August 23, 2000

Donald E. Wilson
Hadley & Pech, Inc.
5000 Cirrus Drive, Suite 200
Medford, OR 97504

Dear Mr. Wilson:

This is in response to your letter of August 7, 2000, to Jarvis Cochran, FAA Flight Standards District Office, Hillsboro, Oregon. In your letter, you requested our interpretation of section 135.152(a)(b) of the Regulations as they apply to the operation of civil aircraft N91TH. It is our understanding that N91TH is a Dassualt Falcon 900B, an multi-engine turbine-engine powered airplane having a passenger seating configuration, excluding any required crewmember seat, of 10 to 19 seats. It is also our understanding that N91TH was manufactured outside of the United States in 1988 and registered as a United States civil aircraft in 1989. Based on those understandings, it is our opinion that you will not be required to comply with the requirements of section 135.152(a)(b) of the regulations in order to operate the aircraft under Part 135.

In pertinent part, section 135.152(a) states:

> "...no person may operate under this part a multi-engine, turbine-engine powered airplane or rotorcraft having a passenger seating configuration, excluding any required crewmember seat, of 10 to 19 seats, that was either brought into the U.S. register after, or was registered outside the United States and added to the operator's U.S. operations specifications after, October 11, 1991, unless it is equipped with one or more approved flight recorders..."

The language and regulatory history of section 135.152(a) indicates that the regulation is intended to apply to two distinct categories of aircraft: those registered in the United States after October 11, 1991, and foreign-registered aircraft that are added to Part 135 operations specifications after that date. Inasmuch as your aircraft was brought into the U.S. aircraft register before October 11, 1991, we do not believe that you are required to comply with the requirements of that section.

Section 135.152(b) applies to multi-engine, turbine-powered airplanes having a passenger seating configuration of 20 to 30 seats. It is our understanding that N91TH has a passenger seating configuration of less than 20 seats. Therefore, that section of the Regulations does not apply to your aircraft.

We hope that this opinion has been responsive to your request. Please feel free to contact our office if we can provide you any further assistance.

Sincerely,

John J. Callahan
Deputy Regional
Counsel

The NTSB agrees with the intent of the SNPRM, but comments that specific language is needed to prevent part 121 operators from operating foreign-registered aircraft fitted with FDR's that have as few as five parameters. The commenter also states that the language intended to correct the policy decision discussed in the NPRM and SNPRM is somewhat confusing. The commenter feels that exemptions to § 135.152 should be handled through the exemption process on a case-by-case basis rather being addressed in rule language, and agrees that the "out of production" argument is not a sufficient reason for exclusion. The NTSB agrees that the increase in the minimum FDR recording duration for part 135 aircraft from 8 to 25 hours is an appropriate and timely change.

FM Response: The language proposed in the SNPRM, that the flight data recorder requirements of § 135.152 apply to aircraft registered outside the United States but placed on the U.S. operations specifications of an operator, is included in the final rule. In its comment, the NTSB indicates that specific language should also be added to part 121 requirements to ensure that all aircraft operated in part 121 service, including those under foreign registration, are operated in accordance with the flight data recorder requirements of that part. The NTSB indicates that § 121.153 would permit the use of foreign-registered aircraft that record only 5 parameters of flight data. The FAA disagrees with the NTSB's reading of § 121.153. Paragraph (c) (2) of that section requires that foreign-registered aircraft operated under part 121 must meet all of the requirements "of this chapter (14 CFR Chapter 1)," which includes all of the part 121 requirements. Thus, any foreign-registered airplane operated under part 121 must meet the FDR requirements as though the aircraft were registered in the United States.

However, after further consideration, the FAA has decided that § 121.344a should contain the same language as § 135.152 concerning aircraft placed on the operations specifications of an operator. The "brought on the U.S. register" language of § 135.152 was repeated in new § 121.344a (a), and the correction proposed for § 135.152(a) in the SNPRM also applies to § 121.344a (a). The language is included in the final rule for clarity and parallelism between the two sections. The FAA does not want to cause confusion in the applicability of § 121.344a for airplanes that are subject to it beginning in March 1997.

The FAA agrees that the simple fact that airplanes are out of production is not sufficient justification for their exclusion from the DFDR requirements. The number of out of production airplanes still operating is significant, and many airplanes have too much economic life remaining to allow them to operate with no or limited flight data recorders. The FAA disagrees that any exception to this rule be handled as exemptions on a case-by-case basis. The FAA does not grant blanket permanent exemptions, and use of that process would necessitate the reapplication of affected parties every two years. The FAA does not anticipate that circumstances would change so as to justify later the retrofit of the airplanes listed in this final rule as exempt. Further, because these exceptions are listed for aircraft types, it is more efficient to list them as part of the rule rather than having individual operators apply on behalf of themselves and all affected operators of a certain airplane type design.

Discussion of Policy Change

In the preamble to Notice No. 96-7, the FAA announced a change in policy regarding certain airplanes that were brought on the U.S. register after October 11, 1991 (61 FR 37154, July 16, 1996). The language of current § 135.152 is clear that any aircraft subject to that section that was brought onto the U.S. register after that date would have to meet the flight data recorder requirements of that section. As explained in that Notice, there has been at least one previous policy determination that certain airplanes—those that were on the register before October 11, 1991, were taken off, and were added to the register again after October 11, 1991—do not have to meet the DFDR requirements because of their previous registration. As noted, this policy is inconsistent with the clear language of the rule, and with the recently adopted rules making part 135 scheduled commuter airplanes subject to part 121 beginning in March 1997.

Comments to the NPRM and SNPRM, and telephone inquiries by operators indicate to the FAA that some commenters thought that this was *a proposed* policy change. Commenters also took the opportunity to suggest alternative policies to cover these airplanes, including a change in § 135.152 to make it applicable only to airplanes manufactured after October 11, 1991. (See response at discussion of TOIL's comments, above.) Further, the NPRM did not contain any proposed compliance time for aircraft affected by the policy change, nor did it specifically indicate that the policy change affects all aircraft—airplanes and rotorcraft—subject to § 135.152.

In the SNPRM, the FAA proposed to give operators that had been operating under the old policy two years to comply with the regulation. The commenters note, however, that this places a burden on some operators, and could cause operators of certain airplanes that are now subject to part 121 requirements to possibly undergo a second retrofit—first to meet § 135.152 because of the policy change and again to meet § 121.344a.

part of an AIMS-type system, as suggested by the commenter, without ignoring the carefully established categories. Moreover, JAL states that "most of the newly-requested parameters are already recorded in (JAL's) DFDR," and that compliance would require a rearrangement of word slot assignments. JAL has not shown that this presents an undue regulatory burden or one that was not already considered by the FAA in this rulemaking.

The FAA again acknowledges that this rule will place some economic burdens on operators. Discussion of comments on economic issues can be found in the Regulatory Evaluation section of this preamble.

No other comments were received pursuant to these proposals. In the absence of sufficient, persuasive justification that is necessary to change the proposed regulations, they are adopted as proposed.

Discussion of Comments to the SNPRM

Two commenters stated that they support the proposals in the SNPRM.•

TOIL submitted further comment to justify exemption of the DHC–6–300 from the DFDR retrofit requirements. The commenter's main concern is with "the proposed reversal of policy established by Flight Standards Information Bulletin 92–09" and again urges the FAA to adopt its previous policy interpretation regarding airplanes brought onto the register after October 11, 1991, and to codify that previous policy. TOIL did not offer comments on the proposals in the SNPRM.

FAA Response: The commenter seems to have misunderstood that the change in policy announced in the NPRM was a "proposed" reversal of policy. The change in policy was a determination already made; the NPRM was merely a conduit for announcing the change since the subject matter was relevant to the NPRM and the affected parties would be notified more efficiently using that document. As stated in the NPRM and the SNPRM, the previous policy interpretation was found to be inconsistent with the text of the rule. The FAA cannot, in good faith, allow operators to continue to operate without complying with the rule and has made no changes to the rule addressing the change of policy. Further explanation is provided in this preamble in the section, "Discussion of Policy Change" below.

One individual commented that the rule should address alternate methods of powering recording devices, stating that sometimes the busses powering the recorders are turned off for isolation purposes in the event of an emergency that involves fire or smoke.

FAA Response: The FAA acknowledges the merit of this comment; however, the issue it addresses is outside the scope of this rulemaking; it may be considered in a future rulemaking action. No changes were made as a result of this comment.

RAA comments that neither the NPRM nor the SNPRM have provided data to suggest that adoption of the proposals will result in a reduction of accidents, and therefore the final rule should not be applicable for aircraft where it is shown that disproportionate economic *hardship* would result. The commenter feels that aircraft with 10 to 19 passenger seats should be affected only if they are newly manufactured after October 11, 1991 (as opposed to being brought onto the U.S. register, as the rule currently states). RAA comments that if the FAA does insist on adopting the rule as proposed, the 2 year compliance time stated in the SNPRM should be revised to 4 years, stating that it doesn't make sense to propose a 2 year compliance time for some airplanes and 4 years for others.

FAA Response: The FAA acknowledges that immediate benefits from this rule may not be readily recognized in terms of reducing accidents, and that DFDR's themselves can prevent accidents. However, to respond to the NTSB recommendations to provide better investigative tools for accidents and incidents, the FAA undertook this rulemaking action. Aviation industry representatives supplied the FAA with figures for the economic evaluation that was presented in the NPRM. The cost figures that the RAA submits in this comment refer only to the DHC–6–300, an airplane with a unique combination of cost factors. The FAA has determined that the DHC–6 will not have to comply with the DFDR requirements. Other operators that can justify why their airplanes should also be exempt, discussing the criteria outlined in the preamble of the NPRM and the SNPRM, may petition to have their airplanes added to the exemption paragraph in part 135.

The FAA agrees that the 2-year compliance time for airplanes of operators that "thought their aircraft were grandfathered to meet the current requirements of part 135, not for installation of an upgrade" should be revised to read 4 years, and those affected airplanes will have 4 years to come into compliance. The compliance time language that was included in the SNPRM has been removed to avoid any confusion in compliance times. Affected operators have four years to comply, whether operating under part 135 or part 121. Further explanation is provided in this preamble in the section, "Discussion of Policy Change" below.