Huerta v. Pirker: FAA's Regulation of Innovative Technology on Trial

By E. Tazewell Ellett and William L. Elder

For decades, unmanned aircraft systems (UAS)[1] operated in U.S. airspace without the Federal Aviation Administration (FAA) exercising oversight, regulation, or approval rights over the operations. This approach was typified by the FAA's 1981 issuance of Advisory Circular (AC) 91-57, Model Aircraft Operating Standards (the AC).[2] The AC encouraged "voluntary compliance" with certain "model aircraft" standards, without defining "model aircraft" or distinguishing between recreational and business/commercial uses of these aircraft.

Starting in 2005, through a series of guidance and policy documents, the FAA changed its approach and declared that UAS operations for business/commercial purposes are subject to the Federal Aviation Regulations (FAR) requirements applicable to aircraft and are not permitted without prior FAA approval.[3] Over nine years later, the FAA has yet to develop regulations for business/commercial UAS operations. Except for approvals covering certain limited operations in the Arctic and Alaska, the FAA's ban on UAS business/commercial operations remains in place.

Because of the FAA's changed approach, the prolonged delay in issuing regulations or approvals for business/commercial operations, and the FAA's willingness to grant approvals to government but not private sector entities through Certificates of Waiver or Authorization (COA), the UAS industry has lost patience with the FAA and numerous operators are conducting UAS operations in open defiance of the FAA's ban.

The FAA has issued many cease and desist directives to UAS operators, but its first actual enforcement action against such an operator was against Mr. Raphael Pirker.

Huerta v. Pirker

According to the FAA, on October 17, 2011:

- Pirker operated a small UAS in the vicinity of the University of Virginia (UVA) campus.
- The small UAS recorded photographs and video during the flight.
- The flight operated at low altitudes over vehicles, buildings, and people; within 50 feet of numerous individuals; directly toward at least one individual who had to take evasive action to avoid being struck by the small UAS; and within 100 feet of an active heliport at UVA.
- Pirker was compensated for aerial photographs and video obtained from the flight.

The FAA initiated enforcement action against Pirker, alleging that Pirker operated the small UAS in a careless and reckless manner in violation of FAR § 91.13(a). The FAA assessed a $10,000 civil penalty, which Pirker appealed to National Transportation Safety Board (NTSB) Administrative Law Judge (ALJ) Patrick G. Geraghty.

Pirker filed a motion to dismiss,[4] arguing that (i) no FAR requirement applied to the "model aircraft" operation and (ii) FAA guidance and policy statements regarding UAS operations, such as AC 91-57 and FAA Notice 07-01, Unmanned Aircraft Operations in the National Airspace System (the 2007 Notice), were "not binding or enforceable." The FAA argued[5] that UAS are within the statutory and regulatory definitions of "aircraft"[6] and that FAR § 91.13 is binding on all aircraft, including UAS, even if the AC and the 2007 Notice are not.

On March 6, 2014, Judge Geraghty granted Pirker's motion to dismiss.[7] The ALJ's order vacated the FAA's Order of Assessment and terminated the proceedings. In the decision, Judge Geraghty ruled that

- the definitions of "aircraft" found in FAR § 1.1 and 49 U.S.C. § 40102(a)(6) do not include "model aircraft";
- Pirker's "model aircraft" operation was subject only to the voluntary compliance standards of AC 91-57[8];
- the 2007 Notice and prior policy notices and guidance materials do not provide a jurisdictional basis for the FAA asserting enforcement authority on "model aircraft" operations; and
- at the time of Pirker's "model aircraft" operation, "there was no enforceable FAA rule or FAR Regulation applicable to the model aircraft or for classifying model aircraft as an UAS."

Response to ALJ Decision

Many UAS operators interpreted the ALJ decision

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as indicating that they were free to operate without being subject to any FAA regulation. The FAA quickly appealed the ALJ decision to the full NTSB and issued a press release stating that its appeal stayed the ALJ's decision until the Board rules. The FAA stated that it was concerned that this decision could impact the safe operation of the national airspace system and the safety of people and property on the ground.

The FAA, Pirker, and several amicus curiae filed briefs. At time of writing, the appeal is under review by the NTSB's General Counsel's Office, with a full NTSB decision expected in the late summer or early fall of 2014.

Significant Issues Raised by the ALJ Decision and the Appeal Briefs

Among the many issues raised by the ALJ decision and the appeal briefs, the following two are the most significant, both for the *Pirker* appeal and for future FAA regulation and enforcement.

The Scope of the Definition of "Aircraft"

Pirker argued, and the ALJ held, that neither the statutory nor the regulatory definition of "aircraft" includes "model aircraft." We respectfully disagree. Title 49 U.S.C. § 40102(a)(6) defines "aircraft" as "any contrivance invented, used, or designed to navigate or fly in the air." FAR § 1.1 provides the regulatory definition: "Aircraft means a device that is used or intended to be used for flight in the air." Even though both definitions are quite broad, the ALJ noted several reasons for determining that "model aircraft" are not within these definitions of "aircraft." First, he reasoned that "[b]y affixing the word 'model' to aircraft the reasonable inference is that the Complainant FAA intended to distinguish and exclude model aircraft from either or both of the aforesaid definitions of 'aircraft.'"

The FAA's use of the word "model" before "aircraft" does not mean that the FAA intended to exclude "model aircraft" from the definition of "aircraft." The FAA frequently uses a word as a prefix for "aircraft" without intending to exclude that type of device from the definition of "aircraft." For example, prefixes to "aircraft" (or to "airplane" or "rotorcraft") are found in FAR parts 21, 23, 25, 27, 34, 36, and 91, and yet in none of these cases does the FAA intend the prefix to exclude those devices from the definition of "aircraft." Similarly, there is no evidence of FAA intent to exclude "model aircraft" or "unmanned aircraft" from the definition of "aircraft" just because the FAA uses the prefix "model" or "unmanned."

The ALJ also reasoned that if the definition of "aircraft" covers all types of devices intended for, or used for, flight in the air, "a paper aircraft, or a toy balsa wood glider, could subject the 'operator' to the regulatory provisions of FAR Part 91, Section 91.13(a)."[9] The ALJ noted that the FAA historically has not required "model aircraft" operators to comply with FAR Part 21 airworthiness certificate requirements or FAR Part 47 aircraft registration requirements. He concluded: "The reasonable inference is not that FAA has overlooked the requirements, but, rather that FAA has distinguished model aircraft as a class excluded from the regulatory and statutory definitions."[10]

This analysis confuses the concepts of a jurisdictional definition, on the one hand, and the discretionary power to exercise that jurisdiction, on the other. Nothing in the legislative history of either the Federal Aviation Act of 1958 or the Air Commerce Act of 1926 (the origin of the statutory definition of "aircraft") suggests that the definition of "aircraft" is intended to be limited as suggested by the ALJ. Rather, the definition was intended to be quite broad, providing the FAA considerable discretion, up to and including the power to regulate the operation of very small "aircraft" if the FAA were to determine that the operation could interfere with the safe flight of aircraft in air commerce or endanger individuals or property on the ground.

The fact that the FAA does not subject certain types of flying devices to FAA safety rules, or that the FAA subjects certain devices to some but not all of the FAA's safety rules, does not mean that these devices are not "aircraft" or that they are not subject to the FAA's authority to regulate. It simply means that the FAA has exercised the discretion provided by Congress to determine the best regulatory approach for that type of device.

The Consequences of the FAA's Failure to Comply with the Administrative Procedure Act

Respondent argued on appeal that while "model aircraft" have been operated in the United States for nearly a century, the FAA never adopted a regulation covering these aircraft or took any action suggesting that they were subject to FAR requirements until 2005. Amicus briefs argued that the FAA's actions inappropriately attempt to regulate through issuance of guidance materials or litigation, rather than through Administrative Procedure Act (APA)–required notice-and-comment rulemaking.[11]

What is really on trial here is whether the FAA has complied with APA requirements in its efforts to impose and enforce binding obligations on UAS. We respectfully disagree with the FAA's argument that all FAR applied to UAS or "model aircraft" at the time of Pirker's flight. This is not because these vehicles are not "aircraft" or are not subject to the FAA's safety regulatory authority. We believe they are. The issue is that the FAA has not, consistent with the APA, properly subjected them to the FAR.

Small, remotely piloted UAS have operated in U.S. airspace since at least 1923.[12] At no time prior to 2005 did the FAA or its predecessor, the Civil Aeronautics

Administration (CAA), ever suggest that, or act as though, UAS were subject to FAR requirements or FAA enforcement. In recent decades, the FAA has been well aware that small, remotely piloted aircraft were being operated, not only for recreational or hobby use, but also for business/commercial purposes,[13] yet prior to 2005 there was absolutely no FAA (or CAA) interpretive, guidance, regulatory, or enforcement activity that indicated to the general public or the aviation industry that UAS were regulated by the FAR or subject to FAA enforcement.

The FAA's first written statement to the public about UAS came in 1981, when the FAA issued AC 91-57, which stated: "This advisory circular outlines and encourages voluntary compliance with, safety standards for model aircraft operators." The AC did not mention any FAR provision applicable to "model aircraft." Remarkably, it used the terms "model aircraft," "model aircraft operators," and "modelers" without defining them.[14] Nothing in the AC suggested that it applies only to certain uses of "model aircraft" (such as recreational uses) and not others (such as business/commercial uses).

The AC was not a rule, was not adopted in accordance with APA requirements, and changed nothing from a regulatory standpoint. The FAA had never applied an FAR to UAS before issuance of the AC, and did not do so for 24 years after issuance of the AC. But the AC did one very important thing. It made a clear written FAA statement to the public that "model aircraft" should voluntarily comply with the standards articulated in the circular, clearly signaling the FAA's view that "model aircraft" operations are not subject to the FAR or FAA enforcement if they comply with the standards in the AC.

Despite this course of conduct by the FAA and the CAA over many decades, starting in 2005 the FAA embarked on a course of issuing several guidance and policy documents that imposed new requirements on UAS. In one or more of these documents, the FAA stated for the first time

- a definition of "unmanned aircraft";
- the requirement that UAS must be shown to be airworthy to conduct flight operations;
- the requirement that UAS must comply with certain operational, air traffic, pilot, and observer requirements, including certain specified FAR sections;
- the requirement that civil UAS operators must obtain an FAA airworthiness certificate; and
- the applicability of the AC to recreational and hobbyist use only and therefore that it "only applies to modelers, and thus specifically excludes its use by persons or companies for business purposes."[15]

Even though these documents deviated markedly from the FAA's past course of conduct and imposed significant new requirements, the FAA issued none of them in proposed form to the public or solicited any public comment on them. Instead, the FAA simply finalized them internally, issued them, and stated that they reflected current FAA policy.

Section 553 of the APA[16] provides that, with certain exceptions not relevant here, (1) "[g]eneral notice of proposed rule making shall be published in the *Federal Register*," (2) "the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments," and (3) "[a]fter consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose." These requirements apply not only to actions the agency itself characterizes as rulemaking, but also to other agency actions that impose new binding obligations on the regulated public. As the U.S. Court of Appeals for the District of Columbia Circuit (D.C. Circuit) noted in *Appalachian Power Co. v. Environmental Protection Agency*:

> If an agency acts as if a document issued at headquarters is controlling in the field, if it treats the document in the same manner as it treats a legislative rule, [or] if it bases enforcement actions on the policies or interpretations formulated in the document, . . . then the agency's document is for all practical purposes "binding."[17]

The D.C. Circuit also ruled in *Alaska Professional Hunters Ass'n v. FAA* (*Alaska Hunters*) that a fundamental change in the FAA's past approach to regulating a particular constituency requires the agency to follow APA notice-and-comment requirements:

> Once an agency gives its regulation an interpretation, it can only change that interpretation as it would formally modify the regulation itself: through the process of notice and comment rulemaking. . . . Rulemaking, as defined in the APA, includes not only the agency's process of formulating a rule, but also the agency's process of modifying a rule [citation omitted]. When an agency has given its regulation a definitive interpretation and later significantly reverses that interpretation, the agency has in effect amended its rule, something it may not accomplish without notice and comment.[18]

The *Alaska Hunters* holding squarely applies to the FAA's treatment of UAS. Even though UAS have operated in U.S. airspace since at least the 1920s, at no time prior to 2005 did the FAA suggest that, or act as though, UAS operations complying with the AC standards were subject to any FAR requirement or FAA

enforcement. No FAA or CAA interpretive, guidance, regulatory, or enforcement activity suggested otherwise. Further, the issuance of the AC clearly signaled the FAA's view that UAS operations that complied with the AC standards were not subject to any FAR or FAA enforcement.

The FAA argued that it has not issued any previous "interpretation" on UAS that conflicts with the FAA's 2005–2008 guidance and policy statements and that the "FAA has never changed its course with regard to UAS."[19] *Alaska Hunters*' use of the word "interpretation," however, is not limited to prior written interpretations. It also refers to an agency's course of conduct relating to what a regulation means and how it is to be applied. The FAA's decades-long course of conduct regarding UAS changed dramatically when the FAA issued its guidance and policy documents in 2005–2008. Thus, the FAA's assertions that there were no "conflicting interpretations" on UAS and that the "FAA has never changed its course with regard to UAS" are incorrect.

The FAA had a legal obligation to provide notice to the public, solicit public comment, and consider that public comment *before* issuing any public document that significantly changed the FAA's longstanding approach to UAS and imposed new, binding obligations. Because the FAA did not do that, the 2005–2008 guidance and policy documents did not change the longstanding FAA interpretation regarding its treatment of UAS.

FAA Modernization and Reform Act of 2012

In 2012, Congress passed the FAA Modernization and Reform Act of 2012 (FMRA).[20] FMRA defined "unmanned aircraft" and clarified, once and for all, that "unmanned aircraft" (including "model aircraft") are "aircraft" for purposes of title 49. The Act also required the FAA to develop a "comprehensive plan," including rulemaking, to accelerate the integration of civil UAS into the national airspace system (NAS); defined "model aircraft"; and prohibited the FAA from regulating "model aircraft" where the operation meets certain conditions.

Section 336(b) allowed for FAA enforcement action "against persons operating model aircraft who endanger the safety of the national airspace system." The FAA has issued a notice with its interpretation of FMRA's "model aircraft" provisions.[21]

Conclusions and Recommendations

While senior FAA officials are commendably committed to the safe and prompt incorporation of UAS into the NAS, the FAA as an institution must be held accountable when it fails to comply with APA requirements. The public is entitled by law to participate in the development of FAA regulatory mandates and to receive clear, consistent, and complete information on what is required by FAA regulations. Regardless of the FAA's safety motivations, the agency's willingness to sidestep APA requirements, to act without considering public input, and then to aggressively enforce mandates that were never properly adopted is troubling.

While it is unclear how the NTSB will rule on the *Pirker* appeal, a careful analysis of the case, the underlying facts, the agency's willingness to sidestep APA requirements, and FMRA yield the following conclusions:

1. Even before FMRA, "model aircraft" and UAS were "aircraft" as defined in the relevant statute and regulation.
2. Even before FMRA, the FAA had jurisdiction and authority to impose safety regulations on UAS operations.
3. FMRA clarifies FAA authority to pursue enforcement action against persons operating "model aircraft," as defined in the Act, "who endanger the safety of the national airspace system."
4. The FAA's course of conduct over many decades demonstrated that the FAA interpreted UAS operations that complied with the AC standards as not being subject to the FAR or FAA enforcement.
5. None of the guidance or policy documents on UAS issued by the FAA starting in 2005 were adopted through a process involving notice to the public of the proposed actions, solicitation of public comment on the proposals, and consideration of public comment prior to finalization. Thus, these documents did not properly effectuate a change in the FAA's past interpretation and could not impose any new binding mandates on UAS.
6. If Pirker's flight complied with the AC standards, the flight should not subject Pirker to FAA enforcement action.

As for the NTSB and reviewing courts, they should rigorously enforce APA requirements in reviewing the FAA's actions. The FAA's enforcement of mandates that were never properly adopted is an extremely serious matter. If left unchecked, this practice will corrode the integrity of the FAA's safety regulatory program and jeopardize the voluntary public compliance that always has enabled the program to work effectively.

As for the FAA:

1. If the FAA believes there are legitimate safety issues related to UAS operations, the FAA should adopt, through notice-and-comment rulemaking, an interim rule imposing on UAS whatever safety requirements the FAA determines are appropriate in the interim period until its final rule on UAS or small UAS (as applicable) becomes effective. If the FAA legitimately believes there is an emergency in air safety to address, the APA allows the agency to provide for either a shortened comment period or a post-effective date comment period for such an interim rule.
2. In the context of any rulemaking on UAS, the FAA should strive to treat in the same way UAS

and "model aircraft" engaged in the same types of flight operations, regardless of the purpose for which they are being operated. The purpose of a UAS or "model aircraft" flight has no bearing on whether it is safe.

3. The FAA should take whatever administrative steps it believes are necessary in order to clarify that it is authorized and committed to taking enforcement action against any operator of any UAS who endangers the safety of the NAS.
4. The FAA should follow strictly not just the letter, but the spirit of the APA and strive to avoid even the appearance of impropriety in regard to the manner in which the FAA imposes new binding mandates, or changes past interpretations regarding what a regulation means and how it is to be applied.
5. The FAA should never again provide a path for new civil aircraft technology to be operated by government entities without providing a similar path for nongovernment entity operation. It is poor public policy to permit years of government entity operation of such new aircraft technology in the civil airspace while banning similar operations by the private sector for business or commercial use.
6. The FAA should be more forward-thinking in its regulatory program. When the FAA does not adequately monitor aircraft technology developments, anticipate regulatory needs raised by those developments, and proactively manage the necessary regulatory changes valuable technological developments are held back from utilization for years, at great cost to U.S. jobs and the economy.
7. In order to avoid confusing the public, the FAA should notify the public about what types of aircraft the FAA has decided to not regulate or to subject to only a specified subset of the FAR. One possible approach would be a regulatory structure under which a limited set of FAR sections would apply to all aircraft, regardless of size or type, including aircraft not yet developed and aircraft for which the FAA has not created a category. These sections would include FAR § 91.13 (which prohibits careless and reckless operation) and other sections of Part 91 Subparts A (General) and B (Flight Rules) that impose safety requirements that should be followed for all aircraft operations. Other FAR sections would not apply until the FAA went through APA rulemaking procedures to impose those sections on the particular category of aircraft, through either an interim or final rule.

The future will see many new generations of civil aircraft technologies—some that are well beyond our collective imagination. It is imperative that the FAA becomes more actively engaged in embracing these new technologies and more nimble in adjusting the FAA regulatory framework to facilitate their timely assimilation into the NAS.

Endnotes

1. The FAA only recently defined the terms "unmanned aircraft" (UA) and "unmanned aircraft systems (UAS)," the latter of which includes the "associated elements" to operate the UA. This article uses the term "UAS" (even when referring to unmanned aircraft and "model aircraft" that existed before the FAA defined "UAS"), except when referencing the term "model aircraft" as used by others.

2. FAA Advisory Circular 91-57, Model Aircraft Operating Standards (June 9, 1981).

3. FAA Memorandum, AFS-400 UAS Policy 05-01, Unmanned Aircraft Systems Operations in the U.S. National Airspace System—Interim Operational Approval Guidance (Sep. 16, 2005); FAA Notice 07-01, Unmanned Aircraft Operations in the National Airspace System, 72 Fed. Reg. 6689 (Feb. 13, 2007) [hereinafter, "2007 Notice"]; Interim Operational Guidance 08-01, Unmanned Aircraft Systems in the U.S. National Airspace System (Mar. 13, 2008).

4. Respondent's Motion to Dismiss, Michael P. Huerta v. Raphael Pirker (N.T.S.B. Sept. 27, 2013) (Docket No. CP-217) [hereinafter Respondent's Motion to Dismiss]. Pirker also argued that the FAA does not have jurisdiction below "navigable airspace." Although we believe that the FAA has such jurisdiction, this article does not analyze this issue.

5. Administrator's Response to Respondent's Motion to Dismiss at 8, Michael P. Huerta v. Raphael Pirker (N.T.S.B. Nov. 1, 2013) (Docket No. CP-217).

6. *See* 49 U.S.C. § 40102(a)(6) (defining "aircraft as "any contrivance invented, used, or designed to navigate, or fly in, the air"); 14 C.F.R. § 1.1 (defining "aircraft" as "a device that is used or intended to be used for flight in the air").

7. Decisional Order, Michael P. Huerta v. Raphael Pirker, Docket No. CP-217 (N.T.S.B. Mar. 6, 2014) [hereinafter Decisional Order].

8. It is not clear that the record in the *Pirker* case was developed sufficiently to determine whether Pirker's flight complied with AC 91-57.

9. Decisional Order, *supra* note 7, at 3.

10. *Id*.

11. *See, e.g.*, Brief of News Media Amici in Support of Respondent Raphael Pirker at 19–23, Michael P. Huerta v. Raphael Pirker (N.T.S.B. May 6, 2014) (Docket No. CP-217).

12. Respondent's Appendix of Exhibits, Exh. E, at 1, Michael P. Huerta v. Raphael Pirker (N.T.S.B. Mar. 6, 2014) (Docket No. CP-217).

13. *See* Respondent's Motion to Dismiss, *supra* note 4, at 11.

14. The FAA has never defined any of these terms.

15. FAA Notice 07-01, Unmanned Aircraft Operations in the National Airspace System, 72 Fed. Reg. 6689, 6690 (Feb. 13, 2007).

16. 5 U.S.C. § 553.

17. Appalachian Power v. Envtl. Prot. Agency, 208 F.3d 1015, 1021 (D.C. Cir. 2000).

18. Alaska Prof. Hunters Ass'n, Inc. v Fed. Aviation Admin., 177 F.3d 1030, 1034 (D.C. Cir. 1999).

19. Administrator's Appeal Brief at 12–13, Michael P. Huerta v Raphael Pirker (N.T.S.B. Apr. 7, 2014) (Docket No. CP-217).

20. FAA Modernization and Reform Act of 2012, Pub. L. No. 112-95, 126 Stat. 11.

21. Interpretation of the Special Rule for Model Aircraft, 79 Fed. Reg. 36,172 (June 25, 2014).