

DEPARTMENT OF TRANSPORTATION**Federal Aviation Administration****14 CFR Part 136**

[Docket No. FAA-2001-8690; Notice No. 01-01]

RIN 2120-AF46

National Parks Air Tour Management**AGENCY:** Federal Aviation Administration (FAA), DOT.**ACTION:** Notice of proposed rulemaking (NPRM).

SUMMARY: The FAA is codifying title VIII of Public Law 106-181, National Parks Air Tour Management Act of 2000 (the Act), as a new part of its regulations, 14 CFR part 136. This action also proposes, in cooperation with the National Park Service, a 5,000-ft. above ground level (AGL) altitude that will complete the definition of "commercial air tour operation" as required by the Act. If an operator conducts operations below this proposed 5,000-ft. AGL altitude over a national park, and otherwise meets the statutory definition of a commercial air tour operation, that operator would be defined as a commercial air tour operator and would be required to meet the requirements of the Act and new part 136. This action provides easy access to portions of the Act by publishing these portions in the Code of Federal Regulations format as 14 CFR part 136. This NPRM provides the public the opportunity to comment on an altitude that will complete the definition of "commercial air tour operation."

DATES: Send your comments on or before June 11, 2001.

ADDRESSES: Address your comments to the Docket Management System, U.S. Department of Transportation, Room PL401, 400 Seventh Street, SW., Washington, DC. You must identify Docket Number FAA-2001-8690 at the beginning of your comments.

You may also submit comments through the Internet to <http://dms.dot.gov>. You may also review the entire public docket for this NPRM at that same site. You may also review the public docket in person in the Docket Office between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The Docket Office is on the plaza level.

FOR FURTHER INFORMATION CONTACT: Howard Nesbitt, Flight Standards Service, Federal Aviation Administration, 800 Independence

Avenue, SW., Washington, DC 20591; Telephone: (202) 493-4981.

SUPPLEMENTARY INFORMATION:**Comments Invited**

Anyone may participate in this rulemaking by providing such written data, views, or arguments. The FAA also invites comments relating to the environmental, energy, federalism, or economic impact. Include cost estimates, if possible, for substantive comments. Identify the regulatory docket and submit your comments to the DOT Rules Docket address specified above.

The FAA will file all comments received, as well as report summarizing each substantive public contact with FAA personnel on this rulemaking. The docket is available for public inspection before and after the comment closing date.

The FAA will consider all comments received on or before the closing date before we take action on this proposed rulemaking. We will consider comments received late as far as possible without incurring expense or delay.

If you want the FAA to acknowledge receipt of your comments, include a pre-addressed, stamped postcard with those comments. On the card write "Comments to Docket No. FAA-2001-8690." We will date stamp the card and mail it back to you.

Availability of This NPRM

You can get an electronic copy of this NPRM from the docket with the following steps:

- (1) Go to the search function of the Department of Transportation's electronic Docket Management system (DMS) web page (<http://dms.dot.gov/search>).
- (2) On the search page, type in the last four digits of the Docket number shown at the beginning of this document. Click on "search".
- (3) On the next page, which contains the Docket summary information for the Docket you selected, click on the NPRM.

You can also get an electronic copy using the Internet through the FAA's web page at <http://www.faa.gov/avr/arm/nprm/nprm.htm> or the **Federal Register's** web page at http://www.access.gpo.gov/su_docs/aces/acrs140.htm.

You can also get a copy of this NPRM by mail by submitting a request to the Federal Aviation Administration, Office of Rulemaking, 800 Independence Avenue, SW., Washington, DC 20591, or by calling (202) 267-9680. Be sure to identify the Notice No. of this NPRM.

Background

The National Parks Air tour management Act of 2000 (the Act) was enacted on April 5, 2000, as Public Law 106-181. The Act applies to "commercial air tour operations" occurring over a unit of the national park system or tribal lands within or abutting a national park. A commercial air tour operation is defined in the Act as a "flight conducted for compensation or hire in a powered aircraft where a purpose of the flight is sightseeing over a national park, within ½ mile outside the boundary of any national park, or over tribal lands, during which the aircraft flies—(i) Below a minimum altitude, determined by the Administrator in cooperation with the Director, above ground level (except solely for purposes of takeoff or landing, or necessary for safe operation of aircraft as determined under the rules and regulations of the Federal Aviation Administration requiring the pilot-in-command to take action to ensure the safe operation of the aircraft or (ii) less than 1 mile laterally from any geographic feature within the park (unless more than ½ mile outside the boundary)." See Section 803 of the Act, to be codified at 49 U.S.C. Section 40128(f)(4)(A). In making the determination as to whether a flight is a commercial air tour operation, the Act lists eight factors that the Administrator may consider. Id. at 40128(f)(4)(B). The term "tribal land" is defined in the Act as "Indian Country (as that term is defined in section 1151 of title 18 of the U.S. Code) that is within or abutting a national park." The term "National Park" is defined in the Act as "any unit of the national park system."¹ All commercial air tour operations must be conducted in accordance with the following: (1) Title 49 of the U.S. Code (U.S.C.) Section 40128; (2) conditions and limitations prescribed for that operator by the FAA; and (3) any applicable air tour management plans.

The Act states that "Before commencing commercial air tour operations over a national park or tribal lands, a commercial air tour operator shall apply to the Administrator for authority to conduct the operations over the park or tribal lands." See Section 803 of the Act, to be codified at 49 U.S.C. 40128(a)(2)(A). This application then triggers the process for the FAA and NPS to cooperatively develop an air tour management plan (ATMP) for that park or tribal land. The objective of the

¹ There are currently 379 units of the National Park System in the United States. For a complete listing of all units of the national park system see www.nps.gov/legacy/nomenclature.html.

ATMP process is to “develop acceptable and effective measures to mitigate or prevent the significant adverse impacts, if any, of commercial air tour operations upon the natural and cultural resources, visitor experiences, and tribal lands.” See Section 803 of the Act, to be codified at 49 U.S.C. 40128(b)(1)(B).

The Act also provides that “upon application for operating authority, the Administrator shall grant interim operating authority under [49 U.S.C. Section 40128(c)] to a commercial air tour operator for commercial air tour operations over a national park or tribal lands for which the operator is an existing commercial air tour operator.” See Section 803 of the Act to be codified at 49 U.S.C. Section 40128(c)(1). Such interim operating authority is subject to a number of requirements and limitations, including a limit on the number of commercial air tour operations that may be conducted on an interim basis pending issuance of the ATMP for that park.

In the Act, Congress found that the FAA has the authority “to preserve, protect and enhance the environment by minimizing, mitigating, or preventing the adverse effects of aircraft overflights, on public and tribal lands.” Section 802 of the Act. Congress also found that the National Park Service (NPS) 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.” *Id.* Further, the Act states that “the protection of tribal lands from aircraft overflights is consistent with protecting the public health and welfare and is essential to the maintenance of the natural and cultural resources of Indian tribes.” *Id.*

The Proposal

In this rulemaking, the FAA solicits comments on the establishment of the altitude that completes the definition of a commercial air tour operation. The definition of a commercial air tour operation cannot become fully effective until the FAA, in cooperation with the Director of NPS, establishes through rulemaking a minimum altitude over national park units and tribal lands within or abutting a national park below which a commercial sightseeing flight would be defined as a commercial air tour operation. In making the determination that a flight is a commercial air tour operation, the Administrator may consider eight factors, which are enumerated in the Act.

The FAA, in cooperation with the NPS, proposes that the altitude be 5,000 feet above ground level (AGL). Therefore, under this proposed rule, if a flight is conducted for compensation or hire in a powered aircraft for the purpose of sightseeing over a national park unit (or within ½ mile of the park boundary) or tribal land within or abutting a national park and is less than one mile laterally from any geographic feature of the Park (unless more than ½ mile outside the park boundary) or flies below 5,000 feet AGL for the purpose of sightseeing at any point during its flight over a park or tribal land, then that flight and that operator would be subject to the provisions of the Act and the new Part 136.

A 5,000-ft. AGL altitude would address the great majority of current and potential commercial air tour operations over national park units. In addition, the National Parks Overflights Working Group (NPOWG), which met from May 1997 through December 1997, considered a number of possible minimum altitudes and recommended that the minimum altitude be set at 5,000 feet AGL. The Act acknowledged their efforts in saying: “this title reflects the recommendations made by that Group.” See Section 802 of the Act.

The FAA reminds readers that the 5,000-ft. altitude, if adopted, would complete the definition of commercial air tour operation. This would trigger the start of the ATMP process and notify operators conducting commercial air tour operations, as defined in the Act, that such operations are subject to the provisions of the Act. It does not mean that all air tour operations would be required to be conducted above 5,000 ft. AGL or would be limited to that minimum altitude. Rather the air tour management plan for any given national park unit would define the altitudes at which operations may be conducted. The 5,000-ft. AGL altitude also would not apply to takeoffs and landings or for other operations necessary for safety of flight.

The FAA solicits specific, tangible examples of the impact of the proposed 5,000-ft. AGL altitude. The FAA and the NPS also solicit specific information on whether there are any commercial air tours currently conducted at or above 5,000 feet AGL.

Codification

Although the only issue for comment for this notice is the proposed 5,000-ft. altitude, the FAA also sets forth in this rulemaking the codification of the Act so that readers may have easy access to the Act’s requirements. The FAA cannot substantively change the Act although

the codification is modified in places so that its format conforms with other regulations of Title 14, Chapter 1.

Section by Section

Section 136.1 Applicability

This section codifies Sections 803 and 809 of the Act into FAA’s regulations. These provisions have parallel codifications in the United States Code, which are referenced herein. It clarifies that this new part, Part 136, 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. It specifically excludes the Grand Canyon National Park, tribal lands within or abutting Grand Canyon National Park, land or waters located in the state of Alaska, and air transportation routes over the Lake Mead area.

Readers should note that there are certain portions of the Act that are not incorporated in this rulemaking. They include judicial review (Section 803(a)), competitive bidding (Section 803(a)), quiet technology aircraft issues (Section 804), and the advisory group as established by Section 805. The latter three issues will be addressed in separate rulemaking actions. The FAA considers this altitude proposal a first priority to establish a final rule for the management of such commercial air tour operations.

Section 136.3 Definitions

This section of the Act (to be codified in Title 18 of the U.S. Code as 49 U.S.C. Section 40128(f)) provides the reader with the key definition applicable to this rulemaking. Those include commercial air tour operator, existing commercial air tour operator, new entrant commercial air tour operator, commercial air tour operation, National Park, Tribal Lands, Administrator, and Director. Again, readers are reminded that the focus of this rulemaking is on establishing the altitude, 5,000 feet AGL, which would complete the Act’s definition of a commercial air tour operation. With the exception of the definition of “Superintendent,” which is administrative, the other definitions are taken directly from the Act and cannot be changed. The definition of “Superintendent” is added to the proposal because the term is used in the Act for the exception for Part 91 commercial air tour operations as distinguished from the use of “Director” in other sections.

Section 136.5 Prohibition of Commercial Air Tour Operations Over the Rocky Mountain National Park

Section 806 of the Act prohibits all commercial air tour operations in the airspace over the Rocky Mountain National Park regardless of altitude. The FAA notes that this prohibition already exists as SFAR 78 of 14 CFR Part 91. When the final rule is issued in this rulemaking, SFAR 78 will be rescinded and the prohibition of commercial air tour operations over Rocky Mountain National Park will be codified as Section 136.5.

Section 136.7 Overflights of National Parks and Tribal Lands

This section codifies into FAA regulation Section 803 of the Act (to be codified in the U.S. Code as 49 U.S.C. 40128(b)) concerning ATMPs and refers to the authority of the Administrator and the air tour management plan. It states that before beginning any commercial air tour operation over a national park or tribal land, a person must apply to the Administrator for operating authority. The FAA will publish an advisory circular detailing how operators are to comply with this requirement. The FAA will notify the public when the advisory circular is available through a notice published in the **Federal Register**.

This section also describes how the Administrator, in cooperation with the Director, will determine the number of commercial air tour operations to authorize for each park. In making this determination, the Administrator, in cooperation with the Director, will consider the provisions of the air tour management plan, the number of existing commercial air tour operators, the current level of service and equipment provided by operators, and the financial viability of each operator.

Congress also specified in the Act that the FAA is directed to make every effort to act on any ATMP application and issue a decision on the application no later than 24 months after it is received or amended. See Section 803 of the Act, to be codified as 49 U.S.C. 40128(a)(2)(E). The Act also instructs the Administrator to give priority to applications submitted by new entrants.

An exemption to this rule is set forth in the Act, to be codified in 49 U.S.C. 40128(a)(3) which permits a commercial air tour operator conducting only a limited number of commercial air tour operations to be excepted from certain requirements of the Act provided such activity is permitted by Title 14 Code of Federal Regulations Part 119. Section 119.1(e)(2) specifically excludes from

the requirement to obtain certification for conducting operations under Part 121 or 135 "nonstop sightseeing flights conducted with aircraft having a passenger seat configuration of 30 or fewer, * * * that begin and end at the same airport, and are conducted within a 25 statute mile radius of that airport." To qualify for the exception, such operators are required to obtain a letter of agreement from the Administrator and the national park superintendent for the particular park describing the conditions under which that operator will conduct its commercial air tour operations. This exception is limited to not more than 5 flights in any 30-day period over a particular park. Readers should note that this does not mean 5 flights per operator, but rather a total of 5 flights for any park. For example, if there are two operators in a particular park who wish to use this exception, the 5 flights would have to be divided between them.

Existing commercial air tour operators who did not already have part 119 operating authority were required to apply, not later than 90 days after enactment of the Act, for authority under Part 119 to conduct operations under either part 121, or 135. See Section 803 of the Act, to be codified at 49 U.S.C. Section 40128. Readers are referred to a notice published in the **Federal Register** on May 26, 2000, reminding commercial air tour operators of this requirement. Part 119 also sets forth the process by which a person applies for a part 119 certificate and the types of information that are required by the Administrator for completing the application process. Once the application process is complete, the person would then conduct operations under 14 CFR part 121 or 14 CFR part 135, as appropriate. The FAA reminds operators that if they already hold an operating certificate under 14 CFR part 119, a second application is not required.

Section 136.9 Air Tour Management Plans

This section codifies 49 U.S.C. Section 40128(a) into the FAA's regulations and includes the general requirements for the establishment of an air tour management plan (ATMP), the contents of such a plan, procedures to be followed by the Administrator and the Director, and how amendments will be processed. Establishing an ATMP involves a public process whereby public meetings are held, proposed plans are published in the **Federal Register**, and the participation of any Indian tribe affected by the overflights of commercial air tour operations is

solicited. An ATMP may include a broad array of alternatives: some parks may prohibit overflights, other parks may restrict overflights during certain times, and the Administrator and Director may consider incentives such as quiet technology aircraft. The objective of the ATMP is to develop "acceptable and effective measures to mitigate or prevent the significant adverse impacts, if any, of commercial air tour operations upon the natural and cultural resources, visitor experiences, and tribal lands." (See Section 803 of the Act, to be codified at 49 U.S.C. 40128(b)(1)(B)). To mitigate or prevent such impacts the FAA, in cooperation with the NPS, may consider guidelines on such things as type of aircraft, routes, altitudes, time of day, and seasonal times, etc. Once an ATMP is finalized, any air tour operator wishing to conduct commercial air tour operations within a particular park will be required to comply with the ATMP for that park.

Section 136.11 Interim Operating Authority (IOA)

Because the certification process cannot be accomplished immediately, the Act gives existing operators the opportunity to continue conducting existing commercial air tour operations over national parks. Additionally, in some instances, new entrant operators may be granted authority to begin operations. These procedures are spelled out in the Act (to be codified as 49 U.S.C. 40128(c)) and will be codified in regulation as section 136.11. Section 136.11 states that upon application for operating authority, the Administrator will grant IOA for existing operators. The number of flights annually authorized would be the greater of the number of commercial air tour operations conducted over the 12 months immediately prior to enactment of the Act, or an average number of commercial air tour operations per 12-month period conducted within a 36-month period prior to enactment of the Act. This number may not be increased, unless agreed to by the Administrator and the Director. The IOA, including the number of operations, will be published in the **Federal Register** for comment, and will be used as a basis for the development of the ATMP. The IOA must promote protection of national park resources, visitor experiences and tribal lands, safe commercial air tour operations, and the adoption of quiet technology, as appropriate.

Section 136.11 also describes the IOA that may be given to new entrant operators. In general, such operating authority may be granted if the Administrator finds it necessary to

ensure competition and if the ATMP has not been developed within 24 months of the enactment of the Act. IOA for new entrant operators will not be granted if the Administrator determines that granting the IOA would create a safety problem or the Director determines that granting the IOA would create a noise problem at the part or on tribal lands.

Environmental Review

The Act provides that the objective of an ATMP is to "mitigate or prevent the significant adverse impacts, if any, of commercial air tour operations upon the natural and cultural resources, visitor experiences, and tribal lands (to be codified at 49 U.S.C. 40128(b)(a)(B))." Accordingly, the purpose of this proposed rule is to allow achievement of this statutory objective, thereby ensuring that any significant adverse environmental impacts from commercial air tour operations are avoided.

In accordance with FAA Order 1050.ID, the FAA has determined that this proposed rule is categorically excluded from environmental review under section 102(2)(C) of the National Environmental Policy Act (NEPA). In particular, this determination is based on FAA Order 1050.1D, Appendix 4, paragraph 4.i, which applies to "[r]egulatory documents which cover administrative or procedural requirements," and paragraph 4.j, which covers "[r]egulations, standards, and exemptions (excluding those which if implemented may cause a significant impact on the human environment)."

NEPA compliance will be performed as part of the development of each ATMP prepared in accordance with this rule.

Economic Summary

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 effect of regulatory changes on small entities. Third, the Trade Agreement Act of 1979 directs agencies to assess the effect of regulatory changes on international trade. Fourth, Public Law 104-4 requires federal agencies to assess the impact any of federal mandates on state, local, tribal governments, and the private sector. The FAA has determined that this rule is a "significant regulatory action" under section 3(f) of Executive Order 12866 and Department of

Transportation policies and procedures (44 FR 11034, February 26, 1979) because of significant Congressional and public interest in this rulemaking. This proposed rule would not have a significant impact on a substantial number of small entities. In addition, this rule would not constitute a barrier to international trade. Finally, the FAA has determined that the proposal would not impose a federal mandate on state, local, or tribal governments, or the private sector of \$100 million per year.

Benefit—Cost Analysis

This proposed rule would codify the applicable provisions of the Act concerning commercial air tour operations over national parks into a new part 136. The Act and the proposed rule are also applicable to the commercial air tour operations over the area within 1/2 mile outside the boundary of any national park or over tribal lands within or abutting national parks, or less than 1 mile laterally from any geographic feature within the park. The Act and the proposed rule specifically exclude the Grand Canyon National Park and tribal lands within or abutting it, air transportation routes over the Lake Mead area, and land or waters located in Alaska. Congress directed the FAA, in cooperation with the NPS, to determine the minimum altitude under which commercial air tour operations would be subject to the provisions of the statute. An altitude of less than 5,000 feet above ground level is proposed as the altitude that completes the definition of a commercial tour operation to be subject to part 136. A 5,000-ft. AGL altitude would address the great majority of current and potential commercial air tour operations over national park units. In addition, the National Parks Overflights Working Group (NPOWG), which met from May 1997 through December 1997, considered a number of possible minimum altitudes and recommended that the minimum altitude be set at 5,000 feet AGL.

These new statutory provisions will enable the FAA to develop acceptable and effective measures to mitigate or prevent the significant adverse effects, if any, of commercial air tour operations upon the natural and cultural resources, visitor experiences, and tribal lands.

The costs and benefits of this rule cannot be evaluated effectively without taking account of specific noise mitigation measures that would be incorporated in an ATMP for a specific park. The NPS and FAA thus intend to prepare such evaluations when specific plans specified in Section 136.9 (Air Tour Management Plans) are proposed.

Initial Regulatory Flexibility Determination and Assessment

The Regulatory Flexibility Act (RFA) of 1980 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, organization, and government 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 determination is 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 has determined that this proposed rule imposes no costs on small commercial air tour operators because the actual effect on small entities will be determined by individual ATMPs. This proposed rule is limited to only what has been authorized by this Act. Accordingly, pursuant to the Regulatory Flexibility Act, 5 U.S.C. 605(b), the Federal Aviation Administration certifies that this rule will not have a significant impact on a substantial number of small entities. The FAA solicits comments on this determination.

International Trade Impact Assessment

The Trade Agreement Act (TAA) of 1979 prohibits Federal agencies from engaging in any standards or 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 TAA also requires consideration of international standards and where appropriate, that they be the basis for U.S. standards. In addition, consistent

with the Administration's belief in the general superiority and desirability of free trade, it is the policy of the Administration to remove or diminish to the extent feasible, barriers to international trade, including both barriers affecting the export of American goods and services to foreign countries and barriers affecting the import of foreign goods and services into the United States.

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

Unfunded Mandates Reform Act Assessment

The Unfunded Mandates Reform Act of 1995 (UMRA), enacted as Public Law 104-4 on March 22, 1995, is intended, among other things, to curb the practice of imposing unfunded Federal mandates on State, local, and tribal governments.

Title II of the UMRA 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 a \$100 million or more expenditure (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 proposed rule does not contain such a mandate. Therefore, the requirements of Title II of the Unfunded Mandates Reform Act of 1995 do not apply.

Paperwork Reduction Act

The FAA finds that although this is a process rulemaking, there will be a paperwork and recordkeeping burden on both the agencies and the air tour operators. This NPRM, however, only describes a process. Actual paperwork requirements will be determined according to individual ATMPs, developed through a public process which will involve public meetings and publication in the **Federal Register** for notice and comment. Public Law 106-181 states that the Administrator shall "make every effort" to act on an application for an ATMP for a park within 24 months. Within this 24 months, the agencies must publish current air tour operations for a park for public comment, hold public meetings, and prepare the plan. Although the FAA does not anticipate that an ATMP will be developed for each of the 379 parks, even if only 50 parks are initially affected, the burden will be considerable. Since the FAA does not know how

many applications will be received or in what timeframe, the agency specifically solicits comments from air tour operators who anticipate filing applications. In addition, the notifications received by the FAA in response to the notice to part 91 operators who will eventually receive a certificate under part 119 with authority to operate under part 121 or part 135 should provide some of the number of commercial air tour operators.

List of Subjects in 14 CFR Part 136

Aircraft, Air transportation, Aviation safety, National parks, Recreation and recreation areas.

The Proposed Amendment

For the reasons set forth above, the Federal Aviation Administration proposes to add a new part 136 to chapter I of title 14 of the Code of Federal Regulations as follows:

PART 136—NATIONAL PARKS AIR TOUR MANAGEMENT

Sec.

136.1 Applicability.

136.3 Definitions.

136.5 Prohibition of commercial air tour operations over the Rocky Mountain National Park.

136.7 Overflights of national parks and tribal lands.

136.9 Air tour management plans (ATMP).

136.11 Interim operating authority.

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

§ 136.1 Applicability.

(a) This part restates and paraphrases several sections of the National Parks Air Tour Management Act of 2000, including section 803 (to be codified at 49 U.S.C. 40128) and Sections 806 and 809. This part clarifies the requirements for the development of an air tour management plan for each park in the national park system.

(b) Except as provided in paragraph (c) of this section, this part applies to each commercial air tour operator who conducts a commercial air tour operation over:

- (1) A unit of the national park system;
- (2) Tribal lands as defined in this part;

or

- (3) Any area within one-half mile outside the boundary of any unit of the national park system.

(c) This part does not apply to a commercial air tour operator conducting a commercial air tour operation:

- (1) Over the Grand Canyon National Park;

(2) Over that portion of tribal lands within or abutting the Grand Canyon National Park;

(3) Over any land or waters located in the State of Alaska; or

(4) While flying over or near the Lake Mead Recreation Area, solely as a transportation route, to conduct a commercial air tour over the Grand Canyon National Park.

§ 136.3 Definitions.

For purposes of this part:

(a) *Commercial air tour operator* means any person who conducts a commercial air tour operation.

(b) *Existing commercial air tour operator* means a commercial air tour operator who was actively engaged in the business of providing commercial air tour operations over a national park at any time during the 12-month period ending on April 5, 2000.

(c) *New entrant commercial air tour operator* means a commercial air tour operator who:

(1) Applies for operating authority as a commercial air tour operator for a national park or tribal lands; and

(2) Has not engaged in the business of providing commercial air tour operations over the national park or tribal lands for the 12-month period preceding the application.

(d) *Commercial air tour operation:*

(1) Means any flight, conducted for compensation or hire in a powered aircraft where a purpose of the flight is sightseeing over a national park, within ½ mile outside the boundary of any national park, or over tribal lands, during which the aircraft flies:

(i) Below 5,000 feet above ground level (except for the purpose of takeoff or landing, or as necessary for the safe operation of an aircraft as determined under the rules and regulations of the Federal Aviation Administration requiring the pilot-in-command to take action to ensure the safe operation of the aircraft);

(ii) Less than 1 mile laterally from any geographic feature within the park (unless more than ½ mile outside the boundary); or

(iii) Except as provided in paragraph (c) of this section.

(2) The Administrator may consider the following factors in determining whether a flight is a commercial air tour operation for purposes of this part:

(i) Whether there was a holding out to the public of willingness to conduct a sightseeing flight for compensation or hire;

(ii) Whether a narrative that referred to areas or points of interest on the surface below the route of the flight was provided by the person offering the flight;

(iii) The area of operation;
 (iv) The frequency of flights conducted by the person offering the flight;
 (v) The route of flight;
 (vi) The inclusion of sightseeing flights as part of any travel arrangement package offered by the person offering the flight;
 (vii) Whether the flight would have been canceled based on poor visibility of the surface below the route of flight; and
 (viii) Any other factors that the Administrator and director consider appropriate.

(3) For purposes of § 136.5 of this part, means any flight conducted for compensation or hire in a powered aircraft where a purpose of the flight is sightseeing over a national park.

(e) *National park* means any unit of the national park system. (See title 16 of the U.S. Code, section 1, et. seq.)

(f) *Tribal lands* means that portion of Indian country (as that term is defined in section 1151 of title 18 of the U.S. Code) that is within or abutting a national park.

(g) *Administrator* means the Administrator of the Federal Aviation Administration.

(h) *Director* means the Director of the National Park Service.

(i) *Superintendent* means the duly appointed representative of the National Park Service for a particular unit of the national park system.

§ 136.5 Prohibition of commercial air tour operations over the Rocky Mountain National Park.

All commercial air tour operations in the airspace over the Rocky Mountain National Park are prohibited regardless of altitude.

§ 136.7 Overflights of national parks and tribal lands.

(a) *General*. A commercial air tour operator may not conduct commercial air tour operations over a national park or tribal land except:

- (1) In accordance with this section;
- (2) In accordance with conditions and limitations prescribed for that operator by the Administrator; and
- (3) In accordance with any applicable air tour management plan for the park or tribal lands.

(b) *Application for operating authority*. Before commencing commercial air tour operations over a national park or tribal lands, a commercial air tour operator shall apply to the Administrator for authority to conduct the operations over the park or tribal lands. Advisory Circular 119-xxx contains information on how to submit such an application.

(c) *Number of operations authorized*. In determining the number of authorizations to issue to provide commercial air tour operations over a national park, the Administrator, in cooperation with the Director, shall take into consideration the provisions of the air tour management plan, the number of existing commercial air tour operators and current level of service and equipment provided by any such operators, and the financial viability of each commercial air tour operation.

(d) *Cooperation with National Park Service*. Before granting an application under this part, the Administrator, in cooperation with the Director, shall develop an air tour management plan in accordance with § 136.9 and implement such a plan.

(e) *Time limit on response to applications*. Every effort will be made to act on any application under this part and issue a decision on the application not later than 24 months after it is received or amended.

(f) *Priority*. In acting on applications under this paragraph to provide commercial air tour operations over a national park, the Administrator shall give priority to an application under this paragraph in any case where a new entrant commercial air tour operator is seeking operating authority with respect to that national park.

(g) *Exception*. Notwithstanding § 136.7, commercial air tour operators may conduct commercial air tour operations over a national park under part 91 of this chapter if:

- (1) Such activity is permitted under part 119 of this chapter;
- (2) The operator secures a letter of agreement from the Administrator and the Superintendent for that park describing the conditions under which the operations will be conducted; and
- (3) The number of operations under this exception is limited to not more than a total of 5 flights by all operators in any 30-day period over a particular park.

(h) *Special rule for safety equipment*. Notwithstanding § 136.11, an existing commercial air tour operator shall apply, not later than 90 days after April 5, 2000, for operating authority under part 119 of this chapter, for certification under part 121 or part 135 of this chapter. A new entrant commercial air tour operator shall apply for such authority before conducting commercial air tour operations over a national park or tribal lands that are within or about a national park. The Administrator shall make every effort to act on such application for a new entrant and issue a decision on the application not later

than 24 months after it is received or amended.

§ 136.9 Air tour management plans (ATMP).

(a) *Establishment*. In general, the Administrator, in cooperation with the Director, shall establish an air tour management plan for any national park, or tribal land for which such a plan is not in effect whenever a person applies for authority to conduct a commercial air tour operation over the park. The air tour management plan shall be developed by means of a public process in accordance with paragraph (d) of this section. The objective of any tour management plan is to develop acceptable and effective measures to mitigate or prevent the significant adverse impacts, if any, of commercial air tour operations upon the natural and cultural resources, visitor experiences, and tribal lands.

(b) *Environmental determination*. In 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.

(c) *Contents*. An air tour management plan for a park:

- (1) May prohibit commercial air tour operations in whole or in part;
- (2) May establish conditions for the conduct of commercial air tour operations, including, but not limited to, commercial air tour routes, maximum number of flights per unit of time, maximum and minimum altitudes, time of day restrictions, restrictions for particular events, intrusions on privacy on tribal lands, and mitigation of noise, visual, or other impacts.

(3) Shall apply to all commercial air tour operations within ½ mile outside the boundary of a national park;

(4) Shall include incentives (such as preferred commercial air tour routes and altitudes, and relief from caps and curfews) for the adoption of quiet technology aircraft by commercial air tour operators conducting commercial air tour operations at the park;

(5) Shall provide for the initial allocation of opportunities to conduct commercial air tour operations if the plan includes a limitation on the number of commercial air tour operations for any time period; and

(6) Shall justify and document the need for measures taken pursuant to

paragraphs (c)(1) through (c)(5) of this section and include such justification in the record of decision.

(d) *Procedure.* In establishing an ATMP for a national park or tribal lands, the Administrator and Director shall:

(1) Hold at least one public meeting with interested parties to develop the air tour management plan;

(2) Publish the proposed plan in the **Federal Register** for notice and comment and make copies of the proposed plan available to the public;

(3) Comply with the regulations set forth in 40 CFR 1501.3 and § 1501.5 through 1501.8 (for the purposes of complying with the regulations, the Federal Aviation Administration is the lead agency and the National Park Service is a cooperating agency); and

(4) Solicit the participation of any Indian tribe whose tribal lands are, or may be, overflowed by aircraft involved in a commercial air tour operation over the park or tribal lands to which the plan applies, as a cooperating agency under the regulations referred to in paragraph (d)(3) of this section.

(e) *Amendments.* The Administrator, in cooperation with the Director, may make amendments to an air tour management plan. Any such amendments will be published in the **Federal Register** for notice and comment. A request for amendment of an ATMP will be made in accordance with § 11.25 of this chapter as a petition for rulemaking.

§ 136.11 Interim operating authority.

(a) *General.* Upon application for operating authority, the Administrator shall grant interim operating authority

under this section to a commercial air tour operator for commercial air tour operations over a national park or tribal land for which the operator is an existing commercial air tour operator.

(b) *Requirements and limitations.* Interim operating authority granted under this section:

(1) Shall provide annual authorization only for the greater of:

(i) The number of flights used by the operator to provide the commercial air tour operations within the 12-month period prior to April 5, 2000; or

(ii) The average number of flights per 12-month period used by the operator to provide such operations within the 36-month period prior to April 5, 2000, and for seasonal operations, the number of flights so used during the season or seasons covered by that 12-month period.

(2) May not provide for an increase in the number of commercial air tour operations conducted during any time period by the commercial air tour operator above the number the air tour operator was originally granted unless such an increase is agreed to by the Administrator and the Director;

(3) Shall be published in the **Federal Register** to provide notice and opportunity for comment;

(4) May be revoked by the Administrator for cause;

(5) Shall terminate 180 days after the date on which an air tour management plan is established for the park and tribal lands;

(6) Shall promote protection of national park resources, visitor experiences, and tribal lands;

(7) Shall promote safe commercial air tour operations;

(8) Shall promote the adoption of quiet technology, as appropriate, and

(9) Shall allow for modifications of the interim operating authority based on experience if the modification improves protection of national park resources and values and of tribal lands.

(c) *New entrant operators.* The Administrator, in cooperation with the Director, may grant interim operating authority under this paragraph to an air tour operator for a national park or tribal lands for which that operator is a new entrant air tour operator if the Administrator determines the authority is necessary to ensure competition in the provision of commercial air tour operations over the park or tribal lands.

(d) *Limitation.* The Administrator may not grant interim operating authority under paragraph (c) of this section if the Administrator determines that it would create a safety problem at the park or on the tribal lands, or if the Director determines that it would create a noise problem at the park or on the tribal lands.

(e) *ATMP limitation.* The Administrator may grant interim operating authority under paragraph (b) of this section only if the ATMP for the park or tribal lands to which the application relates has not been developed within 24 months after April 5, 2000.

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Director, Flight Standards Service.

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