

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

THE TRUMPETER SWAN SOCIETY, <i>et al.</i> ,	)	Case No. 1:12-cv-929 (EGS)
	)	
Plaintiffs,	)	
	)	
v.	)	
	)	
	)	
ENVIRONMENTAL PROTECTION	)	<b>MOTION TO INTERVENE</b>
AGENCY, <i>et al.</i> ,	)	
	)	
Defendants,	)	
	)	
And	)	
	)	
NATIONAL SHOOTING SPORTS	)	
FOUNDATION, INC.	)	
Flintlock Ridge Office Center	)	
11 Mile Hill Road	)	
Newtown, CT 06470-2359	)	
	)	
Proposed Defendant-Intervenor.	)	
<hr/>	)	

National Shooting Sports Foundation, Inc. (“NSSF”), by and through the undersigned counsel, hereby respectfully seeks an order from this Court allowing it to intervene of right pursuant to Fed. R.Civ. P. 24(a)(2), or alternatively, to intervene permissively in this matter under Fed. R. Civ. P. 24(b)(1)(B). Intervention is sought so that the movant may appear in support of the named Defendants and file responsive pleadings to Plaintiffs’ Complaint.

Plaintiffs do not oppose this Motion. Defendant take no position on the motion.

On January 18, 2011, this Court granted NSSF’s motion to intervene in a case that was essentially the same as this one in all relevant respects. *Center for Biological Diversity v. Jackson*, No. 1:10-cv-2007 (D. D.C., Minute Order of Jan. 18, 2011) (“*CBD Litigation*”). The

Order of January 18 succinctly summarizes the grounds for allowing NSSF to intervene in this case as a matter of right:

For the following reasons, and largely for the reasons given by the prospective intervenor, the Court finds that NSSF has satisfied these criteria and thus is entitled to intervene in this matter as of right. First, no party contests that NSSF's motion was timely filed, as the federal defendants have not yet responded to the complaint. Second, the Court concludes that NSSF has standing to intervene on behalf of its members. See *Hunt v. Washington State Apple Adver. Comm'n*, 432 U.S. 333, 343 (1977) (setting out the standard for associational standing). Particularly, NSSF has demonstrated that its members would have standing in their own right because the product that they manufacture, distribute, sell, and use is the object of the particular regulation that plaintiff seeks. *Fund for Animals*, 322 F.3d at 733-34 (if the prospective intervenor's property is "an object of the action (or foregone action) at issue" there should be "little question that the action or inaction has caused him injury, and that a judgment preventing or requiring the action will redress it" (citation omitted)). A demonstration of standing is also sufficient to establish "an interest relating to the property or transaction which is the subject of the action." Fed. R. Civ. P. 24(a)(2); *Fund for Animals*, 322 F.3d at 735. Third, NSSF has demonstrated that the disposition of this action "may as a practical matter impair or impede [its] ability to protect [its] interests." Fed. R. Civ. P. 24(a)(2). NSSF members currently benefit from the agency's determination that it has no authority to regulate lead ammunition. Plaintiffs have asked this Court to order EPA to develop and implement regulations for lead shot and bullets under TSCA because these items present an "unreasonable risk of injury to health or the environment." Compl. 7. If the Court were to grant plaintiffs' requested relief, the "task of reestablishing the status quo... will be difficult and burdensome." *Fund for Animals*, 322 F.2d at 735. The opportunity to participate in subsequent rulemaking procedures is an inadequate substitute. Finally, NSSF has demonstrated that the federal defendants cannot adequately represent the business interests of NSSF's members, even if they share the same interest in upholding the EPA's denial of plaintiffs' petition. See *Fund for Animals*, 322 F.3d at 736-37 (noting that the D.C. Circuit has often concluded that governmental entities do not adequately represent the interests of prospective intervenors on similar grounds). Accordingly, this Court finds that NSSF is entitled to intervene as of right, and it is hereby ORDERED that [5] the motion of National Shooting Sports Foundation to intervene as a defendant pursuant to Rule 24(a)(2) of the Federal Rules of Civil Procedure is GRANTED.

*CBD Litigation* (Minute Order of Jan. 18, 2011). All of the reasons set forth by this Court in its January 18, 2011 Order in the *CBD Litigation* apply with equal force in this case.

Dated: June 25, 2012

Respectfully submitted,

/s/ Roger R. Martella, Jr.

Roger R. Martella, Jr. (Bar No. 976771)

Ragu-Jara Gregg (Bar No. 495645)

SIDLEY AUSTIN LLP

1501 K Street, N.W.

Washington, D.C. 20005

(202) 736-8000

(202) 736-8711 (fax)

Christopher L. Bell (Bar No. 412857)

SIDLEY AUSTIN LLP

600 Travis Street

Suite 3100

Houston, TX 77002

(713) 315-9000

(713) 315-9199 (fax)

*Attorneys for Proposed Defendant-  
Intervenors*

*NATIONAL SHOOTING SPORTS  
FOUNDATION, INC.*

*Of Counsel*

Lawrence G. Keane

General Counsel

National Shooting Sports Foundation

11 Mile Hill Road

Newtown, CT 06470-2359

(203) 426-1320

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

THE TRUMPETER SWAN SOCIETY, <i>et al.</i> ,	)	Case No. 1:12-cv-929 (EGS)
	)	
Plaintiffs,	)	
	)	<b>MEMORANDUM OF POINTS</b>
v.	)	<b>AND AUTHORITIES IN SUPPORT</b>
	)	<b>OF MOTION TO INTERVENE</b>
	)	<b>OF NATIONAL SHOOTING</b>
ENVIRONMENTAL PROTECTION	)	<b>SPORTS FOUNDATION, INC.</b>
AGENCY, <i>et al.</i> ,	)	
	)	
Defendants.	)	
	)	
	)	
	)	

---

**INTRODUCTION**

The National Shooting Sports Foundation, Inc. (“NSSF”) moves to intervene in this action filed by the Trumpeter Swan Society, Cascades Raptor Center, Center for Biological Diversity, Loon Lake Loon Association, Preserve Our Wildlife Organization, Tennessee Ornithological Society and Western Nebraska Resources Council (collectively “Plaintiffs”). In this action, Plaintiffs challenge the United States Environmental Protection Agency’s (“EPA’s” or the “Agency’s”) denial of Plaintiffs’ petition demanding that 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. *See The Trumpeter Swan Society, et al.*, Complaint for Declaratory and Injunctive Relief (“Complaint”) (Exhibit 1). NSSF, which speaks for the nation’s leading ammunition manufacturers, seeks to intervene to defend EPA’s correct conclusion that the

Agency does not have the jurisdiction to regulate traditional ammunition (including the shot and bullets that make up ammunition) under TSCA and that the Plaintiffs' petition was not cognizable under TSCA. As described below, this court previously granted NSSF's request to intervene in a similar case that also challenged EPA's decision not to regulate lead ammunition under TSCA. Furthermore, NSSF has consulted with the Plaintiffs, who do not oppose NSSF's request for intervention here.

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, shooting and hunting-related goods and services, as well sporting organizations, public and private shooting ranges, gun clubs, and individual hunters and sports shooters. Plaintiffs' demand that EPA use TSCA to ban traditional ammunition threatens to shut down the domestic ammunition manufacturing industry and increase costs to the hunting and sports shooting public, while allowing foreign manufacturers to import that very same ammunition into the United States without domestic competition or TSCA regulation.

On January 18, 2011, this Court granted NSSF's motion to intervene in a case that was essentially the same as this one in all relevant respects. *Center for Biological Diversity v. Jackson*, No. 1:10-cv-2007 (D. D.C., Minute Order of Jan. 18, 2011) ("*CBD Litigation*"). The Order of January 18 succinctly summarizes the grounds for allowing NSSF to intervene in this case as a matter of right:

For the following reasons, and largely for the reasons given by the prospective intervenor, the Court finds that NSSF has satisfied these criteria and thus is entitled to intervene in this matter as of right. First, no party contests that NSSF's motion was timely filed, as the federal defendants have not yet responded to the complaint. Second, the Court concludes that NSSF has standing to intervene on behalf of its members. See *Hunt v. Washington State Apple Adver. Comm'n*, 432 U.S. 333, 343 (1977) (setting out the standard for associational standing). Particularly, NSSF has demonstrated that its members would have standing in their own right because the product that they

manufacture, distribute, sell, and use is the object of the particular regulation that plaintiff seeks. *Fund for Animals*, 322 F.3d at 733-34 (if the prospective intervenor's property is "an object of the action (or foregone action) at issue" there should be "little question that the action or inaction has caused him injury, and that a judgment preventing or requiring the action will redress it" (citation omitted)). A demonstration of standing is also sufficient to establish "an interest relating to the property or transaction which is the subject of the action." Fed. R. Civ. P. 24(a)(2); *Fund for Animals*, 322 F.3d at 735. Third, NSSF has demonstrated that the disposition of this action "may as a practical matter impair or impede [its] ability to protect [its] interests." Fed. R. Civ. P. 24(a)(2). NSSF members currently benefit from the agency's determination that it has no authority to regulate lead ammunition. Plaintiffs have asked this Court to order EPA to develop and implement regulations for lead shot and bullets under TSCA because these items present an "unreasonable risk of injury to health or the environment." Compl. 7. If the Court were to grant plaintiffs' requested relief, the "task of reestablishing the status quo... will be difficult and burdensome." *Fund for Animals*, 322 F.2d at 735. The opportunity to participate in subsequent rulemaking procedures is an inadequate substitute. Finally, NSSF has demonstrated that the federal defendants cannot adequately represent the business interests of NSSF's members, even if they share the same interest in upholding the EPA's denial of plaintiffs' petition. See *Fund for Animals*, 322 F.3d at 736-37 (noting that the D.C. Circuit has often concluded that governmental entities do not adequately represent the interests of prospective intervenors on similar grounds). Accordingly, this Court finds that NSSF is entitled to intervene as of right, and it is hereby ORDERED that 5 the motion of National Shooting Sports Foundation to intervene as a defendant pursuant to Rule 24(a)(2) of the Federal Rules of Civil Procedure is GRANTED.

*CBD Litigation* (Minute Order of Jan. 18, 2011). All of the reasons set forth by this Court in its January 18, 2011 Order in the *CBD Litigation* apply with equal force in this case.

#### A. Summary of Case

On August 3, 2010, several organizations, including one of the Plaintiffs in this case (Center for Biological Diversity), petitioned EPA under Section 21 of TSCA asking EPA to 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 "First Petition"). On August 27, 2010, EPA took final agency action to properly deny the portion of the petition seeking to ban lead in ammunition because the Agency does not have the legal authority to regulate ammunition under TSCA. *Id.* at 58,377. Plaintiffs filed a challenge to EPA's denial of the First Petition regarding bullets and shot on November 23, 2010, 88 days after EPA's final decision. *CBD Litigation*,

Dkt. #1. On January 18, 2011, this Court granted NSSF's Motion to Intervene in the *CBD Litigation* (Minute Order of Jan. 18, 2011), and 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 First Petition had been filed after the statutory time for filing such petitions had run. *CBD Litigation*, Dkt. #36.

On March 13, 2012, Plaintiffs filed another petition with EPA, again demanding that EPA regulate traditional ammunition containing lead bullets and shot under TSCA, including advocating a nationwide ban of such ammunition (the "Second Petition"). On April 9, 2012, in a letter sent to the Center for Biological Diversity, EPA rejected the Second Petition, and on June 7 the Plaintiffs filed this action challenging EPA's action.

In denying the First Petition, EPA correctly 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. The Agency properly explained:

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. There is no debate that "shells and cartridges" are subject to the firearms and ammunition excise tax ("FAET") imposed by section 4181 of the Internal Revenue Code,

which is collected by the Alcohol and Tobacco Tax and Trade Bureau (“TTB”).<sup>1</sup> Thus, “shells and cartridges” are not “chemical substances” subject to EPA’s jurisdiction under TSCA.

Plaintiffs concede that “shells and cartridges” are exempt from TSCA. Complaint ¶ 33. However, they assert that EPA has TSCA jurisdiction over the lead shot and bullets because additional FAET is not collected on the shot and bullets that are components of the shells and cartridges. Complaint ¶ 36. That is, the tax code does not impose a “double FAET,” first on the components of shells and cartridges (i.e., shot and bullets), and then again on the final ammunition containing the components. Plaintiffs thus seek to effectively read out of the statute Congress’s clear direction that TSCA was not intended to regulate ammunition, since ammunition is simply the sum total of its components (i.e., there would not be any shells and cartridges for the IRS to tax without bullets or shot), and require EPA to use TSCA to ban approximately 95% of the domestically manufactured ammunition that is produced today.

In rejecting the Second Petition, EPA, again correctly, concluded that the Second Petition was “substantially the same” as the First Petition and that therefore EPA did not consider the Second Petition to be a “new” petition cognizable under Section 21 of TSCA. Letter From James Jones, Acting Administrator, Office of Chemical Safety and Pollution Prevention, EPA, to Jeff Miller, Center for Biological Diversity (Apr. 9, 2012) (Exhibit 2). EPA observed that the evidence presented in the Second Petition was “in essence the same” as that presented in the First 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.* 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

---

<sup>1</sup> The TTB was created by the Homeland Security Act of 2002, and is part of the U.S. Department of the Treasury.

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 Second Petition was cognizable under Section 21 of TSCA, the Agency would deny it for the same reasons it denied the First Petition. *Id.*

B. Interests of Defendant-Intervenor NSSF

NSSF is the trade association for the firearms and ammunition industry, and its members will be directly impacted by the outcome of this litigation. NSSF’s mission is to promote, protect, and preserve hunting and the shooting sports, and support America’s traditional hunting heritage and firearms freedoms. Formed in 1961, NSSF is a Connecticut non-profit tax-exempt corporation with a membership of more than 7,000 federally-licensed firearms manufacturers, distributors, and retailers; companies manufacturing, distributing, and selling shooting and hunting-related goods and services; sportsmen’s organizations; public and private shooting ranges; gun clubs; publishers; and recreational target shooters and hunters. Keane Decl. ¶ 3 (Exhibit 3). NSSF members and the firearms and ammunition industry on whole provide approximately 210,000 jobs in the United States and have an overall annual economic impact of almost \$32 billion. *Id.* ¶ 4. NSSF’s members manufacture, distribute, sell, and use ammunition. Approximately 95% of the domestically manufactured ammunition is traditional ammunition made with lead bullets or shot, and over 90% of that domestically manufactured traditional ammunition is manufactured by NSSF members. *Id.* ¶ 5. The traditional ammunition (i.e., cartridges and shells) that consumers purchase consists of the projectile (i.e., lead shot or bullets), propellant, and a primer, all contained in a casing. *Id.* More than 50 million target shooters and hunters across the United States purchase and use traditional ammunition. *Id.* at ¶ 4.

Thus, NSSF has significant economic, legal, and policy interests in this lawsuit and defending EPA's decision, as a ruling in Plaintiffs' favor could result in the manufacture and distribution of ammunition being regulated under TSCA, and potentially ban the domestic manufacture of traditional ammunition. In the face of such a result, NSSF's members would have to significantly change, if not entirely abandon, their manufacturing and business practices. *Id.* ¶ 6.

Ammunition is made in very high volume and high speed precision processes using specialized mass production equipment and manufacturing know-how honed by decades of experience. *Id.* These facilities produce millions of cartridges a day. *Id.* The shot and bullets used in traditional ammunition cannot simply be replaced with alternative materials in the existing mass production processes. Domestic ammunition manufacturers would be forced to either retool their entire manufacturing processes at a significant cost or shut down. At the same time, domestic manufacturers would face unfair competition from foreign manufacturers whose import of shells and cartridges containing lead shot or bullets could not be affected by EPA's action. *Id.*<sup>2</sup>

Banning traditional ammunition will increase the cost of ammunition, on average up to 190%, and create burdens that will cascade throughout the entire hunting and shooting sports community represented by NSSF, including retailers, shooting ranges, and the sportsmen who use ammunition. *Id.* These costs will also be borne by Federal and State law enforcement, as well the military. *Id.* Increasing the cost of ammunition will also decrease demand, which has additional follow-on consequences. For example, decreased ammunition purchases will mean a

---

<sup>2</sup> Imported ammunition comes into the United States in the form of finished shells and cartridges. Therefore, even under Plaintiffs' incorrect view of the law, imported ammunition containing lead components could not be regulated by EPA under TSCA.

decrease in the collection of the FAET (11% on taxable ammunition sales), which is one of the primary sources of funding for wildlife conservation (all of the FAET goes to the U.S. Fish and Wildlife Service, which then distributes the funds to the States for wildlife and sport fish restoration).<sup>3</sup> *Id.* These burdens would injure many – if not all – of NSSF’s members. *Id.* NSSF therefore seeks to intervene in this case to support EPA’s decision and oppose Plaintiffs’ attempt to force EPA to use TSCA to ban the domestic manufacture and use of traditional ammunition. For the reasons stated below, this Court should grant NSSF’s motion for leave to intervene.<sup>4</sup>

## ARGUMENT

### I. NSSF Is Entitled to Intervene as of Right Pursuant to Federal Rule of Civil Procedure 24(a)

Federal Rule of Civil Procedure 24(a) states in relevant part:

On timely motion, the court must permit anyone to intervene who . . . (2) claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant’s ability to protect its interest, unless existing parties adequately represent that interest.

The D.C. Circuit applies a four part test for determining if an applicant has a right to intervene under Rule 24(a): (1) the motion must be timely; (2) the applicant must assert a

---

<sup>3</sup> As plaintiffs’ recognize, state fish and game agencies and U.S. Fish and Wildlife Service set a range of hunting regulations, including, in some instances, regulations regarding the type of ammunition a hunter may use to harvest game. *See e.g.*, Complaint at ¶¶ 47, 53.

<sup>4</sup> NSSF meets Article III standing requirements because its members would be subject to the TSCA provisions in question in this case if Plaintiffs prevail, and the individual participation of the members in the case is not required. *See Military Toxics Project v. EPA*, 146 F.3d 948, 954 (D.C. Cir. 1998) (finding trade association had standing in challenge of EPA regulation where some of its members were subject to challenged regulation). The interests alleged as grounds for intervention are sufficient to demonstrate that NSSF satisfies the test of constitutional standing and associational standing on behalf of their members. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). As discussed above and in the Keane Declaration, NSSF’s members face a potential injury that would provide them with their own right to sue, that injury is related to NSSF’s organizational purpose, and the nature of the claim and the relief requested is not such that participation of NSSF’s members in the lawsuit is required. Nonetheless, the D.C. Circuit has indicated that Article III standing should not be required of any party seeking to intervene as a defendant. *Roeder v. Islamic Republic of Iran*, 333 F.3d 228, 233 (D.C. Cir. 2003), *cert. denied*, 542 U.S. 915 (2004) (“Requiring standing of someone who seeks to intervene as a defendant ... runs into the doctrine that the standing inquiry is directed at those who invoke the court’s jurisdiction”) (citations omitted).

“significantly protectable” interest relating to property or a transaction that is the subject matter of litigation; (3) the applicant must be situated so that disposition of action may as a practical matter impair or impede the interest; and (4) the applicant’s interest must be inadequately represented by the parties. *See, Fund for Animals, Inc. v. Norton*, 322 F.3d 728, 731 (D.C. Cir. 2003). As this Court already found in the *CBD Litigation*, NSSF satisfies each prong of this test in this case and therefore should be permitted to intervene as of right.<sup>5</sup>

A. This Motion to Intervene is timely.

Just as in the *CBD Litigation*, where NSSF filed its intervention motion in a similar timeframe, this Court should find this Motion to Intervene to be timely filed. As “[t]imeliness is to be determined by looking at all of the circumstances relevant to the case and the motion,” there can be no doubt that NSSF’s motion is timely. *See Hardin v. Jackson*, 600 F. Supp. 2d 13, 16 (D.D.C. 2009) (citation omitted). Plaintiffs filed their Complaint on June 7, 2012, and NSSF is filing this Motion to Intervene two and a half weeks later. This case is still in its earliest phases. As of the date of filing of this Motion to Intervene, EPA has not yet filed an answer, neither party has filed any procedural or dispositive motions, and no schedules or substantive orders have been issued by this Court. Consequently, granting NSSF’s timely Motion will not cause any delays. Furthermore, because NSSF agrees to comply with any forthcoming scheduling orders, and will endeavor to avoid the duplication of issues with the other parties, there is no danger of prejudice to Plaintiffs or to EPA. In short, under any test of timeliness, this Motion satisfies this provision of Rule 24 (a)(2).

---

<sup>5</sup> Because this Motion to Intervene is being filed so early in the litigation, the time in which to file an answer or dispositive motion has not yet run, notwithstanding the Federal Rule of Civil Procedure 24(c) requirement that an applicant for intervention accompany its motion with an original of the “pleading that sets out the claim or defense for which intervention is sought.” NSSF understands that, at the appropriate time, it will be required to file an answer or other response to the Complaint. Consequently, NSSF has included in the attached Proposed Order a provision stating that the requirement to plead or file a motion in response to the Complaint is deferred until the date that such filing by EPA is due.

B. NSSF has a protectable interest in the policy and economic impacts that would result from the potential ban under TSCA of the use of traditional ammunition that is the subject of Plaintiffs' suit.

As this Court has already determined, intervention is warranted because “the product that [NSSF’s members] manufacture, distribute, sell, and use is the object of the particular regulation that plaintiff seeks.” *CBD Litigation* (Minute Order of Jan. 18, 2011). Plaintiffs seek to establish through this litigation that EPA has the authority and obligation to regulate traditional ammunition under TSCA, despite the clear statutory language to the contrary. When a third-party challenges an agency final action or other regulatory direction, the members of the regulated industry that are directly affected by that government action have a significant, protectable interest that supports intervention. *See id.* (citing *Fund for Animals*, 322 F.3d at 735; *NRDC v. EPA*, 99 F.R.D. 607, 609 (D.D.C. 1983) (holding that pesticide manufacturers subject to regulation under challenge had a legally protected interest); *see e.g., Military Toxics Project v. EPA*, 146 F.3d 948, 954 (D.C. Cir. 1998) (holding that companies that produce military munitions and operate military firing ranges had standing to challenge EPA’s Military Munitions Rule); *Conservation Law Found. of New England v. Mosbacher*, 966 F.2d 39, 41-44 (1st Cir. 1992) (holding that commercial fishermen impacted by regulatory plan to address overfishing had a recognizable interest in the timetable for implementing that plan).

Further, Plaintiffs’ claims will affect NSSF because NSSF has a direct interest in the economic vitality and legal rights of its members, which include the leading domestic manufacturers of the traditional ammunition that is at issue in this suit, as well as thousands of distributors, firearms retailers, shooting ranges, sportsmen’s organizations (including hunters and target shooters) that distribute, sell, and use that ammunition. Keane Decl. ¶ 3. Plaintiffs are

seeking to have this Court review EPA's rejection of the Second Petition, which includes the advocacy of a nation-wide ban on the use of traditional ammunition. *See* Second Petition at pp. 2 and 16. Pursuant to the nation-wide ban that the Plaintiffs continue to seek, domestic manufacturers would be required – at great cost – to re-design their products, retool or purchase new manufacturing equipment and significantly change their manufacturing processes, as it is not possible to simply replace lead with alternative material in the existing mass production manufacturing processes. Keane Decl. ¶ 6. This process would include evaluating the efficacy, consumer acceptance, and environmental, health and safety impacts of substitutes in order to determine if a switch to exclusively lead-free ammunition is even feasible. *Id.*

Assuming that an across-the-board switch to some form of alternative ammunition in mass production processes is feasible (which has not been demonstrated), given the razor-thin operating margins and the current economic climate that these manufacturers face, manufacturers might not be able to obtain the capital needed to accomplish such a radical re-shaping of the ammunition industry. *Id.* All of these technical and economic factors could create ammunition shortages. In addition, any alternative material will be more costly, further driving up manufacturing costs and costs to the American public. *Id.*

The ban on traditional ammunition sought by Plaintiffs' will benefit foreign ammunition manufacturers at the expense of domestic companies and U.S. jobs. Even Plaintiffs agree that fully assembled ammunition (i.e., shells and cartridges) is not subject to regulation under TSCA. Complaint ¶ 33. Therefore, if Plaintiffs prevail, foreign manufacturers could continue to sell traditional ammunition into the United States market, while domestic manufacturers would be prohibited from producing and selling that same ammunition. Thus, domestic manufacturers would face unfair foreign competition, American jobs would be lost, and the traditional

ammunition about which Plaintiffs complain would continue to be sold in the United States.

Keane Decl. ¶ 6.

The relief sought by Plaintiffs will harm not only domestic ammunition manufacturers that belong to NSSF, but also NSSF members who distribute, sell and use that ammunition. *Id.* If Plaintiffs are successful in their efforts, the prohibition on traditional ammunition will increase the cost of ammunition by on average up to 190% for all users, including Federal and State law enforcement and the military. *Id.* ¶ 5. Thus, a prohibition on the domestic manufacture of lead-containing ammunition would create uncertainty in the marketplace, with effects (including shortages, price increases, and reduced FAET revenues used for wildlife conservation) that would cascade through the supply chain, significantly impacting NSSF members who distribute, sell, and use ammunition. *Id.* ¶ 6. The FAET paid by the manufacturers from the sale to hunters and sportsmen of the very ammunition Petitioners want to ban is a primary source of wildlife habitat and conservation funding throughout the United States that benefits all species.

Thus, NSSF, on behalf of its membership, has direct legal and economic interests in the subjects of Plaintiffs' suit that can be protected by intervention as of right in this action.

C. The disposition of this case may impair or impede NSSF's ability to protect its interests and the interests of its members.

To show impairment of interests for the purposes of Rule 24(a)(2), a proposed intervenor need show only that the disposition of an action "may as a practical matter," impede the intervenor's ability to protect its interests in the subject of the action. Fed. R. Civ. P. 24(a)(2) (emphasis added).<sup>6</sup> Where the relief sought by the Plaintiffs would have direct, immediate, and harmful impact on a third party's interests, that adverse impact is sufficient to satisfy Rule

---

<sup>6</sup> Fed. R. Civ. P. 24 advisory committee's notes to 1966 Amend. ("If an absentee would be substantially affected in a practical sense by the determination made in an action, he should, as a general rule, be entitled to intervene ....").

24(a)(2). *Fund for Animals*, 322 F.3d at 735; *Sagebrush Rebellion, Inc. v. Hodel*, 790 F.2d 760 (9th Cir. 1986). Further, an entity has sufficient interests to intervene where the proceeding has the potential to subject the movant to governmental regulation or significantly change how the movant does business. *See, e.g., Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561-62 (1992); *Fund for Animals*, 322 F.3d at 735; *Military Toxics Project* 146 F.3d at 954.

As this Court has already recognized, “NSSF members currently benefit from the agency’s determination that it has no authority to regulate lead ammunition” and Plaintiffs seek to have the court overturn that determination. *CBD Litigation* (Minute Order of Jan. 18, 2011). The disposition of this claim in favor of the Plaintiffs will have an immediate and significant adverse impact on the legal interests of NSSF’s members. Further, as discussed above, Plaintiffs’ action, if successful, would harm NSSF’s members throughout the hunting and shooting sports industry by changing product content, design, and manufacturing processes, increasing manufacturing costs, benefiting foreign manufacturers, and increasing the cost of ammunition. Intervention of right is warranted where there is even a *possibility* that the remedies sought by Plaintiffs will harm the interests of NSSF’s members, and thereby NSSF itself. Given the certain and significant impacts of Plaintiffs’ claims on NSSF’s members, intervention of right is warranted because “NSSF has demonstrated that the disposition of this action ‘may as a practical matter impair or impede [its] ability to protect [its] interests.’” *Id.* (citing Fed. R. Civ. P. 24(a)(2) (alterations in original)).

D. NSSF’s interests may not be adequately represented by the Government and will not be adequately represented by Plaintiffs.

The requirement under Federal Rule of Civil Procedure 24(a)(2) to show inadequate representation “is satisfied if the applicant shows that representation of his interest ‘may be’

inadequate; and the burden of making that showing should be treated as minimal.” *Trbovich v. United Mine Workers of America*, 404 U.S. 528, 538 n.10 (1972) (citation omitted). “A showing that existing representation is inadequate ‘is not onerous.’” *Hardin v. Jackson*, 600 F. Supp. 2d at 16 (citing *Dimond v. District of Columbia*, 792 F.2d 179, 192 (D.C. Cir. 1986)). Further, the D.C. Circuit has frequently found “inadequacy of governmental representation” when the government has no financial stake in the outcome of the suit, whereas a private intervenor does. See e.g., *Dimond v. Dist. of Columbia*, 792 F.2d at 192; *Fund for Animals*, 322 F.3d at 736; *NRDC v. Costle*, 561 F.2d 904, 912, n.41 (D.C. Cir. 1977); *Forest Conservation Council v. U.S. Forest Service*, 66 F.3d 1489, 1499 (9th Cir. 1995) (nothing that a government agency was “required to represent a broader view than the more narrow, parochial interests of” the intervenors); *Sierra Club v. Espy*, 18 F.3d 1202, 1208 (5th Cir. 1994); *County of Fresno v. Andrus*, 622 F.2d 436, 438-39 (9th Cir. 1980); *NRDC v. U.S. Nuclear Regulatory Comm’n*, 578 F.2d 1341, 1345-46 (10th Cir. 1978).

This Court has already determined “that the federal defendants cannot adequately represent the business interests of NSSF’s members, even if they share the same interest in upholding the EPA’s denial of plaintiffs’ petition.” *CBD Litigation* (Minute Order of Jan. 18, 2011) (citing *Fund for Animals*, 322 F.3d at 736-37). NSSF’s interests here include protecting the legal rights and economic interests of its members by supporting EPA’s decision that it does not have the legal authority or obligation under TSCA to regulate ammunition. NSSF’s interests are directly opposed to those of Plaintiffs – hence Plaintiffs will not represent the NSSF’s interests. Nor can EPA adequately represent NSSF’s interests. As a government agency, EPA is focused on a broad “representation of the general public interest,” not the “narrower interest” of certain businesses. *Dimond*, 792 F.2d at 192-93. In contrast to EPA, NSSF has a specific

interest in protecting its members' ability to pursue their legitimate business interests in compliance with applicable laws, but without being wrongly burdened by incorrect interpretations of TSCA or being subjected to unfair foreign competition. While EPA is charged with the correct interpretation and implementation of TSCA, the Agency is not in a position to fully understand the impact of Plaintiffs' claims on the ammunition market specifically and the sport shooting and hunting community generally, or to advocate on behalf of the interests of NSSF's members.

Even if NSSF's interests and EPA's interests were more closely aligned, "that [would] not necessarily mean that adequacy of representation is ensured." *NRDC v. Costle*, 561 F.2d at 912. Precisely because NSSF's interests are "more narrow and focused than EPA's," NSSF's participation is "likely to serve as a vigorous and helpful supplement to EPA's defense." *Id.* Accordingly, NSSF should be allowed to intervene as of right to fully and fairly represent the legitimate interests of its members in this litigation.

## **II. In the Alternative, NSSF Should Be Granted Leave for Permissive Intervention Under Federal Rule of Civil Procedure 24(b)**

Federal Rule of Civil Procedure 24 contemplates two forms of intervention – intervention of right and permissive intervention – and a court may grant an intervenor's motion on either basis. *Int'l Union, United Auto., Aerospace, & Agric. Implement Workers of Am. AFL-CIO, Local 283 v. Scofield*, 382 U.S. 205, 217 n.10 (1965). Regarding permissive intervention, Rule 24(b) provides "[o]n timely motion, the court may permit anyone to intervene who . . . has a claim or defense that shares with the main action a common question of law or fact."

As demonstrated above, NSSF's Motion to Intervene is timely, will not cause undue delay, and will not prejudice Plaintiffs or EPA. Moreover, as discussed above, NSSF possesses legally protectable interests in its members' economic interests and legal rights. The potential

for harm to those interests from Plaintiffs' suit provides an independent basis for jurisdiction, particularly given the minimal showing required by Federal Rule of Civil Procedure 24(b). Also, NSSF's members' economic and legal interests are directly at issue in this suit, and thus NSSF's own interests are at issue.

NSSF is asserting a concrete interest in whether TSCA can be used to regulate the manufacture, distribution and use of ammunition. NSSF supports EPA's decision that the Agency does not have the authority under TSCA to regulate ammunition and will be offering defenses that overlap with the common questions of fact and law that will be raised by the Plaintiffs and EPA. Therefore, the requirements for permissive intervention are fully satisfied, and because intervention would contribute to the just and equitable adjudication of the legal questions presented, it should be permitted.

#### **CONCLUSION**

Faced with a case that was essentially the same as this one in all relevant respects, this Court granted NSSF's motion to intervene in the *CBD Litigation*. NSSF likewise respectfully requests leave to intervene of right in this matter, pursuant to Federal Rule of Civil Procedure 24(a), and to file its own responsive pleading in support of EPA on or before the date on which the Government is required to file a responsive pleading. In the alternative, NSSF respectfully requests leave for permissive intervention, pursuant to Rule 24(b), and to file its own responsive pleading in support of EPA on or before the date on which the Government is required to file its responsive pleading.

Dated: June 25, 2012

Respectfully submitted,

/s/ Roger R. Martella, Jr.  
Roger R. Martella, Jr. (Bar No. 976771)  
Ragu-Jara Gregg (Bar No. 495645)  
SIDLEY AUSTIN LLP  
1501 K Street, N.W.  
Washington, D.C. 20005  
(202) 736-8000  
(202) 736-8711 (fax)

Christopher L. Bell (Bar No. 412857)  
SIDLEY AUSTIN LLP  
600 Travis Street  
Suite 3100  
Houston, TX 77002  
(713) 315-9000  
(713) 315-9199 (fax)

*Attorneys for Proposed Defendant-  
Intervenors*  
**NATIONAL SHOOTING SPORTS  
FOUNDATION, INC.**

*Of Counsel*  
Lawrence G. Keane  
General Counsel  
National Shooting Sports Foundation  
11 Mile Hill Road  
Newtown, CT 06470-2359  
(203) 426-1320

**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing was on this 25th day of June 2012, served electronically to the Clerk of the Court to be served through the Court's CM/ECF system on all registered counsel.

/s/ Roger R. Martella, Jr.  
Roger R. Martella, Jr. (Bar No. 976771)  
SIDLEY AUSTIN LLP  
1501 K Street, N.W.  
Washington, D.C. 20005

UNITED STATES DISTRICT COURT  
DISTRICT OF COLUMBIA

**THE TRUMPETER SWAN SOCIETY,**  
12615 County Road 9  
Plymouth, MN 55441;

**CASCADES RAPTOR CENTER,**  
32275 Fox Hollow Rd  
Eugene, OR 97405;

**CENTER FOR BIOLOGICAL DIVERSITY,**  
1333 North Oracle Rd  
Tucson, AZ 85705;

**LOON LAKE LOON ASSOCIATION,**  
39917 North Shore Dr  
Loon Lake, WA 99148;

**PRESERVE OUR WILDLIFE ORGANIZATION,**  
4238 65th Terrace East  
Sarasota, FL 34243;

**TENNESSEE ORNITHOLOGICAL SOCIETY,**  
4962 Gwynne Rd  
Memphis, TN 38117;  
and

**WESTERN NEBRASKA RESOURCES COUNCIL,**  
205 N. Mears St  
Chadron, NE 69337;

Plaintiffs,

v.

**ENVIRONMENTAL PROTECTION AGENCY,**  
Ariel Rios Building  
1200 Pennsylvania Avenue, N.W.  
Washington, DC 20460;

**LISA P. JACKSON,** Administrator,  
Environmental Protection Agency  
1200 Pennsylvania Avenue, N.W.  
Washington, DC 20460;

Defendants.

) Case No.:

) **COMPLAINT FOR**  
) **DECLARATORY AND**  
) **INJUNCTIVE RELIEF**

## INTRODUCTION

1. Plaintiffs THE TRUMPETER SWAN SOCIETY, CASCADES RAPTOR CENTER, CENTER FOR BIOLOGICAL DIVERSITY, LOON LAKE LOON ASSOCIATION, PRESERVE OUR WILDLIFE ORGANIZATION, TENNESSEE ORNITHOLOGICAL SOCIETY, and WESTERN NEBRASKA RESOURCES COUNCIL (collectively “Plaintiffs”) bring this civil action pursuant to the Administrative Procedure Act (“APA”), 5 U.S.C. § 500 *et seq.*, for review of the decision by Federal Defendants ENVIRONMENTAL PROTECTION AGENCY and LISA P. JACKSON, Administrator of the Environmental Protection Agency (collectively “the EPA”) to regard Plaintiffs’ petition to initiate a rulemaking proceeding under the Toxic Substances Control Act (“TSCA”), 15 U.S.C. § 2601 *et seq.* for toxic lead bullets and shot (“Petition”) as not cognizable under TSCA. To the extent that the EPA’s action constituted a denial of the Petition, Plaintiffs bring this action under Section 21 of TSCA 15 U.S.C. § 2620(b)(4)(B), for *de novo* review of the Petition.

2. TSCA grants the EPA the broad authority to regulate chemical substances that “present an unreasonable risk of injury to health or the environment.” 15 U.S.C. § 2601. The EPA may regulate the manufacture, processing, distribution, use or disposal of such chemical substances. The EPA has already declared that lead is a toxic substance, and although it has implemented some regulations to reduce lead exposure, lead still remains widely distributed in the environment in the form of spent lead bullets and shot and regularly encountered by wildlife leading to harmful lead exposure.

3. On March 13, 2012, Plaintiffs, along with 94 other organizations, submitted a petition to the EPA to initiate a rulemaking pursuant to Section 21 of TSCA. Petitioners submitted the petition because of the unreasonable risk posed by lead bullets and shot, the widespread availability of alternatives to lead bullets and shot, and the EPA’s authority to regulate these substances. The Petition requested that the EPA initiate a rulemaking for regulations that adequately protect wildlife, human health and the

environment against the unreasonable risk of injury from bullets and shot containing lead used in hunting and shooting sports, which have the potential to cause harmful lead exposure to wildlife and humans.

4. By letter dated April 9, 2012, the EPA informed the petitioners that the EPA “does not consider the 2012 submission to be a new petition cognizable under section 21.” The EPA stated that it regarded the 2012 petition as substantially the same as a petition dated August 10, 2010, seeking the ban of lead shot, bullets, and fishing sinkers and claimed that to the extent there were differences between the two petitions, they were not substantive.

5. In its April 9, 2012, letter, the EPA also stated that “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.”

6. The EPA further stated in its April 9, 2012, letter 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).

7. The EPA wrongfully determined the Petition was not “cognizable” under TSCA and thus wrongfully disregarded it. The EPA’s actions were contrary to the plain language of TSCA, which requires the EPA to either grant or deny a petition. 15 U.S.C. § 2620(b)(3). TSCA does not authorize the EPA to redefine a submitted petition as a resubmittal or request for reconsideration and does not provide the EPA with the authority to impose standards on submitted petitions that are in excess of those described in the statute or applicable regulations.

8. The EPA wrongfully characterized the 2012 petition as substantially the same as the 2010 petition. The two petitions contain substantially different requests; while the 2010 petition sought a complete ban on *all* lead bullets and shot, the 2012

petition sought to initiate a rulemaking for regulations that adequately protect wildlife, human health and the environment against the unreasonable risk of injury from bullets and shot containing lead used in hunting and shooting sports (specifically excluding military and law enforcement uses) which have the potential to cause harmful lead exposure to wildlife and humans. Further, the 2012 petition was brought by a different and much larger group of petitioners. Finally, the 2012 petition introduced significant new information regarding the toxic effects of lead ammunition on wildlife, the toxic effects of lead on human health, the availability and performance of alternatives to lead ammunition, the effectiveness of lead ammunition regulations, and the legal authority of the EPA to regulate bullets and shot.

9. The EPA’s decision that the 2012 petition was substantially the same as the 2010 petition and therefore not cognizable under Section 21 of TSCA violated the APA, as it was “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” 5 U.S.C. § 706(2)(A).

10. Alternatively, to the extent that the EPA’s April 9, 2012, letter constituted a denial of the Petition under Section 21 of TSCA, Plaintiffs seek *de novo* review of the Petition by this Court. The EPA has the authority to regulate lead in bullets and shot, and the Petition clearly demonstrates that there is a reasonable basis for concluding that a rule or order is necessary to protect health or the environment against an unreasonable risk of injury to health or the environment. Therefore, Plaintiffs ask that the Court order the EPA to initiate a rulemaking proceeding to develop and implement regulations that adequately protect wildlife, human health and the environment against the unreasonable risk of injury from bullets and shot containing lead used in hunting and shooting sports, which have the potential to cause harmful lead exposure to wildlife and humans.

### **JURISDICTION AND VENUE**

11. This Court has jurisdiction in this matter pursuant to 5 U.S.C. § 702 (APA) and 15 U.S.C. § 2620(b)(4)(A) (TSCA).

12. Venue is properly vested in this Court pursuant to 28 U.S.C. § 1391(e), because the Defendant resides in this district and a substantial part of the events and omissions which gave rise to this action occurred in this district.

#### **RELATED CASE**

13. Pursuant to Local Rule 40.5, this action is related to a previous action filed by one of the present Plaintiffs, Center for Biological Diversity, against the same Defendants in this action. The previous action, *Center for Biological Diversity, et al. v. Jackson, et al.*, 10-CV-2007 (EGS), was dismissed by court order on April 30, 2012. The previous action was brought under TSCA and concerned the EPA's denial of the 2010 petition.

#### **PARTIES**

14. Plaintiff THE TRUMPETER SWAN SOCIETY ("TTSS") is a 501(c)(3) non-profit corporation founded in 1968 and based in Minnesota. TTSS works throughout North America to assure the vitality and welfare of wild Trumpeter Swans. Trumpeter Swans are the largest species of waterfowl in the world and occur naturally only in North America. By the 1930's Trumpeters were headed for extinction with fewer than 90 remaining in the United States, confined to the Greater Yellowstone area. The efforts of conservation groups, private citizens, and public agencies have resulted in significant recovery of Trumpeters. However, Trumpeter numbers are still well below pre-settlement levels and they are still absent from significant parts of their historic range. TTSS Board of Directors and membership includes most of the swan experts engaged in swan population and habitat research and management in the United States and Canada. They assist federal, state, provincial, tribal, and private organizations in these endeavors and with environmental education efforts centered on wetland and swan conservation. Lead poisoning of Trumpeter Swans is one of the most serious mortality factors the species faces. TTSS has been involved with lead poisoning research, mitigation, rehabilitation, and education related to Trumpeter and Tundra swan mortality for

decades. Since 1999 a minimum of 3,000 Trumpeter and Tundra swans have died from lead poisoning in Washington State and adjacent British Columbia. Most of the deaths were attributed to spent lead shot deposited during waterfowl hunting. Lead shot, fishing sinkers, and bullets persist in the environment for many years and can kill swans and other wildlife decades after deposition. TTSS has avid hunters as members, staff, and directors. TTSS brings this action on behalf of its adversely affected members, staff, directors and, most of all, the swans.

15. Plaintiff CASCADES RAPTOR CENTER (“CRC”) is a non-profit 501(c)(3) nature center and wildlife hospital specializing in birds of prey (raptors). Incorporated in Oregon in 1990, CRC has over 2500 members and supporters and produces a listserv, “RaptorCare,” and participates in conferences that together reach thousands of wildlife rehabilitators. CRC also attracts visitors from throughout the country and internationally to see its very diverse collection of native birds, none of whom can be returned to the wild for one reason or another. As a nationally known raptor rehabilitation facility, CRC has received and treated lead-poisoned birds, published an article on eagle poisoning cases in both a veterinary journal and a wildlife rehabilitation journal, and has an active public education component regarding lead and other secondary poisonings. CRC receives from the Oregon Department of Fish & Wildlife or the Oregon State Police hunter-shot game meat that has been confiscated from poachers, but CRC must radiograph all packets before feeding the meat to the birds in order to find and discard those sections that have lead fragments. CRC staff, members, and supporters have a strong vested interest in removing lead from ammunition and thereby removing one more human-caused problem for the wildlife CRC serves. CRC staff, members, and supporters intend to continue their work on behalf of raptors and to eliminate lead from the environment in the future. CRC brings this action on behalf of its staff, volunteers, members, and supporters who appreciate wildlife and are concerned about the perils we as humans create for all nature.

16. Plaintiff CENTER FOR BIOLOGICAL DIVERSITY (“Center”) is a non-profit 501(c)(3) corporation with offices in Arizona, California, Oregon, Alaska, Florida, Vermont, and Washington, D.C. The Center works throughout the United States and the world to protect endangered species and wild places through science, policy, education, citizen activism, and environmental law. The Center and its 42,000 members have an ongoing interest in protecting wildlife from lead poisoning. Center members and staff observe, research, study, and seek protections for the wildlife species that are vulnerable to lead poisoning by lead bullets and shot and intend to continue to do so in the future. The Center’s members and staff derive scientific, recreational, conservation, and aesthetic benefits from these species’ existence in the wild and these benefits will be harmed by the damage to wildlife by lead bullets and shot. Since 2004, the Center has taken action through its “Get the Lead Out” campaign to change state and federal policies in order to prevent toxic lead from entering the food chain. The Center has been a leading proponent of regulations on lead ammunition to protect endangered California condors, bald and golden eagles, and other wildlife species at risk from lead poisoning. The Center brings this action on its behalf and on behalf of its adversely affected members and staff.

17. Plaintiff LOON LAKE LOON ASSOCIATION (“LLLA”) is a non-profit 501(c)(3) corporation located at Loon Lake, Washington. LLLA and its 200-plus members are dedicated to protecting the common loon and other waterbird species, such as the red-necked grebe, at Loon Lake, Washington. LLLA’s staff and members monitor common loon and red-necked grebe populations, band individual birds and draw lab samples to monitor toxins and contaminants, promote conservation measures to protect waterbird habitat and wetlands, engage in scientific research, and engage in educational outreach. LLLA’s members and staff intend to continue these and other activities to protect loons and other waterbirds in the future. Lead toxicosis from ingesting lead shot and fishing sinkers is the leading mortality factor for the common loon in Washington

and is a major limiting factor for Washington's loon population. Lead is also a well-known toxin to humans and other species. The Center for Disease Control has stated that "a piece of lead as small as a grain of sand is enough to poison a child." As part of its work to protect loons, Loon Lake Loon Association helped develop the educational pamphlet, "Get the Lead Out of Washington and Responsible Fishing Practices," and helped enact legislation that requires non-lead fishing tackle to be used at 13 common loon nesting lakes in Washington. LLLA brings this action on behalf of its adversely affected members and staff.

18. Plaintiff PRESERVE OUR WILDLIFE ORGANIZATION ("POWO") is a non-profit unincorporated organization based in Sarasota, Florida. POWO works toward the protection and preservation of all wildlife species and their habitats through the production and distribution of educational DVDs, articles, and other media and through giving educational presentations throughout the U.S. POWO also supports the work of The Raptor Center of the College of Veterinary Medicine at the University of Minnesota, and other nationally recognized wildlife and habitat preservation organizations. POWO's work on behalf of raptors, especially bald eagles, has made it aware of the appalling and preventable effects of lead poisoning on these species. To this end, POWO had been actively engaged in advocacy and educational activities advocating the replacement of toxic lead used in hunting and fishing as part of its efforts to educate sportsmen and sportswomen on the need to preserve our wildlife through this modest change in behavior. POWO members observe, research, study, and seek protections for the wildlife species that are vulnerable to lead poisoning by lead bullets and shot and intend to continue to do so in the future. POWO brings this action on behalf of its adversely affected members.

19. Plaintiff TENNESSEE ORNITHOLOGICAL SOCIETY ("Society") is a 501(c)(3) non-profit organization with almost 1000 members organized into 11 chapters throughout Tennessee. The purposes of the Society are to promote the science of

ornithology in Tennessee, to publish the results of its investigations, to advocate for the passage and enforcement of wise and judicious laws for bird protection, and to promote bird study and protection by any other means that may from time to time be deemed advisable. The Society is deeply concerned with the adverse effects of toxic lead poisoning (lead toxicosis) via the ingestion of pellets and bullet fragments from expended lead ammunition. Lead pellets are often mistaken for grit and bullet fragments are consumed from scavenged carcasses. Conservative estimates are that between eight and ten million birds die each year from lead poisoning. Lead poisoning is a major cause of mortality in endangered California Condors and Bald and Golden Eagles. Other species at great risk include: hawks, owls, vultures, waterfowl, doves, ravens, crows, magpies and jays. Society members, volunteers, and directors observe, research, study, and seek protections for the wildlife species that are vulnerable to lead poisoning by lead bullets and shot and intend to continue to do so in the future. The Society brings this action on behalf of its adversely affected members, volunteers, and directors.

20. Plaintiff WESTERN NEBRASKA RESOURCES COUNCIL (“WNRC”) is a 501(c)(3) non-profit organization formed in 1983 that is dedicated to preserving the quality of watersheds and native biomes while maintaining a healthy lifestyle in Western Nebraska. WNRC members and staff work to accomplish its mission by educating the public and policymakers and through hands-on work. WNRC members enjoy the wild natural beauty within Nebraska beyond what words can describe. The toxicity of ‘uncontained’ lead within natural systems never stops killing. WNRC believes that it is necessary to stop this uncontrolled broadcast of lead ammunition and fishing weights that are harming our native ecosystems. WNRC members observe, research, play within and make a living from healthy natural systems, including wildlife that are vulnerable to lead poisoning by lead bullets and shot and intend to do so in the future. WNRC regards the broadcast of lead and the lead poisoning of wildlife as an assault to our native ecosystems

and to our personal health and well-being. WNRC brings this action on behalf of its adversely affected members and staff.

21. The continued poisoning of wildlife due to lead bullets and shot existing in the environment, unabated because of EPA's refusal to enact regulation in response to Plaintiffs' Petition, harms the wildlife species that Plaintiffs, their members, and staff observe, research, study, and seek to protect. Plaintiffs' scientific, recreational, conservational, and aesthetic enjoyment of these species and their habitats are thus harmed by EPA's refusal to take action pursuant to the Petition. Plaintiffs' members and staff include individuals with varying interests in the protection of wildlife, ranging from scientific, professional, and educational to recreational, aesthetic, moral, and spiritual interests. Further, Plaintiffs' members and staff have visited and intend to visit in the future those areas inhabited by lead-affected wildlife. Plaintiffs' members and staff utilize, on an on-going basis, the biological, scientific, research, education, conservation, recreational and aesthetic values of the habitats of lead-affected wildlife.

22. Plaintiffs' staff and members observe and study wildlife affected by lead and derive professional, scientific, educational, recreational, aesthetic, inspirational, and other benefits from these activities and have an interest in preserving the possibility of such activities in the future.

23. Defendant ENVIRONMENTAL PROTECTION AGENCY is the federal agency charged with implementing TSCA.

24. Defendant LISA P. JACKSON, Administrator of the Environmental Protection Agency, is the highest ranking official within the Environmental Protection Agency and, in that capacity, has the duty and authority to administer TSCA. She is sued in her official capacity.

### **STATUTORY BACKGROUND**

25. After finding "that human beings and the environment are being exposed each year to a large number of chemical substances and mixtures" including "some

whose manufacture, processing, distribution in commerce, use or disposal may present an unreasonable risk of injury to health or the environment,” Congress enacted TSCA and assigned its administration to the EPA. 15 U.S.C. § 2601(a).

26. Under Section 21 of TSCA, 15 U.S.C. § 2620, any person may petition for a rule, and such a petition must set forth facts that establish the requested action is necessary.

27. TSCA requires that the EPA either grant or deny a petition for a rule. 15 U.S.C. § 2620(b)(3).

28. TSCA mandates that the EPA must regulate chemical substances where there is a “reasonable basis to conclude” that such substances “present an unreasonable risk of injury to health and or the environment.” 15 U.S.C. § 2605(a). In evaluating unreasonable risk the EPA must consider: A) the effects of the chemical on health and the magnitude of human exposure; B) the effects of the chemical on the environment and the magnitude of environmental exposure; C) the benefits of the chemical for various uses and the availability of substitutes for such uses; and D) the reasonably ascertainable economic consequences of the rule, after consideration of the effect on the national economy, small business, technological innovation, the environment, and public health. 15 U.S.C. § 2605(c)(1).

29. Factual certainty of the magnitude of the risk to health and the environment is not required. The EPA may base its decision not only on known facts, but also on scientific theories, projections and extrapolations from available data, and modeling using reasonable assumptions. H.R. Rep. No. 94-1341, at 32 (1976).

30. TSCA authorizes the EPA to prohibit “the manufacturing, processing, or distribution in commerce” of a chemical substance for a particular use or uses. 15 U.S.C. § 2605(a)(2)(A)(i).

31. Lead used in shot and bullets are “chemical substances” falling within the regulatory scope of TSCA. Except as provided in subparagraph (B), the term “chemical

substance” means “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).

32. It is indisputable that lead is a chemical substance. The EPA has already declared that lead is a toxic substance, and has removed nearly all products containing lead from the market. Most other uses of lead, such as lead-based paints, plumbing pipe and fixtures, and leaded gasoline, are already subject to strict regulation. The EPA has recently initiated additional regulatory actions to reduce lead exposure, for example: in January 2008, EPA added lead and lead compounds to its Priority Testing List, requiring certain manufacturers to submit unpublished health and safety reports to the EPA (40 C.F.R. 716.120); the EPA recently announced its intention to phase out lead automobile wheel balancing weights; and manufacturers of consumer products intended for use by children who also manufacture lead or lead compounds are required to report certain health and safety data to the EPA. However, EPA has still not taken any action to regulate lead bullets and shot under TSCA.

33. Certain chemical substances are excluded from the definition of “chemical substances” for the purpose of regulation under TSCA. “Any article the sale of which is subject to the tax imposed by section 4181 of the Internal Revenue Code of 1986” is excluded from regulation under TSCA. 15 U.S.C. § 2602(B). Section 4181 of the Internal Revenue Code establishes excise taxes for shells and cartridges. 26 U.S.C. § 4181.

34. Shells and cartridges are manufactured products that consist of several component parts, *inter alia* shot and bullets, that are themselves separately manufactured and sold and then assembled together to make ammunition. Shells and cartridges are not defined under TSCA.

35. The Internal Revenue Service has clarified items that are not included as part of the excise tax of shells and cartridges. 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.” IRS Rev. Rul. 68-463, 1968-2 C.B. 507 (emphasis added). This ruling has been confirmed by subsequent administrative decisions. (*See, e.g.*, Fed. Tax Coordinator ¶ W-2911(2d.)).

36. This IRS ruling, along with the legislative history of TSCA, makes clear that the component parts of ammunition, namely shot and bullets, may be regulated as chemical substances under TSCA.

37. The House legislative committee responsible for authoring TSCA makes clear that it intended that the EPA regulate components in ammunition:

“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. Consequently the Administrator has no authority to regulate ammunition as an unreasonable risk because it injures people when fired from a gun. However, the Committee does not exclude from regulation under the bill chemical components of ammunition which could be hazardous because of their chemical properties.”

H.R. Rep. No. 79-313, at 418 (1976) (Committee print)

38. The Senate Report of TSCA also indicates that it intended that EPA regulate components in ammunition, noting under TSCA that while “chemical substance” does not include ammunition, it is only “to the extent subject to taxes imposed under § 4181 of the Internal Revenue Code.” *Id.* at 171.

39. Section 21 of TSCA provides for citizen’s petitions which may request that the EPA initiate proceedings to issue, amend, or repeal rules promulgated under

TSCA. 15 U.S.C. § 2620(a). The Administrator shall either grant or deny the petition within 90 days. If the Administrator grants the petition, the Administrator shall promptly commence an appropriate proceeding. If the Administrator denies the petition, the Administrator shall publish in the Federal Register the reasons for the denial. If such a petition is denied, or if the agency neither grants nor denies the petition, the petitioner may bring a civil action in a district court and is entitled to a *de novo* judicial review of the entire petition. 15 U.S.C. § 2620(b)(4)(A)-(B).

40. Section 702 of the APA provides that any “person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute is entitled to judicial review thereof.” 5 U.S.C. § 702.

41. Section 704 of the APA states that “agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review.” 5 U.S.C. § 704.

42. Section 706 of the APA states that the “reviewing court shall

1. compel agency action unlawfully withheld or unreasonably delayed; and
2. hold unlawful and set aside agency action, findings, and conclusions found to be—
  - a. arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
  - b. contrary to constitutional right, power, privilege, or immunity;
  - c. in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;
  - d. without observance of procedure required by law;
  - e. unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or
  - f. unwarranted by the facts to the extent that the facts are subject to trial *de novo* by the reviewing court.”

5 U.S.C. § 706.

## **FACTUAL BACKGROUND**

**A. Toxicity of Lead**

43. Lead is toxic to organisms, even at very low levels, and has lethal and sublethal effects at higher levels. It is a cumulative metabolic poison affecting a large number of biological functions including reproduction, growth, development, behavior and survival. Even low levels of exposure to lead can cause neurological damage and there may be no safe level of lead in the body tissues of fetuses and young. Despite this knowledge, lead continues to be used in manufactured products, many of which are sources of toxic lead exposure to wildlife and to human beings.

44. Lead bullets and shot are used in hunting and may directly or secondarily expose wildlife to lead and deposit bioavailable lead into the environment. Despite the ban on lead shot for waterfowl hunting, large amounts of spent lead bullets and shot continue to be deposited in the environment through hunting of big game, upland species, furbearers, and from predator control activities.

45. There is extensive documentation showing that lead shotgun pellets accumulate in both aquatic and terrestrial habitats, where animals encounter and ingest these lead items, often mistaking them for food, grit or bone fragments. More than 130 species of animals (including mammals, upland birds, raptors, waterfowl, amphibians and reptiles) have been reported in scientific literature as being exposed or killed by ingesting lead shot, bullets, bullet fragments or prey contaminated with lead bullets or shot.

46. Particularly susceptible are avian scavengers that encounter lead in carcasses left in the wild, in gut piles (viscera) from animals cleaned by hunters in the wild, and in wounded prey species that survive hunting and carry lead bullets or shot in their bodies. Sensitive species such as bald and golden eagles and endangered California condors are frequently killed by lead poisoning or suffer chronic sublethal effects of lead poisoning from scavenging meat containing lead fragments from bullets or shot.

47. Ducks, geese, swans, and their predators have received some protection from hunting sources of secondary lead poisoning since 1991 by a federal requirement to

use only nontoxic shot for hunting waterfowl, but similar restrictions in terrestrial habitats are scattered and localized. Data now show that over 75 terrestrial species of birds are known to be poisoned by spent lead from bullets or shot. Mourning doves are particularly susceptible to ingesting lead shot pellets, and lead poisoning may kill as many as 20 million doves per year in the United States.

48. Lead can act as a neurotoxin, and numerous studies indicate that blood lead concentrations even below 10 micrograms per deciliter can have adverse developmental effects on intellectual functioning and social-behavioral conduct in humans. Human fetuses and young children are particularly sensitive to even low levels of lead exposure and can easily suffer permanent neurological damage. Clinicians now assert there is no safe level of lead in the body tissues for fetuses and young children.

49. Hunters who use lead bullets are at risk of lead poisoning in several ways. One exposure mechanism is inhalation of airborne lead created by friction from lead slugs against the gun barrel, whereby inhaled lead enters the bloodstream. Hunters are also exposed to lead residue ingestion when they handle lead bullets.

50. The most serious risk of exposure for humans is from accidental ingestion of lead shot pellets or lead bullet fragments in meat. Health effects in human beings following ingestion of whole lead shot pellets have been reported in many cases. Ingestion of meat tissues containing minute flakes or fragments of metallic lead from the passage of lead shot or lead bullet fragments through the tissues is also possible.

51. For example, in a highly publicized recent case, packets of venison shot with lead bullets or shot and donated by hunters to feed the hungry tested positive for lead contamination. Fifty-nine of 100 randomly sampled packages of meat had one or more visible lead fragments. Venison donation programs operate in all 50 states, and are estimated to provide a total of approximately 10 million meals annually.

52. Ammunition manufacturers now market a wide variety of non-lead, nontoxic bullets and shotgun shot that can replace existing lead projectiles. There is no

technological or commercial reason why nontoxic bullets and shot with comparable effectiveness should not be substituted in ammunition for their lead counterparts.

53. In fact, several states have mandated nontoxic shotgun shot for upland game bird hunting and other partial bans. However, states with no regulations for non-lead hunting other than waterfowl and even those states with partial regulations, such as California's requirement for big game hunting with nontoxic ammunition within the eight-county range of California condors, continue to have high rates of lead poisoning in wildlife.

54. The EPA has long held that whenever a toxic substance customarily used in the manufacture of commercial products can be replaced by a nontoxic substitute, articles made of the toxic substance should be removed from the market. All shot and bullets containing lead could economically be replaced with effective, nontoxic alternatives.

**B. Petition to Regulate Lead Bullets and Shot in Hunting Ammunition and Shooting Sports**

55. On March 13, 2012, Plaintiffs submitted to the EPA a petition requesting that EPA initiate a rulemaking for regulations that adequately protect wildlife, human health and the environment against the unreasonable risk of injury from bullets and shot containing lead used in hunting and shooting sports, which have the potential to cause harmful lead exposure to wildlife and humans.

56. The Petition specifically noted that it was a substantially different petition from the prior 2010 petition, pointing out the different and much larger group of petitioners, the significantly different remedy and nature of regulations being sought, the new information regarding the toxic effects of lead bullets and shot on wildlife and human health, the new information regarding the availability and performance of alternatives to lead ammunition, the new information regarding the effectiveness of lead

ammunition regulations, and the new information regarding the scope of the EPA's authority to regulate lead bullets and shot.

57. The Petition presented strong evidence that lead bullets and shot pose an unreasonable risk to health and the environment and that the risk cannot be prevented through action under other federal laws.

58. The Petition identified commercially available alternatives to lead rifle bullets, rimfire bullets, and shotgun pellets containing lead. It acknowledged that not all products available in lead are currently available as nontoxic alternatives, but it also shows that the demonstrated technology indicates that all products could be produced in non-toxic alternatives within a short period of time if manufacturers are provided a transition period for expanding upon current designs and stocks of ammunition.

59. In its April 9, 2012, letter, the EPA stated first that "EPA notes that [Plaintiff] 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."

60. The EPA stated in its letter that "[a]s 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 bullet 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."

61. The EPA further stated in its letter that "the 2012 submission presents almost verbatim the same information regarding toxicity and exposure with regards to lead bullets and shot as the 2010 petition," and that "[o]verall, 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.

62. The EPA acknowledged in its letter that the 2012 petition requested different relief than that requested in the 2010 petition, but the EPA determined that because the basis for the rejection of the 2010 petition was the EPA's assessment that it did not have the authority to take any regulatory action regarding lead bullets and shot, the distinction in the requested relief between the two petitions was "a distinction without a substantial difference."

### **FIRST CAUSE OF ACTION**

#### **(Violation of APA, 5 U.S.C. § 500 *et seq.*)**

63. Plaintiffs re-allege, as if fully set forth therein, each and every allegation contained in the preceding and subsequent paragraphs.

64. The EPA's decision that the Petition was not cognizable under TSCA was contrary to the plain language of TSCA, ran counter to TSCA's legislative intent, and applied a standard for petitions in excess of that established by TSCA.

65. The EPA's decision that the Petition was not cognizable under TSCA was arbitrary, capricious, an abuse of discretion, and/or otherwise not in accordance with the law, in violation of the APA.

### **SECOND CAUSE OF ACTION**

#### **(Violation of TSCA, 15 U.S.C. § 2601 *et seq.*)**

66. Plaintiffs re-allege, as if fully set forth therein, each and every allegation contained in the preceding and subsequent paragraphs.

67. As detailed above, the Petition provided a reasonable basis to conclude that the issuance of a rule to prevent the poisoning of wildlife by lead bullets and shot is necessary to protect health and the environment against an unreasonable risk of injury. The authority of the EPA to act was clearly described. 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.

68. TSCA provides that if a petitioner demonstrates to a court by a preponderance of evidence that there is reasonable basis to conclude that the issuance of such a rule or order is necessary to protect health or environment against an unreasonable risk of injury, then the court shall order the defendants to initiate the petitioned action. 15 U.S.C. § 2620(4)(B)(ii).

69. Therefore, to the extent that the Court determines that the EPA denied the Petition, Plaintiffs are entitled to a *de novo* judicial review of the Petition.

### **REQUEST FOR RELIEF**

Wherefore, Plaintiffs respectfully request relief as follows:

A. On the First Cause of Action, that the Court declare the EPA's decision that the Petition was not cognizable under TSCA to be arbitrary, capricious, and abuse of discretion, and/or otherwise a violation of law, that the Court set aside the EPA's decision to disregard the Petition, and that the Court order the EPA to properly consider the Petition and either grant or deny it on its merits;

B. Alternatively, on the Second Cause of Action, that the Court declare that the EPA denied the Petition and that the Court find that there is a reasonable basis for concluding that a rule or order is necessary to protect health or the environment against an unreasonable risk of injury to health or the environment and direct the EPA to initiate rulemaking proceedings in order to develop and implement regulations that adequately protect wildlife, human health and the environment against the unreasonable risk of injury from bullets and shot containing lead used in hunting and shooting sports, which have the potential to cause harmful lead exposure to wildlife and humans;

C. On both Causes of Action, for costs incurred herein, including reasonable attorneys' fees; and

D. For all such other equitable or legal relief that the Court considers just and proper.

Respectfully submitted,

Dated: June 7, 2012

/s/  
\_\_\_\_\_  
William J. Snape, III (DC Bar No. 455266)  
CENTER FOR BIOLOGICAL DIVERSITY  
5268 Watson Street, NW  
Washington, DC 20016  
Telephone: 202-536-9351  
Facsimile: 415-436-9683  
billsnape@earthlink.net

Adam Keats (Cal. Bar No. 191157) (*pro hac vice* pending)  
351 California St., Suite 600  
San Francisco, CA 94104  
Telephone: 415-436-9682  
Facsimile: 415-436-9683  
akeats@biologicaldiversity.org

Jaelyn Lopez (Cal. Bar No. 258589) (*pro hac vice* pending)  
CENTER FOR BIOLOGICAL DIVERSITY  
P.O. Box 2155  
St Petersburg, FL, 33731  
Telephone: 727-490-9190  
jlopez@biologicaldiversity.org

ATTORNEYS FOR PLAINTIFFS

Robert Morgan (DC Bar No. 254565)  
THE TRUMPETER SWAN SOCIETY  
415 E. Cape Shores Dr.  
Lewes, DE 19958-3109  
Telephone: 301-466-8915  
robmorgan322@gmail.com

ATTORNEY FOR PLAINTIFF THE TRUMPETER  
SWAN SOCIETY



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.

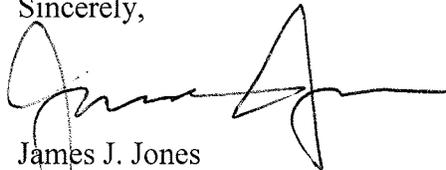
The 2012 submission is substantially the same as the petition to regulate lead bullets and shot submitted in 2010. To the extent that there are differences, they are not substantive. Therefore, EPA does not consider the 2012 submission to be a new petition cognizable under section 21. As with the original 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.<sup>1</sup> 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 et 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,

A handwritten signature in black ink, appearing to read 'James J. Jones', with a long horizontal flourish extending to the right.

James J. Jones  
Acting Assistant Administrator

---

<sup>1</sup> 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.

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

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

**DECLARATION OF LAWRENCE G. KEANE**

I, Lawrence G. Keane, declare as follows:

1. I am Senior Vice President, Assistant Secretary, and General Counsel to the National Shooting Sports Foundation, Inc. (“NSSF”).
2. I make this Declaration in support of NSSF’s Motion to Intervene in *The Trumpeter Swan Society v. Environmental Protection Agency* (Case No. 1:12-cv-929 (EGS)) (the “*Trumpeter Swan Litigation*”). Unless otherwise stated, I make this Declaration based on my personal knowledge, or on information and belief relying on information collected by NSSF.
3. Formed in 1961, NSSF is a Connecticut non-profit tax-exempt corporation with a membership of more than 7,000 federally-licensed firearms manufacturers, distributors, and retailers; companies manufacturing, distributing, and selling shooting and hunting-related goods and services; sportsmen’s organizations; public and private shooting ranges; gun clubs; publishers; and individual recreational target shooters and hunters. NSSF’s mission is to promote, protect and preserve hunting and the shooting sports, and support America’s traditional hunting heritage and firearms freedoms.
4. NSSF’s members, and the ammunition and firearms industry as a whole, provide approximately 210,000 jobs in the U.S., and have an overall annual economic impact of almost \$32 billion. More than 50 million hunters and target shooters in America purchase and use

traditional ammunition containing lead components.

5. NSSF's members manufacture, distribute, sell, and use traditional ammunition made with lead components (the ammunition that a consumer purchases is made of a primer, propellant, the projectile (shot or bullet), and the casing). Approximately 95% of the domestically manufactured ammunition is traditional ammunition made with lead bullets or shot, and over 90% of that domestically manufactured traditional ammunition is manufactured by NSSF members.

6. NSSF's members' economic and legal interests will be directly affected by the outcome of the *Trumpeter Swan Litigation*. Plaintiffs seek to use the Toxic Substances Control Act ("TSCA") to force the U.S. Environmental Protection Agency ("EPA") to prohibit or significantly restrict the manufacture and use of traditional ammunition. This will significantly and negatively impact the interests of NSSF's members in at least the following ways:

- a. Domestic ammunition manufacturers will be required – at great cost – to re-design their products, retool or purchase new manufacturing equipment, and significantly change their manufacturing processes. Ammunition is produced in high speed and high volume automated processes using expensive, close-tolerance, and purpose-built machinery. Ammunition production relies on manufacturing know-how honed by decades of experience. Each of the major manufacturers produces several million cartridges of traditional ammunition a day. It is not possible to simply replace lead with alternative raw material in existing ammunition manufacturing processes. Further, the efficacy, consumer acceptance and environmental, health, and safety impacts of substitutes would have to be evaluated in order to determine if a switch to alternative ammunition is even feasible.
- b. Domestic ammunition manufacturers operate in a very competitive economic environment, with very low profit margins. Even if adequate alternatives for traditional ammunition were available and capable of being mass-produced, domestic manufacturers might not be able to obtain the capital needed, particularly in the current economic climate, to accomplish such a radical change to their ammunition manufacturing processes.

- c. Assuming that alternative materials could be found for traditional mass-produced shot and bullets, such alternatives will be more expensive than existing ammunition. Based on research by organization, my understanding is that banning traditional ammunition will increase the cost of ammunition, on average, up to 190%. Such price increases will impose a burden on NSSF members, including sports shooters and hunters (and thus decrease the number of hunters), firearms dealers, shooting ranges, Federal and State law enforcement, and the U.S. military. Higher prices will not only mean reduced sales and the loss of related jobs, it will also cause a reduction in the collection of the Federal Firearms and Ammunition and Excise Tax ("FAET") (11% on taxable ammunition sales), which is a primary source of wildlife conservation funding in the U.S. All of the FAET goes to the U.S. Fish and Wildlife Service, which then distributes the funds to the States for wildlife and sport fish restoration.
- d. Approximately 20% of the domestic ammunition market is currently held by imports from non-U.S. manufacturers. Since, under TSCA, EPA cannot regulate imported finished ammunition, non-U.S. manufacturers would still be able to sell into the U.S. market traditional ammunition even if the plaintiffs prevail in this litigation. This imported traditional ammunition will also be less costly to produce than the alternative ammunition that the plaintiffs demand EPA require of domestic manufacturers. Imposing restrictions on domestically manufactured ammunition that will not be applicable to imported ammunition will result in an increased market share for non-U.S. manufacturers and the loss of American jobs at NSSF member companies.
7. For these reasons, the economic and legal interests of NSSF and its members are directly at issue in this litigation, and will be significantly affected by its outcome.

Respectfully Submitted,



Lawrence G. Keane