



November 20, 2023

Ms. Julie Marks  
Executive Director (A), AEE-1  
Office of Environment and Energy  
Federal Aviation Administration  
800 Independence Avenue, SW, Suite 900W  
Washington, DC 20591

Ref: *Proposed Air Tour Management Plan (ATMP) at Haleakalā National Park*  
*Maui County, Hawai'i*  
*ACHP Project Number: 020182*

Dear Ms. Marks:

On October 19, 2023, the Federal Aviation Administration (FAA) requested that the Advisory Council on Historic Preservation (ACHP) review its finding of “no adverse effect” for the referenced undertaking. The ACHP’s opinion was requested pursuant to 36 CFR §§800.5(c)(2) and (3) of the regulations implementing Section 106 of the National Historic Preservation Act (NHPA), “Protection of Historic Properties” (36 CFR Part 800). On October 23, 2023, the ACHP notified the FAA that it was extending its review period for an additional 15 days pursuant to 36 CFR § 800.5(c)(3)(i). Seven consulting parties have objected to the FAA’s finding including the Haleakalā Conservancy, the National Trust for Historic Preservation (NTHP), Friends of Haleakalā National Park, National Parks Conservation Association (NPCA), the Office of Hawaiian Affairs (OHA), Hawai’i State Historic Preservation Officer (SHPO), and Mr. Stanley Kī‘ope Raymond. The FAA was able to resolve the objection of one consulting party, OHA, through continued consultation; the other six objections remain unresolved.

Based on the documentation submitted, it appears FAA has not provided clear documentation on the identification of historic properties in the Area of Potential Effects (APE) and has not appropriately applied the criteria of adverse effect [36 CFR § 800.5(a)(1)] for this undertaking; therefore, a finding of adverse effect, based on the potential for adverse effects to occur from the continuation of air tours over portions of the Park, is appropriate. While we acknowledge the FAA has attempted to reduce the potential for adverse effects through imposition of several conditions, these conditions do not avoid the possibility for adverse effects to result. The rationale for this advisory opinion follows.

### ***Background***

FAA’s undertaking consists of the development and implementation of an Air Tour Management Plan (ATMP) for the Haleakalā National Park (Park) to regulate commercial air tours within the ATMP planning area. The undertaking does not include the operation of air tours themselves but implementing a plan that applies to all commercial air routes over the Park and within ½ mile outside the boundary of the Park. Commercial air tours subject to the ATMP are those conducted for compensation or hire in a powered aircraft for the purposes of sightseeing during which the aircraft flies below 5,000 feet (ft.) above ground level (with minor safety exceptions) and less than one mile laterally from any geographic feature within the park.

ADVISORY COUNCIL ON HISTORIC PRESERVATION

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Development of this ATMP or a voluntary agreement is required to comply with the National Parks Air Tour Management Act (NPATMA) enacted in 2000. While commercial air tours have been operating over the Park prior to NPATMA and the federal undertaking, air tour operators were subject only to FAA's general safety regulations, Special Operating Rules for Air Tour Operators in The State of Hawai'i, and a Letter of Agreement that was signed by the National Park Service (NPS) and air tour operators in 1998 with voluntary measures including no flights over the Haleakalā Crater and a flight path across Kīpahulu. After 2005, air tours operated in accordance with an interim operating authority (IOA), also required by NPATMA, for which compliance with Section 106 was not required because it did not impose any conditions other than an annual limit on the number of flights. A 2008 Manual provided authorization for operators below 1,500 feet above ground level (AGL) to comply with requirements in the Manual which included details specific to the Island of Maui.

In initiating consultation under Section 106, FAA has stated that the baseline or existing condition against which it is assessing the potential effects of the undertaking is air tour operation prior to the implementation of the ATMP (i.e., following the interim operating authority and the 2008 Manual), not a condition in which no air tours operate. Currently, five operators hold IOA to conduct 20,145 air tours each year over the Park and within ½ mile of the Park's boundary, but FAA based its analysis on a three-year average (2017-2019) of commercial air tours, which is 4,824 tours per year. Currently, there are no designated flight routes and no 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. Minimum altitudes range from 500 to 1,500 ft. AGL following the 2008 Manual, and are weather dependent and contingent on location over the island.

FAA, in consultation with the National Park Service (NPS) and consulting parties, including the Hawai'i State Historic Preservation Office (SHPO), Native Hawai'ian Organizations (NHO), members of the Park's Kūpuna consultation group, operators, and other consulting parties, delineated the Area of Potential Effects (APE), modified during consultation in response to consulting party comments and Park acquisitions, and identified 32 historic properties including cultural landscapes, historic districts, sites and structures, archaeological sites, and a Traditional Cultural Property (TCP). The identification effort focused on identifying properties where setting and feeling are characteristics contributing to a property's National Register eligibility, as they are the type of historic properties most sensitive to the effects of aircraft overflights. The majority of these are properties of religious and cultural significance to Native Hawaiians, significant for their association with Native Hawai'ian culture, traditions, and sacred uses. In particular, the Haleakalā Summit TCP, including the Kīpahulu Valley and Kaupō Gap, is individually eligible as a TCP for its association with native Hawaiian culture, traditions, and sacred uses. The exceptional stillness and serenity of the Summit of Haleakalā are significant characteristics of the TCP that allow Native Hawaiians to continue conducting traditional ceremonies, which require a quiet setting.

The ATMP proposes a reduction in air tours from existing conditions to only 46 percent of the three-year average, reducing the number to 2,224 flights with a daily limit of 14 flights across all operators. Further, the ATMP proposes conditions that require operators to fly on a single designated flight path with four segments within the ATMP planning area that *avoids noise sensitive resources, including historic properties* (emphasis added); set a minimum altitude and time- of- day restrictions that incentivize the use of quiet technology aircraft, establish regular no- fly days with allowances for additional temporary no-fly periods, prohibit hovering and circling, and require operator training, annual reporting, and meetings.

The FAA determined that the undertaking would have “no adverse effect” on historic properties, basing its finding on the aforementioned reduction in tours and other conditions, and because aircraft are transitory elements in a site or viewshed, meaning that effects would be relatively short in duration. The FAA recognized that noise and visual intrusions from air tours can be disruptive to traditional practices, and reiterated its assertion that these effects are temporary and transitory in nature, and would not result in a diminishment of the characteristics of the properties that qualify them for inclusion in the NRHP.

### ***ACHP’s Review of Finding***

Regarding the adequacy of documentation on the identification of historic properties (36 CFR 800.11(e)(3)), the ACHP finds that the FAA omitted identification of an historic property in its Finding of Effect (Exhibit 8: March 27, 2023 letter, Attachments B and C) that limit an accurate assessment of effects. In responding to comments in a November 28, 2022 letter from OHA, FAA states in its February 10, 2023 letter, Attachment 2, Response to Comments, that “for the purposes of the Section 106 assessment, the entire Park is being considered a TCP. However, due to the time needed to conduct a TCP study and the agencies’ December 31, 2023 deadline to complete an ATMP or voluntary agreement for the Park, a TCP study will not be accomplished.” If the FAA intended to assure OHA and other consulting parties that the Park is being treated as a TCP, considered eligible for the NRHP for the purposes of the FAA’s Section 106 review, it is unclear why the entirety of the Park is not identified as a NRHP-eligible TCP in the map (Attachment B) and table of historic properties (Attachment C) of its Finding of Effect letter or subsequent updates and whether the FAA adequately assessed effects to the Park as an historic property in its subsequent assessment of effects.

As it stands, the assessment of effects only appears to consider effects on historic properties from the proposed air tour route and buffer which cross the Park and ATMP planning area four times but stay outside the boundaries of mapped historic properties. If the mapping showed the Park’s entire boundaries as a TCP, consistent with FAA’s response to OHA, it would have shown that the four route segments do fly directly over an NRHP-eligible TCP, and in these areas, FAA does not meet its stated attempt to *avoid noise sensitive resources, including historic properties* as overflights of the Park as an historic property would continue and would not be avoided. Further, since the FAA has declined to commit to completing a TCP study with a thorough identification of resources contributing to the Park as a TCP, FAA cannot conclude that its proposed flight path for air tours would avoid effects from noise and visual intrusions to characteristics of the historic property that qualify it for inclusion in the NRHP.

In making its finding of “no adverse effect,” the FAA continues to rely on its interpretation of 36 CFR §800.5(a)(2)(v), stating its belief that it is only required to consider potential adverse effects caused by the introduction of audible or visual elements. FAA asserts that noise and visual effects of existing air tour operations are already present in the APE. The ATMP’s continuation of these activities does not introduce new elements and therefore should not be considered an adverse effect. However, as the 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 should also consider how its undertaking would increase effects from these activities on some historic properties.

The FAA’s documentation makes clear that its intent is to move air tours away from and avoid direct overflights of historic properties. The FAA acknowledges that the proposed flight path would shift the bulk of air tour operations to the south and may expose some historic properties to increased noise and visual effects. Any increase in effects from existing conditions, even if these effects are also temporary and transient in nature, represents the potential for adverse effect to historic properties which the FAA has not acknowledged in its finding, in part because it did not identify the Park itself as an historic property.

Because the FAA did not fully identify contributing resources within the Park TCP, it is not reasonable to claim that the concentration of flights in the southern part of the Park and ATMP planning area avoids effects to characteristics of the Park that qualify it for inclusion in the NRHP because the FAA does not know what these characteristics are and which resources contribute to its eligibility.

Accordingly, the ACHP recommends that the FAA reconsider its “no adverse effect” finding to be consistent with the threshold in 36 CFR §800.5(a)(1), which recognizes that an adverse effect finding is appropriate when such diminishment of integrity may result from the undertaking, but that diminishment does not have to be a certainty. Until FAA has completed a TCP study of the Park and determined where contributing resources are located, it cannot avoid the potential for adverse effects. The FAA should document its proposed conditions as commitments in a Memorandum of Agreement (MOA) and consult further on the development of other measures, such as a TCP study of the Park, to resolve adverse effects on historic properties. Swift consultation and execution of an MOA would allow FAA to complete the Section 106 process in accordance with the court-mandated deadline for an ATMP at this Park. Further, an MOA would specify contingencies and Section 106 consultation procedures should the measures in the ATMP need to be changed, or additional adverse effects to historic properties are identified in the future. Should FAA revise its finding to adverse effect, the ACHP would accept the invitation to participate in the continuing consultation to resolve adverse effects.

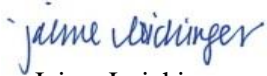
We note that this is the FAA’s third request for dispute resolution for similar findings related to ATMPs; the ACHP previously also opined on disputed “no adverse effect” findings at Great Smoky Mountains National Park and Hawaii Volcanoes National Park. The ACHP encourages the FAA to consider an after-action analysis detailing how the Section 106 reviews were carried out for each park to assess what may have led to this relatively high percentage of disputes and consider actions that would remedy ongoing and future Section 106 reviews as FAA completes the development of ATMPs at remaining parks (Bandelier National Monument, Lake Mead National Recreation Area and Canyon de Chelly National Monument). We understand that because FAA decided to prohibit air tours at both Badlands National Park and Mount Rushmore National Memorial, both in progress at the time the ACHP’s review was requested for the current dispute, that implementation of these ATMPs are not likely to generate disputes from among consulting parties.

We note that FAA’s practice of holding separate meetings with consulting parties who objected to its findings may be one area that would benefit from a different approach. The ACHP previously advised the FAA that while the regulations require the FAA to consult with objecting parties, they do not limit that consultation to only the objecting parties. Consultation is most effective when it is open and transparent, and keeping all consulting parties apprised of efforts to resolve disputes is one method for doing so. It also ensures that all consulting parties are provided the same information and can understand other parties’ interests and positions within a Section 106 review.

In accordance with 36 CFR § 800.5(c)(3)(ii)(B), the FAA is required to take into account this advisory opinion in reaching a final decision on its finding of no adverse effect and provide to the ACHP, SHPO, NHOs, and other consulting parties its rationale and a summary of how this opinion was considered. If the FAA affirms its initial finding, once the summary of the decision has been sent to the ACHP and other parties, the agency official’s Section 106 responsibilities are fulfilled for review of this undertaking.

Thank you for the opportunity to comment on this dispute regarding effects to historic properties. If we may be of further assistance, or you would like to discuss this matter, please contact Ms. Rachael Mangum, at (202) 517-0214, or via e-mail at [rmangum@achp.gov](mailto:rmangum@achp.gov).

Sincerely,



Jaime Loichinger

Director

Office of Federal Agency Programs