



Testimony for the Record

U.S. House of Representatives Committee on Natural Resources, Subcommittee on Water, Wildlife and Fisheries

Oversight Hearing Titled "The National Wildlife Refuge System at Risk: Impacts of the U.S. Fish and Wildlife Service's Proposed BIDEH Rule"

April 10, 2024

America's mining industry supplies the essential materials necessary for every sector of our economy – from technology and healthcare to energy, transportation, infrastructure and national security. The National Mining Association (NMA) is the only national trade organization that serves as the voice of the U.S. mining industry and the hundreds of thousands of American workers it employs before Congress, the federal agencies, the judiciary and the media, advocating for public policies that will help America fully and responsibly utilize its vast natural resources.

We work to ensure America has secure and reliable supply chains, abundant and affordable energy, and the American-sourced materials necessary for U.S. manufacturing, and national and economic security, all delivered under world-leading environmental, safety and labor standards. The NMA has a membership of nearly 300 companies and organizations involved in every aspect of mining, from producers and equipment manufacturers to service providers.

The NMA appreciates the opportunity to provide the subcommittee with written testimony on the U.S. Fish and Wildlife Service's (FWS) proposed rule and policy revision on the National Wildlife Refuge System; Biological Integrity, Diversity, and Environmental Health (BIDEH).¹ The NMA is concerned that without significant changes, the proposals could impede mining activities and create further delays in the administration's stated goal of reducing vulnerabilities in U.S. supply chains.

¹ 89 Fed. Reg. 7,345 (Feb. 2, 2024).

Introduction

The NMA's members have a longstanding record of supporting biological integrity, diversity and environmental health in all of the areas in which they operate. They are routinely at the forefront of engagement in the conservation and recovery of threatened and endangered species and improvement of their habitats. These values are reflected in the sustainable land management practices used at the core of their business models. Additionally, the NMA's members have reclaimed millions of acres of land, much of which is restored to serve as prime species habitat, which prior to operations, were unsuitable for species. As such, our concerns with the proposed rule should not be read as opposition to conservation activities or the incorporation of BIDEH within the Refuge System.

The Proposals Will Cause Delays and Mission Creep by the FWS

The proposed rule and policy changes sought by the FWS would incorporate an overarching statement in support of the Refuge System's conservation mission and includes a legal standard for managing refuges that would apply when the FWS refers to a management action being necessary to ensure BIDEH. The NMA is concerned that the proposed rule and policy changes are directly related to the FWS's increased use of conservation areas to restrict development and therefore could have serious implications for mining projects. For example, the NMA recently commented on an unprecedentedly large proposed 5.7-million-acre conservation area in Montana where valid existing mining claims are within the proposed boundary.² Because conservation areas are managed as units of the Refuge System, this type of management can delay and even block domestic mining activities, leading to a further increase in our nation's reliance on foreign sources of mined materials.

This concern is substantiated by FWS's own assertions that conservation areas are managed as units of the Refuge System. As recently evidenced in the establishment of the Lost Trail Conservation Area (LTCA), management as a Refuge System can stymie mining activity.³ For example, in the LTCA, FWS would only allow mineral extraction or development on Refuge System lands if there is a valid existing right to engage in such activities.⁴ Yet, determining the presence of valid existing rights is a lengthy, cumbersome and expensive process.⁵ The NMA is concerned that the FWS underestimates the burden and difficulty of demonstrating valid existing rights by both the mining claim owners and the federal government.

² FWS, *Proposed Establishment of the Missouri Headwaters Conservation Area*. <https://www.fws.gov/project/proposed-missouri-headwaters-conservation-area>.

³ See, e.g., FWS, *Final Land Protection Plan for the Establishment of the Lost Trail Conservation Area* ("The [Lost Trail Conservation Area] will be a new unit of the National Wildlife Refuge System . . . , as authorized by the Fish and Wildlife Act of 1956.").

⁴ 612 FW 1 at 1.7 (emphasis added); see also 1.7(C) ("The Service should work with BLM, the agency responsible for conducting formal mineral examinations, to verify that a valid mining claim exists.").

⁵ Am. Law of Mining § 14.04[1] (2023); see also *Cameron v. U.S.*, 252 U.S. 450 (1920) (explaining the burdens imposed upon the federal government to provide mineral claim holders notice and an opportunity to be heard with respect to mining claim rights determinations).

Further, the NMA is concerned that this proposal will similarly lead to mission creep and the expanded use of conservation areas beyond the intended use, and put highly mineralized lands off limits. Caution is needed when assessing the use of conservation areas in the future under these BIDEH proposals.

As we are entering the most mineral-intensive era in human history, preventing new mining activities jeopardizes the Biden-Harris administration's objectives to secure our minerals supply chains to meet its clean energy goals. The NMA strongly urges the FWS to recognize that mining and mineral exploration and development can occur concurrently or sequentially with other responsible resource uses, including conservation of wildlife and their habitats. Given the vast amount of federal lands already closed to mining operations, the FWS should not use incorporation of BIDEH within the Refuge System as another way to block resource development activities.

The FWS has Limited Authority Outside of the Refuge System

Another troubling issue is that the proposed policy change would take a more aggressive approach to protecting units of the Refuge System from actions outside of refuges that may – even in some small part – impact refuge lands or waters. While there are various acts of Congress that correctly authorize FWS to acquire and manage areas of land, water, and interests to promote the conservation of wildlife, these acts have conditions and regulatory provisions which apply and oftentimes restrict the agency's purchasing and management activities. The FWS has no authority to manage land uses outside of units of the Refuge System and any attempt to do so would be unlawful. To allow FWS this authority could render the entire U.S. as a refuge under the National Wildlife Refuge System Improvement Act of 1997 (Improvement Act).

The FWS policy change would also require the use of all available tools to protect refuge resources from unacceptable impacts to adjacent refuge lands. However, the term "unacceptable impacts" is undefined in both the policy change and the proposed rule. The policy further states that the FWS may take appropriate action within their legal authorities to obtain an appropriate remedy when an action outside of a refuge may result in those unacceptable impacts. Yet, the FWS provides no explanation or guidance as to what "appropriate actions" may be in this circumstance. Moreover, the policy change requires refuge managers to encourage compatible adjacent land uses by actively participating in the planning and regulatory processes of other federal agencies, and Tribal, state, and local governments that have jurisdiction over public or private property affecting the refuge.

Despite recent efforts to inappropriately control lands outside of the Refuge System,⁶ the FWS cannot act as the wildlife czar to control land activities on private lands or other lands outside of the Refuge System. The NMA is concerned that the new BIDEH proposals will only embolden Refuge System employees to criticize every land use

⁶ See letter from Secretary Deb Haaland to Governor Brian Kemp urging Georgia to not move forward with mining proposal near Okefenokee National Wildlife Refuge, available at <https://subscriber.politicopro.com/eenews/f/eenews/?id=0000018a-6b72-d88e-a7fa-7b7bfcd00000> (last visited Mar. 4, 2024).

project within an undefined radius of a unit of the Refuge System. Accordingly, the NMA urges the FWS to withdraw its proposal, provide the appropriate statutory authority (if one exists), and if it decides to proceed with a rulemaking or policy changes, to provide clear definitions and explanations as to how these changes will be implemented. The FWS has not done so in this proposed rule and policy revisions, and therefore should not proceed with the BIDEH proposal.

The BIDEH Proposals Will Increase Regulatory Uncertainty

The BIDEH proposals are vast in scope and highly consequential. Given this expansive nature, it is almost certain to create regulatory uncertainty for both FWS and the regulated community – which the NMA is concerned could be by design.

The concepts and priorities encompassed in the proposals represent a complete overhaul and stark departure from how lands are currently managed within the Refuge System. This will inevitably lead to permitting delays at a time where mining products are needed more than ever. Furthermore, changing the rules of the game will impact the U.S.' ability to attract investment in mining projects on federal lands. As the World Bank has cautioned, “[G]overnments need to adopt the fundamental principle of ‘no surprises’ if they are to avoid developing a reputation for sovereign risk, thus affecting investment in their countries.”⁷

Regulatory certainty must be the cornerstone of responsible minerals and land use policies to enable the ramping up of domestic production and processing under our rigorous environmental and safety standards. Doing so will ease our nation’s bureaucratic paralysis to provide for greater economic competitiveness and growth while maintaining environmental protections and safeguards.

Conclusion

The NMA appreciates the opportunity to provide written testimony to the subcommittee related to the FWS’s BIDEH proposals. The proposals will result in costly, speculative, and untimely decisions that will only obstruct the needed production of minerals and coal in the United States. These impacts will have a significant impact on the Biden-Harris Administration’s ability to pursue – let alone, reach – their climate goals. The NMA strongly urges the FWS to withdraw or significantly modify its proposals to address stakeholder concerns.

The NMA looks forward to working with Congress and the administration to support conservation solutions that support the responsible development of our nation’s mineral endowment – a goal that is not mutually exclusive.

⁷ Mining Royalties: A Global Study of Their Impact on Investors, Government, and Civil Society, James Otto *et al.*, the World Bank (2006).