UNITED STATES DISTRICT COURT

DISTRICT OF COLUMBIA

CENTER FOR BIOLOGICAL DIVERSITY, PUBLIC EMPLOYEES FOR ENVIRONMENTAL RESPONSIBILITY, and PROJECT GUTPILE, Plaintiffs, vs. LISA P. JACKSON and ENVIRONMENTAL PROTECTION AGENCY, Defendants	Case No.: 10-CV-02007 (EGS) **OPPOSITION TO MOTION TO INTERVENE**

CENTER FOR BIOLOGICAL DIVERSITY, PUBLIC EMPLOYEES FOR ENVIRONMENTAL RESPONSIBILITY, AND PROJECT GUTPILE'S MEMORANDUM IN OPPOSITION TO ASSOCIATION OF BATTERY RECYCLERS, INC.'S MOTION TO INTERVENE AS DEFENDANTS

I. INTRODUCTION

Plaintiffs Center for Biological Diversity, Public Employees for Environmental Responsibility, and Project Gutpile ("Plaintiffs") oppose intervention by the Association of Battery Recyclers, Inc. ("ABR"), both as of right and permissively. ABR seeks to intervene in this action to defend the Environmental Protection Agency's ("EPA") denial of the Plaintiffs' petition to regulate lead shot, bullets, and fishing sinkers under the Toxic Substances Control Act ("TSCA").

This case involves a determination of the health and environmental impacts of lead poisoning. As a result, ABR's alleged economic interests are so remote and

attenuated that it lacks Article III standing and a "significantly protectable interest" necessary to support invention. This case does not concern the lead recycling and reuse interests raised by ABR, and the resolution of this case cannot and will not result in direct and immediate impacts to those interests. ABR has similarly failed to meet its burden to establish that its ability to protect its interests will be impaired or impeded, as it will be free to participate in any future rulemaking proceedings which specifically provide a forum for addressing ABR's interests. It will also have an opportunity to challenge any final EPA rules in the Court of Appeals as provided by TSCA. ABR has also failed to demonstrate that the existing parties will inadequately represent its interests. Finally, the issues ABR seeks to interject in this case will only delay litigation and result in prejudice to the original parties. For these reasons, this Court should deny ABR's motion to intervene. In the event this Court finds ABR may intervene, Plaintiffs request this Court establish limitations to the scope of ABR's intervention in the interest of judicial economy and fairness to the original parties.

II. TSCA PETITION BACKGROUND

TSCA mandates that the EPA regulate chemical substances where there is a "reasonable basis to conclude" that such substances "present an unreasonable risk of injury to health and or the environment." 15 U.S.C. § 2605(a). The EPA may, by rule, regulate a chemical substance by prohibiting its manufacture, processing, or distribution in commerce. *Id.* at § 2605(a)(1)(A). Any person may petition the EPA to initiate a rulemaking proceeding for such a prohibition. *Id.* at § 2620(a). In the event the EPA denies a petition, Congress provides that the *petitioner* is entitled to have the petition considered by a district court in a de novo proceeding. *Id.* at § 2620(b)(4)(B). If the

petitioner-plaintiff demonstrates to the court by a preponderance of the evidence that "there is a reasonable basis to conclude that the issuance of such a rule or order is necessary to protect health or the environment against an unreasonable risk of injury to health or the environment," the court shall order the EPA to initiate a rulemaking. *Id.* at § 2620(b)(4)(B)(ii).

Plaintiffs petitioned the EPA to initiate a rulemaking prohibiting the manufacture, processing, and distribution of lead shot, bullets, and fishing sinkers because these chemical substances pose an unreasonable risk of injury to health and the environment. The petition details the chronic and acute health effects from lead exposure on wildlife and humans. The petition explains that wildlife species are exposed to lead through feeding in aquatic environments and ingesting contaminated vegetation and sediments, feeding on invertebrates or vertebrates containing lead, and ingesting lead pellets or fragments directly, mistaking them for food, grit, or bone. The petition also describes the ways in which humans are impacted, whether through accidently directly ingesting lead fragments in meat tissue, from airborne lead that is created by friction from lead slugs against gun barrels, or ingestion of lead residue after handling lead bullets.

Although the EPA has declared lead a toxic substance, *see* 15 U.S.C. §§ 2581-2692 and 40 C.F.R. 716.21(a)(8), in denying Plaintiffs petition, it claimed that it does not have the authority to regulate lead shot and bullets, and that regulating lead fishing tackle is unnecessary and not the least burdensome alternative to adequately protect health and the environment. Therefore, Plaintiffs seek a de novo review of the petition. If this Court finds that an EPA rule is necessary to protect health or the environment against an unreasonable risk of injury from lead shot, bullets, or fishing sinkers, it can order the

EPA to initiate such a rulemaking. In promulgating such a rule, the EPA would proceed in accordance with the Administrative Procedure Act ("APA") § 553, which governs rulemaking, and would allow interested persons to submit written data, views, and arguments, and provide an opportunity for an informal hearing. 15 U.S.C. § 2605(c)(2). The EPA would then also consider "the reasonably ascertainable economic consequences of the rule, after consideration of the effect on the national economy, small business, technological innovation, the environment, and public health." *Id.* at § 2605(c)(1)(D). Upon issuance of an EPA final rule, any person may file a petition for judicial review of such a rule with the U.S. Court of Appeals. *Id.* at § 2618(a)(1)(A).

III. STANDARD OF REVIEW

Federal Rule of Civil Procedure 24(a) and D.C. Circuit precedent instruct courts to grant intervention as of right to applicants who demonstrate: (1) the timeliness of the motion; (2) a protectable interest relating to the property or transaction which is the subject of the action; (3) an impairment of the applicant's ability to protect that interest; and (4) inadequate representation by the existing parties. *Fund for Animals v. Norton*, 322 F.3d 728, 731 (D.C. Cir. 2003).

In addition, in the D.C. Circuit, an applicant for intervention as of right must establish standing. *Wash. Teachers' Union, Local #6 v. AFT*, Civ. Action No. 10-1387, 2010 U.S. Dist. LEXIS 112710, *19-20 (D.D.C. Oct. 22, 2010); *Citing Mova Pharm. Corp. v. Shalala*, 140 F.3d 1060, 1074 (D.C. Cir. 1998). In doing so, an applicant must at minimum show (1) an injury-in-fact; (2) causation; and (3) redressability, *Lujan v. Defenders of* Wildlife, 504 U.S. 555, 561 (1992). Specifically, the applicant must have suffered harm that is "concrete and actual or imminent, not conjectural or hypothetical,"

Environmental Defense v. Leavitt, 329 F. Supp. 2d 55, 66 (D.D.C. 2004), and the interest harmed must fall within the zone of interests intended to be protected by the statute. *Bennett v. Spear*, 520 U.S. 154, 175-76 (1997). The absence of any one factor – in either the standing or FRCP 24(a) determination – is fatal to the application for intervention as of right.

Furthermore, courts have discretion under FRCP 24(b) to allow permissive intervention upon the applicant's timely motion showing (1) an independent grounds for subject mater jurisdiction; and (2) a claim or defense with a common question of law or fact with the main action. *Equal Emp't Opportunity Comm'n v. Nat'l Children's Ctr.*, 146 F.3d 1042, 1046 (D.C. Cir. 1998). Courts must also consider whether the permissive intervention will unduly delay or prejudice the original parties. *Id.* 1048; FRCP 24(b)(1)(B).

Finally, intervention "may be subject to appropriate conditions or restrictions responsive among other things to the requirements of efficient conduct of the proceedings." Advisory Committee Notes to the 1966 Amendments to the FRCP; *see also* Wright, Miller & Kane, FEDERAL PRACTICE AND PROCEDURE, Vol. 7C, § 1913 at 391-92; *Smuck v. Hansen*, 408 F.2d 175, 180 (D.C. Cir. 1969)(holding the nature of the applicant's interest "may play a role in determining the sort of intervention which should be allowed."). Therefore, a court granting intervention may limit the intervention as appropriate.

IV. ARGUMENT

ABR seeks to intervene as of right or permissively in all aspects of the case, despite failing to articulate a direct, imminent harm to a legally protectable interest, or

demonstrate that existing parties will provide inadequate representation. ABR's intervention in this case will only cause delay and prejudice the original parties by interjecting issues not relevant to the Court's consideration. For these reasons, Plaintiffs ask that the Court deny intervention. If, however, the Court finds intervention warranted, Plaintiffs ask the Court to limit ABR's intervention to promote judicial economy and fairness to the original parties.

A. ABR is Not Entitled to Intervention as of Right

1. ABR Does Not Have Standing to Participate in this Action

The interests alleged by ABR in support of its motion to intervene are not sufficient to confer Article III standing. ABR's alleged interests are in its membership's ability to recover and recycle lead products, as well as process and produce lead for use in other products. It is unclear from ABR's declaration and memorandum in support of its motion to intervene whether any of its members would ever be the subject of any future EPA rulemaking associated with this litigation, i.e. whether ABR's members actually manufacture, sell, or distribute lead bullets, shot, or fishing sinkers.[1] Because ABR cannot articulate an imminent injury, fairly traceable to the present action, ABR does not have standing to intervene in this action.

First, ABR has not shown it will suffer imminent, concrete injuries as a result of this litigation. In support of its motion to intervene, ABR claims that its members "produce and process lead that are *reasonably likely* to be incorporated into consumer products, including lead bullets and shot and lead fishing sinkers," Memorandum in

[1] Although its motion states "Members of ABR also recycle and manufacture these products" at 2, ABR's memorandum and declaration in support of its motion provide no details or support for this statement.

Support of Mot. to Intervene ("Memo") at 6, and that "lead produced and processed by ABR members are *sold for use in products* to consumers, including lead bullets and shots and lead fishing sinkers." Cornette Decl. at 4 (emphasis added). Such injuries are too speculative and remote as to amount to an injury-in-fact. Based on the interests asserted in ABR's memorandum and declaration in support of intervention, any potential changes to the ammunition or fishing sinker industry would only have an indirect impact on ABR's interests. Therefore, ABR lacks the necessary injury-in-fact to satisfy standing.

Second, ABR cannot point to an imminent, concrete injury that is causally related to the resolution of this action. If Plaintiffs prevail and obtain all the relief they have requested, the Court would order the EPA to initiate a rulemaking proceeding. Even if EPA eventually completes a rulemaking that prohibits lead in shot, bullets, or fishing sinkers, it is unclear how and whether ABR's interests will be affected. ABR's alleged interests are in collecting those products to recycle and providing the material for the production of those products. Even if any of ABR's members actually produce the products, such a connection is too attenuated to the present litigation.

ABR is also unable to satisfy the redressability prong of standing. The only question before this Court is whether there is a reasonable basis to conclude that the issuance of a rule prohibiting the manufacture, processing, or distribution of lead shot, bullets, and fishing sinkers is necessary to protect health or the environment against an unreasonable risk of injury. If this Court determines there is a reasonable basis, it must then order the EPA to initiate a rulemaking proceeding; this Court does not itself have the authority to regulate lead, and any future rulemaking associated with the petitioned action

may not even result in the direct regulation of ABR's membership. Because ABR's injuries do not arise from this litigation, this Court cannot redress ABR's alleged injuries.

ABR has failed to demonstrate that its alleged interests fall within the zone of interests intended to be protected by the provision of TSCA invoked by plaintiffs in this litigation. ABR's reliance on *Bennett v. Spear* and *Environmental Defense Fund, Inc. v. EPA*, 636 F.2d 1267 (D.C. Cir. 1980) for support that intervenors' interests fall within the zone of interests in TSCA suits is misplaced. The Supreme Court in *Bennett v. Spear* held that the zone of interests test "is to be determined not by reference to the overall purpose of the Act in questions…but by reference to the particular provision of law upon which the plaintiff relies." *Bennett v. Spear* at 175-76. Also relevant here, the plaintiffs in *EDF v. EPA* brought suit under section 2618(a) of TSCA which provides that "any person may file a petition for judicial review" of a rule promulgated by the EPA in the court of appeals. *EDF v. EPA* at 1274. While the D.C. Court of Appeals did not provide analysis of its intervention determination, a key distinction here is that unlike the plaintiffs in *EDF v. EPA*, Plaintiffs in the present action bring this litigation under section 2620(b)(4)(B) of TSCA which provides that "the petitioner may commence a civil action in a district court of the United States to compel the Administrator to initiate a rulemaking proceeding as requested in the petition." While TSCA permits any person to petition the EPA to initiate a rulemaking, only the petitioner may commence a civil action to compel that initiation. *Id.* For these reasons, ABR's interests do not fall within the zone of interests intended to be protected by this provision of TSCA.

2. ABR Does Not Have a Legally Protected Interest in this Action

Intertwined with the standing analysis is FRCP 24(a)(2)'s requirement that an applicant demonstrate it has a legally protected interest for the purpose of intervention. *Jones v. Prince George's County*, 348 F.3d 1014, 1018-19 (D.C. Circuit 2003) (holding where an applicant "has suffered a cognizable injury sufficient to establish Article III standing, she also has the requisite interest under *Rule 24(a)(2)*"). The D.C. Court of Appeals has further defined a legally protectable interest as one that is "of such a direct and immediate character that the intervenor will either gain or lose by the direct legal operation and effect of the judgment." *United States v. American Telephone and Telegraph* Company, 642 F.2d 1285, 1292 (D.C. Cir. 1980), *quoting Smith v. Gale*, 144 U.S. 509, 518 (1892).

The EPA's denial of Plaintiffs' petition placed no regulatory restrictions on ABR, and the Court's review of the petition cannot not directly result in regulatory restrictions on ABR. Further, it is unclear whether a final rule promulgated by the EPA would even ever directly regulate ABR. As explained throughout this opposition, a favorable ruling by this Court will not immediately or directly impact ABR's interests. Therefore, ABR cannot show that it will "lose" if this Court finds in Plaintiffs' favor.

3. Resolution of this Action will not Impair or Impede ABR's Ability to Protect its Interests

Resolution of this action favorable to Plaintiffs can result only in an order from the Court that the EPA initiate a rulemaking. TSCA's rulemaking procedure, governed by TSCA and Section 553 of the APA, requires the EPA to publish the proposed rule in the Federal Register and provide an opportunity for interested persons to participate. 15 U.S.C. § 2605(c)(2), 5 U.S.C. § 553(b). Participation can include the submittal of written

data, views, and arguments, and participation in an informal hearing. 15 U.S.C. § 2605(c)(2). The required informal hearing would be robust, allowing interested persons an opportunity to present oral or written testimony, or both. *Id.* at § 2605(c)(2)(B). In the event of disputed issues of material fact, interested persons are permitted to present rebuttals and conduct cross-examinations. *Id.* at § 2605(c)(3)(A).

Throughout this rulemaking process, the EPA considers "the reasonably ascertainable economic consequences of the rule, after consideration of the effect on the national economy, small business, technological innovation, the environment, and public health." 15 U.S.C. § 2605(c)(1)(D). ABR will have the appropriate opportunity to submit additional information, and have its purported interests considered in this forum. The statute provides ample opportunity for public involvement specifically to take into account the technical and economic factors that appear to be at the heart of ABR's interests. Finally, upon issuance of an EPA final rule, any person, including ABR, may file a petition for judicial review of such a rule with the U.S. Court of Appeals.

In *Alternative Research and Development Foundation v. Veneman*, the D.C. Court of Appeals held that an applicant-intervenor's rights are not impaired by an initiation of a rulemaking where the applicant-intervenor can participate in the rulemaking and challenge a final rule. 262 F.3d 406 (D.C. Cir. 2001); *see also Environmental Defense v. Leavitt* at 68 (holding the applicant-intervenor did not show an injury or impairment sufficient to satisfy either standing or Rule 24(a)'s impairment-of-interest requirement because it could participate in the rulemaking and challenge a final rule). In *Veneman*, plaintiffs petitioned the Secretary of Agriculture to amend the definition of "animal" to remove the exclusion of birds, mice, and rats bred for use in research under the Animal

Welfare Act. *Veneman* at 406. While the petition was still pending, plaintiffs filed a complaint against the Secretary, and the parties then entered into a stipulation of dismissal, stipulating the Secretary would grant the petition for rulemaking and initiate and complete a rulemaking on the requested action. *Id.* at 407. Applicant-intervenor, an association engaged in research using birds, rats, and mice, sought intervention as of right and, in the alternative, permissive intervention. *Id.* The court held that applicant-intervenor's interests were not impaired by the initiation of a rulemaking because it would have an opportunity to have its opinions heard through the rulemaking process and it could challenge a potential final rule. *Id.* at 411.

Like the applicant-intervenor in *Veneman*, ABR will have ample opportunities to have its interests considered though an EPA rulemaking proceeding and it will be free to challenge a final rule should EPA promulgate one. Therefore, resolution in this Court is but the first domino potentially setting into effect a chain of events that may eventually lead to impacts to ABR's interests. However, nothing in a favorable resolution by this Court impairs or impedes ABR's ability to protect its interests by participating in the rulemaking proceedings or by challenging a final rule in the Court of Appeals.

4. ABR's Interests are Adequately Represented by Existing Parties

ABR also has not met its burden to show inadequate representation. Any interest ABR may have in the present action is adequately represented by the EPA in this action. To the extent ABR's narrow economic interests are different than the broad public interests of the federal government, ABR has not met its burden to show that its interests will not be represented by the EPA.

In *Humane Society of the United States v. Clark*, hunting groups sought to join federal defendants through intervention in an action that challenged a decision to open several National Wildlife Refuges to hunting. 109 F.R.D. 518 (D.D.C. 1985). Applicant-intervenors argued that because federal defendants were "required by law to weigh and reconcile a number of competing interests in deciding whether and to what extent wildlife refuges should be open to sport hunting . . . [they would] not be able to argue for continued access to federal wildlife refuges with the same vigor as would the [applicant-intervenors]." *Id.* The court rejected this "balancing competing interests" argument and found that in the context of the lawsuit, the federal defendants' only interest was in upholding the regulations, not in weighing the competing interests of the public. *Id.* at 520.

Like the applicant-intervenors in *Humane Society*, ABR here argues that because the EPA is focused on the broad representation of the public interest, and because the EPA "cannot promote the narrow interests of ABR with respect to the lead industry," it is not adequately represented by the EPA. Memo at 12. However, like the federal defendants in *Humane Society*, the EPA's only interest in the present litigation is in upholding its decision that it need not regulate lead shot, bullets, or fishing sinkers.

To the extent ABR has *any* interest in this litigation (as opposed to a future EPA rulemaking action), this interest is identical to EPA's, as ABR concedes. Memo at 11. ABR does not allege any conflict of interest or collusion between the present parties which may indicate that EPA is not willing to defend its position. *Humane Society* at 520-21. Therefore, because ABR has failed to show that the EPA will not adequately represent its interests, intervention should be denied.

B. ABR Should be Denied Permissive Intervention

ABR's request for permissive intervention should also be denied because it has not demonstrated it has a defense that shares a common question of law or fact with the main action, it has failed to establish independent grounds for jurisdiction, and its participation will delay and prejudice the resolution of this case. Permissive intervention may be granted where the applicant has shown it has a claim or defense that shares a common question of law or fact with the main action and an independent grounds for subject matter jurisdiction. *EEOC* at 1046. Even after the applicant satisfies these requirements, the court "must consider whether the intervention will unduly delay or prejudice that adjudication of the original parties' rights." FRCP 24(b)(1)(B).

ABR offers no defense that shares a common questions of law or fact with the main action. All that is at issue before this Court is whether there is a reasonable basis to conclude that the issuance of a rule by the EPA is necessary to protect health or the environment against an unreasonable risk of injury from lead shot, bullets, and fishing sinkers. ABR does not raise any defense that EPA is unlikely to raise, rather it seeks to have this Court entertain its concerns about speculative impacts to its economic interests that may come about as a result of a future rulemaking.

ABR also has no independent grounds for subject matter jurisdiction as the statute only allows for *petitioners* to challenge the denial of a petition in federal district court. ABR only seeks to interject its concerns about prospective, speculative impacts to its interests. Allowing the interjection of these issues at this stage of the proceedings is not only contrary to the statute, it will unduly delay adjudication of this case and prejudice the existing parties.

C. If Granted, Intervention Should be Limited

For the reasons stated above, Plaintiffs ask that the Court deny ABR's motion to intervene. If the Court finds that ABR should be granted intervention as of right or permissive intervention, Plaintiffs request that such intervention be appropriately limited so as to best to ensure the efficient conduct of the proceedings and to prevent this litigation becoming a forum for extraneous policy debates. This Court may limit the participation of intervenors, and courts have done so in other cases. *See* Advisory Committee Notes on Fed. Rule Civ. P. 24; *see also Earthworks v. DOI*, cv-09-01972, 2010 U.S. Dist. LEXIS 77894 (D.D.C. Aug. 3, 2010).

As this action has been initiated by Plaintiffs, who bear the burden of proof in the de novo proceeding, Plaintiffs ask the Court to impose restrictions should the Court grant either intervention of right or permissive intervention to ABR, and/or any other applicants for intervention. Plaintiffs request that this Court require consolidated briefing among all defendant parties, including any additional intervenors. If permitted to file its own brief, however, ABR should be limited to filing one opposition brief during the briefing on the merits and not permitted to file any cross-motion for summary judgment or additional reply briefs. Plaintiffs also request that ABR should not be permitted to engage in any discovery, except if granted leave of the Court.

V. CONCLUSION

ABR has failed to demonstrate that its legally protectable interests will be directly impacted by this litigation, that this litigation will impair or impede ABR's ability to protect its interests, or that the EPA will not adequately represent its interests. Finally, ABR's intervention in this case will only serve to delay the litigation process by adding

extraneous issues. For these reasons, Plaintiffs ask this Court to deny intervention. Should this Court find intervention appropriate, Plaintiffs ask this Court to limit ABR's intervention in the interest of judicial economy and fairness to the existing parties.

Respectfully submitted,

Dated: January 3, 2011

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CERTIFICATE OF SERVICE

I hereby certify that on January 3, 2011, I electronically filed the foregoing CENTER FOR BIOLOGICAL DIVERSITY, PUBLIC EMPLOYEES FOR ENVIRONMENTAL RESPONSIBILITY, AND PROJECT GUTPILE'S MEMORANDUM IN OPPOSITION TO MOTION TO INTERVENE AS DEFENDANTS OF ASSOCIATION OF BATTERY RECYCLERS, INC. with the Clerk of Court using the CM/ECF system which will send notification of this filing to all attorneys of record.

I also certify that on the same day, I mailed via First Class Mail paper copies of the above referenced document to the following parties and attorneys who do not appear to be currently registered for accepting service with the CM/ECF system in this case:

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CENTER FOR BIOLOGICAL DIVERSITY, PUBLIC EMPLOYEES FOR ENVIRONMENTAL RESPONSBILITY, and PROJECT GUTPILE, *Plaintiff*, v. LISA JACKSON and ENVIRONMENTAL PROTECTION AGENCY, *Defendants*.	Civil Action No. 10-CV-02007 (EGS) (PROPOSED) ORDER DENYING ASSOCIATION OF BATTERY RECYCLERS, INC.'S MOTION TO INTERVENE

[PROPOSED] ORDER DENYING ASSOCIATION OF BATTERY RECYCLERS, INC.'S MOTION TO INTERVENE

It is ordered that the Association of Battery Recyclers, Inc.'s motion to intervene is denied by this Court.

DATED: _____ _____
United States District Judge