



U.S. Department
of Transportation
**Federal Aviation
Administration**

Northwest Mountain Region
Colorado · Idaho · Montana · Oregon · Utah
Washington · Wyoming

Seattle Airports District Office
2200 S. 216th Street, Room 1W-420
Des Moines, WA 98198

March 29, 2024

Mr. Brian M. Werst
General Counsel
Spokane International Airport
9000 W. Airport Dr.
Spokane, WA 99224

Mr. Werst,

This letter responds to your February 1, 2024, e-mail inquiry regarding the possible conflicts between your airport's Federal obligations and a certain potential settlement agreement with the Washington State Department of Ecology (WSDOE). As we understand it, the proposed draft Agreed Order is designed to resolve issues related to alleged contamination on and around the airport from per- and polyfluoroalkyl substances, also known as PFAS. Your letter acknowledges that the airport used aqueous film-forming foams "AFFF" that contained PFAS and that those uses occurred on airport property. You also provided for FAA review copies of a draft Agreed Order and scope of work as well as a draft Enforcement Order and scope of work submitted by WSDOE for the airport's consideration.

Because Spokane International Airport has accepted Federal grants, there are certain legal obligations (generally contained within the "grant assurances") that apply to the airport. While the grant assurances affect many aspects of airport operations, they do not, in general, implicate an airport's obligation to comply with applicable environmental laws. Likewise, an enforcement action taken by a local government with respect to a required environmental response action is typically not implicated by any constraints within Federal grants. Although we are not experts in Washington state law, we note that generally, at least in the Federal space, environmental liability for contamination, subject to limited defenses, is strict, joint and several. See, e.g., *O'Neil v. Picillo*, 883 F.2d 176, 179 (1st Cir. 1989) (discussing joint and several liability imposed on parties that are merely "partially culpable").

Airports are also prohibited from diverting airport revenue. 49 U.S.C. §§ 47107(b), 47311 and Grant Assurance 25. Courts have made clear that this provision does not bar an airport's payments of bona fide operating costs. *Air Transp. Ass'n of Am., Inc. v. Fed. Aviation Admin.*, 921 F.3d 275, 278 (D.C. Cir. 2019). In the ATAA case, utility fees were found to be permissible operating costs where the airport was not "unfairly target[ed]" or "unfairly singled out." *Id.* at 279-80. This was true even where the rate base for the challenged fees included costs for the utility's own environmental liabilities that were unrelated to the airport.



U.S. Department
of Transportation
**Federal Aviation
Administration**

Northwest Mountain Region
Colorado · Idaho · Montana · Oregon · Utah
Washington · Wyoming

Seattle Airports District Office
2200 S. 216th Street, Room 1W-420
Des Moines, WA 98198

FAA's revenue use policy provides that "[o]perating costs for an airport may be both direct and indirect and may include all of the expenses and costs that are recognized under the generally accepted accounting principles and practices that apply to the airport enterprise funds of state and local government entities." *Policy and Procedures Concerning the Use of Airport Revenue*, 64 FR 7696-01 (Feb. 16, 1999). The policy also expressly allows for "undertaking environmental mitigation measures contained in an FAA record of decision approving funding for an airport development project." *Id.* In general, there is no bar on an airport using its own revenue to discharge its legal liabilities or to settle cases even where liability has yet to be adjudged.

Finally, FAA's Rates and Charges policy expressly provides that reasonable environmental costs are a permissible part of an airport's rate base, i.e., they may be passed on to airport users. *Policy Regarding Airport Rates and Charges*, 78 Fed. Reg. 55330, 55333 (Sept. 10, 2013).

It is possible that where an airport is targeted for environmental costs for which the airport has no plausible liability, based on either fact or law, the payment of such costs could violate the revenue use statutes and grant assurances. The fact that a regulator seeks to impose joint and several liability would not in and of itself implicate the grant assurances where joint and several liability is properly imposed by law. In cases where environmental regulators overreach, FAA would expect a sponsor, in the discharge of its fiduciary duties to operate the airport, to defend itself in court or through negotiations with the regulator. These are not typically issues that involve the FAA or the grant assurances. In general, it is the discretion of the sponsor to settle legal matters, environmental or otherwise, even where issues of liability are not fully resolved.

Grant Assurance 5, Preserving Rights and Powers, implements 49 U.S.C. § 47107. The purpose of Grant Assurance 5 is to "prohibit[] the airport sponsor from entering into an agreement that would deprive it of any of its rights and powers that are necessary to perform all of the conditions in the grant agreement or other federal obligations." FAA Order 5190.6B, Change 3, Airport Compliance Manual, at para. 6.3(b).

The proposed draft Enforcement Order provides WSDOE with certain oversight of real estate sales, leases, transactions, and land uses. The Enforcement Order would require the City and County to give WSDOE thirty days advance notice for any "voluntary conveyance or relinquishment of title, easement, leasehold, or other in interest in any portion of the Site." It also requires notice of relevant restrictions on the activities and uses of airport property to be contained in transfer documents.

It is unclear to the FAA if the provisions highlighted in the order raise concerns that are theoretical or actual. If there are restrictions that have been lawfully imposed on the use of the



U.S. Department
of Transportation
**Federal Aviation
Administration**

Northwest Mountain Region
Colorado · Idaho · Montana · Oregon · Utah
Washington · Wyoming

Seattle Airports District Office
2200 S. 216th Street, Room 1W-420
Des Moines, WA 98198

property it does not seem overly burdensome to provide notice to parties that are entering into transactions that involve that land.

The requirement to provide 30 days advance notice to WSDOE of entering a lease seems excessive, given that this is an operating international airport, but it is not clear if the airport has attempted to negotiate this out.

FAA would tend to agree that liens against airport property could implicate Grant Assurance 5 if they have the effect of limiting an airport's rights and powers over the airport property and/or the ability to safely operate the facility. In the event a lien is being imposed, we would be happy to discuss the circumstances further.

FAA would recommend that the WSDOE order acknowledge Federal safety and access restrictions that apply to the airport and provide and include a subordination clause to apply in the rare instances in which conflict may arise. FAA notes that if the regulator is refusing to negotiate reasonable terms in good faith, the Airport has the option of not agreeing to the order. The analysis herein is intended to provide guidance. Additionally, this letter is an informal analysis of the above issues and does not constitute a final agency decision judicially reviewable under 49 U.S.C. § 46110. We understand that you have retained outside counsel experienced in handling these types of matters, and we encourage you to work closely with them as you navigate this matter. Experienced environmental counsel should have the best advice on how to work with the environmental regulators.

If you have any further questions, please contact me.

Thank you,

Digitally signed by WARREN
DEWAYNE FERRELL
Date: 2024.03.29 17:36:59
-07'00'

Warren D. Ferrell
Seattle ADO Manager