

FAA Lacks Authority to Ground Small UAVs Used for Commercial Purposes

A victory for a small commercial unmanned aerial vehicle operator demonstrates the Federal Aviation Administration's struggle to keep pace with new technologies.

On March 6, 2014, an Administrative Law Judge (ALJ) of the National Transportation Safety Board (NTSB) vacated a civil penalty issued by the Federal Aviation Administration (FAA) against a commercial user of a small Unmanned Aerial Vehicle (UAV) or "drone." The ALJ found that no promulgated FAA Rules or Federal Aviation Regulations exist that would prohibit small UAVs from operating for commercial purposes — consistent with the long-standing "model aircraft" standards. The decision highlights how commercial operators may exploit the disconnect between the commercial demand for using drones, and the FAA's slow pace in developing appropriate regulations for commercial UAVs.

Introduction

The use of small UAVs or Unmanned Aircraft Systems (UASs) for commercial purposes may be taking off, regardless of the FAA's objections. For nearly a decade, the FAA has taken the rigid position that the agency regulates (and thus can ban) the use of all UAVs in the National Airspace. Despite the vast potential of UAVs, the FAA has steadfastly permitted no commercial applications before regulations are promulgated, which would be no earlier than year-end 2015, and probably well after. The FAA's absolute prohibition against all UAV commercial usage is now at odds with its long-standing 1981 policy that allows "model aircraft" operations.

Although the hobby use of model aircraft has long been recognized by the FAA, once a commercial motive becomes involved, the agency's position flips; accordingly, the FAA has moved aggressively against movie studios, ranchers, utilities and others seeking to utilize the obvious advantages of low-level unmanned flights. On March 6, 2014, in the first breach of the broad FAA commercial prohibition, a federal ALJ ruled in *Huerta v. Pirker* that the Federal Aviation Regulations are not enforceable against small UAVs that would otherwise qualify as model aircraft (*i.e.*, aircraft under 55 pounds and which are operated below 400 feet), even when such UAVs engage in commercial operations.

Regulatory Background

Federal Regulation of Aircraft and UAVs

The Federal Aviation Act of 1958 established the FAA and designated the agency responsible for the control of "aircraft" and the use of navigable airspace within the United States. The FAA created the National Airspace System to protect persons and property on the ground through the establishment of a safe and efficient airspace environment for civil, commercial and military aviation. The National Airspace consists of a network of air navigation facilities, airports, technology, and a system of rules and

regulations. “The current FAA policy for UAS operations is that no person may operate a UAS in the National Airspace System without specific authority.”¹

Critical of the slow pace of UAV integration into the national economy, Congress pushed the FAA in 2012 to act faster. Sections 331 through 336 of the FAA Modernization and Reform Act of 2012 (2012 FAA Act) directed the FAA to integrate and “phase in” UAVs to the National Airspace. For nearly a decade, the FAA has been moving very cautiously in developing regulations and related permitting procedures for the commercial use of UAVs in the National Airspace. Industry observers do not expect regulations will be released any sooner than year-end 2015, and the FAA is now openly suggesting integration will likely be accomplished in “phases” and take additional years beyond 2017.

Today, given the absence of a comprehensive regulatory program and the FAA’s ban on UAVs in the National Airspace, there are only three pathways for lawful usage: (1) public agencies must obtain a “Certificate of Authorization,” (2) private entities must obtain specific FAA permission in the form of a Special Airworthiness Certification, or (3) a private entity must operate the UAV consistent with the model aircraft standards.² The FAA has demonstrated no inclination to accommodate applicants for the first two pathways. According to the FAA, only a few public agencies have been granted Certificates of Authorization to operate UAVs in the National Airspace.³ Public uses include border protection, disaster relief and law enforcement. By comparison, the FAA has not issued any Special Airworthiness Certifications to private entities to operate UAVs for commercial purposes.⁴ In practice, the FAA simply holds private applications for years and fails to act. Certain aeronautical manufacturing firms and universities have successfully obtained Special Airworthiness Certifications for “experimental” or “research and development” purposes to develop and test UAVs.⁵ However, these Certificates are reserved for research and development purposes only, and are not meant to permit the commercial use of UAVs.

Model Aircraft Operating Standards

Since June 9, 1981, the FAA has authorized a policy in favor of “recreational use of airspace by model aircraft” through FAA Advisory Circular (AC) 91-57.⁶ The FAA policy creates an exception for small-size UAVs below a certain weight threshold. According to FAA Order 1110.150, the Academy of Model Aeronautics National Safety Code has defined a “model aircraft” as an aircraft that weighs less than 55 pounds. The FAA has effectively expanded upon that size threshold in its June 9, 1981 FAA Advisory Circular (AC) 91-57, which further defines the “Model Aircraft Operating Standards” to include the following operational parameters for aircraft weighing less than 55 pounds:

- Model aircraft may not be operated more than 400 feet above the surface.
- Operating sites must be “sufficient distance” from populated areas.
- When flying within 3-miles of an airport, airport operators must be notified.
- Operators must give the right of way to avoid flying in the proximity of full-scale aircraft.

Section 339 of the 2012 FAA Act formalized this “safe harbor” by prohibiting the FAA from regulating “model aircraft.” “Model aircraft” is defined in the 2012 statute to mean (i) an aircraft used for hobby or recreational purposes, (ii) that is not more than 55 pounds in weight, (iii) “does not interfere with and gives way to manned aircraft,” (iv) is not flown within five miles of an airport, and (v) is flown within the line of sight of the operator.

On February 13, 2007, the FAA published its policies for UAVs in the Federal Register (2007 UAV Guidance).⁷ The 2007 UAV Guidance reaffirms the model aircraft exception, provided that no commercial motive or “business purpose” is involved, and reiterates the operating standards identified since 1981 in AC 91-57. The 2007 UAV Guidance further explains, “[t]he FAA expects that hobbyists will operate these recreational model aircraft within visual line of sight.” Visual line of sight is defined as the operator present within one mile of the aircraft and capable of observing the airspace around the aircraft.

The 2007 UAV Guidance noted that “AC 9157 only applies to modelers, and thus specifically excludes its use by persons or companies for business purposes.” (Emphasis added). The FAA clarified that “business purposes” means a money-making endeavor. Accordingly, under the 2007 UAS Guidance, UAVs utilized for commercial operations could not be considered “model aircraft” by the FAA, at least until the 2014 *Pirker* decision.

Extraordinary Demand for Commercial Use of UAVs

The international demand for the commercial use of UAVs has expanded rapidly, and UAVs are now used regularly in other countries for commercial purposes. The US lags far behind. UAVs have demonstrated improved safety and cost-effectiveness in multiple purposes, such as farming — including more precise pesticide application — aerial surveying, fire security, illegal fishing and endangered species enforcement, power line and pipeline patrolling, mapping, and natural resources exploration. The Association for Unmanned Vehicle Systems International has projected the industry will create 100,000 jobs and generate \$82 billion in economic activity in the decade after UAVs are allowed in the general airspace.⁸

Recognizing such benefits, countries such as Brazil, Japan, Australia and New Zealand have authorized and promoted commercial UAV usage. Indeed, eight organizations in New Zealand have already received governmental permission to utilize UAVs for commercial purposes.⁹ A new company in Australia, Flirtey, recently announced that it intends to begin commercial delivery of textbooks via UAVs in 2014.¹⁰

In December 2013, the FAA announced six experimental sites located within the US — in Alaska, Nevada, New York, North Dakota, Texas and Virginia — to test the integration of UAVs into the National Airspace. The FAA Administrator, however, is already warning that that the year-end 2015 deadline to integrate UAVs into the National Airspace will be “staged” slowly and will likely extend into 2017.¹¹

March 6, 2014 National Transportation Safety Board Decision

In 2013, the FAA issued a \$10,000 fine against Raphael Pirker, an operator who, with the aid of an extremely light-weight and low-cost foam UAV (less than five pounds costing about \$130) engaged in the filming of the University of Virginia campus for commercial purposes in 2011.¹² Specifically, the FAA Order of Assessment alleged that the operator was paid to supply aerial photographs and videos of the University of Virginia and operated an “aircraft in a careless or reckless manner,” in violation of Federal Aviation Regulation Section 91.13.¹³ The allegations included flying the UAV below roof-top levels and within 25 feet of buildings, within 20 feet of active streets, and within 50 feet of individuals — so low and close that pedestrians were forced to scatter.¹⁴ The operator appealed the fine, arguing before a NTSB ALJ that the Federal Aviation Regulations have no authority over “model aircraft” operated for commercial purposes, and his small UAV fell within the parameters of a model aircraft.¹⁵ Specifically, the FAA had not followed proper Administrative Procedure Act rulemaking in its 2007 effort to change its position on model aircraft used for commercial purposes. In June 2013, the operator prevailed, immediately generating international news.

In the ALJ's Decisional Order, the ALJ explained that the FAA has authority to exercise Federal Aviation Regulations for "aircraft" only. While "aircraft" is defined as a "device that is used or intended to be used for flight in the air...", the FAA has for decades distinguished "model aircraft" from the broad definition of "aircraft." Otherwise, the ALJ noted, even absurd airborne items like "paper aircraft, or a toy balsa wood glider" would be subject to FAA regulation.¹⁶ The ALJ reasoned that the FAA has not traditionally required model aircraft operators to comply with the Airworthiness Certification requirements for aircraft found in Federal Aviation Regulation Part 21.¹⁷ Additionally, AC 91-57 encourages voluntary compliance with safety standards for model aircraft operators. The ALJ determined that the FAA's adherence since 1981 to a policy-level guidance document — that excluded certain aircraft from regulation on the ground model aircraft operators would voluntarily comply with safety standards — is incompatible with today's FAA argument that model aircraft are simultaneously subject to regulation and mandatory compliance with the Federal Aviation Regulations if a profit motive can be found to exist.¹⁸ Accordingly, the ALJ held that the model aircraft standards still applied, and the small-size UAV was not subject to the Federal Aviation Regulations.

Significantly, the ALJ explained that the 2007 FAA model aircraft policy that purports to exclude a "business purpose" from the "model aircraft" guidance, is not an enforceable rule or regulation. The 2007 UAV Guidance is "self-defined as a statement of policy," and therefore not binding on the general public.¹⁹ Although the 2007 UAV Guidance was published in the Federal Register, the guidance does not meet the criteria for legislative rulemaking, as it was not issued as a Notice of Proposed Rulemaking and was not published 30 days before the effective date.²⁰ Accordingly, the 2007 UAV Guidance does not effectively re-classify the model aircraft at issue as a regulated UAV that requires a Special Airworthiness Certificate. Accordingly, the ALJ held that the FAA Order of Assessment had to be dismissed.²¹

Conclusion

This ruling has plainly caught the FAA off-guard and flat-footed. An agency response is virtually certain given the international interest, including a potential of appeal to the full National Transportation Safety Board and the D.C. Circuit. The ruling may also trigger "emergency" rulemaking to prohibit light-weight UAVs that have a business purpose from taking off nationally. Regardless of FAA's next step, clearly the pressure is mounting on the FAA to accelerate the process of integrating UAVs (both greater or less than 55 pounds) into the National Airspace. This holding may open the door for private users to begin using small UAVs for low-level, low-risk commercial purposes, especially if such use is limited to the user's own property and otherwise conforms with the slower-speed and low-levels of most model aircraft.

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Endnotes

- 1 "Unmanned Aircraft Operations in the National Airspace System," 72 Fed. Reg. 6689, 6690 (Feb. 13, 2007).
- 2 See *id.* at 6690; FAA Unmanned Aircraft Questions and Answers, found at http://www.faa.gov/about/initiatives/uas/uas_faq/.
- 3 545 Certificates of Authorization have been issued nationally to public agencies for use in firefighting, border protection, and police surveillance. FAA "Fact Sheet—Unmanned Aircraft Systems (UAS)" (Jan. 6, 2014), found at http://www.faa.gov/news/fact_sheets/news_story.cfm?newsId=14153.
- 4 See FAA Order 8130.34 "Airworthiness Certificates of Unmanned Aircraft Systems" (Mar. 27, 2008).
- 5 The University of Oregon is experimenting with UAVs for agricultural purposes, see "Drones Hit New Turf: U.S. Farmland," Wall Street Journal (May 1, 2013), and approximately 95 schools have received some form of experimental authorization from the FAA, see "Looser FAA Regulations to Help Drone Expansion at Universities," The Drone Project (Mar. 18, 2013).
- 6 FAA "Fact Sheet—Unmanned Aircraft Systems (UAS)" (Jan. 6, 2014).
- 7 See "Unmanned Aircraft Operations in the National Airspace System," 72 Fed. Reg. 6689, 6690 (Feb. 13, 2007).
- 8 AUVSI, "The Economic Impact of Unmanned Aircraft System Integration in the United States," at 2 (Mar. 2013), found at http://higherlogicdownload.s3.amazonaws.com/AUVSI/958c920a-7f9b-4ad2-9807-f9a4e95d1ef1/UploadedImages/New_Economic%20Report%202013%20Full.pdf.
- 9 "Drones: Secrets in Our Skies," The New Zealand Herald (Apr. 3, 2013).
- 10 "Drone Book Delivery Service Aims for Take-Off in November," The Guardian (Oct. 14, 2013).
- 11 "F.A.A. Picks Diverse Sites to Carry Out Drone Tests," New York Times (Dec. 30, 2013).
- 12 *Huerta v. Pirker* Decisional Order, at attachment 2 (Mar. 6, 2014).
- 13 Federal Aviation Regulation, Part 91, § 91.13(a) provides "No person may operate an aircraft in a careless or reckless manner so as to endanger the life or property of another."
- 14 FAA Order of Assessment, Docket No. 2012EA210009, at ¶ 9 (June 27, 2013).
- 15 See *Pirker* Decisional Order, at 2.
- 16 *Id.* at 3.
- 17 *Id.* at 3.
- 18 *Id.* at 4.
- 19 *Id.* at 6.
- 20 *Id.*
- 21 *Id.* at 6-8.