintiff's business. The complaint was dismissed with prejudice, and no attorneys' fees are being sought.

Court Denies Preliminary Injunction against Texas Interchange Project

On April 22, 2011, the U.S. District Court for the Western District of Texas denied the preliminary injunction sought in the case of Aquifer Guardian in Urban Areas v. FHWA, 779 F.Supp.2d 542 (W.D. Tex. 2011). The Alamo Regional Mobility Authority (ARMA) and the Texas Department of Transportation (TxDOT) proposed a project to upgrade an existing three level interchange at US

281 and Loop 1604 in the northern part of San Antonio, Texas, to a five level interchange to provide four non-toll direct connectors. In addition to interchange construction, some nine miles of auxiliary lanes would be added to Loop 1604 and US 281 to facilitate traffic movements. Plaintiffs challenge whether the project's Categorical Exclusion (CE) was properly authorized and approved, whether it adequately evaluated environmental impacts, and whether the project was illegally segmented from the US 281project.

In 2008, a lawsuit was filed by the Aquifer Guardians in Urban Areas (AGUA) on another toll project located in the north part of San Antonio. This earlier project was to expand and upgrade an 8.0 mile portion of US 281 northward from the intersection with Loop 1604. The US 281 toll project was approved with an EA/FONSI. In late 2008, FHWA withdrew its FONSI as it was discovered that the TxDOT employee overseeing the environmental documentation had directly employed her husband and his firm to complete a portion of the ESA analysis. The court refused to grant FHWA's request to dismiss the lawsuit after the agency withdrew the prior approval. Instead, finding that issues still remained unresolved, the court stayed the case.

In 2009, ARMA started developing a project to construct several direct connectors on the existing interchange at US 281 and Loop 1604. FHWA approved the project with a documented CE in February 2010. The project construction start was set for late February 2011.

In September, 2010, AGUA requested that the lawsuit be amended to allow challenge of the 281/1604 interchange project. The court, over defendants' objections, allowed the amendment. An administrative record was prepared and filed with the court on December 7, 2010. Then, on December 20, 2010, Plaintiff sought a preliminary injunction. The request included four declarations, from several experts and a local Mayor, asserting that the CE documentation is both improper and inadequate. The court initially issued an advisory opinion noting plaintiff's request but stating that the press of business was such that no immediate ruling would be forthcoming. ARMA then began construction in early March of 2011.

On April 22, 2011, the court issued its opinion denying Plaintiff's request for a preliminary injunction. The court found that FHWA, under its regulations, properly utilized a CE for the project evaluation. Specifically, the court noted from its review of the administrative record that FHWA "rationally determined" that the project would not have any significant impacts and that the project qualified as a CE based upon the "extensive analysis and documents in the record." Further, the court found that plaintiff failed to meet any of the four prerequisites for a preliminary injunction and that FHWA's actions were not arbitrary and capricious. The merits of the case are still pending before the court.

New Appeal in Florida Bridge Project Case

On March 8, 2011, the Plaintiffs in Citizens for Smart Growth v. FHWA (11th Cir. No. 11-11056) filed a new Notice of Appeal and a Motion to Expedite following the district court's grant of defendants' Motion for Summary Judgment in this challenge to the Indian Street Bridge project in Martin County, Florida. The case had previously been dismissed on appeal by the U.S. Court of Appeals for the Eleventh Circuit on procedural grounds.

The case was a challenge to FHWA's decision to approve construction of the Indian Street Bridge Project in Martin County, Florida. Plaintiffs are landowners and citizens groups seeking to halt construction of the bridge, alleging violations of NEPA and section 4(f) of the DOT Act. The U.S. District Court for the Southern District of Florida denied plaintiffs' motion for a preliminary injunction and granted FHWA's motion for summary judgment.

Plaintiffs filed their opening brief on April 15, and defendants filed their response brief on May 18. Plaintiffs argue in their opening brief that FHWA wrongfully "phased" the construction of the project and improperly incorporated a Florida DOT feasibility and corridor study into the Final EIS Additionally, plaintiffs contend that the purpose and need, study area, alternatives, and Section 4(f) analyses in the FEIS failed to comport with applicable law.

Defendants' response briefs argue that plaintiffs did not meet their burden showing that the FEIS and ROD were arbitrary or capricious agency actions, or were in any way contrary to law. The State also argued that there was no jurisdiction over Florida DOT under the Administrative Procedure Act because the Act does not provide for a private right of action against a non-federal agency.

The case has been set for oral argument in Miami, Florida on December 6.

United States Moves to Dismiss Suit against Construction of Detroit River International Crossing after Court Denies U.S. Motion to Transfer

On May 31, 2011, the U.S. District Court for the District of Columbia denied the United States' motion to transfer Detroit International Bridge Co., et al. v. The Government of Canada, et al. (D.D.C. 10-00476), to the U.S. District Court for the Eastern District of Michigan. Detroit International Bridge Company (DIBC) and its Canadian affiliate, owners and operators of the only bridge connecting Detroit to Windsor, Canada, brought suit against the Departments of Transportation and Homeland Security, FHWA, the Coast Guard, and the Government of Canada, alleging that various actions taken by the defendants had deprived DIBC of its right to build a new bridge adjacent to its exiting span, in violation of DIBC's rights under the U.S. Constitution, the Boundary Waters Treaty, and various statutes. The relief requested in the suit includes declaratory judgments regarding DIBC's right to build its new bridge and an injunction against the

construction the Detroit River International Crossing (DRIC), a planned new bridge between Detroit and Windsor downriver from DIBC's bridge. (FHWA has issued the environmental approval for the DRIC, and DIBC is a plaintiff in a separate suit challenging that approval and seeking to stop the DRIC's construction.)

In denying the transfer motion, the court held that the U.S. defendants had not met their burden of showing that plaintiffs could have originally filed suit in the Eastern District of Michigan on all claims and as to all defendants and that, in any event, transfer was not warranted under the applicable statutory standard: for "the convenience of the parties and witnesses, in the interest of justice." 28 U.S.C. § 1404(a).

Following the court's ruling on the transfer motion, the United States moved to dismiss the suit. The government argued that neither the Boundary Waters Treaty nor any of the statutes that plaintiffs cite in their complaint are a source of law that provides them a private right of action to pursue their claims. Additionally, the government contended that the court lacks jurisdiction over plaintiffs' due process claims and that, in any event, plaintiffs failed to identify a property interest that the United States had abridged. Finally, the government argued that plaintiffs had failed to challenge any final agency action. In their opposition to the United States' Motion to Dismiss, plaintiffs argued that they have private rights of action at common law, by statute and treaty, and under the Constitution, and that DIBC has a property interest in a bridge franchise allegedly granted to it by law. Additionally, plaintiffs claim that FHWA's decisions to support construction of the DRIC and the Coast Guard's return of DIBC's application for a navigation permit to allow construction of DIBC's proposed new bridge constitute final agency action. Finally, plaintiffs argue that even if the Coast action was not final agency action, the Coast Guard's delay in issuing the navigation permit is subject to judicial review.

The court has scheduled oral argument on the government's motion to dismiss for November 30.

Cross Motions for Summary Judgment Filed in Kentucky Environmental Case

On April 29, 2011, plaintiff filed a Motion for Summary Judgment, and on June 4, federal defendants filed a Cross-Motion for Summary Judgment in Karst Environmental Education & Protection, Inc. v FHWA (W.D. Ky. No. 10-00154). The complaint alleges a violation of NEPA in the issuance of the Record of Decision for the I-65 interchange and connector road between US 68 and US 31 near Bowling Green, Kentucky. Both Motions for Summary Judgment are still pending. Plaintiff's Motion for Summary Judgment contended that the ROD approval was an arbitrary and capricious decision based upon an FEIS that failed to take the "hard look" at the project's environmental impacts that is required by NEPA. Federal defendants Cross-Motion for Summary Judgment demonstrated through the administrative record that the FEIS and ROD complied with all NEPA requirements.

Highway Widening Project Challenged in Wisconsin

On June 6, 2011, in 1000 Friends of Wisconsin, Inc. v. USDOT (E.D. Wis. No. 11-0545), a citizens group challenged FHWA's approval of the Wisconsin 23 Corridor Project. The Project would widen Wisconsin Route 23 from Fond Du Lac to Plymouth. The complaint seeks declaratory and injunctive relief and alleges a violation of NEPA regarding the alternatives analysis, impacts analysis, and the 4(f) evaluation. Plaintiffs also allege that the Wisconsin DOT violated State statutes, including their little NEPA, WEPA. Of interest is the allegation that the public hearing was an "open house" type, implying that only a "town hall" type hearing satisfies the public hearing requirement, a claim that has found favor in this district before. This allegation is against both the state and USDOT.

Federal Defendants File Motion to Dismiss in Tennessee Megasite Project Case

On April 8, 2011, plaintiff in this case filed a complaint and Motion for Temporary Restraining Order (TRO) in Bullwinkel v. FHWA (W.D. Tenn. No. 11-1082). The pro se complaint alleges that FHWA's approval of a parking area associated with Department of Energy's West Tennessee megasite project violated NEPA. On April 12, the court denied the Motion for a TRO. On April 19, plaintiff filed an amended complaint with a renewed motion for TRO and Preliminary Injunction, which the judge denied on April 26. On July 5, plaintiff filed a third motion for TRO, and on July 18, defendants filed a response to that motion. On August 1 and 8, 2011, state defendants and federal defendants, respectively, moved to dismiss plaintiff's claim. The parties are currently awaiting a decision from the court on the pending motions.

New Environmental Challenge to Seattle Area Bridge Replacement and HOV Project

On September 2, 2011, a citizen's group filed a lawsuit, Coalition for a Sustainable 520 v. DOT (W.D. Wash. No. 11-01461) challenging the decision of FHWA and the State to approve the SR 520 project. The SR 520 project extends 5.2 miles from I-5 in Seattle to the east bank of Lake Washington in Medina, Washington. The proposed $3.5B project would replace structurally deficient bridges and widen SR 520 from four lanes to six lanes to accommodate HOV lanes and managed shoulders in the Seattle project area.

Plaintiffs allege that the FEIS fails to comply with the requirements of NEPA and that the Washington State Environmental Policy Act (SEPA). Specifically, plaintiffs allege that the FEIS failed to: (1) "consider all reasonable alternatives in detail"; (2) "adequately describe the existing environment"; (3) "adequately describe the significant adverse environmental impacts of the project"; (4) "adequately analyze measures to mitigate significant project impacts"; and (5) "describe the project's unavoidable significant adverse impacts."

Environmental Challenge to North Carolina Bridge Project

On July 1, 2011, Defenders of Wildlife and the National Wildlife Refuge Association filed a complaint against the North Carolina Department of Transportation (NCDOT) and FHWA seeking preliminary and permanent injunctive relief enjoining actions to build the Herbert C. Bonner Bridge (the Project). The majority of the proposed Project lies within the Pea Island National Wildlife Refuge (the Refuge). Plaintiffs' in Defenders of Wildlife v. NCDOT (E.D.N.C. No. 11-00035) allege that defendants violated NEPA and Section 4(f) of the DOT Act in approving the Project.

The Bonner Bridge, constructed in 1962, is now reaching the end of its reasonable service life. It runs north-south for approximately two miles and spans Oregon Inlet, the waterway that separates Bodie Island and Hatteras Island. In 1990, NCDOT began the process of investigating alternatives for replacing the current Bonner Bridge. NCDOT and FHWA issued a Draft Environmental Impact Statement (DEIS) in 1993, a Supplemental DEIS (SDEIS) in 2005, and the Final Environmental Impact Statement (FEIS) in September 2008. The Project's purpose is to provide a new means of access from Bodie Island to Hatteras Island for its residents, businesses, services, and tourists prior to the end of Bonner Bridge's service life and to provide a replacement crossing that takes into account natural channel migration and shoreline movement through year 2050. Among the alternatives considered were various plans for a 2.5 mile long replacement bridge to be built parallel to the current Bonner Bridge (Parallel Bridge Alternatives) and various plans to build a 17.5 mile long replacement bridge that would bypass the Refuge and erosion hot spots entirely (Pamlico Sound Alternatives).

The federal and state environmental resource and regulatory agencies that have an interest in the Project formed a NEPA/Section 404 Merger Team (the Merger Team). By the time the FEIS was issued in 2008, cost estimates for the Parallel Bridge Alternatives ranged between $602 million and $1.524 billion (in 2006 dollars) and cost estimates for the Pamlico Sound Alternatives ranged between $942.9 million and $1.441 billion. The FEIS identified one of the Parallel Bridge Alternatives – the "Phased Approach/Rodanthe Bridge Alternative" – as the Preferred Alternative.

Plaintiffs filed substantial comments during the public comment periods for the DEIS, SDEIS, and FEIS, highlighting the legal and environmental problems associated with the Parallel Bridge Alternatives and specifically the Preferred Alternative. NCDOT and FHWA subsequently abandoned the Preferred Alternative and identified a new preferred alternative in a "Revised Final Section 4(f) Evaluation" issued in 2009 and an Environmental Assessment (EA) issued in May 2010. Both documents identified the new preferred alternative as the "Parallel Bridge Corridor with NC-12 Transportation Management Plan," which involved building a parallel replacement bridge. Plaintiffs filed comments opposing this

new preferred alternative in November 2009 and June 2010, highlighting the alleged legal and environmental problems associated with the new preferred alternative and asserting that it would violate several federal laws, including NEPA, Section 4(f), and the National Wildlife Refuge System Improvement Act of 1997. NCDOT and FHWA issued a Record of Decision (ROD) in December 2010 that selected and approved for implementation the new preferred alternative.

In their complaint, plaintiffs allege that defendants failed to assess and disclose environmental impacts adequately in the FEIS and EA, unlawfully segmented the Project, failed to rigorously examine reasonable alternatives, and failed to prepare a supplement to the FEIS after substantial changes to the proposal and in light of new information in violation of NEPA. Plaintiffs also allege defendants violated Section 4(f).

On September 6, 2011, defendants filed answers to the complaint.

FHWA Sued over Idaho's Approval of Oversize Loads

On June 15, 2011, a regional conservation organization filed an amended complaint adding FHWA as a defendant in Idaho Rivers United v. FHWA (D. Idaho No. 11-095), originally brought against the U.S. Forest Service (USFS). This case arises from the Idaho Transportation Department's (ITD) permitting of approximately 200 oversized loads, labeled "megaloads" due to extreme size and weight (in excess of 500,000 pounds), for transport along U.S. Highway 12 (US 12). Approval by FHWA is not required for this use of US 12.

Plaintiff alleges that FHWA (1) breached its duty to enforce the terms of the highway easement deed for US 12, which was conveyed to ITD by USFS via Federal Land Transfer; (2) violated its mandatory duties to ensure federal projects are properly maintained under 23 U.S.C. § 116(a)(c); and (3) violated a mandatory duty to enforce the Northwest Passage Scenic Byway Corridor Management Plan funded by an FHWA grant pursuant to 23 U.S.C. §162. Plaintiff seeks to stop the transfer of the megaloads along US 12.

On August 18, 2011, the government moved to dismiss FHWA from the case on the following grounds: (1) FHWA has no duty to enforce the highway easement deed for US 12; (2) FHWA has no duty to "maintain" federally funded projects; and (3) FHWA has no duty to implement Corridor Management Plans.

Challenge Filed against Kentucky Ring Road Extension Project

On March 15, 2011, Patricia McGehee and Richard McGehee jointly filed a Complaint and Motion for a Temporary Restraining Order (TRO) against the FHWA, the U.S. Army Corps of Engineers (COE), and the Commonwealth of Kentucky Transportation Cabinet and Department of Highways (KYTC) in McGehee v. U.S. Army Corps Corps of Engineers, et

al. (W.D. Ky. No. 11-00160). Plaintiffs are residents and owners of Fannie Harrison Farm in Hardin County, Kentucky, who seek to halt the construction of two bridges and three culverts forming a part of the State's Ring Road Extension Project.

The Ring Road Extension Project is a 1.78-mile highway project that extends the Ring Road from Hwy 62 to the Western Kentucky Parkway. According to the complaint, on June 29, 2006, the KY Transportation Cabinet sought and obtained a Section 404 Clean Water Act (CWA) permit from COE for the construction of three culverts and two bridges to extend Ring Road. The first segment of the project was opened to traffic on August 6, 2009, and plaintiffs now challenge the incomplete second segment of the project. Initial investigations indicate that there are no Federal-Aid Highway funds in the project, and the only COE involvement is the issuance of the CWA permit.

In their complaint, plaintiffs allege that the defendants abused their discretion and acted in bad faith in connection with the Ring Road by condemning plaintiffs' home, farm buildings, and a portion of road frontage of their property, which is listed on the Register of National Historic Places. They claim this action violates Section 106 of the National Historic Preservation Act, Section 404 of the CWA, the Safe Drinking Water Act, and NEPA. Plaintiffs also allege violations of the Uniform Relocation Assistance and Real Properties Acquisition Act.

On April 6, 2011, FHWA and COE filed a motion to dismiss based on the lack of federal funding in the project.

FHWA Sued over Approval of Highway in Iowa Nature Preserve

On June 1, 2011, the Sierra Club Iowa Chapter and two individuals challenged the proposed new Highway 100 project, west of Cedar Rapids, Iowa, which would travel through the Rock Island County Preserve and be adjacent to the Rock Island State Preserve. Plaintiffs in Sierra Club v. LaHood (S.D. Iowa No. 11-00258) allege that defendants failed to comply with NEPA and complete a valid Section 4(f) evaluation in approving a Final Supplemental EIS (FSEIS) for the project. Plaintiffs seek an injunction prohibiting construction until the defendants have prepared a new EIS and complied with the requirements of Section 4(f).

Plaintiffs allege that the FSEIS violates NEPA on grounds that: (1) the purpose and need for the project has not been justified; (2) no alternatives other than very minor variations of the preferred route were seriously considered; (3) the FSEIS did not adequately evaluate the no-build alternative, the environmental impacts, mitigation, traffic patterns and traffic volume, energy resources, climate change, fragmentation of the ecosystem or urban sprawl; (4) the FSEIS has no comments from the public; and, (5) because more than six years elapsed between the Draft and the Final SEIS, a new Draft was required.

With regard to the Section 4(f) evaluation, Plaintiffs allege that: (1) no serious efforts were made to avoid impacting the Rock Island Preserves; (2) the 4(f) evaluation does not adequately address the ecosystem of the Preserves as a whole; (3) noise impacts were not adequately evaluated; (4) mitigation measures are inadequate; and, (5) the document does not discuss the effect of fragmentation of the ecosystem.

Noise Studies Challenged on Texas Tollway Project

On March 7, 2011, six residents and landowners of Harris County, Texas, jointly filed the complaint in Ware v. FHWA (S.D. Tex. No. 11-00848) seeking to halt the construction of the US 290 Project until such time as FHWA completes a Supplemental EIS to take into account the noise regulations in 23 C.F.R. § 772.

The US 290 Project entails the reconstruction of US 290 and the Hempstead Tollway. The Project covers a corridor of varying width that is approximately 38 miles long in Harris County. The overall vision for the US 290 Project includes freeway capacity reconstruction and widening. The Project will also provide improvements along the Hempstead Tollway and bicycle and pedestrian improvements. FHWA issued a Record of Decision for the project on August 25, 2010.

In their complaint, plaintiffs allege that defendants approved the Project in violation of 23 U.S.C. § 109(i), 23 C.F.R. §772, and NEPA. Plaintiffs essentially claim that FHWA allowed the Texas Department of Transportation to perform improper and insufficient noise studies along the projects route.

FHWA's Three-Cable Barrier Policy Challenged in Arizona Tort Cases

On May 5, 2011, plaintiff filed a complaint in June v. United States (D. Ariz. No. 11-00901) challenging FHWA's administrative denial of plaintiff's FTCA claim for wrongful death. Plaintiff alleges that FHWA negligence -- failing to comply with NCHRP Report 350 Crash Testing policies for the 3-cable median barrier -- resulted in the death of plaintiff's father.

The case arises from a February 19, 2005, Arizona highway crossover 3-cable median barrier fatal accident on I-10. Plaintiff's father died as a result of the accident; however, plaintiff did not file a FTCA administrative claim for wrongful death until December 16, 2010. FHWA administratively denied plaintiff's FTCA claim based on the 2-year FTCA Statute of Limitations (SOL). An alternate reason for denial was based on the discretionary function exception.

Plaintiff claims that the 2-year SOL does not apply because FHWA's denial of counsel's request for FHWA witness testimony in a prior state court claim constituted "concealment of material facts." Accordingly, plaintiff claims that the SOL should be tolled until April 2009, the date plaintiff's counsel obtained deposition testimony from FHWA employees as part of U.S. District Court litigation in Melvin v.

United States. Defendants' Motion to Dismiss based on the 2-year SOL is currently pending before the court.

Three additional cases have been recently filed in the same court based on the same tort allegations of wrongful death presented in the June case: Keller v. United States (D. Ariz. No. 11-00536), Dunlap v. United States (D. Ariz. No. 11-01350), and DeVries v. United States (D. Ariz. No. 11-01822).

Federal Motor Carrier Safety Administration

Seventh Circuit Vacates EOBR Rule

On August 26, 2011, the U.S. Court of Appeals for the Seventh Circuit issued a decision in Owner-Operator Independent Drivers Association, et al. v. FMCSA, 656 F.3d 580 (7th Cir. 2011), vacating FMCSA's 2010 Final Rule on Electronic On-Board Recorders (EOBRs) (75 Fed. Reg. 17,208 (Apr. 5, 2010)). This rule would have required certain motor carriers with poor hours of service (HOS) compliance records to install EOBRs starting in June 2012. The rule also established performance specifications for EOBRs. The EOBRs required by the rule would create an electronic record of a driver's duty status time accessible by the driver's employer and by enforcement personnel.

Pursuant to statute, if FMCSA adopts a regulation pertaining to monitoring devices in order to increase HOS compliance, the agency "shall ensure that the devices are not used to harass vehicle operators." 49 U.S.C. § 31137(a). The court found that the EOBR rule could not be upheld because FMCSA "said nothing" about this requirement. In reaching its decision, the court found "a single conclusory sentence in the final rulemaking to the effect that the Agency 'has taken the [] statutory requirement [] into account throughout the final rule...'" to be insufficient to meet Congress's mandate. The court also pointed out that the word "harass" appears only once in the "entire rulemaking." Finally, the Seventh Circuit rejected the Agency's contention that its consideration of privacy issues in the rulemaking meant it considered driver harassment. The court vacated the rule without any qualifying language, merely remanding it to the Agency "for proceedings consistent with this opinion."

In addition to considering the merits of the case, the court rejected FMCSA's ripeness and standing arguments. The agency had argued that, because none of the petitioners were subject to an FMCSA remedial directive to install EOBRs – and in fact the rule would not be enforced until June 2012 – the case was not ripe, and petitioners thus lacked standing. The court rejected the standing argument because the existence of the rule established a "punitive stick" to increase HOS compliance now in order to avoid a remedial directive in the future. Hence, the petitioners suffered "injury" and had standing to sue. As for ripeness, the court rejected FMCSA's arguments, relying on Abbott Labs. v. Gardner, 387 U.S. 136, 149 (1967), "which permits pre-enforcement challenges of final agency rules so long as the claim is fit for judicial decision

and delay will cause some hardship to the parties."

FMCSA Sued over Mexican Long-Haul Trucking Pilot Program

On July 6, 2011, the Owner-Operator Independent Drivers Association (OOIDA) filed a petition for review of the United States-Mexico Cross-Border Long-Haul Trucking Pilot Program in the U.S. District Court for the District of Columbia. The pilot program challenged in Owner-Operator Independent Drivers Association v. U.S. DOT, et al. (D.C. Cir. No. 11-1251) is a step toward full implementation of the provisions of the North American Free Trade Agreement (NAFTA), which would allow Mexico-domiciled motor carriers to operate beyond the border area commercial zones in the United States. FMCSA had outlined the parameters of a proposed United States-Mexico long-haul trucking pilot program and sought public comment in a Federal Register notice published on April 13, 2011 (76 Fed. Reg. 20,807). On July 6, FMCSA announced its intent to proceed with the pilot program. The Agency's decision was subsequently published in a July 8 Federal Register notice (76 Fed. Reg. 40420) that also responded to the public comments that had been filed.

On July 26, OOIDA petitioned the court to stay implementation of the pilot program pending review. OOIDA asserted, inter alia, that FMCSA did not comply with the statutory requirements for establishing a pilot program. On September 8, the D.C. Circuit denied OOIDA's motion to stay.

In its statement of issues filed with the court, OOIDA has raised the following issues concerning the pilot program: (1) whether the United States is offering special treatment to Mexico-domiciled motor carriers that exceeds its obligations under the NAFTA; (2) whether FMCSA may permit Mexico-domiciled carriers to comply with Mexican safety regulations governing drug testing, medical examination, and commercial driver's licenses in lieu of compliance with U.S. safety laws; (3) whether FMCSA should be complying with statutory provisions concerning exemptions before allowing Mexican carriers to operate in the United States; (4) whether FMCSA's exemption authority allows FMCSA to grant exemptions to various statutory requirements; (5) whether 49 C.F.R. § 40.7 precludes FMCSA from granting an exemption to DOT regulations governing collection of drug testing specimens; and (6) whether FMCSA has complied with the provisions of DOT appropriations acts that impose requirements for granting operating authority to Mexico-domiciled motor carriers.

On September 2, 2011, the International Brotherhood of Teamsters and Public Citizen filed a similar petition for review of the Mexican trucking pilot program in the U.S. Court of Appeals for the Ninth Circuit Court. On September 8, the government filed an unopposed motion to transfer the case, International Brotherhood of Teamsters, et al. v. U.S. DOT, et al. (9th Cir. No. 11-72606), to the D.C. Circuit for consolidation with the OOIDA petition. The D.C. Circuit has suspended the briefing schedule in the case pending that transfer.

FMCSA Files Petition to Enforce Administrative Subpoena

On June 3, 2011, FMCSA issued an administrative subpoena to Dr. Xiangping Chen a/k/a Jimmy Chen, President and Chief Executive Officer of Ivy Media Corporation and GotoBus.com. Dr. Chen operates a website called GotoBus.com that is a marketplace for sales of bus tickets on low-cost motorcoach carriers that conduct passenger operations on the East Coast of the United States.

FMCSA issued the subpoena as part of an ongoing investigation related to a bus crash that occurred on May 31, 2011, on I-95, near Richmond, Virginia. The crash involved a Sky Express motorcoach that was transporting 59 passengers from Greensboro, North Carolina to Chinatown in New York City. The bus ran off the road and rolled over. Four passengers were killed, and 50 passengers were injured. The driver of the bus acknowledged that he had fallen asleep while driving. The administrative subpoena sought to identify entities, persons, and transactions affiliated with a number of passenger carriers that utilized Dr. Chen's online ticket selling website. The subpoena sought materials relevant to the relationship between Sky Express and other companies engaged in the business of transporting passengers in interstate commerce.

On June 9, Dr. Chen by counsel objected to the subpoena, arguing that it was vague, overbroad, and not relevant to the Sky Express investigation. On June 17, the U.S. Attorney for the District of Massachusetts filed a petition for an order to enforce the administrative subpoena in United States v. Dr. Dr. Xiangping Chen a/k/a Jimmy Chen, President and Chief Executive Officer of Ivy Media Corporation/ GotoBus.com (D. Mass. No. 11-91151). At a hearing on July 7, the U.S. District Court granted the petition for an order enforcing the administrative subpoena, narrowing some of the subpoena requests, largely based on limitations that had already been offered to Dr. Chen, and ordering production of the documents within 45 days. Dr. Chen produced a number of responsive documents pursuant to the court's order, but has failed to produce critical documents related to financial transactions between GotoBus.com and various motorcoach customers. The U.S. Attorney's Office has notified Dr. Chen of the agency's position that he is in violation of the court order and that it will be filing a motion seeking a court order finding Dr. Chen in contempt.

Federal Railroad Administration

Fifth Circuit Upholds FRA's Determination of Its Safety Jurisdiction over the Port of Shreveport-Bossier

On April 4, 2011, the U.S. Court of Appeals for the Fifth Circuit issued a decision in FRA's favor in Port of Shreveport-Bossier v. FRA, 2011 WL 1228767 (5th Cir. Apr. 4, 2011), a case involving a challenge to FRA's determination that the Port of Shreveport-Bossier (the Port) is subject

to FRA's safety jurisdiction. The Port's petition for review contested a February 22, 2010, determination in which FRA determined that the Port is a railroad carrier within the meaning of the railroad safety laws and regulations and is therefore subject to FRA's safety jurisdiction. The court held that FRA's interpretation of the "plant railroad" exception in FRA's safety regulations is not plainly erroneous or inconsistent with those regulations.

Although FRA's statutory jurisdiction extends to all railroad carriers, FRA has chosen as a matter of policy not to impose its regulations on certain categories of operations, such as "plant railroads." "Plant railroads" are railroads whose entire operations are confined to an industrial installation that is not part of the general railroad system of transportation (general system).

During the litigation, the Port asserted that its rail operation is a plant railroad and that FRA's jurisdiction determination is contrary to FRA's regulations and an improper attempt to expand its jurisdiction outside of the rulemaking process. FRA argued that the Port provides railroad transportation because it switches rail cars in service for fourteen different tenants, rather than for its own purposes or industrial processes, which characterizes operation on the general system.

The Port petitioned for a panel rehearing, but on June 9, the court denied the Port's petition.

Association of American Railroads Challenges Constitutionality of Metrics and Standards Statute

On August 19, 2011, the Association of American Railroads (AAR) filed a complaint in the U.S. District Court for the District of Columbia challenging the constitutionality of Section 207 of the Passenger Rail Investment and Improvement Act of 2008 (PRIIA). The complaint in Association of American Railroads v. DOT, et al. (D.D.C. No. 11-01499) alleges that PRIIA is unconstitutional because it improperly delegates rulemaking authority to Amtrak. The complaint further alleges that PRIIA is unconstitutional because it violates the due process rights of the freight railroads by allowing Amtrak to use legislative and rulemaking authority to enhance its commercial position at the expense of the freight railroads.

Section 207 of PRIIA charged FRA and Amtrak jointly, in consultation with other parties, with developing new or improving existing metrics and minimum standards for measuring the performance and service quality of intercity passenger train operations. On March 13, 2009, FRA posted a draft document, entitled "Proposed Metrics and Standards for Intercity Passenger Rail Service," on FRA's website and published a notice in the Federal Register (74 Fed. Reg. 10,983) requesting comments on the proposed metrics and standards. FRA posted the final version of the metrics and standards on FRA's website and published a notice of the final version in the Federal

Register on May 12, 2010 (75 Fed. Reg. 26,839).

Federal Transit Administration

D.C. Circuit Upholds the Constitutionality of the "Murray Amendment"

On June 14, 2011, the U.S. Court of Appeals for the District of Columbia Circuit issued its decision in American Bus Association, et al. v. Rogoff, 649 F.3d 734 (D.C. Cir 2011), upholding the constitutionality of the "Murray Amendment," which was included in DOT's fiscal year 2010 appropriations act and prevents any funds from being used to enforce FTA's charter regulations, 49 C.F.R. part 604, against King County Metro (KCM) in Seattle. The charter regulations, among other things, prohibit federally-funded transit systems from operating irregularly scheduled bus service to special events such as baseball games and set forth procedures under which interested parties may file complaints with FTA over services that they believe violate the regulations.

KCM had been providing such bus transportation to Seattle Mariners games since the late 1990s, but in 2008, FTA advised KCM that the service violated the regulations. FTA granted KCM an exception to the regulations for that baseball season, but declined to extend that exception to the 2009 season. When no private charter bus company provided the service during the 2009 season, Senator Patty Murray of Washington State sponsored an amendment to the Consolidated Appropriations Act of 2010 that prohibited the expenditure of funds on the enforcement of the regulations against any transit system that "during fiscal year 2008 was both initially granted a 60-day period to come into compliance with part 604, and then was subsequently granted an exception from said part." KCM was the only transit system in the nation fitting this description.

The American Bus Association and the United Motorcoach Association challenged the amendment in the U.S. District Court for the District of Columbia, claiming that it singled out private charter bus operators in King County as the only such operators that cannot request FTA to enforce the charter rule against a competitor and therefore violated the First Amendment's Petition Clause and the Fifth Amendment right to equal protection. They also alleged that the Murray Amendment violated their members' right to procedural due process under the Fifth Amendment and was inconsistent with separation of powers principles. The district court held the Murray Amendment unconstitutional on Petition Clause and equal protection grounds and ordered FTA to enforce the charter regulations with respect to KCM. Am. Bus Ass'n v. Rogoff, 717 F. Supp. 2d 73 (D.D.C. 2010). The court did not reach the due process or separation of powers claims.

The government appealed the district court's decision, and the D.C. Circuit reversed. The court found that the Murray Amendment did not prevent

interested parties from filing a complaint with FTA about KCM, nor did it prevent FTA from responding to such a complaint. This was enough to defeat plaintiffs' Petition Clause claim. It did not matter that under the Amendment, FTA would have to deny such a complaint. Indeed, the court noted, under controlling precedent, the Petition Clause does not even compel the government to respond to a complaint, or even give it consideration. After disposing of the Petition Claus claim, the court rejected the equal protection claim. The court held that because the Amendment is rationally related to the legitimate governmental purposes of accommodating handicapped fans, restoring more affordable bus service, and reducing traffic congestion on game days, it readily passed constitutional muster under the rational-basis test. The court also rejected plaintiffs' Fifth Amendment procedural due process claims, finding that the legislative process had afforded plaintiffs all the process they were due, and their separation of powers arguments, holding that Congress had the right to withdraw enforcement authority that it had itself previously conferred on the agency.

The D.C. Circuit's opinion is available at http://www.cadc.uscourts.gov/internet/opinions.nsf/0B91F0642F3B5964852578AF004FA40F/$file/10-5213-1313036.pdf.

Summary Judgment for FTA in Challenge to Second Avenue Subway Project, Plaintiff Appeals

On June 6, 2011, the U.S. District Court for the Southern District of New York granted summary judgment for FTA in 233 East 69th Street Owners Corp. v. DOT et al., 2011 WL 2436889 (S.D.N.Y. June 6, 2011), a challenge to the design of an ancillary facility on the Second Avenue Subway project, an undertaking by the New York Metropolitan Transportation Authority (MTA) and the New York City Transit Authority (NYCTA) to construct an approximately 8.5-mile two-track rail line extending the length of Manhattan's East Side Corridor. The District Court agreed with FTA that a supplemental environmental impact statement on the design of the ancillary facility, which is planned to be located next to plaintiff's residential building, was not required. On August 1, 2011, plaintiff filed notice that it would appeal the decision to the U.S. Court of Appeals for the Second Circuit.

Court Denies Emergency Request for an Injunction to Halt Construction on the Second Avenue Subway

On September 26, 2011, the U.S. District Court for the Southern District of New York denied plaintiff Yorkshire Towers' request for an emergency injunction to halt the commencement of construction of the Second Avenue Subway's 86th Street entrance. In the denial of the injunction in Yorkshire Towers Co. LP

and Yorkshire Towers Tenants Ass'n v. FTA, et al. (S.D.N.Y. No. 10-8973) and Yorkshire Towers Co. LP and Yorkshire Towers Tenants Ass'n v. DOT, et al. (S.D.N.Y. No. 11-01058), the court reasoned that significant construction of the 86th Street entrance will not begin until October 24, 2011.

Two of the defendants – the Metropolitan Transportation Authority (MTA) and MTA's Capital Construction Company – moved to dismiss the case based on the fact that Yorkshire Towers filed its complaint nearly eight months beyond the 180-day statute of limitations for the Finding of No Significant Impact it challenges. FTA subsequently joined that motion. The court has scheduled oral arguments on the motion to dismiss for November 2.

Honolulu Transit Project Opponents File Suit against FTA and DOT

Opponents of the Honolulu High-Capacity Transit Corridor Project, a project proposed for FTA New Starts funding, filed suit on May 13, 2011, against FTA, the U.S. Department of Transportation, and the City and County of Honolulu, alleging that the defendants failed to comply with NEPA, Section 4(f) of the DOT Act, and Section 106 of the National Historic Preservation Act. The proposed project is a twenty-mile, steel on steel, elevated rapid rail system running between downtown Honolulu and the western suburb of Kapolei. Plaintiffs in the case, Honolulutraffic.com, et al. v. FTA, et al. (D. Haw. No. 11-00307), include a group that favors High Occupant/Toll (HOT) lanes over rapid rail as a principal means to address freeway congestion on Oahu, another group that favors bus rapid transit, a former governor who favors light rail, and an assortment of environmentalists and native Hawaiians seeking to protect their own interests in disparate natural, aesthetic, historic, and cultural resources.

FTA issued the Record of Decision for this project in January 2011, but the project has not yet been approved for entry into Final Design under the New Starts project development process (49 U.S.C. § 5309(d). The City is seeking $1.55 billion in Section 5309 New Starts funds to help finance the estimated $5.34 billion in total project costs.

Interestingly, all of the judges in the U.S. District Court of Honolulu have recused themselves from this case "to avoid even the appearance of impropriety." Previously, all but one of the judges and the local United States Marshall had written a letter to the City objecting to the fact that the rapid rail alignment will run within 45 feet of the United States Courthouse. Given the recusal, the case has been assigned to Judge Wallace Tashima of the U.S. Court of Appeals for the Ninth Circuit. Defendants recently filed a partial motion for judgment on the pleadings, seeking to have most Section 4(f) claims dismissed, as well as all claims by several of the plaintiffs.

Maritime Administration

FOIA Suit Settled

In February, 2009, Potomac Navigation filed a FOIA suit against MarAd and the EPA for failing to provide documents in response to a request regarding the removal of polychlorinated biphenyls (PCBs) from the Liberty Ship ARTHUR M. HUDDELL. The Maritime Administration had begun work on a FOIA response prior to the suit being filed, but was unable to provide its response until after the suit has been filed. After providing its response to the FOIA request, MarAd filed a Motion to Dismiss the matter, Potomac Navigation v. Maritime Administration (D. Md. No. 09-217), as moot. The court denied MarAd's motion and granted plaintiff the unusual right to conduct discovery, ordering both the MarAd and the EPA to submit to discovery and depositions regarding the adequacy of the search for documents. Upon further internal review of MarAd's original production, the agency found that the original production was deficient, although not knowingly or intentionally so, and produced additional documents in response to the FOIA request.

After the supplemental document production, the agency entered into settlement negotiations with plaintiff for the payment of the attorney fees associated with the case. Plaintiff provided documentation supporting a total of approximately $39,000 in fees. As a result of the settlement negotiations, MarAd and plaintiff agreed to settle the matter for $33,000.

Title XI Foreclosure

MarAd foreclosed on the DOWNING, a vessel that had defaulted on its Title XI guaranteed financing, in a U.S. District Court for the Eastern District of Texas proceeding in Admiralty, United States v. SS CAPTAIN H.A. DOWNING (E.D. Tex. No. 10-00240). The vessel was sold for $3.3 million in an interlocutory Marshal's sale. MarAd will be receiving compensation of about $487,000 for its expenses as substitute custodian of the vessel during the foreclosure proceeding. At issue regarding the remaining proceeds are two claims against the vessel that arose while the vessel was operated by the former owner, AHL Shipping Co. Certain maritime claims takes precedence over MarAd's first preferred mortgage. One claim is for a crewmember injury, where a member of the steward's department fell and injured himself while cleaning up his own grease spill. The claim is being defended on the basis that the vessel was seaworthy and the crewmember contributed to his injury. Another claim is for contributions that were not made by the former owner into the union vacation fund. This claim is being defended on the basis that such contributions do not constitute a wage claim and, therefore, do not trump rights under a first preferred mortgage.

Pipeline and Hazardous Materials Safety Administration

Briefing Completed in Hazmat Packaging Supplier's Challenge to Civil Penalty

The parties have completed briefing in Air Sea Containers, Inc. v. PHMSA (11th Cir. No. 11-10142), in which petitioner seeks review of an order of the PHMSA Administrator that imposed civil penalties against Air Sea Containers, Inc. (ASCI) totaling $30,170 for four violations of the packaging testing requirements of the Hazardous Materials Regulations (HMR). The matter arose from a customer complaint about the hazmat packaging testing and certification activities of ASCI. During the course of the investigation and on-site inspections of ASCI, the PHMSA investigators determined that ASCI's testing facility lacked certain testing equipment and other resources that would likely render ASCI incapable of performing the required testing in accordance with the applicable regulations. As such, PHMSA purchased samples of ASCI's packaging designs and sent them to an independent testing lab for design validation testing. The designs tested failed the meet the regulatory packaging testing requirements. Based on the evidence gathered and the lab results, PHMSA initiated a civil enforcement proceeding. ASCI requested an adjudicatory hearing before an ALJ. The ALJ issued a split decision that was appealed by both parties to the PHMSA Administrator.

Petitioner presented two issues on appeal before the 11th Circuit: whether the ALJ abused his discretion in disallowing its late-filed post hearing brief and whether the violations found and the civil penalties assessed by the agency were proven by competent substantial evidence. Petitioner's primary argument in the abuse of discretion issue focused on the petitioner's pro se status and its misunderstanding of the administrative adjudicative rules and procedures. Petitioner asserted that its failure to meet the filing deadline was merely excusable neglect, and contrary to the ALJ's decision, acceptance of its brief should have been allowed and was not in any way prejudicial to the government. Next, petitioner argued that the violations were not supported by the evidence presented by the agency at the hearing. Petitioner characterized the agency's evidence as circumstantial, and based on false assumptions, and further argued that the Administrator's finding that much of the petitioner's fact witness' testimony was unreliable was arbitrary and capricious.

PHMSA countered petitioner's challenge to the ALJ's decision on its late-filed brief on procedural grounds by pointing out that the agency's statute and regulations require pertinent information and arguments for issues raised on appeal. PHMSA argued that the court was barred from considering the issue because the Petitioner failed to properly raise the issue before the Administrator as required. Alternatively, PHMSA argued that the ALJ's denial of the petitioner's extension request was not an abuse of discretion, and in any event was harmless, because the ALJ followed clearly communicated procedures and

the Administrator subsequently conducted a de novo review. PHMSA addressed petitioner's attacks on the agency's conclusion that it committed four violations of the HMR by noting that the agency presented reasoned explanations based on substantial evidence for each of the violations. PHMSA argued that petitioner's characterization of the evidence was not correct and its arguments on this issue were without merit.

Court Dismisses Petition for Review of PHMSA Rule Prohibiting Butane Fuel Cells in Checked Baggage

On May 24, 2011, U.S. Court of Appeals for the District of Columbia Circuit granted voluntary dismissal petitioner Liliputian Systems' petition for review of a portion of a January 19, 2011, PHMSA rule entitled "Harmonization with the United Nations Recommendations, International Maritime Dangerous Goods Code, and the International Civil Aviation Organization Technical Instructions for the Safe Transport of Dangerous Goods by Air." Petitioner described the specific provision challenged in Liliputian Systems, Inc. v. PHMSA (D.C. Cir. No. 11-1085) as revising the hazardous materials regulations to prohibit air passengers from placing spare butane fuel cell cartridges in checked baggage. Petitioner agreed to dismiss the case after the government filed a motion to dismiss arguing that because Lilliputian Systems filed its instant petition for review while it had a request for reconsideration pending before PHMSA, its petition for review was incurably premature and, accordingly, should be dismissed.

Saint Lawrence Seaway Development Corporation

Court Grants Summary Judgment for Government in Bid Protest Case Regarding Electrical Upgrade to Seaway Locks

On June 2, 2011, the U.S. Court of Federal Claims granted the government's February 11, 2011 Cross-Motion For Judgment on the Administrative Record in Dow Electric, Inc. v. United States, 98 Fed. Cl. 688 (Fed. Cl. 2011). This case arose from a sealed bid procurement in which the solicitation required specific or equivalent materials. Although plaintiff was the low bidder, the materials submitted in plaintiff's bid were not deemed equivalent, and its bid was thus nonresponsive.

Shortly after filing its complaint, plaintiff sought a TRO to enjoin the SLSDC from proceeding with any further activity on the project, which had been ongoing since September 30, 2010. Following a status conference on January 6, 2011, the Court issued an order denying the motion, based on plaintiff's failure to show a likelihood of success on the merits and the fact that construction was already underway on the project.

In its briefs on the merits, plaintiff alleged that the court has authority to

award it the contract based either on its original submittal or based on a subsequent offer to provide the materials specified in the solicitation. The government argued that the materials proposed by plaintiff were not equal to the materials specified in the solicitation.

The court found that the Administrative Record (AR) did not contain evidence that plaintiff offered to substitute the specified materials at any time and that even assuming that the AR did contain such evidence, the claim would still fail given that in a sealed bid solicitation, the agency is required to evaluate bids without discussions. Therefore, SLSDC was not obligated to participate in any discussions with plaintiff once plaintiff's bid was submitted or to allow plaintiff to submit a modified bid once the SLSDC determined that plaintiff's initial bid was nonresponsive.

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