



United States Department of Transportation
FEDERAL AVIATION ADMINISTRATION
Office of Policy, International Affairs & Environment
Office of Environment and Energy

NATIONAL PARKS AIR TOUR MANAGEMENT PROGRAM

July 24, 2023

Re: Advisory Council on Historic Preservation Review Pursuant to 36 CFR §800.5(c)(2) of the Federal Aviation Administration's Proposed Finding of No Adverse Effect on Historic Properties from the Implementation of an Air Tour Management Plan for Hawai'i Volcanoes National Park

Ms. Jaime Loichinger
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Office of Federal Agency Programs
Advisory Council on Historic Preservation
401 F Street, Ste. 308
Washington, DC 20001

Dear Ms. Loichinger:

The Federal Aviation Administration (FAA), as the lead Federal agency and in coordination with the National Park Service (NPS), respectfully requests that the Advisory Council on Historic Preservation (ACHP) review the FAA's proposed finding of no adverse effect on historic properties from the implementation of an Air Tour Management Plan (ATMP) for Hawai'i Volcanoes National Park (the Park) made under Section 106 of the National Historic Preservation Act. The FAA submits this request in accordance with 36 CFR §800.5(c)(2)(i) in response to objections from five consulting parties, specifically, Mr. John Carse, the National Trust for Historic Preservation (NTHP), the Office of Hawaiian Affairs (OHA), and Kamehameha Schools (KS), and the National Parks Conservation Association (NPCA) to the proposed finding. The FAA is concurrently notifying all consulting parties about this request and will make the request documentation available to the public at:

https://www.faa.gov/about/office_org/headquarters_offices/ara/programs/air_tour_management_plan.

Enclosed is the correspondence sent to, and received from, consulting parties throughout the consultation process (see **Exhibits 1 through 9**). In particular, **Exhibit 8** contains the agency's March 27, 2023, finding of effect letter, which meets the requirements of 36 CFR §800.11(e). The finding of effect letter describes the undertaking, the Area of Potential Effects (APE), a description of steps taken to identify historic properties, a description of historic properties in the APE and the characteristics that qualify them for listing in the National Register of Historic Places, and an explanation of why the criteria of adverse effect do not apply to this undertaking. It also describes the Section 106 consultation process and public involvement for this undertaking.

Included in **Exhibit 9** are the responses to FAA’s March 27, 2023, letter received from consulting parties. While the FAA received concurrence with the proposed finding of no adverse effect from Bobby Camara (Kupuna), Elizabeth Bell (Kupuna), and the Hawai’i Department of Lands and Natural Resources (DLNR), Division of Forestry and Wildlife; the NTHP, OHA, KS, Mr. Carse, and the NPCA objected to the FAA’s determination.

This letter includes background about the National Parks Air Tour Management Act (NPATMA), describes the undertaking and the history of air tours over the Park, provides an overview of the Section 106 consultation process for the undertaking, and addresses the elements of the objections that were made and the FAA’s responses.

The National Parks Air Tour Management Act

NPATMA requires that all commercial air tour operators conducting or intending to conduct a commercial air tour operation over a unit of the National Park System apply to the FAA for authority to undertake such activity. 49 U.S.C. §40128(a)(2)(A). As amended by the FAA Modernization and Reform Act of 2012, NPATMA further requires the FAA, in cooperation with the NPS, to establish an ATMP or voluntary agreement for each park for which applications were made, unless a park has been exempted from this requirement. *Id.* §40128(b)(1)(A), (b)(7). The objective of an ATMP is to “develop acceptable and effective measures to mitigate or prevent the significant adverse impacts, if any, of commercial air tour operations upon the natural and cultural resources, visitor experiences, and tribal lands.” *Id.* §40128(b)(1)(B).

FAA regulations define a commercial air tour as:

[A]ny flight, conducted for compensation or hire in a powered aircraft where a purpose of the flight is sightseeing over a national park, within ½ mile outside the boundary of any national park, or over tribal lands during which the aircraft flies:

- (i) Below 5,000 feet above ground level (except for the purpose of takeoff or landing, or as necessary for the safe operation of an aircraft as determined under the rules and regulations of the Federal Aviation Administration requiring the pilot-in-command to take action to ensure the safe operation of the aircraft); [or]
- (ii) Less than 1 mile laterally from any geographic feature within the park (unless more than ½ mile outside the boundary). . . .

14 CFR §136.33(d).

Because Congress anticipated that the development of ATMPs would take time, it provided in NPATMA that prior to the establishment of an ATMP, the FAA “*shall* grant interim operating authority” to existing air tour operators that apply for prospective operating authority. 49 U.S.C. §40128(c)(1) (emphasis added). NPATMA required that interim operating authority (IOA) was the greater of the number of commercial air tour flights over the park during the 12-month period, or the average number of commercial air tour flights within the 36-month period, prior to the enactment of NPATMA. *Id.* §40128(c)(2).

The History of Air Tours at the Park

Commercial air tours have been operating over the Park for more than 40 years. Prior to NPATMA’s enactment in 2000, the FAA did not regulate air tours over national parks, and the NPS did not have authority to regulate commercial air tours. Air tour operators were subject only to FAA’s general safety

regulations and Special Federal Aviation Regulation (SFAR) No. 71, Special Operating Rules for Air Tour Operators in The State of Hawai'i (14 CFR 136 Appendix A). Per SFAR-71, commercial air tour operators could not operate below 1,500 ft. above the surface in all areas of the State of Hawai'i, unless otherwise authorized by the FAA. At that time there were no limits on the number of air tours that could be conducted per year and no designated flight paths or altitudes for flights.

Since 2005, most commercial air tours over national parks, including Hawai'i Volcanoes National Park, have been conducted pursuant to IOA issued by the FAA in accordance with NPATMA. *See* 70 Fed. Reg. 36,456 (June 23, 2005). Because the FAA's grant of IOA was a non-discretionary agency act mandated by Congress, compliance with the National Environmental Policy Act (NEPA) and Section 106 of the National Historic Preservation Act was not required. *See Sugarloaf Citizens Ass'n v. FERC*, 959 F.2d 508, 513 (4th Cir. 1992) (holding that where an agency did not have the discretion to deny certification to a facility that met certain criteria, compliance with NEPA and Section 106 was not required); *Sac & Fox Nation of Missouri v. Norton*, 240 F.3d 1250, 1263 (10th Cir. 2001) (compliance with Section 106 and NEPA is not required for nondiscretionary actions).

In 2008, the FAA published an operational guidance document for commercial air tours in Hawai'i, the Hawai'i Air Tour Common Procedures Manual (Manual). The Manual covers a variety of training requirements and operational requirements, including air tour operations below 1,500 ft. AGL. It also includes detailed maps and delineates areas on the Island of Hawai'i where operators may fly below 1,500 ft. AGL.

Currently, ten¹ operators hold IOA to conduct 26,664 air tours each year over the Park and within ½ mile of the Park's boundary. The agencies consider the existing operations for commercial air tours to be an average of 2017-2019 annual air tours flown, which is 11,376 air tours. A three-year average is used because it reflects the most accurate and reliable air tour conditions, and accounts for variations across multiple years. Under existing conditions, there are no designated flight paths or no-fly zones that operators must adhere to; however, commercial air tours are generally concentrated along the east portion of the Park and around the Kīlauea Crater according to available automatic dependent surveillance-broadcast (ADS-B) systems data² of flight paths. Minimum altitudes for commercial air tours within the ATMP planning area are flown in accordance with the Manual, from 500 to 1,500 ft. above ground level (AGL), weather dependent and contingent on location over the island.

In accordance with NPATMA and a plan mandated and approved by the U.S. Court of Appeals for the District of Columbia Circuit (Court), the FAA and the NPS are developing an ATMP for the Park. The Court retained jurisdiction to approve the agencies' plan and monitor their progress. Thus, the planning process to implement an ATMP for the Park has proceeded, and remains, under Court supervision.

The Undertaking

The FAA has determined that the development and implementation of an ATMP for the Park is an undertaking under the National Historic Preservation Act. The ATMP for the Park includes the following:

- Reduces the annual number of commercial air tours permitted within the ATMP planning area to 1,565 flights.
- Designates three flight paths within the ATMP planning area. The flight paths are intended to protect visitor experience, natural and cultural resources, and acoustic resources of the

¹ Only seven of the ten operators that hold IOA for the Park reported flying commercial air tours over the Park between 2013 and 2020.

² ADS-B systems periodically transmits aircraft location data in real-time.

- Park by consolidating existing transportation corridors and avoiding noise-sensitive wildlife habitat and historic properties;
- Would not allow air tours to be conducted over designated or eligible, or potential Wilderness within the Park.
- Sets a minimum altitude of 1,500 ft. AGL or 2,000 ft. AGL over sensitive sites;
- Sets time-of-day restrictions for flights to 10 AM – 2 PM for non-quiet technology flights and 9 AM – 5 PM for quiet technology flights;
- Establishes no-fly days on Sundays and quiet technology-only days on Wednesdays;
- Limits loitering and circling, permitting up to 5 minutes on the Pu‘u‘ō‘ō Route and in the Pu‘u‘ō‘ō QT Zone;
- Provides incentives for operators to adopt and use quiet technology;
- Provides for operator training and education;
- Permits the NPS to establish no fly periods for special events or planned park management with two months’ notice to the operators and sets a mandatory 5-mile stand-off distance for special events that may be impacted by overflights. Special events may include Native Hawaiian events or other natural and cultural resource programs;
- Provides for mandatory annual meetings between the FAA Flight Standards District Office (FSDO), Park staff, and the operators. The agencies may also invite other stakeholders, such as Native Hawaiian Organizations, to attend;
- Authorizes specific types of aircraft to be used on the tours and specifies that any new or replacement aircraft must not be noisier than the authorized aircraft;
- Requires operators to provide semi-annual reports to the agencies including flight monitoring data;
- Includes safety requirements relating to in-flight communications;
- Allows for minor modifications to the ATMP through adaptive management as long as the environmental impacts of such changes have been previously analyzed;
- Outlines a process for amending the ATMP;
- Provides information regarding the process for operators to apply for operating authority as a new entrant; and
- Sets forth a general process for conducting competitive bidding for air tour allocations, where appropriate.

For further details related to the various elements of the ATMP for the Park, refer to the summary in the FAA’s March 27, 2023, finding of effect letter (see **Exhibit 8**).

In summary, the number of air tours authorized under the ATMP is 5.9% of those currently allowed under IOA, which is 14% of the 3-year average, and the ATMP requires that operators fly on designated paths that have been delineated to avoid flying over noise sensitive resources, including historic properties. Figure 2 in **Exhibit 4** to this letter depicts ADS-B systems data of flight tracks within the APE under existing conditions. The designated paths under the ATMP are depicted in **Exhibit 8** (Attachment B of the FAA’s finding of effect letter).

Under NPATMA, all IOA for the Park terminates by operation of law 180 days after the establishment (effective date) of the ATMP, 49 U.S.C. § 40128(c)(2)(E), after which time no operator may continue to rely on any operating specifications issued under IOA as authority to conduct commercial air tours within the ATMP planning area.

Section 106 Consultation Summary

Consultation Initiation

The FAA initiated Section 106 consultation with the Hawai'i State Historic Preservation Division (SHPD), Native Hawaiians (including Native Hawaiian Organizations and members of the Park's Kūpuna consultation group), operators, and other consulting parties by letter between March and August of 2021, inviting them to participate in Section 106 consultation and requesting their expertise regarding historic properties, including properties of significance to Native Hawaiian Organizations, such as TCPs, that may be located within the ATMP planning area (see **Exhibit 1**). The agencies received responses from the SHPD and five other consulting parties expressing interest in consultation (see **Exhibit 1**). Additional newly identified consulting parties were invited throughout the Section 106 process.

Consulting Party Meetings, Initial APE and Historic Property Identification

The agencies have held listening sessions and consulting party meetings to discuss the ATMP planning process, the range of alternatives, and Section 106 consultation. The agencies held an informational webinar on October 28, 2021, to provide background on the ATMP development process at the Park and held a listening session for the agencies to learn about the historic or sacred areas within the park and listen to the consulting parties past and current concerns on December 10, 2021 (see **Exhibit 2**). In a letter dated January 24, 2022, OHA provided comments regarding the need for adequate vertical buffers, flight safety, and flight monitoring, and requesting a Traditional Cultural Property (TCP) study for the Park (see **Exhibit 2**).

The FAA provided a preliminary list of historic properties in the Park to the SHPD for their review and comment in the scoping cover letter dated March 8, 2022, and another consulting party meeting was held on March 11, 2022 (see **Exhibit 3**). On March 16, 2022, Bobby Camara (Kupuna) provided comments noting a deeply intrusive helicopter presence and their noise over several areas of the Park and expressing opposition to any commercial air tours over the Park. During a March 24, 2022, phone call with retired Park staff, Joni Mae Makuakane-Jarrell (Kupuna) voiced support for Alternative 2 (no air tours) and noted that air tours negatively impact and destroy the work to protect and preserve Park resources. In a letter dated April 1, 2022, OHA also expressed support for Alternative 2 (no air tours). In a letter dated April 18, 2022, the SHPD confirmed receipt of the scoping letter and provided recommendations for additional consulting parties. Responses to the March 2022 scoping letter and consulting party meeting are included in **Exhibit 3**.

A consulting party meeting inviting all consulting parties was held on November 21, 2022 (see **Exhibit 4**). A preliminary APE, historic property identification list, and maps of the proposed alternatives were included in the invitations and meeting materials for the November 2022 consulting party meeting. The agencies sent a follow-up letter, dated November 22, 2022, requesting comments on the APE and historic properties list (see **Exhibit 5**). Between November 2022 and January 2023, the FAA received comments from the Park's Kūpuna consultation group, OHA, Historic Hawai'i Foundation (HHF), Mr. Carse, Aku Hauanio (Kupuna and Kalapana Fishing Council), Earl Louis (Kupuna), NTHP, Nona Wilson (Kupuna), and the Department of Hawaiian Home Lands (DHHL). These comments are included in **Exhibit 5**.

Expanded APE, Revised Historic Properties List, and Comment Response Letter

The FAA expanded the APE following consulting party feedback during and after the November 21, 2022, meeting. The FAA sent a letter dated December 23, 2022, to the SHPD with a description of the expanded APE and a revised APE map to incorporate additional areas potentially affected by the

undertaking (see **Exhibit 6**). The SHPD responded on January 27, 2023, that they do not object to the APE (see **Exhibit 6**). On February 21, 2023, the FAA sent a Section 106 consultation letter to all consulting parties that provided responses to comments received during and following the November 2022 consulting party meeting, a revised APE map, and a revised historic properties list and asked for assistance in identifying cultural resources within the revised APE (see **Exhibit 7**). The FAA did not receive any responses to the February 21, 2023, letter.

Finding of Effect Letter and April Informational Meeting

The FAA thoroughly analyzed the effects of the undertaking to support its determination of no adverse effect in its March 27, 2023, letter (see **Exhibit 8**). In accordance with 36 CFR § 800.5(c), the FAA sent the correspondence to all 70 consulting parties, requesting that they concur with the agency's finding. The letter included an invitation to an informational meeting on April 18, 2023, to explain how the FAA arrived at the proposed finding of no adverse effect on historic properties as well as the documentation specified in 36 CFR § 800.11(e). The agencies sent a meeting summary and Question and Answer (Q&A) document with agency responses to questions asked during the informational meeting to all consulting parties on April 28, 2023 (see **Exhibit 8**).

In a letter dated April 21, 2023, the SHPD stated that in order to determine whether to concur with the FAA's proposed effect determination, it must take into account information received during the April 18, 2023, informational meeting. In the same letter, the SHPD requested all of the consulting parties' responses received by the agency to the finding of effect letter as well as comments provided during the April 2023 informational meeting for the ATMP (see **Exhibit 9**) and that it would respond to the FAA's March 27, 2023, letter following receipt of this information. The FAA responded in a letter dated April 28, 2023, providing the meeting summary and Q&A document from the April 18, 2023, informational meeting. The FAA noted that the finding of effect letter provided the SHPD with the documentation specified in 36 CFR § 800.11(e) and requested SHPD's response to the finding of no adverse effect by May 1, 2023 (see **Exhibit 9**). Although not required under 36 CFR § 800.11(d), the FAA also provided consulting party responses to the March 27, 2023, finding of effect letter. The SHPD did not provide a response to the finding of effect letter.³

Consulting Party Objections

The FAA sent its finding of effect letter on March 27, 2023, to all 70 consulting parties requesting that they concur with the agency's finding. Seven consulting parties provided responses to the request. The State of Hawai'i DLNR, Division of Forestry and Wildlife and two individuals from the Kūpuna concurred with the FAA's proposed finding of no adverse effects for the undertaking. The FAA received objections from four consulting parties during the 30-day review period: the OHA, Mr. Carse, the NTHP, and KS. Through continuing consultation, the FAA was able to resolve the objections with OHA. As such, their concerns will not be further addressed in this document. **Exhibit 9** shows the commitments the agency made to resolve the disagreement with OHA. The remaining objections are summarized below:

The NTHP bases its objection on three issues: (1) it contends that the FAA used an incorrect baseline to assess the effects of the undertaking; (2) it claims that the FAA did not consider cumulative effects when assessing the effects of the undertaking; and, (3) it argues that a finding of adverse effects is the

³ In consultation with the SHPD, representatives from the SHPD's office explained that the SHPD does not respond to an agency's proposed finding of no adverse effect for an undertaking until consultation is complete, including any consultation, pursuant to 36 CFR § 800.5(c)(2)(i), with objecting parties.

appropriate finding if the undertaking permits air tours (see **Exhibit 9**).⁴ Mr. Carse bases his objection on three issues, (1) he contends that the assessment of effects of the undertaking does not consider indirect effects; (2) relates to his concerns about the efficacy of the monitoring and enforcement requirement provisions in the undertaking; and, (3) that the consultation meetings are not recorded (see **Exhibit 9**). KS's objection relates to the delineation of the APE, specifically that the APE should be further expanded to include KS property north of the Kīlauea Crater (see **Exhibit 9**).

On June 14, 2023, the NPCA requested to be added as a consulting party for the Section 106 process for the Park. In response, the FAA invited the NPCA to be a consulting party and sent them the finding of effect letter on June 15, 2023. The FAA sent its previous consultation documentation to the NPCA on June 22, 2023, and held a meeting to listen to their comments on July 7, 2023. During that meeting, the NPCA noted that their objections were the same as those stated by other objecting parties, particularly the NTHP. The NPCA sent their written objection to the FAA on July 11, 2023, including a letter dated June 20, 2023, which was also submitted to the agencies through the NEPA public comment process (see **Exhibit 9**). The agency found only one issue relevant to the Section 106 process in the June 20, 2023, letter, which was their concern regarding the noise analysis, specifically that the modeling assumptions could be incorrect because air tour operators could use larger, noisier aircraft in order provide more passengers air tours (see **Exhibit 9**).

The federal agencies held a meeting on June 15, 2023, to continue consultation with the parties that had objected in an effort to resolve the objections in accordance with 36 CFR §800.5(c)(2). Representatives from the FAA and the NPS met with all four parties that had objected to the finding at that time, as well as representatives of the SHPD and ACHP. The meetings were held to allow for any clarification on the objecting points and seek resolution. The agencies were not able to discuss all comments within the timeframe allotted by this meeting. In order to ensure meaningful consultation with each party, the FAA continued consultation by holding individual meetings with the consulting parties that objected to the agency's proposed finding, as well as the SHPD. Individual meetings were held with the SHPD, NTHP, OHA, KS, and the NPCA.⁵ Mr. Carse did not respond to the requests for an individual discussion. The other meetings included a full discussion of the points made by each party and the agencies' responses, but the parties maintained their opposition to the FAA's proposed finding. At the conclusion of the individual consultations the agency held a meeting on July 20, 2023, inviting all parties that have objected to the agency's proposed findings to brief them on the outcome of the consultations and discuss the next steps in the Section 106 process.

FAA's Response to Consulting Party Objections

The following sections provide the FAA's response to the objections that were not resolved through consultations with the objecting parties.

⁴ The NTHP, in its April 28, 2023, objection letter, expressed its support for comments and concerns raised by other consulting parties during past consultations. The agencies do not consider NTHP's expression of support for these comments as a part of NTHP's objection. The agencies consider the comments resolved because they have already been addressed and the commentors did not raised them again. See Exhibits 7 and 9.

⁵ During meeting with the SHPD they informed the agencies that they would like to be included in all of the individual objecting party consultation meetings. The SHPD was invited to all of the individual objecting party meetings but did not attend.

Baseline Conditions

The NTHP asserts that the baseline for the undertaking (developing and implementing an ATMP for the Park) should be an environment where there are no air tours occurring over the Park. To support this NTHP states that

[t]his undertaking is being developed pursuant to the National Parks Air Tour Management Act of 2000 (Pub. L. 106-181) and its implementing regulations contained in 14 C.F.R. Part 136. Nowhere in either the statute or the regulations are ATMPs required to permit adverse effects. The development of this ATMP is instead a *de novo* evaluation of appropriate air tour uses within Hawaii Volcanoes National Park. It is an exercise of federal jurisdiction and management authority. There is thus no baseline that is required to be accepted in the Section 106 process, and all adverse effects resulting from this undertaking must be taken into account.

The NTHP cites no authority for their legal argument that the development of an ATMP was required to be a *de novo* evaluation of air tour uses over the Park. At the time NPATMA was enacted, commercial air tours were occurring over national parks, including the Park. The legislation, as originally enacted, authorized the agencies to address the impacts of those air tours by establishing ATMPs for parks (with certain exceptions). However, Congress also required the FAA to grant IOA to existing air tour operators. 49 U.S.C. §40128(c)(1). Given that Congress expressly preserved the status quo of existing air tour operations pending the establishment of an ATMP, had it intended to require the agencies to evaluate the impacts of regulating air tours under an ATMP against a condition of no air tours, it would have done so expressly.

The NTHP incorrectly presumes that under NPATMA air tour operations are considered adverse and therefore any ATMP that would allow air tours would result in an adverse effect. The NTHP's argument conflates the agencies' authority to regulate air tours through an ATMP under NPATMA with the determination of the effects of the undertaking (the ATMP) on historic properties under Section 106 of the National Historic Preservation Act (NHPA) and its implementing regulations. Under NPATMA, the agencies have the authority to prohibit commercial air tours over national parks in whole or in part, but they are not required to do so. See 49 U.S.C. § 40128. NPATMA requires the agency to assess the environmental impacts of the ATMP (the undertaking) and not the operations of air tours generally. *Id.* § 40128(b)(2). Neither NPATMA nor the NHPA require the effects of the undertaking (an ATMP) to be measured against a condition under which no air tours are occurring.

The FAA correctly measured the effects of the ATMP against the existing condition of commercial air tours over the Park. As discussed above, air tours have been occurring over the Park for more than 40 years. Prior to NPATMA, the FAA did not regulate air tours over national parks and the NPS did not have the authority to regulate commercial air tours. After the passage of NPATMA, the FAA granted interim operating authority to existing operators pursuant to Congress's mandate, which, as a non-discretionary act, did not necessitate Section 106 compliance. See *Sugarloaf Citizens Ass'n v. FERC*, 959 F.2d at 513. Consequently, neither the FAA nor the NPS had any compliance obligations under Section 106 related to air tours over the Park, until the undertaking. Therefore, the agencies identified the existing condition of air tours occurring within the ATMP planning area based on a three-year average of operator-reported tours (11,376 air tours per year), including other general operating conditions such as flight paths and altitudes. The FAA then took into account the effects of the ATMP by comparing them to this existing condition. The ATMP includes measures designed to avoid or reduce impacts to historic properties compared to the existing condition of air tours over the Park, including limiting the number of

air tours permitted annually, setting flight paths, increasing minimum altitudes for tours, setting no fly days and establishing the potential to set no fly periods for special events, among other conditions.

The standard set out in the ACHP's regulations for assessing visual and audible effects is whether there is an introduction of visual or audible elements that diminish the integrity of the property's significant historic features. See 36 CFR § 800.5(a)(2)(v). The FAA's assessment of the effects of the undertaking is consistent with this standard. As explained in the finding of effect letter, the implementation of the undertaking would reduce noise levels associated with commercial air tour operations over the Park across most of the APE (see **Exhibit 8**). Around the Halapē Wilderness Camp where noise increases in both duration and frequency, the sound levels remain low compared to existing conditions, and when combined with the other minimization measures such as time of day restrictions and no fly days, do not diminish the integrity of historic properties in the area. For example, the 12-hour equivalent sound level increases by seven decibels to 30 dBA (see **Exhibit 8**). Visual impacts to historic properties would decrease due to the decrease in commercial air tour operations overall.

For these reasons, the FAA's use of existing conditions as the baseline against which to measure the impacts of its undertaking is appropriate. The FAA's finding that the undertaking would not diminish the characteristics of any historic properties located within the APE but instead would represent a reduction in audible and visual effects on historic properties when compared to existing conditions is supported and consistent with the ACHP's regulations implementing Section 106 of the NHPA.

Cumulative Impacts

The NTHP also alleges that the FAA failed to consider cumulative impacts in assessing the effects of the undertaking and proposing a finding that the undertaking will have no adverse effects (see **Exhibit 9**). This is incorrect. The FAA did consider reasonably foreseeable cumulative effects in the assessment of the effects of the undertaking. The regulations describe an adverse effect as:

an undertaking may alter, directly or indirectly, any characteristics of a historic property that qualify the property for inclusion in the National Register in a manner that would diminish the integrity of the property's location, design, setting, materials, workmanship, feeling or association. . . . Adverse effects may include reasonably foreseeable effects caused by the undertaking that may occur later in time, be farther removed in distance or be cumulative.

36 CFR § 800.5(a)(1)

Here, the undertaking reduces the number of flights that may occur within the ATMP planning area by 86% compared to the current condition. It restricts the air tours that will be permitted to three designated flight paths at increased altitudes than are flown under existing conditions (minimum 1,500 – 2,000 ft. AGL, depending on location over the Park and ATMP boundary). The ATMP authorizes the use of specific fixed wing aircraft and helicopters and requires that any new or replacement aircraft must not exceed the noise level produced by the aircraft being replaced (see **Exhibit 8**). As a result of these and other provisions in the ATMP, implementation of the undertaking would result in a noticeable reduction of noise and viewshed impacts compared to existing conditions. Air tours will no longer be allowed in the areas with the densest flights under current conditions. Air tour flights themselves and their impacts are transient in nature. Commercial air tours do not cause physical impacts that build upon past impacts. For these reasons, the incremental effect from the implementation of the undertaking when added to any reasonably foreseeable effects of the undertaking would not be adverse.

ATMP Continues to Allow Adverse Effects

Comments received from the NTHP and others imply the mere existence of air tours is an adverse effect. In clarifying their comments, it became evident that the commenters were noting their preference for a ban of air tours. In their April 28, 2023, letter, the NTHP writes that the ATMP is permitting existing adverse effects and that there are existing adverse effects from air tours. Specifically, NTHP has stated:

The National Trust specifically asserts that the permitting of air tours within Hawaii Volcanoes National Park would cause adverse effects by diminishing the integrity of “setting, . . . feeling, or association” of the park’s historic resources per 36 C.F.R. § 800.5(a)(1). Air tours within the park also result in an “[I]ntroduction of visual, atmospheric or audible elements that diminish the integrity of the property’s significant historic features;” per 36 C.F.R. § 800.5(a)(2)(v).

Permitting air tours or the presence of air tours is not the standard the regulations implementing the National Historic Preservation Act impose when assessing visual and auditory effects from an undertaking. Rather, the standard is whether there is an *introduction* of visual or audible elements that diminish the integrity of the property’s significant historic features. See 36 CFR §800.5(a)(2)(v). The undertaking is not introducing new noise impacts or new visual impacts, as air tours already exist in the ATMP planning area and have for over 40 years. However, the ATMP would instead *reduce* noise and visual impacts when compared to existing conditions. As further described in the finding of effect letter dated March 27, 2023 (see **Exhibit 8**), the undertaking would not directly or indirectly alter the integrity of the characteristics of a historic property that qualify the property for inclusion in the National Register in a manner that would diminish the integrity of the property’s location, design, setting, materials, workmanship, feeling or association. 36 CFR § 800.5(a)(1). Therefore, the FAA has determined that the implementation of the ATMP will not result in adverse effects on any historic properties.

APE – Indirect Effects of Air Tour Displacement

KS have objected to the FAA’s proposed finding of no adverse effect for the undertaking, solely based on their request to expand the APE to include KS school property near area north of Kīlauea Crater due to their concerns regarding indirect effects from displaced flights as a result of the reduction of air tours in the ATMP planning area. The area of requested expansion was clarified in consultation to include the area to the north of the APE east of the Mauna Loa Unit and southwest of the ‘Ōla’a Forest tract. The area can be identified in the vicinity of the label for Safari Aviation on Figure 2 in **Exhibit 4**, where several air tours enter the park based on reported flight paths and ADS-B data. The FAA has declined to further expand the APE at this time for the following reasons.

The FAA initially proposed an APE that included the Park and the area within ½-mile of the Park’s boundary which corresponded to the area regulated by the ATMP for the Park (also referred to as the ATMP planning area). In identifying the expanded APE, the FAA considered the number and altitude of commercial air tours in these areas to further assess the potential for visual effects to historic properties, assuming they exist, and any change in noise levels that may result in alteration of the characteristics of historic properties qualifying them as eligible for listing in the National Register. In order to determine where the undertaking would cause indirect effects on historic properties, the FAA reviewed reported routes and ADS-B data to determine where air tour operations were currently occurring and whether the implementation of the undertaking would change air tour flights outside of the ATMP planning area.

As stated in the finding of effect letter, it is reasonably foreseeable with the implementation of the undertaking that operators will continue to fly to areas outside of the ATMP planning area where park features may be visible. The area north of the expanded APE area and west of ‘Ōla’a Forest tract

identified by KS was not included in the revised APE because currently reported routes and ADS-B data show a high density of air tours flying over the area under current conditions. Furthermore, while KS speculate that implementing the undertaking will cause an increase in air tour flights hovering over their property, neither KS nor the FAA has data to show that it is reasonably foreseeable the air tour operators will change their current flight routes in that location as a result of the undertaking. However, as discussed with KS during the consulting party meeting, the ATMP includes an amendment provision, which permits revisions to the ATMP if new information, such as effects on historic properties caused by the undertaking that were not addressed during the Section 106 process.

Mr. Carse also voiced an objection related to the indirect impacts of air tour displacement. In particular, he noted in his April 29, 2023, email that “implementation of the plan presented will clearly affect historic areas outside of the park boundaries, which the ATMP is required to consider according to 40 Code of Federal Regulations, Section 1508.8.” He did not identify specific areas outside of the APE that he contends will be affected by the introduction of air tours as a result of the ATMP, nor does he supply any basis for identifying any such areas. The agencies cannot speculate regarding whether or where flights will increase in this area in the future based on such a broad assertion.

In sum, the FAA considered available information, consistent with applicable regulations, in determining the area of potential effects for the undertaking, which includes those areas where, based on available data, there may be indirect effects as a result of the ATMP.

Listening to Cultural Practitioners

Mr. Carse commented that the Section 106 consultation meetings were not recorded and made available to the public, contending that this is standard procedure for other government agencies. Mr. Carse stated that such recordings would show that “many Native Hawaiian elders – whose ancestors have been here for over 40 generations – felt that there should be absolutely no air tours over the park.” However, there is no requirement under 36 CFR Part 800 to record Section 106 consultation meetings and no established standard practice to do so. The method in which consultation meetings are held and documented are at the discretion of the lead federal agency.

The FAA chose to not record consultation meetings for the undertaking to encourage an open dialogue and respect those attendees who may not feel comfortable speaking if a meeting is recorded. The FAA has been very transparent in its consultation and has openly shared relevant information with all consulting parties, including those not in attendance at the meetings. FAA has also taken the comments provided by all consulting parties into consideration in delineating the APE, identifying historic properties, and assessing the effects of the undertaking on historic properties. In accordance with 36 CFR § 800.2(c)(2)(ii)(A), the agency ensured that consultation in the Section 106 process provided the consulting parties, including Native Hawaiian Organizations a reasonable opportunity to identify their concerns about historic properties, advise on the identification and evaluation of historic properties, including those of traditional religious and cultural importance, and articulate their views on the undertaking's effects on such properties.

As noted above, the federal agencies held consultation meetings and listening sessions for the Park's Kūpuna consultation group on December 10, 2021, March 11, 2022, and November 21, 2022; an informational meeting to go over the finding of effect with consulting parties, including Native Hawaiian Organizations and the Park's Kūpuna consultation group, was held on April 18, 2023. Meeting minutes from the December 2021 listening session, which included comments received from Native Hawaiian Organizations and Kūpuna, were provided in the FAA's invitation to the March 2022 listening session, dated March 2, 2022 (see **Exhibit 3**). Comments received during and following the November 2022

consulting party meeting along with agency responses were shared with all consulting parties in a letter dated February 21, 2023 (see **Exhibit 7**). Following the April informational meeting, the agencies provided a meeting summary and Q&A to all consulting parties on April 28, 2023; this included all questions asked during the meeting and agency responses to the questions (see **Exhibit 8**). Summaries of all comments received as part of the Section 106 process are included in the finding of effect documentation and were considered in the assessment of effects (see **Exhibit 8**).

A number of consulting parties imply that because the no air tour alternative is not the undertaking they have not been heard. Comments received from Native Hawaiian Organizations and Kūpuna, including those received during earlier consultations since the passage of NPATMA in 2000, were taken into consideration throughout the ATMP development and Section 106 processes. In particular, these comments were considered regarding identification of historic properties, including the consideration of the entire park as a TCP, and in determining the restrictions to be included in the ATMP. A northern designated flight path proposed in public scoping materials was removed from consideration following comments expressing opposition to this flight path and recommending avoidance of Kīlauea Caldera and other culturally sensitive areas. Time-of-day restrictions in the ATMP were also expanded following comments that flights around sunrise and sunset would interrupt cultural practices that occur during these times. Comments were also received that resulted in changes to the restrictions for flights during cultural events, increasing the standoff distance, and mandatory training was added as a requirement for pilots.

Modeling Assumptions

The NPCA contends that the initial noise modeling assumptions could be incorrect because air tour operators may use larger noisier aircraft that can hold more passengers in order to make up for limitations on air tours imposed by the undertaking. However, the NPCA's assumption that air tour operators independently determine to use larger, noisier aircraft is incorrect. The assumptions made in the noise technical report for the Park are accurate and based on the approved aircraft for the Park. Section 3.3, Aircraft Type, of the ATMP or the undertaking authorizes which type of aircraft may be used for commercial air tours. Furthermore, the undertaking specifies that operators must notify the FAA and NPS in writing of any prospective new or replacement aircraft and obtain concurrence before initiating air tours with the new or replacement aircraft. In addition, new or replacement aircraft must not exceed the noise level produced by the aircraft being replaced.

Comments Outside the Scope of Section 106

Mr. Carse noted monitoring and enforcement are inadequate and the FAA's ADS-B tracking does not function over many of the historic properties listed in his email objecting to the proposed finding. This comment is outside the scope of the request to concur or not concur with the FAA's proposed finding.

However, comments on matters outside the scope of Section 106 considerations have been sent in full to NPS's Planning, Environment and Public Comment (PEPC) site on behalf of the commenters for consideration in the continued development of the ATMP.

Request for Review and Concurrence

For the reasons stated in the finding of effect letter and as stated above, the FAA has proposed a finding of no adverse effect on historic properties. The FAA respectfully requests the ACHP's review of its proposed finding in accordance with 36 CFR § 800.5(c)(3).

Should you have any questions regarding any of the above, please contact me at 202-267-4185 or Judith.Walker@faa.gov and copy the ATMP team at ATMPTeam@dot.gov.

Sincerely,



Judith Walker
Federal Preservation Officer
Senior Environmental Policy Analyst
Environmental Policy Division (AEE-400)
Federal Aviation Administration

CCs: John Carse
Betsy Merritt, National Trust for Historic Preservation
Christopher Cody, National Trust for Historic Preservation
Namaka Whitehead, Kamehameha Schools
Keola Lindsey, Kamehameha Schools
Neal Desai, National Parks Conservation Association

Enclosures:

Exhibit 1 – March 29, 2021, Consultation Initiation Letter and Responses
Exhibit 2 – Invitation to December 10, 2021, Listening Session and Responses
Exhibit 3 – Invitation to March 11, 2022, Consulting Party Meeting; March 8, 2022, Scoping Letter; and Responses
Exhibit 4 – Invitation to November 21, 2022, Consulting Party Meeting
Exhibit 5 – November 22, 2022, Request for Comments Letter and Responses
Exhibit 6 – December 23, 2022, APE Letter to the HI SHPD and Response
Exhibit 7 – February 21, 2023, Response to Comments Letter
Exhibit 8 – March 27, 2023, Finding of Effect Letter with Invitation to April 18, 2023, Informational Meeting; Meeting Reminder; and Meeting Summary and Q&A
Exhibit 9 – Responses to Finding of Effect Letter; National Parks Conservation Association (NPCA) Consulting Party Request; and Office of Hawaiian Affairs (OHA) Objection Resolution