

SERVED: January 18, 2008

NTSB Order No. EA-5353

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 16<sup>th</sup> day of January, 2008

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ROBERT A. STURGELL,		)	
Acting Administrator,		)	
Federal Aviation Administration,		)	
		)	
Complainant,		)	
		)	Docket SE-17849
v.		)	
		)	
DOUGLAS A. SUMLER,		)	
		)	
Respondent.		)	
		)	
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**OPINION AND ORDER**

Respondent appeals the oral initial decision of Administrative Law Judge Patrick G. Geraghty, entered in this proceeding on April 11, 2007.<sup>1</sup> By that decision, the law judge upheld the Administrator's allegation that respondent violated sections 91.13(a), 91.119(b), and 91.515(a)(1) of the Federal Aviation Regulations (FARs),<sup>2</sup> and reduced the 180-day suspension

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

<sup>2</sup> FAR sections 91.13, 91.119, and 91.515, 14 C.F.R. Part 91, state, in relevant part:

of respondent's airline transport pilot certificate sought by the Administrator to a 150-day suspension.<sup>3</sup> We deny respondent's appeal.

The Administrator's September 19, 2006 order of suspension, filed as the complaint in this proceeding, alleged that on November 19, 2005, respondent operated a Gulfstream II, registration number N141JF, a large multi-engine turbine-powered

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(..continued)

**Sec. 91.113 Careless or reckless operation.**

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

\* \* \* \* \*

**Sec. 91.119 Minimum safe altitudes: General.**

Except when necessary for takeoff or landing, no person may operate an aircraft below the following altitudes:

\* \* \* \* \*

(b) *Over congested areas.* Over any congested area of a city, town, or settlement, or over any open air assembly of persons, an altitude of 1,000 feet above the highest obstacle within a horizontal radius of 2,000 feet of the aircraft.

\* \* \* \* \*

**Sec. 91.515 Flight altitude rules.**

(a) Notwithstanding §91.119, and except as provided in paragraph (b) of this section, no person may operate [a turbojet-powered multiengine] airplane under VFR at less than—

(1) One thousand feet above the surface, or 1,000 feet from any mountain, hill, or other obstruction to flight, for day operations[.]

\* \* \* \* \*

<sup>3</sup> The Administrator does not appeal the reduction in sanction.

aircraft, in the vicinity of Mokuleia Beach and Dillingham Airfield, Oahu, Hawaii. Specifically, the Administrator alleged that respondent made two low passes just off the shore of Mokuleia Beach, and a low pass down the runway at Dillingham Airfield with gear and flaps retracted. The Administrator also specifically alleged that these maneuvers were reckless.

At the hearing, the Administrator presented a DVD video recording of the maneuvers at issue, as well as the testimony of three percipient witnesses. Two witnesses observed respondent's maneuvers from their residences along Mokuleia Beach, and, consistent with the video evidence, described very low passes along Mokuleia Beach at an altitude they both estimated to be at or below 100 feet above the water surface. They testified that surfers were in the water and other persons were on the beach within several hundred feet, laterally, of respondent's aircraft's flight path. Additionally, a retired FAA air traffic controller, who was on duty in the UNICOM tower at Dillingham Airfield at the time of respondent's maneuvers, described, consistent with the video evidence, how respondent's aircraft next approached Runway 8 at Dillingham Airfield with the gear and flaps retracted, leveled off at approximately 100 feet above the runway surface, and proceeded to make a low pass down the runway with the landing gear and flaps retracted. The Administrator also presented the testimony of the investigating FAA inspector, Michael Spencer, who testified that respondent's maneuvers violated the regulations specified in the Administrator's complaint. Inspector Spencer, who holds several large, turbojet

aircraft type ratings and has accumulated over 10,000 flight hours, also offered his opinion that:

...the manner in which this aircraft was operated put individuals in the water, individuals on the surface, individuals in the vicinity of the airport, and the individuals who were on board the aircraft not functioning as required crew members, that these individuals were put at extreme risk ... because of the low altitude that the aircraft was operated and the speeds at which the aircraft was operated, that there was an inherent risk of the pilot losing control of the aircraft and striking either the water or the runway surface with catastrophic results.

Tr. at 136.

Respondent testified in his defense, claiming that he flew the passes along Mokuleia Beach "in the neighborhood of a thousand feet" above the water. Tr. at 192. Respondent denied seeing persons or objects in the water. Respondent also claimed that his low pass down Runway 8 was actually a missed approach that he initiated at approximately 200 feet after flying a practice approach. Respondent testified that prior to the flight, he contacted the airport manager and an unknown person who answered a number listed under "Restrictions" in his AC-U-KWIK reference guide, and explained what he intended to do and that they expressed no objections, but he did not claim that he understood either of these persons to be FAA personnel. Respondent also introduced a 3-page declaration of Dave Riggs, who professed expertise with filming aircraft in flight. Mr. Riggs, who did not witness the maneuvers except as depicted on the video, and who stated he did not speak with the video camera operator, stated that filming techniques can make an aircraft appear closer to the ground than it actually is and that

it is "impossible for any lay person to determine the exact height of an aircraft based on video...." Exhibit R-3 at 2. Finally, respondent presented the testimony of Douglas Gillis, a self-proclaimed designated pilot examiner and aviation attorney, who testified to his opinion that respondent's maneuvers did not violate any FARs.

At the conclusion of the hearing, the law judge summarized the evidence, and it is clear that he properly evaluated the witness testimony and weighed the evidence. He concluded that respondent's aircraft did make two low passes over the water, at an altitude less than 500 feet above the surface and within 2,000 feet laterally of persons who were in the water, and structures and persons along the beach. The law judge found that the area in the vicinity of respondent's maneuvers constituted an open air assembly of persons. The law judge also concluded that there was no low approach to Dillingham, but, rather, that respondent intentionally flew a low pass down the runway for purposes other than landing or flying a practice approach. He characterized respondent's maneuvers as reckless and intentional. Accordingly, the law judge affirmed all regulatory violations alleged in the Administrator's complaint. The law judge refused respondent's request for a waiver of sanction for filing an Aviation Safety Reporting Program (ASRP) report, because respondent's acts were not inadvertent.<sup>4</sup>

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<sup>4</sup> Under the ASRP, sanction may be waived, despite the finding of a regulatory violation, if certain requirements are satisfied. Aviation Safety Reporting Program, Advisory Circular 00-46D at ¶ 9c. This program involves filing a report with the National Aeronautics and Space Administration (NASA) concerning a FAR

On appeal, respondent argues that the law judge erred in: (1) concluding that respondent's purported low flight over Runway 8 was not performed in connection with landing; (2) concluding that the maneuvers were conducted over an open air assembly of persons; and (3) denying respondent's request for a continuance prior to the beginning of the hearing. The Administrator urges us to uphold the law judge's decision.<sup>5</sup>

We turn first to respondent's claim that he should have been granted a continuance. Our view of the record convinces us that the law judge did not err in denying respondent's April 6, 2007 motion to continue the April 11 hearing in Honolulu, Hawaii, nor in denying the same request when it was renewed orally by substitute counsel at the hearing. When respondent's first counsel, Mr. Charles Finkel, who was also representing the other crew member involved in the flight at issue, withdrew from the case, a substitute attorney, Mr. Michael Burke, entered an

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(..continued)

violation. Such filing will obviate imposition of sanction if: (1) the violation was inadvertent and not deliberate; (2) it did not involve a criminal offense, accident, or action found at 49 U.S.C. § 44709; (3) the person has not been found in an enforcement action to have committed a regulatory violation in the past 5 years; and (4) the person mails a report of the incident to NASA within 10 days.

<sup>5</sup> The Administrator has also filed a motion to strike six documents attached to respondent's appeal brief, and respondent has not filed an opposition to the motion. It appears that several of the attachments are copies of exhibits that were admitted at the hearing, but the remaining records were not offered at the hearing, or were offered and rejected. Respondent makes no real attempt to justify submission of this now at the appeal stage, and, with the exception of two of the attached documents (the tower log and the cell phone record), which we will permit in light of our discussion below, the attachments to respondent's brief are stricken as improper new evidence under our rules.

appearance on March 29 as respondent's representative in the matter. Mr. Burke is General Counsel for Mantra Entertainment, the owner of N141JF and the production company responsible for "Girls Gone Wild" and the pre-arranged filming of respondent's aerial maneuvers for marketing purposes. Mr. Burke, along with Mr. Finkel, attended the informal conference between the FAA and respondent. Mr. Burke, however, arranged for another attorney to represent respondent at a hearing, and when this attorney, Mr. David Brien, was retained on April 6, Mr. Burke moved for a continuance of the hearing. The record indicates that Mr. Burke's motion was submitted after the close of business on Friday, April 6; counsel for the Administrator stated on the record that it had not arrived at her office in Anchorage, Alaska, prior to leaving her office at 6 p.m., and the law judge's copy is stamped as having been received at his offices in Denver, Colorado, on April 9. The law judge denied the motion for continuance by written order served on April 9 upon Mr. Burke, who was at the time respondent's counsel of record. The law judge's order denying a continuance stated, in relevant part, that:

...Complainant's counsel has already departed for Hawaii and is prepared for trial with subpoenaed witnesses. The incident alleged in this matter ... occur[ed] November 19, 2005. A continuance herein would result, because of ... docket scheduling, postponement until September or October 2007, almost two ... years past the incident. Such delay is not in the public interest in aviation safety. Upon consideration of all factors with [the] request made only days before [the] scheduled [hearing], it is determined that the request for continuance must be and hereby is denied....

Law Judge's Order of April 9, 2007, at 2.

We agree with the law judge's decision, and note that respondent's counsel of record, Mr. Burke, could have moved for a continuance as early as March 29 when he entered his appearance, but instead waited until just a few days before the start of the hearing. Any crisis was, essentially, of respondent's counsels' own making, and the law judge was well within his discretion to refuse to continue the hearing under the circumstances.<sup>6</sup> We also note that on appeal respondent does not demonstrate how he was prejudiced. The only actions that respondent asserts he would have taken had his hearing counsel been granted a continuance would have been to subpoena cell phone records (to attempt to prove that respondent called the Dillingham airport manager and the "restrictions" number listed for Dillingham Airfield in the AC-U-KWIK reference guide), and to subpoena the Dillingham airport manager about his conversation with respondent. Neither of these items of proof would have materially affected the outcome of this case. Dillingham Airfield is operated by the State of Hawaii, and the Dillingham airport manager is not an FAA employee, and, thus, neither effort suggested by respondent's counsel on appeal would tend to provide sufficient proof, when coupled with respondent's hearing testimony, of any reasonable belief on respondent's part that he obtained FAA authorization to maneuver his aircraft in the manner that he did or to depart from

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<sup>6</sup> See, e.g., Administrator v. Gerritsen, NTSB Order No. EA-4837 at 2-3 (2000); Administrator v. Hasley, NTSB Order No. EA-3971 (1993) (no abuse of discretion where continuance denied even though new counsel retained a few days before hearing; no showing of what respondent would have done differently had continuance been granted).

the FAR requirements governing normal flight. In sum, the law judge did not err in refusing to grant a continuance.

Turning to the other substantive matters raised in respondent's appeal, we have no hesitation in affirming the law judge's decision. On this record, it is abundantly clear that respondent operated his aircraft at an excessively low altitude in his two passes over Mokuleia Beach, and again during his level flight down Runway 8 which was not for the purpose of a practice approach or missed approach, but, rather, simply a low pass for the purpose of the filming activities.<sup>7</sup> The record clearly establishes that respondent's aircraft, a large business jet, was actually flown approximately 100 feet above the surface of both the water off Mokuleia Beach and Runway 8 at Dillingham Airfield. Respondent's maneuvers, as depicted in the video and testified to by the Administrator's witnesses, were clearly reckless and apparently intended to provide exciting footage for the "Girls Gone Wild" film crew. The record also provides sufficient basis to affirm the law judge's finding that respondent's maneuvers were performed over an open air assembly of persons at Mokuleia Beach.<sup>8</sup> Therefore, we affirm the law judge's initial decision affirming the violations of FAR sections 91.13(a), 91.119(b), and

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<sup>7</sup> See, e.g., Administrator v. Tokoph, NTSB Order No. EA-5018 at 8-9 (2003) (discussing landing exceptions to minimum safe altitudes, and stating that landing exceptions do not apply where no landing is intended or possible due to aircraft configuration).

<sup>8</sup> See, e.g., Administrator v. Oliveira and Morais, NTSB Order No. EA-4995 at 9 (2002) (upholding violation of 91.119(b) where respondent overflew persons in water and along a beach).

91.515(a)(1).<sup>9</sup>

**ACCORDINGLY, IT IS ORDERED THAT:**

1. Respondent's appeal is denied;
2. The law judge's initial decision, including the reduction in sanction from a 180-day to a 150-day suspension, is

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<sup>9</sup> Respondent also argues that: (1) the law judge's determination that the maneuvers "were not conducted in accordance with a waiver" is not supported by a preponderance of the evidence; (2) respondent should have been granted a waiver of sanction due to his ASRP report, because any FAR violation was the result of an inadvertent error in relying upon authorization of non-FAA persons to perform the maneuvers he did; and (3) the law judge improperly rejected two exhibits respondent offered into evidence. These arguments are also not persuasive. First, there is no evidence of any authorized FAA employee granting a low altitude or other FAR waiver in connection with respondent's maneuvers, and respondent's vague testimony nonetheless made no claim that he believed he was advised by an authorized FAA employee to maneuver his aircraft as he did. Second, our case law, as the law judge properly observed, makes it clear that ASRP sanction immunity is not appropriate for intentional maneuvers; there is absolutely no evidence in this record that respondent held a reasonable belief that he was authorized by FAA personnel to maneuver his aircraft as he did. Finally, our review of the record reveals no abuse of the law judge's discretion or material error in refusing to admit the documents respondent marked as R-2 and R-6. Although we might be inclined to disagree with the law judge's judgment that the witness did not sufficiently authenticate the tower log identified as R-2 (a copy of which is attached to respondent's appeal brief), the law judge did not abuse his discretion over such matters. Indeed, after the law judge's initial refusal to admit the document, respondent's counsel made no further attempt to authenticate the document or to make an offer of proof. Ultimately, however, R-2 (which purportedly documents a portion of the UNICOM tower log noting that respondent's jet aircraft may be arriving at Dillingham Airfield—where, according to witness testimony, jet aircraft operations are very rare—but provides no evidence of advance notice to the UNICOM tower or airport manager about the extreme maneuvers respondent subsequently flew at Dillingham Airfield and Mokuleia Beach) has little to no relevance to the material issues in the hearing, i.e., respondent's aerial maneuvers. Thus, even if any error can be attributed to the law judge regarding R-2, it was harmless error. Similarly, we conclude that the law judge properly exercised his discretion in refusing to admit the photograph marked as R-6 as not relevant to the material issues in the proceeding.

affirmed; and

3. The 150-day suspension of respondent's air transport pilot certificate shall begin 30 days after the service date indicated on this opinion and order.<sup>10</sup>

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

**Member Chealander, Concurring:**

I fully concur with the Board's resolution of the issues raised by the parties on appeal. However, as a former military aviator, military aerial demonstration team member, and 15-year commercial airline professional, I feel obligated to comment that the record in this matter overwhelmingly demonstrates respondent's egregious disregard for the safety of his aircraft, those persons on board, and the property and people on the ground when he deliberately maneuvered his aircraft in a reckless manner. I am convinced by the record before me that respondent to this day fails to appreciate the degree of risk in the maneuvers he undertook and in the manner in which he executed them. The Administrator has elected not to challenge the law judge's reduction in sanction, and the Board, consistent with well-established precedent, therefore properly does not reach the issue, but I would have been inclined to support the Administrator's original suspension had he pursued it on appeal.

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<sup>10</sup> For the purpose of this order, respondent must physically surrender his certificate to a representative of the Federal Aviation Administration pursuant to 14 C.F.R. § 61.19(g).

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

\* \* \* \* \*

In the matter of: \*

MARION C. BLAKEY, \*

ADMINISTRATOR, \*

Federal Aviation Administration, \*

Complainant, \*

v. \* Docket No.: SE-17849

DOUGLAS ARTHUR SUMLER, \* JUDGE GERAGHTY

Respondent. \*

\* \* \* \* \*

United States Ninth Circuit  
Court of Appeals  
1132 Bishop  
Honolulu, Hawaii

Wednesday,  
April 11, 2007

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

BEFORE: PATRICK G. GERAGHTY  
Administrative Law Judge

## APPEARANCES:

On behalf of the Administrator:

SARA MIKOLOP, Regional Counsel  
Federal Aviation Administration  
Office of Regional Counsel  
222 West Seventh Avenue, Suite 14  
Anchorage, AK 99513  
(907) 271-3570

On behalf of the Respondent:

DAVID R. BRIEN, ESQ.  
23801 Calabasas Road, Suite 1006  
Calabasas, CA 91302  
(818) 222-6887

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ORAL INITIAL DECISION AND ORDER

This has been a proceeding before the National Transportation Safety Board on the appeal of Douglas Arthur Sumler, hereinafter referred to as Respondent, from an Order of Suspension which seeks to suspend his Airline Transport Pilot Certificate for a period of 180 days. The Order of Suspension serves herein as the Complaint and was filed on behalf of the Administrator of the Federal Aviation Administration, herein the Complainant.

The matter has been heard before this Administrative



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DISCUSSION

As noted, the Complainant seeks to suspend the Respondent's pilot's certificate for a period of 180 days. That is predicated upon factual allegations which lead to the further charges in the Complaint that the Respondent operated in regulatory violation of the following sections of the Federal Aviation Administration, to wit: Sections 91.119(b), 91.515(a)(1), and 91.13(a), all of the Federal Aviation Regulations. The specific provisions of those Regulations will be referred to subsequent where appropriate and in the discussion subsequent to the discussion of the evidence.

Complainant's case is made through the testimony of four witnesses and also the submission of a DVD video disk presentation.

The first of the witnesses was a Mr. Peter Maguire. He is not a pilot; however, he indicated he did have acquaintance with aviation. Apparently his family and his brother are involved in aviation. With respect to the area that this incident occurred, which is adjacent to the Dillingham Airport on Oahu Island in Hawaii, he indicated that he had resided in his house at that area for about nine years. He described the area as being comprised of surfing beaches. He numbered those as five, and he gave the names of all five. He indicated that there were 12 homes or houses in the area. And when questioned as to the exact number, he indicated that

1 there were apparently compounds and counted a compound  
2 including several structures as one home or each one of the  
3 buildings individually. He also indicated there was a public  
4 beach and that there were squatters that apparently lived on  
5 this beach in a permanent status, apparently, along with  
6 whatever structures they had on the beach for the purposes of  
7 their living there.

8           With the relationship of his property or his home to  
9 the shoreline, which is directly out from his house, he  
10 indicated it was approximately 100 to 200 feet depending on the  
11 tide or the surf conditions, indicating that at times the water  
12 actually came up over the beach onto his actual home property.  
13 He also indicated there is a observation platform or house,  
14 tree house as he named it, located on his property, apparently  
15 one of the trees adjacent to the beach.

16           With respect to the rear of his property, he  
17 indicated that there were two rows of trees and then the  
18 runway, placing the distance from the back of his house to the  
19 runway itself at about 700 feet. And, again, all of these  
20 distances and estimates in here are in fact just that,  
21 estimates, and I take all the numbers given by all of the  
22 Parties as that, estimates. So nobody has indicated they've  
23 gone out there with tape measures and, of course, nobody was  
24 dropping plumb lines from the aircraft to the surface. So  
25 those are all estimates also. And, in fact, even the

1 Respondent himself never testified as to what his altimeter  
2 readings were. So I took his statements of numbers as, again,  
3 estimates.

4 On the date in question, which is November 19, 2005,  
5 the date of the alleged incident, Mr. Maguire indicated that he  
6 was on his property, it was Saturday, and he was out in his  
7 back yard facing the beach talking on a cell phone. With  
8 respect to what he observed at that point, he indicated that he  
9 observed people to be in the water, and he indicated it was one  
10 to three dozen people spread out in the surfing area. And,  
11 again, he indicated that there are five separate surfing areas.  
12 And I do observe from Complainant's Exhibit 3 the shoreline  
13 with Dillingham, and I'm familiar with Dillingham myself, since  
14 I've been there. It does undulate. It's not exactly a sine  
15 curve, but it's pretty close. And so it depends on where one  
16 is making observations from as to distances from the edge of  
17 the runway or how one would estimate someone out in the water  
18 from one point which is, say, a bulge as another person  
19 estimating from where would be a trough, if you're considering  
20 it as a sine wave. So I take that into account also.

21 Going back to Mr. Maguire, he testified directly that  
22 with respect to individuals that were directly in front of his  
23 house, he stated that there were at least ten surfers directly  
24 in front of his house. Also that it was a Saturday, as I've  
25 indicated, that it was a crowded day, it was good weather on

1 his testimony, and that there were people generally in the  
2 area, and there were surfers in the water up and down along the  
3 surf areas that he had already mentioned. He also stated that  
4 there were people strolling on the beach. He called them  
5 beachgoers, apparently just individuals that were walking on  
6 the beach. With reference to the Beach Park, as I've already  
7 stated, he indicated that there were permanent squatters living  
8 in the Beach Park. And on the evidence in front of me, that is  
9 not disputed.

10           While he was on the phone he heard the jet noise.  
11 And looked out and he observed that the jet had actually passed  
12 below trees from his vantage point, and he estimated the height  
13 of those trees to be 100 feet. At that point he thought the  
14 plane, in his testimony, was going to crash into the water, and  
15 therefore he told the person on the phone with him to call  
16 9-1-1, indicating that he thought in fact there would be  
17 necessary some type of emergency response. He testified that  
18 he in fact did observe the airplane to pass directly over at  
19 least one surfing group and between two others. He then got in  
20 his truck and went over to the airport. He testified that the  
21 pass over the runway in his estimation was approximately 100 to  
22 50 feet or to 100 feet. And with the beach, his estimate was  
23 simply that the aircraft was very low.

24           Mr. Robert Titcomb also lives along the Dillingham  
25 beach. He is an airline employee, indicating he's a cabin crew

1 employee for Northwest Airlines. So he has some familiarity  
2 with large jet aircraft if he's a cabin crew member. He  
3 identified his location of his house on the beach, and  
4 indicated from the front of his house that he can see the  
5 water. It's about 300 feet from his house, and that the beach  
6 itself was about 150 feet from the house. So from the edge of  
7 his property out to the water itself is 300 feet, and the edge  
8 of his property is 150 feet. So it splits in between, which  
9 will become subsequently clear why that's important. From the  
10 rear of his house he indicates there's a tree line, that the  
11 trees are close together, and it's hard to see through the  
12 foliage, as he put it. He also indicated that the runway is  
13 about 350 to 400 feet from the rear of his domicile.

14           With respect to the general area, he stated that  
15 within the two-mile radius there are structures of at least ten  
16 homes along the beach area. He also testified as to the park,  
17 which he indicated was about a thousand yards to the east of  
18 his house, also talking about squatters that live permanently  
19 on the beach and that there are surfing areas.

20           As to the date in question, he stated that he heard  
21 the aircraft coming across the open water, that he then went to  
22 the edge of his property, which would have put him 150 feet  
23 from the actual water line on his testimony, and saw the jet  
24 flying low over the water past the front of his house. He gave  
25 estimates as to what he actually saw with respect to the

1 surface. He indicated there were surfers in the water in front  
2 of his home, and on the beach there were people to the east of  
3 him. Indicated that the aircraft passed about 100 yards from  
4 the edge of his property -- one hundred yards from the edge of  
5 his property would be 300 feet. Now, you have 150 feet on the  
6 beach and going out into the water he puts the aircraft well  
7 within 2,000 feet of his residence. He also testified that he  
8 observed structures and stated that the structures were along  
9 the beach, and that the aircraft passed alongside them. There  
10 is no testimony and it's not taken that the aircraft in any way  
11 passed directly over any of the houses or squatters' domiciles,  
12 whatever they are, in the beach area. The aircraft on the two  
13 passes along the beach were passes that were out over the  
14 water.

15 He also estimates that he did observe the aircraft to  
16 pass between the breakers or the water that he saw out from his  
17 home and the shoreline. So he places the aircraft path between  
18 surfers and the shoreline, indicating that that estimate was  
19 between 500 and a thousand. But placing him in between 500 to  
20 600, it still places the aircraft between surfers and the  
21 shoreline. They don't have to pass directly over the surfers.  
22 It's within 2,000 feet horizontally of them. With respect to  
23 the second pass, he indicated, as he said, it was a carbon copy  
24 of the first.

25 With respect to what he saw at the airport, he did

1 indicate that he saw two low passes over the airport prior to  
2 the landing. That's a discrepancy from the testimony of the  
3 other witnesses, and I observe that he was incorrect in his  
4 statement as to at least what Mr. Maguire and Mr. Nomura  
5 testified to and what is shown on the DVD. So I've taken that  
6 into account, that he did testify in error with respect to  
7 that. I also take into account that it was a somewhat, as all  
8 the witnesses indicated, unusual occurrence. I think  
9 Mr. Titcomb said that as if all he knew, this was the first jet  
10 he had ever seen come into Dillingham, which was similar to  
11 what Mr. Maguire said. Mr. Nomura I think said he maybe saw a  
12 jet once a year. So that's the best that I have out of the  
13 testimony, maybe a jet aircraft comes in once a year.

14           Mr. Nomura is a retired individual. He works part-  
15 time. Apparently he runs the tower at Dillingham, the UNICOM.  
16 It's not an ATC facility. It's not run by the FAA, on the  
17 evidence in front of me. Mr. Nomura, however, did state that  
18 he had worked for the Federal Aviation Administration in air  
19 traffic control for 34 years. So, again, it's an individual  
20 with some familiarity, 34 years as a air traffic controller,  
21 with aircraft and looking at them in flight. With respect to  
22 the UNICOM, he indicated that the UNICOM tower is about 35  
23 yards from the centerline of the runway, and is at an elevation  
24 of about 25 feet AGL, above ground level.

25           He was on duty on November 19th, and indicated he has

1 duty hours from 9 a.m. to about 5 p.m., and that he was in the  
2 tower. He had no knowledge of this operation by the Respondent  
3 coming into Dillingham Airport. On the testimony from the  
4 Respondent, apparently contact was made with the airport  
5 supervisor the day before, but there is no indication that  
6 Mr. Nomura had any knowledge of this.

7           He testified that he first observed the aircraft  
8 going northbound over the field at altitude, that he attempted  
9 to contact it on the UNICOM but was unable to do so. He  
10 indicated he did get some garbled transmissions but clearly he  
11 was, on his testimony, not able to establish two-way  
12 communication. He stated that he next observed the aircraft to  
13 be maneuvering twice, and then he did receive contact on the  
14 UNICOM. From his vantage point there is a line of trees along  
15 the edge of the runway between the runway edge and the beach  
16 and water line. And those trees, as he estimated them, are  
17 about 80 to 100 feet, so obviously anything below that tree  
18 line he would not be able to observe.

19           Mr. Nomura was clear on his direct testimony that the  
20 only request he received from Respondent was for making a low  
21 pass over the field. He specifically denied both on direct and  
22 on cross-examination that there was any request for a practice  
23 approach. He reiterated on direct that it was a low pass. He  
24 stated that he did in fact observe the low pass and estimated  
25 that the low pass was conducted at approximately 100 feet AGL

1 with gear and flaps up, which of course is what is seen on the  
2 DVD, and estimated the air speed to be somewhere in the  
3 neighborhood of 200 miles per hour.

4 With respect to people, he was unable to give a  
5 definitive number but that he estimated that there were at  
6 least 50 people on the airport surface at the time of this low  
7 pass.

8 Mr. Mike Spencer is a Federal Aviation employee.  
9 He's an Aviation Safety Inspector with the Federal Aviation  
10 Administration. He's held that position for about 22 years.  
11 Holds an ATP and various type ratings. He's a CFII and has  
12 over 10,000 hours as PIC. He essentially gave a brief  
13 description as to his activities in the investigation, and then  
14 opined that based upon his evaluation of the information that  
15 he garnered, his view of the videotape, that the Respondent did  
16 in fact operate in regulatory violation of those provisions of  
17 the Federal Aviation Regulations which I specifically mentioned  
18 previously.

19 Turning to the Respondent's case, the Respondent  
20 presented his testimony through his own testimony and the  
21 testimony of Mr. Douglas Gilliss. Mr. Gilliss has 35 years in  
22 aviation, as I understood it, holds an ATP and, again, various  
23 type ratings, 5000 hours in jet aircraft. Is typed in the  
24 Gulfstream. He's a pilot examiner. He participates in FAA  
25 safety programs, and in fact has written articles, on his

1 testimony, for various FAA publications, gives check rides, and  
2 has a general knowledge of the FARs.

3 He has never been on the ground in the Dillingham  
4 area. His knowledge as to the Dillingham area and what is  
5 there is gleaned from his observation of the photographs. So I  
6 take that into account in evaluating his testimony. He looked  
7 at the DVD for the first time in court today. However, he did  
8 testify that he had reviewed all of the declarations that were  
9 part of the investigation conducted by the Federal Aviation  
10 Administration, and I take it also had reviewed Mr. Riggs'  
11 declaration, which I'll talk about subsequently.

12 Suffice it to state that he had a problem with the  
13 interpretation of the charged Federal Aviation Regulations and  
14 disagreed with the interpretation. He also opined further  
15 that, based upon what he had read and what he observed, that he  
16 did not observe any careless or reckless or wanton operation or  
17 disregard of the requirements of the Federal Aviation  
18 Regulations. Specifically he indicated, and I think I'm  
19 quoting, "from what I saw, I did not see anything that was  
20 careless or reckless."

21 Mr. Sumler, the Respondent, testified on his own  
22 behalf. He holds an ATP rating. He testified as to his  
23 activities on the day before this charge incident, that is the  
24 18th of November. He testified that he called the airport  
25 manager, and there's nothing to denigrate from that statement

1 that in fact he did contact the airport manager to inquire as  
2 to permission of coming into Dillingham. This was for purposes  
3 of making films. They couldn't do it at the Honolulu Airport,  
4 so he was searching around for someplace on the island where it  
5 could be performed. So this was promotional photography. It  
6 was photography conducted by the Mantra organization,  
7 apparently, for "*Girls Gone Wild*" as part of their videos, and  
8 so it is promotional photography. And that was the purpose of  
9 the photographers that were there to film this. They were part  
10 of this company filming the operation for whatever purpose they  
11 were going to use in their post-productions.

12 He also testified that, using "some book", that he  
13 called some number which was given for an entity called  
14 "Restrictions", but there's no testimony as to who Restrictions  
15 in fact are, or what is this entity. Who are they, part of  
16 what group, who are they functioning for. So anything that  
17 they said is, on the evidence in front of me, is weightless. I  
18 have no idea who they are. However, I take into account that  
19 he in fact called somebody. That's on his testimony and it's  
20 not refuted. So on his testimony at least he made some effort,  
21 contacted the airport manager, called "Restrictions". However,  
22 on the testimony also there's no indication he ever made any  
23 effort to contact the authorities that actually could give  
24 permission, that is the Federal Aviation Administration, if in  
25 fact permission could have been granted.

1           With respect to the operation itself, there's really  
2 no dispute other than with Mr. Titcomb saying that there were  
3 two passes down the runway before the landing. The Respondent,  
4 however, is testifying that the first pass was made in response  
5 to a request for a practice approach. With respect to the  
6 operation over the water, he specifically denied seeing any  
7 people in the water, and he claims that he was at all times  
8 1,000 feet above the surface of the water, and that he was  
9 somewhere between 1,500 to 2,000 feet out from any houses and  
10 in fact did not fly over any houses. And, again, there's no  
11 testimony of any direct overflights of houses. Over the runway  
12 he states that he estimates his altitude down the runway on his  
13 low pass or, as he called it, practice approach of 200 to 150  
14 feet.

15           There is also testimony, and it's not disputed, that  
16 the Respondent apparently filed a timely report with NASA or,  
17 as we term it, a NASA report. So I accept that, that there was  
18 a timely filing of a NASA report related to this incident.  
19 There was a declaration which is declared under penalty of  
20 perjury so that adds to the weight that I attach to the  
21 Declaration of one Mr. Dave Riggs. I have read the Declaration  
22 more than once closely and also looked at the curriculum vitae  
23 which was submitted as supplement or attachment to the  
24 Declaration.

25           The first four paragraphs of the Declaration are

1 essentially nonpertinent to the evaluation of this case.  
2 Paragraph 5 essentially states what I've already reviewed with  
3 respect to the passes along the shoreline and over the  
4 Dillingham Airport itself and the various statements that  
5 Mr. Riggs apparently did review. Paragraph 6 indicates a video  
6 was provided for him, the one on November 19th, and indicates  
7 that with respect to statements that he makes on there -- and  
8 this is what I am quoting -- "but was told," so the statements  
9 as to what the cinematographer did is what he, Mr. Riggs, was  
10 told. Mr. Riggs has no factual knowledge from being present,  
11 so I have to take into account that his testimony as to what he  
12 is saying with respect to his observation of the DVD is based  
13 upon what he was told, not what he knows as a fact. That is  
14 something to take into account on the weight.

15 Paragraph 7 and 8 are essentially, in my view, his  
16 speculation as to what other persons or observers would have  
17 as limitations on what they observed. That is his speculation  
18 or opinion, and that's what I view that testimony. He has no  
19 real knowledge other than what he has reviewed of statements as  
20 to any of the individuals who testified here have as to  
21 abilities to estimate. And again we're talking about  
22 estimates, not people that went out with tape measures or plumb  
23 lines.

24 Paragraph 9 is again an estimation and an opinion on  
25 his part. It's his expert opinion, and I accept that based

1 upon his background. He has a long and extensive background in  
2 photography, which I acknowledge and do take into account.  
3 However, this, again, is opinion testimony based upon partly of  
4 what he was told and what he says he observed from the  
5 videotape. He states that the two passes off the shoreline  
6 were at an altitude of between 500 and 700 feet above the water  
7 and 1500 feet from the shoreline. With respect to the flight  
8 over the airport itself, he estimates the height to be around  
9 250 feet AGL or above the surface, and again those are his  
10 estimates. Simply observed that the Respondent in his own  
11 testimony, in the admissions which I'll refer to specifically,  
12 and on his testimony directly, indicated that he felt that he  
13 was 150 feet over Dillingham Airport. So it's 150-foot or a  
14 100-foot difference from what Mr. Riggs is estimating based  
15 upon his view of the video.

16 Paragraph 10 again is statements made as to what can  
17 be done with angles of the camera or compression of the video  
18 image. However, there was no testimony as to what camera  
19 angles were used, whether or not compression of the video image  
20 was in fact utilized, what kind of "f stops" were used, what  
21 kind of settings on the camera of any type were made, what  
22 lenses were used. There is simply no evidence one way or the  
23 other that any of this that he talks about, which are in fact  
24 things that can be done, unquestionably. But there's no  
25 evidence to support any of these statements in Paragraph 10 of

1 this Declaration. There's just no evidence to it. It's his  
2 speculation again that this can be done. And I may agree that  
3 it can be done, but that doesn't mean that in fact it occurred.  
4 There's no evidence to that effect. And that's my review of  
5 Mr. Riggs' Declaration.

6           Lastly, I refer to the Admissions, and there are some  
7 of these Admissions which I believe should be noted for  
8 purposes here. These are the "Request for Admissions". They  
9 were signed by Mr. Finkel, who was at the time Counsel for the  
10 Respondent. In Admission No. 5, that was admitted, and that  
11 admits that on a flight adjacent to Mokuleia Beach one pass  
12 from east to west from at an altitude of less than a thousand  
13 feet above the surface, talking of the surface of the water.  
14 No. 6 was admitted. He also admitted that on the flight  
15 adjacent to the beach at least one pass from east to west was  
16 less than 500 feet above the surface.

17           It was admitted in Admission No. 8 that there were  
18 persons on the shore. I don't know how many persons but it is  
19 persons, so more than one. And it's clear from the DVD that  
20 there were more than two people actually at the site where the  
21 filming was taking place. They were definitely on the beach.  
22 You can see their footprints in the sand and you can hear their  
23 voices. And in fact when the aircraft goes by you can hear one  
24 of them make an exclamation, and I hate to say it, but I'm  
25 quoting, "holy shit." That is an exclamation by one of the

1 persons, an excited utterance, obviously.

2           Turning to the Admissions again, Admission No. 11 was  
3 that the flight was operated directly over the runway with the  
4 landing gear retracted and the flaps up. And of course flight  
5 directly over the runway, that's really not in dispute.  
6 However, Request for Admission 12 again states that the flight  
7 was operated directly over the runway Dillingham Airfield at an  
8 altitude of less than a thousand feet above the surface with  
9 the gear and flaps up. No. 12, it is admitted that the  
10 aircraft was operated in a flight directly over the runway at  
11 an altitude of less than 500 feet above the surface with the  
12 gear and flaps retracted. And No. 14, it is admitted that the  
13 Respondent never received any kind of clearance from air  
14 traffic control for the flight as conducted below minimum  
15 altitudes for VFR operations. And that's my view of the  
16 Admissions. The Admissions, of course, essentially corroborate  
17 the testimony, in my view, of the witnesses who I've already  
18 discussed.

19           The burden of proof in this case rests with the  
20 Complainant, and she must carry that by a preponderance of the  
21 reliable and probative evidence. Part of the evaluation of the  
22 reliable and probative evidence is consideration of the  
23 credibility of the witnesses. And in doing that I observe the  
24 demeanor of the witnesses, and I have taken into account the  
25 interests of the witnesses in giving of their testimony. Take

1 into account that Mr. Gilliss is retained for this testimony  
2 today. Doesn't mean anything other than that he is retained,  
3 and has no personal knowledge of the area, as I've indicated.

4           The Respondent of course is an interested party.  
5 Mr. Riggs' testimony I think I've discussed in detail, and I've  
6 taken into account that he's going on what he was told, what he  
7 has read, and he's making conclusionary statements without  
8 really knowing who the individuals are or what their abilities  
9 are. He's talking in generalities. And with respect to the  
10 filming itself, there's no evidence to support his statements  
11 as to what was in fact done. What could be done, yes. But was  
12 it done? There's no evidence as to whether it was or was not.

13           Suffice to state that my evaluation on the interests  
14 of the Parties, I would resolve that in favor of the  
15 Complainant's witnesses. They have nothing really to gain from  
16 this proceeding. They live in the area. And I take into  
17 account that Mr. Titcomb made a mistake as to how many passes  
18 he saw over the airport but his testimony is essentially in  
19 accord with that of Mr. Maguire, Mr. Nomura, and in fact the  
20 admissions and the testimony of Mr. Sumler and the DVD itself.  
21 So that's how I resolve that.

22           With respect to the operation itself, there's no  
23 question that the aircraft made two passes over the water along  
24 the beach. The beach, as I've already said, undulates, almost  
25 like a sine wave. So there's a difference as to where

1 Mr. Maguire was observing from and where Mr. Titcomb was  
2 observing from. Also there would be a difference as to whether  
3 you're taking a measurement from a crest on the beach or the  
4 trough area, analogizing it to a sine wave. However, it is  
5 clear from the testimony of these witnesses that they observed.  
6 Mr. Maguire says at least ten people in the water directly out  
7 in front of his house with the aircraft passing close to them.  
8 Mr. Titcomb also testified as to people on the beach,  
9 strollers, people in the park. And looking at the DVD, I've  
10 looked at it several times, and I can observe what appears to  
11 me at least two people in the DVD who are out in the water.  
12 They're in the lower right quadrant.

13           Also I observe on the aircraft passes, that the  
14 aircraft is not over the beach; it is out over the water.  
15 However, the set of breakers behind it are behind the aircraft.  
16 That's my view and understanding of the DVD, and that's how I  
17 interpret it. There are two sets of breakers. There's a far  
18 out breaker and in inner breaker, and Mr. Titcomb's testimony  
19 is that the aircraft passed between the shoreline and the  
20 breakers. There are strollers on the beach. There were people  
21 living in the beach area on the park. The admissions indicate  
22 that at best the altitude was below 500 feet over the water.  
23 In my view the evidence by a preponderance of the evidence does  
24 establish that the Respondent conducted two low passes over the  
25 water within 2,000 feet horizontally of persons who were in the

1 water and structures along the beach, the houses and the  
2 squatters with their tents or whatever they're using up there.

3           Turning to the airport, I reject as improbable that  
4 this was a first pass along the runway at even the Respondent's  
5 estimate of 150 to 200 feet. Other estimates put it lower.  
6 But in any event, even at 200 feet that this was a practice  
7 approach. Respondent says it was a practice approach.  
8 Mr. Nomura says there was never a request for a practice  
9 approach. It was a low pass. And there was no indication in  
10 front of me of why there was a necessity for a practice  
11 approach. If you needed to do a flyover to determine whether  
12 the airport in fact was suitable, it didn't have to be  
13 conducted at high speed at 200 feet. At that speed and at that  
14 altitude there's nothing to be determined. If you're going to  
15 check out the airfield to see whether there's elk or cows or  
16 whatever on the runway, you can fly around the airport and  
17 circle it at altitude, a thousand feet, and clearly determine  
18 whether or not the airport is clear or there are obstructions.

19           In any event, on the evidence in front of me, I  
20 believe that the more credible and probative evidence is that  
21 in fact there was no low approach but in fact rather that there  
22 was a low pass down the center line of this runway. And I also  
23 take in account that, again, as with respect to the photography  
24 on the beach, the photographers were set up to film this, and  
25 you again here the exclamations of the people that are standing

1 near the camera as to what they're observing. They're startled  
2 to say the least. And along with that, I take into account  
3 that: what was the purposes of both the passes along the beach  
4 and over the runway? It was to photograph events that were  
5 going to be incorporated, as I would understand it, since they  
6 were being done by the company photographers, into some post-  
7 production video or whatever they were going to sell to the  
8 public. Passes that were conducted at altitude or far out over  
9 the water, as sponsored by the Respondent, don't comport with  
10 the purpose or the exclamations on the beach you hear, as I've  
11 already stated, somebody saying, "holy shit" and then other  
12 exclamations on the airport. They were startled.

13           So in my view, the evidence by a preponderance does  
14 establish low flight on a low pass down the center line of this  
15 runway when it was not necessary for the purposes for takeoff  
16 or landing or necessary to check out the airport in any event.  
17 And there's no evidence in front of me that there's any type of  
18 navigation facility at Dillingham, unless they put it in since  
19 I've been there. There's nothing to do a practice approach  
20 with. It's a VFR airport. It's a glider airport and for light  
21 aircraft, essentially.

22           Turning then to the Regulations, the first Regulation  
23 is, in my view, FAR 91.119(b), which relates to flights over  
24 congested area. It prohibits, unless necessary for takeoff or  
25 landing, and it wasn't takeoff or landing over the water, and

1 it wasn't necessary for takeoff or landing to do the pass down  
2 the runway, it prohibits flight over any congested area of a  
3 town, city, or settlement, or any open-air assembly of persons.  
4 Open-air assembly of persons has been discussed repeatedly by  
5 the Board and has been found in cases going back all the way to  
6 *Administrator v. Bassabe*, 3 NTSB 1578,(ph.), which was a case  
7 in Puerto Rico in the '70s. A picnic area with 30 or 40 people  
8 in it is an open-air assembly of persons. The testimony here,  
9 ten people out in the water, there are surfers in the water on  
10 both of the testimony, people strolling on the beach, there are  
11 people on the airport clearly seen in the video that are  
12 apparently part of the glider operation. And therefore there  
13 were, in my view, an open-air assembly of persons. Whether or  
14 not you want to consider ten or 12 houses as a city or town,  
15 probably not, but it is at least a settlement. But in any  
16 event there were passes in my view on the evidence in front of  
17 me at altitudes of less than a thousand feet above the highest  
18 obstacle, which would have been the surface of the water,  
19 within a radius of 2,000 feet of the aircraft. And therefore I  
20 do find a regulatory violation of Section 91.119(b).

21           The comment in this particular Regulation in Subpart  
22 C does refer to other than congested areas. And it does refer  
23 to surface, and then it states the exception over open water.  
24 Open water is included in there, in the Board's view and in my  
25 view, to differentiate that out over open water you may have

1 more leeway. Because if it's open water without people in it,  
2 the risk factor is decreased. But it does not mean there is  
3 any conflict in the Regulations. And, in fact, the Board must  
4 state the Regulations as published by the Federal Aviation  
5 Administration. We are bound by their Regulations. We do not  
6 do anything other than interpret them.

7           Turning then to the charge of regulatory violation of  
8 Section 91.515, this is a renumbered Regulation. It is not a  
9 brand new Regulation, simply been recodified into Subpart K.  
10 And that provides that notwithstanding Section 91.119  
11 provisions, that no person may operate an aircraft under VFR  
12 less than 1,000 feet above the surface or 1,000 feet from any  
13 mountain, hill, obstruction, which isn't pertinent here. But  
14 in any event there is definitely, on the Admissions and the  
15 testimony itself, flight below 1,000 feet above the surface,  
16 not in conformity with the requirements of FAR 91.119. The  
17 exceptions included in this particular Regulation, 91.515 in  
18 subpart B are not applicable herein, so I disregard them. In  
19 any event, on the evidence in front of me I do find that the  
20 operation was conducted in regulatory violation of Section  
21 91.515(a) of the Federal Aviation Regulations.

22           Turning then to the charge of violation of Section  
23 91.13(a) that prohibits either careless or reckless operation  
24 so as to endanger the life or property of others, this has been  
25 reviewed by the Board innumerable times and has been reviewed

1 by various United States Courts of Appeal in cases brought up  
2 through the various Courts. It is clearly established that it  
3 is potential endangerment. That is the only necessary showing.  
4 There must be a reasonable nexus between the operation and  
5 potential endangerment but one does not have to wait until  
6 there is a catastrophic occurrence. It is sufficient that  
7 there is a careless or reckless operation which potentially  
8 endangers the life or property of others. From the evidence in  
9 front of me, flight conducted over the surface of the water and  
10 along the shoreline at altitudes of less than 500 feet in  
11 violation of the Regulation, which I've already cited, is a  
12 deliberate act. The airplane didn't do it by itself. You  
13 can't blame the airplane. It was operated. It is an  
14 intentional operation, a fly-by for purposes of filming. It's  
15 intentional. The flight down the runway, again, is not  
16 accidental. It's intentional. It was being filmed. It's  
17 deliberate.

18 In my view the operations, whether or not you  
19 observed the people in the water, maybe you weren't able to see  
20 surfers as you flew by them at 175, 180 knots, whatever. But  
21 they were there on the evidence in front of me. This is a  
22 deliberate action. It is not careless. It is exactly that,  
23 it's you're forgetful about something and you accidentally do  
24 it. If it is intentional, it is no longer careless. It is  
25 reckless. I find, therefore, that in the operations over the

1 water on both passes, those were both reckless operations, and  
2 the low pass down the center line of the runway with people on  
3 the ground, a tower, there are clearly gliders along the edge  
4 of the runway, the wingtips are visible in the DVD, you can see  
5 on the taxi back that there are other structures along the  
6 airport, hangars, there are airplanes, there's a bus. If the  
7 airplane had gone out of control for whatever reason, not  
8 because of the pilot but because of some mechanical malfunction  
9 that occurs unexpectedly, that can't be immediately recovered  
10 from because of the low altitude, the potential is there for a  
11 crash into the ground. I don't know how much fuel is on the  
12 airplane but you can have an explosion with fragmentation going  
13 who knows where. It is at least potentially hazardous in all  
14 those operations.

15 I therefore find that the Respondent did in fact on  
16 the operations over the water both times and over the runway  
17 did operate in regulatory violation of Section 91.13(a), in  
18 that he operated in a reckless manner so as to potentially  
19 endanger the life and property of others.

20 Turning to the NASA report, the NASA report does not  
21 immunize individuals. The Board has clearly ruled on that  
22 innumerable times. The most recent case is *Administrator v.*  
23 *Simmons*, which is EA-5275, a 2007 case which came out about a  
24 month or so ago. And the Board observed in there, and I'm  
25 quoting, "although the Respondent" -- Mr. Simmons -- "had filed

1 a timely report with NASA, his operation of the aircraft into  
2 IMC environment was not inadvertent." When one places himself  
3 at a significantly increased risk of committing a violation,  
4 which it is here, by flying at the altitudes and the places  
5 where the Respondent in this case flew, both over the water and  
6 over the runway, it is not inadvertent. The Board observes  
7 that the ASRP, the NASA reporting system, does not obviate the  
8 imposition of a sanction when an operator's conduct is either  
9 deliberate or intentional. And in fact Advisory Circular 0046D  
10 in its Subparagraph does indicate that in determining the  
11 violation and the enforcement action, that the violation should  
12 be inadvertent and not deliberate. So if it's not inadvertent  
13 but deliberate, the NASA filing, even though it's timely, does  
14 not obviate the imposition of a penalty. In any event, even if  
15 it is operational, all it does is preclude imposition of a  
16 sanction. It does not preclude the finding of violation.

17 In this case I find on the evidence in front of me  
18 that since this is in my view not inadvertent but rather  
19 deliberate, the violations occurred because the Respondent  
20 undertook to operate apparently to satisfy his employer in the  
21 filming process, and therefore they are intentional and not  
22 inadvertent. Therefore, the NASA report is not applicable in  
23 this instance, and I so hold.

24 I've taken Judicial Notice of the Sanction Guidance  
25 Table, and also the Statute that says deference should be shown

1 to the Administrator's choice of sanction absent a showing that  
2 the decision is arbitrary or capricious or not in accord with  
3 prior Board precedent. However, I'm also taking into account  
4 that the Respondent, on the testimony that was given and not  
5 disputed, that he at least made some effort. It wasn't  
6 successful because he didn't contact the right persons. But he  
7 at least contacted the airport operator to let him know he was  
8 coming, and he called whoever these people were who are called  
9 Restrictions, and they told him there were no restrictions.  
10 But I don't know what restrictions they were talking about.  
11 They can't give a waiver to the Federal Aviation Regulations  
12 requirements. And he didn't call ATC on the Admissions, and he  
13 didn't call FAA on the evidence. However, he did call  
14 somebody.

15           So I'm going to give him the benefit of at least  
16 making some effort. And for that I will reduce the sanction to  
17 be imposed in this case to that of 150 days, and I feel that  
18 that would be satisfactory to satisfy the public interest and  
19 air commerce and air transportation and the safety thereof, and  
20 also to act as a deterrent to the Respondent or to any others  
21 who may be similarly disposed. And with that modification, I  
22 will affirm the Administrator's Order of Suspension, the  
23 Complaint herein.

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ORDER

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IT IS THEREFORE ADJUDGED AND ORDERED THAT:

(1) The Order of Suspension, the Complaint herein be, and the same hereby is, modified to provide for suspension of 150 days of the Respondent's Airline Transport Pilot Certificate rather than the 180 days.

(2) The Complaint, the Order of Suspension as modified, be, and the same hereby is, affirmed.

Entered this 11th day of April 2007, at Honolulu, Hawaii.

EDITED & DATED ON  
MAY 4, 2007

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PATRICK G. GERAGHTY  
Administrative Law Judge