



AIRPORT LAW ALERT NO. 9 JUNE 2009

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25TH ANNUAL AAAE
AIRPORT LAW WORKSHOP AND
2009 LEGAL UPDATE

SEPTEMBER 13 – 15, 2009
FAIRMONT HOTEL
SAN FRANCISCO, CALIFORNIA

Registration is now open for the Airport Law Workshop, sponsored by the American Association of Airport Executives, Kaplan Kirsch & Rockwell, and the International Municipal Lawyers Association. This is a unique learning opportunity for newcomers to airport law and experienced practitioners. For additional information, contact [Dan Reimer](mailto:Dan.Reimer@aaae.org) or visit the following website:
<http://events.aaae.org/sites/090908/>

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HOUSE APPROVES FAA REAUTHORIZATION

On May 20, 2009, the U.S. House of Representatives approved, by a vote of 275 to 136, the [FAA Reauthorization Act of 2009 \(H.R. 915\)](#). The matter now proceeds to the U.S. Senate; a bill may be introduced in committee some time in June.

H.R. 915 is similar in many respects to the version of FAA Reauthorization passed by the House in 2007. The elements of H.R. 915 that have received the greatest attention include: (1) authorizing expenditures under the Airport Improvement Program of \$4 billion in 2010, \$4.1 billion in 2011 and \$4.2 billion in 2012; (2) increasing the maximum Passenger Facility Charge from \$4.50 to \$7.00; (3) adjusting fees for services and activities, while omitting any user or overflight fee; (4) authorizing funding and establishing requirements for the Next Generation Air Transportation System; and (5) establishing pilot programs for the greening of airports and imposing requirements related to noise, air quality and other environmental issues.

There are extensive provisions in H.R. 915 that will directly affect airports and aviation. Several Members of Congress presented amendments just prior to the vote on the House floor, some of which apply to individual airports but others that are generally applicable. Kaplan Kirsch and Rockwell prepared a [summary](#) of less publicized changes with potentially significant impacts on the industry.

Prospects for speedy resolution in the Senate remain questionable. Debate will resume on key topics, including labor and user fee issues, that kept the Senate from passing a bill in 2008. Even upon adoption in the Senate, the House and Senate versions are likely to contain major differences that will need to be resolved in Conference.

Kaplan Kirsch & Rockwell attorneys are closely monitoring the legislative process. For further information on specific provisions of H.R. 915 or for other questions regarding FAA Reauthorization, contact [Tom Devine](#) or [Eric Pilsk](#) in our Washington D.C. Office or [Katie van Heuven](#) in our Denver Office.



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LITIGATION

RECENT DECISIONS IN SANTA MONICA LITIGATION

There are two recent developments in litigation over the City of Santa Monica's decision to ban Category C and D aircraft from the Santa Monica Airport. While the litigation is ongoing, these developments, standing alone, may have lasting implications for airport sponsors.

On May 14, 2009, an FAA Hearing Officer issued a 116-page *Initial Decision*, based on a week-long hearing held in March 2009, addressing the FAA's Office of Airport Safety and Standards' ("AAS") assertions that Santa Monica had violated several of its federal obligations. The Hearing Officer found for the City on certain legal issues and for AAS on other legal issues. In particular, the Hearing Officer found that the ban was inconsistent with (i) Grant Assurance 22 (Economic Nondiscrimination), (ii) deed restrictions in an instrument transferring Airport property from the federal government to the City under the Surplus Property Act, and (iii) the terms of a 1984 agreement between the City and the FAA. However, the Hearing Officer also found that the ban did not grant an exclusive right in violation of federal law and Grant Assurance 23, and that the AAS's claim that the ban is preempted is not reviewable in an administrative proceeding under FAR Part 16. In addition to these important conclusions, the Hearing Officer made significant findings concerning the standard of review and burden of proof in hearings conducted under Part 16. Both the City and AAS have appealed portions of the Initial Decision to the FAA's Associate Administrator for Aviation Policy, Planning and Environment. A final decision will be issued in July 2009.

On May 8, 2009, the U.S. Court of Appeals for the Ninth Circuit, in an unpublished decision, affirmed a preliminary injunction issued by the U.S. District Court precluding the City of Santa Monica from enforcing the ban. The preliminary injunction was sought by the FAA to enforce the FAA's own Interim Cease and Desist Order. FAA argued that excluding up to 25 operations per day at the Santa Monica Airport would disrupt the regional air traffic system and overburden other airports that FAA said were at or near capacity. The City had challenged, among other things, the FAA's authority to issue such an order; however, the U.S. Court of Appeals did not address the issue.

OTHER RECENT FAA DECISIONS

Director's Determination, *J&B Enterprises, Inc. v. Metropolitan Nashville Airport Auth.*, FAA Docket No. 16-08-07 (May 5, 2009) (Director dismissed claim of civil rights discrimination filed by airport concessionaire). KKR represents the Airport Authority.

Director's Determination, *Goodrich Pilot Training Center, LLC v. Village of Endicott*, FAA Docket No. 16-08-03 (April 3, 2009) (Director dismissed claims of economic discrimination and grant of exclusive rights filed by airport tenant whose lease was terminated by airport sponsor).

Director's Determination, *Moore v. Sumner County Regional Airport Auth.*, FAA Docket No. 16-07-16 (Feb. 27, 2009) (Director dismissed claims of economic discrimination and grant of exclusive rights filed by airport tenant that was denied approval by airport sponsor to conduct aeronautical activity).

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COURT UPHOLDS FAA APPROVAL FOR NEW FLORIDA AIRPORT

On May 1, 2009, the U.S. Court of Appeals for the Second Circuit denied petitioners' challenge to the FAA's approval of a new commercial service airport in Panama City, Florida. The airport sponsor proposed to construct a new airport to replace an existing airport with inadequate runway safety areas and limited opportunities for expansion. The court, in *NRDC v. FAA*, rejected each of petitioners' arguments challenging the adequacy of the Environmental Impact Statement and further rejected petitioners' argument that the FAA's decision did not satisfy the requirements of the Airport and Airway Improvement Act.

The court's opinion provides valuable guidance on the requirement under the AAIA that the FAA may approve a project likely to have significant environmental impacts only upon finding that no "possible and prudent alternative" exists. While the decision does not break any new ground with respect to NEPA-based challenges, the court's opinion is instructive with respect to, for example, identification of alternatives, indirect and cumulative impact analysis, and supplementation. The decision also reaffirmed existing precedent on the degree to which the FAA can defer to the airport sponsor's objectives and goals for a possible airport project.

This was the second legal victory for the airport sponsor, which prevailed late last year in a challenge to the U.S. Army Corps of Engineers' issuance of permits for construction of the new airport.

Construction of the new airport is ongoing and scheduled to be completed in May 2010.

STATUS OF PENDING LITIGATION

Air Transport Association v. DOT, Case No. 08-1293 (D.C. Cir.). In this case, ATA has challenged the Department of Transportation's amendments to the Policy Regarding Airport Rates and Charges. The case has been fully briefed.

County of Rockland v. FAA, Case No. 07-1363 (D.C. Cir.). In this case, numerous petitioners challenged the FAA's approval of a Record of Decision to adjust the airspace in New York, New Jersey and Philadelphia. The case has been fully briefed. Oral argument was heard on May 11, 2009.

Town of Tinicum v. DOT, Case No. 08-1830 (3d Cir.). In this case, a non-sponsoring local government appealed DOT's declaratory order finding that the town's so-called "privilege fee" for use of Philadelphia International Airport violates the Anti-Head Tax Act. The case has been fully briefed. Oral argument was heard on January 6, 2009.

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SECURITY

TSA Security Directive 08F Now In Effect – Beginning June 1, 2009, individuals requiring unescorted access to the airport operations area of an airport with commercial passenger service must undergo a TSA Security Threat Assessment and maintain identification issued by the airport sponsor. This requirement may apply to, for example, FBO employees, private aircraft owners and operators, mechanics, flight instructors, and students. [The Security Directive is sensitive security information and therefore cannot be reproduced for this *Alert*.]

New Requirements Now In Effect for Passenger Identification – Beginning May 15, 2009, domestic air carriers must request, collect and submit to TSA passenger names as they appear on the passenger's government issued I.D. This is the first public implementation phase of *Secure Flight*, TSA's watch list matching program. Additional requirements for passenger identification will go into effect later this year.

House Considers TSA Reauthorization – The U.S. House of Representatives is considering *H.R. 2200, Transportation Security Administration Authorization Act*. The bill represents the first authorization bill for TSA since the agency was created in 2001. Prospects for the bill in the House, along with consideration of a companion bill in the Senate, are uncertain.

Large Aircraft Security Program on Hold – In April and May, TSA met with representatives of the General Aviation community to discuss the future of the Large Aircraft Security Program, proposed by TSA in October 2008. In the course of debating TSA Reauthorization, several members of the House Homeland Security Committee voiced concern with the proposed LASP. At this point, it appears quite unlikely that TSA will adopt a security program for General Aviation in any form that resembles the LASP.



WHITE HOUSE POLICY INITIATIVES

The first few months of the Obama Administration have witnessed numerous changes in regulation and policy. Some of these changes are specific to the airport and aviation industries, while other changes, particularly in the area of environmental protection, may affect these industries along with many others. In addition to the developments reported elsewhere in this *Alert*, the Obama Administration has instituted the following policy changes of potential importance to airports:

FAA Seeks to Abandon Slot Auction at New York Airports - On May 14, 2009, the FAA provided [notice](#) in the Federal Register of its intent to rescind certain congestion management rules for JFK International, LaGuardia and Newark Liberty International Airports. Under the congestion management rules adopted in October 2008, the FAA would have allocated and auctioned slots at each of the three airports. Several parties challenged the final rule, on grounds that FAA had failed to establish that the rules would ease congestion and that the FAA lacked authority to allocate slots and conduct the auction. In December 2008, the United States Court of Appeals for the District of Columbia Circuit issued an order staying the rules. The Department of Transportation appropriations bill signed into law in March 2009 precluded DOT from spending money to implement the rule.

FAA to Issue CertAlert on Airport Wildlife Hazard Assessments - The FAA has indicated that it will soon issue guidance to its field inspectors on the need to complete wildlife hazard assessments at certain airports that have experienced bird strikes or have the potential for bird strikes. Under FAR Part 139, airports experiencing "triggering events" must prepare a wildlife hazard assessment and may be required to prepare and implement a wildlife hazard management plan. FAA may initiate rulemaking to amend and strengthen the requirements for addressing bird strikes at commercial service airports.

Endangered Species Act Consultation Restored - On April 28, 2009, the Departments of Commerce and Interior revoked a rule adopted by the Bush Administration concerning the requirement to consult with government scientists before taking action that could harm endangered or threatened species. The [latest action](#) restores the requirement to consult wildlife experts with the U.S. Fish and Wildlife Service or the National Oceanic and Atmospheric Administration, whereas the Bush Administration rule made such consultations discretionary.

New Wetlands Policy Announced - On May 20, 2009, the Obama Administration announced its policy with respect to wetlands protection. In a [letter](#) to Representative James Oberstar, representatives from several Executive agencies highlighted the challenges presented by recent judicial decisions and the need for Congressional action to ensure greater consistency in wetlands determinations. The Obama Administration announced four general principles that it believes should be reflected in such legislation: (1) broad protection for the nation's waters, (2) make the definition of covered waters predictable and manageable, (3) promote consistency between the Clean Water Act and Agricultural Wetlands programs, and (4) recognize longstanding practices.

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DOT AND FAA LEADERSHIP

FAA Administrator, J. Randolph ("Randy") Babbitt. Babbitt was confirmed by the Senate on May 21, 2009. He formerly served as the president and chief executive officer of the Air Line Pilots Association and most recently has been with the consulting firm Oliver Wyman.

DOT Deputy Secretary, John D. Porcari. Porcari was confirmed by the Senate on May 21, 2009. He formerly served as the Secretary of the Maryland Department of Transportation.

DOT General Counsel, Robert S. Rivkin. Rivkin was confirmed by the Senate on April 29, 2009. From 2001-2004, Rivkin was general counsel to the Chicago Transit Authority and more recently held the position of Vice President and Deputy General Counsel of Aon Corporation. Rivkin also was a member of the Obama Administration's Department of Transportation transition team.

Other Obama Appointees in the Department of Transportation:

Under Secretary of Transportation for Policy, Roy Kienitz
(confirmed April 29, 2009)

Assistant Secretary for Governmental Affairs, Dana Gresham
(confirmed April 29, 2009)

Administrator of Federal Highway Administration, Victor M. Mendez
(confirmed April 23, 2009)

Federal Railroad Administrator, Joseph C. Szabo (confirmed April 29, 2009)

Administrator of Federal Transit Administration, Peter M. Rogoff
(confirmed May 21, 2009)

Administrator of Research and Innovative Technology, Peter H. Appel
(confirmed April 29, 2009)

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CLIMATE CHANGE

Climate Change Legislation – On May 21, 2009, the Energy and Commerce Committee of the U.S. House of Representatives approved, [H.R. 2454, The American Clean Energy and Security Act](#). The bill would impose new standards and requirements and create pilot programs and incentives with respect to a wide array of subjects, including renewable energy, energy efficiency, greenhouse gas emissions, and green jobs. The bill must pass several additional committees before it can be sent to the House floor for a vote. The prospects for climate change legislation in the Senate this Congressional session remain uncertain.

Endangerment Finding – On April 17, 2009, the U.S. Environmental Protection Agency issued a [proposed Endangerment Finding](#) concluding that greenhouse gas emissions threaten public health and welfare. The proposed Endangerment Finding, and its potential implications for the aviation industry, were the subject of a recent [Airport Law Alert – Special Edition](#).

Greenhouse Gas Reporting – On March 10, 2009, the U.S. Environmental Protection Agency issued a [proposed rule](#) that would require large emitters of greenhouse gases to report their emissions. The proposed rule, and its potential effects on airports, were the subject of a recent [article](#) prepared by Kaplan Kirsch & Rockwell.

For further information and source material on aviation-related climate change, visit our website at www.airportattorneys.com/climate_change.php.



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Kaplan Kirsch & Rockwell's airports practice is one of the largest and most experienced in the country. The firm's lawyers have counseled clients on issues associated with complex airport development and master planning projects, land use, environmental review, rates and charges, finance, security, safety, airport proprietors' rights and compliance with federal requirements. The firm has represented clients throughout the nation in regulatory and legislative advocacy on a wide range of policy matters and in litigation related to airport operations and development. The firm's clients have included airport proprietors; local and state governments; airport tenants and users; and businesses who are affected by airport operations.

Airport Law Alert is a publication of Kaplan Kirsch & Rockwell LLP prepared semi-annually and is intended for general information purposes only for our clients and friends. It is also provided as a free service to registrants in the annual AAAE Airport Law Conference. Readers are urged to consult their counsel and consultants concerning their own situation and any specific legal questions. Please contact us if you would like to receive future editions of this occasional publication or would like to be removed from our mailing list.

If you have any questions or would like to learn more about the topics addressed in this ALERT, please contact the lawyer who normally represents you, or any of the lawyers listed below.

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