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February 2, 2011

Ms. Debra Malek
Office of National Marine Sanctuaries
1305 East-West Highway
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Silver Spring, MD 20910

Re: RIN 0648-AX79, Notice of Proposed Rulemaking for Amendments to National Marine Sanctuary Regulations Regarding Low Overflights in Designated Zones

Ms. Malek:

The Aircraft Owners and Pilots Association (AOPA), representing more than 400,000 members nationwide, submits the following comments in response to the National Oceanic and Atmospheric Administration's (NOAA) Notice of Proposed Rulemaking (NPRM), Amendments to National Marine Sanctuary Regulations Regarding Low Overflights in Designated Zones. While AOPA supports NOAA's mission to conserve and manage coastal and marine resources, we are concerned with the far-reaching effects and implications of this proposed rulemaking on general aviation. Based on the concerns presented below, AOPA cannot support this NPRM.

FAA's sole authority to regulate airspace

According to Article 49, Section 40103 of the US Code, the Federal Aviation Administration (FAA) has the sole authority to regulate the use of the national airspace system. In the National Parks Air Tour Management Act, Congress recognized that the FAA has sole authority to control airspace over the United States. It also recognizes that the FAA has authority to preserve and protect the environment by preventing the adverse effects of aircraft overflights. It is our belief that the NOAA NPRM usurps that authority and permits NOAA to regulate flight operations in the national airspace system. A pilot operating within navigable airspace in the national airspace system and in full compliance with all Federal Aviation Regulations (FAR) could be subject to NOAA enforcement action based solely on the location of his/her aircraft.

Pilots have a reasonable expectation to be familiar with applicable FARs and the operating parameters established therein. If the FAA permits other agencies to regulate airspace, to what end will pilots be expected to know, understand, and follow regulations of countless other agencies? Such an action would create a patchwork quilt of overlapping and potentially contradictory regulations from Federal, State, and local agencies.

There simply is not enough room on aeronautical charts to list multiple flight restrictions from a variety of agencies. The purpose of an aeronautical chart is to provide situational awareness and navigation information to a pilot. Using an aeronautical chart as the sole, practical means to communicate regulatory restrictions is inappropriate and would detract from the safe use of the chart for its intended purpose. Furthermore, there is no FAR requirement for a pilot to have an aeronautical chart on board the aircraft raising the question as to how a pilot would be aware of or familiar with NOAA regulations concerning flight operations.

Unknown class of airspace

The restrictions cited by the NOAA NPRM reference existing “restricted” airspace. This airspace is not familiar to pilots and is not charted on any publicly available aeronautical chart. Indeed, no standard exists for the depiction or operating parameters of such airspace in the Federal Aviation Regulations. At a time when pilots, industry stakeholders, and the FAA are working to reduce chart clutter and improve the readability of aeronautical charts, the above mentioned NPRM would require new charting symbols, additional complexity on aeronautical charts, and extensive pilot outreach to educate airspace users to this previously unknown type of airspace.

The NPRM includes language that appears to contradict standard regulatory process that the FAA uses to establish restricted airspace. From the NPRM, “Regulations for the Monterey Bay, Channel Islands, Gulf of the Farallones, and Olympic Coast National Marine Sanctuaries all *restrict* low altitude overflights within specified zones.” The phrase “restricted area” has a very specific and well defined meaning within the FARs; “airspace designated under part 73 within which the flight of aircraft, while not wholly prohibited, is subject to restriction.” The NPRM does not match this description. Prior to the creation of this restricted airspace, the FAA would need to pursue rulemaking action, and solicit user input on any proposed restrictions.

Impact on airports

AOPA is concerned with how the NPRM will affect airports directly under or in the vicinity of the restrictive airspace areas. The Copalis State Airport is immediately south of the Copalis National Wildlife Refuge, part of the Olympic Coast National Marine Sanctuary. The airport is the only public-use airport in Washington State where landing on the beach is legal. Currently pilots conducting normal operations to and from the airport fly their traffic patterns as designated by the Federal Aviation Administration which puts them at altitudes lower than the 2,000 feet above ground level promulgated in the rule.

In order to safely operate in and out of the airport they need to be able to be at altitudes much lower than 2,000 feet to take off and land at Copalis and other affected airports. There are current flight procedures in place that allow for this and AOPA respectfully requests that those procedures continue in place and be widely disseminated so that pilots are aware of them and will follow them thus preserving their safety and the sanctuary necessary for the marine wildlife. Additionally, language should be included in the Final Rule that exempts flight operations within 5nm of the airport for the purposes of taking off or landing at the airport.

Exemption for search and rescue operations

The proposed rule would affect the altitudes that search and rescue aircraft would be able to fly at in the event that they are conducting a low-level search for a missing hiker, boat or aircraft. Depending on the time of day, weather conditions, experience of the search aircraft crew they may need to be as low as 1,000 to 500 feet above ground level to adequately ensure sighting of their mission target. While the preservation and health of marine animals is important, the ability to save the lives of human beings outweighs the potential harm that may come to the marine animals. AOPA respectfully requests that search and rescue operations be exempted from this rule.

Pilot notification and education

As outlined above, NOAA is proposing to further regulate flight operations within an unknown class of restrictive airspace. How will pilots be notified of changes to the boundaries of this airspace since its promulgation does not follow standard FAA rulemaking processes? How does NOAA plan to educate pilots about the regulatory nature of flying in this new class of airspace? Because pilots are currently unaware of

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NOAA's presumed authority in this airspace, the main option it appears NOAA is using to educate pilots is a handshake agreement with the FAA that new charting symbology will be developed and users will be educated via the aeronautical chart. However, this appears to be a false assumption considering all charting symbology and changes are subsequent to user input through the Aeronautical Charting Forum before becoming implemented.

Rebuttable presumption

The addition of a rebuttable presumption under the NPRM is concerning. The United States legal system is grounded in a belief that an individual is innocent until proven guilty. According to the NPRM, a pilot is guilty of disturbing wildlife unless he/she can prove otherwise. Short of physically photographing the ground as a pilot flies over it, how can a pilot provide evidence contrary to a rebuttable presumption? Furthermore, there is no identified science or data that indicates there is an impact to the mammals. As per an AOPA request on January 21, 2011 and in order to substantiate a position of presumed guilt, NOAA must provide the public with the scientific data that shows all mammals are harmed by all aircraft at all altitudes above 999 feet above ground level overflying these sanctuaries.

Summary

The proposed rulemaking attempts to modify restrictions in airspace that currently is not considered "restricted airspace", usurping the FAA's sole authority to regulate airspace. Prior to the establishment or charting of any additional restricted airspace, NOAA must request and pursue "restricted airspace" through the FAA's own rulemaking process. Aeronautical charts are not an appropriate choice for the primary means of providing regulatory information. Should a Final Rule be promulgated, accommodations are needed for operations at affected airports, and search and rescue operations must be exempted from the flight restrictions. The addition of a rebuttable presumption to this regulation makes it difficult, if not impossible, for a normal pilot to defend him/herself. For these reasons, AOPA cannot support the National Oceanic and Atmospheric Administration's NPRM amending overflight restrictions. We appreciate the opportunity to submit comments regarding the NPRM.

Sincerely,

A handwritten signature in black ink, appearing to read "Tom Kramer".

Tom Kramer
Manager, Air Traffic Services

Cc: Ms Edith Parish, FAA