



California Rifle and Pistol Association, Inc.

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March 16, 2015

Denise Brown
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Office of Regulatory Affairs, Enforcement Programs and Services
Bureau of Alcohol, Tobacco, Firearms and Explosives
99 New York Ave, NE
Washington, DC 20226

ATTN: **AP Ammo Comments**

Dear Ms. Brown:

I submit this comment letter on behalf of the California Rifle and Pistol Association (“CRPA”) concerning the “ATF Framework for Determining Whether Certain Projectiles Are ‘Primarily Intended for Sporting Purposes’ Within the Meaning of 18 U.S.C. 921(a)(17)(c)” (the “Proposed Framework”). CRPA is a nonprofit organization representing tens of thousands of members that seeks to defend and preserve the constitutional and statutory rights of firearm ownership throughout the State of California, including the rights to self-defense and to hunt. Because of the large quantity of comments that have already been submitted, which undoubtedly cover concerns about the propriety of the Proposed Framework, this letter focuses on certain California-specific problems that its adoption would raise *assuming* it is a legally viable scheme—problems that may arise in other parts of the nation in the near future. In doing so, CRPA is not suggesting that these are the only problems with the Proposed Framework. To the contrary, CRPA believes it is fundamentally flawed.

The Proposed Framework Would Lessen the Availability of Already Scarce Non-Lead Ammunition Required for Hunting in California

If adopted, the Proposed Framework would have a detrimental effect on the ability of Californians to legally hunt. This is because in a large portion of central California the use of lead ammunition to take “big game” and coyotes is strictly prohibited. Cal. Gov. Code § 3004.5(a). And “by no later than July 1, 2019, nonlead ammunition, as determined by the [California Fish and Game] commission, shall be required when taking *all wildlife*” in any part of the state. Cal. Gov. Code § 3004.5(b),(i). In other words, within the next few years it will be illegal to hunt¹ in California at all without a projectile made of a material other than lead.

¹ Because the law applies to all taking of animals, i.e. hunting, depredating, varmint control, etc., the use of the term “hunting” herein contemplates all of those activities.

As the Proposed Framework correctly recognizes, because of restrictions like California's there is "increased pressure on the ammunition industry to produce suitable hunting alternatives to lead ammunition." The problem, however, is that despite this pressure, for whatever reason, industry has not produced (or perhaps *cannot* produce) sufficient amounts of such ammunition. In 2014, a study was conducted by Southwick Associates that analyzed the level of availability of non-lead ammunition, i.e., "alternative ammunition," to supply California hunters. The Southwick study, "Effects of the Ban on Traditional Ammunition for Hunting in California on Hunting Participation and Associated Economic Measures," which is available online at: http://www.nssf.org/factsheets/PDF/TraditionalAmmo_CApriso-091514.pdf, found that "it is unlikely that manufacturers will be able to supply an adequate volume of alternative ammunition to meet the demand by hunters in 2019." Staff for the California Fish and Game Commission has corroborated the Southwick study's finding, recognizing that "the availability of [non-lead] ammunition will continue to challenge implementation" of California's ban.²

This is no small problem, as it could mean a de facto ban on hunting for countless would-be hunters. Indeed, the Southwick study explains that "[i]f all hunters were to switch to alternative ammunition, with no drop in hunting participation . . ., the demand in California for [certain] calibers will exceed national production or require a large portion of national production of all alternative substitutes" In other words, there just simply is not enough alternative ammunition as is to supply California's demand. And the problem does not appear to be abating. To the contrary, other states, including Vermont³ and Minnesota⁴ have introduced bills to ban the use of lead ammunition for hunting, while Oregon⁵ and Washington⁶ are likewise considering similar measures. Additionally, so-called environmentalist groups are actively seeking through litigation against federal agencies to ban the use of lead ammunition for hunting not only in other select states, e.g., Arizona⁷, but also to have it regulated as a toxic substance under federal law, prohibiting its use altogether.⁸

This added competition for or potential restrictions on the already limited supply of alternative ammunition, especially from such big hunting states, means the Southwick study likely underestimates the already serious problem of the unavailability of hunting ammunition. It is against this backdrop that CRPA considers the Proposed Framework and finds that it would further exacerbate the unavailability of alternative ammunition for hunting problem in California quite significantly.

² Section 1(B)(I)(b) Wildlife Resources Committee – Receipt of Recommendation to Implement the Non-Lead Ammunition Act (AB 711), *see* <http://www.cal-span.org/cgi-bin/archive.php?owner=CFG&date=2014-10-08&player=silverlight>, starting at 3:23:00.

³ <http://legislature.vermont.gov/assets/Documents/2016/Docs/BILLS/H-0460/H-0460%20As%20Introduced.pdf>

⁴ <https://www.revisor.mn.gov/bills/bill.php?b=House&f=HF1274&ssn=0&y=2015>

⁵ <https://olis.leg.state.or.us/liz/2015R1/Measures/Overview/HB2503>

⁶ <http://wdfw.wa.gov/publications/01676/wdfw01676.pdf>, at page 150.

⁷ *Center for Biological Diversity v. U.S.F.S.* (D. Ariz., July 2, 2013, CV-12-8176-PCT-SMM) 2013 WL 3335234.

⁸ *Trumpeter Swan Soc. v. E.P.A.* (D.C. Cir. 2014) 774 F.3d 1037.

A. The Proposed Framework Sweeps Far Wider than the SS109 and M855 Cartridges It Discusses

While ATF focuses on the SS109 and M855 cartridges, the Proposed Framework is not so limited in its effect. ATF's explanation of the Proposed Framework concludes that:

Applying the sporting purposes framework set-forth above, the 5.56mm projectile that ATF exempted in 1986 does not qualify for an exemption because that projectile when loaded into SS109 and M855 cartridges may be used in a handgun other than a single-shot handgun. Specifically, 5.56mm projectiles loaded into the SS109 and M855 cartridges are commonly used in both "AR-type" rifles and "AR-type" handguns.

The most reasonable reading of this statement is that 5.56mm projectiles, i.e., the bullets themselves, do not meet the "sporting purpose" exception merely because *some cartridges* that use that bullet are commonly used in non-"single shot handguns." Not only does such an approach reach far wider than the original intent of the Law Enforcement Officer Protection Act, it would further limit the already strained supply of alternative ammunition to meet demand from California's hunters.

Hornady's Handbook of Cartridge Reloading, Third Edition (1980) provides that the following cartridges can be assembled with the same projectile as a 5.56mm (.223) round (which is actually caliber .224 inches): .222 Remington; .222 Remington Magnum; .22 PPC; 5.6X50 mm Magnum; .219 Donaldson Wasp; .219 Zipper; .225 Winchester; .224 Weatherby Magnum; .22-250; .220 Swift; and 5.6X57 mm RWS—and there are surely others. Under the Proposed Framework, each of those cartridges is potentially "armor piercing" if made from the listed materials, even if there is *no* handgun "readily available in the ordinary channels of commercial trade" that is made to fire them, simply because they use the same 5.56mm projectile loaded into the SS109 and M855 cartridges.

Tolerance for this sort of collateral damage seems to be built into the Proposed Framework: "ATF recognizes that there will be some cartridges currently manufactured using non-restricted materials (e.g. lead or brass⁹) that have been used by hunters and target shooters for sporting purposes, that if manufactured from listed materials, will not be eligible for exemption under the framework." Indeed, the Proposed Framework logic would likewise apply to extremely popular hunting ammunition like .308, since the same "'AR-type' handguns" that use 5.56mm (.223)—which use is why that projectile's exemption is being revoked—can also be, and often are, chambered for that cartridge as well. To put this into perspective as to how it affects CRPA members, according to the Southwick study, ".308 demand in California is 14% of the entire U.S. production of alternative .308 rounds." And, as with 5.56mm, Hornady explains that there are various cartridges that can be assembled with the same projectile as a .308 round,

⁹ Since brass *is* among the listed materials, it is assumed this was an inadvertent error and that the word "copper" was instead intended.

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including: .300 Savage; .308 Winchester; .30-06¹⁰; .300 Blackout; .300 Wisper; .300 WSM; .300 Remington Short Action Ultra Magnum; .300 Remington Ultra Magnum; .300 H&H Magnum; .308 Norma Magnum; .300 Win Magnum; .300 Weatherby Magnum; .30-40 Krag; and 30 m1 carbine—and there are surely others. Loss of access to projectiles made from the listed materials could spell the demise for some of these cartridges in California.

In any event, at minimum Californians will have even less access to already scarce alternative hunting ammunition in 5.56 (.223), .308, and likely several other cartridges that “‘AR-type’ handguns” use.

B. The Proposed Framework Poses Serious Obstacles for California’s Non-lead Ammunition Certification Process

Complicating the matter for California hunters still further is that before ammunition can be legally used to hunt it will first need to be “certified” as “non-lead” by the California Fish and Game Commission. Cal. Gov. Code § 3004.5(c)(1). This will prove quite a difficult task for that Commission if it is required to know each cartridge a 5.56mm, .308, or any other “armor piercing” projectile *can be* loaded into, as explained above. And, even if the Proposed Framework would not reach all those other cartridges directly, projectiles for hand-loading them may nevertheless be unavailable because apparently “ATF [does] not exempt the projectiles before the cartridges [are] assembled.” In other words, alternative ammunition will be yet even scarcer in California.

As a result, the California Fish and Game Commission may find itself fielding complaints about, and perhaps being subjected to lawsuits over, whether a given bullet or cartridge is indeed “armor piercing ammunition.” And while California brought this problem on itself somewhat, any framework for governing ammunition in this regard should take into account complications caused by competing government interests; especially when it seems more states are acting to further one of those interests, as is the case here. Moreover, ATF may get dragged into some of these disputes, either as an arbiter or a defendant, since both the confusion caused by and the level of specialized knowledge required to comply with the Proposed Framework raise constitutional vagueness questions. At least one appellate court has agreed with CRPA’s Foundation assessment regarding a similar regime. (*See Parker v. State* (2013) 221 Cal.App.4th 340 review granted and opinion superseded) (holding regulations on “handgun ammunition” to be unconstitutionally vague because a normally intelligent person could not be expected to know whether any given cartridge is “principally for use in a handgun.”)

¹⁰ The conclusion that the 30-06 M2AP cartridge would still be exempt under the Framework may thus be erroneous.

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CONCLUSION

A tremendous amount of hunting takes place in California. Non-lead ammunition will soon be required throughout the state (and likely followed by other states) to hunt here. Such ammunition is already scarce and the Proposed Framework will only exacerbate the problem. While CRPA members share the ATF's desire to protect law enforcement officers, the Proposed Framework is simply not the proper means for doing so. As ATF explained, "the inclusion of the ["sporting purpose"] exemption shows Congress anticipated that certain types of ammunition properly classified as armor-piercing could be manufactured and distributed for sporting use without creating a significant risk to law enforcement through diversion to criminals." As explained above, the Proposed Framework would have much too sweeping of an effect on ammunition that is needed for hunting in California, ammunition that has very little if any association with handgun crime. CRPA thanks the ATF for its invitation for these comments and applauds it for deciding to temporarily forego adoption of the Proposed Framework until these and other problems can be addressed.

Sincerely,
California Rifle and Pistol Association

A handwritten signature in black ink, appearing to read "C.D. Michel", with a long, sweeping horizontal stroke extending to the right.

C.D. Michel,
President & General Counsel

CDM/sab

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FROM: C.D. Michel, Esq.

DATE: March 16, 2015

RE: AP Ammo Comments

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