

UNITED STATES DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION
WASHINGTON, DC

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

Appellant/Complainant



v.

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

Appellee/Respondent

FAA Docket 16-11-04

ASSOCIATE ADMINISTRATOR FOR AIRPORTS
FINAL AGENCY DECISION

I. INTRODUCTION

This matter is before the Federal Aviation Administration (FAA) Associate Administrator for Airports on appeal filed by Kenneth D. Paskar and Friends of LaGuardia Airport, Inc., (Complainants) from the Director's Determination of September 27, 2012, issued by the Director of the FAA Office of Airport Compliance and Management Analysis, pursuant to the *Rules of Practice for Federally Assisted Airport Enforcement Proceedings* found in 14 CFR Part 16. The Director's Determination dismissed the Complainants' allegations that the Port Authority of New York and New Jersey (Port Authority, PANYNJ, Respondent, Airport Sponsor) violated its grant assurances in failing to stop the construction of the North Shore Marine Transfer Station (NSMTS) in College Point, New York near LaGuardia Airport (LGA).

The Complainants argue certain conclusions made by the Director were inconsistent with the facts and evidence in the record, arbitrary and capricious, and not in accordance with applicable law. In their Summary of Argument, the Complainants claim that the Director failed to acknowledge that the NSMTS is an "airport hazard" and an incompatible land use, and that the PANYNJ "failed to take reasonable and appropriate action . . . to prevent the creation of the

airport hazard and incompatible land use.”¹ The Complainants argue that “since the PANYNJ has the means and authority to stop the construction of NSMTS at the College Point location and has failed to do so, it is in violation of Grant Assurances 19, 20, 21, and 34.”² The Complainants also suggest that the NSMTS “bars the PANYNJ from taking certain actions to relieve congestion at LaGuardia.”³

The Complainants raise the following issues on appeal:

- a. The Director Has Ignored the Facts of the Case By Concluding that NSMTS Is Not in the Runway Protection Zone for Runway 31 at the Airport, and therefore Erroneously Concluded that the Port Authority Has Not Violated Grant Assurances 19, 20, 21 and 34.
- b. The Director Failed To Take Into Account the Fact that the Location of NSMTS at College Point Prohibits the Airport From Implementing the Long Planned and Congressionally Mandated Precision Approach for Runway 31 in Violation of Grant Assurances 19, 20, 21 and 34.
- c. Even If the Director Were Correct in Determining that the NSMTS Were Outside the RPZ and Did Not Conflict with the Installation of a Precision Approach, It Creates a Hazardous Wildlife Attractant and Therefore The Port Authority Is in Violation of Grant Assurances 19, 20, 21 and 34.
- d. The Director Erred in His Determination in Finding that the Port Authority Did Not Fail to Take “Appropriate Action” to Protect Terminal Airspace from the Creation of Airport Hazards and Incompatible Land Uses in Violation of Grant Assurances 20 and 21.⁴

The Complainants also make a motion in their Appeal requesting the FAA recuse itself from deciding this matter because it cannot be an unbiased and unprejudiced adjudicator.⁵

In its Reply, the Respondent states the record supports the Director’s Determination that the PANYNJ acted in compliance with the applicable Grant Assurances 19, 20, 21, and 34 by taking reasonable efforts to eliminate or mitigate possible hazards to aircraft using LGA which would have been created by the NSMTS as originally proposed.⁶

Upon an appeal of a Part 16 Director’s Determination, the Associate Administrator for Airports must determine whether (a) the findings of fact made by the Director are supported by a preponderance of reliable, probative, and substantial evidence, and (b) each conclusion of law is made in accordance with applicable law, precedent, and public policy. 14 CFR § 16.33(e); *see*,

¹ FAA Exhibit 1, Item 21, page 7

² FAA Exhibit 1, Item 21, page 6

³ FAA Exhibit 1, Item 21, page 7

⁴ FAA Exhibit 1, Item 21

⁵ FAA Exhibit 1, Item 21, page 2

⁶ FAA Exhibit 1, Item 22, page 47

e.g., Ricks v. Millington Municipal Airport, FAA Docket No. 16-98-19, Final Decision and Order p. 21 (Dec. 30, 1999).

In arriving at a final decision on this Appeal, the FAA has reexamined the record, including the Director's Determination, the administrative record supporting the Director's Determination, the Complainants' Appeal, and PANYNJ's Reply in light of applicable law and policy. Based on this reexamination, the FAA affirms the Director's Determination with regard to Grant Assurances 5, *Preserving Rights and Powers*; 19, *Operations and Maintenance*; 20, *Hazard Removal and Mitigation*; 21, *Compatible Land Use*; and 34, *Policies, Standards, and Specifications*. The Associate Administrator concludes that, with regard to these grant assurances; the Director's Determination is supported by a preponderance of reliable, probative, and substantial evidence, and is consistent with applicable law, precedent, and FAA policy. The Associate Administrator concludes the Complainants' Appeal does not contain persuasive arguments sufficient to reverse the Director's Determination, and there is no reason for the FAA to recuse itself from deciding this appeal.

This decision constitutes the final decision of the Associate Administrator for Airports pursuant to 14 CFR Part 16.

II. SUMMARY OF THE DIRECTOR'S DETERMINATION

On September 27, 2012, the Director concluded that the Port Authority of New York and New Jersey was not in violation of its Federal obligations as set forth in its airport grant assurances and existing Federal statutes.

Although the Complainants did not allege a violation of Grant Assurance 5, *Preserving Rights and Powers*, the Director evaluated compliance with this grant assurance based on the allegation that PANYNJ failed to prevent construction of the NSMTS. As the record shows, the City of New York, and not the Respondent, is constructing the NSMTS. The City is not the sponsor of the airport.⁷ Under these circumstances, the Respondent could be in violation if it does not hold sufficient rights and powers to comply with its Federal obligations, or if it ceded its rights and powers to the City. The Director appropriately found that PANYNJ did not cede, or fail to exercise, its rights and powers concerning the construction of the NSMTS.⁸ The Director found that on November 24, 2004, the City of New York and Respondent entered into an amended and restated agreement of lease for the operation of LGA.⁹ The Director found that PANYNJ has the right to prevent the establishment of any structure, facility, or natural growth located on the airport.¹⁰ The Director also found that the agreement reasonably protects the airport from obstructions and hazards to air navigation, as well as incompatible land uses adjacent to LGA.¹¹ The Director found that the PANYNJ took reasonable actions and exercised due diligence to

⁷ See *Paskar v. Fed. Aviation Admin.*, No. 11-2720-ag (2d Cir. Jun. 12, 2012) (upholding FAA dismissal of the City of New York because it is not an airport sponsor).

⁸ FAA Exhibit 1, Item 17, page 28

⁹ FAA Exhibit 1, Item 17, pages 26, *citing* FAA Exhibit 1, Item 1, exhibit 55

¹⁰ FAA Exhibit 1, Item 17, page 27

¹¹ FAA Exhibit 1, Item 17, page 27

prevent the construction of the NSMTS when the FAA issued its notice that the facility was presumed to be a hazard to air navigation.¹²

The Director determined PANYNJ to be in compliance with Grant Assurance 19, *Operations and Maintenance*.¹³ The Director found that PANYNJ was reasonable to assure the NSMTS did not present a safety hazard to LGA, or interfere with its use for airport purposes.¹⁴ The Director found that PANYNJ had 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.¹⁵ The Director found that the Respondent had taken appropriate action to prevent the NSMTS when the FAA issued its notice that the facility was presumed to be a hazard to air navigation.¹⁶ The Director further found that PANYNJ took appropriate actions to ensure the NSMTS's compatibility with safe air operations including "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 PANYNJ'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 LGA."¹⁷

The Director further found that PANYNJ had exercised due diligence with respect to the NSMTS under Grant Assurance 20, *Hazard Removal and Mitigation*.¹⁸ The Director relied on the record that the PANYNJ ultimately determined that the proposed NSMTS was located outside of the existing RPZ for Runway 31.¹⁹ The Director further found the FAA confirmed the proposed NSMTS was outside of the existing RPZ for Runway 31.²⁰

The Director also found that the PANYNJ had exercised due diligence in evaluating the impact of the NSMTS on future airport plans, and that the PANYNJ had reasonably complied with its approved Airport Layout Plan (ALP).²¹ The Director concluded that an airport sponsor is not obligated to pursue airport development at any cost, and that desirable improvements may not be feasible.²² The Director found that future plans identified on the ALP do not demonstrate a need to protect the airspace from the NSMTS.²³ The Director also found that because the PANYNJ studied the future precision approach with the FAA, and determined that such improvements are not feasible due to the myriad of obstacles already in the approach to Runway 31, the PANYNJ

¹² FAA Exhibit 1, Item 17, page 28

¹³ FAA Exhibit 1, Item 17, page 28-29

¹⁴ FAA Exhibit 1, Item 17, pages 28-29

¹⁵ FAA Exhibit 1, Item 17, page 29

¹⁶ FAA Exhibit 1, Item 17, page 29

¹⁷ FAA Exhibit 1, Item 17, page 29

¹⁸ FAA Exhibit 1, Item 17, pages 29-46

¹⁹ FAA Exhibit 1, Item 17, page 34

²⁰ FAA Exhibit 1, Item 17, page 33

²¹ FAA Exhibit 1, Item 17, page 41

²² FAA Exhibit 1, Item 17, page 39

²³ FAA Exhibit 1, Item 17, page 41

completed its due diligence under the grant assurance.²⁴ The Director found that the FAA studied the existing obstructions and the NSMTS and determined that the existing mitigation measures provide an acceptable level of safety for air navigation and air operations at LGA.²⁵ In addition, the Director relied on FAA policy when concluding the FAA makes the final determination on matters related to airspace use and management and on safe and reasonable mitigation measures for obstacles and hazards.²⁶

The Director also found that it was appropriate for PANYNJ to have relied on the FAA conducting an obstruction evaluation of the proposed NSMTS on three separate occasions, and ultimately issuing two No Hazard Determinations.²⁷ The Director found that the record shows that from November 2009 through June 2010, the FAA/USDA panel of experts, on which the PANYNJ's Chief Wildlife Biologist participates, conducted an additional study to evaluate the NSMTS and its compatibility with respect to bird strikes and safe air operations at LGA.²⁸ The Director found the July 2, 2010, report included findings and recommendations regarding the NSMTS to support the conclusion that the NSMTS is neither a hazardous wildlife attractant nor a hazard to air operations at LGA.²⁹ The Director found 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 LGA.³⁰

The Director found that the record showed that the FAA does not consider the NSMTS to be a hazard.³¹ The Director determined that even if the FAA considered the NSMTS to be a hazard, the City of New York accepted the Panel Report's recommended mitigation measures to enhance the safety of the NSMTS with respect to air navigation and air operations at LGA.³²

The Director determined that PANYNJ did not fail to prevent an incompatible land use near LGA and is in compliance with Grant Assurance 21, *Compatible Land Use*.³³ The Director found that the FAA does not consider the NSMTS to be an incompatible land use; that PANYNJ took reasonable measures to prevent the establishment of the NSMTS when the FAA issued its notice that the NSMTS was presumed to be a hazard; participated in the FAA/USDA study of the NSMTS; and relied on the conclusions reached in the FAA and USDA evaluations of the NSMTS with regard to the NSMTS's compatibility with safe air operations at LGA.³⁴

The Director found Grant Assurance 34 not applicable because the NSMTS was not funded with AIP.³⁵ Nevertheless, the Director found that PANYNJ exercised its due diligence in evaluating

²⁴ FAA Exhibit 1, Item 17, page 41

²⁵ FAA Exhibit 1, Item 17, page 40. The no hazard determinations became final agency actions, and the time period to challenge these determinations has elapsed.

²⁶ FAA Exhibit 1, Item 17, page 40

²⁷ FAA Exhibit 1, Item 17, page 45

²⁸ FAA Exhibit 1, Item 17, page 45

²⁹ FAA Exhibit 1, Item 17, page 45

³⁰ FAA Exhibit 1, Item 17, page 46

³¹ FAA Exhibit 1, Item 17, page 46

³² FAA Exhibit 1, Item 17, page 46

³³ FAA Exhibit 1, Item 17, page 46-49

³⁴ FAA Exhibit 1, Item 17, page 49

³⁵ FAA Exhibit 1, Item 17, page 50

the proposed NSMTS had Grant Assurance 34, *Policies, Standards, and Specifications* applied.³⁶ The Director found that PANYNJ reasonably relied on the expertise and guidance provided through the FAA and USDA determinations and findings regarding the NSMTS's compatibility with safe air operations at LGA.³⁷ The Director also concluded that PANYNJ was also made aware of the FAA's conclusions regarding the NSMTS, which were directed to the City of New York as the proponent of the project, and those conclusions served as the foundation for PANYNJ's actions.³⁸

The Director's Determination found that PANYNJ exercised due diligence by considering the potential impact of the NSMTS on future airport plans, and that it did not unreasonably deviate from its approved Airport Layout Plan. The Director found that PANYNJ's actions with regard to the existing obstructions, and the NSMTS, were reasonable, and consistent with its grant assurance obligations.³⁹

III. PARTIES

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 (lessee).

The airport has 357,767 annual aircraft operations and has two 7,000 foot runways.⁴⁰ 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.*

Respondent

The 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).⁴¹

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

³⁶ FAA Exhibit 1, Item 17, page 52

³⁷ FAA Exhibit 1, Item 17, page 51

³⁸ FAA Exhibit 1, Item 17, page 52

³⁹ FAA Exhibit 1, Item 17, page 41

⁴⁰ FAA Exhibit 1, Item 2, Attachment C

⁴¹ FAA Exhibit 1, Item 1

LaGuardia Airport.” As a user of LaGuardia Airport, Mr. Paskar claims to be “directly affected” by the Respondent’s alleged compliance violations.⁴²

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.⁴³

IV. PROCEDURAL HISTORY AND BACKGROUND

Procedural History

On February 12, 2011, Complainants 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 Authority for allegations related to the construction of the NSMTS. The complaint alleged violations of Grant Assurances 19, 20, 21, and 34.⁴⁴

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 16.⁴⁵ Additionally, the Director determined that the City of New York is not a respondent in this case because it is not the sponsor of LaGuardia Airport.⁴⁶

On April 18, 2011, Complainants filed their amended complaint and request for investigation pursuant to 14 CFR Part 16. The Amended Complaint was again filed against the City of New York and PANYNJ for allegations related to the construction of the NSMTS and alleging violations of Grant Assurances 19, 20, 21, and 34.⁴⁷ Complainants argued 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 May 25, 2011, the Director issued the Partial Dismissal Order and Notice of Docketing.⁴⁸ The Partial Dismissal Order dismissed the City of New York from the Part 16 proceedings, referencing the Director’s dismissal letter of February 28, 2011. On July 1, 2011, Complainants petitioned the U.S. Court of Appeals for the Second Circuit for review of the May 25, 2011, FAA Order.⁴⁹

⁴² FAA Exhibit 1, Item 1

⁴³ FAA Exhibit 1, Item 1

⁴⁴ FAA Exhibit 1, Item 1

⁴⁵ FAA Exhibit 1, Item 2, Attachment A

⁴⁶ FAA Exhibit 1, Item 2, Attachment A

⁴⁷ FAA Exhibit 1, Item 1

⁴⁸ FAA Exhibit 1, Item 2

⁴⁹ FAA Exhibit 1, Item 11

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.⁵⁰ 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."⁵¹ 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.*"⁵²

On September 27, 2012, the Director's Determination was issued.⁵³

On October 25, 2012, Complainants filed Unopposed Motion for Extension of Time to File Appeal of Director's Determination.⁵⁴

On January 7, 2013, Complainants filed Second Unopposed Motion for an Extension of Time to File Appeal.⁵⁵

On February 4, 2013, the FAA granted Complainants' Second Unopposed Motion for an Extension of Time to File Appeal. Complainants' Appeal now was due on or before February 4, 2013, and the Respondents' Reply was due on or before April 4, 2013.⁵⁶

On February 4, 2013, Complainants filed their Appeal from the Director's Determination dated September 27, 2012.⁵⁷

On April 3, 2013, PANYNJ filed its Reply of the Port Authority of New York and New Jersey to the Associate Administrator for Airports from Director's Determination.⁵⁸

On April 22, 2013, in *Paskar v. United States Department of Transportation*, the U.S. Court of Appeals for the Second Circuit reviewed a letter from the FAA to the City of New York in which the FAA agreed with the Panel Report finding that the NSMTS will be compatible with safe air operations at LGA so long as it is constructed and operated in accordance with the report's recommendations. The court found that the letter did not constitute a final agency order within the meaning of 45 U.S.C § 4611(a) and dismissed the Complainants' challenge to the letter on the grounds that the letter being challenged did not order the City of New York to take any action.⁵⁹

⁵⁰ FAA Exhibit 1, Item 11

⁵¹ FAA Exhibit 1, Item 11

⁵² FAA Exhibit 1, Item 11

⁵³ FAA Exhibit 1, Item 17

⁵⁴ FAA Exhibit 1, Item 18

⁵⁵ FAA Exhibit 1, Item 19

⁵⁶ FAA Exhibit 1, Item 20

⁵⁷ FAA Exhibit 1, Item 21

⁵⁸ FAA Exhibit 1, Item 22

⁵⁹ FAA Exhibit 1, Item 23, exhibit B (*see also*, Docket No.10-4612 (2d Cir. Apr. 22, 2013))

On June 1, 2013, Complainants filed a Motion for Reconsideration or Remand of the Director's Determination of September 27, 2012, in light of the holding in *Paskar v. U. S. Department of Transportation*.⁶⁰

On June 13, 2013, PANYNJ filed its Opposition to Complainants' Motion for Reconsideration or Remand.⁶¹

On June 28, 2013, the FAA issued a Notice of Extension of Time for issuance of the Final Agency Decision to October 11, 2013.⁶²

On October 15, 2013, the FAA issued a Notice of Extension of Time for issuance of the Final Agency Decision to January 9, 2014.⁶³

On January 14, 2014, the FAA issued a Notice of Extension of Time for issuance of the Final Agency Decision to April 4, 2014.⁶⁴

On July 22, 2014, the FAA issued a Notice of Extension of Time for issuance of the Final Agency Decision to December 5, 2014.⁶⁵

On December 17, 2014, the FAA issued a Notice of Extension of Time for issuance of the Final Agency Decision to February 27, 2015.⁶⁶

On January 7, 2015, Complainants filed Motion to Supplement Record and Amend Appeal.⁶⁷

On January 28, 2015, Respondent filed Opposition to Complainants' Motion to Supplement Record and Amend Appeal and separate Motion to Supplement Record and Amend Reply.⁶⁸

On March 25, 2015, the FAA issued a Notice of Extension of Time for issuance of the Final Agency Decision to June 19, 2015.⁶⁹

On April 3, 2015, City of New York and Port Authority of New York and New Jersey submitted a Change of Address.⁷⁰

⁶⁰ FAA Exhibit 1, Item 23

⁶¹ FAA Exhibit 1, Item 24

⁶² FAA Exhibit 1, Item 25

⁶³ FAA Exhibit 1, Item 26

⁶⁴ FAA Exhibit 1, Item 27

⁶⁵ FAA Exhibit 1, Item 28

⁶⁶ FAA Exhibit 1, Item 29

⁶⁷ FAA Exhibit 1, Item 30

⁶⁸ FAA Exhibit 1, Item 31

⁶⁹ FAA Exhibit 1, Item 32

⁷⁰ FAA Exhibit 1, Item 33

Factual Background

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-OE.⁷¹

On January 28, 2005, the FAA issued its determination of Presumed Hazard for Aeronautical Study No. 2004-AEA-3159-OE. 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.*⁷²

On May 9, 2005, Mr. Tom Bock, Port Authority's General Manager for Airspace Modernization, Technology & Operational Enhancement, sent a letter to Mr. Robert Alexander, Obstruction Evaluation Specialist for the FAA, objecting to the construction of the NSMTS. In Mr. Bock's letter, he indicated 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.*⁷³

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-OE. 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

⁷¹ FAA Exhibit 1, Item 3, Exhibit C

⁷² FAA Exhibit 1, Item 1, exhibit 7

⁷³ FAA Exhibit 1, Item 1, exhibit 8

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:

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.⁷⁴*

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-OE.⁷⁵

In January 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.⁷⁶

On February 28, 2007, Mr. Tom Bock, the Port Authority's General Manager for Airspace Modernization, Technology & Operational Enhancement, sent a letter to the FAA's Airspace and Rules Branch withdrawing its petition concerning 2004-AEA-3159-OE. The letter states:

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 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.⁷⁷

⁷⁴ FAA Exhibit 1, Item 1, exhibit 9

⁷⁵ FAA Exhibit 1, Item 1, exhibit 10

⁷⁶ FAA Exhibit 1, Item 1, exhibit 5

⁷⁷ FAA Exhibit 1, Item 1, exhibit 13

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.⁷⁸

On March 12, 2007, Mr. John Dermody with the FAA's New York Airports District Office (NY ADO) sent an e-mail to Mr. Robert Alexander, FAA Obstruction Evaluation Specialist, regarding Aeronautical Study No. 2007-AEA-1163-OE. The message inquired whether "the [Flight Procedures Office (FPO)] was taking the future LGA RW 31 ILS into account during their analysis."⁷⁹

On March 23, 2007, Mr. Robert Alexander, sent an e-mail to Mr. Don Krager, with the FAA's Eastern FPO with regard to Aeronautical Study No. 2007-AEA-1163-OE. This message inquired about the lowest decision height possible for the proposed ILS approach, in comparison to the lowest decision height if the proposed facility was constructed. Mr. Don Krager responded 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.*⁸⁰

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. Mr. Skyler's letter stated:

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

⁷⁸ FAA Exhibit 1, Item 1, exhibit 22

⁷⁹ FAA Exhibit 1, Item 1, exhibit 14

⁸⁰ FAA Exhibit 1, Item 1, exhibit 15

to work-out a resolution that will enable the City to move forward with this critical facility.

...

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 operational range of the North Shore MTS's west gantry crane, which the City is willing to make, the Port Authority can install a Category I ILS at Runway 31, which will result in immediate and substantial improvements to airport operations. Our analysis also shows that establishing a Category II ILS 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.⁸¹

On May 29, 2008, Mr. Tom Bock, Port Authority's General Manager for Airspace Modernization, Technology & Operational Enhancement, sent a letter to Mr. Robert Alexander, FAA Obstruction Evaluation Specialist, rescinding the Port Authority's request for a CAT II approach for runway 31. Mr. Bock's letter states that:

To assure that our analysis was accurate, we enlisted the assistance of the FAA Flight Procedures Office in Atlanta (AVN). . . . 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.

...

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.⁸²

On September 19, 2008, the FAA issued a Determination of No Hazard to Air Navigation for the NSMTS, Aeronautical Study No. 2007-AEA-1163-OE, subject to the following condition:

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 FAA provided the following basis for its decision:

⁸¹ FAA Exhibit 1, Item 1, exhibit 17

⁸² FAA Exhibit 1, Item 1, exhibit 20

*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.*⁸³

On October 24, 2008, the FAA issued a Determination of No Hazard to Air Navigation for the NSMTS West Gantry Crane, Aeronautical Study No. 2007-AEA-1169-OE, subject to the following condition:

*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.*⁸⁴

On June 10, 2009, Mr. William Flanagan, Manager of the FAA's Eastern Region Airports Division, sent a letter to Mr. Harry Szarpanski, DSNY Deputy Commissioner. The letter indicates in part: the FAA reviewed the U. S. Department of Agriculture (USDA) letter of June 4, 2009; the FAA confirmed that the NSMTS is outside of the RPZ for LGA; the NSMTS can be an example of how a fully enclosed trash transfer station and an airport can operate in close proximity while being compatible with safe aircraft operations; USDA Wildlife Services (WS) believed that the proposed NSMTS will not cause hazardous wildlife movements within the LGA airspace if DSNY follows the operating procedures recommended in the letter; DSNY established operating procedures for the NSMTS; USDA WS determined that the NSMTS is not inherently in conflict with safe operations at LGA provided that certain recommendations are met.⁸⁵

On July 9, 2009, Mr. Harry Szarpanski, DSNY Deputy Commissioner, responded to the FAA's Eastern Region Airports Division. Concurring with the FAA's conclusion that the NSMTS "is not inherently in conflict with safe aircraft operations" at LGA and agreeing to implement the FAA's recommendations.⁸⁶

On February 2, 2010, the FAA released its final report "Evaluation of Trash-Transfer Facilities as Bird Attractants." The study's objectives were to document wildlife use of trash-transfer facilities and to determine if the facility design or on-site management practices influence the facility's attractiveness to wildlife species.⁸⁷

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."⁸⁸ The draft report was made available for public comment.

⁸³ FAA Exhibit 1, Item 1, exhibit 22

⁸⁴ FAA Exhibit 1, Item 1, exhibit 23

⁸⁵ FAA Exhibit 1, Item 1, exhibit 27

⁸⁶ FAA Exhibit 1, Item 1, exhibit 28

⁸⁷ FAA Exhibit 1, Item 1, exhibit 29

⁸⁸ FAA Exhibit 1, Item 1, exhibit 6

On September 2, 2010, the FAA and the USDA issued their joint, final report regarding the NSMTS. Section 3.7 “Determination of Findings” states:

*The technical panel determined that Alternative 3, the [NSMTS] 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 MTS facility) and the North Shore MTS as proposed under the Part 360 application.*⁸⁹

On September 3, 2010, in a letter from Mr. Harry Szarpanski, DSNY Deputy Commissioner responds to Mr. Michael O'Donnell, Director, FAA Airport Safety and Standards, the DSNY agreed with the panel report's conclusion and agreed to implement the panel's recommendations for construction and operation of the NSMTS.⁹⁰

V. APPLICABLE FEDERAL LAW AND FAA POLICY

The Federal role in civil aviation has been augmented by various legislative actions that authorize programs for providing Federal 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 and 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 fair and reasonable access to the airport.

Title 49 U.S.C. § 47101, et seq., provides for Federal airport financial assistance for the development of public-use airports under the Airport Improvement Program (AIP) established by the Airport and Airway Improvement Act of 1982, as amended. Title 49 U.S.C. § 47107, et seq., sets forth assurances to which an airport sponsor agrees as a condition of receiving Federal financial assistance. Upon acceptance of an AIP grant, the assurances become a binding contractual obligation between the airport sponsor and the Federal Government. The assurances made by airport sponsors in AIP grant agreements are important factors in maintaining a viable national airport system. Airport sponsors, who accept a grant, also accept conditions and obligations associated with the grant assurances. These include 39 specifically delineated obligations such as operating and maintaining the airport in a safe and serviceable condition, not granting exclusive rights, mitigating hazards to airspace, and using airport revenue properly.

Airport Sponsor Assurances

As a condition to providing airport development assistance under the Airport Improvement Program, 49 U.S.C. § 47107, et seq., the Secretary of Transportation and, by extension, the FAA must receive certain assurances from the airport sponsor. Section 47107(a) sets forth the

⁸⁹ FAA Exhibit 1, Item 1, exhibit 35

⁹⁰ FAA Exhibit 1, Item 1, exhibit 38

statutory sponsorship requirements to which an airport sponsor receiving Federal financial assistance must agree.

The FAA has a statutory mandate to ensure that airport owners comply with these sponsor assurances.⁹¹ FAA Order 5190.6B, *FAA Airport Compliance Manual*, provides the policies and procedures to be followed by the FAA in carrying out its legislatively mandated functions related to federally obligated airport owners' compliance with their sponsor assurances. The FAA considers it inappropriate to provide Federal assistance for improvement to airports where the benefits of such improvements will not be fully realized due to inherent restrictions on aeronautical activities.

The grant assurances raised on appeal are Grant Assurance 5, *Preserving Rights and Powers*; Grant Assurance 19, *Operation and Maintenance*; Grant Assurance 20, *Hazard Mitigation and Removal*; Grant Assurance 21, *Compatible Land Use*; and Grant Assurance 34, *Policies, Standards, and Specifications*.

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) 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 modify any outstanding rights or claims of right of others which would interfere with such performance by the sponsor. This shall be done in a manner acceptable to the Secretary.

Grant Assurance 19, Operation and Maintenance

Grant Assurance 19, Operation and Maintenance, implements 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

⁹¹ See, e.g., Federal Aviation Act of 1958, as amended and recodified, 49 U.S.C. §§ 40101, 40113, 40114, 46104, 46105, 46106, 46110; and the Airport and Airway Improvement Act of 1982, as amended and recodified, 49 U.S.C. §§ 47105(d), 47106(d), 47107(k), 47107(l), 47111(d), 47122.

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.

Grant Assurance 20, Hazard Removal and Mitigation

Grant Assurance 20, Hazard Removal and Mitigation, implements 49 U.S.C. § 47107(a)(9), and requires that the sponsor of a federally-obligated airport:

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 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, 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 that the sponsor of a federally-obligated airport:

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.

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.⁹²

Grant Assurance 34, Policies, Standards, and Specifications

Grant Assurance 34 applies to projects using AIP grant funds and requires that the sponsor of a federally-obligated airport:

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.

The 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 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 investment in civil aviation. The Airport Compliance Program does not control or direct the operation of airports. Rather, it monitors the administration of the valuable rights that 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 sets forth policies and procedures for the FAA Airport Compliance Program. It establishes the policies and procedures to be followed by FAA personnel in interpreting and administering the various continuing commitments airport owners make to the United States as a condition for receiving Federal funds or 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 the interpretation of grant assurances by FAA personnel.

⁹² See FAA Order 5190.6B, Airport Compliance Handbook, para. 20.1

The FAA Compliance Program is designed to achieve compliance with Federal obligations accepted by owners and/or operators of public-use airports developed with FAA-administered assistance. When addressing allegations of noncompliance, the FAA will make a determination of whether an airport sponsor is *currently* in compliance with the applicable Federal obligations. Consequently, the FAA will consider a successful action by the airport to cure any alleged or potential past violation of an applicable Federal obligation to be grounds for dismissal of such allegation. See Wilson Air Center v. Memphis and Shelby County Airport Authority, FAA Docket 16-99-10 (August 30, 2001) (Final Decision and Order) at 5 (upheld in Wilson Air Center, LLC v. FAA, 372 F.3d 807 (6th Cir., 2004)).

Enforcement of Airport Sponsor Assurances

Enforcement procedures regarding airport compliance matters may be found at *FAA Rules of Practice for Federally Assisted Airport Enforcement Proceedings* (14 CFR Part 16), which were last updated on September 12, 2013 (78 Fed. Reg. 56135) and became effective November 12, 2013.

The Complaint Process

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

“If, based on the pleadings, there appears to be a reasonable basis for further investigation, the FAA investigates the subject matter of the Complaint.” 14 CFR § 16.29(a). In rendering the initial determination, “the FAA may rely entirely on the complaint and the responsive pleadings.... Each 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.” 14 CFR § 16.29(b)(1).

The proponent of a motion, request, or order has the burden of proof. 14 CFR § 16.229(b). A party who has asserted an affirmative defense has the burden of proving the affirmative defense. 14 CFR § 16.229(c). This standard burden of proof is consistent with the Administrative Procedure Act (APA) and Federal case law. The APA provision at 5 U.S.C. § 556(d) states, “(e)xcept as otherwise provided by statute, the proponent of a rule or order has the burden of proof.” See also Director, Office 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). Section 16.229(b) also is consistent with 14 CFR § 16.23, which requires the Complainant to submit all documents then available to support his or her complaint.

The Director's Determination will include “findings of fact and conclusions of law, accompanied by explanations and based upon all material issues of fact, credibility of the evidence, law, and

discretion presented in the record.” 14 CFR § 16.31(b). A party adversely affected by the Director's Determination may appeal to the Associate Administrator as provided in § 16.33. 14 CFR § 16.31(c).

The Appeal Process

In cases where the complaint is dismissed after investigation, a party adversely affected by the Director's Determination may file an appeal with the Associate Administrator for Airports within 30 days after the date of service of the initial determination. 14 CFR § 16.33(b)-(c).

On appeal from a Director's Determination, the Complainants must demonstrate that the Director erred by (1) making findings of fact that were not supported by a preponderance of reliable, probative, and substantial evidence, or (2) by making conclusions of law that were not in accordance with applicable law, precedent, and public policy. 14 CFR § 16.33(e); *see also Ricks v. Millington Municipal Airport*, FAA Docket No. 16-98-19, (Dec. 30, 1999) (Final Decision and Order) at 9, 21.

Review by the Associate Administrator is limited to an examination of the Director's Determination and the administrative record upon which such determination was based. 14 CFR § 16.33(e). “Any new issues or evidence presented in an appeal or reply will not be considered unless accompanied by a petition and good cause as to why the new issue or evidence was not presented to the Director.” 14 CFR § 16.33(f).

The FAA will not consider requests for rehearing, reargument, reconsideration, or modification of a final order without a finding of good cause. 14 CFR § 16.33(i).

Section 16.247(a) of Title 14 CFR describes judicial review of the Associate Administrator's final decision and order, as provided in 49 U.S.C. § 46110 or § 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. COMPLAINANTS' MOTION FOR RECUSAL

The Complainants contend that FAA must recuse itself from deciding this matter because it cannot be an unbiased and unprejudiced adjudicator. The Complainants argue the FAA is unable to separate itself from the litigation position it has taken in a pending matter in the United States Court of Appeals for the Second Circuit.⁹³

The Complainants contend that the Director assumed certain facts (i.e., “whether the North Shore Marine Transfer Station (NSMTS) is in the Runway Protection Zone” and the legitimacy of the Panel Report) that are “part and parcel of the FAA's litigation position in 2nd Circuit Litigation.”⁹⁴

⁹³ FAA Exhibit 1, Item 21, pages 2-3

⁹⁴ FAA Exhibit 1, Item 21, pages 3-4

The evidence and record reflects that the FAA, in different administrative processes, had concluded that the NSMTS is outside the existing and ultimate RPZ multiple times. The FAA made these findings before the Complainants filed this matter under Part 16.⁹⁵

The Complainants further contend that “the Director’s unmitigated bias is shown where the determination assumes that the Panel Report carried the weight of an FAA determination, when, in fact, the FAA in the 2nd Circuit Litigation does not go that far and, in fact, argues that the Panel Report is advisory only and not an agency determination.”⁹⁶

The Complainants also argue that bias and prejudice were shown by the Director discussing that the City of New York was now a Respondent.⁹⁷ Because the issue had been resolved by the 2nd Circuit, Complainants argue there was no reason to mention it because it did not affect the matter with respect to the Port Authority.⁹⁸

Each of these issues presented by the Complainants was properly discussed in the Director’s Determination as part of the administrative record. The Director considered FAA determinations, made through different administrative processes before this Complaint, in finding the NSMTS was outside of the RPZ. The Director considered the Panel Report as an expert analysis of the wildlife hazard impact of the NSMTS on which the PANYNJ could rely. The Director was required to address the complaint against the City of New York as part of the procedural history and administrative record. The Complainants’ arguments that bias or prejudice exists, merely from an adverse finding, is without merit.

The record shows the Complainants attempted to include the City of New York as a Respondent in both of its Original and Amended Part 16 Complaints. The Complainants themselves made it part of the administrative docket for this Complaint requiring it to be addressed in the Director’s Determination. Further, the Director also showed that the City of New York, which is a non-party to this FAA administrative process because it is under no FAA obligations, agreed to implement the recommendations from the Panel Report to enhance safety at the NSMTS.

Finally, the Complainants contend that the Associate Administrator for Airports has rubber stamped 100% of the Director’s Determinations since the institution of the Part 16 regulations.⁹⁹

The Complainants are incorrect in their assertion that all appeals have been upheld by the Associate Administrator. In both the Amended Complaint and the Appeal from the Director’s Determination, the Complainants rely on a specific Part 16 case to support the foundation of their allegations of PANYNJ’s noncompliance.¹⁰⁰ However, this case had been remanded by the Associate Administrator for Airports, and the Director overturned his own initial determination and found the airport sponsor was in noncompliance with its Federal obligations. Consequently,

⁹⁵ See FAA Exhibit 1, Item 1, exhibits 22, 23

⁹⁶ FAA Exhibit 1, Item 21, page 4

⁹⁷ FAA Exhibit 1, Item 21, page 4

⁹⁸ FAA Exhibit 1, Item 21, page 4

⁹⁹ FAA Exhibit 1, Item 21, page 5

¹⁰⁰ *Town of Fairview, Texas v. City of McKinney, Texas*, FAA Docket No. 16-99-04, Director’s Determination on Remand (Jul. 26, 2000)

the Complainant's argument that there is no objective review of a Director's Determination is without merit.

Consequently, the Associate Administrator for Airports dismisses the motion for FAA to recuse itself from this matter.

VII. COMPLAINANTS' MOTION FOR RECONSIDERATION OR REMAND

The Complainants filed a Motion for Reconsideration or Remand on June 1, 2013.¹⁰¹ PANYNJ filed its Motion in Opposition to the Complainants Motion for Reconsideration or Remand on June 13, 2013.¹⁰² The Complainants argued that the U.S. Court of Appeals established that the Panel Report lacked any legal significance and cannot be legally be relied upon by anyone.¹⁰³ The Complainants further contended that, inconsistent with the Second Circuit's decision, the Director's Determination found that parties could rely on the Panel Report.

For background purposes, in *Paskar v. United States Department of Transportation*, Docket 10-4612 (2d Cir., Apr. 22, 2013), the U.S. Court of Appeals for the Second Circuit reviewed a letter from by the FAA to the City of New York stating that the FAA agreed with the Panel Report finding that the NSMTS would be compatible with safe air operations at LGA if several recommendations of the Panel were followed.¹⁰⁴ The court found that the letter did not constitute a final agency order within the meaning of 45 U.S.C § 4611(a) and dismissed the petition for review on the grounds that the letter being challenged did not order the City of New York to take any action.¹⁰⁵

The Court concluded that:

*The FAA letter and inter-agency panel report did not deny a right, impose an obligation, or have legal consequence. It was not a "final order" and we lack jurisdiction to review it. The petition for review is DISMISSED.*¹⁰⁶

The Associate Administrator concludes there is no inconsistency between the Director's Determination and the Second Circuit decision. The Director's Determination found that there were no legal obligations imposed by the Panel Report on either the City or PANYNJ. No penalty could be imposed on the City if it chose to ignore the recommendations in the Panel Report.¹⁰⁷

The Director did not conclude the Panel Report was a final agency order. Such a conclusion was not necessary for the Director to find that the PANYNJ participated in the FAA/USDA study and reasonably relied on the conclusions reached in the study concerning the NSMTS's compatibility

¹⁰¹ FAA Exhibit 1, Item 23

¹⁰² FAA Exhibit 1, Item 24

¹⁰³ FAA Exhibit 1, Item 23, page 5

¹⁰⁴ FAA Exhibit 1, Item 21, exhibit B

¹⁰⁵ FAA Exhibit 1, Item 21, exhibit B, page 17

¹⁰⁶ FAA Exhibit 1, Item 21, exhibit B, page 17

¹⁰⁷ FAA Exhibit 1, Item 11

with safe air operations at LGA.¹⁰⁸ The Complainants' argument that parties can rely only on final agency orders is without merit.

The Associate Administrator for Airports denies the Complainants' Motion for Reconsideration or Remand.

VIII. ANALYSIS AND DISCUSSION

The Complainants argue that there are "several ways in which NSMTS interferes with the safety of air operations at LGA in violation of grant assurances."¹⁰⁹ The Complainants further argue that "the Director's Determination failed to base his determination on the probative, reliable, and substantial facts and his analysis of the legal issues were not consistent with applicable precedent and policy."¹¹⁰

The Complainants' specific claims on appeal are:

- A. The Director Has Ignored the Facts of the Case By Concluding that NSMTS Is Not in the Runway Protection Zone for Runway 31 at the Airport, and therefore Erroneously Concluded that the Port Authority Has Not Violated Grant Assurances 19, 20, 21 and 34.¹¹¹**
- B. The Director Failed To Take Into Account the Fact that the Location of NSMTS at College Point Prohibits the Airport From Implementing the Long Planned and Congressionally Mandated Precision Approach for Runway 31 in Violation of Grant Assurances 19, 20, 21 and 34.¹¹²**
- C. Even If the Director Were Correct in Determining that the NSMTS Were Outside the RPZ and Did Not Conflict with the Installation of a Precision Approach, It Creates a Hazardous Wildlife Attractant and Therefore The Port Authority Is in Violation of Grant Assurances 19, 20, 21 and 34.¹¹³**
- D. The Director Erred in His Determination in Finding that the Port Authority Did Not Fail to Take "Appropriate Action" to Protect Terminal Airspace from the Creation of Airport Hazards and Incompatible Land Uses in Violation of Grant Assurances 20 and 21.¹¹⁴**

On Appeal, the Complainants argue, "*The Director...failed to take into account the Port Authority's failure to take (or even attempt to take) action to prevent the creation of a new hazard. Because the Port Authority failed to take "appropriate and reasonable action" to*

¹⁰⁸ FAA Exhibit 1, Item 17, page 49

¹⁰⁹ FAA Exhibit 1, Item 21, page 25

¹¹⁰ FAA Exhibit 1, Item 21, page 26

¹¹¹ FAA Exhibit 1, Item 21, page 26

¹¹² FAA Exhibit 1, Item 21, page 34

¹¹³ FAA Exhibit 1, Item 21, page 39

¹¹⁴ FAA Exhibit 1, Item 21, page 48

protect terminal airspace from the creation of airport hazards and incompatible land uses, it is in violation of Grant Assurance 19, 20, 21 and 34. The Director's Determination offers no reliable, probative and substantial evidence to support its factual conclusions, and the Director's Determination's legal bases are not consistent with applicable law, precedent and FAA policy."¹¹⁵

The Complainants go on to state, "One of the primary roles of the airport owner and operator is to ensure the safety of all who use the airport. Grant Assurances 19, 20, 21 and 34 enforce that duty. There can be no doubt that NSMTS, as it is currently designed and permitted, is an impediment to safety at the Airport. That was the conclusion of the FAA/USDA Panel. Panel Report, Ex.35, pp.20-22. The Port Authority has not done anything to mitigate the serious risks posed by the construction of NSMTS. Moreover, the Director has failed to acknowledge the Port Authority's duty to mitigate the risks posed by the NSMTS and raised by the Complainants in this matter."

Upon consideration of the Amended Complaint, the Director of the Office of Airport Compliance and Management Analysis determined that PANYNJ is not currently in violation of Federal obligations under Grant Assurances 5, *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. Arguments and supporting documentation submitted by the parties, which comprise the administrative record are reflected in the attached FAA Exhibit 1.

In order to assure that the Complainants' Appeal is addressed on each specific issue, the Associate Administrator for Airports will review each issue separately as submitted by the Complainants.

On appeal, the Associate Administrator for Airports upholds the Director's Determination based on each conclusion of law made in accordance with applicable law, precedent, and public policy.

It is important to note that the Complainants made no argument that the Director erred in finding the PANYNJ had not violated Grant Assurance 5, *Preserving Rights and Powers*. Also, the Complainants made no argument that the Director erred in finding that Grant Assurance 34 is not applicable because the complaint did not involve an AIP funded project. Consequently, the specific issues on appeal as they relate to Grant Assurances 5 and 34 are waived.

A. Whether The Director Has Ignored the Facts of the Case By Concluding that NSMTS Is Not in the Runway Protection Zone for Runway 31 at the Airport, and therefore Erroneously Concluded that the Port Authority Has Not Violated Grant Assurances 19, 20, 21 and 34.

The Complainants make several arguments concerning the NSMTS:

¹¹⁵ FAA Exhibit 1, Item 21, page 10

First, it is located in the RPZ for Runway 31, which not only is a safety concern, but also eliminates it from AC 150/5200-33B's reduced standards for facilities that are "fully enclosed." Second, NSMTS blocks the implementation of a precision approach on Runway 31 with lower visibility minimums, which not only is a safety concern, but also has had severe economic consequences on air traffic in the New York area. Third, NSMTS brings yet another wildlife attractant into the Airport's area of operations, further complicating a situation that is already complex and difficult to manage. Finally, the Panel Report, which the Port Authority and the Director attempt to hide behind, is flawed.¹¹⁶

The Complainants argue that PANYNJ has an obligation, under its lease, to ensure that the City does not construct any structure in the RPZ or that penetrate any surfaces, and to remove any that are in the RPZ or that penetrate any surfaces.¹¹⁷

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 LaGuardia Airport. The agreement conveys to the Port Authority the demised premises that make up LaGuardia Airport in exchange for monetary consideration. 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 avigation 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.¹¹⁸

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

¹¹⁶ FAA Exhibit 1, Item 21, page 25

¹¹⁷ FAA Exhibit 1, Item 21, page 27

¹¹⁸ FAA Exhibit 1, Item 17, page 26, citing FAA Exhibit 1, Item 1, exhibit 55

*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.*¹¹⁹

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 placed, or growth of natural objects be permitted by the City upon 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.*¹²⁰

The Director found that the Respondent has the right to prevent the establishment of any structure, facility, or natural growth located on the airport if, in the opinion of the FAA or in the reasonable opinion of the Respondent, the proposal 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.

Additionally, the Associate Administrator's review of the Amended also found that Section 21.1 is applicable. Section 21.1 states in pertinent part:

*During the term for which the Demised Premises are leased, 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, (x) 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 (y) within the boundaries of the Runway Protection Zones, as such may exist from time to time.*¹²¹

¹¹⁹ FAA Exhibit 1, Item 17, page 26, citing FAA Exhibit 1, Item 1, exhibit 55

¹²⁰ FAA Exhibit 1, Item 17, page 26, citing FAA Exhibit 1, Item 1, exhibit 55

¹²¹ FAA Exhibit 1, Item 1, exhibit 55, page 43

Although this section was not addressed by the Director, it provides the necessary guidance with respect to some of the Complainants' arguments. The Associate Administrator for Airports finds that Section 21.1 allows the area constituting the RPZ to change when necessary to comply with applicable law or FAA regulations, and does not limit the RPZ to the area described in Exhibit B-3 of the Amended Lease.¹²² As the Director found, if the FAA had found that the NSMTS was within the RPZ or otherwise constituted a hazard to air navigation, the PANJNY retained the authority to prevent its construction under the terms of its lease with the City. However, the FAA did not make that finding, thus triggering no obligation on the part of the PANYNJ or the City to prevent its construction. Thus, the Associate Administrator for Airports upholds the Director's Determination as it relates to this specific allegation concerning the lease.

1. Whether the NSMTS is located in the current RPZ.

The Complainants argue that the "*Port Authority and the FAA have on several occasions stated that the NSMTS is within the boundaries of the current RPZ.*"¹²³ The Complainants provide several exhibits supporting this argument. The Complainants contend that after the PANYNJ withdrew its Petition for Review of the FAA's Determination of No Hazard to Air Navigation, Aeronautical Study No. 2004-AEA-3159-OE, the "*Director ignored the facts that the coordinates of the NSMTS did not change enough to move the building from a position inside the RPZ to a place outside the RPZ...*"¹²⁴ The Complainants argue that the NSMTS is closer to Runway 31 than is described in the No Hazard Determination.¹²⁵ The Complainants contend that "*if NSMTS was considered by the Port Authority to be within the RPZ in its Petition for Review in 2006 and by the FAA in 2007, it also must be within the RPZ using the coordinates that the Port Authority supplied to the FAA in 2007.*"¹²⁶ The Complainants contend that neither "*the PANYNJ nor the Director offered any explanation for this discrepancy.*"¹²⁷

In its Reply to the Appeal, the PANYNJ argues that the Director made the correct determination based on the evidence in the record that the NSMTS will be outside the RPZ.¹²⁸ The Respondent contends that the Complainants rely on statements that are contradicted and superseded by later documents in the record.¹²⁹

¹²² The Complainants filed a Motion to Supplement Record and Amend Appeal with Exhibit A, the Amended Lease B-3, which identified the existing RPZ to Runway 31 at LGA on the date of the execution of the Amended Lease of November 24, 2004. The Motion was docketed on January 16, 2015. The Respondent filed its Opposition to the Complainants' Motion to Supplement Record and Amend the Appeal and additional Respondent's Motion to Supplement Record and Amend Reply docketed on January 29, 2015. The Complainants argue that the Amended Lease exhibit B-3 is controlling as defined in the Amended Lease rather than the terms that should be interpreted through the use of other documents and guidance. However, the Amended Lease Section 21.1 provides that there can be changes to the RPZs. The Complainants also previously had submitted the entire Amended Lease with all of the Exhibits attached, including Exhibit B-3. See FAA Exhibit 1, Item 1, exhibit 55. For this reason, both the Complainants' and Respondent's Motions to Supplement Record and Amend the Appeal are denied.

¹²³ FAA Exhibit 1, Item 21, page 28, citing FAA Exhibit 1, Item 1, Exhibits 8, 10, 39

¹²⁴ FAA Exhibit 1, Item 21, page 29

¹²⁵ FAA Exhibit 1, Item 21, page 30

¹²⁶ FAA Exhibit 1, Item 21, page 30

¹²⁷ FAA Exhibit 1, Item 21, page 30

¹²⁸ FAA Exhibit 1, Item 22, page 28

¹²⁹ FAA Exhibit 1, Item 22, page 29, citing FAA Exhibit 1, Item 1, Exhibits 13, 22

The record reflects that the City provided additional detailed information to the Respondent pertaining to the proposed NSMTS. The Respondent was able to determine that the proposed facility was outside of the RPZ for Runway 31 and would not present an adverse effect on air operations at LGA. The Respondent stated:

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

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 existing buildings, no longer making it the controlling obstruction.¹³⁰

Thus, the Director relied on an FAA analysis and determination that the NSMTS is not in the RPZ rather than on other statements made prior to completion of that formal analysis. The Director's finding that the Respondent exercised due diligence in determining the height and corners of the NSMTS and then reasonably withdrew its objections is supported by the record. The Director's finding of fact was based on a preponderance of evidence in the record.

Consequently, the Associate Administrator upholds the Director's finding that the record supports that the NSMTS is outside the existing RPZ.

2. Whether the NSMTS is in the Ultimate RPZ.

The Complainants argue that "[e]ven if the NSMTS is not within the current RPZ, it unquestionably is within the future planned (or "ultimate") RPZ."¹³¹ The Complainants contend that the airport's long-term plan for a Category I or II ILS would render the NSMTS in the future RPZ.¹³² The Complainants contend that the Director ignored that a precision approach would relieve congestion at LGA.¹³³

The Complainants contend that various exhibits show that PANYNJ recognized and planned that the RPZ will go out to 2500 feet consistent with FAA advisory circulars.¹³⁴ The Complainants also argue that even if the NSMTS is technically outside the RPZ, it is very close to the RPZ and should be treated as such because "safety concerns do not magically disappear once the enclosed transfer station is outside the RPZ."¹³⁵

¹³⁰ FAA Exhibit 1, Item 1, exhibit 13

¹³¹ FAA Exhibit 1, Item 21, page 30

¹³² FAA Exhibit 1, Item 21, page 30

¹³³ FAA Exhibit 1, Item 21, page 31

¹³⁴ FAA Exhibit 1, Item 21, page 32

¹³⁵ FAA Exhibit 1, Item 21, page 33

The Respondent contends that the FAA studied the feasibility of installing a glideslope antenna on Runway 31 to accommodate a Category I ILS approach but “concluded that no suitable location exists for the installation,” rendering a Category 1 approach not feasible with existing technology.”¹³⁶

The Respondent also contends that *“even if CAT I approach were feasible, a CAT II approach to Runway 31 would be infeasible irrespective of the presence of the NSMTS because of the presence of preexisting obstructions. Seven existing obstructions penetrate the 34:1 instrument approach surface to LGA Runway 31.”*¹³⁷

The Director found that the Respondent's approved ALP does not depict future plans for visibility minimums below 3/4-mile for Runway 31. Thus, the approved ALP correctly depicted the ultimate RPZ for Runway 31 to be 1,700 feet in length. The proposed NSMTS is located approximately 2,200 feet from the end of the runway. This is within FAA standards considering that the FAA and the Respondent determined that visibility minimums below 3/4mile were not feasible at LGA.

The Record shows the FAA determined that the proposed NSMTS is situated outside the ultimate RPZ for Runway 31. The Record shows that existing obstructions and ILS systems requirements prevent the establishment of a CAT II approach. The Complainants submitted a letter from the owners of one of the obstructions that suggest that its obstruction could be lowered for “significant costs, which must be reimbursed to Ferrara Bros.”¹³⁸ However, the Respondent also provided other evidence of existing obstructions and issues that would prevent a CAT II approach or visibility minimums of less than 3/4 mile, regardless of the NSMTS.¹³⁹

As discussed earlier, the Record shows the Director reasonably determined that after the City provided additional specific 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. Based upon the revised information provided by the City, a new aeronautical study was initiated by the FAA that resulted in a Determination of No Hazard to Air Navigation. Thus, the FAA confirmed that the location of the NSMTS was outside of the current and ultimate RPZ for Runway 31.

Furthermore, the Director found that although the PANYNJ was interested in having a precision instrument approach, it could not reasonably meet the technical and regulatory requirements to install a glidescope.

Consequently, the record supports the Director’s finding that the FAA determined that NSMTS is outside the current and ultimate RPZ; is not located within the PANYNJ leasehold at LGA, and also is not located on any other airport sponsor-owned properties. The record also shows that the FAA and PANYNJ studied and determined that a precision approach to Runway 31 at

¹³⁶ FAA Exhibit 1, Item 22, page 11 *citing* FAA Exhibit 1, Item 3, Attachment C

¹³⁷ FAA Exhibit 1, Item 22, pages 11-12, *citing* FAA Exhibit 1, Item 3, Attachment A

¹³⁸ FAA Exhibit 1, Item 1, exhibit 18

¹³⁹ FAA Exhibit 1, Item 3, Exhibit A

LGA could not reasonably be installed. Thus, the Complainants have not demonstrated that the Director's finding was not based on a preponderance of evidence in the record.

Thus, the Associate Administrator for Airports upholds the Director's Determination with regards to this specific issue on appeal.

3. Whether the Port Authority Has Violated Grant Assurances 19, 20, 21, and 34.

The Complainants argue that the PANYNJ's "*abject failure to keep NSMTS out of the RPZ (current and planned RPZ) or take any mitigation measures is a violation of its duties and obligations under Grant Assurances 19, 20, 21, and 34.*"¹⁴⁰

FAA policy regarding Grant Assurance 19 does not impose obligations with respect to property not owned by the airport sponsor. The Port Authority cannot be found to have violated Grant Assurance 19 because the construction of the NSMTS by the City of New York is off airport property.

As discussed above, the record supports the Director's finding that the FAA determined that NSMTS is outside the current and ultimate RPZ; not located within the PANYNJ leasehold at LGA, and also is not located on any other airport sponsor-owned properties. The record also shows that the FAA and PANYNJ studied and determined that a precision approach to Runway 31 at LGA could not reasonably be installed. Thus, the Associate Administrator for Airports cannot reverse the Director's Determination based on the record.

B. Whether the Director Failed To take into Account the Fact that the Location of NSMTS at College Point Prohibits the Airport from Implementing the Long Planned Precision Approach for Runway 31 in Violation of Grant Assurances 19, 20, 21, and 34.

The Complainants contend that "*by locating NSMTS at College Point, it will not be possible to institute a precision approach for Runway 31 with visibility minimums that can take advantage of the approach.*"¹⁴¹ The Complainants also contend that the "*FAA knew that NSMTS was a hazard to the airspace and would block the implementation of a precision approach.*"¹⁴² The Complainants state that PANYNJ has a long history of restricting new construction that limit the use of airspace around LGA including "*the PANYNJ's successful efforts with regard to the redevelopment of the historic RKO Keith movie theatre in Flushing in 2005 with regard to the redevelopment of the Flushing Municipal Parking Lot in 2006.*"¹⁴³ The Complainants contend that the PANYNJ is allowing a new obstacle to improving operational capabilities rather than eliminating them.¹⁴⁴

¹⁴⁰ FAA Exhibit 1, Item 21, page 34

¹⁴¹ FAA Exhibit 1, Item 21, page 34 *citing* FAA Exhibit 1, Item 1, exhibit 19

¹⁴² FAA Exhibit 1, Item 21, page 35

¹⁴³ FAA Exhibit 1, Item 21, page 35 *citing* FAA Exhibit 1, Item 1, exhibit 10, page 3

¹⁴⁴ FAA Exhibit 1, Item 21, page 37

The record shows that after the City submitted its initial proposal for the NSMTS, the Respondent wrote to the FAA formally objecting to the proposal.¹⁴⁵ 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.¹⁴⁶

The record also reflects 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.¹⁴⁷ The Respondent stated:

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

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 existing buildings, no longer making it the controlling obstruction.¹⁴⁸

Thus, only after the completion of its due diligence, did the Respondent withdraw its objections to the NSMTS and its petition 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, in Mr. William Flanagan's June 10, 2009, letter to Mr. Harry Szarpanski, confirmed that the location of the NSMTS was outside of the RPZ for Runway 31.

As noted above, 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."¹⁴⁹ Although the PANYNJ was interested in having a precision instrument approach, it could not reasonably meet the technical and regulatory requirements.

The record shows that the FAA determined that a precision approach to Runway 31 at LGA is not reasonably possible at the airport. Thus, the Associate Administrator for Airports cannot find any reliable evidence that PANYNJ had violated any grant assurances when it relied on the FAA determination that the NSMTS was outside of the RPZ.

¹⁴⁵ FAA Exhibit 1, Item 1, exhibit 8

¹⁴⁶ FAA Exhibit 1, Item 1, exhibit 10

¹⁴⁷ FAA Exhibit 1, Item 1, exhibit 13

¹⁴⁸ FAA Exhibit 1, Item 1, exhibit 13

¹⁴⁹ FAA Exhibit 1, Item 17, page 39 *citing* FAA Exhibit 1, Item 3, Attachment C

C. Whether the NSMTS Creates a Hazardous Wildlife Attractant and Therefore the Port Authority is in Violation of Grant Assurances 19, 20, 21, and 34.

1. Whether the Director failed to take into account that locating NSMTS at College Point fails to comply with FAA Advisory Circulars 150/5200-33B and 150/5200-34A and therefore violates grant assurances 19, 20, 21, and 34.

a. Whether the NSMTS is not a “fully enclosed” waste transfer station because it is part of a much larger garbage facility and trucks using the facility are not “enclosed.”

The Complainants contend that the NSMTS is not a “fully enclosed” waste transfer station because it is a much larger garbage facility, and trucks using the facility are not “enclosed.”¹⁵⁰ The Complainants allege that the NSMTS is located on the same City-owned lot as a garbage depot through which hundreds of trucks enter and exit every day. Complainants allege garbage trucks frequently enter the depot without first being cleaned and are serviced while the doors to the depot remain open. The Complainants contend that “*when considered in conjunction with one another, the NSMTS and the garbage depot do not constitute a fully enclosed ‘facility’ under AC 150/5200-33B.*”¹⁵¹

The Complainants also allege that “*the garbage trucks bringing refuse to NSMTS will not be ‘enclosed vehicles.’*”¹⁵² The Complainants allege that “*the City does not own ‘enclosed’ vehicles and that based on information and belief, that at least 10% of the garbage hauled to the NSMTS will be from private contractors, who most certainly will not be using enclosed vehicles.*”¹⁵³

PANYNJ responds that the Complainants arguments that the NSMTS will not be fully enclosed are based on allegations that are not supported by the record.¹⁵⁴

The Complainants’ allegations concerning the existing garbage depot were not supported by the facts in the record before the Director. Additionally, the statements may be moot as the NSMTS at issue in this Complaint is replacing by conversion to a waste containerization transfer station at the existing facility.¹⁵⁵

The report provides information that an existing transfer facility is being converted into a new NSMTS facility that is mitigating any wildlife hazards in accordance with the alternative recommendations in the Panel Report. In addition, a DSNY garage for its vehicles currently is co-located on the same property.

The Complainants’ additionally allege that “*the plans call for up to twenty unenclosed trucks, loaded with garbage and exposed garbage clinging to their sides, to queue outside NSMTS on*

¹⁵⁰ FAA Exhibit 1, Item 21, page 41-42

¹⁵¹ FAA Exhibit 1, Item 21, page 41

¹⁵² FAA Exhibit 1, Item 21, page 42

¹⁵³ FAA Exhibit 1, Item 21, page 42

¹⁵⁴ FAA Exhibit 1, Item 22, page 37

¹⁵⁵ FAA Exhibit 1, Item 1, exhibit 5, page 1

*the ramp waiting to enter the facility.”*¹⁵⁶ The Panel Report specifically stated that “*the two-lane access/egress ramp will have an inbound lane with space for queueing up to 20 collection vehicles,*” and those vehicles “*will not be allowed to idle for longer than three minutes.*”¹⁵⁷

The Director found the PANYNJ reasonably relied on the conclusions and mitigations in the FAA/USDA panel report, and the Associate Administrator concludes that finding was based on a preponderance of evidence in the record. Thus, the Associate Administrator for Airports dismisses this specific issue on Appeal.

b. Whether the NSMITS does not meet the AC 150/5200-33B’s definition of “enclosed facility” because it does not filter odors.

The Complainants allege that the NSMITS does not use a filtration system for odor control but rather “negative air pressure” and “odor neutralizer” to control odors.¹⁵⁸ The Complainants contend that this is not sufficient under AC 150/5200-33B for consideration as a “*fully enclosed trash transfer facility.*”¹⁵⁹

The Respondent contends that the Complainants’ arguments are based on a narrow interpretation of Advisory Circular 150/5200-33B.¹⁶⁰ The Respondent further argues that the Complainants ignore the evidence in the record of the various building systems which will be used to control odors.¹⁶¹

Advisory Circular 150/5200-33B states that facilities “*that do not control odors by ventilation and filtration systems (odor masking is not acceptable) do not meet the FAA’s definition of fully enclosed trash transfer stations.*”

The record includes the *January 2007, City of New York Department of Sanitation Engineering Report for the Marine Transfer Station, part 360 Permit Application* that provided there are building systems that will provide odor control. They include a dust control system suspended above both the tipping and loading floors; hoses available on all levels for dust control and water sprayed on the floor during dry periods; paved surfaces swept daily; containerizing all solid waste within 24 hours of tipping to minimize odors; all equipment washed down routinely; regular air changes to circulate air within the processing building; air deodorizing system; and all building doors kept closed when collection vehicles are not entering or exiting the building; building ventilation maintained under negative pressure, which will maintain dust and odors inside the enclosed building; HVAC system to maintain the consistent air changes per hour; and when access doors open, supplementary roof exhaust fans to maintain the buildings negative pressure.¹⁶²

¹⁵⁶ FAA Exhibit 1, Item 21, page 42

¹⁵⁷ FAA Exhibit 1, Item 1, exhibit 5, page 30

¹⁵⁸ FAA Exhibit 1, Item 21, pages 42-43, *citing* FAA Exhibit 1, Item 1, exhibit 5

¹⁵⁹ FAA Exhibit 1, Item 21, page 42

¹⁶⁰ FAA Exhibit 1, Item 22, page 37

¹⁶¹ FAA Exhibit 1, Item 22, page 38

¹⁶² FAA Exhibit 1, Item 1, exhibit 5, pages 70-72

The Panel Report described the facility as designed for indoor transfer of solid waste into sealed, cleaned leak-proof containers.¹⁶³ No solid waste will be transferred or stored outside of the building.¹⁶⁴ Finally, the Panel Report described that:

*All waste will be processed in an enclosed building that maintains negative air pressure to prevent odors from escaping while building doors are open. In addition, exhaust air from the transfer station building will be treated using an odor neutralizing system.*¹⁶⁵

The Director found that the NSMTS was compatible with safe operations at LGA because it is a fully-enclosed trash transfer station and is not on airport property or within the RPZ, and that the PANYNJ reasonably relied on the conclusions reached in the Panel Report with regard to this compatibility. Based on the record, the Complainants are not able to persuade the Associate Administrator for Airports that the facility is not fully enclosed. The technical experts who drafted the Panel Report found that the NSMTS design incorporated alternative methods of odor control (specifically use of an odor neutralizing system) for it to be considered a fully enclosed facility. FAA Advisory Circulars are advisory in nature and permit alternatives to achieve desired results, and the Panel Report experts found, after reviewing the details of the NSMTS proposal, that the facility incorporated an alternative means of odor control that sufficiently achieved the desired results of compatibility with safe airport operations. Consequently, the Complainants have not been persuasive in their argument that the Director erred in relying on the Panel Report to conclude that the NSMTS was fully enclosed.

- c. Since the publication of AC 150/5200-33B, the FAA has concluded that whether a transfer station is “fully enclosed” or not has no bearing on its attractiveness to birds.**

The Complainants argue that the NSMTS will constitute a hazardous wildlife attractant regardless of whether it is fully enclosed because there is an “existing presence of substantial numbers of birds” at the location and a recent FAA study found that whether a facility is open or closed did not make a difference in terms of the facility’s ability to attract birds.¹⁶⁶ Complainants urge the FAA to “reconsider its statement in AC 150/5200-33B that ‘fully-enclosed facilities’ are ‘generally compatible’ with safe airport operations.”¹⁶⁷

The Respondent argues that the *Evaluation of Trash-Transfer Facilities as Bird Attractants* Report is not certification policy.¹⁶⁸ The Respondent further contends that the *Evaluation Report*’s conclusion supports the Panel Report. The conclusion states in part:

Consequently, trash-transfer facilities in close proximity to airport environments should be evaluated on an individual basis to determine whether or not they are

¹⁶³ FAA Exhibit 1, Item 1, exhibit 35, page 15

¹⁶⁴ FAA Exhibit 1, Item 1, exhibit 35, page 16

¹⁶⁵ FAA Exhibit 1, Item 1, exhibit 35, page 16

¹⁶⁶ FAA Exhibit 1, Item 21, page 43-44, citing FAA Exhibit 1, Item 1, exhibit 29

¹⁶⁷ FAA Exhibit 1, Item 21, pages 43-44

¹⁶⁸ FAA Exhibit 1, Item 22, page 40

*attractive to or influence the movement patterns of wildlife and if the location of such a facility increases the risk to safe aircraft operations. Appropriate wildlife control activities could be conducted at trash-transfer facilities to reduce the wildlife attraction and thus decrease the risk of bird strikes associated with those facilities.*¹⁶⁹

The Panel Report is consistent with the conclusion of the *Evaluation of Trash-Transfer Facilities as Bird Attractants*. The Panel Report evaluated the NSMTS on an individual basis and concluded that the report's recommended design changes and operational procedures will achieve compatibility between the NSMTS and LGA with respect to wildlife and safe air operations. The City agreed to implement those recommendations in the construction and operation of the NSMTS.

The Director's Determination reasonably gave greater weight to the specific analysis of the NSMTS in the Panel Report than to general statements about such facilities in the *Evaluation* study. The Director's finding that the NSMTS, subject to recommended mitigations, does not pose a wildlife hazard is supported by a preponderance of evidence in the record.

Consequently, the Associate Administrator for Airports does not find the Complainants' argument concerning this specific issue persuasive to overturn the Director Determination.

d. Whether human factors will keep the NSMTS from being compatible with safe air operations.

The Complainants contend that enclosed facilities are “‘generally compatible’ depends on the assumption that that these facilities will [be] operated properly.”¹⁷⁰ The Complainants contend that human factors enter the equation, and the result is an increased risk to safe air operations based on photo evidence of the Staten Island Rail Transfer Station in the Panel Report and one of the Complainants' experts as well as testimony from another state's administrative process.¹⁷¹

The Respondent contends that the Complainants arguments are based on “mere speculation, not evidence.”¹⁷² The Respondent argues that the Complainants rely on mere risk of human error, a single photograph of a different DSNY transfer facility, and a description of the operations of another state's trash transfer station to support the inference that the NSMTS will not be operated as a fully enclosed facility.¹⁷³

Although the Associate Administrator understands the Complainants' argument on human factors, such speculative evidence is not reliably persuasive to conclude that PANYNJ is not in current compliance with its Federal obligations.

¹⁶⁹ FAA Exhibit 1, Item 22, page 40, *citing* FAA Exhibit 1, Item 1, exhibit 29, page 15

¹⁷⁰ FAA Exhibit 1, Item 22, page 44

¹⁷¹ FAA Exhibit 1, Item 22, pages 44-45

¹⁷² FAA Exhibit 1, Item 22, page 41

¹⁷³ FAA Exhibit 1, Item 22, page 41

Consequently, the Associate Administrator for Airports dismisses this specific issue in the Complainants' Appeal.

2. In considering whether NSMTS is incompatible with safe airport operations, the FAA must consider the totality of circumstances.

The Complainants argue that the “*Director failed to take into account that the totality of circumstances surrounding its location must be considered.*”¹⁷⁴ The Complainants contend that the NSMTS is located on the waterfront, which serves as a significant attractant for a variety of hazardous bird species, and that there are significant numbers of gulls and other large birds already visible at the NSMTS construction site.¹⁷⁵ The Complainants also contend that the Panel Report warned of significant bird activity on and near the NSMTS site and concluded that the NSMTS, as originally designed and permitted, represents a substantial risk of hazardous bird activity.¹⁷⁶ The Complainants argue that NSMTS is located “*next to mud flats, Flushing Bay, an existing garbage depot, and numerous buildings that provide opportunities to perch*” and “*would only add to the already existing risk of bird strikes.*”¹⁷⁷

In its Reply, the Respondent contends that “the Panel Report specifically took these [environmental] factors into account in reaching its conclusion.”¹⁷⁸

The Director's Determination was reasonable to consider the findings of the Panel Report in evaluating the Respondent's actions. The Panel Report specifically considered the environment of the NSMTS and LGA and recommended actions to mitigate the risk presented by wildlife. The record shows those mitigations were accepted by the City of New York and the Respondent.¹⁷⁹ The Complainants have not presented arguments on appeal that the Director's findings were not based on a preponderance of evidence in the record.

Consequently, the Associate Administrator for Airports upholds the Director's Determination.

D. Whether the Director Erred in Finding that the Port Authority Did Not Fail to Take “Appropriate Action” to Protect Terminal Airspace from the Creation of Airport Hazards and Incompatible Land Uses in Violation of Grant Assurances 20 and 21.

1. Whether the NSMTS and Ferrara Brothers' stacks are “airport hazards” under Grant Assurance 20.

The Complainants argue that the sponsor's duty to protect instrument and visual operations to the airport from airport hazards goes beyond preventing structures from being built that are “*obstructions in the aerial approaches to the airport. The sponsor also is required to prevent structures and land uses that will attract wildlife.*”¹⁸⁰ The Complainants allege that the

¹⁷⁴ FAA Exhibit 1, Item 21, page 46

¹⁷⁵ FAA Exhibit 1, Item 21, page 46

¹⁷⁶ FAA Exhibit 1, Item 21, page 46

¹⁷⁷ FAA Exhibit 1, Item 21, page 48

¹⁷⁸ FAA Exhibit 1, Item 22, page 42

¹⁷⁹ FAA Exhibit 1, Item 17, page 54, citing FAA Exhibit 1, Item 1, exhibit 38

¹⁸⁰ FAA Exhibit 1, Item 21, pages 50-51

Respondents have conceded that it has not complied with Grant Assurance 20 and 21 by not taking appropriate action to eliminate or mitigate seven other airport hazards in addition to NSMTS, including the Ferrara Brothers' stacks.¹⁸¹

The Complainants again allege that the NSMTS is within the RPZ, and that the NSMTS will attract wildlife and be a hazard to safe airport operations, despite the findings of the Panel Report.¹⁸²

The Respondent argues the record shows that the *"FAA and Panel found the NSMTS to be compatible with air operations at LGA, and that as a result of reasonable actions by the Port Authority within the scope of Port Authority capability, changes in height, location, design and operation of the NSMTS have and will be made consistent with FAA determinations to eliminate or mitigate possible hazards."*¹⁸³

The Director properly concluded that the FAA makes the final determination on matters related to airspace use and management, including safe and reasonable mitigation measures for obstacles and hazards. The Director's Determination documented that NSMTS is not located within the Port Authority's leasehold at LGA and also is not located on any other airport sponsor-owned properties. The Director found that the record shows that the FAA studied the existing obstructions and the NSMTS, and 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. The Director also found that the Respondent took reasonable actions and exercised due diligence.

Consequently, the Complainants have not made an argument that justifies reversing the Director's Determination.

2. Whether the NSMTS is an incompatible land use within the meaning of Grant Assurance 21.

The Complainants argue that *"NSMTS is not compatible with 'local airport operations' because it is an obstruction to aerial navigation, it is in the RPZ and it is a hazardous wildlife attractant."*¹⁸⁴ The Complainants again state that *"NSMTS is also not compatible with local airport operations because it interferes with the Port Authority's stated goal of implementing a precision approach in general, and CAT II approach in particular."*¹⁸⁵

The Complainants rely on *Keathy v. City of McKinney, Texas and the Collin County Regional Airport*, Docket No. 16-03-14, Director's Determination (October 13, 2004). In that case, the Director stated:

¹⁸¹ FAA Exhibit 1, Item 21, pages 51-52

¹⁸² FAA Exhibit 1, Item 21, pages 53-54

¹⁸³ FAA Exhibit 1, Item 22, page 43

¹⁸⁴ FAA Exhibit 1, Item 21, page 55

¹⁸⁵ FAA Exhibit 1, Item 21, pages 55-56

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?*¹⁸⁶

The Respondent replies that the FAA and the Panel found the NSMTS to be compatible with air operations at LGA, and that the PANYNJ took reasonable efforts to induce the DSNY to change the height, location, design and operation of the NSMTS so that the NSMTS will be constructed and operated consistent with FAA determinations and advice.¹⁸⁷ In addition, the PANYNJ contends that it participated in the FAA's Determinations of No Hazard to Air Navigation with respect to the NSMTS during which the DSNY agreed to change the height and location of the NSMTS.¹⁸⁸ The PANYNJ argues that the "description of what an airport operator 'could' do, or what 'appropriate action may also include,' is not an endorsement of the principles espoused by the Complainants, that to comply with Grant Assurance 21 every conceivable action must be taken to prevent what Complainants identify as a hazard to air navigation at LGA."¹⁸⁹

The Director found that the Respondent passed both prongs of the *Keathy* test in determining whether an airport sponsor is in compliance with Grant Assurance 21.

The record shows that the City of New York is the owner of the land and NSMTS. The City is not the airport sponsor. PANYNJ does not have jurisdiction over the land upon which the NSMTS is being constructed. The Director also determined that PANYNJ had 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 that would interfere with its use for airport purposes. The record again shows that the FAA ultimately determined that the proposed NSMTS is located outside of the existing and ultimate RPZ for Runway 31. Also discussed previously, the record shows that the Respondent took reasonable and appropriate actions to prevent the construction of the NSMTS after the FAA issued a notice presuming it was a hazard to air navigation, and that the Respondent also took appropriate action to ensure the NSMTS's compatibility with safe air operations at LGA.

Consequently, the Associate Administrator for Airports concludes that the Director's finding that Respondent's actions with respect to the NSMTS were reasonable under Grant Assurance 21 is supported by a preponderance of evidence in the record.

3. Whether the Port Authority has not taken "appropriate action" to ensure that the terminal airspace will be protected and therefore failed to comply with both Grant Assurances 20 and 21.

¹⁸⁶ See, [*Keathy v. City of McKinney, Texas and the Collin County Regional Airport*, FAA Docket No. 16-03-14, Director's Determination, page 23]

¹⁸⁷ FAA Exhibit 1, Item 22, page 43

¹⁸⁸ FAA Exhibit 1, Item 22, page 44

¹⁸⁹ FAA Exhibit 1, Item 22, page 47

- a. Whether the Director failed to consider the fact that the Port Authority failed to enforce the lease provision that prohibits the city from building in the Runway Protection Zone or any obstruction or hazards to air navigation.**

The Complainants argue that “*the most important weapon that the Port Authority has in its arsenal is its lease with the City of New York*” because “*the City specifically agreed in its lease with the Port Authority that it will not erect any obstructions or hazards to air navigation, erect any structures in the RPZ or erect any structure that penetrates the surfaces.*”¹⁹⁰ The Complainants contend that the NSMTS location was meant to be included in the area covered by the prohibitions contained in the Lease and that PANYNJ had the authority to stop the construction of the NSMTS and failed to do so.¹⁹¹

The Director found that under the Amended and Restated Agreement of Lease of the Municipal Air Terminals, the PANYNJ “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.”¹⁹²

The record also shows the FAA conducted an obstruction evaluation of the proposed NSMTS on two separate occasions, and the FAA issued two No Hazard Determinations. The record shows PANYNJ opposed both FAA obstruction evaluations of the proposed NSMTS. 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. The record also showed 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 FAA/USDA panel of experts 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.

The record shows that the FAA studied the existing obstructions and the NSMTS, and that the FAA, not the PANYNJ, made the suggestion to the City of New York, which agreed to implement the Panel Report’s proposed mitigation measures in order to provide an acceptable level of safety for air operations at LGA. Furthermore, the documentation for lower minimums for a precision approach for Runway 31 was considered by PANYNJ. PANYNJ along with the FAA determined that there were a number of obstacles that were already in the approach to Runway 31. The PANYNJ’s approved Airport Layout Plan (ALP) depicts the ultimate RPZ to be 1,700 feet in length and that the visibility minimums below 3/4 mile are not feasible due to the number of obstacles.

As the Director found, the lease terms did not require the Respondent to act because the FAA found the NSMTS did not pose a hazard to air navigation, and PANYNJ was reasonable to rely

¹⁹⁰ FAA Exhibit 1, Item 21, pages 59-60

¹⁹¹ FAA Exhibit 1, Item 21, page 60

¹⁹² FAA Exhibit 1, Item 17, page 27

on that determination after exercising due diligence in confirming the determination. The Associate Administrator concludes that the Director's findings were based on a preponderance of evidence in the record.

b. Whether the Port Authority failed to require an avigation easement such that NSMTS would not penetrate the 34:1 surface.

The Complainants argue that the Port Authority did not seek an avigation easement from the City of New York for the airspace above NSMTS, such that it would not penetrate the 34:1 surface or any other surface in the departure or approach areas for Runway 31.¹⁹³ The Complainants contend that under Advisory Circular 150/5300-13, when an airport sponsor cannot obtain fee simple in the RPZ, that airport operators obtain avigation easements, not only for the RPZ but for all areas in the approach and departure surfaces.¹⁹⁴

The Associate Administrator for Airports has previously found that the FAA had determined that the NSMTS is outside the existing and ultimate RPZ of LGA Runway 31 in a separate FAA administrative process.¹⁹⁵ These findings are not reviewable in this Part 16. Consequently, no further discussion on this specific issue on appeal will be considered.

c. Whether the Port Authority should not have withdrawn its Petition for Review.

The Complainants argue that the Respondent should not have withdrawn its Petition for Review based on a number of other issues in the FAA's Determinations of No Hazard that it had raised that went unanswered. The Complainants argue that these issues are significant enough for the Port Authority to have continued to support its Petition for Review. The Complainants argue that none of these issues have been resolved and the Director did not address them in his Determination.¹⁹⁶

The Associate Administrator for Airports finds that three determinations that the proposed NSMTS would not be a hazard to air navigation pursuant to 14 CFR § 77.35 are final agency actions and are outside this Part 16 proceeding. The Complainants previously have been advised that such challenges are set forth in Subpart D of Part 77 of Title 14 of the Code of Federal Regulations and are outside the scope of Part 16.

Consequently, this specific issue on appeal is rejected.

d. Whether the Port Authority should have failed to object to the Panel Report.

The Complainants contend that the Port Authority should have objected to the Panel Report because "*it does not take into account the synergistic construction of the NSMTS would have on the already significant bird strike issue at LaGuardia.*"¹⁹⁷ The Complainants also contend that

¹⁹³ FAA Exhibit 1, Item 21, pages 60-61

¹⁹⁴ FAA Exhibit 1, Item 21, page 60

¹⁹⁵ See, FAA Exhibit 1, Item 17, page 38 *citing* FAA Exhibit 1, Item 1, exhibit 20

¹⁹⁶ FAA Exhibit 1, Item 22, page 62

¹⁹⁷ FAA Exhibit 1, Item 22, pages 63-64

the Port Authority biologist's participation on the panel did not equate with her support of the panel's conclusions, and the Complainants allege that possibility was ignored by the Director.¹⁹⁸ The Complainants argue that by failing to object to the Panel Report, the Port Authority failed in its duty to protect LaGuardia from an airport hazard and an incompatible land use.¹⁹⁹ Finally, the Complainants argue that PANYNJ's reliance on the Panel Reports mitigation measures does not "protect itself from violations of the Grant Assurances."²⁰⁰

The record shows that the FAA advised 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 16.²⁰¹ The Director relied on the Complainants statements that "*the amended complaint does not attack the validity of the Panel Report.*"²⁰²

The record shows that the Complainants provided public comments to the draft report that were incorporated into the final Panel Report. However, throughout the Complainants' Appeal, there are several examples of attacks on the validity of the Panel Report.²⁰³ This is not the appropriate forum to question the validity of the Panel Report. Consequently, the Associate Administrator for Airports concludes these specific issues are outside the purview of the Part 16 process and dismisses them.

IX. CONCLUSION

The FAA's role in this Appeal is to determine whether the Director erred in findings of fact or conclusions of law in issuing the Director's Determination. The Associate Administrator addressed the issues raised by the Complainants and finds that the Director has not erred.

Specifically, upon an appeal of a Part 16 Director's Determination, the Associate Administrator must determine whether (a) the findings of fact made by the Director are supported by a preponderance of reliable, probative, and substantial evidence, and (b) each conclusion of law is made in accordance with applicable law, precedent, and public policy. 14 CFR § 16.33(e); *see, e.g., Ricks v Millington Municipal Airport*, FAA Docket No. 16-98-19 (December 30, 1999) (Final Decision and Order, page 21).

In arriving at a final decision on this Appeal, the FAA has reexamined the record, including the Director's Determination, the administrative record supporting the Director's Determination, the Appeal and Reply submitted by the parties, and applicable law and policy. Based on this reexamination, the Associate Administrator concludes that the Director's Determination is supported by a preponderance of reliable, probative, and substantial evidence, and is consistent with applicable law, precedent, and FAA policy. The Appeal does not contain persuasive

¹⁹⁸ FAA Exhibit 1, Item 22, page 64

¹⁹⁹ FAA Exhibit 1, Item 22, page 64

²⁰⁰ FAA Exhibit 1, Item 22, Page 65

²⁰¹ FAA Exhibit 1, Item 17, page 34, *citing* FAA Exhibit 1, Item 2, Attachment A

²⁰² FAA Exhibit 1, Item 17, page 34

²⁰³ *See* FAA Exhibit 1, Item 22, pages 4, 10, 22, 23

arguments sufficient to reverse any portion of the Director's Determination or to reach a conclusion that the FAA should be recused from deciding this Appeal.

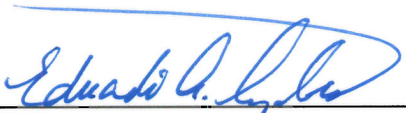
The Associate Administrator affirms the Director's Determination. This decision constitutes the final decision of the Associate Administrator for Airports pursuant to 14 CFR § 16.33(a).

ORDER

ACCORDINGLY, it is hereby ORDERED that (1) the Director's Determination is affirmed, and (2) the Appeal is dismissed, pursuant to 14 CFR § 16.33.

RIGHT OF APPEAL

A party to this decision disclosing a substantial interest in the Final Decision and Order of the Federal Aviation Administration may file a petition for review pursuant to 49 U.S.C. § 46110, in the United States Court of Appeals for the District of Columbia Circuit or in the Court of Appeals of the United States for the Circuit in which the person resides or has its principal place of business. The petition must be filed not later than 60 days after a Final Decision and Order has been served on the party. 14 CFR § 16.247(a).



Eduardo A. Angeles
Associate Administrator
for Airports

June 17, 2015
Date