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The Honorable Sam Graves, Chairman, House Transportation & Infrastructure Comm.
The Honorable Rick Larsen, Ranking Member, House Transportation & Infrastructure Comm.
The Honorable Garret Graves, Chairman, House Aviation Subcommittee
The Honorable Steve Cohen, Ranking Member, House Aviation Subcommittee
United States House of Representatives
2165 Rayburn House Office Building
Washington, DC 20515

July 13, 2023 Sent via Email

Dear Congressmen Graves, Larsen, Graves, and Cohen:

I am writing to alert the House Transportation & Infrastructure Committee and its Aviation Subcommittee to a serious problem involving the way the FAA is implementing what is known as Air Tour Management Plans (ATMPs). These plans are required by Congress and determine the manner in which air tour operators (ATOs) conduct scenic flights over NPS units. Scenic flights constitute significant commercial operations.

I allege that the FAA has knowingly and deliberately ignored a mandate by Congress that the agency conduct pertinent (defined to mean "current, comprehensive, relevant, accurate, and science-based") sound studies at National Parks and Monuments before implementing ATMPs. By so doing, the agency has ignored an Act of Congress, disregarded the primacy of Congressional laws over agency regulations, failed to perform due diligence, abused its powers of agency discretion, and deprived air tour operators of due process/civil rights. The problem involves virtually every State and is growing rapidly. Small aviation businesses are being destroyed in record numbers. Yet the FAA persists, arguing that executive force of agency trumps legislative reason of law. I ask that Congress intervene to prevent further abuse.

Air Tour Management Plans are mandated by the National Parks Air Tour Management Act of 2000, otherwise known as NPATMA (or, "the Act"). The Act spells out who qualifies as an ATO, how they are to apply for authority to fly over National Parks and Monuments, the content and nature of ATMPs, and other administrative details.

ATOs generally support the Act because, in addition to regulating the day-to-day conduct of air tours over units of the National Park Service, the Act also acknowledges and protects ATOs right to fly over said Parks. ATOs strenuously object, however, to the FAA's abuse of the statute to arbitrarily and capriciously deconstruct the air tour industry despite the stated Will of Congress to the contrary. Please see the attached letter of July 3, 2023, page 9, addressed to the FAA's

Environmental Division, in which I quote the Honorable John J. Duncan, Chairman of the House Aviation Subcommittee at the time that NPATMA was drafted.

NPATMA begins by stating the purpose of the Act. Section 40128(b)(1)(B) says:

> The objective of any air tour management plan shall be 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. [Emphasis added.]

One of the main goals of Congress was to control the amount of noise commercial aircraft were creating over Parks and Monuments. At the time that the Act was enacted, Congress thought, and presumably still does, that noise had the potential to create the greatest adverse effect on natural and cultural resources, visitor experiences, and tribal lands.

However, Congress was not convinced that environmental interests were telling the truth about noise. "Potential" noise is not the same as actual. Congress was skeptical that environmental groups were exaggerating their claims about aircraft noise and/or skewing their testimonies as to the time, place, and magnitude of "the problem." That is why Congress inserted the "if any" phrase quoted above. The phrase carries enormous significance, requiring that all data/evidence, assumptions, and conclusions be *tested and verified* as being current, comprehensive, relevant, accurate, and science-based (i.e., pertinent) in order to determine veracity. The phrase is, in effect, a "prove it" clause, and the clause is an order. The "if any" phrase imposes a mandate to positively determine the scope and degree of "significant adverse impacts" as they currently exist. Untested testimony, allegation, conjecture, supposition, hearsay, innuendo, opinion, speculation, and feelings of abuse allowed under Section 106 of the National Historic Preservation Act (NHPA) would not, by themselves, suffice to confirm existence of "adverse effect" under NPATMA. Nor would old and outdated studies be considered to be relevant and reasonable scientific evidence in a working environment that is constantly changing.

To ensure objective environmental analysis, Congress added specific language to the Act, known as Section 808, that spells out the manner in which determinations of aircraft sound levels must be made and evaluated. It reads:

> *Any methodology* adopted by a Federal agency to assess air tour noise in any unit of the national park system (including the Grand Canyon and Alaska) *shall* be based on *reasonable scientific methods*. [Emphasis added.]

Thus, putting the two mandates together, the Act requires both substantiation of actual (not theoretical) adverse effects and application of "reasonable scientific methods" (not deductive speculation) … including the acquisition of current evidence/data (versus historical records that cannot be verified or challenged) … where <u>any</u> analysis of sound impact is at issue.

Under the Act, there must be a specific order of investigation and implementation of corrective measures, if in fact any corrections might even be necessary. First, current aircraft sound levels must be empirically recorded and mathematically measured. Then, second, the FAA was instructed to adopt methodology to analyze the date based on "reasonable scientific methods." Third, after proving (testing *and* verifying) that excessive noise exists over any particular unit of the National Park Service, based only on real measurements, an ATMP could be created, *if*

necessary, to correct the situation. The basis of my complaint to the House Aviation Subcommittee is that the FAA has completely disregarded the order of the Act, picking which Congressional laws and agency regulations the agency will comply with and ignoring the rest. For the six Parks cited, there was no scientific methodology used to arrive at the FAA's assessments and final determinations. The FAA's "evidence" is primarily based on accusations.

The "shall" mandate of Section 808 declares that objective scientific methodology was to prevail and NPATMA was to be the controlling legal authority, not NHPA. The reason is very clear: under NHPA, there is no requirement to gather objective data; mere accusations alone constitute convicting evidence of "adverse impact."

Nor would NEPA regulations be able to take command away from NPATMA law. No contrived regulations under NEPA … drafted by the ever-creative Council on Environmental Quality, having concocted exemptions based on "categorical park exclusions" (CATEX) and "theory of no adverse effects" … would be allowed to get around the imposition of pertinent sound studies.

NPATMA 40128(b)(4)(C) says:

> Procedure – In establishing an air tour management plan for a national park or tribal lands, the Administrator and the Director shall . . . comply with the regulations set forth in sections 1501.3 and 1501.5 through 1501.8 of title 40, Code of Federal Regulations [if they are consistent with other Acts].

The FAA relies on these regulations in support of its theories of CATEX and "no adverse effects." The problem is, in the present instance, none of these regulations are applicable.

NEPA Section 1500.3(a) controls all NEPA regulations which follow that paragraph. It specifies which NEPA regulations apply under any given situation. Section 1500.3(a) says:

> ***Mandate.*** This subchapter is applicable to and binding on all Federal agencies for implementing the procedural provisions of the National Environmental Policy Act of 1969, as amended (Pub. L. 91–190, 42 U.S.C. 4321 *et seq.*) (NEPA or the Act), *except where compliance would be inconsistent with other statutory requirements.* [Emphasis added.]

The "shall" mandate of NPATMA 808 makes regulatory compliance with CEQ regulations statutorily "inconsistent" with NPATMA. The Act dictates that pertinent sound studies *shall* be performed under all conditions; NEPA does not require them under most conditions. Second, the Act strongly indicates that the sound studies should be performed *before* ATMPs may be implemented; proof of need for remedy must *precede* corrective action. The concept of timely sound studies is largely irrelevant under NEPA. Third, under NPATMA, no exemptions, exclusions, or legal fantasies that might be employed by the FAA under NEPA are to be considered. Congressional law overrides allowance of special-interest/purpose regulations. Fourth, NPATMA makes no mention of NHPA and makes no concessions to it, and the only reference to NEPA is conditional. There is an implied "if" imbedded in the "shall" command rendered in NPATMA 40128(b)(4)(C), according to NEPA Section 1500.3(a). Congress compels the FAA to comply with the regulations set forth in sections 1501.3 and 1501.5 through 1501.8 of title 40, Code of Federal Regulations if, *and only if*, said instructions are consistent with other Acts. They are not, as shown above. Therefore, NPATMA remains the controlling legal authority. The

Will of Congress for current, objective, and relevant (pertinent) sound studies must prevail for the Act to hold together.

I contend, agreeing with Congress, that it is not possible to "develop acceptable and effective measures to mitigate or prevent the "significant adverse impacts" of air tour overflights without first assessing aircraft noise. Furthermore, no reasonable assessment of "adverse impact" of any kind can be done without including current pertinent noise studies under today's conditions. Studies conducted 16-23 years ago must be considered irrelevant to current conditions. Historic studies may be interesting for comparative purposes, but they are not pertinent for decision-making purposes. Over time, the number, routes, and altitudes of air tours have changed. Likewise, over time, aircraft technology has changed, including the types of aircraft, engines, and propellers used. One cannot assume that air tour operations are consistent or stable over a 25-year period given the rate of change in today's society. Congress did its best to recognize this fact in Section 808, endeavoring to compel the FAA and NPS to use "reasonable scientific methods" to determine sound presence and impact.

I point out that the FAA has knowingly sidestepped the agency's obligation to meaningfully, effectively, and statutorily comply with Section 808 (having only cited historic sound studies, but not employing analysis of current data) for the sake of "administrative expediency." On May 1, 2020, the U.S. Court of Appeals for the District of Columbia Circuit on May 1, 2020, directed the FAA and NPS to submit a plan by August 31, 2020, to develop ATMPs or voluntary agreements to bring 23 Parks into compliance with the Act within 2 years, or offer concrete reasons why it would take longer than 2 years to comply. The FAA knew at the time, but failed to inform the Court, of the FAA's obligation to comply with Section 808, and therefore committed fraud on the Court, knowing that it would be impossible to comply with the Order without depriving ATOs of due process. The absence of current sound studies would make it impossible for ATOs to mount a defense against the FAA's determinations, which imposed the worst possible air tour restrictions. I allege that the FAA used the Court to force the FAA to do what that agency could not have accomplished on its own, forcing the agency to ignore Section 808 (because the Court allowed no time to comply) and compelling the FAA to disrespect the Will of Congress (by dismantling the air tour industry without first performing pertinent noise tests), which the FAA could not otherwise justify. I allege that this "rogue intent of agency" still exists at the very top levels of the FAA, today.

I will give six examples of typical Parks that represent failure of ATMP process across the Nation. The FAA recently enacted four ATMPs for the State of Utah: Arches, Bryce, Canyonlands, and Natural Bridges. Another was completed for Death Valley in California and Nevada, and then another for Badlands, South Dakota. The FAA conducted sound studies in these parks in roughly the same decade of time, early 2000s.

The studies are all of historic value, not current. The noise studies for Arches were only intermittently conduced between 2000 and 2007. In Bryce, the noise studies were conducted in the years 2009 and 2010. In the case of Canyonlands, the noise studies were conducted in 2006 and 2007. For Natural Bridges, the sound scoping was conducted in 2006 and 2007. In Death Valley, 2008. For Badlands, 2003.

These studies are as much as 23 years old. In the intervening years, not only has aircraft technology become significantly quieter, but the ambient noise level in parks has become

measurably louder, because of record park visitation. I argue that the noise studies the FAA is relying on are out of date and inapplicable to today's reality. Furthermore, the FAA has given no specific, case by case, information to the public as to how these noise studies were conducted, so there is no way to know or challenge the studies' scope, relevance, or "reasonable scientific methodology." Only vague references are made to modeling methods. Under Appendix F of the Badlands Environmental Assessment, the FAA includes a catalogue of "Literature Cited" in support of its noise modeling methods, but most of the references are as outdated as the original sound study itself, many going back to 2003.

Methods and techniques of noise modeling have changed over the years. Many old methods are no longer acceptable. I observe that many basic modeling techniques and assumptions have been discredited over the same 23-year time period since the earliest study mentioned above, causing an uproar of dissention in the environmental community (re. global warming). I note also that noise models were highly contentious and successfully contested when the FAA drew up the Grand Canyon special flight rules. Noise models are inherently fraught with errors precisely because they do not incorporate strict scientific methods. The output frequently defiles the input.

In any case, the FAA asserts that there has been "no significant change" in park conditions and scenic overflight operations in 23 years. I argue that this is simply not the case. The FAA's data is out-of-date and skewed. The FAA's data tends to minimize natural sounds and maximize aircraft noise, to the detriment of ATOs. Therefore, the FAA's data is not pertinent (current, comprehensive, relevant, accurate, and science-based). The FAA's outdated data does not allow the agency to meet, let alone overcome, the "if any" challenge of Congress.

I argue, precisely because of the "stale-dated" and generally-unscientific data that the FAA is relying on, the Agency has not proven, using pertinent data, that there is convincing need for aircraft noise control. In interest of brevity, I will cite two examples, beginning with Arches National Park.

Quoting from the Record of Decision, Air Tour Management Plan for Arches National Park, Appendix B, Environmental Screening Form, Evaluation of the ATMP, Table 1, Soundscapes (Acustic Environment), Page 8:

> Baseline acoustic conditions in the Park were measured in 2000 and continued intermittently through 2007 (Ambrose and Florian, 2008). Long term monitoring was conducted at [only] two sites, the existing ambient sound level was reported to be 19-24 decibels, while the natural ambient sound level was reported to be 18-24 decibels. Short-term monitoring was conducted at eight other sites. The existing ambient sound level at the short-term sites was 19-42 decibels. Natural ambient sound levels were not modeled for the short-term sites. [Editorial comments added.]

With respect to long-term monitoring, the existing ambient sound levels are almost exactly the same as the natural ambient sound levels. With respect to short-term monitoring conducted at eight other sites, existing ambient sound levels were acknowledged to be high considering all forms of aircraft noise (general aviation, airline, military, and air tour). But the figures are meaningless. The FAA does not say how often the noise levels reach 42 decibels, nor for how long, nor does the FAA allocate any specific measurement of noise to air tour aircraft. So, what

is the specific problem with air tour noise? The FAA never addresses the question, conveniently letting it drop. Nor does the FAA state why Natural ambient sound levels were not modeled for the short-term sites; there is no basis or opportunity for comparison by ATOs. The FAA does not seem to care that its data does not support the agency's findings. I could have just as easily quoted from the RODs for Badlands, Bryce, Canyonlands, Death Valley, or Natural Bridges National Parks/Monuments. The "researched" data the FAA presents for those parks reads almost the same. The FAA has not demonstrated "cause for correction," only a persistent desire for determination of adverse effect.

For each of the six Parks referenced above, not just Arches, the FAA carefully presented a ROD in an Appendix to the respective Environmental Screening Form (ESF). Each ESF has an extensive reference section with supporting studies and documentation on noise. The problem is, all of these supporting studies and documents were produced at the same time and are equally out of date. Of even greater import, however, is the FAA's false reliance on its noise models to serve as the baseline to determine existing conditions of noise conditions within the respective ATMP planning areas.

For all of the six Parks, the FAA relies on noise modeling to make its calculations of "adverse impact." This is allowable under NEPA. Paragraph 1502.23 of NEPA says, "Agencies are not required to undertake new scientific and technical research to inform their analyses." However, this statement is directly contrary to NPATMA, the controlling legal authority in the present instance. Paragraph 1502.23 does not apply to NPATMA, and Congress does not refer to that paragraph in NPATMA 40128(b)(4)(C) in order to grant special exception.

The Act (NPATMA) says (as quoted above) that "*any methodology*" used by the FAA to assess air tour noise shall be based on "reasonable scientific methods." Noise models do not constitute scientific methodology, even with incorporation of timely, accurate, thorough, and objective data obtained from vigorous field research. A noise model is just another term for an "Aviation Environmental Design Tool" (AEDT), to use an FAA term. The output from an AEDT is totally dependent on whatever numbers (including formulas) are input. The input data the FAA is using is too old, too few, too isolated, and too infrequently gathered, representing unreliable assumptions of present conditions, this on top of biased formulas. ATOs claim that the FAA is controlling the input so as to get a predetermined output that is contrary to the interests of ATOs.

My second example has to do with Badlands National Park. Here, the FAA all but admits that its noise data for the Park is "stale-dated," incomplete, and biased. The FAA's data is both old and lacking in coverage to the point that extensive noise modeling had to be incorrectly employed to make up ("correct") the difference. I quote from the Badlands ATMP Environmental Assessment, Section 3.1.1, Affected Environment:

> To characterize the natural and existing ambient (both with and without air tours), detailed sound level measurements were conducted at [only] three locations across the Park in 2003 (Lee et al., 2016). These acoustic sampling locations were chosen to be representative of the natural ecological zones or broad ecosystems of the Park and ATMP planning area. [Incredibly,] these locations were not chosen to specifically measure the amount of air tour noise. From the detailed [?] data collected in 2003 [based on only three sites], an ambient "map" of the natural soundscape of the ATMP planning area was developed to be used in computer

> modeling (Figure 5) [which, under NPATMA, does not involve "reasonable scientific methods"]. For more explanation for how sound is described, see the *Noise Technical Analysis,* (Appendix F, Table 1.
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> [The FAA goes on to say:] The contribution of aircraft noise during sound level measurements only provides a snapshot in time at a particular location and *is not necessarily a representative characterization of current conditions*. Current conditions were [artificially and deductively] determined by adding the noise exposure due to air tours, (LAeq, 12h), based on a peak month [why not average month], average day and modeled using the FAA AEDT Version 3e, to the Existing Ambient without Air Tours (L50)11 (see Appendix F, *Noise Technical Analysis*). The result of this process is the [purely hypothetical] Cumulative Existing Ambient (Figure 6). [Comments, underline, and emphasis added.]

In other words, the FAA's AEDT borders on pure fiction, biased first in one direction and then magnanimously in another.

An AEDT is just a fancy name for a spreadsheet. Spreadsheets can be easily manipulated to produce whatever output one wants, as in the example just quoted where the FAA contrives to create artificial "current conditions." In the present situation, as is the case for the other five Parks, the FAA's "manufactured" current conditions are never tested in the field for present-day accuracy. This fact alone establishes that the FAA did not use "reasonable scientific methods" to get, analyze, or verify the truthfulness of the agency's referenced sound studies for Badlands, or any of the other five Parks.

Spreadsheets, themselves, are not science. Science is based on acquiring original data by observation in the field. Noise models, in contrast, are based on deductive armchair reasoning. Therefore, I argue, primary reliance on AEDT technology is not allowable under NPATMA as a conclusive means of determining "adverse impact." This is one of the reasons I have argued above that NPATMA is the controlling legal authority for ATMPs, not NEPA. Under NPATMA, the 1502.23 possible allowance for using AEDT technology does not apply. But even if it did, the FAA would still be required to use scientific methodology to control the input with current, comprehensive, relevant, accurate, and science-based (i.e., pertinent) data. I argue that the FAA's data, even if one allows use of AEDT noise modeling, fails all five tests. For multiple reasons, then, the FAA's decision that each of the six Parks' ATMP conditions were correctly determined to meet the Act's defined objective ("to mitigate or prevent adverse impact, *if any*, of commercial air tours on natural and cultural resources, visitor experiences, and tribal lands") must be rejected at this time. I argue that the "if any" test for excessive aircraft noise has not been satisfied in any of the Parks that I have cited. Ignoring Congress, the FAA has jumped straight to the "cure" for a disease the agency has never properly diagnosed.

In short, I allege that, for the Parks where the FAA said they did consider sound studies, their "studies" are entirely inadequate and inapplicable to today's reality. In the cases of the Parks where the FAA might not yet have conducted sound studies, the FAA's findings would have no legal authority to be implemented. The point is, either by referring to old sound studies or incorporating nonscientific noise models, the FAA has abused the Act by not conducting noise studies that are current, comprehensive, relevant, accurate, and science-based (i.e., pertinent)

before drafting ATMPs. Because of the "if any" challenge and the "shall" mandate, current noise studies were to became the standard of fair decision and the prime investigatory directive of the Act. Again and again, I allege, from every point of view, the FAA appears to have knowingly ignored both the Act and the Will of Congress. This constitutes blatant abuse of process.

Moreover, the burden to conduct pertinent sound studies was placed by Congress on the US Government, not ATOs, so that the data would be acceptable to all parties involved in the decision-making and contesting process. The results of the studies could then be entered into evidence. Of no less importance, pertinent sound studies were required by the Act to ensure due process for air tour operators. With timely, accurate, and objective sound data in hand, ATOs could reasonably debate the proposed actions or inactions of the FAA and, if necessary, submit differences of opinion to the courts for judicial review. Congress recognized that said sound studies were necessary to protect the judicial and civil rights of ATOs. Adequate sound studies were thus assumed by Congress to be part of the fabric of the Act. Failure to perform pertinent sound studies before implementing ATMPs robs ATOs of due process and civil rights.

I contend that the FAA has failed to perform required due diligence by not conducting current sound studies based on timely research in the field at Arches, Badlands, Bryce, Canyonlands, Death Valley, and Natural Bridges units of the NPS before implementing Air Tour Management Plans. Additionally, I allege that the agency has incorrectly resorted to reconstruction of law by using NHPA and NEPA to override the intent of NPATMA in order to escape the administrative burden of conducting sound studies. I further argue that the FAA has deliberately engaged in unlawful acts by conspiring with the NPS to strip ATOs of their Constitutional rights (i.e., due process and civil liberties, referring to ATOs inability to defend their interests in court for lack of access to evidence that was knowingly withheld, namely pertinent sound studies).

In brief, then, here is my petition to the House Aviation Subcommittee. Because of the FAA's failing to perform current, comprehensive, relevant, accurate, and science-based sound studies at these six representative units of the NPS, chosen at random, a group that might someday be expanded to include all units of the NPS, I argue, the process of creating ATMPs has not been completed according to Act. Therefore, I ask Congress to recognize and instruct the FAA that it is premature to require modification of the Operations Specifications of air tour operators, by mandating that their commercial operations comply with ATMPs, until pertinent sound studies are completed for all Parks over which ATOs fly. The FAA will not come to this conclusion on its own.

I have loudly and persistently petitioned the FAA to recognize both the logic and the law of my request. The agency has stubbornly resisted all appeals, for reasons that are self-serving, detrimental to air commerce, and contrary to public interest. The FAA has connived to strip ATOs of due process, operational rights, and constitutional guarantees because of operational mandates "coming down from above" (political directives) and imperatives from below (re. the District of Columbia Circuit Court's May 1, 2020, mandamus order). The FAA appears to be adopting the philosophy that need for administrative expedience justifies abuse of law and fair process. I ask your oversight office, then, to consider the necessity for intervention in the appeals process currently being launched by ATOs across the Nation to ensure that both the Act and the Will of Congress is respected.

Thank you so much for your kind consideration.

Sincerely yours,

Bruce Adams

Enclosure: Letter to FAA Environmental Policy Division