UNITED STATED DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CENTER FOR BIOLOGICAL DIVERSITY, *et al*., Plaintiffs v. LISA P. JACKSON, *et al*., Defendants, and NATIONAL RIFLE ASSOCIATION OF AMERICA and SAFARI CLUB INTERNATIONAL, Defendant- Intervenor Applicants.	Case No.: 1:10-cv-2007 (EGS) **REPLY OF NATIONAL RIFLE ASSOCIATION OF AMERICA and SAFARI CLUB INTERNATIONAL TO OPPOSITION TO MOTION TO INTERVENE**

I. INTRODUCTION

Plaintiffs, Center for Biological Diversity *et al*. ("CBD Plaintiffs"), have asserted three unpersuasive arguments in their opposition to the National Rifle Association of America and Safari Club International's ("NRA/SCI") motion to intervene. Contrary to CBD Plaintiffs' assertions, 1) NRA/SCI have markedly different interests in the outcome of this litigation than those of existing intervenors National Shooting Sports Foundation ("NSSF") and American Battery Recyclers ("ABR") that cannot be adequately represented without NRA/SCI's participation; 2) NRA/SCI are eligible for permissive intervention; and 3) no

conditions need be placed upon NRA/SCI who are accustomed to participating in litigation with multiple defendant-intervenor groups and are perfectly capable of coordinating on their own with other litigating parties to avoid duplication of efforts and unnecessary briefing.

II. ARGUMENT

A. NRA/SCI Are Entitled to Intervention As of Right Because Their Interests May Not Be Adequately Represented by Existing Defendant-Intervenors

1. CBD Plaintiffs Fail to Recognize the Difference Between NRA/SCI's Interests and Those of the Existing Defendant-Intervenors

In response to NRA/SCI's motion to intervene as of right, CBD Plaintiffs have asserted a single argument. CBD Plaintiffs claim that existing Defendant-Intervenors NSSF and ABR will adequately represent NRA/SCI's interests in this litigation. In making this argument, CBD Plaintiffs 1) ignore the factual distinctions between the interests of existing Defendant-Intervenors and NRA/SCI's stake in this litigation and 2) misconstrue the law of this Circuit on the showing necessary to demonstrate inadequate representation.

In their Motion for Leave to Intervene NRA/SCI explained how their members are the users of the ammunition and fishing gear that CBD Plaintiffs seek to ban with this litigation. For example, in their Motion, NRA/SCI assert that "NRA and SCI members hunt with lead-based ammunition throughout the United

States and many participate in fishing activities, using fishing tackle, as part of their hunting trips." Motion of National Rifle Association of America and Safari Club International for Leave to Intervene, Dkt. No. 20 ("NRA/SCI Motion for Leave to Intervene") at 6. The ruling that CBD Plaintiffs seek would harm NRA and SCI members' abilities to participate in hunting and fishing activities, and would undermine their advocacy of sustainable use conservation. CBD Plaintiffs' success would adversely affect NRA and SCI members' enjoyment in participating in hunting, fishing and shooting sports and could affect their proficiency and effectiveness in these activities. For some NRA and SCI members, CBD Plaintiffs' success would mean that they could no longer use prized and valued firearms, or that such firearms would be damaged by non-lead ammunition alternatives.

> NRA and SCI members use lead-based ammunition and lead-based fishing gear for their hunting, shooting and fishing activities. These activities are authorized and protected by a variety of state and Federal laws. Some members of NRA and SCI utilize firearms that can take only lead-based ammunition. Some use firearms that would be harmed by non-lead-based alternatives. Others choose to use lead-based ammunition because of its effectiveness, cost and accessibility. If lead-based ammunition was banned, some of these NRA and SCI members would no longer be able to use some of their firearms. For others, hunting, shooting and fishing would become more expensive and less efficient. Not only would it diminish their enjoyment and their success, but it would discourage their participation in these sports. As a consequence these NRA and SCI members would be harmed as would the organizations of NRA and SCI, who promote and protect hunting and outdoor recreational activities

NRA/SCI Motion to Intervene at 13-14.

In contrast, Defendant-Intervenors NSSF and ABR have commercial and financial interests in the outcome of this litigation. They represent the manufacturers of the ammunition and fishing gear that will suffer financial losses if CBD Plaintiffs succeed in this litigation. NSSF, for example, asserted in its motion to intervene that it "speaks for the nation's leading ammunition manufacturers." NSSF Motion to Intervene (Dkt. No. 5), at 1. NSSF is the trade association for the firearms and ammunitions industry. Unlike NRA and SCI, NSSF is concerned about the impact that the outcome of this litigation will have on the financial well-being of the domestic ammunition industry. Part and parcel of that concern is the competition between NSSF's domestic members and foreign ammunition manufacturers. NSSF's motion demonstrates that it worries that CBD Plaintiffs' success in this litigation could allow foreign manufacturers to gain an advantage on NSSF members because foreign businesses would then be able to import ammunition that domestic manufacturers would be banned from producing.

> Plaintiffs' demand that EPA use TSCA to ban domestically manufactured traditional ammunition threatens to shut down the domestic ammunition manufacturing industry and increase costs to the hunting and sports shooting public, while allowing foreign manufacturers to import that very same ammunition into the United States without domestic competition or TSCA regulation.

NSSF Motion to Intervene at 2.

While NRA and SCI are concerned about their members' ability to obtain ammunition that will allow them to use their firearms and remain proficient in their hunting and fishing pursuits, NSSF is concerned that foreign manufacturers will gain an advantage in the ammunition marketplace. These are very different concerns and could lead to different defense strategies in this litigation.

Similar to NSSF, ABR is a trade association whose interest in the outcome of this litigation is financial.

> 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.

Motion of the Association of Battery Recyclers *et al*. to Intervene in Support of Defendants, Dkt. No. 8 ("ABR Motion to Intervene") at 1. Like NSSF, ABR is not asserting the interests of the individuals who participate in hunting, fishing and shooting activities, who will lose their ability, proficiency and enjoyment in these activities if CBD succeeds. Instead, ABR seeks to protect the financial wellbeing of those who produce lead ammunition and fishing gear.

Although NRA and SCI share with NSSF and ABR an interest in defending against CBD Plaintiffs' challenges, the overlap in interests does mean that those interests are identical. Just as this Court has already determined that the Environmental Protection Agency ("EPA"), who seeks to defend its own actions, cannot adequately represent NSSF and ABR's interests in this suit, so should this Court determine that NSSF and ABR cannot represent NRA and SCI's unique interests in the outcome of this litigation.

2. CBD Plaintiffs Incorrectly Interpret the Law on Adequacy of Representation

CBD Plaintiffs erroneously rely on the case of *Safari Club International v. Babbitt*, 1994 U.S.Dist. LEXIS 18183 (D.D.C. 1994)[1] as justification for why this Court should deny NRA/SCI's intervention. In that case, the D.C. District Court was not considering whether existing intervenors could represent the interests of intervenor applicants. Instead the court examined whether the agency defendant, U.S. Fish and Wildlife Service, could adequately represent the interests of intervenor-applicant Humane Society of the United States, and found that it could not. In making that finding, the Court noted that an intervenor -applicants' obligation is simply to show that the existing party's representation *may* be inadequate.

[1] In that case, Safari Club International was a plaintiff, challenging the adequacy of agency guidelines concerning the importation of trophies.

The leading case on the question of adequacy of representation for the purpose of intervention, *Fund for Animals v. Norton*, 322 F.3d 728 (D.C.Cir. 2003), is another one in which Safari Club International played a significant role. That case also dealt with the question of whether existing Defendant-Intervenors could adequately represent additional intervenor applicants. In *Fund for Animals*, the D.C. Court of Appeals reversed a District Court's denial of intervention to the Ministry of Nature and Environment of Mongolia ("NRD") in a case challenging federal regulations governing the importation of argali sheep trophies from Mongolia, Tajikistan and Kyrgyzstan. The Appellate Court ruled that the existing intervention of Safari Club International and other hunting and conservation groups did not defeat NRD's right to intervene. Although the court acknowledged a "partial congruence of interests" between the existing and proposed intervenors, the Court concluded that the agreement did not equate to an identity of interests or an assurance of adequate representation. The D.C. Circuit also noted that even though the existing parties might seem to be approaching the defense of a case in a way similar to the strategy suggested by the intervenor applicant, that similarity does not guarantee that the existing parties will always adequately represent the applicants' interests nor should it stand in the way for the intervenor applicant to represent its own interests:

> Finally, we also reject the Fund's contention that the NRD's interest is adequately represented by the FNAWS and Safari Club

> intervenors - non-Mongolian organizations and individuals interested in sheep hunting and conservation. We could no more regard the NRD's interests as adequately represented by those intervenors than we could regard the FWS's interests as adequately represented by a Mongolian - or even an American - hunt club, however conservation-minded the club might be. Although there may be a partial congruence of interests, that does not guarantee the adequacy of representation. As we have recognized, "interests need not be wholly 'adverse' before there is a basis for concluding that existing representation of a 'different' interest may be inadequate." *Nuesse*, 385 F.2d at 703. Moreover, even "a shared general agreement ... does not necessarily ensure agreement in all particular respects," *Natural Res. Def. Council,* 561 F.2d at 912, and "[t]he tactical similarity of the present legal contentions of the [parties] does not assure adequacy of representation or necessarily preclude the [intervenor] from the opportunity to appear in [its] own behalf," *Nuesse*, 385 F.2d at 703.

Id. at 737. More recently, in *Roane v. Gonzales*, 269 F.R.D. 1 (D.D.C. 2010), a D.C. district court explained that existing intervenors can adequately represent the interests of intervenor applicants only when "the congruence [of interest] is virtually, if not totally, complete." *Id*. at 5 (Court denied intervention of death row inmate in case challenging lethal injection protocol, where other death row inmates were already participating as plaintiffs). *See also Natural Resources Defense Council v. Costle*, 561 F.2d 904, 913 (D.C.Cir. 1977) (D.C. Court of Appeals reversed a District Court denial of intervention to rubber and chemical companies in a case involving a settlement agreement requiring the EPA to issue regulations under the Federal Water Pollution Control Act Amendments and held that existing intervenors representing oil and other chemical interests, despite some overlap in

interests, would not necessarily adequately represent the intervenor applicants' interests.)

Although NRA/SCI share a desire with NSSF and ABR to defend against CBD Plaintiffs' challenge to the EPA's actions, NRA/SCI represent interests markedly different from those represented by NSSF and ABR. A shared interest in the outcome of the case does not amount to the identity of interests that would make it possible for NSSF and/or ABR to adequately represent NRA/SCI's interests.

B. NRA/SCI Are Eligible for Permissive Intervention Because Their Participation Will Not Delay or Prejudice the Case.

In the event that this Court finds that NRA/SCI does not qualify for intervention as of right, this Court can still grant NRA/SCI leave to intervene because NRA/SCI meets the standard for permissive intervention under FRCP Rule 24(b):

> Upon timely application anyone may be permitted to intervene in an action . . . (2) when an applicant's claim or defense and the main action have a question of law or fact in common . . . . In exercising its discretion the Court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

Fed. R. Civ. P. 24(b). NRA/SCI have demonstrated that they share a common question of law and fact with the main action. See NRA/ SCI Mot. to Intervene at

22-25. Even CBD Plaintiffs' brief does not dispute that NRA/SCI have met the criteria for permissive intervention in Rule 24(b)(1). Nor do CBD Plaintiffs dispute the timeliness of NRA/SCI's Motion to Intervene.

However, CBD Plaintiffs contend that NRA/SCI should not be allowed Permissive Intervenor status "because its participation will delay and prejudice the resolution of this case." CBD Opposition at 7. This allegation is based on unfounded speculation that NRA/SCI "will attempt to interject unrelated issues in the present litigation." CBD Opposition at 8. This is a clear misrepresentation of NRA/SCI's position. NRA/SCI are not intervening to insert new issues in the litigation. On the contrary, NRA/SCI seek to protect the interests of their members who use lead bullets and fishing tackle, the items at the heart of this litigation and the CBD Plaintiffs' petition, from unnecessary and unwarranted regulation. The relief that CBD Plaintiffs seek would harm NRA and SCI members' abilities to participate in hunting and fishing activities, and would undermine their advocacy of sustainable use conservation. Denying permissive intervention on the grounds asserted by the CBD Plaintiffs ignores the potential impacts of a decision adverse to the interests of NRA/SCI members.

CBD Plaintiffs wish to exclude NRA/SCI from this litigation in part on the basis that NRA/SCI could assert their interests in future EPA rulemaking. At that point it will be too late and the damage to NRA/SCI's interests will already be

done. If CBD Plaintiffs' requested relief is granted, the status quo will be changed. NRA/SCI and its members' interests will be fundamentally damaged. EPA will assume authority to regulate or ban lead bullets, shot and fishing tackle. CBD Plaintiffs argue that only at that time, after the interests of NRA/SCI members have been harmed, can NRA/SCI comment a proposed rulemaking and hope they are granted an exemption. CBD Opposition at 7-8. A future comment opportunity is not a reason to deny intervention. *U.S. v. Albert Inv. Co., Inc*., 585 F.3d 1386, 1398 (10th Cir. 2009) ("The notice-and-comment mechanism is not an adequate substitute for intervention."). NRA/SCI should not have to wait until the status quo is changed before they have the opportunity to defend their members' interests.

Finally, CBD Plaintiffs infer that NRA/SCI's discussion of their previous experience in litigation is designed to inject new claims into this litigation. CBD Opposition at 8-9. NRA/SCI only submit their previous litigation experience to demonstrate to the court that they have developed an expertise through their participation in similar cases in the past, both as intervenors and as amici, and that they therefore have the ability to both assist the Court in this matter and abide by any briefing schedule the Court decides. NRA/SCI do not seek to introduce the issues of these previous cases into this litigation, Nevertheless, NRA/SCI can use the knowledge of environmental and administrative law and litigation that they

have acquired from this previous experience to analyze and interpret the law relevant to this case. NRA/SCI should not be penalized for this knowledge and experience.

The participation of NRA/SCI will not burden or prejudice the CBD Plaintiffs in anyway. The Court should grant NRA/SCI permissive intervention if the Court decides that NRA/SCI is not entitled to intervention as of right.

C. CBD Plaintiffs Cannot Show a Sufficient Justification for Limiting the Scope of NRA/SCI's Intervention

As it did regarding existing defendant-intervenors, the Court should deny CBD Plaintiffs' request to place limitations on NRA/SCI's involvement in the case (e.g., requiring consolidated briefing among all defendant parties). Prejudice would result to all defendants should joint briefs be ordered because although all Defendants share an interest in defending the EPA's action, they do not necessarily intend to approach the defense of this case in the same way. As fully described above, NRA/SCI's interests differ from those of the other defendant parties. To require defendant parties to file consolidated briefs might frustrate the very purpose of NRA/SCI's proposed intervention -- to protect interests not adequately represented by other parties in this action. Instead, the Court should defer the question of limitations on any parties' participation in the case until the parties can confer as part of case management conferences and submit briefing proposals to the Court.

The Court has already rejected similar premature requests by CBD Plaintiffs to limit the participation of Defendant-Intervenors NSSF and ABR: "The Court declines to adopt plaintiffs' recommendation to limit the scope of NSSF's participation in this litigation at this time; however, the Court may direct joint or coordinated briefing as appropriate." Minute Orders granting Motions to Intervene of NSSF and ABR, January 18, 2011. Similarly, it is not yet appropriate or necessary for the Court to direct joint or coordinated briefing at this time or otherwise limit NRA/SCI's participation. This Court's decision not to impose limitations on intervention accords with this Circuit's liberal approach to intervention: "[T]he purposes of Rule 24 are best served by permitting the prospective intervenor to engage in all aspects of this litigation." *Wilderness Soc'y v. Babbitt*, 104 F. Supp. 2d 10, 18 (D.D.C. 2000) (Court granted intervention status to State of Alaska and Native Corporation, without the limitations requested by CBD Plaintiffs, in case involving environmental group's challenge to Department of the Interior's decision to commence oil and gas leasing). Accordingly, this Court should not exercise its discretion to curtail NRA/SCI's intervention, especially in light of NRA and SCI's voluntary decision to move for intervention jointly.

The Court should also deny CBD Plaintiffs' request that NRA/SCI "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." CBD Opposition at 9. (Dkt. No. 26). CBD Plaintiffs' requests are not based on any factually-based threat of prejudice or other legitimate basis that would necessitate discretionary intervention limitations.

This Court has no need to place limitations on NRA/SCI's participation in this case. NRA/SCI have significant experience participating in cases involving multiple Defendant/Intervenors and are fully capable of conferring and coordinating with other Defendant-Intervenors to brief a case most effectively and efficiently, and where possible to avoid unnecessary duplication. NRA/SCI will make just that effort in this litigation to work with the other parties.

Dated: February 28, 2011

Respectfully Submitted,

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