



Friends of Minnesota Scientific & Natural Areas

**Petition
to the
Minnesota Department of Natural Resources
for Adoption of Rules
Requiring
Non-toxic Fishing Tackle and Non-toxic Ammunition
in
Minnesota State Parks and Scientific and Natural Areas**

January 15, 2021

Preface

“... there is no safe level of human lead exposure, and no threshold level below which lead causes no injury to the developing human brain. Lead poisoning can potentially impact every organ system in the body and thus is associated with a wide range of toxic manifestations. It is particularly harmful due to its ability to persist and bioaccumulate in the body.

“In humans, the principal organs affected are the central and peripheral nervous system and the cardiovascular (brain and nerves), gastrointestinal (GI tract), renal (kidneys), endocrine (hormone secretion), immune, and hematological (blood) systems.”

https://www.paho.org/hq/index.php?option=com_content&view=article&id=8206:2013-lead-contamination&Itemid=39800&lang=en

Lead is prohibited in gasoline, paint, solder, and water pipes.

“Lead-based ammunition is likely the greatest, largely unregulated source of lead knowingly discharged into the environment in the United States.”¹ Lead fishing tackle only adds to the problem.

The time has long passed to stop using lead ammunition and lead fishing tackle.

I. Mission - Friends of Minnesota Scientific and Natural Areas

Friends of Minnesota Scientific and Natural Areas (FMSNA) is a Minnesota non-profit, tax-exempt [“501(c)(3)”] corporation whose mission is to advocate for the protection,

¹ “Health Risks from Lead-Based Ammunition in the Environment - A Consensus Statement of Scientists, Microbiology and Environmental Toxicology, UC Santa Cruz. 2013.

management, and perpetuation of Minnesota's Scientific and Natural Areas (SNAs) in an undisturbed natural state.

It is important to note that our mission is entirely consistent with the SNA program's statutory purpose: "A state scientific and natural area shall be established to protect and perpetuate in an undisturbed natural state ..." [Minn. Stat. 86A.05, Subd. 5(a)].

FMSNA recognizes and supports the Minnesota Constitution, including Article XIII, Section 12, which states: "Hunting and fishing and the taking of game and fish are a valued part of our heritage that shall be **forever preserved** for the people and **shall be managed by law and regulation for the public good.**" [Emphasis added.]

II. Requested Rules

A. **Non-toxic fishing tackle.** Pursuant to Minnesota Statute 14.09, FMSNA, the undersigned Petitioner, respectfully petitions the Minnesota Department of Natural Resources to adopt a Rule as follows:

"Effective on _____, 2022 [opening day of the Minnesota walleye fishing season], no fish, or other wild animal, shall be taken in Minnesota waters, located wholly within any Minnesota State Park or Scientific and Natural Area, by any method while possessing or using lead or other toxic fishing tackle."

B. **Non-toxic bullets.** Pursuant to Minnesota Statute 14.09, FMSNA, the undersigned Petitioner, respectfully petitions the Minnesota Department of Natural Resources to adopt a Rule as follows:

"A person may not take wild animals, within any Minnesota State Park or Scientific and Natural Area, while possessing or using bullets containing lead or other toxic materials."

C. **Non-toxic shot.** Pursuant to Minnesota Statute 14.09, FMSNA, the undersigned Petitioner, respectfully petitions the Minnesota Department of Natural Resources to adopt a rule as follows:

"A person may not take wild animals, within any Minnesota State Park or Scientific and Natural Area, while possessing or using shotshells loaded with shot other than:

- 1. steel shot;**
- 2. copper-plated, nickel-plated or zinc-plated steel shot; or**
- 3. shot made of other nontoxic material approved by the director of the United States Fish and Wildlife Service."**

D. The following definitions apply to the rules above:

1. “Wild animals means all creatures, whether dead or alive, not human, wild by nature, endowed with sensation and power of voluntary motion, and includes mammals, birds, fish, amphibians, reptiles, crustaceans, and mollusks.” (Minnesota Statute 97A.015, Subd. 55).
2. “Taking means pursuing, shooting, killing, capturing, trapping, snaring, angling, spearing, or netting wild animals, or placing, setting, drawing, or using a net, trap, or other device to take wild animals. Taking includes attempting to take wild animals, and assisting another person in taking wild animals.” (Minnesota Statute 97A.015, Subd. 57.)
3. “‘Possession’ means both actual and constructive possession and control of the things referred to.” (Minnesota Statute 97A.015, Subd. 36.)

III. Statutory Authority to File Petition for Rule

Minnesota Statute 14.09 is the statutory authority to file a petition, which states in full:

“**Any person may petition an agency requesting the adoption**, amendment, or repeal of **any rule**. The petition shall be specific as to what action is requested and the need for the action. Upon receiving a petition an agency shall have 60 days in which to make a **specific and detailed reply in writing** as to its planned disposition of the request and the reasons for its planned disposition of the request. If the agency states its intention to hold a public hearing on the subject of the request, it shall proceed according to sections 14.05 to 14.28. The chief administrative law judge shall prescribe by rule the form for all petitions under this section and may prescribe further procedures for their submission, consideration, and disposition.” [Emphasis added.]

IV. Explanation of Need for Non-Toxic Fishing Tackle and Non-toxic Ammunition Rules

A. The findings under the California law, requiring non-toxic ammunition, are equally applicable to Minnesota’s wildlife:

“(a) California’s wildlife species represent the state’s rich natural resources and environmental health and beauty.

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“(b) California’s wildlife species play an important role in the state’s environmental health.

“(c) Fifty years of research has shown that the presence of lead in the environment poses an ongoing threat to the health of the general public and the viability of the state’s wildlife species, including federally listed threatened and endangered species.

“(d) The United States Environmental Protection Agency defines lead as toxic to both humans and animals, and lead can affect almost every organ and system in the human body, including the heart, bones, intestines, kidneys, and reproductive and nervous systems. It interferes with the development of the nervous system and is therefore particularly toxic to children, causing potentially permanent learning and behavior disorders.

“(e) Lead is a potent neurotoxin, for which **no safe exposure level exists for humans**. The use of lead has been outlawed in and removed from paint, gasoline, children’s toys, and many other items to protect human health and wildlife. [Emphasis added.]

“(f) Routes of human and wildlife exposure to lead include contaminated air, water, soil, and food. Lead ammunition in felled wildlife is often consumed by other animals and passed along the food chain. Dairy and beef cattle have developed lead poisoning after feeding in areas where spent lead ammunition has accumulated. Spent lead ammunition can also be mingled into crops, vegetation, and waterways.

“(g) Efforts to limit wildlife exposure to lead ammunition have been successful. The United States Fish and Wildlife Service banned the use of lead shot for waterfowl hunting decades ago, and both hunting and waterfowl have thrived since. California passed a successful law preventing the use of lead ammunition in condor habitat. However, because these restrictions only apply in certain areas or to the hunting of particular species, many species of wildlife remain threatened by the use of lead ammunition and more protections are needed. These successes have shown us how to extend protection from lead poisoning to other wildlife.

“(h) Varieties of nonlead ammunition are readily available. Studies have shown that nonlead ammunition performs as well as, or better than, lead-based ammunition.

“(i) Given the deleterious impacts of lead ammunition, regulations for the use of nonlead ammunition should be implemented as soon as practicable in California ...”

(California Game and Fish Code, Section 3004.5; Assembly Bill No. 711, Chapter 742.)

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B. The following paragraphs are quoted from the Commissioner's Advisory Committee on Natural Heritage's (CAC) Petition for a rule to prohibit lead fishing tackle, submitted to the DNR in October 2018:

"Many species of birds are at risk from lead tackle, whether by ingesting lead objects as grit for their gizzard or incidentally in prey items. Avian species known to have died from ingested lead fishing tackle include loons, eagles, pelicans, cranes, swans, geese, herons, and more. A creel study on five large Minnesota lakes estimated one metric ton of lead fishing tackle items were lost on those five lakes in just one year (Radomski *et al.* 2006), which suggests Minnesota's waterbirds are exposed to large amounts of lead tackle annually.

"Lead poisoning can have population-level effects as evidenced by a study by Grade *et al.* (2017) on one of Minnesota's most iconic species, the common loon. Grade *et al.* (2017) examined loon carcasses in New Hampshire from 1989-2012. According to their population models, mortalities from lead tackle resulted in a statewide population 43% lower than that estimated if no loons had died from lead poisoning during the study period. Although a similar population modeling effort has not been conducted for Minnesota, a DNR database on necropsied birds in our state suggest 14% of recovered loons died from lead poisoning (Ann Pierce, MN DNR Ecological and Water Resources, *personal communication*).

"There is already a precedent for lead tackle prohibitions within the breeding range of the common loon in the United States:

1. New York prohibits sale of lead fishing sinkers (including split shot) $\leq 1/2$ oz.
2. Vermont prohibits sale and use of lead sinkers $\leq 1/2$ oz.
3. Maine prohibits sale and use of lead sinkers or unpainted bare lead jigs weighing ≤ 1 oz. or measuring ≤ 2.5 in.
4. Massachusetts prohibits use of any lead sinkers, lead weights, or lead jigs < 1 oz. on inland waters.
5. New Hampshire prohibits use and sale of lead sinkers and jigs weighing ≤ 1 oz.
6. Washington prohibits the use of lead weights and jigs that measure $\leq 1\frac{1}{2}$ in. in 13 lakes where loons breed and rear young.

"We are encouraged by the actions of other states that will benefit waterbirds, and loons in particular. However, the responsibility to preserve a healthy loon population in the United States falls disproportionately on our state's shoulders because Minnesota is the top producer of loons in the lower 48 states." [End of CAC Petition quote.]

C. This Petition **incorporates by reference all documents in Minnesota DNR's possession or control** evidencing that lead fishing tackle and lead ammunition are harmful to human health and the environment. As examples:

1. “Lead is toxic, can affect wildlife health and reproduction and is fatal when ingested at higher levels. Effective non-toxic ammunition is widely available and costs about as much as a box of premium lead. Because of its toxicity, the use of lead shot for waterfowl hunting has been illegal in Minnesota since 1987 and nationally since 1991. Additionally, all types of hunting with lead fine shot on Federal Waterfowl Production Areas has [sic] been illegal in Minnesota since 1999. Using non-toxic shot also eliminates the potential risk of ingesting lead in game consumed by hunters and their families.”

<https://www.dnr.state.mn.us/hunting/ammo/index.html> [Last visited 12/05/20.]

2. The “2020 Minnesota Hunting Regulations” states on page 80:

“Lead in Venison.

“Hunters are encouraged to consider non-lead big game ammunition featuring expanding copper, brass, and gilding metal bullets. Dozens of such bullets have been perfected in recent years. They expand reliably and instantly, retain nearly all their weight, and penetrate better than most lead-core bullets. They are available as muzzleloader bullets and shotshell slugs, too.

“Hunters who try non-lead bullets usually find they perform as well as or better than lead-core bullets because there are no jackets to separate from the core and no soft lead to erode or break apart, hindering penetration. Prices for monolithic, non-lead bullets are comparable to those of premium lead-core ammo.

“Lead is a toxic metal harmful to anyone who ingests it, but especially to children and pregnant women. It can also cause cognitive issues for older adults. Lead core bullets can fragment into dozens of pieces and penetrate as far as 18 inches from the wound channel. In several studies, up to 30% of X-rayed, commercially butchered venison burger contained lead fragments.

Non-lead bullets and slugs also eliminate secondary poisoning of bald eagles and other raptors that ingest lead fragments when feeding on gut piles. For more details, visit www.mndnr.gov/lead.”

C. “A regulation banning lead shot will protect wildlife and support a healthy environment. Banning lead shot will improve the image of hunters, safeguard hunting opportunities, and preserve our hunting heritage.”

<https://www.dnr.state.mn.us/hunting/ammo/nts.html> [last visited 11/23/18]

D. This Petition **incorporates by reference all documents in Minnesota Pollution Control Agency’s (MPCA) possession or control** evidencing that lead fishing tackle and lead ammunition are harmful to human health and the environment. For example, the MPCA’s website states:

“Lead is a toxic metal that, in sufficient quantities, has adverse effects on the nervous and reproductive systems of mammals and birds. Found in most fishing jigs and sinkers, this metal is poisoning wildlife such as loons and eagles. But there is hope. There are

alternatives to traditional lead tackle. Anglers can now use sinkers and jigs made from non-poisonous materials such as tin, bismuth, steel, and tungsten-nickel alloy — and they can find them at established sporting goods retailers and on the Internet.”

<https://www.pca.state.mn.us/living-green/background> [Last visited 12/06/20.]

“Switching from lead weights and sinkers to those made from tin, steel, bismuth, and other materials protects our state bird, the common loon. Loons are poisoned when they inadvertently swallow lost lead tackle while scooping up pebbles to help grind their food. Ingesting lead fishing tackle is **the cause of death in up to 20% of loons** turned in by private citizens.” <https://www.pca.state.mn.us/living-green/nontoxic-tackle-get-lead-out>

[Last visited 12/06/20]

E. This Petition **incorporates by reference all documents in the U.S. Fish and Wildlife Service’s possession or control** evidencing that lead fish tackle and lead ammunition are harmful to human health and the environment, including but not limited to:

<https://www.fws.gov/midwest/InsideR3/March14Story14.htm> [last visited 12/6/20.]

www.fws.gov/medwest/refuges/leadfree.html [last visited 11/23/18]

F. Finally, a quote from Cornell Lab’s website “All About Birds: “In the contiguous U.S., **lead is a leading cause of death in the Common Loon**. And now for the first time, researchers in New Hampshire have discovered a much worse population-level impact than previously suspected ... A study of loon mortalities over two decades in New Hampshire documented the high death toll from lead poisoning via fishing tackle. The study concluded that New Hampshire’s loon population would be 43 percent larger if not for lead poisoning.”

<https://www.allaboutbirds.org/lead-fishing-tackle-is-still-a-problem-for-common-loons/> [Last visited 12/10/20; emphasis added.]

V. Non-toxic Ammunition and Fishing Tackle Is consistent with Enabling Legislation

A. State Parks – Legislative Purpose

Minnesota Statute 86A.05, Subdivision 2 states:

“Subd. 2. **State park; purpose; resource and site qualifications; administration.**

“(a) A state park shall be established to **protect and perpetuate** extensive areas of the state possessing those resources which illustrate and exemplify Minnesota's natural

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phenomena and to provide for the use, enjoyment, and understanding of such resources without impairment for the enjoyment and recreation of future generations.

“(b) No unit shall be authorized as a state park unless its proposed location substantially satisfies the following criteria:

(1) exemplifies the natural characteristics of the major landscape regions of the state, as shown by accepted classifications, in an essentially unspoiled or restored condition or in a condition that will permit restoration in the foreseeable future; or contains essentially unspoiled natural resources of sufficient extent and importance to meaningfully contribute to the broad illustration of the state's natural phenomena; and

(2) contains natural resources, sufficiently diverse and interesting to attract people from throughout the state; and

(3) is sufficiently large to permit **protection of the plant and animal life** and other natural resources which give the park its qualities and provide for a broad range of opportunities for human enjoyment of these qualities.

“(c) State parks **shall be administered** by the commissioner of natural resources in a manner which is consistent with the purposes of this subdivision to **preserve, perpetuate,** and interpret **natural features** that existed in the area of the park prior to settlement and other significant natural, scenic, scientific, or historic features that are present. Management shall seek to maintain a balance among the plant and animal life of the park and to reestablish desirable plants and animals that were formerly indigenous to the park area but are now missing. Programs to interpret the natural features of the park shall be provided. **Outdoor recreation activities to utilize the natural features of the park that can be accommodated without material disturbance of the natural features of the park** or the introduction of undue artificiality into the natural scene may be permitted. Park use shall be primarily for aesthetic, cultural, and educational purposes, and shall not be designed to accommodate all forms or unlimited volumes of recreational use. Physical development shall be limited to those facilities necessary to complement the natural features and the values being preserved.” [Emphasis added.]

Certainly, use of lead ammunition and lead fishing tackle, within Minnesota’s state parks, contradicts these statutes.

The “2020 Minnesota Hunting Regulations” states on page 82, “The DNR strongly encourages the use of non-lead ammunition in state park special hunts.”

B. Scientific and Natural Areas – Legislative Purpose

Minnesota Statute 86A.05, Subdivision 5 states:

“Subd. 5. State scientific and natural areas; purpose; resource and site qualifications; administration; designation. (a) A state scientific and natural area shall be established **to protect and perpetuate in an undisturbed natural state** those natural features which possess exceptional scientific or educational value. [Emphasis added.] ...

(c) State scientific and natural areas **shall be administered** by the commissioner of natural resources, in consultation with qualified persons, in a manner which is **consistent with the purposes of this subdivision to preserve, perpetuate and protect from unnatural influences** the scientific and educational resources within them. Interpretive studies may be provided for the general public. Physical development shall be limited to the facilities absolutely necessary for protection, research, and educational projects, and, where appropriate, for interpretive services ...” [Emphasis added.]

Certainly, use of lead ammunition and lead fishing tackle, within Minnesota’s scientific and natural areas, contradicts these statutes.

VI. Statutory Authority to Adopt Rules Requiring Non-toxic Fishing Tackle and Non-toxic Ammunition

A. Minnesota Statute 97C.325 grants the DNR the authority to adopt a rule requiring non-toxic fishing tackle. This statute is quoted in full:

“RESTRICTIONS ON TAKING FISH.

- (a) Except as specifically authorized, a person may not take fish with:
- (1) explosives, chemicals, drugs, poisons, lime, medicated bait, fish berries, or other similar substances;
 - (2) substances or devices that kill, stun, or affect the nervous system of fish;
 - (3) nets, traps, trot lines, or snares; or
 - (4) spring devices that impale, hook, or capture fish.
- (b) If a person possesses a substance or device listed in paragraph (a) on waters, shores, or islands, it is presumptive evidence that the person is in violation of this section.
- (c) The commissioner may, by rule, allow the use of a nonmotorized device with a recoil mechanism to take fish through the ice.
- (d) **To protect water quality or improve habitat for fish or wildlife**, the commissioner may **prescribe restrictions on** fishing seasons, limits, or **methods** on **specific** bodies of water.” [Emphasis added.]

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Minnesota state parks and scientific and natural areas contain “**specific**” bodies of water within the meaning of this statute. Use of lead tackle constitutes a “**method**” within the meaning of this statute.

B. Minnesota Statute 97A.045 grants the Minnesota DNR the authority – and imposes a **legal duty** – to require non-toxic ammunition and non-toxic fishing tackle. Minnesota Statute 97A.045 states:

“COMMISSIONER; GENERAL POWERS AND DUTIES. Subdivision 1. Duties; generally. (a) **The commissioner shall do all things the commissioner determines are necessary to preserve, protect, and propagate desirable species of wild animals.** The commissioner shall make special provisions for the management of fish and wildlife to ensure recreational opportunities for anglers and hunters ...” [Emphasis added.]

C. Requiring non-toxic ammunition and non-toxic fishing tackle would bring Minnesota into compliance with the policy and requirements of the Minnesota Environmental Policy Act (“MEPA”), enacted in 1973 as Chapter 116D. Specifically, Minn. Stat. 116D.02, states:

“116D.02 DECLARATION OF STATE ENVIRONMENTAL POLICY.

“Subdivision 1. Policy.

The legislature, recognizing the profound impact of human activity on the interrelations of all components of the natural environment, particularly the profound influences of population growth, high density urbanization, industrial expansion, resources exploitation, and new and expanding technological advances and recognizing further the critical importance of restoring and maintaining environmental quality to the overall welfare and development of human beings, declares that **it is the continuing policy of the state government, in cooperation** with federal and local governments, and other **concerned public and private organizations, to use all practicable means and measures**, including financial and technical assistance, in a manner calculated to foster and promote the general welfare, to create and maintain conditions under which human beings and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of the state's people.

“Subd. 2. State responsibilities. In order to carry out the policy set forth in Laws 1973, chapter 412, **it is the continuing responsibility of the state government to use all practicable means**, consistent with other essential considerations of state policy, to improve and coordinate state plans, functions, programs and resources to the end that the state may:

- (1) fulfill the responsibilities of each generation as trustee of the environment for succeeding generations;

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- (2) assure for all people of the state safe, healthful, productive, and aesthetically and culturally pleasing surroundings; ...
- (7) define, designate, and protect environmentally sensitive areas; ...
- (10) preserve important existing natural habitats of rare and endangered species of plants, wildlife, and fish, and provide for the wise use of our remaining areas of natural habitation, including **necessary protective measures** where appropriate; ...
- (16) reduce the deleterious impact on air and water quality from all sources ... “

Furthermore, the following MEPA section **requires** the prohibition of lead ammunition and lead fishing tackle. Minn. Stat. 116D.04, Subdivision 6, states:

“No state action significantly affecting the quality of the environment shall be allowed, nor shall any permit for natural resource management and development be granted, where such action or permit has caused or is likely to cause pollution, impairment, or destruction of the air, water, land, or other natural resources located within the state, **so long as there is a feasible and prudent alternative** consistent with the reasonable requirements of the public health, safety and welfare and the state’s **paramount concern** for the **protection** of air, water, land, and other **natural resources** from pollution, impairment, or destruction. Economic considerations alone shall not justify such conduct.” [Emphasis added.]

As previously stated, **“feasible and prudent alternatives”** already exist: non-toxic ammunition and non-toxic fishing tackle. It is the state’s “paramount concern” to protect Minnesota’s natural resources from further degradation.

D. The DNR previously acknowledged its power to adopt rules by the proposed rulemaking in 2015. [See Section “VII. Background” below.]

E. The Minnesota Legislature acknowledged the DNR’s power to adopt rules on this subject, by enacting a moratorium on adopting a lead shot rule until July 1, 2019. This moratorium was not extended by the 2019 legislature and has expired.

F. Minnesota Statute 97B.041(a)(4) does not prevent the DNR Commissioner from banning lead ammunition. This statute states in part:

“POSSESSION OF FIREARMS AND AMMUNITION RESTRICTED IN DEER ZONES.

- (a) A person may not **possess** a firearm or ammunition outdoors during the period beginning the fifth day before the open firearms season and ending the second day after the close of the season within an area where deer may be taken by a firearm, except:

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(1) during the open season and in an area where big game may be taken, a firearm and ammunition authorized for taking big game in that area may be used to take big game in that area if the person has a valid big-game license in possession;

(2) an unloaded firearm that is in a case or in a closed trunk of a motor vehicle;

(3) a shotgun and shells containing No. 4 buckshot or smaller diameter **lead shot** or steel shot; [emphasis added]

(4) a handgun or rifle capable of firing only rimfire cartridges of .17 and .22 caliber, including .22 magnum caliber cartridges;

This statute merely pertains to the possession of lead shot shells, within an area where a deer may be taken by a firearm. This statute does **not** pertain to **taking** an animal while possessing or using lead ammunition. In other words, this statute does not restrict the DNR from rulemaking to require non-toxic ammunition while taking a wild animal.

G. Minnesota Statute 97C.065 prohibits lead deposition in state waters:

“POLLUTANTS IN WATERS. A person may not dispose of **any substance** in state waters, or allow any substance to enter state waters, **in quantities that injure or are detrimental to the propagation of wild animals or taint the flesh of wild animals**. Each day of violation is a separate offense. An occurring or continuous violation is a public nuisance. An action may be brought by the attorney general to enjoin and abate nuisance upon request of the commissioner. This section does not apply to chemicals used for pest control for the general welfare of the public.” [Emphasis added.]

VII. Background

2014:

U.S Court of Appeals (District of Columbia Circuit) ruled that lead ammunition is exempted under the definition of “chemical substance” under the Toxic Substances Control Act and, therefore, use of lead ammunition cannot be prohibited. [Trumpeter Swan Society v. EPA 774 F.3d 1037 (D.C. Cir. 2014).]

2015:

On about October 2015, the Minnesota Department of Natural Resources (DNR) proposed a rule to amend Minnesota Rule 6230.0200, by adding a section:

“Subp. 14. **Non-toxic shot required.** A person may not take wild animals on any wildlife management areas within the farmland furbearer zone as described in 6234.1000 subpart 2 while possessing shotshells loaded with shot other than:

A. steel shot;

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- B. copper-plated, nickel-plated or zinc-plated steel shot; or
- C. shot made of other nontoxic material approved by the director of the United States Fish and Wildlife Service.”

At the same time, the DNR proposed a rule to amend Minnesota Rule 6240.0200, by adding a section:

“Subp. 8. **Non-toxic shot for rails and snipe.** A person may not take rails or common snipe on any lands for [sic] waters within the state while possessing shotshells loaded with shot other than:

- A. steel shot;
- B copper-plated, nickel-plated or zinc-plated steel shot; or
- C. shot made of other nontoxic material approved by the director of the United States Fish and Wildlife Service.”

In reference to the proposed rules above, the DNR is quoted in the Star Tribune (October 14, 2015), “Reducing lead in [the] environment is a good thing ... It seems like it’s time to make the switch.”

On November 20, 2015, FMSNA sent a letter to the DNR supporting the proposed rules, but also requested that the rule be **expanded** to require non-toxic ammunition (i.e. shot and bullets) in **all** SNAs, throughout the state.

The DNR subsequently withdrew this proposed rule.

2016:

The Legislative-Citizen’s Commission on Minnesota Resources’ (LCCMR) work plan included a project entitled, “Workshops and Outreach for Nontoxic Ammunition Alternatives.” However, the proposed project was removed in a legislative conference committee and was not included in the Environmental and Natural Resources Trust Fund appropriations (Chapter 186, 2016 Session Laws; S.F. No. 2963.)

On August 9, 2016, a “Copper Roundtable” was held in Big Lake, Minnesota, which discussed the “ballistic accuracy and effectiveness of copper ammo” along with the environmental benefits of non-toxic ammunition.

2017:

The Minnesota Legislature adopted a statute, instituting the following moratorium: “Until July 1, 2019, the commissioner of natural resources shall not **adopt** rules further restricting the use of lead **shot.**” (2017 Session Laws, Chapter 93, Section 164. Emphasis added.)

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However, this law did not prevent the DNR from **initiating** the rule-making process pertaining to lead **shot**. Furthermore, this **moratorium did not pertain to rule-making that would prohibit lead bullets**.

On March 2, 2017, the U.S. Department of Interior Secretary Zinke signed Order 3346 which revoked a previous Fish and Wildlife Service order (No. 219) that would have phased out lead ammunition and lead fishing tackle. **Federal regulatory action is at a standstill.**

In 2017, the Minnesota Legislature also adopted an appropriation for the study of lead shot deposition:

“Notwithstanding Minnesota Statutes, section 297A.94, \$30,000 the first year is from the heritage enhancement account in the game and fish fund for a study **of lead shot deposition** on state lands. By March 1, 2018, the commissioner shall provide a report of the study to the chairs and ranking minority members of the legislative committees with jurisdiction over natural resources policy and finance. This is a onetime appropriation.” [Emphasis added.] [2017 Session Laws, Chapter 93, Article 1, Section 3, Subd. 6(c)]

2018:

As required by the 2017 session law cited above, the DNR provided a report to the Minnesota Legislature, entitled “Deposition of Lead Shot on State Lands in Minnesota” (February 21, 2018), stating:

“A total of 163 hunters were interviewed across the three wildlife management areas of interest (Lac qui Parle: n=71, Swan Lake: n=50, Talcot Lake: n=42). Most hunters (77%) were not aware of the legislative appropriation to study lead shot deposition on state lands in Minnesota. Pheasants were the primary target species (99%) sought and 84% of hunters were using a 12-gauge shotgun while 15% of hunters were using a 20-gauge shotgun. Over half of the hunters intercepted were using non-toxic shot (56%). Overall, 36% of hunters exclusively used lead shot and less than 1% used a combination of lead and non-toxic. An average of 0.36 lead shells were expended per hunter intercepted at the time of interview.” (Page 1; results of a “hunter intercept survey.”)

“Survey respondents were asked if they always, mostly, occasionally, or never used lead shot for hunting small game. More than half (57.7%) of respondents always (except for waterfowl) or mostly use lead shot while 21.3% never use lead.” (Page 9.)

“In total, we estimated that **178 tons (357,048 pounds) of lead were deposited on state lands** during the 2017 small game hunting season.” (Page 10; emphasis added.)

It is reasonable to infer that a similar percentage of Minnesota hunters are not using non-toxic bullets.

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On October 3, 2018, the (DNR) Commissioner's Advisory Committee on Natural Heritage (CAC) submitted to the DNR a Petition for a rule to prohibit lead fishing tackle, either state-wide or, in the alternative, **within the common loon range**.

On November 24, 2018, an article in the New York Times stated, "... between **10 million and 20 million animals**, including eagles, hawks, bears, vultures, ravens, and coyotes, **die each year** not from being hunted, but from lead poisoning ..." See "Poisoned Wildlife and Tainted Meat ..." <https://www.nytimes.com/2018/11/24/us/ammunition-lead-bullets-condors.html>

On November 27, 2018, Friends of Minnesota Scientific and Natural Areas (FMSNA) submitted a 13-page Petition for Adoption of Rules Prohibiting Lead Fishing Tackle and Lead Ammunition. The Petition requested a state-wide ban of lead ammunition and lead fishing tackle throughout all of Minnesota.

On December 4, 2018, previous DNR Commissioner, Tom Landwehr, sent a letter to the Commissioner's Advisory Committee on Natural Heritage (CAC), denying their Petition stating:

1. The DNR has no authority to prohibit lead fishing tackle throughout all waters of the state; the DNR has authority only over "specific bodies of water."
2. "A policy change of this magnitude is appropriately addressed by the Legislature." The DNR cited the Legislative moratorium on lead shot as a justification.

[Note: Unlike the 2018 CAC Petition, the current Petition pertains only to specific bodies of water – i.e., within state parks and scientific and natural areas. Furthermore, the legislation adopting a lead shot moratorium expired on July 1, 2019.]

2019:

On January 2, 2019, previous DNR Commissioner, Tom Landwehr, sent a letter denying FMSNA's Petition, in which he stated in part:

1. The DNR has no authority to prohibit lead fishing tackle throughout all waters of the state; the DNR has authority only over "specific bodies of water."
2. The DNR has no authority to prohibit lead shot because of the 2017 moratorium.
3. "... a change of this significance is a policy decision that rises to the Legislative level."

[**Note: Again, unlike the 2018 FMSNA petition: (1)**, the current Petition is not state-wide in scope; it pertains only to use of fishing tackle in specific bodies of water – i.e. within state parks and scientific and natural areas. **(2)** The Legislature allowed the lead shot moratorium to expire on July 1, 2019, thereby evidencing its intent to allow the DNR to fulfill its

responsibility to protect and enhance our natural resources by prohibiting lead tackle and lead ammunition; (3) the proposed rule is less “significant” than a state-wide ban because it only pertains to state parks and scientific and natural areas.]

The DNR is now free to move forward to protect human health and the environment.

VIII. The State of Minnesota Constitution Requires Non-toxic Fishing Tackle and Non-toxic Ammunition

As stated above in Section “I – Mission”, FMSNA recognizes and supports the Minnesota Constitution, Article XIII, Section 12, which states: “Hunting and fishing and the taking of game and fish are a valued part of our heritage that shall be forever preserved for the people and **shall be managed by law and regulation for the public good.**” [Emphasis added.] The public’s right to hunt and fish will be continuously impaired by the use of toxic ammunition and toxic fishing tackle.

This constitutional right and responsibility are emphasized in State v. Colosimo 669 N.W. 2nd 1 (Minn. 2003). Although the case pertains to the validity of a search during a game law enforcement activity, the Minnesota Supreme Court emphasized the importance of effective regulations:

“The important role fishing plays in the lives of many Minnesotans and the corresponding **need for effective regulation to protect the viability of our state’s fish and game resources** recently inspired an amendment to the Minnesota Constitution. The legislature proposed the amendment in the Spring of 1998. Act of April 20, 1998, ch. 392, § 1, 1998 Minn. Laws 1228. The proposed amendment was then submitted to the citizens of Minnesota, who adopted it in the 1998 general election. The amendment provides, ‘Hunting and fishing and the taking of game and fish are a valued part of our heritage that shall be forever preserved for the people and shall be managed by law and regulation for the public good.’ Minn. Const. art. XIII, sec. 12.” (Colosimo, page 6.) [Emphasis added.]

This constitutional law is also cited in Save Mille Lacs Sportsfishing, Inc. v. Minnesota Department of Natural Resources 859 N.W.2d 845 (Minn. App. 2015), a lawsuit challenging the DNR rule-making process. The Court of Appeals stated, “Hunting and fishing and the taking of game and fish are a valued part of our heritage that shall be forever preserved for the people and shall be managed by law and regulation for the public good.” Minn. Const. art. XIII, § 12. The Preservation Provision recognizes the “**need for effective regulation to protect the viability of our state’s fish and game resources.**” *State v. Colosimo*, 669 N.W.2d 1, 6 (Minn. 2003).” (Save Mille Lacs, page 6.)

In summary, the Minnesota Constitution, Article XIII, Section 12, supports the necessity of requiring non-toxic ammunition and non-toxic fishing tackle to continue the viability of our fish and game resources.

IX. Public Trust Doctrine

Minnesota Statute 97A.025 states, “OWNERSHIP OF WILD ANIMALS. The ownership of wild animals of the state is in the state, in its sovereign capacity for the benefit of all the people of the state. A person may not acquire a property right in wild animals, or destroy them, unless authorized under the game and fish laws or sections 17.47 to 17.498.” On other words, the state of Minnesota owns wild animals **in trust** for the benefit of **all** Minnesotans.” An article in *Science* magazine argues for applying the public trust doctrine to wildlife, including wolves. (Bruskotter, Jeremy T., Sherry A. Enzler, and Adrian Treves. 2011. “Rescuing Wolves from Politics; Wildlife as Public Trust Resource.” *Science*, Vol. 333, pp. 1828-1839.)

Minnesota case law has applied the public-trust doctrine to confirm that the state is responsible for managing navigable public waters as a trustee for public good. Save Mille Lacs Sportsfishing, Inc. v. Minnesota Department of Natural Resources 859 N.W.2d 845 (Minn. App. 2015).

Most recently, the Minnesota Supreme Court, in White Bear Lake Restoration Association v. Minnesota Department of Natural Resources (___ N.W. 2d ___; 2020 WL 2980718; Minn. 2020), the court stated:

“Homeowners does not allege that the DNR has violated its duty as trustee DNR has violated its duty as trustee to protect public use from ‘**private interruption and encroachment**,’ which is the core rationale of the doctrine. *See Ill. Cent.*, 146 U.S. at 436. Nor does it allege that water has been diverted outside the state. Instead, Homeowners alleges that the DNR issued groundwater permits, primarily to municipalities, and thereby violated its duty as trustee. We have found no precedent—and, at oral argument, counsel for Homeowners could cite none— extending the public trust doctrine in this way.

‘We are generally reluctant to extend the common law unless there is a compelling reason to do so. *See Cent. Hous. Assocs., LP v. Olson*, 929 N.W.2d 398, 408 (Minn. 2019). And we tend to proceed cautiously when a subject is **extensively regulated** by statutes and rules. Here, the field of public water use is heavily regulated by the State. The Legislature has decided that “[t]o conserve and use water resources of the state in the best interests of its people, and to promote the public health, safety, and welfare, it is the policy of the state that: (1) subject to existing rights, public waters are subject to the control of the state; [and] (2) the state, to the extent provided by law, shall control the appropriation and use of waters of the state.” Minn. Stat. § 103A.201, subd. 1 (2018).” [Emphasis added.]

The facts in this Petition are different than the reasons why the Supreme Court ruled against extension of the public trust doctrine in the White Bear Lake case:

1. As an example, hunters and fishers, by their “private” use of lead ammunition and fishing tackle, encroach on the public use and enjoyment of public waters by diminishing the likelihood of seeing and photographing loons and bald eagles.
2. Use of lead ammunition is NOT “extensively regulated” in Minnesota:
 - a. Lead bullets are not regulated at all.
 - b. The use of lead shot is regulated only in two instances (per DNR Hunting Regulations, page 41):
 - (1) “No person may take ducks, geese, mergansers, coots sandhill cranes or gallinules with lead shot or while having lead shot in possession.”
 - (2) “**Lead shot may be used statewide** for hunting other small game in accordance with firearms restrictions in this booklet, except in federal Wildlife Refuges and Waterfowl Production Areas.”
[Emphasis added.]
3. Use of lead fishing tackle is not regulated at all in Minnesota.

In short, requiring non-toxic ammunition and non-toxic fishing tackle will comply with the Minnesota DNR’s public trust responsibilities to protect Minnesotan’s public use and enjoyment of wildlife and public waters from the private interruption and encroachment by the use of toxic lead ammunition and fishing tackle.

X. Applicability of Minn. Stat. 14.127
Request to Governor Walz for
Waiver [per Minnesota Statute 14.127, Subd. 4(e)]

Minnesota Statute 14.127 states, “An agency must determine if the cost of complying with a proposed rule in the first year after the rule takes effect will exceed \$25,000 for: (1) any one business that has less than 50 full-time employees; ...”

The proposed rules in this Petition are very limited in scope, affecting hunting and fishing on a very small fraction of Minnesota’s land and waters. State Parks (including state recreation areas and state waysides) total 234,500 acres; Scientific and Natural Areas total 192,000 acres. The sum equals 426,500 acres.

“Minnesota has approximately 51 million total land acres. The DNR administers 5.6 million acres of state land, or about 11% of Minnesota’s total land area.” [MN DNR – “2019 By the Numbers.”] Thus, the proposed regulations would cover only 7.6 percent of state land and only 0.83 percent of all land within the state of Minnesota.

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Therefore, requirements of Minn. Stat. 14.127 are very unlikely to apply. In the unlikely event that a business (with less than 50 employees) would incur over \$25,000 in expenses within the first year after the rule was adopted, the business can file a statement claiming a temporary exemption from the rule until the legislature approves the rule. (Minn. Stat. 14.127, Subd. 3.)

Furthermore, Governor Walz has the option of exempting the rule from the requirements of Minn. Stat. 14.127. [Minn. Stat. 12.127, Subd. 4(e).] FMSNA requests that this proposed rule be exempt from Minn. Stat. 14.127.

Summary

Now is the time to act. The science is indisputable; lead ammunition and lead fishing tackle are toxic and have significant adverse effects on the environment and human health. The loon is listed by the DNR as a “Species in Greatest Conservation Need.”

Efforts to achieve voluntary compliance have fallen short. Federal action under the Trump administration is at a standstill. The lead shot moratorium expired on July 1, 2019. The State of Minnesota, via Minnesota Department of Natural Resources, has the legal authority – **and duty** - to ban toxic lead ammunition and toxic lead fishing tackle.

Regulations requiring non-toxic ammunition and non-toxic fishing tackle are the only feasible and prudent options to remove lead and other toxic materials from important outdoor recreation activities. In this way, the hunting and fishing communities can be positive role-models for present and future generations.

On behalf of the Friends of Minnesota Scientific and Natural Areas, I **thank** the Minnesota DNR in advance in anticipation of the adoption of non-toxic ammunition and non-toxic fishing tackle rules that will be a great step forward to protect human health and the environment.

Thomas E. Casey

Dated: January 15, 2021

Thomas E. Casey, Board Chair
Friends of Minnesota Scientific and Natural Areas

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