

## DEPARTMENT OF THE INTERIOR

## Fish and Wildlife Service

## 50 CFR Part 20

RIN 1018-AE66

**Migratory Bird Hunting; Temporary Approval of Tungsten-Polymer Shot as Nontoxic for the 1998-99 Season**

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Final rule.

**SUMMARY:** The U.S. Fish and Wildlife Service (Service) amends Section 20.21(j) to grant temporary approval of tungsten-polymer shot as nontoxic for the 1998-99 migratory bird hunting season, except in the Yukon-Kuskokwim (Y-K) Delta region, Alaska. The toxicological report, which is an extensive literature search and analysis of tungsten and Nylon 6 (the polymer), suggests that these compounds are nontoxic under assumed use and in the environment. Analysis of the toxicity study reveal no adverse effects over a 30-day period when dosing mallards (*Anas platyrhynchos*) with 8 BB size tungsten-polymer shot.

**DATES:** This rule takes effect on October 7, 1998.

**ADDRESSES:** Copies of the EA are available by writing to the Chief, Office of Migratory Bird Management (MBMO), U.S. Fish and Wildlife Service, 1849 C Street, NW., room 634-ARLSQ, Washington, DC 20240. The public may inspect comments during normal business hours in room 634, Arlington Square Building, 4401 N. Fairfax Drive, Arlington, Virginia.

**FOR FURTHER INFORMATION CONTACT:** Robert J. Blohm, Acting Chief, Office of Migratory Bird Management, U.S. Fish and Wildlife Service, (703) 358-1838.

**SUPPLEMENTARY INFORMATION:** Since the mid-1970s, the Service has sought to identify shot that, when spent, does not pose a significant toxic hazard to migratory birds and other wildlife. The Service established procedures and requirements for approval of shot and shot coatings as nontoxic in 1986 and published them in 50 CFR 20.134. The Service adopted new procedures in December 1997. These are published at 50 CFR 20.134. Currently, only steel shot and bismuth-tin shot are approved by the Service as nontoxic shot. The Service granted temporary approval of bismuth-tin as nontoxic on two separate actions for the hunting seasons of 1994-95 and 1995-96. Tungsten-iron shot was given temporary approval for the 1997-98 migratory bird hunting season (62 FR

43444 published August 18, 1997). The Service believes approval for other suitable candidate shot materials as nontoxic is feasible. Compliance with the use of nontoxic shot is increasing over the last few years. The Service believes that this level of compliance will continue to increase with the availability and approval of other nontoxic shot types.

Federal Cartridge Company's (Anoka, Minnesota) candidate shot is a matrix of Nylon 6 or 11 polymer surrounding particles of elemental tungsten. Shot made from this material has a density of approximately 11.2 g/cm<sup>3</sup> or approximately the density of lead. The shot will contain approximately 95.5 percent tungsten and 4.5 percent Nylon 6 or 11 by weight. At this time, only tungsten-polymer shot with Nylon 6 has been tested. TP shot with Nylon 11 is currently undergoing research and testing. Therefore, this final rule for temporary approval only deals with Nylon 6.

Federal's application includes a description of the new tungsten-polymer (TP) shot, a toxicological report (Barr, 1996), and the results of a 30-day dosing study of the toxicity of this shot in game-farm mallards (*Anas platyrhynchos*). The toxicological report incorporates toxicity information (a synopsis of acute and chronic toxicity data for mammals and birds, potential for environmental concern, and toxicity to aquatic and terrestrial invertebrates, amphibians and reptiles) and information on environmental fate and transport (shot alteration, environmental half-life, and environmental concentration). The toxicity study is a 30-day dosing test to determine if the candidate shot poses any deleterious effects to game-farm mallards. This will meet the requirements for Tier 2 consideration, as described in 50 CFR 20.134(b)(3).

**Toxicity Information**

There is considerable difference in the toxicity of soluble and insoluble compounds of tungsten. Elemental tungsten (the material submitted by Federal) is virtually insoluble and is, therefore, expected to be relatively nontoxic. The potential toxicity of nylon compounds due to degradation is primarily associated with the stabilizers, antioxidants, plasticizers, and unreacted prepolymers. Residual caprolactum has been found in some commercial Nylon 6 products, but little concern regarding this compound has been developed (Patty, 1981). Even though most toxicity tests reviewed were based on soluble tungsten compounds rather than elemental tungsten (while the toxicity of

Nylon 6 is negligible due to its insolubility), there appears to be no basis for concern of toxicity to wildlife for the TP shot (metallic tungsten and Nylon 6) via ingestion by fish, birds, or mammals (Bursian et al., 1996; Gigiena, 1983; Patty, 1981; Industrial Medicine, 1946; Karantassis, 1924).

**Environmental Fate and Transport**

Tungsten is insoluble in water and, therefore, not mobile in hypergenic environments. Tungsten is very stable in acids and does not easily complex. Preferential uptake by plants in acid soil suggests that uptake of tungsten in the anionic form is associated with tungsten minerals rather than elemental tungsten (Kabata-Pendias and Pendias, 1984).

**Environmental Concentrations**

Calculation of the estimated environmental concentration (EEC) of tungsten in a terrestrial ecosystem is based on 69,000 shot per hectare (Pain, 1990), assuming complete erosion of material in 5 cm of soil. The EECs for tungsten and Nylon 6 in soil are 58.3 mg/kg and 2.7 mg/kg, respectively. Calculation of the EEC in an aquatic ecosystem assumes complete erosion of the shot in one cubic foot of water. The EECs in water for tungsten and Nylon 6 are 18.7 mg/L and 0.9 mg/L, respectively. The Hazard Quotients assume that complete erosion of the shot components would occur; however, the TP shot is considered insoluble and is stable in basic, neutral, and mildly acidic environments. Therefore, erosion is expected to be minimal, and adverse effects on biota are not expected to occur.

**Effects on Birds**

An extensive literature review provided information on the toxicity of elemental tungsten to waterfowl and other birds. Ringelman et al. (1993) orally dosed 20 8-week-old game-farm mallards with 12-17 (1.03g) tungsten-bismuth-tin (TBT) pellets and monitored them for 32 days for evidence of intoxication. No birds died during the trial, gross lesions were not observed during the postmortem examination, histopathological examinations did not reveal any evidence of toxicity or tissue damage, and tungsten was not detectable in kidney or liver samples. The authors concluded that TBT shot presented virtually no potential for acute intoxication in mallards.

Kraabel et al. (1996) assessed the effects of embedded TBT shot on mallards and concluded that TBT was not acutely toxic when implanted in muscle tissue. Inflammatory reactions to TBT shot were localized and had no

detectable systemic effects on mallard health.

Nell (1981) fed laying hens (*Gallus domesticus*) 0.4 or 1 g/kg tungsten in a commercial mash for five months to assess reproductive performance. Weekly egg production was normal and hatchability of fertile eggs was not affected. Exposure of chickens to large doses of tungsten either through injection or by feeding, resulted in an increased tissue concentration of tungsten and a decreased concentration of molybdenum (Nell, 1981). The loss of tungsten from the liver occurred in an exponential manner with a half-life of 27 hours. The alterations in molybdenum metabolism seemed to be associated with tungsten intake rather than molybdenum deficiency. Death due to tungsten occurred when tissue concentrations increased to 25 mg/g liver. At that concentration, xanthine dehydrogenase activity was zero.

Nylon 6 is the commercially important homopolymer of caprolactum. Most completely polymerized nylon materials are physiologically inert, regardless of the toxicity of the monomer from which they are made (Peterson, 1977). Few data exist on the toxicity of Nylon 6 in animals. Most toxicity studies relate to thermal degradation products and so are not relevant to the exposure of wildlife to shot containing nylon. Montgomery (1982) reported that feeding Nylon 6 to rats at a level of 25 percent of the diet for 2 weeks caused a slower rate of weight gain, presumably due to a decrease in food consumption and feed efficiency. However, the rats suffered no anatomic injuries due to the consumption of nylon.

Federal's 30-day dosing study (Bursian et al., 1996) included four treatment groups of game-farm mallards (16 birds in each group, 8 males and 8 females) exposed to different types of shot: 8 No. 4 steel, 8 No. 4 lead, 8 BBs of tungsten-polymer, and none (control). All TP-dosed birds survived the test with no significant alteration in body weight. There were no changes in hematocrit, hemoglobin concentration, or aminolevulinic acid dehydratase (an enzyme important to hemoglobin synthesis) activity. The only significant difference between no-shot, steel, and TP males in any of the 25 plasma chemistry parameters at day 15 was an increase in the albumin/globulin ratio in the TP birds when compared to the other two groups, but the authors felt this was not remarkable. Three TP-dosed males developed mild biliary stasis. The authors attributed this to the intubating of mallards with 8 BBs of TP shot inducing a pathological condition,

however, slight, that is not found in the control birds. No other histopathological lesions were found. In general, no adverse effects were seen in mallards given 8 BB-size TP shot and monitored over a 30-day period. Tungsten was detected in the femur of 2 TP-dosed females and the kidneys of 2 TP-dosed birds; in both tissues, concentrations were only slightly above detection limits.

Based on the results of the toxicological report and the toxicity test (Tier 1 and 2), the Service concludes that TP shot (95.5 percent tungsten and 4.5 percent Nylon 6, by weight with <1 percent residual lead), does not pose a significant danger to migratory birds or other wildlife and their habitats. However, the Service has some concern that the absorption of tungsten into the femur, kidney, and liver could potentially affect the spectacled eider (*Somateria fischeri*), a species already subject to adverse weather, predation, and lead poisoning on the Yukon-Kuskokwim (Y-K) Delta, Alaska. Until a reproductive/chronic toxicity test has been completed and the Service has reviewed the results, TP shot cannot be conditionally approved for the Y-K Delta region.

The first condition of approval is toxicity testing. Candidate materials not approved under Tier 1 and/or 2 testing are subjected to standards of Tier 3 testing. The scope of Tier 3 includes chronic exposure under adverse environmental conditions and effects on reproduction in game-farm mallards, as outlined in 50 CFR 20.134(b)(4)(A and B) (Tier 3) and in consultation with the Service's Office of Migratory Bird Management and the U.S. Geological Survey's Division of Biological Resources. This study includes assessment of long-term toxicity under depressed temperature conditions using a nutritionally-deficient diet, as well as a moderately long-term study that includes reproductive assessment. The tests require the applicant to demonstrate that TP shot is nontoxic to waterfowl and their offspring.

The second condition of approval is testing for residual lead levels. Any TP shot with lead levels equal to or exceeding 1 percent will be considered toxic and, therefore, illegal. In the August 18, 1995, **Federal Register** (60 FR 43314), the Service indicated that it would establish a maximum level for residual lead. The Service has determined that the maximum environmentally acceptable level of lead in any nontoxic shot is trace amounts of <1 percent, and has incorporated this requirement (50 CFR 20.134(b)(5)) in the

December 1, 1997, final rule (62 FR 63608).

The third condition of approval involves enforcement. In the August 18, 1995, **Federal Register** (60 FR 43314), the Service indicated that final unconditional approval of any nontoxic shot would be contingent upon the development and availability of a noninvasive field testing device. This requirement was incorporated into regulations at 50 CFR 20.134(b)(6) in the December 1, 1997, final rule (62 FR 63608). Several noninvasive field testing devices are under development to separate TP shot from lead shot. Law enforcement officials can distinguish between shotshells containing lead pellets and those containing tungsten-polymer in two ways. First, the headstamp of the shell will clearly distinguish it as a shell containing tungsten-polymer shot. Second, electronic devices designed to distinguish between shotshells containing different shot materials will register tungsten-polymer shells as nontoxic, similar to bismuth-tin shells.

In summary, this rule amends 50 CFR 20.21(j) by granting temporary approval of tungsten-polymer shot as nontoxic for the 1998-99 migratory bird hunting season, except in the Y-K Delta region, Alaska. It is based on the original request made to the Service by Federal Cartridge Company on July 16, 1997, the toxicological report, and acute toxicity study reviewed by the Service, and comments received on the July 27, 1998 proposed rule (63 FR 40074). Results of the toxicological report and 30-day toxicity test undertaken for Federal Cartridge Company document the apparent absence of any deleterious effects of tungsten-polymer shot when ingested by captive-reared mallards or to the ecosystem. However, there is some concern that the absorption of tungsten into the femur, kidney, and liver could potentially affect the spectacled eider (*Somateria fischeri*), a species already subject to adverse weather, predation, and lead poisoning on the Y-K Delta. Until a reproductive/chronic toxicity test has been completed and the Service has reviewed the results, tungsten-polymer shot will not be conditionally approved for the Y-K Delta region. A reproductive/chronic toxicity test will be completed and the Service will review the results, prior to any final unconditional approval of tungsten-polymer shot for migratory bird hunting.

#### Public Comments and Responses

The July 27, 1998 proposed rule published in the **Federal Register** (63 FR 40077) invited public comments

from interested parties. The closing date for receipt of all comments was August 26, 1998. During this 30-day comment period, the Service received four comments.

Federal Cartridge Company pointed out a minor technical discrepancy in our description of tungsten-polymer shot. Federal indicated that tungsten-polymer shot contains no iron.

The California Waterfowl Association strongly supported the proposed temporary approval of tungsten-polymer shot for the 1998-99 season. They believed that the temporary approval of tungsten-polymer shot was an important step to address concerns relating to efforts to reduce the unnecessary crippling of waterfowl through the development of more effective nontoxic shot materials.

Kent Cartridge Company questioned the Service's stipulation on the requested reproductive testing as it relates to the Y-K Delta. Kent pointed out language in the July 27 **Federal Register** indicating that "until a reproductive/chronic toxicity test has been completed and the Service has reviewed the results, the Service proposes not to approve the use of tungsten-polymer shot on the Y-K Delta." Kent believed that these references clearly indicate that the required reproductive tests relates only to tungsten shot use in the Y-K Delta and that use of tungsten shot elsewhere in the U.S. was not so conditioned.

The Wisconsin Department of Natural Resources (Wisconsin) supported the proposal to grant temporary approval of tungsten-polymer as nontoxic shot. Wisconsin was concerned, however, with the timing of the proposed and final rules. Because of the lateness of the Service's proposed rule, relative to the establishing and beginning of the migratory bird hunting seasons, Wisconsin was not able to include information on the status of tungsten-polymer shot in their annual hunting regulations pamphlet that went to press in late August. Wisconsin uses the pamphlet to inform their hunters as to the availability of different nontoxic shot materials and stated that because of the timing of the final rule they would not be able to adequately inform their hunters. Wisconsin encouraged that any subsequent rules on nontoxic shot be initiated earlier in the year so that any final rules would be published before August 1.

**Service Response:** The Service has corrected the description of tungsten-polymer shot to indicate that the shot contains no iron.

Regarding Kent Cartridge Company's assertions that the required reproductive

testing relates only to the use of tungsten shots in the Y-K Delta, the Service would like to make clear that the required testing relates to the entire U.S., not just the Y-K Delta. Until a reproductive/chronic toxicity test has been completed and the Service has reviewed the results, tungsten shots will not be conditionally approved for the Y-K Delta region nor unconditionally approved elsewhere. A reproductive/chronic toxicity test will be completed and the Service will review the results, prior to any final unconditional approval of tungsten-polymer shot for migratory bird hunting.

Regarding the timing of the proposed and final rule, the Service realizes the information dissemination problems caused by conditionally approving tungsten-polymer shot at this time. However, we believe that the public benefits of conditionally approving the shot outweigh any potential timing issues and/or problems. We believe that it is in the best interest of the hunting public to provide them an additional legal option for hunting waterfowl and coots for the 1998-99 season and it is in the best interest of small retailers who have stocked tungsten-polymer shot for the coming season. Additionally, we believe that another nontoxic shot option likely will improve hunter compliance, thereby reducing the amount of lead shot in the environment.

#### **Effective Date**

Under the APA (5 U.S.C. 553(d)) the Service waives the 30-day period before the rule becomes effective and finds that "good cause" exists, within the terms of 5 U.S.C. 553(d)(3) of the APA, and this rule will, therefore, take effect immediately upon publication. This rule relieves a restriction and, in addition, it is not in the public interest to delay the effective date of this rule. During the public comment period for conditional approval the Service received four comments. Of these comment letters, one was from a conservation organization, two from industry companies/representatives, and one from a State natural resource agency. All objections/comments have been remedied satisfactorily and are discussed under the Public Comment and Responses section of this document. It is in the best interest of migratory birds and their habitats to grant conditional approval on tungsten-polymer shot as nontoxic for the 1998-99 migratory bird hunting season. It is in the best interest of the hunting public to provide them an additional legal option for hunting waterfowl and coots for the 1998-99 season, which began on

September 1, 1998. It is in the best interest of small retailers who have stocked tungsten-polymer shot for the coming season. The Service believes another nontoxic shot option likely will improve hunter compliance, thereby reducing the amount of lead shot in the environment.

#### **References**

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 Ringelman, J. K., M. W. Miller and W. F. Andelt. 1993. Effects of ingested tungsten-bismuth-tin shot on mallards. Colorado Division of Wildlife, Fort Collins, 24 pp.

#### 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), the Service prepared a Draft Environmental Assessment (EA) in May, 1998 and a Final EA in September 1998. This EA is available to the public at the location indicated under the ADDRESSES caption. Based on review and evaluation of the information in the EA, the Service has determined that amending 50 CFR 20.21(j) to grant temporary approval of tungsten-polymer shot as nontoxic for the 1998–99 migratory bird 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) 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 \* \* \*.” The Service has completed a Section 7 consultation under the ESA for this rule and determined that granting temporary approval of tungsten-polymer shot for the 1998–99 hunting season, except on the Yukon-Kuskokwin (Y–K) Delta, is not likely to affect any threatened, endangered, proposed or candidate species. The result of the Service's consultation under Section 7 of the ESA is available to the public at the location indicated under the ADDRESSES caption.

#### 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 includes small businesses, organizations or governmental jurisdictions. The economic impacts of annual hunting on small business entities were analyzed in detail and a Small Entity Flexibility Analysis (Analysis), under the

Regulatory Flexibility Act (5 U.S.C. 601, *et seq.*), was issued by the Service in 1998 (copies available upon request from the Office of Migratory Bird Management). The Analysis documented the significant beneficial economic effect on a substantial number of small entities. The primary source of information about hunter expenditures for migratory game bird hunting is the National Hunting and Fishing Survey, which is conducted at 5-year intervals. The Analysis utilized the 1996 National Hunting and Fishing Survey which it was estimated that migratory bird hunters would spend between \$429 and \$1084 million nationwide at small businesses in 1998. The approval of tungsten-polymer as an alternative shot to steel and bismuth-tin will have a minor positive impact on small businesses by allowing them to sell a third nontoxic shot to the hunting public. However, the overall effect to hunting expenditures in general would be minor. Therefore, the Service determined this rule will have no effect on small entities since the approved shot merely will supplement nontoxic shot already in commerce and available throughout the retail and wholesale distribution systems. The Service anticipates no dislocation or other local effects, with regard to hunters and others.

#### Executive Order 12866, and the Paperwork Reduction Act

This rule was not subject to Office of Management and Budget (OMB) review under Executive Order 12866. E.O. 12866 requires each agency to write regulations that are easy to understand. The Service invites comments on how to make this rule easier to understand, including answers to questions such as the following: (1) Are the requirements in the rule clearly stated? (2) Does the rule contain technical language or jargon that interferes with its clarity? (3) Does the format of the rule (grouping and order of sections, use of headings, paragraphing, etc.) aid or reduce its clarity? (4) Would the rule be easier to understand if it were divided into more (but shorter) sections? (5) Is the description of the rule in the SUPPLEMENTARY INFORMATION section of the preamble helpful in understanding the rule? What else could the Service do to make the rule easier to understand? Send a copy of any comments that concern how this rule could be made easier to understand to: Office of Regulatory Affairs, Department of the Interior, Room 7229, 1849 C Street, N.W., Washington, D.C. 20240. Comments may also be e-mailed to: Exsec@ios.doi.gov.

#### Congressional Review

In accordance with Section 251 of the Small Business Regulatory Enforcement Fairness Act of 1996 (5 U.S.C. 8), this rule has been submitted to Congress. Because this rule deals with the Service's migratory bird hunting program, this rule qualifies for an exemption under 5 U.S.C. 808(1); therefore, the Department determines that this rule shall take effect immediately.

#### Paperwork Reduction Act

The Service has examined this regulation under the Paperwork Reduction Act of 1995 and found it to contain no information collection requirements. However, the Service does have OMB approval (1018–0067; expires 06/30/2000) for information collection relating to what manufacturers of shot are required to provide the Service for the nontoxic shot approval process. For further information see 50 CFR 20.134.

#### Unfunded Mandates Reform

The Service has determined and certifies pursuant to the Unfunded Mandates 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

The Service, in promulgating this rule, determines that these regulations meet 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, these rules, authorized by the Migratory Bird Treaty Act, do not have significant takings implications and do not affect any constitutionally protected property rights. These rules will not result in the physical occupancy of property, the physical invasion of property, or the regulatory taking of any property. In fact, these rules allow hunters to exercise privileges that would be otherwise unavailable; and, therefore, 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. These rules do 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 12612, these regulations do not have significant federalism effects and do 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 evaluated possible effects on Federally recognized Indian tribes and have determined that there are no effects.

#### **List of Subjects in 50 CFR Part 20**

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

Accordingly, for reasons set out in the preamble, title 50, Chapter 1, subchapter B, part 20 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:** 16 U.S.C. 703–712; and 16 U.S.C. 742 a–j.

2. Amend Section 20.21 by revising paragraph (j) introductory text and adding paragraph (j)(3) 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, 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 part tungsten: 4.5 parts Nylon 6 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:

\* \* \* \* \*

(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.

Dated: October 1, 1998.

**Donald Barry,**

*Assistant Secretary for Fish and Wildlife and Parks.*

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