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Ban on Plastic Microbeads: Too Narrow, or Just Narrow Enough?

Liz Michalowska*

President Barack Obama signed the Microbead-Free Waters Act of 2015 (MFWA) which banned plastic microbeads in 2015.¹ The MFWA specifically banned plastic microbeads found in cosmetic consumer exfoliants that get rinsed and released into waste-water treatment centers, which then flow into lakes, rivers, and oceans.² However, the MFWA does not regulate microbeads found in consumer products that are not rinsed off, such as deodorants, lotions, or other non-cleansing products. The Act also does not ban non-cosmetic microbeads, ranging from those found in cleaning products and medical applications to oil and gas exploration. Critics of the MFWA argue that the ban is too narrow because it does not include all products that contain microbeads,³ and because it does not do enough to rid marine environments of already existing microbeads.⁴ This article will argue that the federal ban is just narrow enough because it closed several statutory loopholes created by individual state bans before the MFWA passed.

Defined under the MFWA as tiny pieces of plastic less than five millimeters in diameter, microbeads, also known as microplastics, are added to many consumer products.⁵ Because of their small size, microbeads easily enter waterways through the discharge of municipal sewage and liquid waste. The Great Lakes, in particular, have a large concentration of microplastics.⁶ According to a study published in the Marine Pollution Bulletin, the 5 Gyres Institute and State University of New York Fredonia found that of the plastics found in the Great Lakes, microplastics comprised 90% of the plastics.⁷ Microbeads present a greater health risk than larger plastic debris because they resemble aquatic food, leading fish and other organisms mistakenly consume them.⁸ Once ingested, the toxic chemicals in microbeads can transfer into the body tissues of fish and other organisms that are frequently consumed by humans.⁹

Because of Lake Michigan’s importance to Illinois, state legislators decided to take the lead in counteracting pollution in the Great Lakes. On June 8, 2014, Governor Pat Quinn signed legislation to make Illinois the first state in the nation to ban the manufacture and sale of personal care products containing synthetic plastic microbeads. Soon after, other states passed their own laws banning microbeads, including New Jersey, Colorado, Indiana, Maryland, Maine, Wisconsin, Connecticut, and California (in that order) implemented their own bans, largely defining microbeads in the same manner.¹¹ The problem with this definition is that the word “non-biodegradable” created a loophole for manufacturers to add microbeads that are biodegradable. The definition further allowed for a broad interpretation for what biodegradable means. Without a clearer provision, a manufacturer can produce microbeads that do technically decompose, but take years, sometimes decades, to do so.¹²

To address the ambiguity, the MFWA clearly defined plastic microbead as “any solid plastic particle that is less than five millimeters in size and is intended to be used to exfoliate or cleanse the human body or any part thereof.”¹² The federal law makes no exception for biodegradable beads. Not only does that clarify the definition of microbeads, but it also alleviates the need to define the term “non-biodegradable” found in so many state laws. In prohibiting all microbeads, and not just non-biodegradable ones, the MFWA takes an important step toward preventing further microbead contamination.

Additionally, not all states prohibited the manufacturing and accepting for sale of products containing plastic microbeads. Only eight states prohibited the manufacture, and sometimes the production, for sale of personal care products containing microbeads.¹⁶ Of those, only six states included language banning the acceptance for sale of these products.¹⁷ Furthermore, only three states included language prohibiting the offer for sale on such products.¹⁸ The differences in language could have led to loopholes available to those who import or simply distribute products with microbeads. Microbeads manufacturers are generally global and develop products for the national market. The varying and ambiguous state-by-state bans would have created distribution and marketing challenges. Making the federal ban this narrow was the most fitting way to address the microbead contamination of waterways because the MFWA clarified what manufacturers were authorized to do.

When Illinois passed its law, it banned its citizens from manufacturing for sale and accepting for sale personal care products containing synthetic plastic microbeads.¹¹ The state ban defined synthetic plastic microbeads as “any intentionally added, non-biodegradable, solid plastic particle measured less than five millimeters in size, and that is used to exfoliate or cleanse in a rinse-off product.”¹² Following the Illinois ban, New Jersey, Colorado, Maryland, Maine, Wisconsin, Connecticut, and California (in that order) implemented their own bans, largely defining microbeads in the same manner.¹¹ The problem with this definition is that the word “non-biodegradable” created a loophole for manufacturers to add microbeads that are biodegradable. The definition further allowed for a broad interpretation for what biodegradable means. Without a clearer provision, a manufacturer can produce microbeads that do technically decompose, but take years, sometimes decades, to do so.¹²

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To further address what manufacturers and retailers could and could not do, Congress enacted simpler language. The MFWA prohibits “[t]he manufacture or the introduction or delivery for introduction into interstate commerce of a rinse-off cosmetic that contains intentionally-added plastic microbeads.”

The vital language in the legislation is the phrase “interstate commerce.” The Commerce Clause grants Congress authority to regulate commerce between states. “Interstate commerce” applies to all steps in a product’s manufacture, packaging, and distribution, so it is rare that a cosmetic product on the market is not in “interstate commerce” under the law. As such, this phrase eliminates any uncertainty regarding the manufacture or the distribution of cosmetic rinse-off products with plastic microbeads.

Because it eliminates uncertainty and potential loopholes, the MFWA is an important first step toward reducing new pollution into maritime environments. Removing existing microbeads is difficult, so Congress used its authority under the Commerce Clause to prevent further contamination. By focusing on what Congress could do immediately, it created a solution to an existing problem, and it did so practically and economically. The narrowness of the legislation works because it closed potential loopholes industries could have exploited, and the MFWA paved the way for keeping future microbead pollution out of our waterways.

ENDNOTES

3 Strifling, supra note 1, at 159, 161-62.
5 Id. at 149, 152.
6 Id. at 153.
7 Id.
8 Id.
9 Id. at 154.
13 Schroeck, supra note 10, at 276-81.
14 Id. at 282.
16 Schroeck, supra note 10, at 283 (noting that only Illinois, New Jersey, Colorado, Indiana, Maryland, Maine, Wisconsin, and Connecticut microbead laws have language prohibiting the manufacture, and sometimes production, for sale of products containing microbeads).
17 Id. (distinguishing that only Illinois, Colorado, Indiana, Maryland, Maine, and Wisconsin microbead laws include language banning the acceptance for sale of products containing microbeads).
18 Id. (highlighting that only New Jersey, Connecticut, and California include language banning the offer for sale on such products).
20 Id.
21 U.S. CONST. ART. 1, § 8, CL. 3.