UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

KEN STROMBORG, *et al.*,	)	
	)	Case No. 14-1807-JDB
Plaintiffs	)	
	)	
v.	)	PLAINTIFFS' SUPPLEMENTAL
	)	BRIEF REGARDING REMEDY
UNITED STATES FISH AND WILDLIFE SERVICE, *et al.*	)	
	)	
Defendants	)	
	)	

PLAINTIFFS' SUPPLEMENTAL BRIEF REGARDING REMEDY

On March 29, 2016, this Court granted Plaintiffs' Motion for Summary Judgment and denied Defendants' Cross-Motion, but ordered supplemental briefing on the issue of remedy. *Mem. Op.* at 15-16, Doc. No. 36. This brief explains why remand with vacatur is appropriate and proposes a remediation plan to ensure that up-to-date scientific research informs the Agency's ultimate decision, as the National Environmental Policy Act ("NEPA") requires.

I. PROCEDURAL HISTORY

Plaintiffs claimed that Defendants violated NEPA, 42 U.S.C. § 4321, *et seq.* and the Administrative Procedure Act ("APA"), 5 U.S.C. § 706, *et seq.* by re-extending for another 5-year period two double crested cormorant ("DCCO") depredation orders ("the Orders") without preparing an Environmental Impact Statement ("EIS"); by relying on an insufficient Environmental Assessment ("EA") to support a Finding of No Significant Impact (FONSI"); and by failing to weigh reasonable alternatives. After considering summary judgment briefing and the administrative record, this Court concluded that FWS's 2014 EA failed to justify its FONSI,

pointing to two deficiencies in the EA without specifically reaching a determination on additional deficiencies that Plaintiffs identified. *Mem. Op.* at 9, n. 1, 13-14 (March 29, 2016).

The Court granted Plaintiffs' summary judgment motion and denied Defendants' cross-motion, concluding that the EA was deficient, but that the deficiencies made it impossible to determine whether an EIS is required. *Id*. at 15. The Court requested further briefing on the equities of diverging from the standard remedy of vacatur, and instructed the Parties to propose a remediation plan. *Id*. at 15- 16. The parties could not agree on a plan, and Defendants filed their brief on April 20, 2016 ("Defs' Br."), requesting remand without vacatur, offering to revise two discrete portions of the EA over a six month period, and suggesting – before having reviewed any updated information, alternatives, or public comments – that they already plan to re-issue the 5-year extension. Defs' Br. at 11. Defendants request that, should the Court remand and vacate the Orders, it stay the date of vacatur while they address the NEPA violations. *Id*. at 12. Herein, Plaintiffs oppose Defendants' remediation plan and their request for remand without vacatur.[1]

II. PLAINTIFFS' PROPOSED REMEDIATION PLAN

Plaintiffs propose that the Court vacate the Orders on remand, meaning that any verified localized DCCO conflicts could be addressed first through non-lethal methods of control (*see* Ludwig Decl. at ¶ 13(a)) and, in the event that this did not work, through individual Migratory Bird Treaty Act ("MBTA") permits (Ludwig Decl. at ¶ 13(b)). Plaintiffs additionally propose that Defendants address their NEPA violations by completing an EIS[2] that considers not only the

[1] The "stay of vacatur" that Defendants request in the alternative is functionally the same as a remand without vacatur. Thus, all of the arguments against remand without vacatur offered in this brief should be read as applying equally to Defendants' alternative request to stay vacatur.

[2] While Plaintiffs understand that the Court did not find the challenged EA to have provided enough information to indicate whether an EIS is necessary, Plaintiffs respectfully continue to believe, based on the reasons articulated in their motion for summary judgment, that one is required under the standards and definitions established by the Council on Environmental Quality. If, however, this Court requires only revision of the EA, then Plaintiffs urge that such revision include an examination of the factors listed in this section of their brief.

Orders' effect on DCCO populations and an array of reasonable alternatives, but also several other data gaps.

A. Non-lethal methods of DCCO control

Non-lethal means of controlling DCCO predation are available at any time without the need for a permit and have been shown to be successful. Ludwig Decl. at ¶ 13(a). Given that the targeted DCCO impacts are localized, harassment and other means to drive the birds away from localized areas such as aquaculture facilities, should be attempted before lethal means are employed. Moreover, the only means by which FWS could take a "hard look" at this alternative, as it proposes in its plan, would be to implement it and monitor its efficacy over time.

B. Individual permits

Where solid data indicate that DCCO negatively impact aquaculture facilities or fisheries, individual MBTA depredation permits are a workable means of control. Ludwig Decl. at ¶ 13(b). The Office of Management and Budget estimated the public reporting burden to be "from 15 minutes to 4 hours per response, with an average of 0.803 hours per response, including time for reviewing instructions, gathering and maintaining data, and completing and reviewing the forms." 50 C.F.R. § 21.4. This modest dedication of review time before setting aside MBTA protections for this species is an entirely reasonable and practical approach. Moreover, increased state and tribal fisheries planning would further streamline the permit issuance process.

This is the same approach employed for most migratory birds, including fish-eating ones. In addition, individual permits allow particular circumstances to be considered so that the depredation actions authorized address the problem and avoid needless negative consequences. This far preferable wildlife management approach will ensure that conflicts are addressed while FWS complies with NEPA without risking the harmful impacts – many of which have not been sufficiently studied – of the one-size-fits-all Orders covering 24 states.

C. FWS to conduct EIS to comply with NEPA

As detailed below, for a wildlife management action of this magnitude, FWS would have to address a number of impacts and factors beyond the cormorant population itself. An EIS would ensure FWS addresses the following data gaps it needs to fill to comply with NEPA by analyzing the Orders':

(1) effect on **fish populations** based on scientific studies and current data, taking into account other factors contributing to declines in fish stocks such as overfishing, toxins, and invasive species;

(2) effect on **DCCO populations**, based on data and not just modeling and taking into account the impacts of avian botulism, hard data on reproductive parameters, the impact on local populations, and updated kill counts from all states and projected kills from hunters who do not report them (as with 60% of those who participated in South Carolina's 2014 hunt);

(3) potential to harm **co-nesting birds and look-alike species**.

(4) implications for the introduction of **lead** into the environment, including an analysis of the percentages of kills made using center-fire rifles (for which bullets must contain no more than 1% lead) and rim-fire rifles (which do not require non-toxic shot);

(5) effect on the **aesthetic and existence values of the public** through a contingency valuation study, as the public may not agree with the underlying presumption that DCCO lack any redeeming qualities and possess no value either instrumental or intrinsic;

(6) implications for noncompliance with **international treaties** ratified by the Migratory Bird Treat Act of 1918 and its amendments; and

(7) implications for the **management of other native piscivorous water birds** that have more recently been scapegoated by angler advocacy groups (e.g., American white pelican, Caspian tern, common merganser).

These information gaps must be filled before the "hard look" promised by the FWS is anything more than a *pro forma* glance. Since "general statements about 'possible effects' and 'some risk' do not constitute a hard look absent justification regarding why more definitive information could not be provided," *Blue Mts. Biodiversity Project*, 161 F.3d at 1213 (citing *Neighbors of Cuddy Mountain*, 137 F.3d at 1380), the analysis for each factor must be based on actual data or must explain why more definitive information could not be provided.

III. DEFICIENCIES IN DEFENDANTS' PROPOSED PLAN

FWS proposes to have a new revised EA available for public comment by August 15th of this year. There are several problems with the Agency's plan:

A. It assumes the same outcome.

The Service is seeking another chance to justify extension of the Orders. It has structured this plan with a pre-determination of the outcome. It has already concluded even before it has begun that no EIS will be required, and that the chosen alternative with be another 5-year extension of the Orders. Ford Decl. at ¶ 6. Moreover, it plans to have a draft EA out for public comment two months before finishing the final documentation. Ford Decl. ¶ at 4. This suggests that the Service will be identifying a preferred alternative before it has assembled, let alone examined, the empirical evidence. As another court has observed under similar circumstances,

> APHIS's apparent position that it is merely a matter of time before they reinstate the same deregulation decision, or a modified version of this decision, and thus apparent perception that conducting the requisite comprehensive review is a mere formality, causes some concern that Defendants are not taking this process seriously.

Center for Food Safety v. Vilsack, 734 F. Supp. 2d 948, 953 (N.D. Cal. 2010). Defendants' stated plan should raise similar concerns.

B. It fails to consider a full range of alternatives

FWS proposes to look at what it characterizes as four alternatives. Ford Decl. at ¶ 10. In reality, however, it is only offering two. Alternative 1 (rescission of Orders) and Alternative 3 (non-lethal means only) are the same, since non-lethal means do not require a permit. *See* Ford Decl. at ¶ 18. Similarly Alternative 2 ("addition of more stringent requirements in some state(s) if needed) and Alternative 4 (increased buffer zones and more localized control) are also strikingly similar –continuing the Order with some slight mitigation of their damaging aspects.

Nor does FWS propose to examine a number of alternatives originally considered in 2003 or those proposed by commenters in response to the Agency's November 8, 2011 request for comments, including a regional population reduction alternative; preventive measures such as netting or wire over aquaculture ponds; other measures that would improve fish populations; a two-year extension of the Orders; and public education to improve public acceptance and appreciation of this species. Thus, it cannot be said that the Agency's plan would meet NEPA's requirement that the agency consider a full range of reasonable alternatives.

C. It omits consideration of an array of impacts

FWS proposed to revise its analysis only as to one factor: the Orders' effect on cormorant populations. While this is an important factor, it is far from the only factor the Agency should fully analyze to achieve NEPA compliance. Public comments on its 2014 EA raised a number of impacts that the Service did not and still does not appear prepared to address, including but certainly not limited to:

- The Orders' impact on fish populations, as well as other factors contributing to declines in fish stocks such as overfishing, toxins, and invasive species;

- The environmental implications of using lead bullets to kill cormorants. The Service in its regulation prohibited lead shot in centerfire ammunition by January 2017, but the commenters noted that this prohibition did not include rim-fire rifles;
- Impacts on look-alike species such as the anhinga and the neotropic cormorant, which might be killed when mistakenly identified as their double-crested cousins; and
- The effects of the Texas program's non-compliance with the PRDO by allowing take on private lands and South Carolina's extensive public hunts in 2014, 2015, and 2016.

FWS's proposed plan is also deficient in failing to factor in DCCOs' positive ecological effects and the Orders' negative ecological impacts, as further discussed below.

D. It lacks a commitment of resources

The Agency's NEPA violations arose in large measure from its refusal or inability to dedicate the resources necessary to complying with NEPA. Now, FWS proposes an effort to quickly attain NEPA compliance, but makes no specific commitment of any resources to accomplish the rewrite of the EA. In the final year of the Obama administration, FWS is embroiled in a number of high-profile wildlife-related legal issues involving species ranging from the grizzly bears and gray wolves of the Northern Rockies to the manatees of Florida. It is unclear where the Agency, in the midst of these intense legal battles, will be able to identify and dedicate the financial resources needed to implement its plan.

In addition, the Court is being asked to accept that FWS can in fact complete a rewrite that is acceptable in roughly 90 days without any indication of who will accomplish this task, their credentials, the other resources the Agency will apply to the tasks required, and how it will address the many gaps that exist in their data. Nor is the Agency proposing to have its new DCCO population modeling peer reviewed or to take any steps to ensure that it will produce a

hastily re-written EA that will survive the public comment period intact and fully meet the requirements of NEPA.

E. It allows insufficient time for information gathering

Another unresolved question is whether FWS can gather the appropriate data to do the proper EA it claims to be able to do in approximately 90 days. Simply put, it cannot. Ludwig Decl. at ¶ 11. It is unclear how FWS could address its identified data gaps without monitoring through multiple nesting seasons.

F. It continues to allow public hunting

FWS's plan does not propose to remedy the loophole that South Carolina has used to allow virtually untrained private citizens to participate in DCCO hunts, nor does it address noncompliance issues in Texas where individuals may pay for a permit allowing them to shoot DCCO on private land. FWS's plan does not address the current problems of lack of appropriate oversight and enforcement.

IV. LEGAL ARGUMENT

A. D.C. Circuit cases employing an exception to the presumptive remedy of vacatur for APA violations do not implicate the same concerns as the instant case.

The APA's plain language provides that if a court concludes an agency action is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," it "*shall* . . . hold unlawful and set aside" the agency action. 5 U.S.C. § 706(2)(A) (emphasis added). The Supreme Court and the D.C. Circuit have so held. *Fed. Commc'n Comm'n v. NextWave Personal Commc'ns, Inc*., 537 U.S. 293, 300 (2003) ("The [APA] requires federal courts to set aside federal agency action that is 'not in accordance with law.'" (citation omitted)); *Fed. Power Comm'n v. Transcon. Gas Pipe Line Corp*., 423 U.S. 326, 331 (1976) ("If the decision of the agency 'is not sustainable on the administrative record made, then the . . . decision must be

vacated and the matter remanded.'" (quoting *Camp v. Pitts*, 411 U.S. 138, 143 (1973))); *Comcast Corp. v. FCC*, 579 F.3d 1, 10 (D.C. Cir. 2009) (Randolph, J., concurring) ("the APA could not be clearer. . .'Set aside' means vacate . . ."). *Humane Soc'y of U.S. v. Johanns*, 520 F. Supp. 2d 8, 37 (D.D.C. 2007) ("Pursuant to the case law in this Circuit, vacating a rule or action promulgated in violation of NEPA is the standard remedy") (citations omitted).

Injunctive relief is particularly important in the NEPA context for the reasons the D.C. Circuit Court explained in *Realty Income Trust v. Eckerd*, 564 F.2d 447 (D.C. Cir. 1977). "Ordinarily when an action is being undertaken in violation of NEPA, there is a presumption that injunctive relief should be granted against continuation of the action until the agency brings itself into compliance," even where "substantial additional costs" may result. *Id*. at 456.

Injunction is important where the challenged analysis failed to consider adverse consequences, since a proper one might reveal factors that affect the final decision. *Id*. Additionally, as an agency invests more time and resources into a chosen course of action, "the greater becomes the likelihood that compliance with section 102 of the NEPA, and the reconsideration of the project in light of section 101, will prove to be merely an empty gesture," effectively narrowing the agency's freedom of choice.[3] *Id*. (citation omitted). Thus, courts:

> should not prejudge the reconsiderations that agencies will make once the full environmental consequences of the action have been determined. . . . "It may be that preparation of the statement will, in the end not move the agency from adherence to decisions it has already made. But it is not for the courts to prejudge." But it may also be true that preparation of an EIS will, in the end, move an agency to a fresh and a different rebalancing of the costs and benefits of its previous decisions, thus vindicating the refusal to prejudge.

[3] FWS argues that leaving the order in place will not narrow its freedom of choice, Defs' Br. at 6, but this is factually incorrect. If the Agency decides to proceed with an alternative that limits or does not involve killing cormorants, all the birds that were killed in the interim cannot be brought back to life.

Id. at 456-57 (quoting *Jones v. D.C. Redevelopment Land Agency*, 499 F.2d 502, 513 (1974)). The Court noted that the presumption of injunction could be overcome when "countervailing equities are exceptional," such as where delay could threaten national defense. *Id*. at 457.

More recently, the D.C. Circuit has explained a two-part test for balancing equities in APA cases by requiring an analysis of the seriousness of the order's deficiencies and the disruptive consequences of vacatur. *Allied-Signal, Inc. v. U.S. Nuclear Regulatory Commission,* 988 F.2d 146 (D.C. Cir. 1993). "[T]he second Allied-Signal factor is weighty only insofar as the agency may be able to rehabilitate its rationale for the regulation." *Comcast Corp. v. FCC*, 579 F.3d 1, 9 (D.C. Cir. 2009). Thus, leaving in place a rule promulgated in violation of the APA may be appropriate where the deficiencies are minor and vacatur would have substantial disruptive consequences. The D.C. Circuit Court has chosen to do so in a few broad categories of cases (cases from which Defendants cherry pick quotations for their brief), but upon examination, these raise concerns that are simply not present in the instant case.

1. Vacatur would preserve the status quo.

The D.C. Circuit has used this exception in non-NEPA cases that presented the futile conundrum of a proverbial egg that could not be unscrambled, making it impossible to preserve the status quo ante. *See, e.g.*, *Allied-Signal,* 988 F.2d at 152 (vacatur would entail refunding fees that had already been collected); *Milk Train, Inc. v. Veneman*, 310 F.3d 747, 755-756 (D.C. Cir. 2002)[4] (subsidy funds distributed three years prior were not recoverable); *Sugar Cane Growers Coop. v. Veneman,* 289 F.3d 89, 97 (D.C. Cir. 2002) (crops had been plowed under pursuant to the program launched, making vacatur effectively impossible).

[4] It is worth noting that in *Milk Train*, the Court was considering whether to remand or vacate, not whether accompany a remand with vacatur, as in the case at bar.

In the instant case, the status quo ante is the situation that would have occurred had the Orders expired as designed rather than being renewed, wherein human-DCCO conflicts are addressed through harassment techniques (which require no permits) or location-specific individual permits under the Migratory Bird Treaty Act ("MBTA," which require applicants to describe the areas where the depredations are occurring and the nature and extent of the injury, 50 C.F.R. § 21.41(b)). A return to this status quo may require some extra effort, but nothing makes it physically impossible or futile.

Defendants somewhat circularly argues that because they have been renewed the Orders several times before, the status quo is actually leaving the Orders in place. While it is easy to understand FWS's logic, it is also easy to see that this logic would eviscerate NEPA by enabling agencies to take major actions affecting the environment before completing NEPA review, then continue these actions while the comply with NEPA on the basis that the action's existence is the "status quo."

2. Defendants' position begs the question

The D.C. Circuit has also used the exception in non-NEPA cases where an agency might be able to justify its action. *See, e.g., Allied-Signal,* 988 F.2d at 152 (agency might have been able to explain its disparate treatment of licensees); *Milk Train,* 310 F.3d at 756 (agency might have been able to explain the use of 1999 funds to pay for economic losses not incurred in 1999 in a manner consistent with the statute, or use an allocation method to correct the problem.)

Here, FWS cannot – nor does it attempt to – justify or explain away the EA's gross inadequacies. Rather, FWS makes the unsupported assertion that there is a "serious possibility" it will ultimately re-approve the 5-year extension, Defs' Br. at 4, yet this Court has already observed that the deficiencies in FWS' EA make it impossible to determine "whether an EIS, rather than just an EA, is required," *Mem. Op.* at 15 (March 29, 2016); certainly it is equally

impossible to determine which course of action FWS will choose after conducting a thorough and good faith review of up-to-date analyses and objectively considering feasible alternatives.

3. Lack of vacatur ensures affirmative harm

The D.C. Circuit has additionally used the exception in non-NEPA cases where plaintiffs did not allege that a challenged rule would result in affirmative harm, only that the rule did not go far enough. *See, e.g., Fertilizer Inst. v. United States EPA*, 935 F.2d 1303 (D.C. Cir. 1991) (plaintiffs complained that exemptions to an EPA rule were not broad enough, not that they should be rescinded); *Advocates for Hwy. & Auto Safety v. Fed. Motor Carrier Safety Admin*., 429 F.3d 1136 (D.C. Cir. 2005) (plaintiffs challenged a Department of Transportation rule as not protective enough, not because it would cause harm). In such cases, vacatur was unnecessary because even challengers agreed that the action taken was better than no action at all.

In the instant case, Plaintiffs do not concede that the challenged re-extension would do no affirmative harm; to the contrary, without vacatur, tens of thousands of large migratory birds native throughout their range which are otherwise protected by the Migratory Bird Treaty Act will be killed while FWS revises its EA; this is an irreversible harm.

4. There are no health or safety risks from vacatur

Finally, the D.C. Circuit has used the exception where vacatur could raise public health and safety risks. *See, e.g., Fertilizer Inst.*, 935 F.2d 1312 (altering an EPA rule would leave the Agency unable to "respond adequately to serious safety hazards"); *Advocates for Hwy. & Auto Safety*, 429 F.3d at 1136 (implicating public safety because the rule imposed standards for training drivers of heavy vehicles); *Winter v. NRDC, Inc*., 555 U.S. 7, 33 (U.S. 2008) (injunction could be "jeopardizing national security."); *Nat. Resources Defense Council, Inc. v. U.S. Nuclear Regulatory Com.*, 606 F.2d 1261, 1272-1273 (D.C. Cir. 1979) (declining to halt the construction

of storage tanks for high level radioactive waste while the agency considered other design and safety features because existing tanks were leaking nuclear waste).

The instant case presents no safety hazards. As explained below, any detrimental economic or environmental effects are speculative and to the extent that such effects could be identified at specific locations, are readily dealt with through harassment techniques and individual Migratory Bird Treaty Act permits.

B. Even under the Allied-Signal analysis, however, vacatur is necessary because the EA's deficiencies are very serious and FWS has not convincingly shown that a return to the status quo will be substantially disruptive.

As explained above, the instant case simply does not implicate the concerns present in cases in this Circuit involving remand without vacatur. However, even applying the Allied-Signal analysis, vacatur remains the proper remedy.

1. The deficiencies in the Agency's EA are significant

In a NEPA case involving remand without vacatur, the D.C. Circuit Court declined to issue an injunction while the Navy revised its Final EIS because the Navy had "taken no arbitrary or capricious action here but has attempted to comply in good faith with the mandates of NEPA . . . especially since we have found that the Navy gave proper weight to environmental considerations." *Concerned about Trident v. Rumsfeld*, 555 F.2d 817, 830 (D.C. Cir. 1976).

Here, FWS so flagrantly violated NEPA's mandate to take a "hard look" at the environmental consequences of a proposed action that this Court found it "hard to imagine a 'softer' look." *Mem. Op.* at 9. The deficiencies the Court identified (the failure to properly examine the Orders' effects on DCCO populations and to consider alternatives) as well as the additional deficiencies Plaintiffs identified strike at the very heart of NEPA, which ensures that no federal agency undertakes a major action without first considering its environmental consequences and weighing alternatives. If the renewal is allowed to stand, a significant

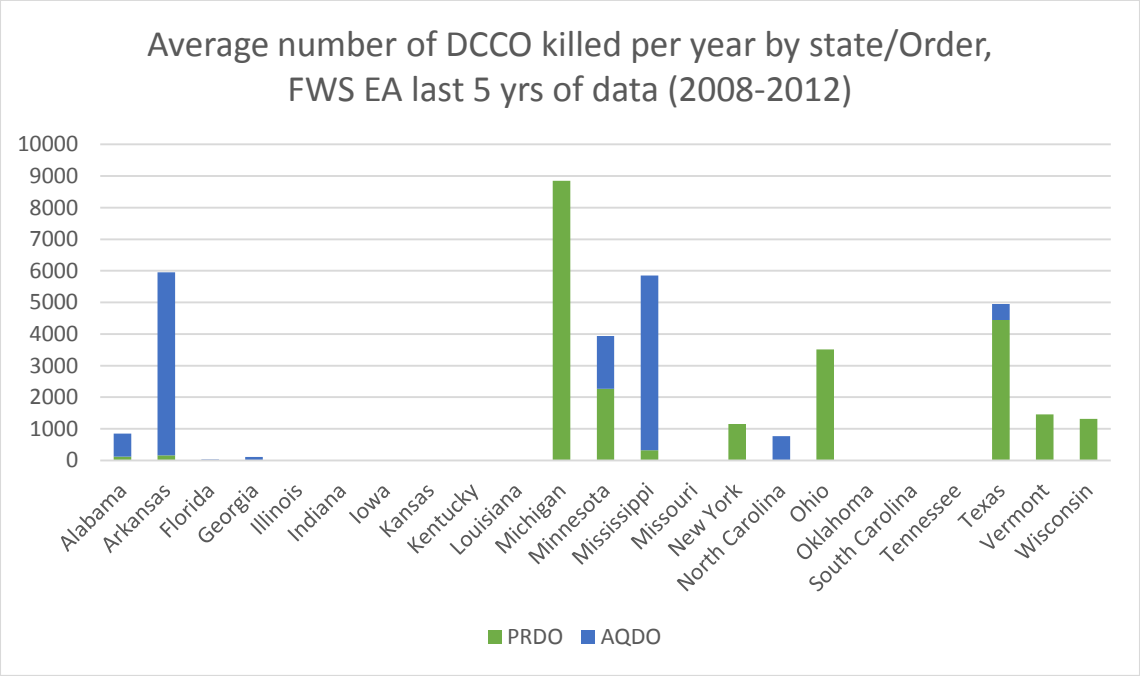
additional number of DCCO will be killed and eggs oiled, and the cumulative effects of these additional killings are unknown since FWS has not analyzed them. They could alter ecosystems, threaten sub-populations of DCCO, or potentially even appreciably affect the species as a whole.

2. Vacatur while FWS corrects its NEPA violations will not cause disruptive consequences significant enough to warrant keeping the Orders in place.

FWS has not shown that vacatur would cause significantly disruptive consequences. *See, e.g., Ctr. for Food Safety v. Vilsack*, 734 F.Supp.2d 948, 953 (N.D. Cal. 2010) (applying DC Circuit law to find vacatur appropriate where USDA "failed to fully consider the potential consequences" of transgenic crop approval, and finding potential economic harm insufficient to limit vacatur because no environmental harm from vacatur shown).

a. As a preliminary matter, most states covered by the Orders do not use them.

It is worth pointing out that most states do not use either Order, or do so only minimally. This graph was compiled using the last five years of data provided in the EA that Plaintiffs challenge, found on pages 1932 (AQDO) and 1934 (PRDO) of the Administrative Record.



FWS has provided no argument as to how vacatur could possibly harm the vast majority of the states covered by the Orders.

b. Aquaculture producers.

Defendants claim that aquaculture producers will be harmed by vacatur. Def. Br. at 8 and Ford Decl. at ¶ 16. However, as Plaintiff Dennis Wild observes in his declaration, FWS uses decade old-figures from the short-lived economic peak of the aquaculture industry, which has steeply declined in recent years. Wild Remedy Decl. at ¶¶ 5-7.

This Court has emphatically rejected, the context of the EA's DCCO population analyses, conclusions based on stale data as unsubstantiated, *Mem. Op.* at 9, and should similarly reject FWS's unsubstantiated claim that vacatur would appreciably harm aquaculture. Notably absent from FWS's filings any evidence at all that the AQDO has helped the aquaculture industry since its enactment in 1998. Accordingly, vacatur is appropriate. If the Court vacates the Orders, aquaculture producers will still be able to apply for individual depredation permits under the MBTA as needed to address any significant cormorant-related damage.

c. Recreational fishing.

Indeed, as Defendants' own EA admits, no appreciable connection has been shown between DCCO and fish populations, and indeed, in the thirteen years during which both Orders have been in place, FWS cannot cite to a single study showing that the fishing industry has been improved by the Orders' existence. In attempting to convince this Court that vacating the Orders will impact recreational fishing, Defendants cite to one lone study that used computer models to estimate the impact of cormorant damage to a recreational fishery in central New York from 1990 through 2009. Ford Decl. at 7. However, this study has been harshly criticized; as explained in Wires 2014,

> The agency hypothesized that increasing cormorant numbers were directly responsible for a large decline in the number of nonresident fishing licenses sold between 1990 and 2005. The agency then projected losses in revenue due to declines in money that would have otherwise been spent by anglers on food, lodging, gas, and supplies. Those hypothetical losses were further projected in order to estimate indirect impacts on other sectors of the economy that would arise from local businesses making fewer purchases of goods and services from other industries. The purportedly far-reaching impact of cormorants led the agency to consider an annual budget of $3.5 million for cormorant control at Oneida Lake to be cost-effective. However, many factors could have influenced the declining number of nonresident anglers. But besides cormorants, the only factors the agency considered were the higher costs of fishing licenses and a downward trend in outdoor recreation in general, both of which were dismissed as unlikely causes. But significant changes in the nation's economy occurring during the same period may have affected people's expenditures on recreational activities. Additionally, a national survey conducted by the USFWS reported interest in fishing peaked in 1991, and then was followed by a declining trend nationally, with about a 16 percent reduction in the number of anglers documented between 1991 and 2006.

Moreover, the study was conducted by Wildlife Services, an agency with a clear conflict of interest because it stands to receive large amounts of funding to address the purported damage. In contrast, Plaintiff James Ludwig has explained that the vast majority of published cormorant predation studies report that the birds generally have inconsequential effects on fish populations, and that many studies suggest that they feed primarily upon invasive species that are not fished recreationally. Ludwig Decl. at ¶¶ 3-4, 7-8.

FWS also raises the specter of minority and low income communities losing income, claiming that tribal biologists with the Grand Traverse Bay Band ("GTTB") "are concerned" about DCCO predation. In reality, reports the tribe submitted to FWS show that they have not done any DCCO control for the last few years because the birds have been at or below maintenance level, and the tribe never provided any data to demonstrate losses from DCCOs in the first place. *See* Ex. 1 and 2, reports from the tribe for 2013 and 2014.

In short, just as it has relied on speculation and anecdotal evidence to renew the Orders time and again, FWS now uses the same faulty rationale to urge this Court to leave the Orders in

place while it attempts to remedy its NEPA violations. This Court should apply the presumptive remedy of vacatur because FWS has not convincingly shown that vacatur would harm fisheries.

d. Co-nesting species and vegetation

Defendants made the bald assertion that "FWS estimates that, without the Orders, the cormorant population would increase and stabilize at higher numbers, leading to detrimental impacts to colonial waterbirds and other co-nesting species." Defs. Br. at 7; Ford Decl. at ¶ 13. As Dr. Ludwig explains, this theory does not take into account recent kill totals or recent research showing that DCCO do *not* impact co-nesting species, and is also based on stale data from a time period when DCCO consumed different types of fish. Ludwig Decl. at ¶ 5-6. He explains why the photograph included with Mr. Ford's declaration should not be considered. *Id*., at ¶ 14. He also explains how habitat modification by DCCO can *benefit* co-nesting species. *Id*., at ¶ 9(b). DCCO are not an invasive or nuisance species; they are a native species for which habitat modification and natural competition for space are simply facets of living. Because FWS has not convincingly demonstrated any appreciable harm from vacatur, this remains the appropriate remedy. Individual MTBA permits can address any specific locations where demonstrated adverse effect occur.

e. Verified human-DCCO conflicts can be dealt just as conflicts with other species of migratory birds are: through individual permits under the Migratory Bird Treaty Act.

Ending the Orders would not preclude states from managing DCCO conflicts. Before the Orders' enactment, individuals, organizations, and government agencies wishing to take DCCO simply had to apply to FWS for a DCCO depredation permit; indeed, FWS had been issuing such permits since 1986. Such permits can last up to one year, and applicants must describe the area where depredations were occurring and the nature and extent of the injury. 50 C.F.R. § 21.41(b)). As noted above, the Office of Management and Budget estimated a fairly minimal

administrative burden for obtaining these permits. Additionally, the Migratory Bird Treaty Act allows a common technique called harassment, whereby particular areas are protected through scaring or hazing birds away, without requiring any permit at all. See 50 C.F.R. § 21.41(a).

Through harassment efforts and individual permits – both of which remain live options should this Court rescind the Orders as Plaintiffs propose – states can manage any resource conflicts that may arise while FWS addresses its NEPA violations. The Orders provide more flexibility because they authorize commercial freshwater aquaculture producers (the AQDO) and states and tribes (the PRDO) to kill cormorants without seeking an individual permit, but FWS has not shown, nor can it show, harm from the absence of this element of convenience.

Defendants offer many vague statements hypothesizing about the effect vacatur would have on FWS, states, and tribes, the number of individual MBTA permits that will be sought if the Orders are vacated is unknown and completely speculative. As noted above, reliance on these orders varies widely in the covered states. In essence, FWS is arguing that the states, tribes, and industry cannot be bothered to obtain individual take permits, as is currently required for lethal removal of most other MBTA-protected bird species. Not only is this argument unsupported, but it also ignores the reality that the states, tribes, and industry would have to be more selective in seeking permits and prioritize on the basis of need relative to their budgets.

It should also be noted that double-crested cormorants not the only fish-eating aquatic fowl for which states, tribes, and industry seek MBTA depredation permits. If these entities have to undertake comprehensive planning to justify individual permits for these other birds, it is unclear why they would have a unique and onerous burden for analyzing the same fish species that are also part of the cormorant diet. In addition, the implications of the Agency's argument is that states and tribes would be harmed or unduly burdened by undertaking responsible resource

planning in order to obtain individual permits. This ignores the benefits states and tribes would gain from a better understanding of the management objectives they are trying to achieve for the fish populations they want to conserve –and whether they are meeting those objectives.

Since states and tribes derive revenue from licenses sold for recreational take of these fish species, the ancillary benefits from having states and tribes derived from planning and increasing their knowledge base should also be factored into the calculus.

Finally, the Defendant's argument about administrative burden seems to rest on the questionable premise that taking illegal shortcuts is more convenient and less costly. But as the Court has noted, lack of resources cannot be used as an excuse for violation of NEPA or –we would argue – the MBTA. In short, although FWS offers vague speculation about the effects of an influx of applications, a departure from the standard remedy of vacatur is unwarranted.

f. FWS does not address the deleterious environmental effects that will occur if the Orders remain in effect.

If the Orders continue during the period of time needed to complete a comprehensive analysis under NEPA, a significant additional number of DCCO will be killed and eggs oiled. The cumulative effects of these additional killings, which would not occur but for the Orders, are unknown since FWS has not analyzed them, but they could alter ecosystems, threaten sub-populations of DCCO, or potentially even appreciably affect the species as a whole. Unintended deleterious impact to other species – which FWS fails to recognize – will also occur, such as when co-nesting species are harmed by DCCO shootings, culls by other means, and undisciplined visits to cormorant colonies. Ludwig Decl. ¶ 10. This is an additional reason why this Court should vacate the Orders, returning the situation to *the status quo ante* in which the Orders were supposed to expire until additional research could be conducted.

Further, if the Orders remain in effect, public resources will not receive the *benefits* that DCCOs provide – benefits that FWS's brief fails to recognize, let alone balance. The Agency's position rests on the unexamined premise that cormorants are a nuisance species for which the public interest would be served only by their removal. For example, there are numerous peer-reviewed papers that show unequivocally that cormorants prey upon invasive species and help to control the deleterious impacts of those species on the ecosystems they have disrupted. Due to the harm posed by and done by invasive species (most recently the round goby) to ecosystem integrity, the Service ignores all beneficial ecosystem services provided by cormorants at no cost. Ludwig Decl. at ¶ ¶ 4, 6, 8 and 9(a). Consequently, continuation of the Orders would risk the loss of these ecological services that certainly benefit some game fish populations and, in that regard, would therefore not be in the public interest. Ludwig Decl.¶ at 3.

3. The balance of impact strongly supports vacatur.

FWS mischaracterizes the Plaintiffs' interest as only aesthetic and recreational. In fact as detailed in these and other filings, our interest is primarily ecological. Its NEPA violations denote an inflexible and almost ideological (i.e., that cormorants can only be seen as a nuisance species) approach to wildlife management which is not rooted in science. In this regard, the Court should also weigh the tremendous ecological harm done in states such as Texas and South Carolina, where poor oversight from FWS has facilitated massive violations of the Orders' conditions. These states allow lethal removal without limit by civilians even – in the case of Texas – on private land. Significantly, when discussing alternatives, FWS mentions "more stringent requirements in some state(s) if needed," Ford Decl. at ¶ 10, an apparent reference to Texas and South Carolina. But the Agency never elaborates on why those more stringent requirement would be needed and how those abusive practices should be weighed in the

balance.[5] Instead, weighed against concrete ecological harm and a poorly managed mass removal of cormorants, FWS offers unquantified and speculative costs of unspecified duration.

Based on the above, the court may conclude safely that there is no reasonable evidence that vacating the Orders will harm sport or commercial fisheries. Further, the evidence available indicates significant beneficial ecosystem effects will be one result of more cormorant predation on burgeoning populations of invasive species that are known to harm sport fisheries. Finally, a finding that it is in the public interest to vacate the depredation orders is well-supported by the historic and recent peer-reviewed scientific literature.

In short, FWS has not come close to meeting its burden to show why an exception to the presumptive remedy of vacatur would apply. Not allowing the Orders to expire would negate NEPA's core purpose by allowing uninformed, environmentally harmful action to continue. *See, e.g.*, *Sierra Club*, 719 F. Supp. 2d at 80 ("Because intervenors intend on continuing development pursuant to the permit, vacatur is appropriate in order to prevent significant harm resulting from keeping the agency's decision in place"); *cf. Nat. Res. Def. Council v. EPA*, 676 F. Supp. 2d 307, 317 (S.D.N.Y. 2009) ("Vacating the EPA's registrations of this potentially harmful insecticide furthers the environmental and agricultural interests FIFRA aims to protect and vindicates FIFRA's procedural requirements"). Only remand with vacatur will fulfill NEPA's purpose of

[5] Indeed, Texas should no longer be in the program at this point. In the Federal Register announcement of the renewal (Federal Register 2014) FWS stated:

> We appreciate the commenters bringing this issue [non-compliance with terms of PRDO] to our attention. Texas Administrative Code Rule § 65.901 appears not to comply with 50 CFR 21.48 because it allows take of DCCOs on private land even though the DCCOs are not necessarily linked to any adverse effect on public resources. We will work with the State of Texas on this issue, and if the State does not revise its code to match the provisions of 50 CFR 21.48, we will remove Texas from the list of States that are authorized to implement the Public Resource Depredation Order.

To date, the state of Texas has not revised its code and yet, incredibly, the PRDO is still fully operational in Texas. This Court should not leave the task of imposing "more stringent requirements" in FWS's hands, as it has already proven itself unwilling or incapable of doing so.

ensuring that federal agencies meaningfully consider the potential environmental impacts of a proposed action before undertaking that action. See 40 C.F.R. § 1506.1(a)-(b); 42 U.S.C. § 4332(C)(v). Absent vacatur while FWS corrects its NEPA violations, FWS's compliance with NEPA would become a mere bureaucratic formality.

V. CONCLUSION

For the reasons explained above, a consideration of the equities does not demonstrate any reason to diverge from the standard remedy of vacatur. The Court should vacate the Orders and remand the matter to FWS to remedy its NEPA violations.

Respectfully submitted on May 6, 2016.

/s/ Paula Dinerstein
PAULA DINERSTEIN
D.C. Bar No. 333971
Public Employees for Environmental Responsibility
962 Wayne Ave, Suite 610
Silver Spring, MD 20910
Phone: (202) 265-7337
Fax: (202) 265-4192