

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

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| CENTER FOR BIOLOGICAL DIVERSITY et al., |) |) |
| |) |) |
| Plaintiffs, |) |) |
| |) |) |
| v. |) |) |
| |) |) |
| LISA P. JACKSON, in her official capacity |) |) |
| as Administrator, United States Environmental |) | Civ. Action No. 10-2007 (EGS) |
| Protection Agency, |) |) |
| |) |) |
| and |) |) |
| |) |) |
| ENVIRONMENTAL PROTECTION AGENCY, |) |) |
| |) |) |
| Defendants. |) |) |
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**DEFENDANTS’ PARTIAL ANSWER TO PLAINTIFFS’ COMPLAINT FOR
DECLARATORY AND INJUNCTIVE RELIEF**

Defendants Lisa P. Jackson, Administrator, United States Environmental Protection Agency and United States Environmental Protection Agency (collectively, “EPA”), hereby answer the Complaint for Declaratory and Injunctive Relief filed by Plaintiffs Center for Biological Diversity, Public Employees for Environmental Responsibility, and Project Gutpile (collectively, “Plaintiffs”), as follows. As noted herein, Plaintiffs’ claim for relief pertaining to their request for an EPA rulemaking banning lead shot and bullets is the subject of Defendants’ motion to dismiss which is being filed in lieu of an answer pursuant to Fed. R. Civ. P. 12(b)(1), and therefore EPA answers only the allegations in the Complaint that are relevant to Plaintiffs’ claim for relief pertaining to its request for an EPA rulemaking regarding lead fishing gear.

1. The allegations in Paragraph 1 are a characterization of Plaintiffs' claims that requires no response.

2. The first two sentences of Paragraph 2 are legal conclusions to which no response is required. In response to the allegations in the last sentence of Paragraph 2, EPA admits that lead is a toxic substance and that EPA has implemented regulations that reduce lead exposure. The remaining allegations in the last sentence of Paragraph 2 are vague and ambiguous such that EPA cannot verify the truth or falsity of the allegations. To the extent a response is required, EPA denies the remaining allegations in Paragraph 2.

3. EPA admits that Plaintiffs submitted a petition pursuant to section 21 of the Toxic Substances Control Act ("TSCA"), 15 U.S.C. § 2620, dated August 3, 2010, to initiate a rulemaking to regulate lead in bullets and shot and a rulemaking to regulate lead in fishing gear. To the extent the allegations in Paragraph 3 assert the reasons Plaintiffs submitted a petition pursuant to section 21 of TSCA, EPA responds that it does not have sufficient information to admit or deny the allegations and so denies the same.

4. EPA admits that it denied Plaintiffs' petition request to impose a nationwide ban on lead shot and bullets on August 27, 2010. EPA further admits that on September 24, 2010, EPA published in the Federal Register its reasons for denying Plaintiffs' petition request to regulate lead shot and bullets. To the extent that the allegations in Paragraph 4 of the Complaint purport to restate or characterize the contents of either the denial letter or the Federal Register notice, EPA responds that the documents are the best evidence of their contents and speak for themselves. Accordingly, EPA denies the allegations of this Paragraph to the extent the allegations mischaracterize the documents.

5. EPA admits that it denied Plaintiffs' petition request for EPA to impose a nationwide ban on lead fishing gear on November 4, 2010. To the extent that the allegations in Paragraph 5 purport to restate the contents of the denial letter, EPA responds that the document is the best evidence of its contents and speaks for itself. Accordingly, EPA denies the allegations of this Paragraph to the extent the allegations mischaracterize the document.

6. EPA admits that on November 17, 2010, EPA published in the Federal Register its reasons for denying Plaintiffs' request to impose a nationwide ban on lead fishing tackle. To the extent that the allegations in Paragraph 6 purport to restate the reasons for the denial, EPA responds that the document is the best evidence of its contents and speaks for itself. Accordingly, EPA denies the allegations of this Paragraph to the extent the allegations mischaracterize the document.

7. EPA denies the allegations in the first and second sentences of Paragraph 7. The allegations in the last sentence of Paragraph 7 are a characterization of Plaintiffs' claims that requires no response.

JURISDICTION AND VENUE

8. The allegations in Paragraph 8 are legal conclusions that require no response.

9. The allegations in Paragraph 9 are legal conclusions that require no response.

PARTIES

10. EPA does not have sufficient information to admit or deny the allegations in Paragraph 10 and so denies the same.

11. EPA does not have sufficient information to admit or deny the allegations in Paragraph 11 and so denies the same.

12. EPA does not have sufficient information to admit or deny the allegations in Paragraph 12 and so denies the same.

13. EPA does not have sufficient information to admit or deny the allegations in Paragraph 13 and so denies the same.

14. To the extent the first sentence of Paragraph 14 relates to Plaintiffs' claim regarding regulation of lead shot and bullets, which is the subject of EPA's motion to dismiss, no response is required. To the extent the allegations in the first sentence of Paragraph 14 relates to Plaintiffs' claim regarding regulation of lead fishing tackle, EPA denies the allegations. EPA does not have sufficient information to admit or deny the remaining allegations in Paragraph 14 and so denies the same.

15. EPA does not have sufficient information to admit or deny the allegations in Paragraph 15 and so denies the same.

16. EPA admits that Lisa P. Jackson is the Administrator of the Environmental Protection Agency. The remaining allegations in Paragraph 16 are legal conclusions that require no response.

17. EPA admits that it is a federal agency that is charged with implementing TSCA.

STATUTORY BACKGROUND

18. Paragraph 18 characterizes a federal statute which speaks for itself and so no response is required.

19. Paragraph 19 characterizes a federal statute which speaks for itself and so no response is required.

20. Paragraph 20 characterizes a federal statute which speaks for itself and so no

response is required.

21. The allegations in Paragraph 21 are legal conclusions that require no response. To the extent that a response is required, EPA responds that the document cited is the best evidence of its contents and speaks for itself. Accordingly, EPA denies the allegations of this Paragraph to the extent the allegations mischaracterize the document.

22. Paragraph 22 characterizes a federal statute which speaks for itself and so no response is required.

23. The allegations in Paragraph 23 are legal conclusions that require no response. To the extent that a response is required, EPA responds that Paragraph 23 characterizes a federal statute which speaks for itself.

24. EPA admits that lead is a “chemical substance” as the term is defined in Section 3(2)(A) of TSCA to the extent that it is not otherwise excluded under Section 3(2)(B) or other provisions of TSCA. EPA admits that lead-based paint, leaded gasoline, and the use of lead plumbing pipes, solder, and flux are subject to federal regulation. In response to the allegations in the third sentence of Paragraph 24, EPA responds that the document is the best evidence of its contents and speaks for itself, and EPA accordingly denies the allegations of this Paragraph to the extent the allegations mischaracterize the document. EPA admits that it has commenced an appropriate proceeding in response to a petition request to issue a rule to prohibit the manufacture, processing, and distribution in commerce of lead wheel balancing weights. EPA admits the fifth and sixth sentences of Paragraph 24.

25. The allegations in Paragraph 25 are legal conclusions that require no response. To the extent that a response is required, EPA responds that the documents are the best evidence

of their contents and speak for themselves. Accordingly, EPA denies the allegations of this Paragraph to the extent the allegations mischaracterize the documents.

26-30. Paragraphs 26-30 relate only to Plaintiffs' claim regarding regulation of lead shot and bullets, which is the subject of EPA's motion to dismiss, and therefore require no response.

31. The allegations in Paragraph 31 are legal conclusions that require no response. To the extent that a response is required, EPA responds that Paragraph 31 characterizes a federal statute which speaks for itself.

FACTUAL BACKGROUND

32. EPA admits that the allegations in the first sentence of Paragraph 32. EPA admits that lead can adversely affect a large number of biological functions. EPA further admits that there may be no safe level of exposure to lead in the body tissue of fetuses and young children. EPA admits that lead continues to be used in manufactured products. The remaining allegations in Paragraph 32 are either opinions that do not require a response, or are vague and ambiguous, because they do not provide sufficient information regarding the "many" products that are sources of lead exposure to permit EPA to verify the truth or falsity of the allegations. To the extent a response is required, EPA denies the remaining allegations.

33. Paragraph 33 relates only to Plaintiffs' claim regarding regulation of lead shot and bullets, which is the subject of EPA's motion to dismiss, and therefore requires no response.

34. EPA admits that lead can end up in aquatic environments from lost or discarded fishing tackle. The remaining allegations in Paragraph 34 characterize statements made by EPA in a 1994 document, which is the best evidence of its contents and speaks for itself.

Accordingly, EPA denies the allegations of this Paragraph to the extent the allegations

mischaracterize the document.

35. To the extent Paragraph 35 relates to Plaintiffs' claim regarding regulation of lead shot and bullets, which is the subject of EPA's motion to dismiss, no response is required. To the extent Paragraph 35 relates to Plaintiffs' claim regarding regulation of lead fishing tackle, EPA responds that the referenced documentation and scientific reports are the best evidence of their contents and speak for themselves. Accordingly, EPA denies the allegations of this Paragraph to the extent the allegations mischaracterize the documents.

36. Paragraph 36 relates only to Plaintiffs' claim regarding regulation of lead shot and bullets, which is the subject of EPA's motion to dismiss, and therefore requires no response.

37. To the extent Paragraph 37 relates to Plaintiffs' claim regarding regulation of lead shot and bullets, which is the subject of EPA's motion to dismiss, no response is required. With respect to the last sentence of Paragraph 36, EPA admits that there is evidence that fishing sinkers and jigs have caused the death of waterfowl species such as trumpeter swans, ducks, geese, and loons.

38. EPA admits that lead can act as a neurotoxin and that blood lead concentrations below 10 micrograms per deciliter can have adverse developmental effects on intellectual functioning in humans. EPA further admits that lead can have adverse developmental effects on social-behavioral conduct in humans. EPA admits that human fetuses and young children are sensitive even at low levels of lead exposure and can suffer neurological damage. EPA admits that there is no known safe level of lead in the body tissue for fetuses and young children. EPA does not have sufficient information to admit or deny the remaining allegations in Paragraph 38 and so denies the same.

39-41. Paragraphs 39-41 relate only to Plaintiffs' claim regarding regulation of lead shot and bullets, which is the subject of EPA's motion to dismiss, and therefore require no response.

42. To the extent Paragraph 42 relates to Plaintiffs' claim regarding regulation of lead shot and bullets, which is the subject of EPA's motion to dismiss, no response is required. EPA admits that there are non-lead, and in some cases non-toxic, fishing tackle alternatives produced by manufacturers. The remaining allegations in the last sentence of Paragraph 42 are opinions that do not require a response. To the extent a response is required, EPA denies the remaining allegations.

43. To the extent Paragraph 43 relates to Plaintiffs' claim regarding regulation of lead shot and bullets, which is the subject of EPA's motion to dismiss, no response is required. To the extent Paragraph 43 relates to Plaintiffs' claim regarding regulation of lead fishing gear, EPA admits that five states have enacted restrictions on the use of lead fishing tackle where studies have identified lead toxicosis as a contributing factor to declining loon populations. EPA does not have sufficient information to admit or deny the remaining allegations in Paragraph 43 and so denies the same.

44. The allegations in Paragraph 44 are legal conclusions or opinions, not facts, that do not require a response. To the extent a response is required, EPA responds that it does not have sufficient information to admit or deny the allegations in Paragraph 44 and so denies the same.

45. EPA admits that Plaintiffs submitted to EPA a petition document dated August 3, 2010, petitioning EPA to initiate a rulemaking to ban lead in bullets and shot and to initiate a rulemaking to ban lead in fishing gear ("Petition"). To the extent that the allegations in

Paragraph 45 characterize the contents of the Petition, EPA responds that the document is the best evidence of its contents and speaks for itself. Accordingly, EPA denies the allegations of this Paragraph to the extent the allegations mischaracterize the document.

46. Paragraph 46 is an opinion characterizing the contents of the Petition, and therefore EPA responds that the document is the best evidence of its contents and speaks for itself. Accordingly, EPA denies the allegations of this Paragraph to the extent the allegations mischaracterize the document.

47. Paragraph 47 is an opinion characterizing the contents of the Petition, and therefore EPA responds that the document is the best evidence of its contents and speaks for itself. Accordingly, EPA denies the allegations of this Paragraph to the extent the allegations mischaracterize the document.

48. EPA admits that a memo was issued authorized the opening of docket number EPA-HQ-2010-0681. With respect to the remaining allegations in the first sentence of Paragraph 48, EPA responds that the document is the best evidence of its contents and speaks for itself. EPA denies the allegations of this Paragraph to the extent the allegations mischaracterize the document. EPA admits the allegations in the last sentence of Paragraph 48.

49. EPA admits that it sent a letter to Plaintiffs dated August 18, 2010. With respect to the remaining allegations in Paragraph 49, EPA responds that the document is the best evidence of its contents and speaks for itself. Accordingly, EPA denies the allegations of this Paragraph to the extent the allegations mischaracterize the document.

50. Paragraph 50 relates only to Plaintiffs' claim regarding regulation of lead shot and bullets, which is the subject of EPA's motion to dismiss, and therefore requires no response.

51. EPA admits that it issued a memo changing the closing date for docket number EPA-HQ-2010-0681. With respect to the remaining allegations in the first sentence of Paragraph 51, EPA responds that the document is the best evidence of its contents and speaks for itself. EPA denies the allegations of this Paragraph to the extent the allegations mischaracterize the document. EPA admits the allegations in the last sentence of Paragraph 51.

52. Paragraph 52 relates only to Plaintiffs' claim regarding regulation of lead shot and bullets, which is the subject of EPA's motion to dismiss, and therefore requires no response.

53. EPA admits that it sent a letter to Plaintiffs dated November 4, 2010, denying the request to ban lead fishing gear. With respect to the remaining allegations of Paragraph 53, EPA responds that the document is the best evidence of its contents and speaks for itself. Accordingly, EPA denies the allegations of this Paragraph to the extent the allegations mischaracterize the document.

54. EPA admits that it published a notice of its denial of the Plaintiffs' request for a uniform national ban of lead for use in all fishing gear in the Federal Register on November 17, 2010, at 75 Fed. Reg. 70,246. With respect to the remaining allegations in Paragraph 54, EPA responds that the document is the best evidence of its contents and speaks for itself. Accordingly, EPA denies the allegations of this Paragraph to the extent the allegations mischaracterize the document.

CAUSE OF ACTION

55. EPA restates and incorporates by reference its response in the preceding Paragraphs.

56. To the extent Paragraph 56 relates to Plaintiffs' claim regarding regulation of lead shot and bullets, which is the subject of EPA's motion to dismiss, no response is required. EPA denies the remaining allegations in Paragraph 56.

57. Paragraph 57 characterizes a federal statute which speaks for itself and so no response is required.

58. The allegations in Paragraph 58 are legal conclusions that require no response.

GENERAL DENIAL

EPA denies each and every allegation of the Complaint not previously admitted, explained, qualified, or denied.

FIRST AFFIRMATIVE DEFENSE

Plaintiffs' claim pertaining to the regulation of lead shot and bullets is untimely under 15 U.S.C. § 2620 and the Court therefore lacks subject matter jurisdiction over that claim.

SECOND AFFIRMATIVE DEFENSE

EPA lacks the authority to regulate shot and bullets under TSCA and, therefore, Plaintiffs have failed to state a claim for which relief can be granted.

THIRD AFFIRMATIVE DEFENSE

Plaintiffs have failed to state a claim for which relief may be granted under 15 U.S.C. § 2620.

WHEREFORE, having partially answered and partially moved to dismiss the Complaint, the United States requests that the Court enter judgment in favor of the United States and that Plaintiff's requests for relief be denied in their entirety. EPA reserves the right to modify, revise

or supplement this Answer, and to plead such further defenses as become necessary as this case develops.

Respectfully submitted,

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Dated: February 8, 2011

CERTIFICATE OF SERVICE

I hereby certify that the foregoing Partial Answer has been served with the corresponding Notice of Electronic Filing via the Electronic Case Filing System (ECF) upon the following on this 8th of February, 2011:

William J. Snape , III
Adam F. Keats
Jaclyn Lopez
Roger R. Martella , Jr.
Anna Margo Seidman
Robert N. Steinwurtzel
Michael Steven Snarr

/s/ Madeline Fleisher
MADELINE FLEISHER
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