



## **Pacific PEER**

### **Public Employees for Environmental Responsibility**

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July 15, 2020

Comments: Migratory Bird Permits: Management of Conflicts Associated with Double-Crested Cormorants (*Phalacrocorax auritus*) Throughout the United States Proposed Rule by FWS on 06/05/2020 ID: FWS-HQ-MB-2019-0103-1411

These comments are submitted on behalf of Public Employees for Environmental Responsibility (PEER):

#### **1. Public Resource Depredation Reversal Unexplained**

In Chapter 3.0 of the 2017 Environmental Assessment for issuing Double-crested Cormorant (DCCO) depredation permits, the U.S. Fish and Wildlife Service (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 revived the idea of a Public Resource depredation permit for 48 states and an unknown number of tribes yet cites no new information to justify the reversal of its 2017 position.

#### **2. Not Science Based**

The current FWS proposal is not based on new scientific research. Indeed, the new proposal appears as legally vulnerable as the predecessor Depredation Orders (DOs) which were invalidated by court order in 2016 in a lawsuit brought by PEER.

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.

#### **3. Nature of Conflict Undocumented**

The purported purpose of the new FWS plan is to reduce predation of fish by DCCOs. Yet, 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 that were competing with those native stocks. FWS offers no evidence that these impacts have changed.



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Further, FWS overlooks evidence in its own Draft Environmental Impact Statement (DEIS) that

- The majority of studies find that important commercial and sport-fish species made up a very small proportion of the cormorant diet. (p.30)
- Invasive fish make up much of DCCO diets, up to 85% of the biomass during periods of the breeding season, (p.31)
- There remains “much controversy regarding whether cormorants, in and of themselves, have the ability to affect an entire fish population.” (p.33)

In addressing the criticism that FWS has failed to show that avian-suppression measures have had an appreciable impact on the fish populations that such measures were supposed to protect, FWS response is that “assessing the influence of predation on a fishery is a complex endeavor that requires vast amounts of data.” (DEIS, p.33). Yet, FWS has not marshalled any of this data.

Instead, it offers vague generalities. In its *Federal Register* notice FWS states:

“Importantly, reducing the abundance of double-crested cormorants is not the goal of the Service or this proposed 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.”

This distinction is meaningless, however, since FWS lacks data to indicate whether conflicts will be reduced.

#### **4. No Coherent 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.

In its *Federal Register* notice, FWS stated that “between 2007 and 2018, the number of permit requests to take depredating birds (exclusive of requests to act under the depredation orders) increased from slightly less than 200 to almost 300.” This hardly seems like a burdensome number, considering it covers all bird species. FWS does not specify the number of depredation



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permits it has issued in the past few years for DCCOs except to claim that they are administratively burdensome.

In that notice, the FWS declares that “the use of only depredation permits to address conflicts will become increasingly time- consuming and cumbersome, and will be less responsive to needs of those seeking relief from conflicts with cormorants.” The basis for that statement is not articulated.

In its place, FWS proposes far more elaborate permits for 48 states, the District of Columbia, and an unknown number of tribes. Unless FWS does not intend to perform the monitoring described in its DEIS, the level of administrative burden on FWS will actually increase under its proposed rule.

In the DEIS, FWS concedes it “can still authorize the take of as much as 76,000 cormorants nationwide under depredation permits for other purposes (e.g., human health and safety, property, aquaculture, vegetation, co-nesting species damage).” (P.62). However, FWS does not explain why the take of that many DCCOs is insufficient.

#### **5. One-Size-Fits-All Proposal Inappropriate**

Contrary to the earlier DOs which were limited to Eastern states, the new FWS proposal is national (the lower-48) in scope. Yet, FWS makes no showing that there is a DCCO problem in all 48 states or that shoot-on-sight permits 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.

#### **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.

The closest thing to a rationale can be found in the DEIS where it explains why the No Action alternative was rejected:

“Because mortality of cormorants would occur only from natural causes, the continental and regional populations would likely increase to the carrying capacity of the landscapes they inhabit before density-dependent mortality and/or recruitment limit further growth. At that point, the populations would stabilize around a mean value, although annual and periodic fluctuations in abundance around that mean would occur due to extant environmental conditions. Given the growth of cormorant populations in the absence of lethal management efforts, the abundance of cormorants likely would be higher than it is currently. Additional population growth would result in increased conflicts between cormorants and society



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exacerbating issues that presently exist. Therefore, we do not believe this alternative to be a reasonable action.” (p.20)

This is hardly a compelling rationale. Nor does it explain why this reasoning would not apply to every cormorant species or every fish-eating bird species.

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

The FWS Potential Take Limit model used to justify killing more than 123,000 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.

The DEIS cites studies that “have shown that harassment at hatchery release sites is often sufficient to reduce cormorant foraging until fish are able to disperse. Likewise, non-lethal measures are sometimes effective at deterring migrating cormorants from foraging on local fish stocks as they are moving through an area.” (p. 62)

FWS claims that it permits would require that non-lethal means are exhausted prior to undertaking lethal removal. If these studies are correct, no lethal take should be required to protect fish populations and state-wide permits would be unnecessary.

#### **8. Take Level May Be Excessive**

The DEIS states that the current estimate of cormorant abundance in the continental U.S. and Canada is 871,001 to 981,394 birds. (p.24). FWS’ proposal would set an allowable take of 123,157 cormorants per year, nationally. (p.10)

That take level would allow removal of between 1 in 7 and 1 in 8 cormorants in North America every year for the five-year duration of the permits.

Notwithstanding FWS’ convoluted Potential Take Level calculations, this take allowance appears excessive and could destabilize DCCO populations.

#### **9. FWS Lacks Ability to Monitor**

These high take levels underscore the importance of FWS monitoring of DCCO populations, what the DEIS labels “an important component of all the alternatives.” (p.10)

Yet, FWS admits that it “has not yet developed population-monitoring programs for the alternatives presented in this DEIS.” (p. 57) The Service also concedes that “To minimize significant negative impacts to the Southern and Western populations, the Service would need to develop a more comprehensive take-tracking program that would entail participation of monitoring from WS [USDA Wildlife Service], states, tribes, and commercial aquaculture facilities to ensure authorized take levels are not exceeded.” (p. 58)



FWS further recognizes the particular vulnerability of “the Western and Southern populations, which may be more vulnerable to negative impacts if authorized take is exceeded.” (p. 72) These are regions that were outside the scope of the previous DOs.

Yet, it is not at all clear that FWS has the ability or the organizational will to invest in achieving substantially upgraded monitoring capability, especially since the driving motive behind this plan is easing the agency’s administrative burden. In sort, FWS should not proceed with this proposal until it has developed the monitoring capacity to prevent excessive DCCO take.

#### **10. Harm to Co-Nesting Birds Inappropriately Minimized**

The DEIS acknowledges “an increasing concern” about harm to co-nesting birds who will also be driven from their nests during DCCO take operations and creating “opportunities for gulls to prey on eggs and chicks” of co-nesting species (p.45). Yet, on the next page of the DEIS, FWS goes on to minimize this concern with the statement –

“However, the Service anticipates the unintentional take of nontarget species to occur infrequently and involve very few individuals of a particular species.” (p.46)

FWS offers no evidence or analysis for this apparently unfounded optimism.

#### **11. No Meaningful Check on Take of Look-Alike Birds**

FWS also discounts the danger to look-alike bird species, such as neo-tropic cormorants, great cormorants, and anhingas. The DEIS points out why this should be a concern:

“Those species often intermix with cormorants. The misidentification of a bird species that appears similar to a cormorant can occur especially when those species mix with cormorants in flight and lowlight conditions.” (p.46)

The only safeguard FWS identifies is that states and tribes with permits would be required to report any other species of bird taken incidentally due to double-crested cormorant management activities under this permit, along with the numbers of birds of each species taken.

It is unclear how often misidentifications will be noticed, especially if carcasses are promptly destroyed. Moreover, states and tribes have no incentive to report mistakes, especially if doing so could result in suspension or loss of their permit.

Nonetheless, without evidence or analysis, FWS dismisses this concern in the DEIS, writing:

“The Service anticipates the unintentional take of nontarget species to occur infrequently and involve very few individuals of a particular species; therefore, the Service does not anticipate cumulative adverse effects to occur from unintentional take of nontarget species under any of the alternatives.”(p.75)



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#### **12. The Illogic of Depredation Trigger**

The permits FWS proposes would authorize killing DCCOs only when cormorants are committing or are about to commit depredations. Yet, DCCOs diet consists almost entirely of fish. Thus, these birds are always either predating on fish or are about to. In essence, FWS through this proposal and past DOs wants to extend shoot-on-sight authority to whichever entity it deputizes to dispatch cormorants.

This indiscriminate approach is poor wildlife management which reflects no credit on FWS.

#### **13. Inability to Assess Environmental Impacts**

Without any knowledge of what permits will be issued for taking what numbers of cormorants in what locations under what circumstances, it is impossible to evaluate the environmental impacts of this proposal.

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