

1 UNITED STATES COURT OF APPEALS

2 FOR THE SECOND CIRCUIT

3 August Term, 2007

4 (Argued: November 9, 2007

Decided: August 14, 2008

5 Errata filed: September 18, 2008)

6 Docket No. 05-2603-cv

7 -----  
8 THE FUND FOR ANIMALS, HUMANE SOCIETY OF THE UNITED STATES,  
9 DEFENDERS OF WILDLIFE, ANIMAL RIGHTS FOUNDATION OF FLORIDA,  
10 DONALD FEARE, GUSTAV W. VERDERBER, JULIE BAKER, KRISTI GHOLSON,  
11 COLLETTE ADKINS GIESE, MARIAN PROBST,

12 Plaintiffs-Appellants,

13 - v -

14 DIRK KEMPTHORNE, Secretary of the Interior, H. DALE HALL, Fish  
15 and Wildlife Service Director, CHUCK CONNER, Acting Secretary of  
16 Agriculture, and CINDY SMITH, Administrator of the  
17 Animal and Plant Health Inspection Service,  
18

19 Defendants-Appellees.

20 -----  
21 Before: McLAUGHLIN, CABRANES, and SACK, Circuit Judges.

22 Appeal from a judgment of the United States District  
23 Court for the Southern District of New York (P. Kevin Castel,  
24 Judge) granting the defendants' motion for summary judgment and  
25 dismissing plaintiffs' claims challenging the defendants' Public  
26 Resource Depredation Order, 50 C.F.R. § 21.48, as a violation of  
27 treaty obligations and federal statutes.

28 Affirmed.

1 KIMBERLY D. OCKENE, Meyer Glitzenstein &  
2 Crystal (Howard M. Crystal, Eric R.  
3 Glitzenstein, Meyer Glitzenstein &  
4 Crystal, Washington, DC; and Leonard D.  
5 Egert, Amy Trakinski, Egert  
6 & Trakinski, New York, NY, of counsel),  
7 Washington, DC, for Plaintiffs-  
8 Appellants.

9 SARAH S. NORMAND, Assistant United  
10 States Attorney (Michael J. Garcia,  
11 United States Attorney for the Southern  
12 District of New York, and Sara L.  
13 Shudofsky, Assistant United States  
14 Attorney, of counsel), New York, NY, for  
15 Defendants-Appellees.

16 SACK, Circuit Judge:

17 The plaintiffs appeal from a judgment of the United  
18 States District Court for the Southern District of New York (P.  
19 Kevin Castel, Judge), which, among other things, dismissed on a  
20 motion for summary judgment their claims challenging the Public  
21 Resource Depredation Order, 50 C.F.R. § 21.48 (the "Depredation  
22 Order"), on the grounds that it violates treaty obligations of  
23 the United States and federal statutes. We consider on appeal  
24 whether the defendants issued the Depredation Order in compliance  
25 with the Migratory Bird Treaty Act ("MBTA"), 16 U.S.C. § 703 et  
26 seq., the Administrative Procedure Act ("APA"), 5 U.S.C. § 706,  
27 the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4321  
28 et seq., and international treaties relating to the treatment of  
29 migratory birds to which the United States is a party.

30 **BACKGROUND**

31 The plaintiffs are individuals who, and organizations  
32 whose members, derive pleasure from observing water birds known

1 as double-crested cormorants ("cormorants") in their natural  
2 habitat. These birds are not protected by the Endangered Species  
3 Act, 16 U.S.C. § 1531 et seq., but their treatment is regulated  
4 by international treaties to which the United States is a party,  
5 and by federal statutes and regulations. The Fish and Wildlife  
6 Service ("FWS") has been delegated primary responsibility for  
7 regulating migratory birds, including cormorants. See Migratory  
8 Bird Permits; Regulations for Double-Crested Cormorant  
9 Management, 68 Fed. Reg. 12,653, 12,653 (Mar. 17, 2003).

10 The plaintiffs brought this action to challenge the  
11 Depredation Order, which, they allege, violates the relevant  
12 treaties and statutes by "authoriz[ing] state fish and wildlife  
13 agencies, Indian Tribes, and U.S. Department of Agriculture . . .  
14 employees to kill an unlimited number of federally protected  
15 double-crested cormorants in New York and twenty-four other  
16 States, without any restrictions on time of year or location of  
17 the killings, without any advance notice to the FWS, and without  
18 any showing of specific, localized harm caused by the  
19 cormorants." Compl. ¶ 1.

20 Because they are migratory birds, cormorants regularly  
21 cross national boundaries. Prior to 1916, the treatment of these  
22 birds was regulated by individual nations within their own  
23 borders, making it difficult for any individual country to  
24 protect their populations from over-hunting or other harm. In  
25 order to create a "uniform system" for migratory birds that  
26 passed through their territories, the United States in 1916

1 negotiated a treaty with the United Kingdom, acting on behalf of  
2 Canada, to coordinate protection of certain bird populations.  
3 See Convention Between the United States of America and the  
4 United Kingdom of Great Britain and Ireland for the Protection of  
5 Migratory Birds in the United States and Canada, U.S.-Gr. Brit.,  
6 Proclamation, Aug. 16, 1916, 39 Stat. 1702 ("U.K. Convention").  
7 Similar treaties were later entered into by the United States  
8 with Mexico in 1936, Japan in 1972, and the Soviet Union in 1976.  
9 See Convention between the United States of America and the  
10 United Mexican States for the Protection of Migratory Birds and  
11 Game Mammals, U.S.-Mex., Feb. 7, 1936, 50 Stat. 1311 ("Mexico  
12 Convention"); Convention between the Government of the United  
13 States of America and the Government of Japan for the Protection  
14 of Migratory Birds and Birds in Danger of Extinction, and Their  
15 Environment, U.S.-Japan, Mar. 4, 1972, 25 U.S.T. 3329; Convention  
16 between the United States of America and the Union of Soviet  
17 Socialist Republics Concerning the Conservation of Migratory  
18 Birds and Their Environment, U.S.-U.S.S.R., Nov. 19, 1976, 29  
19 U.S.T. 4647. Each of these treaties lists the birds that are  
20 protected under its terms. Only the Mexico Convention, as  
21 amended in 1972, explicitly applies to cormorants.

22 The original 1936 Mexico Convention provides, in  
23 pertinent part:

24 ARTICLE I. In order that the species may not  
25 be exterminated, the [United States and  
26 Mexico] declare that it is right and proper  
27 to protect birds denominated as migratory . .  
28 . by means of adequate methods which will  
29 permit, in so far as the respective high

1 contracting parties may see fit, the  
2 utilization of said birds rationally for  
3 purposes of sport, food, commerce and  
4 industry.

5 ARTICLE II. The [United States and Mexico]  
6 agree to establish laws, regulations and  
7 provisions to satisfy the need set forth in  
8 the preceding Article, including:

9 A) The establishment of close seasons,  
10 which will prohibit in certain periods  
11 of the year the taking of migratory  
12 birds . . . .

13 . . . .

14 C) The limitation of their hunting to  
15 four months in each year, as a maximum,  
16 under permits issued by the respective  
17 authorities in each case.

18 D) The establishment of a close season  
19 for wild ducks . . . .

20 . . . .

21 ARTICLE IV. . . . [T]he following birds shall  
22 be considered migratory:

23 Migratory game birds. . . . .

24 Migratory non-game birds. . . . .

25 Mexico Convention, arts. I, II, IV, 50 Stat. at 1312-14. The  
26 1972 amendments to the Mexico Convention added the cormorant  
27 family of birds, but did not specify whether it was a game or  
28 non-game bird. See Agreement between the Government of the  
29 United Mexican States and the Government of the United States of  
30 America Amending Article 4 of the Convention for the Protection  
31 of Migratory Birds and Game Mammals, Signed at Mexico City on  
32 February 7, 1936, U.S.-Mex., Mar. 10, 1972, 23 U.S.T. 260  
33 ("Mexico Convention 1972 Amendments"). It is undisputed for  
34 present purposes that the cormorant is a non-game bird.

1           The MBTA implements these treaties as federal law. It  
2 was first enacted in 1918 to reflect the mandates of the U.K.  
3 Convention, and later amended to reflect each of the subsequently  
4 negotiated treaties. The statute makes it "unlawful at any time,  
5 by any means or in any manner," inter alia, to "take" birds  
6 listed in the relevant treaties. 16 U.S.C. § 703(a). To "take"  
7 a bird means "to pursue, hunt, shoot, wound, kill, trap, capture,  
8 or collect, or attempt to pursue, hunt, shoot, wound, kill, trap,  
9 capture, or collect" it. 50 C.F.R. § 10.12.

10           The MBTA also delegates authority to the United States  
11 Secretary of the Interior,

12           from time to time, having due regard to the  
13 zones of temperature and to the distribution,  
14 abundance, economic value, breeding habits,  
15 and times and lines of migratory flight of  
16 such birds, to determine when, to what  
17 extent, if at all, and by what means, it is  
18 compatible with the terms of the conventions  
19 to allow hunting, taking, capture, killing,  
20 possession, sale, purchase, shipment,  
21 transportation, carriage, or export of any  
22 such bird, or any part, nest, or egg thereof,  
23 and to adopt suitable regulations permitting  
24 and governing the same, in accordance with  
25 such determinations, which regulations shall  
26 become effective when approved by the  
27 President.

28           16 U.S.C. § 704. This authority has been subdelegated by the  
29 Secretary to the FWS. See 50 C.F.R. § 10.1.

30           When migratory birds converge in large numbers, they  
31 may consume large quantities of local plants, fish, or other  
32 species. In doing so, they may harm commercial activity  
33 dependent on those species. For example, as the cormorant  
34 population has grown over the past several decades, the FWS has

1 received increasing numbers of complaints from fishermen and  
2 operators of aquaculture facilities, such as commercial catfish  
3 farms, asserting that cormorants are responsible for plundering  
4 the same fish that they seek to gather, cultivate, and sell.

5 When migratory birds cause, or are about to cause, such  
6 acts of "depredation,"<sup>1</sup> the FWS may, upon application, issue a  
7 permit that allows a person to take migratory birds for  
8 depredation control purposes. See 50 C.F.R. § 21.41.

9 Applications for such permits must include, inter alia, "(1) A  
10 description of the area where depredations are occurring; (2) The  
11 nature of the crops or other interests being injured; (3) The  
12 extent of such injury; and (4) The particular species of  
13 migratory birds committing the injury." Id. Permittees are  
14 subject to a variety of conditions, including limitations on the  
15 manner in which the birds in question may be killed and the  
16 proper methods of disposing of their remains. Id.

17 As an alternative to individual permits, the FWS may,  
18 "[u]pon the receipt of evidence clearly showing that migratory  
19 game birds have accumulated in such numbers in a particular area  
20 as to cause or about to cause serious damage to agricultural,  
21 horticultural, and fish cultural interests . . . issue by  
22 publication in the Federal Register a depredation order . . . ."  
23 50 C.F.R. § 21.42. Such an order must state explicitly that it  
24 is an "emergency measure designed to relieve depredations only"

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<sup>1</sup> "[A]n act of plundering, despoiling, or making inroads."  
Webster's Third International Dictionary Unabridged 606 (2002).  
The FWS regulations do not define the word.

1 and it must impose certain restrictions on the manner in which  
2 birds may be killed. Id.

3 In addition to these general provisions for addressing  
4 depredations, the FWS also provides specific rules for  
5 depredation orders that have been issued relating to specific  
6 species. See 50 C.F.R. §§ 21.43-46. The rules referred to above  
7 were all in effect prior to and at the time of the FWS's  
8 promulgation of the orders at issue in this appeal.

#### 9 Agency Proceedings

10 In response to complaints that cormorants' fish-eating  
11 habits were becoming increasingly costly to aquaculture and other  
12 industries, the FWS in 1998 adopted an Aquaculture Depredation  
13 Order, 50 C.F.R. § 21.47, allowing the taking of cormorants  
14 without a permit when they are found committing or about to  
15 commit acts of depredation on aquaculture stocks, subject to  
16 various conditions and only within thirteen enumerated states.  
17 See id. This provision was amended when the FWS adopted the  
18 Depredation Order at issue in this appeal.

19 In response to continued complaints of cormorant-  
20 related depredations, and an increase in complaints unrelated to  
21 aquaculture, the FWS in 1999 issued a Notice of Intent to develop  
22 a "national cormorant management plan" with an accompanying  
23 Environmental Impact Statement ("EIS") as required by NEPA.  
24 Migratory Bird Permits; Notice of Intent To Prepare an  
25 Environmental Impact Statement and National Management Plan for  
26 the Double-Crested Cormorant, 64 Fed. Reg. 60,826 (Nov. 8, 1999);



1 see also 42 U.S.C. § 4332(2)(C). The FWS also formed a  
2 "Cormorant Team" consisting of staff members from various FWS  
3 offices which consulted with the U.S. Department of Agriculture's  
4 Animal and Plant Health Inspection Service ("APHIS"). The team  
5 evaluated methods of managing the cormorant population. In  
6 December 2001, it released a Draft EIS ("DEIS") for public  
7 comment. Notice of Availability; Draft Environmental Impact  
8 Statement on Double-Crested Cormorant Management, 66 Fed. Reg.  
9 60,218 (Dec. 3, 2001). The DEIS presented "six management  
10 alternatives to address biological and socioeconomic resource  
11 conflicts associated with cormorants." Id. They included: 1) no  
12 action (continuation of existing cormorant management practices);  
13 2) only non-lethal management techniques; 3) expansion of  
14 existing cormorant management policies; 4) a new depredation  
15 order; 5) reduction of regional cormorant populations; and 6)  
16 frameworks for a cormorant hunting season. Id. From these  
17 alternatives, the team recommended the fourth, proposing in the  
18 DEIS the adoption of a new depredation order "to allow public  
19 resource managers greater flexibility in dealing with cormorant  
20 conflicts while ensuring Federal oversight via reporting and  
21 monitoring requirements." Id.

22 The proposed depredation order, as described by the  
23 DEIS, "authoriz[es] State, Tribal, and Federal land management  
24 agencies to implement a [cormorant] management program, while  
25 maintaining Federal oversight of [cormorant] populations via  
26 reporting and monitoring requirements." U.S. Fish and Wildlife

1 Service, Draft Environmental Impact Statement: Double-Crested  
2 Cormorant Management 17 (2001), available at  
3 [http://www.fws.gov/migratorybirds/issues/cormorant/deis/chapter2.](http://www.fws.gov/migratorybirds/issues/cormorant/deis/chapter2.pdf)  
4 pdf (last visited July 22, 2008). These land management agencies  
5 would be allowed to take cormorants without a permit "to protect  
6 biological resources . . . on public lands and waters," though  
7 they were to "utilize non-lethal management tools to the extent  
8 they consider[ed] appropriate." Id. at 18. The agencies would  
9 be required to keep records of all activities and report this  
10 data to the FWS annually. Id. at 19. The FWS reserved the  
11 authority "to immediately suspend or revoke any Agency's  
12 authority under [the proposed depredation order]" if the agency  
13 did not adhere to the terms specified in the order, if the FWS  
14 determined that cormorants no longer posed a threat to public  
15 resources, or if the viability of cormorant populations were  
16 threatened. Id.

17 In March 2003, the FWS published a proposed rule  
18 reflecting slight modifications of the proposed depredation order  
19 as described in the DEIS. Migratory Bird Permits; Regulations  
20 for Double-Crested Cormorant Management, 68 Fed. Reg. 12,653  
21 (proposed Mar. 17, 2003) (to be codified at 50 C.F.R. pt. 21).  
22 Among other changes, the proposed rule reduced the number of  
23 states to which the proposed depredation order would apply from  
24 forty-eight to twenty-four, identified with greater specificity  
25 the agencies to which the order would apply, restricted its  
26 applicability to land and freshwater (therefore excluding

1 saltwater), and allowed more methods for taking cormorants. Id.  
2 at 12,654. It also noted that "[w]hile the [FWS] has the primary  
3 responsibility for regulating [cormorant] management, on-the-  
4 ground management activities are largely carried out by entities  
5 such as State fish and wildlife agencies, wildlife damage control  
6 agencies such as the Wildlife Services program of [APHIS] and, in  
7 some cases, by private citizens." Id.

8 The FWS published its final EIS in August 2003 and  
9 issued a final rule on October 8, 2003. See Notice of  
10 Availability; Final Environmental Impact Statement on  
11 Double-Crested Cormorant Management, 68 Fed. Reg. 47,603 (Aug.  
12 11, 2003); Migratory Bird Permits; Regulations for Double-Crested  
13 Cormorant Management ("Final Rule"), 68 Fed. Reg. 58,022 (Oct. 8,  
14 2003). The Final Rule established the Depredation Order, 50  
15 C.F.R. § 21.48, and amended the Aquaculture Depredation Order, 50  
16 C.F.R. § 21.47.

17 Before issuing the order, the FWS reviewed studies  
18 related to the growth, breeding, and travel patterns of  
19 cormorants in North America. Based on what it considered to be  
20 the available science, the agency concluded that:

21 (1) [Cormorants] are generalist predators  
22 whose diet varies considerably between  
23 seasons and locations and tends to reflect  
24 fish species composition; (2) The present  
25 composition of cormorant diet appears to have  
26 been strongly influenced by human-induced  
27 changes in the natural balance of fish  
28 stocks; (3) "Impact" can occur at different  
29 scales, such that ecological effects on fish  
30 populations are not necessarily the same as  
31 effects on recreational or commercial  
32 catches, or vice versa; (4) Cormorant impact

1 is generally most significant in artificial,  
2 highly managed situations; and (5) Because  
3 environmental and other conditions vary  
4 locally, the degree of conflicts with  
5 cormorants will vary locally.

6 Final Rule, 68 Fed. Reg. at 58,025. The FWS noted that in  
7 addition to the losses at aquaculture facilities resulting from  
8 cormorant depredations, cormorants could also have an adverse  
9 impact on other birds and local vegetation. Id.

10 In its final form, the Depredation Order "authorizes  
11 State fish and wildlife agencies, Federally recognized Tribes,  
12 and State Directors of the Wildlife Services program . . . to  
13 prevent depredations on the public resources of fish . . . ,  
14 wildlife, plants, and their habitats by taking without a permit  
15 double-crested cormorants found committing or about to commit,  
16 such depredations." 50 C.F.R. § 21.48(c)(1). The rule requires  
17 the initial use of non-lethal control methods, id. § 21.48(d)(1),  
18 applies only to cormorants, id. § 21.48(d)(7), and mandates  
19 specific measures intended to limit the impact of control efforts  
20 on species protected under the Endangered Species Act,  
21 id. § 21.48(d)(8). Agencies acting pursuant to the Depredation  
22 Order must, for each year in which they intend to act, provide "a  
23 one-time written notice" to the FWS indicating their intent to  
24 act under the Depredation Order, id. § 21.48(d)(9), and they must  
25 notify the FWS in writing thirty days in advance if any "single  
26 control action . . . would individually, or a succession of such  
27 actions . . . would cumulatively, kill more than 10 percent of  
28 the double-crested cormorants in a breeding colony,"

1 id. § 21.48(d)(9)(i). The FWS has the power to prohibit such  
2 activity if the FWS deems it "a threat to the long-term  
3 sustainability of double-crested cormorants or any other  
4 migratory bird species." Id. § 21.48(d)(9)(ii). Agencies are  
5 also required to submit annual reports describing their  
6 activities under the Depredation Order, including numbers of  
7 cormorants killed and nests whose eggs were oiled,  
8 id. § 21.48(d)(10)-(11), and the FWS reserves the right to  
9 suspend or revoke the authority of any person acting pursuant to  
10 the Depredation Order, id. § 21.48(d)(13). In addition to  
11 adopting the Depredation Order, the FWS expanded the Aquaculture  
12 Depredation Order to allow cormorants to be taken at their winter  
13 roost sites. Final Rule, 68 Fed. Reg. at 58,031.

#### 14 District Court Proceedings

15 In February 2004, the plaintiffs filed a complaint in  
16 the United States District Court for the Southern District of New  
17 York challenging, inter alia, the FWS's adoption of the  
18 Depredation Order, asserting that it was contrary to treaties to  
19 which the United States is a party, federal statutes, and FWS  
20 regulations. The parties all eventually moved for summary  
21 judgment.

22 In a Memorandum and Order filed March 29, 2005, the  
23 district court concluded that the Depredation Order is not in  
24 conflict with the MBTA because it balances the factors set forth  
25 by the MBTA and determines "'when, to what extent, if at all, and  
26 by what means' the taking of [cormorants] is permissible." Fund

1 for Animals v. Norton, 365 F. Supp. 2d 394, 408-11 (S.D.N.Y.  
2 2005) (quoting 16 U.S.C. § 704(a)). To the extent that the MBTA  
3 requires a national approach to migratory bird management, the  
4 district court reasoned, the requirement is not in conflict with  
5 the Depredation Order's limited delegation of discretion to state  
6 agencies and regional branches of the FWS because the FWS "has  
7 not abdicated its authority, or granted states free reign over  
8 management of the cormorant population," particularly in light of  
9 the Depredation Order's notice requirements and limits placed on  
10 the manner in which cormorants may be taken. Id. at 410-11. The  
11 district court also concluded that the Depredation Order does not  
12 conflict with the Mexico Convention. Although the Convention  
13 requires that each nation establish "close seasons" during which  
14 takings are prohibited, the district court deferred to the FWS's  
15 view that this provision applies only to the category of game  
16 birds, which the parties agree does not include the cormorant.  
17 Id. at 412-14.

18 The district court rejected the plaintiffs' argument  
19 that the defendants' adoption of the Depredation Order was  
20 arbitrary and capricious, and contrary to the APA, for it found  
21 that the record adequately demonstrates that: 1) the double-  
22 crested cormorant adversely affects public resources; 2) the  
23 Depredation Order is a reasonable method of effectuating the  
24 goals of the MBTA; and 3) the Depredation Order does not conflict  
25 with the FWS's internal regulations. Id. at 414-23. The court

1 also determined that the defendants had complied with the  
2 requirements of NEPA by issuing the final EIS. Id. at 427-34.

3 The district court therefore granted the defendants'  
4 motion for summary judgment, dismissing all of the plaintiffs'  
5 claims.

6 The plaintiffs appeal the judgment of the district  
7 court, but only as to some of the issues it decided.<sup>2</sup>

## 8 DISCUSSION

### 9 I. Standard of Review

10 "We review de novo a district court's ruling on  
11 cross-motions for summary judgment, in each case construing the  
12 evidence in the light most favorable to the non-moving party."  
13 White River Amusement Pub, Inc. v. Town of Hartford, 481 F.3d  
14 163, 167 (2d Cir. 2007). Our review of the Depredation Order  
15 under the APA, however, is limited. We may reverse an agency's  
16 informal rulemaking if it was "arbitrary, capricious, an abuse of  
17 discretion, or otherwise not in accordance with law." 5 U.S.C. §  
18 706(2)(A); see also, e.g., Nat'l Black Media Coal. v. FCC, 822  
19 F.2d 277, 280 (2d Cir. 1987). An agency's factual findings must  
20 be supported by "substantial evidence," i.e., "less than a  
21 preponderance, but more than a scintilla." Cellular Tel. Co. v.  
22 Town of Oyster Bay, 166 F.3d 490, 493-94 (2d Cir. 1999).  
23 Substantial evidence "means such relevant evidence as a

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<sup>2</sup> The plaintiffs have declined to challenge on appeal the validity of the Aquaculture Depredation Order, 50 C.F.R. § 21.47, or the question of whether the Depredation Order violates the Endangered Species Act, 16 U.S.C. § 1532 et seq.

1 reasonable mind might accept as adequate to support a  
2 conclusion." Universal Camera Corp. v. NLRB, 340 U.S. 474, 477  
3 (1951) (internal quotation marks and citation omitted). "The  
4 reviewing court must take into account contradictory evidence in  
5 the record, but the possibility of drawing two inconsistent  
6 conclusions from the evidence does not prevent an administrative  
7 agency's finding from being supported by substantial evidence."  
8 Am. Textile Mfrs. Inst., Inc. v. Donovan, 452 U.S. 490, 523  
9 (1981) (internal quotation marks and citations omitted). When an  
10 agency makes a decision in the face of disputed technical facts,  
11 "[a] court must be reluctant to reverse results supported  
12 by . . . a weight of considered and carefully articulated expert  
13 opinion." Fed. Power Comm'n v. Florida Power & Light Co., 404  
14 U.S. 453, 463 (1972).

15 In evaluating agency reasoning, we must be satisfied  
16 that the agency examined the relevant data and established a  
17 "rational connection between the facts found and the choice  
18 made." Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins.  
19 Co., 463 U.S. 29, 43 (1983) (internal quotation marks and  
20 citation omitted).

21 The agency's action should only be set aside  
22 [if] it 'relied on factors which Congress has  
23 not intended it to consider, entirely failed  
24 to consider an important aspect of the  
25 problem, offered an explanation for its  
26 decision that runs counter to the evidence  
27 before the agency, or is so implausible that  
28 it could not be ascribed to a difference in  
29 view or the products of expertise.'



1 Cellular Phone Taskforce v. FCC, 205 F.3d 82, 90 (2d Cir. 2000)  
2 (quoting State Farm, 463 U.S. at 43), cert. denied, 531 U.S. 1070  
3 (2001).

4 II. Whether the Depredation Order Violates the MBTA

5 The plaintiffs argue that by delegating "management  
6 authority" to the states and other agencies, the Depredation  
7 Order violates the MBTA's requirement that any killings of  
8 protected birds be specifically authorized by the FWS. We agree  
9 with the district court, however, that the discretion granted to  
10 these third parties is limited and subject to adequate oversight  
11 by the FWS, and that the Depredation Order therefore does not  
12 contravene the MBTA.

13 Delegation of statutory responsibility by federal  
14 agencies and officers to outside parties is problematic because  
15 "lines of accountability may blur, undermining an important  
16 democratic check on government decision-making," U.S. Telecom  
17 Ass'n v. FCC, 359 F.3d 554, 565 (D.C. Cir.), cert. denied, 543  
18 U.S. 925 (2004), and because outside parties, whether private or  
19 sovereign, might not "share the agency's national vision and  
20 perspective," id. at 566 (internal quotation marks omitted). We  
21 agree with the D.C. Circuit that, absent statutory authorization,  
22 such delegation is impermissible. Id.

23 The MBTA authorizes the Secretary of the Interior "to  
24 determine when, to what extent, if at all, and by what means"  
25 takings may occur, 16 U.S.C. § 704(a), and "to adopt suitable  
26 regulations permitting and governing the same," id., but the

1 statute does not specifically provide for this authority to be  
2 delegated to third parties. Because any unauthorized delegation  
3 of this authority beyond the agency would be impermissible, our  
4 inquiry focuses on whether the Depredation Order is, in fact,  
5 such a delegation.

6 An agency delegates its authority when it shifts to  
7 another party "almost the entire determination of whether a  
8 specific statutory requirement . . . has been satisfied," U.S.  
9 Telecom, 359 F.3d at 567, or where the agency abdicates its  
10 "final reviewing authority," Nat'l Park & Conservation Ass'n v.  
11 Stanton, 54 F. Supp. 2d 7, 19 (D.D.C. 1999). Agencies may seek  
12 advice and policy recommendations from outside parties, but they  
13 may not "'rubber-stamp' decisions made by others under the guise  
14 of seeking their 'advice.'" U.S. Telecom, 359 F.3d at 568. If  
15 all it reserves for itself is "the extreme remedy of totally  
16 terminating the [delegation agreement]," Nat'l Park, 54 F. Supp.  
17 2d at 20, an agency abdicates its "final reviewing authority,"  
18 id. at 19.

19 In the case at bar, the authority delegated by Congress  
20 to the FWS under the MBTA bears little resemblance to the far  
21 narrower band of discretion afforded to those acting under the  
22 Depredation Order. The MBTA requires the Secretary "to determine  
23 when, to what extent, if at all, and by what means, it is  
24 compatible with the terms of the conventions" to permit takings  
25 and killings of migratory birds. By contrast, third parties  
26 acting pursuant to the Depredation Order are limited to takings

1 of cormorants, and cormorants only, and even then, solely "to  
2 prevent depredations on the public resources of fish . . . ,  
3 wildlife, plants, and their habitats." 50 C.F.R. § 21.48(c).  
4 Even if we accept the plaintiffs' warning that the term  
5 "depredation" is not explicitly defined by the FWS and could  
6 include birds engaging in the natural behavior of eating fish  
7 with no evidence of harm to a fish population overall, the  
8 Depredation Order nonetheless restricts the species, locations,  
9 and means by which takings in response to such depredations could  
10 occur, thereby restricting the discretion that may be exercised  
11 by third parties acting under the Order.

12 The Depredation Order therefore does not represent a  
13 delegation of authority but is, instead, a permissible "grant of  
14 permission [conditioned] on the decision of another entity, such  
15 as a state, local, or tribal government, . . . [with] a  
16 reasonable connection between the outside entity's decision and  
17 the federal agency's determination." U.S. Telecom, 359 F.3d at  
18 567. By adopting a rule that provides local agencies discretion  
19 to determine what constitutes a "depredation" within a localized  
20 context, the FWS was exercising its "broad permitting authority"  
21 while incorporating "obviously relevant local concern[s] as . . .  
22 element[s] of its decision process." Id.

23 As a practical matter, of course, by issuing the  
24 Depredation Order, the FWS has limited its ability to regulate in  
25 advance those takings that are authorized by the Order. In this  
26 regard, the Depredation Order differs from the permit and

1 rulemaking system for handling requests for depredation permits  
2 set forth at 50 C.F.R. §§ 21.41-21.42, which prohibits  
3 depredation control efforts unless the FWS first affirmatively  
4 issues a permit or order, and which requires the FWS to consider  
5 beforehand evidence of damage caused or about to be caused by  
6 migratory birds. There is, however, no statutory requirement  
7 that the FWS provide prior authorization in the form of a permit  
8 for specific takings of migratory birds. The MBTA mandates only  
9 "suitable regulations permitting and governing" takings. 16  
10 U.S.C. § 704(a). The regulations restricting the taking of  
11 migratory birds, even in the absence of an advance permitting  
12 scheme, satisfy this statutory requirement.

13 It is also worth noting that the FWS does retain some  
14 authority to regulate takings under the Depredation Order before  
15 they occur. For example, the FWS must be notified 30 days in  
16 advance of depredation control efforts that would "kill more than  
17 10 percent of the double-crested cormorants in a breeding colony"  
18 and may prevent any such efforts with simple notification. 50  
19 C.F.R. § 21.48(d)(9)(i)-(ii). It may also suspend or revoke the  
20 authority of third parties to act pursuant to the Depredation  
21 Order if they do not adhere to the Order's "purpose, terms, and  
22 conditions" or if the "long-term sustainability of double-crested  
23 cormorant populations is threatened." Id. § 21.48(d)(13).  
24 Finally, the Depredation Order requires third parties acting  
25 under it to submit annual reports detailing their activities.  
26 The reports are required to include, among other things, an

1 assessment of the effectiveness of control efforts, a description  
2 of efforts made to minimize incidental takings, and a tally of  
3 the number of cormorants and other migratory birds killed.

4 Id. § 21.48(d)(10). In light of this oversight power and  
5 monitoring authority, the FWS is amply equipped to monitor the  
6 nationwide status of cormorant populations and to respond to  
7 long-term effects on the species.

8 We conclude that the Depredation Order does not violate  
9 the MBTA.

10 III. Whether the Depredation Order Conflicts with  
11 Treaties to Which the United States Is a Party

12 Article II(A) of the Mexico Convention -- the only  
13 treaty that refers specifically to cormorants -- requires "[t]he  
14 establishment of close seasons, which will prohibit in certain  
15 periods of the year the taking of migratory birds . . . ."  
16 Mexico Convention, art. II, 50 Stat. at 1312. The plaintiffs  
17 interpret this provision to apply to all migratory birds --  
18 whether or not they are game birds. In their view, the  
19 Depredation Order's failure to provide for a close season renders  
20 the order contrary to the treaty and therefore in violation of  
21 the MBTA. See 16 U.S.C. § 704 (providing that the MBTA is  
22 "[s]ubject to the provisions [of] and [designed] in order to  
23 carry out the purposes of the conventions"). We think that the  
24 Mexico Convention itself is ambiguous regarding the question of  
25 whether the "close seasons" requirement applies to all migratory  
26 birds. We therefore defer to the FWS's reasonable view that the

1 Convention requires a close season only for the category of game  
2 birds, which the parties agree do not include the cormorant.

3 "Respect is ordinarily due the reasonable views of the  
4 Executive Branch concerning the meaning of an international  
5 treaty." El Al Isr. Airlines, Ltd. v. Tsui Yuan Tseng, 525 U.S.  
6 155, 168 (1999); see also Sumitomo Shoji America, Inc. v.  
7 Avagliano, 457 U.S. 176, 184-85 (1982) ("Although not conclusive,  
8 the meaning attributed to treaty provisions by the Government  
9 agencies charged with their negotiation and enforcement is  
10 entitled to great weight.").

11 We will not create ambiguity where none exists, but the  
12 text and structure of the Mexico Convention do not express a  
13 clear intent regarding the need for a close season for all  
14 migratory birds, as opposed to game birds -- a category that does  
15 not include cormorants. Article II(A) refers to "the taking of  
16 migratory birds," not the taking of "all migratory birds." That  
17 section, moreover, creates an exception for "private game farms."  
18 And Article II(C) specifies the minimum length of a close season  
19 when "their hunting" would be limited, implicitly referring back  
20 to the "migratory birds" referenced in subpart (A). These  
21 provisions addressing hunting can reasonably be read to suggest  
22 that the "migratory birds" at issue in Article II(A) include only  
23 those that are hunted, i.e., game birds.

24 The distinction drawn in Article IV between game birds  
25 and non-game birds does little to clarify the meaning of Article  
26 II(A) in this regard. The fact that the states parties to the

1 treaty made this distinction makes it clear enough that they were  
2 aware of the differences between the two. They therefore could  
3 have specified "migratory game birds" at Article II(A) had they  
4 meant that the requirement of close seasons applied only to game  
5 birds. But it is also possible that they viewed this distinction  
6 as implied by the kinds of protection described in Article II,  
7 some of which clearly apply only to game birds, and some of which  
8 do not.

9           The plaintiffs suggest that the references to hunting  
10 at subpart (C), and to game farms at subpart (A) restrict the  
11 meaning of subpart (A)'s "migratory birds" only for those  
12 specific purposes. The "close season" requirement remains  
13 applicable to all migratory birds. Even if we accept this  
14 argument, however, there is nothing in the text or structure of  
15 Article II that would foreclose the defendants' contrary  
16 interpretation. The plaintiffs' interpretation of Article II(A)  
17 is not unreasonable, but the treaty does not unambiguously  
18 require such an interpretation. The agency's view -- that  
19 Article II(A) refers only to migratory game birds -- is also a  
20 reasonable one, and we therefore are required to accept it.<sup>3</sup>

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<sup>3</sup> The plaintiffs also argue that even if Article II(A) is ambiguous, the defendants' interpretation is not entitled to deference under Chevron U.S.A., Inc. v. Natural Res. Def. Council, 467 U.S. 837, 842-43 (1984), because the agency never expressly adopted this interpretation during the administrative process. Even if the FWS's interpretation had not been adopted prior to this litigation, however, it appears that we would still accord deference to the executive branch view concerning the meaning of the Mexico Convention. See United States v. De La Pava, 268 F.3d 157, 164 n.6 (2d Cir. 2001) (accepting the State Department's view concerning rights under the Vienna Convention,

1 IV. Whether the FWS Acted Arbitrarily or Capriciously  
2 in Adopting the Depredation Order

3 The plaintiffs contend that the FWS acted arbitrarily  
4 and capriciously in adopting the Depredation Order. In their  
5 view, the Order "authoriz[ed] a full-scale assault on the  
6 protected birds" in the absence of evidence that cormorants were  
7 having a widespread impact. Appellants' Br. at 46. We disagree.

8 Although the Depredation Order applies to about half  
9 the states, depredation control efforts pursuant to the  
10 Depredation Order may take place only when cormorants are found  
11 "committing or about to commit" depredations and under specified  
12 conditions. See 50 C.F.R. § 21.48(c)(1). By so limiting control  
13 efforts, the Depredation Order provides a "rational connection  
14 between the facts found and the choice made" and is therefore  
15 neither arbitrary nor capricious. See State Farm, 463 U.S. at 43  
16 (internal quotation marks omitted).

17 As the plaintiffs observe, the FWS does not provide  
18 evidence that cormorants have a "widespread impact" on public  
19 resources. Appellants' Br. at 46. But it is the FWS's position  
20 that the agency was not required to make any such finding to  
21 support the Depredation Order. In its review of studies  
22 addressing the impact of cormorants on various types of public  
23 resources, the FWS noted that "negative impacts are typically  
24 very site-specific and thus [cormorant]-fish conflicts are most  
25 likely to occur on a localized scale," Final Rule, 68 Fed. Reg.

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provided in response to questions posed by the Court of Appeals  
for the First Circuit).



1 at 58,025; that "[w]hile large-scale impacts on regional or  
2 continental bird populations have not been documented" there was  
3 evidence that other bird species could "be negatively impacted by  
4 [cormorants] at a site-specific level," id.; and that cormorants  
5 caused significant financial loss at aquaculture facilities and  
6 fish hatcheries, which are localized by their nature, id. at  
7 58,026. Studies reviewed by the FWS also concluded that  
8 cormorant predation had adverse impacts in states including  
9 Wyoming, New York, and states in the Upper Midwest, South, and  
10 Mississippi Delta region, whether in the form of cormorant diets  
11 skewed heavily towards fish, or economic losses due to cormorant  
12 predation at aquaculture or hatchery facilities. As the FWS  
13 itself acknowledged, these studies did not provide a full picture  
14 of the interaction between cormorants and local resources. The  
15 FWS recognized the "need for more information about [cormorants]  
16 and their impacts on resources across a variety of ecological  
17 settings" and agreed with critics of the Depredation Order that  
18 "better information on population status and trends is  
19 desirable." Id. at 58,023. What the FWS did establish, though,  
20 was that in a large number of states, cormorants were responsible  
21 for localized, site-specific harm to public resources, even if  
22 not on a state-wide basis.

23 The remaining question, then, is whether the  
24 Depredation Order is a reasonable response to this evidence of  
25 harm. In light of the limited discretion afforded by the  
26 Depredation Order, we conclude that it is. The express intent of

1 the Order is "to enhance the ability of resource agencies to deal  
2 with immediate, localized [cormorant] damages." Id. And that is  
3 precisely what the Depredation Order does. It applies only to  
4 the public resources of affected states, 50 C.F.R. § 21.48(b),  
5 (c)(1), and takings are permitted only of those cormorants  
6 "committing or about to commit . . . depredations," id. §  
7 21.48(c)(1). All takings must be recorded and detailed in annual  
8 reports. The FWS must be notified in advance of activity that  
9 would result in the taking of more than 10 percent of a breeding  
10 colony. The FWS may also prevent such activity it deems to be a  
11 threat to the long-term sustainability of cormorants. These  
12 restrictions adequately limit depredation control activities  
13 under the Depredation Order to address the types of harm the FWS  
14 specifically found are caused by cormorants. Although, as  
15 discussed, there may be some uncertainty in the meaning of  
16 "depredation," the discretion provided by the Depredation Order  
17 to local agencies to determine when depredations occur is not so  
18 expansive that it would render the order arbitrary and  
19 capricious.

20 The plaintiffs also argue that instead of the  
21 Depredation Order, the FWS should have adopted a "less drastic  
22 liberalized permitting scheme" similar to some of the  
23 alternatives considered by the FWS. Appellants' Br. at 49.  
24 Perhaps such an approach would be a better response than the  
25 Depredation Order in providing local agencies with some degree of  
26 flexibility, addressing actual cormorant damage, and avoiding

1 unnecessary takings of cormorants. However, the FWS has  
2 articulated adequate explanations for its choice not to adopt  
3 this, or another, alternative approach, preferring to grant local  
4 agencies a degree of flexibility that the FWS thinks will more  
5 "adequately address resource damages caused by [cormorants]" than  
6 permit-based approaches. Final Rule, 68 Fed. Reg. at 58,034. It  
7 is, of course, typically the case that there are several  
8 different possible responses to a given problem, more than one of  
9 which may be rational. In this case, the Depredation Order  
10 represents one rational response to the problem of cormorant  
11 depredation based on evidence available to the FWS, and the FWS  
12 has explained its reasons for choosing one rational response over  
13 others. This is the limit of our inquiry, see Citizens to  
14 Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 416 (1971),  
15 and we therefore conclude that the FWS complied with the APA in  
16 adopting the Depredation Order.

17 V. Whether the FWS Complied with NEPA in Adopting  
18 the Depredation Order

19 In order to adopt the Depredation Order, the FWS was  
20 required by NEPA to prepare an EIS that would "provide full and  
21 fair discussion of significant environmental impacts and . . .  
22 inform decisionmakers and the public of the reasonable  
23 alternatives which would avoid or minimize adverse impacts or  
24 enhance the quality of the human environment." 40 C.F.R.  
25 § 1502.1; see 42 U.S.C. § 4332(2)(C). "NEPA is a procedural  
26 statute that mandates a process rather than a particular  
27 result. . . . [It] does not command an agency to favor any

1 particular course of action, but rather requires the agency to  
2 withhold its decision to proceed with an action until it has taken  
3 a 'hard look' at the environmental consequences." Stewart Park &  
4 Reserve Coal., Inc. (SPARC) v. Slater, 352 F.3d 545, 557 (2d Cir.  
5 2003) (internal citation omitted). The court's role is to ensure  
6 that NEPA's procedural requirements have been satisfied, not to  
7 "interject itself within the area of discretion of the executive  
8 as to the choice of the action to be taken." Kleppe v. Sierra  
9 Club, 427 U.S. 390, 410 n.21 (1976) (internal quotation marks and  
10 citation omitted).

11           Where there is uncertainty regarding the potential  
12 effects of an agency action, "speculation in an EIS is not  
13 precluded, [but] the agency is not obliged to engage in endless  
14 hypothesizing as to remote possibilities." County of Suffolk v.  
15 Sec'y of Interior, 562 F.2d 1368, 1379 (2d Cir. 1977). Even where  
16 this uncertainty arises from disparate state and local regulation  
17 that may affect federal action, we have not required detailed  
18 information regarding the effects of these regulations in an EIS  
19 where such "information would be of little or no utility in  
20 determining the impact of state and local exercise of regulatory  
21 powers, since each of the states and municipalities affected could  
22 change its regulations . . . between the publication of the EIS"  
23 and the time when such local regulations would affect the federal  
24 action. Id.

25           The plaintiffs point to the lack of site-specific or  
26 localized analysis in the EIS as evidence that the FWS violated

1 NEPA's requirement to examine and permit the public to comment on  
2 the environmental impact of the proposed Depredation Order. But  
3 under the order, the FWS did not commit itself to any site-  
4 specific actions, and it would have been largely speculative for  
5 the FWS to identify the specific, localized areas where control  
6 efforts under the order would take place. We therefore do not  
7 think that the FWS was obligated under NEPA to include site-  
8 specific analyses in the EIS.

9 Under the Depredation Order, local agencies have  
10 discretion to select the particular sites at which to pursue  
11 depredation control efforts, subject of course to the constraints  
12 set forth in the Depredation Order. The Depredation Order does  
13 not itself mandate that local agencies utilize their authority  
14 under the Order. And, because cormorant depredation is highly  
15 localized, and because the Depredation Order limits control  
16 efforts only to those cormorants "found committing or about to  
17 commit" depredation, the exact locations where local agencies  
18 might act pursuant to the Depredation Order could not be known  
19 with any certainty by the FWS in advance. These compounded  
20 uncertainties would render any site-specific EIS virtually  
21 impossible to prepare. Not only would it be uncertain where  
22 control efforts under the Depredation Order could take place, it  
23 would remain uncertain whether any control efforts actually would  
24 take place there. The FWS had no means of reliably identifying  
25 the relevant sites, let alone ascertaining whether any actions  
26 under the Depredation Order would be warranted at that site.

1 Effects that are not reasonably foreseeable need not be included  
2 in an EIS. See 40 C.F.R. § 1508.8 (including as effects for EIS  
3 purposes those "which are caused by the action and are later in  
4 time or farther removed in distance, but are still reasonably  
5 foreseeable"); Suffolk County, 562 F.2d at 1378 ("If the  
6 additional information would at best amount to speculation as to  
7 [a] future event or events, it obviously would not be of much use  
8 as input in deciding whether to proceed."). The FWS therefore did  
9 not violate NEPA by omitting site-specific analyses in this case.

10 In the absence of any certain site-specific action,  
11 then, it was sufficient for the FWS here to prepare only a  
12 programmatic EIS. See 40 C.F.R. § 1502.4(c) (Environmental impact  
13 statements on "broad actions" may be prepared "[g]enerically,  
14 including actions which have relevant similarities, such as common  
15 timing, impacts, alternatives, methods of implementation, media,  
16 or subject matter."); see also Friends of Yosemite Valley v.  
17 Norton, 348 F.3d 789, 801 (9th Cir. 2003) ("NEPA requires a full  
18 evaluation of site-specific impacts only when a 'critical  
19 decision' has been made to act on site development -- i.e., when  
20 the agency proposes to make an irreversible and irretrievable  
21 commitment of the availability of resources to [a] project at a  
22 particular site. The determination of whether a 'critical  
23 decision' has been made begins with an accurate description of the  
24 [agency's] proposed action." (emphases, internal quotation marks,  
25 and citations omitted)). Any site-specific actions to which the  
26 FWS or any other agency subsequently committed would require the

