

resource depredation order have sound reasoning for doing so.

Comment 54: The Service must publish a Final EIS, Record of Decision, and appropriate Section 7 consultation documents prior to engaging in the rulemaking process.

Service Response: This is not a correct statement of the requirements of either the National Environmental Policy Act or the Endangered Species Act. Issuance of these regulations is in compliance with both of these laws.

Comment 55: The Service cannot establish depredation orders for DCCOs because they are not a "migratory game bird" pursuant to 50 CFR 21.42.

Service Response: This is incorrect because our authority for issuing a depredation order comes from the MBTA, not 50 CFR 21.42. Section 21.42 is a regulation adopted by the Service that allows the Director to issue depredation orders under certain circumstances. This new regulation is in addition to 21.42.

Comment 56: The Service needs to specify how the depredation orders will be enforced.

Service Response: We have law enforcement agents in every State who investigate violations of Federal wildlife laws. Providing the details of how they work is neither necessary nor sensible since such details could prevent the prosecution of those who violate the terms and conditions of the orders.

Comment 57: The requirement to report unauthorized take of migratory birds or threatened and endangered species requires individuals to incriminate themselves and thus violates the Fifth Amendment to the Constitution.

Service Response: While any take, unless permitted, is prohibited by statute, the Service directs its enforcement efforts on those individuals or companies that take migratory bird species outside the scope of the depredation orders. It is incumbent on those who will be working under the orders to have a working knowledge of what is authorized and to properly act under its terms and conditions. Failure to report would be grounds to revoke authorization. The Service sees the reporting requirements not as an attempt to identify the unlawful take of migratory birds but as a management tool to reduce unauthorized take.

Cormorant Regulations Under the Rule

This final rule implements the FEIS selected action in the following ways: (1) It revises the 1998 aquaculture depredation order that allows APHIS/WS to protect public and private aquacultural stock in the 13 States listed

in 50 CFR 21.47 by also allowing the take of DCCOs at winter roost sites and at State and Federal fish hatcheries; and (2) it establishes a new depredation order authorizing State fish and wildlife agencies, Federally recognized Tribes, and APHIS/WS to take DCCOs without a Federal permit to protect public resources on public and private lands and freshwaters in 24 States (the 13 States listed in 50 CFR 21.47 and 11 additional States). Both of the actions revise subpart D of 50 CFR 21.

NEPA Considerations

In compliance with the requirements of section 102(2)(C) of the National Environmental Policy Act of 1969 (42 U.S.C. 4332(C)), and the Council on Environmental Quality's regulation for implementing NEPA (40 CFR 1500–1508), we published a DEIS in December 2001, followed by a 100-day public comment period. In August 2003, both the Service and the Environmental Protection Agency published notices of availability for the FEIS in the **Federal Register**. This FEIS is available to the public (see **ADDRESSES**).

Endangered Species Act Considerations

Section 7(a)(2) of the Endangered Species Act, as amended (16 U.S.C. 1531–1543; 87 Stat. 884) provides that "Each Federal agency shall, in consultation with and with the assistance of the Secretary, insure that any action authorized, funded, or carried out * * * is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of [critical] habitat * * *." We completed a biological evaluation and informal consultation (both available upon request; see **ADDRESSES**) under Section 7 of the ESA for the action described in this final rule. In the letter of concurrence between the Division of Migratory Bird Management and the Division of Endangered Species, we concluded that the inclusion of specific conservation measures in the final rule satisfies concerns about the four species (piping plover, interior least tern, bald eagle, and wood stork) and therefore the proposed action is not likely to adversely affect any threatened, endangered, or candidate species.

Executive Order 12866

In accordance with the criteria in Executive Order 12866, this action is a significant regulatory action subject to Office of Management and Budget review. OMB has made this determination of significance under the Executive Order. OMB has determined

that this action raises novel legal or policy issues. This rule will not have an annual economic effect of \$100 million or more or adversely affect any economic sector, productivity, competition, jobs, the environment, or other units of government. The purpose of this rule is to help reduce adverse effects caused by cormorants, thereby providing economic relief. The total estimated economic impact of DCCOs is less than \$50 million per year. Assuming that landowners (e.g., aquaculture producers) and other stakeholders utilize, informally or formally, some degree of cost-benefit analysis, the financial expenses to control cormorant problems should not exceed the damages incurred. Thus we can assume that the total annual economic effect of this rule will be less than \$50 million.

This rulemaking action will not create inconsistencies with other agencies' actions or otherwise interfere with an action taken or planned by another agency. The selected action is consistent with the policies and guidelines of other Department of the Interior bureaus. This action will not materially affect entitlements, grants, user fees, loan programs, or the rights and obligations of their recipients.

Regulatory Flexibility Act

The Regulatory Flexibility Act of 1980 (5 U.S.C. 601 *et seq.*) requires the preparation of flexibility analyses for actions that will have a significant economic effect on a substantial number of small entities, which includes small businesses, organizations, or governmental jurisdictions. Because of the structure of wildlife damage management, the economic impacts of our action will fall primarily on State governments and APHIS/WS. These do not qualify as "small governmental jurisdictions" under the Act's definition. Effects on other small entities, such as aquacultural producers, will be positive but are not predicted to be significant. Thus, we have determined that a Regulatory Flexibility Act analysis is not required.

Small Business Regulatory Enforcement Fairness Act

This rule is not a major rule under 5 U.S.C. 804(2), the Small Business Regulatory Enforcement Fairness Act. It will not have an annual effect on the economy of \$100 million or more, nor will it cause a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions. It will not have significant adverse effects on competition,