

MUNGER, TOLLES & OLSON LLP

560 MISSION STREET
TWENTY-SEVENTH FLOOR
SAN FRANCISCO, CALIFORNIA 94105-2907
TELEPHONE (415) 512-4000
FACSIMILE (415) 512-4077

355 SOUTH GRAND AVENUE
LOS ANGELES, CALIFORNIA 90071-1560
TELEPHONE (213) 683-9100
FACSIMILE (213) 687-3702

February 17, 2015

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E. LEROY TOLLES
(1922-2008)

A PROFESSIONAL CORPORATION

VIA E-MAIL

Sonke Mastrup
Executive Director
California Fish and Game Commission
1416 Ninth Street, Box 944209
Sacramento, California 94244-2090

Re: A.B. 711 Implementation—Comments on Draft Environmental Document and Proposed Regulations

Dear Ms. Mastrup:

Ventana Wildlife Society (VWS) thanks you for the opportunity to comment on (1) the text of the Department of Fish and Wildlife's proposed regulations implementing A.B. 711; and (2) the draft Environmental Document reviewing the environmental impacts of the regulations. As both a leader in the conservation and management of birds imperiled by lead and a dedicated partner of hunters and ranchers, VWS hopes its perspective will be helpful to the Department as it balances these important interests.

I. Interest of Ventana Wildlife Society

Founded in 1977, Ventana Wildlife Society is committed to the conservation of California native wildlife and their habitats. VWS coordinates outings and educational events to foster wildlife stewardship and also runs programs to support the conversation of native species. VWS led the way to successful reintroduction of the bald eagle and California Condor, two of the most iconic birds in the world, to native habitats in central California. At present, VWS manages the release program for condors on the central California coast, working in partnership

WRITER'S DIRECT LINE
(415) 512-4021
(415) 644-6981 FAX
martin.bern@mto.com

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CALIFORNIA FISH AND GAME COMMISSION

Sonke Mastrup
February 17, 2015
Page 2

with the U.S. Fish and Wildlife Service, Pinnacles National Park, and others. As part of that effort, VWS actively manages condor reproduction in central California by replacing non-viable eggs laid in the wild with viable ones from captivity; vaccinating condor chicks against disease; and conducting lead testing for free-flying condors at its Big Sur wildlife sanctuary, among other activities.

In the course of its work, VWS has developed an organizational culture that strongly values science, education, and collaboration and regularly finds ways for both wildlife and people to benefit from each other. This "Ventana Way" is about finding fact-based solutions that benefit society as a whole. In this spirit, VWS is working directly with ranchers and hunters on phasing out the lead ammunition that is affecting the California condor's recovery. Since 2012, Ventana has purchased substantial quantities of nonlead ammunition to provide to ranchers and hunters each year and has plans to continue this program through full implementation of the AB 711 restrictions. VWS staff are in contact with ranchers and hunters on a routine basis and are actively working to address these communities' concerns over the transition to nonlead ammunition.

II. Comments on Draft Environmental Document and Proposed Regulations

VWS urges the Department to give serious consideration to phasing in nonlead ammunition statewide before 2019. In particular, VWS believes that a statewide phase-in by 2017 would have manageable and acceptable impacts on outdoor recreation.

The current proposal not only postpones full statewide implementation to 2019, but also requires virtually no implementation of the new restrictions in the first (2015) program year. The proposal would require nonlead ammunition use in State Wildlife Areas totaling 925,000 acres, but this represents less than 1% of California's total acreage of 101,000,000. Furthermore, very few acres within State Wildlife Areas currently provide for ongoing foraging by condors. A faster phase-in of A.B. 711 in areas that are meaningful for condor recovery would provide far greater benefits to wildlife.

VWS believes that its proposal for full statewide phase-in by 2017 is feasible and would have acceptable impacts on recreation. Past experience with the regulation of lead ammunition in California shows that a quick phase-in will spur production of nonlead products, easing transition burdens. In addition, history demonstrates that, in general, regulations phasing out toxic products tend to prompt the swift development of affordable substitutes. Given the likelihood of a quick ramp-up in the production of nonlead substitutes, lead ammunition should be phased out quickly to minimize the harms it causes wildlife and alleviate the high costs of ameliorating those harms, which are borne not only by VWS and its peer groups, but also by government entities, and thus by the public.

Sonke Mastrup
February 17, 2015
Page 3

A. The Department Should Evaluate and Adopt an Accelerated Phase-in Alternative

As an alternative to its proposed phase-in plan—under which there will be no requirement that centerfire and rimfire ammunition be nontoxic (except in a very small geographic region) until 2019—**the Department should evaluate and adopt an alternative that phases in all of the requirements of A.B.711 statewide by 2017.** VWS’s experience, and the regulatory history of lead ammunition and other products, demonstrate that this accelerated phase-in is feasible and will have acceptable impacts on recreation.

1. VWS’s Experience Purchasing Nonlead Ammunition Shows Most Calibers Are Already Available

Since 2012, Ventana Wildlife Society staff have purchased thousands of boxes of nonlead ammunition of a variety of types and calibers and have made this ammunition available to hunters and ranchers free of charge.¹ As a result, VWS staff have become very familiar with the availability of nonlead ammunition in California. Through the free ammunition program, staff have successfully purchased significant quantities of ammunition from Cabela’s, a large national retailer of outdoor equipment, for delivery to program participants primarily located in Monterey and San Benito Counties.² Staff also have purchased nonlead ammunition from other online and physical retailers.³

In the course of the 2012 free ammunition program, participants were able to select from 94 different products, including .22 caliber ammunition, and a majority of the participants reported satisfaction with the free ammunition delivered to them.⁴ VWS continued to offer free nonlead ammunition in both big-game and smaller calibers in 2013 and 2014. Across the three-year program, VWS distributed a total of nearly 2,000 boxes of nonlead ammunition, including hundreds of boxes of smaller-caliber ammunition such as Winchester’s

¹ Ventana Wildlife Society, First-Year Results of a Free Non-Lead Ammunition Program to Assist California Condor Recovery in Central California, Dec. 1, 2012, available at http://www.ventanaws.org/images/species/species_condor_lead/Free_Non-Lead_Program_2012.pdf.

² Id. at 5.

³ A survey done by the Institute for Wildlife Studies and Pinnacles National Park also found significant non-lead ammunition availability. Scott Scherbinski and Ben Smith, Reducing Impacts of Lead Ammunition: Challenges and Solutions, Sept. 17, 2014, at p. 10, available at http://www.fgc.ca.gov/meetings/2014/sep/Exhibits/5_2_Scherbinski_Smith_20140917.pdf.

⁴ Id. at 8.

Sonke Mastrup
February 17, 2015
Page 4

22 Long Rifle and Magnum products.⁵ A small number of program participants have commented that the selection of .22 ammunition could be broader, but generally speaking most participants are satisfied with the selections offered through the program.⁶ This experience demonstrates that all calibers of ammunition can feasibly be phased in at a relatively rapid pace.

2. Past Experience With Lead Ammunition Regulation in California Shows That Manufacturers Will Swiftly Develop Alternatives

California's past experience placing controls on lead ammunition shows that a quick phase-in of A.B. 711's statewide ban will spur production of nonlead products, adding to the supply of alternatives available to California hunters. In December 2007, after the passage of the Ridley-Tree Condor Preservation Act, the Commission adopted regulations requiring nonlead ammunition for the shooting of smaller, non-game birds and mammals in the Ridley-Tree condor zone.⁷ In August 2007, before the new regulations were adopted, opponents of the new regulations claimed that the nontoxic .22 rimfire ammunition required under the regulations for small-mammal shooting in the condor range would never be feasible to make.⁸

In January 2009, however, very soon after the regulations took effect, Winchester Ammunition announced the availability of new, lead-free .22 caliber rimfire ammunition.⁹ Winchester recognized the need to respond to the increased demand for nonlead rimfire and demonstrated its ability to do so quickly. In commenting on the new product, a representative from Winchester stated: "We recognize the growing customer demand and interest in lead-free products and we're moving to meet that demand."¹⁰ After the January 2009 product announcement, production apparently moved quite quickly—the first production runs were ready

⁵ Certification paperwork for these products is posted at <http://www.dfg.ca.gov/wildlife/hunting/lead-free/certifiedammo.html>. Remington's Disintegrator Varmint product, a small-caliber varmint hunting ammunition type, is also certified as nontoxic.

⁶ Ventana Wildlife Society, First-Year Results, *supra* n. 1.

⁷ Cal. Dep't of Fish & Wildlife, Nonlead Ammunition, <http://www.dfg.ca.gov/wildlife/hunting/lead-free/> (last visited Feb. 12, 2015).

⁸ The agenda for the public meeting at which these remarks were made is available at <http://www.dfg.ca.gov/meetings/2007/082707agd.pdf> (last visited Feb. 12, 2015). This summary of the remarks made at the meeting is based on personal communications with VWS staff who were in attendance.

⁹ Western Outdoor News, Rimfire Non-Lead Ammo Coming, Mar. 10, 2009, <https://www.wonews.com/t-EquipmentReview-SteveCoomus-rimfirenonleadeammo-030909.aspx>, last visited Jan. 30, 2015.

¹⁰ *Id.*

Sonke Mastrup
February 17, 2015
Page 5

in April 2009, with product moving to dealer shelves as early as April or May.¹¹ Remington followed suit in July 2009, when it introduced the lead-free Disintegrator Varmint product “in the popular 22-250 Remington and 223 Remington calibers.”¹² These manufacturers’ quick response to the new regulations—despite opponents’ prior insistence that no response was possible—suggests that the very same story is likely to play out in the implementation of A.B. 711.

3. Regulation in Other Industries Shows that Industry is Quick to Adapt to the Phaseout of Toxic Products

Experience from other industries further demonstrates that, especially where industry is able to anticipate new regulations, adjustment of manufacturing processes to accommodate new demand for substitute products generally occurs smoothly and efficiently. Examples of industry adjusting to regulation by creating or increasing production of substitute products abound. VWS describes just a few such cases below.

The application of the Clean Air Act to mobile source emissions presents a classic example of industry adaption to dramatic regulatory change. This federal law, passed in 1970, required 90% reduction in tailpipe emission for new 1975 and 1976 automobiles.¹³ “Automakers would begin turning out 1975 model year vehicles in mid-1974, and therefore the mandate provided roughly a three and a half year time horizon for automakers to develop a way to reduce emissions by 90 percent.”¹⁴ At the time, it was not clear that the standards could be met without replacing the internal combustion engine altogether. Automakers insisted that they would not be able to meet the standards,¹⁵ but they were ultimately able to do so by developing two “marquee” technologies, the catalytic converter and the three-way catalyst, which had not previously been used in cars. In the end, the manufacturers were able to create and produce these new technologies in sufficient quantities to outfit an entire new fleet.

¹¹ Id.

¹² Remington.com, Remington Non-Lead Hunting Ammunition Receives California Certification, July 13, 2009, <http://www.remington.com/pages/news-and-resources/press-releases/2009/ammunition/non-lead-ammunition-receives-california-certification.aspx> (last visited Feb. 5, 2015).

¹³ David Gerard & Lester B. Lave, Implementing Technology-Forcing Policies: The 1970 Clean Air Act Amendments and the Introduction of Advanced Automotive Emissions Controls (2003), <http://www.cmu.edu/gdi/docs/implementing-technology.pdf>.

¹⁴ Id at 9.

¹⁵ Roland Hwang & Matt Peak, Innovation and Regulation in the Automobile Sector: Lessons Learned and Implications for California’s CO2 Standards (2006), at 2, http://docs.nrdc.org/air/files/air_08030301A.pdf.

Sonke Mastrup
February 17, 2015
Page 6

Likewise, beginning in 1979, EPA banned distribution, then manufacture, of polychlorinated biphenyls (PCBs), which are potentially cancer-causing substances that were previously used as coolants and insulating fluids.¹⁶ Prior to the ban, EPA had already begun to monitor PCBs and began regulating them in a limited way in 1972.¹⁷ For that reason, the original manufacturer of PCBs, as well as other chemical companies, “began to search for substitutes prior to regulation.”¹⁸ Due to this effort in anticipation of regulation, substitutes were in place years before the ban took effect.¹⁹ Similarly, EPA moved to ban the pesticide mirex, which was potentially carcinogenic, in 1976, adopting a short two-year phaseout period despite worries that a market for substitutes might never develop.²⁰ As it turned out, four companies applied to register substitutes for mirex well within the phaseout period.²¹

There are also a number of instances in which industry has quickly adapted to an environmental ban by ramping up production of existing substitute technologies that fill the same need. For example, in the 1970s EPA banned the use of lead and mercury in paint, and industry was able to respond to both bans by ramping up production of existing substitute compounds.²² Widespread diffusion of these substitutes throughout the industry was the direct result of the regulations, which increased demand for lead and mercury reduction.²³ This example shows that manufacturers are generally able to phase in substitute products once a ban takes effect, even if they have previously expressed strong resistance to the restrictions, as paint manufacturers did for decades.²⁴

All of these examples suggest that, even if opponents of A.B. 711 maintain that quick implementation of the new restrictions is not feasible—as they did with the Ridley-Tree

¹⁶ Nicholas A. Ashford et al., *Using Regulation to Change the Market for Innovation*, 9 *Harv. Env'tl. L.R.* 419, 432 (1985).

¹⁷ *Id.*

¹⁸ *Id.* at 429.

¹⁹ *Id.* at 432.

²⁰ Thomas O. McGarity, *Radical Technology-Forcing in Environmental Regulation*, 27 *Loyola of L.A. L.R.* 943, 947 (1994).

²¹ *Id.*

²² Ashford, *supra* n. 16, at 434-35.

²³ *Id.* at 435.

²⁴ David Rosner & Gerald Markowitz, *Why It Took Decades of Blaming Parents Before We Banned Lead Paint*, *The Atlantic*, Apr. 22, 2013, available at <http://www.theatlantic.com/health/archive/2013/04/why-it-took-decades-of-blaming-parents-before-we-banned-lead-paint/275169/>.

Sonke Mastrup
February 17, 2015
Page 7

implementation—it is very likely that industry will be able to adapt to the new restrictions on a short timeframe. The Department’s current proposal, under which A.B. 711 will not be implemented in full until 2019, merely postpones this adjustment process. Past experience suggests that industry will be able to adapt to the new regulations much more quickly, in time for a 2017 statewide phase-in.

4. Accelerating the Implementation of A.B. 711 Would Alleviate Serious Harms to Wildlife

As VWS pointed out in its prior CEQA scoping comment, a variety of bird species will benefit significantly from the accelerated implementation of A.B. 711. Studies have consistently demonstrated that iconic bird species in California suffer lead poisoning when scavenging in the presence of lead-based ammunition,^{25 26 27} and that substituting nonlead ammunition alleviates the problem.^{28 29} In addition, during its 15 years of managing the central California condor population, VWS has witnessed direct evidence of the harms to condors from ingestion of small-caliber ammunition, including the November 2012 death of a ten-year-old male condor in Pinnacles National Park that had ingested a lead .22 caliber bullet. “This bird was a breeding male, the first at Pinnacles National Park in more than 100 years. With only a few breeding pairs established in the region, the loss of the Pinnacles male leaves a void which might

²⁵ Janet L. Kramer & Patrick T. Redig, Sixteen years of lead poisoning in eagles, 1980–95: an epizootiologic view, *Journal of Raptor Research* 31: 327–333 (1997), available at <https://sora.unm.edu/sites/default/files/journals/jrr/v031n04/p00327-p00332.pdf>.

²⁶ A.R. Harmata & M. Restani, *Environmental Contaminants and Cholinesterase in Blood of Vernal Migrant Bald and Golden Eagles in Montana*, *Intermountain J. of Sci.* (1995), cited in Robert Domenich & Heiko Langner, *Blood-Lead Levels of Fall Migrant Golden Eagles in West-Central Montana*, extended abstract in R.T. Watson et al eds., *Ingestion of Lead from Spent Ammunition: Implications for Wildlife and Humans*, The Peregrine Fund, available at http://www.biologicaldiversity.org/campaigns/get_the_lead_out/pdfs/Domenich_and_Langner_2009.pdf.

²⁷ Loren D. Knopper et al, Carcasses of Shot Richardson’s Ground Squirrels May Pose Lead Hazards to Scavenging Hawks, 70(1) *J. Wildlife Mgmt* 295 (2006), abstract available at http://www.biologicaldiversity.org/species/birds/California_condor/pdfs/Knopper-et-al-2006.pdf.

²⁸ Terra R. Kelley, et al., Impact of the California lead ammunition ban on reducing lead exposure in golden eagles and turkey vultures, *PLoS ONE* 6(4): e17656, available at <http://www.plosone.org/article/info%3Adoi%2F10.1371%2Fjournal.pone.0017656>.

²⁹ Bryan Bedrosian et al, *Lead Exposure in Bald Eagles from Big Game Hunting, the Continental Implications and Successful Mitigation Efforts* (2012), available at <http://www.plosone.org/article/info%3Adoi%2F10.1371%2Fjournal.pone.0051978>.

Sonke Mastrup
February 17, 2015
Page 8

not be quickly filled.³⁰ An accelerated phase-in of A.B. 711 would limit additional losses of this kind during the ramp-up period, and thus would significantly benefit wildlife.

5. Accelerating the Implementation of A.B. 711 Would Lessen the Significant Public Burdens Associated with Management of Wildlife Harmed by Lead

The cost of managing wildlife harmed by lead poisoning is extremely significant, and could be alleviated by expeditious elimination of lead ammunition from the environment.

The condor recovery program is one of the nation's most complex efforts to restore an endangered species. The program exists through the cooperation of an array of nongovernmental and governmental organizations in the U.S. and Mexico, including VWS, the National Park Service, the U.S. Fish and Wildlife Service, and the L.A. Zoo.³¹ Among many other activities, the program includes captive breeding and release, and treatment of birds that need medical attention—often as a result of lead poisoning.

Through the condor recovery program, tens of condors are brought in each year for lead poisoning treatment at the L.A. Zoo.³² In addition, in May 2014, in an effort to keep up with the growing demand for treating lead-poisoned condors, the Oakland Zoo received its first condor patient.³³ “Most birds undergo chelation treatments, which are injections of medications that bind heavy metals so that they can be eliminated from the body.”³⁴ The birds must be given the injections for five days, and the regimen may have to be repeated if blood lead levels are not adequately decreased after the first cycle. The resulting resource drain and impact on personnel is significant. “On any given day the Zoo staff could be catching and treating up to 15 condors,

³⁰ Ventana Wildlife Society, Species Recovery, Condors and Lead, http://www.ventanaws.org/species_condors_lead/ (last visited Nov. 18, 2014). The website contains photographs showing the .22 caliber bullet found in condor #318 at Pinnacles.

³¹ Am. Ornithological Union, at 6, http://www.fws.gov/cno/es/calcondor/PDF_files/AOU-Audubon2008-Report.pdf.

³² Alicia Banks, Record 21 California condors treated at L.A. Zoo for lead poisoning, L.A. Times, Oct. 20, 2013, available at <http://articles.latimes.com/2013/oct/30/local/la-me-ln-condors-treated-la-zoo-20131030>.

³³ Peter Fimrite, SFGate, May 17, 2014, *Oakland Zoo's Facility for Poisoned Condors Gets 1st Patient*, available at <http://www.sfgate.com/science/article/Oakland-Zoo-s-facility-for-poisoned-condors-gets-5458229.php>.

³⁴ Los Angeles Zoo & Botanical Gardens, California Condors at the Los Angeles Zoo, <http://www.lazoo.org/conservation/californiacondor/article1/>.

Sonke Mastrup
February 17, 2015
Page 9

which is by no means an easy task—the birds are powerful and can have wingspans of more than nine feet.”³⁵

VWS staff also work extremely hard to grow the California condor population in the face of frequent setbacks due to lead poisoning. VWS runs the Big Sur condor release site, and its wildlife biologists shelter and care for condors coming to and from other populations or from medical treatment at the L.A. Zoo and other institutions. VWS staff play an active role in tracking the Central Coast population, outfitting birds with tracking devices, monitoring their progress, and actively relocating birds to encourage the growth of the population. VWS staff serve as “first responders” for condors made severely ill by lead poisoning, and VWS thus has firsthand knowledge of the burdens placed by lead ammunition on both condors and their human caretakers.

All of these recovery efforts are extremely costly. Tens of millions of dollars have been spent on condor recovery over the past 2-3 decades, and about \$5 million is currently spent each year, of which two-thirds come from private sources.³⁶ VWS expends approximately \$300,000 annually on condor programs, and the costs of medical treatment of poisoned birds at the L.A. Zoo and other locations is in the hundreds of thousands of dollars.³⁷ The more expeditiously A.B. 711’s restrictions are implemented, the more quickly this financial burden will begin to abate.

VWS urges the Department to implement A.B. 711 on an expedited basis to avoid additional years of expenditures needed to save condors harmed by lead. Although the draft Environmental Document rightly notes that any decline in revenue to the Department of Fish and Wildlife that results from A.B. 711 implementation is likely to be insignificant, the Department should also consider the significant financial *benefits*, in the form of reduced expenditures to address lead, that A.B. 711’s phase-in will cause.

Reducing the financial burdens associated with ameliorating lead in the environment also balances hunters’ compliance costs (estimated by the Department at \$184 annually, per hunter). VWS agrees with the Department that increased compliance costs are worthy of recognition, and VWS is actively working to reduce these costs through its free ammunition program; at the same time, VWS urges the Department to consider not only the costs of compliance with A.B. 711, but also the substantial costs of dragging out its implementation.

³⁵ Id.

³⁶ Am. Ornithological Union, *supra* n. 31, at 7.

³⁷ Id. at 6-7.

Sonke Mastrup
February 17, 2015
Page 10

Ventana Wildlife Society appreciates the opportunity to comment on the proposed regulations and draft Environmental Document for the implementation of A.B. 711. VWS looks forward to collaborating with the Department and with the hunting and ranching communities in implementing this important law.

Sincerely,



Martin D. Bern

Counsel for Ventana Wildlife Society