

*Telespiza ultima*, Nihoa Finch  
*Psittirostra psittacea*, Ou  
*Loxioides bailleui*, Palila  
*Pseudonestor xanthophrys*, Maui Parrotbill  
*Hemignathus virens*, Hawaii Amakihi  
*Hemignathus flavus*, Oahu Amakihi  
*Hemignathus kauaiensis*, Kauai Amakihi  
*Hemignathus ellisianus*, Greater Akialoa  
*Hemignathus lucidus*, Nukupuu  
*Hemignathus munroi*, Akiapolaau  
*Magumma parva*, Anianiau  
*Oreomystis bairdi*, Akikiki  
*Oreomystis mana*, Hawaii Creeper  
*Paroreomyza maculata*, Oahu Alauahio  
*Paroreomyza flammea*, Kakawahie  
*Paroreomyza montana*, Maui Alauahio  
*Loxops caeruleirostris*, Akekee  
*Loxops coccineus*, Akepa  
*Vestiaria coccinea*, Iiwi  
*Palmeria dolei*, Akohekohe  
*Himatione sanguinea*, Apapane  
*Melamprosops phaeosoma*, Poo-uli

Dated: February 3, 2010.

**Thomas L. Strickland,**

Assistant Secretary for Fish and Wildlife and Parks.

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## DEPARTMENT OF THE INTERIOR

### Fish and Wildlife Service

#### 50 CFR Part 21

Docket Number [FWS-R9-MB-2007-0018; 91200-1231-9BPP]

RIN 1018-AV33

#### Migratory Bird Permits; Control of Purple Swamphens

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

**ACTION:** Final rule.

**SUMMARY:** We, the U.S. Fish and Wildlife Service, change the regulations governing control of depredating or introduced migratory birds. The purple swamphen (*Porphyrio porphyrio*) is not native to any State, and competes with native species. However, we have added it to the list of species protected under our Migratory Bird Treaty Act (MBTA) obligations because it occurs naturally in the U.S. Territories of American Samoa, Baker and Howland Islands, Guam, and the Commonwealth of the Northern Mariana Islands. We amend the regulations to allow removal of purple swamphens without a Federal permit in the following areas where the

species is not native: the contiguous United States, Hawaii, Alaska, the Commonwealth of Puerto Rico, and the U.S. Virgin Islands. This rule also requires the use of nontoxic shot or bullets if firearms are used to control purple swamphens.

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

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

#### SUPPLEMENTARY INFORMATION:

##### Background

The Fish and Wildlife Service is the Federal agency delegated the primary responsibility for managing migratory birds. This delegation is authorized by the MBTA (16 U.S.C. 703 *et seq.*), which implements conventions with Great Britain (for Canada), Mexico, Japan, and the Soviet Union (Russia).

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

##### Purple Swamphen

The purple swamphen, a chicken-sized bird in the family Rallidae, is native to the Old World. In the United States and its territories, it is native only in American Samoa, Baker and Howland Islands, Guam, and the Northern Mariana Islands (Pratt et al. 1987). Because of the species' occurrence in these territories, it is protected under the MBTA Act (effective March 1, 2010.) Therefore, we included this species in the proposed rule (71 FR 50194, August 24, 2006) to revise the list of migratory birds found at 50 CFR 10.13. We proposed to add the species to the list because it is in a

group of species that belong to families protected under treaties with Canada and Mexico.

The purple swamphen was introduced in southern Florida through escapes from aviculturalists and from the Miami Metro Zoo in the early 1990s (Anonymous 2007). In Florida, the purple swamphen competes with native species and may impact the plant life of wetlands (Anonymous 2007). The purple swamphen has an international reputation for eating eggs and chicks, including ducklings, of other ground or near-ground nesting species (Anonymous 2007). As far as we know, counties in the southern half of Florida are the only place in the contiguous United States, Hawaii, Alaska, the Commonwealth of Puerto Rico, or the U.S. Virgin Islands where the purple swamphen is found.

This Control Order allows the removal of introduced purple swamphens in the contiguous United States, Alaska, Hawaii, the Commonwealth of Puerto Rico, and the U.S. Virgin Islands from any location where they are found. This removal is in keeping with our other actions to reduce the spread of introduced species that compete with native species or harm habitats that they use. (*see* <http://www.fws.gov/invasives/>).

##### Comments on the Proposed Rule

We received two comments on the proposed rule published on August 22, 2008 (70 FR 49631-49634). One commenter stated that (1) purple swamphens are not migratory and (2) are invasive and should be removed. Though the species is a migratory bird species under the MBTA, it is invasive in the continental U.S. and other locations outside its native range. We agree with the commenter's assertion that the species should be removed where it has been introduced by humans.

A State agency requested that "the requirement to bury or incinerate carcasses be removed. The nature of control programs, *i.e.*, shooting purple swamphens in heavily vegetated habitat, precludes this as a practical disposal method." We changed this rule to accommodate this request.

##### Required Determinations

###### Regulatory Planning and Review

In accordance with the criteria in Executive Order 12866, this rule is not a significant regulatory action. The Office of Management and Budget makes the final determination of significance under E.O. 12866.

a. This rule will not raise novel legal or policy issues. The provisions are in

compliance with other laws, policies, and regulations.

b. This rule does not have an annual economic effect of \$100 million or more, or adversely affect an economic sector, productivity, jobs, the environment, or other units of government. A cost-benefit and economic analysis thus is not required. There will be no costs associated with this rule.

c. This rule will not create inconsistencies with other agencies' actions. The rule deals solely with governance of migratory bird permitting in the United States. No other Federal agency has any role in regulating activities with migratory birds.

d. This rule will not materially affect entitlements, grants, user fees, loan programs, or the rights and obligations of their recipients. There are no entitlements, grants, user fees, or loan programs associated with the regulation of control of purple swamphens.

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

Under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*, as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA) of 1996 (Pub. L. 104-121)), whenever an agency is required to publish a notice of rulemaking for any proposed or final rule, it must prepare and make available for public comment a regulatory flexibility analysis that describes the effect of the rule on small entities (*i.e.*, small businesses, small organizations, and small government jurisdictions). However, no regulatory flexibility analysis is required if the head of an agency certifies that the rule does not have a significant economic impact on a substantial number of small entities.

SBREFA amended the Regulatory Flexibility Act to require Federal agencies to provide the statement of the factual basis for certifying that a rule does not have a significant economic impact on a substantial number of small entities. We have examined this rule's potential effects on small entities as required by the Regulatory Flexibility Act, and we have determined that this action does not have a significant economic impact on a substantial number of small entities because the changes we are proposing are intended to allow removal of an introduced species that competes with native species of wildlife. Purple swamphens are not found in business areas, and we foresee no effects of this rule on small businesses.

There will be no costs associated with this regulations change. Consequently, we certify that because this rule does not have a significant economic effect

on a substantial number of small entities, a regulatory flexibility analysis is not required.

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

a. This rule does not have an annual effect on the economy of \$100 million or more.

b. This rule will not cause a major increase in costs or prices for consumers; individual industries; Federal, State, or local government agencies; or geographic regions.

c. This rule does not have significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of U.S.-based enterprises to compete with foreign-based enterprises.

#### *Unfunded Mandates Reform Act*

In accordance with the Unfunded Mandates Reform Act (2 U.S.C. 1501 *et seq.*), we have determined the following:

a. This rule will not "significantly or uniquely" affect small governments. A small government agency plan is not required. Actions under the proposed regulation will not affect small government activities in any significant way.

b. This rule will not produce a Federal mandate of \$100 million or greater in any year. It will not be a "significant regulatory action" under the Unfunded Mandates Reform Act.

#### *Takings*

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

#### *Federalism*

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

#### *Civil Justice Reform*

In accordance with Executive Order 12988, we have determined that the rule will not unduly burden the judicial system and that it meets the requirements of sections 3(a) and 3(b)(2) of the Order.

#### *Paperwork Reduction Act*

We examined these regulations under the Paperwork Reduction Act of 1995.

There are no information collection requirements associated with this regulations change.

#### *National Environmental Policy Act*

We have analyzed this rule in accordance with the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. 4321 *et seq.* and part 516 of the U.S. Department of the Interior Manual (516 DM). The change we propose is to allow the removal of purple swamphens from locations in the United States and its territories in which the species may have been introduced. The environmental impacts of control of the purple swamphen have already been addressed. The State of Florida prepared a purple swamphen control plan and an environmental assessment of State control actions. We completed an Environmental Action Statement in which we concluded that the proposed regulations change allowing the removal of this introduced species will have no significant impact on the environment and, therefore, requires no additional assessment of potential environmental impacts.

*Socioeconomic.* We do not expect the action to have discernible socioeconomic impacts.

*Migratory bird populations.* This rule will not alter the take of native migratory birds from the wild. It will not harm native migratory bird populations.

*Endangered and Threatened Species.* The purple swamphen is not threatened or endangered, and the regulations change will not affect threatened or endangered species or habitats important to them.

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

### Government-to-Government Relationship With Tribes

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

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

On May 18, 2001, the President issued Executive Order 13211 addressing regulations that significantly affect energy supply, distribution, and use. Executive Order 13211 requires agencies to prepare Statements of Energy Effects when undertaking certain actions. Because this rule only affects control of invasive purple swamphens at limited locations, it will not be a significant regulatory action under Executive Order 12866, nor will it significantly affect energy supplies, distribution, or use. This action will not be a significant energy action, and no Statement of Energy Effects is required.

### References

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

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

### List of Subjects in 50 CFR Part 21

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

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

### PART 21—MIGRATORY BIRD PERMITS

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

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

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

### § 21.53 Control order for purple swamphens.

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

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

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

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

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

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

[www.fws.gov/where/](http://www.fws.gov/where/) to find the location of the nearest Ecological Services office.

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

Dated: February 3, 2010.

**Thomas L. Strickland,**

Assistant Secretary for Fish and Wildlife and Parks.

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## DEPARTMENT OF THE INTERIOR

### Fish and Wildlife Service

#### 50 CFR Part 21

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

RIN 1018–AV34

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

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

**ACTION:** Final rule.

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