

SERVED: March 30, 2023

NTSB Order No. EA-5947

UNITED STATES OF AMERICA  
**NATIONAL TRANSPORTATION SAFETY BOARD**  
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD  
at its office in Washington, D.C.  
on the 30<sup>th</sup> day of March, 2023

_____	)	
BILLY NOLEN,	)	
Acting Administrator,	)	
Federal Aviation Administration,	)	
	)	
Complainant,	)	
	)	Docket SE-30880
v.	)	
	)	
TRENTON J. PALMER,	)	
	)	
Respondent.	)	
	)	
_____	)	

**OPINION AND ORDER**

***1. Background***

Respondent and the Administrator appealed the Oral Initial Decision of Administrative Law Judge Darrell L. Fun, issued on April 6, 2022, in which the law judge affirmed the regulatory violations in the Administrator’s amended order, but reduced the sanction from a 120-day suspension to a 60-day suspension. The law judge ruled that the Administrator proved by a preponderance of the evidence that respondent operated a low altitude flight in violation of 14 C.F.R. §§ 91.119(a), (c) and 91.13(a) but identified mitigating factors justifying a reduced

penalty.<sup>1</sup> Both parties timely appealed. For the reasons set forth below, we deny respondent's appeal and grant the Administrator's appeal.

*A. Facts*

Respondent holds a Private Pilot Certificate and is the registered owner of N318JJ, a 1997 Johnson John T KITFOX V.<sup>2</sup> On November 24, 2019, respondent operated N318JJ as the pilot-in-command near 300 Desert Sun Lane and 400 Desert Sun Lane in Reno, Nevada.<sup>3</sup> While conducting a low inspection pass during the flight, respondent operated the aircraft within 500 feet of persons, vessels, vehicles, and structures,<sup>4</sup> and at an altitude of 100 feet or less than 100 feet above ground level.<sup>5</sup> During the flight near the residences, three adults and two children were outside and witnessed respondent's pass.

*B. Procedural Background and Witness Testimony*

On October 8, 2020, the Administrator issued an Order of Suspension, which became the complaint in this case, alleging respondent violated 14 C.F.R. §§ 91.119(a), (c) and 91.13(a). Respondent timely appealed the order on October 8, 2020, and filed an answer to the complaint on October 16, 2020. The Administrator amended the complaint on September 20, 2021, suspending respondent's certificate for 120 days. The law judge conducted a three-day hearing from March 29, 2022, to April 1, 2022, and issued an oral initial decision on April 6, 2022. The parties cross-appealed. Respondent timely appealed on April 8, 2022, and filed a supporting brief

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<sup>1</sup> A copy of the law judge's initial decision is attached.

<sup>2</sup> Amended Compl. at ¶¶ 1-2; Answer at ¶¶ 1-2.

<sup>3</sup> Amended Compl. at ¶ 3; Answer at ¶ 3.

<sup>4</sup> Amended Compl. at ¶ 4(a)-(c); Tr. 26-27, 353; Oral Initial Decision at 708, 710.

<sup>5</sup> Amended Compl. at ¶ 4; Tr.190; Oral Initial Decision at 699.

on June 9, 2022.<sup>6</sup> The Administrator filed a reply brief on August 10, 2022.<sup>7</sup> The Administrator timely appealed on April 12, 2022, and filed a perfecting brief on May 26, 2022. Respondent filed a reply brief on June 27, 2022.

At the hearing before the law judge, the following witnesses testified on the Administrator's behalf: Gabriel Pena; Julia Pena; Russell Stanley; respondent; Inspector Ronald Green, Principal Operations Inspector and Aviation Safety Inspector at the FAA Flight Standards District Office (FSDO); and Jared Likes. Roy Speeg, Jr., FAA Technical Specialist, testified for the Administrator as an expert in general aviation and flight operations. Respondent also testified on his own behalf.

Mr. Pena testified that he had resided at 400 Desert Sun Lane in Reno, Nevada for over five years.<sup>8</sup> He stated that he is an electrician and a combat veteran from the United States Seabees, serving for four years.<sup>9</sup> Mr. Pena explained that he was a heavy machine gunner, mostly on the MK19 machine gun, and was deployed twice, once to Iraq and once to Kashmir.<sup>10</sup> According to Mr. Pena, using the MK19 provided him with experience in estimating distances, stating because the weapon is a grenade launcher, he was required to estimate the distance of the target.<sup>11</sup>

Mr. Pena testified that on Sunday, November 24, 2019, at 12:00 p.m., he was talking to his neighbor, Russell Stanley, on his fence line.<sup>12</sup> Referring to a photograph, he described the

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<sup>6</sup> On May 4, 2022, the General Counsel extended the time for respondent to file an appeal brief to June 9, 2022.

<sup>7</sup> On June 24, 2022, the General Counsel extended the Administrator's deadline to file a reply brief to August 10, 2022.

<sup>8</sup> Tr. 45.

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> *Id.* 45-46.

<sup>12</sup> *Id.* 46, 48.

structures on and near his property and where they are located, including his and Mr. Stanley's houses, his driveway, backyard, propane tank, dog kennel, two stable areas, and chicken coop.<sup>13</sup> Mr. Pena stated that while he was talking to Mr. Stanley, his wife pulled up in a car to drop off their daughter, and then his wife drove into the garage, parked, and began walking toward them while carrying their son.<sup>14</sup> Mr. Pena stated that his wife was walking past an area near the front door when he heard a loud engine noise coming from the north of the property, but because he could not see any aircraft or vehicle, Mr. Pena believed the aircraft was flying low to the ground and below the line of his house.<sup>15</sup> Mr. Pena testified that he yelled at his wife to start running, explaining,

[S]o when I saw the aircraft when it came into view, it looked to me like it was pretty much at the ridge line of my house, which is about 20 feet off grade of my home, off the grade of the garage. And when I saw the aircraft it was performing a hard eastward banking aggressive maneuver and then it seems to straighten out as it dipped a little bit lower and then it pulled up. Actually, I thought it was going to crash into my neighbor's [...]<sup>16</sup>

Mr. Pena estimated that the aircraft was no more than 300 feet from where he was standing, and 25 to 30 feet above the grade of his house, or five to ten feet above the ridge peak of his roof.<sup>17</sup>

Mr. Pena also surmised that the aircraft flew over his propane tanks based on their location on his property.<sup>18</sup> Mr. Pena described photographs taken when the FAA measured the distances between his property structures on December 19, 2019.<sup>19</sup> Mr. Pena stated that he observed the aircraft fly northeast to southeast, further explaining,

So when I saw the aircraft, it was performing a – almost a 90 degree bank maneuver. If

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<sup>13</sup> *Id.* 47-48.

<sup>14</sup> *Id.* 49-50.

<sup>15</sup> *Id.* 50-51.

<sup>16</sup> *Id.* 52.

<sup>17</sup> *Id.* 53-54.

<sup>18</sup> *Id.* 55.

<sup>19</sup> *Id.* 82-94; Exh. A-17.

you're piloting the aircraft it would be turning to the left and then it quickly straightened out, it dipped a little bit going south, slightly southwest, and then it rose up a little bit and went over [my neighbor] Mr. Likes' house and then went off into the horizon so that that hard left bank maneuver, when it came into my sight, would lead me to believe that it was coming towards my house, I guess coming from the east, which would make sense with the – and then it did a hard left bank to orientate itself more southerly and then it dipped down and then rose above my neighbor's house. It was probably above his – the peak of his roofline from what I saw, maybe 30 feet over his house.<sup>20</sup>

Mr. Pena further estimated that the aircraft flew about 30 feet above his propane tank.<sup>21</sup>

On cross-examination, Mr. Pena testified that he had not observed the aircraft fly over his property before the incident in question, although he had seen it fly over once after the incident.<sup>22</sup>

He also testified that as a result of the one pass the aircraft made, there was no damage to his property.<sup>23</sup> However, Mr. Pena stated that he, his wife, and daughter were traumatized by the incident, although they did not seek medical treatment.<sup>24</sup> At no time was the aircraft directly over Mr. Pena's head.<sup>25</sup> Mr. Pena testified that neither he nor his wife is a pilot and that they reported the incident to the sheriff and the FAA.<sup>26</sup>

On re-direct, Mr. Pena asserted that two and a half years after the incident, his daughter is visibly shaken when an aircraft flies over the house or in close proximity, and both of his children ask questions, such as whether the aircraft is going to crash into their house.<sup>27</sup> At the time of the incident, Mr. Pena's son was one year old and his daughter was between three and four years old.<sup>28</sup>

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<sup>20</sup> Tr. 93-94.

<sup>21</sup> *Id.* 101.

<sup>22</sup> *Id.* 102.

<sup>23</sup> *Id.* 102-03.

<sup>24</sup> *Id.* 103.

<sup>25</sup> *Id.* 105.

<sup>26</sup> *Id.* 105-06.

<sup>27</sup> *Id.* 109.

<sup>28</sup> *Id.*

Upon questioning from the law judge, Mr. Pena stated that he and his wife saw the aircraft flying low again a few weeks later and they wondered whether the flight was “some type of intimidation tactic or harassment.”<sup>29</sup> Mr. Pena and his wife were in their backyard when they observed the aircraft, which he estimated was 200 to 300 feet from them. While Mr. Pena did not report the second flight to the FAA, he mentioned it to the FAA Inspector.<sup>30</sup> Further, Mr. Pena clarified that during the November 24<sup>th</sup> flight, he estimated that the aircraft was 50 feet above his propane tank at the moment it first came into view and then it dipped a bit lower.<sup>31</sup> When Mr. Pena first heard the aircraft, he stated that he initially thought something was crashing into or near his house and as a combat veteran, the sound startled him.<sup>32</sup> When he initially saw the aircraft, Mr. Pena stated that his thoughts were, “[d]isbelief, shock, anger that somebody would do something like that.”<sup>33</sup>

Ms. Pena, Mr. Pena’s wife, testified that she works from home and has lived at 400 Desert Sun Lane in Reno, Nevada for over five years.<sup>34</sup> On November 24, 2019, Ms. Pena states that she had returned home with two of her children at around 11:50 a.m. when she saw her husband speaking with their neighbor, Mr. Stanley.<sup>35</sup> Her daughter asked to get out of the car and after speaking with her husband and Mr. Stanley for a few minutes, Ms. Pena drove toward the house and parked either in or near the garage.<sup>36</sup> Ms. Pena stated that she took her son out of the car and dropped off her belongings, and then while holding her son, began walking toward her

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<sup>29</sup> *Id.* 110.

<sup>30</sup> *Id.* 111.

<sup>31</sup> *Id.* 111-12.

<sup>32</sup> *Id.* 112.

<sup>33</sup> *Id.* 113.

<sup>34</sup> *Id.* 121.

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

husband, daughter, and Mr. Stanley.<sup>37</sup> Before she reached them, Ms. Pena testified that she heard a “very loud engine” and although she could see that her husband was yelling, she could not hear him.<sup>38</sup> Ms. Pena described her observations as,

All I could hear was an engine coming from somewhere behind me and then I looked towards where I could hear the engine sound moving towards, which is coming more from south and I saw it come into view past the garage peak, the roofline because I had a view of the two different roofline sections.

And I saw it and I was immediately just kind of dumbfounded because I couldn’t believe how close it was to the house and how close it was to the ground. And then it continued going south towards our neighbor’s house at 300 Desert Sun and I actually – I was ready to watch it impact into the house because I thought there was no reason that this plane was so low unless it was having an emergency and so I thought for sure it was going to crash into my neighbor’s living room.

But at the last minute he pulled up and flew over the house and kept going straight until he was out of view.<sup>39</sup>

She testified that the experience was frightening, leading the Penas to report the incident to the FAA.<sup>40</sup> Ms. Pena stated that she did not see the aircraft until it passed the garage and estimated that it was 50 feet above the ground while passing over the garage.<sup>41</sup> When Ms. Pena observed the aircraft, she testified that it did not make any quick turns and therefore, she assumed it was flying straight ahead, over the horse stables, propane tank and/or the hay shed.<sup>42</sup>

She also explained that when she saw the aircraft, she believed it banked because she viewed the underside of the wing.<sup>43</sup> Ms. Palmer stated that she saw red and white markings, and possibly blue markings, on the underside of the airplane.<sup>44</sup> She and her husband reviewed the

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<sup>37</sup> *Id.* 121-22.

<sup>38</sup> *Id.* 122.

<sup>39</sup> *Id.* 122-23.

<sup>40</sup> *Id.* 123.

<sup>41</sup> *Id.* 124-26.

<sup>42</sup> *Id.* 126-27.

<sup>43</sup> *Id.* 127.

<sup>44</sup> *Id.* 128.

camera footage from the garage camera and confirmed the markings.<sup>45</sup> Ms. Pena stated that the right side of the aircraft tilted upward, and then the aircraft straightened as it flew over the Penas' property fence line that they share with Mr. Likes.<sup>46</sup> Ms. Pena testified that once the aircraft came into her view, it was near the propane tank and/or hay shed, and the wings were level at the time it reached the fence between hers and Mr. Likes' properties.<sup>47</sup> Ms. Pena estimated that the aircraft was still 50 to 60 feet in altitude as it flew over the fence line.<sup>48</sup> Ms. Pena stated that the airplane pulled up once it flew closer to Mr. Likes' residence, describing the movement as a "pretty quick pull up," then leveling out and staying at the same altitude for the duration of Ms. Pena's observation.<sup>49</sup> Ms. Pena recalled that the aircraft continued flying in a straight path until she lost sight of it.<sup>50</sup>

After viewing a video depicting part of the flight that the law judge declined to admit into evidence, Ms. Pena recollected that the aircraft flew over the eastern side of Mr. Likes' swimming pool and at the edge of his garage.<sup>51</sup> Ms. Pena stated that when she heard the aircraft, she was in a state of panic and wanted to run, but did not know in which direction to run because she initially could not see the airplane.<sup>52</sup> Once the airplane was in her view, she thought she was safe, but believed that the aircraft was going to crash into her neighbor's house.<sup>53</sup> Ms. Pena recalled that she and her husband contacted the FAA the same week in which they observed the

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<sup>45</sup> *Id.* 128.

<sup>46</sup> *Id.* 129-30.

<sup>47</sup> *Id.* 134-35.

<sup>48</sup> *Id.* 135.

<sup>49</sup> *Id.*

<sup>50</sup> *Id.* 136.

<sup>51</sup> *Id.* 140.

<sup>52</sup> *Id.* 141-42.

<sup>53</sup> *Id.* 142.



flight.<sup>54</sup> Ms. Pena testified that her one-year-old son cried when the aircraft flew overhead and that her daughter talked about the low-flying airplane for months and continued to do so at the time the hearing took place.<sup>55</sup>

On cross-examination, Ms. Pena stated that when she first saw the aircraft, it was flying away from her in a left bank, but moving in a straight line.<sup>56</sup> Ms. Pena testified that her observation of the flight at issue lasted two or three seconds.<sup>57</sup> She also acknowledged that jets from the Reno air races fly close enough to her property to hear and see them, but that they “turn around out in the field.”<sup>58</sup>

Mr. Stanley testified that on November 24, 2019, he resided at 445 Desert Sun Lane, next door to the Penas.<sup>59</sup> He stated that on that date around lunchtime, he was at the fence between his and the Penas’ property, speaking with his neighbor, Mr. Pena.<sup>60</sup> Mr. Stanley identified the properties, including his and the Penas’, on an unadmitted photograph.<sup>61</sup> Mr. Stanley recalled that Ms. Pena and her children were on their property, but could not remember their exact location.<sup>62</sup> Regarding respondent’s aircraft, Mr. Stanley testified that,

I noticed the airplane flying on the eastern side of the valley, up along the mountain range or ridge line or whatever you want to call it. He was coming from the south so it would have been my right. I was facing the east. And then he came and was flying down across that ridge line to the left, over the BLM [Bureau of Land Management land north of the properties]<sup>63</sup> ... which is on the left-hand side.

Kind of really didn’t think much of it and then kind of I looked out to the BLM range and

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<sup>54</sup> *Id.* 143.

<sup>55</sup> *Id.* 145.

<sup>56</sup> *Id.* 149-50.

<sup>57</sup> *Id.* 155.

<sup>58</sup> *Id.* 154.

<sup>59</sup> *Id.* 159.

<sup>60</sup> *Id.* 159-60.

<sup>61</sup> *Id.* 161-62.

<sup>62</sup> *Id.* 162.

<sup>63</sup> *Id.* 160.

saw him turn to the left and then started coming back to us, towards us at a lower altitude or level than he was when he was heading out over the BLM...<sup>64</sup>

Mr. Stanley estimated that the aircraft was 80 feet above the ground when flying over the Penas' house.<sup>65</sup> Mr. Stanley further explained that it was a clear day and the mountain range is likely a mile or less from his home.<sup>66</sup> He stated that he recognized the aircraft because it had flown over their properties multiple times, "but this one was specifically just a little bit too low for our comfortableness."<sup>67</sup> Mr. Stanley stated that the aircraft made a U-turn after flying over the mountain range, and flew south, heading back toward him and Mr. Pena at a sustained, lower altitude.<sup>68</sup> Mr. Stanley also noted that the aircraft grew louder when it turned and moved to a lower altitude.<sup>69</sup> In addition, the witness explained that the aircraft was briefly out of sight when his view was obscured by trees and the Penas' house.<sup>70</sup> Mr. Stanley also testified that after flying over the Penas' house, the aircraft made a "little bit of a left turn" during which he saw the bottom side of the wing, and then "it just took off."<sup>71</sup> Mr. Stanley observed the aircraft turn left before reaching Mr. Likes' house, noting that the airplane also increased in altitude by 15 to 20 feet as it turned.<sup>72</sup> However, according to Mr. Stanley, the airplane was approximately the same distance above Mr. Likes' house as it was when flying over the Penas' house – about 80 to 100 feet.<sup>73</sup>

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<sup>64</sup> *Id.* 162-63.

<sup>65</sup> *Id.* 163.

<sup>66</sup> *Id.* 163-64.

<sup>67</sup> *Id.* 164.

<sup>68</sup> *Id.* 165-66.

<sup>69</sup> *Id.* 166-67.

<sup>70</sup> *Id.* 168.

<sup>71</sup> *Id.* 169.

<sup>72</sup> *Id.* 170, 172.

<sup>73</sup> *Id.* 172.

On cross-examination, Mr. Stanley testified that he has never taken flying lessons.<sup>74</sup> When asked whether he considered himself to be traumatized by the flight, Mr. Stanley responded that it bothered him and he was disturbed, explaining that his wife and children ran out of the house when they heard the aircraft.<sup>75</sup> He acknowledged that the airplane did not hit anyone's house.<sup>76</sup>

Respondent testified that the wing-span of his aircraft, N318JJ, is 32 feet, its true speed is 100 miles per hour, and the landing speed is approximately 32 miles per hour.<sup>77</sup> Respondent stated that as of November 24, 2019, he had 900 hours as the pilot-in-command in the aircraft.<sup>78</sup> He acknowledged that on or about December 7, 2017, he received counseling from the FAA, Reno FSDO concerning the use of an unmanned aircraft system outside of N318JJ, noting that he was not the pilot-in-command at that time.<sup>79</sup> He also received a letter of warning from the FAA regarding a flight for which he was the pilot-in-command and was carrying a passenger.<sup>80</sup> During that flight, respondent engaged in water skiing on Lake Tahoe, which respondent described as dragging the airplane tires on the water.<sup>81</sup>

Respondent testified that he received a letter of investigation from FAA Reno Inspector Morgan concerning his November 24, 2019, operation of N318JJ in the vicinity of 300 and 400 Desert Sun Lane.<sup>82</sup> In response, respondent stated that he contacted Mr. Morgan, but was unable

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<sup>74</sup> *Id.* 174-75.

<sup>75</sup> *Id.* 176.

<sup>76</sup> *Id.*

<sup>77</sup> *Id.* 179.

<sup>78</sup> *Id.*

<sup>79</sup> *Id.* 180-82; Exh. A-3.

<sup>80</sup> Tr. 184; Exh. A-4.

<sup>81</sup> Tr. 184.

<sup>82</sup> *Id.* 186; Exh. A-5.

to recall that conversation.<sup>83</sup> Respondent also testified that he went to the Reno FSDO on December 3, 2019, and viewed a video of his November 24<sup>th</sup> flight.<sup>84</sup> Respondent stated that he confirmed that the aircraft was his and that he was the pilot-in-command during the flight.<sup>85</sup> Respondent admitted that the video showed that he flew in the proximity of 300 and 400 Desert Sun Lane and acknowledged that he flew less than 100 feet from the ground while operating the aircraft.<sup>86</sup> Regarding the flight, respondent testified, “I was making a low inspection pass at an RC [(remote controlled)] runway that was in the backyard of my friend’s house as part of a safe landing procedure as outlined in the off airport ops guide that the FAA has released.”<sup>87</sup> He further explained that a low inspection pass has to be conducted at 70 miles an hour at 16 knots ground speed and that he determined that the intended land site was not safe for landing because he could not identify the intended touchdown spot clearly enough when viewing it from his left window.<sup>88</sup> Respondent stated that because this was a low inspection pass, he assessed the safety and feasibility of the landing site, but did not intend to land during the pass.<sup>89</sup> Respondent stated that he flew over the nearby mountains at an altitude of 500 to 1,000 feet, but disputed Mr. Stanley’s testimony that respondent made a left turn over the mountains; rather, respondent stated that he maneuvered north of the area.<sup>90</sup>

According to respondent, an hour earlier, he was heading toward Bedell Flats and to the Reno Stead Airport, and flying in a straight line meant flying over the Desert Sun Lane housing

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<sup>83</sup> Tr. 186-88.

<sup>84</sup> *Id.* 188.

<sup>85</sup> *Id.* 188-89.

<sup>86</sup> *Id.* 189-90.

<sup>87</sup> *Id.* 191.

<sup>88</sup> *Id.* 193.

<sup>89</sup> *Id.* 194.

<sup>90</sup> *Id.* 198-99.

development.<sup>91</sup> He clarified that at the lowest point in the pass, flying over the center meant flying over 300 Desert Sun Lane.<sup>92</sup> When he typically conducts a high reconnaissance pass over the Desert Sun Lane area at about 500 to 1,000 feet, respondent testified that,

I had observed the Likes' backyard had a large flat graded area that they used for flying the open toe airplanes. It was pointing roughly north/northeast would be the departure path. You would approach from the north/northeast. My assessment of it was that it was a one way in/one way out which is fairly typical for off airport landings, the only reason being that the approach or departure from the south would put you over powerlines and even closer to other houses whereas the approach from the north had you over open BLM land.

Also to the east of all the Google map images that you've shown there is a draw on the back side of what would be the Pena's [sic] property that sets a lower terrain, so I was – made the assessment from above that my best approach would be up that draw towards the RC landing strip. It really was just the clearest spot in that backyard.<sup>93</sup>

On cross-examination, respondent again testified that he understood the term “water skiing” to mean dragging the aircraft's tires on the water, explaining that it is a landing technique, but that he was not water skiing during the November 24, 2019 flight.<sup>94</sup> Moreover, respondent testified that Mr. Likes had granted him permission to land on his property because Mr. Likes and his son fly radio-controlled airplanes, stating that this was part of the reason for respondent's operation on November 24<sup>th</sup>.<sup>95</sup> Respondent testified that he flies over the flats and near the residential properties multiple times per week, noting that the Bedell Flats area is frequented by aircraft for training and maneuvering, and given that the Reno Stead Airport is used for air races, he has observed F-5's, the Air National Guard, Black Hawks and Schnook helicopters, and air race planes, such as Mustangs and P6s, in the area.<sup>96</sup> Respondent further

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<sup>91</sup> *Id.* 199-201.

<sup>92</sup> *Id.* 201.

<sup>93</sup> *Id.* 202-03.

<sup>94</sup> *Id.* 215-16.

<sup>95</sup> *Id.* 217-18.

<sup>96</sup> *Id.* 219-20.

stated that he lives two miles south of Desert Sun Lane, asserting that it is not uncommon for the Air National Guard to fly through the area during the day or night at 200 feet above the ground.<sup>97</sup>

Respondent further testified that his aircraft, N318JJ, is capable of takeoff and landing at 150 feet while at sea level on a “standard day.”<sup>98</sup> He estimated that the shortest landing he has made was at 30 to 50 feet.<sup>99</sup> Respondent stated that he often flies in the “back country,” at unimproved strips and off airport operations.<sup>100</sup> Respondent estimated that he has landed his aircraft off-airport more than 1,000 times.<sup>101</sup> He also stated that during the 2018-2019 time period, he flew approximately three to four times per week, noting that it was not uncommon for him to land 30 plus times off-field per week.<sup>102</sup> Respondent explained that after making changes to the aircraft before November 24, 2019, it is quieter, guessing that the plane was measured at 71.8 decibels at takeoff.<sup>103</sup> Respondent surmised that if his engine suddenly failed, he would lose thrust, but would not suddenly lose lift and the aircraft would not careen out of control.<sup>104</sup> Rather, respondent testified that he would have to descend to maintain proper airflow over the wing to sustain lift, and assuming no other structural failures, he would have “full and complete” control over the aircraft.<sup>105</sup>

On November 24, 2019, respondent stated that his intention was to make a low inspection pass to assess the feasibility of the landing site, as outlined in the FAA Off Airport Ops Guide.<sup>106</sup>

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<sup>97</sup> *Id.* 220.

<sup>98</sup> *Id.* 485.

<sup>99</sup> *Id.* 486.

<sup>100</sup> *Id.* 489.

<sup>101</sup> *Id.* 489-90.

<sup>102</sup> *Id.* 490.

<sup>103</sup> *Id.* 492.

<sup>104</sup> *Id.*

<sup>105</sup> *Id.* 493-94.

<sup>106</sup> *Id.* 494.

Respondent explained that while he would normally fly over the strip to assess its length, “on the later portion of my approach to the strip, I was unable to identify my touchdown point. At which point I made a slight left turn and aborted the operation.”<sup>107</sup> Respondent testified that had he lost his engine during the November 24<sup>th</sup> flight, he would have landed in the sagebrush in a vacant lot near Mr. Likes’ property, noting that he is very familiar with the area in which he was flying.<sup>108</sup> According to respondent, there was plenty of room to effect an emergency landing.<sup>109</sup> Respondent stated he was in control of his aircraft at all times during the November 24<sup>th</sup> operation.<sup>110</sup> Respondent disagreed with Inspector Speeg’s suggestion<sup>111</sup> that respondent could have taken a better approach path, stating,

The primary [path] I placed myself off to the right of my landing site, so that I can view it out of my window and door on my left side, since I sit in the left seat. If I were to place it off the right, my panel and cowling would be covering that, as well as my passenger seat floorboard. And specifically the distance he showed inspecting it from would have been insufficient to gather really any useful data on the landing site. I think he had me offset by something like 300 feet. And it would just be ineffective.<sup>112</sup>

Respondent testified that he used a Google Earth image to draw his flight path and intended landing site on Mr. Likes’ land.<sup>113</sup> Respondent further explained that he placed his aircraft to the right of the runway, between the proposed landing area and Mr. Likes’ house so that he could inspect the surface conditions and landing site off of his left wing and through the window.<sup>114</sup> Respondent testified that had he identified a landing site, he would have performed a

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<sup>107</sup> *Id.* 495.

<sup>108</sup> *Id.* 497.

<sup>109</sup> *Id.*

<sup>110</sup> *Id.* 498.

<sup>111</sup> *See infra* summary of Inspector Speeg’s testimony.

<sup>112</sup> Tr. 501-02.

<sup>113</sup> *Id.* 503 (discussing Exh. R-2).

<sup>114</sup> *Id.* 503-04.

“left crosswind” turn to land.<sup>115</sup> Rather, respondent stated that after he chose not to land, he flew to Stead airport and landed.<sup>116</sup> Respondent testified that Mr. Morgan from FSDO contacted him about the November 24<sup>th</sup> flight and during their conversation, respondent stated that he did not remember flying over houses because he was flying often and could not recall that flight.<sup>117</sup> Respondent testified that he met with three or four people at FSDO, including Mr. Morgan and Inspector Green.<sup>118</sup> At the meeting, respondent was shown a video of his aircraft and he informed the attendees that the video depicted him flying the aircraft.<sup>119</sup>

On additional cross-examination, respondent acknowledged that his aircraft has dual controls so that he could operate the airplane from the left or right seat.<sup>120</sup> However, he testified that he could not have operated from the right seat during the November 24<sup>th</sup> flight because all of his hours in the aircraft have been in the left seat, switching seats would have added another variable to consider, and his primary gauges are on the left side.<sup>121</sup> Respondent explained that on November 24<sup>th</sup>, he flew over the potential landing site on Mr. Likes’ property at over 500 feet above the ground and had he landed there, he would have approached to the south because the land slopes downhill to the north and he would use the “up slope” toward the south to assist in stopping.<sup>122</sup> Respondent also testified that another reason to avoid approaching from the south is the presence of houses and power lines, although his primary concern was the runway’s slope.<sup>123</sup>

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<sup>115</sup> *Id.* 505-06.

<sup>116</sup> *Id.* 507.

<sup>117</sup> *Id.* 508-09.

<sup>118</sup> *Id.* 510.

<sup>119</sup> *Id.*

<sup>120</sup> *Id.* 511.

<sup>121</sup> *Id.* 512.

<sup>122</sup> *Id.* 517-19. *See also* Exh. R-2.

<sup>123</sup> Tr. 519-20. *See also* Exh. R-2.



Respondent stated that he decided not to land shortly before he executed his left turn.<sup>124</sup>

Respondent stated that he had been to his intended landing area before and disagreed with Mr.

Likes' testimony that the runway runs from east to west.<sup>125</sup>

On cross-examination, respondent did not recall informing the FAA during the December 3<sup>rd</sup> meeting that he opted not to land at his intended landing site because he deemed the site unsafe.<sup>126</sup> Respondent denied that he could not identify the landing site because his altitude was too low, but stated that, "It was much harder to identify from the perspective that you would have on the approach than I had anticipated. And there were just not enough identifying features to the terrain."<sup>127</sup> Moreover, respondent asserted that he did not recall whether he spotted the fence line separating the Penas' and Likes' houses.<sup>128</sup> Although respondent stated he did not recall his lateral distance from Mr. Likes' property, he estimated that the distance was 100 to 150 feet.<sup>129</sup> Respondent also clarified that he was not intending to land, but was executing a low pass.<sup>130</sup> Respondent explained that while flying at 100 feet in altitude at 70 miles per hour at a 40 degree bank, the bank would add load to the wing, "With added load, it adds drag and your lift vector is no longer in the vertical position. So yeah, you wouldn't be able to glide as far in a turn, as you can flat and level or with level wings."<sup>131</sup> Respondent testified that while flying over the Desert Sun Lane area, his aircraft would require a slightly longer runway for takeoff and landing because of the thinner air at the higher altitude.<sup>132</sup>

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<sup>124</sup> Tr. 520. *See also* Exh. R-2.

<sup>125</sup> Tr. 521. *See also* Exh. R-2.

<sup>126</sup> Tr. 521.

<sup>127</sup> *Id.* 522.

<sup>128</sup> *Id.*

<sup>129</sup> *Id.* 523.

<sup>130</sup> *Id.* 523-25.

<sup>131</sup> *Id.* 537.

<sup>132</sup> *Id.* 538.

On re-direct, respondent testified that the Penas' and Likes' properties are at about 5,500 to 5,700 feet above sea level, but the altitude difference from his takeoff and landing point did not materially affect his aircraft's performance.<sup>133</sup> When asked whether the pass he made on November 24<sup>th</sup> was necessary for him to evaluate the landing area for suitability for landing, respondent replied, "Absolutely, yes."<sup>134</sup>

In response to the law judge's questioning, respondent confirmed that he routinely flies over the Desert Sun Lane area, usually at 6,000 to 6,500 feet above mean sea level.<sup>135</sup> He further testified that above ground level, his standard cruise altitude over sparsely populated, rural areas was 500 to 1,000 feet "if I'm only transitioning for five minutes and to another landing."<sup>136</sup> Respondent stated he did not recall on November 24<sup>th</sup> how high above ground level he was transitioning, or his altitude above ground level when he decided to get a closer look at the runway on the Likes' property, or how far away he was from the Likes' property when he traveled northbound to Bedell Flats.<sup>137</sup> He also did not recall when he began his low pass or descended to 100 feet above ground level.<sup>138</sup> Respondent did not recall any landmarks to assist him in locating the runway, stating that he believed there was sagebrush "or something" at the intersection of one of the roads in the Likes' backyard, but respondent could not identify it from the air.<sup>139</sup> For purposes of landing on the runway on the Likes' property, respondent testified that he did not study any navigational or aviation maps.<sup>140</sup> Explaining why he chose not to land or

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<sup>133</sup> *Id.* 538-39.

<sup>134</sup> *Id.* 540.

<sup>135</sup> *Id.* 540-41.

<sup>136</sup> *Id.* 541-42.

<sup>137</sup> *Id.* 542-43.

<sup>138</sup> *Id.* 543.

<sup>139</sup> *Id.* 545.

<sup>140</sup> *Id.* 546.

conduct additional inspection passes, respondent stated,

I think there was a multitude of reasons that I decided it was not worth going back. And within that was not being able to identify that, but also I did factor in the proximity of [the] house and if that landing, you know, was worth me inspecting over and over. So I chose – to move on.<sup>141</sup>

The law judge asked respondent whether he considered conducting his low pass in the opposing direction to the intended landing site facing northward, while offsetting the landing site to respondent's left, and respondent stated that he had not thought of that.<sup>142</sup> Respondent elaborated that the terrain rises to the south by 20 to 30 feet, so the low inspection pass would have been less effective.<sup>143</sup>

Respondent testified that he has likely known Mr. Likes since 2012, explaining that he raced radio-controlled cars with Mr. Likes and Mr. Likes' son, both of whom worked on respondent's house.<sup>144</sup> Respondent recalled that he received permission to land on the Likes' property before September 2019.<sup>145</sup> Prior to conducting the low pass during the November 24<sup>th</sup> flight, respondent stated that he was not in contact with Mr. Likes or his son.<sup>146</sup> Respondent also stated that he did not make any radio calls as he made the low pass or approached the vicinity of Desert Sun Lane because there were not enough recognizable landmarks to identify his location.<sup>147</sup> Finally, respondent reiterated that the only reason he made the low pass on November 24<sup>th</sup> was to determine the suitability of the landing location.<sup>148</sup>

Inspector Ronald Green testified that he is the Principal Operations Inspector and

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<sup>141</sup> *Id.*

<sup>142</sup> *Id.* 549-50. *See also* Exh. R-2.

<sup>143</sup> Tr. 550.

<sup>144</sup> *Id.* 553.

<sup>145</sup> *Id.* 554.

<sup>146</sup> *Id.*

<sup>147</sup> *Id.* 555.

<sup>148</sup> *Id.* 556.

Aviation Safety Inspector at the FAA Reno FSDO and has been employed by the FAA for two and a half years.<sup>149</sup> He described his duties as managing certificates for both organizations and airmen, investigating aircraft accidents, and taking complaints from the general public about matters that involve aviation.<sup>150</sup> Prior to joining the FAA, Inspector Green served in the U.S. military for 20 years as an aviator and has approximately 4,500 hours of flight time.<sup>151</sup> Inspector Green stated that he holds the following airmen certificates: airline transport pilot for rotorcraft helicopter; commercial pilot for airplane, single engine land, and instrument airplane; flight instructor for rotorcraft helicopter and instrument helicopter; and remote pilot.<sup>152</sup>

On November 24, 2019, Inspector Green stated that he served as an Operations Inspector and Aviation Safety Inspector, but had not yet been promoted to as a Principal Operations Inspector.<sup>153</sup> He explained that his office received a video of a low-flying aircraft in the North Valley areas around Reno and Inspector Green was assigned to assist now-retired Inspector Morgan with his investigation.<sup>154</sup> As part of the investigation, the inspectors interviewed the Penas, Mr. Stanley, Mr. Likes, and respondent.<sup>155</sup> Inspector Green testified regarding a photograph of the Penas' garage that Inspector Green took to depict the security camera that captured respondent's aircraft as it flew near the Penas' house and to give a sense of scale because the FAA took many measurements from the center of the garage.<sup>156</sup> Inspector Green also identified a photograph of an area on the Penas' property including Inspector Morgan, the Penas'

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<sup>149</sup> *Id.* 223-24.

<sup>150</sup> *Id.* 224.

<sup>151</sup> *Id.* 224-25.

<sup>152</sup> *Id.* 225.

<sup>153</sup> *Id.*

<sup>154</sup> *Id.* 225-26.

<sup>155</sup> *Id.* 226.

<sup>156</sup> *Id.* 227; Exh. A-17 at 1.

propane tank, and the nearby mountains, explaining that the photograph was taken to depict a distance of 300 feet from the Penas' driveway to where Inspector Morgan stood.<sup>157</sup> Inspector Green also explained that a photograph of Inspector Morgan standing next to the propane tank was taken to demonstrate the proximity of the tank to the Penas' driveway and house, which was a little over 56 feet.<sup>158</sup> Inspector Green also identified a photograph of Inspector Morgan standing approximately 78 feet from the center of the Penas' garage and a fence, which also showed the propane tank, the stable, and the Penas' neighbor's home to the east and testified the photograph was taken because he and Inspector Morgan believed it represented the location of respondent's flight path.<sup>159</sup> Further, the witness identified a photograph taken from the center of the garage facing south toward Mr. Likes' residence and including Mr. Pena at the fence line between his and Mr. Likes' properties.<sup>160</sup> Inspector Green testified that the photograph contains Mr. Penas' driveway, Mr. Likes' house, fences on Mr. Likes' property, powerline poles, and other neighbors' houses, and noted that the elevation rises on Mr. Likes' property.<sup>161</sup> He also testified that in the photograph, Mr. Pena was approximately 226 feet from the center of his driveway.<sup>162</sup> Further, Inspector Green stated that the distance from the center of the garage to eastern edge of the house at the white gutter was 15 feet.<sup>163</sup>

To determine the location of respondent's flight path, Inspector Green stated that he relied on the video received with the initial complaint, as well as "the known size of the aircraft, and its size in the frame in relation to the ground, and the height at which the garage camera, or the

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<sup>157</sup> Tr. 228-29, 232; Exh. A-17 at 3, 5.

<sup>158</sup> Tr. 232-33; Exh. A-17 at 7, 9.

<sup>159</sup> Tr. 234-35, 240; Exh. A-17 at 11, 13.

<sup>160</sup> Tr. 235; Exh. A-17 at 15.

<sup>161</sup> Tr. 235-36; Exh. A-17 at 15.

<sup>162</sup> Tr. 236-37; Exh. A-17 at 15, 17.

<sup>163</sup> Tr. 239.

camera at the peak of the garage is located, 20 feet above the ground.”<sup>164</sup> Moreover, he stated that he relied on the witnesses’ description of the flight.<sup>165</sup> Inspector Green testified that he and Inspector Morgan considered the slope of certain parts of the properties, including the downslope from the Penas’ garage toward the east, which rises again to the east, but stated that they did not assess the grade of slope for the propane tank.<sup>166</sup> Inspector Green pointed out the location of power poles northwest of the Likes’ driveway in the photograph of Mr. Pena standing at the line between his and Mr. Likes’ property and on a slide Inspector Green created using Google Earth and PowerPoint to demonstrate respondent’s flight path and the structures and witnesses within the 500 foot lateral limit of the path.<sup>167</sup> According to Inspector Green, the power poles were contained within in the 500 foot lateral limit.<sup>168</sup>

On cross-examination, Inspector Green agreed that Google Earth images are not updated on a regular basis.<sup>169</sup> On the image that Inspector Green created, everything to the right of the flight path is desert scrub.<sup>170</sup> Inspector Green also stated that he interviewed respondent and when he showed him the video of the flight, respondent conceded that he was in the video.<sup>171</sup> Inspector Green further explained that he received a total of two videos as part of his investigation into respondent’s flight, and while he believed that the FAA received the video from the garage security camera via email, he was unsure of the exact method used to submit the video.<sup>172</sup> He did not recall seeing a flash drive or CD of the videos, but expounded that while at

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<sup>164</sup> *Id.* 241.

<sup>165</sup> *Id.* 241-42.

<sup>166</sup> *Id.* 243.

<sup>167</sup> *Id.* 246, 250-54; Exhs. A-17 at 15; A-18.

<sup>168</sup> Tr. 254.

<sup>169</sup> *Id.* 256.

<sup>170</sup> *Id.* 256; Exh. A-18.

<sup>171</sup> Tr. 257.

<sup>172</sup> *Id.* 257-58.

the Penas' house, he connected his FAA-issued camera to the Penas' computer to upload the videos to the camera, which he took back to his office to upload to the investigation file.<sup>173</sup>

Inspector Green stated that he viewed the version of the security camera video that he uploaded to his camera, but does not know whether the video was in its native format.<sup>174</sup> Finally, Inspector Green testified that to his knowledge, the videos obtained as part of the investigation did not have sound.<sup>175</sup>

Moreover, Inspector Green acknowledged that the bulk of the measurements he and Inspector Morgan took were based on their interviews with the Penas and Mr. Stanley.<sup>176</sup> Inspector Green testified that he did not measure the size of the Penas' or Likes' lots and did not measure the distance of any potential landing area on Mr. Likes' lot because they were unable to reach Mr. Likes to obtain a statement or get permission to access his property.<sup>177</sup>

On re-direct, Inspector Green testified that he and Inspector Morgan visited the Penas on December 19, 2019, and took the discussed photographs, measurements, and retrieved the video.<sup>178</sup> He clarified that to obtain the video from the Penas' computer, he used a USB connection to direct connect the camera with the computer.<sup>179</sup> Inspector Green testified that he also used the USB connection to transfer the video and photographs from his camera to a shared drive at his office.<sup>180</sup> On the shared drive, the files are labeled using the enforcement investigative report (EIR) number for the case.<sup>181</sup>

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<sup>173</sup> *Id.* 258-60.

<sup>174</sup> *Id.* 266.

<sup>175</sup> *Id.* 279.

<sup>176</sup> *Id.* 261.

<sup>177</sup> *Id.* 262-63.

<sup>178</sup> *Id.* 279-80.

<sup>179</sup> *Id.* 280.

<sup>180</sup> *Id.* 281.

<sup>181</sup> *Id.*

Upon questioning from the law judge, Inspector Green explained that they took a photograph of Inspector Morgan approximately 300 feet from the center of the Penas' garage to obtain a sense of scale. Although they believed that respondent's flight path was approximately 78 feet from where the photo was taken, Inspector Green recalled that they were unable to measure 500 feet, so they selected 300 feet to get a sense of the scale given the lack of landmarks.<sup>182</sup> Inspector Green testified that he and Inspector Morgan assessed the aircraft's altitude using the videos of the flight and approximate dimensions of the aircraft.<sup>183</sup> Inspector Green did not recall discussing the use of a laser range finder to obtain measurements on Mr. Likes' property.<sup>184</sup>

Inspector Green agreed that there were two videos obtained as part of the investigation – one from the garage peak camera and one from the front door camera, clarifying that those were the only two videos he viewed.<sup>185</sup> He testified that when reviewing the case file, he viewed the garage peak and front door videos taken using an iPhone, rather than the native files.<sup>186</sup> Additionally, Inspector Green stated that he viewed the videos he stored on his camera as he uploaded it onto the FAA shared drive, and he recalls that they were the videos taken with the iPhone.<sup>187</sup> Inspector Green remembered that the videos were short, about three to ten seconds in length.<sup>188</sup> Once he uploaded the files from the camera to the shared drive, Inspector Green stated that he deleted the files from his camera so that he had adequate storage capacity for his other

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<sup>182</sup> *Id.* 282-83.

<sup>183</sup> *Id.* 283.

<sup>184</sup> *Id.* 284-85.

<sup>185</sup> *Id.* 285.

<sup>186</sup> *Id.* 286.

<sup>187</sup> *Id.* 287.

<sup>188</sup> *Id.* 287-88.



duties.<sup>189</sup> Inspector Green stated that he and Inspector Morgan visited the Penas three times, and the December 19, 2019 visit was the second visit; they first met with the Penas shortly after receiving the initial complaint and the third visit was after Christmas or in early January 2020.<sup>190</sup> Inspector Green testified that Inspector Morgan visited the Penas a few times on his own between January and April 2020.<sup>191</sup>

On further re-direct, Inspector Green clarified that he and Inspector Morgan determined the approximate altitude of respondent's aircraft using various factors, including the garage video, witness statements, and the downgrade slope of the property east of the Penas' house.<sup>192</sup>

On re-cross examination, Inspector Green confirmed that when he stated that he based respondent's approximate altitude on the garage peak video, he was referring to the video of the video, not the native file.<sup>193</sup> He also testified that he did not ask the Penas for the native file of the video and was unaware whether Inspector Morgan requested the native file.<sup>194</sup> Finally, Inspector Green acknowledged that after downloading the video file to the FAA shared drive, he could have saved a copy on his camera's SD card.<sup>195</sup>

After being recalled as a witness, Inspector Green further testified that he attended the third meeting with respondent at the Reno FSDO and that respondent stated that he was conducting an approach to a radio-controlled airfield on Mr. Likes' property.<sup>196</sup> According to Inspector Green, respondent stated that he did not land on Mr. Likes' property because he

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<sup>189</sup> *Id.* 288.

<sup>190</sup> *Id.* 289-90.

<sup>191</sup> *Id.* 291.

<sup>192</sup> *Id.* 292-93.

<sup>193</sup> *Id.* 293.

<sup>194</sup> *Id.* 293-94.

<sup>195</sup> *Id.* 294.

<sup>196</sup> *Id.* 449.

deemed it unsafe.<sup>197</sup> In addition, he testified that during the meeting with respondent, Inspector Green and Mr. Morgan showed respondent the video of the aircraft and respondent admitted that he was flying.<sup>198</sup>

Jared Likes testified that on November 24, 2019, he resided at 300 Desert Sun Lane and had lived there for 18 years.<sup>199</sup> He stated that while living at that residence, he observed aircraft flying over the desert area “quite a bit.”<sup>200</sup> Mr. Likes testified that he granted respondent permission to land on his property, but mentioned that he was not home during respondent’s November 24<sup>th</sup> flight.<sup>201</sup> Mr. Likes stated that he and his son fly electric remote controlled airplanes and created an area on his property for conducting the operations with a 400 to 500 feet landing area.<sup>202</sup> Mr. Likes also testified that he has flown with respondent in his aircraft a “handful” of times and they landed off-airport, including in an area a 20 minutes’ drive north of his home.<sup>203</sup> When he flew with respondent, Mr. Likes described the landings as “[v]ery safe and doable,” estimating that after touchdown, the aircraft rolled a short distance, about 100 feet.<sup>204</sup>

On cross-examination, Mr. Likes testified that he was not in respondent’s aircraft on November 24, 2019.<sup>205</sup> Mr. Likes stated that he flew with respondent about a month before November 24<sup>th</sup>.<sup>206</sup> He further explained that when operating his radio-controlled aircraft, he used

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<sup>197</sup> *Id.* 449-50.

<sup>198</sup> *Id.* 464.

<sup>199</sup> *Id.* 298.

<sup>200</sup> *Id.* (Mr. Likes initially testified that he did not observe aircraft flying over “that area” when he resided at 300 Desert Sun Lane).

<sup>201</sup> *Id.* 299.

<sup>202</sup> *Id.* 299-300.

<sup>203</sup> *Id.* 300-01.

<sup>204</sup> *Id.* 304-05.

<sup>205</sup> *Id.* 305.

<sup>206</sup> *Id.*

a 400 to 500 foot clearing as a runway, with approximately 10 acres of open space behind it.<sup>207</sup>

Mr. Likes denied ever flying a drone in that area, but acknowledged that his nephew may have.<sup>208</sup> Furthermore, Mr. Likes reiterated that no one was at his home during respondent's flight on November 24<sup>th</sup>.<sup>209</sup>

Upon questioning from the law judge, Mr. Likes recalled giving respondent permission to land on his runway on his property at least a month before November 24, 2019, informing respondent that he could use the runway if he ever needed it and believed that he granted respondent the permission a single time.<sup>210</sup> Mr. Likes clarified that he granted respondent permission to land on his property at any time respondent needed to land and did not limit the permission to any specific dates or times.<sup>211</sup> Mr. Likes stated that the runway had been on his property for years and estimated that it was 25 to 30 feet wide, describing it as a smooth dirt runway with a bit of scrub.<sup>212</sup> Mr. Likes guessed that the runway was at least 500 feet from his home and was oriented east to west.<sup>213</sup> He also testified that there are other areas on his property that could be used as runways, stating, "I had a complete perimeter trail, path around that place with paths through my yard on ten acres that I could land anywhere out there."<sup>214</sup>

On recross-examination, Mr. Likes testified that he and his son are still good friends with respondent and have flown with respondent, but not recently because both Mr. Likes and his son have been busy.<sup>215</sup> Mr. Likes moved about eight miles down the street from his 300 Desert Sun

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<sup>207</sup> *Id.* 306.

<sup>208</sup> *Id.* 307-08.

<sup>209</sup> *Id.* 308.

<sup>210</sup> *Id.* 308-09.

<sup>211</sup> *Id.* 309.

<sup>212</sup> *Id.* 310.

<sup>213</sup> *Id.* 310-11.

<sup>214</sup> *Id.* 311.

<sup>215</sup> *Id.* 311-12.

Lane residence and respondent lives about eight miles “down the road.”<sup>216</sup>

Over respondent’s objection, Roy Speeg, Jr. testified as an expert in general aviation and flight operations, with a particular focus on low flight operations, and the FAA regulatory requirements for low flight operations.<sup>217</sup> He testified that he has worked for the FAA for 18 years and is currently on the EIR review team.<sup>218</sup> Inspector Speeg stated he was a Regional Aviation Event Specialist for the Northwest Mountain Region from 2012 to 2017, dealing with waivers for air shows, banner-tow operations, cross-country air races, and aerobatic competitions under section 91.119(a).<sup>219</sup> He asserted that he is very familiar with the regulation and when waivers are permitted.<sup>220</sup> Inspector Speeg stated that prior to joining the FAA, he held a “statement of aerobatic competency down to 500 feet.”<sup>221</sup> Inspector Speeg noted that he possesses the following airmen certificates: airline transport pilot, single and multi-engine land with type ratings in all the citation 500 series business jets, the Airbus A-320 series, and the Embraer 171-90 series; and flight instructor with instrument airplane and multi-engine instructor ratings.<sup>222</sup> He further testified that he has a little more than 6,500 hours of flight time as a pilot-in-command.<sup>223</sup>

Inspector Speeg explained that during a low pass, a pilot ensures that there are no animals, fallen trees, or other obstacles on the runway and performs the low pass at a slower than

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<sup>216</sup> *Id.* 312.

<sup>217</sup> *Id.* 343-45. The law judge found that Inspector Speeg was not qualified as an expert in short field take off and landings with regarding to the Kitfox 5 aircraft.

<sup>218</sup> *Id.* 318.

<sup>219</sup> *Id.* 318-19, 321.

<sup>220</sup> *Id.* 319.

<sup>221</sup> *Id.*

<sup>222</sup> *Id.* 321.

<sup>223</sup> *Id.*

cruise speed.<sup>224</sup> According to Inspector Speeg, if the runway is clear, the pilot would “come back around and land.”<sup>225</sup> He also testified that considering the statements from the Penas and Mr. Stanley and the photographs and measurements, respondent’s aircraft was an estimated 50 feet in altitude during the low pass on November 24<sup>th</sup>.<sup>226</sup> He also estimated that based on the evidence presented at hearing, when Mr. Pena first spotted the aircraft, it was 78 feet in lateral distance from the Penas’ house and 30 to 50 feet above the ground.<sup>227</sup> Inspector Speeg further opined that respondent flew at altitudes that would not allow him to react timely in an emergency, stating,

He would have to first fly the airplane. He would have to figure out where he was going to put the airplane down. And he would have to be able to do all of that without creating undue hazard to the persons or property on the surface. And I’m not sure that that could have been done from 30 to 50 feet above the ground in a steep bank, because if the engine quits in a steep bank, you’re going to have an immediate loss of width, because the wings are sideways. They’re not level with the horizon. Whether they have STOL additions to the wing or not. But STOL additions to the wing are useless if they’re in, you know, six feet or more degrees of bank.<sup>228</sup>

He also stated that in an emergency, respondent’s attempts to land would create an undue hazard to those residing in the neighborhood, and noted that banking the aircraft could result in structure failure.<sup>229</sup> Inspector Speeg explained that respondent himself made statements indicating that it was unsafe to land on the east side of his flight path, meaning that the only place to land would have been in the residential subdivision – creating an undue hazard to people and property.<sup>230</sup> Inspector Speeg testified that, referring to the map that Inspector Green created, the propane tank was the structure closest to the Penas’ home.<sup>231</sup> Moreover, Inspector Speeg opined that

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<sup>224</sup> *Id.* 348.

<sup>225</sup> *Id.* 348-49.

<sup>226</sup> *Id.* 350.

<sup>227</sup> *Id.* 353-54.

<sup>228</sup> *Id.* 357.

<sup>229</sup> *Id.* 359-60.

<sup>230</sup> *Id.* 361.

<sup>231</sup> *Id.* 365-66 (discussing Exh. A-18). Respondent’s counsel conceded that the propane tank is a

respondent's aviation maneuvers were not necessary for landing, elaborating that banking is not required to "get to an area to assess a possible landing area."<sup>232</sup> He concluded that respondent engaged in intentionally reckless behavior in violation of section 91.119(a).<sup>233</sup>

Inspector Speeg further testified that respondent violated section 91.119(c) by flying recklessly at low altitudes with disregard for the safety of people and structures.<sup>234</sup> Inspector Speeg identified aggravating factors he considered in reaching his opinions, including: the degree of hazard respondent created; respondent's experience level, which the witness considered to be generally low; the intentional nature of respondent's actions; and the prior warnings the FAA issued to respondent.<sup>235</sup> Inspector Speeg further expounded that, "[t]he margin for error when you're operating that low to the ground, things happen fast. ... like I said if the engine quit, a lot of things have to happen real fast in order to get that airplane to a place where you can land it, let alone get on the ground."<sup>236</sup> He expressed a lack of confidence that respondent could respond in an emergency given respondent's level of experience, reiterating his opinion that respondent showed a significant disregard for safety.<sup>237</sup>

On cross-examination, Inspector Speeg testified that he had never met respondent or had an opportunity to assess his flying skills prior to the instant case.<sup>238</sup> He also acknowledged that section 91.119 does not mention an aircraft's bank angle and that an FAA pilot flying handbook is advisory, rather than mandatory.<sup>239</sup> Inspector Speeg further testified that respondent's maneuvers

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structure. *Id.* 365.

<sup>232</sup> *Id.* 367.

<sup>233</sup> *Id.*

<sup>234</sup> *Id.* 367-68.

<sup>235</sup> *Id.* 368.

<sup>236</sup> *Id.* 369.

<sup>237</sup> *Id.*

<sup>238</sup> *Id.* 370.

<sup>239</sup> *Id.* 370-71.

during the November 24<sup>th</sup> flight were not necessary for normal flight, traffic pattern operations, or to observe a possible landing spot, and that based on the video he viewed, he estimated that respondent's aircraft banked at up to 60 degrees.<sup>240</sup> Inspector Speeg agreed with respondent's counsel that on a three-degree glide slope, an aircraft that is one mile from a runway is 300 feet from the ground, and an aircraft one-quarter of a mile from a runway is 75 feet from the ground.<sup>241</sup> Respondent's counsel then questioned the expert witness concerning a photograph of the Linden, NJ airport, showing that the airport is near several houses, and asserting that airplanes operate in close proximity to persons and properties well below 500 feet during landing.<sup>242</sup> In response to whether such an assertion is correct, Inspector Speeg responded, "They do, but ..." before respondent's counsel interrupted him.<sup>243</sup> Inspector Speeg opined that during instrument instruction "at a developed airport," students aim to become comfortable "coming down to minimums," where they are flying close to the ground, buildings, and structures.<sup>244</sup> Inspector Speeg agreed that a low-flying aircraft may operate in an airfield regularly in sparsely populated areas, adding, "[t]his is not a sparsely populated area."<sup>245</sup> He also acknowledged that how well a pilot flies is based on skill and experience, as well as judgment.<sup>246</sup> In addition, he agreed that where an aircraft lands depends on the pilot's skill, the aircraft's capabilities, and applicable regulations.<sup>247</sup>

Referring to the FAA Off Airport Ops Guide, Inspector Speeg testified that making a pass to examine the landing surface is permissible when performed correctly, and while the pass

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<sup>240</sup> *Id.* 371-73.

<sup>241</sup> *Id.* 376-78.

<sup>242</sup> *Id.* 379-81.

<sup>243</sup> *Id.* 380-81.

<sup>244</sup> *Id.* 381-82.

<sup>245</sup> *Id.* 383.

<sup>246</sup> *Id.* 384-85.

<sup>247</sup> *Id.* 389.

requires a low altitude, Inspector Speeg opined that, “[y]ou have to be at an altitude that takes you higher than the intended point of landing.”<sup>248</sup> Inspector Speeg also explained that a pilot must conduct a higher level pass to determine whether there are obstructions to landing and in a sparsely populated area, a pilot may fly low to the ground, but must remain 500 feet from persons, property, vessels, and vehicles.<sup>249</sup>

On re-direct, Inspector Speeg testified that under the applicable regulations,

except for takeoff and landing, you have to stay above the altitudes indicated in the regulation. So if you’re doing a pass over it, that’s not landing or take off, and I think that’s been interpreted previously. But so if you do a low pass and decide not to land, you have to stay, you know, 500 feet above persons, property on the ground. You have to be able to land without causing undue hazard if you lost an engine.<sup>250</sup>

Moreover, Inspector Speeg identified alternative flight paths respondent could have taken that would not have violated the regulations.<sup>251</sup>

In response to questioning from the law judge, Inspector Speeg opined that under the regulations, an aircraft may fly within 500 feet of persons, property, structures, vessels or vehicles if it was done for purposes of landing.<sup>252</sup> Further, the Inspector stated that the pilot exercises judgment when determining which flight path to take and the regulation applies regardless of whether there are other, safer approaches for landing.<sup>253</sup> Inspector Speeg also explained that there is a difference between a low pass and an approach to land because during a low pass, no landing is actually performed.<sup>254</sup> Finally, Inspector Speeg stated that he did not view respondent’s intended landing area in person, but formed his opinion based on the exhibits and

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<sup>248</sup> *Id.* 393-94; Exh. A-22 at 3.

<sup>249</sup> Tr. 394-97.

<sup>250</sup> *Id.* 407.

<sup>251</sup> *Id.* 409-12.

<sup>252</sup> *Id.* 412-13.

<sup>253</sup> *Id.* 414.

<sup>254</sup> *Id.* 415.



testimony.<sup>255</sup> He also testified that he did not know whether he viewed the native video of respondent's flight or a copy.<sup>256</sup>

On additional re-direct, Inspector Speeg testified that if respondent's flight path was necessary for landing and he could ensure a landing without causing an undue hazard to persons or property on the ground, then respondent would not have violated section 91.119(a).<sup>257</sup>

On re-cross examination, Inspector Speeg testified that section 91.119 does not differentiate between on airport and off airport operations and FAA's off airport operations guidance is advisory.<sup>258</sup> Furthermore, Inspector Speeg stated that it is "prudent" to conduct off airport operations in accordance with FAA's guidance, so long as it is consistent with the regulations.<sup>259</sup>

Upon additional questioning from the law judge, Inspector Speeg opined that, except when necessary for takeoff or landing, section 91.119(a) sets forth altitude limits on flights, explaining "we have to be at an altitude that allows[,] if a power unit fails a landing, an emergency landing without undue hazard."<sup>260</sup> Inspector Speeg testified that section 91.119(c) addresses distances.<sup>261</sup>

Prior to issuing his decision, the law judge denied respondent's motion to dismiss the case for failure to state a claim upon which relief can be granted.<sup>262</sup> Respondent argued that the Administrator's amended complaint failed to allege that the low pass operation was not

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<sup>255</sup> *Id.* 416-17.

<sup>256</sup> *Id.* 417.

<sup>257</sup> *Id.* 424.

<sup>258</sup> *Id.* 425.

<sup>259</sup> *Id.* 426.

<sup>260</sup> *Id.* 429.

<sup>261</sup> *Id.* 426.

<sup>262</sup> *Id.* 580-81.

necessary for takeoff or landing, as stated in the prefatory clause of Section 91.119.<sup>263</sup> The Administrator asserted that whether the low altitude operation was necessary for takeoff or landing is an affirmative defense that respondent must prove.<sup>264</sup> In denying the motion, the law judge cited Board precedent and determined that respondent has the burden of proving the low operation was necessary for takeoff or landing.<sup>265</sup>

*C. Law Judge's Oral Initial Decision*

In the April 6, 2022, Oral Initial Decision, the law judge determined that the Administrator proved respondent violated 14 C.F.R. §§ 91.119(a), (c) and 91.13(a) by operating his aircraft at low altitudes, but mitigated the sanction from a 120-day suspension to a 60-day suspension. In making this determination, the law judge cited the regulatory violations alleged in the complaint, noted respondent's admissions and denials in his answer, listed the admitted exhibits, summarized the witness testimony, and addressed respondent's affirmative defenses. The law judge modified the complaint and found that the Administrator proved by a preponderance of the evidence most allegations in the modified complaint.

The law judge made several findings of fact and conclusions of law. The law judge found that: respondent holds a private pilot certificate; he is the registered owner of a 1997 Johnson John T Kitfox 5, registration number N318JJ; on November 24, 2019, respondent was the pilot-in-command of his aircraft in the vicinity of 400 Desert Sun Lane and 300 Desert Sun Lane in Reno, Nevada; and respondent flew less than 100 feet above ground level during his low pass.<sup>266</sup> The law judge modified paragraph 4 of the Administrator's amended complaint so that it reads,

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<sup>263</sup> *Id.* 570-71.

<sup>264</sup> *Id.* 571.

<sup>265</sup> *Id.* 580. Although the law judge acknowledged that respondent's motion to dismiss was untimely, the law judge declined to dismiss the motion on those grounds. *Id.* 572.

<sup>266</sup> Oral Initial Decision at 698-99.

“During the referenced flight operation, you operated N318JJ at altitudes of 100 feet AGL or less than 100 feet AGL.”<sup>267</sup> The law judge further found that the propane tank on the Penas’ property is a structure under the regulations.<sup>268</sup> The law judge held that the preponderance of the evidence showed that respondent flew less than 500 feet from the Penas’ residence and their stable, shed, and propane tank.<sup>269</sup> The law judge determined that while the Penas’ testimonies were likely biased and embellished because of their marital relationship, the problems they had with Mr. Likes flying drones near their home, and their belief that respondent retaliated against them on Mr. Likes’ behalf, the law judge did not believe that they falsified their testimonies about what they saw on November 24<sup>th</sup>.<sup>270</sup> Further, the law judge found Mr. Stanley’s testimony to be credible, noting that he corroborated the Penas’ testimonies concerning the flight path, his testimony was not embellished, and he did not have an “axe to grind.”<sup>271</sup>

Based on his findings, the law judge modified the amended complaint as follows: paragraph 4(a) will now read, “closer than 500 feet of a stable, shed, and propane tank”; paragraph 4(b) will now read “closer than 500 feet of a residential home at 400 Desert Sun Lane”; and paragraph 4(c) will now read “closer than 500 feet of an adult and a child who were outside the residential home at 400 Desert Sun Lane.”<sup>272</sup> The law judge found that the Administrator failed to prove paragraph 4(d), alleging that respondent operated within 300 feet or closer than 500 feet of two adults and two children near the perimeter of 400 Desert Sun Lane.<sup>273</sup>

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<sup>267</sup> *Id.* at 699.

<sup>268</sup> *Id.* at 701.

<sup>269</sup> *Id.* at 706, 708.

<sup>270</sup> *Id.* at 704.

<sup>271</sup> *Id.* at 705.

<sup>272</sup> *Id.* at 708, 710.

<sup>273</sup> *Id.* at 711.

The law judge criticized the Administrator for failing to obtain or preserve the native video from the Penas' garage peak camera showing respondent's aircraft on November 24<sup>th</sup>.<sup>274</sup> However, the law judge declined to apply an adverse inference and instead, excluded copies of the video taken with an iPhone and other evidence relying on the video, and gave no weight to Inspector Speeg's and Inspector Green's testimonies based on the excluded video copy.<sup>275</sup>

In evaluating whether respondent's low pass at 100 feet above ground level allowed for an emergency landing without undue hazard to persons or property in the event of a power unit failure, the law judge credited Inspector Speeg's testimony concerning respondent's ability to land in an emergency, which was not based the excluded video and which the law judge found credible.<sup>276</sup> The law judge cited Inspector Speeg's opinion that respondent could have flown an alternate route further to the east to avoid structure or people, noting that during the law judge's questioning, respondent acknowledged that he could have taken another path, but did not consider it.<sup>277</sup> The law judge found not credible respondent's reasons for declining to take another route or fly at a higher altitude.<sup>278</sup> Thus, the law judge determined that respondent flew at an altitude that did not allow for an emergency landing without undue hazard to persons or property on the surface in the event of a power unit failure, in violation of section 91.119(a).

In finding that respondent violated section 91.119(c), which prohibits flying within 500 feet from any person, vessel, vehicle, or structure in a sparsely populated area unless landing or taking off, the law judge found that, as respondent admitted, respondent flew within 100 feet or

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<sup>274</sup> *Id.* at 714-17.

<sup>275</sup> *Id.* at 712-13, 716-17.

<sup>276</sup> *Id.* at 718-20.

<sup>277</sup> *Id.* at 719-21.

<sup>278</sup> *Id.* at 721-22.

less from any person, vessel, vehicle or structure.<sup>279</sup> Further, the law judge determined that respondent has the burden of proving that his low altitude operation was necessary for takeoff or landing, and citing respondent's testimony, the legislative history of the regulation, and Board precedent, found respondent failed to meet this burden given that the landing site was inappropriate under the circumstances.<sup>280</sup> The law judge found that the Administrator proved every allegation in the complaint, as modified, by a preponderance of reliable, probative and credible evidence, except for paragraph 4(d).<sup>281</sup> Further the law judge concluded that respondent violated 14 C.F.R. §§ 91.119(a) and (c), and 14 C.F.R. § 91.13(a).<sup>282</sup>

The law judge rejected the following affirmative defenses given that respondent failed to offer convincing credible evidence to support them: the Administrator fails to state a claim upon which the Board may grant the relief requested; the Administrator's interpretation of the relevant Federal Aviation Regulations (FARs) is arbitrary, capricious, an abuse of discretion and not in accordance with the law; the Administrator's interpretation of the FARs is unconstitutionally vague; the Administrator's application of the FARs is contrary to the regulation's plain language; the Administrator lacks substantial basis in law and fact to continue prosecution of this matter; and that the sanction of suspension is contrary to policy, precedent, and procedure.<sup>283</sup>

The law judge examined the Administrator's sanction of revocation under the deference provided in the Pilot's Bill of Rights<sup>284</sup> and the Supreme Court's decision in *Martin v. Occupational Safety and Health Review Commission*.<sup>285</sup> The law judge considered aggravating

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<sup>279</sup> *Id.* at 722.

<sup>280</sup> *Id.* at 722-32.

<sup>281</sup> *Id.* at 732-34.

<sup>282</sup> *Id.* at 733-34.

<sup>283</sup> *Id.* at 735-37.

<sup>284</sup> Public Law 112-153 (2012).

<sup>285</sup> 499 U.S. 144 (1991).

and mitigating circumstances in assessing the Administrator's 120-day suspension and determined that while there were no aggravating factors supporting a longer sanction, the Administrator's failure to preserve the native video in the case was mitigating.<sup>286</sup> The law judge noted that the FAA sanction guidance, FAA Order 2150.3C, provided a sanction range of a 60- to a 120 day-suspension for careless operation with a severity level 2, which encompasses the failure to maintain the required minimum altitude in an uncongested area. The law judge reduced respondent's sanction from a 120-day suspension to a 60-day suspension based on the Administrator's failure to preserve evidence and Board precedent.<sup>287</sup> Further, the law judge explained, "[a] suspension of 60 days is at the low end of the moderate range, which is appropriate given all the circumstances and accounting for [r]espondent's experience as a private pilot and failure in judgment in conducting a low pass."<sup>288</sup>

#### *D. Issues on Appeal*

The parties cross-appealed different aspects of the law judge's decision. On appeal, respondent argues that the law judge erred by: 1) not dismissing the Administrator's Amended Order of Suspension for failure to state a claim upon which relief can be granted; 2) misinterpreting and misapplying 14 C.F.R. § 91.119 because a low inspection pass is "necessary" in conjunction with an off-airport landing; 3) finding respondent's intended landing site was inappropriate or not suitable; 4) not dismissing the proceedings in light of the FAA's sloppy investigation; and 5) committing numerous and other prejudicial errors, including amending the Administrator's complaint, relying on an unpled allegation in his decision, and relying on discredited testimony. The Administrator argues on appeal that the law judge erred in

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<sup>286</sup> Oral Initial Decision at 740-41.

<sup>287</sup> *Id.*

<sup>288</sup> *Id.* at 741.

reducing the sanction from a 120-day suspension to a 60-day suspension.

## 2. Decision

While we give deference to our law judge's rulings on certain issues, such as credibility determinations,<sup>289</sup> we review the case under *de novo* review.<sup>290</sup>

### A. *The law judge did not err in denying respondent's motion to dismiss.*

We affirm the law judge's denial of respondent's motion to dismiss for failure to state a claim. Respondent alleges that the Administrator's complaint was deficient because it did not include the prefatory language to 14 C.F.R. § 91.119, "[e]xcept when necessary for takeoff or landing." Respondent also makes a vague assertion that the complaint fails to specify the "facts and circumstances" giving rise to the alleged regulatory violations. The law judge found that the complaint provided respondent with sufficient notice of the allegations and that the prefatory clause of § 91.119 is an affirmative defense that respondent must prove.

"[W]e have long held that in our proceedings, 'notice pleading' principles require the Administrator to 'give only a short and plain statement of the claim showing that the pleader is entitled to relief, and not a complete detailing of all the facts.'"<sup>291</sup> Further, the Board has stated, "[b]ecause the complaint is the vehicle by which respondent is given fair notice of the charges he will be expected to defend against and which facts and circumstances underlie those alleged violations, we cannot give any weight to apparent violations which were not alleged in the

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<sup>289</sup> *Administrator v. Porco*, NTSB Order No. EA-5591 at 13 (2011), *aff'd sub nom.*, *Porco v. Huerta*, 472 Fed. App'x 2 (D.C. Cir. 2012) (per curiam).

<sup>290</sup> *Administrator v. Smith*, NTSB Order No. EA-5646 at 8 (2013); *Administrator v. Frohmuth and Dworak*, NTSB Order No. EA-3816 at 2 n.5 (1993); *Administrator v. Wolf*, NTSB Order No. EA-3450 (1991); *Administrator v. Schneider*, 1 N.T.S.B. 1550 (1972) (in making factual findings, the Board is not bound by the law judge's findings).

<sup>291</sup> *Administrator v. Siegel*, NTSB Order No. EA-5838 at 11-12 (2018) (quoting *Administrator v. Robert*, NTSB Order No. EA-5556 at 10-11 (2010); Black's Law Dictionary 1271 (9<sup>th</sup> ed. 2009); *Administrator v. Darby*, NTSB Order No. EA-5521 at 8 (2010)).

Administrator's complaint."<sup>292</sup> We find that the Administrator's amended complaint was sufficient to place respondent on notice about the charges, itemizing the specific flight, altitudes, and distances at issue, and citing the specific regulations that respondent violated. Respondent was provided sufficient information necessary to prepare a defense and an exchange of additional detail was more appropriate during the discovery and hearing phases. Further, respondent has not demonstrated how the supposed lack of specificity in the amended complaint prejudiced him.<sup>293</sup> Regarding respondent's claim that the absence of § 91.119's prefatory language was fatal, the amended complaint advised respondent of which regulations he was accused of violating and nothing prevented him from referring to those regulations.<sup>294</sup> Moreover, respondent was on notice that the prefatory language of § 91.119 was at issue given that both before and during the hearing, he asserted as an affirmative defense that his low altitude flight

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<sup>292</sup> *Siegel, supra* note 291, at 12 (quoting *Administrator v. Scott*, NTSB Order No. EA-4030 at 6 (1993)).

<sup>293</sup> *See e.g., Administrator v. Ringer*, NTSB Order No. EA-1699 (1981) (finding that the complaint was sufficiently pled, noting that respondent could avail himself of discovery procedures for more details and "has made no attempt to indicate how any alleged lack of specificity in the complaint adversely affected his ability to respond to it in any respect either before or during the hearing."). *See also Administrator v. Bates*, NTSB Order No. EA-1484 (1980) (rejecting respondent's assertion that the complaint was deficient, stating, "[t]he primary purpose of the complaint is to apprise a [r]espondent of the charges so that he can prepare a defense.").

<sup>294</sup> *Administrator v. Richard, et al.*, NTSB Order No. EA-2575 (1987) (Although the complaint failed to specify a prerequisite to violating the regulation – that the excess crewmember hours occurred while in air carrier service – the Board affirmed the law judge's dismissal of respondent's motion for a judgment on the pleadings. The Board explained, "It is well settled that the purpose of modern pleadings is to satisfy the notice-giving function and to dispense with the rigid formalism of the common law. There could be no violation of the only regulation cited in the complaint unless the flight time was in air carrier service, and taken as a whole, the complaints provided respondents with fair notice that an element of the violation which the Administrator would have to prove was that the flight time was in air carrier service...it is apparent that the parties understood before the hearing that an essential element the Administrator had to prove and which respondents would be expected to defend against was that all of the flight time was in or could be applied to the 100-hour limit for air carrier service.").



was necessary for landing.<sup>295</sup> His claim that the amended complaint was inadequate is unconvincing and we affirm that law judge's dismissal of respondent's motion to dismiss.

The law judge did not err in finding that respondent had the burden of establishing applicability of the prefatory language in § 91.119. The law judge's conclusion is consistent with Board precedent, albeit sparse. The Board has noted that the burden of proving the applicability of § 91.119's prefatory clause rests with a respondent.<sup>296</sup> Respondent offers no contrary authority or other reason to refute the law judge's decision and thus, we have no basis to overturn the law judge's finding that respondent, not the Administrator, must establish that his low altitude flight was necessary for takeoff or landing.

*B. The law judge did not misinterpret 14 C.F.R. § 91.119 and did not err in finding respondent's intended landing site was inappropriate.*

Respondent posits that the law judge misinterpreted § 91.119 in finding that a low inspection pass is not necessary for an off-airport landing, but the law judge did not issue such a finding. Rather, the law judge determined that respondent did not prove his affirmative defense that he met the prefatory clause – that his low inspection pass was necessary for landing during the November 24<sup>th</sup> flight.<sup>297</sup> The law judge reasoned that respondent had other alternatives for

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<sup>295</sup> See Respondent's Compliance with Prehearing Order at 1-2; Tr. 41 (respondent's opening statement).

<sup>296</sup> *Application of Wick*, NTSB Order No. EA-5038 (2003) (rejecting respondent's EAJA claim and finding that the Administrator was substantially justified in bringing the matter to a hearing, noting "[i]t was respondent's burden of proving such exculpatory claims, including his defense that any low flight fell within the ambit of the except for landings exception to the proscriptions contained in FAR section 91.119(c)"); *Administrator v. Essery*, NTSB Order No. EA-2221 at 6 (1985) ("In order to show that a low altitude was 'necessary for takeoff or landing,' a respondent must show that the landing site was an appropriate one"), *aff'd* 857 F.2d 1286 (9<sup>th</sup> Cir. 1988). See also *Administrator v. Chemello*, Docket No. SE 18472 (NTSB 2009) ("The exception is in Section 91.119(b), if necessary for takeoff or landing imposes the burden on the proponent of the exception to show that the exception applies"), *aff'd* NTSB Order No. EA-5503 (2010).

<sup>297</sup> See Oral Initial Decision at 722-32.

conducting the low inspection pass that did not violate the regulation by flying within 500 feet to any person, vessel, vehicle, or structure. Given that the law judge did not find that a low inspection pass is not necessary for an off-airport landing, he did not misinterpret the regulation as respondent suggests.

Further, respondent argues that the law judge erroneously concluded that respondent's intended landing site was inappropriate, claiming that: the Administrator abandoned the argument that the landing site was not suitable and in considering it, the law judge violated respondent's due process; the record shows that the landing site was suitable; the law judge relied on Inspector Speeg's "incompetent" and "biased" testimony; and the law judge abused his discretion in crediting Inspector Speeg's legal conclusions.

Although the Administrator objected to respondent's questioning concerning the suitability of the landing site, the law judge acted within his purview and consistent with Board precedent in evaluating the landing site to determine whether respondent's operation was necessary for landing, as required under § 91.119. Our law judges have significant discretion in making evidentiary rulings. In this regard, we will only overturn a law judge's evidentiary ruling when the appealing party can show the law judge's ruling amounted to an abuse of discretion, after a party can show such a ruling prejudiced him or her.<sup>298</sup> Respondent has not shown the law judge's decision to consider the suitability of the landing site caused him prejudice, but merely

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<sup>298</sup> See, e.g., *Administrator v. Kolodziejczyk*, NTSB Order No. EA-5909 at 49 (2021) (citing *Administrator v. Wright*, NTSB Order No. EA-5872 (2020)); *Administrator v. Tarola*, NTSB Order No. EA-5858 (2019); *Administrator v. Leyner*, NTSB Order No. EA-5732 at 4 n.19 (2014) (citing *Administrator v. Walker*, NTSB Order No. EA-5656 at 15 n.39 (2013)); *Administrator v. Giffin*, NTSB Order No. EA-5390 at 12 (2008) (citing *Administrator v. Bennett*, NTSB Order No. EA-5258 (2006)); *Administrator v. Martz*, NTSB Order No. EA-5352 (2008); *Administrator v. Zink*, NTSB Order No. EA-5262 (2006); *Administrator v. Van Dyke*, NTSB Order No. EA-4883 (2001).

asserts that it violated his due process because the Administrator “withdrew” the claim.

However, under our case law, we have long examined the suitability of the intended landing site when assessing whether the operation at issue fell under the prefatory clause of § 91.119. In rejecting respondents’ assertion of the regulation’s exception, we have held,

We cannot accept respondents’ 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, respondents’ 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.<sup>299</sup>

Further, we have explained that “[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.”<sup>300</sup> Moreover, we have rebuffed allegations of a due process violation in considering a landing site’s suitability when assessing a § 91.119 violation.<sup>301</sup> Thus, the law judge properly considered the appropriateness of respondent’s intended landing site to determine whether the operation was necessary for landing under § 91.119’s prefatory clause. Respondent has not addressed whether consideration of the landing site’s suitability caused him prejudice. Because

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<sup>299</sup> *Administrator v. Cobb, et al.*, NTSB Order No. EA-962 (1977), aff’d, 572 F.2d 202 (9<sup>th</sup> Cir. 1977). See also *Administrator v. Prior*, NTSB Order No. EA-4416 at 9 (1996) (finding respondent’s flights were not suitable, noting he had other landing options and therefore, the operations were not necessary for landing under the meaning of section 91.119); *Administrator v. McCollough*, NTSB Order No. EA-4020 at 5 (1993) (“We have long held, however, that the exception is inapplicable in cases where an unsuitable landing site is used”).

<sup>300</sup> *Prior*, *supra* note 299, at 7 (quoting *Administrator v. Kittleson*, NTSB Order No. EA-4068 (1994)).

<sup>301</sup> *McCollough*, *supra* note 299, at 6-7 (“we have noted respondent’s contention that, as no landing site suitability requirement appears in the language of the prefatory clause of section 91.119, the imposition of that requirement upon his operation deprived him of due process. We must, however, point out that the United States Court of Appeals for the Ninth Circuit expressly considered and rejected such an argument in *Essery v. Department of Transportation*, *supra*, holding that the suitability requirement represented a reasonable administrative interpretation of the low flight regulation and that previous decisions setting forth that requirement provided airmen with adequate notice of its applicability.”).

respondent has not demonstrated that the law judge's analysis of the landing site prejudiced him, we do not reach the issue of whether the law judge abused his discretion.

Additionally, we have no reason to overturn the law judge's finding that the intended landing site was unsuitable. The law judge made the determination based on the credible testimony of the witnesses and the evidence before him, and respondent offers no support for his claim that the site was suitable. Rather, respondent merely asserts that he and his aircraft were capable of landing on the runway.<sup>302</sup> Respondent himself testified that during his low inspection pass, he decided against landing at the landing site because he could not identify the touchdown point or center line of the runway.<sup>303</sup> Given the lack of evidence backing respondent's claim that the landing site was suitable, there is no basis to refute the law judge's conclusion. Further, the law judge found credible the testimony of the Administrator's witnesses supporting the unsuitability of the landing site, and as discussed, we must defer to the law judge's credibility findings. Such credible testimony further supports the law judge's conclusion that the landing site was not suitable.

Further, the law judge did not rely on Inspector Speeg's testimony in determining that the landing site was inappropriate and respondent did not suffer prejudice as a result of the law judge's consideration of Inspector Speeg's testimony pertaining to other matters.<sup>304</sup> Respondent was aware in advance that the Administrator planned to call Inspector Speeg as an expert<sup>305</sup> and had the opportunity to conduct a *voir dire* examination and cross-examine him.<sup>306</sup> Respondent

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<sup>302</sup> Respondent's Appeal Br. at 25.

<sup>303</sup> Tr. 507, 523.

<sup>304</sup> Oral Initial Decision at 728-32 (relying mostly on Mr. Likes' testimony).

<sup>305</sup> See Complainant's Compliance with Prehearing Order at 5-7; Complainant's Initial Disclosures.

<sup>306</sup> See, e.g., *Administrator v. Decruz*, NTSB Order No. EA-5827, at 30 (2017) (finding the law judge did not abuse his discretion in admitting expert testimony because the Administrator

presents no convincing argument that Inspector Speeg's testimony was biased, other than respondent's disagreement with the expert's responses and his displeasure with the law judge's conclusions. According to respondent's logic, no federal employee could testify without bias where he or she is paid by his or her respective agency and testifies on that employer's behalf. Respondent's arguments are nonsensical. The fact that Inspector Speeg receives his salary and awards from the FAA does not diminish his expertise. Moreover, there is no evidence that the law judge credited legal conclusions from Inspector Speeg. Instead, he weighed the expert's opinion regarding the applicable regulations. In fact, the law judge limited his reliance on Inspector Speeg's testimony, deciding not to credit testimony concerning respondent's flight path, altitude above ground level, or bank angle because such testimony was based on the excluded video.<sup>307</sup> We find that the law judge's reliance on Inspector Speeg's expert testimony did not prejudice respondent and thus, we do not determine whether the law judge abused his discretion in giving weight to portions of Inspector Speeg's testimony.

*C. The law judge did not err in refusing to dismiss the proceedings as a result of the flaws in the FAA's investigation.*

Respondent argues that the law judge should have dismissed the case as a result of the Administrator's "sloppy" investigation and in particular, the failure to preserve the native video from the Pena's security camera.<sup>308</sup> Rather than dismiss the entire case, the law judge excluded the non-native video and did not consider any testimony relying on the excluded video.

Respondent has not demonstrated that the law judge's decision caused him prejudice given that

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provided advance notice to respondent, identified the witness as an expert witness, and proffered the scope of his testimony in pretrial disclosures and at hearing, respondent had the opportunity to object to questions and cross-examine the witness).

<sup>307</sup> Oral Initial Decision at 717.

<sup>308</sup> Respondent's Appeal. Br. at 31-33.

the excluded evidence did not impact the law judge's ruling on the case and the non-native video was not the only evidence supporting the Administrator's complaint. Moreover, the law judge's decision to exclude certain evidence, instead of dismissing the entire case, is consistent with Board precedent. We have held that in the absence of malfeasance, dismissal of the case or an adverse inference are not appropriate to remedy missing evidence, particularly where other evidence exists.<sup>309</sup> The law judge rectified the lost native video by excluding certain evidence, and respondent is not entitled to an additional remedy, especially since the law judge found that the Administrator did not intentionally destroy evidence. We reject respondent's contention that the law judge erred in refusing to dismiss the case.

*D. We reject respondent's arguments that the law judge committed numerous and other prejudicial errors.*

Respondent argues, without support, that the law judge committed a prejudicial error in amending the Administrator's complaint when issuing the Oral Initial Decision.<sup>310</sup> We disagree. The statute governing appeals to the Board expressly grants the law judge the authority to "amend, modify, or reverse the [Administrator's] order."<sup>311</sup> Thus, the law judge acted within his authority in amending the complaint.

Respondent also claims that although the law judge found "no allegation [in the Administrator's Complaint] that [r]espondent operated within 500 feet of 300 Desert Sun Lane,

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<sup>309</sup>See *Administrator v. Abiraman*, NTSB Order No. EA-4978 (2002) (denying request for adverse inference because while the lost communications with air traffic control were the best evidence, they were not the only evidence, and there was no purposeful destruction of the evidence); *Administrator v. Stricklen*, NTSB Order No. EA-3814 (1993) (rejecting adverse inference for missing radar data, noting respondent took no steps to ensure its preservation); *Administrator v. Rauhofer*, NTSB Order No. EA-3268 (1991) (declining to dismiss the case or draw an adverse inference over missing computer data, which was not critical evidence, and communications with air traffic control, which would not have changed the outcome of the case).

<sup>310</sup> Respondent's Appeal Br. at 34.

<sup>311</sup> 49 U.S.C. § 44709(d).

which is Mr. Likes' house," the law judge considered this fact in his decision.<sup>312</sup> Respondent misconstrues the law judge's opinion. The law judge actually explained, "[s]ince the Amended Complaint fails to allege that [r]espondent operated within 500 feet of 300 Desert Sun Lane in violation of the regulations, my findings in this regard are made only for purposes of making a determination of [r]espondent's flight path and altitude prior to that point."<sup>313</sup> Respondent does not allege that he was prejudiced by the law judge's application of this finding and because the finding regarding 300 Desert Sun Lane did not impact the outcome of the case, we conclude that respondent was not prejudiced.

Finally, respondent claims that the law judge credited the Penas' testimonies, despite stating that they were biased and their testimonies embellished.<sup>314</sup> On the contrary, the law judge appropriately weighed the Penas' testimonies. The law judge explained that their testimonies were likely biased because of their marital relationship and likely embellished given their view of Mr. Likes and their belief that respondent retaliated against them on Mr. Likes' behalf. Nevertheless, the law judge explicitly added, "However, I do not believe they falsified their basic testimony about what they saw."<sup>315</sup> Once again, respondent provides no evidence that the law judge caused him prejudice and does not allege that the law judge's credibility determinations were erroneous.<sup>316</sup> Respondent's assertion that the law judge improperly weighed the Penas' testimonies is meritless.

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<sup>312</sup> Respondent's Appeal Br. at 34 (citing Oral Initial Decision at 701).

<sup>313</sup> Oral Initial Decision at 702.

<sup>314</sup> Respondent's Appeal Br. at 34.

<sup>315</sup> Oral Initial Decision at 704.

<sup>316</sup> Even if respondent alleged that we should overturn the law judge's credibility determinations, we decline to do so. We will not overturn a law judge's credibility determination unless a party can establish the determination was arbitrary and capricious. *Porco, supra* note 289, at 20-21. The law judge based his credibility findings on the record before him and respondent provides no reason to disturb the findings.

*E. We reverse the law judge’s mitigation of the Administrator’s sanction.*

The Administrator argues that the law judge erred in reducing respondent’s sanction from a 120-day suspension to a 60-day suspension. We agree. As discussed, *supra*, the law judge assessed the Administrator’s choice of sanction using the standard set forth in *Martin v. Occupational Safety and Health Review Commission* and after weighing the mitigating factors, including the Administrator’s failure to preserve the native security video. However, since the law judge’s decision, the United States Court of Appeals for the District of Columbia Circuit has clarified the deference we must afford the Administrator’s sanction selection. The Circuit Court held that the Board should only overturn the Administrator’s sanction if it is “unwarranted in law or without justification in fact.”<sup>317</sup> Specifically, in that case, the Circuit Court determined that the Administrator had justification for its selection of the remedy, citing the applicable regulations and statute.<sup>318</sup>

Here, respondent has provided no convincing mitigating factors demonstrating the Administrator’s choice of sanction was unjustified in fact and/or unwarranted in law. Rather, the Administrator’s sanction is supported by its sanction guidance, FAA Order 2150.3C, which provides for a sanction of a 90- to a 150-day suspension for a failure to maintain a minimum altitude in an uncongested area where the severity is high, or reckless or intentional.<sup>319</sup> Given the absence of aggravating or mitigating factors, the Administrator selected a sanction within the midpoint of the range – a 120-day suspension.<sup>320</sup> The Administrator provided a reasonable

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<sup>317</sup> *Pham v. Nat’l Transp. Safety Bd., et al.*, 33 F.4th 576, 583 (D.C. Cir. 2022) (citing *Amer. Power & Light Co. v. SEC*, 329 U.S. 90, 112-13 (1946)).

<sup>318</sup> *Pham, supra* note 317 at 583.

<sup>319</sup> Exh. A-23 at 3-4.

<sup>320</sup> Tr. 600; Administrator’s Appeal Br. at 14. It is not clear why the law judge referred to the sanction guidance’s penalty range for a careless operation, rather than a reckless or intentional operation, under which the FAA determined respondent’s conduct fell. Oral Initial Decision at



explanation for determining that respondent's conduct fell within the high severity category, citing respondent's testimony regarding his flight experience, the level of risk posed, and his prior warnings from the FAA regarding his conduct.<sup>321</sup>

Further, there are no mitigating circumstances warranting a reduction in the penalty. The law judge considered the Administrator's failure to preserve evidence as mitigating, but as previously discussed, the law judge remedied that error by excluding certain evidence and testimony. Thus, the missing native security video is not a mitigating factor requiring a reduction in the sanction and more importantly, such a factor does not render the Administrator's penalty choice unjustified in fact or unwarranted in law. We reverse the law judge's reduction of the sanction and affirm the Administrator's 120-day suspension of respondent's certificate.

**ACCORDINGLY, IT IS ORDERED THAT:**

1. Respondent's appeal is denied;
2. The Administrator's appeal is granted;
3. The law judge's reduction in the sanction is reversed; and
4. The Administrator's 120-day suspension of respondent's Private Pilot Certificate is affirmed.

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741. The law judge stated that the penalty range for a careless operation was a suspension between 60 and 120 days and explained that a sanction at the lower end of that range was appropriate in this case. However, the law judge did not explicitly invalidate the Administrator's conclusion that respondent's operation was reckless or intentional. We find that the Administrator's finding that the conduct was reckless or intentional and that a sanction in the middle of the range for such conduct – a 90 to 150 day suspension – was justified in fact and warranted in law.

<sup>321</sup> Tr. 601-03.

HOMENDY, Chair, LANDSBERG, Vice Chairman, GRAHAM and CHAPMAN, Members of the Board, concurred in the above opinion and order.

UNITED STATES OF AMERICA  
NATIONAL TRANSPORTATION SAFETY BOARD  
OFFICE OF ADMINISTRATIVE LAW JUDGES

\* \* \* \* \*

In the matter of:

BILLY NOLEN,  
ACTING ADMINISTRATOR,  
FEDERAL AVIATION ADMINISTRATION,

Complainant,

v.

TRENTON J. PALMER,

Respondent.

\* \* \* \* \*

Docket No.: SE-30880  
JUDGE FUN

Via Zoom videoconference

Wednesday,  
April 6, 2022

The above-entitled matter came on for Initial Oral  
Decision, pursuant to notice at 1:00 p.m. Eastern Standard Time.

BEFORE: DARRELL L. FUN  
Administrative Law Judge

APPEARANCES:

On behalf of the Administrator:

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Federal Aviation Administration  
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On behalf of the Respondent:

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## 1 ORAL INITIAL DECISION AND ORDER

2 (1:50 p.m. EST)

3 JUDGE FUN: Good afternoon, I am Administrative Law Judge  
4 Darrell L. Fun and was assigned to hear the case of Billy Nolen,  
5 Acting Administrator of the Federal Aviation Administration v.  
6 Trenton J. Palmer, Docket Number SE-30880.

7 This is a proceeding before the National Transportation  
8 Safety Board held pursuant to the provisions of the Federal  
9 Aviation Act pertaining to the Administrator's Amended Order  
10 suspending Respondent's private pilot certificate for 120 days.

11 Today is April 6, 2022. Pursuant to the Board's Rules of  
12 Practice, I am issuing my Initial Oral Decision. Pursuant to  
13 Notice, this case proceeded to a hearing on the merits, with  
14 evidence and arguments presented over a 3-day period, on March  
15 29th and the 30th, and April 1, 2022. My decision is based on the  
16 evidence presented during the hearing, as well as the pleadings in  
17 this matter.

18 Present and representing the Administrator is Lisa M.  
19 Toscano, an attorney with the Federal Aviation Administration,  
20 Western Enforcement Team. Attorney Robert D. Schulte represents  
21 the Respondent Trenton J. Palmer, who were both present throughout  
22 these proceedings. Mr. Palmer waived his presence on April 4th  
23 during closing statements and my decision on his motion to dismiss  
24 for failure to state a claim.

25 The Amended Complaint alleges that the Respondent operated a

1 1997 Johnson John T Kitfox with registration number November 31  
2 8JJ (N3188J) at an altitude that would not allow for an emergency  
3 landing without undue hazard to persons or property if a power  
4 unit failed, in violation of 14 CFR, Section 91.119(a).

5 It is alleged he operated at altitudes of less than 100 feet  
6 above ground level and, more specifically, operated within  
7 approximately 50 feet of a stable, shed, or propane tank; within  
8 approximately 100 to 150 feet of a residential home at 400 Desert  
9 Sun Lane; within 100 to 150 feet of an adult and child outside of  
10 the home; and within 300 feet of 2 adults and 2 children outside  
11 of the home and near the perimeter of the property.

12 It is therefore alleged that he also violated 14 CFR, Section  
13 91.119(c) in that he operated closer than 500 feet to any person,  
14 vessel, vehicle or structure in a sparsely populated area. As  
15 stated in the regulation, the exception to operating below these  
16 minimums is when it is necessary for takeoff or landing.

17 Finally, the Administrator alleges that these circumstances  
18 violate 14 CFR, Section 91.13(a) in that Respondent operated in a  
19 careless or reckless manner so as to endanger the life and  
20 property of another.

21 The Respondent's answer admitted to paragraphs 1, 2 and 3.  
22 He denied paragraphs 4, 5 and 6, as well violating the  
23 regulations. Respondent's admissions to paragraphs 1, 2 are  
24 deemed to be conclusively established as undisputed fact. The  
25 Administrator, therefore, had the burden of proving paragraphs 4,

1 5 and 6 by a preponderance of the evidence. Respondent's answer  
2 sets forth seven numbered affirmative defenses.

3 At the beginning of the first day, the Respondent moved to  
4 dismiss the Amended Complaint for failure to state a claim upon  
5 which relief can be granted. The parties were afforded an  
6 opportunity to submit briefs, which I considered. I issued my  
7 decision denying Respondent's motion to dismiss on April 4, 2022.  
8 I do not repeat the basis of my ruling as it is already on the  
9 record.

10 Due to the pandemic and at the request of the parties this  
11 matter was heard virtually using the Zoom Program. As a result,  
12 parties and witnesses appeared and testified via video from their  
13 respective locations during the hearing. The parties were  
14 afforded a full opportunity to make opening statements, to call  
15 and question witnesses, to present evidence, and to make closing  
16 arguments in support of their positions.

17 I have considered all of the evidence properly admitted, both  
18 testimonial and documentary, in my decision. However, I do not  
19 intend to discuss all of the evidence in detail. Any evidence  
20 that I do not specifically mention or omit is viewed as being  
21 either corroborative or not materially affecting the outcome of my  
22 decision.

23 The following exhibits were admitted into evidence. Exhibits  
24 A-2 and A-6; pages 1 and 3 of A-13; pages 1, 3, 5, 7, 9, 11, 13,  
25 15 and 17 of Exhibit A-17; A-19; A-22; A-23; and A-28.

1 Exhibits A-3 and A-4 were admitted only for the limited  
2 purpose of sanction to demonstrate notice or knowledge, as well as  
3 to show progressive discipline, but not for purposes of  
4 demonstrating aggravating circumstances.

5 Administrator's Exhibits A-7 and A-9 were not admitted.  
6 Respondent objected. Mr. Pena testified that he had provided the  
7 FAA with a USB and possibly a CD, which was an actual copy of the  
8 video from the DVR hard drive. The Administrator was unable to  
9 explain the whereabouts of either the USB or CD.

10 Additionally, Exhibit A-7 depicted a partial video that Mr.  
11 Pena took using his iPhone while recoding what the DVR monitor was  
12 playing. He noted that when viewing Exhibit A-7 he could see the  
13 roof attic trusses in the background behind the DVR monitor  
14 screen, as well as the edge of the monitor. I also noted that A-7  
15 did monitor and appears to cut off the bottom portion of the  
16 monitor, as well as part of the left side of the monitor.

17 Exhibit A-9 was similarly a partial video that Mr. Pena took  
18 using his iPhone while recoding what the DVR monitor was playing.  
19 These Exhibits were not the best evidence, especially in light of  
20 the undisputed testimony that Mr. Pena provided the FAA with a USB  
21 and perhaps CD of a copy of the original from the DVR, and the FAA  
22 had several opportunities to obtain the original video during  
23 multiple visits to the Penas.

24 The Administrator also failed to show that Mr. Pena's iPhone  
25 fully captured what was being seen on the DVR monitor, in terms of



1 the length of the video, as well as the full picture, so it was  
2 not a fair and accurate depiction. I excluded these exhibits  
3 based on the best evidence rule and lack of foundation.

4 The Administrator offered Exhibit A-11, but did not further  
5 seek its admission. I find that there was no foundation for  
6 Exhibit A-11 and it also fails the best evidence rule. A-11  
7 apparently consisted of two still photographs from Mr. Pena's  
8 iPhone video recording, which I again noted was a recording of  
9 another video.

10 The Administrator offered Exhibits A-29, A-30 and A-31.  
11 Exhibit A-30 was essentially A-13 but with a certificate of  
12 authenticity. Respondent objected to these exhibits. With  
13 regards to Exhibits A-29 and A-31, they were untimely and had not  
14 been listed as exhibits in the Administrator's prehearing  
15 submission.

16 Exhibit A-21, excuse me, Exhibit A-29 is hearsay since it was  
17 purported to be a summary of a telephone call that Inspector  
18 Morgan wrote.

19 Exhibit A-31 was a flight path Inspector Green created based  
20 on his review of the investigative file and witness statements.  
21 Parts of the flight path were based on assumptions since no  
22 witness saw the full flight path. Additionally, parts of what was  
23 depicted conflicted with eye-witness testimony.

24 Exhibit A-30 suffered from the same problems.

25 Furthermore, both exhibits contained hearsay statements on

1 them. As such, these exhibits were neither reliable nor helpful.  
2 For these reasons, I sustained the objection and excluded these  
3 exhibits.

4 While there were several other exhibits identified in  
5 prehearing submissions by both parties, they were neither offered  
6 nor admitted so they were not considered. Exhibits that were used  
7 as demonstrative aids or used to refresh a witness' memory were  
8 not admitted nor considered as evidence.

9 The Administrator's counsel presented the testimony of  
10 Gabriel Pena, Julia Pena, Russell Stanley, Respondent Trent  
11 Palmer, and FAA Inspector Ronald R. Green as a fact witnesses.  
12 And FAA Technical Specialist Roy Speeg, Jr., as an expert witness.

13 The Respondent's counsel presented the testimony of Jared F.  
14 Likes and Respondent Trent Palmer as fact witnesses. All  
15 witnesses testified under oath.

16 In summary, Gabriel Pena testified to living at 400 Desert  
17 Sun Lane, Reno, Nevada, for approximately 5 years. On  
18 November 24, 2019, around noon, he was standing at the fence line  
19 of his property due west of his house talking to his neighbor, Mr.  
20 Russell Stanley. He was shown Exhibit A-15, page 7, that depicts  
21 a Google Earth satellite image of his residence and surrounding  
22 property for demonstrative purposes. He was standing with Mr.  
23 Stanley, which was west of his house and in line with his fence  
24 line to the north. While talking to Mr. Stanley, his wife arrived  
25 with their two kids. His wife stopped and dropped off their

1 daughter with Mr. Pena and continued to garage to park the car.

2 The Penas' garage faces south. Mr. Pena said that after his  
3 wife parked, she began walking towards him while carrying their  
4 son. Mr. Pena stated he heard an incredible engine noise, and  
5 that's in quotes, quote, "an incredible engine noise," end quote,  
6 coming from the north as his wife passed near the front door.

7 Mr. Pena indicated he was startled by the noise and looked  
8 towards where it was coming from, but could not see anything. He  
9 believes the airplane was too far away for him to see. However,  
10 he began yelling to his wife to run away from the house. He did  
11 this out of instinct because he thought something was going to  
12 crash into their house.

13 He estimates that when he heard the airplane and began  
14 yelling at his wife to run, she was approximately 140 to 150 feet  
15 away. Mr. Pena stated that when the airplane came into his view,  
16 it was above the ridge line of his house and was making an  
17 aggressive left bank maneuver, or a hard east banking maneuver.

18 He estimates that his wife was approximately 140 to 160 feet  
19 away from the airplane's flight path as it came into his view  
20 above the roof line of his house. He estimates being 300 feet  
21 away from the airplane's flight path when he saw it above the roof  
22 line of his house.

23 In terms of height above the ground, Mr. Pena stated that the  
24 ridge line of his roof is approximately 20 feet above the garage  
25 grade, and the airplane was approximately 25 to 35 feet above the

1 grade of his garage. He estimated the airplane's flight path as  
2 being approximately 5 to 10 feet above the ridge line of his  
3 house.

4 Mr. Pena testified that he could not initially see the flight  
5 path since his house blocked his line of sight, so he only saw the  
6 airplane after it came into view over the ridge of his house. He  
7 also did not see the airplane fly over the propane tank, which is  
8 located southeast of his house, off the eastern corner of his  
9 garage, since the house was between him and the propane tank,  
10 which blocked his view. However, Mr. Pena estimates that the  
11 flight path as being above the propane tank based upon his  
12 knowledge of his property and the location of the propane tank, as  
13 well as the flight path he observed as the airplane came into his  
14 view above the ridge line of his house making a left turn.

15 He also observed the aircraft straighten out towards his  
16 neighbor's house to the south, which is Mr. Likes' house, and then  
17 pull up. Mr. Pena testified that he thought the airplane was  
18 going to crash into his neighbor's house, but pulled up at the  
19 last minute.

20 Mr. Pena stated he is fairly good at estimating distance  
21 because he served 4 years with the Naval Construction Battalion,  
22 or Seabees, as a MK-19 grenade launcher, which required him to  
23 estimate distances for targeting. He stated he used the ridge  
24 line of his house and his familiarity with his property as guides  
25 for calculating the distances.

1 Mr. Pena testified that he was, that he has a security camera  
2 that is located between the peak of his house above the garage,  
3 which captured the flight path of the airplane as it passed by the  
4 back of his house. He identified Exhibit A-13, page 1, as a  
5 photograph showing the security camera below the ridge line of his  
6 house. The security camera is approximately 18 feet above the  
7 garage grade. He has another security camera above the front door  
8 of his house, which captures where his wife was standing. He  
9 identified Exhibit A-13, page 4, as a photograph showing the  
10 security camera above the front door.

11 Mr. Pena said that these security cameras are constantly on  
12 24 hours a day and 7 days week. The cameras record to a  
13 2 terabyte hard drive or a DVR, with an attached monitor for  
14 viewing the recordings. The recording system is located in the  
15 attic. He downloaded a portion of the recordings, approximately  
16 10 to 15 seconds, from both the garage peak camera and front door  
17 camera to a USB, which he says he gave to the FAA.

18 Mr. Pena says that there is no way to download a slow-motion  
19 version of the DVR, so he used his iPhone to record a slow motion  
20 playback being displayed on the DVR monitor. He also stated he  
21 used his iPhone to take two still photographs of the airplane  
22 being displayed on the DVR monitor when he paused the playback.

23 The Administrator sought to offer and admit Exhibit A-7.  
24 Respondent's Counsel objected. During voir dire by Respondent's  
25 counsel, Mr. Pena admitted that he did not provide the FAA the

1 original recordings or DVR. He did not provide the FAA the full  
2 day that was recorded, but only approximately 10 to 15 seconds of  
3 the recording. In addition to a USB, which was a direct copy of  
4 the DVR, he also gave the FAA a CD with the same copy of the  
5 recording. In addition to Exhibit A-7, Respondent objected to A-9  
6 and A-11. As previously stated, I excluded these exhibits.

7 Mr. Pena said that the FAA investigators came out to his  
8 property to take photographs and measurements. He was present  
9 during this time, and explained to them locations where he saw the  
10 airplane and its flight path. Exhibit A-17, page 1, is a  
11 photograph of the front of the garage, with Mr. Pena on the left  
12 and Mr. Morgan from the FAA on the right. They are looking at the  
13 location of the garage peak camera.

14 Mr. Pena again said that the security camera is approximately  
15 18 feet above the garage grade with the roof line at 20 feet. The  
16 garage doors face south. To the east of the garage, or right side  
17 of the photo, there is a dog kennel. To the west, or left side of  
18 the photo, is a bay window. The front door is on the left side of  
19 the bay window and the front door faces southwest.

20 Mr. Pena identified page 3 as a photograph showing a view  
21 from the center line of the garage peak looking east, where the  
22 propane tank is located and a shed just past the propane tank.  
23 To the far left of the photograph, or north of the propane tank  
24 and shed, the photo shows the corner roof of the chicken coop.

25 Mr. Pena was shown Exhibit A-17, page 5, which he testified

1 was a photo from the center line of the garage peak to the area of  
2 the flight path, which was 30 feet.

3 Referring to page 7, this is a photograph of the propane tank  
4 and Inspector Morgan, with the shed behind the propane tank. Mr.  
5 Pena says it is approximately 18 feet from the wall of the house  
6 to the propane tank. It is a 500-gallon propane tank that he  
7 keeps 80 percent full.

8 Page 11 is a photograph of the measurement from the center  
9 line of the garage to the shed.

10 Page 15 shows the front concrete garage driveway looking  
11 south towards Mr. Likes' property. The measurement is from the  
12 garage peak center line to the fence line, where an FAA employee  
13 is standing. Mr. Pena explained that the airplane's flight path  
14 was from the north by northeast to the south by southwest. The  
15 airplane flew over his property, made a 90 degree bank to the  
16 left, then flew straight before making a slight dip and climbing  
17 to the south by southeast over Mr. Likes' house and into the  
18 horizon. Mr. Pena estimates that the airplane was approximately  
19 30 feet above Mr. Likes' roof peak.

20 Mr. Pena was shown Exhibit A-13, page 3, which is a  
21 photograph of the front porch and door, with the security camera  
22 on the right side of the photograph. The roof peak is the same  
23 height as the garage peak on his house and the airplane was  
24 approximately 5 to 10 feet, excuse me, was approximately 5 to  
25 10 feet above the roof peak. As the garage slopes away from his

1 house, with the propane tank being 6 feet lower than the garage  
2 grade, he estimates that the airplane was 30 feet above the  
3 propane tank.

4 On cross-examination, Mr. Pena admitted that he had never  
5 seen the aircraft before November 24th, but had seen it  
6 afterwards. He confirms that the airplane made a single pass.  
7 That there were no, that there was no harm to any property, but he  
8 felt his daughter and him were traumatized. He admitted that  
9 nobody in his family sought medical assistance for trauma. And  
10 although he is a combat veteran, his daughter was traumatized  
11 more.

12 He admitted the airplane was not directly overhead of himself  
13 or his wife. He admitted that his house was between where he was  
14 standing and the path of the airplane, so he could not see the  
15 actual flight path. He confirmed that beyond the shed to the east  
16 is open land. He did not know what kind of engine or propeller  
17 the airplane had and stated he is not that familiar with  
18 airplanes.

19 On redirect, Mr. Pena explained that his family was  
20 traumatized by the aircraft flying so low and close to them. They  
21 were visibly shaken and afraid that the airplane was going to  
22 crash into their house or the neighbors. He stated his daughter,  
23 who was 3 or 4 years old at the time, still asks about an airplane  
24 crashing when she hears one nearby. His son was a 1 year's old at  
25 the time.



1 I asked questions to clarify Mr. Pena's testimony. When he  
2 first heard the airplane but could not yet see it, his first  
3 reaction was a fight or flight response. He was startled by the  
4 noise, but could not see the airplane. He then began to yell at  
5 this wife. When the airplane came into view, he was in disbelief,  
6 anger and shock.

7 Julia Pena testified lives at 400 Desert Sun Lane. On  
8 November 24th, she was coming home with her two kids. Her husband  
9 was at west fence line talking to their neighbor, Mr. Stanley.  
10 She stopped briefly and let her daughter stay with her husband.  
11 She then continued on to the house to park. She began walking  
12 back towards her husband carrying her son.

13 When she was near the front door of the house, she heard a  
14 loud engine. She could not see her husband yelling and waving,  
15 but could, she could see her husband yelling and waving, but could  
16 not hear him over the sound of the engine. When she began looking  
17 around, she saw the airplane. She thought it was going to crash  
18 into the neighbor's house and there was an emergency. She says  
19 she was dumbfounded, shocked, and it was a frightening scenario.  
20 She filed a report with the FAA because of her concerns.

21 Mr. Pena, excuse me, Mrs. Pena said she could not initially  
22 see the airplane because the house blocked her view of the  
23 airplane until it passed the edge of the garage at the southern  
24 end of the house. She could not say how high it was when she saw  
25 it, and guesses it was less than 100 feet above the ground and

1 maybe 50 feet above the ground. She noted that the ground slopes  
2 away from the house so she was using the gravel driveway just  
3 south of the garage's driveway as a reference for her 50-foot  
4 estimation.

5 She did not see the flight path behind the house nor could  
6 she see the stable, shed, or propane tank as the house blocked her  
7 view. She believes that the airplane flew over the house, excuse  
8 me. She believes that the airplane flew over the horse stable,  
9 shed, and propane tank given the path it was taking when it came  
10 into her view.

11 When the airplane first came into her view, it was banked and  
12 she saw the underside of the right wing. The right wing was up  
13 and the left wing was down. The airplane was low enough that she  
14 could see the red, white, and blue stripes. The airplane then  
15 turned straight over the gravel driveway and flew over the fence  
16 line to the south, towards the neighbor's property. She had a  
17 good view of the airplane when it straightened out and saw it pull  
18 up at the least, excuse me, and saw it pull up at the last minute  
19 near the neighbor's house.

20 Mrs. Pena viewed Exhibit A-14, page 3, a Google Earth  
21 satellite image for demonstrative purposes. Her husband and  
22 daughter were west of the house at the west fence line, talking to  
23 Mr. Stanley. When her husband was yelling and waving at her, she  
24 could see his excitement, but did not know where to run as she  
25 could not hear her husband, nor could she see the airplane.

1           A-14 depicts a circular driveway with four pine trees in the  
2 middle, which is the gravel runway, excuse me, the gravel driveway  
3 she was referring to when she saw the airplane and estimated it as  
4 being 50 feet above ground. She says the airplane was at the same  
5 level passing over the fence line until it reached the neighbor's  
6 house and then pulled up quickly.

7           She could not recall if the airplane passed over Mr. Likes'  
8 house, just nearby or over the swimming pool. She remembered  
9 focusing on the airplane and noting it flew straight after pulling  
10 up and continued to the west horizon. Mrs. Pena was shown Exhibit  
11 A-7 to refresh her memory and recalled the airplane passing near  
12 the eastern side of the swimming pool and the edge of the  
13 neighbor's garage.

14           She identified the various structures and their locations in  
15 Exhibit A-17, pages 1, 3, 7, 11 and 15. She identified on page 15  
16 the gravel roundabout and the measuring tape extending out to the  
17 south fence line of Mr. Likes' property with his house shown in  
18 the distance.

19           On cross-examination, Mrs. Pena admitted that when she first  
20 saw the airplane it was in a left bank and turning away. She  
21 estimates seeing the airplane for 2 to 3 second as it came into  
22 her view. Referring to Exhibit A-14, page 3, she indicated the  
23 area east of their property line is pasture or open field. She  
24 admitted to talking to Mrs. Toscano 2 to 3 times on the phone, but  
25 that her husband was not with her or present on the call. Mrs.

1 Pena indicated that Mrs. Toscano did not independently speak to  
2 her husband and that she, Mrs. Pena, passed information to her  
3 husband about the timing of the trial.

4 She admitted that the Reno Stead Airport is approximately 20  
5 minutes away or 7 nautical miles away, and that the Reno Air Races  
6 are held there annually. She has heard and seen airplanes  
7 participate in the air races over the BLM land, over the mountain  
8 range in the past.

9 Russell Stanley testified that was living at 4445 Desert Sun  
10 Lane, Reno, Nevada, on November 24, 2019. When he was living in  
11 Reno, he was neighbors with the Penas and they would meet at the  
12 fence line and talk. Referring to Exhibit A-14, page 3, for  
13 demonstrative purposes, he identified his house in the upper left  
14 corner or the northwest, and Mr. Pena's in the upper right corner  
15 or northeast. He does not know the neighbor to the southeast, or  
16 bottom right corner of the photograph. Mr. Stanley testified that  
17 to the north of his and Mr. Pena's property is BLM land and to the  
18 east of Mr. Pena's is the mountain range.

19 On the 24th, he was at the fence line talking with Mr. Pena  
20 for about an hour when he noticed an airplane fly by. He first  
21 saw the airplane to the far east near the mountain range coming  
22 from the south. He estimated the airplane being approximately a  
23 mile away over BLM land.

24 He saw the airplane turn left, towards the property, and come  
25 towards them at a lower altitude. He didn't know how high the

1 airplane was over the mountain range, but estimates it was 80 feet  
2 above the ground after it turned towards the Pena's property. His  
3 80-foot estimate is based upon his familiarity with tall poles at  
4 a golf driving range. He explained that he is working at Big Shot  
5 Golf in Texas, which is a driving range, and they have 80-foot and  
6 140-foot tall poles, so this gave him a reference for those  
7 heights.

8 Mr. Stanley described the airplane flying at the same level  
9 of 80 feet with a steady altitude. He could not see the airplane  
10 coming towards the north end of Mr. Pena's house, excuse me, let  
11 me rephrase that. He could see the airplane come towards the  
12 north end of Mr. Pena's house above the roof line. He estimates  
13 that the airplane was as far away from the house as it was high.  
14 Mr. Stanley says the speed was constant.

15 As it got closer, he lost sight of it since the airplane was  
16 too low for him to see above the top of the house. After it  
17 passed Mr. Pena's house to the south, he saw the airplane make a  
18 left turn as he could see the bottom of the wing. He stated that  
19 if the airplane did not turn, it would have hit the neighbor's  
20 house. Mr. Stanley said it was a slight turn and not a drastic  
21 turn. The airplane then flew parallel to the neighbor's house  
22 after the turn. He said the airplane seemed to climb during the  
23 turn and maybe gained 15 to 20 feet. Mr. Stanley said that  
24 Mr. Pena and he looked at each other with quizzical expressions.  
25 Mr. Stanley stated he has seen this aircraft flying several times

1 before, but this was the first time it was that low. He said it  
2 was a clear day on the 24th.

3 On cross-examination, Mr. Stanley agreed that east of Mr.  
4 Pena's property line is open scrub brush. Referring to Exhibit  
5 A-14, page 3, he confirmed that the airplane was closer to the  
6 mountain range than Mr. Pena's house when he first saw it.  
7 However, he says he saw it turn inbound. Mr. Stanley confirmed  
8 that when the airplane flew past the property, it made a slight  
9 left turn. He considers the Penas friends, but has not talked to  
10 them for some time. He is not a pilot. And he said he was not  
11 particularly bothered by the fly-by.

12 The Administrator's counsel then called the Respondent Trent  
13 Palmer to testify. Respondent testified that the wingspan of his  
14 Kitfox is 32 feet. The cruising altitude is 100 miles per hour  
15 and the landing speed is 32 miles per hour. He confirmed having  
16 900-plus hours as pilot-in-command of his Kitfox.

17 Referring to Exhibit A-3, page 6, Respondent admitted to  
18 receiving a verbal counseling from Oscar Lee of the Reno Field  
19 Service District Office, or FSDO. There was a video showing  
20 Respondent throwing a UAS, or unmanned aircraft system, out of his  
21 Kitfox near a radio controlled or RC runway.

22 Respondent was counseled about careless or reckless  
23 operations under CFR Section 91.19 and dropping objects from an  
24 aircraft under Section 91.15. Respondent stated that a CFI, or  
25 Certified Flight Instructor, was the pilot-in-command of his

1 Kitfox while he was a passenger flying a UAS.

2 Respondent also admitted to receiving a warning notification  
3 for carrying passengers and water-skiing on Lake Tahoe. Exhibit  
4 A-4 is this warning letter. He explained that water-skiing is  
5 where you drag your wheels on the water.

6 Respondent did not recall the details of a conversation he  
7 had with FAA Inspector Morgan on December 2nd. He did not recall  
8 saying he that he did not see anyone, and that he might have flown  
9 over a hunter. Respondent did recall meeting with the FAA  
10 investigators the next day, December 3rd, where he was shown a  
11 video from November 24th. Respondent admits that he was the  
12 pilot-in-command of his Kitfox, that he was operating in the  
13 vicinity of 300 and 400 Desert Sun Lane, and that he had operated  
14 less than 100 feet above ground level.

15 On November 24th, Respondent says he made a low pass  
16 inspection of the RC runway that was in the backyard of his  
17 friend's house in accordance with FAA's Off-field OPS Guide. He  
18 had permission of his friend to land, but he did not intend to  
19 land on the first pass. Respondent confirms he was alone on the  
20 flight. He stated the purpose of this low-level pass was to  
21 ascertain the surface conditions and feasibility of the landing  
22 site. Respondent said he had not previously conducted, excuse me.  
23 Respondent said he had previously conducted a prior high-level  
24 pass and ground inspection. He was vague about when such high-  
25 level passes or ground inspection were conducted.

1 Mr. Schulte?

2 MR. SCHULTE: I'm here, Your Honor. I'm sorry.

3 JUDGE FUN: All right.

4 MR. SCHULTE: I just glitched up. That was my fault.

5 JUDGE FUN: Okay. Just wanted to make sure you were still  
6 there.

7 MR. SCHULTE: I'm still here. I'm not going anywhere.

8 JUDGE FUN: On the 24th, Respondent determined that the  
9 runway was not suitable on his low level pass. He was not at  
10 cruise speed, but flying at 7 miles per hour so he could time the  
11 distance traveled using the formula of 1 second per 100 feet at 70  
12 miles per hour. He testified he was in a stable flight and offset  
13 to the right side center line of the runway so he could look out  
14 his left window for a better view of the runway during the low  
15 pass.

16 Respondent stated he was assessing the conditions and length  
17 of the runway. Respondent says he did not attempt a landing  
18 because he decided that it was not suitable. The primary reason  
19 it was not suitable was because the touchdown location was hard to  
20 spot and identify. The Respondent explained that the --  
21 Respondent explained that the operations guide states to touchdown  
22 within one aircraft length of the touchdown location, but since he  
23 could not identify the touchdown location he did not believe he  
24 could do so within one aircraft length. At the time of his low  
25 level pass, Respondent says he was headed in a south to southwest



1 direction.

2           When asked about conducting prior high level passes,  
3 Respondent says that for this location he did so between 500 to  
4 1,000 feet above ground level. He was vague about when he  
5 conducted a high level pass, saying he had done so on several  
6 other flights and had done so earlier that day. Respondent  
7 explained that earlier that day he was near Fred's Mountain and  
8 had looked out and seen the runway. He considered this a high  
9 level reconnaissance as he was looking for powerlines or  
10 obstructions that precluded a low level pass. He vaguely referred  
11 to having conducted multiple high level passes during normal  
12 operations when flying in the area in the past and that he is  
13 often flying in that area.

14           When asked if he specifically performed a high level pass on  
15 the 24th, Respondent again said he had previously done so about an  
16 hour earlier when he was flying north to Bedell Flats. Respondent  
17 says there is a traffic corridor from Reno Stead Airport to Bedell  
18 Flats, which takes you over 300 Desert Sun Lane. When he flew  
19 this routing, he was keeping it in mind to perform a low level  
20 pass on his return. When returning from Bedell Flats is when he  
21 performed a low level pass of 300 Desert Sun Lane. Respondent  
22 again said he considered it high reconnaissance when he flew over  
23 the area on several other occasions in the past and looked at the  
24 area to assess it at a higher level.

25           When asked why he did not land, Respondent said his

1 assessment was the RC runway had a northeast departure only, which  
2 meant there was one-way in and one-way out. He testified he did  
3 not approach the area from the south because there are powerlines  
4 and more houses. As a result, he determined that the best  
5 approach was up the draw to the RC landing strip. Referring to  
6 Exhibit A-14, page 3, Respondent confirmed that the RC runway  
7 cannot be seen in the photograph and it is farther to the east.

8       When questioned by his attorney, Respondent explained that  
9 water skiing is an approach to landing technique used for  
10 backcountry landings on river banks or gravel bars, and that  
11 dragging or skimming your tires on the surface of the water is  
12 done to reduce speed for the best possible braking on shore. On  
13 the day in question, he was not water skiing.

14       Respondent confirmed that he uses the Off-Airport Ops Guide  
15 as a baseline for the quality and feasibility of landing  
16 off-airport. He confirmed that he had Mr. Likes' permission to  
17 land on his property prior to the 24th.

18       On the 24th, Respondent stated he was flying north of the  
19 Desert Sun Lane area near Bedell Flats, which is off Bird Springs  
20 Road. This is an area he flies multiple times a week and he goes  
21 through this area on almost every flight. Respondent described it  
22 as a corridor for aircraft to get to the area north of the Reno  
23 Stead Airport. He stated that he had Mr. Likes' permission to  
24 land on his property. Respondent explained he has flown models  
25 with Mr. Likes and his son, and that Mr. Likes has an RC runway on

1 his property. Mr. Likes' son had asked him to come and land.

2 The Administrator presented the testimony of FAA Inspector  
3 Ronald Green. Inspector Green testified he has worked for the FAA  
4 for 2 1/2 years and is the Principal Operations Investigator and  
5 Aviation Safety Inspector at the Reno Flight Standards District  
6 Office. His primary duties include managing certificates,  
7 investigating accidents, and taking complaints involving aviation.  
8 He holds various certificates and ratings including an ATP rotary  
9 aircraft, commercial pilot single engine land and instrument  
10 rating, CFI rotary and instrument, and remote pilot certificate.

11 Inspector Green was asked to assist Inspector Morgan with a  
12 complaint of an aircraft flying too low on November 24th. During  
13 the investigation, they interviewed Mr. Pena and Mrs. Pena, Mr.  
14 Stanley, and the Respondent. They attempted to interview Mr.  
15 Likes. They also went to the location where the low flight  
16 occurred and he took photographs.

17 Referring to Exhibit A-17, page 1, he identified the front of  
18 the garage to the Penas' residence and the garage peak camera that  
19 captured the video footage of the aircraft that flew by. For a  
20 beginning reference point for the measurements, they extended an  
21 imaginary line from center line of the peak where the camera was  
22 located down to the runway, excuse me, not runway, down to the  
23 driveway.

24 Page 3 of A-17 is a photograph of Inspector Morgan standing  
25 to the left side of the stable at the far end of a measuring tape

1 east of Penas' residence. There is a propane tank in front of the  
2 stable, and farther back there are mountains and a distant  
3 residence. This photograph was taken to provide a sense of scale  
4 of how far 300 feet would be from the Penas' residence.

5 Page 5 shows the distance from the center line of the garage  
6 to Inspector Morgan as being 300 feet and 6 inches.

7 Page 7 shows Inspector Morgan standing at the propane tank,  
8 east of the Penas' driveway.

9 Page 9 shows that distance from the center line of the  
10 driveway to the propane tank from the house being just over 56  
11 feet.

12 Page 11 shows Inspector Morgan standing near the fenced area  
13 by the stable. Also depicted is a propane tank and shed.

14 Page 13 shows the distance from the center line of the garage  
15 to where Inspector Morgan is standing near the stable as being 78  
16 feet.

17 Page 15 is a photograph facing south from the Penas' garage  
18 towards Mr. Likes' property. Depicted is a tape measure going  
19 from the center line of the garage to the fence line between Mr.  
20 Penas' and Mr. Likes' property, with Mr. Likes' residence past the  
21 fence line. Farther in the distance and past Mr. Likes' residence  
22 in the south are snow covered roofs of other houses.

23 On the right side of the photograph, to the southwest of the  
24 garage, there is split rail fence that divides the circular drive  
25 -- gravel driveway. On the far right side of the photograph,

1 between two pine trees, a power line pole can be seen in the  
2 distance, which is near the main street, Desert Sun Lane.

3 Inspector Morgan testified that there is an elevation change  
4 leading up to Mr. Likes' house on the east side that he described  
5 as a small hill.

6 Page 17 shows the distance from the center line of the garage  
7 to the fence line where Mr. Pena is standing as being 226 feet and  
8 6 inches.

9 Inspector Green said that there were no measurements taken on  
10 Mr. Likes' property. He did not recall if there was any  
11 estimation of the distance to Mr. Likes' property.

12 Referring to page 1 of A-17, Inspector Green stated that the  
13 distance from the center line of the garage to the white gutter on  
14 the east side of the house was measured. He could not remember  
15 the distance and refreshed his memory with his notes in Exhibit  
16 A-25, recalling that it was 15 feet. Based on this, Inspector  
17 Green determined that the distance from the edge of the house to  
18 the propane tank would be 15 feet less, or 56 feet. The distance  
19 from the edge of the house to where Inspector Morgan is standing  
20 would be 63 feet.

21 Inspector Green again testified that Respondent's flight path  
22 was believed to be approximately 78 feet from the center line of  
23 the garage based on the video footage received at the FSDO. He  
24 also testified that based on the video footage, they determined  
25 the size of the aircraft and the size of the aircraft in

1 relationship to the ground, which helped them determine the  
2 vertical height.

3 He also stated the interviews of Mr. and Mrs. Pena and Mr.  
4 Stanley's description of the events were considered. He noted  
5 that investigators determined the aircraft came from the northeast  
6 area based on witness statements, but investigators could not  
7 definitively determine the aircraft flight path since they, since  
8 the witnesses lost sight of the aircraft behind the Penas' house  
9 and before it emerged in the video over the Penas' property going  
10 towards Mr. Likes' residence.

11 Inspector Green said there is a downward slope from the  
12 Penas' garage as you go east and then the slope rises farther  
13 east. Inspector Green estimated that there was a 6 to 7 foot drop  
14 from the Penas' garage out to 78 feet. He based this on the fact  
15 that Inspector Morgan is holding the measuring tape at eye level  
16 standing 78 feet away.

17 Inspector Green concluded that the shed and stable are on  
18 lower terrain. In comparison, Inspector Green testified that  
19 there is very little downgrade showing, shown on page 7, as you  
20 can see Inspector Morgan's knees and shin area. So he estimates  
21 that downgrade to be a 1-foot drop.

22 Looking at A-18 as a demonstrative exhibit, Inspector Green  
23 stated he created this exhibit using Google Earth and PowerPoint  
24 to determine a 500-foot lateral limit. The photograph is oriented  
25 with the top to the north. He identified the Stanley's house in

1 the northwest. The Penas' house is directly east of the  
2 Stanley's. South of the Penas' is Mr. Likes' residence. He  
3 identified locations of Mr. Pena, and Mr. Stanley, and Mrs. Pena.

4 He identified a pink line as being representative of flight  
5 path, which was determined to be based on the video and witness  
6 statements. He further stated that the pink flight path behind  
7 the Penas' house cannot be confirmed since nobody saw the  
8 airplane's location or path behind the house. Based on witness  
9 statements, Inspector Green believes the airplane came from the  
10 north.

11 There is a yellow line depicted on Inspector Green's  
12 photograph, which depicts the estimated point where the airplane  
13 came into the video footage from the garage peak camera. However,  
14 Inspector Green said that he could not be sure of the in-bound  
15 heading. He did not recall any witnesses stating that the  
16 airplane made a left bank. Inspector Green stated that the yellow  
17 line was made using Google Earth's ruler tool, which he used to  
18 measure the distance of 499 feet.

19 Inspector Green stated that using Google Earth, he could  
20 identify powerline poles. He has experience viewing military  
21 grade satellite images and identifying surface items such as  
22 powerline poles that pose a hazard to low level flying operations.  
23 He identified two powerline poles on Exhibit A-18.

24 Respondent's counsel asked questions of Inspector Green.  
25 Inspector Green admitted that Google Earth is not used by the

1 military for tactical operations, that Google Earth is not updated  
2 on regular basis, and its images can be several years old. He  
3 admitted that to the left of the pink line, or to the east, is  
4 desert scrub brush. He admitted that Respondent voluntarily came  
5 to the FSDO to be interviewed.

6 When asked about the video he reviewed, Inspector Green  
7 recalled receiving a video through a general email box on the FSDO  
8 website. He was not sure if someone outside the organization has  
9 the ability to upload a video to the website. As the FSDO  
10 received the video before he was assigned to assist with the case,  
11 he doesn't know how the FAA came into possession of the video. He  
12 did not know if the video was part of the complaint that was  
13 emailed or they went to get it later from Mr. Pena.

14 Inspector Green admitted to receiving a copy of a video at  
15 his email address, but did not know who sent it to him. On  
16 further questioning, Inspector Green stated that there were two  
17 videos. He did not receive or know of any flash drive or CD of  
18 the videos. He does not recall -- he does recall some discussion  
19 that they did not have a flash drive capable device. As a result,  
20 he used an FAA issued camera to transfer the videos.

21 He explained using the FAA camera as a storage device to get  
22 the still videos and photos from Mr. Pena. Specifically, the FAA  
23 camera has an SD card that he plugged, excuse me. Specifically,  
24 the FAA the camera has an SD card and he plugged the camera into  
25 Mr. Pena's computer. He then downloaded the videos to the



1 camera's SD card. He brought the camera back to the FSDO and then  
2 uploaded the videos to the investigative file on the computer.

3 Inspector Green further admitted that the investigators did  
4 not ask Respondent or have him present for his input when they  
5 were making measurements and taking pictures. He also admitted  
6 that they calculated height or altitude of the aircraft using the  
7 airframe of the aircraft, which was based on the video.

8 Investigators did not measure the size of the Penas' lot or Mr.  
9 Likes' property.

10 Investigators did not measure the landing area. Inspector  
11 Green stated this was because Mr. Likes did not return phone  
12 calls, did not respond to investigator's request for a statement,  
13 and was not home when they went to his house. Inspector Green  
14 also said investigators did not get any information on the  
15 location of the landing area as they could not get ahold of Mr.  
16 Likes.

17 Concerning the videos, Inspector Green explained that the  
18 videos were transferred from Mr. Pena's computer to the SD card on  
19 the FAA camera. He recalls seeing the video on Mr. Pena's  
20 computer when he downloaded it, but did not recall if was the  
21 original native version or was an iPhone recording of another  
22 monitor playing the video. He does recall seeing another video,  
23 which he described as a video being taken of another video using  
24 an iPhone to record. He did not recall if the video that was  
25 uploaded to the FAA investigative file was a copy of the native

1 original video or the iPhone video copy. He did not know what  
2 video was uploaded to the investigative file.

3 Inspector Green stated he was not aware of any thumb drives  
4 or CDs of videos being given to the FAA, but he could not be sure  
5 it did not happen. He confirmed that when he reviewed the videos,  
6 they contained no sound.

7 Inspector Green was shown a document marked as Exhibit R-1 to  
8 refresh his memory. He stated he was not present during the visit  
9 to the Penas' residence on February 13, 2020 that is referenced in  
10 the document, which was authored by Inspector Morgan. He recalled  
11 visiting the Penas' residence two or three times.

12 I asked questions to clarify Inspector Green's testimony.  
13 Inspector Green stated that for purposes of calculating the  
14 vertical height of the airplane above ground level, the video  
15 footage was used. The video showed the airplane in a steep bank,  
16 so they used the wingspan of the airplane to determine how high it  
17 was above the ground.

18 Concerning the distance from the Penas' house to the Likes'  
19 house, since they did not have the permission -- since they did  
20 not have permission to go on Mr. Likes' property, Inspector Green  
21 admitted that there was no thought given to using a laser range  
22 finder to get the distance.

23 Further concerning the videos, Inspector Green confirmed that  
24 the videos were transferred from Mr. Pena's computer to the SD  
25 card on the FAA camera. He said this is digital camera and can be

1 used as a digital storage device. The camera can be connected to  
2 a computer to receive or transfer digital photos and videos to and  
3 from a computer. He recalled plugging the FAA camera's USB  
4 connector into Mr. Pena's computer, which was located in the front  
5 room of the house. He did not go into the attic, nor did he get  
6 the copy of the video off the DVR that was connected to the  
7 security cameras in the attic. He does recall seeing another  
8 video, which he described as a video being taken of another video  
9 using an iPhone to record.

10 Although he saw the video on Mr. Pena's computer when he  
11 downloaded it, he stated could not recall if it was the original  
12 native version or the iPhone recording. He did not know what  
13 video was uploaded to the investigative file, and does not know  
14 where the original native version is or what version is in the  
15 investigative file.

16 As to the version that was downloaded to the FAA camera's SD  
17 card, he stated he deleted anything on the SD card after it was  
18 downloaded to the investigative file so they would have space on  
19 the SD card for other cases.

20 He recalled going to the Penas' residence three times. The  
21 first was after receiving the complaint and to obtain the videos,  
22 the second was December 19th when investigators went to the Penas'  
23 residence to obtain measurements and photos, and the third visit  
24 was to try to contact Mr. Likes.

25 He recalled Inspector Morgan retiring December 31, 2021. He

1 knows that Inspector Morgan had visited the Penas' without him,  
2 which he thinks was between January and April. He had no  
3 knowledge of Inspector Morgan having or receiving a flash drive or  
4 CD with the videos.

5 On redirect examination, Inspector Green reviewed Exhibit  
6 A-15 and said that in addition to taking photos on December 19th,  
7 he also received or downloaded Mr. Pena's videos. Concerning the  
8 investigator's vertical measurements, the investigators used the  
9 video and witness statements. He believes they used the iPhone  
10 video and not the original native video. In calculating vertical  
11 height, investigators accounted for and included the downslope of  
12 the terrain when assessing the aircraft's attitude, excuse me,  
13 aircraft's altitude.

14 On cross examination, Inspector Green admitted that  
15 investigators did not ask for the original native file that was on  
16 the DVR. He also admits that they could not -- he also admits  
17 that they could have preserved the SD card from the camera, as it  
18 was easily removable and replaceable, and he could have simply put  
19 a new SD card into the camera if he needed space for other cases.

20 Finally, FAA Technical Specialist Roy J. Speeg, Jr.,  
21 testified. He summarized his experience, employment and training,  
22 which is set forth in Exhibit A-19. In brief, he has worked for  
23 the FAA for 18 years. He is a technical specialist with the EIR  
24 Review Team. He has worked as an Aviation Safety Inspector and  
25 Operations Specialist.

1           He has also worked as a Regional Aviation Specialist or Air  
2 Show Coordinator for the Northwest Mountain Region. In this  
3 capacity, he was responsible for airshow waivers for aerobatic  
4 competitions, low flight races, cross-country races, and banner  
5 towing. He holds aerobatic competency to 500 feet above ground  
6 level, ATP certificate for single and multi-engine land airplanes  
7 with several type ratings, and Flight Instructor certificate for  
8 single and multi-engine land airplane and instrument. He has a  
9 more than 6,500 total flying hours.

10           Respondent's counsel questioned Specialist Speeg about his  
11 qualifications. He admitted that the last time he flew aerobatics  
12 was in 2000 or 22 years ago. As for the numerous types of  
13 aircraft he has flown, shown on page 8 of his resume, none of them  
14 include the Kitfox 5. While he has seen pictures of a Kitfox 5,  
15 he has not conducted any inspection of Respondent's airplane.

16           He knows the propeller is composite based on pictures, but  
17 does not know the kind of propeller. He said the engine is a  
18 Rotax, but does not know the model. He has not examined the  
19 aircraft's logbook and has no knowledge of the performance  
20 specifications of Respondent's airplane.

21           Prior to hearing Respondent testify about his airplane. He  
22 had no knowledge as to the performance or specifications of the  
23 Kitfox 5.

24           When asked about the fact that his employment history prior  
25 to the FAA shows the pay he received, his FAA employment history

1 is devoid of pay information. Specialist Speeg explained he had  
2 not noticed that. He further explained that he combined two  
3 resumes. Information from one of the resumes was for a position  
4 upgrade and required salary information. His FAA salary is public  
5 information and he disclosed it as \$147,000 a year. It is the  
6 most he has received in comparison to his past jobs.

7 Specialist Speeg stated he has testified in no more than five  
8 enforcement proceedings, and two prior times as an expert witness.  
9 While he could not remember the nature of the cases, he remembered  
10 one as being an aerobatic case.

11 Although Specialist Speeg has performed short landings and  
12 takeoffs, he has not participated in any competitions for short  
13 landings or takeoffs. He described performing short landings and  
14 takeoffs in various aircraft, including a Cessna 172 and 206. He  
15 has taught short takeoff and landings for instrument and  
16 backcountry strips. He has experience in landing various  
17 aircraft, off-airport and on roads, frozen lakes, fields and corn  
18 fields as he did so with aerobatic airplanes. He did not know how  
19 many short takeoffs and landings he performed, but believes it was  
20 between 25 and 50.

21 While he could not remember all of the aircraft he flew in  
22 the backcountry or all of the short takeoff and landings he made  
23 off-airport, he confirmed that he would make several passes to  
24 check for obstructions and obstacles, and to assess runway  
25 conditions. This would include a low level pass to assess runway

1 conditions, after which a decision would be made to land or not.

2 Specialist Speeg was qualified as an expert in general  
3 aviation flight operations, including low flight and the  
4 regulatory requirements under Section 119.19 for low flight. He  
5 was not qualified as an expert in short field and takeoffs, nor  
6 was he qualified as an expert in the operation of Respondent's  
7 aircraft, the Kitfox 5.

8 On the Administrator's questioning, Specialist Speeg stated  
9 that during a low pass to land, the purpose is to check the runway  
10 for obstructions, fallen trees or animals, particularly with  
11 backcountry strips. He stated that his low pass is done at less  
12 than cruise speed but not necessarily a slow speed. He also said  
13 that the low approach, for purposes of Section 119.19, has to stay  
14 500 feet from any person, vessel, vehicle, or structure.

15 As to Respondent's low pass, based on the statements of Mr.  
16 and Mrs. Pena, Mr. Stanley, and the pictures and measurements, he  
17 estimates that the Respondent was 50 feet above ground. He also  
18 opined that he was within 500 feet of people, vessel, vehicle or  
19 structure. He based this on when the airplane first came into  
20 Mrs. Pena's view, as well as the measured 78 feet from the house  
21 to the flight path. Specialist Speeg said that from the center  
22 line of the garage to the propane tank was measured 56 feet and  
23 adding another 25 feet to the hay barn where Inspector Morgan was  
24 standing is how he arrived at the 79 feet.

25 He also opined that the airplane when it first came in view

1 was 50 to 70 feet above ground, which included accounting for the  
2 slope of the Penas' property. Specialist Speeg concluded that  
3 Respondent's altitude was not safe if a power unit failed. He  
4 explained that if there was a problem, there was a low margin of  
5 error since Respondent would have to fly the airplane and decide  
6 on a location to land, which could not be done without undue  
7 hazard.

8 Specialist Speeg said he was not sure you could put the  
9 aircraft down safely 30 to 50 feet off the ground, especially  
10 while in a steep bank. He noted that there would be an immediate  
11 loss of lift if there was a power failure in a steep bank and a  
12 STOL kit is useless if there is 60 degrees or more of bank. He  
13 opined that the airplane first came into view, it was in a steep  
14 bank up to 60 degrees.

15 Specialist Speeg opined that Respondent was at an altitude  
16 that if a power unit failed he could not make an emergency landing  
17 without undue hazard to people or property on the ground.

18 Specialist Speeg said that any attempt to land on any of the roads  
19 in the subdivision would create a hazard to people and structures  
20 nearby.

21 Specialist Speeg testified that a banking turn introduces  
22 G forces, and a 60-degree bank adds two times gravity, or 2-Gs, to  
23 the structure of the airplane. He opined that over time there can  
24 be a structural failure with continued stress due to banking  
25 forces on the airplane.



1 He concluded that Respondent was below an altitude that did  
2 not allow for an emergency landing safely if there was a problem.  
3 He based this on his training and experience, as well as witness  
4 testimony about Respondent's height above ground level of 30 to 50  
5 feet. Specialist Speeg noted that Respondent himself testified it  
6 was unsafe to land on the RC runway, which means the only place to  
7 land would be a road in the subdivision if he had to land because  
8 of a problem and this would have created an undue hazard to  
9 persons or property. Referring to A-18 as a demonstrative aid,  
10 Specialist Speeg stated that Respondent's approach to landing path  
11 showed -- is shown with the pink line was not necessary for  
12 takeoff or landing because he could have gone farther to the east  
13 to avoid structures or people.

14 Specialist Speeg stated that Respondent's operations was less  
15 than 100 feet above ground level and closer than 100 feet to the  
16 Penas' house. He used the photograph Inspector Green created with  
17 the 500-foot, excuse me. He used the photograph Inspector Green  
18 created with a 500-foot grid to one side of the flight path to  
19 make this determination.

20 Specialist Speeg said there were several structures,  
21 including the Penas' house, powerlines, fences, and Mr. Likes'  
22 house within the 500-foot bubble. Referring to A-18 for  
23 demonstrative purposes, Specialist Speeg said that a power unit  
24 failure at any point along the pink line, which indicated  
25 Respondent's flight path, made it unsafe to land anywhere west.

1 West of the flight path was a subdivision which contained houses,  
2 people, fences, and powerlines, so an emergency landing to the  
3 west would have created a hazard. Specialist Speeg opined that  
4 subsection (a) was violated as a result.

5 Specialist Speeg also testified that subsection (c)  
6 essentially creates a 500-foot bubble around an aircraft when in a  
7 sparsely populated area, and no person, vehicle, vessel or  
8 structure can enter that bubble if it is not necessary for takeoff  
9 or landing. He opined that the subdivision area is sparsely  
10 populated and in this case there were people, a shed, the barn, a  
11 chicken coop, houses, fence, and powerlines within Respondent's  
12 500-foot bubble. He concluded that Respondent violated subsection  
13 (c) of the regulation.

14 Specialist Speeg further opined that for purposes of  
15 operating in a careless or reckless manner as to endanger life or  
16 property of another, the maneuvers Respondent performed were not  
17 necessary for landing. In addition, the altitude above ground  
18 level left him little margin for error. Specialist Speeg also  
19 stated that Respondent was too low and that he had no room to see  
20 above the top of the grade based on his flight path if he was  
21 going to land on the RC runway.

22 Specialist Speeg testified there is no operations manual and  
23 nothing in the Off-airport Ops Manual that requires the amount of  
24 bank Respondent was performing. He opined that no pilot would fly  
25 that low to the ground and at that angle of bank. Specialist

1 Speeg stated that even if Respondent was attempting to evaluate  
2 the runway, he disregarded his own safety and the safety of people  
3 and structures by operating 50 feet -- by operating below 50 feet  
4 and within 25 feet of structures.

5 As for aggravating and mitigating circumstances, Specialist  
6 Speeg stated he considered flying at that angle of bank and that  
7 low so close to structures to be aggravating. He considered  
8 Respondent's experience level as a private pilot with over 900  
9 hours in that one aircraft as aggravating. He considered the  
10 intentional maneuvering as aggravating. Finally, he considered it  
11 aggravating that Respondent had notice of unsafe conduct that  
12 violated the regulations when he previously received a warning and  
13 counseling.

14 Specialist Speeg concluded that flying that low to the  
15 ground, things can happen fast, and the fact that Respondent would  
16 have to get control of the aircraft and get to a place on the  
17 ground safely would be difficult. He opined that a more  
18 experienced pilot maybe could land safely, but it would be  
19 difficult for a 900-hour private pilot without a significant  
20 disregarded of safety.

21 On cross-examination, Specialist Speeg admitted he never met  
22 Respondent, never flew with him, and never evaluated his flying  
23 skills. He also admitted that Section 119.19 makes no mention of  
24 prohibiting any specific degrees of bank. Specialist Speeg  
25 confirmed that the FAA Off-airport Ops Manual is advisory and

1 there is no violation if it is not followed.

2 When questioned about being at 60 degrees bank -- when  
3 questioned about being at 60 degrees of bank, Specialist Speeg  
4 admitted that an airplane can go past 60 degrees of bank and still  
5 remain in control, such as a glider or aerobatic airplane. When  
6 determining that Respondent was up to 60 degrees of bank,  
7 Specialist Speeg admitted that it was based on viewing the video  
8 showing 2 to 3 seconds of flight.

9 Referring to A-18 as a demonstrative aid, Specialist Speeg  
10 admitted that if Respondent was traveling from north to south in a  
11 left banking turn at the point just past the garage, Respondent  
12 would be flying away from people and homes to the west. He  
13 admitted that Respondent described an aggressive -- that witnesses  
14 described an aggressive left bank or left turn.

15 Specialist Speeg further admitted that to the right side of  
16 the pink line, or east, it is mostly scrub and desert. He  
17 further agreed that a 3 degree glide path puts a pilot 300 feet  
18 above ground level if they are a mile away from touchdown, and 75  
19 feet above ground if they are half a mile to touchdown.

20 MS. TOSCANO: Judge Fun? I hate to interrupt but --

21 JUDGE FUN: Yes?

22 MS. TOSCANO: Mr. Schulte has requested a quick comfort  
23 break, yes.

24 JUDGE FUN: Yes. And I think that's in line. We've gone for  
25 about 2 1/2 hours, so we'll take a quick 15-minute comfort break.

1 We'll pause the record, and you may mute and stop your videos for  
2 15 minutes.

3 (Off the record at 2:27 p.m. EST)

4 (On the record at 2:42 p.m. EST)

5 JUDGE FUN: We're back on the record after a short recess. I  
6 do apologize to the parties. This is a very initial oral  
7 decision, so we'll likely, might need to take another break. If  
8 we do, just get my attention if I'm distracted giving you my  
9 decision.

10 All right. I'm going to continue now with my decision and  
11 the review of evidence. Respondent's counsel then showed  
12 Specialist Speeg a Google Earth picture of Linden Airport in New  
13 Jersey as demonstrative aid, which depicted petrochemical storage  
14 sites 537 meters from the runway's threshold, and people and homes  
15 133 meters from the runway's threshold. Specialist Speeg admitted  
16 that an aircraft using this runway would come within 500 feet of  
17 people and structures. He also admitted, since he is an  
18 Instrument CFI, he teaches pilots to fly to the minimum altitudes  
19 on instrument approaches, which may bring the aircraft close to  
20 people and structures at a developed airport.

21 Respondent's counsel also showed Specialist Speeg a Google  
22 Earth picture of Kent Moore Airport, a fly-in community with a  
23 grass field and structures 90 feet from the center line of the  
24 runway. Specialist Speeg admits that normal operations would put  
25 a pilot within 500 feet of people and structures, but no violation

1 would be found for an aircraft landing there.

2 Specialist Speeg agreed that pilot skills are perishable and  
3 with practice skills can get better. He also agreed that how and  
4 where to fly depends on the skill and judgment of the pilot. When  
5 asked if he would recommend a pilot to land on a 1,000-foot runway  
6 if the pilot is newly minted and just checked out in a F-33  
7 Bonanza, Specialist Speeg would not. He agreed that he might if  
8 the runway was 4,000 foot long.

9 Under this hypothetical, Specialist Speeg agreed that some of  
10 the factors in determining whether the pilot should land includes  
11 the pilot's skillset and experience. Specialist Speeg was not  
12 familiar with the term balanced runway, but he knew of the concept  
13 that the runway should be long enough for an airplane to  
14 accelerate to full speed and still have enough runway remaining to  
15 come to full stop.

16 Specialist Speeg agreed with Respondent's counsel that in  
17 addition to the type of aircraft and conditions of the landing  
18 site, the pilot's skill and performance of the aircraft are  
19 factors in determining whether the regulation is violated.  
20 Specialist Speeg admitted there is no regulation that specifically  
21 prohibits off-airport operations and that the FAA has published an  
22 Off-Airport Ops Guide for this purpose.

23 Specialist Speeg agreed that 91, excuse me, that 91.119 does  
24 not apply during off-airport operations and explained this is  
25 because a pilot can get a waiver of the regulations. He stated

1 that absent a waiver, under no circumstances can a pilot drag a  
2 runway during off-airport ops or come within 500 feet of persons,  
3 vehicles, vessels, or structures if they are not landing or taking  
4 off.

5 Specialist Speeg agreed that what is written on page 3 of the  
6 Off-Airport Ops Guide is accurate. He agreed that the guide  
7 recommends a low level pass, and that there is no guidance in the  
8 guide on what altitude to fly for the low level pass. He also  
9 agreed that the guide instructs that another pass be performed  
10 with rolling one tire to get a feel for the landing surface,  
11 suggesting multiple low level passes.

12 Specialist Speeg further agreed that there is nothing stated  
13 in the guide referring to staying 500 feet away from people or  
14 structures. Specialist Speeg, nonetheless, stated that a pilot  
15 can land off-airport in a sparsely populated area, and can fly  
16 low, but must still remain 500 feet from people or property unless  
17 it necessary for landing or taking off.

18 Respondent's counsel asked Specialist Speeg whether it is  
19 careless and reckless if a pilot lands off-airport without first  
20 conducting a low level pass and crashes with passengers.  
21 Specialist Speeg said That he could not answer this hypothetical  
22 because it would depend on the circumstances, such as whether the  
23 pilot needed to land because of an emergency. He said that each  
24 situation is different depending on the circumstances.

25 On redirect examination, Specialist Speeg stated that

1 3 degrees is an optimal approach angle to transition from approach  
2 to landing, which is used at towered airports. However, during  
3 off-airport ops, it is not necessary to stick to the 3 degree  
4 approach angle since locations are different. As to the  
5 hypothetical about a newly minted pilot flying an F-33 Bonanza,  
6 Specialist Speeg stated that judgment is also a factor, which  
7 cannot be taught nor assigned any criteria.

8 Specialist Speeg opined that there still would be a violation  
9 if a pilot makes a low level pass below the minimum altitude  
10 stated in 91.119 and does not land because the pilot determined it  
11 was unsafe. He explained that absent a waiver, a pilot that does  
12 not land or takeoff cannot operate below the altitude specified in  
13 the regulation.

14 Give me a moment here. I'm going to check something real  
15 quickly. All right, I apologize for that brief interruption.

16 He further stated that a pilot must stay above the altitude  
17 in the regulations if they are not landing or taking off. Even  
18 during a low level pass, the pilot is still required to stay 500  
19 feet away from any person, vessel, vehicle, or structure.

20 Referring to Exhibit R-2, Specialist Speeg stated that  
21 Respondent's flight path took him within proximity of Mr. Likes'  
22 residence. He testified that Respondent could have flown to the  
23 other side of the runway during his southbound trip and could have  
24 looked out his right side to assess the runway. Specialist Speeg  
25 said that there can be no low passes over a runway unless the



1 pilot is going to land.

2 To clarify Specialist Speeg's testimony, I asked questions.  
3 Specialist Speeg said that an approach to land with an actual  
4 landing would not violate 119.19 if the pilot flew over residences  
5 even if there was a better alternative depending on the  
6 circumstances, such as a life flight that needed to land quickly.  
7 Specialist Speeg stated that a pilot must remain 500 feet away  
8 from people and structures during a low level pass unless they are  
9 performing an approach to land.

10 Specialist Speeg stated that Section 199.19(a) refers to an  
11 altitude anywhere as opposed to an approach path. Specialist  
12 Speeg explained that subsection (a) is to ensure a margin of error  
13 for purposes of landing without undue hazard. He testified that  
14 subsection (a) applies anywhere, including off-airport operations.  
15 As to subsection (c), Specialist Speeg stated that it establishes  
16 distances from people, vehicle, vessels, or structures in sparsely  
17 populated areas.

18 I asked Specialist Speeg if would be acceptable for a pilot  
19 to fly over residences even if there is a better approach path  
20 during an off-field landing. Specialist Speeg said that it  
21 depends on the circumstances, such as an emergency and there was a  
22 need to land quickly. Finally, when I asked Specialist Speeg what  
23 video he saw in forming his opinions, he could not recall whether  
24 it was the iPhone video recording of another video monitor or a  
25 native copy of the original video from the garage peak.

1           The Administrator's counsel recalled Investigator Green, who  
2 testified that being, excuse me, he testified that after getting  
3 the video from the Penas, the investigators had Respondent come to  
4 the FSDO. He was present during the time when Respondent was  
5 showing the video. Respondent admitted it was his airplane and he  
6 was the pilot-in-command. When asked about the reason he was in  
7 the vicinity of Desert Sun Lane, Respondent said he was doing an  
8 approach to land at an RC airfield at Mr. Likes' property. He had  
9 also explained he was at Bedell Flats earlier that day and was  
10 returning home.

11           On cross-examination, Investigator Green agreed that  
12 Respondent contacted the FSDO promptly when they asked him to do  
13 so. And that he agreed to come to the FSDO when they asked him,  
14 and that he did not deny it was him flying the airplane when  
15 showed the video, and did not seek to be evasive in answering.  
16 The Administrator rested its case-in-chief.

17           The Respondent presented his defense. Mr. Jared Likes  
18 testified and Respondent testified. In summary, Jared Likes  
19 testified that he lived at 300 Desert Sun Lane for 18 years and  
20 was living there on November 24th. In the 18 years he lived  
21 there, he recalled aircraft flying in the area frequently. He met  
22 Respondent because, excuse me. He met Respondent as Mr. Likes and  
23 his son have an interest in aviation and they flew a RC aircraft,  
24 or small electric airplanes, at the park with Respondent.

25           Mr. Likes gave Respondent permission to land on his property.

1 Mr. Likes stated that on the south side of his garage, he has a  
2 100 to 500-foot RC runway. It is a graded runway that he keeps  
3 clear of brush. His son and him have been using this runway for  
4 RC airplanes. While he heard what happened, Mr. Likes stated he  
5 was not home on the 24th.

6 He testified to flying with Respondent several times,  
7 including when Respondent made off-airport landings. He recalled  
8 landing in a field that is a 20-minute drive north of his house.  
9 He described Respondent's landings as safe and doable, and  
10 Respondent was able to land in a short distance of approximately  
11 100 feet with his Kitfox. Mr. Likes, however, is not a pilot. He  
12 states that the last time he flew with the Respondent was about a  
13 month before November 24th.

14 On cross-examination, Mr. Likes explained that RC airplanes  
15 are remote controlled foam electric airplanes. He did not  
16 consider them models but radio-controlled. He said that there is  
17 approximately 10 acres of open space behind the RC runway. In  
18 terms of grade, he said it is flat, with an approximately  
19 1 percent grade per 400 feet. He admitted that there is a  
20 swimming pool in the backyard and the RC runway is to the  
21 southeast of the swimming pool. He denied flying any drones from  
22 the RC runway. He stated that he and his son are friends with the  
23 Respondent, but he has not recently flown with Respondent nor seen  
24 him for a few years.

25 To clarify Mr. Likes testimony, I asked questions. Mr. Likes

1 said nobody was home on November 24th, neither him, nor his son.  
2 Even though nobody was home on the 24th, Respondent did not  
3 contact him that day or shortly before to reconfirm that he had  
4 permission to land. Mr. Likes said Respondent had permission to  
5 land anywhere on his property at any time, and there were multiple  
6 areas to land as he has trails and paths on the property that  
7 Respondent could use in addition to the RC runway.

8 He gave his permission prior to November 24th, but does not  
9 recall the circumstances or when. He recalled it being only one  
10 occasion when it was discussed. Mr. Likes did not recall when the  
11 RC runway was built, as it had been there for several years. He  
12 estimates the width to be 25 to 30 feet, and described it as a  
13 cleared dirt runway that is oriented east to west. He stated it  
14 is located 500 feet or more away from the house.

15 Respondent Trent Palmer testified in his defense. He has  
16 been a pilot since 2014 or approximately 8 years. While he has  
17 flown a handful of different aircraft, he has mostly flown his  
18 Kitfox 5 STi, which is a short take-off and landing, or STOL  
19 modified airplane. STOL modifications allow for off-airport  
20 landings, which include rough and unimproved surfaces.

21 His airplane was built in 1997 and is a Johnson John T  
22 Kitfox 5. He rebuilt most of the airplane, including adding STOL  
23 modifications. Respondent testified that the airplane's maximum  
24 cruise speed is 110 miles per hour, but his normal cruise speed  
25 that he is comfortable with is 100 miles per hour. The stall

1 speed is 32 miles per hour and he flies a few miles per hour over  
2 the landing, excuse me, he flies a few miles per hour over that  
3 speed for landing.

4 The performance specifications for his aircraft are based  
5 upon standard atmospheric conditions at sea level. He stated that  
6 he can take off and land within approximately 150 feet flying solo  
7 and with his gas tank halfway full. The shortest takeoff and  
8 landing Respondent has performed was approximately one-half the  
9 length of his aircraft, which he estimates as 30 to 50 feet since  
10 he did not perform any measurements.

11 Respondent's counsel showed a YouTube video as a  
12 demonstrative aid, which depicted Respondent making a short  
13 takeoff and landing in his Kitfox. The video was taken in 2017.  
14 It shows his Kitfox, which is the same one he was flying on the  
15 day in question. He did change the cowling in 2018, so the 2017  
16 video is showing the airplane with older cowling.

17 Respondent says the video is an accurate depiction of his  
18 STOL performance and STOL engine noise. I note that while I could  
19 not hear the engine, I do not find this demonstrative -- I do not  
20 find this demonstration of the actual engine sound, excuse me.  
21 Let me rephrase that. I note that while I could not hear the  
22 engine, I do not find this demonstration of the actual engine  
23 sound accurate since it was a video being played over the Zoom  
24 program, and the volume settings and equipment can distort sound  
25 perception. I further noted that the video shows the airplane on

1 an asphalt runway during the takeoff and landing. Although  
2 Respondent did not measure the STOL distance, he estimates it as  
3 being 150 feet.

4 Respondent testified he spends a lot of time in the  
5 backcountry and off-airport sites. He estimates having performed  
6 1,000 off-field takeoffs and landings. During the November 2019  
7 timeframe, he was flying 3 to 4 times a week, and estimated  
8 performing 30 or more off-field takeoffs and landings in a week.

9 Respondent had modified his airplane for these purposes.  
10 This included installing a different engine and propeller, and new  
11 navigational equipment. He has also modified the landing gear for  
12 a higher take-off attitude. He says all of this increased his  
13 STOL performance. Specifically, he has a Rotax turbo-charged  
14 engine, which doubled his engine output for a shorter takeoff  
15 roll.

16 While the engine added weight, he off-set that with a change  
17 in angle of attack with a taller landing gear. This is how the  
18 Kitfox was equipped on November 24th. Respondent said the engine  
19 was built to European standards for quiet operation, as was the  
20 propeller, which is a MTV-6-A. He stated that the same engine and  
21 propeller combination has been test certified to European aviation  
22 standards of less than 72.8 decibels.

23 Respondent stated that if he is in a straight and level  
24 flight at 100 miles per hour cruise, and lost power unit, lost a  
25 power unit, he would lose thrust but not lift, nor control of the

1 aircraft. He explained that because of the lack of engine thrust,  
2 he would have to descend to maintain airflow over the wing and  
3 would be able to glide. He would be able to continue in the same  
4 direction and would have enough forward inertia to turn within  
5 reason without stalling or loss of control.

6 As to November 24th, he said he flew over to Bedell Flats  
7 because a Fox Hunting Club had asked him to help find a missing  
8 horse. In the course of looking for the horse, he landed a few  
9 times. After finding the horse, he began returning home. Desert  
10 Sun Lane is in the vicinity of his return, so he decided to  
11 perform a low level inspection pass as part of a safe operating  
12 procedures in evaluating an off-airport landing site.

13 He performed a low level pass to determine the feasibility of  
14 the landing site. During the low level pass, he did not know his  
15 airspeed, but was flying at 70 miles per hour ground speed. He  
16 speculates that his indicated airspeed might have been less given  
17 the weather conditions. He states he was at 70 miles per hour  
18 because this is the speed in which he was performing the time and  
19 distance calculation to determine the length of an off-airport  
20 runway. At 70 miles per hour, or 60 knots, the airplane travels  
21 800 feet per second.

22 Respond states that he was unable to identify the touchdown  
23 point on the runway, so he made a left turn to abort the operation  
24 and left the area. He stated that he did perform any time or  
25 distance measurements because he decided against landing when he

1 could not identify the touchdown point. He says it would have  
2 been his standard operating procedure to calculate runway length,  
3 which is why he believes he was flying at 70 miles per hour during  
4 the low level pass.

5 Referring to A-18, Respondent acknowledged flying in the  
6 vicinity of Desert Sun Lane. He described his flight path as  
7 coming from the top of the photograph, which is north, to the  
8 bottom, which is south. Respondent states if he lost his engine  
9 during the low pass, he would have gone straight as there was a  
10 vacant lot to the south of Mr. Likes' property. He describe the  
11 lot as being a 10-acre parcel of scrub brush, which he would have  
12 only needed one-quarter of it to land. Respondent says he would  
13 not have landed on Desert Sun Lane, but would have gone to the  
14 open area away from the houses if he lost his engine.

15 Respondent says he was in control at all times during the low  
16 pass. He opined that he would have been able to safely land in  
17 the event of an engine failure. He based this on a past  
18 experience. He explained that in 2018 he was flying his Kitfox at  
19 cruise altitude from Idaho to Reno and crossing a mountain range  
20 500 feet above ground level. At that time, he had a catastrophic  
21 engine failure. He was able to find an open area and safely land  
22 with a tailwind in a downward slope. There was no airplane damage  
23 and he suffered no injury. He further opined that his experience  
24 in off-field and backcountry takeoffs and landings accounted for  
25 his safe landing with an engine failure.



1           Respondent stated he has never met, nor spoken to Specialist  
2 Speeg. When asked about Specialist Speeg's opinion that it would  
3 have been safer to approach and inspect the landing site from the  
4 east, Respondent disagrees because the RC runway would have been  
5 on the right side of the airplane. Respondent explained that  
6 since he was flying from the left seat, his view of landing site  
7 would not have been as good. He stated he would have to look  
8 across the right side and his view would be partially obstructed  
9 by cowling, the right seat, and the floorboard. Respondent said  
10 it is a standard practice to offset from the landing site about  
11 300 feet and to look out the left side of the aircraft for a good  
12 view.

13           Referring to R-2 for demonstrative purposes, Respondent said  
14 he created this picture using Google Earth and that he drew this  
15 flight path shown in green with arrows. He identified the yellow  
16 line, which was marked as intended landing area -- he identified  
17 the yellow land which was marked as, quote, "intended landing  
18 area," end quote, as the RC runway he was assessing. The RC  
19 runway is depicted as running roughly north and south.

20           Respondent admitted that his flight path took him between the  
21 RC runway and Mr. Likes' house. Respondent explained that this  
22 was so he could off-set the runway to his left side and look out  
23 of the left window. He stated that the RC runway is a one-way in  
24 and one-way out for takeoff and landing. He explained that the  
25 there is a slight slope to the RC runway, with the north end being

1 lower than the south end.

2 Respondent said that when landing off-airport, you would want  
3 to use an upward slope of landing site to help slow you down,  
4 which meant landing to the north and rolling uphill to the south.  
5 However, when taking off, you would want to use the downward  
6 slope, which meant taking off from the south and heading north.

7 Respondent said if he had decided to land after the low pass,  
8 he would have been set up for a left traffic pattern to land to,  
9 land on the north end of the runway. He explained after he made  
10 his low pass with the landing site, excuse me. He explained that  
11 after he made his low pass with the landing site on the left side,  
12 he would have then have climbed and turned left for a left  
13 crosswind, placing him perpendicular to the runway.

14 He would have then turned left again for the left downwind  
15 leg, coming back north, then making a left base, then a left turn  
16 to a final approach. However, Respondent said he did not do this  
17 because he felt uncomfortable with being unable to identify the  
18 touchdown point. Since he made the decision that a safe landing  
19 could not be made without more passes, he decided to continue on  
20 his southbound flight return to the airport, which was  
21 approximately 5 minutes away.

22 Respondent confirmed that sometime afterwards, Inspector  
23 Morgan from the FSDO contacted him either by letter or voicemail  
24 asking him to speak to him. Respondent did contact Inspector  
25 Morgan as he requested. He could not recall the details of the

1 conversation. During the conversation, Respondent did not recall  
2 flying past any houses because the conversation took place a week  
3 after the 24th and he had since flown several times.

4 At the request of Inspector Morgan, Respondent went to the  
5 FSDO. He was shown a video and questioned. Respondent readily  
6 admitted that the video showed him flying his Kitfox 5 in the  
7 vicinity of Desert Sun Lane, and that he did fly past the Penas'  
8 and Likes' properties. He admitted that he was planning an  
9 approaching to land with medium power, but applied power to turn  
10 and climb when he decided to depart the area. He did not land.

11 On cross-examination, Respondent confirmed that his Kitfox  
12 has dual controls. Administrator's counsel questioned him as to  
13 why he not plan on sitting in the right seat to make the low level  
14 pass. Respondent explained that all of his pilot-in-command time  
15 has been from the left seat. The primary instruments are on the  
16 left. And attempting to operate from the right seat would have  
17 introduced a new variable that was unnecessary. When asked about  
18 the prior incident referenced in the 2017 counseling, Respondent  
19 confirmed that he was in the left seat and that he was flying with  
20 an instructor in the right seat.

21 When asked about his flight route through the area of Desert  
22 Sun Lane to get to Bedell Flats from the Reno Stead Airport,  
23 Respondent explained that Bedell Flats is a large area like a sink  
24 and the Desert Sun Lane area is the lowest point in the path due  
25 to the mountain range. When asked about his prior high level

1 inspections, he stated he had flown over the area at higher  
2 altitudes in the past. As he passed through the area, he would  
3 look out and assess the feasibility of landing. He said he would  
4 have done this at approximately 500 feet above ground level. He  
5 could not remember the times he did this, but says it was when he  
6 was flying over the area. He considered these occasions as  
7 performing a high-altitude reconnaissance. The first time he  
8 made a low level inspection pass was on November 24th.

9 When asked how he would approach the RC runway if he intended  
10 on landing, Respondent stated he would not make any landing  
11 approach from the south. He explained that the RC runway slopes  
12 downward towards the north, so when making an off-field landing,  
13 he would have landed at the north end to take advantage of the  
14 upward slope to the south.

15 He did not know the length of the RC runway, but guessed it  
16 at 400 to 500 feet. He stated that his southern flight path was  
17 following a drainage, which led to the to the Likes' property. He  
18 admitted that farther south of the Likes' property are houses and  
19 powerlines. But his main reason for the manner of his approach  
20 was because of the slope of the runway if he decided to land. He  
21 testified he began his left climbing turn away from the Likes'  
22 house once he decided he was unsatisfied with being unable to  
23 identify the touchdown point.

24 Respondent denied having flown any drones at the Likes'  
25 property. He said he had visited the property before, but it was

1 not to fly drones. When asked about where the RC runway was  
2 located, his response was that, it was that he was confused by Mr.  
3 Likes' testimony that the runway was east to west since the one he  
4 was looking at was north to south.

5 On cross-examination, Respondent denied flying so low that he  
6 would have not have been able to see the touchdown point. He  
7 explained that the touchdown point was difficult to identify  
8 because of the lack of identifying features and not because of  
9 flying below the rise where the RC runway was located. He also  
10 said that it was an off-field runway so there are not a lot of  
11 markings on it.

12 Referring to R-2, Respondent estimates that his altitude was  
13 under -- 100 feet above ground level on his flight path between  
14 Mr. Likes' house and the RC runway. He could not recall the  
15 lateral distance he was from Mr. Likes' house. Although he would  
16 have looked out of both windows, he states his focus was on the  
17 landing site so he would have been mostly looking out of his left  
18 window.

19 Respondent reiterates that he was making a low pass and did  
20 not intend to land. He made the decision during the low pass that  
21 he was unable to identify any touchdown point, so decided to  
22 leave. He stated that if he had liked being able to identify the  
23 touchdown point, he would have comeback and made another pass to  
24 inspect the runway. As he did not identify a touchdown point, he  
25 began a climbing turn to leave the area. He began his climbing

1 turn just past Mr. Likes' house. He did not know his altitude  
2 since he was since he was climbing.

3 He admits that he passed by Mr. Pena's house on his route to  
4 the low level pass. Respondent claims that he did ask Mr. Likes  
5 to call Mr. Pena on his behalf, excuse me, let me rephrase that.  
6 Respondent confirms that he did ask Mr. Likes to call Mr. Pena on  
7 his behalf and apologize, but this was because Inspector Morgan  
8 had told Respondent that this incident warranted an apology. He  
9 did not recall telling Mr. Likes that he flew too close to Mr.  
10 Pena's house.

11 Respondent admitted that if lost an engine at 100 feet above  
12 ground level and was in a 40 degree bank, it would be factor in  
13 the glide performance. He explained that a bank angle adds drag  
14 to the wing and less lift would be generated, which would mean it  
15 would glide less in a turn. He also admitted that the performance  
16 numbers are based on sea level and at altitude, the performance is  
17 different because the air is thinner.

18 On redirect, Respondent said he was at approximately 5,000  
19 feet during the STOL demonstration video. In comparison to the  
20 area of Desert Sun Lane, which is 5,500 to 7,500 feet, Respondent  
21 says that there is no noticeable difference on his aircraft's  
22 performance. He explained that it is standard for the pilot-in-  
23 command to fly from the left seat unless they are instructing. He  
24 confirmed that he has no experience performing low level passes or  
25 landing from the right seat. He stated his belief that it is

1 necessary to perform a low level pass in order to evaluate the  
2 suitability of the landing area.

3 I asked questions to clarify Respondent's testimony. He  
4 stated that the sound testing was not specific to his Kitfox, but  
5 was for an airplane with a similar engine and propeller as his.  
6 Before the engine failure he had previously while crossing the  
7 mountain, he said there was little warning. He recalled a buzzing  
8 sound, but he wasn't sure where it was coming from since he was  
9 listening to music with headphones. He later learned that he had  
10 a rod failure.

11 Respondent said he first met Mr. Likes and his son in 2012 at  
12 an RC racing event. Later in 2019, he hired Mr. Likes to perform  
13 some plumbing work and his son to perform finish work at his  
14 house. During that time they began talking more, and Mr. Likes  
15 son, Jacob, invited him to fly RC airplanes at their property, and  
16 asked Respondent if he thought he could land his airplane on the  
17 RC runway. Respondent said he thought he could land on the RC  
18 runway, so Jacob continued to ask him several times.

19 Respondent said his typical cruise altitude in the area is  
20 6,000 to 6,500 feet above mean sea level, or 500 to 1,000 feet  
21 above ground level if he was not flying cross-country. He could  
22 not recall his altitude because, excuse me. He could not -- he  
23 cannot recall his altitude as he was -- as he flew south to north  
24 to Bedell Flats. He could not recall at what point on his flight  
25 back south that he decided to go and get a closer look at the RC

1 runway and make a low level pass. He could not recall his  
2 altitude during his flight south. He could not recall when or  
3 where along his flight path he began his low pass. He did not  
4 recall where along his flight path he descended to 100 feet above  
5 ground level.

6 He has a glass cockpit, or an electronic display. He does  
7 not recall either the highest or lowest altitude along his flight  
8 path, and stated that he was not looking at his altimeter as he  
9 flew near the Likes' house or along the path depicted with the  
10 green line in R-22 -- R-2. He could not recall at what point  
11 along his flight path he reduced his speed to 70 miles per hour.

12 He could not recall when he visited Mr. Likes' property, but  
13 knows it was sometime before the 24th. He recalls identifying a  
14 group of sage brush near runway during his visit, but could not  
15 identify them from the air. He said there is no windsock on the  
16 property, but said the prevailing winds were calm.

17 He had not studied any navigational maps for the purposes of  
18 landing at the RC runway. He did not use any navigation aids to  
19 identify the RC runway. He was not able to identify the runway,  
20 excuse me. He was able to identify the runway, but was not able  
21 to identify a touchdown point. He was not sure of the runway's  
22 length, but he thought it was roughly 400 feet. He had evaluated  
23 other locations on Mr. Likes' property since there were other  
24 roads and trails, but this particular runway was the best.

25 Respondent testified that during low level -- during the low



1 level pass to assess the RC runway, he did not make any radio  
2 calls on the common traffic frequency reporting his location.  
3 Respondent's excuse was because there was no common traffic  
4 advisory frequency for that area and there was no geographic  
5 references he could point to for his position. He said depending  
6 on the circumstances, he doesn't know how many additional passes  
7 he would have made if he was satisfied after his first low level  
8 pass. He stated he would typically make at least three more  
9 passes.

10 I pointed out that instead of the flight path he took as  
11 depicted with the green arrows on R-2 going north and south and  
12 flying between Mr. Likes' house and the RC runway, he had an  
13 alternative. Specifically, instead of turning towards the houses  
14 to look out his left side, as could flown farther south, while  
15 staying farther east of the houses and over the open area. After  
16 going past the landing site, he could have then made a 180 degree  
17 turn to come back north, and fly essentially a downwind leg for  
18 his low pass, would still have allowed him to look out of his left  
19 window without flying so close to Mr. Likes' house that was to the  
20 west. Respondent conceded that the did not consider that option.  
21 Respondent, however, said that the ground was 20 to 30 feet higher  
22 to the south, suggesting that it would have been difficult.

23 The Respondent rested his case-in-chief. There was no  
24 rebuttal evidence offered.

25 Having summarized the evidence, I will now make my findings

1 and conclusions of law starting with the relevant regulations  
2 alleged. 14 CFR, Section 91.119(a) states, and I quote:

3 "Except when necessary for takeoff or landing, no person may  
4 operate an aircraft below an altitude allowing an emergency  
5 landing without undue hazard to persons or property on the surface  
6 if a power unit fails." Actually, that is not a quote. That's my  
7 paraphrasing of Section 91.119.

8 Subsection (c) prohibits operating aircraft at an altitude of  
9 500 feet above the surface, except over open water or sparsely  
10 populated areas. In those cases, the aircraft may not be operated  
11 closer than 500 feet to any person, vessel, vehicle, or structure.

12 Section 91.13(a) is a residual violation that prohibits  
13 operating an aircraft in a careless or reckless manner so as to  
14 endanger the life or property of another.

15 I make the following findings of fact:

16 First, that Respondent holds a pilot -- private pilot's  
17 certificate.

18 Two, that he is the registered owner of a 1997 Johnson John T  
19 Kitfox 5, registration number N318JJ.

20 Three, that on November 24, 2019, he was the pilot-in-command  
21 of his aircraft in the vicinity of 400 Desert Sun Lane and 300  
22 Desert Sun Lane in Reno, Nevada.

23 Respondent admitted to paragraphs 1 to 3, and testimonial  
24 evidence of Respondent, the Penas, and Mr. Stanley corroborate  
25 these undisputed facts. It has not been disputed that area in

1 question is considered a sparsely populated area, and I find it is  
2 a sparsely populated area within the meaning of the regulations.

3 I also find that Respondent flew less than 100 feet above  
4 ground level as stated in the first clause of paragraph 4.  
5 Respondent admitted he was operating in the vicinity of 300 and  
6 400 Desert Sun Lane, and that he had operated less than 100 feet  
7 above ground level. He also testified on cross-examination to  
8 estimating that his altitude was under 100 feet above ground level  
9 on his flight path between Mr. Likes' house and the RC runway.

10 It is undisputed that Mr. Likes' residence is 400 Desert Sun  
11 Lane and south of the Penas' residence. Respondent did not recall  
12 where along his flight path he descended to 100 feet above ground  
13 level. He further did not recall his specific altitude during,  
14 before, or after the low pass. He did, however, clearly concede  
15 to being 100 feet above ground level or less during his low pass  
16 over the Likes' property.

17 The testimony of Mrs. Pena corroborates this. She saw the  
18 airplane before the Likes' property as it past the south end of  
19 the Penas' garage, and guessed the airplane was 100 feet to 50  
20 feet above ground level when she saw it banking and then climbing  
21 near Mr. Likes' house. Similarly, Mr. Pena places the airplane 25  
22 to 35 feet above the grade of the garage, and accounting for a  
23 6-foot slope away from the garage, put Respondent 31 to 46 feet  
24 above the propane tank on their property. Mr. Pena's assessment  
25 is based on his military experience as an MK-19 gunner.

1 This is further corroborated by Mr. Stanley's testimony, who  
2 testified to first seeing the airplane 80 feet above ground level  
3 and keeping a steady altitude until just before Mr. Likes' house  
4 where it turned and climbed. Mr. Stanley's assessment is based on  
5 seeing poles of 140 feet and 80 feet at work. While there is  
6 inconsistency between the Penas' height estimation, as well as Mr.  
7 Stanley's, they are all consistent that airplane's altitude above  
8 ground level was 100 feet or less. I therefore find that the  
9 weight of the credible, relevant and persuasive evidence proves  
10 Respondent operated at 100 feet or less above ground level.

11 Consistent with my findings, I modify the first clause of  
12 paragraph 4 of the Amended Complaint by adding between the word  
13 "altitudes" and the word "less", the phrase "of 100 feet AGL or"  
14 so that the paragraph now reads, "4. During the referenced flight  
15 operation, you operated N318JJ at altitudes of 100 feet AGL or  
16 less than 100 feet AGL." I find that a preponderance of the  
17 evidence proves this clause in paragraph 4 as modified.

18 However, what is disputed are the specific altitudes alleged  
19 in the sub-paragraphs. Specifically, he disputes operating:

20 (a) within approximately 50 feet of a stable, shed, and  
21 propane tank;

22 (b) within 100 to 150 feet of a residential home at 400  
23 Desert Sun Lane;

24 (c) within 100 to 150 feet of an adult and child outside of  
25 the same residential home; and

1 (d) within 300 feet of two adults and two children near the  
2 perimeter of the same residential home.

3 Although the specific distances are disputed, the primary  
4 issue for purposes of Section 91.119(c) is whether he flew within  
5 500 feet of a residential home at 400 Desert Sun Lane and within  
6 500 feet of adults and children outside of the same residential  
7 home as alleged.

8 There is no dispute as the Penas and their children, as well  
9 as Mr. Stanley, meet the definition of people under the  
10 regulations. Nor is there any dispute that the residential house  
11 of 400 Sun Lane, stable, and shed are structures. As to the  
12 propane tank, Respondent disputes that a propane tank is a vessel.  
13 While a propane tank is definitely not a person or vehicle, it  
14 could be a vessel depending on the definition. It can be a vessel  
15 in terms of container to hold items, or it can be a ship or  
16 watercraft.

17 In context of the FARs, or Federal Aviation Regulations,  
18 vessel refers to a ship or watercraft. Therefore, a propane tank  
19 is not a vessel under the regulations. On the other hand, a  
20 structure is commonly defined as a building or other object  
21 constructed from several parts. In *Administrator v. Scollan*,  
22 S-C-O-L-L-A-N, at 2 NTSB 538, a 1973 case, the Board held that  
23 electrical wires, including the poles between which wires are  
24 strung, is reasonably construed as a structure when a pilot flew  
25 within 500 feet of electrical wires.

1           By analogy, I find it reasonable to construe the term  
2 structure to include a propane tank. It is clear that the purpose  
3 of the regulation was to avoid the unnecessary hazards of a pilot  
4 operating too close to certain categories of objects, including  
5 propane tanks. Therefore, I find that a propane tank is a  
6 structure within the meaning of the regulations.

7           At this point, let me note paragraph 4 and sub-paragraphs  
8 focus entirely on operating too close to 200 Desert Sun Lane,  
9 excuse me, I misquoted that. At this point, let me point out that  
10 paragraph 4 and sub-paragraphs focus entirely on operating too  
11 close to 400 Desert Sun Lane, the Penas' house.

12           Paragraph 3 is of little help since it is a general paragraph  
13 that provides no allegation of distance, altitude or proximity in  
14 violation of the regulations. In short, there is no allegation  
15 that Respondent operated within 500 feet of 300 Desert Sun Lane,  
16 which is Mr. Likes' house.

17           Respondent admitted to flying between Mr. Likes' house and  
18 the RC runway. Mr. Likes testified that the RC runway is more  
19 than 500 feet away from his house. And while the Respondent did  
20 not recall how close he was to the Likes' house, he testified  
21 off-setting to the west side of the runway 300 feet so he could  
22 view the runway out of his left window. It is, therefore,  
23 reasonable to assume that Respondent was within 200 to 500 feet  
24 away from the Likes' house.

25           Respondent also testified at flying at an altitude below 100

1 feet above ground level during his low pass, which was over the  
2 Likes' property. The testimony of Mr. Stanley and the Penas  
3 corroborate this as they testified to seeing Respondent pass the  
4 Penas' house, make a left turn, fly towards Mr. Likes' house, and  
5 climb and fly into the horizon.

6 Since the Amended Complaint fails to allege that Respondent  
7 operated within 500 feet of 300 Desert Sun Lane in violation of  
8 the regulations, my findings in this regard are made only for  
9 purposes of making a determination of Respondent's flight path and  
10 altitude prior to that point.

11 There is one other correction I need to make that I noticed.  
12 In my prior discussion, I cited to Regulation Section 119.19 and  
13 its sub-paragraphs. That should actually be and the correct  
14 citation is 14 CFR, Section 91.119(a) and (c).

15 Let me next address the issue of Respondent having permission  
16 to attempt to land and takeoff from a private RC field in the  
17 backyard of 300 Desert Sun Lane.

18 It is undisputed that Mr. Likes gave Respondent permission to  
19 land, as Mr. Likes said, and I paraphrase, "anywhere on his  
20 property at any time." This specifically included the RC runway  
21 according to Mr. Likes' testimony, as well as the Respondent's.  
22 Additionally, Respondent cites to Nevada revised statute Section  
23 493.050(c) allowing for aircraft over lands or waters of another  
24 with his or her consent.

25 However, whether Respondent had Mr. Likes' consent or was in

1 compliance with Nevada's consent statute is largely irrelevant.  
2 While it may have given Respondent a reason for flying over the  
3 Desert Sun Lane area at a low altitude to consider a landing on  
4 the RC runway, the relevant federal regulations in this matter can  
5 be violated with or without the consent of the landowner. That is  
6 neither 19.119 nor 19.13 have any element or defense excusing a  
7 violation because the landowner gave consent for a landing or  
8 takeoff. Therefore, I do not find Mr. Likes' consent to land on  
9 the RC runway relevant for purposes of a violation.

10 Turning to the sub-paragraphs of paragraph 4. There was  
11 conflicting evidence between Respondent's testimony and the  
12 testimony of the other eye-witnesses, particularly with regards  
13 the flight path and altitude of the airplane above ground level.  
14 Respondent testified he was coming back from Bedell Flats. While  
15 he was unsure of his exact flight path, he says he followed the  
16 drainage which brought him from the northeast towards the Likes'  
17 property.

18 On the other hand, Mr. Pena testified he was approximately  
19 300 feet away -- on the other hand, Mr. Pena testified that the  
20 Respondent was approximately 300 feet away when he saw the  
21 airplane to the east and above the roof line of his house. He  
22 then described it disappearing below the roof line and seeing it  
23 again as it came from behind the garage of his house to the south,  
24 and then making a left banking turn towards the Likes' house to  
25 the south. Based on this, he believes the airplane came from the



1 north and flew south above the propane tank, shed, and barn on the  
2 east side of his house, even though he admits he did not see it.  
3 Mr. Pena also testified to hearing the airplane but not seeing it  
4 until it came from behind the garage of the house to the south  
5 towards the Likes' house and then making a left banking turn.

6 The Penas' testimony was likely biased given their marital  
7 relationship. There was also some indication that the Penas' were  
8 having problems with the Likes using drones to buzz their house,  
9 and their belief that the airplane was in retaliation for  
10 complaining about the drones.

11 Despite there not being any evidence of the Likes using  
12 drones to buzz the Penas' house or the Respondent retaliating on  
13 behalf of Mr. Likes, it is reasonable to believe that the Penas  
14 would embellish their testimony. However, I do not believe they  
15 falsified their basic testimony about what they saw.

16 Mr. Stanley largely corroborates the flight path above the  
17 ridge line of the Penas' and out from behind the garage at the  
18 south going towards the Likes' at an altitude of less than 100  
19 feet above ground level. Mr. Stanley testified to talking to Mr.  
20 Pena and seeing the airplane to the far east initially, which was  
21 a mile away near the mountain range coming from the south. He  
22 then saw the airplane turn left towards the Penas' at a lower  
23 altitude. As the airplane approached the Penas' house at the  
24 north end, he could see it above the house's ridge line.

25 Based on seeing 80-foot poles at work, he testified that the

1 airplane was 80 feet above ground level. He also estimates that  
2 the airplane was as far away from the house as it was high. Mr.  
3 Stanley says the speed was constant. As it got closer, he lost  
4 sight of airplane as it became hidden by the Penas' house, at  
5 which point the airplane was too low for him to see above the roof  
6 line of the house. The next time he saw it, it was past the south  
7 end of the Penas' house, but still steady at 80 feet above ground  
8 level, but making a left turn and climb before the Likes' house.

9 Mr. Stanley was not shown to have an axe to grind. Although  
10 he was friendly with Mr. Pena, he had not talked to him for some  
11 time as he had moved to Texas. He did not appear to embellish his  
12 testimony, saying the airplane's altitude was steady at 80 feet  
13 above ground level with a constant speed, and made a slight left  
14 turn and climb. I find Mr. Stanley's testimony credible.

15 The preponderance of the evidence demonstrates that the  
16 Respondent flew towards the Penas' house from the north or  
17 northeast. Respondent further corroborates that he was coming  
18 from northeast, which is consistent with Mr. Pena and Mr. Stanley  
19 seeing the airplane above the roof ridge line at the north end of  
20 the house. While the airplane went out of view because of the  
21 house, both Mr. Pena and Mr. Stanley, as well as Mrs. Pena, all  
22 testified to seeing the airplane coming out at the south end of  
23 the house passed the garage and going towards the Likes' house.

24 Respondent admits going towards -- Respondent admits going  
25 towards the Likes' house during his flight path. This is

1 consistent with the flight path of passing from the north end of  
2 the Penas' property to the south. Again, Respondent admitted to  
3 being 100 feet or less above ground level during his low pass,  
4 which is consistent with the witnesses' observations of the  
5 airplane being low.

6 As to the distance away from the Penas' residence, the  
7 preponderance of the evidence shows that he was less than 500 feet  
8 from the Penas' residence and their stable, shed, and propane  
9 tank. As no witness actually saw the flight path behind the  
10 Penas' house, the flight path must be inferred from the evidence.

11 Mr. Pena testified that he estimated being 300 feet away from  
12 the airplane's flight path when he saw it above the roof line.  
13 His wife and son were between him and the house, approximately 140  
14 to 160 feet away. Although he lost sight of the airplane behind  
15 his house, he saw it come from behind the roof line of the garage  
16 to the south. He speculates that given the two locations he saw  
17 the airplane, as well as his knowledge of the property, that the  
18 airplane was above the propane tank, stable and shed to the east  
19 of his house.

20 Mrs. Pena largely corroborates this saying that when she saw  
21 the airplane appear from the edge of the garage at the southern  
22 end of the house traveling towards the Likes' house. She  
23 concluded that the only reasonable path prior to her seeing the  
24 airplane would be over the propane tank, stable and shed to the  
25 east of their house.

1           Mr. Stanley saw the same thing, but did not testify to his  
2 belief of the flight path when the airplane was out of his sight  
3 behind the house.

4           Respondent denies these accounts. He admitted to flying by  
5 the Penas', but did not say how close he was to their house.  
6 While investigators took various measurements from the house to  
7 the various structures to the east, as well as the supposed flight  
8 path of 78 feet from the center line of the garage or 63 feet from  
9 the edge of the house, this was based on the Penas' accounts. Let  
10 me try that sentence again as my voice got a little rough there.  
11 While investigators took various measurements from the house to  
12 the various structures to the east, as well as the supposed flight  
13 path of 78 feet from the center line of the garage or 63 feet from  
14 the edge of the house, this was based upon the Penas' accounts.

15           There were really no eye-witness to the actual flight path  
16 over the various structures. Nevertheless, a preponderance of the  
17 circumstantial evidence demonstrates that Respondent operated  
18 closer than 500 feet on the west side of the Penas' residence.  
19 This would have also placed him closer than 500 feet of the  
20 various structures east of the house, which ranged in distances  
21 from 41 to 63 feet from the edge of the house. This is based on  
22 the Penas' testimony, the measurements the investigators took, as  
23 well as corroborated by Mr. Stanley's testimony of seeing the  
24 airplane above the roof line at approximately 80 feet above ground  
25 level, and that the airplane was as far away from the house as it

1 was high.

2 Thus, according to Mr. Stanley, the airplane would have been  
3 80 feet away from the Penas' house. Although Mr. Stanley was not  
4 a pilot, his testimony was credible given his work experience of  
5 seeing 80-foot and 140-foot tall poles. He also did not embellish  
6 or exaggerate his testimony. It corroborated the Penas' testimony  
7 as to airplane being approximately 78 feet from the center line of  
8 the garage.

9 I, therefore, find a preponderance of the evidence shows that  
10 Respondent operated closer than 500 feet to a stable, shed and  
11 propane tank, and closer than 500 feet to a residential home at  
12 400 Desert Sun Lane, which are all structures.

13 Consistent with my findings, I modify sub-paragraphs (a) and  
14 (b) of sub-paragraph 4 of the Amended Complaint by striking the  
15 words and figures of, quote, "within approximately 50," end quote,  
16 and the words and figures, quote, "within approximately 100 to  
17 150," end quote, and substituting the figures and phrase, quote,  
18 "closer than 500". Subparagraph (a) will now read, and I quote,  
19 "closer than 500 feet of a stable, shed, and propane tank," end  
20 quote. And sub-paragraph (b) will now read, quote, "closer than  
21 500 feet of a residential home at 400 Desert Sun Lane," end quote.  
22 I find that a preponderance of the evidence proves sub-paragraphs  
23 (a) and (b) as modified.

24 Concerning sub-paragraph (c), the preponderance of the  
25 evidence shows that Mrs. Pena was holding her son near the front

1 door, on the walkway, near the -- near their house on the west  
2 side. While it is unknown how far away she was from house, it is  
3 reasonable to infer that she and her son were closer than 500 feet  
4 to the flight path. This is based upon my finding that  
5 Respondent's flight path was closer than 500 feet to the house.  
6 More specifically, the weight of evidence shows the flight path  
7 was 78 feet from the center line of the garage peak, which is the  
8 same center line extending the length of the house.

9 Inspector Green also testified that the center line of the  
10 garage to the edge of the house was 15 feet. So it is reasonable  
11 that front door of the house was 78 feet plus another 15 feet to  
12 the west edge of the house. This is approximately 407 -- this is  
13 approximately 407 feet for purposes of being within the 500-foot  
14 bubble of 19.9 -- within the bubble of 91.119(c).

15 While it is unknown how close Mrs. Pena was to the house  
16 since investigators took no measurements, both she and Mr. Pena  
17 testified that she was on the walkway just in front of the entry.  
18 This was certainly closer than 400 feet and the evidence  
19 reasonably supports the inference that Mrs. Pena and her son were  
20 closer than 500 feet to Respondent's flight path.

21 I therefore find a preponderance of the evidence shows that  
22 Respondent operated closer than 500 feet of an adult and a child.  
23 Consistent with this finding, I modify sub-paragraph (c) of  
24 paragraph 4 by striking the words and figures of, quote, "within  
25 approximately 100 to 150," end quote, and substituting the phrase

1 and figures, quote, "closer than 500," end quote. Sub-paragraph  
2 (c) will now read, quote, "closer than 500 feet of an adult and a  
3 child who were outside the residential home at 400 Desert Sun  
4 Lane," end quote. I find a preponderance of the evidence supports  
5 and proves paragraphs -- paragraph 4(c) of the Amended Complaint  
6 as modified.

7 As to Mr. Pena and his daughter, and Mr. Stanley at the  
8 western fence line of their properties, the only testimony as to  
9 their distance from the flight path was Mr. Pena's. While he  
10 testified to being 300 feet from the flight path, there was no  
11 corroboration of this.

12 Mr. Stanley did not say how far he was from the flight path.  
13 He only said how far he thought the flight path was from the  
14 house. The investigators did not measure any distances to the  
15 western fence line where Mr. Stanley and Mr. Pena were standing.  
16 Mr. Stanley did not say how far away Mrs. Pena or how far the  
17 house was from him.

18 Finally, there was scant evidence that there were two  
19 children near Mr. Stanley and Mr. Pena. While Mr. Pena and Mrs.  
20 Pena testified about their daughter being with Mr. Pena at the  
21 fence line, Mr. Stanley did not mention this. Furthermore, Mr.  
22 Pena commented in passing that Mr. Stanley's child may have been  
23 somewhere nearby. But Mr. Stanley testified that after hearing he  
24 airplane, his wife and child came out of the house. Therefore, it  
25 can be reasonably inferred a question whether or not there were

1 two children with Mr. Pena and Mr. Stanley at the fence line.  
2 Nonetheless, there is insufficient evidence that Respondent's  
3 flight path was closer than 500 feet of the western fence line in  
4 absence of any measurements or other testimony than Mr. Pena's  
5 guess.

6 Therefore, I do not find the Administrator has sustained his  
7 burden of proving by a preponderance of the evidence that  
8 Respondent operated within 300 feet or closer than 500 feet of 2  
9 adults and 2 children near the perimeter of 400 Desert Sun Lane.  
10 The Administrator has not proven sub-paragraph (d) of paragraph 4  
11 of the Amended Complaint.

12 While there was testimony as to other structures such as  
13 fences, power poles, and a chicken coop, these other structures  
14 were not alleged in the Amended Complaint. In any event, findings  
15 concerning these other structures does not materially alter my  
16 findings, nor is aggravating under these circumstances.

17 As to the height of the airplane on its path, as I mentioned,  
18 Respondent admitted to being 100 feet above ground level or less  
19 during his low pass. He testified that after his low pass, once  
20 he determined he could not identify a touchdown point, he turned  
21 and climbed to leave. This suggests he was in a fairly level  
22 flight during the low pass until he was next to or past the RC  
23 runway, which was next to Mr. Likes' house.

24 This would be consistent with Mr. Stanley's testimony, who  
25 testified that he saw the airplane lower at approximately 80 feet



1 above ground level and in a steady flight until it turned to avoid  
2 Mr. Likes' house and climbed. The Penas also testified to seeing  
3 the airplane climb after it passed the south end of their garage,  
4 which again suggests level flight during the low pass until  
5 Respondent decided to depart the area.

6 While the Penas provided various heights of 25 to 35 feet  
7 above the grade of this garage, approximately 5 to 10 feet above  
8 the ridge line of the house, or approximately 30 feet above Mr.  
9 Likes' roof peak, and 50 to 100 feet above the gravel driveway,  
10 Mr. Stanley's testimony of 80 feet above ground level is more  
11 credible. Mr. Stanley's testimony is also corroborated by  
12 Respondent's admission of being 100 feet or less above ground  
13 level during his low pass.

14 I'll just briefly discuss the issue of the sound of the  
15 aircraft. I know there was testimony from the Penas concerning  
16 the sound of the airplane, which the Respondent disputes.  
17 Although I cannot determine the actual sound of Respondent's  
18 Kitfox 5 and there was no positive evidence admitted as to the  
19 sound levels of his Kitfox 5, I nevertheless find it information  
20 relevant to a violation of the regulations. The regulations  
21 prohibit at least in this case a loud engine on an airplane. The  
22 gravamen of the violation is altitudes and distance, not noise.

23 Let me also briefly turn to the testimony of Inspector Green  
24 and Specialist Speeg as it relates to their opinions of the flight  
25 path and altitude above ground of the flight path. Both Inspector

1 Green and Specialist Speeg testified to relying on and using the  
2 video in arriving at their opinions and conclusions. While they  
3 did say they also considered the witnesses' statements, it was  
4 unclear if they were referring to the witnesses' written  
5 statements or their testimony.

6 Moreover, both witnesses could not say whether they had seen  
7 the original native video of the security camera or merely the  
8 iPhone recording of a video monitor playing a part of the video.  
9 Given my findings concerning the video, which I excluded from  
10 evidence, I discounted both Inspector Green's and Specialist  
11 Speeg's testimony concerning the flight path and altitude of the  
12 airplane above ground level.

13 I also did not give any credence to Specialist Speeg's  
14 testimony about the banking angle of Respondent's airplane as such  
15 testimony was based on the video. Similarly, his assessment of  
16 airplane's height above ground level was based on the wingspan of  
17 the airplane in relationship to the ground as shown in the video.  
18 Neither Specialist Speeg nor Inspector Green were eye-witnesses,  
19 and both relied on the excluded video to form their opinions and  
20 conclusions of Respondent's flight path, altitude above ground  
21 level, and banking angle.

22 During closing argument, Respondent's counsel urges the Board  
23 to dismiss the Amended Complaint as investigators failed to  
24 preserve evidence. Respondent's counsel pointed out that  
25 paragraph 9(b) in Chapter 4 of FAA Order 2150.3C directs that

1 investigative personnel preserve potentially relevant evidence and  
2 that the duty to preserve arises at the start of the  
3 investigation. This paragraph further states, and I quote,  
4 "Despite established record and retention schedules, potentially  
5 relevant evidence is preserved until final action has been  
6 completed and," in parens, "(in the case of legal enforcement  
7 actions)," end parens, "investigative personnel have been released  
8 from any applicable notice to preserve," end quote.

9 The FAA failed to obtain a copy of the native original video  
10 recordings. Or if they did, they either lost them or misplaced  
11 them. The FAA failed to seek out, secure, or copy the original  
12 native video from the DVR record that was located in the Penas'  
13 attic.

14 It is undisputed that Inspector Green downloaded two videos  
15 from the Penas' computer located front room of the house, as  
16 opposed to the DVR in the attic, to his digital camera or SD card.  
17 Inspector Green did not know if the videos were copies of the  
18 original native videos or the iPhone videos of a screen playing  
19 the video. He could not recall what videos were downloaded.

20 It is further undisputed that uploaded videos from the  
21 digital camera to the case file -- it is further undisputed that  
22 he uploaded videos from the digital camera to the case file and  
23 then erased the SD card afterwards. He did not know what videos  
24 he uploaded to the case file. There was no evidence or  
25 documentation for the chain of custody at all. And the FAA did

1 not know of or recall receiving any CD or flash drive of the video  
2 despite Mr. Pena testifying to giving the FAA one or both.

3 I further note that paragraph 10(b) of same chapter in Order  
4 2150.3C also directs investigative personnel to promptly review  
5 and obtain electronic material before it is lost, destroyed,  
6 modified, or altered. And when in doubt, such material should be  
7 collected and preserved. That was not done in this case with  
8 regards to the video from the garage peak video camera or the  
9 front door video camera.

10 Turning to the appropriate remedy for failing to preserve  
11 evidence, Board Rule 19 provides that there may be a negative  
12 inference against the party, a preclusion order, dismissal, or  
13 other relief the judge deems appropriate. Similarly, Rule 36(e)  
14 of the Federal Rules of Civil Procedure provide similar remedies  
15 when a party fails to take reasonable steps to preserve  
16 electronically stored information that cannot be replaced through  
17 reasonable discovery. The Court can take necessary measures to  
18 cure prejudice. And when there is in intent to deceive a party of  
19 useful information, this can include assuming the evidence was  
20 unfavorable, dismiss the action or enter a default judgment.

21 Respondent argued that that failure to preserve or recover  
22 the original DVR video or the SD card denied Respondent critical  
23 evidence. Specifically, the ability to determine the height and  
24 speed of the aircraft, the ability to have his own expert review  
25 it, and the ability to determine if there was sound recorded

1 contrary to the Penas' testimony. I find if there was sound  
2 contrary to the Penas' testimony, it would have been impeaching,  
3 but not exculpatory. Further, as I mentioned, I did not find  
4 evidence of the sound as being highly relevant for purposes of a  
5 violation.

6 Furthermore, Respondent had a version of the video, albeit  
7 the iPhone recording, that he could have had his expert examine to  
8 see if the aircraft's altitude could be determined. The  
9 aircraft's speed is not directly relevant since the regulation  
10 speaks to above ground altitude requirements and distance  
11 requirements. Finally, I note that Respondent could have served a  
12 subpoena on the Penas to try to obtain the DVR or recover the  
13 video, but did not do so.

14 In any event, I do not find maliciousness or ill intent to  
15 deprive a party of useful information. Instead, I find the  
16 investigators were negligent and careless, and at worst reckless.  
17 The simple fact that the native original videos were lost should  
18 not, absent more, direct any adverse inference. There was no  
19 evidence of malfeasance by way of purposeful destruction of  
20 evidence.

21 While Inspector Green intentionally erased the SD card, he  
22 did so after downloading the contents to the case file and for the  
23 purpose of reusing the SD card for other cases, as opposed to  
24 purposefully depriving Respondent of potentially exculpatory  
25 evidence. There was no proof that anything inappropriate

1 occurred. Instead, the FAA was negligent and careless. In short,  
2 the investigation was sloppy.

3 I also note that even though FAA inspectors did not have  
4 permission to access the Likes' property for purposes of measuring  
5 distances, they certainly could have used a laser range finder,  
6 obtained survey records from the county, or sought out Mr. Likes  
7 or the subsequent property owner to obtain permission during the  
8 two plus years this case has been pending. They could have even  
9 used Google Earth and the measuring tool as they did for other  
10 demonstrative exhibits. I point this as it clearly demonstrates  
11 their negligence and carelessness, and sloppiness on this  
12 investigation.

13 I therefore find that the remedy of dismissal as Respondent's  
14 counsel urges is not appropriate under these circumstances.  
15 Instead, I precluded the video and any testimony concerning the  
16 video's content. Further, because portions of Inspector Green's  
17 and Specialist Speeg's opinions, comments, and conclusions cannot  
18 be separated from viewing the video, I find that the appropriate  
19 remedy is to exclude any testimony that relied in whole or part  
20 upon their viewing of the video.

21 Given this, I do not and did not rely upon, nor do I find,  
22 excuse me. Given this, I do not and did not rely upon, nor do I  
23 further discuss Inspector Green's or Specialist Speeg's comments,  
24 opinions, and conclusions related to Respondent's flight path,  
25 altitude above ground level, or bank angle.

1           While the video recording from the garage peak may have been  
2 helpful, it was not necessary to the Administrator's case as there  
3 were three eye-witnesses and Respondent's testimony about his  
4 altitude and flight path, as I have discussed. In short, the  
5 video was not the only evidence.

6           As I discussed above, I considered and gave weight to the  
7 measurements the investigators took, which are objective distances  
8 to objects based upon eye-witness testimony and corroborates Mr.  
9 Stanley and the Penas' testimony.

10           Now I return back to the issue of whether Respondent's low  
11 pass of 100 feet above ground level was below an altitude that  
12 allowed for an emergency landing without undue hazard to persons  
13 or property on the surface in the event of a power unit failure.  
14 In this regard, I weight to Specialist Speeg's opinion concerning  
15 this since Specialist Speeg was qualified as an expert in general  
16 aviation flight operations, including low flight and the  
17 regulatory requirements for low flight, which did not necessarily  
18 rely on the video.

19           Specialist Speeg testified that the low passes off-field are  
20 not necessarily prohibited under the regulation, but it depends on  
21 the circumstances. He testified that the regulation does not  
22 prohibit all off-airport landings, but describes the altitude for  
23 low level operations.

24           Notably, as stated in the wording of subsection (a) of  
25 Section 91.119, this regulation for operating at altitude -- this

1 regulation is for operating at an altitude that would allow an  
2 emergency landing without undue hazard to persons or property on  
3 the surface if a power unit fails, quote, "anywhere," end quote.  
4 This obviously includes off-airport locations.

5       When it comes to off-airport landings, Specialist Speeg  
6 agreed that the Off-airport Ops Guide provides recommended  
7 guidance. Specialist Speeg testified that a low pass is done at  
8 less than cruise speed, but not necessarily at slow speed.  
9 Specialist Speeg opined that the purpose of Subsection (a) of the  
10 regulation is to ensure a safe altitude if a power unit fails. He  
11 explained that if there was a problem, there was a low margin for  
12 error as you operate lower to the ground.

13       In the vicinity of Desert Sun Lane, Specialist Speeg opined  
14 that it is a sparsely populated area. That if a power unit  
15 failed, it would be difficult for Respondent to make an emergency  
16 landing without undue hazard to people or property on the ground.  
17 Specifically, Specialist Speeg said that any attempt to land on  
18 any of the roads in the subdivision would create a hazard to  
19 people and structures nearby.

20       Specialist Speeg noted that Respondent testified that the RC  
21 runway was unsuitable, which meant landing on a road in the  
22 subdivision if there was a problem and this would have created an  
23 undue hazard to persons or property. Specialist Speeg also  
24 testified that Respondent could have gone farther to the east of  
25 Desert Sun Lane to avoid structures or people. I find Specialist



1 Speeg's testimony credible in this regard.

2 Respondent admitted when I questioned him that instead of  
3 flying between the Likes' and the RC runway for purposes of  
4 looking out his left window, that there was an alternative that  
5 still allowed him to look out his left window while staying east  
6 of the houses and the RC runway. This would have been over an  
7 open area of scrub brush to the east.

8 More specifically, Respondent could have flown farther south  
9 along the mountain range, while staying farther east of the houses  
10 and over the open area. After going past the RC runway or the  
11 landing site, he could have then made a 180 degree turn to come  
12 back north, and fly essentially a downwind leg for his low level  
13 pass. He would then have been flying south to north and parallel  
14 to the RC runway. This would have still offset him from the RC  
15 runway to the east and allow him to look out his left side and  
16 away -- allowed him to look out the left side window. It would  
17 also have placed him away from the Likes' house that was farther  
18 to the west. This would have also placed him farther to the west  
19 of the Penas' residence.

20 Respondent agreed that this would have worked even though he  
21 did not consider it. And this corroborates Specialist Speeg's  
22 testimony concerning the hazard created when Respondent's low pass  
23 took him between the Likes' house and the RC runway. Respondent,  
24 in an apparent afterthought excuse of why he did not take this  
25 path, said that the ground was 20 to 30 feet higher to the south,

1 suggesting that it would have been difficult. I do not find this  
2 credible nor believable.

3 First, Respondent is a 900 hour plus private pilot in this  
4 aircraft, and claims to having made thousands, if not hundreds  
5 off-field takeoff and landings. With this experience, he should  
6 be experienced in evaluating safer options for low level his pass.  
7 This particularly the case -- this is particularly the case as  
8 Specialist Speeg testified that there is a lower margin of error  
9 the lower you fly to the ground.

10 Respondent has also experienced an engine failure in the past  
11 at 500 feet above ground. In this situation, he was able to  
12 safely land because he had 500 feet above ground, and was able to  
13 take advantage of the descending slope of the mountain to prolong  
14 his glide until locating a safe place to land.

15 Secondly, despite there being a 20 to 30 foot difference in  
16 terrain height between the south and north, this was not as a  
17 significant height difference in comparison to flying over a  
18 mountain range. Moreover, it was an altitude change that  
19 Respondent could have easily accommodated with his 900 plus hours  
20 experience and STOL performance of his Kitfox. He certainly was  
21 able to accommodate this terrain difference flying south to north  
22 on his low pass, which was in the opposite direction with rising  
23 terrain.

24 Therefore, I find that Respondent's flight path at an  
25 altitude of 100 feet or less above ground level was an altitude

1 that did not allow for an emergency landing without undue hazard  
2 to persons or property on the surface in the event of a power unit  
3 failure. He certainly could have flown higher and could have  
4 taken a path for his low level pass placing him to the east of the  
5 RC runway and away from the residences.

6 As for subsection (c) -- as for subsection (c) of 91.119,  
7 Specialist Speeg testified that a pilot has to stay 500 feet away  
8 from any person, vessel, vehicle, or structure in a sparsely  
9 populated area unless landing or taking off. Subsection (c)  
10 creates a 500-foot bubble around an aircraft, and no person,  
11 vehicle, vessel, or structure can enter that bubble if it is not  
12 necessary for takeoff or landing. Given the Respondent's flight  
13 path coupled with being 100 feet or less above ground level during  
14 his low level pass, demonstrates that he operated closer than 500  
15 feet to any person, vessel, vehicle or structure.

16 Now turning to the issue of whether Respondent's low flight  
17 operation, or his low pass as he phrased it, was necessary for  
18 takeoff or landing under the prefatory language of the regulation.  
19 As I have already ruled on Respondent's pre-hearing motion for  
20 dismissal, I do not repeat the basis of that ruling. However, in  
21 brief summary, I found that it is the Respondent's burden of  
22 proving that the prefatory language and clause applies to him in  
23 order to avoid being found in violation.

24 More specifically, as the Administrator has made a prima  
25 facie showing that Respondent operated below an altitude allowing

1 for an emergency landing without undue hazard to persons or  
2 property on the surface if a power unit fails, it is the  
3 Respondent's burden of showing that the low altitude operation was  
4 necessary for takeoff or landing with the exception to apply.  
5 Similarly, once there is a prima facie showing that Respondent  
6 operated closer than 500 feet to persons or structures under  
7 Section 91.119(c), Respondent has a burden of showing the  
8 exception applies.

9 In this case, Respondent denies he was intending to land  
10 during his low level pass, but that he was merely seeking to  
11 identify the touchdown point. When he was unable to do so, he  
12 turned and climbed to depart the area and return to the airport.  
13 Given Respondent's assertion that he was not landing during his  
14 low level pass, it is clear that his low pass falls outside the  
15 prefatory exception. I, therefore, find he was not landing and  
16 the prefatory exception does not apply. This means that  
17 Respondent was required to maintain an altitude that allowed for  
18 an emergency landing without undue hazard to persons or property  
19 on the surface in the event of a power unit failure since he was  
20 not taking off or landing.

21 In the alternative, I find that the circumstances of this  
22 case demonstrate that Respondent's low pass does not excuse him  
23 from a violation of 91.119. This is because the prefatory  
24 exception of being, quote, "necessary," end quote, for takeoff and  
25 landing is fact-driven on a case-by-case basis. There are a

1 multitude of variables involved. This is explained in the  
2 interpretation and legislative history of Section 60.17, an older  
3 predecessor to Section 91.119, which is Exhibit A-28.

4 The legislative history states, quote, "The matter of safety  
5 of flight in terms of safe altitudes is dependent upon many  
6 variables, including the type of aircraft flown, the weather  
7 conditions at the time, and the terrain below. An altitude which  
8 may be wholly safe and desirable for cruising flight at one time  
9 for one aircraft may be wholly unsafe for it under different  
10 conditions, or for other aircraft under the same conditions. For  
11 these reasons, minimum safe altitudes for flight cannot be  
12 described with the geometric particularity of a conveyance. As a  
13 consequence, the overriding minimums, i.e. altitude rule is  
14 phrased in terms of performance of the particular aircraft related  
15 to the terrain below."

16 Further, the comments to the regulation state, quote, "To  
17 achieve the proper high level of safety, it is vital that every  
18 pilot consistently with sound and conservative operating practices  
19 take full advantage of the performance capabilities of his  
20 aircraft so that as to spend as little time as possible at  
21 altitudes below the minimums established for cruising flight. The  
22 'when necessary' language used in the current Section 60.17  
23 achieves this result simply and directly. It prohibits low  
24 altitude flying except when a departure from otherwise applicable  
25 minimum is necessary for landing or takeoff. It prohibits

1 unnecessary low flying during the execution of those maneuvers.  
2 At every point along the proper flight path for approach to  
3 landing or climb after takeoff, an unnecessary dip would place the  
4 pilot in potential violation of this regulation. In effect, it  
5 requires the pilot to do the best he can consistently with sound  
6 flying practice and the machine at his disposal to avoid unduly  
7 prolonged low flight."

8 The legislative history goes on to state to achieve the  
9 proper high level of safety, it is vital that every pilot --  
10 actually scratch that. I've already said that.

11 In short, given the legislative history and the intent of the  
12 regulation, while the type, performance and operating limits of  
13 the aircraft have to be evaluated, this is done in the context of  
14 terrain, weather, surface conditions, surrounding obstacles and  
15 hazards. The type of runway also needs to be considered including  
16 the length, width, and surface material. The experience,  
17 training, and skills of the pilot-in-command are also  
18 considerations.

19 For example, it might be acceptable for a trained and  
20 experienced pilot to land a Supercub in a dry river bed to drop  
21 off supplies to a resident, but it would not simply be --  
22 similarly be acceptable for a low hour pilot to try to land a  
23 Cirrus in the same location for a picnic. This is an extreme  
24 example, but I think it illustrates that not every situation is  
25 the same.

1           In the context of Section 91.119, the key phrase is, quote,  
2 "Except when necessary for takeoff and landing," end quote. The  
3 word necessary is critical because low flying over an area to  
4 evaluate landing on a roadway due to an emergency or equipment  
5 failure is a different circumstance than doing so just to see if  
6 you can land on an RC runway. The former can be considered  
7 necessary when landing on a city street. The latter would not be.

8           In this instance, the circumstances and the Respondent was  
9 conducting a low pass, this is what determines if it was -- this  
10 is what determines if it was, quote, "necessary," end quote, for  
11 purposes of taking off or landing, whether or not he actually  
12 landed. Board precedent establishes that the site selected by a  
13 pilot for landing must be a suitable and appropriate choice for  
14 the exception of landing or taking off to apply.

15           The case of *Administrator v. Cobb and O'Connor* illustrates  
16 this. The Board concluded in that case that two pilots who landed  
17 on a taxiway exercised poor judgment in choosing a landing site  
18 that necessitated low flight over buildings, power lines, cars,  
19 and people. When addressing the pilot's argument that low  
20 altitudes were excused under Section 91.79, which is now Section  
21 91.119, the Board noted respondent's interpretation of the above  
22 regulation would in effect excuse low flight as being necessary  
23 for any takeoff or landing from any area anywhere, at any time.

24           Such interpretation is patently fallacious in that it would  
25 excuse low flight regardless of the appropriateness of the landing

1 site or approach pathway and as a result -- and would result in  
2 any low flight include, quote, "necessary," end quote, regardless  
3 of the danger. *Cobb and O'Connor* is found at 3 NTSB 98, which was  
4 affirmed by the 9th Circuit Court of Appeals in 1997, which is  
5 found at 572 F.2d 202. Similarly, in *Administrator v. Kittleson*,  
6 NTSB Order No. EA-4068, a 1994 case, and *Administrator v. Lewis &*  
7 *Lewis*, at 3 NTSB 878, a 1978 case, the Board reaffirmed the  
8 principal that, quote, "necessary for takeoff and landing," end  
9 quote, under section 91.119(c) means, and I quote:

10 "Respondent could not simply choose any takeoff route or time  
11 and call it necessary. He must make a reasonable appropriate  
12 choice or the regulation has no meaning. We, thus, reject  
13 respondent's contention that the rule does not apply simply  
14 because he was conducting a takeoff."

15 In the context of balloon flights and Section 91.119, the  
16 Board has similarly held that the appropriateness of the landing site  
17 in terms of the necessity for landing there is part of the  
18 equation when evaluating a pilot's landing choice. Those cases  
19 include *Administrator v. Rees*, 4 NTSB 1323, a 1984 case;  
20 *Administrator v. Cory*, 6 NTSB 536, a 1988 case; *Administrator v.*  
21 *Prior*, NTSB Order EA-4416, a 1996 case; and *Administrator v.*  
22 *Christ*, NTSB Order No. EA-4922, a 2002 case. Thus, the Board has  
23 clearly established that if the landing site is inappropriate  
24 under the circumstances, then a low flight cannot be excused under  
25 the regulations as being necessary for landing or takeoff.



1           Although Respondent had the consent of the property owner,  
2 Mr. Likes, consent of the property owner does not override  
3 compliance with the regulations. Consent of the property owner  
4 only avoided trespass and Respondent was still required to  
5 exercise reasonable judgment in selecting a landing site. Whether  
6 the Respondent had the consent of the property owner to attempt  
7 the landing is irrelevant to the violation. The focus of the  
8 analysis is on necessity. For instance, a landing may be excused  
9 as being necessary under emergency circumstances, even though the  
10 pilot did not have the homeowner's consent to land on the front  
11 lawn. Again, that's an extreme example, but I think there is a  
12 could that circumstances dictate necessity.

13           In this case, it is very clear that there was no necessity  
14 for the Respondent to conduct a low pass, whether or not he  
15 decided to land on the RC runway. I find that there were no other  
16 constraints limiting his landing choices such as shortage of fuel,  
17 mechanical emergency, or weather considerations dictating the  
18 necessity of the low pass. Instead, he deliberately and  
19 intentionally chose this location because he thought he could land  
20 and takeoff based on a conversation with his friends, the Likes.

21           Thus I find that the landing and takeoff exception to 91.119  
22 does not apply under these facts since it was not necessary. Even  
23 though he did not land or says he did not intend on landing, the  
24 landing site was nonetheless unsuitable from the very beginning.  
25 His low flight altitude, below 100 feet above ground level, and

1 his flight path closer than 500 feet to people and property was  
2 simply not necessary within the meaning of the regulations.

3 Certainly, if this was going to be an emergency landing, it  
4 may have been a suitable location if there were no alternatives.  
5 However, under the circumstances presented here, I find there was  
6 no emergency and Respondent had more appropriate and safer  
7 alternatives for his low level pass, alternatives that were  
8 clearly not near any residences, structures, or people to the east  
9 and over an open area.

10 Respondent had the option to refrain from conducting a low  
11 pass to evaluate the landing location, which was located in the  
12 backyard of a residence in a sparsely populated area. By  
13 Respondent's own testimony, he was considering this landing site  
14 during several high-level flights over the area and chose to make  
15 a low level pass on the 24th at 100 feet or less behind a  
16 residential home, among other structures. Respondent exercised  
17 poor judgment, and exhibited a disregard for his own safety, and  
18 the safety of others, and property on the surface.

19 The case of *Administrator v. Walker*, at 3 NTSB 3478, a 1978  
20 case, is similar to the circumstances before me. In *Walker*, the  
21 respondent conducted three low passes to survey the back parking  
22 lot of a Safeway shopping center for a landing. The owner of the  
23 shopping center had no objection to the landing. Respondent  
24 wanted to promote general aviation with a static display of a  
25 Piper PA-38 Tomahawk. Although respondent conducted a ground

1 survey and aerial survey, after making three low passes he decided  
2 against attempting to land.

3         The Board upheld a 60-day suspension finding that the site  
4 the pilot selected was totally inappropriate for landing. The  
5 Board noted that any reasonable ground assessment would have  
6 alerted the pilot of the hazards of a landing at this location and  
7 dictated against the type of flight he conducted. Further, the  
8 pilot would not have been able to make an emergency landing  
9 without causing undue hazards to persons or property on the  
10 surface if he had an engine failure during the low passes.

11         For the same reasons as in *Walker*, I find that the RC runway  
12 Respondent selected was inappropriate for a landing, even though  
13 he made a single low level pass. Any reasonable ground  
14 assessment, or a navigation map, or even a Google Earth view would  
15 have alerted him to nearby residences and structures on Desert Sun  
16 Lane.

17         Further, according to Mr. Likes, it was a dirt runway 500  
18 feet from his house. While he cleared the brush with a tractor  
19 and considered it fairly level, it was essentially a dirt runway  
20 for RC-controlled airplanes. Testimony also established that the  
21 surrounding area to the east and a lot to the south of the Likes'  
22 was scrub brush and desert. The runway was 400 to 500 feet long  
23 and 25 to 30 feet wide according to Mr. Likes. There was no  
24 evidence as to where -- there was no evidence of any runway  
25 markings, lights, navigation aids, or glide slope indicators, or

1 even a windsock.

2 Mr. Likes testified he used it to fly RC foam electric  
3 aircraft, aircraft that contain no pilot, contain no passengers,  
4 and operate on electric -- operate on electricity and are made  
5 from foam. While he said there were other trails and areas around  
6 his property which he used for this purpose as well. All of the  
7 evidence establishes that the RC runway was made of dirt, as well  
8 as any of the surrounding rails, and they were unsuitable for  
9 landing under normal conditions or absent an emergency in  
10 Respondent's aircraft.

11 Whether Respondent believes he could have landed and done so  
12 safely isn't the issue because of the low level altitude passes  
13 near structures and people. Not only was the landing site  
14 unsuitable, but he had other options for evaluating the site other  
15 than the path he took while making a low level altitude pass.  
16 While Respondent claims he was in the left seat and his approach  
17 on the west side of the runway provided the best view, this  
18 completely ignores the fact that he could have approached from the  
19 opposite direction, flying south to north on the east side of the  
20 runway to view the runway out of the left side. As I mentioned,  
21 this would have placed him farther from structures and people.

22 The Board has repeatedly stated that the prefatory exception  
23 of 91.119 does not apply to cases where the landing site is  
24 unsuitable. These cases include *Administrator v. Hart*, 6 NTSB  
25 899, and *Administrator v. McCollough*, NTSB Order EA-4020. Now the

1 *Hart* case involved a practice rejected landing of a grass and dirt  
2 airstrip by a Lockheed Electra. And the *McCullough* case involved  
3 a Learjet making a low level pass down a gravel airstrip, 50-feet  
4 above ground level.

5 In both cases the runway was unsuitable for landing by the  
6 type of aircraft involved. As a result, the Board held that  
7 exception set forth in the prefatory clause of 91.119 did not  
8 apply and that the operations were practice approach maneuvers  
9 were inappropriate. The *Hart* case specifically made it clear that  
10 if the airstrip is unsuitable for landing, it follows that a low  
11 approach over the field which is prescribed by 91.74, the  
12 predecessor to former 91.119, is similarly inappropriate.

13 And please bear with me. Let's take a short recess here of  
14 2 minutes just for a comfort break and then I'll continue with my  
15 Initial Oral Decision. Pause the record.

16 (Off the record at 4:27 p.m. EST)

17 (On the record at 4:40 p.m. EST)

18 JUDGE FUN: Continuing with my Oral Initial Decision. Again,  
19 I apologize for the length of it. I wanted to make sure I covered  
20 all the various issues that were raised and to make sure I was  
21 giving full consideration to the arguments cited by the parties.  
22 But we're almost done.

23 Consistent with the above and based on the totality of the  
24 evidence, I find that the Administrator has proven each and every  
25 allegation in the complaint by a preponderance of reliable,

1 probative and credible evidence. As to paragraph 4, I  
2 specifically find that on November 24, 2019, in the vicinity of  
3 400 Desert Sun Lane and 300 Desert Sun Lane in Reno, Nevada,  
4 Respondent operated N318JJ at altitudes of 100 feet above ground  
5 level or less than 100 feet above ground level, which is below an  
6 altitude allowing for an emergency landing without undue hazard to  
7 persons or property on the surface if a power unit failed.

8 I further find a preponderance of the evidence proves that  
9 Respondent's operation was closer than 500 of a stable, shed, and  
10 propane tank, and closer than 500 feet of a residential home at  
11 400 Desert Sun Lane for purposes of paragraphs 4(a) and (b) of the  
12 Amended Complaint.

13 Additionally, a preponderance of the evidence proves that  
14 Respondent operated closer than 500 feet of an adult and a child  
15 who were outside the residential home at 400 Desert Sun Lane for  
16 purposes of paragraph 4(c) of the Amended Complaint. The  
17 Administrator failed to prove paragraph 4(d).

18 As the Administrator has proven by a preponderance of the  
19 evidence paragraphs 4(a), (b) and (c) as modified, I further find  
20 that Respondent's low pass operation at 100 feet or less above  
21 ground level and his flight path was not necessary for takeoff or  
22 landing. I, therefore, find that Respondent violated 14 CFR,  
23 Section 91.119(a) in that he operated at altitudes of 100 feet  
24 above ground level or less, an altitude which was below an  
25 altitude allowing for an emergency landing without undue hazard to

1 persons or property on the surface if a power unit failed.

2 I further find that that Respondent violated 14 CFR, Section  
3 91.119(c) as his altitude and flight path was closer than 500 feet  
4 to any person or structure. Since he failed to prove that his  
5 operation was necessary for takeoff or landing, the violations of  
6 91.119 are complete. Paragraph 5 of the Amended Complaint is  
7 proven by a preponderance of the evidence.

8 Turning to the issue of whether these also a violation of  
9 Section 91.13(a), I note that the while Section 91.119 contains  
10 and exception for operating too low, that exception being for  
11 purposes of takeoff and landing, there is no exception in Section  
12 91.13. Specifically, circumstances that show an airman operated  
13 in a careless or reckless manner so as to endanger the life and  
14 property of another would apply in all phases of air operations,  
15 whether takeoff, en-route at cruising altitude, holding or  
16 landing. That is even if we assume that Respondent was conducting  
17 a low level pass for purposes of inspecting the runway for a  
18 possible landing and takeoff, it still cannot be done in a  
19 careless and reckless manner.

20 The Board has made this clear in the case of *Administrator v.*  
21 *Bourgeois*, spelled B-O-U-R-G-E-O-I-S. In that case, they state  
22 that a residual violation of Section 91.13(a) does not require  
23 additional proof when an operational violation is found, nor does  
24 it require proof of actual danger as the potential for  
25 endangerment is sufficient. Moreover, it can act as standalone

1 violation as well. This case is found at NTSB Order EA-5427 from  
2 2009.

3 As result of these facts and circumstances, I find that the  
4 preponderance of the reliable, credible and persuasive evidence  
5 shows Respondent acted in a careless or reckless manner as to  
6 endanger the life or property of another. Respondent, therefore,  
7 violated 14 CFR, Section 81.13(a). Paragraph 6 of the Amended  
8 Complaint is proven by a preponderance of the evidence.

9 I note that while there was testimony in this case concerning  
10 the trauma that the Penas suffered, as well as Mr. Stanley being  
11 concerned, under these circumstances and given the nature of the  
12 statute I do not find it necessarily relevant to my findings, nor  
13 does it materially affect my findings.

14 Now turning to Respondent's seven numbered affirmative  
15 defenses.

16 Respondent's first affirmative defense is that the  
17 Administrator fails to state a claim upon which the Board may  
18 grant the relief requested. I have already addressed this in my  
19 previous ruling and I do not further discuss it here. But for the  
20 purposes of this affirmative defense, I reject it. The  
21 Administrator's complaint sufficiently states a claim, specific  
22 violations of regulations are alleged, and there are facts to  
23 support those allegations.

24 Respondent's second affirmative defense is that the  
25 Administrator's interpretation of the relevant Federal Aviation



1 Regulations are arbitrary, capricious, an abuse of discretion and  
2 not in accordance with the law. Respondent has presented no  
3 evidence or arguments as to this second affirmative defense. I  
4 further find that the Administrator's interpretation of the FARs  
5 is in accord with the Pilot's Bill of Rights and given  
6 deference -- and in accord with the deference given to federal  
7 agencies. I, therefore, reject this second affirmative defense.

8 Respondent's third affirmative defense is the Administrator's  
9 interpretation of the FARs is unconstitutionally vague.

10 Respondent again has presented no evidence or argument as to this  
11 third affirmative defense. I further find that the FARs are not  
12 unconstitutionally vague, but give the Respondent reasonable  
13 notice of the prohibited conduct and the sanction that may be  
14 imposed for any violation. I reject this affirmative defense.

15 Respondent's fourth affirmative defense is the  
16 Administrator's application of the FARs is contrary to the  
17 regulation's plain language. Respondent presented no evidence or  
18 argument as to this affirmative defense and I found compelled.  
19 Even assuming the Administrator's enforcement of the regulation is  
20 contrary to the plain language, Respondent has a right to contest  
21 the allegations, which he has done through this hearing. Thus,  
22 Respondent's fourth affirmative defense is rejected since this  
23 matter proceeded to a hearing, which makes this matter moot.

24 Respondent's fifth affirmative defense is the Administrator  
25 lacks substantial basis in law and fact to continue prosecution of

1 this matter. As this matter has proceeded to hearing, with the  
2 Administrator having the burden of proving the allegations, this  
3 affirmative defense is moot. I reject this affirmative defense.

4 Respondent's sixth affirmative defense is that the sanction  
5 of suspension is contrary to policy, precedent, and procedure.  
6 Respondent presented no evidence or argument as to this  
7 affirmative defense. I will talk about the preservation of  
8 evidence, and mitigating and aggravating circumstances later. But  
9 for purposes of this affirmative defense, Respondent has not shown  
10 how or in what manner the sanction is contrary to policy,  
11 precedent, or procedure. I also find, as discussed later in this  
12 decision, the sanction of suspension is founded and authorized,  
13 and not arbitrary, capricious, or not in accordance with the law.

14 As to Respondent's seventh affirmative defense, his counsel  
15 withdrew this defense.

16 In summary, Respondent did not provide convincing credible  
17 evidence proving his affirmative defenses by a preponderance of  
18 the evidence. I, therefore, find no merit in these defenses. I  
19 specifically find that the Respondent failed to meet the burden of  
20 proving his affirmative defenses by a preponderance of the  
21 evidence. I, therefore, deny all affirmative defenses.

22 As the Administrator has proven the Respondent violated the  
23 Federal Aviation Regulations as alleged in the Amended Complaint  
24 by a preponderance of the evidence, and Respondent failed to prove  
25 his affirmative defenses by a preponderance of the evidence, I now

1 turn to sanction in this matter.

2 The Administrator requests suspension of Respondent's private  
3 pilot certificate for 120 days based upon air commerce, air  
4 transportation and public interest. Respondent argues that no  
5 sanction is appropriate. Respondent contends that no sanction is  
6 warranted because he was operating within FAA Off-airport Ops  
7 Guidance and specifically conducted a low level pass to determine  
8 whether it was safe landing site. He also argues that that the  
9 FAA's failure to preserve evidence should be considered. Finally,  
10 he argues that a low level pass is necessary for landing at an  
11 off-airport location.

12 On August 3, 2012, Public Law 112-153, known as the Pilot's  
13 Bill of Rights, was signed into law. This statute applies to all  
14 cases before the National Transportation Safety Board where the  
15 Board reviews actions of the Federal Aviation Administration to  
16 amend, modify, suspend or revoke airman certification.

17 The Pilot's Bill of Rights specifically strikes certain  
18 language from 49 United States Code Section 44703, 44709, and  
19 44710. The language that was stricken as stated by the Board is,  
20 quote, "is bound by all validly adopted interpretations of law and  
21 regulations the Administrator carries out unless the Board finds  
22 an interpretation is arbitrary, capricious, or otherwise not  
23 according to law," end quote. As this language is stricken, I am  
24 no longer bound to give deference to the FAA by statute.

25 However, that agency is still entitled to the judicial

1 deference given to all Federal Administrative Agencies under the  
2 Supreme Court decision of *Martin v. OSHRC*, 499 U.S. 144, a 1991  
3 case. In applying the principals of judicial deference to the  
4 interpretations of law, regulations, and policies that the FAA  
5 Administrator carries out, I must analyze and weigh the facts and  
6 circumstances in each case to determine if the sanction the  
7 Administrator is appropriate.

8 I have considered the Respondent's arguments as noted in my  
9 detailed findings above. However, for purposes of mitigation, I  
10 also considered these arguments. Respondent's argument that he  
11 was operating within FAA Off-airport Operations Guide does not  
12 excuse the circumstances surrounding his low pass. As I found, he  
13 was 100 feet or less above ground level and on a path that took  
14 him closer than 500 feet of structures and people. He was in  
15 violation of the regulation.

16 While a low pass is recommended for -- while a low pass was  
17 recommended in Ops Guidance, it still must comply with the  
18 regulatory requirements of Section 91.119. I did not find  
19 Respondent's arguments or demonstrative exhibits of other  
20 airports, with established runways for airplanes, that required  
21 operation within 500 feet of structures and people during takeoff  
22 or landing persuasive. While accurate, it simply misses the point  
23 that such operations below the minimums of Section 91.119 must  
24 still be necessary for takeoff or landing under the circumstances.

25 Under the circumstances in this case, it was not necessary.

1 I, therefore, reject Respondent's argument that the Off-airport  
2 Ops Guide excused his violation. For the same reason, I reject  
3 his argument that the low pass was necessary for landing at the  
4 off-airport location even though he decided not to land under  
5 these circumstances.

6 As for FAA's failure to preserve evidence should be  
7 considered, I agree that such can and should be considered. I do  
8 not repeat my findings concerning those issues as I discussed them  
9 in detail above.

10 I have further considered the Respondent's experience. As  
11 the Board has noted in low flight cases, there is precedent to  
12 support a broad range of sanctions. It is more important in  
13 saying -- in setting the sanction to review the circumstances  
14 surrounding an airman's actions than it would be to rely solely on  
15 the number and provisions of the regulations determined to have  
16 been violated. The case of *Administrator v. Nazimek*, spelled N-A-  
17 Z-I-M-E-K, at NTSB Order EA-2672, a 1988 case, supports this.

18 Therefore, while it is generally true that the more severe  
19 sanction of 120 to 180 days are imposed in cases involving low  
20 flights over congested areas, and that lesser sanctions are  
21 imposed in cases involving low flights over non-congested areas,  
22 particular when non-aggravated circumstances are involved. The  
23 Board has held -- upheld sanctions of up to 180 days suspension  
24 for violations of the type of conduct the Respondent engaged in.  
25 That can be found at *Administrator v. Cobb and O'Connor*. I do not

1 find similar aggravating circumstances. I also did not give much  
2 credence to Specialist Speeg's opinion on aggravating  
3 circumstances since his conclusions relied in part on viewing the  
4 video.

5 Looking to Order 2150.3C, careless operation with a severity  
6 level 2, which is encompassed by the failure to maintain the  
7 required minimum altitude in an uncongested area, is between 60  
8 and 120 days. A suspension of 60 days is at the low end of the  
9 moderate range, which is appropriate given all the circumstances  
10 and accounting for Respondent's experience as a private pilot and  
11 failure in judgment in conducting a low pass. Certainly, if  
12 Respondent was a CFI, ATP, or commercial pilot, a greater sanction  
13 may be warranted. Obviously, if he was over a congested area, a  
14 greater sanction would also be warranted.

15 The lower end of the sanction further accounts for the FAA's  
16 loss or failure to preserve evidence in violation of Order  
17 2150.3C. Finally, a 60-day suspension is consistent with the  
18 *Walker* case I discussed above.

19 Based on the preponderance of the credible, persuasive and  
20 reliable evidence in this case, as well as Board precedent and  
21 appropriate judicial deference afforded the Administrator, I find  
22 that the sanction of 60 days' suspension is reasonable and  
23 appropriate given the facts of this case. It is further warranted  
24 in the public's interest in air commerce and air safety.

25 Consequently, I find that the Amended Emergency Order of

1 Suspension, with the modification to paragraph 4 and its  
2 sub-paragraphs (a), (b) and (c), to conform to my findings, shall  
3 be modified to a suspension of 60 days and it is otherwise  
4 affirmed as issued.

5 I now ask the court reporter to start a new page with my  
6 order on a separate page.

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ORDER

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2           It is therefore ordered that the Administrator's Amended  
3 Order of Suspension is modified to conform to the evidence and my  
4 findings. Specifically, I order that:

5           1. The first clause of paragraph 4 is modified to now read,  
6 quote, "4. During the referenced flight operation, you operated  
7 N318JJ at altitudes of 100 feet above ground level or less than  
8 100 feet above ground level."

9           2. Sub-paragraph (a) of Paragraph 4 is modified to now read,  
10 quote, "closer than 500 feet of a stable, shed, and propane tank,"  
11 end quote.

12           3. Sub-paragraph (b) of paragraph 4 is modified to now read,  
13 quote, "closer than 500 feet of a residential home at 400 Desert  
14 Sun Lane, end quote." And

15           4. Sub-paragraph (c) of paragraph 4 is modified to now read,  
16 quote, "closer than 500 feet of an adult and a child who were  
17 outside the residential home at 400 Desert Sun Lane, end quote."

18           It is further ordered that the Amended Emergency Order of  
19 Suspension is modified to a period of 60 days of suspension of  
20 Respondent's private pilot certificate.

21           So entered this 6th Day of March, 2022, in Matthews, North  
22 Carolina.



APPEAL RIGHTS

1  
2 Moving now just to address the parties with regards to appeal  
3 rights. I believe both parties have received by email a written  
4 advisory of the appeal rights.

5 MS. TOSCANO: Yes, Your Honor.

6 MR. SCHULTE: We have, Your Honor.

7 JUDGE FUN: Mr. Schulte, do you wish me to discuss your  
8 clients appeal -- right to appeal or will you take care of that  
9 afterwards?

10 MR. SCHULTE: No, Judge, I will take care of that. Fairly  
11 certain that's what I'm paid for.

12 JUDGE FUN: All right, very well. Mr. Palmer, I'd like to  
13 mention to you that your counsel will advise you about your right  
14 to appeal. Now certainly if you believe that I have made an error  
15 in my decision, finding of law or procedure, you're certainly  
16 welcome to appeal.

17 And if you do appeal, I must remind you, emphasize there are  
18 strict deadlines regarding filing. Those deadlines are set forth  
19 in a written advisement. If you miss those deadlines, you miss  
20 the deadline to file a notice of appeal within 10 days of my Oral  
21 Initial Decision, or you fail to perfect your appeal by filing a  
22 timely brief, the NTSB Board will not hear your appeal.

23 So again I remind you that if you decide to appeal my  
24 decision, please pay attention to those deadlines.

25 All right. Are there any procedural or administrative

1 matters we need to discuss before we close the record? Ms.  
2 Toscano?

3 MS. TOSCANO: No, Your Honor. Thank you.

4 JUDGE FUN: Mr. Schulte?

5 MR. SCHULTE: No, sir. Thank you very much.

6 JUDGE FUN: All right. I will, therefore, consider the  
7 record closed. We'll go off the record and we are adjourned.

8 (Whereupon, at 5:02 p.m. EST, the hearing in the above-  
9 entitled matter was adjourned.)

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CERTIFICATE

This is to certify that the attached proceeding before the  
NATIONAL TRANSPORTATION SAFETY BOARD

IN THE MATTER OF: Trenton J. Palmer  
DOCKET NUMBER: SE-30880  
PLACE: Via Zoom videoconference  
DATE: April 6, 2022

was held according to the record, and that this is the original,  
complete, true and accurate transcript which has been compared to  
the recording accomplished at the hearing.



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Marybeth Burke-Dring,  
Official Reporter