

SEMI-ANNUAL AIRPORT LAW DIGEST

2020 MID-YEAR UPDATE

JULY 2020
NO. 32

In March, the COVID-19 pandemic began to envelope the United States and send shockwaves through American everyday life. Airports, airlines, and the travel industry as a whole was and continues to be particularly hard-hit. Passenger numbers have begun to inch up at airports across the country, but the pandemic continues to disrupt the system on a daily basis as new hotspots develop, and health restrictions ebb and flow in different states and local communities. As we highlighted in our [May 2020 Airport Law Alert](#), FAA and airport sponsors continue to grapple with necessary health measures, grant assurance compliance issues, and making sound financial decisions in this time of unprecedented uncertainty.

While COVID-19 is unquestionably the most important development of the last six months, there have been other court decisions, guidance updates, and policy changes affecting airports. This Digest is a summary of the important developments in airport law in the first six months of 2020, including: a list of principal cases decided; new DOT and FAA rules, policies, and guidance; and reports, studies, and articles of particular interest to airport legal professionals. Some of these, including proposed new NEPA regulations, are highlighted in more depth below. We have attempted to provide links to publicly available documents, and most other documents are available via subscription services such as Westlaw or LexisNexis. To ensure that the important regular news items are not contaminated, we have visually quarantined all COVID-19 materials at the end of this Digest.

We hope you find this Digest useful in your efforts to remain current in the always-evolving legal and regulatory framework that governs airports. If you have questions about any of the materials in this Digest, please contact editor [Nicholas M. Clabbers](#) or [any other Kaplan Kirsch & Rockwell attorney](#) who normally represents you.

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BANKRUPTCY DOMINOS BEGIN TO FALL

As many in the industry predicted, the sharp downturn in revenue caused by the COVID-19 pandemic has forced airport concessionaires to re-evaluate and re-structure their businesses. In mid-May, both Hertz Rent A Car and Advantage Rent A Car (which also owns E-Z Rent A Car) succumbed to the reality of their financial situations and filed for Chapter 11 bankruptcy protections within a week of each other. While Hertz's plan is not totally clear, it apparently plans to restructure its business and maintain operations at some, if not all, of its current airport locations. Advantage has already agreed to sell several of its lease and concession agreements at airports to third parties, and effective June 30 ceased operations at those airports where the agreements were not sold. The speed of the Advantage proceeding and the complexity of the Hertz case reinforces the need for airport sponsors to plan for concessionaire – or airline – bankruptcy before it happens. [Kaplan Kirsch & Rockwell's bankruptcy lawyers](#) are presently representing many airport sponsors on bankruptcy issues, including advance planning and with respect to both the Advantage and Hertz matters.

NEW NEPA RULES

The Council on Environmental Quality (CEQ) has prepared a final rule significantly amending its National Environmental Policy Act (NEPA) regulations, which are binding on the FAA and other federal agencies. At press time, the amended regulations had not yet been formally announced, but White House sources have stated that the amendments are in final form and will be released shortly.

Intended to streamline federal environmental review processes, CEQ's rulemaking has proposed several fundamental changes to the NEPA process, including new regulatory exemptions for private projects with limited federal funding and/or involvement; elimination of requirements to consider cumulative environmental impacts (including climate change); limitations on the extent to which project alternatives must be considered; and presumptive time limits for both Environmental Impact Statements (2 years) and Environmental Assessments (1 year).

Perhaps not surprisingly, the rulemaking process has been extremely controversial. CEQ received nearly one million comments on its proposed regulatory amendments, and a wide variety of stakeholders have indicated that they plan to challenge the final rule as soon as it is issued.

For airport sponsors, CEQ's regulatory amendments create both challenges and opportunities. In considering whether and how to rely on the amendments in a project-specific context, several factors are worth bearing in mind. First, the effective date of the final rule – and whether it can be applied to ongoing projects – remains ambiguous. Second, the timing and substance of the FAA's response to CEQ's changes is also unclear. Third, some or all of the amended regulations may be invalidated as a result of legal challenges.

We will provide an update on our website as soon as CEQ's regulatory amendments are formally released. For more information about this rulemaking or other NEPA issues, please contact [Peter Kirsch](#), [Matt Adams](#), or [Katie van Heuven](#).



LITIGATION Listed in Reverse Chronological Order

FEDERAL AND SELECT STATE COURT DECISIONS

NEPA and Judicial Review. *Howard Cty. v. FAA*, No. 19-1062 (4th Cir. July 1, 2020) (unpublished) (rejecting petition for review of FAA approval of EIS for cargo improvements at Baltimore-Washington International Thurgood Marshall Airport and finding that petitioners had filed too late, but noting that under specific circumstances, state agency could operate as FAA's agent with respect to notice of decision).

Car Rental and TNCs. *Turo, Inc. v. City of Los Angeles*, No. 18-cv-06055 (C.D. Cal. June 19, 2020) (granting preliminary injunction against unpermitted car-sharing service at Los Angeles International Airport and finding that the City was likely to succeed on its claims under California trespass and municipal airport business licensing laws).

Takings. *Riser, et al. v. City of Chicago*, 2020 IL App (1st) 190143-U (June 9, 2020) (in case concerning alleged aircraft overflight takings claim, affirming trial court grant of summary judgment to City of Chicago on statute of limitations grounds and holding that statute began to run upon the opening of a new runway).

Immigration and Customs Enforcement. *United States v. King Cty.*, 2020 U.S. Dist. LEXIS 92512 (W.D. Wash. May 27, 2020) (denying motion for judgment on the pleadings and proceeding to discovery phase where United States brought challenge to local government executive order requiring airport contracts to contain a prohibition on providing services to aircraft involved in the deportation of immigrant detainees).

Takings. *Taylor v. United States*, 2020 U.S. App. LEXIS 15565 (Fed. Cir. May 15, 2020) (dismissing complaint alleging regulatory taking, where plaintiff claimed Air Force employee made statements to wind developer contract partner that FAA would likely not issue a No Hazard Determination and developer subsequently elected to terminate the contract).

National Parks and Overflights. *In Re: Public Employees for Env'tl Responsibility*, 957 F.3d 267 (D.C. Cir. May 1, 2020) (granting writ of mandamus directing FAA and NPS to comply with Air Tour Management Act of 2000, which required agencies to develop air tour management plans for flights over National Parks).

Ridesharing. *Arizona v. City of Phoenix*, No. CV-20-0019-SA (Ariz. Apr. 2, 2020), en banc (order without opinion holding that City's assessment of fees on ridesharing companies at Phoenix Sky Harbor Airport did not violate the Arizona Constitution).

Essential Air Service. *Bd. of Cty. Comm'rs of Washington Cty. v. United States DOT*, 955 F.3d 96 (D.C. Cir. Apr. 7, 2020) (rejecting petition for review of DOT decision to remove Hagerstown Regional Airport from Essential Air Service program, finding that it was not arbitrary and capricious because the airport did not meet the enplanement requirement).

Preemption. *Tweed-New Haven Airport Auth. v. Tong*, 930 F.3d 65 (2d Cir. July 9, 2019) (holding that state statute limiting length of runway was preempted by federal safety standards), *cert. denied* 2020 U.S. LEXIS 1705 (Mar. 23, 2020).

Metroplex/NextGen. *Maryland v. FAA*, 952 F.3d 288 (D.C. Cir. Mar. 10, 2020) (dismissing as untimely petition for review of FAA implementation of new approaches at Washington National Airport).



Car Sharing Programs. *Mass. Port Auth. v. Turo, Inc.*, Civ. Action No. 19-1773 (Mass. Sup. Ct. Jan. 22, 2020) (granting preliminary injunction against car sharing service, which sponsor alleges is illegally operating at airport without a car rental permit and trespassing at airport, among other claims).

Zoning and Hazards. *Northeast Pa. SMSA LP v. Smithfield Twp. Bd. of Supervisors*, 2020 U.S. Dist. LEXIS 7096 (M.D. Pa. Jan. 15, 2020) (where lessee sought to construct a cell tower in the vicinity of an airport, FAA Determination of No Hazard to Air Navigation was sufficient evidence to support lessee's contention that cell tower would not endanger operations at the airport or violate local ordinance).

Standing and Airport Closure. *Rosen v. United States Gov't*, 2020 U.S. App. LEXIS 558 (9th Cir. Jan. 3, 2020) (unpublished) (rejecting pro se pilot's third-party challenge to settlement agreement between the City of Santa Monica and the United States concerning eventual closure of Santa Monica Airport).

PENDING CASES

Environmental Review. *Ctr. for Community Action & Env't'l Justice v. FAA*, No. 20-70272 (9th Cir. petition filed Jan. 29, 2020) (petition for review of FAA approval of NEPA Finding of No Significant Impact associated with proposed air cargo facility at San Bernardino International Airport).

Slots. *Spirit Airlines, Inc. v. U.S. Dep't of Transp.*, Case. No. 19-1248 (D.C. Cir. petition for review filed Nov. 25, 2019) (petition for review challenging FAA decision not to immediately allow new flights at Newark Liberty International Airport (EWR) following Southwest Airlines' cessation of flights from EWR).

Drones. *Nat'l Press Photographers Assoc. v. McCraw*, No. 1:19-cv-00946 (W.D. Tex. complaint filed Sept 26, 2019) (challenging state law prohibition on certain unmanned aircraft flights).

Metroplex/Next Gen.

City of Los Angeles v. FAA, No. 19-73164 (9th Cir. petition filed Dec. 12, 2019) (petition for review of FAA decision to allow flight tracks for departing aircraft at Hollywood Burbank Airport to shift following Metroplex implementation).

City of Los Angeles v. Elwell, No. 19-71581 (9th Cir. briefing on motion for summary disposition concluded June 26, 2020) (petition for review of FAA decisions setting flight procedures at Los Angeles International Airport).

Howard Cty. v. FAA, No. 18-2360 (4th Cir. supp. app'x filed Aug. 1, 2019) (challenging flight procedures at Baltimore-Washington International Thurgood Marshall Airport).

Maryland v. FAA, No. 18-1302 (D.C. Cir. case in abeyance pending FAA reconsideration) (petition for review of FAA decision denying administrative petition for supplemental environmental assessment concerning DC Metroplex and BWI).

ADMINISTRATIVE DECISIONS

Economic Nondiscrimination. *Resort Aviation Services, Inc. v. Kootenai Cty.*, FAA Docket No. 16-20-01, Order of the Director (Apr. 30, 2020) (granting motion to dismiss FBO complaint alleging violations of Grant Assurances 22 and 23 where sponsor granted lease agreement to second FBO and withdrew RFP).

RESEARCH WARNING FOR AIRPORT LAWYERS

As we have indicated in prior Airport Law Digests, Lexis Advance has only inconsistently updated its database of FAA Part 16 decisions since September 2017, and we cannot confirm that the database is complete. While many recent decisions do appear to be present, there are also several which are missing. We have been unable to determine why this continues to be an issue. We have been unable to confirm if Westlaw Next is currently experiencing a similar issue, but know that it has in the past. We recommend caution when researching FAA Part 16 decisions on either Lexis Advance or Westlaw Next and to supplement that research with FAA resources and the forthcoming update to the Airport Cooperative Research Program Legal Research Digest 21. New Part 16 decisions are intermittently uploaded to [FAA's website](https://www.faa.gov) and [Regulations.gov](https://www.regulations.gov).

FEDERAL LEGISLATION

[National Defense Authorization Act for Fiscal Year 2020](#), Pub. Law No. 116-92 (Dec. 20, 2019).

FEDERAL RULES, ORDERS, AND GUIDANCE

Listed in Reverse
Chronological Order

THE WHITE HOUSE

Executive Order No. 13927, [Accelerating the Nation's Economic Recovery from the COVID-19 Emergency by Expediting Infrastructure Investments and Other Activities](#) (June 4, 2020).

DEPARTMENT OF TRANSPORTATION AND FAA ORDERS, POLICIES, AND ADVISORY CIRCULARS

Revised Grant Assurances, [FAA Airport Sponsor Assurances](#) (June 4, 2020).

Report to Congress, [FAA Reauthorization Act of 2018 Sections 188 and 173](#) (Apr. 14, 2020) (study regarding day-night average sound levels).

Notice of Proposed Rulemaking, [Noise Certification of Supersonic Airplanes](#), 85 Fed. Reg. 20,431 (Apr. 13, 2020).

Notice of Modification, [Airport Improvement Program \(AIP\) Grant Assurances](#), 85 Fed. Reg. 12,048 (Feb. 28, 2020) (comment period expired Mar. 30, 2020).

Reauthorization Program Guidance Letter (R-PGL) 19-06, [Environmental and Noise](#) (Feb. 27, 2020).

Reauthorization Program Guidance Letter (R-PGL) 19-05, [ZEV, VALE, and Energy Efficiency Programs](#) (Feb. 27, 2020).

Reauthorization Program Guidance Letter (R-PGL) 19-03, [Airport Types and Eligibility](#) (Feb. 27, 2020).

Part 139 Cert Alert No. 20-01, [Required Training for Vehicle Operators Prior to Accessing the Movement Area](#) (Feb. 25, 2020).

Advisory Circular No. 150/5200-33C, [Hazardous Wildlife Attractants on or Near Airports](#) (Feb. 21, 2020).

Notice of Proposed Rulemaking, [Traveling by Air with Service Animals](#), 85 Fed. Reg. 6448 (Feb. 5, 2020) (comment period expired Apr. 6, 2020).

Memorandum PFC 73-20, [Streamlined Procedures for Passenger Facility Charge \(PFC\) Authorizations at Small-, Medium-, and Large-Hub Airports](#) (Jan. 22, 2020).

Reauthorization Program Guidance Letter (R-PGL) 19-04, [Pilot Program Eligibility](#) (Jan. 22, 2020).

Final Rule, [Administrative Rulemaking, Guidance, and Enforcement Procedures](#), 84 Fed. Reg. 71,714 (Dec. 27, 2019) (eff. Jan. 27, 2020).

DEPARTMENT OF TREASURY

Final Rule, [Provisions Pertaining to Certain Transactions by Foreign Persons Involving Real Estate in the United States](#), 85 Fed. Reg. 3158 (Jan. 17, 2020) (includes specific provisions concerning airports).

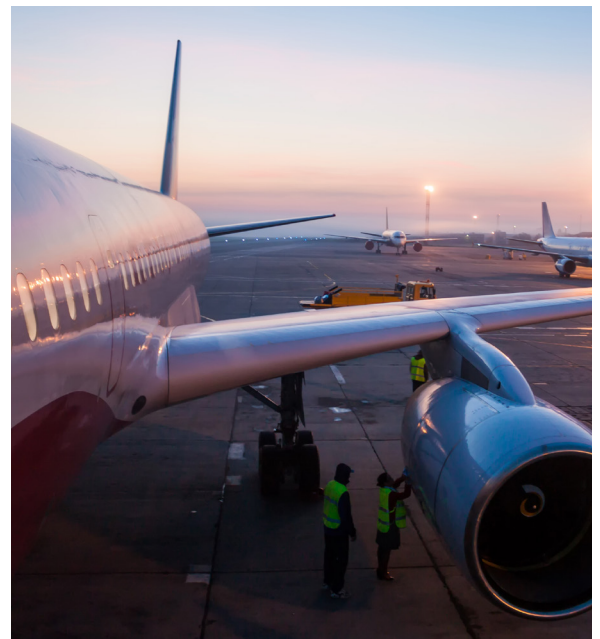
DEPARTMENT OF JUSTICE

FBI Private Industry Notification No. 20200612-001, [Unattributed Cyber Actors Register Domains Spoofing Legitimate Airport Websites as a Possible Precursor to Future Operational Activity](#) (June 12, 2020).

Memorandum, [Guidance Regarding Department Activities to Protect Certain Facilities or Assets from Unmanned Aircraft and Unmanned Aircraft Systems](#) (Apr. 13, 2020).

COUNCIL ON ENVIRONMENTAL QUALITY

Notice of Proposed Rulemaking, [Update to the Regulations Implementing the Procedural Provisions of the National Environmental Policy Act](#), 85 Fed. Reg. 1684 (Jan. 10, 2020) (comment period expired Mar. 10, 2020).



REPORTS, STUDIES, ARTICLES, & OTHER PUBLICATIONS

Listed in Reverse Chronological Order

U.S. DEPARTMENT OF TRANSPORTATION

Office of Inspector General, Report No. EC2020036, [Changes in Airline Service Differ Significantly for Smaller Communities, but Limited Data on Ancillary Fees Hinders Further Analysis](#) (May 27, 2020).

Office of Inspector General, Report No. AV2020028, [Contract Towers Are More Cost Effective Than Comparable FAA Towers and Have Similar Safety Records](#) (Apr. 28, 2020).

Office of Inspector General, Report No. IT2020027, [FAA Lacks Sufficient Security Controls and Contingency Planning for Its DroneZone System](#) (Apr. 15, 2020).

FAA, [Response Letter to Quiet Skies Caucus](#) (January 24, 2020).

U.S. GOVERNMENT ACCOUNTABILITY OFFICE

Report No. GAO-20-275, [TSA Could Strengthen Its Insider Threat Program by Developing a Strategic Plan and Performance Goals](#) (Feb. 2020).

CONGRESSIONAL RESEARCH SERVICE

Report No. IF11550, [Protecting Against Rogue Drones](#) (May 15, 2020).

Report No. IF11420, [Aircraft Noise and Air Traffic Control Modernization](#) (Jan. 27, 2020).



TRANSPORTATION RESEARCH BOARD, AIRPORT COOPERATIVE RESEARCH PROGRAM

Research Reports

Research Report 216: [Guidebook for Assessing Collaborative Planning Efforts Among Airport and Public Planning Agencies](#) (Apr. 15, 2020).

Research Report 215: [Transportation Network Companies \(TNCs\): Impacts to Airport Revenues and Operations—Reference Guide](#) (Mar. 31, 2020).

Research Report 218: [Building and Maintaining Air Service Through Incentive Programs](#) (Mar. 30, 2020).

Research Report 211: [Guidance for Using the Interactive Tool for Understanding NEPA at General Aviation Airports](#) (March 9, 2020).

Research Report 213: [Estimating Market Value and Establishing Market Rent at Small Airports](#) (Feb. 7, 2020).

Research Report 220: [Guidebook for Developing a Zero- or Low-Emissions Roadmap at Airports](#) (Jan. 7, 2020).

Synthesis Reports

Synthesis 106: [Airport Risk Identification and Prioritization Practices](#) (Mar. 3, 2020).

Legal Research Digests

Legal Research Digest 38: [Legal Issues Related to Large-Scale Airport Construction Projects](#) (Feb. 14, 2020).

Web-Only Documents

Web-Only Document 46: [Recovering International Recyclables from In-Flight Service](#) (May 18, 2020).

Web-Only Document 45: [Airport Environmental Research Roadmap Narrative Report](#) (Feb. 18, 2020).

OTHER INSTITUTIONAL AUTHORS

National Cooperative Highway Research Program

Research Report 938: [Incorporating the Costs and Benefits of Adaptation Measures in Preparation for Extreme Weather Events and Climate Change Guidebook](#) (March 23, 2020).

Airport Consultants Council (ACC)

ACC Report, [Capital Development at US Airports](#) (March 5, 2020)

COVID-19 MATERIALS

U.S. Department of Transportation, [Runway to Recovery: The United States Framework for Airlines and Airports to Mitigate the Public Health Risks of Coronavirus](#) (July 2020).

Airports Council International – North America, [COVID-19 Recovery Recommendations](#) (June 2020).

FAA, [Information for Airport Sponsors Considering COVID-19 Restrictions or Accommodations](#) (updated May 29, 2020).

FAA, [CARES Act Airport Grants – Frequently Asked Questions](#) (updated May 29, 2020).

Part 139 CertAlert No. 20-03, [Notice to Airmen \(NOTAM\) Examples when Closing Runway\(s\) and/or Taxiway\(s\) to Temporarily Park Aircraft](#) (May 5, 2020).

United States Department of Transportation, Docket DOT-OST-2020-0037, [Final Order Regarding Continuation of Certain Air Service](#) (Apr. 7, 2020).

FAA, [Considerations for State, Local, and Territorial COVID-19 Restrictions That Impact Air Transportation](#) (Mar. 28, 2020).
[Coronavirus Aid, Relief, and Economic Security \(CARES\) Act](#), Pub. Law No. 116-136 (Mar. 27, 2020).

Part 139 Cert Alert No. 20-02, [Temporary Parking of Overflow Aircraft](#) (updated Mar. 24, 2020)

Congressional Research Service, Report No. IN11267, [COVID-19 and Funding for Civil Aviation](#) (Mar. 23, 2020).

Congressional Research Service, Report No. IN11265, [COVID-19 and Passenger Air Travel](#) (Mar. 20, 2020).

Compliance Guidance Letter 2020-01, [FAA Guidance for Handling Proposals to Temporarily Close or Restrict All or Parts of Federally Obligated Airports for Non Aeronautical Purposes Related to Public Health Concerns](#) (Mar. 16, 2020).



36TH ANNUAL AIRPORT LAW WORKSHOP

The 36th Annual AAAP Airport Law Workshop is going virtual! Instead of meeting in person in Seattle, we will be convening an abbreviated **five-part series of ninety-minute webinars** through the month of **October**. We will, like usual, address the basics of airport law and provide legal updates since last year's conference. Watch for details for the webinars, CLE credit, and dates – in the next few weeks. Like always, updates will be posted at www.airportlawworkshop.com. We look forward to seeing our colleagues as soon as meetings and conferences become practical again.

**DATES
COMING
SOON!**

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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.

The Airport Law Digest is a semi-annual publication of Kaplan Kirsch & Rockwell LLP and is provided as a complimentary service to registrants of the annual Airport Law Workshop. The Digest is for informational purposes only and is not for the purpose of providing legal advice – including the application of law to any particular set of facts and circumstances. Readers are urged to consult their counsel and consultants concerning their own situation and any specific legal questions.

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 contact us at info@kaplankirsch.com or at one of our offices below.

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