

## Submitted Electronically via eRulemaking Portal

The is a Comment on the **Fish and Wildlife Service (FWS) Proposed Rule: Migratory Bird Permits: Management of Conflicts Associated with Double-Crested Cormorants (Phalacrocorax auritus) Throughout the United States**

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### Comment

AFA Comment on Proposed Rule Migratory Bird Permits: Management of Conflicts Associated with Double-Crested Cormorants (Phalacrocorax auritus) Throughout the United States

Attorneys for Animals, Inc. (AFA) is a Michigan non-profit and 501(c)(3) organization of legal professionals and animal advocates. Founded in the 1990s, we actively follow legislative, administrative, and policy actions related to the welfare of animals, both in Michigan and nationwide.

We oppose the Proposed Rule (Rule) because, if finalized, it would be the most extensive program to kill double-crested cormorants, a non-invasive species protected under the Migratory Bird Treaty Act (MBTA), by supplementing the depredation program with newly designated "Potential Take Level" analyses which will expand the circumstances under which these birds can be taken, and result in more killing. It also gives more authority to States and Tribes. The Rule is based on poor science and poor public policy, and significantly undercuts the requirement of nonlethal methods to address perceived conflicts between double-crested cormorants and wild and stocked fisheries, when the scientific evidence is lacking and there already exists the use of depredation orders for such conflicts.

There is little evidence that double-crested cormorants contribute to significant mortality and losses in fisheries, while several "studies indicate that cormorants likely had little impact on sport-fish populations".[1]

The Rule ostensibly requires consideration of nonlethal alternatives. A federal court considering a previous attempt to control double-breasted cormorant populations ruled in 2016 that the government had not performed its due diligence in justifying the program, failing to seriously consider alternatives[2]. The Rule states that "prior to applying for permits to take cormorants, individuals and entities experiencing conflicts with cormorants should attempt nonlethal techniques to alleviate the conflict...States and Tribes must use nonlethal methods, and determine that those methods are ineffective, before lethally taking double-crested cormorants." [3] However, there is no demonstration that nonlethal methods were attempted or lacked success before proposing this Rule.

Further, the Rule explicitly states that the goal of the United States Fish and Wildlife Service (FWS) is "to reduce the number of conflicts with cormorants by combining lethal and nonlethal methods and

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allowing lethal take of cormorants only when supported by information that such take would reduce conflicts."[4]

Despite this, not only is there no discussion of previously attempted nonlethal methods, but there is no information supporting the assertion that the combined nonlethal/lethal take will result in fewer conflicts. Further, there is no guidance given States and Tribes on use of nonlethal methods.

As the Rule anticipates additional authority to the states in conducting lethal takings, this lack of guidance is amplified, and has the potential of nonlethal methods being ignored or glossed over.[5]

That states need such guidance is demonstrated by looking at Michigan. The state's Department of Natural Resources (MDNR) has been trying to control double-crested cormorant populations for years. This Rule has a significant impact on Michigan, home to nearly 55 percent of North America's double-crested cormorant population. The MDNR has engaged in lethal taking of double-crested cormorants for nearly two decades without notable success in addressing declining fish stock. In fact, in 2009 the state noted that the cormorant population had increased and requested that depredation permits be doubled.[6]

While there is also evidence that these populations are declining[7], what is notable is that the conflict their taking was designed to address continues to exist - evidence on its face that lethal taking does not reduce the conflict with fisheries. Yet the standard response, perpetuated in this Rule, is to authorize more killing. For example, as recently as 2018, FWS issued permits to kill over 18,000 cormorants in eight states, in addition to the thousands of depredation permits already available[8]. And all of this has not been enough to protect fish stocks, because, as AFA maintains, double-crested cormorants are not responsible for these declining fish stocks. Nor, we argue, will the additional takings authorized under the "Potential Take Level" analyses address the declining fish stocks, but will result in more double-crested cormorants being killed.

From the outset, this Rule is flawed in its premise that increased killing of cormorants will result in population reductions and reduced losses in fisheries. It is flawed in its continuing emphasis on lethal methods in the face of the inadequacy of these takings.

SEE ATTACHMENT FOR COMPLETE COMMENT

## Attachments (1)

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[Comment Management of Conflicts Associated with Double-Crested Cormorants 072020](#)

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July 20, 2020

Department of the Interior **Fish and Wildlife Service (FWS)** Proposed Rule:  
**Migratory Bird Permits: Management of Conflicts Associated with Double-Crested Cormorants (Phalacrocorax auratus) Throughout the United States**

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50 CFR Part 21

Docket No. ID: FWS-HQ-MB-2019-0103-1411

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**AFA Comment on Proposed Rule Migratory Bird Permits: Management of Conflicts Associated with Double-Crested Cormorants (Phalacrocorax auratus) Throughout the United States**

Attorneys for Animals, Inc. (AFA) is a Michigan non-profit and 501(c)(3) organization of legal professionals and animal advocates. Founded in the 1990s, we actively follow legislative, administrative, and policy actions related to the welfare of animals, both in Michigan and nationwide.

We oppose the Proposed Rule (Rule) because, if finalized, it would be the most extensive program to kill double-crested cormorants, a non-invasive species protected under the Migratory Bird Treaty Act (MBTA), by supplementing the depredation program with newly designated “Potential Take Level” analyses which will expand the circumstances under which these birds can be taken, and result in more killing. It also gives more authority to States and Tribes. The Rule is based on poor science and poor public policy, and significantly undercuts the requirement of nonlethal methods to address perceived conflicts between double-crested cormorants and wild and stocked fisheries, when the scientific evidence is lacking and there already exists the use of depredation orders for such conflicts.

There is little evidence that double-crested cormorants contribute to significant mortality and losses in fisheries, while several “studies indicate that cormorants likely had little impact on sport-fish populations”.<sup>[1]</sup>

The Rule ostensibly requires consideration of nonlethal alternatives. A federal court considering a previous attempt to control double-breasted cormorant populations ruled in 2016 that the government had not performed its due diligence in justifying the program, failing to seriously consider alternatives<sup>[2]</sup>.

The Rule states that “prior to applying for permits to take cormorants, individuals and entities experiencing conflicts with cormorants should attempt nonlethal techniques to alleviate the conflict...States and Tribes must use nonlethal methods, and determine that those methods are ineffective, before lethally taking double-crested cormorants.”<sup>[3]</sup> However, there is no demonstration that nonlethal methods were attempted or lacked success before proposing this Rule.

Further, the Rule explicitly states that the goal of the United States Fish and Wildlife Service (FWS) is “to reduce the number of conflicts with cormorants by combining lethal and nonlethal methods and allowing lethal take of cormorants only when supported by information that such take would reduce conflicts.”<sup>[4]</sup>

Despite this, not only is there no discussion of previously attempted nonlethal methods, but there is no information supporting the assertion that the combined nonlethal/lethal take will result in fewer conflicts. Further, there is no guidance given States and Tribes on use of nonlethal methods.

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That states need such guidance is demonstrated by looking at Michigan. The state’s Department of Natural Resources (MDNR) has been trying to control double-crested cormorant populations for years. This Rule has a significant impact on Michigan, home to nearly 55 percent of North America’s double-crested cormorant population. The MDNR has engaged in lethal taking of double-crested cormorants for nearly two decades without notable success in addressing declining fish stock. In fact, in 2009 the state noted that the cormorant population had increased and requested that depredation permits be doubled.<sup>[6]</sup>

While there is also evidence that these populations are declining<sup>[7]</sup>, what is notable is that the conflict their taking was designed to address continues to exist - evidence on its face that lethal taking does not reduce the conflict with fisheries. Yet the standard response, perpetuated in this Rule, is to authorize more killing. For example, as recently as 2018, FWS issued permits to kill over 18,000 cormorants in eight states, in addition to the thousands of depredation permits already available<sup>[8]</sup>. And all of this has not been enough to protect fish stocks, because, as AFA maintains, double-crested cormorants are not responsible for these declining fish stocks. Nor, we argue, will the additional takings authorized under the “Potential Take Level” analyses address the declining fish stocks, but will result in more double-crested cormorants being killed.

From the outset, this Rule is flawed in its premise that increased killing of cormorants will result in population reductions and reduced losses in fisheries. It is flawed in its continuing emphasis on lethal methods in the face of the inadequacy of these takings.

The scientific evidence is not sound. The FWS’s own 2017 court-ordered environmental assessment cited a lack of evidence demonstrating causality between declines in wild fish populations and the presence of cormorants,<sup>[9]</sup> while evidence exists that cormorants actually prey on invasive fish species in Michigan.<sup>[10]</sup>

Members of Congress, in a March 2020 letter to FWS urging swift action in expanding “depredation measures”, acknowledge that the agency does not currently have established “management and control

options for both wild fisheries and aquaculture facilities”. How then can there exist accurate data on these fish populations, let alone determine any decline is a result of double-crested cormorants<sup>[11]</sup>? It appears that Members of Congress, like FWS, have already decided the outcome will be lethal take, even if there is no sound policy justification for such action.

The FWS asserts in the Rule that increased authority of management to the States and Tribes will shift workload burdens to the States and Tribes “and less [borne] by the Service.”<sup>[12]</sup> AFA finds that shifting this economic burden to States and Tribes is tone-deaf given the current COVID situation. Additionally, this is inequitable given that different states have different cormorant populations and have experienced different economic issues from COVID.

Notably, this Rule has been proposed before FWS has finalized the National Environmental Policy Act (NEPA) analysis as required by law. FWS is putting the cart before the horse in proposing this Rule before required environmental analysis, leading AFA to conclude that FWS has already decided to finalize this Rule, regardless of whether justified by the environmental analysis.

### Conclusion

As the above analysis shows, FWS has proposed a flawed Rule that lacks a thorough analysis of the evidence supporting the conclusions it reaches, and the assumptions it makes: i.e., the perceived problems of the impact of double-crested cormorants on wild and stocked fish populations. It continues to rely on and expand lethal methods that have not worked before, this time giving more authority and responsibility to the states, such as Michigan, who likewise have had little success with these methods. FWS has not completed its required NEPA analysis before proposing this Rule, nor has it fully explored the environmental and economic impacts on individual States and Tribes resulting from this Rule.

The Proposed Rule must be withdrawn.

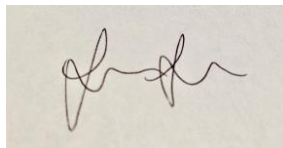
Very truly yours,

Attorneys for Animals, Inc.

By:



Beatrice M. Friedlander, JD  
Its President, Board of Directors



Lauren Saper, JD  
Member

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- [1] Michigan Department of Natural Resources. "Double-crested Cormorants in Michigan: A review of history, status, and issues related to their increased population." August 2005, [https://www.michigan.gov/documents/Cormorant\\_Report\\_136470\\_7.pdf](https://www.michigan.gov/documents/Cormorant_Report_136470_7.pdf)
- [2] [United States District Court, District of Columbia. \*Public Employees for Environmental Responsibility v. United States Fish and Wildlife Service.\*](#)
- [3] "Migratory Bird Permits: Management of Conflicts Associated with Double-Crested Cormorants (*Phalacrocorax auritus*) Throughout the United States," Title 50 Code of Federal Regulations, Pt. 21. 2020 ed.
- [4] *ibid*
- [5] Migratory Bird Permits: Management of Conflicts Associated with Double-Crested Cormorants (*Phalacrocorax auritus*) Throughout the United States," Title 50 Code of Federal Regulations, Pt. 21. 2020 ed. "States and Tribes would have the discretion to determine whether, when, where, and for which of the above purposes they would conduct lethal take within limits and allocations set by the Service" per the Summary
- [6] Kart, Jeff. "Michigan Wants to Double Its Cormorant Kill." *MLive*, 26 May 2009, [https://www.mlive.com/news/bay-city/2009/05/\\_by\\_jeff\\_kart\\_jkartbctimescom.html](https://www.mlive.com/news/bay-city/2009/05/_by_jeff_kart_jkartbctimescom.html)
- [7] Payette, Peter. "Demand to Kill Cormorants Grows in Great Lakes." *Michigan Radio*, 15 Aug. 2018, <https://www.michiganradio.org/post/demand-kill-cormorants-grows-great-lakes#:~:text=There%20are%20renewed%20calls%20to,after%20years%20of%20lethal%20control.&text=Interloc hen%20Public%20Radio's%20Peter%20Payette,to%20protect%20Great%20Lakes%20fish>
- [8] Capital News Service. "Killing Cormorants Legal Again." *Spartan Newsroom*, 13 Sept. 2018, <https://news.jrn.msu.edu/2018/04/killing-cormorants-legal-again/>
- [9] United States, Department of Interior, Fish and Wildlife Service. "Environmental Assessment for Issuing Depredation Permits for Double-crested Cormorant Management Division of Migratory Bird Management." November 2017, <https://www.fws.gov/migratorybirds/pdf/management/double-crested-cormorants/CormorantEA.pdf>
- [10] Capital News Service. "Killing Cormorants Legal Again." *Spartan Newsroom*, 13 Sept. 2018, <https://news.jrn.msu.edu/2018/04/killing-cormorants-legal-again/>
- [11] Bergman, Jack, et al. "Member Letter to US Fish and Wildlife Service." *Bergman.house.gov*, 6 Mar. 2020, [https://bergman.house.gov/uploadedfiles/cormorant\\_anpr\\_public\\_comment.pdf?utm\\_campaign=1862-424](https://bergman.house.gov/uploadedfiles/cormorant_anpr_public_comment.pdf?utm_campaign=1862-424)
- [12] "Migratory Bird Permits: Management of Conflicts Associated with Double-Crested Cormorants (*Phalacrocorax auritus*) Throughout the United States," Title 50 Code of Federal Regulations, Pt. 21. 2020 ed.