

Fireworks Videos Highlight FAA's Evolving Drone Policy

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Dramatic videos of drones flying in Fourth of July fireworks displays have attracted the attention of the Federal Aviation Administration and highlighted the regulatory vacuum on drones. They have also renewed attention on the agency's recent efforts to update its regulations and bring them in line with the rapidly evolving technology and uses of drones.

The fireworks videos are remarkable. The drones often fly within the sweep of exploding shells, and burning fireworks frequently zoom past the cameras. The most widely circulated videos show fireworks over small towns like Decatur, Georgia, as well as large urban areas such as Nashville, Tennessee.[1] One of the most popular videos circulated widely this weekend shows fireworks over West Palm Beach, Florida.[2] That video, which was actually posted in May, has garnered more than 8 million views on YouTube — about 2 million of which came in the past few days.



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On July 8, the FAA responded. The agency issued a statement that it was “looking into multiple incidents in which unmanned aircraft flew into fireworks displays to determine if there was any violation of federal regulations or airspace restrictions.”[3] The agency cited a notice of interpretation that it issued in June as part of its effort to modernize its drone rules. The June notice was the FAA's first substantial effort to update its drone rules, and it follows years of relative inaction by the regulators, even as the technology continued to advance.

The FAA has been playing catch-up on its drone rules. For many years, the agency's policy on drones was primarily limited to a model aircraft advisory circular from 1981 and a policy statement on unmanned aircraft from 2007, neither of which provided a comprehensive set of rules for drone operations.[4] Indeed, those policies reflected the most common unmanned aircraft in use at that time — model airplanes flown by hobbyists. The FAA's guidance to hobbyists was very general, such as “[s]elect an operating site that is of sufficient distance from populated areas.”[5]

In 2012, Congress sought to spur action by the FAA. In legislation reauthorizing the FAA's programs, Congress established several deadlines for the FAA's regulation of drones. Most significantly, Congress required the FAA to develop a plan to integrate civil operation of drones into the national airspace system by September 30, 2015.[6] Related requirements directed the FAA to develop test sites, expand

drone use in the Arctic, and expedite the approval of drones for public sector uses. Congress also adopted a special rule for model aircraft that prohibited the FAA from regulating the recreational use of small drones that meet certain requirements.[7]

Throughout 2012 and 2013, the FAA sought to police the growing use of drones through warning letters issued on the basis of its 1981 advisory circular and its 2007 policy statement. These letters targeted operators that the FAA had concluded were using drones for commercial operations, such as aerial photography, weather analysis, or newsgathering. The warning letters routinely cited the FAA's model aircraft guidance and maintained that "the FAA currently does not allow any [unmanned aircraft system] operation to be conducted for commercial purposes." [8]

The FAA's position — that there was no lawful way to use a drone commercially in the United States — was widely viewed as unsustainable. Indeed, the FAA's warning letter approach suffered a stinging setback in March when an administrative law judge ruled that the FAA could not pursue an enforcement action against a drone operator because the agency had not issued comprehensive regulations pursuant to the requirements of the Administrative Procedure Act. In short, the judge found the FAA's prior guidance failed to create an enforceable rule.[9] While the FAA appealed that decision, it also took steps to adopt comprehensive drone rules that would preclude a similar result in the future.

The FAA's critical first step came in June, when the FAA issued a notice of the agency's interpretation of its authority to regulate drones — the notice that it cited in the announcement this week of the investigation of the fireworks videos.[10] The notice came in the form of an interpretation of Congress's special rule, in the 2012 legislation, that prohibited the FAA from regulating small model aircraft. In interpreting Congress's special rule, the FAA tightly defined the types of operations that would be exempt from regulation, with the effect of reasserting its regulatory authority over broad areas of unmanned aircraft operations.

The FAA notice was relatively unremarkable in its interpretation of the various statutory requirements of the special rule, such as the limitation on recreation uses, weight limitation of 55 pounds, and notice to airports within five miles of a drone operation. The notice was considerably more interesting, however, in the FAA's interpretation of the applicability of general aviation regulations and commercial use of drones.

First, in a key provision of the interpretation, the FAA stated that the prohibition on regulation of model aircraft did not prohibit the agency from enforcing "general rules that the FAA may issue or modify that apply to all aircraft." [11] Citing as examples the rules directed at airspace and security, the FAA concluded that it could apply these regulations to model aircraft "because those rules are not specifically regarding model aircraft." [12] This interpretation would permit the agency, for example, to allege that the fireworks drone operators violated generally applicable regulations that prohibit careless and reckless operations that endanger life or property.[13]

Second, the interpretation offered a very narrow view of operations that the FAA would consider noncommercial. The agency concluded that Congress' special rule for model aircraft would not apply to flights that contain even an incidental business purpose. An incidental business purpose, the agency concluded, indicated that the flight was not purely recreational.[14] This interpretation differed from the agency's longstanding rules that permit private pilots to engage in noncommercial flights that contain an incidental business purpose. (For example, a lawyer-pilot could generally fly himself and his colleagues to an out-of-town court appearance without engaging in commercial operations.)

The FAA's narrow interpretation of noncommercial operations could be significant for the operators of the fireworks flights. Some of the fireworks videos posted online were preceded by advertisements, perhaps indicating that they were part of the site's revenue-sharing platforms, where a portion of the advertising revenue is paid to the video owner. The FAA may well consider this arrangement to be a commercial operation. Indeed in a list of examples provided in the interpretation, the FAA stated that "photographing [an] event and selling the photos to someone else" would not qualify as a recreational use of a drone.

The FAA has indicated that it intends to issue its comprehensive notice of proposed rulemaking on small drones in this calendar year.[15] The June interpretation and the FAA's prompt response to the recent fireworks videos indicate that the agency will likely seek to reassert its authority over drones despite the regulatory vacuum of the last few years and the setback it suffered in March when seeking to enforce its earlier drone policies.

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[1] Decatur, Georgia (<http://www.decatrish.com/2014/07/video-drone-captures-decatur-fireworks/>); Lake Martin, Alabama (http://www.al.com/news/birmingham/index.ssf/2014/07/lake_martin_lights_up_with_fou.html); Oak Mountain State Park, Alabama (http://www.al.com/news/birmingham/index.ssf/2014/07/check_out_video_of_oak_mountai.html); Nashville, Tennessee (<http://www.tennessean.com/story/news/local/2014/07/05/nashville-fireworks-drone-video/12245831/>).

[2] Jos Stiglingh, Fireworks Filmed with a Drone, <http://www.youtube.com/watch?v=a9KZ3jgbbml> (May 13, 2014).

[3] Federal Aviation Administration, FAA Statement (July 8, 2014).

[4] Advisory Circular 91-57, Model Aircraft Operating Standards (June 9, 1981); Unmanned Aircraft Operations in the National Airspace System, 72 Fed. Reg. 6,689 (Feb. 13, 2007).

[5] Advisory Circular 91-57.

[6] FAA Modernization and Reform Act of 2012 § 332(a)(3).

[7] Id. § 336.

[8] Letter from Richard F Scheibel, FAA, to SkyGolf Productions (May 21, 2012).

[9] See Huerta v. Pirker, No. CP-217 (NTSB Mar. 6, 2014).

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

[11] Id. at 36,173.

[12] Id.

[13] See 14. C.F.R. § 91.13.

[14] Interpretation of the Special Rule for Model Aircraft, 79 Fed. Reg. at 36,173.

[15] Federal Aviation Administration, Integration of Civil Unmanned Aircraft Systems in the National Airspace System Roadmap 2013.

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