DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Airspace Docket No. 97–AWA–1]

RIN 2120–AA66

Modification of the San Francisco Class B Airspace Area; CA; Correction

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule; correction.

SUMMARY: This action corrects a final rule published in the **Federal Register** on June 7, 2000 (65 FR 36060). In that rule, the legal description of the San Francisco, CA, Class B airspace, Area E, contained an inadvertent error that failed to exclude airspace within the Travis Air Force (AFB) approach control area. This action corrects that error.

EFFECTIVE DATE: October 11, 2000.

FOR FURTHER INFORMATION CONTACT: Ken McElroy, Airspace and Rules Division, ATA–400, Office of Air Traffic Airspace Management, Federal Aviation Administration, 800 Independence Avenue, SW., Washington, DC 20591; telephone: (202) 267–8783.

SUPPLEMENTARY INFORMATION: On June 7, 2000, Airspace Docket No. 97–AWA–1, FR Doc. 00–14046, was published amending the legal description of the San Francisco, CA, Class B airspace area. This rule included a legal description of the San Francisco, CA, Area E airspace that included a small area within the Travis AFB approach control area, which should have been omitted. This action excludes that airspace from the San Francisco Class B airspace area, thereby correcting this error.

Correction to Final Rule

Accordingly, pursuant to the authority delegated to me, the legal description for the San Francisco, CA, Class B airspace, Area E, as published in the **Federal Register** on June 7, 2000 (65 FR 36060); FR Doc. 00–14046, and incorporated by reference in 14 CFR 71.1, is corrected as follows:

§ 71.1 [Corrected]

On page 36064, in column 3, in the legal description of the San Francisco, CA, Class B airspace, correct Area E to read as follows:

Paragraph 3000—Subpart B—Class B Airspace

* * * * *

AWP CA B San Francisco, CA

* * * * *

Boundaries.

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Area E. That airspace extending upward from 6,000 feet MSL to and including 10,000 feet MSL bounded by a line beginning at the 15-mile DME point on the SFO VOR/DME 277° radial thence counterclockwise along the 15-mile DME arc of the SFO VOR/DME to and southeast along the SFO VOR/DME 167° radial to and counterclockwise along the 20-mile DME arc of the SFO VOR/DME to and northeast along the Sausalito VORTAC 052° radial, to and clockwise along the 25-mile DME arc of the SFO VOR/DME to and northeast along the SFO VOR/DME 227° radial to and clockwise along the 20-mile DME arc to and northeast along the SFO VOR/DME 277° radial to the point of beginning, excluding the airspace north of lat 38°00′00″.

* * * * *

Issued in Washington, DC, on September 27, 2000.

Reginald C. Matthews,

Manager, Airspace and Rules Division.

[FR Doc. 00–25643 Filed 10–10–00; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 93

14 CFR Parts 91, 93, 121 and 135

Commercial Air Tour Limitations in the Grand Canyon National Park Special Flight Rules Area; Modification of the Dimensions of the Grand Canyon National Park Flight Rules Area and Flight Free Zones

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Disposition of a request for stay of compliance date.

SUMMARY: On April 4, 2000, the FAA published two final rules for Grand Canyon National Park (GCNP) limiting the number of commercial air tour operations in the GCNP Special Flight Rules Area (SFRA) and modifying the airspace of the SFRA. One rule limited commercial air tour operations of each operator, the other redefined the SFRA airspace. A Notice of Availability of commercial routes in the GCNP SFRA also was issued on the same day setting forth new routes available. The Commercial Air Tour allocations final rule was effective on May 4, 2000. The new routes and airspace modifications become effective December 1, 2000. In July 31, 2000, the United States Air Tour Association and seven air tour operators in GCNP requested a stay of the compliance date for the rules. This document informs the public of the FAA disposition of this request for a stay of the compliance date for the final rules.

DATES: Effective: October 11, 2000.

ADDRESSES: You may view a copy of the final rules, Commercial Air Tour Limitations in the Grand Canyon National Park Special Flight Rules Area and Modification for the Dimensions of the Grand Canyon National Park Special Flight Rules Area and Flight Free Zones, through the Internet at: *http://dms.dot.gov,* by selecting docket numbers FAA–99–5926 and FAA–99–5927. You may also review the public dockets on these regulations 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 of the Nassif Building at the Department of Transportation. 7th Ave., SW, Room 401, Washington, DC, 20590.

As an alternative, you may search the **Federal Register's** Internet site at http://www.access.gpo.gov/su__docs for access to the final rules.

You may also request a paper copy of the final rules from the Office of Rulemaking, Federal Aviation Administration, 800 Independence Ave., SW., Washington, DC 20591, or by calling (202) 267–9680.

FOR FURTHER INFORMATION CONTACT: Howard Nesbitt, Flight Standards Service (AFS–200), Federal Aviation Administration, Seventh and Maryland Streets, SW, Washington, DC 20591; telephone: (202) 493–4981.

SUPPLEMENTARY INFORMATION:

Background

On April 4, 2000, the Federal Aviation Administration published two final rules, the Modification of the Dimensions of the Grand Canyon National Park Special Flight Rules Area and Flight Free Zones (Air Space Modification), and the Commercial Air Tour Limitation in the Grand Canyon National Park Special Flight Rules Area (Commercial Air Tour Limitation). See 65 FR 17736; 65 FR 17708; April 4, 2000. The FAA also simultaneously published a notice of availability of Commercial Routes for the Grand Canyon National Park (Routes Notice). See 65 FR 17698, April 4, 2000. The Commercial Air Tour Limitations final rule because effective on May 4, 2000. The Air Space Modification final rule and the routes set forth in the Routes Notice are scheduled to become effective December 1, 2000. The implementation of the Air Space Modification final rule and the new routes was delayed to provide the air

tour operators ample opportunity to train on the new route system during the non-tour season. The Final Supplementary Environmental Assessment for Special Flight Rules in the Vicinity of Grand Canyon National Park (SEA) was completed on February 22, 2000, and the Finding of No Significant Impact was issued on February 25, 2000.

On May 8, 2000, the United States Air Tour Association and seven air tour operators (hereinafter collectively referred to as the Air Tour Providers) filed a petition for review of the two final rules before the United States Court of Appeals for the District of Columbia Circuit. The FAA, the Department of Transportation, the Department of Interior, the National Park Service and various federal officials were named as respondents in this action. On May 30, 2000, the Air Tour Providers filed a motion for stay pending review before the Court of Appeals. The federal respondents in this case filed a motion for summary denial on grounds that petitioners had not exhausted their administrative remedies. The Court granted the federal respondents summary denial on July 19, 2000. The Grand Canyon Trust, the National Parks and Conservation Association, the Sierra Club, the Wilderness Society, Friends of the Grand Canyon and Grand Canyon River Guides, Inc. (The Trust) filed a petition for review of the same rules on May 22, 2000. The Court, by motion of the Federal Respondents, consolidated that case with that of the Air Tour Providers. The Hualapai Indian Tribe of Arizona filed a motion to intervene in the Air Tour Providers petition for review on June 23, 2000. The Court granted that motion on July 19, 2000.

On July 31, 2000, the Air Tour Providers filed a motion for stay before the FAA. Both the Hualapai Indian Tribe and the Trust filed oppositions to the Air Tour Providers' stay motion.

Petitions

The Air Tour Providers requested that the FAA stay the effective date of the Air Space Modification Final Rule and suspend the effectiveness of the Commercial Air Tour Limitation final rule ''to avoid imposing additional irreparable harm to the Air Tour Providers.'' Motion at 7. The Air Tour Providers also requested that the stay continue pending the outcome of the judicial proceeding currently before the United States Court of Appeals for the District of Columbia Circuit. Specifically, the Air Tour Providers claim that the four-part test elucidated in *Washington Metropolitan Area Transit Commission* v. *Holiday Tours, Inc.*, 559 F.2d 841, 843 (D.C. Cir. 1977) applies to the FAA and thus, based on this test the FAA should grant the motion for stay. In *Washington Metropolitan,* the Court specified the following four factors that it must look at when considering whether to grant a stay pending review. Those factors are as follows: (a) The likelihood that the moving party will prevail on the merits; (b) the prospect of irreparable injury to the moving party if relief is withheld; (c) the possibility of harm to other parties if relief is granted; and (d) the public interest.

The Air Tour Providers claimed that there is a substantial likelihood that they will prevail on the merits because Air Tour Providers will suffer great harm through these rules. Motion at 8. Additionally, the Air Tour Providers argued that the FAA's actions in issuing the final rules were arbitrary and capricious for the following reasons: (1) The goal of ''natural quiet'' has been achieved and thus these final rules are unnecessary, Motion at 9; (2) the agencies offered no ''reasoned analysis'' for ''abandon[ing] the definition of 'natural quiet' they have used since the Overflights Act was enacted, in 1987, substituting a 'detectability' standard for the 'noticeability standard,' '' Motion at 9–10; (3) the agencies failed to distinguish between aircraft sound generated by commercial aircraft and that generated by other aircraft (military, recreational), Motion at 10; (4) the agencies ''failed to develop quiet technology standards for the Grand Canyon or to use the existing quiet technology incentive route,'' Motion at 9–10; (5) the agencies have ''ignor[ed] the issue of safety and abandon[ed] existing rules that ensure aircraft safety,'' Motion at 11; (6) the agencies' failed to ''accommodate the needs of (the elderly, disabled and mobility impaired)'', Motion at 12; (7) the agencies failed to use current data to impose the flight caps, Motion at 12; (8) the agencies relied on a scientifically invalid computer sound model, Motion at 13; (9) the agencies created an exemption to ''protect the economic interest of the Hualapai (sic) * * * while ignoring the economic interests of the Air Tour Providers,'' Motion at 13. The Air Tour Providers also maintained that the agencies' actions violate the Regulatory Flexibility Act (RFA) by calculating the costs to the recreational air tour operators using inadequate data; asserting that operators can offset their losses by raising prices; failing to analyze the costs to recreational air tour passengers; overestimating the benefits to ground visitors; and failing to minimize the economic impact of the final rules. Motion at 14–16.

Additionally, the Air Tour Providers argued that their economic losses are irreparable because the loss threatens the very existence of their business and deprives them of their constitutional rights. Motion at 17–19. The Air Tour Providers further maintained that the agencies would not be harmed if the stay is granted since ''natural quiet'' has already been achieved. Motion at 19. Finally, the Air Tour Providers stated that the public interest strongly favors granting the stay since the ''Final Rules deal with sound that the public cannot hear'' thus, the ''public interest in 'natural quiet' at the Grand Canyon is protected.'' Motion at 19–20. Also, under the public interest prong of the *Washington Metropolitan* test, the Air Tour Providers argued that the sudden massive economic losses would result in significant losses to the local economy. Motion at 20. Additionally, the Air Tour Providers maintained that because the elderly, disabled or mobility-impaired individuals who visit the Grand Canyon by recreational air tour will be ''specifically and unfairly burdened by the Final Rules, the public interest weighs heavily in favor of staying the Final Rules.'' Motion at 21. The Air Tour Providers attached statements from air tour operators, an alternative acoustical analysis, and an alternative economic analysis to support their contentions.

The Hualapai Indian Tribe (Hualapai) submitted its opposition to the Air Tour Providers' request to stay the final rules arguing that the request is an ''untimely request to the Administrator for reconsideration of the final rule.'' Hualapai Opposition at 1. The Hualapai further argued that the fact that the Air Tour Providers waited three months after the effective date of the final rules to request a stay from the Administrator ''strongly indicates the lack of sufficient harm to warrant expedited consideration of the Stay Request, much less to support a stay.'' Hualapai Opposition at 2. The Hualapai maintained that the only way of staying the rules is through the reconsideration provision because there is not other applicable regulation ''for the issuance of a stay in FAA's procedures for rulemaking.'' Hualapai Opposition at 2. Furthermore, the Hualapai argued that the FAA is ''without power to reconsider (and stay) its decision now because the time for reconsideration (and a stay) ran several months before the Air Tour Providers submitted their Stay Request to the Administrator.'' Hualapai Opposition at 4.

The Air Tour Providers replied to the Hualapai Opposition on August 24, 2000, arguing that the Hualapai were not a party to this proceeding and did not have standing to oppose this request. Additionally, the Air Tour Providers stated that the Hualapai Tribe erred in stating that the Air Tour Providers had failed to demonstrate that they meet the irreparable harm standard set forth in *Washington Metropolitan.* The Air Tour Providers argued that they ''Demonstrated conclusively that the Final Rules have caused them irreparable harm, including: (i) The imminent closure of several of the air tour providers' businesses; (ii) the severe and permanent downsizing of other air tour providers' businesses; (iii) the permanent, and irreparable interference with air tour providers' contractual relationships with their domestic and foreign booking agents; and (iv) the deprivation of the air tour providers' constitutional rights under the Equal Protection component of the Fifth Amendment.'' Reply to Hualapai at 2.

Additionally, the Air Tour Providers took issue with the Hualapai's recharacterization of the Air Tour Providers' request, arguing that it did not ask ''the FAA to 'reconsider' its decision. That matter is now before the Court of Appeals. Instead, the Air Tour Providers asked the FAA to stay the implementation of its rules.'' Reply to Hualapai at 2. In response to the Hualapai's assertion that the FAA lacks the power to grant a stay request, the Air Tour Providers noted that the FAA affirmatively stated that it has the authority to stay the effective date of action pending judicial review pursuant to 5 U.S.C. section 705. Reply to Hualapai at 2–3. Furthermore, the Air Tour Providers noted that the Court's Order denying the Air Tour Providers' Motion for Stay stated that under the Federal Rules of Appellate Procedure, the Air Tour Providers were required to file a request for a stay pending judicial review first with the FAA because they had not demonstrated that to do so was ''impracticale.'' Reply to Hualapai at 3. Finally, the Air Tour Providers maintained that the request for a stay is not time-barred because 14 CFR 11.73 does not apply.

The Trust also submitted an opposition to the Air Tour Providers' Motion, arguing the following: (1) The request is time barred; and (2) even if the FAA considers the Motion, the Air Tour Providers have failed to demonstrate that they satisfy the four-pronged test. First, the Trust maintained that the Stay Motion was filed in violation of 14 CFR 11.73 which permits a request for reconsideration to be filed within 30 days after the rule is published. The Trust noted that the Air Tour Providers filed their request 118 days after publication—88 days after the regulatory deadline. Trust Opposition at 2.

Second, the Trust argued that the Air Tour Providers failed to demonstrate that the FAA adopted the final rules arbitrarily and capriciously or abused its discretion. The Trust maintained that the Air Tour Providers' argument that the final rules violate the Administrative Procedures Act (APA) review almost entirely on evidence not in the administrative record. See Trust Opposition at 4–5. In response to the Air Tour Providers argument that the FAA violated the RFA, the Trust argued that Section 603 of the RFA is not subject to judicial review. The Trust also maintained that the ''RFA does not require agencies to show that economic impacts of their rules were *absolutely* minimized; it requires only a description of steps taken to minimize *significant* economic impact on small entities *consistent with* the stated objectives of the applicable statutes.'' Trust Opposition at 9 (emphasis in original quotation).

The Trust also argued that the Air Tour Providers failed to show that the balancing of interests and injuries weighs in their favor since economic loss does not constitute irreparable harm. Trust Opposition at 9. Moreover, the Trust noted that ''other parties, such as the Grand Canyon Trust, et al. will be *significantly* injured if the FAA grants the requested stay and suspension of the final rules.'' Trust Opposition at 10 (emphasis in original quotation). The Trust stated that ''Members of the Grand Canyon Trust, et al. are frequent backcountry users who take great strides to enjoy unique wilderness settings * * * Air traffic noise destroys the wilderness experience and constitutes a significant injury to an interest protected by federal law.'' Trust Opposition at 10. Furthermore, the Trust argued that Congress has already determined the public interest at stake when it required determination that the ''public interest would be served by timely restoration of natural quiet in the Grand Canyon.'' Trust Opposition at 10.

The Air Tour Providers replied to the Trust's Opposition on September 14, 2000. The Air Tour Providers maintained that the Request for Stay is an administrative proceeding before the FAA and is completely separate and apart from any legal proceeding to which the Trust is a party. Reply to Trust at 1. The Air Tour Providers thus maintained that the Trust does not have the right to file a response. Furthermore, the Air Tour Providers took issue with the Trust's argument that the Air Tour Providers are time barred from filing their Request for Stay. The Air Tour Providers made the same basic argument in response to the Hualapai's Opposition. See Reply to Trust at 1–2.

The Air Tour Providers argued that the FAA can in fact consider evidence not in the administrative record and there is no authority barring the FAA from so doing. Reply to Trust at 2. The Air Tour Providers maintained that the FAA is ''required to consider evidence offered by Air Tour Providers of the irreparable harm they have suffered as a result of the Final Rules.'' Reply to Trust at 2.

The Air Tour Providers also took issue with the Trust's assertion that the Air Tour Providers have failed to show that they are likely to prevail in their claim that the final rules are arbitrary and capricious. Specifically, the Air Tour Providers argued that the Trust's position that the Air Tour Providers have provided only ''thin evidence'' that natural quiet was restored in the Grand Canyon prior to implementation of the Final Rules is without merit. The Air Tour Providers point to the ''sworn testimony of two acoustical experts before the Subcommittee on National Parks and Public Lands of the United States House of Representatives on two separate occasions'' and the declaration by John Alberti. Reply to Trust at 3–4.

The Air Tour Providers also argued that the Trust's statement that the NPS' computer sound model should be given deference because ''it has 'expertise' in the field of acoustical measurements'' is without support. Reply to Trust at 4. The Air Tour Providers asserted that NPS is ''not entitled to any such deference when NPS cannot support its approach even in theory.'' *Id.* The Air Tour Providers then point to a letter from the FAA to NPS in which the FAA allegedly characterized the NPS' methodology as ''unrealistic,'' ''arbitrary and artificial,'' and ''not scientifically valid.'' *Id.*

The Air Tour Providers also denied the validity of the Trust's contention that the Air Tour Providers cannot support their claims about the significant impact of these rules on the elderly and mobility impaired individuals. Reply to Trust at 5.

In response to the Trust's assertion that Air Tour Providers ''cannot even bring the first RFA claim because it is a challenge of the initial regulatory flexibility analysis and therefore, is not subject to review,'' the Air Tour Provides stated that they are challenging the ''final regulatory flexibility analysis

of January 2000'' and that challenges under section 604 of the RFA are subject to judicial review. Reply to Trust at 6. The Air Tour Providers also asserted that the Trust's argument that the FAA satisfied its obligations under the RFA by minimizing the significant economic impact is without merit because the FAA has ''refused to take such steps'' *Id.* Finally, the Air Tour Providers maintained that the Trust's contention that the parties it represents will be significantly injured if the FAA grants the Stay Request is flawed because the standard is not significant injury but ''irreparable injury or harm.'' Rely to Trust at 7. The Air Tour Providers maintained that only they have demonstrated irreparable injury. *Id.*

Agency Response

A. The Air Tour Providers Request Is Not Time Barred

The FAA is not considering this request to be time-barred-While the FAA would not normally consider a stay motion filed 188 days from the issuance of a rule to be timely, in this instance, the Air Tour Providers first sought remedy in the United States Court of Appeals for the District of Columbia Circuit. The government then filed a Motion for Summary Denial of the Air Tour Provider's motion based on the fact that the Air Tour Providers did not file first before the FAA and thus exhaust its administrative remedies as required by the Federal Rule of Appellate Procedure Rule 18. The Court granted the government's Motion for Summary Denial on July 19, 2000. The Air Tour Providers then filed this Stay Motion with the FAA on July 31, 2000. Thus, the FAA does not intend to act in bad faith by refusing to even consider the Air Tour Providers' Motion because of the length of time that has passed between the issuance of the rule and the Air Tour Providers' stay request to the FAA. Notably, the Air Tour Providers filed their Motion with the FAA twelve days after the Court granted the government's Motion for Summary Denial.

B. The Four-Pronged Test Enunciated in Washington Metropolitan Is Not Applicable to an Administrative Proceeding

The Department of Transportation has previously found that the four-pronged test enumerated in *Washington Metropolitan* for deterring whether to grant a stay of rules pending litigation is applicable to the appellate courts only. Albert O. McCauley; Herbert Gene Vance; Duncan Black Parker, FAA Docket CP89SO0149; FAA Docket CP89SO0137; FAA Docket CP89SO0182, 1990 FAA LEXIS 200 (January 12, 1990). ''The primary stay consideration at the trial level usually relate[s] to whether the public interest or the interest of the private parties involved, or both would be served by a delay of the proceeding.'' *Id.* at 7. The public interest, in this case, has been expressed by Congress in Public Law 100–91—to substantially restore natural quiet to the Grand Canyon National Park. Congress gave the NPS broad discretion to define substantial restoration of natural quite. The agencies have determined that the final rules at issue in this stay request would make substantial gains in achieving this goal. Thus, to delay or suspend the effective date of these rules would be contrary to the purpose of the Congressional mandate, unless another public interest or private interest was served by a stay. The private interests alleged by the Air Tour Providers primarily concern the economic impact of the rules. These interests have already been considered by the FAA in the final rules. There is no additional evidence presented by the Air Tour Providers that warrants shifting the balance achieved by these rules. Thus, the FAA has determined that implementing the final rules furthers the public interest by limiting the number of air tours that are permitted in the Park and establishing new routes and air space configurations in the Special Flight Rules Area, thereby promoting the statutory goal of substantial restoration of natural quite.

C. The Air Tour Providers Have Not Satisfied the Four-Part Test Enunciated in Washington Metropolitan

Even if the four-part test enunciated in *Washington Metropolitan* is applicable to the FAA's administrative proceeding, the Air Tour Providers have not demonstrated that the test is satisfied and thus, that a stay of the Commercial Air Tour Limitations final rule and the Air Space Modification final rule is warranted.

1. The Air Tour Providers Have Not Demonstrated That They Are Likely To Prevail on the Merits

In support of their contention that the FAA has violated the APA by issuing the final rules in an arbitrary or capricious manner, the Air Tour Providers submit contrary acoustical data in an attempt to discredit the agency's analysis supporting the need for the final rule. See Motion for Stay, Exhibit A, Statement of John Alberti. Mr. Alberti takes issue with the sound studies completed by the FAA and NPS in the 1990's and states that he ''performed a neutral study of aircraft sound levels in the Grand Canyon.'' Alberti Statement at 2. Mr. Alberti's statement is similar to a statement filed in the public docket that is part of the administrative record to this proceeding, see Administrative Record, Document Number 69, Comment No. 38.

As explained in the final rule, the FAA and NPS determined after the 1996 final rule that the aircraft cap did not adequately limit growth and noise modeling ''indicated that the potential growth in the number of operations could erode gains made toward substantial restoration of natural quiet.'' See 65 FR at 17713. The NPS' conclusion that substantial restoration was not going to be achieved under SFAR 50–2, as amended in December 1996, was explained in detail in the SEA. See SEA at 1–5, 4–17—4–22. The fact that the Air Tour Providers have submitted acoustical studies to contradict the studies conducted by FAA and NPS does not demonstrate that the FAA violated the APA in issuing the final rules. It simply indicates that scientific or statistic analyses can differ. The law is clear, however, that the Court ''will give due deference to the agency especially when the agency action involves evaluating complex scientific or statistical data within the agency's expertise.'' *Natural Resources Defense Council, Inc.* v. *EPA,* 194 F.3d 130 (D.C. Cir., 1999). In this case, the FAA has demonstrated a rational connection between the facts and its choice and thus it has satisfied the rationality standard.

The Air Tour Providers argument that the agencies acted arbitrarily and capriciously by ''abandoning the definition of natural quiet they have used since the Overflights Act was enacted, in 1987, substituting a ''detectability'' standard for the ''noticeability standard'' is also flawed. See Motion at 8. It is not unexpected that over time new information, data and technology might result in a well-considered refinement in methodology. When such a situation occurs, ''* * * an agency changing its course must supply a reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored. * * *'' *Greater Boston Television Corp.* v./ *FCC,* 444 F.2d 841 (D.C. Cir., 1970); *cert. denied,* 403 U.S. 923, 29 L. Ed. 2d 701, 91 S. Ct. 2233 (1971).

Section 3 of Public Law 100–91 authorizes the Secretary of Interior to provide continued advice and recommendations to the FAA regarding the interpretation of policy on noise

impact assessment at GCNP. Section 3 further directs that the FAA adopt the recommendations of NPS ''without change unless the Administrator determines that implementing the recommendations would adversely affect aviation safety.'' The two agencies have been seeking to achieve substantial restoration of natural quiet at GCNP pursuant to these congressional mandates. Therefore, in the December 1996, Final EA, as part of the noise methodology for determining substantial restoration of natural quiet and based upon NPS' recommendations, the FAA defined the threshold for evaluating the percent of time each day (12 hour daytime period) that aircraft would be audible in the park as three decibels above ambient. The use of this noticeability standard and methodology was upheld in *Grand Canyon Air Tour Coalition* v. *FAA,* 154 F.3d 455 (D.C. Cir., 1998).

Since 1996, NPS has refined the noise impact assessment methodology to be used in defining substantial restoration of natural quiet at GCNP to more accurately reflect the potential for aircraft noise impacts in the park based on the specific characteristics of the different areas of the Park. NPS explained its rationale for refining the methodology used to define substantial restoration of natural quiet in its Public Notice ''Change in Noise Evaluation Methodology for Air Tour Operations Over Grand Canyon National Park, 64 FR 3969, published January 26, 1999. See Administrative Record, Document 108. The NPS also published a Notice of Disposition of Public Comments and Adoption of Final Noise Evaluation Methodology, 64 FR 38006, on July 14, 1999. See Administrative Record, Document 121. The January 26, 1999, **Federal Register** Notice explained that the standard for substantial restoration of natural quiet remained unchanged and only the evaluation methodology was to be refined. 64 FR at 3969–3970; see also 64 FR 38006, 38008. NPS further explained that it would apply two different threshold levels to different parts of the Park based upon its analysis of regions of the park that were determined to have greater or less noise sensitivity. Those areas of the Park encompassing the developed areas would be evaluated using the three decibels above ambient threshold (*i.e.,* Zone 1), while areas without development, or ''back country'' areas would be evaluated using the eight below ambient threshold (i.e., Zone 2). NPS described at length how it developed the eight decibels below ambient threshold, the aircraft noise monitoring, natural ambient measurements and INM conversion and calculations required in its July 14, 1999 Notice and Disposition of Comments. 64 FR 38006–38012. In the final rule for the Commercial Air Tour Limitation, NPS and FAA further clarified that ''the minus 8 decibels below ambient is not the sound level at which aircraft must operate or the acoustic level that must be achieved. It is a mathematical conversion necesitated by the computer modeling. The minus 8 decibels below ambient describes the 'starting point' at which the measurement of substantial restoration begins.'' 65 FR at 17721. Therefore, the refinement of the thresholds for evaluating substantial restoration of natural quiet at GCNP was not arbitrary and capricious nor contrary to Public Law 100–91.

In their reply to the Trust's Response to the Administrative Motion for Stay, the Air Tour Provider's cite to a letter from FAA to NPS dated June 6, 2000, to support their contention that the FAA has criticized the NPS' noise methodology. This letter contained FAA comments to NPS on its Draft Director's Order #47, ''Soundscape Preservation and Noise Management.'' The FAA has never interpreted Director's Order No. 47 as applying to GCNP. The quotes relied upon by the Air Tour Providers to support their assertion that the FAA criticized the NPS noise methodology actually addressed certain assumptions, quantitative assessments and approaches to evaluating the baseline noise environment, aircraft noise impacts and noise levels proposed by NPS to be utilized in National Park units that do not have legislative directives. Therefore, the refined evaluation methodology for substantial restoration of natural quiet at GCNP is not the subject of the June 6th letter, and the Air Tour Providers references to this letter are both out of context and inapplicable to the subject of the Motion for Stay.

The Air Tour Providers also have failed to demonstrate that the FAA acted arbitrarily and capriciously by focusing on aircraft sound generated by commercial air tour operators. Public Law 100–91 set forth a broad mandate that the FAA issue regulations, pursuant to recommendations by NPS, to regulate aircraft overflights so as to substantially restore natural quiet at the Park. Congress gave the NPS maximum discretion to determine the best means to effect the goal. NPS recommended an operations limitation on air tour aircraft in its Report to Congress. See Recommendation 10.3.10.3, Report on Effects of Aircraft Overflights on the National Park System, September 12, 1994. Furthermore, the record supports the decision to focus on commercial air tour aircraft. As the FAA stated in the Commercial Air Tour Limitations Final Rule, ''noise generated by aircraft conducting commercial air tours presents a specific type of problem because these aircraft generally are operated repeatedly at low altitudes over the same routes.'' 65 FR at 17710. Additionally, FAA data indicates that the volume of commercial air tour traffic is much higher then general aviation traffic. See Regulatory Evaluation Final Rule, Commercial Air Tour Limitation in the Grand Canyon National Park Special Flight Rules Area, at 21 (January 21, 2000). Thus, the FAA's focus on commercial air tour aircraft is supported by the findings in the Record and the broad mandate set forth in Public Law 100–91.

The FAA also did not act arbitrarily and capriciously by determining to impose a limitation on commercial air tours instead of adopting the quiet technology standards proposed in December 1996. In the final rule on Commercial Air Tour Limitations, the FAA reiterated its commitment to developing a quiet technology standard. 65 FR at 17714. However, due to the numerous issues raised by commenters in the NPRM on Noise Limitation of Aircraft Operations in the Vicinity of Grand Canyon National Park (Docket 29770), issuance of the final rule in the Noise Limitations rulemaking has taken longer than anticipated. It is noteworthy that in that rulemaking as well, many commenters maintained that imposition of quiet technology would pose an unreasonable financial burden on the air tour industry. See 65 FR 17714. Because the agencies found that growth in the industry had only temporarily arrested due to economic factors, they determined that an operations limitation was necessary to ''make significant strides towards meeting the statutory goal'' by the 2008 deadline set by the President of the United States. 65 FR 17714; see 65 FR 17709 (explaining the goals set forth in the President's memorandum of April 22, 1996).

Additionally, the final rules at issue in this stay request were issued prior to the enactment of the National Park Air Tour Management Act. Thus, contrary to the Air Tour Providers' assertions, the issuance of the Commercial Air Tour Limitations final rule and the Air Space Modification final rule does not violate any law. The FAA also notes the fact that operators made equipment decisions to purchase different aircraft is not persuasive since the equipment decision was voluntary and speculative at best. The FAA never finalized the

Noise Limitations Final Rule, thus the FAA has not mandated a definition of quiet technology air tour aircraft.

Contrary to the Air Tour Providers' accusations, the FAA considered comments by the air tour operators on the route system in devising the routes. The Air Tour Providers' Motion contains statements by Ms. Brenda Halverson, Papillon Airways, Inc., and Mr. Ron Williams, AirStar Helicopters, opposing the new route structure that goes up over the north rim because there is no turnaround in the Zuni Corridor for helicopters. NPS, in its Report to Congress, indicated that eliminating two way traffic in the flight corridors was critical to achieving substantial restoration of natural quiet. Thus, where possible, FAA has attempted to minimize two-way traffic in the Dragon and Zuni Point Corridors. The Dragon Corridor has a turnaround for helicopters only. The Zuni Point Corridor has a turnaround for fixed wing aircraft. Both helicopters and fixed wing aircraft operating in the Zuni Point Corridor have the option of going up over the North Rim, or if necessary using Black 2 and Green 3 routes that go east around the Desert View Flight Free Zone. The movement of the Black 2 and Green 3 was necessary in order to protect Traditional Cultural Properties identified during the consultation process with the Native American Tribes. See 65 FR 17739; SEA at 4–40–41, Appendix H.

Additionally, the FAA finds that the Air Tour Providers' allegations that the new routes are unsafe are without merit. The new routes were developed based on ''airspace configurations, safety considerations, the goal of substantial restoration of natural quiet in the GCNP, economic considerations, consultation with Native American tribes'' and comments received in response to the initial Notice and prior route proposals. 64 FR 37191 (July 9, 1999). As is typical when routes are change, the FAA flight checked the routes for safety. Additionally, the FAA created a computer model to assess the impact of peak conditions on the new route system. See 65 FR 17719–20. The FAA's primary concern is that air tour operators do not concentrate the use of their allocations into one season which could pose a safety concern and impede the goal of achieving substantial restoration of natural quiet. *Id.*

The Air Tour Providers assertion that these rules are arbitrary and capricious because they violate the Rehabilitation Act is unsubstantiated. First, the Air Tour Providers make no specific allegation as to the provisions of the Rehabilitation Act that are violated and the citation referenced in the quotation contained in the Motion is not applicable. Second, The Air Tour Providers' evidence as to the percentage of air tourists who are mobility impaired, elderly or handicapped varies dramatically depending upon which operator is providing the information. (See Statement of Brenda Halverson supporting Motion for Stay indicating that over 75% of the Air Tour Provider's clients are handicapped, mobility impaired or elderly; Statement of Ron Norman supporting Motion for Stay indicating no less than 40% of AirStar Helicopters clients account for handicapped, mobility impaired or elderly; Comments of Grand Canyon Air Tour Council, September 3, 1999, indicate that about 20% of air tourists are ''physically challenged.'') The FAA noted in the Commercial Air Tour Limitations Final Rule that ''over 50% of the air tour visitors to GCNP also visit the Park on the ground. Also, people who are handicapped, impaired or elderly will continue to enjoy access to the GCNP.'' 65 FR 17716. Thus people who are handicapped, mobility impaired, or elderly will have the same ability to access the Grand Canyon by air as other individuals.

The Air Tour Providers also attack FAA's choice of base year for the flight limitation because the FAA did not use current data. The FAA's choice of base year was reasonable and is thoroughly discussed in the Commercial Air Tour Limitations Final Rule wherein the FAA stated:

> Data on operations levels for the year May 1, 1997 through April 30, 1998 comprised the most accurate and current data available during the period that this rule was being drafted. Data subsequently collected from the industry for the year May 1, 1998 through April 30, 1999 show a slight decline in the number of total operations from the previous year. Thus the FAA and NPS believe that the period from May 1, 1997 through April 30, 1998 is a representative year for the purpose of imposing this allocation. See 65 FR at 17718.

At the time this rule was being drafted, the data for the period May 1, 1999–April 30, 2000 was not available.

The Air Tour Providers' assertion that the use of the base year data violates the RFA and that the FAA ignored the Small Business Administration's (SBA) comments is unsubstantiated. The SBA did not provide any comments to the docket on the final rules until December 20, 1999 where SBA presented its concerns at a meeting between the Office of Management and Budget, the FAA and representatives of the Air Tour Providers. (In fact, representatives of the Office of Economics and Policy attempted to meet with SBA several times during the time period the final rule was being drafted, but SBA was unable to attend scheduled meetings.) The comment period to the NPRM closed September 7, 1999. At the OMB meeting the SBA noted that ''the use of future years, or an average of the next 2 years, might be an alternative that more accurately reflects the marketplace within the Grand Canyon tour industry and will aid in the forecasting industry growth rates.'' See Administrative Record, Document 70, Comment 277. The FAA believes its analyses of the subsequent base year dispels any concern that this year was an aberration; instead it appears that the base year is part of the business cycle. See Exhibit A, Statement of Alan Stevens to Motion to Stay.

The Air Tour Providers' claim that the agencies' were arbitrary and capricious in relying upon an invalid computer sound model and biased sound data is equally unfounded. The Air Tour Providers rely on statements made by John Alberti asserting that the computer model used by the agencies is without scientific basis. To the contrary, the ''FAA chose to use the Integrated Noise Model (INM) for GCNP analysis because of its: (1) Widespread scientific acceptance; (2) use of methodology that conforms to industry and international standards; (3) measurement-derived noise and performance data; (4) ability to calculate noise exposure over varying terrain elevation; and (5) adaptability and reliability for assessing a variety of situations, including GCNP noise impacts.'' See SEA at 4–5—4–6. The INM is well accepted in the scientific community and meets the standards of the Society of Automotive Engineers Aerospace Information Report (Air) as well as the International Civil Aviation Organization (ICAO) Circular. See SEA at 4–6. The INM was specifically modified for GCNP purposes. These modifications, along with the aircraft and operational data inputted for modeling, assessing and predicting aircraft noise at GCNP were analyzed and explained in detail in the SEA.

The Air Tour Providers did not provide an adequate basis for their statement that the FAA relied on biased sound data. The NPS provided information on data collection in its Disposition or Comments. 64 FR 38006. Additionally, the FAA provided aircraft and operational data utilized in its noise modeling in the SEA. Again, the law is clear, the Court ''will give due deference to the agency especially when the agency action involves evaluating complex scientific or statistical data within the agency's expertise.'' *Natural*

Resources Defense Council, Inc. v. *EPA,* 194 F.3d 130 (D.C. Cir., 1999).

Finally, as stated earlier, the final rules were issued and the accompanying SEA and Record of Decision were completed prior to the enactment of the National Parks Air Tour Management Act cited by the Air Tour Providers. Therefore, the agencies are not in violation of the law. Regardless, the INM is a reasonable and professionally accepted method for assessing and predicting aircraft noise impacts and therefore the agencies' reliance on the model and aircraft and operational data is not arbitrary and capricious.

The Air Tour Provider's assertion that the exception created for operators landing at the Hualapai reservation under contract with the Hualapai Tribe is arbitrary and capricious is contrary to law. When Congress passed the Indian Reorganization Act of 1934 an overriding purpose of that Act was ''to establish machinery whereby Indian tribes would be able to assume a greater degree of self-government both politically and economically.'' *Morton* v. *Mancari et al.,* 417 U.S. 535, 541; 94 S.Ct. 2474 (1974). Congress in 1934 ''determined that proper fulfillment of its trust required turning over to the Indians a greater control of their own destinies.'' Id. at 552. The FAA determined that ''the Hualapai would be significantly adversely impacted from an economic perspective if the operations limitation were applied to operators servicing Grand Canyon West Airport in support of the Hualapai Tribe.'' 65 FR at 17718; see pages 17714–17715 and 17726–17727 (regarding trust responsibility and cost impact on tribe); see also Final Regulatory Evaluation at 98–110. Any operator has the opportunity to obtain the benefits of this exception (i.e., relief from allocations) provided the operator has a contract with the Hualapai Tribe and satisfies the conditions of the exception. The Hualapai decide which operators to contract with.

The exception from allocations applies to the air tour operators servicing the Hualapai Reservation. Contrary to assertions by the Air Tour Providers, this exception does not violate the Air Tour Provider's constitutional rights and in fact, the Air Tour Providers do not actually identify any constitutional rights that have been violated. Furthermore, the Air Tour Providers ignore the fact that if the Hualapai Tribe is enjoying ''unparalleled economic growth,'' the Air Tour Providers also are benefiting since they are providing the flight service to the Hualapai reservation.

2. The Air Tour Providers Have Not Substantiated Irreparable Economic Losses Nor Have They Demonstrated the Quantum of Harm Is Great

In showing irreparable harm, ''the movant must provide the proof that the harm has occurred in the past and is likely to occur again, or proof indicating that the harm is certain to occur in the near future.'' *Wisconsin Gas Co.* v. *FERC,* 758 F.2d 669, 673 (D.C. Cir. 1985). The *Wisconsin* Court further stated that ''economic loss does not, in and of itself, constitute irreparable harm.'' *Id.* Thus, if the Air Tour Providers are in fact losing customers, it does not constitute irreparable harm since the loss of customers is due to the reduction in flights in the SFRA, which is the purpose of the flight limitation. As discussed above, the reduction in flights is necessary in order to achieve the statutory goal of substantial restoration of natural quiet and to meet the President's goal for achieving substantial restoration by 2008.

The Air Tour Providers also do not provide any direct evidence that the harm they are suffering is immediate and imminent and will occur over the next 6–9 months while this litigation is ongoing. The FAA's Commercial air tour limitations final rule became effective May 4, 2000. The operators received a full years worth of allocations for the year 2000. The operators do not provide evidence that they are close to exhausting or have exhausted these allocations and thus must stop conducting business. In fact, Mr. Alan Stevens of Grand Canyon Airlines only acknowledges the theoretical possibility that he could exhaust his allocations. See Statement of Alan Stevens at page 4. Whether the operators will then incur damages for the year 2001 is also theoretical and depends on demand for air tours during the portion of 2001 that coincides with the litigation. Thus, at this point, there is no clear evidence submitted by the Air Tour Providers that the operators currently are losing money for the year 2000 because of the allocation requirement or that they will lose money for the first half of 2001 because of this requirement. Additionally, while some of the operators' statements assert they may go out of business with the imposition of the limitations rule and the routes, they do not provide direct evidence to demonstrate that their demise is due to these rules and not to the cumulative effect of past business conditions in the market.

The Air Tour Providers also argue irreparable injury because the FAA has not minimized the impact of the longer tour routes or the ''use it or lose it provision.'' The FAA has attempted to minimize the impact of the longer routes to the extent possible by creating a fixed wing turnaround in the Zuni Point Corridor. The Dragon corridor contains a turnaround for helicopters. See 65 FR at 17698. With regard to the use it or lose it provision, the FAA eliminated the peak/non-peak distinction that was initially contained in the NPRM. Thus, Ron Norman's assertions that the ''FAA will rescind any flight allocations that go unused during either the Peak or non-peak season'' is unfounded. See Exhibit A Statement of Ron Norman at paragraph 7.

Furthermore, the FAA adopted suggestions by commenters to soften the use it or lose it provision by lengthening the time period. In fact, the FAA adopted a provision similar to Papillon's suggestion in its comments whereby after 180 days of inactivity, the operator simply sends in a letter of intent to operate that indicates why the operator did not operate for 180 days and when it intends to resume business. The operator then may have up to another 180 days to resume operations, as approved by the Flight Standards District Office. An operator would have up to 360 days of inactivity, as suggested by Air Star Helicopters in its comments. See 65 FR 17721–17722.

The FAA's Regulatory Flexibility Act analysis comports with the requirements of the RFA. See generally, Final Regulatory Evaluation, Commercial Air Tour Limitations Final Rule and Airspace Modification Final Rule, January, 2000. Providing statistical analysis to counter an agency's own analysis is not sufficient to show that an agency acted arbitrarily and capaciously since a court will ''give due deference to the agency especially when the agency action involves evaluating complex scientific or statistical data within the agency's expertise.'' See *NRDC* v. *EPA* 194 F.3d 130 (D.C. Cir., 1999). Furthermore, the fact that the FAA did not proceed first with the Quiet Technology Rulemaking or some other alternative now preferred by the Air Tour Providers is not indicative that the agency violated the APA. The law is clear that an ''agency is entitled to the highest deference in deciding priorities among issues, including the sequence and grouping in which it tackles them.'' *Allied Local and Regional Manufacturers Caucus, et al.,* v. *EPA,* 215 F.3d 61 (2000). The agency provided a detailed economic analysis and RFA analysis that addressed alternatives to the adopted alternative and discussed reasons why those

alternatives were not adopted. Thus it has satisfied its mandate under the RFA.

3. The Air Tour Providers Have Not Demonstrated That the Weighing of the Interests Favors a Stay

The FAA, in enacting these rules is carrying out the statutory mandate set forth in Public Law 100–91—to substantially restore natural quiet in the GCNP. It has been 12 years since the enactment of this legislation and the FAA has attempted to work with the Air Tour Providers, the Indian Tribes, the environmental groups and the National Park Service to come to a resolution with regard to the means of substantially restoring natural quiet. The FAA believes that this rule achieves the proper balance that Congress sought in adopting Public Law 100–91 between the interests of the Air Tour Providers and those of the environmental interests and makes significant gains in substantial restoration of natural quiet. See 65 FR 17713. This balance is evidenced by the fact that the government has been sued in the District of Columbia Circuit Court of Appeals for the United States by one party (Air Tour Providers) claiming the government has done too much in effecting the goal of Public Law 100–91 and by another party (Grand Canyon Trust, *et al.*) claiming the government has not gone far enough in fulfilling the statutory mandate. The Air Tour Providers have not demonstrated why their interests outweigh the interest expressed by Congress in passing Public Law 100–91.

D. Conclusion

Given that the Air Tour Providers cannot prevail under either the public interest test followed by the Department of Transportation, or the *Washington Metropolitan* test followed by the Circuit Court, the FAA hereby denies the Air Tour Providers' Motion to Stay the final rules.

Issued in Washington, DC on October 3, 2000.

Jane F. Garvey,

Administrator.

[FR Doc. 00–25952 Filed 10–10–00; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

21 CFR Part 25

[Docket No. 00N–0085]

National Environmental Policy Act; Food Contact Substance Notification System; Confirmation of Effective Date

AGENCY: Food and Drug Administration, HHS.

ACTION: Direct final rule; confirmation of effective date.

SUMMARY: The Food and Drug Administration (FDA) is confirming the effective date of August 24, 2000, for the direct final rule (DFR) that appeared in the **Federal Register** of May 11, 2000 (65 FR 30352). The DFR amended FDA's regulations on environmental impact considerations. This document confirms the effective date of the DFR.

DATES: Effective date confirmed: August 24, 2000.

FOR FURTHER INFORMATION CONTACT: Mitchell A. Cheeseman, Center for Food Safety and Applied Nutrition (HFS–215), Food and Drug Administration, 200 C St. SW., Washington, DC 20204, 202–418–3083.

SUPPLEMENTARY INFORMATION: In a DFR published in the **Federal Register** of May 11, 2000 (65 FR 30352), FDA amended its regulations on environmental impact considerations as part of the agency's implementation of the FDA Modernization Act (FDAMA) of 1997. FDAMA amended the Federal Food, Drug, and Cosmetic Act (the act) by establishing a notification process for authorizing new uses of food additives that are food contact substances. The DFR amended the regulations in 21 CFR 25.20 to add to the list of those actions that require an environmental assessment allowing a notification submitted under section 409(h) of the act (21 U.S.C. 348(h)) to become effective and in 21 CFR 25.32(i), (j), (k), (q), and (r) to expand the existing categorical exclusions from the requirement of an environmental assessment to include allowing a notification submitted under section 409(h) of the act to become effective.

FDA solicited comments concerning the DFR for a 75-day period ending July 25, 2000. FDA stated that the effective date of the DFR would be on August 24, 2000, 30 days after the end of the comment period, unless any significant adverse comment was submitted to FDA during the comment period.

FDA received only one comment (from a trade association) on the DFR, which reiterated the association's views presented in response to an agency public meeting held prior to the initiation of this rulemaking. FDA has determined that the received comment is not a significant adverse comment for several reasons. First, in the preamble to the DFR, FDA referenced the association's prior submission and addressed its substance. Second, the comment does not dispute (or even directly address) the analysis presented in the DFR. It raises no new arguments and provides no new information for the agency's consideration. Finally, the association expressly characterizes the comment as not a ''significant adverse comment'' and supports the rule becoming effective as drafted.

Therefore, under the Federal Food, Drug, and Cosmetic Act and under authority delegated to the Commissioner of Food and Drugs, the amendments issued thereby became effective August 24, 2000.

Dated: October 3, 2000.

Margaret M. Dotzel,

Associate Commissioner for Policy.

[FR Doc. 00–26022 Filed 10–10–00; 8:45 am]

BILLING CODE 4160–01–F

DEPARTMENT OF TRANSPORTATION

Coast Guard

33 CFR Part 117

[CGD11–00–009]

Drawbridge Operation Regulations; Mokelumne River, CA

AGENCY: Coast Guard, DOT.

ACTION: Notice of temporary deviation from regulations.

SUMMARY: The Commander, Eleventh Coast Guard District has approved a temporary deviation to the regulations governing the opening of the Millers Ferry swing bridge, mile 12.1, over the Mokelumne River at Walnut Grove, CA. The approval specifies that the bridge need not open for vessel traffic from 8 p.m. to 6 a.m., October 9 through October 13, 2000. The purpose of this deviation is to allow Sacramento County to perform essential maintenance on the bridge.

DATES: Effective period of the deviation is 8 p.m., October 9, 2000 through 6 a.m., October 14, 2000.

FOR FURTHER INFORMATION CONTACT: Mr. David H. Sulouff, Chief, Bridge Section, Eleventh Coast Guard District, Building 50–6, Coast Guard Island, Alameda, CA 94501–5100, phone (510) 437–3516.