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PLEASE REPLY TO DC OFFICE

January 9, 2008

Robert W. Johnson
Commissioner
Bureau of Reclamation
1849 C St NW
Washington, DC 20240-0001

Re: Restrictions on Seaplane Access in Bureau of Reclamation Waterbodies

Dear Commissioner Johnson:

I am counsel to the Aircraft Owners and Pilots Association (AOPA). AOPA is a non-profit membership organization that represents more than 414,000 individual pilots and aircraft owners from every state. Over 21,000 of our members are seaplane pilots, a figure that represents more than half of all licensed seaplane pilots in the country. I am writing to express serious concern, on behalf of our membership, that a potential interpretation of recent Bureau of Reclamation ("Agency") regulations governing public use of Agency waterbodies could significantly reduce seaplane access to appropriate landing sites.

AOPA is an active participant on all levels of both federal and local government in proceedings involving issues related to general aviation, including access to airports and landing areas, and the air transportation network. A central element of AOPA's activity is the maintenance and development of existing landing sites in areas throughout the United States and the preservation of the aviation infrastructure that supports the air transportation network throughout the country.

For many years, reasonable public access to airports and other landing sites has become increasingly restricted with a resulting detrimental effect on the public interest. AOPA believes that this trend towards a dwindling air transportation infrastructure is largely the result of a lack of understanding about general aviation, aircraft operations, and the nationwide system that exists to support the air transportation infrastructure to

allow the public to enjoy the benefit and necessities of air travel. Therefore, AOPA works hard to educate persons about the benefits and importance of general aviation in the United States, including participation in litigation affecting general aviation. Of particular concern to the advancement of general aviation is the unreasonable and unnecessary restrictions placed on airports and landing sites, for reasons unrelated to the proper consideration of aviation interests, and without due consideration to applicable laws and policies.

On April 17, 2006, the Agency published its final rule on Public Conduct on Bureau of Reclamation Facilities, Lands, and Waterbodies at 43 C.F.R. Part 423. Section 423.41 of the rule prohibits pilots from takeoff or landing on Agency lands or waterbodies, except in designated "special use areas." The rules identify seaplane activity as a special use. 43 C.F.R. § 423.41. Section 423.64 is a grandfather clause in the rule, which provides that special use areas that were "designated and formally documented" for such uses prior to the rule's enactment can remain open for such uses.

While the application of this provision does not look as if it should pose any challenges, AOPA is concerned that a potential lack of clarity regarding the Agency's interpretation of "formal documentation," or a misinterpretation of this term, may effectively bar seaplane pilots from Agency waterbodies that they have long enjoyed access to and should not be denied access to now or in the future. The Agency has not defined the term "formal documentation" in the rule itself, and AOPA is not aware of any Agency guidance identifying what type of materials will satisfy the "formal documentation" requirement for establishing pre-existing seaplane use in these waterbodies. Given these concerns, we contacted the Agency several months ago seeking clarification of this term. In an email dated October 30, 2007, policy analyst Gary Anderson wrote that the Agency would only allow seaplane activity where it could identify "pre-April 17, 2006 documentation of allowance of seaplane activity by an entity with appropriate jurisdiction over each reservoir in question." Mr. Anderson went on to state that, in the Agency's view, a current letter by an authorized official confirming pre-existing seaplane activity would not meet the standard for "formal documentation." Instead, Mr. Anderson maintained that the documentation itself must pre-date the rule.

We understand that since this communication there has been further discussion between James McManus, the Executive Director of the Seaplane Pilots Association, Mr. Anderson, Hendrick Willems, Liaison for Security and Law Enforcement, and Kathy Norris, Assistant Director of Security, Safety, and Law Enforcement, in which the Agency representatives did not indicate an intent to depart from the interpretation articulated by Mr. Anderson. We believe that this narrow interpretation of "formal

documentation" is in direct conflict with the language and purpose of the rule and we urge reconsideration of this position.

The greatest problem with any Agency plan to require pre-existing documentation is that in most cases such documentation does not exist. Prior to the new rule, the Agency had no formal procedure for seaplane pilots to follow when seeking permission to access an Agency waterbody. Instead, the local controlling agency at each waterbody generally determined seaplane access, and in many cases, pilots did not have to obtain either written or oral permission. At most sites where seaplane use was permitted, officials did not charge pilots a usage fee or require them to give any notice regarding their use of the site. Due to the absence of any formal procedure for accessing landing sites, most pilots were never given formal permits, letters of permission, or other documents, such as fee receipts, that could substantiate prior approved use. As the rule specifically authorizes the continuance of certain public uses in areas where the use pre-dated the Agency's enactment of the rule, a regulatory interpretation that sets an impossible standard for documenting this pre-existing usage could make this provision of the rule meaningless. 43 C.F.R. § 423.64; *see* Federal Maritime Commission v. Seatrain Lines, Inc., 411 U.S. 726, 746 (1973) ("The power to make regulations … is not a delegation of authority to wipe out the statute by imposing an Orwellian definition …").

In addition, it appears that the proposed definition of "formal documentation" serves to interpret a legal norm and thus may constitute an interpretative rule. Syncor Int'l Corp. v. Shalala, 127 F.3d 90, 94 (D.C. Cir. 1994). We understand that the Agency is discouraged from departing from the Administrative Procedure Act's public notice requirement regarding such rules, and we believe that this proposed interpretation may constitute such a departure. 5 U.S.C. § 553; Department of Interior, Administrative Procedure, 318 DM 5.3 (1998). Specifically, we feel that the Agency's apparent failure to define the term "formal documentation" in the Notice of Proposed Rulemaking ("NPRM"), or during other points of the rulemaking proceedings could constitute a lack of the notice required under 5 U.S.C. § 553 (b)(3)(1970). While the NPRM indicated that existing special use areas must be formally documented, the Agency appears to have given little warning that this documentation would require an actual formal letter or other similar document issued prior to the rule's enactment. Public Conduct on Bureau of Reclamation Facilities, Lands and Waterbodies, 70 Fed. Reg. 54214, 54222, 54223, (2005) (to be codified at 43 C.F.R. pts. 423 and 429) (proposed Sept. 13, 2005).

In the preamble to the NPRM, the Agency stated that "[t]hese proposed rules would not significantly affect either the administration or the *existing public uses* of Reclamation facilities, lands and waterbodies." Public Conduct on Bureau of

Reclamation Facilities, Lands and Waterbodies, 70 Fed. Reg. at 54214 (emphasis added). There is strong evidence, however, that adopting a pre-existing documentation requirement would dramatically affect both the administration and the existing public uses of Agency waterbodies. In a recent survey of seaplane pilots in Washington State, almost 60% of the respondents reported using one or more Agency waterbodies, and approximately 20% reported use within the past year. Seaplane Pilots Association, Survey of Seaplane Pilots in Washington State (2007) (on file with author). Half of the pilots using these sites reported that they made somewhat regular use of Agency waterbodies, with over 10% of pilots using these sites six or more times per year. Id. These results are likely indicative of the dramatic, negative effect that closure of Agency waterbodies will have on seaplane access throughout the country.

Due to the Agency's statements in the NPRM regarding the proposed rule's minimal effect on public usage, seaplane pilots arguably had little warning that the Agency would implement such a stringent standard for formal documentation of existing special use areas. Kooritzky v. Reich, 17 F.3d 1509, 1513, (D.C. Cir. 1994). Given this inconsistency, it is hard to see how this restrictive interpretation, which will have such a pronounced impact, constitutes a "logical outgrowth" of the proposed rule. Shell Oil Co. v. EPA, 950 F.2d 741, 747 (D.C.Cir.1991).

Moreover, we are concerned by the Agency's apparent failure to identify evidence in the record, or include any rationale in the NPRM, to support the proposition that increased restrictions on seaplane access will promote safety and security of these waterbodies and benefit the public. Pub. L. No. 107-69, 115 Stat. 593 (2001); Nevada Land Action Ass'n v. U.S. Forest Serv., 8 F.3d 713, 718 (9th Cir. 1993); *see* Fertilizer Indust. v. EPA, 935 F.2d 1303, 1311 (D.C. Cir. 1991) (holding that public notice of the proposed rule must "provide sufficient detail and rationale for the rule to permit interested parties to participate meaningfully"). Mr. McManus has informed us that when he met with Agency representatives on December 5, 2007, he was told that there were no specific seaplane incidents or public complaints regarding seaplanes that prompted the broad ban on seaplane access. Instead, these representatives stated that the Agency had simply decided to adopt a default policy that these waterbodies would be closed to seaplanes, unless a special use area could be established.

While it is understandable that the Agency wishes to ensure that documentation of pre-existing special uses is accurate and reliable, I believe that there are more reasonable standards for formal documentation that can effectively accomplish these objectives, without interfering with public access to public lands.

In conclusion, I urge that this apparent interpretation of "formal documentation" put forth by Mr. Anderson be reconsidered. We would be happy to meet with you at your convenience to continue discussion of this very important matter. I hope that this meeting can take place in the near future, so that a fair and proper interpretation of "formal documentation," that is consistent with the safety and security purpose of the statute and the proper exercise of the Agency's authority, can be put in place as soon as possible.

Sincerely,

Kathleen A. Yodice

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