

**DEPARTMENT OF THE INTERIOR****Fish and Wildlife Service****50 CFR Part 92**

RIN 1018-AJ27

**Migratory Bird Subsistence Harvest in Alaska; Subsistence Harvest Regulations for Migratory Birds in Alaska During the Spring/Summer 2004 Subsistence Season****AGENCY:** Fish and Wildlife Service, Interior.**ACTION:** Proposed rule.

**SUMMARY:** The U.S. Fish and Wildlife Service (Service or we) is proposing spring/summer migratory bird subsistence harvest regulations in Alaska for the 2004 subsistence season. This proposed rule would establish regulations that prescribe frameworks, or outer limits, for dates when harvesting of birds may occur, species that can be taken, and methods and means excluded from use. These regulations were developed under a co-management process involving the Service, the Alaska Department of Fish and Game, and Alaska Native representatives. These regulations are intended to provide a framework to enable the continuation of customary and traditional subsistence uses of migratory birds in Alaska. The rulemaking is necessary because the regulations governing the subsistence harvest of migratory birds in Alaska are subject to annual review. This rulemaking proposes regulations that start on April 2, 2004, and expire on August 31, 2004, for the spring/summer subsistence harvest of migratory birds in Alaska.

**DATES:** You must submit comments on the proposed spring/summer harvest regulations for migratory birds in Alaska by February 11, 2004.

**ADDRESSES:** Send your comments on this proposed rule to the Regional Director, Alaska Region, U.S. Fish and Wildlife Service, 1011 E. Tudor Road, Anchorage, AK 99503, or fax to (907) 786-3306.

**FOR FURTHER INFORMATION CONTACT:** Fred Armstrong, (907) 786-3887, or Donna Dewhurst, (907) 786-3499, U.S. Fish and Wildlife Service, 1011 E. Tudor Road, Mail Stop 201, Anchorage, AK 99503.

**SUPPLEMENTARY INFORMATION:****Background***What Events Led to This Action?*

In 1916, the United States and Great Britain (on behalf of Canada) signed the

Convention for the Protection of Migratory Birds in Canada and the United States (Canada Treaty). The treaty prohibited all commercial bird hunting and specified a closed season on the taking of migratory game birds between March 10 and September 1 of each year. In 1936, the United States and Mexico signed the Convention for the Protection of Migratory Birds and Game Mammals (Mexico Treaty). The Mexico treaty prohibited the taking of wild ducks between March 10 and September 1. Neither treaty allowed adequately for the traditional harvest of migratory birds by northern peoples during the spring and summer months. This harvest, which has occurred for centuries, was and is necessary to the subsistence way of life in the north and thus continued despite the closed season.

The Canada treaty and the Mexico treaty, as well as migratory bird treaties with Japan (1972) and Russia (1976), have been implemented in the United States through the Migratory Bird Treaty Act (MBTA). The courts have ruled that the MBTA prohibits the Federal Government from permitting any harvest of migratory birds that is inconsistent with the terms of any of the migratory bird treaties. The more restrictive terms of the Canada and Mexico treaties thus prevented the Federal Government from permitting the traditional subsistence harvest of migratory birds during spring and summer in Alaska. To remedy this situation, the United States negotiated Protocols amending both the Canada and Mexico treaties to allow for spring/summer subsistence harvest of migratory birds by indigenous inhabitants of identified subsistence harvest areas in Alaska. The U.S. Senate approved the amendments to both treaties in 1997.

*What Will the Amended Treaty Accomplish?*

The major goals of the amended treaty with Canada are to allow traditional subsistence harvest and improve conservation of migratory birds by allowing effective regulation of this harvest. The amended treaty with Canada allows permanent residents of villages within subsistence harvest areas, regardless of race, to continue harvesting migratory birds between March 10 and September 1 as they have done for thousands of years. The Letter of Submittal of May 20, 1996, from the Department of State to the White House that officially accompanied the treaty protocol explains that lands north and west of the Alaska Range and within the Alaska Peninsula, Kodiak Archipelago,

and the Aleutian Islands generally qualify as subsistence harvest areas.

*What Has the Service Accomplished Since Ratification of the Amended Treaty?*

In 1998, we began a public involvement process to determine how to structure management bodies to provide the most effective and efficient involvement for subsistence users. This process was concluded on March 28, 2000, when we published in the **Federal Register** (65 FR 16405) the Notice of Decision: "Establishment of Management Bodies in Alaska to Develop Recommendations Related to the Spring/Summer Subsistence Harvest of Migratory Birds." This notice described the establishment and organization of 12 regional management bodies plus the Alaska Migratory Bird Co-management Council (Co-management Council).

Establishment of a spring/summer migratory bird subsistence harvest began on August 16, 2002, when we published in the **Federal Register** (67 FR 53511) a final rule at 50 CFR part 92 that set procedures for incorporating subsistence management into the continental migratory bird management program. These regulations established an annual procedure to develop harvest guidelines to implement a spring/summer migratory bird subsistence harvest.

The next step established the first spring/summer subsistence migratory bird harvest system. This was finalized on July 21, 2003, when we published in the **Federal Register** (68 FR 43010) a final rule at 50 CFR parts 20, 21, and 92 that created the first annual harvest regulations for the 2003 spring/summer subsistence migratory bird season in Alaska. These annual frameworks were not intended to be a complete, all-inclusive set of regulations, but were intended to regulate continuation of customary and traditional subsistence uses of migratory birds in Alaska during the spring and summer. See the August 16, 2002, and July 21, 2003, final rules for additional background information on the subsistence harvest program for migratory birds in Alaska.

This current rulemaking is necessary because the migratory bird harvest season is closed unless opened and the regulations governing subsistence harvest of migratory birds in Alaska are subject to public review and annual approval. The Co-management Council held meetings in April, May, and July of 2003, to develop recommendations for changes effective for the 2004 harvest season. These recommendations were presented to the Service Regulations

Committee (SRC) on July 30 and 31, 2003, for action.

This rule proposes regulations for the taking of migratory birds for subsistence uses in Alaska during the spring/summer of 2004. This rule proposes to list migratory bird species that are open or closed to harvest, as well as season openings and closures by region. It also proposes minor changes in the methods and means of taking migratory birds for subsistence purposes. We propose to amend 50 CFR 92.5 by adding 13 new communities to the list of included areas, and to add corresponding harvest areas and season dates to 50 CFR 92.33. We also propose to amend 50 CFR 92.6 to allow for permits to be issued for possession of bird parts or eggs for scientific research or educational purposes.

*How Will the Service Continue To Ensure That the Subsistence Harvest Will Not Raise Overall Migratory Bird Harvest?*

The Service has an emergency closure provision (§ 92.21), so that if any significant increases in harvest are documented for one or more species in a region, an emergency closure can be requested and implemented. Eligibility to harvest under the regulations established in 2003 was limited to permanent residents, regardless of race, in villages located within the Alaska Peninsula, Kodiak Archipelago, the Aleutian Islands, and in areas north and west of the Alaska Range (§ 92.5). These geographical restrictions open the initial spring/summer subsistence migratory bird harvest to only about 13 percent of Alaska residents. High-population areas such as Anchorage, the Matanuska-Susitna and Fairbanks North Star boroughs, the Kenai Peninsula roaded area, the Gulf of Alaska roaded area, and Southeast Alaska were excluded from the eligible subsistence harvest areas.

Based on petitions requesting inclusion in the harvest, the Co-Management Council at its April and May 2003 meetings recommended that 13 additional communities be included starting in 2004 based on the five criteria set forth in § 92.5(c). The Upper Copper River region would include the communities of Gulkana, Gakona, Tazlina, Copper Center, Mentasta Lake, Chitina, and Chistochina, totaling 1,172 people. The Gulf of Alaska region would include the Chugach communities of Tatitlek, Chenega, Port Graham, and Nanwalek, totaling 541 people. The Cook Inlet region proposed to add only the community of Tyonek, population 193, and the Southeast Alaska region proposed to add only the community of Hoonah, population 860. In addition,

subsistence users of Hoonah are requesting only to continue their tradition of harvesting gull eggs. These new regions would increase the percentage of the State population included in the spring/summer subsistence bird harvest only to 13.5 percent.

Upon publication of the 2003 proposed harvest regulations (68 FR 6697), five Kodiak area organizations expressed a need to close the Kodiak road system starting in the 2003 season. Their primary concern was the likelihood of overharvesting, primarily by user groups that have not demonstrated customary and traditional uses of migratory birds and will have easy access to this resource. On the basis of public testimony and written comments, the Service left closed to harvesting a buffer zone around the Kodiak Island road system under § 92.33(e). The conservation concern is the nontraditional access posed by the road system in a region where the migratory bird hunting is traditionally done by boat in marine waters. In April 2003, the Co-Management Council recommended extending this closure to include an additional buffer strip of 500 feet extending beyond the water's edge, to be effective during the 2004 season. Closing the road system and water's edge to the spring and summer subsistence migratory bird harvest will help ensure local increases in harvest do not occur under the 2004 regulations.

Subsistence harvest has been monitored for the past 15 years through the use of annual household surveys in the most heavily used subsistence harvest areas, e.g., Yukon-Kuskokwim Delta. Continuation of this monitoring would enable tracking of any major changes or trends in levels of harvest and user participation after legalization of the harvest. In the March 3, 2003, **Federal Register** (68 FR 10024), we published a notice of intent to submit the Alaska Subsistence Household Survey Information Collection Forms to the Office of Management and Budget (OMB) for approval under the Paperwork Reduction Act, with a subsequent 60-day public comment period. In the July 31, 2003, **Federal Register** (68 FR 44961), we published a notice that the Alaska Subsistence Harvest Survey Information Collection Forms were submitted to OMB for approval under the Paperwork Reduction Act, with a 30-day public comment period. OMB approved the information collection on October 2, 2003, and assigned OMB control number 1018-0124, which expires on October 31, 2006.

*How Did the Service Develop the Methods and Means Prohibitions, and What Is Proposed To Change for 2004?*

In development of the initial regulations (68 FR 6697), the Co-Management Council encouraged the Service to adopt the existing methods and means prohibitions that occur in the Federal (50 CFR part 20.21) and Alaska (5AAC92.100) migratory bird hunting regulations. Some exceptions to the Federal regulations were made in the initial regulations and also in this proposed rule to allow the continuation of customary and traditional spring harvest methods, but not the creation of new proposed traditions. In this proposed rule, we have incorporated the Bristol Bay region's request to be added to the list of areas where use of air boats is prohibited for hunting or transporting hunters.

*What Is New With Establishing Bird Harvest Limits?*

The Co-management Council recommended the current set of proposed regulations to the Service without setting harvest limits, with the recognition that setting limits by area or species may become necessary. These initial years' harvest regulations provide general frameworks to enable the customary and traditional subsistence uses of migratory birds in Alaska. Within these frameworks, the first step in limiting the overall subsistence harvest was to establish a closed species list that included regional restrictions. Establishing a 30-day closed period during the breeding season also limited the harvest impacts. The eventual need to further adjust levels of harvest, either regionally or overall, is recognized and will be addressed by the Co-management Council on the basis of recommendations by the Council's Technical Committee on a species-by-species basis. These decisions will likely be based on bird population status and past subsistence harvest data. Concepts such as community harvest limits and/or designated hunters may be considered to accommodate customary and traditional subsistence harvest methods.

*How Did the Service Decide the List of Birds Open to Harvest?*

The Service believed that it was necessary to develop a list of bird species that would be open to subsistence harvest during the spring/summer season. The original list was compiled from subsistence harvest data, with several species added based on their presence in Alaska without written records of subsistence take. The original

intent was for the list to be reviewed by the regional management bodies as a check list. The list was adopted by the Co-management Council as part of the guidelines for the 2003 season. Most of the regions adopted the list as written; however, two regions created their own lists. One regional representative explained that it would take much more time than was available for his region to reduce the list and that, once a bird was removed, returning it to the list would be more difficult later. Going with the original list was viewed as protecting hunters from prosecution for the take of an unlisted bird. To understand this rationale, one must be aware that subsistence hunting is generally opportunistic and does not usually target individual species. Native language names for birds often group closely related species, with no separate names for species within these groups. Also, preferences for individual species differ greatly between villages and individual hunters. As a result, regions are hesitant to remove birds from the list open to harvest until they are certain the species are not taken for subsistence use. The list therefore contains some species that are taken infrequently and opportunistically, but this is still part of the subsistence tradition. The Co-management Council initially decided to call this list "potentially harvested birds" versus "traditionally harvested birds" because a detailed written documentation of the customary and traditional use patterns for the species listed had not yet been conducted. However, this terminology was leading to some confusion, so the Service renamed the list "subsistence birds" to cover the birds open to harvest.

The "customary and traditional use" of a wildlife species has been defined in Federal regulations (50 CFR part 100.4) as a long-established, consistent pattern of use, incorporating beliefs and customs that have been transmitted from generation to generation. Much of the customary and traditional use information has not been documented in written form, but exists in the form of oral histories from elders, traditional stories, harvest methods taught to children, and traditional knowledge of the birds' natural history shared within a village or region. The only available empirical evidence of customary and traditional use of the harvested bird species comes from Alaska subsistence migratory bird harvest surveys conducted by Service personnel and contractors and transferred to a computerized database. Because of difficulties in bird species identification, shorebird harvest

information has been lumped into "large shorebird" and "small shorebird" categories. In reality, Alaska subsistence harvests are also conducted in this manner, generally with no targeting or even recognition of individual shorebird species in most cases. In addition, red-faced cormorants, trumpeter swans, Aleutian terns, whiskered auklets, short-eared owls, and others have not been targeted in subsistence harvest questionnaires, so little or no numerical harvest data exists.

#### *How Does the Service Address the Birds of Conservation Concern Relative to the Subsistence Harvest?*

*Birds of Conservation Concern* (BCC) 2002 is the latest document in a continuing effort by the Service to assess and prioritize bird species for conservation purposes. It was published in the **Federal Register** on February 6, 2003 (68 FR 6179). The BCC list identifies bird species at risk because of inherently small populations, restricted ranges, severe population declines, or imminent threats. The species listed need increased conservation attention to maintain or stabilize populations. The legal authority for this effort is the Fish and Wildlife Conservation Act (FWCA) of 1980, as amended. Section 13(a)(3) of the FWCA, 16 U.S.C. 2912(a)(3), requires the Secretary of the Interior through the Service, to "identify species, subspecies, and populations of all migratory nongame birds that, without additional conservation actions, are likely to become candidates for listing under the Endangered Species Act of 1973, as amended (16 U.S.C. 1531–1543)."

The Co-management Council will continually review the list of subsistence birds. As appropriate, the Council will elevate hunter awareness of species that may have small or declining populations in an effort to directly involve subsistence hunters in conserving these vulnerable species.

At a July 2003 meeting, the SRC decided three of the BCC species (bar-tailed godwits [*Limosa lapponica*], dunlin [*Calidris alpina*], and red-legged kittiwakes [*Rissa brevirostris*]) would remain on the list of birds open to harvest in 2004. The Service, however, has conservation concerns about allowing harvest of the remaining 12 species (11 BCC birds plus wandering tattler) and is soliciting additional public comments as well as Co-management Council documentation of past and present use and dependence on these birds. Based on this information, the Service will make a final decision prior to publication of the final rule for the 2004 regulations as to whether or

not to leave these 12 species open for harvest. The 12 species of conservation concern include:

- Red-throated Loon (*Gavia stellata*)—Western Alaska BCC list
- Red-faced Cormorant (*Phalacrocorax urile*)—Aleutians/Bering Sea Islands and Western Alaska BCC list
- Black Oystercatcher (*Haematopus bachmani*)—National and Alaska-wide BCC list
- Solitary Sandpiper (*Tringa solitaria*)—National BCC list
- Wandering Tattler (*Heteroscelus incanus*)—not on BCC lists, but conservation issues were raised by the State of Alaska
- Upland Sandpiper (*Bartramia longicauda*)—National BCC list
- Black Turnstone (*Arenaria melanocephala*)—National and Alaska-wide BCC list
- Red Knot (*Calidris canutus*)—Northern Pacific Forest and National BCC list
- Arctic Tern (*Sterna paradisaea*)—Alaska-wide BCC list
- Aleutian Tern (*Sterna aleutica*)—National and Alaska-wide BCC list
- Whiskered Auklet (*Aethia pygmaea*)—National and Alaska-wide BCC list
- Short-eared Owl (*Asio flammeus*)—National BCC list

The Co-management Council has begun a systematic review of the customary and traditional use of these species and will recommend subsequent action based on its findings. The Co-management Council remains committed to including all stakeholders to determine the list of birds that will ultimately be open for subsistence harvest in 2004. Public comments are welcome on whether these 12 species should remain on the list of birds open to harvest in 2004. Any additional information would assist subsequent decisions made by the Service.

#### **Public Comments Solicited**

The Department of the Interior's policy is, whenever practicable, to afford the public an opportunity to participate in the rulemaking process. If you wish to comment, you may submit comments by any one of several methods. You may mail, fax, or hand-deliver comments to the address indicated under the caption **ADDRESSES**.

Our practice is to make comments, including names and home addresses of respondents, available for public review during regular business hours. Individual respondents may request that we withhold their home addresses from the rulemaking record, which we will honor to the extent allowable by law. In some circumstances, we will also withhold from the rulemaking record a

respondent's identity, as allowable by law. If you wish us to withhold your name and/or address, you must state this prominently at the beginning of your comment. However, we will not consider anonymous comments. We will make all submissions from organizations or businesses, and from individuals identifying themselves as representatives or officials of organizations or businesses, available for public inspection in their entirety. You may inspect comments received on the proposed regulations during normal business hours at the Service's office in Anchorage, Alaska.

Because we conducted an extensive public involvement process prior to formulating this proposed rule, we are soliciting comments on it for only 30 days. We need to finalize this proposed rule as soon as possible to open the subsistence harvest season in April 2004. In developing the final rule, we will consider each comment received during the public comment period. In the final rule, we possibly may not respond in detail to each comment received during the comment period, but we will summarize all comments received and respond to them.

#### Statutory Authority

We derive our authority to issue these regulations from the four migratory bird treaties with Canada, Mexico, Japan, and Russia and from the Migratory Bird Treaty Act of 1918 (16 U.S.C. 703 *et seq.*), that implements these treaties. Specifically, these regulations are issued pursuant to 16 U.S.C. 712(1), which authorizes the Secretary of the Interior, in accordance with these four treaties, to "issue such regulations as may be necessary to assure that the taking of migratory birds and the collection of their eggs, by the indigenous inhabitants of the State of Alaska, shall be permitted for their own nutritional and other essential needs, as determined by the Secretary of the Interior, during seasons established so as to provide for the preservation and maintenance of stocks of migratory birds."

#### Executive Order 12866

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) Is the description of the rule in the "Supplementary Information" section of the preamble helpful in understanding the rule?

(6) 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: Office of Regulatory Affairs, Department of the Interior, Room 7229, 1849 C Street NW., Washington, DC 20240. You may also e-mail the comments to this address: [Exsec@ios.doi.gov](mailto:Exsec@ios.doi.gov).

The Office of Management and Budget (OMB) has determined that this document is not a significant rule subject to OMB review under Executive Order 12866.

a. This rule will not have an annual economic effect of \$100 million or adversely affect an economic sector, productivity, jobs, the environment, or other units of government. The rule does not provide for new or additional hunting opportunities and therefore will have minimal economic or environmental impact. This rule benefits those participants who engage in the subsistence harvest of migratory birds in Alaska in two identifiable ways: first, participants receive the consumptive value of the birds harvested, and second, participants get the cultural benefit associated with the maintenance of a subsistence economy and way of life. The Service can estimate the consumptive value for birds harvested under this rule but does not have a dollar value for the cultural benefit of maintaining a subsistence economy and way of life.

The economic value derived from the consumption of the harvested migratory birds has been estimated using the results of a paper by Robert J. Wolfe titled "Subsistence Food Harvests in Rural Alaska, and Food Safety Issues" (August 13, 1996). Using data from Wolfe's paper and applying it to the areas that will be included in this process, we determined a maximum economic value of \$6 million. This is the estimated economic benefit of the consumptive part of this rule for participants in subsistence hunting. The cultural benefits of maintaining a subsistence economy and way of life can be of considerable value to the participants, and these benefits are not included in this figure.

b. This rule will not create inconsistencies with other agencies' actions. We are the Federal agency

responsible for the management of migratory birds, coordinating with the State of Alaska's Department of Fish and Game on management programs within Alaska. The State of Alaska is a member of the Alaska Migratory Bird Co-management Council.

c. This rule will not materially affect entitlements, grants, user fees, loan programs, or the rights and obligations of their recipients. The rule does not affect entitlement programs.

d. This rule will not raise novel legal or policy issues. The subsistence harvest regulations will go through the same National regulatory process as the existing migratory bird hunting regulations in 50 CFR part 20.

#### Regulatory Flexibility Act

The Department of the Interior certifies that this rule will not have a significant economic effect on a substantial number of small entities as defined under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). An initial regulatory flexibility analysis is not required. Accordingly, a Small Entity Compliance Guide is not required. The rule legalizes a pre-existing subsistence activity, and the resources harvested will be consumed by the harvesters or persons within their local community.

#### Small Business Regulatory Enforcement Fairness Act

This rule is not a major rule under 5 U.S.C. 804(2), the Small Business Regulatory Enforcement Fairness Act, as discussed in the Executive Order 12866 section above.

a. This rule does not have an annual effect on the economy of \$100 million or more. It will legalize and regulate a traditional subsistence activity. It will not result in a substantial increase in subsistence harvest or a significant change in harvesting patterns. The commodities being regulated under this rule are migratory birds. This rule deals with legalizing the subsistence harvest of migratory birds and, as such, does not involve commodities traded in the marketplace. A small economic benefit from this rule derives from the sale of equipment and ammunition to carry out subsistence hunting. Most, if not all, businesses that sell hunting equipment in rural Alaska would qualify as small businesses. We have no reason to believe that this rule will lead to a disproportionate distribution of benefits.

b. This rule will not cause a major increase in costs or prices for consumers; individual industries; Federal, State, or local government agencies; or geographic regions. This rule does not deal with traded

commodities and, therefore, does not have an impact on prices for consumers.

c. This rule does 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. This rule deals with the harvesting of wildlife for personal consumption. It does not regulate the marketplace in any way to generate effects on the economy or the ability of businesses to compete.

#### Unfunded Mandates Reform Act

We have determined and certified pursuant to the Unfunded Mandates Reform Act (2 U.S.C. 1501 *et seq.*) that this rule will not impose a cost of \$100 million or more in any given year on local, State, or tribal governments or private entities. A statement containing the information required by this Act is therefore not necessary. Participation on regional management bodies and the Co-management Council will require travel expenses for some Alaska Native organizations and local governments. In addition, they will assume some expenses related to coordinating involvement of village councils in the regulatory process. Total coordination and travel expenses for all Alaska Native organizations are estimated to be less than \$300,000 per year. In the Notice of Decision (65 FR 16405, March 28, 2000) we identified 12 partner organizations to be responsible for administering the regional programs. When possible, we will make annual grant agreements available to the partner organizations to help offset their expenses. The Alaska Department of Fish and Game will incur expenses for travel to Co-management Council and regional management body's meetings. In addition, the State of Alaska will be required to provide technical staff support to each of the regional management bodies and to the Co-management Council. Expenses for the State's involvement may exceed \$100,000 per year, but should not exceed \$150,000 per year.

#### Paperwork Reduction Act

This rule has been examined under the Paperwork Reduction Act of 1995 and has been found to contain no information collection requirements. We have, however, received OMB approval of associated voluntary annual household surveys used to determine levels of subsistence take. The OMB control number for the information collection is 1018-0124, which expires on October 31, 2006. 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.

#### Federalism Effects

As discussed in the Executive Order 12866 and Unfunded Mandates Reform Act sections above, this rule does not have sufficient federalism implications to warrant the preparation of a Federalism Assessment under Executive Order 13132. We worked with the State of Alaska on development of these regulations.

#### Civil Justice Reform—Executive Order 12988

In accordance with Executive Order 12988, the Office of the Solicitor has determined that the rule does not unduly burden the judicial system and that it meets the requirements of Section 3 of the Order.

#### Takings Implication Assessment

This rule is not specific to particular land ownership, but applies to the harvesting of migratory bird resources throughout Alaska. Therefore, in accordance with Executive Order 12630, this rule does not have significant takings implications.

#### Government-to-Government Relations With Native American Tribal Governments

In accordance with the President's memorandum of April 29, 1994, "Government-to-Government Relations With Native American Tribal Governments" (59 FR 22951), and Executive Order 13175 (65 FR 67249, November 6, 2000), concerning consultation and coordination with Indian Tribal Governments, we have consulted with Alaska tribes and evaluated the rule for possible effects on tribes or trust resources, and have determined that there are no significant effects. The rule will legalize the subsistence harvest of migratory birds and their eggs for tribal members, as well as for other indigenous inhabitants.

#### Endangered Species Act Consideration

Prior to issuance of annual spring and summer subsistence regulations, we will consider provisions of the Endangered Species Act of 1973, as amended, (16 U.S.C. 1531-1543; hereinafter the Act) to ensure that harvesting is not likely to jeopardize the continued existence of any species designated as endangered or threatened, or modify or destroy its critical habitats and that it is consistent with conservation programs for those species. Consultations under section 7 of this Act conducted in connection with the environmental assessment for the annual subsistence take regulations

may cause us to change these regulations. Our biological opinion resulting from the Section 7 consultation is a public document available for public inspection at the address indicated under the caption **ADDRESSES**.

#### National Environmental Policy Act Consideration

The annual regulations and options were considered in the Environmental Assessment, "Managing Migratory Bird Subsistence Hunting in Alaska: Hunting Regulations for the First Legal Spring/Summer Harvest in 2004," issued September 8, 2003. Copies are available from the address indicated under the caption **ADDRESSES**.

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

On May 18, 2001, the President issued Executive Order 13211 on regulations that significantly affect energy supply, distribution, and use. Executive Order 13211 requires agencies to prepare Statements of Energy Effects when undertaking certain actions. Because this rule only allows for traditional subsistence harvest and improves conservation of migratory birds by allowing effective regulation of this harvest, it is not a significant regulatory action under Executive Order 12866. Consequently it is not expected to significantly affect energy supplies, distribution, and use. Therefore, this action is not a significant energy action under Executive Order 13211 and no Statement of Energy Effects is required.

#### List of Subjects in 50 CFR Part 92

Exports, Hunting, Imports, Reporting and recordkeeping requirements, Subsistence, Treaties, Wildlife.

For the reasons set out in the preamble, we propose to amend title 50, chapter I, subchapter G, of the Code of Federal Regulations as follows:

#### PART 92—MIGRATORY BIRD SUBSISTENCE HARVEST IN ALASKA

1. The authority citation for part 92 continues to read as follows:

**Authority:** 16 U.S.C. 703-712.

#### Subpart A—General Provisions

2. In subpart A, amend § 92.4 by adding the definitions "Game Management Unit," "Seabirds," "Shorebirds," and "Waterfowl," to read as follows:

#### § 92.4 Definitions

\* \* \* \* \*

*Game Management Unit*, also referred to simply as *Unit*, means 1 of the 26

geographical areas listed in the codified State of Alaska hunting and trapping regulations and on maps of the Alaska State Game Management Units.

\* \* \* \* \*

*Seabirds* refers to all bird species listed in § 92.32 within the families Alcidae, Laridae, Procellariidae, and Phalacrocoracidae.

\* \* \* \* \*

*Shorebirds* refers to all bird species listed in § 92.32 within the families Charadriidae, Haematopodidae, and Scolopacidae.

\* \* \* \* \*

*Waterfowl* refers to all bird species listed in § 92.32 within the family Anatidae.

3. In subpart A, amend § 92.5 by revising paragraph (a) to read as follows:

**§ 92.5 Who is eligible to participate?**

\* \* \* \* \*

(a) *Included areas.* Village areas located within the Alaska Peninsula, Kodiak Archipelago, the Aleutian Islands, or in areas north and west of the Alaska Range are subsistence harvest areas, except that villages within these areas not meeting the criteria for a subsistence harvest area as identified in paragraph (c) of this section will be excluded from the spring and summer subsistence harvest.

(1) Any person may request the Co-management Council to recommend that an otherwise included area be excluded by submitting a petition stating how the area does not meet the criteria identified in paragraph (c) of this section. The Co-management Council will forward petitions to the appropriate regional management body for review and recommendation. The Co-management Council will then consider each petition and will submit to the U.S. Fish and Wildlife Service any recommendations to exclude areas from the spring and summer subsistence harvest. The U.S. Fish and Wildlife Service will publish any approved recommendations to exclude areas in subpart D of this part.

(2) Based on petitions for inclusion recommended by the Co-Management Council in 2003, the Service is proposing to add the following communities to the included areas under this part starting in the 2004 harvest season:

(i) Upper Copper River Region—Gulkana, Gakona, Tazlina, Copper Center, Mentasta Lake, Chitina, Chistochina.

(ii) Gulf of Alaska Region—Chugach Community of Tatitlek, Chugach Community of Chenega, Chugach Community of Port Graham, Chugach Community of Nanwalek.

(iii) Cook Inlet Region—Tyonek.

(iv) Southeast Alaska Region—Hoonah.

\* \* \* \* \*

4. In subpart A, revise § 92.6 to read as follows:

**§ 92.6 Use and possession of migratory birds.**

You may not sell, offer for sale, purchase, or offer to purchase migratory birds, their parts, or their eggs taken under this part.

(a) *Eligible persons.* Under this part, you may take birds for human consumption only. Harvest and possession of migratory birds must be done using nonwasteful taking. Nonedible byproducts of migratory birds taken for food may be used for other purposes.

(b) *Noneligible persons.* You may receive portions of birds or their eggs not kept for human consumption from eligible persons only if you have a valid permit issued under § 21.27 for scientific research or education, and consistent with the terms and conditions of that permit.

**Subpart C—General Regulations Governing Subsistence Harvest**

5. In subpart C, amend § 92.20 by revising paragraph (i) to read as follows:

**§ 92.20 Methods and means**

\* \* \* \* \*

(i) Using an air boat (Interior and Bristol Bay Regions only) or jet ski (Interior Region only) for hunting or transporting hunters.

**Subpart D—Annual Regulations Governing Subsistence Harvest**

6. In Subpart D, add §§ 92.31 through 92.33 to read as follows:

**§ 92.31 Migratory bird species not authorized for subsistence harvest.**

(a) You may not harvest birds or gather eggs from the following species:

(1) Spectacled Eider (*Somateria fischeri*).

(2) Steller's Eider (*Polysticta stelleri*).

(3) Emperor Goose (*Chen canagica*).

(1) Aleutian Canada Goose (*Branta canadensis leucopareia*)—Semidi Islands only.

(b) In addition, you may not gather eggs from the following species:

(1) Cackling Canada Goose (*Branta canadensis minima*).

(2) Black Brant (*Branta bernicla nigricans*)—in the Yukon/Kuskokwim Delta and North Slope regions only.

**§ 92.32 Subsistence migratory bird species.**

You may harvest birds or gather eggs from the following species, listed in

taxonomic order, within all included regions. When birds are listed only to the species level, all subspecies existing in Alaska are open to harvest.

(a) *Family Gaviidae.*

(1) Red-throated Loon (*Gavia stellata*).

(2) Arctic Loon (*Gavia arctica*).

(3) Pacific Loon (*Gavia pacifica*).

(4) Common Loon (*Gavia immer*).

(b) *Family Podicipedidae.*

(1) Horned Grebe (*Podiceps auritus*).

(2) Red-necked Grebe (*Podiceps grisegena*).

(c) *Family Procellariidae.*

(1) Northern Fulmar (*Fulmarus glacialis*).

(2) [Reserved].

(d) *Family Phalacrocoracidae.*

(1) Double-crested Cormorant (*Phalacrocorax auritus*).

(2) Red-faced Cormorant (*Phalacrocorax urile*).

(3) Pelagic Cormorant (*Phalacrocorax pelagicus*).

(e) *Family Anatidae.*

(1) Greater White-fronted Goose (*Anser albifrons*).

(2) Snow Goose (*Chen caerulescens*).

(3) Lesser Canada Goose (*Branta canadensis parvipes*).

(4) Taverner's Canada Goose (*Branta canadensis taverneri*).

(5) Aleutian Canada Goose (*Branta canadensis leucopareia*)—except in the Semidi Islands.

(6) Cackling Canada Goose (*Branta canadensis minima*)—except no egg gathering is permitted.

(7) Black Brant (*Branta bernicla nigricans*)—except no egg gathering is permitted in the Yukon/Kuskokwim Delta and the North Slope regions.

(8) Tundra Swan (*Cygnus columbianus*).

(9) Gadwall (*Anas strepera*).

(10) Eurasian Wigeon (*Anas penelope*).

(11) American Wigeon (*Anas americana*).

(12) Mallard (*Anas platyrhynchos*).

(13) Blue-winged Teal (*Anas discors*).

(14) Northern Shoveler (*Anas clypeata*).

(15) Northern Pintail (*Anas acuta*).

(16) Green-winged Teal (*Anas crecca*).

(17) Canvasback (*Aythya valisineria*).

(18) Redhead (*Aythya americana*).

(19) Ring-necked Duck (*Aythya collaris*).

(20) Greater Scaup (*Aythya marila*).

(21) Lesser Scaup (*Aythya affinis*).

(22) King Eider (*Somateria spectabilis*).

(23) Common Eider (*Somateria mollissima*).

(24) Harlequin Duck (*Histrionicus histrionicus*).

(25) Surf Scoter (*Melanitta perspicillata*).

(26) White-winged Scoter (*Melanitta fusca*).

(27) Black Scoter (*Melanitta nigra*).

(28) Long-tailed Duck (*Clangula hyemalis*).

(29) Bufflehead (*Bucephala albeola*).

(30) Common Goldeneye (*Bucephala clangula*).

(31) Barrow's Goldeneye (*Bucephala islandica*).

(32) Hooded Merganser (*Lophodytes cucullatus*).

(33) Common Merganser (*Mergus merganser*).

(34) Red-breasted Merganser (*Mergus serrator*).

(f) *Family Gruidae*.

(1) Sandhill Crane (*Grus canadensis*).

(2) [Reserved].

(g) *Family Charadriidae*.

(1) Black-bellied Plover (*Pluvialis squatarola*).

(2) Common Ringed Plover (*Charadrius hiaticula*).

(h) *Family Haematopodidae*.

(1) Black Oystercatcher (*Haematopus bachmani*).

(2) [Reserved].

(i) *Family Scolopacidae*.

(1) Greater Yellowlegs (*Tringa melanoleuca*).

(2) Lesser Yellowlegs (*Tringa flavipes*).

(3) Solitary Sandpiper (*Tringa solitaria*).

(4) Wandering Tattler (*Heteroscelus incanus*).

(5) Spotted Sandpiper (*Actitis macularia*).

(6) Upland Sandpiper (*Bartramia longicauda*).

(7) Bar-tailed Godwit (*Limosa lapponica*).

(8) Ruddy Turnstone (*Arenaria interpres*).

(9) Black Turnstone (*Arenaria melanocephala*).

(10) Red Knot (*Calidris canutus*).

(11) Semipalmated Sandpiper (*Calidris pusilla*).

(12) Western Sandpiper (*Calidris mauri*).

(13) Least Sandpiper (*Calidris minutilla*).

(14) Baird's Sandpiper (*Calidris bairdii*).

(15) Sharp-tailed Sandpiper (*Calidris acuminata*).

(16) Dunlin (*Calidris alpina*).

(17) Long-billed Dowitcher (*Limnodromus scolopaceus*).

(18) Common Snipe (*Gallinago gallinago*).

(19) Red-necked phalarope (*Phalaropus lobatus*).

(20) Red phalarope (*Phalaropus fulicaria*).

(j) *Family Laridae*.

(1) Pomarine Jaeger (*Stercorarius pomarinus*).

(2) Parasitic Jaeger (*Stercorarius parasiticus*).

(3) Long-tailed Jaeger (*Stercorarius longicaudus*).

(4) Bonaparte's Gull (*Larus philadelphia*).

(5) Mew Gull (*Larus canus*).

(6) Herring Gull (*Larus argentatus*).

(7) Slaty-backed Gull (*Larus schistisagus*).

(8) Glaucous-winged Gull (*Larus glaucescens*).

(9) Glaucous Gull (*Larus hyperboreus*).

(10) Sabine's Gull (*Xema sabini*).

(11) Black-legged Kittiwake (*Rissa tridactyla*).

(12) Red-legged Kittiwake (*Rissa brevirostris*).

(13) Ivory Gull (*Pagophila eburnea*).

(14) Arctic Tern (*Sterna paradisaea*).

(15) Aleutian Tern (*Sterna aleutica*).

(k) *Family Alcidae*.

(1) Common Murre (*Uria aalge*).

(2) Thick-billed Murre (*Uria lomvia*).

(3) Black Guillemot (*Cepphus grylle*).

(4) Pigeon Guillemot (*Cepphus columba*).

(5) Cassin's Auklet (*Ptychoramphus aleuticus*).

(6) Parakeet Auklet (*Aethia psittacula*).

(7) Least Auklet (*Aethia pusilla*).

(8) Whiskered Auklet (*Aethia pygmaea*).

(9) Crested Auklet (*Aethia cristatella*).

(10) Rhinoceros Auklet (*Cerorhinca monocerata*).

(11) Horned Puffin (*Fratercula corniculata*).

(12) Tufted Puffin (*Fratercula cirrhata*).

(l) *Family Strigidae*.

(1) Great Horned Owl (*Bubo virginianus*).

(2) Snowy Owl (*Nyctea scandiaca*).

(3) Short-eared Owl (*Asio flammeus*).

### § 92.33 Region-specific regulations.

The 2004 season dates for the eligible subsistence regions are as follows:

- (a) *Aleutian/Pribilof Islands Region*.
- (1) Northern Unit (*Pribilof Islands*):
- (i) Season: April 2–June 30.
- (ii) Closure: July 1–August 31.
- (2) Central Unit (Aleut Region's eastern boundary on the Alaska Peninsula westward to and including Unalaska Island):
- (i) Season: April 2–June 15 and July 16–August 31.
- (ii) Closure: June 16–July 15.
- (3) Western Unit (Umnak Island west to and including Attu Island):
- (i) Season: April 2–July 15 and August 16–August 31.
- (ii) Closure: July 16–August 15.
- (b) *Yukon/Kuskokwim Delta Region*.
- (1) Season: April 2–August 31.

(2) Closure: 30-day closure dates to be announced by the Alaska Regional Director or his designee, after consultation with local subsistence users and the region's Waterfowl Conservation Committee. This 30-day period will occur between June 1 and August 15 of each year. A press release announcing the actual closure dates will be forwarded to regional newspapers and radio and television stations and posted in village post offices and stores.

(c) *Bristol Bay Region*.

(1) Season: April 2–June 14 and July 16–August 31 (general season); April 2–July 15 for seabird egg gathering only.

(2) Closure: June 15–July 15 (general season); July 16–August 31 (seabird egg gathering).

(d) *Bering Strait/Norton Sound Region*.

(1) Stebbins/St. Michael Area (Point Romanof to Canal Point):

(i) Season: April 15–June 14 and July 16–August 31.

(ii) Closure: June 15–July 15.

(2) Remainder of the region:

(i) Season: April 2–June 14 and July 16–August 31 for waterfowl; April 2–July 19 and August 21–August 31 for all other birds.

(ii) Closure: June 15–July 15 for waterfowl; July 20–August 20 for all other birds.

(e) Kodiak Archipelago Region, except the Kodiak Island roaded area is closed to the harvesting of migratory birds and their eggs. The closed area is depicted on a map and consists of all lands and water east of a line extending from Crag Point in the north to the west end of Saltery Cove in the south and all lands and water south of a line extending from Termination Point along the north side of Cascade Lake extending to Anton Larson Bay. Waters adjacent to the closed area are closed to harvest within 500 feet from the water's edge. The offshore islands are open to harvest.

(1) Season: April 2–June 20 and July 22–August 31, egg gathering: May 1–June 20.

(2) Closure: June 21–July 21.

(f) *Northwest Arctic Region*.

(1) Season: April 2–August 31 (in general); waterfowl egg gathering May 20–June 9; seabird egg gathering July 3–July 12; molting/non-nesting waterfowl July 1–July 31.

(2) Closure: June 10–August 14, except for the taking of seabird eggs and molting/non-nesting waterfowl as provided in paragraph (f)(1) of this section.

(g) *North Slope Region*.

(1) Southern Unit (Southwestern North Slope regional boundary east to Peard Bay, everything west of the longitude line 158°30'S and south of the

latitude line 70°45'E to west bank of the Ikpikpuk River, and everything south of the latitude line 69°45'E between the west bank of the Ikpikpuk River to the east bank of Sagavinirktok River):

(i) Season: April 2–June 29 and July 30–August 31 for seabirds; April 2–June 19 and July 20–August 31 for all other birds.

(ii) Closure: June 30–July 29 for seabirds; June 20–July 19 for all other birds.

(2) Northern Unit (At Peard Bay, everything east of the longitude line 158°30'S and north of the latitude line 70°45'E to west bank of the Ikpikpuk River, and everything north of the latitude line 69°45'E between the west bank of the Ikpikpuk River to the east bank of Sagavinirktok River):

(i) Season: April 6–June 6 and July 7–August 31 for king and common eiders and

April 2–June 15 and July 16–August 31 for all other birds.

(ii) Closure: June 7–July 6 for king and common eiders and June 16–July 15 for all other birds.

(3) Eastern Unit (East of eastern bank of the Sagavanirktok River):

(i) Season: April 2–June 19 and July 20–August 31.

(ii) Closure: June 20–July 19.

(h) *Interior Region.*

(1) Season: April 2–June 14 and July 16–August 31; egg gathering May 1–June 14.

(2) Closure: June 15–July 15.

(i) Upper Copper River (Harvest Area: State of Alaska Game Management Units 11 and 13) (Eligible communities: Gulkana, Chitina, Tazlina, Copper Center, Gakona, Mentasta Lake, Chistochina and Cantwell).

(1) Season: April 15–May 26 and June 27–August 31.

(2) Closure: May 27–June 26.

(3) Note: The Copper River Basin communities listed above also documented traditional use harvesting birds in Unit 12, making them eligible to hunt in this unit using the seasons specified in paragraph (h)(1) of this section.

(j) *Gulf of Alaska Region.*

(1) Prince William Sound Area (Harvest area: Unit 6 [D]), (Eligible Chugach communities: Chenega Bay, Tatitlek).

(i) Season: April 2–May 31 and July 1–August 31.

(ii) Closure: June 1–30.

(2) Kachemak Bay Area (Harvest area: Unit 15[C] South of a line connecting the tip of Homer Spit to the mouth of

Fox River) (Eligible Chugach Communities: Port Graham, Nanwalek).

(i) Season: April 2–May 31 and July 1–August 31.

(ii) Closure: June 1–30.

(k) Cook Inlet (Harvest area: portions of Unit 16[B] as specified below) (Eligible communities: Tyonek only)

(1) Season: April 2–May 31—That portion of Unit 16(B) south of the Skwentna River and west of the Yentna River and August 1–31—that portion of Unit 16(B) south of the Beluga River, Beluga Lake, and the Triumvirate Glacier.

(2) Closure: June 1–July 31.

(l) Southeast Alaska (Harvest area: National Forest lands in Icy Strait and Cross Sound including Middle Pass Rock near the Inian Islands, Table Rock in Cross Sound, and other traditional locations on the coast of Yakobi Island) (Eligible communities: Hoonah only).

(1) Season: glaucous-winged gull egg gathering only: May 15–June 30.

(2) Closure: July 1–August 31.

Dated: November 28, 2003.

**Craig Manson,**

*Assistant Secretary for Fish and Wildlife and Parks.*

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