



The voice of fish and wildlife agencies

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Written Testimony of:

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**Oversight Hearing before the Subcommittee on Water, Wildlife, and Fisheries
Committee on Natural Resources
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Good morning, Chairman Bentz, Ranking Member Huffman, and members of the Committee. Thank you for the opportunity to testify before you today.

I am Gordon Batcheller, a Certified Wildlife Biologist. I am here today to represent the Association of Fish and Wildlife Agencies (AFWA); all 50 states are members as well as Guam, U.S. Virgin Islands, Puerto Rico, and the District of Columbia. AFWA is the voice of state fish and wildlife agencies. Prior to my current position, I was Chief of Wildlife for New York State.

Our mission is to protect state agency authority to conserve and manage fish and wildlife within their borders. These agencies exercise primary statutory authority for management of fish and wildlife as public trust resources within their borders, including on lands and waters in the National Wildlife Refuge System (NWRS).

We appreciate the efforts of the Service to modernize regulations and policy relating to ecological health within the NWRS, but we are deeply concerned by the justification and substance of key parts of the proposed rule and accompanying policy updates. Due to the importance and impact of this proposed rule on management of fish and wildlife species across the NWRS and adjacent habitats, its failure to account for the judicially and statutorily established primacy of state authority to manage wildlife, the increased administrative burden and limited flexibility with which it would restrict managers, and the fundamental lack of scientific basis for various aspects of the proposal, we offer the following testimony for your urgent consideration. We hope the result will be significant revisions that transform the proposed rule into one that allows refuge managers to use the well-established and successful wildlife and habitat management tools to secure the health of habitats and abundant species across the NWRS.

While the Association made the most of the opportunity to engage with the Service on the review of the draft policy and rule, the vast majority of our substantive input was ignored. As a result, we feel that the proposed

rule requires significant revisions if the Department and the Service intend to proceed with this rulemaking. In our view the changes made based on our initial input were minimal, and did not address the most concerning elements of the proposed rule, specifically:

- Inclusion of the concept of “predator control”, which infringes on state jurisdiction and suffers from the lack of any workable scientific definition for “predators”
- Restrictions on commonly used and widely accepted wildlife management tools such as cooperative agricultural practices
- A pervasive lack of consideration for state fish and wildlife agencies’ roles and authorities
- Rigid processes that threaten to overburden refuge managers, erode cooperative conservation efforts, and delay timely decisions
- Vague, ambiguous definitions that could be applied inconsistently or leveraged to restrict compatible and priority uses of NWRS lands and waters

The National Wildlife Refuge System Administration Act (NWRSAA) as amended by the National Wildlife Refuge System Improvement Act (NWRISA) at Section 668(dd)(a)(4) assigns the Secretary 14 responsibilities in administering the System. Among these, at Section 668(dd)(4)(B), the Act directs the USFWS to “ensure that the biological integrity, diversity and environmental health of the System are maintained for the benefit of present and future generations of Americans.” However, there are 13 other statutory responsibilities assigned to the Secretary and the Act does not prioritize those responsibilities but simply lists them¹. The Association supports the concept of BIDEH within the system, just as we support the 13 other priorities. With this rule it appears that the USFWS is elevating this single aspect of administering refuges over all others, and if this is the case, we do not believe it is in the best interest of the management and goals of the NWRS.

Predator Control

As we shared repeatedly with the Service, inclusion of restrictions on “predator control” is fundamentally flawed on multiple levels and as such should be stricken from future iterations of the rule. Because “predator” is not a scientific classification (and the Service wisely does not attempt to define “predator” in the proposed rule), this proposed restriction could ensnare any native species that employs predation as part of their life history (which is most species), creating a jurisdictional conflict over the management, method, and means of take for species that state fish and wildlife agencies hold in trust for the benefit of the public. State agencies exercise primary statutory authority for management of species within their borders across all types of land, including those within the NWRS. Indeed, 43 CFR 24.4(e) states:

“...in recognition of the existing jurisdictional relationship between the States and the Federal Government, Congress, in the National Wildlife Refuge System Administration Act of 1966 (16 U.S.C. 668dd), has explicitly stated that nothing therein shall be construed as affecting the authority of the several States to manage fish and resident wildlife found on units of the system. Thus, Congress has directed that, to the maximum extent practicable, such public uses shall be consistent with State laws and regulations. Units of the National Wildlife Refuge System, therefore, shall be managed, to the extent practicable and compatible with the purposes for which they were established, in accordance with State

¹ Likewise, House Committee Report 105-106 (NWRISA) does not assign a priority to these 14 responsibilities.

laws and regulations, comprehensive plans for fish and wildlife developed by the States, and Regional Resource Plans developed by the Fish and Wildlife Service in cooperation with the States.”

This conflict is exacerbated by the proposed exceptions to predator control, which include “[c]ompatible, refuge-approved recreational hunting and fishing opportunities that do not compromise maintaining biological integrity, diversity and environmental health [(BIDEH)] on the refuge.” By including this as an exception to predator control, the Service is explicitly stating its assumed authority to regulate methods and means of take on refuges at any time if it categorizes an activity as predator control, regardless of existing approval or the purpose for which a refuge or unit was established. The National Wildlife Improvement Act of 1997 clearly and plainly requires that when conflict arises between the NWRS mission and the established refuge purpose, the purpose of the unit itself should take precedence over the NWRS mission.

The proposed definition of predator control—“...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...” —appears to describe a substantial portion of management for harvested and non-harvested species alike. Claiming authority to potentially influence the management of countless species will create conflicts with state authorities and disregard individual refuge purposes by subordinating those purposes secondary to the overarching principles of BIDEH.

Additionally, refuge managers are already entrusted with the responsibility to maintain population levels based on what the best available science demonstrates is necessary for the health and abundance of the full range of species that rely upon a refuge for habitat, subject to the specific purposes of that refuge. Under these existing rules and guidance, BIDEH is already being considered and served. By requiring managers to determine that there is no other feasible method to address specific species or habitat issues prior to utilizing “predator control,” the proposed rule would severely hamper timely management decisions and open a broad window for wasteful litigation. State agency concerns are by no means limited to the prohibitions on “predator control”, as various aspects of these principles apply to several potentially harmful policy proposals.

Consider just a few specific case studies that demonstrate the importance of active management “predator control” to enhance the conservation status of wildlife:

The trapping of raccoons on Archie Carr National Wildlife Refuge in Florida is vitally important to reduce predation of sea turtle eggs and hatchlings.²

Conserving big game populations in Alaska by managing predation is central to subsistence lifestyles, and food security.³

At the Don Edwards San Francisco Bay National Wildlife Refuge, predation on western snowy plovers and California clapper rails by red foxes prompted the initiation of a predator management program targeting red foxes, skunks, and raccoons, resulting in improved nesting success.⁴

² https://www.fws.gov/sites/default/files/documents/Archie_Carr_CCP.pdf

³ https://www.adfg.alaska.gov/static/research/programs/intensivemanagement/pdfs/intensive_management_protocol.pdf

⁴ <https://westernsnowyplover.org/pdfs/WSP%20Final%20RP%2010-1-07.pdf>

Radiotelemetry at Malheur National Wildlife Refuge in Oregon showed predators, primarily coyotes, were severely limiting the survival of sandhill crane young or “colts,” leading to initiation of a predator control program. With the exception of a drought year, crane productivity improved during the first 4 years of the control program.⁵ Similarly, on the Mississippi Sandhill Crane National Wildlife Refuge, removal of coyotes is critical to improving the nesting success of highly vulnerable and rare Mississippi Sandhill Cranes.⁶

The lethal removal of mink and river otter within the Maine Coastal Islands National Wildlife Refuge Complex is vitally important to protecting nesting seabirds.⁷

The lethal removal of Mountain lions on the Hart Mountain National Wildlife Refuge in Oregon is required to improve the conservation status of big horn sheep.⁸

There are countless other examples within the Refuge System, in all parts of the Country, that underscore the importance of active management, “predator control,” for the conservation of many species.

Finally, those who recall the highly contentious 2016 predator control rule in Alaska, observe that this proposed rule appears to be an attempt to reinstate that same rule, which was rejected by Congress under the Congressional Review Act due to the leadership of Alaska’s Congressman Don Young.⁹

However, rather than just reinstate this rule for Alaska, it enacts similar provisions across all 50 states, and applies it more broadly with the proposed definition including “potential to alter predator/prey dynamics[.]”

Restrictions on Agricultural Use and Practices

As drafted, the rule also prohibits certain well established and widely accepted wildlife and habitat management practices, unless the refuge manager takes a series of laborious steps. The proposed restrictions on agricultural practices are contrary to the very purpose for which many refuges were established: to manage habitat to benefit migratory birds, particularly waterfowl. As such, we are aware that farming is effectively used throughout the NWRs where needed and recognized in the North American Waterfowl Management Plan. We are concerned that, under the proposed revisions agricultural uses, waterfowl production, and a variety of other cooperative habitat management activities may be unavailable on refuges that are managed for waterfowl hunting opportunities and other refuge-specific purposes. We strongly recommend that upon revision, this proposed rule should not place excessive burdens on managers and Refuges that have successfully employed these practices.

Roles and Authorities of State Fish and Wildlife Agencies

State fish and wildlife agency management allows for the practical and efficient use of resources to manage the broad diversity of species and habitats across the country, many of which require geographic or species-specific solutions that could not be fulfilled by a one-size fits all approach. While we respect the USFWS’s responsibilities to manage refuges in coordination with the states, we strongly disagree with the approach of this proposed rule

⁵ <https://digitalcommons.unl.edu/cgi/viewcontent.cgi?article=1217&context=nacwgproc>

⁶ https://www.fws.gov/sites/default/files/documents/Mississippi_Sandhill_Crane_NWR_CCP.pdf

⁷ <https://www.fws.gov/sites/default/files/documents/REFUGE%20ISLANDS%20March%202022.pdf>

⁸ <https://www.regulations.gov/document/APHIS-2022-0002-0003>

⁹ https://naturalresources.house.gov/uploadedfiles/hj_res_69_one_pager_final.pdf

and the problems it will create for the individual state-USFWS partnerships within the refuge system as well as research and management of wildlife and habitat on refuges as a whole. Denying or curtailing the ability of state agency resource managers to use these tools (agriculture, hunting seasons and regulations, etc.) would not only undermine state management authority, but it would also severely limit federal agencies' pursuit of cooperative management strategies.

While a complete review of well-established state authority is unnecessary, a long line of case law that began in the nineteenth century and created the jurisdictional backdrop for federal legislation from the Lacey Act to the Migratory Bird Treaty Act and beyond, has consistently held that, absent a clear exercise and/or delegation of congressional power through the Supremacy, Property, or Commerce Clauses of the U.S. Constitution, states retain control over wildlife to manage in trust for the benefit of the people of the states. The primacy that the proposed rule places on BIDEH would diminish all other refuge purposes and infringe on states' authority to manage the methods and means of take for species within their borders that have not been placed under federal protection. If finalized, the proposed rule would enable drastic federal overreach by establishing a flawed basis through which USFWS could attempt to eliminate methods and means of hunting that the USFWS determines are not compatible with BIDEH.

Even though the proposed rule is silent regarding trapping on refuges, it is clear that unnecessarily restrictive or duplicative regulations on methods and means of take may be imposed should the USFWS decide it is necessary to maintain BIDEH. Regulated trapping of furbearers for a variety of purposes is necessary and provides numerous societal benefits, ranging from damage and population control, protection of endangered species, reintroductions and necessary supporting research, and protection of sensitive habitats. Further, trapping is a unique activity that deepens Americans' connection with nature and understanding of the outdoors and its flora and fauna. In many rural communities, self-sufficiency is core to the public's activities, of which trapping is included with complementary, sustainable uses of natural resources such as angling, hunting, gardening, and other uses. State and federal wildlife agencies, including the USFWS, use trapping as a cost-effective method (compared to hunting or chemical control) to manage wildlife. Trapping helps protect endangered species and migratory birds, restore species in decline, prevent and reduce property damage, and control destructive invasive species.

Under this co-management structure, trapping regulations in the NWRS usually reflect those made by the state agency with management authority over the relevant species, meaning any lawful trapper on refuge lands must adhere to applicable state regulations and permit stipulations, as well as possess the applicable licenses. The BIDEH rule should not provide any vehicle by which the USFWS may attempt to impose restrictions on trapping or any methods and means of take for state managed species.

Another area of consideration relates to "conservation translocations" as defined in 29.3(b). We strongly recommend USFWS clarify that these translocations must comply with state regulations such as those relating to the health of the individual or disease quarantining for transport across state lines, or even transport within the state.

In 3.10(c)(3) the proposed rule states that USFWS "conserve[s] and manage[s] fish and wildlife populations to meet refuge population objectives, sustain ecosystems, and, where appropriate, restore or recover imperiled species." We strongly recommend inclusion of language to recognize state authority in species management decisions. Under management activities and uses, the proposed rule states that "Proposed activities and uses

will be evaluated in compliance with the National Environmental Policy Act (42 U.S.C. § 4321 et seq.) and other legal requirements, as applicable.” We strongly suggest including references to 43 CFR § 24.4(e) and the Fish and Wildlife Coordination Act to document the importance of state coordination.

Administrative Burden

As we have touched on previously, but further stress here, the proposed rule would establish overly rigid processes that will overburden refuge managers, restrict use of widely accepted wildlife management practices, and delay timely decisions. We are concerned that the desire to create a “high bar” to justify widely accepted wildlife and habitat management practices may create unnecessary barriers, generate more opportunities for procedural inconsistencies between refuges and regions, and hamper NWRS staff that are already stretched thin. We encourage the Service to recognize and continue to employ well-founded, supported, and justified management actions and activities currently employed on the NWRS. Further, decision making at the local level will be difficult for individual refuge managers if they must consider factors that are outside of their control.

For example, the proposed policy for conservation translocations in 601 FW 3.13B(2)(a) includes the requirement for translocations to undergo scientific peer review, and refers to 3.14C for the criteria of “us[ing] novel, precedent-setting methods or models,” or being “of high ecological risk or controversy...likely to change prevailing practices, or...likely to affect policy decisions of significant environmental impact.” This opens up significant room for interpretation. It is not clear how the carve-out for activities that have undergone peer review within the past 10 years with no substantial changes in scientific knowledge or relevant circumstances will be applied, whether refuge by refuge or programmatically.

The rule also establishes prohibitions on several commonly administered, widely accepted and successful wildlife management practices, such as the use of agriculture, unless specifically approved. For these activities, that are already successfully utilized by its managers, we suggest the rule should instead take the approach of “allowed until prohibited” vs. “prohibited unless justified” as currently drafted. Again, Agricultural Use and Predator Control revisions should not place excessive burdens on managers and Refuges who have successfully employed these practices.

Vague and Otherwise Flawed Definitions

The proposed rule is rife with vague, ambiguous definitions that could be leveraged to restrict multiple-use of NWRS lands and waters. In a number of instances, from “predator” to “historical conditions” to “natural processes”, we previously communicated to the USFWS that these terms were vague and would benefit from being better defined, clarified, or omitted.

Where the proposed rule references the “best available science,” USFWS should explicitly state that this includes consideration of science from on-the-ground managers, whether state, federal or tribal. Additionally, the term and use of “historic conditions” throughout the definitions remains vague, as well as “natural processes” throughout the definition, management principles, and management activities and uses; all natural processes occur under some level of human influence and have for thousands of years. The term “historic conditions” is defined as referencing conditions “prior to substantial anthropogenic changes”. This definition is subjective, as humans have always been part of the ecosystem. We understand that the USFWS is drafting these

policies based on the reality that pre-European contact conditions are not an attainable baseline for the NWRS. Moving away from the current baseline requires the establishment of a new baseline to measure effects to the refuge. The policy and definition do not define the new historic baseline condition. As the proposed planning policy decentralizes decision making, the proposed BIDEH policy needs to provide more direction to refuge managers to best understand what a substantial change is, whether the changes are anthropogenic in nature, and whether those anthropogenic changes are under local control (e.g. climate change impacts from carbon emissions elsewhere). We request that the USFWS explain what the new historic baseline condition will be to evaluate change on the refuges and how this aligns with previous conversations regarding historic human use. We also recommend amending the definition of “natural processes” to state that it encompasses interactions that would reasonably be expected to occur in the absence of substantial human influence.

The definition of “Anthropogenic change” – “Environmental change that humans cause or influence, either directly or indirectly,” is too broad and could include nearly any type of change as currently written. We recommend removing the term “indirectly” at the end of the definition to limit the scope of the change. Decision making at the local level will be difficult for the individual refuge managers if they must consider factors that are outside of their control. If the intent of the policy is to keep the decision making at the local level, then the policy must focus on issues that the individual refuge managers can control. Refuge managers simply cannot control the output of emissions that may affect their refuge. Requiring refuge managers to mitigate these emissions could result in undue burden on refuge management.

Including genetic differences in living organisms is a broad term that could mean anything from a genetic difference between individuals, genetic differences between populations, or other unknown advances in genetic science not yet contemplated. The more traditional definition of diversity focuses on species diversity which is the number of different species present in an ecosystem and the relative abundance of each of those species. Based on the proposed definition, we are concerned that there is no historic reference to serve as a baseline for measuring these genetic changes as proposed in the regulations and policy. The Alaska Native Interest Lands Conservation Act (ANILCA) uses the broader term natural diversity in the purposes of each refuge created by Title III of ANILCA. We request this definition be reworded to align more closely with the definition of species diversity, particularly as ANILCA remains the prevailing statute in Alaska. The definition of mosquito control in (d)(7) could also be expanded to include control of other biting arthropods that transmit disease (such as ticks) or pose a threat to conservation goals, for the greatest flexibility in this regulation.

Administrative Structuring / Priority

Finally, we are concerned that if an activity, such as the use of prescribed fire, was challenged because it would impact a directive, such as air quality, the directive to address air quality would prevail over the necessary and effective habitat management activity – prescribed fire. Another example is the inclusion of “soil compaction” as a directive. If an activity, such as a timber sale or forest practice like thinning were challenged due to its contribution toward the directive, which is to prevent soil compaction - which would prevail? Without clarification, such endless questions, challenges, and litigation could effectively hamstring any reasonable management practice which would prevent the NWRS from achieving its mission. Therefore, if this is not the intent of the rule, to have directives supersede individual refuge actions, it should be clarified. If this is the intent, and our concerns are legitimate, then we encourage the Service to reconsider this approach.

Thank you for the opportunity to testify today. The Association looks forward to continuing to work with the Service, the Department, and other federal and private partners to ensure co-management of the NWRS provides healthy habitats, abundant wildlife populations, and accessible recreation opportunities for all.