

Applicants have failed to meet their minimum burden to demonstrate that the existing parties will inadequately represent their interests. Furthermore, the issues Applicants seek to interject in this case will only delay litigation and result in prejudice to the original parties. For these reasons, this Court should deny Applicants' motion to intervene. In the event this Court finds Applicants may intervene, Plaintiffs request this Court establish limitations to the scope of all defendant-intervenors' intervention in the interest of judicial economy and fairness to the original parties.

II. ARGUMENT

Applicants seek to intervene as of right or permissively in all aspects of the case, despite failing to demonstrate that existing parties will not provide adequate representation. Applicants' intervention in this case will only cause delay and prejudice the original parties by interjecting issues not relevant to the Court's consideration. For these reasons, Plaintiffs ask that the Court deny intervention. If, however, the Court finds intervention warranted, Plaintiffs ask the Court to limit Applicants' intervention to promote judicial economy and fairness to the original parties.

A. Applicants' Interests are Adequately Represented by Existing Parties

Applicants have failed to meet their minimal burden of demonstrating that the existing parties do not adequately represent their interests. *Trbovich v. United Mine Workers of America*, 404 U.S. 528, 538 n. 10 (1972). Applicants argue their members' interests will not be adequately represented by existing parties because while their interests are similar, they are not "sufficiently analogous," to those of the membership of existing defendant-intervenors NSSF and ABR. Applicants' Mot. to Int. 21. Applicants' itemized distinctions, however, do nothing to alter the reality that fundamental to the

interests of the Applicants and the defendant-intervenors is the shared primary interest in preserving the regulatory status quo of lead shot, bullets, and fishing sinkers for the benefit of those who manufacture, process, distribute, use or dispose of those products. Because Applicants have failed to show that existing defendant-intervenors will not adequately represent their interests, Applicants' request for intervention should be denied.

1. NSSF will adequately represent Applicants' interests

In distinguishing their interests from those of NSSF, Applicants first claim that "[i]t is foreseeable that the trade association for firearms industry may have interests divergent from [Applicants], or that NSSF and [Applicants] may value certain interests differently." Applicants' Mot. to Intervene at 20. This distinction should be given no credence. Applicants must do more than propose that foreseeable divergent interests may exist among the prospective parties to raise the specter of inadequate representation. Such differences, if they do exist, would still need to cause NSSF to inadequately represent Applicants' interests in the present litigation, and Applicants have not met the very low bar of showing that they may. For example, Applicants have not explained how these foreseeable, yet unspecified, divergent interests will at all interfere with or compromise NSSF's ability to defend against the Plaintiffs' claim that lead shot, bullets, and fishing sinkers present an unreasonable risk to health or the environment.

Applicants next argue that while NSSF's mission is to "support America's traditional hunting heritage and firearms freedoms," NSSF has no interest in promoting sustainable fish and wildlife conservation through hunting.¹ Applicants' Mot. to Intervene

¹ Applicants also allege NSSF cannot represent their members' interests in lead fishing gear. Yet, ABR has stated its interests in lead fishing gear, and Applicants have not

at 20. This attempt to distance Applicants' interests from those of NSSF via their respective missions is also unavailing. "[T]he mere fact that there is a slight difference in interests between the applicant and the supposed representative does not necessarily show inadequacy, if they both seek the same outcome." *Nuesse v. Camp*, 385 F.2d 694, 703 (D.C. Cir. 1967). Even if Applicants' interest in promoting hunting as a conservation method were a significant protectable interest relevant to the present litigation, this minor distinction is insufficient to erode the adequacy of NSSF's representation of Applicants' interests. It is beyond dispute that both Applicants and NSSF seek the same outcome in this litigation and for substantially similar reasons.

2. ABR will also adequately represent Applicants' interests

In arguing ABR will not adequately represent their members' interests, Applicants again redefine their interests in an effort to make them appear distinct enough from those of ABR's members' interests to lead one to conclude that ABR's representation will be inadequate. However, the differences Applicants claim are both too insignificant and irrelevant to draw the conclusion that ABR will not adequately represent Applicants' interests.

First, Applicants claim their members' "right to armed self defense" will not be adequately represented by ABR.² Applicants' Mot. to Intervene at 21. The right to armed self defense is plainly not at issue in this litigation. Despite Applicants' attempt to

explained how the purported regulated community would fail to represent the interests of the community it serves in this regard. Decl. of Cornette at 4.

² Applicants also claim here that ABR does not have an interest in the promotion of sustainable use conservation through hunting. As stated above, Applicants' members' alleged interests in sustainable use conservation, even if they raise to a legally protectable interest, are not sufficient to show that the existing defendant-intervenors will not adequately represent Applicants' interests in defending against Plaintiffs' claims.

portray this case as an attack on second amendment rights,³ the truth remains that this case is about the singular issue of whether the toxic effect of lead from shot, bullets, and fishing sinkers on wildlife and humans warrants EPA regulation. To the extent Applicants otherwise invoke the interests of hunters and fishers, those interests are adequately represented by existing defendant-intervenors.⁴

Applicants also argue that their members' right to cast their own bullets and fishing sinkers cannot be adequately represented by existing parties. Decl. of Casten at 2, Decl. of Redeker at 2. These interests are already represented by existing defendant-intervenors who represent the interests of those who manufacture, process, distribute, use and dispose of lead shot, bullets, and sinkers. The mere fact that the way in which these individuals manufacture their own bullets and sinkers may differ from existing defendant-intervenors does not support a manifest result that their representation will be inadequate. Insignificant divergences of interests, particularly when they do not amount to disagreement, should not give rise to a finding of inadequate representation without something more. To conclude otherwise would render meaningless the requirement that the applicant demonstrate that there may not be adequate representation.

3. To the extent Applicants have significant protectable interests, they are adequately represented by existing parties

"Adequacy of representation must be assessed in relation to the specific purpose that intervention will serve." *United States of America v. American Telephone and Telegraph Co.*, 642 F.2d 1285, 1293 (D.C. Cir. 1980). Based on Applicants' motion to

³ Decl. of Cox at 2-3; Applicants' Mot. to Intervene at 21.

⁴ For example, NSSF's mission is to "to promote, protect, and preserve hunting and the shooting sports, and support America's traditional hunting heritage and firearms freedoms." Decl. of Keane at 2.

intervene and declarations submitted in support of it, it is evident that Applicants' interests, no matter how they are dissected and repackaged, boil down to one overriding interest: the desire to continue using lead shot, bullets, and fishing sinkers in hunting and fishing activities. To this end, Applicants have failed to demonstrate that existing defendant-intervenors will not adequately represent their common interest in upholding the status quo of the regulation of lead shot, bullets, and fishing sinkers.

Courts in this district have held that "[r]epresentation is adequate if no collusion is shown between the representative and an opposing party, if the representative does not have or represent an interest adverse to the proposed intervenor and if the representative does not fail in the fulfillment of his duty." *Safari Club Int'l v. Babbitt*, 1994 U.S. Dist. LEXIS 18183 at *40 Civil Action No. 91-2523 (D.C. Dist. Dec. 15, 1994), *Quoting United States v. Board of School Commissioner, Indianapolis, Ind.*, 466 F.2d 573, 575 (7th Cir. 1972)(*quoting Martin v. Kalvar Corp.*, 411 F.2d 552, 553 (5th Cir. 1969); *see also Humane Society of the United States v. Clark*, 109 F.R.D. 518, 520-21 (D.D.C. 1985). Applicants have not alleged collusion between the parties, they have not claimed defendant-intervenors have an interest adverse to their own, and they do not allege that defendant-intervenors will fail in the fulfillment of their duty. Put simply, Applicants have not demonstrated how the regulated industry will not represent the interests of the community it serves.

To the extent Applicants have *any* interest in this litigation, the interest is identical to the existing defendant-intervenors. Applicants do not allege any conflict of interest or collusion between the present parties which may indicate that the existing parties are not willing to defend their position. To parcel out every single minor difference in the

interests of the parties, and then offer them as the rationale for why existing defendant-intervenors will not adequately represent Applicants' interests makes meaningless the fourth factor of proving inadequate representation. Therefore, because Applicants have failed to show that the existing parties will not adequately represent its interests, intervention should be denied.

B. Applicants Should be Denied Permissive Intervention

Applicants' request for permissive intervention should also be denied because its participation will delay and prejudice the resolution of this case. Permissive intervention may be granted where the applicant has shown it has a claim or defense that shares a common question of law or fact with the main action and an independent grounds for subject matter jurisdiction. *Equal Emp't Opportunity Comm'n v. Nat'l Children's Ctr.*, 146 F.3d 1042, 1046 (D.C. Cir. 1998). Even after the applicant satisfies these requirements, the court "must consider whether the intervention will unduly delay or prejudice that adjudication of the original parties' rights." Fed. Rule Civ. P. 24(b)(1)(B).

Based on their motion, declarations in support of their motion for intervention, and their purported interests, it is likely Applicants will attempt to interject unrelated issues in the present litigation. Several declarants recite their desire to continue using weapons that they claim are incapable of using non-lead ammunition. *See* Applicants' Mot. to Intervene at 8, Decl. of Ford at 2, Decl. of Lanford at 1, and Decl. of Casten at 2. Whether any types of ammunition uses will be exempt from a future rulemaking is not, and cannot be addressed in this litigation. Applicants also offer an account of their experience in other pieces of litigation. Applicants' Mot. to Intervene at 11-12; Decl. of

Goodenow at 2. It is unclear why Applicants offer this information, as the only claim at issue is governed by TSCA.

All that is at issue before this Court is whether there is a reasonable basis to conclude that the issuance of a rule by the EPA is necessary to protect health or the environment against an unreasonable risk of injury from lead shot, bullets, and fishing sinkers. If the Plaintiffs demonstrate by a preponderance of the evidence that “there is a reasonable basis to conclude that the issuance of such a rule or order is necessary to protect health or the environment against an unreasonable risk of injury to health or the environment,” the court shall order the EPA to initiate a rulemaking. *Id.* at § 2620(b)(4)(B)(ii). In promulgating such a rule, the EPA would then allow interested persons to submit written data, views, and arguments, and provide an opportunity for an informal hearing. 15 U.S.C. § 2605(c)(2). This rulemaking process, not the present litigation, would be the appropriate forum for the EPA to consider “the reasonably ascertainable economic consequences of the rule, after consideration of the effect on the national economy, small business, technological innovation, the environment, and public health.” *Id.* at § 2605(c)(1)(D). Allowing the interjection of these issues is not only contrary to the statute, it will unduly delay adjudication of this case and prejudice the existing parties.

C. If Granted, Intervention Should be Limited

For the reasons stated above, Plaintiffs ask that the Court deny Applicants’ motion to intervene. If the Court finds that Applicants should be granted intervention as of right or permissive intervention, Plaintiffs request that such intervention be appropriately limited so as to best to ensure the efficient conduct of the proceedings and

to prevent this litigation becoming a forum for extraneous policy debates. This Court may limit the participation of intervenors, and courts have done so in other cases. *See* Advisory Committee Notes on Fed. Rule Civ. P. 24; *see also Earthworks v. DOI*, cv-09-01972, 2010 U.S. Dist. LEXIS 77894 (D.D.C. Aug. 3, 2010).

The Advisory Committee Notes to the Federal Rules of Civil Procedure explain that intervention of right “may be subject to appropriate conditions or restrictions responsive among other things to the requirements of efficient conduct of the proceedings.” *County of San Miguel v. MacDonald*, 244 F.R.D. 36 (D.D.C. 2007) at fn 17, *quoting* Fed. R. Civ. P. 24 advisory committee’s notes; *citing Smuck*, 408 F.2d at 180 (finding that after requirements for intervention are met, consideration of “the nature of applicant’s interest may play a role in determining the sort of intervention which should be allowed”).

Plaintiffs ask the Court to impose restrictions on Applicants, existing intervenor-defendants, and/or any other future applicants for intervention. Plaintiffs request that this Court require consolidated briefing among all defendant parties, including any additional intervenors. If permitted to file its own brief, however, Applicants should be limited to filing one opposition brief during the briefing on the merits and not permitted to file any cross-motion for summary judgment or additional reply briefs. Plaintiffs also request that Applicants should not be permitted to engage in any discovery, except if granted leave of the Court.

V. CONCLUSION

Applicants have failed to demonstrate that the existing parties will not adequately represent their interests. Applicants’ intervention in this case will only serve to delay the

litigation process by adding extraneous issues. For these reasons, Plaintiffs ask this Court to deny intervention. Should this Court find intervention appropriate, Plaintiffs ask this Court to limit Applicants' intervention in the interest of judicial economy and fairness to the existing parties.

Respectfully submitted,

Dated: February 16, 2011

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CERTIFICATE OF SERVICE

I hereby certify that on February 16, 2011, I electronically filed the foregoing
CENTER FOR BIOLOGICAL DIVERSITY, PUBLIC EMPLOYEES FOR
ENVIRONMENTAL RESPONSIBILITY, AND PROJECT GUTPILE'S
MEMORANDUM IN OPPOSITION TO MOTION TO INTERVENE AS
DEFENDANTS OF NATIONAL RIFLE ASSOCIATION OF AMERICA and SAFARI
CLUB INTERNATIONAL with the Clerk of Court using the CM/ECF system which will
send notification of this filing to all attorneys of record.

Dated: February 16, 2011

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