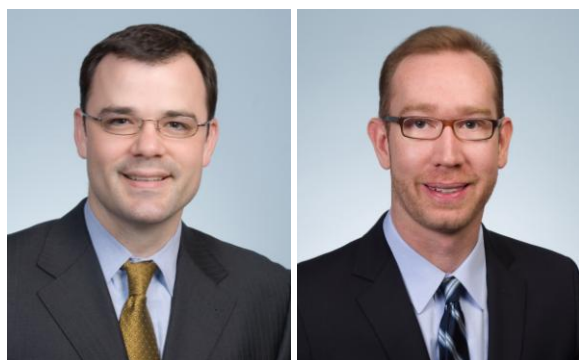


## NTSB Ruling Strengthens FAA's Authority Over Drones



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Individuals who operate drones are subject to Federal Aviation Administration regulations that prohibit careless and reckless operation of an aircraft, the National Transportation Safety Board ruled on Nov. 18, 2014, in the closely watched case *Huerta v. Pirker*.<sup>[1]</sup> The NTSB's decision overturned an earlier ruling by an administrative law judge, who previously held that regulations addressing careless and reckless use of an "aircraft" did not apply to drones.

After examining the statutory and regulatory definitions of "aircraft," the NTSB concluded that drones are "aircraft" for purposes of federal aviation regulations. First, under transportation law, an aircraft is "any contrivance" used to "fly in[] the air."<sup>[2]</sup> Second, federal aviation regulations further define an aircraft as "a device that is used ... for flight in the air."<sup>[3]</sup> The NTSB noted that neither definition excluded models, and neither definition required that the aircraft carry an operator. Put simply, "[a]n aircraft is any device that is used for flight," the NTSB concluded.<sup>[4]</sup>

Importantly, the NTSB's decision this week was limited to an interpretation of the FAA's "careless and reckless" rule. Nonetheless, the decision strengthens the FAA's legal posture as it prepares to release its first set of substantive rules on drones, which the agency refers to as unmanned aircraft systems. The administrative law judge had held that the FAA's failure to adopt specific regulations on drones precluded the agency from imposing a fine on the operator, Raphael Pirker, who flew a drone around the University of Virginia. Although limited to the "careless and reckless" rule, the NTSB decision provides the legal underpinning for the FAA to pursue broader drone regulations.

In 2012, Congress tasked the FAA with integrating drones into the national airspace system by September 2015, but the agency was slow to regulate, and drone operations blossomed in the

regulatory vacuum. In an early attempt to reassert its authority, the FAA pushed strongly to enforce a policy barring any commercial operations of drones. At first, the FAA issued a series of warning letters proclaiming that “the FAA currently does not allow any UAS operation to be conducted for commercial purposes.”[5] Faced with criticism, the FAA began to consider specific applications for commercial approval and started issuing piecemeal authorizations.

In June 2014, the FAA approved BP Exploration & Production Inc.’s application for drone operations to survey pipelines, roads, and equipment at the oilfield at Prudhoe Bay, along the north Arctic Ocean coast of Alaska. In September 2014, the agency granted regulatory exemptions to six aerial photography and video production companies to use drones in movie and television production.[6] These developments have been important, but they are unhelpful to the many smaller drone operators without the time or resources to pursue a specific exemption from the FAA.[7]

The FAA has indicated that it will issue an initial set of broadly applicable regulations this year.[8] The NTSB decision this week may indicate the direction that the FAA will take with drones. For example, the board noted that the FAA has adopted specific operating limitations for items that are technically aircraft but have unique attributed and uses — kites, rockets, moored balloons, and other similar items. The NTSB noted that the FAA has excluded these items from the full set of regulations that are applicable to traditional aircraft.

In our view, it’s likely that the FAA will pursue a similar course with drones, picking and choosing various rules, regulations, and limitations that it will apply to various types of drone activities. Many of the FAA’s existing regulations would lead to absurd results if applied to drones.

Existing FAA rules on aircraft make significant regulatory distinctions based on factors that were designed for an environment of manned aircraft flying far above people and buildings. Commercial aviation regulations, for example, make distinctions on the number and type of engines, the medical examinations required of pilots, and even the regularity of the aircraft’s flight schedule. Airspace regulations presume the ability to communicate with air traffic control, which is impossible from the ground except around larger airports. As a particularly absurd example, consider the requirement for reinforced cockpit doors; without modification, that rule would suggest that drone pilots are required to be in locked rooms.

Even if the FAA produces comprehensive and workable regulations for drones, we are likely to see legal developments in several other areas of law as well. For example, President Obama may issue an executive order directing the National Telecommunications and Information Administration to develop drone privacy guidelines. We may see constitutional challenges: In the NTSB’s decision this week, the board noted that a coalition of news organizations argued that the FAA drone policy had First Amendment implications. The NTSB specifically declined to address the constitutional issues at this time.

For now, the Pirker case is headed back to the FAA. Although the NTSB upheld the FAA’s authority to regulate careless and reckless UAS operations, the board also remanded the case to the administrative law judge for a determination of whether the operator, in fact, operated the drone in that manner. In addition, the drone operator could appeal the NTSB’s decision to a U.S. Court of Appeals.

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[1] Huerta v. Pirker, Order No. EA-5730 (NTSB Nov. 18, 2014) (internal quotation marks omitted), available at <http://www.nts.gov/legal/pirker/5730.pdf>.

[2] 49 U.S.C. § 40102(a)(6).

[3] 14 C.F.R. § 1.1.

[4] Pirker at 6.

[5] Letter from Alvin Brunner, FAA, to Reed Timmer, Tornado Videos.net (May 16, 2013).

[6] Press Release, Department of Transportation, U.S. Transportation Secretary Foxx Announces FAA Exemptions for Commercial UAS Movie and TV Production (Sept. 25, 2014), available at [http://www.faa.gov/news/press\\_releases/news\\_story.cfm?newsId=17194](http://www.faa.gov/news/press_releases/news_story.cfm?newsId=17194).

[7] The FAA has reportedly received 117 exemption requests as of this month. See Yasmin Tadjeh, FAA Official: Small Drone Rule to Be Released by End of Year, National Defense Magazine, Nov. 7, 2014, <http://www.nationaldefensemagazine.org/blog/Lists/Posts/Post.aspx?ID=1663>.

[8] Id.