



**Billing Code: 4333-15**

**DEPARTMENT OF THE INTERIOR**

**Fish and Wildlife Service**

**50 CFR Part 21**

**[Docket Number: FWS–HQ–MB–2018–0225; FF09M29000-190-FXMB12320900000]**

**RIN 1018–BB77**

**Migratory Bird Permits; Regulations Concerning a Depredation Order**

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

**ACTION:** Final rule.

**SUMMARY:** We are following up on a 2013 proposal to remove regulations that set forth a means for controlling damage caused by certain depredating scrub jays and Steller’s jays. We had proposed to remove the regulations that set forth a depredation order for these species to protect nut crops in certain counties in Washington and Oregon. Our reason for the proposed removal of these regulations was that we believed they were no longer necessary. However, we now withdraw this proposal based on comments received, as well as reports of activities

conducted under this deprecation order. Instead of removing the regulations, we hereby make minor updates to them to ensure timely reporting of activities conducted under this deprecation order.

**DATES:** This rule is effective [INSERT DATE 30 DAYS AFTER THE DATE OF PUBLICATION IN THE *FEDERAL REGISTER*.]

**ADDRESSES:** The proposed rule, which published under RIN 1018–AX92, and comments received are available at <http://www.regulations.gov> under Docket No. FWS–R9–MB–2011–0100.

**FOR FURTHER INFORMATION CONTACT:** Eric Kershner, 703-358-2376, [eric\\_kershner@fws.gov](mailto:eric_kershner@fws.gov).

## **SUPPLEMENTARY INFORMATION:**

### **Background**

On November 4, 2013, we, the U.S. Fish and Wildlife Service (Service), published a proposed rule (78 FR 65953) to remove certain regulations concerning control activities for deprecating migratory birds from part 21 of title 50 of the Code of Federal Regulations. These regulations, at 50 CFR 21.42, 21.45, and 21.46, set forth provisions for deprecation orders that allowed control activities to be conducted without a permit issued by the Service. Prior to 2013, we had received no reports of activities undertaken under these regulations and no requests for authorization of a deprecation order under these regulations for many years. Because these regulations apparently were unused, we proposed to remove them.

On March 25, 2015, we published a final rule (80 FR 15689) removing the depredation orders at 50 CFR 21.42 and 21.45, as well as references to those two sections that appeared in 50 CFR 21.41 and 21.53, as we had received no comments on our 2013 proposal to remove those regulations. However, we did receive comments on our proposal to remove 50 CFR 21.46. In the preamble to the March 25, 2015, final rule, we stated that we would address our proposal to remove 50 CFR 21.46 and respond to the comments we received concerning that proposal in a separate document to be published later in the *Federal Register*.

Under 50 CFR 21.46, landowners, sharecroppers, tenants, or their employees or agents actually engaged in the production of nut crops in Washington and Oregon may, without a permit and in accordance with certain conditions, take scrub jays (*Aphelocoma coerulescens*) and Steller's jays (*Cyanocitta stelleri*) when these species are found committing or about to commit serious depredations to nut crops on the premises owned or occupied by such persons.

### **Comments on the Proposed Rule**

In response to our November 4, 2013, proposed rule (78 FR 65953), we requested that all interested parties submit written comments on the proposal by February 3, 2014. During the public comment period, we received eight comments on our proposal to remove 50 CFR 21.46. We received comments from individuals, organizations, a State agency, and the Pacific Flyway Council, an administrative body that forges cooperation among public wildlife agencies for the purpose of protecting and conserving migratory birds in western North America. All comment letters are available at <http://www.regulations.gov> under Docket No. FWS-R9-MB-2011-0100.

(1) *Comment:* One commenter was supportive of removing regulations that are no longer used or outdated.

*Response:* At the time of the proposed rule we had not received a report of activities conducted under 50 CFR 21.46 for 10 years. However, in response to the proposed rule, we received comments stating that this deprecation order was being used, but activities had gone unreported due to a lack of knowledge of the reporting requirements. Since publishing the proposed rule, we have received annual permit reports of activities conducted under this deprecation order in the period 2014–2017.

(2) *Comment:* Five commenters were opposed to the proposed removal of 50 CFR 21.46 because it is currently being used by nut farmers in Oregon and Washington; however, the activities have been underreported due to a lack of awareness of reporting requirements.

*Response:* Since publishing the proposed rule in 2013, we have received reports of activities conducted under 50 CFR 21.46 in 2014–2017. As part of this document, which revises the 2013 proposed rule in regard to 50 CFR 21.46, we have also changed the due date and mailing address for the annual report.

(3) *Comment:* Two commenters were opposed to lethal take of birds.

*Response:* Lethal take is authorized under 50 CFR 21.46 as a tool to help reduce damage to nut crops in specific counties of Oregon and Washington caused by scrub jays and Steller's jays. As discussed in the final rule that set forth the provisions of 50 CFR 21.46 (39 FR 31326, August 28, 1974), before allowing the use of lethal take, the Service evaluated other options, such as the use of scaring devices, but such methods of reducing take proved to be ineffective or otherwise unsatisfactory. In addition, § 21.46(a) states that jays may only be taken between 1 August and 1 December in any year, limiting the season when birds can be taken. Take is limited to three counties in Washington and nine counties in Oregon.

## **This Document**

In response to the comments submitted and the annual reports received, we are (1) withdrawing our proposal to remove 50 CFR 21.46 from the Code of Federal Regulations, (2) updating the reporting requirements for activities conducted under the depredation order, and (3) updating the taxonomy of scrub jays as stated in the rule.

We are revising paragraph (f) of § 21.46 by: Updating the report due date to January 31 of the year following activities conducted under the depredation order, and updating the mailing address for the submission of the report forms.

We solicited comments on the revised reporting requirements by publishing a notice of information collection under OMB Control Number 1018–0146 (Dec. 8, 2017, 82 FR 58022). No comments were received, and OMB approved the request on January 29, 2018.

We are also revising the common and scientific names of one of the species covered by the depredation order, which pertains to scrub jays and Steller’s jays. The scientific name for scrub jay in the introductory text of § 21.46 is *Aphelocoma coerulescens*. However, that is the currently accepted scientific name for the Florida scrub jay. The currently accepted scientific name for the California scrub jay, which is the species of concern to nut growers in Washington and Oregon, is *Aphelocoma californica*, as listed in the List of Migratory Birds at 50 CFR 10.13. Accordingly, we are amending § 21.46 to change the scientific name and replace all references to “scrub jays” with “California scrub jays.”

## **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 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 will 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 will not have a significant economic impact on a substantial number of small entities. We have examined this rule’s potential effects on small entities as required by the Regulatory Flexibility Act. This action will not have a significant economic impact on any small entity, so a regulatory flexibility analysis is not required. There are no costs associated with the nonsubstantive changes we are making to the regulations regarding the deprecation order to protect nut crops in Washington and Oregon.

Entities that undergo control activities under the depredation order are already required to report on their activities to the Service.

This rule is not a major rule under the SBREFA (5 U.S.C. 804(2)). It will 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 will not cause a major increase in costs or prices for consumers, individual industries, Federal, State, Tribal, or local government agencies, or geographic regions. This rule will 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 will not “significantly or uniquely” affect small governments. A small government agency plan is not required.
- b. This rule will not produce a Federal mandate of \$100 million or greater in any year. It is not 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 summary impact statement under Executive Order 13132. It will not interfere with the States’ abilities to manage themselves or their funds.

### *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*

This rule does not contain any new collection of information that requires approval by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*). OMB has previously approved the information collection requirements associated with depredation orders and assigned OMB Control Number 1018–0146 (expires January 31, 2021). An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number.

### *National Environmental Policy Act*

We have analyzed this 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. This rule can be classified as a policy, directive, regulation, and guideline that is of an administrative nature (43 CFR 46.210(i)) and are changes to an already approved action and will have no or minor potential environmental impacts (DM Part 516) and therefore can be categorically excluded from the NEPA process. This action will have no significant effect on the quality of the human environment, nor will it involve unresolved conflicts concerning alternative 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 this final rule. The regulatory revisions will 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 will affect only one depredation order for migratory birds and will not affect energy supplies, distribution, or use. This is not 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)). Our consultation concluded that the regulations are not likely to jeopardize the continued existence of any endangered or threatened species, nor result in the destruction or adverse modification of their critical habitat.

**List of Subjects in 50 CFR Part 21**

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

**Regulation Promulgation**

For the reasons described in the preamble, we hereby 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 continues to read as follows:

AUTHORITY: 16 U.S.C. 703–712.

2. Amend § 21.46 by revising the section heading, introductory text, and paragraphs (a), (b), and (f) to read as follows:

**§ 21.46 Depredation order for depredating California scrub jays and Steller’s jays in Washington and Oregon.**

Landowners, sharecroppers, tenants, or their employees or agents actually engaged in the production of nut crops in Washington and Oregon may, without a permit, take California scrub jays (*Aphelocoma californica*) and Steller’s jays (*Cyanocitta stelleri*) when found committing or about to commit serious depredations to nut crops on the premises owned or occupied by such persons: *Provided*:

(a) That California scrub jays and Steller’s jays may only be taken pursuant to this section between August 1 and December 1 in any year, in the Washington counties of Clark, Cowlitz, and Lewis; and the Oregon counties of Benton, Clackamas, Lane, Linn, Marion, Multnomah, Polk, Washington, and Yamhill.

(b) That California scrub jays and Steller’s jays taken pursuant to this section shall not be transported or sold or offered for sale except that, such transportation within the area, as may be necessary to bury or otherwise destroy the carcasses of such birds is permitted: *Provided*, That the Director of the State agricultural department, college, or other public institution may

requisition such California scrub jays and Steller's jays killed as may be needed for scientific investigations.

\* \* \* \* \*

(f) That any person authorized by this section to act under this depredation order must provide an annual report of take during the calendar year for each species by January 31<sup>st</sup> of the following year. The report must include the number of birds taken for each species, method of take, month(s) in which they were taken, county(ies) and State(s) in which they were taken, purpose of take, and disposition. Submit annual reports to the Pacific Region Migratory Bird Permit Office in Portland, Oregon, at the address shown at 50 CFR 2.2.

Dated: July 18, 2019.

**Karen Budd-Falen,**

*Deputy Solicitor for Parks and Wildlife,*

*Exercising the Authority of the Assistant Secretary for Fish and Wildlife and Parks.*

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