UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

THE TRUMPETER SWAN SOCIETY, *et al.*, Plaintiffs, v. ENVIRONMENTAL PROTECTION AGENCY, *et al.*, Defendants.	)	Case No. 1:12-cv-929 (EGS)

DEFENDANT-INTERVENOR NATIONAL SHOOTING SPORTS FOUNDATION, INC.'S MOTION TO DISMISS PLAINTIFFS' COMPLAINT

Pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6) and Local Rule 7(a), Defendant-Intervenor National Shooting Sports Foundation, Inc. ("NSSF") respectfully moves the Court to dismiss all claims by the Center for Biological Diversity ("CBD") and co-Plaintiffs (collectively "Plaintiffs"). This case is Plaintiffs' second attempt to require that the United States Environmental Protection Agency ("EPA") regulate and even ban traditional ammunition containing lead shot and bullets under the Toxic Substances Control Act ("TSCA"), 15 U.S.C. § 2601 et seq., even though Congress expressly excluded ammunition from the reach of TSCA. Plaintiffs, however, cannot cure fundamental jurisdictional defects, and this Court again should dismiss this complaint as it did their prior one in 2011 for lack of subject matter jurisdiction. *Center for Biological Diversity v. Jackson,* 815 F. Supp. 2d 85 (D.D.C. 2011).

This court should again dismiss Plaintiffs' claims with prejudice pursuant to Fed. R. Civ. P. 12(b)(1) for lack of subject matter jurisdiction, as Plaintiffs failed to timely challenge EPA's denial of their 2010 Petition, and cannot create a loophole around the statute of limitations established by Congress merely by pursuing a substantially similar filing in 2012 that is not a new or different petition cognizable under Section 21. Alternatively, this court should dismiss Plaintiffs' claims with prejudice pursuant to Rule 12(b)(6) for failure to state a claim upon which relief can be granted because EPA correctly found, when it denied Plaintiffs' petition, that TSCA explicitly excludes ammunition from its jurisdiction.

Pursuant to Federal Rule of Civil Procedure 12(i) and Local Rule 7(f), NSSF requests a hearing on its Motion.

Dated: August 30, 2012

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on August 30, 2012, I electronically filed the foregoing DEFENDANT-INTERVENOR NATIONAL SHOOTING SPORTS FOUNDATION, INC.'S MOTION TO DISMISS PLAINTIFFS' COMPLAINT and the accompanying Memorandum and Exhibits, 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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Plaintiffs,	)	
	)	
v.	)	
	)	
	)	
ENVIRONMENTAL PROTECTION AGENCY, *et al*.,	)	
	)	
	)	
Defendants.	)	
	)	
	)	

DEFENDANT-INTERVENOR NATIONAL SHOOTING SPORTS FOUNDATION, INC.'S MEMORANDUM IN SUPPORT OF MOTION TO DISMISS PLAINTIFFS' COMPLAINT

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Defendant-Intervenor National Shooting Sports Foundation, Inc. ("NSSF")[1] respectfully moves the Court to dismiss all claims by the Center for Biological Diversity ("CBD") and co-Plaintiffs (collectively "Plaintiffs"). This case is Plaintiffs' second bite at the proverbial apple, demanding for the second time that the United States Environmental Protection Agency ("EPA" or the "Agency") regulate and even ban traditional ammunition containing lead shot and bullets under the Toxic Substances Control Act ("TSCA"), 15 U.S.C. § 2601 *et seq.*, even though Congress expressly excluded ammunition from the reach of TSCA. Plaintiffs, however, cannot cure fundamental jurisdictional defects, and this Court again should dismiss this complaint as it did the prior one in 2011 for lack of subject matter jurisdiction. *Center for Biological Diversity v. Jackson*, 815 F. Supp. 2d 85 (D.D.C. 2011) ("*CBD Litigation*").

In this case, Plaintiffs challenge EPA's rejection of their *Petition to the Environmental Protection Agency to Regulate Lead Bullets and Shot under the Toxic Substances Control Act* (March 31, 2012) ("2012 Submission"). The 2012 Submission demanded, pursuant to Section 21 of TSCA (15 U.S.C. § 2620(a)), that EPA regulate and even ban all ammunition containing lead shot and bullets (i.e., traditional ammunition) manufactured in the United States. In rejecting the submission, EPA first correctly concluded that the 2012 Submission was not a "petition" cognizable under Section 21 of TSCA because it was substantially the same as the petition filed on August 3, 2010 by CBD and other organizations (the "2010 Petition") that EPA denied on August 27, 2010 and the challenge to which this Court dismissed in the *CBD Litigation*. *See Letter From James Jones, Acting Administrator, Office of Chemical Safety and Pollution Prevention, EPA, to Jeff Miller, Center for Biological Diversity* (Apr. 9, 2012) ("EPA 2012 Letter") (Exhibit 1). Second, EPA determined that even if the Agency decided to address

[1] NSSF is the trade association for the firearms and ammunition industry, with a membership of more than 7,000 manufacturers, distributors, and retailers of firearms, ammunition, and hunting-related goods and services, as well sporting organizations, public and private shooting ranges, gun clubs, and individual hunters and sports shooters.

the 2012 Submission as a request for reconsideration of the denial of the 2010 Petition, the 2012 Submission did not include any new information or data that would cause EPA to reconsider the earlier denial. *Id.* Third, EPA confirmed, in accordance with the clear language of TSCA and EPA's denial of the 2010 Petition, that ammunition is explicitly excluded from EPA's TSCA jurisdiction. Plaintiffs' current suit is not only an effort by CBD to revive the failed 2010 Petition, but amounts to a backdoor attempt to restrict lawful activities protected by the Second Amendment through TSCA, an environmental protection law that is not the appropriate vehicle to address or debate such issues.

This Court should again dismiss Plaintiffs' claims with prejudice pursuant to Fed. R. Civ. P. 12(b)(1) for lack of subject matter jurisdiction, as Plaintiffs failed to timely challenge EPA's denial of their 2010 Petition, and cannot re-set the statute of limitations clock merely by resubmitting a substantially similar filing in 2012 that is not a new or different petition cognizable under Section 21. To permit such action would enable any party to defeat the process established by Congress in TSCA, and entrusted to EPA to manage, by merely re-filing the same paperwork.

Alternatively, this Court should dismiss Plaintiffs' claims with prejudice pursuant to Fed. R. Civ. P. 12(b)(6) because EPA correctly concluded that Congress excluded ammunition from the Agency's regulatory authority under TSCA. 15 U.S.C. § 2602(2)(B)(v). When Congress exempted ammunition from TSCA regulation, virtually all ammunition was made with lead. This confirms what is unambiguous in the statute—that Congress intended to exempt traditional ammunition (i.e., ammunition made with lead) from TSCA's reach. Plaintiffs seek nothing less than to use EPA and TSCA to regulate out of existence the domestic industry that manufactures ammunition containing lead, while still allowing that same ammunition to be imported into the

United States. Because Congress expressly barred EPA from engaging in the regulation which Plaintiffs seek to compel, Plaintiffs fail to state a claim upon which relief can be granted.

REGULATORY BACKGROUND

I. EXCLUSION OF AMMUNITION FROM TSCA JURISDICTION

Congress enacted TSCA in 1976 in an effort to provide a comprehensive framework for regulating "chemical substances." *Envtl. Def. Fund v. Reilly*, 909 F.2d 1497, 1498 (D.C. Cir. 1990). A "chemical substance" is broadly defined as "any organic or inorganic substance of a particular molecular identity." 15 U.S.C. § 2602(2)(A). However, Congress excluded from TSCA a number of widely used materials that would otherwise be considered "chemical substances," including drugs and medical devices, tobacco, food and food additives, and nuclear material. 15 U.S.C. § 2602(2)(B)(i)-(iv), (vi).

Not wanting TSCA to be used as a vehicle for gun control, Congress also excluded ammunition from the definition of "chemical substances" subject to TSCA, excluding "any article the sale of which is subject to the tax imposed by section 4181 of the Internal Revenue Code of 1986." 15 U.S.C. § 2602(2)(B)(v). A House legislative committee explained:

> Although the language of the bill is clear on its face as to the exemption for pistols, revolvers, firearms, shells, and cartridges, the *Committee wishes to emphasize that it does not intend that the legislation be used as a vehicle for gun control.*

H.R. Rep. No. 94-1341, at 10 (1976), *reprinted in* 5 Environment and Natural Resources Policy Division, Library of Congress, *Legislative History of the Toxic Substances Control Act* 407, 418 (1976) (hereinafter "House Report") (emphasis added).

Section 4181 of the Internal Revenue Service ("IRS") Code, also known as the Firearms and Excise Tax ("FAET"), imposes a tax "upon the sale by the manufacturer, producer, or importer" of "shells, and cartridges." 26 U.S.C. § 4181. Shells and cartridges are the assembled

products of ammunition, composed of a casing, propellant, and either a bullet or shot. Because finished shells and cartridges are subject to the FAET, it follows that the components used to create the finished ammunition are effectively taxed by the FAET. That is, the FAET does not impose a "double tax" on finished ammunition, first on the components that are used to assemble ammunition, and then again on the final product.

Years before TSCA was promulgated, the IRS explicitly concluded that the FAET applied to the "component[s]" of shells and cartridges that are sold in "knock-down" (unassembled) condition:

> However, in accordance with the provisions of section 48.4181-1(a)(2) of the Manufacturers and Retailers Excise Tax Regulations, the tax imposed by section 4181 of the Code does apply to sales of complete shells and cartridges or to sales of such articles which, although in a knock-down condition, are complete as to all *component* parts.

Rev. Rul. 68-463, 1968-2 C.B. 507 (emphasis added). Therefore, if one sells a knock-down kit which contains all of the separate individual components—but not a single finished shell or cartridge—the FAET applies to those components. Where all of the components of a shell or cartridge are being sold together as a kit, and all that remains is to assemble them (e.g., by a hunter or hobbyist), those components are also taxable. Thus, domestically-manufactured traditional ammunition (i.e., ammunition made with lead), and the components from which such ammunition is assembled, are squarely beyond the reach of TSCA.

FACTUAL BACKGROUND

On August 3, 2010, CBD, along with several other organizations, petitioned EPA under Section 21 of TSCA, demanding that EPA prohibit the manufacture, processing, and distribution in commerce of lead for shot, bullets, and fishing sinkers. 75 Fed. Reg. 58,377 (Sept. 24, 2010) (the "2010 Petition"). On August 27, 2010, EPA denied the portion of the petition seeking to

ban lead in ammunition on the grounds the Agency does not have the legal authority to regulate ammunition under TSCA. *Id.* Plaintiffs filed a judicial challenge to EPA's denial of the 2010 Petition regarding bullets and shot on November 23, 2010, eighty-eight days after EPA's final decision. On September 29, 2011, this Court granted partial motions to dismiss the ammunition portion of the *CBD Litigation* for lack of subject matter jurisdiction because the 2010 Petition was filed after the 60-day statutory period (15 U.S.C. § 2620(a)) for filing such petitions had expired. In dismissing the ammunition portion of the *CBD Litigation*, this Court held that the 60-day limitations period was jurisdictional, 815 F. Supp. 2d at 91, n. 1, that EPA's interpretation of what constituted a "petition" was due deference, and that EPA has "broad discretion" to determine how to address TSCA Section 21 petitions, 815 F. Supp. 2d at 93-94 (citations omitted).

On March 13, 2012, again led by CBD, Plaintiffs filed a second, nearly identical petition with EPA, again demanding that EPA regulate under TSCA traditional ammunition containing lead bullets and shot, including advocating a nationwide ban of such ammunition (the "2012 Submission"). On April 9, 2012, in a letter sent to CBD, EPA rejected the 2012 Submission. Exhibit 1. In the *EPA 2012 Letter*, the Agency concluded that the 2012 Submission was "substantially the same" as the 2010 Petition and therefore was not a "new" petition cognizable under Section 21 of TSCA. *Id.* After reviewing the 2012 Submission, EPA observed that the evidence presented was "in essence the same" as that presented in the 2010 Petition, and that the relief sought was similar because, even though Plaintiffs arguably petitioned EPA for more open-ended relief, the Plaintiffs still advocated a nation-wide ban of traditional ammunition. *Id*. (*See, e.g.*, 2012 Submission at pp. 2, 16, 18, 67, where Plaintiffs state that they continue to advocate a nationwide ban on traditional ammunition.) The Agency noted that "EPA also does not believe

that the statutory time bar in section 21 [of TSCA] on judicial review can be avoided by resubmitting virtually the same petition, with the addition of parties, less than two years after the submission of the first petition." *Id.* EPA concluded that even if the 2012 Submission was cognizable under Section 21 of TSCA, the Agency would deny it for the same reasons it denied the 2010 Petition. *Id.*[2]

On June 7, 2012, led by CBD, Plaintiffs filed this action, amending their complaint on July 10, 2012.

STANDARD OF REVIEW

A motion to dismiss under Rule 12(b)(1) challenges the jurisdiction of the court to adjudicate the claim. "A court must dismiss a case pursuant to Rule 12(b)(1) when it lacks subject matter jurisdiction." *Laukus v. United States*, 691 F. Supp. 2d 119, 125 (D.D.C. 2010). The plaintiffs bear the burden of establishing subject matter jurisdiction. *Delaney v. District of Columbia*, 612 F. Supp. 2d 38, 42 (D.D.C. 2009). While the court "must accept as true all of the factual allegations set forth in the Complaint," *Equal Rights Ctr. v. District of Columbia*, 741 F. Supp. 2d 273, 279 (D.D.C. 2010), it is "not limited to the allegations contained in the complaint," and "may consider materials outside the pleadings." *Delaney*, 612 F. Supp. 2d at 42. Moreover, the "Court need not accept unsupported inferences or legal conclusions cast as factual

[2] In denying the 2010 Petition, EPA concluded that the definition of "chemical substance" in TSCA section 3(2)(B)(v) excludes firearms, shells and cartridges from the Agency's TSCA jurisdiction:

> This plain reading of the statute is consistent with EPA's longstanding interpretation of the six TSCA exclusions at TSCA section 3(2)(B).
>
> The statutory definition of "chemical substance" excludes "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) (determined without regard to any exemptions from such tax provided by section 4182 or 4221 or any other provision of such code)." 15 U.S.C. 2602(2)(B)(v). Section 4181 imposes a tax on firearms, shells and cartridges. 26 U.S.C. 4181. Bullets and shot, and any lead within them, are contained in shells and cartridges and are therefore excluded from the chemical substance definition. In addition, EPA's plain reading of TSCA is consistent with EPA's long-standing interpretation of TSCA's definition of "chemical substance" and with the purpose of the exemption.

75 Fed. Reg. at 58,378.

allegations." *Tabman v. FBI*, 718 F. Supp. 2d 98, 100 (D.D.C. 2010). In addition, "[b]ecause subject matter jurisdiction focuses on the court's power to hear the claim, … the court must give the plaintiff's factual allegations closer scrutiny when resolving a Rule 12(b)(1) motion than would be required for a Rule 12(b)(6) motion for failure to state a claim." *Delaney*, 612 F. Supp. 2d at 42.

Faced with motions to dismiss under Rule 12(b)(1) and Rule 12(b)(6), a court should first consider the Rule 12(b)(1) motion because once a court "determines that it lacks subject matter jurisdiction, it can proceed no further." *Sledge v. United States*, 723 F. Supp. 2d 87, 91 (D.D.C. 2010) (quoting *Simpkins v. District of Columbia Gov't*, 108 F.3d 366, 371 (D.C. Cir. 1997)).

A motion to dismiss under Rule 12(b)(6) "challenges the adequacy of a complaint on its face, testing whether a plaintiff has properly stated a claim." *Delaney*, 612 F. Supp. 2d at 41. In ruling on such a motion, the court "must treat the complaint's factual allegations as true [and] must grant [the] plaintiff the benefit of all reasonable inferences from the facts alleged." *Heard v. U.S. Dep't of State*, No. 08-02123, 2010 WL 3700184, at *3 (D.D.C. Sept. 17, 2010) (quoting *Trudeau v. Fed. Trade Comm'n*, 456 F.3d 178, 193 (D.C. Cir. 2006)). However, the court is "not bound to accept as true a legal conclusion couched as a factual allegation." *Bostic v. U.S. Capitol Police*, 644 F. Supp. 2d 106, 109 (D.D.C. 2009) (quoting *Trudeau*, 456 F.3d at 193).

In assessing the reasonableness of EPA's treatment of Petitioner's request under TSCA, this Court is to follow the familiar two-step *Chevron* analysis. *Chevron, USA, Inc. v. Natural Res. Def. Council*, 467 U.S. 837 (1984); *CBD Litigation*, 815 F. Supp. at 91. At the first step, "[i]f the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron*, 467 U.S. at 842-43. But, "if the statute is silent or ambiguous with respect to the specific issue, the

second step for the court is whether the agency's answer is based on a permissible construction of the statute." *Id.* at 843. If a court needs to proceed to *Chevron* step two, then it is to give *Chevron* deference to the agency's interpretation of a statute if Congress has delegated authority to the agency "generally to make rules carrying the force of law, and . . . the agency interpretation claiming deference was promulgated in the exercise of that authority." *United States v. Mead Corp.*, 533 U.S. 218, 226-27 (2001). In such a situation, the court "need not determine that the [agency's] reading . . . is the best possible reading, only that it was reasonable." *Am. Fed'n of Gov't Emps., Local 446 v. Nicholson*, 475 F.3d 341, 355 (D.C. Cir. 2007).

ARGUMENT

I. THE COURT SHOULD DISMISS PLAINTIFFS' AMENDED COMPLAINT BECAUSE RE-FILING VIRTUALLY THE SAME PETITION CANNOT "RESET THE CLOCK" ON THE ORIGINAL UNTIMELY PETITION.

This action should be dismissed for want of subject matter jurisdiction because, as EPA determined, the 2012 Submission was not a "petition" cognizable under Section 21 of TSCA. EPA, acting within its broad discretion on how to manage petitions for Agency action, properly concluded that the 2012 Submission was "substantially similar" to the 2010 Petition that EPA denied previously and the judicial challenge to which was dismissed by this Court. CBD, the central plaintiff in both the *CBD Litigation* and this case, cannot circumvent the limitations period and revive the 2010 Petition by resubmitting a virtually identical second submission in 2012.

A. The 2012 Submission was not a "petition" cognizable under Section 21 of TSCA.

The 2012 Submission essentially repeated the unsuccessful 2010 Petition and thus was not a separately cognizable "petition" under Section 21 of TSCA. Section 21 states, in relevant

part:

> If the Administrator denies a petition filed under this section . . . the petitioner may commence a civil action in a district court of the United States to compel the Administrator to initiate a rulemaking proceeding as requested in petition. Any such action shall be filed within 90 days after the Administrator's denial of the petition[.]

15 U.S.C. § 2620(b)(4)(A). As this Court has observed, "TSCA nowhere defines the term 'petition'" and there is no legislative history clarifying what the term might mean in the context of TSCA. 815 F. Supp. 2d at 92. Accordingly, under "step two" of *Chevron*, the court is then to give deference to EPA's interpretation of what constitutes a "petition" under Section 21 of TSCA and the Agency's management of that process, because Congress has charged EPA with the administration of TSCA.[3]

In the *2012 EPA Letter* rejecting the 2012 Submission, the Agency took the following factors into account in reaching its conclusion that the 2012 Submission was "almost identical" or "substantially the same" as the 2010 Petition, and thus was not a new or different "petition" cognizable under Section 21 of TSCA.

- The 2012 Submission presented "almost verbatim" the same exposure and toxicity information with respect to lead bullets and shot as the 2010 Petition.
- The 2012 Submission did not present any new (i.e., previously unavailable or non-cumulative) information. Of the more than 400 literature citations attached to the 2012 Submission, only 20 were not included in the 2010 Petition and only six appeared to post-date the 2010 Petition. As EPA concluded, these additional citations did not make a material difference to Plaintiffs' assertions about the alleged risks posed by traditional ammunition.
- The 2012 Submission contained essentially the same legal arguments as were made in the 2010 Petition, though they were expressed somewhat differently and included references to the legislative history of TSCA. EPA noted that this legislative history was available when the 2010 Petition was filed, and that EPA had taken it into account in its denial of the 2010 Petition.
- Though the 2012 Submission requested more "open ended" regulatory relief from EPA,

[3] NSSF believes that "*Chevron* deference" is the appropriate standard of review on this issue. However, EPA's determination that the 2012 Submission was not a "petition" under Section 21 should also be viewed as "persuasive" under the standard enunciated in *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944).

> the Submission continued to advocate a nationwide ban of lead shot and bullets, as did the 2010 Petition.

Thus, EPA concluded that the 2012 Submission made essentially the same legal and factual arguments as did the 2010 Petition, frequently using the identical language. The conclusions reached by EPA could only have been arrived at by a close review and comparison of the 2012 Submission with the 2010 Petition; the Agency clearly did not reject the 2012 Submission out of hand.

Plaintiffs contend that the 2012 Submission should be treated as a new petition because a different and larger group of organizations supported the 2012 Submission. Amended Complaint ¶58. However, both submissions share the same lead party: CBD. CBD and its in-house counsel played the lead role in the 2010 Petition and the subsequent *CBD Litigation*. In the 2012 Submission, CBD is again identified as the "lead petitioner" and is described as a "leading proponent of federal regulations on lead ammunition to protect endangered California condors, bald and golden eagles, and other wildlife species at risk from lead poisoning." 2012 Submission at p. 6. CBD's central role is further reflected in the fact that though the 2012 Submission was styled as jointly submitted with 99 other conservation organizations, the sole contact listed for all of these organizations was CBD (2012 Submission at p. 15), and the fact that CBD's in-house counsel was lead counsel regarding the 2010 Petition and has taken that lead role in this litigation. Further, the addition of 98 new organizations (one of the organizations on the 2012 Submission, Project Gutpile, also participated in the 2010 Petition) made no material difference to the content of the two documents: as EPA determined, the factual and legal content of the two submissions were "almost identical," suggesting that the 2012 Submission does not reflect any new or unique interests or concerns raised by those 98 organizations.

Accordingly, it was within EPA's discretion to conclude that the 2012 Submission was "substantially similar" to the 2010 Petition that was denied by EPA and thus not a new or discrete "petition" cognizable under Section 21 of TSCA. *See, e.g.*, *Walker v. EPA*, Civ. Action No. H-87-3552 (S.D. Tex. Oct. 15, 1990) (Exhibit 2) (holding that it was "well within EPA's discretion" and not arbitrary and capricious for EPA to determine that a subsequent submission was not a new TSCA petition where the second submission related to the identical subject matter and sought identical action by EPA).[4]

Should the Court determine that the meaning of "petition" under Section 21 of TSCA is ambiguous, then it should defer to EPA's careful determination that the 2012 Submission was essentially a re-submission of the 2010 Petition and thus not a cognizable "petition." This Court should defer to any permissible construction of a statute the agency is charged with administering, even if it is not the construction the court might have given the statute, unless Congress has "directly addressed the precise question at issue." *New Jersey v. EPA*, 517 F.3d 574, 581 (D.C. Cir. 2008) (citing *Chevron*, 467 U.S. at 842-43). Congress established a specific process for how citizen petitions under TSCA § 21 should be addressed, and entrusted the management of this process to EPA. As this Court observed in granting the motions to dismiss in the *CBD Litigation*, "[t]he EPA has expertise in handling TSCA petitions, and the Court finds that it should defer to the Agency's determination of the most efficient way to address rulemaking documents containing multiple requests." 815 F. Supp. 2d at 94. Similarly, the Court should defer to EPA's decision regarding how to address serial rulemaking documents containing essentially similar requests. Since the 2012 Submission was not a "petition" under

[4] Indeed, under CBD's view of what constitutes a new "petition" under TSCA § 21, the identical "petition" could be individually filed 98 times in succession by each of the entities listed by CBD in the 2012 Submission, with EPA having to separately make a determination on each "petition," and each of those determinations being subject to judicial review.

Section 21 of TSCA, this Court should dismiss the Complaint for lack of subject matter jurisdiction.[5]

B. Plaintiffs cannot re-set the statute of limitations for judicial review of EPA actions on TSCA § 21 petitions by re-filing the same submission.

A suit challenging EPA's denial of a TSCA Section 21 petition must be filed "within 60 days after the Administrator's denial of the petition." 15 U.S.C. § 2620(b)(4)(A). This Court has concluded that compliance with this 60-day filing period is a jurisdictional prerequisite that must be strictly construed against the petitioner: "'statutory time limits for review of agency action are jurisdictional in nature,' and are therefore strictly construed." *CBD Litigation*, 815 F. Supp. 2d at 91, n. 1 (quoting *EDF v. Thomas*, 657 F. Supp. 302, 306 (D.D.C. 1987)). In the *CBD Litigation*, this Court dismissed the suit challenging EPA's denial of the 2010 Petition because the plaintiffs brought their action 28 days after the statute of limitations had run. Plaintiffs' now seek, impermissibly, to use this legal proceeding to reverse that result. However, this Court's dismissal of the claims in the *CBD Litigation* on statute of limitations grounds is a judgment on the merits for purposes of res judicata. *See Smalls v. United States*, 471 F.3d 186, 192 (D.C. Cir. 2006). The "clearly correct rule [is] that dismissal of a prior action as barred by the statute of limitations precludes a second action on the same claim in the same system of courts." 18A Charles Alan Wright et al., *Federal Practice and Procedure* § 4441.

As EPA noted in the *2012 EPA Letter,* Plaintiffs should not be allowed to circumvent the result of the *CBD Litigation* by "re-submitting virtually the same petition, with the addition of parties, less than two years after the submission of the first petition." In *Walker v. EPA*, a party

[5] Separately, Count Three of Plaintiffs' Amended Complaint, alleging a failure by EPA to grant or deny a "petition" as required by TSCA § 21, should also be denied because EPA properly exercised its discretion to conclude that the 2012 Submission was not a "petition" and thus EPA did not have an obligation to formally grant or deny the 2012 Submission. Nonetheless, EPA did not ignore 2012 Submission filed on March 31, providing Plaintiffs with a detailed explanation for its rejection of the 2012 Submission in its April 9, 2012 letter, which was within the 90-day response time that would have applied if the 2012 Submission had been a petition.

submitted a petition to EPA under TSCA § 21, but did not commence an action for judicial review within 60 days of EPA's denial of that petition. The *Walker* petitioner instead filed a second, similar petition that EPA characterized as a petition for re-consideration that the Agency rejected, a decision that was challenged in court within the 60-day limitation period. The court rejected the petitioner's argument that the second petition should be considered a "new" petition that was timely filed:

> The July [second] submission, which was treated as a motion to reconsider the prior agency decision, cannot revive an expired jurisdictional statute of limitations. To hold otherwise would rend the statute of limitations meaningless, permitting a plaintiff to circumvent the limitations period by submitting a repetitive request for identical action on an identical issue long after the time period has expired.

Exhibit 2 at p. 3.[6]

As in *Walker*, allowing Plaintiffs to proceed in this case would render meaningless both the 60-day limitations period established by Congress for seeking review of EPA decisions on TSCA § 21 petitions and this Court's own decision in the *CBD Litigation*. The 2012 Submission was the same as the 2010 Petition in all material respects. The addition of over 90 public interest organizations to the "almost identical" 2012 Submission should not change that conclusion: CBD described itself as the "lead" petitioner, CBD identified itself as the sole point of contact for the other 99 organizations, and the almost identical nature of the 2010 Petition and the 2012 Submission, demonstrates that adding those organization did not affect or change the interests represented in the two submissions.[7] In the context of petitioning EPA to take regulatory action

[6] In rejecting Plaintiffs' 2012 Submission, EPA provided an alternative explanation that, if the Submission could be considered a petition for reconsideration of EPA's denial of the 2010 Petition, then EPA would also reject that request because the Plaintiffs had not presented any new non-cumulative information that would give rise to a need to reconsider their denial of the 2010 Petition. This conclusion was based upon EPA's review of the information presented to it, including closely comparing the 2010 Petition with the 2012 Submission, and should be affirmed because it was not arbitrary or capricious.

[7] This is not a situation of "virtual representation," where one attempts to establish nonparty claim preclusion based on a relationship between different parties in two cases. *See, e.g., Taylor v. Sturgell*, 553 U.S. 880 (2008). Here,

of nationwide applicability (Plaintiffs continue to advocate a nationwide ban of traditional ammunition), allowing them to simply re-file the same petition but adding a new set of similarly-situated organizations to keep an issue alive would subject EPA, and this Court, to a virtually endless process of repeatedly responding to the same demands by the same interests.[8]

Nor can CBD avoid the res judicata effect of this Court's judgment in the *CBD Litigation* by joining additional parties. *See Bethesda Lutheran Homes & Servs., Inc. v. Born*, 238 F.3d 853, 857 (7th Cir. 2001) ("The defense of res judicata is not avoided by joinder."). Furthermore, because EPA properly concluded that the 2012 Submission was not a new or novel petition but, at best, a request for reconsideration of the 2010 Petition, the latecomers who associated themselves with the 2012 Submission are not petitioners in their own right. Their belated support for the 2010 Petition cannot re-set the statute of limitations clock. Given the central role of CBD in both cases, and the plainly passive and derivative role of the parties added by CBD, Plaintiffs should not be allowed to skirt the statute of limitations and the res judicata effect of this Court's earlier decision by attempting to re-file a "petition" and then bring this case. The statute of limitations bar from this Court's prior decision applies here.

In sum, this Court should defer to EPA's determination that Plaintiffs' 2012 Submission was not a cognizable "petition" under Section 21, reject the effort to revive the failed 2010 Petition, affirm the res judicata effect of its decision in the *CBD Litigation*, and dismiss this case

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CBD is the primary litigant in both cases and its in-house counsel is serving as lead counsel in both cases. Thus, CBD is an "actual," not a "virtual," representative. The addition of parties by CBD in this matter is a transparent effort by CBD to get a second bite at the apple, including using "strawman" co-petitioners to avoid the results of its original 2010 petition and failed litigation

[8] Just as the 2012 Submission was alternatively viewed by EPA as an inadequate petition for reconsideration of its denial of the 2010 Petition, Plaintiffs' First Amended Complaint in this case could be characterized as an effort to persuade this Court, similar to a motion seeking reconsideration pursuant to Fed. R. Civ. P. 60(b), to reconsider its decision to dismiss the *CBD Litigation* for lack of subject matter jurisdiction. This invitation should be declined, as there are no grounds, either factual or legal, for this Court to reconsider the decision it reached in the *CBD Litigation*.

for lack of subject matter jurisdiction.

C. Plaintiffs Cannot Rely On The Administrative Procedure Act To Challenge EPA's Decision Under Section 21 of TSCA.

Plaintiffs also challenge EPA's refusal to recognize the 2012 Submission as a TSCA § 21 "petition" under the Administrative Procedure Act, 5 U.S.C. § 706 ("APA"). However, Plaintiffs may not simultaneously invoke the procedures available to them under Section 21 of TSCA and also seek relief under the APA. *Envtl. Def. Fund*, 909 F.2d at 1501 ("Congress did not intend to permit a litigant challenging an administrative denial of such a petition to utilize simultaneously both Section 21 [of TSCA] and the APA."). Accordingly, Count One of Plaintiffs' Amended Complaint, challenging EPA's action under the APA, should be dismissed.

Even if the Plaintiffs could bring an APA claim, the Agency's decision that the Plaintiffs' 2012 Submission was not a legitimate TSCA § 21 petition is presumed valid and must be upheld unless the court finds that it was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A); *see also Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 413-420 (1971); *Am. Paper Inst., Inc. v. Am. Elec. Power Serv. Corp.*, 461 U.S. 402, 412-413 (1983). The decision not to treat a submission as a petition under Section 21 of TSCA is "within the discretion of the EPA," and the court may not "substitute its judgment for that of the agency." Exhibit 2. For the reasons set forth in Sections I.A and I.B of this brief, EPA's determination that the 2012 Submission was not a "petition" under Section 21 of TSCA was not arbitrary and capricious.

II. PLAINTIFFS' CLAIM SHOULD BE DISMISSED BECAUSE CONGRESS EXPRESSLY EXCLUDED AMMUNITION FROM THE REACH OF TSCA.

Should this Court reach the merits of Plaintiffs' claims, it should dismiss Plaintiffs' First Amended Complaint for failure to state a claim upon which relief can be granted under the first

step of *Chevron*, because Congress directly addressed the precise question at issue by excluding ammunition from EPA's regulatory authority under TSCA. In the alternative, Plaintiffs' complaint should be dismissed under the second step of *Chevron*. EPA, the agency charged by Congress with implementing TSCA, has determined that it does not have the authority to regulate ammunition under the statute, and the Court should give deference to that determination. Lastly, the Court should not allow Plaintiffs' efforts to use TSCA, an environmental statute, to ban the domestic manufacture of traditional ammunition.

A. Congress expressly excluded ammunition from the jurisdiction of TSCA.

Plaintiffs' complaint should be dismissed because EPA has no authority to regulate lead bullets and shot under TSCA. EPA's regulatory authority under TSCA is constrained by the scope of the definition of the term "chemical substance." TSCA defines the term "chemical substance" in two steps. First, TSCA defines the term to include "any organic or inorganic substance of a particular molecular identity," "[e]xcept as provided in subparagraph B" of TSCA Section 3. 15 U.S.C. § 2602(2)(A). Second, TSCA excludes six broad categories of substances and articles from the definition of "chemical substance." In one of the excluded categories, TSCA prohibits EPA from regulating "any article the sale of which is subject to the tax imposed by section 4181 of the Internal Revenue Code of 1986." 15 U.S.C. § 2602(2)(B)(v). Section 4181 of the IRS Code, also known as the FAET, provides as follows:

> There is hereby imposed upon the sale by the manufacturer, producer, or importer of the following articles a tax equivalent to the specified percent of the price for which so sold:
>
> Pistols.
>
> Revolvers.
>
> Firearms (other than pistols and revolvers).

Shells, and cartridges.

26 U.S.C. § 4181.

Plaintiffs' complaint should be dismissed because EPA cannot regulate shot and bullets without regulating cartridges and shells, which Congress expressly forbade EPA to do. Plaintiffs concede that "shells and cartridges" are exempt from TSCA. (Amended Complaint ¶35.) A cartridge, by definition, includes the bullet or shot. The Alcohol and Tobacco Tax and Trade Bureau in the Department of the Treasury ("ATTTB") defines "shells and cartridges" to "[i]nclude any article consisting of a projectile, explosive, and container that is designed, assembled, and ready for use without further manufacture in firearms, pistols or revolvers." 24 C.F.R. § 53.11; *see also* Webster's Third New International Dictionary of the English Language at 344 (1993) (defining "cartridge" as "a tube of metal, paper, or a combination of both containing a complete charge for a firearm …"); *id.* at 2092 (1993) (defining "shell" as "a metal or paper case which holds the charge of powder and shot or bullet …").[9] Because Congress prohibited EPA from regulating cartridges and shells under TSCA, and bullets and shot are, by definition, integral to cartridges and shells, EPA is prohibited from using TSCA to regulate the use of lead in bullets and shot. EPA cannot regulate the latter without regulating the former, which Congress expressly prohibited.

Plaintiffs have not argued that lead bullets and shot pose an unreasonable risk to health or the environment apart from their use in cartridges and shells. Plaintiffs' petition is concerned with lead bullets and shot precisely *because* of their use in cartridges and shells (i.e., bullets and shot have no function other than their use in cartridges and shells). Plaintiffs focus exclusively

[9] A cartridge without a bullet is not a cartridge, but a blank. *See* Merriam-Webster.com (defining a blank as "a cartridge loaded with propellant and a seal but no projectile"), *available at* http://www.merriam-webster.com/dictionary/blank.

on the alleged risk to health and the environment from "spent" lead bullets and shot; that is, bullets and shot that were part of assembled cartridges and shells discharged from firearms. *See generally* 2012 Submission (containing more than 30 references to "spent" lead ammunition). Plaintiffs' petition makes clear that the regulation they seek would regulate ammunition (*i.e.*, shells and cartridges) and not merely lead bullets and shot apart from their use in cartridges and shells. *See, e.g.*, 2012 Submission at p. 20 (seeking regulation under TSCA of "ammunition manufactured with lead projectiles"). The Plaintiffs want EPA to prevent hunters and sportsmen from using cartridges and shells that contain lead, but the regulation by EPA of cartridges and shells is precisely what TSCA forbids.

Since "Congress has directly spoken to the . . . issue," no further analysis is necessary and Plaintiffs' complaint should be dismissed under the first step of *Chevron*. *Chevron*, 467 U.S. at 842. EPA has no jurisdiction under TSCA to regulate traditional ammunition, and Plaintiffs' attempt to use TSCA limit lawful activities protected under the Second Amendment must be rejected.

B. In the alternative, this Court should defer to EPA's reasonable interpretation of the statute.

If this Court concludes that Congress has not directly addressed the issue of whether TSCA exempts the regulation of traditional ammunition, then under the second step of *Chevron* this Court should defer to EPA's interpretation that TSCA does not give the Agency jurisdiction to regulate traditional ammunition (or its component parts). *Chevron*, 467 U.S. at 842.

EPA's decision to reject the 2012 Submission is entitled to *Chevron* deference, as EPA acted pursuant to an express delegation of congressional authority. 15 U.S.C. § 2620; *Mead*, 533 U.S. at 226-27. EPA's rejection of Plaintiffs' submission has the force of law because it has binding legal effect on the Agency and Plaintiffs. *See Pharm. Research & Mfrs. of Am. v.*

Thompson, 362 F.3d 817, 821-22 (D.C. Cir. 2004). Further, Congress "expressly conferred on the [Administrator] authority to review and approve" or deny such petitions. *Id.* "Through this 'express delegation of specific interpretive authority,' the Congress manifested its intent that [EPA's] determinations, based on interpretation of the relevant statutory provisions, should have the force of law." *Id.* at 822 (citing *Mead*, 533 U.S. at 229). EPA's interpretations of TSCA are therefore entitled to *Chevron* deference.

In rejecting the 2012 Submission, EPA correctly concluded, as it did when it denied the 2010 Petition, that bullets and shot that are manufactured into shells and cartridges are excluded from TSCA's definition of "chemical substance." Exhibit 1; 75 Fed. Reg. at 58,377-78. EPA's interpretation is not merely reasonable, but compelling – if shells and cartridges are subject to the FAET tax, then the components of those articles are also effectively being taxed, and therefore are excluded from the definition of a "chemical substance" under TSCA.

> The statutory definition of "chemical substance" excludes "any article the sale of which is subject to the tax imposed by section 4181 of the Internal Revenue Code of 1986…" 15 U.S.C. 2602(2)(B)(v). Section 4181 imposes a tax on firearms, shells and cartridges. 26 U.S.C. 4181. Bullets and shot, and any lead within them, are contained in shells and cartridges and are therefore excluded from the chemical substance definition.

75 Fed. Reg. at 58,378. EPA further correctly concluded that its "plain reading of TSCA is consistent with EPA's long-standing interpretation of TSCA's definition of 'chemical substance' and with the purpose of the exemption." *Id.*[10] EPA's reasonable interpretation warrants judicial deference even if this Court might have composed a different explanation if it were writing on a

[10] This Court should also defer to the Alcohol and Tobacco Tax and Trade Bureau in the Department of the Treasury ("ATTTB"), which is the agency that currently administers the Section 4181 tax. That agency's regulations define "shells and cartridges" to "[i]nclude any article consisting of a projectile, explosive, and container that is designed, assembled, and ready for use without further manufacture in firearms, pistols or revolvers." 24 C.F.R. § 53.11. This definition makes clear that components of manufactured "shells and cartridges" are effectively being taxed under the FAET.

blank slate. *See Am. Fed'n of Gov't Emps., Local 446*, 475 F.3d at 355; *New Jersey*, 517 F.3d at 581.

C. The legislative history makes clear that Congress did not intend to allow EPA to regulate traditional ammunition.

Plaintiffs have argued that a few lines of legislative history suggest that Congress intended EPA to be able to regulate the components of shells and cartridges under TSCA. Amended Complaint ¶¶38 – 40. However, in light of Congress' clear intent that manufactured ammunition is exempt from regulation under TSCA, as well as EPA's interpretation to which deference is owed, it is unnecessary to resort to a review of legislative history. *Dep't of Hous. & Urban Dev. v. Rucker*, 535 U.S. 125, 132-33 (2002) ("[R]eference to legislative history is inappropriate when the text of the statute is unambiguous."). This Court "should not resort to legislative history to cloud a statutory text that is clear," nor should it "read legislative history to create otherwise non-existent ambiguities." *Consumer Elecs. Ass'n v. FCC*, 347 F.3d 291, 299 (D.C. Cir. 2003) (internal quotation marks and citations omitted); *Williams Cos. v. FERC*, 345 F.3d 910, 914-15 (D.C. Cir. 2003) (refusing to reinterpret a clear statute because of language in a House Report because, while "history can be used to clarify congressional intent even when a statute is superficially unambiguous, the bar is high"). In any event, Plaintiffs' reading of this legislative history is incorrect—the context makes clear that Congress did not intend to give EPA the authority to eliminate domestically-manufactured traditional lead-containing ammunition from the marketplace, which is Plaintiffs' fundamental demand.

When Congress was deliberating on the text of TSCA in 1975 and 1976, Congress was also actively engaged in ensuring that gun control issues did not unintentionally get addressed through the backdoor of similar statutes. In 1972, Congress, in the Consumer Protection Safety Act ("CPSA"), excluded ammunition from the regulatory jurisdiction of the Consumer

Protection Safety Commission ("CPSC").[11] 15 U.S.C. § 2052(a)(5)(E). However, in 1974, the CPSC was nonetheless petitioned by a citizens' group to regulate ammunition pursuant to the Federal Hazardous Substances Act (which governs the labeling of hazardous household products and authorizes the CPSC to issue regulations regarding such labels), and an ensuing court decision suggested that perhaps the CPSC might have had the requisite authority to regulate ammunition under that Act.[12] In response to these developments, Congress considered a number of legislative responses and amended the CPSA in 1976 to make it clear that the CPSC did not have the authority to regulate firearms or ammunition. 15 U.S.C. § 2052(a)(5).[13] It was in this context of clear Congressional efforts to prohibit agencies such as the CPSC from regulating ammunition that Congress, also in 1976, prohibited EPA from using TSCA to regulate ammunition. It is unreasonable to conclude that, at the same time Congress was taking vigorous action to ensure that the CPSC could not regulate ammunition, that the very same Congress was also authorizing EPA to ban the only generally available ammunition through the regulation of shot and bullets under TSCA.

The House legislative committee report cited by Plaintiffs, *see* Amended Complaint ¶39,

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[11] The CPSA excludes from the definition of "consumer product":

> (E) any article which, if sold by the manufacturer, producer, or importer, would be subject to the tax imposed by section 4181 of the Internal Revenue Code of 1986 [26 U.S.C. 4181] (determined without regard to any exemptions from such tax provided by section 4182 or 4221, or any other provision of such Code), or any component of any such article[.]

15 U.S.C. § 2052(a)(5)(E). The presence of the term "component[s]" in the CPSA exclusion makes sense, given that the definition of "consumer product", to which the ammunition exclusion applies, also explicitly includes "component parts." 15 U.S.C. § 2052(a)(5) (defining the term "consumer product" as "any article, or component part thereof, produced or distributed" under certain conditions). Thus the text of the CPSA exclusion parallels the definition of consumer product. Since "chemical substance" is defined by TSCA "any organic or inorganic substance of a particular molecular identity," and does not include the concept of "component[s]" (i.e., one does not have a "component" of a chemical substance), it is understandable that an exclusion from the definition of "chemical substance" would not be framed in terms of "component[s]."

[12] *Comm. for Hand Gun Control, Inc. v. Consumer Prod. Safety Comm'n*, 388 F. Supp. 216, 217 (D.D.C. 1974).
[13] For a discussion of this history, *see* Dennis B. Wilson, *What You Can't Have Won't Hurt You! The Real Safety Objective of the Firearms Safety and Consumer Protection Act*, 53 Clev. St. L. Rev. 225, 232–235 (2006).

makes clear that, "[a]lthough the language of the bill is clear on its face as to the exemption for pistols, revolvers, firearms, shells, and cartridges, the *Committee wishes to emphasize that it does not intend that the legislation be used as a vehicle for gun control*." House Report at 10 (emphasis added). This prohibited result, however, is exactly what would be accomplished if EPA were to eliminate the domestic manufacture, processing, and distribution of traditional ammunition.

The central and historic importance of the use of lead in shells and cartridges was well known to Congress when it passed TSCA and, as discussed above, Congress was focused on preventing federal agencies from regulating ammunition. It is unreasonable to conclude that, when Congress created the ammunition exemption in TSCA and made clear that TSCA should not "be used as a vehicle for gun control," it intended that EPA would nonetheless have the authority to use TSCA to effectively ban the only domestically-manufactured traditional ammunition available at the time of passage.

Further, Congress could not have intended to allow EPA to use TSCA to regulate or ban the domestic manufacture of traditional ammunition, while allowing that same ammunition to be imported into the United States. Imported ammunition comes into the United States in the form of finished shells and cartridges subject to the FAET. Under Plaintiffs' incorrect view of TSCA, EPA could regulate and even ban the domestic manufacture of traditional ammunition, while foreign-manufactured "finished" ammunition containing lead components could continue to be imported and used in the United States. Such a reading of TSCA flies in the face of the well-established canon of statutory construction that disfavors interpretations that arrive at "absurd results." *See, e.g., Flatow v. Islamic Republic of Iran*, 201 F.R.D. 5, 10 (D.D.C. 2001).

Plaintiffs also misconstrue the House legislative committee statement that the TSCA

provision "does not exclude from regulation under the bill chemical components of ammunition which could be hazardous because of their chemical properties." Amended Complaint ¶39. This language was intended to make clear that the use of a chemical substance (such as lead) in ammunition did not deprive EPA of its general authority to regulate that substance in other contexts that are not within the exclusion for ammunition. For example, while EPA cannot use TSCA to prohibit the use of lead in ammunition, it retains the authority to potentially regulate the use of lead in other contexts (e.g., paint). Plaintiffs' interpretation—to allow EPA to use TSCA to regulate the shot and bullets in ammunition even though TSCA expressly prohibits the regulation of ammunition (*i.e.*, shells and cartridges)—is not reasonable because it would eviscerate TSCA's exemption of "shells" and "cartridges" by allowing EPA to regulate those products through their component parts. The central and historic importance of the use of lead in shells and cartridges was well known to Congress when it passed TSCA. *See* Doc. No. 10-3, Decl. of Lawrence G. Keane at ¶5 ("Approximately 95% of the domestically manufactured ammunition is traditional ammunition made with lead bullets or shot."). It is unreasonable to conclude, based on a single line in a House legislative committee report, that while Congress did not want TSCA to be used as a vehicle for gun control and expressly prohibited EPA from using TSCA to regulate ammunition, Congress nonetheless intended for EPA to have the authority to regulate out of existence the only ammunition that was generally available at the time of passage.[14]

[14] Plaintiffs also misconstrue a statement in the Senate Report of TSCA stating that while the term "chemical substance" excludes ammunition, that exclusion is only "to the extent subject to taxes imposed under § 4181 of the Internal Revenue Code"; Plaintiffs assert that this statement suggests that Congress "indicate[d] that it intended that EPA regulate components in ammunition." Amended Complaint ¶40. It does no such thing. This language from the Senate Report simply restates what Congress codified in the text of TSCA, which, as discussed above, clearly does not allow traditional ammunition to be regulated by EPA through the back door of restricting its component parts.

D. Plaintiffs' reading of the FAET is unreasonable.

Plaintiffs concede that "shells and cartridges" are exempt from TSCA (Amended Complaint ¶35), but have tried to avoid TSCA's plain language by engaging in a semantic tax argument. They assert that EPA has TSCA jurisdiction over the lead shot and bullets used to manufacture shells and cartridges because *additional* Section 4181 taxes are not *separately* collected on them. Amended Complaint ¶¶37 – 40. This interpretation ignores the fact that ammunition is simply the sum total of its components (i.e., there would not be any shells and cartridges to tax without bullets or shot), and that by applying the FAET to finished ammunition, the components that make up the ammunition have been taxed as well. Taxing the components and the finished ammunition separately would impose a double tax on the ammunition. Further, Plaintiffs' interpretation is contrary to Congress' express intent, since their petition aims to force EPA to use TSCA to ban domestically-manufactured traditional ammunition, precisely the outcome Congress intended to prohibit.

Plaintiffs also incorrectly rely on an IRS Revenue Ruling to assert that the component parts of ammunition may be regulated as chemical substances under TSCA, stating:

> In 1968, eight years prior to the passage of TSCA, the Internal Revenue Service in a Revenue Ruling stated, "The manufacturers excise tax imposed upon sales of shells and cartridges by section 4181 of the Internal Revenue Code of 1954 *does not apply* to sales of separate parts of ammunition such as cartridge cases, primers, bullets and powder."

Amended Complaint ¶37 (quoting Rev. Rul. 68-463, 1968-2 C.B. 507) (emphasis added by Plaintiffs). Thus, Plaintiffs assert that, with the IRS exempting "separate parts of ammunition" from the FAET, these parts may be regulated by EPA. *Id.* ¶28.

Plaintiffs' reliance on the revenue ruling is misplaced, as it only addresses the applicability of the FAET to the "sales of separate parts of ammunition" (*i.e.*, not as components

of finished ammunition). However, Plaintiffs are seeking to force EPA to use TSCA to regulate finished ammunition, i.e., cartridges and shells, not the shot and bullets that are sold separately as individual components.

Furthermore, Plaintiffs' analysis ignores that the IRS, in that same ruling, explicitly concluded that the FAET *does* apply to the "component[s]" of shells and cartridges that are sold in "knock-down" (unassembled) kits. Rev. Rul. 68-463, 1968-2 C.B. 507. This demonstrates that the tax on finished cartridges and shells is, in effect, a tax on the components that go into those products. In the case of commercially-manufactured ammunition, this is accomplished by taxing the finished ammunition and not the components used to assemble that ammunition, while in the case of kits selling ammunition in "knock-down" condition, this is accomplished by taxing the kit that contains components before they are assembled into finished ammunition. Because finished shells and cartridges are subject to the FAET, and the FAET is not a double tax on both the components of finished ammunition and the finished ammunition itself, it follows that the components used to create the finished ammunition are effectively taxed by the FAET. TSCA therefore unambiguously exempts bullets and shot contained in shells and cartridges from regulation as "chemical substances" under TSCA.

Accordingly, Plaintiffs' effort to force EPA to use TSCA to ban the domestic manufacture of traditional ammunition is contrary to the plain text of TSCA, the reasonable interpretations of TSCA by EPA, the IRS and the Alcohol and the Tobacco Tax and Trade Bureau, and common sense.

CONCLUSION

For the reasons set forth above, this Court should dismiss Plaintiffs' Amended Complaint under Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure.

Dated: August 30, 2012

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on August 30, 2012, I electronically filed the foregoing DEFENDANT-INTERVENOR NATIONAL SHOOTING SPORTS FOUNDATION, INC.'S MEMORANDUM IN SUPPORT OF MOTION TO DISMISS PLAINTIFFS' COMPLAINT with the Clerk of Court using the CM/ECF system which will send notification of this filing to all attorneys of record.

/s/ Roger R. Martella, Jr.

Roger R. Martella, Jr. (Bar No. 976771)
SIDLEY AUSTIN LLP
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Washington, D.C. 20005

Exhibit 1

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

APR 09 2012

OFFICE OF CHEMICAL SAFETY
AND POLLUTION PREVENTION

Mr. Jeff Miller
Center for Biological Diversity
351 California Street, Suite 600
San Francisco, CA 94104

Dear Mr. Miller:

This letter is to inform you that EPA has concluded its review of your recent submission ("Petition to the Environmental Protection Agency to Regulate Lead Bullets and Shot under the Toxic Substances Control Act," dated March 13, 2012). As an initial matter, EPA notes that the Center for Biological Diversity (CBD) and Project Gutpile (together with several other organizations) previously submitted an almost identical petition request under section 21 of TSCA, dated August 3, 2010, seeking among other things that EPA regulate lead in ammunition pursuant to section 6(a) of TSCA by prohibiting the manufacture, processing and distribution in commerce of lead bullets and shot. EPA denied that petition request on August 27, 2010, for lack of jurisdiction. Specifically, EPA determined that the statutory exclusion found in TSCA § 3(2)(B)(v) precludes EPA from regulating lead in ammunition under TSCA. CBD and Project Gutpile sought judicial review of EPA's denial. CBD's judicial challenge to EPA's denial of its petition on lead bullets and shot was dismissed as untimely.

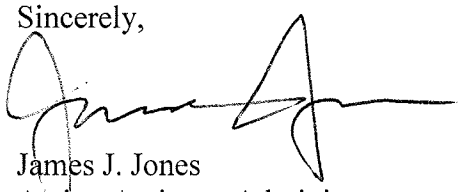
The 2012 submission is substantially the same as the petition to regulate lead bullets and shot submitted in 2010. To the extent that there are differences, they are not substantive. Therefore, EPA does not consider the 2012 submission to be a new petition cognizable under section 21. As with the original 2010 petition, the 2012 submission recognizes the exclusion in TSCA § 3(2)(B)(v) but argues that TSCA nonetheless provides EPA with the authority to regulate bullets and shot. While the 2012 submission does argue the issue of EPA's statutory authority slightly differently (including references to the legislative history from 1976), on this issue, the 2012 submission contains no new information that was not previously available to CBD and Project Gutpile. Moreover, EPA was aware of, and considered, the cited legislative history in reaching its decision on the 2010 petition.

The relief requested in the 2012 submission differs somewhat from that requested in the 2010 petition. Both request EPA to initiate a rulemaking under TSCA section 6(a), but where the 2010 petition specifically requested a nationwide ban, the 2012 submission presents a more open-ended request for a section 6(a) rule, while at the same time advocating for a nationwide ban. In light of EPA's previous denial explaining that EPA does not have the authority to pursue any regulatory alternative, this change is a distinction without a substantive difference. As further evidence that the 2012 submission is in essence the same as the 2010 petition, the 2012 submission presents almost verbatim the same information regarding toxicity and exposure with respect to lead bullets and shot as the 2010 petition.

Overall, with respect to the more than 400 separate citations, only 20 citations were not included in the 2010 petition, and, of those, only six citations appear to post-date the 2010 petition. For these reasons, EPA does not consider the 2012 submission to be a new petition cognizable under TSCA section 21. [1] Even if the 2012 submission could be understood to be a request that EPA reconsider its earlier decision, as explained above, it does not present any new (i.e., previously unavailable, non-cumulative) information or data that would cause EPA to reconsider its earlier denial. Accordingly, even if the 2012 submission could be considered to be a request for reconsideration, EPA would deny it because the 2012 submission does not present significant newly discovered, non-cumulative material.

Finally, 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. See *Lead in Ammunition and Fishing Sinkers; Disposition of TSCA Section 21 Petition*, 75 Fed. Reg. 58,377 at 58,378 (Sept. 24, 2010); 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), *Center for Biological Diversity e al., v. Jackson*, No. 10-2007 (D. DC 2010). Nonetheless, because EPA does not consider this to be a cognizable section 21 petition and because EPA has already published its reasons for denying the request to regulate bullets and shot under TSCA, EPA does not intend to publish its response to the 2012 submission in the Federal Register.

Sincerely,



James J. Jones
Acting Assistant Administrator

[1] EPA also does not believe that the statutory time bar in section 21 on judicial review of a denial can be avoided by re-submitting virtually the same petition, with the addition of parties, less than two years after the submission of the first petition.

Exhibit 2

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

DR. DAVID G. WALKER, Plaintiff, v. UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, LEE M. THOMAS, As Administrator of United States Environmental Protection Agency, and CHARLES L. ELKINS, Director of Office of Toxic Substances of United States Environmental Protection Agency, Defendants.	CIVIL ACTION NO. H-87-3552

MEMORANDUM OPINION

This case is before the Court on defendants' motion to dismiss for lack of subject matter jurisdiction. Plaintiff seeks de novo review of the Environmental Protection Agency's ("EPA") denial of his petition requesting that EPA amend certain regulations. Defendants assert that plaintiff failed to bring this action within the sixty-day time limitation as required by 15 U.S.C. § 2620(b)(4)(A). Alternatively, defendants argue if the Court finds it has jurisdiction, the standard for review is "arbitrary and capricious" and not de novo. The parties have submitted extensive briefs and the motion to dismiss is ripe for decision.

The history of this litigation in the administrative agency is undisputed. On March 27, 1987, the EPA received plaintiff's petition requesting that the EPA amend its regulations regarding the definition of toxic chemical polychlorinated biphenyls (PCB). This petition was submitted pursuant to § 2620 of the Toxic Substances Control Act ("TSCA"), 15 U.S.C. § 2620. The EPA denied the petition on June 24, 1987 and published the reasons for the denial in the Federal Register as required by TSCA. Section 2620(b)(4)(A) provides for judicial review of the denial of a petition if an action is commenced within sixty (60) days. It is undisputed that plaintiff did not commence an action for judicial review within sixty days.

Instead, on July 31, 1987, plaintiff attempted to file a second petition seeking the same rule change. By letter dated September 11, 1987, the EPA notified plaintiff of its decision not to accept the petition for consideration. Because the July submission concerned the exact same subject matter as the March petition and sought the exact same action on the part of the EPA, the EPA characterized the July submission as a refiling of the March petition. Plaintiff argues, however, that the July submission was a separate and distinct petition that must be accepted or denied pursuant to § 2620.

TSCA does not contain a definition of "petition." Whether a subsequent submission is sufficiently different from another to qualify as a separate petition rests on the content of

each. In making this determination, consideration must be given to the relief sought, the identity of the requesting parties, the temporal relationship between submissions, and the presence of new information. The decision to treat a submission as a petition is within the discretion of the EPA, and 5 U.S.C. § 706, the Administrative Procedure Act, provides that the applicable standard of review of a final agency decision is arbitrary and capricious. The Court may not "substitute its judgment for that of the agency." Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 416 (1971). Plaintiff has failed to provide any basis for a finding that the decision by the EPA not to treat his July submission as a separate petition was arbitrary and capricious. The July submission related to the identical subject matter, the EPA regulations regarding PCB's, and sought identical action on the part of the EPA, an amendment to the definition of toxic chemical PCB. The EPA was well within its discretion in determining that the July submission was not a new petition requiring agency consideration in accordance with § 2620.

The July submission, which was treated as a motion to reconsider the prior agency decision, cannot revive an expired jurisdictional statute of limitations. To hold otherwise would render the statute of limitations meaningless, permitting a plaintiff to circumvent the limitations period by submitting a repetitive request for identical action on an identical issue long after the time period has expired. See Long v. United States

Department of Defense, 616 F. Supp. 1280 (E.D.N.Y. 1985); Pacuna v. Marsh, 617 F. Supp. 101 (W.D.N.Y. 1984), aff'd 809 F.2d 792 (Fed. Cir. 1986), cert. denied 481 U.S. 1048 (1987).

Having determined that the EPA decision that plaintiff's July submission was not a separate petition should not be disturbed and that the July submission does not renew the running of the sixty-day limitations period, it is clear that the case must be dismissed. "Statutory time limits on petitions for review of agency actions are jurisdictional in nature such that if the challenge is brought after the statutory time limit, we are powerless to review the agency's action." Texas Municipal Power Agency v. EPA, 799 F.2d 173, 174 (5th Cir. 1986). It is undisputed that plaintiff did not file this action within sixty days of the denial of his March petition and, as a result, this Court does not have subject matter jurisdiction. Defendants' motion to dismiss must be granted.

An appropriate order consistent with this memorandum opinion shall be signed this day.

SIGNED this 3rd day of October, 1990.

Chief Judge
United States District Court

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IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

DR. DAVID G. WALKER,
Plaintiff,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, et al.,
Defendants.

CIVIL ACTION NO. H-87-3552

FINAL ORDER

In accordance with the memorandum opinion signed this day, it is hereby

O R D E R E D

that the defendants' motion to dismiss is GRANTED.

THIS IS A FINAL ORDER.

SIGNED this 3rd day of October, 1990.

Chief Judge
United States District Court

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

THE TRUMPETER SWAN SOCIETY, *et al*.,	
Plaintiffs,	
v.	
	Case No. 1:12-cv-929 (EGS)
ENVIRONMENTAL PROTECTION AGENCY, *et al*.,	
Defendants.	

[PROPOSED] ORDER GRANTING MOTION TO DISMISS

Upon consideration of the Motion to Dismiss by Defendant-Intervenor National Shooting Sports Foundation, Inc. ("NSSF"), and the materials submitted in support of that Motion, the Court has determined that NSSF's Motion to Dismiss should be, and hereby is, GRANTED.

Dated: _____, 2012

_____
Emmet G. Sullivan
United States District Judge