

## CBD Poised To Continue Push For Ban On Lead Bullets In Appeals Courts

The Center for Biological Diversity (CBD) is continuing its push to compel federal agencies, including EPA, to restrict the use of lead bullets and plans to appeal two recent federal court rulings that CBD argues failed on procedural grounds rather than on the merits.

The most recent decision came July 2 when Judge Stephen McNamee of the U.S. District Court for the District of Arizona dismissed the CBD's novel push to compel the U.S. Forest Service (USFS) to ban lead bullets in the Kaibab National Forest (KNF), ruling the Administrative Procedure Act (APA) precludes courts from forcing agencies to take discretionary action and that a ban in one national forest would not stop the poisoning of condors.

In CBD, et al. v. USFS, CBD and co-plaintiffs Sierra Club and Grand Canyon Wildlife Council argued that bullets in carcasses or missed shot constitute an illegal disposal of hazardous materials under

the Resource Conservation & Recovery Act (RCRA) and that USFS had failed to use its broad authority to stop the disposal of lead in the form of spent ammunition.

McNamee said that while the plaintiffs have suffered a cognizable injury in being unable to view the California condor in its natural habitat and that USFS has the authority to restrict the use of lead bullets on its property, the redressibility of the injury is "speculative at best." The judge ruled that because USFS would have to consult Arizona state officials, who favor voluntary reductions over a ban, an agency rulemaking would be insufficient to protect condors. The judge also found that the birds' broad scavenging range makes a ban in KNF unlikely to prevent poisonings. (Doc ID: 2440727)

The Arizona ruling comes on the heels of a late May decision from the U.S. District Court for the District of Columbia that rejected a CBD-led effort to force EPA to regulate lead

bullets and shot under the Toxic Substances Control Act (TSCA) (Risk Policy Report, May 28).

A source with the CBD says federal action restricting lead bullets is essential, and the group will likely continue to push both cases by filing appeals with the U.S. Courts of Appeal for the 9th and D.C. circuits.

"What needs to happen is broad level elimination of lead from the entire spectrum of hunter-shot bullets," the source says, adding that the state level bans and voluntary reductions, which environmentalists have also sought are helpful, but insufficient. "We will continue to push from as many different angles that we can to require the switchover [from lead bullets] including every law that we can marshal in all these contexts against every agency we can."

McNamee's backing of a link between hunter-shot bullets and the poisoning of wildlife indicates that environmentalists

are succeeding in educating people on the risks of lead ammunition, the CBD source says. The source also says environmentalists will have more time to address the ability of federal agencies to mitigate that risk to wildlife at the appellate level.

Lead is a known neurotoxin that the Centers for Disease Control & Prevention says has no safe level of exposure. The CBD and other groups have successfully petitioned and worked with the government to remove lead from items including water pipes, gasoline, paint, cooking utensils and wheel weights, though more recently their focus has turned to ammunition.

CBD first petitioned EPA in 2010 to regulate lead in ammunition and also fishing tackle under TSCA, a move that EPA denied in two separate notices; for bullets in August 2010, and for fishing gear in November of that year. CBD then sued the agency in the U.S. District Court for the District of Columbia, but a federal judge dismissed that challenge on the bullet petition, finding that activists missed the statutory deadline to file suit.

After that ruling, CBD enlisted the support of numerous other environmental groups and filed

a new narrower petition with EPA, which the agency denied. CBD again sued, leading to the case the D.C. district court dismissed in May.

Facing those struggles on its TSCA push, CBD filed the novel RCRA suit in federal court in Arizona in September 2012, arguing that USFS failure to regulate lead bullets is allowing the disposal of hazardous waste in the KNF, threatening wildlife, primarily endangered condors.

While the CBD has sought regulation of lead bullets in separate cases under TSCA, RCRA and the Endangered Species Act, sportsmen's rights groups are continuing to push legislators to block EPA from regulating lead bullets through TSCA, arguing that alternatives to lead bullets are prohibitively expensive and that the effort for regulation is an affront to hunting itself.

In June the House approved legislative language in a defense authorization bill that would bar the regulation of lead bullets and shot under TSCA, and which could also limit EPA's ability to regulate other substances such as perchlorate found in projectiles (Risk Policy Report, June 25). Similar waivers have been pushed in the Senate. During

the 112th Congress, Sen. Jon Tester (D-MT) attached the legislative exemption to a sportsmen's rights bill, though the measure failed to pass.

During the CBD's effort to compel EPA to regulate lead bullets under TSCA with the case Trumpeter Swan Society, et al. v. EPA, in U.S. District Court for the District of Columbia, the agency argued that lead bullets and shot are exempt from regulation under the chemicals law because of an exclusion for items taxed as firearms or ammunition.

In dismissing that case, U.S. District Judge Emmet Sullivan appeared to leave open the possibility for groups other than CBD to petition EPA or courts, since the CBD's first claim was dismissed on grounds the CBD had missed a deadline under the statute of limitations. The second petition was dismissed after the court found it substantially similar to the first.

The CBD source says other environmental groups will have to decide whether to pursue that option for themselves, though the CBD is planning to appeal the district judge's ruling in its own case.