



*Via Email and Certified Mail*

October 27, 2020

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**Re: Expansion of Hunting and Fishing in National Wildlife Refuges and National Fish Hatcheries: Notice of Intent to Sue for Violations of the Endangered Species Act**

Dear Secretary Bernhardt and Director Skipwith:

On behalf of the Center for Biological Diversity, I hereby provide notice that we intend to bring a lawsuit against you (in your official capacities) for violating the Endangered Species Act (“ESA”), 16 U.S.C. §§ 1531-1544. The Interior Department and the U.S. Fish and Wildlife Service (collectively “FWS”), have authorized the largest-ever expansion of hunting and fishing – affecting 2.3 million acres of the National Wildlife Refuge System and National Fish Hatchery System – in violation of Section 7 of the ESA, 16 U.S.C. § 1536, and the ESA’s consultation regulations, 50 C.F.R. Part 402.<sup>1</sup> *See* 2020-2021 Station-Specific Hunting and Sport Fishing Regulations, 85 Fed. Reg. 54,076 (Aug. 31, 2020) (hereinafter “Final Rule”).

If you do not remedy these violations of law within the next 60 days, you would be subject to a lawsuit in the United States District Court to enjoin implementation of the Final Rule. I provide this letter pursuant to the citizen suit provision of the ESA. 16 U.S.C. § 1540(g)(2).

The Center for Biological Diversity (the “Center”) is a national, nonprofit conservation organization with more than 1.7 million members and supporters dedicated to the protection of endangered species and wild places. The Center and its members are concerned with the

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<sup>1</sup> The FWS’s decision also violates the National Environmental Policy Act (“NEPA”), 42 U.S.C. §§ 4321-47; the CEQ regulations that implement NEPA, 40 CFR parts 1500–1508; the National Wildlife Refuge System Improvement Act, 16 U.S.C. § 668dd(a)(4)(B); and the Administrative Procedure Act (“APA”), 5 U.S.C. § 706(2).

conservation of imperiled species, effective implementation of the ESA, and protection of our public lands.

## **STATUTORY BACKGROUND**

When a species has been listed or critical habitat designated under the ESA, all federal agencies – including FWS – must ensure through consultation that their programs and activities comply with the ESA. 16 U.S.C. § 1536(a)(2). Through consultation under Section 7 of the ESA, FWS determines whether actions will jeopardize listed species’ survival or adversely modify designated critical habitat, and if so, works to identify ways to modify the action to avoid that result. 50 C.F.R. § 402.14. FWS must use the best available science in making these determinations. 16 U.S.C. § 1536(a)(2).

The scope of agency actions subject to consultation are broadly defined to encompass “all activities or programs of any kind authorized, funded, or carried out, in whole or in part, by Federal agencies.” 50 C.F.R. § 402.02 (definition of “action”). The Final Rule, the station-specific hunting and sport fishing regulations and hunt plans, and the management actions that the regulations and plans authorize and implement are “agency actions” subject to consultation.

For each federal action, FWS must first determine whether any listed or proposed species may be present in the area of the agency action. 16 U.S.C. § 1536(c)(1); 50 C.F.R. § 402.12. If listed or proposed species may be present, the action agency, which here is FWS, must prepare a “biological assessment” to determine whether the listed species may be affected by the proposed action. *Id.* The biological assessment must generally be completed within 180 days. 16 U.S.C. § 1536(c)(1); 50 C.F.R. § 402.12(i). The low threshold for a “may affect” determination and the required ESA section 7(a)(2) consultation helps ensure that listed species are not jeopardized. *Karuk Tribe of Cal. v. U.S. Forest Serv.*, 681 F.3d 1006, 1027 (9th Cir. 2012).

If the action agency determines that its action “may affect” but is “not likely to adversely affect” a listed species or its critical habitat, the regulations permit “informal consultation,” during which FWS must concur in writing with that determination. 50 C.F.R. § 402.13. If the action agency determines that its action is “likely to adversely affect” a listed species or critical habitat, or if FWS does not concur with the “not likely to adversely affect” determination, the action agency must engage in “formal consultation,” as outlined in 50 C.F.R. § 402.14 (“General Formal Consultation”). 50 C.F.R. §§ 402.02, 402.14(a). An action agency is relieved of the obligation to consult on its actions only where the action will have “no effect” on listed species or designated critical habitat. Effects determinations are based on all consequences to listed species or critical habitat that are caused by the proposed action, including the consequences of other activities that are caused by the proposed action. *See* 50 C.F.R. § 402.02 (definition of “effects of the action”).

To complete formal consultation, FWS must provide a “biological opinion” explaining how the proposed action will affect the listed species or habitat. 16 U.S.C. § 1536(b); 50 C.F.R. § 402.14. Consultation must generally be completed within 90 days from the date on which consultation is initiated. 16 U.S.C. § 1536(b)(1)(A); 50 C.F.R. § 402.14(e). If certain criteria are met, action agencies must also reinstate consultation on actions over which the federal agency retains, or is authorized to exercise, discretionary involvement or control. 50 C.F.R. § 402.16.

During the consultation process, the action agency is prohibited from making any irreversible or irretrievable commitment of resources that may foreclose the formulation or implementation of any reasonable and prudent alternative measures. 16 U.S.C. § 1536(d). This means that FWS may not implement the Final Rule, station-specific regulations, hunt plans, or management actions authorized by the Final Rule unless it completes Section 7 consultation for all listed species on the National Wildlife Refuge System and National Fisheries System that are affected by the Final Rule.

Compliance with the Section 7 consultation process is integral to compliance with the substantive requirements of the Act – that an agency’s action will not jeopardize the continued existence of any endangered or threatened species or result in the destruction or adverse modification of habitat.

## **FACTUAL BACKGROUND**

### **Significant Expansion of Hunting and Fishing on National Wildlife Refuges**

FWS annually reviews hunting and sport fishing programs on the National Wildlife Refuge System and National Fish Hatchery System to determine whether to include additional stations or modify individual station regulations. This spring FWS proposed the largest-ever expansion of hunting and fishing on the System. *See* 85 Fed. Reg. 20,030 (April 9, 2020). The Center and many others submitted comments on the overarching proposed rule, as well as numerous individual stations. Following the receipt of thousands of comments during the 60-day comment period, the agency issued the Final Rule. 85 Fed. Reg. 54,076 (Aug. 31, 2020). For nearly all issues raised in the comments, FWS did not make any changes to the rule. The Final Rule became effective upon publication.

Through the Final Rule, FWS, for the first time, opened eight refuges that were previously closed to hunting and sport fishing. FWS also opened hunting or sport fishing on nine units of the National Fish Hatchery System. FWS opened 41 limited-interest easement refuges in North Dakota for upland and big game hunting and sport fishing, and it opened or expanded hunting and sport fishing at 89 other refuges.

Through these openings and expansions, FWS has opened or expanded hunting or sport fishing on 2,264,796 acres of refuges and 47,419 acres on limited interest easement refuges. The agency also opened hunting or sport fishing on 1,484 acres of the National Fish Hatchery System. These totals combine for an overall total of 2,313,699 acres opened or expanded to hunting or sport fishing by the Final Rule.

### **FWS Fails to Fully Analyze Impacts to Endangered Wildlife and Plants**

FWS acknowledges in the Final Rule that the agency must comply with Section 7 of the ESA when developing hunting or fishing plans. It asserts that it completed Section 7 consultation on each of the affected stations. However, our analysis has identified numerous gaps in that

analysis, as detailed below and in the attached table. The deficiencies we have identified are based on information presently available and therefore cannot be exhaustive.

As an initial matter, FWS's decision to consult at the station-specific level is problematic because it fails to address that the Final Rule is itself an action triggering consultation that effects changes across dozens of refuges that together adversely affect listed species. For example, across 41 limited easement refuges and three national wildlife refuges in the Midwest, whooping cranes would be harmed by FWS's authorization of lead ammunition. FWS did not fully consider the effects from lead toxicity on the cranes because the agency only consulted at the station-specific level instead of consulting on the Final Rule at a programmatic level.

Another major problem with FWS's intra-agency consultation is that the [biological evaluations](#) are missing numerous listed species, even though the agency's [own documents](#) show that the missing species use the refuges and may be affected by the Final Rule. These species may be affected directly by poaching or vehicle strikes or indirectly by disturbance from increased human presence, noise, or traffic.<sup>2</sup> For example, the following refuges failed to initiate/reinitiate or complete consultation on the species indicated in parentheses: Arthur R. Marshall Loxahatchee National Wildlife Refuge in Florida (Audubon's crested caracara<sup>3</sup>); Bosque del Apache National Wildlife Refuge in New Mexico (Least tern<sup>4</sup>); Browns Park National Wildlife Refuge in Colorado (Yellow-billed Cuckoo<sup>5</sup>); and Lacreek National Wildlife Refuge in South Dakota (Piping Plover<sup>6</sup>).

Several other refuges did not even prepare biological evaluations to examine impacts from the Final Rule, even though the refuges are home to listed wildlife that may be affected by the expansion of hunting and fishing. For example, the following refuges failed to initiate/reinitiate or complete consultation on the species indicated in parentheses: Big Branch Marsh National Wildlife Refuge in Louisiana (Red-cockaded woodpecker<sup>7</sup>); Pahrangat National Wildlife Refuge in Nevada (Desert tortoise<sup>8</sup> and Southwestern willow flycatcher<sup>9</sup>); St. Marks National Wildlife Refuge in Florida (Frosted flatwoods salamander,<sup>10</sup> red-cockaded woodpecker<sup>11</sup> and wood stork<sup>12</sup>).

For some stations and species, FWS completed consultation but failed to consider all effects of the action using the best available science and therefore reached the wrong result. 16 U.S.C. § 1536(a)(2) ("In fulfilling the requirements of this paragraph each agency shall use the best scientific and commercial data available."); 50 C.F.R. § 402.12(a) ("A biological assessment

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<sup>2</sup> See generally, Center for Biological Diversity, Comments on "2020-2021 Station-Specific Hunting and Sport Fishing Regulations, (June 8, 2020).

<sup>3</sup> <https://ecos.fws.gov/ecp0/profile/speciesProfile.action?spcode=B06O>

<sup>4</sup> <https://ecos.fws.gov/ecp0/profile/speciesProfile.action?spcode=B07N>

<sup>5</sup> <https://ecos.fws.gov/ecp0/profile/speciesProfile.action?spcode=B06R>

<sup>6</sup> [https://www.fws.gov/refuges/databases/ThreatenedEndangeredSpecies/ThreatenedEndangered\\_Display.cfm](https://www.fws.gov/refuges/databases/ThreatenedEndangeredSpecies/ThreatenedEndangered_Display.cfm)

<sup>7</sup> <https://ecos.fws.gov/ecp0/profile/speciesProfile.action?spcode=B04F>;  
[https://www.fws.gov/refuge/Big\\_Branch\\_Marsh/wildlife\\_birds.html](https://www.fws.gov/refuge/Big_Branch_Marsh/wildlife_birds.html)

<sup>8</sup> <https://ecos.fws.gov/ecp0/profile/speciesProfile.action?spcode=C04L>

<sup>9</sup> <https://ecos.fws.gov/ecp0/profile/speciesProfile.action?spcode=B094>

<sup>10</sup> <https://ecos.fws.gov/ecp0/profile/speciesProfile.action?spcode=D013>

<sup>11</sup> <https://ecos.fws.gov/ecp0/profile/speciesProfile.action?spcode=B04F>

<sup>12</sup> <https://ecos.fws.gov/ecp0/profile/speciesProfile.action?spcode=B06O>

shall evaluate the potential effects of the action . . . .”); 50 C.F.R. § 402.02 (definition of “effects of the action”). Lead toxicity is an effect that the consultations universally ignored. The Final Rule authorizes the use of lead ammunition or tackle on numerous refuges but FWS has failed to analyze through consultation how lead could have effects on listed wildlife that use the refuges. Whooping cranes, in particular, have been documented as ingesting lead shot, bullets, fragments, or contaminated prey, and have been shown to have elevated lead bone, tissue, or blood levels from lead ammunition.<sup>13</sup> Several examples of FWS’s deficient analysis of lead impacts on endangered wildlife are provided immediately below.

For the **41 Limited Easement Refuges in North Dakota**, the Final Rule authorizes hunting consistent with state law, if the landowners give permission. FWS did not restrict use of lead ammunition or lead tackle. FWS concluded that the Final Rule would have no effect on whooping cranes even though the endangered birds migrate through the state and use shallow wetlands on the refuges.

The Final Rule has expanded sport fishing on the **Kirwin National Wildlife Refuge** in Kansas to new acres. It is a major stopover area for whooping cranes in both the spring and fall, and the species has been observed as recently as 2018. FWS concluded that the Final Rule would have no effect on whooping cranes – and therefore did not initiate consultation on that species, even though cranes could be exposed to lead from tackle used in additional areas.

The Final Rule has opened the **Horicon National Wildlife Refuge** in Wisconsin, to hunting of woodcock, moorhen, coyote, grouse, opossum, raccoon, fox, skunk, bobcat, snowshoe hare and black bear on acres already open to other hunting. That refuge is home to endangered whooping cranes from the reintroduced eastern migratory population. These birds have spent all or part of the spring, summer, and/or fall on or near the refuge since 2002. The environmental assessment explains that lead bullets and shotgun slugs are permitted for taking big game and small game during open seasons. The biological evaluation concluded that the Final Rule is unlikely to adversely affect whooping cranes but did not consider lead impacts.

The Final Rule also expands hunting on the **Patoka National Wildlife Refuge** in Indiana. It opens crow, pheasant and skunk hunting on new acres and acres already open to other hunting, and expands existing migratory bird, upland game, big game, and sport fishing to new acres. In the past six years, as many as twelve whooping cranes from the experimental flock of

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<sup>13</sup> Hall, S.L., and F.M. Fisher (1985), Lead concentrations in tissues of marsh birds: relationships of feeding habits and grit preference to spent shot ingestion, *Bull. Environ. Contam. Toxicol.* 35: 1–8; Fisher, I.J., D.J. Pain, and V.G. Thomas (2006), A Review of Lead Poisoning From Ammunition Sources in Terrestrial Birds, *Biological Conservation* 131: 421-432, available at [https://www.biologicaldiversity.org/campaigns/get\\_the\\_lead\\_out/pdfs/Fisher\\_et\\_al\\_2006.pdf](https://www.biologicaldiversity.org/campaigns/get_the_lead_out/pdfs/Fisher_et_al_2006.pdf); R. T. Watson, M. Fuller, M. Pokras, and W. G. Hunt (eds.) (2008), Ingestion of Lead from Spent Ammunition: Implications for Wildlife and Humans, The Peregrine Fund, Boise, Idaho, USA, available at [https://www.researchgate.net/publication/258209816\\_Ingestion\\_of\\_Lead\\_from\\_Spent\\_Ammunition\\_Implications\\_for\\_Wildlife\\_and\\_Humans](https://www.researchgate.net/publication/258209816_Ingestion_of_Lead_from_Spent_Ammunition_Implications_for_Wildlife_and_Humans); Scheuhammer, A.M. and S. L. Norris (1995), A Review of the Environmental Impacts of Lead Shotshell Ammunition and Lead Fishing Weights in Canada, Canadian Wildlife Service, Environment Canada, Ottawa, available at [https://www.researchgate.net/publication/287181064\\_Lead\\_fishing\\_sinkers\\_and\\_jigs\\_in\\_Canada\\_Review\\_of\\_their\\_use\\_patterns\\_and\\_toxic\\_impacts\\_on\\_wildlife](https://www.researchgate.net/publication/287181064_Lead_fishing_sinkers_and_jigs_in_Canada_Review_of_their_use_patterns_and_toxic_impacts_on_wildlife) .

whooping cranes raised in Wisconsin have begun to use the Refuge from October through February as a wintering site. FWS concluded that the Final Rule is unlikely to adversely affect the birds but did not consider lead impacts, even though FWS permits lead ammunition for big game and furbearers and lead tackle for fishing.

Lead can also impact scavengers that may feed on contaminated carcasses. On **Everglades Headwaters National Wildlife Refuge** in Florida, the Final Rule opens migratory bird, upland game and big game hunting, and sport fishing for the first time in alignment with state regulations, which do not prohibit use of lead ammunition and tackle. FWS concluded that the Final Rule is unlikely to adversely affect Audubon's crested caracara but did not consider that this endangered bird scavenges on carcasses and could be poisoned by ingesting lead fragments.

Similarly, FWS did not consider that endangered jaguars could be harmed by scavenging on lead-contaminated carcasses. Jaguars have been documented near **Leslie Canyon National Wildlife Refuge** in Arizona, which FWS opened to migratory bird, upland game and big game hunting for the first time with no restrictions on use of lead ammunition. FWS concluded that the Final Rule is unlikely to adversely affect the jaguar but did not consider the risk of lead toxicity. For **Buenos Aires National Wildlife Refuge** in Arizona, FWS concedes that the jaguar and ocelot are within the action area and that the endangered cats may rarely cross the refuge but again concluded that the Final Rule is unlikely to adversely affect them without considering the risk of lead toxicity to these scavengers from opening snipe, gallinule, merganser, bobcat, badger, coati, fox, ringtail cat, raccoon and mountain lion hunting – with no restrictions on use of lead ammunition. Nor did FWS consider the risk to jaguars from being accidentally shot by hunters targeting mountain lions.

**Laguna Atascosa National Wildlife Refuge** in Texas is one of two known populations of ocelot in the U.S. For that refuge, the agency has opened alligator, feral hog and nilgai hunting on acres already open to white-tailed deer hunting. The Laguna Atascosa Unit (33,766 huntable acres), for example, is opened to hook/line/firearm hunting of alligator, and archery and firearm hunting of white-tailed deer, nilgai, and feral hogs. *See* Laguna Atascosa National Wildlife Refuge White-tailed Deer, Exotic Ungulate, and Alligator Draft Hunt Plan at 8. FWS unreasonably concluded that the action would not likely adversely affect the piping plover (or its designated critical habitat on the refuge), red knot, eastern black rail (proposed listing), ocelot, and other endangered wildlife. The biological evaluation does not consider the impacts from use of lead ammunition on the ocelot, even while acknowledging in the environmental assessment that the wild cat feeds on carcasses. *See* Environmental Assessment at 41. Lead toxicity is not the only effect of the Final Rule that FWS failed to consider for this refuge. The biological evaluation concedes that the ocelot and listed shorebirds may be present in areas where hunting occurs and that “minimal human disturbance” may occur. Intra-Service Section 7 Biological Evaluation Form for Laguna Atascosa National Wildlife Refuge (Jan. 19, 2020). The biological evaluation relies on speed limits to dismiss the risk to ocelots of vehicle strikes, even though that danger was identified in the environmental assessment. *See* Environmental Assessment at 24 (“The public vehicle use in these areas is a risk and danger to ocelots even if drivers are operating at a slow speed and being cautious.”). The agency unreasonably suggests that “hunting will generally occur away from shoreline and mudflat areas” given that hunters will be targeting

– with hook/line and firearms – alligators that live in these same areas. This refuge is critically important to its rare animals and already receives extensive use because it is one of the top birding destinations in the nation – with more bird species than any other refuge. *Id.* at 29. A complete examination of the effects of the action would show that adverse impacts are likely and that FWS should have completed formal consultation.

For the **Northern Tallgrass Prairie National Wildlife Refuge** in Minnesota, FWS concluded that opening an additional 467.76 acres to fishing and the hunting of migratory game birds, upland game and big game would have no effect on a range of ESA listed species including the gray wolf, northern long eared bat, piping plover, least tern, Dakota skipper, Poweshiek skipperling, pallid sturgeon, Topeka shiner, prairie bush clover, rusty patched bumble bee, and the western prairie fringed orchid. The no effect determination acknowledges these species’ presence on the refuge but fails to analyze the effects of hunting, fishing, and additional disturbance on the species or their habitat. *See* Intra-Service Section 7 Biological Evaluation Form (Dec. 31, 2019).<sup>14</sup> It discounts any impact by explaining that hunting and fishing occurred prior to acquisition by FWS but that does not excuse analysis of impacts, as FWS could have chosen to close the area to hunting and fishing. 50 C.F.R. § 402.02 (definition of “environmental baseline”). Also, FWS acknowledges that “[s]ome habitat disturbance will result from continued hunting/fishing of these properties,” which clearly contradicts the “no effect” determination. Other impacts would include increased risk of poaching of gray wolves, trampling of nests of the plover and tern, exposure to lead ammunition and tackle and more. The response to comments claims that “use of lead tackle was included when evaluating the impacts of fishing during the Section 7 consultation,” but the biological evaluation contains no mention of lead tackle or ammunition.<sup>15</sup>

For the **Rhode Island Complex National Wildlife Refuge** FWS opened several hundred acres in five wildlife refuges for the hunting of deer, waterfowl, turkey, coyote, fox, and saltwater fishing. ESA listed species that occur within the affected area include, among others, the roseate tern, piping plover, red knot, and northern long-eared bat. Lead ammunition would be allowed on three of the five refuges, including Block Island NWR, Ninigret NWR, and John H. Chafee NWR, and lead tackle would be allowed at all refuges’ areas opened for fishing. The environmental assessment acknowledges that increased hunting “could result in localized accumulations of lead in some portions of the refuge, including small wooded wetlands” and that “[t]his accumulation of lead could incur negative impacts if it is consumed by wildlife.” Environmental Assessment at C-27.<sup>16</sup> However, it does not support its conclusory assertion that “the likelihood of that resulting in poisoning is low.” *Id.* Moreover, there is no discussion of the use or impacts of lead fishing tackle in the environmental assessment or biological evaluation. While FWS limits spring and summer hunting to mitigate impacts to endangered birds nesting on the Rhode Island Complex, FWS fails to analyze how additional hunting opportunities on the Complex would lead to more noise, traffic, and other risks to protected animals, especially during the fall hunting season. FWS’s “no effect” determination for the northern long-eared bat cannot withstand scrutiny given that FWS has authorized night fishing and hunting at dusk, when the endangered bats are active and could be disturbed. FWS also fails to adequately account for

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<sup>14</sup> <https://ecos.fws.gov/ServCat/DownloadFile/173574>

<sup>15</sup> <https://ecos.fws.gov/ServCat/DownloadFile/173565>

<sup>16</sup> <https://ecos.fws.gov/ServCat/DownloadFile/173672>

year-round saltwater fishing from shorelines that may harm piping plovers and other endangered birds likely to be present near the shorelines.

For the **North Mississippi Refuges Complex** (Coldwater River, Dahomey and Tallahatchie) in Mississippi, FWS unreasonably concluded in the biological evaluation that the action would have “no effect” on the wood stork even while acknowledging that the listed species uses the refuge for foraging. Intra-Service Section 7 Biological Evaluation Form for North Mississippi Refuges Complex (Nov. 27, 2019); *see* Environmental Assessment (“The threatened wood stork (*Mycteria americana*) is commonly observed during post-breeding dispersal on Tallahatchie and Coldwater River NWRs.”). The agency provided no supporting analysis to justify its conclusion, even though consultation documents from other refuges recognize that wood storks are particularly susceptible to disturbance. *See, e.g.*, Section 7 Intra-Service Consultation for Arthur R. Marshall Loxahatchee National Wildlife Refuge (July 23, 2018) at 295 (“Wood storks are more sensitive to disturbance than other wading birds and exhibit a greater flushing distance when foraging than when nesting.”). The biological evaluation does not even mention the least tern, even though the agency has long recognized its use of all the refuges in the Complex. *See* Environmental Assessment (“The least tern has been documented occasionally on the Refuge in recent years. Least Terns are primarily observed in flight or foraging over the waters of the larger impoundments.”).<sup>17</sup> The Final Rule authorizes hunting opportunities for doves, rail, woodcock, coyote, beaver, nutria, and feral hogs across the Complex. For the Tallahatchie refuge, for example, migratory bird hunting (dove, geese, ducks, mergansers, snipe, woodcock, rails, and coots) will now occur near the impoundments used by least terns and the marshy habitats used by wood storks. Hunting may result in poaching or disturb listed birds through increased presence of people and loud gun shots, but the agency did not consider these effects through consultation.

Similar deficiencies exist for the no effect determinations for the **Middle Mississippi River and Great River Refuges Complex** in Missouri and Illinois, where the Indiana bat, northern long-eared bat, and least tern are present and could be disturbed by hunting. For example, the Middle Mississippi River NWR is opening rail, snipe, woodcock, dove, crow, coyote, woodchuck/groundhog, bobcat, fox (gray and red), pheasant, skunk (striped), opossum and raccoon hunting for the first time on the refuge’s 8,103 acres. The biological evaluation discounts the potential for effects by suggesting that hunting would not occur during the spring or summer when the endangered birds are nesting and the endangered bat active. Intra-Service Section 7 Biological Evaluation Form (Dec. 9, 2019). But the Final Rule does not limit hunting to the fall and winter, and hunting for coyotes, for example, can be done year-round under state law. Also, no explanation is given why dormant bats would not be affected by gunshot noise or other hunting-related disturbance.

Similarly, for **Fort Niobrara National Wildlife Refuge** in Nebraska, FWS concluded that the expansion of hunting would have no effect on northern long eared bats using the refuge because they would not be mistaken for huntable species. Intra-Service Section 7 Biological Evaluation Form for Fort Niobrara NWR (July 6, 2020). It provides no justification to support its conclusion that hunting would not disturb roosting bats and does not address bats that would be foraging at dusk when hunting can occur.

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<sup>17</sup> <https://ecos.fws.gov/ecp0/profile/speciesProfile?sPCODE=B07N>

For the **Clarks River National Wildlife Refuge** in Kentucky, FWS concluded that hunting would have no effect on endangered mussels found on the refuge. *See* Intra-Service Section 7 Biological Evaluation Form for Clarks River NWR (Sept. 20, 2019). However, the Final Rule authorizes killing unlimited numbers of beavers. Beavers play important ecological roles that benefit freshwater mussels. Specifically, beaver dams can retain sediment, pollutants and nutrients so that the water quality downstream is improved and stream sediment load is reduced.<sup>18</sup> The biological evaluation should have considered this indirect and cumulative effect on listed mussels using the best available science.

The Final Rule opens the **Swan River National Wildlife Refuge** in Montana to black bear hunting. This increases the likelihood that a grizzly bear may be killed by a black bear hunter who mistakenly identifies a grizzly bear for a black bear. In fact, a black bear hunter shot a grizzly bear in the Swan Valley in 2018.<sup>19</sup> Black bear hunting also increases the risk that a hunter may encounter and shoot a grizzly bear in self-defense but FWS did not consider that risk and concluded that black bear hunting is unlikely to adversely affect grizzly bears. FWS reached that same conclusion for **Lee Metcalf National Wildlife Refuge** in Montana even though expanded hunting could increase risk to grizzly bears that use the refuge. Grizzly bears could also be impacted by lead ammunition when scavenging carcasses.

Another problem is that FWS appears to have failed to complete consultation according to the mandatory deadlines imposed by the ESA and its implementing regulations. Again, the biological assessment must generally be completed within 180 days. 16 U.S.C. § 1536(c)(1); 50 C.F.R. § 402.12(i). For example, the docket includes a biological evaluation but no concurrence for Stewart B. McKinney NWR in Connecticut.

### **LEGAL VIOLATIONS**

FWS failed to consult on the Final Rule at a programmatic level to determine whether any actions implemented across multiple refuges would together adversely affect species. For numerous stations covered by the Final Rule, FWS failed to analyze through consultation how the expansion of hunting and fishing would impact endangered wildlife and plants that live on the refuges. For other stations, FWS completed a biological evaluation but erroneously concluded that the Final Rule would have “no effect” on one or more listed species and therefore failed to initiate or reinstate consultation on those species. By allowing, authorizing, and approving projects and activities to proceed that may affect endangered wildlife and plants, prior to the completion of consultation, FWS is failing to ensure against jeopardy, in violation of Section 7(a)(2) of the ESA. 16 U.S.C. § 1536(a)(2). For this same reason, FWS is also violating Section 7(d) of the ESA. 16 U.S.C. § 1536(d).

For some refuges, FWS previously completed intra-agency consultation on impacts from “comprehensive conservation planning” or prior annual station-specific hunting and fishing

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<sup>18</sup> Campbell, R.D. (2006), What has the beaver got to do with the freshwater mussel decline? A response to Rudzīte (2005). *Acta Universitatis Latviensis* 710, Biology: 159–60, *available at* <http://eeb.lu.lv/EEB/2006/Campbell.pdf>.

<sup>19</sup> <https://www.mtpr.org/post/black-bear-hunter-kills-grizzly-montanas-swan-valley>

regulations but failed to now reinitiate consultation, even though multiple events triggering the need to reinitiate consultation have since occurred. These include new information on impacts on listed species; modification of authorized actions such as expansion of hunting methods, acreage, or targeted species that affect listed species in ways not previously considered; and listings of new species that may be affected by the regulations. 50 C.F.R. § 402.16(b)-(d). Yet FWS have failed to timely reinitiate and complete reinitiated consultation regarding the continued implementation and impacts of the station-specific hunting and fishing regulations, in violation of the ESA. 16 U.S.C. §§ 1536(a)(2), 1536(b)(1)(A); 50 C.F.R. §§ 402.14, 402.16.

Additionally, for many refuges, FWS failed to properly analyze the effects of the action by excluding relevant impacts like risk of lead poisoning. 50 C.F.R. § 402.12(a). That is a violation of the ESA's requirement to use the best available science in making these determinations. 16 U.S.C. § 1536(a)(2). The agency also violated the law by failing to complete consultation under the deadlines imposed by the ESA and its implementing regulations. 16 U.S.C. §§ 1536(b)(1)(A), (c)(1); 50 C.F.R. §§ 402.12(i), 402.14(e).

If FWS does not act to correct the violations described in this letter, it would be subject to suit within 60 days in U.S. District Court. The Center would seek injunctive and declaratory relief, and legal fees and costs regarding these violations. If you have wish to discuss this matter or believe this notice is in error, please contact Collette at 651-955-3821.

Sincerely,



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<u>Refuge or Hatchery</u>	<u>State</u>	<u>Species</u>	<u>Nature of Claim</u>
41 Limited Easement Refuges	North Dakota	Whooping crane	Arbitrary "no effect" determination. Failure to consider best available science on lead impacts.
Arthur R. Marshall Loxahatchee NWR	Florida	Audubon's crested caracara	Species missing from biological evaluation
Big Branch Marsh NWR	Louisiana	Red-cockaded woodpecker	No biological evaluation prepared
Bosque del Apache NWR	New Mexico	Least tern	Species missing from biological evaluation
Browns Park NWR	Colorado	Yellow-billed cuckoo	Species missing from biological evaluation
Buenos Aires NWR	Arizona	Jaguar	Arbitrary "NLAA" determination. Failure to consider best available science on lead impacts. Failure to consider risk from mistaken identity shootings by mountain lion hunters.
Buenos Aires NWR	Arizona	Ocelot	Arbitrary "NLAA" determination. Failure to consider best available science on lead impacts.
Clarks River NWR	Kentucky	Orangefoot pimpleback	Arbitrary "no effect" determination. Failure to consider best available science on impacts from beaver killing, such as sedimentation
Clarks River NWR	Kentucky	Pink mucket	Arbitrary "no effect" determination. Failure to consider best available science on impacts from beaver killing, such as sedimentation
Clarks River NWR	Kentucky	Sheepnose	Arbitrary "no effect" determination. Failure to consider best available science on impacts from beaver killing, such as sedimentation
Clarks River NWR	Kentucky	Rabbitsfoot	Arbitrary "no effect" determination. Failure to consider best available science on impacts from beaver killing, such as sedimentation
Clarks River NWR	Kentucky	Fat pocketbook	Arbitrary "no effect" determination. Failure to consider best available science on impacts from beaver killing, such as sedimentation

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Everglades NWR	Florida	Audubon's crested caracara	Arbitrary "NLAA" determination. Failure to consider best available science on lead impacts.
Fort Niobrara NWR	Nebraska	Northern long-eared bat	Arbitrary "no effect" determination. Failure to consider best available science on disturbance impacts
Horicon NWR	Wisconsin	Whooping crane	Arbitrary "NLAA" determination. Failure to consider best available science on lead impacts.
Kirwin NWR	Kansas	Whooping crane	Arbitrary "no effect" determination. Failure to consider best available science on lead impacts.
Lacreek NWR	South Dakota	Piping plover	Species missing from biological evaluation
Laguna Atascosa NWR	Texas	Piping plover and designated critical habitat	Arbitrary "NLAA" determination. Failure to consider best available science on disturbance impacts
Laguna Atascosa NWR	Texas	Red knot	Arbitrary "NLAA" determination. Failure to consider best available science on disturbance impacts
Laguna Atascosa NWR	Texas	Eastern black rail (proposed listing)	Arbitrary "NLAA" determination. Failure to consider best available science on disturbance impacts
Laguna Atascosa NWR	Texas	Ocelot	Arbitrary "NLAA" determination. Failure to consider best available science on lead impacts, vehicle strikes/disturbance impacts
Lee Metcalf NWR	Montana	Grizzly bear	Arbitrary "NLAA" determination. Failure to consider best available science on lead impacts, mistaken identity or self-defense shootings
Leslie Canyon NWR	Arizona	Jaguar	Arbitrary "NLAA" determination. Failure to consider best available science on lead impacts.

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Middle Mississippi River and Great River Refuges Complex	Missouri and Illinois	Indiana bat	Arbitrary "no effect" determination. Failure to consider best available science on disturbance impacts
Middle Mississippi River and Great River Refuges Complex	Missouri and Illinois	Northern long-eared bat	Arbitrary "no effect" determination. Failure to consider best available science on disturbance impacts
Middle Mississippi River and Great River Refuges Complex	Missouri and Illinois	Least tern	Arbitrary "no effect" determination. Failure to consider best available science on disturbance impacts
North Mississippi Complex	Mississippi	Least tern	Species missing from biological evaluation
North Mississippi Complex	Mississippi	Wood stork	Arbitrary "no effect" determination. Failure to consider best available science on disturbance impacts
Northern Tallgrass Prairie NWR	Minnesota and Iowa	Indiana bat	Arbitrary "no effect" determination. Failure to consider best available science on disturbance impacts
Northern Tallgrass Prairie NWR	Minnesota and Iowa	Gray wolf	Arbitrary "no effect" determination. Failure to consider best available science on lead impacts, poaching/vehicle strikes/disturbance impacts
Northern Tallgrass Prairie NWR	Minnesota and Iowa	Northern long eared bat	Arbitrary "no effect" determination. Failure to consider best available science on disturbance impacts
Northern Tallgrass Prairie NWR	Minnesota and Iowa	Piping plover	Arbitrary "no effect" determination. Failure to consider best available science on disturbance impacts
Northern Tallgrass Prairie NWR	Minnesota and Iowa	Least tern	Arbitrary "no effect" determination. Failure to consider best available science on disturbance impacts
Northern Tallgrass Prairie NWR	Minnesota and Iowa	Pallid sturgeon	Arbitrary "no effect" determination. Failure to consider best available science on lead impacts, disturbance impacts

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Northern Tallgrass Prairie NWR	Minnesota and Iowa	Topeka shiner	Arbitrary "no effect" determination. Failure to consider best available science on lead impacts, disturbance impacts
Pahranagat NWR	Nevada	Desert tortoise	No biological evaluation prepared
Pahranagat NWR	Nevada	Southwestern willow flycatcher	No biological evaluation prepared
Patoka NWR	Indiana	Whooping crane	Arbitrary "NLAA" determination. Failure to consider best available science on lead impacts.
Rhode Island Complex	Rhode Island	Northern long eared bat	Arbitrary "no effect" determination. Failure to consider best available science on disturbance impacts
Rhode Island Complex	Rhode Island	Piping plover	Arbitrary "no effect" determination. Failure to consider best available science on disturbance impacts
Rhode Island Complex	Rhode Island	Red knot	Arbitrary "no effect" determination. Failure to consider best available science on disturbance impacts
Rhode Island Complex	Rhode Island	Roseate tern	Arbitrary "no effect" determination. Failure to consider best available science on disturbance impacts
St. Marks NWR	Florida	Frosted flatwoods salamander	No biological evaluation prepared
St. Marks NWR	Florida	Red-cockaded woodpecker	No biological evaluation prepared
St. Marks NWR	Florida	Wood stork	No biological evaluation prepared
Swan River NWR	Montana	Grizzly bear	Arbitrary "NLAA" determination. Failure to consider best available science on mistaken identity or self-defense shootings