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. and AMERICAN BATTERY RECYCLERS,

Defendant-Intervenors.

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

COMBINED OPPOSITION TO PARTIAL MOTIONS TO DISMISS

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I. INTRODUCTION

Federal Defendants Lisa P. Jackson and the Environmental Protection Agency ("EPA") and Defendant-Intervenor National Shooting Sports Foundation, Inc. ("NSSF") filed partial motions to dismiss Plaintiffs' complaint on February 8, 2011, each seeking the dismissal of the portions of Plaintiffs' action regarding lead bullets and shot. Both motions argue that Plaintiffs' action is time-barred and thus should be dismissed under Fed. R. Civ. Proc. 12(b)(1) for lack of subject matter jurisdiction, or in the alternative, that the EPA does not have the statutory authority to regulate lead bullets and shot and that portion of Plaintiffs' complaint should therefore be dismissed under Fed. R. Civ. Proc. 12(b)(6) for failure to state a claim upon which relief can be granted.

Plaintiffs' action should not be dismissed under either argument. First, Plaintiffs timely filed their complaint pursuant to § 2620(b)(4) of the Toxic Substances Control Act ("TSCA") 15 U.S.C. §§ 2601, *et seq*., by filing within 60 days of EPA's final agency action denying Plaintiffs' petition as described and required by TSCA. Second, the plain language of TSCA confirms that EPA has the authority to regulate lead bullets and shot, a conclusion further established by TSCA's legislative history. As both motions for partial dismissal are substantially similar, Plaintiffs submit this consolidated brief in opposition. Pursuant to Loc. Rules Civ. Proc. 7(f), Plaintiffs request a hearing on these motions.

II. FACTUAL BACKGROUND

The essential facts are not in dispute. Plaintiffs filed a petition for rulemaking with the EPA on August 3, 2010. Petition, EPA Exhibit 1. The petition detailed the toxic effects of lead on wildlife and humans and requested that the EPA "adopt regulations prohibiting the manufacture, processing, and distribution in commerce of lead shot, lead bullets, lead fishing sinkers, and other lead-containing fishing gear." Petition, EPA Exhibit 1 at 7. On August 27, 2010, EPA Assistant Administrator Stephen A. Owens sent a letter to Plaintiffs denying "that portion of your petition" regarding lead bullets and shot, adding that the EPA was still "reviewing the request in the petition regarding lead

fishing sinkers…." EPA Exhibit 2. On September 24, 2010, EPA published in the Federal Register an explanation of its reasons for denying "the first request," stating that the agency lacked the authority to regulate lead bullets and shot under section 2620(2)(b)(v). 75 Fed. Reg. 58377.

On November 4, 2010, the last possible day EPA could have granted or denied the petition, EPA sent Plaintiffs a second letter stating that the agency had "completed its review of your August 3, 2010, petition requesting that the Agency take action under [TSCA] to prohibit the manufacture, processing, and distribution in commerce of lead shot, bullets, and fishing sinkers." EPA Exhibit 3. EPA explained that Plaintiffs had not "demonstrated that the remaining action requested in [their] 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." *Id.* On November 17, 2010, EPA published in the Federal Register an explanation for its denial of "the request specific to fishing sinkers." 75 Fed. Reg. 70246. Plaintiffs filed this action on November 23, 2010.

III. STANDARD OF REVIEW

Under a Rule Civ. Proc. 12(b)(1) motion to dismiss, "the Court considers the factual allegations of the complaint in the light most favorable to the non-moving party." *Loughlin v. United States*, 230 F. Supp. 2d 26, 35 (D.D.C. 2002). When there are "significant facts in dispute that [would] preclude a finding that [a] statute of limitations bars the claims of the plaintiffs," a court must deny a 12(b)(1) motion. *Id*. at 38. Similarly, "[f]or the purposes of a Fed. R Civ. P. 12(b)(6) motion to dismiss, the material allegations of the complaint are taken as admitted." *Jenkins v. McKeithen*, 395 U.S. 411, 421 (1969); *see also Ashcroft v. Iqbal*, 129 S.Ct. 1937 (2009); *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 572 (2007)); *Howard v. Gutierrez*, 474 F. Supp. 2d 41, 47 (D.D.C. 2007) ("Under Rule 12(b)(6), the plaintiffs [sic] factual allegations must be presumed true and should be liberally construed in his or her favor. The plaintiff must be

given every favorable inference that may be drawn from the allegations of fact" (internal citations and citation marks omitted)).

IV. ARGUMENT

A. Plaintiffs' Action is not Time-Barred

At the heart of EPA's and NSSF's arguments that Plaintiffs' action is time-barred is their contention that EPA's August 27 letter amounted to the denial of Plaintiffs' petition and that Plaintiffs therefore missed the 60-day window for timely filing. This argument fails because the plain language of TSCA supports the conclusion that EPA did not deny the petition until November 4 and therefore Plaintiffs filed their complaint within the 60-day time limit.

1. The Plain Language of TSCA Permits a Civil Action for the Denial of a Petition, not the Denial of a Portion of a Petition

Section 21 of TSCA provides unambiguous instructions to the EPA for processing petitions, and to petitioners for commencing civil litigation. It provides that within 90 days of receiving a petition, "the Administrator shall either grant or deny the petition," and, if the petition is denied, the petitioner may bring a lawsuit to "compel the Administrator to initiate a rulemaking proceeding as requested in the petition…within 60 days after the Administrator's denial of the petition…." 15 U.S.C. §§ 2620(b)(3), (b)(4)(A). In response to Plaintiffs' petition, EPA issued a letter on August 27 indicating that it was denying the "portion of the petition" dealing with lead shot and bullets. Complaint, ¶ 4. EPA issued another letter on November 4 denying the portion of the petition dealing with lead fishing sinkers. Complaint, ¶ 5. Defendants argue that because Plaintiffs waited for a final disposition of their petition, they are time-barred. This argument fails as it is inconsistent with the plain language of the statute and EPA's historic treatment of TSCA petitions.

EPA's August 27 letter did not constitute an actionable denial of the petition. In the August 27 letter, EPA stated it was "denying that *portion* of your petition" regarding

lead shot and bullets and that it was still reviewing the request regarding lead fishing sinkers. EPA Exhibit 2. By the plain language of TSCA, Congress intended the EPA to either "grant" or "deny" a petition. It further intended that only the denial of the petition, and not the denial of a portion of a petition, be actionable. "Statutory construction must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose," *Engine Mfrs. Assn. v. S. Coast Air Quality Mgt. Dist.*, 541 U.S. 246, 252 (2004) (quoting *Park 'N Fly, Inc. v. Dollar Park & Fly, Inc.*, 469 U.S. 189, 194 (1985)). Therefore, the language instructing the EPA must be afforded considerable weight.

Nowhere does the statute contemplate the denial of a portion of a petition. It instead instructs the EPA to either grant or deny the petition. This unambiguous direction provides petitioners clear guidance on when to commence civil litigation. EPA and NSSF argue that the single petition was actually two separate petitions in disguise. EPA Mot. to Dismiss at 7 ("Plaintiffs decided to submit two petition requests in one document"); NSSF Mot. to Dismiss at 5 ("EPA acted to sever Plaintiffs' two requests into two separate petitions."). The briefest glimpse at the petition quickly repudiates that allegation.

The petition presents scientific research from over 450 scientific journals, articles, and other resources on the toxic effects of lead in the environment on wildlife and humans. While the petition does address lead shot and bullets separately from sinkers in some sections of the petition, it discusses them collectively just as often. *See* Petition, EPA Exhibit 1, Parts I, II, III.A-D, VI, VII. Ultimately, EPA's argument that the petition is a mere collection of "disparate evidence" rings hollow: the unmistakable unifying theme of the petition, requested rule, and indeed this litigation, is that wildlife is being poisoned by lead products that EPA can and must regulate. EPA Mot. to Dismiss at 7. Even if, as EPA suggests, Plaintiffs should have submitted two separate petitions for separate rulemakings, nothing in TSCA or EPA's previous treatment of petitions for

rulemakings suggested this was necessary. In 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,[1] thereby only triggering one filing deadline. Plaintiffs should not now be penalized for EPA's novel treatment of their petition.

2. EPA Does not Have the Discretion to Segment the Petition

In the alternative, EPA argues that it should be accorded "traditional discretion" in determining whether to consider multiple requests presented within a single petition together or separately. EPA Mot. to Dismiss at 8. However, this argument too is unconvincing as the two cases relied upon by EPA, *Her Majesty the Queen in Right of Ontario v. EPA*, 912 F.2d 1525 (D.C. Cir. 1990) and *Mass. Pub. Interest Research Group v. U.S. Nuclear Regulatory Commission*, 852 F.2d 9 (1st Cir. 1988), involve statutes that provide substantially more discretion to agencies in processing petitions than does TSCA, and because in the present matter, EPA itself never made public its intent to segment the petition into separate decision-makings.

The cases cited by EPA involve petition procedures that vest considerable deference to agencies in determining when or how the agency responds to petitions. The courts in these cases allowed the agencies to segment requests likely because the statutes at issue permit the agencies to take years to respond to petitions, and allowing the agencies to segment the requests in those situations actually resulted in a more equitable process for plaintiffs who were then able to challenge the decisions in a more timely manner (rather than waiting six years or more for a final denial). The petition procedures at issue in the cases cited by EPA stand in sharp contrast to the tight deadlines and

[1] EPA has denied petitions in part and granted them in part, but always at the same time, resulting a final disposition of the entire petition. *See e.g.*, *Environmental Defense Fund v. Thomas*, 657 F. Supp. 302, 305 (D.D.C. 1987) (where EPA denied "all requests for rulemaking under section 6" but "granted plaintiffs' request for record-keeping requirements under section 8" and agreed to "initiat[e] proceedings under section 4"); *Environmental Defense Fund v. Reilly*, 909 F.2d 1497, 1499-1500 (D.C. Cir. 1990).

specific procedures found in TSCA. Unlike the plaintiffs in cases cited by EPA, Plaintiffs and any future petitioner would be prejudiced if the Court permitted EPA to unilaterally segment TSCA petitions, because EPA could then limit a petitioner's access to the courts by forcing a petitioner to choose between bringing multiple costly lawsuits or losing claims to the statutory filing deadline; Congress clearly did not intend that petitioners suffer this dilemma.

The two cases are also distinguishable because here, the petitioners and the public had no way of knowing that the EPA's denial of a portion of the petition served to split the single petition into two petitions, and that its decision on the first "portion" was final. This is in contrast to the two cases relied upon by EPA, where the agencies' decision statements were far more explicit in their finality. *See Her Majesty the Queen in Right of Ontario,* 912 F.2d at 1532 ("the EPA's [stated] interpretation of section 115…is unambiguous and devoid of any suggestion that it might be subject to subsequent revision."); *Mass. Pub. Interest Research Group,* 852 F.2d at 13 ("A notice…published in the Federal Register stated that the Director's decision would become final in twenty-five days"). EPA's August 27 letter only served to notify Plaintiffs that their request regarding lead bullets and shot was *going to be denied at some future point*.

3. Plaintiffs Were Justified in Awaiting the Outcome of the Petition as a Whole

Finally, Plaintiffs should not have filed their complaint within 60 days of EPA's first letter because EPA announced that it had not disposed of all the issues presented in the petition. When an agency treats a proceeding as ongoing, it is judicially imprudent for a court to consider an "initial order while the proceeding as a whole remained pending before the [agency]." *New York v. United States*, 568 F.2d 887, 893 (2nd Cir. 1977). In *New York v. U.S.*, New York appealed an order by the Interstate Commerce Commission approving train rates for wheat. The Commission had issued an order in August 1975 denying petitioners' request for reconsideration of the Commission's decision approving

three of the four train rates at issue. *Id*. at 892. Subsequently, however, the Commission issued a "final report and order" January 1976, discussing all the rates, and affirming and adopting the Commissions' previous decision about the three rates. *Id*. The Second Circuit found that the August 1975 order did not dispose of all the rates at issue and therefore did not start the 60-day statute of limitations, holding that, "[e]specially in view of the deeply rooted policies of the federal courts against piecemeal appeals and in favor of allowing administrative proceedings to run their course without interference from the courts, we hold that the instant petition to review was timely." *Id*. at 893.

Like EPA here, the federal agency in *New York* "seem[ed] to have viewed the proceeding as still pending as a whole, notwithstanding its [earlier] denial of reconsideration." *Id*. Here, EPA continually referred to the petition throughout its review process in the singular, as "your petition," "a petition," or "the petition."[2] Not until November 4, 2010, the last day allowed under TSCA Section 21for granting or denying a petition, did EPA state it had "completed review of your August 3, 2010, petition requesting that the Agency take action under [TSCA] to prohibit the manufacture, processing, and distribution in commerce of lead shot, bullets, and fishing sinkers." EPA Exhibit 3. Similar to the Commission in *New York v. U.S.* whose "final order" "discussed all the rates and affirmed and adopted the conclusions previously made," *New York v. United States*, 568 F.2d at 893, here EPA reiterated its position on the "request" regarding lead shot and bullets in its November 4 letter that also denied the portion of the petition that regarded lead sinkers. At no point did EPA ever state, or even suggest, that it intended to treat the bullets, shot, and sinker portions of the petition as *separate petitions*.

[2] *See* EPA Exhibit 2 ("your petition" "the petition"); EPA Exhibit 3 ("your petition," "the petition"); 75 Fed. Reg. 58377 ("a petition," "the petition"); 75 Fed. Reg. 70246 ("a petition," "the petition").

As the court in *New York* explained: "Even assuming that petitioners could have filed a petition to review the order approving three of the four rates immediately after denial of their petition for reconsideration…we are satisfied that they were justified in awaiting the outcome of the proceeding as a whole. Respondents have not shown that they were prejudiced by the passage of time." *New York v. United States*, 568 F.2d at 893. The same is true here: Plaintiffs filed their action within 60 days of EPA's November 4, 2010 letter, which all evidence suggests EPA intended to be its final answer on the Plaintiffs' petition. The interests of judicial economy were best served by Plaintiffs filing one suit on the entire petition, as the threshold question on the merits is whether lead poses unreasonable risks to wildlife. Because no injury to EPA would result or has resulted from Plaintiffs' filing their suit within 60 days of EPA's final denial of the petition, and due to the practicality of not engaging in two parallel *de novo* appeals from the same petition, Plaintiffs prudently and appropriately waited until the EPA disposed of the entire petition before bringing suit.

Plaintiffs were therefore justified in bringing their suit when they did because, at least prior to November 4, 2010, it was doubtful as to whether their claim was reviewable. Finality of an agency's action is "a prerequisite of judicial review" where the statute prescribes finality. *John Doe v. Drug Enforcement Agency*, 484 F.3d 561, 565 (D.C. Cir. 2007). TSCA requires that the EPA deny or grant the petition before the petitioner can file suit. In evaluating finality in cases arising in statutes other than the Administrative Procedure Act ("APA"), courts rely on the interpretation of "final" within the meaning of the APA. *Id.* at 566. Therefore, in determining whether the August 27 letter denied the petition and constituted the EPA's final agency action, the Court must consider whether the letter "mark[ed] the consummation of the agency's decisionmaking process" and was "one by which rights or obligations [were] determined, or from which legal consequences will flow." *Id.* at 566, *citing Nat'l Ass'n of Home Builders v. Norton*, 415 F.3d 8, 13 (D.C. Cir. 2005), *see also Bennett v. Spear*, 520 U.S. 154, 177-78 (1997).

Here, EPA's August 27 letter clearly did not "mark the consummation of the agency's decisionmaking process" as EPA indicated it was still "reviewing the request in the petition regarding lead fishing sinkers…." EPA Exhibit 2. Furthermore, it was not until EPA's final November 4 letter that it announced that it had "completed its review of your August 3, 2010, petition requesting that the Agency take action under [TSCA] to prohibit the manufacture, processing, and distribution in commerce of lead shot, bullets, and fishing sinkers." EPA Exhibit 3. No rights or obligations were determined in EPA's August 27 letter. The only final agency action here was EPA's November 4 letter where EPA announced for the first time it had disposed of all the matters in the petition. The November 4 letter is the final agency action triggering TSCA's 60-day filing deadline, therefore, Plaintiffs timely filed their complaint.

4. Exceptions to the Statute of Limitations Apply

The Supreme Court has held that statutes of limitation can be non-jurisdictional where they seek to protect defendants from "stale or unduly delayed claims" or jurisdictional where they seek "to achieve a broader system-related goal, such as facilitating the administration of claims…limiting the scope of a governmental waiver of sovereign immunity…or promoting judicial efficiency." *John R. Sand & Gravel Co. v. United States*, 552 U.S. 130, 133 (2008)(internal citations omitted). Though the jurisdictional nature of Section 21 of TSCA has never been decided, *see Environmental Defense Fund v. Thomas*, 657 F. Supp. 302, 307 (D.D.C. 1987), this Court should find that it is non-jurisdictional because Congress intended that petitioners have prompt, unfettered access to the courts.

In determining whether Fed. R. Civ. Proc. 6(a) applies to computing TSCA's 90-day response and 60-day filing period, a D.C. district court found that "section 21 and the legislative history behind it demonstrate Congress' solicitousness toward citizen petitions." *Environmental Defense Fund v. Thomas*, 657 F. Supp. at 307. In finding that Rule 6(a) was applicable, the court noted that while courts generally construe "time limits

for review of agency action as jurisdictional in order to 'impart[] finality into the administrative process, thereby conserving administrative resources,'" the agency action of responding to a petition does not present the same heavily-weighted factors that administrative adjudication or administrative rulemaking present. *Id., citing Eagle-Picher Indus. v. EPA*, 759 F.2d 905, 911 (D.C. Cir. 1985). The same logic applies here. Therefore, even if this Court concludes that the portion of Plaintiffs' action regarding lead bullets and shot is untimely under TSCA Section 21, the Court should find that the 60-day time limit is not jurisdictional and apply exceptions to the statute of limitations to further the interests of justice and equity.

a. The Court Should Equitably Toll the Statute of Limitations to EPA's November 4 Letter

Equitable tolling presumptively exists absent an express statement by Congress to the contrary. *Timoni v. United States*, 419 F.2d 294, 299 (D.C. Cir. 1969). This "rebuttable presumption of equitable tolling" has also been extended by the Supreme Court to apply to suits against the United States, much like the immediate one. *Irwin v. Department of Veterans Affairs*, 498 U.S. 89, 95-96 (1990) ("We therefore hold that the same rebuttable presumption of equitable tolling applicable to suits against private defendants should also apply to suits against the United States.")

If Plaintiffs' suit is deemed to be untimely, it is through no fault of its own; nor is it the result of Plaintiffs' failure to exercise due diligence. Rather, EPA's unique and confusing procedural conduct forced Plaintiffs to decide whether to bring potentially unripe piecemeal litigation challenging each denial of each "request" in the petition, or to follow the plain language of Section 21 and wait until there was a complete disposition of the entire petition. Sensibly, Plaintiffs opted for the latter option.

The doctrine of equitable tolling is intended to ensure "the plaintiff is not, by dint of circumstances beyond his control, deprived of a 'reasonable time' in which to file suit." *Chung v. DOJ*, 333 F.3d 273, 279 (D.C. Cir. 2003). Here, Plaintiffs' reliance on

the plain language of Section 21, combined with EPA's past treatment of TSCA petitions, justified Plaintiffs waiting until EPA responded to the petition in full. Consequently, the Court should apply doctrine of equitable tolling, tolling the statute of limitation until the EPA's November 4 letter, and find Plaintiffs' action timely.

b. The Court Should Find That EPA Is Equitably Estopped From Asserting Untimeliness

Alternatively, if this Court finds EPA's confusing conduct was the root cause of Plaintiffs' purported delay, this Court should invoke the doctrine of equitable estoppel, foreclosing EPA from taking advantage of its misleading conduct. The D.C. Circuit Court has explained that:

> [w]hereas equitable tolling allows a plaintiff to avoid the bar of the limitations period if despite all due diligence he is unable to obtain vital information bearing on the existence of his claim, *Smith-Haynie v. District of Columbia*, 155 F.3d 575, 579 (D.C.Cir.1998), equitable estoppel in the statute of limitations context prevents a defendant from asserting untimeliness where the defendant has taken active steps to prevent the plaintiff from litigating in time.

Currier v. Radio Free Europe/Radio Liberty, Inc., 159 F.3d 1363, 1367 (D.C. Cir. 1998). Here, EPA has taken the unprecedented action of bifurcating Plaintiffs' petition by issuing an initial notice of its intent to deny a portion of the petition, which it now claims was intended to trigger the 60-day filing deadline, while never clearly stating that the initial notice was a final action by the agency on the petition.

Courts have found that "[a] finding of estoppel must rest on consideration of several factors. Of critical importance is a showing of the plaintiff's actual and reasonable reliance on the defendant's conduct or representations." *Naton v. Bank of California*, 649 F.2d 691, 696 (9th Cir. 1981). As discussed above, EPA treated the disposition of Plaintiffs' petition as ongoing, including an open comment period, until it announced it had completed review on November 4, 2010. This treatment of the petition as ongoing justifies invocation of equitable estoppel because Plaintiffs understandably

relied on EPA's characterization of the petition review as ongoing, and waited until the decision on the entire petition was made.

c. The Court Should Invoke the Lulling Doctrine to Preclude EPA From Raising Timeliness

Even if EPA's confusing actions are not found to have been purposefully executed as such, the result is the same. EPA's piecemeal disposition of the petition was tantamount to an affirmative inducement to plaintiffs to delay bringing an action. The D.C. Circuit has explained that "if it appears [the defendant] has done anything that would tend to lull the plaintiff into inaction" defendants cannot raise it as an affirmative defense." *Bailey v. Greenberg*, 516 A.2d 934, 937 (D.C.1986) *quoting Hornblower v. George Washington University*, 31 App. D.C. 64, 75 (D.C. Cir. 1908)). Based on EPA's past treatment of petitions, its treatment of Plaintiffs' petition as an ongoing decision, and its improper segmentation of its response to Plaintiffs' petition, the Court should apply the doctrine of lulling and deny Defendants' motions to dismiss.

B. EPA Has the Authority to Regulate Bullets and Shot Under TSCA

1. The Plain Language of TSCA Grants EPA the Authority to Regulate Lead Bullets and Shot

Both EPA and NSSF argue that TSCA denies EPA the authority to regulate lead bullets and shot. But despite their best efforts, the plain language of TSCA (and the Internal Revenue Code, on which TSCA relies) cannot support their arguments. Rather, the plain language of these statutes clearly and unequivocally confers upon the EPA the authority to regulate lead bullets and shot.

TSCA authorizes EPA to prohibit "the manufacturing, processing, or distribution in commerce" of a chemical substance for a particular use or uses. 15 U.S.C. § 2605(a)(2)(A)(i). The term "chemical substance" means "any organic or inorganic substance of a particular molecular identity, including (i) any combination of such substances occurring in whole or in part as a result of a chemical reaction or occurring in

nature and (ii) any element or uncombined radical." 15 U.S.C. § 2602(2)(A). It is beyond dispute that EPA already regulates lead as a chemical substance under TSCA.[3]

Congress' expansive definition of "chemical substance," however, is limited by definition in several ways. 15 U.S.C. § 2602(2). In particular, TSCA section 2602(2)(B)(v) states the term "chemical substance" does not include:

> any article the sale of which is subject to the tax imposed by section 4181 of the Internal Revenue Code of 1954 (determined without regard to any exemptions from such tax provided by section 4182 or 4221 or any other provision of such Code)…

Section 4181 of the Internal Revenue Code, in turn, states that:

> 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.

26 U.S.C. 4181.[4]

Section 4181 of the Internal Revenue Code quite specifically refers only to "shells" and "cartridges," which as EPA observes, are the finished articles that include all of their component parts, including a case, gunpowder, and a projectile. For shells, the projectiles are normally shot, while for cartridges, the projectiles are normally bullets.

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[3] Most other uses of lead, such as lead-based paints, plumbing pipe and fixtures, and leaded gasoline, are already subject to strict regulation. In January 2008, EPA added lead and lead compounds to its Priority Testing List, requiring certain manufacturers to submit unpublished health and safety reports to the EPA. 40 C.F.R. 716.120. Automobile wheel balancing weights will be phased out with an EPA proposed rule scheduled for 2011. Manufacturers of consumer products intended for use by children who also manufacture lead or lead compounds are required to report certain health and safety data to the EPA.

[4] Sections 4182 and 4221 of the Internal Revenue Code regard specific instances where the tax described in Section 4181 does not apply ("exemptions" from the tax), but they are not relevant pursuant to the express language of section 2602(2)(B)(v). Nonetheless, neither bullets nor shot are specifically included as categories in these exemptions.

EPA Mot. to Dismiss at 11. Although it may normally (but not always) be a component part of a cartridge, a bullet is not the same as a cartridge. Likewise, shot is not the same as a shell. The words are not only different, they describe different things. If Plaintiffs had petitioned EPA to regulate lead shells and cartridges, EPA would be justified in claiming it lacks the authority to regulate such products. However, Plaintiffs petitioned EPA to regulate lead bullets and shot, and specifically not shells and cartridges. Petition, EPA Exhibit 1 at 2, 58. Neither bullets nor shot are mentioned in TSCA or section 4181 of the Internal Revenue Code as excluded items, and are therefore included in TSCA's inclusive definition of a "chemical substance." Thus, by the plain reading of TSCA, EPA has the authority to regulate lead bullets and shot.

a. Section 4181 Refers Only to Shells and Cartridges

EPA and NSSF both argue that because bullets and shot are components of cartridges and shells, "it follows that all of the components used to create the finished ammunition are effectively taxed" as well, and therefore cannot be regulated under TSCA. NSSF Mot. to Dismiss at 19, *see also* EPA Mot. to Dismiss at 11. But it does not follow that the components used to create finished ammunition are *effectively* taxed when a tax is placed on a shell or cartridge; the tax described in section 4181 is an example of a common excise tax placed on specific finished goods, irrespective of their component parts. For example, a state motor vehicle excise tax is not a tax on the wheels, the engine, the steel, or any other component of the vehicle—it is a tax on the finished product and that alone.

More importantly, however, it makes no difference whether the component parts are effectively taxed or not when a cartridge or shell is taxed under section 4181, for section 4181 in referenced in TSCA exclusively for its very specific list of articles that EPA does not have the authority to regulate. TSCA is not concerned with the metaphysical nature of the objects or of the stream of commerce implicated by the taxation scheme of section 4181; it is concerned with defining what a chemical substance

is or is not. For its purposes, quite clearly by its plain language, section 4181 is of utility as a description of articles only. This list plainly refers only to shells and cartridges and does not include bullets and shot, either by name, by meaning, or by effect.

b. Bullets and Shot Are not Exempted from Section 4181

EPA's argument that bullets and shot are "exempted" from section 4181 has no merit. EPA argues that the parenthetical in section 2602(2)(B)(v), which states that the question of whether an article is a "chemical substance" subject to TSCA is to be "determined without regard to any exemptions from such tax provided by section 4182 or 4221 or any other provision of such Code," necessarily acts to exclude bullets and shot from the definition of chemical substances under TSCA. EPA Mot. to Dismiss at 12; 15 U.S.C. § 2602(2)(B)(v). This argument fails because bullets and shot are not *exempt* from section 4181, they are simply not subject to the tax described in section 4181 in the first place (and thus the parenthetical does not apply).

In fact, the purpose of this parenthetical is to prevent the definition of "chemical substance" from being unduly imposed on an article that would in most circumstances not qualify as such. For example, shells and cartridges "purchased with funds appropriated for the military department" are not taxed under section 4181 pursuant to I.R.C. § 4182. Thus, under section 2602(2)(B)(v), shells and cartridges do not become "chemical substances" subject to regulation under TSCA when they are purchased with military department funds. Shells and cartridges are never considered chemical substances, even if they are sometimes taxed and sometimes not, because TSCA is only concerned with the articles as described in section 4181. This parenthetical illustrates TSCA's interest and focus on the article itself (rather than the details of the transaction, or their tax status). Items included in section 4181 cannot be a chemical substance under TSCA, period.

EPA and NSSF also argue that when shells and cartridges are sold in knockdown form (unassembled cartridges or shells complete as to all component parts), they are still

subject to the tax in section 4181. IRS Rev. Rule 68-463, 1968-2 C.B. 507; EPA Mot. to Dismiss at 13, NSSF Mot. to Dismiss at 19. However, this rule does not describe an exemption to the tax for bullets and shot when sold separately, as EPA argues. EPA Mot. to Dismiss at 13. Nor does it create a situation where bullets and shot are themselves taxed. Rather, it further clarifies the definition of cartridges and shells by specifying that the tax in section 4181 cannot be evaded by selling the cartridge or shell as a kit. If all the parts are sold together but unassembled, it is still considered a cartridge or shell under section 4181 and taxed accordingly. Bullets and shot are never taxed, not even under this rule. IRS Rev. Rule 68-463, 1968-2 C.B. 507 ("No tax is imposed by section 4181…on the sale of parts…of…shells[] and cartridges when sold separately… The tax does attach, however, to sale of completed…shells[] and cartridges, *and to the sale of such articles that*, although in knockdown form, are complete to all component parts." (emphasis added)). "Such articles" clearly refers to shells and cartridges—not bullets or shot.[5]

2. The Legislative History of TSCA Confirms EPA's Authority

Under the well-established two-step analysis described in *Chevron v. NRDC*, this should be "the end of the matter," as Congress has spoken directly to the precise question at issue and the statute is neither silent nor ambiguous to it: nothing excludes lead bullets or shot from TSCA's definition of "chemical substance." *See Chevron, USA Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 842 (1984). Plaintiffs agree with EPA and NSSF that, because the text of TSCA is unambiguous, there is no need to refer to its legislative history. *Dep't of Hous. & Urban Dev. V. Rucker*, 535 U.S. 125, 132-33 (2002) (holding it is well established that "reference to legislative history is inappropriate

[5] This rule was made eight years prior to the passage of TSCA, strongly suggesting that Congress was fully aware that bullets and shot would be subject to regulation under TSCA since they were not included in section 4181 of the Internal Revenue Code. *See* Complaint at 7.

when the text of the statute is unambiguous."). But to the extent that EPA and NSSF attempt to read ambiguities into the text, TSCA's legislative history should put the matter to rest:

> Although the language of the bill is clear on its face as to the exemption for pistols, revolvers, firearms, shells, and cartridges, the Committee wishes to emphasize that it does not intend that the legislation be used as a vehicle for gun control. Consequently the Administrator has no authority to regulate ammunition as an unreasonable risk because it injures people when fired from a gun. However, the Committee does not exclude from regulation under the bill chemical components of ammunition which could be hazardous because of their chemical properties.

H.R. Rep. No 94-1341, at 10, *reprinted in* Legislative History of the Toxic Substances Control Act, 1976, at 418 (1976) ("House Rep.").[6] As Plaintiffs allege in their Complaint and demonstrate in their petition, lead bullets and lead shot are chemical components of ammunition which are hazardous because of their chemical properties (i.e., their being composed of lead). Complaint at 8-10; Petition, EPA Exhibit 1 at 2-3.

The legislative history is instructive in discerning why TSCA was written as it was. Congress drafted the definition of chemical substances broadly, carving out very narrow exceptions. Had Congress wished to divest the EPA of its authority to regulate bullets and shot, it could and would have, by explicitly defining them as not being chemical substances. Congress was clearly concerned that TSCA not be used as a mechanism for gun control—that ammunition not be declared a hazardous substance under TSCA because it harms people when fired from a gun—but Congress just as clearly recognized that regulating the chemical components of ammunition, like lead bullets or lead shot, is an appropriate under TSCA and would not function as a vehicle for gun control. House Rep. at 418.

[6] When legislative histories are appropriately consulted, "the authoritative source for finding the Legislature's intent lies in the Committee Reports on the bill," such as the House report cited here. *Garcia v. United States*, 469 U.S. 70, 76 (1985).

The legislative history clearly establishes that Congress anticipated that the chemical component parts of ammunition might one day be determined to be hazardous and in need of regulation, and it acted to ensure that the EPA would have the authority to regulate them under TSCA. While lead was known to be a hazardous substance in 1976, its harms to wildlife and humans when used in bullets and shot, including the extent to which lead pervades the flesh of animals shot with lead bullets and the extent to which wildlife is harmed by their consumption of these lead particles, is a more recently developed body of knowledge. *See* Petition, EPA Exhibit 1 at Section III. So, too, is the development of non-lead bullets and shot which are now widely available. *See id*. at 47-51; Complaint at 10. In short, the legislative history demonstrates the simple logic of Congress's exclusion of cartridges and shells from the definition of chemical substances: it guaranteed that TSCA would not be used as a back-door mechanism for gun control through the banning of ammunition because it can harm people when fired from a gun, while simultaneously ensuring that if the component parts of shells and cartridges, in this case bullets and shot, were determined to be hazardous, EPA would have the authority and duty to regulate lead bullets and lead shot.

EPA's and NSSF's contorted interpretations of this legislative history result in flawed and unsupportable arguments regarding the purpose of section 2602(2)(B)(v) of TSCA. EPA argues that it is possible that Congress intended to enable EPA to regulate "the basic materials" of ammunition, like lead. EPA Mot. to Dismiss at 15. However, it does not explain how this is any different from regulating lead bullets or lead shot: if EPA were to ban the manufacture or sale of lead itself it would have the same impact to ammunition as if it focused its regulation on lead bullets or lead shot. NSSF meanwhile argues that Congress wanted to make sure that EPA could still regulate lead in other forms, presumably like wheel weights. NSSF Mot. to Dismiss at 24. This interpretation ignores the reference to section 4181 in the first place. Had Congress intended to prevent EPA from regulating lead components of ammunition it would have stated as much. It

instead did the opposite, specifically distinguishing between the chemical components of ammunition, which can be regulated, and ammunition itself, which cannot.

Both EPA and NSSF cite to a section in the Consumer Product Safety Act, 15 U.S.C. § 2052(a)(5)(E) ("CPSA"), that also refers to section 4181, for support of their interpretations of the legislative history of TSCA. However, this comparison suffers a fatal flaw. While CPSA, like TSCA, excludes articles described in section 4181 from its definition of a "consumer product," CPSA goes a step further by also expressly excluding "any component of any such article." 15 U.S.C. § 2052(a)(5)(E). The fact that this language is present in CPSA but is omitted from the nearly-identical provision in TSCA demonstrates that Congress was aware that the language in section 4181 did not by itself include the component parts of shells and cartridges.

3. EPA's Interpretation of TSCA Warrants No Deference

EPA and NSSF argue that, if the Court finds that TSCA is ambiguous or silent as to the question of EPA's jurisdiction over lead bullets and shot, that the Court should defer to the agency's interpretation of TSCA under the second step of the *Chevron* test. *Chevron*, 467 U.S. at 842-3. They describe their conclusion that EPA does not have the authority to regulate lead bullets and shot as "an interpretation of a statute that Congress authorized the Agency to administer," citing numerous cases where agencies have been granted such deference. *See* EPA Mot. to Dismiss at 17-19; *see also* NSSF Mot. to Dismiss at 20. However, none of the cases they cite concern an agency's determination of the scope of its own authority which is the relevant question concerning any deference to EPA's decision to deny Plaintiffs' petition.

The question of whether *Chevron* deference is appropriate for an agency's determination of the scope of its own authority has not been definitively decided by either

the Supreme Court or this Circuit.[7] But the logic of not applying *Chevron* deference to such agency determinations is compelling. *Chevron* deference applies "when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority." *United States v. Mead*, 533 U.S. 218, 226-27 (2001). Congress did not delegate to EPA the power to define what is and what is not a chemical substance—it expressly contained this definition in the statute, in a section that serves to limit the authority of the agency. 15 U.S. § 2602(2)(B). Thus, EPA's interpretation of section 2602(2)(B)(v) warrants no deference because "it seems highly unlikely that a responsible Congress would implicitly delegate to an agency the power to define the scope of its own power." *ACLU v. FCC*, 823 F.2d 1554, 1567 n.32 (D.C. Cir. 1987) (*per curiam*). Here, EPA has not been "entrusted to administer" section 2602(2)(B)(v) of TSCA, which is a statutory limitation on the scope its jurisdiction, and as such its interpretation of that section should be granted no deference.

Moreover, EPA's interpretation of section 2602(2)(B)(v) necessarily requires it to interpret section 4181 of the Internal Revenue Code. Because this statute is neither administered by nor pertains to EPA at all, EPA is entitled to no deference for its incorrect interpretation that section 4181's reference to "shells" and "cartridges" necessarily includes bullets and shot. *Scheduled Airlines Traffic Offices, Inc. v. Dep't of Defense*, 87 F.3d 1356, 1361 (D.C. Cir. 1996). In fact, unlike section 2602(2)(B)(v),

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[7] *Business Roundtable v. Securities and Exchange Commission*, 905 F.2d 406, 408 (D.C. Cir. 1990) (finding that "The Supreme Court cannot be said to have resolved the issue definitively…Here we need not reach the issue….") (*citing Miss. Power & Light Co. v. Mississippi ex rel. Moore*, 487 U.S. 354, 381 (1988) (Scalia, J., concurring in the judgment) ("it is settled law that the rule of deference applies even to an agency's interpretation of its own statutory authority or jurisdiction") *with id*. at 386 (Brennan, J., dissenting) ("I cannot, however, agree with Justice Scalia's conclusion that courts must defer to an agency's statutory construction even where, as here, the statute is designed to confine the scope of the agency's jurisdiction to the areas Congress intended it to occupy.").

section 4181 is not a statutory limitation on jurisdiction, and thus the agency that *is* entrusted to administer it—the Department of the Treasury (26 U.S.C. § 7801(a)(1))—does properly warrant deference in its interpretation (if the statute is found to be ambiguous and step two of the Chevron analysis is implicated). The Department of Treasury has had several occasions to interpret section 4181, as discussed in Plaintiffs' Complaint (IRS Rev. Rul. 68-463, 1968-2 C.B. 507; Fed. Tax Coordinator ¶ W-2911(2d.); Complaint, ¶ 27) and as observed by EPA in its motion (EPA Mot. to Dismiss at 12-13; 27 C.F.R. § 53.61(b)(1)). Each time, the Department, through its administrating agencies, has clearly stated that section 4181 does not apply to bullets and shot. These determinations warrant deference under *Chevron*.

Deference is also inappropriate in this instance due to the express language of TSCA section 2640(b)(4)(B), which provides for *de novo* review of Plaintiffs' petition. Deferring to EPA's interpretations of section 2602(2)(B)(v) and section 4181, by which EPA limits its own authority and on that basis denies the petition, would improperly deprive Plaintiffs' of *de novo* review of their petition by this Court in violation of TSCA. 15. U.S.C. § 2640(b)(4)(B).

Even if the Court determines that a *Chevron* deference analysis is appropriate, EPA's interpretation of TSCA section 2602(2)(B)(v) and I.R.C. section 4181 should not be given deference as it is not "based a permissible construction" of either statute. *Chevron*, 467 at 843. An agency's interpretation of a statute is not given unconditional deference by the courts, for the "judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent." *Id*. at 843, n.9. What is granted deference is "a reasonable accommodation of conflicting policies that were committed to the agency's care by the statute," which is not disturbed by the courts "unless it appears from the statute or its legislative history that the accommodation is not one that Congress would have sanctioned." *Id*. at 845, quoting *United States v. Shimer*, 367 U.S. 374, 382, 383 (1961).

There is nothing reasonable in EPA's construction of section 2602(2)(B)(v) or of section 4181. Referencing words that do not exist in the statutes and invoking meanings that have no support in the legislative intent defies the plain language of the statutes. It also runs contrary to the clear intent of Congress that EPA should have the authority to regulate hazardous chemical components of ammunition, as demonstrated unequivocally by the House Committee Report and by comparing the language of section 2602(2)(B)(v) with the similar language found in CPSA. Because EPA's interpretation of TSCA lacks support in either the statute or congressional intent, it warrants no deference.

The arguments above apply equally to EPA's argument that it be given "respect" under *Skidmore v. Swift & Co*., 323 U.S. 134 (1944). *See* EPA Mot. to Dismiss at 19. Moreover, EPA's own interpretations of section 2602(2)(B)(v), contained in 40 C.F.R. §710.3(d) and § 720(e)(5), provide it no cover, as neither cited regulation include the words "bullets" or "shot". And the fact that a single EPA reporting form does not require manufacturers to report chemical substances manufactured or processed solely for use as ammunition provides no cover either, as these substances are currently not regulated. EPA Mot. to Dismiss at 20, citing 47 Fed. Reg. 26,992, 27,002.

V. CONCLUSION

Plaintiffs' action should not be dismissed. Plaintiffs timely filed their complaint as EPA's November 4 letter denied Plaintiffs' petition. Considering the factual allegations of the complaint in the light most favorable to the Plaintiffs, this Court should find that Plaintiffs' action is not time-barred. Likewise, giving Plaintiffs every favorable inference from the allegations of fact, EPA's interpretation that it does not have the authority to regulate lead bullets and shot is not entitled to deference. The plain language of TSCA confirms that EPA has the authority to regulate lead bullets and shot, and this conclusion is further established by TSCA's legislative history. Plaintiffs' action is not time-barred, and Plaintiffs have stated claims upon which this Court can grant relief.

Therefore, Plaintiffs respectfully request that this Court DENY EPA's and NSSF's motions to dismiss.

Respectfully submitted,

Dated: February 22, 2010

/s/ Adam Keats

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CERTIFICATE OF SERVICE

I hereby certify that on February 22, 2011, I electronically transmitted the document **COMBINED OPPOSITION TO PARTIAL MOTIONS TO DISMISS** to the Clerk's Office using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing to the following CM/ECF registrants:

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