

Aviation & Space Alert

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So the FAA DOES Have Authority Over Commercial Drones! Or Does it?

A few months ago I wrote an article about the "Pirker" case (*FAA Administrator Huerta v. Pirker*) for the [Aviation Law Section of the Georgia Bar Newsletter](#). In that case, an Administrative Law Judge ruled that the FAA had no authority to regulate "model" drones, so could not fine Raphael Pirker for operating his drone in a commercial operation.

Since nobody disputed that the FAA had authority over aircraft, the issue boiled down to whether Mr. Pirker's drone was an "aircraft".

Despite the very broad legal definitions of aircraft ("any contrivance invented, used, or designed to navigate, or fly in, the air", 49 U.S.C. § 40102(a)(6), and "a device that is used or intended to be used for flight in the air" 14 C.F.R. § 1.1) the judge ruled that Mr. Pirker's drone was not an aircraft, basically because the FAA had treated model aircraft differently in the past.

Some thought this signaled the Wild West of unregulated commercial drone use. And since Jason and I represent people like Mr. Pirker accused of wrongdoing by the FAA, I was pleased to see an ALJ disagree with the FAA.

But I was perplexed as to how Mr. Pirker's drone, or any drone, could not be "a device that is used or intended to be used for flight in the air".

I cautioned against relying too heavily on that case.



On November 17, the full National Transportation Safety Board reversed the Administrative Law Judge's ruling. Mr. Pirker's legal team had provided some impressive (and quite lengthy) legal arguments on appeal, but in the end, the NTSB's ruling seemed to say: ***The law may be broad, but it is clear: all drones, model or otherwise, are devices that are used or intended to be used for flight in the air; therefore, all drones are aircraft, and all aircraft are subject to FAA authority.***

End of story? Maybe. But the NTSB's ruling did leave a little wiggle room. The ruling was specific to the FAA's authority to fine for "careless and reckless" operations. The NTSB specifically declined to address further issues, "At this stage of the proceeding."

One such issue: can the FAA prohibit someone from flying a drone commercially, if not careless or reckless?

I think the answer is—they could then and they really can now. Those broad definitions of aircraft cited above apply to all operations in U.S. airspace, and the Federal Aviation Regulations impose certain requirements and certifications (for the aircraft, pilots, maintenance, training, etc.). Since the rules were written for manned aircraft, drones just can't meet some of those requirements. Congress has tasked the FAA to come out with regulations to allow drone use, but until then, except for small drones operated non-commercially, they have to be granted a specific exemption to fly legally.

As I said in my earlier article, I've been wrong before, but now even more than before I would caution against relying on that gap left by the NTSB. I also note that the earlier *Pirker* decision was based on the law as it existed before the FAA Modernization and Reform Act of 2012, which in my view closes that gap pretty clearly for commercial drone operations, and makes the lower *Pirker* decision, even if upheld on further appeal, unhelpful for anyone wanting to conduct commercial drone operations after the passage of the 2012 Act (follow the link above to my earlier article if you're interested in more detail about that).

What are some options? Read below



2014 Georgia Legislative Roundtable Highlights Georgia Commercial Drone and Commercial Space Industries

Jason and I were invited to the recent 2014 Legislative Roundtable on Disruptive Technologies, Aerospace, and Workforce Development, sponsored by TAG (Technology Association of Georgia). This is an annual event "focused on bringing legislators, researchers and industry representatives together to discuss emerging science and technology policy issues in Georgia." Two of the topics were near and dear to us:

Commercial Drones: Apply now for an Exemption or be Left Behind?

Background highlights from this panel discussion included:

- The FAA has been tasked to publish rules for integrating drone use into the U.S. national airspace system.
- Until that happens, commercial drone operations are prohibited in the United States, unless specifically exempted. (although Mr. Pirker and others may still disagree, after the November 17th NTSB decision discussed above, that position is much weaker).
- The FAA has granted some exemptions for commercial drone operations, but it is a time consuming, unpredictable, expensive process with no assurance of outcome.
- The commercial drone industry is expected to grow to \$80 - \$90 billion within the next ten years.

The FAA is expected to publish a much-anticipated Notice of Proposed Rulemaking on drone use in U.S. airspace soon. Nobody knows what those rules will look like. But there is strong suspicion that, just like manned aircraft, commercial drone operations will require FAA certification for most if not all aspects: aircraft, pilot, maintenance, training, etc.

Once those certification rules are effective, commercial drone use will be allowed on a broad scale, with more predictable, achievable steps to qualify. However, given the pent-up demand of commercial drone operator hopefuls, and the new certification processes to integrate within the FAA, there is also anticipated a huge backlog for

some time after the process is implemented.

Accordingly, although the individual exemption process for commercial drone use can be time-consuming and expensive, with no assurance that it will be granted, more and more operators are applying for an exemption now. The idea is that they will have to go through time and expense anyway, and if they aren't successful in getting an exemption now, at least they will be at the head of the certification line once that opens.

So, wait until commercial drone regulations are finalized for a more predictable process, or take on the uncertainty of an exemption application now in hopes of beating the crowd? Maybe it's not an either / or question for you; perhaps starting the process and establishing the contacts with the FAA now, with actual operations to start after regulations are in place. Available resources (your own and the FAA's) may affect your course. And some other options besides a full exemption or full compliance with future rules may be available to you. In any event, one course I would strongly avoid, especially after the November 17th NTSB decision, is to start commercial drone operations now without some type of confirmed approval from the FAA, under the belief that the FAA cannot regulate and/or does not have the resources to enforce.

Private Commercial Space Operations Looking Stronger in Georgia

Background highlights from this panel discussion included:

- Since NASA's retirement of the Space Shuttle program in 2011, the US Government's policy has been to shift outer space operations to the private sector.
- Industry has responded enthusiastically to that policy.
- Private sector growth in the commercial space industry seems dependent in part on State government collaboration: spaceport development, education, tax incentives, operator liability policies.



Other states already have operational commercial spaceports. Georgia does not. But Camden County Administrator Steve Howard reported that the FAA has granted approval to conduct an Environmental Impact Statement for a proposed spaceport site on the Georgia coast, the first major step for FAA licensing of a commercial spaceport. Mr. Howard noted that the location (which served as a site for rocket engine testing in the 1960s) offers advantages over spaceports in other states, including quality of life features of proximity to towns and activities (contrasted with other spaceports in the middle of deserts).

Jason and I noted that other states with commercial spaceports have passed laws aimed at protecting commercial space operators, and we asked the Georgia legislative panel if they had considered that.

We've seen how different states have experimented with these "space liability shield" laws and wondered whether Georgia could learn from the successes and mistakes of other states (such as New Mexico, where the tension between promoting new business and protecting the public divided their legislature almost to the point of driving Virgin Galactic out of the state,

or Florida, whose space liability shield law may arguably be unenforceable based on potential conflicts with other state laws) to create a law agreeable and helpful to all interests in Georgia. The response was that they had not, but that this was a new area for Georgia, and they are open to ideas that can help grow Georgia's commercial space industry to match its already thriving aviation industry.

This was encouraging to us, as we see great potential for Georgia (and other states) in developing space liability shield laws that are enforceable, that work with existing federal laws, and that promote business and community development while also protecting the public. And we think those goals are even more achievable in Georgia from what we've learned from other states.

About Hardy Law

We believe in an aviation & space industry with everyone working together for safety, innovation, utility, economic security and fun. We combine our industry and legal experiences to help people avoid making really big mistakes with their aircraft and spacecraft.

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