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To: Office of General Counsel, National Transportation
Safety Board

From: Aircraft Owners and Pilots Association

Re: NTSB Notice of Proposed Rulemaking,
Docket ID Number NTSB-GC-2011-0001

COMMENTS TO THE NTSB'S NPRM

The Aircraft Owners and Pilots Association hereby respectfully responds to the NTSB's request for comments in its Notice of Proposed Rulemaking (NPRM) involving its Rules of Practice in Air Safety Proceedings and Rules Implementing the Equal Access to Justice Act of 1980, noticed in the Federal Register at 77 Fed. Reg. 6760-71 (Feb. 9, 2012).

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 NPRM.

A. Electronic Filing

In the NPRM, the NTSB proposes incremental changes to allowing the practice of electronic filing. AOPA supports those changes on an incremental basis, to begin with the acceptance of filings via electronic mail as an option for the parties to NTSB proceedings. In AOPA's experience, there continues to be a significant number of members whom may only receive communications from AOPA through traditional snail mail methods because of the unavailability of computer access or the limited availability of computer access, sometimes only to a public computer. Thus, the NTSB's proposal to begin to allow electronic filing but also to give respondent's the choice to use postal delivery, overnight delivery, and facsimile delivery for their filings will permit those who may not be able to reasonably use an electronic filing system fair access to exercising any rights to NTSB review.

B. Review of FAA Emergency Determinations

AOPA appreciates the review that the NTSB has made of the comments related to its review of an FAA emergency determination and offers the following responsive comments:

1. Standard of "assuming the truth of the allegations"

The NTSB states in the NPRM that it does not intend to remove the section of the review standard of "assuming the truth of the allegations" during a respondent's challenge to the FAA's emergency determination. As stated in more detail in AOPA's comments to the ANPRM, the intent of Congress in giving the NTSB authority to review the FAA's emergency determination was to provide substantive review. AOPA remains perplexed as to why

the NTSB maintains that this type of review does not lend itself to evidentiary proof. Whether someone poses a threat to aviation safety because that individual cannot be trusted, or is continuing to violate the regulations, or has failed to sufficiently remedy conduct that violates the regulation, or the like could easily be subject to review by a judge using evidence of the respondent's past or present conduct, or mitigating circumstances, or changed circumstances, or other relevant information to the safety risk. True, Congress gave FAA the authority to take immediate action when the FAA believes an emergency exists related to aviation safety, but Congress and the law never intended that authority be unfettered as evidenced by the Administrative Procedure Act's right to have a final agency decision reviewed in the Courts of Appeals and Congress' statutory change to give the NTSB the right to review the FAA's decision. AOPA is mindful of the time constraints imposed on the parties (less so for the FAA who has been working with the case for weeks, many time months) by reason of an FAA emergency determination, but that should not be the basis to undermine meaningful review as contemplated by Congress' statutory change. And, while such review may not lend itself to an in-person evidentiary hearing, the process could allow for telephonic oral presentations and argument of a limited nature, maybe even time-restricted, much like an argument before the U.S. Courts of Appeals in order for the judge to be as fully and fairly informed of the factors that may affect a decision about any compromise to aviation safety. This may be left to the judge's discretion in assessing whether more information or answered questions are necessary before a final decision can be made. And, AOPA again urges the NTSB to give the judge discretion in assuming any, all, or no allegations true in the review of the FAA's emergency determination, especially where there may be objective data contrary to an FAA charge.

2. Information that may be submitted by the parties

In the NPRM, the NTSB proposes to make it clear that the law judge may consider and the parties may submit evidence pertaining to the propriety of the emergency determination. AOPA supports the clarification in this regard so that the parties may understand the scope of their rights in presenting their position to the judge.

3. Requirement that FAA provide a respondent with information

In the NPRM, the NTSB proposes a rule that would allow the NTSB to dismiss an FAA order (filed as the FAA's complaint) if the FAA has failed to provide a copy of the releasable portions of its Enforcement Investigative Report (EIR) to the respondent at the time that the emergency order is served. AOPA supports this proposed change, but has two comments.

First, the NTSB's proposed rule change in this regard is limited to the emergency context. The proposed rules do not reach cases that the FAA may initiate with a Notice of Proposed Certificate Action or Civil Penalty; those cases are not provided the same process. Yet, access to that information is no less important in non-emergency cases and is necessary in those cases in permitting a respondent to exercise a full and fair opportunity to be heard prior to the FAA taking the action it proposes, which is a right the statute gives a certificate holder. Just as the stale complaint rule involves FAA conduct in timely notifying a respondent of the reasons for an FAA proposed action, see 49 C.F.R. § 821.33, the same logic applies in the NTSB's review that assures the fairness of Respondent's opportunity to be heard after the FAA has issued its Notice of Proposed Certificate Action or Civil Penalty, see 49 USC § 44709(c). That is, the NTSB has authority to review a respondent's claim that that right has been denied and to order a case dismissed if the FAA failed to reasonably afford that right. See Oceanair v. NTSB, 888 F.2d 767 (11th Cir. 1989) (FAA's case is subject to dismissal by the NTSB if the FAA fails to comply with a certificate holder's right to answer the proposed charges). Not everyone knows that there is access to the FAA's EIR and the FAA does not advise a certificate holder of its availability. AOPA maintains that the same requirement should be imposed on the FAA in the non-emergency context.

Second, the NTSB proposes that whether or not a dismissal of the FAA's complaint is with or without prejudice will be left to the judge's decision. AOPA presumes that this flexibility is intended to allow for consideration of cases that involve safety implications that do not lend themselves to outright dismissal on technical grounds. Nonetheless, AOPA is concerned with the timing of such recourse. By the time an FAA complaint may be filed in a case, which could be almost two weeks later, the damage done to a respondent's livelihood and reputation has been done, the fairness intentions of providing that respondent with

information to begin to fairly and fully defend against the FAA's allegations have passed, and the intent of encouraging the FAA to provide the information is lost. In other words, the FAA may not be impacted at all, but the respondent has suffered substantially, and the reason for the rule change may be subverted. AOPA suggests that in order to have any FAA omission swiftly addressed, the NTSB consider that the FAA's failure to provide a respondent with the EIR information with the issuance of the order may also be considered in determining whether to overturn an emergency determination. In this regard, the FAA's failure to provide the respondent with a copy of the EIR has potentially interfered with the ability of the parties to provide relevant information to the judge for consideration of a challenge to the emergency determination.

C. Equal Access to Justice Act (EAJA)

In the NPRM, the NTSB proposes a change to its rules that will allow an Administrative Law Judge to decide to terminate a proceeding with or without prejudice. AOPA supports and encourages such a change. Apart from the issues of fairness and conservation of resources that come from knowing whether a matter is finally disposed of or not, the ability for a judge to exercise discretion in dismissing a case with or without prejudice may fairly affect the eligibility status of any application for an award of attorney fees and expenses under the EAJA.

AOPA reiterates its suggestion that the NTSB is too strict in its interpretation of what fees and expenses may be recoverable as part of "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

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 FAA's order. Because a respondent may incur considerable legal expense in drafting a

significant legal services and expenses rendered prior to the appeal of the FAA'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 FAA prior to issuing an order and adjudicating the matter, those early activities take on no less significance in 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, an ensuring individuals are not deterred from defending against unreasonable government action due to the expense involved, is served by including a recovery of these considerable fees and expenses when the FAA 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, 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 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

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).

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); Penn 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 meaningfully trying to persuade the FAA from a case that it should know, after learning from additional information provided by the respondent, does not have the strength and thoroughness to succeed. See e.g., Administrator v. Hayes, NTSB Order No. EA-5459 (2009) (The law judge stated that "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 that "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 and AOPA recommends a change to the NTSB's rules to specifically 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 an FAA Order that is litigated before and reviewed by the NTSB; 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 a 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.

Conclusion

AOPA wants to acknowledge and thank the NTSB for their efforts in publishing an ANPRM, receiving comments, and considering those comments in publishing the NPRM to which the above comments are directed. The NTSB's consideration in this regard is appreciated, and AOPA looks forward to the NTSB's further consideration of changes to its Rules of Practice to assure fairness for all parties to the NTSB's proceedings.

Respectfully submitted,



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