



motors as an explosive and is now trying again, with a new decision (on remand) based on a new administrative record. See *Tripoli Rocketry Association, Inc. v. Bureau of Alcohol, Tobacco, Firearms, and Explosives*, 437 F.3d 75 (D.C. Cir. 2006) (“*Tripoli 2*”).

ATFE is correct in its Memorandum of Points and Authorities (“ATFE Memorandum”) (at pp. 9-10) that whether APCP functions by explosion in hobby rockets depends on whether it burns (or reacts) at a rate (distance divided by time, or burn velocity) fast enough to “deflagrate,” as opposed to “simply burn,” and that the terms of the remand required ATFE to specify a minimum burn rate that would constitute deflagration, determine by testing how fast the APCP in hobby rockets actually burned, and then relate the testing data to the deflagration burn rate.<sup>1</sup> As ATFE itself explained in a related Federal Register Notice, ATFE failed to support its classification of APCP “with a specific, articulated standard for deflagration,” and “the Court of Appeals offered clear guideposts as to the characteristics of a classification decision that would pass judicial review.” 71 Fed. Reg. 46079, 46082, August 11, 2006.

## **B. Standard of Review**

As is usual in administrative review cases, ATFE’s Memorandum begins with the standard discussion of how the Court should apply a deferential review standard. Plaintiffs do not dispute that *Chevron* applies to ATFE’s interpretation of the relevant provisions of the Organized Crime Control Act (“OCCA”)<sup>2</sup> or that, in general, courts defer to agency expertise, but at this stage in the litigation these principles have already been applied and the results of their application are specified. The key issue at this point is more simple: the Court of Appeals provided (in ATFE’s own words) “clear guideposts,” and so the question now is whether ATFE

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<sup>1</sup> ATFE’s October 13, 2006 decision (on remand) correctly states (at p. 2) that “[a]n explosion can be further defined as either a deflagration (slower reaction, at speeds up to the speed of sound) or a detonation (reacting faster than the speed of sound). This definition is the law of the case that prompted this reconsideration.”

<sup>2</sup> Plaintiffs do not understand ATFE to argue that the OCCA is so clear and unambiguous that *Chevron* step two is never reached.

has in fact done what the Court of Appeals told it to do. ATFE is entitled to no special deference on that simpler inquiry. *New York New York, LLC v. NLRB*, 313 F.3d 585, 590 (D.C. Cir. 2002) (*Chevron* deference does not apply to agency interpretations of judicial opinions).

**C. ATFE Did Not Do What It Was Told**

ATFE argues in its Memorandum (at p. 10) that it has now “made a determination of the line between deflagrating and mere burning.” ATFE is wrong. One searches ATFE’s October 13, 2006 decision in vain for any such determination, and statements of counsel to the contrary cannot make up for the deficiency. *Burlington Truck Lines, Inc. v. U.S.*, 371 U.S. 156, 168 (1962) (“The courts may not adopt appellate counsel’s *post hoc* rationalizations for agency [orders].”).

On remand, ATFE faced an insurmountable problem. It could not admit defeat at the hands of Plaintiffs so it wanted to continue listing APCP as an explosive. However, the manufacturer’s well-established burn rate data indicate that APCP burns at rates well below any reasonable concept of a deflagration.<sup>3</sup> Therefore, instead of establishing a minimum burn rate for deflagration, and using this definition to decide whether APCP deflagrates, ATFE side-stepped the question and instead established a burn rate for “safety fuse,” compared APCP burn rates to safety fuse burn rates, concluded that APCP burns faster, and argued that since “safety fuses” are designated as “explosives” in 18 U.S.C. § 841(d), it follows that APCP must be an explosive as well. October 13, 2006 decision at p. 4.

This approach failed to comply with the clear terms of the remand because nowhere does ATFE claim, let alone establish, that *safety fuses* deflagrate. In short, ATFE ignored the Court of

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<sup>3</sup> The manufacturer’s tested burn rates are from 2.79 mm/second to 8.38 mm/second (Administrative Record “AR”) at p. 00164). Using ATFE’s own data, bond paper burns at rates of from 4.2 mm/second to 55.8 mm/second. October 13, 2006 decision at p. 4. Ordinary bond paper clearly does not deflagrate and could not properly be classified as an “explosive.”

Appeals' "clear guideposts." ATFE's decision has other problems as well, each explained below.

**D. ATFE Changed Its Position Without An Adequate Explanation**

Until the October 13, 2006 decision, ATFE's classification of a substance as an explosive depended on whether it burned fast enough to deflagrate.<sup>4</sup> Indeed, until now, the issue of whether APCP deflagrates has been the focus of the litigation before both this Court and the Court of Appeals. However, in its October 13, 2006 decision, ATFE apparently applied a new standard to classify APCP as an explosive---whether APCP burns at a rate faster than safety fuses, regardless of whether it deflagrates. In so doing, ATFE refused to acknowledge its change in position, let alone explain why such a change was justified. This is arbitrary and capricious. *Greyhound Corp. v. ICC*, 551 F.2d 414, 416 (D.C. Cir. 1977) ("This court emphatically requires that administrative agencies adhere to their own precedents or explain any deviations from them.")<sup>5</sup>

**E. ATFE's New Standard Is Based On a Demonstrably False Premise**

ATFE's new standard for classifying substances like APCP as an explosive (assuming it even has a standard) necessarily presumes that Congress included "safety fuses" in the definition of "explosives" in 18 U.S.C. § 841(d) because safety fuses burn at a high enough rate to be called an "explosive." This presumption is incorrect. As ATFE's own Administrative Record explains, the ordinary and common purpose of a safety fuse is to initiate an explosion, AR at p. 00868, and "[w]hen ignited, it [a safety fuse] burns at a predetermined rate without any external explosive effect." AR at p. 02089. Safety fuses are licensed and regulated like explosives not

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<sup>4</sup> See, e.g., 71 Fed. Reg. 46079, August 11, 2006 ("Because APCP deflagrates when confined, it has been classified by ATF[E] as an explosive").

<sup>5</sup> Alternatively, ATFE classifies APCP and other substances as an explosive on a completely *ad hoc* basis, with no consistent standard. This too is arbitrary and capricious. *Ramaprakash v. FAA*, 346 F.3d 1121 (D.C. Cir. 2003).

because they deflagrate or explode themselves, but because their purpose is to initiate an explosion in something else. *See also* Plaintiffs' Memorandum at p. 10. Clearly, Congress included safety fuse on the statutory explosives list is because of the ease with which safety fuse can and has commonly been used to facilitate initiation of explosions in actual explosive materials.

**F. ATFE's New Standard Is Impermissibly Vague**

As Plaintiffs' Memorandum explains (at pp. 10-11), BTFE tested only a few safety fuses. In fact, there are numerous kinds of safety fuses, and one can readily purchase safety fuses that burn at rates of from 5.08 mm/s to 101.6 mm/s. So, even assuming Congress included "safety fuses" in the definition of explosives because it believed safety fuses burned fast enough to constitute explosives *per se*, and ATFE intended to establish a standard for explosive using safety fuse burn rates, its "standard" is impermissibly vague. Is AFTE's standard 5.08 mm/s? Or 7.26 to 7.48 mm/s (ATFE's test data)? Or 101.6 mm/s? We simply do not know. Such a "standard" not only fails to distinguish deflagration from ordinary burning of paper (which, at from 4.2 to 55.8 mm/s falls in the middle of the 5.08 to 101.6 mm/s safety fuse burn rate continuum), but it also fails for extreme vagueness. Defining an explosive as a substance that burns at a rate in excess of from 5.08 to 101.6 mm/s not only ignores the requirement on remand for ATFE to define a *deflagration* burn rate, but it is also hardly constitutes the "concrete standard" the Court in *Tripoli 2* required. Instead, such a vague standard requires precisely the kind of "unbounded comparative analysis" criticized in *Tripoli 2*. *Tripoli 2* at p. 82.<sup>6</sup>

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<sup>6</sup> Also, as pointed out in Plaintiffs' Memorandum (at pp. 12-13), scientifically valid burn rates for APCP, derived directly from ATFE's own data on APCP burn durations, are in the range of from 4.25 to 7.33 mm/second. These APCP burn rates are not clearly distinguishable from the safety fuse burn rates of from 5.08 to 101.6 mm/second. The APCP manufacturer's burn rates of from 2.79 mm/second to 8.38 mm/second, AR at p. 00164, likewise are not clearly distinguishable. ATFE goes to some length to criticize the manufacturer's burn rate data, Memorandum at p. 12, but these are *post hoc* arguments of counsel. In fact, as pointed out in

**G. Other Problems**

Plaintiffs' Memorandum explains why ATFE's October 13, 2006 decision is arbitrary and capricious on additional grounds, including its failure to consider an important part of the problem before it (Plaintiffs' Memorandum at pp. 11-13) and its dissimilar treatment of apparently similar materials like paper (Plaintiffs' Memorandum at p. 14).

**H. Conclusion**

ATFE's cross-motion for summary judgment on count one must be denied; Plaintiffs' cross-motion for summary judgment on count one should be granted.

**II. COUNTS FOUR AND FIVE ARE NOT MOOT**

Counts four and five of Plaintiffs' Third Amended Complaint allege that ATFE's regulation of individuals who purchase and store hobby rockets that use more than 62.5 grams of APCP, either in a single fuel grain (count four) or as smaller fuel grains that are intended be used with other grains so as to add up to more then 62.5 grams of APCP when used (count five) is "arbitrary, capricious, an abuse of discretion, and/or not in accordance with law" because ATFE "did not provide the public with reasonable notice of, or an opportunity to comment on," its decision to regulate such activities. Third Amended Complaint at pp. 16-17.

On August 11, 2006, ATFE completed a rulemaking on these issues. 71 Fed. Reg. 46079. ATFE argues that Plaintiffs' counts four and five are now moot. ATFE Memorandum at pp. 15-19. ATFE would be right if the referenced rulemaking afforded Plaintiffs an adequate opportunity to comment, but it did not. Therefore, ATFE's motion for summary judgment cannot be granted.<sup>7</sup>

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Plaintiffs' Motion for Summary Judgment on Count One (at p. 13), ATFE made no effort to analyze *any* data that would undercut its determination to classify APCP as an explosive.

<sup>7</sup> Plaintiffs did not move for summary judgment on counts four and five because ATFE had not filed its administrative record with the Court on these issues. However, Plaintiffs do not object

ATFE's notice of proposed rulemaking announced simply that "[s]ection 55.141 is being amended by revising paragraph (a) (7) to clarify the items exempt from the [licensing] requirements of part 55." 68 Fed. Reg. 4406, 4413 (January 29, 2003). The proposed rule text then included the 62.5-gram exemption language in section 55.141(a)(7)(v). ATFE offered no reasons whatsoever for its proposal, which is nothing short of amazing since ATFE was surely aware that Plaintiffs and others had long disputed the basis for both limiting the exemption to 62.5 grams and excluding smaller fuel grains adding up to more than 62.5 grams when used as intended from the 62.5-gram exemption.

This required Plaintiffs and others filing comments to guess at what reasons ATFE had in mind. Still, NAR filed extensive and thoughtful comments directed at what NAR *thought* ATFE might have in mind. In the end, however, the public rulemaking turned out to be a sham. ATFE refused to expand the scope of the exemption because "to raise the exemption threshold beyond 62.5 grams would pose an increased threat to public safety and homeland security." 71 Fed. Reg. 46079, 46084, August 11, 2006. This conclusion was said to be based on test results of rockets powered by motors with more than 62.5 grams of APCP. No details were provided about these test results because they were supposedly "classified." *Id.*

"Notice of a proposed rule must include sufficient detail on its content and basis in law and evidence to allow for meaningful and informed comment." *American Medical Ass'n, v. Reno*, 57 F. 3d 1129, 1132 (D.C. Cir. 1995). "[I]t is especially important for the agency to identify and make available technical studies and data that it has employed in reaching the decisions to propose particular rules. To allow the agency to play hide the peanut with technical information, hiding or disguising the information that it employs, is to condone a practice in which the agency treats what should be genuine interchange as mere bureaucratic sport. An

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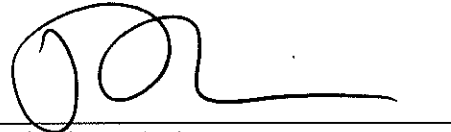
to the Court deciding ATFE's motion based on the notices of proposed and final rulemaking published by ATFE.

agency commits serious procedural error when it fails to reveal portions of the technical basis for a proposed rule in time to allow for meaningful commentary.” *Connecticut Light and Power Company v. NRC*, 673 F.2d 525, 530-31 (D.C. Cir. 1982).

Since ATFE neither offered any rationale for its proposed rule, nor offered any meaningful opportunity to comment on the technical information it relied on to find a threat to public safety or homeland security, its refusal to expand the 62.5-gram exemption was (in the language of counts four and five) “arbitrary, capricious, an abuse of discretion, and/or not in accordance with law” because ATFE “did not provide the public with reasonable notice of, or an opportunity to comment on,” its decision.

In sum, the rulemaking cited by ATFE did not moot Plaintiffs’ counts four and five.

Respectfully submitted,



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COUNSEL FOR PLAINTIFFS

Dated: March 16, 2007

**CERTIFICATE OF SERVICE**

I hereby certify that on this 16<sup>th</sup> day of March, 2007, the foregoing Plaintiffs' Opposition To Defendant's Renewed Motion for Summary Judgment was filed electronically using the Court's CM/ECF system, which will automatically send email notification of such filing to the following attorneys of record:

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



A handwritten signature in black ink, consisting of a large, stylized 'M' followed by a checkmark-like flourish.

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Martin G. Malsch

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

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TRIPOLI ROCKETRY ASSOCIATION, INC.,	)	)	
and NATIONAL ASSOCIATION OF	)	)	
ROCKETRY,	)	)	
	)	)	
Plaintiffs,	)	)	
	)	)	
v.	)	)	
	)	)	
U.S. BUREAU OF ALCOHOL, TOBACCO,	)	)	Civil Action No. 00-273 (RBW)
FIREARMS, AND EXPLOSIVES,	)	)	
	)	)	
Defendant.	)	)	
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**PLAINTIFFS' COUNTER STATEMENT  
OF MATERIAL FACTS IN GENUINE DISPUTE**

Local Civil Rule 7(h) requires that a party opposing a motion for summary judgment file a statement of material facts which it believes must be litigated, with supporting citations. However, in a judicial review case such as the instant one, there are only questions of law. Nevertheless, to assist the Court in reaching an informed and expeditious decision, Plaintiffs submit the following response to Defendant's Statement of Material Facts Not in Genuine Dispute.

1. No dispute.
2. No dispute.
3. No dispute. However, as noted in Plaintiffs' Memorandum (at pp. 3-4), there is a separate and broader definition of explosives for criminal purposes
4. No dispute.

5. Dispute: whether APCP burns “very quickly” or “deflagrates” when used for its primary or common purpose as the propellant in Plaintiffs’ members’ hobby rocket motors goes to the heart of the dispute over count one in Plaintiffs’ Third Amended Complaint. For the reasons given in Plaintiffs’ Memorandum of Points and Authorities in Support of Motion for Summary Judgment on Count One (Plaintiffs’ Memorandum”), filed January 31, 2007, Defendant’s (“ATFE’s”) decision on remand that APCP is an explosive is arbitrary, capricious, and contrary to law because, among other reasons, ATFE never properly defined a threshold burn rate for deflagration and, therefore, did not properly determine that APCP deflagrates.

6. Dispute in part: As explained in Plaintiffs’ Memorandum, there is no basis for the proposition that Congress included safety fuses within the definition in 18 U.S.C. § 841 (d) because they deflagrated. Instead, as explained in plaintiffs’ Memorandum (at pg. 10), safety fuses were included not because they were explosives but because they were and are used to initiate an explosion in other materials. *See also* Administrative Record (“AR”) at pp. 00868, 02089.

7. Dispute in part: The AR indicates that ATFE tested only a few safety fuses and ignored others. Plaintiffs’ Memorandum shows (at pg. 10) that safety fuses burn at rates from 5.08 mm/second to 101.6 mm/second.

8. Dispute: For the reasons given in Plaintiffs’ Memorandum (at pp. 11-14), ATFE’s burn rate test results for APCP ignored an important part of the problem, ATFE could not validly distinguish the burning rates of APCP and ordinary paper, and ATFE failed to consider contrary data in the record.

9. Dispute: For the same reasons as paragraphs 6-8. Moreover, classifications of APCP by other agencies are irrelevant because such agencies do not apply the definition in 18 U.S.C. § 841 (d).

10. No dispute.

11. Dispute in part: For the reasons given in Plaintiffs' Opposition to Defendant's Renewed Motion for Summary Judgment (at pp. 6-8), the referenced rulemaking did not afford the legally required opportunity to comment and therefore the final rule was not "the product of thorough notice-and-comment-rulemaking."

12. No dispute.

Respectfully submitted,

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