UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CENTER FOR BIOLOGICAL DIVERSITY, *et al.*,	)	
Plaintiffs,	)	
v.	)	Case No. 1:10-cv-2007 (EGS)
LISA P. JACKSON, *et al.*,	)	
Defendants.	)	

DEFENDANT-INTERVENOR NATIONAL SHOOTING SPORTS FOUNDATION, INC.'S PARTIAL MOTION TO DISMISS PLAINTIFFS' COMPLAINT

Pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6) and Local Rule 7(a), Defendant-Intervenor National Shooting Sports Foundation, Inc. ("NSSF") respectfully moves the court to dismiss all claims related to the efforts by Center for Biological Diversity, Public Employees for Environmental Responsibility and Project Gutpile (collectively "Plaintiffs") to require the Environmental Protection Agency ("EPA") to ban lead shot and bullets and the traditional ammunition that contains them pursuant to the Toxic Substances Control Act ("TSCA"). This court should dismiss Plaintiffs' claims with prejudice pursuant to Fed. R. Civ. P. 12(b)(1) for lack of subject matter jurisdiction as untimely, as Plaintiffs filed this action more than 60 days after EPA denied Plaintiffs' petition filed pursuant to Section 21 of TSCA demanding that EPA regulate traditional ammunition. Alternatively, this court should dismiss Plaintiffs' claims with prejudice pursuant to Rule 12(b)(6) for failure to state a claim upon which relief can be granted because EPA correctly found, when it denied Plaintiffs' petition, that TSCA explicitly excludes ammunition from its jurisdiction.

Pursuant to Federal Rule of Civil Procedure 12(i) and Local Rule 7(f), NSSF requests a hearing on its Motion.

Dated: February 8, 2011

Respectfully submitted,

/s/ Roger R. Martella, Jr.
Roger R. Martella, Jr. (Bar No. 976771)
Christopher L. Bell (Bar No. 412857)
Ragu-Jara Gregg (Bar No. 495645)
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000
(202) 736-8711 (fax)

Attorneys for Defendant-Intervenor NATIONAL SHOOTING SPORTS FOUNDATION, INC.

Of Counsel
Lawrence G. Keane
General Counsel
National Shooting Sports Foundation
11 Mile Hill Road
Newtown, CT 06470-2359
(203) 426-1320

CERTIFICATE OF SERVICE

I hereby certify that on February 8, 2011, I electronically filed the foregoing DEFENDANT-INTERVENOR NATIONAL SHOOTING SPORTS FOUNDATION, INC.'S PARTIAL MOTION TO DISMISS PLAINTIFFS' COMPLAINT and the accompanying Memorandum and Exhibits, along with the Proposed Order with the Clerk of Court using the CM/ECF system which will send notification of this filing to all attorneys of record.

/s/ Roger R. Martella, Jr.
Roger R. Martella, Jr. (Bar No. 976771)
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, D.C. 20005

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DEFENDANT-INTERVENOR NATIONAL SHOOTING SPORTS FOUNDATION, INC.'S MEMORANDUM IN SUPPORT OF PARTIAL MOTION TO DISMISS PLAINTIFFS' COMPLAINT

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CASES

Defendant-Intervenor National Shooting Sports Foundation, Inc. ("NSSF") respectfully moves the court to dismiss all claims related to the efforts by Center for Biological Diversity, Public Employees for Environmental Responsibility, and Project Gutpile (collectively, "Plaintiffs") to ban lead shot and bullets and the traditional ammunition that contains them. The Environmental Protection Agency ("EPA") properly denied Plaintiffs' request to ban domestically-manufactured traditional ammunition containing lead shot and bullets under the Toxic Substances Control Act ("TSCA"), 15 U.S.C. § 2601 *et seq*., concluding that it lacked the authority to do so under TSCA. Plaintiffs' suit amounts to a backdoor attempt at gun control using an environmental protection law that is not the appropriate vehicle to address or debate such issues.

This court should dismiss Plaintiffs' claims with prejudice pursuant to Fed. R. Civ. P. 12(b)(1) for lack of subject matter jurisdiction, as Plaintiffs failed to timely file this action, despite their prompt recognition—and criticism—of EPA's decision. Alternatively, this court should dismiss Plaintiffs' claims with prejudice pursuant to Rule 12(b)(6) for failure to state a claim upon which relief can be granted because EPA correctly found that TSCA explicitly excludes ammunition from its jurisdiction.

The claims related to lead shot and bullets are time barred. Plaintiffs filed this suit 88 days after EPA denied their petition, well beyond the 60-day jurisdictional deadline in 15 U.S.C. § 2620(b)(4)(A). Plaintiffs received and had ample notice of EPA's denial and, in fact, immediately published multiple press releases decrying the denial. Yet Plaintiffs failed to file suit within the strict jurisdictional timeline provided by Congress.

In addition, Plaintiffs have failed to state a claim upon which relief can be granted because EPA correctly concluded that it does not have jurisdiction to regulate or ban

domestically-manufactured traditional ammunition. Plaintiffs seek nothing less than to use EPA and TSCA to regulate traditional ammunition out of existence and shut down the domestic ammunition manufacturing industry.[1] *See* Complaint. However, Congress made clear that TSCA cannot be used as a vehicle for gun control by explicitly exempting ammunition from the scope of its regulation. 15 U.S.C. § 2602(2)(B)(v). At the time that Congress exempted ammunition from TSCA regulation, virtually all ammunition was made with lead, which makes Plaintiffs' effort to force EPA to use TSCA to ban traditional ammunition absurd. Because Congress expressly barred EPA from engaging in the regulation which Plaintiffs seek to compel, Plaintiffs fail to state a claim upon which relief can be granted.

As such, Plaintiffs' claims related to lead shot and bullets should be dismissed with prejudice under Rule 12(b)(1) for lack of subject-matter jurisdiction and Rule 12(b)(6) for failure to state a claim. Pursuant to LCvR 7(f), NSSF respectfully requests a hearing on this Motion.

REGULATORY BACKGROUND

I. CONGRESS EXCLUDED AMMUNITION FROM TSCA JURISDICTION.

Congress enacted TSCA in 1976 in an effort to provide a comprehensive framework for regulating "chemical substances." *Envtl. Def. Fund v. Reilly*, 909 F.2d 1497, 1498 (D.C. Cir. 1990). A "chemical substance" is broadly defined as "any organic or inorganic substance of a particular molecular identity." 15 U.S.C. § 2602(2)(A). However, Congress excluded from TSCA a number of widely used materials that would otherwise be considered "chemical substances," including drugs and medical devices, tobacco, food and food additives, and nuclear material. 15 U.S.C. § 2602(B)(i)-(iv), (vi).

Not wanting TSCA to be used as a vehicle for gun control, Congress also excluded

[1] NSSF is the trade association for the firearms and ammunition industry, with a membership of more than 6,000 manufacturers, distributors, and retailers of firearms, ammunition, and hunting-related goods and services, as well as sporting organizations, public and private shooting ranges, gun clubs, and individual hunters and sports shooters.

ammunition from the definition of "chemical substances" subject to TSCA by excluding "any article the sale of which is subject to the tax imposed by section 4181 of the Internal Revenue Code of 1986." 15 U.S.C. § 2602(2)(B)(v). A House legislative committee explained:

> 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.*

H.R. Rep. No. 94-1341, at 10 (1976), *reprinted in* 5 Environment and Natural Resources Policy Division, Library of Congress, *Legislative History of the Toxic Substances Control Act* 407, 418 (1976) (hereinafter "House Report") (emphasis added).

Section 4181 of the Internal Revenue Service ("IRS") Code, also known as the firearms and ammunition excise tax ("FAET"), imposes a tax "upon the sale by the manufacturer, producer, or importer" of "[s]hells, and cartridges." 26 U.S.C. § 4181. Shells and cartridges are assembled products that are composed of a casing, propellant, primer and either a bullet or shot. Because finished shells and cartridges are subject to the FAET, it follows that the components used to create the finished ammunition are effectively subject to that same tax. The FAET does not impose a "double tax" on finished ammunition, first on the components that are used to manufacture ammunition, and then again on the final product.

Congress' understanding of the FAET was informed by an IRS revenue ruling that was issued years before TSCA was promulgated. In that ruling, the IRS explicitly concluded that the FAET applies to the "components" of shells and cartridges that are sold in "knock-down" (unassembled) condition:

> However, in accordance with the provisions of section 48.4181-1(a)(2) of the Manufacturers and Retailers Excise Tax Regulations, the tax imposed by section 4181 of the Code does apply to sales of

> complete shells and cartridges or to sales of such articles which, although in a knock-down condition, are complete as to all *component* parts.

IRS Rev. Rul. 68-463, 1968-2 C.B. 507 (emphasis added). Thus, if one sells a knock-down kit which contains all of the separate individual components—but not a single finished shell or cartridge—the FAET applies to those components.[2] Where all of the components of a shell or cartridge are being sold together as a kit, and all that remains is to assemble them (e.g., by a hunter or hobbyist), those components are taxable. Thus, domestically-manufactured traditional ammunition, and the components from which such ammunition is assembled, are squarely beyond the reach of TSCA.

II. TSCA IMPOSES A 60-DAY LIMIT FOR CHALLENGING DENIALS OF TSCA SECTION 21 PETITIONS.

TSCA Section 21 provides that "[a]ny person may petition [EPA] to initiate a proceeding for the issuance, amendment, or repeal of a rule . . . or an order" under designated provisions of the Act. 15 U.S.C. § 2620(a). TSCA includes a judicial review provision for challenging a denial of any TSCA Section 21 petition. *Id.* § 2620(b)(4). Importantly, Congress provided for a strict 60-day time limit for the filing of a citizen suit that starts from the "denial" of a petition—not the publication of EPA's reasons for the denial in the Federal Register. This court has explained the procedure and deadlines associated with such citizen participation:

> Section 21 authorizes citizens to petition EPA for the initiation of rulemaking proceedings under any of the aforementioned sections. [15 U.S.C.] § 2620(a). The agency must either grant or deny the petition within 90 days of its filing. *Id.* § 2620(b)(3). Where a

[2]This approach is also codified in the current regulations promulgated by the Alcohol and Tobacco Tax and Trade Bureau. That agency's regulations state that a "manufacturer who sells a taxable article in a knockdown condition is liable for the tax as a manufacturer" and define "knockdown condition" as "[a] taxable article that is unassembled but complete as to all component parts." 24 C.F.R. §53.11.

> petition is granted, EPA must promptly commence proceedings under the appropriate section. *Id.* In cases where the agency denies the petition, it must publish its reasons for the denial in the Federal Register. *Id.* Where a petition is denied, or where EPA fails to respond to a petition within the 90-day period, the petitioner may seek *de novo* review of the denial in federal district court. *Id.* § 2620(b)(4). Such review must be sought within 60 days from the date of the denial, or, in cases where EPA fails to respond within 90 days, within 60 days from the expiration of the 90-day period. *Id.*

Envtl. Def. Fund v. Thomas, 657 F. Supp. 302, 304-05 (D.D.C. 1987). Thus, Plaintiffs were required to bring this suit within 60 days of the denial of their petition.

FACTUAL BACKGROUND

Notwithstanding the explicit exclusion of ammunition from TSCA jurisdiction, Plaintiffs, on August 3, 2010, petitioned EPA under Section 21 of TSCA to prohibit the manufacture, processing, and distribution in commerce of domestically-manufactured traditional ammunition by banning the use of lead for shot and bullets. *See* Complaint ¶3; *see also* 75 Fed. Reg. 58,377 (Sept. 24, 2010). In that same submission, Plaintiffs also petitioned EPA to ban the use of lead in fishing sinkers. *Id.* In an August 27, 2010 letter to Plaintiffs, EPA acted to sever Plaintiffs' two requests into two separate petitions—one regarding shot and bullets and the second regarding fishing sinkers—and denied the first petition seeking to ban lead in ammunition. Exhibit 1;[3] Complaint ¶4; *see also* 75 Fed. Reg. 58,377.

In its August 27, 2010 denial letter, EPA correctly explained to Plaintiffs that it was denying the petition because the definition of "chemical substance" in TSCA Section 3(2)(B)(v) excludes firearms, shells and cartridges from the Agency's TSCA jurisdiction:

[3]EPA's August 27, 2010 denial is referred to in ¶¶ 4, 50 of the Complaint, and is available at http://www.epa.gov/oppt/chemtest/pubs/Owens_Petition_Response.pdf. For the court's convenience, EPA's denial is also included with this brief as Exhibit 1.

> After careful review, EPA has determined that TSCA does not provide the Agency with authority to address lead shot and bullets as requested in your petition, due to the exclusion found in TSCA §3(2)(B)(v). Consequently, we are denying that portion of your petition.

Exhibit 1. EPA went on to say that "[w]e are reviewing the request in the petition regarding lead fishing sinkers and will respond to you when we have made a determination on that matter." *Id.* EPA did not indicate when it would make a decision regarding fishing sinkers.

On the same day EPA denied the petition in the letter to Plaintiffs, the Agency also issued a press release announcing the denial. Exhibit 2.[4] In that press release, Steve Owens, EPA Assistant Administrator for the Office of Chemical Safety and Pollution Prevention, stated:

> EPA today denied a petition submitted by several outside groups for the agency to implement a ban on the production and distribution of lead hunting ammunition. EPA reached this decision because the agency does not have the legal authority to regulate this type of product under the Toxic Substances Control Act (TSCA) – nor is the agency seeking such authority.
> . . .
> As there are no similar jurisdictional issues relating to the agency's authority over fishing sinkers, EPA – as required by law – will continue formally reviewing a second part the petition related to lead fishing sinkers.

Exhibit 2.

On August 27, 2010—*the same day* EPA denied their petition aimed at banning traditional ammunition—Plaintiffs issued a press release expressing their "dismay today after a decision by the Environmental Protection Agency to deny a petition to ban toxic lead bullets and shot." Exhibit 3.[5] The press release stated that EPA "denied the petition's request regarding lead ammunition on the grounds that the Toxic Substances Control Act contains a specific exemption for lead ammunition," a conclusion which Plaintiffs claimed was incorrect. *Id.* On September 9, 2010, Plaintiffs issued another press release that again disputed EPA's jurisdictional basis for the

[4] http://yosemite.epa.gov/opa/admpress.nsf/d0cf6618525a9efb85257359003fb69d/48d939b5009411038525778c00768006!opendocument

[5] http://www.biologicaldiversity.org/news/press_releases/2010/lead-08-27-2010.html.

denial of their petition aimed at traditional ammunition. Exhibit 4.[6]

In a September 24, 2010 Federal Register notice, EPA reiterated that it had denied the request in Plaintiffs' petition that it regulate lead bullets and shot under TSCA on August 27, 2010. 75 Fed. Reg. 58,377-78 (Sept. 24, 2010). EPA repeated its jurisdictional reasons for denying Plaintiffs' petition aimed at traditional ammunition:

> This plain reading of the statute is consistent with EPA's longstanding interpretation of the six TSCA exclusions at TSCA section 3(2)(B).
>
> The statutory definition of "chemical substance" 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 imposes a tax on firearms, shells and cartridges. 26 U.S.C. 4181. Bullets and shot, and any lead within them, are contained in shells and cartridges and are therefore excluded from the chemical substance definition. In addition, EPA's plain reading of TSCA is consistent with EPA's long-standing interpretation of TSCA's definition of "chemical substance" and with the purpose of the exemption.

Id. at 58,378.

On November 4, 2010, EPA denied the petition aimed at fishing tackle and published information about that denial in the Federal Register on November 17, 2010. Complaint at ¶¶ 5-6.

On November 23, 2010, 88 days after EPA's denial of their petition aimed at banning domestically-manufactured traditional ammunition, Plaintiffs filed this action. *See* Complaint at

[6] http://www.biologicaldiversity.org/news/press_releases/2010/lead-09-09-2010.html.

¶1, Request for Relief.

STANDARD OF REVIEW

A motion to dismiss under Rule 12(b)(1) challenges the jurisdiction of the court to adjudicate the claim. "On a motion to dismiss for lack of subject matter jurisdiction pursuant to Rule 12(b)(1), the plaintiff bears the burden of establishing that the court has subject matter jurisdiction." *Delaney v. District of Columbia*, 612 F. Supp. 2d 38, 42 (D.D.C. 2009); *see also Shuler v. United States*, 531 F.3d 930, 932 (D.C. Cir. 2008). While the court "must accept as true all of the factual allegations set forth in the Complaint," *Equal Rights Ctr. v. District of Columbia*, No. 06-1942, 2010 WL 3894002, at *3 (D.D.C. Oct. 5, 2010), it is "not limited to the allegations contained in the complaint," and "may consider materials outside the pleadings." *Delaney*, 612 F. Supp. 2d at 42. Moreover, the "Court need not accept unsupported inferences or legal conclusions cast as factual allegations." *Tabman v. FBI*, 718 F. Supp. 2d 98, 100 (D.D.C. 2010). In addition, "[b]ecause subject matter jurisdiction focuses on the court's power to hear the claim, [] the court must give the plaintiff's factual allegations closer scrutiny when resolving a Rule 12(b)(1) motion than would be required for a Rule 12(b)(6) motion for failure to state a claim." *Delaney*, 612 F. Supp. 2d at 42.

"A court must dismiss a case pursuant to Rule 12(b)(1) when it lacks subject matter jurisdiction." *Laukus v. United States*, 691 F. Supp. 2d 119, 125 (D.D.C. 2010). Faced with motions to dismiss under Rule 12(b)(1) and Rule 12(b)(6), a court should first consider the Rule 12(b)(1) motion because "[o]nce a court 'determines that it lacks subject matter jurisdiction, it can proceed no further.'" *Sledge v. United States*, 723 F. Supp. 2d 87, 91 (D.D.C. 2010) (quoting *Simpkins v. District of Columbia Gov't*, 108 F.3d 366, 371 (D.C. Cir. 1997)).

A motion to dismiss under Rule 12(b)(6) "challenges the adequacy of a complaint on its

face, testing whether a plaintiff has properly stated a claim." *Delaney*, 612 F. Supp. 2d at 41. In ruling on such a motion, the court "'must treat the complaint's factual allegations as true [and] must grant [the] plaintiff the benefit of all reasonable inferences from the facts alleged.'" *Heard v. U.S. Dep't of State*, No. 08-02123, 2010 WL 3700184, at *3 (D.D.C. Sept. 17, 2010) (quoting *Trudeau v. Fed. Trade Comm'n*, 456 F.3d 178, 193 (D.C. Cir. 2006)). However, the court is "not bound to accept as true a legal conclusion couched as a factual allegation." *Bostic v. U.S. Capitol Police*, 644 F. Supp. 2d 106, 109 (D.D.C. 2009) (quoting *Trudeau*, 456 F.3d at 193).

ARGUMENT

I. PLAINTIFFS' CLAIM MUST BE DISMISSED AS TIME-BARRED BECAUSE PLAINTIFFS FAILED TO FILE SUIT WITHIN THE JURISDICTIONAL DEADLINE.

A. TSCA requires that a suit challenging a denial of a petition must be initiated within 60 days after EPA's denial of the petition.

TSCA has a strict jurisdictional filing deadline for suits challenging EPA's denial of a TSCA Section 21 petition: "[a]ny such action shall be filed within 60 days after the Administrator's denial of the petition." 15 U.S.C. § 2620(b)(4)(A). As this court has recognized, complying with this 60-day filing period is a jurisdictional prerequisite: "'statutory time limits for review of agency action are jurisdictional in nature,' and are therefore strictly construed." *Envtl. Def. Fund v. Thomas*, 657 F. Supp. at 306 (quoting *Eagle-Picher Industries v. EPA*, 759 F.2d 905, 911 (D.C. Cir. 1985)).

1. The statute is clear that a judicial challenge must be brought within 60 days after EPA's denial of the petition.

The statute is unambiguous that the relevant date to use for calculating initiation of the 60-day period is the date of "the Administrator's denial of the petition," not the agency's subsequent publication of information about that denial in the Federal Register. 15 U.S.C. § 2620(b)(4)(A). The text of TSCA clearly separates the denial of the petition from the subsequent

publication in the Federal Register of the reasons for that denial: "If the Administrator *denies such petition*, the Administrator shall publish in the Federal Register the Administrator's *reasons for such denial*." 15 U.S.C. § 2620(b)(3) (emphasis added). Having distinguished the "denial" of the petition from the publication of the "reasons for such denial," the statute goes on to trigger the start of the 60-day period on the date of the "Administrator's denial of the petition," 15 U.S.C. § 2620(b)(4)(A), and not on the date of publication of the "reasons for such denial" in the Federal Register.

If Congress had wanted to trigger the 60-day period with the publication in the Federal Register, it knew the language to use to do so. It used such triggers elsewhere in TSCA and in other statutes. For example, in another section of the statute, TSCA sets a trigger date for an agency action to be "within 90 days of the publication in the Federal Register." 15 U.S.C. § 2608(a)(2)(B).[7] This provision demonstrates that Congress knew how to use a Federal Register publication date as a trigger for calculating a deadline, but chose not to use it as the trigger for the deadline for filing a challenge to a denial of a TSCA Section 21 petition. When "Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Gozlon-Peretz v. United States*, 498 U.S. 395, 404 (1991). Thus, "'[w]hen Congress includes a specific term in one section of the statute but omits it in another section of the same Act, it should not be implied where it is excluded.'" *Cramer v. Commissioner, Internal Revenue Service*, 64 F.3d 1406, 1412 (9th Cir. 1995), *cert. denied*, 517 U.S. 1244 (1996). "Where Congress knows how to say something but chooses not to, its silence

[7]The jurisdictional provisions for challenging EPA decisions regarding TSCA Section 21 petitions are separate from the general judicial review provisions of TSCA, which provide that challenges must be filed within 60 days after the promulgation (i.e., publication in the Federal Register) of rules under Sections 4, 5, 6 and 8 of TSCA. 15 U.S.C. § 2619(a)(1)(A).

is controlling." *In re Haas*, 48 F.3d 1153, 1156 (11th Cir. 1995).

Other statutes also use clear language when using publication in the Federal Register as a trigger for a time periods. For example, a judicial review provision of the Clean Air Act requires that:

> Any petition for review under this subsection *shall be filed within sixty days from the date notice of such promulgation, approval, or action appears in the Federal Register*, except that if such petition is based solely on grounds arising after such sixtieth day, then any petition for review under this subsection shall be filed within sixty days after such grounds arise.

42 U.S.C. § 7607(b)(1) (emphasis added); *see also* Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. § 136d(f)(1)(C)(ii) (EPA "may not approve or reject the request until the termination of the 180-day period beginning on the date of publication of the notice in the Federal Register."); Safe Drinking Water Act, 42 U.S.C. § 300h–3(a)(2) (requiring agency action "[n]ot later than the 30th day following the date of the publication of a petition under this paragraph in the Federal Register"). Thus, Congress has had no trouble making clear in other statutes when time periods were intended to be triggered by publication in the Federal Register. However, Congress did not do so with the time limit at issue here, instead it set the "denial" date as the trigger date.

2. <u>This court's case law reaffirms that a denial of a petition must be brought within 60 days after EPA's denial of the petition</u>.

This court has also clearly indicated that the appropriate date to use as the starting point for the 60-day filing period for challenging an EPA denial of a TSCA Section 21 petition is the date of the denial, not the date of the subsequent Federal Register publication. In *Envtl. Def. Fund v. Thomas*, this court closely examined how to count the 60-day filing period in a TSCA

Section 21 case and counted the days from the denial, not the Federal Register publication. *See* 657 F. Supp. at 305-06. In that case, the plaintiffs filed a TSCA Section 21 petition on October 22, 1984, EPA denied the petition on January 22, 1985, and the Agency published the denial in the Federal Register on January 30, 1985. *Id.* at 305. The plaintiffs filed their suit challenging EPA's denial on March 25, 1985, 62 days after EPA denied the petition and 54 days after publication in the Federal Register. EPA argued that the suit was untimely because it was brought 62 days after EPA denied the petition. *Id.* The court concluded that the suit was timely, because the sixtieth day after EPA issued its denial fell on a Saturday and, pursuant to Fed. Rule Civ. P. 6(a),[8] plaintiffs were permitted to file their suit the following Monday, 62 days after the denial. *Id.* at 306. The court identified, but disregarded the Federal Register publication date, focusing its jurisdictional analysis solely on the earlier date of the denial. *Id.* at 305. This is telling, as the jurisdictional dispute would not have existed at all if the Federal Register notice was the trigger date, because that notice was published only 54 days before the plaintiffs filed suit.

Thus, both the statute, as well as this court's precedent, establish that the trigger date for the 60-day filing period is the denial by EPA provided to Plaintiffs, not the subsequent notice in the Federal Register.

B. Plaintiffs filed this suit 88 days after EPA's denial of the petition, well beyond the statutory 60-day limit.

On August 27, 2010, EPA denied the petition seeking to ban lead in ammunition. Exhibit

[8]Fed. R. Civ. P. 6(a) provides a rule for "computing any time period specified . . . in any statute that does not specify a method of computing time." It states that:

> When the period is stated in days or a longer unit of time: . . . include the last day of the period, but if the last day is a Saturday, Sunday, or legal holiday, the period continues to run until the end of the next day that is not a Saturday, Sunday, or legal holiday.

Fed. R. Civ. P. 6(a).

1. That denial clearly explained the basis for EPA's decision: the Agency does not have the legal authority to regulate ammunition under TSCA. *Id.*; Complaint ¶4. In the denial letter to Plaintiffs, EPA stated that "EPA has determined that TSCA does not provide the Agency with authority to address lead shot and bullets as requested in your petition, due to the exclusion found in TSCA § 3(2)(B)(v)." Exhibit 1. EPA subsequently published information about that denial in the Federal Register on September 24, 2010, re-stating the jurisdictional explanation contained in the denial. *Id.* Plaintiffs did not file this lawsuit until November 23, 2010, 88 days after EPA's denial regarding bullets and shot.

1. Plaintiffs have repeatedly admitted that EPA denied the petition on August 27, 2010, 88 days before they filed suit.

Plaintiffs admit in their complaint that the effective date of EPA's denial was August 27, 2010.[9] Plaintiffs' complaint explains:

> On August 27, 2010, the EPA sent a letter to Plaintiffs indicating it was *denying* the "portion" of the petition dealing with lead shot and bullets. On September 24, 2010, the EPA published in the Federal Register its reasons for denying the Plaintiffs' request to regulate lead shot and bullets – citing a lack of authority due to an exclusion found at TSCA § 3(2)(B)(v).

Complaint ¶4 (emphasis added)..

Plaintiffs had full notice of EPA's action as of the day of the denial. On August 27, 2010, the very day the denial was issued, Plaintiffs issued a press release expressing their "dismay today after a decision by the Environmental Protection Agency to deny a petition to ban toxic lead bullets and shot." Exhibit 3. Plaintiffs' press release explained EPA's basis for denying the

[9]Even if the denial was not effective until receipt of the denial letter by Plaintiffs, Plaintiffs still failed to timely file their lawsuit, as there is no rational basis to conclude that Plaintiffs received the letter a month or more after it was sent, particularly given that Plaintiffs issued multiple press releases on the issue during that month. More fundamentally, there is no basis in Plaintiffs' Complaint to justify such a conclusion.

petition, noting that EPA "denied the petition's request regarding lead ammunition on the grounds that the Toxic Substances Control Act contains a specific exemption for lead ammunition." *Id.* Plaintiffs challenged the propriety of EPA's action, regardless of "the so-called exemption for lead ammunition that is written into TSCA." *Id.* Thus, it was clear on the day of the denial that Plaintiffs knew of both the existence of the denial as well as the basis for that denial.

Plaintiffs subsequently took litigation-focused actions that further indicated that they understood that EPA had denied their petition. On September 9, 2010—75 days before filing suit—Plaintiffs issued another press release titled "Congressional Documents Contradict EPA Claim That It Lacks Authority to Regulate Lead Ammunition: Agency Wrongly Denied Petition to Protect Wildlife From Toxic Lead." Exhibit 4. This press release discussed Plaintiffs filing of a Freedom of Information Act request regarding information about EPA's "denial" of their petition. *Id.* The press release also summarized some of the main arguments that Plaintiffs ultimately included in their complaint, such as the legislative history citations that Plaintiffs (incorrectly) claimed "contradict the Environmental Protection Agency's recent claim that it doesn't have the authority to regulate toxic lead bullets and shot." *Id.*

Plaintiffs knew on August 27 that EPA had denied their petition aimed at banning traditional ammunition and the reasons for that denial, and did not learn anything new in the subsequent Federal Register notice. *Compare* 75 Fed. Reg. 58,377, *with* the August 27, 2010 letter, Exhibit 1. Thus, Plaintiffs had every opportunity to timely file this case, but failed to do so.

2. <u>This court should defer to EPA's determination that the date of the denial was August 27, 2010</u>.

EPA was also clear that its denial of the petition dealing with lead shot and bullets took

place on August 27, 2010. 75 Fed. Reg. at 58,377-78 (repeatedly stating that EPA "denied" the request on August 27, 2010); Exhibit 2 ("EPA today denied a petition submitted by several outside groups.").[10] Should the court determine that there is ambiguity on how to interpret the language of TSCA regarding what constitutes "denial of the petition" under 15 U.S.C. § 2620(b)(4)(A), the court should defer to EPA's determination that the "denial" was accomplished with the August 27, 2010 letter. As discussed more fully *infra* in Section II, EPA is entitled to *Chevron* deference in its interpretation of TSCA's petition provisions. The court must defer to any permissible construction of a statute the agency is charged with administering, even if it is not the construction the court might have given the statute, unless Congress has "directly addressed the precise question at issue." *New Jersey v. EPA*, 517 F.3d 574, 581 (D.C. Cir. 2008) (citing *Chevron, USA, Inc. v. Natural Resources Def. Council*, 467 U.S. 837, 842-43 (1984)).

3. EPA's subsequent denial of Plaintiffs' petition regarding fishing sinkers did not extend the deadline for challenging EPA's denial of the ammunition petition.

EPA's subsequent denial of Plaintiffs' request with respect to fishing sinkers is immaterial to the issue of when the 60-day clock began to run on the denial of the petition regarding ammunition. EPA's August 27, 2010 denial of the petition aimed at traditional ammunition severed Plaintiffs' two requests—regarding shot and bullets, on one hand, and fishing sinkers, on the other hand—and treated them as separate petitions. This division makes sense because the products at issue, their use, and their legal status are completely different. As EPA explained in its press release when it issued the denial regarding ammunition:

[10] When EPA explained its subsequent denial of the petition aimed at fishing tackle, it again noted that it had denied the "first request" (i.e., the petition seeking to regulate traditional ammunition) on August 27, 2010. 75 Fed. Reg. 70,246 (Nov. 17, 2010).

> EPA reached this decision because the agency does not have the legal authority to regulate this type of product under the Toxic Substances Control Act (TSCA) . . .
> …
> *As there are no similar jurisdictional issues relating to the agency's authority over fishing sinkers*, EPA – as required by law – will continue formally reviewing a second part the petition related to lead fishing sinkers.

Exhibit 2 (emphasis added). Thus, EPA denied Plaintiffs' request with respect to traditional ammunition on the threshold issue that EPA did not have the requisite authority under TSCA, while subsequently denying their request with respect to fishing sinkers on substantive grounds. Plaintiffs had no reason to believe that they would be better equipped to file suit over their request related to traditional ammunition by waiting until their request related to the separate issue of fishing sinkers was resolved. The court should defer to EPA's approach and treat these two requests as separate petitions for purposes of the 60-day filing period.

The 60-day period for challenging EPA's denial of the petition aimed at traditional ammunition was not "tolled" by EPA's consideration of the petition regarding fishing tackle. Petitioners only have a right to seek judicial review if EPA denies a petition (in which case review must be sought within 60 days of the denial), or if EPA fails to act on a petition within 90 days after the petition is filed (such a challenge must be filed within 60 days after EPA's failure to act). EPA clearly separated Plaintiffs' initial submission into two petitions, promptly denying the traditional ammunition petition on TSCA jurisdictional grounds, while leaving the petition regarding fishing tackle open. Linking the running of the 60-day period for challenging the denial of the first petition to EPA's eventual action on the second petition would introduce significant and unacceptable uncertainty into the judicial process. When EPA decided the petition regarding traditional ammunition, no one knew what EPA was going to do with respect

to fishing sinkers and when it was going to do it. Jurisdictional determinations regarding the first EPA denial should not be dependent on such subsequent unpredictable events. Further, if EPA had decided to grant the petition regarding fishing sinkers, the only permissible reading of the statute would again be for the 60-day period to run from EPA's August 27, 2010 "denial" of the petition regarding ammunition, as it would clearly be inconsistent with the plain language of the statute for the clock to run instead from the "granting" of the fishing sinker petition.

Therefore, because Plaintiffs filed their challenge to EPA's denial of the petition aimed at traditional ammunition 28 days after the expiration of the jurisdiction deadline, this court must dismiss this portion of the case for lack of subject matter jurisdiction.

II. PLAINTIFFS' CLAIM SHOULD BE DISMISSED BECAUSE CONGRESS EXPRESSLY EXCLUDED AMMUNITION FROM THE REACH OF TSCA.

Plaintiffs' claim must be dismissed for failure to state a claim upon which relief can be granted because EPA correctly concluded that it does not have the authority under TSCA to regulate ammunition. Congress specifically removed ammunition from the reach of TSCA. In turn, EPA, the agency charged with implementing TSCA, has determined that it does not have the authority to regulate ammunition. Regardless, Plaintiffs are asking this court to use that very statute to take the extraordinary step of requiring EPA to ban the domestic manufacture of traditional ammunition and threaten the existence of the domestic ammunition manufacturing industry.

On issues of statutory interpretation, the court is to follow the familiar two-step *Chevron* analysis. At the first step, "[i]f the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron,* 467 U.S. at 842-43. But, "if the statute is silent or ambiguous with respect to the specific issue, the second step for the court is whether the agency's answer is based on a

permissible construction of the statute." *Id.* at 843. If a court needs to proceed to *Chevron* step two, then it is to give *Chevron* deference to the agency's interpretation of a statute if Congress has delegated authority to the agency "generally to make rules carrying the force of law, and . . . the agency interpretation claiming deference was promulgated in the exercise of that authority." *United States v. Mead Corp.*, 533 U.S. 218, 226-27 (2001). In such a situation, the court "need not determine that the [agency's] reading . . . is the best possible reading, only that it was reasonable." *Am. Fed'n of Gov't Employees, AFL-CIO, Local 446 v. Nicholson*, 475 F.3d 341, 355 (D.C. Cir. 2007).

As the D.C. Circuit has made clear:

> [I]f the court determines that "Congress has not directly addressed the precise question at issue," then, under step two, "the question for the court is whether the agency's answer is based on a permissible construction of the statute." The agency's interpretation need not be the only permissible reading of the statute, nor the interpretation that the court might have originally given the statute.

New Jersey v. EPA, 517 F.3d 574, 581 (D.C. Cir. 2008) (quoting *Chevron*, 467 U.S. at 842-43).

A. Congress expressly excluded ammunition from the jurisdiction of TSCA.

This case can be resolved under the first step of *Chevron* because TSCA directly addresses the precise question at issue by expressly excluding ammunition from EPA's jurisdiction. TSCA regulates the manufacture, processing, use, and distribution in commerce of "chemical substances." A "chemical substance" is broadly defined as "any organic or inorganic substance of a particular molecular identity." 15 U.S.C. § 2602(2)(A). Central to this case, Congress expressly excluded from the definition of "chemical substances" "any article the sale of which is subject to the tax imposed by section 4181 of the Internal Revenue Code of 1986," or

the FAET. 15 U.S.C. § 2602(2)(B)(v). Because finished shells and cartridges are subject to the FAET, it follows that all of the components used to create the finished ammunition are effectively taxed by the FAET. TSCA therefore unambiguously exempts shells and cartridges, and the bullets and shot contained in them, from regulation as "chemical substances" under TSCA.

Plaintiffs concede (Complaint ¶27) that Congress' understanding of the FAET was informed by the IRS revenue ruling that explicitly concluded that the FAET applies to the "components" of shells and cartridges that are sold in a "knock-down" (unassembled) condition. IRS Rev. Rul. 68-463, 1968-2 C.B. 507. This demonstrates that the tax on finished cartridges and shells is, in effect, a tax on the components that go into those products. In the case of commercially-manufactured ammunition, this is accomplished by taxing the finished ammunition and not the components used to assemble that ammunition, while in the case of kits selling ammunition in "knock-down" condition, this is accomplished by taxing the kit that contains components before they are assembled into finished ammunition. Thus, Congress intended the exclusion from TSCA to extend to the component parts used to manufacture shells and cartridges.

Since "Congress has directly spoken to the . . . issue," no further analysis is necessary. *Chevron*, 467 U.S. at 842. EPA has no jurisdiction under TSCA to regulate traditional ammunition, and Plaintiffs' attempt to use TSCA as a gun control statute must be rejected.

B. In the alternative, the court must defer to EPA's reasonable reading of the statute.

Should this court conclude that Congress has not directly addressed the issue of whether TSCA can be used to regulate traditional ammunition, under the second step of *Chevron*, this court must defer to EPA's interpretation that TSCA does not give the Agency jurisdiction to ban

traditional ammunition (or its component parts). *Id.*

EPA's decision to deny Plaintiffs' Section 21 petition is entitled to *Chevron* deference, as EPA clearly acted pursuant to an express delegation of congressional authority. 15 U.S.C. § 2620; *Mead*, 533 U.S. at 226-27. TSCA specifically requires "the Administrator [to] either grant or deny the petition" and sets up formal administrative procedure following such a decision. 15 U.S.C. § 2620. Further, EPA's denial of Plaintiffs' petition has the force of law as it has binding legal effect on the agency and Plaintiffs. *See Pharm. Research and Mfrs. of Am. v. Thompson*, 362 F.3d 817, 821-22 (D.C. Cir. 2004). With respect to deciding TSCA Section 21 petitions, the delegation of authority to EPA is not merely implicit "through the grant of general implementation authority." *Id.* at 821. Rather, Congress "expressly conferred on the Secretary authority to review and approve" or deny such petitions. *Id.* at 821-22. "Through this 'express delegation of specific interpretive authority,' the Congress manifested its intent that [EPA's] determinations, based on interpretation of the relevant statutory provisions, should have the force of law." *Id.* at 822 (citing *Mead*, 533 U.S. at 229). EPA's interpretations of TSCA are therefore entitled to *Chevron* deference.

In deciding Plaintiffs' petition, EPA correctly concluded that bullets and shot that are manufactured into shells and cartridges are "subject to the tax imposed by section 4181" and are therefore excluded from the chemical substance definition in TSCA. Exhibit 1; 75 Fed. Reg. at 58,377-78. EPA's logic is unassailable – if shells and cartridges are subject to the FAET tax, then the components of those articles are also effectively being taxed, and therefore are excluded from the definition of a "chemical substance" under TSCA.

> The statutory definition of "chemical substance" excludes "any article the sale of which is subject to the tax imposed by section 4181 of the Internal Revenue Code of 1986…" 15 U.S.C.

> 2602(2)(B)(v). Section 4181 imposes a tax on firearms, shells and cartridges. 26 U.S.C. 4181. Bullets and shot, and any lead within them, are contained in shells and cartridges and are therefore excluded from the chemical substance definition.

75 Fed. Reg. at 58,378. EPA further correctly concluded that its "plain reading of TSCA is consistent with EPA's long-standing interpretation of TSCA's definition of 'chemical substance' and with the purpose of the exemption." *Id*. Even if EPA's interpretation of TSCA is "not . . . the interpretation that the court might have originally given the statute," it is a permissible reading of the statute and the court must defer to EPA. *New Jersey*, 517 F.3d at 581.[11]

C. The legislative history makes clear that Congress did not intend to allow EPA to regulate traditional ammunition.

In light of Congress' clear intent that manufactured ammunition is exempt from regulation under TSCA, as well as EPA's interpretation to which deference is owed, it is unnecessary to resort to a review of legislative history. *Dep't of Hous. & Urban Dev. v. Rucker*, 535 U.S. 125, 132-33 (2002) ("[R]eference to legislative history is inappropriate when the text of the statute is unambiguous."). The court "should 'not resort to legislative history to cloud a statutory text that is clear'" nor should it "read legislative history to create otherwise non-existent ambiguities" *Consumer Elecs. Ass'n v. FCC*, 347 F.3d 291, 299 (D.C. Cir. 2003) (quoting *Ratzlaf v. United States*, 510 U.S. 135, 147-48, 126 L. Ed. 2d 615, 114 S. Ct. 655 (1994) and *Air Transport Ass'n of Canada v. FAA*, 323 F.3d 1093, 1096 (D.C. Cir. 2003)). However, Plaintiffs have argued that the legislative history suggests that Congress intended EPA to be able to

[11]This court should also defer to the Alcohol and Tobacco Tax and Trade Bureau in the Department of the Treasury, which is the agency that currently administers the Section 4181 tax. That agency's regulations define "shells and cartridges" to "[i]nclude any article consisting of a projectile, explosive, and container that is designed, assembled, and ready for use without further manufacture in firearms, pistols or revolvers." 24 C.F.R. § 53.11. That definition's reference to the "projectile, explosive, and container" makes clear that components of manufactured "shells and cartridges" are effectively being taxed under the FAET.

regulate the components of shells and cartridges under TSCA. Complaint ¶¶28 – 30. Plaintiffs' reading of the legislative history is incorrect, as Congress clearly did not intend to give EPA the authority to eliminate domestically-manufactured traditional lead-containing ammunition from the marketplace, which is Plaintiffs' fundamental demand.

When Congress deliberated on TSCA in 1975 and 1976, Congress was also actively engaged in ensuring that gun control did not come in through the backdoor of similar statutes. In 1972, Congress, in the Consumer Protection Safety Act ("CPSA"), excluded ammunition from the regulatory jurisdiction of the Consumer Protection Safety Commission ("CPSC").[12] 15 U.S.C. § 2052(5)(E). However, in 1974, the CPSC was nonetheless petitioned by a citizens' group to regulate ammunition pursuant to the Federal Hazardous Substances Act, and an ensuing court decision suggested that the CPSC might have the requisite authority to regulate ammunition under that Act.[13] In response to these developments, Congress considered a number of legislative responses in 1975 and 1976, and amended the CPSA in 1976 to make it clear that the CPSC did not have the authority to regulate firearms or ammunition. 15 U.S.C. § 2052(a)(5).[14] It was in this context of clear Congressional efforts in 1975 and 1976 to prohibit

[12] The CPSA excludes from the definition of "consumer product":

> (E) any article which, if sold by the manufacturer, producer, or importer, would be subject to the tax imposed by section 4181 of the Internal Revenue Code of 1986 [26 U.S.C. 4181] (determined without regard to any exemptions from such tax provided by section 4182 or 4221, or any other provision of such Code), or any component of any such article[.]

15 U.S.C. § 2052(5)(E). The presence of the term "components" in the CPSA exclusion makes sense, given that the definition of "consumer product," to which the ammunition exclusion applies, also explicitly includes "component parts." 15 U.S.C. § 2052(5) ("The term "consumer product" means any article, or component part thereof, produced or distributed" under certain conditions.). Thus the text of the CPSA exclusion parallels the definition of consumer product. Because "chemical substance" is defined by TSCA as "any organic or inorganic substance of a particular molecular identity," and does not include the concept of "components," (i.e., one does not have a "component" of a chemical substance), it is understandable that an exclusion from the definition of "chemical substance" would not be framed in terms of "components."

[13] *Committee for Hand Gun Control, Inc. v. Consumer Product Safety Comm'n*, 388 F. Supp. 216, 217 (D.C. Cir. 1974).

[14] For a discussion of this history, *see* Dennis B. Wilson, *What You Can't Have Can't Hurt You! The Real Safety Objective of the Firearms Safety Act and Consumer Protection Act*, 53 Clev. St. L. Rev. 225, 232–235 (2006).

agencies such as the CPSC from regulating ammunition that Congress, also in 1976, prohibited EPA from using TSCA to regulate ammunition. It is unreasonable to conclude that, at the same time Congress was taking vigorous action to ensure that the CPSC could not regulate ammunition, that the very same Congress was subtly opening a back door that would allow EPA to ban traditional ammunition through the regulation of shot and bullets under TSCA.

The House legislative committee report cited by Plaintiffs makes clear that "the Committee wishe[d] to emphasize that it does not intend that the legislation be used as a vehicle for gun control." House Report at 418; Complaint ¶29. That is exactly what Plaintiffs are attempting to do by seeking to eliminate the domestic manufacture, processing, and distribution of traditional ammunition.[15] The central and historic importance of the use of lead in shells and cartridges was well known to Congress when it passed TSCA and, as discussed above, Congress was focused on preventing federal agencies from regulating ammunition. It is unreasonable to conclude that when Congress created the ammunition exemption in TSCA and made it clear that TSCA should not "be used as a vehicle for gun control," that it intended that EPA would nonetheless have the authority to use TSCA to effectively ban the only domestically-manufactured traditional ammunition available at the time of passage.

Plaintiffs point to a statement in the Senate Report of TSCA that while "chemical substance" does not include ammunition, it is only "to the extent subject to taxes imposed under § 4181 of the Internal Revenue Code" and assert that this statement suggests that Congress "indicate[d] that it intended EPA regulate components in ammunition." Complaint ¶30. It does no such thing. That Senate Report statement simply restates what Congress codified in the text of

[15]Further, the House report stated that "the Administrator has no authority to regulate ammunition as an unreasonable risk because it injures people when fired from a gun." Complaint ¶29. However, that is exactly one of the arguments that Plaintiffs are making for why this court should act. In their Complaint, Plaintiffs attempt to justify the regulation of traditional ammunition by pointing to the alleged "serious risk of exposure for humans [] from accidental ingestion of lead shot pellets or lead bullet fragments in meat." *Id.* ¶40.

TSCA, which, as discussed above, clearly does not allow traditional ammunition to be regulated by EPA through the back door of restricting its component parts.

Plaintiffs also read too much significance into the Congressional committee statement that the TSCA provision "does not exclude from regulation under the bill chemical components of ammunition which could be hazardous because of their chemical properties." Complaint ¶29. If read as Plaintiffs suggest—to allow the regulation of shot and bullets even though TSCA expressly prohibits the regulation of ammunition (e.g., shells and cartridges)—that statement would effectively eliminate the statutory language that it is meant to interpret. That single statement in a committee report should not be interpreted to mean that Congress authorized EPA to regulate traditional ammunition out of existence. *See Williams Cos. v. FERC*, 345 F.3d 910, 914-15 (D.C. Cir. 2003) (refusing to reinterpret a clear statute because of language in a House Report because, while "history can be used to clarify congressional intent even when a statute is superficially unambiguous, the bar is high"). A more reasonable reading of that language is that the House committee wanted to make sure that the ammunition exclusion was not used in some other context to argue that EPA was prohibited from regulating a "chemical substance" such as lead simply because it is used in ammunition. Accordingly, Plaintiffs' challenge to EPA's denial of Plaintiffs' petition attempting to force EPA to ban the manufacture and sale of traditional ammunition does not state a claim upon which relief should be granted, and should be dismissed.

D. Plaintiffs' reading of TSCA is unreasonable.

Plaintiffs concede that "shells and cartridges" are exempt from TSCA. Complaint ¶25. However, they assert that EPA has TSCA jurisdiction over the lead shot and bullets used to manufacture shells and cartridges because additional Section 4181 taxes are not collected on them. *Id.* ¶28. This interpretation ignores the common sense point that ammunition is simply the

sum total of its components (i.e., there would not be any shells and cartridges to tax without bullets or shot), and that by applying the FAET to finished ammunition, the components that make up the ammunition have been taxed as well. Plaintiffs' interpretation is contrary to Congress' express intent; their petition aims to force EPA to use TSCA to ban domestically-manufactured traditional ammunition, precisely the outcome Congress intended to prohibit.[16]

Plaintiffs also incorrectly rely on an IRS revenue ruling to assert that the component parts of ammunition may be regulated as chemical substances under TSCA, stating:

> In 1968, eight years prior to the passage of TSCA, the Internal Revenue Service in a Revenue Ruling stated, "The manufacturers excise tax imposed upon sales of shells and cartridges by section 4181 of the Internal Revenue Code of 1954 *does not apply* to sales of separate parts of ammunition such as cartridge cases, primers, bullets and powder."

Complaint ¶27 (quoting IRS Rev. Rul. 68-463, 1968-2 C.B. 507) (emphasis added by Plaintiffs). Thus, Plaintiffs assert that, with the IRS exempting "separate parts of ammunition" from the FAET, these parts may be regulated by the EPA Administrator. *Id.* ¶28.

Plaintiffs' reliance on the revenue ruling is misplaced, as it only addresses the applicability of the FAET to the "sales of separate parts of ammunition" (i.e. not as components of finished ammunition). Plaintiffs are seeking to force EPA to use TSCA to regulate finished traditional ammunition, not the shot and bullets that are sold separately as individual components. Further, as discussed above, Plaintiffs' analysis ignores that the IRS, in that same ruling, explicitly concluded that the FAET does apply to the "components" of shells and

[16]Plaintiffs' unreasonable reading of the statute would result in other absurd results, such as the prospect that domestic manufacturers would be prohibited from manufacturing traditional ammunition, while foreign manufacturers could continue to export such ammunition to the United States. Imported ammunition comes into the United States in the form of finished shells and cartridges. Therefore, under Plaintiffs' incorrect view of the law, imported "finished" ammunition containing lead components could not be regulated by EPA under TSCA, whereas EPA could eliminate the domestic manufacture of the same ammunition.

cartridges that are sold in "knock-down" (unassembled) kits. IRS Rev. Rul. 68-463, 1968-2 C.B. 507.

Accordingly, Plaintiffs' effort to force EPA to use TSCA to ban the domestic manufacture of traditional ammunition is contrary to the plain text of TSCA, the reasonable interpretations of TSCA by EPA, the IRS and the Alcohol and the Tobacco Tax and Trade Bureau, and common sense.

CONCLUSION

For the reasons set forth above, the court should dismiss this case under Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure.

Dated: February 8, 2011

Respectfully submitted,

/s/ Roger R. Martella, Jr. _____
Roger R. Martella, Jr. (Bar No. 976771)
Christopher L. Bell (Bar No. 412857)
Ragu-Jara Gregg (Bar No. 495645)
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000
(202) 736-8711 (fax)
Attorneys for Defendant-Intervenor NATIONAL SHOOTING SPORTS FOUNDATION, INC.

Of Counsel
Lawrence G. Keane
General Counsel
National Shooting Sports Foundation
11 Mile Hill Road
Newtown, CT 06470-2359
(203) 426-1320

Exhibit 1

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

AUG 27 2010

OFFICE OF CHEMICAL SAFETY
AND POLLUTION PREVENTION

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

Dear Mr. Fry:

We received your August 3, 2010, petition requesting that the EPA take action under the Toxic Substances Control Act (TSCA) to prohibit the manufacture, processing, and distribution in commerce of lead shot, bullets, and fishing sinkers.

After careful review, EPA has determined that TSCA does not provide the Agency with authority to address lead shot and bullets as requested in your petition, due to the exclusion found in TSCA § 3(2)(B)(v). Consequently, we are denying that portion of your petition.

We are reviewing the request in the petition regarding lead fishing sinkers and will respond to you when we have made a determination on that matter.

Sincerely,

Stephen A. Owens
Assistant Administrator

Exhibit 2

EPA: United States Environmental Protection Agency

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News Releases By Date

EPA Denies Petition Calling for Lead Ammunition Ban

Release date: 08/27/2010

Contact Information: Brendan Gilfillan gilfillan.brendan@epa.gov

WASHINGTON - The U.S. Environmental Protection Agency today denied a petition calling for a ban on the production and distribution of lead hunting ammunition. EPA sent a letter to the petitioners explaining the rejection – that letter can be found here: http://www.epa.gov/oppt/chemtest/pubs/sect21.html

Steve Owens, EPA assistant administrator for the Office of Chemical Safety and Pollution Prevention, issued the following statement on the agency's decision:

"EPA today denied a petition submitted by several outside groups for the agency to implement a ban on the production and distribution of lead hunting ammunition. EPA reached this decision because the agency does not have the legal authority to regulate this type of product under the Toxic Substances Control Act (TSCA) – nor is the agency seeking such authority.

"This petition, which was submitted to EPA at the beginning of this month, is one of hundreds of petitions submitted to EPA by outside groups each year. This petition was filed under TSCA, which requires the agency to review and respond within 90 days.

"EPA is taking action on many fronts to address major sources of lead in our society, such as eliminating childhood exposures to lead; however, EPA was not and is not considering taking action on whether the lead content in hunting ammunition poses an undue threat to wildlife.

"As there are no similar jurisdictional issues relating to the agency's authority over fishing sinkers, EPA – as required by law – will continue formally reviewing a second part the petition related to lead fishing sinkers.

"Those wishing to comment specifically on the fishing tackle issue can do so by visiting http://www.regulations.gov. EPA will consider comments that are submitted by September 15."

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Exhibit 3

CENTER for BIOLOGICAL DIVERSITY *Because life is good.*

For Immediate Release, August 27, 2010

Contacts: Gavin Shire, American Bird Conservancy, (571) 308 4301
Jeff Miller, Center for Biological Diversity, (510) 499-9185

EPA Denies Petition to Protect Wildlife From Toxic Lead-based Ammunition

WASHINGTON— Conservation groups expressed dismay today after a decision by the Environmental Protection Agency to deny a petition to ban toxic lead bullets and shot that commonly kill and harm bald eagles, trumpeter swans, endangered California condors and other wildlife. An estimated 10 million to 20 million birds and other animals die each year from lead poisoning in the United States.

“The EPA had ample evidence that lead bullets and shot have a devastating effect on America’s wildlife, yet has refused to do anything about it. It’s disappointing to see this country’s top environmental agency simply walk away from the preventable poisoning of birds and other wildlife,” said Darin Schroeder, Vice President for Conservation Advocacy at American Bird Conservancy.

On Aug. 3, American Bird Conservancy, Center for Biological Diversity, Association of Avian Veterinarians, Public Employees for Environmental Responsibility, and the hunters’ group Project Gutpile petitioned the EPA to ban lead in bullets and shot for hunting, as well as fishing tackle. The petition referenced nearly 500 peer-reviewed scientific papers illustrating the widespread dangers of lead ammunition and fishing tackle. While the EPA is still considering the petition’s request for the regulation of lead fishing tackle, it denied the petition’s request regarding lead ammunition on the grounds that the Toxic Substances Control Act contains a specific exemption for lead ammunition.

“We strongly believe that the EPA has the clear authority and duty to regulate this very harmful and toxic substance as used in bullets and shot, despite the so-called exemption for lead ammunition that is written into TSCA. We had hoped they would take that responsibility seriously but we remain committed to making sure toxic lead is removed from the environment and we’ll redouble our efforts to see that through,” said Adam Keats, senior counsel for the Center for Biological Diversity.

Lead is an extremely toxic substance that is dangerous to people and wildlife even at low levels. Exposure can cause a range of health effects, from acute poisoning and death to long-term problems such as reduced reproduction, inhibition of growth and damage to neurological development.

Animals are poisoined when they scavenge on carcasses shot and contaminated with lead bullet fragments, or pick up and eat spent lead-shot pellets or lost fishing weights, mistaking them for food or grit. Some animals die a painful death from lead poisoning while others suffer for years from its debilitating effects.

Arizona . California . Nevada . New Mexico . New York . Alaska . Oregon . Illinois . Minnesota . Vermont . Washington, DC
P.O. Box 710 . Tucson, AZ 85702-0710 *tel:* (520) 623.5252 *fax:* (520) 623.9797 *www.BiologicalDiversity.org*

Go back

Exhibit 4

CENTER for BIOLOGICAL DIVERSITY Because life is good.

For Immediate Release, September 9, 2010

Contact: Jeff Miller, Center for Biological Diversity, (510) 499-9185
Robert Johns, American Bird Conservancy, (202) 234-7181 x 210

Congressional Documents Contradict EPA Claim That It Lacks Authority to Regulate Lead Ammunition
Agency Wrongly Denied Petition to Protect Wildlife From Toxic Lead

WASHINGTON— Congressional documents contradict the Environmental Protection Agency's recent claim that it doesn't have the authority to regulate toxic lead bullets and shot that commonly kill and harm bald eagles, trumpeter swans, endangered California condors and other wildlife. The EPA last month denied a petition to ban lead ammunition and require nontoxic alternatives for use in hunting. But the language of the Toxic Substances Control Act, as well as the Senate and House reports on the legislative history and intent of the Act, run counter to the EPA's claim, in an Aug. 27 letter rejecting the lead ammunition portion of the petition, that it lacks regulatory authority.

"The Environmental Protection Agency's denial was based on false assumptions and an inexplicable misreading of so-called exemptions in the Act," said Adam Keats, senior counsel for the Center for Biological Diversity. "Given the EPA's clear authority and duty under the Toxic Substances Control Act to regulate toxic lead in ammunition to end unnecessary lead poisoning of wildlife and reduce human health risk, it appears that their decision to dodge the issue was politically motivated."

In fact, according to a House report on the history and intent of the Act, "the Committee does not exclude from regulation under the bill chemical components of ammunition which could be hazardous because of their chemical properties." The EPA appears to have been influenced by a misleading "legal opinion" sent by the National Rifle Association on Aug. 20. The Center has sent a Freedom of Information Act Request to the EPA asking for all documents related to the agency's partial denial of the petition.

Last month the Center for Biological Diversity, American Bird Conservancy and other conservation groups petitioned the EPA to ban lead in bullets and shot for hunting, as well as lead in fishing tackle. The petition referenced nearly 500 peer-reviewed scientific papers illustrating the widespread dangers of lead ammunition and fishing tackle. While the EPA is still considering the request for regulation of lead fishing tackle, it denied the portion of the petition regarding lead ammunition regulation. So far, 40 conservation groups in 16 states have signed onto the petition, including organizations representing physicians, veterinarians and zoos, birders, public employees, American Indians and hunters.

"We are going to get to the bottom of the politics behind the EPA decision — we are not going to let the agency simply walk away from the preventable poisoning of birds and other wildlife," said Jeff Miller, conservation advocate with the Center. "We remain committed to making sure toxic lead is removed from the environment, and we're continuing our campaign to see that through."

Lead is an extremely toxic substance that is dangerous to people and wildlife even at low levels. Exposure can cause a range of health effects, from acute poisoning and death to long-term problems such as reduced reproduction, inhibition of growth and damage to neurological development. Wildlife is poisoned when animals scavenge on carcasses shot and contaminated with lead-bullet fragments, or pick up and eat spent lead-shot pellets or lost fishing weights mistaking them for food or grit. Animals can die a painful death from lead poisoning or suffer for years from its debilitating effects. An estimated 10 million to 20 million birds and other animals die each year from lead poisoning in the United States.

For more information, read about the Center's Get the Lead Out campaign and the petition to EPA.

The Center for Biological Diversity (www.biologicaldiversity.org) is a national, nonprofit conservation organization with more than 255,000 members and online activists dedicated to the protection of endangered species and wild places.

Background
Section 2605(a)(2)(A)(i) of the Toxic Substances Control Act, passed in 1968 as the federal mechanism for regulating toxic substances, allows the EPA to prohibit the manufacture, processing or distribution in commerce of a chemical substance for a particular use. Lead used in bullets and shot as well as fishing sinkers is a "chemical substance" falling within the scope of the Act. Although certain substances that are regulated under other federal laws are excluded from the definition of "chemical substances," none of these exclusions are applicable to lead shot or sinkers.

In denying the lead ammunition portion of the petition, the EPA in its Aug. 20 letter claimed "TSCA does not provide the agency with authority to address lead shot and bullets as requested in your petition, due to the exclusion found in TSCA § 3(2)(B)(v)."

The relevant section of the Act exempts "any article the sale of which is subject to the tax imposed by section 4181 of the Internal Revenue Code of 1986…" However, section 4181 of the Internal Revenue Code taxes firearms, shells and cartridges. Shot and bullets are explicitly not subject to this tax. According to a 1968 Revenue Ruling (IRS Rev. Rul. 68-463), "The manufacturers excise tax imposed upon sales of shells and cartridges by section 4181 of the Internal Revenue Code of 1954 *does not apply* to sales of separate parts of ammunition such as cartridge cases, primers, bullets, and powder" (emphasis added). Because shot and bullets, as separate parts of ammunition, are not taxed under section 4181 of the Internal Revenue Code, the Act's exception does not apply, and lead shot and bullets are properly classified as "chemical substances" subject to its regulation. The petition does not ask EPA to regulate firearms or the manufacture and sale of ammunition, but rather the toxic, separate parts of ammunition, such as bullets and shot.

The Senate and House reports on the legislative history and intent of the Toxic Substances Control Act are equally clear and instructive. The House report explicitly states on page 418: "Although the language of this 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…However, ***the Committee does not exclude from regulation under the bill chemical components of ammunition which could be hazardous because of their chemical properties***" (emphasis added). The Senate report states, "In addition, the term [chemical substance] does not include pesticides, tobacco, or tobacco products, nuclear material (as defined in the Atomic Energy Act), firearms and ammunition (to the extent subject to taxes imposed under section 4181 of the Internal Revenue Code)…"

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P.O. Box 710 . Tucson, AZ 85702-0710 *tel:* (520) 623.5252 *fax:* (520) 623.9797 *www.BiologicalDiversity.org*

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