IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CENTER FOR BIOLOGICAL DIVERSITY et al., Plaintiffs v. LISA P. JACKSON, in her official capacity as Administrator, United States Environmental Protection Agency, and ENVIRONMENTAL PROTECTION AGENCY, Defendants, and NATIONAL SPORTS SHOOTING FOUNDATION, INC., Intervenor-Defendant, and ASSOCIATION OF BATTERY RECYCLERS, Intervenor-Defendant.	Civ. Action No. 10-2007 (EGS)

REPLY IN SUPPORT OF DEFENDANTS' PARTIAL MOTION TO DISMISS FOR LACK OF JURISDICTION UNDER RULE 12(B)(1) AND FAILURE TO STATE A CLAIM UNDER RULE 12(B)(6)

I. INTRODUCTION

Plaintiffs Center for Biological Diversity, Public Employees for Environmental Responsibility, and Project Gutpile attempt to preserve their claim for regulation of lead shot and bullets under the Toxic Substances Control Act ("TSCA" or "Act") from dismissal by offering

proposed interpretations of the Act that, if adopted by this Court, would create confusion regarding the administration of TSCA's citizen petition provision and would circumvent Congress's intent regarding the scope of EPA's regulatory authority. Plaintiffs FIRST contend that their challenge to Defendant the Environmental Protection Agency's ("EPA" or "Agency") denial of their request for a nationwide ban on lead shot and bullets was timely, despite being filed 88 days after that denial occurred. Given the mandate in 15 U.S.C. § 2620(b)(4)(A) that any such challenge to the EPA's decision on a rulemaking petition be filed within 60 days of the "denial of the petition," Plaintiffs' construction would create uncertainty as to whether the word "denial" in fact means "denial" when it comes to a TSCA citizen petition. Plaintiffs' short-sighted construction of TSCA's exemption for lead ammunition to allow EPA regulation of shot and bullets, meanwhile, would require both EPA and the courts to engage in mind-reading of future petitioners in order to prevent them from circumventing Congress's intent that TSCA not be used as a vehicle for gun control. In both cases, the Court may avoid those consequences by applying the plain language of TSCA.

II. ARGUMENT

A. Plaintiffs' Claim Regarding Lead Shot and Bullets Was Filed Too Late, as a Result of Plaintiffs' Own Choice.

1. Plaintiffs Incorrectly Argue that the 60-Day Period for Judicial Review of the Denial of a Section 21 Petition Need Not Begin With a "Denial."

The core of Plaintiffs' argument is that they believe they were entitled under TSCA section 21, 15 U.S.C. § 2620, to bundle their rulemaking requests and appeal the denials of those requests in a single action, regardless of when EPA acted on the disparate requests in their petition. Such "[p]roffered excuses for late filing [of a petition] are carefully scrutinized" in order to avoid undermining the "policy of finality underlying" statutory limitations periods.

Eagle-Picher Indus., Inc. v. EPA, 759 F.2d 905, 912 (D.C. Cir. 1985). Here, the necessary scrutiny reveals that Plaintiffs' approach is inconsistent with both the plain language of the statute, which envisions petitions containing only a single rulemaking request, and with a statutory scheme that allows EPA to decide when to issue a denial that triggers the period for judicial review under 15 U.S.C. § 2620.

Section 2620 clearly contemplates a petition seeking a single rulemaking, followed if necessary by judicial review of EPA's denial of that individual rulemaking request. See, e.g., 15 U.S.C. § 2620(a), (b)(1), (b)(4)(A) (respectively discussing a petition "to initiate *a* proceeding for the issuance, amendment, or repeal of *a* rule"; the presentation of "the facts which it is claimed establish that it is necessary to issue, amend, or repeal *a* rule"; a civil action seeking "to compel the Administrator to initiate *a* rulemaking proceeding as requested in the petition" (emphasis added)). Subsection (b)(4)(A) specifically states that EPA may "grant or deny" a petition, a description that would be inapposite if a petition contained separate rulemaking requests that could be the subject of different EPA decisions.

By contrast, nothing in the plain language of section 2620 suggests that Congress contemplated the scenario proposed by Plaintiffs: the bundling of two separate, discrete requests for rulemaking in a single document that may then, if both are denied, be addressed in a single civil action – regardless of the relationship between the two requests or the timing of EPA action on those requests. Indeed, Plaintiffs' suggestion that Congress "intended that only denial of the petition, and not the denial of a portion of a petition, be actionable," Dkt. No. 27, Pls.' Opp. at 4, though leading to Plaintiffs' preferred outcome here, would be unworkable for petitioners in other situations. For example, a future petitioner presenting two rulemaking requests in a single document would be in an intractable dilemma if EPA denied the first of two requests. If EPA

were to later grant the remaining request, then presumably that first denial would be the only "denial" that could trigger the 60-day time period to bring a civil action under section 2620, and that petitioner would have no recourse. However, if EPA were to deny the second request, then the 60-day clock would not start until after that later denial resulted in the denial of all rulemaking requests in the petition document. Yet the petitioner would have no way to know, at the time of the first denial, which date would turn out to be the trigger for filing. Thus, if EPA denied one request on the second day after receiving a petition document, but granted the second request on the seventieth day, the time for challenging that first denial might run out while the petitioner waited to see if there would be a second denial.

The only way to avoid such an untenable result under Petitioners' reading of the statute would be to treat the disposition of the second request as the effective "denial" of the first request, even if it were a *grant* of the second request, in direct contradiction of the statute's language stating that a "denial" is what triggers the window for filing under section 2620. Plaintiffs attempt to evade that flaw in their approach by remaining conspicuously silent as to what they would have done had EPA granted their request for a rulemaking regarding lead fishing gear.

Holding that a petitioner should respond separately to separate denials would in no way "forc[e] a petitioner to choose between bringing multiple costly lawsuits or losing claims to the statutory filing deadlines." Pls.' Opp. at 6. As Plaintiffs should have done here, a petitioner confronted with two independent denials of rulemaking requests may simply file a timely civil action in response to each denial. The D.C. Circuit has made clear that such a protective filing within the time provided by Congress is the correct course to allow a court to determine the proper timeframe for challenging an agency's action. See Eagle-Picher, 759 F.2d at 914 ("As a

general proposition . . . if there is *any* doubt about the ripeness of a claim, petitioners must bring their challenge in a timely fashion or risk being barred.”). The only additional cost of filing such a protective complaint would be the second filing fee, which is currently $350. Certainly such a petitioner would not be forced, as Plaintiffs were not, to miss the statutory filing deadline. Indeed, as outlined above, treating each denial separately under section 2620 provides TSCA petitioners with necessary clarity as to when the time for filing a civil action starts to run and is most consistent with the language of the statute.

Where EPA has issued denials of different requests on different dates, the operation of section 2620 is clear: it is the specific “denial” being challenged that triggers the 60-day window for filing a civil action challenging that denial, not some later denial or other disposition of a different request. Here, EPA denied Plaintiffs’ request regarding regulation of lead shot and bullets on August 27, 2010, and thus the period for filing a civil action challenging that denial expired sixty days later, well before Plaintiffs filed this suit on November 23, 2010.

2. EPA Had Discretion to Issue Denials of Plaintiffs’ Two Requests on Two Separate Dates.

Although EPA has in past instances responded to petitions requesting multiple actions by issuing multiple denials on the same date, the Agency has no obligation to do so and may, as in this case, choose to act on one request earlier than another. Despite Plaintiffs’ generic assertion that TSCA contains “tight deadlines and specific procedures,” Pls.’ Opp. at 5-6, they identify no specific portion of the Act that would require EPA to dispose of multiple requests together simply because a petitioner chooses to present them to the Agency together. In fact, section 2620 does grant EPA significant discretion in deciding how to handle a petition: “The Administrator may hold a public hearing or may conduct such investigation or proceeding *as the Administrator deems appropriate* in order to determine whether or not such petition should be

granted." 15 U.S.C. § 2620(b)(2) (emphasis added). Even if that specific language regarding EPA's procedural discretion were not present, the Supreme Court has recognized that "the formulation of procedures [i]s basically to be left within the discretion of the agencies to which Congress ha[s] confided the responsibility for substantive judgments." Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council, 435 U.S. 519, 524 (1978); see also Heckler v. Chaney, 470 U.S. 821, 831-32 (1985) (recognizing inherent agency expertise, especially relative to courts, in determining ordering of its own priorities).

Here, since EPA had two independent rationales for rejecting Plaintiffs' two requests to regulate two separate types of products, the Agency issued two separate denials. This circumstance stands in contrast to the cases cited by Plaintiffs. Pls.' Opp. at 5 n.1. In Environmental Defense Fund v. Thomas, 657 F. Supp. 302, 305 (D.D.C. 1987), EPA proffered the same underlying rationale for denying requests to regulate a number of different, though related, chemicals. And in Environmental Defense Fund v. Reilly, 909 F.2d 1497, 1499-1500 (D.C. Cir. 1990), the petitioners simply requested different potential regulatory actions regarding the same chemical substance, and thus EPA issued its determination regarding which regulatory approach it had decided to pursue in a single consolidated response.

Similarly, Plaintiffs' contention that EPA needed to take some further action to indicate its "intent to segment the petition" has no basis in TSCA itself. Section 2620 states that the start of the 60-day period for filing a period is EPA's denial of a petition. As Plaintiffs concede in their Complaint, see Compl. ¶¶ 4, 50, EPA issued a denial of the relevant request on August 27, 2010. Accordingly, on that date the 60 days began to run. No further action by the Agency is required or even contemplated by the Act; indeed, the only action EPA must take after a "denial" under section 2620 is to publish its reasons for the denial in the Federal Register, which EPA did

with respect to the first denial well before it acted on Plaintiffs' rulemaking request regarding lead fishing gear. Plaintiffs' assertion that they were justified in assuming that the August 27 denial had no effect rings hollow given TSCA's express statement that a "denial" is what triggers the beginning of the 60-day limitations period for filing suit under section 2620.

3. EPA's August 27, 2010 Denial Letter Set Forth the Agency's Unequivocal Denial of Plaintiffs' Request for a Ban on Lead Shot and Bullets.

EPA denied Plaintiffs' request for a ban on lead shot and bullets on August 27, 2010. The letter communicating that denial clearly set forth EPA's determination that "TSCA does not provide the Agency with authority to address lead shot and bullets . . . ." Dkt. No. 22, Ex. 2. The letter's only reference to any further action was the statement that EPA was "reviewing the request in the petition regarding lead fishing sinkers and will respond to you when we have made a determination *on that matter*." Id. (emphasis added). The Federal Register notice explaining EPA's reasons for not undertaking the rulemaking reiterated the Agency's rationale: "[B]ecause of the absence of legal authority under TSCA to grant the petitioners' first request, this request was resolved without reaching the factual argument set forth by the petitioners. The request was denied based on the scope of EPA's statutory authority." 75 Fed. Reg. 58,377, 58,378 (Sept. 24, 2010). EPA never indicated that it would revisit this conclusion, and Plaintiffs never sought reconsideration of EPA's decision.

Despite the unequivocal nature of this denial, Plaintiffs attempt to analogize EPA's August 27, 2010 decision to an interlocutory judicial order. However, EPA's August 27 letter is far different from the interlocutory order of the Interstate Commerce Commission that the petitioners in New York v. United States, 568 F.2d 887 (2d Cir. 1977), sought to appeal. In that case, the petitioners sought review of an order approving three train rates and disapproving a

fourth, where the Commission had subsequently granted a motion for reconsideration of the disapproved rate and issued an order affirming the approval of the first three rates but reversing the disapproval of the fourth. In ruling that the challenged order was not final, the Second Circuit noted that "the Commission itself seemed to have viewed the proceeding as still pending as a whole," even after its first order, since its later order reexamined and readopted its conclusions regarding the three approved rates. Id. at 893. Here, on the other hand, EPA's second letter referred to the first request regarding lead shot and bullets only in observing that it had been denied "on August 27, 2010" – surely a clear indication that the Agency considered that to be the date of denial. Dkt. No. 22, Ex. 3.

The New York opinion also rested on the fact that the rates at issue were interrelated, rather than being separate tariffs that the court could examine independently. 568 F.2d at 893. Again, this situation is different; EPA's rationale for denying the request for a ban on lead shot and bullets – its lack of statutory authority – is unrelated to the reasons the Agency cited in deciding not to conduct rulemaking proceedings regarding lead fishing gear. The decision regarding the first had no bearing on the second, much as in Her Majesty the Queen in Right of Ontario v. EPA, 912 F.2d 1525, 1531-32 (D.C. Cir. 1990), where this Court held EPA's decision on one pending request to be reviewable even though the Agency had not made a final decision on a separate, accompanying request.

New York also cited the lack of prejudice to the respondents and the court's interest in avoiding piecemeal appeals as reasons for refusing to review the Commission's initial order. Both considerations weigh in the opposite direction here. As explained above, Plaintiffs' interpretation of section 2620 could create uncertainty for future petitioners presenting multiple requests as to whether a given "denial" is really a "denial" for purposes of that provision.

Plaintiffs' approach would also require the Court to ignore the language of the statute and redefine "denial" to mean any disposition of the last rulemaking request in a petition document, whether grant, denial, or inaction. Finally, requiring separate treatment of separate EPA determinations under section 2620 would pose no danger of inappropriate piecemeal appeals, since at worst the suits challenging those separate determinations would be filed within 90 days of each other, at which point the petitioner could seek consolidation under Federal Rule of Civil Procedure 42(a) if necessary.

Most importantly, in New York the statutory provision authorizing judicial review, 28 U.S.C. § 2344 (1970), provided for appeal of any "final order" of the Commission rather than a "denial," and thus the Second Circuit could identify as the reviewable "final order" a later order that ruled on the validity of all the rates at issue. Section 2620, on the other hand, authorizes a civil action only in response to a "denial" of a petition, and only if the action is filed within 60 days of that denial – whether the denial might be followed by some further EPA action is irrelevant.[1] Yet Plaintiffs spend much of their time discussing whether EPA's August 27 letter was truly "final," despite the fact that section 2620 nowhere contains that word. See, e.g., Pls.' Opp. at 8 (citing John Doe v. Drug Enforcement Admin., 484 F.3d 561 (D.C. Cir. 2007) (discussing whether an agency's permit denial was "final agency action" reviewable under 5 U.S.C. § 704). Meanwhile, Plaintiffs assiduously avoid discussing their implicit interpretation of the word "denial" to mean "the disposition of the last of a set of combined rulemaking requests, whether it is a denial or not." However, this Court must look to the actual language of the

[1] Had EPA's August 27 decision regarding the lead shot and bullets rulemaking request truly been non-final, the Court could presumably take that issue into account as a matter of ripeness doctrine in order to defer action pending a final decision by the Agency. See generally Reckitt Benckiser Inc. v. EPA, 613 F.3d 1131, 1137 (D.C. Cir. 2010). However, there is no basis in TSCA itself for refusing to review a final agency determination on a rulemaking request because it may not satisfy the definition of finality gleaned from another statutory context.

statute, and here it is clear. EPA's denial of a particular rulemaking request is the trigger for the 60 days to seek judicial review of that denial.

4. The Court Cannot and Should Not Exempt Plaintiffs from the Application of 15 U.S.C. § 2620's Sixty Day Statute of Limitations.

i. The Sixty Day Limitations Period Is Jurisdictional.

The Court should recognize the 60-day period for seeking judicial review under 15 U.S.C. § 2620 as jurisdictional. "When the United States consents to be sued, the terms of its waiver of sovereign immunity define the extent of the court's jurisdiction. . . . In particular, '[w]hen waiver legislation contains a statute of limitations, the limitations provision constitutes a condition on the waiver of sovereign immunity.'" United States v. Mottaz, 476 U.S. 834, 841 (1986) (citations omitted). Such waivers must be strictly construed in favor of the United States. See, e.g., United States v. Nordic Village, Inc., 503 U.S. 30, 33-34 (1992).

The Supreme Court has recognized an exception to that general rule that limitations periods that are part of a waiver of sovereign immunity are jurisdictional. Irwin v. Department of Veterans Affairs, 498 U.S. 89 (1990), created a rebuttable presumption that equitable tolling and other such doctrines apply in suits against the government "in the same way . . . [they are] applicable to private suits." Id. at 95. However, this Court concluded in 2003 that such "traditional feature[s] of the procedural landscape" do not come into play when dealing with "peculiarly governmental" contexts where "there is no basis for assuming customary ground rules apply." Chung v. U.S. Dep't of Justice, 333 F.3d 273, 276-77 (D.C. Cir. 2003). That holding was recently reaffirmed in Menominee Indian Tribe v. United States, 614 F.3d 519 (D.C. Cir. 2010), where the Court noted that Irwin's presumption applies only "where 'the injury to be redressed is of a type familiar to private litigation.'" Id. at 529 (quoting Chung, 333 F.3d at 277).

Plaintiffs make no attempt to explain why this suit, challenging EPA's decision not to commence a rulemaking proceeding, is in any way analogous to private litigation such as "a traditional tort claim" seeking recovery of monetary damages. 333 F.3d at 277. Indeed, this action seems far closer to the petition for review of an agency rulemaking that Chung offered as an example of a context where Irwin's rebuttable presumption in favor of the application of doctrines like equitable tolling would not apply. Id. Other decisions within this Circuit have accordingly held administrative law claims seeking to compel a particular government regulation to be the type of "peculiarly governmental" context where any statute of limitations must be considered jurisdictional. See, e.g., West Virginia Highlands Conservancy v. Johnson, 540 F. Supp. 2d 125, 140 (D.D.C. 2008) (holding limitations period for suit seeking to compel agency action to be jurisdictional despite Irwin); The Wilderness Society v. Norton, No. 03-cv-64, 2005 WL 3294006, at *6 (D.D.C. Jan. 10, 2005), aff'd on other grounds, 434 F.3d 584 (D.C. Cir. 2006) (concluding that a mandamus action is a "quintessentially governmental matter" and therefore holding the relevant limitations period for the action to be jurisdictional); see also P & V Enter. v. U.S. Army Corps of Eng'rs, 466 F. Supp. 2d 134, 142-43 (D.D.C. 2006), aff'd 516 F.3d 1021 (D.C. Cir. 2008) (recognizing that statute of limitations in 28 U.S.C. § 2401(a) is jurisdictional in a case involving a challenge to agency regulations); Felter v. Norton, 412 F. Supp. 2d 118, 124 (D.D.C. 2006) (holding that a suit seeking to void agency regulation is "peculiarly governmental" under Chung).

ii. Plaintiffs' Circumstances Do Not Merit Equitable Relief.

Even if the Court should deem the limitations period in section 2620 to be non-jurisdictional and thus "subject to judicial malleation," Chung, 333 F.3d at 276, Plaintiffs muster only the feeblest arguments for equitable relief, especially considering that "federal courts have

typically extended equitable relief only sparingly." Irwin, 498 U.S. at 96. Equitable relief falls into two categories. The first is equitable tolling, which relates to the conduct of the plaintiff and is usually applied to ensure the plaintiff is not deprived of a reasonable time in which to file suit because of "circumstances beyond his control." Chung, 333 F.3d at 279. The second sort of equitable relief, equitable estoppel, looks instead to the conduct of the defendant and prevents invocation of the statute of limitations where such a step would allow the defendant to "benefit[] from his misconduct." Id.

According to Plaintiffs, they merit equitable tolling because they exercised "due diligence" and their belated filing came through "no fault of their own." Yet, while Plaintiffs were indisputably aware of EPA's August 27, 2010 denial of their rulemaking request regarding lead shot and bullets, they neither sought clarification of the effect of that denial from the Agency nor filed a protective action in this Court, steps that were well within their ability. They offer no explanation for those lapses, except that they did not believe that EPA's August 27 letter triggered the running of the 60-day period for seeking judicial review. Such conscious pursuit of a dubious legal theory is far from the "carefully circumscribed circumstances" where the D.C. Circuit has allowed equitable tolling, such as where "despite all due diligence [a plaintiff] is unable to obtain vital information bearing on the existence of her claim." Smith-Haynie v. District of Columbia, 155 F.3d 575, 580, 579 (D.C. Cir. 1998). Rather, it was a strategic choice on Plaintiffs' part, a choice for which they should bear the consequences. As noted above, the D.C. Circuit has warned that plaintiffs must assume the risk if they decide to file outside a statutory limitations period based on their own interpretation of whether their petitions are timely:

> We emphasize first that petitioners who delay filing requests for review on their own assessment of when an issue is ripe for review do so at the risk of finding

> their claims time-barred. Normally, the appropriate time for a judicial determination of the ripeness of an issue is within the prescribed statutory period for review.

Eagle-Picher, 759 F.2d at 909; see also Fiesel v. Board. of Educ. of New York, 675 F.2d 522, 524-25 (2d Cir. 1982) ("The only sure way to determine whether a suit can be maintained is to try it. The application of the statute of limitations cannot be made to depend upon the constantly shifting state of the law, and a suitor cannot toll or suspend the running of the statute by relying upon the uncertainties of controlling law." (quoting Veraluis v. Town of Haskell, 154 F.2d 935, 943 (10th Cir. 1946)).

Equitable estoppel is likewise inappropriate in this context.[2] Foremost, there is an "extraordinarily high hurdle required to invoke equitable estoppel against the government." Chennareddy v. Dodaro, 698 F. Supp. 2d 1, 24 (D.D.C. 2009) (Sullivan, J.); see also Rann v. Chao, 346 F.3d 192, 197 (D.C. Cir. 2003) ("[W]e have read the Supreme Court's powerful cautions against application of the [equitable estoppel] doctrine to the government . . . as normally barring its use to undercut statutory exhaustion requirements . . . ." (citations omitted)). And for good reason; were the Court to adopt Plaintiffs' argument that alleged governmental ambiguity was sufficient grounds for equitable estoppel, the United States would undoubtedly be accused of "lulling" plaintiffs into missing statutory deadlines for challenging government action every time such a violation of a statute of limitations occurred. See Office of Personnel Mgmt. v. Richmond, 496 U.S. 414, 433 (1990) ("To open the door to estoppel claims would only invite

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[2] The "lulling doctrine" invoked by Plaintiffs appears to be simply a variation on the theme of equitable tolling and equitable estoppel. See Baldwin County Welcome Ctr. v. Brown, 466 U.S. 147, 151 (1984) (rejecting application of equitable tolling where, among other things, the case was not one "where affirmative misconduct on the part of a defendant lulled the plaintiff into inaction"); Smith-Haynie, 155 F.3d at 580 (noting that "tolling on estoppel grounds is proper where," *inter alia*, "'affirmative misconduct on the part of a defendant lulled the plaintiff into inaction'" (quoting Baldwin County)).

endless litigation over both real and imagined claims of misinformation by disgruntled citizens . . . . Even if most claims were rejected in the end, the burden of defending such estoppel claims would itself be substantial.”).

Plaintiffs cannot overcome that “high hurdle” by, at worst, accusing EPA of “confusing actions.” Pls.’ Opp. at 12. The D.C. Circuit has refused to apply equitable estoppel even where government officials affirmatively give erroneous advice to a plaintiff. See Deaf Smith County Grain Processors, Inc. v. Glickman, 162 F.3d 1206, 1214 (D.C. Cir. 1998). Here, the August 27 denial letter does not even purport to tell Plaintiffs when their 60-day window for filing suit under section 2620 to challenge that denial begins, whatever subtext Plaintiffs may have read into it. The fact is, Plaintiffs’ reading of the letter represents their own legal interpretation of section 2620, which they pursued at their own risk. See ATC Petroleum, Inc. v. Sanders, 860 F.2d 1104, 1112 (D.C. Cir. 1988) (“[T]here is no grave injustice in holding parties to a reasonable knowledge of the law.”); In re Katrina Canal Breaches Consol. Litig., 572 F. Supp. 2d 664 (E.D. La. 2008) (refusing to apply equitable estoppel against government even though government officials confused plaintiffs as to status of their claim).

EPA made no secret of the fact that it was treating the petition as containing two separate rulemaking requests and disposing of them separately. The Federal Register notice relating to EPA’s denial of the request for a ban on lead bullets and shot was titled “Lead in Ammunition and Fishing Sinkers; Disposition of TSCA Section 21 Petition.” 75 Fed. Reg. 58,377 (Sept. 24, 2010). That notice described Plaintiffs’ petition as “requesting that EPA prohibit under TSCA section 6(a) the manufacture, processing, and distribution in commerce of (1) lead bullets and shot; and (2) lead fishing sinkers.” 75 Fed. Reg. at 58,378. Likewise, the Federal Register notice relating to Plaintiffs’ second rulemaking request was titled “Lead Fishing Sinkers;

Disposition of TSCA Section 21 Petition" and referred to the lead fishing sinkers rulemaking request as one of two rulemaking requests contained in Plaintiffs' petition document. 75 Fed. Reg. 70,246 (Nov. 17, 2010). While EPA did at times refer to its action on Plaintiffs' first request as a decision regarding a "portion" of Plaintiffs' petition, in the context of the Agency's repeated statements that it was denying the lead shot and bullets rulemaking request, that colloquial description is far from the affirmative misconduct – such as "active steps amounting to a deliberate design by the [defendant] or actions that the [defendant] should unmistakably have understood would cause the [plaintiff] to delay filing his charge" or "acts of wrongdoing such as hiding evidence or promising not to rely on a statute of limitations defense" – that would warrant application of equitable estoppel. Chennareddy, 698 F. Supp. 2d at 19 (internal quotation marks and citation omitted).

Ultimately, Plaintiffs ask this Court to shift the burden for determining when to bring suit that has traditionally rested with the plaintiff on to the defendant. "It is the plaintiff who must exercise due diligence, not the defendant . . . ." Norman v. United States, 467 F.3d 773, 777 (D.C. Cir. 2006). Plaintiffs' own lack of due diligence in failing to consider the effect of EPA's August 27 denial of their request for rulemaking regarding lead shot and bullets far outweighs any ambiguity in the Agency's references to the two requests contained in Plaintiffs' petition, especially when it was Plaintiffs' own choice to present those two rulemaking requests in a single document. Cf. Marshall v. Honeywell Tech. Solutions, Inc., 536 F. Supp. 2d 59, 68 (D.D.C. 2008) (refusing to grant equitable relief to plaintiff, even crediting her allegation that she was misled by an agency official regarding proper filing of claims, where she did not pursue her legal rights with due diligence). Thus, even if the Court has the power to grant equitable relief from section 2620's 60-day limitations period, the circumstances here do not merit it.

B. EPA Lacks Authority to Ban Integral Components of Shells and Cartridges.

1. Plaintiffs' Interpretation of 15 U.S.C. § 2602(2)(B)(v) Is Completely Unworkable.

All of the parties in this case agree that Congress intended to bar the use of TSCA as "a vehicle for gun control" on the basis that ammunition poses "an unreasonable risk because it injures people when fired from a gun." H.R. Rep. No. 94-1341, at 10 (1976), reprinted in Legislative History of the Toxic Substances Control Act 418 (Comm. Print 1976). To accomplish this aim, Congress barred EPA from regulating articles taxed under 26 U.S.C. § 4181, including shell and cartridges. Yet Plaintiffs assert that EPA has full authority to regulate shot and bullets under TSCA even though, as they admit, shot and bullets are integral components of shells and cartridges, which necessarily include a projectile that is "normally" shot or a bullet. Pls.' Opp. at 13-14. Under Plaintiffs' stingy reading of section 2602(2)(B)(v), EPA may regulate any article, however essential to and inherent in the operation of a firearm, as long as it is not specifically named in 26 U.S.C. § 4181.

If the Court were to adopt Plaintiffs' interpretation of TSCA's firearms and ammunition exception, there would be nothing to prevent gun control advocates from circumventing Congress's intent by arguing that EPA should regulate shot and bullets ("specifically not shells or cartridges," Pls.' Opp. at 14) because they present "an unreasonable risk because [they] injure people when fired from a gun." In other words, Plaintiffs' construction would improperly open the door to indirect regulation of articles that Congress barred EPA from regulating directly. Cf. Frito-Lay, Inc. v. Local Union No. 137, Int'l Bhd. of Teamsters, 623 F.2d 1354 (9th Cir. 1980) (recognizing that Congress's creation of a statutory bar on unions from forcing employers to bargain as part of a multiemployer "employer organization" should also prevent union from pressuring employers into bargaining as part of an informal employer group, not just a formal

organization). Plaintiffs attempt to duck this problem by arguing that *they* have no such objectives, and are perfectly happy to have lead shot and bullets replaced by non-lead alternatives. That approach, however, leaves both EPA and the Court with the impossible task of scrutinizing the motives of those who seek regulation of the components of firearms or ammunition under TSCA and attempting to discern whether they are truly pursuing gun control aims.

2. The Components of Firearms, Shells, and Cartridges Do Fall Within the Effective Ambit of Section 4181 of the Internal Revenue Code.

It is unnecessary to imagine how EPA could administer the exception in section 2605(2)(B)(v) under Plaintiffs' interpretation because shot and bullets *are* effectively taxed under 26 U.S.C. § 4181. Plaintiffs contend that those articles must be expressly named in section 4181 itself in order to be subject to taxation, because any tax is a tax on the finished product alone. Pls.' Opp. at 14. Yet the regulations implementing section 4181 make clear that the tax imposed on articles such as firearms, shells, and cartridges is intended to encompass the value of their component parts. See 27 C.F.R. § 53.61(b)(2) ("All component parts for firearms are includible in the price for which the article is sold."); 27 C.F.R. § 53.91(a) ("The 'price' for which an article is sold includes the total consideration paid for the article . . . ."). Although components such as shot and bullets are taxed at the stage of commerce at which they have been incorporated into a retail product, the fact remains that the tax paid by the manufacturer on the product reflects the value of those components; they are simply taxed at the point at which they have been already incorporated into a shell or cartridge, rather than earlier in the chain of commerce. The Court should not ignore this application of section 4181; for if Congress truly intended to use this provision simply as a "list" of the articles firearms, shells, and cartridges, Pls.' Opp. at 15, why did the legislature specifically cross-reference section 4181 rather than

simply naming a discrete list of articles that were the only ones excluded from regulation under TSCA? Despite Plaintiffs' parsimonious reading of section 2602(2)(B)(v), Congress did have an intent in enacting that provision, one that would be undermined by ignoring the actual, practical scope of section 4181.

Indeed, Plaintiffs' own interpretation rests on one particular aspect of the technical implementation of section 4181, rather than its exact words: the exemption of component parts from taxation under that provision when they are sold separately as replacement parts or accessories. However, the Court should not allow Plaintiffs to elevate that single exception over the normal application of section 4181 as an effective tax on the value of shot and bullets. To do so would turn one administrative interpretation, relevant only to certain factual circumstances, into a wholesale license for thwarting Congress's intent.

3. Plaintiffs' Argument that EPA Has Statutory Authority to Regulate Lead Shot and Bullets Rests on Importing Unclear Legislative History into the Plain Language of the Statute.

The Supreme Court has warned that one reason courts must be dubious of relying on legislative history is that "legislative history is itself often murky, ambiguous, and contradictory." Exxon Mobil Corp. v. Allapattah Servs., Inc., 545 U.S. 546, 568 (2005). In this case, the House Committee's report accompanying TSCA stated that EPA might still regulate "*chemical* components of ammunition," which Plaintiffs construe as giving them free reign to seek regulation of any subcomponent of shells or cartridges. Yet most people would probably not consider shot and bullets to be "chemicals," rendering it unclear whether the Committee meant that EPA could regulate the integral component parts of ammunition, or simply to emphasize EPA's general authority to regulate chemicals that might also be used as constituents of ammunition. By contrast, what we do know, and what is borne out by the plain text of TSCA,

is that Congress sought to prevent the use of TSCA as a means of gun control. Given that intent, the legislative history cited by Plaintiffs provides only a feeble basis for recognizing an implicit exception to section 2502(2)(B)(v) that is not apparent from the text itself: a judicial rule that EPA may in fact regulate essential components of firearms and ammunition.

Like the above legislative history, the relevance of the slight difference in the language of the Consumer Product Safety Act ("CPSA"), which specifically exempts components of firearms and ammunition, is far from clear. 15 U.S.C. § 2052(a)(5). If anything, it seems highly unlikely that Congress, though seeking to prevent the Consumer Product Safety Commission ("CPSC") from regulating firearms, ammunition, or their components for *any* purpose (even, presumably, because of safety concerns completely unrelated to gun control), would freely grant EPA such authority. Moreover, it is possible that Congress referred to components directly in the CPSA because that statute normally allows the CPSC to regulate components of consumer products, see 15 U.S.C. § 2052(5), and in fact gun control advocates had previously sought CPSC regulation of firearms components. See Committee for Hand Gun Control, Inc. v. Consumer Prod. Safety Comm'n, 388 F. Supp. 216, 217 (D.C. Cir. 1974). The Court thus must be guided by the plain text of TSCA and undisputed evidence of Congress's intent, rather than such peripheral evidence of dubious import.

4. EPA's Reading of the Plain Language of 15 U.S.C. § 2602(2)(B)(v) Merits Chevron Deference.

Plaintiffs' argument that EPA's interpretation of section 2602(2)(B)(v) should not receive deference under Chevron U.S.A. Inc. v. Natural Resources Defense Council, 467 U.S. 837 (1984), based mainly on interplay between Justices Scalia and Brennan in Mississippi Power & Light Co. v. Mississippi ex rel. Moore, 487 U.S. 354 (1988), is out of step with this Court's

current case law.[3] In recent years, the D.C. Circuit has made clear that an agency's interpretation of a statute that it administers merits Chevron deference regardless of whether the provision in question involves the agency's regulatory jurisdiction. Transmission Agency of Northern California v. Federal Energy Regulatory Commission, 628 F.3d 538 (D.C. Cir. 2010), stated without debate that "the court affords Chevron deference to the Commission's interpretation of its jurisdiction under the FPA [Federal Power Act]." Id. at 544. Similarly, in reviewing the Federal Trade Commission's interpretation of its own jurisdiction under the Graham-Leach-Billey Act, the D.C. Circuit's only question in deciding whether to defer to that interpretation was the traditional Chevron inquiry of whether the statute was silent or ambiguous on the point in question and whether Congress had implicitly delegated authority to the agency to fill that statutory gap. See American Bar Ass'n v. Fed. Trade Comm'n, 430 F.3d 457, 468-69 (D.C. Cir. 2005).

Here, the first of those two questions will be answered if the Court finds that 15 U.S.C. § 2602(2)(B)(v) is ambiguous with respect to shot and bullets. On the second question, it is clear that, in authorizing EPA to administer TSCA, Congress granted the Agency the power to interpret the definition of "chemical substance." For example, the Conference report for the Act

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[3] Plaintiffs also attempt to throw Chevron out the window altogether based on 15 U.S.C. § 2620(b)(4)(B), which provides the Court should consider Plaintiffs' petition for a rulemaking regarding lead shot and bullets "in a *de novo* proceeding." However, the provision goes on to state that such *de novo* consideration relates to whether the petitioner is able to "demonstrate[] to the satisfaction of 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." 15 U.S.C. § 2620(b)(4)(B)(ii). Nothing indicates that this provision is meant to override the traditional judicial approach regarding questions of law; it simply directs the Court to consider the *factual* evidence in the petition regarding the risks posed by lead shot and bullets under a *de novo* standard. Moreover, since section 2620 allows for petitions under key rulemaking provisions of TSCA, such as 15 U.S.C. §§ 2603, 2604, 2605, and 2607, Petitioners' approach would in essence divest EPA of Chevron deference for its construction of these central provisions, since any of them could arise in the context of a citizen petition.

expressly stated: "It is expected that the Administrator will develop guidelines for the purpose of clarifying the extent to which impurities and concomitant products will be included within a reference to 'chemical substance' as it relates to the various provisions of the Act." H.R. Rep. No. 94-1679, at 57 (1976), reprinted in Legislative History of the Toxic Substances Control Act 676 (Comm. Print 1976). Thus, in situations involving ambiguous application of the definition of chemical substance, such as when a chemical substance contains impurities, Congress evidently expected EPA to provide reasonable interpretations of the statute's text, and trusted the Agency to do so.

Furthermore, EPA's application of section 2602(2)(B)(v) does not involve interpretation of section 4181. Indeed, the Agency's reading of the firearms and ammunition exemption stems entirely from the regulations promulgated by the Department of the Treasury pursuant to its authority to administer section 4181. EPA's expertise enters into the equation at the point of determining the application of any particular interpretation of the chemical substance definition. This is an area in which the Agency's expertise can and should be brought to bear, since that definition is critical to the application of most of the operative provisions of TSCA (*e.g.*, 15 U.S.C. §§ 2603, 2604, 2605, 2607), which Congress has expressly authorized EPA to administer.

5. EPA's Interpretation of 15 U.S.C. § 2602(2)(B)(v) Should Prevail Given Either Chevron or Skidmore Deference.

Plaintiffs have little answer for EPA's citation of its prior interpretations of the term "chemical substance" in line with the Agency's construction of subsection (v), asserting that these interpretations are irrelevant simply because they do not contain the precise words "bullets" or "shot." Pls.' Opp. at 22. Although the direct application of the firearms and ammunition exemption has not arisen before this petition, EPA has previously taken the position that chemical substances "manufactured or processed solely for use as . . . firearms or

ammunition" are "not TSCA regulable." Dkt. No. 22, Ex. 6; see generally Dkt. No. 27, Defs.' Partial Mot. to Dismiss at 20. And when EPA was directly confronted with the question of whether it may regulate bullets and shot under TSCA in light of section 2602(2)(B)(v), the Agency issued a definitive, plain language interpretation of subsection (v) as exempting bullets and shot from TSCA regulation. EPA's sensible approach, of not accomplishing regulation that Congress has forbidden by regulating the integral components of articles expressly exempted in 15 U.S.C. § 2602(2)(B), is the approach that the Court should adopt here.

III. CONCLUSION

For the foregoing reasons, the Court should grant EPA's Partial Motion to Dismiss.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing Reply in Support of Defendants' Partial Motion to Dismiss has been served with the corresponding Notice of Electronic Filing via the Electronic Case Filing System (ECF) upon the following on this 4th of March, 2011:

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