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DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Parts 91, 121 and 135

Docket No. FAA-2003-14830; Special Federal Aviation Regulation (SFAR) No.71

RIN 2120-AH02

Air Tour Operators in the State of Hawaii

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: This final rule continues the existing safety requirements in Special Federal Aviation Regulation No. 71 (SFAR 71) and eliminates the termination date for SFAR 71. The procedural, operational, and equipment safety requirements of SFAR 71 will continue to apply to Parts 91, 121, and 135 air tour operators in Hawaii. SFAR 71 does not apply to operations conducted under part 121 in airplanes with a passenger-seating configuration of more than 30 seats and a payload capacity of more than 7,500 pounds or to flights conducted in gliders or hot air balloons.

DATES: This final rule is effective October 26, 2003.

FOR FURTHER INFORMATION CONTACT: Alberta Brown, Aviation Safety Inspector, Air Transportation Division, AFS-200, Federal Aviation Administration, 800 Independence Avenue, SW., Washington, DC 20591; Telephone (202) 267-8321, or by email at *Alberta.Brown@faa.gov*.

SUPPLEMENTARY INFORMATION:

Availability of the Rulemaking Documents

You can download an electronic copy of this final rule through the Internet by:

(1) Searching the Department of Transportation's (DOT) electronic Docket Management System (DMS) web page (http://dms.dot.gov/search); by going to the DOT in person; or by requesting by mail to DOT at 400 Seventh Street SW, Washington, D.C. 20590;

(2) Visiting the Office of Rulemaking's web page at http://www.faa.gov/avr/armhome.htm; or

(3) Accessing the Federal Register's web page at http://www.access.gpo.gov/su_docs/aces/aces140.html.

You also can get a copy by submitting a request to the Federal Aviation Administration, Office of Rulemaking, ARM-1, 800 Independence Avenue SW., Washington, DC 20591, or by calling (202) 267-9680. Make sure you put docket number FAA-2003-14830 on your request. to identify this rulemaking.

You may review the public docket containing this final rule, any comments received, and any final disposition, in person in the Docket Management System office (see address above) between 9:00 a.m. and 5:00 p.m., Monday through Friday, except Federal holidays.

Privacy Act

Anyone is able to search the electronic form of all comments received into our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on

behalf of an association, business, labor union, etc.). You may review DOT's complete Privacy Statement in the *Federal Register* published on April 11, 2000 (volume 65, Number 70, pages 19477-78), or you may visit http://dms.dot.gov.

Small Entity Inquiries

The Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA) requires the FAA to comply with small entities requests for information or advice about compliance with statutes and regulations within its jurisdiction. Internet users can find additional information on SBREFA on the FAA's web page at http://www.2faa.gov/avr/arm/sbrefa.htm. Persons without Internet access may call the office of rulemaking at (202) 267-8677 for more information.

Background

On August 8, 2003, the FAA published a notice of proposed rulemaking (NPRM) that would continue the safety requirements of SFAR 71 and eliminate its termination date. (68 FR 47269) The FAA omitted the Regulatory Flexibility Analysis from the final document. Therefore, on August 20, 2003, the FAA published a correction to the proposed rule including the Regulatory Flexibility Analysis (68 FR 50085).

Summary of Comments on the Proposal

NOTE: "Petitioners" as used in this summary of comments refers to the15 petitioners who filed a petition for rulemaking to operate helicopters at 300 feet above uncongested terrain, dated October 15, 2002, Docket FAA-2002-13959. The petition may also be reviewed in Docket FAA-2003-14830. All material and relevant comments have been reviewed. Most of the comments raised issues that the FAA has already addressed in prior rulemakings regarding this SFAR.

Eliminate SFAR 71

Some commenters want SFAR 71 eliminated completely. They maintain that the air tour operators in Hawaii should be allowed to operate under parts 91 and 135 like the rest of the air tour operators in the United States. They claim that the SFAR's additional requirements have not reduced the accident rate, or fatalities, and may have contributed to accidents and fatalities. These commenters believe that restrictions are unnecessary because SFAR 71 adds to pilot workload and fatigue. These commenters argue that pilot judgment should dictate altitude and standoff distances, not the SFAR, in accordance with regulatory practices and flight conditions. Some individual pilots state that the SFAR's 1500-foot altitude minimum has forced them into controlled airspace to maintain cloud clearance. They also state the SFAR's minimum altitude requirements increase the possibility of flying inadvertently into instrument meteorological conditions.

FAA response

The issues from the comments summarized above have been addressed in prior rulemakings concerning SFAR 71. Commenters have provided no new information.

SFAR 71 as a noise abatement rule

Some commenters continue to refer to SFAR 71 as a noise abatement regulation and ask the FAA to continue the rule or enhance it. Others maintain that SFAR 71 was issued to address noise and environmental issues, not safety, and want the SFAR eliminated. Elected officials and

environmental groups characterize SFAR 71 as reducing noise pollution in Hawaii's national parks, forests, and scenic wildlife areas and ask for its continuation or enhancement.

FAA response

In 1994, the FAA issued SFAR 71 as an emergency final rule because of the increase in the number of fatal accidents involving air tour aircraft during the period 1991-1994 and the causes of those accidents. The FAA extended the SFAR in 1997 and 2000 to keep the SFAR's safety requirements in place. There were Congressional concerns that noise could be addressed at the same time, but noise was not the reason for issuing the rule. The FAA's mandate for this rulemaking was safety. The comments regarding noise, noise impacts, and noise benefits are speculative.

Commenters proposing changes to SFAR 71

Elected officials, the Sierra Club, and some commenters seek elimination of the SFAR's 500-foot deviations or "exemptions" from the minimum altitude requirements. They believe that eliminating the deviations would mean less noise and less impact on the human environment, forests, and plants of Hawaii.

Elected officials and other commenters oppose petitioners' request that the FAA amend the SFAR to allow tour helicopter flights at 300 feet above uncongested terrain because they believe noise would increase.

Still other elected officials and commenters want to raise the SFAR's minimum altitudes because they believe air tour operations at higher altitudes would generate less noise.

Still other commenters request that overflights of national parks in Hawaii be eliminated.

The petitioners and some commenters want to lower minimum altitudes and standoff distances for helicopters because that would allow helicopters to fly comfortably in the rainforest and away from populated noise-sensitive areas. They claim it would greatly reduce air traffic in the SFAR's flight corridors.

FAA's response

SFAR 71 continues to serve a safety purpose. The FAA chooses to continue the altitude minimums and the deviation authority of SFAR 71 for safety reasons. The minimum altitude and standoff distances provide pilots with more time to make decisions, to recover in the event of an error, or land in the event of an emergency. Because the FAA maintains control of deviations, they reduce the potential for congestion over a particular site at the SFAR's 1500-foot altitude while still allowing for a safe landing in the event of engine failure. The SFAR's regulatory safety requirements were promulgated based on NTSB safety recommendations. We disagree that the minimum altitudes and stand off distances should be increased, or decreased, for alleged noise benefits. Noise abatement is beyond the scope of this rulemaking.

Overflights of the national parks are part of the national airspace system. The National Parks Air Tour Management Act of 2000 (the Act) was enacted on April 5, 2000. The Act applies to any person who conducts a commercial air tour operation over a unit of the National Park System, over tribal lands that are within or abutting a unit of the National Park System, or any area within ½ mile outside a unit of the National Park System. The regulations codifying the National Parks Air Tour Management Act of 2000 can be found in Title 14, Code of Federal

Regulations, Part 136. The FAA has no mandate to eliminate overflights of national parks. Banning or restricting air tour aircraft from national parks, or other areas, for asserted noise benefits or to avoid asserted impacts, is beyond the scope of this rule.

The national parks in Hawaii will be subject to the development of an ATMP under 14 CFR Part 136 (67 FR 65667; October 25, 2002). The FAA encourages persons interested in the development of these ATMPs to visit the website at *www.atmp.faa.gov.* There, you may search by individual park for the status of any ATMP development.

Potential for mid-air collisions

Commenters' concerns on the potential for mid-air collisions can be divided into four categories:

1) the mix of airplanes and helicopters;

2) congestion at the same altitude;

3) the use of different frequencies; and

4) weather-related factors.

1) Commenters state that helicopters should not be flown in an airplane environment. A helicopter pilot's initial reaction to unforecasted poor weather, and/or a mechanical problem, is to immediately descend to a lower altitude with slower airspeed. Fixed-wing aircraft do not have this option.

2) A commenter states that the primary routes for small commuter and private fixed wing aircraft around the Hawaiian Islands are around the coastal shorelines 1000 – 2500 MSL. This

commenter maintains that SFAR 71 places Hawaii air tour helicopters at the same altitudes, in opposite directions, and at points of no two-way communications with commuter and general aviation aircraft.

Petitioners and commenters state that because of SFAR 71's altitude requirement and the normal orographic cloud ceiling that forms along the windward sides of the Hawaiian islands, helicopter tours are often forced to fly over, or close to, coastal communities. In these circumstances, general aviation airplanes fly low to stay below the helicopters. Commenters maintain that the practice is contrary to safe practices and increases the potential risk of midair collisions as well as noise exposure.

3) Commenters find that because one aircraft may be on a common frequency and another on an airport frequency, they may not be able to talk to each other. If these aircraft are at the same altitude, this could be a problem.

Another individual comments that the present route structures tend to concentrate air traffic too densely in certain areas presenting greater midair accident potential. Examples are the Pahoa NDM and the "Mill" in Hilo. At these points a pilot must fly between frequencies or off communication frequencies to monitor STID in very critical areas.

4) Commenters also state that in marginal weather, SFAR 71 concentrates air traffic along specific routes, which is not conducive to a safe flight environment. Pilots have come close to mid-air collisions in the valleys and open areas because the SFAR requires them to maintain the same altitudes in the same areas. Pilots are forced to fly over noise sensitive areas

at 1,500 feet above the surface when they could have avoided the areas if they could have flown lower and not had such cloud restriction rules.

FAA response

The FAA is not aware of any safety issue with allowing helicopters and airplanes to operate in the same airspace in Hawaii. The air tour environment in Hawaii is "see and be seen." There has been no identified problem with mid-air accidents in Hawaii; the preponderance of accidents involve weather factors and engine shutdowns with the pilot having insufficient time to recover or no place to land.

The SFAR has never prescribed routes, and this rulemaking did not propose doing so. If the FAA were to propose routes, to include frequencies, it would have to be done in a separate rulemaking.

The FAA is aware of areas all over the country where certain aircraft operate safely on different frequencies. If air tour operators have identified an issue that needs to be brought to the attention of the local flight standards district office or air traffic control facility, then those offices will work with the operators to develop a common frequency format for the areas of concern. Through their own organizations, operators can develop common frequency monitoring procedures, and in an emergency, a guard channel can be used. The FAA is not aware of any reason to develop rules that will regulate the routes in these areas, and a proposal was not included in this document.

Standoff distances in valleys

Commenters suggest that complying with the SFAR's 1,500-foot standoff distances in narrow valleys makes a safe environment hazardous because they must fly in the middle of the valley rather than near the sides where there is less wind turbulence.

FAA response

We disagree. The FAA did not propose to make changes to the standoff distances in this rulemaking. The FAA does not agree that the SFAR's standoff distances should be reduced or eliminated for valleys for the reasons discussed in this and prior rulemakings. The commenters have not presented a compelling safety argument for reducing the rule's baseline standoff distance. Generally speaking, the greater the standoff distance, the greater the chances that the pilot can avoid a collision with steep rugged terrain. The FAA has granted deviations from the baseline standoff distance after making safety assessments on a location-by-location basis.

The national air tour safety rule

A commenter states that to codify the flawed SFAR instead of designing a national air tour policy is unsound. A proposed national rule would force the FAA to provide a competent safety analysis. A national rule would eliminate the "improper and extraordinary impact on the rulemaking process heretofore enjoyed by the Hawaii Congressional delegation."

In a related comment, an air tour operator argues that the FAA's policy of "equivalent level of safety" should move the agency to either eliminate SFAR 71 or to get Part 135 in line with it, if the agency is not going to issue a national rule anytime soon.

Another commenter states that the FAA should present a new version of SFAR 71 or replace it with a national rule.

Numerous pilots state that the rule is inherently unfair. If air tour operators under Part 135 can fly at a 300-foot altitude over congested areas in the United States mainland, why should Hawaii pilots be restricted to 1,500 feet?

FAA response

The FAA is not certain what the commenters are attempting to say in its discussion of the advantage enjoyed by Congressional interest of Hawaii, so it will not discuss that portion of the comment.

The SFAR has been in effect without substantive change since 1994, and it has been successful in reducing the rate of air tour accidents in Hawaii. This final rule continues SFAR 71 with no changes other than the elimination of the expiration date; it allows SFAR 71 to continue until further notice from the FAA. The FAA continues to work on a proposed national air tour safety rule that could, if adopted, supersede the SFAR.

To the extent that any commenter believes that it is only fair to have the altitude restriction and standoff distances in SFAR 71 apply to all part 135 air tour operators nationally, the FAA responds as follows: First, the existing SFAR and the SFAR adopted today apply to all air tour operators in Hawaii regardless of whether they are conducting tours under parts 91, 121 or 135. Second, as we have previously stated, the FAA is considering whether aviation safety requires that the longstanding air tour safety rules in Hawaii should be applied nationally and whether Part 91 commercial air tour operators should be required to operate under part 135.

The FAA disagrees with some commenters' argument that the Hawaii SFAR should be set aside until the national rule is developed. The FAA received a series of recommendations from the NTSB, which it acted on, and the resulting regulatory effort was SFAR 71. Those rules have been effective, they have withstood court challenge, and the FAA will not rescind the SFAR while it considers whether to issue a national rule.

Continue or increase the minimum altitude and standoff distances. Eliminate the deviation authority of SFAR 71.

More than 100 individuals, residents of Hawaii or persons who enjoy the environment there, filed almost identical comments to support maintaining or increasing the 1500-foot altitude, eliminating the lower altitudes exceptions (deviations), and giving the state of Hawaii and the National Park Service (NPS) the ability to restrict tour overflights of state and national parks and wilderness areas. They would like the SFAR's minimum altitude increased. Further, they object to petitioners' request for an amendment that would permit a 300-foot above the surface altitude for helicopters over uncongested areas. In support, they state that "government studies" have demonstrated that higher minimum altitudes save lives, constant noise adversely impacts human health and can ruin the wilderness experience for hikers and campers, and overflights disrupt Hawaii's wildlife. They also note that the vibration from helicopters flying close to cliffs and precarious rock structures may cause landslides or rock falls.

FAA response

In this rulemaking, the FAA proposed only to eliminate the expiration date. Comments regarding changing the altitude restriction or eliminating deviations are beyond the scope of this rulemaking and will not be considered.

In response to commenters who wish to give sole authority to regulate the airspace of parks to the National Park Service (NPS) or State governments, the FAA has sole and exclusive jurisdiction and control over the navigable airspace. That power cannot be delegated to the NPS or a State absent express Congressional legislation. The comments are also beyond the scope of this rulemaking. As to national parks, the FAA is working cooperatively with the NPS on development of certain air tour management plans, as required by 14 CFR part 136, National Parks Air Tour Management. This work is being conducted independently of SFAR 71, and when appropriate, public participation will be invited.

Frequency and reporting requirements

One individual comments that many pilots have discontinued the practice of reporting position, altitude, and direction of flight or report only the legal details required by SFAR 71.

FAA's response

The SFAR does not require any special reporting by pilots. However, since the purpose of the comment is unclear, the FAA offers the following. As a matter of general practice, the FAA allows operators to develop standard procedures as to how they operate in the scenic areas. As long as the operating procedures are not in conflict with the regulations, the FAA generally

will not be involved. If the commenter is saying that pilots are ignoring operating procedures that have been approved by the FAA as part of the operator's manual, then the FAA urges the commenter to provide the necessary information to the Flight Standards District Office for investigation and appropriate action.

Using landmarks for reporting requirements

Another commenter recommends that, to the extent there is an increased risk of midair collisions, a system of common frequency and reports over landmarks should be used.

FAA's response

Development and implementation of a procedures manual for pilots does not require regulatory action. Incorporation of landmarks and common frequencies are issues that the operators and pilots could agree on. In fact, a procedures manual used by operators in the Grand Canyon Special Flight Rules Area was developed by the Flight Standards District Office (FSDO) in cooperation with the operators and is a primary document used in the training of new pilots.

The FAA continues to be puzzled by comments it has received on this rule proposal. On the one hand, commenters are demanding that SFAR 71 needs to be rescinded, while on the other hand, commenters seem to want more procedural regulation. The FAA is more than willing to provide additional guidance and, as a result of recent accidents and the comments received in this rulemaking, the FAA has decided to hold a series of safety meetings to discuss these issues with pilots and operators. Additional procedural guidance may result from these meetings.

Public disclosure of SFAR 71 rulemaking proceedings

A commenter requests that the Administrator produce for public comment and inspection in the FAA docket all rulemaking documents related to the promulgation of SFAR 71. This commenter believes that this action would disclose the "deficient safety analysis" of SFAR 71 and also would highlight the Congressional pressure to limit helicopter operations in Hawaii.

FAA's response

Commenters should be aware that the FAA rulemaking process is a public process, and issues involved with the rule are in a public docket open for all persons to review. The Congressional record and NTSB recommendations are also public documents that are readily available through the Internet.

However, deliberative material and internal FAA working documents used in the development of an NPRM or rule are not subject to public scrutiny and do not belong in the public docket. These documents are predecisional and are exempt from public review under the Freedom of Information Act. Moreover, they are not helpful to anyone since the decision of the FAA to issue a proposal may change as issues are discussed internally within the FAA.

During the development of this proposal and disposition of comments in this final rule, it has become apparent that many commenters believe SFAR 71 is a noise rule and is not related to safety. The FAA cannot change what commenters believe, nor will it try since neither this commenter nor any other commenter has provided any evidence that the FAA should support their opinions instead of the NTSB and the FAA's aviation safety expertise.

In support of commenters, it is a matter of public record that the Hawaii Congressional delegation believes low flying aircraft are causing serious noise pollution. They have written numerous pieces of correspondence to the FAA concerning this issue. Air tour operators do not need to receive copies of internal FAA documents in order to know what their delegation thinks because their public position is very clear. On the other hand, the FAA has not been directed by any act of Congress to regulate air tour operators in Hawaii for noise with the exception of the recently passed the National Parks Air Tour Management Act. That act has been codified as part 136 and its provisions were developed by a National Parks Overflights Working Group (NPOWG), which included an air tour operator from Hawaii.

No justification for altitude restrictions

A commenter states that although accident statistics show that a compelling argument can be made for the life vest requirement in SFAR 71, just the opposite is true of the altitude restriction. This commenter notes that 77% of the accidents attributable to engine failures occurred before the SFAR was issued; 23% occurred afterward. The engines used in the pre-SFAR timeframe are no longer in use. The engines used predominantly in the post-SFAR timeframe have proven very reliable.

FAA's response

The decrease in engine failures is encouraging; however, in-flight engine failures (e.g., mechanical failures, fuel starvation) continue to occur.

To the extent that commenters are suggesting that the altitude restriction and associated increases in weather minimums are not necessary, the FAA disagrees. The SFAR's life vest and altitude requirements have been analyzed in the regulatory evaluation and each measure provides a safety benefit. The altitude baseline in the SFAR, which is higher than those altitudes suggested by some commenters, gives a pilot a better opportunity to make a safe landing should an engine failure occur. The FAA has granted deviations from the baseline altitude of 1,500 feet to lower altitudes based on numerous factors, including whether the terrain permits a safe landing and the performance capabilities of the aircraft.

Additional training as an alternative

A commenter states that given the unique terrain and climate features of Hawaii, if the FAA is really concerned about safety, it should mandate additional training instead of imposing artificial altitudes. Another commenter credits the Tour Operators Program of Safety (TOPS), that has been in effect since the mid-1990's, with providing great benefits to the safety of air tour operations in Hawaii.

FAA's response

The FAA considered the uniqueness of Hawaii when it issued SFAR 71 in 1994. Additional training may be necessary in the future but the FAA does not consider such measures necessary at this time.

Operators are always free to provide additional training; the regulations contain only minimum requirements. The FAA encourages programs such as TOPS that can provide pilots additional training benefits and help develop a culture of compliance.

The FAA's claim that the SFAR has increased safety is misleading

Some commenters believe that the altitude restriction has not been the contributing cause to the decrease in accidents, but rather cites three factors: 1) efforts of air tour operators and pilots to increase training and standards; 2) the replacement of helicopters with engines that had a high failure rate with helicopters with reliable engines; and 3) a number of safety devices, such as the use of flotation devices, that were mandated by the SFAR. This commenter states that it is the operators' opinion that the altitude restriction may have added to the accident potential.

Other commenters state that the intent of the SFAR was to reduce accidents and fatalities/injuries due to loss of power in cruise.

FAA's response

The FAA agrees that the overall decrease in the accident rate may be due to a number of unquantifiable factors. However, as stated previously, the altitude restrictions in SFAR 71 are needed. The reasons the FAA issued the SFAR, with the altitude restriction, are articulated in the 1994 final rule and discussed in the extensions. The stated intent of the 1,500-foot altitude provision is not to prevent accidents solely due to loss of power in cruise. Comments that the SFAR increases the potential for accident have been addressed in prior rules, and the FAA disagrees with such comments.

Accident rates

Using the figures that supported the original promulgation of SFAR 71, a commenter concludes that the accident rate for helicopters was one-fourth that of airplanes. Between 1982 and 1994, air tour airplanes had an accident rate of over 24 per million flights, and helicopters had a rate of 5.9 per million flights. This commenter maintains that the accident rates for helicopters in Hawaii were lower than many other states. Further, the commenter posits that the drop in the accident rate for helicopters is due to better equipment, not the SFAR, and that the majority of the accidents from 1982 to 1994 were because of mechanical failures.

FAA's response:

The commenter is incorrect; the analysis addresses the benefits of the rule to airplanes and helicopters separately. While the commenter correctly cites information in the FAA's 1994 regulatory evaluation (which are also incorporated in the evaluation for this rulemaking) regarding airplane and helicopter accident rates, the cited accident rates only apply to accidents attributable to weather and flying low, and are not a comprehensive rate for all accidents which the commenter apparently assumes. The FAA's estimate of accidents avoided is only based on accidents rates related to specific provisions of the rule and are not related to accidents due to mechanical failures. Since accidents attributed to mechanical failures are not included, the helicopter accident rate is not misleading.

Affordability analysis

A commenter notes that the FAA stated that the drop in business since the enactment of the SFAR was due to the nature of tourism. This commenter claims that the majority of helicopter services have lost a great deal of income due to a lack of repeat customers because of the altitude and standoff distances. The claim is that prior to SFAR 71 almost 25% of the air tour business was made up of returning tourists.

FAA's response

The FAA cannot use this cost estimate because the information is insufficient and undocumented. It is also at odds with a comment by a large helicopter operator that the helicopter tour industry in Hawaii "has flown well over 80,000 hours per year in every year since 1985."

Cost-benefit analysis

A commenter contests "the elusive cost-benefit analysis" because no real analysis, statistics, or time parameters are provided. This commenter claims that the FAA promised, both in 1997 and 2000, that such an analysis would be provided in a final rule, which has not been forthcoming. The commenter further remarked that the estimated number of fatalities avoided lacked sufficient detail and another commenter questioned the basis for the accident rate referenced in the NPRM.

FAA's response

The regulatory evaluation provided a list of all Hawaii air tour accidents related to the provisions of SFAR 71 from 1982 to June 30, 2003. The commenters included a listing of

helicopter accidents in Hawaii covering the period from November 19, 1985 – July 23, 2003 based on NTSB data. The FAA used the same database but for the time period of 1982- June 30, 2003 and with some differences in the results. The commenters included three helicopter accidents that the NTSB narratives do not indicate were sightseeing or air tours and therefore are not incorporated in the FAA's analysis.[1]The number of accidents, fatalities, and injuries associated with each of the major provisions of the rule were extracted and the accident rate per million air tour flights was calculated for helicopters and airplanes. The number of air tour flights was derived from the FAA's Terminal Area Forecast, the 1994 FAA final regulatory evaluation and FAA operations specification data on air tour operators.[2] The accident rate was determined for the 1982-1994 and 1995-2002 time periods. The difference between the post-SFAR and the pre-SFAR accident rates were then applied to the number of forecasted helicopter and airplane air tour flights to arrive at the estimated number of accidents that would be avoided by adoption of the minimum altitude and weather provision of the rule. The 1982-1994-accident rate related to helicopter flotation gear requirement was applied to the forecast number of helicopter flights to estimate the number of fatalities that would be avoided by adoption of the flotation gear provision.

The Final Rule

[1] Accidents not identified by NTSB as air tours: LAX86FA243, LAX87FA112, and LAX01LA083. The first 2 accidents occurred in the take-off phase of operation and the third during a pre-departure check. None appear to be related to the SFAR provisions. The FAA has therefore not added these accidents to the database used in the regulatory analysis.

[2] FAA Office of Aviation, Policy, and Plans: Terminal Area Forecast, Fiscal Years 2002-2020. Final Regulatory Evaluation, Final Regulatory Flexibility Determination, and Trade Impact Assessment: "Air Tour Operators in the State of Hawaii" August 1994

The FAA continues the safety requirements of SFAR 71 without a termination date because of the regulation's continuing success in reducing the air tour accident rate in Hawaii and the proven effectiveness of the SFAR's requirements.

Justification for Immediate Adoption

The FAA finds that good cause exists under 5 U.S.C. 553(d) for this final rule to become effective upon issuance. The FAA notes that this final rule does not change the long-standing requirements of SFAR 71 for air tour operators in Hawaii; it only eliminates the termination date.

Environmental Review

In accordance with FAA Order 1050.1D, the FAA has determined that this amendment is categorically excluded from environmental review under section 102(2)(C) of the National Environmental Policy Act. In 1994 the original SFAR 71 established procedural, operational, and equipment safety requirements for air tour aircraft in the state of Hawaii. This amendment will maintain those requirements and is part of an ongoing action. The continuation of SFAR 71 will not involve any significant impacts to the human environment and the FAA has determined that there are no extraordinary circumstances. This rule does not change the existing environment and is not likely to effect listed, endangered or threatened species. Comments requesting that the FAA ban overflights from critical habitat are beyond the scope of this rule.

Regulatory Evaluation Summary

Proposed changes to Federal regulations must undergo several economic analyses. First, Executive Order 12866 directs that each Federal agency shall propose or adopt a regulation only upon a reasoned determination that the benefits of the intended regulation justify its costs. Second, the Regulatory Flexibility Act of 1980 requires agencies to analyze the economic impact of regulatory changes on small entities. Third, the Trade Agreements Act (19 U.S.C. sections 2531-2533) prohibits agencies from setting standards that create unnecessary obstacles to the foreign commerce of the United States. In developing U.S. standards, this Trade Act requires agencies to consider international standards and, where appropriate, that they be the basis for U.S. standards. Fourth, the Unfunded Mandates Reform Act of 1995 (Public Law 104-4) requires agencies to prepare a written assessment of the costs, benefits, and other effects of proposed or final rules that include a Federal mandate likely to result in the expenditure by State, local, or tribal governments, in the aggregate, or by the private sector, of $100 million or more annually (adjusted for inflation.)

In conducting these analyses, FAA has determined this rule: (1) has benefits that justify its costs, is not a "significant regulatory action" as defined in section 3(f) of Executive Order 12866, and is not "significant" as defined in DOT's Regulatory Policies and Procedures; (2) will have a significant economic impact on a substantial number of small entities; (3) will not constitute a barrier to international trade; and (4) will not impose an unfunded mandate on state, local, or tribal governments, or on the private sector. The FAA has placed these analyses in the docket and summarized them below.

COSTS

The FAA estimates the total cost of this rule at $29.8 million or $20.9 million, discounted. The costs reflect maintenance and operating costs attributable to flotation devices and life vests, operating costs required for calculating helicopter performance plans and providing a passenger briefing for emergency egress in the event of a water landing. Lost opportunity costs will also be incurred due to the minimum weather provisions.

The rule requires single-engine helicopters conducting air tours beyond the shore of any island to be either amphibious or equipped with flotation devices. The capital costs associated with this provision are reflected in the maintenance costs. In addition, there are operating costs from increased fuel consumption. The cost for required float inspections is estimated at $4.0 million over a 10-year period, $2.8 million, discounted. The helicopters will incur an operating penalty from increased fuel consumption due to the extra weight of the floats. The FAA estimates the 10-year weight-related costs at $4.6 million or $3.2 million, discounted. The total operating costs of these provisions over a 10-year period are estimated at $8.6 million or $6.0 million, discounted.

Each person on board an air tour helicopter is required to wear a life vest. Air tour operators in Hawaii had provided life vests aboard helicopters prior to the issuance of SFAR 71 in 1994 and thus already complied with the equipment requirement so there are no acquisition costs associated with this provision. Prior to SFAR 71, the life vests were stowed under the passenger's seat. Since the issuance of SFAR71, passengers have to wear a life vest during the

helicopter air tour. This results in additional continuing maintenance costs associated with these life vests since the rule requires the vests to be worn as well as a weight penalty. The 10-year cost totals $485,000 or $341,000, discounted.

Each helicopter air tour operator must develop and comply with a performance plan. The development costs have already been incurred but each pilot must complete the performance plan before each flight. The 10-year cost of preparing the performance plans are estimated at $4.9 million or $3.5 million, discounted.

The pilot in command must ensure each passenger is briefed on water ditching procedures, use of required life vests, and emergency egress from the aircraft in event of a water landing. The 10-year cost of this provision is estimated at $8.1 million or $5.7 million, discounted.

Opportunity costs will also be incurred due to the minimum weather provisions. The total lost net revenue due to cancelled air tours is estimated at $7.6 million or $5.3 million, discounted.

BENEFITS

The FAA has quantified the benefits of the life vests and minimum altitude provisions and estimates the monetary benefits of these provisions at $125.3 million. An estimated 39 fatalities will be avoided, if the rule is 100 percent effective. This rule would be cost beneficial if it were only 24 percent effective. The benefits of the briefing provision are reflected in the life vest provision. The benefits of the performance plan have not been quantified.

Between 1982 and 1994 there were 3 helicopter water-landing accidents in which 8 persons drowned. These 3 accidents occurred in the course of an estimated 1.176 million flights or 2.55 accidents per million helicopter air tour flights. Applying this accident rate to the forecast of 1.157 million flights over the next 10-years results in 8 fatalities averted and a monetary benefit of $24 million.

There were 7 helicopter accidents between 1982 and 1994 related to weather or flying low. These accidents resulted in 11 fatalities, 9 serious and 12 minor injuries. The helicopter air tour accident rate related to weather equaled 5.95 accidents per million flights. Between 1995 and 2002 there were 2 helicopter accidents resulting in 13 fatalities and a weather related accident rate of 2.43 accidents per million flights. The difference in accident rates was 3.514 accidents per million flights. Based on a forecast of 1.16 million helicopter tours over the next 10-years, applying this accident rate results in 4 accidents avoided and 11 fatalities averted and monetary benefits of $38.8 million.

Airplane air tour operators experienced 5 weather related accidents between 1982 and 1994 (24.04 weather-related accidents per million operations) but only 1 weather-related accident between 1995 and 2002 (6.9 weather-related accidents per million operations). These 6 accidents resulted in 39 fatalities and 4 serious injuries. The difference in accident rates was 17.14 per million operations. Applying this accident rate differential to the forecast of 183,000 flights over the next 10-years results in 3 accidents avoided and 20 fatalities averted and a monetary benefit of $62.5 million.

Regulatory Flexibility Analysis

The Regulatory Flexibility Act of 1980 (RFA) establishes "as a principle of regulatory issuance that agencies shall endeavor, consistent with the objective of the rule and of applicable statutes, to fit regulatory and informational requirements to the scale of the business, organizations, and governmental jurisdictions subject to regulation." To achieve that principle, the RFA requires agencies to solicit and consider flexible regulatory proposals and to explain the rationale for their actions. The RFA covers a wide-range of small entities, including small businesses, not-for-profit organizations and small governmental jurisdictions.

Agencies must perform a review to determine whether a proposed or final rule will have a significant economic impact on a substantial number of small entities. If the agency determines that it will, the agency must prepare a regulatory flexibility analysis as described in the RFA.

However, if an agency determines that a proposed or final rule is not expected to have a significant economic impact on a substantial number of small entities, section 605(b) of the RFA provides that the head of the agency may so certify and a regulatory flexibility analysis is not required. The certification must include a statement providing the factual basis for this determination, and the reasoning should be clear.

The FAA conducted the required review of this rule and determined that it will have a significant economic impact on a substantial number of small entities. Accordingly, pursuant to Section 603 of the Regulatory Flexibility Act, the Federal Aviation Administration has prepared the following final regulatory flexibility analysis.

Reasons Why Agency Action Is Being Considered

The FAA will continue the existing safety standards in SFAR 71 without a termination date as a result of the reduction in accidents and incidents involving air tour operators in Hawaii and NTSB recommendations. The rationale for the major provisions of the rule are summarized below:

Safety provisions addressing the risks of beyond the shore operations. Based on an analysis of the risks of beyond the shore operations and NTSB recommendations, the FAA concludes that the benefits of these provisions justify the costs. Based on survivors' testimony, life vests alone are insufficient in preventing loss of life in helicopter accidents over water. Without floats, helicopters sink very quickly upon impact, giving occupants little time to exit the aircraft. The FAA believes that helicopter floats, in conjunction with life vests and pre-flight briefing on water ditching procedures, will significantly improve the chances of survival. Therefore, this rule requires life vests and passenger briefings for all air tours and floats for helicopters.

Provisions addressing weather. Between 1982 and 1994 there were 12 weather related accidents in Hawaii while between 1994 and 2002 there were 3 weather related accidents. This illustrates the effectiveness of the existing SFAR 71 weather related provisions and warrant their continuation.

Summary of Significant Issues Raised In Comment Period

The FAA received four comments related to economic evaluation issues, and the FAA has determined none of the comments were significant. One comment mistakenly interpreted accident rate data presented in the economic analysis to support removing the altitude restriction on helicopters. Another comment questioned the basis for the accident rate referenced in the NPRM, and a third claimed a lack of detail on the estimated number of fatalities avoided. The FAA has provided a detailed response to these comments and determined the analysis questioned is accurate and complete. A fourth comment claimed the rule has resulted in a loss of income due to a lack of repeat customers, which prior to 1994 accounted for almost 25 percent of tour business. The comment was not supported by any documentation and was contrary to a comment by a small, but well-known operator, that the helicopter tour industry in Hawaii "has flown well over 80,000 hours per year in every year since 1985".

Statement of Objectives and Legal Basis

The objective of this rule is to continue a higher level of safety for Hawaii air tours. Under the United States Code, the FAA Administrator is required to consider the following matter, among others, as being in the public interest: assigning, maintaining, and enhancing safety and security as the highest priorities in air commerce. [See 49 U.S.C. §40101(d)(1).] Additionally, it is the FAA Administrator's statutory duty to carry out her responsibilities "in a way that best tends to reduce or eliminate the possibility or recurrence of accidents in air transportation." [See 49 U.S.C. §44701(c).] Accordingly, this rule will amend Title 14 of the

Code of Federal Regulations to continue the safety requirements of air tour operations in Hawaii, without a termination date.

Description of Small Entities Affected

The FAA concludes that all of the entities affected by the rule are small according to thresholds established by the Small Business Administration (i.e., employ fewer than 1,500 employees). An estimated 6 part 91 operators and 24 part 135 operators will be affected by the rule. The part 91 operators own about 11 aircraft, while the part 135 operators have about 80 aircraft. This rule will impose total annualized costs per operator of approximately $99,000. According to a Small Business Administration analysis of Bureau of Census data for non-scheduled air transportation firms, firms with fewer than 500 employees have average revenues of $1.87 million. The estimated cost to each of these small entities is approximately 5.3 percent of the average revenue of non-scheduled air transportation firms with fewer than 500 employees based on the SBA's Census data cited.

Projected Reporting, Recordkeeping and Other Compliance Requirements

The annualized cost for completing the performance plan and conducting the passenger briefing will impose average annualized costs per operator of approximately $43,500.

Overlapping, Duplicative, or Conflicting Federal Rules

The rule will not overlap, duplicate, or conflict with existing Federal Rules.

Analysis of Alternatives

Affected operators and helicopter air tour pilots have petitioned the FAA to amend SFAR 71. They argue that SFAR 71's 1,500 feet minimum altitude requirement is cumbersome and lacks flexibility in dynamic circumstances. The petitioners also maintain that allowing air tour flights as low as 300 feet above the surface would make SFAR 71 safer in certain circumstances.

The FAA has considered the petitioners' views in formulating this rule. The issues raised are similar to comments received by the agency during the three SFAR rulemaking preceding this rule. The FAA concludes that 1,500 feet provides a pilot with more distance, and thus time, to avoid an accident or to deal with an error. An altitude of 300 feet provides 80 percent less distance and thus, much less reaction time.

Affordability Analysis

The FAA lacks reliable revenue and profit data on the individual entities affected by this rule, but the estimated cost to each of these small entities is approximately 5.3 percent of the average revenue of non-scheduled air transportation firms with fewer than 500 employees based on the SBA's Census data. Hawaii air tour operators have been subject to the provisions of this rule since 1994.

Business Closure Analysis

The FAA estimates that none of the operators currently providing air tour flights will elect to stop providing the service. These operators have been complying with these provisions since 1994. While there are fewer operators today than in 1994, the cause cannot be directly attributed to SFAR 71, but rather the vagaries and nature of the tourism market. New ait tour operators have entered the market after making the business decision to accept the provisions of this rule.

Disproportionality Analysis

All Hawaiian entities in the air tour market are small. Accordingly, the costs imposed by this rule will be borne almost entirely by small businesses. The estimated costs are proportional to the frequency of operations and thus the burden is not disproportionate. Air tour safety in Hawaii has been significantly improved, and the FAA believes that the only way to continue this is to maintain these higher standards on these entities.

Key Assumptions Analysis

The FAA has made several conservative assumptions in this analysis, which may have resulted in an overestimate of the costs of the rule. For example, the revenue loss resulting from tour cancellations due to the minimum flight altitude provision has been partially offset by the FAA's issuance of "deviations' allowing lower minimum altitudes and thus fewer tour cancellations. In addition, the FAA assumes that the pilot in command will conduct all pre-flight

briefings but the provision only requires the pilot to "ensure that each passenger has been briefed". The briefing could be recorded or provided by a lower paid employee. Also, the helicopter life vest costs may be overestimated since there is a voluntary industry standard to which 13 helicopter tour operators subscribe that requires occupants to wear a personal flotation device.

International Trade Impact Assessment

The Trade Agreement Act of 1979 prohibits Federal agencies from establishing any standards or engaging in related activities that create unnecessary obstacles to the foreign commerce of the United States. Legitimate domestic objectives, such as safety, are not considered unnecessary obstacles. The statute also requires consideration of international standards and, where appropriate, that they be the basis for U.S. standards.

In accordance with the above statute, the FAA has assessed the potential effect of this final rule and has determined that it would have only a domestic impact and therefore no affect on any trade-sensitive activity.

Paperwork Reduction Act

SFAR 71 contains information collection requirements. OMB approval (No. 2120-0620) has been extended through January 31, 2004.

Unfunded Mandates Reform Act

The Unfunded Mandates Reform Act of 1995 (the Act) is intended, among other things, to curb the practice of imposing unfunded Federal mandates on State, local and tribal governments. Title II of the Act requires each Federal agency to prepare a written statement assessing the effects of any Federal mandate in a proposed or final agency rule that may result in the expenditure of $100 million or more (adjusted annually for inflation) in any one year by State, local, and tribal governments, in the aggregate, or by the private sector; such a mandate is deemed to be a "significant regulatory action."

This final rule does not contain such a mandate. The requirements of Title II do not apply.

Federalism Implications

The regulations herein will not have substantial direct effects on the State, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government. Therefore, in accordance with Executive Order 12612, the FAA certifies that this regulation will not have sufficient federalism implications to warrant the preparation of a Federalism Assessment.

List of Subjects

14 CFR Part 91

Aircraft, Airmen, Aviation safety.

14 CFR Part 121

Air carriers, Aircraft, Airmen, Aviation safety, Charter flights, Safety, Transportation.

14 CFR Part 135

Air taxi, Aircraft, Airmen, Aviation safety.

The Amendment

The Federal Aviation Administration amends 14 CFR parts 91, 121, and 135 as follows:

PART 91 -- GENERAL OPERATING AND FLIGHT RULES

1. The authority citation for part 91 continues to read as follows:

Authority: 49 U.S.C. 106(g), 40103, 40113, 40120, 44101, 44111, 44701, 44709, 44711, 44712, 44715, 44716, 44717, 44722, 46306, 46315, 46316, 46502, 46504, 46506-46507, 47122, 47508, 47528-47531.

PART 121—OPERATING REQUIREMENTS: DOMESTIC FLAG, AND SUPPLEMENTAL OPERATIONS

2. The authority citation for part 121 continues to read as follows:

Authority: 49 U.S.C. 106(g), 40113, 40119, 41706, 44101, 44701-44702, 44705, 44709-44711, 44713, 44716-44717, 44722, 44901, 44903-44904, 44912, 46105.

PART 135 -- OPERATING REQUIREMENTS: COMMUTER AND ON-DEMAND OPERATIONS

3. The authority citation for part 135 continues to read as follows:

Authority: 49 U.S.C. 106(g), 40113, 44701-44702, 44705, 44709, 44711-44713, 44715-44717, 44722.

4. In parts 91, 121, and 135, SFAR No. 71 -- Special Operating Rules For Air Tour Operators In The State of Hawaii, Section 8 is revised to read as follows:

SFAR No. 71 -- Special Operating Rules For Air Tour Operators In The State Of Hawaii

* * * * *

Section 8. *Termination date*. This SFAR No. 71 shall remain in effect until further notice.

Marion C. Blakey

Issued in Washington, DC, on OCT 20 2003

Certified to be a **True Copy**

John Allen