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NTSB Order No. EA-3767

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 30th day of December, 1992

THOMAS C. RICHARDS, Administrator, Federal Aviation Administration, Complainant, v. NICHOLAS HARRINGTON, Respondent.	Docket SE-9124

OPINION AND ORDER

Respondent has appealed from the oral initial decision of Administrative Law Judge Patrick G. Geraghty, issued on June 8, 1990, following an evidentiary hearing.[1] The law judge affirmed an order of the Administrator suspending respondent's airline transport pilot certificate for 90 days. We deny the appeal.

[1]The initial decision, an excerpt from the hearing transcript, is attached.

The basic facts surrounding the incident that gave rise to the Administrator's complaint are not disputed. Respondent, a helicopter pilot for Hilo Bay Air, was assigned by his employer to fly three men, Messrs. Nall, Wolters, and Birkenhead, to a point on the island of Hawaii where a barge had run aground several months earlier. These three intended to examine the barge for salvage possibilities. The barge was beached just below a steep cliff,[2] in an area where land access was difficult. There was no adjacent beach, only a rocky shore, and there was no walkway down the cliff. Respondent piloted the helicopter (a Bell 206) from the airport "along the shoreline" to the site. Tr. at 12. High and low reconnaissance was performed for approximately 5-10 minutes (id.) to assess possible landing sites. Landing on the barge was chosen as the best option, and the option apparently preferable to the passengers, as compared to landing at the top of the cliff and rapelling down.[3]

The barge was approximately 300 feet long and 80-100 feet wide. Id. It was canted 15-20 degrees (Tr. at 27), with one end slightly under water, but it was stable. Respondent intended (after discussion with the group) to drop off the passengers one by one onto an elevated area of the barge, termed the deckhouse,[4]

[2]Estimates of the cliff's height ranged from 100 to 200 feet.

[3]The record does not indicate whether the passengers had considered hiring a boat to take them to the site.

[4]This area was also sometimes called the doghouse, but apparently was a structure covering a downward rampway on the barge.

with respondent performing a "sloped" landing (i.e., with only one skid grounded). According to the testimony, other locations on the barge were less acceptable for a landing (see discussion infra). This slope landing procedure was successfully accomplished with Mr. Nall, although he testified that he did not wait until the skid was on the deckhouse before he disembarked. Instead, he jumped the foot or so between the two. Respondent then raised the aircraft somewhat and hovered above the barge, to permit Mr. Nall safely to leave the deckhouse area and proceed, out of the way, towards the bow. The procedure was repeated for Mr. Birkenhead, but he had more difficulty. The law judge found, and the record supports a finding, that respondent lowered one skid onto the deckhouse for this second disembarkation. Tr. at 280.

As respondent was ascending to prepare to repeat the procedure for the third passenger, spray from a wave hitting the barge rose a sufficient height (a greater height than they had previously witnessed) to strike the underside of the helicopter. Power and resultant control of the aircraft was lost, and the helicopter ended up in the water.[5] Respondent and passenger Wolter escaped from the helicopter. Although Mr. Nall swam out to assist them, Mr. Wolter drowned before rescue personnel arrived. Respondent was treated in the intensive care unit of the local hospital. The helicopter apparently was not recovered.

[5]There is some dispute whether the aircraft crashed or was ditched; the law judge found it had crashed. In our view, the difference is immaterial to our conclusions.

The Administrator charged respondent with violations of 14 C.F.R. Part 91, paragraphs .79(a) and (d) and .9, and Part 135, paragraphs .5 and .183.[6] At the hearing, respondent did not

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[6] § 91.79(a) and (d) (now 91.119(a) and (d)) read:

> Except when necessary for takeoff or landing, no person may operate an aircraft below the following altitudes:
>
> (a) Anywhere. An altitude allowing if a power unit fails, an emergency landing without undue hazard to persons or property on the surface.
>
> * * * * * *
>
> (d) Helicopters. Helicopters may be operated at less than the minimums prescribed in paragraph (b) or (c) if the operation is conducted without hazard to persons or property on the surface. In addition, each person operating a helicopter shall comply with any routes or altitudes specifically prescribed for helicopters by the Administrator.

§ 91.9 (now 91.13) provided:

> No person may operate an aircraft in a careless or reckless manner so as to endanger the life or property of another.

§ 135.183 reads:

> No person may operate a land aircraft carrying passengers over water unless -
>
> (a) It is operated at an altitude that allows it to reach land in the case of engine failure;
>
> (b) It is necessary for takeoff or landing;
>
> (c) It is a multiengine aircraft operated at a weight that will allow it to climb, with the critical engine inoperative, at least 50 feet a minute, at an altitude of 1,000 feet above the surface; or
>
> (d) It is a helicopter equipped with flotation devices.

§ 135.5 requires operations under that part to be conducted in accordance with the operating certificate and operating specifications. Hilo Bay Air's operating specifications included the following provision:

> Unless it is necessary for takeoff or landing, carriage of

dispute that this was a Part 135 operation; the merits of respondent's appeal depend instead in great part on the meaning of various of these rules, and the applicability of the exceptions contained in them. See, e.g., § 135.183(b). In brief, respondent primarily challenges those findings by the law judge that: (1) respondent was engaged in "over water" operations; and (2) respondent was not engaged in takeoff or landing the helicopter at the time.[7]

Respondent challenges the law judge's finding that this was an over water operation because, if it were not, findings of §§ 135.183 and 135.5 violations could not be sustained. Respondent, however, incorrectly argues that no evidence of over water flight prior to the accident was introduced. Respondent himself admitted the contrary. Tr. at 147.[8] Moreover, as noted

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> passengers with a helicopter, overwater, is prohibited unless the aircraft is operated at an altitude that would allow it to reach land and suitable forced landing area in the case of an engine failure, or is equipped with FAA approved helicopter flotation devices.

[7]Respondent seeks leave to submit a supplemental brief, a request opposed by the Administrator. We deny the request. Respondent's first two reasons warrant little comment. That this may be a case with wide ranging ramifications (a conclusion with which we disagree) is not a reason to grant the extraordinary relief of supplemental briefing. Moreover, the Board does not require the parties' assistance to uncover misleading or false characterizations of testimony. Respondent's third reason, while of greater appeal, is also ultimately unconvincing. Although respondent is correct that the Administrator, in his reply to the appeal, could be viewed as changing the focus of his argument somewhat (from whether a landing had actually occurred -- an issue addressed in detail in the appeal -- to whether an appropriate site for a landing existed), the latter issue was raised before the law judge and fully explored at the hearing.

[8]See Tr. at 147:

earlier, Mr. Nall testified that the flight plan was along the shoreline, thus suggesting at least some over water operations. Given the location of the barge and respondent's choice of the water as a possible emergency landing site (see infra), the record will not support the conclusion respondent urges. The circumstances of this case, in fact, illustrate the validity and importance of the flotation devices requirement. Accordingly, respondent's argument that the aircraft did not require flotation devices because the flight was not over water cannot prevail.

We also cannot accept respondent's alternative claim that, in fact, the passengers were properly equipped. The words of § 135.183(d) require "a helicopter equipped with flotation devices." The operating specifications, which underlie the § 135.5 charge, require even more -- that the helicopter be equipped with FAA-approved helicopter flotation devices. The unrebutted evidence is that it was not so equipped. Respondent did not rebut the Administrator's showing with proof that, because the passengers independently and coincidentally had some sort of equipment of their own (here, apparently, they had wet suits with some sort of flotation mechanism), the operation met the terms (or intent) of the rules. And, we note in this regard, that the passengers were not wearing this apparel during the flight, and there is no evidence in any event that respondent

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Q. How much of your approach if any was over the water.

A. That is very difficult to answer. I mean obviously I was over water as everybody very well knows.

even had a life preserver for himself.

Respondent's next challenge relates to the applicability of the takeoff and landing exception in §§ 91.79, 135.5 (see the operating specifications themselves) and 135.183. Respondent attacks the law judge's finding that the procedure he conducted was not a landing for purposes of this exception. Respondent may well be correct that the disembarkation of Mr. Birkenhead was a landing, and that even Mr. Nall's departure from the aircraft could constitute a landing. Nevertheless, the exception requires more and, therefore, the law judge's decision in this regard is, at most, harmless error.

It is well established that the availability of the takeoff and landing exception requires an underlying finding that the site is appropriate. Administrator v. Essery, 5 NTSB 609, 615 (1985), rev'd on other grounds Essery v. Department of Transportation, 857 F.2d 1286 (9th Cir. 1988), citing Administrator v. Cobb and O'Connor, 3 NTSB 98, 100 (1977).[9] The law judge found that it was not and, despite respondent's continued insistence that his options were reasonable and proper, we agree with the law judge. The preponderance of the evidence warrants a finding that respondent's chosen landing site (the barge), as well as the alternative landing sites he had

[9]The Administrator suggests that we have not heretofore held that the requirement of an appropriate landing site applies to Part 135 as well as Part 91. We have not researched our precedent, but agree that the principles and purposes are the same and that the same condition precedent should apply. Indeed, § 135.5 already speaks of a "suitable forced landing area."

identified (the rocky shore and the water) were unsafe in the circumstances, and were inherently hazardous. And, we reject respondent's suggestion (Appeal at 67) that all helicopter salvage or construction missions are inherently dangerous to some extent and, therefore, a finding against him in this case would place in doubt the lawfulness of all such operations.

In Administrator v. Palmer, 1 NTSB 504, 505 (1969), in our discussion of 14 C.F.R. 91.79, we noted:

> While the Board recognizes that a helicopter is capable of hovering or moving at a slow rate of speed and can effectuate a landing in a very small area, and the safety regulation here involved recognizes this fact of the helicopter's operation, the aircraft nonetheless has certain operating characteristics which create safety hazards. Thus, where there is a power failure, the aircraft, unless it possesses a sufficient altitude, will immediately plummet if it has been in a hovering position, and in the situation here involved, would not land at any safe place but would land in the river bed and be subjected to severe stress on impact with substantial damage to the aircraft and a serious hazard to the well-being of respondent and his passengers.

The same sentiments apply here, and do not undermine the use of helicopters in potentially dangerous situations. The FAA's rules require only that the potential for hazardous results be minimized by the pilot identifying a safe emergency landing site should the need later arise-- surely a reasonable and common sense caution.

As the law judge found (Tr. at 283, 285-286), respondent's emergency landing alternatives all had inherent and considerable dangers.[10] The record indicates no place on the barge other than

[10]We are not favorably inclined towards the Administrator's argument that § 91.79(a) requires a landing on "land," and that neither the barge nor the rocks are "land."

the deckhouse that was a possible, reasonably safe landing site.[11] There is also no claim that the deckhouse itself could have supported the helicopter and allowed for a safe emergency landing either for the aircraft or its passengers. Tr. at 283. In fact, respondent's testimony supports the opposite conclusion. Tr. at 133. The Administrator aptly discusses other problems with landing on the barge. See Reply Brief at 23-24.

In addition to the law judge's uncontested finding that landing on the rocks would have been perilous (Tr. at 282), respondent's testimony makes it clear that the only consistently available landing site in the event of a power failure was the water. See, e.g., Tr. at 147 ("I can't say that I was within a safe gliding distance to the barge at all throughout."). We need look no further than the results of respondent's water landing without flotation devices to affirm the law judge's §§ 91.79 and 91.9 findings.[12]

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[11]We agree with the law judge's statement that "[i]f it [the front part of the barge] was not appropriate or suitable in the first instance [for a landing], it certainly was at least a risky spot for putting down the helicopter in the event of engine failure if the pipes were there and other extrusions to cause rejection [of this landing site] in the first place." Tr. at 281. See also Tr. at 272 for a discussion of the surface of the barge.

[12]Not only was landing in the water hazardous without flotation, the surf was so rough that swimming to shore was too dangerous. Mr. Wolters had begun to do so when respondent waved him off. Tr. at 139, 273. In addition to the fatality and respondent's injuries, a propeller blade flew within 4 feet of Mr. Nall. See also Administrator v. TerKeurst, 5 NTSB 1643, 1646 (power failure that caused helicopter to drop into water could cause moving parts to separate from the aircraft and strike persons or property in the vicinity).

As the law judge found, respondent is held to a high degree of care, judgment, and responsibility. That his passengers wished to examine the barge that day, and preferred the easier and faster access of a helicopter landing, did not supplant his responsibility as pilot in command to avoid hazard to persons and property. See, e.g., Administrator v. Bell, 1 NTSB 1960 (1972). We agree with the law judge's comment that pilots may need to override client wishes in circumstances such as these. Tr. at 269.

Respondent's defense that the accident was caused by a "freak" wave that could not have been foreseen misses the point. As the law judge found, respondent was operating at a low altitude and had few options in the event of engine failure. It may well have been that the wave was unforeseeable. Nevertheless, respondent had the duty to identify an appropriate landing site that could be used without hazard. Thus, respondent's urging that he chose the "best" place to land is immaterial.[13]

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[13]Similarly, respondent's experience does not allow him to take inappropriate risks. The rules apply to everyone equally; they do not apply in some less measure for more experienced pilots. Administrator v. Oeming, NTSB Order EA-3542 (1992), at footnote 9. Administrator v. Reynolds, 4 NTSB 240 (1982), cited by respondent, does not hold to the contrary or excuse respondent's performance. Indeed, it could be argued that respondent's extensive "personal knowledge . . . [of] the limitations and capabilities of the specific aircraft . . . and his . . . experience and expertise with it" (Reynolds at 242), combined with his personal knowledge of the unpredictability of the seas off Hawaii, required greater caution on his part than would be expected of a pilot without the same background. As compared to Reynolds, and to paraphrase that case, we think the Administrator demonstrated that the likelihood of harm was

In any case, we think that, given the sensitivity of the helicopter mechanisms and the proximity of the helicopter to the water, respondent's calculations regarding this operation should have included the possibility that a wave could interfere with the operation of the helicopter. We, therefore, agree with the law judge's finding on this point (Tr. at 281), as well as his conclusion that respondent was careless. Cases cited by respondent in which charges were dismissed because respondent could not reasonably have foreseen the danger are inapposite.

In sum, we find all the law judge's ultimate findings of regulatory violations supported by a preponderance of the evidence and that the FAA met its burden of proof.[14]

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unacceptably high and respondent's exercise of judgment was clearly deficient.

[14]Respondent also alleges as count "G" in his appeal (at 33) that the law judge committed prejudicial error. This issue is never separately addressed. We assume respondent is alluding to the law judge's refusal to hear certain testimony, and we find harmless error, if any, as the disallowed testimony would either have been cumulative or irrelevant to the facts at hand. See Tr. at 217 offer of proof. Respondent's proffered witness had no actual knowledge of the events. Further, in view of our prior conclusions, respondent's dissatisfaction with the law judge's other procedural rulings (disallowing testimony regarding the military's definition of "landing") is moot.

ACCORDINGLY, IT IS ORDERED THAT:

1. Respondent's appeal is denied;

2. The 90-day suspension of respondent's airline transport pilot certificate shall begin 30 days from the date of service of this order.[15]

VOGT, Chairman, COUGHLIN, Vice Chairman, LAUBER, HART and HAMMERSCHMIDT, Members of the Board, concurred in the above opinion and order.

[15]For the purposes of this order, respondent must physically surrender his certificate to an appropriate representative of the FAA pursuant to FAR § 61.19(f).