

Why Mercury Tuna Is Still Legal

The Bush FDA helped industry suppress the bad news about mercury. Still want fish for dinner?"

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First, Deborah Landvik-Fellner's hair started falling out. Then her speech began to slur and her memory grew unreliable. Her heart started fluttering, and her hands shook. One day she walked out of the supermarket and woke up surrounded by a crowd of people. She'd collapsed in the parking lot for no apparent reason. Landvik-Fellner, then 45, went to one doctor, then another, and another. None could figure out what was wrong. Finally, in 2004, after five years of weird symptoms, her husband Mike saw a TV show about a man who was poisoning his business partner with mercury, a potent toxin that can damage the heart, nervous system, and kidneys. The business partner's symptoms—shaky hands, staggering gait—reminded Mike of his wife's. On a lark, he suggested that she have her blood tested. When the results came back, they were both stunned: 48 parts per billion of mercury, nearly 10 times what the Environmental Protection Agency says is safe.

A few Google searches later, the Fellners, who own an auto shop in Rockaway, New Jersey, had solved Deborah's health mystery. For some 12 years, she'd been eating a can of albacore tuna every day, because it was one of the few foods that didn't exacerbate her Crohn's disease. (Her family, of Norwegian extraction, consumed a lot of fish anyway. "We'd think nothing of putting a piece of cod on a piece of flatbread for breakfast.") She'd never realized that most tuna sold in the United States is contaminated with the toxic heavy metal—some up to double the epa's safety benchmark.

Landvik-Fellner stopped eating tuna, and within about a year, her symptoms began to subside. But by now she was angry, and confused. If eating tuna could make your hair fall out, shouldn't the label tell you so? In 2006, she filed a lawsuit against Tri-Union Seafoods, parent company of Chicken of the Sea, alleging that the company had violated the New Jersey Consumer Fraud Act by failing to disclose that its product contained mercury.

"Toxic tort" cases are notoriously hard to win, and Landvik-Fellner faced long odds against the deep-pocketed industry. That much she knew. What she didn't anticipate was that her biggest obstacle would turn out to be the US Food and Drug Administration—the very agency responsible for protecting the public from mercury in the first place.

tuna is big business. Americans eat nearly three pounds of canned tuna per capita every year, making it the nation's second most popular seafood (behind shrimp). The government promotes it via school lunch programs, wic (the federal food program for poor women and children), and even in the fda and US Department of Agriculture dietary recommendations. It's a staple of low-carb diets. Bodybuilders binge on it. Low in fat, high in protein, canned tuna contains lots of omega-3 fatty acids that are thought to protect against heart disease and boost brain development early in life. Some tuna cans come stamped with the American Heart Association seal of approval.

But thanks to emissions from power plants and garbage incinerators, tuna also absorbs significant amounts of methylmercury, a form of mercury that concentrates in the fatty tissues of big fish and humans. Fatal in high doses, mercury at lower levels has been linked to heart disease in older men and developmental problems in babies. Tuna is not the highest-

mercury fish we eat—that honor belongs to swordfish and tilefish—but it is by far the most widely consumed. "Tuna is the largest source of mercury in the diet because people eat so much of it," says Edward Groth, a scientist who has written a report on mercury in fish for the environmental groups Oceana and Mercury Policy Project.

None of this is news to federal regulators. In 1970, a New York chemistry professor tested a can of tuna in his pantry and discovered that it contained significantly more mercury than what the fda then considered safe. After running tests of its own, the agency recalled nearly 1 million cans of tuna. It also issued an "action level" under which fish with more than 0.5 parts per million (ppm) of methylmercury could be pulled from the market.

An action level is not a regulation. It doesn't require anyone to do anything. Even so, the fishing industry found the new benchmark so intolerable that it sued the fda. In 1979, drawing mostly on a National Marine Fisheries Service assessment that relaxing the guideline would "provide economic benefit" to industry, the fda doubled the level to 1 ppm, making it twice as high as what the epa (which issues mercury advisories for anglers) and the European Union consider safe. The action level in China is 0.3 ppm—more than three times more stringent than the fda's. (Tuna often exceeds even the weak US standard: In 2006, for instance, the group Defenders of Wildlife tested cans of tuna straight out of grocery stores and found that 1 in 20, particularly those imported from Latin America, had mercury above the fda action level and could, in theory, be pulled from the shelves.)

After its initial burst of activity in the 1970s, the fda seemed to lose interest in tuna. In the 1990s, it even stopped its occasional tests of store-bought fish. But after years of criticism from environmental groups and scientists, it drafted an advisory in 2000 that warned pregnant women about mercury. The original draft listed canned tuna as a high-mercury product. But then, fda officials met privately with representatives of the country's three largest tuna companies (Bumble Bee, Tri-Union, and StarKist), the US Tuna Foundation, and the National Food Processors Association.

The companies were very worried. The Tuna Foundation had warned the agency in private meetings that including canned tuna in the mercury advisory could cause sales to plummet nearly 25 percent, and that seafood producers "would face the distinct possibility of numerous class action lawsuits." fda focus groups also suggested that tuna consumption would fall. Sure enough, the final advisory—released after President Bush had taken office—didn't include canned tuna.

When the fda failed to come through on tougher regulations, some states stepped up with more stringent warnings. Washington, for example, warns that children under six should eat no more than half a can of albacore a week. Scientists, doctors, and environmental groups also continued to urge the fda to adopt more stringent federal warnings based on the epa's reference dose for safe mercury exposure.

In 2003, the fda did revise the mercury advisory for several kinds of fish, but again it bent the science to accommodate the industry's interests. Clark Carrington, an fda official, told the agency's Food Advisory Committee that in drawing up three categories for fish—high, medium, and low mercury—agency staffers had crafted the boundaries so that canned light tuna would end up in the low mercury group "in order to keep the market share at a reasonable level." (Canned light represents some 75 percent of the US tuna market; the rest is albacore, or white tuna, which tends to be higher in mercury.)

The new fda advisory warned pregnant and nursing women to eat no more than 6 ounces of albacore, and no more than 12 ounces of chunk light tuna, per week. The fda recommended following the same guidelines for children, with the vague suggestion that they eat "smaller portions." A 44-pound preschooler who follows the fda guideline would consume four times the mercury the epa considers safe.

The fda relayed its advisory mostly through brochures in doctors' offices, never requiring warnings in stores or on tuna cans. Still, the industry has blamed the advisory for a 10 percent drop in sales within a year, and it's worked hard to mute the message. In 2005, the tuna companies launched a \$25 million campaign to counteract the fda's advisory, with full-page newspaper ads touting the brain-building benefits of omega-3 fatty acids ("Tuna: A Smart Catch") and reassuring women that "No government study has ever found unsafe levels of mercury in women or young children who eat canned tuna." (True, but none has ever looked.) David Burney, then the executive director of the US Tuna Foundation, told the New York Times in 2005 that his wife ate a can of albacore tuna almost every day while pregnant, and that his nine-year-old triplets ate several cans of albacore a week.

The US Tuna Foundation (which recently merged with the National Fisheries Institute) also enlisted spokespeople such as celebrity pediatrician Dr. Lillian Beard, who earned \$6,000 a month for two days of work promoting canned tuna, plus \$10,000 to serve on a nutrition advisory council for six months. In October 2004, Beard wrote a column in Pediatric News that suggested giving children "a little warm milk or tuna fish before bedtime" to help make them sleepy. She made no mention of her industry ties.

The US Tuna Foundation also underwrote science to help make its case, in one instance picking up nearly the entire \$500,000 cost of a 2005 Harvard Center for Risk Analysis study and using the results to suggest that Americans weren't eating enough fish. The Center for Consumer Freedom, a nonprofit founded by the tobacco industry to fight restaurant smoking bans, similarly rose in tuna's defense, creating a website, FishScam.com, that claims the fda standards are actually overcautious.

Meanwhile, reporters who have written about mercury in tuna have found themselves in hot water with the industry. The National Fisheries Institute and the US Tuna Foundation have waged aggressive and public attacks on people like Marian Burros at the New York Times (who earlier this year published a story warning of mercury in sushi tuna) and Larry Wheeler at USA Today. When I contacted the Fisheries Institute, its spokesman, Gavin Gibbons, first grilled me about whether this story had been prompted by an environmental group (it wasn't) and then warned that all our conversations would be recorded and the transcripts posted on the organization's website, along with any correspondence. In response to my specific questions, Gibbons emailed that linking high blood mercury levels to any kind of symptoms "is an unproven assertion that flies in the face of independent and proven scientific knowledge about canned tuna and all seafood's proven benefits...It is irresponsible to perpetuate anecdotal tales of high seafood consumption causing health concerns when those types of stories contradict published science showing the health benefits of eating fish at least twice per week."

luke lindley is one of the people Gibbons says it would be irresponsible to write about. As an undergrad at Stanford, the now-24-year-old medical student was "deeply immersed" in bodybuilding, so he ate "tuna for breakfast, tuna for lunch, tuna for dinner" for years. In 2003, he began having trouble with his memory. His hair fell out and he suffered gastrointestinal problems so severe he ended up taking a year off med school. Finally—after seeing a news report on mercury in tuna—he asked his doctor to test a sample of his hair. According to

another doctor who reviewed the records, it had mercury levels higher than in any patient the doctor had ever seen. "I thought I was eating a low-fat, healthy diet," says Lindley. "As it turned out, I was ingesting enough mercury to make my hair fall out."

Dr. Jane Hightower has made something of a cottage industry out of treating fish consumers suffering from elevated mercury levels. In 2003 the San Francisco physician published a paper in *Environmental Health Perspectives* after surveying her entire patient load and testing more than 100 people whose questionnaires suggested they consumed a lot of fish. The majority had blood mercury levels well above what the EPA considers safe. One was a 10-year-old named Matthew Davis who suffered serious neurological problems his doctors suspected were from the three to six ounces of canned albacore he ate daily. His fingers curled involuntarily, and his hands shook when he tried to write. The problems mostly resolved after he quit eating tuna.

Dr. Michael Gochfeld, a professor in environmental and occupational health sciences at the Robert Wood Johnson Medical School in New Jersey, says that mercury poisoning from fish is probably underreported because doctors don't know to look for it. His clinic at the medical school, he says, has been seeing more cases—at least half a dozen a year. People come in complaining of slurred speech, clumsiness, and vision problems. "It is usually related to fish," he says.

Yet, like the tuna industry, the FDA says there's nothing to worry about. "There are no confirmed cases of adverse effects from methylmercury in commercial fish in the United States," says Stephanie Kwisnek, an FDA spokeswoman. "There are infrequent anecdotal reports in the media that are virtually impossible to confirm. The FDA does not track them on any kind of a formal basis."

Deborah Landvik-Fellner's Chicken of the Sea lawsuit should have been fairly straightforward. That she ate a lot of canned tuna is indisputable, as is the fact that she had steeply elevated levels of mercury in her blood. Whether mercury caused all of her symptoms, whether Tri-Union ought to be held responsible for the effects of what they call her "abnormal consumption," even the definition of "abnormal," are the kind of disputed facts usually left to a jury. But so far, Landvik-Fellner hasn't come anywhere near a jury—in good part because the Bush FDA has worked to protect industry from claims like hers.

In the Landvik-Fellner case, Tri-Union has used an increasingly popular legal strategy, arguing that her claim was "preempted" by federal law. The argument goes like this: If a product is regulated by the federal government, however weakly, consumers shouldn't be allowed to sue—and states should be prohibited from passing regulations or issuing health and safety warnings more stringent than the feds'.

But Tri-Union went one step further. It argued that Landvik-Fellner's case was preempted because the FDA had refused to require warning labels on tuna—in other words, when the feds fail to regulate a product, that, too, can preempt state law. It was an argument familiar to top officials at the FDA. In fact, Daniel Troy, the agency's chief counsel from 2001 to 2004, was a lawyer who'd spent most of his career in the private sector suing the FDA on behalf of drug and food companies. Troy, who was a leading proponent of the preemption doctrine, essentially ran the agency for more than a year before President Bush appointed Lester Crawford, a former vice president of the National Food Processors Association, as FDA commissioner. During his tenure, Troy invited big companies to bring him cases in which the agency could help defeat anti-industry lawsuits using the preemption argument. One of those cases involved a suit by the California attorney general's office seeking to force tuna

companies to disclose their product's mercury content on the label. A lawyer representing the companies suggested to Troy that a letter from Crawford might help the industry's preemption argument. The lawyer helpfully enclosed a lengthy memo outlining the points the commissioner should include.

In August 2005, a letter precisely hitting all of the tuna lawyer's points arrived on the desk of California attorney general Bill Lockyer. Tuna companies quickly introduced it in court. Barely a month later, Crawford resigned from the fda in connection with criminal charges that he'd misreported his ownership of stock in fda-regulated companies.

But his letter lived on in the courts: In the California case, a lengthy trial featuring various industry spokespeople—including pediatrician Beard, who was paid \$5,000 to testify that if people got worried about mercury in tuna, they might eat more junk food—ended with the judge citing Crawford's letter as a key factor in ruling for the tuna companies. And the letter made another appearance in Landvik-Fellner's case: Tri-Union's lawyers have brought it up as evidence that her lawsuit is preempted by federal regulations. After a year of legal wrangling, in January 2007 a US District Court judge agreed with the industry—and once again the ruling cited what the judge called Crawford's "persuasive" letter.

Fellner appealed the case to the 3rd Circuit Court of Appeals, and on August 19, just after this story was published in our print edition, the court handed down a remarkable decision in her favor. A three-judge panel agreed with her arguments that a letter from the FDA commissioner written at the behest of the tuna company's lawyers was not the sort of federal action that could trump the state law. The court also scoffed at the notion that the FDA's advisory on mercury in fish qualified as a federal regulation, which requires formal proceedings, public criticism, and other serious vetting. "[W]e fail to see how an educational campaign might preempt Fellner's lawsuit," the panel wrote.

In fact, the court found that the New Jersey laws that Fellner sued under complemented, rather than conflicted with, the federal guidelines on mercury. And in a conclusion that is no doubt giving the tuna industry fits, the court noted that contrary to the industry's pleas, it would be fairly simple to come up with a warning label that would comply with both the FDA and New Jersey law. That last point may have implications beyond Fellner's case.

The original Proposition 65 litigation in California, brought by the state attorney general to force the tuna companies to put warning labels on tuna cans, is currently on appeal in the California state courts. Oral arguments haven't been scheduled yet, but lawyers in the attorney general's office have already alerted the appellate court of the decision in the Fellner case. The California courts don't have to follow the federal ones, but they usually give them quite a bit of deference. If the California courts do align with the 3rd Circuit, they could open the door to states requiring warning labels about mercury on tuna cans. Fellner, for her part, is thrilled with the outcome. "People are feeding their children tuna fish. There are still a lot of people out there who don't know," she says.

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<http://www.motherjones.com/news/feature/2008/09/exit-strategy-tuna-surprise.html>