On September 12, 2013, FAA published Rules of Practice for Federally-Assisted Airport Enforcement Proceedings (Retrospective Regulatory Review). The notice identifies significant changes to 14 C.F.R. Part 16, which contains the procedures for filing and adjudicating complaints against airport sponsors for violations of the Grant Assurances and other federal obligations. This is the first amendment to Part 16 since its adoption in 1996.

The changes to Part 16 include the following:

- **Motions to Dismiss.** Under new Section 16.26(b), airport sponsors may file a motion to dismiss on the basis that a complaint is outside FAA’s jurisdiction, the complaint fails to state claim warranting an investigation, or the complainant lacks standing.

- **Summary Judgment.** Under new Section 16.26(c), airport sponsors may file a motion for summary judgment requesting judgment as a matter of law. Both motions to dismiss and motions for summary judgment may seek dismissal of an entire complaint or specific claims or issues.

- **Electronic Filing.** New Section 16.13(h) sets forth a process for filing and serving documents via e-mail.

- **Civil Rights.** New Section 16.11(d) captures current FAA practice of referring claims for civil rights discrimination and violations concerning Disadvantaged Business Enterprise and Airport Concession Disadvantaged Business Enterprise to the FAA Deputy Assistant Administrator for Civil Rights or the Office of Civil Rights.

- **Other Amendments.** FAA has amended provisions concerning: (1) intervention; (2) corrective action for noncompliant sponsors; (3) procedures for seeking rehearing of Director’s Determinations; and (4) the standard of proof and burden of proof.

The updated rules will be effective on November 12, 2013. It is critically important for airports and their counsel to understand the rule changes should the airport be involved in a Part 16 proceeding. For additional information, contact Tom Devine at tdevine@kaplankirsch.com or Eric Pilsk at epilsk@kaplankirsch.com.
Airport Law Made Easy

The airport industry is filled with jargon. Here, we tackle three broad topics: NextGen, Unmanned Aircraft Systems, and Through-the-Fence. We hope to explain these subjects in simple terms, describe recent developments, and highlight their importance to airports.

NextGen

NextGen refers to the latest generation of technology which the aviation industry is implementing for aircraft navigation. While traditional navigation procedures rely principally on radar technology, NextGen is being enabled by a shift to smarter, satellite-based, and digital technologies and procedures.

FAA forecasts that implementing NextGen will, by 2020, reduce delays by 41 percent, reduce fuel consumption by 1.6 billion gallons, and cut carbon emissions by 16 million metric tons. In total, this should provide $38 billion in cumulative benefits to aircraft operators, the traveling public, and FAA.

FAA has identified thirteen “metroplexes” containing several commercial or general aviation airports where the airspace is congested or other factors combine to reduce airspace efficiency. FAA has assigned teams of experts to analyze the operational challenges, develop strategies to optimize the airspace, and redesign the airspace and navigation procedures in these metroplexes.

NextGen navigation procedures around airports are referred to as Performance Based Navigation (PBN) and include Required Navigation Performance (RNP), Required Navigation (RNAV), and Optimized Profile Descent (OPD).

The new, more efficient flight tracks will be less dispersed, meaning that more aircraft will overfly a smaller area. While there could be noise impacts from these changes, Congress decided in the FAA Modernization and Reform Act of 2012 to exempt implementation of NextGen procedures from environmental review in most instances. This new statute, implemented by the FAA in 2013, will expedite implementation of NextGen procedures.

This Alert contains references to several recent reports and articles exploring the implementation of NextGen.

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Unmanned Aircraft Systems

Unmanned Aircraft Systems (UAS), as the term implies, are aircraft that operate without a pilot or operator inside the aircraft. UAS technology has been advancing rapidly in recent years, necessitating a whole new examination by the FAA of the appropriate regulatory framework for this technology.

In 2007, FAA issued a policy notice stating that “no person may operate a UAS in the National Airspace System (NAS) without specific authority.” Because of this general prohibition, entities may only operate UAS in the NAS under one of three specific exceptions: (1) federal, state, and local government agencies may apply for a certificate of authorization from FAA; (2) civil and commercial operators can apply to FAA for an experimental category airworthiness certificate; and (3) FAA encourages users of remote control aircraft to follow a 1981 advisory circular.
Airport Law Made Easy (cont.)

In the FAA Modernization and Reform Act of 2012, Congress directed the FAA to integrate unmanned aircraft systems into the NAS by September 2015. In particular, Congress has instructed FAA to draft a “comprehensive plan” to safely accelerate the integration of civil UAS into the NAS. Congress directed that the plan must address certain elements including: (1) certification; (2) operator or pilot licensing and registration; and (3) sense and avoid capabilities.

In February 2013, the U.S. Government Accountability Office examined the status of implementation efforts in the report *Unmanned Aircraft Systems: Continued Coordination, Operational Data, and Performance Standards Needed to Guide Research and Development* (GAO-13-346T).

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Through The Fence

The term “through-the-fence” refers primarily to the movement of aircraft between an airport and adjacent property. There are many different types of land uses adjacent to airports that may seek through-the-fence access, including commercial, residential, and military.

The rules on through-the-fence have changed considerably in recent years. Although the FAA decided in 2011 to prohibit all new residential through-the-fence access, Congress, in the FAA Modernization and Reform Act of 2012, authorized residential through-the-fence access to general aviation airports under certain conditions.

The FAA has amended the Grant Assurances to reflect the new requirements for through-the-fence, and, in July 2013, issued a policy statement and Compliance Guidance Letter on residential through-the-fence. Guidance on commercial through-the-fence can be found in FAA Order 5190.6B, *Airport Compliance Manual*. The Transportation Research Board, Airport Cooperative Research Program has a research project underway on the subject of through-the-fence. (ACRP 10-12).

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Litigation

Court Decisions

**Helicopters.** *Helicopter Ass’n Int., Inc. v. FAA*, No. 12-1335, 2013 WL 3481537 (D.C. Cir. 2013). Helicopter Association International, Inc. (HAI) challenged the authority of FAA to issue a rule requiring helicopter pilots to use a route one mile off the north shore of Long Island, New York for the purpose of noise abatement in residential areas. The court denied HAI’s petition for review. Accordingly, the route change will be mandatory for a period of two years. After two years, the FAA will sunset the rule if it determines that “there is no meaningful improvement in the effects of helicopter noise on quality of life.” If there is improvement, FAA may make the rule permanent after notice and an opportunity to comment.

**Wildlife Hazards.** *Paskar v. United States Department of Transportation*, 714 F.3d 90 (2d Cir. 2013). The U.S. Court of Appeals for the Second Circuit dismissed a challenge to an FAA letter to the City of New York concerning the planned waste transfer station near LaGuardia Airport. In the letter, the FAA endorsed the findings of a blue-ribbon panel of experts and recommended that the City implement the panel’s recommendations for mitigating wildlife hazards associated with the transfer station. The court held that the letter was not a reviewable final order and that the court therefore lacked jurisdiction to consider the petition for review.

**Preemption.** *American Trucking Ass’n v. City of Los Angeles, California*, 133 S.Ct. 2096 (2013). The Court held that two provisions of the concession agreement are preempted by the Federal Aviation Administration Authorization Act of 1994 (FAAAA). This case is of interest to the airport and aviation industry because the FAAA preemption provision is very similar to the preemption provision in the Airline Deregulation Act and because of the way airports regulate tenants and users is similar to how the Port of LA imposed requirements on trucking companies. The court reversed the District Court and the Ninth Circuit in finding that the requirements were covered by the FAAA in light of the Port’s use of criminal penalties to coerce compliance with the concession agreements.

**Curfew.** *No Night Flights Network v. Telluride Regional Airport Authority*, Case No. 2011CV71 (Dist. Ct., San Miguel County, State of Colorado) (Mar. 2013). The Colorado District Court granted summary judgment for Telluride Regional Airport Authority in a suit over the nighttime curfew at the Telluride Regional Airport in Colorado. In 2011, the Airport Authority expanded the hours during which the Airport is operational each day. Plaintiffs claimed that the change was inconsistent with the Special Use Permit for the Airport and was subject to review under the San Miguel County land use code. The court dismissed Plaintiff’s claim for mandamus relief on the basis that the County’s enforcement of its land use code is discretionary.

**Preemption.** *Gilstrap v. United Airlines, Inc*., 709 F.3d 995 (9th Cir. 2013). The Ninth Circuit held that the Air Carrier Access Act (ACAA) does not preempt state-law personal injury claims by a disabled passenger against an airline. Here, Plaintiff filed a tort claim against an airline for improper treatment at multiple airports. The court held that the ACAA preempts state law standards of care but does not preempt state remedies for violations of the ACAA. The court also found that the ACAA is the applicable statute, and not the Americans with Disabilities Act (ADA), because the ADA does not apply to areas of an airport controlled by airlines.
Litigation (cont.)

**Tort Liability.** *Hartman v. U.S.*, 923 F.Supp.2d 1287 (W.D. Okla. 2013). The U.S. District Court for the Western District of Oklahoma granted summary judgment for the Oklahoma City Airport Trust and the City of Oklahoma in a wrongful death suit for an aircraft accident. In 2008, an aircraft departing the Wiley Post Airport struck one or more birds, causing the plane to crash and five deaths. The court granted summary judgment on the basis that the airport’s acts or omissions could not, as a matter of law, be the proximate cause of the wildlife strike and aircraft accident.

**Pilots.** *Emory v. United Air Lines, Inc.*, 720 F.3d 915 (D.C. Cir. 2013). The U.S. District of Columbia Court of Appeals affirmed the judgments of the District Court on behalf of the defendants. The plaintiffs are former United Airlines pilots who turned 60 just days before Congress passed the Fair Treatment for Experienced Pilots Act of 2007 (FTEPA), Pub. L. No. 110-135, 121 Stat. 1450, extending the maximum age for piloting commercial flights by five years to 65. Plaintiffs challenged the non-retroactivity and protection for compliance provisions of FTEPA. The court dismissed all claims on the basis that FTEPA was constitutional and Defendants could not be liable for their compliance with the law.

**Pending Cases**

*United States v. U.S. Airways Group, Inc.*, No. 1:13-CV-01236 (D.C. Cir. Aug. 13, 2013). The Attorney General has brought suit to enjoin the merger of U.S. Airways Group, Inc. and AMR Corporation alleging that the combination will result in “anticompetitive effects.”

*Spirit Airlines, Inc., et al. v. US DOT*, 687 F.3d 403 (D.C. Cir. 2012). Spirit Airlines has filed a writ of certiorari in the Supreme Court seeking review of DOT’s April 2011 Air Passenger Protection Rule. Specifically, Spirit Airlines alleges that the Airfare Advertising Rule violates the First Amendment and that DOT exceeded its statutory mandate to prohibit unfair or deceptive practices by implicitly “reregulating” the airline industry.

*Town of Barnstable et al. v. FAA*, (D.C. Cir. Nos. 12-1362 & 1363). The Town of Barnstable, Massachusetts and the Alliance to Protect Nantucket Sound filed a joint brief in support of their petition to review the FAA’s “no hazard” decision in connection with the Cape Wind energy project. At issue is whether the FAA properly determined that the wind project was not a hazard to air navigation. Arguments are scheduled for October 8, 2013.

*City of Mukilteo v. US DOT*, (9th Cir. N. 13-70385). The Cities of Mukilteo and Edmonds, Washington challenged the the FAA's decision to amend the FAR Part 139 Airport Operating Certificate to accommodate commercial airlines for the first time at Snohomish County Airport/Paine Field.

Litigation (cont.)

Administrative Decisions

Bodin v. County of Santa Clara, California, FAA Docket No. 16-11-06 (Aug. 12, 2013). The County of Santa Clara (the "County") appealed a Director's Determination in which FAA held that the County violated Grant Assurances 22 and 5. On appeal, FAA held that the County was in violation of Grant Assurance 22. The County did not show that FAA's safety analysis was incorrect and that parachute operations could not be safely conducted at the airport. However, FAA dismissed the claim with regard to a violation of Grant Assurance 5. The court held that Santa Clara did not improperly cede rights and powers by elevating the decision making process regarding the allowance of parachute operations from the Airport Director to the County of Santa Clara.

Alaska Airlines Inc. v. Los Angeles World Airports, DOT Docket No. OST-2007-27331 (Jul. 3, 2013). Department of Transportation issued an order dismissing all claims remaining in a longstanding dispute involving fees imposed by regulation at Los Angeles International Airport. Several airlines operating at LAX initially challenged the fees in an administrative proceeding filed in 2007. Both DOT and the U.S. Court of Appeals found fault with certain aspects of how LAWA had calculated the fees, and the matter had been remanded to DOT for further consideration. LAWA ultimately negotiated agreements with the airlines over fees, in which the parties also agreed that the claims challenging the prior fees were moot. Upon motions of the parties, DOT dismissed the claims of the airlines with prejudice and terminated the proceeding.

Northern Air, Inc. v. County of Kent, Michigan, FAA Docket 16-11-10 (Mar. 28, 2013). FAA Director of the Office of Airport Compliance and Management Analysis dismissed a complaint filed under FAR Part 16 by two FBOs at the Gerald R. Ford International Airport against Kent County, Michigan. They alleged multiple violations of the Grant Assurances in connection with the County's consideration of a request by a third FBO to lease property at the Airport. The Director rejected each of the claims and found that the County had complied fully with the Grant Assurances in its consideration and negotiation of the lease.

Kaplan Kirsch and 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 each of the twenty-two topic areas and provides a comprehensive compendium of legal authorities potentially applicable to each topic area. The Airport Law Desk Reference is a companion tool for the Basics of Airport Law Workshop and Legal Update.

For a copy, contact Bryan Snyder at ABAE, brian.snyder@aaae.org, or call (703) 824-0500, ext. 174.
Federal Rules, Orders, and Guidance


Reports, Studies, and Articles

U.S. Government Accountability Office


Transportation Research Board, Airport Cooperative Research Program


Report 85: Developing and Maintaining Support for Your Airport Capacity Project (July 2013).

Report 87: Procuring and Managing Professional Services For Airports (June 2013).

Legal Research Digest 18: Buy America Requirements for Federally Funded Airports (Feb. 2013).

Reports, Studies, and Articles (cont.)

DOT, Office of the Inspector General


ARRA Lessons Learned: Opportunities Exist for FAA To Further Improve Its Oversight of Airport Grant Payments (April 2013).

Articles


Airport Law Alert

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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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.

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