

Exceptions to the Prohibition Against Hunting Waterfowl Over Crops Manipulated Prior to Harvest as Proposed by Section 104 of S. 405, The Bipartisan Sportsmen’s Act of 2015 Introduced by Senator Murkowski on 5 February 2015 and Section 5 of S. 659 (same title) by Senator Sullivan Introduced on 4 March 2015, and S. 595, Hunter and Farmer Protection Act by Senator Cotton (also H.R. 1099 by Rep. Crawford) – Discussion and Recommendations

The exceptions proposed by S. 405, Section 104; S. 659, Section 5; S. 595 and H.R. 1099 to the definition of a baited area apparently were provoked by the following incidents. One incident was in Arkansas where ratoon (“second crop”) rice was not harvested but mechanically treated (manipulated) and determined to be a “baited area” by US Fish & Wildlife Service (FWS) law enforcement, thereby making it illegal to hunt waterfowl over the area. The other was a somewhat parallel situation at Louisiana Delta Plantation when heavy rains associated with a hurricane (declared a major disaster by the president) flooded and ruined crops. In compliance with the Federal Crop Insurance Program (FCIP), the farmer mechanically destroyed (manipulated) the unharvested crop to collect the crop insurance damage claim. The farmer OPTED to destroy the crop immediately before rather than after the waterfowl hunting season. The manipulated fields were determined to be “baited” by FWS, thus precluding the use of the fields for waterfowl hunting.

Both of these incidents raised the hackles of hunters and landowners who had anticipated hunting waterfowl on the affected properties during the impending waterfowl season. Such unanticipated consequences can be avoided in the future with a better understanding of the reasons for rules prohibiting hunting waterfowl over bait, honest and more detailed descriptions of normal agricultural practice that triggers an exception to the rules, a clear process for determining a baited area, and formal guidance from the FCIP (or adjustments to current FCIP guidance governing crop destruction orders) so that creation of baiting situations is precluded or minimized.

It is troubling that federal legislation has been filed to change the baiting rules to address what are uncommon situations. The concern is that the changes proposed by S. 405, S. 659, S. 595 and H.R. 1099 will create loopholes inviting abuse and that there could be unintended consequences detrimental to both hunters and waterfowl.

To avoid unintended consequences and truly address any fair and legitimate concerns with the scope and application of the current baiting rules, a review of the rules by the FWS followed by promulgation of any modifications deemed to be necessary to adjust them is a more prudent

(More)

approach. Any potential impacts of such modifications will receive a more thorough evaluation via the rulemaking process, including abundant opportunity for public comment. The FWS requires no additional authority or direction from Congress to pursue such a review or rulemaking, though a formal request from Congress may be a helpful impetus.

Discussion

Prohibitions on hunting over bait/baited field were adopted as conservation measures to prevent overharvest of waterfowl resources. They are also recognized by recreational hunters as fair and reasonable restrictions to promote ethical behavior and equitable distribution of the harvest. As the art and science of wildlife management advanced and species population dynamics and habitat requirements became better understood, seasons and bag limits were refined to assure conservation of the resource within the context of the annual and long-term amount and quality of habitat, the amount of refuge available on and between the breeding and the wintering grounds, and natural mortality rates. Baiting regulations have become less crucial to sustaining waterfowl populations within this context. However, seasons and bag limits are set with the assumption that hunters will NOT harvest the limit each hunting effort, so any practice (like baiting) that would tend to increase harvest in excess of what is anticipated by the season/bag limit regulations could be detrimental to both waterfowl populations and future hunting opportunities. Baiting regulations are still an important component of waterfowl conservation and continue to be embraced by ethical hunters who value fair chase principles.

The baiting rules and their interpretation are relaxed with respect to hunting over ag lands where unharvested crops remain in the field, hunting over grain or other fields planted to seed-bearing plants that have been intentionally flooded for the purpose of attracting waterfowl, and hunting over croplands that have been treated with a normal agricultural practice. Indeed, planting crops and flooding them for waterfowl use has long been a practice on many federal and state refuges within the Flyways, even those with public hunting programs.

A conservation rationale for allowing hunting over food plots or crop fields is that it encourages the establishment of food and cover resources – vital habitat components – that are available to waterfowl before, during and often after the hunting season. The benefit to wildlife is thought to outweigh the possible increased harvest mortality resulting from the attraction of game to feed.

The FWS has exempted hunting over artificially flooded crops from the prohibition against hunting a baited field. The rules also recognize the importance of rice and other agricultural crops to waterfowl and accommodate the farmer and his lessees by exempting any field treated with a normal agricultural practice from the definition of a baited field. These exceptions tend to favor hunters (and hunt outfitters) who have the financial resources to plant and flood crops or who can pay a farmer to manipulate his unharvested field with a “normal agricultural practice” to

attract waterfowl. But the numbers of hunters with access to such fields will always be small compared to the total number of waterfowl hunters, so even if landlords, club members and clients fill their bag every time out it will not measurably affect waterfowl population trends. Such exceptions in the baiting regulations do, however, have consequences with respect to the equitable distribution of the resource among hunters and other users, hunting ethics and fair chase values, and the decline in hunter participation caused by “gentrification” of the sport.

Specific Concerns with Proposed Baiting Exceptions

Normal Agricultural Practice Exceptions

The description of “Normal Agricultural Practice” [S. 405, Sec. 104(b)(1)(D); S. 659, Sec. 5(b)(1)(D); S. 595, Sec. 2(b)(1)(D); H.R. 1099, Sec. 2(b)(1)(D)] is too vague in that it could include field treatments that, though otherwise normal such as discing, chopping, mowing, composting, etc., are not typically necessary at that time, or that could be accomplished at another time (when the treatment would not influence use of the field by waterfowl during the hunting season) without impairing current or future crop production on the property. The role given to the state wildlife agencies is perplexing; the required recommendation of USDA Ag Extension “in consultation with, and if requested, the concurrence of, the head of the applicable State department of fish and wildlife” is insufficient to assure a “favor” is not being done for the farmer or the persons with hunting rights to the property.

Discussion

Farmers should not be penalized by losing hunting use of their property for applying a routine and needed treatment. Most such treatments are not likely to create what would otherwise be designated a baited area under the current rules and guidelines. However, any pre-harvest field treatment that will occur immediately prior to or during a waterfowl season that will cause the scattering of ripe grain should preclude waterfowl hunting over that field unless certified to be a necessary treatment by the local office of the USDA Ag Extension in consultation with the local enforcement office of the FWS. (Example – In the case of secondary growth of ripe seed after the initial or primary harvest of the crop, as sometimes occurs in rice production, that secondary growth should either be harvested, or left in the field without further manipulation for the duration of the waterfowl season. If the secondary seed head production is manipulated by chopping, mowing, discing, etc., the field should be considered a baited area unless the treatment was certified as necessary by the local USDA Ag Extension office in consultation with [but not requiring approval from] the local enforcement office of the USF&WS.) If the Ag Extension determination is that the field treatment is needed and cannot be reasonably delayed until after the waterfowl season, the subject field would NOT be considered “baited” within the meaning of

(More)

the regulations prohibiting hunting over a baited field. A record of each such decision and the circumstances should be made by the local FWS law enforcement office and filed with the Office of Migratory Bird Management [OMBM]. OMBM should annually review these incidences and propose clarification to the rules, as needed, to conserve the waterfowl resources and avoid abuse of the intent of the baiting regulations.

Federal Crop Insurance Program Exception (S. 405, Sec. 104(b)(1)(D)(ii); S. 569, Sec. 5(b)(1)(D)(ii); S. 595, Sec. 2(b)(1)(D)(ii); H.R. 1099, Sec. 2(b)(1)(D)(ii)

The inclusion of crop destruction (manipulation) pursuant to requirements of the Federal Crop Insurance Corporation (FCIP) under the circumstances of a Stafford Act-authorized presidential declaration of a major natural disaster is not necessary because crops have already been “destroyed” by the effects of the disaster. To receive a claim for crop loss yet still harvest the crop is insurance fraud that should carry stiff penalties. Any required further destruction of crops should be done at a time or in a manner that avoids running afoul of the current waterfowl baiting regulations.

Discussion

If a farmer absolutely must further destroy (manipulate) a ripe, unharvested crop in order to receive payment from the FCIP for damages caused by a declared natural disaster, then he and his lessees should not be penalized by not being able to hunt waterfowl during the waterfowl seasons on the affected property. However, there are few if any conceivable situations where it would be necessary to manipulate (destroy) the crop immediately prior to through the end of the waterfowl seasons. First, it is assumed that there are penalties for fraudulently claiming an insurance loss. That should deter a farmer from attempting to collect on a FCIP claim and also harvest the crop on which the claim was paid. Further, it should not be necessary to also require that a crop be destroyed (more so than done by the disaster) to collect on a claim; it is an unnecessary cost to the farmer (and the taxpayer if the subsidized insurance is footing the bill). If penalties are not a deterrent to fraud, Congress and/or the FCIP should address that oversight. Second, if penalties are still not a sufficient deterrent to attempts at crop insurance fraud, and the FCIP continues to require mechanical crop destruction to pay a crop loss claim, the FCIP should advise the claimant to consult with the FWS prior to manipulating any unharvested crop that is intended to be used for waterfowl hunting in order to assure a baiting situation will not be created. In almost every instance, crop insurance claim-related destruction of ripe, unharvested crops does not have to occur immediately prior to or during the waterfowl season and does not have to result in closure to waterfowl hunting. It is unnecessary (and wrong) for Congress to allow the FCIP to be an excuse and tool for getting around the baiting regulations.

(More)

Summary Recommendations

Do not codify federal baiting regulations as proposed by Bipartisan Sportsmen's Act of 2015 and Hunter and farmer Protection Act.

Direct a review of the waterfowl baiting regulations by the US Fish & Wildlife Service (FWS) that takes into consideration the concerns raised by the herein-cited incidents and others regarding normal agricultural practices that may or are likely to create a baiting situation as described by the current regulations. Public comment should be sought during the review. The FWS should consider developing a schedule of normal ag practices, based on relevant (to the baiting rules) crops and regions in consultation with the USDA Cooperative Extension Service and refine its rules and procedures as necessary to exempt legitimate normal ag practices while monitoring the impact of such exemptions. Any changes FWS proposes to the rules should be promulgated according to the Administrative Procedures Act.

Review the penalties for Federal Crop Insurance Program (FCIP) fraud and stiffen them if found to be an insufficient deterrent. Require the FCIP to advise claimants to consult with the FWS prior to destroying (manipulating) any ripe unharvested grain or seed crop on land that is intended to be used for waterfowl hunting in order to assure a baiting situation will not be created.

The foregoing information, commentary and discussion are provided by the Louisiana Waterfowl Alliance.

Louisiana



Waterfowl Alliance