

March 12, 2020



VIA Federal eRulemaking Portal

Rob Wallace, Assistant Secretary for Fish and Wildlife Parks
Public Comments Processing
Attn: FWS-HQ-MB-2019-0105
U.S. Fish and Wildlife Service
5275 Leesburg Pike MS: JAO/1N
Falls Church, Virginia 22041

Re: Proposed Rule, Revision of Migratory Bird Hunting and Conservation Stamp (Duck Stamp) Contest Regulations

Dear Mr. Wallace:

Friends of Animals¹ submits these comments in response to the Proposed Rule 1018-BE20 (hereinafter “Proposed Rule”), which attempts to revise the duck stamp contest regulations.

By permanently forcing artists to include a mandatory hunting element, U.S. Fish and Wildlife Service (hereinafter “FWS”) obscures the ultimate purpose of the Migratory Bird Hunting Stamp Act (hereinafter “Duck Stamp Act”). Congress did not pass the Duck Stamp Act to encourage more people to shoot birds. Congress did not pass the Act to celebrate any “hunting heritage.” Congress passed the Duck Stamp Act for one simple reason: to finance preservation of wetlands. FWS confuses the **purpose** of the Act (habitation protection) with the **method** of finance: a small fee imposed on those who have been historically responsible for overhunting.

FWS has ignored the possibility that the Proposed Rule will alienate non-hunters and reduce the numbers of duck stamps sold, thereby reducing the funds available for the Migratory Bird Conservation Fund (hereinafter “the Fund”). Section 16 U.S.C. §718b(c) of the Duck Stamp Act already requires FWS to consider whether their actions will reduce revenues deposited to the Fund. The Proposed Rule also implicates the National

¹ Friends of Animals is a non-profit international advocacy organization incorporated in the state of New York since 1957. Friends of Animals has nearly 200,000 members worldwide. Friends of Animals and its members seek to free animals from cruelty and exploitation around the world, and to promote a respectful view of non-human, free-living and domestic animals.

Environmental Policy Act (hereinafter “NEPA”), as reduced revenues could result in a significant action by reducing funds for the Fund.

Friends of Animals asks FWS to reconsider forcing a hunting element on all future duck stamps. Friends of Animals requests that FWS conduct a Biological Assessment (hereinafter “BA”) to consider the clear risk that alienation of non-hunters could reduce revenues for the Fund.

LEGAL BACKGROUND

The Migratory Bird Conservation Act

Congress passed the Migratory Bird Conservation Act (hereinafter “MBCA”) in 1929 to authorize the federal purchase of wetlands.² Birds across North America require wetlands to thrive, and the purchases made possible by the MBCA turn the wetlands into permanent refuges.

Congress did not call the act the “Habitat Acquisition Act” for a reason: the MBCA first and foremost protects birds, recognizing habitat as one part of a comprehensive effort which also includes limits on the amount and duration of waterfowl hunting. Only a decade earlier, Congress passed the Migratory Bird Treaty Act (hereinafter “MBTA”), which outlawed the killing of migratory birds.³ Congress made an additional migratory bird treaty with Mexico just a few years after the MBCA.⁴ Congress explicitly signed these treaties to combat commercial hunting in birds and bird feathers that threatened the existence of many bird species.

Five years after the passage of the MBCA, Congress passed the Duck Stamp Act.⁵ This law was designed to provide a permanent source of money for the Fund. Anyone who wishes to shoot waterfowl in the United States must first purchase a duck stamp. The duck stamp currently costs \$25 for a yearlong license to kill waterfowl.⁶ People who do not hunt, including birders, wildlife photographers, conservationists, stamp collectors, and artists,

² U.S. Fish and Wildlife Service, *Migratory Bird Conservation Commission* (Oct. 29, 2019), <https://www.fws.gov/refuges/realty/mbcc.html>.

³ U.S. Fish and Wildlife Service, *Migratory Bird Treaty Act of 1918* (Aug. 7, 2017).

⁴ U.S. Fish and Wildlife Service, *Digest of Federal Resource Laws of Interest to the U.S. Fish and Wildlife Service*, <https://www.fws.gov/laws/lawsdigest/treaty.html#MIGBIRDMEX> (last visited Feb. 12, 2020).

⁵ U.S. Fish and Wildlife Service, *History of the Federal Duck Stamp* (Dec. 15, 2017), <https://www.fws.gov/birds/get-involved/duck-stamp/history-of-the-federal-duck-stamp.php>.

⁶ *Id.*

also purchase duck stamps.⁷ FWS states that about 10% of duck stamp revenues come from non-hunters.⁸

DISCUSSION

1. FWS should continue to look for ways to incorporate more non-hunters in its efforts to protect wildlife in the United States, not alienate non-hunters who already support conservation.

a. Fewer Americans hunt now than ever.

Hunting peaked in the United States in 1982, with roughly seventeen million people hunting. The number has been steadily declining since then, even while the overall United States population has continued to increase, with only eleven million people hunting in 2016.⁹ That number represents less than four percent of the population.

Waterfowl hunters represent an even smaller percentage still: less than 1% of Americans hunt waterfowl.¹⁰ Duck stamp sales peaked in 1970, with 2.4 million sales. Numbers of duck stamps sold have continued to decline to the point where only about 1.5 million are sold each year.¹¹

Moreover, hunters have already maxed out their participation in this annual twenty-five-dollar benefaction. Some hunting organizations even encourage their members to buy more than one duck stamp. Attempting to appeal to hunters more will not raise additional duck stamp revenue. Financial participation from hunters will continue to decline as fewer Americans decide to kill for fun.

⁷ U.S. Fish and Wildlife Service, *Duck Stamp Information for Birders & Photographers* (Sept. 5, 2018), <https://www.fws.gov/birds/get-involved/duck-stamp/duck-stamp-information-for-birders-and-photographers.php> (advertising duck stamp as a way for birders to support conservation); see also American Birding Association, *Buy Your Duck Stamps Through the ABA*, <http://www.aba.org/stamp> (last visited Feb. 27, 2020).

⁸ U.S. Fish and Wildlife Service, *How long has the Federal Government been setting aside lands for wildlife?* (October 15, 2015), <https://www.fws.gov/refuges/about/acquisition.html>.

⁹ Natalie Krebs, *Why We're Losing Hunters*, OUTDOOR LIFE (Oct. 15, 2019), <https://www.outdoorlife.com/why-we-are-losing-hunters-and-how-to-fix-it/>.

¹⁰ Paul Wait, *Looming Crisis: Falling waterfowl hunter numbers threaten the future of hunting and conservation* (Spring 2017), <https://deltawaterfowl.org/looming-crisis/>. The 2015 tally of waterfowl hunters amounted to 998,600 people, which represents about one-third of one percent of Americans.

¹¹ U.S. Fish and Wildlife Service, *Duck Stamp Sales* (September 26, 2018), <https://www.fws.gov/migratorybirds/pdf/get-involved/DuckStampSales.pdf>.

b. FWS should focus on raising duck stamp revenue and looking for ways to involve more people in the duck stamp program.

With duck stamp numbers in decline – some hunting organizations call it a “looming crisis” – FWS should look for more ways to incorporate additional people to participate in conservation.¹² At least two pro-hunting think tanks support this conclusion. In 2016, the Federal Duck Stamp Task Group stated,

“Central to these eight ideas are the goals of getting **more outdoor-involved Americans** to appreciate how the federal duck stamp conserves habitat, saves wildlife, builds a valuable National Wildlife Refuge System, and serves the American public. Friends groups, non-waterfowl hunters, birders, wildlife photographers, collectors, and environmental educators **should be approached** with the argument that they should buy a stamp.”¹³

Likewise, the Wildlife Management Institute came to a similar conclusion, when it found that the “lack of relationships with non-hunters can lead to indifference toward or mistrust of state fish and wildlife agencies by citizens who do not hunt or fish. This can lead to inadequate public support for new funding...”¹⁴

While the money from the duck stamp program goes to a great cause, the duck stamp program has only provided for roughly 3% of National Wildlife Refuge System lands.¹⁵ The overwhelming majority of funds came from non-hunting, general taxpayer sources. FWS should focus its efforts on expanding, not limiting, the potential group of duck stamp participants.

c. More Americans participate in birding and other non-violent wildlife appreciation than ever before.

The Proposed Rule runs contrary to FWS’ own finding: that “birders and wildlife photographers have played a key role in helping generate these important monies for

¹² Wait, *supra* note 10.

¹³ Association of Fish and Wildlife Agencies, *Federal Duck Stamp Task Group Final Report* (Sept. 15, 2015), <https://www.fishwildlife.org/afwa-informs/research> (emphases added).

¹⁴ Wildlife Management Institute, *Lessons from the Montana Wolf Management Stamp* (Oct. 2014), <https://wildlifemanagement.institute/outdoor-news-bulletin/october-2014/lessons-montana-wolf-management-stamp>.

¹⁵ U.S. Fish and Wildlife Service, *How long has the Federal Government been setting aside lands for wildlife?* (Oct. 15, 2015), <https://www.fws.gov/refuges/about/acquisition.html#hunters>.

habitat protection.”¹⁶ The mandatory and permanent nature of the Proposed Rule contradicts FWS’ own sentiment that the stamps are “Not Just for Ducks or Hunters.”¹⁷

According to FWS, forty-six million people participate in bird watching in the United States.¹⁸ Fewer than one million people hunt migratory birds.¹⁹

Yet, in forcing a mandatory and permanent emphasis on hunting, FWS alienates a much larger source of stamp buyers. Some people may want to support bird conservation, but do not have an interest in killing birds for fun. FWS should look for more and new ways to boost participation in the duck stamp, instead of doubling down on the small and dwindling population of hunters who buy these stamps.

d. Only one winning stamp artwork in eighty-four years of duck stamp contests voluntarily included a hunting element.

Despite FWS’ assertion in the 2018 contest rule that “several examples of previous stamps []contain objects such as decoys, dogs, and hunters,” only three stamps out of the duck stamp’s eighty-four unique artworks contain any depiction of hunting.²⁰ Underscoring this point is that only **one** of those three instances was voluntary.

The first hunting element did not show up until twenty-five years into the program. The 1959-1960 contest had a mandatory theme of “retrievers save game,” and required inclusion of a dog. The winning stamp depicted a dog holding a dead duck in her mouth.²¹

The 1975-1976 stamp included a duck decoy in its artwork.²² For the next forty-two years, from 1975 to 2018, stamps only included peaceful pictures of ducks and their natural habitat. Both artists and judges chose to exclude hunting elements.

¹⁶ U.S. Fish and Wildlife Service, *Duck Stamp Information for Birders & Photographers* (Sept. 5, 2018), <https://www.fws.gov/birds/get-involved/duck-stamp/duck-stamp-information-for-birders-and-photographers.php>.

¹⁷ *Id.*

¹⁸ U.S. Fish and Wildlife Service, *Bird Watching: An Activity for All* (June 19, 2020), <https://www.fws.gov/birds/bird-enthusiasts/bird-watching.php>.

¹⁹ U.S. Fish and Wildlife Service, *Migratory bird hunting activity and harvest during the 2016-17 and 2017-18 hunting seasons* (August 2018), <https://www.fws.gov/birds/surveys-and-data/harvest-surveys.php>.

²⁰ U.S. Fish and Wildlife Service, Federal Migratory Bird Hunting and Conservation Stamp (Duck Stamp) Contest Regulations, 83 Fed. Reg. 12276 (Mar. 21, 2018).

²¹ U.S. Fish and Wildlife Service, Federal Duck Stamp Gallery 1959-1960, <https://www.fws.gov/birds/get-involved/duck-stamp/federal-duck-stamp-gallery-1959-1960.php>.

²² U.S. Fish and Wildlife Service, Federal Duck Stamp Gallery 1975-76, <https://www.fws.gov/birds/get-involved/duck-stamp/federal-duck-stamp-gallery-1975-1976.php>.

Only during the 2018-2019 stamp contest, where FWS **forced** artists to include a hunting element or suffer disqualification, did another hunting element show up in the winning artwork.²³

Artists and judges immediately returned to their preferred styles in the 2019-2020 contest, which once again did not include any hunting elements. FWS should interpret this as a signal that the duck stamp audience does not need – or even want – permanent inclusion of a hunting element.

The winningest artist in the duck stamp contest history, Jim Hautman, does not wish to permanently include a hunting element. Even as a duck hunter himself, he would “prefer not to have it be a requirement every year.”²⁴ Similar to many non-hunters, Hautman believes that “it’s nice to see a natural scene without any hint of mankind.”²⁵

The 2018 contest saw numerous artists drop out of the contest in protest of the forced inclusion of a hunting theme.²⁶ Not only does forcing a hunting element reduce artist participation in the program, it unnecessarily alienates (1) current non-hunters who support the program, and (2) future non-hunters who might want to support the program. As mentioned above, the latter group far outweighs the hunting population.

By permanently including a hunting element in the duck stamp contest requirements, FWS has cut down on the number of potential supporters of the program. This places in jeopardy continued support for the Fund, and sends a clear message to non-hunters that FWS does not desire or value their contributions.

2. The Migratory Bird Conservation Fund came into existence primarily due to unregulated overhunting.

The late 19th century and early 20th century saw an extreme rise in bird hunting. Americans hunted so many birds – some to the point of extinction – that Congress and early

²³ U.S. Fish and Wildlife Service, Federal Duck Stamp Gallery 2019-2020, <https://www.fws.gov/birds/get-involved/duck-stamp/federal-duck-stamp-gallery-2019-2020.php>

²⁴ Andy McGlashen, *Hunting Imagery May Soon Be Mandatory for Federal Duck Stamp Contest*, AUDUBON (May 30, 2019), <https://www.audubon.org/news/hunting-imagery-may-soon-be-mandatory-federal-duck-stamp-contest>.

²⁵ *Id.*

²⁶ U.S. Fish and Wildlife Service, Federal Migratory Bird Hunting and Conservation Stamp (Duck Stamp) Contest Regulations, 83 Fed. Reg. 12276 (Mar. 21, 2018).

conservationists realized they needed to act before all the birds disappeared. Market shooting, bounty hunting, and unregulated sport hunting all contributed to this.²⁷

Congress' signing of the MBTA signaled that the United States needed **less** wanton killing of birds, not more. The Duck Stamp Act made this even more clear when it set out to purchase protected wetlands for birds to live and breed in.

In short, the Duck Stamp Act came into existence as a balance against overhunting and destruction of habitat. The Duck Stamp Act sought to conveniently place the burden of conservation on those most responsible for the decimation of birds and other species during the 19th and 20th centuries: hunters.

Thus, hunting regulations must control and contain the destructive acts that hunters commit, not encourage or expand them. Hunters contribute money to conservation, but the act of shooting birds does not contribute toward conservation. We should not celebrate or glamorize this behavior simply because Congress chose it as a method to finance habitats for birds. This behavior is the reason why birds need protection in the first place.

a. America's "waterfowl hunting heritage" should invoke shame, not pride.

When congress passed the MBTA in 1918, hunters had already decimated waterfowl populations all over the United States. Without a limit on the numbers of kills per day, or a seasonal limit on when hunting could occur, hunters depleted canvasbacks, redheads, scaup, goldeneye, ring-necked ducks, Northern pintail, American wigeon, gadwall, mallards, teal, and both Canada and Snow geese.²⁸

A 1941 interview provided by FWS shines light on these practices that do not deserve celebration. Conducted just eleven years after the passage of the MBCA, the interview gives firsthand accounts of the pre-MBCA era by Captain Theodore Johnson. Johnson killed and sold about 10,000 (ten thousand) birds each season between 1902 and 1911. He was considered one of the most "successful" hunters of the Mississippi Delta.²⁹

Johnson states that, "[A] good market hunter down here shot an average of 100 birds a day and thought nothin' of it."³⁰ While the daily bag limits of twenty-five were in place as early

²⁷ U.S. Fish and Wildlife Service, *History of the Federal Duck Stamp* (Dec. 15, 2017), <https://www.fws.gov/birds/get-involved/duck-stamp/history-of-the-federal-duck-stamp.php>.

²⁸ All About Birds, *How Hunters and Artists Helped Save North America's Waterfowl*, THE CORNELL LAB (2015), <https://academy.allaboutbirds.org/duck-stamps>.

²⁹ U.S. Fish and Wildlife Service, *Old-time Market Hunter Reminisces: Says Protection Bringing Game Back* (Jan. 21, 1941), <https://www.fws.gov/news/Historic/NewsReleases/1941/19410121.pdf>.

³⁰ *Id.* at 1.

as 1922, an average shooter was “liable to cripple as many as 15 or 20 birds before he gets his limit.”³¹

Johnson also gives his expert opinion on how the fall of market and sport hunting had (in 1941) already helped contribute to conservation. “Settin’ up a daily bag limit is what did the trick in the first place.”³² He points out that it was financial reasons – not conservation – that reduced the demand for overhunting. With the curtailed take of birds, market hunting was no longer profitable. When selling ducks for meat or feathers became unprofitable, hunters slowed their killing.

Even as an avid market hunter himself, Johnson recognized the dangers of hunting. “[It’s] a good thing **they stopped both us** market hunters and the sport hunters before we went too far or there wouldn’t be any huntin’ left now.”³³ Hunters in the early 20th century had to be forced, by law, to slow down their unregulated killing. Only until the federal government imposed bag limits and seasonal restrictions did the birds slowly start to mount a comeback.

This is America’s “waterfowl hunting heritage.” Any celebration of it must recognize that hunters’ greatest contribution to waterfowl conservation involved the collective decision to abide by the laws that explicitly commanded hunters to stop decimating bird populations.

3. FWS should consider its obligations under NEPA.

a. The Proposed Rule does not appropriately fit under a “Categorical Exclusion.”

Under NEPA, federal agencies may “categorically exclude” certain actions that do not “individually or cumulatively have a significant effect on the human environment.”³⁴

Reducing the funding for, and thus availability of, protected refuges in the United States would significantly impact the human environment. As FWS itself highlights in the Proposed Rule, healthy wetlands “help dissipate storms, purify water supplies, store flood water, and nourish fish hatchlings...”³⁵ FWS has shown no evidence to suggest that a reduction in duck stamp revenue would not occur as a result of demonstrated alienation of

³¹ *Id.* at 3.

³² *Id.*

³³ *Id.* at 5 (emphasis added).

³⁴ 40 C.F.R. § 1508.4.

³⁵ U.S. Fish and Wildlife Service, Revision of Federal Migratory Bird Hunting and Conservation Stamp (Duck Stamp) Contest Regulations, 85 Fed. Reg. 5182 (Jan. 29, 2020).

non-hunters, such as the blowback from the 2018 contest rule. FWS has shown nothing to support its bare assertion that the “impacts are limited to administrative effects.”

b. The Proposed Rule meets the level of significance that triggers preparation of at least an EA.

While NEPA does not mandate results, NEPA does require that agencies take “a hard look” at their actions before deciding.³⁶ Here, FWS neglects to consider the possibility of a drop in duck stamp sales. FWS ignores the demonstrated effects of the 2018 duck stamp contest rule change, where numerous people commented to say they would not participate because of the mandatory hunting element.

At a minimum, FWS should conduct an EA to determine whether the Proposed Rule would result in a reduction of the Fund revenues. The EA should include a brief discussion of (1) the need for the rule change, (2) alternatives, (3) environmental impacts of the Proposed Rule, and (4) a listing of agencies or persons consulted.

c. The Proposed Rule could alienate people who would otherwise purchase the stamps, leading to reduced revenue for habitat acquisition.

FWS’ Proposed Rule negatively impacts funding in at least two ways. First, a hunting-focused stamp will appeal to fewer non-hunters who already purchase the stamps on an annual basis. Birders, wildlife photographers, stamp collectors, and artists do not want hunting elements permanently present. They stated so during the 2018 contest.

Second, FWS alienates potential supporters of the program. As hunting decreases and non-violent wildlife appreciation increases, the duck stamp program will require contributions from previously uninvolved populations. Both the Federal Duck Stamp Task Force and the Wildlife Management Institute point to the need to engage with **additional** groups of people who are interested in conservation.³⁷ With the Proposed Rule, FWS reinforces the idea that only hunters should purchase duck stamps.

Participation in the duck stamp program peaked fifty years ago. FWS should find ways to reach out to new audiences. Hunters will not stop purchasing the stamp just because it will not include – like it almost always has not included – a hunting element. Forcing a hunting element turned many supporters away in 2018, and a permanent inclusion will drive away more supporters forever.

³⁶ See, e.g., *Marble Mountain Audubon Society v. Rice*, 914 F.2d 179 (9th Cir. 1990) (concluding that the Forest Service had not taken a hard look at the impacts and alternatives of the Proposed Action).

³⁷ See *supra* notes 13, 14.

FWS needs to focus on common ground for the future of migratory bird conservation. The duck stamp program should focus on acquiring funds for conservation, not celebrating the sordid history of waterfowl hunting.

CONCLUSION

Friends of Animals strongly opposes the permanent, mandatory inclusion of a hunting theme in future duck stamps. Not only does this inclusion fly in the face of the underlying reason behind the Duck Stamp Act, it alienates the growing population of non-consumptive users of wildlife in an attempt to bolster the dwindling numbers of waterfowl hunters.

FWS has also neglected to consider its duties under NEPA. Sending a message to non-hunters that FWS does not value their participation in the duck stamp program will only reduce the revenue for the Fund. Less funding significantly affects the human environment by providing fewer funds for refuge acquisition.

FWS should broaden participation in the duck stamp program, and not narrow it by catering to one portion of supporters while alienating the vast majority of potential supporters. Thank you for the opportunity to comment. Please contact me if you have any question or concerns.

Sincerely,

Adam Kreger
Animal Law Fellow
Friends of Animals
Wildlife Law Program
Western Region Office
7500 E. Arapahoe Rd., Suite 385
Centennial, CO 80112
adam.kreger@friendsofanimals.org