UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

MICHAEL P. HUERTA, Administrator Federal Aviation Administration Complainant, v. RAPHAEL PIRKER Respondent.	)	Docket No. CP-217 Judge Patrick G. Geraghty

ADMINISTRATOR'S RESPONSE TO RESPONDENT'S REPLY IN FURTHER SUPPORT OF HIS MOTION TO DISMISS

The Administrator of the Federal Aviation Administration pursuant to 49 C.F.R. § 821.17 of the Board's Rules of Practice in Air Safety Proceedings and the ALJ's order files this response in opposition to Respondent's reply in further support of his motion to dismiss. The Respondent makes three primary arguments in his further reply:

1) that the 2007 policy statement is not enforceable and therefore the Administrator is precluded from prosecuting this matter;
2) that the Unmanned Aircraft System (UAS) at issue in this case is not an "aircraft" as defined in 14 C.F.R. § 1.1; and
3) that the FAA lacks jurisdiction over the airspace at issue in this case.

Each of his arguments is deeply flawed and provides no legal or factual basis for granting his motion to dismiss.

The FAA has broad authority to regulate aircraft operating in U.S. airspace. See, e.g., 49 U.S.C. § 40103 and 44701. Consistent with that authority it long ago promulgated a regulation that

prohibits the careless or reckless operation of aircraft in that airspace that could potentially endanger the life or property of another. The Complaint alleges that Respondent violated 14 C.F.R. § 91.13 by operating an aircraft on October 17, 2011 in Charlottesville, Virginia in a manner contrary to the prohibition of that regulation.

I. The 2007 policy statement Respondent relies upon does not preclude the FAA's finding that Respondent's operation violated 14 C.F.R. § 91.13.

Respondent attempts to divert attention from what is at issue in this case by steadfastly arguing that the FAA's policy statements on unmanned aircraft are not enforceable. The FAA, however, is not seeking to enforce those policies here[1]; rather it is enforcing its longstanding regulation that prohibits operation of any aircraft in a careless or reckless manner.

Based on Respondent's persistence in arguing about the unenforceability of the 2007 policy, he appears to believe that if he vigorously criticizes the FAA's efforts to address UAS operations through policy, it will excuse his operation of an aircraft, as alleged in the Complaint, in a careless or reckless manner so as to endanger the life or property of another. The issue of whether he violated section 91.13, however, is one that can only be resolved at a hearing on the merits of this case.

Respondent's contention that the Administrator has not previously sought enforcement of the Federal Aviation Regulations in cases regarding model aircraft also is irrelevant to resolving this matter. Even if it is assumed that this is a case of first impression, that fact does not mean that this case is improper in any way. Finally, Respondent relies on You Tube videos; newspaper articles; and purported statements of FAA employees again presumably to distract from what is at issue in this case; but those sources do nothing to rebut what has been charged in the Complaint in this case.

[1] The FAA notes that the 2007 Notice upon which Respondent relies for his argument is not inconsistent with the FAA's argument that section 91.13 pertains to the operation of all aircraft, including UASs. Moreover, a plain reading of the 2007 Notice makes it clear that UASs are "aircraft" within both the statutory and regulatory definitions of "aircraft."

II. UASs are "aircraft" as defined in 49 U.S.C. § 40102(a)(6) and 14 C.F.R. § 1.1 .

The Respondent asserts that the Administrator's "overbroad interpretation [of "aircraft"] is not faithful to the text." *See* Resp't's Mot. at 11. He does little in the way of legal analysis to support his position. The UAS in this case was indisputably designed to navigate or fly in the air. Respondent does not dispute this fact nor does he dispute that he operated the UAS to navigate and fly in the air as alleged in the Complaint.

Instead, Respondent erroneously contends that all "aircraft" must, by definition, have a pilot-in-command onboard. Neither the plain wording of section 40102(a)(6) of the statute[2] nor section 1.1 of the FAA's regulations[3] contain this requirement and Respondent cites no other controlling authority for his proposition. Moreover, 49 U.S.C. § 40102(a)(35), which defines "operate aircraft" and "operation of aircraft" cannot be read to require that a pilot be onboard the aircraft to operate the aircraft.[4] The Respondent's view of the definition of "aircraft" is neither supported by the plain language of section 40102(a)(6) of the statute nor the definition in the section 1.1 of the FAA's regulations.[5] It, therefore, should be accorded no weight in deciding this motion.

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[2] 49 U.S.C. §40102(a)(6) ("[A]ircraft" means any contrivance invented, used, or designed to navigate, or fly in, the air.").

[3] 14 C.F.R. § 1.1 defines aircraft as: "a device that is used or intended to be used for flight in the air."

[4] 49 U.S.C. § 40102(a)(35) defines "operate aircraft" and "operation of aircraft" as: (A) the navigation of aircraft; and (B) causing or authorizing the operation of aircraft with or without the right of legal control of the aircraft.

[5] To the extent Respondent contends that there is any ambiguity as to the FAA's reading of the statutory definition of "aircraft" or "operate aircraft," or as to the scope of the FAA's authority to regulate airspace (addressed in the following argument), Chevron deference is owed to the FAA's interpretation of its own statutory authority, as Congress clearly assigned regulation of this subject matter to the FAA. See City of Arlington v. F.C.C., 133 S.Ct. 1863, 1874-75 (2013).

III. The FAA has the authority to regulate the airspace below 500 feet.

The Respondent asserts that the FAA does not have authority to regulate the airspace below 500 feet and that Congress may even be prohibited from doing so. *See* Resp't's Mot. at 22. Respondent misconstrues the scope of the FAA's regulatory authority. 49 U.S.C. § 40103(a)(1) grants the U.S. Government "exclusive sovereignty of airspace of the United States." *Id.* Paragraph (b) grants the Administrator the authority to regulate the airspace in the public interest to do such things as "preventing collision between aircraft, between aircraft and land and water vehicles, and between aircraft and airborne objects" and "to protect individuals and property on the ground." 49 U.S.C. § 40103(b). *See also* City of Burbank v. Lockheed Air Terminal, Inc., 411 U.S. 624, 638-39 (1973). Congress expressly did not restrict the FAA's ability to regulate the operation of aircraft at any altitude to prevent collisions between aircraft with land vehicles and other airborne objects and to protect persons and property on the ground.[6]

As the legislative history of the Federal Aviation Act of 1958 demonstrates, Congress proposed to "give the Administrator authority to regulate the use of *all airspace* over the United States by both civil and military aircraft . . . ." United States v. Christenson, 419 F.2d 1401, 1404 (9th Cir. 1969) (citing 1958 U.S. Code Cong. & Admin. News, p. 3745) (emphasis added). Consistent with its broad statutory authority, the FAA promulgated section 91.13, which prohibits the careless or reckless operation of an aircraft so as to endanger the life or property of another. This prohibition is not limited to operations above 500 feet; to be sure, the unambiguous wording of the regulation is to

[6] Consistent with its statutory authority, the FAA in 49 C.F.R. §1.1 defines "operation with respect to aircraft, means use, cause to use or authorize to use aircraft, for the purpose **(except as provided in § 91.13 of this chapter)** of air navigation including the piloting of aircraft with or without the right of legal control (as owner, lessee, or otherwise)." (emphasis added).

bar careless and reckless operations of aircraft in any of the airspace over the United States where the operation could potentially endanger persons and property of another.

Contrary to what Respondent argues, the definition of navigable airspace in neither 49 U.S.C. § 40102(32) nor 14 C.F.R. § 1.1 acts to limit the FAA's authority to regulate U.S. airspace at any altitude.[7] The FAA's mandate is to regulate the use of all airspace necessary to "ensure the safety" of aircraft, for "protecting, and identifying" those aircraft, and for "protecting individuals on the ground." That authority is not circumscribed by the definition of "navigable airspace." Consistent with the broad scope of authority that Congress gave to the FAA, the prohibition of careless and reckless operations in section 91.13 is not limited to aircraft operating in navigable airspace above a certain altitude. The plain wording of the regulation mirrors the Congressional intent that FAA promulgate regulations to prevent aircraft collisions with land-based vehicles and to protect individuals and property on the ground.[8] Accordingly, deference is owed to the FAA's

[7] Respondent's reliance on U.S. v. Causby, 328 U.S. 256 (1946) at pages 19-23 of his further argument does not support his contention that the U.S. government may lack authority to regulate airspace below minimum prescribed altitudes. Causby was a case brought in the Court of Claims in which the Plaintiffs alleged the government had impermissibly taken their land under the 5th Amendment by operating military aircraft over it at a low altitude into and from a nearby airport. The issue in the case was whether the Plaintiffs had suffered a compensable harm; not whether the government had a right to regulate the use of the airspace.

[8] The Complaint alleges, among other things, that Respondent operated the aircraft: directly towards an individual standing on a University of Virginia (UVA) sidewalk causing the individual to take immediate evasive maneuvers so as to avoid being struck by the aircraft; through a UVA tunnel containing moving vehicles; under a crane; below tree top level over a tree lined walkway; within approximately 15 feet of a UVA statue; within approximately 50 feet of railway tracks; within approximately 50 feet of numerous individuals; within approximately 20 feet of a UVA active street containing numerous pedestrians and cars; within approximately 25 feet of numerous UVA buildings; on at least three occasions under an elevated pedestrian walkway and above an active street; directly towards a two story UVA building below rooftop level and making an abrupt climb in order to avoid hitting the building; and within approximately 100 feet of an active heliport at UVA.

interpretation of its own statutory authority, as Congress clearly assigned regulation of this subject matter exclusively to the FAA. City of Arlington, 133 S.Ct. at 1874-75.

WHEREFORE, for the reasons stated above, the Administrator respectfully requests that Respondent's Motion to Dismiss be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this day copies of the foregoing Administrator's Response to Respondent's Reply in Further Support of his Motion to Dismiss was sent by fax and placed in the United States mail, postage prepaid, addressed as follows:

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