

UNITED STATES DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION
WASHINGTON, DC

**Kenneth D. Paskar and Friends
of LaGuardia Airport Inc.**

Complainants

v.



**The Port Authority of New York and
New Jersey, an Interstate Compact
Agency Pursuant to Article I, Section 6
of the US Constitution**

Respondent

FAA Docket 16-11-04

DIRECTOR'S DETERMINATION

I. INTRODUCTION

This matter is before the Federal Aviation Administration (FAA) based on the Complaint filed under Title 14 of the Code of Federal Regulations (CFR), Part 16,¹ by Kenneth D. Paskar and Friends of LaGuardia Airport, Inc. (FOLA). [FAA Exhibit 1, Item 1] The nature of the complaint is related to the construction of the North Shore Marine Transfer Station adjacent to LaGuardia Airport (LGA), and whether the construction of this facility is in conflict with the Respondent's Federal obligations.

Complainants allege the Respondent violated Grant Assurance 19, *Operation and Maintenance*, Grant Assurance 20, *Hazard Removal and Mitigation*, Grant Assurance 21, *Compatible Land Use*, and Grant Assurance 34, *Policies, Standards and Specifications*. The Complainants claim the Respondent failed to maintain and operate the airport in a safe and serviceable condition, failed to prevent the establishment of a hazard adjacent to the airport, failed to prevent the establishment of an incompatible land use adjacent to the airport, and that it did not comply with FAA policies, standards and specifications. Respondent denies each allegation and requests dismissal of the Complaint. [FAA Exhibit 1, Item 3] Respondent's Memorandum of Points and Authorities in support of motion to dismiss includes the following arguments:

¹ Enforcement procedures regarding airport compliance matters may be found at *FAA Rules of Practice for Federally Assisted Airport Enforcement Proceedings* (14 CFR Part 16). These enforcement procedures were published in the Federal Register (61 FR 53998, October 16, 1996) and became effective on December 16, 1996.

- *Complainants fail to state a claim against the Port Authority for violating grant assurance 19 based upon construction of the NSMTS because the NSMTS is being constructed off-airport property.*
- *Complainants fail to state a claim against the Port Authority for violating grant assurance 34 based upon construction of the NSMTS because grant assurance 34 concerns compliance with FAA directives concerning a specific project for which federal funds are granted, and not with respect to continuing operations of an airport in general.*
- *Complainants claims of violations of grant assurances 20 and 21 are based upon attacks on FAA determinations that the NSMTS will not create a hazard to air navigation at LGA are not within the jurisdiction of a Part 16 proceeding, as the FAA determined in its February 28, 2011 determination dismissing the complainant's original complaint.*
- *Complainants claims of violations of grant assurances 20 and 21 based upon attacks on a document produced by a panel appointed by the Secretary of Transportation and whose conclusions were endorsed by the FAA concerning the compatibility of the NSMTS with air navigation at LGA are not within the jurisdiction of a Part 16 proceeding, as the FAA determined in its February 28, 2011 determination dismissing the complainant's original complaint.*
- *Respondent has taken reasonable actions to eliminate or mitigate possible hazards to aircraft using LGA which would have been created by the NSMTS as originally proposed.*

The decision in this matter is based on: (i.) applicable law and FAA policy regarding the Respondent's Federal obligations as imposed by Grant Assurances 5 - *Preserving Rights and Powers*, 19 - *Operation and Maintenance*, 20 - *Hazard Removal and Mitigation*, 21 - *Compatible Land Use*, and 34 - *Policies, Standards, and Specifications*, as well as Title 49 U.S.C., § 47107 *et. seq.*; and (ii.) arguments and supporting documentation submitted by the parties, which comprise the administrative record reflected in the attached FAA Exhibit 1.

With respect to the allegations presented in the Complaint, under the specific circumstances as discussed below and based on the evidence submitted to the record in this proceeding, the Director finds the Respondent is not currently in violation of its Federal obligations.

The basis for the Director's decision is set forth herein.

II. PARTIES

A. Complainants

The first Complainant, Kenneth D. Paskar, describes himself as "an individual, residing and working in New York, New York. Paskar is also a licensed pilot and aeronautical user of LaGuardia Airport." As a user of LaGuardia Airport, Mr. Paskar claims to be "directly affected" by the Respondent's alleged compliance violations. [FAA Exhibit 1, Item 1]

The other Complainant, Friends of LaGuardia Airport, Inc. (FOLA), describes itself as a New York association that is being incorporated as a New York nonprofit corporation. FOLA's members consist of individuals and businesses that use LaGuardia Airport as either passengers or as pilots, including Mr. Paskar. As aeronautical users of LaGuardia Airport, FOLA and its members (such as Mr. Paskar) claim to be "directly affected" by the Respondent's alleged compliance violations. [FAA Exhibit 1, Item 1]

B. Respondent

Port Authority of New York and New Jersey ("Port Authority," "PANYNJ" or "Respondent") is an Interstate Compact agency pursuant to Article 1, Section 6 of the United States Constitution. The Port Authority is the sponsor of LaGuardia Airport (LGA). [FAA Exhibit I, Item 1]

C. The Airport

LaGuardia Airport is a public-use, commercial service airport located in New York, New York. The airport is owned by the City and operated by the Port Authority pursuant to *Amended and Restated Agreement of Lease of the Municipal Air Terminals*. The lease agreement was executed on November 24, 2004, and it is between the City of New York (lessor) and the Port Authority of New York and New Jersey (leasee). [FAA Exhibit I, Item 1, exhibit 55]

The airport has 357,767 annual aircraft operations and has two 7,000 foot runways. [FAA Exhibit I, Item 2, Attachment C] The planning and development of the Airport has been financed in part with funds provided by the FAA under the Airport Improvement Program (AIP), authorized by the Airport and Airway Improvement Act of 1982, as amended, 49 U.S.C., § 47101, *et seq.*

D. Complaint History

On February 12, 2011, Complainants previously filed a formal complaint and request for investigation pursuant to 14 CFR, Part 16. The complaint was filed against the City of New York and the Respondent Port for allegations related to the construction of the NSMTS. The complaint alleged violations Grant Assurance Nos. 19, 20, 21, and 34. By letter, dated February 28, 2011, the Director dismissed the original complaint without prejudice because the complaint was determined to be incomplete under 14 CFR, Part 16. [FAA Exhibit 1, Item 2, Attachment A]

Within the February 28, 2011, dismissal letter, the Director determined that the City of New York is not a respondent in this case.

"The City is not the governing body that has accepted Federal financial assistance or a conveyance of Federal property", and thus does not have privity with the FAA. Neither is the City responsible for noncompliance at LGA. In this case, the Port Authority is the sponsor of record. [See FAA Form 5010, Airport Master Record for LaGuardia Airport.] Accordingly, the City of New York is not the sponsor of LaGuardia Airport and is not properly named as a respondent in this proceeding"

On April 18, 2011, Complainants filed their amended formal complaint and request for investigation pursuant to 14 CFR, Part 16. (FAA Docket No. 16-11-04) The complaint was again filed against the City of New York^e and Respondent Port for allegations related to the construction of the NSMTS and alleging violations of Grant Assurance Nos. 19, 20, 21, and 34. [FAA Exhibit 1, Item 1]

On May 25, 2011, the Director issued the Partial Dismissal Order and Notice of Docketing. The Partial Dismissal Order dismissed the City of New York from the Part 16 proceedings, referencing the Director's February 28, 2011 dismissal letter. [FAA Exhibit 1, Item 2] On July 1, 2011, Complainants petitioned the U.S. Court of Appeals of the Second Circuit for review of the May 25, 2011 FAA Order under Case No. 11-2720-ag.

On June 12, 2012, via Summary Order, the Court agreed with FAA's position and found that the FAA's factual findings were supported by substantial evidence, and that the FAA's application of the law to the facts was not arbitrary or capricious, or an abuse of discretion. The Court noted that "*[t]he City is not a signatory or party to the grant agreements, nor is it a proper Part 16 "respondent" as defined in 14 C.F.R. § 16.3, as the City is not a "sponsor, proprietor, or operator" of the airport.*" The Court stated that although the City owns the land upon which LaGuardia sits, "*the Port Authority is the operator of LaGuardia and leases the land from the City. The City does not qualify as a sponsor under the terms of the grant agreement, statute, or regulations, because it is not an agency that receives financial assistance from the FAA.*" The Court agreed that the City was also not a "*proprietor" because ownership alone is not sufficient to warrant proprietor status, and the City does not "operate" the airport.*" [FAA Exhibit 1, Item 11]

As noted, the Director has previously determined that the City is not a respondent in this case was upheld by the US Court of Appeals of the Second Circuit. Therefore the City is not named as a respondent in this proceeding.

III. BACKGROUND AND PROCEDURAL HISTORY

On November 10, 2004, the FAA received a Notice of Proposed Construction or Alteration, Form 7460-1 from the Department of Sanitation of New York (DSNY), in which DSNY indicated its plans to construct the North Shore Marine Transfer Station. The proposal described the location of the facility as North Shore Marine Transfer Station North of 31st Avenue West of 122nd Street. The proposal listed the coordinates of the facility as Latitude 40° 46' 15.35"N and Longitude 73° 50' 57.49"W, and indicated a total height of 110 feet (AMSL). The proposal was assigned Aeronautical Study No. 2004-AEA-3159-0E. [FAA Exhibit 1, Item 3, Exhibit C]

² Complainants argue that the City should be named a respondent in this case for the following reasons: the facts show that the City is the proprietor of the airport, by statute, the land "used regularly by aircraft for receiving or discharging passengers or cargo" constitutes an airport, and viewing the City as a "nonproprietor" of the airport is contrary to FAA policy, guidance and orders.

On January 28, 2005 the FAA issued its determination of Presumed Hazard for Aeronautical Study No. 2004-AEA-3159-0E. [FAA Exhibit 1, Item 1, exhibit 7] The determination stated that:

...the initial findings of this study indicated that the structure as described above would exceed obstruction standards and/or would have an adverse physical or electromagnetic interference effect upon navigable airspace or air navigation facilities. Therefore, pending resolution of the issues described below, it is hereby determined that the structure is presumed to be a hazard to air navigation.

... To pursue the possibility of a favorable determination at the originally submitted height, further study would be necessary. Further study entails circularization to the public for comment. This process requires approximately 90 to 120 days from the date that further study is requested before any subsequent determination would be effective.

In April 2005, the proposed NSMTS building was identified as a presumed hazard³ under the Code of Federal Regulations Part 77 and was released for public comment.⁴

On May 9, 2005, Tom Bock, Port Authority's General Manager for Airspace Modernization, Technology & Operational Enhancement, sent a letter to Robert Alexander, Obstruction Evaluation Specialist for the FAA, objecting to the construction of the NSMTS. [FAA Exhibit 1, Item 1, exhibit 8] In Mr. Bock's letter he indicates that:

... We have reviewed the documentation regarding the proposed New York City Sanitation Transfer Station in Flushing, New York and have determined that it will have a significant impact to the operations at LaGuardia Airport. This structure is located only 2206 feet from runway 13/31 which is one of the busiest runways in the world. At its proposed height it exceeds by over 40 feet, not only the 40:1 surface but the 34:1 surface as well.

... The FAA requires airport operators to refrain from building any object in the Runway Protection Zone. This building is not on airport property, but it is clearly inside the RPZ.

On September 18, 2006, the FAA completed its further study of the NSMTS and issued a Determination of No Hazard to Air Navigation for Aeronautical Study No. 2004-AEA-3159-0E. [FAA Exhibit 1, Item 1, exhibit 9] The Determination letter states that:

This aeronautical study revealed that the structure would have no substantial adverse effect on the safe and efficient utilization of navigable airspace by aircraft or on the operation of air navigation facilities. Therefore, pursuant to the authority delegated to

³ See, [14 CFR, Part 77, § 77.15(b)] - Objects that are considered obstructions under the standards described in this subpart are presumed hazards to air navigation unless further aeronautical study concludes that the object is not a hazard. Once further aeronautical study has been initiated, the FAA will use the standards in this subpart, along with FAA policy and guidance material, to determine if the object is a hazard to air navigation.

⁴ See, [FAA Exhibit 1, Item 1, exhibit 35, Pg. 5.]

me, it is hereby determined that the structure would not be a hazard to air navigation provided the following condition (s) is (are) met:

— As a condition to this Determination, the structure is marked and/or lighted in accordance with FAA Advisory Circular 70/7460-1 K Change 1, Obstruction Marking and Lighting, red lights — Chapters 4, 5, (Red), & 12...

... This determination becomes final on October 28, 2006 unless a petition is timely filed. In which case, this determination will not become final pending disposition of the petition.

On October 17, 2006, the Port Authority filed a Petition with the FAA for a review of the Determination of No Hazard to Air Navigation for Aeronautical Study No. 2004-AEA-3159-0E. [FAA Exhibit 1, Item 1, exhibit 10]

On October 23, 2006, a letter cosigned by Gary L. Ackerman, Member of Congress, Carolyn B. Maloney, Member of Congress, Anthony D. Weiner, Member of Congress, Joseph Crowley, Member of Congress, and Gregory W. Meeks, Member of Congress, "Queens Delegation Letter",⁵ was sent to then FAA Administrator Marion C. Blakey. [FAA Exhibit 1, Item 1, exhibit 12] The letter was written with regard to the FAA's Determination of No Hazard to Air Navigation for Aeronautical Study No. 2004-AEA-3159-0E, and states that:

... We agree with the concerns raised by the Port Authority of New York and New Jersey, and support its view that constructing the Marine Transfer Station at this location needlessly endangers the flying public and citizens living in the surrounding area.

In January of 2007, the City's Department of Sanitation (DSNY) released its Comprehensive Waste Management Plan. The plan addressed DSNY's long-term exportation and disposal of municipal solid waste from New York City, which included the refurbishment of four closed transfer stations that were previously operated by the City. The NSMTS, located in the College Point section of Queens, was one of the four proposed facilities to be refurbished. [FAA Exhibit 1, Item 1, exhibit 5]

On February 28, 2007, Tom Bock, Port Authority's General Manager for Airspace Modernization, Technology & Operational Enhancement, sent a letter to Ms. Ellen Crum with the FAA's Airspace and Rules Branch. [FAA Exhibit 1, Item 1, exhibit 13] Mr. Bock's letter states that:

The Port Authority of New York and New Jersey respectfully requests withdrawal of its petition concerning airspace case ft 2004-AEA-3159-0E, Obstruction Evaluation Case Number 06-AWA-0E-29, Sanitation Waste Transfer Station, Flushing, NY. After discussions between the New York City Department of Sanitation and the Port Authority of NY & NJ, we were able to clarify the specific corner points of the building, allowing us the opportunity for a more detailed review of the potential impacts. In addition, the

⁵ See [FAA Exhibit 1, Item 1, Pg. 13]

Department of Sanitation was able to redesign the building high point to a height of 100.06.

... As a result of this new information, we have determined that, the building is now located outside the RPZ and outside the ICAO departure splay. The redesigned height also puts the structure below the slope of the existing buildings, no longer making it the controlling obstruction. Based on the new height and analysis, there will not be an impact to aircraft operations at LaGuardia Airport if the building is constructed as described above. Therefore, the Port Authority of NY & NJ withdraws our letter of petition dated October 17, 2006.

The new coordinates and amended elevation for the building's high point were subsequently assigned Aeronautical Study No.'s 2007-AEA-1163-OE, and the FAA began evaluating the proposal. The DSNY is identified as the proponent of the proposal.⁶

On March 12, 2007, John Dermody with the FAA's New York Airports District Office (NY ADO) sent an e-mail to Robert Alexander, FAA Obstruction Evaluation Specialist, regarding Aeronautical Study No. 2007-AEA-1163-OE. The intent of the message was to "make sure the [Flight Procedures Office (FPO)] was taking the future LGA RW 31 ILS into account during their analysis." [FAA Exhibit 1, Item 1, exhibit 14]

On March 23, 2007, Robert Alexander, sent an e-mail to Don Krager, with the FAA's Eastern FPO with regard to Aeronautical Study No. 2007-AEA-1163-OE. The intent of the message was to inquire about the lowest decision height possible for the proposed ILS approach, in comparison to the lowest decision height if the proposed facility was constructed. [FAA Exhibit 1, Item 1, exhibit 15] A summary of the e-mail chain is as follows:

- On March 23, 2007, Don Krager responded to Robert Alexander stating that:

The lowest DA would be 200 ft. If the obstacle were to be built the ILS approach would be denied since you cannot adjust the DA on proposed obstacles. And I'm sure they are not going to raise the glide slope or displace the threshold based on a proposed obstacle.

On March 23, 2007, Robert Alexander responded to Don Krager stating that:

ok, you gave me half the answer, how about the rest. "We" absolutely give numbers on proposed obstacles.

On March 26, 2007, Don Krager responded to Robert Alexander stating that:

07-AEA-1163-OE would require a DA of 203, 07-AEA-1169-OE would require a DA of 216. Being a proposed ILS both obstacles would require a IA accuracy code.

⁶ See, [FAA Exhibit 1, Item 1, exhibit 22]

On July 2, 2007, Tom Bock, Port Authority's General Manager for Airspace Modernization, Technology & Operational Enhancement, sent a letter to Mr. Steven Urlass with the NYADO. [FAA Exhibit 1, Item 1, exhibit 16] Mr. Bock's letter states that:

...As you are aware the, the FAA is in the process of installing a glide slope on Runway 31. It has taken years to finally get this project off the drawing board and into production. We are grateful to all who have helped to achieve this goal.

The new glide slope will allow for a consistent flight path to the airport from the southeast, and reduce noise and air emissions for our airport neighbors. To improve upon the use of this approach, the Port Authority is looking at potential actions we can take to make this new tool even more effective. Current minimums, even with the glide slope, will be high due to the lack of approach lighting and some existing obstructions. However, it is our long term plan to study these obstructions and resolve them one by one with our goal to obtain a CAT II approach to Runway 31. As you know, in snow conditions, LGA usually has north or northeast wind and the visibility minimums on Runway 4 are 4000 RVR. By adding an approach lighting system to Runway 31 and removing a few of closer-in obstacles we will achieve better landing minimums and eventually a CAT II approach. This will help our area capacity in poor weather tremendously. Once the glide slope is installed, we will begin the study to determine the most expeditious means to gain lower landing minimums on Runway 31."

On February 20, 2008, Mr. Edward Skyler, New York City Deputy Mayor for Operations, sent a letter to Mr. Anthony Shorris, Executive Director of the Port Authority. [FAA Exhibit 1, Item 1, exhibit 17] Mr. Skyler's letter states:

...The Department of Sanitation (DSNY) initiated this process in 2004 with the filing of a Notice of Proposed Construction or Alteration (Form 7460-1) and received a No Hazard Determination on September 18, 2006. On October 17, 2006, the Port Authority filed a petition with the FAA, seeking to reverse that determination based on concerns regarding impacts the MTS structure might have had on flight operations at LaGuardia Airport. To address this concern, the City agreed to redesign the MTS, at an estimated cost of \$2 million, to reduce its maximum height by 12 feet. The Port Authority agreed that the redesigned MTS does not have any negative impacts on runway operations at LaGuardia, and withdrew its petition to reverse the FAA's No Hazard Determination

... Following this agreement, the Port Authority surprised the City by submitting a letter to the FAA on July 2, 2007, (attached as Exhibit C) indicating that as part of its long term plan, it may seek to install a Category II Instrument Landing System (ILS) on Runway 31. Following this submission, the FAA notified the City that the North Shore MTS could adversely affect the installation of a Category II ILS, and since that time we have actively engaged the Port Authority and the FAA to work-out a resolution that will enable the City to move forward with this critical facility.'

Exhibit C referenced in the February 20, 2008 letter from Skyler Shorris, is the same as FAA Exhibit 1, Item 1, exhibit 16.

... Our experts' analysis concludes that the North Shore MTS, as currently designed will not adversely affect the existing instrument approach procedures on Runway 31. Moreover the analysis concludes that with slight adjustments to the operation range of the North Shore MTS's west gantry crane, which the City is willing to make, the Port Authority can install a Category ILLS at Runway 31, which will result in immediate and substantial improvements to airport operations. Our analysis also shows that establishing a Category IIIILS on Runway 31 currently appears infeasible due to the already-existing obstacle environment, and a number of other technical issues (see Technical Memorandum at page 13). While the North Shore MTS would add to the obstacle environment, it would not be the controlling obstruction, nor is it likely that already-existing obstructions could be addressed and other technical issues resolved in a reasonable time frame, if at all.

...As a next step, I request that the Port Authority withdraw its July 2, 2007, letter to the FAA, which is preventing the FAA from permitting the City to move forward with the reactivation of the North Shore MTS. In addition, I would like to meet as soon as possible to discuss this issue with you and reach agreement on the changes the City needs to make to the design of the North Shore MTS to clear the way for installation of a Category I ILS.

On May 5, 2008, Tom Bock, Port Authority's General Manager for Airspace Modernization, Technology & Operational Enhancement, sent a letter to Robert Alexander, FAA Obstruction Evaluation Specialist. [FAA Exhibit 1, Item 1, exhibit 20] Mr. Bock's letter states that:

... Our goal was to develop an ILS approach installed in Runway 31 in the short-term and protect for the potential CAT II approach in the longer term.

To assure that our analysis was accurate, we enlisted the assistance of the FAA Flight Procedures Office in Atlanta (AVN). AVN developed procedures based on several assumptions that we provided All these procedures were developed to the lowest possible landing minimums that could be attained In total, there were five main alternatives and two additional alternatives requested by FAA Airports Division. We have attached these analyses for your review, as well as additional studies performed by the City of New York In summary, FAA analyses revealed that a CAT II approach to LGA Runway 31 is impractical based on the myriad of obstructions that plague the Northern Queens landscape. Therefore we are rescinding our request for the establishment of a CAT II approach for Runway 31.

Based on the results of these FAA studies and the studies performed by the City of New York it is the plan of the Port Authority to continue to pursue an ILS approach to Runway 31 at LGA. However, our best course of action is to utilize an offset localizer and develop a glideslope angle of 3.1 degrees to obtain a Decision Height of 280 HAT with a RVR of 5,000. This will allow operations on Runway 31 at lower minimums than we have today and also increase safety within the existing obstacle environment.

On September 19, 2008, the FAA issued a Determination of No Hazard to Air Navigation for the NSMSTS, Aeronautical Study No. 2007-AEA-1163-OE. [FAA Exhibit 1, Item 1, exhibit 22] The determination stated:

This aeronautical study revealed that the structure would have no substantial adverse effect on the safe and efficient utilization of the navigable airspace by aircraft or on the operation of air navigation facilities. Therefore, pursuant to the authority delegated to me, it is hereby determined that the structure would not be a hazard to air navigation provided the following conditions are met:

... Any height exceeding 100 feet above ground level (100 feet above mean sea level), will result in a substantial adverse effect and would warrant a Determination of Hazard to Air Navigation.

The study goes on to state:

- a. The impact on arrival, departure, and en route procedures for aircraft operating under VFR follows: None.*
- b. The impact on arrival, departure, and en route procedures for aircraft operating under IFR follows: LaGuardia Airport currently has a plan on file with the FAA to install a precision approach to runway 31. During the aeronautical study, the FAA and Port Authority of New York and New Jersey has agreed to install an offset localizer with a 3.1 degree glide slope angle which will allow for a decision height of 280 feet above touchdown with visibility of 5000 feet. The proposed building will not impact this approach procedure.*
- c. The cumulative impact resulting from the proposed construction or alteration of a structure when combined with the impact of other existing or proposed structures follows: None.*

...Negotiation with the proponent during the aeronautical study 2004-AEA-3159-OE resulted in the filing of aeronautical study number 2007-AEA-1163-OE at a reduced height of 100 AGL and a minor relocation of the structure to the north.

... After a complete review of the aeronautical study within the FAA, it was decided that no current VFR or IFR operations would be impacted by the proposal and that there is no cumulative impact resulting from the proposal when combined with the impact of other existing or proposed structures.

On October 24, 2008, the FAA issued a Determination of No Hazard to Air Navigation for the NSMSTS West Gantry Crane, Aeronautical Study No. 2007-AEA-1169-OE. [FAA Exhibit 1, Item 1, exhibit 23] The determination stated:

This aeronautical study revealed that the structure would have no substantial adverse effect on the safe and efficient utilization of the navigable airspace by aircraft or on the

operation of air navigation facilities. Therefore, pursuant to the authority delegated to me, it is hereby determined that the structure would not be a hazard to air navigation provided the following condition(s) is (are) met:

... Any height exceeding 97 feet above ground level (97 feet above mean sea level), will result in a substantial adverse effect and would warrant a Determination of Hazard to Air Navigation.

...Negotiation was attempted with the proponent but full filed height and location was requested. The proponent has agreed to supply a certified IA survey.

... The proposal would not impact any plans on file. There is a plan to install a precision approach to runway 31. After much study, a decision has been reached to install an offset localizer with a 3.1 degree glide slope angle which will allow a decision height of 280 feet above touchdown and a visibility of 5000 feet. The proposed building will not impact this approach procedure.

... The structure would not adversely impact any present or future VFR or IFR Terminal Procedure. The structure exceeds a direct 40:1 departure slope by 33 feet, 35 feet is allowed and is outside of the single engine out departure splay.

... The structure would not adversely impact any VFR or IFR enroute procedure.

On January 15, 2009, US Airways flight 1549 departed from LGA and struck a flock of geese shortly after take-off. Miraculously, the pilot, Captain Chesley Sullenberger, was able to successfully land the plane in the Hudson River with no loss of life. This accident is commonly referred to as the "Miracle on the Hudson."⁸

As a result of this accident, various members of the local community took to the media in hope of preventing the establishment of the NSMTS by referring to the facilities ability to potentially attract birds into the flight path of runway 31. One such article appeared in the Queens Chronicle on March 12, 2009. [FAA Exhibit 1, Item 1, exhibit 24] In that article, it refers to a letter written to Acting FAA Administrator Lynne Osmus from Congressman Gary Ackerman in which Rep. Ackerman wrote:⁹

...I would like to know if the FAA is reconsidering its determination in light of the Jan. 15 crash landing of US Airways Flight 1549 on the Hudson River due to a bird strike.

On June 10, 2009, William Flanagan, Manager of the FAA's Eastern Region Airports Division, sent a letter to Harry Szarpanski, DSNY Deputy Commissioner. [FAA Exhibit 1, Item 1, exhibit 27]. The letter indicates in part, that the FAA has reviewed the United States Department of Agriculture letter of June 4, 2009; the FAA has confirmed that the NSMTS is outside of the RPZ for LGA; USDA, Wildlife Services (WS) believes that the proposed NSMTS will not cause hazardous wildlife movements within the LGA airspace if DSNY follows the operating

⁸ See, [FAA Exhibit 1, Item 1, Pg. 18]

⁹ The record does not include a copy of Rep. Ackerman's letter to Acting FAA Administrator Lynne Osmus.

procedures recommended in the letter; DSNY has established operating procedures for the NSMTS; USDA Wildlife Services has determined that the NSMTS is not inherently in conflict with safe operations at LGA provided that certain recommendations are met.

On July 9, 2009, Harry Szarpanski, DSNY Deputy Commissioner, responds to William Flanagan, Manager of the FAA's Eastern Region Airports Division. [FAA Exhibit 1, Item 1, exhibit 28] In the letter, Mr. Szarpanski states:

DSNY concurs with your conclusion that the proposed [NSJM]TS is not inherently in conflict with safe aircraft operations at LaGuardia Airport. We agree to institute the measures recommended in your letter at the start of [NSJM]TS operations.

On February 2, 2010, the FAA released its final report on the "Evaluation of Trash-Transfer Facilities as Bird Attractants. [FAA Exhibit 1, Item 1, exhibit 29] The objective of this study was to document wildlife use of trash transfer facilities and to determine if the facility design or on-site management practices influenced the facility's attractiveness to wildlife species.

On April 23, 2010, the FAA/USDA panel issued its draft report "Evaluation of the North Shore Marine Transfer Station and its Compatibility with Respect to Bird Strikes and Safe Air Operations at LaGuardia Airport." [FAA Exhibit 1, Item 1, exhibit 6] The draft report was submitted for public comment.

On September 2, 2010, the FAA and the USDA issued their joint, final report regarding the NSMTS. [FAA Exhibit 1, Item 1, exhibit 35] Section 3.7 "Determination of Finding" of the report states:

The technical panel determined that Alternative 3, the [NSJM]TS with changes to building design and operational procedures and the implementation of an integrated wildlife hazard management plan and program, will most likely provide the safest, most acceptable alternative. This alternative would greatly reduce the risk of a bird strike as compared to the present situation (no [NSJM]TS facility) and the North Shore MTS as proposed under the Part 360 application.

On September 2, 2010, Michael O'Donnell, Director, FAA Airport Safety and Standards, sent a letter to Harry Szapanski, DSNY Deputy Commissioner. [FAA Exhibit 1, Item 1, exhibit 37] In the letter, Mr. O'Donnell states:

Last year following the forced landing of U.S. Airways Flight 1549 in the Hudson River, Secretary LaHood requested that an expert technical panel reexamine whether the proposed North Shore Marine Transfer Station (MTS) in College Point, Queens, would be compatible with safe operations at LaGuardia Airport. We were fortunate to be able to assemble a true "blue ribbon" panel, including experts in bird strike hazards from the United States Air Force, the Federal Aviation Administration, the United States Department of Agriculture, the City of New York, and the Port Authority of New York and New Jersey.

The panel issued its final report, "Evaluation of the North Shore Marine Transfer Station and its Compatibility with Respect to Bird Strikes and Safe Air Operations at LaGuardia Airport," on September 2. The report concludes the proposed MTS will be compatible with safe air operations so long as it is constructed and operated in accordance with the report's recommendations.

The FAA has reviewed the final report. We believe the technical panel's approach to the issue presented was appropriate and its analysis and conclusions are sound. We believe it is important for the City to adopt the recommendations of the panel and we appreciate your undertaking to adopt them in full, and we urge you to commit to implementing the recommendations in full.

On September 3, 2010, Harry Szarpanski, DSNY Deputy Commissioner responds to Michael O'Donnell, Director, FAA Airport Safety and Standards. [FAA Exhibit 1, Item 1, exhibit 38] In the letter, Mr. Szarpanski states:

... The Department of Sanitation's plan for the INS_ IMTS were the result of a detailed planning effort. We agree with the report's conclusion that this facility can be operated safely in regards to safe aviation operations at LaGuardia Airport. We will implement the panel's recommendations as we seek to construct and operate a facility that will reduce the environmental impact of solid waste removal on New York City while ensuring the safety of the flying public.

5. Procedural History

On November 12, 2010, Complainants formally notified the Respondent of their concerns regarding the NSMTS. In their letter, the Complainants informed the Respondent of their intentions to file a complaint pursuant to 14 CFR, § 16.23, and requested a meeting with the Respondent to discuss the matter and see if it could be resolved informally.¹⁰ [FAA Exhibit 1, Item 1, exhibit 3]

On February 12, 2011, Complainants filed their Complaint and Request for Investigation with 53 Exhibits. [FAA Exhibit 1, Item 3, exhibit E]

On February 28, 2011, the FAA issued a Dismissal Letter. [FAA Exhibit 1, Item 2, Attachment A]

On April 12, 2011, Complainants filed their Amended Complaint and Request for Investigation with 55 Exhibits. [FAA Exhibit 1, Item 1]

¹⁰ Title 14 CFR §16.21(a) states, "Prior to filing a complaint under this part, a person directly and substantially affected by the alleged noncompliance shall initiate and engage in good faith efforts to resolve the disputed matter informally with those individuals or entities believed responsible for the noncompliance. These efforts at informal resolution may include, without limitation, at the parties' expense, mediation, arbitration, or the use of a dispute resolution board, or other form of third party assistance."

On May 9, 2011, the FAA issued Order extending time period to docket or dismiss complaint. [FAA Exhibit 1, Item A]

On May 24, 2011, the FAA issued a Partial Dismissal Order and Notice of Docketing for the Complaint. [FAA Exhibit 1, Item 2]

On June 10, 2011, Respondent filed its Answer to the Amended Complaint and Motion to Dismiss with 6 Exhibits. [FAA Exhibit 1, Item 3]

On June 21, 2011, Complainants filed a request for Extension of Time to file its reply. [FAA Exhibit 1, Item 4]

On June 27, 2011, the FAA granted Complainants' request for Extension of Time to Reply. [FAA Exhibit 1, Item 5]

On July 12, 2011, Complainants filed their Reply to the Respondent's Motion to Dismiss. [FAA Exhibit 1, Item 6]

On July 15, 2011, Respondent filed a request for Extension of Time to file its Rebuttal. [FAA Exhibit 1, Item 7]

On July 21, 2011, the FAA granted Respondent's request for Extension of Time to file its Rebuttal. [FAA Exhibit 1, Item 8]

On July 29, 2011, Respondent filed its Rebuttal to Complainants' Reply. [FAA Exhibit 1, Item 9]

On January 4, 2012, Attorney Taber sent a letter to the FAA inquiring on the issuance of the Director's Determination.

On January 20, 2012, the FAA issued a Notice of Extension of Time for issuance of Director's Determination. This Notice extended the time for the Director to issue his Determination until April 15, 2012. [FAA Exhibit 1, Item 10]

On April 25, 2012, the FAA issued a Notice of Extension of Time for issuance of Director's Determination. This Notice extended the time for the Director to issue his Determination until July 16, 2012. [FAA Exhibit 1, Item 14]

On July 16, 2012, the FAA issued a Notice of Extension of Time for issuance of Director's Determination. This Notice extended the time for the Director to issue his Determination until September 7, 2012. [FAA Exhibit 1, Item 15]

On September 10, 2012, the FAA issued a Notice of Extension of Time for issuance of Director's Determination. This Notice extended the time for the Director to issue his Determination until September 26, 2012. [FAA Exhibit 1, Item 16]

IV. ISSUES UNDER INVESTIGATION

The FAA is responsible for adjudicating airport compliance matters involving federally-assisted airports arising under the Airport and Airway Improvement Act (AAIA) of 1982, as amended; certain airport-related provisions of the Federal Aviation Act of 1994, as amended; the Surplus Property Act, as amended; predecessors to those acts; and regulations, grant agreements, and documents of conveyance issued or made under those acts. [See, FAA Rules of Practice for Federally-Assisted Airport Enforcement Proceedings, 14 CFR, Part 16]

In accordance with this mandate, this Director's Determination addresses the following issues:

ISSUE #1: *Whether the Respondent's alleged failure to prevent the construction of the NSMTS at its proposed location constitutes a violation of Grant Assurance 19, Operation and Maintenance, Grant Assurance 20, Hazard Removal and Mitigation, Grant Assurance 21, Compatible Land Use, and Grant Assurance 34, Policies, Standards and Specifications.*

ISSUE #2: *Whether the Respondent's alleged failure to follow the recommendations contained in the FAA/USDA panel report, with regard to the NSMTS facility, constitutes a violation of Grant Assurance 19, Operation and Maintenance, Grant Assurance 20, Hazard Removal and Mitigation, Grant Assurance 21, Compatible Land Use, and Grant Assurance 34, Policies, Standards and Specifications.*

V. APPLICABLE LAW AND POLICY

The following is a discussion pertaining to (a) the FAA's enforcement responsibilities; (b) the FAA compliance program; (c) statutes, sponsor assurances, and relevant policies; and (d) the complaint process.

A. FAA Enforcement Responsibilities

The Federal Aviation Act of 1958, as amended, 49 U.S.C., § 40101, et seq., assigns the FAA Administrator broad responsibilities for the regulation of air commerce in the interests of safety, security, and development of civil aeronautics. The Federal role in encouraging and developing civil aviation has been augmented by various legislative actions, which authorize programs for providing funds and other assistance to local communities for the development of airport facilities. In each such program, the airport sponsor assumes certain obligations, either by contract or by restrictive covenants in property deeds and conveyance instruments, to maintain and operate its airport facilities safely, efficiently, and in accordance with specified conditions. Commitments assumed by airport sponsors in property conveyance or grant agreements are important factors in maintaining a high degree of safety and efficiency in airport design, construction, operation, and maintenance, as well as ensuring the public reasonable access to the airport. Pursuant to 49 U.S.C., § 47122, the FAA has a statutory mandate to ensure that airport owners comply with their grant assurances.

B. FAA Airport Compliance Program

The FAA discharges its responsibility for ensuring that airport sponsors comply with their Federal obligations through its Airport Compliance Program. Sponsor obligations are the basis for the FAA's airport compliance effort. The airport owner accepts these obligations when receiving Federal grant funds or when accepting the transfer of Federal property for airport purposes. The FAA incorporates these obligations in grant agreements and instruments of conveyance to protect the public's interest in civil aviation and to ensure compliance with Federal laws.

The FAA designed the Airport Compliance Program to ensure the availability of a national system of safe and properly maintained public-use airports that airport sponsors operate in a manner consistent with their Federal obligations and the public's interest in civil aviation. The Airport Compliance Program does not control or direct the operation of airports. Rather, it monitors the administration of valuable rights, which airport sponsors pledge to the people of the United States in exchange for monetary grants and donations of Federal property, to ensure that airport sponsors serve the public interest.

FAA Order 5190.6B, FAA Airport Compliance Manual, September 30, 2009, (hereinafter Order) sets forth policies and procedures for the FAA Airport Compliance Program. The Order is not regulatory and is not controlling with regard to airport sponsor conduct; rather, it establishes the policies and procedures for FAA personnel to follow in carrying out the FAA's responsibilities for ensuring airport compliance. It provides basic guidance for FAA personnel in interpreting and administering the various continuing commitments airport owners make to the United States as a condition for the grant of Federal funds or the conveyance of Federal property for airport purposes. The Order, *inter alia*, analyzes the various obligations set forth in the standard airport sponsor assurances, addresses the application of the assurances in the operation of public-use airports, and facilitates interpretation of the assurances by FAA personnel.

The FAA compliance program is designed to achieve voluntary compliance with Federal obligations accepted by owners and/or operators of public-use airports developed with FAA administered assistance. Therefore, in addressing allegations of noncompliance, the FAA will make a determination as to whether an airport sponsor is currently in compliance with the applicable Federal obligations. Consequently, the FAA will consider the successful action by the airport to cure any alleged or potential past violation of applicable Federal obligation to be grounds for dismissal of such allegations. [See e.g. *Wilson Air Center v. Memphis and Shelby County Airport Authority*, FAA Docket No. 16-99-10, (August 30, 2001) (Final Decision and Order).]

C. Statutes, Sponsor Assurances, and Relevant Policies

As a condition precedent to providing airport development assistance under the Airport and Airway Improvement Act of 1982 (AAIA), codified at Title 49 U.S.C., § 47101, et seq., the Secretary of Transportation receives certain assurances from the airport sponsor.

The AAIA, 49 U.S.C., § 47101, et seq., sets forth assurances to which an airport sponsor receiving Federal financial assistance must agree as a condition precedent to receipt of such

assistance. These sponsorship requirements are included in every airport improvement program (AIP) grant agreement. Upon acceptance of an AIP grant by an airport sponsor, the assurances become a binding obligation between the airport sponsor and the Federal Government.

Five (5) grant assurances apply to the specific circumstances of this complaint.

- **Grant Assurance 5, *Preserving Rights and Powers***

Grant Assurance 5, *Preserving Rights and Powers*, implements the provisions of the Airport and Airway Improvement Act (AAIA), 49 U.S.C., § 47107(a), *et seq.*, and requires, in pertinent part, that the sponsor of a federally obligated airport:

...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 mollify, any outstanding rights or claims of right of others which would interfere with such performance by the sponsor.

- **Grant Assurance 19, *Operation and Maintenance***

Grant Assurance 19, *Operation and Maintenance*, implements the provisions of the AAIA, 49 U.S.C., § 47107(a)(7), and requires, in pertinent part, that the sponsor of a Federally-obligated airport assure:

"a. The airport and all facilities which are necessary to serve the aeronautical users of the airport, other than facilities owned or controlled by the United States, shall be operated at all times in a safe and serviceable condition and in accordance with the minimum standards as may be required or prescribed by applicable Federal, state, and local agencies for maintenance and operation. It will not cause or permit any activity or action thereon which would interfere with its use for airport purposes. It will suitably operate and maintain the airport and all facilities thereon or connected therewith, with due regard to climatic and flood conditions. Any proposal to temporarily close the airport for non-aeronautical purposes must first be approved by the Secretary. In furtherance of this assurance, the sponsor will have in effect arrangements for:

- (1) Operating the airport's aeronautical facilities whenever required;*
- (2) Promptly marking and lighting hazards resulting from airport conditions, including temporary conditions; and,*
- (3) Promptly notifying airmen of any condition affecting aeronautical use of the airport.*

Nothing contained herein shall be construed to require that the airport be operated for aeronautical use during temporary periods when snow, flood,

or other climatic conditions interfere with such operation and maintenance. Further, nothing herein shall be construed as requiring the maintenance, repair, restoration, or replacement of any structure or facility which is substantially damaged or destroyed due to an act of God or other condition or circumstance beyond the control of the sponsor.

Additionally, FAA Order 5190.6B provides that the owner should adopt and enforce adequate rules, regulations, or ordinances as necessary to ensure safety and efficiency of flight operations and to protect the public using the airport. In fact, the prime requirement for local regulations is to control the use of the airport in a manner that will eliminate hazards to aircraft and to people on the ground. As in the operation of any public service facility, FAA advises airport sponsors to establish adequate rules covering, *inter alia*, vehicular traffic, sanitation, security, crowd control, access to certain areas, and fire protection. [See, FAA Order 5190.6B, Chapter 7 Airport Operation, Section 7.9]

- Grant Assurance 20, *Hazard Removal and Mitigation*,

Grant assurance 20, *Hazard Removal and Mitigation*, implements 49 U.S.C., § 47107(a)(9), and states:

[The airport owner or sponsor] will take appropriate action to assure that such terminal airspace as is required to protect instrument and visual operations to the airport (including established minimum flight altitudes) will be adequately cleared and protected by removing, lowering, relocating, marking, lighting, or otherwise mitigating existing airport hazards and by preventing the establishment or creation of future airport hazards.

For the purpose of evaluating airport owner or sponsor compliance with hazard removal and mitigation requirements, the FAA defines "airport hazard" as "any structure or object of natural growth located on or in the vicinity of a public use airport, or any use of land near such an airport that obstructs the airspace required for the flight in landing or taking off at such airport or is otherwise hazardous to such landing or taking off of aircraft. [See FAA Order 5190.6B, FAA Order, Appendix Z.]

- Grant Assurance 21, *Compatible Land Use*

Grant Assurance 21, *Compatible Land Use*, implements 49 U.S.C., § 47107 (a)(10) and requires that:

[The airport owner or sponsor] will take appropriate action, to the extent reasonable, including the adoption of zoning laws, to restrict the use of land adjacent to or in the immediate vicinity of the airport to activities and purposes compatible with normal airport operations, including landing and takeoff of aircraft. In addition, if the project is for noise compatibility program implementation, it will not cause or permit any change in land

use, within its jurisdiction, that will reduce its compatibility, with respect to the airport, of the noise compatibility program measures upon which federal funds have been expended.

Noise compatible land use in the vicinity of airports is necessary to protect the public's health and welfare while preserving the airport's capability to meet aviation transportation needs efficiently.

Incompatible land use includes usage that adversely affects flight operations at and near airports, such as obstructions to aerial navigation, noise impacts resulting from residential construction too close to the airport, or any other land usage that creates a negative impact on the operation of an airport.

FAA guidance regarding airport-related environmental assessments identifies documentation needed to support the requirements stipulated in Grant Assurance 21. Specifically, documentation relating to existing and planned land uses is to include information depicting what is being done by the jurisdictions(s) having land use control authority. The FAA recognizes that not all airport owners or sponsors have direct jurisdictional control over property surrounding or near the airport. However, for the purpose of evaluating airport owner or sponsor compliance with compatible land use, the FAA does not *per se* accept an owner or sponsor declining any action on the simple grounds that it does not possess zoning authority outside the airport boundaries.

In those cases, the FAA expects appropriate actions to the extent reasonable on the part of the owner or sponsor to minimize incompatible land use and hence minimize the adverse impact on the airport. More often than not, airport owners or sponsors have a voice in the affairs of the community in which the airport development is undertaken and should be required, as a minimum, to make their best effort to assure proper zoning or other land use controls near the airport. Some level of participation in local zoning activities pertaining to or having an impact on the operation of the airport is expected.

Depending upon the owner or sponsor's capabilities and authority, "appropriate action" could include actions such as exercising zoning authority as granted under state law or active representation and defense of the airport's interests before the pertinent zoning authorities. Appropriate action may also include taking steps with respect to implementing sound insulation, land acquisition, purchase of easements, and real estate disclosure programs or initiatives to establish that areas are compatible with airport operations. [See *M. Daniel Carey and Cliff Davenport v. Afton-Lincoln County Municipal Airport Joint Powers Board*, FAA Docket No. 16-06-06, Director's Determination, Pgs. 13 - 14]

• **Grant Assurance 34, Policies, Standards, and Specifications**

Grant Assurance 34 ascribes general Airport Improvement Program (AIP) standards, including the incorporation of certain advisories circulars, to the Grant Assurance Program. Specifically, it states a sponsor:

will carry out the project in accordance with policies, standards, and specifications approved by the Secretary including but not limited to the advisory circulars listed in the Current FAA Advisory Circulars for AIP projects, dated _____ and included in this grant, and in accordance with applicable state policies, standards, and specifications approved by the Secretary.

D. The Complaint Process

Pursuant to 14 CFR, Part 16, § 16.23, a person directly and substantially affected by any alleged noncompliance may file a complaint with the FAA. The complainant shall provide a concise but complete statement of the facts relied upon to substantiate each allegation. The complaint shall also describe how the complainant was directly and substantially affected by the things done or omitted by the respondents. [14 CFR, Part 16, § 16.23(b)(3,4)]

If, based on the pleadings, there appears to be a reasonable basis for further investigation, the FAA will investigate the subject matter of the complaint. In rendering its initial determination, the FAA may rely entirely on the complaint and the responsive pleadings provided. Each party shall file documents it considers sufficient to present all relevant facts and arguments necessary for the FAA to determine whether the sponsor is in compliance. [14 CFR, Part 16, § 16.29]

The proponent of a motion, request, or order has the burden of proof. A party who has asserted an affirmative defense has the burden of proving the affirmative defense. This standard burden of proof is consistent with the Administrative Procedure Act (APA) and Federal case law. The APA provision states, "[e]xcept as otherwise provided by statute, the proponent of a rule or order has the burden of proof." [5 U.S.C., § 556(d).] [See also, Director, Office of Worker's Compensation Programs, Department of Labor v. Greenwich Collieries, 512 US 267, 272 (1994); Air Canada et al. v. Department of Transportation, 148 F3d 1142, 1155 (DC Cir, 1998).] Title 14 CFR, § 16.229(b) is consistent with 14 CFR, § 16.23, which requires that the complainant must submit all documents then available to support his or her complaint. Similarly, 14 CFR, § 16.29 states that "[e]ach party shall file documents that it considers sufficient to present all relevant facts and argument necessary for the FAA to determine whether the sponsor is in compliance."

Title 14 CFR, § 16.31(b-d), in pertinent parts, provides that "(t)he Director's determination will set forth a concise explanation of the factual and legal basis for the Director's determination on each claim made by the complainant. A party adversely affected by the Director's determination may appeal the initial determination to the Associate Administrator as provided in §16.33." In accordance with 14 CFR, § 16.33(b) and (e), upon issuance of a Director's determination, "a party adversely affected by the Director's determination may file an appeal with the Associate Administrator within 30 days after the date of service of the initial determination;" however, "(i)f

no appeal is filed within the time period specified in paragraph (b) of this section, the Director's determination becomes the final decision and order of the FAA without further action. A Director's determination that becomes final because there is no administrative appeal is not judicially reviewable."

Title 14 CFR, § 16.247(a) defines procedural recourse for judicial review of the Associate Administrator's final decision and order, as provided in 49 U.S.C., § 46110 or section 519(b)(4) of the Airport and Airway Improvement Act of 1982, as amended, (AAIA), 49 U.S.C., § 47106(d) and 47111(d).

VI. ANALYSIS AND DISCUSSION

Prior to analyzing and discussing the pertinent issues in this case, it is relevant to restate that the FAA's Office of Airports reviews matters pertaining to a sponsor's compliance with its Federal grant assurance agreements. [See, 14 CFR, § 16.1] The agency does not replace or act on behalf of local law enforcement, civil courts, or other legal fora outside the scope of FAA's Part 16 purview. Additionally, the formal complaint process under 14 CFR, Part 16 is not the proper forum for complaints alleging misfeasance or wrongdoing by the FAA or FAA personnel. [See Steere v. County of San Diego, CA, FAA Docket No. 16-99-15 (December 7, 2004), and Heide v. MnDOT, FAA Docket No. 16-04-11 (April 26, 2005)]. As previously stated in Director's February 28, 2011 dismissal letter:"

The complainant asserts violations of Grant Assurances 19, 20, 21, and 34, and related statutory obligations under 49 U.S.C., § 47107. These alleged violations are within the FAA's jurisdiction under the Acts listed in 14 C.F.R., § 16.1. However, the following allegations appear to be outside the scope of the authority of the FAA under Part 16: alleged inadequacies of DOT's commissioned panel report, Evaluation of the North Shore Marine Transfer Station and Its Compatibility with Respect to Bird Strikes and Safe Operations at LaGuardia Airport; alleged actions by the City of New York; allegations relative to the safety of the North Shore Marine Transfer Station; alleged actions of FAA employees and FAA's alleged duty to consider the totality of the circumstances when reviewing whether the North Shore Marine Transfer Station is compatible with safe airport operations.

Accordingly, the Director will not opine on any allegations that are outside of the scope of the authority of the FAA under 14 CFR, Part 16, and not related to the airport sponsor.

Consequently, any allegations which were previously determined to be outside of the FAA's jurisdiction under 14 CFR, Part 16, or unrelated to the airport sponsor's compliance with its Federal obligations, are dismissed.

In addition, the Director will address the Complainants' standing for this Part 16 proceeding. Both Mr. Paskar and FOLA submitted the formal complaint under 14 CFR, Part 16. Mr. Paskar identifies himself as a licensed pilot and aeronautical user of the LGA; FOLA claims that its members consist of individuals and businesses that use LGA as either passengers or as pilots, including Mr. Paskar.

¹¹ See, [FAA Exhibit 1, Item 2, Attachment A]

Respondent asserts that Complainants make no colorable attempt to satisfy the requirement of 14 CFR, §16.23(a) and 14 CFR, § 16.23(b)(4), but only merely *allege* in conclusory and cursory fashion that they are directly affected by the regulatory violations. Respondent asserts that the amended Complaint should be dismissed for lack of standing under 14 CFR, § 16.23(a) and failure to comply with 14 CFR, § 16.23(b)(4). [FAA Exhibit 1, Item 3, attachment D]

Under 14 CFR, Part 16, in order to have standing to file a complaint, "a person must be directly and substantially affected by any alleged noncompliance." [14 CFR, § 16.23(a)] As explained in the preamble to the Final Rule, "[a]n association will have to meet the same 'directly and substantially affected' standing requirement *individually*" (emphasis added). [61 *Fed Reg.* 53,998 (October 16, 1996)] The preamble also states that an association will be able to file a Part 16 complaint as a "representative" of its members who meet the standing requirement. Kenneth Paskar, as a pilot and an aeronautical user of LaGuardia Airport has established standing for this Part 16 proceeding. FOLA has standing in this proceeding as a representative of its member, Kenneth Paskar.

ISSUE #1: *Whether the Respondent's alleged failure to prevent the construction of the NSMTS at its proposed location constitutes a violation of Grant Assurance 19, Operation and Maintenance, Grant Assurance 20, Hazard Removal and Mitigation, Grant Assurance 21, Compatible Land Use, and Grant Assurance 34, Policies, Standards and Specifications.*

The central focus of this Complaint revolves around the Complainants' allegation that the Respondent failed to prevent the construction of a wildlife hazard, and an incompatible land use adjacent to LGA, by allowing the construction of the NSMTS.

Complainants contend throughout the amended complaint that the proposed location of the NSMTS represents an incompatible land use and a hazard to aircraft operations at LaGuardia Airport. The Complainants' argument for these allegations is based on their beliefs that the proposed NSMTS location conflicts with current and future airport plans, as well as FAA policy, standards and specifications pertaining to airspace and hazardous wildlife attractants.

The Complainants reference the past precedent established in *Town of Fairview Texas, v. City of McKinney, Texas*, FAA Docket No. 16-99-04, Director's Determination on Remand, July 26, 2000 "Fairview." It is the Complainants' belief that under the past precedent established in Fairview, the Respondent's, "abject failure to keep NSMTS out of the RPZ (current and planned RPZ) is a violation of their duties and obligations under Grant Assurances 19, 20, 21, and 34."¹²

Complainants also reference past precedent established in *Valley Aviation Services, LLP v. City of Glendale, AZ*, FAA Docket No. 16-09-06, Director's Determination "Valley Aviation Services" regarding a sponsor's obligations under Grant Assurance 19; the past precedent established in *M Daniel Carey and Cliff Davenport v. Afton-Lincoln County Municipal Airport Joint Powers Board*, FAA Docket No. 16-06-06, Director's

¹² See, [FAA Exhibit 1, Item 1, Pg. 36]

Determination "Afton" and *Keathly v. City of McKinney, Texas and the Collin County Regional Airport*, FAA Docket No. 16-03-14, Director's Determination "Keathly" regarding a sponsor's obligations under Grant Assurance 21.

In their response to the amended complaint the Respondent generally states:¹³

...the NSMTS is not on airport property, the Port Authority does not have zoning or land use authority with respect to the property which the NSMTS is located, and the FAA has determined that the NSMTS will not constitute a hazard to air navigation.

Complainants claim this argument is erroneous, and asserts that the City of New York promised in its lease with the Respondent that it would not erect any structures that were obstructions to air traffic or were in the Runway Protection Zone (RPZ). Complainants contend that the NSMTS is both in alleging it penetrates surfaces required to support the planned precision approach to Runway 31, and is located in the RPZ. [FAA Exhibit 1, Item 6]

In its rebuttal, the Respondent opposes the Complainants' position by generally characterizing the Respondent's obligations under Grant Assurance 20 and 21, as well as the Respondent's actions and involvement with regard to the FAA and USDA evaluations, which concluded that the NSMTS did not pose a hazard to air navigation, as evidence of reasonably fulfilling its obligations. [FAA Exhibit I, Item 9] In its rebuttal, the Respondent also generally affirmed its position that it was only studying the possibility of improved visibility minimums and/or approaches to Runway 31 with the FAA, but that such improvements were determined to be infeasible. Because the improvements were determined to be infeasible, the conditions which would cause the NSMTS to fall within the RPZ for runway 31 were never met. Thus the RPZ for Runway 31 does not encompass the NSMTS. [FAA Exhibit I, Item 9, Attachment A]

Based upon the nature of the allegations, the Director finds that it would be appropriate to consider whether the Respondent is in compliance not only with Grant Assurances 19, 20, 21, and 34, as alleged by Complainants, but also Grant Assurance 5, Preserving Rights and Powers. The findings for each issue are based on the Respondent's obligations under its Federal grant assurances, applicable law, and precedent.

Fairview

Complainants rely upon the past precedent established in Fairview to support the foundation of their allegations. Complainants interpret Fairview to require airport sponsors to adhere to all FAA guidance, policy, standards, and specifications with respect to their operation of the airport. However, as discussed herein, the Complainants' reliance on Fairview is misplaced in this case.

The issue in Fairview centered on the existing McKinney municipal landfill and wastewater treatment facility located near the McKinney airport, which was owned and operated by the City of McKinney. Over the years, the City had allowed the airport to expand closer to the landfill until its existence conflicted with future airport plans on file with the FAA. Subsequently, the

¹³ See, [FAA Exhibit 1, Item 3, Pg. 9]

FAA advised the sponsor that no Federal funding for airport development would be provided until the City developed a closure plan for the landfill.

Accordingly, the City provided a closure plan for the landfill, and after review the FAA advised the City, as the airport sponsor, that the landfill must be closed within 6 years, and that the City must take interim steps to mitigate any bird hazards associated with the landfill. However, 8-years later, the City had still not closed the landfill or taken appropriate measures to mitigate the wildlife hazard stemming from the landfill, prompting the Town of Fairview to file a complaint with the FAA. In the complaint, Fairview alleged that the continued existence of the land fill posed a hazard to the aircraft operating at the Airport, as well as the citizens of Fairview who reside in the approach to the affected runway.

In the Director's Determination on Remand, the FAA found the City of McKinney to be in violation Grant Assurances 19 and 20. These findings were based upon the City's history of disregarding its duty to comply with Federal guidance related to the closure of the landfill," failing to properly mitigate bird hazards documented at the landfill,¹⁵ and the City's long history of making commitments to satisfy FAA concerns only when faced with possible enforcement action.¹⁶

However, a review of the record in Fairview identifies several key differences between the circumstances in the present case. In the matter currently before the Director, it is the City of New York that is proposing to construct the NSMTS and not the Respondent. As discussed in issue # 1 above, the City of New York is not the Sponsor of LGA. In Fairview, the Respondent was the City of McKinney who not only was the Airport sponsor, but also the owner of the landfill.

This difference is of significant importance, because in Fairview, the City, as the owner of both the airport and landfill, was solely responsible for the noncompliance and had the full authority and responsibility to comply with all FAA requirements pertaining to the landfill. Yet, even under those circumstances, the City failed to take actions deemed appropriate by the FAA.

In the present case, the Respondent is not responsible for the NSMTS and does not have jurisdictional control of the lands outside of the airport boundary. Therefore, the Respondent's ability to affect the establishment of the NSMTS is limited to the FAA's determinations regarding the NSMTS's safety and compatibility with air operations at LGA.

Also, the present case is centered on the proposed North Shore Marine Transfer Station which has been evaluated by the FAA on three separate occasions. In the two most recent evaluations, the FAA has concluded that the NSMTS does not represent an airport hazard and does not

¹⁴ The record in Fairview showed that on numerous occasions, the City had agreed to close the landfill in a timely fashion and take interim measures to mitigate the birds at the landfill since 1991, but had ultimately failed to take satisfactory steps in pursuit if those agreements during the 8 year period leading up to the Part 16 complaint.

¹⁵ This finding stemmed from an inadequate bird harassment program which did not comply with FAA/USDA recommendations.

¹⁶ This finding stemmed from the fact that the FAA's Southwest Region twice stopped funding to the McKinney airport due to the City's failure to provide a timely closure plan for the landfill, as well as the fact that the City did not take timely action to enter into a bird harassment program.

conflict with existing or future airport plans." In the last and most recent evaluation, the FAA determined that the NSMTS is not an incompatible land use and can safely co-exist with LGA provided that certain conditions are met, such as changes to the facility design, and operational procedures aimed at mitigating the facilities ability to attract wildlife. Additionally, the City in this case has incorporated FAA/USDA panel report's recommendations into the NSMTS operating permit, issued by the New York State Department of Environmental Conservation. [FAA Exhibit 1, Item 12, Pg. 6]¹⁸

Against this background, the Director concludes that the circumstances in Fairview are inherently different than those in the present case. Thus, the Complainants' application of the past precedent established in Fairview, regarding a sponsor's obligations to adhere to FAA policy, guidance, standards, and specifications, is not applicable to the allegations currently before the Director. Further analyses of the allegations currently before the Director, as well as the other Part 16 decisions referenced by the Complainants are discussed more thoroughly within the individual issues below.

Grant Assurance 5. Preserving Rights and Powers

In reviewing the circumstances related to Issue #1, it appears that the Complainants contend that the construction of the NSMTS interferes with the airport. Thus the Complainants contend that by not preventing the construction of the NSMTS in its proposed location, Respondent is in conflict with its Federal obligations.

However, as the record clearly shows, it is the City which is constructing the NSMTS and not the Respondent. It has also been previously determined that the City is not the sponsor of the airport. Under these circumstances, the only way in which the Respondent could be in conflict with its Federal obligations, is if the Respondent does not hold sufficient rights and powers to comply with its Federal obligations, or if the Respondent ceded its rights and powers to the City. Therefore, in evaluating the Respondent's compliance with its Federal obligations as they relate to this allegation, the Director must consider the Respondent's compliance with Grant Assurance 5.

Grant Assurance 5, states in pertinent part, that the sponsor of a federally obligated Airport [See, FAA Airport Sponsor Assurances¹⁹]:

..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.

¹⁷ See, Analysis of Grant Assurance 20 below, Pgs. 31 - 48

¹⁸ See, Analysis of Issue #2 below, Pgs. 55 - 58

¹⁹ FAA Airport Sponsor Assurances may be found at

http://www.faa.gov/airports/aip/grant_assurancesimedia/airport_sponsor_assurances.pdf

The record shows that on November 24, 2004, the City and the Respondent entered into an amended and restated agreement of lease for the operation of the LaGuardia Airport. [FAA Exhibit 1, Item 1, exhibit 55] The agreement conveys to the Port Authority the demised premises that make up the LaGuardia airport in exchange for monetary considerations. With respect to this allegation, Section 21.2.3 of the agreement states:

The City shall use the LaGuardia Avigational Easement Areas for park purposes and for no other purpose whatsoever and shall not develop or use the LaGuardia Avigational Easement Areas so as to interfere with, impair or obstruct the safe and efficient operation and development of LaGuardia Airport or the safe and unrestricted passage of aircraft in and over the same. The City shall not erect, install or maintain any structure, building, tower, pole, wire or other object within LaGuardia Avigational Easement Areas the construction maintenance or operation of which would constitute a hazard to aviation in the reasonable opinion of the Port Authority nor place fill upon the LaGuardia Avigational Easement Areas or place any structures or buildings thereon except in accordance with plans approved by the Chief Engineer of the Port Authority, which approval shall not be unreasonably withheld, conditioned, or delayed. The City shall take all reasonably practical steps to prevent its agents, employees, licensees, contractors, and invitees from intruding upon, interfering with or damaging Equipment installed, operated or managed by or on behalf of the Port Authority or the FAA on the LaGuardia Avigational Easement Areas.

Additionally, Section 21.41 of the agreement states:

The City agrees that at no time during the Term shall the Height and Use Restricted Properties be used or occupied at any time (i) for school house or similar educational purposes or (ii) for residential purposes which include but shall not be limited to private homes, apartment houses, hospitals, nursing homes or similar facilities, hotels or motels unless the use or occupancy of such hotel or motel shall have received the express prior written consent of the Port Authority, which consent shall not be unreasonably withheld, delayed or conditioned

Similarly, Section 21.4.2 of the agreement states:

*The City agrees that at no time during the term shall structures of any nature be erected, vehicles parked, other items places, or growth of natural objects be permitted by the City the Height and Use Restricted Properties which in the opinion of the FAA or in the reasonable opinion of the Port Authority constitute an obstruction to aviation nor shall any activity be permitted on the Height and Use Restricted Properties which in the opinion of the FAA or in the reasonable opinion of the Port Authority interferes with or constitutes a hazard to the Municipal Air Terminals or in any way interferes with aviation or communications serving the Municipal Air Terminals. In no event, moreover, shall any structure or structures be erected or growth of natural object be permitted upon the Height and Use Restricted Properties which shall project above a horizontal plane (i) at elevation 316 measured in feet above mean sea level at Sandy Hook, New Jersey as to the Height and Use Restricted Property described in **Exhibit B-6***

*as Property 1, (ii) at elevation 212 measured in feet above mean sea level at Sandy Hook, New Jersey as to the Height and Use Restricted Property described in **Exhibit B-6** as Property 2 or (iii) at elevation 162 measured in feet above mean sea level at Sandy Hook, New Jersey as to the Height and Use Restricted Property described in **Exhibit B-6** as Property 3.*

In consideration of the aforementioned Sections of the *Amended and Restated Agreement of Lease of the Municipal Air Terminals*, it is clear that the Respondent has the right to prevent the establishment of any structure, facility, or natural growth located on the airport, which in the opinion of the FAA or reasonable opinion of the Respondent, constitutes a Hazard to Air Navigation or an incompatible land use. Therefore, it appears that the agreement reasonably protects the airport from obstructions and hazards to air navigation, as well as incompatible land uses adjacent to the LaGuardia Airport. Accordingly, the Director finds that, through the lease agreement, the Respondent holds sufficient rights and powers to comply with its Federal obligations, as they relate to this allegation.

Second, the record shows that after the City submitted its initial proposal for the NSMTS, the Respondent wrote the FAA formally objecting to the proposal. Again, after the FAA subsequently issued its Determination of No Hazard to Air Navigation for Aeronautical Study No. 2004-AEA-3159-0E, the Respondent wrote the FAA objecting to the proposal and filing a petition for the FAA to review the study.

The record also indicates that after the City provided additional information pertaining to the proposed NSMTS, the Respondent was able to determine that the proposal was outside of the RPZ for Runway 31 and would not present an adverse effect on air operations at LGA. Thus, only after the completion of its due diligence, did the Respondent withdraw its objections to the NSMTS and petition the FAA to review the Determination of No Hazard to Air Navigation for Aeronautical Study No. 2004-AEA-3159-0E. Subsequently, the FAA confirmed that the proposed NSMTS does not pose a Hazard to Air Navigation when it issued its Determination of No Hazard to Air Navigation on September 19, 2008.²⁰ Additionally, the FAA also confirmed that the location of the NSMTS was outside of the RPZ for Runway 31, in William Flanagan's June 10, 2009 letter to Harry Szarpanski.²¹

Additionally, the Respondent's Chief Wildlife Biologist, Laura C. Francoeur, participated as a member of the FAA/USDA panel of experts tasked with the evaluation of the NSMTS and its compatibility with respect to bird strikes and safe air operations at LaGuardia Airport. The final panel report concluded that with design changes to the NSMTS facility, and adherence to operational procedures, the proposed NSMTS would be compatible with safe air operations at LGA.²²

The Respondent emphasizes its position that the sponsor's obligation to take action "by property acquisition or zoning to prevent the creation of hazards to air navigation *only to the extent that it is reasonably possible for the sponsor to do so.*" [FAA Exhibit 1, Item 3, Attachment D, Pg. 16]

²⁰ See, [FAA Exhibit 1, Item 1, exhibit 22]

²¹ See, [FAA Exhibit 1, Item 1, exhibit 27]

²² See, [FAA Exhibit 1, Item 1, exhibit 35]

Therefore, the record shows that the Respondent took reasonable actions to prevent the construction of the NSMTS when it was presumed to be an incompatible land use and hazard to air navigation. The record also shows that the Respondent also participated in the evaluation of the NSMTS to ensure its compatibility with safe air operations at LGA. Accordingly, the Director is unable to find that the Respondent ceded, or failed to exercise, its rights and powers with regard to this allegation.

Conclusion

When evaluating if a sponsor is in compliance with its grant assurances, the Director considers the reasonableness of a sponsor's actions and its obligation to exercise due diligence in assessing its compliant status and posture. Against this background, the Director finds the Respondent is in compliance with Grant Assurance 5, Preserving Rights and Powers.

Grant Assurance 19, Operation and Maintenance

With regard to this allegation, Complainants allege that by failing to prevent the construction of the NSMTS, the Respondent is in violation of Grant Assurance 19. Complainants point to the past precedent established in *Valley Aviation Services, LLP v. City of Glendale, AZ*, FAA Docket No. 16-09-06, Director's Determination "Valley Aviation Services" regarding a sponsor's obligations under Grant Assurance 19.

However, Complainants do not specifically state how the sponsor's failure to prevent the construction of the NSMTS violates Grant Assurance 19, except to state that part of an airport sponsor's "duty involves setting up and maintaining a program whereby the approaches and departures are protected so as to ensure safety and efficiency of flight operations."²³ Therefore, the Director interprets this allegation to be based upon the two fundamental obligations contained in Grant Assurance 19.

First, the assurance that, "The airport and all facilities which are necessary to serve the aeronautical users of the airport, other than facilities owned or controlled by the United States, shall be operated at all times in a safe and serviceable condition and in accordance with the minimum standards as may be required or prescribed by applicable Federal, state, and local agencies for maintenance and operation." [*See, FAA Airport Sponsor Assurances*]

Second, the assurance that the airport sponsor, "...will not cause or permit any activity or action thereon which would interfere with its use for airport purposes." [*See, FAA Airport Sponsor Assurances*]

Respondent denies this allegation because the proposed NSMTS is located off of the airport property. In response to the amended complaint respondent states:²⁴

By their own terms, the Grant Assurances 19, the statute from which the Grant Assurances are derived, and the interpretations of the Grant Assurances in the Manual,

²³ See, [FAA Exhibit 1, Item 6, Pg. 34]

²⁴ See, [FAA Exhibit 1, Item 3, Attachment D, Pg. 13]

all impose land use responsibility on the airport sponsor with respect to the subject airport, and not all property outside of that airport. The NSMTS is not located within the Port Authority's leasehold of LGA. Thus the Port Authority cannot be found to have violated Grant Assurance 19 because of the construction of the NSMTS off of airport.

As stated by the Complainants themselves, Grant Assurance 19 requires the airport sponsor to "operate the airport 'at all times in a safe and serviceable condition and in accordance with the minimum standards as may be required or prescribed by applicable Federal, state and local agencies for maintenance and operation. It will not cause or permit any activity or action thereon which would interfere with its use for airport purposes. — Clearly, Grant Assurance 19 mandates maintenance and operation of the airport, and activity and action "thereon. " Grant Assurance 19 does not purport to impose obligations with respect to property other than the airport.

As discussed under Grant Assurance 5 above, record shows that the Respondent has a program in place, through the *Amended and Restated Agreement of Lease of the Municipal Air Terminals*, to evaluate and restrict incompatible land uses and unsafe development at, or around, LGA which would interfere with its use for airport purposes. Also discussed under Grant Assurance 5 above, the record also shows that the Respondent took appropriate actions to prevent the construction of the NSMTS when it was presumed to be an incompatible land use and hazard to air navigation, and that the Respondent also took appropriate action to ensure the NSMTS's compatibility with safe air operations at LGA.²⁵ The Respondent's actions included, inter alia, filing a Petition with the FAA for a review of the Determination of No Hazard in October 2006; engaging in discussions with the City of New York in late 2006 and into 2007, and determining that the transfer station will be located outside the RPZ and outside the ICAO departure splay; and determining that the redesigned height also puts the structure below the slope of existing buildings, so that it will not be a controlling obstruction; and having the Respondent's Chief Wildlife Biologist participate as a member of the panel of experts tasked with the evaluation of the NSMTS and its compatibility with respect to bird strikes and safe air operations at LaGuardia Airport. [FAA Exhibit 1, Item 3, Attachment B]

Conclusion

Against this background, the Director finds that the Respondent's actions were reasonable to ensure the NSMTS does not present a safety hazard to LGA, or interfere with its use for airport purposes. The Director finds Respondent to be in compliance with Grant Assurance No. 19.

Grant Assurance 20, Hazard Removal and Mitigation

With regard to this allegation, Complainants generally allege that by failing to prevent the construction of the NSMTS, the Respondent is in conflict with Grant Assurance 20, *Hazard Removal and Mitigation*. The Complainants contend that the construction of the NSMTS represents a hazard because it is in the existing Runway Protection Zone (RPZ) for Runway 31; it is in the future (planned) RPZ for Runway 31; and it is a hazardous wildlife attractant.

²⁵ See analysis of Grant Assurance 5 on Pgs. 26 - 29.

Complainants also, allege that the NSMETS represents a new airport hazard. [FAA Exhibit 1, Item 1]

Complainants also contend that with respect to new airport hazards, such as the NSMETS, Grant Assurance 20 obligates airport sponsors to "prevent creation of the hazard, ... Mitigation is not an option."²⁶ Therefore, the Complainants imply that the proposed NSMETS represents a new airport hazard, and per Grant Assurance 20, mitigation is not an option for new airport hazards. Therefore, in evaluating this allegation, the FAA reviewed the standard of compliance to the above referenced obligations.

In response to the Amended Complaint, Respondent denies this allegation stating that:²⁷

Grant Assurance 20 and 21 do not mandate an airport sponsor to exercise control over property which the airport sponsor does not have jurisdiction, but requires only that an airport sponsor take reasonable action to influence off-airport property owners to eliminate or mitigate any hazards created by off-airport property uses. The Port Authority has taken such reasonable action with respect to the NSMETS and has thus satisfied the requirements of Grant Assurances 20 and 21.

In response to the Amended Complaint, Respondent further denies this allegation stating that:²⁸

The record presented by the Complainant's themselves demonstrate that the Port Authority, in cooperation with the FAA and others, took reasonable efforts to induce the DSNY to changes, or agree to change, the height, location, design and operation of the NSMETS so that the NSMETS will be constructed and operated consistent with FAA determinations and advice.

With Respect to the height and location of the NSMETS, the Port Authority participated in the proceedings resulting in the FAA's Determination of No Hazard To Air Navigation with respect to the NSMETS during which the DSNY agreed to change the height and location of the NSMETS. In light of the inability of the Port Authority to control use of the property on which the NSMETS will be located, the Port Authority acted in compliance with the requirements of Grant Assurances 20 and 21 regarding the requirement to take reasonable means to influence off-airport property over which the Port Authority lacks control.

According to the record presented by the Complainants themselves, the history of the Port Authority's activities with respect to the possible effects of the NSMETS on air navigation at LGA is as follow: The Port Authority objected to construction of the NSMETS as originally proposed after the DSNY filed a Notice of Proposed Construction or Alteration, Form 7460-1, with regard to the NSMETS; the Port Authority's objection was in effect overruled by the FAA by the FAA's issuance of a Determination of No Hazard To Air Navigation, Aeronautical Study No. 2004-AEA-3159-OE (Sept. 18, 2006);

²⁶ See, [FAA Exhibit 1, Item 6, Pg. 27]

²⁷ See, [FAA Exhibit 1, Item 3, Attachment D, Pg. 15]

²⁸ See, [FAA Exhibit 1, Item 3, Attachment D, Pgs. 19-23]

the Port Authority then filed a Petition for review of the Determination Of No Hazard To Air Navigation; the DSNY agreed to reduce the height and change the location of the NSMETS after discussion with the Port Authority; the DSNY filed a new Notice of Proposed Construction or Alteration, Form 7460-1, reflecting the changes to the NSMETS; the Port Authority again submitted comments; and the FAA again determined that the NSMETS presented no hazard to air navigation in its Determination of No Hazard to Air Navigation, Aeronautical Study No. 2007-AEA-1163-OE (Sept. 19, 2008).

The September 19, 2008 Determination of No Hazard to Air Navigation which found that the NSMETS would be compatible with a plan to install a precision approach to LGA Runway 31, among other findings:

The proposal would not impact any plans on file. There is a plan on file to install a precision approach to runway 31. After much study, a decision has been reached to install an offset localizer with a 3.1 degree glide slope angle which will allow a decision height of 280 feet height above touchdown and a visibility of 5000 feet. The proposed building will not impact this approach procedure.

The structure would not interfere with any airport traffic patterns.

The structure would not adversely impact any present or future VFR or IFR Terminal Procedure.

The structure exceeds a direct 40:1 departure slope by 33 feet, 35 feet is allowed and is outside of the single engine out departure splay.

The structure would not adversely impact any VFR or IFR enroute procedure.

The structure would not have a cumulative impact on any existing or planned airport.

Determination of No Hazard to Air Navigation, Aeronautical Study No. 2007-AEA-1163-OE (Sept. 19, 2008), Exhibit 23 to Amended Complaint.

The Respondent asserts that it actually "achieved some degree of success in causing alteration of the use of land that the Port Authority does not control to mitigate the effects of such use on flight activity at LGA" and claims there is "no merit to Complainant's contention that, despite the Port Authority's efforts and the FAA's Determination of No Hazard to Air Navigation, the Port Authority has violated Grant Assurance 20 because the NSMETS will be constructed by the DSNY." [See FAA Exhibit 1, Item 3, Attachment D, Pgs. 19-23]

In their reply, Complainants generally allege that the NSMETS constitutes a hazard to aircraft operations at LGA and that the Respondent's actions were insufficient to be viewed as reasonable efforts to mitigate or prevent the creation of an airport hazard and incompatible land use. Complainants claim that the only actions that the Port Authority has taken are "[1] [t]he Port Authority objected to construction of the NSMETS as originally proposed ... [2] the Port

Authority then filed a petition for review of the Determination Of No Hazard ... [and 3] the Port Authority again submitted comments." [See FAA Exhibit 1, Item 6, Pgs. 26-28]

In review of this allegation, the Director notes that Grant Assurance 20 compels airport sponsors to:

...take appropriate action to assure that such terminal airspace as is required to protect instrument and visual operations to the airport (including established minimum flight altitudes) will be adequately cleared and protected by removing, lowering, relocating, marking, lighting, or otherwise mitigating existing airport hazards and by preventing the establishment or creation of future airport hazards.

Accordingly, the FAA defines "airport hazard" as:

...any structure or object of natural growth located on or in the vicinity of a public use airport, or any use of land near such an airport that obstructs the airspace required for the flight in landing or taking off at such airport or is otherwise hazardous to such landing or taking off of aircraft. [See FAA Order 5190.6B, FAA Airport Compliance Manual, Appendix Z.]

Additionally, the Director found the precedent established in FAA Docket 16-09-13, *Orange County Soaring Association Inc. v. Riverside County, California*, Directors Determination, (Orange County Soaring) to be relevant with regard to the FAA's preemption of all matters related to aviation safety. In *Orange County Soaring*, the Director stated:²⁹

[F] or the purpose of making a final determination on reasonableness when aviation safety is at issue, FAA safety determinations pursuant to the Federal Aviation Regulations take precedence over any airport sponsor views or local ordinances pertaining to safety. [See Drake Aerial Enterprise, LLC v. City of Cleveland, Ohio, FAA Docket No. 16-09-02, (February 22, 2010) (Director's Determination) at 14; Santa Monica; Skydive Paris Inc. v Henry County, Tennessee, FAA Docket No. 16-05-06, (January 20, 2006) (Director's Determination) at 15; and Florida Aerial Advertising v. St. Petersburg-Clearwater International Airport, FAA Docket No. 16-03-01, (December 18, 2003) (Director's Determination) at 111 This is especially true when the Director is asked to make a determination regarding a sponsor's compliance with its federal obligations in cases where restrictions or limitations are instituted in the interest of safety. Under 49 U.S.C. § 40103, the FAA develops plans and policy for the use of the navigable airspace and assigns by regulation or order the use of the airspace necessary to ensure the safety of aircraft and the efficient use of airspace.

Therefore, in consideration of the points above, the Director will conduct an analysis of the Respondent's obligations under Grant Assurance 20 as they relate to the NSMTS with regard to

²⁹ See, [*Orange County Soaring Association Inc. v. Riverside County, California*, FAA Docket 16-09-13, Director's Determination, Pgs. 21-22]

the existing and ultimate runway protection zones (RPZ), as well as a new airport hazard and a hazardous wildlife attractant.

Existing RPZ

Complainants allege that proposed NSMTS is within the existing Runway 31 RPZ. Complainants point to the fact that after the City submitted its initial proposal for the NSMTS the Respondent wrote the FAA formally objecting to the proposal. In its letter, one of the objections raised by the Respondent was that the proposed NSMTS was located in the RPZ for Runway 31.³⁰

Complainants also point to the fact that after the FAA subsequently issued its Determination of No Hazard to Air Navigation for Aeronautical Study No. 2004-AEA-3159-0E, the Respondent again wrote the FAA objecting to the proposal and filing a petition for the FAA to review the study. Again, the Respondents objections to the FAA's Determination of No Hazard included an objection based on the proposed NSMTS being located in the RPZ for Runway 31.³¹

However, the record indicates that after the City provided additional information pertaining to the proposed NSMTS, the Respondent was able to determine that the proposal was outside of the RPZ for Runway 31 and would not present an adverse effect on air operations at LGA, and subsequently withdrew its petition.³² Based upon the revised information provided by the City, a new aeronautical study was initiated by the FAA, which resulted in a Determination of No Hazard to Air Navigation.³³ Additionally, the FAA confirmed that the location of the NSMTS was outside of the RPZ for Runway 31.³⁴

Complainants confirm that they "are not attempting to challenge the No Hazard Determinations." [FAA Exhibit 1, Item 6, Pg. 38] However, the Respondent counters that Complainants' claim that the Port Authority violated Grant Assurances 20 and 21 by withdrawing its Petition for Review in a Part 77 proceeding in which one of those Determinations of No Hazard to Navigation were made, and not objecting to other Determinations of No Hazard to Navigation "is the equivalent of an attempt to challenge those Determinations of No Hazard to Navigation in this proceeding. The Respondent's position is premised on its view that "the FAA cannot make a finding in this proceeding that any alleged lack of effort by the Port Authority to oppose those determinations were wrongful unless the FAA *first* finds that those determinations of no hazard to navigation are erroneous". [FAA Exhibit 1, Item 9, Pg. 8]

We do note that the Complainants do assert in their Reply that the amended complaint does not attack the validity of the Panel Report and asserts for "the most part, the Panel Report is irrelevant to the issue as to whether the Port Authority complied with its Grant Assurances. [FAA Exhibit 1, Item 6, Pg. 36] The Complainants do suggest that the Port Authority is "attempting to hide behind the Panel Report as a justification for its lack of action in protecting

³⁰ See, [FAA Exhibit 1, Item 1, exhibit 8, Pg. 1]

³¹ See, [FAA Exhibit 1, Item 1, exhibit 10, Pg. 11]

³² See, [FAA Exhibit 1, Item 1, exhibit 13]

³³ See, [FAA Exhibit 1, Item 1, exhibit 22]

³⁴ See, [FAA Exhibit 1, Item 1, exhibit 27]

the Airport from the creation of airport hazards (Grant Assurance 20) and protecting the terminal airspace from encroachment (Grant Assurance 21)." [FAA Exhibit 1, Item 6, Pg. 37]

The Respondent asserts that Complainants do raise numerous alleged deficiencies of the Panel Report, and that "claims related to the Panel Report and the Port Authority's failure to object to the Panel Report should be dismissed because a Part 16 proceeding is not the proper forum to challenge actions of the Secretary of Transportation or the FAA." [FAA Exhibit 1, Item 9, Pg.-10-11] The FAA did advise in its February 28, 2011 dismissal letter that alleged inadequacies of DOT's commissioned panel report, *Evaluation of the North Shore Marine Transfer Station and Its Compatibility with Respect to Bird Strikes and Safe Operations at LaGuardia Airport* appeared to be outside the scope of FAA's authority under 14 CFR, Part 16. [FAA Exhibit 1, Item 2, Attachment A] Therefore, the Director will rely on the Complainants' statements that "the amended complaint does not attack the validity of the Panel Report."

Conclusion

Against this background, we are not able to find that the Respondent has failed to complete its due diligence with respect to the NSMTS. To the contrary, the record shows that through the completion of its due diligence, the Respondent ultimately determined that the proposed NSMTS is located outside of the existing RPZ for Runway 31. Additionally, the record shows that the FAA also considers the proposed NSMTS to be outside of the existing RPZ for Runway 31. Therefore, the Director finds that the Respondent's actions with respect to the NSMTS are reasonable.

Ultimate RPZ

Complainants contend that even if the proposed NSMTS is outside of the existing RPZ, it is within the ultimate "future" RPZ.³⁵ Specifically the Complainants refer to several key documents to show that the Respondent is pursuing improved visibility minimums or approach procedures, which would affect the size of the future RPZ, causing the proposed NSMTS to fall within the future RPZ. First the Complainants point to the July 2, 2007, letter from Tom Bock to Steven Urllass of the FAA, in which the Complainants claim Mr. Bock, "expressed his long and short terms goals for the airport with respect to Runway 31." [FAA Exhibit 1, Item 1, Pg. 15]

Complainants allege that in the July 2, 2007, letter, "Mr. Bock recognized that there are obstacles preventing the installation of the precision approach."³⁶ [FAA Exhibit 1, Item 1, Pg. 15] Complainants refer to the following excerpt from the letter as proof that the sponsor is seeking improved minimums and/or approach procedures:³⁷

...However, it is our long term plan to study these obstructions and work to resolve them one by one with our goal to enable a CAT II approach on Runway 31. As you know, in

³⁵ See, [FAA Exhibit 1, Item 1, Pgs. 33-36]

³⁶ See, [FAA Advisory Circular 150/5300-13, Appendix 16 ¶ 4(a)] — A precision approach is defined as an instrument approach procedure providing course and vertical path guidance conforming to ILS, or MLS, precision system performance standards contained in ICAO annex 10.

³⁷ See, [FAA Exhibit 1, Item 1, exhibit 16]

snow conditions, LGA usually has a north or northeast wind, and the visibility minimums on Runway 4 are 4,000 RVR. By adding an approach lighting system to Runway 31 and removing a few of the closer-in obstacles we will better achieve better landing minimums and eventually a CAT II approach. This will help our area capacity in poor weather tremendously. Once the glide slope is installed, we will begin the study to determine the most expeditious means to gain lower landing minimums on Runway 31.

Secondly, Complainants point to the March 23, 2009, e-mail from Tom Bock, with the Port Authority, as evidence that the Respondent is pursuing minimums less than $\frac{3}{4}$ -mile for Runway 31. However, the Complainants' Exhibit does not include a copy of the drawings referenced in the e-mail. The e-mail referred to by Complainants states:³⁸

The different sizes of the RPZ pertain to the current airport landing system and the one the FAA is in the process of trying to install. Currently, because we do not have a precision landing system in place on that runway the RPZ is 1700 feet. If (or when) the FAA installs the glideslope equipment (they have been studying this for the last year) we will have a precision approach and RPZ will go out to 2500 feet.

Third, Complainants point to the Respondent's 2006 Petition to the FAA. Referencing pages 3-8 of the Respondent's Petition, the Complainants claim that "the lack of the precision approach on Runway 31 has severe consequences not only for the Airport, but for the entire National Airspace System."³⁹

Finally, the Complainants point to a letter dated August 30, 2010, from Ferrara Brothers, Building Materials Corp., to Complainant Paskar. [FAA Exhibit 1, Item 1, exhibit 18] The Complainants claim that this letter shows that the Ferrara Brothers' cement silos can be lowered to an acceptable height, thus rendering the Respondent's claims that other obstructions exist which would render a CAT II approach to Runway 31 infeasible irrespective of the NSMTS. [FAA Exhibit 1, Item 3, Attachment C]

In response to these allegations, the Respondent relies on the June 6, 2011 Declaration of Tom Bock,⁴⁰ which states the following:

A Category II ILS approach to Runway 31 remains infeasible irrespective of the presence of the NSMTS because of the presence of the Ferrara Brothers' cement silos and other pre-existing obstructions. (Declaration of Tom Bock, dated June 6, 2011 "Bock Declaration"), ¶ 6

First, the Ferrara Brothers' cement silos remain to be a current and future obstruction to implementation of a Category II ILS approach to Runway 31, because irrespective of any statements made by Ferrara Brothers to Complainant Paskar, Ferrara Brothers have never made any such statement to the Port Authority. "Bock Declaration", 118

³⁸ See, [FAA Exhibit 1, Item 1, exhibit 54]

³⁹ See, [FAA Exhibit 1, Item 1, Pg. 36]

⁴⁰ See, [FAA Exhibit 1, Item 3, Attachment C, Pgs. 2- 4]

Second, even the letter to Complainant Paskar from Ferrara Brothers cannot be said to constitute "significant progress ... in eliminating those obstacles" because that letter does not set forth the parameters of any specific proposal to lower the height of those structures. The letter only makes the general and indefinite statement that the Ferrara Brothers believe that the Port Authority, the FAA and the Ferrara Brothers could possibly come to an agreement to lower the concrete silos to an acceptable height if the Port Authority agreed to pay some unspecified amount of money to the Ferrara Brothers in compensation. "Bock Declaration", ¶ 9

Third, other obstacles to implementation of a Category II ILS approach to LGA Runway 31 would exist even if the Ferrara Brothers' cement silos were not a factor in an [sic] determining the feasibility of a Category II ILS approach to LGA Runway 31. "Bock Declaration", ¶ 10

Fourth, the FAA has been studying the feasibility of installing a glideslope antenna on Runway 31 whose installation would be necessary to accommodate a CAT ILLS approach to LGA Runway for three years without success. After three years of effort studying the issue, the FAA has been unable to find a suitable location that will permit all weather operations and enable facility staff to clear snow without impacting a CAT I glideslope antenna. Without a glideslope antenna, a CAT I approach is not feasible, and therefore a CAT II approach is also not feasible with existing technology, irrespective of the existence of the NSMTS. "Bock Declaration", ¶13

After reviewing this allegation carefully, it appears that the Complainants are alleging that by failing to prevent the construction of the NSMTS, the Respondent failed to protect future airport plans. It also appears that the Complainants are of the opinion that the Respondent is obligated to pursue planned airport development, such as improved approach procedures and/or visibility minimums, at all costs. However, for the reasons discussed herein, the Complainants' interpretation of the Respondent's obligations with respect to hazard removal and mitigation, as well as airport planning is misconstrued.

In reviewing the record, it is clear that on July 2, 2007, Tom Bock sent a letter to Mr. Steven Urlass with the NYADO. In this letter Mr. Bock, states:⁴¹

...it is our long-term plan to study these obstructions and work to resolve them one by one with our goal to enable a CAT II approach on Runway 31.

The Record also shows that on May 5, 2008, Tom Bock sent a letter to Robert Alexander indicating that:⁴²

In summary, FAA analyses revealed that a CAT II approach to LGA Runway 31 is impractical based on the myriad of obstructions that plague the Northern Queens landscape. Therefore we are rescinding our request for the establishment of a CAT II approach for Runway 31.

⁴¹ See, [FAA Exhibit 1, Item 1, exhibit 16, Pg. 1]

⁴² See, [FAA Exhibit 1, Item 1, exhibit 20, Pg. 1]

Therefore, it appears that as recent as 2009, the sponsor was considering the possibility of a precision approach with visibility minimums below $\frac{3}{4}$ -mile for Runway 31. However, through consultation with the FAA, the Respondent decided not to pursue a CAT 11⁴³ approach to Runway 31. The documentation shows that the Respondent and FAA have also studied the possibility of a CAT 1⁴⁴ approach to Runway 31, yet after three years, have been unable to find a suitable location for the glideslope antenna. Thus the sponsor contends that without a glide slope antenna, a CAT I approach is also not feasible with current technology.

Such actions are not inconsistent with an airport sponsor's Federal obligations. In fact, there is no Federal obligation which prevents an airport sponsor from studying the feasibility of future airport plans. Similarly, there is no Federal obligation which prevents an airport sponsor from amending its future airport plans, especially after they have studied the plans with the FAA and determined that the plans are not feasible. On numerous occasions the FAA has upheld a sponsor's decision to amend its direction with respect to future airport plans.

In evaluating this allegation, the FAA reviewed the standard of compliance to the above referenced obligations, as well as applied past precedent to the instant complaint. The Director found FAA Docket 16-09-13, *Orange County Soaring Association Inc. v. Riverside County, California*, Directors Determination, (Orange County Soaring) to be relevant in determining the standard of compliance regarding a sponsor's obligation's with respect to airport planning. In *Orange County Soaring*,⁴⁵ the Director stated:

The FAA recognizes an airport sponsor 's proprietary rights with regard to future airport planning. Airport sponsors retain the prerogative to develop their airports in any manner that meets their federal obligations and is consistent with the approved Airport Master Plan and Airport Layout plan for that airport. [See, Thermco Aviation, Inc., and A-26 Company v. City of Los Angeles Board of Airport Commissioners, and Los Angeles World Airports, FAA Docket No. 16-06-07, (June 21, 2007) (Director's Determination) at 29]

Subsequently, in *Orange County Soaring*,⁴⁶ the Director also stated that:

The FAA accepts that a sponsor may need to deviate from its master plan in order to accommodate changing airport conditions or new requirements. [See, Pacific Coast Flyers, Inc., Donnya Daubney d/b/a Carlsbad Aircraft Pilot Supply, and Roger Baker v.

⁴³ See, [FAA Advisory Circular 150/5300-13, Chapter 1 § 2] — A Precision Approach Category II (CAT II) Runway is defined as a runway with an instrument approach procedure which provides for approaches to minima less than CAT I to as low as a decision height (DH) of not less than 100 feet (30m) and RVR of not less than RVR 1200.

⁴⁴ See, [FAA Advisory Circular 150/5300-13, Chapter 1 § 2] — A Precision Approach Category I (CAT I) Runway is defined as a runway with an instrument approach procedure which provides for approaches to as low as a decision height (DH) of not less than 200 feet (60m) and visibility of not less than $\frac{1}{2}$ mile (800m) or Runway Visual Range (RVR) 2400 (RVR 1800 with operative touchdown zone and runway centerline lights).

⁴⁵ See, [*Orange County Soaring Association Inc. v. Riverside County, California*, FAA Docket 16-09-13, Director's Determination, Pg. 25]

⁴⁶ See, [*Orange County Soaring Association Inc. v. Riverside County, California*, FAA Docket 16-09-13, Director's Determination, Pg. 27]

County of San Diego, California, FAA Docket No. 16-04-08, (July 25, 2005) (Director's Determination) at 35 (Pacific Coast Flyers)]

The circumstances in Orange County Soaring are slightly different than those discussed in the present case; however, the positions discussed in Orange County Soaring are applicable to the present case. In Orange County Soaring, the Director found that the Respondent closed Runway 4/22 (primary glider runway) and restricted glider operations on Runway 5/23 in an attempt to deny access to glider operations.

The Respondent in that case claimed that the long range plans to accommodate glider operations, shown in its master plan and approved ALP (consistent with CalTran recommendations), were not economically feasible. Therefore, the Respondent deviated from its master plan and approved ALP, by closing Runway 4/22 and restricting glider operations on Runway 5/23.

However, the Respondent in that case came to its own conclusions regarding the safety of glider operations, without the involvement of the FAA. Subsequently, the FAA determined that the Respondent's safety reasons for closing Runway 4/22 and restricting glider operations on Runway 5/23 were without merit.

In Orange County Soaring, the Director found that the Respondent had deviated from its future plans for safety reasons, which were contrary to the results of the FAA's safety determination. Accordingly, the Director found that the Respondent's actions constituted an unreasonable denial of access and a violation of the Respondent's Federal obligations.

Conversely, in the present case, the Complainants allege that by failing to prevent the construction of the NSMETS, the Respondent deviated from its future plans for a precision approach, and is therefore in conflict with its Federal obligations. However, the record here clearly shows that the Respondent and the FAA have studied various options regarding precision approaches to Runway 31, and have been unable to find a reasonable solution to obtain a precision approach with visibility minimums below $\frac{1}{2}$ -mile.

As a result of these studies, the Respondent opted to pursue a precision approach to Runway 31 utilizing an offset localizer and a glideslope angle of 3.1 degrees to obtain a Decision Height of 280 HAT with a RVR of 5,000.⁴⁷ The FAA evaluated the impact of the proposed NSMETS against this plan and concluded that the NSMETS as proposed would not impact this plan.⁴⁸

The record also shows that existing obstructions exist in the approach to Runway 31, irrespective of the NSMETS, which would prevent the establishment of a CAT II approach. While the letter from the Ferrara Brothers to Complainant Paskar indicates that the Ferrara Brothers would be willing to lower their cement silos to accommodate a CAT II approach, the Director concurs with the Respondent that the letter from Ferrara Brothers is an open ended response that implies an agreement could be reached in exchange for compensation. The Ferrara Brothers do note that "reconfiguring our plant would entail significant costs, which must be reimbursed to

⁴⁷ See, [FAA Exhibit 1, Item 1, exhibit 20]

⁴⁸ See, [FAA Exhibit 1, Item 1, exhibit 22]

Ferrara Brothers. We can provide an estimate of these costs if the PANYNJ or FAA agrees in principle to fund such a reconfiguration. [FAA Exhibit 1, Item 1, exhibit 18]

Additionally, the FAA has long since opined that an airport sponsor is not obligated to pursue airport development at any cost to the airport sponsor. This includes planned airport development such as extending runways, improving approach procedures, or reducing airport visibility minimums. While such improvements may be highly desirable to both aviation users and the airport sponsor, the FAA is cognizant of the fact that under certain circumstances such improvements may not be feasible for a number of reasons, including financial reasons. [See for example, Wilson Air Center, LLC v. Memphis Shelby County Airport Authority, Directors Determination, (Wilson)]

While the circumstances in Wilson are different than the circumstances in the present case, the precedent established in Wilson, regarding a sponsor's obligation to pursue airport development at all costs is applicable. The Director stated in Wilson, "*the Respondent is not obligated to make the parcel available for development by WIC at any cost to the Respondent.*" Wilson, Pg. 24.

Similar to the case at hand, the Respondent contends that while it may be possible to reach an agreement with Ferrara Brothers to lower their cement silos, there is an expectation that the Respondent would incur a substantial cost to do so. The Respondent also provides evidence of other existing obstructions, which penetrate the 34:1 approach surface.⁴⁹ The Respondent contends that these other existing obstructions would prevent a CAT II approach or visibility minimums less than $\frac{3}{4}$ -mile, irrespective of the NSMTS.

Respondent also points to the fact that after three years of efforts studying the issue, "the FAA and the PANYNJ have been unable to find a suitable location that will permit all weather operations and enable facility staff to clear snow without impacting a CAT I glide slope antenna."⁵⁰ Thus without a glide slope antenna, the Respondent claims that a precision approach (with visibility minimums less than $\frac{3}{4}$ -mile) is not possible.

Complainants do not present any evidence to the record that would refute the Respondent's contentions that existing obstacles exist, irrespective of the NSMTS, which would prevent the establishment of a precision approach to runway 31 with visibility minimums less than $\frac{3}{4}$ -mile. Rather, the Complainants counter by alleging that all obstructions could be removed, lowered or relocated to enable a precision approach, and that with current localizer performance with vertical guidance (LPV) approach procedures, the Respondent could attain visibility minimums equal to that of an ILS approach. [See, FAA Exhibit 1, Item 6, Attachment G] While that may be the case, the Complainants fail to take into consideration that the existing obstructions would still need to be removed to accommodate any approach procedure with visibility minimums less than $\frac{3}{4}$ -mile, and that there would be a substantial cost associated with removing the obstructions.

⁴⁹ See, [FAA Exhibit 1, Item 3, Exhibit A]

⁵⁰ See, [FAA Exhibit 1, Item 3, Attachment C]

Complainants also imply that the Respondent should acquire an aviation easement over the NSMTS property and other existing obstructions. However, the Complainants again fail to take into consideration that even under those circumstances the existing obstructions would still need to be removed to obtain an approach with visibility minimums less than $\frac{3}{4}$ -mile. Similarly, there might be a substantial cost associated with acquiring the easements and removing the obstructions.

Therefore, in applying the past precedent, it is the Respondent's prerogative to develop the airport in any manner that meets its Federal obligations and is consistent with its master plan and ALP. The precedent established in Orange County Soaring, also allows the Respondent to deviate from its future plans as long as the Respondent's rationale for doing so is within reason. Studying potential improvements with the FAA to determine their feasibility is within the reasonable realm of due diligence.

Additionally, in applying the past precedent established in Wilson, the Respondent in this case is also not obligated to pursue airport development at all costs. While it may be technically possible, and/or desirable, to remove, lower or relocate the existing obstructions in the approach to Runway 31 to acquire improved approaches and/or visibility minimums, or acquire aviation easements, the Respondent has determined that the cost to do so is not feasible. Airport sponsors are not obligated to remove, lower, or relocate obstructions, or acquire aviation easements, provided that the obstructions can otherwise be mitigated.

In all cases, the FAA makes the final determination on matters related to airspace use and management, air traffic control, and aviation safety. Accordingly, the FAA also makes the final determination regarding safe and reasonable mitigations measures for obstacles and hazards. Such mitigations may include raising airport minimums and/or amending approach/departure procedures.

In this case, the record shows that the FAA has studied the existing obstructions and the NSMTS, and has determined that the mitigation measures in place provide an acceptable level of safety for air navigation and air operations at LGA. Thus the FAA does not consider the existing obstructions, or the NSMTS, to be a hazard to air navigation or air operations at LGA.

While the Complainants also contend that the Respondent somehow deviated from its future plans by locating the NSMTS within the ultimate RPZ for Runway 31, the documentation submitted to the record by the Complainants only shows that at one time the Respondent was considering the possibility of a precision approach with visibility minimums below $\frac{3}{4}$ -mile for Runway 31. From the documentation submitted to the record, it is not clear if the Respondent studied the possibility of visibility minimums below $\frac{3}{4}$ -mile for Runway 31 as part of their master planning process, or through some other planning process.

The master planning process is an appropriate forum for airport sponsors to identify and evaluate future airport plans, including alternative plans, to determine their feasibility.⁵¹ However, the FAA does not approve airport master plans. The FAA reviews and accepts airport master plans. Only the Aviation Forecasts and ALP portions of the airport master plan receive FAA

⁵¹ See, [FAA Advisory Circular 150/5070-6B § 903(a)]

approval.⁵² Thus the inclusion of studies and/or airport drawings depicting potential airport improvements in the airport master plan, or otherwise, does not constitute a future airport plan unless it is appropriately included on the FAA approved ALP.

FAA approval of an ALP indicates that the existing facilities and proposed development conforms to FAA airport design standards and that the FAA finds the proposed development to be safe and efficient.⁵³ Accordingly, the FAA considers the approved ALP to be the official document of record for airport planning and airspace protection purposes.⁵⁴ Consequently, the FAA does not consider any future plans not identified on an airport's approved ALP for airspace protection purposes.

In this case, the record shows that the Respondent's approved ALP does not depict future plans for visibility minimums below $\frac{3}{4}$ -mile for Runway 31.⁵⁵ Thus, the approved ALP correctly depicts the ultimate RPZ for Runway 31 to be 1,700 feet in length.⁵⁶ This is appropriate considering that the Respondent determined that visibility minimums below $\frac{3}{4}$ -mile are not feasible at LGA. Therefore, the Respondent is not obligated to protect the airspace around LGA for such improvements. Additionally, the record shows that the FAA has previously determined that the proposed NSMTS is situated outside the ultimate RPZ for Runway 31.

While the Respondent may have studied the possibility of obtaining improved approaches or visibility minimums, this alone does not constitute a violation of the Respondent's Federal obligations. In fact, for matters of air navigation and aviation safety it is appropriate, if not necessary, for an airport sponsor to study such matters with the FAA, either on a case-by-case basis or cumulatively through the airport master planning process, to determine their feasibility.

In this case, the record clearly shows that the Respondent has studied a precision approach with visibility minimums less than $\frac{3}{4}$ -mile for Runway 31 with the FAA and has determined that such improvements are not feasible due to the myriad of obstacles already in the approach to Runway 31. Therefore, by studying improved approach procedures and visibility minimums with the FAA, the Respondent has completed its due diligence.

Conclusion

Against this background, we are not able to find that the Respondent has failed to complete its due diligence with respect to the impact of the NSMTS on future airport plans nor are we able to find that the Respondent has unreasonably deviated from its approved ALP. Therefore, the Director finds that the Respondent's actions with regard to the existing obstructions, and the NSMTS, are reasonable, and consistent with its grant assurance obligations.

⁵² See, [FAA Advisory Circular 150/5070-6B § 205]

⁵³ See, [FAA Advisory Circular 150/5070-6B § 205(a)(2)]

⁵⁴ See, [FAA Advisory Circular 150/5070.6B § 1001(0)(4)]

⁵⁵ See, [FAA Exhibit 1, Item 13]

⁵⁶ The Proposed NSMTS is located approximately 2,200 feet from the end of the runway.

Hazardous Wildlife Attractant

Throughout the complaint, the Complainants contend that by failing to prevent the construction of the NSMTS, the Respondent has failed to prevent the construction of a hazardous wildlife attractant near LGA. Complainants point to various FAA Advisory Circulars and Reports, as well as expert opinions to suggest that the NSMTS constitutes a hazardous wildlife attractant and should be prohibited in its proposed location.

However, the basis for the Complainants' arguments is aimed more at the conclusions of the FAA/USDA panel and previous FAA safety determinations, than the Respondent's actions with regard to the NSMTS. As previously stated, the formal complaint process under 14 CFR, Part 16 is not the proper forum for complaints alleging misfeasance or wrongdoing by FAA personnel. [See Steere v. County of San Diego, CA, FAA Docket No. 16-99-15 (December 7, 2004), and Heide v. Minnesota DOT, FAA Docket No. 16-04-11 (April 26, 2005).]

Complainants contend that "in light of the shortcomings of the FAA/USDA panel report, the Port Authority cannot rely on the report's conclusions that the significant bird strike risk created by the NSMTS can be adequately mitigated." Based on this, the Complainants allege that the Port Authority is in violation of its grant assurances because the Panel Report does not relieve the Port Authority of its obligation to prevent the creation of new hazardous wildlife risks and incompatible land uses under Grant Assurances 20 and 21. [FAA Exhibit 1, Item 6, Pg. 14] The Director is considering this allegation in reliance on his earlier reference to Complainants' statements that "the amended complaint does not attack the validity of the Panel Report." [FAA Exhibit 1, Item 6, Pgs. 36-37]

As previously discussed under Grant Assurance 20 above, the Respondent denies this allegation based on the fact that the Respondent does not control use of the property on which the NSMTS will be located, and has taken reasonable means to influence off-airport property over which the Respondent lacks control. Throughout its response to the Amended Complaint, the Respondent also refers to the FAA's previous evaluations and subsequent No Hazard Determinations, as well as the FAA/USDA panel report's findings and recommendations regarding the NSMTS to support its position that the NSMTS is neither a hazardous wildlife attractant nor a hazard to air operations at LGA.

The Complainants point to FAA Advisory Circular's (AC) 150/5200-33B "Hazardous Wildlife Attractants on or Near Airports", and 150/5200-34A "Construction or Establishment of Landfills Near Public Airports," as evidence that the proposed NSMTS constitutes a wildlife hazard.

Complainants also point to FAA's February 2010 report titled "Evaluation of Trash- Transfer Facilities as Bird Attractants" [FAA Exhibit 1, Item 1, exhibit 29] as additional evidence that the proposed NSMTS constitutes a wildlife hazard.

Throughout the Amended Complaint and subsequent responses and rebuttals, the Complainants rely heavily on the notion that the aforementioned Advisory Circulars and Technical Reports regarding landfills and wildlife attractants are regulatory in nature, and that the Respondent is

obligated to fully adhere to the recommendations contained in the referenced advisory circulars and technical reports.

FAA advisory circulars and technical reports are not themselves regulatory. They are used to provide guidance and recommendations to airport sponsors to assist them in complying with underlying grant assurance, regulatory (e.g., 14 CFR, Part 139), or statutory requirements. Advisory circulars and technical reports can only be mandatory or regulatory when they reflect external legal requirements such as the grant assurances or Part 139.

Advisory circulars "[p]rovide[] guidance such as methods, procedures, and practices acceptable to the Administrator for complying with regulations and grant requirements. ACs may also contain explanations of regulations, other guidance material, best practices, or information useful to the aviation community. They do not create or change a regulatory requirement." FAA Order 1320.46C, Advisory Circular System (May 31, 2002), p. 1.

The applicability section of Advisory Circular No. 150/5200-33B states that:

The Federal Aviation Administration (FAA) recommends that public-use airport operators implement the standards and practices contained in this AC. The holders of Airport Operating Certificates issued under Title 14, Code of Federal Regulations (CFR), Part 139, Certification of Airports, Subpart D (Part 139), may use the standards, practices, and recommendations contained in this AC to comply with the wildlife hazard management requirements of Part 139. Airports that have received Federal grant-in-aid assistance must use these standards.

Since LGA is a certificated airport, the Port Authority may use the standards in the AC to comply with Part 139 requirements pertaining to wildlife hazards or the Port could suggest another method acceptable to the FAA.⁵⁷

The relevant standards are as follows:

As a matter of policy, the FAA encourages operators of public-use airports who become aware of proposed land use practice changes that may attract hazardous wildlife within 5 statute miles of their airports to promptly notify the FAA. The FAA also encourages proponents of such land use changes to notify the FAA as early in the planning process as possible. [AC 150/5200-33B, section 4-3]

⁵⁷ See, e.g., *Town of Fairview v. McKinney*, FAA Docket No. 16-99-04, DD on Remand (July 26, 2000), p. 19: ...the [Hazardous Wildlife] AC is intended to provide guidance for one acceptable method of mitigating existing wildlife hazards and does not represent the only method acceptable to the FAA. We note that other airports with operations exceeding those at McKinney Municipal Airport are not situated in accordance with AC 150/5200-33 but operate in a safe and efficient manner with the use of effective wildlife mitigation measures. As in this case, however, if an airport sponsor fails to follow an advisory circular, and the failure results in a violation of a grant assurance, the FAA would find the airport in noncompliance with the grant assurance and not the advisory circular.

Airports that have received Federal grant-in-aid assistance are required by their grant assurances to take appropriate actions to restrict the use of land next to or near the airport to uses that are compatible with normal airport operations. The FAA recommends that airport operators to the extent practicable oppose off-airport land-use changes or practices within the separations identified in Sections 1-2 through 1-4 that may attract hazardous wildlife. Failure to do so may lead to noncompliance with applicable grant assurances. [AC 150/5200-33B, section 4-3(a)]

The record shows that the Port Authority has complied with the AC. The record shows that after the City submitted its initial proposal for the NSMTS, the Respondent wrote the FAA formally objecting to the proposal. Again, after the FAA subsequently issued its Determination of No Hazard to Air Navigation for Aeronautical Study No. 2004-AEA-3159-OE, the Respondent wrote the FAA objecting to the proposal and filing a petition for the FAA to review the study.

The record also indicates that after the City provided additional information pertaining to the proposed NSMTS, the Respondent was able to determine that the proposal was outside of the RPZ for Runway 31 and would not present an adverse effect on air operations at LGA. Thus, only after the completion of its due diligence, did the Respondent withdraw its objections to the NSMTS and petition the FAA to review the Determination of No Hazard to Air Navigation for Aeronautical Study No. 2004-AEA-3159-OE. Subsequently, the FAA confirmed that the proposed NSMTS does not pose a Hazard to Air Navigation when it issued its Determination of No Hazard to Air Navigation on September 19, 2008. Additionally, the FAA also confirmed that the location of the NSMTS was outside of the RPZ for Runway 31, in William Flanagan's June 10, 2009 letter to Harry Szarpanski.

Additionally, the Respondent's Chief Wildlife Biologist, Laura C. Francoeur, participated as a member of the FAA/USDA panel of experts tasked with the evaluation of the NSMTS and its compatibility with respect to bird strikes and safe air operations at LGA.

The Port also took appropriate action to oppose the NSMTS. "To the extent practicable," the Port opposed the NSMTS, an off-airport land use change or practice. As noted, among other things, the Respondent formally objected to the proposal and appealed the FAA's determination that the NSMTS was not a hazard to air navigation.

The AC also states that:

Enclosed waste-handling facilities that receive garbage behind closed doors; process it via compaction, incineration, or similar manner; and remove all residue by enclosed vehicles generally are compatible with safe airport operations, provided they are not located on airport property or within the Runway Protection Zone (RPZ). [AC 150/5200-33B, section 2-2(d)]

Since the NSMTS is a fully enclosed trash transfer station and is not on airport property or within the RPZ, the relevant standard has been met.

The Complainants also contend that an FAA "No Hazard Determination is not a safe harbor for sponsors (FAA Order 5190.6B ¶ 7.13(c)(2)." However, as specifically stated in FAA Order 5190.6B § 7.13:

A determination of "no hazard," however, does not ensure a safe environment. Many areas may not be addressed following a federal analysis that may affect visual flight rule (VFR) flight operations.

It appears the Complainants have interpreted this statement to mean that the Respondent cannot rely upon the FAA's No Hazard Determinations issued for the NSMTS as a means of complying with their Federal obligations. The Complainants' interpretation of this statement has no merit. Therefore, the Director will clarify the meaning of this statement in the Order. Simply put, an FAA "No Hazard Determination" for a proposed structure addresses obstacle clearance. However, there are other factors that may affect visual flight rule (VFR) flight operations, including plumes, glint and glare from solar panels, glass buildings, and car windshields in parking lots.

The inclusion of this statement in the Order is advisory in nature and does not impose any additional obligations on airport sponsors with regard to Grant Assurances 20 and 21. It simply lets FAA personnel and sponsors know that there may be other factors not considered during the FAA Obstruction Evaluation process that could still pose a hazard to air operations. One such area would be a proposal's ability to attract wildlife that could pose a hazard to aircraft. This area is typically not addressed in the Obstruction Evaluation forum, which is why the FAA requests sponsors to conduct separate wildlife hazard assessments.

As previously discussed in the analysis of Grant Assurance 20 above, the FAA, in all cases, makes the final determination on matters related to airspace use and management, air traffic control, and aviation safety. Accordingly, the FAA also makes the final determination regarding safe and reasonable mitigations measures for obstacles and hazards.

In this case, the record clearly shows that the FAA conducted an obstruction evaluation of the proposed NSMTS on two separate occasions, and ultimately issued two No Hazard Determinations. The record also shows that from November 30, 2009, until approximately June 2010, the FAA/USDA panel of experts conducted a study to evaluate the NSMTS and its compatibility with respect to bird strikes and safe air operations at LaGuardia Airport. The Respondent's Chief Wildlife Biologist, Laura C. Francoeur, participated as a member of FAA/USDA panel of experts. On July 2, 2010, the FAA/USDA panel of experts released their final report, which concluded that with design changes to the NSMTS facility, and adherence to certain operational procedures, the proposed NSMTS would be compatible with safe air operations at LGA.

Conclusion

Against this background, it is evident that the evaluation of the NSMTS went beyond the FAA Obstruction Evaluation process to include a separate evaluation of the NSMTS's compatibility with respect to bird strikes and safe air operations at LaGuardia Airport.

Accordingly, the Respondent appropriately relied on the conclusions reached in the FAA No Hazard Determinations and the FAA/USDA panel report with regard to the NSMTS's compatibility with safe air operations at LGA. Given these circumstances, the Director finds that the Respondent's actions with respect to the NSMTS were reasonable.

New Airport Hazard

Complainants contend that "Grant Assurance 20 states that with respect to new airport hazards, such as NSMTS, an airport sponsor will prevent the establishment or creation of future airport hazards,... Mitigation is only an option for existing airport hazards."⁵⁸ Complainants also contend that the Respondent "admits that NSMTS is an "airport hazard," but asserts that it has taken all appropriate and reasonable action."⁵⁹

While Complainants contend that the NSMTS is a new airport hazard and that mitigation is not an option for new airport hazards under Grant Assurance 20, the Complainants overlook the fact that the FAA makes the final determination with respect to airspace use and management, air traffic control, and aviation safety. Therefore, the FAA is the final arbiter as to what constitutes an airport hazard and what should be the appropriate mitigations for an airport hazard. Accordingly, it is also within FAA's authority to determine whether a new airport hazard can be mitigated in a manner that would allow an airport sponsor to remain in compliance with Grant Assurance 20.

However, a review of the documentation submitted to the record clearly shows that the FAA does not consider the proposed NSMTS to be a hazard. Even if the FAA considered the NSMTS to be a hazard, which it does not, the FAA has recommended mitigation measures to the City to enhance the safety of the NSMTS with respect to air navigation and air operations at LGA. Accordingly, the City has accepted those mitigations.

Conclusion

Against this background, the Director concludes that the Respondent has not failed to prevent the creation of a new airport hazard. Thus, the Respondent is not in violation of Grant Assurance 20 with respect to this allegation.

Grant Assurance 21, Compatible Land Use

Throughout the complaint, the Complainants contend that by failing to prevent the construction of the NSMTS, the Respondent has failed to prevent an incompatible land use near LGA.

⁵⁸ See, [FAA Exhibit 1, Item 6, Pg. 33]

⁵⁹ See, [FAA Exhibit 1, Item 6, Pg. 27]

Complainants point to various FAA Advisory Circulars and Reports, as well as expert opinions to suggest that the NSMETS constitutes a hazardous wildlife attractant and should be prohibited in its proposed location.

Complainants also point to the past precedent established in *M Daniel Carey and Cliff Davenport v. Afton-Lincoln County Municipal Airport Joint Powers Board*, FAA Docket No. 16-06-06, Director's Determination "Afton" and *Keathly v. City of McKinney, Texas and the Collin County Regional Airport*, FAA Docket No. 16-03-14, Director's Determination "Keathly" regarding a sponsor's obligations under Grant Assurance 21.

Complainants assert that "a sponsor's lack of jurisdictional control over the incompatible land use does not excuse the sponsor from declining. to take any action at all to achieve land use compatibility outside the airport boundaries."⁶⁰ In support of this assertion, Complainants refer to FAA Order 5190.6B, ¶ 20.2(d), as well as the past precedent established in Afton.⁶¹

For the purpose of evaluating airport owner or sponsor compliance with compatible land use, the FAA does not per se accept an owner or sponsor declining any action on the simple grounds that it does not possess zoning authority outside the airport boundaries.

Complainants also point to Keathly,⁶² where the Director stated:

With regard to compatible land use issues, FAA typically addresses two questions in order to determine if a sponsor has violated its obligations.

- 1. Are the facility's operations compatible with local airport operations?*
- 2. If not, could the sponsor have prevented the facility from operating near the airport?*

As previously discussed under Grant Assurance 20 above, the Respondent generally denies this allegation based on the fact that the Respondent does not control use of the property on which the NSMETS will be located, and has taken reasonable means to influence off-airport property over which the Respondent lacks control.

In review of this allegation, the Director notes that Grant Assurance 21 compels airport sponsors to:

... take appropriate action, to the extent reasonable, including the adoption of zoning laws, to restrict the use of land adjacent to or in the immediate vicinity of the airport to activities and purposes compatible with normal airport operations, including landing and takeoff of aircraft. In addition, if the project is for noise compatibility program implementation, it will not cause or permit any change in land use, within its jurisdiction,

⁶⁰ See, [FAA Exhibit 1, Item 6, Pg. 26]

⁶¹ See, [M. Daniel Carey and Cliff Davenport v. Afton-Lincoln County Municipal Airport Joint Powers Board, FAA Docket No. 16-06-06, Director's Determination, Pg. 13]

⁶² See, [Keathly v. City of McKinney, Texas and the Collin County Regional Airport, FAA Docket No. 16-03-14, Director's Determination, Pg. 23]

⁶³ FAA Airport Sponsor Assurances may be found at http://www.faa.gov/airports/aip/grant_assurances/media/airport_sponsor_assurances.pdf

that will reduce its compatibility, with respect to the airport, of the noise compatibility program measures upon which Federal funds have been expended.

The language in FAA Order 5190.6B, at section 20.2(d) is also instructive.

Reasonable Attempt. In cases where the airport sponsor does not have the authority to enact zoning ordinances, it should demonstrate a reasonable attempt to inform surrounding municipalities on the need for land use compatibility zoning. The sponsor can accomplish this through the dissemination of information, education, or ongoing communication with surrounding municipalities. Depending upon the sponsor's capabilities and authority, action could include exercising zoning authority as granted under state law or engaging in active representation and defense of the airport's interests before the pertinent zoning authorities. The sponsor may also take action with respect to implementing sound insulation, land acquisition, purchase of easements, and real estate disclosure programs or initiatives to mitigate areas to make them compatible with aircraft operations. Sponsors without zoning authority may also work to change zoning laws to protect airport interests.

The record shows that the City of New York is the proponent of the NSMETS; that the City is not the airport sponsor; that the Respondent does not have jurisdiction over the land upon which the NSMETS is being constructed. Therefore in evaluating the standard of compliance, the Director reviewed the record to determine if the Respondent met the standard of compliance as described in Keathly.

First, the record shows that from November 30, 2009, until approximately June 2010, the FAA/USDA panel of experts conducted a study to evaluate the NSMETS and its compatibility with respect to bird strikes and safe air operations at LaGuardia Airport. On September 2, 2010, the FAA/USDA panel of experts released their final report, which concluded that with design changes to the NSMETS facility, and adherence to operational procedures, the proposed NSMETS would be compatible with safe air operations at LGA.

However, the Director's review of the record also shows that the sponsor took reasonable actions to prevent the establishment of the NSMETS when it was a presumed hazard and incompatible land use. A summary of those actions are described more thoroughly within the analysis of Grant Assurances 5 and 20 above.

The record shows that after the City submitted its initial proposal for the NSMETS, the Respondent wrote the FAA formally objecting to the proposal. Again, after the FAA subsequently issued its Determination of No Hazard to Air Navigation for Aeronautical Study No. 2004-AEA-3159-0E, the Respondent wrote the FAA objecting to the proposal and filing a petition for the FAA to review the study.

The record also indicates that after the City provided additional information pertaining to the proposed NSMETS, the Respondent was able to determine that the proposal was outside of the RPZ for Runway 31 and would not present an adverse effect on air operations at LGA. Thus, only after the completion of its due diligence, did the Respondent withdraw its objections to the

NSMETS and petition the FAA to review the Determination of No Hazard to Air Navigation for Aeronautical Study No. 2004-AEA-3159-0E. Subsequently, the FAA confirmed that the proposed NSMETS does not pose a Hazard to Air Navigation when it issued its Determination of No Hazard to Air Navigation on September 19, 2008.⁶⁴ Additionally, the FAA also confirmed that the location of the NSMETS was outside of the RPZ for Runway 31, in William Flanagan's June 10, 2009 letter to Harry Szarpanski.⁶⁵ Additionally, the Respondent's Chief Wildlife Biologist, Laura C. Francoeur, participated as a member of the FAA/USDA panel of experts tasked with the evaluation of the NSMETS and its compatibility with respect to bird strikes and safe air operations at LaGuardia Airport. The final panel report concluded that with design changes to the NSMETS facility, and adherence to operational procedures, the proposed NSMETS would be compatible with safe air operations at LGA.⁶⁶ Additionally, the FAA has recommended mitigation measures to the City to enhance the compatibility of the NSMETS with respect to safe air operations at LGA. Accordingly, the record shows that the DSNY intends to implement the FAA/USDA panel report's recommendations as they seek to construct and operate the NSMETS facility.⁶⁷ Thus, the documentation submitted to the record clearly shows that the FAA does not consider the proposed NSMETS to be an incompatible land use. Because the FAA does not consider the NSMETS to be an incompatible land use, the Director can dismiss this allegation without any further evaluation, because it passes the first test with regard to the precedent established in Keathly. Thus moving on to the second test is irrelevant, because the Respondent would not be required to take any actions to prevent the establishment of the NSMETS since it is not considered to be an incompatible land use. However, as noted, Respondent took a number of actions to oppose the establishment of the NSMETS.

Accordingly, the Director finds that the Respondent passes both tests in determining if an airport sponsor is in compliance with Grant Assurance 21. The record shows that the FAA does not consider the NSMETS to be an incompatible land use; that the Respondent took reasonable actions to prevent the establishment of the NSMETS when it was presumed to be a hazard and incompatible land use; participated in the FAA/USDA study of the NSMETS, and relied on the conclusions reached in the FAA and USDA evaluations of the NSMETS with regard to the NSMETS's compatibility with safe air operations at LGA.

Conclusion

Against this background, the Director concludes that the Respondent has not failed to prevent an incompatible land use near LGA. Thus, the Respondent is not in violation of Grant Assurance 21 with respect to this allegation.

Grant Assurance 34, Policies, Standards and Specifications

With regard to this allegation, Complainants allege that by failing to prevent the construction of the NSMETS, the Respondent has created an incompatible land use and a hazard to air operations at LGA, which is in direct conflict with FAA policies, standards and specifications. The

⁶⁴ See, [FAA Exhibit 1, Item 1, exhibit 22]

⁶⁵ See, [FAA Exhibit 1, Item 1, exhibit 27]

⁶⁶ See, [FAA Exhibit 1, Item 1, exhibit 35]

⁶⁷ See, [FAA Exhibit 1, Item 1, exhibit 38]

Complainants point to FAA Advisory Circular's (AC) 150/5200-33B "*Hazardous Wildlife Attractants on or Near Airports*", and 150/5200-34A "*Construction or Establishment of Landfills Near Public Airports*," as evidence that the proposed NSMTS is in conflict with FAA policies, standards, and guidance.

Complainants also point to FAA's February 2010, report titled "*Evaluation of Trash- Transfer Facilities as Bird Attractants*" [FAA Exhibit 1, Item 1, exhibit 29] as additional evidence that the proposed NSMTS conflicts with FAA policies, standards, and specifications. Thus the Complainants allege the Respondent failed to prevent the construction of the NSMTS, knowing that it does not comply with FAA policies, standards, and specifications.

The Respondent generally denies this allegation through its response's to the other allegations by referring to the FAA's No Hazard Determinations and the FAA/USDA panel report findings and recommendations regarding the NSMTS.

In response to the Amended Complaint, Respondent also denies this allegation stating that:⁶⁸

Grant Assurance 34 concerns compliance with FAA directives concerning a specific project for which federal funds are granted, and not with respect to continuing operation of the airport in general.

In review of this allegation, the Director notes that Grant Assurance 34, *Policies, Standards, and Specifications*, addresses a sponsor's responsibilities for ensuring grant projects are carried out "in accordance with policies, standards, and specifications approved by the Secretary," and incorporates Advisory Circulars related to AIP projects. Therefore, in determining the Respondent's obligations pertaining to AIP funded projects, the Director must first examine the applicability of Grant Assurance 34 as it relates to this matter.

First, Grant Assurance 34 requires a sponsor to carry out AIP projects "in accordance with applicable policies, standards, and specifications approved by the Secretary." In reviewing the record, it is clear that the NSMTS is not an AIP funded project. Therefore, Grant Assurance 34 does not apply to the Respondent's obligations as they relate to the construction of the NSMTS. The Respondent's obligations related to this allegation would be more appropriately directed toward Grant Assurance 20, *Hazard Removal and Mitigation*, and Grant Assurance 21, *Compatible Land Use*. The Respondent's obligations as to these assurances were fully discussed above.

Because the Grant Assurance 34 is not applicable since the transfer station is not being funded with AIP, Director can dismiss this allegation without any further evaluation. However, the Director's review of the record also shows that the Respondent relied upon FAA determinations and findings regarding the NSMTS's compatibility with safe air operations at LGA. Therefore, the Director will also analyze the sponsor's actions with regard to the standard of compliance.

When evaluating if a sponsor is in compliance with its grant assurances, the Director considers the reasonableness of a sponsor's actions and its obligation to exercise due diligence in assessing

⁶⁸ See FAA Exhibit 1, Item 3, Attachment D, Pg. 14.

its compliant status and posture. In the instant Complaint, Complainants allege the Respondent violated its grant assurances by failing to prevent the construction of the NSMETS, knowing that it does not comply with FAA policy standards and specifications.

As previously addressed within the analyses of Grant Assurances 19, 20 and 21, the record clearly shows that the FAA and USDA completed numerous due diligence evaluations of the NSMETS facility, which ultimately concluded that "the structure would have no substantial adverse effect on the safe and efficient utilization of the navigable airspace by aircraft or on the operation of air navigation facilities"⁶⁹ and that "the proposed [NS]METS will be compatible with safe air operations so long as it is constructed and operated in accordance with the report's recommendations."⁷⁰ While it is the City that is constructing the NSMETS off of airport property, it is clear that the Respondent relied heavily on the conclusions reached in the FAA's No Hazard Determinations and the FAA/USDA panel report regarding the safety and compatibility of the proposed NSMETS with air operations at LGA.

In evaluating this allegation, the FAA reviewed the standard of compliance to the above referenced obligations, as well as applied past precedent to the instant complaint. The FAA found FAA Docket 16-08-12, *William H. Keyes and Dewitt T. (Jack) Ferrell, Jr. v. McMinn County, Tennessee*, Directors Determination, (McMinn) to be relevant in determining the standard of compliance regarding a sponsor's obligation to comply with FAA policies, standards and specifications.

In McMinn, Complainant Keyes alleged that, *"because McMinn County was aware of the line of sight deficiency prior to actual construction... (the Respondent) knowingly built the airport out of compliance."*

However, Respondent in McMinn objected to Keyes' contentions by stating, *"While (Respondent) is technically the owner of the airport, we rely heavily on (TN DOT's) funding, advice and expertise. We went forward with this project on the expert advice of (TN DOT)."*

Specifically, in McMinn, the Director stated:⁷¹

While the FAA expects its airport sponsors to abide by its grant obligations as well as be knowledgeable of the agency's standards regarding airport operations, the Director previously has held that, "the issue of whether the (Respondent) acted unreasonably lies with the justification for its actions and what the record establishes." [Platinum Aviation and Platinum Jet Center BMI v. Bloomington-Normal Airport Authority, Illinois, FAA Docket No. 16-06-09 (Director's Determination issued June 4, 2007) (Final Decision and Order issued November 28, 2007)] The Director would be remiss to assert that sponsors are reasonably expected to know more than airport consultants and state engineers on airport design matters. Therefore, the Director cannot equate the Respondent's decision to take the expert advice it was given by its approving authority,

⁶⁹ See, [FAA Exhibit 1, Item 1, exhibit 22]

⁷⁰ See, [FAA Exhibit 1, Item 1, exhibit 37]

⁷¹ See, [*William H. Keyes and Dewitt T (Jack) Ferrell, Jr. v. McMinn County, Tennessee*, FAA Docket 16-08-12, Directors Determination, Pg. 31]

TN DOT, by virtue of its Block Grant State status, to a violation of Grant Assurance 34 or any other assurance. The Respondent was reasonable to rely upon the expertise and guidance of TN DOT; it should not be penalized for such reliance.

The Director agrees with the Respondent that it has no more ability to control the operation of the NSMTS off of LGA than it does in controlling the location and height of the NSMTS off of LGA property, and the Complainants do not put forth any action which the Respondent did not take but which it could have taken that would have had the result of altering the decisions of the City of New York with respect to the NSMTS.⁷² The Respondent is also correct that the Secretary convened a panel of experts to study the impact of the NSMTS on safe operations at LaGuardia Airport; the panel put forth recommendations for the safe operation of the transfer station. Accordingly, in the case at hand, the Director would be remiss to assert that the Respondent is reasonably expected to know more than FAA and USDA personnel on matters related to airport planning, aviation safety, hazards to air navigation, compatible land uses, and/or hazardous wildlife attractants. Therefore, similar to the Director's Determination in McMinn, the Director, in this case, cannot equate the Respondent's decision to rely upon expert advice it was given by the FAA and USDA, by virtue of its grant obligations, to be a violation of Grant Assurance 34 or any other assurance previously discussed. The Respondent was reasonable to rely upon the expertise and guidance of FAA and USDA; it should not be penalized for such reliance.

In this case, however, it is the City that is constructing the NSMTS off of airport property. Accordingly, the recommendations contained in the FAA/USDA panel report, and airspace determinations, were directed to the City as a proponent of the NSMTS. However, the record shows that the Respondent was also made aware of the FAA's conclusions regarding the NSMTS, and those conclusions served as the foundations for the Respondent's actions.

Conclusion

Against this background, the Director finds that the Respondent exercised its due diligence in evaluating the proposed NSMTS with respect to FAA policies, standards, and specifications. Thus, the Respondent is not in violation of Grant Assurance 34 with respect to this allegation.

Summary of Issue #1 Findings

When evaluating whether a sponsor is in compliance with its grant assurances, the Director considers the reasonableness of a sponsor's actions and its obligation to exercise due diligence in assessing its compliant status and posture. In evaluating the standard of compliance, FAA Order 5190.6B explains:

⁷² The Director is aware of the provision at Section 21 of the *Amended and Restated Agreement of Lease* addressing Off-Airport Properties-Height and Use Restrictions. Subsection 21.1 provides that the City shall not erect or authorize the erection of any obstructions or hazards to air navigation to the extent prohibited by law or by rule or regulation of the FAA, upon or above City streets or other property belonging to the City which will project into the Horizontal Surfaces, Conical Surfaces, Primary Surfaces, Approach Surfaces or Transitional Surfaces or within the boundaries of the RPZ. This lease provision is not at issue here based on the Determination of No Hazard and the fact that the NSMTS is not in the RPZ. [FAA Exhibit I, Item 1, exhibit 55]

A sponsor meets commitments when: (1). The federal obligations are fully understood; (2). A program (e.g., preventive maintenance, leasing policies, operating regulations, etc.) is in place that the FAA deems adequate to carry out the sponsor commitments; (3). The sponsor satisfactorily demonstrates that such a program is being carried out; and (4). Past compliance issues have been addressed. [See FAA Order 5190.6B, ¶2.8.b.]

Therefore, the Director finds the Respondent is not in violation of Grant Assurances: 5, *Preserving Rights and Powers*; 19, *Operation and Maintenance*; 20, *Hazard Removal and Mitigation*; 21, *Compatible Land Use*; and 34, *Policies, Procedures, and Standards*, because the Respondent's actions met the standards of reasonableness and due diligence.

ISSUE #2: *Whether the Respondent's alleged failure to follow the recommendations contained in the FAA/USDA panel report, with regard to the NSMETS facility, constitutes a violation of Grant Assurance 19, Operation and Maintenance, Grant Assurance 20, Hazard Removal and Mitigation, Grant Assurance 21, Compatible Land Use, and Grant Assurance 34, Policies, Standards and Specifications.*

With regard to this allegation, the Complainants allege that the Respondent failed to require the City to adhere to the FAA/USDA recommendations contained in the panel report. Therefore, the Complainants allege that the Respondent is in conflict with its Federal obligations under Grant Assurances, 19, 20, 21, and 34.

In the amended complaint, Complainants specifically contend:⁷³

The Panel Report made several recommendations that the City must adopt prior to beginning construction. The Panel report stated that the City must update the existing engineering report for the NSMETS to reflect the additional wildlife hazard mitigation measures described in the Panel Report, with the conditions added to the engineering report becoming conditions of the NSMETS operating permit. Panel Report, Ex. 35, p. 22. In addition, the Panel Report required the City to join the current wildlife hazard working group for John F. Kennedy International Airport and LaGuardia Airport. Id. These provisions were not new to the City. It had purportedly agreed to these requirements over eighteen months ago. See, Szarpanski July 9, 2009, Letter, Ex. 28. Upon information and belief however, the City has not taken any action to include these requirements in the Engineering Report.

Moreover, the Panel Report specifically states that part of the Integrated Wildlife Hazard Management Plan was necessary prior to construction so that any building design changes could be effected prior to NSMETS being built. Panel Report, Ex.35, pp. 23. For example, the Panel Report specifically states that the building design of NSMETS should be changed to "eliminate ledges and other perching sites," that "anti perching devices" should be installed and "landscaping plans and selected plants and materials will attract

⁷³ See, [FAA Exhibit 1, Item 1, Pgs. 49-50]

wildlife." Id. The City has not taken even the first steps toward developing an IWHMP, but has begun construction of the NSMTS without changing the design to incorporate the Panel Report's requirements.

As previously discussed in the analysis of Grant Assurance 5 above, the Respondent in this case is the sponsor of LGA. However, it is the City of New York that is the proponent of the NSMTS, and the City is not the sponsor of LGA.⁷⁴ Accordingly, the recommendations provided by the FAA/USDA panel, and FAA airspace determinations, were directed to the City as the proponent of the NSMTS.

The record also shows that the City is constructing the proposed NSMTS off of airport property. Therefore, the FAA has no ability to compel the City of New York to accept the recommendations contained in the FAA/USDA Panel Report.

However, the record shows that the Respondent was also made aware of the Panel Report's conclusions regarding the NSMTS.⁷⁵ The record also shows that the City agreed to implement the Panel Report's recommendations as they began constructing and operating the NSMTS.⁷⁶

The Complainants' allegation that the City has not implemented the recommendations of the Panel Report are based upon the Complainants' "information and beliefs."⁷⁷ The Director's review of the record shows that the Complainants provided very little evidence to substantiate this allegation.

In order for the Director to find a sponsor in violation of its Federal obligations under a Part 16 proceeding, not only must the Complainant include sufficient factual evidence to support its allegations, but also establish by a preponderance of substantial and credible evidence that the sponsor has violated its Federal obligations.⁷⁸ The Director finds that the evidence submitted to the record by the Complainants in support of this allegation is insufficient to meet this criterion.

Additionally, upon further investigation of this allegation, the Director discovered *The Matter of the Application of Kenneth Paskar and FRIENDS OF LAGUARDIA AIRPORT, INC., Petitioners, For a Judgment Pursuant to CPLR Article 78 against New York State Department of Environmental Conservation, PETER M IWANOWICZ and NEW YORK CITY DEPARTMENT OF SANITATION, Respondents*, which contains additional information that is applicable to this allegation. In that matter, decided on November 28, 2011, the Supreme Court of Queens County found that:⁷⁹ *The documentary evidence submitted herein establishes that on February 23, 2011, the DSNY submitted a request to the DEC for minor alterations or the North Shore MTS permit, pursuant to Special Condition 28(b) of said permit, in order to incorporate the FAA/USDA's*

⁷⁴ See, [Page 4]

⁷⁵ Respondent participated in the FAA/USDA panel, and was a signatory party on the FAA/USDA Panel Report.

⁷⁶ See, [FAA Exhibit 1, Item 1, exhibit 38]

⁷⁷ [See, FAA Exhibit 1, Item 1, Pg. 52]

⁷⁸ See, BMI Salvage Corporation & Blueside Services, Inc. v. Miami-Dade County, Florida, FAA Docket No. 16-05-16, (July 25, 2006) (Director's Determination). BMI v. FAA, No. 07-12058 (11th Cir, Apr. 8, 2008), reversed and remanded with instructions on other grounds.

⁷⁹ See, [FAA Exhibit 1, Item 12, Pg. 6]

recommendations into the permit. On April 8, 2011 the DEC granted DSNY's request for said minor modification. The North Shore MTS is presently under construction with an expected completion date of mid-2013, and respondent DSNY states in an affidavit that it is implementing all of the recommendations of the Technical Panel.

On April 8 2011, the DEC responded to Mr. Paskar's November 12, 2010 letter, stating that it had approved the modifications requested by DSNY which incorporated the recommendations of the FAA/USDA into the subject permit.

Conclusion

Against, this background the record reflects that the City incorporated the Panel Report's recommendations into the NSMTS operating permit, issued by the New York State Department of Environmental Conservation. However, the City is not a Respondent in these proceedings and the allegations are thereby viewed in terms of the Port Authority's actions and obligations as the airport sponsor. Therefore, with regard to this allegation, the Director finds that the Respondent is not in violation of Grant Assurances: 5, *Preserving Rights and Powers*; 19, *Operation and Maintenance*; 20, *Hazard Removal and Mitigation*; 21, *Compatible Land Use*; and 34, *Policies, Procedures, and Standards*, because the Respondent's actions met the standards of reasonableness and due diligence.

VII. FINDINGS AND CONCLUSION

Upon consideration of the submissions, responses by the parties, the record herein, applicable law and policy, and for the reasons stated above, the Director of the FAA Office of Airport Compliance and Management Analysis finds that The Port Authority of New York and New Jersey currently is not in violation of Grant Assurance 5, *Preserving Rights and Powers*; Grant Assurance 19, *Operation and Maintenance*; Grant Assurance 20, *Hazard Removal and Mitigation*; Grant Assurance 21, *Compatible Land Use*, and Grant Assurance 34, *Policies, Standards, and Specifications*.

ORDER

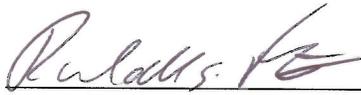
Accordingly, it is ordered that:

1. The Complaint is dismissed; and
2. All motions not expressly granted in this Determination are denied.

RIGHT OF APPEAL

This Director's Determination, FAA Docket No. 16-11-04, is an initial agency determination and does not constitute a final agency decision and order subject to judicial review as provided in 14 CFR, § 16.247(b)(2). A party to this proceeding adversely affected by the Director's Determination may appeal the initial determination to the FAA Associate Administrator for Airports pursuant to 14 CFR, § 16.33(b) within thirty (30) days of service of this Determination on the parties.

Signed,



Randall S. Fiertz
Director of Airport Compliance
and Management Analysis

SEP 27 2012
Date