

There are no limits to the length of written comments presented at these hearings or mailed to the Service. Legal notices announcing the date, time, and location of the hearings are being published in newspapers concurrently with this **Federal Register** notice.

The comment period on the proposal initially closed on February 17, 1998. To accommodate the hearing, the public comment period is now reopened. Written comments may be submitted until June 1, 1998, to the Field Supervisor (see **ADDRESSES** section).

Author: The primary author of this document is Cary Norquist (see **ADDRESSES** section).

**Authority:** The authority for this action is the Endangered Species Act of 1973 (16 U.S.C. 1531 *et seq.*).

Dated: March 18, 1998.

**Judy L. Jones,**

*Acting Regional Director, Region 4, Fish and Wildlife Service.*

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## DEPARTMENT OF THE INTERIOR

### Fish and Wildlife Service

#### 50 CFR Part 20

RIN 1018-AD74

#### Migratory Bird Hunting: Regulations Regarding Baiting and Baited Areas

**AGENCY:** Fish and Wildlife Service, Interior.

**ACTION:** Proposed rule.

**SUMMARY:** The Service proposes to clarify and simplify the migratory game bird hunting regulations regarding baiting. The Service is proposing these changes after an extensive review of the current regulations and in response to public concern about interpretation and clarity of the current regulations, especially with respect to current migratory bird habitat conservation practices (i.e., moist-soil management).

The Service proposes new regulatory language for: Accidental scattering of agricultural crops or natural vegetation incidental to hunting, normal agricultural and soil stabilization practices, baited areas, baiting, manipulation, natural vegetation, and top-sowing of seeds. Proposed changes include new guidance with respect to hunting over natural vegetation that has been manipulated.

The Service invites public comment on this proposed rulemaking and will carefully review and consider all comments received prior to any final rulemaking.

**DATES:** Comments on this proposed rulemaking must be received by May 26, 1998.

**ADDRESSES:** Comments regarding this proposed rulemaking should be addressed to: Director, U.S. Fish and Wildlife Service, Post Office Box 3247, Arlington, Virginia 22203-3247. Comments may be hand delivered to 4401 North Fairfax Drive, Suite 500, Arlington, Virginia 22203. The public may inspect comments during normal business hours at 4401 North Fairfax Drive, Suite 500, Arlington, Virginia 22203.

**FOR FURTHER INFORMATION CONTACT:**

Kevin Adams, Chief, Division of Law Enforcement, telephone 703/358-1949, or Paul Schmidt, Chief, Office of Migratory Bird Management, telephone 703/358-1714.

**SUPPLEMENTARY INFORMATION:**

**Background**

The Fish and Wildlife Service (Service) has authority (16 U.S.C. 703-712 and 16 U.S.C. 742a-j) to regulate activities involving the hunting and other taking of migratory game birds. The Service has promulgated regulations (50 CFR part 20) for the hunting of migratory game birds that includes sections for *Methods of Take* and *Definitions of Terms*.

First established in 1935, the migratory game bird hunting regulations have been substantially modified over the last 60 years to allow more effective management of migratory game bird populations and to respond to public concerns. The Service last modified the portion of the regulations specific to baiting and hunting over baited areas [50 CFR 20.21(i)] in 1973.

The Service has recently received comments from various State wildlife management agencies, the general public, hunters, and conservation organizations to the effect that the baiting regulations are outdated, unclear, and difficult for the general public to interpret and understand. While the Service is attempting to simplify and clarify the regulations in this proposed rulemaking, the Service must also ensure that any proposed changes will both provide continued control over unlawful baiting activities and encourage habitat conservation and management for the benefit of migratory birds.

In 1991, the Service published its intent to review multiple wildlife regulations, including the regulations covering migratory birds, in a **Federal Register** notice dated November 14, 1991 (56 FR 57872). Subsequently, in a **Federal Register** notice dated December 1, 1993 (58 FR 63488), the Service published its intent to further review

the migratory bird regulations in 50 CFR parts 20 and 21, subpart D. On March 22, 1996, the Service announced its intent in the **Federal Register** (61 FR 11805) to review the migratory bird hunting regulations specific to waterfowl baiting separately from review of other portions of the regulations pending Service assessment of the moist-soil management aspect (manipulation of natural vegetation). However, the Service has recently decided that in order to achieve the necessary clarity and simplicity in the current regulations, it should review the baiting regulations for all migratory game birds, not just waterfowl. All of the public comments received by the Service in response to the prior **Federal Register** notices have been carefully considered during development of this proposed rule.

In addition to the **Federal Register** notices detailed above inviting public comments, on March 22, 1996, the Service requested the International Association of Fish and Wildlife Agencies (International) to review waterfowl baiting issues involving moist-soil management and make recommendations to the Service. In developing its recommendations, the Service suggested that the International would likely need a working group that represented a broad range of use interests. In May 1997, the International submitted comments to the Service that have been reviewed and considered during development of this proposed rule.

**Overview of Proposed Changes**

The Service proposes to add new definitions to 50 CFR 20.11, *Meaning of Terms*, for the following terms: *baited area*, *baiting*, *manipulation*, *natural vegetation*, and *normal agricultural and soil stabilization practice*. The purpose of these additions to section 20.11 is to provide a base of reference for terminology used in the regulation and to remove perceived ambiguity about what the Service means when using a particular term. For simplification of the regulations, the Service also proposes to add new language to section 20.21(i), *Methods of Take*, regarding baited areas and baiting.

The Service is proposing new regulatory language to address situations involving the accidental scattering of grains or seeds from agricultural crops or natural vegetation incidental to a migratory game bird hunter's activities. Specific concerns include entering or exiting hunting areas, placing decoys, retrieving downed birds, and using natural vegetation to camouflage blinds.

Current exemptions allow for the hunting of migratory game birds over agricultural lands, and separate those practices allowed for the hunting of waterfowl from those allowed for the hunting of other migratory game birds, such as doves. In this rule, the Service proposes to consolidate the different practices into one term *normal agricultural and soil stabilization practice* that is intended to apply to the hunting of all migratory game birds. The Service is not proposing to change the current exemption in the regulation that allows the hunting of migratory game birds, except waterfowl, over wildlife management food plots that have been manipulated. However, in addition to the words *except waterfowl*, the Service is proposing to exclude cranes as well by changing the language to read *except waterfowl and cranes*."

The Service is proposing a new prohibition that would apply to the hunting of all migratory game birds over any area that has been planted by means of top sowing (including aerial application) where seeds remain on the surface of the ground as a result. The Service is proposing that this prohibition apply regardless of the purpose of the seeding, and proposes to explicitly exclude top sowing from the proposed definition of *normal agricultural and soil stabilization practice*.

The Service has long supported and encouraged the use of moist-soil management to benefit wildlife by providing important food and habitat. While the Service believes it is very important to continue encouragement of this valuable practice on both public and private lands, clear guidance on what constitutes baiting should accompany this encouragement. Currently, hunting over manipulated moist soil areas could be considered illegal since seeds can be made available to waterfowl as a result of a manipulation. To address moist-soil management issues, the Service proposes to distinguish between those moist-soil practices that will constitute baiting for migratory birds and those that will not. The Service is proposing to provide for the hunting of waterfowl and cranes over natural vegetation that has been manipulated, provided that the manipulations are conducted within specified parameters. The hunting of migratory game birds other than waterfowl and cranes will not be restricted as a result of any such manipulation.

As a related issue, the Service is proposing specific regulatory changes dealing with millet species. Millet, which is easily and readily naturalized,

is somewhat unique in that it has applications for both agricultural and wildlife management (i.e., moist-soil management) purposes. After careful consideration and review, the Service has decided to include millet species in its proposed definition of natural vegetation.

Violations of the Migratory Bird Treaty Act constitute criminal offenses and because of this, since 1916 the MBTA has provided significant protection to migratory birds. Enforcement of its regulations includes application of a "strict liability" doctrine. Under strict liability, the fact that a person acted in such a way as to cause a prohibited result is sufficient basis to impose liability. Thus, in the prosecution of a strict liability crime, the government need not prove "scienter" (that the accused knew that he or she was violating the law) or even that the accused should have known he or she was violating the law.

In 1978, the Fifth Circuit Court of Appeals took exception to the strict liability standard in the judicial decision *U.S. v. Delahoussaye*, 572 F.2d 910 (5th Cir. 1978). In this decision, the court found that a hunter must make a determination prior to hunting about the legality of a hunting area and the presence or absence of any bait, and a law enforcement officer must show that a hunter knew or should have known about any bait. In 1993, in the Fifth Circuit judicial decision *U.S. v. Garrett* (5th Cir. 1993, No. 92-3483), the court revisited *Delahoussaye* and found evidence that it was, in fact, contrary to the intent of a subsequent Congress.

Other Federal courts have repeatedly upheld application of the strict liability doctrine. In *U.S. v. Schultz*, 28 F. Supp. 234 (W.D. Kentucky 1939), the court stated: "The beneficial purpose of the treaty and the act would be largely nullified if it was necessary on the part of the government to prove the existence of scienter on the part of defendants accused of violating the provisions of the act." In *Holdridge v. United States*, 282 F.2d 302 (8th Cir. 1960), the court stated that strict liability was utilized to "enact the broad policy of protecting an important natural resource, migratory game birds." In *U.S. v. Miller*, unpublished (D. Ariz. 1982), the court stated: "The importance of the goal of preserving certain migratory birds in our environment, the difficulty the government would have in enforcing its laws if it were required to prove scienter \* \* \* and the contemplated leniency of the sentence need all be considered." In written testimony to the United States Congress in 1984, Judge Frederic Smalkin, District of Maryland, wrote:

"In addition to being a shield for the innocent, such a requirement [to prove scienter] could be a windfall for the guilty, in view of the difficulty of proving scienter beyond a reasonable doubt \* \* \*. The requirement of proving scienter would effectively curtail enforcement of the prohibition of baiting." These are provided as mere samples of a strong foundation of existing case law that supports application of the strict liability doctrine.

At this time, no changes are proposed in the application of strict liability to the migratory game bird baiting regulations. However, the Service recognizes that the application of the strict liability standard to the baiting regulations is of concern to many hunters. Unlike other Federal wildlife laws that provide for both criminal and civil remedies, the Migratory Bird Treaty Act is limited to criminal penalties. The Service invites comments that identify alternatives to the existing penalty provisions dealing with these regulations.

The Service is the principal Federal agency responsible for conserving, protecting, and enhancing fish and wildlife and their habitats for the continuing benefit of all American people. As such, the Service must give due regard not only to the interests of migratory bird hunters but to the interests of all groups. Any other action would conflict with the Service's ability to be fair, impartial, and equitable in accomplishing its mission, and would serve to undermine enforcement efforts and negatively impact migratory birds and their habitat. For example, the doctrine of strict liability applies equally to hunters, who enjoy the privilege of hunting migratory game birds, and to industrial and agricultural entities, whose combined actions create the potential for far-reaching impact on migratory birds and their habitat.

Awareness of the strict liability standard has been important in initiating changes in agricultural and industrial practices to protect migratory birds. For example, the chemical industry has made changes in the manufacture and use of pesticides that are toxic and deadly to migratory birds. In order to comply with the strict liability standard, the electric power industry has taken steps to prevent electrocution and power line strikes to migratory birds; the agriculture community modifies farming practices to prevent the accidental loss of migratory birds due to pesticide poisonings; the petroleum and mining industries have implemented measures to prevent contamination to migratory

birds at petroleum pits, open oil pits, and cyanide leach operations; the commercial aquaculture industry modifies its operations to reduce bird mortality; and developers monitor construction sites to avoid destruction to migratory birds, their habitat, nests, and young.

The strict liability doctrine has long been recognized in Federal courts throughout the Nation as a reasonable and necessary element in protecting the Nation's valuable migratory bird resource. The Supreme Court discussed the necessity for application of the strict liability doctrine in "public welfare offenses," such as violations of the migratory bird regulations, finding that since an injury is the same no matter the intent of the violator, intent is not specified as a necessary element of the offense [see *Morissette v. United States*, 342 U.S. 246 (1952)].

#### **Overview—Description of Proposed Regulations Accidental Distribution and Scattering of Grains or Seeds Incidental to Hunting**

While the Service does not believe that the accidental distribution and scattering of grains or seeds occurring incidental to migratory game bird hunting has been an enforcement problem in the past, the proposed regulation addresses concerns and provides clarity to law enforcement officers and hunters alike. Therefore, areas where grains or seeds from agricultural crops or natural vegetation have been accidentally scattered as a result of hunters entering or exiting areas, placing decoys, or retrieving downed birds will not be considered baited areas.

#### **Natural vegetation**

North America has lost many of its original wetlands in the last 200 years. Dahl (1990) estimates that 22 States have lost over 50%, and 11 States have lost over 70%, of their original wetlands. Overall, about 53% of the original wetlands in the lower 48 States have been lost (Dahl and Johnson, 1991). In many of the remaining wetlands, large-scale land-use changes have often altered the natural water regime to the point that many wetlands are no longer functional. The Service believes that one of the most important factors affecting waterfowl and other migratory bird populations is the amount and availability of quality habitat.

Because of the extensive loss and alteration of wetlands, managers have intensively managed remaining wetland areas to maximize their value to wildlife, especially migratory birds,

through moist-soil management. Moist-soil management, or the management of man-made, seasonally flooded impoundments, is a technique that uses manipulation of soil, water, and vegetation to enhance habitat for migratory birds. Modern moist-soil management includes water level manipulation, mowing, burning, and other practices to: (1) Encourage production of moist soil plants for use by wildlife; (2) promote the production of invertebrate and vertebrate food sources; (3) control undesirable plants; and (4) increase biological diversity. Moist-soil plants provide essential nutritional requirements, consistently produce more pounds and diversity of food per acre than agricultural crops, provide seed that are more nutritionally complete and resistant to decay when flooded (providing longer and more constant use by waterfowl), and are more economical and efficient to manage than agricultural crops.

To address moist-soil management issues, the Service is proposing several regulatory changes to ensure that this valuable wildlife management practice continues to be encouraged while also clarifying what constitutes baiting. The proposed regulations provide several new definitions and parameters that attempt to make it clear to the public how natural vegetation may be manipulated for moist-soil management purposes and subsequently hunted over.

The Service proposes to define *natural vegetation as any non-agricultural, native, or naturalized plant species, including millet, that grows at a site in response to planting or from existing seeds or other propagules*. This definition is not intended to include plants grown as agricultural crops.

In determining how any proposed regulatory changes should deal with millet, the Service recognizes that millet species have both agricultural and moist-soil management purposes. Millet is readily naturalized and can be an important food source for migrating and wintering waterfowl. Because of these valuable wildlife management traits, the Service believes that the potential benefits justify including millet in the proposed definition of *natural vegetation*. Therefore, the Service is proposing to treat millet species separately from agricultural crops and include millet in the proposed definition for *natural vegetation*.

#### **Manipulation**

Because the term is an important component of the proposed regulation, the Service is proposing to add a new definition for *manipulation*. The proposed definition for manipulation is

*mowing, shredding, discing, rolling, chopping, trampling, flattening, or wetland-associated plant propagation techniques*. The term manipulation will not include the distributing or scattering of grain, salt, or other feed once it has been removed from or stored on the field where grown. The Service intends that the proposed definition for manipulation apply both to natural vegetation and agricultural crops.

#### **Manipulation of Natural Vegetation**

The Service recognizes that the artificial maintenance and restoration of natural vegetation through moist-soil management often creates important habitat for waterfowl and other migratory bird species. The Service intends that any proposed changes to the regulations regarding natural vegetation should be readily understood, enforceable, and provide flexibility for habitat managers to perform wildlife management practices beneficial to breeding, migrating, and wintering migratory birds.

The Service acknowledges that the current regulations were not intended to prevent the manipulation of naturally vegetated areas or to discourage moist-soil management practices of benefit to migratory birds. However, the Service recognizes that there appears to be some disagreement over the interpretation of the current regulations regarding moist-soil management, and that this disagreement could potentially discourage the maintenance and/or restoration of wetland areas. Therefore, the Service is proposing to expressly provide for the hunting of waterfowl and cranes in areas where natural vegetation, including millet, has been manipulated in accordance with certain restrictions. The Service is proposing no restrictions on the manipulation of natural vegetation when hunting migratory game birds other than waterfowl and cranes.

Several commenters pointed out that in wetland situations under ideal conditions some improved varieties of natural vegetation can outproduce their wild counterparts. While seed retention rarely rivals that of agricultural crops, seeds from natural vegetation can persist in the environment for long periods of time after the manipulation of such plants. In recognition of this difference, some recommended that certain wetland plants that have been planted (as opposed to grown naturally), could not be hunted over for 10 days following any alteration (i.e., manipulation). While the Service agrees that some time restriction is necessary (for the reasons outlined above), the Service also believes that any change in

the regulations should be clear, consistent, enforceable, and easily understood by the public. Thus, the Service is proposing to treat all natural vegetation, whether or not it is planted, in the same manner.

The Service is proposing that any natural vegetation may be manipulated and subsequently hunted over, provided that: (1) The manipulation must be completed 10 days prior to any waterfowl season, and (2) the manipulation is not done during any open waterfowl season. The Service believes that this proposed change will accomplish several objectives. First, it provides for the manipulation of planted natural vegetation areas (i.e., moist-soil management areas) while also allowing subsequent hunting. Second, it provides the public with a clear, specific cut-off date for legal manipulation of such areas, if such areas are to be hunted. Third, it provides multiple opportunities to manipulate the same area during the fall and winter. This is especially important in those areas where there may be long breaks in between waterfowl seasons, such as a September teal season and the regular waterfowl season. Fourth, it provides law enforcement with clear time periods when manipulations are not allowable if such areas are to be hunted. And finally, it does not require a determination of whether the area has been planted or naturally grown, and does not have different requirements for different plant species.

#### **Normal Agricultural and Soil Stabilization Practice**

In response to public concerns about the need for greater clarity and consistency when interpreting the regulation covering those agricultural practices that are and are not allowed when hunting migratory game birds, the Service is proposing new regulatory language. The proposed new term to apply to all agricultural activities is *normal agricultural and soil stabilization practice*. This proposed term would replace the agricultural terms in the current regulations (i.e., *normal agricultural planting and harvesting* for waterfowl hunting, and *bona fide agricultural operations* for the hunting of other migratory game birds, such as doves). In addition, the proposed new term would add language to allow post-harvest manipulation activities (such as discing or mowing stubble after harvest and removal of grain) and soil stabilization practices. The proposed term, like the terms it replaces, is intended to apply to the hunting of all migratory game birds over agricultural fields.

In the new definition of *normal agricultural and soil stabilization practice*, the Service is proposing to include specific language providing for the Service to rely upon recommendations by the U.S. Department of Agriculture (USDA) for determinations with respect to planting, harvesting, post-harvest manipulation, and soil stabilization practices. This proposed language will codify current Service policy, and provide the public with a reliable and consistent source of guidance when making determinations about the legality of hunting in agricultural areas. Each year, USDA State specialists, through the cooperative agricultural extension services, make agricultural recommendations that are readily available to farmers, landowners, and the general public. By codifying the role of the USDA, the Service proposes to recognize USDA's State specialists across the United States as an authority on agricultural matters. Since 1980, the Service has relied upon these specialists for assistance with questions on agricultural practices.

Some commenters suggested that the term *normal* used in the current regulations was too vague and that the term *accepted* was a more accurate representation when referring to agricultural operations and procedures. While the final responsibility for determining the conditions by which migratory birds may be harvested remains with the Service, this new definition that relies on recommendations and determinations of USDA State specialists can provide the public with clear and concise direction for obtaining guidance on agricultural practices and their compatibility with migratory game bird hunting.

#### **Baiting**

The Service is proposing to add a new definition for baiting to the *Meaning of Terms* section of the regulation. The term *baiting* will be defined as *the direct or indirect placing, exposing, depositing, distributing, or scattering (other than by controlling flooding or water levels) of salt, grain, or other feed capable of attracting migratory game birds that could serve as a lure or an attraction to, on, or over any areas where hunters are attempting to take them*. This definition differs from the language in the *Hunting Methods* section of the current regulation only in that it is shorter and more concise. The current wording *shelled, shucked, unshucked corn wheat or other grain, salt, or other feed* will become *salt, grain, or other feed*. In addition, the language in the current regulation *so as*

*to constitute for such birds a lure, attraction or enticement* to is proposed to be shortened by elimination of the word *enticement* and replacement of the words *so as to* with *that could*. Finally, the proposed definition clarifies that the controlling of flooding and water levels does not constitute baiting.

#### **Baited Area, Top-Sown Seeds**

To ensure compliance with the baiting laws, the current regulation requires hunters, landowners, or law enforcement officers to determine whether a hunting area has been subjected to a normal agricultural planting or harvesting, bona fide agricultural operation, or wildlife management practice. When assessing the legality of a hunting situation, the Service recognizes that, at times, it may be difficult to properly determine if a top-sown area has been planted as a normal agricultural planting or has been planted to lure migratory game birds to hunters illegally attempting to take them. Therefore, the Service is proposing to prohibit the taking of all migratory game birds over any lands where planting by top sowing of seeds (including aerial seeding) has occurred where seeds remain on the surface of the ground as a result. Any such area will be considered baited and will remain so for ten days following complete removal of all seeds from the surface of the land. The Service believes that this prohibition will allow hunters and others to more easily and readily determine the legality of a hunting area.

#### **Hunting of Doves and Pigeons**

This proposed rule directly affects the hunting of all migratory game birds, including doves and pigeons, with respect to the proposed prohibition on hunting over any top-sown area (see *top-sown seeds* discussion above). The Service is not proposing any change to the current exemption that allows hunting of migratory game birds, other than waterfowl and cranes, over agricultural crops that have been manipulated for wildlife management purposes. Further, the proposed definition for the term *manipulation* is intended to apply to both natural vegetation and agricultural crops.

#### **Hunting of all Migratory Game Birds**

This proposed rule maintains the current prohibition on hunting any migratory game bird over any areas where the placing, exposing, depositing, distributing, or scattering of grains, salt, or other feed has occurred once they are removed from or stored on the field where grown. This proposed rule would continue to allow the hunting of all

migratory game birds over an agricultural field that has been planted or harvested in a normal manner, in accordance with the proposed definition for *normal agricultural and soil stabilization practice*.

The Service is proposing to maintain the current *ten-day rule* with respect to baiting and baited areas. The ten-day rule considers an area baited for ten days following complete removal of any salt, grain, or other feed that is capable of luring or attracting migratory game birds to, on, or over areas where hunters are attempting to take them.

#### Required Determinations

##### Paperwork Reduction Act of 1995 (Pub. L. 104-13)

The Service has examined this proposed rule under the Paperwork Reduction Act of 1995 and has found it to contain no information collection requirements for which Office of Management and Budget review is required.

##### Unfunded Mandates Reform Act of 1995 (Pub. L. 104-4) and Unfunded Mandates (Executive Order 12875)

There are no credible scenarios in which this proposed rule could result in a significant annual effect on the economy of \$100 million or more. The U.S. Department of Agriculture independently accomplishes the publishing, distributing, and periodically updating of its agricultural determinations, and this is the only identifiable cost associated with this proposed rule. Likewise, there are no foreseen significant adverse effects on the economy. Therefore, the Service has determined and certified 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 governments or private entities.

##### Economic Effects (Executive Order 12866)

This proposed rule is a wide-ranging update to the current regulations governing migratory game bird hunting. The changes clarify definitions and simplify language, thereby benefitting both law enforcement officers and the hunting public by improving the efficiency of enforcement and protection to migratory bird resources. This proposed rule is not subject to Office of Management and Budget review under Executive Order 12866.

##### Endangered Species Act Considerations

Section 7 of the Endangered Species Act (ESA) of 1972, as amended (16 U.S.C. 1538 *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 initiated a Section 7 consultation under the ESA for this proposed rule. The result of the Service's consultation under Section 7 of the ESA will be available to the public at the location indicated under the ADDRESSES caption.

##### Regulatory Flexibility Act Determination (5 U.S.C. 601)

This proposed rule will make minor changes in the existing basic regulation for migratory game bird hunting and will have no significant effect on small entities. No dislocation or other local effects, with regard to hunters and others, are likely to occur. The proposed changes in this rule are intended to provide clarity, simplify methods whereby migratory game birds may be taken, and add new definitions for terms used in part 20. The Service will rely upon State specialists of the U.S. Department of Agriculture for determinations on normal agricultural and soil stabilization practices when questions arise. Accordingly, Service review of this rulemaking under the Regulatory Flexibility Act of 1980 (5 U.S.C. 601 *et seq.*) has revealed that it will not have a significant effect on a substantial number of small entities, which includes small businesses, organizations and small government jurisdictions.

##### Civil Justice Reform (Executive Order 12988)

The Department, in promulgating this proposed rule, has determined that these regulations meet the applicable standards provided in Section 3(a) and 3(b)(2) of Executive Order 12988.

##### Environmental Effects (National Environmental Policy Act—42 U.S.C. 4321 *et seq.*)

The Service has determined that National Environmental Policy Act documentation is not required because the proposed rule qualifies as a categorical exclusion under the Department of the Interior's NEPA procedures in 516 DM 2, Appendix 1.10.

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

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

#### Regulation Promulgation

For the reasons set out in the preamble, the Service proposes to amend Title 50, Chapter I, subchapter B of the Code of Federal Regulations as set forth below:

#### PART 20—MIGRATORY BIRD HUNTING

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

**Authority:** 16 U.S.C. 703-712, 16 U.S.C. 742a-j.

2. Revise section 20.11 by adding new paragraphs (g), (h), (i), (j), and (k) to read as follows:

##### § 20.11 Meaning of terms.

\* \* \* \* \*

(g) *Normal agricultural and soil stabilization practice* means planting, harvesting, and post-harvest manipulation and soil stabilization practices as recommended by State specialists of the cooperative extension service of the U.S. Department of Agriculture, except that for the purposes of this part planting by means of top sowing (including aerial seeding) is not to be considered a normal agricultural or soil stabilization practice.

(h) *Baited area* means any area containing salt, grain, or other feed capable of attracting migratory game birds that is placed, exposed, deposited, distributed, or scattered (other than controlling of flooding or water levels) that could serve as a lure or attraction for such birds to, on, or over areas where hunters are attempting to take them. Such areas will remain a baited area for ten days following complete removal of all such salt, grain, or other feed.

(i) *Baiting* means direct or indirect placing, exposing, depositing, distributing, or scattering (other than by controlling of flooding or water levels) of salt, grain, or other feed capable of attracting migratory game birds that could serve as a lure or attraction to, on, or over any areas where hunters are attempting to take them.

(j) *Manipulation* means mowing, shredding, discing, rolling, chopping, trampling, flattening, or wetland-associated plant propagation techniques with respect to natural vegetation and agricultural crops. The term *manipulation* does not include the distributing or scattering of grain or other feed once it has been removed from or stored on the field where grown.

(k) *Natural vegetation* means any non-agricultural, native, or naturalized plant species, including millet, that grows at a site in response to planting or from existing seeds or other propagules.

3. Amend § 20.21 by revising paragraph (i) to read as follows:

**§ 20.21 Hunting methods**

\* \* \* \* \*

(i) By the aid of baiting or on or over any baited area. However, nothing in this paragraph shall prohibit:

(1) The taking of all migratory game birds on or over areas where grains or seeds from agricultural crops or natural vegetation have been accidentally scattered incidental to hunters entering or exiting areas, placing decoys, or retrieving downed birds.

(2) The taking of all migratory game birds on or over standing crops, flooded standing crops (including aquatics), flooded harvested croplands, grain

crops properly shocked on the field where grown, or grains found scattered solely as the result of a normal agricultural and soil stabilization practice;

(3) The taking of migratory game birds, except waterfowl and cranes, on or over any lands or areas where salt, grain, or other feed has been distributed or scattered as a result of manipulation of an agricultural crop or other feed on the land where grown for wildlife management purposes, or as a result of manipulation of natural vegetation;

(4) The taking of waterfowl and cranes on or over natural vegetation that has been manipulated; *Provided that* the manipulation does not occur: (a) Less than 10 days before any waterfowl

season opening, or (b) during any open waterfowl season in that area; Except that for the purposes of this paragraph (3), waterfowl season does not include special sea duck seasons or tribally- ceded land seasons;

(5) The taking of all migratory game birds from a blind or other place of concealment camouflaged with natural vegetation;

\* \* \* \* \*

Dated: February 17, 1998.

**William Leary,**

*Acting Deputy Assistant Secretary for Fish and Wildlife and Parks.*

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