

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 20

RIN 1018-AD41

Migratory Bird Hunting; Decision on the Conditional Approval of Bismuth-Tin Shot as Nontoxic for the 1995-96 Season

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Final rule.

SUMMARY: The U.S. Fish and Wildlife Service (Service) is publishing this final rule to notify the public of the interim conditional approval of bismuth-tin shot for the 1995-96 migratory bird hunting season. Concluded acute toxicity studies, ongoing toxicity reproductive studies undertaken by the Bismuth Cartridge Company, and other pertinent materials indicate that bismuth-tin shot is nontoxic when ingested by waterfowl.

EFFECTIVE DATE: This rule becomes effective on September 1, 1995.

FOR FURTHER INFORMATION CONTACT: Paul R. Schmidt, Chief, or Keith Morehouse and Pete Poulos, Staff Specialists, Office of Migratory Bird Management, U.S. Fish and Wildlife Service, ms 634 ARLSQ, 1849 C Street NW., Washington DC 20240 (703/358-1714).

SUPPLEMENTARY INFORMATION: The Service published a final regulation in the January 3, 1995, **Federal Register** (60 FR 61) to provide for conditional approval of bismuth-tin shot (in a mixture of [nominally] 97-3 percents, respectively) as nontoxic for the taking of waterfowl and coots during the 1994-1995 hunting season. This action was in response to a petition for rulemaking from the Bismuth Cartridge Company received June 24, 1994. The petition requested that the Service modify the provisions of 50 CFR section 20.21(j), to legalize the use of bismuth-tin shot on an interim, conditional basis for both the 1994-95 and the 1995-96 seasons. The petition cited the following reasons in support of the proposal: a) bismuth is nontoxic; b) the proposed rule is conditional; and c) the evidence presented in the record, i.e., the application from the Bismuth Cartridge Company. This petition acknowledged responsibility by the Bismuth Cartridge Company to complete all the nontoxic shot approval tests as outlined in 50 CFR section 20.134. The Service granted conditional approval (effective December 30, 1994) of the use of bismuth-tin shot for the 1994-95 hunting season only. For a complete

review of the bismuth-tin shot application and review process, refer to the Supplementary Information Section of the January 3, 1995, **Federal Register** (60 FR 61).

This regulatory action is now taken to further amend Section 20.21(j) to extend the conditional approval for bismuth-tin shot to the 1995-96 hunting season. This is based on a request made to the Fish and Wildlife Service by the Bismuth Cartridge Company on March 20, 1995. Results of the concluded 30-day acute toxicity test and progress made by the Bismuth Cartridge Company in their current reproductive toxicity testing are viewed as justification for extending conditional approval into the next hunting season. A status report of the current reproductive toxicity testing dated July 7, 1995, and received for review by the Office of Migratory Bird Management concludes that as of day 150 of the test "... we had observed no toxic effects, which we can attribute to ingested Bi shot, on young adult ducks, or their offspring..."

The reproductive toxicity test is being conducted by Dr. Glenn Sanderson and follows a testing protocol reviewed and approved by the Service, with technical assistance provided by the Branch of Environmental Contaminants Research of the Patuxent Environmental Service Center. The general outline of the reproductive toxicity test given below is not a complete description of the testing protocol, but gives the basic outline of the test procedures being conducted:

The test consists of 60 male and 60 female mallards and uses No. 4 lead, steel, and candidate (bismuth-tin) shot. Males and females will be paired randomly and divided into four groups that will be dosed with lead, steel, bismuth-tin, and sham dosed. After diet and light manipulation, birds will be brought into breeding condition. Nests will be checked twice daily with recorded data including clutch initiation, number of eggs laid, egg fertility, egg hatchability, and number of ducklings produced. Eggs collection will continue until 21 uncracked eggs have been collected or until 150 days have elapsed. Eggs will be placed in an incubator and after hatching, ducklings will be examined for signs of intoxication and illness. Blood will be collected with hematocrits determined and the blood analyzed. Livers, kidneys, and gonads from adults will be examined for gross and microscopic lesions, and analyzed for major elements found in the candidate shot and for major essential and trace elements. Livers and kidneys will be collected from ducklings and will be

examined for gross and microscopic lesions, and analyzed for major elements contained in the candidate shot and for major essential and trace elements. Blood, liver, kidneys, and gonads will be analyzed by ICP for calcium, potassium, magnesium, zinc, copper, tin, iron, and any metal other than Bismuth or lead. Bismuth and lead in the livers, kidneys, and gonads, and blood will be analyzed by graphite furnace atomic absorption spectrometry.

Since the mid-1970s, the Service has sought to identify shot that, when spent, does not pose a significant hazard to migratory birds and other wildlife. Currently, only steel shot has been approved by the Service Director as nontoxic. The Service believes, however, that there may be other suitable candidate shot materials that could be approved for use as nontoxic shot. The Service is eager to consider these other materials for approval as nontoxic, and does not feel constrained to limit nontoxic shot options.

In summary, this rule extends conditional approval for the use of bismuth-tin shot for waterfowl and coot hunting to the 1995-96 season. Additionally, the applicant, wishing to obtain final unconditional approval for bismuth-tin shot as nontoxic, is required to obtain season-by-season approval until successfully completing the remaining tests required by 50 CFR section 20.134. One additional standard will be applied to the unconditional approval of bismuth-tin shot. Since bismuth is a by-product of the smelting of iron, copper, and tin, it is not surprising that traces of lead may be present in bismuth-tin shot. The Service has initiated discussion with the Branch of Environmental Contaminants Research at the Patuxent Environmental Science Center to determine the maximum environmentally acceptable level of lead in bismuth-tin shot. Once this maximum level is determined, it will be stated in any regulation granting unconditional approval for the use of bismuth-tin shot. It will be the Service's position that any bismuth-tin shot manufactured with lead levels exceeding those stated in the regulation will be considered toxic and therefore, illegal.

We are encouraged by the progress that has been made to develop a noninvasive field testing device to assist law enforcement personnel in detecting the use of illegal shot. Service law enforcement personnel will be asked to assess any noninvasive field testing equipment on the market to determine their utility and accuracy. Final unconditional approval, if otherwise

proper, would be contingent upon the development and availability of a noninvasive field testing shot device.

Public Comments

The June 14 proposed rule (60 FR 31356) invited comments from interested parties. Closing date for receipt of all comments was July 14, 1995. During this 30-day comment period, the Service received 35 comments. These comments consisted of 1 from Flyway Councils, 5 from State fish and wildlife agencies, 10 from other organizations, and 18 from individuals. Of the 35 comments, only the Indiana Department of Natural Resources expressed opposition to the proposed rule. They stated that bismuth-tin shot should not be approved for use until after reproductive toxicity testing was completed and noninvasive field detection procedures were available for law enforcement personnel. The field testing procedure issue was also raised by the New York Department of Conservation, Division of Law Enforcement, that expressed concern that the level of noncompliance with the law "is apt to increase" without a viable noninvasive field test; however, this comment did acknowledge some positive aspects to the availability of this alternative shot. The State of South Carolina also expressed concern about the difficulty facing law enforcement personnel when inspecting shot in the field, but otherwise supported the development of alternative shot.

Comments received from the Atlantic Flyway Council and the States of Louisiana and New Jersey were supportive of this regulation. The Atlantic Flyway Council expressed concern that the approval process is confusing to the average hunter and they suggest that the Service make every effort to quickly clarify the legal status of bismuth-tin shot. Several other comments also included a general concern that the approval process was confusing.

Organizations were represented by 10 comments. Support for this proposal came from the California Waterfowl Association, The Wildlife Legislative Fund of America, Ontario Federation of Anglers & Hunters, New Jersey State Federation of Sportsmen's Clubs, Inc., Michigan United Conservation Clubs, New York State Conservation Council Inc., Congressional Sportsmen's Foundation, National Rifle Association of America, Safari Club International and the Congressional Sportsmen's Caucus. These organizations used phrases such as "strongly supports," "in favor of," "unconditional support," and

"unanimously urges" to endorse this proposal.

Individuals submitted 19 comments that were in favor of this proposal, with several of the comments including statements in opposition to steel shot. A comment from one individual, while not stating opposition to the bismuth-tin proposal per se, expressed the opinion that opposition to steel is not due to the performance of the shot but instead, due to the improper use of the steel shot by the hunter.

Response to Comments

While the comments received expressed minimum opposition to this regulation, there was concern for the difficulty that would be experienced by law enforcement personnel in detecting the shot in the field and in the general procedure/timing of the bismuth-tin shot approval process.

The Service continues to support the development of a noninvasive field detection device to address law enforcement concerns and continues to believe that this is an important component of the alternative shot approval process. It is the current position of the Service to withhold unconditional approval of this shot until a viable fully tested field detection device is available.

The Service recognizes the difficulty that was caused last year when conditional approval of bismuth-tin shot was granted after the start of the 1994-1995 hunting season. As we stated in the January 3, 1995, **Federal Register** (60 FR 61) regulation, conditional approval was dependent on conclusion of the Phase 1 30-day acute toxicity test. The test was concluded after the start of the 1994-1995 hunting season and the Service felt that the effort made by the Bismuth Cartridge Company to complete the testing, warranted immediate approval. With the cooperation of the shot manufacturer, the Service will make every effort to avoid a similar situation from occurring in the future.

The Service anticipates the required toxicity testing and the development of a viable noninvasive field detection device will be concluded in the near future. If test results prove nontoxicity and a field device is readily available to law enforcement personnel, it is anticipated that unconditional approval for the use of this shot can be granted prior to the 1996-1997 hunting season.

NEPA Consideration

Pursuant to the requirements of section 102(2)(C) of the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4332(C)), and the

Council on Environmental Quality's regulation for implementing NEPA (40 CFR 1500-1508), an Environmental Assessment has been prepared and is available to the public at the Office of Migratory Bird Management at the address under the caption **FOR FURTHER INFORMATION CONTACT**. Based on review and evaluation of the information contained in the Environmental Assessment, the Service determined that the proposed action to amend 50 CFR 20.21(j) to allow conditional use of bismuth-tin a nontoxic shot for the 1995-96 waterfowl hunting season would not be a major Federal action that would significantly affect the quality of the human environment.

Endangered Species Act Considerations

Section 7 of the Endangered Species Act (ESA), as amended (16 U.S.C. 1531-1543; 87 Stat. 884), provides that, "The Secretary shall review other programs administered by him and utilize such programs in furtherance of the purposes of this Act" (and) shall "ensure that any action authorized, funded or carried out ... is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of (critical) habitat ..." Consequently, the Service initiated Section 7 consultation under the ESA for this rulemaking to legalize, on a conditional basis, the use of bismuth-tin shot for hunting waterfowl and coots during the 1995-96 seasons. Completed results of the Service's consultation under Section 7 of the ESA may be inspected by the public in, and will be available to the public from, the Office of Migratory Bird Management, at the address under the caption **FOR FURTHER INFORMATION CONTACT**.

Regulatory Flexibility Act, Executive Order 12866, and the Paperwork Reduction Act

The Regulatory Flexibility Act of 1980 (5 U.S.C. 601 et seq.) requires the preparation of flexibility analyses for rules that will have a significant effect on a substantial number of small entities, which includes small businesses, organizations and/or governmental jurisdictions. The Service has determined, however, that this rule will have no effect on small entities since the shot to be approved will merely supplement nontoxic shot already in commerce and available throughout the retail and wholesale distribution systems. No dislocation or other local effects, with regard to hunters and others, are apt to be evidenced. This rule was not subject to Office of Management and Budget

(OMB) review under Executive Order 12866. This rule does not contain any information collection efforts requiring approval by the OMB under 44 U.S.C. 3504.

Effective Date

This rule reflects the interim approval in the text of section 20.21(j), by restricting permission to use bismuth-tin for the 1995-96 season. Because this rule relieves a restriction, and the current hunting season begins on September 1, 1995, the Service has determined that there is good cause to establish the effective date of this rule as the first day of the hunting season, as authorized under 5 U.S.C. 553(d)(1 and 3).

Authorship

The primary author of this proposed rule is Peter G. Poulos, Office of Migratory Bird Management.

List of Subjects in 50 CFR Part 20

Exports, Hunting, Imports, Reporting and recordkeeping requirements, Transportation, Wildlife.

Accordingly, part 20, subchapter B, Chapter I of title 50 of the Code of Federal Regulations is amended as follows:

PART 20—[AMENDED]

1. The authority citation for part 20 continues to read as follows:

Authority: Migratory Bird Treaty Act (July 3, 1918), as amended (16 U.S.C. 703-711); the Fish and Wildlife Improvement Act of 1978 (November 8, 1978); as amended, (16 U.S.C. 712); and the Fish and Wildlife Act of 1956 (August 8, 1956), as amended, (16 U.S.C. 742 a-d and e-j).

2. Section 20.21 is amended by revising paragraphs (j) introductory text and (j)(2) to read as follows:

§20.21 Hunting methods.

* * * * *

(j) While possessing shot (either in shotshells or as loose shot for muzzleloading) other than steel shot, bismuth-tin ([nominally] 97-3 percents, respectively) shot or such shot approved as nontoxic by the Director pursuant to procedures set forth in §20.134.

Provided that:

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(2) Bismuth-tin shot is legal as nontoxic shot only during the 1995-96 season.

Dated: August 10, 1995.

Robert P. Davison,

Acting Assistant Secretary for Fish and Wildlife and Parks.

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