

42nd Annual AAAE
Airport Law Workshop
Phoenix, AZ

Session #8

Current State of Environmental Law



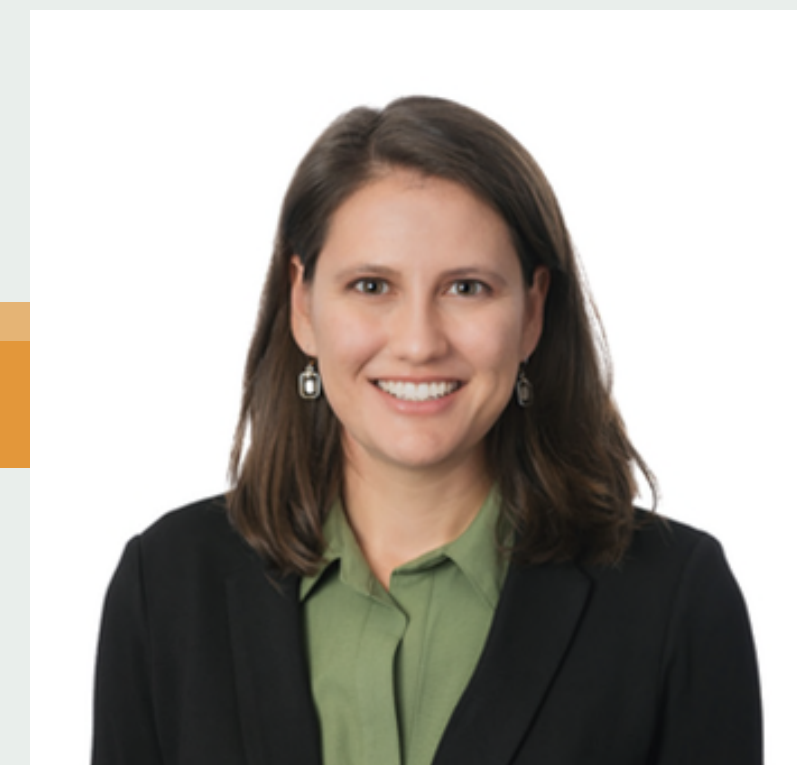

KAPLAN KIRSCH

Speakers



Katie van Heuven

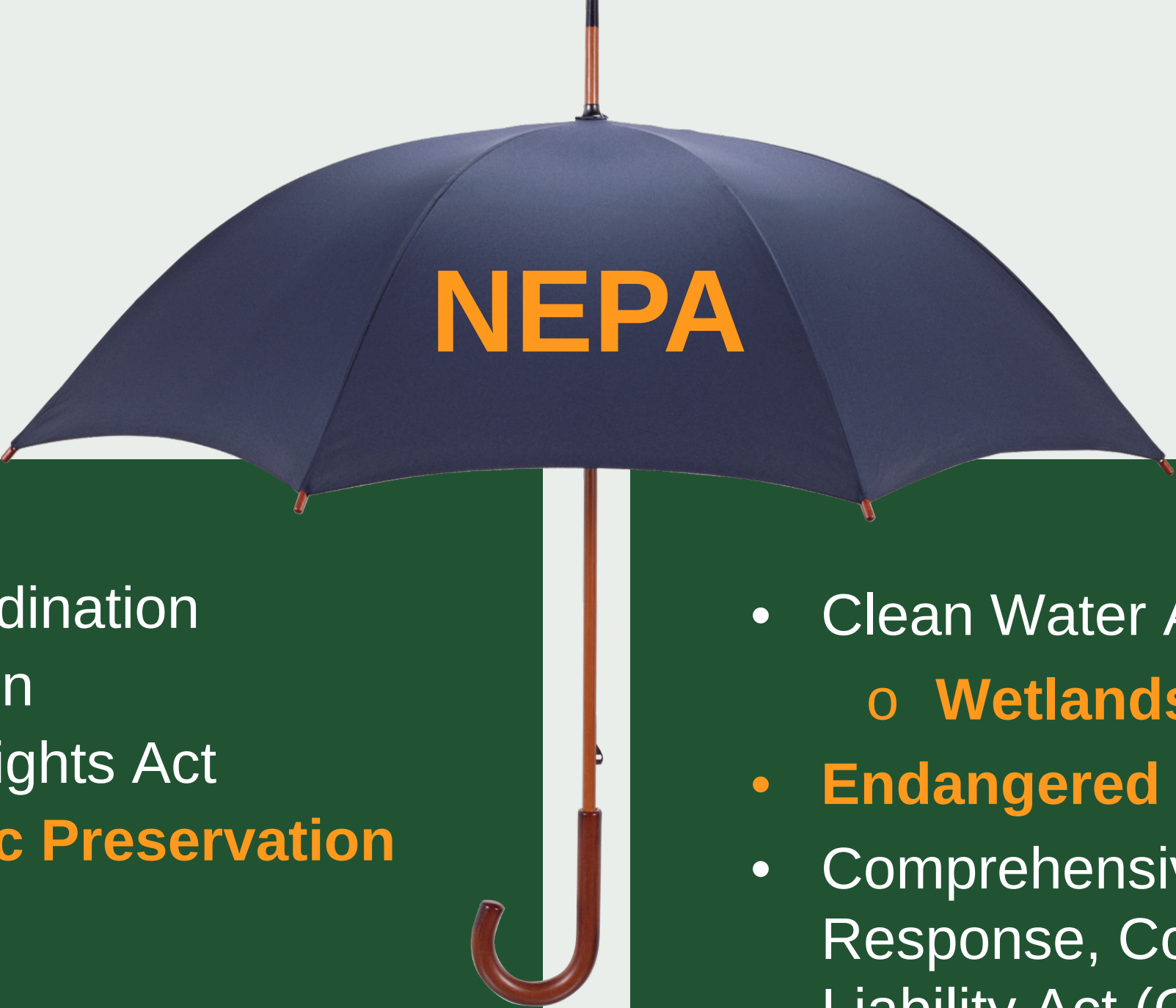
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Today's Presentation



NEPA

- Interagency coordination
- Tribal consultation
- Title VI of Civil Rights Act
- **National Historic Preservation Act**
- Noise standards
- **Section 4(f)**
- Clean Air Act
 - **Conformity**
 - **Preemption**

- Clean Water Act
 - **Wetlands**
- **Endangered Species Act**
- Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA)
 - **PFAS**
- Public Participation

National Environmental Policy Act - NEPA

- Federal agencies must prepare a “detailed statement” when they propose to take a “major federal action significantly affecting the quality of the human environment.”
 - Take a hard look at the impacts
 - Provide information about environmental effects to decision-makers and the public
 - Improve decision-making through disclosure and coordination/consultation
- Establishes Council on Environmental Quality (CEQ)
 - Agencies must develop procedures in consultation with CEQ





NEPA Overview (cont.)

- NEPA imposes *procedural*, not substantive requirements.
- The NEPA process is often how the public learns about airport improvement projects.



“Major Federal Action”

Evolving
definition!!!

- FAA
 - Providing federal financial assistance
 - Approving an Airport Layout Plan
 - Approving a release of obligations (e.g., sale of federally funded airport property)
 - Approving airspace changes
- Other agencies (e.g., FHWA, Army Corps, Department of Defense)

“Detailed Statement”

Categorical Exclusion (CATEX)

U.S. DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION
NORTHWEST MOUNTAIN REGION - AIRPORTS DIVISION
Categorical Exclusion Form
Version 06/05/07a

CONTACT THE ADO ENVIRONMENTAL SPECIALIST BEFORE USING THIS FORM

Directions: The person (analyst) preparing this form should have knowledge of the environmental features of the airport and general impacts of the project. Although some responses may be obtained from the preparer's own observations, previous environmental documents or research should be cited. Some of the best sources for information are the jurisdictional federal, state and local resource agencies responsible for the impact categories. This form is to be used with the current versions of FAA guidance, specifically FAA Orders 1050.1E, and 5050.4B.

FAA urges the analyst to contact the ADO as quickly as possible for any extraordinary circumstance that requires FAA to complete the process any applicable special purpose laws require. For example, FAA is solely responsible for completing the Section 106 process. Other special purpose laws may require FAA to complete certain procedures. Early coordination with FAA will do much to reduce delays that would have occurred if it did not begin compliance procedures with the applicable special purpose law early in the project review cycle.

Some of the categories below require a reference or information to support a finding. Attach that information to the form or scan it as an attachment if you are filing this form on the web site noted below.

An electronic version of this form is available at:
http://www.faa.gov/airports/airports/regions/guidance/northwest_mountain/airports/resources/forms/med/environments/environments_060507a.pdf

APPLICABILITY:
This Environmental Evaluation Form may be used only if the sponsor's proposed project meets the following two (2) criteria:

1. The proposed project is a federal action subject to NEPA. List applicable paragraph number from FAA Order 5050.4B, Chapter 1 para. 9g
2. The proposed project is identified as one that can be categorically excluded. List applicable category from FAA Order 1050.1E paragraphs 307 through 312.

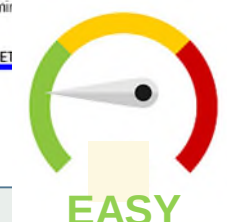
Project Information:

Airport:	Airport Identifier:
Project Title:	
Project Description:	List and clearly describe ALL components of project proposal including all connected actions. (Attach site map identifying project area).
Proposed Start Date of Project:	
Purpose & Need:	

Per FAA Order 1050.1E, paragraph 304 and 5050.4B paragraph 606, before a categorical exclusion may be utilized, a review of extraordinary circumstances must be conducted to ensure the categorical exclusion is valid. Extraordinary circumstances exist when the proposed action (1) involves any of the following circumstances and (2) may have an adverse effect requiring further analysis to determine that effect. Please complete this form so that the FAA can make a determination.

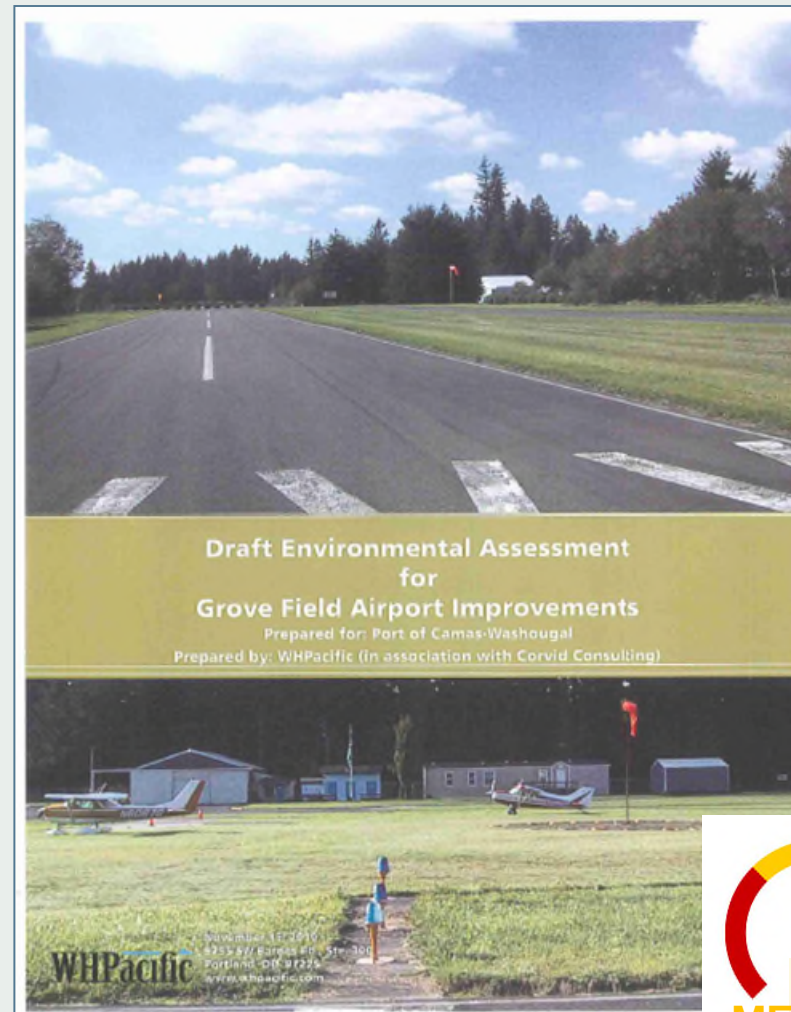
FOR EACH YES OR NO ANSWER, PROVIDE DOCUMENTATION USED AS THE BASIS FOR THE DETERMINATION.

Page 1 of 7



- Most common for airport projects
- Only available if no extraordinary circumstances
- No public involvement required

Environmental Assessment (EA)



- Used if a CATEX is not available, or
- If unsure whether there will be a significant impact
- *Public review of final EA*

Environmental Impact Statement (EIS)

U.S. Department of Transportation
Federal Aviation Administration
O'Hare Modernization
Final Environmental Impact Statement
&
Section 4(f) and Section 6(f) Evaluation
&
General Conformity Determination

DATE: July 2005

VOLUMES 1 - 4
Chapters 1- 8, Appendices A-L

Cooperating Agencies: U.S. Environmental Protection Agency
U.S. Army Corps of Engineers
Federal Highway Administration
U.S. Fish and Wildlife Service
Illinois Environmental Protection Agency

This Final Environmental Impact Statement (FEIS) identifies the potential environmental impacts associated with proposed major development at Chicago O'Hare International Airport and reasonable alternatives pursuant to the National Environmental Policy Act. Also included with the FEIS are FAA's Final Section 4(f) and Section 6(f) Evaluation and Final General Conformity Determination.

This statement is submitted for review pursuant to the following public law requirements: Section 102(2) (C) of the National Environmental Policy Act of 1969 (P.L. 91-190); 42 U.S.C. 4321; E.O. 11990, Protection of Wetlands; E.O. 11998, Floodplain Management Title V of Public Law 97-248; the Federal Aviation Act of 1958 recodified at 49 U.S.C. Section 40101 et seq; the Airport and Airway Improvement Act of 1962, as amended recodified at 49 U.S.C. Section 47101 et seq; Section 4(f) of the Department of Transportation Act of 1966 recodified at Section 303c, as amended; Section 6(f) of the Land and Water Conservation Act; Sections 401 and 404 of the Clean Water Act of 1972, (P.L. 107-303); Section 7(c) of the Endangered Species Act of 1973, as amended; Fish and Wildlife Coordination Act of 1934, as amended; Migratory Bird Treaty Act of 1918, as amended; Clean Air Act of 1970, as amended; National Historic Preservation Act of 1966, as amended, and other laws as applicable.

The Federal Aviation Administration is the lead agency for the Federal government in the preparation of this statement.

For additional information, contact:
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Email: ompets@faa.gov



- Not common for airport projects
- Most detailed analysis
- *Public involvement and review of draft EIS*



Sponsor's Role

- NEPA is a federal obligation, but....
- Longstanding practice to allow sponsors to prepare CATEXs and EAs.
 - New opportunity for EISs
- Documents must be prepared under the “supervision of the agency”
- Agency procedures for sponsor preparation





What's in the Document?

Documented CATEX

EA/EIS major elements

- Purpose and need of the proposed action
- Explanation of alternatives
- Description of the affected environment
- Analysis of the environmental consequences of the alternatives (including no action alternative)
- Mitigation
- Public Involvement*

Key Sources:

FAA Order 1050.1G

Order 1050.1 Desk
Reference



Shifting Landscape

(2023 - ??)

Fiscal Responsibility Act of 2023

- Substantive edits to NEPA statute

FAA Reauthorization Act of 2024

- Amendments to Aviation Streamlining Act
- Section 743 limits FAA approval authorities (therefore limiting NEPA requirement)

One Big Beautiful Bill Act

- More NEPA amendments
- Opt-in fee for expedited review

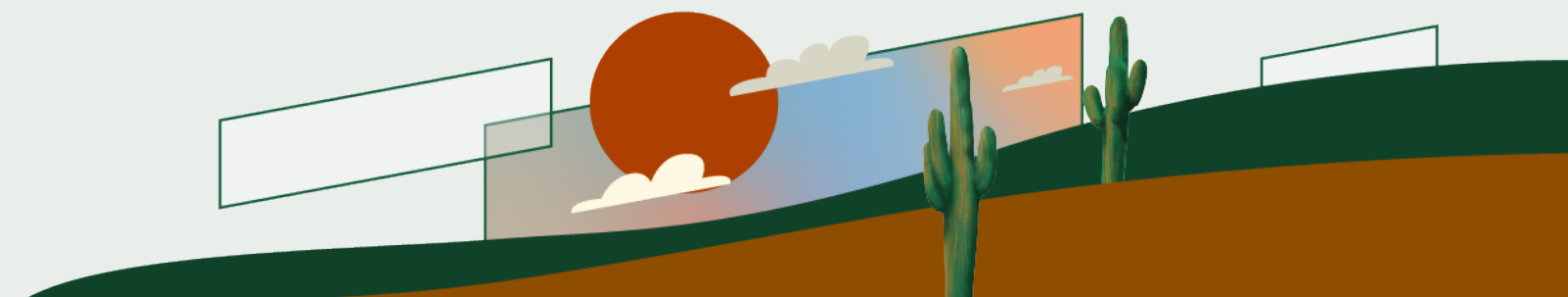
Bipartisan American Affordability and Jobs Act of 2026.....



Supreme Court

Seven County Infrastructure Coalition v. Eagle County, Colorado

- Agencies are owed “substantial deference” when they decide what effects to consider in an EIS and how deeply to analyze them
- Agencies can draw a “reasonable and manageable line” to define the project
- Agencies only need to consider the effects of the “project at hand” not other projects separated by time or space
- Agencies not required to study effects of projects over which they do not exercise regulatory authority



Regulatory Changes



- Trump 1 Revisions to NEPA regulations (July 2020)
- Biden “Phase 1” Rulemaking (April 2022)
- Biden “Phase 2” Rulemaking (May 2024)
- Marin Audubon v. FAA (Nov. 2024) (D.C. Cir rules that CEQ regulations are “ultra vires”)
- Executive Order 14154 (Jan. 2025) (proposing rescission of CEQ regulations)
- CEQ Rulemaking rescinding NEPA regulations (published Feb. 2025, effective April 2025)
- Updated FAA guidance in Order 1050.1G

National Historic Preservation Act

Section 106 Handbook:

How to Assess the Effects of FAA Actions on
Historic Properties under Section 106 of the
National Historic Preservation Act



Federal Aviation Administration

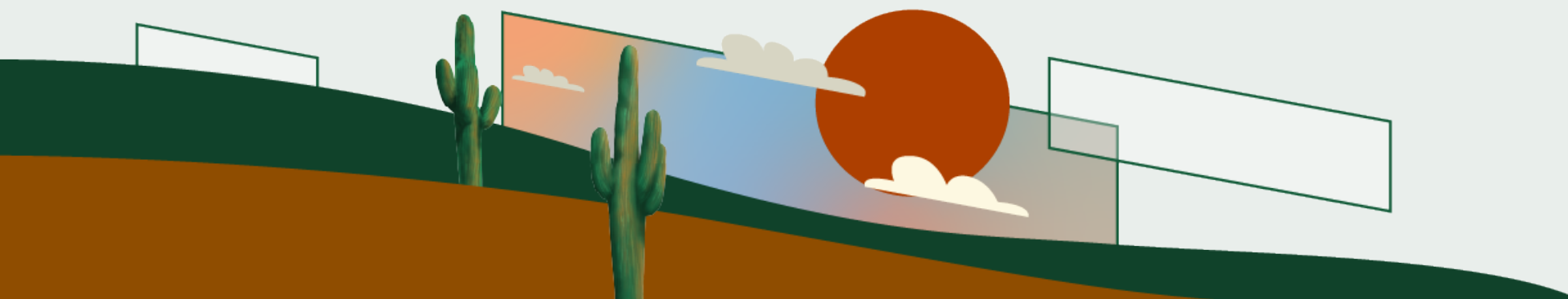
June 2015

- Primary U.S. law for historic preservation
- **Section 106:** Federal agencies must consider the impact of their undertakings on historic properties
- Procedural requirements

Proposed Changes to NHPA Regulations

36 C.F.R. Part 800 (Protection of Historic Resources)

- July 26, 2026: Advisory Council on Historic Preservation (ACHP) voted to move forward with a Notice of Proposed Rulemaking (NPRM) to revise the NHPA regulations (July 26, 2026)
 - Characterizes Section 106 as "procedural"
 - Revises definitions of "historic property" and "area of potential effect"
 - Eliminates "avoidance" and "minimization" as express regulatory objectives, and new language permitting agencies to determine that "other considerations outweigh" preservation
 - Replaces prior multi-step coordination process with a new agency "Section 106 Report"
 - Changes existing requirement for public engagement to allow agency discretion on scope of public engagement
- Secretary of the Interior Order 3452, *Timely Completion of National Historic Preservation Act Section 106 Review* (August 20, 2026)



DOT Act of 1966 – Section 4(f)

- Codified at 49 U.S.C. § 303(c)
- Only applies to Department of Transportation Agencies

“... the Secretary may approve a transportation program or project ... requiring the use of publicly owned land of a public park, recreation area, or wildlife and waterfowl refuge of national, State, or local significance, or land of an historic site of national, State, or local significance (as determined by the Federal, State, or local officials having jurisdiction over the park, area, refuge, or site) only if—

- (1) there is no prudent and feasible alternative to using that land; and*
- (2) the program or project includes all possible planning to minimize harm to the park, recreation area, wildlife and waterfowl refuge, or historic site resulting from the use.”*

Section 4(f)



Covered Properties

Property that is protected by this statute has come to be known as “Section 4(f) Property”

- Public parks & recreation areas
- Wildlife and waterfowl refuges of national, state, or local significance
- Historic properties

Covered Uses

Physical use: Actual physical taking of Section 4(f) property

Constructive use: No physical taking, but project has impacts that constitute “substantial impairment” on the value of the Section 4(f) property



Section 4(f): “Feasible and Prudent”

Safe, Accountable, Flexible, Efficient
Transportation Equity Act: A Legacy for
Users (SAFETEA-LU) (2005)

- Directed DOT to clarify factors for determining whether an alternative is “feasible and prudent”
- New exception for projects with only *de minimis* impacts on 4(f) lands

Federal Highway Administration/Federal
Transit Administration (FHWA/FTA)
regulations (23 C.F.R. Part 774)

- Alternative is “feasible and prudent” if it avoids using Section 4(f) property and does not cause problems that substantially outweigh the importance of protecting the Section 4(f) property
- FAA does not have its own 4(f); relies on FHWA/FTA regulations
- If no feasible and prudent alternative avoids 4(f) property, agency must approve the alternative that meets the purpose and need and causes the least overall harm.



Clean Air Act



Clean Air Act Basics

- EPA sets National Ambient Air Quality Standards (NAAQS) for 6 “criteria pollutants”
- States propose a State Implementation Plan (SIP) to implement, maintain and enforce the NAAQS
- EPA reviews the SIPs
 - If SIP is approved, the state and local regulations in the SIP are enforceable as federal law
 - If SIP is rejected, EPA creates a Federal Implementation Plan (FIP) and takes over administration of the state program

Clean Air Act Conformity

- Areas where air pollution levels meet the NAAQS are in **“attainment”**
- Areas where air pollution levels exceed the relevant NAAQS are in **“nonattainment”**
- Why is this relevant?
 1. More stringent emissions controls required in nonattainment areas
 2. Different permit requirements
 3. Conformity rules only apply in nonattainment areas

“No department, agency, or instrumentality of the Federal Government shall engage in, support in any way or provide financial assistance for, license or permit, or approve, any activity which does not conform to an implementation plan after it has been approved or promulgated ...”

- Clean Air Act § 176(c)

Clean Air Act Conformity (cont.)

- Substantive requirement
 - Bars federal actions that do not conform to the Clean Air Act
- Federal requirement
 - FAA makes the conformity determination
 - Airport sponsors still play a crucial role supplying background and planning data

Does Conformity Apply?

- Is there a federal action?
- Is the project in a nonattainment area?
- Is there an exclusion?
- Is the project “presumed to conform”?
- Are emissions above de minimis thresholds?

CAA Preempts State Tort Claims Over Flight Emissions

Codoni, et al. v. Port of Seattle, et al., No. 25-2830 (9th Cir. Sept. 23, 2026)

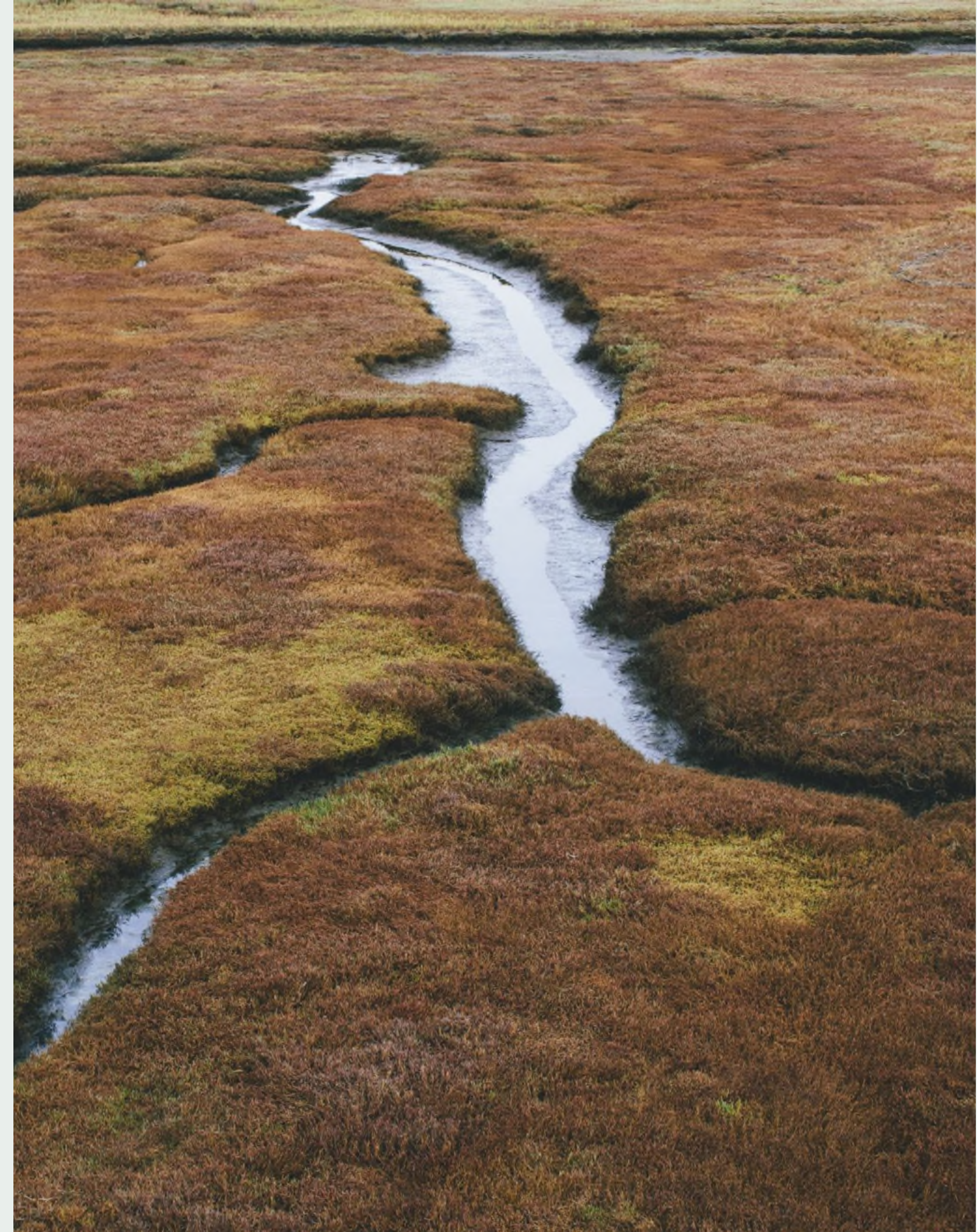


- Plaintiffs brought state law claims against Delta, Alaska, and the Port of Seattle alleging impacts from particulate emissions from aircraft
- Clean Air Act Section 233: ***No State or political subdivision thereof may adopt or attempt to enforce any standard respecting emissions of any air pollutant from any aircraft or engine thereof unless such standard is identical to a standard applicable to such aircraft under this part.***
- Held: Section 233 preempts tort law claims that would regulate aircraft emissions or seek recovery for emissions that are consistent with federal standards

Clean Water Act - Wetlands

Redefining “Waters of the United States”

- *Sackett v. EPA*, 598 U.S. 651 (2023) significantly narrowed federal authority to regulate certain waters and wetlands nationwide
 - “Significant nexus” from *Rapanos* → “continuous surface connection” from *Sackett*
- EPA and the Corps proposed new rule to update the definition of “WOTUS” per *Sackett* decision:
 - “Relatively permanent” = standing or flowing year-round or at least during the wet season
 - “Continuous surface connection” = abutting a jurisdictional water
 - See Proposed Rule, *Updated Definition of ‘Waters of the United States’* 90 Fed. Reg. 52,498 (Nov. 20, 2025)
- Look for States acting to fill in permitting gaps
 - Ex: Colorado’s new dredge and fill program

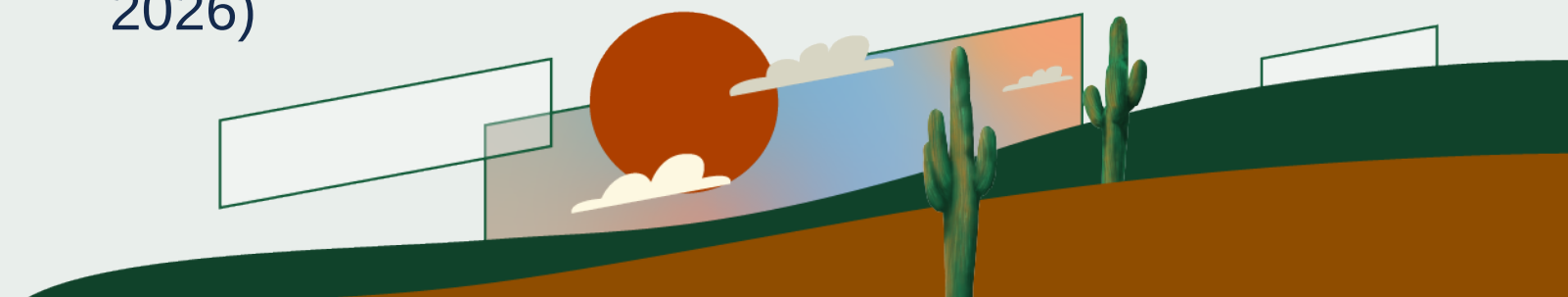




Endangered Species Act

Re-defining “Harm” to Listed Species

- ESA prohibits taking species; “**Take**” historically meant: “to harass, harm, pursue, hunt, shoot, kill, trap, capture, or collect, or to attempt to engage in any such conduct.” 16 U.S.C. § 1532(19).
 - “**Harm**” included significant habitat modification or degradation that would kill or injure by impairing essential behaviors (i.e., breeding or feeding)
- New rule removes habitat degradation from “harm” so that modification or harm to critical habitat is permissible so long as it does not *directly* hurt or kill members of listed species.
- Final Rule, *Rescinding the Definition of “Harm” under the ESA*, 91 Fed. Reg. 43,400 (Jul. 14, 2026)



PFAS Overview

What Are PFAS?

- PFAS Background
- Relevance to airport operators
- Where are PFAS at airports?
- F3 transition planning

Federal Regulation of PFAS

- Safe Drinking Water Act
- CERCLA regulatory and litigation update
- Other PFAS regulatory updates

AFFF Multi-District Litigation

Minimizing PFAS Risk

- Status of AFFF Multi-District Litigation
- Steps airport operators can (and should!) take to minimize PFAS risk



PFAS Background

What are PFAS?

- Human-made class of thousands of chemicals
- Chemically stable and virtually indestructible
- Water soluble (travel quickly in water)
- Heat and water resistant
- Bioaccumulate in plants and animals
- Now ubiquitous in the environment
- Evolving science and understanding of PFAS health risks





Relevance to Airport Operators

PFAS in AFFF Used Nationwide at Airports

FAA historically required Part 139 Airports to use PFAS-containing AFFF that met a specific Mil Spec

Oct. 2021: FAA allows F3 if it meets Mil Spec

Jan. 2023: DOD releases a new Mil Spec for F3

Jul. 2024: PFAS designated as Hazardous Substance

Oct. 2024: Transition to F3 begins with three approved F3 products on the market

Now: Many airports have completed the transition to F3, many still in transition, all airports grappling with PFAS contamination, costs to manage it, and potential risk/liability



Where are PFAS at Airports?

Potential locations of impacts

- **Primary impact**
 - Sites of fuel fires
 - Training areas
 - Hangars
 - ARFF/fire stations
- **Secondary impact**
 - Soil re-use areas
 - Wastewater lagoons
 - Stormwater runoff
- **Environmental media**
 - Groundwater
 - Surface water
 - Impacted soil



F3 Transition Planning

Create Airport Stakeholder Team

Dispose of AFFF/ARFF

Decontaminate/replace ARFF

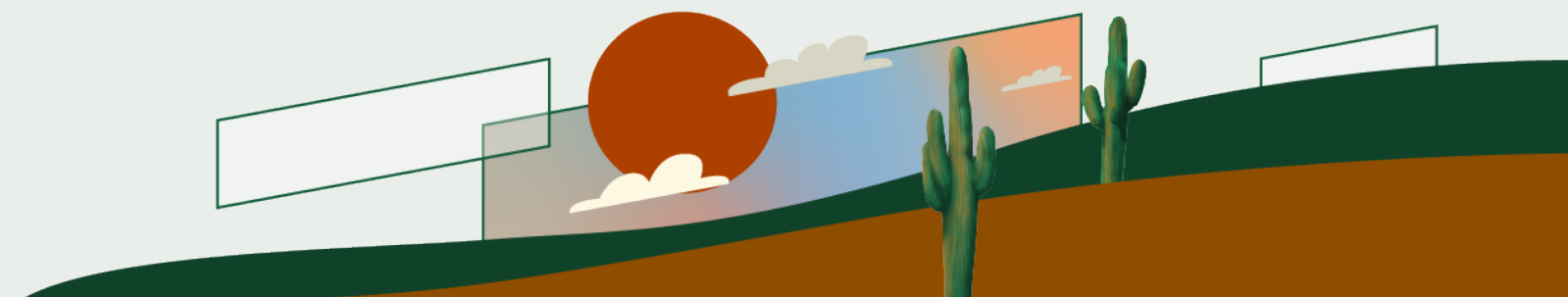
Modify/procure new ARFF

Management of spent F3 from testing

Training on ARFF with F3

Identify locations for all of this

Pay for all of this



PFAS Federal Regulatory Developments

CERCLA/Superfund

- **PFAS designated as “hazardous substances”**
 - PFOA and PFOS only (for now)
 - CERCLA liability for AFFF releases
 - Reporting requirements if PFAS released above RQ
 - Potential for enforcement by EPA
 - Cost recovery lawsuits
- **Enforcement Discretion Policy**
 - Agency to focus on industrial sources
 - Encourages public entities to enter voluntary settlements
 - Makes settlement protections available



PFAS Federal Regulatory Developments

Safe Drinking Water Act

EPA set Maximum Contaminant Levels for PFAS:

- PFOA = 4 ppt
- PFOS = 4 ppt
- Standards for other PFAS have now been rescinded

Implementation timeline:

- 2024-2027: PWSs must monitor for PFAS
- 2027-2029: PWSs must publish results
- 2029 onward: compliance with MCLs is required
- Flexibility → 2 more years if PWS requests it under 2026 Rule

Impacts on airport operators:

- Stringent standards
- Scrutiny on sources of PFAS
- MCLs could be de facto cleanup standards



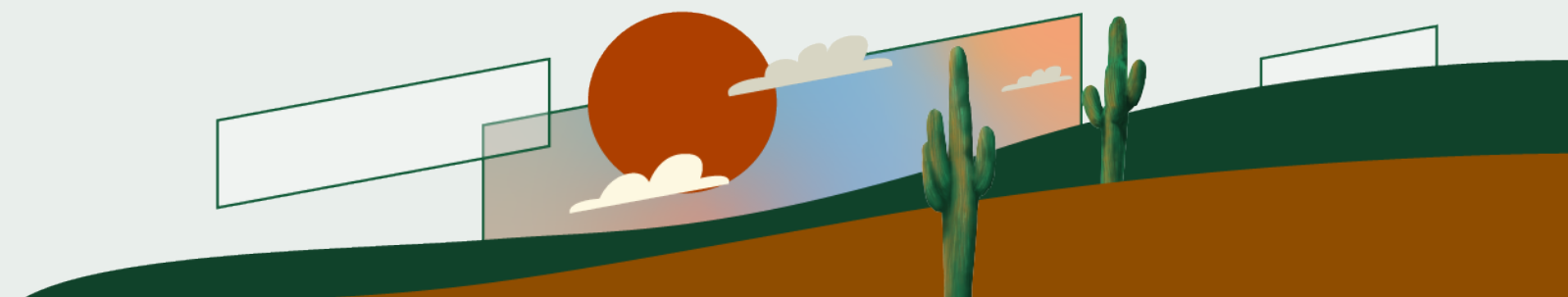
Other PFAS Regulatory Developments

- Clean Water Act NPDES Permits
 - EPA considering imposing quarterly indicator monitoring for 40 PFAS compounds as part of its 2026 update to the Multi-Sector General Industrial Stormwater Permit
- Resource Conservation & Recovery Act
 - Two proposed RCRA rules for PFAS (Feb. 1, 2024)
 - Modify definition of hazardous waste for cleanups at permitted hazardous waste facilities to require cleanup of PFAS (recently withdrawn)
 - Proposed amendment to add 9 PFAS as “hazardous constituents” (not withdrawn but future uncertain)
- PFAS Disposal and Destruction Guidance
 - April 2026 update is potentially useful for airport operators considering disposal options
- States have evolving PFAS requirements, too
 - Check ITRC for current state PFAS requirements: <https://pfas-1.itrcweb.org/fact-sheets/>

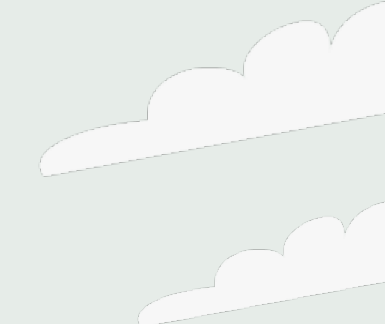
AFFF Multi-District Litigation

PFAS Litigation Update

- **Plaintiffs:** states, counties, cities, PWSs, airport operators, and more
- **Claims:** product liability, common law torts
- **Status:** “bellwether cases” selected, discovery, trials scheduled, settlements
- **PWS Settlements:** 3M = “largest drinking water settlement in U.S. history”; also DuPont, Tyco, & BASF
- **Importance:** impacts for PFAS litigation
- **Airport operators in the AFFF MDL**



What Should Airport Operators Do?



Where Are We?

- Many airports likely released AFFF
 - may be groundwater and soil contamination onsite
 - may have migrated off-site to other properties, PWSs, landfills, etc.
- Airports are starting the complicated, costly transition from AFFF to F3
- New federal regulations subject airport operators to liability under CERCLA
- Airport operators may be increasingly subject to enforcement and/or lawsuits

What's Next?

- Airport operators need a strategy for:
 - Reducing & managing PFAS liability
 - Recovering PFAS-related cleanup costs
- Such a strategy will apply beyond PFAS



Airport Operators Need a PFAS Strategy

General

- Do not admit liability and do reserve rights
- Know & abide by PFAS regulations/guidance
- Understand airport tenant operations
- Include PFAS in planning /development
- Have a multidisciplinary team (technical, legal, and PR expertise)

Releases

- Minimize future releases
- Complete the transition to F3 as quickly as possible
- Research historical releases (proper documentation to distinguish sources)

Remediation

- Conduct testing and remedial efforts strategically
- Maximize ability to recover costs under CERCLA by complying with the National Contingency Plan (NCP)

Publicly

- Engage thoughtfully with the public
- Disclose potential PFAS liability risk in Official Statements
- Be responsive and respectful with regulators



Takeaways for Airport Lawyers

- Airport operators must be sophisticated environmental managers
- Environmental laws are evolving – stay informed
- Pay attention to substantive environmental statutes as well as environmental review requirements (like NEPA)
- Track PFAS developments and take affirmative steps to minimize liability and maximize cost recovery
- Don't forget about state/local obligations in addition to federal ones



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Questions?




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Thank You!



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