

Legal Challenges to Nontoxic (Steel) Shot Regulations

J. Scott Feierabend, *Fisheries and Wildlife Division, National Wildlife Federation, 1412 16th St., N.W., Washington, D.C. 20036*

Abstract: State and federal nontoxic (steel) shot regulations have been challenged unsuccessfully in court on 8 separate occasions. Several characteristics are common to many of the cases. First, sportsmen have filed every lawsuit; “anti-hunters” or “protectionists” have not litigated the nontoxic shot-lead poisoning issue. Second, plaintiffs have argued unsuccessfully that the regulations were “arbitrary and capricious.” Third, the courts have unilaterally rejected allegations that nontoxic shot is ballistically inferior to lead shot, that it causes firearms damage, and that lead poisoning losses are insufficient to warrant nontoxic shot regulations. Opponents’ failure to secure favorable court decisions may cause them to increasingly seek legislative rather than adjudicatory relief. Short-term “gains” achieved through this process will be offset entirely if the U.S. Department of the Interior, Fish and Wildlife Service exercises closure authority under the Migratory Bird Treaty Act. Moreover, legislation disrupting state nontoxic shot programs compromises authority of administrators to manage wildlife by employing political consensus rather than sound biological reasoning.

Proc. Annu. Conf. Southeast. Assoc. Fish and Wildl. Agencies 39:452–458

Waterfowl hunters deposit more than 3,000 tons of lead shot into the environment annually (U.S. Dep. Int. 1976:18). Poisoning from ingestion of lead shot kills an estimated 2% to 3% of the fall population of all waterfowl species annually (U.S. Dep. Int. 1976:40) in addition to many other wildlife species (U.S. Dep. Int. 1985*a*), including endangered bald eagles (Pattee and Hennes 1983, U.S. Dep. Int. 1985*b*). These losses can be reduced through use of nontoxic (steel) shot for migratory game bird hunting.

Responsibility for reducing lead shot availability to waterfowl and other wildlife is shared by the U.S. Department of the Interior, Fish and Wildlife Service (FWS) and the state wildlife agencies. These agencies meet this responsibility by establishing nontoxic shot zones where possession of lead shot is prohibited. During the 1984-85 waterfowl season 30 states had 1 or more nontoxic shot zone (U.S. Dep. Int. 1985*c*).

State and federal regulations delineating nontoxic shot zones provide administrative frameworks necessary to control lead shot deposition. They also have been the unsuccessful target of litigation 8 times by opponents of nontoxic shot.

Case Studies

The National Rifle Association of America Case (*NRA v. Kleppe et al.*)

The first 2 legal challenges to nontoxic shot regulations were brought by the National Rifle Association (NRA) in the Federal U.S. District Court for the District of Columbia. On 4 October 1976 NRA sought a temporary restraining order (TRO) to prohibit the FWS from enforcing nontoxic shot zone regulations in the Atlantic Flyway. The TRO motion was denied the same day, and a trial without a jury on the merits began 20 October 1976.

NRA's principal argument was that the FWS's 1976 environmental impact statement (EIS) on the proposed use of nontoxic shot for waterfowl hunting was inadequate because it failed to address certain impacts of, and alternatives to, the regulations. Plaintiffs also asserted the FWS decision to require nontoxic shot in problem areas was arbitrary and capricious because nontoxic shot posed human health and safety risks, damaged firearms, other property and the environment, and increased waterfowl crippling. During the 3-day trial, expert testimony was given on the ballistics and toxicity of lead and nontoxic shot, waterfowl habitat, firearms, field shooting tests, safety and performance of nontoxic shot, and preparation of the EIS and nontoxic shot regulations. On 17 December 1976 the District Court upheld the regulations, concluding that the FWS's nontoxic shot regulations were not arbitrary or capricious, an abuse of discretion, or contrary to law, but were instead adequate and rational.

NRA appealed this decision to the U.S. District Court of Appeals on 29 December 1976. Plaintiffs contested the lower court findings and also cited need for a separate EIS on use of nontoxic shot in the Atlantic Flyway and designation of areas in that Flyway. The Appeals Court rejected both arguments 13 months later on 1 February 1978.

The South Dakota Case (*South Dakota Migratory Bird Association v. South Dakota Game, Fish and Parks Commission et al.*)

State authority to establish and enforce nontoxic shot zones was challenged in 1980 in South Dakota. On 15 April 1980 the South Dakota Game, Fish, and Parks Commission (Commission) adopted regulations prohibiting lead shot for waterfowl hunting in 10 and 12 gauge shotguns in portions of 8 counties. The South Dakota Migratory Bird Association (Association)—a coalition of waterfowl hunters, sporting goods store owners, and commercial goose hunt club operators—petitioned the Circuit Court for Hughes County, South Dakota, on 19 September 1980 to enjoin the Commission from enforcing the regulations. Plaintiffs sought to annul the rule alleging that the rule was adopted without valid delegation of legislative authority, and it exceeded the Commission's jurisdiction. The Association also argued that the

nontoxic shot zone boundaries were established on inadequate evidence and so were arbitrary and capricious.

The case was tried for 10 hours on 19 October 1980. Three months later, on 26 January 1981, the Court ruled that the Commission's regulation had been adopted legally, that the Commission had acted within the scope of its jurisdiction, that the regulation violated no constitutional or statutory principles, and that it was not arbitrary or capricious. The Court reinforced these findings in a 5 March 1981 declaratory judgment.

The Association appealed the decision to the Supreme Court of South Dakota within 4 weeks. The plaintiffs' 31 March 1981 appeal reiterated the argument that the regulations were invalid because the Commission lacked constitutional authority to issue such regulations. The case was tried 30 September 1981 and on 18 November 1981 the State Supreme Court upheld the lower court decision ruling that the Commission was constitutionally empowered to adopt and implement nontoxic shot regulations.

The New York Case (*Faerber et al. v. Watt et al.*)

The third challenge to state and federal regulations and the fifth attempt to eliminate steel shot regulations came in New York during the summer of 1981. Based on 4 years of research, the New York Department of Environmental Conservation (Department) established a nontoxic shot zone in 1980 along the Hudson River Valley requiring use of nontoxic shot in all gauges of shotguns for waterfowl hunting. Shortly thereafter local sportsmen filed suit in the U.S. District Court of Northern New York challenging both the federal and state nontoxic shot regulations. Plaintiffs argued FWS and the Department had acted arbitrarily and capriciously because they failed to: 1) consider the effect of diet on lead poisoning in waterfowl, 2) evaluate costs of the regulation to hunters, 3) consider less drastic alternatives, 4) inform hunters that shotguns may be damaged by nontoxic shot, and 5) employ valid statistical and analytical techniques. Plaintiffs also alleged the Department's actions were arbitrary and capricious because an entire geographic area was designated a nontoxic shot zone although lead shot ingestion was documented at only a few locations within the zone.

The lawsuit was never tried. After plaintiffs' complaint was filed, defendants requested, and on 3 June 1983 were granted, a joint motion for summary judgment. The District Court did so because defense produced studies and affidavits authored by experts refuting all of plaintiffs' allegations whereas plaintiffs rested their case only on the assertions enumerated in their complaint. The Court did not find the Department's actions arbitrary and capricious because the Hudson River Valley nontoxic shot zone was established only after exhaustive empirical study.

The Texas Case (*Muldoon et al. v. Texas Parks and Wildlife Department et al.*)

The sixth and seventh challenges to nontoxic shot zone regulations were litigated during fall 1981 in Texas. On 28 July 1980, the Texas Parks and Wildlife Department (Department) established nontoxic shot zones in all or parts of 5 coun-

ties along the Texas gulf coastal plain for the 1981 season. On 16 September 1981, just weeks before commencement of the 1981 waterfowl season in Texas, the Muldoon Hunting and Fishing Club (Muldoon), a group of local sportsmen whose lands were included in the nontoxic shot zones, sought a court order to invalidate the rule.

Plaintiffs argued 3 points. First, they alleged the rule would impair their legal hunting rights because 1) economic losses would be incurred from unusable lead shot inventories, 2) nontoxic shot damaged firearms, 3) nontoxic shot reloading components were unavailable, 4) commercially loaded nontoxic shot was more expensive and not readily available, and 5) it discriminated against children, females, and older hunters who could not safely use 12 and 20 gauge shotguns.

Second, Muldoon alleged the rule was arbitrary because it affected only hunters in 5 counties. Hunters in the rest of the state, they argued, could use lead shot to hunt all types of birds.

Third, plaintiffs alleged the rule was invalid because: 1) the Department lacked evidence that use of lead shot depletes migratory waterfowl and that the rule would prevent such depletion, 2) the Department did not conduct the necessary studies before issuing the rule, 3) defendants lacked authority to determine the type of metal to be used in shot, and 4) the rule was unconstitutional.

The Department agreed to allow the Court to impose a TRO blocking the rule. In return, however, the Court assured defense to set an October 1981 trial date and to render a final decision prior to opening day of the 1981 season. The case was heard on 19 October 1981 and lasted 5 days. Based on information presented by defendants, including evidence from shotgun and ballistic experts, industry representatives, waterfowl biologists, wildlife pathologists, sportsmen, and state and federal officials, the Court dissolved the TRO and upheld the Department's nontoxic shot rule. On 19 November 1981 the Court opined that the rule was a rational means of reducing lead poisoning of waterfowl in Texas, that it was not irrationally discriminatory, vague, ambiguous or overly broad, that defense possessed authority to establish the rule, and that it was supported by substantial evidence and preceded by appropriate investigations.

Muldoon appealed the District Court decision 2 months later on 8 January 1982 to the Texas Court of Appeals. Plaintiffs' appeal brief, due 8 February 1982, however, was never filed. Muldoon abandoned appeal and never briefed or orally defended it. On 10 March 1982, for want of prosecution, the Court of Appeals dismissed Muldoon's appeal and upheld the 19 November 1981 District Court decision.

The Florida Case (*Fair et al. v. Miller et al.*)

The eighth case also challenged state nontoxic shot regulations. On 22 December 1981 several hunters sought to restrain enforcement of the Florida Game and Fresh Water Fish Commission's (Commission) regulation prohibiting use of lead shot in 12 gauge shotguns. Plaintiffs argued the regulation was unconstitutional and the requirement to use nontoxic shot harmful because it costs more, cripples greater numbers of waterfowl, and damages firearms. Plaintiffs also alleged that nontoxic shot ricochets off water and that it poses dental hazards. On 22 December 1982,

after 4 hours of testimony and extensive documentary evidence, the Court enjoined the Commission from enforcing the regulation until a full trial on the merits was held.

The 2-day trial was heard on 19 and 20 April 1982. Testimony was given by nontoxic shot authorities, industry representatives, statisticians, state and federal officials, wildlife pathologists, and shotgun and ballistic experts. This information persuaded the Court to conclude that: 1) lead shot poisoning, although difficult to detect, is a significant problem in migratory waterfowl, 2) there was inadequate evidence to demonstrate that nontoxic shot damages guns, 3) nontoxic shot availability varies and there was no evidence that nontoxic shotshells were unavailable in the most popular waterfowling gauges, 4) although individuals may be affected by greater costs of nontoxic shot, the price of shotgun shells is insignificant compared to other costs to hunt waterfowl, 5) there was no evidence that nontoxic shot cripples more ducks; and 6) the nontoxic shot zone was neither arbitrarily and capriciously established nor unconstitutional. On 2 June 1982 the Circuit Court reversed its earlier decision and upheld the Commission's nontoxic shot regulation.

Discussion

Although the lawsuits spanned almost 6 years, were widespread geographically, and were contested in both state and federal court, they share a number of similarities. First, all were filed by persons or organizations that support hunting. Plaintiffs in 6 suits were local sportsmen or sportsmen's clubs and plaintiff in 2 suits was the nationally-based NRA. Sportsmen used the courts on 8 separate occasions to try to nullify nontoxic shot zone regulations and abrogate state and federal migratory bird management authority. This strategy is similar to that of "anti-hunting" organizations that have used the courts in attempts to curtail hunting, fishing, and trapping. Sportsmen opposing nontoxic shot regulations and who object to legal efforts of protectionist organizations to obstruct federal and state wildlife management were, in fact, asking the courts to run the wildlife management agencies. In its simplest terms, hunters were challenging the decision-making of the agencies established to protect and conserve wildlife resources for sportsmen and others. Many have argued that FWS and the states are vulnerable to legal challenges on lead poisoning from anti-hunting organizations. The only groups thus far to litigate the issue, however, have been hunters.

Second, with the exception of *NRA v. Kleppe et al.*, very few sportsmen have been directly involved in challenging nontoxic shot regulations. Six of the 8 lawsuits were filed by local hunters or sportsmen's clubs. With the exception of *NRA v. Kleppe et al.*, which was a generic challenge to nontoxic shot regulations involving alleged National Environmental Policy Act violations, all of the court cases have been narrow in scope, site-specific, and brought by a small proportion of the total sportsmen affected by the regulation.

Third, all plaintiffs argued that the administrative decision to establish non-

toxic shot zones was "arbitrary and capricious." Specific allegations why the regulations were arbitrary and capricious varied, but all asserted that defendants' actions lacked scientific merit. Five of the 8 complaints argued that nontoxic shot is unacceptable as a substitute for lead shot because it is ballistically inferior, cripples large numbers of waterfowl, damages firearms, and puts hunters at risk from barrel explosions. One plaintiff alleged that nontoxic shot is dangerous to humans because it ricochets off water and because the harder pellets pose dental hazards. The courts have unilaterally rejected these arguments and held that nontoxic shot is an acceptable substitute for lead shot.

Finally, many of the plaintiffs argued that the regulations were unconstitutional because they were unfair and discriminatory and because the agencies exceeded their statutory authority. The courts have consistently dismissed these allegations.

This issue's legal history demonstrates judicial support for reducing lead poisoning through nontoxic shot zone regulations. It also illustrates court acceptance of the biological data used to delineate these zones and that state and federal agencies do possess statutory and constitutional authority to establish nontoxic regulations. The courts have consistently accepted the scientific standards used to designate nontoxic shot zones. Because of the large number of scientific studies published on lead poisoning and nontoxic shot since the first legal challenge to nontoxic shot zone regulations in 1976 (Feierabend 1983; U.S. Dep. Int. 1984, 1985*b*), these standards will likely become increasingly difficult to challenge.

Although legal and biological evidence for nontoxic shot is compelling, future litigation involving nontoxic shot zones may yet arise. However, the issue's legal history and the voluminous body of scientific literature on lead poisoning will likely force nontoxic shot opponents to seek relief through legislation rather than through adjudication. This has already occurred in Illinois, Maryland, and Wyoming where legislators have dictated conditions to the state wildlife agencies under which nontoxic shot zones can be established. By convincing legislators to require narrow standards for establishing nontoxic shot zones (i.e., documented waterfowl lead poisoning die-offs in Illinois and pellet counts of 20,000 shot/acre in Wyoming), nontoxic shot opponents can dramatically reduce the size and number of a state's nontoxic shot zones.

Legislation has curtailed nontoxic shot programs in some states. Such initiatives have been successful because the FWS is prohibited by law from establishing or enforcing nontoxic shot zones without state consent. Although FWS cannot unilaterally impose nontoxic shot zones, the Secretary of the Interior is not prohibited from exercising authority under the Migratory Bird Treaty Act not to open areas to hunting for the protection and conservation of migratory birds. This federal authority supercedes all state statutes. It will be used on several national wildlife refuges in 1986 and 1987 where waterfowl are at risk to lead poisoning should the states reject the FWS's recommendation to use nontoxic shot (U.S. Dep. Int. 1985*d*:19249). Current FWS options to addressing lead poisoning are therefore limited to either convincing states to use nontoxic shot in problem areas or closing

the areas to waterfowl hunting. States with statutes limiting establishment of non-toxic shot zones may have to modify these laws or else be confronted with season closure by FWS.

Legislation that disrupts state nontoxic shot programs not only invites closure of seasons by the Federal government, but also promotes wildlife management through political consensus rather than sound biological reasoning. Sportsmen, biologists, and administrators have historically opposed empowering state legislatures to render conservation decisions. Legislation to establish, limit, or remove nontoxic shot zones is no different than legislation to establish season lengths, bag limits, or other equipment restrictions. Attempts to legislatively compromise administrators' authority to manage wildlife resources should be opposed, regardless of the issue.

Literature Cited

- Feierabend, J. S. 1983. Steel shot and lead poisoning in waterfowl. An annotated bibliography of research, 1976-1983. Sci. and Tech. Ser. 8. Nat. Wildl. Feder., Washington, D.C. 62pp.
- Pattee, O. H. and S. K. Hennes. 1983. Bald eagles and waterfowl: the lead shot connection. Trans. North Am. Wildl. and Nat. Resour. Conf. 48:230-237.
- U.S. Department of Interior. 1976. Final environmental statement: proposed use of steel shot for hunting waterfowl in the United States. U.S. Gov. Printing Off., Washington, D.C. 276pp.
- . 1984. Lead poisoning: a selected bibliography of references on lead poisoning in waterfowl and other wildlife. U.S. Dep. Int., Fish and Wildl. Serv. Lead Poisoning Clearinghouse. Fish and Wildl. Ref. Serv. Rockville, Md. 22pp.
- . 1985a. Lead poisoning in non-waterfowl avian species. U.S. Dep. Int. Fish and Wildl. Serv., Nat. Wildl. Health Lab. Madison, Wis. 12pp.
- . 1985b. Bald eagle mortality from lead poisoning and other causes, 1963-1984. U.S. Dep. Int. Fish and Wildl. Serv., Nat. Wildl. Health Lab. Madison, Wis. 48pp.
- . 1985c. Migratory bird hunting; zones in which nontoxic shot will be required for waterfowl hunting in the 1985-86 hunting season. Federal Register. 50:5,759-5,764.
- . 1985d. Migratory bird hunting; notice of intent that certain areas will not be opened for migratory bird hunting. Federal Register. 50:19,248-19,249.