

## ARTICLE

# Drone D-Day: How NTSB Case Could Impact FAA Authority

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Recent news stories have heralded the advent of unmanned aircraft systems ("UAS," which are more popularly—and less accurately—referred to as drones) for commercial purposes. Whether delivering packages and pizzas or providing low-cost, high-quality aerial video, would-be UAS operators now face the challenges of navigating the complex legal issues associated with novel uses of UAS technologies.

The Federal Aviation Administration is in the process of developing regulations that will apply specifically to UAS operations. While it undertakes that multiyear process, the agency has sought to push the pause button on the commercial use of UAS technologies by applying existing rules and regulations to commercial UAS operators.

The pending case of *Huerta v. Pirker* represents the FAA's first attempt to enforce its rules in the commercial UAS context, and as a result its outcome will have a significant impact on whether and how the FAA regulates commercial UAS.

## FAA Background

UAS technology has evolved quickly over the past few years, bringing a wide range of advanced capabilities to the mass market. Where a "drone" used to be nothing more than a model airplane buzzing around an operator standing in a field, modern UAS can be controlled from long distances using point-of-view cameras or autonomous software and GPS location. The FAA's existing rules were drafted long before this revolution in UAS technology, and thus do not speak directly to the question of how these systems should be

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## Practice Areas

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Uncrewed Aircraft Systems (UAS)

regulated.

In the absence of UAS-specific rules, the FAA has worked to apply its existing paradigm to UAS operators. For example, recreational use of airspace by model aircraft is covered by the 1981 FAA Advisory Circular 91-57 ("AC 91-57"), which encourages voluntary safety standards for model aircraft operators.[1] In 2007, the FAA clarified in a policy statement that AC 91-57 applied to persons interested in flying model aircraft as a hobby or for recreational use and precluded operations for "business purposes." [2]

The 2007 policy statement also set out the current FAA policy for UAS operations, which amounts to a soft ban on commercial use: No person may operate UAS in the national airspace system ("NAS") without specific authority. In 2013, the FAA advised that while private sector unmanned aircraft can apply to obtain an experimental airworthiness certificate to conduct research and development, there are currently no means to obtain an authorization for commercial UAS operations in the NAS.[3] Further action is expected, as the FAA Modernization and Reform Act of 2012 requires the FAA to promulgate regulations concerning the operation of UAS by September 2015.[4]

### **The Pirker case**

In October of 2011, Raphael Pirker used a Ritewing Zephyr remote unmanned aircraft in order to take pictures of the University of Virginia's campus and medical center. Pirker was being paid by a communications company, and the Zephyr contained a camera that transmitted real-time pictures back to Pirker on the ground.

On June 27, 2013, the FAA issued an administrator's order of assessment imposing a \$10,000 penalty against Raphael Pirker for operating a UAS in a careless or reckless manner.[5] The order of assessment asserts that Pirker did not possess an FAA pilot certificate and operated the aircraft recklessly, including in a tunnel containing moving vehicles, under a crane, and unacceptably close to humans, buildings, and a heliport. The order of assessment alleges a violation of Section 91.13(a) of the federal aviation regulations ("FARs"), which states that no person may operate an aircraft in a careless or reckless manner so as to endanger the life or property of another.[6]

Pirker has filed a motion to dismiss the order of assessment, presenting three main arguments against the FAA's action.[7] First, Pirker alleges that there is no existing federal aviation regulation governing the operation of model aircraft. He claims that the FAA expressly declined to regulate model airplanes, instead promulgating voluntary guidelines.[8] Second, Pirker's motion states that the FAA lacks jurisdiction – arguing that UAS operating at very low altitudes and in tunnels and below overpasses are not in "navigable airspace" [9] that is subject to FAA jurisdiction. Finally, Pirker argues that neither the commercial ban on drones nor the application of the FARs (such as § 91.13) is legally enforceable, because the FAA has failed to undertake the requisite rulemaking procedures of the Administrative Procedure Act ("APA") [10] that would be required to put in place such new regulation.

The FAA fired back against Pirker's motion,[11] arguing that it unquestionably has authority to regulate aircraft in U.S. airspace, and that Section 91.13 clearly and without ambiguity pertains to the operation of any aircraft by any person and prohibits careless or reckless operation.[12] The FAA claims that UAS are "aircraft" pursuant to 14 CFR § 1.1 and therefore their careless or reckless operation is prohibited by 14 CFR § 91.13. Moreover, the FAA has taken the position that "nothing in AC 91-57 or in the 2007 policy statement demonstrates that FAA policy excluded UAS from the definition of 'aircraft' such that their careless or reckless operation is permissible." [13]

In addition, the FAA asserts that it has a mandate 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 — activities not confined solely to the "navigable airspace." The FAA further states that Pirker's claim that the FAA's 2007 policy statement improperly substituted for valid APA rulemaking is groundless.

In December 2013, Pirker filed a reply memorandum of law in further support of his motion to dismiss.[14] Pirker contested the FAA's claims that the definition of aircraft in 14 C.F.R. § 1.1 is broad enough to include model aircraft and that the FAA's jurisdiction extends to activity conducted in locations outside the navigable airspace.

Pirker argues that "[t]he FAA's attempt to capture all activity in airspace everywhere elides the historic record concerning the creation of the public navigable airspace as it was carved out from the property rights of land owners decades ago. ... In the FAA's organic statute, Congress correspondingly empowered the FAA only to regulate activity in that same 'navigable airspace,' generally defined as the airspace at and above 500 feet." Pirker's motion to dismiss remains pending at this time.

National Transportation Safety Board proceedings permit a first appeal of an order of assessment to an administrative law judge — Pirker's case is currently at this stage. An initial decision affirming, reversing or modifying the FAA's order of assessment will be issued by the administrative law judge. Any party to a proceeding may appeal the initial decision before the full NTSB. Judicial review of the NTSB's final order can be sought by filing a petition in either the U.S. District Court or the U.S. Court of Appeals.

## Analysis

*Huerta v. Pirker* is significant because it represents the FAA's first attempt to enforce its policies banning the commercial use of UAS. On its narrowest grounds, Pirker's motion to dismiss argues that model aircraft generally are not subject to existing FAA regulation, because the FAA's Advisory Circular 91-57 and 2007 policy statement, which address model aircraft and UAS operation, are voluntary guidelines rather than legally binding regulations. The FAA argues, however, that insofar as the documents reflect regulatory requirements such as the prohibition against operating aircraft in a careless or reckless manner, those requirements are mandatory. If the case is decided against the FAA on these grounds, it will represent a setback for the agency's current policies and would call into question the existing ban on commercial

operation of UAS use.

But Pirker makes two arguments in the alternative that have potentially broader implications. First, he claims that model airplanes are not “aircraft” under FAA regulations. Accepting this argument would remove all unmanned aircraft from the definition of “aircraft,” including large UAS operating at higher altitudes that would pose an obvious danger to other, manned aircraft.

Indeed, the most extreme version of the argument advanced by Pirker is that the FAA does not even have statutory authority to include UAS in the definition of “aircraft.” While these arguments have some grounding in the regulations and text of the statute, limiting the FAA’s jurisdiction in this manner would seem to come at a clear cost to public safety, and this may be a step the ALJ is unwilling to take.

Further, even if the ALJ accepted Pirker’s argument, it seems certain that the FAA would work to find a way to impose regulations on at least some UAS operations given the potential danger that certain kinds of UAS flights could pose to manned aircraft. The FAA thus may respond by adopting UAS regulations through a notice and comment rulemaking process in accordance with the APA. In issuing a notice of proposed rulemaking, the FAA would have to set out the basis for its regulatory authority over UAS.

Second, Pirker argues that the FAA lacks authority to regulate outside the “navigable airspace.” Pirker attempts to distinguish between navigable airspace (generally airspace above 500 feet, along with airspace necessary for landing and departure), on the one hand, and the airspace adjacent to land and buildings on the other. Pirker’s claim is that only state common law and the airspace rights of property owners apply at these lower altitudes.

The FAA counters that 49 U.S.C. § 40103(b)(2) gives the administrator the authority to prescribe regulations on the flight of aircraft for “navigating, protecting, and identifying aircraft” and “protecting individuals on the ground,” and that the FAA’s jurisdiction is not limited to “navigable” airspace but instead covers all airspace.<sup>[15]</sup> As with Pirker’s argument about the definition of “aircraft,” the ALJ may be hesitant to accept Pirker’s claim that the FAA has no authority at lower altitudes.

Doing so would deny the FAA the ability to bring enforcement actions against UAS operators who harm individuals and property. It would thus effectively throw open the skies at altitudes below 500 feet to unregulated UAS operation, and potentially create a regulatory vacuum which state and local authorities may try to occupy. This result could also potentially goad Congress into taking further action to regulate UAS specifically.

While this case has the potential to offer further guidance on the FAA’s authority over UAS operation, this case will not address related questions regarding whether the FAA would be able to bring an enforcement action over a UAS operator flying in a safe manner. The FAA has asserted here that Pirker’s operation was unsafe, and that the agency has the authority to regulate in the interest of safety, but the FAA’s 2007 notice specifies

that the current FAA policy for UAS operations contains no such limitation. Rather, it simply states that “no person may operate a UAS in the NAS without specific authority,” regardless of the level of danger posed by the operation.[16]

If AC 91-57 and 2007 policy statement are indeed enforceable as written, then the FAA could bring an action against any operator of UAS who lacks specific authority — but that issue is unlikely to be decided in *Pirker*. As for how aggressively the FAA plans to enforce these rules, when Jim Williams, manager of the Unmanned Aircraft Systems Integration Office of the FAA, was asked about the possibility of enforcement against a UAS operator, he answered, “The bottom line is that unless you cross that line into hazardous or reckless behavior or come to the attention of the FAA because you’re operating a business illegally, the key is operating safely. And if you’re operating safely and there’s no obvious commerce going on, we’re not going to get involved.” [17]

Finally, while Section 91.13 prohibits operating aircraft in a careless and reckless manner, the FAA has not defined what would constitute carelessness or recklessness when operating a UAS. For example, how close of a flight to humans and buildings would be permissible? What is a safe speed for a UAS? Would a flight movement considered reckless for a larger aircraft be acceptable for a small UAS?

The outcome of this proceeding could force the FAA to create defined standards of UAS operation. If the judge upholds the FAA’s assessment against *Pirker*, the agency could potentially bring additional enforcement actions against other commercial UAS users. Alternately, the judge could avoid addressing the underlying FAA authority questions or release an ambiguous decision, creating even greater uncertainty as the FAA moves toward promulgating UAS regulations. Undoubtedly, the resolution of *Huerta v. Pirker* will influence the deployment of UAS for commercial uses.

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[1] FAA, Advisory Circular 91-57, Model Aircraft Operating Standards (June 9, 1981) (“AC 91-57”).

[2] Unmanned Aircraft Operations in the National Airspace System, Docket No. FAA-2006-25714, 72 Fed. Reg. 29 at 6689 (Feb. 13, 2007) (“2007 Policy Statement”).

[3] FAA, Notice, N 8900.227, Unmanned Aircraft Systems Operational Approval (effective July 30, 2013); FAA, Unmanned Aircraft Questions and Answers, available at [http://www.faa.gov/about/initiatives/uas/uas\\_faq/#Qn7](http://www.faa.gov/about/initiatives/uas/uas_faq/#Qn7) (last modified July 26, 2013).

[4] Pub. L. 112-95 § 332(a), 126 Stat. 11 (2012).

[5] *Administrator v. Raphael Pirker*, NTSB Docket No. CP-217 (July 18, 2013).

[6] 14 C.F.R. § 91.13(a).

[7] Respondent's Motion to Dismiss, NTSB Docket No. CP-217 (Sept. 27, 2013).

[8] See AC 91-57.

[9] 49 U.S.C. § 40102.

[10] See 5 U.S.C. § 500 et seq.

[11] See Administrator's Response to Respondent's Motion to Dismiss, NTSB Docket No. CP-217 (Nov. 1, 2013) ("Administrator's Response").

[12] 14 C.F.R. § 91.13(a).

[13] Administrator's Response at 8.

[14] Respondent's Reply Memorandum of Law in Further Support of His Motion to Dismiss, NTSB Docket No. CP-217 (Dec. 10, 2013).

[15] Administrator's Response at 5.

[16] 2007 Policy Statement.

[17] See AMA/FAA Forum AMA Expo 2013 (Feb. 10, 2013) at 53:35-55:19, available at <http://www.youtube.com/watch?v=hJECplst10M>

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