

December 20, 2021

Thomas E. Casey
Board Chair
Friends of Minnesota Scientific and Natural Areas
2854 Cambridge Lane
Mound, MN 55364

RE: Petition for Adoption of Rules Requiring Non-toxic Fishing Tackle and Non-toxic Ammunition in MN State Parks and SNAs

Dear Mr. Casey:

The Minnesota Department of Natural Resources (DNR) received a petition on October 18, 2021 from Friends of Minnesota Scientific and Natural Areas, a non-profit corporation (“Friends”), requesting that the agency initiate rulemaking to ban the use of lead shot and bullets and lead fishing tackle in Scientific and Natural Areas (SNAs) and Minnesota State Parks (the “Petition”).

The DNR has carefully considered this Petition. The DNR has determined that, over the next year, it will implement two changes to require the use of non-toxic ammunition at certain SNAs and State Parks through orders or DNR procedures that do not require changes to Minnesota rules or statutes. Specifically, the DNR may allow hunting in SNAs in the Commissioner’s designation order for the SNA, and SNA designations are exempted from rulemaking in accordance with Minn. Stat. § 84.033 and § 86A.05, subd. 5. The DNR will identify all SNAs that allow hunting and require the use of non-toxic bullets and non-toxic shot on those lands. The DNR will also require the use of non-toxic bullets and non-toxic shot at State Parks when it issues permits for special hunts. The DNR may include requirements for non-toxic bullets and non-toxic shot in these permits in accordance with Minn. R. 6100.0550. At the present time, the DNR will not require the use of non-toxic bullets and non-toxic shot on Minnesota State Park lands that are designated in Minnesota Session Laws as open to hunting, but will continue to encourage their use.

The DNR also intends to continue efforts to encourage the use of non-toxic fishing tackle. The DNR supports the work that is underway through the Minnesota Pollution Control Agency’s “Get the Lead Out” program. We also sell and encourage the use of non-toxic tackle at all Minnesota State Parks.

While the DNR will implement the actions outlined above, the DNR denies the Petition for rulemaking with respect to the prohibition of lead or other toxic shot, bullets or tackle at SNAs and State Parks for the following reasons:

- 1) Rulemaking is not necessary to implement the requirements for use of non-toxic ammunition at certain SNAs and State Parks as described above. See Minn. Stat. § 14.09 (requiring that the petitioner explain the need for a proposed rule); Minn. R. 1400.2040 (same); Minn. Stat. § 14.131 (requiring an agency to consider the need for a proposed rule).

2) To completely ban the use of lead or other toxic ammunition and tackle on all SNAs and State Park lands necessitates statute or rule changes that warrant a comprehensive exploration of the full spectrum of such changes. The DNR must adhere to the Legislature's directive to consider persons who will be affected by the proposed rule, alternative means of achieving the purpose of the proposed rule, or cumulative effects of the proposed rule per Minn. Stat. § 14.131. Given the number of stakeholders potentially affected by such changes, and the Minnesota Legislature's clear indication that it believes a broad ban on lead such as that called for in the petition is a matter for the Legislature, the DNR concludes that this proposal would be more appropriately addressed by the Legislature. See e.g. DNR's Findings of Fact and Order Regarding Petition for Adoption of Rules Requiring Non-Toxic Fishing Tackle and Non-Toxic Ammunition dated November 4, 2019 ("Prior Order")(Attached as *Exhibit A*).

3) This petition is Friends' second petition to the DNR to initiate rulemaking with respect to non-toxic bullets, shot and fishing tackle. See *Exhibit A: Prior Order*. While DNR acknowledges that Friends' has narrowed its request for rulemaking, some of the findings outlined by DNR in the Prior Order have not changed, including those outlined in items 4-6 below.

4) Your request includes letters of support from several organizations including Minnesota Environmental Partnership, the Humane Society, the Animal Law Section of the Minnesota State Bar Association, the Minnesota Herpetological Association, the Vadnais Lake Area Watershed Management Organization, and the Izaak Walton League, and from former DNR employee Carroll Henderson.

While DNR appreciates the views expressed by these individuals and organizations, as described in the Prior Order, these letters "reflect a small segment of the persons and organizations in Minnesota with a strong interest in the question of whether and how the state should regulate the use of lead tackle, lead ammunition, and lead shot in the taking of fish and wildlife in Minnesota." *Exhibit A: Prior Order* at ¶ 38. DNR concludes it is necessary to have a larger conversation on this topic.

5) With respect to the argument that DNR is required to adopt rules based on Minn. Stat. § 97A.045, subd. 1(a), the Minnesota Environmental Policy Act, the Minnesota Constitution, or the public trust doctrine, I refer you to the discussion in the Prior Order. *Exhibit A: Prior Order* at ¶ 47. I also note that Friends does not cite any authority for the proposition that failure to adopt a rule is a "state action significantly affecting the quality of the environment" under Minn. Stat. § 116D.04, subd. 6. Further, although the Minnesota Supreme Court has adopted the wildlife trust doctrine, that doctrine requires the Legislature and not its state agencies, to set limits it "sees fit to impose" to protect wildlife for public benefit. *State v. Rodman*, 59 N.W. 1098 (Minn. 1894). And while it is true that the Legislature has delegated to the commissioner the authority to manage wildlife for public benefit, the DNR has determined that the lead ammunition and tackle topic is more appropriately addressed by the Legislature. *Exhibit A: Prior Order* at ¶¶ 48 through 53.

6) Finally, as described in the Prior Order, Friends has not provided DNR with any information about the costs of complying with the proposed rule. Without this information, DNR is not able to move forward with rulemaking. Minn. Stat. § 14.131, subd. 5 (requiring the agency to consider "the probable costs of complying with the proposed rule"). *Exhibit A: Prior Order* at ¶¶ 31 through 32 and 40 through 43.

For the reasons described in items 1-6 above and set forth in further relevant detail in *Exhibit A*, DNR **denies** the Petition in full.

Though the DNR has denied the petition for rulemaking, we will immediately begin the process of implementing the changes at SNAs and State Parks as outlined above. Additionally, the DNR is committed to working with the petitioners, legislators, tribal governments, wildlife watchers, tackle and ammunition producers, hunters and anglers to facilitate an inclusive conversation over the next year about any actions that would be above and beyond those that we have outlined in this letter.

Sincerely,



Sarah Strommen
Commissioner
Minnesota Department of Natural Resources

Attachment *Exhibit A*



FINDINGS OF FACT AND ORDER REGARDING Petition for Adoption of Rules Requiring Non-toxic Fishing Tackle and Non-toxic Ammunition

DATE: November 4, 2019

Petitioner Name: Thomas E. Casey Board Chair on behalf of Friends of Minnesota Scientific & Natural Areas (FMSNA)

Request: The Petition is brought pursuant to Minn. Stat. § 14.09 and requests the Department of Natural Resources adopt rules: (1) banning the possession and use of lead or other toxic fishing tackle on “Minnesota waters located within the common loon range”; (2) prohibit the taking of wild animals within Minnesota “while possessing or using bullets containing lead or other toxic materials”; and prohibit the taking of wild animals within Minnesota with shotshells other than those loaded with steel shot, copper-plated shot, nickel-plated shot, zinc-plated steel shot, or shot made of other nontoxic materials approved by the director of the U.S. Fish and Wildlife Service (USFWS).

Decision: Based on the information on file at the Minnesota Department of Natural Resources (DNR), Petitioners’ request is denied.

FINDINGS OF FACT

Based on the documents contained in the administrative record for this matter, the DNR makes the following Findings of Fact:

1. This matter arises out of a petition brought by Thomas E. Casey Board Chair of the Friends of Minnesota Scientific & Natural Areas on behalf the FMSNA, the Austin Coalition for Environmental Sustainability, the Center for Biological Diversity, the Friends of the Mississippi River, Humming for Bees, the Mankato Area Environmentalists, the Minnesota Ornithologists Union, the Pollinator Friendly Alliance, Save our Sky Blue Waters, the St. Croix River Association, the MN Division of the Izaak Walton League of America, and Wilderness in the City (collectively “the Petitioners”) requesting that the DNR adopt rules: (1) banning the possession and use of lead or other toxic fishing tackle on all “Minnesota waters located within the common loon range”; (2) prohibiting the taking of wild animals within Minnesota “while possessing or using bullets containing lead or other toxic materials”; and (3) prohibiting the taking of wild animals within Minnesota with shotshells other than those loaded with steel shot, copper-plated shot, nickel-plated shot, zinc-plated steel shot, or shot made of other nontoxic materials approved by the director of the USFWS. The Petition was received on September 3, 2019.

Background

2. Minnesota banned the use of lead shot for waterfowl hunting in 1987. Minnesota Rule 6240.0550 requires the use of non-lead shot approved by the USFWS for the taking of geese, ducks, mergansers, coots, moorhen, and sandhill cranes in Minnesota.

FINDINGS OF FACT AND ORDER REGARDING Petition for Adoption of Rules Requiring Non-toxic Fishing Tackle and Non-toxic Ammunition

3. In response to a federal lawsuit brought by the National Wildlife Federation, the USFWS, in 1991 banned the use of lead shot while waterfowl hunting on Federal Waterfowl Production Areas throughout the United States.

4. During the Minnesota legislature's 2002-03 session, the Minnesota Pollution Control Agency attempted to ban the sale and use of lead tackle. That effort was opposed by anglers, bait shop owners, and other retailers and was abandoned in lieu of an education program promoting the use of non-lead tackle.

5. In 2005, the DNR implemented rules restricting the use of lead shot on managed dove fields located on Wildlife Management Area (WMAs). *Report of the Nontoxic Shot Advisory Committee* at 4 (December 12, 2006)(*2006 Advisory Report*). That restriction remains in place. Minn. R. 6230.0200, subp. 13.

6. In 2006, the DNR formed a Nontoxic Shot Advisory Committee (2006 Advisory Committee) to study the nontoxic shot issue. *2006 Advisory Report* at 1. The formation of the Advisory Committee arose out of a DNR 2006 regulation banning the use of lead shot for dove hunting on managed dove fields located on WMAs. Members of the 2006 Advisory Committee included representatives from the manufacturing and retail industry, hunting constituencies, environmental groups and technical experts from other state and federal agencies. The 2006 Advisory Committee could not reach consensus on options for the future regulation of lead shot in Minnesota. *Id.* at 2.

7. A 2006 survey conducted concurrent with the 2006 Advisory Committee work showed that one-half of all respondents opposed further restrictions on the use of lead shot for small game hunting, one-third supported it and one-fifth had no opinion on further regulatory controls. *Id.* at 4.

8. The 2006 Advisory Committee concluded the following:

- a. There is currently insufficient data to clearly determine which wildlife were adversely affected by lead shot and the scope of any impact.
- b. There is currently a lack of scientific consensus on the human health concerns of hunting with lead shot.
- c. There is a lack of consensus among members of the 2006 Advisory Committee about the impact lead shot regulations might have on hunter recruitment and retention; whether regulations should focus on species, geographic ranges of the state or property ownership; and hunters' willingness to accept new regulations.
- d. The DNR should begin to regulate lead shot on managed dove fields.

FINDINGS OF FACT AND ORDER REGARDING Petition for Adoption of Rules Requiring Non-toxic Fishing Tackle and Non-toxic Ammunition

- e. It is inevitable that lead shot will have to be restricted for all shotgun hunting at some future date but the 2006 Advisory Committee was unable to reach agreement on when that should occur and how it should occur.

9. In 2007, Fulton et al. conducted a survey of small game hunters who were also Minnesota residents to determine the level of support or opposition to a lead shot ban in the Minnesota farmland zone and to assess attitudes and beliefs regarding a potential ban on the use of lead shot for taking small game in the farmland zone. Dave Fulton *et al*, *Support For Attitudes Toward, and Beliefs About a Ban on Lead Shot in the Farmland Zone of Minnesota*, at 156 (2007), see also Susan Schroeder *et al*, *Clarifying Beliefs Underlying Hunter Intentions to Support a Ban on Lead Shot*, 29 Society of Natural Resc. 852 (2015). The study found that Minnesota hunters were fairly evenly divided between hunters who supported a ban at 42% and hunters who opposed a ban at 44%. *Id*. Respondents generally believed that banning lead shot would protect wildlife from lead poisoning and be beneficial to the environment but there was also a strong sentiment that use of non-lead shot would increase crippling and wounding of small game, require use of less effective shot, would be expensive, and would decrease hunting opportunity. *Id*. at 162. The majority of respondents also believed that regulation of lead shot was something that hunters would get used to in a few seasons. *Id*.

10. In 2008, the DNR undertook a lead fragmentation study in hunter harvested venison. The study was undertaken to gather information on lead fragmentation in harvested deer, to help hunters and meat processors avoid further lead fragmentation during deer processing, and to inform hunters so that they could make informed ammunition selections. Lou Cornicelli and Marett Grund, *Examining Variability Associated with Bullet Fragmentation and Deposition in White-Tailed Deer and Domestic Sheep* (2008). Based on this study the DNR developed tips for hunters to minimize lead exposure lead post-harvest. DNR, *Tips for Deer Hunters* available at <https://www.dnr.state.mn.us/hunting/ammo/lead.html>.

11. Based on the work of the 2006 Advisory Committee, the Fulton *et al* study, and DNR's 2008 lead fragmentation study, the DNR initiated a rule making process to regulate the use of lead shot on WMAs in the Farmland Zone. The process was initiated in 2015, when DNR issued a request for public comment on a proposed rule banning the use of lead shot on WMAs in the Farmland Zone. *Draft Statement of Need and Reasonableness for Proposed Amendment to and Repeal of Rules Governing Species of Special Concern, Wildlife Management Areas, State Game Refuges, Small Game Hunting and Big Game Hunting, Minnesota Rules chapters 6134, 6230, 6232, 6234, 6236, 6237, and 6240*, Revisor's File No. R-043at 3 (2016)(2016 *Draft SONAR*). DNR received over 4,000 comments in response to the request for comments. A review of the comments indicated that a ban on the use of lead shot on WMAs in the Farmland Zone was supported by a number of environmental interests and some hunters. These commenters expressed the view that the ban would benefit wildlife, the natural environment, and public health. *Id*. at 4- 6. The rulemaking effort was opposed by some hunting interests who argued that non-lead shot is less effective, that the science on the impact of lead shot on wildlife is uncertain, that non-lead options were both more expensive and unavailable in all shot sizes, and that the regulation was a

FINDINGS OF FACT AND ORDER REGARDING Petition for Adoption of Rules Requiring Non-toxic Fishing Tackle and Non-toxic Ammunition

barrier to hunters and would reduce hunter numbers. *Id.* The proposal was also opposed by some ammunition manufacturers. *Id.* In short, while there was extensive support for the proposal among the general public there was also vocal opposition from certain stakeholder segments. This opposition gave rise to a 2017 rulemaking moratorium adopted by the Minnesota legislature.

12. During the 2017 legislative session, the Minnesota legislature ordered the DNR to undertake a study of lead shot deposition on state lands and to report its findings back to the legislature. 2017 Session Laws, ch. 93, Art. 1 § 3, subd. 6(c). At that same time, the legislature prohibited the DNR from adopting rules further restricting the use of lead shot until July 1, 2019. 2017 Session Laws, Ch. 93, Art. 2 § 164. This moratorium has expired.

13. In compliance with the legislative directive, the DNR, on March 1, 2018, submitted a study captioned *Deposition of Lead Shot on State Lands in Minnesota* (Feb. 21, 2018) to the Minnesota legislature. To gather the information requested by the legislature, the DNR interviewed 163 hunters who were hunting on state WMAs in the Farmland Zone. Interview questions focused on the target species, type of firearm, type of ammunition, and number of shots taken. *Id.* at 1. Hunters were also asked how many boxes of lead shell they expended in a typical hunting season. Additionally, the DNR undertook an online survey of Minnesota residents 18 years of age and older who purchased a 2017 small game license. *Id.* at 2. 8,000 surveys were emailed, 394 were undeliverable and of the remaining 7,606 questionnaires, 2,756 were completed and returned, for a response rate of 36.2%. The survey asked respondents to answer questions regarding where they hunted, the land classification of the land on which they hunted, target species, type of gun, type of ammunition, and volume of ammunition expended by season and by season on land type. *Id.* at 2-7. This information was then used to estimate the total number of lead shotgun shells expended on state lands by land type and species targeted in a given hunting season. *Id.* at 9. The study concluded that, during the 2017 hunting season, approximately 178 tons of lead were deposited on state lands during the 2017 small game hunting season.

14. Also in 2018, a bill was introduced in the Minnesota House to repeal the moratorium. The bill failed.

15. In October 2018, the Commissioner's Advisory Committee on Natural Heritage filed a Petition for a rule to prohibit lead fishing tackle either statewide or within the Common Loon Range. In December 2018, the Commissioner denied the Petition, stating that Minn. Stat. § 97C.325 (d) only authorized the Commissioner to regulate the method of fish take "on specific bodies of water" for water quality or habitat improvement in those specified water bodies. Minnesota Statute does not permit the Commissioner to adopt a lead tackle ban for all fish species in all water bodies of the state or in all water bodies in the Common Loon Range. In addition, the Commissioner observed that a rule of this scale would impact 1.5 million licensed anglers and Minnesota's fishing tackle industry. In the Commissioner's view, a full-scale rule of this magnitude could not be undertaken by petition but must involve the full breadth of potential stakeholders prior to undertaking any rule making. Finally, the

FINDINGS OF FACT AND ORDER REGARDING Petition for Adoption of Rules Requiring Non-toxic Fishing Tackle and Non-toxic Ammunition

Commissioner opined that the legislature, in passing the 2017 moratorium had indicated that “a change of this significance is a policy decision that rises to the Legislative level.”

16. At least 26 states have banned the use of lead shot for small game. For the vast majority of these states, these bans are species-specific and limited to specified geographical areas within the state. These species- and geographically-specific bans have been accomplished by both regulation and statute. Restrictions on the wider sale or use of lead ammunition or tackle, of the type envisioned in the Petition, have generally been by legislative enactment in the individual states.

17. In 2013, the California legislature adopted legislation requiring non-lead rifle and pistol ammunition be used by all hunters when taking big game, nongame birds, and nongame mammals within the California condor range together with a coupon program to subsidize the purchase of non-lead ammunition. Cal. Fish and Game Code § 3004.5. The code also directed the state game and fish commission to adopt regulations restricting the use of lead ammunition in California condor range. *Id.*

18. In 2019, the California legislature amended § 3004.5 to prohibit the use of any lead projectiles or ammunition containing lead projectiles when taking wildlife with a firearm throughout the state. This law became effective July 1, 2019. The California Fish and Game Commission subsequently adopted regulations to implement this requirement. *See* 14 CCR § 250.1. California is the first state in the union to ban the use of all lead ammunition for taking of wildlife. To DNR’s knowledge, no other state has adopted such a wide ban on both lead ammunition and lead shot.

19. Effective January 1, 2006, the Vermont legislature banned the sale of lead sinkers weighing one-half ounce or less within the state of Vermont. 10 V.S.A. §4615.

20. Effective June 1, 2016, the New Hampshire legislature banned the sale of lead sinkers and jigs weighing one ounce or less within the state of New Hampshire and prohibited anglers from using most lead sinkers and jigs while harvesting fish within New Hampshire. N.H. Rev. Stat. Ann §§ 339.77 and 211.13-b.

21. In 2004, the New York legislature banned the sale of lead sinkers weighing one-half ounce or less to anglers in New York. New York Env’tl. Conserv. § 11-0308.

22. In 2013, the Maine legislature banned the use of lead sinkers and jigs weighing one ounce or less or measuring 2 ½ inches or less. ME Stat. Conservation, Inland Fisheries and Wildlife § 12664.

23. In 2010, the Illinois legislature adopted legislation establishing an educational program to discourage the use of lead sinkers and jigs. Il. Stat. Ch. 20 § 885/5

24. Massachusetts by regulation bans the use of lead singers and jigs weighing less than one ounce in all inland (fresh) waters. 321 CMR 4.00

FINDINGS OF FACT AND ORDER REGARDING Petition for Adoption of Rules Requiring Non-toxic Fishing Tackle and Non-toxic Ammunition

25. Michigan by regulation bans the use of lead sinkers, weights of jigs with a mass weight of less than one ounce. Mich. Admin. Code r. 321.4.01.

26. The State of Washington by regulation has banned the use of lead weights or jig measuring one and one-half inches or less in length in thirteen lakes. *See generally* § 232-28-619.

Current Petition

27. Minnesota Statute section 14.09 permits any person to petition an agency for the adoption of rules. The petition must be specific as to the action requested and the need for the action.

28. Pursuant to the requirements of Minn. Stat. § 14.09, the Petitioners submitted the Petition, which DNR received on September 3, 2019, requesting that the DNR adopt a rule requiring the following:

- a. Prohibiting the possession and use of all lead or other toxic fishing tackle, on all Minnesota waters located within the common loon range and on all Minnesota waters “identified by the MN DNR as having breeding pairs of loon or waters frequented by loons.”
- b. Prohibit persons from taking a wild animal in the State of Minnesota while possessing or using bullets containing lead or other toxic materials.
- c. Prohibit persons from taking a wild animal in the State of Minnesota while possessing or using shot shells that are not steel shot; copper-, nickel- or zinc-plated steel shot; or are not made of non-toxic materials approved by the USFWS.

29. The Petition’s definition of common loon range covers all waters across the state of Minnesota. Petition Exh. 1.

30. The proposed rule set forth in the Petition meets the minimum requirement of Minn. Stat. § 14.09 that the petition be specific regarding the action requested.

31. Minnesota Statute § 14.09 also requires that the Petition set forth the need for the proposed rule. Minnesota Statute § 14.131 sets forth the statutory requirement for a Statement of Need and Reasonableness that must be prepared by the agency prior to the adoption of a rule. While not directly applicable to the rule petition process, this section does provide guidance to the agency regarding the definition of the needs requirement set forth in Minn. Stat. § 14.09. Section 14.131 requires that the agency must articulate both the need for and reasonableness of the proposed rule and

FINDINGS OF FACT AND ORDER REGARDING Petition for Adoption of Rules Requiring Non-toxic Fishing Tackle and Non-toxic Ammunition

make it available for public review. Factors to be considered in assessing the need and reasonableness of the proposed rule are:

- a. A description of why the rule is needed;
- b. A description of the classes of persons affected by the rule together with an articulation of who will bear the cost of the rule and receive the benefit of the rule;
- c. The cost of implementing the rule and anticipated effect of the rule on state revenues;
- d. Alternative methods for achieving the proposed rule and reasons why they were rejected;
- e. The cost of complying with the proposed rule by affected parties;
- f. Differences between the proposed rule and similar federal rules or rules of other states;
and
- g. The cumulative impact of the rule.

32. The Petition does not contain a description of the classes of persons affected by the proposed rule, the cost of implementing the proposed rule, alternative methods for achieving the proposed rule, or the cumulative impact of the proposed rule.

33. As rationale for the proposed rule (why the rule is needed), the Petition adopts the findings of the California legislature adopted in support of California's legislation banning the use and possession of all lead ammunition in the taking of wild animals across the State of California. The Petitioners, without further analysis explaining its rationale as to how California is similar to Minnesota, simply state that the findings adopted by the California legislature are equally applicable to the State of Minnesota.

34. As rationale for the proposed rule pertaining to fishing tackle, the Petitioners point to the Commissioner's Advisory Committee on Natural Heritage's 2018 Petition (2018 Petition) for a rule prohibiting lead fishing tackle. The Petitioners note that avian species are exposed to lead tackle and that ingestion by birds may result in lead poisoning and death to avian species such as loons. The Petition cites to no scientific evidence documenting the impact of lead exposure on other wildlife either individually or on a population wide basis.

FINDINGS OF FACT AND ORDER REGARDING Petition for Adoption of Rules Requiring Non-toxic Fishing Tackle and Non-toxic Ammunition

35. As rationale for the proposed rule prohibiting the use of all lead tackle, the Petition points to legislation adopted by the states of New York, Vermont, Maine, and New Hampshire and the regulations of Massachusetts, and Washington. But, as outlined in ¶¶ 19 through 26, the legislation and regulations adopted by these states are limited to jigs and sinkers one ounce or less and do not have the breadth of the proposal advanced by the Petitioners. Petitioners have failed to explain the need for a rule banning all lead tackle.

36. As rationale for the proposed rules, the Petitioners incorporate by reference “all documents in DNR’s possession or control evidencing that lead fishing tackle and lead ammunition are harmful to human health and the environment”, all documents in the Minnesota Pollution Control Agency’s (MPCA’s) possession or control evidencing that lead fishing tackle and lead ammunition are harmful to human health and the environment, and all documents in the U.S. FWS possession and control evidencing that lead fish tackle and lead ammunition are harmful to human health and the environment.” *Petition* at 8. These generalized references to documents, many of which are not in DNR’s possession or control, are insufficient to meet the requirements of Minn. Stat. 14.09 that the Petition on its face sets forth the need for the rule.

37. The DNR has received 70 additional comment letters in support of the Petition and has reviewed each of these letters. These letters reiterate concern for reducing toxic contamination through support for banning lead ammunition and tackle. Rationales expressed to support the Petition included availability of safe and effective alternative products; concerns for ecosystem health, human health, and water quality; and negative impacts to fish and wildlife, including birds and mammals. Wildlife taxa mentioned include turtles, loons, trumpeter swans, bald eagles, Canada geese, many species of waterfowl, 16 species of upland game birds, and 29 species of raptors. Predators of animals that have consumed lead are also cited as vulnerable. Roughly two-thirds of the comment letters supporting the Petition came from individuals, including hunters, anglers, and the general public. The remaining one-third of the letters were from non-government organizations or associations.

Analysis of the Petition

38. The comments received by the DNR on the Petition reflect a small segment of the persons and organizations in Minnesota with a strong interest in the question of whether and how the state should regulate the use of lead tackle, lead ammunition and lead shot in the taking of fish and wildlife in Minnesota. Constituencies with a strong and historically vocal interest in this issue are: environmental interests, hunters and anglers, retailers, bait shop owners, tribal governments and tribal interests, and ammunition and tackle manufacturers. The views of these interests are not reflected in the

FINDINGS OF FACT AND ORDER REGARDING Petition for Adoption of Rules Requiring Non-toxic Fishing Tackle and Non-toxic Ammunition

petition and must be considered prior to determining whether to undertake rulemaking of such magnitude as that proposed by the Petition.

39. Minnesota has approximately 1.5 million licensed anglers and 557,000 licensed hunters, all with an interest in the proposed rule.

40. Minnesota Statute section 14.131 requires the agency to assess the probable cost of complying with the proposed rule on businesses and individuals. The Petition does not include a cost assessment.

41. Some preliminary data gathered by the DNR in 2014, when it proposed the lead shot ban in WMAs, indicates that there is a differential between the cost of lead shot and that of non-lead shot. In most instances, non-lead shot is more expensive than lead shot. DNR also discovered that, while lead free shot is widely available for some caliber rifles, availability is not universal across all calibers. (2016 Draft SONAR Appendix 2). DNR has very limited data on the cost differential between lead-free ammunition and ammunition containing lead. The data that are available indicate that lead ammunition is less expensive than lead free ammunition. DNR has no data on the cost differential between lead-free tackle and lead tackle. DNR has not analyzed the cost to hunters and anglers of complying with a regulation with the breadth of that proposed in the Petition. Nor does the DNR have any data on the impact of ammunition and tackle cost increases on hunter and angler recruitment.

42. DNR has no data on the financial impact of the Petition's proposed regulation on retailers, bait stores, and tackle and ammunition manufacturers. Minnesota Statute § 14.127, subd. 2 requires that the DNR collect this information and determine if the financial impacts meet the statutory threshold of \$25,000 per business for any business with less than 50 employees prior to the close of the hearing record. Because this data has not been gathered and assessed and DNR does not have the available resources to undertake such an in-depth effort, DNR does not have the information necessary on financial impacts required for a rule making pursuant to Minn. Stat. § 14.131. Therefore, ordering a hearing on the proposed rule pursuant to Minn. Stat. § 14.09 and 14.14 is premature.

43. Furthermore, if the cost to any business with less than 50 employees of complying with the rule within one year of adoption exceeds \$25,000, the rule must be submitted to the legislature for approval. Minn. Stat. § 14.127, subd. 3. It is probable that one or more ammunition or tackle manufacturer or retailer may sustain financial impacts meeting the statutory threshold given the breadth of the proposed rule.

FINDINGS OF FACT AND ORDER REGARDING Petition for Adoption of Rules Requiring Non-toxic Fishing Tackle and Non-toxic Ammunition

44. When adopting rules, the Commissioner must set forth the statutory authority for the proposed rule. Minn. Stat. § 14.14, subd. 1a. The Petition cites a number of statutory and common law provisions that it asserts form the legal authority for the Commissioner to adopt the proposed rule. A detailed discussion of these authorities is set forth below.

45. The Petitioners contend that Minn. Stat. § 97C.325 grants the Commissioner the authority to adopt the regulations advanced the Petition. *Petition* at 9. Minnesota Statute section 97C.325 governs fishing restrictions and grants the Commissioner the authority to adopt restrictions on fishing methods used on specific bodies of water. The Petition does not set forth specific bodies of water that should be covered by the rule; rather the rule advanced in the Petition covers all bodies of water in the “common loon range” and defines that range as all water bodies within the state. All bodies of water within the common loon range (i.e., all water bodies in the state) does not constitute a specific body of water within the meaning of the statute and, therefore, the Commissioner cannot rely of Minn. Stat. § 97C.325 to adopt the proposed rule.

46. The Petitioners contend that the Commissioner must adopt the proposed rule to comply with the requirements set forth in the Minnesota Environmental Policy Act (MEPA), which requires state government to use all practical measures 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.” Minn. Stat. § 116D.02. The Petitioners also assert that the continued use of lead shot, lead ammunition, and lead tackle is significantly affecting the quality of the environment and may not be permitted so long as there is a feasible and prudent alternative to its use. Minn. Stat. § 116D.04, subd. 6 and *Petition* at 9-10. MEPA does not, however, confer on the individual state agencies the authority to adopt rules to advance this state policy, rather MEPA requires that the policy goals of Minn. Stat. ch. 116D are to be addressed in the environmental review process. *See* Minn. Stat. § 116D.04 (requiring the preparation of environmental review documents for all actions that have the potential to significantly impact the environment prior to government action). Because MEPA does not confer on the Commissioner the legal authority to adopt regulations to implement the policies set forth therein, MEPA cannot form the basis of the legal authority for the Commissioner to adopt the rules advance in the Petition.

47. The Petitioners contend that the Commissioner is required to adopt these rules by Minn. Stat. § 97A.045, subd. 1(a), which provides in part “that the commissioner shall do all things the commissioner determines are necessary to preserve, protect and propagate desirable species of wild animals.” *Petition* at 9-10. The Petition does not, however, set forth sufficient scientific evidence for the Commissioner to conclude that banning all lead ammunition and tackle across the state is necessary to preserve, protect, and propagate the fish and wildlife of the state. Minnesota Statute § 97A.045, subd. 1(a) also requires the Commissioner to “make special provisions for the management of fish and wildlife to ensure recreational opportunities for anglers and hunters.” The Petition does not articulate if and how the proposed rule would impact hunters and anglers.

FINDINGS OF FACT AND ORDER REGARDING Petition for Adoption of Rules Requiring Non-toxic Fishing Tackle and Non-toxic Ammunition

48. The Minnesota Constitution provides that the right to harvest fish and game is part of the state's heritage and that state's wildlife assets be managed for the public good. The Petitioners assert that this provision, together with the state's wildlife trust obligation, requires the DNR to adopt rules regulating the use of lead shot, ammunition, and tackle. *Petition* at 12. While these principles are important constitutional and legal principles that the Commissioner must consider in managing the state's wildlife assets, neither the Minnesota Constitution nor the common law wildlife trust doctrine confer on the Commissioner rulemaking authority.

49. The obligations set forth by both the Minnesota Constitution and the wildlife trust doctrine are equally applicable to the Minnesota legislature, which delegates to the executive branch the legal authority to adopt rules to meet the state's obligations under both the Minnesota Constitution and the wildlife trust doctrine. The Minnesota legislature has twice instructed the DNR to stand down on much narrower rule making attempts to address this issue, first when it imposed the moratorium on the adoption of a rule banning the use of lead shot in WMAs in the Farmland Zone and again in 2018 when it declined to lift the moratorium. Absent direction from the legislature, it would be imprudent to proceed on a rule making proposal of the breadth proposed by the Petition.

50. While the Commissioner does have broad statutory authority to adopt rules setting limits, seasons, establishing harvest zones, and setting seasons and methods of take in special management waters, the Minnesota statutory scheme regulating hunters and anglers generally regulates by species and geographically. *See* Minn. Stat. §§ 84.027, subds. 13 and 13a; 97A.045, subd. 3; 97C.385; 97C.005; 97C.401 (outlining the general rule making authority of the Commissioner). *See* Minn. Stat. 97B (outlining statutes regulating state hunters by species) and Minn. Stat. 97C (regulating fishing including methods of harvest). Likewise, Minnesota rules regulating hunting are either species-specific and/or apply to specific geographic regions. Minn. R. Chs. 6232 through 5242. And while Minnesota does regulate the number of hooks an angler can use on waters of the state, other tackle regulations are undertaken on a species-by-species and lake-by-lake basis. Minn. R. 6262.0100, subp. 6 (regulating the number of hooks an angler can use), *see e.g.* Minn. R. 6264.0400, subp. 4 (designating tackle restrictions on Lake Mille Lacs).

51. The breadth of the proposed rule advanced by the Petitioner exceeds that of any rule adopted by any state to date and exceeds that of any statute adopted by any state legislature to date, including California. For example, although the California legislature has adopted a comprehensive ban on the use of lead shot and ammunition by state hunters it has not adopted a similar ban on lead tackle. Of the states regulating the use of lead tackle only, three have done so by administrative rule; the remaining have done so through legislative action. Additionally, none of the states regulating the use of lead tackle by anglers have banned the use of all fishing tackle; these states have only banned the use of sinkers or jigs weighing one ounce or less.

FINDINGS OF FACT AND ORDER REGARDING Petition for Adoption of Rules Requiring Non-toxic Fishing Tackle and Non-toxic Ammunition

52. The vast majority of states regulating the use of lead shot and/or ammunition have limited the reach of their regulation by either species or geographic area. Only California has adopted a statewide ban on the use of lead shot and ammunition by hunters harvesting wildlife within the state.

Conclusions


53. Given the breadth of the proposed rules and the number of stakeholders potentially affected by the proposed rules, the Commissioner concludes that this proposal is one more appropriately addressed by the Minnesota legislature.

54. As set forth in ¶¶ 2 through 52 herein, the Commissioner finds that, given the scope and breadth of the proposed rules, the lack of data documenting potential impact of the proposed rules, the lack of documented broad stakeholder support for the proposed rules, and the history documenting the state's failed attempts to adopt narrower regulations addressing non-toxic shot and tackle, there is an insufficient basis to commence rulemaking.

Order

Therefore, Petitioners' request to adopt rules banning the possession and all lead shot, lead ammunition and lead fishing tackle when taking wildlife within the State is hereby **DENIED**.

Dated: November 4, 2019

By: 
SARAH STROMMEN
Commissioner
Department of Natural Resources