

Baiting of Waterfowl – Briefing

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“GREEN SHEET”

Meeting: September 11-12, 2009

Agenda Item: Baiting of Waterfowl – Briefing

Prepared By: Mike Cenci, Deputy Chief, Enforcement Program

Presented By: Chris Anderson, Region 2 Captain, Enforcement Program; and
Charles “Corky” Roberts, Special Agent, U.S. Fish and Wildlife Service

Background:

Throughout the United States, it is illegal to hunt waterfowl by the aid of baiting or on or over any baited area where a person knows or reasonably should know that the area is or has been baited.

Baiting is the direct or indirect placing, exposing, depositing, distributing, or scattering of salt, grain, or other feed that could lure or attract waterfowl to, on, or over any areas where hunters are attempting to take them. Agricultural lands offer prime waterfowl hunting opportunities.

For years, the Department has struggled with the issue of whether manipulating the harvest of a crop and then flooding the harvested area constitutes the illegal baiting of waterfowl. The reason this activity is so difficult to identify as legal or illegal is that an officer must determine whether a farmer manipulated harvest operations contrary to normal agricultural practices.

According to the U.S. Fish and Wildlife Service (USFWS), a farmer’s planting, harvest, and post-harvest manipulations must be conducted in accordance with recommendations by the U.S. Department of Agriculture’s Cooperative Extension Service to be considered normal agricultural practices. Farmers must harvest and remove grain before they can manipulate any remaining agricultural vegetation, such as corn stubble or rice stubble.

The federal regulation prohibiting waterfowl-baiting, 50 CFR 20.21, indicates that a person can legally hunt waterfowl over post-harvest manipulated crops if the field was first subject to a normal harvest and removal of grain. Post-harvest manipulation includes, but is not limited to, activities such as mowing, shredding, discing, rolling, chopping, trampling, flattening, burning, or herbicide treatments. But if a farmer manipulates a crop *prior* to a normal harvest and leaves grain or seed on the ground or on stalks contrary to normal agricultural practice, the grain or seed is considered bait. For example, it would be illegal to hunt on or over a field where a corn crop has been knocked down by a motorized vehicle or livestock but not harvested. Kernels of corn would be exposed and/or scattered.

If a farmer cannot harvest an agricultural crop or a portion thereof due to equipment failure, weather, insect infestation, or disease, the area can be legally hunted if the farmer leaves the crop intact. It is legal to hunt waterfowl in fields of unharvested standing crops and in standing crops that have been flooded. It is also legal to hunt waterfowl in fields that a farmer deliberately flooded after he or she harvested the crops.

If a farmer manipulates a crop or a portion of it after an irregular harvest or a partial harvest, the area is considered baited. For example, no waterfowl hunting could legally occur on or over a field of grain that has been partially harvested and the remainder mowed. The presence of long rows, piles, or other heavy concentrations of grain raises questions about the legality of the area for waterfowl hunting.

The Washington Department of Fish and Wildlife (WDFW) has a significant interest in banning the practice of baiting waterfowl over agricultural crops. As explained above, however, an officer must first determine whether a farmer's planting, harvest, and post-harvest manipulations are contrary to normal agricultural practices before the officer can take enforcement action. This determination must be based on solid evidence in order to stand up in court.

USFWS has embarked upon a thorough education campaign for farmers and waterfowl hunters over the past few years to reduce the illegal baiting of waterfowl over agricultural lands. The campaign includes an expanded discussion of waterfowl baiting on USFWS's Website, and outreach in the Columbia Basin to teach farmers what they can and cannot do with their crops to allow waterfowl hunting on agricultural lands. However, more needs to be done. For its part, WDFW can amend its current rule prohibiting waterfowl-baiting, WAC 232-12-264, to mirror the federal regulation. WAC 232-12-264 is less restrictive than 50 CFR 20.21, and state regulations are preempted by federal regulations if the state regulations are less restrictive than their federal counterparts.

Policy Issue(s) you are bringing to the Commission for consideration:

Should the Washington Fish and Wildlife Commission amend WAC 232-12-264 to mirror 50 CFR 20.21, so that the rule is at least as restrictive as 50 CFR 20.21?

Public involvement process used and what you learned:

USFWS learned through its outreach efforts that some farmers are unaware that their planting, harvest, and post-harvest manipulation practices constitute illegal baiting of waterfowl. By amending WAC 232-12-264 to mirror 50 CFR 20.21 and continuing to educate farmers, WDFW can take a step towards significantly reducing the waterfowl-baiting problem in Washington.

Action requested (identify the specific Commission decisions you are seeking):

Amend WAC 232-12-264 to make it consistent with 50 CFR 20.21. Ask the Department to schedule the rule proposal for briefing and public comment at the December Commission meeting.

Draft motion language:

"I move that the Department schedule a proposal to amend WAC 232-12-264 for briefing and public comment at the December Commission meeting."

Justification for Commission action:

WAC 232-12-264 must be at least as restrictive as its federal counterpart. It currently is not. By amending WAC 232-12-264, the rule will be in line with the federal regulation prohibiting waterfowl-baiting and will provide the Department with more effective tools in identifying violations and enforcing the rule.

Communications plan:

WDFW filed a CR-101 to open WAC 232-12-264 on August 27, 2009. The Department will file a CR-102 to show the amendments it proposes and to advertise the opportunity for public comment. These rule filings will be posted on the Department's Website; and details of the December Commission meeting, during which the public can provide testimony, will be conveyed through a news release prior to the meeting.

WAC 232-12-264

No agency filings affecting this section since 2003

Baiting of game birds — Unlawful.

It is unlawful to hunt game birds by the aid of baiting, or in a baited area or area posted as an upland bird feeding site. As used in this section "baiting" or "baited area" means the placing, exposing, depositing, distributing or scattering of corn, wheat or other grain, or feed so as to constitute for such birds a lure or attraction to, on or over areas where hunters are attempting to take them. Any such area will remain a baited area for ten days following the complete removal of all such grain or other feed. This shall not prohibit hunting of game birds, on or over standing crops, flooded crop lands, grain crops properly harvested on the field where grown or grains found scattered as the result of normal agricultural planting or harvesting.

[Statutory Authority: RCW 77.12.040. 99-17-034 (Order 99-118), § 232-12-264, filed 8/11/99, effective 9/11/99; 81-12-029 (Order 165), § 232-12-264, filed 6/1/81. Formerly WAC 232-12-650.]

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MIGRATORY BIRD HUNTING

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instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Thus the total annual reporting and record-keeping burden for this collection is estimated to be 112,000 hours. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing the burden, to the Service Information Collection Clearance Officer, ms-224 ARLSQ, Fish and Wildlife Service, Washington, DC 20240, or the Office of Management and Budget, Paperwork Reduction Project 1018-0015, Washington, DC 20503.

(b) General provisions. Each person hunting migratory game birds in any State except Hawaii must have identified himself or herself as a migratory bird hunter and given his or her name, address, and date of birth to the respective State hunting licensing authority and must have on his or her person evidence, provided by that State, of compliance with this requirement.

(c) Tribal exemptions. Nothing in paragraph (b) of this section shall apply to tribal members on Federal Indian Reservations or to tribal members hunting on ceded lands.

(d) State exemptions. Nothing in paragraph (b) of this section shall apply to those hunters who are exempt from State-licensing requirements in the State in which they are hunting.

(e) State responsibilities. The State hunting licensing authority will ask each licensed migratory bird hunter in the respective State to report approximately how many ducks, geese, doves, and woodcock he or she bagged the previous year, whether he or she hunted coots, snipe, rails, and/or gallinules the previous year, and, in States that have band-tailed pigeon hunting seasons, whether he or she intends to hunt band-tailed pigeons during the current year.

HISTORY: [58 FR 15098, Mar. 19, 1993; 59 FR 53336, Oct. 21, 1994; 60 FR 43318, 43320, Aug. 18, 1995; 61 FR 46350, 46352, Aug. 30, 1996; 62 FR 45706, 45708, Aug. 28, 1997; 63 FR 46399, 46401, Sept. 1, 1998]

➔ § 20.21 What hunting methods are illegal?

Migratory birds on which open seasons are prescribed in this part may be taken by any method except those prohibited in this section. No persons shall take migratory game birds:

(a) With a trap, snare, net, rifle, pistol, swivel gun, shotgun larger than 10 gauge, punt gun, battery gun, machinegun, fish hook, poison, drug, explosive, or stupefying substance;

(b) With a shotgun of any description capable of holding more than three shells, unless it is plugged with a one-piece filler, incapable of removal without disassembling the gun, so its total capacity does not exceed three shells;

(c) From or by means, aid, or use of a sinkbox or any other type of low floating device, having a depression affording the hunter a means of concealment beneath the surface of the water;

(d) From or by means, aid, or use of any motor vehicle, motor-driven land conveyance, or aircraft of any kind, except that paraplegics and persons missing one or both legs may take from any stationary motor vehicle or stationary motor-driven land conveyance;

(e) From or by means of any motorboat or other craft having a motor attached, or any sailboat, unless the motor has been completely shut off and/or the sails furled, and its progress therefrom has ceased: Provided, That a craft under power may be used to retrieve dead or crippled birds; however, crippled birds may not be shot from such craft under power except in the seaduck area as permitted in subpart K of this part;

(f) By the use or aid of live birds as decoys; although not limited to, it shall be a violation of this paragraph for any person to take migratory waterfowl on an area where tame or captive live ducks or geese are present unless such birds are and have been for a period of 10 consecutive days prior to such taking, confined within an enclosure which substantially reduces the audibility of their calls and totally conceals such birds from the sight of wild migratory waterfowl;

(g) By the use or aid of recorded or electrically amplified bird calls or sounds, or recorded or electrically amplified imitations of bird calls or sounds;

(h) By means or aid of any motordriven land, water, or air conveyance, or any sailboat used for the purpose of or resulting in the concentrating, driving, rallying, or stirring up of any migratory bird;

→ (i) By the aid of baiting, or on or over any baited area, where a person knows or reasonably should know that the area is or has been baited. However, nothing in this paragraph prohibits:

(1) the taking of any migratory game bird, including waterfowl, coots, and cranes, on or over the following lands or areas that are not otherwise baited areas --

(i) Standing crops or flooded standing crops (including aquatics); standing, flooded, or manipulated natural vegetation; flooded harvested croplands; or lands or areas where seeds or grains have been scattered solely as the result of a normal agricultural planting, harvesting, post-harvest manipulation or normal soil stabilization practice;

(ii) From a blind or other place of concealment camouflaged with natural vegetation;

(iii) From a blind or other place of concealment camouflaged with vegetation from agricultural crops, as long as such camouflaging does not result in the exposing, depositing, distributing or scattering of grain or other feed; or

(iv) Standing or flooded standing agricultural crops where grain is inadvertently scattered solely as a result of a hunter entering or exiting a hunting area, placing decoys, or retrieving downed birds.

(2) The taking of any migratory game bird, except waterfowl, coots and cranes, on or over lands or areas that are not otherwise baited areas, and where grain or other feed has been distributed or scattered solely as the result of manipulation of an agricultural crop or other feed on the land where grown, or solely as the result of a normal agricultural operation.

(j) While possessing shot (either in shotshells or as loose shot for muzzleloading) other than steel shot, or bismuth-tin (97 parts bismuth: 3 parts tin with <1 percent residual lead) shot, or tungsten-iron ([nominally] 40 parts tungsten: 60 parts iron with <1 percent residual lead) shot, or tungsten-polymer (95.5 parts tungsten: 4.5 parts Nylon 6 or 11 with <1 percent residual lead) shot, or tungsten-matrix (95.9 parts tungsten: 4.1 parts polymer with <1 percent residual lead) shot, or such shot approved as nontoxic by the Director pursuant to procedures set forth in 20.134, provided that:

(1) This restriction applies only to the taking of Anatidae (ducks, geese [including brant] and swans), coots (*Fulica americana*) and any species that make up aggregate bag limits during concurrent seasons with the former in areas described in Section 20.108 as nontoxic shot zones, and

(2) Tungsten-iron shot (nominally 40 parts tungsten: 60 parts iron with <1 percent residual lead) is legal as nontoxic shot for the 1998-99 migratory bird hunting season, except in the Yukon-Kuskokwim (Y-K) Delta region, Alaska.

(3) Tungsten-polymer shot (95.5 parts tungsten: 4.5 parts Nylon 6 with <1 percent residual lead) is legal as nontoxic shot for the 1998-99 migratory bird hunting season, except for the Yukon-Kuskokwim Delta region in Alaska.

4) Tungsten-matrix shot (95.9 parts tungsten: 4.1 parts polymer with <1 percent residual lead) is legal as nontoxic shot for waterfowl and coot hunting for the 1998-1999 hunting season only, except for the Yukon-Kuskokwim Delta habitat in Alaska.

HISTORY: [38 FR 22021, Aug. 15, 1973, as amended at 38 FR 22896, Aug. 27, 1973; 44 FR 2599, Jan. 12, 1979; 45 FR 70275, Oct. 23, 1980; 49 FR 4079, Feb. 2, 1984; 52 FR 27364, July 21, 1987; 53 FR 24290, June 28, 1988; 60 FR 64, Jan. 3, 1995, as corrected at 60 FR 2177, Jan. 6, 1995; 60 FR 43314, 43316, Aug. 18, 1995; 61 FR 42492, 42494, Aug. 15, 1996; 62 FR 4874, 4876, Jan. 31, 1997; 62 FR 43444, 43447, Aug. 13, 1997; 63 FR 54016, 54019, 54022, 54026, Oct. 7, 1998; 63 FR 67619, 67624, Dec. 8, 1998; 64 FR 7507, 7517, Feb. 16, 1999; 64 FR 29799, 29804, June 3, 1999; 64 FR 32778, 32780, June 17, 1999]

§ 20.22 Closed seasons.

No person shall take migratory game birds during the closed season.

HISTORY: [38 FR 22021, Aug. 15, 1973; 64 FR 7517, 7527, Feb. 16, 1999; 64 FR 32778, 32780, June 17, 1999]



PREPROPOSAL STATEMENT OF INQUIRY

CR-101 (June 2004)
(Implements RCW 34.05.310)
Do **NOT** use for expedited rule making

Agency: Washington Department of Fish and Wildlife

Subject of possible rule making: WAC 232-12-264, Baiting of game birds -- Unlawful.

Statutes authorizing the agency to adopt rules on this subject: RCW 77.12.047.

Reasons why rules on this subject may be needed and what they might accomplish: State laws and rules can be more restrictive than their federal counterparts, but not less restrictive. WAC 232-12-264 is less restrictive than the federal regulation prohibiting baiting waterfowl, 50 CFR 20.21. The Department wants to amend WAC 232-12-264 to mirror 50 CFR 20.21, and in doing so, WDFW will have more efficient tools for identifying violations and enforcing the rule.

Identify other federal and state agencies that regulate this subject and the process coordinating the rule with these agencies:
The U.S. Department of the Interior, U.S. Fish and Wildlife Service. WDFW is working with USFWS to ensure that we have common goals and will have the same language in our regulations prohibiting waterfowl-baiting.

Process for developing new rule (check all that apply):

- Negotiated rule making
- Pilot rule making
- Agency study
- Other (describe)

How interested parties can participate in the decision to adopt the new rule and formulation of the proposed rule before publication:

(List names, addresses, telephone, fax numbers, and e-mail of persons to contact; describe meetings, other exchanges of information, etc.)

Contact Lori Preuss, WDFW Enforcement, 600 Capitol Way, N., Olympia, WA 98501-1091.
Phone (360) 902-2930; fax (360) 902-2155; e-mail at Lori.preuss@dfw.wa.gov.

Contact by October 15, 2009. Expected proposal filing on or after October 21, 2009.

DATE
August 27, 2009

NAME (TYPE OR PRINT)
Lori Preuss

SIGNATURE

TITLE
Rules Coordinator

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