READY FOR TAKEOFF

- Sources and summary of safety obligations
- FAA enforcement
- Critical issues in tort liability
- Safety management systems (SMS)
- Airport security
  - Airport Security Plans
  - TSA enforcement
WHAT KIND OF AIRPORT ARE YOU?

- Public use airport – not federally obligated
- Public use airport – federally obligated
- Certificated airport (Airport Operating Certificate / Part 139)
- Uh...the kind with runways?
SOURCES OF AIRPORT SAFETY OBLIGATIONS

- Torts
- Part 139
- Grant Assurances
SAFETY-RELATED GRANT ASSURANCES

- Operation and maintenance (#19)
- Hazard removal and mitigation (#20)
- Compatible land use (#21)
- Economic nondiscrimination (#22)
- Airport layout plan (#29)
ADVISORY CIRCULARS

- 123 current Series 150 Advisory Circulars
- Generally *mandatory* for Part 139 airports
- Often *mandatory* for grant- or PFC-funded projects
- *Recommended* practices in other cases, but beware…
OPERATIONS AND MAINTENANCE
(#19)

- “The airport and all facilities which are necessary to serve the aeronautical users of the airport . . . shall be operated at all times in a safe and serviceable condition and in accordance with the minimum standards as may be required or prescribed by applicable Federal, state and local agencies for maintenance and operation.”

- Signage, marking, and lighting
- NOTAMs
- Snow and ice
- Foreign object debris (FOD)
- Pavement maintenance
- Wildlife hazard management
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“It will not cause or permit any activity or action thereon which would interfere with its use for airport purposes.”
HAZARD REMOVAL AND MITIGATION (#20) AND COMPATIBLE LAND USE (#21)
AIRPORT LAYOUT PLANS (#29)

- Maintain a current layout plan of the airport:
  - Airport boundaries
  - Existing/proposed facilities
  - Non-aviation areas

- Limited FAA review and approval authority (see Session 21 this PM)
ECONOMIC NONDISCRIMINATION (#22)

- An airport sponsor –
- May establish reasonable and not unjustly discriminatory conditions for the safe and efficient operation of the airport.
- May prohibit or limit aeronautical uses of the airport if such action is necessary for the safe operation of the airport.
Part 139 prescribes minimum regulatory safety standards
- Many mandatory Advisory Circulars
- Aircraft Rescue and Firefighting (ARFF)
- Wildlife Hazard Assessment and Management
- Snow and Ice Control Plan (SICP)

ACM is a regulatory obligation once approved by FAA!
FAA SAFETY ENFORCEMENT

14 C.F.R. Part 139
(Civil penalty enforcement)

AIP funds
PFCs
(Part 13/16 enforcement)

Source: coaching-journey.com
HAVE YOU HAD AN AIRFIELD ACCIDENT?

- No (find some wood and knock on it)
- Yes, but we did not receive a claim as a result
- Yes, and our insurance company paid a claim
- Yes, and a lawsuit was filed, but we were found not liable
- Yes, and a lawsuit was filed, and we were found liable
TORT LIABILITY

Duty

Breach

NEGLIGENCE

Causation

Damages
TORT LIABILITY

Premises Liability?  Negligence Per Se?

NEGLIGENCE

Res Ipsa Loquitur?  Damages Caps?

Negligence Per Se?
No private right of action under the FAA Act

Standard of care depends on your airport:
- Certificated
- Non-certificated
- Was the airfield component AIP-funded?

And it depends on your jurisdiction:
- Standard of care
- Evidence of the standard of care
- Preemption
SOVEREIGN IMMUNITY

Things to know:

- Are you covered?
- Limitations on damages?
- Procedural requirements?
- Discretionary function exceptions?
- Permissible causes of action?
- Liability insurance?

SOMETHING COMPLETELY DIFFERENT?
SAFETY MANAGEMENT SYSTEMS
REGULATORY PROCESS

- Notice of Proposed Rulemaking – October 2010
- Final Rule
  - Q1 of 2017
  - Q4 of 2017
  - April 2018
  - Summer 2018
- December 27, 2019?
- Advisory Circular?
KEY ELEMENTS OF SMS

- The accountable executive
- Responsibility on non-movement areas
- Data collection
- Sponsor-produced documents
  - Risk matrix
  - SMS manual
WATCH THIS SPACE...

- Liability implications for the –
  - Sponsor
  - Accountable executive

- Data protection and privacy

- Restructuring existing relationships
SECURITY IS DIFFERENT...

Transportation Security Administration

Airport Security Program
35th Annual AAAE Airport Law Workshop
Action Plan Program and Civil Enforcement

Nikki Harding, Assistant Chief Counsel
TSA’s Office of Chief Counsel

October 15, 2019
TSA employs a progressive enforcement philosophy when addressing non-compliance.

Progressive enforcement actions include:

- **On-the-Spot Corrections**
  - Areas of non-compliance may be resolved immediately by entity.
  - Recorded by TSA in inspection report.

- **Warning Notice**
  - Written notice identifying area of non-compliance to the regulated entity.

- **Action Plan Program**
  - Voluntary agreement between TSA and the regulated entity that achieves the best security outcome through collaboration and reinvestment.

- **Civil Penalty**
The Action Plan Program drives consistency across TSA and improved security by providing an opportunity for:

- Eligible parties and TSA to discuss and reach an agreement on the root cause of an identified vulnerability or noncompliance with TSA’s security requirements.

- Collaboration and agreement on the corrective actions needed to address the security vulnerability or noncompliance with TSA’s security requirements.

- Resolution of an issue of noncompliance with administrative action (Letter of Correction) instead of a civil enforcement action.

- Resolution of a vulnerability with a written acknowledgement the action plan has been completed instead of administrative action.
Action Plan Program: Administrator’s Intent

- Strategic Goal 1.4: Advance global transportation security standards
  - Effectively partner and collaborate to achieve our desired security outcomes and will seek security improvements that are transferrable to the global transportation network. We remain committed to ensuring the implementation and proper oversight of global standards, and to redesigning compliance approaches in order to mitigate potential threats.

- Objective 1.4.2
  - Improve oversight and compliance regimes through increased focus on security outcomes and collaboration.
Achieve better transportation security by:

- Providing eligible parties and TSA an opportunity to discuss and reach an agreement on corrective actions to address root causes of any regulatory noncompliance or security vulnerability,
- Resolving that noncompliance or vulnerability with administrative action instead of a civil enforcement action after corrective actions have been completed,
- Offsetting potential civil penalties with investment and without a formal adjudication of regulatory violations, and
- Providing for resolution of noncompliance and security vulnerabilities before the civil enforcement process is initiated, resulting in better security sooner.

An action plan is an agreement and participation in the Action Plan Program is completely voluntary.
Applicability – Section II

- **Voluntary Disclosures by Eligible Parties:**
  - TSA encourages eligible parties to discover their own instances of noncompliance and take prompt and effective corrective action to ensure that the same or similar noncompliance does not reoccur.

- **TSA Discovered Noncompliance:**
  - TSA encourages eligible parties to take prompt and effective corrective action when TSA discovers an instance of noncompliance with a security requirement to ensure that the same or similar noncompliance does not reoccur.

- **Security Vulnerabilities:**
  - TSA encourages eligible parties to take prompt and effective action to address significant vulnerabilities identified by either an eligible party or TSA through audits, testing, and other data. Vulnerabilities are not regulatory violations.
Designated TSA Official (DTO)

- The TSA official responsible for oversight and coordination of the resolution of the matter disclosed under this program.
  - Federal Security Director (FSD) - for matters involving domestic regulated entities, where the noncompliance occurred
  - Regional Operations Center (ROC) Manager – for matters at non-U.S. locations, responsible for the area where the noncompliance occurred
  - TSA Headquarters individual assigned to Security Operations
Decision Point – Should TSA offer an Action Plan?

- Threshold and items to consider and evaluate:
  - Voluntary Disclosure
  - Noncompliance or a vulnerability
  - Worth the Agency’s or eligible party’s effort
  - Administrative / paperwork findings
  - Non-systemic / one-off’s
  - Effective corrective actions already implemented

- An action plan generally does not apply for:
  - Egregious or intentional noncompliance
  - Disregard for TSA’s regulatory requirements by the mid/upper level management
  - Criminal activity
  - Fraud
Voluntary Disclosure Procedures – Section VI

- **Initial Notification to TSA:** The voluntary disclosure is made to the DTO immediately or as soon as possible after the eligible party discovers the noncompliance. The initial notification must be made electronically by emailing the DTO and copying TSAVDP@tsa.dhs.gov and must include, to the extent possible, the following information:
  
  - A brief description of the instance(s) of noncompliance, where it occurred, an estimate of the time that it remained undetected, as well as how and when it was discovered
  
  - Verification that, upon discovery, immediate action was taken to terminate the relevant conduct
  
  - The name, title, and contact information for the individual making the initial notification
Voluntary Disclosure Report (VDR) Content:

- The following information must be provided to the DTO by the eligible party after the initial notification and no later than seven (7) business days after the entity discovers the noncompliance:
  - Description of noncompliance
  - Summary of noncompliance
  - Immediate action taken by entity
  - Summary and analysis of supporting material

- If the eligible party fails to meet any deadline, the DTO may issue a Letter of Rejection advising that TSA will proceed with an investigation.
The eligible party may request to withdraw completely from the action plan process at any time.

DTO evaluates eligibility:
- Is an action plan appropriate?

The DTO will contact the eligible party’s representative.

After DTO contact, eligible party has fourteen (14) business days to:
- Review the circumstances
- Conduct their own investigation
- And respond to the DTO

If proceeding with Action Plan, have a follow-up meeting within seven (7) business days.

Participation in an action plan is voluntary.
Action Plan Process – Section VII

- **Coming to the table**
  - This meeting will be a discussion and negotiation
    - Are proposed corrective actions commensurate with the noncompliance or vulnerability?
    - Does it address the root cause?
    - Does the entity have a similar Action Plan at another location?

- **Collaborate and come to an agreement**
During this meeting, the eligible party must be prepared to discuss:

- An analysis of root cause, including any supporting materials
- A detailed description of the corrective action(s) proposed or already taken
- Require procedural or organizational changes
- The projected cost of implementing the corrective action(s), if applicable
- The anticipated completion date(s) for corrective actions

For cases involving a voluntary disclosure, the voluntary disclosure **must be** considered a mitigating factor during the discussion and negotiation of an action plan.
Action Plan Process – Section VII

- Action plan letter will be sent after agreeing upon the root cause and corrective actions
  - DTO will create and send to the eligible party, OR
  - If the parties agree, may be drafted by the eligible party (TSA template).

- Each corrective action(s) documented within the action plan letter must:
  - identify a completion date; or
  - the period of time the corrective action(s) will remain in place

- Upon receipt of an action plan letter, within seven (7) business days, the eligible party must send a written acknowledgment to the DTO indicating the action plan is accurate and agreeing to the corrective actions contained in the action plan letter.

- If the action plan letter is created by the eligible party, TSA will send the written acknowledgment of receipt indicating the action plan is accurate and agreeing to the corrective actions contained in the letter.
Successful completion of the action plan

- For only instances involving noncompliance:
  - DTO verifies the corrective action(s) detailed in the action plan
  - TSA will send the eligible party a Letter of Correction (LOC) advising that the corrective action(s) is approved
    - The LOC is part of the compliance history of an eligible party but is not a part of the violation history

- For only instances involving vulnerabilities:
  - DTO verifies corrective action(s) detailed in the action plan,
  - TSA will send the eligible party a written acknowledgment that the action plan has been completed
    - This letter will not be a part of the entity’s compliance history or violation history
    - A LOC will not be issued in matters involving only security vulnerabilities
Dispute Resolution

- Eligible party may request the issue be taken under consideration at any time and it will be referred to the Director of Compliance for resolution
  - If it can’t be resolved
    - Letter of Rejection will be issued to the eligible party
    - Matters involving noncompliance only:
      - TSA will proceed with an investigation

Withdrawal or cancellation of the action plan

- Letter of Rejection issued by TSA when:
  - Entity fails to provide requested information
  - Parties cannot agree and are unable to resolve any dispute and the action plan is being terminated
  - An issued Letter of Rejection cannot be considered as an aggravating factor for any related or subsequent civil enforcement matter.
Repeated Instances of Noncompliance

- Unless the noncompliance involves:
  - Egregious or intentional noncompliance by mid/upper level management
  - Criminal activity
  - Fraud

- TSA will not initiate an administrative or civil enforcement action on the eligible repeated similar noncompliance at that time

- TSA and the eligible party will work together to amend the action plan to address the similar instance(s) of noncompliance
The effective date of the Action Plan Program was August 26, 2019
- Two month roll-out and implementation period

TSA will conduct a series of three reviews of this program document within 18 months of the effective date of the Action Plan Program

This Program remains effective unless otherwise terminated or amended by TSA
Initiation of Civil Enforcement Process

- If noncompliance cannot be resolved through Administrative Action or the Action Plan Program, TSA will send the entity a Letter of Investigation (LOI)

- The entity may send a Letter of Response (LOR)
  - Disputing the allegation; or
  - Stating how the entity responded, including any corrective actions taken

- Upon receipt of the LOR, TSA will make a determination about whether to proceed and refer to Chief Counsel’s office for civil penalty
Field Counsel and the Action Plan

- Field Counsel are encouraged to utilize the Program:
  - Was an action plan offered by the DTO before referral to counsel?
  - What immediate corrective actions were taken after the noncompliance was discovered?
  - What corrective actions have been taken since the LOR?
  - Dispute resolution
Field Counsel will issue a Notice of Proposed Civil Penalty (NPCP) under 49 CFR 1503.413, which must contain:
- Facts alleged
- Statute, regulation or order violated
- Amount of the proposed civil penalty
- Certificate of service

Entity may choose to:
1. Pay the proposed civil penalty;
2. Request a reduction of civil penalty;
3. Request an informal conference (IC); or
4. Request a formal hearing with ALJ
Preparing for an IC

During the IC, entities should be prepared to:

- Discuss the underlying facts of the alleged violation and present evidence refuting the violation

  or

- Present evidence of mitigation regarding the penalty amount, such as corrective actions taken by the entity
Final Notices and Orders

- If the matter cannot be resolved, TSA issues Final Notice of Proposed Civil Penalty (FNPCP) and Order under 49 CFR 1503.417

- Entity may either:
  1. Pay proposed civil penalty; or
  2. Request formal ALJ hearing

- If the entity does not respond to the FNPCP within 15 days of receipt, the FNPCP automatically converts to an Order Assessing Civil Penalty. 49 CFR 1503.419(b)(2)
Appeals to an ALJ

- If entity wishes to have case heard before an ALJ, the entity must request a formal hearing under 49 CFR 1503.427 and file that request with the Docket Clerk, with copies to TSA, following the process in 49 CFR 1503.429
  - The filing must contain a “plain statement of facts supporting the person's position and a brief statement of the action requested…”

- Upon receipt, TSA must file a complaint pursuant to 49 CFR 1503.609 or a motion pursuant to 1503.629, within 30 days of the request.

- After reviewing TSA’s complaint and entity’s answer, ALJ follows process outlined in 49 CFR subpart G and hears evidence regarding whether a violation occurred and/or whether proposed civil penalty is within TSA’s sanction guidance and justified based on underlying facts
Any party may appeal the ALJ’s initial decision to the TSA Decision Maker under 49 CFR 1503.657.
- An appeal to the TSA decision maker must be made within 10 days of the oral decision on the record or service of the initial written decision
- 50 days to “perfect the appeal”

Any party may petition the TSA Decision Maker to reconsider or modify the final decision under 49 CFR 1503.659
- Petition must be filed within 30 days after the decision is served
Questions?

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