U.S. Department
of Transportation
Federal Aviation Administration

Office of the Chief Counsel

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

APR - 7 2015

Dave Weiman
President
Flyer Publications Inc.
6031 Lawry Court
Oregon, WI 53575

Re: Request for Legal Interpretation Regarding IFR Clearances and Obstructions

Dear Mr. Weiman:

This is in response to your emails dated September 10, 2014 and October 28, 2014, in which you asked several questions relating to the following scenario:

> Pilot departs his private airstrip VFR and requests an IFR clearance from the closest air traffic control (ATC) facility. The elevation at the private airstrip is 950 feet MSL. Ceiling is 2000 feet MSL. Visibility is 6 miles or greater. ATC gives the pilot a transponder code, and confirms radar contact. ATC then asks the pilot if he can maintain obstacle clearance until reaching 3500 feet MSL on a northerly heading. Pilot says that he will be in instrument meteorological conditions (IMC) at 2000 feet MSL, so will be unable to see any obstacles. ATC says that if the pilot cannot maintain obstacle clearance until reaching 3500 feet, that he will be unable to give the pilot his IFR clearance.

First, you asked if ATC should have suggested a heading for the pilot to reach a higher ceiling in hopes of reaching 3500 feet MSL. You subsequently asked why ATC has taken the position of not assisting pilots in avoiding obstacles on the ground when such obstacles are known and within their area of radar coverage. You quoted the following provision from FAA Order 7110.65, paragraph 10-2-7, in support of your position:

> 3. If the aircraft has already encountered IFR conditions, inform the pilot of the appropriate terrain/obstacle clearance minimum altitude. If the aircraft is below appropriate terrain/obstacle clearance minimum altitude and sufficiently accurate position information has been received or radar identification is established, furnish a heading or radial on which to climb to reach appropriate terrain/obstacle clearance minimum altitude.

ATC was correct in not providing a heading to the pilot in your scenario because the pilot was operating under VFR below the minimum IFR altitude, and ATC was aware that the pilot could not climb in VFR conditions to the minimum IFR altitude. 14 C.F.R. § 91.177 establishes minimum altitudes for IFR operations. These altitudes are based on terrain and obstruction clearances. Section 91.177 states that no person may operate an aircraft under IFR below the applicable minimum IFR altitude except when necessary for takeoff or landing, or unless otherwise authorized by the FAA. In your scenario, the pilot sought an IFR clearance when he was operating under VFR below the minimum IFR altitude. ATC cannot ensure terrain and obstruction clearance until the minimum IFR altitude is reached. Therefore, the pilot in your scenario would be responsible for maintaining terrain and obstruction clearance during his climb to the minimum IFR altitude. ATC was aware that the pilot could not climb in VFR conditions to the minimum IFR altitude. Therefore, ATC should not have given specific course guidance to the pilot in your scenario.

The provision you quoted is ATC's policy in emergency situations when VFR aircraft have already encountered IFR conditions. A pilot operating an aircraft under VFR is required to comply with the basic VFR weather minimums prescribed in 14 C.F.R. § 91.155. Furthermore, under 14 C.F.R. § 91.173, a pilot may not operate an aircraft in controlled airspace under IFR unless that pilot has filed an IFR flight plan and has received an appropriate ATC clearance. If the pilot in your scenario encountered IFR conditions prior to receiving his IFR clearance, ATC would treat it as an emergency and would assist the pilot in reaching an appropriate terrain/obstacle clearance minimum altitude. However, the pilot would be in violation of 14 C.F.R. §§ 91.155 and 91.173.

Next, you asked if it is safe and legal for a pilot to accept responsibility for obstacle clearance when he cannot see obstacles on the ground. You then asked if it is safe and legal for a pilot to accept responsibility for obstacle clearance when he cannot see obstacles on the ground, but could "likely avoid" obstacles due to his knowledge of the area or his charts depicting obstacles on the ground. 14 C.F.R. § 91.13(a) states that "[n]o person may operate an aircraft in a careless or reckless manner so as to endanger the life or property of another." It may be deemed careless and reckless operation in violation of § 91.13(a) if a pilot stated that he could maintain terrain and obstruction clearance when he could not see obstacles on the ground. It may also be deemed careless and reckless operation in violation of § 91.13(a) if a pilot stated that he could maintain terrain and obstruction clearance when he could not see obstacles on the ground, but could "likely avoid" obstacles due to his knowledge of the area or his charts depicting obstacles on the ground.

Finally, you asked for details concerning an accident in which ATC was blamed for not providing advisories to prevent the accident. We are unaware of the accident you are referring. If you provide us with specific information about the accident, we will be happy to consider your question.

We appreciate your patience and trust that the above responds to your concerns. If you need further assistance, please contact my staff at (202) 267-3073. This response was prepared by Katie Patrick, Attorney, Regulations Division of the Office of the Chief Counsel, and

coordinated with Flight Standards Service, General Aviation and Commercial Division (AFS-800) and Air Traffic Organization, Mission Support Terminal Procedures (AJV-8).

Sincerely,

Mark W. Bury
Assistant Chief Counsel for Regulations