

The TSCA, Lead and The Division Of The Hazardous Bullet

Law360, New York (May 24, 2012) -- For much of their recorded history, humans have known lead dually as a toxin and as ammunition. Over 2,000 years ago, the ancient Greeks chronicled what would now be called neurotoxicity in those exposed to large amounts of lead.[1]

The Greeks also knew that lead could be useful in warfare. Writing of the 401 B.C. battle of Cunaxa, Greek historian Xenophon described how Rhodian peltists, armed with lead missiles, outranged their stone-slinging Persian counterparts.[2]

By the 16th century, muscle power gave way to gunpowder as the energy source for projecting lead bullets. This gave rise to the “cartridge” — simply, the bullet or projectile placed into the case or shell with powder and primer.

The Militia Act of 1792, which has received much attention during the individual health care mandate debate of late, required those subject to it to maintain “24 cartridges, suited to the bore of his musket or firelock, each cartridge to contain a proper quantity of powder and ball.”[3]

The “ball,” or bullet, was made of lead. Two hundred and thirty years later, it is estimated that 95 percent of cartridges sold in the United States still contain bullets or shot made of lead.[4]

Lead predominates as the material for ballistic projectiles because it is dense, cheap and malleable. However, fired bullets and shot do not remain aloft long, and, once at rest, the lead can be of ecological concern.

Take waterfowl. They grub the lake bottoms, where lead shot settles, for food and in the process can ingest the projectiles.[5] Thus, from 1986 to 1991, the U.S. Fish and Wildlife Service phased in a ban on the use of lead shot in waterfowl hunting due to an estimated annual lead poisoning rate of 2 to 3 percent.[6]

Similarly, in 2007, the California Department of Fish and Game banned lead bullets in designated California condor ranges due to concerns over them scavenging lead bullets or fragments thereof.[7] With only minimal grumbling, hunter compliance has been near perfect.[8]

Regulation of firearms and ammunition is generally the province of the U.S. Bureau of Alcohol, Tobacco and Firearms under the U.S. Department of Justice, though game agencies and associated statutes typically control their use in hunting.

The U.S. Environmental Protection Agency (EPA) and the statutes it administers also cross paths with bullets from time to time. Although spent bullets or shot are not “hazardous waste” under the Resource Conservation and Recovery Act (RCRA), and ranges allowing firing over dry land are not subject to permitting requirements under the Clean Water Act[9], the EPA has in the past invoked the Safe Drinking Water Act to address lead contamination at Camp Edwards.

It has also maintained best management practices for ranges[10] and overseen range cleanups.[11] Despite this involvement, however, the EPA is not in the bullet-regulating business, nor is it allowed to be. The statute granting the EPA authority to regulate products, the 1976 Toxic Substances Control Act (TSCA), was written with a firm ammunition exclusion prohibiting its application to “cartridges.”

Given lead’s long-known toxicity and use as the bullet in “cartridges,” it seems strange then that the TSCA, a toxic substances statute that expressly forbids its application to “cartridges,” could require the EPA to ban lead bullets due to lead’s toxicity.

Nonetheless, this is precisely the position advocated in a TSCA petition recently filed by various environmental advocacy groups. While the petition was rejected by the EPA, petitioners have indicated they intend to challenge that determination in court.

In August 2010, a number of advocacy groups, including the Center for Biological Diversity, the American Bird Conservancy and others, argued for a lead bullet ban in a rulemaking petition to the EPA. Specially, the petition sought a nationwide ban of “lead shot, [lead] bullets and [lead] fishing sinkers.”

While the petition was initially denied for want of authority to regulate “lead shot and bullets” under the TSCA, the consortium subsequently reviewed, reworded and re-submitted its petition.

In their latest petition, submitted in March 2012, the consortium argued that “[a]s long as ammunition manufactured with lead projectiles remains available for purchase and use, numerous species of wildlife will continue to be poisoned by lead[,] and human health will be threatened, posing an unreasonable risk of injury to human health and the environment.” Petition, 20.

In hopes of circumventing the TSCA’s express exclusion of “shells and cartridges,” the petition argues that while the EPA may not regulate complete “ammunition,” i.e., complete cartridges, it may nonetheless regulate the “toxic, separate parts of ammunition, such as [lead] bullets and shot,” this time quoting a legislative statement that “the Committee does not exclude from regulation under [the TSCA] chemical components of ammunition which could be hazardous because of their chemical properties[.]”

The EPA was unimpressed. It found the “2012 submission” to be “substantially the same” as the 2010 submission and thus not “a new petition cognizable under section 21” of the act. This is one of the few occasions where the EPA and the National Rifle Association (NRA) are closely aligned.

Petitioners must challenge the EPA’s denial of the petition if they are to have any hope of success. But before shooting enthusiasts start stockpiling cartridges ahead of a judicially enforced TSCA ban on 95 percent of the ammunition currently sold in the United States, it is worth briefly considering petitioners’ litigation prospects.

Procedurally, they have a timeliness problem. They challenged the EPA’s denial of their petition for a lead ammunition ban, but the district court dismissed it because they failed to do so “within the 60–day time frame provided by TSCA[.]” With the EPA’s finding that the 2012 submission is not “a new petition” under the TSCA, the prior 60-day challenge window will likely stay closed.

Substantively, there are further challenges. Petitioners claimed “unreasonable risk” implicating the TSCA is of human or animal exposure to the lead bullets or shot that strike a game animal or fall to earth or water and are then consumed by animals or affect the ecosystem.

Petitioners cite the “toxicity of spent lead bullets and shotgun pellets from hunting and shooting activities to wildlife and to humans” and argue that “[l]ead-based bullets fragment on impact, distributing toxic lead particles widely,” and that animals “ingest spent lead shot pellets” or “lead fragments.”

The problem with this argument is that bullets only exit firearms as part of cartridges. Thus, the risk petitioners allege is from assembled cartridges, not the bullets themselves.

“[S]pent lead bullets and shotgun pellets” can only occur if a bullet is first made into cartridge then fired through a gun. Without the other components of a cartridge that propel a bullet out of a gun, the lead bullet in even the most environmentally sensitive habitat can do little beyond sit in storage waiting to be assembled into a “cartridge.”

This is why those lead bans that do exist — such as for waterfowl hunting or in California’s designated condor zones — prohibit the use of cartridges or shells containing lead shot or bullets. Those bans avoid the need for the pretense of regulating only bullets and not “cartridges” by being enacted under statutes that do not prohibit the regulation of ammunition.

The EPA’s interpretation is likely to pass the deferential Chevron standard, which upholds an agency answer “based on a permissible construction of the statute” absent clear intent to the contrary. *Chevron USA Inc. v. Natural Resources Defense Council Inc.*, 467 U.S. 837, 843 (1984).

Petitioners’ proposed distinction between the permissible regulation of unassembled components and the prohibited regulation of them once assembled is mere semantics. The proposed ban, if enacted, would “allow [the] EPA to regulate firearms and ammunition in direct contradiction of Congress’s purpose in enacting” the exclusion to the TSCA.

Further, absent some showing that lead bullets pose an environmental risk separate and apart from their status as the projectile in a “cartridge,” arguments about whether the EPA can regulate them as a “component” may be beside the point.

More generally, it is questionable whether many exclusions could survive if bypassing them were as simple as claiming to regulate the “components” of the excluded item. With a little imagination, such creative readings could be turned on TSCA’s other exclusions — food, drugs, cosmetics, pesticides, firearms, etc. — since they too involve components.

Just as regulation of “the manufacture, processing or distribution” of ammunition is the province of other federal agencies and sets of laws, so too is regulation of such other categories. And as with those other areas, it is complicated.

To take one complication from petitioners’ proposed ban, consider that bullets made of many lead substitutes, e.g., tungsten alloys, steel, iron, brass, bronze, et al, can be prohibited as “armor-piercing ammunition” under the Gun Control Act of 1968.[12]

Those, like almost all metals, are much harder than lead and so are correspondingly more able to shoot through “bulletproof” vests. So while bullets of nonlead metals can be more “green” from an environmental perspective, law enforcement might have a more dim view on their proliferation.

None of the above is meant to dismiss or invalidate concerns over risk to health and wildlife from the firing of cartridges loaded with lead bullets or shot. However, a statute that expressly prohibits its application to “shells and cartridges” is not the vehicle to address these concerns.

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[1] Needleman, H (2009). "Low level lead exposure: history and discovery". *Annals of epidemiology* 19 (4): 235–8. doi:10.1016/j.annepidem.2009.01.022. PMID 19344860.

[2] "Xenophon, Anabasis, chapter III". Gutenberg.org. 1998-01-01. www.gutenberg.org/dirs/etext98/anbss10.txt. Retrieved 2010-09-12

[3] http://constitution.org/mil/mil_act_1792.htm

[4] D. Main, Zeroing in on Lead in Hunters' Bullets, *NY Times (Green)* (Mar. 15, 2012) available at <http://green.blogs.nytimes.com/2012/03/15/zeroing-in-on-lead-in-hunters-bullets/>

[5] US Fish & Wildlife, Service Continues to Expand Non-Toxic Shot Options as Study Dhow's Ban on Lead Shot Saves Millions of Waterfowl (Oct. 25, 2000) available at www.fws.gov/pacific/news/2000/2000-177.htm

[6] M. Leah Wright and Gregory Tolbert, Reform at Last for the Lead Shot Controversy, 12 *Wm. & Mary Envtl. L. & Pol'y Rev.* 8 (1987), <http://scholarship.law.wm.edu/wmelpr/vol12/iss1/3>

[7] 14 CCR 353

[8] See e.g., NRA huntersrights.org, at www.nrahuntersrights.org/LeadIssues.aspx, Times Op-Ed Baseless (May 17, 2011) (“As virtually every hunter knows, lead shot was banned for hunting migratory waterfowl in 1991. Does the Times think we need to ban it again?”); National Shooting Sports Foundation, Fact Sheet . . . Protect Traditional Ammunition available at <http://nssf.org/factsheets/traditional-ammunition.cfm> (arguing that with the exception of “waterfowl” and “possibly the California condor” there is “no sound scientific evidence that the use by hunters of traditional ammunition is causing harm to wildlife populations.”).

[9] *Cordiano v. Metacon Gun Club, Inc.*, 575 F.3d 199, 208 (2d Cir. Conn. 2009)

[10] EPA, Best Management Practices for Lead at Outdoor Shooting Ranges available at www.epa.gov/region2/waste/leadshot/

[11] See e.g., EPA, Firing range cleanup agreement means Kincaid Park soccer field construction can move forward (Oct. 7, 2010) available at <http://yosemite.epa.gov/opa/admpress.nsf/0/23DECB94A146472F852577B500642D80>

[12] 18 U.S.C., § 921(a)(17)(B)

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