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Re: Comments of the City of Mukilteo on the Draft Environmental Assessment for Snohomish County Airport Paine Field

Dear Mr. Waggoner and Ms. Morgan:

The following constitute the comments of the City of Mukilteo ("Mukilteo") regarding the "Draft Environmental Assessment" ("DEA") for "Amendment to the Operations Specifications for Air Carrier Operations, Amendment to a FAR Part 39 Certificate, and Modification of the Terminal Building, Snohomish County Airport, Paine Field" ("Project").

As a threshold matter, please be advised that Mukilteo is deeply concerned regarding the superficial nature of the DEA's Project identification and environmental evaluation. Especially troubling are: (1) the attenuated scope of the physical Project, which is limited to evaluation of the 29,000 square foot "modular" terminal, without mention of the cumulative terminal facilities already existing, planned and approved under the Master Plan; (2) the failure to evaluate the cumulative impacts of this more comprehensive project which will, when taken together with the

proposed amendment to the Paine Field Operating Certificate, be more than sufficient to accommodate a far higher level of aircraft operations than acknowledged in the current Project Description; (3) the absence of any analysis of the Project's resulting growth inducing impacts; (4) the failure to mention, let alone evaluate, the Project's climate change impacts; and (5) the DEA's failure to adequately review or analyze the Project's potential impacts on special population groups, including minority and special ethnicity neighborhoods.

## I. THE DEA IMPERMISSIBLY SEGMENTS CLOSELY RELATED ACTIONS THAT SHOULD BE ANALYZED IN A SINGLE ENVIRONMENTAL DOCUMENT.

The DEA defines the Project to include essentially three components: changes to the operations specifications for two airlines, Horizon and Allegiant, (DEA, p. A.2); changes to the Operating Certificate for Paine Field (DEA, p. A.3); and the construction of a new "modular terminal," not accommodated in the currently approved 2007 Master Plan, or in the FAA approved Airport Layout Plan ("ALP") (DEA, p. A.3). Nevertheless, the impacts of these components are analyzed, not only in isolation from one another, but also without regard to the reasonably foreseeable future impacts of each component individually.

For example, the amendment to Paine Field's current Category IV Operating Certificate, which does not allow scheduled operations by large aircraft weighing over 300,000 pounds, will be upgraded to a Category I Operating Certificate which allows operations by all types and sizes of aircraft. The Project sponsor is, no doubt, aware that, once designated a Category I airport, which allows operations of passenger aircraft in excess of 300,000 pounds, the airport must allow access by all parties requesting access where it is safe to do so, and terminal facilities are adequate to accommodate them. Airline Deregulation Act of 1978, 49 U.S.C. §§ 49701, *et seq.*; Airport Noise and Capacity Act, 49 U.S.C. §§ 47521, *et seq*.

Despite this radical shift in operational configuration, the DEA's analysis is limited to the impacts of aircraft operations of only the two carriers which have already requested access, Horizon and Allegiant. The DEA has, therefore, impermissibly attenuated the Project's scope of analysis, in contravention of the express call of the CEQ regulations implementing NEPA, 40 C.F.R. § 1500.1, *et seq.*, for the broadest possible Project Definition. "Agencies shall make sure the proposal which is the subject of an EIS is properly defined. Agencies shall use the criteria for scope (§ 1508.25) to determine which proposal(s) shall be the subject of a particular statement." 40 C.F.R. § 1502.4(a).

To determine a project's scope, "[A]gencies shall consider three types of actions . . .," 40 C.F.R. § 1508.25(a)(2), including "cumulative actions which when viewed with other proposed actions have cumulatively significant impacts and should therefore be discussed in the same impact statement." *Id.* [Emphasis added.] While the CEQ regulations refer on their face to environmental impact statements, the courts have interpreted the mandate of § 1508.25 to apply

to environmental assessments such as the DEA here, as well. *Wetlands Action Network v. United States Army Corp of Engineers*, 222 F.3d 1105 (9th Cir. 2000).

The FAA has turned a blind eye to this unequivocal mandate. First, the Project Definition in the DEA falls squarely within the definition of judicially prohibited "segmentation." "Federal agencies may plan a number of related actions but decide to prepare impact statements on each action individually rather than prepare an impact statement on the entire group. This decision creates a 'segmentation' or 'piecemealing' problem." *Daniel R. Mandelker NEPA Law and Litigation*, Chapter 9, § IV. Segmentation, § 9:11, p. 9-25.

FAA confirmed this erroneous approach when confronted at a public meeting concerning the specter of unlimited passenger operations at Paine Field enabled by the Project's Operating Certificate amendment. The FAA's consultant opined that the Project would not be the proverbial "camel's nose under the tent," because environmental review would be performed for each additional request by an airline for access. Such a response ignores the definition of "cumulative impact," *i.e.*, one "which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions. . .," 40 C.F.R. § 1508.7, and which the CEQ regulations require be considered within the designated scope of an action. 40 C.F.R. § 1508.25(a)(2).

There can be no doubt that the Project will give rise to reasonably foreseeable future actions as well as impacts. The Operating Certificate amendment enables a currently uncalculated and unanalyzed number of passenger carrier operations. The currently approved Master Plan supports this analysis. For example, Master Plan, p. B.30, forecasts that, by the year 2016, the last year analyzed in the EA, between 10,861 and 40,872 scheduled passenger carrier operations could occur at Paine Field, accommodating anywhere from 144,630 to 1,461,553 passengers. The DEA, without explanation, chooses 11,698 passenger carrier operations to evaluate, slightly in excess of the "regional low" scenario in the Master Plan (Master Plan, § B, p. B.30, Table B.11),[1] and ignores the other scenarios evaluated in the Master Plan which give rise to a far larger number of passengers and far greater impacts.

However, even if the Project sponsor considers such an outcome unlikely, the CEQ regulations require a more stringent treatment. They require that a DEA contain, at minimum, "(3) a summary of existing credible scientific evidence which is relevant to evaluating the reasonably foreseeable significant adverse impacts on the human environment, and (4) the agency's evaluation of such impacts based upon theoretical approaches or research methods generally accepted in the scientific community." 40 C.F.R. § 1502.22(b)(3) and (4). The term "reasonably foreseeable", as used in the CEQ regulations, "includes impacts which have

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[1] For an explanation of the various scenarios evaluated in the Master Plan, *see* Master Plan, § B, Forecasts of Aviation Activity.

catastrophic consequences, even if their probability of occurrence is low, provided that the analysis of the impacts is supported by credible scientific evidence, is not based on pure conjecture, and is within the rule of reason." *Id.* The courts have construed this regulation to require "an analysis of the range of environmental impacts likely to result" even from an alternative of "lower probability," *San Luis Obispo Mothers for Peace v. Nuclear Regulatory Commission*, 449 F.3d 1016, 1034 (9th Cir. 2006) [emphasis added], such as the "national high" scenario in Master Plan, § B, p. B.30, Table B.11.

Finally, the DEA's analysis of the terminal component of the Project conclusively establishes the DEA's piecemeal approach. The DEA purports to evaluate, in isolation, the environmental impacts of the 29,000 square foot "modular" terminal (DEA, p. B.5). However, a terminal building of 1,600 square feet already exists, and space is reserved in the Master Plan for the development of an additional terminal of 30,000 square feet (Master Plan, p. C.35). Collectively, Paine Field could, without a single additional page of environmental review, include over 60,000 square feet of terminal space. This is enough, according to the Master Plan, to accommodate well over 300,000 passenger enplanements per year (Master Plan, p. B.30, Table B.11).

In short, because the DEA gives short shrift to analysis of a potential range of aircraft operational levels, and terminal configurations, it fatally understates the scope of the Project, its prospective capacity, and its resulting impacts.

## II. THE DEA FAILS TO MENTION, LET ALONE ANALYZE, THE PROJECT'S REASONABLY FORESEEABLE CUMULATIVE IMPACTS.

One of the purposes of an Environmental Assessment is consider the cumulative effects of the proposed action and other "reasonably foreseeable" actions. A cumulative impact is defined in NEPA's implementing regulations as "the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions.... Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time." 40 C.F.R. § 1508.7; *Klamath v. BLM*, 387 F.3d 989, 993 (9th Cir. 2004).

As far back as 1985, the courts laid out the specific criteria for examining cumulative effects in EAs. For example, in *Fritiofson v. Alexander*, 772 F.2d 1225 (5th Cir. 1985) the court found five criteria that must be identified in the analysis of cumulative impacts:

- The area in which the effects of the proposed action will occur;
- The impacts that are expected in that area from the proposed action:

- Other past, present, and reasonably foreseeable actions that have or are expected to have impacts in the area;
- The impacts or expected impacts from these other actions;
- The overall impacts that can be expected if the individual impacts are allowed to accumulate.

*Fritiofson*, 772 F.2d at 1245; *see also*, *City of Carmel-By-The-Sea v. U.S. Dept. Of Transportation*, 95 F.3d 892, 902 (9th Cir. 1996) ("[w]e adopt the Fifth Circuit's analysis of what a cumulative impacts analysis requires"). The DEA fails this test.

A. The DEA Fails to Properly Examine Other Past, Present, and Reasonably Foreseeable Actions.

On pp. D.36 and D.37, the DEA lists a few "past and present on-airport projects" and "future airport projects." Moreover, the DEA only lists a handful of past, present and future on-airport projects. A much more complete list of projects, past, present and future can be found in the Master Plan on pp. F.2-F.5. Since these projects were included in the Master Plan, to the extent that they have not been completed, they are reasonably foreseeable. Thus, the DEA has failed to identify, let alone analyze all of the "other actions - past, proposed and reasonably foreseeable - that have had or are expected to have impacts in the same area." *Fritiofson,* 772 F.2d at 1245.

B. The DEA Fails to Analyze the Potential Impacts of Past, Present or Reasonably Foreseeable Actions.

While the DEA devotes one page to "cumulative impacts" it is insufficient to meet the NEPA standard. "A proper consideration of the cumulative impacts of a project requires some quantified or detailed information;" *Klamath*, 387 F.3d at 993. Indeed, the DEA fails *Klamath's* test that "t]he analysis must be more than perfunctory - it must provide useful analysis of the cumulative impacts of past, present, and future projects." *Id*. at 944. The DEA here, like the EA in *Klamath*, provides a list of on-airport and off-airport projects, notably omitting any mention of how the change in the operating certificate will effect the future new planned terminal (as discussed in detail above), and, without so much as a wink or a nod to the various projects' individual or collective impacts. In *Klamath*, the Ninth Circuit rejected the lead agency's conclusory approach to cumulative effects, holding that it "does not offer any more than the kind of 'general statement about possible effects and some risk' which we have held to be insufficient to constitute a 'hard look.'" *Klamath*, 387 F.3d at 995, *citing Ocean Advocates v. U.S. Army Corps of Engineers*, 361 F.3d 1108 (9th Cir. 2004). That parsimonious approach will not withstand judicial scrutiny.

C. The DEA Fails to Analyze the Overall Impacts that Can Be Expected if the Individual Impacts Are Allowed to Accumulate.

The DEA lacks any analysis of reasonably foreseeable cumulative impacts that the Project will have on the environment. First, the DEA does not account for the Project's reasonably foreseeable cumulative noise impacts. The DEA states that it is "County policy not to encourage commercial passenger service at the airport." DEA, p. D.38. However, the additional facilities projected in the Master Plan, when combined with the modular terminal that is the subject of the DEA and the existing terminal facility, effectively remove that decision from the County, because Federal law requires airports to accommodate any aircraft that desires access, so long as airport facilities and equipment can accommodate it safely. *See*, DEA, pp. A.2-A.3. The DEA does not predict that Horizon and Allegiant will use the full capacity of the Modular Terminal until 2016. Until that time, there is unused capacity at the Modular Terminal that could be used by other airlines, which, in the long run, may require construction of the Planned Terminal. Therefore, the DEA ignores the increased noise impacts resulting from the reasonably foreseeable increased increment of aircraft operations that the project will enable through the final Master Plan Year, 2027 through the removal of all barriers to scheduled operations at Paine Field.

Second, The DEA ignores the project's cumulative air quality impacts. The Conformity provision of the Clean Air Act requires that all Federal projects such as this one conform to a State Air Quality Implementation Plan ("SIP"). While Paine Field is in a "maintenance area," rather than an area that is in non-attainment of the SIP's air quality goals, if a Federal project emits more than 100 tons of Carbon Monoxide ("CO"), a full conformity determination must be performed. Even the analysis in the DEA, based on the limited terminal facilities and forecast of operations, predicts that the project will emit 75 tons of CO per year by 2015. DEA, p. D.4. Since the DEA only evaluates the emissions impacts from the current "phase" of development, the modular terminal, and fails to take into account the impacts of reasonably foreseeable future projects and emissions caused by, or reasonably related to, such projects, it is reasonably foreseeable that emissions of CO will exceed 100 tons per year by 2016. Moreover, even if the attenuated scope of the air quality analysis were reasonable, it is based on an outdated version of FAA's model.[2]

Finally, even the conclusions the DEA does reach regarding cumulative effects are inadequate. While the DEA contains the conclusion that the cumulative effects will be minimal, the DEA is inadequate because it only contains narratives of expert opinions. *Klamath*, 387 F.3d at 996. Since the NEPA regulations tell agencies that "public scrutiny [is] essential (40 C.F.R. § 1500.1(b)) and are charged to "encourage and facilitate public involvement in decisions," (*Id.*, § 1500.2(d)) so that "environmental information is available to public officials and citizens before

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[2] *See, infra* § VIII.

decisions are made," (*Id.*, § 1500.1(b) NEPA requires that the agencies provide the "underlying environmental data from which [the agency] derived [its] opinion." *Idaho Sporting Congress v. Thomas*, 137 F.3d 1146 (9th Cir. 1998); *see also, Klamath*, 387 F.3d at 996. For example, in focusing on the impacts of operations requested by Horizon and Allegiant, the FAA leaves unanswered the question of whether those action would have a cumulatively significant impact on the environment when combined with the "incremental impact" of the operations that would be allowed with a Class I Operating Certificate and the number of operations planned for in the Master Plan and provided for with the Planned Terminal. *See* 40 C.F.R. § 1508.7, § 1508.27(b)(7). Without the underlying data supporting the bare conclusions contained in the cumulative effects section of the DEA, the DEA is inadequate.

In summary, NEPA requires that cumulative impacts be considered with specificity. The holding of the *Klamath* court applies here. "Although it might ultimately be appropriate for the agency to consider, after a proper analysis, that the projects would not have significant cumulative effects, the potential for such serious cumulative effects is apparent here, such that the subject requires more discussion than [this EA] provide[s]." *Klamath*, 387 F.3d at 996.

## III. THE DEA CONTAINS NO MENTION, LET ALONE ANALYSIS, OF POTENTIAL CLIMATE CHANGE IMPACTS OF THE PROJECT, EITHER INDIVIDUALLY OR CUMULATIVELY.

While NEPA predates the current sensitivity to climate change, courts have already recognized that its analysis falls within NEPA's purview. NEPA requires that federal agencies consider adverse effects of major federal actions, whether the effects are direct or indirect. 42 U.S.C. § 4332(C), 40CFR § 1508.8. Indirect effects are those that "are caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable." 40 C.F.R. §1508.8. The U.S. Court of Appeals for the Ninth Circuit stated as recently as 2008, in *Center for Biological Diversity v. National Highway Traffic Safety Administration*, 538 F.3d 1172, 1214-1215 (9th Cir. 2008), that it is NEPA's purpose to insure that environmental information, including information about climate change, is made available to public officials and citizens before decisions are made and actions are taken.

Information about broad-scale causes and effects of climate change has been well publicized. In *Center for Biological Diversity, supra*, the Ninth Circuit recently summarized the following findings from International Panel on Climate Change reports and other sources:

- Carbon dioxide concentrations increasing over the 21st century are virtually certain to be mainly due to fossil-fuel emissions;

- The average earth surface temperature has increased by about 0.6 degrees;

- There have been severe impacts in the Arctic due to warming, including sea ice decline;
- Global warming will affect plants, animals, and ecosystems around the world. Some scientists predict that it will cause 15 to 37 percent of species in certain regions to be extinct;
- Global warming will cause serious consequences for human health, including the spread of infections and respiratory diseases;
- Climate change is associated with increasing variability and heightened intensity of storm such as hurricanes; and,
- Climate change may be non-linear, meaning there are positive feedback mechanisms that may push global warming past a dangerous threshold (the"tipping point").

*Id.* at 522-23. These findings indicate that greenhouse gases from combustion of fossil fuels substantially contribute to climate change, and climate change is expected to result in widespread adverse environmental effects. It is indisputable that aircraft and ground operations at airports emit greenhouse gases and contribute to climate change, as well as the construction associated with reasonably foreseeable projects.

While it is doubtful that individual projects, standing alone, could result in significant climate change effects, in *Center for Biological Diversity,* the Ninth Circuit faulted NHTSA's Environmental Assessment, which quantified the expected amount of CO2 emitted from light trucks under the proposed CAFÉ standard, because the EA did not include an evaluation of the "incremental impact" that such emissions will have on climate change or on the environment more generally in light of other past, present, and reasonably foreseeable actions. *Id.* at 549. Based on governing legal precedent, FAA should evaluate the incremental impact that the Project's emissions of greenhouse gases will have on climate change or on the environment more generally in light of other past, present, and reasonably foreseeable actions.

## IV. THE DEA DOES NOT ACKNOWLEDGE OR ANALYZE THE PROJECT'S MANIFEST GROWTH-INDUCING IMPACTS.

A Federal agency is required to evaluate not merely the direct impacts of a project, but also its indirect impacts, including those "caused by the action and later in time but still reasonably foreseeable." 40 C.F.R., Section 1508.8(b), *see also California v. U.S. D.O.T.*, 260 F.Supp.2d 969, 976-977 (N.D. Cal. 2003). Indirect impacts include a project's growth-inducing effects, such as changes in patterns of land use and population distribution associated with the

project [40 C.F.R., § 1508.8(b)] and increased population, increased traffic, and increased demand for services. *City of Davis v. Coleman*, 521 F.2d 661, 675 (9th Cir. 1975). The "growth-inducing effects of [an] airport project appear to be its 'raison d'etre.'" *California v. U.S. D.O.T.*, 260 F.Supp.2d at 978, *citing City of Davis, supra*, 521 F.2d at 675. The DEA ignores this requirement, even though the Project is virtually defined by its growth-inducing impacts.

Amendment of the Paine Field FAR Part 139 Operating Certificate from Class IV (Unscheduled Large Air Carrier Aircraft) to Class I (Scheduled Large Air Carrier Aircraft) would pave the way for realization of the most extreme passenger enplanement forecast in the Airport Master Plan (p. B.30, Table B11). The Project would certify the Airport for virtually unlimited use not previously allowed, and require construction of new terminal facilities, including new gates, to accommodate such use. And yet, the DEA evaluates only the environmental impacts of the limited operations proposed by two carriers, and only through 2016.

The growth-inducing nature of the Project is readily apparent in the DEA. The assurance that neither the County nor Horizon Air or Allegiant Air intend to expand service beyond the services proposed by the carriers and, "[t]herefore, no expansion of service or facilities beyond those proposed is reasonably foreseeable" [DEA, p. B.3] is belied by the reasonably foreseeable future on-Airport projects listed at DEA, p. D.37. They include, among other things, installation and upgrade of navigational aids, construction of Taxiway "K" South, aircraft apron improvements, construction of aircraft hangars and support buildings and improvements to the passenger terminal building and utilities. If, with the addition of the temporary terminal, existing facilities are sufficient to support the limited operations evaluated in the DEA, there would be no need for the future on-Airport projects. They would be needed only to support increased Airport capacity and would, in fact, induce and accommodate increased capacity. The reasonably foreseeable future on-Airport projects listed in the DEA, along with the Class I certification and the County's obligation to "make the airport available for public use on reasonable terms and without unjust discrimination to all types, kinds and classes of aeronautical activities, including commercial aeronautical activities offering services at the airport" [DEA, p. A.3] create an unidentified, unquantified, unanalyzed increase in Airport capacity.

The increased Airport capacity will also result in commensurate increases in indirect off-Airport impacts which must be evaluated. The DEA states that off-airport development is expected to be minimal over the next few years, with no major planned development expected in the immediate airport vicinity. [DEA, p. D.37] However, that expectation is based only on the limited operations proposed by Horizon and Allegiant through 2016. The operational growth facilitated by the Project will create potential, increased but unanalyzed off-Airport environmental impacts resulting from increases in aircraft noise, aircraft emissions and surface traffic, as well as potential changes in land use and development surrounding the Airport.

## V. THE DEA FAILS TO ADEQUATELY ANALYZE THE ENVIRONMENTAL JUSTICE IMPACTS OF THE PROJECT.

The DEA fails to comply with a series of related Federal directives governing Environmental Justice. Executive Order ("EO") 12898, "Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations" [59 Fed. Reg. 7629 (1994)] provides that "each Federal agency shall make achieving environmental justice part of its mission by identifying and addressing, as appropriate, disproportionally high and adverse human health or environmental effects of its programs, policies, and activities on minority populations and low income populations . . ." *Id.*, § 1-101

In addition, Department of Transportation ("DOT") Order 5610.2, "Department of Transportation Actions to Address Environmental Justice in Minority Populations and Low-Income Populations" establishes procedures for DOT and its components (including the FAA) to use in complying with EO 12898. It directs that compliance with Executive Order 12898 be achieved "by fully considering environmental justice principles throughout planning and decision-making processes in the development of programs, policies, and activities, using the principles of (among other statutes and regulations) the National Environmental Policy Act of 1969 (NEPA)" DOT Order 5610.2 § 4.a.

FAA Order 1050.1E, "Environmental Impacts: Policies and Procedures", directs that FAA officials and project proponents comply with EO 12898 and DOT Order 5610.22. Section 208e. provides that "NEPA also serves as 'a framework' statute for completing the public notice and participation requirements specified in . . . applicable environmental laws and regulations, e.g., . . . Executive Order 12898 and Order DOT [*sic*] 5610.22, addressing environmental justice. Responsible FAA officials and project proponents must involve . . . other agencies during the NEPA process and meet the public involvement needs specified in all the environmental laws, regulations and executive orders applicable to a proposed FAA action." Similarly, FAA Order 5050.4B, "National Environmental Policy Act (NEPA) Implementing Instructions For Airport Actions" states, in the context of "Environmental justice issues," that "[w]hen an action would cause disproportionally high and adverse human health or environmental effects on minority and low-income populations, a significant impact may occur." FAA Order 5050.4B, Table 7-1, p. 7-21

Finally, the FAA Environmental Desk Reference for Airport Actions reiterates that compliance with EO 12898 and DOT Order 5610.2, and the requirement that the FAA analyze impacts on low-income and minority populations [Chapter 10, ¶ 5.] applies to airport development actions funded under the Airport Improvement Program ("AIP") or any airport action subject to FAA approval including, among other actions, "airfield/landside expansion (new or expanded terminal . . . facilities)" and "significant changes in airfield operations". [Chapter 10, ¶ 3.a.]

The DEA fails to comply with EO 12898, DOT Order 5610.2 and governing FAA Orders where it does not adequately analyze the environmental impacts of the Project on low-income and minority populations and children's environmental health.

A. The DEA Obscures the Noise Impacts the Project Will Have on Special Population Groups, Including Minority and Special Ethnicity Neighborhoods.

The DEA gives short shift to environmental justice analysis of the Project. In one brief paragraph, the DEA concludes that, because: (1) there is no land acquisition associated with the Project; (2) no significant impacts are expected as a result of the increased traffic attributable to the Project; and (3) as the 65 DNL noise contour remains primarily on airport property, there will be no significant impacts on any special population groups. [DEA, p. D.30]. Such an unsupported statement is belied not only by the DEA's list of future on and off-airport projects which provides a roadmap for future expansion and an indication of resulting impacts, but also by the definition of the Project to include the Operating Certificate amendment which provides the basis for virtually unlimited aircraft operations and vastly expanded facilities to accommodate them.

Moreover, the DEA is internally contradictory with respect to Environmental Justice. On the one hand, it acknowledges that the combined populations within the four Consensus Designated Places ("CDPs") potentially impacted by aircraft noise resulting from the Project (the Paine Field-Lake Stickney CDP, the Picnic Point-North Lynwood CDP, and the Cities of Mukilteo and Everett) are 7.7 percent Asian and 6.5 percent Hispanic or Latino (DEA, p. C.20). On the other, it states that "there are no known special population groups within the project area." (DEA, p. C.19).

In addition, by combining and averaging the populations over the four CDPs, the DEA does not disclose the actual proportion of Asian and Hispanic population in the Paine Field-Lake Stickney CDP, proposed for annexation by the City of Mukilteo, where the proportion of Asian and Hispanic population is far greater. (For example, within Lake Stickney Census Tract No. 418.04 the Hispanic population is 11.69 percent, and within Census Tract 418.06 the Asian population is 8.41 percent.) Finally, the DEA was circulated only in English, and no public hearings are planned in the Lake Stickney area. In short, for all the above reasons, the DEA's purported analysis of Environmental Justice impacts is fatally flawed.

B. The DEA Does not Adequately Analyze Children's Environmental Health and Safety Risks

The DEA correctly cites Executive Order 13045 [62 Fed. Reg. 19883-888 (1997)] for the mandate that Federal agencies make it a high priority to identify and assess environmental health risks and safety risks that may disproportionally affect children. [DEA, p. C.20] However, the

DEA disposes of that mandate in two sentences, by stating that there are no schools in the Project area, and even the two schools located less than one mile from the terminal building, closest to the Project area, would not be impacted. [DEA, pp. C.20, D.30] The glaring problem with that analysis is that it defines the Project too narrowly as construction of the terminal building only, and does not address the many schools located within the vicinity of the Airport that will be affected by increased operations at the Airport.

A simple Google Maps search shows that there are many schools located within a few miles of Paine Field. The following is a partial list of schools near Paine Field that could be affected by commercial carrier operations at the Airport. The list is illustrative, not exhaustive.

Harbour Pointe Middle School
5000 Harbour Pointe Boulevard
Mukilteo

Kamiak High School
10801 Harbour Pointe Boulevard
Mukilteo

Olympic View Middle School
2602 Mukilteo Speedway
Mukilteo

Mukilteo Academy
13000 Beverly Park Road
Mukilteo

KinderCare
4224 Harbour Pointe Boulevard Southwest
Mukilteo

Endeavour Elementary School
12300 Harbour Pointe Boulevard
Mukilteo

Mukilteo Montessori School
13318 Beverly Park Road
Mukilteo

Mariner High School
200 120th Street Southwest
Everett

Explorer Middle School
9600 Sharon Drive
Everett

A World Discovery Montessory Preschool
10814 7th Avenue Southeast
Everett

Sylvan Learning Center
221 Southeast Everett Mall Way
Everett

Northshore Christian Academy
5700 23rd Drive West
Everett

Voyager Middle School
11711 4th Avenue West
Everett

Odyssey Elementary School
13025 17th Ave. W.
Everett

Oak Heights Elementary School
15500 18th Avenue West
Lynwood

The potential environmental impacts on these and all other schools located near the Airport should be analyzed, including the impacts of future increased Airport operations forecast in the Master Plan and enabled by the Project.

## VI. THE PROJECT OMITS A REQUIRED REVISION TO THE AIRPORT LAYOUT PLAN.

Federal law requires that an airport within the FAA's National Plan of Integrated Airport Systems ("NPIAS") have an approved ALP to receive federal funding. *See, e.g.,* 29 C.F.R. §

152.107. An ALP is a planning document designed to show existing conditions, near-term and long-term airport development. To receive federal funding, all proposed airport improvement projects must be shown on an approved ALP. *Id.* If an airport sponsor is proposing an airport project not on the current ALP, an ALP update will be required before receiving a federal grant for the proposed project. *Id.*

While the DEA does mention that the Planned Terminal is depicted on the ALP, it does not state that the Modular Terminal is depicted on the current Airport Layout Plan. However, in order for the FAA to approve the Project and for the County to receive FAA funds for the project, the Modular Terminal must be depicted on the ALP. This is required not only by the FAA's own orders, but also by federal regulations.

First, 29 C.F.R. § 152.107 "Project Eligibility: Airport Development" states: "The development included in a project for airport development must . . . (3) *be described in an approved airport layout plan."* 29 C.F.R. § 152.107(c)(3) (emphasis added). Moreover, 29 C.F.R. § 152.111 requires that the airport sponsor submit the approved ALP when applying for aid:

> (c) Unless otherwise authorized by the Administrator, the preapplication required by paragraph (b) of this section must be accompanied by the following:
>
> (2) A sketch or sketches of the *airport layout indicating the location for each item of work proposed*, using the same item numbers used in the list required by paragraph (c)(1) of this section.

29 C.F.R. § 152.107(c) (emphasis added).

Second, the airport sponsor's grant assurances require that the ALP be kept up-to-date. "The Sponsor will not make or permit any changes or alterations in the airport or in any of its facilities *other than in conformity with the airport layout plan, as so approved by the FAA*, if such changes or alterations might adversely affect the safety, utility or efficiency of the Airport." Grant Assurance No. 29. All of this was made part of the FAA's process for obtaining FAA funding in FAA Order 5100.38C. Section 300 of 5100.38C, entitled "General Project Eligibility Requirements," states that in order for a project to be eligible for FAA funding, such as this one, the project sponsor must submit "a current airport layout plan (ALP) *that depicts the proposed project* and which has FAA approval from the standpoint of safety, utility, and efficiency of the airport shall be required before a development project is approved." FAA Order 5100.38C, § 300.

The Project Definition fails to mention approval of an ALP, nor does the DEA indicate that the Modular Terminal has been included on an approved ALP. Although *previous* ALPs are mentioned in the DEA *(See, e.g.*, Figure B.1), there is no mention that Snohomish County has ever submitted a revised ALP to show the Modular Terminal, let alone that the FAA has approved a revision to the ALP to show the modular terminal. Without the ALP revision, the Project Definition is incomplete.

VII. THE FAA'S RELIANCE ON EDMS IS MISPLACED.

The DEA relies on an Air Quality Model, EDMS, Version 5.1, that is not approved by EPA.[3] *See* Appendix A to 40 C.F.R., Part 51, Appendix W. EPA maintains a "Guideline on Air Quality Models," which is codified at 40 C.F.R. Part 51, Appendix W. Until November, 2005, EDMS was included in a list of approved air quality models, Appendix A of Appendix W. In November, 2005, EDMS was removed from that list because the EPA believed that EDMS was no longer a reliable model. The EPA summarized the reasons for the removal in the Federal Register notice:

> In our April 2000 NPR we proposed to adopt the version 3.1 update to EDMS [as part of appendix A]. However, this update *had not been subjected to performance evaluation and no studies of EDMS' performance have been cited in appendix A of the Guideline . Comment was invited on whether this compromises the viability of EDMS 3.1 as a recommended or preferred model and how this deficiency can be corrected.*
>
> *Several commenters expressed concern about EDMS 3.1 as a recommended model in appendix A. Indeed, there were concerns that EDMS 3.1 had not been as well validated as other models, nor subjected to peer review, as required by the Guideline 's subsection 3.1.1.* One of these commenters suggested that EDMS 3.1 should be presented only as one of several alternative models.
>
> At the 7th Conference, FAA proposed for Appendix A adoption an even newer, enhanced version of EDMS--version 4.0, an

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[3] In addition, EDMS 5.1 is not the most current version of EDMS available. According to the FAA's website, EDMS 5.1.2, which was issued in November 2009, is the most current version. http://www.faa.gov/about/office_org/headquarters_offices/aep/models/edms_model/ EDMS version 5.1.1 was released in September, 2009. Either one of these versions should have been used in place of EDMS 5.1.

> immediate precursor to Version 4.4 which was purportedly used in the FSEA air quality analysis.
>
> In response to written comments on our April 2000 NPR, at the 7th Conference (transcript) *FAA promised a complete evaluation process that would include sensitivity testing, intermodel comparison, and analysis of EDMS predictions against field observations. . .*
>
> As we explained in our September 8, 2003 Notice of Data Availability, *FAA has decided to withdraw EDMS from the Guideline 's Appendix A.* We stated that no new information was therefore provided in that notice, and we affirmed support for EDMS' removal from appendix A. *This removal, which we promulgate today, obviates the need for EDMS' documentation and evaluation at this time.*

70 *Fed.Reg.* 68,218, 68,223-4 (Nov. 9, 2005)(emphasis added). Thus, because the FAA repeatedly refused to validate EDMS, it is referenced in the USEPA's Guideline on Air Quality Models, but is no longer included as a preferred model.

It is true that EDMS is included under § 6.2.4(c) of Appendix W which states that it is "appropriate for air quality assessment of primary pollutant impacts at airports or air bases." However, § 6.2.4(c) also states that "If changes in other than aircraft operations are associated with analyses, a model recommended in Chapter 4 or 5 should be used.." Since the DEA purports to model the air quality impacts of construction of the modular terminal, which are not associated with changes in aircraft operations, the FAA should use one of EPA's preferred air quality models instead of EDMS.

## VIII. THE PROJECT REQUIRES AN ENVIRONMENTAL IMPACT STATEMENT.

". . . NEPA requires federal agencies to prepare 'a detailed statement . . . on the environmental impact' of any proposed major federal action 'significantly affecting the quality of the human environment.'" *San Luis Obispo Mothers for Peace*, 449 F.3d at 1029, *quoting* 42 U.S.C. § 4332(1)(C)(i). "As an alternative to the EIS, an agency may prepare a more limited environmental assessment ('EA') concluding in a 'finding of no significant impact' ('FONSI'), briefly presenting the reasons why the action will not have a significant impact on the human environment." *Id.* at 1020. "The question thus becomes whether a given action 'significantly affects' the environment." *Id.* at 1029, *quoting* 42 U.S.C. § 4332(1)(C)(i).

Here, in light of: (1) the definition of the Project which includes FAA's amendment of the Operating Certificate to allow virtually unlimited numbers and types of aircraft, where no scheduled aircraft presently exist, and a 29,000 square foot modular terminal to supplement the 30,000 square foot already master planned terminal; and (2) the patent cumulative impact of that combination, the potential impacts of the Project are neither "remote nor highly speculative." *No Gwen Alliance v. Aldridge*, 855 F.2d 1380, 1386 (9th Cir. 1988). Rather, "the closeness of the relationship between the change in the environment and the 'effect' at issue," *San Luis Obispo Mothers for Peace*, 449 F.3d at 1029, *quoting Metropolitan Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766, 772 (1983), clearly reveals the status of the Project as a major federal action significantly affecting the quality of the environment. *Id.* A full EIS must therefore be performed, which includes a comprehensive project description; reveals the full panoply of environmental effects resulting from that project; and discloses the effects of the Project, when combined with other reasonably foreseeable past, present and future actions, including, but not limited to, those documented in the existing approved Master Plan.

Mukilteo appreciates this opportunity to comment, and looks forward to the FAA's substantial revision of the DEA, and an additional opportunity to review and comment on a fully compliant and complete Environmental Impact Statement.

Sincerely,

CHEVALIER, ALLEN & LICHMAN, LLP

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