

To: New Jersey Law Revision Commission
From: Samuel M. Silver, Deputy Director
Re: Public Safety - Operating an unmanned aircraft system while under the influence of intoxicating liquor, a narcotic, or hallucinogen, N.J.S. 2C:40-28.
Date: May 06, 2024

MEMORANDUM

Project Summary

“Drones can be fun, but they have the potential to be dangerous if not used correctly.”¹ In 2017, the New Jersey Legislature acknowledged the escalating disruption caused by drone usage, including near-misses with airplanes, interference with firefighter operations, and their exploitation for smuggling contraband into prisons.² Additionally, the Legislature was concerned about the operation of such devices by intoxicated individuals.³

In 2018, New Jersey became the first state to enact a law that made it a disorderly persons offense to operate an unmanned aircraft system (“UAS” or “drone”)⁴ “while under the influence of intoxicating liquor, a narcotic, hallucinogenic, or habit-producing drug....”⁵ A person found guilty of operating a UAS with a blood alcohol concentration (“BAC”) of 0.08% or more by weight of alcohol faces up to six months in jail and/or a fine of \$1,000.00.⁶

A member of the public expressed concern regarding the absence of an implied consent provision in the New Jersey Act concerning the operation of unmanned aircraft systems.⁷ Despite the severity of the penalties set forth in N.J.S. 2C:40-28(e), the absence of provisions empowering officers to obtain blood alcohol concentration readings from alleged offenders poses an impediment to the enforcement of the statute.

This request served as the catalyst for an examination of New Jersey statutes governing the operation of unmanned aircraft systems.⁸

¹ Press Release, N.J. Assembly Democrats, ‘Quijano & Mazzeo Bill to Regulate the use of Drones in NJ Passes Both houses, Goes to Governor’s Desk’ (Jan. 2018).

² *Id.*

³ See S3370, 217th Leg., Second Sess. (N.J. 2017); L. 2017, c. 315, §2 eff. May 1, 2018; codified as N.J.S. 2C:40-28(e) (2018) (prohibiting the use of UASs: to surveil correctional facilities; to interfere with the work of first responders; to take or assist in the taking of wildlife; while under the influence; or, in violation of any restraining order).

⁴ Possible gender neutral reference to the term “*unmanned* aircraft systems” include Remote Piloted Aircraft (“RPA”); or Remotely Operated Aircraft (“ROA”).

⁵ Benjy Schirm, J.D., ‘Is it Illegal to Drink and Drone?: Under new state laws, yes,’ SUPER LAWYERS (Nov. 08, 2023); L. 2017, c. 315, §2 eff. May 1, 2018; codified as N.J. STAT. ANN. § 2C:40-28(e) (West 2024).

⁶ N.J. STAT. ANN. § 2C:40-28(e)

⁷ In-person meeting with a member of the N.J. Police Traffic Officer’s Ass’n (Mar. 06, 2024).

⁸ N.J. STAT. ANN. § 1:12A-8(c) (providing that it is the duty of the Commission to “[r]eceive and consider suggestions and recommendations from. . . the public generally, for the improvement and modification of the general and permanent statutory law of the State, and bring the law. . . into harmony with modern conceptions and conditions....”).

Statute Considered

N.J.S. 2C:40-28. Prohibited activities relating to the operation of unmanned aircraft systems; violations; conviction not to merge with other convictions.

* * *

e. A person commits a disorderly persons offense if he operates an unmanned aircraft system while under the influence of intoxicating liquor, a narcotic, hallucinogenic, or habit-producing drug or with a blood alcohol concentration of 0.08% or more by weight of alcohol in the defendant's blood.

* * * *

Background and Analysis

“The United States Government has exclusive sovereignty of airspace of the United States.”⁹ The Administrator of the Federal Aviation Administration is authorized by Congress to “develop plans and policy for the use of the navigable airspace and assign by regulation or order the use of the airspace necessary to ensure the safety of aircraft and the efficient use of airspace.”¹⁰

By the Summer of 2016, the Department of Transportation’s Federal Aviation Administration (“FAA”) “finalized the first operational rules for routine commercial use of small[,] unmanned aircraft systems (“UAS” or “drones”).”¹¹ These rules were designed to open pathways toward “fully integrating UASs into the nation’s airspace. In addition, the federal regulations were aimed at “harness[ing] new innovations *safely*....”¹²

By December of 2017, “[t]here [were] more unmanned drones in the country than piloted aircraft.”¹³ Despite the newly enacted federal regulations regarding UASs, there were “no rules governing drone use elsewhere.”¹⁴ In New Jersey, despite the many commercial and recreational benefits of this technology, unmanned aircraft “pose[d] threats to safety, security, and privacy.”¹⁵ The Legislature sought to mitigate these threats by enacting statutes to regulate the use of unmanned aviation systems in New Jersey.

• *New Jersey’s Act Concerning Unmanned Aircraft Systems*

On January 16, 2018, then-Governor Chris Christie signed into law an Act regarding the operation of unmanned aircraft systems (“Act”).¹⁶ The Act defined an “unmanned aircraft” as “an aircraft that is operated without the possibility of direct human intervention from without or on the

⁹ 49 U.S.C. § 40103(a)(1).

¹⁰ 49 U.S.C. § 40103(b)(1).

¹¹ Press Release, Fed. Aviation Admin., ‘DOT and FAA Finalize Rules for Small Unmanned Aircraft Systems.’ (June 21, 2016).

¹² *Id.* (emphasis added).

¹³ Susan K. Livio, ‘Drunken drone flying could soon be outlawed in Jersey,’ NJ.COM (Dec. 07, 2017, 11:15 p.m.) (quoting Sen. Paul Sarlo) [hereinafter Livio Article].

¹⁴ *Livio Article* at *1.

¹⁵ *Id.* See also n.1.

¹⁶ L. 2017, c. 315, §2 eff. May 1, 2018; codified as N.J.S. 2C:40-28(e) (2018).

aircraft.”¹⁷ Colloquially, these unmanned aircraft are referred to as “drones.”¹⁸ When an unmanned aircraft includes a communication link that enables a person to pilot the craft remotely the system is collectively referred to as an “unmanned aircraft system” or “UAS.”¹⁹

The Act recognizes that the federal government holds primary regulatory authority over drone aircraft.²⁰ Subject to the provisions of the Act, “a person who is authorized by federal law to operate an unmanned aircraft system may operate [such a system] in a manner consistent with applicable federal law and regulations.”²¹ The statute also acknowledged that “[n]othing in this section shall be construed to affect federal preemption of State law regarding aviation.”²²

As enacted, the Act regulates the use of remotely piloted aircraft to ensure public safety, privacy protection, and responsible operation of these aerial vehicles.²³ The statute prohibits the use of a UAS “in a manner that endangers the life or property of another.”²⁴ The UAS operator must not endanger the safety or security of a correctional facility by flying the drone on or near its premises without prior authorization.²⁵ Furthermore, the law forbids drone pilots from obstructing first responders actively involved in air, water, vehicular, ground, or specialized transportation operations.²⁶ The statute also prohibits the utilization of a UAS to “take or assist in the taking of wildlife.”²⁷ New Jersey became the first state to prohibit the operation of a drone while under the influence of alcohol or narcotics.²⁸ Finally, in domestic violence matters, the statute forbids using a UAS within the restricted distance of a person or location covered by a restraining order.²⁹

The subsection that addresses the operation of a UAS while under the influence has generated a question regarding its potential enforcement.³⁰

- *Operating a UAS while Intoxicated*

In New Jersey, the operation of a remotely operated aircraft, under certain circumstances, while under the influence is a disorderly persons offense.³¹ To be found guilty, an individual must operate the unmanned aircraft system “while under the influence of intoxicating liquor, a narcotic, hallucinogenic, or habit-producing drug...”³² The statute, written in the conjunctive, provides that an individual may also be found guilty if they operate a UAS “with a blood alcohol concentration

¹⁷ N.J. STAT. ANN. § 2C:40-27(a).

¹⁸ See *supra* n.11 and accompanying text.

¹⁹ *Id.*

²⁰ N.J. STAT. ANN. § 2C:40-27(b)-(c). See also CANNEL, CRIMINAL CODE ANNOTATED, (Gann), Comment N.J.S. 2C:40-27 (2023).

²¹ N.J. STAT. ANN. § 2C:40-27(b).

²² *Id.*

²³ N.J. STAT. ANN. § 2C:40-28(a)-(e).

²⁴ N.J. STAT. ANN. § 2C:40-28(a).

²⁵ N.J. STAT. ANN. § 2C:40-28(b).

²⁶ N.J. STAT. ANN. § 2C:40-28(c).

²⁷ N.J. STAT. ANN. § 2C:40-28(d).

²⁸ N.J. STAT. ANN. § 2C:40-28(e).

²⁹ N.J. STAT. ANN. § 2C:40-28(f).

³⁰ See *supra* n. 7.

³¹ N.J. STAT. ANN. § 2C:40-28(e).

³² *Id.*

of 0.08% or more by weight of alcohol in the defendant's blood."³³ Unlike New Jersey's statutes that prohibit the operation of a motor vehicle while intoxicated, the Act does not authorize a law enforcement officer to conduct a blood alcohol test upon the operator of the UAS.

• *Driving (a Motor Vehicle) while Under the Influence*

The New Jersey Legislature enacted its driving while intoxicated statutes to “curb the senseless havoc and destruction caused by intoxicated drivers.”³⁴ To empower law enforcement officers to effectively enforce the DWI statutes, the Legislature also enacted the “Implied Consent Law.”³⁵

The implied consent statute provides that “[a]ny person who operates a motor vehicle on any public road, street or highway or quasi-public area in this State shall be deemed to have given [their] consent to the taking of samples of [their] breath for the purpose of making chemical tests to determine the content of alcohol in [their] blood....”³⁶ In an effort to protect the public from the dangers posed by intoxicated drivers, the statute “encourage[s] motorists suspected of driving under the influence to submit to breathalyzer tests.”³⁷ The failure of an operator to provide “anything substantially short of any unconditional, unequivocal assent to an officer’s request that the arrested motorist take the breathalyzer test constitutes a refusal to do so.”³⁸ The current UAS statutes do not contain an implied consent provision.

In the absence of a state implied consent provision in the Code of Criminal Justice, it is necessary to examine the Federal Aviation Administration’s regulations on this subject to determine whether such samples may be gathered pursuant to federal law.

• *FAA Regulations*

The Federal Aviation Administration regulates the use of unmanned aircraft systems in United States Airspace.³⁹ All drone pilots are by default, subject to the federal regulations set forth in Title 14, Chapter I, Subchapter F, Part 107⁴⁰ (“Part 107”) of the Code of Federal Regulations, unless the operator meets all of the requirements for limited recreational operations.⁴¹ To

³³ *Id. Compare* N.J. STAT. ANN. § 2C:40-28(e) (requiring the operator of a UAS to have blood alcohol concentration of 0.08% to be found guilty of a disorderly persons offense) *and* N.J. STAT. ANN. § 39:4-50(a) (requiring the operator of a motor vehicle to have a blood alcohol concentration of 0.08% to be found guilty of operating a motor vehicle while under the influence) *with* 14 C.F.R. § 91.17(a)(4) (prohibiting any person from acting as a crewmember of a civil aircraft “[w]hile having an alcohol concentration of 0.04 or greater in a blood or breath specimen....”).

³⁴ *State v. Widmaier*, 157 N.J. 475, 487 (1999) (quoting *State v. Tischio*, 107 N.J. 504, 512 (1987)).

³⁵ *Id.* (citing N.J. STAT. ANN. § 39:4-50.2).

³⁶ N.J. STAT. ANN. § 39:4-50.2(a).

³⁷ *Widmaier*, 157 N.J. at 487.

³⁸ *Id.* at 488 (quoting *State v. Bernhardt*, 245 N.J. Super. 210, 219 (App. Div.) (1991)).

³⁹ 14 C.F.R. §§ 107.1—107.205. *But see* 49 U.S.C. § 44809 (providing an exception for limited recreational operations of unmanned aircraft).

⁴⁰ 14 C.F.R. §§ 107.1—107.205.

⁴¹ *Id. But see* 49 U.S.C. § 44809 (setting forth nine requirements that must be satisfied to operate an UAS without specific certification or operating authority from the FAA including:

- (1) The aircraft is flown strictly for recreational purposes.
- (2) The aircraft is operated in accordance with or within the programming of a community-based organization's set of safety guidelines that are developed in coordination with the Federal Aviation Administration.
- (3) The aircraft is flown

understand the limitation of N.J.S. 2C:40-28(e), it is important to first understand how the FAA addresses the use of drugs and alcohol while operating a UAS.

• *Part 107*

Among the behaviors that the FAA regulates in Part 107, are those involving the use of drugs and alcohol while in control of a UAS. Pursuant to 14 C.F.R. § 107.27, “[a] person manipulating the flight controls of a small unmanned aircraft system or acting as the remote pilot in command or visual observer must comply with the provisions of §§ 91.17 and 91.19 of this chapter.” The cross-referenced regulations govern the “general operating and flight rules for aircraft.”

The FAA prohibits any person from acting or attempting to act as a crewmember of a civil aircraft, or by extension operate a UAS, when that person has used either alcohol or drugs.⁴² The regulations further provide that crewmembers are required to “submit to a test to indicate the alcohol concentration in their blood or breath” if two conditions precedent are met. First, the “law enforcement officer [must be] authorized under State or local law to conduct the test or to have the test conducted.”⁴³ Further, the “law enforcement officer [must be] requesting submission to the test to investigate a suspected violation of State or local law governing the same or substantially similar conduct prohibited by paragraph (a)(1), (a)(2), or (a)(4)” of subsection 91.17.⁴⁴

Pursuant to Part 107, and arguably N.J.S. 2C:40-28, the local constabulary may stop an individual whom they believe is operating a UAS while under the influence of drugs or alcohol.⁴⁵ The current New Jersey statute, however, does not grant law enforcement officers the authority to conduct blood or breath tests to confirm the officer’s suspicion.⁴⁶ Thus, in New Jersey, an officer lacks the authority to request a breath or blood sample from a seemingly intoxicated drone user

within the visual line of sight of the person operating the aircraft or a visual observer co-located and in direct communication with the operator. (4) The aircraft is operated in a manner that does not interfere with and gives way to any manned aircraft. (5) In Class B, Class C, or Class D airspace or within the lateral boundaries of the surface area of Class E airspace designated for an airport, the operator obtains prior authorization from the Administrator or designee before operating and complies with all airspace restrictions and prohibitions. (6) In Class G airspace, the aircraft is flown from the surface to not more than 400 feet above ground level and complies with all airspace restrictions and prohibitions. (7) The operator has passed an aeronautical knowledge and safety test described in subsection (g) and maintains proof of test passage to be made available to the Administrator or law enforcement upon request. (8) The aircraft is registered and marked in accordance with chapter 441 of this title and proof of registration is made available to the Administrator or a designee of the Administrator or law enforcement upon request.)

⁴² 14 C.F.R. § 91.17 (prohibiting an individual from serving as a crewmember of a civil aircraft:

- (1) Within 8 hours after the consumption of any alcoholic beverage;
- (2) While under the influence of alcohol;
- (3) While using any drug that affects the person's faculties in any way contrary to safety; or
- (4) While having an alcohol concentration of 0.04 or greater in a blood or breath specimen. Alcohol concentration means grams of alcohol per deciliter of blood or grams of alcohol per 210 liters of breath).

See also 14 C.F.R. § 91.19 (prohibiting the carriage of narcotic drugs, marijuana, and depressant or stimulant substances on a civil aircraft unless authorized by Federal or State statute or agency).

⁴³ 14 C.F.R. § 91.17(c)(1)(i).

⁴⁴ *Id.* § 91.17(c)(1)(ii). *See supra* n. 42.

⁴⁵ 14 C.F.R. § 107.2.

⁴⁶ N.J. STAT. ANN. § 2C:40-28(e).

under either Part 107 or subsection (e) of N.J.S. 2C:40-28. The result is the same if the suspect is not subject to FAA regulation as a result of an exemption.⁴⁷

If an individual is exempt from FAA regulation,⁴⁸ a law enforcement officer with probable cause to suspect that the individual is operating a drone while under the influence of narcotics or alcohol may consider this to be a violation of N.J.S. 2C:40-28(e). Unlike New Jersey's implied consent statute, N.J.S. 39:4-50.2, which explicitly permits the taking of samples at the request of a police officer, N.J.S. 2C:40-28 does not include a comparable provision. The lack of an implied consent provision in N.J.S. 2C:40-28 complicates the enforcement of the statute prohibiting the operation of a drone while under the influence in comparison to New Jersey's implied consent statute.

Common Law

To this time, there is no common law in the State of New Jersey that has addressed, or interpreted, the enforcement of N.J.S. 2C:40-28(e).

Pending Bills

There are no bills pending that seek to amend the language of N.J.S. 2C:40-28.

Conclusion

Staff requests authorization to conduct further research and outreach to determine whether N.J.S. 2C:40-28 of New Jersey's unmanned aircraft systems statute would benefit from modification to address the absence of an implied consent provision.

⁴⁷ See *supra* n. 41.

⁴⁸ *Id.*