



## Operational and Legal Issues with Fuel Farms

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## AIRPORT COOPERATIVE RESEARCH PROGRAM

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# Legal Research Digest 28

## OPERATIONAL AND LEGAL ISSUES WITH FUEL FARMS

This report was prepared under ACRP Project 11-01, Topic 06-01, "Legal Aspects of Airport Programs," for which the Transportation Research Board (TRB) is the agency coordinating the research. The report was prepared by W. Eric Pilsk, Kaplan Kirsch and Rockwell LLP; David C. Benner, Aviation Management Consulting Group; and Louis M. Timpanaro, Jr., Crystal and Company.

### Background

There are over 4,000 airports in the country and most of these airports are owned by governments. A 2003 survey conducted by Airports Council International–North America concluded that city ownership accounts for 38 percent, followed by regional airports at 25 percent, single county at 17 percent, and multi-jurisdictional at 9 percent. Primary legal services to these airports are, in most cases, provided by municipal, county, and state attorneys.

Reports and summaries produced by the Airport Continuing Legal Studies Project and published as ACRP Legal Research Digests are developed to assist these attorneys seeking to deal with the myriad of legal problems encountered during airport development and operations. Such substantive areas as eminent domain, environmental concerns, leasing, contracting, security, insurance, civil rights, and tort liability present cutting-edge legal issues where research is useful and indeed needed. Airport legal research, when conducted through the TRB's legal studies process, either collects primary data that usually are not available elsewhere or performs analysis of existing literature.

### Applications

Airports need to provide a ready source of fuel for all of their users, including commercial airlines, general aviation, corporate aircraft operators, and other commercial operators. Fuel farms are an efficient way to provide the storage and dispensing of aviation fuels to multiple users at an airport. But there are different ownership and operating models for achieving this objective. Some airports may choose to serve as the single source of fuel, while others retain commercial providers, and still larger airports may have an airline fuel consortium. Analyzing the most appropriate model includes understanding the legal issues, safety and operational standards, risk assignment, environmental liability and other risk management issues, and insurance limits and structures, in addition to the various state, federal, and local rules and regulations.

This digest is a practical guide to assist airport sponsors and their legal counselors in 1) understanding the basic legal and operational issues, and 2) evaluating the appropriate ownership and operating model at the airport.

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## OPERATIONAL AND LEGAL ISSUES WITH FUEL FARMS

By W. Eric Pilsk, Kaplan Kirsch and Rockwell LLP; David C. Benner, Aviation Management Consulting Group; and Louis M. Timpanaro, Jr., Crystal and Company

### I. INTRODUCTION

Aircraft fuel is one of the most important resources an airport can provide. At the simplest level, aircraft cannot operate without fuel. Providing a reliable and affordable source of quality aviation fuel—whether avgas for piston-powered aircraft or jet fuel for turbine-powered aircraft—is an essential service at an airport. Accordingly, deciding who will provide aircraft fueling services and under what terms and conditions is one of the most important decisions an airport sponsor can make. Over time, airports and their users have developed numerous ownership and operating models to meet the legal and operational requirements of a fuel distribution system. The purpose of this digest is to provide a practical guide to assist airport sponsors and legal professionals in 1) understanding the basic legal and operational issues presented by on-airport fuel distribution systems and 2) evaluating an appropriate ownership and management model to address those legal and operational issues.

This guide is based in part on the results of a survey of 11 airports that represent a cross-section of the industry in terms of size, location, and fuel farm ownership and management model. One of the more striking results of the survey was that most airport sponsors have selected their fuel farm ownership and management model in a passive manner, by simply continuing historic practice or following the lead of large airport users. At the same time, virtually all airport sponsors surveyed indicated that they were pleased with their fuel farm operating and management model and would not make a change.

Often, however, an airport sponsor may not have the luxury of continuing to use the same fuel farm ownership and management model. Changes to an existing fuel provider, such as bankruptcy, new ownership, or corporate restructuring, or changes in airport operations, such as the introduction or expansion of commercial service, an increase in jet operations, or higher volumes of general aviation traffic, may cause an airport sponsor to rethink its fuel farm ownership and management model. An important goal of this guide is to draw lessons from the experience of a cross-section of airports based on

survey responses in order to help other airports 1) select the appropriate ownership and management model and 2) identify and address the legal and risk management issues posed by changes in fuel farm operations.

This digest is structured in a way to provide guidance for professionals addressing fuel farm issues for the first time, as well as professionals with considerable experience looking for more sophisticated guidance on specific issues. Accordingly, this guide begins with basic information on the operation of the typical fuel supply system, the role of the fuel supply system in overall airport operations, and the basic documents typically used to control the fuel supply system.

The digest then discusses the different ownership and operating models and the key legal and operational issues relating to any fuel supply system. This section is based in part on interviews with airport managers and includes examples of key language from airport documents to illustrate how airports meet their obligations and goals. Because of the importance of insurance and risk management, the digest includes a detailed discussion of the insurance and risk management tools available to airport sponsors and some of the associated coverage issues.

This digest is intended to provide an overview of the principal legal and operational issues relating to fuel farms; it is not intended to provide legal advice regarding any particular issue or to provide detailed guidance on specific legal or operational issues that apply to fuel farms or the myriad technical issues related to fuel farm operations. Where appropriate, this guide identifies additional resources for more in-depth information on specific topics. Many of those issues have been addressed in other Airport Cooperative Research Program (ACRP) publications:

- ACRP *Legal Research Digest 8, The Right to Self-Fuel* (2009).
- ACRP *Legal Research Digest 11, Survey of Minimum Standards: Commercial Aeronautical Activities at Airports* (2011).
- ACRP *Synthesis 31, Airline and Airline–Airport Consortiums to Manage Terminals and Equipment* (2011).

- ACRP *Synthesis 63, Overview of Airport Fueling System Operations* (2015).

For additional information on a specific issue mentioned in this guide, consult the appropriate ACRP publication or the authority cited in the footnotes.

## II. FACTUAL BACKGROUND

### A. Definition of Fuel Farm

At the outset, it is important to define how the term “fuel farm” is used in this digest. In the narrowest sense, a fuel farm is numerous fuel storage tanks located in a single facility. Each tank may be under separate ownership or management, and the fuel in each tank may be owned by more than one entity. A fuel farm, however, is part of a larger fuel storage and distribution system that moves fuel from off-airport suppliers through storage tanks and into aircraft. Ultimately, the purpose of the fuel distribution system is to provide a safe, efficient, and cost-effective means to deliver aviation fuel from the refinery to aircraft.

The fuel farm is the heart of an airport fuel delivery system. Operating control of the fuel farm itself may also entail operation and control of the intake and distribution components of the fuel delivery system. How the ownership and management of the fuel farm itself is structured tends to drive how the airport sponsor regulates or manages the other components of the fuel distribution system. To reflect that central role, this digest will use the term “fuel farm” to refer to the fuel storage facilities *and all other components of the fuel delivery system that are owned or operated by the same entity that owns or operates the fuel storage facility*.

That broad understanding of fuel distribution systems is also consistent with the critical role fuel plays in airport operations. Because fuel is essential for nearly all aircraft operations, an airport that can provide a reliable source of quality and reasonably priced fuel will be able to attract and retain aeronautical tenants and users. That not only serves the basic purpose of an airport but provides income to enable airports to meet the legal goal of self-sustainability through fuel flowage fees, local sales taxes, rents, and other fees and charges. Fuel sales are also an important source of revenue for fixed-base operators (FBO) and other service providers who sell fuel directly to aircraft operators. Balancing users’ desire for reasonably priced, quality fuel with the financial needs of the airport sponsor or fuel retailers is an important consideration in selecting the appropriate ownership and operating model and setting the terms of that model.

### B. Goals of a Fuel Distribution System

To better understand the dynamics of how to best address the legal and operational issues posed by a fuel distribution system, it is useful to identify the key goals of such a system.

- *Fuel Access and Availability*. The primary goal of any fuel distribution system is to assure that fuel is available to aeronautical users and that aeronautical users have convenient access to that fuel. Although simply allowing fuel sales on an airport satisfies that objective, the goal of an airport sponsor is to assure that fuel is available to aeronautical users on reasonably convenient terms and conditions, including physical access to the fuel. This goal also includes the legal obligation to accommodate self-fueling to allow individual users to buy, store, and pump their own fuel into their own aircraft.

- *Fuel Pricing*. Fuel is a significant cost of operating an aircraft. Providing reasonably priced fuel at a competitive price is an important goal to assure that aeronautical users have meaningful access to fuel. From an airport sponsor’s perspective, fuel sales are a potential source of revenue through rents (which may include a base rent and additional rent based on fuel sales volume), fuel flowage fees, or direct sales tax.

- *Safety*. Because of the flammable nature of aviation fuel, assuring the safety of the fuel distribution system is essential. As discussed in the following section, almost every aspect of the fuel distribution system is subject to industry and government standards governing the fuel itself; the equipment used to transport, store, and deliver fuel; the personnel who handle the fuel; and the airport staff who oversee the fuel distribution system.

- *Environmental Compliance*. Because aviation fuel is a hazardous substance, its storage and use is subject to extensive regulation to prevent environmental damage. This includes measures to prevent or minimize environmental damage due to air emissions, spills, and infiltration into water sources. Moreover, environmental laws provide often complex rules for allocating liability to assure that environmental damage, whether past or current, is remediated. The legal and management structure of a fuel distribution system should address these often complex environmental obligations.

- *Security*. In the environment that followed the terrorist attacks of September 11, 2001, assuring airport security is a necessity. Because of the flammable nature of fuel storage facilities, fuel distribution systems raise particular security concerns. Similarly, because fuel must enter the airport, airport sponsors must assure that the people and property entering the airport do not pose a security threat.

- *Risk Management.* The safety, environmental, security, and liability risks posed by a fuel distribution system make it important for airport sponsors to manage the liability risk posed by fuel distribution, whether through best management and operational practices, insurance, or indemnity protection.

### C. Fuel Distribution System Components

Another predicate to understanding how to address fuel distribution services is to understand the different components of the fuel distribution system and identify who owns, operates, and uses each component. In simple terms, a fuel distribution system consists of three basic components:

1. *Fuel Delivery to the Airport.* The first step in the fuel distribution process is to deliver fuel to the airport. This process technically begins at the refinery and includes the critical certification process to validate the grade and quality of the fuel. From the refinery, fuel is delivered to airports through local or regional distributors, who deliver fuel to the airport by truck. This is often the method used at smaller airports or for smaller fuel storage facilities owned by FBOs or individual operators. As an alternative, fuel may be delivered to on-airport storage tanks directly from a pipeline. A pipeline delivery system may include ancillary facilities, such as settling tanks, pumps, and additional pipes. As discussed in the following section, understanding who owns the delivery equipment and facilities (and underlying land) and who is performing the work is critical to providing the appropriate legal structure for the fuel distribution system.

2. *Fuel Storage.* At the heart of a fuel farm are the fuel storage tanks and related pumps, filters, safety systems, and containment vessels. Depending on the size of the airport and the number of tank owners, the storage system may consist of multiple tanks for each fuel grade (avgas and jet fuel). Modern fuel tanks are typically built above ground, or in sunken open-air “vaults,” and are surrounded by a wall designed to contain a fuel spill. Each fuel tank may be owned by separate owners, or all fuel tanks may be owned by a single owner. Moreover, the fuel in each tank may be owned by one entity or multiple entities.

3. *Fuel Delivery.* The final component of a fuel distribution system is the method of delivering fuel from the storage facility to the aircraft. Many airports use trucks to deliver fuel to aircraft, which are usually fueled in specified locations for safety and environmental purposes. Other airports, particularly commercial-service airports with hard-stand aircraft parking facilities, use a hydrant system that uses underground pipes to deliver fuel to hydrants located at aircraft parking locations.

A hydrant lifting pump is then used to pump fuel into the aircraft. Many airports also offer a self-service pumping station to allow aircraft operators to fuel aircraft themselves.<sup>1</sup>

To understand how best to address the legal and operational issues regarding a fuel farm and fuel distribution system, it is important to understand *who* is doing what with respect to each component:

*Who* owns the facility or equipment?

*Who* owns the fuel itself?

*Who* owns or controls the land on which the facility or equipment is located or operated?

*Who* operates the facility or equipment?

*Who* uses the facility or equipment?

There may be more than one entity in answer to each question. Knowing who those entities are will help the airport sponsor structure the organization of the fuel distribution system in a way that imposes legal and operational obligations on the appropriate entity.

### D. Fuel Farm Governance Documents

Similar to other on-airport aeronautical activities, the operational obligations of airport fuel farms are managed through a series of airport sponsor documents (e.g., standard operating procedures, rules and regulations, minimum standards, lease agreements, and licenses or permits) based on the type of fuel farm operating and management models utilized by the airport sponsor. Each of these documents is developed for a unique purpose and a specific audience, as follows:

- *Standard operating procedures* are typically developed by airport sponsors (or the operator of the fuel farm) to address the unique operating requirements of the fuel farm and the associated physical layout at that airport. Each airport sponsor should develop, or require the development of, standard operating procedures to facilitate the safe and secure operation of the fuel farm at that airport. These procedures include detailed fuel tender routing, vehicle escort requirements, use of an interconnected gate system to access the fuel

<sup>1</sup> This form of “self-service fueling” is different than the legal obligation of an airport sponsor to allow aeronautical users to “self-service” their aircraft, including “self-fueling.” In the legal context, “self-service” and “self-fueling” means allowing aircraft operators to service their own aircraft, including buying fuel from the supplier of their choice and fueling their own aircraft. FEDERAL AVIATION ADMINISTRATION, Order 5190.6B, FAA COMPLIANCE MANUAL at ¶ 6.3(b) (Sept. 30, 2009) (hereinafter “Compliance Manual”). The Grant Assurances require obligated airport sponsors to allow self-fueling. See 19–20, *infra*. Providing a self-service pump to allow an aircraft operator to buy fuel from an on-airport fuel supplier and pump that fuel itself is not self-fueling, however.

farm, and procedures for accessing, operating, and maintaining specific equipment. Because of the unique nature of each airport's standard operating procedures, this digest is intended to provide an overview of the types of issues that operating procedures should address.

- *Rules and regulations* apply to all persons using the airport—at all times—for any purpose, including entities managing, operating, accessing, and using a fuel farm. An airport's rules and regulations provide standards and procedures to ensure the safe, orderly, and efficient use of the airport and fuel farm and to protect the public health, safety, interest, and welfare of airport users. Rules and regulations related to a fuel farm would typically include fuel quality control, training, fuel-handling procedures, and noncommercial self-fueling requirements.

- *Minimum standards* are typically reserved for commercial aeronautical activities consistent with Federal Aviation Administration (FAA) Advisory Circular 150/5190-7, *Minimum Standards for Commercial Aeronautical Activities*.<sup>2</sup> Minimum standards establish consistent threshold requirements to promote fair competition by setting forth the minimum requirements that commercial aeronautical service providers must meet. Minimum standards related to a commercial fuel farm would typically include fuel storage capacity (by fuel type), hours of operation, environmental standards, fuel supply, and fuel volume reporting.

- *Lease agreements* set forth the specific terms and conditions under which a commercial aeronautical operator or tenant would use or occupy land or improvements associated with a fuel farm at the airport. Leases typically include insurance requirements, indemnity provisions, and environmental standards.

- *Operating permits* convey the permissions by which a commercial aeronautical operator or tenant can engage in commercial aeronautical activities or noncommercial self-fueling at the airport. Operating permits often incorporate standards and rules from minimum standards and rules and regulations and impose specific insurance, training, indemnity, and other requirements.

Depending on the current operational or management fuel farm model at a given airport, the airport sponsor will need to develop and establish the applicable documents to ensure that all operational obligations support a seamless supply of aviation fuel to

the end user in a safe, orderly, and efficient manner. In addition, the airport sponsor needs to ensure that enforcement mechanisms are clearly stated in unambiguous terms in the applicable documents and consistently enforced throughout the term of the agreement and permit.

Based on the existing operational or management model, the documents typically utilized are shown in Table 1 on page 7.

## E. Summary of Operating Models

There are several basic fuel farm ownership and operation models typically used by airport operators and fuel farm operators:

*Airport Sponsor-Owned-and-Operated:* The airport sponsor owns the fuel farm and the airport sponsor's employees operate and manage all aspects of the fuel farm using the airport sponsor's assets and resources. This is the simplest ownership and management model because there is no third party involved. The airport sponsor assumes all responsibility, risks, and rewards for the fuel operation. Airport management assures that its operational and legal objectives are met by developing internal policies and practices and by direct supervision of its employees. Airport users access the fuel farm pursuant to leases, licenses, permits, or other agreements with the airport sponsor.

*Airport Sponsor-Owned and Privately Operated (Under a Management Contract):* Under this model, the airport sponsor owns the fuel distribution system but retains a private firm to operate and manage all aspects of the fuel distribution system. The private operating company and its employees operate and manage the fuel distribution system using the airport sponsor's assets. The airport sponsor assures that the private contractor meets applicable legal and operational goals through a management contract or other similar contract for services.

*Airport Sponsor-Owned and Privately Operated (Under a Lease Agreement):* Under this model, the airport sponsor owns the fuel farm, which it leases to a private entity. The private entity's employees operate and manage the fuel distribution system using the private entity's assets and resources. The airport sponsor assures that the lessee meets applicable legal and operational goals through terms and conditions in the lease agreement and other airport governance documents, such as rules and regulations or minimum standards, that may be incorporated into the lease.

*Privately Owned and Operated:* Under this model, a private entity owns the fuel distribution system and the private entity's employees construct,

<sup>2</sup> Federal Aviation Administration, Advisory Circular 150/5190-7, *Minimum Standards for Commercial Aeronautical Activities* (Aug. 28, 2006).

**Table 1. Fuel Farm Governance Documents**

	Airport Sponsor-Owned-and-Operated	Airport Sponsor-Owned and Privately Operated (Management Contract)	Airport Sponsor-Owned and Privately Operated (Lease Agreement)	Privately Owned and Operated (Commercial)	Privately Owned and Operated (Noncommercial)	Consortium
Standard Operating Procedures	X	X	X	X	X	X
Rules and Regulations	X	X	X	X	X	X
Minimum Standards	X	X	X	X		X
Lease Agreement			X	X	X	X
Operating Permit		X	X	X	X	X

operate, and manage all aspects of the fuel distribution system using the private entity's assets and resources. The airport sponsor typically leases the land under the fuel distribution system to the private operator, but the private operator is responsible for building and operating the system itself.

*Consortium.* This model is a variation of the last two models and describes the circumstance when the private entity is comprised of a group—a consortium—of airport tenants or users. Consortium members are typically airlines and cargo operators constituted as a special-purpose legal entity such as a limited liability corporation. The basic relationship between the consortium and the airport sponsor is similar to the relationship with a private fuel farm operator and is set forth in a lease agreement or contract. In addition, there is an agreement among the consortium members governing the consortium itself, such as an “Interline Agreement,” and typically a contract between the consortium and a management company that operates the fuel distribution system itself as a contractor to the consortium.<sup>3</sup>

<sup>3</sup> There are a number of variations on the consortium model. For example, at airports with a dominant carrier, the fuel farm may be operated under a “special facilities model” in which the dominant carrier operates or controls the fuel farm as a hybrid of the privately owned and operated and consortium models. Although operated by a single entity, the special facilities model functions like a consortium because it is operated by a fuel user (and competitor of other users) and allows its competitors access to the fuel farm.

It is important to note that a single model may not cover all fuel suppliers on a given airport. For example, an airport with two FBOs may use a different model for each FBO. Similarly, an airport with a fuel consortium that supplies jet fuel to commercial air carriers may also have one or more FBOs that supply fuel to piston-powered aircraft for nonscheduled operations, which may be operated under a different model than the consortium. Those FBOs (or other entities) may purchase jet fuel from the consortium for resale to their customers or may participate in the consortium as nonmembers. The airport sponsor may have a different kind of legal relationship with each of those entities. For example, one FBO may be operated as a lessee and the other FBO may resell fuel as a licensee or permittee of the airport sponsor.

In addition, there may be others involved in the fuel distribution system not covered by any fuel farm ownership model. For example, airport users may use fueling service providers to transport fuel from the storage facility and pump the fuel into the aircraft. That service provider may be an independent entity that is not covered under the lease agreement with the fuel farm operator. The airport sponsor will need to provide for the appropriate legal structure to assure that the fuel service provider abides by applicable rules and standards through a license or permit. Other entities may exercise their right to self-fuel, which is typically



addressed in airport leases, rules and regulations, minimum standards, or permits.<sup>4</sup>

### III. HOW AIRPORT SPONSORS MEET KEY LEGAL ISSUES APPLICABLE TO FUEL FARMS

Fuel farms, like other on-airport activities, are subject to a number of different laws and regulations under federal, state, and local law. Although it is not practicable to provide a comprehensive discussion of every possible law that might apply to a fuel farm, this guide identifies the primary legal issues that an airport sponsor may face in connection with a fuel farm. Although the focus will be on federal law issues, including in particular FAA grant obligations, Part 139 requirements, and environmental law issues, this guide will also discuss commonly encountered state law issues at a general level. For each legal issue, the guide will discuss how airport sponsors typically address those legal issues and how that approach may vary based on the ownership and management model.

#### A. FAA Grant Assurances

Among the principal legal obligations of any federally obligated airport sponsor are the 39 Sponsor Assurances that are conditions of compliance with federal grant obligations. Although all Sponsor Assurances apply as a general matter, several Sponsor Assurances have particular applicability to fuel farms.

##### 1. Assurance 5 (*Preserving Rights and Powers*)

Sponsor Assurance 5 provides that an airport sponsor

will not take or permit any action which would operate to deprive it of any of the rights and powers necessary to perform any or all of the terms, conditions, and assurances in the grant agreement without the written approval of the Secretary, and will act promptly to acquire, extinguish or modify any outstanding rights or claims of right of others which would interfere with such performance by the sponsor. This shall be done in a manner acceptable to the Secretary.<sup>5</sup>

<sup>4</sup> Although unusual, an entity may seek to establish an off-airport fuel farm and bring fuel onto the airport using a through-the-fence operation. In that case, the operation would be governed largely under a through-the-fence agreement, which is subject to a different set of legal standards that are beyond the scope of this guide. See Agreement to Conduct Through-the-Fence Operations at The Ohio State University Airport (May 6, 2015) (fuel storage and self-service for Ohio Department of Transportation). For information on through-the-fence operations in general, see Airport Cooperative Research Program, *Report 114, Guidebook for Through-the-Fence Operations* (2014).

<sup>5</sup> Compliance Manual, App. A.

Assurance 5 prohibits an airport sponsor from taking “any action that may deprive it of its rights and powers to direct and control airport development and comply with the grant assurances.”<sup>6</sup> FAA construes Assurance 5 as imposing an obligation on airport sponsors to preserve those powers in the context of almost every contract an airport sponsor enters into, because any contract could be understood to bargain away or limit a sponsor’s ability to take action necessary to assure compliance with grant obligations.<sup>7</sup> Assurance 5 identifies three particular kinds of contracts that frequently come up in the fuel farm context: selling ownership of airport property, leasing airport property, and entering into a contract for another entity to manage all or part of the airport.<sup>8</sup>

The sale or disposal of airport property requires prior FAA approval.<sup>9</sup> Leases and management contracts do not require prior FAA approval, but the airport sponsor must retain sufficient authority to compel the lessee or management company to take actions to comply with federal obligations.<sup>10</sup> The preferred way of achieving this is through a “subordination clause” in the lease, contract, or other agreement that gives the airport sponsor the authority to order the lessee or contractor to take whatever action is necessary to comply with federal obligations even if such action is otherwise prohibited by the lease or contract.<sup>11</sup> A typical subordination clause states:

This Lease is subject and subordinate to the provisions of any agreement heretofore or hereafter made between the Port of Seattle and the United States, the execution of which is required to enable, or permit transfer of rights or property to the Port for Airport purposes or expenditure of federal grant funds for Airport improvement, maintenance or development. Lessee shall reasonably abide by requirements of agreements entered into between the Port and the United States, and shall consent to amendments and modifications of this Lease if required by such agreements or if required as a condition of the Port’s entry into such agreements.<sup>12</sup>

<sup>6</sup> Compliance Manual at ¶ 6.3(b).

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> *Id.* ¶ 6.6(b); *id.* at App. A, p. 5 (Sponsor Assurance 5(b)). Sales of airport property are generally disfavored, which is why most fuel farms are leased to a fuel farm operator rather than sold.

<sup>10</sup> *Id.* ¶ 12.3.

<sup>11</sup> *Id.* ¶ 6.6(a).

<sup>12</sup> Fuel System Lease By and Between The Port of Seattle and SEATAC Fuel Facilities LLC, at 50 (May 14, 2003).

Similar language is typically found in license agreements and other agreements with third parties related to fueling.<sup>13</sup>

The absence of a subordination clause, coupled with contract provisions that give an airport user the power to take actions that violate sponsor assurances, can constitute a violation of Assurance 5. For example, FAA has found that an airport sponsor violated Assurance 5 by granting a fuel farm operator so much control over ramp space and utility connections that it could deny access to the ramp and facilities<sup>14</sup> and effectively preclude a new fuel farm operator from leasing space. The absence of a subordination clause left the airport sponsor powerless to meet its obligations under Assurances 22 and 23 and therefore violated Assurance 5.

Airport sponsors address Assurance 5 in the same manner regardless of the ownership and management model, although airport sponsors that own and operate the fuel farm themselves do not have an Assurance 5 issue because they do not “contract away” any authority. Although the general principles are the same regardless of ownership and management model, the details of implementation do vary. For example, a consortium model may include an agreement between the consortium and the airport sponsor, an agreement among the consortium members, and contracts between the consortium

<sup>13</sup> Addison Airport, *Aviation Bulk Fuel Dispensing License Agreement*, §§ 26.1, 26.3.

26.1 Licensor and Licensee acknowledge that there are in effect federal, state, county and municipal laws, rules, regulations, standards, and policies (together, “laws”) and that the same may hereafter be modified or amended and additional laws may hereafter be enacted or go into effect, relating to or affecting the Fuel Farm or the Fuel Tanks. Licensee shall not cause, or permit or allow the Licensee parties to cause, any violation of any applicable laws. Moreover, Licensee shall have no claim against Licensor by reason of any changes Licensor may make in the Fuel Farm or the Fuel Tanks required by any applicable laws or any charges imposed upon Licensee, Licensee’s customers or other invitees as a result of applicable laws.

26.3 Licensee hereby acknowledges that Licensor is bound by the terms and conditions of any and all Federal Aviation Administration, Texas Department of Transportation, and other grant agreements, grant assurances and regulations regarding the Airport, and terms of any grant, loan, regulation, or agreement under Section 22.055 of the Texas Transportation Code, as amended or superseded, whether now existing or made in the future. Without limiting the generality of Section 26.1, Licensee agrees not to take any action or omit to take any action in relation to the Fuel Farm that would cause Licensor to be in violation of such terms, conditions, agreements, assurances, regulations, grant or loan.

<sup>14</sup> Final Director’s Determination, *Boston Air Charter v. Norwood Airport Comm’n*, FAA Docket No. 16-07-03, at 27–28 (Apr. 11, 2008).

and nonmembers and the consortium and fuel suppliers, among others. An airport sponsor may want to require that each of those contracts include a subordination clause to assure that the airport sponsor’s authority to compel compliance “flows down” through every contract, so there is no break in its authority. Other models may require a different contract structure, but the principle remains the same.

A similar issue unique to the consortium model is assuring that there is a “real” entity to make the payments necessary to assure that the consortium meets its financial obligations. This is particularly important when the consortium is organized as a special purpose entity, such as a partnership, limited liability partnership (LLP), or limited liability corporation (LLC). The costs of maintaining the fuel farm are typically addressed in an “interline agreement” or similar agreement among consortium members or fuel farm users. These agreements allocate fuel farm costs using an agreed-upon formula. To prevent a situation where one or more parties to the interline agreement fails to make required payments, leaving the consortium underfunded, airport sponsors often require the agreement to include a “step-up” provision that requires nondefaulting parties to the interline agreement to cover the share of the defaulting party.<sup>15</sup> Agreements with consortia also often include provisions requiring that the interline agreement remain in effect and prohibiting amendments to the interline agreement without airport sponsor consent,

<sup>15</sup> Seattle-Tacoma International Airport Amended and Restated Fuel System Interline Agreement at ¶ 7.7(b).

Each Contracting Airline must make payments to the Company in accordance with the terms of this Interline Agreement, with no right of defense, setoff, reduction, recoupment or counterclaim for any reason. Nothing in this Interline Agreement constitutes a waiver by a Contracting Airline of any rights or claims the Contracting Airline may have against the Company, any User or its Into-Plane Agent or the Fuel System Operator under this Interline Agreement or otherwise, but any dispute or recovery upon such rights and claims must be had separately and any recovery shall not be deducted from amounts payable by the Contracting Airline under this Interline Agreement. In the event of the failure of any Contracting Airline to pay its share of the Total Facilities Charge which is not satisfied by such defaulting Contracting Airline’s Reserve Account, each non-defaulting Contracting Airline must pay, within ten (10) days after a written demand from the Company and/or an invoice from the Fuel System Operator authorized by the Company, its pro rata share of the amount in default, determined in accordance with the allocation set forth in Section 7.3 above, but calculated assuming that the defaulting Contracting Airline was not a Contracting Airline for the month in question. In the event of default in the payment of any amounts due to the Company from any Contracting Airline, such defaulted amounts may also be collected as provided in Article 8.

in order to prevent the consortium members from diluting their financial responsibilities.<sup>16</sup>

## 2. Assurance 22 (Economic Nondiscrimination)

Assurance 22 provides that an airport sponsor must “make its aeronautical facilities available to the public and its tenants on terms that are reasonable and without unjust discrimination.”<sup>17</sup> FAA explains that there are three aspects of this requirement: 1) making facilities available for public use, 2) imposing terms on aeronautical users that are reasonable, and 3) applying those terms without unjust discrimination.<sup>18</sup>

In the context of fuel farms, this requirement imposes obligations primarily in three areas. First, an airport sponsor must provide new fuel operators access to the airport on reasonable, nondiscriminatory terms. FAA has made clear that an airport sponsor may not deny a fuel farm operator access to the airport based on the objections of an existing farm operator and may not enter into a lease with a fuel farm operator that gives that operator an

<sup>16</sup> Fuel System Lease By and Between The Port of Seattle and SEATAC Fuel Facilities LLC at ¶ 7.3(a). *Interline Agreement*.

Lessee has entered into the Interline Agreement with the Contracting Airlines. Lessee covenants and agrees that the Interline Agreement shall remain in full force and effect, and further covenants and agrees to enforce the terms of the Interline Agreement. Lessee shall provide written notice to the Port and, so long as the Bonds or any Reimbursement Obligations are Outstanding, to the Trustee and Bond Insurer, of any “Event of Default” under the Interline Agreement with respect to (a) any single Contracting Airline which represented more than five (5) percent of Gallonage for the preceding twelve (12) months and (b) with respect to any Contracting Airline in the event that there are eight or fewer Contracting Airlines under the Interline Agreement at the time of the Event of Default.

The Interline Agreement, as amended from time to time, is and shall be attached as Appendix B hereto. Except for Sections 3.2 through 3.4 and 5.2 through 5.4, Lessee shall not amend the Interline Agreement without the prior written consent of the Port and, for so long as Bonds or any Reimbursement Obligations are outstanding, the prior written consent of the Bond Insurer. All such consents, together with the relevant amendment to the Interline Agreement, shall be attached to Appendix B but shall not be incorporated herein. Lessee covenants to provide written notice to the Port (and so long as the Bonds or any Reimbursement Obligations are outstanding, the Trustee and the Bond Insurer), at the earliest possible date, of the proposed termination of the Interline Agreement pursuant to its terms. Lessee shall not terminate the Interline Agreement without the prior written consent of the Port and so long as the Bonds of any Reimbursement Obligations are outstanding, without the prior written consent of the Trustee and the Bond Insurer.

<sup>17</sup> Compliance Manual at ¶ 9.1(a).

<sup>18</sup> *Id.*

effective veto over a new fuel farm operator.<sup>19</sup> This issue can be particularly difficult when the airport has a single, centralized fuel farm. Although a centralized fuel farm has many advantages from environmental, safety, and security perspectives, centralization also requires the airport sponsor to assure that new fuel farm operators or fuel suppliers have meaningful access to the fuel farm.

Second, *before* establishing a fuel farm or other components of a fuel distribution system, an airport should define the reasonable conditions on fuel operations and facilities. In practice, these terms may be negotiated as part of the applicable contract or lease, but all such terms should be reasonable and justifiable in the context of the airport. Furthermore, terms and conditions applied to one entity or facility must be applied without unjust discrimination to other equivalent facilities. Accordingly, an airport sponsor should evaluate a term or condition by considering whether it could be applied equally to other similarly situated entities or facilities.

Third, *after* establishing a fuel farm or other fuel facility, the airport sponsor must apply those reasonable terms and conditions to others without unjust discrimination. It is important to understand that the concept “unjust discrimination” provides flexibility for an airport sponsor to adjust standards to different circumstances. For example, a single fuel storage tank to be used by a single user for self-fueling may be subject to different requirements than a multi-tank facility used to supply multiple users. The key is that the airport sponsor be able to justify any different treatment based on the facts.

Another aspect of Assurance 22 is public access, which generally requires that an airport accommodate any aeronautical user on the same terms and conditions as existing aeronautical users. This requirement often causes problems when a new entity seeks access to the airport to open a business in competition with an existing entity. For example, an incumbent FBO may resist attempts by a new FBO to open a fuel sale business at the airport. In addressing the new entrant’s request, an airport sponsor must bear in mind its obligation to provide access to all aeronautical users without unjust discrimination.<sup>20</sup>

Another aspect of access is assuring that airport users have meaningful access to the fuel

<sup>19</sup> Final Director’s Determination, *Boston Air Charter v. Norwood Airport Comm’n*, FAA Docket No. 16-07-03, at 24–26 (Apr. 11, 2008).

<sup>20</sup> The requirement is closely related to Sponsor Assurance 23’s prohibition of granting an exclusive right, discussed in greater detail in the following section, *infra* pp. 21–23.

farm. On a day-to-day basis, this may mean requiring that fuel farm operators maintain certain hours of operation or be able to open the fuel farm within a specified period of time.<sup>21</sup> Providing for access may also require the airport sponsor to include language in the relevant agreement requiring that the fuel farm operator provide access to specific entities, such as self-fuelers, into-plane operators, or, in the case of a consortium, nonconsortium members.

Assurance 22 includes two subsections of particular applicability to fuel farms and fuel operations. Assurance 22(f) provides that an airport sponsor

will not exercise or grant any right or privilege which operates to prevent any person, firm, or corporation operating aircraft on the airport from performing any services on its own aircraft with its own employees [including, but not limited to maintenance, repair, and fueling] that it may choose to perform.<sup>22</sup>

Similarly, Assurance 22(d) preserves the right of air carriers to self-service or to use any authorized FBO to perform service on its aircraft.<sup>23</sup>

These rights to self-fuel and self-service are not absolute, however. FAA has made clear that self-fueling and self-servicing may be limited by reasonable, nondiscriminatory conditions. For example, FAA has affirmed the authority of an airport sponsor to require that self-fuelers store fuel in a central fuel farm rather than on the self-fueler's leasehold.<sup>24</sup> FAA has also found that an airport sponsor may terminate a temporary permit allowing truck fueling operations when those operations violate fire codes and other safety standards, but that the sponsor must allow self-servicing and self-fueling in some way subject to reasonable terms and conditions.<sup>25</sup>

To meet this basic obligation, airports typically adopt minimum standards or airport rules and regulations that establish a uniform set of standards to govern different aeronautical (and other) activities at the airport. If justified, these standards can have the effect of limiting access. For example, FAA has upheld an airport rule

<sup>21</sup> See *infra* p. 42.

<sup>22</sup> Compliance Handbook, App. A at 10 (Sponsor Assurance 22(f)).

<sup>23</sup> *Id.* (Sponsor Assurance 22(d)).

<sup>24</sup> Final Agency Decision, *Monaco Coach Corp. v. Eugene Airport and the City of Eugene, Ore.*, FAA Docket No. 16-03-17, at 13–17 (Mar. 4, 2005). See also Director's Determination, *Scott Aviation v. Dupage Airport Auth.*, FAA Docket No. 16-00-19, at 21 (July 19, 2002) (upholding requirement that fuel trucks be parked off-airport).

<sup>25</sup> Final Director's Determination, *Boston Air Charter v. Norwood Airport Comm'n*, FAA Docket No. 16-07-03, at 27–28 (Apr. 11, 2008).

requiring that all fuel storage tanks be located in the same fuel farm for safety and environmental reasons.<sup>26</sup> Similarly, airports have been able to justify not entering into leases with new entrants based on the application of nondiscriminatory standards, even when those standards were developed after the request to start fueling operations was made.<sup>27</sup> Airport sponsors also include language in leases and contracts requiring lessees and contractors to make their facilities available to all aeronautical users on reasonable and non-discriminatory terms.

With respect to fuel farms and fueling operations, airport minimum standards, rules and regulations, or similar policies impose standards on all aspects of the fuel distribution system, including where fuel is stored, storage tank standards, where aircraft may be fueled, and training and certification requirements for fuel handling and pumping. Often airports will require that all fuelers, including both self-fuelers and commercial fuelers, obtain a fuel-handling permit that includes specific training and safety standards and specifies where fuel can be stored, the standards for storage tanks, where fueling can occur, and what equipment must be used for fueling and storage. For example, Rules and Regulations at Fort Wayne International Airport in Indiana outline specific requirements for self-fuelers as follows:

- (1) Self-Fueling is only permitted if the Aircraft Owner has a valid lease with the Authority.
- (2) Self-Fueling is only permitted if Tenant leases building space equal to or in excess of the square footage as specified in the Minimum Standards.
- (3) Self-Fueling is only permitted if Tenant has a specified provision in the lease permitting this activity and outlining responsibilities regarding this activity.
- (4) Self-Fueling is only permitted if Tenant is the Aircraft Owner or has a current lease documenting exclusive use and control of the Aircraft.
- (5) Self-Fueling is only permitted for Aircraft owned and/or controlled by Operator.
- (6) Copy of the Aircraft Registration must be on file with the Authority for each Aircraft that will be Self-Fueled.
- (7) Self-Fueling will only be allowed in areas designated by the Authority.
- (8) No retailing or wholesaling of fuel of any kind is permitted.

<sup>26</sup> *Monaco Coach*, *supra* at 13–17.

<sup>27</sup> Final Agency Decision and Order, *Airborne Flying Service, Inc. v. City of Hot Springs, Ark.*, FAA Docket No. 16-07-06, at 20–26 (May 2, 2008).

(9) Self-Fuelers shall have a Self-Fueling Permit or a written agreement with the Board for any aviation fuel storage facility and/or fueling vehicle.<sup>28</sup>

These general principles apply regardless of the ownership and management model employed. The precise way in which an airport sponsor assures compliance with Assurance 22 may vary depending on the ownership and management model. For airport-owned facilities, these standards are imposed through internal operating procedures and minimum standards.<sup>29</sup> For third parties, the standards may be imposed through leases, permits, licenses, or other contractual documents. In addition, when faced with requests by new entrants, an airport sponsor must take care to address those requests in a reasonable and nondiscriminatory manner to avoid further issues under Assurance 22.

Moreover, restrictions on fueling operations may require an airport sponsor to assure that operations can be accommodated elsewhere at the airport. For example, a prohibition on storing fuel in hangars or outside of the designated fuel farm would require the airport sponsor to assure that fuel storage capacity is

<sup>28</sup> Fort Wayne–Allen County Airport Auth., Fort Wayne Int'l Airport, 2009 Rules and Regulations Ordinance, § 1.65 (May 18, 2009) (imposing restrictions on self-fueling, including permit requirements). *See also* Port of Portland General Aviation Minimum Standards (v. 2)—“No entity shall engage in Self-Fueling activities unless a valid storage tank Agreement authorizing such activity has been obtained from the Port. Such entities shall herein be referred to as Self-Fuelers.”

<sup>29</sup> The Ohio State University Airport, *Minimum Operating Standard and Requirements for Commercial Operations*, Part II, § I (Nov. 2014):

Section I: Aviation Fuels and Oil Dispensing Service. The Ohio State University has executed its right to serve as the only entity that provides aviation fuels and oil dispensing services at The Ohio State University Airport.

(A) All Aviation fuels delivered to The Ohio State University Airport shall be placed directly into tanks owned and operated by the Airport. Any entity or individual desiring to dispense aviation fuels into their own aircraft shall purchase fuel from the Airport at a rate equal to the cost of the fuel plus an additional percentage fee that is mutually agreed upon between the two parties from time-to-time in a separate agreement. All fuel purchased from the Airport by any entity or individual wishing to dispense aviation fuels into their own aircraft shall be transferred directly into a mobile refueler that meets the standards set forth by the Air Transport Association. Mobile refuelers shall only be stored in locations authorized for such use by The Ohio State University. The employees of any entity or individual wishing to dispense aviation fuels into their own aircraft shall meet all fuel handling, fire, and spill prevention training as prescribed by National Air Transportation Association (NATA) through its Safety 1st program and by the individual fuel manufacturers, including annual recurrent training. Copies of training certificates shall be on file with the Airport.

available on the fuel farm, either by leasing space for a fuel storage tank or by allowing users to use common fuel storage tanks.<sup>30</sup> If the fuel farm is operated by an entity other than the sponsor, then the lease or contract should include provisions to require the fuel farm operator to make fuel storage capacity available on reasonable terms. This is particularly important when dealing with a consortium.

### 3. Assurance 23 (Exclusive Rights)

Assurance 23 prohibits an airport sponsor from granting an exclusive right. FAA defines an exclusive right as

a power, privilege, or other right excluding or debarring another from enjoying or exercising a like power, privilege or right. An exclusive right may be conferred either by express agreement, by imposition of unreasonable standards or requirements or by another means. Such a right conferred on one or more parties, but excluding others from enjoying or exercising a similar right or right, would be an exclusive right.<sup>31</sup>

FAA further explains that this prohibition means that “the sponsor may not grant a special privilege or a monopoly to anyone providing aeronautical services on the airport or engaging in an aeronautical use. The intent of this restriction is to promote aeronautical activity and protect fair competition at federally obligated airports.”<sup>32</sup>

FAA generally recognizes two ways in which an airport sponsor may confer an exclusive right. First, an airport sponsor may grant an express exclusive right by granting a single entity the exclusive right to conduct an aeronautical activity at the airport. For example, FAA has found that a lease provision stating that the airport sponsor would grant only one lease for the sale of aviation fuel until sales exceed 3 million gallons constituted an exclusive right.<sup>33</sup>

Second, an airport sponsor may grant an exclusive right by implication by taking unreasonable actions that have the effect of granting a single entity the exclusive right to conduct an aeronautical activity at the airport.<sup>34</sup> For example, an airport sponsor was held to have created an exclusive right in favor of an existing fuel farm operator by giving

<sup>30</sup> *See Monaco Coach, supra*.

<sup>31</sup> Compliance Manual at ¶ 8.2.

<sup>32</sup> *Id.* at ¶ 8.1.

<sup>33</sup> Director’s Determination, *Platinum Aviation and Platinum Jet Center BMI v. Bloomington–Normal Airport Auth., Ill.*, FAA Docket No. 16-06-09, at 39–40 (Aug. 7, 2000).

<sup>34</sup> *See* Compliance Manual at ¶ 8.4(d) (“it does not matter how the sponsor granted the exclusive right (e.g., express agreement, unreasonable minimum standards, action of a former sponsor, or other means”)); FAA Advisory Circular 5190-6, *Exclusive Rights at Federally Obligated Airports*, at ¶ 1.2 (Jan. 4, 2007) (same).

that fuel farm operator so much control over ramp areas and connections to electric power that it effectively allowed the existing operator to veto a new fuel farm operator's request to operate.<sup>35</sup>

In the fuel farm context, most airport sponsors address the issue of an express grant of an exclusive right by stating in the relevant agreement that the airport sponsor is *not* granting an exclusive right. Typical language provides that “nothing in this Lease shall be construed to grant to Lessee any exclusive right to conduct any aeronautical activity at the Airport.”<sup>36</sup> That is good practice, but is not necessarily sufficient to address Assurance 23 if the sponsor has impliedly granted an exclusive right through other means. For example, leasing an FBO more land than is necessary for its operation, thereby excluding competitors from using that land, could be construed as granting an exclusive right. As with Assurance 22, most airport sponsors address the implied exclusive rights issue by adopting and adhering to minimum standards or other uniform rules and regulation or policies that provide a uniform set of reasonable standards for different aeronautic uses, including fuel farms. Reasonable standards applied in a nondiscriminatory way typically avoid issues under Assurance 23.

Compliance with Assurance 23 does not vary substantially based on the ownership and management model. The exception being that an airport sponsor is permitted to create a proprietary exclusive use in certain circumstances that has the effect of granting itself a monopoly to provide a given aeronautic service.<sup>37</sup> It is important to note that a proprietary exclusive right can only be exercised if the sponsor provides the service with its own employees and resources; it

may not operate an exclusive facility through a management contract or other third-party means.<sup>38</sup>

#### 4. Assurance 24 (Airport Rates and Charges)

An airport sponsor has an obligation to charge reasonable rates for the use of airport land and facilities and to set its overall structure of rates and charges in a manner that will help the airport sponsor achieve the goal of financial self-sustainability. Assurance 24 affords an airport sponsor considerable flexibility in how to meet those obligations, however, particularly with regard to aeronautical users. Most importantly, an airport sponsor is not required to charge full fair-market rent to aeronautical users such as fuel farm operators and fuel service providers. FAA generally considers a fee or rent to aeronautical users to be reasonable if it “reflects the cost of the services or facilities....”<sup>39</sup> In addition, self-sustainability is a goal, not a requirement. An airport sponsor is not *required* to set fees and rents in a manner that guarantees the airport will be self-sustaining, although self-sustainability remains the goal.<sup>40</sup>

Although there is significant variation in the rents and fees airport sponsors charge fuel farm owners and operators, the differences do not depend on the ownership and management model (other than airport-owned), but typically reflect broader economic and bargaining issues. For example, an airport sponsor may set a fuel farm base rent at a very low level, but derive additional income from other sources. As an alternative, the base rent may be low but supplemented by additional rent based on fuel sales volumes or fuel storage capacity. Moreover, an airport sponsor may set rent and overall fuel fees very low to allow the fuel farm operator to make the capital expenditures necessary to address environmental issues or construct new fuel storage tanks or other facilities. The precise calculus will vary considerably from airport to airport based on the particular financial needs of the airport and its users. For purposes of this guide, it is important to note that rents and fees to fuel farm owners and operators, and other fuel service providers, must at a minimum cover the costs to the airport of providing the facilities used by the fuel farm operator (typically the amortized cost of the land and any fixtures) and cannot exceed the fair market value for that land and facilities.<sup>41</sup> Within

<sup>35</sup> Final Director's Determination, Boston Air Charter v. Norwood Airport Comm'n, FAA Docket No. 16-07-03, at 28–29 (Apr. 11, 2008).

<sup>36</sup> Fuel Facilities Ground Lease and Easement—Port of Portland and Portland Fueling Facilities Corporation at ¶ 2.6 (Sept. 29, 2011). 2.6 *No Exclusive Right for Aeronautical Activities*. “Nothing in this Lease shall be construed to grant to Lessee any exclusive right to conduct any aeronautical activity at the Airport.” See also Port of Portland General Aviation Minimum Standards (v. 2):

In accordance with the Airport Assurances given to the federal or state government by the Port as a condition to receiving federal or state funds, the granting of rights or privileges to engage in commercial or Non-Commercial Aeronautical Activities shall not be construed in any manner as affording any entity any Exclusive Right, other than the exclusive use of an entity's Leased Premises and then only to the extent provided in the entity's Agreement or Permit.

<sup>37</sup> Compliance Manual at ¶ 8.5. See The Ohio State University Airport, *Minimum Operating Standard and Requirements for Commercial Operations*, at Part II (Nov. 2014) (stating that airport sponsor will provide fuel storage and sales services as a proprietary exclusive), *supra* note 23.

<sup>38</sup> Compliance Manual at ¶ 8.9(a).

<sup>39</sup> *Id.* ¶ 17.10.

<sup>40</sup> *Id.* ¶ 17.5.

<sup>41</sup> *Id.* ¶ 17.10. It is also important to bear in mind that revenue derived from rents and other charges to fuel farm operators and fuel service providers and revenue from most taxes from fuel sales are considered airport revenue pursuant to Assurance 25 and may only be used for airport purposes. Airport fees and charges are discussed *infra* at pp. 43–45. Airport revenue rules are discussed *infra* at \_\_\_.

those broad parameters, airport sponsors enjoy considerable flexibility to structure appropriate rates and charges.

### 5. Assurance 25 (Airport Revenues)

Assurance 25 requires that revenue generated on airport property be used only for airport purposes.<sup>42</sup> Airport revenue is defined broadly:

Revenue generated by the airport for the aeronautical and non-aeronautical use of the airport includes, but is not limited to, the fees, charges, rents, or other payments received by or accruing to the sponsor from air carriers, tenants, concessionaires, lessees, purchasers of airport properties, airport permit holders making use of the airport property and services, etc.<sup>43</sup>

Rents, fuel flowage fees, and other fees and charges collected from fuel farm operators and users constitute airport revenue and may be used only for airport purposes. The rules regarding airport revenues apply to federally obligated airports and to taxing authorities that collect taxes on aviation fuel.<sup>44</sup> The proper use of airport revenue is a complex subject that has been discussed in detail in other publications<sup>45</sup> and is the subject of substantial FAA guidance.<sup>46</sup> Airport sponsors should consult those publications and similar sources for a detailed discussion of revenue use policies and rules. The rules regarding airport revenue use apply to all airport revenues collected from fuel farm operations regardless of the fuel farm ownership or management model.

One aspect of revenue use obligation that is of particular importance relates to fueling operations. Pursuant to federal law, all taxes on aviation fuels that went into effect after December 30, 1987, are considered airport revenue.<sup>47</sup> FAA interprets this to apply to taxes levied expressly or explicitly on the sale or use of aviation fuel and to general taxes that apply to the sale or use of aviation fuel, such as generally applicable sales and use taxes.<sup>48</sup> If the airport sponsor is the taxing authority, Assurance 25 requires the airport sponsor to take steps to assure that taxes collected for the sale and use of aviation fuels are used only for airport

<sup>42</sup> Compliance Manual at ch. 15. See also 49 U.S.C. § 47107(b) and § 47133; Federal Aviation Administration, *Policy and Procedures Concerning the Use of Airport Revenue*, 64 Fed. Reg. 7696 (Feb. 16, 1999) (“Revenue Use Policy”).

<sup>43</sup> Compliance Manual at ¶ 15.6(a).

<sup>44</sup> *Id.* ¶ 15.7(a).

<sup>45</sup> *E.g.*, THEORY AND LAW OF AIRPORT REVENUE DIVERSION (Airport Cooperative Research Program, Legal Research Digest No. 2, 2008).

<sup>46</sup> *E.g.*, Compliance Manual at ch. 15 and App. (Revenue Use Policy).

<sup>47</sup> 49 U.S.C. § 47107(b).

<sup>48</sup> Policy and Procedures Concerning the Use of Airport Revenue; Proceeds from Taxes on Aviation Fuels, 78 Fed. Reg. 69789 (Nov. 21, 2013).

purposes.<sup>49</sup> If the tax-collecting entity is not the airport sponsor, the airport revenue rules require it to use those revenues for airport purposes.<sup>50</sup>

### 6. Assurance 29 (Airport Layout Plan)

Assurance 29 requires airport sponsors to maintain an airport layout plan (ALP) that depicts existing and planned facilities at the airport. An ALP must be approved by FAA, with such approval indicating FAA concurrence that the overall ALP conforms to applicable airport design standards.<sup>51</sup>

The ALP requirement and obligations apply to all federally obligated airport sponsors regardless of the fuel farm ownership and management model. Thus, changes in the layout, composition, or location of a fuel farm or other fuel servicing facilities would require submission of an amended ALP for FAA approval. As discussed in the following section, approval of an ALP that includes the construction of new or modified fuel farm facilities may trigger environmental review by FAA pursuant to the National Environmental Policy Act (NEPA). In addition to addressing the cost of preparing a revised ALP, an airport sponsor may want to require the fuel farm operator to bear some or all of the cost of preparing the appropriate NEPA documentation.

### 7. Part 139

Federal law requires that most airports providing passenger service, whether scheduled (by an air carrier operating aircraft configured for more than 9 passengers) or unscheduled (by an air carrier operating aircraft configured for at least 31 passengers), obtain certification pursuant to 14 Code of Federal Regulations (C.F.R.) Part 139, which imposes requirements on the airport sponsor in addition to its obligations under Airport Improvement Program (AIP) grants. Several aspects of Part 139 have particular applicability to fuel farms and fuel handling.<sup>52</sup> FAA has provided detailed guidance on the requirements of Part 139 relating to fuel storage and handling in an Advisory Circular, *Aircraft Fuel Storage, Handling, and Dispensing on Airports*.<sup>53</sup>

<sup>49</sup> *Id.* See also Questions for 76 FAA from NSAU Members, Feb. 25, 2015, and updated July 15, 2015 (available at <http://www.kaplankirsch.com/News-Publications/Publications/85047/Airport-Law-Alert-No-22>).

<sup>50</sup> *Id.*

<sup>51</sup> Compliance Manual at ¶ 7.18.

<sup>52</sup> See 14 C.F.R. §§ 1391.203(b) (Airport Certification Manual must include, *inter alia*, “procedures for protecting persons and property during the storing, dispensing, and handling of fuel and other hazardous substances”); § 321(d) (requiring procedures for safety in fuel storage and handling and establishing training standards for fueling personnel).

<sup>53</sup> Federal Aviation Administration, Advisory Circular No. 150/5230-4B, *Aircraft Fuel Storage, Handling, and Dispensing on Airports* (Sept. 28, 2012).

Part 139 generally requires airport sponsors to assure that airport employees, contractors, and others handling or storing fuel at Part 139-certificated airports meet detailed training requirements for both supervisory and line personnel on the full range of topics relating to fuel handling and storage, including basic safety practices, first aid, public protection, storage area access control, fire and spill safety and procedures for both fuel farms and fuel delivery, fire code requirements, and use of hand-held fire extinguishers.<sup>54</sup> Airports must assure that fuel handlers have taken courses to provide training in those areas, including testing.<sup>55</sup> Completion of the required training must be certified and records kept proving that all appropriate personnel have received the required training.

Airport sponsors of Part 139-certificated airports comply with Part 139's fueling requirements by assuring that their employees take and complete the required courses and by including in the appropriate lease, contract, or license that the supervisory and line employees of its lessees, contractors, and licensees attend the appropriate courses and provide to the airport sponsor the required certifications and record proving completion of the required courses.

How airport sponsors comply with Part 139 fueling requirements does not vary substantially based on fuel farm ownership and operation model. As with other federal obligations, the airport sponsor must meet the requirements and must impose those requirements on the fuel farm operator.

## B. Tort and Similar Liability Laws

State laws typically impose liability for negligent, reckless, and intentional actions that cause injury to people and property. State law also often imposes liability or potential liability on property owners and entities that directly or indirectly control the operations of others on their property.<sup>56</sup> Without addressing the particular liability laws in each state, an airport sponsor needs to be generally aware that fuel farm and fuel distribution services expose an airport sponsor to potential litigation and potential liability based on accidents involving the fuel farm operations. Airport sponsors would be prudent to consult with experts in the appropriate state law to identify particular liability risks under state law.

Airport sponsors typically address this risk in three ways. First, airport sponsors undertake direct risk management by adopting rules and regulations, minimum standards, standard operating procedures, or other requirements in an effort to minimize the

chances of an accident. These documents often include training and certification requirements for persons who store, pump, or handle fuel; specify industry standards for fuel storage tanks, pumps, and related equipment; limit locations on which fuel storage, handling, and pumping can occur; and include requirements for conducting regular inspections. This form of direct risk management also includes inspection and oversight by airport personnel, including the collection and review of inspections and maintenance records. Airport staff often devote considerable time to these oversight duties to insure compliance.

Second, airport sponsors include indemnity clauses in leases, contracts, and other documents with fuel farm operators and fuel handlers that require the third party to indemnify the airport sponsor from any and all liability arising from the fueling operation.<sup>57</sup>

<sup>57</sup> Fuel Facilities Ground Lease and Easement—Port of Portland and Portland Fueling Facilities Corporation at ¶ 9 (Sept. 29, 2011):

### *9.1 Lessee's General Indemnity; Reimbursement of Damages.*

Lessee agrees to defend (using legal counsel reasonably acceptable to the Port), indemnify, and hold harmless the Port from and against and reimburse the Port for any and all actual or alleged claims, damages, expenses, costs, fees (including, but not limited to reasonable attorney, accountant, paralegal, expert, and escrow fees), fines, Environmental Costs and/or penalties (collectively "Costs") which may be imposed upon, claimed against or incurred by the Port and which, in whole or in part, directly or indirectly, arise from or are in any way connected with any of the following, except to the extent resulting from the negligence or willful misconduct of the Port or the Port's employees, agents or contractors: (a) any act, omission or negligence of Lessee or Lessee's partners, officers, directors, agents, employees, invitees or contractors; (b) any use, occupation, management or control of the Premises by Lessee, whether or not due to Lessee's own act or omission and whether or not occurring on the Premises; (c) any condition created in or about the Premises by Lessee or any of its agents, including any accident, injury or damage occurring on or about the Premises after the Effective Date; (d) any breach, violation or nonperformance of any of Lessee's obligations under this Lease; (e) any damage caused by Lessee on or to the Premises. For purposes of Section 9.1(a) through (e), Lessee shall to be deemed to include Lessee and Lessee's employees, agents, invitees and contractors. This indemnification shall require Lessee to reimburse the Port for environmental Costs as defined by, but as limited by and only as expressly set forth in, Section 7.

Addison Airport, *Aviation Bulk Fuel Dispensing License Agreement*, §§ 14.2.

14.2 INDEMNITY. Licensor shall not be liable to Licensee, any Licensee parties or any other person for (a) any injury to person (including, without limitation, death) or damage to or destruction of property on or about the Fuel Farm or any other portion of the Airport or premises adjacent thereto caused by the act or omission of Licensee, any Licensee Parties or any other person using the Fuel Farm or any equipment used in connection therewith under the express or implied invitation of

<sup>54</sup> *Id.* at 6–10.

<sup>55</sup> *Id.* at 11–15.

<sup>56</sup> *E.g.*, *Afoa v. Port of Seattle*, 296 P.3d 800 (2013) (airport sponsor may be liable as an employer for actions of licensee's employees under Washington law).



Although airport sponsors want these provisions to be as broad as possible, fuel farm operators and others often push back and seek to narrow the scope of the indemnity. This is often a difficult issue of negotiation.

Third, airport sponsors often obtain insurance to cover their own financial exposure and require fuel farm operators and fuel handlers to carry insurance to assure the financial resources to cover any injuries and minimize the risk that a claimant would need to file a claim against the airport itself. A more detailed discussion of insurance issues is set forth in the following section, but it is important for an airport sponsor to be aware of the different coverage issues to obtain the appropriate coverage for itself and require that fuel farm operators and fuel handlers also obtain the appropriate coverage. Negotiation of effective and adequate insurance coverage requires the assistance of insurance experts to assure that policies have appropriate coverage and that the various exclusions, limitations, deductibles, coinsurance requirements, and other conditions are appropriate. Negotiations over insurance requirements are often difficult because of the costs of obtaining insurance.

Licensee; or (b) events, acts or occurrences arising out of any breach or default by Licensee in the performance of its obligations under this License. LICENSEE AGREES TO AND SHALL DEFEND AND INDEMNIFY LICENSOR AND THE OTHER LICENSOR INDEMNIFIED PERSONS AND HOLD LICENSOR AND THE OTHER LICENSOR INDEMNIFIED PERSONS HARMLESS FROM AND AGAINST ANY AND ALL INDEMNIFIED DAMAGES ARISING OUT OF SUCH INJURY, INDEMNIFIED DAMAGES OR DESTRUCTION, OR INDEMNIFIED DAMAGES CAUSED BY (I) LICENSEE'S PERFORMANCE OF THIS AGREEMENT, (II) THE USE OF THE FUEL FARM, FUEL TANKS, OR ANY OTHER PORTION OF THE AIRPORT OR PROPERTY ADJACENT THERETO BY LICENSEE OR BY ANY LICENSEE PARTIES; (III) THE CONDUCT OF LICENSEE'S BUSINESS OR ANYTHING ELSE DONE OR PERMITTED BY LICENSEE (OR ANY OF LICENSEE PARTIES) TO BE DONE IN OR ABOUT THE FUEL FARM, FUEL TANKS, OR ANY OTHER PORTION OF THE AIRPORT OR PROPERTY ADJACENT THERETO; (IV) ANY MISREPRESENTATION OR BREACH OF WARRANTY BY LICENSEE UNDER THIS AGREEMENT; OR (V) WITHOUT LIMITING ANY OF THE FOREGOING, ANY ACT OR OMISSION OF LICENSEE OR OF ANY OF LICENSEE PARTIES UNDER, RELATED TO, OR IN CONNECTION WITH THIS AGREEMENT, *INCLUDING ANY INDEMNIFIED DAMAGES CAUSED BY THE NEGLIGENCE OF THE LICENSOR OR ANY OF THE OTHER LICENSOR INDEMNIFIED PERSONS, BUT LICENSEE SHALL HAVE NO DUTY TO INDEMNIFY LICENSOR OR ANY LICENSOR INDEMNIFIED PERSON FOR INDEMNIFIED DAMAGES CAUSED BY THE SOLE NEGLIGENCE OF LICENSOR OR SUCH LICENSOR INDEMNIFIED PERSON, UNLESS THE INSURANCE OF LICENSEE COVERS THE INDEMNIFIED DAMAGES CAUSED BY SUCH SOLE NEGLIGENCE.*

The survey responses did not indicate substantial differences in how airports managed the risk of tort and similar liability. Airport-owned-and-operated fuel farms did not have the benefit of contractual indemnity clauses or insurance coverage through their lessees, licensees, or contractors. They relied instead on direct risk management methods and employee oversight as well as their own insurance coverage.

Furthermore, the survey results indicated that most airports, particularly Part 139 airports, address potential liability issues directly by devoting considerable resources to overseeing fuel farm and fuel distribution activities by their lessees, licensees, and contractors. This includes collecting and reviewing documentation of inspections and maintenance and generally making it the airport sponsor's business to know what was happening on the fuel farm. Although this activity is in part mandated by Part 139 and is good contract-oversight practice, it also serves to manage the risk of liability posed by fuel farm and fuel-handling activities.

### C. Environmental Laws Relating to the Siting of Fuel Farms

Construction, reconstruction, or expansion of a fuel farm will usually entail some kind of environmental review and permitting process. At the outset, it is important to bear in mind that some of these environmental review requirements apply to FAA directly, but that FAA will expect the airport sponsor to pay for the study, whereas other environmental review and permitting requirements apply to the airport sponsor directly. The important point is that airport sponsors need to account for both kinds of environmental review in developing a schedule for construction of a fuel farm and in any agreements with fuel farm operators. This section will identify the primary kinds of environmental review requirements and provide a general summary of the requirements to inform airport sponsors of the scope of the legal obligations.

First, as noted previously, amending an ALP to reflect a new or modified fuel farm may require FAA to conduct an environmental analysis pursuant to NEPA. The scope of environmental review could be relatively cursory (categorical exclusion or finding of no significant impact) or extensive (environmental assessment or environmental impact statement), depending on the scope and size of the project and the environmental resources affected by the project.<sup>58</sup> In addition, FAA's environmental review may

<sup>58</sup> See generally FAA Order 5050.4B, National Environmental Policy Act (NEPA) Implementing Instructions for Airport Actions (May 5, 2006); FAA Order 1050.4F, Environmental Impacts: Policies and Procedures (July 16, 2015).

require evaluation under other environmental laws, such as the Clean Air Act.

Although these laws impose obligations upon FAA and not airport sponsors, FAA typically looks to airport sponsors to cover the costs of performing the required analysis, although those costs may be reimbursed by FAA through a grant or other means.<sup>59</sup> Further, preparation of the analysis can take time and FAA will control that schedule, not the airport sponsor. Although none of the documents provided by survey respondents identified any specific contract provisions addressing the cost of NEPA and related environmental reviews, allocating the cost and schedule risk of that environmental analysis is an important issue for an airport sponsor to consider in negotiations with a fuel farm operator.

Other laws impose permitting requirements directly upon the airport sponsor. For example, the Clean Water Act may require an airport sponsor to obtain a permit if the project will affect wetlands or waterways that qualify as “waters of the United States.”<sup>60</sup> State laws may require additional permits related to wetlands, clean air, and hazardous materials (including construction of fuel storage tanks or fuel-handling facilities). In addition, a fuel farm may require additional review and approval by state and local fire departments and building departments and state aviation regulators. An airport sponsor should determine the full scope of permits and review required by state and local law in order to develop a realistic time schedule for construction and to allocate responsibility for obtaining the relevant permits and the risk of delay.<sup>61</sup> In addition, to the extent a permit includes continuing requirements—such as monitoring and reporting—an airport sponsor should allocate responsibility for meeting those continuing obligations.

#### D. Environmental Laws Relating to the Operation of Fuel Farms

A variety of federal and state environmental laws also apply to the operation of a fuel farm. Although

<sup>59</sup> FAA Order 5050.4B, National Environmental Policy Act (NEPA) Implementing Instructions for Airport Actions, ¶ 1003(a)(3) (May 5, 2006).

<sup>60</sup> Effective as of Aug. 28, 2015, the Environmental Protection Agency has adopted a new definition of “waters of the United States” that changes, and in many cases narrows, the applicability of the Clean Water Act. For example, certain temporary drainage ditches and other areas that were once considered jurisdictional wetlands are now excluded from regulation under the Clean Water Act. Clean Water Rule: Definition of “Waters of the United States,” 80 Fed. Reg. 37054 (June 29, 2015).

<sup>61</sup> If construction is required by the contract, it may be prudent to include construction and operation deadlines and appropriate enforcement mechanisms to assure that construction adheres to the schedule.

it is not possible to describe all of the permutations of how each law might apply to fuel farm issues, a summary of each law will help identify the issues and describe industry practices for complying with those requirements.

Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 United States Code (U.S.C.) § 9601 *et seq.*, is intended to assure that parties responsible for causing releases of hazardous materials contribute to the costs of cleaning up those spills. CERCLA is primarily a retrospective law that apportions financial responsibility after a release or spill involving hazardous substances, including aviation fuel. CERCLA accomplishes this, in part, by defining “potentially responsible persons” who jointly may be required to pay clean-up costs and among whom costs may be allocated based on the degree to which they contributed to the problem. Property owners are always considered potentially responsible persons and thus always face potential liability under CERCLA in the event of a spill.

Allocating and avoiding liability under CERCLA is a complex subject in its own right, and airport sponsors need to understand the potential liability under CERCLA for the past and future conduct of entities operating at the airport. As discussed in greater detail in the following section, airport sponsors typically address that exposure by contractually shifting liability and obtaining indemnity and hold-harmless agreements in the relevant agreement or by obtaining (or requiring the fuel farm operator to obtain) insurance. Often those agreements include allocating responsibility for cleaning up past contamination.

The Resource Conservation and Recovery Act (RCRA), 42 U.S.C. § 6901 *et seq.*, is a comprehensive statute intended to prevent releases of hazardous materials, including aviation fuel. It includes regulations covering fuel storage tanks and the prevention, monitoring, and detection of leaks, as well as financial responsibility requirements for underground storage tanks.<sup>62</sup> The Environmental Protection Agency (EPA) has delegated RCRA enforcement authority to almost all of the states, allowing states to enforce RCRA’s requirements, including those regarding underground storage tanks.

Airport sponsors typically comply with, or address, environmental laws in several ways. First, airport sponsors seek and obtain any required permits, or require their lessees, contractors, or licensees to do so. Second, airport sponsors adopt best practices for their own employees and third-party

<sup>62</sup> 40 C.F.R. pts. 239–282. Financial responsibility obligations under RCRA are typically \$1 million per occurrence and \$1 million aggregate coverage for fuel farms with fewer than 100 tanks. The financial responsibility requirements apply to USTs that have not been removed.

employees to promote compliance and effective oversight to prevent issues from arising in the first place. When specific environmental issues are known, airport sponsors indemnify those issues in the relevant contract or permit and establish standards and procedures to address those issues. These practices often include regular inspections, training, and maintenance, as well as careful documentation of these steps. Third, airport sponsors include detailed environmental indemnity provisions in their leases, contracts, licenses, or other documents relating to fuel farms or fuel-handling facilities to allocate responsibility and liability in the event of a spill, accident, or other environmental issues.<sup>63</sup> Those provisions typically include insurance requirements to assure that the fuel farm operator will have sufficient coverage to address any environmental issue.<sup>64</sup> Fourth, airport

<sup>63</sup> Fuel System Lease By and Between The Port of Seattle and SEATAC Fuel Facilities LLC, Art. 9.4 (May 14, 2003).

*Section 9.4 Environmental Indemnification*

(a) *General Indemnification.* This environmental indemnification section is in addition to the general indemnification provision of Section 10.1.

(b) *Indemnification for Tank Farm, Tank Farm Improvements and Truck Rack Properties.* Notwithstanding any provisions of this Agreement, Lessee agrees to defend, indemnify and hold harmless the Port and its directors, agents and employees from and against any and all damages, fines, penalties, judgments, losses, liabilities, costs and reasonable expenses (including without limitation, reasonable attorneys' fees and expenses), claims, actions, suits and other proceedings (collectively "Liabilities"), which result from, related to or arise out of the existence or discovery of any Hazardous Substance on, under, from, through, about or within the Tank Farm Land, Tank Farm Improvements, North Truck Rack and South Truck Rack, other than (i) all matters covered by the Participation Agreement; (ii) all matters relating to any release of Hazardous Substances as identified in that certain groundwater monitoring test boring COENMW-05 as reported in [a specified report]; (iii) any release of Hazardous Substances from the Sea-Tac Lateral or the Six-Inch Delivery Lines; and (iv) any release of Hazardous Substances after the Lease Commencement Date relating to any act, omission or breach by the Port or any third party which is not a contractor, or subcontractor, agent or affiliate of Lessee. Lessee acknowledges and agrees that Lessee's indemnification of the Port includes, among other things, all Liabilities and remediation costs arising from environmental contamination at, on, under or from the Tank Farm Land, Tank Farm Improvements, North Truck Rack and South Truck Rack which predates this Lease and was caused by prior owners and/or operators of those properties.

<sup>64</sup> Fuel Facilities Ground Lease and Easement – Port of Portland and Portland Fueling Facilities Corporation, at Art. 9.3.2 (Sept. 29, 2011):

sponsors obtain insurance coverage for themselves, or require fuel farm operators to provide coverage for the airport sponsor itself.<sup>65</sup>

These methods of addressing environmental legal obligations did not vary substantially among the different ownership and management models. The primary difference appears to be reflected in the business and financial terms of the agreements based on the allocation of costs to address environmental issues. Virtually all airports surveyed included similar terms regarding environmental indemnity, insurance, and compliance, regardless of the ownership and management model.

## E. Bankruptcy

The risk that a fuel farm operator will become insolvent or seek protection under the bankruptcy laws presents a fundamental risk to an airport sponsor. If a fuel farm operator is insolvent, it may not be able to operate the fuel farm effectively, may not be able to meet its obligations, both financial and performance, and may stop operations altogether.

### 9.3.2 Environmental Impairment Liability Insurance

The demonstration of Financial Assurance shall take the form of liability insurance for claims arising out of environmental impairment liability for gradual, sudden and accidental discharge or spill of pollutants on land and on water, in an amount of not less than TWO MILLION DOLLARS AND NO CENTS (\$2,000,000.00) per occurrence. Such coverage shall specifically address and cover loading and unloading of the Hazardous Substances listed on Exhibit E to and from the Storage Tanks and include liability under this Agreement. If coverage is claims made: (a) the retroactive date shall be on the or before the Execution Date or the retroactive date of prior insurance coverage, whichever is earlier; (b) coverage shall be maintained continuously in effect until the later of two (2) years after expiration or earlier termination of this Agreement or all obligations under this Agreement have been completed; and (c) if coverage or insurer is replaced, continuity of coverage on replaced and replacement policies. The insurance provided under this Section shall name the Port and its commissioners, directors, employees, and agents as additional insured. The insurance provided by this Section may not have a deductible in excess of TWO HUNDRED THOUSAND DOLLARS AND NO CENTS (\$200,000.00), without the express written consent of the Port, which consent may be given or withheld in the sole discretion of the Port. Furthermore, the Port shall be given thirty (30) days written notice prior to cancellation, non-renewal, or material change in the policy and shall be named as additional insured. The insurer shall be rated "A" or better by A.M. Best, or the equivalent. The policy shall be primary and will not seek any contribution from any insurance or self-insurance carried by the Port.

<sup>65</sup> See § V, *infra*, regarding insurance and risk management.

Furthermore, once a fuel farm operator seeks the protection of the bankruptcy laws, it may become more difficult for an airport sponsor to compel performance under the applicable fuel farm operating contract or to terminate the lease or contract and assume operation of the fuel farm itself (or grant operating rights to another entity).

Several provisions of the Bankruptcy Code intended to protect creditors have the potential effect to impair the ability of an airport sponsor to assure continued operation of the fuel farm at an accepted standard of service. First, the filing of a Bankruptcy Petition creates an automatic stay of all new or existing legal proceedings against the debtor to address claims that arose before the bankruptcy filing.<sup>66</sup> Claims that arise after bankruptcy is filed must follow the bankruptcy claims procedures. The effect of the automatic stay is to require that all claims against the debtor be pursued through the bankruptcy process and not through separate legal actions. The Bankruptcy Code does provide an exception to the automatic stay to enforce government police and regulatory powers.<sup>67</sup> In general, this exception will allow legal proceedings to continue in order to pursue a government entity's public policy interest in general safety and welfare, but not to protect its financial interest in the debtor's property or assets.<sup>68</sup>

Second, the Bankruptcy Code requires the bankruptcy trustee (who assumes legal control of the debtor's assets) to accept or reject leases and executor contracts within prescribed times.<sup>69</sup> Leases must be accepted or rejected within 120 days of filing the bankruptcy petition.<sup>70</sup> Executory contracts in a Chapter 7 (liquidation) proceeding must be accepted or rejected within 60 days of filing the bankruptcy petition.<sup>71</sup> In a Chapter 11 (reorganization) proceeding, executory contracts must be accepted or rejected before confirmation of a plan of reorganization.<sup>72</sup>

During bankruptcy but before the trustee accepts or rejects a lease or contract, an airport sponsor's enforcement rights are limited in several ways. Although a debtor must fully perform its obligations under a lease until the lease is rejected,

enforcement is through motions in the Bankruptcy Court seeking to compel performance or other relief.<sup>73</sup> Accordingly, an airport sponsor's ability to compel immediate performance of a specific duty—such as ordering fuel or addressing an environmental problem—may be limited by the judicial process. Executory contracts are generally *not* enforceable against the debtor, although the debtor must pay the reasonable value of goods and services for which it receives a benefit, even if that value is less than the contract amount.<sup>74</sup> The principal means of recourse to enforce an executory contract are to seek an order compelling acceptance or rejection by a date certain,<sup>75</sup> seek relief from the automatic stay,<sup>76</sup> or seek adequate protection from the court.<sup>77</sup>

If the trustee accepts a lease or contract, it must cure (or make provision for the cure) any breaches, provide compensation for monetary losses, and provide adequate assurance of future performance.<sup>78</sup> If the trustee rejects the lease, the rejection is considered a breach of the lease or contract effective prior to the bankruptcy.<sup>79</sup> When a lease is rejected, the debtor must surrender the leasehold to the lessor.

Third, contract provisions providing for termination or modification of a lease or contract based on the bankruptcy or insolvency of the debtor—often called *ipso facto* clauses—are not enforceable *after* commencement of the bankruptcy proceeding.<sup>80</sup> The purpose of this provision is to prevent the fact of bankruptcy from being used to effectively remove assets from the bankruptcy proceeding, which would favor some creditors over others. *Ipso facto* provisions are not prohibited by Section 365(e)(1) and may be enforced *prior* to the filing of a bankruptcy petition or *after* the bankruptcy proceeding is over.<sup>81</sup>

Airport sponsors address the risk of bankruptcy in several ways. First, most surveyed airport sponsors include an *ipso facto* provision in the lease or contract to preserve their ability to terminate a

<sup>66</sup> 11 U.S.C. § 362.

<sup>67</sup> *Id.* § 362(b)(4).

<sup>68</sup> See *In re W.R. Grace & Co.*, 412 B.R. 657 (D. Del. 2009).

<sup>69</sup> 11 U.S.C. § 365(a).

<sup>70</sup> *Id.* § 365(d)(4).

<sup>71</sup> *Id.* § 365(d)(1).

<sup>72</sup> *Id.* § 365(d)(2).

<sup>73</sup> *Id.* § 365(d)(3).

<sup>74</sup> See *In re Tabernash Meadows, LLC*, 2005 Br. LEXIS 210, \*210–\*31 (Bankr. Colo. Feb. 15, 2005).

<sup>75</sup> 11 U.S.C. § 365(d)(2).

<sup>76</sup> *Id.* § 362(d).

<sup>77</sup> *Id.* § 363(e).

<sup>78</sup> *Id.* § 365(b)(1).

<sup>79</sup> *Id.*

<sup>80</sup> 11 U.S.C. § 365(e)(1).

<sup>81</sup> See *In re Gordon Car & Truck Rental, Inc.*, 59 B.R. 956, 960 (Bankr. N.D.N.Y. 1985); *In re Solocolowski*, 227 B.R. 16, 18–19 (Bankr. D. Conn. 1998).

lease prior to or after bankruptcy.<sup>82</sup> Second, airport sponsors defined the kinds of breaches that would

<sup>82</sup> Fuel System Lease By and Between The Port of Seattle and SEATAC Fuel Facilities LLC, § 13.1(j) (May 14, 2003):

(j) Lessee consolidates, dissolves or liquidates or takes an equivalent action or an involuntary case is commenced under any federal or state bankruptcy, reorganization, insolvency, moratorium or similar statute against Lessee, or a custodian, receiver, trustee, assignee for the benefit of creditors or other similar official is appointed to take possession, custody, or control of the property of the Lessee unless such case, petition or appointment is dismissed, set aside or withdrawn or ceases to be in effect within sixty (60) days after the date such case is commenced or the date of said filing or appointment; or Lessee becomes insolvent or admits in writing its inability to pay its debts as they mature, or commences any voluntary case or files any petition or action for relief relating to any bankruptcy, reorganization, insolvency or moratorium law, or any other law or laws for the relief, or relating to, debtors; or the Lessee makes an assignment for the benefit of creditors or enters into an agreement of composition with its creditors; or the Lessee fails generally to pay its debts as they become due; or the Lessee fails to have discharged promptly any judgment, execution, garnishment or attachment of such consequence as could impair the ability of the Lessee to carry on its operations or to fulfill its obligations under this Lease.

Fuel Facilities Ground Lease and Easement—Port of Portland and Portland Fueling Facilities Corporation, at § 12.1.3 (Sept. 29, 2011):

To the extent permitted by the United States Bankruptcy Code, insolvency of Lessee shall be deemed to include an assignment by Lessee for the benefit of creditors; the filing by Lessee of a voluntary petition in bankruptcy; an adjudication that Lessee is bankrupt or the appointment of a receiver of the properties of Lessee and the receiver is not discharged within ninety (90) calendar days; the filing of an involuntary petition of bankruptcy and failure of Lessee to secure a dismissal of the petition within ninety (90) calendar days after filing; attachment of or the levying of execution on the leasehold interest and failure of Lessee to secure discharge of the attachment or release of the levy of execution within forty five (45) calendar days, shall all constitute an Event of Default hereunder. In these instances, no notice that an Event of Default has occurred shall be required from the Port.

Addison Airport, *Aviation Bulk Fuel Dispensing License Agreement*, §§ 20.3(c) & (d):

20.3 Event of Bankruptcy. In addition to, and in no way limiting the other remedies set forth in this Section 20, Licensor and Licensee agree that if Licensee ever becomes the subject of a voluntary or involuntary bankruptcy, reorganization or other similar type proceeding under the federal bankruptcy laws, as now enacted or hereinafter amended, then:

(a) “adequate protection” and “adequate assurance” of Licensor’s interest under this License pursuant to the provisions of Section 361, 362, 363, 364 and 365 (or their successor sections) of the Bankruptcy Code, 11 U.S.C. Paragraph 101, et seq. (such Bankruptcy Code

is amended from time to time being herein referred to as the *Bankruptcy Code*”), prior to assumption and/or assignment of this License by Licensee shall include, but not be limited to, all or any part of the following:

(1) Curing all monetary and non-monetary defaults, including, without limitation, payment of attorneys’ fees incurred by Licensor related to enforcing the terms and conditions of this License and the continued payment by Licensee of the Base Fee and all other Considerations due and owing hereunder and the performance of all other covenants and obligations hereunder by Licensee;

(2) The furnishing of an additional and/or new security deposit by Licensee in the amount of three (3) times the then-current monthly Base Fee and other Considerations payable hereunder; and

(3) In addition, the Licensee shall provide financial statements evidencing the financial condition and operating performance of any proposed assignee and guarantors, if any, which is sufficient to show that the proposed assignee is capable of performing in Licensor’s sole discretion, all of the Licensee’s obligations under the terms and conditions of this License, including, without limitation, the “adequate assurance” and “adequate protection” requirements set forth herein.

(b) in the event Licensor consents, in its sole discretion, to the assignment of this License, any person or entity, to which this License is assigned pursuant to the provisions of the Bankruptcy Code, shall be deemed without further act or deed to have assumed all of the obligations of Licensee arising under this License on and after the effective date of such assignment, including, without limitation, adequate protection and adequate assurance requirements under Section 20.3(a). Any such assignee shall, upon demand by Licensor, execute and deliver to Licensor an instrument confirming such assumption of liability, along with applicable guaranties of any principals of the assignee.

(c) notwithstanding the prohibition against assignment contained in Section 17.1 herein, if this License is assigned to any person or entity pursuant to the provisions of the Bankruptcy Code, any and all monies or other considerations payable or otherwise to be delivered to Licensor including Base Fees and other Considerations hereunder, shall be and remain the exclusive property of Licensor and shall not constitute property of Licensee or of the bankruptcy estate of Licensee. Any and all monies or other considerations constituting Licensor’s property under the preceding sentence not paid or delivered to Licensor shall be held in trust by Licensee or Licensee’s bankruptcy estate for the benefit of Licensor and shall be promptly paid to or turned over to Licensor.

(d) to the extent permitted by law, Licensor and Licensee agree that this License is a contract under which applicable law excuses Licensor from accepting performance from, or rendering performance to, any person or entity other than Licensee within the meaning of the Bankruptcy Code, 11 U.S.C. Paragraph 101, et seq.

warrant termination or reentry.<sup>83</sup> This is intended to allow an airport sponsor to avoid the limitation on the *ipso facto* clause and terminate or reenter based on a failure to perform specific services rather than on financial capability or solvency. Those provisions would also allow an airport sponsor to terminate a lease or take over fuel farm operations prior to bankruptcy. Third, airport sponsors also include language intended to assure that any new fuel farm operator to which the lease or other agreement is assigned has the financial capacity to fulfill its obligations.<sup>84</sup>

The nature of contract and lease language to address bankruptcy did not vary substantially based on the ownership and management model in effect. Because the ownership and management model is fundamentally defined and governed by a lease or contract, the means of addressing bankruptcy concerns are the same regardless of the ownership and management model.

## F. Antitrust Laws

Antitrust laws are generally aimed at preventing two problems. First, the creation of monopolies through improper means that allow a company to control a given market and, ultimately, charge above-market prices. Second, the improper exercise of market power by companies that reduces fair competition. Ultimately, the antitrust laws are intended to preserve a competitive marketplace on the theory that fair competition will result in fair prices and better quality goods and services.

Based on the survey responses, airport sponsors do not view antitrust laws as an issue relating to fuel farms and do not include provisions specifically addressing antitrust laws in fuel farm documents. There are likely several reasons for this. First, as previously discussed, most of the relevant documents contained language stating that the agreement did not create an exclusive right—the equivalent of a monopoly. Thus, no airport purported to create a monopoly. Moreover, the federal prohibition against granting an exclusive right was

<sup>83</sup> Fuel Facilities Ground Lease and Easement—Port of Portland and Portland Fueling Facilities Corporation, at § 12.2 (Sept. 29, 2011).

### 12.2 Remedies on Breach

Immediately following an uncured Event of Default or an Event of Default for which there is no cure period, the Port at its option may terminate this Lease and Lessee's right to possession of the Premises and at any time may exercise any or all of the following remedies, in addition to any other rights and remedies provided in this Lease or at law or equity. Any notice to terminate may be given before or within the grace period and may be included in a notice of failure of compliance.

<sup>84</sup> Addison Airport, *Aviation Bulk Fuel Dispensing License Agreement*, § 20.3, *supra* note 76.

intended to prevent the creation of monopolies on airports and to preserve competition.<sup>85</sup> Accordingly, compliance with Assurance 23's prohibition against exclusive rights addresses many antitrust concerns.

Second, many airports enjoy immunity from anti-trust laws pursuant to the “state action doctrine.”<sup>86</sup> Under that rule, courts have found that many, but not all, airports are immune from suit under the antitrust laws, whether as state actors or because the plaintiff could not show the appropriate “anti-trust injury” to confer standing.<sup>87</sup>

Finally, many airports regulate the pricing of aviation fuel by imposing maximum markups to prevent uncompetitive pricing. For example, most agreements with consortia require the consortium to sell aviation fuel to nonconsortium members but limit the markup above the consortium's cost to a fixed percentage.<sup>88</sup> Although not identified as a means to address

<sup>85</sup> Compliance Handbook at ¶ 8.1; Final Agency Decision, *In the Matter of the City of Santa Monica*, FAA Docket No. 16-02-08, at 51 (July 8, 2009).

<sup>86</sup> See *Parker v. Brown*, 317 U.S. 341 (1943) (holding that the Sherman Act applies to individual, not state, action); *Cal. Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980) (establishing a two-part test for determining whether a public-private entity counts as a state entity for purposes of the state action exception); *Town of Hallie v. City of Eau Claire*, 471 U.S. 34 (1985) (holding that municipalities only have to satisfy the first prong of the *Midcal* test: whether the challenged anticompetitive conduct follows a clearly articulated and affirmatively expressed state policy).

<sup>87</sup> *JetAway Aviation, LLC v. Bd. of County Comm'rs of County of Montrose*, 754 F.3d 824 (10th Cir. 2014) (plaintiff lacked antitrust injury); *Interface Group, Inc. v. Mass. Port Auth.*, 816 F.2d 9 (1st Cir. 1987); *Padgett v. Louisville and Jefferson County Air Bd.*, 492 F.2d 1258 (6th Cir. 1974); *Four T's, Inc. v. Little Rock Mun. Airport Comm'n*, 108 F.3d 909 (8th Cir. 1997); *Deak-Perera Haw., Inc. v. Dep't of Transp.*, 745 F.2d 1281 (9th Cir. 1984); *Allright Colo., Inc. v. City and County of Denver*, 937 F.2d 1502 (10th Cir. 1991); *Zimomra v. Alamo Rent-A-Car*, 111 F.3d 1495 (10th Cir. 1997); *Commuter Transp. Sys., Inc. v. Hillsborough County Aviation Auth.*, 801 F.2d 1286 (11th Cir. 1986); *Rectrix Aerodome Ctrs., Inc. v. Barnstable Mun. Airport Comm'n*, 534 F. Supp. 2d 201 (D. Mass. 2008), *aff'd*, 610 F.3d 8 (1st Cir. 2010); *Pennsylvania v. Susquehanna Area Reg'l Airport Auth.*, 423 F. Supp. 2d 472 (M.D. Pa. 2006); *Ne. Jet Ctr. v. Lehigh-Northampton Airport Auth.*, 767 F. Supp. 672 (E.D. Pa. 1991); *Golta, Inc. v. Greater Orlando Aviation Auth.*, 761 F. Supp. 779 (M.D. Fla. 1991); *General Rent-A-Car v. Roberts*, 1988 U.S. Dist. LEXIS 18653 (S.D. Fla. 1988). *But see Cont'l Airlines, Inc. v. United Airlines, Inc.*, 277 F.3d 499 (4th Cir. 2002) (state action doctrine did not insulate from antitrust scrutiny agreement between airport management council and primary air carrier); *Cedarhurst Air Charter v. Waukesha County*, 110 F. Supp. 2d 891 (E.D. Wis. 2000) (state action doctrine did not apply because a broad grant of power did not clearly circumvent legislative intent expressed in state antitrust laws).

<sup>88</sup> See pp. 45–46, *infra*.

antitrust concerns, this control of pricing has the effect of preventing the kinds of abuses of market power that the antitrust laws were intended to prevent.

#### IV. HOW AIRPORTS MEET KEY OPERATIONAL OBLIGATIONS

Regardless of the ownership and operational model in effect at the airport, many of the same operational obligations will apply. The most common operational obligations typically include fuel access and availability, rents and fees, fuel pricing, safety, environmental compliance, security, and risk management. The method utilized to address each operational obligation, however, can vary from an internal standard operating procedure to policy documents to agreements or permits depending on the ownership and operational model used. For each operational issue, this section discusses how the issue is typically addressed by airport sponsors and which governance document is most applicable based on the ownership and operational model.

##### A. Fuel Access and Availability

The primary goal of any aviation fuel distribution system is to ensure that the fuel is safe, easily accessible, and available to aeronautical users without interruption or unreasonable delay. To ensure access and availability of aviation fuel, airport sponsors must address 1) physical access at useful and necessary times, 2) commercial provision of fuel during reasonable hours of operation, and 3) an adequate supply of aviation fuel.

###### 1. Fuel Farm Access

Access to the fuel farm must be provided from both the landside and the airside—landside access for the delivery of aviation fuels to the fuel farm and airside access for the delivery of fuel to aircraft or refueling vehicles, as well as access for airport personnel at all times (24 hours a day, 365 days a year). The complexity and control of access to the fuel farm can vary greatly from one airport to the next.

At some airports, the fuel delivery truck will access the fuel farm strictly from the landside, whereas at other airports the fuel delivery truck may have to utilize a route on the airside to deliver fuel (such as gaining access to an underground storage tank (UST) in a self-service fuel farm). Refueling vehicles obviously operate on the airside, often alongside aircraft and other vehicles.

Airport sponsors, fuel farm operators, and aircraft fuelers must work together to develop the safest possible access routes and procedures for fuel delivery trucks to minimize potential conflicts with

other vehicles and aircraft. For the airport sponsor-owned-and-operated model, the landside and airside access routes and protocols are typically outlined in the standard operating procedures. For the remaining operational and management models, access routes and protocols are typically set forth in the airport's rules and regulations or similar documents. For example, language may state "Lessee shall construct and maintain any access roads to the Premises which are necessary and to be used exclusively for constructing, operating, and maintaining the Fuel Facilities."<sup>89</sup>

In addition to providing access to fuel delivery and refueling vehicles, an airport sponsor should assure access for its own personnel to allow for inspections and to take other steps necessary to assure compliance with applicable legal obligations. Access to the fuel farm is typically addressed in a lease agreement with the private fuel farm operator. For example:

Port shall have the right to enter upon the Premises for the purposes of (a) confirming the performance by Lessee of all obligations under this Lease; (b) doing any other act which the Port may be obligated or have the right to perform under this Lease; (c) inspecting and copying books and records of Lessee related to Lessee's performance of its obligations under this Lease....<sup>90</sup>

Similarly, a license agreement (if applicable) typically provides for access by stating "Licensor shall have the right to enter upon the Fuel Farm at any time for any purpose consistent with this License,"<sup>91</sup> which will generally include, but not be limited to, the fuel farm and any of its systems and system components.

As will be later discussed in this section, the airport sponsor often designates an internally responsible party who is responsible for risk management, operational safety, environmental compliance, and compliance with aircraft fueling procedures. Through consistent and diligent oversight, as well as inspections and checks, the airport sponsor can be assured that the operational obligations are effectively managed and enforced to ensure a reliable source of fuel is available to all aircraft operators.

Fuel delivery and refueling vehicles, as well as personnel, must be provided unencumbered access to the fuel farm at all times (24 hours a day, 365 days per year). By providing access, fuel farm operators and users can accept delivery of fuel, replenish refueling

<sup>89</sup> Fuel Facilities Ground Lease and Easement—Port of Portland and Portland Fueling Facilities Corporation (Sept. 29, 2011).

<sup>90</sup> Fuel Facilities Ground Lease and Easement—Port of Portland and Portland Fueling Facilities Corporation (Sept. 29, 2011).

<sup>91</sup> Aviation Bulk Fuel Dispensing License Agreement—Addison Airport.

vehicles, and conduct all necessary and required testing and inspections. The rules and regulations or standard operating procedures should address these issues, including vehicular access to the fuel farm (e.g., routes, vehicle inspections, etc.); fuel transfer protocols; and personnel access requirements (permitting, access controls, etc.) needed to conduct all necessary and required testing and inspections.

## 2. Hours of Operation

The hours of operation for a fuel farm vary from airport to airport based on the market, type of aeronautical user, and location.

Hours of operation for commercial fuel providers are typically set forth in the airport's minimum standards, including response time as appropriate. The minimum standards will identify certain hours (e.g., 6 a.m. to 10 p.m.) for certain days (e.g., 7 days per week, including holidays) and the after-hours response time (e.g., not to exceed 1 hour). Hours of operation for airports with increased activity may state the following: "Aircraft Fueling, Parking, and passenger, crew, and Aircraft ground services, support, and amenities shall be continuously offered and available to meet reasonable demands of customers for this Aeronautical Activity 24 hours a day, 7 days a week including holidays."<sup>92</sup>

## 3. Fuel Supply

Assuring an adequate supply of fuel is a basic requirement of a fuel farm. The airport sponsor or commercial fuel provider must have a historical understanding of the requirements of the local market to ensure sufficient supply to meet demand. There are two basic aspects of assuring adequate supply.

First, there must be sufficient storage and handling capacity to meet demand. Based on historic and projected demand, an airport sponsor may need to build additional storage or processing capacity or require the third-party fuel farm operator to do so. For example, one large hub airport sponsor explained in an interview that it built a large settling tank to allow the consortium fuel farm operator to process and store an adequate supply of the appropriate grade fuel that was delivered through a pipeline.

Second, demand may vary based on multiple factors, including seasonality. In airports located in areas that experience extreme weather conditions, provisions need to be made to assure adequate supply when weather conditions prevent fuel delivery. In addition, the availability of back-up electrical service may need to be addressed to ensure consistent

availability of fuel from the fuel farm during extended power outages. Other airports experience substantial changes in demand from season to season or may experience demand spikes based on specific events. Addressing those supply and demand needs requires that documents be tailored to local conditions.

Airport sponsors address the goal of adequate supply in many different ways. For a fuel farm privately operated by a commercial entity, minimum standards often require a minimum supply for a commercial fuel provider. For example, requirements typically specify that the commercial fuel provider must develop, own, or lease a fuel farm with "total capacity for three days peak supply of aviation fuel for aircraft being serviced by FBO."<sup>93</sup> In this manner, the airport sponsor is assured that fuel is available during peak demand in the event of a disruption in the fuel delivery system. In addition, specific minimum requirements for provision of fuel types ("FBO shall provide into-aircraft retail delivery of a recognized brand of aviation fuel—including, but not limited to, avgas and jet fuel"), as well as size of the fuel farm, are typically addressed.<sup>94</sup>

Minimum standards are typically used to define and establish specific requirements for refueling vehicles to provide additional on-site storage capacity, as well as ensuring the capability to deliver fuel to aircraft. When drafting minimum standards for commercial entities, the airport sponsor should consider how unexpected equipment failures and routine maintenance may impact fuel availability and develop contingency plans as appropriate.

Under all operational and management model scenarios, there must be a close working relationship with a reputable and reliable wholesale fuel supplier. Minimum standards will typically require "that satisfactory arrangements have been made with a recognized aviation petroleum distributor."<sup>95</sup> Airport management must have an accurate understanding of the capabilities of the wholesale fuel provider to provide the necessary quantities of fuel during peak demand under extreme weather conditions (if applicable). In addition, supplier contracts need to specifically outline availability and delivery protocols to ensure a reliable source of fuel.

<sup>93</sup> General Aviation Minimum Standards (v. 2)—Port of Portland.

<sup>94</sup> Minimum Standards and Requirements for Commercial Aeronautical Service Providers—Addison Airport (Mar. 1, 2004).

<sup>95</sup> Minimum Standards for Commercial Aeronautical Activities—Front Range Airport (Oct. 15, 2003).

<sup>92</sup> Port of Portland General Aviation Minimum Standards (v. 2).



## B. Rents and Fees

The rents and fees associated with a fuel farm and its operation and maintenance vary based on the ownership and management model at the airport. For example, an airport sponsor-owned-and-operated fuel farm may not charge rents and fees because the airport sponsor owns and operates the fuel farm. The airport sponsor recoups the costs related to installation, operation, and maintenance through retail fuel sales and other airport revenue. If the airport sponsor is operating a competitive fixed-base operation, however, certain rents and fees that are applicable to the private fixed-base operation may also apply to the airport sponsor. On the other hand, a fuel farm operated by a third party under another operating model will pay rent and other charges, such as fuel flowage fees.

### 1. Rent

Airport sponsors generally charge market-based rent<sup>96</sup> for land or improvements at the airport that are occupied by a commercial or noncommercial entity. Conversely, airport sponsors may charge cost-recovery-based rates that are also considered compliant with FAA's self-sustaining requirement.<sup>97</sup>

More specifically related to the fuel farm, airport sponsors may charge rent for airport land related to a privately owned and operated fuel farm or charge rent for the use of a fuel farm owned by the airport sponsor (typically on a triple net basis, wherein the lessees pay all maintenance, utilities, insurance, and taxes associated with the leased premises). Determining the appropriate rental rate structure is an essential element of an operating agreement for the airport sponsor-owned and privately operated (under a lease agreement), privately owned and privately operated, or consortium models.

Rent charged solely for fuel farm improvements is often calculated differently than rent charged for land. Market-based rents for exclusive use of fuel farm improvements owned by the airport sponsor is an approach utilized in the industry. Sufficient data for comparable fuel farm facilities are typically not available, however, to derive a market-based conclusion. Although the cost of real property (land or improvements) is not typically considered when determining market-based rental rates for aeronautical use properties, the limitations of available

<sup>96</sup> Market-based rent differs from using a cost recovery basis, which is based on recovering all costs associated with operating and managing the airport, whereas market-based rent is determined on transactions of a willing buyer and willing seller in an open market.

<sup>97</sup> See Compliance Handbook at chs. 17 & 18 and App. D (Policy Regarding Airport Rates and Charges).

data typically require the sponsor to use a return-on-investment (or cost) analysis approach to establish an appropriate rental rate for an airport sponsor-owned and privately operated fuel farm.

### 2. Fees

Consistent with industry best practices, airports typically charge cost recovery (or compensatory) fees for the fuel farm. These fees typically consist of a throughput fee (charged to users of an airport-owned fuel farm) and fuel flowage fees (charged to commercial and noncommercial entities dispensing fuel).

In the case of an airport sponsor-owned and privately operated fuel farm (management contract or consortium model), airport sponsors either lease the land and fuel farm (as previously discussed) or charge a throughput fee for the use of the fuel farm. Utilizing a fee-based approach may be applicable to the airport sponsor-owned and privately operated (under a management contract), airport sponsor-owned and privately operated (under a lease agreement), or consortium models. These fees are developed to recover the capital investment and ongoing maintenance and operational costs incurred by the airport sponsor. Cost recovery throughput fees are typically calculated on a per-gallon basis.

It is significant to note that throughput fees are different than fuel flowage fees. Fuel flowage fees are typically collected by commercial fuel providers (for each gallon sold or delivered) or paid directly to the airport sponsor based on gallons dispensed by noncommercial self-fueling entities to support the operation and management of the airport. To ensure correct calculation of any throughput fees, the airport sponsor must retain the ability to audit and verify the fuel sold or dispensed from the fuel farm. Consistent with best practices, the airport sponsor should be provided a monthly report detailing the number of gallons purchased, delivered, and dispensed from the fuel farm for audit purposes. For a commercial fuel provider, this is typically addressed in the airport's minimum standards by stating

FBO shall: (a) provide a summary report to the Port identifying the number of gallons of (i) aviation fuel purchased by FBO by fuel type, (ii) delivered to FBO's fuel storage facility by fuel type, and (iii) dispensed to FBO customer aircraft and/or dispensed by FBO at the airport by customer type and (b) pay the appropriate fees and charges due to the Port....<sup>98</sup>

## C. Fuel Pricing

The retail price of fuel at a given airport reflects many factors, including the capital investment in the fuel distribution system, ongoing maintenance

<sup>98</sup> General Aviation Minimum Standards (v. 2)—Port of Portland.

and operational costs, rents and fees related to the fuel farm, and market demand. Accordingly, there is no standard pricing formula. Based on a review of the documents received during the interview process, however, airport sponsors address retail pricing through minimum standards (for commercial aeronautical activities), lease agreements, and fuel sales licenses and permits. Language may directly state “Operator shall charge reasonable, and not unjustly discriminatory, prices for each product, service, or facility.”<sup>99</sup> In all cases, the airport sponsor must ensure commercial fuel providers are not charging unjustly discriminatory prices as it relates to fuel sales, while maintaining the flexibility to provide reasonable discounts, rebates, or other similar types of price reductions to volume purchasers.

#### D. Safety

Creating and maintaining a safe, orderly, and efficient environment at the airport is a core responsibility of the airport sponsor. Due to the inherent flammable properties of aviation fuel (jet fuel and avgas), access to and storage of fuel at the airport is a highly regulated activity designed to ensure safe operations for both the fuel handlers and aircraft operators. In addition, airport sponsors should ensure that only fuel meeting the appropriate American Society for Testing and Materials (ASTM) standards for aircraft use is distributed or dispensed at the airport.

Although these operational obligations may be addressed in a variety of airport sponsor documents, the requirements and protocols remain the same for any entity accessing, storing, distributing, and dispensing fuel at an airport, regardless of the ownership and management model. Airport sponsors in particular identified operation and maintenance, fuel handling, training, and emergency response requirements in controlling documents.

##### 1. Operation and Maintenance

The highly regulated nature of aviation fuels has led to the development of numerous resources and industry-adopted regulatory measures that can be incorporated into documents by airport sponsors to ensure that a fuel farm is operated and maintained consistent with typical state and local laws and industry-recognized best practices. Many airport sponsors refer to National Fire Protection Agency (NFPA) standards in their minimum standards or rules and regulations. Typical language states that “all [fuel] farms will conform to the appropriate City

Fire Codes, applicable NFPA standards, state, and federal regulations,”<sup>100</sup> or “all installations shall comply with applicable Town of Addison Code of Ordinances and the National Fire Protection Association and the International Fire Code requirements.”<sup>101</sup> In particular, NFPA Pamphlets 30 and 407 are often cited as the industry standard. NFPA 30 identifies standards related to the construction or installation of a fuel storage facility, whereas NFPA 407 outlines standards for aircraft fuel servicing.

In addition to NFPA guidance, airport sponsors identified ATA (Air Transport Association of America, now known as Airlines for America or A4A) Specification 103, Standard for Jet Fuel Quality Control at Airports, and FAA Advisory Circular 150/5230-4B, Aircraft Fuel Storage, Handling, Training, and Dispensing on Airports, as well as local building codes and local fire codes and regulations. For example,

All transportation, storage and other handling of aircraft and vehicle fuel within the Airport shall comply with the Uniform Fire Code, as amended, the National Fire Protection Association (NFPA) codes and standards, particularly, but not limited to NFPA 407 and 409, as amended, FAA Advisory Circular 150/5230-4 or current version, as amended, all requirements of these regulations, and all other applicable law.<sup>102</sup>

Airport rules and regulations or minimum standards typically require that all commercial fuel providers and noncommercial self-fueling entities provide plans and specifications to the airport sponsor and other regulatory agencies for approval prior to the installation and operation of a fuel farm.

Airport sponsors also ensure continued safety by requiring ongoing maintenance of the fuel farm, fuel distribution system, and related facilities such as security systems and facility lighting. For example, minimum standards or rules and regulations, licenses, leases, or other appropriate documents, may include the following language: “During the term, Licensee, at Licensee’s sole expense, shall maintain, repair and replace, as reasonably prudently required, all equipment at the fuel farm...to include all fuel loading and unloading equipment, such as hoses, couplings, swivels and such devices related to the fuel tanks.”<sup>103</sup> Through regular inspections and audits, the airport sponsor can ensure safe

<sup>100</sup> Minimum Standards for Commercial Aeronautical Activities—Front Range Airport (Oct. 15, 2003).

<sup>101</sup> Minimum Standards and Requirements for Commercial Aeronautical Service Providers—Addison Airport (Mar. 1, 2004).

<sup>102</sup> Rules and Regulations—Addison Airport (Dec. 14, 2010).

<sup>103</sup> Aviation Bulk Fuel Dispensing License Agreement—Addison Airport.

<sup>99</sup> General Aviation Minimum Standards (v. 2)—Port of Portland.

operation of the fuel farm and minimize the risk of an environmental mishap (such as a fuel spill or equipment failure) and also ensure the integrity of the dispensing system and fuel product.

To facilitate the inspection and audit function, airport sponsors typically establish clear lines of responsibility in the minimum standards, lease agreement, or operating permit to shift liability from the airport sponsor to the fueling entity. Typical language may specify that “ensuring the quality of [f]uel is the sole responsibility of FBO.”<sup>104</sup> It is also prudent to require that commercial fuel providers provide annual or regular quality assurance inspection reports to ensure compliance with federal regulations and applicable conditions of insurance coverage.

## 2. Fuel Handling

Fuel handling is typically understood in the industry as all activities related to transporting, delivering, fueling, dispensing, or draining of fuel or fuel-related waste products at the airport. Although detailed protocols for the many specific activities related to fuel handling vary considerably from airport to airport, the importance of assuring the integrity of fuel handling cannot be overstated and is a vital operating obligation for any fuel farm. Because fuel handling standards apply to all fueling activities regardless of the fuel farm operational and management model, fuel handling standards are typically set forth in the airport’s rules and regulations or other documents that apply to both commercial fuel providers and noncommercial self-fueling entities.

Fuel-handling standards typically include a Spill Prevention, Control, and Countermeasures (SPCC) Plan to ensure that all aspects of the fueling operation meet regulatory measures. Airport sponsors commonly require that the fuel handler provide its SPCC for verification. After the fuel farm is constructed and during its operation, the airport’s rules and regulations typically identify very specific operational requirements that an operator must follow, including identifying malfunctions or irregularities, implementing emergency response procedures, positioning of refueling vehicles during loading, using approved dispensing devices, specifying conduct during an electrical storm, bonding, grounding, prohibiting use of hold-down devices on dispensing apparatus, and setting requirements on the use and availability of fire extinguishers and absorbent materials. For example, language may state, “Aircraft refueling vehicles, other moveable aircraft fuel containers and refueling devices shall be stored outside and not less than fifty (50) feet from a building

<sup>104</sup> General Aviation Minimum Standards (v. 2)—Port of Portland.

or such other distance as shall be approved by Airport Director and Town of Addison fire department,” or “Aircraft refueling vehicles shall be parked in a manner which provides a minimum of ten (10) feet of separation between said vehicles and any other vehicle or aircraft refueling device.”<sup>105</sup>

Rules and regulations also often outline quality control mechanisms on fuel and fuel handling, placing the responsibility for ensuring the quality of fuel product and operational procedures on the entity conducting the fueling activity: “Fuel delivered, stored, or dispensed by FBO shall fully comply with the quality specifications outlined in ASTM [American Society for Testing and Materials] D1655 (jet fuel), ASTM D1910 (avgas).”<sup>106</sup> Similar standards may also be required for the fuel handler to preserve insurance coverage, including liability coverage provided by the refinery.

## 3. Training Requirements

The airport sponsor must ensure that individuals that have access to the fuel farm are properly trained and proficient in its use and operation to mitigate risk and liability exposure and to assure that the fuel farm is operating in a safe manner. Under an airport sponsor-owned-and-operated model, this requires development of internal standard operating procedures (SOPs). These SOPs may reference specific advisory circulars set forth by FAA (e.g., Advisory Circular 00-34A, Aircraft Ground Handling and Servicing); training plans and procedures; record-keeping; emergency response procedures; inspections; bonding; grounding; and markings, etc. As previously discussed, Part 139 airports are required to meet specific training standards.<sup>107</sup> Non-Part 139 airports may choose to meet similar requirements as a matter of prudence or a condition of insurance coverage.

For the remaining operational and management models, airport rules and regulations and minimum standards require fuel farm operators to develop their own SOPs. For example,

FBO shall develop and maintain SOP for fueling and ground handling and shall ensure compliance with standards set forth in AC 00-34A “Aircraft Ground Handling and Servicing.” FBO’s SOP shall include a training plan, fuel quality assurance procedures and associated record keeping, and emergency response procedures to fuel spills and fires.<sup>108</sup>

<sup>105</sup> Rules and Regulations—Addison Airport (Dec. 14, 2010).

<sup>106</sup> General Aviation Minimum Standards (v. 2)—Port of Portland.

<sup>107</sup> *Supra* at 29–30.

<sup>108</sup> General Aviation Minimum Standards (v. 2)—Port of Portland.

Because minimum standards apply only to commercial aeronautical activities, similar requirements for noncommercial self-fueling should be included in airport rules and regulations (applicable to all users of the airport) or integrated into the specific operating permit for the operation of the fuel farm and related fuel handling.

#### 4. Emergency Response

Despite the best planning and preventative measures, unforeseen emergency situations may still occur, and the airport sponsor must ensure that plans and protocols for emergency response are implemented, reviewed, and routinely practiced by all entities involved in fuel handling.

The most typical emergency relating to fuel handling is a fuel overflow or spill. Such events can be very minor in nature involving just a few ounces of product, or they can be a catastrophic event involving hundreds of gallons of fuel. The airport sponsor, whether through SOPs (for the airport sponsor-owned-and-operated model) or through rules and regulations, minimum standards, or lease and permit conditions (for all other models), sets forth the protocols for responding to a wide range of overflow or spill scenarios by stating “all necessary actions must be taken to stop the source of the spill and promptly implementing spill management measures to prevent the spill from adversely impacting the environment.”<sup>109</sup>

In all cases, the first step in response to a fuel spill is ensuring that the responsible party takes immediate and appropriate action to secure the safety of the public and property, contains the overflow or spill (including blocking all stormwater drains), notifies the applicable fire department or aircraft rescue and firefighting unit, and then works with the appropriate agencies to ensure appropriate cleanup and mitigation efforts are properly employed. In addition, language may state, “Tenants of the Airport transporting fuel or other liquids, including on any vehicle operating at the Airport, shall keep appropriate and sufficient spill response materials and equipment on hand to respond to a minor spill and have a response contractor identified for responding to a major spill.”<sup>110</sup>

#### E. Environmental Compliance

As previously discussed, environmental compliance requires ongoing supervision and monitoring. Accordingly, the airport sponsor must create protocols related to testing, inspection, and remediation

to assure compliance. For an airport-operated fuel farm, these requirements will be contained in internal SOPs. For other models, environmental compliance standards must be addressed through minimum standards, rules and regulations, the lease agreement, or the operating permit.

Depending on the complexity of the fuel farm and fuel distribution system at the airport, testing and inspections may be strictly limited to the fuel farm or may involve ensuring the integrity of pipelines receiving or distributing fuel across the airport. Larger commercial service airports with hardstand aircraft parking facilities may employ a hydrant fueling system that provides fuel from the fuel farm to various aircraft parking facilities through a pipeline system. In this case, pipeline integrity testing should be conducted on a defined basis to ensure compliant operation. The testing process typically requires that the “Lessee shall conduct the following: (a) annual testing of the cathodic protection systems for the pipeline; monthly visual inspections of every valve, hydraulic pit, low point drain, and high point in the pipeline system and conduct needed maintenance, repair, or replacement,”<sup>111</sup> as well as “leak testing and reporting.”<sup>112</sup> The airport sponsor must also ensure complete and total access to all privately owned and operated fuel farms to conduct environmental compliance inspections and reserve the right to inspect the premises and operations of the fuel farm.

To establish a baseline for environmental conditions, and to help allocate potential liability for past contamination, airport sponsors often conduct (or require the fuel farm operator to conduct) an environmental site assessment (ESA) (Phase 1 and/or Phase 2) prior to installation or transfer of ownership of a fuel farm or fuel distribution system.<sup>113</sup> A Phase 1 ESA involves review of land records, historic uses of the property, and other documents to identify potential environmental liabilities based on historic uses of the

<sup>111</sup> Fuel Facilities Ground Lease and Easement—Port of Portland and Portland Fueling Facilities Corporation (Sept. 29, 2011).

<sup>112</sup> Fuel Facilities Ground Lease and Easement—Port of Portland and Portland Fueling Facilities Corporation (Sept. 29, 2011).

<sup>113</sup> See Fuel Facilities Ground Lease and Easement—Port of Portland and Portland Fueling Facilities Corporation (Sept. 29, 2011), § 7.10.4, Special Audit, at 31:

If Lessee requests a Lease extension, consent to assignment or sublease of all or a portion of the Lease, or consent to removal or demolition of all or any portion of the Fuel Facilities, the Port may, without limiting its other rights and remedies, require Lessee to conduct, and furnish to the Port, at Lessee’s sole expense, an Environmental Audit (“Special Audit”) of the Premises and operations that are subject of the request.

<sup>109</sup> Portland International Airport Rules—Port of Portland (July 7, 2015) (internal quotations omitted).

<sup>110</sup> Portland International Airport Rules—Port of Portland (July 7, 2015).

site.<sup>114</sup> A Phase 1 ESA is required by law in many circumstances and can satisfy the “all appropriate inquiries” standard to shield a property owner or user from liability for past pollution. A Phase 2 ESA is a more in-depth examination of the site that may include site testing, monitoring, and surveying to identify whether there is any contamination or hazardous materials present.<sup>115</sup> A Phase 2 ESA is not required by law, but it is often required by lenders and land purchasers or users to identify any potential contamination or hazardous materials on the site. Depending on the history and condition of the site, an environmental assessment can be expensive and time-consuming.

If the fuel farm is privately owned and operated, a lease agreement or license agreement should dictate that an additional ESA be conducted at the termination of the lease agreement for the associated airport land. Similarly, if ownership interest in the fuel farm is transferred during the term of the lease agreement, an additional environmental assessment should also be conducted.

## F. Security

Consistent with the responsibility to create and maintain a safe, orderly, and efficient operating environment at the airport, the airport sponsor must ensure proper security protocols are created and enforced. Although the airport sponsor must provide access without interruption or excessive delay, the airport sponsor must also implement the necessary security provisions to ensure that only authorized individuals have access to the fuel farm. For example, airport sponsors typically ensure that all security gates leading to the fuel farm remain closed, locked, and secured except when actually in use. The installation of on-site security systems to monitor vehicle and pedestrian access to the fuel farm was also identified in documents provided during the interviews for this digest.

Creating a secure environment may require additional provisions predicated on the size, use, and complexity of the fuel farm. For example, Part 139 airports require background checks on individuals with airside access, including access to the fuel farm (depending on its on-airport location).<sup>116</sup>

<sup>114</sup> The standards for a Phase 1 ESA are set forth in EPA’s All Appropriate Inquiries Final Rule, 40 C.F.R. pt. 312. *See also* ASTM E1527-05 and E1527-13, which EPA recognizes as setting forth standards that comply with the regulations.

<sup>115</sup> The standards for a Phase 2 ESA are set forth in ASTM E1903-11.

<sup>116</sup> *See* Port of Portland Rules and Regulations, § 13.4.1, at 36: “A PDX Security Badge may not be issued to any person who has not been in possession of a valid PDX Security Badge during the previous thirty (30) calendar days, until a background check, the required training and verification of specific identification documents have been completed.”

Non-Part 139 airports typically require the fuel service providers to “control the premises so as to prevent unauthorized access,” which is typically outlined in the airport’s minimum standards or rules and regulations. Although this type of background check may be cost prohibitive in certain situations, it would tend to create a more secure operating environment. Further, the airport sponsor typically issues an identification badge or license to assure that only approved individuals have access to the fuel farm. Finally, the airport sponsor should implement regular security inspections and audits of the fuel farm. Given the ever-evolving security environment in the post-September 11 aviation industry, airport operators should be alert to changing security risks, requirements, and best practices. This is particularly true for non-Part 139 airports that are not currently subject to security requirements.

## V. INSURANCE AND OTHER APPROACHES TO RISK MANAGEMENT

The final obligation for the airport sponsor to address in the ownership and operation of a fuel farm is understanding and mitigating risk and liability exposure through risk management tools. Risk is most typically addressed through insurance as well as the incorporation and implementation of best management practices. Insurance requirements are typically addressed in the lease agreement or operating permit.

Under the airport sponsor-owned-and-operated model, insurance requirements are developed through an internal process conducted by the airport sponsor and an insurance specialist with a comprehensive knowledge and understanding of fuel farms. For other models, insurance requirements can be developed in the same way and implemented through minimum standards (for commercial fuel providers), or through the specific lease agreement or operating permit with the fueling entity.

Fuel farms present significant risk and liability exposure due to the flammable nature of fuel and environmental risk. Insurance provides an important tool to address the financial risk posed by a fuel farm. Moreover, even though airport sponsors generally require fuel farm operators to indemnify the airport sponsor against general and environmental liability, as previously discussed, that indemnity does not provide the necessary protection if it is not supplemented with adequate financial resources. Insurance provides a way to assure that airport users will have adequate financial resources to meet their obligations.

In considering insurance, the differences between the operational and management models can be significant. For example, under the airport sponsor-owned-and-operated model, all operational risks and liability exposure would be assumed by the airport sponsor. Under the remaining models, varying portions of the risk and exposure can be transferred to other entities. The airport sponsor, however, must ensure adequate insurance coverage under each applicable model to mitigate risk and potential liability exposure that may impact the airport sponsor.

Insurance is a complex issue, and airport sponsors would be well-advised to consult with an insurance agent or consultant with aviation expertise for assistance in obtaining the appropriate coverage. There are many different insurance products that may apply to different aspects of fuel farm operations. An insurance expert can help an airport sponsor evaluate which products apply to the specific activities and conditions at that airport. In addition to the appropriate *types* of insurance and the *amount* of coverage, insurance experts can advise airport sponsors about *conditions* of coverage, such as coverage limitations, exclusions, and other factors that may limit the availability of insurance in particular circumstances. Insurance experts can similarly advise airport sponsors on the use of layered insurance consisting of separate primary, excess, and umbrella policies. Although it is not practicable here to discuss the many complexities and nuances of insurance coverage, this guide will identify the primary types of coverage for fuel farm operations and the basic principles of risk management for fuel farms.

## A. Insurance Products

### 1. General Liability Insurance

General liability insurance addresses many basic liability risks, such as slip-and-fall-type accidents and other generic accidents. This coverage is typically provided in a premises and products policy for commercial fuel providers, which includes completed operations. For noncommercial self-fueling entities, basic liability is typically provided through aircraft hull insurance. It is significant to note, however, that general liability policies may have an exclusion related to specific pollution or contamination events that may include fuel. Airport sponsors should assure that airport users have insurance coverage for all activities that the user is expected to conduct at the airport.<sup>117</sup> Airport sponsors

<sup>117</sup> It is significant to note that some older policies do not exclude environmental events. Airport operators should examine their current insurance policies carefully, perhaps with the advice of an insurance agent with expertise in environmental, fuel farm, and airport insurance issues, to determine the extent of coverage.

should also be aware of, and require users to maintain, insurance coverage available to specific kinds of airport users. For example, aircraft owners' hull insurance policy typically includes general liability coverage, including fuel-related liability. Fuel refineries or sellers similarly provide insurance coverage related to the quality of their fuel. As previously discussed, airport sponsors should require airport users to take the steps necessary to maintain that coverage.

### 2. Environmental Insurance

The costs related to an environmental event may be significant and include, but not be limited to, claims for bodily injury, property damage, investigation and defense, litigation, remediation, loss of use or rental income related to facilities, prolonged mitigation or clean-up efforts, or natural resource damage. To address these various risks, there are several general kinds of environmental insurance available.

In conjunction with a legal and environmental consulting team, research and analysis of specific insurance may be required to satisfy fuel farm financial responsibility requirements and the Oil Pollution Act of 1990.<sup>118</sup>

*a. Commercial Pollution Insurance.*—Commercial pollution insurance is available through specialty underwriters to address claims associated with first-party and third-party losses. These can include site-specific policies to address risks associated with properties and facilities (pollution legal liability), operations coverage for liability claims arising out of the operation and activities of a public entity (pollution commercial policy), and contractors coverage for liability claims arising out of releases caused by construction or remediation activities (contractor's pollution liability).

*b. Pollution Liability Insurance.*—Similar to commercial pollution insurance, pollution liability insurance typically covers the following risks:

- Third-party claims due to bodily injury and property damage from on-site pollution or migration of pollution to off-site locations.
- Third-party claims arising out of pollution caused by operations and activities of an insured public entity.
  - First-party losses for on-site cleanup and damage to property of others.
  - Off-site cleanup of pollutants released from insured locations or from insured operations of the airport.

In addition, pollution liability policies (from a strictly environmental perspective) may provide coverage for losses associated with emergency

<sup>118</sup> 33 U.S.C. §§ 2701–2761.

response, natural resource damage, business interruption, transportation of hazardous materials, non-owned disposal site coverage (for releases from sites where the insured sent waste materials), and legal defense costs.

## B. Insurance Compliance and Preserving Coverage

In addition to understanding the available insurance options, airport sponsors should develop a system to determine that airport users and the airport sponsor itself remain in compliance with insurance requirements. A process should be established to monitor certificates of insurance (for the airport sponsor and any private entity operating a fuel farm on the airport) to ensure insurance policies are in full force and effect throughout the term of the operating agreement. Further, the airport sponsor should require that “no insurance policy may be canceled, materially revised, or non-renewed without at least 30 days prior written notice being given to the Port.”<sup>119</sup>

## C. Effectively Transferring Risk

To secure the full benefits of insurance, airport sponsors typically require that airport users maintain appropriate insurance coverage. Insurance requirements are set forth in the lease agreement, management contract, operating permit, minimum standards, or rules and regulations, as appropriate. Insurance requirements for commercial fueling operations are typically set forth in the minimum standards. Insurance requirements for noncommercial self-fuelers are typically set forth in the lease agreement or operating permit. Although those documents may specify certain kinds of insurance policies and certain policy limits (which may range from \$1-million policies for limited, low-risk situations, such as smaller general aviation airports, up to more than \$1-billion policies for significantly high-risk situations, such as large-hub commercial airports), the airport sponsor should reserve the right to require more or different types of insurance coverage based on the entity’s operation and individual risks or liability exposures.

To assure that the primary risk is borne by the airport user’s insurance, the insurance requirements should state that insurance provided by the airport user tenant shall be primary without contribution from any other insurance carried by the airport sponsor and require that the airport sponsor

<sup>119</sup> General Aviation Minimum Standards (v. 2)—Port of Portland. Note that state law may require a shorter period of time. Airport sponsor should check its state and local laws to assure that notice periods comply with applicable law.

(and all related individuals and employees) are named as additional insureds on the policy. For example, language can be inserted stating, “All insurance, which entity is required to carry and keep in full force and effect, shall name the Port and the Airport, individually and collectively, and their commissioners, directors, officers, employees, agents, and volunteers as additional insured.”<sup>120</sup> A prudent airport sponsor, however, should carry adequate contingency insurance to cover any claims in excess of the insurance carried by the third parties.

## VI. FACTORS AFFECTING AIRPORT SPONSORS’ DECISIONS ON SELECTING A FUEL FARM OWNERSHIP AND MANAGEMENT MODEL

The survey results showed that most airport sponsors continued to use the fuel farm ownership and management model that has been in place for many years, and that the airport sponsor was generally satisfied with the existing models. There did not appear to be much internal consideration of alternative models when the existing models were selected. Moreover, as previously discussed, the industry has developed ways that allow airports to meet legal and operational obligations under each model. Accordingly, the choice of one model over another largely reflects the particular circumstances at each airport rather than any overarching legal or operational issue. That said, the reasons the interviewees articulated for why they were comfortable with their chosen model offer some insight into why one model may be better suited for a particular airport than another model.

Most larger commercial service airports use a consortium model. When questioned about that approach, interviewees indicated that the airlines were best able to manage the fuel farm because they were in the best position to integrate fueling operations into airline operations, including assuring sufficient supply. Moreover, the airlines themselves often request to establish a consortium to better control costs and supply themselves. In addition, the airport sponsors indicated that they did not have the staff and expertise necessary to manage the large fuel farm needed to support scheduled service. It was more efficient to allow the consortium to operate the fuel farm and for the airport sponsor to perform an oversight role to assure compliance with contractual and environmental obligations. It is important to note, however, that the airport sponsors typically devote substantial resources to that

<sup>120</sup> General Aviation Minimum Standards (v. 2)—Port of Portland.

oversight function, and airport staff are involved with fuel farm operations on a daily basis.

Similar factors tend to underlie the model used by general aviation airports. On the one hand, most of the surveyed general aviation airports lease the fuel farm to a private operator, usually an FBO. From the airport sponsor's point of view, this shifts both the management responsibility and overall risk to the fuel farm operator, reducing airport operating expenses and risk. In addition, an FBO is typically in the best position to manage supply based on market demand. From the FBO's point of view, that model allows the FBO to realize revenue from fuel sales, which is often the source of most profits, and better serve its customers by providing a full range of services. In addition, some noncommercial self-fueling entities desire to operate a fuel farm in an effort to control or decrease costs.

On the other hand, the airport sponsors who owned and operated their own fuel farm indicated that they were more comfortable controlling the operation themselves, rather than relying on a third-party. Despite the additional demands and associated risks, those airport sponsors felt that greater control was the more desirable way to meet all of the legal and operational obligations of a fuel farm and that exposure or risk could be controlled through insurance.

Although it appears that the overwhelming factor governing the choice of fuel farm model is historic practice, underlying that is an assessment of who has the expertise and incentive to operate the fuel farm most effectively. Most airport sponsors have found that the airlines (in a consortium) or an FBO (in a lease model) are in the best position to provide fuel services because they have the greatest incentive to serve the market for fuel at the airport. Historic practice and management philosophies differ from airport to airport, however, leading some airports to pursue alternative models (e.g., management contract).

Revenue considerations did not seem to play a substantial role in the choice of ownership and operating model. Although fuel sales are a potential significant source of revenue, airports that do not own the fuel farm are able to generate some revenue, though a lesser amount, through rents and fuel flowage fees rather than direct sales of fuel.

The need for capital expenditures can also play a role in the selection of an ownership and operating model because allowing a private entity to control fuel sales creates a financial incentive to also assume the costs of operating and maintaining a fuel farm. For example, the fuel farm at one surveyed commercial service airport had been operated through a

lease with a single air carrier that maintained a hub at the airport. That carrier withdrew its hub and then filed for bankruptcy, leaving the airport facing significant expenses to address long-deferred maintenance and improvement projects at the fuel farm, as well as to operate the fuel farm. Discussions with the remaining air carriers quickly led to an agreement to lease the fuel farm to a consortium. Leasing the fuel farm to a consortium transferred the maintenance and improvement costs, as well as the daily operating costs, to the consortium. The airport was able to agree to a rent structure that allowed the consortium members to assume those costs and still control their fuel costs, while providing a revenue stream to the airport.

The key factor that appeared to fundamentally drive how airport sponsors consider fuel farm ownership and management models is the airport sponsor's willingness to assume day-to-day management responsibility, expense (including maintenance), and risk or exposure in order to assure effective operation of the fuel farm. Most airports choose to outsource those responsibilities to a third party—whether a consortium, FBO, or management contractor—and limit the airport's role to a supervisory one to avoid assuming the day-to-day responsibilities and expenses directly. Some airports, however, are willing to accept those responsibilities, costs, and exposure or risk in order to maintain control of all airfield operations and assure both quality of service and legal compliance.

The choice of appropriate type of third-party operator seems to be driven by a local assessment of who is in the best position to provide the service. At most larger commercial service airports, that third party was determined to be a consortium of airlines, cargo operators, and other large-volume users who have an incentive to control costs and manage supply. At most smaller commercial service and general aviation airports, that third party is an FBO that provides other services to aeronautical users. In some cases, the airport may retain a management contractor due to historical management issues with local FBOs or other local considerations.

As previously discussed, regardless of the choice of ownership and management model, the industry has developed contractual or other tools to assure compliance with legal obligations and to assure that operational goals are met. The basic question of who will operate the fuel farm is essentially a question of identifying the entity at each airport in whom the airport sponsor has the greatest confidence of meeting the legal obligations, operational goals, and capital needs of the fuel farm.



## VII. CONCLUSION

A fuel farm, including associated fuel delivery and distribution systems, presents airport sponsors with numerous legal and operational challenges. Those challenges include complying with myriad federal, state, and local laws and assuring the safe operation of the fuel farm in order to provide fuel to airport users. Although those requirements can be complex and technical, the industry has developed standards to assure compliance and standardized methods to assign compliance responsibility to the appropriate airport tenant or user. This digest presents examples of how airport sponsors meet those obligations under the several ownership and management models commonly used for airport fuel farms. The survey responses and sample fuel farm management documents did not reveal substantial differences in how airport sponsors addressed the legal and operational challenges. The primary difference is who is charged with the responsibility (lessee, licensee, permittee, or airport sponsor itself) and the name of the document

used to impose those obligations (lease, license, internal SOP, commercial minimum standards, or airport rules and regulations).

The responses to survey questions indicate that airport sponsors selected their fuel farm ownership and management model based largely on practical considerations, such as historic practice, requests from airport users (including airlines and FBOs), and the airport sponsor's willingness to assume the financial and management risk of operating a fuel farm itself. Most airport sponsors chose to lease the fuel farm to a fuel consortium (at larger commercial service airports) or an FBO (at general aviation airports) and assign legal and operational obligations on the fuel farm operator through lease terms, often incorporating commercial minimum standards and airport rules and regulations. That decision reflects a basic assessment of whether the airport sponsor wants to devote the resources necessary to operate a fuel farm itself or focus on oversight of the fuel farm operator to assure compliance with contractual obligations.

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