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 REPLY IN SUPPORT OF PARTIAL MOTION TO DISMISS PLAINTIFFS' COMPLAINT

For the reasons set forth in Defendant-Intervenor National Shooting Sports Foundation, Inc.'s ("NSSF's") opening memorandum, and that of Defendants Lisa P. Jackson and the Environmental Protection Agency ("EPA"), this court should dismiss Plaintiffs' demand that EPA ban domestically-manufactured traditional ammunition containing lead shot and bullets under the Toxic Substances Control Act ("TSCA"), 15 U.S.C. § 2601 *et seq*.

Plaintiffs filed this action 22 days after the statutory deadline and have offered no legitimate reason why the court should extend that jurisdictional time limit. Plaintiffs' two requests to EPA (one directed at banning traditional ammunition, the other at fishing tackle) raised distinct legal and factual issues; therefore, the Agency acted well within its discretion to first deny Plaintiffs' petition to ban traditional ammunition and then separately address their petition to ban lead-containing fishing tackle later. It is clear that Plaintiffs understood the procedure that EPA was following, as the very day that EPA sent its denial letter, Plaintiffs issued a press release decrying EPA's "*decision . . . to deny a petition* to ban toxic lead bullets and shot" and they followed up with another similar press release soon thereafter. Doc. Nos. 23-4, 23-5, Mot. to Dismiss, Exhibits 3 and 4 (emphasis added). Plaintiffs' own contemporaneous statements demonstrate that they were not "confused" or "lulled" by EPA's actions.

Plaintiffs knew that EPA had acted, they knew the rationale for that action, and they went to the press repeatedly to denounce that action. Yet Plaintiffs now argue that they should be given more time to file their suit than is statutorily allowed, arguing that EPA's unequivocal denial was somehow not a final agency action. Plaintiffs have, however, offered no rational basis for why EPA's action on their request for an entirely separate rulemaking on fishing sinkers should have tolled the deadline to file suit regarding EPA's decision on ammunition. Because Plaintiffs understood that their petition regarding traditional ammunition had been

denied as of August 27 and, regardless, ignored the 60-day filing deadline, their claims regarding ammunition must be dismissed.

In addition, because EPA correctly found that TSCA explicitly excludes ammunition from its jurisdiction, this court should dismiss Plaintiffs' claims pursuant to Rule 12(b)(6) for failure to state a claim upon which relief can be granted. 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). Plaintiffs acknowledge that "shells" and "cartridges" are outside of EPA's jurisdiction to regulate. Because these assembled products necessarily include either a bullet or shot among their components, this court should defer to EPA's reasonable conclusion that these components are also beyond EPA's authority to regulate under TSCA.

Plaintiffs' claims related to lead shot and bullets should therefore be dismissed with prejudice under Fed. R. Civ. P. 12(b)(1) and Fed. R. Civ. P. 12(b)(6).

ARGUMENT

I. PLAINTIFFS' CLAIM IS TIME-BARRED AND MUST BE DISMISSED.

Plaintiffs failed to file suit within the jurisdictional deadline. TSCA plainly requires that a suit challenging EPA's denial of a petition must be filed within 60 days after EPA's denial of the petition. 15 U.S.C. § 2620(b)(4)(A). It is uncontroverted that Plaintiffs filed this suit 88 days after EPA's August 27, 2010 letter denying their petition regarding lead shot and bullets. Plaintiffs' entire argument hinges on the claim that the 60-day clock did not begin to run until EPA acted on their distinct request to ban lead-containing fishing tackle. This argument is without merit and should be rejected by the court.

A. EPA properly concluded that Plaintiffs' August 3, 2010 filing contained two distinct petition requests.

On August 3, 2010, Plaintiffs petitioned EPA with two separate requests: (1) that EPA issue a rulemaking prohibiting the manufacture, processing, and distribution in commerce of domestically-manufactured traditional ammunition by banning the use of lead for shot and bullets; and (2) that EPA issue a rulemaking banning the use of lead in fishing sinkers. EPA properly evaluated these requests separately. Not only did Plaintiffs ask for separate "regulations," Doc. No. 22-2, Lead Petition at 7 (emphasis added), the legal and factual contexts in which EPA had to resolve the requests were also radically different. Because Congress specifically removed ammunition from the reach of TSCA, the legal framework for addressing lead shot and bullets is necessarily different than it is for fishing tackle.[1] Moreover, the factual issues associated with hunting and fishing differ radically: ammunition and fishing tackle are completely different products with different uses; how, where, and the extent to which these products are introduced into the environment are not the same; and the practical issues associated with regulating these very different products and activities bear little resemblance to each other. It was eminently reasonable for EPA to evaluate Plaintiffs' claims regarding traditional ammunition separately from those aimed at fishing tackle.[2]

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[1] As EPA explained in its press release when it issued the denial regarding 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) . . .
> *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.

Doc. No. 23-3, Mot. to Dismiss, Exhibit 2 (emphasis added).

[2] Because lead shot and bullets fall outside of EPA's jurisdiction under TSCA, it was unnecessary for the Agency to conduct a risk analysis for ammunition.

EPA's determination that section 21 of TSCA authorized it to separate the two petitions deserves deference. First, the agency is empowered to determine how to best manage multiple requests and its decisions should be afforded deference. *See Mobil Oil Exploration & Producing Southeast Inc. v. United Distribution Cos.*, 498 U.S. 211, 230 (1991) ("An agency enjoys broad discretion in determining how best to handle related, yet discrete, issues in terms of procedures and priorities." (citations omitted)); *see also Mass. Pub. Interest Research Group v. U.S. Nuclear Regulatory Comm'n*, 852 F.2d 9, 13 (1st Cir. 1988) (holding that agency's partial disposition of a petition was final action despite agency's decision to defer part of petition). Second, EPA is entitled to *Chevron* deference in its interpretation of TSCA's petition provisions, as 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). Thus, this 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).

Such deference is warranted, as Plaintiffs cannot dictate EPA's decision-making process simply by the form of the documents they submit. Plaintiffs' decision to submit two petitions in one filing–and arbitrarily label it as a single petition–should not force EPA to ignore the obvious differences between petitions and obligate the Agency to evaluate two petitions as if they were one, regardless of obvious differences in law and fact. Under Plaintiffs' theory, someone could file a "single petition" with 20 different requests and then wait until EPA disposed of the very last one before seeking judicial review on any of them. However, it is EPA, not the petitioners,

that controls how EPA reviews TSCA section 21 petitions, and EPA has the discretion to resolve multiple requests in the most efficient manner.[3]

B. EPA's August 27, 2010 letter denying Plaintiffs' petition requesting EPA issue regulations banning lead in shot and bullets was final agency action triggering the 60-day period for Plaintiffs to file a lawsuit.

EPA consistently has stated that it denied the petition related to lead shot and bullets on August 27 and Plaintiffs' actions show that they understood their petition was denied on that date. EPA's August 27 letter was final agency action that triggered the 60-day period in which Plaintiffs were required to file their challenge.[4]

The August 27 letter clearly satisfies the "two conditions" set out by the Supreme Court for final agency action: "the action must mark the consummation of the agency's decisionmaking process" and "the action must be one by which rights or obligations have been determined, or from which legal consequences will flow." *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997) (citations and quotations omitted). The D.C. Circuit has long held that agency letters and opinions setting forth definitive interpretations of law may constitute final agency action. *See, e.g., Ciba-Geigy Corp. v. EPA*, 801 F.2d 430, 435 (D.C. Cir. 1986) ("The term 'agency action' encompasses an agency's interpretation of law."); *see also Unity08 v. FEC*, 596 F.3d 861, 865 (D.C. Cir. 2010) (orders "are final when 'they impose an obligation, deny a right or fix some

[3] Similarly, Plaintiffs' suggestion that the two separate requests contained in that filing present a "unifying theme" related to their concerns about lead in the environment must be rejected. Opp'n at 9. Plaintiffs' August 3 filing does not request that EPA regulate lead-containing products generally; it is clearly focused on two specific products used in two completely different activities, and not on the myriad of other lead products. EPA reasonably addressed Plaintiffs' two, distinct petition requests in separate responses.

[4] Plaintiffs' statements regarding "finality" serve only to reinforce that the clock started running when EPA issued its August 27 letter. Opp'n at 13. Indeed, Plaintiffs' only argument as to why the letter did not "mark the consummation of the agency's decisionmaking process" is that "EPA indicated it was still 'reviewing the request in the petition regarding lead fishing sinkers." *Id.* at 14. EPA's consideration of Plaintiffs' demands regarding fishing tackle, however, had no legal or factual connection with EPA's final denial of Plaintiffs' demands regarding ammunition. While EPA had not made a decision on Plaintiffs' demands regarding fishing tackle as of August 27, it was clear that it had completed its decision-making process and denied Plaintiffs' request with respect to ammunition. Moreover, as explained *infra*, Plaintiffs' actions and statements show that it understood EPA had issued a final denial on August 27. *See infra* Section I.C.

legal relationship as a consummation of the administrative process.'"). In the August 27 letter, EPA clearly and unequivocally announced its final interpretation that it lacked authority under TSCA to regulate lead shot and bullets, and consummated its decision-making process by denying Plaintiffs' petition request with respect to lead shot and bullets. Nothing in the August 27 letter indicates that EPA's decision on shot and bullets would be subject to any further consideration or action by the agency. EPA explained, and Plaintiffs' actions show that they understood, that the August 27 letter was the end of the decision-making process and an action "from which legal consequences will flow."

Plaintiffs' contention that they were waiting for the November 4 "final disposition of their petition" is illogical. EPA's denial of Plaintiffs' petition regarding fishing tackle does not relate to or affect in any way EPA's prior denial of Plaintiffs' request with respect to lead shot and bullets. There was nothing left for "final disposition," as EPA's August 27 denial letter addressed all issues relating to shot and bullets. The August 27 letter 1) clearly states that EPA is denying Plaintiffs' petition and 2) fully explains the basis for EPA's decision: that the Agency does not have the legal authority to regulate ammunition under TSCA. *See* Doc. No. 23-2, Mot. To Dismiss, Exhibit 1 ("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)."). 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 decision regarding fishing tackle did not and could not add to the finality of EPA's prior final agency action on ammunition.

Plaintiffs' insistence that they needed to wait for EPA's action on its fishing tackle request before they could challenge EPA's denial of their petition regarding traditional

ammunition is belied by the fact that they could not have known that EPA was going to deny their request to regulate 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). *See* 15 U.S.C. § 2620(b)(3). Linking the running of the 60-day period for challenging the denial of the first petition on shot and bullets to EPA's eventual action on the second petition on fishing tackle would introduce significant and unacceptable uncertainty into the regulatory and judicial process. *See* Doc. No. 23-1, Mem. in Support of Mot. to Dismiss at 21-22. Although EPA denied the fishing tackle petition on November 4, it might have granted the petition or even ignored it.[5] In those scenarios, Plaintiffs clearly could not have argued that EPA's denial of its ammunition petition occurred at any date other than August 27 because there would have been no other denials. It would be inconsistent with the plain language of TSCA for the 60-day clock to run from the "granting" of the fishing sinker petition, or from a failure to act on the petition. *See* 15 U.S.C. § 2620(b)(4)(A) (emphasis added) ("[a]ny such action shall be filed within 60 days after the Administrator's *denial* of the petition.").

Plaintiffs' citation to *New York v. United States*, 568 F.2d 887, 893 (2nd Cir. 1977), Opp'n at 11-13, is inapposite. This matter does not involve a situation, as in *New York*, where an agency issues an "initial order," but the proceeding remained pending at the agency until it issued a "final report and order." *Id.* As described above, EPA's decision with respect to shot and bullets was complete and known as of its August 27 letter. EPA's later actions with respect

[5] Indeed, Plaintiffs recognize that when a single filing contains more than one petition request, EPA may grant some requests, but not other requests. Opp'n at 10 ("EPA has disposed of petitions requesting more than one action by denying, granting, or both granting and denying, portions of a single petition at the same time . . . .").

to fishing tackle did not impact its earlier, final decision regarding shot and bullets. Contrary to Plaintiffs' assertions, Opp'n at 12, a ruling that the August 27 letter represents final agency action with respect to EPA's decision regarding ammunition does not present a danger of "piecemeal" litigation. Although Plaintiffs believe "[t]he interests of judicial economy were best served by Plaintiffs filing one suit" on its claims related to lead shot and bullet and its claims related to lead fishing tackle, these claims need not be brought in a single action. As described above, although they both relate generally to Plaintiffs' allegations regarding the impacts of lead on the environment, the claims related to shot and bullets arise in a factual and legal context that is entirely distinct from the claims related to fishing tackle. Moreover, if Plaintiffs had filed a timely challenge to the denial of their petition regarding shot and bullets, and wanted to litigate the subsequent denial of their petition regarding fishing tackle in the same lawsuit, they could have sought to amend their complaint.

In sum, EPA's November 4 denial of Plaintiffs' fishing tackle demands should not change the jurisdictional deadline for Plaintiffs to have filed their challenge to EPA's August 27 denial regarding traditional ammunition.

C. EPA was clear that it denied Plaintiffs' petition regarding lead shot and bullets on August 27, and Plaintiffs' statements and actions demonstrate that it understood the denial was final on that date.

Plaintiffs' protestations that EPA's actions were confusing fly in the face of the Agency's repeated and unequivocal statements that it denied the petition regarding lead shot and bullets on August 27 and Plaintiffs' own definitive reactions to EPA's denial.[6] The August 27 letter states

[6] EPA's determination that August 27 was the date of its "denial" of Plaintiffs' request related to ammunition is entitled to deference because it is within EPA's discretion to interpret TSCA's provision. 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)). Congress has expressly delegated authority to EPA to administer TSCA and decide

that EPA is "denying that portion of [Plaintiffs'] petition" regarding its request that EPA take action regarding lead shot and bullets. Doc. No. 23-2, Mot. to Dismiss, Exhibit 1. EPA's subsequent published statements reiterate that its August 27 letter was a denial of Plaintiffs' petition request regarding lead shot and bullets. *See* 75 Fed. Reg. at 58,377-78 (Sept. 24, 2010) (repeatedly stating that EPA "denied" the request on August 27); Doc. No. 23-3, Mot. to Dismiss, Exhibit 2 ("EPA today denied a petition submitted by several outside groups."); 75 Fed. Reg. 70,246 (Nov. 17, 2010) (noting that EPA denied Plaintiffs' "first request," namely the petition seeking to regulate traditional ammunition, on August 27).

Moreover, Plaintiffs' statements and actions on August 27 and immediately thereafter demonstrate that they understood the denial was final as of that date.[7] Although Plaintiffs now argue that EPA's August 27 letter "only served to notify Plaintiffs that their request regarding lead bullets and shot was *going to be denied at some future point*," Opp'n at 11, Plaintiffs issued a press release on August 27 expressing their "dismay today after a decision by the Environmental Protection Agency *to deny a petition* to ban toxic lead bullets and shot." Doc. No. 23-4, Mot. to Dismiss, Exhibit 3 (emphasis added). This press release makes clear that, on the day of the denial, Plaintiffs understood both that EPA had denied their petition to ban traditional ammunition, and the basis for that denial. On September 9, 2010, Plaintiffs issued yet another press release that demonstrates they understood their petition had been denied. *See* Doc. No. 23-5, Mot. to Dismiss, Exhibit 4. Plaintiffs' complaint also shows they interpreted the

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TSCA Section 21 petitions. Congress "expressly conferred on the Secretary authority to review and approve" or deny such petitions. *Pharm. Research and Mfrs. of Am. v. Thompson*, 362 F.3d 817, 821-22 (D.C. Cir. 2004). "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.

[7] For the same reasons, Plaintiffs' assertion that "the petitioners and the public had no way of knowing that the EPA's denial of a portion of the petition served to split the single petition into two petitions, and that its decision on the first 'portion' was final," Opp'n at 11, is disingenuous.

August 27 letter to be a denial of their request regarding lead shot and bullets. Doc. No. 1, Complaint ¶4.

Therefore, Plaintiffs knew on August 27 that EPA had denied their petition aimed at banning traditional ammunition and the reasons for that denial.

D. The 60-day time limit is jurisdictional and Plaintiffs are not entitled to an exception.

Plaintiffs argue that if the court should conclude that its challenge is untimely, it should find that the 60-day time limit is not jurisdictional and allow them to proceed as an "exception." Opp'n at 15. This court previously has recognized that complying with the 60-day filing period is a jurisdictional prerequisite, stating that the "'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. 302, 306 (D.D.C. 1987) (quoting *Eagle-Picher Industries v. EPA*, 759 F.2d 905, 911 (D.C. Cir. 1985)); *see also id.* at 307 (noting that application of Fed. R. Civ. P. 6(a) to calculate TSCA's "time limits is consistent . . . with the jurisdictional dictates of the provision").

Plaintiffs' assertion that EPA's "unique and confusing procedural conduct" warrants an equitable tolling of the statute of limitations is without merit. As described above in Section I.C, Plaintiffs' contemporaneous actions show that they were not at all confused about the status of their request for EPA to regulate traditional ammunition; they clearly understood that this request had been denied as of August 27. As Plaintiffs acknowledge, equitable tolling only applies when "despite all due diligence," a plaintiff "is unable to obtain vital information bearing on the existence of his claim." Opp'n at 16 (quoting *Currier v. Radio Free Europe/Radio Liberty, Inc.*, 159 F.3d 1363, 1367 (D.C. Cir. 1998)). However, it is clear from EPA's August 27 denial and Plaintiffs' response to that denial that Plaintiffs had all of the information necessary to the existence of their claim: EPA had denied the demand to ban traditional ammunition on the

grounds that TSCA did not provide EPA jurisdiction for such action. There was no "vital information" that was missing. For the same reasons, EPA is not equitably estopped or prevented by the "lulling doctrine" from arguing that Plaintiffs' lawsuit is untimely. Opp'n at 16-17. EPA consistently stated that it denied the petition on August 27. *See supra* Section I.C.

II. PLAINTIFFS' CLAIM SHOULD BE DISMISSED BECAUSE EPA REASONABLY CONCLUDED THAT IT DOES NOT HAVE THE AUTHORITY TO REGULATE AMMUNITION UNDER TSCA.

Plaintiffs' argument that EPA has the authority to regulate bullets and shot is based on a strained reading of the relevant statutes that would effectively eliminate Congress' decision to exempt ammunition from EPA's jurisdiction under TSCA. Plaintiffs ignore the plain relationship between shells and cartridges, and bullets and shot—a relationship that Congress was well aware of when promulgating TSCA. Bullets and shot are indisputably component parts of shells and cartridges. *E.g.* Opp'n at 18-19. EPA correctly concluded that the exemption of ammunition from TSCA cannot be circumvented merely by regulating the necessary components of ammunition. Because the assembled products, shells and cartridges, are subject to the FAET[8] and thus beyond EPA's authority to regulate under TSCA, it follows that the components used to create the assembled products are also beyond EPA's TSCA jurisdiction.

The parties all agree that it is unnecessary to resort to a review of TSCA's legislative history because the statute itself is unambiguous. *E.g.* Opp'n at 21. However, Plaintiffs' presentation of the legislative history, *id.* at 21-24, is mistaken and warrants correction. EPA's TSCA authority does not extend to regulating bullets and shot. The House legislative committee report cited by Plaintiffs, *id.* at 22, makes clear that "the Committee wishe[d] to emphasize that it

[8] Section 4181 of the Internal Revenue Service 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. Congress excluded 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).

does not intend that the legislation be used as a vehicle for gun control." Although Plaintiffs argue that regulating the components of ammunition is "appropriate under TSCA and would not function as a vehicle for gun control," it is uncontroverted that they seek to eliminate the domestic manufacture, processing, and distribution of lead-containing ammunition, which would necessarily restrict and control the use of guns.[9] *See* Doc. No. 5-2, Decl. of Lawrence G. Keane at ¶5 ("Approximately 95% of the domestically manufactured ammunition is traditional ammunition made with lead bullets or shot"). The central and historic importance of the use of lead in shells and cartridges was well known to Congress when it passed TSCA. It is unreasonable for Plaintiffs to claim that, although Congress did not want TSCA used as a vehicle for gun control, it nonetheless intended EPA to have the authority to prohibit the only domestically-manufactured traditional ammunition available at the time of passage.[10] Plaintiffs' interpretation of the statute would effectively eliminate TSCA's exemption of "shells" and "cartridges" by allowing EPA to regulate those products via their component parts. Such an outcome is not envisioned by the plain text of the statute and would clearly be contrary to legislative intent. Plaintiffs' unreasonable reading of the statute would also result in 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. *See* Doc. No. 23-1, Mem. in Support of Mot. to Dismiss at n.16. Congress could not have intended such an absurd result.

Further, as the expert agency charged with administering TSCA, EPA's interpretation of

[9] Plaintiffs also emphasize the report's statement that "the Committee does not exclude from regulation under the bill chemical components of ammunition which could be hazardous because of their chemical properties." Opp'n at 22 (citation omitted). Given its context, this statement is most plausibly read as Congress's attempt to ensure that the exemption for ammunition not be read as an exemption for lead generally or all types of products that might contain lead. The statement appears aimed at making clear that EPA could still regulate lead which could be hazardous in other products such as paint and children's toys.

[10] Plaintiffs wrongly assert that non-lead bullets and shot are "now widely available." Opp'n at 23. This alternative ammunition only constitutes about 5% of the domestic market. *See* Doc. No. 5-2, Decl. of Lawrence G. Keane at ¶5.

the ammunition exemption from the definition of "chemical substance" warrants *Chevron* deference.[11] EPA is charged with interpreting the definition in order to decide whether it may initiate rule-making under TSCA. Plaintiffs assert that "Congress did not delegate to EPA the power to define what is and what is not a chemical substance—it expressly contained this definition in the statute." Opp'n at 25. However, to the extent that the court finds any ambiguity in this definition, *Chevron* dictates that the court must defer to EPA's reasonable construction of the statute. EPA's conclusion that the individual components of ammunition are not to be regulated under TSCA is consistent with its regulations and guidance. For example, EPA has stated that "ammunition" is not subject to the pre-manufacture notification requirements of Section 5 of TSCA. 48 Fed. Reg. 21,722, 21,723 (May 13, 1983). In addition, EPA has consistently instructed manufacturers that report information on their chemical substances in accordance with 40 C.F.R. § 712 not to report "any quantity of chemical substance that is manufactured or processed solely for use as: . . . firearms or ammunition. . . . The above are not TSCA regulable."[12] *See* EPA Form 7710-35 (01/2005), Instructions for Manufacturer's Report Form, at 4, *available at* http://www.epa.gov/opptintr/chemtest/pubs/pairform.pdf (previously filed at Doc. No. 22-7). EPA has explained that "[i]f a chemical from a given manufacturing stream is solely for a non-TSCA use, no reporting is required." *Id.* The agency's consistent

[11] The fact that TSCA contains a provision allowing for *de novo* review does not suggest that EPA's interpretation of TSCA should be afforded any less deference. The *de novo* review provision is merely intended to, where necessary, "provide the opportunity to develop . . . a record" upon which review of EPA's denial of the petition can be based. *Environmental Defense Fund v. Reilly*, 909 F.2d 1497, 1503 (D.C. Cir. 1990) (quoting S.Rep. No. 698, 94th Cong., 2d Sess. 13 (1976), *reprinted in* 1976 U.S. Code Cong. & Admin. News 4491, 4502-4503). The provision thus clearly relates to developing the factual record, not the standard of review by which the court is to evaluate EPA's interpretations of the statute it has been charged to administer.

[12] Plaintiffs argue that "the fact that a single EPA reporting form does not require manufacturers to report chemical substances manufactured or processed solely for use as ammunition provides no cover either, as these substances are currently not regulated." Opp'n at 27 (citing EPA Mot. to Dismiss at 20, citing 47 Fed. Reg. 26,992, 27,002). This form, however, is further evidence that EPA has consistently interpreted TSCA's exclusion as applying to all chemical substances contained within the articles listed in section 2602(2)(B)(v). *See also* Doc. 22 EPA Mot. to Dismiss at 22 (providing further examples that EPA's interpretation of TSCA's exemption is consistent with its past policy).

determination that the use and processing of lead solely for use as ammunition is a "not TSCA regulable" should be afforded deference.

Plaintiffs incorrectly assert that EPA is not entitled to deference on this issue because EPA is not charged with administering the Internal Revenue Code. However, even Plaintiffs acknowledge that EPA's interpretation of TSCA "necessarily requires it to interpret section 4181 of the Internal Revenue Code." Opp'n at 25. By virtue of TSCA's cross-reference to section 4181, in order to determine whether it may initiate a rulemaking, EPA has been charged—in this particular context—with interpreting and administering this provision of the Internal Revenue Code and its interpretation should be afforded deference in this context as it is precisely related to the agency's expertise.

Even if EPA were not entitled to deference on this issue, an IRS revenue ruling, which was issued years before TSCA was enacted, makes clear that FAET can directly apply to the "components" of shells and cartridges—e.g., bullets and shot—that are sold in "knock-down" or unassembled condition. *See* IRS Rev. Rul. 68-463, 1968-2 C.B. 507. In accordance with that ruling, if one sells a knock-down kit that contains all of the separate individual components of an assembled shell or cartridge—including bullet or shot—but not the finished shell or cartridge, the FAET still applies. *Id.* Although Plaintiffs argue that this ruling suggests that the tax is still applied to shells and cartridges, the "knock-down" kits do not actually contain assembled shells and cartridges, but rather the component parts. Plaintiffs' attempt to distinguish this ruling merely demonstrates that they are splitting hairs over what it meant for Congress to exclude "shells" and "cartridges." Congress was legislating against the backdrop of this IRS ruling and can be deemed to have understood that the components included in these articles, namely bullet and shot, would be captured by the FAET.

In the Consumer Protection Safety Act ("CPSA"), Congress also excluded ammunition from the regulatory jurisdiction of the Consumer Protection Safety Commission ("CPSC"). Plaintiffs attempt to distinguish the significance of the CPSA by noting that it excludes "any component of any such article" from the definition of "consumer product." Opp'n at 24. As explained in NSSF's opening memorandum, however, 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." *See* Doc. No. 23-1, Mem. in Support of Mot. to Dismiss at 22-23 (further describing history of CPSA). It is unreasonable to conclude that at the same time as Congress was taking definitive steps to prohibit agencies such as the CPSC from regulating ammunition, it was throwing open a back door that would allow EPA to do so under TSCA.

CONCLUSION

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

Dated: March 1, 2011

Respectfully submitted,

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