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NTSB OVERTURNS ADMINISTRATIVE LAW JUDGE DECISION AND HOLDS THAT FEDERAL AVIATION REGULATION 91.13 (CARELESS OR RECKLESS OPERATION) APPLIES TO UNMANNED AIRCRAFT SYSTEMS

By Barry S. Alexander

The Federal Aviation Association (FAA) is feverishly working on a Notice of Proposed Rulemaking (NPRM) governing commercial use of unmanned aircraft systems (UAS), which it intends to have ready by the end of 2014. Details about the NPRM have begun to spread, including the FAA's apparent intention to require a private pilot certificate for commercial UAS pilots. Those in the industry also fear that the NPRM will cover even those UAS that weigh less than 55 pounds, including tiny handheld models that potentially could have commercial applications.

A recent *Wall Street Journal* article opined that the NPRM will receive so much backlash that it could take years to enact. The impact of any potential delay was lessened on November 17, 2014, however, when the National Transportation Safety Board reversed the administrative law judge's decision in *Huerta v. Pirker*, and held that 14 C.F.R. §91.13 applies to unmanned aircraft. The NTSB remanded the matter to the law judge for a determination as to whether Pirker's operation of the Zephyr on October 17, 2011 was reckless under §91.13, which states that "[n]o person may operate an aircraft in a careless or reckless manner so as to endanger the life or property of another."

Background

On June 27, 2013, the Administrator of the FAA issued an assessment of \$10,000 against Raphael Pirker for violating 14 C.F.R. §91.13 by operating an unmanned aircraft—a Ritewing Zephyr—in a reckless manner around the University of Virginia campus in Charlottesville, Virginia, on October 17, 2011. Pirker was taking aerial photographs and video of the UVA campus and medical center for compensation.



Ritewing Zephyr, photo courtesy of geek.com

On March 6, 2014, Administrative Law Judge Patrick G. Geraghty vacated the FAA's order of assessment, finding that §91.13 does not apply to Pirker's unmanned aircraft because the device was not an "aircraft" for purposes of the regulation. The law judge concluded that the Zephyr was a "model aircraft" to which §91.13 did not apply, basing his conclusion on a 1981 FAA Advisory Circular setting forth safety standards for model

aircraft and a 2007 policy notice that he claimed excluded model aircraft from the regulatory and statutory definitions of the term aircraft.

The Administrator appealed the law judge's decision, arguing that the law judge erred in determining that (1) respondent's Zephyr was not an aircraft under 49 U.S.C. §40102(a)(6) and 14 C.F.R. §1.1, and (2) respondent's aircraft was not subject to 14 C.F.R. §91.13.

The NTSB's Decision

The NTSB's decision is relatively straightforward. The general rule of construction for the interpretation of statutes and regulations provides: "If the language of a provision is clear and unambiguous on its face, the language controls; if the language is ambiguous, we interpret the provision in reference to, among other factors, the context in which it appears."

As the NTSB noted, "[t]he Administrator's authority to ensure aviation safety largely rests upon the Administrator's statutory responsibility to regulate aircraft," and the term "aircraft" is defined at 49 U.S.C. §40102(a)(6) as "any contrivance invented, used, or designed to navigate, or fly in, the air," and at 14 C.F.R. §1.1 as "a device that is used or intended to be used for flight in the air." The NTSB found that these definitions are clear, and draw no distinction between manned and unmanned devices. Accordingly, the NTSB found that the law judge erred in presuming that the FARs categorically do not apply to model aircraft.

Having determined that the Federal Aviation Regulations so apply to UAS, the NTSB turned its attention to whether §91.13 in particular applies to UAS. In *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 294-95 (1974), the Supreme Court held that an agency may set forth an interpretation of a regulation through the adjudicative process, and courts have deferred to such interpretations where they are grounded in a reasonable reading of the regulation's text and purpose. Courts even defer to agency interpretations where they reverse

prior policy as long as the reasons for the reversal are adequately explained.

The NTSB found that the Administrator's application of §91.13 to Pirker's operation of the Zephyr was reasonable based on the clear language of the regulation. The NTSB was unpersuaded by Pirker's argument that a prior internal memorandum and Advisory Circular, as well as other documents, evidenced that the Administrator's current interpretation of the relevant regulations conflicted with prior interpretations. The NTSB summed up its position well in its conclusion:

This case calls upon us to ascertain a clear, reasonable definition of "aircraft" for purposes of the prohibition on careless and reckless operation in 14 C.F.R. §91.13(a). We must look no further than the clear, unambiguous plain language of 49 U.S.C. §40102(a)(6) and 14 C.F.R. §1.1: an "aircraft" is any "device" "used for flight in the air." This definition includes any aircraft, manned or unmanned, large or small."

The NTSB remanded the matter to the law judge for a full hearing to determine whether Pirker operated the Zephyr "in a careless or reckless manner so as to endanger the life or property of another," contrary to §91.13."

A Fledgling Industry Trying to Navigate the Legal Landscape

In 1925 and 1929, the international community met in Paris and Warsaw, respectively, with the objective of encouraging a then-fledgling industry. That industry was the commercial aviation industry, and the result of those meetings was the Warsaw Convention, which set forth the basic framework that continues to govern international air transportation today. The commercial aviation industry inevitably would have succeeded regardless of the Convention, but there can be little dispute that the favorable legal framework assisted in its development.

Now, less than a century later, new and exciting technology has led to the development of a new industry: UAS. The UAS industry's impact on society is yet to be seen, but is likely to be profound.

Whether the FAA is being as supportive of UAS as the international community was of commercial aviation depends on whom you ask. Some think the FAA's stance on UAS is draconian, while others think strict regulation is absolutely necessary to protect the public.

As history has shown, innovation and advancement inevitably will win out. Under the anticipated rulemaking, operators of UAS will have to navigate complicated terrain, however, including the procurement of a special airworthiness certificate or Section 333 exemption in the present, and a pilot operator's license and numerous other regulations in the future. Moreover, obtaining authority to operate is just the first of many legal hurdles to be cleared, with liability, insurance, privacy, First Amendment and other issues certain to follow. Those who succeed no doubt will follow the Boy Scout motto to "Be Prepared." Success will require them to take precaution to understand the legal issues that lie ahead, and to map out a plan to navigate all hurdles. ◆

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