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

Office of the Chief Counsel

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

11/29/2023

The American Mosquito Control Association
One Capitol Mall, Suite 800
Sacramento, California 95814

Dear Board of Directors:

We recently received your letter dated July 28, 2023 [sic], requesting an interpretation of § 137.3 of Title 14 of the Code of Federal Regulations. We have determined that your request is appropriate for legal interpretation because it is novel. You asked several questions about the use of live insects, specifically mosquitoes carrying Wolbachia, a type of bacteria, in aircraft operations. We believe all of your questions boil down to whether certain operations involving the dispensing of live mosquitos are considered agricultural aircraft operations for purposes of part 137 applicability.

An agricultural aircraft operation is defined in 14 CFR § 137.3 as the operation of an aircraft for the purpose of (1) dispensing any economic poison, (2) dispensing any other substance intended for plant nourishment, soil treatment, propagation of plant life, or pest control, or (3) engaging in dispensing activities directly affecting agriculture, horticulture, or forest preservation, but not including the dispensing of live insects.

The definition of agricultural aircraft operation was last amended on July 2, 1968. Specifically, clause (3) was amended to limit "other activities directly affecting agriculture, horticulture, or forest preservation to those involving dispensing and expressly [exclude] the dropping of live insects as a dispensing activity."[1] The FAA explained operators not holding a part 137 certificate may be permitted to obtain a waiver from applicable part 91 provisions to engage in nondispensing type agricultural aircraft activities.[2]

In support of your request, you provided a case study containing a proposal from the U.S. Fish and Wildlife Service and the State of Hawaii to use Incompatible Insect Technique (IIT) to reduce mosquito populations within forest reserves, state parks, and private lands on the Hawaiian Islands of Maui and Kaua'i.

Based on the case study you supplied, the proposed operation would not be an agricultural aircraft operation covered by 14 CFR part 137, because these activities fall under the exclusion from the third clause of the definition as the operation involves the dispensing of live insects.

[1] 33 FR 9579, 9600 (July 2, 1968).
[2] *Id*.

The construction of the definition in § 137.3, specifically the exclusionary language "not including the dispensing of live insects," demonstrates that this exclusion applies to clause (3) only because the second and third clauses are separated by "or." The history indicates the amendment adding the exclusionary language to clause (3) was meant to clarify that while "dispensing activities directly affecting agriculture, horticulture, or forest preservation" could include activities that specifically involve "dispensing live insects" for part 137 purposes, such operations are expressly excluded from clause (3). Based on the plain language of clause (3) and the preamble for the final rule, "live insects" were excluded from clause (3) to clear up any potential confusion as to whether dispensing live insects would constitute an agricultural aircraft operation under part 137. Indeed, the absence of this express exclusion elsewhere in the definition signals that the first two clauses were not intended to encompass insect dispensing operations.

This opinion is further supported by a plain reading of the first two clauses of the definition, including consideration of the ordinary meaning "substance" as this term is not defined specifically for purposes of FAA regulations. First, the dispensing of this type of mosquitos, as proposed, does not classify as an economic poison, as defined by § 137.3, for FAA purposes as the insects are not a "substance or mixture of substances intended for preventing, destroying, repelling or mitigating" the organisms or pests. Second, these operations would not fall under clause (2) as live insects are not substances. Substance is defined as a physical material from which something is made or which has discrete existence.[3] As such, the proposed dispensing of live insects is not an agricultural aircraft operation for purposes of part 137. Furthermore, as the preamble states, releasing live insects may be permitted through other regulatory relief, such as a waiver from part 91 provisions, as a "nondispensing" agricultural type activity. The use of pods to dispense the mosquitoes and whether the live mosquitos are carrying Wolbachia does not alter our assessment of the case study provided.

For further questions about dispensing chemicals and agricultural products in accordance with part 137, an operator should seek assistance by email at uashelp@faa.gov.

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 Megan Culligan, Attorney-Adviser in the Regulations Division of the Office of the Chief Counsel, and coordinated with the General Aviation and Commercial Division of the Office of Safety Standards in the Flight Standards Service.

Sincerely,

LAURA JANE MEGAN-POSCH

Digitally signed by LAURA JANE MEGAN-POSCH
Date: 2023.11.29 10:08:08 -05'00'

Laura Megan-Posch
Assistant Chief Counsel for Regulations

[3] Substance. Merriam-Webster. https://www.merriam-webster.com/dictionary/substance (last visited October 30, 2023).