

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

TRIPOLI ROCKETRY ASSOCIATION, INC., and )  
NATIONAL ASSOCIATION OF ROCKETRY, )

Plaintiffs, )

v. )

UNITED STATES BUREAU OF ALCOHOL, )  
TOBACCO, FIREARMS AND EXPLOSIVES, )

Defendant. )

Civil Action No. 00-273 (RBW)

**DEFENDANT’S RENEWED MOTION FOR PARTIAL SUMMARY JUDGMENT**

Pursuant to Rule 56 of the Federal Rules of Civil Procedure, defendant, the United States Bureau of Alcohol, Tobacco, Firearms and Explosives (“ATF”), respectfully moves for judgment in its favor on Counts One, Four and Five of plaintiff’s Third Amended Complaint. This motion is supported by the Administrative Record and Supplemental Administrative Record filed in 2002 [19] and October 31, 2006 [94], and the accompanying Defendant’s Memorandum of Points and Authorities in Support of Renewed Motion for Partial Summary Judgment on Counts One, Four and Five. A statement of material facts not in genuine dispute and a draft order are also attached to this motion.

Dated: January 31, 2007.

Respectfully submitted,

\_\_\_\_\_  
JEFFREY A. TAYLOR, D.C. Bar # 498610  
United States Attorney

/s/ \_\_\_\_\_  
RUDOLPH CONTRERAS, D.C. Bar # 434122  
Assistant United States Attorney

/s/ \_\_\_\_\_  
JANE M. LYONS, DC Bar #451737  
Assistant United States Attorney  
Civil Division  
555 Fourth Street, N.W.- Room E4822  
Washington, D.C. 20530  
(202) 514-7161  
(202) 514-8780 (fax)

OF COUNSEL:

Joel J. Roessner, Associate Chief Counsel (Litigation)  
Bureau of Alcohol, Tobacco, Firearms and Explosives



18 U.S.C. § 841(d); see 27 C.F.R. § 555.23.<sup>2</sup>

These statutory excerpts raise a point crucial to the adjudication of this case; namely, that despite plaintiffs' apparent conviction that ATF is out to persecute their members unfairly, there exists a legislative command for classification of substances as explosives in the interests of public safety. Indeed, when the plaintiffs characterize ATF as engaging in an "unlawful assertion of civil regulatory authority over high-powered sport rocketeers" (Third Am. Compl. ¶¶ 2), the fact is that Congress has for over three decades sought to protect the public by directing ATF to identify substances which qualify as explosives.

Tripoli Rocketry Association and the National Association of Rocketry are non-profit organizations whose members enjoy the hobby of high-powered sport rocketry. In this action, they challenge the Bureau's regulation of a chemical compound known as ammonium perchlorate composite propellant ("APCP"), which is commonly used in the rocket motors, as an explosive within the meaning of 18 U.S.C. § 841(d). ATF has included APCP on the explosives list since it was first published in 1971. See 36 Fed. Reg. 675 (January 15, 1971).

---

<sup>2</sup> Under the current statute, the Attorney General is responsible for enforcement and administration of the federal laws relating to explosives set out at Title 18, Chapter 40, and is authorized to issue rules and regulations to carry out these laws. 18 U.S.C. § 847; see also 6 U.S.C. § 531 (establishing, within the Department of Justice, the Bureau of Alcohol, Tobacco, Firearms and Explosives effective January 24, 2003). The Attorney General has re-delegated his authority in this area to the Director of ATF. 28 C.F.R. § 0.130. When this action was initiated in 2000, and prior to January 24, 2003, ATF was known as the Bureau of Alcohol, Tobacco and Firearms, an agency within the Department of the Treasury. See 6 U.S.C. § 531. At that time, the Secretary of the Treasury was responsible for enforcement of federal explosives laws and had also re-delegated his authority to ATF. Treasury Dept. Order 120-01 (formerly Order No. 221), 37 Fed. Reg. 11696 (1972).

**B. Procedural History**

On March 19, 2004, this Court issued an opinion addressing the parties' cross motions for summary judgment. Tripoli Rocketry Ass'n, Inc. v. Bureau of Alcohol, Tobacco, Firearms & Explosives, 337 F. Supp. 2d 1 (D.D.C. 2004). Among other things, this Court's March 19, 2004, opinion granted summary judgment in favor of the Bureau on the issue whether it properly classified APCP as an explosive, ruling that "the ATF's decision that APCP is a deflagrating explosive is permissible. Accordingly ... the Court will grant the defendant's summary judgment on Count 1 of the plaintiff's complaint." Tripoli, 337 F. Supp. 2d at 9. Pursuant to Rule 54(b) of the Federal Rules of Civil Procedure, this Court also directed the entry of judgment with respect to this issue. Tripoli Rocketry Association v. ATF, 2004 U.S. Dist. LEXIS 29224 (D.D.C. Order December 21, 2004). The plaintiffs appealed from this judgment.

On February 10, 2006, the United States Court of Appeals for the District of Columbia Circuit rejected the sufficiency of the record to justify the Bureau's classification of APCP as a deflagrating explosive, and found that ATF had failed to articulate a standard for "determining when a material deflagrates." Tripoli Rocketry Association, Inc. v. ATF, 437 F.3d 75, 84 (D.C. Cir. 2006). Recognizing that ATF's classification "of APCP as an explosive was in place long before the present challenge," the D.C. Circuit declined to "vacate the designation without first affording the agency an opportunity to reconsider this matter." Id. Accordingly, the case was remanded to this Court, "with instructions to remand the case to the agency for further consideration consistent with this decision." Id. On April 20, 2006, this Court remanded the matter to ATF for further consideration, consistent with the Court of Appeals' opinion. Tripoli Rocketry Association, Inc. v. ATF, No. 00-273 (RBW)(D.D.C. Order April 20 2006).

ATF has now further studied and reconsidered its classification of APCP, and notified the plaintiffs by letter dated October 13, 2006 that it continues to consider APCP an explosive (“Agency Decision”). See Docket Entry No. 92. ATF also filed notice of its decision in this proceeding. Tripoli, No. 00-273 (Notice of Agency Decision Regarding APCP October 13, 2006). In the Agency Decision, ATF explained its re-affirmation of APCP as an explosive. Id. On October 31, 2006, the Bureau filed the administrative record upon which its decision is based (Administrative Record II). Tripoli, No. 00-273 (Administrative Record October 31, 2006).

On December 18, 2006, plaintiffs filed their Third Amended Complaint in this action. Count one of the Third Amended Complaint claims that APCP is not an explosive because it is not a chemical compound, mixture or device whose primary or common purpose is to function by explosion. Count two claims that the inclusion of APCP on the 1999 explosives list and subsequent lists violated 18 U.S.C. § 847 and the APA, because ATF did not provide notice or opportunity to comment. Count three alleges that rocket motors are propellant actuated devices, that ATF lacks authority to regulate, because rocket motors are special mechanized devices that either are actuated by a propellant or release and direct work through a propellant charge. Count four claims that the Bureau’s regulation of rocket motors that contain more than 62.5 grams of APCP violates 18 U.S.C. § 847 and the APA, because ATF did not provide notice or opportunity to comment before adopting the 62.5 gram threshold. Similar to count four, count five claims that the Bureau’s regulation of rocket motors that contain less than 62.5 grams of APCP based on design and intended use [e.g., stacking pellet motors] violates 18 U.S.C. § 847 and the APA,

because ATF did not provide notice or opportunity to comment before adopting the 62.5 gram threshold.<sup>3</sup>

On January 5, 2007, the defendant filed its Answer to the Third Amended Complaint. The defendant now moves for summary judgment on counts one, four and five of the Third Amended Complaint. For the reasons set forth below, the Court should grant this motion.

## **II. ARGUMENT**

### **A. The Applicable Legal Standards**

#### **1. Summary Judgment**

Summary judgment is appropriate when the pleadings and the record demonstrate that "there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). The moving party bears the initial burden of demonstrating the absence of a genuine dispute of material fact. See Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). In this case, where cross-motions for summary judgment are at issue, the Court draws all reasonable inferences regarding the assertions made in a light favorable to the non-moving party. Flynn v. Dick Corp., 384 F. Supp.2d 189, 192-93 (D.D.C. 2005). The

---

<sup>3</sup> This motion does not address Count Two or Count Three. Count Two challenges ATF's inclusion of APCP on the 1999 List of Explosives without public notice and an opportunity to comment. Count Three claims that because rocket motors are "special mechanized devices that either are actuated by a propellant or release and direct work through a propellant charge," rocket motors are excepted from regulation as "propellant actuated devices." On June 21, 2002, the Court dismissed Count Two. See Order [Docket Entry No. 37]. On March 19, 2004, the Court granted summary judgment in favor of the plaintiffs on Count Three, and ATF has been engaged in rulemaking to address the applicability of the PAD exemption to model rocket motors. See Docket Entry Nos. 61-62 (Mem. Op. & Order), 90 (Notice of Publication of Notice of Proposed Rulemaking).

Court will "grant summary judgment only if one of the moving parties is entitled to judgment as a matter of law upon material facts that are not genuinely disputed." Consumer Fed'n of Am. v. Dep't of Agriculture, 383 F. Supp.2d 1, 2 (D.D.C. 2005).

## **2. Review Under the Administrative Procedure Act**

ATF's classification of APCP is reviewed by the Court in accordance with the judicial review provisions of the APA. When reviewing agency action under the APA, the court must determine whether the challenged decision is "arbitrary, capricious or an abuse of discretion." 5 U.S.C. § 706(2)(A). To make this determination, the Court must "consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 415-16 (1971). At a minimum, the agency must have weighed the relevant data and articulated an explanation that establishes a "rational connection between the facts found and the choice made." Bowen v. Am. Hosp. Ass'n, 476 U.S. 610, 626 (1986). In the final analysis, an agency's actions are "entitled to a presumption of regularity." Citizens to Preserve Overton Park, 401 U.S. at 415-16 (noting the court cannot substitute its judgment for that of the agency). Review of agency action "is to be based on the full administrative record that was before the [agency] at the time [it] made [its] decision." Id. at 420. Here, that record consists of the original administrative record submitted to the Court in 2002 [Docket Entry No. 19], as well as the Supplemental Administrative Record filed on October 31, 2006 [Docket Entry No. 94].

This Court has recognized ATF's authority to classify items within its regulatory sphere. In Modern Muzzleloading, Inc v. Magaw, 18 F. Supp. 2d 29 (D.D.C. 1998), a gun manufacturer alleged that ATF's classification of a particular weapon as a "firearm" instead of an "antique

firearm" was arbitrary and capricious. The distinction turned on the meaning of the term "replica" in the applicable statute. Id. at 31. Based on the language and structure of the statute, the Court found that Congressional intent was substantially clear and that ATF's interpretation of the remaining ambiguity was entitled to deference. Id. at 33-34. Although the firearms statute did not "speak directly to the question of how to classify the Knight Disc Rifle," because ATF considered relevant factors as shown in the administrative record, its classification was neither arbitrary nor capricious. Id. at 36-37. Importantly, the Court expressly recognized in Modern Muzzleloading that ATF was "better able than the Court to make technical distinctions between firearm ignition systems." Id. at 37. The same type of review and result should obtain here for ATF's classification of APCP as an explosive. See York v. Secretary of Treasury, 774 F.2d 417 (10th Cir. 1985) (ATF's classification of "machine gun"); American Mining Congress v. Environmental Protection Agency, 907 F.2d 1179 (D.C. Cir. 1990) (EPA's classification of six wastes as "hazardous").

**B. ATF's Classification of APCP Is Supported by the Supplemental Administrative Record and Is Neither Arbitrary Nor Capricious**

This case concerns the meaning of the term "explosives" as defined in Title XI of the Organized Crime Control Act of 1970 ("OCCA") as "any chemical compound[, ] mixture, or device, the primary or common purpose of which is to function by explosion. . . ." 18 U.S.C. § 841(d). The analysis begins with the plain language of the statute. Intel Corp. v. Advanced Micro Devices, Inc., 542 U.S. 241, 255 (2004). The statutory definition lists a number of specific examples of explosives and grants the ATF broad authority to classify others. See id.<sup>4</sup> Where

---

<sup>4</sup> See also supra, footnote 2.

Congress has "explicitly left a gap for an agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute . . ." See, e.g., Chevron U.S.A., Inc. v. Natural Resources Defense Council, 467 U.S. 837, 843-44 (1984). Judicial review of the express delegation of authority to classify explosives and all decisions necessary to carry out Congress's broad purpose is extremely circumscribed. As the D.C. Circuit has commented:

In United States v. Mead Corp., [533 U.S. 218, 121 S. Ct. 2164 (2001)], the Supreme Court confirmed the applicability of the Chevron test to a case like this one, where "Congress delegated authority to the agency generally to make rules carrying the force of law and . . . the agency interpretation claiming deference was promulgated in the exercise of that authority."

Global Crossing Telecommunications, Inc. v. Federal Communications Comm'n, 259 F.3d 740, 744 n.6 (D.C. Cir. 2001). Accordingly, because Congress expressly conferred such discretion on the ATF in the OCCA, the agency's "views merit the greatest deference" and may be "entitled to more than mere deference or weight" and should be given "legislative effect." Air Freight Sys., Inc. v. National Labor Relations Bd., 510 U.S. 317, 324 (1994); Schweiker v. Gray Panthers, 453 U.S. 34, 44 (1981) (internal quotation marks omitted). Judicial review in such a circumstance is limited to determining whether ATF "exceeded [its] statutory authority and whether the [classification of APCP] is arbitrary and capricious." Herweg v. Ray, 455 U.S. 265, 275 (1982) (citing Gray Panthers, *supra*).

The Agency Decision and Administrative Record II, demonstrate that ATF, on remand, has engaged in further testing and consideration, and that its reaffirmation and explanation of its classification of APCP as an explosive is not arbitrary, capricious or contrary to law. When it directed that ATF further consider the classification of APCP, the Court of Appeals set out

certain benchmarks. First, the Court of Appeals did not disturb the Bureau's reliance on three general categories of reaction rate as the principal criterion for determining whether a material is an explosive:

The statutory definition of "explosive" encompasses materials whose "primary or common purpose" is to "function by explosion." [ATF] determines whether a material fits this definition by characterizing the speed at which the material burns: materials with the fastest burn rates detonate, the slowest ones burn, and substances in between deflagrate. In other words, under [ATF's] characterization, a substance that deflagrates burns more rapidly than something that simply burns (like paper or a candle wick), but less rapidly than something that detonates (like dynamite). And [ATF] treats a material as explosive if it functions by detonation or deflagration.

Tripoli, 437 F.3d at 77. Second, the opinion made clear that the Bureau's conclusion that explosive materials include both materials that detonate and materials that deflagrate is no longer at issue. Tripoli, 437 F.3d at 84 (ATF's "authority to designate deflagrating materials as explosives under § 841(d) is undisputed by appellants."). Third, the Court of Appeals held that the Bureau's classification was inadequate because ATF failed to articulate how it determined whether a material deflagrates (as opposed to merely burns):

The fatal shortcoming of [ATF's] position is that it never reveals how it determines that a material deflagrates. Scientific sources reproduced in the record suggest that the defining characteristic is burn velocity, but the agency never defines a range of velocities within which materials will be considered to deflagrate. We understand that it may be necessary for [AFT] to define a range flexibly, accounting for gray areas where expert discretion is necessary to characterize a particular substance. But, as a reviewing court, we require some metric for classifying materials not specifically enumerated in the statute, especially when, as here, the agency has not claimed that it is impossible to be more precise in revealing the basis upon which it has made a scientific determination. Yet, in this case, [ATF] has provided virtually nothing to allow the court to determine whether its judgment reflects reasoned decisionmaking.

Tripoli, 437 F.3d at 81. The Court of Appeals further explained:

[ATF's] relational definition suffers from a further methodological flaw: it designates no points of comparison. In order to say that one item burns "much faster" than another, one would need to know the speed at which each item burns. But [ATF] has never pointed to evidence establishing the data points necessary to make a comparison. For one thing, [ATF] has not stated the burn velocity of APCP in the form relevant to this regulation. The sections of the Encyclopedia of Explosives reproduced in the record include tables displaying the burn speeds of several compounds containing APCP in varying proportions. See ENCYCLOPEDIA OF EXPLOSIVES AND RELATED ITEMS, supra, 412-16, 433-36, J.A. 199-203, 220-23. Whether the compositions listed in those tables approximate the features of APCP when used for its "primary or common purpose" is entirely unclear. Similarly, whether the conditions under which these compositions were observed match those under which APCP commonly functions is not ascertainable. Even if the agency had provided representative measurements for APCP, it would still need to identify the speed at which normal burning occurs, which it has not done.

Id. at 82.

The Agency Decision and Administrative Record II together demonstrate that ATF has thoroughly addressed the issues identified by the Court of Appeals. First, ATF, working with the United States Air Force Research Laboratory, Materials and Manufacturing Directorate, made a determination of the line between deflagration and mere burning. The floor reaction rate for deflagration was established by conducting tests to ascertain the reaction rate of materials which Congress specifically included in the section 841(d) definition of "explosive." Agency Decision at 3 ("ATF tested APCP installed in rocket motors and compared their reaction rates with those of other explosive materials..."); Administrative Record II at 111 (Test Protocols provide that "[t]he objective of these protocols is to measure the reaction rate (deflagration rate) of a questioned explosive propellant, in the instant case Ammonium Perchlorate Composite Propellant ("APCP"), in its common use configuration as assembled in a rocket motor, and compare this to the reaction rates of other statutorily defined explosive materials..."); 117 (Air Force Research Laboratory Final Report, October 2006, provides that "[t]he purpose of this research was to experimentally determine the reaction rates of various explosive propellants and items

containing these propellants, including black powder and ammonium perchlorate composite propellant-based hobby rocket motors, and to compare these reaction rates to those of other explosive materials defined by statute at 18 United States Code, Chapter 40 ...”); 120 (same); 121 (same). These tests generated a range of reactions rates, with safety (or “time”) fuse having the slowest reaction rate of the explosives tested. Administrative Record II at 18, 22 (Air Force Research Laboratory Final Report, October 2006, found that commercial safety fuse had a linear reaction rate of approximately 7.5 millimeters per second (mm/s), while military safety fuse had a rate of approximately 7.3 mm/s).<sup>5</sup>

The government also tested the reaction rate of APCP in seven types of hobby rocket motors. Administrative Record II at 126, 137-40 (Air Force Research Laboratory Final Report, October 2006, testing of hobby rocket motors). The Air Force Research Lab tested seven different series of hobby rocket motors of various sizes manufactured by either Estes or Aerotech. Id. at 126. The tests were designed to isolate the burn time of the rocket motor propellant. Id. at 122. Because the Air Force Research Lab found that their results were highly similar to manufacturers’ published thrust duration times, they were confident about the accuracy and repeatability of the data gathered. Id. at 139-40.

The table of data for the hobby rocket motors demonstrates a range of linear burn rates between 22 and 143 mm per second. Administrative Record II at 141. More specifically, five of the rocket motors tested were fueled by APCP, the material at issue, and two of the rocket motors tested were fueled by black powder. Id. at 137. Overall, the Air Force Research Lab determined that “rocket motor propellant grains burned at rates of 22-143 mm per second.”

---

<sup>5</sup> Safety fuse is specifically listed as an explosive at 18 U.S.C. § 841(d).

Administrative Record II at 120. This range falls within the burning rates of materials identified as explosives in § 841(d). The fastest burning material tested, black powder, tested at a rate of 9615 mm per second. Id. Smokeless powder burned at a rate of 18 mm per second. Id. The slowest reacting materials tested around 7 mm per second. Id.

ATF's own Fire Research Laboratory tested bond paper and candles to assess the lower range of reaction rates of materials that are not explosives. Administrative Record II at 146. Paper was tested under a variety of conditions and the flame spread results were tabulated. Id. ATF found that candles can burn at a rate of 0.11 mm per second and paper can burn as fast as 55.2 mm per second. Id. at 156.

Plaintiffs submitted burn rate data for APCP and other common items from Dr. Terry McCreary at Murray State University's Department of Chemistry and a company called Safety Management Services, Inc.. Administrative Record II at 158-83. In Dr. McCreary's paper, it is clearly stated that he did not test either "commercial APCP formulation" he referenced; instead he relied on the company's published data. Id. at 163. Consequently, much is unknown about the results he presents and how they were obtained. For example, his table merely lists "APCP formulations at 1000 psi." Id. at 164.<sup>6</sup> Moreover, Dr. McCreary's burn rates for paper were actually lower than the rates found by ATF. Compare id. at 164 (showing a maximum burn rate of 21.1 mm / s) with id. at 156 (listing a maximum burn rate of 55.2 mm / s). The other report submitted by plaintiffs, entitled "Hazard Classification Determination of In-Process Explosive Substances and Articles Using a Step-By-Step Approach," candidly acknowledges that:

---

<sup>6</sup> Dr. McCreary's average burn rates are calculated in inches per second. Thus, because 0.11 in. / sec is equivalent to 2.8 mm per second, and 0.33 in. / sec is equivalent to 8.4 mm per second, the burn rates proffered by plaintiffs are actually lower than those found by ATF.

“Currently, there is not a consistent standard available for explosive or energetic material characterizations and classifications applied to manufacturing operations.” Id. at 171. Because the challenge in this case is brought by users of already-manufactured hobby rocket motors, this report would seem to have little relevance to ATF’s classification determination. Indeed, its conclusion is that more should be done to examine materials in manufacturing, a proposition with which ATF does not disagree, but which is not the subject of this case. See id. at 182-83. The article apparently accepts that ATF has a functioning classification system for explosives.

The government was careful to make sure that the testing of the hobby rocket motors using APCP as a fuel was reflective of the “primary or common purpose” of the material. As described in detail at pages 7-15 of the Air Force Research Laboratory Final Report, October 2006, manufacturer’s instructions for assembling and igniting the rocket motors were followed, and only manufacturer-recommended igniters were employed. The rocket motors were fixed to sliding stands to ensure that the measurements were limited to the burn duration of propellant grains alone. The test report also noted that the test method did not account for small additional thrust time required to overcome the weight of the rocket motor and attached test equipment, but calculated that the variations were not material. Administrative Record II at 126-34.

How fast does something have to burn to deflagrate? The answer to this question requires a level of scientific expertise and judgment that Congress has appropriately delegated to ATF and which is particularly poorly suited for the judiciary to second-guess. Thomas Jefferson Univ. v. Shalala, 512 U.S. 504, 513 (1994) (broad judicial deference to agency is “more warranted” when the subject concerns a highly technical field); see American Mining Congress v. Environmental Protection Agency, 907 F.2d 1179, 1191-92 (D.C. Cir. 1990) (approving EPA’s

decision to re-list six wastes as hazardous). Because ATF's classification decision involves the application of technical, engineering and scientific expertise, special deference to the agency is particularly appropriate. See, e.g., Federal Power Comm'n v. Florida Power & Light Co., 404 U.S. 453, 463-64 (1972); Community Nutrition Institute v. Block, 749 F.2d 50,54 (D.C. Cir. 1984). Here, ATF has shown that the reaction rate of APCP falls within the range established by Congress in the examples provided in the statute, and APCP's other characteristics are consistent with its classification as an explosive.

To find that ATF's classification of APCP survives a challenge under the APA, the Court is not required to find that the administrative record be free of material that could support a different conclusion. "The question ... is not whether record evidence supports [petitioners'] version of events, but whether it supports [the agency's]." Arizona Corp. Comm'n v. Federal Energy Reg. Comm'n, 397 F.3d 952, 954-55 (D.C. Cir. 2005) (citing Florida Mun. Power Agency v. Federal Energy Reg. Comm'n, 315 F.3d 362, 368 (D.C. Cir.), cert. denied, 540 U.S. 946 (2003)). Agency decisions should not be set aside merely because the agency's "investigation . . . could have been more searching," and an administrative "decision does not lack substantial evidence simply because petitioners offered some contradictory evidence." Id.; see Lead Indus. Ass'n v. Environmental Protection Agency, 647 F.2d 1130, 1160 (D.C. Cir. 1980) (declaring that the existence of evidence in the record supporting conclusions other than those drawn by the Administrator does not preclude a court from finding the Administrator's decision was reasonable), cert. denied, 449 U.S. 1042 (1980). The APA standard is not equivalent to having to produce evidence to support the agency's decision beyond a reasonable doubt or anything close to it. All that is required is evidence that the agency considered

appropriate information and that its decision has a rational basis. Citizens to Preserve Overton Park, 401 U.S. at 416.

Even assuming that the plaintiffs' characterization of APCP's burn rate is correct for purposes of argument, it is insufficient for them to prevail under the APA, because it shows (at most) some disagreement as to the required reaction rate. As noted above, the law does not require that an agency's record be free of conflicting information. Arizona Corp. Comm'n, 397 F.3d at 954-55; Lead Indus. Ass'n, 647 F.2d at 1160. Under the APA, a court should review scientific judgments of the agency "not as the chemist, biologist, or statistician that [it is] qualified neither by training nor experience to be, but as a reviewing court exercising [its] narrowly defined duty of holding agencies to certain minimal standards of rationality." Ethyl Corp. v. EPA, 541 F.2d 1, 36 (D.C. Cir.), cert. denied, 426 U.S. 941 (1976). ATF's determination that APCP is an explosive amply satisfies this standard because APCP's burn rate falls within the range of burn rates established by other items listed as explosives in 18 U.S.C. § 841(d), and ATF considered other relevant characteristics of the compound.

**D. As Amended, Counts Four and Five of the Third Amended Complaint Should Be Dismissed As Moot**

Under the "case or controversy" requirement of Article III of the Constitution, federal courts "may only adjudicate actual, ongoing controversies." Honig v. Doe, 484 U.S. 305, 317 (1988). A moot issue is not an "actual, ongoing controvers[y]." See Friends of the Earth, Inc. v. Laidlaw Env'tl. Servs., Inc., 528 U.S. 167, 180 (2000) ("Constitution's case-or-controversy limitation on federal judicial authority, Art. III, § 2, underpins ... our mootness jurisprudence"); Spirit of the Sage Council v. Norton, 411 F.3d 225, 230 (D.C. Cir. 2005). "A case is moot if 'events have so transpired that the decision will neither presently affect the parties' rights nor

have a more-than-speculative chance of affecting them in the future.’ ” Pharmachemie B.V. v. Barr Labs., Inc., 276 F.3d 627, 631 (D.C. Cir. 2002) (internal citation omitted); see also McBryde v. Comm'n to Review Circuit Council Conduct & Disability Orders of the Judicial Conference of the U.S., 264 F.3d 52, 55 (D.C. Cir. 2001) (“If events outrun the controversy such that the court can grant no meaningful relief, the case must be dismissed as moot.”). As recently amended in the Third Amended Complaint to challenge rules that have been replaced with proper notice and comment procedures which plaintiffs do not challenge, the mootness of counts four and five is unmistakable.

Other than referring to the defendant as “BATFE,” rather than “ATF,” the fourth and fifth claims for relief asserted in the Third Amended Complaint are identical to those claims for relief as set out in the Second Amended Complaint. Both assert procedural defects. Count four claims:

Defendant’s civil regulation of individuals that purchase and store rockets that use no more than 62.5 grams of APCP as a fuel source violates 18 U.S.C. § 877 and 5 U.S.C. §§ 551(4) and 553(b)( and (c) because BATFE [ATF] did not provide the public with reasonable notice of, or an opportunity to comment on, BATFE’s [ATF’s] decision (and its underlying rationale) to civilly regulate individuals that purchase and store rockets that use more than 62.5 grams of APCP as a fuel source, notwithstanding its exemption of those individuals that purchase and store rockets using the identical material containing no more than 62.5 grams of APCP as a fuel source.

Third Amended Complaint, ¶ 50; Second Amended Complaint , ¶ 50. Likewise, count five claims:

Defendant’s civil regulation of individuals that purchase and store rockets that use no more than 62.5 grams of APCP as a fuel source based upon the design or intended use of such rockets violates 18 U.S.C. § 877 and 5 U.S.C. §§ 551(4) and 553(b)( and (c) because BATFE [ATF] did not provide the public with reasonable notice of, or an opportunity to comment on, BATFE’s [ATF’s] decision (and its

underlying rationale) to condition the applicability of the 62.5-gram exemption based upon the motor's design or intended use.

Third Amended Complaint at ¶ 53; Second Amended Complaint at ¶ 53.

The Second Amended Complaint was filed on October 28, 2004. See Docket Entry Nos. 68, 79. The Third Amended Complaint was filed on December 18, 2006. See Docket Entry No. 96. Between those two dates, however, the defendant published in the Federal Register its final rule on the 62.5 gram exemption. See Commerce in Explosives - Hobby Rocket Motors (2004R-7P) (RIN 1140-AA25), 71 Fed. Reg. 46,079 (August 11, 2006)(announcing final rule codified at 27 C.F.R. § 555.141(a)(10). This new rule added to list of items exempted from regulation as explosives:

Model rocket motors that meet all of the following criteria –

- (I) Consist of ammonium perchlorate composite propellant, black powder, or other similar low explosives;
- (ii) Contain no more than 62.5 grams of total propellant weight; and
- (iii) Are designed as single-use motors or as reload kits capable of reloading no more than 62.5 grams of propellant into a reusable motor casing.

27 C.F.R. § 555.141(a)(10).

Furthermore, this final rule was the product of thorough notice-and-comment rulemaking. On January 29, 2003, ATF published in the Federal Register Notice of Proposed Rulemaking (NPRM) 968, soliciting comments from the public and industry on a number of proposals to amend the regulations in part 555. Commerce in Explosives (2000R-9P) (RIN 1512-AB48), 68 Fed. Reg. 4406. One proposal was to amend 27 C.F.R. § 555.141 to provide that the regulations in part 555 do not apply to the importation and distribution of model rocket motors consisting of APCP, black powder, or other similar low explosives; containing no more than 62.5

grams of total propellant weight; and designed as single-use motors or as reload kits capable of reloading no more than 62.5 grams of propellant into a reusable motor casing. The comment period for NPRM 968 was initially set to close on April 29, 2003, but was extended until July 7, 2003, pursuant to ATF Notice No. 2. See 68 Fed. Reg. 37,109 (June 23, 2003).

In Natural Resources Defense Council v. U.S. Nuclear Regulatory Comm'n, 680 F.2d 810 (D.C. Cir. 1982), the Court held that even if a rule was originally promulgated in violation of the APA's notice and comment requirements, following “repromulgation of the rule after providing notice and opportunity for comment,” “we can hardly order the [agency] at this point to do something that it has already done.” Id. at 814-15. In NRDC, the agency did not even undertake an entirely new rulemaking procedure as ATF has done here. Plaintiffs have not claimed in their Third Amended Complaint that the notice-and-comment procedures giving rise to the new regulation were in any way deficient. Likewise, the Third Amended Complaint contains no challenge to the substance of 27 C.F.R. § 555.141(a)(10). To the contrary, counts four and five of the Third Amended Complaint are in all respects identical to claims that were pled and filed prior to ATF amending 27 C.F.R. § 555.141. Counts four and five have been made moot by the amendment of 27 C.F.R. § 555.141 following proper notice-and-comment rulemaking. Arizona Public Serv. Co. v. E.P.A., 211 F.3d 1280, 1295-96 (D.C. Cir. 2000), citing Motor & Equip. Mfrs. Ass'n v. Nichols, 142 F.3d 449, 458 (D.C. Cir. 1998) (finding challenge to EPA's waiver for state's program was moot where actions complained of were revised after lawsuit was filed); see National Mining Ass'n v. United States Dep't of Interior, 251 F.3d 1007, 1010-11 (D.C. Cir. 2001) (holding that certain challenges to regulations were moot after new regulations were passed where, as here, the organizations’s “complaint, did not see fit to provide citations to all of

the regulations it thought invalid.”); Associated Builders & Contractors, Inc. v. Herman, 976 F. Supp. 1, 8-10 (D.D.C. 1997) (finding moot an APA challenge of agency action unreasonably delayed where agency issued public notice and provided opportunity for comment). Because the purposes of notice and comment procedures have been achieved and are not challenged, judgment should be granted in favor of the defendant on these two claims. American Water Works Ass'n v. E.P.A., 40 F.3d 1266, 1274 (D.C. Cir. 1994) (“We apply that standard functionally by asking whether ‘the purposes of notice and comment have been adequately served,’ that is, whether a new round of notice and comment would provide the first opportunity for interested parties to offer comments that could persuade the agency to modify its rule.”).

### **III. CONCLUSION**

For these reasons, defendant respectfully requests that the Court grant its Renewed Motion for Summary Judgment on Counts One, Four, and Five, and dismiss those claims with prejudice.

Dated: January 31, 2007.

Respectfully submitted,

---

JEFFREY A. TAYLOR, D.C. Bar # 498610  
United States Attorney

/s/ \_\_\_\_\_  
RUDOLPH CONTRERAS, D.C. Bar # 434122  
Assistant United States Attorney

/s/ \_\_\_\_\_  
JANE M. LYONS, D.C. Bar # 451737  
Assistant United States Attorney  
555 4th Street, N.W. - Room E4822

Washington, D.C. 20530  
(202) 514-7161

OF COUNSEL:

Joel J. Roessner, Associate Chief Counsel (Litigation)  
Bureau of Alcohol, Tobacco, Firearms and Explosives