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August 28, 2000

Title VI Guidance Comments
U.S. Environmental Protection Agency
Office of Civil Rights (1201A)
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20460
ATTN: Yasmin Yorker

Re: Comments by the American Association of Airport Executives Regarding the U.S. Environmental Protection Agency's *Draft Title VI Guidance for EPA Assistance Recipients Administering Environmental Permitting Programs (Draft Recipient Guidance) and Draft Revised Guidance for Investigating Title VI Administrative Complaints Challenging Permits (Draft Revised Investigation Guidance)* 65 Fed. Reg. 39, 649 (June 27, 2000)

Dear Sir or Madam:

The American Association of Airport Executives ("AAAE") respectfully submit the following comments on the U.S. Environmental Protection Agency's D*raft Title VI Guidance for EPA Assistance Recipients Administering Environmental Permitting Programs (Draft Recipient Guidance) and Draft Revised Guidance for Investigating Title VI Administrative Complaints Challenging Permits (Draft Revised Investigation Guidance*).

I. BACKGROUND

AAAE is a not-for-profit professional individual association of the airport management industry. Founded in 1928, AAAE is the largest professional organization for airport executives in the world. Representing thousands of airport management personnel at over 800 U.S. airports, the Association represents executives of large and medium-size airports, as well as hundreds of managers from smaller airports.

The airport manager's primary duty is to ensure and take responsibility for the safe and efficient operation of the airport. The airport manager must answer both to the airport operator and the tenants. In some cases, the airport operator is an independent authority with a policy board. However, in most cases, the local government owns the airport and leases the facility to airlines, fixed-base operators ("FBOs"), and service businesses.

The airport manager must deal with all tenants and persons who lease or use portions of the airport, including: (1) commercial airlines that schedule flights, maintain and service their own aircraft, and process passengers; (2) all segments of the general aviation community, including FBOs and individual and corporate owners and operators of aircraft; and (3) government-employed staffs, such as air traffic controllers and customs agents.

Tenants share responsibility for compliance with federal regulations with the airport owner/operator. Although the manager works cooperatively with the tenants and airport operator, at most commercial airports, the airport manager does not have direct control over most flying activities. Thus, the manager may not have any control over the types or amounts of chemical deicers that are used, or even how they are used. Nevertheless, the airport manager's overall responsibility for the safe operation of the airport may expose him or her to liability for injuries resulting from "airport" activities.

II. GENERAL AND SPECIFIC COMMENTS

AAAE'S comments apply both to the *Draft Recipient Guidance* and the *Draft Revised Investigation Guidance*. AAAE appreciates the amount of effort expended by the Agency in order to implement President Clinton's Executive Order 12898. Nevertheless, the issue of environmental justice is perhaps one of the toughest moral, economic, administrative, and social issues facing the Agency. There are no simple answers to the many thorny and complex issues. However, EPA must answer many more of the fundamental issues than it has with these proposed guidance documents.

AAAE was represented at one of EPA's Washington, D.C. public listening sessions and the Association was struck by Mr. Christopher Foreman's statement that the original Civil Rights Act of 1964 Title VI was never intended to be applied in environmental permitting situations. A senior fellow and author at the Brookings Institute, Mr. Foreman seemed to advocate a broader national debate regarding the protection of minority and low-income populations regarding disproportional environmental impacts. EPA, the President, and Congress should consider such a debate.

One of the primary reasons AAAE supports a more uniform national policy is because airports and the aviation industry often are forced to confront varying policies and guidance generated by various regulators of numerous and competing programs. Airports have an environmental interest in promoting environmental stewardship at their facility and for the surrounding community while also having to prioritize safety for the general traveling public. Thus, airports must not only answer to EPA but also to the Department of Transportation, its Federal Aviation Administration, and other Federal, state, and local regulatory agencies. Further, some airports are publicly-owned and operated while others are privately controlled. Many larger airports not only are regulated by federal or state permits, but they also are direct recipients of federal funds. This maze of bureaucracy and the independent and unrelated federal actions by competing agencies relating to similar concerns is confusing and inefficient.

At the very least, EPA must create a mechanism for working with other federal agencies regarding environmental justice enforcement, especially when multiple agencies have regulatory authority over a single regulated entity. Therefore, EPA should work with the Department of Transportation to craft a more definitive direction regarding the applicability of Title VI of the Civil Rights Act to aviation activities and how best to achieve the goal of fairness in implementing environmental programs.

AAAE encourages EPA to take the following comments into consideration when revising its two guidance documents.

- The guidance documents fail to lay out a clear process and what roles key stakeholders play in the deliberation process. Facilities that are subject to federal action and are subjected directly to EPA guidance documents and yet EPA envisions no role for them in the process. If the granting or denial of an airport's federal approval hinges on an environmental claim, it ought to have a clearly defined role in resolving any environmental justice claim.

- Specific terms are used throughout the document, such as "adverse disparate impact." However, these terms are not defined. If EPA is unprepared to define such terms, it may be unprepared to finalize guidance that relies upon specific definitions. EPA's guidance should add clarity to the program, not merely mask the confusion surrounding it. The same holds true for the terms "adequate justification" and "comparison populations." Without a clear understanding of what EPA has in mind, the guidance will not prove to be helpful.

- EPA has not provided a rational standard for judging "cumulative impacts" that result in adverse impact. EPA must establish a procedure founded in sound scientific methodology for analyzing "cumulative impacts." We cannot rely on the historic Supreme Court standard of "we know it when we see it."

- EPA must provide some sort of methodological safe harbor. A regulated entity ought to be able to work with local representatives to address environmental justice concerns without the threat of new claims being raised in the waning moments of the permit approval process. An airport ought to be able to predict the effort and expense associated with its actions based upon the initial reaction to, for example, new expansion plans, rather than address issues more likely intended to delay or halt aviation-related expansion unrelated to environmental justice. In other words, the Agency should not create a forum for rectifying all the ills of society through this program. As a related issue, EPA must acknowledge that Title VI was not intended to guaranty all communities with equal environments. Unintended and unequal environmental risks and rewards are created throughout the economy.

- Permit actions that do not increase net emissions levels ought to be categorically excluded from environmental justice claims. Further, permits issued pursuant to EPA health-based determinations also ought to be excluded; EPA should recognize the precedent it set in the *Select Steel* case.

- EPA should establish stringent standards of proof supported by adequate data that must be met prior to the acceptance of an environmental justice claim. This will discourage

entities from filing frivolous claims and wasting resources that could be expended on legitimate claims. The Agency's "so incoherent they cannot be grounded in fact" standard is too lenient.

- EPA shall support whatever interpretation of Title VI it relies upon with a thorough legal analysis. The U.S. Supreme Court has established significant precedent for reviewing Title VI claims, but the Court seems largely ignored by EPA's documents.

- The Agency should not finalize this guidance, but rather initiate a formal notice and comment rulemaking on environmental justice regulations that includes those necessary considerations inherent therein, including the Regulatory Flexibility Act, Office of Management and Budget review, the Unfunded Mandates Act, etc.

AAAE appreciates the opportunity to provide these comments on EPA's draft environmental justice guidance documents. If you have any questions, please call.

Respectfully submitted,

Carter B. Morris
Staff Vice President of Environmental
Affairs and Airport Projects

cc: Jeffrey S. Longsworth
Environmental Counsel