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VIA ELECTRONIC MAIL

Mr. Jack Baylis, President
California Department of Fish and Game Commission
1416 Ninth Street, Suite 1320
Sacramento, CA 94244
fgc@fgc.ca.gov

**Re: California Department of Fish and Game Commission Implementation and
Phasing of the AB 711 Regulations Requiring Non-Lead Ammunition for All
Taking of Wildlife**

Dear President Baylis and Commissioners:

We write on behalf of our clients the National Rifle Association (NRA), the California Rifle & Pistol Association (CRPA), and the hundreds of thousands of individual members of those associations in California. By this letter we are submitting our comments on the implementation of the proposed AB 711 regulations by the California Department of Fish and Game Commission (Commission).

Our clients and their membership who hunt in California and are affected by these proposed regulatory provisions have significant concerns regarding the Commission's implementation of the AB 711 regulations involving the phasing of alternative ammunition for all hunting in California. So much so that we believe the Commission lacks authority to currently implement the regulations because it is not "practicable" to do so at this time, which AB 711 requires.

I. Introduction

In October of 2013, Governor Brown signed AB 711 into law. For multiple reasons, NRA and CRPA did not, and do not, support AB 711, and believe that it should be repealed. Nonetheless, as it exists AB 711 requires the Commission to implement the statutory mandate of requiring the use of alternative ammunition for the taking of all wildlife statewide, consistent with Fish & Game Code section 3004.5, by no later than July 1, 2019. The Commission's proposed regulations include the addition of section 250.1, the repeal of section 355, and amendment to sections 311, 353, 464, 475 and 485 of Title 14 of the California Code of Regulations.

The California Legislature has acknowledged: "the party subject to regulation is often in the best position, and has the greatest incentive, to inform the agency about possible unintended consequences of a proposed regulation." (*Tidewater Marine Western, Inc. v. Bradshaw* (1996) 14 Cal. 4th 557, 568-69, citing *Armistead v. State Personnel Bd.* (1978) 22 Cal. 3d 198, 204-05 and *Ligon v. State Personnel Bd.* (1981) 123 Cal. App. 3d 583, 588.). The NRA and CRPA, on behalf of their numerous members who hunt in California, have just such an incentive to inform the Commission of the consequences that will result under the current plan for implementing AB 711 regulations. Accordingly, the NRA and CRPA respectfully submit their comments to the proposed implementation and phasing of the regulations.

II. The Commission Lacks Authority to Implement the Proposed Regulations at This Time Because It Is Not Currently "Practicable" to Do So

The Administrative Procedure Act ("APA") governs the rulemaking process of government agencies, including the Commission. Under the APA, the validity of an agency's proposed regulations is evaluated by: necessity, authority, clarity, consistency, reference, and nonduplication. Cal. Gov't Code § 11349.1. Thus, a key purpose of the APA is to limit an agency's authority to adopt only those regulations "within the scope of the authority conferred" and "consistent and not in conflict with [any] statute" Cal. Gov't Code §§ 11342.1-11342.2.

Under the APA, "authority" is defined as "the provision of law which permits or obligates the agency to adopt, amend, or repeal regulation." Cal. Gov't Code § 11349(b). AB 711 certainly confers authority on the Commission to promulgate regulations implementing its mandates. But, that authority is not without limitations. To the contrary, the provisions of AB 711 describe well the narrow specifics of the Commission's regulatory authority. One of those details is that regulations can only be implemented before July 1, 2019 if it is "practicable" to do so. AB 711 makes repeated reference to this precondition on the Commission's regulatory authority:

Except as provided in subdivision (j), and as soon as is practicable as implemented by the commission pursuant to subdivision (I), but by no later than July 1, 2019, nonlead ammunition, as determined by the commission, shall be required when taking all wildlife, including game mammals, game birds, nongame birds, and nongame mammals, with any firearm.

Fish & Game Code § 3004.5(b).

If any of the requirements of this section can be implemented practicably, in whole or in part, in advance of July 1, 2019, the commission shall implement those requirements.

Fish & Game Code § 3004.5(I).

The Fish and Game Commission should implement the requirement for the use of nonlead ammunition incrementally, if practicable, to provide for increasing protection from lead exposure until full compliance with the nonlead ammunition

requirement is achieved.

Subsection (I) of Legislative findings for Fish & Game Code § 3004.5.

In sum, AB 711 repeatedly makes clear that the Commission is only to implement regulations before July 1, 2019 if it is “practicable” to do so. But, implementation of the proposed regulations at this time is *not* practicable due to: (1) the general unavailability of alternative ammunition needed for hunting under AB 711; and (2) the lack of necessary regulatory frameworks for fairly and consistently implementing AB 711’s mandates, including the absence of any official process for California Department of Fish and Wildlife (CDFW) wardens to confirm ammunition is on the certified list as “lead-free” while in the field, or for the CDFW Director to exempt a certain “caliber” that is not commercially available because of the federal “armor piercing ammunition” ban.

A. General Unavailability of Alternative Ammunition (e.g. .22 caliber and bird shot)

As the Commission is well aware, the National Shooting Sports Foundation (NSSF)—the trade association for firearms, ammunition, hunting and recreational shooting sports industry in the United States—has consistently provided the CDFW and the Commission throughout the AB 711 regulatory process with factual information from the firearms and ammunition industry demonstrating the unavailability and prohibitive cost of lead alternatives for certain ammunition that is popular for use in hunting..

NSSF commissioned a comprehensive study by Southwick Associates that analyzed the lack of supply for alternative ammunition used for hunting in California. CDFW and the Commission, however, provide no deference to industry analysis and disregard the findings in the Southwick Associates study. Incredibly, certain Commissioners have even gone on the record at Commission meetings stating that it is an elaborate conspiracy by the ammunition industry to limit the alternative ammunition supply in California in order to subvert AB 711.

Nonetheless, NSSF has provided the following information showing that certain ammunition is either not commercially available in alternative metals or is are cost prohibitive when so made, and demonstrating how AB 711 will cause many problems for hunters in California and the state:

- The Nonlead Projectile and Ammunition Certification Process will severely limit alternative ammunition already in the market that is not currently certified by the CDFW.
- Currently, only 0.5% of rimfire ammunition is produced using alternative metals with manufactures reporting an inability to increase production.
- Unavailability and higher costs associated with alternative ammunition will cause 36% of hunters in California to either stop hunting or reduce participation.
- Unavailability and higher costs associated with alternative ammunition will result in a 13% reduction of hunters in California.

- The reduction in the number of hunters will be approximately 51,676.
- The economic impact from the loss of hunters, due to either the unavailability or high cost of alternative ammunition will result in the loss of 1,868 jobs, \$68.7 million in salaries and wages, \$13.9 million in state and local tax revenues and \$5.8 million of federal tax revenues.

Despite an abundance of information provided by the firearms and ammunition industry regarding the unavailability and burdensome costs associated with alternative ammunition, the Commission downplays the industry's information, finding that the loss of hunters will be minimal.

Because of the unavailability of alternative ammunition it is not "practicable" for the Commission to expect hunters to be able to comply with the proposed regulations at this time. Indeed, the Commission should propose mitigation measures that delay implementation of the regulations for as long as necessary, to allow alternative ammunition used in certain calibers that are popular with hunters to become more available. Without such a delay in implementation, hunters in California will be unduly prejudiced by the phasing of the proposed AB 711 regulations.

If the Commission chooses to not delay implementation, then an exemption for alternative ammunition that is not commercially available, due to lack of supply must be implemented. Accordingly, either the Director must have the necessary authority and criteria for making a decision, or hunters must have the ability to petition for such an exemption. Without such a regulatory framework it is not practicable or fair to subject hunters to regulations they will not be able to comply with.

It is also impracticable to implement the regulations because the Commission has not addressed critical issues for making a functioning regulatory framework.

B. Failure to Propose the Necessary Regulatory Framework

1. Process for Confirming Ammunition Is Certified in the Field

The Commission has provided no explanation of the verification process for wardens checking ammunition in the field to confirm it is certified "lead-free" and thus compliant with AB 711. Will the wardens be looking for certified cartridges? If reloaded ammunition, the brand of the casing may likely not match that of the projectiles. Will the wardens be checking the projectiles? If so, how will they identify those projectiles? Will they require hunters to carry box tops of certified projectiles? That is obviously fraught with problems and, thus begs additional questions. What is the back up plan for verifying projectiles? Will that involve destructive testing, e.g., cutting open projectiles in the field? Will it include field testing projectiles for lead content ($\geq 1\%$)? What is the process for reloaders that cast their own projectiles, or hand tool by a lathe (monolithic bullets)? How will wardens know whether or not those projectiles are certified? And, most importantly, how will hunters know what is and is not allowed in such inspections by wardens?

Additionally, will there be a process prior to going to criminal court for a hunter to challenge a field-finding that a particular projectile is not certified? On that note, is there a process for a hunter to challenge a rejection of certification for his or her ammunition *before* going into? These are essential questions that in the core of our system of due process, which have not been sufficiently answered yet.

Without any regulatory framework regarding the working guidelines for the aforementioned issues, both those charged with enforcing AB 711 and those subject to its restrictions remain uninformed and guessing as to what is and is not acceptable enforcement practices. Before these issues are resolved it would not be "practicable" to implement the regulations.

2. CDFW Director Discretion to Allow Lead Ammunition

As a concession to assure the passage of AB 711 by the California Legislature, the CDFW decided to support AB 711, provided that the Director was given the ability to suspend the lead ammunition ban for the season as applied to a specific "caliber," if alternative ammunition for that "caliber" is determined to be not "commercially available" due to the federal "armor piercing ammunition" ban. The problem is that the Commission has utterly failed to propose a regulatory framework for providing the Director this discretion. Thus, hunters are only left to guess at the process for exempting a given "caliber" and the scope of the Director's discretion to exempt. This uncertainty creates a great potential for *ad hoc* decisions and lack of accountability.

Accordingly, for hunters in California to better understand the process for the Director's apparently unfettered discretion in this area, we seek clarification on the following:

- 1) What is the criteria used by the Director for determining whether an alternative ammunition is not "commercially available?"
- 2) What is the procedural framework for the Director to make a determination that an alternative ammunition is not "commercially available."
- 3) What is the timing on the Director's decision and when will it be noticed so that hunters can contest the determination and eventually know what ammunition is allowed for a particular hunting season.
- 4) How is the Director's decision made for suspending the lead ammunition ban for certain game, based upon certain calibers being not "commercially available?"
- 5) What does it mean to suspend the lead ammunition ban for a season?
- 6) What are the procedures for contesting or appealing the Director's decision on what is, or is not, "commercially available?"
- 7) What is the criteria for reviewing the Director's decision on not "commercially available?"
- 8) What does "caliber" mean in this context?

9) How does a member of the public petition the Director to add or remove a "caliber" from the list of certified ammunition?

These are just a few of the foundational questions that need to be answered before it is practicable for the Commission to implement any regulations.

Further complicating the matter is the proposed framework BATFE introduced on February 13, 2015, for determining whether a particular projectile may be exempted from the definition of "armor piercing ammunition." Considering the uncertainty stemming from BATFE's failed attempt to address concerns that were raised during the AB 711 process, and any future attempts that may impact the proposed AB 711 regulations regarding the commercial availability of certain alternative ammunition, there is no doubt that the BATFE's armor piercing designation will have an impact, either immediately or in the future, on the AB 711 regulations.


The problem with the proposed AB 711 regulations is that they completely fail to address how the CDFW Director, per his authority derived from the AB 711 legislation, will handle the BATFE's recently, or future, proposed changes to the federal regulations regarding the designation of armor piercing ammunition. The Commission has not properly evaluated BATFE's proposed changes and the potential impact these changes may have on the availability of alternative ammunition for hunting in California. Considering numerous comments by Commissioners regarding their serious concern about BATFE's future decisions on armor piercing ammunition, the Commission's failure to implement a regulatory framework to address future impacts regarding the availability of alternative ammunition due to the armor piercing ammunition designation is simply unacceptable.

Because there is no regulatory framework for this issue, and given the uncertainty of BATFE's future plans, the big question is what will the Director's position be if BATFE's regulatory framework is eventually implemented, and will that decision making criteria change from Director to Director? Without a regulatory framework to guide the Director's discretion, it is not practicable to implement regulations prohibiting use of any ammunition.

III. Conclusion

The NRA and CRPA strongly urge the Commission to revise the proposed AB 711 regulations to address the deficiencies outlined in this comment letter, and to re-analyze the phasing for the implementation of the proposed regulations. Because implementation of the regulations is not currently "practicable," our clients request that the Commission propose mitigation measures that delay implementation of the regulations for as long as these issues remain outstanding.

Sincerely,
Michel & Associates, P.C.



Sean A. Brady on behalf of C. D. Michel

CDM/sab