Federal Aviation Administration

Memorandum

Date: JUN 18 20[illegible]

To: James E. Gardner, Manager, Flight Standards Division, AGL-200

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

Prepared by: Alex Zektser, Attorney, AGC-220

Subject: To what extent an operator can make a congested area uncongested

This is in response to your October 6, 2011 memorandum requesting an interpretation as to whether an operator can make a congested area over which they are operating uncongested in order to avoid having to develop and file a congested area plan (CAP) required by 14 C.F.R. § 133.33. Your memorandum provides two factual scenarios, which are analyzed below.

Subsection 133.33(d)(1) requires the holder of a Rotorcraft External-Load Operator Certificate to develop a CAP and get that CAP approved by the local FAA Flight Standards District Office before conducting rotorcraft external-load operations over congested areas. The CAP requirements in § 133.33(d)(1) do not trigger if the area over which the operation is conducted is not congested.

The FAA has not defined the term "congested area" by regulation.[1] Instead, determinations of what constitutes a congested area are made on a case-by-case basis.[2] Factors that are relevant to determining whether an area is congested include housing density, the presence of people, and whether buildings are occupied.[3] With this in mind, we now turn to the specific facts set out in your scenarios.

Scenario 1

The first scenario in your memorandum is set out as follows:

[1] Letter to Leanne Simmons from Rebecca MacPherson, Assistant Chief Counsel for Regulations (Mar. 8, 2010).

[2] Letter to Robert E. Anderson from Rebecca MacPherson (July 2, 2009).

[3] *Id.*

> The lift is conducted to place an air handler on a large building that is under construction. The building sits on a large lot that is surrounded by a parking lot. It is being built in a small town in Wisconsin and surrounding the building and parking lot are residential areas, roads, and businesses. There are many different types of people working various types of trades surrounding the building and working on the structure. There is also a large amount of heavy lift and other construction type vehicles and machines on or around the building.

For this scenario, you ask whether the construction foreman and/or person in control of the privately owned building can make the area "non-congested" by stopping the work and depopulating the area.

The NTSB decision in *Administrator v. Johnson*[4] is instructive for our analysis of this scenario.[5] In *Johnson*, a pilot flew over a shopping plaza below the minimum altitude prescribed for a congested area. On appeal, the pilot argued that the plaza was not a congested area because at the time of the flight, the stores in the plaza had not yet opened for business, and thus, those stores did not have any people inside when the pilot flew over them. The NTSB rejected the pilot's argument, holding that "the commercial or business areas of a city" are inherently considered to be congested areas.[6] Because the shopping plaza was in the commercial/business area of the city, it was inherently a congested area, and as such, it was irrelevant that the plaza did not have people inside it at the time of the flyover.[7]

Applying the above case to the facts of Scenario 1, in this scenario, a lift is conducted in a small town, in an area that is surrounded by residential areas and businesses. Based on this description, it appears that the lift will be conducted over the residential and commercial/business parts of town. As such, this scenario is similar to the facts that the NTSB examined in *Johnson*, and, as that decision pointed out, this part of town is inherently a congested area. As the NTSB pointed out in *Johnson*, the presence or absence of people in certain parts town is irrelevant to their status as a congested area. Rather, it is the residential and/or commercial/business aspect of an area of town that makes that area congested because those parts of town have a high housing density. Because the area discussed in Scenario 1 is a residential/commercial/business part of town, that area is inherently congested, and it cannot be made uncongested by removing all the people from the area.

Scenario 2

The second scenario in your memorandum is set out as follows:

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[4] 3 N.T.S.B. 363 (1977).

[5] "While the Administrator is not bound by NTSB case law, the Administrator may follow it if it is persuasive." *In the Matter of David C. Siddall*, FAA Order No. 2008-9 (Oct. 7, 2008).

[6] *Johnson*, 3 N.T.S.B. at 365.

[7] *Id.*

> The lift is conducted over a privately owned large factory that is in normal operation. The factory sits on a very large lot that is approximately 1200 feet from a busy road. There is an open field which leads to a residential area and a large parking lot on the remaining sides of the property.

For this scenario, you ask whether the owner of the property and the operator can make the area "uncongested" by depopulating the factory and blocking the entrances and exits. You also ask whether, after it is uncongested, the area could become congested by people outside the area wandering in because they are attracted to the lift. Finally, you ask what type of impediments must be put into place by the operator to prevent people from wandering into the operation area.

Unlike the previous scenario, the operation site in this scenario does not appear to be located in an inherently congested area such as a town's business district. Because the factory over which the operation will be conducted is not located near any other structures, the question of whether the factory is in a congested area turns on whether there is a possibility of people gathering in that area.[8]

Since a large number of people can gather in a factory, in order to make the area uncongested, the factory must be depopulated and people must be prevented from reentering the factory while the operation is taking place. In addition, the open field, parking lot, and busy road surrounding the factory also have the potential for becoming congested areas because they can contain large numbers of people.[9] Accordingly, if any part of the operation takes place over the open field, parking lot, and busy road described in Scenario 2, those areas would also need to be depopulated, and people must be prevented from entering the area until the operation is over. Finally, no part of the operation may take place over the residential area mentioned in Scenario 2 because, as discussed above, the residential area of town is an inherently congested area.

Because an area is congested if it contains a large group of people, a depopulated uncongested area could potentially become congested if people wander into that area. The FAA's guidance provides one way to resolve this situation, which is by developing a contingency plan showing the means that the certificate holder intends to employ to maintain a sterile operation area. *See* FAA Order 8900.1, Vol. 3, Ch. 51, Sec. 6, 3-4203(E)(2). The specific impediments put in place by the operator to maintain a sterile area would be specific to the operation area, but they should effectively block outside people from entering the operation area.

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[8] *See* Simmons Letter (summarizing NTSB case law holding that operations near a large group of people are in a congested area).

[9] *See id.*; *Siddall* (finding that a busy road was a congested area).