

# Take-Off and Landing Unmanned Aircraft on Land Owned by a Political Subdivision or Locality of the Commonwealth

August 27, 2021 Emergency Text

## Comments of the Small UAV Coalition<sup>1</sup>

The Small UAV Coalition submits the following comments on the above-captioned rule, which is intended to implement HB 742, codified at Virginia Code 15.2-926.3, into Title 24 of the Virginia Administrative Code.

### **General comments**

*Virginia should be applauded for its leadership in the development of the drone industry*

The Coalition wishes to acknowledge that the Commonwealth of Virginia was early to recognize the economic and consumer benefits of drones and by prohibiting the creation of a patchwork of varying and inconsistent local regulations in its 2018 law preempting local regulation of drones. As a result, Virginia became a leader in drone research and development and investment.

*Virginia's rule is generally consistent with the constitutional and statutory allocation of responsibility.*

As a general matter, the Coalition supports subsection 24VAC5-20-440(A)(1) that no political subdivision may prohibit the take-off or landing of an unmanned aircraft by a commercial operator in compliance with Federal Aviation Regulations.

This provision is consistent with the Federal Aviation Act of 1958, as amended, which was an exercise by Congress of its delegated power under the Commerce Clause of the United States Constitution. The Federal Aviation Administration (FAA) has plenary authority over aircraft operations, including unmanned aircraft operations, in the nation's airspace. See State and Local Regulation of Unmanned Aircraft Systems (UAS) Fact Sheet, Office of FAA Chief Counsel (Dec. 17, 2015), and cases cited therein. Accordingly, any State or local regulation of aircraft must serve important State and local interests, be narrowly tailored to serve such interests, and not discriminate against, or cause an undue burden on, interstate commerce.

The Coalition also supports subsection 24VAC5-20-440(B), which excludes the vehicular travel portions of public highways and streets from take-off and landing areas

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<sup>1</sup> Filed with Virginia Regulatory Town Hall.

subject to political subdivision regulation. We further recommend that this provision be expanded to include rights of ways adjacent to the public highways and streets.

*Four provisions in the Virginia rule are subject to federal preemption unless revised*

The provisions in 24VAC5-20-420 that raise concerns under this constitutional rubric are:

- (B) A political subdivision may regulate the hours during which take-offs and landing are allowed.
- (C) For certain designated specific properties, the operator must make a safety showing to the political subdivision, which can deny permission unless the safety of the operation is demonstrated to the subdivision
- (D) For UAS over 55 lbs., the regulation may require the operator to demonstrate the safety of take-off and landing
- (E) No political subdivision shall require a permit for take-off and landing of UAS in areas designated for UAS use.

The Coalition believes these provisions should be revised or limited, as recommended below, to avoid any undue burden on interstate commerce and any conflict with Federal Aviation Regulations.

**Specific comments**

**Section 24VAC5-20-420 Political Subdivision Powers**

- Revise subsection (B) to read:

*The regulation may provide for times when take-offs and landings are allowed, which shall apply specifically to each designated property or a class of such properties that share the same specific zoning designation and use.*

The regulation of times for take-offs and landings should not apply across-the-board to all public property in a political subdivision but should be tailored to each specifically designated property or a category of properties. Any locality-wide time restriction will be overbroad and could interfere with interstate commerce.

- Revise subsection (C)

We continue to be concerned with the first paragraph of subsection (C) for two reasons:

First, a commercial operator should not be required to show the purpose of the operation. Apart from the fact that a commercial operator should be presumed to takeoff or land in furtherance of its business and for no other reason, the purpose of a flight has no bearing on public safety or natural resources.

Second, this language empowers political subdivisions to evaluate the safety of the UAS operation, and to deny permission unless the operator provides a safety demonstration sufficient for the locality. As we have stated in comments submitted on previous drafts of this rule, the safety of UAS operators and operations is solely the responsibility of the FAA. Political subdivisions do not have the experience, expertise, or resources to evaluate safety risks or mitigations of such risks, nor should they be expected to, as this is the FAA's responsibility. At most, a political subdivision may require compliance with and a commitment to comply with the Federal Aviation Regulations.

The FAA's recognition of the local role in regulating the take-off and landing of aircraft -- both manned and unmanned -- is an acknowledgment of a local jurisdiction's police powers, but such powers do not include aviation safety regulation; that responsibility rests with the FAA. Accordingly, the Coalition recommends the Department of Aviation consult with the FAA, and in the absence of the FAA's approval of this language, the three showings in the first paragraph of subsection (C) should be deleted.

The Coalition supports a clarification that granting a permit should be a ministerial act; political subdivisions should not be vested with authority to deny a permit for any reason other than the operator is unwilling to certify that it is in compliance with FAA regulations, lest the discretion to grant a permit intrude on the FAA's authority over UAS and UAS operators. The Coalition recommends this limiting text to reflect this principle.<sup>2</sup>

*To obtain a permit, the applicant may be required only to provide the name, address, phone number, and FAA remote pilot certificate number for the pilot in command under the permit, and to affirm that the applicant is fully compliant with applicable FAA regulations, and the conditions and limitations of any certificate, waiver, or exemption thereunder.*

We support the requirement in the second paragraph of subsection (C) that any prohibition should be based upon a finding that takeoffs and landings on that property pose a "specific and significant risk" to public safety or natural resources. We also support requiring a map of this property in "electronic, computable, machine readable, and transmissible form."

We recommend that the rule require any prohibition be narrowly tailored to the risk identified to public safety or natural resources, both as to the local property area designated and the times during which take-offs and landings will be prohibited. This additional requirement will help ensure that any prohibition will not place an undue burden on, or discriminate against, interstate commerce.

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<sup>2</sup> In Subsection (F), the reference to subsection (B) should be changed to "subsection (C)".

- Delete or revise subsection (D)

Subsection (D) allows a political subdivision to require a safety showing for a UAS weighing 55 pounds or more to conduct a take-off or landing at a specifically designated area. This language suffers from the same legal infirmity in subsection (C). The FAA has authorized the operation of UAS weighing more than 55 pounds by exemption under 49 U.S.C. 44807 (and previously under section 333 of Public Law 112-95 (2012)), and the Coalition recommends that no distinction based on weight should be made in this rule. A political subdivision should only be allowed to require compliance with applicable FAA regulations – 14 C.F.R. Part 107 for commercial drones weighing not more than 55 lbs., including any waiver granted under Part 107, section 44807 exemption for any operation of a drone weighing more than 55 lbs., and airworthiness and air carrier certification.

At a certain weight, UAS may need an airport runway to conduct take-offs and landings; in such cases, the operations should not be governed by this rule.

- Revise subsection (E) to read:

*No permit may be required except for take-offs and landings at a specifically designated local government property.*

By prohibiting the requirement of a permit for take-off and landing drones in areas designated for UAS use, subsection (E) implicitly allows a political subdivision to require a permit to conduct a take-off or landing from a particular local government property. The revised language makes this limitation explicit.

### **Section 24VAC5-20-430 Procedure for adopting an ordinance or regulation**

- Revise subsection (A) to add “on property owned by it” after “aircraft”

This language would remove any ambiguity on whether this section bestows on a political subdivision any authority in addition to the authority provided in section 24VAC5-20-420.

- Revise subsection (B) by adding the following text after the end of the subsection:

*The political subdivision must also submit to the department its findings of need for public safety or protection of specific natural resources. If the regulation is modified in a material way as a result of the review by the department, the political subdivision must advertise the revised regulation in its entirety.*

- Revise subsection (C)

*A locality may regulate the take-off and landing of unmanned aircraft on property owned by the locality by ordinance or regulation.*

The first sentence is duplicative of the first sentence of the subsection (A) and can therefore be deleted. It also may be misread as granting broad regulation authority if not limited explicitly to take-offs and landings.

- Revise the last sentence of subsection (E) to read:
- *No regulation shall take effect until the department determines that it is consistent with this chapter and published on the department's website.*
- Move subsection (F) to follow subsection (G) and renumber subsections accordingly.

### **Section 24VAC5-20-440 Exceptions**

- As noted above, the Coalition strongly supports subsection A, paragraph (1).

As we read this exception, no political subdivision may prohibit the take-off or landing of a UAS by a commercial operator in compliance with FAA regulation, even on local government property designated under 24VAC5-20-420. The locality may require a permit to do so, and the commercial operator may not be able to take-off or land at certain times, but no political subdivision may by ordinance or regulation prohibit the take-off and landing of a drone by a commercial operator in compliance with FAA rules. However, the Coalition is concerned that a locality may use the permit process effectively to prohibit take-off or landing, even if not set forth in an ordinance or regulation. Accordingly, we recommend that subsection (A) be revised to state:

*No ordinance or regulation may prohibit, and no exercise of the permitting process may effectively prohibit:*

- The Coalition also supports subsections (B) and (C). Subsection (B) should be revised to read:

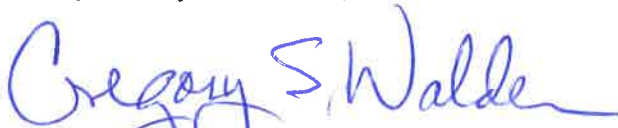
*No political subdivision's local regulation enacted pursuant to the authority in this chapter shall apply to take-offs and landings on the vehicular travel portions of public highways and streets, including rights of way adjacent to such public highways and streets.*

**Section 24VAC5-20-450 Federal laws and regulations**

Consistent with the congressional delegation of authority to regulate aviation authority to the FAA , this section should also address local government restrictions as well as allowances. We suggest adding the words "or restrict" as set forth below.

*Nothing in this chapter shall allow or restrict any use of unmanned aircraft in any manner inconsistent with the federal laws and regulations, including Title 14 of the Code of Federal Regulations.*

Respectfully submitted,



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