Aviation Fueling at Large Airports: Negotiating Workable Agreements Between Airlines and Airport Proprietors

William Lahey* & Patricia Heilbron**

I. INTRODUCTION

The fueling of aircraft at commercial airports raises a complex mix of law, economics and policy issues. The cost of jet fuel has long played an important role in airline profitability,[1] and recent increases in the price of petroleum amplify the significance of this topic. Fuel prices are also adding to the financial instability of the airline industry and contributing to the recent wave of airline bankruptcies.[2] Moreover, due to the large vol-

* Managing Partner, Anderson & Kreiger LLP, Cambridge, MA (www.andersonkreiger.com) with assistance from Jennifer Rushlow, associate at Anderson & Kreiger.

** Deputy Port Attorney, Port of Oakland, California

1. For instance, Southwest Airlines' extraordinary profits are largely attributable to its fuel-hedging program, which brought the airline its 69th consecutive profitable quarter this summer, as compared to the steep losses reported this year by the other six U.S.-based major airlines. Micheline Maynard, *Southwest Turns a Profit for 69th Straight Quarter*, N.Y. TIMES, July 25, 2008, at C2, *available at* http://www.nytimes.com/2008/07/25/business/25air.html?_r=1&scp=1&sq=southwest%20airlines%20profit%20fuel&st=cse&oref=slogin.

2. The record-high cost of oil per barrel this year has many airlines scrambling to cut costs, and some have even had to shutter their operations altogether. Lisa LaMotta, *The Hurdles Keep Coming for Airlines*, FORBES.COM, Aug. 29, 2008, http://www.forbes.com/2008/08/29/zoom-airlines-closer-markets-equity-cx_lal_0829markets27.html. For example, in July 2008, both Delta and American Airlines reported record losses attributable to the cost of jet fuel. American, the U. S.'s largest carrier, posted a loss of $1.45 billion and Delta reported a $1.04 billion loss. *The Washington Post* reported that "[a]nalysts say American Airlines, Delta and other major airlines

ume of jet fuel used at airports, it presents significant environmental considerations[3]. Thus, how aviation fueling is conducted at airports in the United States and how the costs and risks are allocated between the airlines and airport owners is an important and timely topic.

In late 2007 the City of Oakland, acting through its Board of Port Commissioners (the "Port"), the owner of the Oakland International Airport (the "Airport") in Oakland, California, entered into a complex, long-term agreement with a consortium of airlines to revamp and operate the aviation fueling system at the Airport[4]. This innovative and comprehensive agreement addresses a wide range of legal and policy issues associated with aviation fueling[5]. It was the result of lengthy negotiations between the Port and the airline consortium where both sides worked together to develop creative and cooperative solutions to the environmental, economic and capital improvement issues[6]. The negotiations leading up to this agreement provide an informative case study of the fueling issues facing airport owners and airlines across the country and how they can be addressed through joint problem solving.

II. BACKGROUND

A. JET FUEL

The standard fuel for commercial jet aircraft is a kerosene-type fuel known as Jet A.[7] At most commercial airports, jet fuel is stored in large above-ground tanks and delivered to aircraft either by refueling trucks or by an underground fuel hydrant system[8]. For example, a 2003 survey of

---

are entering a high-stakes period over the next 18 months that could bring about a major industry shakeout." Sholnn Freeman, *Steep Losses for American Airlines, Delta*, WASH. POST, July 17, 2008, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2008/07/16/AR2008071600782.html.

3. Patrick Parenteau, *Lead, Follow, or Get out of the Way: The States Tackle Climate Change with Little Help from Washington*, 40 CONN. L. REV. 1453, 1466 (2008) (discussing CO2 emissions in the United States from jet fuel).

4. Lease Agreement between City of Oakland, Acting by and Through its Board of Port Commissioners, and Oakland Fuel Facilities Corp. (Dec. 19, 2007) [hereinafter "OFFC Lease"].

5. See id.

6. See id.

7. Jet A is to be distinguished from Avgas, a different type of fuel sometimes used for aviation. Avgas is used in piston engine aircrafts. Jet A, on the other hand, is an unleaded/paraffin (kerosene) fuel used in turbine engines, and is produced to an internationally standardized set of specifications. *See, e.g.* Experimentalaircraft.info, Common Aviation Fuels, Jet Fuel, http://www.experimentalaircraft.info/homebuilt-aircraft/aviation-fuel-1.php (last visited Oct. 5, 2008); Experimentalaircraft.info, Common Aviation Fuels, Avgas, http://www.experimentalaircraft.info/homebuilt-aircraft/aviation-fuel.php (last visited Oct. 5, 2008).

8. See, e.g., Massport.com, Massport Cuts Ribbon for New Aircraft Fueling System; Safeguards Environment, Cuts Down on Pollution (1999) http://www.massport.com/about/press99/press_news_ fuels.html.

large airports across the country found that of the 128 airports surveyed, 91 had fuel farms and of those, 47 had underground fuel hydrant systems.[9] Underground fuel hydrant systems tend to be operationally and environmentally preferable because they result in fewer fuel spills and they avoid the greenhouse gas emissions from refueling trucks.[10]

Fuel prices are currently at an all-time high, and these increased costs hit airlines particularly hard. In 2006, for the first time ever, fuel surpassed labor as airlines' primary expense.[11] As of August 2008, the cost of jet fuel is up 58 percent from just a year earlier.[12] Jet aircraft require a large quantity of fuel: 7,000 gallons to fill a Boeing 737 and as many as 60,000 gallons to fill larger 747s.[13] Given increased costs and high demand, fuel now accounts for 40 percent of yearly total operating costs for airlines, up from 25.5 percent in 2006 and 12-13 percent between 2001 and 2003.[14] At current costs, in 2008 the country's airlines will spend a total of $61.2 billion on fuel alone[15].

B. Environmental Issues

Aviation fueling at airports presents a range of environmental issues, which can be loosely grouped into two categories: (i) how to respond to releases, both historic and future, and (ii) how to prevent or minimize future environmental risks.

Given the volumes of jet fuel and other petroleum products that are used and have been used at airports, it is not surprising that many airports contain soil and groundwater contamination from historic releases[16]. For example, over 31 different sites contaminated with oil and hazardous substances have been identified at Logan International Air-

9. Airports Council International-North America, *General Information Survey* (2003).

10. Underground fuel hydrant systems have been applauded for the added protection they provide to air, soil and water resources at and around airports. *See, e.g.*, *Massport Cuts Ribbon for New Aircraft Fueling System, supra* note 8; Portseattle.org, *EPA Presents Port of Seattle with Clean Air Excellence Award* (2006) http://www.portseattle.org/news/press/2006/04_05_2006_70.shtml.

11. IATA.org, IATA Economic Briefing (June 2007) http://www.iata.org/nr/rdonlyres/4a49f6da-2b12-48a9-a283-e035aea5d165/0/airline_labour_cost_share.pdf.

12. IATA.org, Jet Fuel Price Monitor (2008) http://www.iata.org/whatwedo/economics/fuel_monitor/index.htm (last visited Oct. 5, 2008).

13. Micheline Maynard, *To Save Fuel, Airlines find no Speck too Small*, N.Y. Times, June 11, 2008, at A1, *available at* http://www.nytimes.com/2008/06/11/business/11air.html?_r=1&ei=5070&en=950efee223fbe1aa&ex=1213848000&adxnnl=1&oref=slogin&emc=eta1&adxnnlx=1215273936-Sz6ywfLPH7tVX1wCUu/6iw.

14. *Id.*; *see also* IATA.org, Jet Fuel Price Monitor (2008) http://www.iata.org/whatwedo/economics/fuel_monitor/index.htm.

15. Maynard, *supra* note 13.

16. *See, e.g.*, *Project Clean-up*, PHX News, Oct.-Dec. 2007, at 5, *available at* phoenix.gov/skyharborairport/customer_service/phxnews_fall07.pdf.

port in Boston, Massachusetts.[17]Additionally, the U.S. Environmental Protection Agency (the "EPA") is pursuing enforcement action over the historic soil and groundwater contamination from jet fuel at the San Juan International Airport.[18] These are just two of many examples of historic contamination at U.S. airports.

Even though airlines and airports have generally improved the fueling technology and practices to reduce the number and size of petroleum spills, no system is foolproof[19]. For instance, in 1997 over a million gallons of jet fuel were released into the soil and groundwater at the Phoenix Sky Harbor International Airport from the underground fuel hydrant system owned and operated by the airline fuel consortium in Phoenix, called the Arizona Fuel Facility Corporation ("AFFC").[20] This fuel release occurred despite the fact that underground fuel hydrant systems are generally thought to reduce the risk of fuel spills compared to aircraft fueling by tanker trucks, as noted earlier.[21] AFFC is remediating the contamination pursuant to a consent decree negotiated with the City of Phoenix, the owner of the Phoenix Sky Harbor International Airport, and filed in Federal District Court in 2005.[22]

Airports and airlines also face the challenge of ensuring that airport fueling facilities and their operations comply with all relevant laws and regulations. This is particularly challenging given that there is no comprehensive federal regulation program over aviation fueling systems.[23] Instead, there is a complex quiltwork of local, state and federal laws and

17. *See* Massport.com, *1999 Annual Report, Financial Statements* http://www.massport.com/1999annual/notes_financial.html (discussing Massachusetts Department of Environmental Protection sending Notice of Responsibility to Massachusetts Port Authority regarding hazardous material at Logan Airport).

18. *See* Administrative Order on Consent, U.S. Envtl. Prot. Agency, Docket No. RCRA-02-2003-7301 (2002).

19. *See, e.g.*, Project Clean-Up, *supra* note 16.

20. Consent Decree in *City of Phoenix, Ariz. v. Ariz. Fuel Facilities Corp.*, D. Ariz., No. CV 051158 PHXROS, Exhibit A Statement of Work (2003).

21. See Massport Cuts Ribbon for New Aircraft Fueling System, supra note 10.

22. See City of Phoenix, supra note 20.

23. The federal laws applicable to these facilities and potential releases include the Oil Pollution Control Act of 1990, the Spill Prevention, Control and Countermeasure Plans pursuant to the Clean Water Act, and the Resourced Conservation and Recovery Act. Oil Pollution Control Act of 1990, Pub. L. No. 101-380, 104 Stat. 484; Spill Prevention, Control and Countermeasure Plans, 40 C.F.R. § 112.1 (2008), pursuant to the Clean Water Act, 33 U.S.C. § 1251 (2006); Resource Conservation and Recovery Act, 42 U.S.C. §§ 6901-6992k (2006). The application of some of the federal regulatory programs depends, of course, on the nature of the fuel storage and distribution system at a particular airport. For example, the Technical Standards and Corrective Action Requirements for Owners and Operators of Underground Storage Tanks applies only to fuel tanks containing an accumulation of regulated substances that are 10% or more beneath the surface of the ground. However the nature of that calculation varies because the statute itself does not provide a clear cut definition of how exactly to determine the relevant percentage. 40 C.F.R. § 280.12 (2008).

regulations that regulate aviation fueling systems.[24] Additionally, there are dozens of standards and guidance documents promulgated by agencies and trade groups that relate to the equipment and operation of airport fueling facilities.[25] Ensuring regulatory compliance often requires more than just airport and airline negotiations. The airlines that manage fueling facilities at many airports in the U.S. often contract with a third party to actually operate the facilities[26]. Thus, the experience and obligations of this third party operator need to be considered when negotiating prospective environmental requirements.

C. Consortiums

A substantial number of aviation fueling systems are operated by individual airlines or by a consortium of airlines ("fuel consortium").[27] Typically, a group of "contracting airlines" incorporates for the sole purpose of managing fueling facilities at a particular airport[28]. For instance, a 2003 survey of airport owners across the country found that fuel consortiums managed some or all of the fueling systems for at least 45 airports.[29] There are many common elements and attributes to these fuel consortiums. Generally, the fuel consortium contract with an independent, third-

24. *See* sources cited *supra* note 23.

25. See ATA 103 Standards for Jet Fuel Quality Control; API Specification 5L Specification for Line Pipe; API RP 651 Cathodic Protection of Aboveground Petroleum Storage Tanks; API 653 Tank Inspection, Repair, Alteration and Maintenance; ASME B31.3 Chemical Plant and Petroleum Refinery Piping; ASTM A53 Standard Specification for Pipe, Steel, Back and Hot-Dipped Zinc-Coated Welded and Stainless; ASTM D 610 Standard Test Method for Evaluating Degree of Rusting on Painted Steel Surfaces; ASTM B31G Manual for Determining the Remaining Strength of Corroded Pipelines; FAA Advisory Circular No. 150/5230-4 Aircraft Fuel Storage, Handling and Dispensing on Airports; NACE standard RPO169 Control of External Corrosion on Underground or Submerged Metallic Piping Systems; SSPC Standard SPCC-VIS 2 Standard for Evaluating Degree of Rusting on Painted Surfaces; API 650 Welded Steel Tanks for Oil Storage; API 1001 Tank Vehicles; API RP 2350 Overfill Protection for Storage Tanks in Petroleum Facilities; API RP 1632 Cathodic Protection of Underground Petroleum Storage Tanks and Piping Systems; API 334 A Guide to Leak Detection for Aboveground Storage Tanks; API 353 Managing Systems Integrity of Terminal and Tank Facilities, Managing the Risk of Liquid Petroleum Releases; API RP 1595 Design, Construction, Operation, Maintenance and Inspection of Aviation Pre-Airfield Storage Terminals; API RP 1110 Pressure Testing of Liquid Petroleum Pipelines.

26. *See, e.g.*, Memorandum from William F. Sherry, A.A.E. to Honorable Mayor and City Council of the City of San Jose (April 12, 2006), *available at* http://www.sanjoseca.gov/clerk/Agenda/050206/050206_06.02.pdf. (discussing that an entity besides the airlines commonly operates facilities).

27. *See supra* note 9. 2003 survey found that of the 91 airports that had at least one fuel farm (of the 128 airports that responded to the survey), 14 reported that their fuel farm was operated by an individual airline and 45 reported that they were operated by a consortium of airlines.

28. *See* Memorandum from William F. Sherry, A.A.E to City of San Jose.

29. *See supra* note 9.

party operator to operate and maintain the fuel system[30]. A small handful of companies operate fuel farms for fuel consortiums across the country, such as Swissport International Ltd., which operates fueling facilities at 14 U.S. airports, including the Oakland Airport.[31]

The contracting airlines typically enter into an interline agreement for purposes of setting forth their rights and obligations with respect to each other and the fuel consortium[32]. The interline agreements used by airlines at various airports often contain similar provisions.[33] For instance, the way the fuel consortiums respond to default on the part of a participating airline, where a contracting airline goes bankrupt or fails to make a payment, is generally the same. If an airline defaults, it will often be retroactively billed as a non-contracting user for a period of time before and after the default. During the period of default, the defaulting airline is stripped of its voting rights, but is not relieved of other responsibilities, liabilities or obligations. Often the non-defaulting airlines are called upon to loan money to the fuel consortium to cover costs and the fuel consortium will seek to obtain funds to reimburse its members pro rata by pursuing a judgment against the defaulting airline[34]. The fuel consortium can also withdraw from its reserve account to offset these costs. The reserve account contains deposits from each of the member airlines, which are considered security for the airline's performance and obligations under the interline agreement. However, the interline agreements do not necessarily specify a minimum amount held in the reserve account, so it can be difficult for an airport owner negotiating with a consortium to know how much security this reserve actually provides. Also, the interline agreement allows for the membership of the consortium to change over time which can alter the financial depth and stability of the consortium[35]. This too creates uncertainty for airport owners relying on

30. *See* Memorandum from William F. Sherry, A.A. .E. to City of San Jose, *supra* note 26.

31. Swissport Network List for the United States of America, Fueling Business Lines as of October 12, 2008. http://www.swissport.com/networklist/index.php (Country - select United States of America, check only fueling box).

32. *See, e.g., Schwarz v. National Van Lines, Inc.*, 375 F. Supp. 2d 690, 693 (N.D. Ill. 2005) (stating that the purpose of an "interline agreement" is to set forth obligations between two parties).

33. See, e.g., Amended and Restated Cost Sharing Agreement, Sky Harbor International Airport, Phoenix, AZ (1991); Amended and Restated Fuel System Interline Agreement Among Contracting Airlines and SFO Fuel Company LLC, San Francisco International Airport (1997); Amended and Restated Fuel System Interline Agreement, Seattle-Tacoma International Airport (2003); Oakland Fuel Facilities Corporation Interline Agreement, Metropolitan Oakland International Airport (1989).

34. See, *e.g., In re GP Express Airlines, Inc.* 192 B.R. 954, 956 (Bkrtcy. D. Neb. 1996).

35. *See, e.g.*, Board of Port Commissioners of the Lee County Port Authority Minutes of October 18, 2005, *available at* http://www.lee-county.com/meetings/agendafiles/2005/10-18-05/Administrative/A14A.pdf (stating that "[t]he Fuel System Agreement, as amended, allows other scheduled airlines that signed an airport use agreement to join as additional Fueling Airlines by:

consortium performance.

Interline agreements usually also include indemnification clauses, requiring each contracting airline (the "indemnitor") to indemnify (i) the third-party operator hired to operate the fuel system, (ii) each of the other contracting airlines from liability arising from the indemnitor's use of the fuel system, or (iii) the other contracting airlines for any breach by a contracting airline[36]. Interline agreements vary as to whether indemnification is required for acts of negligence of willful misconduct[37]. Some interline agreements clarify that the consortium is not a partnership, so that no airline can commit any other airline to any debts or obligations unless specifically provided in the interline agreement[38].

D. Federal Regulation of Airport Rates

A key safeguard for airport owners contracting with fuel consortiums is the safety net of airport rates and charges[39]. Under FAA policy, an airport owner who has received federal grants may recover from air carriers and other aeronautical users of the airport all of its costs related to the construction and operation of aviation facilities, including those involved with fueling.[40] Airport owners may recoup these costs via one or more fees on airport users including landing fees, terminal rents, fuel flowage fees or other aeronautical charges.[41] FAA's policy includes express authorization to recover "reasonable environmental costs,"[42] including but not limited to, investigating and remediating environmental contamination caused by airfield operations at the airport.[43] Either by

1) Paying the "Buy-In Amount" of $45,000 to the existing Fueling Airlines; 2) Entering into an agreement with the Authority, agreeing to become bound by the Fuel System Agreement as a Fueling Airline and assume the obligations of a Fueling Airline; and 3) Agreeing to become a party to the existing Fuel System Interline Agreement (which is amongst the Fueling Airlines))."

36. *Fuel System Agreement*, Southwest Florida Regional Airport of July 17, 1989 § 15, *available at* http://www.lee-county.com/meetings/agendafiles/2005/10-18-05/Administrative/A14A.pdf (last viewed October 12, 2008)

37. *Id.*

38. *Id.*

39. *See* Federal Aviation Administration's Final Policy Regarding Airport Rates and Charges, 61 Fed. Reg. 31,994, 32,019 (June 21, 1996).

40. *Id.*

41. *Id.*

42. *Id.*

43. The general requirements that aviation rates and charges must be reasonable are set forth in two federal statutes. First, the Airport and Airway Improvement Act of 1982 ("AAIA"), 49 U.S.C. § 47107 (2008), requires that airports accepting federal grant money for airport improvements give certain assurances, including that the airport will be made available for public use on fair and reasonable terms without unjust discrimination. Implicit in this assurance is that airports are obligated to be reasonable in the application of fees to aeronautical users. 49 U.S.C. §4701(a)(1). Second, the Federal Aviation Act's Anti-Head Tax provides that publicly-owned airports may collect landing fees and charges from airlines using airport facilities

agreement with the airlines or, in the absence of agreement, by rate ordinance, airport owners can protect themselves from financial risks associated with fueling operations by providing for rate recovery of environmental cleanup and compliance costs that are not covered by airport fuelers or insurance[44].

III. Oakland International Airport Case Study

Aviation fuel is delivered to commercial aircraft at the Airport through fueling facilities owned by the Port[45]. The active fueling facilities at the Airport consist of several large above-ground storage tanks that are approximately 50 years old and miles of underground lines that deliver jet fuel to 29 passenger gates at the Airport[46]. These fueling facilities have been operated by a consortium of airlines called the Oakland Fuel Facilities Corporation ("OFFC")[47] since 1989 pursuant to an initial ten-year operating agreement with the Port.

The pending expiration of the 1994 operating agreement with OFFC gave the Port and the airlines serving the Airport an opportunity to upgrade the fueling system at the Airport, address historic environmental contamination and enter into a long-term agreement that clearly sets out the respective obligations of the Port and the airlines operating at the Airport[48]. After several years of negotiations, the Port and OFFC executed a detailed 20-year Lease covering the rehabilitation and operation of the fueling facilities at the Airport.[49]

What follows is a description of a number of key issues considered by the parties and how the Port and the airlines resolved them in the Lease through compromise and joint problem solving. All of these issues are ones that frequently arise at other airports across the country and in several instances we discuss how these issues were addressed at other large airports. The provisions in other airport fuel agreements are also rele-

as long as those fees and charges are reasonable. 49 U.S.C. § 40116(e)(2). For a discussion of the application of the Anti-Head Tax Act, *see Northwest Airlines v. County of Kent*, 510 U.S. 355 (1994).

44. *See, e.g.*, *Fuel System Agreement*, Southwest Florida Regional Airport of July 17, 1989 § 5, *available at* http://www.lee-county.com/meetings/agendafiles/2005/10-18-05/Administrative/A14A.pdf (last viewed October 12, 2008).

45. OFFC Lease § 1.

46. URS Oakland International Airport Fuel Farm Study and Conceptual Plan (August 24, 2004, pp. 3).

47. OFFC is a California nonprofit mutual benefit corporation made up of the following airlines: ABX Air Inc., Alaska Airlines, Inc., Delta Air Lines, Inc., Federal Express Corp., Hawaiian Airlines, Inc., JetBlue Airways Corp., Mexicana Airlines, Skywest Airlines Inc., Southwest Airlines Co., US Airways, Inc., United Airlines, Inc., and United Parcel Service, Inc.

48. *See* OFFC Lease (containing 45 provisions, spanning over 90 pages, and detailing the obligations of all parties involved in the Lease).

49. Id.

vant because at different times during the negotiations both the Port and OFFC cited provisions from these other fuel agreements to buttress their negotiation positions, a common tactic sometimes referred to as "pattern bargaining."[50]

A. Capital Upgrades

The existing active fuel farm at the Airport consists of four large aboveground jet fuel storage tanks constructed in 1967 and 1970 and is located adjacent to an estuary that flows into San Francisco Bay.[51] The tanks are filled via pipelines operated by Kinder Morgan Energy Partners and fuel is distributed to commercial aircraft primarily by an underground fuel hydrant system. By 2004, both the Port and OFFC recognized that the existing fuel farm needed to be upgraded. Although the fuel farm was legally grandfathered from a number of current regulatory requirements, both the Port and OFFC agreed that the future fuel farm should meet all current regulatory requirements and industry standards.[52] The parties recognized that building a new fuel farm to accommodate the large volume of jet fuel used at the Airport, approximately 482,000 gallons a day in 2004,[53] is a multi-year, multi-million dollar undertaking. Thus, the parties needed to work together to develop capital improvement lease terms that efficiently and fairly allocated the risks and responsibilities between OFFC and the Port.

OFFC agreed to a key Port objective of having OFFC design and construct a replacement fuel farm and all related upgrades.[54] OFFC agreed to construct the replacement fuel farm within three years of Lease execution[55] in accordance with all regulatory requirements and "industry standards."[56] Moreover, OFFC agreed to submit to the Port the proposed replacement tank farm design for pre-approval at four different

50. The term "pattern bargaining" was coined in the context of employment contract negotiations where a labor union would gain a new entitlement from an employer and then use that agreement as precedent to demand it from other employers. *See, e.g.*, Robert C. Marshall and Antonio Merlo, *Pattern Bargaining*, 45 International Economic Review Issue 1, 239 (2004).

51. These four tanks make up what is known as Tank Farm S. The two largest tanks are approximately 61 feet in diameter and 48 feet high with a design capacity of 1,050,000 gallons. The remaining two tanks are about 42 feet in diameter and 42 feet high with a capacity of 420,000 gallons. All four tanks are enclosed in a common dike wall. California Regional Water Quality Control Board, San Francisco Region Order No. R2-2002-0013, Adoption of Site Cleanup Requirements and Rescission of Order No. 99-103 p. 3 (2002).

52. OFFC Lease § 7.2.

53. Id.

54. Id.

55. Id.

56. "Industry standards" is defined in section 1.1 of the OFFC Lease as follows: "Industry best management practices applicable to the operation of Jet Aviation Fuel storage and distribution systems at the majority of large hub airports in the United States, including, but not limited

design development stages: conceptual, schematic, design development and final design.[57] OFFC also agreed to accept full responsibility for obtaining all necessary permits and approvals to construct and operate the replacement fuel farm.[58]

After the replacement fuel farm is completed and the Port gives final approval of the improvements, the parties agreed that title to the new facilities should vest with the Port.[59] Another approach adopted in some fueling agreements between other airport owners and consortiums is to have the consortium maintain ownership of the new capital improvements until the lease expires.[60] Given that the Port already had title to the existing fueling facilities at the Oakland Airport, OFFC and the Port agreed that it was better to have the entire fueling system owned by a single entity as soon as possible to avoid potential confusion and conflict that might arise from a patchwork ownership arrangement[61].

In exchange for these and other commitments by OFFC regarding the replacement fuel farm, the Port agreed to several accommodations requested by OFFC. First, the Port agreed to a 20 year fixed Lease term to give OFFC ample time to recoup its capital investment.[62] The Port originally sought to limit the Lease to an initial five-year term but was persuaded by OFFC that a longer term was appropriate given the extensive capital improvements committed to by OFFC[63]. Second, the Port agreed not to seek rent payments beyond recouping the Port's actual costs attributable to OFFC's fueling operations, so-called Fuel-Related Costs.[64] Third, the Port agreed to an open, transparent process of setting

---

to, those issued by the National Fire Protection Association, Air Transport Association, American Petroleum Institute, and the FAA and those contained in 49 C.F.R. 195."

57. Id. § 7.4.

58. Id.

59. Id. § 9.1.

60. *See, e.g.,* Fuel System Lease by and between The Port of Seattle and SEATAC Fuel Facilities LLC (May 14, 2003), § 8.1; Fuel Storage and Distribution System Lease by and between The Massachusetts Port Authority and BOSFUEL CORPORATION (May 1, 1997), § 12.2.

61. *See, e.g.*, OFFC Lease § 2.

62. Id. § 2.1.

63. See, e.g., Id. § 7.

64. The Port's Fuel Related Costs are defined in section 4.4(c) of the Lease as follows: "The Port's Fuel-Related costs shall include all costs and expenses associated with aviation fueling at the Premises, including, but not limited to: direct and indirect costs, in-house costs (including Port employees' time attributable to the administration and management of this Lease), consulting and engineering fees, attorneys' fees, insurance and premium costs, insurance deductibles and self retention for property insurance, operation and maintenance costs, repair and construction costs, security expenses, entry and inspection costs, costs resulting from Lessee's failure to perform any obligations under this Lease (unless otherwise specified) and expenses related to the Port's oversight and monitoring related to the Clean-up of Current and future Contamination and expenses related to the oversight, monitoring and cleanup of the PST Tank Farm and

rent based on the Port's Fuel-Related Costs, which includes the Port providing OFFC, on an annual basis, an estimate of the Fuel-Related Costs for the upcoming year.[65] Finally, the Port gave the airlines the opportunity to shift some of these anticipated fuel-related costs from rent paid by OFFC to airport rates and charges charged to all airlines operating at the Airport.[66] This gives the airlines added flexibility about how to share and allocate fuel costs among the airlines operating at Oakland Airport and reduces the likelihood that the Port would be in the middle of an inter-airline dispute.

B. Financial Security

One of the Ports important goals was the establishment of adequate and effective measures to ensure that the environmental and capital upgrade commitments of OFFC were satisfied given the unique nature of consortiums. This was especially important to the Port for several reasons, including the structure and finances of consortiums, the substantial capital investments required under the Lease and the risk of future airline bankruptcies with the corresponding impacts of such bankruptcies on OFFC's finances.

OFFC is a limited purpose nonprofit corporation made up of the major commercial airlines operating at the Airport,[67] and governed by an interline agreement as discussed in Part II.3 above. As with many other agreements between consortiums and airports, OFFC made it clear from the outset that only OFFC would execute the Lease with the Port, not any of the individual airline members.[68] Moreover, the airlines ruled out providing any sort of individual guarantees by member airlines.

Like most consortiums, OFFC has no dedicated staff, limited financial resources and relies on a third party operator to operate the Airport's fueling facilities. While the OFFC interline agreement provides for a cash reserve, it does not specify a minimum amount of reserve. The only mechanism in the OFFC interline agreement in the event that one member defaults on its obligation is to distribute the obligations to the remaining members.[69] The Port had concerns that OFFC alone did not provide

---

Airport Metering Station (collectively, 'Fuel-Related Costs'). Fuel-Related Costs do not include any of the costs and expenses governed by Sections 4.1, 4.2, 4.3, 17.2, 17.10(a) and 20.2(f) and do not include any costs of decommissioning or Cleanup related to the PST Tank Farm (except the Port's groundwater monitoring costs incurred during that time until the PST Tank Farm Property is used by the Port in any manner or is otherwise relet or used by a third party)."

65. Id. § 4.4(d).

66. Id. §§ 4.4(d) and 4.5. *See also* discussion of aviation rates and charges, *supra* p. 9.

67. *See supra* note 47.

68. *See* OFFC Lease § 2.

69. To this end, the Interline Agreement includes a "step-up provision" for incidents of default, requiring: "each non-defaulting Contracting Airline [to] advance to the Corporation,

sufficient financial security given the significant capital improvements that were needed, the importance of fueling at the Airport and the substantial costs involved with the remediation of historic and future spills.[70] The inherent structure of consortiums, as described in part II.3 above, arguably does not provide adequate capitalization and the step-up clauses do not provide the level of security needed by an airport in the event of default, particularly should multiple airlines go into bankruptcy around the same time, leading to the collapse of the indemnification structure.

Thus, the Port and OFFC negotiated a number of additional financial protections.[71] First, the Lease requires OFFC to fund a reserve account with annual contributions which will, at the end of the 20-year term, total $3,250,000.[72] This reserve account, to be held by the Port, is available to the Port in the event that OFFC is not able to meet its environmental obligation and certain other Lease requirements.[73] Second, the parties agreed that OFFC would obtain and maintain comprehensive insurance coverage including $300 million in comprehensive liability coverage; pollution liability coverage for OFFC's third-party contractor of $50 million per pollution incident and $100 million in the aggregate; and pay a portion of the Port's premiums for pollution liability insurance applicable to the fueling operations.[74] The Port pushed for more pollution insurance than what OFFC's third party operator provided because the Swissport insurance policy initially proffered by OFFC was a master policy which covered losses at multiple airports with a combined policy limit. Third, the Lease expressly reserves the Port's ability to recover the costs of any Lease default from any or all of the air carriers operating at the Airport through airport rates and charges.[75]

---

within ten (10) days, its allocated share of the amount not paid . . .." Oakland Fuel Facilities Corporation Interline Agreement, § 9.04(b)(iii). Other Interline Agreements contain similar step-up provisions. *See, e.g., Fitch IBCA Assigns "A-" Rtg To Fuel Co. Lease Revenue Bonds*, BUSINESS WIRE, May 17, 2000; *Fitch Rates $112MM MassPort Rev Bonds for BosFuel 'A-'; Stable Outlook*, BUSINESS WIRE, May 18, 2007.

70. *See, e.g.*, OFFC Lease § 7.

71. *See generally*, OFFC Lease §§ 4.1-4.5, 8, and 16.2 (provisions pertaining to rent and other charges, financial assurances and security, and liability insurance).

72. Id. §§ 4.2 and 4.4(g).

73. Id. §§ 4.4(g) and 17.10(a)(i)-(iii).

74. Id. §§ 16.2(a), (c), and (d).

75. Section 8.4 of the OFFC Lease provides as follows: "Nothing in this Lease is intended to limit or alter the Port's right to recover from any or all of the Air Carriers serving the Airport now or in the future any or all of the Port's costs associated with the Premises and the Fueling Facilities or otherwise associated with this Lease that are not paid by Lessee by seeking recovery of those costs in the rate bases used by the Port to calculate landing fees, terminal rents, fees associated with Jet Aviation Fuel flowage or other aeronautical rates and charges at the Airport, including without implied limitation, any or all of the Port's costs relating to construction, or operation of the Premises and the Fueling Facilities or Current and Future Contamination, as provided by the FAA's Final Policy Regarding Airport Rates and Charges, ¶ 2.4.2(a), 61 Fed.

C. Environmental Issues

The environmental issues associated with the fueling facilities at the Airport were the subject of lengthy negotiations between the Port and OFFC. The Port had two primary environmental goals in negotiating a new long-term agreement with OFFC. First, the Port sought to ensure that the existing contamination at the current and adjacent fuel farms was adequately cleaned up. Second, going forward the Port wanted to ensure that aviation fueling at the Airport satisfied all relevant environmental laws and industry standards. What follows is a discussion of both of the goals and how the ultimate agreement between OFFC and the Port addressed them.

1. Historic Contamination

Adjacent to the active fuel farm at the Airport[76] are two out-of-service fuel farms on Port property: one was dismantled in 2001 and the other in 2005.[77] These fuel farms, known as Tank Farm C and PST Tank Farm, operated from 1969 until approximately 1989 and 1991 respectively.[78] Environmental investigations from the late 1990s and early 2000s of the three Tank Farms (S, C and PST), collectively known as the South Field Tank Farm ("SFTF"), revealed that jet fuel had been released from all three tank farms into the surrounding soil and groundwater.[79] The State of California Regional Water Quality Control Board ("RWQCB") took enforcement action against the Port and several other corporations that previously owned and/or operated one of the three fuel farms to require the investigation and remediation of the soil and groundwater contamination, by issuing a comprehensive cleanup order in 2002[80] under the California Water Code.[81]

The historic contamination from the SFTF raised several important

Reg. 31994, 32019 (June 21, 1996) as hereinafter revised or otherwise in accordance with law ('Rates and Charges'). Nothing in this Lease is intended to limit or alter the rights of any such Air Carrier to challenge such rate recovery by the Port."

76. *Supra* text accompanying note 51for a description of Tank Farm S, the active fuel farm.

77. The fuel farm with the existing tanks, Tank Farm C, contained tanks constructed in 1969. *See* California Regional Water Quality Control Board, San Francisco Region Order No. R2-2002-0013, Adoption of Site Cleanup Requirements and Rescission of Order No. 99-103 p. 4-5 (2002). The other fuel farm, Humble/PS Trading Tank Farm, was constructed in 1969 and the tanks were removed in 2001. *Id.*

78. *Id.*

79. *Id.* at 7-8.

80. *Id.* at 13-22. The other parties subject to the enforcement order are: Chevron Products Company, Equilon Enterprises LLC, Fueling Maintenance Co., PS Trading, Inc., Shell Oil Company and Swissport Fueling, Inc. *Id.* at 1.

81. Cal. Water Code § 13304 (West 2004). This section requires that any person responsible for the discharge of waste into waters of the state is liable for the cost of cleanup and abatement, including oversight of those efforts. Under this section, the state can require the

legal and environmental issues for a new long-term lease between the Port and OFFC. For example, to what extent would OFFC accept, as a matter of contract, legal responsibility for the historic contamination, including contamination that OFFC did not cause?[82] Also, how much cleanup should OFFC be required to perform that given that the site would continue to be used as a fueling facility?[83] OFFC sought to lease Tank Farms C and S, both of which contained a variety of petroleum contaminates from historic activities, some of which were not attributable to OFFC's prior operation of Tank Farm S.[84] However, the Port and OFFC both recognized early in the negotiations that it would be expensive and time-consuming to attempt to differentiate the contamination caused by OFFC from what was released by other parties operating Tank Farm S over the years.[85] Thus, OFFC and the Port agreed that OFFC would accept responsibility for the cleanup of all the contamination, including jet fuel and other petroleum products such as gasoline and other toxic substances, at or emanating from the SFTF.[86]

In light of OFFC's willingness to accept responsibility for certain historic contamination (including contamination not caused by OFFC), the Port was willing to accommodate OFFC's request that it not be required to perform any cleanup beyond what is required by law.[87] California, as does many jurisdictions, establishes cleanup standards based, in part, on the current and anticipated future use of the property, so-called risk-based cleanup standards.[88] For example, under a risk-based cleanup, cer-

---

responsible party to pay for the provision of uninterrupted replacement water service to affected public water suppliers and private well owners.

82. *See* OFFC Lease § 17.4 for a description of OFFC's ultimate cleanup obligations.

83. See id.

84. *See, e.g.*, Order No. R2-2002-0013, *supra* note 77, at 1.

85. For example, jet fuel such as gasoline and other petroleum products is made up of hundreds of compounds that degrade at different rates, making it extremely difficult to "fingerprint" the source of co-mingled petroleum contamination. *See* Michael J. Wade, *The Use of Isoprenoid Ratios to Calculate Percentage Mixing of Different Distillate Fuels Released to the Environment*, 6 Environmental Forensics 187 (2005) (noting the difficulty or impossibility of determining party responsibility with regard to similar fuel spills, over time, in a particular location.).

86. Section 17.4(a) of the OFFC Lease provides in pertinent part: "Lessee hereby accepts all Clean-up responsibility including, without limitation, Clean-Up responsibilities required by Environmental Laws and Regulatory Agency Orders, associated with: (i) all Toxic Materials and Jet Aviation Fuel, regardless of when they were released, spilled or migrated, on or emanating from the Leased Premises (including the portion of the Shell pipeline shown on Exhibit F); . . . (iii) all Toxic Materials, Jet Aviation Fuel or any other materials released or spilled by Lessee regardless of when or where they were released, spilled or migrated, (collectively "Current and Future contamination")."

87. Id. § 17.4(a)-(b).

88. Many states have adopted statutes that include "risk-based" clean-up standards, which match the level of risk related to hazardous waste at a given property with its anticipated future reuse. Massachusetts and Michigan were two of the first states to do so, and since then many more have followed suit. See Matthew J. Lawlor, *Super Settlements for Superfund: A New Para-*

tain amounts of contamination may be left in the soil and groundwater provided that an analysis is done to ensure that the contamination left in place does not pose an unacceptable risk to human health or the environment[89]. In the case of the SFTF, the risk of direct human exposure to the soil and groundwater contaminates is remote because, among other things, the site is largely covered by pavement and people are not residing at the site so exposure duration is limited by working hours.

Thus, the Port agreed to allow OFFC to avail itself of the California risk-based cleanup standards[90] provided that at the end of the Lease term, OFFC would perform any additional cleanup to accommodate the Port's "Planned Use" of the site.[91] The exception was included to make sure that at the end of the Lease term, the Port would have the option to use the SFTF for other aviation uses without potential constraints or costs caused by contaminate levels. In other words, the Port agreed that OFFC did not need to remove or clean up all contamination to non-detectable levels or even to remediate the site to residential cleanup standards, but reserved the ability to require OFFC to undertake further cleanup to make the site available for other commercial or industrial uses.[92]

2. *Environmental Compliance*

Given the large volumes of jet fuel that flow through the fueling facilities at the Airport, a mutual goal of the Port and the airlines was to ensure that the Lease had ample environmental safeguards and provi-

---

digm for Voluntary Settlement?, 27 B.C. Envtl. Aff. L. Rev. 123, 137-38 (1999) (citing Anderson *supra* note 71, at 22-23).

89. *See* Oklahoma Department of Environmental Quality, *Risk-Based Cleanup Levels for Total Petroleum Hydrocarbons*, http://www.deq.state.ok.us/factsheets/land/TPH.pdf.

90. Section 17.4(b)(iii) of the OFFC Lease provides as follows: "In consideration of the mutual covenants herein, the Parties will cooperate in promoting to Regulatory Agencies with jurisdiction over Current and Future Contamination that a risk-based remedial approach to Clean-up Current and Future Contamination in the soil and groundwater be applied provided that such regulatory approach complies with Environmental Laws and the Port's Planned Uses of the relevant property. Notwithstanding this cooperation with the Regulatory Agencies, upon expiration or earlier termination of this Lease, the Premises shall comply with Section 17.6. Furthermore, if during the term of this Lease the Port notifies Lessee of the Port's Planned Uses of any portion of the Leased Premises which require additional reasonable Clean-up, Lessee shall either be responsible to pay for or conduct, at the Port's election, any Clean-up required to make the Premises suitable for any such Planned Uses. However, any decision to use a risk-based approach will not affect Lessee's obligations to surrender the Premises at the expiration of the Term as required by Section 17.6 or the environmental indemnification obligations of Section 17.10. The dispute resolution procedures of Section 17.8 shall apply to this Section 17.4(b)(iii)."

91. Id.

92. Section 1.1 of the OFFC Lease defines "Planned Uses" as follows: "Commercial, industrial or aviation related land uses reasonably contemplated or anticipated by the Port, including post-secondary education uses incidental to aviation but excluding the following activities: retail food service; child care; residential, general primary and secondary education facilities; and health care uses."

sions to prevent future spills and releases[93]. Another reason why an agreement between airport owners and fuel farm operators is important is the absence of any comprehensive regulatory program over aviation fueling systems[94]. As mentioned earlier, despite the environmental significance and number of airport fueling facilities across the country, there is no comprehensive federal program that regulates these facilities or releases from these facilities[95]. Moreover, many states also have rules and regulations that apply to airport fuel operations, which increase the challenge of insuring that the fueling facilities are in full compliance with all relevant laws. For example, in California, the relevant laws include, among others, the California Aboveground Petroleum Storage Act[96], the Spill Prevention and Response Regulations[97]; the Regional Water Quality Control Board regulations; and the California Fire Code.[98]

In light of the confusing patchwork of legal requirements and industry standards governing airport fueling facilities, the Port and OFFC agreed to express requirements for the development and maintenance of an up-to-date and comprehensive operations and maintenance manual ("O&M Manual).[99] For example, under the Lease, OFFC is obligated to: (i) periodically certify that the O&M Manual complies with all relevant laws and industry standards;[100] (ii) provide copies of all audits of the fueling facilities performed by OFFC or member airlines to the Port,[101] and (iii) allow the Port to audit the fueling facilities and/or the O&M Manual[102].

The Lease also gives the Port review and approval authority over the third-party operator retained by OFFC[103]. OFFC, like most Consortiums around the country retains third-party operators to operate the airport fueling facilities.[104] Thus, the qualifications of OFFC's third-party operator and its track record was a direct concern of the Port, especially given the absence of clear financial resources of OFFC (as discussed above, at pp. 14-16)[105]. The Parties negotiated several Lease provisions that give the Port a vote in the retention of the third-party operator, including: (a)

93. *See* OFFC Lease § 17 (describing obligations relating to environmental matters).
94. *See supra* notes 23-25.
95. *See supra* note 23.
96. H.R. 1130 § 25270, 2007-2008 Gen Assem., Reg. Sess. (Ca 2008).
97. California Office of Spill Prevention response regulations, 14 CCR § 790 (2008).
98. H.R. 1130, 2007-2008 Gen Assem., Reg. Sess. (Ca 2008).
99. OFFC Lease § 10.1.
100. Id. § 10.1(a)
101. Id.
102. Id.
103. OFFC Lease § 10.3(a).
104. OFFC, as noted earlier, has a contract with Swissport.
105. *See supra* text accompanying note 68-70.

giving the Port pre-approval rights over the third-party operator retained by OFFC;[106] (b) establishing minimum qualifications of the OFFC's third-party operator;[107] and (c) requiring Port pre-approval of OFFC's contract with the third-party operator.[108]

IV. Conclusion

The financial, environmental and operational stakes associated with aviation fueling at airports across the United States are at an all time high[109]. Thus, it is especially important for airport owners and airlines to carefully allocate the risks and benefits in a comprehensive agreement. While the negotiations between the Port of Oakland and OFFC reflected these high stakes on both sides, the negotiating teams were respectful and professional throughout the process and were committed to joint problem-solving. As a result, the parties were able to devise and agree upon a number of innovative solutions. In the end, while both sides had to make a number of concessions, the final 20-year agreement reflected the primary goals and objectives of both parties.

106. OFFC Lease § 10.3(a).
107. Id. § 10.3(b).
108. Id. § 10.3 (a).
109. *See supra* text and sources accompanying notes 1-3.