SMALL UAV COALITION
A Partnership for Safety & Innovation

February 10, 2016

Via email

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Senator Michelle N. Kidani, Vice Chair
Senator Will Espero
Senator Les Ihara Jr.
Senator Clarence N. Nishihara
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Senate Committee on Judiciary and Labor

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Senator Rosalyn H. Baker
Senator Lorraine R. Inouye
Senator Sam Slom
Senate Committee on Public Safety, Intergovernmental, and Military Affairs

Re: Hawaii SB 2172 & SB 2347, Relating to Unmanned Aerial Vehicles, and Related Bills

Dear Senators:

The Small UAV Coalition[1] opposes the above-captioned bills that would regulate operations of small unmanned aircraft systems ("sUAS") in the State of Hawaii and make some violations subject to a civil penalty, other violations subject to a misdemeanor, as well as provide a private right of action. We understand SB 2347 is to be discussed at a joint hearing of the Senate Committees on Public Safety, Intergovernmental, and Military Affairs ("PSM") and Commerce, Consumer Protection, and Health ("CPH") scheduled for tomorrow, February 11, 2016, and SB 2172 is to be discussed at a joint hearing of the CPH Committee and the Senate Committee on Judiciary and Labor ("JDL"), the following day. While we understand the good intentions of the drafters of these bills, and agree that a State may protect the reasonable privacy interests of its

[1] Members of the Small UAV Coalition include 3D Robotics, AGI, AirMap, Amazon Prime Air, Botlink, DJI Innovations, Drone Deploy, Flirtey, Google [X] Project Wing, GoPro, Intel, Kespry, Parrot, PrecisionHawk, Strat-Aero, Verizon Ventures, and ZeroTech.

citizens from unwarranted invasions by any means (not solely by operation of a UAS), in several respects these bills – if adopted as currently written -- would be preempted by Federal law.

We also take this opportunity to comment on other bills introduced in the Hawaiian legislature that address sUAS operations.[2]

General comments

Under the Supremacy Clause of the United States Constitution, Article VI, clause 2, Federal law is the supreme law of the land. As a bedrock principle of constitutional law, a State aviation law is subject to preemption where Congress has vested the FAA with complete and exclusive regulatory authority or where the State law is inconsistent with Federal law or would frustrate the Federal government's objectives and purposes reflected in Federal statutes and regulations.

The FAA has plenary control over the navigable airspace and has promulgated a comprehensive set of safety regulations that leaves no room for supplementation by state or local law. Therefore, it does not matter that there may not be a "conflict" between Federal and local law. In fact, SB 2172 would significantly conflict with Federal law. This bill would prohibit certain UAS operations that are not currently prohibited by the FAA. Even where a bill purports simply to codify FAA rules into State law, like SB 2347, the operations the bill would prohibit may be currently restricted by Federal law, but may be subsequently permitted, whether by a rule change, an exemption or waiver, or a change to the Federal Aviation Act. The FAA has proposed a set of rules governing operation of small unmanned aerial systems ("sUAS NPRM"); a final rule is expected later this year. Also, the FAA has granted over 3,300 exemptions for commercial use of small UAS under section 333 of the FAA Modernization and Reform Act of 2012.

SB 2172 is an attempt to enact into State law several of the current restrictions in Federal law, whereas section 2(a)(1) of SB 2347 simply would make a violation of State law any violation of "any applicable Federal law and Federal Aviation Administration regulations." A person should not be subject to two enforcement schemes for the same conduct. The FAA has sufficient enforcement authority and resources to take action against UAS operators who violate the Federal Aviation Regulations. If additional authority is desired, it is up to Congress, or the FAA under its delegated authority, to act, and not up to a State or municipal government to do so.

This language in SB 2347 and similar language in Section 3(14) of SB 2172 that would prohibit operations in violation of State or Federal law also raise a significant concern under the Due Process Clause of the 14th Amendment to the United States Constitution, whether a person has

[2] The Coalition supports SB 3062, which would fund research and development activities as part of the Pan-Pacific FAA-designated test site. The Coalition also supports the purpose of HB 2684, which would promote the operation of unmanned aircraft systems at Honolulu International Airport for air cargo delivery. This bill would prohibit UAS operations *at an airport* without first obtaining a certificate of registration with the State of Hawaii. Operators of sUAS will typically not operate at an airport (and be subject to restrictions on operating near airports) and in any event are governed by a FAA registration system. The Coalition opposes State and local registration systems that are duplicative of the Federal registration system the FAA has recently established.

fair notice of the law. What may now be prohibited or restricted may in a short time be permitted or changed.

A strong and consistent line of judicial decisions holds that State and local regulations that concern matters entrusted to the FAA are preempted. See, e.g., *French v. Pan Am Express*, 869 F.2d 1, 4 (1st Cir. 1989)(Rhode Island law requiring drug testing of pilots preempted)("The intricate web of statutory provisions affords no room for the imposition of state-law criteria vis-à-vis pilot suitability."); *Abdullah v. American Airlines,* 181 F.3d 363, 367 (3d Cir. 1999)("We hold that federal law establishes the applicable standards of care in the field of air safety, generally, thus preempting the entire field from state and territorial regulation."). The FAA's statutory authority to regulate operator certification and its authority to certificate air carriers derive from the broad authority under the Federal Aviation Act, as supplemented by the UAS-specific provisions of the FAA Modernization and Reform Act of 2012.

Specific comments

At the outset, the Coalition wants to emphasize that it has no objection to State or local prohibitions on criminal behavior, such as operating a UAS under the influence of alcohol or controlled substances, operating a weaponized UAS, operating a UAS intentionally to harm a person, or operating a UAS to spy on someone who holds a reasonable expectation of privacy, such as the unwitting subject of a Peeping Tom or the paparazzi. Criminal behavior and invasions of privacy, whether facilitated by a motor vehicle, a UAS, a ladder, or by physical trespass, should be investigated and prosecuted, and the Coalition has no desire to shield UAS operators from these laws.

Accordingly, the Coalition does not oppose the Peeping Tom provisions in the two bills to be considered in committee this week, SB 2172 and SB 2347, and also in HB 637, HB 1582, SB 2415, and SB 2965, that would prohibit the intentional or knowing installation or use of a device (including an unmanned aircraft system) with the intent to conduct surveillance of a person in the stage of undress or sexual activity without that person's consent.[3] Some of these bills also would prohibit the use of an unmanned aircraft system for "spying" or recording persons in their homes without their consent. These provisions must be written with care, so that they do not prohibit sUAS operations that merely transit the airspace over private property with no intent to violate the reasonable privacy interests of residents.[4]

[3] The Coalition takes no position on any bill, including HB 1979, S.B. 1329, and SB 2712, or any provision in SB 2172 and SB 2347 and other bills that would regulate the operation of an sUAS for law enforcement purposes or, for other government use (e.g., HB 1914, for water rescue operations). The common language used in these bills covers "law enforcement agency, person, entity, or state or local public agency" and we read the reference to "person" and "entity" as "law enforcement person" and "law enforcement entity."

[4] For example, SB 579 would prohibit "tracking" of an individual without that person's consent. This term is not defined in the bill, and should be revised to be limited to conduct that would constitute an invasion of privacy under current law, without regard to whether an unmanned aircraft system is the means by which a person's reasonable expectation of privacy is violated.

Other bills, such as HB 609 and HB 1805, would prohibit the use of unmanned aircraft systems from conducting "surveillance or observation" of an individual without the individuals' consent. The term "observation" is so vague, capable of varying interpretations, that it does not provide the fair notice required by the Constitution as to the conduct the bill would criminalize. An sUAS (either the person operating the sUAS, a visual observer, a person employing an sUAS for first person view, or the sUAS itself) may observe persons and structures for the purpose of collision avoidance, or simply view a person incidentally as part of an operation whose purpose is other than spying or "surveillance." There is no reason to sweep these operations into a bill that seeks to criminalize invasions of privacy.

The Coalition does not support prohibiting the transit of a UAS over private property, without the consent of that owner, where there is no intent to capture any image for which a person has a reasonable expectation of privacy. Flight paths are within the FAA's regulatory ambit. Exemptions the FAA has granted under section 333 do not prohibit operations over or near critical facilities, as would section 3(10) of SB 2172, and do not prohibit operations over certain sites, as would section 3(9) of that bill The FAA's standard condition in exemptions it has granted under section 333 requires a commercial operator to remain at least 500 feet away from persons or structures not involved in the operation, but earlier this year the FAA granted an exemption to allow operations closer than 500 feet, and the agency is expected to grant additional exemptions providing similar authority.

Section 2(a)(3) of SB 2347 would prohibit any person from intentionally "collect[ing]" personal information . . . without the express written consent from the individual whose personal information is acquired." "Personal information" is defined in section 1 to include "physical location." The term "collect," however, is not defined, and could be construed broadly to cover information needed to be obtained by a small UAS operator to ensure safe operation and avoid any collision with persons or structures. This language should be narrowed (and the language in section 2(b) clarified) to address violations of a person's reasonable expectation of privacy while at the same time they do not prohibit sUAS operations transiting the airspace over private property with no intent to use any information "collected" for a purpose other than the safe and efficient operation of the sUAS.

Careless or reckless operations would be prohibited by section 3(13) of SB 2172. FAA regulations prohibit the operation of an aircraft, including a UAS, in a careless or reckless manner "so as to endanger the life or property of another," 14 CFR 91.13, and a violator of this provision faces civil penalty or certificate action from the FAA. As we stated above, a person should not be subject to two enforcement schemes for the same conduct. The FAA has sufficient enforcement authority and resources to take action against UAS operators who operate a UAS carelessly or recklessly.

We note further that the FAA has not proposed to restrict operations over or near critical facilities other than airports, although UAS operators would be prohibited under the proposed FAA rule from operating in prohibited airspace, as well as in restricted airspace, except as permitted by Air

Traffic Control. The key point is that FAA regulates operations of aircraft in the navigable airspace. Such regulation is not a matter for State or city regulation.[5]

The FAA's proposed rule for small UAS would prohibit UAS operations over a person not directly involved with that operation (section 107.39), although in the preamble to the sUAS NPRM, the FAA suggests it may allow a micro UAS (weighing no more than 4.4 lbs., including payload) to fly over people not involved in the UAS operation. Further, the FAA can and has issued Notices to Airmen (NOTAMs) establishing temporary flight restrictions over a large events. Thus, because the FAA regulates the operations of small UAS in these circumstances, a State or city may not do so.

Section 3(2) of SB 2172 would prohibit operations within five miles of an airport. This restriction conflicts with the condition the FAA imposes in section 333 exemptions: operations within five miles may be conducted provided the operator obtains a letter of agreement from the airport operator or the operation is authorized by Air Traffic Control in a Certificate of Authorization. It also conflicts with proposed section 107.41 in the FAA's sUAS NPRM: operations in Class B, C, or D airspace (near airports), or within the lateral confines of Class E airspace designed for an airport, could be authorized by Air Traffic Control.

Section 3(3) of SB 2172 would prohibit operations within 500 feet of a first responder. The Coalition does not object to a prohibition on interfering with a first responder, but the 500 foot distance is not reflected in any FAA rule, policy, or exemption, and unduly broad.

Section 3(5) of SB 2172 would prohibit operations above 400 feet AGL. The FAA's sUAS NPRM would allow small UAS operations up to 500 feet AGL, and thus this provision would conflict with Federal law. Whether a State or local law would prohibit operations below or above a certain altitude, such prohibition runs afoul of the Federal control over operations in the navigable airspace.[6]

Section 3(6) of SB 2172 would prohibit operations beyond the visual line of sight of the pilot (BVLOS). While such operations would not be authorized under the sUAS NPRM, the FAA has recently sought public comment on whether to authorize BVLOS operations in two section 333 exemptions.

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[5] The Coalition has concerns with HB 636, which would establish a drone regulation working group as part of its existing Aerospace Advisory Committee. Any such effort should give due regard and deference to the FAA's authority over sUAS operations in the navigable airspace.

[6] The Coalition opposes HB 1522, which would prohibit operations below 500 feet AGL above residential property with the consent of the owner or lessee. Given that the FAA's sUAS NPRM would prohibit operations *above* 500 feet AGL, HB 1522 would effectively ban all sUAS operations over private property. The Coalition also opposes HB 2021, which amend the offense of "simple trespass" to cover a person who "knowingly enters or remains unlawfully" (a) in or upon premises; or (b) in the airspace directly above premises up to two hundred feet above ground level." Flights of a sUAS merely transiting the airspace above private property at an altitude well above the height of residential property should not be deemed a trespass.

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Section 2(a)(2) of SB 2347 would prohibit operations of an unmanned aircraft system below 25 feet above a residential property without the express written consent of the owner or tenant, except that UAS operations would not be so prohibited if used "only to perform reasonable tasks within the scope of practice or activities permitted under the business or professional license[.]" The Coalition believes that this exception should be revised to cover sUAS operations authorized by FAA rule or exemption.

In sum, the current and forthcoming Federal regulatory framework is and will be sufficient to address most of the concerns underlying these bills. An additional, as well as varying, layer of rules, no matter how well-intentioned, will serve only as a deterrent to an industry that has enormous potential to generate local revenues, create jobs, drive innovation, and reduce the risk of accidents, as well as produce substantial energy savings and environmental benefits. Conflicting or duplicative Federal and State laws and regulations are also a disservice to citizens and consumers who aim to operate within the confines of the law.

For these reasons, we urge you not to pass these bills without removing all provisions preempted by Federal law.

Thank you for your consideration.

Sincerely,

Gregory S. Walden
Aviation Counsel