UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CENTER FOR BIOLOGICAL DIVERSITY 1333 North Oracle Road Tucson, AZ 85705; PUBLIC EMPLOYEES FOR ENVIRONMENTAL RESPONSIBILITY 2000 P Street NW, Suite 240 Washington, DC 20036; PROJECT GUTPILE, an unincorporated association in Santa Barbara, California; Plaintiffs, vs. LISA P. JACKSON, Administrator, Environmental Protection Agency Ariel Rios Building 1200 Pennsylvania Avenue, NW Washington, DC 20460; ENVIRONMENTAL PROTECTION AGENCY, Ariel Rios Building 1200 Pennsylvania Avenue, NW Washington, DC 20460; Defendants. ASSOCIATION OF BATTERY RECYCLERS, INC., 2020 K Street, NW Washington, DC 20006 Movant-Intervenor.	Case No. 1:10-cv-02007-EGS

MOTION OF THE ASSOCIATION OF BATTERY RECYCLERS, INC. TO INTERVENE IN SUPPORT OF DEFENDANTS

The Association of Battery Recyclers, Inc. ("ABR") respectfully moves for leave to intervene as of right pursuant to Federal Rule of Civil Procedure 24(a), or, in the alternative, permissive intervention pursuant to Federal Rule of Civil Procedure 24(b). In support of this motion, ABR states as follows:

1. This action was initiated by the Center for Biological Diversity, Public Employees for Environmental Responsibility, and Project Gutpile ("Plaintiffs") against Lisa P. Jackson, in her official capacity as Administrator of the U.S. Environmental Protection Agency ("EPA"), and EPA ("Defendants") on November 23, 2010. The suit was filed pursuant to Section 21 of the Toxic Substances Control Act ("TSCA"), 15 U.S.C. § 2620. The Defendants' answer is due on or about January 23, 2010. Plaintiffs ask that the Court order the EPA to develop and implement regulations to prohibit lead bullets and shot and lead fishing sinkers.

2. ABR is a national trade association that has represented the lead recycling industry for more than twenty years with respect to, among other issues, development of and compliance with applicable environmental standards and regulations. Members of the ABR include battery manufacturers, lead chemical manufacturers, secondary lead smelters, consumers of secondary lead, and suppliers and consultants to the industry. The battery recycling industry members of the ABR collectively represent nearly all the lead recycling capacity currently available in the United States. The lead produced and processed by ABR members are sold for use in products sold to consumers, including lead bullets and shots and lead fishing sinkers. Members of ABR also recycle and manufacture these products.

3. On August 3, 2010, Plaintiffs, with the American Bird Conservancy and the Association of Avian Veterinarians, filed a petition under TSCA Section 21 requesting that EPA prohibit under TSCA Section 6(a), 15 U.S.C. §2605(a), the manufacture, processing, and

distribution in commerce of (1) lead bullets and shot; and (2) lead fishing sinkers ("Petition"). 75 Fed. Reg. 58,377, 58,378 (Sept. 24, 2010).

4. On August 27, 2010, EPA denied the first part of the request, finding that it lacks authority to regulate lead in bullets and shot under TSCA based on the exclusion from the definition of "chemical substance" found in TSCA Section 3(2)(B)(v), 15 U.S.C. §2602(2)(B)(v). 75 Fed. Reg. at 58,377. Section 3(2)(B)(v) of TSCA excludes "any article the sale of which is subject to the tax imposed by section 4181 of the Internal Revenue Code of 1986 (26 U.S.C.A. 4181) (determined without regard to any exemptions from such tax provided by section 4182 or 4221 or any other provision of such code)." 15 U.S.C. §2602(2)(B)(v). Section 4181 of the Internal Revenue Code imposes a tax on firearms, shells and cartridges. 26 U.S.C. §4181. EPA found that "[t]his exclusion functions to carve out a discrete set of substances from regulation under TSCA: those used in firearms and ammunition." 75 Fed. Reg. at 58,378.

5. On November 4, 2010, EPA denied the second request to prohibit under TSCA section 6(a) the manufacture, processing, and distribution in commerce of lead fishing gear, finding that the petitioners had not demonstrated that the action requested is necessary to protect against an unreasonable risk of injury to health or the environment. 75 Fed. Reg. 70,246 (Nov. 17, 2010). EPA found that petitioners did "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." *Id.* at 70,247. Nor did the petitioners demonstrate "that the action requested—a uniform national ban of lead for use in all fishing gear—is the least burdensome alternative to adequately protect against the concerns identified in the petition, as required by section 6." *Id.*

6. Plaintiffs contend that the Petition provided a reasonable basis to conclude that the issuance of a rule to prevent the poisoning of wildlife by lead shot, bullets and fishing tackle is necessary to protect health and the environment against an unreasonable risk of injury. Compl. ¶56. Plaintiffs request that the Court order the Defendants to initiate the petitioned action. Compl. ¶57.

7. If the requested relief is granted, ABR members would become regulated by the ban and/or suffer direct economic impacts from the loss of business due to the requested ban of use of lead in these products. As such, ABR has standing and, therefore, an interest in the subject matter of this case, and ABR's interests will be directly affected by the Court's action in this case. Unless ABR is granted intervention, its ability to protect its interests will be impaired.

8. Further, ABR's interests will not be adequately represented in the absence of intervention. Plaintiffs are conservation groups whose interests diverge from those of ABR. Defendants are the Administrator of EPA and EPA, the administrative agency that is responsible for enforcing and administering the applicable provisions of TSCA and representing the interests of the general public. Accordingly, none of the parties to the litigation adequately represents the interests of ABR. Moreover, ABR has special knowledge and information related to the lead industry, which can assist the Court in this case.

9. Finally, ABR's application for intervention is timely. Granting ABR leave to intervene in this matter will not cause prejudice to any party, nor will it delay the proceedings. The motion is being filed at the preliminary stages of the case, and the Defendants have yet to file an answer. In addition, ABR will comply with all scheduling orders established by the Court for intervenor participation in this action.

10. ABR, therefore, is entitled to intervention as a matter of right under Federal Rule of Civil Procedure 24(a) because (a) its motion is timely, and ABR has a (b) significantly protectable interest in the subject matter of this case, (c) which will be impaired absent intervention and (d) is not adequately represented by the existing parties in this case.

11. In the alternative, ABR should be granted intervention on a permissive basis under Federal Rule of Civil Procedure 24(b) because ABR raises common issues of law and fact, and intervention will not unduly delay the proceedings or prejudice the original parties.

12. Counsel for ABR attempted to contact counsel for the parties to this case to obtain their position on this motion, but did not receive a response by the time of this filing.

WHEREFORE, Movant-Intervenor Association of Battery Recyclers respectfully requests that this Court grant its Motion to Intervene and permit ABR to file the Answer attached to this motion as Exhibit A.

Respectfully submitted,

/s/ *Robert N. Steinwurtzel*

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Dated: December 17, 2010

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CENTER FOR BIOLOGICAL DIVERSITY 1333 North Oracle Road Tucson, AZ 85705; PUBLIC EMPLOYEES FOR ENVIRONMENTAL RESPONSIBILITY 2000 P Street NW, Suite 240 Washington, DC 20036; PROJECT GUTPILE, an unincorporated association in Santa Barbara, California; Plaintiffs, vs. LISA P. JACKSON, Administrator, Environmental Protection Agency Ariel Rios Building 1200 Pennsylvania Avenue, NW Washington, DC 20460; ENVIRONMENTAL PROTECTION AGENCY, Ariel Rios Building 1200 Pennsylvania Avenue, NW Washington, DC 20460; Defendants. ASSOCIATION OF BATTERY RECYCLERS, INC., 2020 K Street, NW Washington, DC 20006 Movant-Intervenor.	Case No. 1:10-cv-02007-EGS

MEMORANDUM IN SUPPORT OF THE MOTION OF
THE ASSOCIATION OF BATTERY RECYCLERS, INC.'S TO INTERVENE

The Association of Battery Recyclers, Inc. ("ABR") seeks to intervene as a party in Case No. 1:10-cv-02007-EGS, a case brought by the Center for Biological Diversity, Public Employees for Environmental Responsibility, and Project Gutpile ("Plaintiffs") against Lisa P. Jackson, in her official capacity as Administrator of the U.S. Environmental Protection Agency ("EPA"), and EPA ("Defendants"). ABR's intervention would raise no new issues in the case. It would not delay or complicate the case, nor would it otherwise increase the burden on the existing parties. The sole effect of ABR's intervention would be to protect its interests and the interests of its members that may be directly affected by the outcome of this litigation.

INTRODUCTION

On August 3, 2010, Plaintiffs, with the American Bird Conservancy and the Association of Avian Veterinarians, filed a petition under TSCA Section 21, 15 U.S.C. § 2620, requesting that EPA prohibit under TSCA Section 6(a), 15 U.S.C. §2605(a), the manufacture, processing, and distribution in commerce of (1) lead bullets and shot; and (2) lead fishing sinkers and tackle ("Petition"). 75 Fed. Reg. 58,377, 58,378 (Sept. 24, 2010). On August 27, 2010, EPA denied the first part of the Petition, finding that it lacks authority to regulate lead in bullets and shot under TSCA based on the exclusion of shells and cartridges from the definition of "chemical substance" in TSCA Section 3(2)(B)(v), 15 U.S.C. §2602(2)(B)(v). *Id.* at 58,377-58,378. On November 4, 2010, EPA denied the second part of Petition, finding that the petitioners had not demonstrated that a ban on lead fishing sinkers and tackle is necessary to protect against an unreasonable risk of injury to health or the environment. 75 Fed. Reg. 70,246 (Nov. 17, 2010).

On November 23, 2010, Plaintiffs filed this action, challenging EPA's denial of the Petition. In their Complaint, Plaintiffs request that this Court find they have, by a preponderance of the evidence, demonstrated a reasonable basis to conclude the "issuance of a rule or order

consistent with Plaintiff's petition is necessary to protect health or the environment against an unreasonable risk of injury." Compl., ¶57. Plaintiffs then request that the Court order the Defendants to initiate the petitioned action. Compl. at 13. The Defendants have not yet filed their answer.

ABR is an organization of companies that utilize and recycle lead acid batteries and other lead products. (Cornette Decl., ¶5). Members of ABR include battery manufacturers, lead chemical manufacturers, secondary lead smelters, consumers of secondary lead, and suppliers and consultants to the industry. (*Id.*). Recycled lead and plastic products are returned to the battery industry and other consumers to be used in place of virgin materials. (*Id.*, ¶¶6-7). In 2009, approximately 80 percent of lead came from secondary production. (*Id.*, ¶6). The lead produced and processed by ABR members are sold for use in products sold to consumers, including lead bullets and shots and lead fishing sinkers. (*Id.*, ¶8). Members of ABR also manufacture these products. (*Id.*).

Because ABR members produce or process lead for use in lead bullets and shots and lead fishing sinkers, they will be adversely affected by the requested relief. As such, they have an interest in this case, which may be impaired absent intervention.

ARGUMENT

I. ABR IS ENTITLED TO INTERVENE IN THIS ACTION AS A MATTER OF RIGHT.

ABR is entitled to intervention as a matter of right under Federal Rule of Civil Procedure 24(a)(2). Rule 24(a)(2) provides:

> On timely motion, the court must permit anyone to intervene who: . . . claims an interest relating to the property or transaction which is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's

> ability to protect its interest, unless existing parties adequately represent that interest.

Fed. R. Civ. P. 24(a)(2). This Court and the D.C. Circuit have taken a liberal approach to intervention. *See Wilderness Soc'y v. Babbitt*, 104 F. Supp. 2d 10, 12, 18 (D.D.C. 2000) (citing *Natural Res. Def. Council v. Costle*, 561 F.2d 904, 910-11 (D.C. Cir. 1977)).

When intervention is sought by a movant to uphold an agency's action, intervention as a matter of right should be granted when the applicant (a) files a timely motion, (b) has standing, and (c) has an interest in the action that may be impaired by the outcome and is not adequately represented without intervention. *See Fund for Animals, Inc. v. Norton*, 322 F.3d 728, 731-32 (D.C. Cir. 2003); *County of San Miguel, Colo. v. MacDonald*, 244 F.R.D. 36, 42-43 (D.D.C. 2007); *Am. Horse Prot. Ass'n, Inc. v. Veneman*, 200 F.R.D. 153, 156 (D.D.C. 2001). For reasons set forth below, ABR satisfies the requirements of Federal Rule of Civil Procedure 24(a)(2) to intervene as a matter of right in the present action.

A. ABR's Motion To Intervene Is Timely.

ABR's motion for leave to intervene is timely, as the proceedings are still in the early stages. Movant's intervention will not prevent this case from an "efficient proceeding to a final resolution." *Am. Horse Prot. Ass'n*, 200 F.R.D. at 157. Also, the motion will not result in prejudice to the parties. *See Foster v. Gueory*, 655 F.2d 1319, 1324 (D.C. Cir. 1981) ("Whether a motion to intervene is timely made is 'to be determined from all the circumstances, including the purpose for which intervention is sought . . . and the improbability of prejudice to those already in the case.'") (quoting *Natural Res. Def. Council*, 561 F.2d at 907).

ABR has not delayed in filing this motion. The instant motion is being filed within the time granted to the Defendants to file an answer to the Plaintiffs' Complaint under Federal Rule of Civil Procedure 12(a)(3), and less than one month since the complaint was filed, before any

status conference has been held or scheduling order has been issued. *See Fund for Animals*, 322 F.3d at 735 (finding motion to intervene timely where it was filed less than two months after plaintiffs filed complaint and before defendants filed an answer); *Utah Ass'n of Counties v. Clinton*, 255 F.3d 1246, 1250-51 (10th Cir. 2001) (finding motion to intervene timely because it was filed at early stage of litigation in which no scheduling order has been issued, no trial date set, and no cut-off date for motions set, and because parties would not be prejudiced by intervention); *Sierra Club v. EPA*, 995 F.2d 1478, 1481 (9th Cir. 1993) (finding "Timeliness is undisputed" where motion to intervene was filed "before the EPA had even filed its answer").

Because ABR has filed its motion at such an early stage in this litigation, the addition of ABR as an intervenor would not unduly delay or prejudice the adjudication of the rights of any of the original parties. ABR will be subject to any scheduling order issued by the Court. Because neither party will suffer prejudice from ABR's intervention at this early stage of the litigation, ABR's motion to intervene is timely.

B. ABR Has Standing to Sue, and, Therefore, a Significantly Protectable Interest in the Subject Matter of the Action.

ABR has standing in this case. This Court has found that "when a party seeks to intervene as a defendant to uphold what the government has done, it would have to establish that it will be injured in fact by the setting aside of the government's action it seeks to defend, that this injury will have been caused by that invalidation, and the injury would be prevented if the government action is upheld." *Am. Horse Prot. Ass'n*, 200 F.R.D. at 156. In addition, the interest requirement under Federal Rule of Civil Procedure 24(a) is met when the proposed intervenor has constitutional standing. *See Fund for Animals*, 322 F.3d at 735 ("Our conclusion that the [Movant] has constitutional standing is alone sufficient to establish that [it] has 'an interest relating to the property or transaction which is the subject of the action.'") (quoting Fed.

R. Civ. P. 24(a)(2)); *Am. Horse Prot. Ass'n*, 200 F.R.D. at 157 ("[I]t is impossible to conjure a case in which an intervenor would have constitutional standing to intervene but not have a sufficient 'interest in the litigation' to justify intervention under Fed. R. Civ. P. 24(a)(2)."); *see also County of San Miguel, Colo.*, 244 F.R.D. at 46. ABR satisfies these requirements in this case.

ABR is a non-profit trade association. "An association has standing to bring suit on behalf of its members when its members would otherwise have standing to sue in their own right, the interests at stake are germane to the organization's purpose, and neither the claim asserted nor the relief requested requires the participation of the individual members in the lawsuit." *Friends of the Earth, Inc. v. Laidlaw Envtl. Serv. (TOC), Inc.*, 528 U.S. 167, 181 (2000) (citing *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, 343 (1977)). ABR can establish associational standing to sue in this case.

First, at least one of ABR's members would have standing to sue on its own behalf. *See Military Toxics Project v. EPA*, 146 F.3d 948, 954 (D.C. Cir. 1998); *see also ACORN v. Edwards*, 842 F. Supp. 227, 234 (E.D. La. 1993) ("The requirement is satisfied if the organization's members, 'or any one of them, are suffering immediate or threatened injury as a result of the challenged action.'") (quoting *Warth v. Seldin*, 422 U.S. 490, 511 (1975)). ABR's members produce and process lead that are reasonably likely to be incorporated into consumer products, including lead bullets and shot and lead fishing sinkers. Plaintiffs seek to ban the use of lead in these products, which the agency properly denied in this case. Setting aside EPA's

denial of the petition would cause injury in fact to ABR members by restricting their ability to produce and sell lead and lead-containing products.[1]

Courts have consistently found that the interests of the regulated community sufficient to meet this requirement of Rule 24(a). *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561-62 (1992) ("When the suit is one challenging the legality of government action or inaction, the nature and extent of facts that must be averred (at the summary judgment stage) or proved (at the trial stage) in order to establish standing depends considerably upon whether the plaintiff is himself an object of the action (or forgone action) at issue. If he is, there is ordinarily little question that the action or inaction has caused him injury, and that a judgment preventing or requiring the action will redress it."); *Kleissler v. U.S. Forest Serv.*, 157 F.3d 964, 973 (3d Cir. 1998) (finding business interests tied to agency action sufficient to grant intervention); *Sierra Club v. Glickman*, 82 F.3d 106, 109 (5th Cir. 1996) (finding a trade association representing farmers, the "real parties in interest," could intervene in a suit to cut off federal subsidies to those who pumped water from an aquifer); *Conservation Law Found. of New England, Inc. v. Mosbacher*, 966 F.2d 39, 43 (1st Cir. 1992) (holding interest of members of fishing industry in consent decree concerning fishery management plan sufficient as the subjects of the regulator plan). "[C]ourts in this circuit typically grant motions to intervene *in full* when they are brought by industry groups seeking to defend a challenged agency action relating to environmental

[1] Plaintiffs request an order requiring regulation of lead bullets and shot and lead fishing sinkers and tackle, which will impact one or more of ABR's members. *See S. Coast Air Quality Mgmt. Dist. v. EPA*, 472 F.3d 882, 895-96 (2006), *reh'g denied*, 489 F.3d 1245 (D.C. Cir. 2007); *cert. denied*, 552 U.S. 1140 (2008) (finding standing where "[i]t is inconceivable that EPA's comprehensive reworking of an Act that specifically controls the requirements for industrial pollution would fail to affect the requirements of even a single NPRA member.") (citations omitted); *Bethlehem Steel Corp. v. EPA*, 723 F.2d 1303, 1306 (7th Cir. 1983) (finding facility had standing to challenge reclassification of area as "nonattainment" under Clean Air Act, which leads to additional regulatory requirements).

regulation." *Oceana, Inc. v. Locke*, No. 08-1881, 2009 WL 6581013, at *2 (D.D.C. June 24, 2009) (listing cases) (emphasis added); *see also Am. Horse Prot. Ass'n, Inc.*, 200 F.R.D. at 158 ("[T]he participation of the persons most directly affected by the [challenged agency action] is utterly consistent with the notice and opportunity to be heard concerns that lie at the heart of the due process clause.").

The loss of revenues resulting from the ban of use of lead also constitutes sufficient injury in fact to support standing in this case. *See Fund for Animals*, 322 F.3d at 733 (finding threatened loss of tourist dollars, and consequent reduction in funding for Mongolia's conservation program, constitute a concrete and imminent injury fairly traceable to regulatory action being challenged). Although there is a "prudential" test of standing, it is not implicated here where TSCA allows "any person" to file a petition under Section 21. 15 U.S.C. §2620(a); *see George E. Warren Corp. v. U.S. EPA*, 159 F.3d 616, 621 (D.C. Cir. 1998) (finding it unnecessary to resolve question of prudential standing because citizen suit provision of Clean Air Act "apparently removes that 'judicially self-imposed limit[] on the exercise of federal jurisdiction'"), *amended by* 164 F.3d 676 (D.C. Cir. 1999) (quoting *Bennett v. Spear*, 520 U.S. 154, 162 (1997)); *Save Our Community (SOC) v. EPA*, 971 F.2d 1155, 1160 n. 10 (5th Cir.1992) (noting Clean Water Act confers standing to limits of Constitution since under the Act "any citizen may commence a civil action."). In any event, the prudential test for standing is also met here.

In *Bennett v. Spear*, the U.S. Supreme Court found economic interests sufficient to support standing under the Endangered Species Act ("ESA") where, as with TSCA, "economic consequences are an explicit concern of the ESA." 520 U.S. at 176-77. TSCA expressly recognizes that EPA's authority over chemical substances and mixtures under TSCA "should be

exercised in such a manner as not to impede unduly or create unnecessary economic barriers to technology innovation while fulfilling the primary purpose of this chapter to assure that such innovation and commerce in such chemical substances and mixtures do not present an unreasonable risk of injury to health or the environment." 15 U.S.C. § 2601(b)(3). Further, it is the intent of Congress that the EPA Administrator "shall consider the environmental, economic, and social impact of any action the Administrator takes or proposes to take under this chapter." *Id.* § 2601(c). In addition, courts have allowed industry intervenors in support of EPA in suits under TSCA. *See Envtl. Def. Fund, Inc. v. EPA*, 636 F.2d 1267 (D.C. Cir. 1980).[2]

In addition, ABR can meet the second prong of associational standing because the interests at stake are "germane to the organization's purpose." *Laidlaw Envtl. Servs.*, 528 U.S. at 181. "This requirement of germaneness is 'undemanding'; 'mere pertinence between litigation subject and organizational purpose' is sufficient." *Nat'l Lime Ass'n v. EPA*, 233 F.3d 625, 636 (D.C. Cir. 2000) (quoting *Humane Soc'y v. Hodel*, 840 F.2d 45, 58 (D.C. Cir. 1988)). The subject of the litigation is "is certainly 'pertinent'" to ABR as a trade association of companies in the lead battery and lead smelting industry, who provide lead for consumer products. ABR monitors EPA's rulemaking procedures with respect to lead and represents the interests of these members, among other ways, by submitting comments to EPA on issues affecting the lead smelting industry, including requirements under TSCA.

Finally, the participation of the individual members of ABR is not required in this litigation. ABR and its members, therefore, can establish standing in this case, and thereby have a sufficiently protectable interest in the subject matter of this case.

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[2] ABR has been granted full intervention in a similar proceeding brought pursuant to Section 21 of TSCA. *Sierra Club v. Johnson*, No. C 06-5641 (N.D. Cal. Nov. 29, 2006). This order is attached to this Memorandum.

C. ABR's Interest in the Action Would Be Substantially Prejudiced By Any Judgment Rendered in its Absence.

To intervene, an applicant must be so situated that the disposition of the action may, "as a practical matter," impair or impede that person's interest, unless that person's interest is adequately represented by existing parties. Fed. R. Civ. Proc. 24(a)(2). This Court looks to the "practical consequences" to the movant of denying intervention in determining whether the movant's interest will be impaired by an action. *Am. Horse Prot. Ass'n*, 200 F.R.D. at 158 (citations omitted). This Circuit determines whether a party has sufficient interest in the litigation to justify intervention "by the most pragmatic test possible": the "interest test" is "primarily a practical guide to disposing of lawsuits by involving as many apparently concerned persons as is compatible with efficiency and due process." *Id.* at 157 (citations omitted). ABR's ability to protect its interests and the interests of its members will be practically impaired absent intervention in this case.

The relief requested would subject ABR members to additional regulation under TSCA. In addition, ABR's ability to protect its interest will be impaired or impeded absent intervention by any determination as to the adequacy of the Petition under Section 21. Section 21 requires a showing of "unreasonable risk of injury to health or the environment" of lead bullets and shot and lead fishing sinkers and tackle under TSCA. 15 U.S.C. § 2620(b)(4)(B). Any determinations in this case may influence or serve as *stare decisis* in subsequent administrative or judicial proceedings regarding EPA's authority to regulate lead under TSCA. *See Foster*, 655 F.2d at 1325 (citing *Nuesse v. Camp*, 385 F.2d 694, 700 (D.C. Cir. 1967)); *Cook v. Boorstin*, 763 F.2d 1462, 1470 (D.C. Cir. 1985).

D. ABR's Interest Is Not Adequately Represented By The Existing Parties.

The movant for intervention must also demonstrate that existing parties do not adequately protect its interest. "The Supreme Court has held that inadequacy of representation is satisfied 'if the applicant shows that representation of [its] interest 'may be' inadequate; and the burden of making that showing should be treated as minimal.'" *County of San Miguel, Colo.*, 244 F.R.D. at 48 (quoting *Trbovich v. United Mine Workers of Am.*, 404 U.S. 528, 538 n.10 (1972)); *Am. Horse Prot. Ass'n*, 200 F.R.D. at 159. Here, ABR's interest is unique from the parties currently before the Court, and its interest is narrowly limited to those of the lead industry. Neither party adequately represents these interests.

The interests of Plaintiffs and ABR are divergent. "The possibility that the interests of the applicant and the parties may diverge 'need not be great' in order to satisfy this minimal burden." *Utah Ass'n of Counties*, 255 F.3d at 1254 (quoting *Natural Res. Def. Council v. U.S. Nuclear Regulatory Comm'n*, 578 F.2d 1341, 1346 (10th Cir. 1978)); *see also Coalition of Ariz./N.M. Counties for Stable Econ. Growth v. U.S. Dep't of Interior*, 100 F.3d 837, 844 (10th Cir. 1996) (noting an applicant may fulfill this burden by showing ". . . that the representative has an interest adverse to the applicant. . ."). Plaintiffs are challenging the actions of the EPA, which ABR seeks to have upheld.

In addition, the Defendants cannot adequately represent the interests of ABR. Although the EPA and ABR may have the same ultimate objective in this matter, upholding EPA's denial of the Petition, the Administrator represents the broader interests of the general public. Courts have held that the fact that the government agency must represent broader interests as opposed to the "more narrow and focused" interests of a particular industry group is sufficient to meet this requirement. *Natural Res. Def. Council*, 561 F.2d at 912-13; *see also Fund for Animals, Inc.*,

322 F.3d at 736 (finding Fish & Wildlife Service was obligated to "represent the interests of the American people" and did not adequately represent intervenor where it could not give intervenor's interests "the kind of primacy that [the intervenor] would given them"); *County of San Miguel, Colo.*, 244 F.R.D. at 48 ("[T]he [Fish and Wildlife Service's] obligation is to represent the interests of the general public . . . while the intervenor-applicants' interests are those of its members, which include, but are not limited to protecting their members' livelihoods and business operations . . .."); *Am. Horse Prot. Ass'n*, 200 F.R.D. at 159; *People for the Ethical Treatment of Animals v. Babbitt*, 151 F.R.D. 6, 8 (D.D.C. 1993).[3] In this case, the Defendants cannot promote the narrow interests of ABR with respect to the lead industry. Overall, neither the Plaintiffs nor the Defendants can adequately represents the narrow interest of ABR.

Finally, ABR's knowledge and experience with regulation of the lead industry can inform this court on issues that the other parties will likely neglect, or, in the case of Plaintiffs, oppose. The lead industry is already highly regulated. (Cornette Decl., ¶9). In reviewing petitions under Section 21 of TSCA, EPA "encourages" petitioners to consider "the risk involved, whether TSCA would most appropriately regulate that risk and, if so, ***to indicate why TSCA is preferable to other Federal statutes***." 50 Fed. Reg. 46,825, 46,827 (Nov. 13, 1985) (emphasis added).

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[3] *See also Utahns for Better Transp. v. U.S. Dep't of Transp.*, 295 F.3d 1111, 1117 (10th Cir. 2002) ("We have repeatedly pointed out that in such a situation the government's prospective task of protecting 'not only the interest of the public but also the private interest of the petitioners in intervention' is 'on its face impossible' and creates the kind of conflict that 'satisfies the minimal burden of showing inadequacy of representation.'") (citations omitted); *Kleissler*, 157 F.3d at 973-74 ("[T]he government represents numerous complex and conflicting interests in matters of this nature. The straightforward business interests asserted by intervenors here may become lost in the thicket of sometimes inconsistent governmental policies."); *Sierra Club v. Espy*, 18 F.3d 1202, 1208 (5th Cir. 1994) (finding that the government did not adequately represent the timber industry because it "must represent the broad public interest, not just the economic concerns of the timber industry"); *Nat'l Farm Lines v. ICC*, 564 F.2d 381, 384 (10th Cir. 1977) ("We have here . . . the familiar situation in which the government agency is seeking to protect not only the interest of the public but also the private interest of the petitioners in intervention, a task which is on its face impossible.").

ABR and the other parties will likely disagree as to the adequacy of current regulations on the lead industry.[4]

In sum, because its motion is timely, it has standing, its interests could be impaired, and it is not adequately represented by the existing parties, ABR is entitled to intervene as a matter of right.

II. EVEN IF THE COURT FINDS ABR IS NOT ENTITLED TO INTERVENE AS A MATTER OF RIGHT, THE COURT SHOULD PERMIT ITS INTERVENTION.

Even if ABR is not entitled to intervene as a matter of right, the court should exercise its discretion and permit its intervention in this matter. Under Federal Rule of Civil Procedure 24(b), permissive intervention should be granted whenever the movant "has a claim or defense that shares with the main action a common question of law or fact." Fed. R. Civ. P. 24(b)(1)(B). In exercising its discretion, the Court also must consider whether the intervention will delay or prejudice the rights of the existing parties. Fed. R. Civ. P. 24(b)(1)(C); *see also Appleton v. Food & Drug Admin.*, 310 F. Supp. 2d 194, 196 (D.D.C. 2004).

First, there is a common question of law and fact between ABR's defense and the main action. ABR raises no new questions of law, and would raise only facts that are properly before the Court. Allowing ABR to intervene will not enlarge the issues involved in this case. As such, ABR's defense and the main action have the same questions of law and fact. *See Weinberg v. Barry*, 604 F. Supp. 390, 392 n.1 (D.D.C. 1985) (finding "it is clear that common questions of law and fact exist" where the intervenor sought to defend the validity of its own landmark application against plaintiffs' challenges).

[4] ABR is also aware that there is a pending motion to intervene by the National Shooting Sports Foundation, Inc. This association represents the firearms and ammunition industry and hunting interests, not suppliers of lead or lead products or the lead recycling industry. It would not adequately represent the interests of ABR.

Second, as described above, this motion for intervention is timely, and will not delay the adjudication or prejudice the existing parties. As described above, the instant motion is timely because it is being filed early in the proceedings of the case. In addition, ABR will abide by any scheduling order issued by the Court. Intervention in this case, then, would not delay the proceedings or prejudice the parties to the case. This Court, therefore, should grant the motion to intervene in this case. *See Huron Envtl. Activist League v. EPA*, 917 F. Supp. 34, 43 (D.D.C. 1996) (granting permissive intervention where movant's defenses to plaintiffs' claims had common questions of law and fact and would not unduly delay adjudication of rights of original parties).

Moreover, allowing intervention in this case would promote judicial economy.

> The early presence of intervenors may serve to prevent errors from creeping into the proceedings, clarify some issues, and perhaps contribute to an amicable settlement. Postponing intervention in the name of efficiency until after the original parties have forged an agreement or have litigated some issues may, in fact, encourage collateral attack and foster inefficiency. In other words, the game may already be lost by the time the intervenors get to bat in the late innings.

Kleissler, 157 F.3d at 973-74. For all these reasons, ABR's motion for intervention should be granted.

CONCLUSION

ABR has standing and, thereby, a significant, legally protectable interests that relate to the subject of this action. The disposition of this action will, as a practical matter, impair or impede its ability to protect its interests. The Defendants may not adequately represent ABR's interests in contesting Plaintiffs' complaint. Intervention by ABR may prevent or simplify future litigation relating to the same issues and will allow an additional interested party to express its views before the Court. The motion is timely. Therefore, ABR is entitled to intervene as of right

under Federal Rule of Civil Procedure 24(a)(2). Alternatively, ABR requests permissive intervention under Federal Rule of Civil Procedure 24(b).

Respectfully submitted,

/s/ *Robert N. Steinwurtzel*

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Counsel for Movant Association of Battery Recyclers, Inc.

Dated: December 17, 2010

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SIERRA CLUB and IMPROVING KIDS' ENVIRONMENT,

Plaintiffs,

v.

STEPHEN L. JOHNSON, in his official capacity as Administrator of the U.S. Environmental Protection Agency,

Defendant,

ASSOCIATION OF BATTERY RECYCLERS, INC.,

Defendant/Intervenor.

_____/

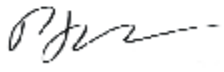
No. C 06-5641 PJH

ORDER VACATING HEARING DATE AND GRANTING MOTION FOR LEAVE TO INTERVENE

Good cause appearing and no opposition having been received, the motion of the Association of Battery Recyclers, Inc. ("ABR"), to intervene is GRANTED pursuant to Federal Rule of Civil Procedure 24. The December 13, 2006 hearing date is VACATED. ABR's answer and disclosure statement, are deemed filed as of the date of this order.

November 29, 2006

IT IS SO ORDERED.



PHYLLIS J. HAMILTON
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CENTER FOR BIOLOGICAL DIVERSITY 1333 North Oracle Road Tucson, AZ 85705; PUBLIC EMPLOYEES FOR ENVIRONMENTAL RESPONSIBILITY 2000 P Street NW, Suite 240 Washington, DC 20036; PROJECT GUTPILE, an unincorporated association in Santa Barbara, California; Plaintiffs, vs. LISA P. JACKSON, Administrator, Environmental Protection Agency Ariel Rios Building 1200 Pennsylvania Avenue, NW Washington, DC 20460; ENVIRONMENTAL PROTECTION AGENCY, Ariel Rios Building 1200 Pennsylvania Avenue, NW Washington, DC 20460; Defendants. ASSOCIATION OF BATTERY RECYCLERS, INC., 2020 K Street, NW Washington, DC 20006 Movant-Intervenor.	Case No. 1:10-cv-02007-EGS

CERTIFICATE REQUIRED BY LCVR 7.1 OF THE LOCAL RULES OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

I, the undersigned, counsel of record for the Association of Battery Recyclers, Inc. certify that to the best of my knowledge and belief, the following are parent companies, subsidiaries or affiliates of the Association of Battery Recyclers, Inc. which have any outstanding securities in the hands of the public:

None.

These representations are made in order that judges of this court may determine the need for recusal.

Attorney of Record for the Association of Battery Recyclers, Inc.

/s/ *Robert N. Steinwurtzel*
Robert N. Steinwurtzel (DC Bar 256743)

Dated: December 17, 2010

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CENTER FOR BIOLOGICAL DIVERSITY 1333 North Oracle Road Tucson, AZ 85705; PUBLIC EMPLOYEES FOR ENVIRONMENTAL RESPONSIBILITY 2000 P Street NW, Suite 240 Washington, DC 20036; PROJECT GUTPILE, an unincorporated association in Santa Barbara, California; Plaintiffs, vs. LISA P. JACKSON, Administrator, Environmental Protection Agency Ariel Rios Building 1200 Pennsylvania Avenue, NW Washington, DC 20460; ENVIRONMENTAL PROTECTION AGENCY, Ariel Rios Building 1200 Pennsylvania Avenue, NW Washington, DC 20460; Defendants.	Case No. 1:10-cv-02007-EGS
ASSOCIATION OF BATTERY RECYCLERS, INC., 2020 K Street, NW Washington, DC 20006 Movant-Intervenor.	

CERTIFICATE OF SERVICE

The undersigned certifies that, on the 17th day of December, 2010, I caused a true and correct copy of the foregoing Motion of the Association of Battery Recyclers, Inc. to Intervene in Support of Defendants and accompanying papers to be sent by first-class mail, postage prepaid to:

William J. Snape, III
Center for Biological Diversity
5268 Watson Street, NW
Washington, DC 20016

Jaclyn Lopez
Adam Keats
Center for Biological Diversity
351 California Street, Suite 600
San Francisco, CA 94104

Lisa P. Jackson
U.S. Environmental Protection Agency
Ariel Rios Building (AR), 1101A
1200 Pennsylvania Avenue, NW
Washington, DC 20004

U.S. Environmental Protection Agency
Correspondence Control Unit
Office of General Counsel (2311)
1200 Pennsylvania Avenue, NW
Washington, DC 20460

Eric H. Holder, Jr.
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Roger R. Martella , Jr.
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1501 K Street, NW
Washington, DC 20005

/s/ *Robert N. Steinwurtzel*

Robert N. Steinwurtzel

A/73608131.2

EXHIBIT A

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CENTER FOR BIOLOGICAL DIVERSITY 1333 North Oracle Road Tucson, AZ 85705; PUBLIC EMPLOYEES FOR ENVIRONMENTAL RESPONSIBILITY 2000 P Street NW, Suite 240 Washington, DC 20036; PROJECT GUTPILE, an unincorporated association in Santa Barbara, California; Plaintiffs, vs. LISA P. JACKSON, Administrator, Environmental Protection Agency Ariel Rios Building 1200 Pennsylvania Avenue, NW Washington, DC 20460; ENVIRONMENTAL PROTECTION AGENCY, Ariel Rios Building 1200 Pennsylvania Avenue, NW Washington, DC 20460; Defendants. ASSOCIATION OF BATTERY RECYCLERS, INC., 2020 K Street, NW Washington, DC 20006 Defendant-Intervenor .	Case No. 1:10-cv-02007-EGS

ANSWER OF THE ASSOCIATION OF BATTERY RECYCLERS, INC.

Defendant-Intervenor the Association of Battery Recyclers, Inc. ("ABR") for its Answer in response to the Complaint (the "Complaint") filed by the Center for Biological Diversity, Public Employees for Environmental Responsibility, and Project Gutpile (the "Plaintiffs") in this matter states as follows:

INTRODUCTION

1. The allegations in Paragraph 1 of the Complaint consist of Plaintiffs' characterization of the nature of the case and require no response.

2. The allegations in the first two sentences of Paragraph 2 of the Complaint consist of conclusions of law to which no response is required. To the extent a response is required, ABR refers to the source cited for its words, substance, meaning, content or context thereof and they are denied. In response to the allegations in the last sentence of Paragraph 2, ABR admits that EPA, among other government entities, has undertaken regulatory actions that have reduced exposures to lead. ABR denies the remainder of the allegations in Paragraph 2 of the Complaint.

3. ABR admits that Plaintiffs submitted a petition to EPA to initiate rulemaking pursuant to Section 21 of the Toxic Substances Control Act ("TSCA"), 15 U.S.C. §2620, to ban lead in bullets, shot and fishing sinkers/tackle on or about August 3, 2010. ABR denies the remainder of the allegations in Paragraph 3 of the Complaint.

4. ABR admits that EPA denied the request to ban lead bullets and shot based on its lack of authority under TSCA Section 3(2)(B)(v), and published notice of that denial in the Federal Register on September 24, 2010. ABR denies the remainder of the allegations in Paragraph 4 of the Complaint.

5. In response to the allegations in Paragraph 5 of the Complaint, ABR specifically refers to the source in its entirety for its words, substance, meaning, content or context thereof

and, to the extent that these allegations require a response, they are denied except that ABR admits that EPA denied Plaintiffs' request to ban fishing sinkers on November 4, 2010.

6. ABR admits the allegations in Paragraph 6 of the Complaint.

7. ABR denies the allegations in the first and second sentences of Paragraph 7 of the Complaint. The allegations in the last sentence of Paragraph 7 of the Complaint consist of Plaintiffs' characterization of the nature of the case and require no response. To the extent a response is required, they are denied.

JURISDICTION AND VENUE

8. ABR admits that, if EPA denies a petition filed pursuant to Section 21 of TSCA, 15 U.S.C. § 2620(b)(4)(A), Section 21 authorizes a petitioner whose petition is denied to commence a civil action in a district court of the United States to compel the Administrator to initiate a rulemaking proceeding, and that such suit must be filed within 60 days after the Administrator's denial of the petition. ABR denies the remainder of the allegations in Paragraph 8 of the Complaint.

9. Barring any jurisdictional defect, ABR admits that venue is proper in this district pursuant to 28 U.S.C. §1391(e).

PARTIES

10. ABR does not have sufficient information or knowledge to form a belief as to the truth of the averments in Paragraph 10 of the Complaint and therefore denies same.

11. ABR does not have sufficient information or knowledge to form a belief as to the truth of the averments in Paragraph 11 of the Complaint and therefore denies same.

12. ABR does not have sufficient information or knowledge to form a belief as to the truth of the averments in Paragraph 12 of the Complaint and therefore denies same.

13. ABR does not have sufficient information or knowledge to form a belief as to the truth of the averments in Paragraph 13 of the Complaint and therefore denies same.

14. ABR denies the allegations in the first sentence of Paragraph 14 of the Complaint. ABR does not have sufficient information or knowledge to form a belief as to the truth of the averments in the remainder of the allegations in Paragraph 14 and therefore denies same.

15. ABR does not have sufficient information or knowledge to form a belief as to the truth of the averments in Paragraph 15 of the Complaint and therefore denies same.

16. ABR admits the allegations in Paragraph 16 of the Complaint.

17. ABR admits the allegations in Paragraph 17 of the Complaint.

STATUTORY BACKGROUND

18. In response to the allegations in Paragraph 18 of the Complaint, ABR specifically refers to the source in its entirety for its words, substance, meaning, content or context thereof and, to the extent that these allegations require a response, they are denied.

19. The allegations in Paragraph 19 of the Complaint consist of conclusions of law to which no response is required. To the extent a response is required, ABR refers to the source cited for its words, substance, meaning, content or context thereof and, therefore, denies same.

20. The allegations in Paragraph 20 of the Complaint consist of conclusions of law to which no response is required. To the extent a response is required, ABR refers to the source cited for its words, substance, meaning, content or context thereof and, therefore, denies same.

21. The allegations in Paragraph 21 of the Complaint consist of conclusions of law to which no response is required. To the extent a response is required, ABR refers to the source cited for its words, substance, meaning, content or context thereof and, therefore, denies same.

22. The allegations in Paragraph 22 of the Complaint consist of conclusions of law to which no response is required. To the extent a response is required, ABR refers to the source cited for its words, substance, meaning, content or context thereof and, therefore, denies same.

23. The allegations in Paragraph 23 of the Complaint consistent of conclusions of law to which no response is required. To the extent a response is required, ABR denies the allegations in the first sentence of Paragraph 23, and with respect to the remainder of the allegations in Paragraph 23, ABR refers to the source cited for its words, substance, meaning, content or context thereof and, therefore, denies same.

24. In response to the allegations in Paragraph 24 of the Complaint, ABR states that lead is a naturally occurring metal in the environment, and that lead is a "chemical substance" as the term is defined in Section 3 of TSCA to the extent it is not otherwise excluded under Section 3(2)(B). 15 U.S.C. §2602(2)(A). ABR admits that uses of lead are already subject to strict regulation, and that EPA has required manufacturers (including importers) of consumer products intended for use by children who also manufacture (including import) lead or lead compounds to report certain unpublished health and safety data to EPA, 73 Fed. Reg. 5109 (Jan. 29, 2008). ABR denies the remainder of the allegations in Paragraph 24.

25. The allegations in Paragraph 25 of the Complaint consist of conclusions of law to which no response is required. To the extent a response is required, ABR admits that TSCA contains exclusions to the definition of "chemical substance" under 15 U.S.C. §2602(2)(B), and, with respect to the remainder of the allegations in Paragraph 25, refers to the source cited for its words, substance, meaning, content or context thereof and, therefore, denies same.

26. ABR admits that TSCA does not include a definition of shells or of cartridges. ABR does not have sufficient information or knowledge to form a belief as to the truth of the remainder of the allegations in Paragraph 26 of the Complaint and therefore denies same

27. In response to the allegations in Paragraph 27 of the Complaint, ABR refers to the source cited for its words, substance, meaning, content or context thereof, and, to the extent that these allegations require a response, they are denied

28. ABR denies the allegations in Paragraph 28 of the Complaint.

29. In response to the allegations in Paragraph 29, ABR refers to the source cited for its words, substance, meaning, content or context thereof, and, to the extent that these allegations require a response, they are denied.

30. In response to the allegations in Paragraph 30, ABR refers to the source cited for its words, substance, meaning, content or context thereof, and, to the extent that these allegations require a response, they are denied.

31. The allegations in Paragraph 31 of the Complaint consist of conclusions of law to which no response is required. To the extent a response is required, ABR refers to the source cited for its words, substance, meaning, content or context thereof. ABR denies the allegations in Paragraph 31 to the extent they imply that Plaintiffs are entitled to such relief in this matter.

FACTUAL BACKGROUND

32. Upon information and belief, ABR admits that lead is used in manufactured products. ABR does not have sufficient information or knowledge to form a belief as to the truth of the remainder of the allegations in Paragraph 32 of the Complaint and therefore denies same.

33. ABR does not have sufficient information or knowledge to form a belief as to the truth of the averments in Paragraph 33 of the Complaint and therefore denies same.

34. ABR does not have sufficient information or knowledge to form a belief as to the truth of the averments in Paragraph 34 of the Complaint and therefore denies same.

35. ABR does not have sufficient information or knowledge to form a belief as to the truth of the averments in Paragraph 35 of the Complaint and therefore denies same.

36. ABR does not have sufficient information or knowledge to form a belief as to the truth of the averments in Paragraph 36 of the Complaint and therefore denies same.

37. ABR does not have sufficient information or knowledge to form a belief as to the truth of the averments in Paragraph 37 of the Complaint and therefore denies same.

38. ABR does not have sufficient information or knowledge to form a belief as to the truth of the averments in Paragraph 38 of the Complaint and therefore denies same.

39. ABR does not have sufficient information or knowledge to form a belief as to the truth of the averments in Paragraph 39 of the Complaint and therefore denies same.

40. ABR does not have sufficient information or knowledge to form a belief as to the truth of the averments in Paragraph 40 of the Complaint and therefore denies same.

41. ABR does not have sufficient information or knowledge to form a belief as to the truth of the averments in Paragraph 41 of the Complaint and therefore denies same.

42. ABR does not have sufficient information or knowledge to form a belief as to the truth of the averments in Paragraph 42 of the Complaint and therefore denies same.

43. ABR does not have sufficient information or knowledge to form a belief as to the truth of the averments in Paragraph 43 of the Complaint and therefore denies same.

44. ABR does not have sufficient information or knowledge to form a belief as to the truth of the averments in Paragraph 44 of the Complaint and therefore denies same.

45. ABR admits that, on or about August 3, 2010, Plaintiffs submitted a petition to EPA requesting rulemaking to prohibit the manufacture, processing, and distribution of lead shot, bullets, and fishing sinkers under TSCA.

46. ABR denies the allegations in Paragraph 46 of the Complaint.

47. In response to the allegations in Paragraph 47, ABR refers to the source cited for its words, substance, meaning, content or context thereof and, to the extent that these allegations require a response, they are denied.

48. In response to the allegations in the first sentence in Paragraph 48, ABR refers to the source cited for its words, substance, meaning, content or context thereof and, to the extent that these allegations require a response, they are denied. ABR does not have sufficient information or knowledge to form a belief as to the truth of the averments in the remainder of the allegations of Paragraph 48 of the Complaint and therefore denies same.

49. ABR does not have sufficient information or knowledge to form a belief as to the truth of the averments in Paragraph 49 of the Complaint and therefore denies same.

50. In response to the allegations in Paragraph 50, ABR refers to the source cited for its words, substance, meaning, content or context thereof and, to the extent that these allegations require a response, they are denied, except that ABR admits EPA denied the request to ban lead bullets and shot based on its lack of authority under TSCA Section 3(2)(B)(v).

51. ABR does not have sufficient information or knowledge to form a belief as to the truth of the averments in Paragraph 51 of the Complaint and therefore denies same.

52. In response to the allegations in Paragraph 52, ABR refers to the source cited for its words, substance, meaning, content or context thereof and, to the extent that these allegations require a response, they are denied, except ABR admits that EPA published notice of its denial of

Plaintiffs' request to ban lead bullets and shots and the reasons therefore in the Federal Register on September 24, 2010, at 75 Fed. Reg. 58,377.

53. In response to the allegations in Paragraph 53, ABR refers to the source cited for its words, substance, meaning, content or context thereof and, to the extent that these allegations require a response, they are denied, except ABR admits that EPA denied Plaintiffs' request to ban lead fishing sinkers on November 4, 2010.

54. In response to the allegations in Paragraph 54 ABR refers to the source cited for its words, substance, meaning, content or context thereof and, to the extent that these allegations require a response, they are denied, except ABR admits that EPA published notice of its denial of Plaintiffs' request to ban lead fishing sinkers and the reasons therefore in the Federal Register on November 17, 2010, at 75 Fed. Reg. 70,246.

PRAYER FOR RELIEF

55. ABR restates and incorporates by reference its responses in Paragraphs 1 through 54 above as if fully set forth herein.

56. ABR denies the allegations in Paragraph 56 of the Complaint.

57. The allegations in Paragraph 57 of the Complaint consist of conclusions of law to which no response is required. To the extent a response is required, ABR refers to the source cited for its words, substance, meaning, content or context thereof. ABR denies the allegations in Paragraph 57 to the extent they imply that Plaintiffs are entitled to such relief in this matter.

58. ABR denies the allegations in Paragraph 58 of the Complaint.

GENERAL DENIAL

59. ABR denies each and every allegation of the Complaint not previously admitted, explained, qualified, or denied.

FIRST AFFIRMATIVE DEFENSE

The Complaint fails to state a claim upon which relief can be granted.

SECOND AFFIRMATIVE DEFENSE

This Court lacks jurisdiction over one or more of the claims in the Complaint.

PRAYER FOR RELIEF

WHEREFORE, Defendant-Intervenor the Association of Battery Recyclers, Inc. prays for judgment as follows:

1. To the extent the Complaint seeks an order requiring EPA to initiate a rulemaking regarding spent lead shot, bullets and lead containing fishing tackle/sinkers, it is denied;

2. To the extent the Complaint seeks litigation expenses of the Plaintiffs, it is denied;

3. Judgment on the merits in favor of Defendants and against the Plaintiffs;

4. For the costs of this lawsuit, including reasonable attorneys' fees; and

5. For such other relief that this Court may deem just and proper.

Respectfully submitted,

/s/ *Robert N. Steinwurtzel*

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Sandra P. Franco (DC Bar 467091)
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(202) 373-6000
(202) 424-6001 (facsimile)

Counsel for Association of Battery Recyclers, Inc.

Dated: December 17, 2010

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

PUBLIC EMPLOYEES FOR
ENVIRONMENTAL RESPONSIBILITY
2000 P Street NW, Suite 240
Washington, DC 20036;

PROJECT GUTPILE, an unincorporated
association in Santa Barbara, California;

Plaintiffs,

vs.

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

LISA P. JACKSON, Administrator,
Environmental Protection Agency
Ariel Rios Building
1200 Pennsylvania Avenue, NW
Washington, DC 20460;

ENVIRONMENTAL PROTECTION AGENCY,
Ariel Rios Building
1200 Pennsylvania Avenue, NW
Washington, DC 20460;

Defendants.

ASSOCIATION OF BATTERY
RECYCLERS, INC.,
2020 K Street, NW
Washington, DC 20006

Movant-Intervenor.

DECLARATION OF EARL CORNETTE

I, Earl Cornette, am over 18 years of age and otherwise competent to testify as to the matters herein, which are based on my personal knowledge.

1. I am the Chairman of the Association of Battery Recyclers, Inc. ("ABR"). I am familiar with the Petition submitted by the Center for Biological Diversity, Public Employees for Environmental Responsibility, Project Gutpile, the American Bird Conservancy, and the Association of Avian Veterinarians to the United States Environmental Protection Agency ("EPA") pursuant to Section 21 of the Toxic Substances Control Act ("TSCA"), 15 U.S.C. §2620, that is the subject matter of this case, and the determination by EPA to deny that petition. I am submitting this declaration in support of the Motion of the Association of Battery Recyclers, Inc. to Intervene in Support of Defendants in the above-captioned case.

2. On August 3, 2010, the Center for Biological Diversity, Public Employees for Environmental Responsibility, Project Gutpile, the American Bird Conservancy, and the Association of Avian Veterinarians filed a petition under TSCA Section 21 requesting that EPA prohibit under TSCA Section 6(a), 15 U.S.C. §2605(a), the manufacture, processing, and distribution in commerce of (1) lead bullets and shot; and (2) lead fishing sinkers ("Petition"). 75 Fed. Reg. 58,377, 58,378 (Sept. 24, 2010).

3. On August 27, 2010, EPA denied the request to prohibit the manufacture, processing, and distribution in commerce of lead bullets and shot. 75 Fed. Reg. at 58,378.

4. On November 4, 2010, EPA denied the second request to prohibit the manufacture, processing, and distribution in commerce of lead fishing gear. 75 Fed. Reg. 70,246 (Nov. 17, 2010).

5. ABR is an organization of companies that utilize and recycle lead acid batteries and other lead products. (America's Battery Recyclers, http://www.americasbatteryrecyclers.org

/association.html). Members of the ABR include battery manufacturers, lead chemical manufacturers, secondary lead smelters, consumers of secondary lead, and suppliers and consultants to the industry. (*Id.*). The battery recycling industry members of the ABR collectively represent nearly all the lead recycling capacity currently available in the United States.

6. There are two main production routes for lead: (1) primary production from mined lead ore; and (2) secondary production, where it is recovered from recycled products or from residues arising from the production process. (United States Geological Survey, Mineral Commodity Summaries 2010, at 88 (2010), *available at* http://minerals.usgs.gov/minerals/pubs/mcs/2010/mcs2010.pdf). In 2009, approximately 80 percent of reported domestic lead consumption came from secondary production. (*Id.*) Ammunition remains a significant use of lead. (United States Geological Survey, *Lead Statistics and Information*, http://minerals.usgs.gov/minerals/pubs/commodity/lead/.

7. ABR members recycle lead-acid batteries, and other lead products, including recovered lead shots. (*See, for example,* Mayco Industries, Inc., *Buy Lead Scrap*, http://www.maycoindustries.com/lead_scrap.htm; EPA, Best management practices for lead at outdoor shooting ranges, EPA-902-B-01-001, at A-2 (rev. June 2005), *available at* http://www.epa.gov/region2/waste/leadshot/epa_bmp.pdf). In place of virgin materials, recycled lead and plastic products are returned to the battery industry and other consumers to be used for the manufacture of batteries and other products. In particular, EPA has identified reclaiming and recycling of spent lead as a best management practice for shooting ranges. (EPA, Best management practices for lead at outdoor shooting ranges, EPA-902-B-01-001 (rev. June 2005), *available at* http://www.epa.gov/region2/waste/leadshot/epa_bmp.pdf).

8. The lead produced and processed by ABR members are sold for use in products sold to consumers, including lead bullets and shots and lead fishing sinkers. (America's Battery Recyclers, http://www.americasbatteryrecyclers.org/technology.html; *see also* Gopher Resources, *Answers to Your Questions*, http://www.gopherresource.com/lead_faq.asp). Members of ABR also manufacture these products. (*See, for example,* Mayco Industries, Inc., *Lawrence Brand Lead Shot / West Coast Magnum Shot*, http://www.maycoindustries.com/lead_shot.htm).

9. The lead industry is already highly regulated, particularly secondary smelters.

10. Plaintiffs request EPA to ban the manufacture, processing and distribution in commerce of lead shot, bullets, and fishing sinkers pursuant to Section 6(a) of TSCA. Compl. ¶45. Such a ban will apply to activities by certain of ABR's members.

11. A ban on lead shot, bullets and fishing sinkers will also have adverse economic impacts on ABR's members by restricting sources of supply for the recycling business and eliminating a significant portion of their customer base.

12. ABR, and its members, have a substantial interest in the outcome of this case and, therefore, are seeking leave to intervene.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on December 16 2010.

E. Earl Cornette

Earl Cornette

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CENTER FOR BIOLOGICAL DIVERSITY 1333 North Oracle Road Tucson, AZ 85705; PUBLIC EMPLOYEES FOR ENVIRONMENTAL RESPONSIBILITY 2000 P Street NW, Suite 240 Washington, DC 20036; PROJECT GUTPILE, an unincorporated association in Santa Barbara, California; Plaintiffs, vs. LISA P. JACKSON, Administrator, Environmental Protection Agency Ariel Rios Building 1200 Pennsylvania Avenue, NW Washington, DC 20460; ENVIRONMENTAL PROTECTION AGENCY, Ariel Rios Building 1200 Pennsylvania Avenue, NW Washington, DC 20460; Defendants. ASSOCIATION OF BATTERY RECYCLERS, INC., 2020 K Street, NW Washington, DC 20006 Movant-Intervenor.	Case No. 1:10-cv-02007-EGS

[PROPOSED] ORDER

This matter came before the Court on the Motion of the Association of Battery Recyclers, Inc. for Leave to Intervene in Support of Defendants in the above-captioned matter pursuant to Federal Rules of Civil Procedure 24(a)(2) or alternatively Rule 24(b), filed December __, 2010. This Court having considered the motion, the supporting memorandum, and declaration in support thereof, finds good cause exists for granting the motion.

It is therefore ORDERED that the Association of Batter Recyclers Inc.'s Motion to Intervene in Support of Defendants is hereby GRANTED and that the Clerk accept the attached Answer for filing.

DATED this _____ day of _____, 2010

BY THE COURT:

_____