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Background

In 1994, the FAA issued SFAR 71 as an emergency rule because of safety concerns about the risks associated with air tours in Hawaii and the increase in the accident rate (59 FR 49138, September 26, 1994). Currently, SFAR 71 imposes special safety requirements for all air tours conducted in Hawaii under parts 91, 135, and certain part 121 operations.

Section 3 specifically addresses single engine helicopters operated beyond the shore of any island. Without regard to gliding distance, the helicopter must be equipped with floats adequate to accomplish a safe emergency ditching as well as flotation gear easily accessible to each occupant. If there are no floats on the helicopter, each occupant must wear the flotation gear.

Section 4 applies to all helicopter air tours, not just single engine helicopters or off shore air tours, and requires operators to complete a performance plan before each flight. The pilot in command must comply with the performance plan.

Section 5 requires that, except for approach to, and transition from a hover, the pilot in command of a helicopter air tour operate at a combination of height and forward speed (including hover) that would permit a safe landing in the event of engine power loss, in accordance with the height-speed envelope for that helicopter under current weight and aircraft altitude.

Section 6 requires minimum altitudes for air tours in Hawaii. No person may conduct an air tour in Hawaii below an altitude of 1,500 feet above the surface or closer than 1,500 feet to any person or property. There are exceptions for altitudes necessary for takeoff and landing, compliance with air traffic control clearances, and altitudes

prescribed by federal statute or regulation. Section 6 also allows operators to obtain deviation authority from the FAA to operate at lower altitudes.

Section 7 requires that each pilot in command of an air tour flight of Hawaii, with a flight segment beyond the ocean shore of any island, ensure that passengers are briefed on water ditching procedures, use of flotation equipment, and how to exit from the aircraft in the event of a water landing.

The original SFAR would have expired 3 years after becoming effective in October 1994; however, the FAA extended the termination date in both 1997 and 2000 for additional 3-year terms. (62 FR 58854, October 30, 1997; 65 FR 58610, September 29, 2000.) Except for the date extensions, SFAR 71 has continued without change to its substantive or procedural safety requirements and has remained in effect for approximately 9 years.

As discussed in the two extensions, the FAA will continue to develop a national air tour safety standards notice of proposed rulemaking. The national rulemaking will be responsive to the NTSB and others who believe that air tour safety standards should be applicable nationwide.

There have been three lawsuits regarding SFAR 71 rulemaking. The Hawaii Helicopter Operators Association (HHOA) challenged the validity of the emergency rule issued in 1994, contending that the FAA had violated the notice and comment provisions of the Administrative Procedure Act (APA). The United States Court of Appeals for the Ninth Circuit upheld the promulgation of SFAR 71 as an emergency rule finding that the FAA had properly invoked the good cause exception to section 553(c) of the APA. Also, the Court rejected HHOA's claim that the SFAR's 1,500 foot minimum altitude requirement was arbitrary and capricious. *See Hawaii Helicopter Operators Association v. FAA*, 51 F. 3d 212 (9th Cir. 1995).

When the FAA extended SFAR 71 in 1997 and 2000, Safari Aviation, Inc., petitioned for review of both rules in the 9th Circuit. As to the 1997 interim rule, the Court held that the challenge was moot because the rule had expired. As to the 2000 rule extending SFAR 71 without change (except for the date) the Court found that the FAA adequately responded to the comments it received. The FAA was required to respond only to significant comments raising relevant points and which, if adopted, would require a change to the proposal. The Court found that the FAA had a rational basis for promulgating SFAR 71 and

held that the rule was not arbitrary or capricious. The Court also held that the FAA-approved deviations from the altitude minimums in SFAR 71 were interpretive rules not subject to the notice and comment provisions of the APA. *See Safari Aviation v. FAA*, 300 F. 3d 1144 (9th Cir. 2002) *cert. denied*.

The Petition for Rulemaking

In October 2002, 15 helicopter air tour operators and their pilots who operate in Hawaii petitioned to amend SFAR 71. Each of the identical petitions was signed by air tour pilots. The petitions are available in docket number FAA-2002-13959 as well as this rulemaking docket. Petitioners state that the 1,500-foot minimum altitude requirement in SFAR 71, even with FAA approved specific deviation authority, "is cumbersome and lacks flexibility in dynamic circumstances." They maintain that the altitude requirement in SFAR 71 is "unnecessarily restrictive and compromises safety by taking away pilot options." Petitioners state that "pilot judgment should dictate altitude and standoff distances in accordance with well-established FAA regulatory practice and helicopter industry experience."

Petitioners agree that the 1,500-foot minimum altitude restriction should be maintained for habitable structures and congregations of persons. For other areas, however, they request that the FAA amend the altitude restriction for helicopters to align it with federal aviation regulation section 135.203 (14 CFR 135.203). The 300-ft. altitude restriction in 14 CFR 135.203 refers to VFR helicopter operations over congested areas; however, petitioners maintain that 300 feet is a reasonable minimum altitude to apply to helicopter tour operations in noncongested areas in Hawaii. They ask the FAA to amend SFAR 71 to allow air tour helicopter operations at 300 feet except when operating over habitable structures or congregations of people.

Petitioners maintain that allowing helicopter air tours as low as 300 feet would make "SFAR 71 safer because pilot decision-making would no longer be compromised by pressure to maintain unreasonable altitudes in certain circumstances." They believe that "the pilot would then have the latitude to determine the safe and most reasonable route of flight considering terrain and weather."

Petitioners state that SFAR 71 causes helicopter tours to fly over, or very close to, communities concentrated along the coast of the windward side of the Hawaiian Islands in order to stay at 1,500 feet and remain under the cloud