



91.13(a), 91.155(a), 91.155(d)(1), 91.155 (d)(2), and 91.173(b) of the Federal Aviation Regulations (FAR), 14 CFR Part 91,<sup>2</sup> by recklessly taking off under VFR [visual flight rules] weather

<sup>2</sup>FAR §§ 91.13(a), 91.155(a), 91.155(d)(1), 91.155(d)(2) and 91.173(b) provide in pertinent part as follows:

§ 91.13 Careless or reckless operation.

(a) Aircraft operations for the purpose of air navigation.  
No person may operate an aircraft in a careless or reckless manner so as to endanger the life or property of another.

§ 91.155 Basic VFR weather minimums.

(a) Except as provided in §§ 91.155(b) and 91.157, no person may operate an aircraft under VFR when the flight visibility is less, or at a distance from clouds that is less, than that prescribed for the corresponding altitude in the following table:

Altitude	<sup>3</sup> Flight visibility <sup>3</sup>	Distance from clouds
1,200 feet or less above the surface--	<sup>3</sup>	<sup>3</sup>
Within controlled airspace... <sup>3</sup> 3 statute miles.. <sup>3</sup>	<sup>3</sup>	500 feet below. 1,000 feet above. 2,000 feet horizontal.
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(d) Except as provided in § 91.157, no person may take off or land an aircraft, or enter the traffic pattern of an airport, under VFR, within a control zone-

- (1) Unless ground visibility at that airport is at least 3 statute miles; or
- (2) If ground visibility is not reported at that airport, unless flight visibility during landing or takeoff, or while operating in the traffic pattern, is at least 3 statute miles.

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§ 91.173 ATC clearance and flight plan required.

No person may operate an aircraft in controlled airspace under IFR unless that person has -

- (a) Filed an IFR flight plan; and
- (b) Received an appropriate ATC clearance.

conditions from an airport within a control zone, when the weather was below VFR minimums and when there was inbound IFR [instrument flight rules] traffic.<sup>3</sup> For the reasons that follow, we deny the appeal.

The Administrator's complaint is premised on the assertion that, at the time of respondent's VFR takeoff in civil aircraft N166CP, the official weather report indicated that IFR conditions existed at Altoona Airport. The crux of respondent's defense is that, while the weather report may have indicated that IFR weather conditions existed 26 minutes before his takeoff, that report was stale and, in his opinion, the weather at the time of his takeoff was VFR.

The Altoona, Pennsylvania Airport, does not have an air traffic control (ATC) tower. When Altoona weather conditions are below VFR minimums, the Cleveland Air Route Traffic Control Center (ARTCC) provides ATC service to those aircraft operating under IFR in Altoona airspace, which is within a control zone. An Automated Flight Service Station (AFSS) is located at Altoona Airport. The AFSS is manned by ATC specialists who are certified National Weather Service weather observers. The controllers at the AFSS issue hourly surface weather observations as well as special weather observations when there is a need to report significant changes in the weather.<sup>4</sup> Altoona AFSS also relays

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<sup>3</sup>The Administrator has filed a brief in reply, urging the Board to affirm the initial decision and order.

<sup>4</sup>A laser beam ceilometer is located about 100 feet from the facility.

ARTCC clearances to pilots operating under IFR at Altoona Airport.

Respondent admits that the weather was IFR when he landed his aircraft at Altoona on the morning of the day in question. He also admits that at noon, after he had finished his business in Altoona,<sup>5</sup> he called for a weather observation and the weather was reported at 900 feet, overcast, with 2 miles visibility with fog. Respondent filed an IFR flight plan with Cleveland Center.

According to respondent, he continued to observe the weather as he drove to the airport, and he claims that the weather was improving. Before boarding aircraft N166CP, respondent claims that he could see the mountain ridges southeast of the airport, which are about 3 miles away,<sup>6</sup> and the ceiling was 1,500 feet and overcast. In his opinion the weather was VFR. Respondent does not dispute that he called for an IFR clearance, but he claims he did so only because he already had an IFR flight plan on file. The transcript of respondent's communications with ATC

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<sup>5</sup>Respondent has acquired over 9,000 hours, using his airman certificate to reach healthcare-related clinics which he operates throughout the eastern region of the country.

<sup>6</sup>Respondent also argues that the fact that the airport beacon was not lighted is evidence that the weather was VFR, notwithstanding evidence that the beacon is no longer operated by the AFSS, and that respondent knows that a pilot should not rely on an airport beacon to determine weather conditions.

(Administrator's Exhibit A-2) reveals, in pertinent part:

**1927 UTC** N166CP            yeah I'd like to pick up my I-F-R- down to Cambridge

AOO [AFSS]                six Charlie papa Roger uh put your I-F-R- on request uh be advised there is uh another aircraft four three zero one lima also on request.

N166CP                    OK

CLE ARTCC                Tyrone [land line heard on tape]

AOO                        Altoona radio we have November one six six Charlie papa also requesting I-F-R clearance from Altoona to Cambridge.

CLE ARTCC                uh OK we're not going to be able to do it yet that guy's put'sin around there yet landing Bedford he should be (unintelligible) locally shortly whenever he calls us we'll get them both off.

AOO                        alright thank you...

AOO                        ten six Charlie papa Altoona center advises there will be a delay on your clearance reference I-F-R traffic inbound

N166CP                    OK I think I'll just take off uh V-F-R then

AOO                        be advised we are I-F-R

N166CP                    I guess I'll wait then

AOO                        we're currently measured ceiling eight hundred broken one thousand five hundred overcast visibility two and one half in fog.

N166CP                    and when was your last observation

AOO                        that was a special at ten minutes after the hour

N166CP                    yeah....

ATC also advised N4301L, the other aircraft waiting on the runway, that the weather conditions were still IFR. Several minutes transpired before the next communication. See also Administrator's Exhibit A-1 (tape of communications). Cleveland Center called Altoona AFSS with a clearance for N4301L. At 1935:15 hours, Altoona AFSS read the clearance to N4301L and advised that the clearance would be void after 1940 hours. N4301L read back the clearance and advised ATC that respondent's aircraft had just taken off.

ATC estimates that respondent departed Altoona at approximately 1936 zulu hours. (2:36 p.m.) At 1910 zulu hours, 26 minutes before respondent's takeoff, a special weather observation report was issued by the Altoona AFSS indicating that the ceiling measured 800 feet broken, 1,500 feet overcast, and 2 and 1/2 miles visibility, fog. See Administrator's Exhibit A-4; TR-23. At 1947 zulu hours, 11 minutes after respondent's takeoff, the official weather was reported as ceiling measured 900 feet, overcast, and 3 miles visibility, fog. See TR-32. At 1940 zulu hours, Altoona AFSS received a report from a Cessna 172 pilot at an unknown flight level reporting that the base of the overcast was at 2,700 feet, the top of the overcast was at 2,900 feet, flight visibility was 5 miles, fog and haze. See TR-30. At 2028 zulu hours, Altoona AFSS issued a terminal forecast indicating that the ceiling was 1,100, overcast, visibility 3 miles, fog, and that there was an occasional ceiling of 700 feet,

overcast, visibility five miles, fog. See TR-29.

The Administrator's witnesses' testimony establishes that the official weather reports indicate IFR weather at the time of takeoff, and indeed, for the entire day. The Cleveland ARTCC controller further testified that it was unlikely that the weather could have changed from IFR to VFR and then back again to IFR in 37 minutes, as respondent suggests.<sup>7</sup> According to that controller, neither ceilings nor fog move that quickly.<sup>8</sup> The FAA inspector who investigated the incident also noted that it was unlikely that the fog would have moved quickly because there was little wind that day, nor was there rain or sun that could improve visibility in a matter of minutes.<sup>9</sup> The controller who was manning the AFSS disputed respondent's claim that ground visibility was VFR at the time of takeoff. He testified that

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<sup>7</sup>Respondent's contention that this testimony should be rejected by the Board is without merit. Counsel's questions on cross-examination revealed only that the witness had not personally observed the conditions at Altoona because he was in the Cleveland ARTCC at the time of takeoff. This does not mean, however, that his testimony regarding the weather at Altoona at 1936 hours was speculative. His opinions were based on the official weather reports and on his expertise, as a certified weather observer, in evaluating those reports.

<sup>8</sup>The controller did admit on cross-examination that if the broken layer of clouds had changed to scattered clouds, then the ceiling would have been 1,500 feet. However, he persisted in his opinion that this kind of change was unlikely to happen so rapidly.

<sup>9</sup>Even though the Administrator did not allege a violation of FAR § 91.155(c), we think the charge under § 91.155(a) can be read to encompass an allegation of a violation of the basic VFR ceiling minimums by prohibiting operation of an aircraft under VFR at a distance from clouds that are less than 1,000 feet above. The absence of that allegation, in any event, does not affect our view towards sanction.

there are over 20 markers, including the mountains, which are used by the official weather observers located at the AFSS to determine prevailing visibility. While it is possible to see mountains that are even 10 miles away from the airport, a pilot may still not have the requisite ground visibility. TR-28. Moreover, according to this witness, if the weather had changed to VFR, a special weather observation would have been issued by the weather observer on duty, and the controller would have received that report.

The law judge concluded that the weather conditions at the time of respondent's takeoff were IFR. He noted in support of his findings that respondent knew the conditions were IFR because he had been informed that the weather was IFR before he took off, and he had acknowledged that information. Moreover, the law judge found that respondent's actions were reckless under the circumstances. We agree.

Respondent argues that the law judge's findings fail to recognize that a pilot may exercise his own judgment as to the condition of the weather, when the official weather report is stale. In Administrator v. Gaub, 5 NTSB 1653, 1656 (1986), we noted that,

Reported weather is a measurement of conditions existing at the time of the observation. Given the dynamic nature of certain weather conditions, weather in a control zone can rapidly deteriorate or improve in a matter of minutes. To rule that a pilot cannot substitute his own judgment for reported weather may actually sanction unsafe flight practices.



Gaub however is not so broad as to suggest that a pilot may substitute his own weather observation for the official weather report merely because of the passage of time since the issuance of the official report. Cf., Administrator v. Rolund, NTSB Order No. EA-3991 at 5, appeal docketed, FAA v. NTSB and Rolund, No. 94-1428 (D.C. Cir. June 7, 1994)(pilot observation accepted where weather was improving rapidly). While Gaub recognized that, in some circumstances, such as where the weather is changing rapidly, the reasonable and prudent pilot may be required to assess the conditions,<sup>10</sup> as explained in Administrator v. Howard, NTSB Order No. EA-3328 n. 1 (1991), we think that the general rule is that officially reported weather is normally controlling.

The record in this case contains ample evidence that weather conditions were not changing rapidly at the time of respondent's departure. Thus, respondent was not at liberty to substitute his own judgment of weather conditions for the official weather report. In any event, implicit in the law judge's determination that the weather was actually IFR is a credibility finding against respondent. Our reading of the initial decision convinces us that the law judge simply did not believe him.

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<sup>10</sup>There was also testimony in this case that when a pilot is planning to depart VFR when the reported weather is IFR, the pilot should evaluate the current weather in context of the weather trends for the day, and not just for the moment -- i.e., what was the weather before the last report? What is the forecast? What is the weather at the pilot's destination? In the Board's view, the reasonable and prudent pilot would not simply look up at the sky, see a hole in the clouds, and attempt to take off under VFR, when the trend in the weather is unquestionably IFR.

Respondent offers us no persuasive reason to disturb the credibility determination of the law judge.

Finally, respondent fails to persuade us that the law judge's finding of recklessness is unsupported by the record. The fact that there is evidence suggesting that the inbound IFR traffic to which ATC referred<sup>11</sup> may have already been on the ground by the time of respondent's takeoff is not determinative, because there is no evidence that respondent knew that fact when he took off. Nor is there evidence that respondent knew or could have known that the aircraft in front of him was about to receive his takeoff clearance, when respondent taxied around him.<sup>12</sup> In our view, the potential for endangerment to aircraft on the ground and in the air was significant, and a 180-day suspension of respondent's airman certificate is neither excessive or inconsistent with Board precedent. See, e.g., Administrator v. Tuel, NTSB Order No. EA-3393 (1991), and cases cited therein.

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<sup>11</sup>We also think respondent's argument on whether ATC told him to delay his departure is misplaced. Respondent was not charged with failing to comply with an ATC instruction or clearance.

<sup>12</sup>There is also no evidence in the record to indicate that respondent was monitoring the ATC frequency, or that he announced his intentions to depart VFR. To the contrary, he advised ATC that he would wait for an IFR clearance and then took off VFR.

**ACCORDINGLY, IT IS ORDERED THAT:**

1. Respondent's appeal is denied;
2. The Administrator's order and the initial decision are affirmed; and
3. The 180-day suspension of respondent's commercial pilot certificate shall commence 30 days after service of this order.<sup>13</sup>

HALL, Chairman, LAUBER, HAMMERSCHMIDT and VOGT, Members of the Board, concurred in the above opinion and order.

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<sup>13</sup>For purposes of this order, respondent must physically surrender his certificate to an appropriate representative of the FAA pursuant to FAR § 61.19(f).