

**Billing Code: 4333-15**

**DEPARTMENT OF THE INTERIOR**

**Fish and Wildlife Service**

**50 CFR Part 21**

**[Docket No. FWS–HQ–MB–2019–0103; FF09M22000–201–FXMB1232090000]**

**RIN 1018–BE67**

**Migratory Bird Permits; Management of Conflicts Associated with Double-Crested  
Cormorants (*Phalacrocorax auritus*) Throughout the United States**

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

**ACTION:** Final rule.

**SUMMARY:** The U.S. Fish and Wildlife Service (Service) establishes a new permit for State and federally recognized Tribal (hereafter “Tribe” or “Tribal”) fish and wildlife agencies for the management of double-crested cormorants (*Phalacrocorax auritus*; hereafter “cormorants”). The

new permit authorizes specific take activities that are normally prohibited and are intended to relieve or prevent impacts from cormorants on lands or in waters managed by State or Tribal fish and wildlife agencies to address conflicts related to the following issues: wild and publicly stocked fish managed by State fish and wildlife agencies or federally recognized Tribes; Tribal- and State-owned or operated aquaculture facilities (including hatcheries); human health and safety; State- or Tribal-owned property and assets; and threatened and endangered species (listed under the Endangered Species Act of 1973, as amended, or identified in State- or Tribal-specific legislation as threatened or endangered) or those listed as Species of Greatest Conservation Need in State Wildlife Action Plans. The Service retains ultimate authority for regulating the take of cormorants. States and Tribes have the discretion to determine whether, when, where, and for which of the above purposes they conduct lethal take within limits and allocations set by the Service.

**DATES:** This rule takes effect on [INSERT DATE 45 DAYS AFTER THE DATE OF PUBLICATION IN THE FEDERAL REGISTER].

*Supplementary Documents:* The Environmental Protection Agency will announce the availability of the Final Environmental Impact Statement (FEIS) associated with this rulemaking action. The Service will execute a Record of Decision no sooner than 30 days from the date of publication of the notice of availability of the FEIS by the Environmental Protection Agency.

*Information Collection Requirements:* If you wish to comment on the information collection requirements in this rule, please note that the Office of Management and Budget (OMB) is required to make a decision concerning the collection of information contained in this rule between 30 and 60 days after the date of publication of this rule in the *Federal Register*.

Therefore, comments should be submitted to OMB by [INSERT DATE 30 DAYS AFTER THE DATE OF PUBLICATION IN THE FEDERAL REGISTER].

**ADDRESSES:** You may inspect comments received on the draft environmental impact statement and associated proposed rule and view the final environmental impact statement and other documents associated with this rulemaking action at <http://www.regulations.gov> in Docket No. FWS–HQ–MB–2019–0103.

*Information Collection Requirements:* Written comments and suggestions on the information collection requirements should be submitted within 30 days of publication of this document to [www.reginfo.gov/public/do/PRAMain](http://www.reginfo.gov/public/do/PRAMain). Find this particular information collection by selecting "Currently under Review - Open for Public Comments" or by using the search function. Please provide a copy of your comments to the Service Information Collection Clearance Officer, U.S. Fish and Wildlife Service, 5275 Leesburg Pike, MS: PRB (JAO/3W), Falls Church, VA 22041–3803 (mail); or [Info\\_Coll@fws.gov](mailto:Info_Coll@fws.gov) (email). Please reference OMB Control Number 1018–0175 in the subject line of your comments.

**FOR FURTHER INFORMATION CONTACT:** Jerome Ford, U.S. Fish and Wildlife Service, Department of the Interior, (202) 208–1050.

**SUPPLEMENTARY INFORMATION:**

**Background**

The Service is the Federal agency delegated with the primary responsibility for managing migratory birds. Our authority derives from the Migratory Bird Treaty Act of 1918 (MBTA; 16 U.S.C. 703–712), as amended, which implements conventions with Great Britain (for Canada), Mexico, Japan, and Russia. We implement the provisions of the MBTA through the regulations in parts 10, 13, 20, 21, 22, and 92 of title 50 of the Code of Federal Regulations (CFR). The MBTA protects migratory birds (listed in 50 CFR 10.13) from take, except as authorized under the MBTA. Regulations pertaining to specific migratory bird permit types are at 50 CFR parts 21 and 22. The Service works on migratory bird conservation in partnership with four Flyway Councils (Atlantic, Mississippi, Central, and Pacific), which include representatives of State, provincial, and territorial agencies.

The double-crested cormorant is a fish-eating migratory bird that is distributed across a large portion of North America. There are five different breeding populations, variously described by different authors as the Alaska, Pacific (or Western), Interior, Atlantic, and Southern populations. Although these populations are described by their breeding ranges, the birds commingle to various extents on their migration and wintering areas, with birds from populations closer to each other overlapping more than those that are more distant.

Cormorant populations have increased over both the short term (2005–2015) and long term (1966–2015) (United States Geological Survey 2020). Permits issued by the Service to take birds are one method available to reduce conflicts. However, prior to applying for permits to take cormorants, individuals and entities experiencing conflicts with cormorants should attempt nonlethal techniques (e.g., hazing, habitat modification) to alleviate the conflict. Nonlethal techniques combined with lethal take should be more effective and may ultimately result in less need for lethal take in the future.

In response to ongoing damage at aquaculture facilities and other damage and conflicts associated with increasing cormorant populations, the Service administered regulations that included, in addition to Depredation Permits (located at 50 CFR 21.41), an Aquaculture Depredation Order (which was located at 50 CFR 21.47) beginning in 1998 and a Public Resource Depredation Order (which was located at 50 CFR 21.48), which began in 2003. Both of these regulations were in place until May 2016 when they were vacated by Court order (see more information, below).

The Aquaculture Depredation Order eliminated individual permit requirements in 13 States for private individuals, corporations, State agencies, and Federal agencies taking cormorants at aquaculture facilities. The Public Resource Depredation Order enabled States, Tribes, and the U.S. Department of Agriculture (USDA) Wildlife Services in 24 States, without the need for individual depredation permits, to take cormorants found committing or about to commit, and to prevent, depredations on the public resources of fish (including hatchery stock at Federal, State, and Tribal facilities), wildlife, plants, and their habitats.

In May 2016, these depredation orders were vacated by the United States District Court for the District of Columbia. The Court concluded that the Service failed to consider a reasonable range of alternatives in its 2014 environmental assessment (EA) and directed the Service to take “a hard look” at the effects of the depredation orders on double-crested cormorant populations and other affected resources. Finally, the Court ordered that the Service perform a new and legally adequate EA or environmental impact statement (EIS) under the National Environmental Policy Act of 1969, as amended (NEPA; 42 U.S.C. 4321–4347). Following the Court ruling, the Service prepared an EA in 2017 to address continuing conflicts with cormorants (USFWS 2017). The authority for authorizing lethal take of depredating cormorants reverted to the issuance of

individual depredation permits pursuant to 50 CFR 21.41. Under the 2017 EA, cormorants could lethally be taken only to address conflicts with aquaculture, human health and safety, threatened and endangered species (as listed under the Endangered Species Act of 1973 (ESA), 16 U.S.C. 1531 *et seq.*) and State-listed species of management concern, and personal property (under the 2017 EA, take of cormorants to protect wild and publicly stocked fisheries would only be allowed to protect threatened or endangered species).

Conflicts in aquatic systems continue to exist between cormorants and fish stocks managed by Federal, State, and Tribal agencies as recreational and/or commercial fisheries. Conflicts also exist between cormorants and conservation of other species and habitats in some areas. As fish-eating birds, cormorant predation of fish occurs not only at aquaculture facilities, but also in private recreational ponds and large aquatic ecosystems. While conflicts exist between cormorants and some stakeholders, birders and other interested parties value cormorants for their aesthetic and existence values.

The Service is responsible for balancing the lethal take of cormorants to alleviate conflicts where available data support such take and maintaining sustainable populations of cormorants and minimizing the regulatory burden on Federal and State agencies, Tribes, and individual citizens. In making decisions, the Service strives to use an effective and transparent decision-making process that ensures input from migratory bird and fisheries management programs and other stakeholders, fulfills requirements under NEPA, and addresses key biological uncertainties. When determining allowable take, the Service must consider uncertainty related to cormorant population dynamics, estimated maximum sustainable lethal take, and risk of over-exploitation. Furthermore, the Service must identify monitoring requirements that could be used to assess the effects of lethal take on cormorant populations and to ensure take is

commensurate with population status. Monitoring can also improve future decisions regarding allowable take and how that allowable take could be determined. States, Tribes, and other stakeholders can provide assistance and information. The Service will formally convene meetings with the Flyway Councils and other relevant stakeholders to develop a specific cormorant population monitoring plan.

### **History of Management and Conflicts**

Cormorants are migratory waterbirds protected by the MBTA. They are native to North America and range widely across the continent, typically inhabiting wetlands and adjacent upland habitats. Cormorants also are found in some human-modified environments including airport airfields and aquaculture ponds. As described previously, the bird-management community generally accepts that there are five different breeding populations: the Alaska, Pacific (Western), Interior, Atlantic, and Southern populations.

Cormorant abundance in North America has increased dramatically since the 1960s and 1970s, mostly due to the growth of the Interior and Atlantic populations. The current estimate of cormorant abundance in the continental United States and Canada is 871,001 to 1,031,757 birds (USFWS 2020).

Prior to 1998, the sole method for authorizing the lethal take of depredating cormorants to alleviate damage and conflicts was through the issuance of depredation permits pursuant to 50 CFR 21.41, which allows the take of migratory birds that are injuring “crops or other interests.” In 1998, the Service published a final rule (63 FR 10550–10561, March 4, 1998) establishing a depredation order that authorized commercial freshwater aquaculture producers in 13 States to

take cormorants without the need for a depredation permit when cormorants were found committing or about to commit depredations on aquaculture stocks. That rule was located at 50 CFR 21.47. The Service continued to issue depredation permits to address damage and conflicts to property, natural resources, and threats to human health and safety pursuant to 50 CFR 21.41. Any individual or entity conducting lethal take of cormorants under depredation permits or the depredation order was required to submit a report detailing the take to the Service annually.

The increase in cormorant abundance across areas of North America and the subsequent range expansion of cormorants has been well documented along with concerns of the negative impacts associated with the expanding population (e.g., Taylor and Dorr 2003, Hunter et al. 2006, Atlantic Flyway Council and Mississippi Flyway Council 2010, Pacific Flyway Council 2012). In response to increasing requests for depredation permits to alleviate damage and conflicts associated with cormorants, the Service issued a final environmental impact statement (FEIS) pursuant to NEPA and made changes to the regulations governing the take of cormorants in 2003. The 2003 FEIS considered direct, indirect, and cumulative effects of alternatives for cormorant management in the United States and discussed mitigating measures. In October 2003, based on analysis in the FEIS and review of public and agency comments, the Service published a final rule and notice of record of decision (68 FR 58022–58037, October 8, 2003) that modified the existing depredation order for aquaculture facilities (previously located at 50 CFR 21.47). The regulations became effective in November 2003. The modified depredation order for aquaculture facilities eliminated the need for private individuals, corporations, State agencies, and Federal agencies to obtain a depredation permit to take cormorants at aquaculture facilities in 13 States. It also authorized USDA Wildlife Services' employees to take cormorants at roost



sites in the vicinity of aquaculture facilities during October, November, December, January, February, March, and April.

That final rule in 2003 also established a depredation order that authorized Federal agencies, State fish and wildlife agencies, and Tribes in 24 States to take cormorants to reduce damage and conflicts with public resources without the need for a depredation permit. At that time, the Service defined a public resource as a natural resource managed and conserved by public agencies, which included fish (i.e., wild fish and stocked fish at Federal, State, and Tribal hatcheries that are intended for release in public or Tribal waters), wildlife, plants, and their habitats. The depredation order for public resources was previously located at 50 CFR 21.48. As with previous regulations, any individual or entity conducting lethal take of cormorants under depredation permits or the depredation orders was required to submit a report detailing the take to the Service annually.

To evaluate the potential effects on the cormorant population from the implementation of the two depredation orders, a mitigating measure required by the 2003 FEIS was to review and renew, if warranted, the two depredation orders every 5 years. Subsequently, the Service developed an EA pursuant to NEPA in 2009 and again in 2014 that determined that a 5-year extension of the expiration date of the two depredation orders would not threaten cormorant populations and that activities conducted under the two depredation orders would not have a significant impact on the human environment. Therefore, from October 2003 through May 2016, the Service authorized the take of cormorants pursuant to the two depredation orders (which covered certain States), through the issuance of depredation permits for activities in States not addressed in the two depredation orders, and through the issuance of scientific collecting permits (50 CFR 21.23).

Since the Court's vacating of the depredation orders in May 2016 as discussed above, the Service has been reviewing and issuing individual depredation permits in the central and eastern lower 48 States pursuant to two separate analyses conducted under NEPA. Individuals or entities apply for these permits to address site-specific conflicts, and each application is logged, evaluated, and acted upon (approved or rejected) on a case-by-case basis based on the merits of the permit application.

The 2017 EA (USFWS 2017) evaluated issuing depredation permits to take cormorants for specific circumstances across 37 central and eastern States and the District of Columbia. The selected alternative (Reduced Take Alternative) authorized the average annual take of cormorants that occurred during 2010–2015 (51,571 cormorants). This amount was well below the allowable level resulting from the take analyses included in the EA (82 FR 52936–52937, November 15, 2017). In December 2019, in response to requests for increased take to alleviate growing conflicts, the Service issued a notice (84 FR 69762–69762, December 19, 2019) that it would implement a different proposed alternative analyzed in the 2017 EA (Potential Take Limit Alternative) that had a higher annual take threshold, increasing the take of cormorants authorized by permits to 74,396.

Management of cormorants in the western United States (Western population, *P. albociliatus*) is also through site-specific, case-by-case permits. The Service authorizes take of Western population cormorants primarily to reduce predation-related losses by cormorants of federally threatened or endangered juvenile salmon (*Oncorhynchus* spp.) and steelhead (*O. mykiss*) migrating to the Pacific Ocean. Additional authorizations for take occur at Federal, State, and Tribal hatcheries rearing federally threatened or endangered fish species, to protect aquaculture facilities, and for removing nests related to infrastructure maintenance. The U.S.

*Army Corps of Engineers' Double-crested Cormorant Management Plan to Reduce Predation of Juvenile Salmonids in the Columbia River Estuary—Final Environmental Impact Statement* (FEIS; United States Army Corps of Engineers (USACE) 2015) guides management activities related to the take of cormorants in the Western cormorant population. The National Oceanographic and Atmospheric Administration's National Marine Fisheries Service (NOAA Fisheries) had previously determined that a reduced cormorant population of 5,380 to 5,939 breeding pairs on East Sand Island in the Columbia River Estuary would restore juvenile steelhead survival to the environmental baseline levels (NOAA Fisheries 2014), and the Service authorized lethal take at levels that attempted to achieve that colony abundance. Specifically, the Service authorized approximately 2,300 cormorants to be lethally taken each year under depredation permits, scientific collecting permits, and special purpose permits.

The Service expects the number of conflicts to increase, and we expect that demand for authorizations to take cormorants will continue to increase as a means to reduce those conflicts in the future. For example, between 2007 and 2018, the number of permit requests to take depredating cormorants (exclusive of requests to act under the depredation orders) increased from slightly less than 200 to almost 300 (USFWS, unpublished data). As requests to take cormorants increase, the use of multiple individual depredation permits to address conflicts within State and Tribal jurisdictions will become increasingly time-consuming and burdensome. Therefore, creating a new State and Tribal cormorant permit would enable the Service to more efficiently respond to the needs of States and Tribes seeking relief from conflicts associated with cormorants. The new permit also provides States and Tribes with the ability to address conflicts between cormorants and wild and publicly stocked fish managed by State fish and wildlife agencies or federally recognized Tribes, which was not previously available to them under the

scope of individual depredation permits per 50 CFR 21.41.

### **Estimating Allowable Take**

To alleviate conflicts with cormorants, we used a method called Potential Take Level (PTL) analyses (Wade 1998, Runge et al. 2004) to determine the number of cormorants that may be taken while maintaining the species (and breeding populations) at sustainable levels. This process has been used to determine allowable take levels for cormorants in a previous EA (USFWS 2017) and for other species, including several bird species (e.g., USFWS 2009, Runge et al. 2009, Johnson et al. 2012, Zimmerman et al. 2019). Methods used to determine population sizes and allowable take levels in this rule are detailed in the USFWS Final Environmental Impact Statement: Management of Conflicts Associated with Double-crested Cormorants (USFWS 2020). The median amount of allowable take resulting from the analysis was 166,800 cormorants annually. However, we recommend being more conservative and allowing take only up to the lower 20 percent of the distribution of the PTL annually (121,504 cormorants). Population-specific recommended levels of take are: Atlantic, 37,019; Interior, 78,632; Western, 9,077; and Southern (Florida), 1,314. At those levels of take, the continental population of double-crested cormorants is expected to average about 830,285 cormorants. However, due to concerns expressed by a number of commenters in the Pacific Flyway that take reaching the allowable level could negatively impact the Western Population, the Service initially will allow a maximum of 4,539 birds to be taken annually from that population.

This final rule brings all populations of double-crested cormorants under a common assessment framework to determine allowable levels of take. However, levels of take for each

population could differ based on their current abundances, population biology, and population-specific management objectives.

### **Special Double-Crested Cormorant Permit**

The Service establishes a new permit option under 50 CFR part 21 (Special Double-Crested Cormorant Permit) that is available to State and Tribal fish and wildlife agencies in the 48 contiguous United States to manage conflicts specifically associated with double-crested cormorants. The special permit is available only to a State or Tribal fish and wildlife management agency responsible for migratory bird management. Under this permit, the Service authorizes State and Tribal fish and wildlife agencies to conduct lethal take of double-crested cormorants that is normally prohibited and is intended to relieve or prevent impacts from cormorants on lands or in waters managed by those agencies within their respective jurisdictions or where States or Tribes manage wild or stocked fish that are accessible by the public or all Tribal members. The Service will issue this permit only when it is expected to reduce conflicts involving depredation at State- and Tribal-owned or operated aquaculture facilities (including hatcheries), impacts to health and human safety, impacts to threatened and endangered species (as listed under the ESA or identified in State- or Tribal-specific legislation as threatened or endangered) or those listed as Species of Greatest Conservation Need in State Wildlife Action Plans, damage to State- or Tribal-owned property and assets, and depredations of wild and publicly stocked fish managed by State fish and wildlife agencies or federally recognized Tribes and accessible to the public or all Tribal members. Those States and Tribes not wishing to obtain this new permit may apply for a depredation permit (50 CFR 21.41) to address site-specific

conflicts with cormorants. However, these individual depredation permits do not authorize take of cormorants to reduce or prevent conflicts with wild and publicly stocked fisheries (except for threatened or endangered species).

The Service retains overall authority for the take of double-crested cormorants to ensure that levels of take are consistent with management objectives. States and Tribes must use nonlethal methods, and independently determine that those methods are insufficient to resolve conflicts before lethally taking double-crested cormorants. Lethal management should be considered as part of an integrated approach to managing cormorant conflicts and used only when other methods are insufficient to resolve conflicts. No permit is required merely to scare or herd migratory birds other than threatened or endangered species or bald or golden eagles (see 50 CFR 21.41). The Service will periodically determine the population-specific numbers of double-crested cormorants that may be taken lethally during a specified number of years in efforts to reduce conflicts while sustaining cormorant abundances, and will track authorized take through permits issued to States and Tribes to ensure take does not exceed those levels specified in the PTL. The annual allocation of take to States and Tribes will be based on recent demand by those entities and adjusted as needed (while remaining at or below population-specific allowable take levels) to respond to spatial and temporal changes in population status and the need to reduce conflicts in specific regions. The Service will prepare reports every 5 years, and additionally as necessary, to provide the public with information regarding the take of cormorants and the extent to which this permit, along with other management tools (e.g., depredation permits per 50 CFR 21.41 and scientific collection permits per 50 CFR 21.23), is achieving management objectives.

The special double-crested cormorant permit is subject to the following conditions/restrictions:

1. States and Tribes must use nonlethal methods, and independently determine that those methods are insufficient in controlling the depredation conflict, before lethally taking double-crested cormorants.

2. Lethal take of adults during the breeding season must occur prior to hatching of eggs to avoid the loss of adults that likely would result in orphaning chicks and their ultimate death due to starvation. Adult birds may not be taken at any nest with young in it unless the purpose of the take of adults is intended to address a human health and safety issue. States and Tribes and their subpermittees must make efforts to avoid disturbance to co-nesting species. Existing research findings and publications detailing appropriate nonlethal methods and/or models for reducing conflicts should be used to justify activities.

3. A permit under this section does not authorize the taking of any other migratory bird, including other species of cormorants; the disturbance of bald or golden eagles; or the take of any species listed under the ESA as threatened or endangered. If these impacts to other migratory bird species or to threatened and endangered species are likely to occur, the permittee must obtain permits specifically authorizing those activities (i.e., additional migratory bird, Bald and Golden Eagle Protection Act, and/or threatened and endangered species permits).

4. Actions under the permit may be conducted during any time of the year on lands or in waters managed by State or Tribal fish and wildlife agencies within their jurisdictions, or where States or Tribes manage wild or stocked fish that are accessible by the public or all Tribal members. Actions may occur only when cormorants are committing or are about to commit depredations at Tribal- and State-owned or operated aquaculture facilities (including hatcheries); to alleviate impacts to health and human safety; reduce impacts to threatened and endangered species (as listed under the ESA or identified in State- or Tribal-specific legislation as threatened

or endangered) or those listed as Species of Greatest Conservation Need in State Wildlife Action Plans; and to prevent damage to State- or Tribal-owned property and assets. Take activities to prevent depredation on aquatic Species of Greatest Conservation Need may occur only in natural or public waters. Permittees need to include a description of long-term plans to eliminate or significantly reduce continued need to take double-crested cormorants as part of their application. Permits will be issued annually. Permittees are required to submit an annual report by January 31 for activities conducted during the preceding calendar year. The report must detail the amount of lethal take that occurred under their permit and for what purpose the take was conducted.

5. Anyone undertaking lethal control with a firearm must use nontoxic shot or nontoxic bullets (50 CFR 20.21). However, this prohibition would not apply if an air rifle or an air pistol is used.

6. Individuals conducting lethal control may not use decoys, calls, or other devices or bait to lure birds within gun range.

7. Methods of take are at the discretion of the permittee responsible for the action, but must be accomplished by means of humane lethal take or active nest take. Lethal take may occur by firearm in accordance with paragraph (5) above or lethal or live traps. Active nest take may occur by egg oiling or destruction of nest material and contents (including viable eggs and chicks). Birds may be euthanized by cervical dislocation, CO<sub>2</sub> asphyxiation, or other methods recommended by the American Veterinary Medical Association. Only 100 percent corn oil, a substance exempted from regulation by the Environmental Protection Agency under the Federal Insecticide, Fungicide, and Rodenticide Act, may be used to oil eggs. Other damage control



methods of take consistent with accepted wildlife damage management programs may be authorized.

8. States and Tribes applying for the first time must consult with the USDA Wildlife Services for an assessment of the appropriate level of take and provide recommendations of short-term measures to provide relief from depredation and long-term measures to help eliminate or significantly reduce conflicts. Wildlife Services provides a “Form 37 Permit Review”. This form is required for first-time applicants only. Permittees need not submit a Form 37 for renewal applications unless requested by the regional Migratory Bird Permit Office. Permittees are expected to continue working with Wildlife Services for review of management plans and remaining current on best practices.

9. States and Tribes and their employees and subpermittees may possess, transport, and otherwise dispose of double-crested cormorants taken. Double-crested cormorants killed and nests/eggs destroyed under the authority of this permit must be properly disposed of by donation to an entity authorized by permit or regulation to receive migratory birds, or be destroyed completely in accordance with Federal, State, and/or local laws and ordinances. This may include donation to public museums or public scientific and educational institutions for exhibition, scientific, or educational purposes, or burial or incineration. This permit does not allow for birds or their parts or nests/eggs to be sold, offered for sale, bartered, or shipped for the purpose of sale or barter. Birds may not be retained for personal use.

10. This permit does not apply to any efforts to prevent depredation or harm to privately owned animals (e.g., hobby animals, pets, or similar categories of animals) that are raised free-range or otherwise released to the wild. Private landowners may apply for a depredation permit (50 CFR 21.41) to alleviate damage to some types of property (i.e., buildings and infrastructure;

vehicles and equipment; some types of vegetation; and display animals, such as those in zoo exhibits).

11. States and Tribes may designate subpermittees who must operate under the conditions of the permit. Subpermittees can be employees of State and Tribal fish and wildlife agencies, USDA Wildlife Services employees, and employees of other Federal, State, or Tribal agencies or private companies specializing in wildlife damage abatement and under direct control of the permittee.

12. Any employee or subpermittee authorized by the State or Tribe to carry out actions under the special permit must retain in their possession a copy of the State's or Tribe's permit while carrying out any action.

13. Any State or Tribal agency, when exercising the privileges of this permit, must keep records of all activities, including those of subpermittees, carried out under the authority of the special permit. Prior to any permit renewal, the Service will require an annual report detailing the activities conducted under the permit and the numbers of cormorants, nests, and eggs lethally taken, treated, or destroyed.

14. Nothing in the permit should be construed to authorize the take of cormorants, their eggs, or nests contrary to any State or Tribal law or regulation or on any Federal land without written authorization by the appropriate management authority. Further, none of the privileges granted under the permit shall be exercised without any State or Tribal permit that may be required for such activities.

15. The scope of this permit applies to lands or in waters managed by State and Tribal fish and wildlife agencies and within those agencies' jurisdictions. If a State or Tribe must enter private property to access State and Tribal lands or waters where take is approved in their permit,

the State or Tribe must obtain authorization from the private property owner, and require that the private property owner or occupant provide free and unrestricted access. The private property owner or occupant should also allow access at all reasonable times, including during actual operations, to any Service special agent or refuge officer, State or Tribal wildlife or deputy wildlife agent, warden, protector, or other wildlife law enforcement officer on the premises where they are, or were, conducting activities. Furthermore, any State or Tribal employee or approved subpermittee conducting such activities must promptly furnish information concerning such activities to any such wildlife officer.

16. The Service reserves the authority to immediately suspend or revoke any permit if the Service finds that the terms and conditions set forth in the permit have not been adhered to, as specified in 50 CFR 13.27 and 13.28.

Since November 2017, permits have been available only to address conflicts with aquaculture, human health and safety, threatened and endangered species, and personal property; take of cormorants to protect wild and publicly managed fisheries has not been authorized unless warranted to protect threatened or endangered species. The conflicts with these managed fisheries are increasingly causing concerns with State and Tribal fish and wildlife agencies, particularly those involved with providing recreational fishing opportunities. As cormorant abundance increases, and even at current levels, the issuance of individual depredation permits to address conflicts is becoming increasingly time-consuming and lengthy in some cases. The Service expects this special double-crested cormorant permit, which increases the flexibility of States and Tribes to address issues and also expands the scope of conflicts that can be addressed to wild and publicly managed fish, will result in increased efforts to reduce those conflicts, including lethal take of birds, nests, and eggs. Localized abundances of cormorants may decline

as a result of these efforts, but regional and continental populations are not likely to be negatively impacted.

The Service also expects that, by allowing States and Tribes to address conflicts through a special permit, more aggressive management activities will result at sites experiencing high levels of conflicts associated with cormorants, and within the scope of this rule. By authorizing conflict-management activities at the State or Tribal level, instead of at the Department of the Interior Regional level, management activities will be more responsive and timely than is currently the case. Quicker resolution of conflicts ultimately may result in fewer complaints regarding cormorants. In expanding authority given to the States and Tribes via this permit, workload burdens may shift with more being borne by the States and Tribes and less by the Service. However, because States and Tribes are not required to obtain this permit, this rule does not impose an unfunded mandate on State, local, or Tribal governments. Further, since this permit is available only to States and Tribes, it does not impose an unfunded mandate on the private sector. Those States and Tribes interested in obtaining the new permit would likely have staff and resources in place with dedicated duties falling within the scope of conflicts associated with cormorants. Additional explanations can be found in the **Required Determinations** section of this rule.

Importantly, reducing the abundance of double-crested cormorants is not the goal of the Service or this new management action. Reducing their overall abundance does not guarantee that conflicts in specific areas will decrease. If cormorants are attracted to an area due to food resources, nesting habitats, or other factors, those places will remain attractive regardless of the size of the cormorant population and may still experience damage to the resources. Rather, the goal of the Service is to reduce the number of conflicts with cormorants by combining lethal and

nonlethal methods and allowing the lethal take of cormorants only when supported by information that such take would reduce conflicts. As a consequence, abundance of cormorants in some areas may be reduced, but regional and continental populations will be managed at sustainable levels, albeit at somewhat reduced abundances. The Service also wants to ensure accountability not only in determining allowable take, but also in reporting of actual take by permittees. We will annually review reports submitted by permit holders and will periodically assess the overall impact of this permit program to ensure compatibility with long-term conservation of double-crested cormorants. This approach will result in the transparency and accountability necessary to make informed decisions about and promote adherence to authorized levels of take.

## **Public Comments**

On January 22, 2020 (85 FR 3601–3603), the Service published an advance notice of proposed rulemaking (ANPR) and announced our intent to prepare a NEPA document indicating that the Service intended to establish new regulations regarding the management of double-crested cormorants. The comment period for the ANPR continued through March 9, 2020. The ANPR listed possible alternatives, which include the no action alternative in addition to the following:

- (1) Establish a new permit for State and Tribal fish and wildlife agencies for authorizing certain cormorant management and control activities;
- (2) Establish an aquaculture depredation order; and
- (3) Both (1) and (2) in combination.

We also announced that several public scoping meetings would be held, and that specific dates and times for the public meetings would be available on the internet at <https://www.fws.gov/birds/management/managed-species/double-crested-cormorants.php>. A total of four public scoping webinars were convened, two on February 11, 2020, and two on February 12, 2020. Additionally, we conducted two webinars provided only to Tribal members on February 19 and 27, 2020. We provided all attendees of all webinars with information on the following topics regarding cormorants, their management, and the regulations process: (1) biology and population changes; (2) background of the issues and previous management approaches; (3) current management of conflicts; (4) proposed approaches and alternatives; and (5) the planning process for the NEPA analysis. We also informed attendees that they could provide comments on the proposed actions and the scope of the NEPA review via a website (<http://www.regulations.gov>, Docket No. FWS–HQ–MB–2019–0103) or by U.S. mail or hand-delivery to Public Comments Processing, Attn: FWS–HQ–MB–2019–0103; U.S. Fish and Wildlife Service Headquarters, MS: PRB (JAO/3W), 5275 Leesburg Pike, Falls Church, VA 22041–3803.

On June 5, 2020, the Service published a notice of proposed rulemaking (proposed rule; 85 FR 34578), and the Environmental Protection Agency published notice of a draft environmental impact statement (DEIS) (85 FR 34625). The comment period for each continued for 45 days, ending on July 20, 2020. The Department of the Interior’s policy is, whenever possible, to afford the public an opportunity to participate in the rulemaking process. We received more than 1,400 comments in response to the ANPR and 1,047 in response to the proposed rule and DEIS<sup>1</sup>. You may review the comments received at the Federal eRulemaking

---

<sup>1</sup> Regulations.gov shows 1,052 total comments, which comprise 1,047 public submissions, 2 primary documents (proposed rules), and 3 supporting documents (DEIS, 2003 FEIS, and U.S. Army Corps of Engineers documents)

Portal: <http://www.regulations.gov> in Docket No. FWS–HQ–MB–2019–0103. We considered comments on the ANPR in developing the proposed rule, and comments on the DEIS and proposed rule when developing this final rule. A summary of the comments is included in the 2020 FEIS associated with this rulemaking action, and we incorporate those responses to comments by reference to this rule. We also include additional responses to comments below that highlight important issues raised by the public. Comments and our responses pertaining to information collection are also set forth below in this document in **Required Determinations**, under *Paperwork Reduction Act*, as a majority of those comments pertained to information collection issues.

**Use of Nonlethal Control:** Commenters submitted several questions regarding the required use and efficacy of nonlethal methods used to address conflicts associated with cormorants. Comments appear to focus on two primary concerns: (1) how the Service will enforce or require that permittees implement nonlethal methods first before carrying out authorized take, and (2) how the permittee will determine when nonlethal methods of management are “enough” or insufficient. Commenters also requested clarity on the type of nonlethal control methods the Service expects permittees to use. Specifically, some commenters requested that the Service require that permittees (individual or a new special permit for States and Tribes) “make progress” toward nonlethal solutions to conflicts as a condition of any permit. They further commented that they felt the DEIS did not provide information on how nonlethal methods are used in a comprehensive approach. Members of the general public commented that there is a general bias against nonlethal measures even when nonlethal measures are proven to work. Commenters assert that the Service failed to

demonstrate how States and Tribes would satisfy the requirement that people first use nonlethal methods to address conflicts. In addition, commenters also recommended that the Service ensure that States and Tribes applying for the special permit have conclusive data on a site-by-site basis indicating the effectiveness of cormorant management before take begins.

Further, several State agencies expressed concern that a requirement for attempting nonlethal control before lethal control will delay effective management, and that such a requirement would be so complex that it will add unnecessary documentation and time before lethal controls may be used. Similarly, some State agencies mentioned that “redundant” documentation required under the proposed new permit process could delay control and impede success. One State agency commented seeking clarification on implementation of nonlethal methods as well, stating that such a request is not feasible since the geographic distribution of State and Tribal fish hatcheries is too broad and each hatchery is taken on a case-by-case basis. Another State agency commented that nonlethal control methods are often impractical or ineffective, as cormorants become habituated to persistent, affordable methods (e.g., noise-making deterrents, lasers, harassment from shore by hatchery personnel). Commenters further stated that the size of some hatcheries makes other methods difficult or too expensive to implement. Another commenter suggested that the Service identify a process for the required evaluation of efficacy of nonlethal methods. A State agency recommended that the Service develop guidelines for determining when there is sufficient proof that nonlethal mechanisms are ineffective at resolving conflicts. Another State agency commented that the Service needs to clarify its expectations on use of nonlethal methods to meet the needs of managers, stating that there are certain cases where take is essentially unavoidable, or where there is significant evidence that would indicate, *prima facie*, the need for take. Yet another



State agency also requested that the Service provide States seeking permits with a guide or Best Management Practices on nonlethal methods of resource protection. Lastly, a State agency recommended that the Service develop and provide States with sampling protocols to assist with collecting and analyzing fish population data where cormorant control activities occur.

Some commenters recommended no management of the conflict, or managing the conflict with nonlethal management methods only. And some commenters recommended the “no action” alternative, which would continue to address conflicts associated with cormorants within a specific scope with the issuance of individual permits. Reasons for support of the no action alternative generally indicate that this option would focus lethal control explicitly on birds that are committing or about to commit depredation or harm/damage, identifies and defines a limited and specific set of types of conflicts, requires permittees to demonstrate they have exhausted reasonable nonlethal methods of management, and requires the Service approval lethal control on a case-by-case basis.

**Agency Response to use of Nonlethal Control:** The Service agrees that harassment of cormorants may be effective in some areas, but ineffective in others. The conditions that dictate this outcome are often site-specific and variable throughout any given year. For example, some commenters note that many catfish farms must employ full-time employees to harass and take cormorants when authorized, but management of the conflict in general is considered an added business expense. Another commenter asserted that nonlethal measures may work for a limited time period, but some birds may become habituated. It is in these situations where the Service anticipates lethal removal of cormorants would be warranted. In addition, as the Service noted in the DEIS and the FEIS, the use of nonlethal methods alone is

not an effective management tool to respond to conflicts associated with cormorants, which is why the Service rejected that possible alternative in its analysis.

The Service encourages and expects continued use of nonlethal measures in conjunction with lethal measures where permittees find this approach most effective. Often, a combination of measures is the most effective way to address conflicts associated with cormorants. The Service needs to rely on permittees to make site-specific assessments and employ cormorant conflict management in a manner that makes the most sense, so long as those permittees follow the conditions of the permit. For added clarity in response to these comments, the following is a condition that would be part of any permit issued by the Service under the preferred alternative in this FEIS: States and Tribes and their subpermittees must use nonlethal methods, and independently determine that those methods are insufficient in controlling the depredation conflict, before lethally taking double-crested cormorants. Permittees may also consult with USDA Wildlife Services for additional assistance to determine when nonlethal methods are insufficient.

With regard to methods of nonlethal management methods expected, the new special permit application now includes language intended to be clear and concise. The revised language reads, “(2) For each location(s), describe the nonlethal methods that you have used previously and/or plan on implementing, including (a) active hazing (e.g., horns, pyrotechnics, propane cannons, etc.), (b) passive deterrents (e.g., netting, exclusion devices, nest deterrents, etc.), (c) habitat management (e.g., vegetative barriers, grass management, prey management, etc.), and (d) changes in management practices (e.g., water level management, fish release timing, etc.).”

With regard to the question in the FWS Form 3–200–90, Permit Application, and the language requesting, “A statement indicating what information will be collected to assess whether the management and take of double-crested cormorants is alleviating the damage or other conflict,” the Service revised this language as well. The revised language is intended to be less ambiguous and better solicit an answer that allows a Service permit staff employee/specialist to make a determination on efficacy. The revised language reads, “Describe your long-term plans to eliminate or significantly reduce the continued take of double-crested cormorants or destruction of eggs/nests.”

With respect to the comment suggesting no management, or only using nonlethal controls, nonlethal management would essentially mean that the Federal Government would not issue any permits or other authorizations (i.e., depredation permits, depredation orders, control orders, or conservation orders) that would allow the take of cormorants to alleviate depredations or other conflicts. This is an alternative the Service considered but eliminated from further analysis as it would not meet the purpose and need to address cormorant conflicts.

With respect to the “no action alternative,” while individual permits do offer control on a site-specific case-by-case basis, they do not meet the purpose and need for action as cited in the DEIS. Specifically, the no action alternative does not fully address the need for Tribes in the western region of the United States (excluding Alaska), to address cormorant impacts on fisheries—especially on hatchery-raised salmonids. Similarly, the Service is rejecting the no action alternative because it could potentially have a negative effect on wild and publicly stocked fish, as it would not allow for take of cormorants found to be heavily depredating a fishery. Under the no action alternative, the Service expects continued or enhanced conflict

between cormorants and some economically important fisheries across the nation, as well as at some hatchery release sites.

**Permit Conditions:** Several commenters expressed concern that year-round lethal take will lead to high chick mortality through starvation, predation facilitated by human disturbance, a removal of parent(s), and/or exposure. One commenter requested the Service require a control moratorium during the nesting season when chicks are present. Several commenters voiced a preference for the Service to require only nontoxic shot and not allow the use of any lead ammunition. Some commenters also requested the Service specify permit conditions to protect nontarget and federally listed species. Separately, some commenters voiced a preference for the use of decoys when implementing cormorant management actions.

**Agency Response to Permit Conditions:** The Service views lethal control methods as a last resort for addressing conflicts between avian species and human interests. Lethal take of adults during the breeding season should occur prior to hatching of eggs to avoid the loss of adults that likely would result in orphaning chicks and their ultimate death due to starvation. Adult birds may not be taken at any nest with young in it unless the take of adults addresses a human health and safety issue. In addition, States and Tribes and their subpermittees must make efforts to avoid disturbance to co-nesting species.

This rule limits the use of lead ammunition when persons use firearms to take cormorants. As a standard condition for all permits under this rule, permit holders must use nontoxic shot when using shotguns or other firearms to take cormorants, except when using an air rifle or air pistol due to the limited availability of nontoxic bullets for them.

The Service considered the impacts of issuing depredation permits on nontarget migratory birds, including threatened and endangered species. The Service anticipates the unintentional take of nontarget species will occur infrequently and involve very few individuals of a particular species. An Intra-Service ESA Section 7 consultation Biological Evaluation (ESA BE) was completed to assess if any proposed, threatened, or endangered species or associated critical habitat would be affected by cormorant control. The Service added specific permit conditions for piping plover (*Charadrius melodus*), interior least tern (*Sterna antillarum*), and wood stork (*Mycteria americana*): (1) a buffer zone for wood storks for all activities; (2) a buffer zone for these three birds when discharging firearms; and (3) a buffer zone for these three birds for egg oiling, CO<sub>2</sub> asphyxiation, egg destruction, or nest destruction.

The Service acknowledges that decoys can be effective in luring birds into sites to make them easier to kill, particularly those that are gregarious by nature. In most cases, the kill of birds is higher when using decoys than when they are not used (e.g., use of decoys in hunting situations). However, in cases concerning depredation issues, animals that may not otherwise depredate a particular area may do so when decoyed into that area. Decoying birds may create, extend, or exacerbate conflicts (e.g., exacerbating a disease outbreak by attracting additional birds) where an issue may not exist or could be lessened if the birds had not been decoyed into the area; and could limit the ability of entities to obtain relief from cormorant conflicts due to the limited numbers of birds that could be taken to ensure sustainability of cormorant populations. For these and other reasons, decoys may not be used in the Service's depredation permit (50 CFR 21.41).

**Western Subpopulation of Cormorants:** Several entities commented with concerns regarding the PTL and potential impacts to the western subpopulation of cormorants. Similarly, some commenters also submitted additional data considerations and analyses. Commenters provided many specific empirical details for the Service to consider, but, in general, considerations included the following issues: (1) the confidence interval for this western subpopulation is too large; (2) the take limit for the western subpopulation is much larger than historical take in the West; and (3) there was an error in the equation used to estimate a pre-breeding multiplier.

**Agency Response to Western Subpopulation of Cormorants:** Based on information received during the public comment period, the PTL for the western subpopulation may not have captured complex and changing population dynamics precipitated by cormorant management in the Columbia River Estuary. To reduce the risk of over-exploiting the western subpopulation, the Service reduced the level of authorized annual take to half the PTL in the DEIS, or 4,539 individuals. This is a maximum allowable annual take level, not a prescribed level. Based on the average past take of cormorants, expected take is unlikely to exceed 2,000 annually. The status of the population can be reassessed at 5-year intervals, and additionally as necessary, and there is a sound monitoring program in place for the western subpopulation, which can estimate how the western subpopulation responds to take subsequent to the habitat management in the Columbia River Estuary.

With respect to the comments on the error in the pre-breeding multiplier, two errors were found in the formula. First, an equation had the denominator and numerator reversed. This was a typo in that the equation was used in its proper form to estimate a pre-breeding multiplier. The reversal did not result in any errors in estimating PTL. Second, an equation to

extrapolate cormorant nest counts was missing a term needed to correctly estimate the proportion of nonbreeding birds. The equation as written estimates the number of nonbreeders as a percentage of breeders, whereas it should have estimated the number of nonbreeders as a percentage of the total population. This error was propagated in estimating PTL. Correcting this error caused estimates of PTL to increase 2–3% for each subpopulation.

## **Required Determinations**

### *Regulatory Planning and Review (Executive Orders 12866 and 13563)*

Executive Order 12866 provides that the Office of Information and Regulatory Affairs (OIRA) in the Office of Management and Budget (OMB) will review all significant rules. In accordance with the criteria in Executive Order 12866, this action is not a significant regulatory action subject to OMB review.

This rule will not have an annual economic effect of \$100 million or adversely affect any economic sector, productivity, competition, jobs, the environment, or other units of government. This action will not create inconsistencies with other agencies' actions or otherwise interfere with an action taken or planned by another agency. Our economic analysis determined that this rule is expected to result in positive economic benefits to both the commercial aquaculture industry as well as the recreational sport fishing industry.

E.O. 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.

Codifying a new permit for the management of double-crested cormorants provides an additional tool for States and Tribes to appropriately manage conflicts on lands or in waters managed by their respective fish and wildlife agencies within their jurisdictions, while maintaining overall authority for the take of birds within the Service. Further, current regulations allow the take of cormorants only for the purposes of reducing conflicts with and damage to aquaculture, human health and safety, threatened and endangered species (as listed under the ESA) and State-listed species of management concern, and personal property. Many of the conflicts with cormorants involve depredations of sport fish by cormorants, for which there is no relief under current Federal regulations unless warranted to reduce impacts to threatened and endangered fish species listed under the ESA. This new permit would allow the take of cormorants to reduce depredation of wild and publicly stocked fish managed by State fish and wildlife agencies or Tribes, thus enhancing the scope of conflict resolution to more comprehensively address areas of concern. However, the total number of cormorants from each population that can be taken annually will be determined by the Service to ensure that cormorant populations are sustainable.

The Service does not have empirical information to quantify the changes in costs as a result of this new permit, because we do not know how many States and Tribes would avail themselves of this permit and the extent to which conflicts would be addressed using it.



However, we expect that the overall cost and regulatory burden to individuals, businesses, and State, Tribal, and Federal government agencies associated with this new permit will be lower than exists under current regulations. The reduction would be the result of fewer requests by States and Tribes for individual depredation permits previously needed compared to single State or Tribal permits that could be used; hence, total costs associated with permit applications and biological assessments of those applications likely will be lower.

#### *Executive Order 13771*

This rule is not an E.O. 13771 (“Reducing Regulation and Controlling Regulatory Costs”) (82 FR 9339, February 3, 2017) regulatory action because it is not significant under E.O. 12866.

#### *Regulatory Flexibility Act*

Under the Regulatory Flexibility Act (RFA; 5 U.S.C. 601 *et seq.*), as amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA; 5 U.S.C. 801 *et seq.*), 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 effects 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 the agency certifies the rule will not have a significant economic impact on a substantial number of small entities. The SBREFA amended the RFA to require Federal agencies to provide a certification statement of the factual basis for certifying that the rule will not have a significant economic impact on a substantial number of small entities.

According to the Small Business Administration, small entities include small organizations such as independent nonprofit organizations; small governmental jurisdictions, including school boards and city and town governments that serve fewer than 50,000 residents; and small businesses (13 CFR 121.201). Small businesses include finfish farming and fish hatcheries (NAICS 112511) and other types of commercial aquaculture farms (NAICS Code 112519). The small business size standard defined for these businesses (as defined by the U.S. Small Business Administration) is businesses with revenues under \$0.75 million.

The Service has difficulties estimating impacts to recreational fisheries because few studies have investigated direct economic impacts of cormorant management on recreational fisheries. Although a few studies have estimated impacts to local economies, loss of fishing day activities in those local areas may be offset through engaging in angling opportunities elsewhere. While it is feasible that this rule could have localized effects on recreational fisheries, data do not exist to predict where those effects could occur. Further research might determine whether any impacts that may be seen at local scales can be extended to larger scales. However, the Service concludes that this rule will result in an overall net benefit to facilities as it will provide another option to control double-crested cormorants that are negatively impacting their operations.

This new permit affects only State and Tribal governments and does not impact small businesses. The new special cormorant permit would be optional and available to State and Tribal fish and wildlife agencies in the 48 contiguous States to manage conflicts specifically associated with cormorants. This permit would provide State and Tribal fish and wildlife agencies flexibility within predefined guidelines to address conflicts caused by cormorants within their jurisdictions.

Commercial entities, such as privately managed aquaculture facilities, would continue to

have the opportunity to apply for individual depredation permits to address site-specific conflicts. A higher threshold for annual take associated with this regulation will yield benefits to the aquaculture industry and others in need of individual depredation permits. These benefits result from indirect effects on cormorant populations from a higher threshold of authorized take, and the resulting lower cormorant populations that are projected. The new permit coupled with the continued use of individual depredation permits for commercial aquaculture producers would provide the flexibility to manage cormorants sustainably and authorize take in an equitable fashion across multiple conflicts.

Thus, we are certifying that this rule will not have a significant economic impact on a substantial number of small business entities. Therefore, a regulatory flexibility analysis is not required.

#### *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 government activities, because the Federal Government would not require States or Tribes to obtain this permit. By authorizing conflict-management activities at the State or Tribal level, instead of at the Department of the Interior Regional level, management activities will be more responsive and timely than is currently the case. Quicker resolution of conflicts ultimately may result in fewer complaints regarding cormorants. In expanding authority given to the States and Tribes via this permit, workload burdens may shift with more being borne by the States and Tribes and less by the Service. However, a small government agency plan is not required.

(b) We have determined and certify, in compliance with the requirements of the Unfunded Mandates Reform Act, 2 U.S.C. 1502 *et seq.*, that this rulemaking will not impose a cost of \$100 million or more in any given year on local or State government or private entities. The rule does not have a significant or unique effect on State, local, or Tribal governments or the private sector, and the permit is optional to States and Tribes. Those States and Tribes interested in obtaining the new permit would likely have staff and resources in place with dedicated duties falling within the scope of conflicts associated with cormorants. Therefore, this rule is not a “significant regulatory action” under the Unfunded Mandates Reform Act.

#### *Takings*

In accordance with E.O. 12630, this rule does not contain a provision for taking of private property, and would not have significant takings implications. A takings implication assessment is not required.

#### *Federalism*

This rule would not interfere with the States’ or Tribes’ abilities to manage themselves or their funds. The new special cormorant permit would be optional and available to State and Tribal fish and wildlife agencies in the 48 contiguous States to manage conflicts specifically associated with cormorants. This permit would provide State and Tribal fish and wildlife agencies flexibility within predefined guidelines to address conflicts caused by cormorants within their jurisdictions. Therefore, this rule would not have sufficient federalism effects to warrant preparation of a federalism summary impact statement under E.O. 13132.

### *Civil Justice Reform*

In accordance with E.O. 12988, we have reviewed this rule and determined that it 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*

This final rule contains a collection of information that we have submitted to OMB for review and approval under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*). 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. OMB has reviewed the information collection requirements in this rule and assigned OMB Control Number 1018–0175. The new reporting and/or recordkeeping requirements identified below require approval by OMB:

**(1) FWS Form 3–200–90, Permit Application—Special Double-Crested Cormorant Permit (50 CFR part 21) (and associated amendments):** This new permit would be available only to State or Tribal fish and wildlife agencies responsible for migratory bird management on lands and in waters managed by those agencies within their jurisdictions. Under this permit, the Service would authorize State and Tribal fish and wildlife agencies to conduct lethal take to reduce conflicts involving depredation at State- and Tribal-owned or operated aquaculture facilities (including hatcheries); impacts to health and human safety; impacts to threatened and endangered species (as listed under the ESA and listed species identified in State- or Tribal-specific legislation as threatened or endangered) or those listed as Species of Greatest Conservation Need in State Wildlife Action Plans; damage to State- or Tribal-owned property and assets; and depredations of wild and publicly stocked fish managed by State fish and wildlife

agencies or federally recognized Tribes and accessible to the public or all Tribal members. Take activities to prevent depredation on aquatic Species of Greatest Conservation Need may occur only in natural or public waters.

Any State or Tribal fish and wildlife agency wishing to obtain a permit must submit an application (FWS Form 3–200–90) to the appropriate Regional Director containing the general information and certification required by 50 CFR 13.12(a) plus the following information:

- a. A brief description of your State's or Tribe's double-crested cormorant conflicts, including physical location(s) and type of conflict specified above in this paragraph (1);
- b. A detailed description of the nonlethal methods (i.e., active hazing, passive hazing, habitat management, and changes in management practices) you have and/or will implement and how activities will address one or more of the issues specified above in this paragraph (1);
- c. The requested annual take of double-crested cormorants by life-stage, including eggs and nests;
- d. A description of long-term plans to eliminate or significantly reduce continued need to take double-crested cormorants;
- e. A statement indicating that the State or Tribe will inform and brief all employees and subpermittees of the requirements of these regulations and permit conditions;
- f. A list of all subpermittees who may conduct activities under the Special Double-Crested Cormorant Permit, including their names, addresses, and telephone numbers; and
- g. The name and telephone number of the individual in your agency who will oversee the double-crested cormorant management activities authorized under the permit.

States and Tribes applying for the first time must consult with the U.S. Department of Agriculture's Wildlife Services for an assessment of the appropriate level of take and provide

recommendations of short-term measures to provide relief from depredation and long-term measures to help eliminate or significantly reduce conflicts. Wildlife Services provides a “Form 37 Permit Review,” which is required to be completed and included with the application for first-time applicants only.

(2) **FWS Form 3–202–56, Annual Report:** The State or Tribe must submit an annual report (FWS Form 3–202–56) detailing activities, including the dates, numbers, and locations and life stages of birds, eggs, and nests taken and nonlethal techniques utilized, by January 31 for activities conducted during the preceding calendar year. The Service will require an annual report by the State or Tribe prior to any permit renewal.

(3) **Recordkeeping Requirements:** Any State or Tribal agency, when exercising the privileges of this permit, must keep records of all activities, including those of subpermittees, carried out under the authority of the special permit.

(4) **Designation of Subpermittees:** States and Tribes may designate subpermittees who must operate under the conditions of the permit. Subpermittees can be employees of State and Tribal fish and wildlife agencies, USDA Wildlife Services employees, and employees of other Federal, State, or Tribal agencies or private companies licensed to conduct wildlife damage abatement.

(5) **Landowner Notifications:** If a State or Tribe must enter private property to access State and Tribal lands or waters where take is approved in their permit, the State or Tribe must obtain authorization from the private property owner.

*Title of Collection:* Federal Fish and Wildlife Permit Applications and Reports—Special Double-Crested Cormorants; 50 CFR part 21.

*OMB Control Number:* 1018–0175.

*Form Numbers:* FWS Forms 3–200–90 and 3–202–56.

*Type of Review:* New.

*Respondents/Affected Public:* State and/or Tribal governments.

*Total Estimated Number of Annual Respondents:* 711.

*Total Estimated Number of Annual Responses:* 711.

*Estimated Completion Time per Response:* Varies from 10 minutes to 16 hours, depending on activity.

*Total Estimated Number of Annual Burden Hours:* 4,598.

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

*Frequency of Collection:* On occasion for applications, recordkeeping, and designations of subpermittees; and annually for annual reports.

*Total Estimated Annual Nonhour Burden Cost:* None.

A proposed rule, soliciting comments on this collection of information for 30 days, was published on June 5, 2020 (85 FR 34578). While we received no comments pertaining to information collection in response to the proposed rule, we also solicited comments regarding the DEIS titled “Management of Conflicts Associated with Double-crested Cormorants” (EIS number 20200116) that was published June 5, 2020. Of the 1,047 public comments submitted in response to the proposed rule and DEIS, we received 49 comments from the following entities in response to the DEIS that address the information collection requirements:

<b>Agency</b>	<b>Date Submitted</b>
Arkansas Farm Bureau Federation	July 20, 2020
Arkansas Game and Fish Commission	July 16, 2020
Association of Fish and Wildlife Agencies	July 17, 2020
Attorneys for Animals, Inc.	July 21, 2020
Audubon	July 20, 2020
Audubon Society of Portland	July 21, 2020



Arizona Game and Fish Department	July 20, 2020
Catfish Farmers of America	June 30, 2020
Center for Biological Diversity	July 20, 2020
Central Flyway Council	July 20, 2020
Columbia River Inter-Tribal Fish Commission	July 21, 2020
Congressional Sportsmen's Foundation	July 20, 2020
Congressman Jack Bergman	July 21, 2020
Finger Lakes Conservation Council	July 13, 2020
Georgia Department of Natural Resources, Wildlife Resources Division	July 20, 2020
Idaho Department of Fish and Game	July 20, 2020
Kalmiopsis Audubon Society	July 20, 2020
Leech Lake Band of Ojibwe Division of Resources Management	July 13, 2020
Louisiana Department of Wildlife and Fisheries	July 16, 2020
Michigan United Conservation Clubs	July 16, 2020
Mid-Columbia Public Utility District	July 20, 2020
Mississippi Commissioner of Agriculture and Commerce	July 20, 2020
Mississippi Farm Bureau Federation	July 20, 2020
Mississippi Flyway Council	July 20, 2020
Missouri Department of Conservation	July 17, 2020
National Aquaculture Association	July 20, 2020
New York State Department of Environmental Conservation	July 20, 2020
New York State Fish and Wildlife Management Board	July 21, 2020
New York State Conservation Council, Inc.	July 20, 2020
North Dakota Game and Fish Department	July 17, 2020
Northwest Guides and Anglers Association	July 20, 2020
Ohio Department of Natural Resources Division of Wildlife	July 20, 2020
Oklahoma Department of Wildlife Conservation	July 20, 2020
Oregon Department of Fish and Wildlife	July 20, 2020
Pacific Flyway Council	July 20, 2020
Pacific Public Employees for Environmental Responsibility	July 15, 2020
Pro Lake Management, LLC	July 21, 2020
Quality Lake, Inc,	July 21, 2020
Roby, Daniel	July 21, 2020
South Carolina Department of Natural Resources	July 20, 2020
Texas Parks and Wildlife Department	July 20, 2020
University of Minnesota–Twin Cities Department of Fisheries, Wildlife and Conservation Biology	July 21, 2020
U.S. Environmental Protection Agency, Region 9	July 16, 2020
Virginia Department of Wildlife Resources	July 21, 2020
Washington Department of Fish and Wildlife	July 20, 2020
Waterbird Society	July 20, 2020
Wisconsin Department of Natural Resources	July 20, 2020
World Aquaculture Society	July 20, 2020
Wyoming Game and Fish	July 20, 2020

As mentioned previously, we incorporate by reference comments and our responses in the 2020 FEIS associated with this rulemaking action, and address below those comments directly relevant to this rule. We arranged the comments addressing the information collections

by overarching themes and provide a synopsis of the comments related to each theme, along with the Service's response to each theme, as indicated below:

**FUNDING/RESOURCE CONCERNS:** Several State agencies and organizations commented on the need for funding and technical support to implement a new State-wide special permit as described in the preferred alternative. Commenters expressed concern that a new permit process would be overly burdensome to implement, which could delay cormorant control efforts and impede management success. One State agency asked how much potential new monitoring or reporting a State would have to agree to, and the amount of time and resources that would need to be invested. They expressed concern that funding of population monitoring (and monitoring of take) would be sourced from State budgets if population monitoring is stepped down to the Flyways. Another State agency stated that in order to ensure that monitoring efforts are conducted consistently, the Service should conduct population monitoring or must allocate funding to the States for monitoring. A separate State agency expressed concerns about the burden that the proposed permit will place on States to develop and maintain programs to manage allowable take (i.e., population monitoring, permitting, and reporting). Similarly, another State agency cautioned that State resources are limited, while a separate State agency inquired whether States will receive financial assistance to implement the new permit. Lastly, the Mississippi and Pacific Flyway Councils also commented that Federal financial support may be needed to manage reporting and monitoring and the ability to administer a cormorant depredation program.

**Agency Response to Funding/Resource Concerns:** This new permit does not require a State or Tribe to process or issue any depredation permits to entities within their jurisdiction. As

stated in the proposed rule and DEIS, States and Tribes would not be required to request a permit, and those entities within States or Tribes not seeking a new permit would continue to be able to apply for individual depredation permits (except those that address wild and publicly stocked fisheries). The Service's purpose and need for this action, however, is to provide the flexibility for a State or Tribe to address spatial and temporal complexity of conflicts. This is because each State and Tribe has different goals and objectives for wildlife management, and, therefore, allowances for flexibility when prioritizing allocation of authorized take must be granted. In all cases under a new permit, States and Tribes would be required to respond to questions as part of a permit application, and document all take that occurs under their permit(s), and provide the Service with a report by January 31 for activities conducted during the preceding calendar year. But the cost and means to implement permit requirements will vary based on the goals of any particular State or Tribe seeking relief from conflicts associated with cormorants. The Service cannot obligate funds to implement a new special permit at this time, nor could the Service accurately project any necessary additional funding for each State or Tribe due to the flexibility provided to them. As with the management of other migratory bird species, the Service expects costs of management to be shared among the Service, States, and Tribes.

**MONITORING PLANS:** Several States, organizations, and individuals commented on the need for more clarity and details from the Service with regard to the development of a cormorant population monitoring program, and how adaptive management will be incorporated. Entities requested that the Service provide an outline of a cormorant population monitoring regime as a foundation for current consideration by stakeholders and as the basis for stakeholder meetings with the Service following the publication of the record of decision. These commenters

also asked how much potential new monitoring or reporting a State would have to agree to, and the amount of time and resources that would need to be invested. Some State agencies and Flyway Councils provided specific recommendations for population monitoring. One State agency, for example, requested that the Service provide standardized population monitoring and reporting protocols needed to evaluate impacts of authorized take on cormorant populations, as well as criteria to be used to assess the costs and benefits of take on wild fish stocks, aquaculture facilities, human health and safety, property, and species of conservation concern. Several commenters expressed concern over any requirement that permittees gather data to assess the efficacy of take. Similarly, commenters seek to clarify on who would be required to collect any such data.

**Agency Response to Monitoring Plans Concerns:** The Service will work with the four Flyway Councils and partnering Federal agencies to develop agreed-upon, standardized monitoring protocols. The purpose of the monitoring protocols will be to provide scientifically defensible estimates and/or indices of double-crested cormorant population abundance, biologically allowable take, and observed take. The protocols will detail agency-specific responsibilities and estimated annual costs associated with monitoring. The Service will also produce a report every 5 years, and additionally as needed, that provides analyses from population-monitoring efforts and other status information. This report would be provided to the public to promote transparency of decision-making and evaluation of the effectiveness of this conflict-management tool. This report would include, but not be limited to: (1) updated cormorant population status and trends; (2) reported lethal take of cormorants nationally and by cormorant population; (3) updated PTL analyses based on new or more current population information; (4) the state of the conflicts described in the scope of the rule and assessment of a

need for continued management, as reported by requests for depredation permits (both individually and programmatically by participating States and Tribes); and (5) a conflict-management decision and justification for either continued management or a proposed new management approach, if appropriate and needed. In providing clarity to potential permittees about the necessary information applicants need to provide in the application, the Service clarifies that the application does not include language that permittees gather data to assess the efficacy of take. Rather, it includes language asking the applicant to provide a description of long-term plans to eliminate or significantly reduce continued need to take cormorants. The Service encourages State and Tribal fish and wildlife agencies to coordinate with subpermittees to assess take measures that address long-term prevention of depredation where possible, and to conduct monitoring in conjunction with the Service as it develops its population monitoring plan.

**DEVELOPMENT OF GUIDELINES:** A number of State agencies recommended that the Service develop guidelines for determining when there is sufficient proof that nonlethal mechanisms are ineffective at resolving conflicts. One State agency requested that the Service provide States seeking permits with a guide or Best Management Practices on nonlethal methods of resource protection. Another State agency recommended that the Service develop and provide States with sampling protocols to assist with collecting and analyzing fish population data where cormorant control activities occur.

**Agency Response to Development of Guidelines Concerns:** The Service received many comments either in favor of or opposed to using nonlethal methods in all situations. Commenters cited that nonlethal methods are not effective in all cases; some may be cost-prohibitive, and some may not respond well in situations where birds may become habituated to

nonlethal management. The Service agrees that harassment of cormorants may be effective in some areas, but ineffective in others. The conditions that dictate this outcome are often site-specific and variable throughout any given year. Some commenters noted that nonlethal measures may work for a limited time period, but some birds may become habituated. The Service stated in the DEIS and the FEIS that the use of nonlethal methods alone is not an effective management tool to respond to conflicts associated with cormorants, which is why the Service rejected that possible alternative in its analysis.

The Service encourages and expects continued use of nonlethal measures in conjunction with lethal measures where permittees find this approach most effective. Often, a combination of measures is the most effective way to address conflicts associated with cormorants. The Service needs to rely on permittees to make site-specific assessments and employ cormorant conflict management in a manner that makes the most sense, so long as those permittees follow the conditions of the permit. For added clarity in response to these comments, the following is a condition that would be part of any permit issued by the Service under the preferred alternative in this FEIS: States and Tribes must use nonlethal methods, and independently determine that those methods are insufficient in controlling the depredation conflict, before lethally taking double-crested cormorants. Permittees may also consult with USDA Wildlife Services for additional assistance to determine when nonlethal methods are insufficient.

**FLYWAY COUNCILS AND ADAPTIVE MANAGEMENT:** Comments from the Flyway Councils indicated an interest in being involved in the development of the Service's monitoring plans. The Mississippi Flyway Council noted that they felt the 5-year monitoring plan seemed reasonable, and suggested the Service consider the participation of Flyway Councils

to develop coordinated monitoring. The Central Flyway Council indicated support for developing monitoring plans, and recommended that the four Flyways contribute recommendations on reasonable take allocations. A State agency recommended the Service use the Flyway system to assist in the allocation of permitted lethal removal of cormorants, due to the pressing need to resolve cormorant conflicts across broad geographic regions.

Another State agency requested that the Service convene meetings with the Flyways and other relevant stakeholders to develop a specific cormorant population monitoring plan. The need to ensure adequate monitoring and reporting to manage take while considering the limited State resources was cited by some State agencies as well. One State agency also noted a concern for how Flyways would fund and provide resources for additional monitoring and reporting of cormorant populations and lethal take, as much of their funding comes from State budgets.

Another State agency commented suggesting that the involvement of the Flyway Council could be beneficial in the development of monitoring plans, but felt that monitoring plan development should be the extent of their involvement, since their nongame technical section has little relevant experience with the management of overabundant species. Both the Mississippi Flyway Council and a State agency in that flyway encouraged the Service to align their regulatory cycle with the Flyway Council's summer meeting to provide sufficient time for States to properly and carefully consider the Service's regulatory proposals.

The Mississippi Flyway Council recognized, supports, and appreciates that, under Alternative A, some States and Tribes in the Flyway not wishing to establish a new permit system, as well as commercial aquaculture facilities experiencing cormorant issues, have the option to apply for depredation permits under 50 CFR 21.41. Lastly, the Central Flyway

Council recommended the Flyway process be used to notify the Service of which States within each Flyway will be participating in the new permit.

Two stakeholders submitted comments regarding adaptive management. One stated that the Service did not address adaptive management in the information collection. Another stated that the concept of adaptive management only appeared once in the DEIS, in reference to the perceived benefits of Alternative A allowing flexibility in a State's or a Tribe's cormorant control strategies to achieve desired fisheries benefits.

**Agency Response to Flyway Council and Adaptive Management Concerns:**

Regarding population monitoring and adaptive management, the Service will work with the four Flyway Councils and partnering Federal agencies to develop agreed-upon, standardized monitoring protocols. The Service will make every effort to align coordination with the Flyway Councils around their meetings throughout the calendar year. The purpose of the monitoring protocols will be to provide scientifically defensible estimates and/or indices of double-crested cormorant population abundance, biologically allowable take, and observed take. The protocols will detail agency-specific responsibilities and estimated annual costs associated with monitoring. The Service will also produce a report every 5 years, and additionally as needed, that provides analyses from population-monitoring efforts and other status information. This report will be provided to the public to promote transparency of decision-making and evaluate the effectiveness of this conflict-management tool. This report will include, but not be limited to: (1) updated cormorant population status and trends; (2) reported lethal take of cormorants nationally and by cormorant population; (3) updated PTL analyses based on new or more current population information; (4) the state of the conflicts described in the scope of the rule and an assessment of the need for continued management, as reported by requests for depredation



permits (both individually and programmatically by participating States and Tribes); and (5) a conflict-management decision and justification for either continued management or a proposed new management approach, if appropriate and needed.

**DEPREDATION/CONTROL ORDERS:** Several entities and State agencies commented in support of an aquaculture depredation order in conjunction with a new special State and Tribal permit addressing conflicts associated with cormorants. Some State agencies also voiced support for a new aquaculture depredation order or a new general depredation order without commenting specifically on a new State or Tribal special permit. One State agency referenced the DEIS by concluding that the environmental impacts between Alternatives A and C would be similar, and stated that Alternative C would provide greater efficacy and less administrative burden for their agency. Another commenter submitted a similar comment and voiced support for a nationwide depredation order. Other entities also commented in support of an aquaculture depredation order in general, stating that individual permits are not effective and the proposed rule does not provide a lethal take management option for commercial aquaculture facilities such as catfish farms. A State agency also commented in support of Alternative C, citing specific support for a new special State and Tribal permit and the ability for States to manage their own water resources. A nongovernmental organization commented in support of a nationwide depredation order, stating that individual depredation permits are ineffective due to the unpredictable migratory patterns of cormorants making it difficult to effectively assess where individual permits are needed.

Commenters in support of a new aquaculture depredation order suggested that this alternative would reduce the administrative and regulatory burden on the Service and the

aquaculture industry, and emphasized that individual take permit applications are a significant burden for small businesses. These commenters asserted that low take limits for individual permits are sometimes arbitrarily set by regional agency offices, making these permits inefficient, and that small businesses would be required to continue to apply for individual take permits. One aquaculture farmer spoke about complications with having to apply and pay for two separate permits at two separate regional offices due to having farms in bordering States. A State agency commented in disagreement with the assertion that the requirement to track take of cormorants under Alternative A is less burdensome than for other alternatives and that reporting requirements under most alternatives could be structured to equally assess take levels.

A Tribal Commission commented in support of Alternative D, a general depredation order. They also suggested that the Service include Federal lands in this alternative in order to allow State and Tribal wildlife managers the necessary flexibility to manage cormorants effectively and efficiently for the resources that need protection. This Commission further states Alternative D is ideal to maximize flexibility in protecting out-migrating juvenile salmon and steelhead as it includes all lands where cormorants impact fisheries resources throughout the Columbia River basin.

Lastly, an industry association commented in support of the vacated depredation order, and not the depredation orders analyzed in the DEIS.

**Agency Response to Depredation Order Comments:** As explained in the DEIS, the Service would apply an annual maximum allowable take threshold across all the needs identified by stakeholders. The Service determined this threshold by using a Potential Take Limit (PTL) model, which uses underlying cormorant population metrics (productive rates, survival rates,

etc.) to calculate an annual allowable take level. This is the same type of model used to sustainably manage some migratory game bird species (band-tailed pigeons) and take levels for species such as black vultures. By establishing an annual sustainable take threshold, and ensuring systems are in place to keep take below that threshold, the Service will implement the robust tool needed to assess the effects of take on cormorant populations to address potential legal challenges.

Under the vacated aquaculture depredation order, aquaculture facilities were required to annually report lethal cormorant control activities. This system of limited accountability and self-reporting with a year time-lag was not adequate to consistently track authorized take on a national scale. In addition to timing, the lack of reliable annual take from information under the previous depredation orders complicated our ability to assess the impacts of the orders on cormorant populations.

The Service must be capable of tracking take by all authorization mechanisms available throughout the year. Presently, however, the Service does not have the necessary process or resources to adequately monitor take under any new depredation order. This is because, unlike the use of a permit system, the Service cannot track take under a depredation order until the take has already occurred, creating a greater probability that the take will exceed the maximum limit before it is reported. To adequately track take under any new depredation order, whether that order be the vacated orders, or those analyzed in the DEIS, the Service needs to develop a mechanism that allows take to be tracked in real time, such as the Canada Goose Registration database (50 CFR 21.50). Such a tool would reduce the likelihood of exceeding the annual take threshold or reaching the annual take threshold prior to the end of the year. Additionally, a registration/tracking tool would only be effective if those using the depredation order were

willing to register and report take numbers on a regular and frequent basis. Since a tracking system is not currently in place, this alternative is not ripe for decision. The Service must therefore continue to rely on individual permits for private and commercial entities.

The Service will continue to issue individual depredation permits and is not proposing to implement any new cormorant depredation orders anywhere in the United States at this time. Based on information received during the public comment period, the PTL model for the western subpopulation may not have captured complex and changing population dynamics precipitated by cormorant management in the Columbia River Estuary. To reduce the risk of over-exploiting the western subpopulation, the Service will initially limit that annual take to half the PTL in the DEIS, or 4,539 individuals. This is a maximum allowable annual take level, not a prescribed level. Based on past take of cormorants, expected take is unlikely to exceed 2,000 annually.

In regard to comments questioning which entities may remain eligible to apply for and receive individual depredation permits, the Service acknowledges this complexity and refers commenters to Table 1 in the FEIS, “Differences In Regulatory Frameworks That Would Address Conflicts Across All Alternatives,” which outlines how each alternative in the NEPA analysis would employ different proposed regulatory frameworks to address conflicts relating to cormorants. The preferred alternative would establish a new, optional permit that would be available to State and Tribal fish and wildlife agencies in the 48 contiguous States to manage conflicts specifically associated with cormorants. This alternative would provide State wildlife management agencies and Tribes flexibility within predefined guidelines to address conflicts caused by cormorants within their jurisdictions. As stated in the rule and NEPA analyses, States and Tribes would not be required to request a permit, and those entities within States or Tribes not seeking a new permit would continue to be able to apply for individual depredation permits

(individual depredation permits would not authorize the take of cormorants to protect wild or stocked fish except when circumstances require the protection of federally listed species). Commercial aquaculture facilities would continue to have the ability to apply for individual depredation permits (50 CFR 21.41) from the Service. Regarding the individual's comment about having to apply and pay for two separate permits at two separate regional offices due to having farms in bordering States, the Service emphasizes that multiregional depredation permits will remain available for these circumstances. For example, the regional office to which a commercial aquaculture producer would apply can issue a permit for more than one State and across regional boundaries. This would require a coordination step between those two regional permit offices, which is a standard operating practice for the Service when an applicant seeks to take migratory birds from States that occur in different administrative regions.

#### **PERMIT APPLICATION/PERMIT SYSTEM:**

*Allocation and Scope of Authorized Take:* Several commenters submitted questions pertaining to how the Service would manage overall allocation of authorized take of cormorants. Generally, commenters asked how the Service would: (1) allocate take among all existing authorizations for take, including a new State and Tribal permit; (2) account for regional take under the national permit system; and (3) determine an upper limit of take for each State. For example, two State agencies commented on the need to understand how the Service would allocate take among all authorization mechanisms. Another State agency also commented on the need for clarity on how annual take, both at the State and regional level, would be shared among the States and Tribes so that they can make informed determinations in successive years. Another State agency stated that the method by which take will be allocated

across the western population is unclear from the DEIS and needs to be clarified. The Central Flyway Council requests the Service engage the four administrative flyways so they can provide recommendations to the Service on reasonable take allocation among States and flyways. One individual commented with concern that States may take the majority of the allocated take within a cormorant subpopulation's allowable take threshold within the PTL. This commenter further states that there is no structure to ensure that take for resources will be balanced (prioritization) or that a diversity of stakeholder interests will be considered.

Several State agencies and commenters voiced a need for clarity on the scope of authorized take within a new cormorant depredation permit for States and Tribes outlined in the proposed rule. Specifically, commenters requested clarity on the scope of circumstances for when take would be authorized, the geographic and temporal scope, and whether the new special permit would apply to private property owners and Species of Greatest Conservation Need (SGCN) as identified in State Wildlife Action Plans. Commenters stated that this clarity is needed to understand where and when States and Tribes can implement take of cormorants. For example, two State agencies recommended rewording "wild and publicly stocked fish stocked by State agencies or Tribes" to "wild and stocked fish managed by State agencies or Tribes." Another separate State agency stated that a State agency may need to apply control of cormorants on public waters, which can occur in cases where a State does not own the land, and recommends the final rule language be revised from, "Lands under the jurisdiction of the State," to "Lands and/or public waters under the jurisdiction of the State." Similarly, another State agency sought clarification on the language used in the proposed rule, and referenced "state or tribal lands" and "respective jurisdiction."

One private entity commented that the proposed rule should not limit State cormorant

control efforts to only those water bodies where impact studies have been performed, and should be revised to provide relief for water bodies with "publicly stocked fish" to include "publicly accessible fisheries" to include protection for wild fish. A State agency similarly requested that the Service provide States with standardized guidance on determining when take is warranted to support fish resources, and to reduce conflicts associated with risks to human health and safety, property, and species of conservation concern. A separate State agency commented about the scope of the conflicts, and asked if a State permit is the only way a State can address cormorant conflicts. That agency further asked about possible ramifications of opting out of the permit system, and if there will still be a mechanism by which a State can address wild fishery conflicts with cormorants.

**Agency Response to Allocation and Scope of Authorized Take Comments:** States and Tribes would not be required to request a permit, and those entities within States or Tribes not seeking a new permit would continue to be able to apply for individual depredation permits (except those that address wild and publicly stocked fisheries). The Service cannot yet provide the specificity requested on how the allocation of individual permits for aquaculture facilities and property owners would occur because the Service does not yet know how many States or Tribes would request the proposed new permit. However, the Service understands that States and Tribes need clarity on the Service's expectations for an acceptable level of requested take in an application for a new permit. Permittees would be restricted to maximum levels of take authorized, designed not to exceed the PTL within the subpopulation where the State or Tribe is located. This level of authorized take would depend on: (1) which States and Tribes seek a new special permit within the same subpopulation analyzed within the PTL; (2) an assessment by Service permit staff of the available level of take each year within the specific

subpopulation where the State or Tribe is located; and (3) an assessment by Service permit staff of the historical information of authorized take of cormorants due to depredation in the past. However, allocation of authorized take may be modified as conditions change once take is allowed. The Service encourages interested States and Tribes to communicate with the Service during the application process to best determine prioritization and allocation of authorized take of cormorants.

The Service appreciates the comments that the scope of where take activities could occur may be too limiting relative to the areas that States and Tribes manage for fisheries. The Service therefore revised the language in the final rule to better encompass the lands and waters managed by State and Tribal fish and wildlife management agencies stating that, under this (special double-crested cormorant) permit, the Service authorizes State and Tribal fish and wildlife agencies to conduct lethal take of double-crested cormorants that is normally prohibited and is intended to relieve or prevent impacts from cormorants on lands or in waters managed by those agencies within their respective jurisdictions. The scope of management and take activities conducted under the permit is intended to reduce or prevent conflicts associated with cormorants for the following concerns:

1. Depredation of fish at State- and Tribal-owned or operated aquaculture facilities, including hatcheries;
2. Realized and potential impacts to human health and safety (e.g., collisions of airplanes with birds, fecal contamination of urban wetlands);
3. Impacts to threatened and endangered species (as listed under the ESA and listed species identified in State- or Tribal-specific legislation as threatened or endangered) or those listed as Species of Greatest Conservation Need in State Wildlife Action Plans, where take



activities to prevent depredation on aquatic Species of Greatest Conservation Need may occur only in natural or public waters;

4. Damage to State- or Tribal-owned property and assets; and

5. Depredation of wild and publicly stocked fish managed by State fish and wildlife agencies or federally recognized Tribes and accessible to the public or all Tribal members.

#### **PERMIT APPLICATION/PERMIT SYSTEM:**

*Geographic and Temporal Scope:* Some commenters inquired about the geographic scope of a new State or Tribal permit, stating that implementation of lethal control of cormorants to reduce impacts on aquaculture, wild and stocked fisheries, human health and safety, property, and species of conservation concern should be authorized at a biologically sustainable level for the Alaska, Pacific Coast, Interior, Atlantic, and Southern breeding cormorant populations. These entities commented that the scope of the new special cormorant permit would allow States and Tribes to be able to take cormorants at any location and at any time.

**Agency Response to Geographic and Temporal Scope Comments:** The new permit would be available to all States and federally recognized Tribes in the contiguous 48 States. The geographic scope of the new State or Tribal permit is authorized at biologically sustainable levels for each subpopulation. To ensure biological sustainability, the Service used the most recent cormorant population data available to develop the PTL model. The PTL is a biologically based model and evaluates allowable take of cormorants in the contiguous 48 States. The Service regularly uses PTL models to determine sustainable levels of take and has concluded that if this level of take were to be authorized, it would be biologically sustainable based on knowledge of

cormorant population dynamics. The PTL sets the upper limit for allowable take; it is not a take prescription. The PTL limits apply to take for entire subpopulations (i.e., Florida, Western, and Atlantic plus Central). The number of birds authorized for take for each subpopulation will depend on (a) the number of States that request a State permit, and (b) the number of birds each State/Tribe requests to take in order to minimize their particular conflict. Regarding the comment about the geographic scope and the inclusion of Alaska, the Service notes that the Alaska population is not included.

On the comment of taking cormorants at any location and at any time, actions under the permit may be conducted during any time of the year, unless specified otherwise in the permit's terms and conditions. Specific conditions include those pertaining to lethal take during the breeding season. Lethal take of adults during the breeding season must occur prior to hatching of eggs to avoid the loss of adults that likely would result in orphaning chicks and their ultimate death due to starvation. Adult birds may not be taken at any nest with young in it unless the take of adults addresses a human health and safety issue.

#### **PERMIT APPLICATION/PERMIT SYSTEM:**

*Private Property Owners:* Several commenters also requested the Service include provisions that allow for the lethal take of cormorants on private property, particularly to protect fish that are stocked by the landowner for their personal use. One State agency recommended that the Service include private recreational pond owners in the scope of the new permit. Some commenters voiced concerns that, if such provisions are not allowed, landowners will take matters into their own hands to protect their fish and that the presence of and depredation by cormorants on stocked fish in private ponds would negatively impact

recruitment of new anglers.

**Agency Response to Private Property Owners:** The Service, in some instances, does allow the take of migratory birds to protect private property. Private landowners may apply for a depredation permit (50 CFR 21.41) to alleviate damage to some types of property (i.e., buildings and infrastructure, vehicles and equipment, some types of vegetation). However, by policy, the Service's Migratory Bird Program does not issue permits to prevent depredation or harm to privately owned animals (e.g., hobby animals, pets, or similar categories of animals) that are raised free-range or otherwise released to the wild. Numerous nonlethal means, such as harassment, use of effigies, habitat modification, and others, are available to landowners who maintain animals in natural-like environments. Regarding the comment suggesting that some landowners may unlawfully take cormorants if they do not receive authorization to do so from the Service, we recognize that this activity may occur, but we can neither prevent unlawful activity nor predict where and when unlawful activity would occur in such cases. However, landowners taking such actions would face the possibility of being cited for violations of the MBTA, as well as fines for such violations.

**PERMIT APPLICATION/PERMIT SYSTEM:**

*Species of Greatest Conservation Need (SGCN):* Several State agencies also commented on the need to include conflicts related to SGCN as identified in State Wildlife Action Plans. Because not all States have State-designated lists of threatened and endangered species within their State, some State agencies recommended that the language of the rule be changed to "state or tribal species of greatest conservation need," in reference to lists created for State Wildlife Grants. Similarly, another State agency recommended greater flexibility for

State fish and wildlife agencies to authorize take to protect SGCN species. Another agency stressed in the comments responding to the DEIS and the ANPR that, when determining priority and allocation of allowable take of cormorants, the protection of special-status resources should have first priority. The Central Flyway Council stated that the final rule should include conflicts related to SGCN as identified in State Wildlife Action Plans in the scope of the new special permit.

**Agency Response to SGCN Comments:** With regard to Species of Greatest Conservation Need as identified in State Wildlife Action Plans, the Service agrees. One of the stated needs for action is to address impacts from cormorants on special status species. Impacts may involve competition for nest sites, competition for food, reducing available nesting space and nesting material for co-nesting species, habitat degradation, and nest abandonment resulting from habitat degradation. Therefore, the Service included new language within the scope of the preferred alternative, which now states, “listed species identified in State- or Tribal-specific legislation as threatened or endangered) or those listed as Species of Greatest Conservation Need in State Wildlife Action Plans, where take activities to prevent depredation on aquatic Species of Greatest Conservation Need may occur only in natural or public waters.”

**REPORTING REQUIREMENTS:** Several stakeholders inquired as to the specific requests for information required in a new special permit. Commenters also expressed concern regarding the Service’s commitment to producing a report every 5 years. One nongovernmental organization asserted that the Service’s reporting plan is inadequate as it will produce a report providing analysis of population monitoring efforts only every 5 years, and instead recommends it be done annually. Regarding reporting by permittees, both the Central Flyway Council and a

State agency recommended authorization of a 5-year State and Tribal permit with annual reporting requirements, to provide the Service with timely data regarding take while reducing the Service's staff time needed to process annual permit renewals. The Central Flyway Council recommended annual reporting of control activities conducted under each permit, similar to what was required in the past, and a periodic cormorant population assessment at a decadal interval while encouraging the Service to explore the efficacy of existing monitoring programs. Another State agency suggested commercial aquaculture facilities and private landowners be required to report annually, at a minimum, and noted that issuing annual permits provides accurate and timely reporting to maintain compliance with permit provisions. Separately, another State agency recommended that the Service provide detailed criteria regarding the annual reporting requirements.

The Central Flyway Council opined that increased reporting requirements and intensive monitoring of cormorant populations would be difficult for many State wildlife agencies, given limited personnel and budget constraints. One State agency in that flyway requested clarification on how much potential new monitoring or reporting a State would have to agree to, and the amount of time and resources that would need to be invested.

Both the Pacific Flyway Council and a State agency in that flyway stressed the importance that any expectation of monitoring and reporting needed to implement the proposed new permit system must be backed with a robust program of Federal funding to support the duration of the monitoring activities. The Pacific Flyway Council also noted a concern that the costs of permit management, reporting, and monitoring will detract from other species conservation work, which is already difficult due to limited funding. A separate State agency commented with concern for the burden that the proposed permit will place on States to

develop and maintain programs to manage allowable take (i.e., population monitoring, permitting, and reporting). One private entity questioned whether the requirement to provide information to evaluate control efforts could become so complex and cumbersome that it curtails action, citing the information collected for a considerable amount of time by State agency wildlife professionals.

A State agency requested clarification of the Service's expectations with regards to permitting, monitoring, and reporting requirements on waters managed by private landowners. Another State agency noted that it does not desire the authority to issue take permits to other entities within their State to address aquaculture conflicts, property damage, nuisance, or human safety issues. Another State agency noted that the renewal of subpermittee authority would be conditional on timely and accurate reporting, and recommended that steps be taken to ensure data collection is timely, accurate, and complete by all persons authorized to take cormorants (offering a comparison to the Resident Canada Goose Nest and Egg Depredation Order under 50 CFR 21.50 (OMB Control No. 1018-0146)).

Separately, one State agency requested that the Service provide standardized population monitoring and reporting protocols needed to evaluate impacts of authorized take on cormorant populations, as well as criteria to be used to assess the cost and benefit of take on wild fish stocks, aquaculture facilities, human health and safety, property, and species of conservation concern. Another State noted their assumption that, under a special permit, the prioritization of issued take ultimately would be the responsibility of the respective State fish and wildlife agencies or Tribes to manage accordingly, including reporting. Yet another State opined that the reporting requirements for the proposed permit system are unclear.

**Agency Response to Reporting Requirements Concerns:** The Service will require, as

part of receiving a permit, an annual report that must be submitted by January 31st each year. The annual report requires the permittee to include location of take (GPS coordinates in decimal degrees), purpose of take (aquaculture, health, threatened or endangered species, property, stocked fish), nonlethal methods implemented, month taken, quantity taken (birds killed, nests oiled/addled, and nests destroyed), and disposition of carcass (e.g., buried, incinerated, donated).

Given the controversial nature of this issue and the novel approach toward reducing conflicts, the Service concludes annual permits and annual reporting by permittees are appropriate at this time. As we gain experience with this program, the Service could consider permits of longer duration, but additional NEPA analyses may be required for any additional rulemaking procedures or amendments.

Take of cormorants will be compiled annually and information can be made available if needed prior to completion of the 5-year reports. However, as with any bird population monitoring efforts, variation throughout the year, due largely to sampling error, can be quite high. The Service concludes that assessing population status over a 5-year period will avoid inappropriate decisions based on observed, but not necessarily real, annual changes in abundance, and still be sufficient to ensure sustainable populations of cormorants.

The new special permit would not apply to private landowners. Private property owners may apply for a depredation permit (50 CFR 21.41) to the Service to alleviate damage to some types of property (i.e., buildings and infrastructure, vehicles and equipment, and some types of vegetation).

**DESIGNATION OF SUBPERMITTEES:** Several commenters requested clarity about who a State or Tribe may delegate authority to as a subpermittee under a new permit to conduct

take of cormorants. One State recommended that the Service allow willing States and Tribes to issue permits to subpermittees, with the subpermittee's renewal authority conditional on timely and accurate reporting. Another State agency requested clarity on the level of authority given by a State or Tribe to carry out lethal take, asking if this would be limited to only State agency personnel, or other private and public entities or persons as authorized by States. For example, one State commented that the language related to subpermittees should read, "Subpermittees may be, but are not limited to, employees of state and tribal wildlife agencies, Wildlife Services employees, and employees of federal and state agencies or private companies specializing in wildlife damage abatement." Some commenters opined that the Service should define the level of training and control needed to ensure people operate in a humane, accountable, and lawful manner.

**Agency Response to Designation of Subpermittees Concerns:** The Service agrees with the need to provide further clarification of the role that subpermittees may play, and to identify who can operate as a subpermittee pursuant to a permit issued under this rule. The final rule states that subpermittees "can be employees of State and Tribal wildlife agencies, USDA Wildlife Services employees, and employees of Federal and State agencies or private companies specializing in wildlife damage abatement and under direct control of the permittee." The Service is limiting subpermittees to these entities because in some areas other cormorant species and look-alike species (e.g., anhingas) can overlap in specific ranges and habitats with double-crested cormorants. Professional biologists and trained experts are more likely to be able to differentiate between these species and reduce the possibility of taking nontarget species.

There are many levels of training that vary widely across the country that may be appropriate. The Service will not identify specific training requirements necessary to become a



subpermittee. Rather, we expect that the categories of individuals listed above will have the skills, or could readily acquire the skills, to accurately identify double-crested cormorants and differentiate other look-alike species to avoid taking them. Further, by virtue of their positions, we expect that all such employees will operate in a humane, accountable, and lawful manner. The authority to take double-crested cormorants conferred by the permit is given to the State or Tribal fish and wildlife agency, and those agencies may designate permittees that the Service approves on the application for the permit. To provide added clarity, the Service included as part of the application for a new permit that permittees must agree that, “(e) Anyone taking birds under this permit must be skilled in double-crested cormorant identification. Nontarget take of any other avian species must be reported to your permit office with your annual report including species, number, and description of events.” The application for this permit can be found in Appendix H of the FEIS, and we cross-reference the FEIS for additional comments and responses on this issue not directly related to this rulemaking. Further, any birds incidentally taken would be reported by States and Tribes, and the Service would use this data to better track accidental take of these species when take of cormorants occurs, and recommend appropriate actions such as additional training of personnel, or avoiding areas where there is a high concentration of non-target species in the area.

**GENERAL COMMENTS:** Some entities commented that the Service would need to ensure that current depredation permits for take of cormorants continue to be issued under 50 CFR 21.41, as population levels allow. These commenters stated that depredation permits are essential to manage the effects of increased double-crested cormorant populations on migrating salmon and steelhead smolts. One State agency requested clarity on which entities remain

eligible to receive individual depredation permits for those States that do choose to obtain a special statewide depredation permit, noting that they do not desire the authority to issue take permits to other entities within their State to address aquaculture conflicts, property damage, nuisance, or human safety issues. This particular State agency requested the preferred alternative include a specific statement affirming the continued availability of individual depredation permits for entities within States that choose to obtain a special depredation permit.

Another State agency requested clarification on how the Service will account for the illegal take of cormorants. This State agency also inquired as to whether they should apply for and receive 150 permits. They ask if it is possible for the Service to consider a higher level of take (150 permits) under Alternative E for hatcheries to correspond to the higher level of authorized take, or the maximum allowable take, in Alternatives A–D. This State asserts that they operate four State-owned hatcheries, where fingerlings are raised for stocking public water bodies for the enjoyment and recreational use of fisheries resources by the public. The current number of depredation permits allocated to this State appears to be helpful in reducing fingerling depredation and pond liner damage, but not adequate to prevent still significant losses to production and facilities. Therefore, this particular State requested 150 cormorant depredation permits, regardless of the management alternative selected, to better manage cormorant populations at its State hatchery facilities.

Some commenters stated that the Service failed to address the cumulative impacts of climate change and other cormorant take, and should therefore evaluate the cumulative impact of other cormorant take, such as the planned hunting seasons in Ontario, Canada.

**Agency Response to General Comments Concerns:** Individual permits would still be available to address some depredation activities. However, conflicts associated with cormorants

and wild or publicly stocked fish would only be addressed through the special cormorant permit, which would only be available to fish and wildlife agencies of States and federally recognized Tribes in the contiguous 48 States. Entities other than private landowners who want to reduce depredations of fish in their private ponds may be eligible to apply for permits other than the special cormorant permit.

The PTL estimate considers all forms of take and is conservative in that the lower 60 percent confidence interval of the PTL was used. However, in the NEPA analyses where comparisons are made to historical take data, historical take only included legal take. The Service was not able to include data relating to any potential illegal take of cormorants in the PTL. This is because the Service does not have the ability to adequately track where and when individuals might illegally take cormorants. If in the future the Service is sufficiently able to track and monitor illegal take across the broad geographic scale represented in the PTL, then this data can be counted against PTL. If illegal take is substantial, however, then this factor should also become an enforcement issue in the management of cormorants.

The Service encourages the State and Tribal agencies to seek a new permit under this final rule to accomplish its goals, as that permit would be less costly, but also sufficient for a State or Tribe to meet its needs. Permits under this rule will provide the flexibility to State and Tribal fish and wildlife agencies to address conflicts related to the following issues: wild and publicly stocked fish managed by State fish and wildlife agencies or federally recognized Tribes; Tribal- and State-owned or operated aquaculture facilities (including hatcheries); human health and safety; State- or Tribal-owned property and assets; and threatened and endangered species or those listed as Species of Greatest Conservation Need in State Wildlife Action Plans. If a State or Tribe determines a permit under this rule would meet their needs, upon receiving the permit, that

State or Tribe would have the discretion to determine whether, when, where, and for which of the above purposes they conduct lethal take within limits and allocations set by the Service.

The Service used population data from Canada in the subpopulation estimates, and will work closely with Ontario on population monitoring and obtain take data and incorporate it into our assessments. Our DEIS discussed climate change, and we noted that there remains some uncertainty regarding effects of climate change, but the Service can estimate that there will likely be less water available in the Great Basin, and cormorant colonies may shift locations. Cormorants may be able to stay and forage longer in northern portions of the Interior and Atlantic subpopulations, and it is possible that breeding seasons may lengthen. The Service makes decisions given this uncertainty by using the data and modeling available and adapting through time as change occurs. The planned 5-year assessment will address this issue.

**IMPACT ON SMALL BUSINESSES:** The U.S. Small Business Administration (SBA) commented in support of an aquaculture depredation order in combination with a new special permit for States and Tribes. SBA stated that, prior to the previous aquaculture depredation order being vacated, commercial aquaculture producers were able to manage cormorant populations while not exceeding the allowable take limits established by the Service. SBA further stated that this rulemaking has the potential to increase costs to small private aquaculture facilities that are not otherwise able to employ effective methods of controlling cormorant damage and that have seen and may well continue to see an increase in cormorant feeding. SBA further stated that individual depredation permit applications are a significant burden for small businesses, citing lower take limits for cormorants and complications among Service regions in issuing permits. SBA stated that an aquaculture

deprecation order would eliminate these burdensome and time-consuming application requirements. SBA also cautioned that the Service should not require documentation of revenue increases as part of any new aquaculture deprecation order, as this would result in additional administrative costs associated with recordkeeping. SBA recommended that the Service consider other sources of data, and methods of data collection other than reporting increased revenue data, to measure the success of conflict management programs. SBA urged the Service to consult with industry directly to devise a cost-effective and more accurate method of data collection.

**Agency Response to Impact on Small Businesses Concerns:** This collection associated with the new permit affects only State and Tribal governments, and does not impact small businesses. Commercial entities, such as privately managed aquaculture facilities, would continue to have the opportunity to apply for individual deprecation permits to address site-specific conflicts. Information collection requirements associated with individual deprecation permits are outside the scope of this rulemaking.

In response to comments about a new aquaculture deprecation order, we reference our response above. The Service must be capable of tracking take by all authorization mechanisms available throughout the year. Presently, however, the Service does not have the necessary process or resources to adequately monitor take under any new deprecation order. However, the Service established a new, higher threshold for annual maximum allowable take using the most recent biological information. While the Service is best equipped to accurately monitor the authorized and actual take of cormorants throughout the year under preferred Alternative A (the new State and Tribal permit in this final rule), a higher threshold for annual take will still yield benefits to the aquaculture industry and others in need of individual deprecation permits. These

benefits result from indirect effects on cormorant populations from a higher threshold of authorized take, and the resulting lower cormorant populations projected in the EIS. The new special cormorant permit would be optional and available to State and Tribal fish and wildlife agencies in the 48 contiguous States to manage conflicts specifically associated with cormorants. This permit would provide State wildlife management agencies and Tribes flexibility within predefined guidelines to address conflicts caused by cormorants within their jurisdictions. The new permit coupled with the continued use of individual depredation permits for commercial aquaculture producers would provide the accountability and flexibility to manage cormorants while ensuring populations are managed sustainably and take is authorized in an equitable fashion across multiple conflicts.

#### *Comments Requested*

As part of our continuing effort to reduce paperwork and respondent burdens, we invite the public and other Federal agencies to comment on any aspect of this information collection, including:

(1) Whether or not the collection of information is necessary for the proper performance of the functions of the agency, including whether or not the information will have practical utility;

(2) The accuracy of our estimate of the burden for this collection of information, including the validity of the methodology and assumptions used;

(3) Ways to enhance the quality, utility, and clarity of the information to be collected; and

(4) How the agency might minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical,

or other technological collection techniques or other forms of information technology, e.g., permitting electronic submission of response.

Written comments and recommendations for the information collection should be sent within 30 days of publication of this document to [www.reginfo.gov/public/do/PRAMain](http://www.reginfo.gov/public/do/PRAMain). Find this particular information collection by selecting "Currently under 30-day Review - Open for Public Comments" or by using the search function. Please provide a copy of your comments to the Service Information Collection Clearance Officer, U.S. Fish and Wildlife Service, 5275 Leesburg Pike, MS: PRB (JAO/3W), Falls Church, VA 22041–3803 (mail); or [Info\\_Coll@fws.gov](mailto:Info_Coll@fws.gov) (email). Please reference OMB Control Number 1018–0175 in the subject line of your comments.

#### *National Environmental Policy Act*

We evaluated this regulation in accordance with the criteria of NEPA, the Department of the Interior regulations on implementation of NEPA (43 CFR 46.10–46.450), and the Department of the Interior Manual (516 DM 8). On June 5, 2020, the Service published a DEIS, and the comment period ended on July 20, 2020. You may review the comments received at the Federal eRulemaking Portal: <http://www.regulations.gov> in Docket No. FWS–HQ–MB–2019–0103. We considered comments on the DEIS when developing this final rule, and a summary of the comments is included in the FEIS associated with this rulemaking action. The Service initiated development of the FEIS prior to the establishment of updated Council on Environmental Quality regulations on September 14, 2020, and, therefore, the FEIS is written to comply with the previous regulations. You may review the DEIS, FEIS, and the comments received at the Federal eRulemaking Portal: <http://www.regulations.gov> in Docket No. FWS–

HQ–MB–2019–0103. We will issue a record of decision no sooner than 30 days after the Environmental Protection Agency publishes notice of the FEIS in the *Federal Register*.

#### *Compliance with Endangered Species Act Requirements*

Section 7 of the ESA (16 U.S.C. 1531–44) 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 Act” (16 U.S.C. 1536(a)(1)). It further states that “[e]ach Federal agency shall, in consultation with and with the assistance of the Secretary, insure that any action authorized, funded, or carried out by such agency ... 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.” We have complied with provisions of the ESA as necessary to ensure that this new regulation is not likely to jeopardize the continued existence of any species designated as endangered or threatened or destroy or adversely modify its critical habitat.

#### *Government-to-Government Relationship with Tribes*

In accordance with Executive Order 13175, “Consultation and Coordination with Indian Tribal Governments,” and the Department of the Interior's manual at 512 DM 2, we have considered the possible effects of this rule on federally recognized Indian Tribes. The Department of the Interior strives to strengthen its government-to-government relationship with Indian Tribes through a commitment to consultation when appropriate and recognition of their right to self-governance and Tribal sovereignty. We readily acknowledge our responsibility to communicate meaningfully with recognized Federal Tribes on a government-to-government basis. We evaluated this rule under the criteria in Executive Order 13175 and under the



Department's Tribal consultation policy and have determined that this rule may have a substantial direct effect on federally recognized Indian Tribes.

In February we held four public scoping webinars and then two webinars only for Tribal members (February 19 and 27, 2020). We provided the attendees of all the webinars with information on the following topics regarding cormorants, their management, and the regulations process: (1) biology and population changes; (2) background of the issues and previous management approaches; (3) current management of conflicts; (4) proposed approaches and alternatives; and (5) the planning process for the NEPA analysis. We also informed attendees that they could provide comments on the proposed actions and the scope of the NEPA review via a website or by U.S. mail or hand-delivery. Two Tribal entities provided comments, and they have been addressed in this final rule. No formal requests for government-to-government consultations were submitted in response to this rulemaking.

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

E.O. 13211 requires agencies to prepare Statements of Energy Effects when undertaking certain actions. This rule is not a significant regulatory action under E.O. 13211 and would not significantly affect energy supplies, distribution, or use. Therefore, this action is not a significant energy action. No Statement of Energy Effects is required.

#### **Literature Cited**

Atlantic Flyway Council and Mississippi Flyway Council. 2010. Atlantic and Mississippi Flyways double-crested cormorant management plan. Cormorant ad hoc committees, Atlantic and Mississippi Flyway Councils, Nongame Migratory Bird Technical Sections.

- Hunter, W.C., W. Golder, S. Melvin, and J. Wheeler. 2006. Southeast United States Regional Waterbird Plan. Waterbird Conservation for the Americas. Available at: <http://www.waterbirdconservation.org/>.
- Johnson, F.A., M.A.H. Walters, and G.S. Boomer. 2012. Allowable levels of take for the trade in Nearctic songbirds. *Ecological Applications* 22:1114–1130.
- NOAA Fisheries. 2014. Endangered Species Act Section 7(a)(2) Supplemental Biological Opinion: Consultation on remand for operation of the Federal Columbia River Power System. NOAA Fisheries Log Number NWR–2013–9562. Available at: <https://www.fisheries.noaa.gov/resource/document/consultation-remand-operation-federal-columbia-river-power-system>.
- Pacific Flyway Council. 2012. Pacific Flyway Plan: a framework for the management of double-crested cormorant depredation on fish resources in the Pacific Flyway. Pacific Flyway Council, U.S. Fish and Wildlife Service, Portland, Oregon.
- Runge, M.C., W.L. Kendall, and J.D. Nichols. 2004. Exploitation. Pages 303–328 *in* W.J. Sutherland, I. Newton, and R.E. Green, editors. *Bird ecology and conservation: a handbook of techniques*. Oxford University Press, Oxford, United Kingdom.
- Runge, M.C., J.R. Sauer, M.L. Avery, B.F. Blackwell, and M.D. Koneff. 2009. Assessing allowable take of migratory birds. *Journal of Wildlife Management* 73:556–565.
- Sauer, J.R., D.K. Niven, J.E. Hines, D.J. Ziolkowski, Jr., K.L. Pardieck, J.E. Fallon, and W.A. Link. 2017. The North American Breeding Bird Survey, results and analysis 1966–2015. Version 2.07.2017. USGS Patuxent Wildlife Research Center, Laurel, Maryland. Available at: <https://www.mbr-pwrc.usgs.gov/bbs/bbs.html>.

- Taylor, J.D., II and B. Dorr. 2003. Double-crested cormorant impacts to commercial and natural resources. In K. Fagerstone and G. Witmer, editors. Tenth Wildlife Damage Management Proceedings, Hot Springs, Arkansas.
- USACE. 2015. Final Environmental Impact Statement: Double-crested cormorant management plan to reduce predation of juvenile salmonids in the Columbia River Estuary. Portland District.
- USFWS. 2009. Final Environmental Assessment: Extended management of double-crested cormorants under 50 CFR 21.47 and 21.48. Division of Migratory Bird Management, Arlington, Virginia.
- USFWS. 2017. Environmental assessment for issuing depredation permits for double-crested cormorant management. Division of Migratory Bird Management, Falls Church, Virginia.
- USFWS. 2020. Final Environmental Impact Statement: Management of conflicts associated with double-crested cormorants. Division of Migratory Bird Management, Falls Church, Virginia.
- USGS. North American Breeding Bird Survey (BBS). *Patuxent Wildlife Research Center - Bird Population Studies*. U.S. Department of the Interior. 2020. <https://www.mbr-pwrc.usgs.gov/>
- Wade, P. 1998. Calculating limits to the allowable human-caused mortality of cetaceans and pinnipeds. *Marine Mammal Science* 14:1–37.
- Zimmerman, G.S., B.A. Millsap, M.L. Avery, J.R. Sauer, M.C. Runge, and K.D. Richkus. 2019. Allowable take of black vultures in the eastern United States. *Journal of Wildlife Management* 83:272–282.

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

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

## **Regulation Promulgation**

For the reasons described in the preamble, we hereby amend part 21 of subchapter B, chapter I, title 50 of the Code of Federal Regulations, as set forth below:

### **PART 21—MIGRATORY BIRD PERMITS**

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

AUTHORITY: 16 U.S.C. 703–712.

2. Add a new § 21.28 to read as follows:

#### **§ 21.28 Special double-crested cormorant permit.**

(a) *What is the special double-crested cormorant permit, and what is its purpose?* The special double-crested cormorant permit is a permit issued by the Service to State or Tribal fish and wildlife agencies that authorizes specific take activities that are normally prohibited and are intended to relieve or prevent impacts from cormorants on lands or in waters managed by those agencies and within those agencies' jurisdiction. We will issue such a permit only when we determine that an application submitted by a State or Tribal fish and wildlife agency meets the requirements set forth in paragraph (c) of this section. The take activities conducted under the permit are intended to reduce or prevent conflicts associated with cormorants for the following concerns:

(1) Depredation of fish at State- and Tribal-owned or operated aquaculture facilities, including hatcheries;

(2) Realized and potential impacts to human health and safety (e.g., collisions of airplanes with birds, fecal contamination of urban wetlands);

(3) Impacts to threatened and endangered species (species listed under the Endangered Species Act of 1973, as amended (16 U.S.C. 1531 *et seq.*), and species identified in State- or Tribal-specific legislation as threatened or endangered) or those listed as Species of Greatest Conservation Need in State Wildlife Action Plans, where take activities to prevent depredation on aquatic Species of Greatest Conservation Need may occur only in natural or public waters;

(4) Damage to State- or Tribal-owned property and assets; and

(5) Depredation of wild and publicly stocked fish managed by State fish and wildlife agencies or federally recognized Tribes and accessible to the public or all Tribal members.

(b) *Who may receive a permit?* Only State and Tribal fish and wildlife agencies are eligible to receive a permit to undertake management and take activities. Additionally, only employees or subpermittees of a permitted State or Tribal fish and wildlife agency designated on the permit application may undertake activities for double-crested cormorants in accordance with the conditions specified in the permit, conditions specified in 50 CFR part 13, other requirements set forth in this section, and conditions specified in paragraph (d) of this section.

(c) *How does a State or Tribe apply for a permit?* Any State or federally recognized Tribal fish and wildlife agency wishing to obtain a permit must submit an application (FWS Form 3–200–90) to the appropriate Regional Director (see § 13.11(b) of this subchapter) containing the general information and certification required by § 13.12(a) of this subchapter plus the following information:

(1) A description of your State's or Tribe's double-crested cormorant conflicts, including physical location(s) and type of conflict specified in paragraph (a) of this section;

(2) A detailed description of the nonlethal methods (i.e., active hazing, passive hazing, habitat management, and changes in management practices) you have and/or will implement and how take activities will address one or more of the issues specified in paragraph (a) of this section;

(3) The requested annual take of double-crested cormorants by life-stage, including eggs and nests;

(4) A description of long-term plans to eliminate or significantly reduce continued need to take double-crested cormorants;

(5) A statement indicating that the State or Tribe will inform and brief all employees and subpermittees of the requirements of these regulations and permit conditions;

(6) A list of all subpermittees who may conduct activities under the special double-crested cormorant permit, including their names, addresses, and telephone numbers; and

(7) The name and telephone number of the individual in your agency who will oversee the double-crested cormorant management activities authorized under the permit.

(d) *What are the conditions of the permit?* The special double-crested cormorant permits are subject to the conditions specified in the permit, the general conditions in 50 CFR part 13, and other requirements set forth elsewhere in this section, and, unless otherwise specifically authorized on the permit, the following conditions:

(1) *What are the limitations on management and take activities?* Take of double-crested cormorants under this section may not exceed the number authorized by the permit. In addition, permittees must adhere to these provisions:

(i) States and Tribes must implement nonlethal methods, and independently determine that those methods are insufficient at resolving depredation conflicts, before taking double-crested cormorants.

(ii) A permit under this section does not authorize the take of any other migratory bird, including other species of cormorants; the take of bald or golden eagles; or the take of any species federally listed as threatened or endangered. If take of those species is likely to occur, the permittee must obtain permits specifically authorizing that take (i.e., permits under the Migratory Bird Treaty Act, Bald and Golden Eagle Protection Act, or the Endangered Species Act of 1973, as amended).

(iii) Methods of take for double-crested cormorants are at the State's or Tribe's discretion. Take of double-crested cormorants may occur by means of humane lethal take or active nest take. Lethal take of adults during the breeding season should occur prior to hatching of eggs. Adult birds may not be taken at any nest with young in it unless the take of adults addresses a human health and safety issue. States and Tribes and their subpermittees must make efforts to avoid disturbance to co-nesting species. Lethal take may occur by firearm in accordance with paragraph (d)(1)(iv) of this section or lethal or live traps. Active nest take may occur by egg oiling or destruction of nest material and contents (including viable eggs and chicks). Birds may be euthanized by cervical dislocation, CO<sub>2</sub> asphyxiation, or other methods recommended by the American Veterinary Medical Association. Only 100 percent corn oil, a substance exempted from regulation by the Environmental Protection Agency under the Federal Insecticide, Fungicide, and Rodenticide Act, may be used to oil eggs. Other damage control methods of take consistent with accepted wildlife damage management programs may be authorized.

(iv) Take using firearms (other than an air rifle or air pistol) must use nontoxic shot or nontoxic bullets (see § 20.21 of this subchapter).

(v) Individuals conducting lethal take activities may not use decoys, calls, or other devices or bait to lure birds within gun range.

(vi) States and Tribes applying for the first time must consult with the U.S. Department of Agriculture's Wildlife Services for an assessment of the appropriate level of take and provide recommendations of short-term measures to provide relief from depredation and long-term measures to help eliminate or significantly reduce conflicts. First-time applicants must include a completed "Form 37 Permit Review" from Wildlife Services. Permittees need not submit a Form 37 for renewal applications unless requested by the regional Migratory Bird Permit Office. Permittees should continue working with Wildlife Services for review of conflict management approaches and anticipated level of take, and to remain current on effective strategies for nonlethal removal.

(2) *When may a State or Tribe conduct management and control activities?* Actions may occur only when cormorants are committing or are about to commit depredations. State and Tribal employees and approved subpermittees may conduct management activities, including lethal take, at any time of year.

(3) *How must States and Tribes dispose of or utilize cormorants taken under this permit?* Unless otherwise authorized on your permit, double-crested cormorants taken under this permit may be temporarily possessed and transported for the purposes of disposal under the regulations in this section. Double-crested cormorants must be disposed of by donation to an entity authorized by permit or regulation to receive migratory birds, such as a public museum or public institution for scientific or educational purposes, or be destroyed completely by burial or



incineration in accordance with Federal, State, and/or local laws and ordinances. States, Tribes, their employees, and subpermittees may not sell, offer for sale, barter, or ship for the purpose of sale or barter any double-crested cormorants taken under this section or their parts or eggs. Birds may not be retained for personal use.

*(4) How does the permit relate to existing State and Tribal law and Federal land?*

Permits under this section do not authorize the take of double-crested cormorants contrary to any State or Tribal laws or regulations or on any Federal land without specific written authorization by the responsible management agency. Prior to taking double-crested cormorants pursuant to a permit under this section, the permittee must obtain any permits required by State, Tribal, or other Federal law or regulation.

*(5) How will the Service ensure that persons conducting control activities have the authority to do so?* Any State or Tribal employee or approved subpermittee authorized to carry out management and take activities must have a copy of the permit and, if appropriate, the subpermittee's designation in their possession when carrying out any activities. The scope of this permit applies to lands or in waters managed by State and Tribal fish and wildlife agencies and within those agencies' jurisdictions. If a State or Tribe must enter private property to access State and Tribal lands or waters where take is approved in their permit, the State or Tribe must obtain authorization from the private property owner, and require that the private property owner or occupant provide free and unrestricted access. The private property owner or occupant should also allow access at all reasonable times, including during actual operations, to any Service special agent or refuge officer, State or Tribal wildlife or deputy wildlife agent, warden, protector, or other wildlife law enforcement officer on the premises where they are, or were, conducting activities. Furthermore, any State or Tribal employee or approved subpermittee

conducting such activities must promptly furnish information concerning such activities to any such wildlife officer.

(6) *What are the reporting requirements of the permit?* Any State or Tribal agency, when exercising the privileges of this permit, must keep records of all activities, including those of subpermittees, carried out under the authority of the special permit, including the number of double-crested cormorants taken and their disposition. Any other species of bird taken incidentally to double-crested cormorant management activities under this permit, along with the numbers of birds taken of those species, also must be reported. The State or Tribe must submit an annual report (FWS Form 3–202–56) detailing activities and purpose for take, including the date birds were taken, numbers, and locations and life stage of birds, eggs, and nests taken and nonlethal techniques utilized, by January 31 for activities conducted during the preceding calendar year. The State or Tribe must submit the annual report to the appropriate Migratory Bird Permit Office (see § 2.2 of this subchapter).

(7) *What are the limitations of this permit?* The following limitations apply:

(i) Nothing in this section applies to any Federal land within a State's or Tribe's boundaries without written permission of the Federal agency with jurisdiction.

(ii) We will issue permits only to State and Tribal fish and wildlife agencies in the conterminous (i.e., contiguous 48) United States.

(iii) States and Tribes may designate subpermittees who must operate under the conditions of the permit. Subpermittees can be employees of State and Tribal fish and wildlife agencies, U.S. Department of Agriculture's Wildlife Services employees, employees of other Federal, State, or Tribal agencies, or private companies licensed to conduct wildlife damage abatement and under direct control of the permittee.

(iv) A special double-crested cormorant permit issued or renewed under the regulations in this section expires on the date designated on the face of the permit unless it is amended or revoked, or at such time we determine that conflicts with cormorants within the bounds of the specific population of double-crested cormorants have been reduced to the point where lethal take is no longer necessary. In all cases, the term of the permit may not exceed 1 year from the date of issuance or renewal.

(v) We reserve the right to suspend or revoke any permit, as specified in §§ 13.27 and 13.28 of this subchapter.

(e) *What are the OMB information collection requirements of the permit program?* OMB has approved the information collection requirements of the permit and assigned OMB Control Number 1018–0175. Federal agencies 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. Direct comments regarding the burden estimate or any other aspect of the information collection to the Service’s Information Collection Clearance Officer at the address provided at 50 CFR 2.1(b).

**Dated:** \_\_\_\_\_.

---

**George Wallace,**

*Assistant Secretary for Fish and Wildlife and Parks.*