

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

TRIPOLI ROCKETRY ASSOC., INC.,)	
)	
and)	
)	
NATIONAL ASSOCIATION OF ROCKETRY,)	
)	
Plaintiffs,)	Case No. 00cv0273(RBW)
)	
v.)	
)	
UNITED STATES BUREAU OF ALCOHOL,)	
TOBACCO AND FIREARMS,)	
)	
Defendant.)	

URGENT MOTION FOR EARLY STATUS CONFERENCE

The Court has set a status conference in the captioned matter for December 17, 2004. For the reasons given below, plaintiffs Tripoli Rocketry Association, Inc. (“Tripoli”) and National Association of Rocketry (“NAR”) respectfully and urgently ask for an earlier status conference, to be held as soon as practicable for the Court.

1. This case is a dispute over the lawfulness of defendant United States Bureau of Alcohol, Tobacco, Firearms, and Explosives’ (“ATF’s”) licensing and regulation of the model rocket hobby, specifically, hobbyists’ use of model rocket motors containing ammonium perchlorate composite propellant (“APCP”). In its March 19, 2004 Order and Memorandum Opinion, the Court ruled on the parties’ cross motions for summary judgment. Among other things, the Court: (1) granted Plaintiffs’ motion challenging the procedural invalidity of ATF’s December 22, 2000 rule effectively revoking (without the

required opportunity for public comment) its earlier April 20, 1994 rule that had determined that sport rocket motors with APCP are license-exempt propellant actuated devices (“PADs”); and (2) deferred any ruling on Plaintiffs’ counts four and five, which sought invalidation of ATF’s new 62.5-gram propellant-mass threshold for licensing and regulating APCP hobby rocket motors, pending completion of notice and comment rulemaking on the 62.5-gram issue promised by ATF. In particular, the Court held that “the variance between the pronouncements in the ATF’s April 20, 1994 and December 22, 2000 letters, with respect to the applicability of the PAD exemption to sport model rockets, squarely fits into the scenario discussed by the District of Columbia Circuit in [*Alaska Professional Hunters v. FAA*, 177 F.3d 1030 (D.C. Cir. 1999)],” Memorandum Opinion at p. 20, and therefore ATF’s “December 22, 2000 pronouncement regarding the applicability of the PAD exemption to sport rocket motors was not in compliance with the OCCA [Organized Crime Act of 1970] or the APA [Administrative Procedure Act].” *Id.* The Court held in conclusion that “**the ATF’s pronouncement that sport rocket motors are not PADs is invalid...**” Memorandum Opinion at p. 22 (emphasis added).

2. As the Court’s March 19, 2004 Memorandum Opinion also noted, the Court had held previously in this case that ATF’s imposition of a 62.5-gram weight limit on APCP rocket motors was likewise the result of **invalid rulemaking**. Memorandum Opinion at p. 21. The Court deferred ruling on Plaintiff’s substantive challenge to this 62.5-gram limit until the limit itself had been set by ATF through proper rulemaking, which “will necessarily take several months.” Memorandum Opinion at p. 22. Reading the Court’s two opinions together, Plaintiffs believe that, at least pending the completion of the ATF’s rulemaking (which Plaintiffs are sure to challenge on the merits), the PAD

exemption applies to single-use APCP motors regardless of any 62.5-gram threshold. Indeed, there is apparently no other way to read the Court's two opinions in concert. ATF violated the law when it established the critical elements of its licensing and regulation scheme for sport rocket motors. And no new ATF rule has yet been issued to cure the defective procedures.

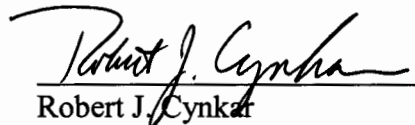
3. However, ATF's apparent aversion to (or difficulty with) efficient rulemaking and public participation has recently led it to attempt an end-run around the law and this Court's opinions and orders. Rather than expediting its promised rule, ATF issued unilaterally and commenced enforcement of a regulatory pronouncement on its web site (www.atf.gov/explarson/0504rocketryqa.pdf) to the same purported effect as the now-discredited two letters. A copy of the pronouncement is attached as Exhibit A. The pronouncement is entitled "Questions and Answers Hobby Rocket Motors" ("Web Announcement"). It states that "[a]ny fully assembled rocket motor containing more than 62.5 grams of propellant" and "[a]ny reload kit or propellant modules that can be used in the assembly of a rocket motor containing a total of more than 62.5 grams of propellant (even if the individual propellant modules each contain 62.5 grams of propellant or less)" are "subject to the permitting, storage, and other requirements of Federal explosives law and regulations." Web Announcement at Question 1.

5. Far from being the type of document designed to assist rocketeers, this document is now being used in the field by ATF inspectors to impose draconian new restrictions on motor dealers and to take enforcement action against them. *See* Affidavit of Kenneth Herrick, attached as Exhibit B. In short, whether by design or inadvertence, ATF's new and unlawfully promulgated requirements are now threatening to undermine

or even wipe out the sport rocket hobby. *Id.*

6. Plaintiffs' members are now asking how their apparently successful efforts to force ATF to comply with established regulatory procedures has had any effect, and how long they must endure ATF's unlawful application of new requirements. An early status conference will, among other things, enable the Court to take account of the ATF's recent actions described above, clarify the effect of the Court's previous two rulings as they apply in concert, provide the Court with an update of ATF's plans and schedules for rulemaking, and possibly set the stage for requests for additional relief.

Respectfully submitted,



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Dated: September 30, 2004

Copies to:

Jane Lyons, Esquire
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555 Fourth Street, N.W.
Washington, D.C. 20001

State of Illinois)
) ss.
County of *DaPage*)

AFFIDAVIT OF KENNETH HERRICK

Kenneth Herrick, being duly sworn, deposes and says as follows:

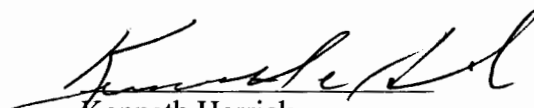
1. My name is Kenneth Herrick. I reside at 3131 Haber, Melrose Park, Illinois, 60164. I am the Rocketry Product Line Manager for Al's Hobby Shop, P.O. Box 449, 121 Addison Avenue, Elmhurst Illinois, 60126.
2. All's Hobby Shop is a family owned business. It has been in operation for over fifty years and has sold model rocketry products for about forty years. It is one of the largest hobby shops in the country.
3. Without any prior notice, a Bureau of Alcohol, Tobacco, Firearms, and Explosives ("ATF") inspector entered and inspected the premises of Al's Hobby shop on September 2, 2004. One or more ATF inspectors also inspected the premises on September 8, 9, and 13, 2004. These inspections were all for the stated purpose of gathering information in connection the Shop's application for renewal of its low explosives dealer permit ("LEDP"). I was present during almost all of the inspections, which consumed a total of over ten hours. There were also telephone calls from ATF on September 2 and 3, 2004.
4. ATF told me during the inspections that the rules it is following are set forth in a set of FAQs published in the ATF website on August 9, 2004. According to these rules, and what the ATF inspector said, fully assembled model rocket motors (such as the single-use Ellis Mountain motors we carry and sell) are subject to

use, and record the name of the driver that picked up any boxes for shipment and the driver's employer. These are all brand new requirements. I was also informed that the locks on the doors of the store premises were insufficient, although these are the same locks that have been in place during previous ATF inspections (and there is an electronic burglar system in place). Additionally, the acceptability of the locker we have been using for over six years to store the rocket motors was now questioned, and we are awaiting a final determination on that issue.

5. After being informed on September 8, 2004 that the Ellis Mountain single use motors now had to be stored in a special locker designed for explosives storage, I put these motors in the locker only to be informed the next day by ATF that the locker was now overweight because of the new motors stored there.
6. ATF has not yet determined if a renewal of our LEDP will be granted, and if they will levy any fines for infractions they maintain may have occurred based upon the inspection criteria discussed above.
7. After the inspections, I discussed the matter with management of the Shop and it was decided that serious consideration needed to be given to discontinuing sales

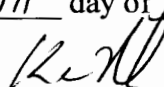
of model rocket motors because the profit margins do not justify the time and effort required to respond to the ATF.

Further affiant sayeth not

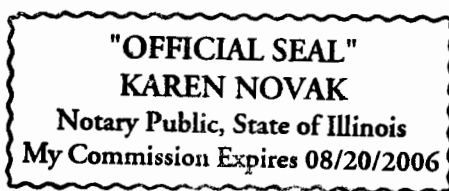


Kenneth Herrick

Subscribed and sworn to before me this
29th day of SEPTEMBER, 2004



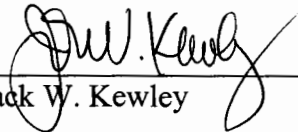
Notary Public for the County of DEPAGE
My commission expires on 08/20/2006



CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of Plaintiff's Urgent Motion for Early Status Conference and attached Affidavit of Kenneth Herrick was caused to be served on the following attorney of record for Defendant by placing a copy of the same in an envelope and mailing that envelope via first class mail on this 30th day of September 2004:

Jane Lyons, Esquire
Assistant United States Attorney
555 Fourth Street, N.W.
Washington, D.C. 20001



Jack W. Kewley