

**UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

CENTER FOR BIOLOGICAL DIVERSITY,  
*et al.*,

Plaintiffs,

v.

LISA P. JACKSON, *et al.*,

Defendants,

Civil Action No. 1:10-cv-02007-EGS

**DEFENDANT-INTERVENOR, ASSOCIATION OF BATTERY RECYCLERS, INC.’S  
OPPOSITION TO MOTION FOR VOLUNTARY DISMISSAL**

Defendant-Intervenor, Association of Battery Recyclers, Inc. (“ABR”) opposes Plaintiffs’ unconditional, voluntary dismissal without prejudice. Plaintiffs should not be allowed to file and re-file lawsuits under the Toxic Substance Controls Act (“TSCA”) on related petitions hoping to eventually secure a “victory.”

Plaintiffs filed a TSCA petition with the Environmental Protection Agency (“EPA”) in August 2010 for rulemaking that would restrict the use of lead bullets and shot, and then challenged EPA’s denial of that petition in this Court. After the Court denied that challenge in September 2011 as untimely, the lead Plaintiffs filed a new petition in March 2012 again to use TSCA to restrict lead bullets and shot.

Similarly, Plaintiffs filed a TSCA petition for rulemaking in August 2010 that would restrict the use of lead fishing tackle, and then challenged EPA’s denial of that petition in this Court. After apparently realizing that the administrative record was not favorable for a legal challenge to the denial of the fishing tackle petition, the lead Plaintiffs filed a new petition on

lead fishing tackle in November 2011. That petition also was denied by EPA and Plaintiffs now request this Court to grant voluntary dismissal of this case while reserving their right to file a new legal challenge that would be in the same Court, against the same parties, on the same issues. If the Court grants the voluntary dismissal of this case it should be conditioned upon Plaintiffs' payment of the Defendants' and Defendant-Intervenors' unnecessary costs and attorney's fees. Alternatively, as previously requested by Defendant-Intervenor ABR, the Court should wait yet a few more weeks so that if a second lawsuit is filed on lead fishing tackle, the Court can determine whether the cases can be consolidated.

### **STATEMENT OF FACTS**

Plaintiffs Center for Biological Diversity ("CBD"), Project Gutpile, and Public Employees for Environmental Responsibility submitted a petition to the EPA on August 3, 2010 under TSCA 15 U.S.C. § 2620 with two distinct requests: to initiate rulemaking proceedings for restricting the manufacture, processing and distribution in commerce of (1) lead shot and bullets (the "First Lead Shot Petition") and (2) lead fishing tackle (the "First Lead Fishing Tackle Petition"). EPA provided a period for public comment and received more than 6,000 comments in response. The comments and other documents considered by EPA are available at [www.regulations.gov](http://www.regulations.gov), Docket ID# EPA-HQ-OPPT-2010-0681.

EPA denied the First Lead Shot Petition in a letter to Plaintiffs dated August 27, 2010, on grounds that lead ammunition was excluded from the scope of EPA's regulating authority under TSCA. *See* 15 U.S.C. § 2602(2)(B)(v); 26 U.S.C. § 4181.

EPA denied the First Lead Fishing Tackle Petition on November 4, 2010, and published a Federal Register notice citing adequate protection by existing state regulations, programs and educational activities as reasons for the denial. *See* 75 Fed. Reg. 70246, 70247 (Nov. 17, 2010).

Plaintiffs sued EPA Administrator Lisa P. Jackson and the EPA on November 23, 2010 challenging EPA's denial of both requests. The Association of Battery Recyclers, Inc., National Shooting Sports Foundation, Inc. ("NSSF"), National Rifle Association of America ("NRA") and Safari Club all moved to intervene as defendants. The Court granted the motions to intervene over Plaintiffs' opposition. EPA and NSSF filed partial motions to dismiss regarding the First Lead Shot Petition, and ABR supported the motions. Defendants and Defendant-Intervenors also filed answers in which they defended EPA's denial of the First Lead Fishing Tackle Petition.

The Court determined that this case was filed too late with respect to the EPA's denial of the First Lead Shot Petition. TSCA requires that an action challenging EPA's denial of a petition be filed in federal district court within 60 days of the denial, 15 U.S.C. § 2620(b)(4)(A), but Plaintiffs had filed this case 88 days after the denial of the First Lead Shot Petition. The Court decided on September 29, 2011 that it lacked subject matter jurisdiction as to that petition due to the untimeliness of Plaintiffs' filing and granted the partial motions to dismiss. *See* Docket #35 and 36.

The Court ordered the parties to file a joint recommendation by October 31, 2011 for further proceedings on the First Lead Fishing Tackle Petition. During a call among the parties on October 19, 2011, "Plaintiffs indicated that they would be better able to gauge their preferred approach to this litigation after having the opportunity to review the comments submitted to EPA regarding their petition on lead fishing gear." Docket #37 at 3. The parties agreed to an extension of 45 days to "allow Plaintiffs sufficient time to review the more than 6,000 such comments [so that] the Parties [could] productively discuss a joint recommendation for further proceedings in this case." *Id.*

On November 16, 2011, Plaintiffs CBD, Project Gutpile, and non-party Loon Lake Loon Association (“LLLA”) submitted a new petition requesting that EPA “evaluate the unreasonable risk of injury to the environment from fishing tackle containing lead” (the “New Lead Fishing Tackle Petition”). *See* Docket #38, Ex. 1. In “the interests of judicial economy and consistency of judicial decisions,” the parties to this action jointly moved the Court on December 12, 2011 to hold this case in abeyance until February 15, 2012 to allow time for EPA to decide whether to grant or deny the New Lead Fishing Tackle Petition. *See* Docket #38. EPA denied the New Lead Fishing Tackle Petition on February 14, 2012, *see* Docket #43, Exhibit 1, and published notice of the denial on February 22, 2012. *See* Docket #43, Exhibit 2. EPA denied the New Fishing Tackle Petition on the same grounds as the First Fishing Tackle Petition, namely that Federal action was unwarranted in light of existing programs at state and local levels. The time period for CBD, Project Gutpile and LLLA to file an action on the New Fishing Tackle Petition expires Monday, April 16, 2012.

On March 13, 2012, Plaintiffs CBD and Project Gutpile submitted yet another TSCA petition to EPA to regulate lead bullets and shot (the “New Lead Shot Petition”). A decision by EPA on the New Lead Shot Petition is pending. Assuming EPA does not change its position that lead ammunition is excluded from the scope of EPA’s regulating authority under TSCA, the New Lead Shot Petition likely will be denied. *See* 15 U.S.C. § 2602(2)(B)(v); 26 U.S.C. § 4181.

### **ARGUMENT**

Rule 41(a) of the Federal Rules of Civil Procedure makes it necessary to obtain a court order for a voluntary dismissal where, as here, the Defendants and Defendant-Intervenors already have served answers. In these circumstances, “an action may be dismissed at the plaintiff’s request only by court order, on terms that the court considers proper.” FRCP Rule 41(a)(2).

Where a voluntary dismissal raises the threat that the defendants will face another action, “[t]hat kind of disadvantage can be taken care of by a condition that plaintiff pay to defendant its costs and expenses incurred in the first action.” *Conafay v. Wyeth Laboratories, Div. of American Home Products Corp.*, 841 F.2d 417, 419 (D.C. Cir. 1988). The purpose of imposing such terms “is to protect a defendant from any prejudice or inconvenience that may result from a plaintiff’s voluntary dismissal.... Attorneys’ fees and costs are commonly awarded as one such ‘term and condition’ for a voluntary dismissal, for those costs were undertaken unnecessarily in such a case.” *GAF Corp. v. Transamerica Ins. Co.*, 665 F.2d 364, 367 (D.C.Cir.1981); *see, e.g., Gossard v. Washington Gas Light Co.*, 217 F.R.D. 38, 41-42 (D.D.C. 2003), *Mittakarin v. Infotran Systems, Inc.*, No. 11-0017(EGS), 2012 WL 119841 (D.D.C. 2012).

If the Court were to grant Plaintiffs’ motion for voluntary dismissal, it should impose reimbursement of Defendants’ and Defendant-Intervenor’s unnecessary costs and attorney’s fees as essential terms and conditions of dismissal, for several reasons. First, it was unnecessary for the defending parties to respond to Plaintiffs’ challenge of EPA’s denial of the First Lead Shot Petition. Plaintiffs knew or should have known that their legal challenge was too late because it was brought more than 60 days after EPA denied the First Lead Shot Petition.

Second, unlike cases in which “there is no evidence that plaintiff intends to re-file his suit in another forum, or that he is seeking dismissal for a tactical advantage,” *Mittakarin*, 2012 WL 119841 at \*3, there is such evidence here. The filing of the Second Lead Fishing Tackle Petition and the Second Lead Shot Petition both suggest an intention to re-file this suit. The re-filing is not the result of discovering new facts that affect the jurisdiction of the Court (such as a defendant whose residence defeats diversity jurisdiction), but rather is an attempt to recharacterize the New Petitions in more favorable terms than the First Petitions, to reestablish

subject matter jurisdiction with this Court through a timely re-filing of the legal action concerning lead shot, or to seek a tactical advantage by presenting new evidence on a different record.

In October 2011, Plaintiffs sought additional time to review the 6,000-plus comments submitted in response to the First Petitions and were reluctant to proceed with this case until they were given an extension of time to review the comments. Once Plaintiffs had reviewed the comments, they “gauge[d] their preferred approach to the litigation” by filing the New Lead Fishing Tackle Petition. According to Plaintiffs, the New Lead Fishing Tackle Petition contains different evidence than the First Lead Fishing Tackle Petition. *See* Plaintiff’s Motion for Vol. Dismissal at 3. The Court should not require Defendants and Defendant-Intervenors to follow Plaintiffs through repeated petitions and court actions until Plaintiffs conclude they have the petition and administrative record to pursue their litigation.

A voluntary dismissal conditioned on payment of the defending parties’ unnecessary attorney’s fees and costs would help prevent piecemeal litigation and serial filings that undermine long-established doctrines of finality in judicial proceedings. Alternatively, as provided by Defendant-Intervenor ABR in its Motion to Hold Case In Abeyance (filed 3/15/12), the Court can stay these proceedings until a legal challenge to EPA’s denial of the Second Lead Fishing Tackle Petition has been filed (or waived), at which time the Court can assess whether consolidation of multiple related actions is necessary.

### **CONCLUSION**

For the foregoing reasons, Defendant-Intervenor ABR requests that the Court deny Plaintiffs’ Motion for Voluntary Dismissal absent conditions requiring Plaintiffs to pay Defendants and Defendant-Intervenors’ their attorney’s fees and costs unnecessarily undertaken

in this case in amounts to be determined by motions subsequently presented to the Court, or further stay the proceedings to determine whether Plaintiffs file a new lawsuit.

Dated: March 29, 2012

Respectfully submitted,

/s/ Michael S. Snarr

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**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a true and correct copy of the foregoing document was filed using the Court's electronic case filing system this 29<sup>th</sup> day of March, 2012, which results in service on all counsel of record registered on the case management/electronic case filing ("CM/ECF") system.

/s/ Michael S. Snarr  
MICHAEL S. SNARR