



March 4, 2024

Shannon Estenoz, Assistant Secretary for Fish and Wildlife and Parks
Katherine Harrigan, Division of Natural Resources and Conservation Planning, National Wildlife
Refuge System
Public Comments Processing
Attn: FWS–HQ–NWRS–2022–0106
U.S. Fish and Wildlife Service
5275 Leesburg Pike, MS: PRB (JAO/3W)
Falls Church, VA 22041–3803

RE: Comments to Proposed Rule (50 C.F.R. 29.3) and Policy Updates (601 FW 3)

Dear Ms. Harrigan and Assistant Secretary Estenoz:

The Montana Mining Association (“MMA”) is an industry organization representing the mining community throughout the State of Montana. MMA’s mission promotes the responsible mining of critical and important metal and mineral resources within Montana for purposes of furthering energy independence, combating climate change, and feeding the supply chains of our country. This mission includes engaging with federal agencies as they craft policies for land use and natural resource planning, as well as advocacy at the agency and executive level on behalf of the mining industry. In this capacity, MMA is concerned with the United States Fish & Wildlife Service (“FWS”)’s proposed “biological integrity, diversity, and environmental health” (“BIDEH”) rule and associated policy updates (together, “Proposed Rule and Policy”). We believe the Proposed Rule and Policy, while well intentioned, will negatively affect the ability for existing mines to expand and/or continue to develop, and it will stymie future mineral exploration or development.

As a preliminary matter, we note that MMA is not opposed to conservation. On the contrary, MMA believes that conservation and mineral development are far from being mutually exclusive. As Congress intended, there is room for multiple uses on public lands, without blocking mining and without halting conservation efforts. Along these lines, private landowners and interest-holders have shown their ingenuity and the ability to conserve wildlife while conducting mineral operations on their own properties. The Proposed Rule and Policy, however, would have negative consequences for multiple use efforts. It would effectively block mineral exploration and development on lands managed by FWS, lands included within the agency’s broadly designated

conservation areas, and lands linked or near any portion of the FWS refuge system. Consequently, MMA is opposed to the Proposed Rule and Policy, as drafted.

I. The Proposed Rule and Policy is overbroad.

As drafted, the Proposed Rule and Policy is overly broad and would apply to lands and property interests which the public would not typically consider as part of the National Wildlife Refuge System (“NWRS”) (e.g., conservation areas and easements). In this respect, we note that the Proposed Rule and Policy and other FWS policy manuals use a variety of words and phrases to describe the lands and interests subject to BIDEH management – none of which are consistent and few of which are defined. The result of these inconsistent definitions is a strong likelihood that the agency will apply the Proposed Rule and Policy far beyond the original intent of Congress.

The Proposed Rule and Policy states that it would apply BIDEH to “national wildlife refuges, both individually *and as a network*,” and to “refuge *ecosystems and all their components* across processes across multiple spatial scales.”¹ The associated policy manual confirms BIDEH would be applied to “to all Refuge System units.”² By statute, a “refuge” is “a designated area of land, water, or an interest in land or water within the System, but does not include Coordination Areas.”³ The “System,” in turn, is defined as “the National Wildlife Refuge System designated under [16 U.S.C. § 668dd(a)(1)],”⁴ which broadly includes “the various categories of areas that are administered by the Secretary for the conservation of fish and wildlife, including species that are threatened with extinction, all lands, waters, and interests therein administered by the Secretary as wildlife refuges, areas for the protection and conservation of fish and wildlife that are threatened with extinction, wildlife ranges, game ranges, wildlife management areas, or waterfowl production areas.”⁵

Clearly, the Proposed Rule and Policy would apply to all NWRS lands, which includes refuges and all “other areas” managed by the FWS. However, based on the broad and inconsistent definitions used, it appears conservation areas and similarly designated areas would be encompassed as well. To this point, we note that FWS asserts that the term “other areas” includes conservation areas and easements alike. Indeed, the FWS Strategic Growth Policy expressly includes “conservation areas” in its use of the term “refuge.”⁶ Because “conservation area” is largely undefined in the underlying federal laws, FWS acts as though it is not bound to a specific definition, and would be free to interpret the phrase as narrowly or broadly as it sees fit. This creates problems where conservation areas encompass vast amounts of federal and public lands managed by other agencies with conflicting policies and management plans. Despite other management agencies and interests, the FWS Conservation Easement Handbook asserts that

¹ Proposed Rule at 43 C.F.R. § 29.3 and §29.3(a) (emphasis added).

² Proposed Service Manual Update, § 3.2.

³ 16 U.S.C.S. § 668ee(11); *see also* 50 CFR § 25.12.

⁴ 16 U.S.C.S. § 668ee(14).

⁵ 16 U.S.C. § 668dd(a)(1); *see also* 50 CFR § 25.12 (“National Wildlife Refuge System, and System mean *all lands, waters, and interests therein administered by the U.S. Fish and Wildlife Service as wildlife refuges, wildlife ranges, wildlife management areas, waterfowl production areas, coordination areas, and other areas for the protection and conservation of fish and wildlife* including those that are threatened with extinction...”)

⁶ *See Strategic Growth Policy, 602 FW 2*, U.S. FISH & WILDLIFE SERVICE (Sept. 4, 2014), <https://www.fws.gov/policy-library/602fw5>.

“conservation easements ... are subject to the same laws, regulations, and policies as any other real property that is part of the National Wildlife Refuge System.”⁷

The applicability of the Proposed Rule and Policy to conservation areas and easements is concerning. For example, just this past year, FWS proposed the establishment of the Missouri Headwaters Conservation Area (“MHCA”) in Montana. As proposed, the MHCA would encompass approximately 5.8 million acres comprised of county, state, federal, and privately held interests, and would include the entirety of Beaverhead County, the majority of Madison County, and large portions of Jefferson, Silver Bow, and Deer Lodge Counties. If established, the MHCA would become the largest conservation area within Montana. With respect to the MHCA, this Proposed Rule and Policy would not only restrict extractive activities on NWRS lands⁸ but also empower FWS to police activities occurring on adjacent lands and, arguably, any lands associated with the conservation area.⁹ Consequently, if the MHCA is established, the Proposed Rule and Policy would permit FWS to apply BIDEH concepts, directly or indirectly, to a landmass larger than the State of Connecticut – thereby affecting the ability of existing mines to expand or continue operations and potentially forestalling future mineral development altogether.

II. The Proposed Rule and Policy would undermine critical mineral development.

The Proposed Rule and Policy wrongfully encourages an unprecedented expansion of the NWRS. Specifically, it promotes this expansion by “acquir[ing] lands when necessary to ... ensure biological integrity, diversity, and environmental health” and “connect habitat.”¹⁰ In this regard, the Proposed Rule and Policy’s repeat references to “connectivity,”¹¹ “connect[ing] habitat,”¹² and conservation “across multiple spatial scales,”¹³ together with its instructions to pursue “appropriate actions” to address “threats to refuge resources [that] arise *outside refuge boundaries*,”¹⁴ demonstrate FWS’s intent to link and expand the NWRS through the acquisition of additional lands and affect adjacent properties. The associated policy manual is even more explicit – instructing FWS to: promote “ecological connectivity” by “acquir[ing] lands to ... ensure BIDEH”¹⁵; “take a *proactive* approach” to “acquiring” lands for “*enhancing* the BIDEH of the Refuge System at all spatial scales”¹⁶; create “connected, and intact habitats,” “habitat corridors, linkages, or contiguous blocks”¹⁷; “*maximize* the size of contiguous habitat, restore and maintain connectivity between blocks of habitats, and protect wildlife corridors”¹⁸; and “acquire additional

⁷ *Conservation Easement Handbook (Supplements 601 FW 6 (Administration of National Wildlife Refuge System Conservation Easements))*, at 9, NATIONAL WILDLIFE REFUGE SYSTEM, U.S. FISH & WILDLIFE SERVICE (October 2022), <https://www.fws.gov/sites/default/files/policy/files/ConservationEasementHandbook.pdf> (*hereinafter Conservation Easement Handbook*).

⁸ Proposed Service Manual Update, § 3.10(B)(4) (“We avoid resource intensive activities and uses such as logging or livestock grazing”).

⁹ See generally Proposed Service Manual Update, § 3.15.

¹⁰ See Proposed Rule at 43 C.F.R. § 29.3(c)(2).

¹¹ See Proposed Rule at 43 C.F.R. § 29.3(b).

¹² See Proposed Rule at 43 C.F.R. § 29.3(c)(2).

¹³ See Proposed Rule at 43 C.F.R. § 29.3(a).

¹⁴ See Proposed Rule at 43 C.F.R. § 29.3(c)(5) (emphasis added).

¹⁵ See Proposed Service Manual Update, § 3.10(B).

¹⁶ See Proposed Service Manual Update, § 3.10(B) (emphasis added).

¹⁷ See Proposed Service Manual Update, § 3.10(B).

¹⁸ See Proposed Service Manual Update, § 3.11(B)(2) (emphasis added).

lands to establish wildlife corridors that improve connectivity and allow species movement from one habitat to another in support of BIDEH.”¹⁹ The result of these directives is a blank check, which wrongfully allows the agency to expand its reach and authority.

MMA opposes such a dramatic expansion of the NWRS. With respect to federally owned minerals, mineral exploration, prospecting, and the location of mining claims, these activities would be immediately halted on newly acquired or affected lands.²⁰ To the extent minerals are privately owned (e.g., grants of surface rights or conservation easements where landowners have specifically reserved the minerals), even where mining is legally permissible, existing regulations would impose restrictive burdens and chill any efforts to explore and develop the mineral estate responsibly.²¹ Notably, FWS is instructed to exert its authority when seeking and drafting conservation easements, by, “whenever possible, includ[ing] in the easement document authority for the Service to require and approve a permit to access any associated subsurface minerals.”²² Such language disrupts the general rights of parties in split estate situations and creates unpredictability for the application of state and local laws balancing the interests of private ownership.

In this regard, we note that under Montana law, when ownership of surface and mineral estates are split, the holder of the mineral estate must obtain approval from the surface owner before it can commence any mineral development or disturb the property.²³ FWS regulations restrict the exploration, development, and production of private minerals by mandating that such activities “prevent damage, erosion, pollution, or contamination to Service-administered lands, waters, facilities, and to wildlife thereon,” “to the greatest extent practicable.”²⁴ In addition to these standards, the request for surface owner approval would trigger, at the least, an environmental assessment under the National Environmental Policy Act.²⁵ Expansion of the NWRS is also likely to suppress mining on adjacent lands. Unlike other types of uses (e.g., recreation, hunting, fishing, grazing, etc . . .), mining operations cannot simply move to another location—the minerals are where they are. As seen with the proposed MHCA, expansion of the NWRS creates an increasing likelihood that access to mineral interests not subject to FWS jurisdiction will be effectively blocked by NWRS lands. Mineral and other operations which occur on checkerboard lands or locations involving multiple interests within the same section would be effectively blocked as well.

Expansion of the NWRS — and the associated interference with mineral and other types of development — is an extreme measure that is ultimately unnecessary to protect BIDEH. MMA members’ activities are already subjected to a comprehensive suite of state and federal statutes and regulations, all of which protect the natural environment, wildlife, and human health, and these members are committed to responsible mineral development and operations. In furtherance of

¹⁹ See Proposed Service Manual Update, § 3.10(B).

²⁰ See 50 C.F.R. § 27.64 (“Prospecting, locating, or filing mining claims on national wildlife refuges is prohibited unless otherwise provided by law.”).

²¹ See 50 C.F.R. § 29.32 (addressing non-federal mineral rights within the National Wildlife Refuge System).

²² See Conservation Easement Handbook, § V(j); see also *Administration of National Wildlife Refuge System Conservation Easements*, 601 FW 6, at § V(i), p.8§, U.S. FISH & WILDLIFE SERVICE (Oct. 27, 2022), <https://www.fws.gov/policy-library/601fw6> (*hereinafter* “Conservation Easement Service Manual”).

²³ See MCA § 82-2-303.

²⁴ See 50 CFR § 29.32.

²⁵ See *San Luis Valley Ecosystem Council v. U.S. Fish and Wildlife Service*, 657 F.Supp.2d 1233 (Colo. Dist. 2009).

these goals, many of MMA’s members engage in good samaritan cleanup efforts and go above and beyond their legal requirements. Enforcing existing environmental regulations and allowing responsible, compliant companies to continue their lawful activities is better than the wholesale elimination or obstruction of mining. Moreover, contrary to the agency’s assertions, expansion of the NWRS would actually have an adverse effect on efforts to reduce climate change. Gold, silver, and copper and many other minerals have been designated by the U.S. Department of Energy as “critical materials for energy”—i.e., they are essential for energy technologies and have a high-risk for supply chain disruption.²⁶ These and other minerals are also essential to fuel the country’s transition to a green energy economy.²⁷ Restricting mining and mineral development in areas where these minerals are found makes it more difficult for the United States to obtain materials necessary to develop renewable energy alternatives. More importantly, it results in the United States outsourcing its mineral needs to other countries (like China) which do not adhere to the same rigorous environmental standards as MMA’s membership. In this regard, the contemplated expansion is likely to be counterproductive.

III. The Proposed Rule and Policy ignores existing local efforts to manage BIDEH.

The Proposed Rule and Policy is a one-size-fits-all, top-down approach for BIDEH management which ignores the role that local stakeholders already play in management activities and their efforts to conserve species habitat and promote BIDEH. While the Proposed Rule and Policy extols the virtue of “coordination” with local stakeholders, it incorporates an assumption that local efforts to advance BIDEH are insufficient and require more rigid federal oversight. The Proposed Rule and Policy fails to account for local efforts and local interests. Using the proposed MHCA as an example – we note that public lands make up more than sixty percent (60%) of the lands within the proposed conservation area.²⁸ As noted above, these lands are already subject to significant state and federal regulations designed to prevent environmental degradation. Additionally, of the remaining private lands, we note that large portions of the conservation area are already subject to state and private conservation easements which, arguably, already promote BIDEH and its purposes.²⁹ More broadly, Montana Fish Wildlife & Parks has engaged, and continues to engage, in the successful conservation and management of critical keystone species and their habitat, and the state agency has been in constant coordination with FWS. At best, the Proposed Rule and Policy duplicates efforts already being undertaken locally. At worst, it amounts to a power grab by supplanting local efforts and subverting local autonomy.

²⁶ See *What are Critical Materials and Critical Minerals?*, U.S. Dep’t of Energy, <https://www.energy.gov/cmm/what-are-critical-materials-and-critical-minerals> (last visited Jan. 10, 2024).

²⁷ See 2022 Final List of Critical Minerals, 87 Fed. Reg. 10381 (Feb. 24, 2022).

²⁸ See, e.g., U.S. Fish & Wildlife Serv., *Proposed Missouri Headwaters Conservation Area Map* (Sept. 15, 2023), <https://www.fws.gov/sites/default/files/documents/Landowner-Public-Meeting-09-14-2023.pdf>.

²⁹ Approximately 25% of Madison County and 19% of Beaverhead County private lands are already under conservation easements.

IV. The Proposed Rule and Policy conflicts with multiple use requirements and federal minerals policy.

Contrary to numerous federal statutes, in which Congress has prioritized mining and instructed agencies to promote the same, the Proposed Rule and Policy fails to account for and allow mineral development. In the Mining and Minerals Policy Act of 1970 (“MMPA”), Congress declared “it is the continuing policy of the Federal Government in the national interest to foster and encourage private enterprise in (1) the development of economically sound and stable domestic mining, minerals, metal and mineral reclamation industries, (2) the orderly and economic development of domestic mineral resources, reserves, and reclamation of metals and minerals to help assure satisfaction of industrial, security and environmental needs... including all minerals and mineral fuels including oil, gas, coal, oil shale and uranium”. 30 U.S.C 21(a). Moreover, the MMPA expressly provides the Secretary of Interior with the responsibility to carry out MMPA policies.

Furthering Congress’ mandated policy of prioritizing mineral development, the Federal Land Policy and Management Act of 1976 (“FLPMA”) establishes that it is the authority of the U.S. Department of Interior and BLM to manage federal lands and federal mineral interests. 43 U.S.C. 1701 et seq. Under FLPMA, “public lands [are to] be managed in a manner which recognizes the Nation’s need for domestic sources of minerals . . . from public lands” in further implementation of the MMPA. 43 U.S.C. 1701(a)(12). Additionally, the National Materials and Minerals Policy, Research and Development Act of 1980 expressly directs the Secretary to act immediately to attain goals set forth in the MMPA, and calls on the Executive Office to promote the MMPA within the federal government’s various departments and agencies. *See generally* 30 U.S.C. 1601 – 1605.

The Proposed Rule and Policy fails to provide a means for mineral development, as mandated by the above policies and statutes, and it stands in direct conflict with mineral development. Despite the lack of statutory authority for such restrictions, it is well understood that mineral development is not allowed on federally owned lands within the NWRS. The Proposed Rule and Policy further alienates the prospect of mineral development by requiring additional analysis by the agency—ensuring BIDEH is furthered by the action—in addition to making a determination that a proposed action is compatible with the refuge purpose and NWRS mission. These disparities are especially concerning given the vast amount of federal lands included in FWP’s conservation area designations (see MHCA discussion above). Clearly, the Proposed Rule and Policy stands to impact lands which are not typically understood to constitute wildlife refuges – including private lands and other public lands. These changes, therefore, put FWS in conflict with both private ownership as well as other federal agencies trying to advance congressional policies on public lands.

V. Conclusion.

The overbreadth, substantive deficiencies, and inherent consequences of the Proposed Rule and Policy cause MMA serious concern. Further, it is unnecessary. For the reasons discussed above, we ask that FWS abandon the Proposed Rule and Policy as drafted.

Regards,

Montana Mining Association

A handwritten signature in black ink, appearing to read "M. Vincent", is centered within a light gray rectangular box.

Matt Vincent,
Executive Director