

Choose Your Landing Site Carefully

In 1991 the FAA denied the BFA's petition for lower minimum altitudes for balloons citing that the §91.119 of the Federal Aviation Regulation is adequate to conduct reasonable balloon flight. Still, there is a concern in ballooning that low flight to land, or for navigation, will lead to certificate action against pilots.

How the regulation is interpreted for ballooning is demonstrated in a recent National Transportation Safety Board decision. The case involves an appeal by both the pilot and the FAA of an Administrative Law Judge's decision regarding violation of §91.119 and §91.13 (Careless and Reckless Operation). The Board went to great length to explain why and how the regulations are applied to balloon flight.

The case involved a Southern California balloonist (*Balloon Life*, June 1995, *Minimum Safe Altitudes Rewritten?*, and February 1996, *Who's Making the Rules?*). The pilot made a flight in February, 1993 in Escondido, California. The city has an ordinance against balloons landing without prior permission of the chief of police. The pilot, who was conducting a commercial sightseeing flight, made two landings within the city limits. Both were in small confined spaces in congested areas. The pilot's final landing was in an open field outside of the city. The purpose of the first two landings was to exchange passengers.

In the original hearing the pilot claimed that a change in wind direction caused him to fly toward Escondido.

The police department cited the pilot for landing in the city limits. He plead guilty and paid a small fine. The police reported the incident to the FAA, which investigated and issued an order to suspend the pilot's certificate for 365 days.

In the original ALJ's decision the FAA's claim that the pilot had violated §91.119 was thrown out as "inapplicable to this case." Apparently the law judge concluded that if the respondent believed he had an adequate reason for landing where and when he did, then those landings were "necessary."

The NTSB, to which the decision was appealed, felt quite different. In reversing the law judge the board cited numerous cases that give guidance as to how the regulations are applied to balloons.

Following are excerpts from the NTSB decision in *Administrator v. Prior*:

"Respondent first landed in an empty parking lot near the intersection of Rock Springs Road and Mission Avenue in Escondido sometime after 8 a.m. to exchange passengers. Escondido Police Officer

Dana Gravette observed the landing and testified that the balloon, which she had seen 'flying at low altitude throughout the morning,' approached the intersection at an altitude of about 500-600 feet, and landed less than 50 feet from a building, 30 feet from powerlines, and less than 50 feet from light poles. The parking lot where the balloon landed was less than 70 feet wide and located in the City of Escondido, in a populated area, where there are several businesses_

"After exchanging passengers, the balloon took off, traveling again over the City of Escondido. Police Officer Ben Martinez testified that he saw the balloon, just over the trees, descend near the intersection of Third Avenue and Juniper Street in a busy area of Escondido. It landed in a 40-foot wide parking lot, within 50 feet of powerlines, 15 feet from trees, and 15 feet from a building. Pedestrians had gathered and there were several vehicles on the two busy streets. After respondent exchanged passengers, the balloon took off again_

"An FAA inspector/safety program manager testified that the landings within the City of Escondido and their concomitant takeoffs were, at minimum, careless because both sites were in congested areas and dangerously close to powerlines. He opined that, unless respondent was experiencing an emergency, he should not have landed at or taken off from those locations. (Respondent did not assert that an emergency situation had occurred.) He concluded that respondent's low flight was not necessary for takeoff or landing.

"Respondent admitted that he flew less than 1,000 feet over the highest obstacle but insists that his actions were necessary for takeoff and landing. He asserted that the areas where he landed were not congested at that time of day and, in any event, balloons should be judged by a different standard than fixed-wing aircraft because, in a balloon, a loss of power at a *higher* altitude is actually more dangerous to the balloon occupants than a loss of power at a *lower* altitude_ As an experienced balloon pilot, he argued, he had the skill to land and take off at the sites he chose, as evidenced by the fact that no one was injured and no property was damaged.

"Respondent stated that the balloon pilot should have the unbridled autonomy to determine whether a site is appropriate for landing at that moment. He further testified that, 'I had always been under the impression up to this time that the FAA was wise enough to let [the balloon pilot] have this authority to make that decision without interfering with that authority by holding the pilot responsible for the results of that decision. If that landing was a safe landing and everyone was okay, then his site selection decision was a good decision. If an accident occurred he, perhaps, made a poor decision and he could then be reviewed by the FAA to determine if he was careless or needed to get better pilot skills.'

"_Based on [NTSB] review of the transcript, briefs, and evidence, we are obliged to reverse the initial decision and constrained to express some dismay with the law judge's apparent disregard for the ample Board precedent on the issues presented in this case. The application of the language in section 91.119 (formerly 91.79) regarding low altitude flight that is 'necessary for takeoff and landing' is well-established. For example, in the case of Administrator v. Cobb and O'Connor, which was cited by the Administrator during closing argument, two pilots were found to have operated two fixed-wing aircraft

within 500 feet of obstacles on the ground over a sparsely populated area and then landed on a taxiway. The Board, after concluding that the respondents exercised poor judgment in choosing a landing site that necessitated low flight over buildings, powerlines, cars, and people stated;

"'We cannot accept respondent's proposition that the low altitudes at which their aircraft were operated were excused by the prefatory clause of section [91.119]. As the law judge stated, respondent's interpretation of the above regulation would in effect excuse low flight where necessary for 'any takeoff or any landing from any area anywhere at any time.' Such an interpretation is patently fallacious in that it would excuse low flight regardless of the appropriateness of the landing site.'

"Similarly, in Administrator v. Kittlosen, the Board discussed when low flight was 'necessary for takeoff and landing' under section 91.119 (c):

"'[R]espondent could not simply choose any takeoff route or time and call it necessary. He must make a reasonable, appropriate choice, or the regulation has no meaning. Administrator v. Lewis & Lewis. We, thus, reject respondent's contention that the rule does not apply simply because he was conducting a takeoff.'

"In the context of balloon flight, we refer to Administrator v. Rees. In Rees, the respondent's commercial pilot certificate was revoked for violations of sections 91.119 (a), (b), and (c), and 91.13 (a) in connection with four incidents of operating a hot air balloon in low flight. We determined that the appropriateness of the landing site, 'in terms of the necessity for landing there,' is part of the equation when evaluating a pilot's landing choices. Similarly, in Administrator v. Cory the respondent operated a balloon in low flight over residences and other structures and landed in a parking lot near cars and light poles. The Board found that the law judge correctly considered the suitability of the landing site in his analysis when he concluded that respondent's low flight was not necessary for landing. If the landing site is inappropriate under the circumstances, then the low flight cannot be excused under the regulation as necessary for landing.

"[In] Administrator v. Van de Hoef where a balloon pilot was found to have operated above a congested area below an altitude of 1,000 feet above the highest obstacle. Specifically, he operated the aircraft over Seattle, Washington, and landed in a northwest suburb of the city. We agreed with the law judge that both the takeoff and landing sites were inappropriate and, thus, did not involve permissible low flight. Just as in the instant case, while the low flight may have been a prerequisite to the questioned landing, that landing itself was inappropriate.

"[Also] Administrator v. Willauer another balloon low flight case, where, citing 'Cory' and 'Rees', supra, we noted, 'Board precedent is clear that the prefatory language of [91.119] will not serve to excuse a pilot unless the evidence establishes that the chosen landing site was suitable.

"While in the instant case, the Administrator does not address head-on the issue of other appropriate landing sites, the facts as established indicate that respondent's third landing, effected outside the City of

Escondido, took place in an area that was significantly less congested than the areas of the first two landings. Therefore, respondent certainly had the option to refrain from landing in the City of Escondido and, instead, land the balloon in a more suitable location.

"[In Rees] where we stated, [W]e think it clear that the law judge's conclusion that these sites were inappropriate is based not 'solely' on the fact that they were within congested areas, but also on the availability of alternative sites respondent could have employed which, not being within congested areas, would not have entailed the risks to persons and property below that these landing sites, close to residences and powerlines, posed and that the regulation is intended to minimize or avoid.

"Given the facts as established by the testimony of the two police officers, the FAA inspector, and respondent himself, the two landings in the City of Escondido occurred in congested areas that, based on Board precedent, were not appropriate for takeoff or landing. Both landing sites were unsuitable due to their close proximity to powerlines, buildings, and trees and the availability of alternative sites. Respondent was not faced with an emergency situation, but instead was anxious to please his customers and provide each with a 30-minute balloon ride. As such, the low flights were not necessary for takeoff or landing, within the meaning of the regulation.

"Respondent's argument that section 91.119 should not apply to balloons was squarely addressed in 'Rees,' and is not, as respondent contends, 'being newly applied to balloons.' In 'Rees,' the Board agreed with the Administrator's interpretation that a balloon's heater is its 'power unit,' the failure of which is addressed in section 91.119(a). We rejected the argument in 'Rees' that, because balloons have less lateral control over where they will land if a heater fails, the regulation does not apply to balloons.

"In disagreeing with the respondent's notion that the regulation does not apply to balloons, we noted, the circumstance that a balloon has less lateral control following a power unit failure than other aircraft and thus would have less ability to avoid collision with persons or property on the ground in an emergency landing does not point to inapplicability of the regulation. It would suggest, rather, a reading that this regulation does not permit balloons to operate over any congested area at any altitude. We do not understand the Administrator to be urging such a view in this case.

"Moreover, FAR section 91.119 (a) seeks to minimize the hazard an aircraft's low flying poses to persons and property 'on the surface,' not to those in the aircraft."

The NTSB Board, based on maximum penalties under FAA sanctioning guidelines for 91.13 and 91.119, ordered a 300-day suspension of respondent's commercial pilot certificate. Editor