

Explosives regulation in the USA



The federal Bureau of Alcohol, Tobacco, Firearms, and Explosives is under pressure to improve its implementation of regulations controlling the use of explosives. As a result, US industrial minerals producers need to be equally rigorous in their compliance with the legislation, argues *Edward M. Green*.

OF THE MORE than 5,500m. lbs of explosives used each year in the USA, the mining industry accounts for about 90%. Some 13% of that total is used in quarrying and non-metal mining. As the major consumer of explosives – since the Safe Explosives Act (SEA) was enacted in November 2002, as part of the massive US Homeland Security Act – the mining industry has been on the front lines of the USA's 'War on Terror'.

The SEA mandates a complex and expansive set of statutory requirements. These range from the need for all users of explosives to hold and maintain federal licences and permits for the manufacture and use of explosive materials, to a requirement for background checks by the federal Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF) on 'employee possessors' of explosive materials and persons responsible for the use and management of explosives.

The SEA, however, is only part of a larger ATF programme of federal regulation of explosive materials, in place since 1970. These pre-SEA requirements deal not only with safe and secure explosives storage, but also with complicated record keeping regulations aimed at showing a complete chain of possession of explosives, from manufacture to purchase and use.

With ATF special agents and industry operations investigators increasingly active in inspecting mines for compliance with the SEA and other ATF regulations, it is important for US mining company management to understand what is required by federal explosives regulations, so as not to run foul of the law. This is especially the case since wilful violations of both the SEA and pre-SEA requirements are federal crimes, punishable by fines, imprisonment, or both.

To briefly summarise, the SEA mandates, for the first time, that all users of explosive materials must have a federal permit or licence. The SEA also expands the categories of persons who are prohibited from possessing explosives. It also requires that persons "authorised to possess explosive materials" (employee possessors) and persons "responsible for the use and management of explosive materials" (responsible persons) must be identified by their employers to the ATF, so that it can carry out a background check and clearance of each individual to ensure that he or she is not a person prohibited from possessing explosive materials (prohibited person).

By establishing this nationwide permitting and licensing scheme and its accompanying new background check and clearance system, the goal of the SEA is to operate as a screen to prevent explosive materials from falling into the hands of terrorists and other criminals.

Failures and fees

Even though the SEA substantially expanded the mission of the ATF, the Agency's budget and human resources were not expanded to keep pace with its new responsibilities. In addition, developing new regulations and policies to implement the SEA and keeping abreast of the flood of new and renewed permit and licence applications has been an enormous undertaking for the ATF, so training of ATF field personnel has not kept pace.

The result has been uneven implementation of the SEA. These problems have taken their toll on the morale of ATF personnel, as evidenced by two developments that took place in 2005.

First, at the end of March 2005, the Inspector General of the Justice Department (the cabinet department in which the ATF resides) issued a scathing report. It found critical deficiencies in the ATF's implementation of the background check and clearance process.

Second, the Bush Administration, in its budget proposal for the financial year 2006 (and again in its budget proposal for FY 2007), proposed a user fee "on all explosives manufactured in or imported into the United States". The fee would be set at a rate of \$0.02/lb, thereby generating \$120m. each year, or \$600m. over five years. This fee, plus current explosives licensing fees, would provide full offset for the ATF's regulation of the explosives industry. The fee would be set in regulation, and could be increased as deemed necessary by the Attorney General.

As we discuss below, both of these developments pose significant potential problems for mining companies, including the industrial minerals sector.

The Inspector General's report

The most troubling aspect of the Inspector General's report is its overall finding of "critical deficiencies" in the ATF's implementation of the background check and clearance process required by the SEA. According to the Inspector General, this has prevented ATF from ensuring that prohibited persons are denied access to explosives. The Inspector General also found that ATF industry operations investigators responsible for inspecting explosives permittees and licensees have not received adequate training, resulting in inconsistent regulatory enforcement.

In connection with the background check and clearance process deficiencies, the Inspector General noted that to get help in carrying out its responsibility to conduct these checks of responsible persons and employee possessors, the ATF had

entered into an agreement with its sister agency, the FBI, to perform the checks on its behalf. However, a comparison of ATF and FBI data found that the ATF had failed to follow up on over half of the individuals whose FBI background checks had flagged them as possible prohibited persons.

Because the ATF never completed its determination of whether or not these individuals were prohibited persons, they were, therefore, still authorised to use and have access to explosives. In addition, according to the Inspector General, the ATF did not even request FBI background checks on all potentially prohibited persons submitted to ATF by licence and permit applicants.

In another troubling development, the Inspector General found that many explosives licensees and permittees have not reported hiring new employee possessors. This is in spite of the fact that, under the SEA, licensees and permittees have a continuing obligation to notify the ATF of any changes in responsible persons or employee possessors. This includes not only situations when an employee is terminated, or when an individual's job changes, but also when new employees are hired.

As for the finding of the Inspector General that ATF field personnel have received inadequate training, especially telling is the reported observation of one licensee operating nationwide. He stated that his company was unable to develop a consistent corporate policy to comply with ATF regulations, because ATF industry operations investigators conduct inspections and interpret regulations differently at various locations around the country.

The Inspector General also found that ATF's procedures are not adequate to ensure that these investigators check for employee possessors who may have become prohibited persons since their initial ATF background check was carried out.

In response to the Inspector General's report, the ATF, in an April 2005 statement, said that the report "does not adequately recognise ATF's many accomplishments in implementing the [SEA]...ATF recognises [however] that there are discrepancies resulting from this review that need to be immediately and appropriately addressed. We are committed to doing so".

User fee on explosives

As for the proposed user fee on explosives, while the Bush administration is certainly not the first to propose user fees as a way of increasing revenue without raising taxes, fortunately such proposals rarely survive the Congressional budget process. To some extent, these proposals represent book-keeping legerdemain because they are counted not as revenue but as a reduction in spending, since they pay for government activities without taking money from general government revenues. Presidents have found them to be popular budget tools because the fees have the effect of reducing the total outlays the President is proposing.

The President's budget proposal, however, is merely the first step in a complicated budget process. Without getting into the details of that process, key to this "smoke and mirrors" explosives user fee proposal is that it is only a proposal. In the case of this proposal, an ad hoc coalition called the Safety and Security Alliance for Explosives has, to date, waged a successful campaign to defeat the Administration's proposed explosives user fee.

The Industrial Minerals Association – North America (IMA-NA) is a leading member of this coalition. IMA-NA, and its fellow coalition members, have worked hard to educate the Congress and media as to why the explosives fee proposal should be defeated.

However, in these times of rapidly shrinking revenues to fund domestic programmes – even those aimed at national security – IMA-NA and its coalition allies will have to remain vigilant in

order to ensure that Congress does not adopt the Administration's proposed explosives user fee.

Impact on industrial minerals companies

ATF considers itself one of the nation's pre-eminent law enforcement agencies. Until the SEA became law at the end of 2002, the ATF occupied a well respected position at the US Department of the Treasury. Now, having been transferred to the Department of Justice, the ATF finds itself in a rivalry for funding, personnel, and attention with the much larger and much richer FBI.

The stinging criticism of the Inspector General's report is exacerbated in the minds of ATF employees by the fact that it is FBI data that served as the basis for many of the Inspector General's criticisms. It is certainly true, based on our communications with ATF officials, that the ATF is unhappy that the administration has proposed that its explosives regulations funding would be wholly supported by a user fee, while leaving its sister agency, the FBI, to be funded by general revenues.

Indeed, the President's financial year 2006 budget proposal would have increased the FBI's funding from general revenues by nearly \$600m. – the total amount to be raised by the proposed explosives user fee over five years. It is not surprising, therefore, that according to a report last year in the Wall Street Journal, one senior ATF agent said: "This gives us an idea of where we stand in this administration. I guess we'd better print bake sale and car wash signs".

In our view, since the SEA was passed, the ATF has been working hard to implement it, without any significant new funding or personnel. The ATF has worked hard to facilitate compliance by explaining the new requirements of the SEA to mining companies. While being far from perfect, the Agency has developed and published required regulations, policies, and forms to implement the SEA. In many respects, implementation of the SEA appears to have gone smoothly.

Having said all this, clearly the ATF has been and continues to be under significant stress. This means that US industrial minerals producers and other mining companies can expect ATF to be more rigorous and demanding than they have been in the past. This is likely to be especially true when mining companies submit their applications for permit and licence renewals, as they must do every three years.

US industrial minerals producers, therefore, need to be especially vigilant to assure they are in full compliance with all of the statutory and regulatory requirements of the SEA and other provisions of federal explosives law, lest they fall victim to an increasingly aggressive ATF as it seeks to prove its critics wrong. 

Contributor: Edward M. Green, Counsel, Crowell & Moring LLP, Washington DC, USA.

Notes

1. Prohibited persons include those who: are under indictment for a crime punishable by more than one year in prison; have been convicted of such a crime; are fugitives from justice; are unlawful users of, or are addicted to, any controlled substance; have been adjudicated as a mental defective or been committed to a mental institution; have dishonourable military discharges; have renounced their US citizenship; or are aliens (with some exceptions).



2011 Pennsylvania Avenue NW, Suite 301,
Washington, DC 20006
Tel: 202 457 0200 Fax: 202 457 0287
E-mail: info@ima-na.org
Website: <http://www.ima-na.org>

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