

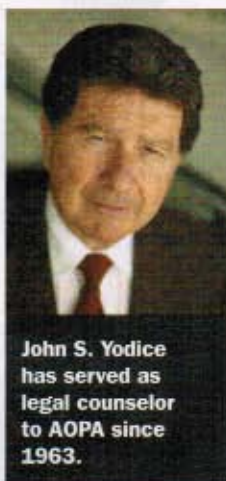
Low flying

FAA violations for low flying have historically been the most frequently charged infractions against general aviation pilots. Only recently have low-

flying violations been overtaken by TFR/ADIZ violations. This is my third column in less than a year in which I have reported low-flying cases (see "Pilot Counsel: What is a Congested Area?" April 2008 and "Pilot Counsel: More on Congested Areas" October 2008 *AOPA Pilot*). Although most pilots are familiar with the rule on minimum safe altitudes specified in FAR 91.119, it is the FAA's and NTSB's muddled interpretations of the rule, made after the fact in FAA enforcement cases, which have caught many pilots unaware. That was the message of my earlier columns. From our experience in the AOPA Legal Services Plan, most pilots are surprised by the FAA enforcement of flight activities they had been previously conducting without a problem. Now, a recent decision of the NTSB prompts me again to report an actual case in which the FAA brought enforcement action in a low-flying incident, and the NTSB was called upon to review the case on appeal.

In this most recent case, a pilot had his FAA certificate suspended for 60 days for violation of FAR 91.119 (also including a charge of "careless or reckless" in violation of FAR 91.13, a charge that the FAA always throws in for good measure regardless of the facts). The NTSB denied the pilot's appeal of the suspension, although an NTSB law judge reduced the period of suspension from the 90 days ordered by the FAA because the pilot had no previous violations.

The pilot was flying a Piper J-3 Cub at low altitudes over a reservoir in Massachusetts. The reservoir is approximately eight miles long and two miles wide. His passenger, a professor at a world-renowned university, was taking photographs of wildlife. To that end the pilot admittedly was flying a circuit around the reservoir at about 50 feet msl, approximately 200 feet offshore, but the pilot insisted that he did not operate his aircraft within 500 feet of any person or structure. He insisted that he was not careless or reckless in the operation, and that the aircraft was always in a position to make a landing in the event of a power failure. In the appeal, the professor supported the pilot's version of events. As was suggested earlier in typical cases, this pilot was surprised, and testified that on other occasions he had flown over the reservoir in the Cub at low level, and that no one had complained to him about those flights.



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The FAA enforcement action was precipitated by four eyewitnesses who complained that they saw the aircraft flying at low altitude over the reservoir. Two of the witnesses were fishermen standing on the shore of the reservoir, and two were watershed rangers from the Massachusetts Department of Conservation and Recreation. In the NTSB appeal, the witnesses all testified that they saw the aircraft fly too close to a building near the reservoir, and two said they saw the aircraft fly too near the dam. The two fishermen said that the aircraft passed 50 feet or less from them. The NTSB chose to believe the FAA witnesses rather than the pilot and his witnesses. After hearing the pilot's appeal, the NTSB affirmed the 60-day suspension of the pilot's certificate.

As a review, then, let's look at the structure of FAR 91.119. The main body of the regulation prescribes

minimum altitudes depending on the nature of the geographical area over which an aircraft is operated. However, regardless of the geographical area, there is an overriding minimum that applies "anywhere," and there is an exception that applies to takeoffs and landings. The "anywhere" minimum is not a numerical altitude. Rather, this minimum requires a pilot to fly high enough so that "if a power unit fails" the pilot would be able to make an emergency landing without creating an "undue hazard" to any person or any property on the surface. The takeoff-and-landing exception says that the minimum safe altitudes of the regulation do not apply "when necessary for takeoff or landing."

The geographical areas where minimum altitudes are specified are: *congested areas*, *populated areas* (my term), and *open water and sparsely populated areas*. The regulation says that "over any congested area of a city, town, or settlement, or over an open air assembly of persons, [a pilot must operate the aircraft at least] 1,000 feet above the highest obstacle within a horizontal radius of 2,000 feet of the aircraft." The regulation then goes on to specify minimum altitudes for "other than congested areas." Over a populated area that is not congested, a pilot must fly at least at "an altitude of 500 feet above the surface." This minimum is measured vertically, as distinguished from the next minimum we will talk about, which can be measured on the slant. Over a sparsely populated area, or over open water, an aircraft may be operated down to the surface, so long as it is not operated any "closer than 500 feet to any person, vessel, vehicle, or structure."

The rule itself is fairly straightforward. It is the interpretation and application in specific cases that can be tricky. No doubt, our pilot believed that he was flying over open water attempting to comply with the 500-foot slant minimum, as he had done on other occasions. This case should illustrate for pilots just how tricky these cases can be, how the FAA prosecutes them, and how the NTSB adjudicates them.

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