U.S. Department
of Transportation
**Federal Aviation
Administration**

Office of the Chief Counsel

800 Independence Ave., S.W.
Washington, D.C. 20591

AUG 25 2011

Mindy Eisenberg, Acting Branch Chief
US Environmental Protection Agency
Office of Water, Office of Ground Water and
Drinking Water, Protection Branch, MC: 4606M
1200 Pennsylvania Avenue, NW
Washington, DC 20460-0001

Dear Ms. Eisenberg:

This letter is in response to your email request for information regarding the applicability of the Aircraft Drinking Water Rule (ADWR), 40 C.F.R part 141 to foreign air carriers operating within the United States under 14 C.F.R part 129. EPA has requested the FAA's response to the following specific question:

> [The] ADWR requires air carriers to develop an Operations and Maintenance (O&M) plan and submit to "FAA-accepted air carrier O&M program [as part of] 14 CFR part 43, 14 CFR part 91, 14 CFR part 121." [Is it correct that] part 129 air carriers have to follow these FAA regulations for US registered aircraft in their fleet… Are there other regulation requirements that would require establishment of an FAA O&M program for part 129 air carriers.

We understand this request is prompted by an inquiry from a foreign air carrier operating under an open skies agreement that serves an international route and two domestic locations within the United States. In this response, we focus only on the Federal Aviation Administration's safety oversight responsibilities for foreign air carrier operations within the United States.

Background

The EPA interprets the ADWR to include air carriers having any aircraft within their fleet that meet all of the following applicability criteria for a public water system:

1. Provides water for human consumption through pipes or other constructed conveyances and regularly serves an average of at least 25 people daily at least 60 days per year;
2. The water used for consumption is finished water;
3. The aircraft is used to convey passengers in interstate commerce; and

4. The aircraft flies an international route and serves two or more destinations within a State or across States.

See §§141.2, 141.801, 141.3. With respect to the fourth criteria, EPA states that these rules apply regardless of aircraft ownership, as noted in the following language in the preamble to the ADWR-

> EPA received public comment as to the applicability of the ADWR to aircraft water systems based on ownership (e.g., foreign carrier, U.S. military). The final rule clarifies that the applicability of the ADWR is not based on ownership, but on the determination as to whether the aircraft water system is operating within the U.S., meets the definition of a public water system (PWS) under SDWA section 1401, and is not excluded from regulation under SDWA section 1411… The ADWR applies to aircraft (regardless of ownership) that fly routes between two or more locations within the U.S., while the aircraft is within U.S. jurisdiction. For instance, an aircraft flying an international route that serves only one U.S. location would not generally be considered a PWS.

Compliance with the ADWR requires air carriers to develop and implement an aircraft water system "operations and maintenance plan" for each aircraft water system that it owns or operates. This plan must be included in an "FAA-accepted air carrier operations and maintenance program (14 C.F.R parts 43, 91 and 121)." *See* 40 C.F.R 141.804. The operations and maintenance plan must include watering point selection; disinfecting and flushing procedures in accordance with the manufacturer's recommendations; coliform sampling procedures; training requirements for staff affected by the rule; self-inspection procedures, procedures for boarding water, and the coliform sampling plan; and a statement whether the aircraft water system can be physically disconnected or shut off to prevent water flow through the tap.

Discussion

Part 129 establishes the international obligations applicable to foreign air carriers operating within the United States as follows-

> 14 C.F.R § 129.5
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> (a) Each foreign air carrier conducting operations within the United States, and each foreign air carrier or foreign person operating U.S.-registered aircraft solely outside the United States in common carriage must conduct its operations in accordance with operations specifications issued by the Administrator under this part.
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> (b) Each foreign air carrier conducting operations within the United States must conduct its operations in accordance with the Standards contained in Annex 1 (Personnel Licensing), Annex 6 (Operation of Aircraft), Part I (International Commercial Air Transport—Aeroplanes) or Part III (International Operations—

> Helicopters), as appropriate, and in Annex 8 (Airworthiness of Aircraft) to the Convention on International Civil Aviation.

Where the foreign air carrier operates U.S.-registered aircraft in common carriage, within or outside the United States, those aircraft must be operated in accordance with U.S. airworthiness standards and must be maintained in accordance with a program approved by the Administrator, as stated in §129.14 (a) -

> "[e]ach foreign air carrier and each foreign person operating a U.S.-registered aircraft within or outside the United States in common carriage must ensure that each aircraft is maintained in accordance with a program approved by the Administrator in the operations specifications."

Under the Chicago Convention, the State of Registry of an aircraft is responsible for the airworthiness of aircraft carried on its registry, consistent with the standards established by the International Civil Aviation Organization (ICAO) in Annex 8. Assuming those airworthiness standards are at or above the minimum standards established under Annex 8, other ICAO Contracting States must recognize the validity of those airworthiness certificates.

ICAO Contracting States must also comply with ICAO Annex 6, Part 1, specifically, provisions requiring approval of the operations manual by the State of the Operator, approval of the maintenance program by the State of Registry, and requirements on the operator to provide the State of the Operator and the State of Registry with a copy of the operator's maintenance control manual, together with all amendments/and or revisions to it, and to incorporate in it such mandatory material as the *State of the Operator* or the *State of Registry* may require.

For foreign-registered aircraft operated by a foreign air carrier, the U.S (as represented by the FAA) is neither the State of the Operator of the air carrier nor the State of Registry of the aircraft. The FAA (and by implication, the EPA) would therefore lack jurisdiction to mandate changes to the maintenance program of a foreign-registered aircraft operated by a foreign air carrier. Thus, even if the EPA interprets the ADWR to require compliance by part 129 operators who serve two or more locations within the United States (and there are foreign air carriers who meet that requirement), the FAA would review and approve only the maintenance programs of those foreign air carriers who operate U.S.-registered aircraft as required by §129.14.

With regard to part 121 air carriers that dry-lease foreign-registered aircraft, the rules are different, as set forth in §43.1(a)(2)[1] and §121.153.[2] Prior to authorizing those foreign

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[1]Section 43.1 states in pertinent part-

(a) Except as provided in paragraphs (b) and (d) of this section, this part prescribes rules governing the maintenance, preventive maintenance, rebuilding and alteration of any-

(1) Aircraft having a U.S airworthiness certificate;

(2) (2) Foreign-registered civil aircraft used in common carriage or carriage of mail under the provisions of Part 121 or 135 of this chapter; and

(3) Airframe, aircraft engines, propellers, appliances, and component parts of such aircraft.

aircraft for operations under domestic part 121 operations specifications, the FAA as the State of the Operator, must confirm that the aircraft maintenance program is acceptable to the FAA. In that case, the FAA would review the maintenance programs of those aircraft for compliance with part 121 maintenance rules. *See* 14 CFR parts 43, 91, and 121.

If as required by the EPA, the aircraft's operations and maintenance manuals include a maintenance program for the aircraft's water system, in performing safety oversight inspections, the FAA's role would be limited to verification that the operator is following the aircraft's specific maintenance program. However, the FAA would have no jurisdiction (or expertise) to determine whether the air carrier is in compliance with EPA's ADWR.

In summary, the FAA offers the following overview of its safety oversight authority-

- As the State of the Operator, the FAA has authority for the safety oversight of dry-leased aircraft operated under part 121, whether or not these aircraft are U.S.-registered aircraft or foreign-registered aircraft.
- If the foreign air carrier operates U.S.-registered aircraft in common carriage, whether within or outside the United States, as the State of Registry of the aircraft, the FAA has authority to oversee the airworthiness of the aircraft, including approval of the operator's maintenance program.
- The FAA has no jurisdiction to impose operations and maintenance requirements (e.g. plans for aircraft drinking water systems) for a foreign-registered aircraft operated by a foreign air carrier, because the FAA is neither the State of Registry of the aircraft, nor is the FAA the State of the Operator for the foreign air carrier.

This response was prepared by Lorna John, Senior Attorney in the Regulations Division of the Office of the Chief Counsel and coordinated with the Aircraft Maintenance Division of the Flight Standards Service and within the Office of the Chief Counsel. If we can be of further assistance, please contact us at (202) 267-3073.

Sincerely,

Rebecca B. MacPherson
Assistant Chief Counsel for Regulations, AGC-200

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[2] Section 121.153(c) allows a part 121 air carrier to operate a foreign-registered aircraft under a dry lease in common carriage and for the carriage of mail, if the aircraft is registered in an ICAO Contracting State, carries an appropriate airworthiness certificate issued by the country of registration and meets certain other requirements.