UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

MICHAEL P. HUERTA, Administrator, Federal Aviation Administration, Complainant, v. RAPHAEL PIRKER, Respondent.	Docket No. CP-217

ADMINISTRATOR'S APPEAL BRIEF

Pursuant to 49 C.F.R. § 821.48(a) of the Board's Rules of Practice in Air Safety Proceedings, the Administrator of the Federal Aviation Administration files this brief on appeal of Administrative Law Judge Patrick G. Geraghty's written decisional order served on March 6, 2014, which granted Respondent's motion to dismiss, vacated the FAA's order of assessment, and terminated the proceeding with prejudice.

STATEMENT OF THE CASE

On June 27, 2013, the FAA issued an order assessing Respondent a $10,000 civil penalty based on allegations that he operated an unmanned aircraft system (UAS), a Ritewing Zepher power glider aircraft, on October 17, 2011, in the vicinity of the University of Virginia. The order alleged that he deliberately operated the aircraft at low altitudes over vehicles, buildings, people, streets, and structures. The order, among other things, alleged that Respondent operated the aircraft: directly towards an individual standing on a University of Virginia sidewalk causing the individual to take immediate evasive maneuvers so as to avoid being struck by the aircraft;

through a tunnel containing moving vehicles; under a crane; below treetop level over a tree-lined walkway; within approximately 15 feet of a statue; within approximately 50 feet of railway tracks; within approximately 50 feet of numerous individuals; within approximately 20 feet of an active street containing numerous pedestrians and cars; within approximately 25 feet of numerous buildings on the University of Virginia campus; on at least three occasions under an elevated pedestrian walkway; above an active street; directly towards a two-story building on the campus below its rooftop and making an abrupt climb in order to avoid hitting the building; and within approximately 100 feet of an active heliport. The order alleged that Respondent violated 14 C.F.R. § 91.13(a) in that Respondent operated the aircraft in a careless or reckless manner so as to endanger the life or property of another.

Respondent filed a notice of appeal and the FAA filed the order assessing the civil penalty as the complaint. Respondent filed a motion to dismiss on September 27, 2014, arguing that the complaint should be dismissed as a matter of law. In his motion, Respondent essentially argued that there are no current Federal Aviation Administration regulations that applied to Respondent's operation as alleged in the complaint. The FAA responded in opposition to Respondent's motion. The ALJ allowed the parties to make an additional responsive filing. In his supplemental filing, Respondent argued that his Ritewing Zepher power glider should not be treated as an aircraft for regulatory compliance purposes and that the FAA could not regulate the airspace within which he operated that aircraft. The FAA filed an opposition citing its broad statutory and regulatory authority with regard to aviation safety as the basis for its order and requested the ALJ to defer to the FAA's interpretation of that authority.

On March 6, 2014, the ALJ issued a decisional order granting Respondent's motion. The FAA filed a timely appeal of that order.

THE DECISIONAL ORDER

In his decision, the ALJ reasons that if he were to construe the statutory and regulatory definitions of the term "aircraft," which are found in 49 U.S.C. § 40102(a)(6) and 14 C.F.R. § 1.1 respectively, as the FAA argued in its submissions in this case, that it could subject the operator of a "paper aircraft, or a toy balsa wood glider . . . to the regulatory provisions of FAA Part 91, Section 91.13(a)."[1] Order at 3. He suggests that because the FAA has not in the past required what he refers to broadly as "model aircraft" to comply with part 21 and part 43 of its regulations it has implicitly "distinguished model aircraft as a class excluded from the regulatory and statutory definitions." Id. He also notes that in 14 C.F.R. part 103 of its regulations, the FAA has elected to apply only some of its safety regulations to "ultralight vehicles." He surmises from this, without much explanation at all, that because the FAA has not promulgated similar regulations with regard to "model aircraft" operations, it cannot enforce its existing regulations.

As support for his belief that the FAA implicitly distinguished model aircraft from the statutory and regulatory definition of "aircraft" for purposes of enforcing its regulations when there is noncompliance, the ALJ cites Advisory Circular (AC) 91-57, which encourages model aircraft operators to voluntarily comply with safety standards. He concludes from the AC that seeking voluntary compliance from model aircraft operators is "incompatible" with the FAA also subjecting them to mandatory compliance with the Federal Aviation Regulations. Order at 4. He concludes that "Respondent's model aircraft operation was not subject to FAR regulation and enforcement." Id. He also notes that the FAA has not promulgated a regulatory definition for

[1] The ALJ states, "Accepting Complainant's overreaching interpretation of the definition [of] 'aircraft,' would result reductio ad absurdum in assertion of FAR regulatory authority over any device/object used or capable of flight in the air, regardless of method of propulsion or duration of flight." Order at 7 n.24.

the term "UAS."[2] He goes on to discuss FAA Notice 07-01 and, while acknowledging that neither AC 91-57 nor Notice 07-01 are regulatory in nature, he finds that they are instructive to his holding that the statutory and regulatory definitions of aircraft found in 49 U.S.C. § 40102(a)(6) and 14 C.F.R. § 1.1 are not applicable to "model aircraft."[3] Order at 7. He further finds that Respondent's operation of a Ritewing Zepher power glider aircraft as described in the complaint was not subject to regulation under the Federal Aviation Regulations, but only to the voluntary safety guidelines in AC 91-7. Id. Based on these findings, he granted the motion to dismiss, vacated the FAA's order, and terminated the proceeding with prejudice.

ISSUES

I. Whether the ALJ Erred in Finding that the Ritewing Zepher Power Glider Respondent Operated in the Vicinity of the University of Virginia Was Not an Aircraft as Defined in 49 U.S.C. § 40102(a)(6) and 14 C.F.R. § 1.1?

II. Whether the ALJ Erred in Finding that Respondent's Operation of the Ritewing Zepher Power Glider Aircraft as Described in the Complaint Was Not Subject to Regulation Under the Federal Aviation Regulations?

ARGUMENT

I. The ALJ Erred in Substituting his Judgment for that of the FAA as to whether Respondent's Operation of the Ritewing Zepher Power Glider as Described in the Complaint Constituted Operation of an "Aircraft" Within the Plain Meaning of 49 U.S.C. § 40102(a)(6) and 14 C.F.R. § 1.1.

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[2] In the "FAA Modernization and Reform Act of 2012," Pub. L. No. 112-95, which became effective on February 14, 2012 (about four months after Respondent's flight), the terms "small unmanned aircraft," "unmanned aircraft," "unmanned aircraft system," and "model aircraft" are defined as "aircraft." Pub. L. 112-95, §§ 331(6), (8), (9), and 336(c) respectively.

[3] Because the ALJ decided the case solely in regard to the meaning of the word "aircraft," he did not address Respondent's secondary issue as to whether the FAA has the authority to regulate the airspace in which Respondent operated. Order at 8 n.26.

a. The ALJ Erred in Interpreting the Plain Meaning of the Statutory and Regulatory Definitions of the word "Aircraft" to exclude "Model Aircraft."

The ALJ's reasoning for finding that a Ritewing Zepher power glider is not an aircraft under the statutory and regulatory definitions of the word "aircraft" is both illogical and deeply flawed. To the extent that he believed that the statutory or regulatory definitions of the word "aircraft" found in 49 U.S.C. § 40102(a)(6) and 14 C.F.R. § 1.1 contain any ambiguity, Chevron deference was owed to the FAA's interpretation of its own statutory authority, as Congress clearly assigned regulation of this subject matter to the FAA in 49 U.S.C §§ 40103 and 44701. See City of Arlington v. F.C.C., 133 S.Ct. 1863, 1874-75 (2013). The plain wording of the statute and the regulation, however, are not ambiguous. Indeed, other than noting that the statute uses the word "contrivance" and the regulation uses the word "device," which he found are synonyms, the ALJ has not pointed to any ambiguity that would render any of the plain words of the statute or regulation subject to his interpretation.[4] Order at 3 and at 3 n.6 (citing Webster's New Dictionary of Synonyms and Roget's Thesaurus). Even though the wording of the statute and regulation are plain and not subject to interpretation, the ALJ almost immediately began to interpret what the meaning of "aircraft" is under the statute and regulation without regard to the plain wording or any reference to statutory or regulatory intent related to the enactment of section 40102(a)(6) or the promulgation of section 1.1.

He suggests, without explanation, that the statutory and regulatory definitions of "aircraft" are circumscribed whenever the word "model" is placed in front of the word "aircraft."

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[4] 49 U.S.C. § 40102(a)(6) provides that "aircraft" means "any contrivance invented, used, or designed to navigate, or fly in, the air." 14 C.F.R. § 1.1 defines "aircraft" as "a device that is used or intended to be used for flight in the air." 49 U.S.C. § 40102(a)(35) defines "operate aircraft" and "operating aircraft" as using an aircraft for purposes of air navigation, including – the navigation of aircraft and causing or authorizing the operation of aircraft with or without the right of legal control of the aircraft.

Order at 3. He states: "By affixing the word 'model' to 'aircraft' the reasonable inference is that Complainant FAA intended to distinguish and exclude model aircraft from either or both of the aforesaid definitions of 'aircraft'." Id. He cites nothing to support his contention or to support that the FAA has ever said directly or indirectly that its intent was to exclude "model aircraft" from the definition of aircraft. As discussed more fully in Argument II below, none of the documents the ALJ cites in his decision articulate that the FAA has directly or implicitly excluded "model aircraft" from the statutory and regulatory definitions of the word "aircraft." But the ALJ steadfastly attaches the word "model" before the word "aircraft" throughout his decision as if it is a talisman that restricts the FAA's statutory authority to enforce its regulations.[5]

In arbitrarily excluding what he calls "model aircraft" from the statutory and regulatory definition of "aircraft" for purposes of enforcing regulatory compliance, the ALJ opines without any support that his action is justified because to hold otherwise could "result in a risible argument that a flight in the air of, e.g., a paper aircraft, or a toy balsa wood glider, could subject the 'operator' to the regulatory provisions of FAA Part 91, Section 91.13(a)." Order at 3. He also states that "[a]ccepting Complainant's overreaching interpretation of the definition [of] 'aircraft,' would result reductio ad absurdum in assertion of FAR regulatory authority over any device/object used or capable of flight in the air, regardless of method of propulsion or duration of flight." Order at 7 n.24. He uses this perceived absurdity as justification to limit the plain wording of both the statutory and regulatory definition of "aircraft." The ALJ does this even though there is no evidence before him to support his belief that the FAA will abuse its

[5] Respondent in his pleadings characterizes the aircraft involved in this case as a "model aircraft." Perhaps the ALJ simply adopted the use of the term "model aircraft" from Respondent's pleadings. The ALJ provides no other explanation for his use of the term "model aircraft."

enforcement authority if he does not impose such a limitation.

The ALJ's decision resting on his arbitrary determination that "model aircraft" are not "aircraft," without regard to the plain wording of the statutory and regulatory definitions of "aircraft" and with no deference whatsoever to the Administrator's finding that Respondent's operation of the aircraft as alleged in the complaint was in violation of section 91.13 is reversible error.[6] To the extent the ALJ found it necessary to interpret any statutory or regulatory provision relevant to this case, the ALJ's decision contains fundamental error in that he substituted his judgment for that of the FAA in complete disregard of the fact that, by virtue of its statutory authority, the FAA stands in a better place than he to know both what the statutory and regulatory definitions of the word "aircraft" mean and the parameters of its authority to enforce its own regulations. See, e.g., City of Arlington, 133 S.Ct. at 1873, citing, Ford Motor Credit Co. v. Milhollin, 444 U.S. 555, 568 (1980) (cautioning that "judges ought to refrain from substituting their own interstitial lawmaking" for that of an agency as long as what the agency does is rational).

b. The ALJ Erred in Arbitrarily Determining that Respondent's Aircraft was a "Model Aircraft" for Purposes of Finding that Respondent's Operation was Exempted from Compliance with 14 C.F.R. § 91.13.

Aside from his larger error with regard to his arbitrary circumscription of what the word "aircraft" means, it was reversible error for the ALJ to simply assume, in order to support his decision, that this case involves what he deemed to be a "model" aircraft. He never expressly defines what he thinks the word "model" means. And he offers no explanation for why the word

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[6] The ALJ failed to consider that Respondent's operation in proximity to people, vehicles, structures, and a helipad could have potentially resulted in a catastrophic event such as his aircraft colliding with a car and precipitating an accident, hitting and injuring a person on the ground, or impacting the rotor on a helicopter operating from the nearby helipad and causing a crash.

"model" should be ascribed to a Ritewing Zepher power glider aircraft operated deliberately at low altitudes over and in proximity to vehicles, buildings, people, streets, and structures near the University of Virginia campus as alleged in the complaint.[7] Once the ALJ attached such legal significance to the word "model" he needed, at a minimum, to explain what he meant when he used that word and consider such things as the nature of Respondent's operation of the aircraft before he found that the aircraft was a *per se* "model" aircraft for any purpose.[8] Had he held a hearing in the matter, he would have had the opportunity to hear and weigh evidence related to the "method of propulsion" of Respondent's aircraft and the "duration of flight" in proximity to persons, property, and vehicles on the University of Virginia campus. "Method of propulsion" and "duration of flight" are two factors that the ALJ seemingly saw as being relevant to determining what constitutes an "aircraft." Order at 7 n.24.

Moreover, as a matter of public policy, if the ALJ's decision stands with its undefined use of the word "model" it will lead to unnecessary confusion about what type of aircraft are excluded from the definition of "aircraft" for purposes of enforcing the FAA's safety

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[7] The complaint does not refer to Respondent's aircraft as a "model aircraft" and the term is not used in connection with any other relevant statute or regulation that was in effect when Respondent conducted the operation as described in the complaint.

[8] The "FAA Modernization and Reform Act of 2012," at section 336(c), which the ALJ characterizes as "instructive" at page 7 of his Order, defines "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. Similarly, FAA Notice 07-01, 72 Fed. Reg. 6689 (Feb. 13, 2007), which both the ALJ and the Respondent cite, refers to "model aircraft" as unmanned aircraft being operated for "recreational or sport" purposes. The Notice, which highlights the evolving commercial and civil uses for unmanned aircraft, characterized "model aircraft" as a subset of unmanned aircraft based solely on the type of operation for which the aircraft is used. While the ALJ cites to Notice 07-01 to support his decision, he gives no regard to the point made in the Notice that "model aircraft" are operated only for recreational and sport use and that Respondent's operation, on the face of the allegations made in the complaint, was not for these purposes.

regulations.[9] The lack of clarity in the ALJ's decision leaves open questions about whether the statutory and regulatory definition of the word "aircraft" is limited by: 1) an operator merely placing the word "model" before the word "aircraft" in describing the aircraft; 2) a presumption that all unmanned aircraft are per se "model aircraft;" or 3) a case-by-case determination based on such factors as the aircraft's size, construction, propulsion, performance, or operational qualities. Given that the ALJ's decision provides no insight into what he intends beyond the placement of the word "model" before the word "aircraft," it is hard to see from a public policy perspective how the decision, even if it were at all proper, is in the public interest. For all the foregoing reasons, the ALJ's novel interpretation of the word "aircraft" and undefined use of the word "model" in conjunction with the word "aircraft" should not stand.

II. The ALJ Erred in Finding That Respondent's Operation of the Ritewing Zepher Power Glider Aircraft as Described in the Complaint Was Not Subject to Regulation Under the Federal Aviation Regulations

The ALJ dismisses the complaint based on his belief that the FAA has waived its right to enforce its safety regulations against "model aircraft" operators because in 1981, when most unmanned aircraft were operated solely for hobby or recreational purposes, it issued AC 91-57. Order at 4 and 7. AC 91-57 on its face was intended to encourage voluntary compliance with

[9] The "FAA Modernization and Reform Act of 2012," at section 336, contains a special rule for "model aircraft." Under that section 336(c) of the law, Respondent's operation as described in the complaint would be excluded from being considered as a "model aircraft" operation because the aircraft was not flown for hobby or recreational purposes. But even if Respondent had flown the aircraft for hobby or recreational purposes, section 336(b) expressly provides that "[n]othing 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." Had the statute been in effect at the time of Respondent's operation, there would be no doubt that enforcement action could be taken against Respondent for violating section 91.13(a). Moreover, section 336(a) expressly bars the FAA from doing further rulemaking with regard to "model aircraft" that meet certain criteria. Thus, Congress clearly contemplated in the plain wording of section 336(b) that the FAA would use its existing regulatory structure with regard to "model aircraft" that are operated in such a way that they endanger the national airspace system.

safety standards for model aircraft operators. The AC suggests operating standards for "modelers" that "will help reduce the potential for [] hazard and create a good neighbor environment with affected communities and airspace users."[10] Specifically, the AC seeks voluntary compliance with these non-regulatory standards:

a. Select an operating site that is of sufficient distance from populated areas. The selected site should be away from noise sensitive areas such as parks, schools, hospitals, churches, etc.

b. Do not operate model aircraft in the presence of spectators until the aircraft is successfully flight tested and proven airworthy.

c. Do not fly model aircraft higher than 400 feet above the surface. When flying aircraft within 3 miles of an airport, notify the airport operator, or when an air traffic facility is located at the airport, notify the control tower, or flight service station.

d. Give right of way to, and avoid flying in the proximity of, full-scale aircraft. Use observers to help if possible.

The AC contains no content that could be construed or interpreted as a waiver of compliance with the Federal Aviation Regulations. And, the complaint cannot be construed as

[10] Notice 07-01 states that the purpose of AC 91-57 was to provide "guidance to persons interested in flying model aircraft as a hobby or for recreational use. This guidance encourages good judgment on the part of operators so that persons on the ground or other aircraft will not be endangered."

holding Respondent responsible for non-compliance with these voluntary standards.[11] But in the ALJ's view, the FAA's request for voluntary compliance from "modelers" with these standards constituted a tacit exemption from enforcing mandatory compliance with safety regulations. Order at 3. The ALJ has misconstrued AC 91-57; it cannot on its face reasonably be read to constitute a grant of a waiver or exemption from regulatory compliance under 49 U.S.C. § 44701(f).[12]

The ALJ looked for support for his finding that AC-91-57 constitutes a waiver of the FAA's ability to enforce its regulations, by highlighting that the FAA has not enforced the airworthiness and registration requirements found in parts 21 and 43 against "model aircraft"

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[11] It is axiomatic that ACs are not regulatory in nature. To the extent that the ALJ relied on the AC as indicating the FAA's regulatory intent with regard to the aircraft he referred to as "model aircraft," he improperly did so. Cf. Gorman v. Nat'l Transp. Safety Bd., 558 F.3d 580, 582, 587-89 (D.C. Cir.), cert denied, 558 U.S. 580 (2009) (upholding an FAA interpretation of its regulations advanced through adjudication that contradicted the content of an advisory circular). The FAA's intent with regard to enforcing its regulations against the operator of an unmanned "aircraft" has been advanced through its order of assessment charging Respondent with violating section 91.13 in this case. This is a proper exercise of the Administrator's statutory authority under 49 U.S.C. § 46301(a)(5)(A). The Administrator's interpretation of the definition of "aircraft" and the scope of the FAA's regulatory authority with regard to aircraft was advanced through the adjudicatory process in this case. As such, those interpretations are entitled to deference absent unambiguous statutory language to the contrary or unreasonable resolution of language that is ambiguous. U.S. v. Eurodif, S.A., 555 U.S. 305, 316 (2009) (supporting citations omitted).

[12] The FAA does not grant tacit exemptions from regulatory compliance under its authority in 49 U.S.C. § 44701(f). The FAA's process to obtain an exemption is contained in 14 C.F.R. §§ 11.81-11.103.

operators.[13] He suggests that in not doing this the FAA "distinguished model aircraft as a class excluded from the regulatory and statutory definitions" for purposes of enforcing its regulations. Order at 3. From this and his analysis of AC-91-57, he concludes that the FAA has no enforceable regulations that pertain to "model aircraft." As authority for this proposition, he cites Alaska Professional Hunters Ass'n v. F.A.A., 177 F.3d 1030, 1034 (D.C. Cir 1999). Order at n.25. But that case is not applicable here, because the FAA has never interpreted the FAA's statute or regulations as the ALJ suggests in his decision.

In the Alaska case, the petitioner alleged that the FAA significantly changed a long-standing interpretation of its regulations. For a period of about thirty years the FAA actively advised hunt and fish guide operators in Alaska that they could conduct flights for those purposes under part 91. But in the mid-1990s, the FAA switched course without doing notice-and-comment rulemaking and said the flights had to be conducted under part 135. See Mortgage Bankers Asso. v. Harris, 720 F.3d 966 (D.C. Cir. 2013) (explaining its decision in Alaska). The D.C. Circuit held that "[w]hen an agency has given its regulation a definitive interpretation, and later significantly revises that interpretation, the agency has in effect amended its rule, something that it may not accomplish without notice and comment." Alaska, 177 F.3d at 1034. This case differs significantly from Alaska as the FAA has never changed its course with regard to UAS.

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[13] The FAA's enforcement philosophy is guided by prioritizing safety risk. See FAA Order 2150.3B at page 2-1. The cases it initiates and the regulations it enforces in any case are matters reserved for prosecutorial discretion. The Board has long held "[t]he selection of which cases to prosecute, and the manner in which they are prosecuted, are matters within the discretion of the Administrator, acting pursuant to statutory authority." See, e.g., Adm'r v. Heidenberger, NTSB Order No. EA-3759 (1993), citing, Adm'r v. Griner, 1 NTSB 874, 877 (1970). Accordingly, it is not for the ALJ to question what regulatory provisions the FAA chooses to enforce and in what context. It was his duty to review what was alleged in this case and determine if the FAA's order should be upheld, reversed, or modified in accordance with 49 U.S.C. § 44709(d)(2) and 49 C.F.R. § 821.35(b). His powers do not include dismissing a case without reviewing the propriety of what was charged in the complaint because the FAA has chosen not to charge other possible regulatory violations.

The FAA has never said that it would not enforce its regulations when appropriate. There are no conflicting interpretations as there were in the Alaska case.[14] Seeking voluntary compliance with safety measures cannot be implicitly construed as a regulatory interpretation or as an interpretation of the FAA's statute that constituted a waiver of the FAA's authority to enforce its safety regulations when the regulations are flagrantly violated, as they were in the present case. Voluntary compliance has long been one of the cornerstones of the FAA's compliance and enforcement philosophy. See FAA Order 2150.3B at page 2-1. The FAA seeks voluntary compliance with its regulations and policies before it reaches the necessity for taking legal enforcement action. Id. The FAA is unaware of any other instance in which its efforts to seek voluntary compliance with safety guidelines have been construed as a bar to taking legal enforcement action when it is appropriate. The ALJ has offered no rationale for why he has interpreted the FAA's efforts to seek voluntary compliance with safety measures in such a novel manner.

In another part of his decision, the ALJ points to "ultralight vehicles" regulated under 14 C.F.R. part 103 as not being defined as "aircraft" and not being subject to the provisions of

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[14] To the extent that there are any documents generated by FAA employees or contractors that support or suggest that a UAS is not subject to regulation under the Federal Aviation Regulations, those documents reflect the opinions or beliefs of individual employees or contractors and are not validly adopted interpretations advanced by the Administrator of the FAA. Validly adopted interpretations are created only by employees to whom the Administrator has expressly delegated his authority for that purpose. *See* FAA Order No. 1100.2 at Chapter 16, specifically delegating to the Office of the Chief Counsel responsibility for: "Drafting, approval as to the form and legality, and interpretation of FAA rules, regulations, orders, and obstruction evaluation determinations." FAA Order No. 1100.2C is available at: www.faa.gov/regulations_policies/orders_notices/ See also Pet. of Van Eaton, NTSB Order No. EA-4692 at 4 (1998) (rejecting that an internal memo of an employee, who was not authorized to make regulatory interpretations, set the policy of the Administrator).

part 91.[15] Order at 4. He surmises from this that because the FAA has not promulgated similar regulations with regard to "model aircraft" operations, it cannot enforce its existing regulations in part 91.[16] He does not delve into this issue deeply as he offers no rationale whatsoever for why the FAA could not have enforced its regulations, including section 91.13, against an operator of an ultralight that is covered under part 103 prior to the promulgation of part 103 just as today ultralights not under part 103 are subject to part 91. See, e.g., Adm'r v. Hopkins, NTSB Order No. EA-5206 (2006) (affirming violations of 14 C.F.R. §§ 61.3(a)(1), 91.13(a)(1), and 91.203(a)(1) and (2) against the pilot of a 2-passenger ultralight aircraft that was not subject to regulation under part 103). In any event, to the extent that certain ultralight vehicles may be regarded as other than aircraft because of how they are excepted from part 91 and regulated under part 103, there is nothing in the regulations that excepts model aircraft from coverage under part 91 or defines them as anything other than aircraft.

Finally, the FAA was free to use the adjudicatory process to advance that a UAS may not be operated in a careless or reckless manner so as to endanger the persons or property of

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[15] Section 91.1(a) states ". . . this part prescribes rules governing the operation of civil aircraft (other than moored balloons, kites, unmanned rockets, and unmanned free balloons, which are governed by part 101 of this chapter and ultralight vehicles operated in accordance with part 103 of this chapter) within the United States . . . ." Presumably had the ultralight vehicles governed by part 103 not been excepted from part 91's coverage, they would have been subject to part 91 just as those ultralights not governed by part 103 are today.

[16] As mentioned previously at note 8, Public Law 112-95 at section 336(a) expressly bars the FAA from doing further rulemaking with regard to "model aircraft" that meet certain criteria. But section 336(b) expressly authorizes the FAA to use its existing regulations "to pursue enforcement action against persons operating model aircraft [as defined in section 336(c)] who endanger the safety of the national airspace system."

another.[17] In the context of this case, this has been advanced in the allegations of the complaint that state Respondent violated 14 C.F.R. § 91.13(a) when he deliberately operated the UAS in proximity to vehicles, buildings, people, streets, and structures in the vicinity of the University of Virginia campus. In NLRB v. Bell Aerospace Co., 416 U.S. 1757, 1771-72 (1974), the Supreme Court reaffirmed SEC v. Chenery Corp., 332 U.S. 194 (1947) for the proposition than an agency "is not precluded from announcing new principles in an adjudicative proceeding and that the choice between rulemaking and adjudication lies in the first instance within the [agency's] discretion." This principle of law has been applied in other cases in which the FAA has interpreted the existing language in section 91.13 to pertain to specific conduct that the FAA deemed to be careless or reckless without the necessity for rulemaking. See Miranda v. Nat'l Transp. Safety Bd., 866 F.2d 805 (5th Cir. 1989) and Tearney v. Nat'l Transp. Safety Bd., 868 F.2d 1451 (5th Cir. 1989) (affirming the FAA's interpretation that conducting taxiing operations while passengers are standing violates the prohibitions of section 91.13). In general, using the adjudicatory process to advance an interpretation such as those made in Miranda, Tearney, and in this case is only an abuse of discretion when the interpretation is "such a new departure that [it]

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[17] For the same reasons already stated in this argument, the fact that this is the first legal enforcement case that the FAA has taken against the operator of a UAS for a regulatory violation does not serve as a bar to the action. See NLRB v. Bell Aerospace Co., 416 U.S. 267, 294 (1974) (quoting NLRB v. Wyman-Gordan Co., 394 U.S. 759, 765-766 (1969), "adjudicative cases may and do . . . serve as vehicles for the formulation of agency policies, which are applied and announced therein and that such cases generally provide a guide to action that the agency may be expected to take in future cases."). Obviously, aviation is a technically based industry that is constantly evolving and creating new challenges for the FAA with regard to carrying out its statutory safety mandate. See Notice 07-01. As the challenges with the operations of UASs have evolved, it has become abundantly clear to the FAA that it needs to use its authority to deter operations exactly like the one that took place in this case; and, using the adjudicatory process to do so is a discretionary matter for the FAA to determine. See Bell Aerospace, 416 U.S. at 293 (citing SEC v. Chenery Corp., 332 U.S. at 202-203, holding that an administrative agency may use adjudication to address new problems that arise under the agency's regulations that could not reasonably be foreseen at the time the regulation was promulgated.).

cannot reasonably be foreseen." Tearney, 868 at 1453, citing Nicholson v. Brown, 599 F.2d 639 (5th Cir. 1979). Given that it is entirely reasonable to characterize the operation that Respondent conducted as inherently careless or reckless in that it potentially placed the persons and property of others in peril, it cannot be said that the FAA was overreaching in interpreting section 91.13 to bar an operation like Respondent's.

CONCLUSION

The ALJ ignores the plain wording of 49 U.S.C. § 40102(a)(6) and 14 C.F.R. § 1.1, which both clearly and unambiguously define the word "aircraft." He instead imposes his own novel interpretation of the word "aircraft" that excludes what he calls "model aircraft." He does not define what he believes "model aircraft" are or explain why Respondent's aircraft should be deemed a "model aircraft." He uses his amorphous definition of "aircraft" to find that "model aircraft" are not subject to the FAA's safety regulations including section 91.13. He supports this finding by misapprehending AC 91-57, which the FAA issued in 1981 in order to encourage "modelers" to voluntarily comply with some safety guidelines. He inexplicably deems the AC as a tacit waiver or exemption for all "model aircraft" operators from the FAA's regulatory requirements, despite the fact that the AC says nothing that would support his contention.

Moreover, the ALJ likens the circumstances in this case to those in the Alaska case. But he fails to cite to any previous interpretation that the FAA has made or advanced, either directly or indirectly, that would support that the FAA informed the class of "model aircraft" operators (as he uses the term) that the aircraft they operate are not "aircraft" under the statutory and regulatory definitions of the word, and that their flight operations are not subject to regulation under the Federal Aviation Regulations.

For all the foregoing reasons the FAA respectfully requests that the Board reverse the ALJ's decision and remand the case for a hearing on the merits.

Respectfully submitted,

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Dated: April 7, 2014

CERTIFICATE OF SERVICE

I hereby certify that on this date I have sent by United States certified mail, postage pre-paid, return-receipt requested, a copy of the Administrator's Appeal Brief in Administrator v. Pirker, Docket No. CP-217, addressed to:

Brendan M. Shulman, Esq.
Kramer, Levin, Naftalis & Frankel, LLP
117 Avenue of the Americas
New York, NY 10036

In addition, I hereby certify that I have this date placed in the United States mail, postage prepaid, certified return-receipt requested, an original and one copy of the foregoing document:

National Transportation Safety Board
Office of General Counsel
Room 6401
490 L'Enfant Plaza East, S.W.
Washington, D.C. 20594

Susan S. Caron

Dated: April 7, 2014

U.S. Department
of Transportation
**Federal Aviation
Administration**

Office of the Chief Counsel
Enforcement Division

800 Independence Ave., SW.
Washington, DC 20591

CERTIFIED MAIL – RETURN RECEIPT REQUESTED

April 7, 2014

Office of General Counsel
National Transportation Safety Board
490 L'Enfant Plaza East, S.W., Room 6401
Washington, D.C. 20594

RE: Administrator v. Pirker, Docket No. CP-217

Dear Mr. Tochen:

Please be advised that we are the attorneys of record for the Administrator in the appeal of the above-referenced matter. Accordingly, copies of all documents to be served on the Administrator related to this appeal should be sent to us at the following address:

Enforcement Division, AGC-300
Office of the Chief Counsel
800 Independence Avenue, S.W.
Washington, D.C. 20591

Thank you for your attention to this matter.

Sincerely,

Peter J. Lynch
Assistant Chief Counsel
for Enforcement

Susan S. Caron
Manager, Appellate Practice, AGC-300
Telephone: (202) 267-7721
Fax: (202) 267-5106

CERTIFICATE OF SERVICE

I hereby certify that on this date I have sent by United States certified mail, postage pre-paid, return-receipt requested, a copy of the entry of appearance in Administrator v. Pirker, Docket No. CP-217, addressed to:

Brendan M. Shulman, Esq.
Kramer, Levin, Naftalis & Frankel, LLP
117 Avenue of the Americas
New York, NY 10036

In addition, I hereby certify that I have this date placed in the United States mail, postage prepaid, certified return-receipt requested, an original and one copy of the foregoing document:

National Transportation Safety Board
Office of General Counsel
Room 6401
490 L'Enfant Plaza East, S.W.
Washington, D.C. 20594

Dated: April 7, 2014