



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

October 18, 2023

Re: Request for Review from the Advisory Council on Historic Preservation 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 Haleakalā National Park

Ms. Jaime Loichinger
Director
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 Haleakalā National Park (Park) made under Section 106 of the National Historic Preservation Act (NHPA). The FAA submits this request in accordance with 36 CFR §800.5(c)(2)(i) in response to objections from consulting parties, specifically, Haleakalā Conservancy, the National Trust for Historic Preservation (NTHP), Friends of Haleakalā National Park, National Parks Conservation Association (NPCA), Hawai'i State Historic Preservation Division (SHPD), and Mr. Stanley Kī'ope Raymond, 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 10**). In particular, **Exhibits 8 and 10** contain the agency's finding of effect letters, which meet the requirements of 36 CFR §800.11(e). The finding of effect letters describe the undertaking, the Area of Potential Effects (APE), the steps taken to identify historic properties, the historic properties in the APE and the characteristics that qualify them for listing in the National Register of Historic Places (National Register), and explain why the criteria of adverse effect do not apply to this undertaking. They also describe 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. As further detailed in the Section 106 Consultation Summary section below, the FAA continued consultation in July 2023, due to a minor scope change. **Exhibit 10** contains the updated APE letter, sent July 26, 2023; updated finding of effect letter, sent August 14, 2023; and responses to the FAA’s August 14, 2023, letter received from consulting parties. The Office of Hawaiian Affairs (OHA), Haleakalā Conservancy, NTHP, Friends of Haleakalā National Park, NPCA, SHPD, and Mr. Raymond objected to the FAA’s determination. As further detailed in the Consulting Party Objections section below, the FAA was able to resolve OHA’s objection through continued consultation.

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 objections that were made and provides the FAA’s response.

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 routes or altitudes for flights, other than some voluntary measures per a Letter of Agreement that was signed by the NPS and air tour operators in 1998. The voluntary measures included no flights over the Haleakalā Crater and a flight path across Kīpahulu. Since 2005, most commercial air tours over national parks, including Haleakalā 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 NHPA 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, the Hawai'i Air Tour Common Procedures Manual (Manual), AWP13-136A, for commercial air tour operations below 1,500 feet above ground level within the state of Hawai'i. All commercial air tour operators with authorization to conduct operations below 1,500 feet above ground level must comply with the requirements and limitations set forth in the Manual. Appendix B of the Manual details the operational requirements for the Island of Maui.

Currently, five¹ operators hold IOA to conduct 20,145 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 4,824 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 routes or no-fly zones that operators must adhere to; however, commercial air tours are generally concentrated south of the Haleakalā Crater and along the southern portions of the Park according to 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 most locations over the Park, the Manual allows helicopters to fly at a minimum of 500 ft. AGL if they have received authority to do so.

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 monitor the agencies' progress consistent with the approved plan. Thus,

¹ The finding of effect letter stated that six operators had IOA for a total of 25,827 air tours over the ATMP planning area. One of the operators no longer conducts commercial air tours in Hawai'i and no longer holds IOA.

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

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 NHPA. The ATMP for the Park includes the following:

- Reduces the annual number of commercial air tours permitted within the ATMP planning area to 2,224 flights with a daily limit of 14 flights across all operators.³
- Designates a single flight path with four segments within the ATMP planning area. The flight path is intended to protect visitor experience, natural and cultural resources, and acoustic resources of the Park by adopting, where appropriate for resource protection, existing transportation corridors and avoiding noise-sensitive wildlife habitat and historic properties;
- Sets a minimum altitude of 2,000 ft. AGL over land and 3,000 ft. AGL over the ocean;
- Sets time-of-day restrictions for flights to 11 AM – 2 PM for non-quiet technology flights and 11 AM – 4 PM for quiet technology flights;
- Establishes no-fly days on Sunday and Wednesday;
- Prohibits hovering and/or circling;
- Provides incentives for operators to adopt and use quiet technology and requires all air tours to be conducted using quiet technology aircraft by 2033;
- Provides for operator training and education;
- 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;
- Establishes six no-fly days per year based on the Park's existing commercial-free days that follow the Hawaiian Moon Calendar and Makahiki Season and two no-fly days per year based on culturally significant Hawai'i State holidays;
- Establishes six additional no-fly days per year to be identified at the mandatory annual meeting;⁴
- Permits the NPS to establish additional temporary no-fly periods for special events or planned park management with two months' notice to the operators. Special events may include Native Hawaiian events or other natural and cultural resource programs;
- 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 aircraft being replaced;
- Requires operators to provide semi-annual reports to the agencies including flight monitoring data;
- Includes protocols 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

³ The ATMP has been changed since the noise modeling and assessment of effects in the finding of effect letters to further reduce air tours from 2,412 to 2,224 flights per year. The reduction in the number of tours per year also reduces the maximum number of daily from 16 to no more than 14 tours per day across all operators. The ATMP still limits the number of tours each operator could conduct on the days when air tours are permitted.

⁴ The additional no fly days were added as a result of comments received from consulting parties and through the NEPA process.

- 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 **Exhibits 8 and 10**).

In summary, the number of air tours authorized under the ATMP is 11% of those currently allowed under IOA, or 46% of the 3-year average, and the ATMP requires that operators fly on a designated flight path that has 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 single designated flight path under the ATMP is 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 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 Hawaiians and Native Hawaiian Organizations, such as TCPs, that may be located within the ATMP planning area (see **Exhibit 1**). The agencies received responses from one consulting party expressing interest in consultation and one consulting party opting out of 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 Park's Kūpuna consultation group on December 9, 2021 (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 7, 2022 (see **Exhibit 3**). In a letter dated April 18, 2022, the SHPD confirmed receipt of the scoping letter and provided recommendations for additional consulting parties (see **Exhibit 3**).

A consulting party meeting with all consulting parties was held on November 10, 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 14, 2022, requesting comments on the APE and historic properties list (see **Exhibit 5**). In November 2022 and December 2022, the FAA received comments from Friends of Haleakalā National Park, Historic Hawai'i Foundation (HHF), Tweetie Lind, OHA, and NTHP. 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 10, 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 did not object to the APE (see **Exhibit 6**). On February 10, 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 10, 2023, letter.

Finding of Effect Letter and April Informational Meeting

The FAA thoroughly analyzed the effects of the undertaking and supported 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 58 consulting parties, requesting that they concur with the agency’s finding. The letter included an invitation to an informational meeting on April 20, 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**). As further detailed in the Consulting Party Objections section, the FAA received objections from OHA, Haleakalā Conservancy, NTHP, Friends of Haleakalā National Park, and NPCA (see **Exhibit 9**).

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 20, 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 20, 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 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 Friends of Haleakalā National Park, the SHPD, NTHP, Haleakalā Conservancy, OHA, and the NPCA.⁵ The individual meetings

⁵ During the 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 except for Friends of Haleakalā National Park, which occurred prior to this request, but did not attend.

included a full discussion of the points made by each party and the agencies' responses, but all parties except for OHA 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.

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**).

Parcel Acquisitions, Expanded APE, and Updated Effects Analysis

In July 2023, the agencies expanded the APE after the Park acquired two new parcels that expanded the Park boundary by 8.18 acres, and consequently, the ATMP planning area. When reviewing the changes needed for new parcels, the NPS also found other small parcels that needed to be added to the maps and found that remapping of the Denman parcel reduced it by 1.971 acres. Consequently, these parcels expanded the ATMP planning area (the Park and a ½ mile buffer around the Park) by 236.3 acres (+0.18% change). The agencies adjusted the APE to include the areas of expanded buffer and sent an APE letter to all 61⁶ consulting parties on July 26, 2023, with a map showing the new areas within the APE and requesting comments on historic properties and potential effects within these new areas (see **Exhibit 10**). The APE description remained the same as what was provided in the March 27, 2023, finding of effect letter.

In response to the July 2023 APE letter, the FAA received comments from the George K. Cypher 'Ohana, Hōkūlani Holt, and Mr. Raymond (see **Exhibit 10**). On August 11, 2023, and August 12, 2023, respectively, the NPCA and NTHP requested a suspension of the consultation process due to the emergency situation on Maui. The NTHP also reiterated their comments provided in their April 28, 2023, letter (see **Exhibit 10**). No new historic properties were identified through consultation.

The FAA analyzed the effects of the undertaking in the expanded areas of the APE and maintained a finding of "no adverse effect" in an August 14, 2023, letter sent to all 61 consulting parties (see **Exhibit 10**). In a letter dated August 21, 2023, the NPCA and NTHP reiterated their request to suspend the consultation process and expressed concerns regarding the Section 106 consultation process. The agencies extended the comment period for the finding of effect letter an additional 30 days, for a total of 60 days, on September 1, 2023, and provided a letter detailing the FAA's response to the NPCA's and NTHP's comments on September 29, 2023 (see **Exhibit 10**). In response to the August 14, 2023, letter, the FAA received a concurrence from the National Solar Observatory (Daniel K. Inouye Solar Telescope), and Nu'u Mauka Ranch noted that they have no issues with the ATMP (see **Exhibit 10**). As further

⁶ Two newly identified consulting parties, the Association of Hawaiian Civic Clubs and Ms. Nan Cabatbat, were invited to consult on July 26, 2023, and were sent all prior correspondence on the undertaking at that time (see Exhibits 8 and 10).

detailed in the Consulting Party Objections section, the FAA received additional objections from the SHPD and Mr. Raymond (see **Exhibit 10**). On October 16, 2023, the FAA received an email from the NTHP and NPCA reiterating their objections and a letter dated August 19, 2023, that made the same points as the August 21, 2023, letter noted above.⁷

Consulting Party Objections

The FAA sent its finding of effect letters on March 27, 2023, and August 14, 2023, to all consulting parties requesting that they concur with the agency's finding. The FAA received objections from seven consulting parties during the review periods: OHA, Haleakalā Conservancy, NTHP, Friends of Haleakalā National Park, NPCA, SHPD, and Mr. Raymond. 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:

Haleakalā Conservancy bases its objection on two issues: (1) that air tours compromise the silence of the Park; and, (2) it argues that continuing to allow air tours dismisses concerns expressed by the community and Kānaka Maoli about the impacts of flights to sacred lands and cultural practices (see **Exhibit 9**). 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 appropriate finding if the undertaking permits air tours (see **Exhibit 9**).⁸ In its objection, Friends of Haleakalā National Park argues that although the ATMP would reduce the effects of air tours compared to existing conditions, continuing to allow air tours also continues adverse audible and visual effects on visitors and historic sites that are renowned for their silence and/or wilderness character (see **Exhibit 9**). As noted in the above Section 106 Consultation Summary, the FAA found only one issue relevant to the Section 106 process in the NPCA's 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**). In his objection, Mr. Raymond reiterated and clarified his prior comment in response to the finding of effect letter, indicating that he did not consider the reduction of flights to be adequate. Mr. Raymond argues that noise disturbance has an adverse effect on some Native Hawaiian religious practices, and reducing the likelihood of noise is not sufficient (see **Exhibit 10**). The SHPD also did not concur with the FAA's proposed finding. The SHPD determined that the ATMP will have an adverse effect on TCPs and traditional cultural practices (see **Exhibit 10**).

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.

⁷ Contrary to the NTHP's claim in their October 16, 2023, email, the FAA did not receive a letter from the NTHP/NPCA on August 19, 2023. The FAA received a similar letter from Neil Desai on behalf of the NTHP/NPCA on August 21, 2023.

⁸ 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 been addressed and the commentors did not raise them again (see Exhibits 7 and 9).

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 Haleakala 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 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 IOA 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 (4,824 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 and daily, setting a designated flight path, increasing minimum altitudes for tours, setting no-fly

days, and establishing the potential to set no fly periods for special events, among other conditions. For these reasons, the FAA's use of existing conditions as the baseline against which to measure the impacts of its undertaking is appropriate.

ATMP Continues to Allow Adverse Effects

Comments received from the NTHP, Mr. Raymond, Haleakalā Conservancy, and the SHPD 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. For instance, 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 Haleakala 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 NHPA impose when assessing visual and auditory effects from an undertaking. Rather, 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. 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. While noise intensity may increase at some points under the ATMP near the proposed flight path, any increases in the time above metrics and L_{Amax} at these points are minor, and the overall time that air tours are audible would significantly decrease under the ATMP at all of these points. For example, the largest increase in time above 52 dBA is at noise point 37, which would experience an increase of just 7 minutes (spread out over operating hours) compared to existing conditions. At this same point, the overall time that air tours will be audible under the ATMP would decrease by 104 minutes compared to existing conditions (see **Exhibits 8 and 10**). When combined with the other minimization measures such as time-of-day restrictions and no-fly days, any increases in noise intensity do not diminish the integrity of historic properties in the area. Visual impacts to historic properties would decrease due to the decrease in commercial air tour operations overall. As further described in the finding of effect letters (see **Exhibits 8 and 10**), 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.

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 commercial air tours that may occur within the ATMP planning area by 46% compared to the current condition. It restricts the air tours that will be permitted to a single designated flight path at increased altitudes than are flown under existing conditions (minimum 1,500 – 2,000 ft. AGL, depending on weather and location over the Park and ATMP boundary). The ATMP authorizes the use of specific 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 within the ATMP planning area 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.

Listening to Cultural Practitioners

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. The 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 9, 2021, and November 10, 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 20, 2023. A summary of previous Kūpuna comments was provided along with the invitation to the December 2021 listening session. 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 10, 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**).

Some of the consulting parties imply that because the no air tour alternative is not the undertaking they have not been heard. Specifically, the Haleakalā Conservancy states that continuing air tours dismisses the concerns expressed by the community and the Kanaka Maoli about the impacts of flights to sacred lands and cultural practices. However, compliance with the Section 106 process does not dictate

selection of a specific outcome. 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. The agencies received comments noting that the silence on Haleakalā Summit is sacred and noting Kīpahulu Valley as a particular area of concern, so the undertaking does not authorize air tours over Haleakalā Summit and Kīpahulu Valley and moves them further away from these areas. Commenters also noted that they preferred air tours over the ocean instead of the land, and the ATMP shifts the designated flight path in the southeast side of the ATMP planning area over the ocean. Commenters also expressed concerns regarding monitoring; the ATMP includes provisions regarding monitoring and enforcement. In response to commenters' requests, an additional six no fly days were added to the ATMP. Furthermore, the undertaking implements annual and daily limits, time-of-day restrictions, and no-fly days to reduce the likelihood that an air tour would interrupt Native Hawaiian traditional practices.

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. Specifically, comments from the Haleakalā Conservancy regarding the undertaking effects on wilderness areas were considered outside the scope of Section 106 and have been sent to PEPC for consideration under the NEPA process.

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.

Request for Review and Concurrence

For the reasons stated in the finding of effect letters 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
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CCs: Olena Alec, Haleakalā Conservancy
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Christopher Cody, National Trust for Historic Preservation
Matt Wordeman, Friends of Haleakalā National Park
Neal Desai, National Parks Conservation Association
Susan Lebo, Hawai'i SHPD
Stephanie Hacker, Hawai'i SHPD
Jessica Puff, Hawai'i SHPD
Stanley Kī'ope Raymond

Enclosures:

Exhibit 1 – March 29, 2021, Consultation Initiation Letter and Responses
Exhibit 2 – Invitation to December 9, 2021, Listening Session
Exhibit 3 – March 7, 2022, Scoping Letter and Responses
Exhibit 4 – Invitation to November 10, 2022, Consulting Party Meeting
Exhibit 5 – November 14, 2022, Request for Comments Letter and Responses
Exhibit 6 – December 23, 2022, APE Letter to the HI SHPD and Response
Exhibit 7 – February 10, 2023, Response to Comments Letter
Exhibit 8 – March 27, 2023, Finding of Effect Letter with Invitation to April 20, 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
Exhibit 10 – ATMP Boundary Expansion: APE Letter; Responses to APE Letter; Effects Assessment; and Responses to Effects Assessment