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AVIATION

Holding Pattern: FAA Regulation of Commercial Drones After *Huerta v. Pirker*

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The Federal Aviation Administration (FAA) suddenly finds itself with questionable authority over unmanned aircraft systems (UAS)—more commonly known as ''drones''—used for business purposes.

A Denver-based National Transportation Safety Board (NTSB) administrative law judge recently declared that the FAA has never issued rules implementing its jurisdiction over the commercial use of UAS. The ruling may compel the FAA to expedite new rules, subject to the public notice and comment rulemaking process, in accordance with a 2012 Congressional mandate. Otherwise, the agency's authority to regulate the use of drones and model aircraft for commercial purposes will remain unclear.

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FAA Jurisdiction Over Drones

Drone technology, and its accessibility to commercial operators, has rapidly increased over the past few years, outstripping the FAA's ability to issue applicable regulations to keep pace. Gone are the days where civil use of UAS was limited to weekend hobbyists. Drones are now used in many different types of commercial endeavors, primarily on relatively remote work sites where safety concerns are minimal.

For example, land surveyors can now photograph terrain by deploying cost-efficient drones to cover areas that previously required dozens of employees working numerous hours. Similarly, mining companies now attach high-definition cameras to drones to create three-dimensional maps of dig sites that can be used to calculate the amount of material removed and to project production estimates.

Such uses highlight the potential for employing drones as a cheaper and safer alternative for virtually any commercial task that companies previously entrusted only to manned aircraft, including crop irrigation and traffic surveillance.

Commercial use of unmanned aircraft in the U.S. is poised to expand into more congested areas, as well. UAS are commonplace in the overseas film industry, and already a number of stateside movie productions have already utilized a drone's ability to shoot certain

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aerial scenes both effectively and safely. Photo journalists in the U.S. are poised to use drones for taking footage and photos of newsworthy sites, but are hesitant to do so pending a clarification of FAA policy. And although it may take years to become reality, potentially the most ubiquitous commercial use of UAS is yet to come: giant on-line retail proprietor Amazon has announced that drones will be the next evolutionary step in package delivery.

The sole FAA publication on civil use of unmanned aircraft has been 1981 safety guidelines for model aircraft operators.

Historically, the sole FAA publication that addressed the civil use of unmanned aircraft was a 1981 policy statement, Advisory Circular (AC) 91-57, that provided safety guidelines for model aircraft operators.[1] In February 2007, however, the agency issued FAA Notice 07-01, which prohibited reliance on AC 91-57 as a justification for commercial operation of unmanned aircraft, and provided that all civil UAS operators are subject to the same FAA regulations as any other aircraft.[2] Notice 07-01 also indicated that the FAA would undertake a safety review to determine whether it might issue a new policy document, similar to AC 91-57, focused on operation of unmanned aircraft for civil uses that do not qualify as sport or recreation. To date, the FAA has issued no such document.

Congress Presses for FAA Action. In 2012, Congress recognized the growing disparity between the ever-expanding operation of drones for commercial purposes and the absence of a set of bright-line rules to govern such operations. Accordingly, Congress directed the FAA to work with other relevant government and industry entities to issue no later than September 2015 a plan for integrating civil unmanned aircraft into the national airspace system (NAS).[3] Unmanned aircraft operators lament how the U.S. has lagged behind other countries in the regulation and integration of civil UAS. But the FAA's measured and methodical process to date for developing and issuing new rules highlights the complexity of introducing UAS into the busiest airspace system in the world. The agency has stated that it wants to see the commercial UAS industry reach its full potential in the U.S., but appears apprehensive to move forward with new rules until it is confident that it can do so having fully addressed all the concerns.

In the interim, the FAA has attempted to rely on its existing publications, namely, AC 91-57 and Notice 07-01, as the basis for its purported jurisdiction over the commercial use of unmanned aircraft. The FAA typically flexed this jurisdiction only in the form of written warnings and cease-and-desist letters to commercial drone operators—until June 2013, when it fined Raphael Pirker $10,000 for allegedly flying his commercial drone in an unsafe manner.

Huerta v. Pirker

In October 2011, a communications company paid Pirker to fly his remote-controlled, 4-pound, 56-inch-wingspan Ritewing Zephyr over the University of Virginia. During the flight, the Zephyr snapped photographs and took footage of the campus and medical school facilities and transmitted them back to Pirker for use in a commercial. On June 27, 2013, the FAA issued an Order of Assessment and a fine to Pirker, alleging that he recklessly piloted his model aircraft (including through a tunnel with moving vehicles and dangerously close to persons and property on the ground) in violation of applicable Federal Aviation Regulations.[4]

Pirker appealed his fine to the NTSB,[5] moving to dismiss the order on grounds that the FAA's regulations do not apply to commercial model aircraft flight operations. Pirker asserted that, because the FAA has never published an applicable regulation using the required public notice and comment procedures, there was no rule violation to support the FAA's assessment of a fine. The FAA countered that the statutory definition of ''aircraft'' incorporates within its scope any device intended for flight,[6] model aircraft included, and that Pirker was therefore subject to all FAA regulations. Further, the FAA asserted that operators of commercial drones are subject to the model aircraft safety guidelines in AC 91-57 and to Notice 07-01, which made civil unmanned aircraft operators subject to all FAA regulations, including registration and airworthiness requirements.

ALJ Finds No Applicable FAA Rule. The administrative law judge held in favor of Pirker and dismissed the FAA's order, finding that there was no enforceable FAA rule applicable to model aircraft under which the FAA could assess a fine. Under the judge's reasoning, because the agency has historically distinguished civil unmanned flying devices from other ''aircraft'' by modifying that term with the pre-fix ''model,'' the FAA regulations at issue did not apply to model aircraft. Otherwise, the FAA's expanded definition of ''aircraft'' would lead to the unintended, illogical consequence that flying a toy balsa wood glider or a paper airplane could be subject to FAA regulations.

In addition, the administrative judge held that, to the extent that AC 91-57 applied to commercial model aircraft operators, the circular's safety guidelines were not binding because they employed language that merely encourages voluntary compliance. Finally, the judge found the FAA's 2007 policy statement to be nonbinding on civil UAS operators, because the agency issued the statement as internal agency guidance and

[1] FAA AC 91-57 (June 9, 1981) (*available at* http://www.faa.gov/documentLibrary/media/Advisory_Circular/91-57.pdf).

[2] *See* 72 Fed. Reg. 6,689-90 (Feb. 13, 2007) (providing that ''AC 91–57 only applies to modelers, and thus specifically excludes its use by persons or companies for business purposes'' and that ''unmanned aircraft for civil use must obtain an FAA airworthiness certificate the same as any other type aircraft'').

[3] Pub. L. 112-95 § 332(a) (Feb. 14, 2012).

[4] Federal Aviation Regulation § 91.13(a) (''[n]o person may operate an aircraft in a careless of reckless manner so as to endanger the life or property of another'').

[5] *See* Decisional Order, *Michael P. Huerta v. Raphael Pirker* (Mar. 6, 2014) (*available at* https://www.ntsb.gov/legal/Pirker-CP-217.pdf).

[6] *See* 49 U.S.C. § 40102(a)(6) (''Aircraft means any contrivance invented, used, or designed to navigate or fly in the air.'').

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never subjected the policies to the public notice and comment process required of rulemaking.

Although Pirker's win was a boost for commercial drone operators everywhere, the victory was short-lived. The day after the ruling, the FAA announced that it is appealing to the full NTSB, an action that automatically stays the ALJ decision pending the appeal.[7] Following the full NTSB decision, either party may appeal the decision to a U.S. District Court or a U.S. Court of Appeals.[8] In other words, a final, precedential judicial ruling on the FAA's jurisdiction over commercial unmanned aircraft operations may be years away, which would leave the industry and potential customers in a troubling position of regulatory uncertainty.

The FAA's Next Maneuver

The ruling in *Huerta v. Pirker* raises a number of questions, foremost of which is why the FAA has failed to promulgate new rules, despite being fully aware of the gap in its policies. Indeed, the agency published online guidance earlier this year reiterating that Notice 07-01 clarified that AC 91-57 was inapplicable to commercial drone operators.[9]

Assuming the *Pirker* decision and the potentially lengthy appeals process will compel the agency to accelerate its rulemaking procedures, the more critical question is how the agency intends to regulate unmanned aircraft going forward. Notwithstanding potential legal obstacles related to privacy issues and the free-speech right of journalists and citizens to use drones to record matters of public interest, the FAA has significant practical concerns. One would expect the safety aspects of a new rule to be more comprehensive than AC 91-57, which generally restricts model aircraft operators to flight below 400 feet and requires them to notify air traffic control if flying within three miles of an airport.

Complicated Questions Abound. So, just how, exactly, does the FAA intend to integrate civil drones into the NAS, as Congress has mandated? Air traffic control is a complicated enough endeavor without asking the FAA's controllers to monitor and direct remote-controlled devices like Pirker's Zephyr. One might suppose that civil unmanned aircraft could operate under right-of-way rules similar to the way smaller airplanes are piloted in and out of uncontrolled airports.

But other, more complicated questions abound. Should small, lightweight drones be expected to carry GPS-based equipment that can send out location signals, similar to airplane transponders? Can the FAA require that civil drones—some of which are capable of flying tens of thousands of feet in the air—be equipped with collision avoidance systems like those employed by airliners and military aircraft?

The FAA's November 2013 "roadmap" for the integration of UAS into the NAS is perhaps the best current indicator of the FAA' thinking.

At this time, the FAA's November 2013 ''roadmap'' for the integration of UAS into the NAS is perhaps the best indicator of the how the FAA plans to answer these questions.[10] The roadmap details the many obstacles to developing relevant policies and procedures, and indicates that the FAA sees its current task as UAS ''accommodation'' until such time that the agency can promulgate regulations to govern the integration of UAS in the NAS. But while the roadmap purports to identify goals, metrics, and even timelines for UAS integration, it does so in very general terms. For example, the roadmap states the FAA's goal of making UAS policy and training adaptable to evolving Next Generation Air Transportation System (NextGen) interoperability and collision avoidance technology, but acknowledges that the FAA will be in the research stage of this objective ''from 2012 to 2017.''[11]

Such a timeline implies that actual regulations are still a long way off. The reality may be that the FAA is in a race with itself to promulgate new rules or to appeal the *Pirker* decision successfully. Until the FAA can do one or the other, its jurisdiction over a growing UAS industry will likely remain up in the air.

[7] *See* FAA Press Release (Mar. 7, 2014) (*available at* http://www.faa.gov/news/press_releases/news_story.cfm?newsId=15894&cid=TW209).

[8] *See* NTSB Description of Appeals Process (*available at* https://www.ntsb.gov/legal/airman_appeals.html).

[9] *See* FAA Fact Sheet, Unmanned Aircraft Systems (UAS) (Jan. 6, 2014) (*available at* http://www.faa.gov/news/fact_sheets/news_story.cfm?newsId=14153).

[10] *Integration of Civil Unmanned Aircraft Systems (UAS) in the National Airspace System (NAS) Roadmap*, 1st Ed. (Nov. 7, 2013) (*available at* http://www.faa.gov/about/initiatives/uas/).

[11] *Id.*, App. C at 60.