UNITED STATED DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

TRUMPETER SWAN SOCIETY, et al. Plaintiffs, vs. ENVIRONMENTAL PROTECTION AGENCY, et al., Defendants, NATIONAL RIFLE ASSOCIATION OF AMERICA and SAFARI CLUB INTERNATIONAL, Defendant-Intervenors.	Case No.: 1:12-cv-00929-EGS

DEFENDANT-INTERVENORS NATIONAL RIFLE ASSOCIATION OF AMERICA AND SAFARI CLUB INTERNATIONAL'S MOTION TO DISMISS THE AMENDED COMPLAINT

Defendant-Intervenors National Rifle Association of America and Safari Club International (collectively "NRA/SCI"), by and through their undersigned counsel, hereby move to dismiss the above captioned matter pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6), and Local Rule 7.

As discussed in detail in NRA/SCI's Memorandum in Support of their Motion to Dismiss the Amended Complaint, and in the motions to dismiss and memoranda in support submitted by Defendants Environmental Protection Agency *et al.* and Defendant-Intervenor National Shooting Sports Foundation, this Court lacks subject matter jurisdiction to consider the claims made by plaintiffs Trumpeter Swan Society *et al.* ("CBD Plaintiffs"), and CBD Plaintiffs have failed to state claims for which this Court can grant relief.

WHEREFORE, NRA/SCI respectfully request that this Court grant NRA/SCI's motion to dismiss the Amended Complaint, grant the motions to dismiss of all Defendants and Defendant-Intervenors in the matter and dismiss CBD Plaintiffs' Amended Complaint with prejudice. NRA/SCI also request oral argument on this motion.

Dated: August 31, 2012

Respectfully Submitted,

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DEFENDANT-INTERVENOR NATIONAL RIFLE ASSOCIATION OF AMERICA AND SAFARI CLUB INTERNATIONAL'S MEMORANDUM IN SUPPORT OF MOTION TO DISMISS PLAINTIFFS' AMENDED COMPLAINT

I. Introduction

Defendant-Interveners National Rifle Association of America ("NRA") and Safari Club International ("Safari Club") (collectively "NRA/SCI") respectfully file this memorandum in support of their motion to dismiss claims of the Amended Complaint ("Am. Compl.") in the above-captioned matter. In this brief NRA/SCI will demonstrate that when all facts alleged by plaintiffs Trumpeter Swan Society, Cascade Raptor Center, Center for Biological Diversity, Loon Lake Loon Association, Preserve Our Wildlife Organization, Tennessee Ornithological Society, and Western Nebraska Resources Council (collectively "CBD Plaintiffs") are taken as true and all matters are viewed in CBD Plaintiffs' favor, the three causes of action of the Amended Complaint must be dismissed with prejudice. The question in this case is not whether CBD Plaintiffs want the Environmental Protection Agency ("EPA") and this Court to believe

that lead ammunition could potentially harm the environment, but instead 1) whether the EPA has the authority to regulate ammunition containing lead bullets and shot when Congress intended otherwise, and 2) whether CBD Plaintiffs complied with statutory and constitutional requirements for bringing their challenge to this Court.

II. Statutory Background

In 1976 Congress enacted the Toxic Control Substances Act ("TCSA") to protect both humans and the environment from unreasonable risks of injury from "chemical substances" and "mixtures." *Ctr. for Biological Diversity v. Jackson*, 815 F. Supp. 2d 85, 87 (D.D.C. 2011). TSCA directs the EPA to apply regulatory measures, promulgated under the Act "to the extent necessary to protect adequately against such risk using the least burdensome requirements." 15 U.S.C. § 2605(a).

TSCA defines the phrase "chemical substance" as "any organic or inorganic substance of a particular molecular identity, including (i) any combination of such substances occurring in whole or in part as a result of a chemical reaction or occurring in nature, and (ii) any element or uncombined radical." 15 U.S.C. § 2602(2)(A). The term "mixture" is defined as a combination of two or more "chemical substances." *Id.* § 2602(8)[1] However, Congress exempted from the Act's definitions of "chemical substances" and "mixtures" any articles subjected to taxes under 26 U.S.C. § 4181. 15 U.S.C. § 2602(2)(B)(v). Section 4181, also known as the firearms and

[1]TSCA defines "mixture" as "any combination of two or more chemical substances if the combination does not occur in nature and is not, in whole or in part, the result of a chemical reaction; except that such term does include any combination which occurs, in whole or in part, as a result of a chemical reaction if none of the chemical substances comprising the combination is a new chemical substance and if the combination could have been manufactured for commercial purposes without a chemical reaction at the time the chemical substances comprising the combination were combined." 15 U.S.C. § 2602(8).

ammunition excise tax ("FAET"), imposes a tax on a manufacturer, producer or importer's sale of pistols, revolvers, firearms, shells, or cartridges. 26 U.S.C. § 4181.

Section 21 of TSCA provides the process by which citizens may petition the EPA Administrator to initiate TSCA's rule making proceedings to protect against statutorily defined unreasonable risks. 15 U.S.C. § 2620(a). A petition must "set forth the facts which it is claimed establish that it is necessary to issue . . . a rule . . . ." *Id.* § 2620(b)(1). The Administrator then has ninety days to "either grant or deny the petition." *Id.* § 2620(b)(3). If the EPA denies the petition, the petitioner may, within sixty days of the denial, file a claim in a United States District Court "to compel the Administrator to initiate a rulemaking proceeding as requested in the petition." *Id.* § 2620(b)(4)(A). If the petitioner fails to bring a claim within sixty days of the petition's denial, the court will lack subject matter jurisdiction over the claim. *Ctr. for Biological Diversity*, 815 F. Supp. 2d at 94. If the petitioner files a timely claim with the court, he or she must demonstrate, 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). If the petitioner successfully meets that burden, then the "court shall order the Administrator to initiate the action requested by the petitioner." *Id.*

III. Factual Background

Plaintiff Center for Biological Diversity ("CBD"), along with several other groups who are not a party to the present action, filed an initial TSCA petition with the EPA on August 3, 2010. CBD's initial petition sought to ban lead bullets and shot and lead fishing tackle.[2] *Ctr. for*

[2] The EPA determined that the first petition actually constituted two separate petitions, one petition requesting regulations to ban lead bullets and shot, and a second one seeking regulations to ban lead fishing tackle. *Ctr. for Biological Diversity*, 815 F. Supp. at 87. For purposes of this

Biological Diversity, 815 F. Supp. at 87. The EPA denied that initial petition on August 27, 2010. *Id.* CBD and the other petitioners that joined in that initial petition brought suit in this Court on November 23, 2010 against the EPA, challenging the petition's denial. *Id.* That suit was filed eighty-eight days after the EPA denied the initial petition. *Id.* The EPA moved to dismiss the case for lack of subject matter jurisdiction, claiming that CBD and the other petitioners failed to bring their claim within sixty days of the EPA's denial of the petition, as required by Section 21 of TSCA. *Id.* at 90.[3] The Court granted EPA and Defendant-Intervenor National Shooting Sports Foundation's ("NSSF") motions and dismissed the claim. *Id.* at 87-91. On April 30, 2012, the Court granted the plaintiffs' motion for a voluntary dismissal of the remaining claims regarding fishing tackle. *Ctr. for Biological Diversity v. Jackson*, No. 1:10-cv-02007-EGS (D.D.C. April 30, 2012) (order granting motion to dismiss).

On March 13, 2012, CBD and several other organizations made a second attempt at filing a petition, requesting that the EPA initiate rule making proceedings to ban the use of lead shot and ammunition in hunting and shooting sports.[4] Am. Compl. ¶¶ 3 & 57; Dkt. 12. On April 9, 2012, the EPA sent CBD Plaintiffs a letter denying the second attempt at a petition ("rejection letter"), which explained that the EPA did not consider the second attempt to be cognizable as a newly filed petition because it was substantially the same as the first petition. Am. Comp. ¶ 3. Alternatively, the EPA's rejection letter explained that "even if the 2012 submission could be considered to be a request for reconsideration, EPA would deny it because the 2012 submission

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memorandum, any references to the first petition are in regard to the lead bullet and shot petition unless otherwise specified.

[3] The NRA and Safari Club intervened in the case, as did NSSF. NSSF also filed its own motion to dismiss the complaint in that action.

[4] CBD and Project Gutpile were named petitioners on both the initial and second petitions to the EPA.

does not present significant newly discovered, noncumulative material." *Id*. ¶ 5. The rejection letter further stated that, '"even if the 2012 submission were considered to be a new or different petition cognizable under section 21 of TSCA, EPA would deny it for the same reasons it denied the 2010 petition,' citing 75 Fed. Reg. 58,377 at 58,378 (Sept. 24, 2010)." *Id*. ¶ 6. CBD Plaintiffs filed their complaint in the instant matter on June 7, 2012 - fifty-nine days after the EPA sent the rejection letter. Dkt. 1. The original complaint included two causes of action. This Court granted NSSF, the Association of Battery Recyclers, and NRA/SCI intervention as defendants on July 5, July 13, and July 31, 2012, respectively. Dkts. 10, 17, & 22. *Trumpeter Swan Soc. v. EPA*, No. 12-00929-EGS (D.D.C. July 5, 13, 31, 2012) (minute orders granting intervention). CBD Plaintiffs filed an Amended Complaint on July 10, 2012- ninety-two days after the EPA sent the rejection letter. Dkt. 12. In the Amended Complaint, CBD Plaintiffs included the original two causes of action and one additional claim.

CBD Plaintiffs' first cause of action claims that the EPA's decision that its petition is not cognizable under TSCA was "contrary to the plain language of TSCA," and was "arbitrary, capricious, an abuse of discretion, and/or otherwise . . . in violation of the APA." *Id*. ¶¶ 68-69. CBD Plaintiffs assert that this court must "order the EPA to properly consider the petition and either grant or deny it on its merits[.]" *Id*. ¶ A.

CBD Plaintiffs' second cause of action claims that "to the extent the EPA denied the petition, it did so wrongfully and failed to give an adequate reason for doing so, in violation of TSCA." *Id*. ¶ 71. CBD Plaintiffs contend that they have demonstrated by a preponderance of the evidence that a rule banning the use of lead bullets and shot in hunting and shooting sports is necessary under TSCA, and to the extent the EPA denied their petition, they are "entitled to a de novo judicial review of the petition." *Id*. ¶¶ 71-73. Plaintiffs request that the Court order the

EPA to initiate rulemaking proceedings to develop a rule to protect the environment from ammunition containing lead. *Id.* ¶ B.

Finally, CBD Plaintiffs' third cause of action argues that the EPA failed to either grant or deny their petition within ninety days as required by Section 2(b)(3) TSCA, and to the extent the EPA intended for the April 9, 2012 letter to be a denial, the EPA failed to publish its reasons for the denial in the Federal Register as required by TSCA. *Id.* ¶¶ 75-77 (citing 15 U.S.C. § 260(b)(3)). CBD Plaintiffs request that, if this Court finds that the EPA failed to grant or deny the petition within ninety days, and finds that CBD Plaintiffs have proved by a preponderance of the evidence that a rule banning the use of ammunition containing lead bullets and shot is necessary under TSCA, then the Court should review the case de novo, and order the EPA to initiate rule making proceedings under TSCA. *Id.* ¶¶ 77-79 & C.

NRA/SCI move this Court to deny and dismiss all three of CBD Plaintiffs' causes of action with prejudice because this Court lacks subject matter jurisdiction to consider those claims (Fed. R. Civ. P. 12(b)(1)) and because CBD Plaintiffs have failed to state claims upon which this court can grant relief (Fed. R. Civ. P. 12(b)(6)).

IV. Standard of Review

A motion filed under authority of Fed. R. Civ. P. 12(b)(1) "presents a threshold challenge to the court's jurisdiction." *Haase v. Sessions,* 835 F.2d 902, 906 (D.C. Cir. 1987). The plaintiff must overcome this challenge, and establish that the court has jurisdiction. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992) (citing *FW/PBS, Inc. v. Dallas*, 493 U.S. 215, 231 (1990)). When evaluating a motion to dismiss, the court must take all the factual allegations in the complaint as true. *Leatherman v. Tarrant Cnty. Narcotics Intelligence & Coordination Unit,* 507 U.S. 163, 164 (1993) (citing *United States v. Gaubert*, 499 U.S. 315, 327 (1991)). A court can

look to materials outside the pleadings to decide a Fed. R. Civ. P. 12(b)(1) motion when necessary. *Coal. for Underground Expansion v. Mineta,* 333 F.3d 193, 198 (D.C. Cir. 2003) (citing *Herbert v. Nat'l Acad. of Scis.*, 974 F.2d 192, 197 (D.C. Cir. 1992)). Once a court determines that it lacks subject matter jurisdiction over a case, the court cannot precede any further. *Simpkins v. Dist. of Columbia Gov't,* 108 F.3d 366, 371 (D.C. Cir. 1997).

Alternatively, a motion filed pursuant to Fed. R. Civ. P 12(b)(6) challenges the legal sufficiency of the complaint. *ACLU Found. of S. Cal. v. Barr,* 952 F.2d 457, 472 (D.C. Cir. 1991). A complaint must have "a short and plain statement of the claim showing that the pleader is entitled to relief, in order to give the defendant fair notice of what the claim is and the grounds upon which it rests." *Bell Atl. Corp. v. Twombly,* 550 U.S. 544, 555 (2007) (internal quotations omitted) (citing *Conley v. Gibson,* 355 U.S. 41, 47 (1957)). This "requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do[.]" *Id*. (citing *Papasan v. Allain,* 478 U.S. 265, 286 (1986)). The court makes "the assumption that all the allegations in the complaint are true[.]" *Id*. (citing *Swierkiewicz v. Sorema N. A.*, 534 U.S. 506, 508, n.1 (2002)). However, "the Court need not accept inferences drawn by plaintiffs if such inferences are unsupported by the facts set out in the complaint." *Kowal v. MCI Commc'ns Corp.*, 16 F.3d 1271, 1276 (D.C. Cir. 1994); *see also Papasan,* 478 U.S. at 286 (on a motion to dismiss, courts "are not bound to accept as true a legal conclusion couched as a factual allegation"). Finally, when reviewing a Fed. R. Civ. P. 12(b)(6) motion, the court may not review materials outside the pleadings without converting the motion into a Fed. R. Civ. P. 56 summary judgment motion, unless those materials are "central to plaintiff's claim." *Vanover v. Hantman,* 77 F. Supp. 2d 91, 98 (D.D.C. 1999) (citing *Greenberg v. Life Ins. Co. of Va.*, 177 F.3d 507, 514 (6th Cir. 1999)) *aff'd.*, 38 Fed. Appx. 4 (D.C. Cir. 2002).

V. Argument[5]

A. Congress Drafted TSCA to Deprive the EPA of Authority to Regulate Ammunition and Regulation of Such Ammunition Would Undermine Conservation

In asking the EPA and subsequently this Court to direct a wholesale ban of lead-based ammunition, CBD Plaintiffs paint a bleak and inaccurate picture of whether and how that type of ammunition affects the health of wildlife species. As with most controversies, when the issues are viewed only from one of the litigant's point of view, the incomplete portrayal fails to address the benefits provided by the target of the controversy as well as the harm threatened by the litigant's proposed relief. In this case, ironically, the lead ammunition ban that CBD Plaintiffs seek could pose great harm to the wildlife species that CBD Plaintiffs purport to have brought this suit to protect.

TSCA exempts from EPA rulemaking authority the sale of ammunition that is subject to federal taxation. 15 U.S.C. § 2602(2)(B)(v). TSCA authorizes the Administrator of the EPA to act on petitions relating to "chemical substances and mixtures" (15 U.S.C. §§ 2605, 2620), but provides an exemption to the EPA's authority for "any article the sale of which is subject to the tax imposed by section 4181 of the Internal Revenue Code of 1986 [26 U.S.C.A. § 4181]." *Id.* § 2602(2)(B)(v). Those taxes identified in section 4181 are collected for specific purposes – including the conservation of the very wildlife species upon which CBD Plaintiffs base their assertions of harm in this lawsuit.

[5]To avoid redundancy and unnecessary briefing, NRA/SCI incorporate by reference the factual and legal arguments included in the motions to dismiss and memoranda in support filed by Federal Defendants, EPA et al., and Defendant-Intervenor NSSF in this matter. The arguments in this motion and memorandum are intended to complement and supplement those filed by the Defendants and other Defendant-Intervenors.

Pursuant to the Federal Aid in Wildlife Restoration Act (16 U.S.C. §§ 669-669i; 50 Stat. 917) of September 2, 1937, also known as the Pittman-Robertson Act ("Wildlife Restoration Act" or "PR Act"), the tax imposed by section 4181 on the sales of firearms and ammunition go into "the Federal aid to wildlife restoration fund in the Treasury" (16 U.S.C. § 669b(a)(1)) and are distributed to the states for "the planning and implementation of [their] wildlife conservation and restoration program[s] and wildlife conservation strateg[ies]." *Id*. § 669b(c)(2). "Priority for funding from the Wildlife Conservation and Restoration Account shall be for those species with the greatest conservation need as defined by the State wildlife conservation and restoration program." *Id.* § 669b(c)(3). Judge Wright of the D.C. Circuit offered a concise description of the workings of the PR Act:

> Also known as the Federal Aid to Wildlife Restoration Act, that statute provides for distribution among the states, for use in approved wildlife conservation projects, of receipts from the federal excise tax on firearms, shells and cartridges. Since 1939, the Secretary of the Interior has been charged with the administration of the Act. He is required, initially, to apportion the net receipts among the several states, one-half on an area basis, the remaining portion 'in the ratio which the number of paid hunting-license holders of each State in the preceding fiscal year, as certified to (him) by the State fish and game departments, bears to the total number of paid hunting-license holders of all the States.' 16 U.S.C.A. § 669c. Upon notice of the amount set aside for its use, each participating state must submit details of its wildlife project, and, of the Secretary approves it, the allocated moneys are ultimately paid to the applicant state on a matching basis. 16 U.S.C.A. §§ 669d- 669f.

Udall v. States of Wisc., Colo., and Minn., 306 F.2d 790, 791 (D.C. Cir. 1962) (Court ruled on appropriate analysis for determining number of licenses state could use to seek share of federal PR Act funds). Since Congress established the Pittman-Robertson Wildlife Restoration program approximately 75 years ago, the federal government has collected an amount in excess of $7.15 billion from manufacturers' excise taxes. The United States Department of the Interior Budget Justifications and Performance Information Fiscal Year 2013,

http://www.fws.gov/budget/2013/PDF%20Files%20FY%202013%20Greenbook/24.%20Wildlife%20Restoration.pdf ("2013 FWS Budget") at WR-4.[6] Collectively, states have provided a required match of over $1.78 billion. *Id.* "Many states have been successful in restoring numerous species to their native ranges, including the Eastern and Rio Grande turkey, white-tailed deer, pronghorn antelope, wood duck, beaver, black bear, giant Canada goose, American elk, desert and Rocky Mountain bighorn sheep, bobcat, mountain lion, and several species of birds." *Id.* at WR-3. The bald eagle, one of the species of specific concern to several of the individual Plaintiff organizations in this litigation, was one such species whose recovery can be attributed to the investment of funds generated through the collection of Wildlife Restoration funds. *Id.*; Am. Compl. ¶¶ 17, 19, 20.

The FWS estimates that states use approximately 60% of Wildlife Restoration Program funds for the purchase, lease, development, maintenance and operation of wildlife management areas. 2013 FWS Budget at WR-4. States have acquired about five million acres of land using these funds. *Id.* Approximately 26% of the Wildlife Restoration Program funds are used annually by states for wildlife surveys and research. *Id.* In addition, states have used Pittman-Robertson funds to improve over 38.6 million acres of habitat, develop over 43,700 acres of waterfowl impoundments and improve 604,700 acres for waterfowl. The United States Department of the Interior Budget Justifications and Performance Information Fiscal Year 2011,

[6]This Court may take judicial notice of the budget justifications prepared by the U.S. Fish and Wildlife Service ("FWS") and posted on the agency's website. *Hamilton v. Geithner*, 616 F. Supp. 2d 49, 57 n.6 (D.D.C. 2009) (acknowledging authority of courts to take judicial notice of information on federal agency websites); *see also Seifert v. Winter*, 555 F. Supp. 2d 3, 11 n.5 (D.D.C. 2008) (taking judicial notice of court martial manual, recognizing propriety of court taking judicial notice of documents on federal and state agency websites).

http://www.fws.gov/budget/2011/PDF%20files%20FY2011%20Greenbook/24.%20Wildlife%20Restoration%202011.pdf at WR-3.

CBD Plaintiffs seek a ban on lead-based ammunition without taking into account the impact that such a ban would have on wildlife health and conservation. An abrupt ban on the most significant share of the ammunition market would remove from that market one of the major sources of revenue fueling federal and state wildlife and habitat conservation. If hunters are deprived of the ability to purchase the most readily available and affordable ammunition products, the states that rely on the sales of those products for Wildlife Restoration Program funds will be deprived of the revenue they use to purchase and restore wildlife habitat, research wildlife health, and plan and implement conservation programs and projects. If CBD Plaintiffs achieve the relief they seek in this litigation, they will sabotage rather than protect the wildlife species in which they claim a conservation interest. Because the management and conservation of our nation's wildlife and habitat is the authority of state agencies and is not the domain of the EPA, questions concerning the health and welfare of that wildlife and habitat cannot be regulated by the latter. CBD Plaintiffs cannot twist the facts of their petition or this litigation to undermine Congress' intent.

B. CBD Plaintiffs Cannot Rely on the Legislative History to Support Their Claims

CBD Plaintiffs point to a single paragraph in the legislative history of TSCA in an attempt to support the argument that Congress intended to give the EPA authority over the regulation of lead-based ammunition. Am. Compl. ¶ 39. Unfortunately, the passage on which CBD Plaintiffs focus, extracted from a single House committee report, offers more ambiguity than clarification of the EPA's authority. The D.C. Circuit has repeatedly expressed its disregard for the use of ambiguous legislative history to aid in statutory construction, regardless of whether

the words of the statute being interpreted are clear on their face or ambiguous themselves. *Sweet Home Chapter of Communities for a Great Oregon v. Babbitt*, 1 F.3d 1, 6 (D.C. Cir. 1993) (rejecting ambiguous legislative history references from conflicting House and Senate reports in effort to interpret ambiguous Endangered Species Act language); *W. Fuels-Utah, Inc. v. Fed. Mine Safety & Health Review Comm'n*, 870 F.2d 711, 717 (D.C. Cir. 1989) ("Ambiguous legislative history does not becloud a clear statutory command.").[7]

In addition to being ambiguous, the single paragraph on which CBD Plaintiffs rely can only be found in one report from the House Committee on Interstate and Foreign Commerce that was issued July 14, 1976, months before the passage of TSCA. H.R. Rep. No. 94-1331, at 404 (1976).[8] That language to which CBD Plaintiffs attribute such importance never appeared again, and no reference to that discussion was made in the Conference Report that was published on September 23, 1976, just 2½ weeks prior to TSCA's passage on October 11, 1976. H.R. Conf. Rep. No. 94-1679 (1976). When given the choice of seeking guidance from individual committee reports as opposed to conference reports, courts regularly choose the latter as the far more reliable indicator of the will of the legislators. "[A] congressional conference report is recognized as the most reliable evidence of congressional intent because it 'represents the final statement of the terms agreed to by both houses.'" *Northwest Forest Res. Council v. Glickman*, 82 F.3d 825, 835 (9th Cir. 1996) (citing *Dept. of Health and Welfare v. Block*, 784 F.2d 895, 901 (9th Cir. 1986) (citation omitted) (discussing primary role of conference reports in courts'

[7] In fact, the legislative history to which CBD Plaintiffs cite itself explains that "the language of the bill is clear on its face as to the exemption for pistols, revolvers, firearms, shells, and cartridges." Am. Compl. ¶ 39. The statutory command for exemption is clear, and it is therefore necessary to reject the ambiguities that this legislative history introduces.

[8] CBD Plaintiffs cite this reference as H.R. Rep. No. 79-313, at 418 (1976) (Committee print) in ¶ 39 of their Amended Complaint.

resources to determine meaning of statutory language when analyzing provisions of appropriations bill affecting timber sales)). Other courts, including the D.C. Circuit Court of Appeals, have specifically recognized the value of conference reports over other forms of legislative history:

> Conference Reports generally are viewed with less suspicion and are deemed more reliable than other sources of legislative history, like committee reports or floor statements of individual legislators. One court has even said of conference reports that, "next to the statute itself [,] it is the most persuasive evidence of congressional intent."

In re Telxon Corp. Sec. Litig., 67 F. Supp. 2d 803, 820 n.30 (N.D. Ohio. 1999) (Court rejected legislative history that contradicted plain language of the statute) *citing Demby v. Schweiker*, 671 F.2d 507, 510 (D.C. Cir. 1981). The absence of any reference in TSCA's Conference Report to Congress' intention to give the EPA authority over lead-based ammunition in the form of bullets and shot overrides any individual statement in a single committee report. CBD Plaintiffs have given this Court no reason to give any weight to a single unreliable sentence mined from TSCA's legislative history.

C. CBD's Third Cause of Action Lacks Factual Support and Is Untimely

On July 10, 2012, CBD Plaintiffs amended their complaint to add a third cause of action alleging that the EPA failed to grant or deny their petition as required by TSCA. Am. Compl. ¶ 75. CBD Plaintiffs' new third cause of action also claims that, to the extent that the April 9, 2012 rejection letter EPA sent CBD Plaintiffs was a denial of that petition, the EPA violated TSCA's requirement that the denial be published in the Federal Register. *Id.* ¶ 76. CBD Plaintiffs' third cause of action must fail for the following reasons: 1) a denial was unnecessary and therefore no publication in the Federal Register was required; 2) the EPA made it clear that even if the petition was cognizable, it would be denied; and 3) because they had actual notice of

the denial, CBD Plaintiffs failed to demonstrate the requisite prejudice necessary to challenge the EPA's failure to publish its response in the Federal Register, if such publication was appropriate.

1. If It Was Necessary, Federal Defendants Denied CBD Plaintiffs' Petition

After receiving CBD Plaintiffs' second petition to ban lead ammunition under TSCA, the EPA sent CBD Plaintiffs a letter stating that the EPA "does not consider the 2012 submission to be a new petition cognizable under section 21." Am. Compl. ¶ 4. The letter went on to say "even if the 2012 submission were considered to be a new or different petition cognizable under section 21 of TSCA, EPA would deny it for the same reasons it denied the 2010 petition." *Id.* ¶ 6 (citing 75 Fed. Reg. 58,377 at 58,378 (Sept. 24, 2010)). Thus, the EPA made it clear to CBD Plaintiffs that, if the petition were cognizable, the petition was denied. CBD Plaintiffs' claim that the EPA failed to either grant or deny their petition has no merit and should be dismissed.

2. Federal Defendants Bear No Liability for Notifying CBD Plaintiffs By Letter Rather Than By Federal Register Notice

CBD Plaintiffs argue that TSCA required that the EPA to inform them of the denial of their petition by publication in the Federal Register. Am. Compl. ¶ 5 (citing 15 U.S.C. § 2620(b)(3). Assuming, for the sake of argument, that CBD Plaintiffs' petition was cognizable under Section 21 of TSCA and the rejection letter denied that petition, the EPA's alleged failure to publish that denial would not, by itself, justify CBD Plaintiffs' claim. To successfully assert that it should recover for the EPA's failure to publish its denial of their petition, CBD Plaintiffs must show that they were "prejudiced" by the agency's failure to publish materials in the Federal Register under the enabling statute. *Sheppard v. Sullivan*, 906 F.2d 756, 762 (D.C. Cir. 1990) (finding that plaintiffs were not harmed by SSA's failure to publish provisions of its operating manual under the freedom of information act); *see also Donovan v. Wollaston Alloys, Inc.*, 695

F.2d 1, 9 (1st Cir. 1982) (applying an "adversely affect" standard) (citing *Hogg v. United States,* 428 F.2d 274, 280 (6th Cir. 1970)). CBD Plaintiffs have not met this burden.

CBD Plaintiffs have failed to allege any harm from the absence of a notice of their petition's denial in the Federal Register. Their Amended Complaint demonstrates that they had actual notice of the bases for the EPA's denial of their petition. Am. Compl. ¶¶ 5 & 6. "[E]ven if an agency has not given notice in the statutorily prescribed fashion, actual notice will render the error harmless." *Nat'l Mining Ass'n v. Mine Safety & Health Admin.,* 116 F.3d 520, 531 (D.C. Cir. 1997) (quoting *Ass'n of Am. R.Rs. v. Dep't of Trans.*, 38 F.3d 582, 589 (D.C. Cir. 1994) (quoting *Small Refiner Lead Phase-Down Task Force v. EPA,* 705 F.2d 506, 549 (D.C. Cir. 1983)). In the present case, CBD Plaintiffs petitioned the EPA to initiate the rule making proceeding on March 13, 2012. Am. Compl. ¶ 3. The EPA sent CBD Plaintiffs a rejection letter dated April 9, 2012, informing them of the denial of their petition. *Id.* ¶ 4. Thus, Plaintiffs had actual notice that their petition was being denied within the 90 day statutory deadline. This actual notice renders the EPA's alleged error in not publishing the denial in the Federal Register harmless. Therefore, Plaintiffs were not prejudiced, and this claim should be dismissed.

3. CBD Plaintiffs Lack Standing to Pursue Their Third Cause of Action

To bring this suit in federal court, CBD Plaintiffs must demonstrate that they can satisfy each of the requisites of constitutional or Article III standing to sue. The "irreducible constitutional minimum of standing" requires showing 1) an injury in fact that is "concrete and particularized" and "actual or imminent"; 2) that the injury is fairly traceable to the defendant's challenged conduct; and 3) that the injury is likely to be redressed by a favorable decision. *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560-61 (1992) (internal quotation marks omitted). CBD Plaintiffs cannot meet that burden for their third cause of action because their Amended

Complaint fails to allege any injury as a result of their receiving notice of the EPA's rejection of their petition in the form of a letter, rather than as a Federal Register notice.

The Amended Complaint contains no allegation to dispute CBD Plaintiffs' receipt of actual notice of the EPA's denial of their attempt at a second petition. Similarly, the Amended Complaint contains nothing to suggest that notice in the form of a letter harmed or prejudiced CBD Plaintiffs in any way. Without the requisite demonstration of harm, CBD Plaintiffs lack standing to pursue their third claim and this Court lacks subject matter jurisdiction to consider the claim.

Courts have dismissed similar claims because a plaintiff who had actual notice of the information required for publication could not establish injury in fact when an agency failed to publish notice of that information. *See Cargill, Inc. v. United States*, 173 F.3d 323, 332 (5th Cir. 1999) (mine owners with actual notice lacked standing to claim National Institute for Occupational Safety and Health's Board of Scientific Counselors authorization was not properly renewed, without evidence of injury in fact stemming from failure to comply with notice rules); *Miller v. United States*, 531 F.2d 510, 515 (Ct. Cl. 1976) (plaintiffs with actual notice lacked standing to challenge the Secretary's failure to publish in the Federal Register as required under the Redwood National Park Act). Because, in the Amended Complaint, CBD Plaintiffs admit they had actual notice of the EPA's denial, they cannot establish injury in fact, and therefore do not have standing to challenge the Administrator's failure to publish the denial in the Federal Register.

VI. Conclusion

NRA/SCI respectfully request that this Court dismiss all three causes of action of CBD Plaintiffs' Amended Complaint. This Court lacks subject matter jurisdiction to consider CBD

Plaintiffs' claims and CBD Plaintiffs fail to state claims upon which relief may be granted. The EPA lacked authority, under TSCA, to issue the rule sought by CBD Plaintiffs because the bullets and shot that are the subject of CBD's submission are statutorily exempt from EPA's rulemaking authority. The legislative history of TSCA does not create any basis to dispute that lack of authority.

CBD Plaintiffs' recently added third cause of action is unsupportable in that the EPA did in fact deny the second attempt at a petition, if such denial was necessary. CBD Plaintiffs received actual notice of the rejection/denial of their submission and suffered no harm from receipt of that notice by letter instead of Federal Register publication. As the Amended Complaint alleges no harm from the form of notice, CBD Plaintiffs have not demonstrated the requisite standing to give this Court jurisdiction over the their third claim.

Dated: August 31, 2012

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on August 31, 2012, I electronically filed the foregoing National Rifle Association of America and Safari Club International's Motion to Dismiss the Amended Complaint and Memorandum in Support along with the Proposed Order with the Clerk of Court using the CM/ECF system which will send notification of this filing to all attorneys of record.

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UNITED STATED DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

TRUMPETER SWAN SOCIETY, et al. Plaintiffs, vs. ENVIRONMENTAL PROTECTION AGENCY, et al., Defendants, NATIONAL RIFLE ASSOCIATION OF AMERICA and SAFARI CLUB INTERNATIONAL, Defendant-Intervenors.	Case No.: 1:12-cv-00929-EGS

[PROPOSED] ORDER GRANTING NATIONAL RIFLE ASSOCIATION OF AMERICA AND SAFARI CLUB INTERNATIONAL'S MOTION TO DISMISS THE AMENDED COMPLAINT

Upon consideration of the Motion to Dismiss the Amended Complaint filed by Defendant-Intervenors National Rifle Association of America and Safari Club International ("NRA/SCI") and the memorandum in support thereof, and other papers on file in this case, the Court has determined that NRA/SCI's Motion to Dismiss is GRANTED and that Plaintiffs Trumpeter Swan Society et al.'s Amended Complaint is DISMISSED with prejudice.

Dated: _____, 2012

_____
Emmet G. Sullivan
United States District Judge