Pacific PEER
Public Employees for Environmental Responsibility

March 9, 2020

Comments: Advance notice of proposed rulemaking – Management of Double-crested Cormorants (Phalacrocoraxauritus) Throughout the United States [Docket No. FWS–HQ–MB–2019–0103; FF09M29000–190–FXMB1232090000]

These comments are submitted on behalf of Public Employees for Environmental Responsibility (PEER). Despite serving as the organization that led the litigants who succeeded in winning judicial invalidation of the U.S. Fish and Wildlife Service (FWS) Aquaculture and Natural Resource Depredation Orders (DOs), PEER was not among the entities that FWS consulted, let alone collaborated with, in developing this proposed rulemaking. Nonetheless, PEER offers the following comments:

1. **Not Science Based**

Today's FWS proposal is not based on new scientific research. Indeed, the new proposal appear as legally vulnerable as the predecessor DOs which were invalidated by court order in 2016.

In the succeeding years, FWS has failed to take the required "hard look" at impacts or to explore alternatives. Instead, FWS appears to have fashioned what it believes to be a political solution that is unsupported by any scientific research. In short, this proposal appears to be the antithesis of competent wildlife management.

2. **Nature of Conflict Undocumented**

The purported purpose of the new FWS plan is to reduce predation of fish by Double-crested Cormorants (DCCOs). For the proposed new Natural Resource DO, FWS has not even specified which fish populations are at risk from unabated DCCO predation.

In the prior litigation, PEER and co-plaintiffs offered significant evidence that DCCOs actually benefitted native fish populations by feeding on invasive species competing with those native stocks. FWS offers no evidence that these impacts have changed.

3. **No Explanation for Eschewing Individual Permit System**

In his May 25, 2016 ruling, U.S. District Judge John D. Bates concluded that revoking or vacating these DOs was the appropriate remedy by finding that individual permits for removal, as are used for most other birds protected by the Migratory Bird Treaty Act (MBTA), would be sufficient to alleviate any "any serious detrimental impact" caused by cormorants.

Nothing in the latest FWS filing invalidates that finding or explains why the issuance of individual depredation permits is an unworkable approach for controlling excessive DCCO damage.

4. **One-Size-Fits-All Proposal Inappropriate**

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Contrary to the earlier DOs which were limited to Eastern states, the new FWS proposal is national in scope. Yet, FWS makes no showing that there is a DCCO problem in all 50 states or that shoot-on-sight DOs are an appropriate remedy in any one state.

In the earlier litigation, the lack of appropriate controls in DCCO hunting programs within South Carolina and Texas was a factor in the ruling striking down the DOs. FWS offers no evidence indicating that the failures of these state programs have been cured.

5. **Aquaculture Industry Deserves No Further Public Subsidy**

The aquaculture interests to which FWS is referring are commercial catfish farmers. It is never explained why these catfish farms deserve any MBTA regulatory relief.

This industry has made few, if any, capital expenditures or improvements to their facilities in protection of their ponds. Nor has this industry funded physical solutions to cormorant conflicts, such as exclusion techniques, such as netting enclosures, submerged netting, floating catfish refuges, and floating fish cages which are used successfully in other countries.

At the very least, application of reasonable exclusion efforts should be made a precondition for any individual depredation permit, let alone the Aquaculture DO that FWS is now proposing.

Finally, this industry has historically been environmentally irresponsible. Through its negligence, the catfish farming industry has been responsible for the introduction of invasive Asian carp species which now threaten the entire Mississippi ecosystem and may soon imperil the Great Lakes. This industry does not deserve any further regulatory relief and should instead indemnify both the federal government and other victims of the Asian carp plague this industry has unleashed.

6. **Sole Focus on DCCOs Unexplained**

DCCOs are not the only aquatic wildfowl that eat fish, yet it is the only species FWS targets for mass lethal removal. FWS offers no evidence justifying this singular focus. If all DCCOs were suddenly to be lethally removed, it is unclear whether other birds would fill that void with the same impact on fish populations.

7. **Bias against Non-Lethal Measures**

The FWS' Potential Take Limit model for killing more than 51,000 wild cormorants presupposes the failure of non-lethal measures in favor of lethal removal. However, the empirical basis for this presupposition is never presented, let alone explained.

8. **Public Resource DO Reversal Unexplained**

In Chapter 3.0 of the 2017 Environmental Assessment for issuing DCCO depredation permits, FWS eliminated reduction of adverse impacts on free-swimming fish populations from the list of resources qualifying for permits. In section 3.2, FWS stated that to determine if there may be significant impacts essential to a reasoned choice among alternatives the agency would need additional information requiring analyses beyond the scope of the EA. FWS acknowledged that scientific evidence to demonstrate DCCO presence as a limiting factor for declines in free-swimming fish on a landscape level was limited, and that available data indicate impacts are likely site specific. FWS also noted limited ability to clarify whether DCCO depredation on free-swimming fish is compensatory or additive and that in some systems, the issue is further complicated by introduction of invasive species.

In 2020, however, FWS revives the idea of a Public Resource DO yet cites no information to justify the reversal of its 2017 position.

9. Lack of Alternatives

In its scoping, FWS offers no alternatives to DOs other than a "no action" alternative. In addition, FWS does not explain why both an Aquaculture and Public Resource DO are needed. As before, the lack of consideration of alternatives will make any FWS action on this subject legally vulnerable.

10. Appearance of Prejudgment

In its January 21, 2020 press release accompanying the advanced notice of public rulemaking, FWS included laudatory statements from selected Members of Congress, the American Farm Bureau Federation, and others applauding the direction and content of this rulemaking. This blatant show of bias could undermine the agency's ultimate action in court. While anyone has the right to comment on federal agency rule-making, public comments are accepted by agencies only during the formal comment period. Secretly soliciting and publishing a large number of orchestrated "pre-comments" from one side of an issue, and then attaching them to the agency's announcement of a proposal, may be a violation of the Administrative Procedure Act, which mandates even-handed administration of federal rulemaking.

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