



July 20, 2020

VIA ELECTRONIC SUBMISSION

The Honorable David Bernhardt
Secretary
U.S. Department of the Interior
Fish and Wildlife Service
1849 C St. NW
Washington, D.C. 20240

Re: Migratory Bird Permits; Management of Conflicts Associated With Double-Crested Cormorants (*Phalacrocorax auritus*) Throughout the United States (Docket No. FWS-HQ-MB-2019-0103).

Dear Secretary Bernhardt:

On June 5, 2020 the U.S. Department of the Interior's Fish and Wildlife Service (Service) published a proposed rule and draft environmental impact statement establishing a new permit for State and federally recognized Tribal wildlife agencies for the management of double-crested cormorants.¹ The Office of Advocacy of the U.S. Small Business Administration (Advocacy) submits the following comments on the proposed rule and draft environmental impact statement. Advocacy encourages the Service to adopt alternative C discussed in the rule's draft environmental impact statement which better addresses the Service's stated objectives for the rulemaking while minimizing the burden to small businesses.

The Office of Advocacy

Advocacy was established pursuant to Pub. L. 94-305 to represent the views of small entities before federal agencies and Congress. Advocacy is an independent office within the U.S. Small Business Administration (SBA), so the views expressed by Advocacy do not necessarily reflect

¹ Migratory Bird Permits: Management of Conflicts Associated With Double-Crested Cormorants (*Phalacrocorax auritus*) Throughout the United States, 85 Fed. Reg. 34578 (June 5, 2020).



the views of the SBA or the Administration. The Regulatory Flexibility Act (RFA),² as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA),³ gives small entities a voice in the rulemaking process. For all rules that are expected to have a significant economic impact on a substantial number of small entities, federal agencies are required by the RFA to assess the impact of the proposed rule on small business and to consider less burdensome alternatives.

The Small Business Jobs Act of 2010 requires agencies to give every appropriate consideration to comments provided by Advocacy.⁴ The agency must include, in any explanation or discussion accompanying the final rule's publication in the Federal Register, the agency's response to these written comments submitted by Advocacy on the proposed rule, unless the agency certifies that the public interest is not served by doing so.⁵

Advocacy's comments are consistent with Congressional intent underlying the RFA, that "[w]hen adopting regulations to protect the health, safety, and economic welfare of the nation, federal agencies should seek to achieve statutory goals as effectively and efficiently as possible without imposing unnecessary burdens on the public."⁶

Background

The Migratory Bird Treaty Act of 1918, as amended, generally makes it unlawful to take or kill any migratory bird, nest, or egg.⁷ The Act lists several species of birds covered under these statutory protections including the double-crested cormorant. Under the Act, the Secretary of the Interior may allow taking and killing of these birds and adopt regulations permitting the same.⁸

The double-crested cormorant is a fish-eating bird found in a large portion of North America. As stated in the proposed rule, cormorant populations have risen over both the short and long term.⁹ Because the cormorant is a fish-eating bird, it has been known to cause substantial damage and disruption to aquaculture and fishery operations. In response to damage to aquaculture facilities, the Service issued a series of regulations aimed at providing conflict management for the species, including aquaculture depredation orders, which allowed for the taking of cormorants at aquaculture facilities via lethal methods among other things, and without the requirement of an individual permit in several states.¹⁰ These orders were subsequently vacated in 2016 by the U.S. District Court for the District of Columbia, which found that the Service had failed to consider the effects of depredation orders on cormorant populations, and failed to consider a reasonable range of alternatives within its Environmental Assessment (EA).¹¹ In 2017 the Service prepared

² 5 U.S.C. § 601 et seq.

³ Pub. L. 104-121, Title II, 110 Stat. 857 (1996) (codified in various sections of 5 U.S.C. § 601 et seq.).

⁴ Small Business Jobs Act of 2010 (PL 111-240) § 1601.

⁵ *Id.*

⁶ 5 U.S.C. § 601 note

⁷ *See* 16 U.S.C. § 703 (a).

⁸ *See id.* 16 U.S.C. § 704 (a).

⁹ *Supra* note 1 at 34579.

¹⁰ *See id.*

¹¹ *See Public Employees for Environmental Responsibility v. United States Fish & Wildlife Serv.*, 189 F. Supp. 3d 1, 2016 U.S. Dist. LEXIS 68966.

a new EA that addressed the continuing conflicts with cormorants,¹² but did not reinstate the aquaculture depredation order. As a result of the findings in the 2017 EA, the Service decided that it would make all decisions regarding take of cormorants on an individual basis, and that aquaculture facilities would be required to pursue individual depredation permits.¹³

On January 22, 2020, the Service published an advance notice of proposed rulemaking (ANPRM) and intent to prepare National Environmental Policy Act (NEPA) documents to establish new regulations for the management of double-crested cormorants.¹⁴ In the ANPRM the Service listed several possible alternatives it would consider including: (1) establishing a new permit for State and Tribal wildlife agencies; (2) establishing an aquaculture depredation order; (3) combining alternatives one and two.¹⁵ On June 5, 2020 the Service published this proposed rule in which it selected the first option only, which would establish a new permit for State and Tribal wildlife agencies.¹⁶ States and Tribes would have the discretion to determine when to conduct lethal takes of the double-crested cormorant within limits and allocations set by the Service. The accompanying draft environmental impact statement (DEIS) discusses several potential regulatory alternatives the Service considered in implementing a management plan for the species including reinstating an aquaculture depredation order.¹⁷

Advocacy Outreach and Summary of Small Business Comments

On July 8, 2020 Advocacy conducted a teleconference to hear directly from affected small entities and their representatives.¹⁸ During the teleconference, Advocacy and the Service heard from representatives of aquaculture farms from around the country, small fishing charter companies, tropical and ornamental fish farms, agricultural economists, and professors who have studied the impact of cormorants on fish populations. Participants spoke about the dramatic increase in cormorant populations over time, citing that in some instances the increase has grown by hundreds of birds on a single farm.

In all instances these stakeholders were concerned about the lack of a depredation order in being able to effectively manage cormorant populations. They stated that prior to the order being vacated they were able to manage cormorant populations while not exceeding the allowable take limits established by the agency. One small farm owner stated that previously they had returns of stocked fish near 90 percent on their ponds; however in recent years since the depredation order was vacated their fish returns have ranged from 20 to 50 percent on these same ponds due to increased cormorant feeding habits on the ponds. This loss in returns of stocked fish equates to

¹² Environmental Assessment and Finding of No Significant Impact for the Issuance of Depredation Permits for Double-Crested Cormorants, 82 Fed. Reg. 52936 (November 15, 2017).

¹³ *See id.*

¹⁴ Migratory Bird Permits; Management of Double-Crested Cormorants (*Phalacrocorax auritus*) Throughout the United States, 85 Fed. Reg. 3601 (January 22, 2020).

¹⁵ *See id.* at 3602.

¹⁶ *Supra* note 1.

¹⁷ *See* Draft Environmental Impact Statement for Management of Conflicts Associated with Double-Crested Cormorants (March 2020), available at <https://www.regulations.gov/document?D=FWS-HQ-MB-2019-0103-1412>.

¹⁸ *See* Office of Advocacy, Teleconference To Discuss Migratory Bird Permit Conflicts Management Proposal For The Double-Crested Cormorant – July 8, 2020 Agenda, available at: <https://advocacy.sba.gov/2020/06/30/fws-migratory-bird-permits-conflict-management-proposal-for-the-double-crested-cormorant-teleconference-july-8/>

substantial losses in revenue for the farm as they ultimately have fewer fish to sell. In addition, farmers spoke about the effect of cormorant feeding on the fish that do not get eaten, stating the fish are fearful of the increased level of bird activity and are thus feeding less and not reaching the same sizes as when the depredation order was in place. Many owners of small fish farms stated that they see cormorants as their biggest challenge.

Advocacy heard from one small fish farm that had recently gone out of business because they were not able to recover lost revenue from cormorant damage. Being able to manage and protect the health of the fish was also a major concern for many small businesses. One farmer spoke about the potential for entire fish populations in contained areas to be degraded by disease-carrying cormorants. This would amount to a total loss of revenue for the business and time and labor costs to rebuild and ensure adequate cleanup procedures. The stakeholders all agreed that the most efficient way to manage damage caused by cormorants to aquaculture and fish populations would be a combination of state and Tribal permits as well as the issuance of a new aquaculture depredation order. This combination would address the needs of both public and private fish farm operations. These comments are further discussed below.

The Service Should Reconsider its Choice of Regulatory Alternatives and Instead Choose Alternative C.

In the proposed rulemaking, the Service relies on the findings of its DEIS to choose its preferred regulatory alternative. Within the DEIS, the Service states that it must ensure that its rulemaking is responsive to several concerns including (1) predation losses of wild and publicly stocked fisheries; and (2) predation losses of stocks at aquaculture facilities.¹⁹ The DEIS then presents four alternatives for consideration. Alternative A, the current chosen alternative would establish a new permit for state and Tribal wildlife agencies to manage conflicts associated with the species specifically on these lands.²⁰ Alternative B, would establish an aquaculture depredation order to address cormorant damage to private aquaculture facilities.²¹ Alternative C, would combine both alternatives A and B and alternative D would enact a general depredation order covering all cormorant populations on any land.

The rule as proposed does not adequately address the second factor stated in the Service's objectives of predation losses to both wild and publicly stocked fish and aquaculture facilities. Alternative C, however, proposes to establish both a state and Tribal wildlife permit, and an aquaculture depredation order. A combination of both state and Tribal permits and an aquaculture depredation order are necessary to adequately manage cormorant populations.

a. Alternative C has comparable environmental effects to alternative A.

In comparing the various alternatives, the Service indicates that alternative A is comparable to alternative C with respect to many factors including cormorant populations which the Service states will remain sustainable with the use of a maximum allowable take limit for both

¹⁹ *Supra* note 2 at iii.

²⁰ *See id.*

²¹ *See id.*

alternatives.²² Additionally, alternative A is comparable to alternative C with respect to cumulative environmental impacts, and with respect to environmental consequences.²³ What is not captured however, is that alternative A does not address the concerns of the aquaculture industry in being able to adequately manage damage to fish stocks by cormorants absent a depredation order.

b. Small businesses are greatly affected by cormorant damage.

Advocacy believes that a large number of small entities in the affected sectors of fish hatcheries (NAICS 112511) are affected by cormorant damage. Stakeholders indicated that cormorants feed on salmon, bluegill, catfish and various other species.

By way of example, Advocacy analyzed the share of small businesses in catfish farming and found that many catfish farmers nation-wide are small businesses.²⁴ Because cormorants feed on a variety of fish and are found in various locations across North America, this example only illustrates impacts to one sector of small businesses, but Advocacy believes that it adequately shows that the problem is widespread for many small businesses.

Rank	State	Number of Farms	Total Sales (\$1,000)	Total Sales (\$)	Average Sales Per Farm	Size Standard	Under Threshold?
1	Mississippi	157	\$189,620.00	\$189,620,000	\$1,207,771	1M	No
2	Alabama	95	\$92,037.00	\$92,037,000	\$968,811	1M	Yes
3	Texas	30	\$20,778.00	\$20,778,000	\$692,600	1M	Yes
4	Arkansas	29	\$20,054.00	\$20,054,000	\$691,517	1M	Yes
5	California	35	\$10,238.00	\$10,238,000	\$292,514	1M	Yes
6	Georgia	17	\$694.00	\$694,000	\$40,824	1M	Yes
7	Florida	14	\$204.00	\$204,000	\$14,571	1M	Yes
	Other	92	\$8,290.00	\$8,290,000	\$90,109	1M	Yes
	United States	469	\$341,915.00	\$341,915,000	\$729,030	1M	Yes

c. The current methods available to address cormorant damage are ineffective and costly.

Absent a proper aquaculture depredation order, the methods available to address damage to fish stocks at private aquaculture facilities are simply ineffective. Without the ability to properly manage cormorants, many fish farms will continue to face significant economic losses. Small businesses spoke about the cormorant’s increased level of adaptation to current harassment methods including no longer being afraid of loud sounds. One small entity estimated that the costs of manpower needed to harass cormorant populations absent the depredation order was one-third greater than the costs if the order were to be in place. According to public comments filed by small businesses and their representatives, the cost to scare birds on the average catfish

²² See *id.*

²³ See *id.* at 78.

²⁴ See U.S. Small Business Administration, 2019 Small Business Table of Size Standards available at <https://www.sba.gov/document/support--table-size-standards>. See also United States Department of Agriculture, National Agricultural Statistics Service 2018 Census of Aquaculture available at: https://www.nass.usda.gov/Publications/AgCensus/2017/Online_Resources/Aquaculture/index.php

farm is approximately \$285 per acre with some years being lower or higher.²⁵ These same small business representatives stated that the annualized industry-wide value of lost catfish sales revenue to cormorant damage averaged \$47.2 million.²⁶ The combined total of negative direct economic effects of the annualized costs of scaring birds and the value of catfish lost to cormorants averaged \$64.7 million.²⁷

The Service asserts that regulatory burdens will be reduced across all firms by this rule. However, absent a depredation order, this rulemaking has the potential to increase costs to small private aquaculture facilities who are not otherwise able to employ effective methods of controlling cormorant damage and who have seen and may well continue to see an increase in cormorant feeding. Stakeholders confirmed that without the depredation order, cormorant feeding habits have increased at an alarming rate. Moreover, allowing for increased measures to prevent damage on public lands while not allowing for the same measures at private facilities may serve to further increase the volume of cormorants feeding at these private facilities, as the cormorants may move to locations with less perceivable threats.

Individual take permit applications are a significant burden for small businesses. Low take limits for individual permits that are sometimes arbitrarily set by regional agency offices, make these permits inefficient. Under alternative A, small businesses would be required to continue to apply for individual take permits. One aquaculture farmer spoke about complications with having to apply and pay for two separate permits at two separate regional offices due to having farms in bordering states. In order to modify these permits to allow for additional take allocations, he stated he would have to pay an entirely new application fee each time. An aquaculture depredation order would eliminate these burdensome and time-consuming application requirements.

d. Alternative C as proposed may impose additional administrative costs and should be revised before being implemented.

In implementing an aquaculture depredation order under proposed alternative C, Advocacy cautions that the Service consider costs associated with record keeping, including the requirement to document revenue increases. Small businesses have indicated that collecting and reporting increased revenue data is not an adequate measure of the success of conflict management programs for the cormorant as this data may be influenced by many additional factors making it volatile and not indicative of successful management. The Service should consider other sources of data, and methods of data collection that would more adequately capture depredation order effects without overly burdening small businesses. Advocacy urges the Service to consult with industry directly to devise a cost-effective and more accurate method of data collection.²⁸

²⁵ See Comments of the National Aquaculture Association, (85 Fed. Reg. 34578) (filed on July 20, 2020) available at <https://www.regulations.gov/document?D=FWS-HQ-MB-2019-0103-2279>. Note that these sources have not been independently verified by Advocacy.

²⁶ See *id.* Note again that the sources relied upon in the comments have not been independently verified by Advocacy.

²⁷ See *id.*

²⁸ See *id.* The Service should review and consider the comments of small business with respect to data collection and methodology for tracking impacts of depredation orders.

Conclusions and Recommendations

Advocacy appreciates the opportunity to comment on this proposed rule. Based on the Service's own analysis and indications that alternative C has the same overall environmental impacts as alternative A, Advocacy encourages the Service to instead consider alternative C. This would minimize the burden to small entities and more adequately meet the Service's stated objectives for the rulemaking in attempting to better manage cormorant populations on both state and Tribal wildlife lands and aquaculture facilities.

If you have any questions or require additional information, please contact me or Assistant Chief Counsel Prianka Sharma at (202) 205-6938 or by email at prianka.sharma@sba.gov.

Sincerely,

/s/

Major L. Clark, III
Acting Chief Counsel
Office of Advocacy
U.S. Small Business Administration

/s/

Prianka P. Sharma
Assistant Chief Counsel
Office of Advocacy
U.S. Small Business Administration

Copy to: Paul Ray, Administrator
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