

**CONTACT**

**LEGISLATIVE AFFAIRS DEPARTMENT**

MARIA CILENTI

212.382.6655 | [mcilenti@nycbar.org](mailto:mcilenti@nycbar.org)

ELIZABETH KOCIENDA

212.382.4788 | [ekocienda@nycbar.org](mailto:ekocienda@nycbar.org)

**REPORT ON LEGISLATION BY THE  
ANIMAL LAW COMMITTEE**

**A.8790-A  
S.6589 -A**

**M. of A. Cymbrowitz  
Sen. Avella**

AN ACT establishing requirements for any Management Plan for Mute Swans in New York State to prioritize non-lethal methods, document the scientific basis for population control, include a public education component, and include responses to public comments.

**THIS LEGISLATION IS APPROVED**

**SUMMARY OF THE PROPOSED LAW**

Assembly Bill No. 8790-A / Senate Bill No. 6589-A would require any Management Plan for Mute Swans in New York State issued by the New York State Department of Environmental Conservation (“DEC”) to (1) give priority to non-lethal management techniques, (2) fully document the scientific basis for population and environmental damage projections, (3) include a public education component, and (4) include responses to public comments. In addition the proposed legislation would require the DEC to hold at least two public hearings and provide a 45-day public comment period before issuing the Management Plan.

**BACKGROUND**

In December 2013, the DEC Division of Fish, Wildlife, and Marine Resources issued a Proposed Management Plan for Mute Swans in New York State (the “Draft Swan Plan”).<sup>1</sup> The Draft Swan Plan declares that mute swans are an “invasive species” and proposes steps for eliminating free-ranging mute swans from New York State by 2025. On February 28, 2014, the DEC announced that it would be revising and releasing for additional public comment the Draft Swan Plan’s recommendations for managing mute swans.<sup>2</sup>

---

<sup>1</sup> The Draft Swan Plan is available on-line at [http://www.dec.ny.gov/docs/wildlife\\_pdf/muteswanmgmtpln2013.pdf](http://www.dec.ny.gov/docs/wildlife_pdf/muteswanmgmtpln2013.pdf) (all URLs cited in the report last visited December 15, 2014). The proposed legislation states that the Draft Swan Plan seeks to eliminate “all of the 2,200 mute swans in the state by 2025.” The Draft Swan Plan states that it seeks to eliminate all “free-ranging mute swans” in New York State by 2025.

<sup>2</sup> DEC, Press Release, Draft Mute Swan Management Plan to be Revised and Released for Second Public Comment Period (Feb. 28, 2014), at <http://www.dec.ny.gov/press/95792.html>.

## JUSTIFICATION

The Animal Law Committee (“the Committee”) approves the proposed legislation because (a) lethal methods of bird control are inhumane and ineffective, (b) the underlying determination that mute swans meet the statutory definition of an invasive species requires further analysis and thus the Draft Swan Plan does not make the case for exterminating the entire free-ranging population of mute swans and (c) it is important that the public be given ample opportunity to comment on the Plan given the demonstrated public interest in mute swans.

### ***(a) Lethal methods are inhumane and an ineffective means of controlling bird populations.***

Lethal methods of goose removal typically include the use of live traps and carbon dioxide asphyxiation, which have been recognized as inhumane by a number of avian experts<sup>3</sup> and may not comport with guidelines set forth by the American Veterinary Medical Association.<sup>4</sup> Mute swans, like all animals, are protected under New York State law from being “unjustifiably” killed or subjected to injury or pain. N.Y. AGM. LAW § 353.

The cruelty of these lethal methods is exacerbated by the fact that killing mute swans may ultimately be ineffective at controlling the mute swan population. Data gathered by avian experts demonstrates that the killing of a particular species may actually increase the population of the targeted species or increase the population of other “undesired” species.<sup>5</sup> An effort to kill New York’s free-ranging mute swans may ultimately result in an increased number of mute swans due to reproductive overcompensation and population cycling or an increase in the population of another species, creating further environmental unbalance.

---

<sup>3</sup> According to wildlife biologist Stephanie Boyles, such “[r]oundups cause immeasurable stress—separating lifetime mates from each other and from their young goslings.” See Geoff Shackelford, *PETA Leader Speaks Out*, GOLFDOM 49, Feb. 2006, <http://archive.lib.msu.edu/tic/golfd/article/2006feb48.pdf>. Similarly veterinarian John G. Hynes has recognized that “[c]arbon dioxide asphyxiation used by the USDA is an especially cruel process that slowly strangles [the birds] as they struggle to breathe and compete for oxygen.” See *700 Geese From Jamaica Bay Wildlife Refuge To Be Euthanized*, CBSNewYork, July 10, 2012, <http://newyork.cbslocal.com/2012/07/10/700-geese-from-jamaica-bay-wildlife-refuge-to-be-euthanized/>; See also AVMA Guidelines for the Euthanasia of Animals: 2013 Edition, American Veterinary Medical Association, 2013, <https://www.avma.org/KB/Policies/Documents/euthanasia.pdf> (noting that “diving birds have a great capacity for holding their breath and anaerobic metabolism. Therefore, induction of anesthesia and time to loss of consciousness when using inhalants may be greatly prolonged. Noninhaled methods of euthanasia should be considered for these species and a secondary method is required to kill the unconscious animal.”)

<sup>4</sup> *Id.* at 2013 AVMA Guidelines.

<sup>5</sup> Killing individuals of one species opens the habitat to other wildlife or even ultimately increases the population of the targeted species. Experience has shown that removing geese from parks, wetlands, and other desirable habitat creates a vacuum which can become quickly repopulated. See, e.g., Cate Doty, *Where Geese Were Thinned, Their Population Thickens*, New York Times, Aug. 17, 2010, available at <http://cityroom.blogs.nytimes.com/2010/08/17/where-geese-were-thinned-their-population-thickens/>. Killing of one species can even result in increases in population of the targeted species due to reproductive overcompensation and population cycling. Elise F. Zipkin, Clifford E. Kraft, Evan G. Cooch, and Patrick J. Sullivan, *When can efforts to control nuisance and invasive species backfire?*, *Ecological Applications* 19:1585–1595, available at <http://www.esajournals.org/doi/abs/10.1890/08-1467.1> (“Population control through harvest has the potential to reduce the abundance of nuisance and invasive species. However, demographic structure and density-dependent processes can confound removal efforts and lead to undesirable consequences, such as overcompensation (an increase in abundance in response to harvest) and instability (population cycling or chaos).”)

Accordingly, prioritizing the use of non-lethal methods for any management of mute swans comports with New York State animal cruelty law and reflects best scientific practices.

***(b) The underlying determination that mute swans meet the statutory definition of an invasive species requires further analysis.***

The New York Environmental Conservation Law (“ECL”) defines the term “invasive species” as a plant or animal species that was introduced into the ecosystem by humans and whose harm or likely harm to human health, the economy, or the environment “*significantly*” outweighs the benefit. ECL section 9-1703 provides that an “invasive” species is a species that is:

1. nonnative to the ecosystem under consideration; and
2. whose introduction causes or is likely to cause economic or environmental harm or harm to human health. For the purposes of this paragraph, the harm must significantly outweigh any benefits.

The Draft Swan Plan offers evidence that mute swans meet the first prong of the statutory definition: the mute swan is a species nonnative to New York. Evidence that mute swans were introduced by human activity to New York over 100 years ago<sup>6</sup> appears to be undisputed.

However, the Draft Swan Plan does not appear to fully articulate the benefits of mute swans, which is integral to the equation in the second prong of the statutory definition. The Draft Swan Plan acknowledges that some people like to feed mute swans<sup>7</sup> but there appear to be additional benefits that deserve consideration. For example, the New York Terrestrial Vertebrate Invasiveness Ranking Form prepared by the DEC states, “Some studies show that there are benefits of sharing habitat with Mute Swans . . . . Evidence that mute swans harm native wildlife is limited.”<sup>8</sup> The benefits of sharing habitat should be articulated in the Draft Swan Plan and further explored. Also, the sheer number of people voicing opposition to the Draft Swan Plan in one month suggests that the public perceives that mute swans have a benefit. Before the close of the comment period on the Draft Swan Plan, one single petition opposing the Draft Swan Plan generated over 25,000 signatures<sup>9</sup> and there are thousands of signatures on a handful of similar petitions.<sup>10</sup> Numerous academics, researchers, politicians, wildlife rehabilitators, and animal

---

<sup>6</sup> Draft Swan Plan at 2.

<sup>7</sup> Draft Swan Plan at 8.

<sup>8</sup> J. Corser, DEC zoologist, New York Terrestrial Vertebrate Invasiveness Ranking Form 4 (Feb. 1, 2013), at [http://www.nyis.info/user\\_uploads/c3690\\_Cygnus%20olor%20Ecological.pdf](http://www.nyis.info/user_uploads/c3690_Cygnus%20olor%20Ecological.pdf).

<sup>9</sup> Petition by Goosewatch NYC, Stop New York State’s Swan Killing Plan, at <https://www.change.org/petitions/new-york-state-department-of-environmental-conservation-stop-new-york-state-s-sw-an-killing-plan>.

<sup>10</sup> The DEC received more than 1,500 comments, 16,000 form letters, and 30,000 signatures on various petitions concerning the Draft Swan Plan. DEC, Press Release, Draft Mute Swan Management Plan to be Revised and Released for Second Public Comment Period (Feb. 28, 2014), at <http://www.dec.ny.gov/press/95792.html>.

protection groups have criticized the Draft Swan Plan.<sup>11</sup> Many news articles and public comments have suggested that people derive benefit from recreational bird watching and viewing the beauty of the swans.<sup>12</sup> The National Invasive Species Council stated that “recreation” is one of the primary benefits that non-native species offer to be considered by governmental agencies in developing management plans.<sup>13</sup> Also, the benefit that mute swans themselves derive from being alive and remaining in their families and social groups must be considered. Notably, the ECL definition of “invasive species,” in stating that harms must significantly outweigh “any benefits,” does not limit the relevant benefits to those enjoyed by humans.

The Draft Swan Plan identifies possible harm to human health and the environment, but it lacks specificity and critics have observed flaws that suggest further research is necessary to determine whether the harm “significantly” outweighs the benefits.

The Draft Swan Plan states that mute swans harm human health in three ways, but further analysis may be necessary to understand whether this harm significantly outweighs the benefits. First, the Draft Swan Plan states that mute swans attack humans who get too close to nests or young, but it acknowledges that “the potential for injury is low.”<sup>14</sup> The Draft Swan Plan does not suggest how these potential attacks are any more frequent or serious than attacks of native species protecting their young and does not indicate how many of these attacks occurred in New York, if any.<sup>15</sup> Second, the Draft Swan Plan states that mute swan feces may be present in New York waters used for swimming, drinking water, and fishing, but it does not say conclusively if it is present in such waters in amounts high enough to threaten human health. Third, the Draft Swan Plan suggests that air travel is threatened by mute swans in New York. The Animal Law Committee previously issued a letter explaining that the killing or removal of mute swans near airports may actually increase the risk of plane-bird collisions by birds who move into the habitat

---

<sup>11</sup> E.g., Hugh Raffles, *Speaking Up for the Mute Swan*, N.Y. TIMES (Feb. 17, 2014), at <http://www.nytimes.com/2014/02/18/opinion/speaking-up-for-the-mute-swan.html?emc=eta1> (Hugh Raffles is professor of anthropology at the New School); Carl Safina, *Killing Swans is a Bad Idea*, cnn.com (Feb. 21, 2014), <http://www.cnn.com/2014/02/21/opinion/safina-mute-swans> (Carl Safina is a MacArthur Fellow, Pew Fellow and Guggenheim Fellow, a professor at Stony Brook University and founding president of Blue Ocean Institute); Lyndsay McCabe, *Nassau County SPCA Fights Back Against DEC Plan to Eradicate Mute Swans*, Longisland.com (Feb. 19, 2014), at <http://www.longisland.com/news/02-18-14/nassau-county-sPCA-fights-back-against-dec-plan-to-eradicate-mute-swans.html>; Heather Chin, *Local Pols and Activists Cry Foul on DEC Plan to “Eliminate” Mute Swans*, BROOKLYN SPECTATOR (Feb. 20, 2014), at <http://homereporter.com/local-pols-and-activists-cry-foul-on-dec-plan-to-eliminate-mute-swans/> (Quoting Assembly Member Steven Cymbrowitz, “Wildlife experts and environmentalists are not unanimous in their belief that exterminating the mute swan population is justified, and there’s plenty of debate over whether eradicating mute swans will be even minimally beneficial to the ecosystem or our environment.”)

<sup>12</sup> See, e.g., Lori Bordonaro, *NY’s Mute Swan Cull Plan Sparks Outcry*, WNBC (Jan. 28, 2014), at <http://www.nbcnewyork.com/news/local/Mute-Swan-Cull-Kill-Plan-Long-Island-New-York-State-242298341.html>.

<sup>13</sup> The National Invasive Species Council (NISC), *Five-Year Review of Executive Order 13112 on Invasive Species 3*, [http://www.invasivespecies.gov/home\\_documents/Five-Year%20Review-FINAL%20PRINT%20VERSION.pdf](http://www.invasivespecies.gov/home_documents/Five-Year%20Review-FINAL%20PRINT%20VERSION.pdf).

<sup>14</sup> Draft Swan Plan at 2.

<sup>15</sup> See, e.g., *Stop Mute Swan Slaughter in NY*, Friends of Animals (Jan. 30, 2014), at <http://friendsofanimals.org/news/2014/january/stop-mute-swan-slaughter-ny>.

that the swans previously occupied and that there may be more effective means of reducing the risk of such collisions that do not involve the killing or removal of mute swans.<sup>16</sup>

The Draft Swan Plan states that mute swans cause environmental harm, but it is unclear if the harm is serious enough to significantly outweigh the benefits. Specifically, the Draft Swan Plan states that the mute swan is a species “that has the potential to adversely impact native wildlife and their habitats.”<sup>17</sup> The Draft Swan Plan provides no specific information about what harm or likely harm that the mute swan is likely to cause to particular species native to New York, despite its century-long presence in the state. It does not compare the threat caused by mute swans to the threat to native wildlife caused by hunters, habitat loss, and pollution. In the Executive Summary, the Draft Swan Plan states that mute swans destroy submerged aquatic vegetation, but it does not develop this claim.

For these reasons, the bill’s requirement that the DEC fully document the scientific basis for population and environmental damage projections before issuing the Management Plan is prudent.

***(c) It is important that the public be given an ample opportunity to comment on the plan given the demonstrated public interest in the mute swans.***

As stated above, one single petition against the Draft Swan Plan generated over 25,000 signatures. This demonstrates that the public is interested in the issue and compels the government to hear and take into consideration public comments. This legislation requires hearings and a public comment period and it requires the DEC to address substantive comments. This should provide the public with a better opportunity to help inform the DEC’s decisions on this matter.

## **SUMMARY**

For the aforementioned reasons, the Committee supports the proposed legislation.

Revised and Reissued December 2014

---

<sup>16</sup> New York City Bar Committee on Animal Law letter to Mr. Martin Lowney, USDA APHIS Wildlife Services (Oct. 21, 2013), at <http://www2.nycbar.org/pdf/report/uploads/20072580-CommentonAPHISMuteSwan.pdf>.

<sup>17</sup> Draft Swan Plan at 5.