
**BEFORE THE
FEDERAL AVIATION ADMINISTRATION**

WASHINGTON, D.C.

**REQUEST FOR COMMENTS REGARDING
INTERPRETATION OF THE SPECIAL RULE FOR MODEL AIRCRAFT**

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**COMMENTS OF THE
NATIONAL PRESS PHOTOGRAPHERS ASSOCIATION
AND THE
AMERICAN SOCIETY OF MEDIA PHOTOGRAPHERS**

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SUMMARY

The National Press Photographers Association (“NPPA”) supports and joins with the *News Media Coalition's Comments Suggesting that the FAA Reconsider Portions of Its Interpretation of the Special Rule for Model Aircraft*. We appreciate the opportunity to submit these additional comments in order to address the specific concerns of our members and are joined here by the American Society of Media Photographers (ASMP).

Along with many others, we are extremely puzzled and troubled by the FAA Interpretation of the Special Rule for Model Aircraft (Docket Number FAA-2014-0396), submitted for public comment on June 23, 2014. Given the findings by the NTSB administrative judge in *Huerta v Pirker* and by the United States Court of Appeals for the District of Columbia Circuit, in *Texas Equusearch Mounted Search and Recovery v. Federal Aviation Administration*, we cannot fathom why it has chosen this time to “interpret” a statutory provision that has already provided more than ample guidance for the nation’s model aircraft community.

While we do not challenge the FAA’s authority to regulate the safe operation of UAS in the national airspace system, we do question some of the recent decisions by the agency, which we believe oversteps that authority and attempts to establish requirements on sUAS operation that circumvent the rulemaking process and limit far more use than is necessary to achieve its regulatory mandate.

COMMENTS OF THE NATIONAL PRESS PHOTOGRAPHERS ASSOCIATION JOINED BY THE AMERICAN SOCIETY OF MEDIA PHOTOGRAPHERS

INTRODUCTION

The NPPA is a 501(c)(6) non-profit organization dedicated to the advancement of visual journalism in its creation, editing and distribution. NPPA’s approximately 7,000 members include staff photographers and independent photojournalists, photographers who create original still and moving images for publication and broadcast in all media. Since its founding in 1946, the NPPA has vigorously promoted the constitutional rights of journalists as well as freedom of the press in all its forms, especially as it relates to visual journalism. Our members’ images and video inform Americans and others to better understand the world in which we live.

The American Society of Media Photographers (ASMP) is a 501(c)(6) not-for-profit trade association, established in 1944 to protect and promote the interests of professional photographers who earn their livings by making still and motion images. There are approximately 7,000 members of ASMP representing literally every aspect of professional media photography, including both still and motion photography.

Our organizations have an acute interest in helping the FAA properly expedite the integration of small Unmanned Aircraft Systems (“sUAS”) into the national airspace system (“NAS”). As both staff photographers and independent visual journalists and photographers, our members use a wide range of photographic equipment from large video and Digital Single Lens Reflex (DSLR)

cameras to iPhones and GoPro's. As noted in a paper¹ presented by Mr. Osterreicher at this year's Association for Unmanned Vehicle Systems International (AUVSI) conference, there are many beneficial uses for which news organizations and individual journalists would deploy sUAS as another tool in their reporting and newsgathering endeavors, much in the same way that they might use a wide angle or telephoto lens. And while a sUAS is defined by the FAA as a vehicle weighing less than 55 pounds, in point of fact, most of the sUAS being considered for newsgathering purposes are under 10 pounds.

The NPPA and ASMP support the safe integration of sUAS into the national airspace. Visual journalists and other professional photographers rely on the latest available technology, including aerial photography, in their efforts to inform the public. Our members work under extremely tight deadlines, covering events of great national and international importance, including political campaigns, wars, breaking news and sports. Those of our members who are independent commercial photographers also use their talents to provide photography to support many businesses, large and small. In 2014, this necessarily includes the use of sUAS.

While aerial photography has traditionally been a crucial tool for reporting on matters of public concern, its benefits come with safety and financial costs. No matter how safe, accidents still occur, such as one on March 18, 2014, where a pilot and photographer were killed when a television news helicopter covering a breaking news story crashed on takeoff in Seattle, Washington. The crash also critically injured a motorist on the ground.² A tragedy of this magnitude is unlikely to occur when operating a sUAS. And it is self-evident that with increasing fuel and insurance prices, operating any type of manned aircraft (fixed or rotary wing) is extremely costly for most news organizations and prohibitive for most independent journalists.

The evolution, ease of use, comparative safety, and relative affordability of high quality images using sUAS presents an enormous opportunity for visual journalists to bring a better understanding of important news and information to the public while minimizing risk to both the journalists themselves and the public at large.

Sec. 336. Special Rule for Model Aircraft is a Limitation, Not a Grant of Authority

The FAA Modernization and Reform Act of 2012 ("the Act"), defines "unmanned aircraft" as "an aircraft that is operated without the possibility of direct human intervention from within or on the aircraft." The Act also defines "small unmanned aircraft" as "an unmanned aircraft weighing less than 55 pounds" and "unmanned aircraft systems (UAS) as "an unmanned aircraft and associated elements (including communication links and the components that control the unmanned aircraft) that are required for the pilot in command to operate safely and efficiently in the national airspace system."

¹ Mickey H. Osterreicher, *Charting The Course For Use Of Small Unmanned Aerial Systems In Newsgathering* (Orlando: AUVSI, 2014) Available at <http://www.auvshow.org/auvsi2014/public/SessionDetails.aspx?FromPage=Sessions.aspx&SessionID=773&SessionDateID=20>

² <https://nppa.org/news/two-killed-komo-tv-seattle-helicopter-crash>.

The Act also directs “the Secretary [of the Department of Transportation] to promulgate rules to allow for integration of small UASs into the national airspace system [“NAS”].” Section 333 of the Act directs the Secretary of Transportation, to “determine if certain UASs may operate in the NAS...” Section 336(a) of the Act states “the Administrator of the Federal Aviation Administration *may not promulgate any rule or regulation* regarding a model aircraft, or an aircraft being developed as a model aircraft if:

1. the aircraft is flown strictly for hobby or recreational use;
2. the aircraft is operated in accordance with a community-based set of safety guidelines and within the programming of a nationwide community-based organization;
3. the aircraft is limited to not more than 55 pounds unless otherwise certified through a design, construction, inspection, flight test, and operational safety program administered by a community-based organization;
4. the aircraft is operated in a manner that does not interfere with and gives way to any manned aircraft; and
5. when flown within 5 miles of an airport, the operator of the aircraft provides the airport operator and the airport air traffic control tower (when an air traffic facility is located at the airport) with prior notice of the operation (model aircraft operators flying from a permanent location within 5 miles of an airport should establish a mutually-agreed upon operating procedure with the airport operator and the airport air traffic control tower (when an air traffic facility is located at the airport)).”

Section 336(c) of the Act defines a “model aircraft” as “an unmanned 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.”

Section 336(b) of the Act states, “Nothing in this section 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.”

On June 16, 2014 the FAA issued its Notice of Interpretation of Section 336 and interpreted the existence of Section 336 to conclude that “model aircraft that do not meet [Section 336] statutory requirements are nonetheless unmanned aircraft, and as such, ***are subject to all existing FAA regulations***... and the FAA intends to apply its regulations to such unmanned aircraft.”

NPPA and ASMP strongly disagree with that expansive interpretation as a grant of authority, rather than the limitation of authority intended by Congress through a commonsense and plain reading of Section 336.

In fact, the Act acknowledges that no current valid regulations for UAS exist in subsection 333(c). Accordingly, the Secretary of Transportation is tasked with “establish[ing] requirements for the safe operation of such aircraft systems in the national airspace system.” Such requirements must be established because they do not currently exist, as noted by the *Pirker* court.

The FAA also interpreted Section 336 to indicate that “the rulemaking prohibition would not apply in the case of general rules that the FAA may issue or modify that apply to all aircraft, such as rules addressing the use of airspace [] for safety or security reasons” and going so far to say that “the FAA interprets the section 336 rulemaking prohibition as one that must be evaluated on a rule-by-rule basis.” If that were the case section 336(b) should have included language not only granting the Administrator authority “to pursue enforcement action against persons operating model aircraft who endanger the safety of the national airspace system” but also allow him to “issue or modify rules” regarding safety, security or the use of airspace, including model aircraft.

Lost in Translation

The FAA interpretation relies on a mumbo-jumbo wordplay that “the prohibition against future rulemaking is not a complete bar on rulemaking that may have an effect on model aircraft.” That is like saying a bar to regulating anything “red” may not restrict someone from regulating things made in all colors including red. Rather than taking section 336 as a warning to the Agency not to spend time promulgating future rules that would impact model aircraft, it has misinterpreted that section as a green light to redefine well-established terms and expand its authority.

Instead of adhering to the congressional directive by helping the Secretary of Transportation to develop a plan to “safely accelerate the integration of civil unmanned aircraft systems into the national airspace system,” the FAA has veered off course by inexplicably losing legislative intent in translation.

Rather than relying upon Section 336 to redefine its previously issued guidelines for the use of model aircraft, the FAA should embrace section 333 in order to help “the Secretary of Transportation . . . determine if certain unmanned aircraft systems may operate safely in the national airspace system” before its rulemaking is complete. As set forth in the Act, such accelerated UAS integration could only be determined by “size, weight, speed, operational capability, proximity to airports and populated areas and operation within visual line of sight,” and whether such use would “create a hazard to users of the national airspace system or the public or pose a threat to national security” (Sec. 333(b)(1)).

In reviewing the decision by Administrative Law Judge Patrick Geraghty in *Huerta v. Pirker*, No. CP-217 (NTSB Office of Admin. Law Judges, Mar. 6, 2014), the NPPA and ASMP are concerned that the newly issued interpretations impose new requirements on model aircraft operation in a thinly-veiled attempt by the FAA to cure the court’s inference that it has “distinguished model aircraft as a class excluded from the regulatory and statutory definitions.” (*Huerta* at 3). Additionally, this interpretation improperly attempts to turn the voluntary compliance found in the Model Aircraft Operating Standards, Advisory Circular 91-57 into mandatory requirements subject to FAA enforcement action without undertaking formal rulemaking consistent with the Administrative Procedure Act.

Other Issues Raised by the Notice of Interpretation

Notwithstanding the objections raised above, the NPPA and ASMP believe that the following interpretations do comport with the intent of the Act and help encourage the safe integration of UAS into the NAS:

- Model aircraft are defined as vehicles weighing 55 pounds or less, including equipment, payload and fuel.
- Model aircraft must not interfere with and must give way to any manned aircraft.
- Model aircraft will be operated in accordance with a community-based set of safety guidelines and within the programming of a nationwide community-based organization.

We do however take issue with the FAA interpretation concerning model aircraft operators intending to operate their UAVs within 5 miles of an airport. The Act states that they must notify the airport operator and control tower prior to operating the vehicle in that air space. We believe that this requirement is still open to further interpretation regarding whether or not operation within 5 miles but below 400' would trigger the notice provision. We are also concerned that the FAA may have overstepped its authority by turning a "notice provision" into one requiring airport "permission."

We believe that the interpretation of model aircraft use for "hobby or recreational purposes" versus an overall ban on "use by persons or companies for business purposes" highlights the problem with regulating sUAS activity based upon criteria other than safety. The FAA once again chooses to divine legislative intent as to the meaning of "hobby or recreational purposes," by circuitously relying upon its prior legal interpretations and using questionable dictionary definitions. Those include *hobby* as "a pursuit outside one's regular occupation engaged in especially for relaxation" and *recreation* as "refreshment of strength and spirits after work."

Taking the logic of those subjectively chosen definitions to their natural conclusions, it could be argued that if one did not find sUAS use "relaxing or refreshing," it might not qualify as an FAA approved use. However, if one enjoys those aerial activities outside of their "regular occupation" and finds flying a model aircraft or sUAS not to be "work" but refreshing and relaxing, it might qualify as a hobby, regardless of whether or not payment is offered for the resulting images. In fact, many people take photographs and record video because they find it mentally and emotionally fulfilling. Whether such sUAS use is relaxing, or refreshing of the spirits, is completely irrelevant to whether or not its operation is safe.

Line of Sight Interpretation Blurred

The Act defines model aircraft to mean "an unmanned aircraft that *is* flown within visual line of sight of the person operating the aircraft." (Sec. 336(c)(2) emphasis added). The FAA misstates that definition in their interpretation that "a model aircraft *must* be flown" in that manner. Reference in the Act language to "within visual line of sight" was meant to provide the range within which model aircraft should be flown, not what method of flight control must be used. The FAA then goes on to assert that model aircraft use by any other method such as a "first-

person view' [FPV] from the model" or "rely[ing] on another person to satisfy the visual line of sight requirement" are prohibited by statute. Should that interpretation hold true it would prohibit the very method by which an amateur operator helped find an elderly man suffering from dementia who had been missing for 3 days despite an exhaustive search. He was located in 20 minutes by a hobbyist using his sUAS and FPV technology.³

This interpretation also flies in the face of decades of FPV experience. Ready Made RC, LLC, "with over 75 years of combined model aircraft experience," noted in its response to the FAA's *Interpretation of the Special Rule for Model Aircraft*,

that operating model aircraft using video glasses or "goggles" is a safe way to enjoy recreational model aircraft. FPV video glasses offer much more precise control of the model in flight and, when combined with a spotter, offer a much greater situational awareness than simply flying a model from a single operator's perspective viewing the model aircraft directly from the ground. A line of sight operator by necessity focuses nearly all of his attention on the model as seen from the ground, as opposed to an FPV operator who is focused on the airspace ahead in the direction of the model's flight. For this and other reasons, in our opinion, FPV operations are as safe as, if not safer than, model aircraft operations, which are themselves extraordinarily safe.⁴

Of particular concern is the apparent rejection by the FAA of safety guidelines set forth by the Academy of Model Aeronautics (AMA) in its Document #550, *Radio Controlled Model Aircraft Operation Utilizing "First person View Systems."* This comprehensive document was revised in January, 2014 and attests to the advantages of FPV flight as well as noting the exclusion for model aircraft under the Act from the requirement that they "must be flown within VLOS [Visual Line of Sight] of the operator."⁵

Compensation is Not a Bar to Safety

In its "interpretation" the FAA recognizes that "Section 336(a)(2) requires model aircraft to be operated within a community-based set of safety guidelines and within the programming of a nationwide community-based organization's interpretation," and yet throughout the "interpretive rule" cherry-picks which guidelines it wishes to adopt as appropriate and which it rejects. This inconsistency is arbitrary and capricious. For example, as Ready Made and the AMA pointed out in their comments, the FAA has overreached in its assessment that compensation is a detriment to safety, noting that under the FAA's interpretation, "compensated model aircraft demonstrations and contests are illegal, even though they have been safely conducted by communities for decades and are an important part of attracting talented individuals into the model aircraft industry."

The examples that the FAA uses in its interpretive chart only serve to point out the inconsistencies in its approach to compensated versus uncompensated operation which have no nexus to air safety. We believe these purposeless distinctions are self-serving and create a new, improperly imposed rule.

³ See: <http://www.examiner.com/article/amateur-drone-pilot-finds-man-missing-for-three-days>

⁴ Available at: <http://www.prnewswire.com/news-releases/ready-made-rc-llc-responds-to-the-faas-interpretation-of-the-special-rule-for-model-aircraft-264789071.html>

⁵ Available at: <https://www.modelaircraft.org/files/550.pdf>

Interpretive Rules as Applied to Newsgathering

NPPA and ASMP are extremely concerned that these interpretive model aircraft rules, if allowed to stand, will be applied to all sUAS operations, including use for newsgathering. As such they would impose overly burdensome restrictions on beneficial uses which in turn may cause many operators to ignore them entirely. While not within the scope of these new rules, the FAA also fails to distinguish newsgathering from its overall ban on “use for business purposes.” The absence of a newsgathering/free speech exception to these rules fails to recognize the imperative First Amendment role of journalism and photography in the United States.

Limitation on that role may be subject to reasonable time, place and manner restrictions. While FAA concern for air safety serves a significant governmental purpose, we believe that the inclusion of newsgathering in the “for business purposes” ban is not narrowly tailored and abridges far more First Amendment activity than is necessary to achieve the government’s safety objective. We also assert that current FAA policies would fail constitutional scrutiny because they do not leave open alternative avenues of communication regarding the use of sUAS for newsgathering purposes. We therefore urge the FAA to reconsider its position and revise its total ban on sUAS use for newsgathering to one permitting such use under clearly articulated and properly promulgated rulemaking.

The FAA and the OIG

In addition to the comments as noted above we cannot understand how, despite years of warnings and advance notice, the Agency has failed to adhere to established timetables for developing a comprehensive plan for safely integrating UAS use into the NAS. In October, 2012, at the request of the Chairmen and Ranking Members of the Senate Commerce Committee, the House Committee on Transportation and Infrastructure, and their Aviation Subcommittees, the Office of Inspector General (OIG) announced plans to initiate an audit of the Agency’s oversight of UAS to assess: “(1) FAA’s efforts to mitigate safety risks for integrating UAS into the NAS; and (2) FAA’s progress and challenges in meeting the UAS requirements cited in the Act.”⁶

A year later the Assistant Inspector General for Aviation Audits testified before the House Committee on Transportation and Infrastructure Subcommittee on Aviation regarding the Federal Aviation Administration’s (FAA) certification process. Part of his testimony focused on Next Generation Air Transportation System (NextGen) capabilities, including integrating unmanned aircraft systems. He “warned that a growing demand for certifying NextGen technologies and procedures, as well as FAA’s need to certify unmanned aircraft systems, will further add to FAA’s certification workload.”⁷

In February, 2014 the Inspector General testified on the FAA’s progress in implementing key provisions of the Act, noting that “while FAA has made progress implementing provisions of the act, significant actions are needed to meet the act’s intent and improve the execution and management of its programs.” He also noted that the Agency “has determined that it will not meet the act’s September 2015 deadline for integration of unmanned aircraft systems (UAS) into

⁶ See: <http://www.oig.dot.gov/library-item/5973>

⁷ See: <http://www.oig.dot.gov/library-item/6233>

the Nation's airspace due to a series of complex technological, regulatory, and managerial barriers.⁸

In June, 2014 the OIG issued the results of its audit⁹ and despite those earlier observations and warnings to the FAA, those findings indicate “the Agency is significantly behind schedule in meeting most of the UAS-related provisions” of the Act, “including the August 2014 milestone for issuing a final rule on small UAS operations. These delays are due to unresolved technological, regulatory, and privacy issues and will ultimately prevent the Agency from meeting Congress’s September 2015 deadline for achieving safe UAS integration.” Accordingly, the FAA concurred with all 11 of the OIG “recommendations to enhance the effectiveness of its efforts to safely integrate UAS into the NAS” and based on the Agency’s response, the OIG requested “additional information or revised responses for five recommendations.”¹⁰

Given this history of delays in meeting its deadlines with regard to sUAS rulemaking, we would respectfully request that the FAA address these issues immediately rather than exacerbating those setbacks by choosing to spend precious time and energy “interpreting” a clear statutory provision, especially where the agency has well established guidelines which have provided excellent guidance to the model aircraft community for many years.

The FAA Should Expedite Compliance with Section 333

The FAA should expedite its determination of which unmanned aircraft may operate safely in the national airspace system, as required by Section 333 of the Act. As such, the determination of safe operation should be based on the UAS, not on the individuals or companies operating them. As previously noted, the Act calls for the FAA to determine safety based on “size, weight, speed, operational capability, proximity to airports and populated areas, and operation within visual line of sight”.

While the FAA has begun to accept and consider petitions for exemption of certain FAA regulations by a few commercial organizations, to our knowledge, the FAA has yet to determine which types of unmanned aircraft systems do not create a safety hazard, or subsequently, establish requirements for the safe operations for such systems. Instead the FAA has continued to focus on the red herring of whether or not UAS are being used for “business purposes,” which has little or nothing to do with safety. Rather than abusing its authority to pry into the purposes behind the use of UAS, the FAA should make its determinations on permissible operation of UAS based on the systems.

⁸ See: <http://www.oig.dot.gov/library-item/6303>

⁹ Office of the Inspector General, Audit Report, *FAA Faces Significant Barriers To Safely Integrate Unmanned Aircraft Systems Into the National Airspace System* (Federal Aviation Administration, June 26, 2014) http://www.oig.dot.gov/sites/dot/files/FAA%20Oversight%20of%20Unmanned%20Aircraft%20Systems%5E6-26-14_0.pdf

¹⁰ See: <http://www.oig.dot.gov/library-item/6605>

CONCLUSION

For the reasons discussed above, the NPPA and ASMP urge the FAA to reconsider, if not entirely withdraw its interpretive rule. As stated we believe that the FAA's interpretations contravene the legislative intent of the Act pertaining to model aircraft and by extension to sUAS. As written section 336 is a limitation on FAA regulation of model aircraft and should not be interpreted by clever construction into a grant of authority to redefine clearly established guidelines. As articulated it also turns voluntary acquiescence into mandatory compliance by circumventing the rulemaking process.

We believe that the Agency's conclusion that it may rely on a range of its *existing regulations* to impose new rules on model aircraft is in clear defiance of the Act's directive that it "may not promulgate any rule or regulation regarding a model aircraft, or an aircraft being developed as a model aircraft." We further assert that the FAA interpretation incorrectly interpolates its ability "to pursue enforcement action against persons operating model aircraft" with the authority to impose new rules or regulations.

If the FAA is truly seeking widespread compliance with its "rules," we encourage the Agency to expeditiously promulgate commonsense regulations through proper rulemaking that may be embraced by the model aircraft and sUAS community rather than issuing interpretations that are so open to challenge.

Thank you for your time and consideration.

Respectfully submitted,

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