

DEPARTMENT OF THE INTERIOR**Fish and Wildlife Service****50 CFR Part 20**

RIN 1018-AT32

Migratory Bird Hunting; Approval of Three Shot Types—Tungsten-Bronze, Tungsten-Iron, and Tungsten-Tin-Bismuth—as Nontoxic for Hunting Waterfowl and Coots**AGENCY:** Fish and Wildlife Service, Interior.**ACTION:** Final rule.

SUMMARY: We (us or Fish and Wildlife Service) approve three shot types, Tungsten-Bronze [formulated of tungsten, bronze (copper and tin), and less than 1 percent iron], Tungsten-Iron (formulated of tungsten and iron), and Tungsten-Tin-Bismuth (formulated of tungsten, tin, and bismuth), as nontoxic for hunting waterfowl and coots. We assessed possible effects of all three shot types, and have determined that none of the types presents a significant toxicity threat to wildlife or their habitats. Therefore, further testing is not necessary for any of the types. An Environmental Assessment for each of the shot types is available from us.

In our proposed rule we called tungsten-bronze shot tungsten-bronze-iron (TBI) shot. However, we have concluded that it is more appropriate to call it tungsten-bronze shot because it contains less than 1 percent iron.

DATES: This rule takes effect on September 8, 2004.

ADDRESSES: Copies of the Final Environmental Assessments are available from the Chief of the Division of Migratory Bird Management, U.S. Fish and Wildlife Service, 4401 North Fairfax Drive, Mail Stop MBSP-4107, Arlington, Virginia 22203-1610.

FOR FURTHER INFORMATION CONTACT: Brian Millsap, Chief, Division of Migratory Bird Management, telephone 703-358-1714; John J. Kreilich, Jr., Wildlife Biologist, telephone 703-358-1928; or Dr. George T. Allen, Wildlife Biologist; telephone 703-358-1825; Division of Migratory Bird Management.

SUPPLEMENTARY INFORMATION:**Background**

The Migratory Bird Treaty Act of 1918 (Act) (16 U.S.C. 703-712 and 16 U.S.C. 742 a-j) implements migratory bird treaties between the United States and Great Britain for Canada, Mexico, Japan, and Russia (then the Soviet Union). These treaties protect certain migratory birds from take, except as permitted

under the Act. The Act authorizes the Secretary of the Interior to regulate take of migratory birds in the United States. Under this authority, the Fish and Wildlife Service controls the hunting of migratory game birds through regulations in 50 CFR part 20.

Deposition of shot and release of shot components in waterfowl hunting locations is potentially harmful to a variety of organisms. Research has shown that the effects of ingestion of spent lead shot causes significant mortality in migratory birds. Since the mid-1970s, we have sought to identify shot types that do not pose significant toxicity hazards to migratory birds or other wildlife. We first addressed the issue of lead poisoning in waterfowl in a 1976 Environmental Impact Statement (EIS), and later readdressed the issue in a 1986 supplemental EIS. The 1986 document provided the scientific justification for a ban on the use of lead shot and the subsequent approval of steel shot for hunting waterfowl and coots that began that year, and set a ban on lead for waterfowl and coot hunting beginning in 1991. Since then, we have sought to consider other potential nontoxic shot candidates; we believe that other nontoxic shot types should be made available for public use in hunting, and steel, bismuth-tin, tungsten-iron, tungsten-polymer, tungsten-matrix, tungsten-nickel-iron, and tungsten-tin-iron-nickel types are now approved as nontoxic (50 CFR 20.21(j)). Compliance with the use of nontoxic shot for waterfowl hunting has increased over the last few years (Anderson *et al.* 2000). We believe that it will continue to increase as other nontoxic shot types are approved and available in growing numbers and possibly at lower cost.

On March 15, 2004, we published a proposed rule to approve these three shot types in the **Federal Register** (69 FR 12105). The applications for the three shot types included information on chemical characterization, production variability, use, expected production volume, toxicological effects, environmental fate and transport, and evaluation, and the proposed rule included this information, a comprehensive evaluation of the likely effects of each shot, and an assessment of the affected environment.

The Director of the U.S. Fish and Wildlife Service has concluded that the spent shot material will not pose a significant danger to migratory birds or other wildlife or their habitats, and therefore approves the use of Tungsten-Bronze (TB), Tungsten-Iron (TI), and Tungsten-Tin-Bismuth (TTB) as

nontoxic for hunting waterfowl and coots. Our previously approved tungsten-iron shot, an alloy of approximately 40 percent tungsten and 60 percent iron differs in composition from the 22 percent tungsten and 78 percent iron shot approved in this rule.

We received 22 comments in response to the proposed rule; 3 from state agencies and 19 from individuals. Most supported approval of all three shot types. However, as discussed below, several issues raised warranted further evaluation of our proposal.

One individual suggested that the low percentage of iron in the TB shot was not sufficient to allow detection of the shot in the field. TB shot is slightly magnetic, and TB shotshells are only very slightly attracted to a typical magnet. We tested inert loaded shotshells containing TB shot with rare-earth magnets, which we determined are sufficient to identify the shotshells in the field.

It was suggested by one commenter that the composition of TB shot should be confirmed and the reported section density should be confirmed. Analysis of the shot showed it to be 50.4 percent tungsten, 44.1 percent copper, 4.7 percent tin, and 0.8 percent iron, compared to the 51.1 percent tungsten, 44.4 percent copper, 3.9 percent tin, and 0.6 percent iron formulation submitted for approval as nontoxic. We conclude that the shot conforms with the formulation for which the submitter sought approval. The section density of the shot was 11.68 grams per cubic centimeter (g/cc), compared to the reported 12.1 g/cc.

One State agency commenter suggested that "It is getting confusing for hunters with all the non-toxic shot types * * * that perform differently. Right now, the ballistic equivalent to #2 steel is #3 bismuth, #4 Tungsten-iron, -matrix and -polymer, and #5 Hevi-shot [sic]. We have no idea how these 3 new shot types compare to steel and would not know what to recommend to hunters for use on ducks or geese." This commenter noted that it will be difficult to regulate the new shot types until more is known about their density and performance. Further, the commenter suggested that manufacturers should "be required to conduct lethality testing and publish their results before these shot types are legalized."

We agree that the increasing number of approved nontoxic shot types may be confusing. Nevertheless, we believe that it is in the best interest of waterfowl populations and the public to approve new shot types that we believe to be nontoxic. Information on sectional density of the shot types can be the

basis for simple comparisons of their likely effectiveness. We will try to make information available on the different types of approved nontoxic shot. However, lethality testing is not required by the regulations governing approval of nontoxic shot for waterfowl hunting, and it is a function of shot type, velocity, pellet buffering, and perhaps other factors that can be readily varied in different shotshell loadings. We do not believe we can effectively address lethality in nontoxic shot approvals.

Cumulative Impacts

We foresee no negative cumulative impacts of approval of the three shot types for waterfowl hunting. Approval of an additional nontoxic shot type should help to further reduce the negative impacts of the use of lead shot for hunting waterfowl and coots. We believe the impacts of approval of the three shot types for waterfowl hunting should be positive both in the United States and elsewhere. Approval of additional nontoxic shot types should help to further reduce lead poisoning of waterfowl that migrate south of the United States for the winter and of animals that prey on them or consume their carcasses.

NEPA Consideration

In compliance with the requirements of section 102(2)(C) of the National Environmental Policy Act of 1969 (42 U.S.C. 4332(C)) and the Council on Environmental Quality's regulation for implementing NEPA (40 CFR 1500–1508), we have complied with NEPA by completing draft and final Environmental Assessments and a Finding of No Significant Impact for each of the shot types. These documents are available to the public at the location indicated in the **ADDRESSES** section.

Endangered Species Act Considerations

Section 7 of the Endangered Species Act (ESA) of 1972, as amended (16 U.S.C. 1531 *et seq.*), provides that Federal agencies shall “insure 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.” We completed a Section 7 consultation under the ESA for each shot covered by this rule. Approval of these shot types is not likely to adversely affect threatened or endangered species. The results of our ESA consultations are available at the location indicated in the **ADDRESSES** section.

Regulatory Flexibility 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 include small businesses, organizations, or governmental jurisdictions. This rule is to add the three additional types of nontoxic shot that may be sold and used to hunt migratory birds to the list of those that are already approved. We have determined, however, that this rule will not affect small entities because the approved shots merely will supplement nontoxic shot types already in commerce and available throughout the retail and wholesale distribution systems. We anticipate no dislocation or other local effects, with regard to hunters and others. This rule was not subject to Office of Management and Budget (OMB) review under Executive Order 12866.

Small Business Regulatory Enforcement Fairness Act

Similarly, this is not a major rule under 5 U.S.C. 804(2), the Small Business Regulatory Enforcement Fairness Act. This rule does not impose an unfunded mandate of more than \$100 million per year or have a significant or unique effect on State, local, or tribal governments or the private sector because it is the Service's responsibility to regulate the take of migratory birds in the United States.

Executive Order 12866

In accordance with the criteria in Executive Order 12866, this rule is not a significant regulatory action subject to Office of Management and Budget (OMB) review under Executive Order 12866. OMB makes the final determination under E.O. 12866. This rule will not have an annual economic effect of \$100 million or adversely affect any economic sector, productivity, competition, jobs, the environment, or other units of government. Therefore, a cost-benefit economic analysis is not required. This action will not create inconsistencies with other agencies' actions or otherwise interfere with an action taken or planned by another agency. The action is consistent with the policies and guidelines of other Department of the Interior bureaus. This action will not materially affect entitlements, grants, user fees, loan programs, or the rights and obligations of other recipients because it has no mechanism to do so. This action will not raise novel legal or policy issues because the Service has already

approved several other nontoxic shot types.

Executive Order 12866 requires each agency to write regulations that are easy to understand. We received no comments suggesting improvements to this rule.

Paperwork Reduction Act

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number. The information collection associated with this rule (*see* 50 CFR 20.134) is already approved under OMB control number 1018–0067, which expires December 31, 2006.

Unfunded Mandates Reform

We have determined and certify pursuant to the Unfunded Mandates Reform Act, 2 U.S.C. 1502, *et seq.*, that this rulemaking will not impose a cost of \$100 million or more in any given year on local or State government or private entities.

Civil Justice Reform—Executive Order 12988

We have determined that this rule meets the applicable standards provided in Sections 3(a) and 3(b)(2) of Executive Order 12988.

Takings Implication Assessment

In accordance with Executive Order 12630, this rule, authorized by the Migratory Bird Treaty Act, does not have significant takings implications and does not affect any constitutionally-protected property rights. This rule will not result in the physical occupancy of property, the physical invasion of property, or the regulatory taking of any property. In fact, this rule will allow hunters to exercise privileges that would be otherwise unavailable, and therefore will reduce restrictions on the use of private and public property.

Federalism Effects

Due to the migratory nature of certain species of birds, the Federal Government has been given responsibility over these species by the Migratory Bird Treaty Act. This rule does not have a substantial direct effect on fiscal capacity, change the roles or responsibilities of Federal or State governments, or intrude on State policy or administration. Therefore, in accordance with Executive Order 13132, this regulation does not have significant federalism effects and does not have sufficient federalism implications to warrant the preparation of a Federalism Assessment.

Government-to-Government Relationship With Tribes

In accordance with the President's memorandum of April 29, 1994, "Government-to-Government Relations with Native American Tribal Governments" (59 FR 22951) and 512 DM 2, we have determined that this rule has no effects on Federally recognized Indian tribes.

Energy Effects

In accordance with Executive Order 13211, this rule, authorized by the

Migratory Bird Treaty Act, does not significantly affect energy supply, distribution, and use. This rule is not a significant energy action and no Statement of Energy Effects is required.

List of Subjects in 50 CFR Part 20

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

■ For the reasons discussed in the preamble, we hereby amend part 20, subchapter B, chapter I of Title 50 of the Code of Federal Regulations as follows:

PART 20—[AMENDED]

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

Authority: 16 U.S.C. 703–712; 16 U.S.C. 742 a–j; Pub. L. 106–108.

■ 2. Section 20.21 is amended by revising paragraph (j) to read as follows:

§ 20.21 What hunting methods are illegal?

* * * * *

(j)(1) While possessing loose shot for muzzleloading or shotshells containing other than the following approved shot types.

Approved shot type	Percent composition by weight
bismuth-tin	97 bismuth, 3 tin.
steel	iron and carbon.
tungsten-bronze	51.1 tungsten, 44.4 copper, 3.9 tin, 0.6 iron.
tungsten-iron (2 types)	40 tungsten, 60 iron and 22 tungsten, 78 iron.
tungsten-matrix	95.9 tungsten, 4.1 polymer.
tungsten-nickel-iron	50 tungsten, 35 nickel, 15 iron.
tungsten-polymer	95.5 tungsten, 4.5 Nylon 6 or 11.
tungsten-tin-bismuth	49–71 tungsten, 29–51 tin; 0.5–6.5 bismuth.
tungsten-tin-iron-nickel	65 tungsten, 21.8 tin, 10.4 iron, 2.8 nickel.

(2) Each approved shot type must contain less than 1 percent residual lead (see § 20.134).

(3) This shot type restriction applies to the taking of ducks, geese (including brant), swans, coots (*Fulica americana*),

and any other species that make up aggregate bag limits with these migratory game birds during concurrent seasons in areas described in § 20.108 as nontoxic shot zones.

Dated: July 26, 2004.

David P. Smith,

Acting Assistant Secretary for Fish and Wildlife and Parks.

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