

**UNITED STATES DISTRICT COURT  
DISTRICT OF COLUMBIA**

CENTER FOR BIOLOGICAL DIVERSITY,  
PUBLIC EMPLOYEES FOR ENVIRONMENTAL  
RESPONSIBILITY, and PROJECT GUTPILE,

Plaintiffs,

vs.

LISA P. JACKSON and ENVIRONMENTAL  
PROTECTION AGENCY,

Defendants,

and

NATIONAL SHOOTING SPORTS  
FOUNDATION, INC., AMERICAN BATTERY  
RECYCLERS, NATIONAL RIFLE  
ASSOCIATION OF AMERICA, and SAFARI  
CLUB INTERNATIONAL,

Defendant-Intervenors.

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Case No.: 10-CV-02007 (EGS)

**PLAINTIFFS' MOTION FOR  
VOLUNTARY DISMISSAL**

Plaintiffs hereby file this Motion for Voluntary Dismissal in lieu of filing a separate recommendation for further proceedings in this matter.

On December 12, 2011, the Court stayed the current action until February 15, 2012, and ordered the parties to file a joint recommendation for further proceedings, or separate recommendations if agreement on a joint recommendation was not possible, by February 29, 2012. The stay was requested by the parties pending a decision by the

Environmental Protection Agency (“EPA”) on a subsequent petition regarding lead fishing sinkers submitted by Plaintiffs Center for Biological Diversity and Project Gutpile, and one other organization. The EPA made its decision on this petition by letter dated February 14, 2012. All parties requested, and the Court granted, an extension to the February 29th deadline until March 15, 2012.

Plaintiffs have contacted all parties in an effort to file this motion jointly, but as consensus was not possible, Plaintiffs hereby file their motion separately. Counsel for Federal Defendants, Administrator Jackson and EPA, have indicated that they will consent to the motion. Counsel for Defendant-Intervenors National Rifle Association of America and Safari Club International do not oppose the motion. Counsel for Defendant-Intervenors National Shootings Sports Foundation, Inc., opposes the motion. Counsel for Defendant-Intervenors Association of Battery Recyclers, Inc. opposes the motion.

This motion is based on this Motion and the attached Memorandum of Points and Authorities.

Respectfully submitted,

Dated: March 15, 2012

/s/ Adam Keats

Adam Keats (*pro hac vice*, Cal. Bar No. 191157)  
Jaclyn Lopez (*pro hac vice*, Cal. Bar No. 258589)  
CENTER FOR BIOLOGICAL DIVERSITY  
351 California St., Suite 600  
San Francisco, CA 94104  
Telephone: 415-436-9682  
Facsimile: 415-436-9683  
[akeats@biologicaldiversity.org](mailto:akeats@biologicaldiversity.org)  
[jlopez@biologicaldiversity.org](mailto:jlopez@biologicaldiversity.org)

William J. Snape, III (DC Bar No. 455266)  
CENTER FOR BIOLOGICAL DIVERSITY  
5268 Watson Street, NW  
Washington, DC 20016  
Telephone: 202-537-3458  
Telephone: 202-536-9351  
Facsimile: 415-436-9683  
[billsnape@earthlink.net](mailto:billsnape@earthlink.net)

## MEMORANDUM OF POINTS AND AUTHORITIES

Plaintiffs believe that, in light of the EPA's denial of their second petition, and in light of the reasoning expressed by the EPA for that denial, the current action filed on Plaintiffs' first petition no longer warrants litigation. Therefore, Plaintiffs seek from this Court voluntary dismissal of the pending action under Fed. Rules Civ. Proc. 41(a)(2).

While a court's determination of a motion for voluntary dismissal under Rule 41(a)(2) is discretionary, it should generally be granted unless dismissal "will inflict clear legal prejudice on a defendant." *Conafay v. Wyeth Laboratories, Div. of American Home Products Corp.*, 841 F.2d 417, 419 (D.C. Cir. 1988). Here, there is no basis for a finding of prejudice that would prevent the voluntary dismissal of this action. Although all defendants and intervenor-defendants have filed answers, no substantive motions have been filed regarding the remaining causes of action in this case.

Should any party wish to litigate the second petition, a second independent lawsuit would be required. The petitioning parties are not identical, the evidence cited in the petitions is different, the nature of the requested actions is different, and EPA rejected the two petitions on separate and independent grounds. *Compare* Exhibit 1, EPA denial of first petition dated November 4, 2010, *and* Exhibit 2, EPA denial of second petition dated February 14, 2012. For these reasons, any challenge to the EPA's rejection of the second petition would likely require the filing of a second and independent lawsuit. The possibility of a second lawsuit being filed after the voluntary dismissal of the current action appears to be the primary basis for at least one party (Intervenor-Defendant Association of Battery Recyclers, Inc. ("ABR")) opposing the dismissal of this action at this time. *See* ABR's Motion to Hold Case in Abeyance, *filed* March 15, 2012. However, the threat of a second lawsuit being filed does not, by itself, qualify as legal prejudice to a defendant and should therefore not be the basis for denying this motion. *Id.*, *see also* *Westland Water Dist. v. United States*, 100 F.3d 94, 96 (9th Cir. 1996).

All parties stipulated to staying this action pending a decision by the EPA on the second petition. After reviewing that decision, Plaintiffs concluded that continued

litigation of the current action was no longer warranted. There being no substantive papers filed in this action regarding the remaining claims and there being no clear prejudice to any party by this action being dismissed, Plaintiffs should be permitted to dismiss the action.

For the above reasons, Plaintiffs respectfully request that this Motion for Voluntarily Dismiss be granted.

Respectfully submitted,

Dated: March 15, 2012

/s/ Adam Keats

Adam Keats (*pro hac vice*, Cal. Bar No. 191157)  
Jaclyn Lopez (*pro hac vice*, Cal. Bar No. 258589)  
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[billsnape@earthlink.net](mailto:billsnape@earthlink.net)

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a true and accurate copy of the foregoing Motion was filed using the Court's electronic case filing system this 15th day of March, 2012, which results in service on all counsel of record registered on the case management/electronic case filing ("CM/ECF") system.

/s/ Adam Keats

Adam Keats



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

NOV 4 2010

Mr. Michael Fry  
Director of Conservation Advocacy  
American Bird Conservancy  
1731 Connecticut Ave., N.W.  
Washington, DC 20009

OFFICE OF CHEMICAL SAFETY  
AND POLLUTION PREVENTION

Dear Mr. Fry:

EPA has completed its review of your August 3, 2010, petition requesting that the Agency take action under the Toxic Substances Control Act (TSCA) to prohibit the manufacture, processing, and distribution in commerce of lead shot, bullets, and fishing sinkers. EPA denied your request concerning lead shot and bullets on August 27, 2010.

After careful review, EPA has determined you have not demonstrated that the remaining action requested in your petition -- a uniform national ban of lead for use in all fishing gear -- is necessary to protect against an unreasonable risk of injury to health or the environment, as required by TSCA section 21. The petition also does not demonstrate that the action requested is the least burdensome alternative to adequately protect against the concerns, as required by TSCA section 6. Accordingly, EPA is denying your request for a national ban on lead in all fishing gear.

Your petition does not provide a sufficient justification for why a national ban of lead fishing sinkers and other lead fishing tackle is necessary given the actions being taken to address the concerns identified in the petition. There are an increasing number of limitations on the use of lead in fishing gear on some Federal lands, as well as Federal outreach efforts. A number of states have established regulations that ban or restrict the use of lead sinkers and have created state education and fishing tackle exchange programs over the last decade. The emergence of these programs and activities over the past decade calls into question whether the broad rulemaking requested in your petition would be the least burdensome, adequately protective approach. EPA also notes that the prevalence of non-lead alternatives in the marketplace continues to increase.

If you would like to discuss this matter further, please contact Wendy Cleland-Hamnett, Director of the Office of Pollution Prevention and Toxics. Wendy can be reached at 202-564-3810.

Sincerely,

A handwritten signature in black ink, appearing to read "S. A. Owens".

Stephen A. Owens  
Assistant Administrator





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

FEB 14 2012

OFFICE OF CHEMICAL SAFETY  
AND POLLUTION PREVENTION

Mr. Adam Keats  
Senior Counsel  
Center for Biological Diversity  
351 California Street, Suite 600  
San Francisco, CA 94104

Dear Mr. Keats:

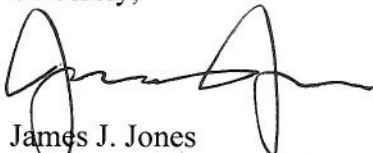
EPA has completed its review of your November 16, 2011, petition requesting the Agency take action under the Toxic Substances Control Act (TSCA) to "evaluate the unreasonable risk of injury to the environment from fishing tackle containing lead (including fishing weights, sinkers, lures, jigs, and/or other tackle) of various sizes and uses that are ingested by wildlife resulting in lead exposure" and to "initiate a proceeding for the issuance of a rulemaking under section 6 of TSCA to adequately protect against such risks."

After careful review, EPA has determined that, while the petition does provide evidence of exposure and a risk to waterfowl in some areas of the United States, it does not provide a basis for finding that the risk presented is an unreasonable risk for which federal action under section 6(a) of TSCA is necessary to adequately protect against such risks. Accordingly, EPA is denying your request to initiate a proceeding for the issuance of a rulemaking under Section 6(a) of TSCA to adequately protect against risks posed by fishing tackle containing lead of various sizes and uses that are ingested by wildlife.

Your petition does not demonstrate why federal action is necessary given the mix of regulatory and education actions state agencies and the Federal Government already are taking to address the impact of lead fishing tackle on local environments. The risk described in the petition does appear to be more prevalent in some geographic areas than others, and the trend over the past decade has been for increasing state and localized federal activity regarding lead in fishing tackle. The petition does not demonstrate that these state and local efforts are ineffective or have failed to reduce the exposure and risks presented to waterfowl in particular. Therefore, EPA concludes that the petition does not demonstrate that action under TSCA section 6(a) is necessary to adequately protect wildlife. EPA also recognizes that the market for fishing tackle and equipment continues to change and that the prevalence of non-lead alternatives in the marketplace continues to increase. In light of these trends, the petition does not demonstrate that rulemaking is necessary under TSCA section 6(a).

If you would like to discuss this matter further, please contact Wendy Cleland-Hamnett, Director of the Office of Pollution Prevention and Toxics. Wendy can be reached at 202-564-3810.

Sincerely,

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

James J. Jones  
Acting Assistant Administrator