

**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
REPLY IN SUPPORT OF MOTION TO HOLD CASE IN ABEYANCE**

In less than two weeks, on April 16, 2012, the parties and the Court will know whether Plaintiffs Center for Biological Diversity (“CBD”) and Project Gutpile will file a new lawsuit in this Court challenging EPA’s denial of their second petition under the Toxic Substance Controls Act (“TSCA”) seeking restrictions and regulations on the use of lead in fishing tackle (the “Second Lead Fishing Tackle Petition”). Under the circumstances, it is virtually certain they will file such a suit. If Plaintiffs CBD and Project Gutpile intended to abandon their efforts to require EPA to regulate lead fishing tackle, they would not oppose holding the case in abeyance for only a few weeks until the April 16 statutory deadline has passed. Instead, however, CBD and Project Gutpile oppose a stay and urge the Court to dismiss this case before they file a new case on the Second Lead Fishing Tackle Petition, presumably so they can obtain a tactical advantage with respect to the evidence before the Court. Plaintiffs should not be allowed to dismiss this action voluntarily, unconditionally, and without prejudice in order to manipulate the timing and record

of the question ultimately presented to the Court—whether EPA must initiate rulemaking procedures regarding the regulation of lead fishing tackle under TSCA.

Plaintiffs’ memorandum in opposition to holding this case in abeyance claims that this suit “concerns a different petition, filed by a different set of petitioners, requesting different action by the agency, and rejected by the agency on different grounds” as compared to the Second Lead Fishing Tackle Petition. Pl’s Opp. at 3. Yet any such “differences” are so slight as to be immaterial.

The First and Second Lead Fishing Tackle Petitions both request EPA to regulate lead fishing tackle under TSCA. The petitioners to the First Lead Fishing Tackle Petition are CBD, Project Gutpile, the Public Employees for Environmental Responsibility, American Bird Conservancy, and Association of Avian Veterinarians;¹ and the petitioners to the Second Lead Fishing Tackle Petition are CBD, Project Gutpile, and the Loon Lake Loon Association.

The First Lead Fishing Tackle Petition requests that EPA “adopt regulations prohibiting the manufacture, processing and distribution in commerce of ... lead fishing sinkers, and other lead-containing fishing gear.” *See* First Lead Fishing Tackle Petition at Docket # 22-2, page 7. The Second Lead Fishing Tackle Petition requests that EPA “evaluate the unreasonable risk of injury to the environment from fishing tackle containing lead” and “initiate a proceeding for the issuance of a rulemaking ... to adequately protect against such risks.” *See* Second Lead Fishing Tackle Petition at Docket # 38-2, page 8.

EPA denied the First Lead Fishing Tackle Petition on grounds that “[t]here are an increasing number of limitations on the use of lead in fishing gear on some Federal lands, as well as Federal outreach efforts,” and “[a] number of states have established regulations that ban or restrict the use of lead sinkers and have created state education and fishing tackle exchange

¹ American Bird Conservancy and the Association of Avian Veterinarians did not join as plaintiffs in this suit.

programs over the last decade.” *See* EPA Nov. 4, 2010 denial letter at Docket # 44-1. EPA denied the Second Lead Fishing Tackle Petition citing “the mix of regulatory and education actions state agencies and the Federal Government already are taking to address the impact of lead fishing tackle on local environments. ... The petition does not demonstrate that these state and local efforts are ineffective or have failed to reduce the exposure and risks presented to waterfowl in particular.” *See* EPA Feb. 14, 2012 denial letter at Docket # 44-2. Given the similar facts, parties, issues and relief requested, there can be no dispute that an action on the Second Lead Fishing Tackle Petition would be considered a “related case” under Local Civil Rule 40.5(a)(3).

Defendant-Intervenor, Association of Battery Recyclers, Inc. (“ABR”) does not believe that the resources of the parties or this Court should be wasted while Plaintiffs, or some combination of them, file and re-file lawsuits on related TSCA petitions. The Court could condition the voluntary dismissal by requiring Plaintiffs to pay the defending parties’ costs and attorney’s fees (*see e.g., GAF Corp. v. Transamerica Ins. Co.*, 665 F.2d 364, 367 (D.C.Cir.1981); *Gossard v. Washington Gas Light Co.*, 217 F.R.D. 38, 41-42 (D.D.C. 2003); *Collins v. Baxter Healthcare Corp.*, 200 F.R.D. 151 (D.D.C. 2001); *Piedmont Resolution LLC v. Johnston, Rivlin & Foley*, 178 F.R.D. 328 (D.D.C. 1998)) or it could simply hold this case in abeyance for a few weeks as ABR has proposed so that any related lawsuit filed in that time might be consolidated with this action and addressed at once.

CONCLUSION

For the foregoing reasons, Defendant-Intervenor ABR requests that its motion to hold this case in abeyance be granted.

Dated: April 4, 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 4th day of April, 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