



THE STATE
of **ALASKA**
GOVERNOR MIKE DUNLEAVY

Department of Natural Resources
OFFICE OF PROJECT MANAGEMENT AND PERMITTING

550 West 7th Avenue, Suite 1430
Anchorage, AK 99501-3561
Main: 907.269-8690
Fax: 907-269-5673

May 6, 2024

Ms. Katherine Harrigan
US Fish & Wildlife Service
1849 C St. NW
Washington, DC 20240

Submitted online at <https://www.regulations.gov/commenton/FWS-HQ-NWRS-2022-0106-35375>

Re: National Wildlife Refuge System: Biological Integrity, Diversity, and Environmental Health,
Docket FWS–HQ–NWRS–2022–0106

Dear Ms. Harrigan,

The State of Alaska (State) reviewed the proposed rule entitled National Wildlife Refuge System; Biological Integrity, Diversity, and Environmental Health (BIDEH) and provides the following comments.

We appreciate the comment period extension (to May 6, 2024) the Fish and Wildlife Service (FWS) provided for this proposed rule; the extended time is in line with what normally occurs for a rule of this significance. The final rule will benefit from the opportunity for impacted parties to provide a more thorough analysis of the significant impacts and changes the proposed rule envisions to refuge management and use across all 50 States, especially Alaska.

Despite being the manager of all fish and wildlife within the State of Alaska, the Alaska Department of Fish and Game (ADF&G) only became aware of the intent to issue this proposed rule through ancillary discussions through the Association of Fish and Wildlife Agencies (AFWA) in 2023. AFWA members, including ADF&G, met with FWS staff to discuss the proposed revisions to the USFWS' Refuge Management Policies. AFWA and its members were subsequently given an opportunity to provide advance comments on the proposed rule. Unfortunately, we do not see any of the significant changes we recommended during that comment opportunity and subsequent discussions reflected in the proposed rule. Given the broad, discretionary authority this proposed rule would create and the following specific issues, the State requests this proposed rule be withdrawn and the required consultation with State fish and wildlife agencies be carried out. Should the FWS choose not to rescind this proposed rule, we request that an exemption to these 50 CFR Part 29 regulations be granted for Alaska and that Alaska-specific regulations at 50 CFR Part 36 be cooperatively developed with the State to comply with the Alaska National Interest Lands Conservation Act (ANILCA). Management of refuge lands in Alaska is to the natural diversity standard identified in ANILCA not the BIDEH standard found in the NWRSIA. Any changes applied to refuges in the State of Alaska must

comply with Public Law 115-20 which voided the 2016 “Non-Subsistence Take of Wildlife, and Public Participation and Closure Procedures, on National Wildlife Refuges in Alaska.”

The proposed rule would, in practice, unnecessarily limit Alaskans’ and non-rural tribal members’ ability to participate in traditional uses. Our concerns and proposed solutions are outlined in detail in the attached document. Please review that information and contact us if clarification is needed. Main topics include:

- The proposed rule conflicts with the Congressional Review Act (CRA) (Pub. L. 115-20, April 3, 2017) as the proposed rule is substantially similar to the *Non-Subsistence Take of Wildlife on, and Public Participation and Closure Procedures, on National Wildlife Refuges*¹ that was voided by Congress.
- The proposed rule conflicts with the National Wildlife Refuge System Improvement Act (NWRSIA).
- The proposed rule conflicts with ANILCA.
- The proposed rule is a Major Rule under the CRA, 5 USC 801(a)(1)(A). A copy must be submitted to both houses of Congress and the Government Accounting Office before it can be finalized.
- The proposed rule is prevented by the Major Question Doctrine. The major questions doctrine prevents the FWS from expanding its authority as described in the proposed regulations absent clear direction from Congress.
- The proposed rule conflicts with Executive Order 13132 – Federalism.
- The proposed rule conflicts with the National Environmental Protection Act (NEPA) and guidance on issuing Categorical Exclusions resulting in extraordinary circumstances that will have significant effects.
- In general, the State supports the FWS exercising reserved water rights on waters within the refuge system in accordance with local, State and Federal laws. However, additional regulation is not necessary.

Action items:

- Withdraw the proposed rule and carry out appropriate consultation with States and traditional user groups, Native Tribes, Alaska Native Corporations, and Federal subsistence users in Alaska. This will provide time to appropriately meet the requirements and intent of NEPA.
- If the proposed rule is not withdrawn, FWS needs to prepare an Environmental Impact Statement and make provisions for public comment on it before implementing the final rule.
- If the proposed rule is not withdrawn, FWS needs to exempt refuges in Alaska and develop Alaska-specific regulations as discussed below and in our attached comments.

Additionally, the FWS must recognize that States are responsible for the management of fish and wildlife populations across all lands. The final regulation and policy must outline how the FWS will work with State fish and wildlife agencies to complement efforts of the States’ agencies to conserve fish and wildlife and their habitats, ensuring healthy, sustainable populations are conserved across boundaries. This includes outlining how and when consultation, coordination, and collaboration with States will occur. The regulations should state simply and clearly that hunting and fishing will be conducted in accordance with “principles of sound fish and wildlife

¹ 81 FR 52250, September 6, 2016, *Non-Subsistence Take of Wildlife, and Public Participation and Closure Procedures, on National Wildlife Refuges in Alaska*.

management and administration,” and “to the extent practical, will be consistent with State fish and wildlife laws, regulations, and management plans.”

Lastly, the final regulation needs to clearly state how the FWS will work through the States to accomplish their objectives including how they will work with the State of Alaska’s Board of Game to implement any restrictions on the take of predators.

Thank you for the opportunity to comment. Please contact me at (907) 269-0880 or by email at Catherine.heroy@alaska.gov to coordinate any follow-up discussions.

Sincerely,

A handwritten signature in blue ink that reads "Catherine Heroy". The signature is written in a cursive, flowing style.

Catherine Heroy
Federal Program Manager

Attachment: SOA Comments-BIDEH

Contents

I. Introduction	2
II. Overarching Issues	4
1. Failure to Comply with the Congressional Review Act (CRA)	4
i. Major Rule	4
ii. Significant Rule	5
iii. 2017 Exercise of Congressional Review Act Revoked Interior’s Authority to Adopt the Proposed Rule.	6
2. National Wildlife Refuge System Improvement Act.	7
i. Flips USFWS’ Management from Congressionally Designated Conservation Mandate to a Preservation Mandate.	7
ii. Fails to ensure timely and effective cooperation and collaboration with State fish and wildlife agencies when managing refuges reversing the current balance on fish and wildlife management with the States.	11
iii. Predator Control.	13
2. ANILCA	14
i. ANILCA Title VIII – Subsistence Management and Use	16
ii. Reverses ANILCA’s “open until closed” provisions.	17
iii. No 810 Analyses.	18
iv. Additional BIDEH findings are contrary to ANILCA’s statutorily allowed traditional uses.	18
5. Major Questions Doctrine	19
6. Infringement on State of Alaska Management Authorities	21
i. ADF&G -- the Rule reverses the current balance where the State sets wildlife population objectives	21
ii. State of Alaska Water Rights.	24
7. Federalism Issues	24
8. Inadequate NEPA Analyses.	25
9. Impacts to Alaskans and Non-Rural Tribal Members.	26

I. Introduction

The Alaska Department of Fish and Game staff (ADF&G) reviewed the proposed rule entitled National Wildlife Refuge System; Biological Integrity, Diversity, and Environmental Health (BIDEH), issued on February 2, 2024, and provides the following comments.

We understand that the NWRSA includes the provision for incorporating BIDEH into refuge system planning, however, the broad, discretionary authority included in this proposed rule must not usurp the other thirteen (13) provisions provided for in the NWRSA or those found in ANILCA. One of the other 13 provisions in the NWRSA, on equal footing with the BIDEH standard, is to ensure effective coordination, interaction, and cooperation with State fish and wildlife agencies.¹ We appreciate the conversations the Fish and Wildlife Service (FWS) staff had with state representatives through the Association of Fish and Wildlife Agencies (AFWA) in 2023 to discuss the proposed revisions to the FWS' Refuge Management Policies. During these discussions, we became aware of the proposal to establish BIDEH regulations in 50 Code of Federal Regulations (CFR) Part 29. Unfortunately, the meeting where we discussed the BIDEH rule proposal was not as productive as previous meetings. FWS staff did not review our comments before the meeting citing travel commitments. At the meeting, State and AFWA representatives outlined concerns about the proposed rule. There was little to no discussion nor any response from FWS staff to comments made at that meeting before the release of this proposed rule. While the box was checked that consultation with the States occurred, the consultation certainly did not meet the direction Congress provided in the National Wildlife Refuge System Improvement Act (NWRSA) to: “ensure effective coordination, interaction, and cooperation with ... the fish and wildlife agency of the States in which the units of the System are located.”²

We request this proposed rule and policy be withdrawn. If the proposed rule and policy are not withdrawn, we request an exemption for refuges in Alaska and development, in consultation with the State of Alaska, of appropriate Alaska-specific regulations at 50 CFR Part 36 – Alaska National Wildlife Refuges.

This action will be in line with 50 CFR 36.1(a)

The regulations contained in this part are prescribed for the proper use and management of all Alaska National Wildlife Refuges and supplement the general National Wildlife Refuge System regulations found in Title 50 CFR Chapter I, subchapter C.

This proposed regulation and its associated revised policy fail to acknowledge ANILCA provisions require refuges in Alaska to be managed to a different standard than those elsewhere in the system. For example, refuges in Alaska are “open until closed” as opposed to refuges that are “closed until open” elsewhere in the nation. The management standard in Alaska is “the conservation of fish and wildlife populations and habitats in their natural diversity” not in accordance with BIDEH. When a conflict exists between the NWRSA and ANILCA, ANILCA prevails.³

¹ NWRSA, Public Law 105-57, 16 USC 668dd(3)(D).

² NWRSA, Public Law 105-57, 16 USC 668dd(a)(4)(E).

³ Pub. Law 105-57, Oct. 9, 1997, Sec. 9(b) “If any conflict arises between any provision of this Act and any provision of the [ANILCA], then the provision in the [ANILCA] shall prevail.

⁵ 81 FR 52250, September 6, 2016, *Non-Subsistence Take of Wildlife, and Public Participation and Closure Procedures, on National Wildlife Refuges in Alaska*.

In 2016, the FWS promulgated an Alaska-specific rule, the *Non-Subsistence Take of Wildlife, and Public Participation and Closure Procedures, on National Wildlife Refuges in Alaska; Final Rule* (2016 Wildlife Rule).⁴ In that rule, the FWS recognized that ANILCA established “natural diversity” as a different refuge management standard for refuges in Alaska and tried to equate natural diversity with BIDEH. In the preamble to the final 2016 Wildlife Rule, the FWS stated in the preamble: “We conclude that management in accordance with the BIDEH policy mandated by the Improvement Act is essentially the same as managing for natural diversity as mandated by ANILCA.” The BIDEH directive justifies “deviat[ing], in certain respects, from applying State regulations within refuges... because predator-prey interactions represent a dynamic and foundational ecological process in Alaska's arctic and subarctic ecosystems and are a major driver of ecosystem function...”⁵ Thus, the FWS used BIDEH to prohibit predator control in Alaska. As we discuss in further detail later, Congress rejected these interpretations through the Congressional Review Act in 2017 (Public Law (P.L.) 115-20), directing the FWS could not implement a substantially similar rule in the future. The FWS appropriately repealed the 2016 Wildlife Rule in 2017 but is now proposing this rule, a rule that is substantially similar to the 2016 Wildlife Rule, issuing it under their national regulations rather than their Alaska-specific regulations at 50 CFR Part 36.

ANILCA states, “Nothing in this Act is intended to ... diminish the responsibility and authority of the State of Alaska for management of fish and wildlife on public lands ...”⁶ and the NWRSA reinforces the role of the State where it states, “If any conflict arises between any provision of this Act and any provision of the Alaska National Interest Lands Conservation Act, then the provision in the Alaska National Interest Lands Conservation Act shall prevail.”⁷ Both Acts require the FWS to maintain traditional uses such as hunting, fishing, and trapping and access to these sorts of traditional uses on refuge lands in Alaska. In Alaska, restrictions to hunting, fishing, and trapping on refuge lands are currently the result of active management decisions made by the Federal Subsistence Board (FSB), the Alaska Board of Fish (BOF), and the Alaska Board of Game (BOG) through robust public processes. Actions by a Federal land management agency restricting access is a closure under ANILCA.

The proposed rule incorporates BIDEH as a component of individual refuge management raising it to equal status with the System mission and refuge purposes in determining refuge management and its associated policy. BIDEH implies management by natural processes, with active management as a last resort. The proposed rule and policy impose a new, more passive approach to managing the System, its refuges, and fish and wildlife populations that use the refuges. This is a substantial change in refuge management that differs from the FWS’ Congressional mandate to actively manage the system for conservation purposes, with a priority on refuge-specific purposes. The new management style will be one focused on the preservation of the refuge system resources through BIDEH. The FWS also broadly asserts authority to set refuge fish and wildlife population objectives without outlining how these objectives will be coordinated with State fish and wildlife agencies to complement State population objectives. The result will take refuge management focus away from refuge purposes and State fish and wildlife population efforts and direct them to the broad, discretionary BIDEH authority established at the national level. This may limit refuge managers whose refuge’s purposes differ from the national direction, from achieving what Congress intended within a particular ecological setting. This may result in

⁴ 81 FR 52247, September 6, 2016, *Non-Subsistence Take of Wildlife, and Public Participation and Closure Procedures, on National Wildlife Refuges in Alaska*.

⁵ 81 FR 52251-52252, September 6, 2016, *Non-Subsistence Take of Wildlife, and Public Participation and Closure Procedures, on National Wildlife Refuges in Alaska*.

⁶ NWRSA, Public Law 105-57, 16 USC 668dd(m) and ANILCA Section 1314.

⁷ 111 STAT. 1260 PUBLIC LAW 105-57—OCT. 9, 1997.

unnecessarily restrictive and protectionist management decisions, especially in Alaska where refuges are closest to the desired condition represented by BIDEH.

The proposed rule and policy also assign refuges and the System itself far broader fish and wildlife management responsibilities under the definition of “Manage fish and wildlife populations” at the proposed 29.3(c)(3). The definition directs refuges to meet refuge population objectives. Management of fish and wildlife and setting population objectives are the responsibility of the States. This proposed rule upends the existing relationships between the States and FWS that Congress established regarding fish and wildlife management.

Traditionally, refuge management and state management have been similarly aligned, with active management to conserve/sustain fish and wildlife populations occurring on both refuge and state lands. By prioritizing deference to natural processes to achieve refuge objectives and landscape connectivity and limiting management techniques to those that mimic natural processes⁸ the proposed regulation and policy eliminate legitimate and well-regulated traditional management practices the FWS and State fish and wildlife agencies have both historically used to conserve fish and wildlife populations.

We request this proposed rule and policy be withdrawn. If the proposed rule and policy are not withdrawn, we request an exemption for refuges in Alaska and that Alaska-specific regulations be developed for inclusion in 50 CFR Part 36 – Alaska National Wildlife Refuges, which recognizes the provisions of ANILCA.

II. Overarching Issues

1. Failure to Comply with the Congressional Review Act (CRA)

i. Major Rule

The proposed rule is a major rule under the definition provided in the CRA.⁹

To understand the economic importance of wildlife we need only to look at Pittman Robertson Act funding numbers. In the fourth quarter of 2022 alone, the firearm and ammunition manufacturers contributed more than \$235 million to the Wildlife Restoration Trust Fund. Established by the Pittman-Robertson Act, an excise tax is set at 11 percent of the wholesale price for long guns and ammunition and 10 percent of the wholesale price for handguns.¹⁰ These numbers do not include what is collected from archery, fishing and boating activities. The non-monetary value is also profound – most Alaskans cite wildlife as a significantly important reason for living here. The following economic reports on Alaska wildlife are over 10 years old and the numbers have not been adjusted for the major inflation experienced recently in the United States; however, the reports demonstrate the scale of the industry affected by the proposed rule.

The ADF&G Division of Wildlife Conservation report, *The Economic Importance of Alaska's Wildlife in 2011*, indicates that spending on hunting and wildlife viewing totaled \$3.4 billion in 2011 and generated

⁸ Proposed 601 FW 3, Section 3.10 C. Conserve and manage fish and wildlife populations., subsection (1).

⁹ 5 USC 804(2).

¹⁰ <https://www.nssf.org/articles/firearm-industry-surpasses-16-billion-in-pittman-robertson-excise-tax-contributions-for-conservation/> accessed 4/29/2024.

\$4.1 billion in economic activity in Alaska. This includes more than 27,000 jobs and \$1.4 billion in labor income.¹¹

The Alaska Professional Hunters Association contracted with McDowell Group to conduct a study of the economic impact of guided hunting in Alaska. Because guided hunting occurs in remote parts of the state, many Alaskans are not aware of the significant contributions that hunting guides and their clients make to the state's economy, especially the rural economy. The following are key findings from the study:

- Guided hunting in Alaska accounted for a total of 2,210 jobs and \$35 million in total labor income in 2012, including all direct, indirect and induced impacts.
- An estimated 1,620 people were directly employed in guiding activity in Alaska in 2012. While most of these jobs were seasonal, they provided \$21 million in direct wages and guide income. Those directly employed in the industry include registered guides, assistant guides, packers, pilots and boat captains, camp support, cooks, mechanics, and accountants. Multiplier effects generated another 590 jobs and \$14 million in wages in Alaska's support sector.
- In 2012, guides contracted with 3,207 hunters, 3,055 of them non-residents. In total, hunters spent \$51 million on guided hunts.
- In addition to hunting packages, non-resident hunters and their companions spent another \$3.5 million on lodging, food and beverage, clothing, souvenirs, and outdoor equipment, among other purchases while in Alaska.
- Including \$29.5 million in direct and indirect (multiplier effects) associated with this spending, guided hunting in Alaska accounted for \$78 million in total economic activity in 2012.¹²

The proposed rule also fails to show any consideration regarding the costs the proposed rule will have on other currently allowed uses in existing refuges. The proposed rule focuses on the context of the historically approved refuge activity of hunting for predators on the Nation's refuges. Yet the language in proposed 39.2(c) *Management activities and uses with potential to ensure [BIDEH]* does not limit the application of the BIDEH management directives to so-called predator control activities. The proposed 39.2(c) states:

Management directives for ensuring biological integrity, diversity, and environmental health. **The following regulations serve as a framework for determining and implementing refuge management actions** to meet our statutory obligations and policy goals:[emphasis added]

We request FWS produce a cost-benefit analysis of the proposed rule under Section 801(a)(1)(B)(i) of the Congressional Review Act (5 U.S.C. Chapter 8). The cost analysis of the proposed rule must include estimates on projected economic effects to the statutorily allowed oil and gas drilling activities and other mandated refuge purposes that occur on the System's refuges.

ii. Significant Rule

Additionally, the proposed rule qualifies as a "significant rule" and should have gone through advanced review by the Office of Management and Budget's Office of Information and Regulatory Affairs (OIRA).

¹¹ ECONorthwest. 2014. The economic importance of Alaska's wildlife in 2011.

¹² McDowell Group, Inc., 2014. Economic Impacts of Guided Hunting in Alaska.

As we discuss in these comments, it raises novel legal and policy issues arising out of existing legal mandates.

iii. 2017 Exercise of Congressional Review Act Revoked Interior’s Authority to Adopt the Proposed Rule.

Through Pub. L. 115-20, Congress expressed that ANILCA’s definition of “natural diversity” does not equal “BIDEH,” that the regulated take of fur-bearing animals is allowed in Alaska, and its intent that broad, general rules that remove Congressionally mandated hunting opportunities across large swaths of public lands in Alaska are not acceptable. Congress specifically stated:

Congress disapproves the rule submitted by the Department of the Interior relating to “Non-subsistence Take of Wildlife, and Public Participation and Closure Procedures on National Wildlife Refuges in Alaska” (81 [FR] 52247 (August 5, 2016)), and such rule shall have no force or effect.

In finalizing the 2016 AK Wildlife Rule, the FWS attempted to supersede Alaska’s sovereign authority to manage fish and wildlife on 76 million acres of refuge lands (an area the collective size of the state of New Mexico). Agreeing with the State of Alaska’s position and legal interpretation of ANILCA, Congress took action and rescinded the 2016 AK Wildlife Rule. P.L. 115-20 provides that no substantially similar rule may be adopted in the future, see Sec. 801(b)(2).

The legislative history of the CRA provides that “a court or agency must give effect to the intent of the Congress when such a resolution is enacted and becomes the law of the land” (142 Cong. Rec. S3683, S3686 (1996)). Public Law 115-20 revoking the 2016 AK Wildlife Rule became law on April 3, 2017. On November 9, 2017, the revocation of the rule was published in the Federal Register, stating the *Non-subsistence Take of Wildlife on, and Public Participation and Closure Procedures, on National Wildlife Refuges* “shall be treated as if it had never taken effect”. Additionally, during deliberations on the CRA, House and Senate sponsors of the CRA review strongly criticized a substantially similar rule the NPS finalized in 2015¹³ but acknowledged that repeal through the CRA was time-barred (see e.g., 163 Cong. Rec. S1864-05, S1868 (Mar. 21, 2017), remarks of Sen. Murkowski). These remarks clearly show Congressional intent that the State of Alaska continue to manage wildlife and that the broad, discretionary authority such as what is proposed in this BIDEH rule is contrary to Congressional intent.

As stated by Congress, all regulations related to rescinded rules that supersede Alaska’s authority to manage fish and wildlife must be rescinded. This proposed rule would prohibit, for substantially the same reasons, some of the same methods and means as the Congressionally voided 2016 AK Wildlife Rule, contrary to the direction of the CRA and Pub. L. 115-20.

The 2016 AK Wildlife Rule stated:

50 CFR 36.1 How do the regulations in this part apply to me and what do they cover?

(a) National Wildlife Refuges in Alaska are maintained to conserve species and habitats in their natural diversity and to ensure biological integrity, diversity, and

¹³ 80 FR 64325, October 23, 2015.

environmental health of these refuges are maintained for the continuing benefit of present and future generations.¹⁴

There is no question that National Wildlife Refuges in Alaska must be maintained to conserve species and habitats in their natural diversity, therefore, Congress rejected the FWS premise that ANILCA directs them to “ensure [BIDEH] of these refuges are maintained.”

FWS defined “natural diversity” in the final 2016 AK Wildlife Rule,

Natural diversity means the existence of all fish, wildlife, and plant populations within a particular wildlife refuge system unit in the natural mix and in a healthy condition for the long-term benefit of current and future generations. Managing for natural diversity includes avoiding emphasis of management activities favoring some species to the detriment of others and assuring that habitat diversity is maintained through natural means, avoiding artificial developments and habitat manipulation programs whenever possible.¹⁵

Congress rejected that definition for Alaska, FWS may not avoid management activities favoring some species to the detriment of others nor may they only assure that habitat diversity is maintained through natural means (i.e., natural processes), avoiding artificial developments and habitat manipulation programs whenever possible.

This proposed rule’s BIDEH definition of ‘Predator Control’ is also substantially similar to the 2016 AK Wildlife Rule and cannot be applicable in Alaska. Both rules essentially describe ‘Predator Control’ as any intent to alter predator-prey populations.

The 2016 ‘Predator Control’ definition at 50 CFR 36.2 was “the **intention to reduce the population of predators for the benefit of prey** species.” [emphasis added]

The ‘Predator Control’ definition in 2024 now reads:

actions or programs **with intent** or potential **to alter predator-prey population dynamics** on a refuge **by reducing a population of native predators** through lethal or nonlethal methods. [emphasis added]

2. National Wildlife Refuge System Improvement Act.

- i. Flips USFWS’ Management from Congressionally Designated Conservation Mandate to a Preservation Mandate

In establishing the BIDEH policy into regulation and determining that it is necessary “... to ensur[e] that imperiled species and diverse wildlife populations in North America are secure and thriving, sustained by a network of healthy lands and waters.”¹⁶ the FWS reprioritizes the mission of the System by changing its focus to maintaining natural processes, supporting landscape connectivity, and managing fish and wildlife

¹⁴ 81 FR 52271, August 5, 2016.

¹⁵ 81 FR 52252, August 5, 2016.

¹⁶ 89 FR 7346, February 2, 2024, National Wildlife Refuge System; Biological Integrity, Diversity, and Environmental Health

populations. Management of fish and wildlife populations is traditionally a Trust resource managed by the states, except when federal law defers to the FWS (e.g., migratory birds, marine mammals, endangered species). By reprioritizing the mission of the System, this proposed rule exceeds FWS authority and raises the issue of the Major Questions Doctrine, discussed later in this letter.

The preamble to the proposed rule declares:

The Improvement Act is recognized as a visionary legislative charter for managing a system of wildlife reserves in part due to its mandate to ensure BIDEH. The terms comprising the BIDEH mandate are grounded in conservation biology and demonstrate congressional intent to conserve Refuge System fish, wildlife, plants, and habitats in accordance with the latest scientific understanding. This directive for a comprehensive, science-based approach to refuge management is critical to ensuring that imperiled species and diverse wildlife populations in North America are secure and thriving, sustained by a network of healthy lands and waters.¹⁷

This shift to a preservation focus is a great leap from the intent Congress identified in creating the NWRSA. The foundation for the statutory changes in the NWRSA was two Executive Orders (EO) issued to facilitate wildlife-dependent public use of FWS lands dedicated “singularly” to wildlife conservation.

(7) On March 25, 1996, the President issued Executive Order 12996, which recognized “compatible wildlife-dependent recreational uses involving hunting, fishing, wildlife observation and photography, and environmental education and interpretation as priority public uses of the Refuge System”.

(8) Executive Order 12996 is a positive step and serves as the foundation for the permanent statutory changes made by this Act. [emphasis added]¹⁸

In 2000, Congress enacted the National Wildlife Refuge System Centennial Act (Centennial Act).¹⁹ The Centennial Act reiterated FWS lands are dedicated “singularly” to wildlife conservation and determined that wildlife-dependent recreation and environmental education are “priority public uses” in keeping with the direction in EO 12996. The Centennial Act also specifically identifies the focus of the NWRSA conservation as migratory birds, dozens of endangered and threatened species and the habitats on which such species of fish and wildlife depend.²⁰ The term “imperiled species” is not included in either statute. The final rule should not create new, undefined terms in regulation. Please replace the term “imperiled species” with “endangered and threatened species.”

The System was established at the national level in the context of local and regional conservation needs. Enabling legislation for each refuge sets out its unique purposes and the NWRSA reiterates that refuge purposes take priority over the system mission.²¹ The proposed regulation, in violation of the NWRSA,

¹⁷ *ibid*

¹⁸ 111 STAT. 1252 P.L. 105–57—Oct. 9, 1997, Section 2(7) and (8).
<https://www.congress.gov/105/plaws/publ57/PLAW-105publ57.pdf>, accessed 4/29/2024

¹⁹ 114 STAT. 1782 P.L. 106–408, Section 302(a)(3), Nov. 1, 2000.

²⁰ *ibid*, Section 302(a)(4).

²¹ “... if a conflict exists between the purposes of a refuge and the mission of the System, the conflict shall be resolved in a manner that first protects the purposes of the refuge, and, to the extent practicable, that also achieves the mission of the System;...” NWRSA 16 USC 668dd, Sec. 4(a)(4)(D).

elevates the components of BIDEH so they are on par with refuge purposes. This will lead to closures of wildlife-dependent general hunting harvest opportunities currently consistent with refuge purposes and the conservation of healthy (i.e., sustainable) wildlife populations.

The deference to “natural processes,” and “ecological [i.e., landscape] connectivity” described in the proposed 29.3(c)(2) and in the associated policy are terms and concepts not found anywhere in the NWRSA. These are important concepts in wildlife management, however, the NWRSA does not give the FWS the authority to base its refuge management on these concepts.

Management focused on “maintaining” “natural processes” is the mandate Congress assigned to the National Park Service (NPS), not to the FWS. Congress specifically assigned different management schemes to the different federal land management agencies. It is imperative that agencies implement their assigned management schemes rather than implementing philosophies that feed into overregulation by a federal bureaucracy. Refuges are not national parks.

The NPS Organic Act prioritizes management to an unimpaired standard, a standard that aligns with managing for natural processes, and the enjoyment of future generations:

... fundamental purpose... **is to conserve** [emphasis added] the scenery and the natural and historic objects and the wild life [sic] therein and to provide for the enjoyment of the same in such manner and by such means **as will leave them unimpaired** [emphasis added] for the enjoyment of future generations.²²

The FWS’ “organic act,” the NWRSA, differs and directs that the FWS manages for conservation and to provide opportunities for compatible wildlife-dependent recreation for present and future generations:

Created to conserve fish, wildlife, [emphasis added] and plants and their habitats and this conservation mission has been **facilitated by providing Americans opportunities to participate in compatible wildlife-dependent recreation,** [emphasis added]²³

Congress also specifically defined what it meant by “conservation” in the NWRSA, including the types of scientific methods and procedures it expected would be used in conservation and management, e.g., regulated taking.

The terms ‘conserving’, ‘conservation’, ‘manage’, ‘managing’, and ‘management’, **mean to sustain and, where appropriate, restore and enhance, healthy populations of fish, wildlife,** [emphasis added] and plants utilizing, in accordance with applicable Federal and State laws, methods and procedures associated with modern scientific resource programs. Such **methods and procedures include,** [emphasis added] consistent with the provisions of this Act, protection, **research, census,** [emphasis added] law enforcement, habitat management, propagation, live trapping and transplantation, and **regulated taking** [emphasis added].²⁴

The definition above is clear, the FWS mandate is to conserve “healthy populations of fish, wildlife, and plants” utilizing methods and procedures consistent with modern scientific resource programs. Conserving populations to a healthy standard requires maintaining sustainable populations. Traditionally, the FWS, like the States, has engaged in active management of its fish, wildlife and plant populations.

²² National Park Organic Act, 39 Stat. 535, 16 U.S.C. 1.²³ NWRSA (P.L 105-57, Sec. 2(2)).

²³ NWRSA (P.L 105-57, Sec. 2(2)).

²⁴ NWRSA Sec. 5(4).

The proposed regulation may put an end to many of those activities as they do not qualify as “natural processes” under the BIDEH standard. The proposed rule elevates the BIDEH standard to the overall mission of the System. The existing requirement that uses must be compatible with refuge purposes will become the secondary standard to be met. These changes indicate that FWS is moving towards a preservation mandate to protect refuge resources as opposed to a conservation mandate where resources are used by the public.

The FWS continues to administratively assign itself additional powers in this proposed rule. When comparing what the NWRSA states regarding BIDEH to the proposed rule and policy, it is clear the FWS has exceeded its authority. The NWRSA states:

...ensure that the biological integrity, diversity, and environmental health of the System **are maintained** [emphasis added] for the benefit of present and future generations of Americans.²⁵

The proposed regulation at 29.3, shown below, expands that direction to maintain the BIDEH of the System by requiring refuges maintain, **restor[e] and enhance** BIDEH using the arbitrary language “where necessary and appropriate” to describe when restoration and enhancement will be required. If the final rule and policy continue to require restoration and enhancement of BIDEH on refuges, an outline describing the types of situations that would trigger such activities must be included. Additionally, requiring BIDEH at a System level is very different than at a refuge level. It is possible that at a System level within an area, the wolf population meets the BIDEH standard, but on an individual refuge within that overall area, they do not. The proposed rule fails to outline how that situation would be handled. The language from 29.3:

We will maintain **and, where necessary and appropriate, restore and enhance** [emphasis added] the biological integrity, diversity, and environmental health of national wildlife refuges ...

When the statutory BIDEH standard is read in conjunction with the definition of “conservation” at 16 USC 668ee(4), which directs that “conservation, etc.” means to “sustain” healthy populations of fish and wildlife, it is clear the FWS is expanding BIDEH beyond its statutory direction, and expanding its management authority beyond the maintenance of existing refuge conditions to include restoration of historic conditions and enhancement of existing refuge conditions through the elimination of currently compatible uses. The proposed rule’s use of arbitrary language is additionally clarified in the preamble, where the FWS states that:

... historical conditions may need to serve as a reference point, rather than an end goal, for managing refuges where climate change and other anthropogenic change are significantly altering ecosystems.²⁶

The proposed regulation changes the intent of the NWRSA to using BIDEH to preserve refuges for the benefit of present and future generations (i.e., to ensure present and future generations can carry out wildlife-dependent recreational activities on System lands), to prioritizing deference to natural processes and preservation of refuges in a condition absent human influence.

²⁵ NWRSA 668dd(4)(a)(4)(B).

²⁶ 89 FR 7347, February 2, 2024.

The proposed regulation states the USFWS will “enhance the biological integrity, diversity, and environmental health of national wildlife refuges, **both individually and as a network** [emphasis added] of intact, functioning, and resilient habitats...” Contrary to the System-wide approach the proposed regulation promotes, Congress made it very clear in the NWRSA that while the FWS is managing a national network of lands and waters, the purposes of each refuge are to take priority in management.

... **if a conflict exists** [emphasis added] between the purposes of a refuge and the mission of the System, **the conflict shall be resolved in a manner that first protects the purposes of the refuge, and, to the extent practicable, that also achieves the mission of the System...**²⁷ [emphasis added]

Congress directs the FWS to consider the management of ecosystems in the United States but limits that consideration to actions that grow the System **and complement efforts of States** and other Federal agencies, additionally stressing direction to the FWS to increase participation in wildlife-dependent recreation by the public.

plan and direct the continued growth of the System in a manner that is best designed to accomplish the mission of the System, to contribute to the conservation of the ecosystems of the United States, to complement efforts of States and other Federal agencies to conserve fish and wildlife and their habitats, and to increase support for the System and participation from conservation partners and the public;...²⁸

The proposed regulations fail to include any discussion of how refuge purposes take priority over system priorities, in fact, in an approach we consider fundamentally flawed, the regulation and related policy specify that the following (national) management directives will serve as the framework for refuge management, elevating climate change, natural processes, connectivity, and wildlife management (as opposed to habitat management) over individual refuge purposes. Refuge managers will be overwhelmed with the task of recognizing and acting on the refuge-specific exceptions to the national directives that exist on most of the holdings within the System.

The final regulations need to identify that if a conflict exists between the purposes of a refuge and the mission of the System, the conflict shall be resolved in a manner that first protects the purposes of the refuge, and, to the extent practicable also achieves the mission of the System and how they intend to ensure refuge management complements the efforts of the States’ fish and wildlife management programs.

- ii. Fails to ensure timely and effective cooperation and collaboration with State fish and wildlife agencies when managing refuges reversing the current balance on fish and wildlife management with the States.

The NWRSA specifically requires the FWS to cooperate and collaborate with State fish and wildlife agencies²⁹ as management of fish and wildlife populations within their borders has long been a power reserved for the States, not the Federal government. By identifying the management of fish and wildlife

²⁷ NWRSA 668dd4(a)(4)(D).

²⁸ NWRSA 668dd4(a)(4)(C).

²⁹ National Wildlife Refuge System Improvement Act, 668dd(a)(4)(M).

populations as a management directive for both individual refuges and for the System (i.e., “We will maintain ... [BIDEH] of national wildlife refuges, both individually **and as a network of intact** [emphasis added], functioning, and resilient habitats for ...”) in proposed 29.3(c)(3), the proposed rule infringes on the fish and wildlife management authority Congress has provided the States, which exists except as modified or diminished by an Act of Congress. In proposing to manage wildlife populations for natural fluctuations the FWS adopts a "hands-off" management strategy that is in direct contrast to State management which actively manages wildlife populations for consumptive uses. In prioritizing deference to natural processes to achieve refuge objectives and landscape connectivity and limiting management techniques to those that mimic natural processes³⁰ the proposed regulation and policy eliminate legitimate and traditional management practices (e.g., irrigation, water level regulation, artificial nest structures, food plots, hunting, fishing, predator control, etc.) the FWS and State fish and wildlife agencies have both used to conserve fish and wildlife populations. The proposed management-established by this new rule will substantially reduce opportunities for wildlife-dependent recreational opportunities across the System, especially consumptive uses, despite numerous attempts by Congress to emphasize the importance of the System continuing to provide, and direction to grow, opportunities for fish and wildlife-dependent recreation.

This new management direction will produce unnecessarily restrictive and protectionist management decisions as well as create conflicts with State fish and wildlife management activities because a large percentage of legitimate management practices (artificial nest structures, hunting, fishing, trapping, predator control, etc.) are not consistent with the ideals expressed by the Service in its endeavor to manage for “natural processes” and BIDEH. The proposed policy is even more disturbing than the proposed rule as it devotes an entire Section (3.10.C) to "Conserve and Manage Fish and Wildlife Populations” without any discussion of how it will cooperate and collaborate with State fish and wildlife agencies despite the clear direction in the NWRSA as well as Department of Interior Regulations at 43 CFR Part 24.

The proposed policy in Section 3.10(C) states:

We prioritize deference to natural processes as the default for determining sustainable populations... We formulate our management strategies by considering population densities, social structures, and population dynamics at the refuge scale and how anthropogenic change and ecological transformation have altered or may alter the natural processes driving population parameters.

The provision to defer to natural processes will result in impractical management for naturally occurring densities, sex ratios, age classes, social structures, and population dynamics that cloud the FWS mission “to administer a national network of lands and waters for conservation, management, and where appropriate, restoration of fish and wildlife resources for the benefit of present and future generations of Americans.”³¹ It may lead to discretionary interpretations by managers that are overly protective, restrictive, and even hinder population rebounds. Fishing, hunting, and trapping by their very nature alter the age, sex, and social structures of hunted populations. There is no way to prevent this, except by disallowing these activities, and such disallowance would be inconsistent with the intent and purpose of the NWRSA when healthy populations exist. Furthermore, fishing, hunting, and trapping on lands surrounding the refuge will alter the age, sex, and social structures of mobile species that use refuges,

³⁰ Proposed 601 FW 3, Section 3.10 B. Conserve and Connect Habitat, subsection (1).

³¹NWRSA, 16 USC 668dd(a)(2).

regardless of refuge practices. Not allowing fishing, hunting, and trapping within refuges may lead to destructively high densities of certain species (e.g., pike, beaver, or deer). The infeasibility of replacing top predators or the existence of enhanced [e.g., agricultural] habitat components may alter population parameters from natural conditions even in the absence of hunting.

The final regulation needs to simply and clearly state that hunting and fishing will be conducted following “principles of sound fish and wildlife management and administration,” and “to the extent practical, consistent with State fish and wildlife laws, regulations, and management plans.” The final regulation and policy should outline how and when the consultation, coordination, and collaboration will occur. It should also outline that State fish and wildlife agency management activities are considered to be refuge management activities as both have jurisdiction for fish and wildlife management.

The FWS fails to consider how the proposed rule and its policies will impact opportunities for wildlife-dependent recreational opportunities, especially hunting, trapping, and fishing. Limiting opportunities for hunting, fishing, and trapping may well result in significant, deleterious, impacts to State management of fish and wildlife resources. As an example, here in Alaska, ADF&G’s Constitutional mandate is to maintain sustainable (i.e., healthy) fish and wildlife populations for consumptive use by residents, taking actions when necessary to conserve fish and wildlife populations. Considering the size and scale of FWS refuges in Alaska, the proposed shift to managing System lands to preserve natural populations threatens to impact our fish and wildlife management.

We do not disagree that Congress has also delegated certain fish and wildlife responsibilities to the FWS. Clearly, Congress has assigned the FWS management of migratory birds, eagles, marine mammals, and threatened and endangered species. The management of these and other fish and wildlife species needs to be carried out in collaboration and cooperation with the States.

Regarding Alaska alone, the effect of the proposed rule is to diminish the State’s authority to define and implement sustained yield in accordance with the Alaska Constitution, contrary to the direction in Sec. 1314 of ANILCA, resulting in the potential to unbalance fish and wildlife populations throughout the State.

The final rule needs to recognize that FWS is not responsible for the management of fish and wildlife populations (this is the role of the States), rather the FWS is responsible for the conservation of healthy populations of fish and wildlife and their habitats.

The final rule must remove “manage fish and wildlife populations” from the management framework outlined in the proposed 50 CFR 29.3(c) as FWS is responsible for the conservation of healthy fish and wildlife not the management of fish and wildlife populations.

iii. Predator Control.

Hunting and trapping involve taking animals on a sustainable basis for food to satisfy subsistence, recreation, and cultural needs, and in some situations, for monetary gain such as guiding and trapping. Hunting is regulated through laws and regulations that prescribe methods, means, and bag limits. Yet with this proposed rule, the FWS once again proposes that legal and regulated hunting or trapping a predator is considered predator control.

The State of Alaska carries out predator control management programs when authorized by the BOG under a 1994 Intensive Management (IM) law that provides a specific process for determining when and where IM activities should be carried out. The IM law seeks to “restore the abundance or productivity of

identified big game prey populations as necessary to achieve human consumptive use goals of the board...”³² The State meets its Constitutional mandate to utilize wildlife for the maximum benefit of its people through IM projects designed to address food security issues in rural Alaska by reducing the number of animals that prey on ungulate populations that are important to local Alaskans for food and cultural and traditional practices. The FWS, similarly, uses predator control projects to address threats to endangered species and other Congressionally mandated responsibilities. The overall objective in both State and FWS management actions is to reduce certain populations to improve their survival and recovery, and to prevent declines in other populations.

The NWRSIA does not define predator control and Congress rejected a previous FWS regulation defining and broadly regulating predator control in Alaska, however, the proposed rule makes another attempt to define it, again with sweeping and overly broad restrictions on predator harvest by members of the public, unreasonably limiting wildlife management options.

The proposed rule broadly defines “predator control” as “actions or programs with intent or potential to alter predator-prey population dynamics on a refuge by reducing a population of native predators through lethal or nonlethal methods.” This definition is so broad it could encompass nearly all hunting, trapping, and fishing under state regulation. Current Alaska refuge management plans and compatibility determinations specifically exclude these activities from the definition of predator control or predator management. The proposed rule is also not clear how “intent” or “potential” will be determined as these terms are not discussed in the preamble. Nor is a definition of predator found in the proposed rule. It must be defined. Predation is a behavior of an animal, not a class of animal.

Tying predator control to an “intent” or “potential to alter” predator-prey population dynamics exceeds the management authority Congress gave the FWS, as it proposes to eliminate actions and programs without clarifying that these activities are allowed as long as the predatory-prey populations remain in a stable condition and species mix. The proposed policy fails to address how predator control will be authorized in Alaska refuges where it can be necessary to fulfill the almost universal refuge purpose of providing the opportunity for continued subsistence uses by local residents, consistent with the conservation of predators and prey in their natural diversity.

We request the FWS strike the predator control language from future iterations of the rule and policy. We also request the FWS identify how they will work through the states to accomplish their objectives including how they will work with the State of Alaska’s Board of Game to implement any restrictions on the take of predators.

Also see Section II.1.iii in these comments, explaining that any restrictions in the proposed rule that are substantially similar to the revoked 2016 Wildlife Rule are prohibited by federal law.

2. ANILCA

In crafting ANILCA, Congress balanced both national and state interests. The overarching intent language in Section 101 establishes a needed perspective for this rulemaking and any other management decision affecting public lands in Alaska. ANILCA sought to preserve unrivaled scenic values, wildlife populations, and their habitat in vast undeveloped landscapes. Congress also sought to provide recreational opportunities for all and opportunities for rural residents to remain in their communities, and to balance the social and economic needs of the State of Alaska.

³³ 46 Fed. Reg. 3181. June 17, 1981.

ANILCA established conservation system units (CSUs) including FWS refuges of a size and scale not seen elsewhere in the United States. Given the overall remote and undeveloped nature of the State, with its lack of roads and numerous remote communities, communities still dependent on harvesting subsistence resources to survive, man is indeed still an active part of the Alaskan ecosystems, recognizing this Congress established unique land management provisions ensuring the continuation of existing uses on Alaskan public lands within the statute. It recognized the need to continue management of fish and wildlife “in accordance with recognized scientific principles.”

The original BIDEH policy, as well as this regulation and revised policy, failed to consider how it would apply in “the unique Alaska setting.” A setting the FWS has traditionally recognized in its management. In 1981, shortly after the passage of ANILCA, the FWS put out a final rule at 50 CFR Part 36 “Alaska National Wildlife Refuges; Interim Management Regulations” stating:

... the [FWS] develop[ed] regulations that are workable yet flexible enough to deal with the exigencies of terrain, climate, resources and lifestyles encountered with the Alaska National Wildlife Refuges... The rules published today and immediately effective... relieve restrictions imposed by the general [NWRS] regulations that are generally inappropriate in the unique Alaska setting.³³

Congress continued to recognize the uniqueness of Alaska’s refuges and the balancing provisions in ANILCA including a savings clause in the NWRSIA that ensures ANILCA prevails whenever there is a conflict between the two laws.³⁴

(b) CONFLICTS OF LAWS —If any conflict arises between any provision of this Act and any provision of the Alaska National Interest Lands Conservation Act, then the provision in the Alaska National Interest Lands Conservation Act shall prevail.

The Supreme Court confirmed that ANILCA carves out Alaska-specific exceptions to federal agency authority. “Those Alaska-specific provisions reflect the simple truth that Alaska is often the exception, not the rule.”³⁵

Alaska is a landscape that meets many of the desired outcomes of the BIDEH rule and on its face, application of the ecological integrity policy would appear to be least problematic for Alaska. Currently, 137 million acres, or nearly 40% of Alaska, are designated for conservation purposes. Alaska's refuges are indeed vast, almost 77 million acres in total,³⁶ and with some notable exceptions, modern natural conditions are largely similar to conditions 200 or more years ago. Large chunks of intact ecosystems have indeed been preserved. There are 16 refuges within our State and, according to the Friends of Alaska’s National Wildlife Refuges, “Nearly all of the 76.8 million acres of refuge lands in Alaska can be described as “wilderness, but more than 18 million acres have been designated by Congress ...”³⁷

³³ 46 Fed. Reg. 3181. June 17, 1981.

³⁴ NWRSIA 668dd 9(b), Conflicts of Laws. *If any conflict arises between any provision of this Act and any provision of the Alaska National Interest Lands Conservation Act, then the provision in the Alaska National Interest Lands Conservation Act shall prevail.*

³⁵ 4 *Sturgeon v. Frost*, ___ U.S. ___ (2016).

³⁶ [Fish and Wildlife Service Lands - Statistical Data Tables \(as of 9/30/2021\)](https://www.fws.gov/land/land-ownership-statistics). (fws.gov) <https://fws.gov/>, accessed 4/19/2024.

³⁷ <https://alaskarefugefriends.org/refuges/>, accessed April 12, 2024.

“Eighty-six percent of Alaska’s communities cannot be reached by roads.³⁸ In the Yukon Delta Refuge alone thirty-six occupied communities lie within the Refuge boundaries.”³⁹

Yet the Service should not assume that implementation of this proposed regulation in Alaska would be straightforward. The underlying purposes of the NWRSRIA are already amply served by the specific refuge purposes in ANILCA and as noted earlier, in case of conflict – ANILCA prevails.

The NWRSRIA calls for "maintaining biological integrity, diversity and environmental health" in a system that "conserves fish, wildlife, and plants in their habitats."

ANILCA identifies a purpose for each refuge: "to conserve fish and wildlife populations and habitats in their natural diversity." Unlike most of the refuges elsewhere, Alaska's System is already based on the recognition of larger ecosystems.

The FWS’ previous attempt to base management decisions in Alaska on the premise of implementing its BIDEH standard as equivalent to Alaska’s natural diversity mandate was rejected by Congress. The final regulations must ensure that Alaska refuges are managed to the refuge standard of “conserve[ation of] fish and wildlife populations and habitats in their natural diversity.”⁴⁰

Our concerns on the definition assigned to “predator control” are addressed above, but it is important to point out that nothing in ANILCA or the NWRSRIA explicitly prohibits active management of fish or wildlife or their habitat. ANILCA and the NWRSRIA specifically affirm state management of fish and wildlife, which has always used a spectrum of management tools, such as regulated take, to provide for a variety of consumptive uses, including subsistence. By eliminating the take of predators under general hunting and trapping regulations, deeming it “predator control” in most situations, the proposed rule precludes the State from using predator control as a management tool dramatically diminishing the State’s ability to manage fish and wildlife both on and off refuge lands. This action is inconsistent with ANILCA Section 1314(a).

i. ANILCA Title VIII – Subsistence Management and Use

ANILCA recognizes subsistence use as being of utmost importance in Alaska. This proposed rule fails to do the same. In 50 CFR 29(d)(1)(iii) the FWS circumvents the FSB public process for federal subsistence closures:

(iii) Compatible, **refuge-approved taking of fish and wildlife for subsistence uses** [emphasis added] under Federal or State subsistence regulations **that do not compromise maintaining biological integrity, diversity, and environmental health on the refuge** [emphasis added];

ANILCA directs federal land management agencies to “provide the opportunity for continued subsistence uses on the public lands by Native and non-Native rural residents.”⁴¹ Every refuge in Alaska, except the Kenai Refuge, has a refuge purpose to provide the opportunity for continued subsistence uses by local residents consistent with the conservation of fish and wildlife populations and habitats in their natural

³⁸ <https://www.rural.gov/community-networks/ak>, accessed April 12, 2024.

³⁹ 72 FR 27329, May 27, 2007, Notice of Intent to revise the comprehensive conservation plan and prepare an environmental impact statement for the Yukon Delta National Wildlife Refuge.

⁴⁰ ANILCA Sections 302 and 303, see each refuge’s purposes.

⁴¹ ANILCA 801(4).

diversity and consistent with international treaty obligations. The FWS cannot condition the taking of fish and wildlife for subsistence uses in Alaska with the maintenance of BIDEH as the continued subsistence use is a refuge purpose. Subsistence use is also intended to be protected on a unit-specific basis, taking into account the purposes for which each CSU is established.⁴² The FWS is not allowed to unilaterally place limits on the subsistence use of predators in Alaska through a nationwide regulation. This action usurps the FSB, the BOG, and the BOF the entities mandated to manage fish and wildlife take within Alaska.

ANILCA Title VIII gives the Secretaries of Agriculture and Interior the authority to restrict the take of fish and wildlife for two reasons – to assure the continued viability of a fish or wildlife population and to provide for the continuation of subsistence uses of such populations. Whenever restrictions are determined necessary for these specific reasons, rural subsistence users are afforded priority *over other consumptive uses*. That priority is implemented based on the following criteria – customary and direct dependence upon the populations as the mainstay of livelihood; local residency; and the availability of alternative resources (ANILCA Sections 802(2) and 804). Further, ANILCA Section 815 states that nothing in Title VIII is intended to “*authorize a restriction on the taking of fish and wildlife for nonsubsistence uses on the public lands (other than in national parks and park monuments) unless necessary for the reasons set forth in section 816, to continue subsistence uses of such populations, or pursuant to other applicable law.*” FWS cannot limit the take of predators to subsistence users only using its refuge purpose to provide continued subsistence opportunities as its sole rationale. The proposed rule attempts to do this in 29.3(d)(iv) by failing to include recreational trapping along with refuge-approved hunting and fishing opportunities.

The Federal Subsistence Regulations at 50 CFR 100.10(a) directs that the “Secretary of the Interior ... assigns [the FSB] responsibility for administering the subsistence taking and uses of fish and wildlife on public lands [in Alaska]...” The FWS cannot usurp this authority from the FSB through these regulations.

ii. Reverses ANILCA’s “open until closed” provisions.

In 1980, ANILCA established an “open until closed” regime for Alaska’s refuges which constituted a substantial departure from refuge management elsewhere, where refuges are “closed until opened.”

ANILCA included crucial access provisions like Sec. 1110 guaranteeing access by airplane, motorboat, snowmachine, and other traditional means of access to Alaska refuges. In addition to providing access, another crucial provision in Sec. 1314 was the savings clause that ensured the status quo where the refuges were open to the taking of fish and wildlife. The state has remained the wildlife manager in Alaska unless superseded by federal law. Without these guarantees, there would have been no acceptance of ANILCA among Alaskans. Furthermore, without these provisions, millions of acres of public land would be off-limits to all U.S. citizens.

In the 2016 Wildlife Rule, the FWS first proposed limiting ‘predator control’ through regulation and identified certain state-regulated hunting and trapping methods as predator control, previously only an action conducted by a State or federal agency had been considered predator control. The FWS cited BIDEH as their rationale for implementing the rule.

This rule was developed because FWS wanted to establish consistent definitions and guidance for all Alaska NWRs to abide by when evaluating predator control requests on an NWR. It specifically clarifies how our existing mandates for the conservation of

⁴² ANILCA 101(c).

natural and biological diversity, biological integrity, and environmental health on NWRs in Alaska relate to predator control...⁴³

The 2016 AK Wildlife Rule upset the status quo and made predator hunting and trapping in Alaska ‘closed until opened.’ In the 2017 revocation of the 2016 Wildlife Rule under the CRA, Congress voided this rule as described above. Enactment of Public Law 115-20 prevents adoption of a rule that would restrict predator control on refuges in Alaska. *Center for Biological Diversity v. Bernhardt*, 946 F.3d 553, (9th Cir. 2019). Congress effectively amended the law and updated whatever authority Interior may have had previously. *Id.*

Now, in 2024 the FWS is proposing a rule that again attempts to upset the status quo by implementing a substantially similar rule to the 2016 AK Wildlife Rule, and again proposing to limit the take of predators. The proposed rule only allows subsistence, hunting, and fishing if the activities are determined to maintain BIDEH, 50 CFR 29(c)(1)(iii) and (iv), or “closed until open.”

The final rule and policy must exempt Alaska, so the FWS can meet its Congressionally assigned obligations to Alaskans to continue the traditional uses including hunting, fishing, and trapping, and maintain the historic methods and means of take customary to Alaska.

iii. No 810 Analyses.

ANILCA Title VIII, Section 810, ensures the voices of Alaskan rural residents and communities are heard on federal land use decisions. It requires federal agencies to consider how their actions might impact the ability of local residents to gather food and other resources for traditional lifestyles.

Three Key Steps of the Evaluation:

- A finding of whether or not a proposed action **may have** a significant restriction on subsistence uses.
- Notice and hearing, if an action **may have** a significant restriction on subsistence uses; and
- If there may be a significant restriction on subsistence uses, a three-part determination must be made before the action may be authorized.

This process applies to all federal land use decisions, even if such action is covered by NEPA Categorical Exclusions (CATEX) or Determinations of NEPA Adequacy (DNAs).

The FWS must complete an ANILCA Sec. 810 analysis for this rule.

iv. Additional BIDEH findings are contrary to ANILCA’s statutorily allowed traditional uses.

The proposed rule, in 29.3 (d)(1)(iii) and (iv) excludes the subsistence take of fish and wildlife, as well as recreational hunting and fishing opportunities, from the definition of predator control if the actions are compatible, refuge approved, and do not compromise maintaining BIDEH on the refuge.

⁴³ 81 FR 52259, Non-Subsistence Take of Wildlife, and Public Participation and Closure Procedures, on National Wildlife Refuges in Alaska.

As we discussed above, the FWS cannot adopt restrictions on predator control or unilaterally restrict Title VIII subsistence.

ANILCA provides general hunting, fishing, and trapping on refuges are traditional uses that “the Secretary shall permit subject to reasonable regulation to insure compatibility.⁴⁴” If the final rule includes Alaska refuges, these three traditional activities must be allowed to continue, if compatible with refuge purposes.⁴⁵ Historically, these three traditional activities have continued consistent with Alaska refuge purposes without major conflict. By placing the condition, through these regulations, that these traditional refuge uses must, besides being compatible with refuge purpose, not compromise BIDEH, it is unclear how these activities can continue. The actual harvest of populations has the potential to affect BIDEH.

In the 2016 Wildlife Rule, FWS took issue with season dates and methods and means adopted by the BOG for the take of predators after 2008, but not with population harvest objectives. The proposed rule now brings refuge population objectives into the management scenario without outlining how this management will interface with State wildlife managers. As the proposed rule fails to consider the holistic aspect of wildlife management across borders, the proposed rule will result in ambiguous, arbitrary, ideological, and nonscience-based decisions.

In addition, 50 CFR 29.3(d)(1)(iv), omits trapping as a compatible recreational activity even though it is a traditional activity on refuges in Alaska,

(iv) Compatible, refuge-approved recreational hunting and fishing opportunities that do not compromise maintaining biological integrity, diversity, and environmental health on the refuge;

This conflicts with ANILCA Sec. 1314(c) that recognizes trapping as allowed an allowed method of take in Alaska CSUs, FWS regulations concur with that definition.

(c) The taking of fish and wildlife in all conservation system units, and in national conservation areas, national recreation areas, and national forests, shall be carried out in accordance with the provisions of this Act and other applicable State and Federal law.

ANILCA Sec. 102(18) and 50 CFR 36.2 defines the taking of wildlife to include trapping,

(18) The term “take” or “taking” as used with respect to fish or wildlife, means to pursue, hunt, shoot, trap, net, capture, collect, kill, harm, or attempt to engage in any such conduct.

The final rule must revise 29.3(d)(iv) to allow “Compatible, refuge-approved recreation take of fish and wildlife...”

The final rule and policy must exempt Alaska so the FWS can meet its Congressionally assigned obligations to Alaskans to continue the traditional uses including hunting, fishing, and trapping, and maintain the historic methods and means of take customary to Alaska.

5. Major Questions Doctrine

⁴⁴ ANILCA Section 1316.

⁴⁵ ANILCA Section 304(f)(3)(B), 50 CFR 36.31(a).

The major questions doctrine prevents the FWS from expanding its authority as described in the proposed regulations. Congress did not elevate BIDEH above refuge purposes, nor did it direct that management should “prioritize deference to natural processes.” The proposed rule also extends FWS’ authority in fish and wildlife management by establishing refuge population objectives. Congress has consistently directed that management of fish and wildlife populations is a trust resource managed by the states, except when federal law explicitly defers to the FWS (e.g., migratory birds, marine mammals, endangered species, etc.).

FWS needs to show clear congressional authorization after Congress has considered and rejected the agency’s proposed action, and also when an agency seeks to intrude into an area that is the particular domain of state law. The major questions doctrine prevents the risk of intruding on powers reserved to the states. *Id.* at 743-44.

In *West Virginia v. EPA*, 597 U.S. 697 (2022), The concurrence by Justices Gorsuch and Alito explained that the Constitution gives legislative power to Congress. If Congress were allowed to divest its legislative power to the Executive Branch, the whole separation of powers scheme would be dashed. “Little would remain to stop agencies from moving into areas where state authority has traditionally predominated.” *Id.* at 2618. Transfer of power from Congress to an administrative body “is not to be presumed or implied from doubtful and uncertain language;” the language must be clear and direct. *Id.* at 740-41.

The relevant language of the statutes, NWRSIA and ANILCA, is described above. These statutes describe refuge purposes as the primary driver of refuge management without raising the importance of one purpose over another, and both statutes recognize the State’s fish and wildlife management authority. Ultimately the question is “whether Congress meant to confer the power the agency has asserted.” *Id.* at 721. The Supreme Court repeatedly claws back on federal agency overreach. Other relevant examples include:

- *Utility Air Regulatory Group v. EPA*, 573 U.S. 302 (2014)
- *Alabama Assn. of Realtors v. Dep’t of Health and Human Servs.*, 594 US ____, 141 S. Ct. 2485 (2021)
- *FDA v. Brown and Williamson*, 529 U.S. 120 (2000),
- *National Federation of Independent Business v. OSHA*, 595 U.S. 109 , 142 S.Ct. 661 (2022)
- *American Hospital Ass’n v. Becerra*, 596 U.S. 724 (2022)

The Ninth Circuit has also limited federal agencies to authority granted by Congress invalidating a FWS rule that was not consistent with the ESA. *Friends of Animals v. Haaland*, 997 F.3d 1010 (9th Cir. 2021) The FWS pre-file rule was invalid because it was not consistent with the ESA.

Like the EPA in the *West Virginia* case, the FWS is seeking to unilaterally broaden its authority, effecting a “fundamental revision of the statute” that is improper. As the Supreme Court said, “Agencies have only those powers given to them by Congress, and ‘enabling legislation’ is not an ‘open book to which the agency [may] add pages and change the plot line.’” *West Virginia* at 723. The Court expressly disapproved EPA’s authority where Congress considered and rejected statutory language. *Id.* at 731. The Court (in the concurrence) acknowledged that prior practice may show that a federal agency has authority, but not where Congress deleted that authority. We have a similar situation here where the FWS is attempting to adopt a rule substantially similar to the 2016 Wildlife Rule that Congress revoked.

6. Infringement on State of Alaska Management Authorities

- i. ADF&G -- the Rule reverses the current balance where the State sets wildlife population objectives.

We find the decision to not consult with the State of Alaska, as well as other States, on this proposed refuge management modification, nor to include any reference to the prevailing federal conservation land management statute in Alaska, disconcerting. The FWS itself has noted on many occasions, including in their 2022 Station to Station regulations preamble⁴⁶ Alaska refuges are managed differently than the NWRs in the other States. FWS has traditionally recognized this, promulgating specific land management regulations for Alaskan Refuges at 50 CFR Part 36 in 1981, shortly after the passage of ANILCA.

Given that one of the intents of this proposed regulation is to broadly limit, through the definition of “Predator control” at proposed 39.3(b) -- “actions or programs with the intent or potential to alter predator-prey population dynamics on a refuge by reducing a population of native predators through lethal or nonlethal methods, and a second intent, through a management directive at proposed 39.3(c)(3), is to “manage fish and wildlife populations ... **to meet refuge population objectives** [emphasis added] ...” the failure to address how the FWS intends to work with State fish and wildlife managers, expressly preserved in the NWRSA and ANILCA, will continue on refuges is a major flaw in the proposed rule.

State fish and wildlife managers are tasked with trying to ensure sustainable fish and wildlife populations remain within the State to meet subsistence and general hunting needs. Yet the proposed regulation sets the stage for refuges and/or the System to have their own population objectives regardless of what the State has set.

Ideally, State and Federal on the ground biologists, who overall have excellent local relationships, would coordinate and conduct census (i.e., count each animal in a population). Unfortunately, there is no simple way to do this. Animals move from place to place, they hide, they move to inaccessible terrain, they hibernate, and they are often camouflaged and difficult to see in their environment. Weather, costs, and time impact the ability to carry out population surveys in States as small as Rhode Island, in Alaska it is almost impossible given the size and scale of the landscapes. It is a struggle all fish and wildlife managers in Alaska acknowledge they are facing. It is the reason Congress stressed cooperation and coordination between State and federal managers. Wildlife does not limit itself to refuge boundaries, but the responsibility for wildlife populations across all lands belongs to the State. FWS cannot assign themselves the responsibility to manage across refuge boundaries which it tries to do in this proposed rule, stating they will manage for BIDEH at both the individual refuge and at the System-wide network level.⁴⁷

Ultimately, the management proposed by this new rule, if not modified, will substantially reduce opportunities for wildlife-dependent recreational opportunities across the System, especially the consumptive uses Congress has consistently assigned to States to manage.

⁴⁶ 87 Fed. Reg. 57108, September 16, 2022. “The National Wildlife Refuge System Administration Act of 1966 ([16 U.S.C. 668dd–668ee](#)), as amended (Administration Act), closes NWRs in all States except Alaska to all uses until opened.”

⁴⁷ 89 FR 7350, February 2, 2024, proposed Section 29.3.

Unlike any other state, the majority of Alaska's small communities and villages are located adjacent to or surrounded by vast national wildlife refuges and other federal conservation system units that were designated by ANILCA.

As proposed, the regulation ignores the State's constitutional mandate to responsibly manage fish and wildlife for sustainable populations and instead proposes managing fish and wildlife for natural fluctuations. This "hands-off" style of management will significantly impact the State's ability to actively manage fish and wildlife populations for subsistence and other consumptive uses under the sustained yield concept, potentially resulting in unstable fish and wildlife populations that will directly affect both subsistence and non-subsistence hunting opportunities.

In stark contrast to ANILCA Section 1314,⁴⁸ the proposed rule will diminish the state's management authority and significantly alter how fish and wildlife have been managed in Alaska since statehood. This is also contrary to the NWSRIA which states that nothing shall be construed as affecting the authority of the States to manage fish and resident wildlife on refuges,⁴⁹ as well as Department of Interior regulations at 43 CFR 24, Fish and Wildlife Policy: State-Federal Relationships, which explains Congress' intent that, to the maximum extent practicable, public uses shall be consistent with State laws and regulations.

The Service has existing processes (i.e., refuge planning, compatibility determinations, and refuge-specific regulations) to address resource concerns. The proposed rule circumvents these processes without explanation. Further, since the proposed rule dramatically increases the Service's discretionary authority over state management activities and state-authorized uses, it is not possible to determine with any certainty what otherwise legal management tools and authorized uses will be prohibited in the future, nor will any new restrictions be appropriately justified in the manner required under the NWSRIA.

The proposed rule continues the Department of the Interior's ongoing efforts to erode State management authority that has occurred through multiple federal actions on both national preserves and national wildlife refuges. ADF&G's fish and wildlife management mandate originates with the Statehood Act and the Alaska Constitution and was subsequently confirmed by Congress in ANILCA sec. 1314 (Taking of Fish and Wildlife). The only exceptions Congress noted in ANILCA to this management were Title VIII "or, to amend the Alaska constitution."⁵⁰ Congress also specifically recognized that ANILCA implemented a unique management situation for land managers in Alaska, calling out that, "except as specifically provided otherwise by this Act, nothing in this Act is intended to enlarge or diminish the responsibility and authority of the Secretary over the management of the public lands."⁵¹

⁴⁸ 16 USC 3202, ANILCA Sec. 1314. (a) **Nothing in this Act is intended to enlarge or diminish the responsibility and authority of the State of Alaska for management of fish and wildlife on the public lands except as may be provided in title VIII of this Act, or to amend the Alaska constitution.** (b) **Except as specifically provided otherwise by this Act, nothing in this Act is intended to enlarge or diminish the responsibility and authority of the Secretary over the management of the public lands.** [Emphasis added]

⁴⁹ NWSRIA, 668dd(8)(m) *Nothing in this Act shall be construed as affecting the authority, jurisdiction, or responsibility of the several States to manage, control, or regulate fish and resident wildlife under State law or regulations in any area within the System. Regulations permitting hunting or fishing of fish and resident wildlife within the System shall be, to the extent practicable, consistent with State fish and wildlife laws, regulations, and management plans.*

⁵⁰ See ANILCA Sec. 1314(a) "Nothing in this Act is intended to enlarge or diminish the responsibility and authority of the State of Alaska for management of fish and wildlife on the public lands except as may be provided in title VIII of this Act, or to amend the Alaska constitution."

⁵¹ See the ANILCA section of these comments for further specific language from ANILCA.

Self-management of natural resources, including Alaska’s wildlife resources, was a driving force behind Alaska statehood; fish and wildlife are held in trust by the State for the benefit of all residents. Trust responsibilities and management of the resources passed to Alaska upon statehood under the Alaska Statehood Act. General management authority over fish and wildlife within Alaska passed from the federal government to Alaska shortly after Alaska adopted a comprehensive fish and game code in 1959.⁵² The BOG and the BOF are the government entities authorized and obligated to “provide for the conservation and development” of Alaska’s wildlife resources (AS 16.06.221). The BOG is authorized to regulate “the conservation, development, or utilization of game in a manner that addresses whether, how, when, and where the public asset of game is allocated or appropriated” (AS 16.05.255). This includes establishing seasons, means and methods, and bag and harvest limits for hunting; implementing “methods, means, and harvest levels necessary to control predation and competition among game in the state;” and “regulating sport hunting and subsistence hunting as needed for the conservation, development, and utilization of game” (Ibid.). ADF&G, led by its commissioner, administers regulations adopted by the BOG and BOF in accordance with the statutory duty to “promote fishing, hunting, and trapping and preserve the heritage of fishing, hunting, and trapping in the state.” In ANILCA, Congress expressly recognized and maintained the State’s management authority, except as limited in Title VIII as noted above, thus any authority regarding fish and wildlife not specifically granted by Congress in Title VIII remains with the State. ADF&G carries out the State’s fish and wildlife management mandate by managing hunting in Alaska for the sustained yield of wildlife populations across all public lands and waters throughout the state no matter the landowner. The Alaska State Legislature enacts wildlife laws. The Governor of the State of Alaska appoints members to the BOG and BOF, and the boards enact regulations to conserve and develop Alaska’s wildlife resources and provide hunting and trapping opportunities. The BOG sets seasons, bag limits, and methods and means via a transparent public process. The BOF conducts similar activities for both sport and commercial fisheries. ADF&G monitors wildlife populations, conducts wildlife research, and does the day-to-day work of wildlife management to provide scientific information to the BOG and to carry out the BOG’s decisions. Additionally, ADF&G Division of Wildlife Conservation has staff in area offices across the state to provide a local on-the-ground presence and to interface with area residents with local knowledge. As the wildlife manager on all lands throughout Alaska, the State works in cooperation with private and federal land management agencies, including the FWS, to monitor wildlife populations. The State of Alaska preserved its regard for natural resources in Article VIII of its Constitution. Article VIII Sec. 4 contains the sustained yield principle, which states: Fish, forests, wildlife, grasslands, and all other replenishable resources belonging to the State shall be utilized, developed, and maintained on the sustained yield principle, subject to preferences among beneficial uses. The state “enshrined sustainable management in our constitution [that] ended the federally allowable practices of fish traps and the use of poison for predator control”—the practices that drove Alaskans to fight for State management rights under statehood to sustain our public resources.⁵³

The State’s sustained yield principle serves to conserve wildlife species. Sustained yield requires a surplus of harvestable game for both predator and prey species. The management of both predator and prey species under the sustained yield principle has allowed the State to maintain healthy populations unique to Alaska and not experienced in the rest of the nation. This proposed rule does not acknowledge these abundant healthy populations resulting from the effective wildlife management by the State.

⁵². See Executive Order No. 10857, 25 FR 33 (Dec 29, 1959) (transferring management of fish and wildlife resources to the State of Alaska effective January 1, 1960); see also *Metlakatla Indian Cmty.*, 369 U.S. at 47, n.2.

⁵³. Anchorage Daily News. OPINION: Defending Alaska’s authority over its land and wildlife management is worth the investment. DeLena Johnson. March 7, 2023. <https://www.adn.com/opinions/2023/03/07/opinion-defending-alaskas-authority-over-its-land-and-wildlife-management-is-worth-the-investment/>. Accessed 3/11/23.

The health of the population is the primary driver of the sustained yield principle. You cannot have a harvestable surplus of either a predator or prey species without having a stable and continually viable population.

43 CFR Part 24, Executive Order 13443, Secretarial Order (SO) 3356, directive memorandum of September 10, 2018, “State Fish and Wildlife Management Authority on Department of the Interior Lands and Waters,” all reflect national wildlife management law and reaffirm the authority of the states to exercise their broad trustee and police powers as stewards of the Nation’s fish and wildlife species on public lands.

ii. State of Alaska Water Rights

Additionally, the Department of Natural Resources (DNR), Division of Mining, Land and Water, authorizes water rights. A water right is a legal right to use surface water or groundwater under the Alaska Water Use Act. A water right allows a specific amount of water from a specific water source to be diverted, impounded, or withdrawn for a specific use.

In general, DNR supports the Service exercising water rights on waters within the System in accordance with local, State and Federal laws. However, additional regulation is not necessary. Presently, the Service can choose if a water right is needed or not at any refuge and there is no cause for additional regulation to require water rights System-wide. Additionally, DNR requests more specific information and detail when adjudicating the Service’s water right requests. The proposed rule states: “Where necessary, we will acquire, transfer, or lease water rights to meet statutory requirements, fulfill refuge purposes, and ensure biological integrity, diversity, and environmental health” (§ 29.3(c)(4)). The extent of the water reservations established to fulfill refuge purposes should not preclude the State from considering the needs of other users in the review of water right applications.

7. Federalism Issues

The Office of Information and Regulatory Affairs (OIRA) failed to summarize the federalism implications of this proposed rule that preempts state law and ensures state government consultation.

OIRA failed to ensure the proposed rule summarized the federalism impacts under criteria 2 of Executive Order (E.O.) 13132. Under the criteria in section 2 of E.O. 13132, this rule will have federalism implications that specifically preempt State laws regarding hunting, fishing, and trapping and sets a precedent of banning predator trapping as a hunter harvest method of predators. As part of OIRA’s regulatory review, OIRA staff need to ensure the regulatory clearance packages include, if applicable, the agency certification required by E.O. 13132, "Federalism," and E.O. 13175, "Consultation and Coordination with Indian Tribal Governments."

Since this rule will have federalism implications that preempt state law, one of the conditions necessary for an agency to promulgate rulemaking is for it to consult with state governments early in the process of rulemaking under E.O 13132 “Federalism.” No meaningful consultation with the state of Alaska or any of the other affected states occurred. “As OMB Director Daniels has pledged to Congress, rulemaking proposals that were not subjected to adequate State and local consultation will be returned to agencies for

reconsideration.”⁵⁴ We request the rulemaking package be returned to FWS for meaningful consultation with the states impacted by the proposed rule’s effect on State fish and wildlife management and federal preemption of state-authorized predator harvest methods. Once meaningful consultation with States has occurred, a separate public notice will be needed including a separate preamble section and federalism summary impact statement for the criteria in Section 2 of E.O. 13132.

8. Inadequate NEPA Analyses.

The FWS improperly relied on a Categorical Exclusion (CATEX) for this proposed national rule, even though it completed an environmental assessment (EA) for a substantially similar rule in 2016 AK Wildlife Rule that only applied in Alaska.

To fully comply with the NEPA-implementing regulations at 40 CFR Part 1600 and Service policy guidance in the *NEPA Handbook for the National Wildlife Refuge System (Handbook)* and at 550 FW 3, all provisions of the rule should have been analyzed in an EA, at a minimum. By raising BIDEH to equal status with refuge purposes, the proposed rule constitutes a major practical change to the System and refuge management, both on the ground and in relation to existing processes (*e.g.*, circumventing the existing compatibility determination and planning processes for actions that fall into the broadly expanded definition for predator control). The rule falls under the following categories identified in the *Handbook*, all of which require an EA or EIS:

Adoption of official policy, such as rules, regulations, and interpretations under the Administrative Procedure Act; treaties and international conventions or agreements; and formal documents establishing policies **that will result in or substantially alter agency programs** (NEPA compliances for these types of actions are managed at HQ and/or Regional Offices).

Adoption of programs to implement a policy, plan, specific statutory program, or Executive directive, etc.

Actions requiring development of a new compatibility determination or modification to an existing compatibility determination.

The proposed rule also fails to determine the significance or importance of its likely environmental impacts. It fails to consider:

- Failure to meet Congressional and Executive Office direction to enhance and increase wildlife-dependent recreational opportunities, as well as the potential effects of reduced opportunities.
- Effects on State fish and wildlife management.
- Effects on subsistence uses in Alaska.
- The context of the proposed rule on society, including tribal and low-income residents, in particular, local communities adjacent or effectively surrounded by refuges.
- The potential for environmental controversy when usurping state fish and wildlife management of predators.
- The potential for establishing a precedent or representing a decision in principle that defines the parameters of a further action.
- Indirect effects such as causing economic changes to commercial hunting, outfitting, guiding, and trapping activities.

⁵⁴ MEMORANDUM FOR THE PRESIDENT’S MANAGEMENT COUNCIL, John D. Graham, Presidential Review of Agency Rulemaking by OIRA, September 20, 2001

In explaining none of this, the FWS violates the transparency and public review goals of NEPA. We request any consideration of the proposed rule be put on hold until an environmental impact statement has been completed.

Given the significant impacts this proposed rule could have on the fish and wildlife management authorities of several states, including Alaska under ANILCA, and the dramatic departure in refuge management brought about from changing its mandate to conserve resources to preserving natural conditions, the FWS decision that the proposed rule falls under a Department of the Interior Categorical Exclusion (CATEX) for “policies, directives, regulations, and guidelines: that are of an administrative, financial, legal, technical, or procedural nature and that will be later subject to the National Environmental Protection Act (NEPA) process”⁵⁵ is inappropriate and fails to meet the requirements of the National Environmental Policy Act (NEPA) and its associated regulations at 40 CFR Part 1500. It also fails to meet FWS’ own agency guidance on NEPA. An agency is required to take a “hard look” at its actions. By the very nature of the CATEX proposed for use on these regulations, it is clear a “hard look” was not taken. It is also unclear at what future time the actions proposed by this regulation would be subject to NEPA.

Due to the impacts this proposed rule will have on State fish and wildlife management as well as its potential to substantially restrict the public’s ability to carry out wildlife-dependent recreation on individual refuges, we request the FWS prepare an Environmental Impact Statement on this proposed rule prior to finalization.

9. Impacts to Alaskans and Non-Rural Tribal Members.

As of nearly two-decades ago, The First Alaskans Institute reported that “the urban Alaska Native population (42%) is increasing”⁵⁶ and of the 143,587 Alaska Native people residing in Alaska, 73,571 (51%) reside in federal non-rural communities (2012-2016; Alaska Dept. of Labor). These non-rural Alaskans and non-rural tribal members do not qualify for federal subsistence. Under the proposed rule, the collection of raw materials for cultural garments via trapping and hunting has the potential to be negatively affected unless the activity is found compatible by the refuge and BIDEH policy. In addition, unlike recreational hunting and fishing, the proposed rule does not find recreational trapping compatible with its proposed new definition of ‘Predator Control.’ Fur trapping is a long-standing recreational and traditional activity in Alaska and has long been used by managers as a wildlife management tool. Trapping also provides income and is how Alaskans and non-rural tribal members procure the raw materials for handicrafts and cultural regalia. The proposed rule fails to analyze the potential effects the trapping ban will have on Alaskans and non-rural tribal members. The potential effects that need analysis include human health, cultural, economic, and social effects.

We do not support the proposed trapping ban on refuges in Alaska and request trapping be added as an approved use on refuges in Alaska.

⁵⁵ 89 FR 7350, February 2, 2024

⁵⁶ <https://firstalaskans.org/wp-content/uploads/2014/03/ANPCa0.pdf> (See pg. 5)