

**Before the
FEDERAL AVIATION ADMINISTRATION**

In the Matter of)	
)	
National Parks Air Tour Management)	Docket No. FAA-2001-8690
Notice of Proposed Rulemaking)	
)	
)	

COMMENTS OF THE NATIONAL PARKS CONSERVATION ASSOCIATION

The National Parks Conservation Association (“NPCA”) is pleased that the Federal Aviation Administration (“FAA”) has issued a Notice of Proposed Rulemaking regarding the definition of “commercial air tour operator” under the National Parks Air Tour Management Act (the “Act”), 49 U.S.C. § 40128. NPCA submits these comments in support of FAA’s proposed 5,000-ft. above-ground-level (“AGL”) threshold to complete the definition of commercial air tour operator under the Act. The proposed threshold, when adopted, will trigger the start of the air tour management planning (“ATMP”) process through which the National Park Service (“NPS”) and FAA can better manage commercial air tours to minimize adverse impacts to park visitors, wildlife, and the sounds of nature that are inherently part of the environment and experience of our national parks. NPCA encourages FAA to expeditiously adopt the proposed 5,000-ft. AGL threshold so that the ATMP process may begin.

Since 1919, NPCA has fought to safeguard the scenic beauty, wildlife, and historical and cultural treasures of the U.S. National Park System, the largest and most diverse park system in the world. As the nation’s only membership organization dedicated solely to protecting the entire national park system, NPCA and its hundreds of thousands of supporters – nature lovers, outdoor enthusiasts, wildlife advocates,

community activists, environmentalists, and devotees of American history – are committed to preserving our nation’s natural, historic, and cultural heritage for future generations.

NPCA has played an active and consistent role in the effort to regulate the growing number of commercial air tour operations over our national parks. An NPCA director served on the joint FAA/NPS working group that developed the framework for the proposed rule, and NPCA actively supported passage of the Act. This landmark legislation directs FAA to act in “cooperation” with NPS to manage and regulate commercial air tour operations and to establish a process by which natural quiet and the aesthetic, cultural, environmental, and other values of our parks can be protected.

A. NPCA supports the proposed 5,000-ft. AGL threshold.

NPCA supports the 5,000-ft. AGL threshold to complete the definition of commercial air tour operation, as recommended by the National Parks Overflights Working Group (“NPOWG”)¹ with nearly unanimous support, and as supported overwhelmingly by comments already received by FAA, including comments from the commercial aviation industry. *See, e.g.*, Comments of the Nevada Commercial Aviation Council for Tourism. NPCA supports the 5,000-ft. AGL threshold for the following reasons.

First, the 5,000-ft. AGL threshold is consistent with the objective of the Act, which is to “develop acceptable and effective measures to mitigate or prevent the significant adverse impacts, if any, of commercial air tour operations upon the natural

¹ NPOWG was composed of general aviation, air tour, environmental, and Native American representatives. Congress specifically recognized the findings of NPOWG by
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and cultural resources, visitor experiences, and tribal lands.” See 49 U.S.C. § 40128(b)(1)(B). It is clear from comments from park visitors and scientific studies that commercial air tour noise significantly affects the park visitor’s experience and impacts negatively on park resources.

Anecdotal evidence appearing in other comments to the proposed 5,000-ft. AGL threshold make clear that low flying aircraft noise disrupts the park visitor’s experience. See, e.g., Comments of Dr. Robert Bort (explaining that noise in Glacier Park “shatters the pristine quality of [that] park”), Comments of Christopher Lish (stating “[l]ittle has disturbed me more than low flying aircraft disrupting the serenity and my enjoyment of these wild areas.”) As can be seen from the overwhelming support for the proposed 5,000-ft. AGL threshold in the many comments FAA has already received, visitors generally travel to protected national parks to avoid the intrusions of developed areas, and the peaceful settings they seek are greatly compromised by the noise generated from low-flying aircraft.

Furthermore, scientific studies have shown that noise generated from air tours produces negative physiological and behavioral responses in indigenous animals. (Fletcher, J.L. 1980. *Effects of noise on wildlife: A review of relevant literature 1971-1978*, in J.V. Tobias, et al., eds. *Proceedings of the Third International Congress on Noise as a Public Health Problem*, American Speech-Language-Hearing Assoc., Rockville, MD; Fletcher, J.L. 1990. *Review of noise and terrestrial species: 1983-1988*, in B. Berglund and T. Lindvall, eds., *Noise as a Public Health Problem*, vol. 5: New

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stating that the Act “reflects the recommendations made by that Group.” See § 802(6) of the Act (set forth in the Historical and Statutory Notes to 49 U.S.C.A. § 40128).

Advances in Noise Research, Part II. Swedish Council For Building Research, Stockholm). Physiological responses can range from increases in heart rate to more damaging effects on metabolic and hormonal balance. Long-term exposure to noise can cause excessive stimulation to the nervous system leading to chronic stress that can harm the animal's health and reproductive fitness. Behavioral responses to aircraft noise range from abnormal body movement to more harmful escape and panic syndromes. Studies conclude that these behavioral responses can lead to injury, energy loss, decrease in food intake, and habitat abandonment. *See, e.g.,* National Park Service, Report to Congress, Report on effects of aircraft overflights on the National Park System (1994).

Second, a lower AGL threshold would frustrate the objective of the Act by allowing many commercial air tours to continue operations unrestricted. NPOWG found that fixed-wing aircraft have the ability to conduct commercially viable air tours up to 5,000 feet AGL. NPCA believes, as did NPOWG, that if the threshold altitude is set lower than 5,000 feet a loophole will be created for fixed-wing aircraft tour operators who would gain the ability to continue to operate their tours without being subject to any restrictions set forth in an air tour management plan.

Furthermore, a threshold below 5,000 feet AGL would be discriminatory, selective, and unfair to commercial air tour operators using rotary aircraft (helicopters), which typically cannot conduct commercially viable operations above 3,000 feet AGL. Thus, an AGL threshold lower than 5,000 feet could operate to effectively exclude most or all fixed-wing commercial air tours from the provisions of the Act while including all rotary aircraft. Conversely, FAA's proposed threshold of 5,000 feet AGL ensures that the Act will apply equally to *all* commercial air tour aircraft.

Third, the proposed 5,000-ft. AGL threshold will not interfere with non-tour commercial or private aviation, as the definition of commercial air tour operator in the Act clearly exempts non-tour commercial or private aviation. Thus, despite the concerns expressed by Mr. Thomas Dufrense in his comments to the proposed threshold, as a private aviator he will not be forced to “make long, costly and time-consuming deviations around [national park] airspace.” To the contrary, the provisions of the Act simply do not apply to private aviators.

Indeed, non-tour commercial and private aviators are less likely to fly under 5,000 feet AGL than commercial air tour operators. It is a well-established principle of aviation that it is both less efficient and more hazardous to fly at low altitudes. Specifically, there is a notable change in air density when flying as low as approximately 4,000 feet AGL. This change in density leads to a significant drop in fuel efficiency. In addition, at this lower altitude, there is less room for maneuverability and response to unforeseen circumstances. Major airlines have specific policies regulating the amount of time their aircraft spend at or below 4,000 feet AGL; additionally, for reasons of safety, fuel efficiency, and noise reduction, the airline industry has continued to increase the rate at which commercial aircraft are able to climb and descend. As a case in point, it would be attractive for an air tour operation to approach the Jackson Hole airport in Grand Tetons National Park with a long, slow approach and scenic views at a few thousand feet. In contrast, non-tour commercial flights, as a matter of procedure, descend quickly – for the very reasons cited above.

Finally, NPCA notes that the proposed 5,000-ft. AGL threshold does *not* by itself prohibit commercial air tours over national parks, contrary to assertions found in some

comments. Instead, the proposed threshold merely sets a trigger altitude beneath which a flight *may* be considered a commercial air tour operation, in addition to consideration of several other factors. Thus, the concerns expressed by Steve Egger of Air Maui, that the 5,000-ft. AGL “definition/restriction” is “an arbitrary figure, assumed to be ‘high enough’ to deter unregulated flights over the defined management area, without regard to local weather or terrain factors that could impact flights over or around the management area,” are inapposite. Contrary to his assertion, the proposed threshold will not prohibit commercial air tour flights under 5,000 feet AGL. It is the ATMP process (which is triggered by a commercial air tour operator’s application for an operating permit) – and not the proposed threshold – which will define restrictions, if any, on the activities of commercial air tour operators.

For all of the above-stated reasons, NPCA supports the 5000-ft. AGL threshold.

B. NPCA urges FAA to begin immediate enforcement of the Act.

NPCA disagrees with FAA’s statement that “[t]he definition of a commercial air tour operation cannot become fully effective until the FAA . . . establishes through rulemaking a minimum altitude over national park units . . . below which a commercial sightseeing flight would be defined as a commercial air tour operation.” To the contrary, the Act clearly states that a commercial sightseeing flight may be considered a commercial air tour operation if during flight the aircraft flies either below the minimum altitude determined by the FAA, *see* 49 U.S.C. § 40128(f)(4)(A)(i), **or** “less than 1 mile laterally from any geographic feature within the park,” *see* 49 U.S.C. § 40128(f)(4)(A)(ii).

A plain reading of this provision is that a commercial sightseeing flight may be considered an air tour operator under *either* subsection (A)(i) or subsection (A)(ii).

Whereas Congress explicitly left subsection (A)(i) incomplete, necessitating rulemaking before it could be implemented, subsection (A)(ii) is complete without the need for rulemaking and should have been implemented upon enactment of the Act. Accordingly, NPCA believes that air tour operators that fall under subsection (A)(ii) should be required to apply for operating permits immediately. In any event, NPCA agrees with FAA that adoption of the proposed 5,000-ft. AGL threshold will complete the definition for those air tour operators that fall under subsection (A)(i), and that following adoption of the proposed threshold such operators must apply for an operating permit.

Similarly, NPCA urges FAA to begin immediate enforcement of the “no new entrants” clause of the Act for new entrants that would fall under subsection (A)(ii), in order to prevent new air tour operators from flying over parks before the ATMP process starts in an attempt to get a “foot in the door.” Any interpretation of the Act that would allow such actions to occur would run contrary to both the language of the Act and the record of Congress’ intent.

C. NPCA urges FAA to outline the ATMP process.

While the 5,000-ft. AGL threshold is an important step toward achieving the goals of the Act, NPCA notes that it is only a first step. After adoption of the proposed 5,000-ft. AGL threshold, it is critical going forward that the ATMP process operates efficiently and that FAA and NPS cooperate to protect national parks from any adverse impacts resulting from commercial air tour operations. Accordingly, NPCA encourages FAA to clearly outline the ATMP process and to articulate the respective roles of the agencies in that process. NPCA urges FAA to consider NPOWG’s recommended procedures for the ATMP process as delineated in their “Outline of Recommended Rule,” pp. 3-10. NPCA

believes that these procedures will assist the agencies in complying with Congress' "cooperation" mandate, assist commercial air tour operators and the public in understanding the ATMP process, and help to alleviate any misunderstanding of the Act, its goals, and its means of action.

D. NPCA encourages FAA to defer to NPS' expertise in determining impacts upon park resources.

Because of NPS' expertise in determining the impact that visitor activities have upon park resources, it is important that FAA defer to NPS' findings regarding impacts upon park resources resulting from commercial air tour operations. This would be consistent with the Act, its legislative history, and the National Park Service Organic Act.

NPS is charged by Congressional mandate with managing and conserving park resources. As stated in the National Park Service Organic Act:

[T]he National Park Service shall promote and regulate the use of the Federal areas known as national parks, monuments, and reservations . . . by such means and measures as conform to the fundamental purpose of the said parks, monuments, and reservations, which purpose is to conserve the scenery and the natural and historic objects and the wild life therein and to provide for the enjoyment of the same in such manner and by such means as will leave them unimpaired for the enjoyment of future generations.

16 U.S.C. § 1.

In carrying out this mandate, NPS has developed expertise in managing park resources, striking the delicate balance between visitor enjoyment of the parks and conservation of the resources found therein, and determining the potential for visitor use to impair park resources. FAA, on the other hand, has expertise and responsibility for ensuring the safe and efficient use of the nation's airspace. Because FAA lacks experience in managing park resources and park visitors, NPS should be the agency

responsible for determining impacts resulting from air tour operations upon park resources and visitor experiences.

Recognizing this common sense principle, NPOWG recommended that:

NPS shall have responsibility for determining the nature and extent of impacts on natural and cultural resources and visitor experience opportunities. The FAA shall have the responsibility for ensuring the safe and efficient use of the nation's airspace and to protect the public health and welfare from aircraft noise.

NPOWG Outline of Recommended Rule § 3(c).

The Senate Committee Report concurs, envisioning that FAA and NPS would fulfill different roles based on their respective agency competencies:

The Committee intends that the development of ATMPs pursuant to this legislation be a fully cooperative process between the FAA and the NPS, which preserves the essential responsibilities of each agency. The Committee further intends that the FAA retains its role as the sole manager of America's airspace, and its responsibility to ensure a safe and efficient air transport system, and that NPS retains its responsibility and authority to protect park resources and values, and visitor experiences.

S. Rep. No. 106-9, at 44. The Committee Report is clear that "NPS determines potential impacts to the park and visitor opportunities." *Id.*

This recognition of NPS' expertise in determining impacts to park resources is found in the Act as well. Section 802(3) of the Act² states that "the National Park Service has the responsibility of conserving the scenery and natural and historic objects and wildlife in national parks and of providing for the enjoyment of the national parks in ways that leave the national parks unimpaired for future generations." Furthermore, the

² Set forth in the Historical and Statutory Notes to 49 U.S.C.A. § 40128.

Act repeatedly states that FAA must act “in cooperation with” NPS. Finally, the Act requires that:

[i]n establishing an air tour management plan under this subsection, the Administrator and the Director shall each sign the environmental decision document required by section 102 of the National Environmental Policy Act of 1969 (42 U.S.C. § 4332) which may include a finding of no significant impact, an environmental assessment, or an environmental impact statement and the record of decision for the air tour management plan.

49 U.S.C. § 40128(b)(2). The Senate Committee Report makes clear that “[b]oth the FAA Administrator and the NPS Director would have to sign the environmental decision document for each park before proceeding with development of the ATMP. If either agency fails to sign or refuses to sign, the ATMP will be considered premature and not in force.” S. Rep. No. 106-9, at 46.

Furthermore, because of NPS’ expertise, FAA cannot simply ignore a finding by NPS that commercial air tour traffic has impaired park resources without running afoul of the Administrative Procedure Act’s arbitrary and capricious standard, 5 U.S.C. § 706(2)(A). *See, e.g., Northern Spotted Owl v. Hodel*, 716 F. Supp. 479, 482 (W.D. Wash. 1988) (“The Court will reject conclusory assertions of agency ‘expertise’ where the agency spurns un rebutted expert opinions without itself offering a credible alternative explanation.”)

Thus, it is clear from the Act and its legislative history that Congress intended that NPS would bring its expertise in managing park resources and determining potential impacts on park resources to the ATMP process. Accordingly, NPCA encourages FAA to defer to this expertise, and to defer to NPS’ findings regarding the impact of commercial air tour operations upon park resources and visitor experiences.

* * *

In conclusion, NPCA supports the proposed 5,000-ft. AGL threshold, and believes that it is a positive step toward protecting our national parks from unrestricted commercial air tour operations. Nonetheless, NPCA believes that further clarification of the ATMP process and the respective roles of FAA and NPS is necessary to achieve the goals of the Act.

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