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MEMORANDUM RE: MEETING WITH AIR TOUR OPERATORS AT OMB

TO: GRAND CANYON RULEMAKING DOCKET (FAA-99-5927) - 277

FROM: Robert C. Ashby *rc*
**Deputy Assistant General Counsel
for Regulation and Enforcement**

On December 20, 1999, I met with OMB, FAA, SBA and air tour industry representatives concerning the pending FAA rulemaking on air tour limitations in Grand Canyon National Park. The following other persons attended the meeting:

TOUR OPERATORS

Jim Santini
Steve Bassett
Jim Petty
Norm Freeman
Alan Stephen
Judy Bassett

FAA

Tom Smith
Carol Toth

OMB

Don Arbuckle
Ed Clarke
T. Croote

SBA

Claudia Rayford

The tour operators emphasized their concerns about the FAA's proposed rule, which they said would have very serious economic impacts on tour operators, some of whom might well be forced out of business if the rule went into effect as proposed. As a business matter, they said, they cannot live with the proposed cap on operations. They criticized the FAA's economic analysis of the proposed rules on a number of points, saying that it underestimated the economic impacts of the rule. They supported the idea of an FAA regulatory negotiation to try to work out a better middle ground on the issues.

The tour operators presented the attached overview of their comments, which summarizes the points they made at the meeting and in their previous written

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FOR REGULATION
AND ENFORCEMENT

comments. The SBA representative presented a copy of the attached letter from the SBA Office of Advocacy to OMB, detailing that Office's concerns with the SBA's proposed rule.

AIR TOUR MEETING WITH OFFICE OF MANAGEMENT & BUDGET

December 20, 1999

OVERVIEW OF COMMENTS

The following is a thumbnail overview of the major air tour comments relating to this proposed federal regulation. Each of the following points has been substantiated and supported in detail in formal written comments submitted to the FAA by affected air tour companies and presented orally at two public hearings on the issue - one in Flagstaff, AZ and the other in Las Vegas, NV. All of these comments are a part of the formal public record. Individuals representing the air tour industry at this meeting can provide further detail, substantiation and clarification on each of these points.

1. These proposed regulations represent an abuse of power by the National Park Service.
2. This is a clear restraint of trade issue that will do irreparable damage to the entire Grand Canyon air tour industry.
3. The Park Service constantly changes the ground rules on air touring at the Grand Canyon first implementing a cap on aircraft then now seeking a cap on operations; first implementing a threshold of natural quiet at 3dB below natural ambient sound then altering the definition arbitrarily to 8dB below natural ambient sound. This establishes a foundation for yet another round of regulations which no aircraft can possibly meet once a Noise Management Plan is developed.
4. The air tour industry has consistently recommended a formal negotiated rulemaking process under the FAA's Aviation Rulemaking Advisory Committee (ARAC) guidelines to settle these difficult air tour issues at the Grand Canyon. This was a successful forum in which the National Park Overflight Working Group (NPOWG), over a 17-month period, framed a regulatory proposal for air tour requirements at all national parks. ● The FAA and NPS have turned down this request each time it has been offered citing a lack of resources.
5. The science used by the Park Service and FAA to promulgate these new regulatory proposals as well as those enacted previously were the subject of two separate Congressional oversight inquiries. At both hearings, nationally respected acoustics experts testified that the scientific methodology used was serious flawed and unreliable. The Park Service even admitted that the scientific methodology it used had failed to undergo model validation or peer review.
6. The clear evidence on the record prompted Congressman James Hansen, chairman of the House Subcommittee on National Parks and Public Lands, to write in a letter to Transportation Secretary Slater, Interior Secretary Babbitt, NPS Director Stanton and FAA Administrator Garvey:

"...there is no scientific validation that natural quiet has not been restored [at the Grand Canyon] by previously adopted air tour regulations . . . Indeed, logic and equity compels



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*us to urge rescinding all recently adopted air tour management modifications because they were predicated upon bad science. The **result we** now have, with the recently imposed air and tour management changes, are, without question, inappropriate regulations based on bad science . . . if the U.S. Court of Appeals for the District of Columbia had the above admission by the NPS. . .there is every reason to believe their decision would have been substantially different to reflect this critical **evidentiary** fact. "*

7. These regulations are being proposed so that **1.6** percent of the annual visitors to the Grand Canyon – backcountry hikers and backpackers – can enjoy their park experience without ever having to see or hear an aircraft.
8. Air tour passengers outnumber backcountry visitors eight to one. In fact, in the Park Service's own studies, half of back country visitors say they are not bothered by overflying aircraft. In reality, these actions are being taken on behalf of only eight tenths of one percent of the annual visitors to the Grand Canyon.
9. The mandate of the Park **Service** as embodied in the Organic Act of **1916** is to provide “. . .for the enjoyment of national parks in ways that leave the national parks unimpaired for future generations.”
10. What is more damaging to our national parks -- trampling through the wilderness, breaking tree limbs, kicking rocks, disturbing wildlife, destroying natural vegetation, eroding the soil, disturbing historic ruins, removing artifacts, starting camp fires and leaving human waste and garbage along the trails – or flying over the Canyon, taking a few pictures, and leaving without ever having touched a thing?
11. Already, **95** percent of the Grand Canyon is off limits to air tour aircraft. Air tours fly where the preponderance of the people aren't. Of the more than **five** million visitors to the Grand Canyon each year, fewer than **30** have complained about aircraft noise.
12. The proposed rule will have a significant adverse impact on small businesses. It violates Executive Order **12866** which partially ensures regulatory approaches that “maximize net benefits” to society and does not impose ‘unreasonable costs on society.’
13. These proposed regulations place artificial restraints on the number of air tours the Grand Canyon air tour industry can provide, rolling back operations to levels achieved during one of the worst years in our industry's history. Based on the particular operator, it means a reduction in current operations anywhere from **10** percent to **70** percent. It ignores the millions of dollars that the industry has invested in aircraft, pilots, mechanics, facilities, personnel, marketing, advertising and training.
14. The data FAA used to develop these proposed regulations is fraught with incorrect and misleading **information** and the conclusions reached as a result are biased and invalid.
15. The “**target**” year used to establish baseline operations was one of the worst years for Grand Canyon air touring in more than two and a half decades due to the decline in the Asian ‘economy. Grand Canyon air tour companies have recovered from that disastrous year and are back to a normal level of operations sustained prior to the period of time in question.
16. The FAA grossly understated the actual number of air tour operations conducted by operators during the target period from May **1997** to April **1998** in each instance reporting low of the actual number by as much as **50** percent therefore proposing aircraft caps which are based on false and incorrect information ensuring a no-growth policy for all operators and regulations which will put most operators out of business;
17. The FAA's economic analysis of “**benefits**” from the proposed rule is scientifically flawed. The FAA has significantly overstated the **benefits** and studies by the **NPS**' own experts suggest that increased consumer surplus from limitations on air tours is minimal.

18. The costs of the proposed rule significantly outweigh any **benefits**. The FAA has significantly understated the costs of the proposed rules. The FM grossly over-reports the expected revenue operators will generate over the next ten years and severely underreports the estimated financial impact these regulations will have on each air tour operator to the tune of millions of dollars per operator. The net result of this error is the difference between the FAA suggesting that an operator would be able to remain in business under these proposed regulations and the fact that most operators will be forced into bankruptcy.
19. The FAA ignores both the financial investment and actual noise impact of operators' conversion to larger aircraft which has permitted operators to transport the same number of passengers during a "normal" year with up to **35** percent fewer aircraft.
20. As one Las Vegas air tour operators reports – if enacted as proposed, these regulations will reduce revenues at this company by **35** percent or **\$3** million the first year and will prohibit **40,000** tourists from around the world from seeing a small fraction of the Grand Canyon by air. This will render the company's **\$12** million investment in larger aircraft economically unfeasible as aircraft utilization will not be enough to cover fixed costs.
21. The FAA has failed to provide either preferential routing or any other incentives for operators which have already transitioned to quieter aircraft or which are planning such action.
22. The FAA severely under-estimates the impact on foreign trade of these proposed regulatory actions failing to take into account that upwards of **90** percent of air tour passengers to the Grand Canyon are from international locations.
23. The proposed rules are invalid because they address a problem defined by faulty noise evaluation methodology. The FAA has failed to distinguish between noise created by air tours and other flights.
24. The FAA's limits on flights would deprive many customers of a view of the **GCNP** resulting in a significant loss of consumer surplus.
25. Displacing air tour customers would lead to an increase of high-impact ground visitors to the backcountry areas of the **GCNP**.
26. Data from the **GCNP** visitor survey suggests that increased consumer surplus from limiting air tours is vastly overstated.
27. Repeated rulemaking regarding the Special Flight Rules Area makes it impossible for air tour operators to plan effectively. The Incentive Corridor for the Bright Angel Flight Free Zone Should Be Immediately Available.
28. Air tour operators should not be penalized for the FM's failure to promulgate "standards" for quiet aircraft.
29. The economic **benefit** of air touring to Southern Nevada and Arizona is enormous. According to a study by the University of Nevada Las Vegas, air touring annually brings in an estimated **\$375** million to the Southern Nevada local economy. In fact, it can easily be documented that it was air touring over the Grand Canyon which stimulated international travel to the Las Vegas market.
30. There is a regulation in place – Special Federal Air Regulation **50-2** – and it has restored natural quiet to the Grand Canyon as Public Law **100-91** -- the Overflights Act -- mandated:
 - Safety has improved dramatically. There has not been one accident or incident involving an air tour aircraft in **SFAR** airspace since the rule went into effect;

- NPS' own studies have shown that **92** percent of Park visitors report that they are not adversely affected by aircraft sound;
- **Back** country Park visitors reported either seeing or hearing only one or two aircraft per day;
- Park Service studies also showed that visitor complaints about aircraft noise dropped significantly. **26** complaints from more than five million visitors is a remarkable achievement by air tour operators;
- A **1992 follow up** study by the U.S. Forest Service concluded that:

*"Few **adverse** impacts to wilderness users were found resulting **from aircraft overflights** . . . it **appears** that many visitors do not notice **aircraft** even when they are present . . . **aircraft** noise intrusions **did not appreciably** impair surveyed wilderness users overall enjoyment of their visits to wilderness nor reduce **their reported likelihood** of repeat visits."*

31. The Nevada Legislature is so concerned about this that it passed an emergency Resolution this summer in which it asked Congress to:

*" . . . **effect** an outcome for the southern Nevada air tour **industry** that will protect, **support** and sustain the viability of this significant contributor to the tourism economy of the State of **Nevada** and the enjoyment of visitors and sightseers."*

These proposed regulations will do just the opposite.

(USATA)



U.S. SMALL BUSINESS ADMINISTRATION
WASHINGTON, D.C. 20416

OFFICE OF CHIEF COUNSEL FOR ADVOCACY

December 20, 1999

John Spotilla
Administrator
Office of Information & Regulatory Affairs
Office of Management and Budget
The White House
Washington, D.C.

**Re: Commercial Air Tour Limitation in the Grand Canyon National Park
Special Flight Rules Area; Docket No. FAA-99-5927; Notice No. 99-12**

Dear Administrator Spotilla:

As you know, on July 9, 1999, the Federal Aviation Administration (FAA) published a Notice of Proposed Rulemaking (NPRM) on special flight rules in the vicinity of the Grand Canyon National Park (GCNP). The FAA proposal would, among other things, impose a limit on the number of flights small air tour operators could fly over the GCNP in a given year.

The Office of Advocacy of the U.S. Small Business Administration (SBA) was created in 1976 to represent the views and interests of small businesses in federal policy making activities.¹ The Chief Counsel participates in rulemakings when he deems it necessary to ensure proper representation of small business interests. In addition to these responsibilities the Chief Counsel monitors compliance with the Regulatory Flexibility Act (RFA), and works with federal agencies to ensure that their rulemakings analyze and substantiate the impact that their decisions will have on small businesses.

The Office of Advocacy appreciates the opportunity once again to participate in discussions and comment on FAA's proposed rulemaking for the Grand Canyon National Park, during this OMB review period. We have reviewed the proposal and accompanying Initial Regulatory Flexibility Analysis (IRFA) for this rulemaking and have found that the FAA has not fully complied with the requirements of the Regulatory Flexibility Act. Although the FAA has made progress in attempting to analyze the potential impact of this regulation on the small air tour industry, the analysis does not include some important considerations, nor does it fully analyze all of the feasible alternatives to the current proposal.

¹ Regulatory Flexibility Act, 5 U.S.C. § 601, as amended by the Small Business Regulatory Flexibility Act. Pub. L. No. 104-121, 110 Stat. 866 (1996).



Cost Estimates – Choice of Base Year

In its proposal, the FAA plans to institute an “Operations Limitation” by limiting the number of commercial flights air tour operators in the **GCNP** may make each year. This cap on the number of flights will have a significant cost impact on the **24** small businesses operating air tours in the Grand Canyon. In our letter to FAA, dated November 14, 1996, we noted that the agency needed to estimate this impact by considering the operators’ loss of revenue. FAA has attempted to calculate this figure by determining the difference in current and projected future net operating revenues based upon the number of commercial air tours that are conducted in a typical year.

The ‘typical year’ which was chosen by the FAA was the “only one for which there appears to be adequate data, May 1, 1997 – April 30, 1998.” However, numerous affected operators have informed the **Office** of Advocacy that this particular year does not adequately reflect the current and anticipated demand for service. If this is true, FAA’s use of this data in determining allocations of flights would impose great losses in revenues. The **Office** of Advocacy urges the FAA to adequately assure that the base year data is an accurate reflection of the actual average operating figures for these small businesses. Utilizing data **from** a single year to set a cap on the **level** of small business growth, when that data may not be indicative of **future** business operations would surely be an undue burden on small business, as contemplated by the Regulatory Flexibility Act (**RFA**). If this base year is indeed an incorrect barometer (for all of the many **reasons** cited by the air tour operators during stakeholder meetings and other comments), then FAA’s estimates of the loss of revenue to this entire local industry is significantly underestimated. We urge the FAA to find alternative means of setting the base year figures. Perhaps this year of data could be used in conjunction with records provided by the **24** operators, or some other form of verification. Other potential impacts on those numbers for that year need to be taken into account; **i.e.**: foreign tourist figures, seasonal dips and recent market fluctuations.

Lost Revenue Analysis

Another way in which FAA cost estimates may be underestimated is in the analysis of a small tour operator’s ability to absorb the lost revenues and other cost burdens of this proposed regulation. FAA states in its proposal that “. . . air tour operators should be able to raise air tour prices.” As Advocacy stated in an earlier letter to FAA on this subject, the ability of a small business to recoup costs through increased prices depends on the elasticity of demand. It is the position of many of the operators that the air tour industry is very price sensitive. This is true in the case of many **small** businesses, which cannot pass-on regulatory costs to their customers.

When regulating small entities, agencies must understand the nature of the **way** in which small businesses operate. Rising costs and the subsequent impact must be accounted for in the FAA cost model. There is no data to indicate at what point an **aerial** tour of the Grand Canyon becomes cost prohibitive for the average tourist. Once that threshold is reached, ground operations or other activities would replace the choice of taking an aerial

tour. Customers would resort to other activities – bus tours, walking tours, or even a decision to remain in Las Vegas and not tour the park at all. It is true that there will always be those few customers who are willing to pay for a view of the Grand Canyon at any price. However, there is no data or information on FAA assumptions to determine what the price differential might be, which would cause the average tourist to make alternative plans; and therefore be counted as lost revenue for these tour operators. This **type** of analysis would be helpful in making a determination of the actual ability of a small business to survive the new cap by raising its prices. The FAA should not promulgate a regulation without adequate information and a realistic estimate of the lost revenue and overall cost impact on these **24** air tour operators. FAA should give special consideration to the actual estimates and figures provided by the operators themselves in any comments to this proposed rule. This will provide the agency with a further basis for calculation of the economic impact of the promulgation of this rule.

Alternatives

In Advocacy's previous comments, we stated that the FAA should **identify** and analyze alternatives to the proposal which "minimize any significant economic impact of the proposed rule on small entities." We urged the FAA to: **1)** strive for a thoughtful and balanced approach to public policy; **2)** consider the serious objections of the tour operators; and because the FAA is not under a statutory deadline for completing this regulation, to **3)** "flush out more alternatives that include a standards advisory process of some type." We also urged **FAA** to consider the creation of a performance-based system.

All of these suggested methods for seeking feasible alternatives remain viable options for the FAA. The proposal continues to mandate a cap on the number of flights these small air tour operators may make over the Grand Canyon, preventing all of them from adding additional flights as consumer demand for their service increases. These tour operators will be limited to this allocation for two years, and may even continue indefinitely. Further, this proposal would limit entry into the Grand Canyon air tour industry. A small enterprise wishing to **serve** this market would only be allowed to do so by buying out or replacing an existing operator's allocation.

Alternative to the Cap

When there is a regulation that affects **100%** of the industry in an area, as it clearly does here, every possible alternative must be examined in a true effort to avoid the tremendous burdens which would be imposed by a growth denying allocation and a barrier to market entry. Analyzing feasible regulatory alternatives is one of the very important agency mandates under the Regulatory Flexibility Act. The purpose of this provision is to aid the agency in finding the least burdensome formula for promulgating a governmental regulation while accomplishing its important public policy objective. Advocacy recognizes the importance of the "restoration of natural quiet" to the park; however the FAA should not prematurely establish caps which may not reflect the true **future** demand, loss of revenue and actual economic impact of the proposed rule. A cap on the growth of

a small business should truly be the last resort **after** all feasible alternatives have been examined.

Quiet Technology Incentive

Consideration has not been given in the current proposal to a quiet technology incentive program as an alternative to an industry allocation system. The use of an incentive based voluntary program for reducing the level of noise in the park through the purchase and use of quieter planes over time, would seem to meet the goal of the regulation while not unduly burdening these small operators. The FAA should solicit comment **from** the industry and/or establish a working group to devise such a program, which would be acceptable to both the governmental requirements and the industry needs.

Alternative to the Base Year

The FAA should also analyze alternatives to utilizing the **1997-1998** year of data as the base year for establishing an allocation. The use of **future** years, or an average of the next 2 years, might be an alternative that more accurately reflects the marketplace within the Grand Canyon tour industry and will aid in forecasting industry growth rates. The operators have raised significant concerns over the choice of the base year and have concluded that the use of these figures to establish the cap would be economically destructive to the industry. When it can wait, government should not regulate ahead of necessary data, which will provide **meaningful** answers to these important questions. The small air tour operators are not to blame for the **federal** government's lack of data collection prior to **1997**. They should not be penalized for the government's lack of sufficient information to regulate them fairly. The alternative of waiting for the next year or two of data should be examined to aid the FAA in a realistic determination of market demand and the true cost of this rule.

Partial Exemptions & other incentives

Even if an allocation system is used, there has been no consideration given to those operators who have recently managed to reduce their number of flights over the Grand Canyon through purchase of larger, quieter aircraft. **As** part of an incentive program within an allocation system, these operators could be rewarded with additional permitted flights, etc. Rewarding those businesses which are already making significant efforts to reduce the level of noise in the park, instead of penalizing them, seems to be an alternative which deserves significant attention.

Periodic Adjustment to Allocation

Another alternative to the current allocation plan is one that involves FAA and National Park Service (**NPS**) monitoring of the noise level in the park on a regular basis, in order to adjust the limits that have been placed on the operators. The current proposal states that the allocation will remain unchanged for two years. The FAA rejected alternatives to

this proposal, which would revise the allocations over a shorter time frame, because they would not “achieve the proper balance between providing the certificate holders with the latitude necessary to conduct business, and controlling noise in the **GCNP**.” We disagree with this assumption. It is true that an operator would need to know and plan for its anticipated business throughout the year. However, if **after** a noise level was taken in the park and it was determined that additional flights would not adversely affect the ‘**natural quiet**’ of the park; an operator would welcome any additional allocations and the opportunity to increase their yearly business beyond the initial cap. This is perhaps a feasible alternative for the operators which deserves additional attention.

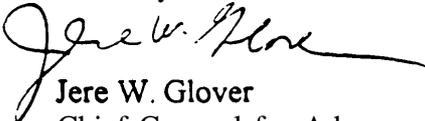
Conclusion

The Federal Aviation Administration must review its cost estimates and analysis to ensure that it has adequately reflected the loss of revenue and the economic impact on the **24** small air tour operators doing business in the Grand Canyon National Park. Further, the Regulatory Flexibility Act requires FAA to consider feasible alternatives that would minimize this burden. The **Office** of Advocacy does not believe that the FAA has gone far enough in examining these and other alternatives.

It is true that current regulatory proposals and existing rules within the **GCNP** already utilize various methods to assist in reducing the level of noise in the park. There have been a number of **rulemakings** to aid in this goal, addressing Flight Free Zones, raised altitudes, curfews, and even a cap on the number of **aircraft** in the park. Now the FAA would like to take the additional step of placing a cap on the number of operations within the park. Why not examine the alternative of waiting for these existing rules and proposals to have an impact on the problem before implementing an allocation system? The FAA is attempting to put in place a system that would have a precedent setting impact upon the **GCNP** and other such areas under their purview. When agencies begin limiting the vital growth of our nation’s businesses instead of examining all feasible alternatives to such action, the regulatory burden upon small businesses increases greatly

The **Office** of Advocacy encourages **OIRA** to **closely** examine FAA’s analysis of this proposed regulation and direct the FAA to reexamine existing alternatives. Additionally, the FAA should be encouraged to work with the industry to find feasible alternatives which would accomplish the goal of restoring the natural quiet to the Grand Canyon **National Park**, without unduly burdening the small air tour operators which provide service within it. If our **office** can be of assistance to you in this matter, Claudia **Rayford**, of my staff can be reached at (202) 205-6533.

Sincerely,


Jere W. Glover
Chief Counsel for Advocacy


Claudia Rayford
Assistant Chief Counsel
for Advocacy