



Virginia's Legal Landscape for Unmanned Aerial Vehicles and Systems

The application of federal, state, and local drone laws in the Commonwealth

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Introduction

While technology often develops at a breakneck pace, the surrounding legal framework cannot always keep up. However, recent changes at both the state and federal level warrant a discussion of the legal landscape in Virginia pertaining to unmanned aerial vehicles (UAV) and systems (UAS), more commonly known as drones or unmanned aircraft (UA). This issue brief discusses current federal, state, and local laws related to unmanned aircraft applicable to citizens, political subdivisions, and businesses in the Commonwealth, as well as measures taken by other states.

Definitions

To form a coherent understanding of UAV and UAS laws, it is important to first define relevant terms. Unfortunately, each level of government utilizes and defines different terms, thus altering their jurisdictional reach. For reference, important federal and state terms are listed here.¹

Federal definitions

The broadest federal term encompassing UAVs and UAS is "unmanned aircraft," or UA, which is defined as "an aircraft operated without the possibility of direct human intervention from within or on the aircraft."²

Other terms include:

"Model aircraft. An unmanned aircraft that is (i) capable of sustained flight in the atmosphere; (ii) flown within visual line of sight of the person operating the aircraft; and (iii) flown for hobby or recreational purposes."³

"Small unmanned aircraft. A UA weighing less than 55 pounds, including everything that is onboard or otherwise attached to the aircraft."⁴

¹ Local definitions exceed the space constraints of this issue brief.

² 14 C.F.R. § 107.3.

³ Pub. L. No. 112-95, § 336(c). See also Huerta, Michael P., "Interpretation of the Special Rule for Model Aircraft," Federal Aviation Administration, Docket No. FAA-2014-0396, June 18, 2014, https://www.faa.gov/uas/educational_users/media/model_aircraft_spec_rule.pdf.

⁴ 14 C.F.R. § 107.3.

"*Small unmanned aircraft system*. A small UA and its associated elements (including communication links and the components that control the small UA) that are required for the safe and efficient operation of the small UA in the national airspace system."⁵

State definitions

The Code of Virginia provides the following definitions:

"*Unmanned aircraft*' means an aircraft that is operated without the possibility of human intervention from within or on the aircraft."⁶

"*Unmanned aircraft system*' means an unmanned aircraft and associated elements, including communication links, sensing devices, and the components that control the unmanned aircraft."⁷

While specific definitions differ, this issue brief will use the term "UA" when referring both to an individual, tangible aircraft and to the hardware and software used in conjunction with a UAV for its operation.

Background

On February 14, 2012, President Obama signed H.R. 658 (P.L. 112-95), titled the FAA Modernization and Reform Act of 2012 (the 2012 Act). The 2012 Act tasked the Secretary of Transportation, and by extension the Federal Aviation Administration (FAA), with developing by September 30, 2015, "a comprehensive plan to safely accelerate the integration of civil unmanned aircraft systems into the national airspace system."⁸ The plan was to include recommendations such as technological requirements and advancements, safety practices, pilot registration, flight standards, and air traffic requirements.⁹ Notably, the 2012 Act distinguished model aircraft from UA and prohibited FAA regulation of model aircraft.¹⁰

The 2012 Act created some uncertainty however regarding state and local UA regulations. When the federal government legislates on or regulates a certain activity, state and local laws and regulations are preempted by such federal legislation or regulations. When the federal government does not legislate on or regulate a certain activity, states are not preempted from making their own laws or regulations.¹¹ Since UA activities touch many different aspects of law, such as privacy, law enforcement, and emergency response, that typically fall within state jurisdiction, it was not immediately clear whether such state and local laws were preempted.

⁵ Ibid.

⁶ VA. CODE § 19.2-60.1.

⁷ Ibid.

⁸ Pub. L. No. 112-95, § 332(a)(1).

⁹ Ibid., § 332(a)(2).

¹⁰ Ibid., § 336.

¹¹ See *Montalvo v. Spirit Airlines*, 508 F.3d 464 (9th Cir. 2007), and *French v. Pan Am Express, Inc.*, 869 F.2d 1 (1st Cir. 1989); see also *Arizona v. U.S.*, 132 S.Ct. 2492, 2502 (2012), which states "[w]here Congress occupies an entire field . . . even complementary state regulation is impermissible. Field preemption reflects a congressional decision to foreclose any state regulation in the area, even if it is parallel to federal standards."; and *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 386-87 (1992).



The FAA clarified this ambiguity in 2015 guidance¹² and a 2018 press release,¹³ claiming that Congress had granted exclusive authority to the agency to regulate aviation safety, the efficiency of the navigable airspace, and air traffic control and explicating which state and local laws were and were not preempted by the 2012 Act.

Examples of preempted laws include any (i) operational UA restrictions on flight altitude and flight paths and other operational bans; (ii) regulation of the navigable airspace; or (iii) mandates on equipment or training for UA-related aviation safety, such as geo-fencing.¹⁴

Examples of non-preempted laws include any laws traditionally related to state and local police power—including laws related to land use, zoning, privacy, trespass, and law-enforcement operations—such as (i) requirements for police to obtain a warrant prior to using a UA for surveillance; (ii) specifications that UA may not be used for voyeurism; (iii) prohibitions on using UA for hunting or fishing or to interfere with or harass an individual who is hunting or fishing; and (iv) prohibitions on attaching firearms or similar weapons to a UA.¹⁵

The 2018 press release further clarified that local land use authority authorizes a locality to "generally determine the location of aircraft landing sites."¹⁶ This statement granted previously unrecognized flexibility to localities to regulate UA use with regard to launch and landing locations. Even if localities cannot determine where UA are permitted to fly, restrictions on launch and landing locations can effectively make the use of certain airspaces impermissible.

Federal Requirements

FAA regulations require UA operators to comply with one of two sets of regulations based on the type of flying that is desired. Flying under either set of regulations still subjects the operator to certain airspace restrictions relating to other aircraft.

Flying under Part 107

A UA operator that wishes to fly remotely, meaning outside the visual line-of-sight, or for a commercial purpose, must obtain a Remote Pilot Certification, which involves taking a written safety test onsite at an approved testing center and filing certain forms with the FAA.¹⁷

Moreover, every UA weighing greater than .55 pounds and less than 55 pounds must be registered with the FAA. During the UA registration process, an operator who intends to fly remotely can select "Fly sUAS [small UAS] under Part 107" to register.¹⁸

¹² Office of the Chief Counsel, "State and Local Regulation of Unmanned Aircraft Systems (UAS) Fact Sheet," Federal Aviation Administration, December 17, 2015, https://www.faa.gov/uas/resources/policy_library/media/UAS_Fact_Sheet_Final.pdf.

¹³ Federal Aviation Administration, "Press Release – FAA Statement – Federal vs. Local Drone Authority," July 20, 2018, https://www.faa.gov/news/press_releases/news_story.cfm?newsId=22938.

¹⁴ Office of the Chief Counsel, "State and Local Regulation of Unmanned Aircraft Systems (UAS) Fact Sheet," Federal Aviation Administration, December 17, 2015, https://www.faa.gov/uas/resources/policy_library/media/UAS_Fact_Sheet_Final.pdf.

¹⁵ Ibid.

¹⁶ Ibid.

¹⁷ Federal Aviation Administration, "Certificated Remote Pilots including Commercial Operators," https://www.faa.gov/uas/commercial_operators/.

¹⁸ Federal Aviation Administration, FAA DroneZone, <https://faadronezone.faa.gov/>.



Flying under Part 101

A UA operator that intends to fly only within the visual line-of-sight of the UA below 400 feet for a recreational purpose may operate without a Remote Pilot Certification.¹⁹ The operator must still register any UA weighing greater than .55 pounds and less than 55 pounds with the FAA, but can select "Fly Model Aircraft under Section 336" during the registration process.²⁰

UA Laws in Virginia

One of the most common concerns related to UA use is the ability of UA to enter spaces that were once inaccessible. Virginia is not alone in attempting to protect the privacy of its residents from UA. States have many options when it comes to UA regulation. Relevant laws currently enacted in Virginia will be discussed first, followed by discussion of approaches taken by localities and other states.

Virginia's UA privacy laws fall into three categories: (i) laws that protect individuals from invasion of privacy or harassment by other individuals, (ii) laws that protect individuals from invasion of privacy or harassment by the government, and (iii) laws that grant additional government authority for emergency situations. These laws affirm that, in general, a UA may be used for private, commercial, or recreational purposes when not interfering with the policy aims of the Commonwealth.²¹

Protection from individuals

In 2018, the General Assembly established a new type of criminal trespass involving a UA. Under Virginia law, trespass with an unmanned aircraft system is a Class 1 misdemeanor if a person "knowingly and intentionally causes a [UA] to (i) enter the property of another and come within 50 feet of a dwelling house (a) to coerce, intimidate, or harass another person or (b) after having been given actual notice to desist, for any other reason, or (ii) take off or land in violation of current Federal Aviation Administration Special Security Instructions or UA Security Sensitive Airspace Restrictions."²²

Virginia law also specifically prohibits any person who is required to register with the Sex Offender and Crimes Against Minors Registry from using a UA "to knowingly and intentionally (i) follow or contact another person without permission of such person or (ii) capture the images of another person without permission of such person when such images render the person recognizable by his face, likeness, or other distinguishing characteristic."²³ A violation is a Class 1 misdemeanor.

Furthermore, a respondent of a protective order is prohibited from using a UA to "follow, contact, or capture images of the petitioner of the protective order or any other individual named in the protective order."²⁴ A violation is a Class 1 misdemeanor.

¹⁹ Federal Aviation Administration, "Recreational Flyers & Modeler Community-Based Organizations," https://www.faa.gov/uas/recreational_fliers/.

²⁰ Federal Aviation Administration, FAA DroneZone, <https://faadronezone.faa.gov/>.

²¹ VA. CODE § 19.2-60.1.

²² VA. CODE § 18.2-121.3.

²³ VA. CODE § 18.2-324.2.

²⁴ Ibid.



Protection from the government

Virginia law prohibits any use of a UA by a "state or local government department, agency, or instrumentality having jurisdiction over criminal law enforcement or regulatory violations, including but not limited to the Department of State Police, [or] department of law enforcement . . . of any county, city, or town . . . except during the execution of a search warrant . . . or an administrative or inspection warrant."²⁵

Moreover, deployment or facilitation of use of a weaponized UA "by a state or local government department, agency, or instrumentality or department of law enforcement in the Commonwealth" is prohibited.²⁶

Emergency situations

There are exceptions for which law enforcement and other government officials in Virginia may use a UA without a warrant.

The Code of Virginia specifies that law enforcement may deploy a UA when activating an Amber Alert, Senior Alert, or Blue Alert or when necessary to address the immediate danger of a person or investigate a traffic accident. A UA is also permitted for certain warrantless searches and to survey property prior to executing an arrest warrant or when seeking a person sought for arrest.²⁷

Non-law-enforcement officials of the Commonwealth or its localities are authorized to use a UA for "damage assessment, traffic assessment, flood stage assessment, and wildfire assessment."²⁸

Institutions of higher learning and research organizations and institutions are authorized to use a UA "solely for research and development purposes."²⁹

Finally, a fire chief or other officer in charge of a fire department is authorized to maintain order at the location of an emergency incident including the immediate airspace, thereby allowing for the restriction or prohibition of the use of a UA in the vicinity.³⁰

Local Regulation of Drone Use in Virginia

Although FAA regulations and guidelines allow localities limited control over UA launch and landing sites under traditional land use authority, Virginia law restricts such local authority. All political subdivisions are prohibited from "regulat[ing] the use of a privately owned [UA] within its boundaries."³¹ Although this provision was originally set to expire on July 1, 2019, the restriction was made permanent by the 2018 Session of the General Assembly.³²

As localities are barred from regulation, any designation of launch and landing areas must be undertaken by the General Assembly. Such legislation could be modeled on the Chesapeake Bay

²⁵ VA. CODE § 19.2-60.1.

²⁶ *Ibid.*

²⁷ *Ibid.*

²⁸ *Ibid.*

²⁹ *Ibid.*

³⁰ VA. CODE § 27-15.1.

³¹ VA. CODE § 15.2-926.3.

³² Virginia Acts 2018, cc. 851, 852



Preservation Act (§ 62.1-44.15:67 et seq. of the Code of Virginia), which creates an overlay map of protected areas that receive heightened regulation on activities conducted within such areas. In the case of UA, areas of consideration for restricted launch and landing sites might include airports, sporting arenas, parks, critical infrastructure facilities, correctional facilities, government facilities, public highways, and schools.

Laws in Other States

As of August 2019, at least 41 states have laws related to UA use.³³ While many of these laws are related to economic development or are supporting resolutions, many others contain specific policy objectives that the Virginia General Assembly might consider adopting. The following list is not comprehensive, but is instead written to provide an understanding of the scope of laws currently enacted.

Connecticut has enacted a prohibition on the municipal regulation of UA similar to Virginia's local regulation prohibition, but Connecticut allows a "municipality that is also a water company . . . [to] enact and enforce ordinances or resolutions that regulate or prohibit the use or operation of private and commercial unmanned aircraft over such municipality's public water supply."³⁴

New Jersey has a suite of UA laws that include prohibitions on operating a UA (i) to conduct surveillance of a correctional facility,³⁵ (ii) in a way that interferes with a first responder actively engaged in response,³⁶ (iii) to take wildlife,³⁷ (iv) to prevent a lawful taking of wildlife,³⁸ or (v) under the influence of drugs or with a blood alcohol content of .08 percent or higher.³⁹

North Carolina allows the use of a UA for emergency management activities, including "incident command, area reconnaissance, search and rescue, preliminary damage assessment, hazard risk management, and floodplain mapping."⁴⁰ Furthermore, state law creates a civil cause of action for privacy violations involving unwarranted surveillance and dissemination of photographs. The cause of action includes attorney fees and actual damages or damages of up to \$5,000 per photograph.⁴¹

Utah prohibits a person from intentionally, knowingly, or recklessly chasing, with the intent of causing distress, or harming livestock through the use of a UA.⁴²

Conclusion

The advent of affordable, user-friendly UA calls for thoughtful action by government officials at all levels in order to keep up with the challenges presented by this innovative technology. While it is unlikely that any single policy package can adequately address the

³³ National Conference of State Legislatures, "Current Unmanned Aircraft State Law Landscape," September 10, 2018, <http://www.ncsl.org/research/transportation/current-unmanned-aircraft-state-law-landscape.aspx>.

³⁴ Conn. Gen. Stat. § 7-149b.

³⁵ N.J. Stat. § 2C:40-28(b)(2).

³⁶ N.J. Stat. § 2C:40-28(c).

³⁷ N.J. Stat. § 2C:40-28(d).

³⁸ N.J. Stat. § 23:7A-2.

³⁹ N.J. Stat. § 2C:40-28(e).

⁴⁰ N.C. Gen. Stat. § 15A-300.1(c1).

⁴¹ N.C. Gen. Stat. § 15A-300.1(e).

⁴² Utah Code Ann. § 76-9-308.



myriad factors introduced by the growing accessibility of UA technology, states are beginning to fill in the gaps left by the federal government in addressing new issues created by UA.

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