

Aviation - USA

FAA issues proposed interpretation of Model Aircraft Rule

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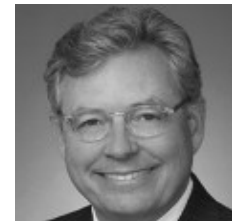
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Introduction

On June 25 2014 the Federal Aviation Administration (FAA) issued a notice of interpretation and request for comment on the special rule for model aircraft codified in the FAA Modernisation and Reform Act of 2012.⁽¹⁾ The notice comes on the heels of a National Transportation Safety Board (NTSB) administrative law judge ruling in *Huerta v Pirker*, currently on appeal, which held that the FAA lacked regulatory authority over model aircraft operations.⁽²⁾ In its proposed interpretation the FAA focuses on:

- defining 'model aircraft' and its inclusion within the definition of 'aircraft';
- the special exception for model aircraft to FAA rulemaking; and
- its further rulemaking authority over model aircraft.

Huerta v Pirker

On June 27 2013 the FAA issued an order of assessment against Raphael Pirker, alleging that he operated a Ritewing Zephyr powered glider aircraft for compensation near the University of Virginia campus in Charlottesville, Virginia. The FAA charged Pirker with operating the aircraft in a careless and reckless manner so as to endanger the life or property of another, in violation of Part 91, Section 91.13(a) of the Federal Aviation Regulations, and ordered him to pay a civil penalty of \$10,000.

On March 6 2014 Administrative Law Judge Patrick G Geraghty granted Pirker's motion to dismiss, concluding that the respondent's operation of the Zephyr was not subject to Federal Aviation Regulation regulation and enforcement, thus setting aside the civil penalty. Despite the FAA's arguments to the contrary, he ruled that:

- the term 'model aircraft' is not included in the FAA's statutory or regulatory definition of 'aircraft';
- the FAA policy statements covering model aircraft are intended as voluntary safety standards and do not serve as a regulatory enforcement mechanism; and
- the FAA's policy statements on unmanned aircraft systems does not meet the criteria for valid legislative rule making.

With respect to the definition of 'aircraft', the administrative law judge noted that the FAA historically prefixed 'model' before 'aircraft' to distinguish these devices, effectively rendering model aircraft not within the purview of the Federal Aviation Regulations governing aircraft operations. The regulatory definition of 'aircraft' found at 14 CFR Part 1, Section 1.1 and the statutory definition of 'aircraft' found at 49 USC 40102(a)(6) both require that the device or contrivance be designed, used or intended to be used for flight in the air.

According to the administrative law judge, to accept the FAA's argument that the Zephyr was an 'aircraft' by virtue of it being designed for flight in the air would subject the operation of paper aircraft or toy gliders to regulatory authority under Part 91, Section 91.13(a) of the Federal Aviation Regulations. Finally, he noted that the FAA's argument that the Zephyr was an aircraft was weakened by the fact that the FAA did not previously require model aircraft operators to comply with aircraft certification requirements under the Federal Aviation Regulations, and found that the reasonable inference was that the FAA intentionally distinguished model aircraft as a class excluded from the regulatory and statutory definitions of 'aircraft'. This inference is supported by the FAA's previous practice of encouraging voluntary compliance with model aircraft safety standards, as promulgated by Advisory

The day after the *Pirker* ruling, the FAA announced that it would appeal to the full NTSB, automatically staying the administrative law judge's decision pending the appeal. Either party may appeal to the US district court or US Court of Appeals following the decision of the full NTSB. Both parties have submitted their briefs on appeal and several *amici* (including hobbyists, commercial drone operators, former FAA officials and news media groups) have weighed in on both sides of the debate.⁽³⁾

Notice of interpretation

On June 25 2014, seemingly in direct response to the administrative law judge's ruling, the FAA published the notice, which included a request for comment. In the notice the FAA states that it has long considered model aircraft to fall within definition of 'aircraft' and within its authority.⁽⁴⁾ The FAA notes that the FAA Modernisation and Reform Act of 2012⁽⁵⁾ defines a 'model aircraft' as an aircraft that is "(1) capable of sustained flight in the atmosphere; (2) flown within visual line of sight of the person operating the aircraft; and (3) flown for hobby or recreational purposes".⁽⁶⁾

Special exception

The FAA concedes that Section 336 of the act prohibits it from promulgating any rule or regulation regarding model aircraft if the model aircraft meets the following statutory requirements:

- The aircraft is flown strictly for hobby or recreational use;
- The aircraft is operated in accordance with a community-based set of safety guidelines and within the programming of a nationwide community-based organisation;
- The aircraft is limited to no more than 55 pounds, unless otherwise certified through a design, construction, inspection, flight test and operational safety programme administered by a community-based organisation;
- The aircraft is operated in a manner that does not interfere with and gives way to any manned aircraft; and
- When the aircraft is flown within a specific radius of an airport, the operator provides the airport operator and the airport air traffic control tower with prior notice of the operation.⁽⁷⁾

Although these requirements seem clear, the FAA expands on the statutory mandate in four notable ways. First, regarding the visual line of sight requirement, the FAA has interpreted this requirement to mean:

"(1) the aircraft must be visible at all times to the operator; (2) the operator must use his or her own natural vision {corrective lenses are considered natural vision, but this does not include binoculars, night vision goggles, etc}; and (3) people other than the operator may not be used in lieu of the operator for maintaining visual line of sight."⁽⁸⁾

Second, the FAA interprets the reference to weight to mean "the weight of the aircraft at the time of the operation".⁽⁹⁾

Third, as for the community-based safety guidelines and nationwide community-based organisation, the Academy of Model Aeronautics is an example of a community-based organisation.

Fourth, and most importantly, is the FAA's guidance on what constitutes a hobby or recreational use. A 'hobby' is "a pursuit outside one's regular occupation engaged in especially for relaxation".⁽¹⁰⁾ The FAA considers flights conducted for commercial operations, in furtherance of a business or incidental to a business to be for non-hobby or recreational purposes.⁽¹¹⁾ Examples of flights considered by the FAA to qualify or not qualify hobby or recreation are set out in the following table.

Hobby or recreation	Not hobby or recreation
Flying a model aircraft at the local model aircraft club.	Receiving money for demonstrating aerobatics with a model aircraft.
Taking photographs with a model aircraft for personal use.	A realtor using a model aircraft to photograph a property that he or she is trying to sell and using the photos in the property's real estate listing. A person photographing a property or event and selling the photos to someone else.
Using a model aircraft to move a package from point to point without any kind of compensation.	Delivering packages to people for a fee.
Viewing a field to determine whether crops need water when they are grown for personal enjoyment.	Determining whether crops need to be watered that are grown as part of commercial farming operation.

Enforcement authority

Even though Congress restricted the FAA from future "rulemaking action specifically regarding model aircraft", the FAA does not consider the special exception to restrict its authority to enact regulations that will affect all aircraft operations.⁽¹²⁾ Therefore, the FAA holds that regulations that, currently or in the future, have an impact on all aircraft operations will be fully enforced against model aircraft.⁽¹³⁾ This includes rules covering:

- how the aircraft is operated;
- operating rules for designated airspace;
- special restrictions such as temporary flight restrictions and notice to operators; and
- what constitutes a prohibited commercial operation of a model aircraft.⁽¹⁴⁾

The FAA cites congressional authority to do such: "Nothing in this [special exception] shall be construed to limit the authority of the Administrator to pursue enforcement action against persons operating model aircraft who endanger the safety of the national airspace system."⁽¹⁵⁾

Extension of comment period and pending litigation

At the request of the Academy of Model Aeronautics, the FAA has extended the comment period to September 23 2014. As of the date of writing, the FAA had received nearly 5,000 comments on its proposed interpretation.

Since initial publication of the notice, a group led by USA America Fund has filed a petition for review at the US Court of Appeals for the DC Circuit.⁽¹⁶⁾ The notice, according to the group, is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law, in excess of statutory jurisdiction, authority, or limitations, and without observance of procedure required by law".⁽¹⁷⁾

Comment

Until further judicial action is taken in *Pirker* or in the petition filed by USA America Fund, the notice should put model aircraft hobbyists and commercial drone operators on warning that the FAA will continue to maintain that it has regulatory authority over this space. Unfortunately, this pending litigation and delayed rulemaking attempt will put any final rules governing the commercial use of drones well past the 2012 congressional mandate of the act. This delay, according to critics, will only widen the gap between federal regulations and drone technology.

With the announcement of Amazon's delivery drone development programme and Google's Project Air, media coverage and public attention focused on this issue have never been higher. As a result, federal regulators will have to cooperate with experts in the transportation, technology, defence and energy industries in order to implement an effective and efficient regulatory infrastructure.

For further information on this topic please contact Timothy Lynes at Katten Muchin Rosenman LLP by telephone (+1 202 625 3500), fax (+1 202 298 7570) or email (timothy.lynes@kattenlaw.com). The Katten Muchin Rosenman LLP website can be accessed at www.kattenlaw.com.

Endnotes

(1) Interpretation of the Special Rule for Model Aircraft, 79 Fed Reg 122, 36172 (FAA, June 25 2014); Docket FAA-2014-0396, available at www.regulations.gov/#!documentDetail;D=FAA-2014-0396-0001.

(2) Decisional Order, *Huerta v Pirker*, Docket CP-217 (NTSB Mar 6 2014), available at www.nts.gov/legal/Pirker-CP-217.pdf.

(3) See Documents relating to Docket CP-217: *Huerta v. Pirker*, www.nts.gov/legal/pirker.html.

(4) Notice at 79 Fed Reg 122, 36172.

(5) Pub L. 112-95, 126 Stat 11.

(6) PL 112-95, § 336(c).

(7) PL 112-95, § 336(a)(1)-(5).

(8) Interpretation at 8.

(9) Interpretation at 12.

(10) Notice at 79 Fed Reg 122, 36174.

(11) *Id.*

(12) *Id* at 79 Fed Reg 122, 36175.

(13) See PL 112-95, § 336(b)(5).

(14) See Notice at 79 Fed Reg 122, 36174-75. See 14 CFR 91.1.

(15) PL 112-95, § 336(b).

(16) *UAS America Fund v FAA*, Case 14-1156, Petition for Review (August 22 2014).

(17) *Id* at 5.

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