Federal Aviation Administration

Memorandum

Date: March 17, 2015

To: Stewart Jackson, Regulations and Analysis Division, AST-300 Manager

From: Mark W. Bury, Assistant Chief Counsel for Regulations, AGC-200

Subject: FAA Oversight Authority, under 14 C.F.R. § 420.65, for the Storage Requirements of Division 1.1 and 1.3 Explosives

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This memorandum is in response to your November 12, 2014 memorandum requesting an interpretation of the FAA's oversight authority for the storage requirements of division 1.1 and 1.3 explosives. Specifically, you asked (1) whether 14 C.F.R. § 420.65 covers storage requirements of class 1.1 and 1.3 explosives, and (2) whether the FAA has any legal basis to exercise its oversight authority now that the Bureau of Alcohol, Tobacco, Firearms and Explosives ("ATF") no longer has oversight authority over the storage requirements for ammonium perchlorate composite propellant ("APCP"). In response to your questions, section 420.65 does not currently cover storage requirements of division 1.1 and 1.3 explosives. The FAA does, however, have the authority to regulate the storage of APCP, as long as the Office of Commercial Space Transportation ("AST") determines that such regulations are necessary to protect the public from launch site explosive hazards created by APCP.

The FAA does not currently regulate the storage of 1.1 and 1.3 explosives. Under 14 C.F.R. §§ 420.63 through 420.70, the FAA regulates the storage and handling of liquid propellants and the handling of solid propellants. Section 420.65 applies to the handling of solid propellants only.[1] This is apparent from both the regulatory text and preamble language. First, the title of § 420.65 reads: "Separation distance requirements for *handling* division 1.1 and 1.3 explosives." (Emphasis added.) Contrast this with section 420.66, titled: "Separation distance requirements for *storage* of hydrogen peroxide, hydrazine, and liquid hydrogen and any incompatible energetic liquids stored within an intraline distance." (Emphasis added.) Second, the FAA expressed in preamble that it chose not to duplicate the ATF's storage requirements for solid explosives. According to the preamble of the part 420 final rule published in 2000, the distances the

[1] Section 420.65 references table E-4 of appendix E. Table E-4 lists the separation distance requirements for public areas and public traffic routes, and the intraline distance requirements. These requirements apply to handling of solid propellants only.

FAA selected for the "use"—in other words, handling—of explosives are consistent with ATF regulations pertaining to the "storage" of explosives. The final rule states that "the FAA is not duplicating the ATF storage requirements." Licensing and Safety Requirements for Operation of a Launch Site, 65 FR 62812, 62822 (Oct. 19, 2000).

The FAA chose not to regulate the storage of solid propellants to avoid duplication. However, the FAA may have the authority to regulate the storage of APCP. The FAA's authority is derived from 51 U.S.C. 50905, which requires the FAA to issue a license to operate a launch site consistent with public health and safety, safety of property, and the national security and foreign policy interests of the United States. 51 U.S.C. 50905 (2015). In its 2000 rulemaking, the FAA determined that ATF's regulations on the storage of solid propellants was sufficient to satisfy the FAA's obligations under section 50905. However, a 2009 Order issued by the United States District Court for the District of Columbia vacated ATF's classification of APCP, a solid propellant, as an explosive as defined under 18 U.S.C. § 841 (d). *Tripoli Rocketry Ass'n, Inc. v. ATF*, Order No. 00-00273 (March 16, 2009). In response to the Court's Order, ATF issued a notice that it no longer regulates APCP. Open Letter from Carson W. Carroll, Assistant Director for Enforcement Programs and Services, Bureau of Alcohol, Tobacco, Firearms and Explosives, to All Federal Explosives Licensees and Permittees (Jul. 17, 2009) (available on the ATF website). ATF's open letter stated that "APCP and products that contain only APCP are not subject to the recordkeeping, storage, and other regulatory requirements under 27 C.F.R § 555." *See id.* As a result, there are currently no storage requirements for APCP on an FAA-licensed launch site.

In light of this lack, the FAA may choose to exercise its oversight authority if AST finds that APCP is a detriment to the public health and safety, safety of property, or the national security and foreign policy interests of the United States. To be clear, the FAA's jurisdiction to issue regulations on the storage of APCP does not derive from the Court-ordered deregulation. Rather, the FAA has the authority to issue regulations pertaining to the storage of solids as long as the regulations are consistent with its statutory obligations. AGC is unable to provide a final response regarding AST's legal basis for exercising oversight authority over the storage of APCP before AST has determined whether APCP storage is a safety concern. In making this determination, AGC recommends that AST address ATF's decision not to provide the Court with any evidence supporting ATF's position that APCP is an explosive under 18 U.S.C. § 841 (d).