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Dated: September 17, 2013.

Michael J. Bean,

Acting Principal Deputy Assistant Secretary for Fish and Wildlife and Parks.

[FR Doc. 2013–26063 Filed 10–31–13; 8:45 am]

BILLING CODE 4310–55–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 21

[Docket No. FWS–R9–MB–2011–0060; FF09M21200–134–XMB123199BPP0]

RIN 1018–AX90

Migratory Bird Permits; Definition of ''Hybrid'' Migratory Bird

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Final rule.

SUMMARY: We, the U.S. Fish and Wildlife Service (FWS), revise the definition of ''hybrid'' as it relates to birds protected under the Migratory Bird Treaty Act. We revise the definition to make it clear that it applies to all offspring of any species listed at 50 CFR 10.13.

DATES: This rule is effective on December 2, 2013.

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

SUPPLEMENTARY INFORMATION:

I. Background

At 50 CFR 21.3, the term ''hybrid'' is defined as the ''offspring of birds listed as two or more distinct species in § 10.13 of subchapter B of this chapter, or offspring of birds recognized by ornithological authorities as two or more distinct species listed in § 10.13 of subchapter B of this chapter.'' This means that, under the definition of ''hybrid'' at 50 CFR 21.3, the only hybrid migratory birds that are protected by our regulations under the Migratory Bird Treaty Act (MBTA; 16 U.S.C. 703–712) are birds that are the offspring of two species already protected under the MBTA.

This definition has created difficulties because it differs from the longstanding Service interpretation of ''hybrid'' as applied to falconry and raptor propagation birds, in particular, where hybrids between two separate taxa when one or both include genetic material of a species listed in 50 CFR 10.13 have been regulated under the MBTA. This interpretation is consistent with the § 10.12 definition of ''migratory bird,'' which is any bird, whatever its origin and whether or not raised in captivity, which belongs to a species listed in § 10.13, or which is a mutation or a hybrid of any such species.

The definition at 50 CFR 21.3 also differs from the definition of ''hybrid'' under the Convention on International Trade in Endangered Species of Wild Fauna and Flora, which requires CITES documentation for import or export of all raptors, including any resulting from a cross of genetic material between two separate taxa when one or both are listed under the CITES appendices (CITES, 50 CFR 23.5).

''Hybrid'' was not defined under the MBTA prior to 2008, when the falconry regulations were substantially revised (73 FR 59448–59477, October 8, 2008). At that time, we inadvertently defined ''hybrid'' in 50 CFR 21.3 in a manner that conflicts with the use of the term in other regulations.

To ensure that migratory birds are protected under our regulations implementing the MBTA, on November 8, 2011, we proposed a change to the definition of ''hybrid'' at 50 CFR 21.3 (76 FR 69223–69225). The change was intended to make it clear that the offspring of any species listed at 50 CFR 10.13 are protected under the MBTA, whether or not additional species that are not protected under the MBTA have contributed to its genetics, and regardless of how many generations separate such birds from a species protected by the MBTA. This change will also make our regulations consistent with our long-standing practice.

II. Comments on the Proposed Rule

The most in-depth comments on the proposed rule were based on assessment of the proposal in light of the 2004 Migratory Bird Treaty Reform Act (MBTRA, Pub. L. 108–447, December 8, 2004). Commenters asserted that the proposed definition was in conflict with the provisions of the MBTRA. The MBTRA amended 16 U.S.C. 703, stating that the Migratory Bird Treaty Act (MBTA, 16 U.S.C. 703–712) ''applies only to migratory bird species that are native to the United States or its territories.''

The MBTRA states that ''a migratory bird species that occurs in the United States or its territories solely as a result of intentional or unintentional human-assisted introduction shall not be considered native to the United States or its territories.'' The MBTRA was intended to address problems of human-introduced bird species, such as the mute swan. These species often become established in the wild and conflict with native wildlife. The MBTRA refers throughout only to migratory bird ''species.'' It does not address hybrids, including those intentionally created in captivity by man. Therefore, the MBTRA does not apply to this regulations change.

Lastly, we conclude that the MBTRA does not affect the protection of hybrid birds. The MBTRA was precipitated by litigation forcing the Service to protect the mute swan, a nonnative species introduced through human intervention. It was intended to exclude such nonnative, human-introduced bird species from protection under the MBTA. We find nothing in the legislative history to show that Congress intended the MBTRA to have the effect of excluding hybrids of native species from the protection of the MBTA.

It was also argued that the proposed definition change used the *Andrus* v. *Allard* decision (444 U.S. 51, 1979) and ''is an attempt to justify the expansion of FWS authority.'' In the unanimous decision in that court case, the Supreme Court ruled that imposition of a restriction on commercial use of migratory birds or migratory bird parts was not a taking of private property. Many activities with migratory birds are governed by regulations, and may not be conducted without permits. This does not mean that the government has taken private property, nor does it mean that the Service is attempting to expand its authority in this case. The definition of ''hybrid'' we are codifying is already in use by the Service in other regulations.

One commenter asserted that ''Most hybrid raptors are more easily distinguished from native species than any of the above species are from each other. In addition, wildlife officials have access to the trained eyes of experts at museums, falconers and raptor breeders if the possession or importation of any raptor is in question.''

We disagree with this argument. For enforcement of the MBTA, identification of the birds held by permittees is vital to State and Federal law enforcement officers. Yet, identification of hybrids is difficult. Eastham and Nicholls (2005, Morphometric analysis of large *Falco* species and their hybrids with implications for conservation, Journal of Raptor Research 39:386–393) concluded that ''phenotypic characteristics are not reliable for identification of such hybrids [gyrfalcon (*Falco rusticolus)* × peregrine (*Falco peregrinus*), gyrfalcon × saker falcon (*Falco cherrug*), peregrine × saker], and for legal purposes.'' Thus, hybrids present challenges to law enforcement officers in the field. Experts at museums, falconers, and propagators may be available to assist

law enforcement officers. However, import of hybrids is of less concern than is identification of hybrids produced by propagators here in the U.S. And, in most cases it may be difficult for a law enforcement officer to get prompt assistance from anyone for identification of raptors while conducting inspections or field investigations.

One commenter asserted that ''The point made in the conclusion of this FWS proposal, that law enforcement efforts would be more burdensome due to the difficulty in identifying purebred versus hybrid raptors, is irrelevant. The rights and liberties of citizens are of greater importance than law enforcement convenience given the fact that the very purpose of law enforcement efforts is to protect the rights and liberties of citizens.''

Though we agree about the importance of the rights of citizens, we disagree that the law enforcement difficulties are irrelevant. The ability to enforce the MBTA is critical to the Service's conservation mission. If the provisions of the MBTA cannot be enforced for some activities, such as propagation, purchase, sale, and barter, we might not be able to allow those activities. Hybrids of MBTA species often are difficult to distinguish from one of the parent species. Because hybrids may look so much like wild or pure-bred birds, enforcing provisions of the MBTA could be impossible.

If hybrids of MBTA species are not regulated under the MBTA, we cannot require that they be banded. Therefore, law enforcement officers would have no simple means to identify them or their origins, and could not practicably enforce the MBTA.

Some commenters stated that we decided to revise the definition because hybrid raptors ''may pose a threat to native raptor populations through competition or crossbreeding.'' We said in our proposed rule that hybrids may pose such a risk, not that we believe this risk is significant, though concern about this possible problem has been expressed to us. However, if hybrid raptors are not protected under the MBTA, the question likely could not ever be assessed because we would not be able to require that they be identified.

Several commenters asserted that governance of hybrid raptors is the responsibility of the States, not of the Federal Government. Enforcement of the MBTA is a Federal responsibility, and identification of hybrid birds is necessary for enforcement and for assuring compliance with the provisions of the MBTA treaties.

The U.S. Department of Agriculture's Animal and Plant Health Inspection Service's Wildlife Services requested that the final rule include ''an explicit statement that the definition of ''hybrid'' does not extend to species other than migratory birds protected under the MBTA. A statement of this sort, in addition to the existing statements that the rule applies to 50 CFR 10.13 (list of migratory birds), would clarify the definition's application to migratory birds only. Without this clarification, it could be construed that the definition extends to CITES-protected canids and other species groups.''

The definition of hybrid in this rule is being codified at § 21.3, which is the section of regulatory definitions that apply only to 50 CFR part 21 (migratory bird permits), and to bald eagles (*Haliaeetus leucocephalus*) and golden eagles (*Aquila chrysaetos*) as affected by regulations in part 21. Therefore, we see no need to add the statement requested by the commenter.

III. Changes From the Proposed Rule

On November 8, 2011, at 76 FR 69223, we proposed a definition of hybrid that read, ''*Hybrid* means offspring of any two different species listed in § 10.13 of subchapter B of this chapter, and any progeny of those birds; or offspring of any bird of a species listed in § 10.13 of subchapter B of this chapter and any bird of a species not listed in § 10.13 of subchapter B of this chapter, and any progeny of those birds.'' In this rule, we are adopting a definition with different wording: ''*Hybrid* means any bird that results from a cross of genetic material between two separate taxa when one or both are listed at 50 CFR 10.13, and any progeny of those birds.'' We are adopting this different wording in this final rule because comments from the public convinced us that the definition should be more consistent with the language used elsewhere in our regulations and should be easier to understand.

Required Determinations

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

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

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

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

Under the Regulatory Flexibility Act (5 U.S.C. 601 et seq., as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA) of 1996 (Pub. L. 104–121)), whenever an agency is required to publish a notice of rulemaking for any proposed or final rule, it must prepare and make available for public comment a regulatory flexibility analysis that describes the effect of the rule on small 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 will not have a significant economic impact on a substantial number of small entities.

SBREFA amended the Regulatory Flexibility Act to require Federal agencies to provide the statement of the factual basis for certifying that a rule will not have a significant economic impact on a substantial number of small entities. There will be no costs associated with this regulation change because the Service's Office of Law Enforcement has treated hybrids as protected. We have determined that because this regulation change will not have a significant economic impact on a substantial number of small entities, a regulatory flexibility analysis is not required.

This rule is not a major rule under the SBREFA (5 U.S.C. 804 (2)). It 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, 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 affect small governments. A small government agency plan is not required. Amending the definition of ''hybrid'' at 50 CFR 21.3 will not affect small government activities.

b. This rule will not produce a Federal mandate of $100 million or greater in any year. This rule is not a significant regulatory action.

Takings

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

Federalism

This rule does not have sufficient Federalism effects to warrant preparation of a Federalism assessment under Executive Order 13132. It will not interfere with the States' abilities to manage themselves or their funds. No significant economic impacts are expected to result from the change in the definition of ''hybrid'' at 50 CFR 21.3.

Civil Justice Reform

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

Paperwork Reduction Act of 1995

This rule does not contain any new information collections or recordkeeping requirements for which approval from the Office of Management and Budget (OMB) is required under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*). We may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number.

National Environmental Policy Act

We have analyzed this rule in accordance with the National Environmental Policy Act (NEPA), 42 U.S.C. 4321 et seq. and Part 516 of the U.S. Department of the Interior Manual (516 DM). The regulation change will have no environmental impact.

Socioeconomic. The regulation change will have no discernible socioeconomic impacts.

Migratory bird populations. The regulation change will not affect native migratory bird populations.

Endangered and threatened species. The regulation change will not affect endangered or threatened species or habitats important to them.

Government-to-Government Relationship With Tribes

In accordance with the President's memorandum of April 29, 1994, ''Government-to-Government Relations with Native American Tribal Governments'' (59 FR 22951), Executive Order 13175, and 512 DM 2, we have determined that there are no potential effects on Federally recognized Indian Tribes from the regulation change. The regulation change will not interfere with Tribes' abilities to manage themselves or their funds, or to regulate migratory bird activities on tribal lands.

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

This rule will not 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)). 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.

Regulation Promulgation

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

PART 21—AMENDED

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

Authority: 16 U.S.C. 703–712.

■ 2. Amend § 21.3 by revising the definition of ''hybrid'' to read as follows:

§ 21.3 Definitions.

* * * * *

Hybrid means any bird that results from a cross of genetic material between two separate taxa when one or both are listed at 50 CFR 10.13, and any progeny of those birds.

* * * * *

Dated: October 21, 2013.

Rachel Jacobson,

Principal Deputy Assistant Secretary for Fish and Wildlife and Parks.

[FR Doc. 2013–26069 Filed 10–31–13; 8:45 am]

BILLING CODE 4310–55–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 21

[Docket No. FWS–R9–MB–2012–0037; FF09M21200–134–FXMB1231099BPP0]

RIN 1018–AY65

Migratory Bird Permits; Depredation Order for Migratory Birds in California

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Final rule.

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

DATES: This regulation change will be effective on December 2, 2013.

ADDRESSES: This final rule as well as supplementary information used in its development, such as the public comments received, is available at *http://www.regulations.gov* at Docket No. FWS–R9–MB–2012–0037.

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

SUPPLEMENTARY INFORMATION:

Background

The U.S. Fish and Wildlife Service is the Federal agency delegated the primary responsibility for managing migratory birds. This delegation is