

Memorandum

Draft Comments in Response to the ATF NPRM # 968

This Notice of Proposed Rulemaking would change a number of provisions of 27 CFR Part 55 (the Orange Book). The actual proposed rule, which was published in the Federal Register on January 29, 2003 can be downloaded from the ISEE web site "What's New" page. I have reviewed the changes, incorporated comments from members, and will be adding other information as it becomes available to us.

First a few general observations: 1) It is clear that ATF has not accepted a number of industry recommendations and has done little to consult with industry regarding the proposed changes to ensure that the rules are feasible, cost effective, safe, and would increase security; 2) ATF has not addressed certain issues that it has assured industry it would address in these rules; 3) in a number of provisions, ATF has adopted definitions that defy common sense, are inconsistent with industry usage, and do not equate to definitions used by other agencies, organizations, and Webster,

Furthermore, the net effect of a number of these proposals will be to undermine the ability of small businesses to operate within this industry. It seems that ATF has also not considered the economic impact to the public of these proposed rules. has not provided data to support the proposed rules and has ignored the fact that since 1971, this industry has an excellent safety record while handling billions of pounds of explosives per year

- ATF indicated in its comments on the proposed rule that, because persons storing explosive material are required to notify the local fire authorities of the type, magazine capacity, and location of each site, responders will be adequately informed and that it would be inappropriate to require posting in potentially non-industrial settings.

Since November 1988, when six fire fighter fatalities occurred following an explosion at a construction site in Kansas City, ISEE has supported the posting of these warning signs. In addition the National Fire Protection Association (NFPA) has adopted this policy in their standards. ISEE believes this is a question of safety in that many firefighters are generally unaware that no attempt should be made to fight explosives fires.

The Kansas City case was a good example. Firefighters involved were “highly experienced”, were informed that explosives were on the site, and still chose to fight the fire. A “Do Not Fight Explosives Fires” sign, posted at the entryway, could have helped to save their lives.

are required to notify the local fire authorities of the type, magazine capacity, and location of each site,

One of the primary objectives of ISEE, is to promote standardization of terminology within the industry. When terminology is inconsistent, it causes confusion and confusion creates unsafe conditions.

For at least twenty years, in this industry, the term “cap” has referred to the metal portion of the detonator, as in “cap and fuse.” The international, national, and industry recognized standard term for the assembled unit is “detonator.” It is the term used by many other agencies including the United Nations (UN), United States Department of Transportation (USDOT), the Mining Safety and Health Administration (MSHA), ANSI, NFPA, IFC, IATA, ICAO, ISEE, IME, by nearly all countries in the world, and all states. That is why commercial blasting caps sold today have the designation “detonator” and not “blasting caps” marked clearly on the packaging. Also manufacturers technical data sheets refer to these products as “detonators.”

In fact, the two most widely used industry and government references, the IME SLP and the ISEE Blasters’ Handbook, both use the term “detonator.”

ISEE believes that, in disregarding the recommendation to adopt the term “detonator”, ATF has not taken into account the degree to which technology and industry standards have changed in the commercial explosives industry as required by the Regulatory Flexibility Act, 5 USC 610. ISEE fully supports the IME position and recommends that the term “detonator” be adopted in the proposed rule in order to avoid confusion by users of commercial explosives and others within the industry.

detonators.

– At the ISEE Annual Conference in Nashville in February of 1999, the Director of ATF assured the industry in his opening remarks that this issue would be addressed. Instead, the definition of “highway”, as established in this rulemaking, makes it more difficult for our members to carry on their businesses.

In 1998, without an opportunity for the industry to comment, the definition was changed to “any privately financed, constructed, or maintained road that is regularly traveled by any member of the general public.” The new proposed rule broadens the definition of the term “general public” and adds that those in the industry are members of the general public if they work for another explosives facility.

Under the proposed rule, the amount of storage allowed in hundreds, if not thousands, of magazines across the country will necessarily be reduced and many storage magazines will become unusable creating an unreasonable economic burden on the industry and increasing safety and security risks.

Historically, because of the table of distances, many storage magazines have been placed on leased property owned by farmers or others in rural, very low use areas such as farm fields, pastures, or forests near low density, unimproved, sometimes gated, traffic routes, such as logging roads, tractor paths, non passenger railways, forest-fire access roads, utility access drives, private roads on mine properties, etc...

Clearly farm fields and dirt access drives are not “public highways.” That is why the existing definition as shown in the ATF table 55.218 allows magazines near “public highways” with 3000 or less vehicles per day. To ensure compliance with this provision and security, ATF has authority to inspect and survey existing locations and check maps and photos.

The rule as proposed could put magazine owners out of business by forcing them to go to considerable expense to either reduce storage quantities or relocate magazines, just so a “passer by”, which could include a farmer on a tractor or forest ranger, will not get within the newly defined distance limits.

If quantities stored are reduced accordingly, the effect will be that the number of deliveries to these sites will increase tremendously, substantially increasing the miles traveled on the highways and handling time of explosive materials. This will unnecessarily expose the public and workers to increased risk, increase the possibility of hijacking, and greatly increase delivery costs to the site.

To remove, relocate and/or reconstruct magazines would require large capital expenditures including new purchases of land or leasing arrangements that might no longer be possible in certain locations. In fact, it is extremely difficult to find new sites for storage magazines under current definitions. The cost of business interruption and loss of business must also be taken into account and could be substantial. This would constitute an unreasonable burden on a large number of small businesses in this industry and these costs ultimately would be passed on to consumers.

Furthermore, by proposing this rule, ATF is seeking to increased protection from a non-event. In the last 25 years have any motorists on a public highway been injured or killed by the detonation of a magazine? Since 1971 when the original rules were adopted, what data has ATF acquired to prompt or support this change? What accidents or instances have occurred to prompt this new definition?

ISEE opposes this approach to rulemaking and will challenge the provision if it stands. The Society is very dissatisfied that the agency has chosen to ignore its assurances that this issue would be addressed with industry.

- ATF has expanded the definition to include any “structure where people are accustomed to ... be present for any purpose.” Adoption of this definition, for example, would mean that a seldom-used mechanics shop on a mine site would be treated the same as a public school building for the purposes of storage. Also, among other effects on the industry, the provision would eliminate shared magazine sites by applying the ATD where currently it is not required. Why? Because, under the proposed definition, storage magazines themselves would constitute “inhabited buildings.”

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ISEE strongly opposes this provision as it believes that storage magazines and other buildings designed and built for only occasional use or storage on a job site, mine or quarry, cannot reasonably be considered to be “inhabited.” ISEE believes that the proposed rule would increase the security risk by creating more, less secure magazine sites and requiring increased shipments to additional locations.

Furthermore, what is the need? In many cases existing activities overlap each other in blasting, mining, quarrying, and construction operations and access to these areas is restricted. In other cases manufacturing activities are separated from sales activities with magazines located on the same site. Or a company may own more than one magazine on the same site under two different subsidiary names. How would they be impacted by the rule? What is the data that ATF relied on to support this proposed change?

– Under the rule, the definition has been expanded to include “assembling...for his own use”. Despite assurances to the contrary by ATF officials at the ISEE Annual Conference in February, this definition could include end users and field personnel as it could be construed to include assembly of a primer, loading of a blast hole, and use of two component explosives on a job site.

The combined words “assembling explosive materials from explosive and/or non explosive materials ... for his own use” could be construed to mean the assembly of an explosives primer (for example, the insertion of a detonator in a cast booster to initiate a blast) or the loading of explosives and initiating device into a blast hole or borehole liner or tube for insertion into a blast hole. These are activities that are clearly not “manufacturing” by any reasonable definition but could certainly be interpreted as such by ATF field personnel. If

In addition, many ISEE members either are, employ, or train utility workers, small contractors, or others who use two component commercial explosives for pole work and small rock blasting jobs. Many of these individuals routinely use two component explosives to blast because it is safe, convenient and cost effective. i.e., they are able to mix onsite and there is no need for placarding, storage magazines, hazmat CDL endorsement, and hazmat insurance for transportation purposes, among other cost benefits.

Many of these people already are required to be licensed by ATF and some only use explosives occasionally and in small quantities. Requiring that blasters obtain a manufacturer's permit under the proposed rule

and will increase their cost of doing business for no apparent reason, costs that certainly will be passed along to the public.

ISEE recommends that the words "for his own use" be deleted from section (b) under the definition of "manufacturer" such that it reads: "(b) Any person engaged in the business of assembling explosive materials from explosive and/or non-explosive materials for purposes of sale or distribution."

– "Previously submitted requests for variances will be subject to review and a new determination may be issued." The removal of variances after businesses have relied on them, in some cases, for many years, could result in a substantial financial burden from many businesses. ISEE opposes this rule as ATF has shown neither the need nor the purpose for this new requirement. (55.22)

– Apparently, ATF variances that have been issued over the years have not been kept on file by ATF. This rule would require that companies produce a copy upon request.

ISEE does not oppose this rule, but recommends and petitions ATF to make all variances available to industry, unless security issues preclude otherwise in particular cases, as US DOT now does with respect to RSPA variances.

– Under the proposed rule, "magazines used for the temporary storage of explosives will be subject to the table of distances and magazine construction requirements."

The quantity distance table is meant for storage, while the Type 3 "daybox" is actually designed as a temporary holding place for use of explosive material on site during a job. It is the interim storage means for materials for that day's work. In that regard, the "daybox" actually provides a degree of security for explosive materials on site.

To subject the industry to these proposed rules would effectively shut down, or seriously delay, and dramatically increase costs for most construction projects across the country that require the use of explosives. The alternative, as explained below, will be to seriously increase the risk to workers and others near the job site.

Under the rule as proposed, contractors will no longer be able to transfer explosives to and park vehicles at job sites using approved magazines. Magazine construction requirements would add thousands of pounds to each vehicle requiring the purchase of

new trucks for many companies and retrofitting them with new boxes at tremendous cost. Even then, the contractor would not be able to park the vehicle at the job site because of the table of distance requirements.

Many contractors work on projects that last anywhere from one day to a year, but most are three weeks or less. It is safer, more economical, and more secure by far to transport explosives each day blasting takes place. With this rule, for each new project - however short the duration, magazines will need to be moved using a wrecker service, ATF notification will be required each time, state inspections will be needed, and then ATF inspections. Then contractors will need to unload trucks into the magazine, retrieve the materials for each job, transport to the job site as needed, unload the “daybox” and, later, transport the remaining explosives to proper magazines for overnight storage – a completely unworkable, unsafe, insecure, and unreasonably expensive system.

Inevitably, blasting crews will opt for the next best and less expensive alternative,

Would this be safer than secure storage in a “daybox” at the site? Of course not.

ISEE strongly opposes these provisions. Imposition of these rules will be cost prohibitive for most construction work in the U.S. that requires blasting and will reduce safety and security by increasing the number of magazine locations and shipments to job sites. The alternative will be that the use of the daybox will simply be ignored and security and safety will be sacrificed for expediency. ISEE asks how ATF justifies this change? What data exists to support this proposal?

- Permittees will no longer need a variance to keep inventory records on the computer but a number of restrictions apply including frequent backups. ISEE supports this part of the proposed rule.

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The rule requires that inventory discrepancies between physical inventory and records be actually reconciled by the end of the next business day after “discovery”. ISEE supports this position.

- Under this proposal, an additional inch of hardwood will be required for certain magazines. ISEE supports this based on testing done by the industry years ago.

- “No sparking material is to be exposed to contact with the stored explosives materials. All ferrous metal nails in the floor and sidewalls that might be exposed to contact with explosive materials must be blind nailed, counter-sunk, or covered with a nonsparking lattice work or other nonsparking material.”

These rules were established with the support of this industry many years ago to address the storage of black powder to protect the material from the most frequent causes of premature explosions due to friction, sparks and flames. When considering storage of commercial explosives used today, with few exceptions, such rules are no longer necessary. As a number of studies in recent years have shown, no accidents in involving storage of commercial explosives of today have been found that can be attributed to frictional sparks.

ISEE questions why this rule is necessary with the types of explosives that are primarily used today. What is the data that supports this change? Are there any instances of detonations in magazines as a result of sparking materials?

– Under this proposal, magazine owners will be required to retrofit or replace virtually all locks and hoods. ATF proposes this because, in a significant number of explosives thefts, “access was gained to the explosives by cutting the padlock.” The agency has not produced the data to support those results, nor have they produced the technical data to support this proposal as the solution.

ISEE strongly opposes this provision of the proposed rule for a number of reasons.

First, ISEE does NOT believe that this proposed rule will measurably increase security of explosives storage. A properly hooded lock is not accessible to bolt cutters unless the hood is cut off. That is the purpose of the hood. The only practical method to defeat the lock is with a cutting torch. If the steel hood can be defeated, the size of the shackle is not going to prevent entry if the individual is determined to do so. If someone is going to take the time to cut off the hood (most likely with an oxy-acetylene torch) a 3/8" or 1/2" shackle lock will not slow him down to any appreciable degree.

So we ask the following questions: What difference does the size of the shackle make if a lock is covered by a steel hood? Did the thefts referred to by ATF involve “unhooded” locks? Did the thefts involve hoods that were “oversized”? Did the thefts involve magazines that had been inspected by ATF? (i.e. did they meet existing standards?) What data supports the proposition that a 1/2" lock will be significantly more secure than a 3/8" lock or a 7/16" lock?

ISEE asserts that ATF has not demonstrated that there would be a high degree of probability that the use of 1/2" shackles would have prevented a significant number of thefts. Although the Society desires maximum security as an organization, until statistically proven otherwise, we do not believe that increasing the diameter of lock shackles protected by a hood will result in a significantly increased level of security.

Second, it is clear from our members that it may be impossible to find locks with 1/2" diameter shackles as these locks may not be presently available on the market. Even if they are available the cost just for new locks will be substantial. But the major problem is

that, if this provision is adopted, virtually all storage magazines will need to be substantially modified in order to accommodate the larger sized locks.

The reason is that, in order to gain maximum security, hoods today are made small enough so that lock cutters cannot be placed under them. Consequently, in order to accommodate the larger lock size, magazine owners will need to modify their magazines by drilling and cutting or grinding off the old hoods and pins, and welding on a new pin for the lock, and installing, by welding a new hood to go over it - for thousands of magazines across the country. In addition, all magazines would have to be emptied for this to occur, a costly exercise, creating an even greater safety consideration, security risk, and expense.

Third, the cost to the industry to make these modifications, in time, labor, and materials, will be enormous, causing extensive hardship especially for small businesses. The cost of new locks alone will be very expensive. Shop time to retrofit each magazine and schedule the job will be substantial as will the time and expense to visit each site, empty the magazines, and perform the labor.

ISEE believes that this NPRM will have a significant impact on a substantial number of small entities in the commercial explosives industry and that, in issuing this proposal, ATF has not fully taken into account the degree to which this rule will impact small businesses as required by the Regulatory Flexibility Act, 5 USC 610.

Finally, if this provision remains part of the final rule, because of the extensive amount of work involved, it will be necessary to allow a long period of time, possibly many months, for the industry to make these modifications.

– Under the current law, vehicular magazines may be immobilized by having the wheels removed, equipping with a kingpin locking device or other methods approved by the director. In the past, the director has approved steering wheel locking devices. Under the proposed rule, ATF has changed that to require steering wheel locking devices only if the storage is attended at all times. What is the point of locking the magazine if it must be attended? ISEE would recommend that the requirement that the magazine be attended be deleted from the proposed rule.

– ATF justifies this proposal by stating that a significant number of explosives thefts access was gained by cutting the padlock.

ISEE opposes this provision and believes that increasing locking requirements on (type 5) drop trailers will require substantial modification of the locking mechanisms at enormous cost to the industry and will not significantly increase the security of this type of storage. Drop trailers are thinly constructed and can be cut into easily with common devices, such as an axe or a power saw.

What data does ATF have showing that a significant number of explosives thefts access was gained by cutting the padlock? What data exists that shows that bigger locks and hoods will significantly increase security for Type 5 magazines?

– ISEE requests that the deadline for comments on these proposed rules be extended for a minimum of 90 days and that these rules be held open for discussion at public hearings to be scheduled at several regional locations over the summer. This would allow time for more input from the industry which is necessary to be able to respond appropriately to this complex set of proposed rules that will certainly have a dramatic impact on this industry. It will also provide an opportunity for open discussion of many of these issues and allow time for ATF to respond to our questions.

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