UNITED STATES DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION
WASHINGTON, DC

Walker AG Supply LLC and Midwest Spray Service LLC **Complainants** **v.** **Wahoo Municipal Airport and Wahoo Airport Authority** **Respondents**	**Docket No. 16-14-08**

ASSOCIATE ADMINISTRATOR FOR AIRPORTS

FINAL AGENCY DECISION AND ORDER

I. INTRODUCTION

This matter is before the Federal Aviation Administration Associate Administrator for Airports on appeal (FAA Exhibit 37)[1] filed on January 3, 2018, by Walker AG Supply LLC, Walker Luedtke, Midwest Spray Service, and Brad Gage (collectively, Walker)[2] appealing the Director's Determination issued on December 6, 2017. (FAA Exhibit 36.)

The issues on appeal include whether the Wahoo Airport Authority (Wahoo) violated certain Federal obligations, including grant assurances and statutes, when Wahoo denied Walker's application to operate at the Wahoo Municipal Airport (AHQ)[3]. (FAA Exhibit 37, p.11 and FAA Exhibit 39, p.16.) Walker asks the Associate Administrator to find Wahoo in violation of their grant assurances and asserts that Wahoo's Minimum Standards[4] are arbitrary and unreasonable.

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[1] FAA exhibit citations are to the Index of Administrative Record carried forward from the Director's Determination, supplemented by this Decision, and attached to this Order.

[2] The complaint was originally filed by Walker AG Supply LLC, Midwest Spray LLC, and Better Airports LLC. The Director dismissed Better Airports LLC as a complainant due to standing. In their appeal the Complainants add Walker Luedtke and Brad Gage in the caption. As these two individuals appear to be the principals of their respective companies they are added to the list of Complainants.

[3] The FAA uses a three to five-character alphanumeric code to identify aviation related facilities in the United States. The FAA identifier for the Wahoo Municipal Airport is AHQ.

[4] Federally obligated airports have the option to establish minimum standards for entities providing commercial aeronautical services to the public at the airport. The FAA's Advisory Circular (AC), *Minimum Standards for Commercial Aeronautical Activities,* defines and provides guidance for

(FAA Exhibit 37, p.32.) In response, Wahoo states that the appeal provides no basis for reversing the Director's Determination, and the determination should be affirmed. (FAA Exhibit 39, p.17.)

The Associate Administrator concludes that the Director's Determination is supported by a preponderance of reliable, probative, and substantial evidence, and is consistent with law, precedent, and the FAA policy. The Director's Determination is affirmed.

II. THE PARTIES

A. Respondent

AHQ is a public-use general aviation airport located in Wahoo, Nebraska, that is owned and operated by Wahoo. As a condition of receiving Federal funding, the airport must comply with the FAA sponsor grant assurances and related Federal law. The planning and development of AHQ 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 USC § 47101, *et seq*. Since 1985, Wahoo has accepted $4,343,081 in Federal AIP grants for AHQ. (FAA Exhibit 23.)

B. Complainants

Walker AG Supply LLC is a commercial aerial agricultural operator owned by Mr. Walker Luedtke. It has operated at AHQ periodically since 2008. (FAA Exhibit 37, p.7.) Midwest Spray Company LLC is also a commercial aerial agricultural operator having operated periodically at AHQ since 2008, whose president and owner is Mr. Brad Gage. (FAA Exhibit 1, p.15.)

The Director of the FAA Office of Airport Compliance and Management Analysis (Director) issued a Director's Determination finding that Better Airports LLC and its owner, Mr. William Foster, did not have standing as complainants, in that no evidence was provided to prove that they "have been substantially and directly affected by the allegations of the Respondents' noncompliance." (FAA Exhibit 36, p.10.) However, the Director allowed Better Airports to continue to represent the named Complainants as their Agent. Because Walker has not challenged the Director's ruling regarding Better Airports' standing and representation of the other Complainants, the Associate Administrator will not address the Director's finding that Better Airports lacks standing or that it may represent the other two Complainants. (*Cf., Bombardier Aerospace Corp, et. al* v. *City of Santa Monica*, FAA Docket 16-03-11, Director's Determination, p.1, fn.1, and p.22 (January 3, 2005) and *NBAA, et.al.*, v. *City of Santa Monica*, FAA Docket 16-14-04, Final Agency Decision, p.2 (August 15, 2016)).

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airports developing minimum standards: "The airport sponsor of a federally obligated airport agrees to make available the opportunity to engage in commercial aeronautical activities by persons, firms, or corporations that meet reasonable minimum standards established by the airport sponsor. The airport sponsor's purpose in imposing standards is to ensure a safe, efficient and adequate level of operation and services is offered to the public. Such standards must be reasonable and not unjustly discriminatory." (AC No: 150/5190-7, *Minimum Standards for Commercial Aeronautical Activities*, August 28, 2006, Section 1. Minimum Standards, paragraph 1.1.)

III. SUMMARY OF THE DIRECTOR'S DETERMINATION

On December 6, 2017, the Director found Wahoo was not in violation of Federal law or its federal grant obligations. (FAA Exhibit 36.)[5] The Director found that the Complaint contained repetitious and unsubstantiated allegations of the airport sponsor's Federal obligations. (FAA Exhibit 36, p.9.) He also found that contrary to Walker's argument, Walker had to meet the burden of proof to prevail and that Walker had failed to meet this burden of proof. (FAA Exhibit 36, p.9.) The Director found that Wahoo was not in violation of the grant assurances as alleged by Walker. (FAA Exhibit 36, p.21.)

IV. PROCEDURAL HISTORY

On September 22, 2014, Walker filed a formal Part 16 Complaint (FAA Exhibit 1)[6] that was docketed on October 27, 2014. (FAA Exhibit 2.) On December 22, 2014, Wahoo filed its Answer. (FAA Exhibit 10.) On January 4, 2015, Walker filed a Reply (FAA Exhibit 13), and on January 20, 2015, Wahoo filed a Rebuttal. (FAA Exhibit 15.) On December 6, 2016, the Director issued a Director's Determination. (FAA Exhibit 36.) On January 3, 2017, Walker filed an appeal brief (FAA Exhibit 37) and a separate motion to supplement. (FAA Exhibit 38.) Wahoo filed an answer to the appeal on January 23, 2017. (FAA Exhibit 39.)

V. BACKGROUND

In 2008, Wahoo considered allowing commercial aerial agricultural application operations at AHQ. (FAA Exhibit 10, p.2.) In 2011, Wahoo authorized Walker to operate at AHQ under five conditions: operating at the end of a taxi-lane; using a portable containment pad; keeping its trucks on the grass and not the taxiway; operating with no more than two aircraft; and ensuring the aircraft have and use radios. (FAA Exhibit 10, p.3.) Due in part to Walker's alleged non-compliance with these conditions, Wahoo adopted Minimum Standards on March 12, 2012, for all commercial operators to use at AHQ. (FAA Exhibit 1, pp.709-721.) The Minimum Standards required commercial aerial application operators to have aircraft parking and storage and a permanent containment spill pad. (FAA Exhibit 1, p.718.) It also required operators to comply with all FAA and Department of Agriculture regulations, as well as any requirements specified in the agreement between the Operator and the Authority. (FAA Exhibit 1, p.718.) The Minimum Standards did not include provisions for itinerant commercial aerial application operators.

On March 19, 2012, Wahoo received applications for commercial aerial application operations from Storm Flying Service and Frontier Coop, which Wahoo approved. (FAA Exhibit 32.) On

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[5] The Director's findings also included recommendations that AHQ and Wahoo should follow. (FAA Exhibit 36, p. 22.) Although the Director labeled these as "corrective actions" it does not appear that the Director intended to impose a Corrective Action Plan upon Wahoo in that such actions were not included in the Order, nor were ramifications specified for non-implementation as those contained in 14 CFR §16.109(c), (d), or (f.) Further, the parties have not challenged the corrective actions in their respective appeal and answer. Accordingly, the Associate Administrator will not address the concerns and need for corrective action listed by the Director.

[6] Walker's Complaint contains 932 pages. The Associate Administrator concludes that the Complaint lacks the "conciseness" required by 14 CFR §16.23(b)(3.), and could have been dismissed for this reason.

June 1, 2012, Better Airports, on behalf of Walker, filed a Part 13 Informal Complaint alleging Wahoo's violations of their grant assurances. (FAA Exhibit 1, p.37.) In July 2012, Walker requested permission to operate at AHQ as itinerant aerial application operators.[7] (FAA Exhibit 1, p.249.) On July 18, 2012, Wahoo denied Walker's application because there was no reference in Walker's application about complying with the Aerial Applications Operation as defined in Article Nine of the Minimum Standards, and there was not adequate space at AHQ to accommodate its desired aircraft and support vehicles. (FAA Exhibit 1, pp.295-296.) On October 4, 2012, the FAA Central Region Airports Division found that Wahoo was in compliance with its federal obligations and dismissed Walker's Part 13 Informal Complaint. (FAA Exhibit 5, Item 1.)

In November 2012, Walker complained to Wahoo that Wahoo's treatment of Storm Flying Service was in violation of the AHQ Minimum Standards and Walker asked Wahoo to reconsider Wahoo's decision not to allow itinerant agricultural aerial operations at AHQ. (FAA Exhibit 10, Item 4.) On January 7, 2013, Storm Flying Service and a board member of Wahoo obtained the Coranco Great Plains' report finding Storm Flying Service essentially in compliance with its regulatory requirements. (FAA Exhibit 10, Item 34.)

V APPEALING THE DIRECTOR'S DETERMINATION

A party adversely affected by the Director's Determination may file an appeal with the Associate Administrator within 30 days after the date of service of the initial determination (14 CFR §16.33(c).) The Associate Administrator does not consider new allegations or issues on appeal unless finding good cause to do so (14 CFR §16.33(f).)
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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. (*See, Ricks* v. *Millington Municipal Airport*, FAA Docket No. 16-98-19, Final Decision and Order, p.21 (Dec. 30, 1999)). On appeal, the Associate Administrator will consider any issues accepted in the Director's Determination using the following analysis:

1. Are the findings of fact each supported by a preponderance of reliable, probative, and substantial evidence contained in the record?
2. Are conclusions made in accordance with law, precedent, and policy?
3. Are questions on appeal substantial?
4. Have any prejudicial errors occurred? (14 CFR §16.33(e))

VI. ISSUES ON APPEAL

The Associate Administrator has identified the following issues to be reviewed on Appeal:

Issue 1 - Whether the new evidence presented in Walker's motion to supplement complies with the rules and is proper for consideration in the Associate Administrator's review.

[7] Walker had previously operated at AHQ less than 14 days in 2011. (FAA Exhibit 1, p.11.) It does not appear that Walker was "based" at AHQ during this time, or at any subsequent time and, therefore, was itinerant.

Issue 2 - Whether the Director was correct in finding that Wahoo did not violate Grant Assurance 22, *Economic Nondiscrimination*, when Wahoo denied Walker's application to base Walker's aerial spraying operation at AHQ and when Wahoo failed to amend its Minimum Standards to allow itinerate operations at AHQ.

Issue 3 - Whether the Director was correct in finding that Wahoo did not violate Grant Assurance 23, *Exclusive Rights*, when Wahoo allowed Jared Storm and Storm Flying Service, and Frontier Coop to operate at AHQ while denying Walker such right, and in failing to lease the EAA hangar[8] to Walker.

Issue 4 - Whether the Director was correct in finding that Wahoo did not violate Grant Assurance 24, *Fee and Rental Structure*, when Wahoo charged different fees for itinerate and non-itinerate operations, when it did not lease the EAA hangar to Walker and/or when it allowed non-aeronautical items to be stored in hangars.

VII. ANALYSIS AND DISCUSSION

Walker's appeal and brief fail to analyze the issues accepted in the Director's Determination using the requirements contained in 14 CFR §16.33(e.) Walker's appeal does not challenge the Director's Determination by arguing that the findings of fact are not each supported by a preponderance of the reliable, probative, and substantial evidence contained in the record. He does not challenge whether the Director's conclusions were made in accordance with law, precedent, or policy. He does not submit any substantial questions on appeal nor does he assert that prejudicial errors occurred. Walker simply repeats his arguments contained in his complaint and reply. Walker's appeal brief states, "In this appeal we will *again* provide [conclusions] each supported by . . . evidence that is contained in the record in the Informal Complaint, Formal Complaint and Complainants Reply [*sic*]." (emphasis added) (Exhibit 37, p.1.)

Walker's reiteration of his previously presented arguments again addresses three of the eleven grant assurances contained in his complaint. The grant assurances with which Walker asserts Wahoo lacks compliance are Grant Assurance 22, *Economic Nondiscrimination*; Grant Assurance 23, *Exclusive Rights*; and Grant Assurance 24, *Fee and Rental Structure*.[9]

Regarding the reliability of the evidence contained in Walker's 932-page Complaint, 528-page Reply, 33-page Appeal, and 20-page motion to supplement the appeal, the Associate Administrator finds that many documents within Walker's pleadings lack credibility. Many of Walker's exhibits of photographs, diagrams, and voice recordings are not labeled, dated,

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[8] The "EAA hangar" appears to be named as such because the EAA leased the hangar from 2009 to High Planes Aviation until April 2014 when it became the AHQ maintenance equipment storage facility.

[9] While Walker fails to satisfy the regulatory requirements of 14 CFR §16.33(e), Walker seeks an appeal of the Director's Determination arguing now that 3 of the 11 grant assurances were violated and he reiterates his arguments in support thereof. Given the *pro se* status of the Complainants, the Associate Administrator will address whether the Director was correct in finding no violations of Grant Assurance 22, *Economic Nondiscrimination*; Grant Assurance 23, *Exclusive Rights*; and Grant Assurance 24, *Fee and Rental Structure*.

verified, or explained. (*See e.g.*, FAA Exhibit 1, pp.373, 374, 375, 381, 382, 385, 386, 388 - 391, 395 - 398, 470, and 509-510.) The Associate Administrator finds it difficult to determine the reliability of this evidence. The Director also questioned the reliability of Walker's evidence. For example, the Director found that evidence did not exist to prove that the Storm Flying Service AG hangar was being used primarily for non-aeronautical use. (FAA Exhibit 36, p.19.) The Director also faulted Walker for using its own estimates for traffic counts as opposed to more accurate data found in, for example, the FAA Form 5010. (FAA Exhibit 36, p.19.) The Director's findings must be based upon a preponderance of reliable, probative, and substantial evidence contained in the record. Based upon the unreliable evidence presented by Walker, the Associate Administrator concurs with the Director's findings.

The Associate Administrator reviewed Walker's specific arguments it presents again on Appeal and determined that four separate issues exist. These are discussed below.

Issue 1 - WHETHER THE NEW EVIDENCE PRESENTED IN WALKER'S MOTION TO SUPPLEMENT COMPLIES WITH THE RULES AND IS PROPER FOR CONSIDERATION IN THE ASSOCIATION ADMINISTRATOR'S REVIEW.

Walker asks in a separately filed Motion to Supplement the appeal, dated January 3, 2018, that it be allowed to add five documents to the record. (FAA Exhibit 38.) Guidance for consideration of new evidence is contained in 14 CFR §16.33(f) that states:

> Any new issues or evidence presented in an Appeal or Reply will not be considered unless accompanied by a petition and good cause found as to why the new issue or evidence was not presented to the Director. Such a petition must:
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> (1) Set forth the new matter;
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> (2) Contain affidavits of prospective witnesses, authenticated documents, or both, or an explanation of why such substantiation is unavailable; and
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> (3) Contain a statement explaining why such new issue or evidence could not have been discovered in the exercise of due diligence prior to the date on which the evidentiary record closed. (14 CFR §16.33(f))

The documents consisting of 15 pages Walker submits include:

1. Wahoo Airport Authority Approved Meeting Minutes dated July 17, 2009;
2. Wahoo Airport Authority Approved Meeting Minutes dated February 8, 2010;
3. Wahoo Airport Authority Approved Meeting Minutes dated March 8, 2010;
4. Frontier Cooperatives Aerial Developments Layout Plan dated February 13, 2012; and
5. E-mail from Randy Stranberg to Melissa Harrell dated February 29, 2012.

New allegations or issues may not be presented on appeal unless the regulatory exceptions are met. 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. *Airborne Flying service, Inc.*, v *City of Hot Springs, Arkansas*, FAA Docket No 16-07-06, Final Decision and Order, p.14 (May 3, 2008). Walker's Motion does not include a petition containing affidavits of prospective witnesses, authenticated documents, or both, or an explanation of why

such substantiation is unavailable. The Motion states that this information "was not available to the complainants when they filed their Initial Formal complaint or the Complaints [*sic*] reply." (FAA Exhibit 38, p.2.) This statement does not explain why such new evidence could not have been discovered in the exercise of due diligence prior to the date on which the evidentiary record closed – only that it was simply not available.[10] The Associate Administrator disagrees. The Wahoo Airport Authority Approved Meeting Minutes are documents contained in a public record and can be found in the City Offices.[11] The minutes predate the Complaint and were conclusively available to Walker at the time Walker filed its Complaint.

Further, the Associate Administrator agrees with Wahoo's claim that it is inappropriate for Walker to use these documents in violation of the court order issued in the matter of *GFG Ag Services, et al* v. *Airport Authority of the City of Wahoo*, Case No. CI 15-276 in the District Court of Saunders County, Nebraska. While Walker was not a party to that suit it should have been evident that this was a tainted source ergo the Bates stamp. Walker made no explanation of the source of these documents (contrary to 14 CFR §16.33(f)(3)) indicating why Walker used documents that were prohibited from disclosure. The Associate Administrator will not condone such practice without an adequate explanation why the prohibited documents may be used. Moreover, even if such an explanation was provided, we would still be disinclined to grant the motion based on the failure to meet the regulatory exceptions discussed above.

Walker's Motion violates two of the three regulatory requirements necessary for the introduction of new material under 14 CFR 16.33(f.) As such, the Associate Administrator will not consider the evidence presented in Walker's motion, and Walker's Motion to Supplement the Appeal is denied.

Issue 2- WHETHER THE DIRECTOR WAS CORRECT IN FINDING THAT WAHOO DID NOT VIOLATE GRANT ASSURANCE 22, *ECONOMIC NONDISCRIMINATION*, WHEN WAHOO DENIED WALKER'S APPLICATION TO BASE WALKER'S AERIAL SPRAYING OPERATION AT AHQ AND WHEN WAHOO FAILED TO AMEND ITS MINIMUM STANDARDS TO ALLOW ITINERATE OPERATIONS AT AHQ.

Wahoo denied Walker's itinerate aerial spraying operation application to be based at AHQ because Walker did not have a hangar to store his aircraft or a containment pad to prevent the spread of spills. (FAA Exhibit 39, p.40.) Storage of aircraft used in agricultural operations and the use of a containment pad for agricultural operations are required by AHQ Minimum Standards. (FAA Exhibit 1, p.718.) Walker wanted Wahoo to build or provide a hangar for its operations, arguing that neither Walker nor others similarly situated could afford to spend $500,000 to build a hangar necessary to comply with the Minimum Standards. (FAA Exhibit 37, p.27.) Walker's application to operate at AHQ was denied because Walker "never proposed utilizing a permanent containment pad as required by the Minimum Standards nor was he willing

[10] Even though, Walker appears to submit the appeal brief and motion to supplement without the assistance of a representative or counsel. Acting *pro se* does not alleviate the requirement to follow the *Rules of Practice for Federally-Assisted Airport Enforcement Proceedings*, 14 CFR §16.1 *et. seq. Also see,* 78 Fed.Reg. 56135, 56137 (September 12, 2013).

[11] Nebraska Code, Chapter 32, Section 32.06 provides that "minutes shall be public records and open to public inspection during normal business hours."

to invest in a building suitable for his aircraft. The available hangar space he claims he could have leased from [Wahoo] in all instances was too small for his aircraft." (FAA Exhibit 10, p.16.) Wahoo allowed Storm Flying Service and Frontier Coop to operate at AHQ because they had adequately sized hangars and containment pads necessary to comply with the Minimum Standards. (FAA Exhibit 39, p.9.) Wahoo's allowing Storm Flying Service and Frontier Coop to operate at AHQ did not constitute economic discrimination against Walker. Walker had the same opportunity as Storm Flying Service and Frontier Coop to build a hangar and containment pad suitable for its operation. Wahoo offered to lease land to Walker for the purpose of building a hangar to house Walker's agricultural application aircraft and a suitable containment pad. (FAA Exhibit 10, p.16.) However, Walker's applications did not propose to lease AHQ property to build a hangar or comply in any other manner with the Minimum Standards. The Associate Administrator affirms the Director's finding that Wahoo did not discriminate against Walker when Wahoo denied Walker's application to operate at AHQ because of Walker's lack of compliance with the Minimum Standards.

Walker argues Wahoo's Minimum Standards should allow itinerant operations at AHQ that would put itinerant operators on an equal footing with permanent based operators. (FAA Exhibit 37, p.21.) Walker argues that it is unreasonable for Wahoo to require itinerant aerial ag operators to house their aircraft in a hangar, and if there are none available, to construct a hangar in order to meet the Minimum Standards. (FAA Exhibit 37, p.24.) Walker argues that Wahoo's intention in requiring ag operators to store their aircraft in hangars is not safety related. (FAA Exhibit 37, p.24.) Wahoo answers that safety is the objective in requiring ag operators to store their aircraft in hangars and that this position is supported by state regulatory requirements (FAA Exhibit 39, p.15) and FAA guidance. (FAA Exhibit 39, p.15; and FAA Order 5190.6B *Airport Compliance Manual*, September 30, 2009, section 8-8.)

Wahoo's adoption of its Minimum Standards with these requirements is also consistent with the FAA Advisory Circular No 150/5190-7, *Minimum Standards for Commercial Aeronautical Activities*, August 28, 2006, sections 1.2.b. and d.(2.) The Advisory Circular states, "Under certain circumstances, an airport sponsor could deny airport users the opportunity to conduct aeronautical activities at the airport for reasons of safety and efficiency. A denial based on safety must be based on evidence demonstrating that safety will be compromised if the applicant is allowed to engage in the proposed aeronautical activity." (FAA AC 150/5190-7, section 1.2.b.) Wahoo based its denial on the evidence that it is a safe practice to store agricultural chemical application aircraft in hangars. (FAA Exhibit 10, p.16.) The Director further explained in his Determination that "restrictions on aeronautical operations by airport sponsors for safety must be reasonable." (FAA Exhibit 26, p.14.) The Director cited examples of reasonableness that included handling of flammable and hazardous materials. (FAA Exhibit 26, p.14.) And the Director concluded that Wahoo was reasonable to require ag aircraft to be stored in a hangar. (FAA Exhibit 26, p.14.) The Associate Administrator agrees with the Director's findings.

The AHQ Minimum Standards do not specifically address itinerant aircraft operations. It appears that Walker wants itinerant aircraft operators to be exempt from the AHQ Minimum Standards. Walker argues in his appeal:

> The requirements for an itinerant agricultural aerial applicator to 'construct or lease all or a portion of a facility or aircraft parking and storage, automobile parking for customers and employees, concrete loading area of sufficient size that the aircraft can be loaded and maneuver without blocking or impeding aircraft on the taxiway or taxi lane, and a concrete spill containment pad,' are not reasonable, are not necessary to ensure safe aerial application operations at the airport, and are not necessary for the orderly development of the airport. (FAA Exhibit 37, p.32.)

Making an exemption to the Minimum Standards from having to use permanent containment pads and to store agricultural aircraft in hangars for itinerant operators is not logical.[12] Requiring hangars for storage of permanent based ag aircraft and containment pads to control spills for safety reasons should also apply to itinerant operators. If it is a safety requirement for permanent tenants to store their agricultural aircraft in a hangar and to use a chemical containment pad to prevent the spread of spills, then it is only logical that the same safety requirement should apply to itinerate users at AHQ.

There is an additional consideration of creating an unfair business advantage for itinerant operators who would not be required to hangar their aircraft and use containment pads over permanent tenants who must follow the rules to house their ag aircraft in a hangar and use a containment pad. The FAA Advisory Circular No. 150/5190-7 states in Section 1.2.d that the airport sponsor has the prerogative to ensure that the standards "reasonably protect the investment of providers of aeronautical services to meet minimum standards from competition not making a similar investment." Therefore, it was correct for the Director to find that Wahoo did not violate Grant Assurance 22, *Economic Nondiscrimination*, when it established Minimum Standards that protect the investment of based operators that did not convey an unfair business advantage to the seasonal operator.

The Associate Administrator finds that the Director's decision was based on substantial evidence, it was made in accordance with the law and policy, the question is not substantial, and it is not a prejudicial error.

Issue 3 -WHETHER THE DIRECTOR WAS CORRECT IN FINDING THAT WAHOO DID NOT VIOLATE GRANT ASSURANCE 23, *EXCLUSIVE RIGHTS*, WHEN WAHOO ALLOWED JARED STORM AND STORM FLYING SERVICE, AND FRONTIER COOP TO OPERATE AT AHQ WHILE DENYING WALKER SUCH RIGHT, AND IN FAILING TO LEASE THE EAA HANGAR TO WALKER.

Title 49 USC §40103(e), provides, in relevant part, that "there shall be no exclusive right for the use of any landing area or air navigation facility upon which Federal funds have been expended."

[12] Walker continues to argue that it should be allowed to operate from non-permanent facilities. (FAA Exhibit 38, p.22). The Director found that it is reasonable to require permanent containment pads to ensure the safety of people and the environment (FAA Exhibit 36 pp.14-15) The Associate Administrator agrees. Further, sponsors may establish Minimum Standards to protect the investment of based operators and not to convey an unfair business advantage to the seasonal operator. (FAA Exhibit 10, p.4) (FAA Order 5190.6B, App. C, p.33.)

Title 49 USC §47107(a)(4), similarly provides, in pertinent part, that "there will be no exclusive right for the use of the airport by any person providing, or intending to provide, aeronautical services to the public."

Grant Assurance 23, *Exclusive Rights*, of the prescribed sponsor assurances implements both statutory provisions requiring, in pertinent part, that the sponsor of a federally obligated airport:

> ...will permit no exclusive right for the use of the airport by any persons providing, or intending to provide, aeronautical services to the public...and that it will terminate any exclusive right to conduct an aeronautical activity now existing at such an airport before the grant of any assistance under the Airport and Airway Improvement Act of 1982.

In FAA Order 5190.1A, *Exclusive Rights at Airports*, October 10, 1985, the FAA published its exclusive rights policy and broadly identified aeronautical activities as subject to the statutory prohibition against exclusive rights. While public use airports may impose qualifications and minimum standards upon those who engage in aeronautical activities, the FAA has taken the position that the application of any unreasonable requirement or standard that is applied in an unjustly discriminatory manner may constitute a constructive grant of an exclusive right. Courts have found the grant of an exclusive right where a significant burden has been placed on one competitor that is not placed on another. (*See e.g. Pompano Beach* v. *FAA*, 774 F.22 1529 (11th Cir, 1985.))

Exceptions to the policy include limiting activity due to space limitation. (FAA Order 5190.6B, pp.8-11, section d.) Limitation of the activity or lease may be restricted to one operator occupying the leased space as is demonstrably needed, which practice would not result in a violation of Grant Assurance 23, *Exclusive Rights*. (FAA Order 5190.1A, *Exclusive Rights at Airports*, October 10, 1985, p.4; and FAA Advisory Circular 150/5190-6, *Exclusive Rights at Federally Obligated Airports*, January 4, 2007, p.6.) Additionally, an airport sponsor can deny an individual or prospective aeronautical service provider the right to engage in an on-airport aeronautical activity for reason of safety. (FAA Order 5190.6B, *Airport Compliance Manual*, September 30, 2009, p.8-8.) Safety concerns are not limited to aeronautical activities but may include Occupational Safety and Health Administration (OSHA) standards, fire safety standards, building codes, or sanitation considerations. (FAA Order 5190.6B, p.8-8.)

In this instance Wahoo was concerned about safety and developed Minimum Standards to address the hazard of exposing contaminant coated aircraft to the public. The Director agreed with Wahoo and found that "it is reasonable to require aircraft that may be coated with contaminants to be stored inside a hangar." (FAA Exhibit 36, pp.14-15.) The Director went on to additionally address the containment pads by finding, "[i]t is also reasonable to require permanent containment pads to ensure the safety of people and the environment. The required containment prevents the migration of potentially harmful contaminants to neighboring properties and sensitive resources such as Lake Wahoo." (FAA Exhibit 36, p.15.)

Walker argues again in the Appeal that Wahoo ignored Walker's requests to lease hangar space and then refused Walker the opportunity to lease the EAA hangar when it became available, even though Walker was next on the waiting list. (FAA Exhibit 37, p.21.) Walker again argues that Wahoo would not renew the EAA Hangar Lease in April of 2014 and that Wahoo indicated the need for the hangar and space for its airport equipment. (FAA Exhibit 37, p.25.) In the end, Walker's argument that Wahoo gave exclusive rights to Storm Flying Service and Frontier Coop by not renting the EAA hangar to Walker fails simply because Walker's aircraft could not physically fit into the EAA hangar. (FAA Exhibit 39, p.16.) Walker's argument is disingenuous.

Walker further argues that the lease terms Wahoo granted Storm Flying Services constitute an exclusive right. Walker contends the 'right of first refusal' in the Storm Flying Service AG Hangar Lease is an 'exclusive right'. (FAA Exhibit 37, p.21.) Wahoo replies that "a 'right of first refusal' provision is not uncommon in leases. This language is consistent with the language the WMA uses with other commercial tenants in WMA-owned buildings. A right of first refusal gives the tenant the right to match the proposed terms of the lease with a new tenant. Wahoo argues without a right of first refusal, a tenant could be forced off AHQ at the expiration of its lease without any cause except for the motivation of the airport to make more money." (FAA Exhibit 39, p.29.) The Director found that an exclusive right did not exist at the airport since Walker still has the opportunity to lease other available airport property and/or construct a commercial agricultural operator spray facility at AHQ that meets any reasonable requirements of Wahoo.[13] (FAA Exhibit 36, p.16.) The Associate Administrator agrees with the Director's finding.

The Director further found it reasonable for Wahoo to take back the EAA hangar and use it for airport maintenance equipment until the hangar repairs were made. (FAA Exhibit 36, p.15.) The Director also found it reasonable not to accommodate Walker given the damaged hangar would not enclose Walker's aircraft used in its commercial aerial operations, and that the hangar did not have a permanent containment pad as required to meet environmental standards. (FAA Exhibit 36, p.15.)

The Associate Administrator agrees with the Director's findings. Wahoo's actions appear to be consistent with accepted business practices. The right of first refusal when employed at the beginning of a lease term and is limited to one property and not a majority of the airport's properties, does not confer an exclusive right. *Pacific Coast Flyers, et al.* v. *County of San Diego, California*, FAA Docket No. 16-04-08, July 25, 2005, p.27. Such practices are not economically discriminatory to similarly situated parties. And it follows that such practices are not economically discriminatory to parties who are not similarly situated such as Walker in this case.

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[13] The Associate Administrator acknowledges the Director's concern for the potential for noncompliance with the "right of first refusal" provision in the airport-owned facility leases. (FAA Exhibit 36, p.16.) "[T]he use of leases with options or future preferences, such as rights of first refusal, must generally be avoided." FAA Order 5190.6B, p. 8-7. However, Wahoo need not remove the right of first refusal provision from its leases if its revision will comply with its grant obligations. Accordingly, Wahoo's written confirmation to the FAA Central Region Airports Division (FAA Exhibit 36, p.16) must confirm either the removal *or revision* of this provision. The Director is correct in finding no present violation of Grant Assurance 23, *Exclusive Rights*, regarding the right of first refusal provision of its lease.

Storm Flying Service and Frontier Coop complied with the AHQ Minimum Standards thereby qualifying them to operate at AHQ, whereas Walker failed to comply with AHQ Minimum Standards by not having a hangar or storage space for its aircraft nor a containment pad for the control of spills. Thus, permitting Storm Flying Service and Frontier Coop to operate at AHQ and denying Walker for reasons stated is not a grant of exclusive rights and a violation of Grant Assurance 23, *Exclusive Rights*.

Against this background, the Associate Administrator finds that the Director's decision was based on substantial evidence, it was made in accordance with the law and policy, the question is not substantial, and it is not a prejudicial error.

Issue 4 - WHETHER THE DIRECTOR WAS CORRECT IN FINDING THAT WAHOO DID NOT VIOLATE GRANT ASSURANCE 24, *FEE AND RENTAL STRUCTURE*, WHEN WAHOO CHARGED DIFFERENT FEES FOR ITINERATE AND NON-ITINERATE OPERATIONS, WHEN IT CHARGED DIFFERENT RENTS FOR THE AG HANGAR, WHEN IT DID NOT LEASE THE EAA HANGAR TO WALKER AND/OR WHEN IT ALLOWED NON-AERONAUTICAL ITEMS TO BE STORED IN HANGARS.

Walker pled this alleged violation as Grant Assurance 24, which addresses self-sustainability. No facts exist to show the airport violates the sustainability principle. Even if properly pled under Grant Assurance 22 for the reasons set forth in this section, the Associate Administrator finds there is no violation of this grant assurance.

Walker states that each similar aeronautical user is not being subject to the same rates. (Exhibit 37, p.31.) Walker argues that Storm Flying Service has not made the estimated $500,000 commitment as Frontier Cooperative has made, and that each similar aeronautical user is not being subject to the same rates as Storm Flying Service was receiving [*sic*, paying] in 2011. (Exhibit 37, p.32.) In support, Walker cites Wahoo's charge of $283.57 per day fuel flow charge to Walker versus $16.44 being charged to Storm Flying Service. (Exhibit 37, p.32.)

Wahoo argues in its reply to the appeal that the fees being charged to permanent and itinerant users are reasonable. (FAA Exhibit 39, p.15.) Wahoo cites the findings of the FAA Southwest Regional Office investigation of Walker's informal complaint:

> (A) reasonable fee for the itinerant user may not be considered reasonable by those that have made a substantial investment in facilities. Unless the fee for access is comparable to what based operators pay in leases, it seems highly likely that the based operators would complain, and right[ly] [*sic*] so, that the itinerant or seasonal operator has an unfair business advantage. (FAA Exhibit 39, pp.15-16.)

Walker correctly states that similar aeronautical users should be charged the same rates for the same services. But Walker is mistaken when it assumes that it is similar to Storm Flying Service and Frontier Coop. Storm Flying Service and Frontier Coop are non-itinerant, permanent tenants of AHQ. They have signed a lease with Wahoo to store their agricultural aircraft in a hangar and operate at AHQ on a full-year, full-time basis. And it appears that Wahoo has set a fee for these users based upon these and other appropriate conditions. Walker, on the other hand, is an

itinerant user of AHQ. Walker has no hangar at AHQ in which to store its agricultural aircraft. Walker does not have a containment pad at AHQ on which to service, load, and unload its agricultural aircraft. Walker does not have a lease or contract with Wahoo under which it can store and operate its agricultural aircraft. Contrary to Walker's assertions, Walker is not similar to Storm Flying Service or Frontier Coop in its status at AHQ. Accordingly, Wahoo may charge Walker different fees than those charged to Storm Flying Service and Frontier Coop and not be in violation of Grant Assurance 24, *Fees and Rental Structure.*

In its appeal Walker has taken issue that Frontier Coop "is not being subject [*sic*] to the same rates" as Storm Flying Service. (FAA Exhibit 37, p.31.) Walker argues that similar aeronautical users are not being charged the same rates. Walker states that Storm Flying Service did not make the same $500,000 commitment as Frontier Cooperative made. (FAA Exhibit 37, p.31.) But the record does not support this allegation. It appears that Wahoo allocates its rate-based cost to their aeronautical users by a transparent, reasonable, and not unjustly discriminatory rate-setting methodology, and Walker has not presented any evidence to indicate otherwise. Wahoo's fees charged to Frontier, Storm, and other tenants appear to be based on individual conditions existing at the time of the lease, such as size of the hangar, duration of the lease, condition of the facilities, etc. The rates charged to aeronautical users, while not being amounts exactly the same, are fair and commensurate with the existing conditions, and within the limits to comply with the principles of Grant Assurance 24, *Fee and Rental Structure.*[14]

Walker argues in its appeal that one of the three hangars was being used as a maintenance storage facility. (FAA Exhibit 37, p.25.) The Director determined an airport sponsor reasonably may store airport maintenance equipment in a hangar that is unusable for leasing to a tenant. The Director also found that Wahoo corrected the nonaeronautical storage practices of the tenants in a reasonable period of time. The Director concluded that Wahoo took the appropriate corrective action at AHQ and, therefore, the issues were moot. (FAA Exhibit 36, p.17.) The Associate Administrator agrees with the Director's finding.

Walker argues that Wahoo lost the opportunity to collect revenue to make the airport as self-sustaining as possible by not leasing an available Hangar (EAA Hangar) to Walker. Walker also alleges that Wahoo allowed Storm Flying Services to lease the AG Hangar for storing vehicles and trailers, which are not aeronautical equipment or for aviation use. Walker alleges that the tenants are not charged fair market value on the open market (FAA Exhibit 1, pp.368-369, 388-420, 738-771 and 771-776.) The Director found that Wahoo no longer allows the storage of vehicles and trailers in aeronautical hangars thus rendering that issue moot. (FAA Exhibit 36, p.17.) The Director also found that an airport sponsor reasonably may store airport maintenance

[14] The disparity in fees claimed by Walker occurred in 2011, prior to Wahoo's adoption of its minimum standards. Walker does not cite any disparities subsequent to that. In his declaration Mr. Mert Oden states, "However, since the WAA adopted Minimum Standards, we have required Storm Flying Service to comply with all of the Minimum Standards. The WAA does not provide 'entitlements' to Storm Flying Service because it has been here the longest, as the Complainants suggest." (FAA Exhibit 15, Exhibit A, p.3.) The pleadings do not indicate if a disparity of fees is presently charged by Wahoo to any of its tenants.

equipment in a hangar that is unusable for leasing to a tenant. (FAA Exhibit 36, p.17.) Finally, the Director found that there was no need to determine the fair market value of the hangar facility and collect additional rent for the period of time the tenants used their hangars for nonaeronautical storage or sales because Wahoo took corrective action once notified of the improper storage. The Associate Administrator concurs with the Director's findings. Accordingly, the Associate Administrator finds that Wahoo is not in violation of Grant Assurance 24, *Fees and Rental Structure*.

Walker asks in its appeal "that the FAA determine if the past actions and initial implementation of the (Minimum standards) by (Wahoo) did in fact violate grant assurances." (FAA Exhibit 37, p.4.) The Director was clear in his analysis and findings that the successful action by an airport to cure any alleged or potential past violation of applicable Federal obligations to be grounds for dismissal of such allegations. (*See, Wilson Air Center* v. *Memphis and Shelby County Airport Authority*, FAA Docket No. 16-99-10, (August 30, 2001) (Final Decision and Order), p.5.) Walker's persistence in pursuing past alleged violations will not persuade the Associate Administrator to address matters beyond the scope of the Part 16 process. The Associate Administrator finds that the Director was correct in dismissing issues regarding past compliance with Grant Assurance 24, *Fee and Rental Structure*.

Therefore, the Associate Administrator finds that the Director's decision on this issue was based on substantial evidence, it was made in accordance with the law and policy, the question is not substantial, and it is not a prejudicial error.

VIII. FINDINGS AND CONCLUSIONS

On appeal, the FAA has re-examined the record, including the Director's Determination, the administrative record, and the pleadings. Based on this reexamination, the FAA 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 Associate Administrator finds that the Walker Appeal does not contain persuasive arguments sufficient to reverse any portion of the Director's Determination. Accordingly, the Associate Administrator affirms the Director's Determination.

ORDER

ACCORDINGLY, it is hereby ORDERED that (1) the Director's Determination is affirmed, (2) the Appeal is dismissed, pursuant to 14 CFR §16.33, and (3) the Complainants' Motion of January 3, 2018, is denied.

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 USC § 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 Agency Decision has been served on the party. (14 CFR §16.247(a))

D. Kirk Shaffer
Associate Administrator
for Airports

3-5-2019
Date