COALITION TO PROTECT AMERICA'S NATIONAL PARKS MARIN AUDUBON SOCIETY, PUBLIC EMPLOYEES FOR ENVIRONMENTAL RESPONSIBILITY, WATERSHED ALLIANCE OF MARIN

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Sandra Fox, Environmental Protection Specialist
Federal Aviation Administration
Submitted to: NPS Planning, Environment and Public Comment System,
https://parkplanning.nps.gov/commentForm.cfm?documentID=147892

PUBLIC COMMENT – Notice of Availability of Proposed Voluntary Agreement

Dear Ms. Fox,

The **Coalition to Protect America's National Parks**, **Marin Audubon Society, Public Employees for Environmental Responsibility (PEER)**, and **Watershed Alliance of Marin** submit this comment on the above-referenced proposed Voluntary Agreement (V.A.) for Golden Gate National Recreation Area, San Francisco Maritime National Historical Park, Point Reyes National Seashore, and Muir Woods National Monument (Federal Register 90:229, Tuesday, Dec. 2, 2025, pp. 55328-329). This comment addresses the failure of the National Park Service (NPS) and Federal Aviation Administration (FAA) to comply with the National Parks Air Tours Management Act (NPATMA) and other applicable laws and rulings.

We are concerned that the terms of the V.A. do not adequately protect park resources and the visitor experience. In addition, the mechanisms for ensuring compliance with the terms of the V.A. are inadequate.

Our specific concerns are as follows:

Violation of D.C. Circuit Court of Appeals Stay Order

The proposed V.A. template does not comply with the D.C. Circuit Court of Appeals' decision on the merits in the *Marin Audubon et al. v. FAA et al.* decision, 121 F. 4th 902 (D.C. Cir. 2024), nor with its Order filed on February 28, 2025, on the Joint Unopposed Motion to Stay Issuance of the Mandate (Document #2103298). For example, the latter Order states, referring to the Court's decision on the merits (p. 2):

> *We agreed with a group of organizations and one area resident (Petitioners) that the Agencies' NEPA analysis was arbitrary and capricious. See id. at 917. In so holding we stated that, "[i]f the Agencies and Petitioners desire to keep the*

current Plan in place while the Agencies restart their NEPA review, the parties may move for a stay of our mandate." Id. at 918

Because the proposed V.A. does not involve any National Environmental Policy Act (NEPA) review whatsoever it plainly does not meet the fundamental point of the Court's Order, which was to allow the agencies to "restart" their review because their previous "NEPA analysis was arbitrary and capricious". Other Court language supports our position as well. The Order makes clear that the 12-month length of the stay of the mandate was based on the Court's understanding that the NPS and FAA would need, and use, the intervening time to comply with the newly evolving NEPA regulations (p. 5, and fn 2). But they have not done so.

Violation of NPATMA

Going back to the D.C. Circuit's unanimous decision on the merits, what the NPS and FAA propose here is not just a detour around NEPA, it is contrary to the fundamental reasoning of that decision with regard to NPATMA. As the Court stated, 121 F. 4th, at 917 (emphasis added):

In preparing the Bay Area Parks Plan, the Agencies treated the existing air tours in the Parks as the status quo for purposes of conducting their NEPA analysis. Those tours were conducted under interim operating authority. With the thousands of air tours conducted pursuant to interim operating authority serving as the baseline for comparison, the Agencies concluded that the Plan would have "no or minimal" environmental impacts. Record of Decision, supra, at 8-9. But by treating interim operating authority as the baseline, the Agencies enshrined the status quo without evaluating the environmental impacts of the existing flights. That outcome stands at odds with the Agencies' duties under the Act and NEPA.

Under the Act, "[t]he 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." 49 U.S.C. § 40128(b)(1)(B). The Act thereby confers a duty upon the Agencies to develop "acceptable and effective" Plans that "mitigate or prevent" significant environmental harms. The Agencies cannot sidestep those obligations by tilting the scales in a way that obscures the true environmental effects of a Plan.

That, though, is effectively what the Agencies have done here. The Agencies "decided to implement the existing condition"—that is, existing tours conducted under interim operating authority— in the Plan "because the impacts associated with the existing condition, together with reasonable mitigation measures included in the Plan, would not result in significant adverse impacts of commercial air tour operations upon the natural and cultural resources of any of the Parks or visitor experience in any of the Parks." Record of Decision, supra, at

> *14. But the "the impacts associated with the existing condition" along with the "mitigation measures" in the Plan would "not result in significant adverse impacts" only because they were compared to the existing condition itself. It was unreasonable for the Agencies to avoid fully treating the environmental effects of the Bay Area Parks Plan on the ground that those effects would minimally alter a status quo that itself has never been adequately assessed. See id. at 21 ("The agencies acknowledge that no previous NEPA analysis of [interim operating authority] occurred. ").*
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> *The Agencies insist that Congress set interim operating authority as the status quo and that their choice of interim operating authority as the baseline thus was reasonable. True, Congress provided for granting interim operating authority as a means of smoothing the transition between the pre- and post-Air Tour Management Act worlds. But Congress did not intend for the Agencies to treat the level of pre-Act air tours as a legal status quo against which to compare all potential Plans. Under such an approach, the Agencies could grandfather in all pre-Act air tours without ever conducting a NEPA analysis. Congress, though, enacted the Act to "preserve, protect, and enhance the environment by minimizing, mitigating, or preventing the adverse effects of aircraft overflights" on national parks. Pub. L. No. 106-181, § 802(2), 114 Stat. at 186……. But by treating interim operating authority as the baseline for assessment of a Plan, the Agencies effectively transform a stopgap into a permanent part of a Plan that never undergoes NEPA analysis.*

And this statement (p. 916):

> *The agency's choice of the baseline for comparison matters a great deal. If the baseline is artificially high, the agency might erroneously conclude that even highly disruptive actions will have minimal incremental environmental effects*

The NPS and FAA here propose a detour by way of a V.A. approach with the individual operators so as to further and permanently avoid NEPA. But the harmful environmental effects of the baseline levels that the agencies propose to continue with via the V.A.s are not swept away by their legal hair-splitting. The V.A. template under consideration would, on its face, approve basically the "same level of pre-Act air tours as a legal status quo" as the Court ruled was an invalid level to start from and contrary to Congress's intent, above.

In terms of impacts on the resources that the NPS and FAA are duty-bound to protect, it makes no difference that the baseline flight level previously was adopted for an ATMP and now the agencies are proposing it for for V.A.s. The ATMP authorized 2,548 flights per year while the V.A. would authorize slightly more – 2,727 flights (see NPS. 2025. "Air Tour Voluntary

Agreement – Frequently Asked Questions," online at: https://parkplanning.nps.gov/documentsList.cfm?projectID=133164). In both situations, NPATMA is violated by the agencies' failure to fully analyze and justify their decision about the allowed flight numbers that serve to "minimize[e], mitigate[e], or prevent[] adverse effects" on the Parks, as required by § 802(2) of NPATMA, cited above. Congress plainly intended those protective duties to apply equally for approving ATMPs and V.A.s.

Because full compliance with the Court's order is due by February 28, 2026, the NPS and FAA should take the remaining time to initiate at least an Environmental Assessment (EA) that addresses the appropriate baseline of no air tour overflights and then fully assess the impacts of various alternative flight numbers above that base. Only then can it justify the ultimate flight numbers chosen as being protective under NPATMA.

The irregular and novel scenario proposed here would not comply with the 2020 ruling of the D.C. Circuit Court of appeals in *In Re Public Employees for Environmental Responsibility* (Writ of Mandamus), 957 F.3d 267 (D.C. Cir. 2020), which has driven the whole process to complete the agencies' severely delayed compliance with the Act. Not only did PEER bring that case, it has been involved in almost all the litigation that has occurred under NPATMA since and it has reviewed the various resulting ATMPs and V.A.s. (See, December 20, 2024 - FAA/NPS Air Tours Progress Update, at: www.nps.gov/subjects/sound/upload/2024-12-20-Agencies-Final-ProgressUpdate.pdf.) What the agencies propose here is unprecedented. Never have the NPS and FAA proposed to convert from a fully implemented ATMP that was subject to a judicial order directing full NEPA compliance to a new V.A. with no NEPA whatsoever. And since the ATMP remains in force now, the new proposal from the agencies improperly fails to describe any process under NPATMA by which they will officially rescind it and switch to the V.A. approach. At a minimum, rescission should include notice-and-comment on a proposal to do so as is required for adoption of ATMPs initially, 49 U.S. Code § 40128. That has not occurred here.

Violation of the Endangered Species Act

Section 7(a)(2) of the ESA requires the NPS and FAA to ensure that any action they authorize is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of critical habitat. The agencies must consult with either the Fish and Wildlife Service or NOAA Fisheries to ensure that a proposed agency action is not likely to jeopardize ESA-protected species or habitat. *Defenders of Wildlife v. Gutierrez,* 532 F.3d 913 (D.C. Cir. 2008) The consultation requirement is clearly triggered here because the proposed V.A. template itself documents that numerous endangered or threatened species are present in the area affected by the agency-authorized overflights, and implementation of such action will likely affect such species.

While V.A.s under NPATMA may provide a detour around NEPA procedural requirements, they cannot also detour around the ESA Section 7 duties. Note too that the "agency action" standard under the ESA is more liberal than the "major federal action" standard under NEPA; a federal agency action does not need to be "major" to trigger the Section 7 consultation duty. *Karuk Tribe*

of Cal. v. United States Forest Serv., 681 F.3d 1006 (9th Cir. 2012). Yet here there is no indication that the agencies have complied despite clear potential impacts on listed species.

The V.A. document states, without any analysis:

> (p. 3-4) ***Golden Gate National Recreation Area*** *... It is also home to more than 1,250 plant and animal species, including 39 threatened and endangered species such as the threatened northern spotted owl (Strix occidentalis caurina). It provides sanctuary for nesting seabirds such as Brandt's cormorants (Phalacrocorax penicillatus) and common murres (Uria aalge), as well as peregrine falcons (Falco peregrinus), which are gradually recovering in the San Francisco Bay Area. It also provides protection for marine mammals under the Marine Mammal Protection Act.*
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> (p. 5) ***Point Reyes National Seashore*** *.... Twenty-eight threatened and endangered species are present within the park's boundary, including the threatened northern spotted owl. The park provides sanctuary for marine mammals such as the harbor seal (Phoca vitulina)....*

While NPATMA may suggest that no "further environmental ….. process" is needed, 49 U.S. Code § 40128(b)(7(C), the sweeping duty for Section 7 compliance under the ESA overrides that provision. As the Supreme Court has said, Section 7 takes precedence over other statutes that may allow unfettered agency actions by subjecting such actions, if they are discretionary such as issuing the proposed V.A. here, to the additional condition that they pose no jeopardy to endangered species. *TVA* v. *Hill*, 437 U.S. 153 (1978) (Section 7 "reveals a conscious decision by Congress to give endangered species priority over the 'primary missions' of federal agencies," *id*., at 185; Section 7 "admits of no exception." *id*., at 173). Nevertheless, while conceding potential adverse impacts on listed species, the V.A. does not disclose whether the agencies have engaged in any Section 7 consultation with FWS or NOAA.

Violation of the Migratory Bird Treaty Act

In addition to the ESA violation, the documentation provided does not indicate compliance with the Migratory Bird Treaty Act (MBTA). The area affected by the V.A. transects the Pacific Flyway, yet it makes only perfunctory mentions of protected species and the very sketchy claims of protections for a few species in the V.A. under "3.1. Management Issues" are inadequate. The V.A. also concedes that migratory bird strikes with aircraft are a possibility, but it provides only for after-the-fact reporting. MBTA compliance requires detailed biological analysis, which the NPS and FAA have not provided.

Moreover, while conceding that nesting times may be of sensitivity the V.A. makes no provision for minimizing disturbances of nesting, other than limiting overflights to dawn to dusk flights. No consideration is given to avoiding certain critical areas during mating or nesting periods.

Violation of the Marine Mammal Protection Act

Similarly, the V.A, concedes that the affected park areas host sizeable populations of marine mammals, such as the "significant haul out and pupping area in Bonita Cove" While noting that for harbor seals are "sensitive to visual and noise disturbance", the V.A. itself makes no specific provision for protecting marine mammal habitat from disturbance beyond its overall vertical and lateral space requirements for flights. The sole protection that the V.A. offers is the vertical and lateral buffers over all areas within the affected parks. This perfunctory approach is inadequate to meet the species protection and requirements of the Marine Mammal Protection Act

Degradation of Designated Wilderness

The V.A. notes that one area affected is the Phillip Burton Wilderness, which it describes as offering "an extraordinary opportunity for solitude and unconfined recreation in untrammeled terrestrial and marine environments and includes one of only two marine wilderness areas in the National Parks." The V.A. provides for higher flight altitudes over this designated wilderness rather than providing that this 33,000-acre wilderness be avoided altogether.

In a myopic passage, the V.A. states --

> *The minimum altitudes required in this Agreement over land-based wilderness in Point Reyes National Seashore will improve preservation of wilderness character and visitor experiences on the ground by reducing the intensity of air tour noise to visitors…*

Less noise is still noise, and an intrusion on the peace and quiet many visitors seek. The agencies did not give detailed consideration to the fact that aircraft noise disturbance is antithetical to the wilderness experience.

Inadequate Noise Minimization

The V.A. points out that the Golden Gate Recreation Area "is one of the highest visitation parks in the National Park System" while Muir Woods National Monument is "one of the last remaining ancient redwood forests in the San Francisco Bay Area" visited by more than one million visitors per year. Meanwhile, Point Reyes National Seashore regularly draws more than 2 million visitors a year. Despite all these visitors, the agencies preparing the V.A. did not do a survey of visitors to ascertain their perception of aircraft noise levels or their preferences on the topic.

In addition, on the topic of quieter aircraft technology, the V.A. does not require that operators use quieter technology, Instead, it extends a paradoxical incentive to quieter operators, allowing them to "conduct air tours during extended hours." This in essence means quieter operators will be able to create aircraft noise over the parks for longer each day,

Lax Enforcement

One key safeguard in the V.A. is a ban on "hovering". The term, however, is not defined. Thus, it remains unclear how long a helicopter may remain in place, especially over especially sensitive areas. In addition, the V.A. lacks fixed penalties for violations. Instead, the operator is largely responsible for self-policing, an arrangement conducive to abuse. Finally, the V.A. provisions on "adaptive management" means, in effect, that the development of safeguards for operators is shielded from public scrutiny.

The Agencies Should Not Finalize a Voluntary Agreement with Helicopter Operators in the Region

Hard experience by local citizens has revealed that helicopter tour operators San Francisco Helicopters LLC and Specialized Helicopters which are controlled by the same person, Chris Gularte, have not respected past restrictions. They have violated past Interim Operating Authority and the existing ATMP through frequent unauthorized flights, including flying too low. Numerous complaints have been filed with FAA about this and it's investigation and follow-up have been non-existent. Documentation has been sent to the NPS also. Rewarding these violators now with a V.A. to conduct air tours over the very parks they illegally overflew would be highly unjustified in view of the past violations. The proposed V.A. has nothing but boilerplate language about enforcement with no recognition that similar generic language, and the FAA itself, have been toothless to date.

CONCLUSION

As with the earlier detour around NEPA through the Categorical Exclusion decision for the ATMP that the D.C. Circuit struck down, the agencies again are showing an allergy to public review and involvement in the environmental protections chosen for the San Francisco region air tours before they are cast in stone in V.A.s. The public must have a chance to review the agencies' ESA Section 7 analysis and it compliance with the other species protection laws. The proposed V.A. approach must be discarded in favor of a revised proposed ATMP for the Parks accompanied by at least a draft EA and a public comment period on it. That was the entire point of the *Marin Audubon* decision; the agencies should not try to escape it.

Peter T. Jenkins, Senior Counsel
Public Employees for Environmental Responsibility (PEER)
962 Wayne Ave., Suite 610 · Silver Spring, MD 20910
Tel: 202.265.4189 (direct) | 202.265.7337 (main)
pjenkins@peer.org | www.peer.org