



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

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

September 12, 2023

Re: Response to the Advisory Council on Historic Preservation's Opinion Pursuant to 36 CFR 800.5(c)(3)(ii)(B) on 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 (ACHP Project Number: 019858)

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

Dear Ms. Loichinger:

Thank you for your advisory opinion letter dated August 23, 2023, in response to the Federal Aviation Administration's (FAA) request for the Advisory Council on Historic Preservation's (ACHP) review of the proposed finding of no adverse effect for the undertaking (air tour management plan (ATMP)) at Hawai'i Volcanoes National Park. After careful review of the ACHP advisory opinion, the FAA is confirming the finding that implementing the ATMP at Hawai'i Volcanoes National Park would have no adverse effect. The FAA respectfully disagrees for the reasons stated below with the ACHP's opinion that the FAA may not have appropriately applied the criteria of adverse effect [36 CFR § 800.5(a)(1)] for this undertaking and that a finding of adverse effect, based on the potential for adverse effects to occur, is appropriate.

- *The ACHP states that, in making its finding of "no adverse effect" [the FAA] has relied on its interpretation of 36 CFR § 800.5(a)(2)(v), stating its belief that it is only required to consider the potential adverse effects caused by the introduction of audible or visual elements. Because air tours are a continuation of activities that have occurred for over 20 years, FAA asserts that these are not an introduction of new elements and therefore should not be considered an adverse effect. However, as ACHP has previously opined to FAA, this section of the regulations includes examples of adverse effects, but does not constitute an exhaustive list, as other changes may also result in an adverse effect.*

The FAA acknowledges that 36 CFR § 800.5(a)(2)(v) provides examples of adverse effects and is not an exhaustive list. However, as the FAA explained in assessing the effects of the undertaking on historic

properties within the area of potential effects (APE), the standard the FAA used was whether implementing the ATMP would alter the characteristics that qualify the property for eligibility for listing or inclusion on the National Register of Historic Places (National Register) in accordance with 36 CFR § 800.5(a)(1). In determining whether an effect was adverse, the agency analyzed whether implementing the ATMP would introduce visual or audible elements or change the character of the property within the setting that contributes to its historic significance in a manner that would diminish the integrity of the property. The ACHP suggests that there are “other changes” that may result in an adverse effect; however, the ACHP does not identify what those other changes may be. The FAA, in assessing the effects of the undertaking, analyzed any changes that could result from the implementation of the ATMP, rather than the effects of the existing condition of air tour operations. The FAA assessed the effects of the undertaking in accordance with the Section 106 regulations and appropriately determined that none of the minor noise increases occurring less than two minutes a day when flights occur would diminish the integrity of the historic properties within the APE.

- *The ACHP states that “it is clear that the [FAA’s] intent is to move air tours away from the most sensitive and avoid direct overflights of most historic properties, but it is not clear how the FAA determined which historic properties were most sensitive to noise or visual intrusions.”*

In assessing the effects of the undertaking, the FAA did not determine which historic properties were most sensitive; the agency focused on assessing the effects of the undertaking on properties where setting and feeling are the characteristics contributing to the property’s National Register eligibility, because they are the type of property most sensitive to the effects of aircraft overflights.

The FAA analyzed impacts to resources, flight safety, and consulted with Native Hawaiians and other consulting parties. This process is how the agencies arrived at the terms and conditions for this undertaking. In the case of Hawai’i Volcanoes National Park, Native Hawaiian Organizations, the Park’s Kūpuna consultation group, and individuals articulated a preference for zero air tours because of concerns about impacts from air tours. However, the size and topography of Hawai’i Volcanoes National Park provided several opportunities for reducing air tour impacts. The Kahuku Route was developed to follow a highway with existing noise intrusions in order to mask helicopter noise by the existing highway noise. The Coastal Route was developed over water to avoid historic properties. The Pu’u ‘Ō’ō Route, with a single entry and exit over the ocean and following a lava field, was developed to protect Park species.

The FAA learned about specific properties through consultation and public input and gathered significant characteristics through existing documentation and feedback from the consulting parties and Park staff. Consulting party input was considered in the refinement of alternatives for the ATMP. Following initial Section 106 consultation and preliminary environmental analysis, four potential alternatives (No Action Alternative (Alternative 1), Alternative 2 which would not permit air tours within the ATMP planning area, and Alternatives 3 and 4 which would permit limited numbers of air tours in the ATMP planning area on various routes) were released for review and comment during the public scoping period in February 2022. Input received from Native Hawaiian Organizations and Kūpuna were taken into consideration in the development of the alternatives. In response to comments regarding sensitive resources, the agencies dismissed Public Scoping Alternative 3, which included a proposed northern designated flight path, from consideration to avoid Kīlauea Caldera and other culturally sensitive areas in the north. Other modifications included expanding time-of-day restrictions to avoid

cultural practices during sunrise and sunset, increasing the standoff distance during cultural events, and adding mandatory training for pilots. Finally, the undertaking was developed to protect Park resources while allowing air tours by: moving flights away from noise sensitive areas in the Park; creating no-fly zones over the summits of Kīlauea and Mauna Loa to provide greater protection from noise impacts to cultural resources, Native Hawaiian cultural practices, ceremonial sites, and traditional cultural properties; setting minimum altitudes; significantly limiting number of flights; and establishing no-fly days.

Air tours have been operating over Hawai'i Volcanoes National Park for more than 40 years and were operating when most of the historic properties in the APE were determined eligible for or listed on the National Register. Most historic properties in the APE were not determined eligible in an ideal setting devoid of air traffic or modern visual and noise intrusions. The ATMP, which reduces existing air tours over the Park, will therefore not diminish the integrity of the historic properties in the APE.

- *The ACHP states, "From FAA's analysis, flights would increase along the Coastal Route and the Kahuku Route, and noise modeling demonstrated an increase in noise associated with the flights in the vicinity of historic properties near the Coastal Route compared to existing conditions. Any increase in effects from existing conditions, where these effects are also already temporary represents a potential for adverse effect to historic properties which the FAA has not acknowledged."*

The ACHP is applying a broader standard for determining adverse effects than is stated in 36 CFR § 800.5(a)(1). While the ACHP seems to be stating that any increase in noise represents a potential for an adverse effect, an adverse effect is found when an undertaking may alter, directly or indirectly, any of the characteristics of a historic property that qualify it 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. *Id.* The Kahuku Route follows a highway with existing modern intrusions and the Coastal Route is over water instead of land, avoiding direct overflights of historic properties. While the FAA noted that there were noise increases along the Coastal Route in assessing the effects of the undertaking, individuals might only experience minor noise increases for an average of two minutes per day on days when flights are allowed to fly.¹ Therefore, the FAA did not find that the noise increases comprised an adverse effect because the increases were minor and infrequent and would not diminish the integrity of the historic properties in the APE.

Moreover, the ACHP's analysis focuses exclusively on noise impacts, but fails to note other measures in the ATMP that will have beneficial impacts on traditional cultural properties in the ATMP planning area, including those in the vicinity of the Coastal Route and the Kahuku Route compared to current conditions. The ATMP sets Sundays as a no-fly day – meaning no air tours will occur on that day. It also sets time of day restrictions for commercial air tours on those days when air tours are permitted, where such restrictions do not exist under current conditions. In particular, air tours are not authorized during

¹ Individuals may experience noise increases for an average of 2 minutes across a 4-8 hour day on days that flights are allowed. The five flights allowed per day are not frequent enough to cause chronic noise disruptions. Note that the noise from air tours will only reach levels that would disrupt noise-sensitive activities for a total maximum of 10 non-consecutive minutes per day and levels that may cause speech interference for one minute per day. These timeframes would be spread across a 4-8 hour operating day; therefore, they would only be experienced for seconds or up to a couple minutes during each of the 5 flights allowed per day and only on days that flights are allowed.

sunrise or sunset, which are both important times of day for traditional cultural activities. Under current conditions, air tours are conducted during these times. Furthermore, as a result of Section 106 consultation and public comment, the ATMP sets 8 annual no-fly days for certain days that are important to traditional cultural practices, in addition to setting Sundays as a no-fly day. The ATMP also provides that the NPS may, with two months' notice to operators, set additional no-fly days for Native Hawaiian cultural events. Further, the ATMP prohibits hovering, loitering, and circling on the Kahuku Route and the Coastal Route and sets a required minimum altitude for flights. No such prohibitions exist under the existing condition. Thus, though there are minor noise increases near these two routes, when appropriately considered within the context of all the operating parameters included in the ATMP that do not exist under the existing condition, the ATMP clearly will not have an adverse effect on historic properties, including those in the vicinity of the Coastal Route and the Kahuku Route.

- *The ACHP states, "While the ACHP agrees it is not within FAA's purview to assess effects that occurred prior to its involvement in the ATMP, it cannot reasonably deny that effects from air tours have been occurring to historic properties in the Park. Further, the measures proposed would reduce or minimize the likelihood that noise from an air tour would interrupt Native Hawaiian traditional practices and diminish the integrity of setting and feeling for these historic properties, but the conditions set by the ATMP do not completely avoid these effects. Absent ending air tours altogether, there does not appear to be a way to eliminate the potential for adverse effects."*²

Impacts from the existing condition of air tours over the Park is the appropriate baseline for determining whether the undertaking (ATMP) will adversely affect historic properties. ACHP correctly acknowledges that it is "not within FAA's purview" to assess the effects of air tours conducted under interim operating authority. However, the ACHP then goes on to state that the agency must acknowledge the effect of existing air tour operations on historic properties in the Park. Though its reasoning is not clear, the ACHP seems to assume that air tour operations under existing conditions have an adverse effect on historic properties.³ Therefore, the FAA's undertaking must completely ban air tours to remove the adverse effect, and any action that does less than a total ban does not address the adverse effect of air tours. That view goes beyond the authority of the Section 106 process and its implementing regulations.

The Section 106 regulations state that one of the purposes of the Section 106 process is to require Federal agencies "to take into account the *effects of their undertakings* on historic properties and afford the Council [or ACHP] a reasonable opportunity to comment on such undertakings." (Emphasis added) 36 CFR § 800.1(a). Pursuant to Section 106 regulations the FAA assessed the effects of the undertaking, the ATMP, compared to existing conditions. The regulations do not call for an assessment of the existing conditions. As the FAA explained in its request to the ACHP for an opinion on this finding, neither the National Parks Air Tour Management Act (NPATMA) nor the National Historic Preservation Act (NHPA)

² The ACHP states that any potential for adverse effects is an adverse effect. However, the ACHP does not explain what the "potential" adverse effect could be that the FAA has not already analyzed. The regulations at 36 CFR § 800.1(a) limit the scope of an adverse effect to reasonably foreseeable effects caused by the undertaking, whether the effects are later in time, farther removed in distance or cumulative.

³ ACHP took a different view in their opinion on the Great Smoky Mountains National Park ATMP, where they agreed with the FAA finding of no adverse effect although there was not a total ban of air tours over the park.

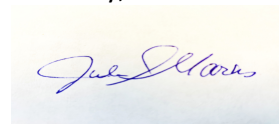
require the effects of the undertaking to be measured against a condition under which no air tours are occurring.

Furthermore, neither NPATMA nor NHPA require the agency to assess the effects of the undertaking assuming that the existing conditions already have an adverse effect. This is no different than how a ground-based undertaking would be assessed under Section 106. For example, if the agency had an undertaking that involved a historic building that had been damaged prior to their involvement and were now proposing to fund or permit repairs, the agency would not be required to assess impacts of the repairs compared to how the building existed in its original pristine condition. Making in-kind repairs to improve the condition of the building rather than fully restoring the building to its original condition would not result in an adverse effect. The assessment of effects for the undertaking on the building would be limited just to the effect of the undertaking; the existing condition of the building would be taken into consideration as a factor in determining its integrity and evaluating effects. The agency would not evaluate the effects of the circumstances that led to the damage if it was out of the agency's control (for example, disaster damage is not an undertaking). It is no different with assessing the effects of the ATMP. The FAA correctly measured the effects of the ATMP against the existing condition of commercial air tours over the Park, making no assumptions about the existing conditions, and the proposed finding of no adverse effect is appropriate.

After careful consideration of the ACHP's advisory opinion, the FAA is confirming its finding that the ATMP at Hawai'i Volcanoes National Park would have no adverse effect on historic properties within the APE.

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

Sincerely,



Julie Marks
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Enclosure

Exhibit 1 – ACHP Opinion Letter, dated August 23, 2023