



Summary of Public Submissions Received on

NPRM 13-01 — Part 115 Drug and Alcohol Impairment

**Prepared by Paul Elton
Principal Standards Specialist**

31 October 2012

Table of Contents

General	1
Summary of Submissions	1
Subject area	1
Section 2.2 of the NPRM	1
Form of the proposed rule	2
Definitions.....	4

General

Notice of Proposed Rulemaking (NPRM) 13-01 was issued for public consultation on 5 October 2012, with a submission close-off of 19 October 2012. The objective of the proposed rules is to reduce the potential for serious harm and fatalities arising from adventure aviation providers impaired by drugs and/or alcohol.

A copy of the NPRM was sent to:

- Adventure aviation certificate holders:
 - Skydive Taupo Ltd, Skydive Lake Wanaka Ltd, Sunrise Balloon Adventures Limited, Queenstown Commercial Parapenters Ltd, Skydive Abel Tasman Ltd, Tandem Skydiving (2002) Ltd, Blue Sky Microlight 2006 Limited, Skydive Queenstown Limited, Skydive Zone (Bay of Islands) Limited, Kiwi Balloon Co (2009) Limited, Aoraki Balloon Safari (Methven) Ltd, Double X Aviation Limited, Ballooning Canterbury.Com Ltd, Strikemaster Limited, Skydive Franz Josef Ltd, Skydive Waikato (2009) Limited, Tauranga Tandem Skydiving Ltd, Coronet Peak Tandems Limited, Skydive Ballistic Blondes Limited, Blue Skies Skydiving Limited, Warbird Adventure Rides Ltd, Skytrek Tandem Hang Gliding & Paragliding, Soviet Star Limited, Skydiving Kiwis Limited, Skydive Auckland Ltd, Laguna Inc Limited, Parapro Ltd, Skydivingnz.Com Ltd
- Industry representative associations and other interested parties:
 - Gliding New Zealand Inc, Recreational Aircraft Association of New Zealand, Sport Aviation Corp. Ltd, Flying NZ, Ruth Presland (U-Fly), Aviation Industry Association of NZ (Inc), Tourism Industry Association New Zealand
- The NPRM was also published on the CAA website

Summary of Submissions

A total of 3 submissions were received. They were received from Sunrise Balloons, Michael Shouse, and the Aviation Industry Association of NZ (Inc).

Subject area

Section 2.2 of the NPRM

One submission was received regarding the wording of the third paragraph of section 2.2 *NPRM Development* which was taken by the submitter as offensive and insulting in that it implied that operators were deliberately putting their customers at risk of serious harm.

CAA Response

The CAA reviewed the NPRM text and amended it to better reflect the intention. The amended NPRM was immediately posted on the CAA web site in place of the original.

Form of the proposed rule

One submission was received regarding the form of the proposed rule:

We fully support a regulatory regime for drugs and alcohol but feel that the regime provided for here on the one hand is so non prescriptive that it does little to assist with the development of an appropriate programme and on the other because of its non-prescriptive nature imposes an unfair regulatory burden on operators to justify actions when it comes to determining whether an employee is impaired or not.

The submitter's position was then detailed as follows—

Our view is the mixing of the non-prescriptive nature of the HSE Act with our own very prescriptive CAA rule environment needs to be carefully thought through.

We question whether it is possible to extend the jurisdiction of the Civil Aviation Act to persons who are not document holders. This is the effect when persons referred to in [proposed rule] 115.62(4)¹ are included. The question then arises as to who makes the decision and judgement about the extent of coverage under this clause – is it the operator or the CAA who determines and is such a determination possible. We note in Australia the restriction is to safety sensitive roles and the regulator has determined the extent of coverage. In New Zealand we are aware that other operators have determined that all employees hold safety sensitive roles and this is a matter that has been consulted through with employees and their unions where appropriate.

In our view it is also important to distinguish between the consumption of alcohol away from work premises – it is not the intent of the clause that there be prohibition on the consumption of alcohol as this would be an infringement of a person's human rights. Similarly it is possible to consume some drugs as these may be a requirement of holding a license or a particular role – these drugs of course are designed to remove possible impairment so it is possible the consumption of particular drugs may reduce or mitigate the risks i.e. not all drugs are bad. However because of the generic statement in the rule it appears to imply all drugs are bad, however what we are attempting to discourage is the use of mind altering type drugs which we all agree should not be consumed at work irrespective of the particular type of work.

We appreciate that the definition of impairment is derived from the Maritime Sector and we always encourage CAA to use definitions which has some prior standing however we think that defining impairment in this way could potentially be confusing and in the aviation environment it is about diminished effectiveness and not attributing the diminished effectiveness to any specific set of circumstances. We are concerned for example that a medical condition could be quite acceptable within an aviation environment; i.e. acknowledged on a license but in the particular circumstances on the day may be the cause of diminished effectiveness. This would mean that the Operator would have to override the judgement of the CAA's own medical examiner who has said the person is acceptable. We think this is a very significant call for an operator to make and could result in employment related claims for lost earnings. It may also cause the operator to think the CAA doctor knows better and not to exercise his/her judgement in the particular circumstances. Our preference is to keep the definition simple and say Impaired means diminished effectiveness.

¹ An applicant for an adventure aviation operator certificate must establish a drug and alcohol programme for monitoring and managing the risks related to the use of any drug, or consumption of alcohol by...any other person whose work directly affects the safety of an adventure aviation operation.

CAA Response

The CAA acknowledges the submitter's desire for a more prescriptive proposal as a means to clarify operator compliance expectations, and to ensure a robust regime for addressing drugs and alcohol.

There are three factors that influence the CAA to retain the non-prescriptive nature of the proposed rule:

- The wider policy that deals with this issue for the entire adventure tourism industry obliges agencies to require operators to manage, monitor for, and respond to situations where a worker or other person providing an adventure activity is affected by drugs or alcohol. At the same time the proposal must be flexible enough to take account of the level of risk of an activity and the size of the operation. This means providing for the ability for operators to choose the approach that is right for their business; which will also help to address cases where the owner-operator is also the activity provider, avoiding any conflict created from self-monitoring.*
- That same policy states that there will be no mandatory rule requirement for random testing; so the type of testing available to operators will be in line with current law.*
- The current form of the proposed requirement is consistent with other CAA rule requirements with regard to organisational matters – for example fatigue.*

The CAA is aware that non-prescriptive rules must be supported and is developing guidance for that purpose. In addition, the CAA is already engaging operators during HSE audit visits to promote compliance considerations.

With regard to the other points raised by the submitter:

- The jurisdiction of the Civil Aviation Act is unaffected. The proposed requirement is of the operator, in the same manner as other rules that require an outcome which is, in practice, delivered by an employee of, or contractor to, a certificate holder. For example, control of maintenance is a requirement which is often the function of a person who does not hold an aviation document; but the responsibility for the control of maintenance is the operator's, as is the responsibility that the person can properly perform the function.*
- Regarding the determination of whose work directly affects flight safety – the submitter is correct in saying that the Australians have listed² “safety sensitive*

² “any activity undertaken by a person, other than as a passenger, in an aerodrome [drug] testing area; calculation of the position of freight, baggage, passengers and fuel on aircraft; the manufacture or maintenance of aircraft, aeronautical products, aviation radio navigation products, aviation telecommunication products; the certification of maintenance of the aforementioned kind; the fuelling and maintenance of vehicles that will be used to fuel aircraft on aerodrome testing areas; activities undertaken by an airport security guard or a screening officer in the course of the person's duties as a guard or officer, activities undertaken by a member of the crew of an aircraft in the course of the person's duties as a crew member; the loading and unloading of trolleys containing baggage for loading onto aircraft and the driving of such trolleys; activities undertaken by a holder of an air traffic controller licence in the course of the person's

aviation activities” as they are termed in their rule. However, they have a separate rule part to deal with drug and alcohol management, and it applies to the entire aviation industry. The CAA has resisted making a list since the contents of a list may change, and the resource burden of amending rules overshadows the outcome. The CAA feels that the determination of whose work directly affects the safety of an adventure aviation operation is well within the capabilities of the affected document holders.

- *The CAA disagrees that there is an implication that all drugs are bad. The proposed rule is requiring the monitoring and management of the risks of impairment, which would not include, say, benign medication.*
- *The CAA would note that in the context of the proposed requirements, impairment is addressing transient conditions affecting the pilot (who, it should be noted, has a personal responsibility for fitness to perform his or her duties), rather than suggesting that an operator may be influenced a medical examiner’s assessment.*

The CAA has not amended the proposed rules in light of this submission.

Definitions

One submission was received recommending “the addition of the terms ‘ground crew member’ and ‘tandem master’ to Part 1 *Definitions and Abbreviations*.”

CAA Response

The definition for ground crew member is only used in Part 115, and it is appropriate that it remains there. However, tandem master is used in both Part 105 and Part 115, so that definition, along with the definitions for tandem parachute decent, tandem pair, and tandem rider, which are also currently contained in Part 105 will be moved to Part 1 as it is not a change of policy, it is not controversial, it doesn’t have any regulatory impact, and this rule project already amends Part 1.

duties as a controller; activities undertaken by the supervisor of a holder of an air traffic controller licence in the course of the person’s duties as such a supervisor; providing flight information and search and rescue alert services to a pilot or operator of an aircraft immediately before the flight of the aircraft, or to a pilot or operator of an aircraft, during the flight of the aircraft, or as an intermediary for communications between a pilot or operator of the aircraft, and an air traffic controller; providing aviation fire fighting services.”