

U. S. Department
Avenue #14
of Transportation

**Federal Aviation
Administration**

Association
Through Mr. Joe Schuster,
Via Email

Alaskan Region

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**Alaska Professional
Hunters**

Dear Mr. Schuster:

Thank you for giving me the opportunity to share information with your membership. The professional hunting guides in Alaska have a long and storied history in the state's history and continue to be an integral part of the state's economy and culture. Unlike guide and outfitter operations in other parts of the country, the guiding industry is closely tied to and in many cases dependent on use of aircraft. Many of the finest pilots in Alaska come from the guide ranks. It's time well spent for all of us to review the regulatory background and common questions presented by many of the guide-related aircraft operations within the state.

For several decades, the Federal Aviation Administration (FAA) in Alaska treated the carriage of guide and/or lodge clientele (and their property) by the registered guide or lodge operator as incidental to the primary business of guiding and lodge operations, and thus allowed the owner/operator to operate aircraft without an air carrier or operator certificate and concurrently allowed the pilot to operate with only a private pilot certificate. After issues were raised by the National Transportation Safety Board and other extrinsic parties, the FAA determined that the Alaskan Region did not follow the policy of the FAA nationwide nor was it consistent with decisions of the National Transportation Safety Board. See e.g., *Administrator v. Scherf*, 7 N.T.S.B. 1343 (1990).

In reaction to these inquiries and evaluation by the agency, the FAA issued a notice in January, 1998, announcing lodge and guide operations using aircraft to ferry clientele must do so consistent with Part 119 and Part 135 of the Federal Aviation Regulations. The Alaska Professional Hunters Association (APHA) sought judicial relief against the agency's proposed action, and in 1998, the United States Court of Appeals in *Alaska Professional Hunters Ass'n, Inc. v. F.A.A.* 177 F.3d 1030 (C.A.D.C. 1999) held that the agency could not make such a substantive change in the implementation and interpretation of its rules without first going through procedures dictated by the Administrative Procedure Act.

Subsequent to the *APHA* court decision, Congress amended Title 49 of the United States Code to provide that operation of single-engine aircraft by those providing guide and lodge service within the State of Alaska shall be considered incidental to that guiding and/or the furnishing of lodge services and shall not be subject to Part 135. Congress concurrently directed the FAA to establish rules set out in the statute and such others as deemed necessary by the Administrator for safe operations.

The congressional language is clear that the flight activities of each individual pilot must be incidental in nature and not the primary business concern of that pilot. Likewise, to fall under this definition, the service must be pursuant to and part of a conventional guiding operation that provides in-the-field guide service or is part of a camp or lodge operation. However, the rule-making project implementing these congressional standards has not been completed, and thus the FAA currently does not enforce the additional safety provisions called out in the statute. The congressional enactment does underscore the continuing intent to recognize that “incidental” remains and will remain an important concept in determining regulatory applications

We note that the statute may be more restrictive in that it includes accommodations as an element of the definition of covered operations. However, the *APHA* decision does not make a distinction between those guiding activities that include accommodations and those that do not. It dictates that the FAA continue application of its historical application in Alaska until such time as the legal processes are followed to change the historical interpretation in this state. During its decades old policy, the Alaskan Region did not distinguish between “day” guiding service for fishing and bird-hunting and those situations where the guide or lodge provided accommodations. So, we note at the outset that the application of what the Alaskan Region historically determined was “incidental” to guiding operations and thus allowed under Part 91 did not hinge on the provision for accommodations.

With this as the backdrop, it’s helpful to review common situations, particularly those which are often the question of public inquiry to our office. These examples and their regulatory applications are as follows:

1. Registered guide owns and personally operates the aircraft and uses it to ferry clients and equipment in support of the guiding operations. These operations do not have to be conducted under Part 119/135 and the guide may do so with only a private pilot certificate and a 3rd class medical certificate.
2. Registered guide owns or otherwise legally possesses an aircraft and that aircraft is physically operated by an assistant guide who is engaged in bona fide field guiding and not simply hired to operate an aircraft and act as a pilot. The flight operations are considered incidental to the assistant guide’s employment and he or she may do so with a private pilot certificate and 3rd class medical. These flight operations are not subject to Part 119/135.
3. Registered guide hires a pilot to operate the aircraft owned or otherwise legally possessed by the guide. These operations do not have to be conducted under Part 119/135 but the pilot must hold at least a commercial pilot certificate and 2nd class medical certificate. The pilot’s duties are not incidental in respect to his employment and he is much like a corporate pilot that flies for hire and needs the quoted certificates.
4. Registered guide hires an assistant guide who is engaged in bona fide field guiding and not simply hired to operate an aircraft and act as a pilot. The assistant guide provides his or her own airplane and is compensated for its use. Flight operations are closely related to the actual field work of the assistant guide and not used as a substitute generally for air service. The flight operations are considered incidental to the assistant guide’s employment and he or she may do so with a private pilot certificate and 3rd class medical. These flight operations are not subject to Part 119/135.

5. Registered guide hires the services of a person or entity such that the person or entity will provide an aircraft and a pilot. The pilot does not participate in bona fide guide service in the field but instead has principal duties of moving people and equipment in and out of the guiding areas. This is not considered incidental but instead is providing air service. The operations are subject to Parts 119/135 and the pilot must possess at least a commercial pilot certificate and second class medical. The requirements are NOT affected by the fact the pilot may hold an assistant guide's license. This situation is distinct from that called out in No. 4, above.
6. Registered guide owns an aircraft and uses it to transport clients to the field. The guide may or may not provide equipment for the clients' use. However, the guide or assistants do not remain in the field with the clients but instead conduct a "drop-off". Although this is regulated for hunting operations as outfitting and a guide activity, the FAA has not and does not consider this incidental to guiding and the operations are subject to part 119/135 and the pilot would be required to have at least a commercial pilot certificate and a 2nd class medical certificate.
7. Registered guide (Guide A) owns or has legal possession of an aircraft and operates it himself or it is operated by an otherwise properly certificated pilot. Another registered guide (Guide B) arranges with Guide A to move persons or property in the field which are unrelated Guide A's own guide operations. The operations are subject to Parts 119/135 and the pilot must possess at least a commercial pilot certificate and second class medical. The requirements are NOT affected by the fact Guide A holds a guide's license

We should note that if circumstances dictate, the FAA will always look behind written agreements if it appears parties may have engaged in sham contracts to distract from actual arrangements. For example, if a guide hires an assistant on paper to provide in-field guide services and provide an aircraft, but our investigation determines that in fact the person was hired primarily to provide air service, we may take appropriate enforcement action against the pilot and the guide. It's important to underscore, this is intended to preserve the status quo of regulatory interpretation and application as required by the federal appeals court and not to condone any charade or paper façade.

As of this date, the FAA has not completed the rule making dictated by Congress. Until completion of the rule making, we cannot enforce the special rules found in the legislation against qualifying "guide pilots". Nevertheless, the safety regulations in Part 91 are still applicable, and we caution that the additional statutory standards might arguably set out a standard of care for other purposes, such as tort liability and insurance coverage. We offer no opinion in this regard but anyone so affected would do well to discuss this with their insurance carrier and private counsel. If other regulatory questions come up for your members, please encourage them to contact me at (907)-271-5272. I am always happy to try and work through these matters to support a safe and viable guiding industry in the state.

Sincerely,

Howard L. Martin, Jr.
Regional Counsel