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DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 21

[Docket No. FWS–HQ–MB–2012–0037; FF09M21200–234–FXMB1232099BPP0]

RIN 1018–AY65

Migratory Bird Permits; Depredation Order for Migratory Birds in California

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Proposed rule.

SUMMARY: We propose to revise the regulations that allow control of depredating birds in some counties in California. We propose to specify the counties in which this order is effective, to better identify which species may be taken under the order, to add a requirement that landowners attempt nonlethal control, to add a requirement for use of nontoxic ammunition, and to revise the reporting required. These changes would update and clarify the current regulations and enhance our ability to carry out our responsibility to conserve migratory birds.

DATES: Electronic comments on this proposal via *http://www.regulations.gov* must be submitted by 11.59 p.m. Eastern time on [**INSERT DATE 90 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER**]. Comments submitted by mail

must be postmarked no later than [**INSERT DATE 90 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER**].

ADDRESSES: You may submit comments by either of the following two methods:

• *Federal eRulemaking portal*: http://www.regulations.gov. Follow the instructions for submitting comments on Docket FWS–R9–MB–2012–0037.

• *U.S. mail or hand delivery:* Public Comments Processing, Attention: FWS–R9–MB–2012–0037; Division of Policy and Directives Management; U.S. Fish and Wildlife Service; 4401 North Fairfax Drive, MS 2042–PDM; Arlington, VA 22203–1610.

We will not accept e-mail or faxes. We will post all comments on *http://www.regulations.gov.* This generally means that we will post any personal information that you provide. See the **Public Comments** section below for more information.

FOR FURTHER INFORMATION CONTACT: Dr. George T. Allen at 703–358–1825.

SUPPLEMENTARY INFORMATION:

Background

The U.S. Fish and Wildlife Service is the Federal agency delegated the primary responsibility for managing migratory birds. This delegation is authorized by the Migratory Bird Treaty Act (MBTA, 16 U.S.C. 703 et seq.), which implements conventions with Great Britain (for Canada), Mexico, Japan, and the Soviet Union (Russia). We implement the provisions of the MBTA through regulations in parts 10, 13, 20, 21, and 22 of title 50 of the Code of Federal Regulations (CFR). Regulations

pertaining to migratory bird permits are at 50 CFR part 21; subpart D of part 21 contains regulations for the control of depredating birds.

A depredation order allows the take of specific species of migratory birds for specific purposes without need for a depredation permit. The depredation order at 50 CFR 21.44 allows county commissioners of agriculture to authorize take of designated species of depredating birds in California "as may be necessary to safeguard any agricultural or horticultural crop in the county."

Current Depredation Order

Take of depredating birds has been reported under the depredation order at 50 CFR 21.44 in Fresno, Merced, Napa, and Sonoma counties in California in recent years, and some counties have reported take of species not authorized under the regulation. Because these are the only counties making use of the depredation order, we propose to limit future use of the order to these four counties.

The depredation order allows take of horned larks (*Eremophila alpestris*), golden-crowned sparrows (*Zonotrichia atricapilla*), white-crowned sparrows (*Zonotrichia leucophrys*), house finches (*Carpodacus mexicanus*) and "other crowned sparrows" where they cause agricultural damage. We believe the current wording of the regulation is unclear as "other crowned sparrows" is imprecise. The only other U.S. sparrow with "crowned" in the name is the rufous-crowned sparrow (*Aimophila ruficeps*), which can be found in coastal California. However, the term "crowned" might be applied to many other sparrow species that have feather patterns on their heads that people might call "crowns."

Proposed Changes

We propose to revise § 21.44 to:

(1) specify in which counties this regulation is applicable;

(2) precisely identify the species that may be taken as described below;

(3) specify the times of year that they may be taken to maximize protection of affected crops and effectiveness of control operations;

(4) require that landowners attempt nonlethal control each year;

(5) require the use of nontoxic ammunition; and

(6) update the requirement for reporting take under this depredation order.

These changes would bring the requirements of this depredation order in line with current regulations for other depredation orders under the MBTA and allow us to better carry out our statutory responsibility to protect and conserve migratory birds.

This proposed rule would remove horned larks from the depredation order. Horned larks feed on "a diversity of food types, primarily seeds and insects, but also some fruits" (Beason 1995). Damage to some agricultural crops has been documented, including to crops in California (Beason 1995, Clark and Hygnstrom 1994). However, trapping and shooting of horned larks to limit depredation is considered ineffective (Clark and Hygnstrom 1994).

In addition, the streaked horned lark subspecies, *E. a. strigata*, is endangered in Canada (Committee on the Status of Endangered Wildlife in Canada 2003), a Listing Priority 3 candidate species in the United States (76 FR 66370, October 26, 2011), and a subspecies of conservation concern in Washington and Oregon (USFWS 2008). Because

the wintering locations of this subspecies may include parts of California, take of this subspecies would not be allowed under this depredation order.

Finally, we propose to remove golden-crowned sparrows, because none have been reported taken under the depredation order.

Public Comments

We request comments on this proposed rule. You may submit your comments and supporting materials by one of the methods listed in **ADDRESSES**. We will not consider comments sent by e-mail or fax, or written comments sent to an address other than the one listed in **ADDRESSES**.

If you submit a comment via *http://www.regulations.gov*, your entire comment—including any personal identifying information—will be posted on the Web site. If you submit a hardcopy comment that includes personal identifying information, you may request that we withhold this information from public review, but we cannot guarantee that we will be able to do so. We will post all hardcopy comments on *http://www.regulations.gov*.

Comments and materials we receive, as well as supporting documentation we used in preparing this proposed rule, will be available for public inspection at *http://www.regulations.gov*, or by appointment, during normal business hours, at the U.S. Fish and Wildlife Service (see **FOR FURTHER INFORMATION CONTACT**).

Required Determinations

Regulatory Planning and Review (Executive Orders 12866 and 13563).

Executive Order 12866 provides that the Office of Information and Regulatory Affairs (OIRA) will review all significant rules. OIRA has determined that this rule is not significant.

Executive Order 13563 reaffirms the principles of E.O. 12866 while calling for improvements in the nation's regulatory system to promote predictability, to reduce uncertainty, and to use the best, most innovative, and least burdensome tools for achieving regulatory ends. The executive order directs agencies to consider regulatory approaches that reduce burdens and maintain flexibility and freedom of choice for the public where these approaches are relevant, feasible, and consistent with regulatory objectives. E.O. 13563 emphasizes further that regulations must be based on the best available science and that the rulemaking process must allow for public participation and an open exchange of ideas. We have developed this rule in a manner consistent with these requirements.

Regulatory Flexibility Act (5 U.S.C. 601 et seq.)

Under the Regulatory Flexibility Act (5 U.S.C. 601 et seq., as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA) of 1996 (Pub. L. 104-121)), whenever an agency is required to publish a notice of rulemaking for any proposed or final rule, it must prepare and make available for public comment a regulatory flexibility analysis that describes the effect of the rule on small businesses, small organizations, and small government jurisdictions. However, no regulatory flexibility

analysis is required if the head of an agency certifies the rule would not have a significant economic impact on a substantial number of small entities.

SBREFA amended the Regulatory Flexibility Act to require Federal agencies to provide the statement of the factual basis for certifying that a rule would not have a significant economic impact on a substantial number of small entities. Other than a minimal change in the resources needed to address the proposed reporting requirements, there are no costs associated with this regulations change.

We have examined this rule's potential effects on small entities as required by the Regulatory Flexibility Act. Because only four counties have made use of this depredation order, we believe no economic impacts to any small entities will result from the proposed revisions. Any agricultural producers who qualify as small entities in those counties could still seek relief from depredating birds under these proposed revisions. Under the current regulations, the county commissioners of agriculture have needed to comply with a reporting requirement, and the proposed changes to this requirement should add minimal burden. Because we have determined that this action would not have a significant economic impact on a substantial number of small entities, a regulatory flexibility analysis is not required.

This rule is not a major rule under the SBREFA (5 U.S.C. 804 (2)). It would not have a significant impact on a substantial number of small entities.

a. This rule does not have an annual effect on the economy of $100 million or more.

b. This rule would not cause a major increase in costs or prices for consumers, individual industries, Federal, State, tribal, or local government agencies, or geographic regions.

c. This rule would not have significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of U.S.-based enterprises to compete with foreign-based enterprises.

Unfunded Mandates Reform Act

In accordance with the Unfunded Mandates Reform Act (2 U.S.C. 1501 et seq.), we have determined the following:

a. This rule would not "significantly or uniquely" affect small governments. A small government agency plan is not required. The proposed revisions would not have significant effects. The proposed regulation would minimally affect small government activities by changing the reporting requirement under the depredation order.

b. This rule would not produce a Federal mandate of $100 million or more in any year. It would not be a "significant regulatory action."

Takings

This rule does not contain a provision for taking of private property. In accordance with Executive Order 12630, a takings implication assessment is not required.

Federalism

This rule does not have sufficient Federalism effects to warrant preparation of a Federalism assessment under Executive Order 13132. It would not interfere with the

States' abilities to manage themselves or their funds. No significant economic impacts are expected to result from the proposed changes in the depredation order.

Civil Justice Reform

In accordance with Executive Order 12988, the Office of the Solicitor has determined that the rule does not unduly burden the judicial system and meets the requirements of sections 3(a) and 3(b)(2) of the Order.

Paperwork Reduction Act of 1995

We may not conduct or sponsor and you are not required to respond to a collection of information unless it displays a currently valid Office of Management and Budget (OMB) control number. Because this rule affects only four county government agencies in California, the annual report does not require OMB approval under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 et seq.).

National Environmental Policy Act

We have analyzed this proposed rule in accordance with the National Environmental Policy Act (NEPA), 42 U.S.C. 432-437(f), and U.S. Department of the Interior regulations at 43 CFR part 46. We have completed an Environmental Action Statement stating that this action would have neither a significant effect on the quality of the human environment, nor unresolved conflicts concerning uses of available resources.

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), Executive Order 13175, and 512 DM 2, we have determined that there

are no potential effects on Federally recognized Indian Tribes from the proposed regulations change. The proposed regulations change would not interfere with Tribes' abilities to manage themselves or their funds or to regulate migratory bird activities on Tribal lands.

Energy Supply, Distribution, or Use (Executive Order 13211)

This rule only affects depredation control of migratory birds, and would not affect energy supplies, distribution, or use. This action would not be a significant energy action, and no Statement of Energy Effects is required.

Compliance with Endangered Species Act Requirements

Section 7 of the Endangered Species Act (ESA) of 1973, as amended (16 U.S.C. 1531 et seq.), requires that "The Secretary [of the Interior] shall review other programs administered by him and utilize such programs in furtherance of the purposes of this chapter" (16 U.S.C. 1536(a)(1)). It further states that the Secretary must "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" (16 U.S.C. 1536(a)(2)). The proposed regulations change would not affect listed species.

Clarity of This Regulation

Executive Order 12866 requires each agency to write regulations that are easy to understand. We invite your 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) Does the description of the rule in the "Supplementary Information" section of the preamble help you to understand the proposed rule? What else could we do to make the rule easier to understand?

Send a copy of any comments that concern how we could make this rule easier to understand to the Office of Regulatory Affairs, Department of the Interior, Room 7229, 1849 C Street NW, Washington, DC 20240-0001. You also may e-mail comments to Exsec@ios.doi.gov.

Literature Cited

Beason, Robert C. 1995. Horned Lark (*Eremophila alpestris*). Number 195 *in* The Birds of North America Online. Edited by A. Poole. Ithaca, New York, Cornell Lab of Ornithology. Birds of North America Online, http://bna.birds.cornell.edu/bna/species/195doi:10.2173/bna.195.

Clark, J. P. and S. E. Hygnstrom. 1994. Horned Larks. Number 64 *in* The Handbook: Prevention and Control of Wildlife Damage. http://digigalcommons.unl.edu/icwdmhandbook/64.

Committee on the Status of Endangered Wildlife in Canada. 2003. COSEWIC Assessment and Status Report on the Horned Lark *Strigata* subspecies, *Eremophila alpestris strigata*. Canadian Wildlife Service, Environment Canada, Ottawa, Ontario, Canada.

U.S. Fish and Wildlife Service. 2008. Species of Conservation Concern. U.S. Fish and Wildlife Service, Arlington, Virginia.

List of Subjects in 50 CFR Part 21

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

Proposed Regulation Promulgation

For the reasons described in the preamble, we propose to amend subchapter B of chapter I, title 50 of the Code of Federal Regulations, as set forth below:

PART 21—MIGRATORY BIRD PERMITS

1. The authority citation for part 21 is revised to read as follows:

Authority: 16 U.S.C. 703–712.

2. Revise § 21.44to read as follows:

§ 21.44 Depredation order for house finches and white-crowned sparrows in California.

House finches (*Carpodacus mexicanus*) and white-crowned sparrows (*Zonotrichia leucophrys*) may be taken in Fresno, Merced, Napa, and Sonoma Counties in California if they are depredating on agricultural or horticultural crops. Take of birds under this order must be done under the supervision of the county agriculture

commissioner. You do not need a Federal permit for this depredation control as long as you meet the conditions below, but a depredation permit (§ 21.41 in this subpart) is required for take of other migratory bird species, or for take of white-crowned sparrows from 1 April through 30 September.

(a) *When is take allowed?*

(1) House finches may be controlled at any time.

(2) White-crowned sparrows may be controlled from 1 October through 31 March.

(b) *Use of nonlethal control.* Each year, before lethal control may be undertaken, the landowner must attempt to use nonlethal control of migratory bird depredation as recommended by the U.S. Department of Agriculture, Animal and Plant Health Inspection Service, Wildlife Services. The county agriculture commissioner must confirm that nonlethal measures have been undertaken to control or eliminate the problem prior to the landowner using lethal control.

(c) *Ammunition.* Except when using an air rifle or an air pistol, if firearms are used to kill migratory birds under the provisions of this regulation, the shooter must use nontoxic shot or nontoxic bullets to do so. See § 20.21(j) of this chapter for a listing of approved nontoxic shot types.

(d) *Disposition of carcasses.* Specimens useful for scientific purposes may be transferred to any entity authorized to possess them. If not transferred, all carcasses of birds killed under this order must be buried or otherwise destroyed. None of the above

migratory birds killed, or the parts thereof, or the plumage of such birds, shall be sold or removed from the area where killed.

(e) *Annual report.* Any county official acting under this depredation order must provide an annual report to the Regional Migratory Bird Permit Office. The use of FWS Form 3–202–2144 (see Service website) is preferred, but not required. The address for the Regional Migratory Bird Permit Office is in § 2.2 of subchapter A of this chapter, and is on the form. The report is due by January 31st of the following year and must include the following information:

(1) The name, address, phone number, and e-mail address of the reporting County Commissioner;

(2) The species and number of birds taken each month;

(3) The disposition of the carcasses; and

(4) The crop or crops that the birds were taken to protect.

Dated: April 30, 2013

Rachel Jacobson,

Principal Deputy Assistant Secretary for Fish and Wildlife and Parks.

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