

**Comments on Proposed Extension of
DEPREDATION ORDERS FOR DOUBLE-CRESTED CORMORANTS
50 C.F.R. 21.47 AND 21.48
And Supporting Draft Environmental Assessment**

Submitted by:
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The following comments on the above captioned items are made pursuant to the *Federal Register* [79(43):12458-12461] notice and submitted on behalf of Public Employees for Environmental Responsibility (PEER).

In its proposed action, the U.S. Fish and Wildlife Service (FWS) seeks to extend the Aquaculture Depredation Order (AQDO) and Public Resource Depredation Order (PRDO), hereafter collectively, the Orders, related to double-crested cormorants (*Phalacrocorax auritus*, hereinafter DCCO). This extension would be for a period of five years from June 2014 to June 2019. This latest extension would follow an earlier five-year extension granted in 2009.

PEER has several concerns about this proposed action:

1. The Extension Is Based upon Shoddy and Incomplete Science

In its Draft Environmental Assessment (DEA) supporting this proposal, FWS admits that it has not conducted a thorough scientific review of all important aspects of its proposal. In the DEA, FWS states that:

“Resource limitations preclude completion of a thorough review of potential revisions to the regulations prior to the 30 June 2014 expiration dates for the depredation orders.”

FWS offers no explanation for why it has been unable to conduct a thorough review of the issue during the past five years. Indeed, FWS implies that it has not taken the time to examine any aspect of the issues since it offers no report on what, if anything, it has learned or done in the past five years.

Instead, FWS states in the DEA that it will address concerns and alternatives “in a subsequent analysis” but without specifying when. Since FWS regards extending the Orders by another five years to be only “an interim measure” one can reasonably expect that its state of review will not have progressed when this extension expires in 2019.

In short, FWS appears to be using its lack of diligence and rigor as a justification for “Xeroxing forward” a largely unexamined policy.

In fact, as detailed below, the DEA is honeycombed with unsupported beliefs and expectations as the underpinnings of what is supposed to be science-based wildlife management.

The better course of action would be to let the Orders expire until such time that FWS obtains a coherent grasp of their effects, alternatives and need.

2. FWS Appears to Be in Violation of the National Environmental Policy Act (NEPA)

The DEA appears to be legally deficient in three respects:

A. Need for Consideration of Additional Alternatives

In accordance with the Council on Environmental Quality regulations, an environmental assessment must include a brief discussion of alternatives. 40 C.F.R. § 1508.9(b). “[C]onsideration of alternatives is critical to the goals of NEPA even where a proposed action does not trigger the EIS process . . .”. *Bob Marshall Alliance v. Hodel*, 852 F.2d 1223, 1228–29 (9th Cir. 1988).

Limiting the alternatives to letting the Orders expire, renewing then for 5 years and renewing them indefinitely – without even considering modifications to the Orders -- cannot meet the requirement to consider reasonable alternatives. *Save Our Cumberland Mts. v. Kempthorne*, 453 F.3d 334, 345 (6th Cir. 2006). See also *Davis v. Mineta*, 302 F.3d 1104 (10th Cir. 2002) (rejecting alternatives analysis limited to choice between build and no build); *Muckleshoot Indian Tribe v. U.S. Forest Serv.*, 177 F.3d 800, 813 (9th Cir. 1999) (consideration of no action and two virtually identical alternatives insufficient).

Here, FWS did not even consider the alternatives it had itself suggested and received comments on in 2011. 76 Fed. Reg. 69225 (Nov. 8, 2011). As a result, feasible alternatives such as changes in fisheries habitats and fish farm operations, protection of vegetation, and increased reliance on reproductive controls, nest destruction and harassment are not even considered, let alone analyzed.

FWS cannot claim that the alternatives it put forward do not lie within the range of reasonable alternatives that should be considered in an EA, nor does it claim that alternatives proposed by the commenters were unworthy of consideration. FWS merely asserts that resource constraints prevented it from considering these alternatives in the years since the 2011 Notice. FWS cannot avoid the requirements of NEPA simply by saying it decided not to do the work that NEPA requires.

B. Need for Scientific Data to Support Conclusions

“The agency may not rely on conclusory statements unsupported by data, authorities, or explanatory information.” *Earth Island Inst. v. U.S. Forest Service*, 442 F.3d 1147, 1159-60 (9th Cir. 2006); 40 C.F.R. §1502.24.

As the Supreme Court has explained, “[r]ecognizing that policymaking in a complex society must account for uncertainty, however, does not imply that it is sufficient for an agency to merely recite the terms ‘substantial uncertainty’ as a justification for its actions.” *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 52 (1983)

As explained in *National Parks & Conservation Ass'n v. Babbitt*, 241 F.3d 722, 733 (9th Cir. 2001) “The Parks Service's lack of knowledge does not excuse the preparation of an EIS; rather it requires the Parks Service to do the necessary work to obtain it. . . . Here, the Parks Service's repeated generic statement that the effects are unknown does not constitute the requisite ‘hard look’ mandated by the statute if preparation of an EIS is to be avoided.”

Further, the agency "cannot avoid NEPA responsibilities by cloaking itself in ignorance." *Fritiofson v. Alexander*, 772 F.2d 1225, 1244 (5th Cir. 1985).

In this instance, FWS has impermissibly sought to use the lack of information as the basis for its review of potential environmental impacts.

C. Need to Justify Decision not to Prepare an Environmental Impact Statement (EIS) or Supplemental Environmental Impact Statement (SEIS)

CEQ regulation 40 C.F.R. § 1508.9(a)(1) stipulates that an EA must “Briefly provide sufficient evidence and analysis for determining whether to prepare an environmental impact statement or a finding of no significant impact.”

This EA does not do so, despite the agency’s statement in the 2011 Federal Register notice that the decision of whether to prepare a Supplement Environmental Impact Statement or an Environmental Assessment would be based on NEPA and its implementing regulations 76 Fed. Reg. 69226. FWS has provided no support for its conclusion that an EIS or SEIS is not required under NEPA – but rather has stated that it did not prepare an SEIS because of “constraints on our ability to conduct the work necessary to complete a supplemental environmental impact statement.” 79 Fed Reg 12458 (March 5, 2014). Again, failure to do the necessary work does not excuse compliance with NEPA.

The loss of approximately one half million large, long-lived migratory birds is unquestionably a significant environmental impact requiring more than the cursory assessment FWS has given it. This action requires a full EIS or SEIS rather than merely this DEA.

3. Proposed Restrictions Do Not Assure Long-term Conservation of DCCO Populations

The Orders have been in effect for 15 and 10 years (PRDO and AQDO, respectively). During this time, the reported annual kill has been approximately 24,000 birds under the AQDO and traditional damage management permits, mostly in the south, and 19,000 under the PRDO.

According to the DEA, together the two Orders authorize lethal take of an estimated 160,000 double-crested cormorants per year although the agency estimates that only 27% of the authorization is exercised, meaning that more than 43,000 birds were “harvested” annually during the period from 2004 to 2012

For the period of 1999 through 2012, the DEA reports that more than 500,000 birds have been dispatched under both Orders and permits while they have been in place. The data reported in the DEA appears to be the first public release of these totals.

The DEA contains population modeling which is the first time FWS has directly addressed effects of the Orders on future DCCO population. In one modeling scenario, the Service estimates that as much as a 48% decline in the entire double-crested cormorant population could result. While the percentages of the DCCO population lost vary in different modeling scenarios, there is no question that extension of the Orders will have a significant impact on these populations.

Significantly, the specific impacts the Orders will have depend upon factors such as the extent and manner of state implementation – factors that FWS chooses not to oversee or even meaningfully address. Thus, FWS proposes to continue policies that will have largely unknown impacts with no plan to fill in those data gaps.

More fundamentally, however, these modeling scenarios avoid the central question that FWS should be asking: What is the desired future state of the DCCO population and will these Orders achieve these population management goals?

Further, the DEA is devoid of any consideration of what depredation is designed to achieve in terms of management outcomes, such as higher fish stocks, better habitat for other species, increased aesthetic and existence values, etc. Rather than serve as a biological plan, the DEA seems designed solely to justify a shoot-to-kill policy.

Most FWS management plans for other migratory species seek to preserve and enhance the status of these species within healthy, functioning ecosystems. In the case of the DCCO, maintaining a healthy population status is barely an afterthought for FWS.

4. FWS Ignores Adverse Effects on Co-Nesting and Look-Alike Birds

Many birds co-nest with the DCCO. The DEA makes scant mention of the impact that mass depredation of the DCCO has on its biological neighbors. The DEA offers no information about what steps are being taken (or required) to protect co-nesting species. Yet, the DEA offers the unsupported conclusion that “We have no reason not to believe that [state] agencies would not continue to be highly conscientious in avoiding negative impacts to bird species...at management sites.”

Without an empirical or regulatory basis for this belief, the FWS posture is that it simply hopes for the best.

Similarly, the DEA ignores the problem of “look alike” species, such as the neotropic cormorant. This cormorant is virtually indistinguishable from the DCCO, especially to an untrained hunter.

Despite warnings that the neotropic cormorant is strictly protected, the Orders make no provision to protect these other species from accidental take.

5. The Orders Perpetuates Massive Additions of Toxic Lead-Based Ammunition in Sensitive Aquatic Habitats

Under the Orders, permit holders are required to use non-toxic shot only if shooting DCCO with a shotgun. Other firearms, such as rifles and handguns, carry no such restriction.

As a result, the Orders will have the effect of introducing significant amounts of additional lead-based ammunition into fragile aquatic environments.

In prohibiting use of lead-based ammunition on its National Wildlife Refuges, FWS acknowledges the severe adverse consequences that use of this toxic ammunition can have on the entire food chain. If it extends the Orders, FWS should require that all ammunition used in nuisance control permits should be non-toxic.

6. In Texas, FWS Is Abdicating All Responsible Management Restrictions

In Texas, the PRDO that FWS would renew would continue the Nuisance Double-crested Cormorant Control Permit program in that state [see <http://www.tpwd.state.tx.us/business/permits/land/wildlife/cormorant/>]. This permit program appears to lack any reasonable management control and is in conflict with the PRDO in a number of respects.

In the Texas permit program, any private citizen with a hunting license and landowner permission can get a permit to shoot at DCCO. There is no supervision or required training.

The PRDO requires documentation that control actions are directed at resolving a resource problem. The Texas Nuisance Permit has no such provision. It effectively declares all DCCO a nuisance and allows unlimited take by any Texas hunting license holder with permission of a landowner.

Since the Texas permit “is restricted to the control of Double-crested Cormorants and IS NOT a public hunting permit” the ordinary restrictions about retrieving carcasses and avoiding wanton waste are not part of the permit program. Similarly, there is no requirement that wounded or crippled birds be retrieved or dispatched.

While record keeping is required, enforcement is not provided for or in any way assured.

In short, by extending these permits to include Texas, FWS is clearly abdicating all responsibility for any meaningful management of DCCO depredation.

7. FWS Conflates Public Resources and Private Interests

By its very nature, the PRDO is supposed to protect public resources. FWS cannot identify the purely public resources extension of the PRDO would protect.

Even if a connection can be shown between the PRDO and potential predation of fish inhabiting public waters, FWS has no real evidence that dispatching DCCO significantly affects fish populations. Thus, the protection being extended to public resources is nebulous at best.

In reality, these Orders are designed to protect private interests. They are, in essence, a backdoor taxpayer subsidy to industries that may not even materially benefit from this massive armed biological intervention.

Moreover, the Orders are not even customized to protect what they purport to protect. The DEA points out that catfish farming has declined precipitously in several states despite heavy cormorant culling. Yet, the FWS is not reducing the scope of the AQDO accordingly.

Moreover, in Texas there is absolutely no requirement to show a loss of public resources. In states where there is a requirement, the basis is meaningless bureaucratic boilerplate that is cut-and-pasted into each annual report submitted and rubber-stamped by FWS.

In short, the notion that DCCO must be removed in large numbers to protect public resources has little empirical support.

8. The Orders Are Rooted in Politics Not Biology

These birds are targeted for removal because they eat fish. That is what fish-eating birds do. Eating fish is how they survive and it does not matter to them whether the fish are on public or private property.

Presumably, FWS does not believe all predation is a nuisance – otherwise there would be no wildlife to “manage.” In this case, FWS is considering predation by DCCO a nuisance only because it raises hackles of certain economic interests who do not want natural competition for the fish from which they seek to derive profit.

These profits, in turn, purchase the political influence to induce FWS to adopt regulations targeting certain fish-eating birds. The choice of which birds are subject to depredation orders is a political and not a biological choice.

If the double-crested cormorant had a better public image, bigger fan club or more effective lobbyist it would not be classified as a winged varmint.

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