

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

CENTER FOR BIOLOGICAL DIVERSITY,
et al.,

Plaintiffs,

vs.

LISA P. JACKSON *et al.*,

Defendants.

Case No. 1:10-cv-02007-EGS

**DEFENDANT-INTERVENOR ASSOCIATION OF BATTERY
RECYCLERS, INC.’S REPLY IN SUPPORT OF PARTIAL MOTIONS
TO DISMISS PLAINTIFFS’ COMPLAINT**

Defendant-Intervenor Association of Battery Recyclers, Inc. (“ABR”) submits this reply in support of the partial motions to dismiss Plaintiffs’ complaint filed by Defendants Lisa P. Jackson and the Environmental Protection Agency (“EPA”), and Defendant-Intervenor the National Shooting Sports Foundation, Inc. (“NSSF”), and in response to Plaintiffs’ opposition to those motions.

The partial motions to dismiss establish that Plaintiffs’ complaint is time-barred. Plaintiffs filed their petition requesting regulations to ban lead ammunition and lead fishing sinkers on August 3, 2010. EPA denied Plaintiffs’ petition for a regulation to ban lead ammunition on August 27, 2010, citing its lack of statutory authority. Doc. #23-2 at 2. Plaintiffs did not file their complaint until November 23, 2010, well outside of the 60-day period allowed under TSCA. 15 U.S.C. § 2620(b)(4)(A).

Plaintiffs' rebuttal is that their complaint was filed within 60 days of EPA's November 4, 2010 denial of the petition regarding lead fishing sinkers, and that only the denial or grant of the whole, and not "a portion of a petition," is actionable. Doc. #27 at 9. Plaintiffs concede, however, that "[i]n the past, EPA has disposed of petitions requesting more than one action by denying, granting, *or both granting and denying, portions of a single petition* at the same time" Doc. #27 at 5 (emphasis added). Moreover, the only statutory limitation on when EPA may act on a petition (or portions of a petition) is that it must do so within 90 days of filing. 15 U.S.C. § 2620(b)(3). Nothing in the statute requires EPA to grant or deny all of the requested actions in a petition at the same time. Plaintiffs should have known that in order to preserve their rights to challenge the August 27, 2010 denial of their request for a regulation banning lead ammunition, they had to file a complaint by October 26, 2010, which they failed to do.

The motions also establish that Congress has not authorized the EPA to regulate lead bullets and shot as Plaintiffs have requested. Plaintiffs concede that EPA may not regulate ammunition shells or cartridges, Doc. #27 at 18, but attempt to circumvent that limitation by arguing that EPA can regulate the lead shot and bullets found inside the shells and cartridges. Were EPA to regulate lead shot and bullets, it would be regulating shells and cartridges indirectly. It is axiomatic that EPA cannot do indirectly what Congress has forbidden it to do directly. EPA appropriately avoided misconstruing the statute in such fashion and the Court likewise should respect Congress's limitation by granting the partial motions to dismiss. ABR supports the partial motions to dismiss for the additional reasons presented today in NSSF's reply.

CONCLUSION

For the reasons provided in EPA and NSSF's partial motions to dismiss, and in ABR's and NSSF's replies in support of those motions, the Court should dismiss Plaintiffs' claim for an order that EPA initiate rulemaking proceedings to develop regulations banning lead bullets and shot.

Respectfully submitted,

/s/ Robert N. Steinwurtzel

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