



# KAPLAN KIRSCH ROCKWELL

## semi-annual airport law digest

No. 28 | July 2018



### **FAA Reauthorization Bill Passes House; Senate Process Underway**

In late April, the House of Representatives passed a six-year FAA reauthorization bill. This is a significant step forward in the effort to reauthorize the FAA, since the House has been unable to reach consensus on long-term reauthorization for several years, and the FAA has operated under short-term extensions for some time. This most recent bill passed the House after Congressman Bill Shuster—outgoing Chairman of the Committee on Transportation and Infrastructure—dropped his proposal to privatize the FAA’s air traffic control functions – an idea that was previously met with significant resistance. The House bill includes several provisions that should be of interest to airport sponsors:

- Limits FAA regulation of non-federally sponsored airport property to facilitate airports’ ability to generate non-aeronautical revenue
- Requires some airports to provide sanitizing equipment in mothers’ rooms and baby-changing tables in restrooms
- Directs the FAA and GAO to undertake various studies related to noise impacts of air traffic on local communities
- Adds contract tower construction as an eligible activity under the AIP small airport fund
- Allows AIP funds to be used to construct storage facilities to shelter snow removal, aircraft rescue, and firefighting equipment meeting certain conditions regardless of whether federal funding was used to acquire the equipment
- Directs the FAA to partner with nongovernmental organizations, state, and local agencies to prevent recreational unmanned aircraft from interfering with the efforts of emergency responders

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Despite House passage of the bill, there remains a long and winding road ahead for reauthorization. The Senate still needs to act on its own bill, and there must be a Conference Committee to reconcile the inevitable differing House and Senate visions for FAA reauthorization. Senate action is not expected until late 2018 at the earliest. The FAA's current authorization expires on September 30, 2018. As a result, there remains a strong likelihood that Congress will again need to extend that authority on a short-term basis, as it has repeatedly done in the past. We will continue to update our clients and friends on significant new developments or opportunities for airports to participate in the process. For more information, please contact [Peter Kirsch](mailto:pkirsch@kaplankirsch.com) at [pkirsch@kaplankirsch.com](mailto:pkirsch@kaplankirsch.com) or [Steven Osit](mailto:sosit@kaplankirsch.com) at [sosit@kaplankirsch.com](mailto:sosit@kaplankirsch.com).

## Late Breaking: FAA Announces Process and Short Deadlines for Supplemental Airport Improvement Program Funding Requests

On July 9, 2018, the FAA [is expected to publish the process for airport sponsors](#) to apply for supplemental Airport Improvement Program (AIP) funds for 2018 through 2020. This supplemental AIP funding was authorized by the Consolidated Appropriations Act, 2018, which also set criteria for projects that are to receive "priority consideration" in the disbursement of funds. Projects are to receive "priority consideration" if they are located at (a) certain nonprimary airports (Regional, Local, or Basic airports not located in a Metropolitan or Micropolitan area), or (b) primary airports classified as Small Hub or Nonhub. For requests for funding in fiscal year 2018, sponsors and their projects must be eligible for "priority consideration" under this criteria and must submit a brief application and summary of the eligible project to the appropriate FAA office by August 8, 2018. For requests for funding in fiscal years 2019 and 2020, any eligible NPIAS airport sponsor must submit a request for funding by October 31, 2018, with a more robust application that includes explaining the status of the proposed project (specifically, ALP and environmental reviews). The specific material the FAA requires for sponsor submissions under each deadline can be found in the document linked above. For more information, please contact [Peter Kirsch](mailto:pkirsch@kaplankirsch.com) at [pkirsch@kaplankirsch.com](mailto:pkirsch@kaplankirsch.com) or [Steven Osit](mailto:sosit@kaplankirsch.com) at [sosit@kaplankirsch.com](mailto:sosit@kaplankirsch.com).

## Airport Firefighting Chemicals Potentially Contaminate Water Systems

In recent months, there has been an increasing awareness and concern regarding perfluorinated compounds (PFAS), a catch-all term for certain ingredients in firefighting foams commonly used at airports. While these chemicals have been in use for decades, recent research suggests that they are harmful to human health and that [airports are a serious potential source of contamination](#) to local water supplies. This year, water supplies near [Westchester County Airport](#) and [Fairbanks International Airport](#) were both found to have contamination above the levels set in an [EPA health advisory](#). Airport sponsors should be aware of this issue because as possible PFAS users, they may be susceptible to claims by water system operators or individuals seeking compensation for cleanup costs or other damages – indeed, [at least one case has already been filed to that effect](#). Firm attorneys [Polly Jessen](#), [Nick DiMascio](#), and [John Putnam](#) recently published an article on these issues in the Colorado Municipal League Newsletter (see page 3). For more information, please contact [John Putnam](mailto:jputnam@kaplankirsch.com) at [jputnam@kaplankirsch.com](mailto:jputnam@kaplankirsch.com) or [Nick DiMascio](mailto:ndimascio@kaplankirsch.com) at [ndimascio@kaplankirsch.com](mailto:ndimascio@kaplankirsch.com).



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## AOPA Seeks Enhanced Regulatory Oversight over FBO Pricing Practices

Over the past several months, the Aircraft Owners and Pilots Association (AOPA) has launched an aggressive campaign against the sponsors of certain airports, where a single fixed-base operator (FBO)—most commonly, Signature Flight Services—operates all fuel flowage and transient general aviation (GA) aircraft parking. Last summer, AOPA filed informal Part 13 complaints with the FAA against Asheville Regional Airport, Key West International Airport, and Waukegan National Airport. AOPA later voluntarily dismissed its complaint against Waukegan after it discovered that alternative transient GA parking was available there. More recently, the organization threatened similar litigation against ten other airports on its so-called Airport Access Watch List, announced in April 2018. In AOPA's view, the pricing practices of FBOs at these airports effectively amount to an access restriction for transient GA users which, AOPA alleges, the sponsor has a duty to resolve under its AIP grant assurance obligations.

While AOPA's efforts have so far been directed at a relatively small number of airports, its claims strike at the very essence of the relationship between airport proprietors and FBOs doing business on the field. The FAA does not regulate FBOs directly and has repeatedly affirmed its position that pricing for aeronautical services is best determined by the marketplace. The FAA has also traditionally afforded airport proprietors substantial discretion as to the manner in which they select and manage FBOs – a position the agency reaffirmed in a [December 2017 Q&A document](#) summarizing the federal regulatory landscape with respect to FBOs. However, AOPA's claims ask the agency to not only review the prices charged by FBOs, but to then also substitute its judgment for that of the airport proprietor.

So far, however, AOPA's litigation efforts have been unsuccessful. On June 7, 2018, the FAA [issued a decision in the Part 13 filed against Asheville](#), finding that the sponsor was in compliance with its federal obligations. The agency determined that the sponsor reasonably concluded that the FBO's pricing practices were reasonable and that AOPA had not provided any evidence that would justify "second-guessing" the sponsor's conclusion. The FAA also found that Signature, the FBO at Asheville, is entitled to set its fees and pursue a business model that provides a reasonable return of its investment.

The FAA also [issued a decision in the claim against Key West](#), finding in favor of the airport sponsor on all but one of the areas of concern raised by AOPA. It remains to be seen how much further AOPA will take its claims. AOPA has threatened additional litigation, potentially including a formal Part 16 complaint, and continues to aggressively advocate for sponsors to address high FBO prices. For more information, please contact [Steven Osit](#) at [sosit@kaplankirsch.com](mailto:sosit@kaplankirsch.com).

## FAA Still Without Permanent Administrator, Several Other Key Positions

In January, FAA Administrator Michael Huerta's term expired, and his Deputy Daniel Elwell became Acting Administrator. Now six months later, there has been little movement from the White House to nominate a new permanent administrator. Among the candidates reportedly being considered: Elwell; John Dunkin, [the President's personal pilot](#); Robert Sturgell, Acting Administrator under President George W. Bush; and Sam Graves, a Missouri Congressman who has been [publicly lukewarm about his appetite for the job](#). Whoever the permanent Administrator may be, the nominee will be faced with a bevy of challenges related to the agency's Congressional reauthorization, NextGen litigation, UAS regulations, and other issues.

Those challenges will only be exacerbated by the continued vacancies at the highest levels of the agency. According to the [FAA's organizational chart](#), two of five Associate Administrator posts and three of nine Assistant Administrator positions are currently filled by acting individuals. Among the high-level positions currently vacant are the Associate Administrator for Airports and the Assistant Administrator for NextGen. Winsome Lenfert continues to be the Acting Associate Administrator for Airports. In addition to these high-level political vacancies, many senior civil service positions are vacant because of agency departures.

## FAA Wins Most Recent NextGen Battle, But War Continues

Last year, the City of Phoenix won a victory against the FAA, successfully arguing that by instituting new NextGen flight patterns without appropriate consultation, the agency violated the National Environmental Policy Act and the National Historic Preservation Act. That case has reverberated throughout the airport community. In a recently decided case that was just as closely watched across the country, the FAA scored a win of its own when the D.C. Circuit held that a citizen group's challenge to FAA's new NextGen flight patterns in the D.C. Metroplex [came too late](#). Fights over NextGen procedures, however, continue elsewhere – a challenge to the NextGen flight patterns in the [SoCal Metroplex is still pending in the D.C. Circuit](#), and the [State of Maryland recently filed two petitions](#) (one administrative and one judicial) regarding flight paths at Ronald Reagan Washington National Airport and at BWI Thurgood Marshall Airport. For more information, please contact [John Putnam](#) at [jputnam@kaplankirsch.com](mailto:jputnam@kaplankirsch.com).



#ProjectsThatKeepLifeMoving

# Litigation

(Listed in Reverse Chronological Order)

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## **Court Decisions**

**Airport Closure.** *Nat'l Bus. Aviation Assn. v. Huerta*, 2018 U.S. App. LEXIS 16095 (D.C. Cir. June 12, 2018) (dismissing challenge to FAA settlement agreement with the City of Santa Monica that permits closure of the airport in 2028 because preliminary agreement was not final agency action and thus was not reviewable); see also *Scott v. City Council for the City of Santa Monica*, No. 17-07329 (C.D. Cal. Dec. 15, 2017) (dismissing complaint alleging that City Council failed to hold a public hearing in violation of California state law before entering into settlement agreement).

**Petition for Review.** *Skydive Myrtle Beach Inc. v. Horry Cty. Dep't of Airports*, 2018 U.S. App. LEXIS 15089 (4th Cir. June 5, 2018) (dismissing as untimely a challenge to FAA decision in Part 16 matter where petitioner failed to submit petition within 60 days of service of the agency's decision).

**Air Carrier Permits.** *Air Line Pilots Ass'n v. Chao*, 889 F.3d 785 (D.C. Cir. May 11, 2018) (on the merits, rejecting challenge to Department of Transportation's issuance of air carrier permit to Norwegian Air because nothing requires the Secretary to deny a permit on public interest grounds alone).

**Preemption.** *Bailey v. Rocky Mt. Holdings, LLC*, 2018 U.S. App. LEXIS 11969 (11th Cir. May 8, 2018) (holding that the balance billing provision in Florida's personal injury protection statute, which prohibits medical providers from charging in excess of a fee schedule amount, operates as a state-imposed regulation on air carrier rates and that the Airline Deregulation Act preempts the application of the balance billing provision to air carriers).

**Airport Revenue.** *Clayton Cty. v. FAA*, 887 F.3d 1262 (11th Cir. Apr. 24, 2018) (dismissing petition for review for lack of jurisdiction where non-sponsor municipality challenged letter setting forth FAA's interpretation of statute requiring taxes on aviation fuel to be used for airport purposes and the court did not find the FAA letter to constitute a final agency action).

**Area Navigation.** *Citizens Ass'n of Georgetown v. FAA*, 886 F.3d 130 (D.C. Cir. Mar. 27, 2018) (dismissing petition for review of FAA's NextGen flight patterns in D.C. Metroplex because challenge was filed more than 60 days after issuance of FONSI).

**Subject Matter Jurisdiction.** *Boneyard Acquisitions, LLC v. Bibb Cty.*, 2018 U.S. Dist. LEXIS 44956 (N.D. Ala. Mar. 20, 2018) (dismissing complaint for lack of subject matter jurisdiction where plaintiff alleged airport sponsor had extinguished easement in accordance with federal law).

**Grant Assurances.** *SPA Rental, LLC v. Somerset-Pulaski Cty. Airport Bd.*, 884 F.3d 600 (6th Cir. Mar. 7, 2018) (upholding FAA's finding of no unjust discrimination where complainant was not similarly situated to other entities).

**Labor and Employment.** *Frunghillo v. Bradford Reg'l Airport Operating*, 2018 U.S. Dist. LEXIS 39739 (W.D. Pa. Mar. 12, 2018) (finding that co-defendant municipalities were not "joint employers" with their collectively incorporated airport authority for purposes of plaintiff's FMLA and ADA claims).

**Standing and NEPA.** *Kaufmann v. FAA*, 2018 U.S. App. LEXIS 1393 (6th Cir. Jan. 22, 2018) (finding that petitioners did not have standing nor a federal cause of action against airport sponsor engaged in tree trimming using solely state funds).

**False Claims Act.** *United States ex rel. Durkin v. Cty. of San Diego*, 2018 U.S. Dist. LEXIS 5550 (S.D. Cal. Jan. 11, 2018) (dismissing complaint alleging airport sponsor made false statements in grant applications because plaintiff had not sufficiently alleged how the statements led to the sponsor securing federal funds or the Defendant's knowledge of the falsity of the statements).

**Noise.** *BRRAM, Inc. v. FAA*, 721 Fed. Appx. 173 (3d Cir. Jan. 9, 2018) (on NEPA appeal brought by airport neighbors, affirming FAA decision to use categorical exclusion to approve amendment to operating specifications allowing new air carrier to use airport).

**First Amendment.** *McDonnell v. City & Cty. of Denver*, 878 F.3d 1247 (10th Cir. Jan. 4, 2018) (overturning district court's grant of preliminary injunction against airport sponsor and finding that sponsor was not required to grant an exception to its regulations on speech-related activities for exigent circumstances).

## Pending Cases

**Area Navigation.** *City of Culver City v. Dept. of Trans.*, Case No. 17-1010 (D.C. Cir. appellee's brief filed May 15, 2018) (consolidated challenge by various parties to FAA's new flight patterns in the SoCal Metroplex).

**Premises Liability.** *Afoa v. Port of Seattle*, 189 Wn.2d 1015 (Oct. 5, 2017) (granting partial review of Washington Court of Appeals decision holding that the Port had a "nondelegable duty to ensure a safe workplace" on the airfield at Seattle-Tacoma Airport, and was therefore liable for the injuries of an independent contractor's employee).

**Air Tours.** *Pub. Employees for Env't'l Responsibility v. FAA*, No. 17-cv-2045 (D.D.C. motion to dismiss filed Dec. 14, 2017) (seeking injunctive relief requiring FAA to develop Air Tour Management Plans for various national parks and recreation areas).

## Administrative Decisions

**Gate Allocation.** *In re Compliance with Federal Obligations by the City of Dallas*, FAA Docket No. 16-15-10 (Notice of Investigation served Aug. 7, 2015, since dismissed without prejudice) (FAA investigation into possible grant assurance violations related to a failure to accommodate air carrier requesting gate space).

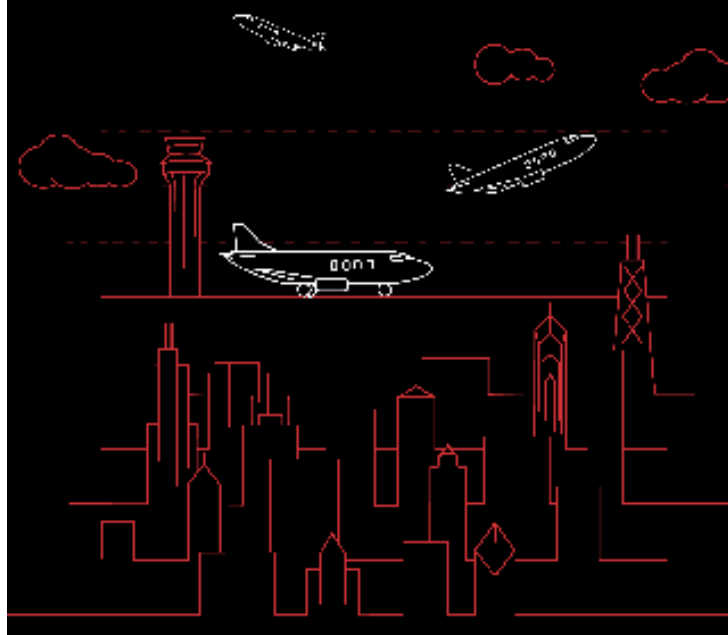
**Revenue Diversion.** *Air Transport Assn. of Am., Inc. v. Port of Portland*, FAA Docket No. 16-16-04, Final Agency Decision (May 18, 2018) (affirming Director's Determination finding no violation of Grant Assurance 25 where airlines alleged that airport sponsor had impermissibly charged them certain utility fees it then paid to the City of Portland).

**Economic Discrimination.** *Pelzer v. Michigan*, FAA Docket No. 16-16-05, Director's Determination (May 16, 2018) (finding sponsor in violation of Grant Assurance 22 where lease negotiations generally lacked transparency or clarity about requirements to operate on the airport, and where sponsor provided no reasons for prohibition on temporary commercial operations).

**Legal Fees and Airport Revenue.** *Nat'l Bus. Aviation Assn., Inc. v. Town of E. Hampton*, FAA Docket No. 16-15-08, Director's Determination (Mar. 26, 2018) (finding that attorney's fees and other costs paid by sponsor to defend use restriction was permissible use of airport revenue).

**Acquisition of Property.** *Boggs v. City of Cleveland*, FAA Docket No. 16-16-15, Final Agency Decision (Jan. 26, 2018) (affirming Director's Decision dismissing complaint alleging Grant Assurance violations where sponsor chose not to acquire private property shown on the Airport Layout Plan).

# Airport Law DESK REFERENCE



**Kaplan Kirsch & Rockwell**, in cooperation with AAAE, publishes the ***Airport Law Desk Reference***, a user-friendly resource guide intended to make legal authorities on airport law both accessible and understandable. The ***Airport Law Desk Reference*** highlights the black-letter law in 28 topic areas and provides a comprehensive compendium of legal authorities applicable to each topic area.

The ***Airport Law Desk Reference*** is a companion tool for the Basics of Airport Law Workshop and Legal Update and are available for purchase from AAAE.

For a copy, please contact Maribeth Sarnecki at AAAE, [maribeth.sarnecki@aaae.org](mailto:maribeth.sarnecki@aaae.org).

## Federal Legislation

Consolidated Appropriations Act, 2018, Pub. Law No. 115-141 (signed Mar. 23, 2018) (extending FAA authorization through Sept. 30, 2018).

## Federal Rules, Orders, and Guidance

*(Listed in Reverse Chronological Order)*

### The White House

[Memorandum of Understanding Implementing One Federal Decision Under Executive Order 13807](#) (eff. Apr. 9, 2018).

Press Release, [Building a Stronger America: President Donald J. Trump's American Infrastructure Initiative](#) (Feb. 12, 2018); see also [Legislative Outline for Rebuilding Infrastructure in America](#) (Feb. 2018).

### Department of Transportation and FAA

[Supplemental Guidance on the Airport Improvement Program \(AIP\) for Fiscal Years 2018-2020](#), FR Doc. 2018-14675 (publication expected Jul. 9, 2018).

[Contract Provision Guidelines for Obligated Sponsors and Airport Improvement Program Projects](#) (updated Jun. 19, 2018).

Draft Advisory Circular No. 150/5200-36B, [Qualifications for Wildlife Biologist Conducting Wildlife Hazard Assessments and Training Curriculums for Airport Personnel Involved in Controlling Wildlife Hazards on Airports](#) (Jun. 5, 2018).

Proposed Policy, [Policy on the Temporary Closure of Airports for Non-aeronautical Purposes](#), 83 Fed. Reg. 24,438 (May 29, 2018).

Guidance Document, [Compliance with Requirements for Timely Processing of \[DBE and ACDBE\] Certification Applications](#) (Apr. 29, 2018).

Draft Advisory Circular No. 150/5345-43J, [Specification for Obstruction Lighting Equipment](#) (Mar. 21, 2018).

Draft Advisory Circular No. 150/5100-13C, [Development of State Aviation Standards for Construction at Non-primary Public-use Airports and Use of State Highway Material Specifications for Individual Projects](#) (Mar. 2, 2018).

Draft Advisory Circular No. 150/5345-54C, [Specification for L-884, Power and Control Unit for Land and Hold Short Lighting Systems](#) (Feb. 6, 2018).

Draft Advisory Circular No. 150/5345-26E, [FAA Specification for L-823 Plug and Receptacle, Cable Connectors](#) (Feb. 6, 2018).

Advisory Circular No. 150/5340-30J, [Design and Installation Details for Airport Visual Aids](#) (Feb. 2, 2018).



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## Reports, Studies, Articles, and Other Publications

### **U.S. Department of Transportation**

Office of Inspector General, Report No. AV2018041, [FAA Needs to More Accurately Account for Airport Sponsors' Grandfathered Payments](#) (Apr. 17, 2018).

Office of Inspector General, Report No. AV2018030, [FAA Needs To Strengthen Its Management Controls Over the Use and Oversight of NextGen Developmental Funding](#) (Mar. 6, 2018).

### **U.S. Government Accountability Office**

Report No. 18-236, [Aviation Security: TSA Uses Current Assumptions and Airport-Specific Data for Its Staffing Process and Monitors Passenger Wait Times Using Daily Operations Data](#) (Feb. 2018).

### **Transportation Research Board, Airport Cooperative Research Program**

#### ***Reports***

Report 184: [Executive Summary for the Guidebook on Understanding FAA Grant Assurance Obligations](#) (May 2018) (individual volumes listed in Web-Only Documents).

Report 183: [User Guides for Noise Modeling of Commercial Space Operations – RUMBLE and PCBoom](#) (Apr. 2018).

Report 182: [Guidance for Planning, Design, and Operations of Airport Communications Centers](#) (Jan. 2018).

#### ***Synthesis Reports***

Synthesis 93: [Sustainability's Role in Enhancing Airport Capacity](#) (pre-publication draft released Jun. 2018).

Synthesis 87: [Airport Participation in Oil and Gas Development](#) (Apr. 2018).

Synthesis 86: [Airport Operator Options for Delivery of FBO Services](#) (Feb. 2018).

Synthesis 88: [Airport Community, Water Quality Events, and the Aircraft Drinking Water Rule](#) (Jan. 2018).

#### ***Web-Only Documents***

Web-Only Document 44: [Understanding FAA Grant Assurance Obligations Volume 1: Guidebook](#) (May 2018).

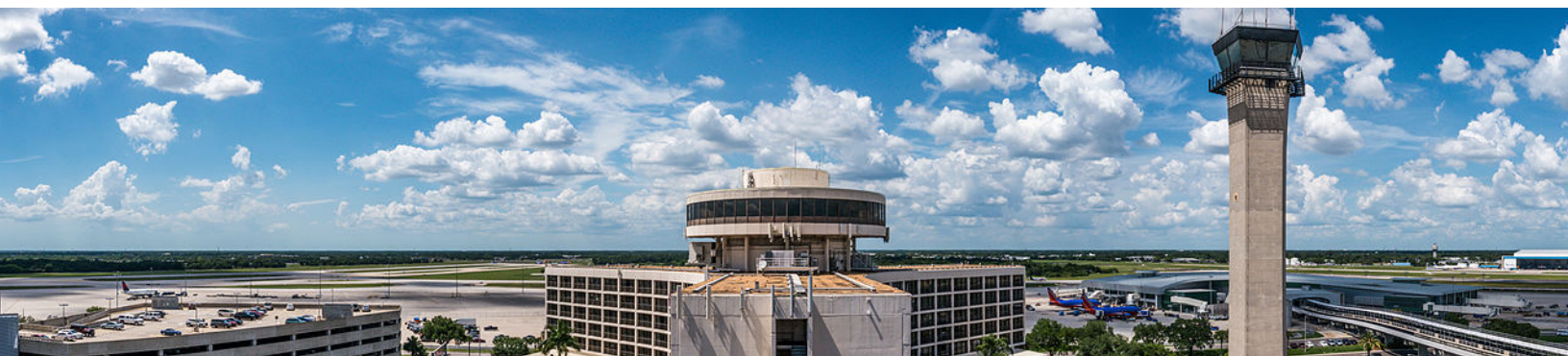
Web-Only Document 44: [Understanding FAA Grant Assurance Obligations Volume 2: Technical Appendices](#) (May 2018).

Web-Only Document 44: [Understanding FAA Grant Assurance Obligations Volume 3: Research Report](#) (May 2018).

Web-Only Document 44: [Understanding FAA Grant Assurance Obligations Volume 4: Summary of AIP Grant Assurance Requirements](#) (May 2018).

Web-Only Document 35: [State of the Industry Report on Air Quality Emissions from Sustainable Alternative Jet Fuels](#) (Apr. 2018).

Web-Only Document 33: [Commercial Space Operations Noise and Sonic Boom Modeling and Analysis](#) (Apr. 2018).



# Unmanned Aircraft Systems

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## **Decided Cases**

*Taylor v. FAA*, 2018 U.S. App. LEXIS 18381 (D.C. Cir. Jul. 6, 2018) (dismissing petition for review, which challenged FAA's regulation of small UAS as beyond the agency's statutory authority).

*Elec. Privacy Info. Ctr v. FAA*, 2018 U.S. App. LEXIS 16400 (D.C. Cir. Jun. 19, 2018) (dismissing challenge to FAA's decision not to promulgate privacy-specific UAS regulations because petitioners failed to establish standing).

## **Pending Cases**

*Elec. Privacy Info. Ctr v. Drone Advisory Committee, et al.*, Civ. Action No. 18-833 (D.D.C. filed Apr. 11, 2018) (complaint alleging that DOT's Drone Advisory Committee is failing to make meetings open to the public).

## **FAA Rules, Orders, and Guidance**

[Notification to UAS Operators Proposing To Engage in Air Transportation](#), 83 Fed. Reg. 18,734 (Apr. 30, 2018) (setting forth procedure to seek an air taxi operator exemption to hold economic authority from DOT for companies proposing to engage in certain air transportation operations with UAS).

## **Reports, Studies, and Articles**

National Academies of Sciences, Engineering, and Medicine, [Assessing the Risks of Integrating Unmanned Aircraft Systems into the National Airspace System](#) (pre-publication draft released Jun. 2018).

United States Government Accountability Office, Report No. GAO-18-110, [Small Unmanned Aircraft Systems: FAA Should Improve Its Management of Safety Risks](#) (May 2018).





# Editor's Notes



KAPLAN KIRSCH & ROCKWELL'S airports practice is one of the largest and most experienced in the country. The Firm's attorneys have counseled clients on issues associated with complex airport development and master planning projects, land use, environmental review, rates and charges, airline incentives, 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 affected by airport operations.

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

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