

Aviation Administration, plaintiffs' arguments are overly simplistic and attempt to prove too much. By implying that if APCP is an explosive, then paper towels and newspaper (which plaintiffs claim burn more rapidly than APCP) must be as well, plaintiffs' motion ends up demonstrating the obvious need for informed and expert discretion in the classification of explosives to avoid absurd results. Congress has delegated that discretion to ATF, not to plaintiffs. Because the administrative record shows that ATF considered relevant information and reached rationale conclusions, its classification of APCP as an explosive should be upheld, not second-guessed.

Plaintiffs' motion for summary judgment should be denied for the reasons set forth below, and defendant's motion should be granted. A statement of genuine issues in dispute with respect to plaintiffs' motion is attached. As an initial matter, defendant notes that it is not now nor has it ever in the course of this litigation challenged plaintiffs' standing to bring this action. Indeed, the only issue even tangentially related to plaintiffs' injury is defendant's broader obligation to the entire public -- and not just the members of plaintiffs' organizations -- to classify substances based on their chemical properties and common or primary purpose. That duty is beyond question here.

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). “A fact is ‘material’ if a dispute over it might affect the outcome of a suit under governing law; factual disputes that are ‘irrelevant or unnecessary’ do not affect the summary judgment determination.” Holcomb v. Powell, 433 F.3d 889, 895 (D.C. Cir. 2006). 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 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. Department 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). “The scope of review under the ‘arbitrary and capricious’ standard is narrow and a court is not to substitute its judgment for that of the agency.” Mount Royal Joint Venture v. Kempthorne, --- F.3d ----, 2007 WL 489221, at *5 (D.C. Cir. Feb. 16, 2007). However, 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. American 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.

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." Citizens to Preserve Overton Park, 401 U.S. 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 (AR II) filed on October 31, 2006 [Docket Entry No. 94]. When reviewing the record, the "question ... is not whether record evidence supports [petitioners'] version of events, but whether it supports [the agency's]." Arizona Corp. Comm'n v. FERC, 397 F.3d 952, 954 (D.C. Cir. 2005). A court should review the scientific judgments of an agency "not as a 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. 1976). When reviewing the administrative record, it is

not [the Court's] function to resolve disagreements among the experts or to judge the merits of competing expert views. Our task is the limited one of ascertaining that the choices made by the [agency] were reasonable and supported by the record. That the evidence in the record may also support other conclusions, even those that are inconsistent with the [agency's], does not prevent us from concluding that [its] decisions were rational and supported by the record.

American Trucking Associations, Inc. v. EPA, 283 F.3d 355, 362 (D.C. Cir. 2002).

Deference to the agency is due even if the agency's interpretation is not the only possible one. OSG Bulk Ships, Inc. v. United States, 132 F.3d 808, 814 (D.C. Cir. 1998).

Although the D.C. Circuit was unwilling to accord ATF any deference previously, its

reason for declining to do so was based solely on an inability to discern the agency's reasoning. Tripoli, 437 F.3d at 77. Now that the agency has conducted tests, established a range of reactions rates for deflagrating materials consistent with 18 U.S.C. § 841(d), and better explained its conclusion that APCP is properly classified as an explosive, deference is due.

B. ATF Complied with the Terms of the Remand

The Court of Appeals remanded this case back to this Court to provide ATF an opportunity to “define[] a range of velocities within which materials will be considered to deflagrate.” Tripoli Rocketry Ass’n, Inc. v. ATF, 437 F.3d 75, 81 (D.C. Cir. 2006). The D.C. Circuit indicated:

that it may be necessary for ATF[] 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.

Id. ATF accomplished this by testing a variety of items enumerated in the statute as explosives and establishing the range of their reaction rates. As shown by the supplemental administrative record, ATF complied with the remand by working with the United States Air Force Research Laboratory¹ to determine whether

¹ Although not in their “Argument” Section, plaintiffs complain that the “expert qualifications” of ATF experts John Hawk and Robert J. Dinan, among others, “in the area of rocketry or explosives, if any, are not specified.” Tripoli Motion for Summary Judgment at 7. Apparently, plaintiffs are suggesting that ATF is required to specify or establish in the administrative record the qualifications of its own experts. Plaintiffs provide no case law for this proposition. To the contrary, the Supreme Court has held that “an agency must have discretion to rely on the reasonable opinions of its own qualified experts even if, as an original matter, a court might find contrary views more persuasive.” Marsh v. Oregon Natural Resources Council, 490 U.S. 360, 378 (1989); see also Sabine River Auth. v. United States Dep’t of the Interior, 951 F.2d 669, 678 (5th Cir. 1992). In an analogous case involving an insurance company’s denial of an ERISA claim, plaintiff complained that the physicians rendering expert opinions for the defendant were not “Daubert qualified;” the reviewing court held that Daubert governs the admissibility of expert opinions at trial, not qualifications relied upon by administrators making decisions in the underlying administrative record. See Dowdy v. Hartford Life & Accident Ins. Co., 458 F. Supp. 2d 289, 302 n.13 (S.D. Miss. 2006) (holding that, where reports of various physicians were made a part of an administrative record, the only

APCP “burn[s], or more accurately deflagrate[s], in absence of atmospheric oxygen, including when confined.” Agency Decision at 2. ATF then tested and compared the “burn” or “reaction” rates² of APCP with materials defined as explosives in 18 U.S.C. § 841(d) (including two black powder rocket motors) and APCP in five types of hobby rocket motors. Finally, ATF measured the atmospheric burning of some materials (*i.e.*, paper and candles) that do not meet the definition of explosives as a reference point. See Mem. in Support of Def.’s Motion for Partial Summary Judgment (“ATF MSJ”) at 10-11, 12.

1. ATF has established a concrete standard for deflagration

Plaintiffs’ claim that ATF failed to “articulate a concrete standard for deflagration,” see Tripoli Motion for Summary Judgment (Tripoli MSJ) at 9, is simply incorrect. The *minimum* reaction rate for deflagration established in ATF’s test is 7.5 millimeters per second (mm/sec). See Agency Decision at 3 (“ATF developed test protocols ... [that] provided a general lower limit for the reaction/burning rate of typical low explosive materials (safety fuse at approximately 7.5 millimeters per second.”)). For the reasons described below, safety fuse is an appropriate baseline to establish the floor for burn or reaction rates for deflagrating materials. With respect to APCP in particular, ATF’s testing revealed that APCP’s burn rate was 36-143 mm/sec. Id. at 4. ATF’s reaction rates are corroborated by the similar ranges for hobby rocket motors reported by manufacturers (22-143 mm/sec.). See ATF MSJ at 11. Although the manufacturers do not specify whether their figures are based on linear or radial tests, it would appear likely

question for the court is whether there is substantial evidence in the record to support insurance company denial of benefits under ERISA, not whether the physicians were qualified under Daubert).

² Throughout the pleadings and administrative records filed in this case, the terms “burn rate” and “reaction rate” are used interchangeably.

that even the manufacturers of these items use linear. In any event, the comparable rates are above the lower floor of 7.5 mm/sec, refute the data proffered by plaintiffs, and strongly support the validity of ATF's methodology.

In sum, contrary to plaintiffs' characterizations, ATF did establish a concrete reaction-rate standard for materials that deflagrate, as instructed by the Court of Appeals.

2. The use of safety fuses was reasonable and appropriate

a. Safety fuses are explosives

Plaintiffs first allege that "safety fuses clearly are not an explosive per se." Tripoli MSJ at 10, and argue that safety fuse is instead used "to initiate an explosion in other explosives materials," id. (citing to AR II at 02089).

However, *Congress* expressly identified "safety fuse" as an example of an "explosive" in 18 U.S.C. § 841(d) (defining explosives to include "initiating explosives, detonators, *safety fuse*, detonating cord, igniter cord, and igniters") (emphasis added). See also 27 C.F.R. § 555.202 (defining low explosives as "[e]xplosive materials which can be caused to deflagrate when confined (for example, black powder, *safety fuses*, igniters, igniter cords, fuse lighters...")) (emphasis added); AR II at 66. Moreover, safety fuse has a core of black powder. See AR II at 2089. Congress also identified "black powder" as an explosive in 18 U.S.C. § 841(d). See also Affidavit of David S. Shatzer ("Shatzer Aff."), ¶ 4 (attached hereto).

While safety fuses can initiate additional explosions, they remain explosives in and of themselves by definition. Indeed, other explosives specifically identified by Congress function by initiating an explosion. For example, Congress also included "igniters" in the definition of explosive found in 18 U.S.C. § 841(d). Igniters are

“[a]rticles containing one or more *explosive substances*.” AR II at 2089 (emphasis added); Shatzer Aff. ¶ 4.

Finally, ATF’s statement that safety fuse burns at a predetermined rate “without any explosive effect” refers to the fact that it is designed to prevent any sparks or visible external explosive effects from accidentally initiating nearby explosive materials. See AR II at 1561 (ISEE Blaster’s Handbook, 17th Ed., 1988, p. 159); Shatzer Aff. ¶ 5.

b. Safety fuses are reasonable benchmarks for establishing the 7.5mm/sec lower limit for deflagration

Plaintiffs object to ATF’s choice of safety fuses as a benchmark in establishing the lower limits for deflagration. See Tripoli MSJ at 9-11. Safety fuses were chosen in part because they are expressly defined by statute as explosives. See 18 U.S.C. § 841(d); Agency Decision at 2. Additionally, they are “typical low explosive materials” or “deflagrating” materials that as a general matter have among the slowest reaction rates of explosives tested. Agency Decision at 2, 3. As such, their reaction rates are useful in determining the general floor of reaction rates for deflagrating explosives:

The speed of reaction is one factor used in determining the category of explosives (high, low, or blasting agent) for storage purposes. An example of a relatively slowly reacting explosive that we selected to evaluate is safety fuse. Safety fuse, as tested, reacts at approximately 7.5 millimeters per second, and this is not the slowest-reacting explosives. The explosives listed in 18 U.S.C. § 841(d) represent speeds from several millimeters per second to tens of kilometers per second.

Id. at 2.

In determining the reaction rate of safety fuse, ATF was establishing a floor threshold – that is to say, a minimum reaction rate at which a material could be said to deflagrate (explode). This approach was necessary and proper to cure the defect, identified by the Court of Appeals, that ATF had “articulated no standard whatsoever for

determining when a material deflagrates.” 437 F.3d at 84. Because Congress has listed “safety fuses” as explosives (i.e., all safety fuse), see 18 U.S.C. § 841(d), ATF may reasonably set the threshold at which materials deflagrate (explode) at the low end of reaction rates associated with safety fuse. For reaction rates above the floor, ATF retains the discretion to consider other factors bearing on the nature of the item under consideration.

ATF in fact tested safety fuse with a slow reaction rate, relative to the range of safety fuse reaction rates presented by the plaintiffs. Because ATF is setting a floor reaction rate, it is not required (or even sensible) for ATF to test faster reacting safety fuse. Moreover, the floor reaction rate of safety fuse at 7.5 mm/s is not inconsistent with the safety fuse reaction rates determined by other explosives experts. See AR II at 1561 (ISEE Blaster’s Handbook, 17th Ed., 1998, pp. 158-59, stating that safety fuse with an approximate burning rate of 131 sec/meter [7.63 mm/sec] is an industry standard for commercial safety fuse in North America); id. at 141 (showing military safety fuse had a burn rate of approximately 7.3 mm/sec). Choosing a rate that is an industry standard is eminently reasonable and practical. Safety fuses, like almost all commercially produced explosives, explode at a controlled rate as designed by the manufacturer for the purpose intended, and thus present a wide variety of reaction rates. See Shatzer Aff. ¶¶ 6-7.

On the other hand, ATF arguably could have attempted to identify the safety fuse having the slowest possible reaction rate. However, the fact that ATF did not do so does not invalidate its test or its conclusion. First, an agency is not required to exhaustively consider all possible data, so long as its assessment is reasonable. See Arizona Corp. Comm’n, 397 F.3d at 954 (agency decisions should not be set aside merely because the

agency's "investigation ... could have been more searching," and its "decision does not lack substantial evidence simply because petitioners offered some contradictory evidence."); Pacific Shores Subdivision, California Water Dist. v. United States Army Corps of Engineers, 448 F. Supp. 2d 1, 7 (D.D.C. 2006) (when making a decision an agency "is not obligated to include every potentially relevant document existing within its agency. ... It is the [agency] that did the 'considering,' not [plaintiff].") (internal citation omitted); Fund for Animals v. Williams, 391 F. Supp. 2d 191, 197 (D.D.C. 2005) ("[A]n agency may exclude arguably relevant information that . . . may be available from third parties."). Using two ordinary safety fuses, about which plaintiffs offer no precise objections, is reasonable in light of the purposes of ATF here.

Second, to the extent that ATF might have set its floor reaction rate somewhat lower (based on testing a safety fuse with a reaction rate even slower than that tested by ATF), having not done so, its threshold is under inclusive, and not over inclusive. Plaintiffs plainly suffered no harm if ATF set the floor too high.

C. ATF's Determination on Remand Considered the Relevant Factors

Plaintiffs also allege that ATF "failed to consider an important aspect of the problem" by calculating burns rates by using a linear method, see Tripoli MSJ at 11, 12, and failed to consider contrary data in the form of its own expert report and a test conducted by NASA, see id. at 13.³ Plaintiffs' criticisms of the testing methods and

³ Plaintiffs also find fault with ATF's testing of the G40-10W rocket motor; plaintiffs allege that the failure of the G40-10W rocket motor was "not surprising" and "shows that the APCP immediately stopped burning when the motor casing ruptured, something definitely not characteristic of an explosive." Tripoli MSJ at 8, n.4. However, by definition, low explosives are "explosive materials which can be caused to deflagrate *when confined*." 27 C.F.R. § 555.202(b)(emphasis added); see also AR II at 2088 (A "deflagration reaction" is the "[i]gnition and burning of the *confined* energetic materials ... The case might rupture ... and *unburned* or burning energetic material might be thrown about. . . .") (emphases added); Shatzer Affidavit ¶ 8. As an example, when a pipe bomb explodes, unburned propellant remains on or in the pipe. See id. ¶ 9.

calculations and the fact that ATF did not discuss the burn rates offered by plaintiffs at length in the decision fail to carry their burden of showing arbitrary or capricious decision-making.

1. The Calculation of Burn Rates

Plaintiffs claim that ATF's calculations of APCP burn rates were fatally flawed in that ATF used "linear" burn rates, that is, "observing the total time APCP burned... and then dividing the total length of the rocket grain specimen by the burn duration." Tripoli MSJ at 11. Plaintiffs allege that the "scientifically valid burn rate" is achieved by using not a "linear" but rather a "radial" burn rate. Id. at 12. Using this rate, plaintiffs determined that the reaction rates of APCP are "4.25 to 7.33 mm/s, not the 36 to 145 mm/s" as determined by ATF. Id. at 13.⁴ Plaintiffs conclude that the correct burn rate is 4.25-7.33 mm/s, and that, since ATF used the "wrong dividend... its reported burn rates are blatantly scientifically invalid." Id.

Contrary to plaintiffs' assertions, defendant's methodology for calculating the burn rate - the "linear" method - is a valid method. Shatzer Aff. ¶ 10. The linear method was utilized because safety fuses—the benchmark—burn linearly. Additionally, common everyday items burned by ATF as a reference point also burn linearly. Therefore, in order to have the most meaningful comparison to a variety of low explosives, the linear rate was utilized. Moreover, this burn rate is a reasonable, repeatable method, which can readily be compared to other low explosives with linear burn rates. Id. ¶ 11. This methodology produced an APCP burn rate of 36 to 143 mm per second, Agency Decision at 4.

⁴ ATF actually determined the reaction rate to be 36 to 143 mm/s. See Agency Decision at 4.

On the other hand, plaintiff's radial burn rate is of limited use; it is useful for comparing other propellants of similar shapes and compositions (i.e., rocket motors), under similar test conditions, but does not adequately address all the burning that takes place on the exposed surfaces of the uniform, non-porous APCP motor grains. Shatzer Aff. ¶ 12. Plaintiffs cite to Piobert's Law to support their opinion that the radial burn rate is the correct methodology to apply in calculating burn rates. See Tripoli MSJ at 12, n.6. However, even if applicable, the use of Piobert's Law would require the plaintiffs to concede that APCP is an explosive as this principle applies only to deflagrating explosive materials, and is not dependent on reaction speeds. Shatzer Aff. ¶ 13. Utilizing a scientific test procedure that automatically defines APCP as an explosive to determine whether APCP is an explosive would not have been an objective test.

Assuming that plaintiffs' methodology for calculating the burn rate – the “radial method”—is valid, or for purposes of this argument, even “better” than the linear method, does not require a finding that ATF's “conflicting views” are invalid. “When specialists express conflicting views, an agency must have discretion to rely on the reasonable opinions of its own qualified experts even if, as an original matter, a court might find contrary views more persuasive.” Marsh v. Oregon Natural Resources Council, 490 U.S. 360, 378 (1989); see also id. at 385 (The Court ultimately found that the Army Corp of Engineers' decision, “although perhaps disputable, was not ‘arbitrary and capricious.’”); Thomas Jefferson Univ. v. Shalala, 512 U.S. 504, 512 (1994) (“Our task is not to decide which among several competing interpretations best serves the regulatory purpose. Rather, the agency's interpretation must be given ‘controlling weight unless it is plainly erroneous or inconsistent with the regulation.’”); Florida Cellular Mobile Commc'ns

Corp. v. FCC, 28 F.3d 191, 197 (D.C. Cir. 1994) (“When reviewing agency decisions, this court does not require agencies to justify their actions as the ‘most appropriate’ under the circumstances ... The court’s duty is to ensure that the [agency] has ‘examined the relevant data and articulated a satisfactory explanation for its action’ based on the materials that were before the [agency] at the time its decision was made.”) (internal citations omitted).

The “question ... is not whether record evidence supports [petitioners’] version of events, but whether it supports [the agency’s].” Arizona Corp. Comm’n v. FERC, 397 F.3d at 954. The court’s “task is the limited one of ascertaining that the choices made by the [agency] were reasonable and supported by the record. That the evidence in the record may also support other conclusions, even those that are inconsistent with the [agency’s], does not prevent us from concluding that [its] decisions were rational and supported by the record.” American Trucking Associations, Inc., 283 F.3d at 362; see also Small Refiner Lead Phase-Down Task Force v. United States EPA, 705 F.2d 506, 520-21 (D.C. Cir. 1983) (a court “can only require the agency’s reasons and policy choices to conform to certain minimal standards of rationality. If so, the rule is reasonable and must be upheld.”) (internal quotation marks and citation omitted). ATF is only required to show evidence that it considered appropriate information and that its decision has a rational basis. See Citizens to Preserve Overton Park, 401 U.S. at 416. This is especially true where, as here, the decision involves the application of technical, engineering and scientific expertise, mandating special deference to the agency. See Federal Power Comm’n v. Florida Power & Light Co., 404 U.S. 453, 463-64 (1972). In this case, ATF has shown—by a scientifically sound and reasonable test—that the

reaction rate of APCP is above the minimum rate of a safety fuse—included by Congress as an example of explosives—and that APCP’s other characteristics are consistent with its classification as an explosive.

2. The Plaintiffs’ Expert’s Report and NSWC Test

Plaintiffs’ expert report was part of the Supplemental Administrative Record and as such, was considered by ATF. See ATF MSJ at 12-13. However, for the reasons previously articulated in the Motion for Summary Judgment, ATF did not find the plaintiffs’ report persuasive.⁵ Id. Furthermore, plaintiffs’ expert concedes that he did not actually conduct any tests on APCP products. See AR II at 163 (stating that “[t]hese propellants were not physically tested for this project”). The report also provided no references regarding the test procedures, methodology, conditions or standards employed to arrive at the result. While “an agency decision must take contradictory evidence into account in making its determination,” Bender v. Dudas, No. Civ.A. 04-1301 (RBW), 2006 WL 89831, at *10 (D.D.C. Jan. 13, 2006), consideration of the evidence does not equate to adoption of that evidence. “Where conflicting evidence is before the agency, the agency and not the reviewing court has the discretion to accept or reject from the several sources of evidence. The agency may rely on the expertise of its own people, so long as they express a reasonable opinion.” Sabine River Auth. v. United States Dep’t of the Interior, 951 F.2d 669, 678 (5th Cir. 1992); see also Marsh, 490 U.S. at 378 (“When specialists express conflicting views, an agency must have discretion to rely on the reasonable opinions of its own qualified experts, even if, as an original matter, a court

⁵ Plaintiffs’ report was authored by Dr. McCreary, who provided as a reference a Department of Transportation report indicating that APCP is a low explosive. See Agency Decision at 3, n.6; Shatzer Affidavit ¶ 14.

might find contrary views more persuasive.”). Plaintiffs’ motion is insufficient to disturb the presumption of regulatory.

Plaintiffs also allege that defendant ignored a NASA test of APCP, purportedly concluding that APCP could not deflagrate. Tripoli MSJ at 8. It appears that plaintiffs cite to a report prepared by the U.S. Navy, Naval Surface Warfare Center. ATF did, however, consider this report which concludes that APCP is not only an explosive that commonly deflagrates, but that it also detonates under certain conditions. See AR II at 1458; Shatzer Aff. ¶ 15.

In short, properly viewed, plaintiffs’ strident insistence that ATF’s conclusions are “blatantly scientifically invalid” (Tripoli’s MSJ at 12) amounts largely to a form of scientific mud-slinging without a solid correlation demonstrating that APCP falls outside the range of burn rates established by the agency. Plaintiffs’ incredulity that other items not classified by ATF as explosives might fall within the range of reaction rates disregards the exercise of the discretion delegated by Congress to ATF.

D. The Treatment of APCP and Paper is Not Arbitrary and Capricious

Previously ATF had taken the position that “... the deflagration reaction is *much faster* than the reaction achieved by what is more commonly associated with burning (such as with the burning of a candle or with the burning that occurs in a typical building or forest-fire).” Tripoli, 437 F.3d at 79. As stated above, the Court of Appeals rejected this position because ATF had “articulated no standard whatsoever for determining when a material deflagrates.” Id. at 84. As stated above, the minimum burn rate for deflagration is 7.5 mm/sec. In addition, the Court of Appeals also stated that “ATF’s relational definition suffers from a further methodological flaw: it designates no points of

comparison.” Id. at 82. To remedy this second flaw, ATF used the burning rates of candles and paper as a point of reference. See AR II at 146.

Plaintiffs allege that ATF’s reported range of reaction rates for candles and paper (0.00069-55.8 mm/s), as compared to APCP (36-145 mm/s), demonstrate that the agency has failed to establish adequate standards for “deflagration,” and further, that the dissimilar treatment of APCP and paper in particular is arbitrary and capricious. See Tripoli MSJ at 9-10, 14. Plaintiffs argue that these findings demonstrate that ATF has failed to establish a concrete standard to distinguish “normal burning” from deflagration (explosion). Id.

The range of reaction rates for “non-deflagrating” materials such as candles is 0.00069-0.11 mm/s and paper is 4.2-55.8 mm/s. AR II at 156. The range of reaction rates for “deflagrating” materials is 7.5 mm up to the speed of sound, or approximately 1000 meters per second. See AR I at Tab 6 (Cooper, Introduction to the Technology of Explosives, ix.) Thus, many deflagrating materials do burn “much faster” than paper or candles. The fact that there is some overlap is not fatal to ATF’s classification of APCP. The Court of Appeals recognized that “[w]e understand that it may be necessary for [ATF] to define a range flexibly, accounting for gray areas where expert discretion is necessary to characterize a particular substance.” Tripoli, 437 F.3d at 81. The metric that ATF has established, a low threshold of 7.5 mm/sec, provides an appropriate burn velocity range in establishing this explosives’ classification.

More importantly, however, the data on candles and paper in the Agency Decision were only intended to provide a “reference point” for burning. Agency Decision at 4. As an initial matter, neither of these materials satisfies the statutory definition of explosives

– “any chemical compound[,] mixture, or device, the primary or common purpose of which is to function by explosion...” 18 U.S.C. § 841(d). Further, “[n]either of these materials are considered explosives, regardless of burn rate, because they do not contain a fuel and an oxidizer.” Agency Decision at 4. That is, they do not sustain their own reaction when confined, or with insufficient oxygen. AR II at 156 (ATF Lab Report finding that inverted candle and paper laying flat do not burn). By contrast, APCP is a chemical mixture that contains its own oxygen source and clearly “burned” when confined. Shatzer Aff. ¶ 16; see also Agency Decision at 2 (Explosives are a “mix[tur]e of] fuels and oxidizers that permit them to function in the absence of air, specifically atmospheric oxygen,” “including when confined.”)

In any event, ATF’s differing classifications of APCP, paper and candles is not arbitrary and capricious, but instead establishes a “rational connection between the facts found and the choice made.” Bowen, 476 U.S.at 626; see also York v. Secretary of Treasury, 774 F.2d 417, 420 (10th Cir. 1985) (approving ATF’s classification of a “machine gun”); Gun South, Inc. v. Brady, 877 F.2d 858, 865 (11th Cir. 1989) (upholding ATF’s classification of semiautomatic assault rifles). APCP’s burn rates are similar to those of other statutorily defined low explosives, and APCP is a chemical compound or mixture whose primary or common purpose is to function by explosion, see 18 U.S.C. § 841(d), the purpose of neither paper nor candles is “to function by explosion.” As noted above, the law does not require that an agency’s record be free of conflicting information, just that its decision be rational. Arizona Corp. Comm’n, 397 F.3d at 954-55; Lead Indus. Ass’n, 647 F.2d at 1160.

Thus, ATF's classification of APCP is neither arbitrary nor capricious. But even if the Court remains unconvinced that ATF has explained its reasoning sufficiently, plaintiffs are still not entitled to the drastic remedy they seek. "Under settled principles of administrative law, when a court reviewing agency action determines that an agency made an error of law, the court's inquiry is at an end: the case must be remanded to the agency for further action consistent with the corrected legal standards." PPG Indus. v. United States, 52 F.3d 363, 365 (D.C. Cir. 1995).⁶ Defendant is unaware of any numerical limit on this principle, and the stakes are too high in terms of public safety to remove APCP from the list of explosives precipitously after three decades.

CONCLUSION

For the above reasons, plaintiffs' motion for summary judgment should be denied.

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⁶ See also Florida Power & Light, 470 U.S. at 744 (proper course is to remand to agency for additional investigation or explanation); Vermont Yankee Nuclear Power Corp. v. NRDC, 435 U.S. 519, 549 (1978); Camp v. Pitts, 411 U.S. 138, 143 (1973); SEC v. Chenery Corp., 318 U.S. 80, 94-95 (1943).