

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 evaluated potential effects on Federally recognized Indian Tribes and have determined that there are no potential effects. This rule will not interfere with the Tribes' ability to manage themselves or their funds or to regulate migratory bird activities on Tribal lands.

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

On May 18, 2001, the President issued Executive Order 13211 addressing 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 affects control of invasive purple swamphens at limited locations, it will not be a significant regulatory action under Executive Order 12866, nor will it significantly affect energy supplies, distribution, or use. This action will not be a significant energy action, and no Statement of Energy Effects is required.

References

Anonymous. 2007. Purple swamphen control plan. Unpublished document, Florida Fish and Wildlife Conservation Commission.

Pratt, H. D., P. L. Bruner, and D. G. Berrett. 1987. *The Birds of Hawaii and the Tropical Pacific*. Princeton University Press, Princeton, New Jersey.

List of Subjects in 50 CFR Part 21

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

■ For the reasons stated in the preamble, we amend part 21 of subchapter B, chapter I, title 50 of the Code of Federal Regulations, as follows:

PART 21—MIGRATORY BIRD PERMITS

■ 1. The authority citation for part 21 continues to read as follows:

Authority: Migratory Bird Treaty Act, 40 Stat. 755 (16 U.S.C. 703); Public Law 95-616, 92 Stat. 3112 (16 U.S.C. 712(2)); Public Law 106-108, 113 Stat. 1491, Note following 16 U.S.C. 703.

■ 2. Add new § 21.53 to subpart D to read as follows:

§ 21.53 Control order for purple swamphens.

(a) *Control of purple swamphens.* Federal, State, Tribal, and local wildlife management agencies, and their tenants, employees, or agents may remove or destroy purple swamphens (*Porphyrio porphyrio*) or their nests or eggs at any time when they find them anywhere in the contiguous United States, Hawaii, Alaska, the Commonwealth of Puerto Rico, or the U.S. Virgin Islands. Any authorized agency personnel may temporarily possess, transport, and dispose of purple swamphens, subject to the restrictions in paragraph (c) of this section. No permit is necessary to engage in these actions.

(b) *Disposal of purple swamphens.* If you are authorized to control purple swamphens, you may dispose of purple swamphens by the following methods: You may donate purple swamphens taken under this order to public museums or public institutions for scientific or educational purposes; you may dispose of the carcasses by burial or incineration; or, if the carcasses are not readily retrievable, you may leave them in place. No one may retain for personal use, offer for sale, or sell a purple swamphen removed under this section.

(c) *Other provisions.* (1) You may not remove or destroy purple swamphens or their nests or eggs if doing so is contrary to any State, territorial, tribal, or local laws or regulations.

(2) You may not remove or destroy purple swamphens or their nests or eggs if doing so will adversely affect other migratory birds or species designated as endangered or threatened under the authority of the Endangered Species Act. In particular, the purple swamphen resembles the native purple gallinule (*Porphyryla martinica*). Authorized persons must take special care not to take purple gallinules or their nests or eggs when conducting purple swamphen control activities. Certain persons may take purple gallinules without a permit on rice-producing property in Louisiana according to the terms of a separate depredation order (see § 21.45).

(3) If you use firearms to control purple swamphens under this regulation, you may use only nontoxic shot or nontoxic bullets for the control.

(4) If, while operating under this regulation, an authorized person takes any other species protected under the Endangered Species Act, the Migratory Bird Treaty Act, or the Bald and Golden Eagle Protection Act, that person must immediately report the take to the nearest Ecological Services office of the Fish and Wildlife Service. See <http://>

www.fws.gov/where/ to find the location of the nearest Ecological Services office.

(5) We may suspend or revoke the authority of any agency or individual to undertake purple swamphen control if we find that agency or individual has, without an applicable permit, taken actions that may take Federally listed threatened or endangered species or any bird species protected by the Bald and Golden Eagle Protection Act or the Migratory Bird Treaty Act (see § 10.13 of subchapter A of this chapter for the list of protected migratory bird species), or otherwise violated Federal regulations.

Dated: February 3, 2010.

Thomas L. Strickland,

Assistant Secretary for Fish and Wildlife and Parks.

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DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 21

[Docket Number FWS-R9-MB-2007-0017; 91200-1231-9BPP]

RIN 1018-AV34

Migratory Bird Permits; Control of Muscovy Ducks, Revisions to the Waterfowl Permit Exceptions and Waterfowl Sale and Disposal Permits Regulations

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Final rule.

SUMMARY: We, the U.S. Fish and Wildlife Service, change the regulations governing control of introduced migratory birds. The muscovy duck (*Cairina moschata*) occurs naturally only in southern Texas. It has been introduced in other locations, where it is considered an invasive species that sometimes creates problems through competition with native species, damage to property, and transmission of disease. We amend the regulations to prohibit sale, transfer, or propagation of muscovy ducks for hunting and any other purpose other than food production, and to allow their removal in locations in which the species does not occur naturally in the contiguous United States, Alaska, and Hawaii, and in U.S. territories and possessions. This requires revision of regulations governing permit exceptions for captive-bred migratory waterfowl other than mallard ducks, and waterfowl sale and disposal permits, and the addition of an order to allow control of muscovy

ducks, their nests, and eggs. We also have rewritten the affected regulations to make them easier to understand.

DATES: This rule will be effective on March 31, 2010.

FOR FURTHER INFORMATION CONTACT: Dr. George T. Allen, Division of Migratory Bird Management, U.S. Fish and Wildlife Service, 703-358-1825.

SUPPLEMENTARY INFORMATION:

Background

The Fish and Wildlife Service is the Federal agency delegated the primary responsibility for managing migratory birds. The 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 MBTA through Federal regulations found in title 50 of the Code of Federal Regulations (CFR). In 50 CFR 10.13, we list all species of migratory birds protected by the MBTA that are subject to the regulations protecting migratory birds in title 50, subchapter B (Taking, Possession, Transportation, Sale, Purchase, Barter, Exportation, and Importation of Wildlife and Plants). In 50 CFR part 13 (General Permit Procedures) and part 21 (Migratory Bird Permits), regulations allow us to issue permits for certain activities otherwise prohibited in regard to migratory birds. In part 21, we issue permits for the taking, possession, transportation, sale, purchase, barter, importation, exportation, and banding and marking of migratory birds. In that part, we also provide certain exceptions to permit requirements for public, scientific, or educational institutions and establish depredation and control orders that provide limited exceptions to the MBTA.

Muscovy Duck

The muscovy is a large duck native to South America, Central America, and Mexico. Due to a recent northward expansion of the range of the species, there is a small natural population in three counties in southern Texas in which natural breeding of wild birds has been confirmed. For that reason, we included this species in the final rule published today to revise the list of migratory birds found at 50 CFR 10.13.

The muscovy duck normally inhabits forested swamps and mangrove ponds, lakes and streams, and freshwater ponds near wooded areas. The species often roosts in trees at night. The hen usually lays her eggs in a tree hole or hollow. However, muscovy ducks will occasionally nest in abandoned nests of

large birds such as ospreys or eagles, between palm tree fronds, and in wooden boxes or other man-made, elevated cavities. The species does not form stable pairs.

Muscovy ducks can breed near urban and suburban lakes and on farms, nesting in tree cavities or on the ground, under shrubs in yards, on condominium balconies, or under roof overhangs. Feral populations, particularly in Florida, are said to present problems. Feral muscovy ducks are wary and associate little with other species.

Muscovy ducks feed on the roots, stems, leaves, and seeds of aquatic and terrestrial plants, including agricultural crops. They also eat small fishes, reptiles, crustaceans, insects, millipedes, and termites.

Muscovy ducks live alone or in groups of 4 to 12, rarely in large flocks. They are mainly active in the morning and afternoon, feeding on the shores of brackish waters, or in the flood savannah and underbrush. They often sleep at night in permanent roosts in trees along the river bank. Heavy and low-flying, they are silent and timid. Muscovy ducks swim much less than other ducks, and the males fly poorly.

We received comments from States and individuals expressing concern over control of muscovy ducks in response to the 2006 proposal to add the species to the list of those protected under the MBTA (50 CFR 10.13). In general, States expressed concern over feral and free-ranging populations of muscovy ducks present as the result of human activity. For example, one State was concerned that protecting the species under the MBTA “would severely impede our efforts to manage the feral and free-ranging populations of domestic muscovy ducks.” Individuals expressed concern over property damage and aggressiveness demonstrated by the ducks. The muscovy duck is an introduced species in many locations in the United States. We believe it is prudent to prohibit activities that would allow release of muscovy ducks in areas in which they are not native and may compete with native species.

We expect control of muscovy ducks to be undertaken primarily through the use of walk-in baited traps and through shooting. The use of baited traps will greatly limit the potential impacts to other species, especially passerines, which would be unlikely to enter properly placed traps. Shooting undertaken by State agency or U.S. Department of Agriculture Wildlife Services personnel would be very unlikely to harm other species.

We propose to revise 50 CFR 21.14 to prohibit sale and, in most cases,

possession, of muscovy ducks; to revise § 21.25 to prohibit sale or transfer of captive-bred muscovy ducks for hunting; and to add § 21.54 to allow removal of introduced muscovy ducks from any location in the contiguous United States outside Hidalgo, Starr, and Zapata Counties in Texas, and in Alaska, Hawaii, and U.S. territories and possessions. This removal is in keeping with the Service’s other actions to reduce the spread of introduced species that compete with native species or harm habitats that they use. It also is in keeping with the intent of the Migratory Bird Treaty Reform Act of 2004 (16 U.S.C. 703 (b)), which excluded non-native species from MBTA protection.

Comments on the Proposed Rule

We received ten sets of comments on the proposed rule published on August 22, 2008 (73 FR 49626-49631). The commenters raised the following issues.

Issue. One commenter suggested that Cameron County, Texas not be included in the natural range of the muscovy duck in Texas.

“I suggest leaving Cameron County, TX out of ‘native range’ since birds there act quite tame and occur in urban/suburban settings.”

Reference Brush, T. 2005. Nesting Birds of a Tropical Frontier, the Lower Rio Grande Valley of Texas. Texas A&M University Press, College Station, Texas.

Response. We revised this regulation accordingly. The listing of counties now matches the information in the listing by the American Ornithologists’ Union (1998. Check-list of North American Birds. 7th edition. American Ornithologists’ Union, Washington, DC) and subsequent updates.

Issue. Escape to the wild and competition with native species.

“* * * these new proposed rules do not deal with domesticated farm populations. Regulation of feral populations may help to solve some problems, but efforts should be taken to regulate domesticated populations as well. On most farms, some animals escape from time to time. These escaped animals could easily set up a population and be responsible for the spread of Muscovy ducks. If the Fish and Wild Life Service’s true goal is to control indigenous Muscovy ducks, it seems imperative that they should adopt provisions aimed at minimizing the potential for domesticated ducks to escape and then reproduce.”

“I am happy to get rid of muscovy ducks because as anyone would probably heard, this species really mess up the lives of other bird species in Tampa Bay area. There is, in my opinion, way too many muscovy ducks hanging or hovering around aquatic ecosystem especially suburban pond or lake where many local species thrive. I personally saw muscovy ducks chasing white ibis and great egret from a lake not too far from my

house. Not only the muscovy ducks take over the "aquatic territory", they multiply too fast. I am seeing locals feeding the duck making the ducks staying put so they would get easy food which also help supply the offspring as well. I've lived in Tampa Bay area for almost 15 years and noticed that the muscovy ducks are definitely taking over the local species habitat and pushing the local species to find other place where it get tougher with development brewing. If we can manage the population by limiting eggs hatching and if possible, hunting, we can somewhat control the population. The muscovy ducks have been more of bad news than good news."

Response. Control of this species in areas in which it is invasive is the intent of this rulemaking.

Issue. Range expansion of this species to the north.

"These ducks are moving up because of global warming. Why when they seek the warmer weather up north are they being killed because of that natural movement?"

"If the birds are expanding their range—why would you want to stop this?"

"* * * nowhere in the proposed rule does the agency make an allowance for natural populations that spread into neighboring counties. The language should be changed to allow for natural population growth from native regions."

Response. We recognize that muscovy ducks have expanded their range slightly into very southern Texas. However, they are introduced in most locations in the U.S. in which they are found, and as such are an invasive species that competes with native species. Control of muscovy ducks within their natural range in southern Texas will not be allowed under the control order. Any control of muscovy ducks in the three counties in which they have a natural population will require a depredation permit, just as with any other species protected by the MBTA. It is doubtful that we would issue any such permits unless current population levels increase significantly, as we may not issue depredation permits that potentially threaten a wildlife population under 50 CFR 13.21. We will consider this species' status and range in future updates of the list of the migratory birds at 50 CFR 10.13, and may amend this regulation accordingly. In *Hidalgo, Starr, and Zapata* counties in Texas, muscovy ducks will be protected as any other migratory bird listed in 10.13.

Issue. Interbreeding with other species.

"The species has "begun to interbreed with northern ducks." How does this proposal intend on dealing with this issue?"

"* * * the proposed rule makes no mention of so-called "mules," a cross between Muscovy ducks and other duck species. Mules, while unable to reproduce,

s[t]ill have the potential to hamper government control of Muscovy duck populations. This topic should be addressed."

Response. Any hybrid of a species listed at 50 CFR 10.13 is a Federally-regulated migratory bird species. As such, it may be managed under all relevant regulations. Hybrids of muscovy ducks in the wild may be controlled under this regulation.

Issue. Production of muscovy ducks for food.

"* * * muscovy ducks are produced in the millions in the United States generally for meat production * * *. No permits are needed to possess domesticated barnyard fowl. This species is bought and sold in the millions being the most commonly held species of waterfowl in the United States."

"I believe that problems associated with large feral populations of muscovy ducks are from domesticated varieties raised in captivity that have wandered, or allowed to free range, and not from 'wild' type muscovies imported from Latin America.

"The proposed regulation's goal of preventing additional human introduction of Muscovy ducks has great merit. It is far better to prevent populations from establishing than to subject more ducks to control later. However, the proposed regulation limits acquisition, possession, and propagation for some owners but not for others. Accidental releases from food production are not addressed and could continue to allow Muscovy populations to become established. No clear reason is evident for targeting only Muscovies not in food production to prevent additional introductions. Why are Muscovies in food production excepted when this source of accidental releases may be significant?"

"The rule should be focused on controlling populations, both feral and domestic, instead of destroying established populations. By controlling populations, the Fish and Wildlife Service can largely achieve the same goals without many of the potential harmful side effects."

Response. This rule is intended to limit production and releases of muscovy ducks in locations in which the species is not native. However, it is unusual because we will continue to allow ongoing commercial endeavors with a species that was not protected under the MBTA. We are aware of the production of muscovy ducks for food, and this rule is intended to allow that production to continue. We will allow continued production of muscovy ducks for food because we do not want to create economic dislocation. We may review allowing possession for food production in the future if escapes and releases from this source are shown to be a problem. However, the regulations state that release of muscovy ducks to the wild is not to be allowed, regardless of the source of the birds.

Issue. Three commenters requested that use of OvoControlJ (nicarbazine) be allowed under the control order.

"The HSUS supports non-lethal tools to resolve conflicts such as when people feel Muscovy ducks are a nuisance. We strongly recommend that the final regulation explicitly allows use of contraceptive technology to control Muscovy ducks. Nicarbazine is registered by the Environmental Protection Agency for Muscovy ducks. It prevents egg and embryo development so that additional ducklings do not hatch. This tool allows communities to humanely reduce flocks without the controversy engendered by killing. Muscovy and other ducks are much loved by some members of the community even where they are considered a nuisance. Contraceptive technology must be available for communities that rightly reject killing neighborhood ducks."

Response. As with control of some other bird species, particularly Canada geese (*Branta Canadensis*), nicarbazine may be used if the applicator has a migratory bird permit to use it. However, we will work on the necessary Endangered Species consultation to allow use of nicarbazine under this control order in the future.

Issue. USDA Wildlife Services requested that within Cameron, Hidalgo, Starr, and Zapata counties in Texas, muscovy duck management be allowed consistent with rules and regulations for other migratory bird species, including take of birds and their nests and eggs.

Response. Control of Muscovy ducks in Hidalgo, Starr, and Zapata counties (we removed Cameron county from the provisions in § 21.54) would be subject to the regulations for authorizing depredation permits and our general permit regulations. We added language to § 21.54 to address this concern.

Issue. Capture and transfer of muscovy ducks, and muscovy ducks on private property.

"Live-capture and transfer to responsible private ownership is also a humane resolution for so-called nuisance ducks. While the opportunities for such transfer are limited, where there are potential new homes it is humane to the ducks and offers communities an uncontroversial solution. With the proposed restrictions on propagation and release, this resolution would also achieve the regulation's goal. The final regulations should allow this option for controlling Muscovy ducks."

"The HSUS is very concerned about the proposed regulation's impact on currently owned ducks who are not kept for food production. As proposed, the regulations seem to outlaw these ducks. It is not clear what USFWS expects will become of them but it seems it would be illegal for their owners to continue to keep them. This would be unreasonable and unnecessarily cruel for both the ducks and their owners. Many people keep ducks as pets. Waterfowl

fanciers maintain hobby flocks. Waterfowl rescuers have removed ducks from places people considered them nuisances; keeping some and finding new private owners for others. Forcing all these private owners to kill their birds or be in violation of this regulation would be outrageous. However, that appears to be the only way to construe the proposed regulation.”

Response. We allow private ownership of MBTA-protected species in few circumstances. We intend to disallow private possession of muscovy ducks, except to raise them to be sold as food (which has been ongoing for years). However, we will allow possession of any live muscovy duck held on the date when this rule takes effect.

In most every location, the muscovy duck is an introduced, invasive species. We will allow control of muscovy ducks as best suits the needs of the States and wildlife management agencies, who requested this authorization. Though the control order allows States and other entities to remove muscovy ducks, we do not expect that they will do so when the ducks are on private property. However, people who propagate muscovy ducks or allow them to multiply and move off their property should realize that the muscovy ducks may be subject to the control efforts that the State or local wildlife agency deems necessary.

Required Determinations

Regulatory Planning and Review (Executive Order 12866)

The Office of Management and Budget (OMB) has determined that this rule is not significant and has not reviewed this rule under Executive Order 12866. OMB bases its determination upon the following four criteria:

- Whether the rule will have an annual effect of \$100 million or more on the economy or adversely affect an economic sector, productivity, jobs, the environment, or other units of the government,
- Whether the rule will create inconsistencies with other Federal agencies' actions,
- Whether the rule will materially affect entitlements, grants, user fees, loan programs, or the rights and obligations of their recipients, and
- Whether the rule raises novel legal or policy issues.

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 entities (*i.e.*, 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. We have examined the rule's potential effects on small entities as required by the Regulatory Flexibility Act. Commercial producers of muscovy ducks for sale to entities other than food-producers are few and widely scattered across the country. Therefore, we have determined that this action will not have a significant economic impact on a substantial number of small entities, because the changes we are proposing are intended primarily to reduce the spread of an invasive species little used in commercial endeavors.

There will very minimal costs, if any, associated with this regulations change. Consequently, we certify that because this rule will not have a significant economic effect on a substantial number of small entities, a regulatory flexibility analysis is not required.

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

a. This rule will 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, or local government agencies; or geographic regions.

c. 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. Actions under the proposed regulation will not affect small

government activities in any significant way.

b. This rule will not produce a Federal mandate of \$100 million or greater in any year; *i.e.*, it is not a “significant regulatory action” under the Unfunded Mandates Reform Act.

Takings

In accordance with E.O. 12630, the rule will not have significant takings implications. This rule will not contain a provision for taking of private property. Therefore, a takings implication assessment is not required.

Federalism

This rule will not have sufficient Federalism effects to warrant preparation of a Federalism assessment under E.O. 13132. It will not interfere with the States' ability to manage themselves or their funds. No significant economic impacts are expected to result from control of muscovy ducks.

Civil Justice Reform

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

Paperwork Reduction Act

We examined these regulations under the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*). There are no new information collection requirements associated with this regulations change.

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 part 516 of the U.S. Department of the Interior Manual (516 DM). The change we propose is to allow people and agencies to remove the muscovy duck a species from locations in the United States and United States territories in which the species may have been introduced. We completed an Environmental Assessment and a Finding of No Significant Impact in which we concluded that the regulations change allowing the removal of an introduced species does not require an environmental impact statement addressing potential impacts on the quality of the human environment.

Environmental Consequences of the Action

The primary change made in this final rule is to prohibit release of the muscovy duck in locations in which it does not occur naturally. It has been

introduced in other locations, where it is an invasive species that sometimes creates problems through competition with native species and damage to property. We amend 50 CFR part 21 to prohibit sale of muscovy ducks for hunting, and to allow their removal in locations in which the species does not occur naturally in the contiguous United States, Alaska, and Hawaii, and in U.S. territories and possessions. Revisions are made to § 21.14 (permit exceptions for captive-bred migratory waterfowl other than mallard ducks) and § 21.25 (waterfowl sale and disposal permits), and addition of § 21.54, an order to allow control of muscovy ducks, their nests, and eggs. The first two regulations are to prevent introduction of the species and will only have a positive environmental impact, if any. Because the muscovy duck occurs only in small numbers at scattered locations outside its natural range in southern Texas, the impacts of control of the species under a new regulation at § 21.54 are minimal.

Socioeconomic. This rule will have minimal socioeconomic impacts.

Migratory bird populations. This rule will not affect migratory bird populations.

Endangered and threatened species. The regulation is for migratory bird species that are not threatened or endangered. It will not affect threatened or endangered species or critical habitats.

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)). We have concluded that the regulations change would not affect listed species, and the Division of Migratory Bird Management has conducted an Endangered Species consultation on this rule to confirm this conclusion.

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), E.O. 13175, and 512 DM 2, we have

evaluated potential effects on Federally recognized Indian Tribes and have determined that there are no potential effects. This rule will not interfere with the Tribes’ ability to manage themselves or their funds or to regulate migratory bird activities on Tribal lands.

Energy Supply, Distribution, or Use (E.O. 13211)

On May 18, 2001, the President issued E.O. 13211 addressing regulations that significantly affect energy supply, distribution, and use. E.O. 13211 requires agencies to prepare Statements of Energy Effects when undertaking certain actions. Because this rule will affect only import and export of birds in limited circumstances, it is not a significant regulatory action under E.O. 12866, and will not significantly affect energy supplies, distribution, or use. Therefore, this action is not a significant energy action and no Statement of Energy Effects is required.

List of Subjects in 50 CFR Part 21

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

■ For the reasons stated in the preamble, we amend part 21 of subchapter B, chapter I, title 50 of the Code of Federal Regulations, as follows:

PART 21—MIGRATORY BIRD PERMITS

■ 1. The authority citation for part 21 continues to read as follows:

Authority: Migratory Bird Treaty Act, 40 Stat. 755 (16 U.S.C. 703); Pub. L. 95–616, 92 Stat. 3112 (16 U.S.C. 712(2)); Pub. L. 106–108, 113 Stat. 1491, Note following 16 U.S.C. 703.

■ 2. Revise § 21.14 to read as follows:

§ 21.14 Permit exceptions for captive-bred migratory waterfowl other than mallard ducks.

You may acquire captive-bred and properly marked migratory waterfowl of all species other than mallard ducks (*Anas platyrhynchos*), alive or dead, or their eggs, and possess and transport such birds or eggs and any progeny or eggs for your use without a permit, subject to the following conditions and restrictions. Additional restrictions on the acquisition and transfer of muscovy ducks (*Cairina moschata*) are in paragraph (g) of this section.

(a) You may acquire live waterfowl or their eggs only from a holder of a valid waterfowl sale and disposal permit in the United States. You also may lawfully acquire them outside of the United States with appropriate permits (*see* § 21.21 of subpart C of this part).

(b) All progeny of captive-bred birds or eggs from captive-bred birds must be physically marked as set forth in § 21.13(b).

(c) You may not transfer or dispose of captive-bred birds or their eggs, whether alive or dead, to any other person unless you have a waterfowl sale and disposal permit (*see* § 21.25 of subpart C of this part).

(d) Lawfully possessed and properly marked birds may be killed, in any number, at any time or place, by any means except shooting. Such birds may be killed by shooting only in accordance with all applicable hunting regulations governing the taking of like species from the wild (*see* part 20 of this subchapter).

(e) At all times during possession, transportation, and storage until the raw carcasses of such birds are finally processed immediately prior to cooking, smoking, or canning, you must leave the marked foot or wing attached to each carcass, unless the carcass was marked as provided in § 21.25(b)(6) and the foot or wing was removed prior to your acquisition of the carcass.

(f) If you acquire captive-bred waterfowl or their eggs from a waterfowl sale and disposal permittee, you must retain the FWS Form 3–186, Notice of Waterfowl Sale or Transfer, from the permittee for as long as you have the birds, eggs, or progeny of them.

(g) You may not acquire or possess live muscovy ducks, their carcasses or parts, or their eggs, except to raise them to be sold as food, and except that you may possess any live muscovy duck that you lawfully acquired prior to March 31, 2010. If you possess muscovy ducks on that date, you may not propagate them or sell or transfer them to anyone for any purpose, except to be used as food. You may not release them to the wild, sell them to be hunted or released to the wild, or transfer them to anyone to be hunted or released to the wild.

(h) Dealers in meat and game, hotels, restaurants, and boarding houses may serve or sell to their customers the carcass of any bird acquired from a holder of a valid waterfowl sale and disposal permit.

■ 3. Revise § 21.25 to read as follows:

§ 21.25 Waterfowl sale and disposal permits.

(a) *Permit requirement.* You must have a waterfowl sale and disposal permit before you may lawfully sell, trade, donate, or otherwise dispose of, most species of captive-reared and properly marked migratory waterfowl or their eggs. You do not need a permit to sell or dispose of properly marked captive-reared mallard ducks (*Anas platyrhynchos*) or their eggs.

(b) *Permit conditions.* In addition to the general conditions set forth in part 13 of this subchapter B, waterfowl sale and disposal permits are subject to the following conditions:

(1) You may not take migratory waterfowl or their eggs from the wild, unless take is provided for elsewhere in this subchapter.

(2) You may not acquire migratory waterfowl or their eggs from any person who does not have a valid waterfowl propagation permit.

(3) Before they are 6 weeks of age, all live captive migratory waterfowl possessed under authority of a valid waterfowl sale and disposal permit must be physically marked as defined in § 21.13(b).

(4) All offspring of birds hatched, reared, and retained in captivity also must be marked before they are 6 weeks of age in accordance with § 21.13(b), unless they are held in captivity at a public zoological park, or a public scientific or educational institution.

(5) Properly marked captive-bred birds may be killed, in any number, at any time or place, by any means except shooting. They may be killed by shooting only in accordance with all the applicable hunting regulations governing the taking of like species from the wild.

(6) At all times during possession, transportation, and storage, until the raw carcasses of such birds are finally processed immediately prior to cooking, smoking, or canning, the marked foot or wing must remain attached to each carcass. However, if you have a State license, permit, or authorization that allows you to sell game, you may remove the marked foot or wing from the raw carcasses if the number of your State license, permit, or authorization has been legibly stamped in ink on the back of each carcass and on the wrapping or container in which each carcass is maintained, or if each carcass is identified by a State band on a leg or wing pursuant to requirements of your State license, permit, or authorization.

(7) You may dispose of properly marked live or dead birds or their eggs (except muscovy ducks and their eggs) in any number at any time or place, or transfer them to any person, if the birds are physically marked prior to sale or disposal, regardless of whether or not they have attained 6 weeks of age.

(8) You may propagate muscovy ducks (*Cairina moschata*) only for sale for food.

(i) You may not release muscovy ducks to the wild or transfer them for release to the wild.

(ii) You may not sell or transfer muscovy ducks to be killed by shooting.

(9) If you transfer captive-bred birds or their eggs to another person, you must complete FWS Form 3–186, Notice of Waterfowl Sale or Transfer, and provide all information required on the form, plus the method or methods by which individual birds are marked as required by § 21.13(b).

(i) Give the original of the completed form to the person acquiring the birds or eggs.

(ii) Retain one copy in your files.

(iii) Attach one copy to the shipping container for the birds or eggs, or include it with shipping documents that accompany the shipment.

(iv) By the end of the month in which you complete the transfer, mail two copies to the Fish and Wildlife Service Regional Office that issued your permit.

(c) *Reporting requirements.* You must submit an annual report by January 10th of each year to the Fish and Wildlife Service Regional Office that issued your permit. You must report the number of waterfowl of each species you possess on that date, and the method or methods by which each is marked.

(d) *Applying for a waterfowl propagation permit.* Submit your application for a waterfowl sale and disposal permit to the appropriate Regional Director (Attention: Migratory Bird Permit Office). You can find addresses for the Regional Directors in 50 CFR 2.2. Your application must contain the general information and certification required in § 13.12(a) of subchapter A of this chapter, and the following additional information:

(1) A description of the area where you will keep waterfowl in your possession;

(2) The species and numbers of waterfowl you possess and a statement showing from whom the birds were obtained;

(3) A statement indicating the method by which birds you hold will be marked as required by the provisions of this part 21; and

(4) The number and expiration of your State permit if you are required to have one.

(e) *Term of permit.* A waterfowl sale and disposal permit issued or renewed under this part expires on the date designated on the face of the permit unless amended or revoked, but the term of the permit will not exceed five (5) years from the date of issuance or renewal.

■ 4. Add new § 21.54 to subpart D to read as follows:

§ 21.54 Control order for muscovy ducks in the United States.

(a) *Control of muscovy ducks.* Anywhere in the contiguous United

States except in Hidalgo, Starr, and Zapata Counties in Texas, and in Alaska, Hawaii, and U.S. territories and possessions, landowners and Federal, State, Tribal, and local wildlife management agencies, and their tenants, employees, or agents may, without a Federal permit, remove or destroy muscovy ducks (*Cairina moschata*) (including hybrids of muscovy ducks), or their nests, or eggs at any time when found. Any authorized person may temporarily possess, transport, and dispose of muscovy ducks taken under this order.

(b) *Muscovy ducks in Hidalgo, Starr, and Zapata Counties in Texas.* In these counties, take of muscovy ducks, their nests, and their eggs may be allowed if we issue a depredation permit for the activity.

(c) *Disposal of muscovy ducks.* You may donate muscovy ducks taken under this order to public museums or public institutions for scientific or educational purposes, or you may dispose of them by burying or incinerating them. You may not retain for personal use or consumption, offer for sale, or sell a muscovy duck removed under authority of this section, nor may you release it in any other location.

(d) *Other provisions.* (1) You must comply with any State, territorial, or Tribal laws or regulations governing the removal or destruction of muscovy ducks or their nests or eggs.

(2) You may not remove or destroy muscovy ducks or their nests or eggs if doing so will adversely affect other migratory birds or species designated as endangered or threatened under the authority of the Endangered Species Act. If you use a firearm to kill muscovy ducks under the provisions of this section, you must use nontoxic shot or nontoxic bullets to do so.

(3) If you operate under this order, you must immediately report the take of any species protected under the Endangered Species Act, or any other bird species protected under the Migratory Bird Treaty Act, to the Fish and Wildlife Service Ecological Services Office for the State or location in which the take occurred.

(4) We reserve the right to suspend or revoke the authority of any agency or individual to undertake muscovy duck control if we find that the agency or individual has undertaken actions that may harm Federally listed threatened or endangered species or are contrary to the provisions of this part.

Dated: February 3, 2010.

Thomas L. Strickland,

*Assistant Secretary for Fish and Wildlife and
Parks.*

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