



NATIONAL SHOOTING SPORTS FOUNDATION, INC.

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April 5, 2012

Lisa P. Jackson
Administrator
Environmental Protection Agency
Ariel Rios Building
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20004

RE: March 13, 2012 Petition Submitted by the Center For Biological Diversity *et al.* For Rulemaking to Regulate Lead Bullets and Shot Under the Toxic Substances Control Act (“TSCA”)

Dear Administrator Jackson:

The National Shooting Sports Foundation (“NSSF”), the trade association for the firearm, ammunition, hunting, and shooting sports industry, urges you to deny the above-referenced rulemaking petition requesting the U.S. Environmental Protection Agency (“EPA”) to ban the use of traditional ammunition made with lead-core components in hunting and shooting sports under Section 6 of TSCA. Though the petition claims to narrow the scope of the ban, it does not change the fact that the EPA has no jurisdiction over ammunition.¹ The NSSF opposes *any* regulation that would threaten the right of America’s sportsmen and gun owners to use ammunition of their choice and function as a vehicle for gun control as Petitioners seek to do through their petition.

This petition is the third time a Center For Biological Diversity-led coalition has tried to ban lead ammunition. The Center For Biological Diversity (“CBD”) filed its first petition on August 3, 2010 seeking a total nationwide ban on the manufacture, processing and distribution in commerce of lead shot, bullets, and fishing sinkers (“2010 Petition”).² The NSSF opposed the 2010 Petition by submitting comments to the EPA refuting CBD’s claims that the EPA had authority to regulate lead ammunition.³ (See, **Exhibit A**). On August 27, 2010, the EPA correctly denied the ammunition part of the 2010 Petition on the grounds that the agency did not have authority to regulate the production and distribution

¹ It should be noted that the Petitioners in their current petition specifically request the EPA to exclude from regulation under TSCA lead ammunition used for military and law enforcement purposes. No such military or law enforcement exemption is found in their 2010 Petition. By now excluding military and law enforcement, the Petitioners all but admit that the 2010 Petition was overbroad.

² Petition to the EPA to Ban Lead Shot, Bullets, and Fishing Sinkers Under TSCA, Posted Aug. 24, 2010, Docket ID: EPA-HQ-OPPT-2010-0681

³ Comment Submitted by Lawrence G. Keane, SVP and General Counsel, NSSF, Posted Sept. 10, 2010, Docket ID: EPA-HQ-OPPT-2010-0681-0512

of lead shot and bullets under TSCA.⁴ (See, **Exhibit B**). Following the denial, the CBD made a second attempt to compel issuance of the ammunition lead ban by filing a federal lawsuit against the EPA. The lawsuit was dismissed as to the ammunition ban on September 29, 2011, but is still pending with respect to lead fishing sinkers. Center For Biological Diversity v. Jackson, 815 F.Supp.2d 85 (D.D.C. Sept. 29, 2011). (See, **Exhibit C**).

The NSSF opposes the CBD's current petition to regulate lead bullets and shot used in hunting and shooting sports for the same reasons it opposed the CBD's 2010 Petition to regulate the production and distribution of lead shot and bullets. The NSSF refers the EPA to **Exhibit A** to review these reasons.

Regardless of the alleged differences between the current petition and the 2010 Petition, the Petitioners still fail to establish that the EPA has authority under TSCA to regulate lead shot and bullets. This time, the Petitioners argue that "the plain language of TSCA, as well as the Senate and House reports on the legislative history and intent of TSCA" somehow now confirms that the EPA can regulate lead shot and bullets.

Petitioners either do not understand the basic canons of statutory interpretation or intentionally ignore them in order to defeat the purpose of TSCA and advance their anti-hunting and anti-gun agenda. It is a well-settled principal of statutory interpretation that "[i]f the intent of Congress is clear, that is the end of the matter." Chevron U.S.A., Inc. v. National Resources Defense Counsel, 467 U.S. 837, 842 (1984). "If, however . . . the statute is silent or ambiguous with respect to the specific issue, [the second step] . . . is whether the agency's answer is based on a permissible construction of the statute." Id. at 843.

The EPA should deny the current petition under step one of the *Chevron* analysis. 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," commonly known as the firearms and ammunition excise tax ("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. The regulations implementing section 4181 make clear that the tax imposed on articles such as firearms, shells and cartridges is intended to encompass the value of their component parts. See, 27 C.F.R. §53.61(b)(2). The EPA supported this understanding in its own brief in Center For Biological Diversity v. Jackson:

To read Section 2602(2)(B)(v) otherwise would violate the basic canons of statutory interpretation that a provision should not be interpreted to be meaningless. (citation omitted). Section 2602(2)(B)(v) must have the result of removing some substance or group of substances from TSCA regulation. An interpretation of this statutory exemption to exclude only firearms, cartridges, and shells *themselves* would nevertheless allow EPA to regulate those articles indirectly simply by regulating their major components, thus completely circumventing the intended purpose and effect of Congress's exclusion.

⁴ Letter to Petitioner Denying the Lead Shot and Bullets Portion of the Petition, Posted Aug. 31, 2010, Docket ID: EPA-HQ-OPPT-2010-0681-0005; See also, 75 Fed. Reg. 58,377 (September 24, 2010). The EPA subsequently rejected the fishing tackle portion of the petition on November 4, 2010 on the grounds that the petition did not demonstrate that a national ban on lead in fishing gear was necessary to protect against unreasonable risk of injury to health or the environment, as required by TSCA. See, Docket ID: EPA-HQ-OPPT-2010-0681-6668.

See, EPA's' Partial Mot. to Dismiss For Lack of Jurisdiction Under Rule 12(B)(1) and Failure to State a Claim Under Rule 12(B)(6) at 11-12, Center For Biological Diversity. (**Exhibit D**).

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

Should the EPA believe that Congress has not directly addressed the issue of whether TSCA can be used to regulate traditional ammunition, under the second step of Chevron, the EPA should defer to its own well-reasoned and longstanding interpretation of the statute and not to unclear and dubious legislative history. Petitioners claim that TSCA's legislative history gives the EPA authority to regulate the lead components of traditional ammunition. Petitioners' reading of the legislative history is incorrect. When TSCA was enacted in 1976, essentially the only substance available at that time to manufacture shot and bullets was lead. 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 the 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 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...." If read as the Petitioners 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. Furthermore, as the EPA itself expressed in its brief in Center For Biological Diversity v. Jackson:

[M]ost people would probably not consider shot and bullets to be "chemicals," rendering it unclear whether the Committee meant that EPA could regulate the integral component parts of ammunition, or simply to emphasize EPA's general authority to regulate chemicals that might also be used as constituents of ammunition. By contrast, what [the EPA does] know, and what is borne out by the plain text of TSCA, is that Congress sought to prevent the use of TSCA as a means of gun control. Given that intent, the legislative history cited by [the Petitioners] provides only a feeble basis for recognizing an implicit exception to section 2502(2)(B)(v) that is not apparent from the text itself: a judicial rule that EPA may in fact regulate essential components of firearms and ammunition.

See, Reply in Support of EPA's' Partial Mot. To Dismiss For Lack of Jurisdiction Under Rule 12(B)(1) and Failure to State a Claim Under Rule 12(B)(6) at 18-19, Center For Biological Diversity. (**Exhibit E**).

Accordingly, Petitioners' effort to force EPA to use TSCA to ban the use of ammunition made with lead-core components in hunting and shooting sports is contrary to the plain text of TSCA, the reasonable interpretations of TSCA by EPA (as well as the Internal Revenue Service and the Alcohol and the Tobacco Tax and Trade Bureau), and common sense. The EPA should promptly deny the petition because the Agency has no authority to regulate either the finished product— shells and cartridges— or their component parts— lead-containing shot and bullets.

We are standing by to help EPA in any way in considering this petition. We would welcome the opportunity to discuss this with you further and to provide EPA with additional information, which might assist the Agency in considering the petition.

Sincerely,

A handwritten signature in black ink that reads "Lawrence G. Keane". The signature is written in a cursive style with a large, stylized initial 'L'.

Lawrence G. Keane

Enclosures