ORAL ARGUMENT NOT YET SCHEDULED

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 13-5228

TRUMPETER SWAN SOCIETY, et al.
Plaintiff-Appellants,

v.

ENVIRONMENTAL PROTECTION AGENCY, et al.,
Defendants-Appellees.

Appeal from the U.S. District Court for the
District of Columbia, No. 1:12cv929
(Hon. Emmet G. Sullivan).

FINAL BRIEF FOR THE FEDERAL DEFENDANTS-APPELLEES

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Circuit Rule 28(a)(1), counsel for the Federal Defendants-Appellees hereby certifies as follows:

A. Parties, Intervenors, and Amici

The parties, intervenors, and amici appearing before the District Court and in this Court are:

Trumpeter Swan Society

Cascades Raptor Center

Center for Biological Diversity

Loon Lake Loon Association

Preserve Our Wildlife Organization

Tennessee Ornithological Society

Western Nebraska Resources Council

United States Environmental Protection Agency

Lisa P. Jackson, former Administrator, EPA

Gina McCarthy, Administrator, Environmental Protection Agency

National Shooting Sports Foundation, Inc.

Association of Battery Recyclers, Inc.

National Rifle Association of America

Safari Club International

There were no amici curiae.

B. Ruling under Review

Appellants appeal the final judgment of the Honorable Emmet G. Sullivan of the U.S. District Court for the District of Columbia. On May 23, 2013, the district court entered a minute order stating that the complaint was dismissed for "the reasons stated on the record during the hearing held on May 23, 2013." On July 22, 2013, the district court entered a separate document stating the same. JA 169. A transcript of the oral ruling containing the district court's reasoning can be found at JA 172-205.

C. Related Cases

This case was not previously before this Court or any other court except for the District Court for the District of Columbia from which this appeal was taken. Counsel for the Federal Defendants-Appellees is not aware of any related cases pending in this Court or any other court.

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Acting Assistant Attorney General

s/ Jennifer S. Neumann
JENNIFER SCHELLER NEUMANN

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

* Authorities upon which we chiefly rely are marked with asterisks.

STATUTES:

RULES and REGULATIONS:

LEGISLATIVE HISTORY:

GLOSSARY

APA	Administrative Procedure Act
Br.	Brief
CBD	Center for Biological Diversity
Dkt.	District court docket entry
EPA	Environmental Protection Agency
IRS	Internal Revenue Service
TSCA	Toxic Substances Control Act
TTB	Tobacco Tax and Trade Bureau

JURISDICTIONAL STATEMENT

The plaintiff-appellant conservation organizations,[1] sought review of their request that the Environmental Protection Agency (EPA) initiate a rulemaking to regulate lead bullets and shot under the Toxic Substances Control Act (TSCA). EPA rejected the request because it was not a petition under Section 21 of TSCA, 15 U.S.C. § 2620, but rather essentially a request to reconsider EPA's denial of an earlier Section 21 petition. JA 14. Plaintiffs alleged that the district court had jurisdiction under TSCA, 15 U.S.C. § 2620(b)(4)(A), and the Administrative Procedure Act (APA), 5 U.S.C. § 702. JA 15. Several organizations intervened in the action as defendants.

On May 23, 2013, in an oral ruling, the district court granted motions to dismiss the complaint for lack of subject matter jurisdiction filed by EPA and the defendant-intervenors. JA 172-205. The same day, the court entered a minute order stating that the complaint was dismissed for "the reasons stated on the record during the hearing held

[1] The plaintiff-appellants are 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.

on May 23, 2013." The minute order states that it was signed by Judge Sullivan. Courts are not in agreement about whether or under what circumstances a minute order can constitute the final judgment required by Fed. R. Civ. P. 58. *See Brown v. Fifth Third Bank*, 730 F.3d 698, 700-01 (7th Cir. 2013) (collecting cases). This Court need not decide whether the minute order entered here was a final judgment because the plaintiffs requested that the district court enter a separate document containing the final judgment, which the court did on July 22, 2013. Dkt. 42, JA 169. Plaintiffs filed a notice of appeal on July 22, 2013. Dkt. 43. That appeal was timely regardless of which order qualifies as a "final decision" within the meaning of 28 U.S.C. § 1291 because it was filed within 60 days of both the May 23, 2013 minute order and the July 22, 2013 order.[2]

STATEMENT OF THE ISSUES

Within the span of two years, EPA first received a petition requesting that the agency regulate lead bullets and shot pursuant to

[2] Plaintiffs' notice of appeal was entered on the docket before the court's July 22, 2013 order. To the extent that the notice of appeal was premature, the rules of appellate procedure provide that such a notice of appeal "is treated as filed on the date of and after the entry" of judgment. Fed. R. App. P. 4(a)(2).

Section 21 of TSCA (the 2010 petition), followed by a second, almost identical submission, which again requested that EPA regulate lead bullets and shot (the 2012 submission). Plaintiffs filed the 2012 submission approximately six months after a court determined that the petitioners' suit challenging the denial of the 2010 petition was barred by the 60-day limitations period in Section 21. EPA rejected the 2012 submission because it was so similar to the 2010 petition that it was not a new "petition" within the meaning of Section 21 of TSCA. EPA reached this conclusion because, among other reasons, two of the original petitioners were also parties on the 2012 submission, the 2012 submission was effectively identical to the 2010 petition, and the 2012 submission did not contain meaningful new information. This appeal presents the following issues:

1. Whether EPA properly determined that the 2012 submission was not a separate petition within the meaning of TSCA, but rather an attempt to circumvent the 60-day limitations period on seeking review of the first petition?
2. If the 2012 submission should have been treated as a new Section 21 petition, whether the judgment should be affirmed

on the alternative ground that EPA lacks authority to regulate bullets and shot under TSCA, and therefore that Plaintiffs' complaint fails to state a claim on which relief can be granted?

STATUTORY AND REGULATORY BACKGROUND

Congress enacted TSCA in 1976 to prevent unreasonable risks of injury to human health or the environment associated with the manufacture, processing, distribution in commerce, use, or disposal of chemical substances and mixtures. *See* TSCA, Pub. L. 94-469, 90 Stat. 2003 (1976) (codified at 15 U.S.C. §§ 2601-2692).

A. EPA's authority to regulate under TSCA

Pursuant to Section 6 of TSCA, if EPA finds "that the manufacture, processing, distribution in commerce, use, or disposal of a chemical substance or mixture, or that any combination of such activities, presents or will present an unreasonable risk of injury to health or the environment," the agency "shall by rule" regulate that substance "to the extent necessary to protect adequately against such risk using the least burdensome requirements." 15 U.S.C. § 2605(a). The requirements that EPA may impose include prohibition of "the manufacture, processing, or distribution in commerce of such substance

or mixture for . . . a particular use." *Id.* § 2605(a)(2). In considering whether to promulgate such a requirement, EPA "shall consider and publish a statement with respect to" several factors:

> (A) the effects of such substance or mixture on health and the magnitude of the exposure of human beings to such substance or mixture,
>
> (B) the effects of such substance or mixture on the environment and the magnitude of the exposure of the environment to such substance or mixture,
>
> (C) the benefits of such substance or mixture 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.

Id. § 2605(c)(1).

EPA may regulate only "chemical substance[s]" and "mixture[s]" under Section 6. *Id.* § 2605(a). TSCA defines "chemical substance" as "any organic or inorganic substance of a particular molecular identity," and a "mixture" as a "combination of two or more chemical substances." *See id.* §§ 2602(2), (8). Congress also created several statutory exclusions from the definition of a chemical substance. Among other things, the statutory definition of "chemical substance" specifically excludes "any article the sale of which is subject to the tax imposed by

section 4181 of the Internal Revenue Code of 1986 (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 of the Internal Revenue Code imposes a sales tax on "[p]istols," "[r]evolvers," and "[f]irearms (other than pistols and revolvers), shells, and cartridges." 26 U.S.C. § 4181.

B. TSCA's citizen petition provision

TSCA contains a citizen petition provision. Section 21 allows "[a]ny person" to petition EPA "to initiate a proceeding for the issuance . . . of a rule under" certain enumerated sections of TSCA, including Section 6. 15 U.S.C. § 2620(a). Thus, TSCA's citizen petition provision is one of limited scope. Not every petition that EPA receives requesting that the agency take action under TSCA is a Section 21 petition.

Section 21 further provides that the petition must "set forth the facts which it is claimed establish that it is necessary to issue . . . a rule." *Id.* § 2620(b)(1). When a citizen files a petition for rulemaking pursuant to TSCA, EPA has 90 days to either grant or deny the petition. *Id.* § 2620(b)(3).

If EPA denies the petition, the agency must publish the reasons for the denial in the Federal Register. *Id.* If EPA denies the petition or fails to respond within 90 days, the petitioner "may commence a civil action in a district court of the United States to compel the Administrator to initiate a rulemaking proceeding as requested in the petition." *Id.* § 2620(b)(4)(A). TSCA provides that the petition to initiate a rulemaking is considered by the court in a *de novo* proceeding with the standard of review being preponderance of the evidence. *Id.* § 2620(b)(4)(B). However, to obtain judicial review, Congress mandated that a petitioner must file a civil action "within 60 days after the Administrator's denial" or failure to act. *Id.* § 2620(b)(4)(A).

STATEMENT OF FACTS

A. The original petition and suit.

On August 3, 2010, five organizations, including current Plaintiff-appellant Center for Biological Diversity (CBD) and Project Gutpile, petitioned EPA to regulate lead shot and bullets under Section 6 of TSCA, requesting that EPA ban their manufacture, processing, and distribution in commerce. JA 21. The petition also requested that EPA issue a similar ban for lead fishing sinkers. *Id.*

EPA denied the request regarding lead shot and bullets on August 27, 2010, on the ground that "TSCA does not provide the Agency with authority to address lead shot and bullets . . . due to the exclusion found in TSCA § 3(2)(B)(v)." JA 42. EPA subsequently published the explanation of its reasons for denying the request to regulate lead bullets and shot in the Federal Register. 75 Fed. Reg. 58,377 (Sept. 24, 2010). The Federal Register notice reiterated that EPA lacks statutory authority to regulate lead shot and bullets under TSCA because of the exclusion of articles taxed under 26 U.S.C. § 4181 from TSCA's definition of "chemical substance" in 15 U.S.C. § 2602(2)(B)(v). The agency noted that Section 4181 imposes a tax on shells and cartridges and that "[b]ullets and shot, and any lead within them, are contained in shells and cartridges and are therefore excluded from the chemical substance definition" under a "plain reading of TSCA." 75 Fed. Reg. at 58,378. Separately, on November 4, 2010, EPA denied the petitioners' request for regulation of lead in fishing gear and published its rationale in the Federal Register. *See* 75 Fed. Reg. 70,246 (Nov. 17, 2010).

On November 23, 2010, three of the petitioners, including the Center for Biological Diversity and Project Gutpile, filed a complaint in

the District Court for the District of Columbia regarding both of these denials. *CBD v. Jackson*, No. 10-2007 (D.D.C.). EPA filed a motion to dismiss the claim regarding lead shot and bullets on two grounds: first, that shot and bullets are exempted from TSCA pursuant to 15 U.S.C. § 2602(2)(B)(v); and second, that the request for regulation of shot and bullets was a discrete petition for purposes of TSCA Section 21 that CBD had failed to challenge within 60 days of EPA's denial as required by the statute. *See CBD v. Jackson*, 815 F. Supp. 2d 85, 87 (D.D.C. 2011). On September 29, 2011, the district court granted the motion to dismiss the shot and bullets claim on timeliness grounds, holding that the 60-day time limit for suit under 15 U.S.C. § 2620 is jurisdictional, and holding that EPA had properly acted on the requests for regulation of lead in fishing gear and ammunition separately, thus triggering two separate 60-day periods for suit under 15 U.S.C. § 2620(b)(4)(A). *Id*. at 91-95. The suit then proceeded on the fishing gear claim alone until the plaintiffs voluntarily dismissed their complaint. *CBD v. Jackson*, No. 10-2007, Order (D.D.C. Apr. 30, 2012). None of the plaintiffs, including CBD, appealed the district court's ruling that its claim with respect to lead shot and bullets was untimely.

B. The 2012 submission

After the district court held that the challenge to EPA's petition response was untimely, CBD and co-plaintiff Project Gutpile tried again. On March 13, 2012, less than six months after the district court dismissed their civil action on the first petition, those parties, along with 99 other entities, submitted to EPA a virtually identical "petition" under TSCA Section 21. JA 43. Whereas the 2010 petition requested that EPA impose a complete regulatory ban on the manufacture, processing, and distribution in commerce of lead shot and bullets under Section 6 of TSCA, the 2012 submission advocated for such a ban in the context of a more general request for EPA to regulate bullets and shot containing lead used in hunting and shooting sports under Section 6. JA 58, 60. CBD designated itself the "[l]ead petitioner." JA 48. The parties asserted that the 2012 submission presented "significant new information" in the form of legislative history relating to the ammunition exclusion in 15 U.S.C. § 2602(2)(B)(v). JA 46. However, the bulk of the 2012 submission, including the core evidence and arguments offered as ostensibly supporting regulation of lead shot and

bullets, was essentially copied from the 2010 petition with only superficial alterations.

Accordingly, EPA decided to treat the 2012 submission as essentially a request for reconsideration of the 2010 petition and rejected it by a letter to CBD dated April 9, 2012. JA 150-51. EPA explained that CBD and Project Gutpile had submitted an "almost identical" petition in 2010, which EPA had denied because "the statutory exclusion found in TSCA § 3(2)(B)(v) precludes EPA from regulating lead in ammunition under TSCA." JA 150. EPA noted that although the 2012 submission "argue[d] the issue of EPA's statutory authority slightly differently," the agency had been aware of and considered the 30-year old legislative history described in the 2012 submission at the time it denied the 2010 petition and that any other new material in the 2012 submission added nothing of significance to the previous petition. *Id*. In light of EPA's conclusion that it lacked statutory authority to regulate lead shot and bullets, the agency explained that any differences in the information presented by or relief requested in the 2012 submission were irrelevant. *Id*. Finally, EPA noted that of the 400 references listed in the 2012 submission, only 20

reports and articles were not cited in the 2010 petition, and of those, only six were published after the 2010 petition was submitted. JA 151. EPA found that the 2012 submission did not present any "previously unavailable, non-cumulative" information that would have caused EPA to reconsider its denial of the 2010 petition. *Id.*; *see also* JA 150. EPA concluded that, since "[t]he 2012 submission is substantially the same as the petition to regulate lead bullets and shot submitted in 2010," the agency did not consider the 2012 submission "to be a new petition cognizable under section 21." JA 150.

Alternatively, EPA stated that even if the 2012 submission could be considered a new Section 21 petition, the agency would deny it for the same reasons as the 2010 petition. JA 151. Because EPA had already published the rationale for rejecting the 2010 petition in the Federal Register, and because the agency did not consider the 2012 submission to be a distinct Section 21 petition, it did not publish the reasons for rejecting the 2012 submission in the Federal Register. *Id.*

C. The present suit.

On June 7, 2012, CBD and six co-plaintiffs filed a complaint challenging EPA's treatment of the 2012 submission and seeking *de*

novo review of the 2012 submission. *See* JA 16-19 (amended complaint). EPA moved to dismiss the complaint on two grounds: (1) that it was an impermissible attempt to circumvent the statutory time limit for seeking judicial review of the 2010 petition, and (2) that EPA lacks authority to regulate lead shot and bullets under TSCA. The defendant-intervenors also filed motions to dismiss the complaint. The same district court judge that presided over CBD's challenge to the denial of the first petition held a hearing on May 23, 2013, and issued an oral ruling at the hearing dismissing the complaint because the 2012 submission was an impermissible attempt to avoid the statutory time limit on challenging EPA's denial of the original petition. JA 199, 203.

The court reasoned that neither TSCA nor its legislative history address how EPA is to treat requests for reconsideration or how multiple submissions seeking similar relief are to be treated under Section 21, and thus TSCA is ambiguous on that issue. JA 199. The court concluded that EPA's decision to treat the 2012 submission as a request for reconsideration satisfied either the *Chevron* or *Skidmore* standards for according deference to an agency interpretation of a

statute. JA 192, 197-200. In reaching that conclusion, the district court specifically noted that EPA "determined that the relief requested in the two petitions was nearly identical and contained little new information," the groups submitted the second request to EPA about six months after the court dismissed CBD's lawsuit over EPA's denial of the 2010 petition, and CBD was the lead party in both instances. JA 197-200. Because the district court concluded that it lacked jurisdiction over the complaint, it did not reach the question of whether EPA had statutory authority to regulate lead bullets and shot. JA 174.

On May 23, 2013, the district court also entered a minute order granting the motions to dismiss the complaint. On July 9, 2013, the plaintiffs filed a motion requesting the district court to enter a separate judgment. Dkt. 42. On July 22, 2013, the court entered another order granting the motions to dismiss. JA 169. Also on July 22, 2013, the plaintiffs filed a notice of appeal. Dkt. 43.

STANDARD OF REVIEW

This Court generally reviews the district court's dismissal of a complaint for lack of subject matter jurisdiction under Rule 12(b)(1) *de novo*. *See Artis v. Greenspan*, 158 F.3d 1301, 1306 (D.C. Cir. 1998).

Where "necessary, the court may consider the complaint supplemented by undisputed facts evidenced in the record." *Herbert v. Nat'l Academy of Sciences*, 974 F.2d 192, 197 (D.C. Cir. 1992).

To survive a motion to dismiss for failure to state a claim under Rule 12(b)(6), "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citation omitted). A court does not need to "accept legal conclusions cast as factual allegations." *Hettinga v. United States*, 677 F.3d 471, 476 (D.C. Cir. 2012).

SUMMARY OF ARGUMENT

Plaintiffs' complaint fundamentally seeks to evade the 60-day limitations period for requesting review of petitions for rulemaking under Section 21. The district court properly dismissed the complaint for lack of jurisdiction because EPA reasonably concluded that Plaintiffs' 2012 request to regulate lead bullets and shot was not a "petition" within the meaning of Section 21 of TSCA at all. Determining whether EPA's conclusion was reasonable has two components: (1) was EPA's legal interpretation that TSCA permits it, in appropriate circumstances, to conclude that a rulemaking request is

not a cognizable "petition" within the meaning of Section 21 permissible and (2) was EPA's conclusion here that the 2012 submission was so similar to CBD's 2010 rulemaking petition that it was essentially a request for reconsideration reasonable.

TSCA does not speak directly to the question of the definition of a "petition." However, EPA's interpretation that a later, duplicative submission is not a Section 21 petition deserves deference because that interpretation preserves the meaning in and function of Section 21's 60-day limitations period for seeking review of a petition. Plaintiffs' interpretation is that EPA must treat any request for rulemaking as an entirely new "petition" subject to all of Section 21's provisions, including its provision for a *de novo* proceeding for a court to consider the petition. Plaintiffs' interpretation would render the statute of limitations meaningless because any petitioner that failed to timely bring suit after the denial of an initial petition could resubmit the same or a nearly identical petition and seek review of EPA's treatment of that petition.

Plaintiffs have failed to show that EPA's conclusion that the 2012 submission was in essence a request for reconsideration of the 2010 petition was arbitrary or capricious given the totality of circumstances.

Plaintiffs are incorrect that the 2012 submission contained meaningfully new information or requested materially different relief. Plaintiffs are also incorrect that the addition of new parties to the 2012 submission required EPA to treat the submission as a "petition" when two of the five original petitioners were also petitioners on the 2012 submission. Finally, the timing of the second request, which was submitted six months after CBD's suit seeking review of the original petition was dismissed as untimely, also supports the reasonableness of EPA's finding that the 2012 submission was effectively a request for reconsideration and therefore not a "petition" triggering the requirements of Section 21.

Alternatively, this Court can affirm the judgment because TSCA forbids EPA from doing what Plaintiffs want: regulating lead bullets and shot. TSCA excludes firearms, cartridges, and shells from EPA's authority to regulate. Bullets and shot are components of cartridges and shells, therefore EPA cannot regulate them.

ARGUMENT

I. Plaintiffs' suit was properly dismissed because the 2012 submission was not a "petition" within the meaning of Section 21, but rather an impermissible attempt to circumvent the statute of limitations on seeking review of the 2010 petition.

The citizen petition provision of TSCA Section 21 creates an important opportunity for public participation in the rulemaking process, provided that petitioners comply with the limits that Section 21 imposes. Those limits include a 60-day window in which a petitioner may seek judicial review following EPA's denial of or failure to respond to a petition. 15 U.S.C. § 2620(b)(4)(A). This Court has held that plaintiffs may not circumvent such jurisdictional limits through filing successive petitions for agency action. *See Nat'l Bank of Davis v. Office of Comptroller of Currency*, 725 F.2d 1390, 1391-92 (D.C. Cir. 1984). TSCA does not unambiguously define the term "petition," but it does make clear that once EPA acts on a petition, a petitioner may not seek judicial review outside the 60-day window.

For that reason, EPA has discretion in appropriate circumstances to determine that a subsequent submission by a party is not a cognizable Section 21 petition. If a plaintiff that failed to seek judicial

review after EPA denied an earlier petition could obtain that review simply by filing a subsequent identical petition, then the 60-day window would have no meaning. This creates two questions for the Court: First, is EPA's interpretation that the statute gives it discretion to determine if a submission is a Section 21 "petition" reasonable? And second, did EPA reasonably determine that Plaintiffs' 2012 submission was not a separate "petition?"

A. EPA's statutory interpretation that not all submissions are "petitions" within the meaning of Section 21 is consistent with the statute.

The first question for a court reviewing an agency's interpretation of a statute is whether "the intent of Congress is clear" as to "the precise question at issue." *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842, (1984). If so, "that is the end of the matter." *Id.* But "if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Id.* at 843. If the agency's reading "fills a gap or defines a term in a way that is reasonable in light of the legislature's revealed design," it receives "'controlling weight.'"

NationsBank of N. Carolina, N.A. v. Variable Annuity Life Ins. Co., 513 U.S. 251, 257 (1995) (quoting *Chevron*, 467 U.S. at 844).

Plaintiffs ask the Court to decide this case at *Chevron* step one, arguing that the plain language of TSCA compels their interpretation that EPA must mechanically "grant or deny" any submission styled as a petition for rulemaking. Br. 9. But the language and structure of TSCA, congressional intent, and the case law of this Court show that Congress did not specifically define what a "petition" is for purposes of TSCA Section 21, leaving an ambiguity for EPA to resolve. EPA has applied a reasonable interpretation given the language and structure of the statue that should be upheld under *Chevron* step two.

1. Language and structure of TSCA

Here, the internal structure of Section 21 makes clear that Congress did not mandate, as Plaintiffs contend, that EPA must apply the Section 21 decision-making process to any filing styled as a petition for rulemaking. The statute does not define "petition," but rather gives the agency latitude to determine what constitutes a petition. Any other interpretation, including Plaintiffs', would read out of the statute the

limitations period for seeking judicial review of a petition for rulemaking following a denial or failure to respond by EPA.

"'A statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant.'" *Hibbs v. Winn*, 542 U.S. 88, 101 (2004) (quoting 2A N. Singer, Statutes and Statutory Construction § 46.06, pp.181–186 (rev. 6th ed.2000)). TSCA requires that any civil suit following the denial of a petition for rulemaking "shall be filed within 60 days after the Administrator's denial of the petition." 15 U.S.C. § 2620(4)(A). This Court has held that similar time limitations are jurisdictional and "reflect 'a deliberate congressional choice to impose statutory finality on agency orders, a choice [courts] may not second-guess.'" *Eagle-Picher Indus., Inc. v. U.S. E.P.A.*, 759 F.2d 905, 911 (D.C. Cir. 1985) (quoting *City of Rochester v. Bond*, 603 F.2d 927, 935 (D.C.Cir.1979)); *see also CBD v. Jackson*, 815 F. Supp. 2d 85, 91 n.1 (D.D.C. 2011).[3]

[3] The Supreme Court has "adopted a 'readily administrable bright line' for determining whether to classify a statutory limitation as jurisdictional." *Sebelius v. Auburn Reg'l Med. Ctr.*, 133 S. Ct. 817, 824, 184 L. Ed. 2d 627 (2013) (quoting *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 516 (2006)). Courts should look to "whether Congress has 'clearly state[d]' that the rule is jurisdictional." *Id.* (quoting *Arbaugh*, 546 U.S.

(Cont.)

Plaintiffs' interpretation of TSCA Section 21 would read the 60-day limitations period out of the statute. A party that failed to timely seek judicial review of its rulemaking petition could refile the original petition, have it denied on the same grounds, file suit within 60 days of the new denial, and receive judicial review. Moreover, TSCA provides that for a petition to initiate rulemaking, the petition shall be "considered by the court in a de novo proceeding." 15 U.S.C. § 2620(b)(4)(B). TSCA also prescribes the standard the court shall apply when reviewing such petitions:

> If the petitioner demonstrates to the satisfaction of the court by a preponderance of the evidence that . . . there is a reasonable basis to conclude that the issuance of such a rule or order is necessary to protect health or the environment against an unreasonable risk of injury to health or the environment[;] the court shall order the Administrator to initiate the action requested by the petitioner.

Id.

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at 515–516). Even if this Court were to determine that Congress did not intend the 60-day limitations period or the requirement that plaintiffs challenge a "petition" to be jurisdictional, but rather an affirmative defense or part of the cause of action, the district court's judgment should still be affirmed under Rule 12(b)(6), failure to state a claim on which relief can be granted. *See Sierra Club v. Jackson*, 648 F.3d 848, 854 (D.C. Cir. 2011).

Because Section 21 provides that a civil action for review of a petition to initiate rulemaking would consider only whether the petition showed that such a rule is "necessary" to protect against an "unreasonable risk" posed by an alleged toxic substance, EPA may be limited in its ability to argue that a court should not look at the merits of the second petition because it is essentially a resubmission of a prior petition and the statute of limitations has already run on the prior petition. Such an outcome would render the 60-day limitations period in Section 21 meaningless. This would particularly burden EPA and the courts because it would encourage petitioners – whether or not they had sought judicial review of an earlier petition – to file successive petitions in the hopes of obtaining favorable *de novo* review.

Although TSCA does not expressly provide for requests to reconsider EPA denials of Section 21 petitions, "the courts have uniformly concluded that administrative agencies possess inherent authority to reconsider their decisions, subject to certain limitations, regardless of whether they possess explicit statutory authority to do so." *Tokyo Kikai Seisakusho, Ltd. v. United States*, 529 F.3d 1352, 1360 (Fed. Cir. 2008); *see also Albertson v. FCC*, 182 F.2d 397, 399 (D.C. Cir.

1950) ("The power to reconsider is inherent in the power to decide."). No other provision of TSCA provides the authority for EPA to reconsider its own decisions denying petitions for rulemaking. In order to give proper effect to the time bar in Section 21, EPA interprets TSCA to allow it, in certain circumstances, to treat the refiling of a request for rulemaking as essentially a request for reconsideration.

2. Legislative history

The House Conference Report accompanying TSCA's enactment noted a similar concern regarding petitions seeking amendment or repeal of an existing rule. Existing rules would have already been subject to potential judicial review pursuant to TSCA Section 19, 15 U.S.C. § 2618, and Congress did not want EPA to be subject to endless petitions to amend or repeal such rules. Specifically, Congress explained that:

> the conferees do not intend that the Administrator be subjected to constant petitions challenging rules or orders for which adequate judicial review is provided under section 19 [15 U.S.C. § 2618, providing for judicial review of TSCA regulations]. Therefore, if the Administrator denies a petition to amend or repeal [a TSCA regulation issued under] section 4, 5(e), 6, or 8, the conference [provision] permits review of such denial only under the Administrative Procedure Act.

H.R. Conf. Rep. No. 1679, 94th Cong., 2nd Sess. 98, 99 (1976), reprinted in 1976 U.S.C.C.A.N. 4491, 4584. Congress's concern about endless litigation if petitions to amend or repeal an existing rule were subject to *de novo* review supports EPA's interpretation of TSCA: once a petition for issuance of a new rule has been given an opportunity for judicial review under Section 21, a resubmission should not get a proverbial "second bite of the apple" for *de novo* review. Otherwise, under Plaintiffs' interpretation, EPA could "be subjected to constant petitions" challenging decisions for which judicial review had already been made available (even if, as in this case, the opportunity was not timely utilized).

Plaintiffs' contention that Congress's intent supports their position is misplaced. Plaintiffs cite to authorities supporting the general idea that when enacting TSCA, Congress wanted to make sure that government was responsive to the concerns of citizens and that EPA fulfilled its duties under the statute. Br. 12-14. However, Congress placed limits on the right of citizens to petition the agency and did not, as Plaintiffs claim, "determine[] that *access* was paramount." Br. 14. One of the major limitations on the right of citizens to petition

the agency is the strict 60-day time limit on seeking judicial review of a petition for rulemaking that EPA has denied or failed to respond to. 15 U.S.C. § 2620(b)(4). CBD failed to act in a timely manner to avail itself of this right of judicial review when EPA denied its 2010 petition and cannot now nullify that time limit by submitting a virtually identical submission and adding new parties.

Plaintiffs' opening brief ignores the effect of its interpretation on Section 21's 60-day limitations period. Plaintiffs' interpretation is fundamentally inconsistent with Congress's goals in enacting that provision. As the district court recognized, Plaintiffs' interpretation would "render the statute of limitations in Section 21 meaningless." JA 199 (internal quotation marks omitted). In contrast, EPA's decision to treat the 2012 submission as essentially a request for reconsideration rather than a new TSCA Section 21 petition gives proper effect to the time bar in Section 21 and is consistent with the statute.

3. Law in this Circuit concerning rulemaking petitions

Precluding EPA from ever construing a resubmission as a request to reconsider would allow parties like Plaintiffs to seek judicial review

of petitions after Section 21's time limit expired. This would run counter to well-established precedent dictating that "where a party petitions an agency for reconsideration . . . on the same record that was before the agency when it rendered its original decision, 'an order which merely denies rehearing of . . . [the prior] order is not itself reviewable.'" *ICC v. Brotherhood of Locomotive Eng'rs*, 482 U.S. 270, 280 (1987) (citation omitted; second and third alterations in original). This Court has specifically rejected use of such a maneuver to restart a statutory review period. *Nat'l Bank of Davis*, 725 F.2d at 1391-92 (dismissing petition for review as untimely where petitioner sought to challenge Comptroller's order outside of applicable thirty day limitations period, based on filing of a motion for reconsideration three months after original order issued).

EPA's consideration of, among other factors, whether a second submission presents "significant newly discovered, non-cumulative material," is in accordance with precedent of both this Court and the Supreme Court that a party must present new evidence or other changed circumstances in order to obtain judicial review of the denial of a petition to reconsider. *Bhd. of Locomotive Eng'rs*, 482 U.S. at 284;

Southwestern Bell Tel. Co. v. FCC, 180 F.3d 307, 311 (D.C. Cir. 1999) ("[A] petition seeking review of an agency's decision not to reopen a proceeding is not reviewable unless the petition is based upon new evidence or changed circumstances."). In fact, the Supreme Court specifically sought to ensure that such reconsideration requests do not operate as a means for "extending indefinitely the time within which . . . agency orders can be judicially overturned." *Bhd. of Locomotive Eng'rs*, 482 U.S. at 279; *see also id.* at 281 (refusing to allow for the "perpetual availability of review" in the face of a statutory limitations period "by the mere device of filing a suggestion that the agency has made a mistake and should consider the matter again").

Given these principles, it is clear that Congress did not intend to allow indefinite judicial review when EPA denies a Section 21 petition. EPA's interpretation – that Section 21 of TSCA does not require it to treat a resubmission as a new "petition" in circumstances like these where a party is attempting to evade the limitations period – is consistent with this intent. Any other result would nullify Congress's intent in providing that a Section 21 petition be subject to judicial review only for a 60-day window and would remove an important

constraint on a party's ability to embroil the courts and EPA in repetitive litigation.

B. EPA's letter merits deference.

Plaintiffs argue that, even if the meaning of "petition" is not established by the plain language of TSCA, EPA's interpretation is not entitled to deference because it is not sufficiently formal (Br. 14 n.4), or because it conflicts with EPA's past practice, (Br. 10-12). Plaintiffs are incorrect, and EPA's interpretation is entitled to deference as a "permissible construction of the statute." *See Chevron*, 467 U.S. at 843, 844.

1. The formality of EPA's interpretation

Although EPA's interpretation of Section 21 was contained in a letter, it still merits *Chevron* deference. That an agency "previously reached its interpretation through means less formal than 'notice and comment' rulemaking . . . does not automatically deprive that interpretation of the judicial deference otherwise its due." *Barnhart v. Walton*, 535 U.S. 212, 221 (2002). In determining whether deference under *Chevron* is appropriate, courts look to "the interstitial nature of the legal question, the related expertise of the Agency, the importance

of the question to administration of the statute, the complexity of that administration, and the careful consideration the Agency has given the question over a long period of time." *Id.* at 222.

Applying these factors here supports according EPA's interpretation *Chevron* deference. EPA was addressing an "interstitial" legal issue – the threshold question of what constitutes a "petition" for purposes of TSCA Section 21 – the agency has relevant expertise in administering Section 21 over the course of the last 30 years and this interpretation is central to the application of Section 21 with respect to enforcement of the jurisdictional time bar on Section 21 citizen suits. Deference is particularly appropriate when the agency is resolving procedural questions raised by the statute regarding "when and how to hear and decide the matters that come before it." *Tenn. Valley Mun. Gas Ass'n v. FERC*, 140 F.3d 1085, 1088 (D.C. Cir. 1998); *see also Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council*, 435 U.S. 519, 543 (1978) ("Absent constitutional constraints or extremely compelling circumstances the administrative agencies should be free to fashion their own rules of procedure and to pursue methods of inquiry capable

of permitting them to discharge their multitudinous duties." (internal quotation marks and citations omitted)).

The Supreme Court and this Court have repeatedly deferred under *Chevron* to agency interpretations contained in letters. *See*, *e.g.*, *NationBank of North Carolina, N.A. v. Variable Annuity Life Ins. Co.*, 513 U.S. 251, 254-55, 257 (1995); *Cal. Miwok Tribe v. United States*, 515 F.3d 1262, 1266 (D.C. Cir. 2008); *Mylan Labs, Inc. v. Thompson*, 389 F.3d 1272, 1279-80 (D.C. Cir. 2004); *Fed. Election Comm'n v. Nat'l Rifle Ass'n*, 254 F.3d 173, 185-86 (D.C. Cir. 2001); *see also Citizens Exposing Truth About Casinos ("CETAC") v. Kempthorne*, 492 F.3d 460, 467 (D.C. Cir. 2007) (publication in the Federal Register of interpretation and reasoning originally contained in agency letter "evidence of a *Chevron*-worthy interpretation").

Finally, the Supreme Court's analysis in *United States v. Mead Corp.*, which focused on the existence of indications that "Congress would expect the agency to be able to speak with the force of law," also supports deference to EPA's interpretation contained in the letter denying the 2012 submission. In this case, Congress delegated authority to EPA to resolve Section 21 petitions and in doing so gave no

indication that it intended to disturb EPA's "inherent power[] to control its own docket." *See GTE Serv. Corp. v. FCC*, 782 F.2d 263, 274 n.12 (D.C. Cir. 1986).

2. EPA's past practice

In addition to the interstitial and procedural nature of the question of statutory interpretation at issue here, EPA's past practice supports deference to its interpretation of "petition." EPA previously relied on this same interpretation and that interpretation was upheld by a federal court. In *Walker v. EPA*, the plaintiff filed a petition requesting that EPA amend its regulations defining the toxic chemical polychlorinated biphenyls ("PCBs") to exclude certain forms of PCBs. *See* No. 87-3552, slip op. at 2 (S.D. Tex. Oct. 15, 1990) (reproduced in Addendum). EPA denied that petition and Walker did not bring suit within 60 days. Add. 33. Walker then filed a second submission, which EPA treated as a re-filing of the first petition and rejected because it contained no significant new information. *Id.* Like Plaintiffs here, Walker challenged EPA's decision on the ground that the second submission "was a separate and distinct petition that must be accepted or denied pursuant to § 2620." *Id.*

The District Court for the Southern District of Texas noted that TSCA does not define the term "petition" and held that "[t]he decision to treat a submission as a petition is within the discretion of the EPA," to be reviewed under the "arbitrary and capricious" standard of the APA, looking to "the relief sought, the identity of the requesting parties, the temporal relationship between submissions, and the presence of new information." Add. 33-34; *see also Walker v. EPA*, 802 F. Supp. 1568, 1572 n.6, 1573 (S.D. Tex. 1992) (summarizing earlier decision). Applying those factors, the court concluded that EPA's action was not arbitrary or capricious. As *Walker* also explained, such a reconsideration request "cannot revive an expired jurisdictional statute of limitations," lest it "render the statute of limitations meaningless, permitting a plaintiff to circumvent the limitations period by submitting a repetitive request for identical action on an identical issue long after the time period has expired." Add. 34. The present case involves closely analogous facts, and the Court should apply the same persuasive reasoning as the *Walker* court.

Plaintiffs' appellate brief contends that, in other cases, EPA previously addressed some successive petitions on the merits. *See*

Br. 10-12. All but one of the situations cited by Plaintiffs are obviously different from the present case. For example, CBD's reliance on the statement in EPA's denial of CBD's original petition to regulate lead bullets and shot that "'EPA is required to grant or deny the petition'" is misplaced because EPA was responding to an original petition, not a resubmission. Br. 11 (quoting 75 Fed. Reg. 70,247; 75 Fed Reg. 58,378).

In *Citizens for a Better Environment v. Reilly*, 33 ERC (BNA) 1460, 1991 U.S. Dist. LEXIS 7203, 1991 WL 95040 (N.D. Ill., May 24, 1991), the differences between the first and second petitions (both of which EPA considered on the merits) went beyond what Plaintiffs characterize as the "level of specificity of the request." Br. 11. At the very least, the two petitions requested action under different sections of TSCA with different standards.

The first petition requested regulation under Section 4(f)(2) or Section 6(a) and a "'full field investigation'" conducted pursuant to Section 21(b)(2). 49 Fed. Reg. 43,764 (Oct. 31, 1984) (quoting petition). Those sections apply when "there may be . . . a significant risk of serious or widespread harm to human beings from cancer, gene mutations, or birth defects," 15 U.S.C. § 2603(f)(2), or when " there is a

reasonable basis to conclude that . . . a chemical substance or mixture . . . presents or will present an unreasonable risk of injury to health or the environment." *Id.* § 2605(a).

In contrast, the second petition at issue in *Citizens* requested testing pursuant to Section 4(a). 50 Fed. Reg. 30,517 (July 26, 1985). Section 4(a) says EPA shall require testing where a chemical substance or mixture "may present an unreasonable risk of injury to health or the environment," is likely to enter the environment in substantial quantities or there may be significant human exposure, and there is insufficient data and experience with the substance or mixture. 15 U.S.C. § 2603(a). The standard for EPA action was therefore different, and EPA denied the request for different reasons. *Compare* 49 Fed. Reg. at 43,765 *with* 50 Fed. Reg. at 30,518. Given the differences in the petitions and the legal standards to be applied, *Citizens* is clearly distinguishable from the present case.

Also distinguishable is EPA's denial of General Electric's and Dow Chemical's petitions for rulemaking to exempt certain kinds of PCBs from regulation. *See* Br. 12. In both instances, EPA denied the petitions because it believed it would be dealing with the same issue in

an ongoing, larger rulemaking that was "likely to affect hundreds of companies" and "w[ould] be a major undertaking," so EPA declined to initiate separate rulemaking proceedings on the companies' petitions "to avoid duplic[a]tion of regulatory efforts." Polychlorinated Biphenyls (PCBs); Denial of Citizen's Petition, 47 Fed. Reg. 46,723 (Oct. 20, 1982); *see also* Denial of Citizen's Petition, 47 Fed. Reg. 37,258 (Aug. 25, 1982) (Dow). In neither instance did EPA rule on the merits of the petitions. Therefore it is not surprising that the agency invited the companies to, as Plaintiffs put it, "resubmit their petitions . . . without requiring that they not be substantially the same." Br. 12.

Finally, Plaintiffs' observation that EPA previously published in the Federal Register the denial of a petition that failed to request relief available pursuant to Section 21 is irrelevant to the situation here. *See* Br. 12, (citing 59 Fed. Reg. 48,436 (Sept. 21, 1994), discussing petition relating to sewage over flow that did not request any action by EPA).

Only in *Walker v. EPA*, 802 F. Supp. 1568 (S.D. Texas 1992), did EPA address the merits of a petition that was similar to a previously submitted petition. Neither the district court opinion in that case, nor EPA's Federal Register notice (56 Fed. Reg. 23,534 (May 22, 1991)),

reveals why EPA decided not to exercise its discretion to deem the petitioner's third submission a request for reconsideration when EPA had previously concluded that the second submission by the same petitioner was not a separate "petition" from the first submission, *see supra* at 32-33. EPA did not indicate that it was abandoning its interpretation that such discretion was permitted under the statute.[4] In fact, EPA's decision denying the petitioner's February 6, 1991 petition references his "similar" March 27, 1987 petition, but not the repetitive July 31, 1987 submission that EPA had previously refused to treat as a separate "petition." 56 Fed. Reg. at 23,535; *cf. Walker*, 802 F. Supp. at 1572-73.

In any event, EPA's reasons for addressing that particular petition on the merits are not dispositive because EPA has discretion to treat subsequent submissions as Section 21 petitions based on the specific facts before it. As noted above, an agency always has the discretionary

[4] EPA's public record denying Walker's third submission references at least one study that was not available at the time of the first and second submissions in 1987. *See* 56 Fed. Reg. at 23,538 (citing Lilienthal, H., et al. Behavioral Effects of Pre- and Postnatal Exposure to a Mixture of Low Chlorinated PCBs in Rats. Fundamental and Applied Toxicology. 15, 457-467 (1990)).

power to reconsider its own rules or to reopen the record of its prior decisions. It may do so on its own initiative, or in response to a petition for rulemaking. Here, in contrast, Plaintiffs seek to mandate that EPA reconsider a prior decision by submitting a "petition" for rulemaking that is effectively identical to a petition that EPA had recently denied. But the fact that EPA might use a successive request for rulemaking as the entry point to a reconsideration of its own rules does not mean that the agency abandoned its statutory interpretation that, in appropriate circumstances, a resubmission can effectively be treated as a request for reconsideration of a prior petition, not a new Section 21 petition.

Accordingly, EPA's reasonable interpretation of the statutory term "petition" should be given *Chevron* deference

3. Alternatively, EPA's interpretation should be upheld under Skidmore.

Even if this Court concludes that EPA's interpretation is not entitled to *Chevron* deference, it is surely entitled to *Skidmore* deference because it was thoroughly considered, its reasoning is valid, and its approach is consistent with earlier pronouncements (namely, EPA's position on Walker's second petition and in the *Walker* litigation).

See Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944); *see also supra* at 32-33. In short, EPA's reasonable interpretation should prevail.

C. EPA properly exercised its discretion in determining that CBD's 2012 submission was not a new Section 21 petition.

The district court correctly concluded that it lacked jurisdiction under Section 21 of TSCA because EPA reasonably found that Plaintiffs' 2012 submission was not a "petition" within the meaning of Section 21 but instead was essentially a request for reconsideration. EPA concluded that the 2012 submission was not a "new petition cognizable under section 21" based upon a thorough review of the totality of the circumstances related to the resubmission.

With respect to the dispositive issue in EPA's evaluation of the original petition – EPA's authority to regulate – the 2012 submission "contains no new information that was not previously available to CBD and Project Gutpile" and "EPA was aware of, and considered" the legislative history cited in the 2012 submission. JA 150. With respect to the relief requested, EPA explained that although the 2012 submission requested "somewhat" different relief in that it sought initiation of a rulemaking on the topic and advocated for a nationwide

ban while the 2010 petition specifically requested a nationwide ban, that was a "distinction without a substantive difference" given the grounds for the denial of the 2010 petition. *Id.*

EPA also explained that the 2012 submission contained no new substantive information. EPA noted that the 2012 submission was "almost identical" to the original petition and contained "almost verbatim the same information regarding toxicity and exposure" for lead shot and bullets. *Id.* Of the 400 citations in the 2012 submission, a mere 20 were not included in the original petition and only 6 of those appeared to post-date the original petition. JA 151. Finally, EPA stated that it did not think that the 60-day limitations period for seeking review of citizen petitions could be "avoided by resubmitting virtually the same petition, with the addition of parties, less than two years after the submission of the first petition." *Id.* In these circumstances, EPA's decision to treat the 2012 submission as essentially a request for reconsideration and not a new petition cognizable under Section 21 was reasonable. The first *Walker* decision is the only other court opinion to consider an EPA conclusion that a supposed petition for rulemaking was not cognizable as a Section 21

petition. *Walker* looked to similar factors and properly concluded that in the totality of the circumstances, EPA had reasonably construed the submission. *See* Add. 34.

Plaintiffs contend that EPA's treatment of the 2012 submission was arbitrary and capricious because of four alleged differences between the two submissions: new information in the 2012 submission, different relief requested, new petitioners, and the timing of the 2012 submission. Plaintiffs fail to show that EPA's conclusion was arbitrary or capricious considering all the circumstances present here.

1. The supposed new information was not relevant or new.

EPA denied the original petition based on a straightforward question of statutory interpretation, concluding that it lacked authority to regulate lead shot and bullets because they were excluded from the definition of "chemical substance" under TSCA Section 3(2)(B)(v). Accordingly, in assessing the virtually identical 2012 submission, the agency reasonably determined that any differences between the two petitions were not substantive because the only relevant information added to the 2012 submission regarding the proper interpretation of Section 3(2)(B)(v) was 30-year-old legislative history that CBD and

Project Gutpile could have presented at the time of their original petition and that EPA actually did know about and consider at that time. JA 150.

Plaintiffs criticize EPA's consideration of whether the 2012 submission included material new information on the question of whether EPA has statutory authority to regulate lead shot and bullets and contend that the focus should be on the "substance and content of the petitions . . . not the agency's response." Br. 16. However, EPA properly considered whether there were *material* differences between the two submissions and in this case, reasonably determined that the lack of new information on EPA's authority to regulate lead bullets and shot weighed in favor of the 2012 submission not being a new petition. JA 150. If EPA could not take into account the grounds on which it had denied a prior petition, a petitioner could create a "new" petition by making superficial alterations or adding irrelevant or cumulative evidence and avoid the 60-day limitations period on the original petition.

The only supposedly new statutory interpretation information Plaintiffs' brief points to is legislative history information (Br. 20), but

not only was that information known to EPA, but it also is thirty years old and so could and should have been discussed in the original petition. *See* JA 150. To allow a party to submit 30-year-old information as "new" evidence would permit easy evasion of Section 21's 60-day limitations period. TSCA Section 21 states that the petitioner must present "the facts which it is claimed establish" the need for regulation under TSCA. 15 U.S.C. § 2620(b)(1). The Supreme Court has explained in similar circumstances that courts will review an agency's denial of an untimely motion to reconsider based on "facts which, *through no fault of his own*, the original proceeding did not contain." *Bhd. of Locomotive Eng'rs*, 482 U.S. at 279 (emphasis added). The original petition here could easily have cited any legislative history that CBD believed was relevant. Finally, to the extent that Plaintiffs are implying that EPA was ignorant of the legislative history of the Act it administers when it denied the first petition, that position is untenable.

Plaintiffs also focus on supposedly new information about the risks of lead bullets and shot. Br. 21. Even if that information were "new," it is irrelevant to the question of whether EPA has statutory

authority to regulate lead bullets and shot, as the agency concluded in response to the 2010 petition. *See* JA 151.

Regardless, the information is not new. Only a few of the "new" citations actually post-date the 2010 petition. *See id*. Moreover, while Plaintiffs assert the *studies* are new, they do not explain what they meaningfully added to the *scientific evidence* beyond what was in the 2010 petition. It is worth noting that the supposed new studies include a non-published, non-peer reviewed conference presentation[5] and what appears to be a two-page policy paper that does not include any original research and relies on sources no more recent than 2009.[6] It is not clear what the 2011 "Spectacled Eider Recovery" document attributed to the U.S. Fish and Wildlife Service is, since no citation is provided (JA 147), but an Internet search based on that title and date leads to a two-page

[5] Finkelstein et al. 2011, JA 122.

[6] Raptor Research Foundation 2011, JA 140; *see also* Raptor Research Foundation White Paper (2011), http://www.raptorresearchfoundation.org/wp-content/uploads/2010/12/2011_lead_poisoning.pdf (last visited February 3, 2014).

pamphlet that also does not include any original research.[7] Thus, Plaintiffs' characterization of these documents as "new studies" is unfounded. Br. 21. The other studies mentioned – California Department of Fish and Game studies from 2009 and 2010; Kelly and Johnson 2011; and Kelly *et al.* 2011 – relate to the effects of lead on California condors, golden eagles, and turkey vultures. The 2010 petition included 11 pages of discussion on these issues and the 2012 submission largely duplicated that discussion.[8] Assuming arguendo that the risks from lead bullets and shot were relevant given that EPA had previously denied the 2010 petition because it lacks statutory authority to regulate those items, Plaintiffs have failed to show that the handful of new sources cited in the 2012 submission added anything material.

Plaintiffs criticize EPA's finding that the 2012 submission replicates large portions of the 2010 petition nearly verbatim (Br. 22),

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[7] *See* http://alaska.fws.gov/fisheries/fieldoffice/fairbanks/pdf/Specs.pdf (last visited February 3, 2014).

[8] *Compare* JA 30-41 *with* JA 71-83; *see also* Br. 21 (describing these studies as providing "additional evidence" regarding arguments presented in first petition).

but even a brief review of the two documents shows that whole paragraphs, pages, and even sections remain unchanged from one to the other, with only occasional insertions describing purportedly new information (along with deletions of those portions of the 2010 petition relating to the separate request for regulation of lead fishing gear). *Compare, e.g.*, JA 21-22, 24-41 *with* JA 44-46, 65-83. The lack of meaningful new information weighs in favor of EPA's conclusion that the 2012 submission was not a new petition within the meaning of TSCA Section 21.

2. Relief requested

Plaintiffs also contend that the 2012 submission should have been treated as a new petition because the scope of the rulemaking it requested was different than the original petition. The original petition requested a specific regulation – a nationwide ban. The 2012 submission requested more generally that EPA develop "regulations that adequately protect wildlife, human health and the environment," while continuing to advocate for a nationwide ban as the petitioners' preferred regulation. Br. 16 (internal quotation marks omitted). As EPA explained, however, this slight change was "a distinction without a

substantive difference" given that EPA's original decision was that it could not grant relief of any kind. JA 150.

Plaintiffs incorrectly assert that the slight change they made in the requested relief was "directly responsive to the agency's concerns." Br. 17. Plaintiffs base this assertion on the claim that "the scope of the ban raised perhaps the biggest concern with the *public*" because commenters said that such a rule would burden the military and law enforcement and that issue was "repeatedly raised in the press." Br. 17-18 (emphasis added). However, EPA did not base its denial of the first petition in whole or in part on the scope of the relief requested. Plaintiffs' assertion to the contrary is based solely on language in the letter denying that petition stating that "'EPA has determined that TSCA does not provide the Agency with authority to address lead shot and bullets *as requested in your petition* due to the exclusion found in TSCA § 3(2)(B)(v).'" Br. 18. The contention that this language meant that the original petition was denied because of the scope of the relief requested strains credulity, especially given that EPA explained in the accompanying Federal Register notice that its denial was based on "a lack of authority to regulate lead in bullets and shot under TSCA" –

with no mention of the particular relief requested by CBD. 75 Fed. Reg. at 58,378. Because EPA had already considered the only material issue raised by Plaintiffs' 2012 submission – the question whether EPA may regulate lead in bullets and shot *at all* – the supposed difference in the relief requested did not transform the 2012 submission into a new petition.

3. Timing of request

The timing of events leading up to the 2012 submission also suggest that it was not a new petition under TSCA Section 21, but a vehicle for CBD to evade the 60-day limitations period and re-file the suit that it was unsuccessful in bringing with respect to the 2010 petition. Plaintiffs incorrectly focus on whether some absolute amount of time elapsed between the two submissions and how that time compared to how EPA treated the potentially duplicative petitions for rulemaking submitted by Walker. Br. 19. Instead, as in *Walker*, EPA rationally determined that the period of time between CBD's repetitive submissions was a relevant fact to consider in evaluating whether the 2012 submission is a separate petition.

As explained *supra*, EPA's treatment of the submissions at issue in *Walker* did not establish a bright-line rule for when a future submission is, or is not, a separate "petition." Neither the court decision nor EPA's Federal Register notice reveal why EPA decided to address Walker's third petition on the merits when it declined to so address Walker's second submission. Here, Plaintiffs filed the 2012 submission just six months after the district court dismissed as untimely CBD's claim seeking review of the first petition. The timing, along with the other factors EPA noted, suggests that the 2012 submission was a thinly disguised attempt to escape the effect of the district court's dismissal of the suit seeking review of the 2010 petition.

4. Identity of requesting parties.

Finally, two of the five organizations that filed the 2010 petition – CBD and Project Gutpile – were also parties to the 2012 submission. Indeed, CBD identified itself as the lead petitioner in the 2012 submission and has been the primary litigant in both cases. *See* JA 48. In arguing that EPA should have treated the 2012 submission as a "petition" under TSCA, Plaintiffs note that 99 other parties joined the

2012 submission. Br. 18-19. They contend that these additional parties make the 2012 submission a "petition" because TSCA emphasizes "open access to the public for the rulemaking process." Br. 19.

Plaintiffs focus on the wrong end of the issue – which parties are different, as opposed to which are the same. The concern is that a party may attempt to evade the 60-day time limit in Section 21 for seeking judicial review by filing a second petition. The mere fact that CBD and Project Gutpile were able to recruit more organizations to join them in a second rulemaking request should not allow them to evade the effect of the district court's order dismissing as untimely their suit seeking review of the 2010 petition. Otherwise, where a petitioner failed to seek judicial review of a petition within the requisite 60 days, the time bar in Section 21 would be effective only if the petitioner were unable to find any other person or organization to join it in re-filing the same petition – surely not what Congress would have intended. Conversely, if any of the other parties that joined the 2012 submission wished to ensure that EPA considered their request, the way to go about it was to submit their own unique petition, not to join in a resubmission by petitioners who previously failed to seek timely judicial review of their original

petition. The presence of new petitioners on a virtually identical petition does not show that EPA's conclusion that the 2012 submission was not a separate Section 21 petition was arbitrary or capricious given all the circumstances here.

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For these reasons, EPA's judgment that the 2012 submission was simply a recapitulation of the 2010 petition was not arbitrary, capricious, an abuse of discretion, or contrary to law based on the record before it. The district court correctly relied on EPA's reasonable determination that Plaintiffs' 2012 submission was not a "petition" under TSCA, but was instead an untimely attempt to seek judicial review of the first petition and correctly dismissed the complaint for lack of subject matter jurisdiction.

II. TSCA Section 3(2)(b)(v) excludes shot and bullets from EPA's authority to regulate "chemical substances."

Even if the district court erred in dismissing the complaint for lack of jurisdiction, the judgment may be upheld on the alternative ground that EPA does not have statutory authority to regulate lead shot and bullets under TSCA.

Plaintiffs want EPA to undertake a rulemaking pursuant to TSCA Section 6(a). Section 6(a) applies only to chemical substances and mixtures thereof, 15 U.S.C. §§ 2605(a), 2602(8), but TSCA's definition of "chemical substance" excludes lead shot and bullets, *see* 15 U.S.C. § 2602(2)(B)(v). Therefore the district court cannot as a matter of law grant the relief Plaintiffs seek and the dismissal can be upheld on that independent ground because the complaint fails to state a claim upon which relief can be granted. *See* Fed. R. Civ. P. 12(b)(6); *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (U.S. 2009) (court must determine whether allegations in complaint "plausibly give rise to an entitlement to relief"); *see also Sierra Club v. Jackson*, 648 F.3d 848, 854 (D.C. Cir. 2011) (dismissal pursuant to Rule 12(b)(1) could be affirmed if properly based on failure to state a claim under Rule 12(b)(6)).

A. The plain language of section 3(2)(B)(b)(v) precludes EPA's regulation of bullets and shot.

The plain language of TSCA on this point is unambiguous: EPA cannot regulate under Section 6 "any article the sale of which is subject to the tax imposed by section 4181 of the Internal Revenue Code of 1986 (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. The applicable regulation defines "shells and cartridges" as "any article consisting of a projectile, explosive, and container that is designed, assembled, and ready for use without further manufacture in firearms, pistols or revolvers." 27 C.F.R. § 53.11. Shot and bullets are typical projectiles used in such shells or cartridges, and as EPA found when denying CBD's first petition, "[b]ullets and shot, and any lead within them, are contained in shells and cartridges and are therefore excluded from the chemical substance definition." 75 Fed. Reg. at 58,378; *see also* Webster's Ninth New Collegiate Dictionary 1085 (1984) (defining "shell" (as used in firearms) as "a metal or paper case which holds the charge of powder and shot or bullet used with breech-loading small arms"); *see also id.* at 211 (defining cartridge as "containing a complete charge for a firearm," which would include the projectile).

Plaintiffs contend that the exclusion for firearms, cartridges, and shells in Section 2602(2)(B)(v) should be read to apply only to those items, not their component parts such as bullets and shot. Br. 23-24. However, the regulations, in addition to defining the projectile as part

of a shell or cartridge, make clear that the tax imposed on firearms, shells, and cartridges includes the value of their component parts, including shot and bullets. 27 C.F.R. § 53.61(b)(2) ("All component parts for firearms are includible in the price for which the article is sold."); 27 C.F.R. § 53.91(a) (the "'price' for which an article is sold includes the total consideration paid for the article"). Bullets and shot are sold with the cartridges and shells in most instances and included in the tax imposed by Section 4181 when sold together.

As a practical matter, therefore, EPA cannot regulate the major components of shells and cartridges – bullets and shot – without also regulating the shells and cartridges that are covered by Section 4181. Such a result would circumvent the purpose of Congress's exclusion and render the provision meaningless as EPA could impose restrictions on shells and cartridges by regulating the items that make them up, violating the basic canon of statutory construction that statutes should "be construed in a manner that gives effect to all of their provisions." *United States ex rel. Eisenstein v. City of New York*, 556 U.S. 928, 933 (2009).

Plaintiffs seek to undermine Congress's straightforward intent by pointing to an Internal Revenue Service (IRS) revenue ruling interpreting 26 U.S.C. § 4181. *See* Br. 25 (citing IRS Rev. Rul. 68-463, 1968-2 C.B. 507). The revenue ruling concludes that bullets and shot *when sold alone* are not subject to taxation under 26 U.S.C. § 4181. Plaintiffs say this means that the TSCA exclusion should not apply to bullets and shot because the revenue ruling predated TSCA and Congress should have been aware of the IRS's interpretation of Section 4181. Br. 25.

With this argument, Plaintiffs are trying to use an overly technical interpretation of the tax code to allow EPA to regulate items that Congress intended to exclude from TSCA. Congress knew that IRS interpretations of the tax code could create fine distinctions that make no difference to Congress's intended purpose, and attempted to avoid this result. TSCA provides that the scope of the shell and cartridge exclusion should be "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). Thus, even if certain items may be exempted from taxation in some circumstances (such as bullets and

shot when sold separately), they are included within the scope of the exemption set out in Section 2602(2)(B)(v). Formal distinctions may be necessary for the administration of tax law – for example, the IRS might seek to avoid taxing the same items twice when they are sold separately for later assembly – but those distinctions are irrelevant to the question of whether Congress intended EPA to regulate those items under TSCA.

Moreover, it is not true that Section 4181 exempts shot and bullets from taxation in all circumstances. Section 4181 is currently administered by the U.S. Department of the Treasury's Alcohol and Tobacco Tax and Trade Bureau ("TTB"), rather than the IRS. The TTB's regulations state:

> No tax is imposed by section 4181 of the Code on the sale of parts or accessories of firearms, pistols, revolvers, shells, and cartridges when sold separately or when sold with a complete firearm for use as spare parts or accessories. The tax does attach, however, to sales of completed firearms, pistols, revolvers, shells, and cartridges, and to sale of such articles that, although in knockdown condition, are complete as to all component parts.

27 C.F.R. §53.61(b)(1). Thus, under current regulations, component parts of articles taxed under Section 4181 are exempt from taxation only when sold "separately" or "with a complete firearm for use as spare

parts or accessories." Likewise, the IRS ruling Plaintiffs rely on (Br. 25) indicates that only "sales of separate parts" of ammunition such as bullets are exempt from Section 4181; even if a shell or cartridge is broken down into its component parts at the time of sale, Section 4181 applies to the entire price of the product. IRS Rev. Rul. 68-463, 1968-2 C.B. 507. Conversely, the value of bullets and shot, when sold as part of a cartridge or shell, are included in the value of the item and thus subject to the tax as explained *supra*. Plaintiffs seek regulation of all lead bullets and shot used for hunting and sport, not just regulation of those items when sold separately from shells and cartridges. In fact, their primary concern is harm to animals from lead entering the environment *after being fired from a gun as part of a cartridge or shell*. *E.g.*, JA 44. Thus, the rulemaking Plaintiffs seek would necessarily require EPA to regulate bullets and shot when sold as part of cartridges and shells. Such a regulation would plainly violate TSCA.

Plaintiffs' interpretation would also lead to absurd results in other circumstances. If EPA could regulate bullets and shot under TSCA simply because in certain limited circumstances they may escape taxation (i.e., when sold separately), then the agency could also regulate

firearm barrels, trigger mechanisms, sights, buttstocks, magazines, or any of the other component parts of firearms that the TTB has expressly stated are not subject to taxation under section 4181 when sold separately from firearms. *See* 27 C.F.R. § 53.61(b)(5)(ii). Granting EPA regulatory jurisdiction over such items would effectively allow EPA to regulate firearms, shells, and cartridges in direct contradiction of the language of 15 U.S.C. § 2602(2)(B)(v) and 26 U.S.C. § 4181, simply because in certain circumstances the TTB presently exempts components of those articles from taxation.

In sum, EPA cannot regulate lead shot and bullets without circumventing the plain language of 15 U.S.C. § 2602(2)(B)(v).

B. EPA's construction of 15 U.S.C. § 2602(2)(B)(v) merits deference even if the plain language of the statute is ambiguous.

The plain language of 15 U.S.C. § 2602(2)(B)(v) is unambiguous, but even if this Court concludes otherwise, EPA's interpretation of that exclusion deserves *Chevron* deference because it is permissible in light of the statutory text as explained above, TSCA is a statute that EPA has authority to interpret, and EPA's interpretation is consistent with past policy and practice.

EPA administers TSCA, including the regulation of "chemical substances" pursuant to 15 U.S.C. §§ 2602 and 2605. EPA's construction of 15 U.S.C. § 2602(2)(B)(v) deserves *Chevron* deference because it has the force of law as an EPA interpretation of a statute that Congress authorized the agency to administer. *See City of Arlington, v. FCC*, 133 S. Ct. 1863, 1868-69 (2013) (agencies receive *Chevron* deference when interpreting scope of their authority).

EPA previously set forth its interpretation of this provision in a Federal Register notice in response to the first petition. 75 Fed. Reg. at 58,378. That notice was published pursuant to the mechanism Congress created for EPA to decide whether to exercise its rulemaking authority at the behest of a citizen petition and so is deserving of deference. *See FEC v. NRA*, 254 F.3d at 186 (deferring to Federal Election Commission's advisory opinion in part because it was "the product of a statutorily created decision-making process"). Moreover, Plaintiffs had the opportunity to challenge that interpretation at the time EPA made its decision on their original rulemaking petition – an opportunity that they waived.

Plaintiffs contend that "the Treasury Department warrants deference in its interpretation of [Internal Revenue Code] § 4181, not EPA." However, EPA is not seeking deference for its interpretation of the Internal Revenue Code, but rather for its interpretation of the exclusion from the definition of "chemical substance" in TSCA Section 3(2)(B)(v) and whether that exclusion encompasses the constituent components of shells and cartridges. Congress tasked EPA, not Treasury, with interpreting TSCA. EPA's interpretation of what Congress meant when TSCA referred to Section 4181 deserves *Chevron* deference here.

Alternatively, EPA's construction of section 2602(2)(B)(v) merits deference as a "cogent administrative interpretation[]" under *Skidmore*. *Alaska Dep't of Envtl. Conservation v. EPA*, 540 U.S. 461, 488 (2004) (internal quotation marks and citation omitted). Such deference is especially justified where an agency's interpretation "confirms [the] . . . understanding of the everyday sense of the term" being construed. *S.D. Warren Co. v. Maine Bd. of Envtl. Prot.*, 547 U.S. 370, 378 (2006); *see also Fed. Ex. Corp. v. Holowecki*, 552 U.S. 389, 402 (2008) (upholding agency statutory interpretation that was "consistent with the statutory

framework"). EPA's interpretation of Section 2602(2)(B)(v) likewise relies on the "everyday sense" of the terms "shells" and "cartridges" as including the shot and bullets that are their major component parts. Moreover, EPA's construction of TSCA's exemption is rooted in the agency's specialized experience in implementing the statute, as noted above. *See Skidmore*, 323 U.S. at 139 (stating that deference is due to agency's policies where they are "based upon more specialized experience . . . than is likely to come to a judge in a particular case").

EPA's interpretation that the components of substances and articles expressly exempted by 15 U.S.C. § 2602(2)(B)(v) are also exempted is longstanding. *See Fed. Express*, 552 U.S. at 399 ("Under *Skidmore*, we consider whether the agency has applied its position with consistency."). For example, an EPA form instructing manufacturers about reporting information regarding chemical substances under 15 U.S.C. § 2607 states: "TSCA Regulable Quantities – Except under items 4 and 5, do not report any quantity of chemical substance that is manufactured or processed solely for use as: . . . firearms or ammunition . . . . The above are not TSCA regulable." JA 155; *see also*

47 Fed. Reg. 26,992, 27,002 (June 22, 1982) (original form contained same language).

Likewise, EPA stated in a 2003 Federal Register notice that "substances that are manufactured only for non-TSCA purposes, as described in TSCA section 3(2)(B), are exempt from all TSCA requirements," including "substances that are intended at the time of manufacture to be used for non-TSCA purposes (e.g., as a pesticide, as a drug)." 68 Fed. Reg. 848, 871 (Jan. 7, 2003). EPA thus has a longstanding interpretation that the components of substances and articles expressly exempted by 15 U.S.C. § 2602(2)(B)(v) are also exempted, and the Court should respect the agency's informed approach to administering that provision of TSCA.

C. The legislative history supports EPA's interpretation rather than Plaintiffs' interpretation.

Plaintiffs seek to escape the effect of the straightforward prohibition in 15 U.S.C. § 2602(2)(B)(v) by citing a statement from TSCA's legislative history regarding the purported effect of that provision:

> [The House] 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. Rep. No. 94-1341, at 10 (1976) (discussed at Br. 24). However, that language cannot mean what Plaintiffs suggest – that Congress forbade TSCA regulation of shells and cartridges for the purpose of accomplishing gun control, yet let the same ends be accomplished as long as EPA names the major components of those articles as the object of regulation instead. Such an interpretation would allow the exception to swallow the rule of Section 2602(2)(B)(v). *See Bloate v. United States*, 559 U.S. 196, 210 (2010) (refusing to read exception into statutory provision that would undermine its basic purpose where that interpretation "is not justified, much less compelled, by the textual ambiguities and legislative history").

Even if the Court looks beyond the plain statutory language to this isolated statement in a House committee report, one need not read that statement as imposing an absurd gloss on Section 2602(2)(B)(v) as Plaintiffs do. The Committee is just as likely to have meant that the

statutory exemption for firearms and ammunition should not prevent EPA from regulating processes such as the manufacture of the basic materials of those exempted products, simply because they might later be utilized to make firearms and ammunition. For example, Section 2602(2)(B)(v) did not prevent EPA from granting a petition under TSCA Section 21 to initiate a proceeding for the issuance of a rule to ban lead wheel balancing weights in tires, even though lead is also used as a chemical component of ammunition.[9] On the other hand, there is no doubt that bullets and shot will be incorporated into shells and cartridges, therefore they are subject to the statutory exclusion. That interpretation of the legislative history is much more sensible than inferring that Congress, despite setting out a straightforward exemption of firearms and ammunition from the definition of "chemical substance," somehow meant to allow EPA to regulate or even ban integral components of those items, namely bullets and shot. As this Court has explained, it "must avoid an interpretation that undermines congressional purpose considered as a whole when alternative

[9] *See* Letter from EPA to Ecology Center (Aug. 26, 2009), available at http://www.epa.gov/opptintr/chemtest/pubs/Document.pdf (last visited February 3, 2014).

interpretations consistent with the legislative purpose are available." *United States v. Braxtonbrown-Smith*, 278 F.3d 1348, 1352 (D.C. Cir. 2002).

CONCLUSION

The district court's judgment should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH TYPE VOLUME LIMITATION

This brief complies with the type volume limitation set forth in Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure. Excepting the portions described in Circuit Rule 32(a)(1), the original brief contained 12,808 words. After substituting citations to the Joint Appendix for the citations to the record in the original brief, this brief contains 12,748 words.

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CERTIFICATE OF SERVICE

When All Case Participants are Registered for the Appellate CM/ECF System

I hereby certify that I electronically filed the foregoing Response Brief of Federal Defendants-Appellees with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system on *February 3, 2014*.

I electronically filed the Final Brief for the Federal Defendants-Appellees with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system on *March 27, 2014*.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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ADDENDUM

INDEX TO FEDERAL APPELLEES' ADDENDUM

Effective:[See Text Amendments]

United States Code Annotated Currentness
Title 15. Commerce and Trade
Chapter 53. Toxic Substances Control (Refs & Annos)
Subchapter I. Control of Toxic Substances (Refs & Annos)
§ 2602. Definitions

As used in this chapter:

(1) the [FN1] term "Administrator" means the Administrator of the Environmental Protection Agency.

(2)(A) 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.

(B) Such term does not include--

(i) any mixture,

(ii) any pesticide (as defined in the Federal Insecticide, Fungicide, and Rodenticide Act) [7 U.S.C.A. § 136 et seq.] when manufactured, processed, or distributed in commerce for use as a pesticide,

(iii) tobacco or any tobacco product,

(iv) any source material, special nuclear material, or byproduct material (as such terms are defined in the Atomic Energy Act of 1954 [42 U.S.C.A. § 2011 et seq.] and regulations issued under such Act),

(v) 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), and

(vi) any food, food additive, drug, cosmetic, or device (as such terms are defined in section 201 of the Federal Food, Drug, and Cosmetic Act (21 U.S.C.A. 321]) when manufactured, processed, or distributed in commerce for use as a food, food additive, drug, cosmetic, or device.

The term "food" as used in clause (vi) of this subparagraph includes poultry and poultry products (as defined in sections 4(e) and 4(f) of the Poultry Products Inspection Act [21 U.S.C. 453(e) and (f)]), meat and meat food products (as defined in section 1(j) of the Federal Meat Inspection Act [21 U.S.C. 601(j)]), and eggs and egg products (as defined in section 4 of the Egg Products Inspection Act [21 U.S.C. 1033]).

(3) The term "commerce" means trade, traffic, transportation, or other commerce (A) between a place in a State and any place outside of such State, or (B) which affects trade, traffic, transportation, or commerce described in clause (A).

(4) The terms "distribute in commerce" and "distribution in commerce" when used to describe an action taken with respect to a chemical substance or mixture or article containing a substance or mixture mean to sell, or the sale of, the substance, mixture, or article in commerce; to introduce or deliver for introduction into commerce, or the introduction or delivery for introduction into commerce of, the substance, mixture, or article; or to hold, or the holding of, the substance, mixture, or article after its introduction into commerce.

(5) The term "environment" includes water, air, and land and the interrelationship which exists among and between water, air, and land and all living things.

(6) The term "health and safety study" means any study of any effect of a chemical substance or mixture on health or the environment or on both, including underlying data and epidemiological studies, studies of occupational exposure to a chemical substance or mixture, toxicological, clinical, and ecological studies of a chemical substance or mixture, and any test performed pursuant to this chapter.

(7) The term "manufacture" means to import into the customs territory of the United States (as defined in general note 2 of the Harmonized Tariff Schedule of the United States), produce, or manufacture.

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

(9) The term "new chemical substance" means any chemical substance which is not included in the chemical

substance list compiled and published under section 2607(b) of this title.

(10) The term "process" means the preparation of a chemical substance or mixture, after its manufacture, for distribution in commerce--

(A) in the same form or physical state as, or in a different form or physical state from, that in which it was received by the person so preparing such substance or mixture, or

(B) as part of an article containing the chemical substance or mixture.

(11) The term "processor" means any person who processes a chemical substance or mixture.

(12) The term "standards for the development of test data" means a prescription of--

(A) the--

(i) health and environmental effects, and

(ii) information relating to toxicity, persistence, and other characteristics which affect health and the environment,

for which test data for a chemical substance or mixture are to be developed and any analysis that is to be performed on such data, and

(B) to the extent necessary to assure that data respecting such effects and characteristics are reliable and adequate--

(i) the manner in which such data are to be developed,

(ii) the specification of any test protocol or methodology to be employed in the development of such data, and

(iii) such other requirements as are necessary to provide such assurance.

(13) The term "State" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, the Canal Zone, American Samoa, the Northern Mariana Islands, or any other territory or possession of the United States.

(14) The term "United States", when used in the geographic sense, means all of the States.

CREDIT(S)

(Pub.L. 94-469, Title I, § 3, Oct. 11, 1976, 90 Stat. 2004; Pub.L. 99-514, § 2, Oct. 22, 1986, 100 Stat. 2095; renumbered Title I, Pub.L. 99-519, § 3(c)(1), Oct. 22, 1986, 100 Stat. 2989; amended Pub.L. 100-418, Title I, § 1214(e)(1), Aug. 23, 1988, 102 Stat. 1156.)

[FN1] So in original. Probably should be capitalized.

HISTORICAL AND STATUTORY NOTES

Revision Notes and Legislative Reports

1976 Acts. Senate Report No. 94-698 and House Conference Report No. 94-1679, see 1976 U.S. Code Cong. and Adm. News, p. 4491.

1986 Acts. House Conference Report No. 99-841 and Statement by President, see 1986 U.S. Code Cong. and Adm. News, p. 4075.

House Report No. 99-763, see 1986 U.S. Code Cong. and Adm. News, p. 5004.

1988 Acts. House Conference Report No. 100-576, see 1988 U.S. Code Cong. and Adm. News, p. 1547.

References in Text

The Federal Insecticide, Fungicide, and Rodenticide Act, referred to in par. (2)(B)(ii), is Act June 25, 1947, c. 125, as amended generally by Pub.L. 92-516, Oct. 21, 1972, 86 Stat. 973, which is classified generally to subchapter II (§ 136 et seq.) of chapter 6 of Title 7, Agriculture. For complete classification of this Act to the Code, see Short Title note set out under section 136 of Title 7 and Tables.

The Atomic Energy Act of 1954, referred to in par. (2)(B)(iv), is Act Aug. 30, 1954, c. 1073, 68 Stat. 919, as amended, which is classified generally to chapter 23 (§ 2011 et seq.) of Title 42, The Public Health and Welfare. For complete classification of this Act to the Code, see Short Title note set out under section 2011 of Title 42 and Tables.

The Harmonized Tariff Schedule of the United States, referred to in par. (7), is not set out in the Code. See Publication of Harmonized Tariff Schedule note set out under section 1202 of Title 19, Customs Duties.

Effective:[See Text Amendments]

United States Code Annotated Currentness
Title 15. Commerce and Trade
Chapter 53. Toxic Substances Control (Refs & Annos)
Subchapter I. Control of Toxic Substances (Refs & Annos)
§ 2603. Testing of chemical substances and mixtures

(a) Testing requirements

If the Administrator finds that--

(1)(A)(i) the manufacture, distribution in commerce, processing, use, or disposal of a chemical substance or mixture, or that any combination of such activities, may present an unreasonable risk of injury to health or the environment,

(ii) there are insufficient data and experience upon which the effects of such manufacture, distribution in commerce, processing, use, or disposal of such substance or mixture or of any combination of such activities on health or the environment can reasonably be determined or predicted, and

(iii) testing of such substance or mixture with respect to such effects is necessary to develop such data; or

(B)(i) a chemical substance or mixture is or will be produced in substantial quantities, and (I) it enters or may reasonably be anticipated to enter the environment in substantial quantities or (II) there is or may be significant or substantial human exposure to such substance or mixture,

(ii) there are insufficient data and experience upon which the effects of the manufacture, distribution in commerce, processing, use, or disposal of such substance or mixture or of any combination of such activities on health or the environment can reasonably be determined or predicted, and

(iii) testing of such substance or mixture with respect to such effects is necessary to develop such data; and

(2) in the case of a mixture, the effects which the mixture's manufacture, distribution in commerce, processing, use, or disposal or any combination of such activities may have on health or the environment may not be reasonably and more efficiently determined or predicted by testing the chemical substances which comprise the mixture;

the Administrator shall by rule require that testing be conducted on such substance or mixture to develop data with respect to the health and environmental effects for which there is an insufficiency of data and experience and which are relevant to a determination that the manufacture, distribution in commerce, processing, use, or disposal of such substance or mixture, or that any combination of such activities, does or does not present an unreasonable risk of injury to health or the environment.

(b) Testing requirement rule

(1) A rule under subsection (a) of this section shall include--

(A) identification of the chemical substance or mixture for which testing is required under the rule,

(B) standards for the development of test data for such substance or mixture, and

(C) with respect to chemical substances which are not new chemical substances and to mixtures, a specification of the period (which period may not be of unreasonable duration) within which the persons required to conduct the testing shall submit to the Administrator data developed in accordance with the standards referred to in subparagraph (B).

In determining the standards and period to be included, pursuant to subparagraphs (B) and (C), in a rule under subsection (a) of this section, the Administrator's considerations shall include the relative costs of the various test protocols and methodologies which may be required under the rule and the reasonably foreseeable availability of the facilities and personnel needed to perform the testing required under the rule. Any such rule may require the submission to the Administrator of preliminary data during the period prescribed under subparagraph (C).

(2)(A) The health and environmental effects for which standards for the development of test data may be prescribed include carcinogenesis, mutagenesis, teratogenesis, behavioral disorders, cumulative or synergistic effects, and any other effect which may present an unreasonable risk of injury to health or the environment. The characteristics of chemical substances and mixtures for which such standards may be prescribed include persistence, acute toxicity, subacute toxicity, chronic toxicity, and any other characteristic which may present such a risk. The methodologies that may be prescribed in such standards include epidemiologic studies, serial or hierarchical tests, in vitro tests, and whole animal tests, except that before prescribing epidemiologic studies of employees, the Administrator shall consult with the Director of the National Institute for Occupational Safety and Health.

(B) From time to time, but not less than once each 12 months, the Administrator shall review the adequacy of the standards for development of data prescribed in rules under subsection (a) of this section and shall, if necessary, institute proceedings to make appropriate revisions of such standards.

(3)(A) A rule under subsection (a) of this section respecting a chemical substance or mixture shall require the persons described in subparagraph (B) to conduct tests and submit data to the Administrator on such substance or mixture, except that the Administrator may permit two or more of such persons to designate one such person or a qualified third party to conduct such tests and submit such data on behalf of the persons making the designation.

(B) The following persons shall be required to conduct tests and submit data on a chemical substance or mixture subject to a rule under subsection (a) of this section:

(i) Each person who manufactures or intends to manufacture such substance or mixture if the Administrator makes a finding described in subsection (a)(1)(A)(ii) or (a)(1)(B)(ii) of this section with respect to the manufacture of such substance or mixture.

(ii) Each person who processes or intends to process such substance or mixture if the Administrator makes a finding described in subsection (a)(1)(A)(ii) or (a)(1)(B)(ii) of this section with respect to the processing of such substance or mixture.

(iii) Each person who manufactures or processes or intends to manufacture or process such substance or mixture if the Administrator makes a finding described in subsection (a)(1)(A)(ii) or (a)(1)(B)(ii) of this section with respect to the distribution in commerce, use, or disposal of such substance or mixture.

(4) Any rule under subsection (a) of this section requiring the testing of and submission of data for a particular chemical substance or mixture shall expire at the end of the reimbursement period (as defined in subsection (c)(3)(B) of this section) which is applicable to test data for such substance or mixture unless the Administrator repeals the rule before such date; and a rule under subsection (a) of this section requiring the testing of and submission of data for a category of chemical substances or mixtures shall expire with respect to a chemical substance or mixture included in the category at the end of the reimbursement period (as so defined) which is applicable to test data for such substance or mixture unless the Administrator before such date repeals the application of the rule to such substance or mixture or repeals the rule.

(5) Rules issued under subsection (a) of this section (and any substantive amendment thereto or repeal thereof) shall be promulgated pursuant to section 553 of Title 5 except that (A) the Administrator shall give interested persons an opportunity for the oral presentation of data, views, or arguments, in addition to an opportunity to make written submissions; (B) a transcript shall be made of any oral presentation; and (C) the Administrator shall make and publish with the rule the findings described in paragraph (1)(A) or (1)(B) of subsection (a) of this section and, in the case of a rule respecting a mixture, the finding described in paragraph (2) of such subsection.

(c) Exemption

(1) Any person required by a rule under subsection (a) of this section to conduct tests and submit data on a

chemical substance or mixture may apply to the Administrator (in such form and manner as the Administrator shall prescribe) for an exemption from such requirement.

(2) If, upon receipt of an application under paragraph (1), the Administrator determines that--

(A) the chemical substance or mixture with respect to which such application was submitted is equivalent to a chemical substance or mixture for which data has been submitted to the Administrator in accordance with a rule under subsection (a) of this section or for which data is being developed pursuant to such a rule, and

(B) submission of data by the applicant on such substance or mixture would be duplicative of data which has been submitted to the Administrator in accordance with such rule or which is being developed pursuant to such rule,

the Administrator shall exempt, in accordance with paragraph (3) or (4), the applicant from conducting tests and submitting data on such substance or mixture under the rule with respect to which such application was submitted.

(3)(A) If the exemption under paragraph (2) of any person from the requirement to conduct tests and submit test data on a chemical substance or mixture is granted on the basis of the existence of previously submitted test data and if such exemption is granted during the reimbursement period for such test data (as prescribed by subparagraph (B)), then (unless such person and the persons referred to in clauses (i) and (ii) agree on the amount and method of reimbursement) the Administrator shall order the person granted the exemption to provide fair and equitable reimbursement (in an amount determined under rules of the Administrator)--

(i) to the person who previously submitted such test data, for a portion of the costs incurred by such person in complying with the requirement to submit such data, and

(ii) to any other person who has been required under this subparagraph to contribute with respect to such costs, for a portion of the amount such person was required to contribute.

In promulgating rules for the determination of fair and equitable reimbursement to the persons described in clauses (i) and (ii) for costs incurred with respect to a chemical substance or mixture, the Administrator shall, after consultation with the Attorney General and the Federal Trade Commission, consider all relevant factors, including the effect on the competitive position of the person required to provide reimbursement in relation to the person to be reimbursed and the share of the market for such substance or mixture of the person required to provide reimbursement in relation to the share of such market of the persons to be reimbursed. An order under this subparagraph shall, for purposes of judicial review, be considered final agency action.

(B) For purposes of subparagraph (A), the reimbursement period for any test data for a chemical substance or mixture is a period--

(i) beginning on the date such data is submitted in accordance with a rule promulgated under subsection (a) of this section, and

(ii) ending--

(I) five years after the date referred to in clause (i), or

(II) at the expiration of a period which begins on the date referred to in clause (i) and which is equal to the period which the Administrator determines was necessary to develop such data,

whichever is later.

(4)(A) If the exemption under paragraph (2) of any person from the requirement to conduct tests and submit test data on a chemical substance or mixture is granted on the basis of the fact that test data is being developed by one or more persons pursuant to a rule promulgated under subsection (a) of this section, then (unless such person and the persons referred to in clauses (i) and (ii) agree on the amount and method of reimbursement) the Administrator shall order the person granted the exemption to provide fair and equitable reimbursement (in an amount determined under rules of the Administrator)--

(i) to each such person who is developing such test data, for a portion of the costs incurred by each such person in complying with such rule, and

(ii) to any other person who has been required under this subparagraph to contribute with respect to the costs of complying with such rule, for a portion of the amount such person was required to contribute.

In promulgating rules for the determination of fair and equitable reimbursement to the persons described in clauses (i) and (ii) for costs incurred with respect to a chemical substance or mixture, the Administrator shall, after consultation with the Attorney General and the Federal Trade Commission, consider the factors described in the second sentence of paragraph (3)(A). An order under this subparagraph shall, for purposes of judicial review, be considered final agency action.

(B) If any exemption is granted under paragraph (2) on the basis of the fact that one or more persons are developing test data pursuant to a rule promulgated under subsection (a) of this section and if after such exemption is granted the Administrator determines that no such person has complied with such rule, the Administrator shall (i) after providing written notice to the person who holds such exemption and an opportunity for a hearing, by order terminate such exemption, and (ii) notify in writing such person of the requirements of the rule with respect to which such exemption was granted.

(d) Notice

Upon the receipt of any test data pursuant to a rule under subsection (a) of this section, the Administrator shall publish a notice of the receipt of such data in the Federal Register within 15 days of its receipt. Subject to section 2613 of this title, each such notice shall (1) identify the chemical substance or mixture for which data have been received; (2) list the uses or intended uses of such substance or mixture and the information required by the applicable standards for the development of test data; and (3) describe the nature of the test data developed. Except as otherwise provided in section 2613 of this title, such data shall be made available by the Administrator for examination by any person.

(e) Priority list

(1)(A) There is established a committee to make recommendations to the Administrator respecting the chemical substances and mixtures to which the Administrator should give priority consideration for the promulgation of a rule under subsection (a) of this section. In making such a recommendation with respect to any chemical substance or mixture, the committee shall consider all relevant factors, including--

(i) the quantities in which the substance or mixture is or will be manufactured,

(ii) the quantities in which the substance or mixture enters or will enter the environment,

(iii) the number of individuals who are or will be exposed to the substance or mixture in their places of employment and the duration of such exposure,

(iv) the extent to which human beings are or will be exposed to the substance or mixture,

(v) the extent to which the substance or mixture is closely related to a chemical substance or mixture which is known to present an unreasonable risk of injury to health or the environment,

(vi) the existence of data concerning the effects of the substance or mixture on health or the environment,

(vii) the extent to which testing of the substance or mixture may result in the development of data upon which the effects of the substance or mixture on health or the environment can reasonably be determined or predicted, and

(viii) the reasonably foreseeable availability of facilities and personnel for performing testing on the substance or mixture.

The recommendations of the committee shall be in the form of a list of chemical substances and mixtures which shall be set forth, either by individual substance or mixture or by groups of substances or mixtures, in the order in which the committee determines the Administrator should take action under subsection (a) of this section with

respect to the substances and mixtures. In establishing such list, the committee shall give priority attention to those chemical substances and mixtures which are known to cause or contribute to or which are suspected of causing or contributing to cancer, gene mutations, or birth defects. The committee shall designate chemical substances and mixtures on the list with respect to which the committee determines the Administrator should, within 12 months of the date on which such substances and mixtures are first designated, initiate a proceeding under subsection (a) of this section. The total number of chemical substances and mixtures on the list which are designated under the preceding sentence may not, at any time, exceed 50.

(B) As soon as practicable but not later than nine months after January 1, 1977, the committee shall publish in the Federal Register and transmit to the Administrator the list and designations required by subparagraph (A) together with the reasons for the committee's inclusion of each chemical substance or mixture on the list. At least every six months after the date of the transmission to the Administrator of the list pursuant to the preceeding [FN1] sentence, the committee shall make such revisions in the list as it determines to be necessary and shall transmit them to the Administrator together with the committee's reasons for the revisions. Upon receipt of any such revision, the Administrator shall publish in the Federal Register the list with such revision, the reasons for such revision, and the designations made under subparagraph (A). The Administrator shall provide reasonable opportunity to any interested person to file with the Administrator written comments on the committee's list, any revision of such list by the committee, and designations made by the committee, and shall make such comments available to the public. Within the 12-month period beginning on the date of the first inclusion on the list of a chemical substance or mixture designated by the committee under subparagraph (A) the Administrator shall with respect to such chemical substance or mixture either initiate a rulemaking proceeding under subsection (a) of this section or if such a proceeding is not initiated within such period, publish in the Federal Register the Administrator's reason for not initiating such a proceeding.

(2)(A) The committee established by paragraph (1)(A) shall consist of eight members as follows:

(i) One member appointed by the Administrator from the Environmental Protection Agency.

(ii) One member appointed by the Secretary of Labor from officers or employees of the Department of Labor engaged in the Secretary's activities under the Occupational Safety and Health Act of 1970 [29 U.S.C.A. § 651 et seq.].

(iii) One member appointed by the Chairman of the Council on Environmental Quality from the Council or its officers or employees.

(iv) One member appointed by the Director of the National Institute for Occupational Safety and Health from officers or employees of the Institute.

(v) One member appointed by the Director of the National Institute of Environmental Health Sciences from officers or employees of the Institute.

(vi) One member appointed by the Director of the National Cancer Institute from officers or employees of the Institute.

(vii) One member appointed by the Director of the National Science Foundation from officers or employees of the Foundation.

(viii) One member appointed by the Secretary of Commerce from officers or employees of the Department of Commerce.

(B)(i) An appointed member may designate an individual to serve on the committee on the member's behalf. Such a designation may be made only with the approval of the applicable appointing authority and only if the individual is from the entity from which the member was appointed.

(ii) No individual may serve as a member of the committee for more than four years in the aggregate. If any member of the committee leaves the entity from which the member was appointed, such member may not continue as a member of the committee, and the member's position shall be considered to be vacant. A vacancy in the committee shall be filled in the same manner in which the original appointment was made.

(iii) Initial appointments to the committee shall be made not later than the 60th day after January 1, 1977. Not later than the 90th day after such date the members of the committee shall hold a meeting for the selection of a chairperson from among their number.

(C)(i) No member of the committee, or designee of such member, shall accept employment or compensation from any person subject to any requirement of this chapter or of any rule promulgated or order issued thereunder, for a period of at least 12 months after termination of service on the committee.

(ii) No person, while serving as a member of the committee, or designee of such member, may own any stocks or bonds, or have any pecuniary interest, of substantial value in any person engaged in the manufacture, processing, or distribution in commerce of any chemical substance or mixture subject to any requirement of this chapter or of any rule promulgated or order issued thereunder.

(iii) The Administrator, acting through attorneys of the Environmental Protection Agency, or the Attorney General may bring an action in the appropriate district court of the United States to restrain any violation of this subparagraph.

(D) The Administrator shall provide the committee such administrative support services as may be necessary to enable the committee to carry out its function under this subsection.

(f) Required actions

Upon the receipt of--

(1) any test data required to be submitted under this chapter, or

(2) any other information available to the Administrator,

which indicates to the Administrator that there may be a reasonable basis to conclude that a chemical substance or mixture presents or will present a significant risk of serious or widespread harm to human beings from cancer, gene mutations, or birth defects, the Administrator shall, within the 180-day period beginning on the date of the receipt of such data or information, initiate appropriate action under section 2604, 2605, or 2606 of this title to prevent or reduce to a sufficient extent such risk or publish in the Federal Register a finding that such risk is not unreasonable. For good cause shown the Administrator may extend such period for an additional period of not more than 90 days. The Administrator shall publish in the Federal Register notice of any such extension and the reasons therefor. A finding by the Administrator that a risk is not unreasonable shall be considered agency action for purposes of judicial review under chapter 7 of Title 5. This subsection shall not take effect until two years after January 1, 1977.

(g) Petition for standards for the development of test data

A person intending to manufacture or process a chemical substance for which notice is required under section 2604(a) of this title and who is not required under a rule under subsection (a) of this section to conduct tests and submit data on such substance may petition the Administrator to prescribe standards for the development of test data for such substance. The Administrator shall by order either grant or deny any such petition within 60 days of its receipt. If the petition is granted, the Administrator shall prescribe such standards for such substance within 75 days of the date the petition is granted. If the petition is denied, the Administrator shall publish, subject to section 2613 of this title, in the Federal Register the reasons for such denial.

CREDIT(S)

(Pub.L. 94-469, Title I, § 4, Oct. 11, 1976, 90 Stat. 2006; renumbered Title I, Pub.L. 99-519, § 3(c)(1), Oct. 22, 1986, 100 Stat. 2989.)

[FN1] So in original. Probably should be "preceding".

HISTORICAL AND STATUTORY NOTES

Revision Notes and Legislative Reports

1976 Acts. Senate Report No. 94-698 and House Conference Report No. 94-1679, see 1976 U.S. Code Cong. and Adm. News, p. 4491.

Effective: September 30, 2012

United States Code Annotated Currentness
Title 15. Commerce and Trade
Chapter 53. Toxic Substances Control (Refs & Annos)
Subchapter I. Control of Toxic Substances (Refs & Annos)
→→ § 2605. Regulation of hazardous chemical substances and mixtures

(a) Scope of regulation

If the Administrator finds that there is a reasonable basis to conclude that the manufacture, processing, distribution in commerce, use, or disposal of a chemical substance or mixture, or that any combination of such activities, presents or will present an unreasonable risk of injury to health or the environment, the Administrator shall by rule apply one or more of the following requirements to such substance or mixture to the extent necessary to protect adequately against such risk using the least burdensome requirements:

(1) A requirement (A) prohibiting the manufacturing, processing, or distribution in commerce of such substance or mixture, or (B) limiting the amount of such substance or mixture which may be manufactured, processed, or distributed in commerce.

(2) A requirement--

(A) prohibiting the manufacture, processing, or distribution in commerce of such substance or mixture for (i) a particular use or (ii) a particular use in a concentration in excess of a level specified by the Administrator in the rule imposing the requirement, or

(B) limiting the amount of such substance or mixture which may be manufactured, processed, or distributed in commerce for (i) a particular use or (ii) a particular use in a concentration in excess of a level specified by the Administrator in the rule imposing the requirement.

(3) A requirement that such substance or mixture or any article containing such substance or mixture be marked with or accompanied by clear and adequate warnings and instructions with respect to its use, distribution in commerce, or disposal or with respect to any combination of such activities. The form and content of such warnings and instructions shall be prescribed by the Administrator.

(4) A requirement that manufacturers and processors of such substance or mixture make and retain records of the processes used to manufacture or process such substance or mixture and monitor or conduct tests which

are reasonable and necessary to assure compliance with the requirements of any rule applicable under this subsection.

(5) A requirement prohibiting or otherwise regulating any manner or method of commercial use of such substance or mixture.

(6)(A) A requirement prohibiting or otherwise regulating any manner or method of disposal of such substance or mixture, or of any article containing such substance or mixture, by its manufacturer or processor or by any other person who uses, or disposes of, it for commercial purposes.

(B) A requirement under subparagraph (A) may not require any person to take any action which would be in violation of any law or requirement of, or in effect for, a State or political subdivision, and shall require each person subject to it to notify each State and political subdivision in which a required disposal may occur of such disposal.

(7) A requirement directing manufacturers or processors of such substance or mixture (A) to give notice of such unreasonable risk of injury to distributors in commerce of such substance or mixture and, to the extent reasonably ascertainable, to other persons in possession of such substance or mixture or exposed to such substance or mixture, (B) to give public notice of such risk of injury, and (C) to replace or repurchase such substance or mixture as elected by the person to which the requirement is directed.

Any requirement (or combination of requirements) imposed under this subsection may be limited in application to specified geographic areas.

(b) Quality control

If the Administrator has a reasonable basis to conclude that a particular manufacturer or processor is manufacturing or processing a chemical substance or mixture in a manner which unintentionally causes the chemical substance or mixture to present or which will cause it to present an unreasonable risk of injury to health or the environment--

(1) the Administrator may by order require such manufacturer or processor to submit a description of the relevant quality control procedures followed in the manufacturing or processing of such chemical substance or mixture; and

(2) if the Administrator determines--

(A) that such quality control procedures are inadequate to prevent the chemical substance or mixture from presenting such risk of injury, the Administrator may order the manufacturer or processor to revise such quality control procedures to the extent necessary to remedy such inadequacy; or

(B) that the use of such quality control procedures has resulted in the distribution in commerce of chemical substances or mixtures which present an unreasonable risk of injury to health or the environment, the Administrator may order the manufacturer or processor to (i) give notice of such risk to processors or distributors in commerce of any such substance or mixture, or to both, and, to the extent reasonably ascertainable, to any other person in possession of or exposed to any such substance, (ii) to give public notice of such risk, and (iii) to provide such replacement or repurchase of any such substance or mixture as is necessary to adequately protect health or the environment.

A determination under subparagraph (A) or (B) of paragraph (2) shall be made on the record after opportunity for hearing in accordance with section 554 of Title 5. Any manufacturer or processor subject to a requirement to replace or repurchase a chemical substance or mixture may elect either to replace or repurchase the substance or mixture and shall take either such action in the manner prescribed by the Administrator.

(c) Promulgation of subsection (a) rules

(1) In promulgating any rule under subsection (a) of this section with respect to a chemical substance or mixture, the Administrator shall consider and publish a statement with respect to--

(A) the effects of such substance or mixture on health and the magnitude of the exposure of human beings to such substance or mixture,

(B) the effects of such substance or mixture on the environment and the magnitude of the exposure of the environment to such substance or mixture,

(C) the benefits of such substance or mixture 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.

If the Administrator determines that a risk of injury to health or the environment could be eliminated or reduced to a sufficient extent by actions taken under another Federal law (or laws) administered in whole or in part by the Administrator, the Administrator may not promulgate a rule under subsection (a) of this section to protect against such risk of injury unless the Administrator finds, in the Administrator's discretion, that it is in the public interest to protect against such risk under this chapter. In making such a finding the Administrator shall consider (i) all relevant aspects of the risk, as determined by the Administrator in the Administrator's discretion, (ii) a comparison of the estimated costs of complying with actions taken under this chapter and under such law (or laws), and (iii) the relative efficiency of actions under this chapter and under such law (or laws) to protect against such risk of injury.

(2) When prescribing a rule under subsection (a) the Administrator shall proceed in accordance with section 553 of Title 5 (without regard to any reference in such section to sections 556 and 557 of such title), and shall also (A) publish a notice of proposed rulemaking stating with particularity the reason for the proposed rule; (B) allow interested persons to submit written data, views, and arguments, and make all such submissions publicly available; (C) provide an opportunity for an informal hearing in accordance with paragraph (3); (D) promulgate, if appropriate, a final rule based on the matter in the rulemaking record (as defined in section 2618(a) of this title), and (E) make and publish with the rule the finding described in subsection (a) of this section.

(3) Informal hearings required by paragraph (2)(C) shall be conducted by the Administrator in accordance with the following requirements:

(A) Subject to subparagraph (B), an interested person is entitled--

(i) to present such person's position orally or by documentary submissions (or both), and

(ii) if the Administrator determines that there are disputed issues of material fact it is necessary to resolve, to present such rebuttal submissions and to conduct (or have conducted under subparagraph (B)(ii)) such cross-examination of persons as the Administrator determines (I) to be appropriate, and (II) to be required for a full and true disclosure with respect to such issues.

(B) The Administrator may prescribe such rules and make such rulings concerning procedures in such hearings to avoid unnecessary costs or delay. Such rules or rulings may include (i) the imposition of reasonable time limits on each interested person's oral presentations, and (ii) requirements that any cross-examination to which a person may be entitled under subparagraph (A) be conducted by the Administrator on behalf of that person in such manner as the Administrator determines (I) to be appropriate, and (II) to be required for a full and true disclosure with respect to disputed issues of material fact.

(C)(i) Except as provided in clause (ii), if a group of persons each of whom under subparagraphs (A) and (B) would be entitled to conduct (or have conducted) cross-examination and who are determined by the Administrator to have the same or similar interests in the proceeding cannot agree upon a single representative of such interests for purposes of cross-examination, the Administrator may make rules and rulings (I) limiting the representation of such interest for such purposes, and (II) governing the manner in which such cross-examination shall be limited.

(ii) When any person who is a member of a group with respect to which the Administrator has made a determination under clause (i) is unable to agree upon group representation with the other members of the group, then such person shall not be denied under the authority of clause (i) the opportunity to conduct (or have conducted) cross-examination as to issues affecting the person's particular interests if (I) the person satisfies the Administrator that the person has made a reasonable and good faith effort to reach agreement upon group representation with the other members of the group and (II) the Administrator determines that there are substantial and relevant issues which are not adequately presented by the group representative.

(D) A verbatim transcript shall be taken of any oral presentation made, and cross-examination conducted in any informal hearing under this subsection. Such transcript shall be available to the public.

(4)(A) The Administrator may, pursuant to rules prescribed by the Administrator, provide compensation for reasonable attorneys' fees, expert witness fees, and other costs of participating in a rulemaking proceeding for the promulgation of a rule under subsection (a) of this section to any person--

(i) who represents an interest which would substantially contribute to a fair determination of the issues to be resolved in the proceeding, and

(ii) if--

(I) the economic interest of such person is small in comparison to the costs of effective participation in the proceeding by such person, or

(II) such person demonstrates to the satisfaction of the Administrator that such person does not have sufficient resources adequately to participate in the proceeding without compensation under this subparagraph.

In determining for purposes of clause (i) if an interest will substantially contribute to a fair determination of the issues to be resolved in a proceeding, the Administrator shall take into account the number and complexity of such issues and the extent to which representation of such interest will contribute to widespread public participation in the proceeding and representation of a fair balance of interests for the resolution of such issues.

(B) In determining whether compensation should be provided to a person under subparagraph (A) and the amount of such compensation, the Administrator shall take into account the financial burden which will be incurred by such person in participating in the rulemaking proceeding. The Administrator shall take such action as may be necessary to ensure that the aggregate amount of compensation paid under this paragraph in any fiscal year to all persons who, in rulemaking proceedings in which they receive compensation, are persons who either--

(i) would be regulated by the proposed rule, or

(ii) represent persons who would be so regulated,

may not exceed 25 per centum of the aggregate amount paid as compensation under this paragraph to all persons in such fiscal year.

(5) Paragraph (1), (2), (3), and (4) of this subsection apply to the promulgation of a rule repealing, or making a

substantive amendment to, a rule promulgated under subsection (a) of this section.

(d) Effective date

(1) The Administrator shall specify in any rule under subsection (a) of this section the date on which it shall take effect, which date shall be as soon as feasible.

(2)(A) The Administrator may declare a proposed rule under subsection (a) of this section to be effective upon its publication in the Federal Register and until the effective date of final action taken, in accordance with subparagraph (B), respecting such rule if--

(i) the Administrator determines that--

(I) the manufacture, processing, distribution in commerce, use, or disposal of the chemical substance or mixture subject to such proposed rule or any combination of such activities is likely to result in an unreasonable risk of serious or widespread injury to health or the environment before such effective date; and

(II) making such proposed rule so effective is necessary to protect the public interest; and

(ii) in the case of a proposed rule to prohibit the manufacture, processing, or distribution of a chemical substance or mixture because of the risk determined under clause (i)(I), a court has in an action under section 2606 of this title granted relief with respect to such risk associated with such substance or mixture.

Such a proposed rule which is made so effective shall not, for purposes of judicial review, be considered final agency action.

(B) If the Administrator makes a proposed rule effective upon its publication in the Federal Register, the Administrator shall, as expeditiously as possible, give interested persons prompt notice of such action, provide reasonable opportunity, in accordance with paragraphs (2) and (3) of subsection (c) of this section, for a hearing on such rule, and either promulgate such rule (as proposed or with modifications) or revoke it; and if such a hearing is requested, the Administrator shall commence the hearing within five days from the date such request is made unless the Administrator and the person making the request agree upon a later date for the hearing to begin, and after the hearing is concluded the Administrator shall, within ten days of the conclusion of the hearing, either promulgate such rule (as proposed or with modifications) or revoke it.

(e) Polychlorinated biphenyls

(1) Within six months after January 1, 1977, the Administrator shall promulgate rules to--

(A) prescribe methods for the disposal of polychlorinated biphenyls, and

(B) require polychlorinated biphenyls to be marked with clear and adequate warnings, and instructions with respect to their processing, distribution in commerce, use, or disposal or with respect to any combination of such activities.

Requirements prescribed by rules under this paragraph shall be consistent with the requirements of paragraphs (2) and (3).

(2)(A) Except as provided under subparagraph (B), effective one year after January 1, 1977, no person may manufacture, process, or distribute in commerce or use any polychlorinated biphenyl in any manner other than in a totally enclosed manner.

(B) The Administrator may by rule authorize the manufacture, processing, distribution in commerce or use (or any combination of such activities) of any polychlorinated biphenyl in a manner other than in a totally enclosed manner if the Administrator finds that such manufacture, processing, distribution in commerce, or use (or combination of such activities) will not present an unreasonable risk of injury to health or the environment.

(C) For the purposes of this paragraph, the term "totally enclosed manner" means any manner which will ensure that any exposure of human beings or the environment to a polychlorinated biphenyl will be insignificant as determined by the Administrator by rule.

(3)(A) Except as provided in subparagraphs (B) and (C)--

(i) no person may manufacture any polychlorinated biphenyl after two years after January 1, 1977, and

(ii) no person may process or distribute in commerce any polychlorinated biphenyl after two and one-half years after such date.

(B) Any person may petition the Administrator for an exemption from the requirements of subparagraph (A), and the Administrator may grant by rule such an exemption if the Administrator finds that--

(i) an unreasonable risk of injury to health or environment would not result, and

(ii) good faith efforts have been made to develop a chemical substance which does not present an unreasonable risk of injury to health or the environment and which may be substituted for such polychlorinated biphenyl.

An exemption granted under this subparagraph shall be subject to such terms and conditions as the

Administrator may prescribe and shall be in effect for such period (but not more than one year from the date it is granted) as the Administrator may prescribe.

(C) Subparagraph (A) shall not apply to the distribution in commerce of any polychlorinated biphenyl if such polychlorinated biphenyl was sold for purposes other than resale before two and one half years after October 11, 1976.

(D) Omitted

(4) Any rule under paragraph (1), (2)(B), or (3)(B) shall be promulgated in accordance with paragraphs (2), (3), and (4) of subsection (c) of this section.

(5) This subsection does not limit the authority of the Administrator, under any other provision of this chapter or any other Federal law, to take action respecting any polychlorinated biphenyl.

(f) Mercury

(1) Prohibition on sale, distribution, or transfer of elemental mercury by Federal agencies

Except as provided in paragraph (2), effective beginning on October 14, 2008, no Federal agency shall convey, sell, or distribute to any other Federal agency, any State or local government agency, or any private individual or entity any elemental mercury under the control or jurisdiction of the Federal agency.

(2) Exceptions

Paragraph (1) shall not apply to--

(A) a transfer between Federal agencies of elemental mercury for the sole purpose of facilitating storage of mercury to carry out this chapter; or

(B) a conveyance, sale, distribution, or transfer of coal.

(3) Leases of Federal coal

Nothing in this subsection prohibits the leasing of coal.

CREDIT(S)

Effective:[See Text Amendments]

United States Code Annotated Currentness
Title 15. Commerce and Trade
Chapter 53. Toxic Substances Control (Refs & Annos)
Subchapter I. Control of Toxic Substances (Refs & Annos)
§ 2620. Citizens' petitions

(a) In general

Any person may petition the Administrator to initiate a proceeding for the issuance, amendment, or repeal of a rule under section 2603, 2605, or 2607 of this title or an order under section 2604(e) or 2605(b)(2) of this title.

(b) Procedures

(1) Such petition shall be filed in the principal office of the Administrator and shall set forth the facts which it is claimed establish that it is necessary to issue, amend, or repeal a rule under section 2603, 2605, or 2607 of this title or an order under section 2604(e), 2605(b)(1)(A), or 2605(b)(1)(B) of this title.

(2) The Administrator may hold a public hearing or may conduct such investigation or proceeding as the Administrator deems appropriate in order to determine whether or not such petition should be granted.

(3) Within 90 days after filing of a petition described in paragraph (1), the Administrator shall either grant or deny the petition. If the Administrator grants such petition, the Administrator shall promptly commence an appropriate proceeding in accordance with section 2603, 2604, 2605, or 2607 of this title. If the Administrator denies such petition, the Administrator shall publish in the Federal Register the Administrator's reasons for such denial.

(4)(A) If the Administrator denies a petition filed under this section (or if the Administrator fails to grant or deny such petition within the 90-day period) the petitioner may commence a civil action in a district court of the United States to compel the Administrator to initiate a rulemaking proceeding as requested in the petition. Any such action shall be filed within 60 days after the Administrator's denial of the petition or, if the Administrator fails to grant or deny the petition within 90 days after filing the petition, within 60 days after the expiration of the 90-day period.

(B) In an action under subparagraph (A) respecting a petition to initiate a proceeding to issue a rule under section 2603, 2605, or 2607 of this title or an order under section 2604(e) or 2605(b)(2) of this title, the

petitioner shall be provided an opportunity to have such petition considered by the court in a de novo proceeding. If the petitioner demonstrates to the satisfaction of the court by a preponderance of the evidence that--

(i) in the case of a petition to initiate a proceeding for the issuance of a rule under section 2603 of this title or an order under section 2604(e) of this title--

(I) information available to the Administrator is insufficient to permit a reasoned evaluation of the health and environmental effects of the chemical substance to be subject to such rule or order; and

(II) in the absence of such information, the substance may present an unreasonable risk to health or the environment, or the substance is or will be produced in substantial quantities and it enters or may reasonably be anticipated to enter the environment in substantial quantities or there is or may be significant or substantial human exposure to it; or

(ii) in the case of a petition to initiate a proceeding for the issuance of a rule under section 2605 or 2607 of this title or an order under section 2605(b)(2) of this title, there is a reasonable basis to conclude that the issuance of such a rule or order is necessary to protect health or the environment against an unreasonable risk of injury to health or the environment. [FN1]

the court shall order the Administrator to initiate the action requested by the petitioner. If the court finds that the extent of the risk to health or the environment alleged by the petitioner is less than the extent of risks to health or the environment with respect to which the Administrator is taking action under this chapter and there are insufficient resources available to the Administrator to take the action requested by the petitioner, the court may permit the Administrator to defer initiating the action requested by the petitioner until such time as the court prescribes.

(C) The court in issuing any final order in any action brought pursuant to subparagraph (A) may award costs of suit and reasonable fees for attorneys and expert witnesses if the court determines that such an award is appropriate. Any court, in issuing its decision in an action brought to review such an order, may award costs of suit and reasonable fees for attorneys if the court determines that such an award is appropriate.

(5) The remedies under this section shall be in addition to, and not in lieu of, other remedies provided by law.

CREDIT(S)

(Pub.L. 94-469, Title I, § 21, Oct. 11, 1976, 90 Stat. 2042; renumbered Title I, Pub.L. 99-519, § 3(c)(1), Oct. 22, 1986, 100 Stat. 2989.)

[FN1] So in original. The period should probably be a semicolon.

I.R.C. § 4181

Effective:[See Text Amendments]

United States Code Annotated Currentness
Title 26. Internal Revenue Code (Refs & Annos)
Subtitle D. Miscellaneous Excise Taxes (Refs & Annos)
Chapter 32. Manufacturers Excise Taxes (Refs & Annos)
Subchapter D. Recreational Equipment
Part III. Firearms

§ 4181. Imposition of tax

There is hereby imposed upon the sale by the manufacturer, producer, or importer of the following articles a tax equivalent to the specified percent of the price for which so sold:

Articles taxable at 10 percent--

Pistols.

Revolvers.

Articles taxable at 11 percent--

Firearms (other than pistols and revolvers).

Shells, and cartridges.

CREDIT(S)

(Aug. 16, 1954, c. 736, 68A Stat. 490.)

HISTORICAL AND STATUTORY NOTES

Revision Notes and Legislative Reports

1954 Acts. House Report No. 1337, Senate Report No. 1622, and Conference Report No. 2543, see 1954 U.S.Code Cong. and Adm.News, pp. 4468, 5127, 5280, respectively.

CROSS REFERENCES

C

Effective: March 31, 2006

Code of Federal Regulations Currentness
Title 27. Alcohol, Tobacco Products and Firearms
Chapter I. Alcohol and Tobacco Tax and Trade Bureau, Department of the Treasury (Refs & Annos)
Subchapter C. Firearms
Part 53. Manufacturers Excise Taxes--Firearms and Ammunition (Refs & Annos)
Subpart B. Definitions
§ 53.11 Meaning of terms.

When used in this part and in forms prescribed under this part, where not otherwise distinctly expressed or manifestly incompatible with the intent thereof, terms shall have the meanings ascribed in this section. Words in the plural form shall include the singular, and vice versa, and words importing the masculine gender shall include the feminine. The terms "includes" and "including" do not exclude other things not enumerated which are in the same general class or are otherwise within the scope thereof.

Administrator. The Administrator, Alcohol and Tobacco Tax and Trade Bureau, Department of the Treasury, Washington, DC.

Appropriate TTB officer. An officer or employee of the Alcohol and Tobacco Tax and Trade Bureau (TTB) authorized to perform any functions relating to the administration or enforcement of this part by TTB Order 1135.53, Delegation of the Administrator's Authorities in 27 CFR Part 53, Manufacturers Excise Taxes--Firearms and Ammunition.

Calendar quarter. A period of 3 calendar months ending on March 31, June 30, September 30, or December 31.

Calendar year. The period which begins January 1 and ends on the following December 31.

Chapter 32. For purposes of this part chapter 32 means section 4181, chapter 32, of the Internal Revenue Code of 1986, as amended.

Code. Internal Revenue Code of 1986, as amended.

Electronic fund transfer (EFT). Any transfer of funds effected by a taxpayer's financial institution, either directly or through a correspondent banking relationship, via the Federal Reserve Communications System (FRCS) or Fedwire to the Treasury Account at the Federal Reserve Bank.

Exportation. The severance of an article from the mass of things belonging within the United States with the intention of uniting it with the mass of things belonging within some foreign country or within a possession of the United States.

Exporter. The person named as shipper or consignor in the export bill of lading.

Financial institution. A bank or other financial institution, whether or not a member of the Federal Reserve System, which has access to the Federal Reserve Communications Systems (FRCS) or Fedwire. The "FRCS" or "Fedwire" is a communications network that allows Federal Reserve System member financial institutions to effect a transfer of funds for their customers (or other financial institutions) to the Treasury Account at the Federal Reserve Bank.

Firearms. Any portable weapons, such as rifles, carbines, machine guns, shotguns, or fowling pieces, from which a shot, bullet, or other projectile may be discharged by an explosive.

Importer. Any person who brings a taxable article

into the United States from a source outside the United States, or who withdraws such an article from a customs bonded warehouse for sale or use in the United States. If the nominal importer of a taxable article is not its beneficial owner (for example, the nominal importer is a customs broker engaged by the beneficial owner), the beneficial owner is the "importer" of the article for purposes of chapter 32 of the Code and is liable for tax on his sale or use of the article in the United States. See section 4219 of the Code and 27 CFR 53.121 for the circumstances under which sales by persons other than the manufacturer or importer are subject to the manufacturers excise tax.

Knockdown condition. A taxable article that is unassembled but complete as to all component parts.

Manufacturer. Includes any person who produces a taxable article from scrap, salvage, or junk material, or from new or raw material, by processing, manipulating, or changing the form of an article or by combining or assembling two or more articles. The term also includes a "producer" and an "importer." Under certain circumstances, as where a person manufactures or produces a taxable article for another person who furnishes materials under an agreement whereby the person who furnished the materials retains title thereto and to the finished article, the person for whom the taxable article is manufactured or produced, and not the person who actually manufactures or produces it, will be considered the manufacturer.

A manufacturer who sells a taxable article in a knockdown condition is liable for the tax as a manufacturer. Whether the person who buys such component parts or accessories and assembles a taxable article from them will be liable for tax as a manufacturer of a taxable article will depend on the relative amount of labor, material, and overhead required to assemble the completed article and on whether the article is assembled for business or personal use.

Person. An individual, trust, estate, partnership, association, company, or corporation. When used in connection with penalties, seizures, and forfeitures, the term includes an officer or employee of a [FN1] partnership, who as an officer, employee or member, is under a duty to perform the act in respect of which the violation occurs.

[FN1] The official CFR appears to have inadvertently omitted text here. See 60 FR 33665.

Pistols. Small projectile firearms which have a short one-hand stock or butt at an angle to the line of bore and a short barrel or barrels, and which are designed, made, and intended to be aimed and fired from one hand. The term does not include gadget devices, guns altered or converted to resemble pistols, or small portable guns erroneously referred to as pistols, as, for example, Nazi belt buckle pistols, glove pistols, or one-hand stock guns firing fixed shotgun or fixed rifle ammunition.

Possession of the United States. Includes Guam, the Midway Islands, Palmyra, the Panama Canal Zone, the Commonwealth of Puerto Rico, American Samoa, the Virgin Islands, and Wake Island.

Purchaser. Includes a lessee where the lessor is also the manufacturer of the article.

Revolvers. Small projectile firearms of the pistol type, having a breech-loading chambered cylinder so arranged that the cocking of the hammer or movement of the trigger rotates it and brings the next cartridge in line with the barrel for firing.

Sale. An agreement whereby the seller transfers the property (that is, the title or the substantial incidents of ownership in goods) to the buyer for a consideration called the price, which may consist of money, services, or other things.

Secretary. The Secretary of the Treasury or his delegate.

Shells and cartridges. Include any article consisting

of a projectile, explosive, and container that is designed, assembled, and ready for use without further manufacture in firearms, pistols or revolvers. A person who reloads used shell or cartridge casings is a manufacturer of shells or cartridges within the meaning of section 4181 if such reloaded shells or cartridges are sold by the reloader. However, the reloader is not a manufacturer of shells or cartridges if, in return for a fee and expenses, he reloads casings of shells or cartridges submitted by a customer and returns the reloaded shells or cartridges with the identical casings provided by the customer to that customer. Under such circumstances, the customer would be the manufacturer of the shells or cartridges and may be liable for tax on the sale of articles. See section 4218 of the Code and § 53.112.

Taxable article. Any article taxable under section 4181 of the Code.

Treasury Account. The Department of Treasury's General Account at the Federal Reserve Bank of New York.

Vendor. Includes a lessor where the lessor is also the manufacturer of the article.

[T.D. ATF–312, 56 FR 31083, July 9, 1991; T.D. ATF–330, 57 FR 40325, Sept. 3, 1992; T.D. ATF–365, 60 FR 33670, June 28, 1995; T.D. ATF–404, 63 FR 52603, Oct. 1, 1998; T.D. ATF–447, 66 FR 19088, April 13, 2001; T.D. TTB–44, 71 FR 16957, April 4, 2006]

SOURCE: 56 FR 303, Jan. 3, 1991; T.D. ATF–365, 60 FR 33670, June 28, 1995; T.D. ATF–487, 68 FR 3747, Jan. 24, 2003; T.D. TTB–62, 72 FR 51711, Sept. 11, 2007, unless otherwise noted.

AUTHORITY: 26 U.S.C. 4181, 4182, 4216–4219, 4221–4223, 4225, 6001, 6011, 6020, 6021, 6061, 6071, 6081, 6091, 6101–6104, 6109, 6151, 6155, 6161, 6301–6303, 6311, 6402, 6404, 6416, 7502, 7805.

27 C. F. R. § 53.11, 27 CFR § 53.11

Current through January 23, 2014; 79 FR 3740

END OF DOCUMENT

C

Effective:[See Text Amendments]

Code of Federal Regulations Currentness
Title 27. Alcohol, Tobacco Products and Firearms
Chapter I. Alcohol and Tobacco Tax and Trade Bureau, Department of the Treasury (Refs & Annos)
Subchapter C. Firearms
Part 53. Manufacturers Excise Taxes--Firearms and Ammunition (Refs & Annos)
Subpart G. Tax Rates
§ 53.61 Imposition and rates of tax.

(a) Imposition of tax. Section 4181 of the Code imposes a tax on the sale of the following articles by the manufacturer, producer, or importer thereof:

(1) Pistols;

(2) Revolvers;

(3) Firearms (other than pistols and revolvers); and

(4) Shells and cartridges.

(b) Parts or accessories--

(1) In general. No tax is imposed by section 4181 of the Code on the sale of parts or accessories of firearms, pistols, revolvers, shells, and cartridges when sold separately or when sold with a complete firearm for use as spare parts or accessories. The tax does attach, however, to sales of completed firearms, pistols, revolvers, shells, and cartridges, and to sale of such articles that, although in knockdown condition, are complete as to all component parts.

(2) Component parts. Component parts are items that would ordinarily be attached to a firearm during use and, in the ordinary course of trade, are packaged with the firearm at the time of sale by the manufacturer or importer. All component parts for firearms are includible in the price for which the article is sold.

(3) Nontaxable parts. Parts sold with firearms that duplicate component parts that are not includible in the price for which the article is sold.

(4) Nontaxable accessories. Items that are not designed to be attached to a firearm during use or that are not, in the ordinary course of trade, provided with the firearm at the time of the sale by the manufacturer or importer are not includible in the price for which the article is sold.

(5) Examples--

(i) In general. The following examples are provided as guidelines and are not meant to be all inclusive.

(ii) Component parts. Component parts include items such as a frame or receiver, breech mechanism, trigger mechanism, barrel, buttstock, forestock, handguard, grips, buttplate, fore end cap, trigger guard, sight or set of sights (iron or optical), sight mount or set of sight mounts, a choke, a flash hider, a muzzle brake, a magazine, a set of sling swivels, and/or an attachable ramrod for muzzle loading firearms when provided by the manufacturer or importer for use with the firearm in the ordinary course of commercial trade. Component parts also include any part provided with the firearm that would affect the tax status of the firearm, such as an attachable shoulder stock.

(iii) Nontaxable parts. Nontaxable parts include items such as extra barrels, extra sights, optical sights and mounts (in addition to iron sights), spare magazines, spare cylinders, extra choke tubes, and spare pins.

(iv) Nontaxable accessories. Nontaxable accessories include items such as cleaning equipment, slings, slip on recoil pads (in addition to standard buttplate), tools, gun cases for storage or

transportation, separate items such as knives, belt buckles, or medallions. Nontaxable accessories also include optional items purchased by the customer at the time of retail sale that do not change the tax classification of the firearm, such as telescopic sights and mounts, recoil pads, slings, sling swivels, chokes, and flash hiders/muzzle brakes of a type not provided by the manufacturer or importer of the firearm in the ordinary course of commercial trade.

(c) Rates of tax. Tax is imposed on the sale of the articles specified in section 4181 of the Code at the rates indicated below.

		Percent
(1)	Pistols	10
(2)	Revolvers	10
(3)	Firearms (other than pistols and revolvers)	11
(4)	Shells and cartridges	11

(d) Computation of tax. The tax is computed by applying to the price for which the article is sold the applicable rate. For definition of the term "price" see section 4216 of the Code and the regulations contained in subpart J of this part.

(e) Liability for tax. The tax imposed by section 4181 of the Code is payable by the manufacturer, producer, or importer making the sale.

[T.D. ATF–404, 63 FR 52603, Oct. 1, 1998]

SOURCE: 56 FR 303, Jan. 3, 1991; T.D. ATF–365, 60 FR 33670, June 28, 1995; T.D. ATF–487, 68 FR 3747, Jan. 24, 2003; T.D. TTB–62, 72 FR 51711, Sept. 11, 2007, unless otherwise noted.

AUTHORITY: 26 U.S.C. 4181, 4182, 4216–4219, 4221–4223, 4225, 6001, 6011, 6020, 6021, 6061, 6071, 6081, 6091, 6101–6104, 6109, 6151, 6155, 6161, 6301–6303, 6311, 6402, 6404, 6416, 7502, 7805.

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27 C. F. R. § 53.61, 27 CFR § 53.61

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C

Effective:[See Text Amendments]

Code of Federal Regulations Currentness
Title 27. Alcohol, Tobacco Products and Firearms
Chapter I. Alcohol and Tobacco Tax and Trade Bureau, Department of the Treasury (Refs & Annos)
Subchapter C. Firearms
Part 53. Manufacturers Excise Taxes--Firearms and Ammunition (Refs & Annos)
Subpart J. Special Provisions Applicable to Manufacturers Taxes
§ 53.91 Charges to be included in sale price.

(a) In general. The "price" for which an article is sold includes the total consideration paid for the article, whether that consideration is in the form of money, services, or other things. However, for purposes of the taxes imposed under chapter 32 of the Code, certain collateral charges made in connection with the sale of a taxable article must be included in the taxable sale price, whereas others may be excluded. Any charge which is required by a manufacturer, producer, or importer to be paid as a condition of its sale of a taxable article and which is not attributable to an expense falling within one of the exclusions provided in section 4216 of the Code or the regulations thereunder is includable in the taxable sale price. It is immaterial for this purpose that the charge may be paid to a person other than the manufacturer, producer, or importer, or that it may be separately billed to the purchaser as a charge earmarked for expenses incurred or to be incurred in his behalf, such as charges for demonstration or display of the article, for sales promotion programs, or otherwise. With respect to the rules relating to exclusion of charges for local advertising of a manufacturer's products, see section 4216(e) of the Code and § 53.100. In the case of sales on credit, a carrying, finance, or service charge is excludable from the sale price if it is reasonably related to the costs of carrying the deferred portion of the sale price (such as interest on the deferred portion of the sale price, expenses of bookkeeping necessary to keep the records of such sales, and expenses of correspondence and other communication in connection with collection).

(b) Tools and dies. Separate charges for tools and dies used in the manufacture or production of a taxable article are to be included, in whole or in part, in the sale price on which the tax is based. It is immaterial whether the charges for such items are billed in a lump sum or are amortized or allocated to each of the taxable articles. If, at the termination of a contract to manufacture taxable articles, the tools and dies used in production pass to the purchaser, only the amount of depreciation of the tools and dies incurred in production, computed on a "production output" basis, should be included in the sale price. If the purchaser furnishes the tools and dies, the amount of the cost thereof, to the extent that such cost has been depreciated in the production of the taxable articles (computed on a "production output" basis), shall be included in determining the sale price of the articles for purposes of computing the tax.

(c) Charges for warranty. A charge for a warranty of an article which the manufacturer, producer, or importer requires the purchaser to pay in order to obtain the article shall be included in the sale price of the article on which the tax is computed. On the other hand, a charge for a warranty of a taxable article paid at the purchaser's option shall not be included in the sale price for purposes of computing tax thereon.

(d) Charges for coverings, containers, and packing.

Any charge by the manufacturer, producer, or importer for coverings and containers of whatever nature used to pack an article for shipment shall be included as part of the sale price for the purpose of computing the tax, whether or not the charges are identified as such on the invoice or are billed separately. Even though there is an agreement that the manufacturer, producer, or importer will repay all or a portion of the charge for the coverings or containers upon the return thereof, the full charge nevertheless shall be included in the sale price. It is immaterial whether the charge made at the time of sale is more or less than the actual value of the covering or container. See § 53.173(b)(4) for provisions relating to the claiming of a credit or refund in the case of a price readjustment due to the return or repossession of a covering or container. Packing charges are to be included in the sale price whether the charges cover normal packing or special packing services, such as for extra protection of the article or for odd-lot quantities. This rule shall apply whether the packing services are initiated by the manufacturer, producer, or importer or are furnished at the request of the purchaser and whether the packing is performed by the manufacturer, producer, or importer or by another person at his request. If the purchaser supplies packing materials, the fair market value of such materials must be included in the tax base when computing tax liability on the sale of the article.

(e) Taxable and nontaxable articles sold as a unit. Where a taxable article and a nontaxable article are sold by the manufacturer as a unit, the tax attaches to that portion of the manufacturer's sale price of the unit which is properly allocable to the taxable article. Normally, the taxable portion of such a unit may be determined by applying to the manufacturer's sale price of the unit the ratio which the manufacturer's separate sale price of the taxable article bears to the sum of the sale prices of both the taxable and nontaxable articles, if such articles are sold separately by the manufacturer. Where the articles (or either one of them) are not sold separately by the manufacturer and do not have established sale prices, the taxable portion is to be determined from a comparison of the actual costs of the articles to the manufacturer. Thus, if the cost of the taxable article represents four-fifths of the total cost of the complete unit, the tax applies to four-fifths of the price charged by the manufacturer for the unit.

[56 FR 31083, July 9, 1991]

SOURCE: 56 FR 303, Jan. 3, 1991; T.D. ATF–365, 60 FR 33670, June 28, 1995; T.D. ATF–487, 68 FR 3747, Jan. 24, 2003; T.D. TTB–62, 72 FR 51711, Sept. 11, 2007, unless otherwise noted.

AUTHORITY: 26 U.S.C. 4181, 4182, 4216–4219, 4221–4223, 4225, 6001, 6011, 6020, 6021, 6061, 6071, 6081, 6091, 6101–6104, 6109, 6151, 6155, 6161, 6301–6303, 6311, 6402, 6404, 6416, 7502, 7805.

27 C. F. R. § 53.91, 27 CFR § 53.91

Current through January 23, 2014; 79 FR 3740

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

DR. DAVID G. WALKER,
Plaintiff,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, LEE M. THOMAS, As Administrator of United States Environmental Protection Agency, and CHARLES L. ELKINS, Director of Office of Toxic Substances of United States Environmental Protection Agency,
Defendants.

CIVIL ACTION NO. H-87-3552

MEMORANDUM OPINION

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

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

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

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

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

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

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

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

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

SIGNED this 3rd day of October, 1990.

Chief Judge
United States District Court

19

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

DR. DAVID G. WALKER,
Plaintiff,

v.

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

CIVIL ACTION NO. H-87-3552

FINAL ORDER

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

O R D E R E D

that the defendants' motion to dismiss is GRANTED.

THIS IS A FINAL ORDER.

SIGNED this 3rd day of October, 1990.

Chief Judge
United States District Court