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Department of the Interior **Fish and Wildlife Service (FWS)** Proposed Rule: **2020-2021 Station-Specific Hunting and Sport Fishing Regulations** Document Citation:, 85 FR, No. 69, Pages 20030 – 20086 (57 pages)  
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### **Attorneys for Animals Comment on Proposed Rule 2020-2021 Station-Specific Hunting and Sport Fishing Regulations**

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

We oppose the Proposed Rule (Rule) because, if finalized, it would have a massive economic and environmental impact, yet the US Fish and Wildlife Service (FWS) is whitewashing and downplaying its significance. AFA asserts that in doing so, FWS may be violating laws that would have required additional analysis, and ignores the reality of 2020 that the majority of people engaging in wildlife-related recreational activities (recreationists) in National Wildlife Refuges (NWRs) and other public lands, are not hunters or fishers, thus denying these non-consumptive users the same opportunity on the lands.

Essentially, FWS is proposing changes that would have a huge impact on large swaths of land across the country. Yet, FWS is selectively minimizing its impact and has not performed statutory requirements necessary for a Rule with such substantial consequences.

The breadth and impact of this Rule is substantial. It contains six separate actions, affecting more acreage nationwide than that of Delaware. This Rule has immense consequences, touching 44 states, 97 wildlife refuges, and nine fish hatcheries. The Rule would expand hunting and fishing in 2.3 million acres, making this the single largest of such efforts in the history of FWS, surpassing last year's

expansion on 1.4 million acres, then the largest effort to date. If this Rule is finalized, 4 million acres will have been affected in the last 3 years. This sweeping enlargement is more than double the acreage opened or expanded in the last five years combined, creating close to 900 new hunting and fishing sites. The proposed Rule not only expands hunting and fishing on 89 NWRs but also opens eight NWRs to hunting and fishing for the first time. For example, the Everglades Headwaters NWR in Florida would be open, for the first time, for migratory bird hunting, big game hunting, upland hunting, and sport fishing. NWRs from West Virginia to Wyoming are impacted by this Rule. In addition, this Rule would create 41 limited-interest easements, expanding hunting and fishing on 47,419 acres accessed via privately-owned lands.

This Rule, and similar previous actions, demonstrate a bias of crafting policies governing national lands substantially for the benefit of a small and decreasing percentage of the US population while simultaneously decreasing similar use and opportunities for the majority of Americans.

This is contrary to the statutory mission of the National Wildlife Refuge System (NWRS) that it “be managed as a national system of lands and waters devoted to conserving wildlife and maintaining biological integrity of ecosystems.”<sup>[1]</sup> The NWRS is supposed to ensure that the lands it manages are maintained for the benefit of present and future generations of all Americans. The goal of the NWRS is to increase public participation on NWRs and engage the public use of the lands so as to foster an appreciation for fish and wildlife. Wildlife-dependent recreation uses are the priority general public use of these lands, and they are not only hunting and fishing, but also wildlife observation, photography, environmental interpretation, and education.

All these activities are to receive priority consideration in refuge planning and management, particularly opportunities “for parents and their children to safely engage in traditional outdoor activities”.<sup>[2]</sup> As such, policies should at minimum not contract – as the Proposed Rule does – but rather expand opportunities for those activities that attract the majority of the wildlife-related recreationists. As will be detailed below, those activities more and more are non-consumptive uses like wildlife-watching, not hunting and fishing.

Instead, by greatly expanding consumptive uses, FWS is ignoring policies to expand non-consumptive opportunities. Further, as required by the National Environmental Policy Act<sup>[3]</sup>, the decision to open an NWR to hunting is to be made on a case-by-case basis, and FWS is to consider the impact hunting would have on other refuge programs and public demand, the latter which we assert if for non-hunting uses. FWS has not truly considered the impact on public demand for non-consumptive use at each of these stations.

AFA is concerned with the trend of federal (and state) agencies focusing their efforts on expanding opportunities for consumptive users that make up the minority, at the expense of the non-consumptive user majority.

According to the 2016 National Survey of Fishing, Hunting, and Wildlife-Associated Recreation (FHWAR):

- Numbers: the number of hunters dropped by 2 million from 2011 to 2016, while the number of non-consumptive users rose sharply by 20 percent in the same period.<sup>[4]</sup> Wildlife watchers

totaled 86.0 million, while anglers and hunters *combined* totaled only 47.3 million (35.8 million and 11.5 million respectively); the former representing nearly 2/3 of all recreationists.

- Expenditures: non-consumptive users spent \$75.9 billion, which is more than either fishers or hunters, and nearly 50% of total expenditures of all recreationists.

Therefore, if FWS is truly interested in increasing public participation on NWRs, as it is mandated to do, it should propose rules that appeal to the majority and not prop up the already-declining minority. This is especially egregious when, as here, increasing use for hunters and fishers **is to the exclusion** of opportunities for the majority of Americans, as will be detailed below in the analysis of the ESA Section 7 Consultation requirement.

AFA challenges the FWS contention that certain laws, executive orders, and regulations are not applicable to this Rule, and disagrees with its legal conclusions that further analysis is not necessary. FWS is simultaneously touting the significance of expanding hunting and fishing on NWRs while downplaying the impact, with the effect of avoiding requisite regulatory analysis. A reasonable person would find FWS is trying to have it both ways - claiming this Rule is not so important, thereby avoiding the requirements of an economic or environmental analysis, while at the same time boasting of the massive expansion of “opportunities” on NWRs. Respectfully, FWS is talking out of both sides of its mouth.

#### Limited-Interest Openings in North Dakota

In 1935, the Easement Refuge Program executed agreements granting the federal government easements “for the purposes of water conservation, drought relief, and migratory bird and wildlife conservation” with management of migratory birds being the “overarching purpose.”<sup>[5]</sup> These easements allow the federal government to control private landowners’ use of their land, and were created in the 1930s in response to the economic depression, declining wildlife populations, and immense drought confronting the US.

Expanding hunting and fishing via limited-interest easements on private property is contrary to the statutory intent of these easements - conservation of water and wildlife. Expanding opportunities only for the minority who hunt and fish limits revenue-generating economic opportunities by non-consumptive users, and is inconsistent with the goal of the Comprehensive Conservation Plan (CCP) for North Dakota Limited-interest NWRs to provide “quality wildlife-dependent recreation opportunities that foster an appreciation and understanding of the management and resources of the Program and the System.”<sup>[6]</sup>

Further, one of the easements at issue, Lake Otis, was designated in 1971 “for use of an inviolate sanctuary”<sup>[7]</sup> - meaning free or safe from injury. To permit hunting and fishing is contradictory to the intended use of this NWR. But in its zeal to promote hunting and fishing, FWS even includes an “inviolate sanctuary” in its expansion plan, while simultaneously denying non-consumptive users access to this NWR.

In addition, by the FWS’s own admission in the hunting and fishing plan, this expansion will increase expenses while not generating as much revenue as compared to similar expansion for non-consumptive users who are a more numerous and growing segment of the Wildlife-Related Recreationist population. An increase of at least \$40,000/year above current funding to implement the program and a five percent increase of current law enforcement program staff time - at a time when our country is facing

unprecedented unemployment and economic strain, increasing funding for non-essential services that do not generate revenue in return is a gross mismanagement of resources. This is particularly remarkable when FWS does not even consider opportunities that would both increase non-consumptive use and provide needed jobs to support such an effort.

#### Regulatory Flexibility Act

FWS maintains that the Proposed Rule is exempt from regulatory flexibility analysis, as required under this Act, because it will not have a significant economic impact on a substantial number of small entities. AFA challenges the supposition that expanding hunting and fishing on more than 2.3 million acres of land will not have a significant economic impact. In addition, as noted, FWS did not fully consider the contributions of non-consumptive users. Failure to consider this cohort of recreationists and the revenue they generate makes this a flawed Rule from inception.

FWS is catering its policies toward a small group while admitting there is little to no economic benefit in doing so, while negatively impacting the majority that has a potential greater economic impact. FWS admits that hunting and fishing activities are flat or declining, while non-consumptive use has been increasing since 1991, as noted above in the FHWAR report, that wildlife watchers are more than double hunters and fishers combined in population size and generate more revenue than either of the consumptive categories. It appears that FWS has not truly considered the negative impact that increased hunting and fishing would have on non-consumptive users and their *significant* economic contribution.

Given that four of the six wildlife-dependent “priority public uses” designated for NWRs are non-consumptive (wildlife observation, photography, environmental interpretation, and education) that contribute almost half the revenue generated from these wildlife-dependent activities, FWS is obligated to consider the economic impact of this Rule on the majority. If FWS had considered the economic impact of the contribution of revenue created by expanding opportunities for non-consumptive users, as well as the decrease of such revenue by expanding opportunities for hunting and fishing, a regulatory flexibility analysis would have been required.

We urge FWS to consider the contributions of and impact on non-consumptive users and to conduct a regulatory flexibility analysis before taking further action to finalize this Rule. We note that failure to even consider this economic factor may violate the Regulatory Flexibility Act itself.

#### Endangered Species Act Section 7 Consultation

While going through the motions of a required Section 7 Consultation, FWS, we believe, had a predetermined outcome in mind regarding the impact of the proposed Rule on endangered species, and interpreted the data to support its foregone conclusion.

We reach this determination by a review of its Cumulative Impacts Report (CIR)<sup>[8]</sup>, in which FWS concedes that the Rule will result in negative impacts, but nonetheless concludes that the proposed changes on the 97 refuges and nine hatcheries “collectively will not result in significant adverse cumulative impacts to the human environment,”<sup>[9]</sup> and that any impacts will be negligible. Of the 11 categories considered in the CIR, FWS “did not determine or expect any of the known, estimated, or projected harvests...to have significant adverse direct, indirect, or cumulative impacts to any hunted or fished wildlife population.”<sup>[10]</sup> On the other hand, FWS emphasizes the possible importance of the one positive impact cited in its CIR.

Therefore, we have a situation where, when the impact is adverse, FWS concludes it “will be” minimal and negligible in the cumulative. When the impact is favorable, FWS concludes that while it may be minimal it “could have” cumulative beneficial impacts. FWS seems to only speculate when the impact supports the Rule. For example, it was only when the impact on habitat and plants was positive that FWS concluded “while most of these beneficial impacts would be localized, they could have cumulative impacts”<sup>[11]</sup> for habitat and wildlife.

In addition, FWS acknowledges that increased hunting and fishing will disturb the non-consumptive users who visit NWRs and hatcheries, yet, in an exercise of what can rightly be called magical thinking concludes this seasonal displacement would be “temporary and would not cause significant adverse cumulative impacts to other recreational users.”<sup>[12]</sup> FWS recognizes it is reducing opportunities for the revenue-generating majority, while increasing use for a small and declining minority, a policy decision with which we profoundly disagree. **Further, if finalized, this Rule not only misses a revenue-generating opportunity at a time of unprecedented economic suffering, but, by likely changing the character of these lands permanently, has a negative impact on the future ability to generate revenue from the non-consumptive majority.**

To add insult to injury, FWS suggests that “if resources are lacking for...wildlife-dependent recreational uses, the refuge manager will make reasonable efforts to obtain additional resources or outside assistance from States, other public agencies, local communities, and/or private and non-profit groups before determining that the use is not compatible.”<sup>[12]</sup> This is simply tone-deaf given the current COVID-19 situation, as additional resources are universally lacking. To put this added burden on resources, while passing an opportunity to generate more revenue by expanding opportunities for non-consumptive users is counterintuitive at the very least.

#### National Environmental Policy Act

FWS concludes that each of the station-specific proposed actions are categorically excluded from NEPA documentation requirements based on their minor impact. AFA is skeptical that such a massive expansion of hunting and fishing would not result in some significant environmental impact on any of the affected NWRs and hatcheries.

#### Conclusion

As the above analysis shows, FWS minimizes the importance and contributions of the majority (non-consumptive users) to benefit the minority (a declining population of hunters) which has three problems: (1) it defies the FWS mission of protecting these lands for the use of *all* Americans; (2) it blatantly ignores economic opportunity in time of need, and (3) it minimizes the effect of the proposed Rule (even while touting its significance), thereby avoiding what AFA asserts is required analysis under applicable laws.

FWS should consider the economic impact that expanding hunting and fishing would have on non-consumptive use, as well as consider what impact expanding non-consumptive use opportunities would have both environmentally and economically. This Rule defies the intent of the FWS mission, is not sound policy based on true conservation efforts and public engagement and ignores an opportunity to generate jobs and increased revenue. At a time when governments are hemorrhaging money and

unemployment is widespread, ignoring such economic opportunities is negligent, does not promote the interests of the American people, and mismanages the lands entrusted to FWS.

The Proposed Rule must be withdrawn.

Very Truly Yours,



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President, Board of Directors

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- [1] United States, Department of Interior, Fish and Wildlife Service. “Meet the Natural Wildlife Refuge System: Special Places Where Wildlife and People Thrive.” March 2015, <https://www.fws.gov/refuges/vision/pdfs/MeetTheNWRSMar2015.pdf>
- [2] “National Wildlife Refuge Administration Act.” Title 16 US Code, sec. 688dd (1998).
- [3] 42 U.S.C. §§ 4321 et seq.
- [4] United States, Department of Commerce, Census Bureau. “National Survey of Fishing, Hunting, and Wildlife-Associated Recreation (FHWAR): 2016.” Oct. 2018, <https://www.census.gov/library/publications/2018/demo/fhw-16-nat.html>
- [5] “2020-2021 Station-Specific Hunting and Sport Fishing Regulations,” Title 50 Code of Federal Regulations, Pts. 32, 36, and 71. 2020 ed.
- [6] United States, Department of Interior, Fish and Wildlife Service. “Draft North Dakota Limited-Interest National Wildlife Refuges Hunting and Fishing Plan.” Frank Durbian, February 2020, [https://www.fws.gov/mountain-prairie/huntfish/ND%20Limited-Interest%20NWRs\\_HuntPlan\\_Draft\\_Clean\\_508-compliant\\_v2.0.pdf](https://www.fws.gov/mountain-prairie/huntfish/ND%20Limited-Interest%20NWRs_HuntPlan_Draft_Clean_508-compliant_v2.0.pdf)
- [7] *ibid*
- [8] *ibid*
- [9] “2020-2021 Station-Specific Hunting and Sport Fishing Regulations: 2020-2021 Final Cumulative Impacts Report,” Title 50 Code of Federal Regulations, Supporting & Related Material, April 2020, <https://www.regulations.gov/document?D=FWS-HQ-NWRS-2020-0013-1462>
- [10] *ibid*
- [11] *ibid*
- [12] *ibid*