

SERVED: August 15, 2008

NTSB Order No. EA-5404

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

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 12th day of August, 2008

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ROBERT A. STURGELL,)	
Acting Administrator,)	
Federal Aviation Administration,)	
)	
Complainant,)	
)	
v.)	Dockets SE-18005
)	and SE-18018
)	
GEORGE WELCH FOLK and)	
TIMOTHY BRIAN FOLK,)	
)	
Respondents.)	
)	
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OPINION AND ORDER

Respondents have appealed from the oral initial decision of Chief Administrative Law Judge William E. Fowler, Jr., issued on November 29, 2007, after a hearing in this consolidated case.¹ The law judge upheld the Administrator's allegations that respondents violated 14 C.F.R. §§ 137.51(b)(1) through (3)²;

¹ A copy of the initial decision, an excerpt from the hearing transcript, is attached.

² Part 137 addresses agricultural aircraft operations. Section 137.51 regulates operations over congested areas. Subsection

91.119(b)³; and 91.13(a),⁴ and affirmed the 120-day and 90-day suspensions, respectively, of Respondent George Folk's and Respondent Timothy Folk's commercial pilot certificates. We deny the appeal.

The June 26, 2007 amended orders of suspension were filed as the complaints in these cases. Well after the hearing and the law judge's decision, and after submission of briefs to the Board by both parties, the Administrator withdrew, on March 28, 2008, several allegations of the amended complaint as to Respondent George Folk and retracted the arguments related to those allegations.

The amended order of suspension regarding Respondent George Folk alleges, after omitting the withdrawn allegations, that on

(..continued)

137.51(b) provides that no person may operate an aircraft over a congested area except in accordance with the requirements of that paragraph. The first requirement of three in the subsequent subparagraphs is that the operator must obtain prior written approval from the appropriate official or governing body of the political subdivision over which the operator will conduct operations. See § 137.51(b)(1). The second requirement is that the operator must give notice of the intended operations by some effective means, such as daily newspapers, radio, television, or door-to-door notice. See § 137.51(b)(2). Third, the operator must submit a plan for the operation, and the Flight Standards District Office must approve it. The plan must include consideration of obstructions to flight, the emergency landing capabilities of the aircraft, and coordination with air traffic control. See § 137.51(b)(3).

³ Section 91.119 prohibits, over any congested area of a city, town, or settlement, except when necessary for takeoff or landing, operation of an aircraft below an altitude of 1,000 feet above the highest obstacle within a horizontal radius of 2,000 feet of the aircraft.

⁴ Section 91.13(a) prohibits aircraft operation in a careless or reckless manner so as to endanger the life or property of another.

or about September 9, 2006, at approximately 3:00 PM, he operated a Grumman G-164A in agricultural operations near Swan Pond Road's intersection with Hollida Lane, in Martinsburg, West Virginia. The amended order of suspension as to Respondent Timothy Folk alleges that on or about July 31, 2006, at approximately 11:00 AM, he operated that aircraft in agricultural operations in the same area. The Administrator alleged that respondents made passes at less than 300 feet above ground level (AGL) over a congested residential area, that the operations occurred without prior written approval from the appropriate official or governing body and without prior public notice, and that these operations occurred without submission or approval of a congested area plan. The Administrator alleged that, as a result, these operations were careless or reckless, and that respondents violated the cited paragraphs of the Federal Aviation Regulations (FARs).

At the hearing, the Administrator presented evidence that consisted of over 30 exhibits, including photographs, maps, diagrams, and documents; and the testimony of a county employee who identified maps and diagrams of the area, several residents who observed the low flights,⁵ and the operations inspector who investigated the alleged violations. The percipient witnesses generally and consistently recounted that respondents operated well below 500 feet AGL. Respondents admitted they were flying the aircraft at the times alleged, but contend that the area over

⁵ When referring to photographs and maps, both counsel repeatedly failed to describe the actions of witnesses in pointing to or identifying areas on these demonstrative exhibits. We caution counsel and our law judges to better protect the record in this regard.

which they flew was not congested and they did not fly over any houses. Although this case does not turn on credibility issues, the law judge, without specifically saying so, clearly credited the testimony of the Administrator's percipient witnesses.⁶ Respondents' testimony also establishes their altitudes and lateral distance from people and structures.⁷ Therefore, the crux of this case is not whether respondents actually flew, for example, directly over homes, but whether the homes are in a congested area.

Respondents presented the testimony of an experienced pilot who observed their aerial operations at his farm and in other operations. The witness said he never saw anything unsafe. Respondent George Folk testified that he lives on Swan Pond Road, in a rural area, where he has been conducting agricultural operations since 1975. He has an airstrip east of his house, perpendicular to Swan Pond Road. His son, Respondent Timothy Folk, assists him in aerial operations. Over the years, Respondent George Folk met with inspectors many times, to discuss complaints. On June 16, 2006, he, along with Respondent Timothy Folk, met with Cooper Towers, his principal operations inspector

⁶ While we encourage our law judges to explain such assessments whenever possible, a failure to do so does not vitiate their choices. See Administrator v. Henderson, NTSB Order No. EA-5372 at 11, n.10 (2008); Administrator v. Crocker, NTSB Order No. EA-4565 at 7 (1997); Administrator v. Boardman, NTSB Order No. EA-3523 (1992); Administrator v. Klock, 6 NTSB 1530, 1531 (1989).

⁷ See also Administrator v. Lucke, 5 NTSB 1495 (1986) (agricultural aerial application not a defense to flights 20 feet above houses because record showed such close flight was unnecessary, and that "hazard" for purposes of § 137.49 means an identifiable and specific endangerment).

for the past 5 years, and they went over records and discussed a complaint. Inspector Towers told him that the area around his farm could be considered a congested area; when Respondent George Folk asked for a definition of the term, the inspector told him there was no definition, and referred him to FAA guidance, including an inspectors' handbook.

Respondent George Folk testified that he subsequently studied the regulations and, finding no examples in the handbook that applied to his operations, decided the area around his farm was not congested. Respondent George Folk identified Joint Exhibit 1 as an aerial photograph of his farm, with markings depicting his flight path on September 9, 2006. He said he flew at 50 feet AGL, to give the seed time to spread before it hit the ground, but flew no closer than 250 feet to a nearby home. He said he had been doing aerial applications on this field for 12 to 14 years. On turnarounds, he said he probably reached an altitude of 250 feet, but never flew directly over the house.

Respondent George Folk said he was told early on that if he thought an area was congested, he should consider filing a congested area plan, but he never filed one. An inspector told him if the FAA knew what was going on they could answer complaints, so they asked him to file an "other than congested area plan," a brief description of the work, and emergency numbers. Respondent George Folk filed such a plan "half a dozen times," the last one in "the late '90s."⁸

⁸ The record does not reflect why respondents discontinued this practice.

Respondent Timothy Folk testified that he lives on Swan Pond Road, has been flying since he was a teenager, and has been a commercial pilot since 1997. He has conducted agricultural operations for 10 years, and sprayed fields on the day of his alleged violations, July 31, 2006. During the aforementioned June 16, 2006 meeting, when Inspector Towers said they might need to file a congested area plan, Respondent Timothy Folk responded that they did not fly over congested areas. He told the inspector that, in the past, when there had been complaints, an inspector told them to give the FAA notice so the inspectors could better field any complaints. Respondent Timothy Folk said those previous inspectors called that an "other than congested area plan,"⁹ but that the current inspector said "there is no such thing" as an "other than congested area plan." Respondent Timothy Folk suggested that if they, respondents, do not "deem it," based on their experience, to be a congested area, then their only recourse is "to have a complaint after the fact."

Respondent Timothy Folk said he did not fly over any houses on July 31, 2006, but about 700 feet laterally from one and 400 feet from another. He said the lateral distance from his flight path to Hollida Lane's intersection with Swan Pond Road was 175 to 225 feet and his altitude was below 100 feet AGL, but when he was 400 feet from one house, his altitude was 500 to 700 feet AGL.

Respondents assert five arguments on appeal. The first is that they did not conduct agricultural operations over congested

⁹ Respondents did not produce such a previously filed plan.

areas. Next, they argue there should be no sanction under the circumstances. They also contend that the law judge committed reversible error by refusing to admit Exhibits R-4, R-5, and R-6, and that the Administrator did not correctly identify boundaries of the alleged congested area. Respondents finally claim exemption from Part 91 violations for departures, turnarounds, and approaches necessary for dispensing operations. The Administrator disputes these contentions, and urges the Board to uphold the law judge's decision.

As at the hearing, respondents' primary argument on appeal is that the area in question is either not congested or the Administrator failed to prove it was congested. Respondents also contend that the logical extension of the Administrator's position that congested area determinations are made on a case-by-case basis is that nobody can know whether or not an area is congested until after their case has been decided. They note that they have been conducting operations at their farm for over 30 years without violation.

Respondents argue, in effect, that if they had to maintain a distance of 2,000 feet from a congested area, and if these are congested areas, they would be prevented from operating, except for takeoffs and landing. They argue that § 137.49, "Operations over other than congested areas," may be read to exempt aircraft in agricultural dispensing operations in congested areas, "including approaches, departures and turnarounds reasonably necessary for the operation," arguing that the quoted language would otherwise be surplusage. They argue that, because that

section also says, "notwithstanding part 91," and does not contain a horizontal radius restriction like that in § 91.119(b), an operator may fly to the edge of a congested area, and that there is no "horizontal buffer of 2,000 feet ... outside a congested area for aircraft engaged in aerial applications."

We begin our analysis with Part 91, which sets forth minimum safe altitudes for aircraft operations. Over a congested area of a city, town, or settlement, an aircraft must operate 1,000 feet above the highest obstacle within a horizontal radius of 2,000 feet of the aircraft. See § 91.119(b). On the other hand, over other than congested areas, an aircraft must operate 500 feet above the surface, unless it is over open water or sparsely populated areas, in which case the aircraft must stay at least 500 feet away from any person, vessel, vehicle, or structure. See § 91.119(c).¹⁰

Agricultural operators have special dispensation under Part 137 to fly at altitudes below the minimums in § 91.119(a). Just as in Part 91, however, Part 137 differentiates between flights over congested areas and those over other than congested areas. Expressly exempting the agricultural pilot from the 500 foot minimum altitude and 500 foot horizontal buffer in § 91.119(c), § 137.49 provides that, during actual dispensing operations, an agricultural operator may fly over "other than congested areas" below 500 feet above the surface and closer than 500 feet to persons, vessels, vehicles, and structures. But § 137.49 also

¹⁰ An aircraft must always be operated at an altitude allowing an emergency landing without undue hazard to persons or property on the surface if a power unit should fail. See § 91.119(a).

conditions this exemption on not creating a hazard to persons or property on the surface.

The agricultural pilot also has dispensation for operations over congested areas. Again clearly exempting the agricultural operator from Part 91 minimums, § 137.51(a) states that an aircraft may be operated over a congested area "at altitudes required for the proper accomplishment of the agricultural aircraft operation." But it also mandates "maximum safety to persons and property on the surface ... and in accordance with the requirements of paragraph (b) of [§ 137.51]."

It is that subparagraph, § 137.51(b), which is our primary focus; it states that no person may operate an aircraft over a congested area without notice to the public and prior written approval from the proper official or governing body of the political subdivision. See § 137.51(b)(1)-(2). In addition to requiring the operator to submit the plan to the FAA, that subparagraph also requires FAA approval before implementation. See § 137.51(b)(3).

Inspector Towers, who investigated the allegations regarding respondents, indicated that if an operator conducts an application in an area the FAA might later determine to be a congested area, the operator ignores that potentiality at his or her peril. He said that he warned respondents about this possibility. Inspector Towers stated that the purpose of the June 16, 2006 meeting was to conduct an annual base operations inspection, including records review, and to discuss a complaint. He told respondents there were cases in which small groups of

houses, as few as two or three, were determined to comprise a congested area. The inspector said he advised them that if they were flying around houses, they should submit a congested area plan. He said that respondents indicated they did not think they were flying in congested areas.¹¹

Inspector Towers testified that, after his meeting with respondents, and during his investigation of the subsequent complaints, he determined that the neighborhood was a congested area for the purposes of filing a congested area plan for conducting agricultural operations. He indicated that, normally, when an operator files a congested area plan, the inspector uses handbook guidance to evaluate several factors, including the location, direction of flight, and how low the pilot would conduct the operation and associated maneuvers. The inspector would then determine whether the congested area plan should be approved and implemented. Inspector Towers identified Exhibits A-19 and A-20a and b, respectively, as excerpts from FAA guidance for inspectors' internal use in congested area determinations and for inspectors to use to provide assistance to operators in helping to determine whether a congested area plan should be submitted. He testified that the guidance does not include a definition of "congested area," but acknowledged the guidance anticipates that agricultural operators may request FAA assistance in determining whether an area is congested. The

¹¹ In other words, despite a visit from the operations inspector, during which he highlighted regulatory guidance for congested areas and submission of congested area plans, respondents chose to follow their own interpretation of the regulations.

inspector said that, after an operator submits a congested area plan, the inspector determines whether the congested area plan will be approved and implemented. He said, depending on density of population or structures, the inspector may determine an approved plan is not required. Inspector Towers testified that a determination of whether an area requires a congested area plan further depends on whether the operation will impact houses, persons, or property on the surface. He said the operator's submission is important, because of the information it contains, in determining whether the proposed operation requires implementation of an approved plan.

Six weeks after the June 16, 2006 meeting with respondents, Inspector Towers fielded another complaint of a low flight over a home in the neighborhood. He called Respondent George Folk, who verified that Respondent Timothy Folk flew on the morning at issue, July 31, 2006. Inspector Towers opened an investigation, and sent letters of investigation to respondents. He received a letter from respondents' counsel, stating that any operations referenced in the letters of investigation were agricultural operations over a rural area.¹² The letter from respondents' counsel also requested a definition of congested area.¹³

Shortly after respondents' receipt of the letters of

¹² Inspector Towers testified that he is not aware of anything suggesting a rural area could not be considered congested for purposes of § 91.119(b)'s minimum safe altitude.

¹³ Our review of the record reveals that the FAA did not respond to this request, perhaps because, as revealed at the hearing, no such definition exists, and because respondents had already been told there was no specific definition.

investigation, Inspector Towers received a new low-flying complaint regarding operations of September 9, 2006. Inspector Towers testified that his investigation determined that in a delineated area adjacent to the intersection of Swan Pond Road and Hollida Lane, there were 30 homes. He had measured out an area 3,520 feet by 2,250 feet, or .667 mile by .43 mile, from a point along Swan Pond Road starting at the intersection west of Hollida, where there existed another concentration of homes, and proceeding to Swan Pond Road's intersection with Hollida and then north about one-third of a mile.¹⁴ He therefore determined the area was congested for the purposes of requiring submission of a congested area plan. He reiterated that such determinations are not made until after submission of a plan.

Part 137 appears to attempt a balancing of the safety and property interests of people on the ground with the economic interests of agricultural pilots and the farmers and landowners who benefit from their services. FAA guidance for the use of inspectors and operators appears to reflect that balance. See Exhs. A-19, A-20a, and A-20b. Although the guidance seemingly appreciates that aerial agricultural operators must fly outside the parameters of the minimum safe altitudes of § 91.119, there are still limitations on the agricultural pilot, clearly designed to protect people and property on the ground. Limitations apply whether the pilot is operating over congested areas or other than

¹⁴ Inspector Towers referred to Administrator v. Pick and Redig, NTSB Order No. EA-3646 (1992), where the Board found that a subdivision comprised of about 20 houses, in an area about .5 mile x .66 mile, would qualify as a congested area.

congested areas; operations are more strictly monitored over congested areas, through submission of congested area plans, for example, due to the consideration of the safety of people and property therein. Another example of such limitations or restrictions is that flight below 500 feet is allowed only during actual application operations. Even over other than congested areas, an operation is permitted only if it can be conducted without creating a hazard to persons or property on the ground. See § 137.49. In sum, the Administrator manages his responsibility to ensure safety by regulating such operations through, among other things, the submission, evaluation, and approval or disapproval of congested area plans.

Our review of the regulations, FAA guidance, precedent, and this record shows that the initial¹⁵ submission of a proposed¹⁶ plan for an operation over a congested area can be likened to an application process for a determination of whether the operation will require an approved¹⁷ congested area plan. Our review also leads us to conclude that respondents were singularly unmotivated to ask necessary questions, and to submit the necessary plan.

We are bound to defer to the Administrator's interpretation of his regulations. We have discussed the FAA's interpretation of these regulations as reflected in published guidance, and we note the Administrator has also advanced his interpretations

¹⁵ See § 137.51(b)(3) ("A plan ... must be submitted....").

¹⁶ See Exh. A-20a, ¶ 2, supra (" ... operator's proposed plan.").

¹⁷ See § 137.51(b)(3) ("A plan ... must be submitted ... and approved....").

through litigation statements of agency counsel and the testimony of Inspector Towers.¹⁸

We conclude, based on FAA guidance, hearing statements made by agency counsel, and the testimony of the FAA inspector, that the regulations in this arena are administered to protect persons in small, sparsely settled communities, as well as persons and property in large metropolitan areas, from the hazards and noise of low-flying aircraft. The size of the area is not controlling, and allegations regarding the violation of minimum safe altitudes have been affirmed for operation over a small congested area of about 10 houses and a school,¹⁹ over a university campus,²⁰ and over a beach along a highway.²¹ Obviously, the presence of people is important, but consideration is also given to operations that come within certain distances of residential areas.²² The Administrator has not pronounced a precise definition that includes the factors of the density of the population in an area; whether there is surface traffic in the

¹⁸ See Garvey v. Merrell, 190 F.3d 571 (D.C. Cir. 1999).

¹⁹ Allman, Airman Certificate, 5 C.A.B. 8 (1940). Although the Board dismissed the order to show cause why the certificate should not be revoked or suspended because the flight was incident to takeoff and therefore not in violation of the minimum safe altitude regulation, the Board clearly referred to "the settlement" as a "small congested area."

²⁰ Tobin, Airman Certificate, 5 C.A.B. 162 (1941) ("Under these circumstances [seven buildings at Niagara University, with no evidence to indicate campus was part of a town, but testimony that persons lived on campus] it is reasonable to regard the campus as a settlement within the meaning of [§ 91.119] and to conclude ... respondent was violating ... the ... Regulations.").

²¹ James Holden Booth, 13 C.A.B. 464 (1947).

²² See also Administrator v. Olds, NTSB Order No. EA-4871 (2000).

vicinity; or the numbers and proximity of residences, buildings, or structures. But it is clear that the intent of the regulations is to protect persons and property on the ground and to fairly apply the rules to operators of aircraft, and, in the case of Part 137, to operators of agricultural aircraft.

A review of the history of the term "congested area," and case law interpreting it, makes clear that small, sparsely settled residential areas are "settlements"²³ for purposes of determining whether an area is congested within the context of Part 91 or, for that matter, Part 137.²⁴ Although both parties cite Pick and Redig, supra, for delineating a congested area in terms of the number of houses in a defined box superimposed on a map or photo of the area, we do not read that case so narrowly. We caution inspectors and operators that, although congested areas are indeed determined on a case-by-case basis, Pick and Redig does not stand for the proposition that a congested area is determined by the number of houses in a measured box superimposed over a depiction of the area.²⁵

The term "congested area" will continue to be adjudicated on a case-by-case basis before this Board. The determination must

²³ See, e.g., § 91.119(b), providing, in pertinent part, that, "... no person may operate an aircraft below the following altitudes: ... (b) Over any congested area of a city, town, or settlement ... an altitude of 1,000 feet above the highest obstruction within a horizontal radius of 2,000 feet of the aircraft." Emphasis added.

²⁴ See, e.g., Administrator v. Harkcom, 35 C.A.B. 934, 937 (1962), citing Booth, supra; Tobin, supra; Allman, supra.

²⁵ Pick and Redig also cites Harkcom, supra, and the cases cited therein. Pick and Redig, supra at 1.

take into consideration all circumstances, not only the size of an area and the number of homes or structures, but, for example, whether the buildings are occupied or people are otherwise present, such as on roads. In the instant case, the law judge found there were:

upwards of 30 homes, buildings, and structures within the area ... and this renders it a congested area. ... It isn't just a number of homes. [It] can be anywhere from three homes to 30 or 50 or 100. It depends on the locale and where they are, and so forth....

Initial Decision at 546. We concur with this reasoning and finding. After reviewing the record, including the testimony of the individuals who lived in the area and complained about the low flights; observing the aerial photos and maps of the area; and looking at the locations and proximity of the homes in the general area around Swan Pond Road, Cross Files Road, and Hollida Lane, we conclude that there is no question this area should be considered a congested area within the meaning of §§ 91.119 and 137.51(b).²⁶ We further conclude that, only when conditions related to submission and approval of a congested area plan are met, may an operator conduct operations over an area at "altitudes required for the proper accomplishment of the agricultural aircraft operation." See § 137.51(a).

We have considered respondents' other arguments, and find

²⁶ For clarification, we point out that, even if we accepted respondents' position as to the rectangular boxes drawn on their exhibits depicting their flight paths, we still would conclude the flights violated the regulations. This is because the flights, based on the testimony of the Administrator's witnesses and of respondents themselves, came within prohibited distances, at their altitudes, from homes within a congested area.

that they have no merit. For example, respondents argue, citing Administrator v. Fay and Takacs, NTSB Order No. EA-3501 (1992), that no sanction should be imposed because this case is akin to a "reasonable reliance" case. Fay and Takacs stands for the proposition that, although a pilot-in-command (PIC) is responsible for the overall safe operation of the aircraft, if a particular task is the responsibility of another, and if the PIC has no independent obligation or ability to ascertain the information as to the other's proper performance of his or her duty, and if the PIC has no reason to question the other's performance, then and only then will no violation be found. Respondents' citing of this case is misplaced. The instant case is simply not a "reasonable reliance" case. In a Fay and Takacs scenario, the respondent would contend that he or she relied on another respondent or another crewmember to perform a certain task and that the respondent had no ability to ascertain any information relating to that other person's proper performance of that task or duty. Respondents' attempt to take that precedent and use it to contend that it applies in this case because they were unable to ascertain the meaning of the term "congested area," is simply off the mark.

As for the argument that the law judge erred by excluding three sectional charts to show that the areas were rural, the Administrator stipulated and the law judge agreed the areas were rural. The law judge did not err by excluding these exhibits. Even had he erred, respondents suffered no prejudice, as the purpose for the exhibits was stipulated and accepted.

Finally, respondents argue that, during dispensing operations, "there is a plenary exemption from Part 91." They argue there is no reason for the words "approaches, departures, and turnarounds reasonably necessary for the operation," in § 137.49, unless the drafters meant to exempt these aircraft from Part 91. Although we would reject this argument in any case, it is mooted by our finding that respondents operated over a congested area. As previously stated, there is an exemption from Part 91 only to the extent that a pilot complies with the requirements of §§ 137.49 and 137.51.

After careful review of the record and the briefs of the parties, we conclude that the law judge correctly found that the evidence demonstrated that respondents committed the regulatory violations alleged. Respondents demonstrate no errors, nor do we discern any, in the law judge's decision.

Having determined that we will affirm the findings as to the allegations regarding Respondent Timothy Folk, and as to the allegations for the September 9, 2006 flight regarding Respondent George Folk, we turn to sanction. After the Administrator's withdrawal of allegations against Respondent George Folk for one of the two flights, respondents moved for remand to the law judge for reconsideration of sanction. The Administrator responded to that motion, arguing against remand.²⁷ Because we find the

²⁷ The Administrator replied to respondents' motion in accordance with our rules of practice. Respondents submitted a response to the Administrator's reply, which is not consistent with the rule regarding motions. 49 C.F.R. § 821.14. Therefore, we decline to consider respondents' additional response. Parties are cautioned to include their arguments within the body of a motion, as opposed to attempting to present argument after the responding

record is well-developed, it would serve little purpose to remand to the law judge for reassessment of sanction. We use our discretion to determine an appropriate sanction, and deny respondents' motion for remand. Finally, respondents requested oral argument, and the Administrator opposed. The issues have been fully briefed by the parties and oral argument is not necessary. Therefore, the request for oral argument is denied. See 49 C.F.R. § 821.48.

ACCORDINGLY, IT IS ORDERED THAT:

1. Respondents' appeal is denied;
2. The law judge's initial decision as to the alleged violations is affirmed, except that the findings regarding the flight on July 31, 2006, and the resulting violations are reversed based on the withdrawal of those allegations by the Administrator;
3. The 90-day suspension of Respondent Timothy Folk's commercial pilot certificate is affirmed; and, in light of the Administrator's withdrawal of allegations for one of the two violative flights as to Respondent George Folk, we modify the sanction from a 120-day suspension to a 90-day suspension of his commercial pilot certificate; and
4. The above suspensions shall begin 30 days after the service date indicated on this opinion and order.²⁸

(..continued)
party replies.

²⁸ For the purpose of this order, respondents must physically surrender their certificates to a representative of the Federal Aviation Administration pursuant to 14 C.F.R. § 61.19(g).

ROSENKER, Acting Chairman, and SUMWALT, HERSMAN, HIGGINS, and CHEALANDER, Members of the Board, concurred in the above opinion and order. Member HERSMAN submitted the following concurring statement, in which Members SUMWALT and CHEALANDER joined.

Member Hersman, Concurring

The controversy that led to suspended licenses for these two pilots centers on a dispute about whether or not they were operating over a congested area. In this case, conversations between the operators and their POI began after the POI heard complaints from local residents. According to testimony provided in the hearing before the ALJ, the POI did not tell the operators they were operating over a congested area and therefore were required to obtain an approved operational plan. Rather, he told them the area *could* be considered congested, pointed the operators to FAA guidance describing "congested area," and instructed them to decide what course of action to take. They did. They reviewed the guidance, concluded that the area was *not* congested, and did not file a proposed operational plan. Unfortunately, this was not the answer the FAA wanted.

I recognize that licensed airmen have a duty to be educated in the FAA regulations and to follow those regulations scrupulously. I also understand that filing an operational plan would not have been overly burdensome for the operators. It also appears that this controversy could have been resolved (eliminating the many hours of work by all parties in appellate process) had the operators received from FAA more directive instructions about what the regulatory agency expected.

I concur with this decision because it is consistent with the regulatory scheme. However, I encourage the FAA to take more direct control over the approval process for agricultural air operators, especially since what constitutes congestion is dynamic and highly subjective. Although both sides in a regulatory dispute have a duty to find the most expeditious way to an acceptable resolution, our government agencies often are best positioned to prevent wrangling with citizens over regulatory matters in the first place. If the FAA believes an area is congested, thus generating certain expectations of agricultural air operators operating there, the agency should make those expectations clearly known from the beginning and avoid a legal dispute that leads to license suspension followed by a lengthy and expensive appeals process.

SERVED: August 15, 2008

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

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 12th day of August, 2008

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ROBERT A. STURGELL,)	
Acting Administrator,)	
Federal Aviation Administration,)	
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Complainant,)	
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v.)	and SE-18018
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³ Section 91.119 prohibits, over any congested area of a city, town, or settlement, except when necessary for takeoff or landing, operation of an aircraft below an altitude of 1,000 feet above the highest obstacle within a horizontal radius of 2,000 feet of the aircraft.

⁴ Section 91.13(a) prohibits aircraft operation in a careless or reckless manner so as to endanger the life or property of another.

or about September 9, 2006, at approximately 3:00 PM, he operated a Grumman G-164A in agricultural operations near Swan Pond Road's intersection with Hollida Lane, in Martinsburg, West Virginia. The amended order of suspension as to Respondent Timothy Folk alleges that on or about July 31, 2006, at approximately 11:00 AM, he operated that aircraft in agricultural operations in the same area. The Administrator alleged that respondents made passes at less than 300 feet above ground level (AGL) over a congested residential area, that the operations occurred without prior written approval from the appropriate official or governing body and without prior public notice, and that these operations occurred without submission or approval of a congested area plan. The Administrator alleged that, as a result, these operations were careless or reckless, and that respondents violated the cited paragraphs of the Federal Aviation Regulations (FARs).

At the hearing, the Administrator presented evidence that consisted of over 30 exhibits, including photographs, maps, diagrams, and documents; and the testimony of a county employee who identified maps and diagrams of the area, several residents who observed the low flights,⁵ and the operations inspector who investigated the alleged violations. The percipient witnesses generally and consistently recounted that respondents operated well below 500 feet AGL. Respondents admitted they were flying the aircraft at the times alleged, but contend that the area over

⁵ When referring to photographs and maps, both counsel repeatedly failed to describe the actions of witnesses in pointing to or identifying areas on these demonstrative exhibits. We caution counsel and our law judges to better protect the record in this regard.

which they flew was not congested and they did not fly over any houses. Although this case does not turn on credibility issues, the law judge, without specifically saying so, clearly credited the testimony of the Administrator's percipient witnesses.⁶ Respondents' testimony also establishes their altitudes and lateral distance from people and structures.⁷ Therefore, the crux of this case is not whether respondents actually flew, for example, directly over homes, but whether the homes are in a congested area.

Respondents presented the testimony of an experienced pilot who observed their aerial operations at his farm and in other operations. The witness said he never saw anything unsafe. Respondent George Folk testified that he lives on Swan Pond Road, in a rural area, where he has been conducting agricultural operations since 1975. He has an airstrip east of his house, perpendicular to Swan Pond Road. His son, Respondent Timothy Folk, assists him in aerial operations. Over the years, Respondent George Folk met with inspectors many times, to discuss complaints. On June 16, 2006, he, along with Respondent Timothy Folk, met with Cooper Towers, his principal operations inspector

⁶ While we encourage our law judges to explain such assessments whenever possible, a failure to do so does not vitiate their choices. See Administrator v. Henderson, NTSB Order No. EA-5372 at 11, n.10 (2008); Administrator v. Crocker, NTSB Order No. EA-4565 at 7 (1997); Administrator v. Boardman, NTSB Order No. EA-3523 (1992); Administrator v. Klock, 6 NTSB 1530, 1531 (1989).

⁷ See also Administrator v. Lucke, 5 NTSB 1495 (1986) (agricultural aerial application not a defense to flights 20 feet above houses because record showed such close flight was unnecessary, and that "hazard" for purposes of § 137.49 means an identifiable and specific endangerment).

for the past 5 years, and they went over records and discussed a complaint. Inspector Towers told him that the area around his farm could be considered a congested area; when Respondent George Folk asked for a definition of the term, the inspector told him there was no definition, and referred him to FAA guidance, including an inspectors' handbook.

Respondent George Folk testified that he subsequently studied the regulations and, finding no examples in the handbook that applied to his operations, decided the area around his farm was not congested. Respondent George Folk identified Joint Exhibit 1 as an aerial photograph of his farm, with markings depicting his flight path on September 9, 2006. He said he flew at 50 feet AGL, to give the seed time to spread before it hit the ground, but flew no closer than 250 feet to a nearby home. He said he had been doing aerial applications on this field for 12 to 14 years. On turnarounds, he said he probably reached an altitude of 250 feet, but never flew directly over the house.

Respondent George Folk said he was told early on that if he thought an area was congested, he should consider filing a congested area plan, but he never filed one. An inspector told him if the FAA knew what was going on they could answer complaints, so they asked him to file an "other than congested area plan," a brief description of the work, and emergency numbers. Respondent George Folk filed such a plan "half a dozen times," the last one in "the late '90s."⁸

⁸ The record does not reflect why respondents discontinued this practice.

Respondent Timothy Folk testified that he lives on Swan Pond Road, has been flying since he was a teenager, and has been a commercial pilot since 1997. He has conducted agricultural operations for 10 years, and sprayed fields on the day of his alleged violations, July 31, 2006. During the aforementioned June 16, 2006 meeting, when Inspector Towers said they might need to file a congested area plan, Respondent Timothy Folk responded that they did not fly over congested areas. He told the inspector that, in the past, when there had been complaints, an inspector told them to give the FAA notice so the inspectors could better field any complaints. Respondent Timothy Folk said those previous inspectors called that an "other than congested area plan,"⁹ but that the current inspector said "there is no such thing" as an "other than congested area plan." Respondent Timothy Folk suggested that if they, respondents, do not "deem it," based on their experience, to be a congested area, then their only recourse is "to have a complaint after the fact."

Respondent Timothy Folk said he did not fly over any houses on July 31, 2006, but about 700 feet laterally from one and 400 feet from another. He said the lateral distance from his flight path to Hollida Lane's intersection with Swan Pond Road was 175 to 225 feet and his altitude was below 100 feet AGL, but when he was 400 feet from one house, his altitude was 500 to 700 feet AGL.

Respondents assert five arguments on appeal. The first is that they did not conduct agricultural operations over congested

⁹ Respondents did not produce such a previously filed plan.

areas. Next, they argue there should be no sanction under the circumstances. They also contend that the law judge committed reversible error by refusing to admit Exhibits R-4, R-5, and R-6, and that the Administrator did not correctly identify boundaries of the alleged congested area. Respondents finally claim exemption from Part 91 violations for departures, turnarounds, and approaches necessary for dispensing operations. The Administrator disputes these contentions, and urges the Board to uphold the law judge's decision.

As at the hearing, respondents' primary argument on appeal is that the area in question is either not congested or the Administrator failed to prove it was congested. Respondents also contend that the logical extension of the Administrator's position that congested area determinations are made on a case-by-case basis is that nobody can know whether or not an area is congested until after their case has been decided. They note that they have been conducting operations at their farm for over 30 years without violation.

Respondents argue, in effect, that if they had to maintain a distance of 2,000 feet from a congested area, and if these are congested areas, they would be prevented from operating, except for takeoffs and landing. They argue that § 137.49, "Operations over other than congested areas," may be read to exempt aircraft in agricultural dispensing operations in congested areas, "including approaches, departures and turnarounds reasonably necessary for the operation," arguing that the quoted language would otherwise be surplusage. They argue that, because that

section also says, "notwithstanding part 91," and does not contain a horizontal radius restriction like that in § 91.119(b), an operator may fly to the edge of a congested area, and that there is no "horizontal buffer of 2,000 feet ... outside a congested area for aircraft engaged in aerial applications."

We begin our analysis with Part 91, which sets forth minimum safe altitudes for aircraft operations. Over a congested area of a city, town, or settlement, an aircraft must operate 1,000 feet above the highest obstacle within a horizontal radius of 2,000 feet of the aircraft. See § 91.119(b). On the other hand, over other than congested areas, an aircraft must operate 500 feet above the surface, unless it is over open water or sparsely populated areas, in which case the aircraft must stay at least 500 feet away from any person, vessel, vehicle, or structure. See § 91.119(c).¹⁰

Agricultural operators have special dispensation under Part 137 to fly at altitudes below the minimums in § 91.119(a). Just as in Part 91, however, Part 137 differentiates between flights over congested areas and those over other than congested areas. Expressly exempting the agricultural pilot from the 500 foot minimum altitude and 500 foot horizontal buffer in § 91.119(c), § 137.49 provides that, during actual dispensing operations, an agricultural operator may fly over "other than congested areas" below 500 feet above the surface and closer than 500 feet to persons, vessels, vehicles, and structures. But § 137.49 also

¹⁰ An aircraft must always be operated at an altitude allowing an emergency landing without undue hazard to persons or property on the surface if a power unit should fail. See § 91.119(a).

conditions this exemption on not creating a hazard to persons or property on the surface.

The agricultural pilot also has dispensation for operations over congested areas. Again clearly exempting the agricultural operator from Part 91 minimums, § 137.51(a) states that an aircraft may be operated over a congested area "at altitudes required for the proper accomplishment of the agricultural aircraft operation." But it also mandates "maximum safety to persons and property on the surface ... and in accordance with the requirements of paragraph (b) of [§ 137.51]."

It is that subparagraph, § 137.51(b), which is our primary focus; it states that no person may operate an aircraft over a congested area without notice to the public and prior written approval from the proper official or governing body of the political subdivision. See § 137.51(b)(1)-(2). In addition to requiring the operator to submit the plan to the FAA, that subparagraph also requires FAA approval before implementation. See § 137.51(b)(3).

Inspector Towers, who investigated the allegations regarding respondents, indicated that if an operator conducts an application in an area the FAA might later determine to be a congested area, the operator ignores that potentiality at his or her peril. He said that he warned respondents about this possibility. Inspector Towers stated that the purpose of the June 16, 2006 meeting was to conduct an annual base operations inspection, including records review, and to discuss a complaint. He told respondents there were cases in which small groups of

houses, as few as two or three, were determined to comprise a congested area. The inspector said he advised them that if they were flying around houses, they should submit a congested area plan. He said that respondents indicated they did not think they were flying in congested areas.¹¹

Inspector Towers testified that, after his meeting with respondents, and during his investigation of the subsequent complaints, he determined that the neighborhood was a congested area for the purposes of filing a congested area plan for conducting agricultural operations. He indicated that, normally, when an operator files a congested area plan, the inspector uses handbook guidance to evaluate several factors, including the location, direction of flight, and how low the pilot would conduct the operation and associated maneuvers. The inspector would then determine whether the congested area plan should be approved and implemented. Inspector Towers identified Exhibits A-19 and A-20a and b, respectively, as excerpts from FAA guidance for inspectors' internal use in congested area determinations and for inspectors to use to provide assistance to operators in helping to determine whether a congested area plan should be submitted. He testified that the guidance does not include a definition of "congested area," but acknowledged the guidance anticipates that agricultural operators may request FAA assistance in determining whether an area is congested. The

¹¹ In other words, despite a visit from the operations inspector, during which he highlighted regulatory guidance for congested areas and submission of congested area plans, respondents chose to follow their own interpretation of the regulations.

inspector said that, after an operator submits a congested area plan, the inspector determines whether the congested area plan will be approved and implemented. He said, depending on density of population or structures, the inspector may determine an approved plan is not required. Inspector Towers testified that a determination of whether an area requires a congested area plan further depends on whether the operation will impact houses, persons, or property on the surface. He said the operator's submission is important, because of the information it contains, in determining whether the proposed operation requires implementation of an approved plan.

Six weeks after the June 16, 2006 meeting with respondents, Inspector Towers fielded another complaint of a low flight over a home in the neighborhood. He called Respondent George Folk, who verified that Respondent Timothy Folk flew on the morning at issue, July 31, 2006. Inspector Towers opened an investigation, and sent letters of investigation to respondents. He received a letter from respondents' counsel, stating that any operations referenced in the letters of investigation were agricultural operations over a rural area.¹² The letter from respondents' counsel also requested a definition of congested area.¹³

Shortly after respondents' receipt of the letters of

¹² Inspector Towers testified that he is not aware of anything suggesting a rural area could not be considered congested for purposes of § 91.119(b)'s minimum safe altitude.

¹³ Our review of the record reveals that the FAA did not respond to this request, perhaps because, as revealed at the hearing, no such definition exists, and because respondents had already been told there was no specific definition.

investigation, Inspector Towers received a new low-flying complaint regarding operations of September 9, 2006. Inspector Towers testified that his investigation determined that in a delineated area adjacent to the intersection of Swan Pond Road and Hollida Lane, there were 30 homes. He had measured out an area 3,520 feet by 2,250 feet, or .667 mile by .43 mile, from a point along Swan Pond Road starting at the intersection west of Hollida, where there existed another concentration of homes, and proceeding to Swan Pond Road's intersection with Hollida and then north about one-third of a mile.¹⁴ He therefore determined the area was congested for the purposes of requiring submission of a congested area plan. He reiterated that such determinations are not made until after submission of a plan.

Part 137 appears to attempt a balancing of the safety and property interests of people on the ground with the economic interests of agricultural pilots and the farmers and landowners who benefit from their services. FAA guidance for the use of inspectors and operators appears to reflect that balance. See Exhs. A-19, A-20a, and A-20b. Although the guidance seemingly appreciates that aerial agricultural operators must fly outside the parameters of the minimum safe altitudes of § 91.119, there are still limitations on the agricultural pilot, clearly designed to protect people and property on the ground. Limitations apply whether the pilot is operating over congested areas or other than

¹⁴ Inspector Towers referred to Administrator v. Pick and Redig, NTSB Order No. EA-3646 (1992), where the Board found that a subdivision comprised of about 20 houses, in an area about .5 mile x .66 mile, would qualify as a congested area.

congested areas; operations are more strictly monitored over congested areas, through submission of congested area plans, for example, due to the consideration of the safety of people and property therein. Another example of such limitations or restrictions is that flight below 500 feet is allowed only during actual application operations. Even over other than congested areas, an operation is permitted only if it can be conducted without creating a hazard to persons or property on the ground. See § 137.49. In sum, the Administrator manages his responsibility to ensure safety by regulating such operations through, among other things, the submission, evaluation, and approval or disapproval of congested area plans.

Our review of the regulations, FAA guidance, precedent, and this record shows that the initial¹⁵ submission of a proposed¹⁶ plan for an operation over a congested area can be likened to an application process for a determination of whether the operation will require an approved¹⁷ congested area plan. Our review also leads us to conclude that respondents were singularly unmotivated to ask necessary questions, and to submit the necessary plan.

We are bound to defer to the Administrator's interpretation of his regulations. We have discussed the FAA's interpretation of these regulations as reflected in published guidance, and we note the Administrator has also advanced his interpretations

¹⁵ See § 137.51(b)(3) ("A plan ... must be submitted....").

¹⁶ See Exh. A-20a, ¶ 2, supra (" ... operator's proposed plan.").

¹⁷ See § 137.51(b)(3) ("A plan ... must be submitted ... and approved....").

through litigation statements of agency counsel and the testimony of Inspector Towers.¹⁸

We conclude, based on FAA guidance, hearing statements made by agency counsel, and the testimony of the FAA inspector, that the regulations in this arena are administered to protect persons in small, sparsely settled communities, as well as persons and property in large metropolitan areas, from the hazards and noise of low-flying aircraft. The size of the area is not controlling, and allegations regarding the violation of minimum safe altitudes have been affirmed for operation over a small congested area of about 10 houses and a school,¹⁹ over a university campus,²⁰ and over a beach along a highway.²¹ Obviously, the presence of people is important, but consideration is also given to operations that come within certain distances of residential areas.²² The Administrator has not pronounced a precise definition that includes the factors of the density of the population in an area; whether there is surface traffic in the

¹⁸ See Garvey v. Merrell, 190 F.3d 571 (D.C. Cir. 1999).

¹⁹ Allman, Airman Certificate, 5 C.A.B. 8 (1940). Although the Board dismissed the order to show cause why the certificate should not be revoked or suspended because the flight was incident to takeoff and therefore not in violation of the minimum safe altitude regulation, the Board clearly referred to "the settlement" as a "small congested area."

²⁰ Tobin, Airman Certificate, 5 C.A.B. 162 (1941) ("Under these circumstances [seven buildings at Niagara University, with no evidence to indicate campus was part of a town, but testimony that persons lived on campus] it is reasonable to regard the campus as a settlement within the meaning of [§ 91.119] and to conclude ... respondent was violating ... the ... Regulations.").

²¹ James Holden Booth, 13 C.A.B. 464 (1947).

²² See also Administrator v. Olds, NTSB Order No. EA-4871 (2000).

vicinity; or the numbers and proximity of residences, buildings, or structures. But it is clear that the intent of the regulations is to protect persons and property on the ground and to fairly apply the rules to operators of aircraft, and, in the case of Part 137, to operators of agricultural aircraft.

A review of the history of the term "congested area," and case law interpreting it, makes clear that small, sparsely settled residential areas are "settlements"²³ for purposes of determining whether an area is congested within the context of Part 91 or, for that matter, Part 137.²⁴ Although both parties cite Pick and Redig, supra, for delineating a congested area in terms of the number of houses in a defined box superimposed on a map or photo of the area, we do not read that case so narrowly. We caution inspectors and operators that, although congested areas are indeed determined on a case-by-case basis, Pick and Redig does not stand for the proposition that a congested area is determined by the number of houses in a measured box superimposed over a depiction of the area.²⁵

The term "congested area" will continue to be adjudicated on a case-by-case basis before this Board. The determination must

²³ See, e.g., § 91.119(b), providing, in pertinent part, that, "... no person may operate an aircraft below the following altitudes: ... (b) Over any congested area of a city, town, or settlement ... an altitude of 1,000 feet above the highest obstruction within a horizontal radius of 2,000 feet of the aircraft." Emphasis added.

²⁴ See, e.g., Administrator v. Harkcom, 35 C.A.B. 934, 937 (1962), citing Booth, supra; Tobin, supra; Allman, supra.

²⁵ Pick and Redig also cites Harkcom, supra, and the cases cited therein. Pick and Redig, supra at 1.

take into consideration all circumstances, not only the size of an area and the number of homes or structures, but, for example, whether the buildings are occupied or people are otherwise present, such as on roads. In the instant case, the law judge found there were:

upwards of 30 homes, buildings, and structures within the area ... and this renders it a congested area. ... It isn't just a number of homes. [It] can be anywhere from three homes to 30 or 50 or 100. It depends on the locale and where they are, and so forth....

Initial Decision at 546. We concur with this reasoning and finding. After reviewing the record, including the testimony of the individuals who lived in the area and complained about the low flights; observing the aerial photos and maps of the area; and looking at the locations and proximity of the homes in the general area around Swan Pond Road, Cross Files Road, and Hollida Lane, we conclude that there is no question this area should be considered a congested area within the meaning of §§ 91.119 and 137.51(b).²⁶ We further conclude that, only when conditions related to submission and approval of a congested area plan are met, may an operator conduct operations over an area at "altitudes required for the proper accomplishment of the agricultural aircraft operation." See § 137.51(a).

We have considered respondents' other arguments, and find

²⁶ For clarification, we point out that, even if we accepted respondents' position as to the rectangular boxes drawn on their exhibits depicting their flight paths, we still would conclude the flights violated the regulations. This is because the flights, based on the testimony of the Administrator's witnesses and of respondents themselves, came within prohibited distances, at their altitudes, from homes within a congested area.

that they have no merit. For example, respondents argue, citing Administrator v. Fay and Takacs, NTSB Order No. EA-3501 (1992), that no sanction should be imposed because this case is akin to a "reasonable reliance" case. Fay and Takacs stands for the proposition that, although a pilot-in-command (PIC) is responsible for the overall safe operation of the aircraft, if a particular task is the responsibility of another, and if the PIC has no independent obligation or ability to ascertain the information as to the other's proper performance of his or her duty, and if the PIC has no reason to question the other's performance, then and only then will no violation be found. Respondents' citing of this case is misplaced. The instant case is simply not a "reasonable reliance" case. In a Fay and Takacs scenario, the respondent would contend that he or she relied on another respondent or another crewmember to perform a certain task and that the respondent had no ability to ascertain any information relating to that other person's proper performance of that task or duty. Respondents' attempt to take that precedent and use it to contend that it applies in this case because they were unable to ascertain the meaning of the term "congested area," is simply off the mark.

As for the argument that the law judge erred by excluding three sectional charts to show that the areas were rural, the Administrator stipulated and the law judge agreed the areas were rural. The law judge did not err by excluding these exhibits. Even had he erred, respondents suffered no prejudice, as the purpose for the exhibits was stipulated and accepted.

Finally, respondents argue that, during dispensing operations, "there is a plenary exemption from Part 91." They argue there is no reason for the words "approaches, departures, and turnarounds reasonably necessary for the operation," in § 137.49, unless the drafters meant to exempt these aircraft from Part 91. Although we would reject this argument in any case, it is mooted by our finding that respondents operated over a congested area. As previously stated, there is an exemption from Part 91 only to the extent that a pilot complies with the requirements of §§ 137.49 and 137.51.

After careful review of the record and the briefs of the parties, we conclude that the law judge correctly found that the evidence demonstrated that respondents committed the regulatory violations alleged. Respondents demonstrate no errors, nor do we discern any, in the law judge's decision.

Having determined that we will affirm the findings as to the allegations regarding Respondent Timothy Folk, and as to the allegations for the September 9, 2006 flight regarding Respondent George Folk, we turn to sanction. After the Administrator's withdrawal of allegations against Respondent George Folk for one of the two flights, respondents moved for remand to the law judge for reconsideration of sanction. The Administrator responded to that motion, arguing against remand.²⁷ Because we find the

²⁷ The Administrator replied to respondents' motion in accordance with our rules of practice. Respondents submitted a response to the Administrator's reply, which is not consistent with the rule regarding motions. 49 C.F.R. § 821.14. Therefore, we decline to consider respondents' additional response. Parties are cautioned to include their arguments within the body of a motion, as opposed to attempting to present argument after the responding

record is well-developed, it would serve little purpose to remand to the law judge for reassessment of sanction. We use our discretion to determine an appropriate sanction, and deny respondents' motion for remand. Finally, respondents requested oral argument, and the Administrator opposed. The issues have been fully briefed by the parties and oral argument is not necessary. Therefore, the request for oral argument is denied. See 49 C.F.R. § 821.48.

ACCORDINGLY, IT IS ORDERED THAT:

1. Respondents' appeal is denied;
2. The law judge's initial decision as to the alleged violations is affirmed, except that the findings regarding the flight on July 31, 2006, and the resulting violations are reversed based on the withdrawal of those allegations by the Administrator;
3. The 90-day suspension of Respondent Timothy Folk's commercial pilot certificate is affirmed; and, in light of the Administrator's withdrawal of allegations for one of the two violative flights as to Respondent George Folk, we modify the sanction from a 120-day suspension to a 90-day suspension of his commercial pilot certificate; and
4. The above suspensions shall begin 30 days after the service date indicated on this opinion and order.²⁸

(..continued)
party replies.

²⁸ For the purpose of this order, respondents must physically surrender their certificates to a representative of the Federal Aviation Administration pursuant to 14 C.F.R. § 61.19(g).

ROSENKER, Acting Chairman, and SUMWALT, HERSMAN, HIGGINS, and CHEALANDER, Members of the Board, concurred in the above opinion and order. Member HERSMAN submitted the following concurring statement, in which Members SUMWALT and CHEALANDER joined.

Member Hersman, Concurring

The controversy that led to suspended licenses for these two pilots centers on a dispute about whether or not they were operating over a congested area. In this case, conversations between the operators and their POI began after the POI heard complaints from local residents. According to testimony provided in the hearing before the ALJ, the POI did not tell the operators they were operating over a congested area and therefore were required to obtain an approved operational plan. Rather, he told them the area *could* be considered congested, pointed the operators to FAA guidance describing "congested area," and instructed them to decide what course of action to take. They did. They reviewed the guidance, concluded that the area was *not* congested, and did not file a proposed operational plan. Unfortunately, this was not the answer the FAA wanted.

I recognize that licensed airmen have a duty to be educated in the FAA regulations and to follow those regulations scrupulously. I also understand that filing an operational plan would not have been overly burdensome for the operators. It also appears that this controversy could have been resolved (eliminating the many hours of work by all parties in appellate process) had the operators received from FAA more directive instructions about what the regulatory agency expected.

I concur with this decision because it is consistent with the regulatory scheme. However, I encourage the FAA to take more direct control over the approval process for agricultural air operators, especially since what constitutes congestion is dynamic and highly subjective. Although both sides in a regulatory dispute have a duty to find the most expeditious way to an acceptable resolution, our government agencies often are best positioned to prevent wrangling with citizens over regulatory matters in the first place. If the FAA believes an area is congested, thus generating certain expectations of agricultural air operators operating there, the agency should make those expectations clearly known from the beginning and avoid a legal dispute that leads to license suspension followed by a lengthy and expensive appeals process.

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
OFFICE OF ADMINISTRATIVE LAW JUDGES

* * * * *

In the matter of: *

ROBERT A. STURGELL, *
ACTING ADMINISTRATOR, *
FEDERAL AVIATION ADMINISTRATION, *

Complainant, *

v. *

Docket Nos.: SE-18005
JUDGE FOWLER SE-18018

GEORGE WELCH FOLK, ET *
TIMOTHY BRIAN FOLK *

Respondents. *

* * * * *

101 W. Lombard Street
Courtroom 3D
Baltimore, Maryland

Thursday,
November 28, 2007

Friday,
November 29, 2007

The above-entitled matter came on for hearing, pursuant
to Notice, at 9:30 a.m.

BEFORE: WILLIAM E. FOWLER, JR.,
Chief Administrative Law Judge

APPEARANCES:

On behalf of the Administrator:

DAVID M. COHEN, ESQ.
ROBERT SPITZER, ESQ.
FAA Eastern Region
Office of the Regional Counsel
1 Aviation Plaza
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On behalf of the Respondents:

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(310) 670-0300

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10 ORAL INITIAL DECISION AND ORDER

11 This has been a consolidated proceeding before the
12 National Transportation Safety Board held pursuant to the
13 provisions of the Federal Aviation Act of 1958 as that Act was
14 subsequently amended on the appeals of George Welch Folk and
15 Timothy Brian Folk from Orders of the Regional Counsel, Eastern
16 Region of the Federal Aviation Administration.

17 Said Orders are dated March 22nd, 2007, and April 5th,
18 2007, which purport to suspend Respondent, George Folk's
19 commercial pilot certificate number (omitted) for a period of 120
20 days, and the concomitant suspension order for Respondent, Timothy
21 Folk's commercial pilot certificate number (omitted), a period of
22 suspension for 90 days.

23 The Administrator's Orders of Suspension as provided by
24 the National Transportation Safety Board's Rules of Practice
25 provide that these Orders of Suspension serve as the Complaints in

1 this proceeding.

2 This matter has been heard before this United States
3 Administrative Law Judge. And as provided, a Judge in a
4 proceeding of this type, according to the Board's Rules of
5 Practice, is given the option either to immediately issue an oral
6 initial decision on the record, which I'm going to do at this
7 time, or to subsequently issue a written decision.

8 Following notice to the parties this matter came on for
9 trial on November 28th and 29th, 2007, in Baltimore, Maryland.
10 Both Respondents were well represented by Robert Blackford,
11 Esquire. Very ably represented, I might add. The Administrator
12 in this proceeding was likewise ably represented by David Cohen,
13 Esquire, of the Regional Counsel's Office, Eastern Region of the
14 Federal Aviation Administration.

15 Both parties have been afforded the opportunity to offer
16 evidence, to call, examine, and cross-examine witnesses on behalf
17 of their respective cases.

18 In addition, the parties were afforded the opportunity
19 to make final argument in support of their positions.

20 Now, I have reviewed the testimony and the evidence
21 adduced during the course of this two-day proceeding. The
22 Administrator has produced five witnesses and 39 exhibits, most of
23 which have been admitted into the hearing record in this
24 proceeding. The Respondent had five exhibits and three witnesses
25 testified. Two of these witnesses, were the two Respondents

1 themselves.

2 Now, there are several issues to be decided here, but I
3 think I will read a few excerpts from Administrator's Exhibit A-8
4 which I think very well sums up why we are here, what brought us
5 here, and what is to be decided.

6 A-8 is a statement of Police Chief Donald H. Buracker,
7 Police Chief of Harpers Ferry, West Virginia. Witness Buracker
8 starts off his statement as set forth in A-8 by saying "My name is
9 Donald H. Buracker and I reside," so forth and so forth. "I write
10 to complain about a low flying aircraft that has flown over the
11 top of my residence on several occasions within the last two
12 years. The first occasion was during August 2005 when we had
13 houseguests over for a family picnic. We observed a low-flying
14 aircraft spraying a field near the intersection of Swan Pond Road
15 and Files Cross Road. The plane then came across our backyard or
16 turning back towards the east." And he goes on to state there
17 were several children present who were harmed by the odor of the
18 spray. On Monday, July 31st, Officer Buracker continues in his
19 statement, "July 31st, 2006, at approximately 10:55 a.m., I was
20 awakened when my windows started rattling and a loud rumble was
21 heard outside. My wife looked out our bedroom window and advised
22 a large yellow plane was flying directly over our residence. I
23 then proceeded to the back deck where I observed a yellow biplane,
24 tail registration number N7695 fly on two occasions directly over
25 my residence, and then on two occasions just south of my property

1 line on an upward climb from a field that he appeared to be
2 spraying." That evening, this is referring to July 31st, that
3 same plane starts spraying again around 7 p.m. I did photograph
4 this event with this very plane directly up and over our
5 neighbors.

6 Now, what this says is we have two Respondents here who
7 are veteran pilots where agricultural aviation is concerned.
8 Mr. George Welch Folk, the father in this proceeding, has been
9 flying agricultural application flights since 1977. That is a
10 long period of time. Other than one small accident which
11 according to the testimony that we have here, the accident was
12 virtually unavoidable, Mr. George Welch Folk has a positive,
13 clean, and unblemished record.

14 Now, as I read the excerpts from Officer Buracker's
15 statement, which coincided very well with his testimony,
16 Respondents in their defense say that they weren't flying over a
17 congested area. That's why we're here ladies and gentlemen,
18 because the Administrator has charged that in his agricultural
19 applications they, the Respondents, were flying over congested
20 areas at flights below, on some occasions, 300 feet. Respondents,
21 say, what is a congested area? There's no definition as to what a
22 congested area is.

23 We have in Administrator's Exhibit A-19 some guidelines
24 by the FAA as to what a congested area is, but there is no really
25 clear pertinent and salient definition as to what constitutes a

1 congested area.

2 I have reviewed, the testimony and the evidence in this
3 case, and it is my determination that in dealing with whether or
4 not we have a congested area here, as counsel for the
5 Administrator stated, I think it sums up fairly well what the
6 thrust, is let me use that term, of the Administrator's Orders of
7 Suspension here is to protect small sparsely settled areas that
8 contain a number of buildings, structures, and homes.

9 Now, we have had out of the five witnesses the
10 Administrator has adduced, two of whom, Officer Donald Buracker
11 and real estate developer Hammett, are percipient witnesses. They
12 have both testified several times, the yellow biplane aircraft
13 with the registration number on it that I mentioned a moment ago,
14 both of these witnesses, Buracker and Hammett have testified that
15 this plane flew over them or their homes, or both, within 50 feet.

16 The Respondent, himself, Mr. George Welch Folk, during
17 the course of his testimony he said he recalled flying over
18 Hammett's house at 150 feet altitude. You may recall Mr. Hammett
19 testified that the flight went right over his head, practically,
20 and so forth.

21 So, there's no question here that we're here because of
22 a series of low flights engaged in by both Respondents in
23 furtherance of their agricultural operations. Fortunately, over
24 the years these flights have been safe.

25 But taking into account the totality of the

1 Administrator's evidence, the testimony of the Administrator's
2 witnesses, together with the 39 documentary exhibits adduced by
3 the Administrator, it's my determination this was a series of low
4 flights on July 31st, 2006, and September 9th, 2006, as set forth
5 in the Administrator's Order of Suspension. Unfortunately, these
6 flights took place subsequent to a June 16th meeting in 2006 that
7 Inspector George Cooper Towers, III, went to meet with both
8 Respondents, and while the meeting was brief, during the course of
9 the discussion, well, during the course of the discussion
10 Inspector Towers informed both George and Timothy Folk about the
11 necessity to have an application to fly over congested areas in
12 the furtherance of their agricultural operation.

13 As we know by the testimony in this proceeding,
14 particularly from the Respondents' side of the case, a
15 misunderstanding apparently developed and Respondents both
16 testified it was not clearly meant to them what is a congested
17 area. They say they tried to find out but there was no definition
18 of what is a congested area. And subsequent to this June 16th,
19 2006, meeting, on July 31st, 2006, and September 9th, 2006, the
20 Respondents went on, to use a shop worn term, with business as
21 usual with their agricultural operations, which brings us here.

22 I cannot find or determine that the FAA, Federal
23 Aviation Administration, was not validly premised in bringing the
24 Order of Suspension against George and Timothy Folk. In the last
25 year I have had more cases of first impression than I've had

1 during my entire judicial career. I would say this is such a
2 case, I may be mistaken, but I believe this is a case of first
3 impression. We're dealing with a rural area here which, while it's
4 sparsely populated, it is my determination that based on the
5 testimony and the evidence that's been stated, there were more or
6 upwards of 30 homes, buildings, and structures within the area
7 that we're concerned with, and this renders it a congested area.
8 This means this area cannot be flown over without an application
9 to so fly over a congested area. The Respondents in essence were
10 informed of this accordingly. Unfortunately, as I said, went
11 ahead with their flights on the 31st of July and September 9th of
12 2006.

13 As I say, I cannot say the FAA was not validly premised
14 in bringing this case. However, this case has a somewhat
15 anomalous situation to some of the Aviation Defense Identification
16 Zone cases I've had the pleasure of hearing, where the FAA did not
17 make certain that new ADIZ zones, that the information was
18 thoroughly disseminated to all pilots. Perhaps this case will be
19 a forerunner, let us at least hope so, as to what constitutes a
20 congested area. It isn't just a number of homes. I can be
21 anywhere from three homes to 30 or 50 or 100. It depends on the
22 locale and where they are, and so forth and so on. In view of the
23 fact that it is my determination that the FAA has substantially
24 proven by a fair and reasonable preponderance, all of the
25 allegations set forth in the Orders of Suspension of March 27th,

1 2007, and April 5th, 2007, against Respondent George Welch Folk
2 and Timothy Brian Folk. I will now proceed to make the following
3 specific findings and conclusions of law:

4 First, pertaining to Respondent George Welch Folk:

5 1) The Respondent admits and it is found that he is the
6 holder of a commercial pilot certificate number (omitted).

7 2) It is found that prior to July 31st, 2006, as a
8 result of reports of low flying by Respondent Folk in the vicinity
9 of Swan Pond Road and Hollida Lane in Martinsburg, West Virginia,
10 Respondent was counseled by an FAA Aviation Safety Inspector that
11 Respondent Folk could not conduct operations over those areas
12 unless Respondent had an approved congested area plan.

13 3) It is found that notwithstanding the above, that on
14 or about July 31st, 2006, at approximately 7 p.m., Respondent
15 George Welch Folk operated a Grumman G-164 aircraft,
16 identification number N7695, in agricultural operations in the
17 vicinity of Swan Pond Road and Hollida Lane in Martinsburg, West
18 Virginia. Referred to the Order of Suspension as flight one.

19 4) It is found that during flight one and while in the
20 vicinity of Swan Pond Road and Hollida Lane in Martinsburg,
21 West Virginia, the aircraft made at least one pass at less than
22 300 feet above ground level over one or more residences and over a
23 congested residential area.

24 5) It is found that notwithstanding the above, during
25 flight one was operated by Respondent George Welch Folk, when:

1 a) Respondent had not received prior written notice
2 approval to conduct the operation from the appropriate official or
3 governing body or the political subdivision over which the
4 operation was conducted.

5 b) When Respondent failed to give prior notice of the
6 operation to the public by some effective means such as daily
7 newspaper, radio, television, or door to door notice.

8 c) A congested area plan for the operation had not been
9 submitted to or approved by the appropriate personnel of the FAA
10 Flight Standards District Office having jurisdiction over the area
11 where the operation was conducted.

12 6) It is found that notwithstanding the above,
13 Respondent, on or about September 9th, 2006, at approximately 3
14 p.m., operated a Grumman G-164A aircraft, identification number
15 N7695 referred to hereafter as the aircraft in agricultural
16 operations in the vicinity of Swan Pond Road in Martinsburg,
17 West Virginia. This is known as flight two.

18 7) It is found that during flight two and while in the
19 vicinity on the aforesaid Swan Pond Road in Martinsburg,
20 West Virginia, the aircraft made at least one pass of less than
21 300 feet above ground level over:

22 a) One or more residences.

23 b) A congested residential area.

24 8) It is found that notwithstanding the above, during
25 flight two Respondent operated the aircraft with:

1 a) He had not received prior written approval to conduct
2 the operation from the appropriate official or governing body, or
3 the appropriate political subdivision over which the operations
4 were conducted.

5 b) The Respondent failed to give prior notice of the
6 operation to the public by some effective means, such as daily
7 newspaper, radio, television, or door to door contact.

8 c) Or have a congested area plan for the operation
9 which had not been submitted to or approved by the appropriate
10 personnel of the FAA Flight Standards District Office having
11 jurisdiction over the area where the operations were conducted.

12 9) It is found that by operating the aircraft in a
13 careless manner, this potentially endangered the lives and
14 property of others during:

15 a) Flight one.

16 b) Flight two.

17 By reason of the foregoing, Respondent George Welch Folk
18 violated the following Sections of the Federal Aviation
19 Regulations. I'm going to list the appropriate Sections of the
20 regulations and incorporate by reference what they state as they
21 are set forth in the Administrator's Order of Suspension.

22 1) Section 137.59(b)(1) [sic] [137.51(b)(1)]

23 2) Section 137.51(b)(2)

24 3) Section 137.51(b)(3)

25 4) Section 91.119(b)

1 that he was and is the holder of commercial pilot certificate
2 number (omitted).

3 2) It is found that prior to July 31st, 2006, as a
4 result of reports of low flying, of Respondent Folk in the
5 vicinity of Swan Pond Road and Hollida Lane in Martinsburg, West
6 Virginia. Respondent Folk was counseled by an FAA Aviation Safety
7 Inspector that the Respondent could not conduct operations over
8 congested areas unless the Respondent had an approved congested
9 area plan.

10 3) It is found that notwithstanding the above, on or
11 about July 31st, 2006, at approximately 11 a.m., Respondent Folk
12 operated a Grumman G-164A aircraft identification number N7695,
13 hereinafter referred to as the aircraft in agricultural operations
14 in the vicinity of Swan Pond Road and Hollida Lane in Martinsburg,
15 West Virginia.

16 4) It is found that during the flight and while in the
17 vicinity previously alluded to of Swan Pond Road and Hollida Lane
18 in Martinsburg, West Virginia, the aircraft made multiple passes
19 at less than 300 feet above ground level over:

20 a) One or more residences.

21 b) Over a congested residential area.

22 5) It is found that notwithstanding the above, during
23 the flight Respondent operated that aircraft:

24 a) It is found the Respondent had not received prior
25 written approval to conduct the operation from the appropriate

1 official or governing body of the political subdivision over which
2 the operation was conducted.

3 b) It is found the Respondent failed to give notice of
4 the operation to the public by some effective means such as daily
5 newspapers, radio, television, or door to door notice.

6 c) It is found that Respondent failed to file a
7 congested area plan for the operation which had not been submitted
8 to or approved by the appropriate personnel of the FAA Flight
9 Standard District Office having jurisdiction over the area where
10 the operation was conducted.

11 6) It is found that as a derivative violation, during
12 the flight, Respondent Folk operated his aircraft in a careless
13 manner potentially endangering the lives and properties of others.

14 7) It is found that by reason of the foregoing, the
15 Respondent violated the following Sections of the Federal Aviation
16 Regulations. I'm incorporating by reference what these regulations
17 spell out as they are set forth in the Administrator's Order of
18 Suspension:

19 a) Section 137.59(b)(1) [sic] [137.51(b)(1)]

20 b) Section 137.51(b)(2)

21 c) Section 137.51(b)(3)

22 d) Section 91.119(b)

23 e) Section 91.13(a)

24 ORDER

25 In view of the aforesaid violations, it is ordered, and

1 adjudged by this U.S. Administrative Law Judge that the
2 Administrator's Order of Suspension, where Respondent Timothy
3 Brian Folk is concerned, that this Order of Suspension be and the
4 same is hereby affirmed. This Order was issued by William E.
5 Fowler, Jr., a United States Administrative Law Judge.

6

7

8 DATED & EDITED ON

WILLIAM E. FOWLER, JR.

9 DECEMBER 22, 2007

Chief Administrative Law Judge