AIRCRAFT OWNERS AND PILOTS ASSOCIATION
421 Aviation Way • Frederick, MD 21701-4798
Telephone (301) 695-2000 • FAX (301) 695-2375
www.aopa.org

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To: NTSB Office of General Counsel

From: Aircraft Owners and Pilots Association (AOPA)

This responds to the NTSB's request for comments in its Advance Notice of Proposed Rulemaking (ANPRM), Rules of Practice in Air Safety Proceedings and Implementing the Equal Access to Justice Act of 1980, noticed in the Federal Register at 75 Fed. Reg. 80452-4 (Dec. 22, 2010).

Interest of AOPA

The Aircraft Owners and Pilots Association (AOPA) is a non-profit membership association of over 400,000 individual civil aircraft pilots comprising most of the pilots currently flying in the United States national airspace system, flying most of the civil aircraft in the system, and accounting for most of the general aviation flying hours in that system. AOPA is an acknowledged spokesman for the segment of the system known as General Aviation.

AOPA provides a legal services plan for its members in which approximately 100,000 pilot-members participate, and the plan uses about 700 panel attorneys throughout the United States to provide legal services to the member-participants. The main coverage to members of the plan is representation in defense of FAA enforcement actions that also includes representation before the NTSB in air safety proceedings incident to those FAA enforcement actions. With the cooperation of the FAA and the NTSB, the plan annually conducts several training sessions for panel attorneys and

others, which focuses principally on handling FAA enforcement actions and appeals to the NTSB.

On behalf of all AOPA members, including those who are or may become involved in FAA enforcement actions and appeals to the NTSB, AOPA offers the following specific comments in response to the ANPRM. At the outset, we want to acknowledge and thank the NTSB for this effort to consider amendments to its rules in three areas and to provide an opportunity to the persons and entities affected by its rules of practice to assure that the rules are fair and just for all parties.

The Standard of Review of FAA "Emergency" Determinations

The ANPRM specifically asks for comments on the current standard applicable to the NTSB law judge's review of FAA emergency determinations. The rules currently provide that the law judge is to dispose of a petition after "consider[ing] whether, based on the acts and omissions alleged in the Administrator's order, and assuming the truth of such factual allegations, the Administrator's emergency determination was appropriate under the circumstances." 49 C.F.R. § 821.54(e). This language was adopted by the NTSB after recognizing the Congressional intent in giving the NTSB the authority to substantively review the FAA's emergency determinations. That is, Congress wanted to provide respondents with a more meaningful review of the FAA's exercise of its authority by an experienced agency rather than the review under an abuse of discretion standard that was being applied by the Courts of Appeals. Just as the Administrator may only issue an order amending, modifying, suspending, or revoking any part of a certificate if "safety in air commerce or air transportation and the public interest require that action", 49 U.S.C. § 44709(b)((1)(A), and the NTSB may amend, modify, or reverse the Administrator's order if "safety in air commerce or air transportation and the public interest do not require affirmation of the order", 49 U.S.C. § 44709(d)(1)(A), so would it follow that the review of an FAA emergency determination be judged by whether "the interest of safety in air commerce or air transportation" requires the immediate application of the order, 49 U.S.C. § 44709(e)(3). Therefore, it is appropriate that any

NTSB review of the FAA's emergency determination be conducted in accord with the statute's language and Congressional intent that a substantive ruling with regard to safety be the standard. AOPA supports the NTSB's critical evaluation of whether the Administrator's allegations truly warrant the immediate grounding of a respondent during the pendency of an appeal in light of *all* factors relevant to such a determination, such as the passage of time, the conduct of the FAA's investigation, the severity of the respondent's alleged activity, and the history of the respondent's exercise of the FAA-issued certificate.

The most challenging aspect of the standard adopted by the NTSB in its current rules is the requirement that the law judge assume the truth of the factual allegations in the Administrator's order. On its face, such a standard is patently unfair to respondent-petitioners who may dispute the Administrator's allegations. We recognize that this assumption was probably adopted for practical reasons and because a fairer alternative may not have been readily apparent. However, in practice, it has served to severely limit the ability to get a fair and full review of the FAA's emergency determination. A rough calculation of the petitions filed to date indicates that of the several hundred petitions, less than 5 percent have succeeded, recognizing that some petitions were dismissed on pure procedural grounds. This presumption of guilt created by the assumption of truth is not mandated nor suggested by the statutory language, nor consistent with the intent of the statute providing for NTSB review of such determinations. It is a one-sided assumption in favor of the Administrator, who otherwise has the burden of proof in these proceedings.

AOPA suggests that a more fair procedure, and one more consistent with the wording and intent of the statute, would be to allow the law judge to exercise discretion in reviewing the allegations and deciding whether it is appropriate to assume the truth, or not, of a particular allegation based on the information provided in the petition and any response from the Administrator. If the respondent-petitioner in the petition specifically denies any of the Administrator's factual allegations, the law judge has the discretion to either to make no factual assumption but rather to decide the matter even with disputed

facts, or alternatively to solicit additional information of the parties to clarify the reasonableness of the assumption. The law judge would continue to have the discretion to make the factual assumption as in the current rule. We believe, based on our experience, that the law judges will be in a better position to assess the relevance of the factual dispute to the emergency determination, even without resolving it at this stage, rather than an arbitrary rule requiring the one-sided assumption.

The NTSB's rules provide for the petition to enumerate reasons for believing that the Administrator's emergency determination is not warranted and that the Administrator's response be strictly limited to rebuttal, and no submissions other than the petition and reply will be accepted except if the law judge solicits more information. 49 C.F.R. §§ 821.54(b), (c) and (d). We do not interpret the NTSB's rules to specifically prohibit the inclusion of documentation with the petition, such as affidavits or other evidence, to refute the Administrator's claim of harm to the public interest and safety but many practitioners have interpreted the rule to so preclude. We recommend that the rules be amended to state clearly that supporting information may be attached to the petition and that it is within the discretion of the law judge to consider its relevance, weight, and import in assessing the interest of safety in air commerce or air transportation.

Allowing a law judge to exercise discretion in evaluating a petition to review the FAA's emergency determination would be consistent with the well-established practice of reviewing requests for injunctions and other such remedies in the state and federal court system. See e.g., Rule 65 of the Federal Rules of Civil Procedure. So, a law judge may review a petition by considering whether safety in air commerce or air transportation require the immediate effectiveness of the Administrator's order by weighing, for example, 1) the compromise to aviation safety that may be presented if the effectiveness is stayed, 2) the irreparable injury to the respondent if the order is not stayed, 3) the public's interest in the order being stayed, 4) a likelihood of the success on the merits of either party, and/or 5) a balancing of the equities.

Furthermore, the NTSB's rules provide that a law judge's decision on a petition cannot be appealed further but in any appeal on the merits, the NTSB may note its view on the law judge's ruling which could serve as precedent for future law judge reviews of FAA emergency determinations. 49 C.F.R. § 821.54(f). To date, on two occasions, the NTSB was asked to comment on the law judge's ruling on a law judge's resolution of a challenge to an FAA emergency determination but the NTSB in one decision declined to comment "except to note that, in his analysis, the law judge appears to have overlooked the broader aviation perspective" and in another decision declined to include its views on the judge's ruling because the "issue is moot." See Administrator v. Spyke, NTSB Order No. EA-5430 (2009) and Administrator v. Dillmon, NTSB Order No. EA -5413 (2008). We respectfully suggest that the NTSB has disregarded the intent of its own rules that specifically provide for the full Board's comment, notwithstanding that the issue it legally moot. Providing a specific accelerated appeal to the full Board from the law judge's decision may be more appropriate in giving full opportunity for a respondent to meaningfully challenge an FAA emergency determination in light of the relevant circumstances in the particular case.

Discovery and Exchange of Documents in Air Safety Proceedings

The ANPRM invites comments on amending the rules governing the discovery process and exchanges of information by the parties, in particular any requirement for prehearing orders.

The FAA's Enforcement Investigative Report (the "EIR") is the single most important discovery item to an airman or air agency involved in an FAA enforcement matter, at least initially. The practice has been that the Administrator will refuse to disclose the EIR until the FAA investigation is concluded, and thereafter the EIR technically becomes available by a formal request under the Freedom of Information Act (FOIA). Because such a formal request frequently, if not always, involves an administrative and sometimes convoluted FOIA process burdensome mostly to the FAA, the FAA attorneys handling the enforcement matters have allowed an alternative informal

process, almost a "ritual," whereby the respondent or his/her representative can ask in precise terms for the "releasable portion of the EIR." A magical incantation that avoids the FOIA burdens and delays. Such a request is virtually always granted. This works well for regular practitioners before the NTSB. For infrequent practitioners and "pro se" airmen who are unfamiliar with the informal process, it does not work as well. The NTSB may want to consider requiring that the Administrator have given the EIR to a respondent at the time of the Notice of Proposed Certificate or Civil Penalty Action (or emergency order), or alternatively, in the routine letter sent by the Office of Administrative Law Judges, to advise the airman/agency of its availability. AOPA suggests that a respondent's statutory right to be advised of the Administrator's "charges" and an opportunity to "answer the charges" is not meaningfully afforded without notification of access to a copy of the FAA's EIR. See 49 U.S.C. § 44709(c).

In the ANPRM, the question is raised whether the rules should require law judges to routinely issue prehearing orders. The present practice is that some individual judges do, and some don't, routinely issue such orders, and we do not see that this practice merits changing. The proceeding before a law judge may be better served by allowing a judge to exercise discretion in whether to issue a pretrial order, and what to include in the order, as may be appropriate to their handling of a case. See 49 C.F.R. § 821.35(b), *Powers of law judge*.

Electronic Filing of Documents

The NTSB has announced that it is committed to creating an electronic filing system in FAA certificate action cases. Such a move is generally salutary, but we join the NTSB in its concern about pro se litigants. Experience in other fora indicate that when the electronic system is implemented, and training is provided, virtually all practitioners will participate. However, we suggest that paper filings continue to be permitted for at least two years thereafter, in a dual system, for the benefit of pro se litigants or infrequent practitioners before the NTSB; even beyond the two years or so, paper filings should be permitted on a good cause shown basis. Alternatively, or in the

interim, we may suggest establishing a rule that permits service by email, which should be an understandable system to the broad breadth of persons appearing before the NTSB.

Procedural Rules Governing EAJA Claims

NTSB plans to update its rules implementing the Equal Access To Justice Act (EAJA). It solicits comments on its unspecified plans, beyond updating and correcting inaccuracies.

AOPA suggests that the NTSB is too strict in its interpretation of what fees and expenses may be recoverable as part of an "an adversary adjudication", i.e., recovery of those costs incurred only after an appeal to the NTSB is filed.[1] As a result, there can be no recovery for the significant legal services and expenses rendered prior to the appeal of the Administrator's order, including investigation of the case once an FAA notice of investigation is issued, participation in the informal conference after an FAA attorney has received the case and issued a Notice of Proposed Certificate Action or Civil Penalty (NPCA or NPCP), settlement negotiations, preparation of the appeal, and the like. This activity (government counsel's preparation of a notice and the respondent's opportunity to be heard) is a statutory requirement. Otherwise, the FAA might simply issue an Order and have the matter proceed directly to review by the NTSB. It is axiomatic that these activities are undertaken to defend against an FAA action to avoid the necessity for litigation. When a respondent is unable to convince the Administrator prior to issuing an order and adjudicating the matter, those early activities take on no less significance in

[1] At the time that this precedent began, and ostensibly established that only fees and expenses incurred after the filing of an appeal could qualify for an award, the NTSB did not have authority to review FAA emergency determinations. The difference in time and expense between the Administrator's issuance of an Order and a respondent's notice of appeal was essentially negligible, so it never seemed to be an issue in EAJA cases about whether the reading of the precedent was correct in having the Order or the Complaint be the precipitating factor. However, given the change in the NTSB's statutory authority, allowing the NTSB to now adjudicate the emergency aspect of an order, AOPA submits that, at the very least, the triggering event to begin an adjudicatory process is the issuance of the Administrator's order. Because a respondent may incur considerable expense in drafting a petition for the NTSB's review to challenge the FAA's emergency determination, *prior to filing an appeal*, it is imperative that the NTSB recognize the adversary adjudication that occurs in this regard at this stage. It is self-evident that an adversary adjudication occurs when a respondent must defend against a government action that is immediately effective before an adjudicatory body authorized to rule and resolve such matters. See, 5 U.S.C. § 504(b)(1)(C) and 49 C.F.R. § 826.3(a).

supporting an eventual prevailing party status and should be recoverable as having been reasonably incurred in preparation for the adversary adjudication and being essential components of that proceeding. EAJA's intent in discouraging the government from pursuing weak and tenuous cases is served by including a recovery of these considerable fees and expenses when the Administrator would not otherwise be deterred from going forward with deficient proof.

The NTSB first held in Application of Barth, NTSB Order No. EA-3833 (1993) that the FAA's withdrawal of its NPCA, prior to the issuance of any order and an appeal, was not an adversary adjudication for purposes of seeking a recovery under EAJA. The NTSB has cited to this case repeatedly for the proposition that any award may not encompass fees incurred prior to the issuance of an Order. However, the Barth case did not involve the FAA's issuance of any Order; rather, the FAA withdrew its Notice following the informal conference, without progressing further. By contrast, cases that do involve an appeal from an FAA Order have progressed past the limited proceedings in Barth and, therefore, any recovery in a case that may be warranted when a respondent has prevailed before the NTSB should be made to include fees and expenses incurred in defending against the FAA's action throughout. Cf. 12 C.F.R. § 1203.5 (FHFA rules providing for an award of fees and other expenses incurred before the date on which an adversary adjudication was initiated if the party can demonstrate that they were reasonably incurred in preparation for the adversary adjudication); Pen v. Delaware Valley Citizen's Council for Clean Air, 478 U.S. 546 (1986) (the Court affirmed an award for work done that did not occur in the context of traditional judicial litigation but was useful, necessary, and crucial to the vindication of the party's rights); Cunningham v. Barnhart, 440 F.3d 862 (7th Cir. 2006) (an EAJA award is appropriate for pre-litigation conduct if the agency's pre-litigation conduct lacked substantial justification). Under the NTSB's current interpretation, the FAA is free to proceed with an investigation and past the informal conference with the same position in the case that the NTSB ultimately finds is not substantiated in law and fact, and the respondent is not entitled to recover the fees and expenses incurred in trying to persuade the FAA from critically evaluating the strength and thoroughness of its case earlier on. See e.g., Administrator v. Hayes, NTSB

Order No. EA-5459 (2009) (The law judge stated "This case, if I may take the liberty, with better communication should never have been brought."); Administrator v. Waingrow, 5 NTSB 372 (1985) (The Board stated, "the FAA investigation lacked objectivity in a number of material respects."); Administrator v. Sottile, 4 NTSB 1217 (1984) (The law judge stated that "there is a radical difference between 'investigation' and persisting in applying a serious sanction after follow-up investigation shows no evidentiary or corroborating support for the initial suspected violation."). The NTSB's current overly-narrow interpretation of the applicability of EAJA runs counter to the purpose of EAJA in that it allows the FAA to be undeterred from proceeding against a respondent right up to, and during, a hearing on charges that it knew, or should have known, were not substantially justified. See, e.g., Administrator v. JetSmart, et. al, NTSB Order No. EA-5572 (2011); Administrator v. Koch, NTSB Order No. EA-5571 (2011); Administrator v. Air Trek, NTSB Order No. EA-5440 (2009). Therefore, AOPA supports a change to the NTSB's rules to provide for the eligibility of an EAJA award of fees and expenses incurred in defense of an FAA legal enforcement action prior to the FAA issuance of an order and a respondent's appeal.

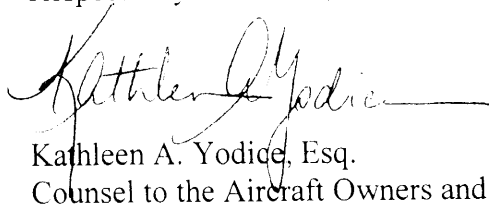
EAJA states that "[a]n agency that conducts an adversary adjudication shall award, to a prevailing party other than the United States, fees and other expenses incurred by that party *in connection with that proceeding*, unless the adjudicative officer of the agency finds that the position of the agency as a party to the proceeding was substantially justified or that special circumstances make an award unjust. 5 U.S.C. § 504(a)(1) (emphasis added). "An adversary adjudication" should include events leading up to the Administrator's Order that is litigated before and reviewed by the NTSB, therefore any award should encompass the actions in the proceeding at least as early as an FAA attorney issues a NPCA or NPCP and a respondent is put into the position of having to understand and exercise legal rights and to defend against an FAA legal action. Congress' intent in promulgating EAJA would be better advanced when applied to the entirety of the FAA's weak and tenuous prosecutory conduct.

Further, the NTSB's rules should be amended to specifically provide for a law judge's decision to terminate a proceeding with or without prejudice, for purposes of EAJA applications. Cf., Rule 41(a)(2) of the Federal Rules of Civil Procedure (providing that a case may be dismissed on plaintiff's request on terms the court considers proper) and 14 C.F.R. § 13.215 (Rules in FAA Civil Penalty Actions that require a law judge's dismissal of an action with prejudice upon the FAA's withdrawal of its complaint); see Administrator v. Koch, NTSB Order No. EA-5571 (2011) (NTSB believes that when a law judge may dismiss with prejudice is a case-specific inquiry). Law judges should have specific authority to issue an order terminating a respondent's case on terms the law judge deems appropriate on the record, including terminating the case with prejudice to prevent future action by the FAA on the same facts and circumstances.

Other

While this ANPRM does not invite comments on other specific provision of the NTSB Rules of Practice, there are others, perhaps more important, that warrant this same consideration. Offering comments in this ANPRM proceeding about other provisions could have the effect of dampening informal discussions with staff and NTSB members. For that reason, these comments are confined to the provisions mentioned in this Advance Notice.

Respectfully submitted,



Kathleen A. Yodice, Esq.
Counsel to the Aircraft Owners and Pilots Association

Law Offices of Yodice Associates
411 Aviation Way, Suite 245
Frederick, MD 21701
301-695-2300