



U.S. Department
of Transportation
**Federal Aviation
Administration**

Office of the Associate
Administrator for Airports

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Washington, DC 20591

MAR 28 2000

Certified-Return Receipt

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Terrance S. Welch
Mark S. Houser
Bickerstaff, Heath, Smiley, Pollan, Kever &
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3000 Bank One Center
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Dear Messrs. Mason, Welch and Houser:

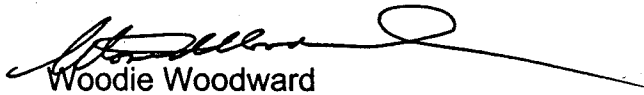
**RE: Town of Fairview, Texas v. City of McKinney, Texas,
Docket No. 16-99-04**

Enclosed is a copy of the Order of Remand of the Federal Aviation Administration (FAA) with respect to the above-referenced complaint under 14 C.F.R. Part 16.

On appeal, I have determined that the Director's Determination, dated September 20, 1999, which found that the city of McKinney is not in violation of its Federal grant assurances, was not supported by adequate record evidence. Consequently, I have ordered that the Director's findings and conclusions be withdrawn and have remanded the entire record, including all pleadings made in the instant appeal, to the Director for further investigation and appropriate handling. The issuance of a new Director's Determination is expected within 90 days of the date of the enclosed Order of Remand.

The reasons for this decision and the actions taken are set forth in the enclosed record.

Sincerely,

A handwritten signature in black ink, appearing to read "Woodie Woodward", with a long horizontal flourish extending to the right.

Woodie Woodward
Acting Associate Administrator for
Airport

Enclosure

**UNITED STATES DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION
WASHINGTON, D.C.**

**Town of Fairview, Texas
v.
City of McKinney, Texas**

Docket No. 16-99-04

ORDER OF REMAND

INTRODUCTION

This matter is before the Federal Aviation Administration by the Town of Fairview, Texas, on appeal from the Director's Determination (DD) of September 20, 1999, issued by the Director of the FAA Office of Airport Safety and Standards, pursuant to the Rules of Practice for Federally-Assisted Airport Proceedings (14 CFR Part 16).

On November 5, 1999, the Town of Fairview, Texas (hereinafter Fairview) appealed the Director's Determination (DD) which dismissed Fairview's complaint, in accordance with the Rules of Practice for Federally-Assisted Airport Proceedings (FAA Rules of Practice), 14 C.F.R. Part 16. Fairview argues on appeal that the DD failed to consider all available facts, and is contrary to law, regulation, and FAA policy and is arbitrary and capricious.

The Fairview complaint, filed on February 1, 1999, alleged that the City of McKinney, Texas (hereinafter McKinney) poses a threat to the welfare of private citizens residing in the vicinity of the airport, including the residents of Fairview, because of a significant bird safety problem at McKinney Municipal Airport.

The DD determined that the City of McKinney was not currently violating the provisions of the grant assurances listed under 49 U.S.C. 47107(a), based on McKinney's written commitments during the FAA investigation to resolve the bird hazards around the airport.

Issues on Appeal

Fairview presents the following issues for consideration in its appeal to the Associate Administrator:

1. Whether the Director violated Federal law by not ordering an environmental assessment, or at a minimum, an investigation of the significant environmental issues raised by Fairview and acknowledged in the DD;
2. Whether the Director acted contrary to law, safety regulations, and FAA policy by finding that FAA Advisory Circular 150/5200-33 was not binding on the airport and only prescribes guidance;
3. Whether the Director's findings are supported by the record facts; and
4. Whether the remedies identified by the Director were adequate to ensure that McKinney is in compliance with its grant assurances and other Federal obligations.

Summary of Order

On appeal, the FAA finds that the record does not support the Director's finding that the City of McKinney is not currently in violation of its grant assurances. Specifically, the Associate Administrator finds that the Director's reliance on McKinney's bird harassment program as a wildlife mitigation measure sufficient to ensure McKinney's compliance with its grant assurances is not supported by adequate record evidence. Consequently, the Associate Administrator orders that the Director's findings and conclusions be withdrawn and remands the entire DD to the Director for further investigation and appropriate handling.

The Associate Administrator will not make additional findings at this time. Rather, all four issues raised by Fairview on appeal are remanded to the Director for further investigation and appropriate handling consistent with this decision. To a certain extent, all four issues raised by Fairview on appeal may be interrelated, and the further investigation being ordered could possibly have a bearing on how these issues are addressed. Consequently, the Associate Administrator declines to address Fairview's arguments regarding the Director's alleged violations of Federal environmental and safety laws and FAA policy, but encourages the Director to consider the information contained in Fairview's appeal and McKinney's reply to the appeal in the issuance of any new DD. Upon issuance of a new DD in this matter, any party adversely affected by the DD may

appeal it to the FAA Associate Administrator for Airports without prejudice to the issues raised in the instant appeal.

Airport

McKinney Municipal Airport is a public-use airport located in McKinney, Texas. The airport is owned and operated by the City of McKinney, Texas. As of February 3, 1998, McKinney Municipal Airport has approximately 143 based aircraft with 114,511 annual operations. [DD Exhibit 8].

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, recodified at 49 U.S.C. 47107, et seq., and is administered by the State of Texas under the State Block Grant Program. Specifically the City is obligated under the assurances given in AIP grants since 1982, the most recent grant in 1994, was to conduct a master plan update totaling \$182,714. In 1999, the city of McKinney received state block grants for constructing a new general aviation apron with Portland Concrete Cement for \$2,276,700; improving drainage for N apron construction for \$1,000,000; and reconstructing apron areas A, B, and C with Portland Concrete Cement for \$1,088,300. [DD Exhibit 7].

Procedural History

On February 8, 1999, the Mayor of Fairview, Texas, filed a Part 16 Complaint on behalf of Fairview residents against McKinney. This complaint alleged that the McKinney Municipal Airport poses a threat to the welfare of private citizens residing in the vicinity of the airport, including the residents of Fairview, because of significant bird safety problems at the airport. [DD Exhibit 1]

The complaint also alleged that the airport's existing runway and proposed runway are in violation of the FAA's minimum safety separation standards and guidelines contained in FAA Advisory Circular No. 150/5200-33, because the airport is within 10,000 feet of a landfill, 1.5 miles of a wildlife sanctuary, 1 to 4.5 miles from Wilson Creek Wetlands, 4.5 miles from a wastewater treatment facility, and 4.5 miles from a lake and associated wetlands; the airport sponsor did not pay particular attention to the development of the landfill or the wastewater treatment facility; and the airport sponsor did not identify the landfill, wildlife sanctuary, wastewater treatment facility, and associated wetlands during the planning process of the proposed expansion of the McKinney Municipal Airport based on FAA Advisory Circular 150/5200-33, "Hazardous Wildlife Attractants on or Near the Airport."

On February 25, 1999, the FAA issued a Notice of Docketed Complaint, 16-99-04, informing McKinney that Fairview had filed a complaint against McKinney. [DD Exhibit 2]

On March 22, 1999, McKinney's counsel, Terrence Welch, filed an Answer and Motion to Dismiss. In its Motion to Dismiss, McKinney asserts, *inter alia*, that there is no significant bird problem at the McKinney Municipal Airport; the existing runway and proposed airport expansion are not in violation of FAA standards and guidelines; and Fairview submits no documentation in support its contention that McKinney did not identify environmentally-sensitive areas or pay "particular attention" to hazardous wildlife attractants during the planning process of the projects. [DD Exhibit 3]

On April 26, 1999, Fairview filed its Reply to McKinney's Answer and Motion to Dismiss. [DD Exhibit 5]

On April 29, 1999, McKinney filed a Rebuttal to Fairview's Reply. [DD Exhibit 6]

On August 10, 1999, the FAA issued a Notice of Extension of Time extending the time for issuing the Director's Determination from August 18 to September 20, 1999. [DD Exhibit 26]

On September 20, 1999, the FAA issued the Director's Determination. The DD found that McKinney is not currently violating its grant assurances, based on written statements made to the FAA during its investigation. However, the Director recognized that, at the time the Complaint was filed, McKinney may not have been in compliance with its Federal obligations concerning the bird hazard problem because it had not timely submitted a landfill closure plan and obtained a wildlife biologist. Nevertheless, the Director determined that McKinney is currently taking reasonable measures to mitigate potential bird hazards by (1) implementing a bird harassment program, (2) retaining the services of a wildlife biologist, and (3) closing the landfill by 2003. Consequently, the DD concluded that McKinney is in current compliance with its grant assurances, and ordered the complaint dismissed. In addition, the DD ordered McKinney to amend the Airport Master Record, issue a NOTAM for bird activity, and retain and use the services of a wildlife biologist to assist in the monitoring and further development of bird activity mitigation measures. [Order of Remand Exhibit 1, Item 1]

On October 15, 1999, Fairview requested an extension of time to file an Appeal from the Director's Determination [Order of Remand, Exhibit 1, Item 5]

On October 18, 1999, FAA granted Fairview its request for an extension of time to file an Appeal from the Director's Determination. [Order of Remand, Exhibit 1, Item 6]

On November 5, 1999, Fairview filed an Appeal from the Director's Determination. [Order of Remand, Exhibit 1, Item 2]

On November 15, 1999, McKinney requested an extension of time to file its reply to the Appeal from the Director's Determination. [Order of Remand, Exhibit 1, Item 9]

On December 1, 1999, FAA verbally granted McKinney its request for an extension of time to file an appeal until December 13, 1999, and on December 7, 1999, confirmed this extension in writing. [Order of Remand, Exhibit 1, Item 10]

On December 13, 1999, McKinney filed its reply to the Appeal from the Director's Determination. [Order of Remand, Exhibit 1, Item 3]

On February 8, 2000, FAA issued a Notice of Extension extending the due date for the Final Agency Decision from February 11, 2000, to February 23, 2000. [Order of Remand, Exhibit 1, Item 19]

On February 23, 2000, FAA issued a Notice of Extension extending the due date for the Final Agency Decision from February 23, 2000, to March 10, 2000. [Order of Remand, Exhibit 1, Item 20]

Factual Background

As presented by the parties, the following statement of facts reflects the relevant background information that are largely undisputed by the parties:

In the early 1960s, the McKinney Municipal landfill opened for public use by the City of McKinney. [DD Exhibit 18].

On October 16, 1974, the FAA issued Order 5200.5 to its employees. The FAA internal order provided internal guidance to FAA employees concerning the elimination or monitoring of open dumps, waste disposal sites, and sanitary landfills on or in the vicinity of airports. [DD Exhibit 11].

On April 6, 1977, the acting FAA Southwest Regional Airports Division Manager, approved the Environmental Impact Assessment Report (EIAR) for the proposed general aviation airport located in the City of McKinney, Texas. [DD Exhibit 3-(5)]

On February 14, 1984, the FAA Southwest Region Airports Division Manager, conditionally approved the environmental assessment/Finding of No Significant Impact (FONSI) for the proposed development of McKinney Municipal Airport. The conditions of approval included (1) a nonstandard traffic pattern to keep traffic to the east and publish the traffic pattern to direct aircraft away from noise-sensitive areas; (2) coordination of drainage plans with U.S. Army Corps of Engineers; and (3) McKinney's continued submission of a bird activity report to the FAA on a quarterly basis, and the development of a plan concerning the continued use of the landfill, including possible relocation. [DD Exhibit 3-(8)].

The first McKinney Municipal Airport runway extension to 5200 feet was substantially completed in 1987. [DD Exhibit 18].

On August 25, 1988, the FAA approved an environmental assessment/FONSI for the proposed construction of a Phase I and II extensions to Runway 17R-35L, including parallel taxiway; a new Runway 17L-35R and parallel taxiway; acquisition of approximately 74 acres for clear zones and aviation-related development; and other airport infrastructure improvements. The FAA did not attach any conditions of approval. [DD Exhibit 3-(4)].

On January 31, 1990, the FAA canceled Order 5200.5 and issued Order 5200.5A, to provide updated internal guidance to airports in making decisions to close landfills near airports. [DD Exhibit 12].

On April 3, 1991, the FAA Southwest Regional Administrator responded to the Congressman Sam Johnson concerning the McKinney landfill/airport proximity issue. The FAA advised that until McKinney developed a closure plan for the landfill, the FAA could not proceed with any airport expansion due to the potential bird hazards. [DD Exhibit 1-G].

On April 3, 1991, McKinney responded to the FAA concerns regarding the various issues at the landfill. McKinney notified the FAA that the projected landfill closure would range from a minimum of 6 to a maximum of 9 1/2 years. [DD Exhibit 1-H].

On April 18, 1991, the FAA advised McKinney that it can best achieve resolving the landfill issue by adhering to the minimum proposed schedule. The FAA also advised McKinney that a landfill site study and selection process needed to be initiated before the FAA would support any further airport development. [DD Exhibit 1-I].

On June 25, 1991, McKinney was notified that a FAA site visit had been conducted and the landfill must be closed within the minimum closure schedule. FAA advised McKinney that it believed that 6 years provided sufficient time to close the existing landfill and have a new site located and in operation. [DD Exhibit 1-K].

On August 7, 1991, the FAA Southwest Region responded to Senator Lloyd Bentsen regarding citizen concerns of potential bird safety issues between the landfill and McKinney Municipal Airport. [DD Exhibit 1-L].

On March 25, 1992, the FAA Southwest Region responded to a letter from Senator Phil Gramm regarding concerns from the city attorney for Lucas, Texas. The region notified Senator Gramm that it had reexamined the 1988 environmental assessment/FONSI for the airfield development and found that it was still valid. [DD Exhibit 1-M].

On March 25, 1992, the FAA Southwest Region responded to a letter from Senator Phil Gramm. The FAA reported that it had advised the Texas Department of Health of its concerns regarding the bird activity at the McKinney landfill, and was prepared to require McKinney to take appropriate action to resolve any conflict over safety. [DD Exhibit 1-M].

On June 16, 1992, the FAA Southwest Region responded to Senator Bentsen concerning the location of landfills near airports. The FAA explained that the FAA does not have the authority to approve or disapprove the location of landfills. Rather, the FAA assists airports to eliminate and monitor landfills to ensure safety of aircraft. [DD Exhibit 24].

On July 24, 1992, the FAA Southwest Region responded to Senator Bentsen concerning the McKinney landfill. The FAA explained the history of the landfill and the North Texas Municipal Water District's (NTMWD's) actions to plan for its closure. [DD Exhibit 25].

On September 28, 1993, NTMWD and McKinney entered into a formal lease and easement for 168.92 acres known as the landfill site. The lease term is from November 1, 1993, until NTMWD has attained closure of the municipal solid waste landfill. [DD Exhibit 9].

The second McKinney Municipal Airport runway extension was completed in 1993. [DD Exhibit 18].

On May 1, 1997, the FAA cancelled FAA Order 5200.5A and issued FAA Advisory Circular No. 150/5200-33, "Hazardous Wildlife Attractants on or Near the Airport," which provides guidance on locating certain land uses near public-use airports. [DD Exhibit 13].

In July 1997, Phase I of the permitting process was authorized for the new landfill. [DD Exhibit 1-Y].

On February 24, 1998, Fairview sent a letter to FAA Aviation Safety Program Manager, Mr. Larry Prentiss, providing its perspective of a meeting between Fairview and Mr. Prentiss on issues pertaining to the Airport. [DD Exhibit 21].

On March 23, 1998, Steven Meeks, USDA Wildlife Damage Management Biologist, provided Ms. Trudi Evans of Fairview, a summary of his observations from site visits on March 5 and March 12, 1998. [DD Exhibit 1-S]. According to the summary, on March 5, 1998, Mr. Meeks observed several thousand gulls flying in several flocks across the flight path to McKinney Municipal Airport. On March 12, 1998, Mr. Meeks made a similar observation. [DD Exhibit 5-S].

The Dallas-Ft. Worth Air Traffic Control Tower received a bird strike report from an aircraft at or near McKinney Municipal Airport on May 28, 1998. No injuries or damage was reported and the aircraft continued on. [DD Exhibit 5-F].

Around June 1998, NTMWD submitted a boring plan for the new landfill to the Texas Natural Resources and Conservation Commission for approval. [DD Exhibit 1-Y].

On August 27, 1998, Steven Meeks, USDA, provided a copy of a report regarding a landfill visit on July 21, 1998, to the FAA Southwest Region Airports Division. [DD Exhibit 1-T].

In August 1998, the Phase II permit application development was approved for the new landfill. [DD Exhibit 1-Y].

On September 1, 1998, Fairview's mayor complained to the FAA Southwest Region that the city of McKinney is allegedly in noncompliance with its Federal grant assurances. [DD Exhibit 21].

On September 14, 1998, FAA Aviation Safety Program Manager, Mr. Larry Prentiss, sent a letter to Fairview's mayor, indicating that statements made by Mr. Prentiss had been taken out of context, as written in a Fairview letter to Mr. Prentiss, dated February 24, 1998. [DD Exhibit 21].

On September 17, 1998, the FAA Southwest Region Airport Division Manager, responded to Fairview's informal complaint of September 1, 1998. The Region informed Fairview, based on current and future proposed actions by McKinney, the FAA, and other agencies, that McKinney was in compliance with all applicable grant assurances. [DD Exhibit 21].

On October 7, 1998, an FAA staff wildlife biologist visited the landfill at the request of FAA Southwest Region and notes the potential bird activity at the McKinney landfill. [DD Exhibit 1-W].

On November 6, 1998, the FAA Texas Airports Development Office Manager, sent a letter to McKinney advising it that the FAA will not provide Federal funding for future airport development projects at the airport until the FAA has a complete understanding of the current status and agreement on a definite landfill closure date. This letter was precipitated by FAA's concerns of the potential of bird strikes and the appearance that the city was not expediting the closure of the landfill. [DD Exhibit 1-W].

On November 16, 1998, NTMWD provided a written response to McKinney concerning the actions taken to date and proposing the closure of the landfill in 2003, once the new landfill is opened. [DD Exhibit 1-X].

On December 10, 1998, McKinney responded to the FAA and provided a schedule of actions for closing the landfill and ongoing actions to provide wildlife mitigation measures. [DD Exhibit 1-Y].

On January 22, 1999, the FAA Southwest Region agreed with projected schedule to close the NTMWD landfill by 2003 and the ongoing activities to mitigate wildlife hazards. The FAA Southwest Region agreed with McKinney only after discussions with the Texas Natural Resource Conservation Commission. [DD Exhibit 20].

On April 19, 1999, McKinney and NTMWD entered into a formalized Bird Harassment Program at the NTMWD landfill. [DD Exhibit 10].

On July 14, 1999, FAA Southwest Region requested specific clarification on the Bird Harassment Plan. [DD Exhibit 14].

On July 21, 1999, McKinney responded to the FAA request of July 14, 1999, and provided clarification concerning the formal Bird Harassment Plan. [DD Exhibit 15].

On July 21, 1999, the City of McKinney provided a date, September 21, 1999, on which the city would engage and begin consultations with a biologist concerning the wildlife monitoring. [DD Exhibit 15].

On September 10, 1999, the Director of the FAA Office of Airport Safety and Standards and FAA's Staff Wildlife Biologist, received from Fairview an assessment report entitled "Wildlife Hazards to Aircraft Assessment for the McKinney Municipal Airport." This assessment was prepared in June, 1999, by Science and Engineering Associates, Inc., for Fairview's outside legal counsel, Sanders, O'Hanlon & Motley, PLLC. [DD Exhibit 27].

On September 20, 1999, McKinney sent a letter to the FAA Southwest Region confirming that the City has engaged an ornithologist who would conduct an assessment of the bird activity in and around the McKinney Municipal Airport and would also prepare a scope of work refinement letter to be delivered to the City on September 29, 1999. [Order of Remand, Exhibit 1, Item 14]

On November 5, 1999, the Town of Fairview submitted an appeal of the Director's Determination. [Order of Remand, Exhibit 1, Item 2]

The Appeal Process

Pursuant to 14 Code of Federal Regulations, Part 16, Section 16.33, the Associate Administrator will issue a final decision on Appeal from the Director's Determination, without a hearing, where the complaint is dismissed after investigation.

In each such case, it is the Associate Administrator's responsibility to determine whether (1) the findings of fact made by the Director are supported by a preponderance of reliable, probative, and substantial evidence, and (2) each conclusion of law is made in accordance with applicable law, precedent, and public policy.

APPLICABLE LAW AND POLICY

The following is a discussion pertaining to the FAA's enforcement responsibilities; the FAA compliance program, the statutes, grant assurances, and policies relevant to this proceeding; the Complainant's right to file the formal complaint; the Complainant's right to Appeal the Director's Determination; and the FAA's responsibility with regard to an Appeal.

FAA Airport Compliance Program

The FAA discharges its responsibility for ensuring that airport sponsors comply with their Federal obligations through its Airport Compliance Program. Sponsor obligations are the basis for the FAA's airport compliance effort. The airport owner accepts these obligations when receiving Federal grant funds or accepts 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 which 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 which airport sponsors pledge to the people of the United States in exchange for monetary grants and donations of Federal property to ensure that airport sponsors serve the public interest.

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

assurances in the operation of public-use airports and facilitates interpretation of the assurances by FAA personnel.

Sponsor Assurances

As a condition precedent to providing airport development assistance under the AAIA, the Secretary of Transportation receives certain assurances from the airport sponsor.

The AAIA, 49 USC § 47107(a), *et seq.*, sets forth assurances to which an airport sponsor receiving Federal financial assistance must agree as a condition precedent to receipt of such assistance. Section 511(b) of the AAIA, 49 U.S.C. 47107(g)(1) and (i) as amended by Pub. L. No. 103-305 (August 23, 1994) authorizes the Secretary to prescribe project sponsorship requirements to insure compliance with Section 511(a), 49 U.S.C. 47107(a)(1)(2)(3)(5)(6) as amended by Pub. L. No. 103-305 (August 23, 1994). These sponsorship requirements are included in every AIP agreement as set forth in FAA Order 5100.38A, Airport Improvement Program (AIP) Handbook, issued October 24, 1989, Ch. 15, Sec. 1, "Sponsor Assurances and Certification." Upon acceptance of an AIP grant by an airport sponsor, the assurances become a binding obligation between the airport sponsor and the Federal government.

Airport Owner Rights and Responsibilities

Assurance 5, "Preserving Rights and Powers", of the prescribed sponsor assurances implements the provisions of the AAIA, 49 U.S.C. 47107 *et seq.*, and requires, in relevant 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.

In addition to obligating the airport sponsor to preserve its rights and powers to carry out all grant agreement requirements, this assurance also places certain obligations on the sponsor regarding land upon which Federal funds have been spent, including the operation and maintenance of airports managed by agencies other than the sponsor.

FAA Order 5190.6A describes the responsibilities under Assurance 5 assumed by the owners of public use airports developed with Federal assistance. Among these is the responsibility for enforcing adequate rules, regulations, or ordinances

as are necessary to ensure the safe and efficient operation of the airport. See Order, Secs. 4-7 and 4-8.

Hazard Removal and Mitigation

Assurance 20, "Hazard Removal and Mitigation," implements Section 511(a)(4) of the AAIA, as amended (AAIA), 49 U.S.C. 47107(a)(9), and requires:

Hazard Removal and Mitigation. It 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, or lighting or otherwise mitigating existing airport hazards and by preventing the establishment or creation of future airport hazards.

For the purpose of evaluating airport 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, which obstructs the airspace required for the flight in landing or take off at such airport or is otherwise hazardous to such landing or taking off of aircraft." See Order, Sec. 4-9 and Appendix 5.

Operation and Maintenance of the Airport

Assurance 19, "Operation and Maintenance," implements 49 U.S.C. 47107(a)(7), and requires, in relevant part, that the sponsor of a Federally-obligated airport assure

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

- (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.

The owner should adopt and enforce adequate rules, regulations or ordinances as necessary to ensure safety and efficiency of flight operations and to protect the public using the airport. In fact, the prime requirement for local regulations is to control the use of the airport in a manner that will eliminate hazards to aircraft and to people on the ground. As in the operation of any public service facility, we advise that adequate rules covering, inter alia, vehicular traffic, sanitation, security, crowd control, access to certain areas, and fire protection be established. See Order, Sec. 4-7(b).

ANALYSIS AND DISCUSSION

On appeal, Fairview argues that by finding that Fairview correctly describes the bird activity in the vicinity of the Airport and that McKinney was not in compliance with its grant assurances at the time of the Complaint was filed, the Director has raised significant environmental impacts that must be investigated and assessed prior to ordering any remedy. Fairview asserts that the Director has violated the law by not requiring an environmental assessment or investigation prior to ordering McKinney to take specific mitigation measures. Additionally, Fairview alleges that the DD is improper because it permits the airport sponsor to violate the terms and assurances of AIP grants, joint resolutions of the parties, and applicable FAA safety regulations and statutes. Finally, Fairview argues that the Director's findings are not supported by the record evidence, and that the remedies ordered by the Director are inadequate. [Order of Remand, Exhibit 1, Item 2, p. 9-10]

In its reply to the appeal, McKinney argues that the DD should be upheld in its entirety. McKinney asserts that Fairview has done nothing more than raise new attacks or mischaracterize its earlier unsuccessful claims in an effort to overturn the DD. The DD is neither arbitrary or capricious, an abuse of discretion nor unsupported by substantial evidence. McKinney states that the DD is well-

reasoned and accurately states the facts and the law. [Order of Remand, Exhibit 1, Item 3, p. 7]

On appeal, the FAA finds that the record does not support the Director's finding that the City of McKinney is in compliance with its grant assurances. Specifically, the Associate Administrator finds that the Director's reliance on McKinney's bird harassment program as a wildlife mitigation measure sufficient to ensure McKinney's compliance with its grant assurances is not supported by adequate record evidence.

The Associate Administrator will not make additional findings at this time. Rather, all four issues raised by Fairview on appeal are remanded to the Director for further investigation and appropriate handling consistent with this decision. To a certain extent, these issues may be interrelated and the further investigation being ordered could possibly have a bearing on how these issues are addressed. Thus, the Associate Administrator declines to address Fairview's arguments regarding the Director's alleged violations of Federal environmental and safety laws and FAA policy.

Upon issuance of a new DD in this matter, any party adversely affected by that DD may appeal it to the Associate Administrator without prejudice to the issues raised in the instant appeal.

Sufficiency of Remedies

In its appeal, Fairview argues that the DD is unreasonable and the articulated remedy is inadequate. Fairview contends that the remedies are based upon speculative and projected mitigation activities. Reliance on these speculative measures is not reasonable given the fact McKinney has a history of disregarding its duty to comply with FAA guidance, its grant assurances, and the findings of the FAA. [Order of Remand, Exhibit 1, Item 2, p. 22]

In its reply to the appeal, McKinney did not specifically address the sufficiency of the remedies identified by the Director. Rather, McKinney argues, in general, that the DD is neither arbitrary or capricious, an abuse of discretion nor unsupported by substantial evidence, is well-reasoned and accurately states the facts and the law. [Order of Remand, Exhibit 1, Item 3, pg. 7]

The DD concluded that Fairview did correctly describe the bird activity in the vicinity of the McKinney Municipal Airport and acknowledged that McKinney may have been previously in noncompliance with its Federal obligations concerning the bird hazard problem in the vicinity of the airport. Nevertheless, the Director determined that the airport sponsor is currently in compliance because it is taking reasonable measures, to the extent practicable, to mitigate potential bird hazards. [Order of Remand, Exhibit 1, Item 1, p. 16] To support this conclusion, the Director cites the following evidence:

The 1998 USDA observation report clearly identified a potential wildlife hazard and provided for recommendations for the airport sponsor to take action on. Only after the complaint was filed in this case, the City of McKinney and the North Texas Municipal Water District (NTMWD) signed a formal Bird Harassment Program on April 19, 1999. [see Order of Remand, Exhibit 1, Item 1, p. 15]

The Bird Harassment Program was reviewed by the FAA staff wildlife biologist, Mr. Ed Cleary. Mr. Cleary's independent assessment found that there appeared to be four inconsistencies between the USDA site visit report and the submitted Bird Harassment Program. The FAA submitted the four inconsistencies as questions to the City of McKinney to clarify and reconcile certain elements of the program with the USDA observation report. [see Order of Remand, Exhibit 1, Item 1, p. 15]

On July 21, 1999, McKinney counsel, Mr. Mark Houser, responded to and addressed the FAA questions. [FAA Exhibit 15]. In a subsequent document also on July 21, Mr. Houser provided a specific date, September 21, 1999, by which McKinney would engage the services of a wildlife biologist. [see Order of Remand, Exhibit 1, Item 1, p. 16]

According to Mr. Cleary, the engagement of the services of a wildlife biologist by September 21, 1999, is appropriate to assist the City of McKinney in the mitigation of those bird activities that could be a hazard to the safety of aircraft. [see Order of Remand, Exhibit 1, Item 1, p. 16]

McKinney also has taken actions to reduce the attractiveness of the landfill and the airport to birds. [Exhibits 1-H and 15].¹ [see Order of Remand, Exhibit 1, Item 1, p. 16]

Additionally, the Director ordered McKinney to (1) amend the Airport Master Record and issue a NOTAM for bird activity in the vicinity of McKinney Municipal Airport, and (2) retain and use the services of a wildlife biologist who would assist

¹ To support this conclusion, the Director cites McKinney's April 3, 1991, letter to the FAA notifying the FAA that the projected landfill closure would range from a minimum of 6 to a maximum of 9 ½ years. The Associate Administrator finds this evidence not persuasive since subsequent evidence showed that the landfill would not be closed as originally projected in the letter. [see DD Exhibit 1-X]. Additionally, the Director cites McKinney's letter of July 21, 1999, addressing FAA's concerns about the apparent four inconsistencies between the Bird Harassment Program and the USDA site visit report. For the reasons discussed below, the Associate Administrator finds this evidence equally unpersuasive in demonstrating that McKinney has taken actions to reduce the attractiveness of the landfill and airport to birds.

in the monitoring and further development of bird activity mitigation measures. [FAA Exhibit 1, Item 1, p. 25]

Against this background, the Associate Administrator agrees with Fairview that the remedies identified and/or ordered by the Director are based upon speculative and projected mitigation activities. Moreover, the Associate Administrator agrees that a promise to provide such remedies is not sufficient given the fact McKinney has a history of disregarding its duty to comply with FAA guidance as acknowledged by the Director in the DD. [Order of Remand Exhibit 1, Item 1, p. 16]

On appeal, the Associate Administrator concludes that the proposed remedies were in fact speculative because (i) there was no record evidence to indicate that the FAA found the responses provided by McKinney sufficient to resolve the four inconsistencies between the USDA site visit report and McKinney's Bird Harassment Program, (ii) the FAA staff wildlife biologist's review of the Bird Harassment Program on appeal revealed concerns about the adequacy of the program and McKinney's responses to the four inconsistencies identified during the investigation, and (iii) the scope of work and qualifications of the wildlife biologist to be hired by McKinney were not known at the time of the Director's Determination.

The Associate Administrator's review of the administrative record found that on July 14, 1999, the FAA Southwest Airports Division (ASW) sent a letter by facsimile to Dave Pearce, Airport Manager at McKinney Airport, about the Bird Harassment Plan and asked for clarification on four issues. In the FAA's letter, it was stated that "there is no mention that the City or the North Texas Municipal Water District (NTMWD) have obtained the necessary Federal and state permits to shoot birds, if necessary." Additionally, the FAA questioned whether City Manager approval would be required prior to shooting birds. The FAA also requested that McKinney provide FAA with specific dates and timetables for seeking outside assistance to review and help with the plan during peak wildlife activity seasons, and that the FAA be sent the quarterly assessments to ensure that the airport management and the city officials have effectively resolved any issues. [DD Exhibit 14]

On July 21, 1999, McKinney responded to the list of questions sent by the FAA and stated that prior to shooting any regulated birds, the City would possess any necessary permits from the appropriate regulatory authorities. McKinney also stated that the city manager had protocols for contacting him on a 24-hour, 7-day a week basis to obtain necessary approvals. McKinney also agreed to contract with a recognized biologist and to provide the schedule and timetables for the monitoring of the peak wildlife seasons and to establish the necessary wildlife controls. [DD Exhibit 15]

The Associate Administrator's review of the entire administrative record found no formal FAA response to the July 21, 1999, letter from McKinney that accepted the responses as adequate to resolve the inconsistencies between the bird harassment program and the USDA report. Moreover, the Director did not discuss in the DD how McKinney's response resolved these inconsistencies. The Associate Administrator finds that such an explanation is necessary since (i) the Director has acknowledged a wildlife hazard in the vicinity of McKinney Municipal Airport, and (ii) the City of McKinney has, in the past, failed to carry out wildlife hazard mitigation measures.

In the absence of such a clarification of McKinney's response in the DD, the Associate Administrator requested the FAA staff wildlife biologist to revisit McKinney's bird harassment program. The purpose of this inquiry was to determine whether the Director's omission was harmless to the ultimate determination of McKinney's current compliance with its Federal obligations. However, upon review, the FAA staff wildlife biologist expressed concern about the adequacy of the responses provided by McKinney to the FAA's four questions of July 14, 1999, but lacked sufficient evidence to determine whether those concerns result in McKinney's noncompliance with its Federal obligations regarding hazard removal and mitigation. For example, the FAA Wildlife Biologist indicated that while hiring a recognized wildlife biologist is appropriate, it is not clear from the record evidence whether McKinney's bird harassment plan will be executed by personnel who have the requisite education, training, background, and experience. Additionally, the FAA Wildlife Biologist indicated that requiring landfill personnel to obtain permission before shooting any birds appears to be unnecessarily burdensome and may limit the effectiveness of some control methods.

Additionally, on or about March 2, 2000, the FAA contacted McKinney to obtain the "scope of work refinement letter" referenced in McKinney's September 20, 1999 letter to the FAA.² Specifically, McKinney's September 20, 1999, letter confirmed McKinney's engagement of an ornithologist and further advised that an initial assessment (of the bird activities in and around the McKinney Municipal Airport) and scope of work refinement letter would be delivered to the City on Wednesday, September 29, 1999. [Order of Remand Exhibit 1, Item 14] However, our inquiry revealed that the "scope of work refinement letter" had not been developed at the time of our inquiry.

Without the "scope of work refinement letter," the Associate Administrator is unable to determine whether the current or planned activities of the ornithologist engaged by McKinney are sufficient to ensure that reasonable measures are being taken to mitigate wildlife hazards in the vicinity of the McKinney Municipal Airport. Moreover, the Associate Administrator finds that McKinney's failure to obtain a "scope of work refinement letter" further supports Fairview's concerns

² The FAA notes that this letter was not included as evidence in the DD as it was issued on the same day as the DD.

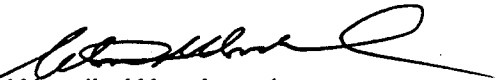
that McKinney has a history of disregarding its duty to comply with FAA requirements and guidance.

Based on the foregoing, the Associate Administrator finds insufficient evidence in the record upon which to conclude that McKinney is currently in compliance with its grant obligations, but lacks sufficient information to find McKinney in noncompliance without conducting additional investigation. For these same reasons, we find that the Director lacked sufficient evidence to conclude that McKinney was in compliance with its grant obligations at the time of the Director's Determination.

ORDER

ACCORDINGLY, it is ordered that:

1. The findings and conclusions of the Director's Determination dated September 20, 1999, regarding FAA Docket No. 16-99-04 are withdrawn;
2. FAA Docket No. 16-99-04, including all pleadings made in the instant appeal and those issues raised on appeal and not addressed herein, are remanded to the Director of the FAA Office of Safety and Standards for further investigation and appropriate handling;
3. The Director of the FAA Office of Airport Safety and Standards shall complete any necessary investigation and issue a new Director's Determination within 90 days of the date of this order consistent with this decision;
4. All motions not expressly granted herein are denied.



Woodie Woodward
Acting Associate Administrator for
Airports.

Date: MAR 28 2000

TOWN OF FAIRVIEW, TEXAS

V.

CITY OF MCKINNEY, TEXAS

APPEAL FROM DIRECTOR'S DETERMINATION

DOCKET NO. 16-99-04

INDEX OF ADMINISTRATIVE RECORD

Exhibit 1

Item 1: September 20, 1999, Director's Determination, Docket No. 16-99-04

Item 2: November 8, 1999, Town of Fairview's Appeal of Director's Determination, includes exhibits A-H

- A – Resolution 93-4-1, Joint Resolution by and between the Town of Fairview and the City of McKinney concerning the noise impact report performed by Harris, Harris, Miller and Hanson, Inc., relative to the McKinney Municipal Airport.
- B—Letter dated 1/3/91 to Linda Engle, City of Fairview from C.E. Newton, Ph.D., regarding Environmental Assessment and finding of no significant impact concerning proposed McKinney airport expansion.
- C—Letter dated 3/25/92 to Honorable Phil Gramm, United States Senator, from Clyde M. Dehart, Jr., Regional Administrator, FAA ASW, regarding Environmental Assessment and finding of no significant impact concerning proposed McKinney Municipal Airport expansion.
- D—Chapter 7.0, Environmental Overview, from Environmental Assessment of McKinney Municipal Airport expansion.
- E—Letter dated 11/4/98 to Terrence S. Welch, City of McKinney, from Karen E. Hattaway, Assistant Attorney General, Open Records Division regarding disclosure of certain documents under Chapter 552 of the Government Code (State of Texas).
- F—Letter dated 12/5/98 to Don Phillips, Mayor of Fairview, from Terrence S. Welch, regarding request for disclosure of certain documents.
- G—Counsel on Environmental Quality Definition of "Cumulative Impact."
- H—Reprint of news article from the Dallas Morning News entitled "FAA ruling may not end airport battle – Fairview set to consider pushing its complaint against McKinney birds.

Item 3: December 22, 1999, Reply of the City of McKinney, Texas to Appeal from Director's Determination by City of Fairview.

Item 4: Airport Master Record for McKinney Municipal Airport, dated 02/03/98.

Item 5: On October 15, 1999, Fairview requested an extension of time to file an Appeal to the Director's Determination.

Item 6: On October 18, 1999, Fairview supplemented their request for an extension of time to file an Appeal by stating that McKinney did not object to the extension.

Item 7: On October 18, 1999, FAA granted Fairview its request for an extension of time to file an Appeal to the Director's Determination.

Item 8: On November 5, 1999, letter from Mark S. Houser (McKinney) to Thomas O. Mason, (Fairview) regarding agreed upon extension of time for McKinney to Appeal of the Director's Determination. [FAA, Exhibit 1, Item 2]

Item 9: On November 15, 1999, Request for an extension of time for McKinney to file its reply to the Appeal to the Director's Determination.

Item 10: On December 1, 1999, FAA verbally granted McKinney its request for an extension of time to file an appeal until December 13, 1999, and on December 7, 1999, confirmed this extension in writing.

Item 11: On December 10, 1999, Letter from Beverly Davidson, Legal Assistant to Mark Houser, to Kathleen Brockman, FAA, confirming telephone discussion of December 1, 1999, that granted a verbal extension to McKinney in replying to Appeal of Director's Determination.

Item 12: On January 11, 2000, request for change of address for Thomas O. Mason, counsel for Fairview.

Item 13: On February 26, 2000, Facsimile of sample bird mitigation work plans from Wildlife Services, U.S. Department of Agriculture, to FAA's staff wildlife biologist.

Item 14: On September 20, 1999, letter from McKinney Municipal Airport Manager to ASW regarding hiring of an ornithologist to conduct an assessment of the bird activities in and around the Airport.

Item 15: Page 216 from the U.S. Government Flight Information Publication Airport Facility Directory indicating birds in the vicinity of the McKinney Municipal Airport.

Item 16: April 19, 1999, Bird Harassment Program at North Texas Municipal Water District/McKinney Landfill.

Item 17: April 1, 1999, Bird Harassment Program at North Texas Municipal Water District/McKinney Landfill.

Item 18: Comments from FAA Staff Wildlife Biologist regarding sufficiency of April 19, 1999, Bird Harassment Plan.

Item 19: February 8, 2000, Notice of Extension of Time to issue a final decision and order on appeal from the Director's Determination from February 11, 2000, to February 23, 2000.

Item 20: February 23, 2000, Notice of Extension of Time to issue a final decision and order on appeal from the Director's Determination from February 23, 2000 to March 10, 2000.