

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

_____)
TRIPOLI ROCKETRY ASSOCIATION,)
INC., *et al.*,)
)
Plaintiffs)
)
v.)
) Civil Action No. 00-273 (RBW)
UNITED STATES BUREAU OF)
ALCOHOL, TOBACCO, FIREARMS,)
AND EXPLOSIVES)
)
Defendant.)
_____)

MOTION FOR FINAL JUDGMENT UNDER RULE 54 (b)

Pursuant to Rule 54 (b) of the Federal Rules of Civil Procedure, Plaintiffs (Tripoli Rocketry Association, Inc. and National Association of Rocketry) respectfully move for a final judgment on Count 1 of their First Amended Complaint, prior to any judgment on the remaining Counts (2 through 5). Under Rule 54 (b) the Court “may direct the entry of a final judgment as to one or more but fewer than all of the claims...only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment.” A judgment on Count 1 meets this requirement for the reasons explained below.

This case was filed almost five years ago, on February 11, 2000. The date of its ultimate resolution is nowhere in sight. Plaintiffs’ First Amended Complaint has five counts. Count 1 is entirely substantive. It challenges the decision of Defendant (United States Bureau of Alcohol, Tobacco, Firearms, and Explosives or “ATF”) to classify ammonium perchlorate composite propellant or “APCP” (the propellant used in hobby

rocketry) as an explosive and, therefore, subjecting it to ATF regulation under federal explosives law. Plaintiff alleged (and later argued in motions for summary judgment) that APCP does not detonate or deflagrate and cannot therefore technically be an “explosive”. The Court granted ATF’s motion for summary judgment on Count 1 in its March 19, 2004 Memorandum Opinion at pg. 14. This decision is final; there will be no further litigation on Count 1. Since ATF won on Count 1, the Court’s ruling on Count 1 does not require it to do anything.

Count 2 alleges ATF listed APCP on its annual explosives list without complying with legal requirements for public comment. This purely procedural challenge was dismissed as time-barred in the Court’s June 24, 2002 Memorandum Opinion. The statute of limitations question addressed in the Court’s opinion and the procedural issue raised in Count 2 are entirely distinct from the substantive question in Count 1 whether APCP is an explosive.

Count 3 challenges ATF’s decision that model rockets with APCP are not exempt propellant actuated devices. There is no ruling on Count 3. See March 19, 2004 Memorandum Opinion at pg. 20, note 7. The question whether model rockets are propellant actuated devices is entirely distinct from the question whether APCP is an explosive, the subject of Count 1, because the two counts address entirely different statutory and regulatory provisions.

Counts 4 and 5 are procedural challenges to various ATF rules exempting certain model rockets but regulating others. In its March 19, 2004 Memorandum Opinion the Court ruled (at pg. 20) that ATF’s December 22, 2000 pronouncement that model rockets are not exempt propellant actuated devices violated requirements for notice and public comment.

Earlier, in its June 24, 2002 Memorandum Opinion, the Court found that ATF's various pronouncements about a 62.5-gram limitation in an exemption for model rockets also violated requirements for notice and comment, but in its later March 19, 2004 Opinion and Order (at pg. 22) the Court withheld a ruling on Counts 4 and 5 until the completion of an ATF rulemaking on the 62.5 gram issue. The purely procedural issues addressed in the Court's rulings on Counts 4 and 5, and raised in the underlying Counts 4 and 5 of the First Amended Complaint, are entirely distinct from the substantive issue in Count 1 whether APCP is an explosive.

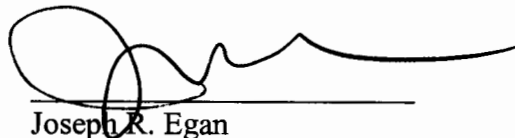
Nothing that will transpire later in this proceeding, or in the ATF rulemaking, will be relevant to whether APCP detonates or deflagrates and is therefore legally an explosive. The issues within the scope of Counts 2-5, and within the scope of the Court's various rulings on Counts 2-5, are therefore entirely distinct from Count 1. However, Count 1 is absolutely fundamental because, if Plaintiffs were correct that APCP is not an explosive, all of the remaining counts would be moot, for this would remove the premise for ATF regulation of APCP and of sport rockets using it.

As indicated above, the Court has deferred ruling on other counts until the completion of an ATF rulemaking. However, nothing in the pending ATF rulemaking will address the explosives question in Count 1. The proposed rule is published at 68 Fed. Reg. 4406, January 29, 2003. The rule preamble does not discuss whether APCP is an explosive. In fact, the rule preamble does not discuss any issue in this litigation. While ATF proposes to "clarify" its rules by adding a new exemption for certain model rocket motors containing no more than 62.5 grams of propellant, there is no explanation of the basis for the proposal, and the current rule exempting all propellant actuated devices would remain unchanged, with the result that the question whether sport rocket motors are propellant actuated devices is not specifically addressed. Compare 68 Fed.

Reg. at 4419 (proposed new 27 C.F.R. § 55.141 (a) (7) (v)) with 27 C.F.R. § 555.141 (a) (8). Moreover, it is unclear when, if ever, the rule will be finalized. As a result, it is unclear when the Court will be positioned to rule on the remaining counts.

In sum, since (1) Count 1 is separate and distinct from the other counts in the First Amended Complaint, (2) the Court's ruling on Count 1 is final and nothing will transpire in the remainder of this litigation that will have any relevance to Count 1, (3) the time when the remaining counts will be addressed is uncertain, at best, (4) the case has been pending almost five years (since February 11, 2000), during which Plaintiffs' members have suffered from burdensome ATF regulation, (5) Count 1 is absolutely fundamental to Plaintiffs' belief that hobby rockets with APCP are not subject to ATF regulation, and (6) ATF will not be prejudiced since the Court's ruling does not require it to do anything, Plaintiffs submit there is no just reason for delay until all of Plaintiffs' counts are addressed, and respectfully request that the Court direct the entry of judgment on Count 1, based on the Court's March 19, 2004 Memorandum Opinion granting ATF's motion for summary judgment on this Count. *See Building Industry Ass'n v. Babbitt*, 161 F. 3d 740 (D.C. Cir. 1998). Entry of judgment on Count 1 will enable Plaintiffs to pursue a timely appeal on this fundamental issue while other matters are still pending.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of Plaintiff's Motion for Final Judgment Under Rule 54(b) was caused to be served on the following attorney of record for Defendant by placing a copy of the same in a federal express envelope overnight on this 21st day of October 2004:

Jane Lyons, Esquire
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John W. Kewley