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We will publish an amendment to 39 CFR Part 20 to reflect these changes.

Stanley F. Mires,

Chief Counsel, Legislative.

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DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 21

[FWS–R9–MB–2008–0064; 91200–1231–9BPP]

RIN 1018–AV66

Migratory Bird Permits; Removal of Rusty Blackbird and Tamaulipas (Mexican) Crow From the Depredation Order for Blackbirds, Cowbirds, Grackles, Crows, and Magpies, and Other Changes to the Order

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Final rule.

SUMMARY: We, the U.S. Fish and Wildlife Service, change the regulations governing control of depredating blackbirds, cowbirds, grackles, crows, and magpies at 50 CFR 21.43. Because of long-term evidence of population declines throughout much of their ranges, we remove the Rusty Blackbird (*Euphagus carolinus*) and the Mexican (Tamaulipas) Crow (*Corvus imparatus*) from the list of species that may be controlled under the depredation order. With the effective date of this final rule, a depredation permit is required to conduct control actions to take either of these species. Also, nontoxic shot or bullets must be used in most cases when a firearm is used to control any species listed under the order. Finally, we add a requirement to report on control actions taken under the order.

DATES: This regulation will be effective on January 3, 2011.

FOR FURTHER INFORMATION CONTACT: Dr. George T. Allen, Division of Migratory Bird Management, U.S. Fish and Wildlife Service, Division of Migratory Bird Management, 4401 North Fairfax Drive, Mail Stop 4107, Arlington, VA 22203–1610, Phone: (703) 358–1825.

SUPPLEMENTARY INFORMATION:

I. Background

The U.S. Fish and Wildlife Service is the Federal agency delegated the primary responsibility for managing migratory birds. This delegation is authorized by the Migratory Bird Treaty Act (MBTA) (16 U.S.C. 703 *et seq.*), which implements conventions with Great Britain (for Canada), Mexico, Japan, and the Soviet Union (Russia). Part 21 of title 50 of the Code of Federal Regulations covers migratory bird permits. Subpart D deals specifically with the control of depredating birds and presently includes eight depredation orders. A depredation order is a regulation that allows the take of specific species of migratory birds, at specific locations, and for specific purposes without a depredation permit. The depredation order at 50 CFR 21.43 for blackbirds, cowbirds, grackles, crows, and magpies allows take when individuals of an included species are "found committing or about to commit depredations upon ornamental or shade trees, agricultural crops, livestock, or wildlife, or when concentrated in such numbers and manner as to constitute a health hazard or other nuisance."

II. Species We Are Removing From the Depredation Order

We remove the Rusty Blackbird (*Euphagus carolinus*) and the Mexican (Tamaulipas) Crow (*Corvus imparatus*) from the list of species that may be controlled under the depredation order at 50 CFR 21.43. We remove the Rusty Blackbird because of the long-term downward trend in its population and its special conservation status. Because of the very limited distribution of the Tamaulipas Crow in the United States and its apparent rapid decline in numbers, we also remove this species from the list of species that may be controlled under the depredation order.

After the effective date of this final rule (*see* **DATES**), any take of either of these species will require a depredation permit (50 CFR 21.41) or other applicable MBTA permit. For background and current information on these two species, see our proposed rule published December 8, 2008 (73 FR 74447).

III. Additional Regulatory Changes

We also require the use of nontoxic ammunition for all take of migratory birds under this depredation order to prevent toxicity hazards to other wildlife. Further, we require reporting of control actions taken under the order to give us data on the number of each species taken each year to better monitor the effects of such take on populations of those species. We expect the respondents to be mostly State and Federal wildlife damage management personnel who undertake blackbird control to protect crops. We also make the list of species to which the depredation order applies more precise by listing each species that may be controlled under the order.

IV. Comments on the Proposed Rule or the Draft Environmental Assessment

Issue: Opposition to the depredation order.

"WS [U.S.D.A. Wildlife Services] is notorious for indiscriminate regimes that have resulted in the mortality of uncountable millions of birds * * * and will continue to pose a real risk to the rusty blackbird and Tamaulipas crow despite the proposed rule change. We therefore request that 50 CFR § 21.43 not only be narrowed in scope, but withdrawn completely."

"Currently, 50 CFR § 21.43 allows for such a broad exemption from the normal MBTA permitting process that some migratory birds are afforded virtually no protections—especially given the enormous amount of land conversion to agriculture and other uses."

Response: Blackbird depredation on crops has been clearly demonstrated. We will consider the effects of the depredation order as we obtain information on reported take of birds under its authority. We may make changes in the depredation order if we determine that it is advisable to do so. However, we leave the order in place.

Issue: Nontoxic ammunition requirement.

"We are also convinced that FWS should finalize its proposal to end the use of toxic shot for killing blackbirds, crows, and grackles, and thus also commend that portion of the proposed change to 50 CFR § 21.43 concerning this point. Lead shot can have detrimental effects on scavengers and the environment."

"I am writing to express my support for * * * the requirement to use nontoxic shot or bullets when a firearm is used to control any species listed under the order."

"WS recommends eliminating the non-toxic requirement for all ammunition in all situations involving blackbirds unless: (1) Further analysis by the FWS provides definitive evidence that lead ammunition has impacted rusty blackbird populations and (2) evidence is provided that lead ammunition used under the authority of the blackbird depredation order has impacted other wildlife species." (USDA Wildlife Services)

"Supporting documentation and analysis is needed for all claims of lead toxicosis in songbirds. The use of unsupported claims of lead toxicosis in songbirds should be discarded since there is not any information from

necropsies supporting these statements." (USDA Wildlife Services)

"The requirement to use non-toxic shot to take crows for depredation management is inconsistent with hunting regulations that allow the use of lead shot to hunt crows. This would represent an unequal application of the Migratory Bird Treaty Act. More lead shot will likely be used to take crows while hunting than non-toxic shot to take crows for depredation purposes." (Wildlife Services)

Response: "Lead has been known for centuries to be a broad-spectrum toxicant to humans and wildlife" (The Wildlife Society Position Statement on lead in ammunition and fishing tackle: *http://joomla.wildlife.org/documents/positionstatements/Lead_final_2009.pdf*). Schulz *et al.* (2009) reported that "Substantial information exists demonstrating the effects of lead poisoning on mourning doves." Poisoning of many other species of birds by lead shot has been well documented. We reasonably infer based on this information that lead is toxic to rusty blackbirds and other bird species, which provides sufficient justification to ban the use of lead shot in bird control under this order.

The requirement for nontoxic shot in depredation control or in hunting is already applied unevenly; nontoxic shot is not required for all migratory bird hunting. However, we are concerned about lead poisoning of migratory birds, and will seek to apply nontoxic shot requirement more evenly by implementing the use of nontoxic shot as we consider revisions to the current regulations.

In the proposed rule, we asserted no effects of lead shot from bird control under the depredation order on any particular wildlife taxon. However, wildlife professionals have recognized that lead shot and lead in bullets are hazardous in the environment, and have recommended that wildlife managers "Advocate the replacement of lead-based ammunition and fishing tackle with nontoxic products, while recognizing that complete replacement may not be possible in specific circumstances" (The Wildlife Society Final Position Statement on lead in ammunition and fishing tackle).

We recognize that nontoxic shot is not required in all hunting in locations in which control under this order might take place. Nevertheless, we are taking a step toward eliminating the use of lead shot and lead ammunition in wildlife damage control.

Issue: "We also have concerns that the use of nontoxic shot would limit the tools available to wildlife managers when conducting blackbird control work. Currently, nontoxic shot is difficult to obtain to nonexistent for air-rifles or .22 caliber rim fire rifles. Both may be valuable tools in certain settings." (Mississippi Flyway Council)

Response: We acknowledge the concerns over availability of lead projectiles for air-rifles and 22 caliber rimfire rifles. We added an exemption for their use to this rule.

Issue: "At the very least, FWS must require that agricultural interests and WS always employ non-lethal methods before releasing indiscriminate toxicants for birds."

Response: We added this requirement to the depredation order.

Issue: Reporting on take under the depredation order.

"WS recommends the FWS continue to use the existing reporting requirement already established to the greatest extent possible, and that no additional requirements be enacted." (Wildlife Services)

"We have concerns about the paperwork requirements of this DEA. We question if non-biologists will collect this data. As stated before, Wildlife Services does the vast majority of blackbird control work in the United States and is already collecting this data. We are concerned that this DEA subjects our constituents to prosecution when the potential for valuable data acquisition is questionable." (Mississippi Flyway)

Response: This depredation order currently has no requirement for reporting on control of depredating birds. We seek to bring this regulation in line with all other migratory bird depredation orders—which require reporting on control taken under their authorities. Without reporting on control of species taken under this order, we have no way to assess the effects of the activities it authorizes. Failure to assess control measures and report on control activities will potentially put any person conducting control under this depredation order in violation of the MBTA.

Issue: "We also ask that an additional provision be added discouraging control of night-time blackbird roosts during the winter months, as well into the month of March in northern regions, when Rusty Blackbirds might be reasonably assumed to be in the roosts."

Response: We defer to Wildlife Services and to State agencies to determine whether or not rusty blackbirds are present in winter night-time blackbird roosts. To ensure compliance with the MBTA, Wildlife Services and State agencies should ensure that no rusty blackbirds are present in a roost before conducting control actions. If Wildlife Services or a State agency determine that rusty blackbirds are present, the relevant agency would need to obtain a depredation permit from FWS before conducting any control actions on that roost.

Issue: "WS recommends the FWS develop a standardized method to estimate the species composition of large mixed blackbird flocks to enhance the reliability of the data collected and analyzed. Many times light conditions in the field are very poor thereby increasing the difficulty of species identification. Additionally, most citizens will be unaware of the reporting requirements and are unable to distinguish fish crows from American crows, common grackles from boat-tailed grackles, etc., and this will result in inaccurate data being reported to the FWS." (Wildlife Services)

Response: Though we recognize that there may be difficulties in distinguishing species of blackbirds, grackles, and crows, we assume that any person or agency undertaking control under this depredation order will carefully identify the species involved. If the individual or agency cannot do so, control under this depredation order should not be undertaken. We are willing to work with Wildlife Services on a method of estimating the species composition of large mixed blackbird flocks as allowed by our budget and other tasks.

V. Required Determinations

Regulatory Planning and Review (Executive Order 12866)

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

(a) 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.

(b) Whether the rule will create inconsistencies with other Federal agencies' actions.

(c) Whether the rule will materially affect entitlements, grants, user fees, loan programs, or the rights and obligations of their recipients.

(d) 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).

SBREFA amended the Regulatory Flexibility Act to require Federal agencies to provide a 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 this rule's potential effects on small entities as required by the Regulatory Flexibility Act, and have determined that this action will not have a significant economic impact on a substantial number of small entities because neither the Rusty Blackbird nor the Tamaulipas Crow are species that frequently cause depredation problems and, where they might do so, we can issue depredation permits to alleviate the problems. There are no costs associated with this regulations change except that persons needing a depredation permit to take Rusty Blackbirds or Tamaulipas Crows will have to pay the $100 application fee for a depredation permit. We estimate the number of people likely to apply for such a permit to be no more than 25 per year. We certify that because this Final 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 the SBREFA (5 U.S.C. 804(2)).

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, Tribal, 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 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. It will not be a "significant regulatory action" under the Unfunded Mandates Reform Act.

Takings

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

Federalism

This rule does not have sufficient Federalism effects to warrant preparation of a Federalism assessment under Executive Order 13132. It will not interfere with the ability of States to manage themselves or their funds. No significant economic impacts are expected to result from the change in the depredation order.

Civil Justice Reform

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

Paperwork Reduction Act

This rule contains new information collection requirements that require approval by the Office of Management and Budget. The OMB has approved these requirements and assigned OMB Control Number 1018–0146, which expires November 30, 2013. We have addressed all comments received on the proposed rule above in this preamble.

Any person or agency acting under this depredation order must provide an annual report to the appropriate Regional Migratory Bird Permit Office. You must provide your name, address, phone number, and email address and the following information for each species taken:

(1) Species and number of birds taken;

(2) Months in which the birds were taken;

(3) State(s) and county(ies) in which the birds were taken; and

(4) General purpose for which the birds were taken (such as for protection of agriculture, human health and safety, property, or natural resources).

We collect this information so that we will be able to determine how many birds of each species are taken each year and whether the control actions are likely to affect the populations of those species.

Title: Depredation order for blackbirds, cowbirds, grackles, crows, and magpies, 50 CFR 21.43.

Service Form Number(s): None.

Affected Public: State and Federal wildlife damage management personnel; farmers; and individuals.

Respondent's Obligation: Required to obtain or retain a benefit.

Frequency of Collection: Annually.

Estimated Annual Number of Respondents: 250.

Estimated Total Annual Responses: 250.

Estimated Time per Response: 2 hours.

Estimated Total Annual Burden Hours: 500.

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. The public may comment, at any time, on the accuracy of the information collection requirements in this rule and may submit comments to the Information Collection Clearance Officer, Fish and Wildlife Service, Department of the Interior, 1849 C Street, NW., (Mailstop 222–ARLSQ), Washington, DC 20240.

National Environmental Policy Act

We have completed a Final Environmental Assessment (FEA) on this regulations change. The FEA is a part of the administrative record for this rule. In accordance with the National Environmental Policy Act (NEPA, 42 U.S.C. 4332(C)) and Part 516 of the U.S. Department of the Interior Manual (516 DM), removal of the Rusty Blackbird and Tamaulipas Crow from the depredation order and adding requirements for nontoxic shot or bullets will not have a significant effect on the quality of the human environment, nor will it involve unresolved conflicts concerning alternative uses of available resources. There will be a positive environmental effect because take of the two removed species as a result of control actions will be significantly reduced or eliminated.

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 apply to Tribes and any control actions that Tribes carry out on their lands, but it will not

interfere with the ability of Tribes to manage themselves or their funds.

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. E.O. 13211 requires agencies to prepare Statements of Energy Effects when undertaking certain actions. This rule change will not be a significant regulatory action under E.O. 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.

Compliance With Endangered Species Act Requirements

Section 7 of the Endangered Species Act (ESA) of 1973, as amended (16 U.S.C. 1531 *et seq.*), requires that "The Secretary [of the Interior] shall review other programs administered by him and utilize such programs in furtherance of the purposes of this chapter" (16 U.S.C. 1536(a)(1)). It further states that the Secretary must "insure that any action authorized, funded, or carried out * * * is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of [critical] habitat" (16 U.S.C. 1536(a)(2)). We have concluded that the regulation change will not affect listed species.

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 § 21.43 as follows:

§ 21.43 Depredation order for blackbirds, cowbirds, grackles, crows, and magpies.

You do not need a Federal permit to control the species listed in the table below if they are committing or about to commit depredations on ornamental or shade trees, agricultural crops, livestock, or wildlife, or when concentrated in such numbers and manner that they are a health hazard or other nuisance:

Blackbirds	Cowbirds	Grackles	Crows	Magpies
Brewer's (*Euphagus cyanocephalus*). Red-winged (*Agelaius phoeniceus*). Yellow-headed (*Xanthocephalus xanthocephalus*).	Bronzed (*Molothrus aeneus*). Brown-headed (*Molothrus ater*). Shiny (*Molothrus bonariensis*).	Boat-tailed (*Quiscalus major*). Common (*Quiscalus quiscula*). Great-tailed (*Quiscalus mexicanus*). Greater Antillean (*Quiscalus niger*).	American (*Corvus brachyrhynchos*). Fish (*Corvus ossifragus*) ... Northwestern (*Corvus caurinus*).	Black-billed (*Pica hudsonia*). Yellow-billed (*Pica nuttalli*).

(a) You must attempt to control depredation by species listed under this depredation order using non-lethal methods before you may use lethal control.

(b) In most cases, if you use a firearm to kill migratory birds under the provisions of this section, you must use nontoxic shot or nontoxic bullets to do so. See § 20.21(j) of this chapter for a listing of approved nontoxic shot types. However, this prohibition does not apply if you use an air rifle, an air pistol, or a 22 caliber rimfire firearm for control of depredating birds under this order.

(c) If you exercise any of the privileges granted by this section, you must allow any Federal, State, tribal, or territorial wildlife law enforcement officer unrestricted access at all reasonable times (including during actual operations) over the premises on which you are conducting the control. You must furnish the officer whatever information he or she may require about your control operations.

(d) You may kill birds under this order only in a way that complies with all State, tribal, or territorial laws or regulations. You must have any State, tribal, or territorial permit required to conduct the activity.

(e) You may not sell, or offer to sell, any bird, or any part thereof, killed under this section, but you may possess, transport, and otherwise dispose of the bird or its parts.

(f) Any person or agency acting under this depredation order must provide to the appropriate Regional Migratory Bird Permit Office an annual report for each species taken. You can find the addresses for the Regional Migratory Bird Permit Offices in § 2.2 of subchapter A of this chapter. You must submit your report by January 31st of the following year, and you must include the following information:

(1) Your name, address, phone number, and e-mail address;

(2) The species and number of birds taken;

(3) The months in which the birds were taken;

(4) The State(s) and county(ies) in which the birds were taken; and

(5) The general purpose for which the birds were taken (such as for protection of agriculture, human health and safety, property, or natural resources).

(g) The Office of Management and Budget has approved the information collection requirements associated with this depredation order and assigned OMB Control No. 1018–0146. We may not conduct or sponsor and you are not required to respond to a collection of information unless it displays a currently valid OMB control number. You may send comments on the information collection requirements to the Service's Information Collection Clearance Officer, U.S. Fish and Wildlife Service, MS 222–ARLSQ, 1849 C Street, NW., Washington, DC 20240.

Dated: July 7, 2010.

Eileen Sobeck,

Acting Assistant Secretary for Fish and Wildlife and Parks.

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