

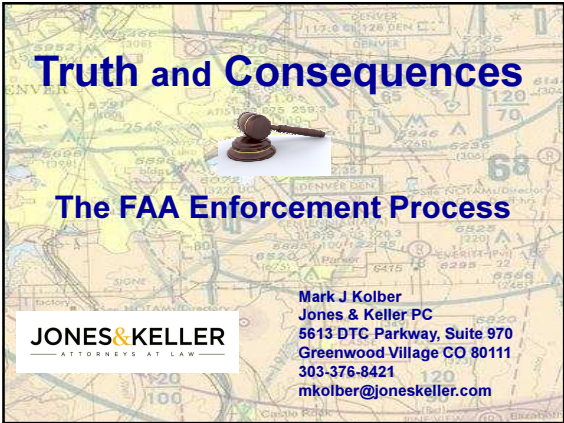
Truth and Consequences



The FAA Enforcement Process


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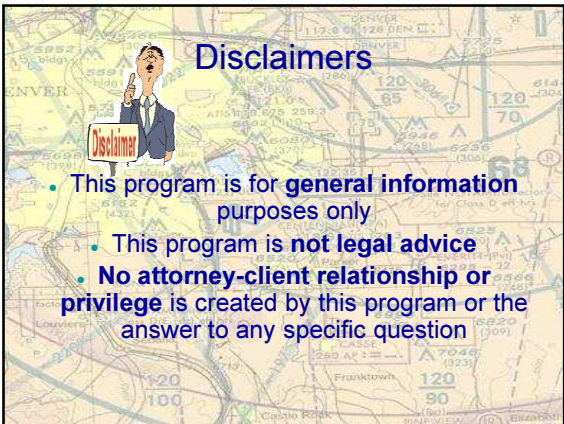
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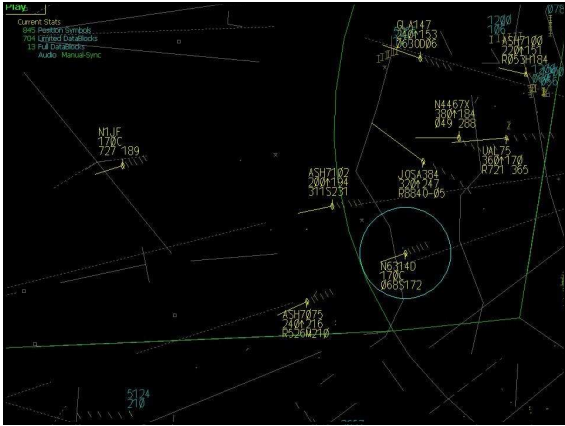
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- Attorney licensed in Colorado & Massachusetts (State and Federal Courts)
- Member
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 - AOPA Legal Services Panel



Disclaimers


- This program is for **general information** purposes only
- This program is **not legal advice**
- **No attorney-client relationship or privilege** is created by this program or the answer to any specific question



How it all begins...

- “After landing call...”
- Ordinary Surveillance by FAA Inspector
- Complaints by Citizens
- Police Complaint
- Ramp Check
- Accident/Incident Review

“Advise you contact...”



“N1234X. Possible pilot deviation. Advise you contact Denver TRACON at (telephone #)”

- “When it appears that the actions of a pilot constitute a pilot deviation, notify the pilot, workload permitting”

ATC Handbook § 2-1-26
– NTSB cases suggest this is a required notice.

“Advise you contact...”

- Complete the flight.
- Fly the airplane.
- Park/Tie down.



**STOP!
RELAX!
THINK!**


“Advise you contact...”

- Should I call?
- What should I say?
- Should I identify myself?
- Polite but non-committal
 - “This is N1234X. I was asked by ATC to call you after I landed. Can you tell me why?”



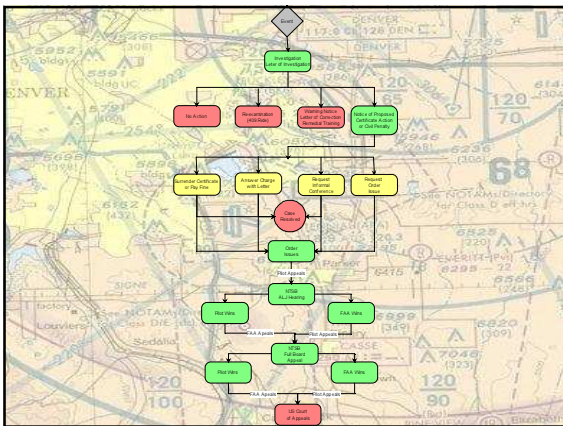
“Advise you contact...”

- File the NASA Form!
- They have the tapes. They saw the radar track. The controllers are filling out required forms.
- The FAA is collecting the data.
- What do you have to add?
 - “I’d rather not say anything about it right now.”

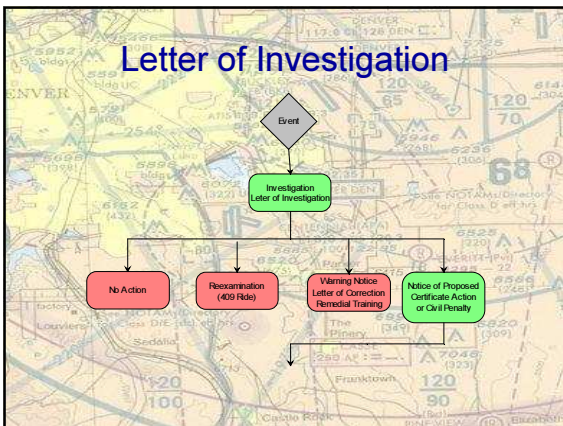


Go With The Flow


- Letter of Investigation
- Administrative resolution
- Certificate action
- Informal conference
- NTSB
 - ALJ Hearing
 - NTSB Appeal
- Appeal to the Courts



Letter of Investigation



Letter of Investigation



“Respond in 10 days or the file will be processed without the benefit of your comments”

- The FAA has the information it needs
- No duty to respond
 - Anything you say can and will be used against you
 - *Sometimes* response will trigger a Remedial Training offer

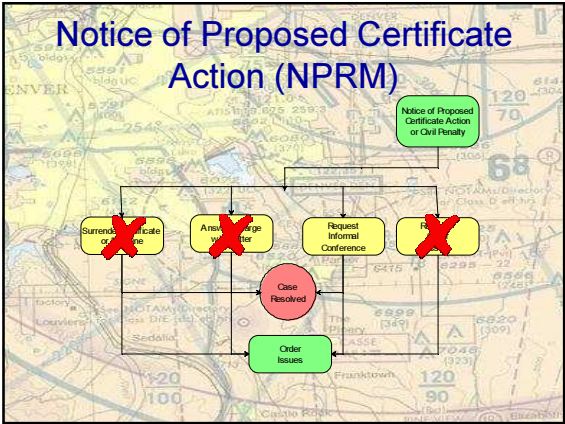
Letter of Investigation

- Investigatory tool
- Respond carefully and only if you are *sure* it will help
- Not the time to grovel and deal
- Use an attorney to help decide *whether* to respond and *how* to respond

Letter of Investigation

Results

- No Action
 - Not a violation
 - Satisfied with your proof/explanation
- Warning Notice or Letter of Correction
 - Record effect
- 709 Ride



Notice of Proposed Certificate Action (NPRM)

The Initial Charging Document

- Sets out the specific violations
- Sets out the proposed penalty
- Offers series of options
 - Answer the charge by letter
 - Ask the FAA to make the order final
 - Surrender your certificate
 - Informal conference

Notice of Proposed Certificate Action (NPRM)

Informal Conference

- With the FAA Inspector and the FAA Attorney
- In person or by telephone
- Obtain the investigation reports (not FOIA)
- Negotiate

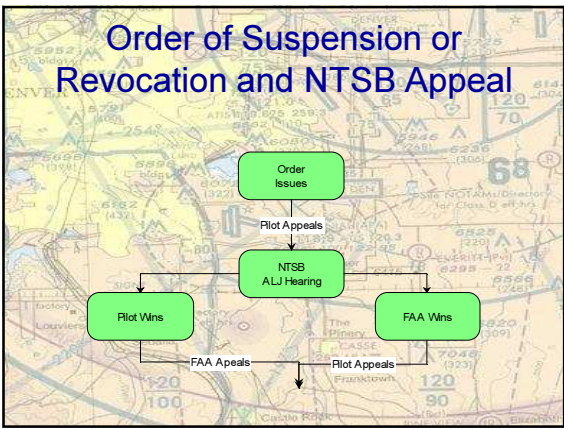
Now is the time to grovel and deal!

Notice of Proposed Certificate Action (NPRM)

Informal Conference Results

- Order of Suspension or Revocation
- Withdraw the proposed certificate action
 - Administrative action?
- Negotiated charges
- Negotiated penalties
- Voluntary suspension
- 709 Ride



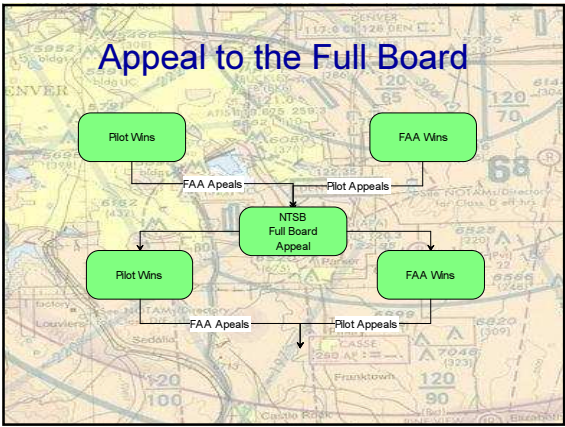


Order of Suspension or Revocation and NTSB Appeal

- Administrative Order by the FAA
- Same format as the NPRM
- Right to "appeal" within 20 days by requesting a trial – NTSB administrative law judge
- Goes into effect unless pilot appeals
- Appeal stops order from taking effect (unless "emergency" order)

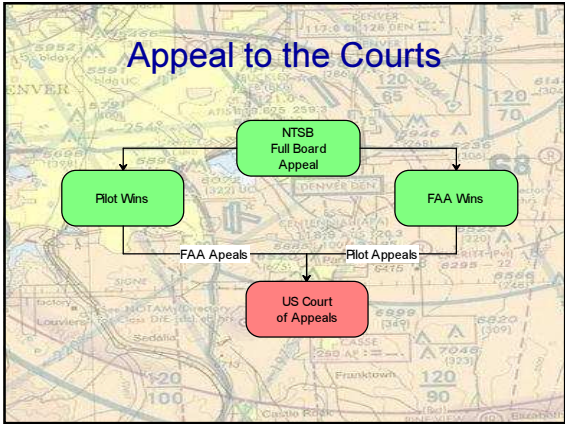
“Appeal” –NTSB Law Judge

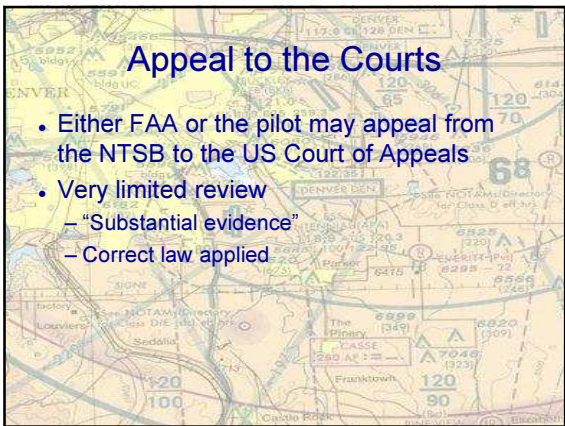
- A trial
- Limited applicability of rules of evidence (hearsay is permitted)
- Burden of proof on the FAA
 - But in an FAA-friendly forum
- Law Judge acts as both judge and jury
 - Decides what the facts are
 - Applies the facts to the law
- Either the FAA or the pilot may appeal either the ruling or the penalty to the full Board.

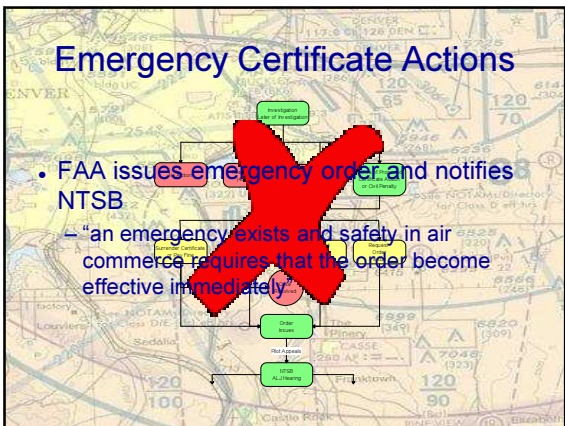


“Appeal” – Full Board

- A traditional looking appeal
- Written briefs
- Limited review of correctness of fact findings
- Primary issue is whether the Law Judge applied the law correctly







Emergency Certificate Actions

- Accelerated procedure of the violation
 - Pilot appeal within 10 days
 - Case must be resolved by the NTSB within 60 days (including both trial and NTSB appeal)
 - Pilot may waive the accelerated procedure
- Challenging the “emergency”
 - File petition to review within 2 days
 - FAA reply with 2 days
 - Decided on the papers unless the Law Judge solicits additional information

Emergency Certificate Actions

- FAA issues emergency order and notifies NTSB
 - “an emergency exists and safety in air commerce requires that the order become effective immediately”
- Accelerated procedure of the violation
 - Pilot appeal within 10 days
 - Case must be resolved by the NTSB within 60 days (including both trial and NTSB appeal)
 - Pilot may waive the accelerated procedure
- Challenging the “emergency”
 - File petition to review within 2 days
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Administrative Dispositions

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graph TD
    A[Administrative Dispositions] --> B[No Action]
    A --> C[Reexamination (409 Ride)]
    A --> D[Warning Notice Letter of Correction Remedial Training]
    A --> E[Notice of Proposed Certificate Action or Civil Penalty]
  
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Remedial Training

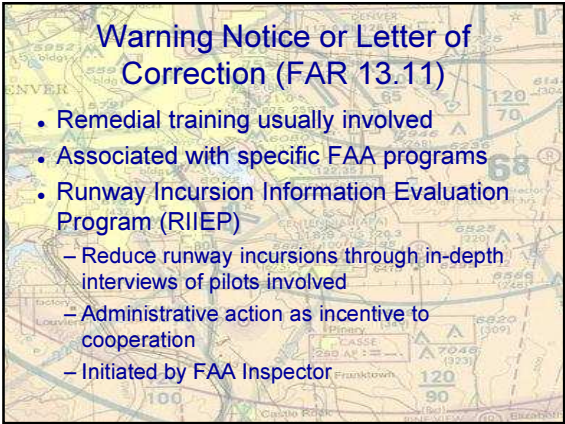
- Beat them to the Punch!
- Schedule session with your own CFI immediately
- This may help and will not hurt

709 Reexamination

- ...the Federal Aviation Administration may ...reexamine an airman... 49 U.S.C. § 44709(a)
- Must be "reasonable"
 - But refusal will lead to an emergency order
- Limited to reason for request
- May request change of inspector or FSDO
- Get and log training

Warning Notice or Letter of Correction (FAR 13.11)

- Warning Notice
 - describes the incident
 - indicates that it "may have been a violation"
- Letter of Correction
 - FAA decides there was a violation
 - States necessary corrective action
 - the alleged violator has taken or agrees to take corrective action
 - If not completed, legal enforcement action may be taken



Warning Notice or Letter of Correction (FAR 13.11)

- Remedial training usually involved
- Associated with specific FAA programs
- Runway Incursion Information Evaluation Program (RIIEP)
 - Reduce runway incursions through in-depth interviews of pilots involved
 - Administrative action as incentive to cooperation
 - Initiated by FAA Inspector



Other Enforcement Issues

- Aviation Safety Reporting Program
- Merrell case – The FAA decides what the FAR means
- 6-month “State Complaint” rule
- Expunction




ASRS – NASA

- <http://asrs.arc.nasa.gov>
- NASA Form sent within 10 days
- A safety program with benefits
- Anonymity
 - Don't lose it by identifying yourself in narrative



ASRS – NASA


- Prohibition on use in enforcement proceedings
 - FAA may use information from other sources
- “Get out of Jail Free”
 - Evidence of a compliant attitude
 - Affects the *penalty* not the *violation*
- Timing and use is *strategic*



ASRS – NASA

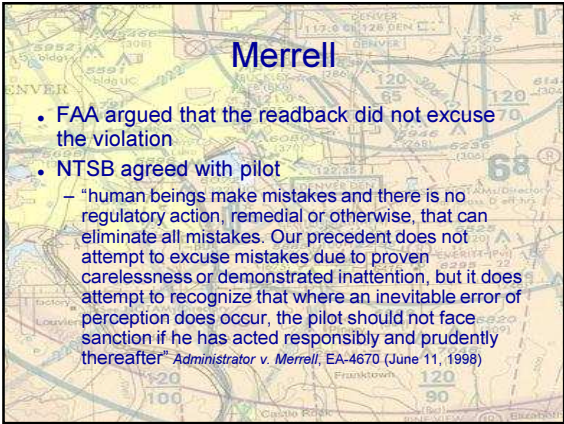
Exceptions to the waiver

- Criminal activity
- Accidents (NTSB Part 830 definitions)
- Intentional/Deliberate violation
 - May be subject of hearing
- “Lack of Qualification” – Does not prevent a “709 Ride”
- Violation within prior 5 years



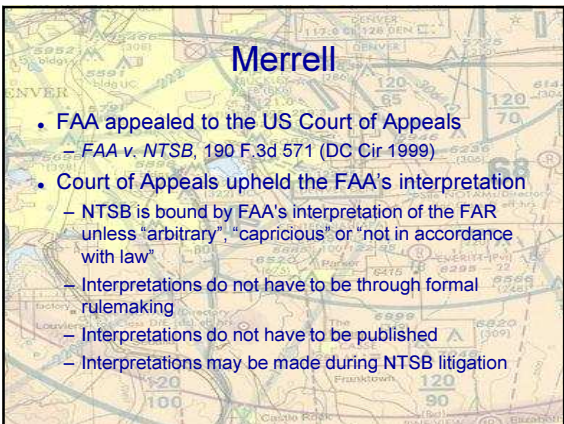
Merrell

- Captain misheard altitude assignment – was meant for another aircraft
- Full readback stepped on and not corrected
- Resulted in loss of separation
- FAA brought certificate action



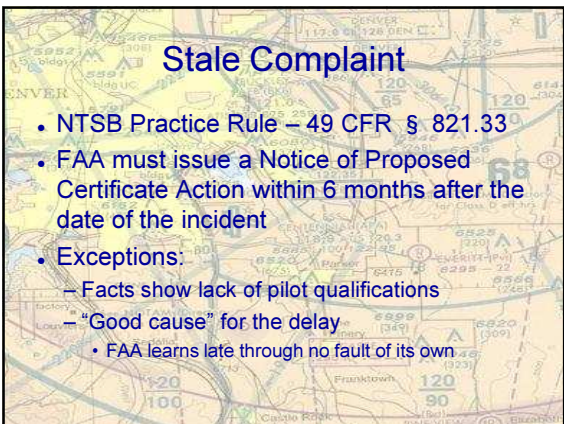
Merrell

- FAA argued that the readback did not excuse the violation
- NTSB agreed with pilot
 - “human beings make mistakes and there is no regulatory action, remedial or otherwise, that can eliminate all mistakes. Our precedent does not attempt to excuse mistakes due to proven carelessness or demonstrated inattention, but it does attempt to recognize that where an inevitable error of perception does occur, the pilot should not face sanction if he has acted responsibly and prudently thereafter” *Administrator v. Merrell*, EA-4670 (June 11, 1998)



Merrell

- FAA appealed to the US Court of Appeals
 - *FAA v. NTSB*, 190 F 3d 571 (DC Cir 1999)
- Court of Appeals upheld the FAA's interpretation
 - NTSB is bound by FAA's interpretation of the FAR unless “arbitrary”, “capricious” or “not in accordance with law”
 - Interpretations do not have to be through formal rulemaking
 - Interpretations do not have to be published
 - Interpretations may be made during NTSB litigation



Stale Complaint

- NTSB Practice Rule – 49 CFR § 821.33
- FAA must issue a Notice of Proposed Certificate Action within 6 months after the date of the incident
- Exceptions:
 - Facts show lack of pilot qualifications
 - “Good cause” for the delay
 - FAA learns late through no fault of its own

Current Hot Issues

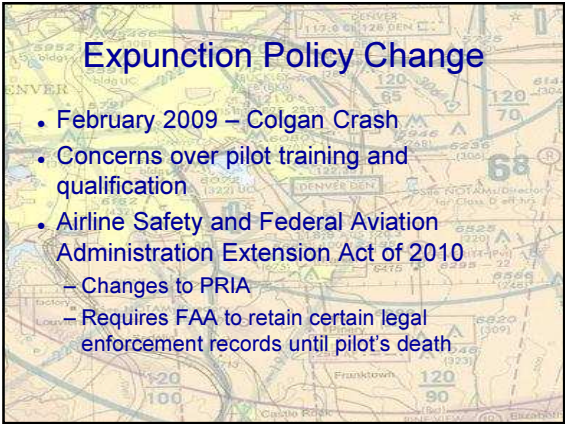
- Sport Pilots need a pilot certificate
- TFRs and Runway Incursions remain special emphasis enforcement areas
- AC 00-58B – Voluntary Disclosure Reporting Program
 - applies to operators not individual airmen
 - Checkered History: FAA v. Ryan Moshea
 - Pilots – file NASA ASRS

Current Hot Issues

- Enforcement of HAZMAT and Weight and Balance violations are becoming more frequent
- Changes in FAA expunction policy

Expunction Policy Change

- Revocation: Never
- Suspension: ~~5~~ 5 years
- Civil Penalty: ~~5~~ 5 years
- Administrative Action: 2 years
- Closed Investigation: 90 days




Expunction Policy Change

- February 2009 – Colgan Crash
- Concerns over pilot training and qualification
- Airline Safety and Federal Aviation Administration Extension Act of 2010
 - Changes to PRIA
 - Requires FAA to retain certain legal enforcement records until pilot's death



Expunction Policy Change

- Revocation: Never
- Suspension: 5 years
- Civil Penalty: 5 years
- Administrative Action: 2 years
- Closed Investigation: 90 days
- FAA Chief Counsel still working to determine full effects on policies



How to Deal with Investigation

- Do not ignore
- Do not schmooze
- “Compliant attitude”
- Listen more; talk less
- Avoid admissions
- Don't threaten to send your lawyer, but...
- If you can, speak with an attorney before speaking with the FAA.

Find a lawyer – Join a LSP

- Cheap protection
- More likely to call attorney
- Recurrent training for AOPA Panel lawyers
- AOPA members have access to the list even if not a subscriber



Questions?

