

BACKGROUND

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The SkyPan Case: FAA Enforcement of Nebulous Drone Rules Undercuts the Rule of Law

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Abstract

The Federal Aviation Administration's \$1.9 million civil enforcement claim against SkyPan International is the highest ever proposed in a drone enforcement action (most civil enforcement actions result in settlements of between \$1,000 and \$5,000), and the \$200,000 civil fine ultimately exacted by the FAA is the largest sum ever collected by the agency in a drone-related enforcement action. Yet even the FAA has recognized SkyPan's record for safety, and when it began its drone operations, SkyPan could point to eight decades of regulatory policy in which the FAA itself had said that it lacked the statutory authority to regulate unmanned aircraft. The FAA has already demonstrated an alarming willingness to expand its regulatory authority beyond the scope of the law, arbitrarily shut down legitimate and lawful businesses, and expose millions of Americans to needless and senseless criminal prosecution. It is time for Congress and the new Administration to rein in the FAA's treatment of drones.

On January 17, 2017, the Federal Aviation Administration (FAA)¹ and SkyPan International,² a private company specializing in aerial photography, announced that they had settled ongoing litigation against SkyPan for its allegedly illegal operation of small Unmanned Aircraft Systems (UAS), commonly referred to as drones. The FAA initially sought a headline-grabbing \$1.903 million from the company for its supposed infractions, but it settled for a requirement that SkyPan produce three public service announcements urging compliance with FAA drone regulations. It also exacted a \$200,000 civil fine that, while significantly less than the initial figure, is still the largest sum ever collected by the FAA in a drone-related enforcement action.

KEY POINTS

- The FAA's enforcement action against SkyPan International seems to be a calculated effort to make an example of the company and deter any future challenges to the agency's drone policies.
- At the time SkyPan began to operate drones for its aerial photography business, it was well understood and universally acknowledged that drones were not "aircraft" and were not subject to federal aviation regulations.
- The FAA has made a complete about-face and now claims, despite statutory language to the contrary, not only that all drone activity is within its regulatory purview, but also that it has the authority to ban commercial drone activity at will.
- The crux of the issue seems to be less about policing the safety of SkyPan's activities, or even promoting aviation safety generally, than it is about SkyPan's unwillingness to comply automatically with FAA regulations that were nebulous, ill-fitting, and promulgated in an arbitrary and capricious manner.

This paper, in its entirety, can be found at <http://report.heritage.org/bg3197>

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The FAA publicly presented its case against SkyPan as a straightforward issue of safety and regulatory noncompliance.³ In reality, the case sought to penalize SkyPan for conduct that was neither clearly unlawful at the time nor harmful to anyone. The case constitutes an unprecedented enforcement action calculated to send a clear and unmistakable message to the drone community: Comply with the FAA's regulatory edicts, however arbitrary and capricious, or face the consequences.

SkyPan and the Case Against It

SkyPan was a market leader in the commercial use of drones, deploying them as early as 1996 to photograph real estate development sites from the air.⁴ When the company was founded in 1988, it relied on full-sized, manned helicopters, which are expensive to operate and, owing to their size and the fact that they carry substantial quantities of highly flammable fuel, inherently risky to fly in dense urban airspace. Drones presented a practical, less expensive alternative that is also safer, since they are significantly smaller and do not carry flammable fuels. SkyPan claims that throughout both its manned and unmanned operations, it has maintained a perfect safety record “without a single instance of personal or property damage” and “without a single instance of jeopardizing security or safety.”⁵

On October 6, 2015, the FAA concluded an extensive three-year investigation into SkyPan's drone business⁶ and issued a civil penalty letter outlining 65 allegedly “unauthorized” drone flights undertaken between March 21, 2012, and December 15, 2014.⁷ The letter detailed 389 alleged violations of Federal Aviation Regulations (FARs). Some applied to all 65 flights, while others resulted from 43 flights that took place over New York City in controlled Class B airspace, a heavily restricted zone surrounding the nation's busiest airports.⁸ The specific allegations include (among many others listed) that:

- SkyPan conducted flights for a purpose “other than hobby or recreational use”;
- SkyPan operated within Class B airspace without first “receiving an Air Traffic Control (ATC) clearance”; and
- SkyPan's aircraft were “not equipped with a two-way radio” or “a transponder and altitude reporting equipment,” “had not been registered with the Federal Aviation Administration,” and did not have “an appropriate and current airworthiness certificate” displayed within the aircraft.

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1. U.S. Department of Transportation, Federal Aviation Administration, “Press Release—FAA and Skypan [sic] International, Inc., Reach Agreement on Unmanned Aircraft Enforcement Cases,” January 17, 2017, https://www.faa.gov/news/press_releases/news_story.cfm?newsId=21374 (accessed January 24, 2017).
 2. SkyPan International, “Press Release in Response to FAA 1/17/17,” January 17, 2017, <http://www.skypanintl.com/SkyPan-FAA-Press-Release.pdf> (accessed January 24, 2017).
 3. U.S. Department of Transportation, Federal Aviation Administration, “Press Release—FAA Proposes \$1.9 Million Civil Penalty Against SkyPan International for Allegedly Unauthorized Unmanned Aircraft Operations,” October 6, 2015, https://www.faa.gov/news/press_releases/news_story.cfm?newsId=19555 (accessed January 24, 2017).
 4. Robert Channick, “Chicago Drone Photographer Pays FAA \$200,000 over Alleged Airspace Violations,” *Chicago Tribune*, January 19, 2017, <http://www.chicagotribune.com/business/ct-drone-faa-settlement-0119-biz-20170118-story.html> (accessed January 24, 2017).
 5. SkyPan International, “FAA Concerns,” <http://www.skypanintl.com/index.php/about> (accessed January 24, 2017).
 6. Jason Koebler, “The Sophisticated FAA Investigation That Led to the Largest Drone Fine Ever,” *Motherboard*, October 8, 2015, <http://motherboard.vice.com/read/the-sophisticated-faa-investigation-that-led-to-the-largest-drone-fine-ever> (accessed January 24, 2017).
 7. Letter from Peter J. Lynch, Assistant Chief Counsel for Enforcement, U.S. Department of Transportation, Federal Aviation Administration, Enforcement Division, to President, SkyPan International, Inc., “RE: SkyPan International, Inc., Case Nos. 2014EA150081 & 2013EA110005,” October 6, 2015, <https://www.scribd.com/doc/283846180/SkyPan-10-6-15-Civil-Penalty-Letter> (accessed January 24, 2017). Cited hereafter as Lynch Civil Penalty Letter.
 8. *Ibid.* The FAA defines class B airspace as “[g]enerally, that airspace from the surface to 10,000 feet MSL surrounding the nation's busiest airports in terms of IFR operations or passenger enplanements. The confirmation of each Class B airspace area is individually tailored and consists of a surface area and two or more layers (some Class B airspace areas resemble upside-down wedding cakes), and is designed to contain all published instrument procedures once an aircraft enters the airspace.” U.S. Department of Transportation, Federal Aviation Administration, “Classes of Airspace: Types of Controlled Airspace,” https://www.faa.gov/gslac/ALC/course_content.aspx?cID=42&ID=505&preview=true (accessed January 30, 2017).
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Based on these alleged violations, the FAA asserted that “SkyPan operated the aircraft on the flights referenced above in a careless or reckless manner so as to endanger the life or property of another.”⁹ The letter notes that 49 U.S.C. § 46301(a)(5) authorizes the agency to issue a civil fine of up to \$11,000 per violation and states that after “careful consideration of all available information, we are willing to accept \$1,903,000 in settlement of this matter.”¹⁰

The FAA’s civil penalty letter to SkyPan never mentions the word “drone.” The agency uses the term “Unmanned Aircraft System” just once, deeming it synonymous with the term “aircraft,” and uniformly alleges that SkyPan illegally operated “aircraft.” The federal laws and regulations that the company was accused of violating were all written to govern “aircraft” operations and safety. In fact, the FAA did not point to any drone-specific rule or regulation that SkyPan was accused of violating. The reason for this is simple: As of October 2015, there were no federal drone regulations on the books.

Thus, in order to pursue its enforcement action against SkyPan, the FAA had to apply regulations written for manned aircraft to small unmanned drones. Was this a reasonable course of action? Could SkyPan have reasonably concluded that drones were not aircraft? To answer these and other crucial questions, one must first look to the history of the FAA’s treatment of small UAS.

A History of Drone Regulation—or Lack Thereof

U.S. regulators have long distinguished between manned and unmanned flight. Congress first defined the term “aircraft” in the Air Commerce Act of 1926 as “any contrivance, now known or hereafter invented, used or designed for navigation or flight in the air, except a parachute or other contrivance designed for such navigation but used primarily as safety equip-

ment.”¹¹ What followed was a comprehensive body of laws and regulations governing aviation safety and operation, including requirements that aircraft be registered, that they be operated above minimum safe altitudes of flight set forth in regulation, and that pilots be licensed. None of these laws and regulations was applied to small model aircraft.

The first agency action to address model aircraft specifically came more than half a century later. In 1981, the FAA released Advisory Circular 91-57 outlining operating standards for drones and requesting voluntary compliance.¹² Crucially, that one-page document did not claim that small unmanned aircraft were within the scope of its regulatory power. As late as 2001, when an Air Traffic Division Manager requested guidance on agency policies for small radio-controlled devices, the FAA’s Program Director for Air Traffic Planning and Procedures “provided a response—consistent with the position the FAA had always taken—that ‘Model aircraft do not require a type certificate, airworthiness certificate, or registration. Federal Aviation regulations do not apply to them.’”¹³

Everyone Knows Drones Are Not “Aircraft”

The regulatory delineation between drones and aircraft reflects the common-sense understanding that drones and airplanes are different and should be regulated differently. As Heritage scholars have noted:

[D]rones differ drastically from their larger, manned cousins. For instance, while a jet aircraft may have a wingspan in excess of 200 feet, the most popular models of quadcopters currently on the market are roughly only a foot wide at their widest point. Traditional aircraft are designed to cruise as high as 35,000 feet and in

9. Lynch Civil Penalty Letter.

10. *Ibid.*

11. Air Commerce Act of 1926, 44 Stat. 573, ch. 344, <http://libraryonline.erau.edu/online-full-text/books-online/aircommerceact1926.pdf> (accessed February 27, 2017).

12. U.S. Department of Transportation, Federal Aviation Administration, Advisory Circular 91-57, “Model Aircraft Operating Standards,” June 9, 1981, https://www.faa.gov/documentLibrary/media/Advisory_Circular/91-57.pdf (accessed February 27, 2017). The other categories were hobby and recreational drones and drones operated for public purposes as “public aircraft.”

13. Brief of Petitioner John A. Taylor, *Taylor v. Huerta*, Case Nos. 15-1495, 16-1008, 16-1011 Consolidated Cases, United States Court of Appeals for the District of Columbia Circuit, June 14, 2016, p. 14, <http://www.wolfenstock.com/TaylorvFAA/TaylorFAABrief.pdf> (accessed February 27, 2017). Cited hereafter as Taylor Brief.

many cases have a range sufficient to cross continents or oceans; drones, limited by the capacity of onboard batteries and the range of their radio control signals, typically can fly no more than a few hundred feet and operate for only a few minutes before their power fails. Finally, drones do not carry human occupants as either passengers or crew. Human involvement in their flight is restricted to remote control of the vehicle.¹⁴

These differences are, by and large, immediately recognizable to lay audiences. No one looks at a small quadcopter and assumes it to be capable of manned flight or transatlantic crossings. When asked to conjure a mental image of an aircraft, most picture a plane or helicopter. Few would even think of a small quadcopter.

This type of common perception has meaning in determining the scope of laws and regulations. In *McBoyle v. United States*, the Supreme Court of the United States considered whether an aircraft was included in the definition of “motor vehicle” in the National Motor Vehicle Theft Act.¹⁵ As Justice Oliver Wendell Holmes noted, “No doubt etymologically it is possible” to equate “motor vehicle” as defined in the law with “airplane.” Yet this ignores the term’s meaning in “everyday speech” and endangers the public’s reasonable expectation that:

[A] fair warning should be given to the world, in language that the common world will understand, of what the law intends to do if a certain line is passed.... When a rule of conduct is laid down in words that evoke in the common mind only the picture of vehicles moving on land, the

statute should not be extended to aircraft simply because it may seem to us that a similar policy applies.¹⁶

Certainly, this reasoning applies in the drone context as well. In short, it is clear that at the time SkyPan began to operate drones for its aerial photography business, it was well understood and universally acknowledged that drones were not “aircraft” and were not subject to federal aviation regulations.

An Arbitrary About-Face

Recently, however, the FAA has acted as though eight decades of regulatory history never occurred. In 2007, the FAA published a notice of policy in the *Federal Register* subdividing drones into three categories based not on performance characteristics, but on usage: those operated as “public aircraft,” those flown as “civil aircraft,” and those used for hobby or recreation.¹⁷ Commercial UAS were henceforth to be considered “civil aircraft,” meaning that under the existing FARs, they would need airworthiness certificates to operate legally.¹⁸ The FAA then made it clear that it would only “issu[e] special airworthiness certificates in the experimental category” and that “UAS-issued experimental certificates *may not be used for compensation or hire.*”¹⁹

Even as the FAA was building out a regulatory framework to support its purported authority to make all commercial drone activity illegal, Congress was mandating a different approach. In 2012, legislators enacted the FAA Modernization and Reform Act, Section 332 of which mandated the development of a “comprehensive plan to safely

14. Jason Snead and John-Michael Seibler, “Redefining ‘Aircraft,’ Defining ‘Drone’: A Job for the 115th Congress,” Heritage Foundation *Legal Memorandum* No. 197, January 13, 2017, p. 2, http://www.heritage.org/research/reports/2017/01/redefining-aircraft-defining-drone-a-job-for-the-115th-congress#_ftnref8 (internal citations omitted).

15. *McBoyle v. United States*, 283 U.S. 25, 26 (1931). The Act, 18 USC § 408 (1919), defined “motor vehicle” as “an automobile, automobile truck, automobile wagon, motor cycle, or any other self-propelled vehicle not designed for running on rails.” The Court overturned *McBoyle*’s conviction for transporting a stolen aircraft across state lines, ruling that an aircraft was not a motor vehicle for the purposes of that statute.

16. *Ibid.*

17. U.S. Department of Transportation, Federal Aviation Administration, “Unmanned Aircraft Operations in the National Airspace System,” *Federal Register*, Vol. 72, No. 29 (February 13, 2007), pp. 6689–6690, <https://www.gpo.gov/fdsys/pkg/FR-2007-02-13/pdf/E7-2402.pdf> (accessed February 27, 2017).

18. Code of Federal Regulations, Title 14, Aeronautics and Space, Section 91.203, “Civil Aircraft: Certifications required,” January 11, 2011, <https://www.gpo.gov/fdsys/granule/CFR-2011-title14-vol2/CFR-2011-title14-vol2-sec91-203> (accessed February 27, 2017). Hereafter cited as 14 CFR § 91.203.

19. *Ibid.* (emphasis added).

accelerate the integration of civil unmanned aircraft systems into the national airspace system.”²⁰ The agency was statutorily mandated to produce this plan within 270 days of the law’s enactment, to publish a “notice of proposed rulemaking to implement the recommendations of the plan” within 18 months, and to complete this process with publication of a final rule in the *Federal Register* 16 months later—a deadline that the agency missed by nearly one year.²¹

Congress also crafted a relief valve intended to permit at least some commercial UAS operations even as the FAA finalized its drone rules. Section 333 of the 2012 law directed the Secretary of Transportation to “determine if certain unmanned aircraft systems may operate safely in the national airspace system before completion of the plan and rulemaking.” The law also required publication, within 18 months of enactment, of “a final rule on small unmanned aircraft systems that will allow for civil operation of such systems in the national airspace system, to the extent the systems do not meet the requirements for expedited operational authorization under section 333 of this Act.”²²

It seems clear that Congress intended that the FAA should *facilitate* commercial drone operations to the maximum extent possible while preserving safety, but the FAA did not deliver on Congress’s mandates. Instead, in 2014, the FAA reiterated its position that commercial activity was prohibited. In a notice of interpretation, it claimed that “[h]istorically, the FAA has considered model aircraft to be

aircraft that fall within the statutory and regulatory definitions of an aircraft.” Therefore, “[a]s aircraft, these devices generally are subject to FAA oversight and enforcement.”²³ This is analogous to a hypothetical regulator’s claiming that a mandate to set safe speed limits grants him the authority to ban driving—clearly an outcome inconsistent with the initial task.

But the agency was not finished with expanding its authority. Having staked a claim to control of the commercial side, the FAA turned to recreational activities.

In the same 2012 act that mandated commercial integration of UAS, Congress crafted a provision to shield hobby drone fliers against future agency regulations. Section 336 stated plainly that “[n]otwithstanding any other provision of law...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...the aircraft is flown strictly for hobby or recreational use” and complies with basic safety provisions enumerated in the statute.²⁴ Nevertheless, in 2015, the FAA published a “clarification” that recreational drones are subject to aircraft registration requirements, followed by an interim final rule making it a federal felony for recreational drone owners to fail to register themselves.²⁵

Thus, within a span of eight years, the FAA has made a complete about-face and now claims—despite statutory language to the contrary—not only that *all* drone activity is within its regulatory pur-

20. FAA Modernization and Reform Act, Public Law No. 112-95, 112th Cong., February 14, 2012, <https://www.congress.gov/112/plaws/publ95/PLAW-112publ95.pdf> (accessed February 27, 2017).

21. *Ibid.* This deadline came and went in October 2015 when the FAA failed to finalize commercial drone regulations. The first of an expected series of commercial drone regulations, known as Part 107, did not go into effect until August 2016, nearly a year after the legal deadline for implementation.

22. *Ibid.*

23. U.S. Department of Transportation, Federal Aviation Administration, “Interpretation of the Special Rule for Model Aircraft,” *Federal Register*, Vol. 79, No. 122 (June 25, 2014), pp. 36172–36176, <https://www.gpo.gov/fdsys/pkg/FR-2014-06-25/pdf/FR-2014-06-25.pdf> (accessed February 28, 2017); U.S. Department of Transportation, Federal Aviation Administration, “Press Release—FAA Offers Guidance to Model Aircraft Operators,” June 23, 2014, https://www.faa.gov/news/press_releases/news_story.cfm?newsId=16474&cid=TW223 (accessed February 27, 2017).

24. See note 21, *supra*.

25. See U.S. Department of Transportation, Federal Aviation Administration, “Clarification of Applicability of Aircraft Registration Requirements for Unmanned Aircraft Systems (UAS) and Request for Information Regarding Electronic Registration for UAS,” *Federal Register*, Vol. 80, No. 204 (October 22, 2015), pp. 63912–63914, <https://www.gpo.gov/fdsys/pkg/FR-2015-10-22/pdf/2015-26874.pdf> (accessed February 27, 2017); U.S. Department of Transportation, Federal Aviation Administration, “Registration and Marking Requirements for Small Unmanned Aircraft,” *Federal Register*, Vol. 80, No. 241 (December 16, 2015), pp. 78594–78648, <https://www.gpo.gov/fdsys/pkg/FR-2015-12-16/pdf/2015-31750.pdf> (accessed February 27, 2017).

view, but also that it has the authority to ban commercial drone activity at will.²⁶

For stakeholders, the consequences of this regulatory course are significant. Businesses operating legally before the FAA's about-face on drones suddenly found their business activities declared illegal. Myriad laws and regulations written for manned aviation and carrying steep criminal penalties now apply to small drones.²⁷ These criminal penalties can be severe. For example, Section 32 of Title 18 makes "destruction of aircraft or aircraft facilities" a federal felony punishable by a 20-year prison sentence. The FAA has made clear that it considers this statute now to be applicable to drones.²⁸

Drone operators quickly discovered how it is sometimes impossible to comply with rules drafted for manned aircraft.²⁹ For example, the FAA accused SkyPan of violating Section 91.203(a)(2) of its Title 14 regulations, which requires that "no person may operate a civil aircraft *unless it has within it...*[a]n effective U.S. registration certificate."³⁰ Exactly how the FAA expects operators to comply with that is an open question, given that for most small UAS, the only accessible internal space is a battery compartment.

The FAA's actions give every evidence of arbitrary and capricious rulemaking. As the Supreme Court has noted:

[A]n agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be

ascribed to a difference in view or the product of agency expertise.³¹

Ultimately, the Court has held that agencies must articulate a "rational connection between the facts found and the choice made."³² At no point has the FAA articulated such a reasonable, rational explanation for the major change in its understanding either of the definition of "aircraft" or of its authority to regulate UAS and other model aircraft. It has professed no explanation at all, instead claiming that no such changes have occurred.

The FAA has applied aircraft regulations to drones despite clear, fundamental differences between the two and has enforced aviation regulations with which operators have no hope of complying. A 2015 lawsuit filed by recreational flier John Taylor challenged the FAA's application of the FARs to drones. As Taylor noted in his brief:

Simply put, the FAA's rules regarding real aircraft, when applied to recreational model aircraft and other small flying devices, make no sense. The absurd and contradictory results in applying full-size aircraft regulations to these toys (*e.g.*, altitude restrictions, onboard documentation) show a lack of "consideration of the relevant factors" and "a clear error of judgment."³³

Legal Challenges Abound

John Taylor was not the only one to challenge the FAA's newly enlarged definition of "aircraft" and expansive understanding of its regulatory authority. For very nearly the entire period during which the FAA alleged that SkyPan was operating its business

26. The swiftness of the agency's regulatory actions is worth noting. The 2007 policy entered into force one month after promulgation. The 2014 interpretation entered into effect immediately. The 2015 interim final rule authorized criminal enforcement actions to begin one week after publication.

27. For a more complete discussion of manned aviation regulations misapplied to drones as a result of the FAA's regulatory actions, see Snead and Seibler, "Redefining 'Aircraft,' Defining 'Drone': A Job for the 115th Congress."

28. John Goglia, "FAA Confirms Shooting a Drone Is a Federal Crime. So When Will U.S. Prosecute?" *Forbes*, April 13, 2016, <http://www.forbes.com/sites/johngoglia/2016/04/13/faa-confirms-shooting-drone-federal-crime-so-when-will-us-prosecute/#a28b7d153ef6> (accessed January 27, 2017).

29. Snead and Seibler, "Redefining 'Aircraft,' Defining 'Drone': A Job for the 115th Congress."

30. 14 CFR § 91.203(a)(2) (emphasis added).

31. *Motor Vehicle Manufacturers Association of the United States v. State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29, 43 (1983).

32. *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 168 (1962).

33. Taylor Brief, p. 45, quoting *Motor Vehicle Manufacturers Association of the United States v. State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29, 43 (1983), quoting *Bowman Transportation, Inc. v. Arkansas-Best Freight System, Inc.*, 419 U.S. 281, 285 (1974).

illegally, the agency's application of FARs to drones was being challenged in court—including by SkyPan itself.³⁴ For eight months of that period, an order by an administrative law judge invalidated the agency's claim of authority over small UAS.

That case, *Huerta v. Pirker*, bears more than a passing resemblance to the SkyPan action.³⁵ The FAA had sought to enforce FARs against Raphael Pirker for operating a drone in an allegedly "careless or reckless manner so as to endanger the life or property of another." The agency also accused Pirker of operating a drone "for compensation" in violation of its prohibition on commercial activity. The incident took place in 2011.

On June 27, 2013, the FAA issued an order of assessment to Pirker, demanding payment of a \$10,000 civil penalty.³⁶ Pirker decided to challenge the FAA's position that drones are "aircraft" and therefore within the FAA's regulatory authority.

In a decision issued on March 6, 2014, Administrative Law Judge Patrick Geraghty sided with Pirker. He held that accepting the FAA's argument that the definition of "aircraft" included literally *any* "contrivance" that flies results in the "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 FAA regulatory enforcement action.³⁷ Judge Geraghty also noted that "historically, in their policy notices, [the FAA] modified the term 'aircraft' by prefixing the word 'model', to distinguish the device/contrivance being consid-

ered."³⁸ He then pointed to the FAA's treatment of ultralight vehicles (devices capable of carrying human beings) not as "aircraft" but as an altogether separate class of "Ultralight Vehicle" for the purposes of FARs.³⁹ Clearly, the FAA had never adopted the uniform, all-encompassing "if it flies it is an aircraft" position that it now claims was its policy all along.

Pirker's victory was short-lived. The FAA appealed, and on November 17, 2014, the full National Transportation Safety Board reversed Judge Geraghty's decisional order and accepted the FAA's expansive definition.⁴⁰

From March 6, 2014, until November 17, 2014, however, Judge Geraghty's decision stood. The FAA claims that SkyPan illegally operated an aircraft from March 21, 2012, through December 15, 2014. There is a significant overlap here: For more than eight months, SkyPan was operating commercial drones in line with Judge Geraghty's decision that drones were not "aircraft." Given that opinion, the FAA cannot now claim that SkyPan was willfully breaking the law during this period.

The Waiver

Following the FAA's blanket ban on commercial drone activity, and before its adoption of Part 107 of the FARs in 2016,⁴¹ the only way that a drone could be operated legally for commercial purposes, at least according to the FAA, was to apply for and receive a waiver pursuant to the aforementioned Section 333

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34. Three lawsuits were simultaneously filed challenging the 2014 agency interpretation. The litigants—the Council on Governmental Relations; a drone business coalition that included SkyPan; and the Academy of Model Aeronautics (AMA), the largest model aircraft organization in the nation—claimed, to quote the AMA petition, that "the Order is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law, in excess of statutory jurisdiction, authority, or limitations, and without observance of procedure required by law." The three cases were *UAS America Fund, et al. v. FAA*; *The Council on Governmental Relations v. FAA*; and *The Academy of Model Aeronautics, Inc., v. FAA*. See Jason Koebler, "FAA Hit with Three Separate Legal Challenges to New Drone Rules," *Motherboard*, August 22, 2014, <http://motherboard.vice.com/read/faa-hit-with-three-separate-legal-challenges-to-new-drone-rules> (accessed February 27, 2017). A lawsuit challenging the FAA's treatment of recreational drone owners also calls into question the FAA's expansive definition of "aircraft." See Taylor Brief.
35. *Michael P. Huerta, Administrator, Federal Aviation Administration, v. Raphael Pirker*, Docket CP-217, National Transportation Safety Board, Office of Administrative Law Judges, Decisional Order, March 6, 2014, <http://www.kramerlevin.com/files/upload/PirkerDecision.pdf> (accessed February 27, 2017).
36. *Ibid.*, Attachment 1, Order of Assessment, June 27, 2013, <http://www.kramerlevin.com/files/upload/PirkerDecision.pdf> (accessed February 27, 2017).
37. *Ibid.*, Decisional Order, p. 3.
38. *Ibid.*
39. *Ibid.*, p. 4.
40. *Michael P. Huerta, Administrator, Federal Aviation Administration, v. Raphael Pirker*, Docket CP-217, National Transportation Safety Board, Opinion and Order, November 17, 2014, <https://www.nts.gov/legal/alj/Documents/5730.pdf> (accessed February 27, 2017).
41. See U.S. Department of Transportation, Federal Aviation Administration, "Fact Sheet—Small Unmanned Aircraft Regulations (Part 107)," June 21, 2006, https://www.faa.gov/news/fact_sheets/news_story.cfm?newsId=20516 (accessed February 28, 2017).

of the 2012 FAA Modernization and Reform Act. These so-called Section 333 waivers were granted on a case-by-case basis. They required would-be commercial operators to submit applications detailing their business-use cases and demonstrate that their drone operations would be executed safely.

Section 333 waivers generally required months to process and were granted only when the FAA certified that the applicant's proposed drone activities satisfied the agency's safety-related concerns. According to the agency, the Section 333 process was designed to afford "safe and legal entry" to the National Airspace System.⁴² The FAA granted the first waivers in September 2014—almost two decades after SkyPan began its commercial drone operations.

In December 2014, SkyPan applied for a waiver. Its application referenced its prior drone activities and provided a detailed overview of the procedures governing its UAS operations. On April 17, 2015, the FAA granted the waiver, allowing SkyPan to operate a drone for commercial purposes and exempting its operations from many federal aviation regulations.⁴³ The decision was made, at least partially, on the basis of SkyPan's operational history and established safety precautions.

Six months later, however, after reviewing this same set of factors, the FAA charged the company with operating its drones in a "careless and reckless manner so as to endanger the life or property of another."⁴⁴ This is a bizarre contradiction that cannot be resolved by pointing out, as the FAA has done, that the flights for which SkyPan was penalized all came before the company received its Section 333 waiver. The FAA asserts that it would not issue a waiver if the underlying conduct being authorized is not deemed to be safe. The waiver thus does not make the underlying conduct safe; it is simply a for-

mal recognition by the FAA that the conduct is safe, coupled with a detailing of the FARs by which the recipient is and is not bound.

That is not the only contradiction in the agency's position on drone safety issues. The FAA maintains that both the initial ban on commercial drone activity and the severe restriction on the development of such activity after Part 107 was finalized were done in the name of public safety. Yet the agency noted when it issued SkyPan's Section 333 waiver that operating drones was inherently safer than operating full-scale helicopters in dense urban airspace.⁴⁵ In essence, the agency conceded that strict compliance with its own regulatory edicts could actually worsen public safety.

The crux of the issue seems to be less about policing the safety of SkyPan's activities, or even promoting aviation safety generally, than it is about SkyPan's unwillingness to comply automatically with FAA regulations that were nebulous, ill-fitting, and promulgated in an arbitrary and capricious manner. The message that the FAA seems intent on sending through its enforcement action against SkyPan is simple: Resist our claim of authority and there will be consequences.

The SkyPan enforcement can be read as a highly visible act of intimidation meant to make an example of the company so as to deter future opposition from other commercial drone operators, and the terms of SkyPan's eventual settlement lend weight to this conclusion: None of the terms of the settlement requires the company to alter its practices on safety grounds. Instead, SkyPan was forced to pay \$200,000, agree to pay further sums of \$150,000 automatically if it runs afoul of agency rules in the future, and produce public service messages advocating industry compliance with the FAA's regulations.⁴⁶

42. See U.S. Department of Transportation, Federal Aviation Administration, "Unmanned Aircraft Systems: Section 333," https://www.faa.gov/uas/beyond_the_basics/section_333/ (accessed February 28, 2017).

43. Letter from John S. Duncan, Director, Flight Standards Service, U.S. Department of Transportation, Federal Aviation Administration, to Gregory S. Walden, Counsel for SkyPan International, granting Exemption No. 11352, April 17, 2015, https://www.faa.gov/uas/beyond_the_basics/section_333/333_authorizations/media/SkyPan_International_11352.pdf (accessed February 28, 2017). Cited hereafter as Duncan Exemption Letter.

44. Lynch Civil Penalty Letter.

45. Specifically, in four previous grants of exemption, "the FAA found that the enhanced safety achieved using an unmanned aircraft (UA) with the specifications described by the petitioner and carrying no passengers or crew, rather than a manned aircraft of significantly greater proportions, carrying crew in addition to flammable fuel, gives the FAA good cause to find that the UAS operation enabled by this exemption is in the public interest." Duncan Exemption Letter, p. 2.

46. U.S. Department of Transportation, Federal Aviation Administration, "Press Release—FAA and Skypan International, Inc., Reach Agreement on Unmanned Aircraft Enforcement Cases."

Conclusion

The \$1.9 million civil enforcement claim against SkyPan is the highest ever proposed in a drone enforcement action and by three orders of magnitude: Most civil enforcement actions result in settlements of between \$1,000 and \$5,000.⁴⁷ In addition, the \$200,000 civil fine exacted by the FAA, while significantly less than the initial figure, is still the largest sum ever collected by the agency in a drone-related enforcement action. The case against SkyPan hardly seems to merit such extreme treatment. The company is not only well established, but also claims a record for safety that, ironically, even the FAA has recognized.

SkyPan was hardly unreasonable in concluding that drones were not aircraft for purposes of applicable federal safety regulations. Moreover, at the time it began its drone operations, SkyPan could point reliably to eight decades of regulatory policy in which the FAA itself had taken the position that it lacked the statutory authority to regulate unmanned aircraft. For half of the enforcement period—at the same time SkyPan itself was suing the FAA for its arbitrary and capricious regulatory efforts to shut down commercial drone operations—the company could rely on an administrative law judge’s decisional order clearly indicating that what it was doing was not illegal.

Given the context, the decision to pursue an enforcement action against SkyPan seems to be a calculated effort to make an example of the company and deter any future challenges to the FAA’s drone policies. This is a troubling development in a series of troubling developments that undermine the fundamental principle of the rule of law.

The FAA has already demonstrated an alarming willingness to expand its regulatory authority beyond the scope of the law, arbitrarily shut down legitimate and lawful businesses, and expose millions of Americans to needless and senseless criminal prosecution. It is time for Congress and the new Administration to rein in the FAA’s treatment of drones.

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47. Ashley Halsey III, “FAA Proposes \$1.9 Million Fine Against SkyPan for ‘Reckless’ Drone Operations,” *The Washington Post*, October 6, 2015, https://www.washingtonpost.com/local/trafficandcommuting/faa-wants-to-fine-skypan-19-million-for-reckless-drone-operations/2015/10/06/2050ca2e-6c34-11e5-aa5b-f78a98956699_story.html?utm_term=.a9ed964d7f58 (accessed January 24, 2017).