State of Alaska

Comments on the U.S. Fish and Wildlife Service
Proposed Rulemaking - Docket No. FWS-R7-NWRS-2014-0005:
Non-Subsistence Take of Wildlife, and Public Participation and Closure Procedures, on National Wildlife Refuges in Alaska

The State of Alaska reviewed the proposed rule entitled Non-Subsistence Take of Wildlife, and Public Participation and Closure Procedures, on National Wildlife Refuges in Alaska. The following comments represent the consolidated views of the State's resource agencies.

Introduction

The proposed rule accurately acknowledges that the Alaska National Interest Lands Conservation Act (ANILCA) provides the primary direction for management of refuges in Alaska. However, it ignores several key provisions in ANILCA, including one that affirms the authority granted to the State of Alaska at statehood to be the primary manager of fish and wildlife resources on all lands in Alaska.

The proposed rule states that its overarching purpose is to accomplish the following:

1. *clarify* how existing mandates for "*the conservation of natural and biological diversity, biological integrity, and environmental health*" relate to predator control;
2. *prohibit* several particularly effective methods and means for the take of predators, and;
3. *update* the public participation and closure procedures

The proposed rule also states that it "*does not change Federal subsistence regulations or restrict the taking of fish or wildlife for subsistence uses under Federal subsistence regulations.*" Although Federal subsistence regulations adopted by the Federal Subsistence Board are not directly amended by the proposed rule, the implication that the proposed rule does not affect subsistence users or the resources upon which they rely is inaccurate.

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. Prior to the release of the proposed rule in the Federal Register, the Service was informed by the State and many users, including Federal Subsistence Resource Advisory Commissions (RACs),which were created by ANILCA as advisory bodies to the Service on subsistence issues, that the proposed rule was seriously flawed, and contrary to its misleading title and stated intent, would directly impact the interests of subsistence users and others who rely on Alaska's vast array of resources both on and off refuge lands.

As proposed, the regulation ignores the State's constitutional mandate to responsibly manage fish and wildlife resources and instead proposes that fish and wildlife be managed for natural fluctuations. This "hands-off" style of management will significantly impact the State's ability to actively manage wildlife populations for subsistence and other consumptive uses under the

sustained yield concept, resulting in unstable wildlife populations that will directly affect both subsistence and non-subsistence hunting opportunities.

The proposed rule focuses on one aspect of state management, Intensive Management (IM) (which includes a broad array of activities, such as habitat management and airborne shooting of predators), and misclassifies certain state authorized hunting seasons, methods, and means as being predator control that are not necessarily IM. As a result, and in stark contrast to ANILCA Section 1314,[1] the proposed rule will *diminish* the state's management authority and significantly *alter* the way in which fish and wildlife have been managed in Alaska since statehood. This is also contrary to the organic act for national wildlife refuge system, the 1997 National Wildlife Refuge System Improvement Act (NWRSIA), which states that nothing shall be construed as affecting the authority of the States to manage fish and resident wildlife on refuges,[2] 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 purported basis for this dramatic departure in the management of refuges stems from elevating one of several equally-weighted provisions in the Refuge Improvement Act, thereby threatening refuge system management outside Alaska and the management authorities of other states. The suggestion that the proposed rule is Alaska-specific is both misleading and inappropriate, and evaluating the affects of only limited aspects of the proposed rule in an environmental assessment (EA) is inadequate and inconsistent with the National Environmental Policy Act (NEPA) regulations and related agency guidance.

The Service already 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 NWRSIA.

The State's overarching concerns with the proposed rule and environmental assessment include the following:

[1] 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]

[2] NWRSIA, Sec. 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.*

1. The proposed rule inaccurately claims that subsistence resources and federally qualified rural subsistence users will not be affected.
2. The proposed rule defines specific terminology and elevates one of 14 directives under the NWRSIA, circumventing existing processes and influencing future decision-making.
3. The proposed rule ignores the State's overarching mandate to responsibly manage fish and wildlife resources for sustainability and fundamentally changes refuge management in Alaska and nationally.
4. The proposed rule adds an unfounded and unclear closure criterion and reduces public participation in long-established Alaska-specific closure process.
5. The EA's improperly limited scope and analysis does not recognize the full impacts of the proposed rule.
6. The Federalism determination in the Services' analysis of the proposed rule is incomplete and lacks relevant information.

Because existing processes and decision criteria are adequate to address any potential resource concerns associated with state management activities and state authorized uses, the State believes the proposed rulemaking is unnecessary and duplicative. Further, many of the proposed changes will result in unclear directives that will unnecessarily preclude otherwise legal uses. Overall, the rule should be withdrawn; however, if the Service moves forward with the proposed rulemaking, numerous changes are necessary to ensure rural residents and others who rely on Alaska's fish and wildlife resources are not negatively affected by the proposed rule, including:

- Retain allowances in existing regulations for subsistence users to subsistence hunt and fish under state regulations.
- Remove the unclear closure criterion that blends the proposed new definition of natural diversity with select terminology from the Service's national Biological Integrity, Diversity and Environmental Health policy and rely instead on existing processes mandated pursuant to ANILCA, the NWRSIA, and their respective implementing regulations.
- Remove the overly-broad definition for "predator control" or use the *full* definition in the Federal Subsistence Program Predator Control Policy or as defined in existing refuge Comprehensive Conservation Plans.
- Cooperatively define "natural diversity" with the State and other stakeholders and consider in the *full* context of the refuge purpose to "*conserve* populations and habitats in their natural diversity."
- Remove proposed prohibitions on specific methods and means for taking wildlife based on unsubstantiated conservation concerns. Any methods and means restrictions must be limited to those in which scientific evidence supports a valid conservation concern.
- Retain the existing closure and public participation process specifically tailored to ensure Alaska's rural residents who rely heavily on refuge resources are meaningfully engaged in proposed decisions; adding the internet as an additional, instead of primary, notice method.
- Update the 43 CFR 36.42 closure process for ANILCA Section 1110(a) authorized methods of access to defer to superseding DOI Title XI regulations at 43 CFR 36.
- Before adopting and implementing the proposed rule, fully analyze and address short and long term effects of individual prohibitions *and* the revised criteria and processes on

refuge resources and uses, including impacts to resources used by subsistence users and opportunities imperative to the subsistence lifestyle and rural Alaska's mixed cash subsistence economy.
- Fully analyze federalism impacts of proposed rule on state management in accordance with EA 13132.

The rationale for these and other specific requests are provided in the following comments.

1. **<u>The proposed rule inaccurately claims that subsistence resources and federally-qualified rural subsistence users will not be affected.</u>**

The Alaska National Interest Lands Conservation Act

In crafting ANILCA, Congress balanced both national and state interests. While the proposed rule focuses primarily on select provisions related to one specific refuge purpose and the priority for subsistence use in Title VIII of ANILCA, the overarching intent language in Section 101establishes needed perspective for this rulemaking and any other management decision affecting conservation areas designated by ANILCA. In particular, following the description of the intent behind designating such vast areas for preservation, use and enjoyment for present and future generations in Sections 101(a) and (b), Section 101(c) recognizes the need to continue management of fish and wildlife resources "*in accordance with* ***recognized scientific principles and the purposes*** *for which each conservation system unit was established…to provide for* ***rural residents engaged in a subsistence way of life*** *to continue to do so*." In summarizing congressional intent, Section 101(d) includes a declarative statement that ANILCA provides for both the protection of the national conservation interests and at the same time provides opportunities to satisfy the economic and social needs of the State of Alaska and its people. In fact, the uniqueness of Alaska's refuges and the balancing provisions in ANILCA are the very reasons that the NWRSIA included an ANILCA savings clause[3] that ensures ANILCA prevails whenever there is a conflict between the two laws. The Supreme Court recently 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."[4]

ANILCA Title VIII – Subsistence Management and Use

As noted above, ANILCA recognizes subsistence use as being of utmost importance in Alaska; however, contrary to implications in the proposed rule, it is not the only consumptive use authorized on refuge lands, nor is it limited to that which is authorized by federal regulation.

ANILCA Title VIII gives federal land managers 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*

[3] NWRSIA Section 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.*
[4] *Sturgeon v. Frost*, ___ U.S. ___ (2016).

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).

ANILCA gives federal land managers the authority to manage subsistence use for the single purpose of ensuring rural Alaska residents are afforded the priority whenever it is determined necessary to restrict the take of fish and wildlife resources. To ensure all available information concerning affected lands and resources are considered in the decision to implement the priority, ANILCA also mandates that federal land management agencies "*cooperate with adjacent landowners, and land managers, including Native Corporations, appropriate State and federal agencies, and other nations*" (ANILCA Section 802(3)).

To further ensure that there would be local and regional participation in federal land manager's decisions, ANILCA Section 805(a)(3)(A) established subsistence resource regions, and in each region advisory councils comprised of residents from the region were given the authority to "…*review and evaluate proposals for regulations, policies, management plans and other matters relating to subsistence uses of fish and wildlife*…" The establishment of the Federal Subsistence Program Board to implement the priority under ANILCA does not change or enhance the authority granted in Title VIII or the directive to cooperate with land and resource managers and others, as well as consider the views of the subsistence resource advisory councils (RACs).

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*."

Section 816 only grants federal land management agencies authority to *temporarily* restrict the take of fish and wildlife for subsistence use for the following reasons - public safety, administration, or to assure the continued viability of a particular fish and wildlife population - and only after consultation with the State and after providing adequate notice and public hearing(s). This section does not grant federal land managers the authority to permanently restrict the take of fish and wildlife, nor does it allow agencies to expand the criteria for restricting subsistence use.

The proposed rule confuses this limited discretionary authority with authority to categorically preempt state management of fish and wildlife resources, *absent any demonstrated or foreseeable conservation concern*. In addition, by removing the regulatory authority for the state to manage any subsistence use on refuge lands in 50 CFR 36.11, revising 50 CFR 36.14 to limit subsistence use to federally-qualified subsistence users hunting under federal law, and defining "sport hunting" to include state authorized subsistence use, the rule inaccurately infers that the *only* subsistence use authorized on federal lands is that afforded rural subsistence users. This is inappropriate when the state authorized subsistence use poses no immediate or long-term conservation concern and, therefore, provides no valid reason to implement the priority for rural users under Title VIII.

In spite of the contention that only non-subsistence use will be affected, the proposed rule effectively implements a blanket closure to all state authorized subsistence use on 76 million acres of refuge lands in Alaska. This closure not only removes otherwise legal opportunities for rural residents to subsistence hunt and fish under state regulations, it also takes away opportunities for other subsistence users who do not live in rural areas, including residents who wish to assist their elders and continue to participate in traditional cultural practices.

2. The proposed rule defines specific terminology and elevates one of 14 directives under the NWRSIA, circumventing existing processes, and influencing future decision-making.

Departure from Current Refuge Management under ANILCA and the NWRSIA

ANILCA and Alaska-specific implementing regulations at 50 CFR 36 established that hunting, fishing and trapping are authorized on Alaska refuges in accordance with applicable State and Federal law. Separate from the limited authority to manage subsistence use discussed above, these Alaska-specific refuge regulations also provide limited closure authority to address management concerns and ensure authorized public uses are compatible with refuge purposes.[5] However, closures and restrictions can only be implemented though a specific public process designed to ensure users who would be most directly affected by refuge manager's decisions can provide meaningful input on proposed public use and resource-related decisions. Section 304 of ANILCA established an unprecedented planning process for Alaska refuges that also required close coordination with the State, Native corporations, and the public.

In 1997, the NWRSIA affirmed the planning process in ANILCA for Alaska, adopted a similar planning process for the entire refuge system, and provided further direction for determining compatible public uses, which also applies to Alaska refuges. Following the precedent set in ANILCA, because compatibility determinations can foreclose or restrict public uses, the NWRSIA required a formal public process for determining compatible public uses. According to the NWRSIA and its implementing regulations, compatible public uses are those that have been determined through a public process to be consistent with individual refuge purposes and the mission of the national wildlife refuge system. The NWRSIA also defined several terms, including "*compatibility*" and "*conserving, conservation, manage, managing, and management*;" identified compatible wildlife-dependent recreational use as the priority public uses of the system; and identified 14 responsibilities for managing the refuge system – which includes, in no order of hierarchy, "*ensure that the biological integrity, diversity, and environmental health of the system are maintained for the benefit of present and future generations of Americans*."

The overarching objective of the proposed rule is to impose a new "hands-off" or passive approach to managing wildlife on refuges in Alaska based on this one directive (out of 14) from

[5] 50 CFR 36.42(b) Criteria. *In determining whether to close an area or restrict an activity otherwise allowed, the Refuge Manager shall be guided by factors such as public health and safety, resource protection, protection of cultural or scientific values, subsistence uses, endangered or threatened species conservation, and other management considerations necessary to ensure that the activity or area is being managed in a manner compatible with the purposes for which the Alaska National Wildlife Refuge area was established.*

the NWRSIA. The proposed rule implements this objective by prohibiting any state management activity or regulated use that the Service views as predator control, without data to support claims that it threatens the integrity or diversity of wildlife populations or consideration of impacts to users, including federally-qualified subsistence users. The majority of state management activities and authorized uses prohibited under the proposed rule are either uses that are currently allowed under existing comprehensive conservation plans and compatibility determinations, or uses that have never been prohibited by regulation previously. However, the proposed rule claims these activities and allowances are and have always been inconsistent with Service mandates - including a new mandate developed specifically for this rulemaking - "*conservation of natural diversity, biological integrity, biological diversity, and environmental health*." This mandate is described in a variety of ways in the proposed rule, including the above as a new closure criterion in 50 CFR 36.42, and "*Natural and biological diversity, biological integrity, and environmental health*" in the context of the prohibition on predator control in 50 CFR 36.32(b), and both "*natural and biological diversity, biological integrity, and environmental health*" and "*conservation of natural biological diversity, biological integrity, and environmental health*" in the discussion under the Regulatory Flexibility Act.

This new and inconsistently-described mandate has been incorporated into the proposed rule as criteria for limiting current and future state management activities and authorized uses that the Service determines to be predator control, absent any meaningful public process. The mandate is actually a combination of terms individually defined in the proposed rule – "natural diversity," '"biological diversity," "biological integrity" that stem from the Services national "*Biological Integrity, Diversity, and Environmental Health*" (BIDEH) policy (601 FW3), and one of several purposes for Alaska refuges "*to conserve fish and wildlife populations and habitats in their natural diversity*…" The proposed rule does not define the combined meaning of the terms but from the context of the proposed rule, including a new definition for "predator control," it appears its intent is that active management of predators is, and has always been, prohibited by ANILCA and the NWRSIA. It also appears there is intent to equate natural diversity with the BIDEH policy simply because the term "diversity" is common to both, despite their very different contexts and history of application in Alaska and elsewhere. The rule is silent on the subject of the active management of prey species, but because the natural diversity definition and combined BIDEH/natural diversity mandate apply to all fish and wildlife populations, the rule must logically extend to prey populations and fishery resources.

In addition to concerns regarding the definition assigned to "natural diversity" and "predator control," which are addressed separately below, there is nothing explicit in ANILCA or the NWRSIA that prohibits active management of fish, wildlife or their habitat. In fact, ANILCA and the NWRSIA 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. As noted, the Service's national BIDEH policy stems from Section 5 of the NWRSIA and is one of 14 specific directives that apply to the management of the refuge system. There is no basis in law, legislative history, or the proposed rule for singling it out as the overriding directive superior to all other directives. As a result, the proposed rule seeks to dramatically diminish the State's management authority over fish and wildlife both on and off refuge lands, and thus is inconsistent with ANILCA Section 1314(a).

Further, the BIDEH policy itself is comprehensive and is not fully invoked by the application of a few specific terms that are both taken out of their policy context and applied to all refuges in Alaska uniformly, without consideration of all individual refuge purposes, resources and management needs, as well as compatible public uses specifically identified through the refuge planning and compatibility public processes. According to the BIDEH Policy (601 FW 3, 3.9(G)), management direction to maintain, and where appropriate, restore biological integrity, diversity, and environmental health, while achieving refuge purposes, is determined through the comprehensive conservation planning process, interim management planning, or compatibility reviews. Further, Section 3.7 (G) of the BIDEH policy specifically states that the priority wildlife-dependent public uses established in the NWRSIA are not in conflict with the policy "*when determined to be compatible*." However, the proposed rule does not address the prohibited activities in terms of compatibility or provide the NWRSIA's definition of "compatible use," which is "*a wildlife-dependent recreational use or any other use of a refuge that in the sound professional judgement of the Director,* ***will not materially interfere with or detract from the fulfillment of the mission of the System or the purposes of the refuge***" (Emphasis added). In fact, by applying the BIDEH policy in this manner, the proposed rule not only over-rides existing planning and compatibility decisions currently in place, it circumvents these processes for future decisions that take this directive into consideration and makes the proposed rule inconsistent with the NWRSIA.

Natural Diversity

As noted above, the compatibility process determines whether refuge uses are "compatible" with refuge purposes. The proposed rule defines "natural diversity" in the context of one of several Alaska refuge purposes (each of equal importance) to support both its application of the BIDEH policy in the proposed rule, and to provide a basis for denying state management activities and state authorized uses in the future – activities that the Service will unilaterally determine to be predator control under the proposed rule. While ANILCA did not define the term "natural diversity," Alaska refuges have been managed ever since without specifically defining the term in policy or regulation. And, similar to the BIDEH policy, the term is being taken out of the full refuge purpose context, which is "*to* ***conserve*** *fish and wildlife populations and habitats in their natural diversity*" (Emphasis added). While also not defined in ANILCA, "*conserve*" is defined in the NWRSIA to mean "***sustain*** *and, where appropriate, restore and enhance,* ***healthy populations of fish, wildlife, 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, consistent with the provisions of this Act, protection, research, census, law enforcement,* ***habitat management, propagation, live trapping and transplantation, and regulated taking***" (Emphasis added, Section 5 (4), NWRSIA). In addition, and also similar to the BIDEH policy, the proposed rule does not address or provide the NWRSIA's definition of "*conserve*" and instead bases the definition of "*natural diversity*" entirely on a on a statement made by U.S. House Representative Udall nine days *after* ANILCA passed.[6] The proposed rule

[6] *Nine days after ANILCA was signed into law on December 2, 1980, Congressman Udall, during a speech on the floor of the House of Representatives described the source of the term "natural diversity." He stated that the conservation of natural diversity refers not only to "protecting and managing all fish and wildlife populations within a particular refuge system unit in the natural 'mix,' not to emphasize management activities favoring on species to the detriment of another (126 Cong. Rec. H12, 352-53 (daily ed. Dec. 11, 1980) (statement of Rep.*

contends that certain phrases from Representative Udall's speech indicate a need for a natural or "hands off" style of management, while ignoring other qualifiers that temper or offset that interpretation. The proposed rule also ignores a statement by Senator Stevens that specifically discusses the addition of the term "natural diversity" to refuge purposes in H.R. 39, which affirms the understanding that the inclusion of the term would not preclude habitat manipulation, predator control, and other management techniques, which were frequently employed on refuge lands.[7] Unlike the statement from Representative Udall, which due to its timing is contrary to GAO principles on determining legislative intent,[8] Senator Steven's statement was made as the legislation was being debated by Congress, and entered without objection or correction into the record. As a result, Senator Steven's testimony is valid legislative history, on which a definition of natural diversity could reasonably be based. In fact, the original Alaska refuge management plans cite this legislative history and allow management activities consistent with the NWRSIA's definition of conserve.

Udall)). During his floor speech, Congressman Udall also stated that in managing for natural diversity it was the intent of Congress, "to direct the U.S. Fish and Wildlife Service to the best of its ability,….to manage wildlife refuges to assure that habitat diversity is maintained through natural means, avoiding artificial developments and habitat manipulation programs….; to assure that wildlife refuge management fully considers the fact that humans reside permanently within the boundaries of some areas and are dependent,…on wildlife refuge subsistence resources; and to allow management flexibility in developing new and innovative management programs different from the lower 48 standards, but in the context of maintaining natural diversity of fish and wildlife populations and their dependent habitats for the long term benefit of all citizen (126 Cong. Rec. H12-,352-53 (daily ed. December 11, 1980)(statement of Rep. Udall). [81 FR 888, January 8, 2016]

[7] *The phrase "in their natural diversity" was included in each subsection of those two sections [regarding refuges] to emphasize the importance of maintaining the flora and fauna within each refuge in a healthy condition.* ***The term is not intended to, in any way, restrict the authority of the fish and wildlife service to manipulate habitat for the benefit of fish or wildlife populations within a refuge or for the benefit or use of such populations by man as part of the balanced management program mandated by the Alaska National Interest Lands Conservation Act and other applicable law.*** *The term* ***also is not intended to preclude predator control on refuge lands*** *in appropriate instances.*

The word "natural" as used in the phrase "in their natural diversity" is specifically not intended to have the same meaning as that terms is used in § 815(1) [mandating national park and monument uses of wildlife be consistent with conservation of "natural and healthy and populations."] It is well recognized that ***habitat manipulation and predator control and other management techniques frequently employed on refuge lands*** *are inappropriate within National Parks and National Park Monuments. Section 815(1) recognizes this difference by providing that the level of subsistence uses within a National Park or National Park Monument may not be inconsistent with the conservation of "natural and healthy, fish and wildlife populations" within the park or monument, while within National Wildlife Refuges the level of subsistence uses of such populations may not be inconsistent with the conservation of "healthy" populations. Nothing in the phrase "in their natural diversity" in Title III is intended to disrupt this well defined, and long recognized difference "in the management responsibilities of the National Park Service and the Fish and Wildlife Service.* (Emphasis added, 126 Cong. Rec. S15131 (daily ed. Dec. 1, 1980) (statement of Sen. Stevens).)

[8] Office of the General Counsel: Principles of Federal Appropriations Law, Chapter 1, Introduction, Fourth Edition, 2016 Revision: *The GAO follows the principle that post-enactment statements shed no useful light on legislative intent. E.g., 72 Comp. Gen. 317 (1993); 54 Comp. Gen. 819, 822 (1975). One type of post-enactment statement is a presidential "signing statement", which usually takes the form of a presidential statement or press release issued in connection with the President's signing of a bill. The Office of Legal Counsel has virtually conceded that presidential signing statements fall within the realm of post-enactment statements that carry no weight as legislative history. See 17 Op. Off. Legal Counsel 131 (1993).*

Further, during the two year period when the proposed rule was under development, and the Service provided briefings to the State and various RACs, the Service did not raise defining "natural diversity" as an issue or consult with the State or affected user groups on the definition that was developed for the proposed rule. Given the emphasis on how "natural diversity" would guide the intent of the proposed rule, the Service would have been fully aware that the proposed definition and its application in the proposed rule would have serious implications for state management and users who hunt, fish and trap under state regulation, including federally-qualified subsistence users.

Predator Control

The proposed rule broadly defines "predator control" as "*the **intention** to reduce the population of predators for the benefit of prey species*." This definition is so broad it could encompass all hunting under state regulation, which currently is specifically excluded from the definition of predator control or predator management in existing Alaska refuge management plans and compatibility determinations. The proposed rule is not clear how "intention" will be determined. The preamble states the Federal Subsistence Program's definition was used as a basis. However, intent in the Federal Subsistence Board's (FSB) Predator Management Policy (adopted by the FSB on 5/20/2004) is based on the stated intent of an actual proposal "*…all Federal **proposals that specifically indicate** that the reason for proposed regulation(s) is to reduce the predator population to benefit prey populations…*" (emphasis added). In other words, the proposing agency determines its own intent as to whether the proposal is predator control. In contrast, the proposed rule gives an outside agency, the Service, full discretion to determine what state management activities and authorized uses constitute predator control, with or without a formal proposal. The proposed definition also conflicts with direction in current refuge management plans, including plans that have been finalized since the NWRSIA was passed, further contradicting the proposed rule's unsubstantiated claim that predator control has always been prohibited in Alaska under the BIDEH policy, and before that, ANILCA.[9]

The proposed rule also specifically prohibits predator control "***unless** it is determined necessary to meet **refuge purposes**, Federal laws, or policy; is consistent with our **mandates to manage for***

[9] Alaska Peninsula Revised 2006 CCP, p. 31: 2.3.11.7 Fish and Wildlife Control. *These activities involve the control, relocation, and/or removal of native species, including predators, to maintain natural diversity of fish, wildlife, and habitats. These management actions may be employed with species of fish and wildlife within their original range to restore other depleted native populations…. Predator management includes the relocation, removal, sterilization, and other management of native predators to accomplish management objectives.* ***The Service considers predator management to be a legitimate conservation tool when applied in a prudent and ecologically sound manner and when other alternatives are not practical.*** *The key requirements are that a predator-management program be ecologically sound and biologically justified. In keeping with the Service's mandate to first and foremost maintain the biological integrity, diversity, and environmental health of fish and wildlife populations at the refuge scale,* ***a predator population will not intentionally be reduced below a level consistent with the low-end of natural population cycles (see 601 FW 3)*** *….Normal environmental education and population-management activities—such as trapper education programs and* ***regulation changes that allow for increased harvests of predatory animals by licensed trappers and hunters—are not considered to be "predator management.*** (emphasis added)[Similar or identical language is found in the Innoko Revised 2008 CCP, Kanuti 2008 Revised CCP, Kenai 2010 Revised CCP, Kodiak 2008 Revised CCP, Koyukuk/Northern Unit Innoko/Nowitna Revised 2009 CCP, Selawik Revised 2011 CCP, Tetlin 2008 Revised CCP, Togiak 2009 Revised CCP—list not inclusive]

natural and biological diversity, biological integrity, and environmental health*; and is based on sound science in response to a* ***significant conservation concern****. Demands for more* ***wildlife for human harvest cannot be the sole or primary basis*** *for predator control*." It is unclear why the criteria includes "*mandates to manage for natural and biological diversity, biological integrity, and environmental health*" when the proposed rule relies on these very same so-called mandates as the basis for *denying* "predator control" in the future.

In addition, with the exception of having to "*evaluate,* ***attempt and exhaust***" alternatives to predator control, which by itself is impractical and unreasonable, the criteria that refuge managers would have to comply with to authorize predator control are already founded in existing law and regulation (the National Environmental Policy Act, Compatibility Policy (603 FW2) and implementing regulations at 50 CFR 36.41, and an ANILCA Section 810 analysis) and do not need to be re-stated in the proposed rule. It is therefore misleading to imply that predator control could ever be authorized on refuge lands under the proposed rule. It is also inappropriate to apply the proposed rule's newly-defined terminology to avoid compliance with the full suite of legal and policy mandates and directives that are already in place to address the activities the proposed rule is targeting.

3. <u>The proposed rule ignores the State's overarching mandate to responsibly manage fish and wildlife resources for sustainability and fundamentally changes refuge management in Alaska and nationally.</u>

ANILCA Section 1314 affirms both the State's role as primary manager of fish and wildlife on all lands in the State, except as amended by Title VIII, and the federal land management agencies responsibility and authority to manage public lands, except as amended by ANILCA. Specifically,

> 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]

Section 1314(a) also does not compel or require the State to amend its constitution, in which the State is directed to manage in accordance with Section 4 of Title 8.

> *Sustained Yield. 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.*

State-Federal Relations regulations at 43 CFR Part 24 also provide direction for States to retain authority to manage fish and resident wildlife on refuges[10] and state management was again

[10] 43 CFR 24: *However, in recognition of the existing jurisdictional relationship between the States and the Federal Government, Congress, in the National Wildlife Refuge Administration Act of 1966(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*

affirmed in the National Wildlife Refuge System Improvement Act (NWRSIA), which amended the National Wildlife Refuge System Administration Act (NWRSAA) of 1966.[11]

43 CFR Part 24 also provides for the individual states and federal land management agencies to enter into Memorandum of Agreements (MOU) that clarify agreements related to management responsibilities, and cooperation and coordination of efforts to manage federal lands. The Alaska Department of Fish and Game (ADF&G) and the Service entered into an MOU in 1982, which was negotiated shortly after the passage of ANILCA. Its intent was to clarify the responsibilities of the State and the Service as intended by ANILCA. This document has, until recently, worked well to guide both ADF&G and the Service managers. The proposed rule would create unnecessary divisiveness and hamper the cooperation and coordination intended by the 1982 MOU for managing game resources in Alaska.

The proposed rule and accompanying EA are misleading in that they focus exclusively on the state's Intensive Management (IM) law while ignoring the State's overall wildlife management program, of which predator control is just one component—a component which the State has never implemented on refuges, despite multiple requests from rural residents to do so. By framing the State's management this way, the Service has created a conflict where none need exist. The State manages all replenishable resources, including fish and wildlife, according to Alaska's sustained yield clause in Article 8, Section 4 of the Alaska Constitution, which "*provides that: [f]ish, 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 sustained yield clause applies to all wildlife, both predators and prey, and the State is required to implement the IM law in accordance with sustained yield for all wildlife, while allowing for selection between predator and prey populations.[12] The proposed rule portrays the sustained yield clause in a negative light by emphasizing the "*high level of human harvest of game*" portion of Alaska Statute (AS) 16.05.255(j)(5), which defines sustained yield for wildlife, and ignores the overall meaning of the law - that managing for the ability to support a high level of human harvest is *not the same as requiring a high level of harvest,* and that the State has the ability to also allocate for other beneficial uses, in addition to harvest. The State does not manage game, or allow methods and means, to jeopardize the existence of a species or to result in habitat degradation. Contrary to the Service's apparent interpretation that the State's sustained yield mandate runs counter to the concept of conservation, the Alaska Constitution's sustained

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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 National Wildlife Refuge System, therefore, shall be managed, to the extent practicable and compatible with the purposes for which are were established, in accordance with State 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.

[11] NWRSIA Section 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.*

[12] *West v. State Board of Game*, 248 P.3d 689 (Alaska 2011).

yield clause was revolutionary at the time for its commitment to conservation, and was a direct reaction to the over exploitation of Alaska's resources during the territorial years under federal management. The Alaska Supreme Court clarified that "*Alaska was the first state to have a constitutional article devoted to natural resources, and it is the only state to have a constitutional provision addressing the principle of sustained yield*."[13] ANILCA Section 1314(a) clearly states that nothing in ANILCA is intended to amend the Alaska constitution, yet the proposed rule essentially states its new definition for natural diversity and BIDEH are inconsistent with the State's management for sustained yield under the Alaska constitution.

Alaska has had a successful program of wildlife management since statehood. Historically, the State's emphasis has primarily been on managing its fisheries, big game and other wildlife on a sustained yield basis primarily for consumptive uses, and this remains a core function. In recent years, as interest in nongame wildlife (wildlife not commonly hunted or trapped) and in wildlife-related recreation and viewing has increased, the State has increased its related programs and adjusted its management efforts to include nongame wildlife. As these programs expand, the State continues to look for ways to manage wildlife for consumptive uses (hunting and trapping) because these uses are a mainstay of Alaskan culture, and are an important food source for many. By and large, state management is not in conflict with refuge management, and this lack of conflict is evidenced by the numerous decisions in existing refuge management plans and compatibility determinations to that effect. In situations that pose potential conflicts between State and Refuge management, existing processes address decision making in the context of individual refuge purposes and agency mandates. For example, the 2012 Compatibility Determination for State management activities in the Arctic National Wildlife Refuge does not address predator management and instead directs the Service to conduct a compatibility determination specific to a proposed management activity.

Ironically, the proposed rule runs counter to existing Federal predator control practices. For example, a few weeks ago five wolves were shot from a helicopter in the Hoback River Basin in Wyoming, with the blessing of the Service, solely to protect livestock. During the past year, it was reported that a total of 55 wolves were killed in Wyoming to protect ungulate populations, despite the fact that gray wolves are a listed species under the Endangered Species Act in Wyoming. In Alaska, the Service has conducted predator control on numerous occasions including mink control to benefit pigeon guillemots on Naked Island; fox control to benefit waterfowl production on the Yukon Delta NWR; and attempted to eradicate Sud Island marmots to benefit seabirds on Sud Island. The Service has a history of meso-carnivore control to enhance waterfowl production on lower 48 refuges.[14] So, even by the definition of "predator control" contained in this proposed rule—the intention to reduce the population of predators for the benefit of prey species—the Service conducts predator control.

[13] *Id.*

[14] See, for example, the 2015 Cypress Creek Furbearer Management Plan, the first goal of which is to "reduce numbers of beavers, muskrats, and raccoons to limit damage to Refuge habitat and adjoining private property" in part because "raccoons have been documented as an efficient nest predator primarily linked to the cause of reproductive failure in birds." (www.fws.gov/uploadedFiles/Trapping%20Plan%202015%20FINAL.pdf).

The State only conducts predator control under its IM program, a formal science-based program implemented under very limited circumstances. The IM program is very distinct from the active management of wildlife through general harvests that the proposed rule selectively redefines as "predator control" and prohibits, absent any metrics demonstrating detriment to predator populations. Further, the public hunting methods (e.g. changes in bag limits, seasons, or methods and means) that could be prohibited in the future under 36.2 and 36.32(b) are not "predator control" as claimed and have little bearing on actual predator control programs (or predator or prey populations) conducted under State law. Hunting under state regulations are not considered by the State to be effective as a form of predator control. ADF&G has presented information to the Board of Game during staff reports and in other public forums, clearly demonstrating that liberalized hunting methods and means have little detectable change in the harvest of predators, and no detectable changes to prey populations. In fact, most of the specifically prohibited state authorized uses (i.e., those listed in Section 36.32(d)(1)(v)), which spurred the proposed rule, were proposed by rural residents in a formal effort to legally recognize methods that were customary and traditional practices or simply to increase hunting opportunity, all of which were approved following public participation and an absence of conservation concerns in either the near or long term.

According to the Federal Register notice for the proposed rule and the Service's accompanying fact sheet, the methods and means the Service has deemed to be "particularly effective" or "particularly efficient" at harvesting predators will be prohibited. The Service does not explain why efficiency requires preemption other than stating that there is an unsubstantiated "*potential to greatly increase effectiveness of the take of predators and to disrupt natural processes and wildlife interactions*." What constitutes a "particularly effective" action is not defined. The proposed rule merely states that certain methods and means have the potential to be unsustainable for the take of wildlife that could lead to overharvest or the disruption of natural or biological integrity, diversity or environmental health – a limitless assertion that could be applied to virtually any method of harvest, regardless of the existing degree of restriction. No data, evidence or rationale supported by "sound professional judgment" is provided to support these claims, despite available harvest information. To the contrary, the available data supports a conclusion that the methods and means allowed by State regulations are not resulting in overharvest or disruption of natural or biological integrity, diversity or environmental health. Further, the State, as directed by Article 8 of its constitution, cannot legally authorize methods or means of harvest which jeopardize wildlife populations, either predators or prey, or prove to be unsustainable in practice. Review of available information and recognition of the State's full mandate in the proposed rule and the EA's effects analysis would surely obviate the need for the proposed rule.

The central contention of the proposed rule is that some hunting and wildlife management methods constitute a threat to natural diversity or biological integrity, biological diversity, or environmental health. That contention is generated without any empirical evidence, or even scientific explanation beyond generalizations that vaguely consider predator-prey interactions and ecosystem function. Instead, the decision on which methods and means are prohibited ultimately rests on the undefined, unrestrained, and arbitrary discretion of refuge managers. Throughout the proposed rule, potential or intent of a hunting or management method becomes the standard for assessment, in lieu of actual supporting data or an evaluation of likely outcomes

based on refuge conditions and uses. At the March 18, 2016 Alaska Board of Game meeting, Service staff stated that where the Service does not have data to support decisions it instead relies on the "preventative principle" to limit uses; further increasing the discretionary authority of refuge managers whose "sound professional judgment" should at least be based on actual data.

The proposed rule provides no empirical evidence (data) to support the conclusion that the State's authorized hunting methods of bears, wolves and coyotes will result in the dire outcomes predicted. The proposed rule states in convincing language, "*…the BOG has authorized measures under its general hunting and trapping regulations that have the potential to greatly increase effectiveness of the take of predators and to disrupt natural process and wildlife interactions*." However, no evidence is given to support this statement. Merely the potential, however unlikely, or the perceived intent, that may cause the effect, is sufficient to impose restrictions. A decision framework, which does not even require "sound professional judgment," in regards to intention means any philosophical conflict with the harvest of predators can justify restricting or eliminating state harvest. As a result, the Service is not considering principles of scientific wildlife management that seek to balance predators, prey and habitat for specific outcomes, including priority public uses and sustained yield in its decision-making.

The complete lack of metrics or standards required by the proposed rule imperils the State's ability to manage wildlife and allows little or no recourse to the State. The proposed rule lacks even the "sound professional judgment" standard used in the NWRSIA for compatibility determinations and defined as ''*a finding, determination, or decision that is consistent with principles* ***of sound fish and wildlife management and administration, available science and resources,*** *and adherence to the requirements of this Act and other applicable laws*." Concerns regarding the use of sound professional judgment were addressed in House Report 105-106 that accompanied the NWRSIA and demonstrate that our concerns regarding the exceedingly low bar for discretionary decision making in this proposed rule are warranted.[15]

There are no standards or procedures for the Service to follow in determining which State management activities or regulations fall under the new definition for predator control, which circumvents the compatibility determination standards and procedures usually employed for making decisions on such uses. As such, the proposed rule apparently seeks to eliminate the ability to challenge a Service action under the Administrative Procedures Act (APA) by granting unfettered discretion to the Service.

Practical effects on ability to manage populations

By reducing the wildlife management tools available to the State, the rule contravenes the State's ability to manage for sustained yield for all species. The proposed rule effectively upends the balanced management approach used for over thirty years on refuges. Correspondence from

[15] *The Committee is aware of concerns that the definition of sound professional judgment confers such a level of discretion that compatibility determinations might be held to be unreviewable as an agency action ''committed to agency discretion by law'' within the meaning of the Administrative Procedure Act (APA, 5 U.S.C. 701). Section 6 of H.R. 1420 provides detailed standards and procedures to be followed in making compatibility determinations and, thus, while discretion resides in refuge officials, there is clearly law to apply so as to permit judicial review if other conditions of reviewability under the APA are met.*

refuge managers and the Department of Interior confirm that refuges in Alaska encourage manipulating predator-prey relationships and altering state and federal regulations to increase harvests of predators to improve prey abundance. In addition, numerous current and initial refuge management plans and CDs explicitly recognize that hunting under state regulations is not predator control, and allow for active management. Examples are provided in the attached appendix.

The proposed rule will make wildlife management the exception rather than the rule, and will effectively remove two and possibly three (predator, prey and habitat management) primary tools long used by wildlife management agencies to manage wildlife populations, leaving prey management as the only automatically allowed option. In summary:

- *Managing predator populations*: The proposed rule prohibits "predator control," and broadens the meaning of predator control to include anything, including hunting or trapping under state regulations, that has the intention or potential to reduce the population of predators for the benefit of prey species. The use of hunting seasons and bag limits to balance populations of one species with another has long been a fundamental tool for state wildlife management agencies.
- *Managing habitat*: The proposed rule requires that habitat diversity be maintained by natural means and that manipulation be avoided. While habitat management is a responsibility of the Service as the land manager, habitat conditions are an important variable in the overall management of wildlife. Existing data illustrates that the Service currently manipulates habitat through fire suppression on refuge lands (see appendix), which the proposed rule and EA do not take into consideration.
- *Managing prey populations*: The proposed rule leaves prey population management as an unknown. Prey management is intertwined with predator management and habitat management, both restricted by the proposed rule, and is equally subject to the new natural diversity definition, which will limit manipulation. We question how prey populations will be affected when the other tools are no longer regularly available. It is unclear to what extent populations may be allowed to decline before the Service allows intervention under the strict terms of the proposed rule. We are concerned that the rule could lead to predators and prey being allowed to be locally extirpated, or "blink out" as the Service has described it with regard to caribou on Unimak Island, to comply with a strict interpretation of biological diversity, despite clear conflicts with refuge purposes and mandatory obligations to provide subsistence opportunities in Alaska.

Fish and game are held in trust by the State.[16] The Service contends that current State management interferes with predator-prey interactions while simultaneously disregarding any effect from the rule on the State's ability to have a balanced scientific management program. We emphatically disagree with this logic and oppose the rule's dismissal of the procedural standards and safeguards used throughout the NWRSIA, Service policy, and federal law to maintain the States' historical role as the primary managers of fish and resident wildlife. The State's authority is recognized in ANILCA. The State manages fish and resident wildlife populations across Alaska on an ecological basis rather than a political boundary basis. To restrict the State's

[16] *Baldwin v. Fish & Game Comm'n*, 436 U.S. 471 (1978); *Shepherd v. State*, 897 P.2d 33 (Alaska 1995); Alaska constitution, Art. VIII, Sec. 2.

management on 76 million acres of refuge lands in Alaska will undoubtedly have an effect on the State's ability to meet its constitutional mandate for sustained yield of fish and wildlife on and off the refuge system in Alaska.

In 2007, Executive Order 13443 was issued and strengthened the Service's mandate to respect "State management authority over wildlife resources." The Service and other land management agencies were ordered to cooperate with State governments "*to foster healthy and productive populations of game species*" and "*enhance hunting opportunities for the public*."[17] Restricting methods and means for hunting on refuges, limiting the state's voice in game management decisions, and prohibiting practices that would enhance game populations and hunting opportunities is directly contrary to the clear direction given to the Service.

4. <u>The proposed rule adds an unfounded and unclear closure criterion and reduces public participation in long-established Alaska-specific closure process.</u>

The public participation and closure procedures are described as updates, which could easily be interpreted as being minor and not substantive. In fact, the changes to this section greatly expand the Service's discretionary authority to restrict or close allowed uses for extended periods of time, with minimal public input. Further, the proposed changes result in an unnecessarily complex process as compared to the existing closure process at 50 CFR 36.42, which to our knowledge has not been problematic for the Service to implement to date. Overall, we feel the majority of the proposed changes to the existing procedures are not necessary or warranted. We therefore request the Service not adopt the process changes, as proposed. Additional explanation and specific suggestions are provided in the following comments.

Criteria

As discussed previously, the proposed rule adds "*conservation of natural diversity, biological integrity, biological diversity, and environment health*" as a new criterion (described in the proposed rule as a "mandate") on which to base closures and restrictions. While these terms are defined individually in the proposed rule, they are not defined in combination and it is unclear how it would be interpreted or applied. Since the term "*natural diversity*" comes from the refuge purpose "*to conserve fish and wildlife populations and habitats in their natural diversity*" and the three other terms are from the Service's national Biological Integrity, Diversity and Environmental Health Policy, there appears to be no reason to incorporate this terminology into the existing closure criteria, which currently include resource concerns, and management considerations to ensure activities are being managed in a manner compatible with refuge purposes. Adding this hybrid criterion takes the individual terms out of their proper context, which results in a lack of clarity and increasing potential for misapplication. Further, applying this policy in Alaska is inconsistent with ANILCA's mandate, as recently affirmed by the Supreme Court, that Alaska is unique and federal lands in Alaska are to be managed accordingly. We therefore request this criterion be removed.

Notice and Hearing

[17] EO 13442, 72 FR 46537 (August 16, 2007)

While we support adding notice by electronic means to the list of methods, as the preamble acknowledges, rural areas in Alaska still lack reliable connectivity and the original methods for providing notice remain relevant. The proposed rule concurrently reduces current notice and hearing requirements in subtle but significant ways, such as no longer providing a subsequent hearing when emergency fish and wildlife closures are determined necessary; making notice methods, other than posting to the Service's website, optional and subject to the Refuge Manager's discretion; and eliminating the requirement to also hold hearings in "*other locations as appropriate*." Requiring hearings and specific methods of notice that are predictable and time-tested to be effective in reaching out to the public provides greater assurance that local rural residents and other users who are potentially affected by closures and restrictions are aware of and can provide meaningful input to the Service. If not required, we are concerned that over time the procedures may not be followed as intended in the proposed rule and ANILCA. Therefore, we request the requirement to employ all notice methods be retained.

Consultation

We support incorporating "consultation" with the State, affected Tribes, and Native Corporations into the process and request it be retained. However, what that constitutes is unclear. Judging from recent experiences, the State is concerned consultation has devolved into a notification process and currently does not yield a meaningful opportunity to exchange information and consider available options before a response to a particular issue is formalized. The State is therefore interested in working with the Service to clearly establish both the purpose and expected outcome of consultation - for this rulemaking as well for other situations where the Service is required by law or regulation to consult with or otherwise work closely with the State, such as in the development of refuge management plans.

Emergency Closures

Under the existing regulations at 50 CFR 36.42, all emergency closures are limited to 30 days. Closures affecting ANILCA authorized access in Section 1110(a) requires notice and hearing, and fish and wildlife closures require notice and a subsequent hearing. Under the proposed rule, all emergency closures can last up to 60 days, with the possibility of an extension provided the temporary or permanent closure procedures are complied with. Depending on the activity, temporary and permanent closures involve some combination of notice, hearing, opportunity for public comment, and consultation; with fish and wildlife closures receiving the highest level of public process. However, the duration of an extension is not specified and temporary closures can last "*as long as necessary to achieve the purpose of the closure*" providing they are evaluated at least every 3 years and the Service provides rationale for the extended closure in a "formal finding."

While it is not unreasonable to consider emergencies could last longer than 30 days, depending on the circumstances, this open ended process provides the public with no assurance that emergency closures and restrictions will not remain in place for unpredictable and potentially unreasonable periods of time, essentially rendering the "emergency" category meaningless. Since the Service is already proposing to require compliance with the temporary or permanent procedural requirements beyond 60 days, we request that emergency closures continue to be

limited to 30 days. Emergency closures that need to extend beyond 30 days could be evaluated and processed as "temporary," thus eliminating the need to increase the emergency timeframe and provide for extensions.

Temporary Closures

Similarly, and as noted above, the temporary closure process can result in restrictions and closures remaining in place for indefinite periods of time, with minimal opportunity for public input. The proposed rule is unclear whether the annual list of refuge closures and restrictions would be made available, not just for public review as the proposed rule indicates, but also for public comment when temporary restrictions are retained following the initial and any subsequent 3 year review(s). Retaining closures and restrictions without first reaching out to the public through a formal comment opportunity and to the State, affected Tribes, and Native Corporations through consultation could result in continuing closures without current resource-related information or knowledge of unnecessary or unreasonable impacts to users.

Additionally, while the stated intent of the proposed temporary regulation is to provide improved consistency between federal regulations and processes, the proposed changes have the opposite effect because they are inconsistent with the duration of current temporary closures set forth in the Federal Subsistence Management Regulations for Special Actions at 36 CFR 242.19 and 50 CFR 100.19, both of which only allow:

> *The length of any temporary action will be confined to the minimum time period or harvest limit determined by the Board to be necessary under the circumstances. In any event, a temporary opening or closure* ***will not extend longer than the end of the current regulatory cycle****.* [Emphasis added]

The current regulatory cycle of the federal Subsistence Board is two years.

Retaining closures and restrictions 3 years or more stretches the original intent of the temporary closure category beyond reason and, similar to the process for emergency closures, essentially renders the category meaningless. Should a closure need to remain in place for 3 years or longer, it is reasonable to assume that it is going to be a permanent closure and therefore needs to comply with procedures developed for that purpose, including as appropriate, publication in the Federal Register, an opportunity for comment, proper notice and consultation with the State, affected Tribes and Native Corporations. The proposed rule establishes no compelling need to increase the temporary closure timeframe beyond the existing 12 month limit; therefore, we request the Service not adopt these proposed changes.

Permanent Closures

The proposed rule eliminates the requirement to hold hearings in "*other areas as appropriate*" in addition to the vicinity of affected area(s). The existing dual requirement provides assurance that all affected users will be afforded an opportunity to provide meaningful input on proposed closures and restrictions. Given the size and remote locations of most refuges in Alaska and the expense and difficulty associated with accessing these areas, additional hearings in hub cities,

such as Anchorage and Fairbanks, may be necessary to reach affected users who do not reside near or within the affected vicinity. We therefore request the Service retain the requirement to also require hearings "*in other areas as appropriate*."

We support the clarification that the closure process requires an opportunity for public comment. The existing regulatory process requires publication in the Federal Register, which implies an accompanying comment opportunity; however, that is not explicit and the Service has been inconsistent in providing an opportunity for the public to also submit written comments on prior closures and restrictions. This clarification will ensure accurate and consistent implementation.

ANILCA Section 1110(a) Access

The existing regulations, including the temporary and permanent closure process provisions at 50 CFR 36.42, contain references to ANILCA Section 1110(a) methods of access. These references have been retained in the proposed rule, even though the corresponding regulations were superseded in 1987 by the Department of Interior (DOI) Title XI regulations at 43 CFR 36. This appears to stem from a previous oversight but if retained, there will be two separate sets of regulations governing the same activities, creating confusion both with the public and Service staff as to which process to follow.

The two processes are not identical; DOI regulations specifically require rulemaking and a 60 day comment period for permanent closures; notice and hearing requirements for both permanent and temporary closures, as opposed to the discretionary direction in the proposed rule; and additional requirements or direction that applies to specific methods of access (e.g. publishing aircraft closures or restrictions in the Department of Transportation's "Notices to Airmen" and the United States Flight Information Service "Supplement Alaska" (43 CFR 36.11(f)(2)) and not restricting motorboat and aircraft use to "traditional activities" (43 CFR 36.11(d) and (f)). Further, the background information and response to comments discussion in the preamble to the final 43 CFR 36 rule is important to understanding the regulatory requirements and closure process, which this proposed rule would not be carrying forward.

As further evidence that retention of earlier references to ANILCA Section 1110(a) methods of access is an oversight, the subsistence access section at 50 CFR 36.12(e) still references subpart C, which while currently vacant, initially implemented the ANILCA Section 1110(a) access provisions before they were superseded by the promulgation of the DOI regulations at 43 CFR 36. Further, there is no discussion of ANILCA Section 1110(a) access in the preamble to the proposed rule, or justification for superseding the DOI regulations, which would serve to alert the public to a significant change on which they could comment.

The only provision in the existing 50 CFR 36.42 closure process that is not addressed in the DOI regulations at 43 CFR 36 is the current emergency provision that is specific to ANILCA Section 1110(a) methods of access (50 CFR 36(c)). The DOI regulations defer to agency-specific regulations for emergency situations. However, we note the proposed rule eliminates the accompanying hearing requirement, which is required under ANILCA Section 1110(a).

For these reasons, we request the Service utilize this opportunity to "update" the 50 CFR 36 regulations to appropriately defer to DOI Title XI regulations at 43 CFR 36 for ANILCA Section 1110(a) access, where applicable, with the exception of the existing process that applies to emergency closures at 50 CFR 36.42(c). We request that provision be retained.

5. **The EA's limited scope and analyses do not recognize full impacts of the proposed rule.**

Limited Scope

The Environmental Assessment (EA) limits the scope of analysis to the prohibition of specific methods and means for taking predators, also described in the proposed rule's fact sheet and EA as "*particularly efficient methods and means*" and in the proposed rule's Federal Register notice as "*particularly effective*," and excludes most of the significant aspects of the proposed rule that will ultimately affect fish and wildlife populations, their habitats, and the users who rely on these resources, including subsistence users. The EA provides no explanation for the limited scope except to say that "*Categorical Exclusion 43 CFR 46.210(i)…applies to some of the proposed rule*" and "*The USFWS has determined that environmental analysis of the other aspects of the proposed rule [not part of the EA's scope] would not inform agency decision-making….*" These excluded activities (components 1 and 3, page 5) have been generally described as "clarifications of existing mandates" and "updates" to public participation and closure procedures. We strongly disagree with the characterization of these changes and, as discussed below, assert that they directly affect agency decision-making and will have significant impacts to the human environment. The aspects of the proposed rule that were excluded from the EA's scope and not analyzed for reasonably foreseeable impacts include:

- Prohibition on all activities that fall under the new broadly defined term "predator control," which will limit available state management tools and authorized uses, resulting in less stable wildlife populations and reduced opportunities for wildlife users, including for subsistence, both on and off refuges.
- Application of a new criterion (described as a mandate) that combines the new definition for "natural diversity" and terms from the national BIDEH policy to decision making on predator control proposals, state authorized uses and state management activities, and other public use closures.
- Prohibition on taking fish and wildlife for subsistence use under state regulation, which narrows the practical meaning of subsistence and reduces available opportunities for all users, including federal qualified subsistence users and their non-rural family members.
- Changes to the public participation and closure criteria and process that will reduce currently available public participation opportunities and create inconsistencies with Federal Subsistence Board regulations and policy.

The proposed rule will fundamentally change the manner in which fish and wildlife resources are managed and conserved on 76 million acres of refuge lands in Alaska (which comprise 80% of refuge lands nationally) by limiting management "*methods and procedures associated with*

modern scientific resource programs"[18] that are currently available to both refuge managers and the State under existing state and federal law, and prohibiting consideration of the need for human harvest in management decisions. This "hands-off" style of management and lack of consideration for subsistence will, over time, have a cascading effect on the stability of wildlife populations both on and off refuge lands, and ultimately will negatively affect opportunities for subsistence users to continue their subsistence ways-of-life, for harvest opportunities and for the practice and passing on of traditional and cultural practices.

For example, on Unimak Island, within the Alaska Maritime Refuge, caribou have experienced decreased abundance over the past decade, and all human harvest has been prohibited, including subsistence use by the community of False Pass. The Service has prevented the Alaska Department of Fish and Game (ADF&G) from using a full spectrum of management tools (including predator control) to aid in the population's recovery, on the basis of the current interpretation of the national BIDEH policy – the basis for the proposed predator control prohibition in the rule. Subsistence users from the community of False Pass strongly support the use of active management to increase subsistence harvest opportunities; however, because of low population levels and recruitment, subsistence harvest remains prohibited. Similar issues are present on the Alaska Peninsula where harvest of ungulates by subsistence users has been significantly curtailed and efforts by ADF&G to apply a full spectrum of management tools, including predator control, to aid in the population's recovery have been rejected by the Service as being inconsistent with the national BIDEH policy, leaving closures to public use, as prioritized in Title VIII of ANILCA and including subsistence, as the only management option. The Service's decision directly reduced the food available to subsistence users, with no scientific or conservation basis to support its decision.

Further implementation of this policy (in combination with the proposed definition for "natural diversity" – see above discussion) as proposed in this rule is expected to have similar effects to population stability and subsistence harvest opportunities across the state.

Equally significant is the omission in the EA of the State's mandate to sustainably manage fish and wildlife resources in accordance with the State's constitution, including the ability of the State to monitor and implement closures when needed to protect fish and wildlife resources. As a result, most of the Service's concerns identified in the EA about sustainability of the resource and effects to natural diversity or BIDEH are based on incomplete information that lead to speculative conclusions in the EA about effects on wildlife resources.

The EA states that allowing the use of bait for the harvest of brown bears will potentially increase harvest to the point where it may be high, but to an unknown level, and must be prohibited because of these potential negative effects. ADF&G's available data does not support this assertion and the EA does not provide any alternative data to support this claim. For example, in GMU 20E, in the eastern interior of Alaska just to the north of Tetlin National Wildlife Refuge, use of bait stations for the harvest of brown bears was authorized from 2004 to

[18] Section 5(4) of the NWRSIA

spring 2009. The brown bear population in GMU 20E numbers 320–394 brown bears[19] and average annual harvest is low (16 brown bears average taken during regulatory years 2007–2008 through 2012–2013), and of these a total of only 13 brown bears were taken over bait (2.6 per year average) during the 2004 to 2009 period. This harvest had no biological effect on the population trend as it was distributed throughout GMU 20E and did not exceed 5% of the total estimated population. Higher harvest levels, including additional harvest from bait stations, would also be sustainable and consistent with the conservation of brown bears and sustained yield management principles.

While unregulated harvests of brown bears can have negative effects, ADF&G's lack of biological concern is based, in part, on state monitoring of harvest for all species, including brown bears. In the unlikely event harvest increases beyond sustainable levels, ADF&G would be able to close the season by emergency order if necessary. ADF&G monitors harvest levels and closes seasons as the harvest approaches season limits.

The EA used the harvest of brown bears over bait in GMU 7 of the Kenai Peninsula as an example of harvests that may reach unsustainable levels under state hunting authorizations. This is not an appropriate example for comparison purposes. Brown bear harvests in GMU 7 (and 15) are unique within the Alaska context and have little relation to the rest of the refuge system in Alaska. GMU 7 (and 15) are within easy access of one half of the State's population in South Central Alaska, while the majority of refuges in Alaska are remote with low density human populations nearby and little or no access outside of air or boat. Harvests in GMU 7 (and 15) were designed to slow a rapidly increasing brown bear population that had been managed under a restrictive exploitation rate for many years, and to reduce negative bear-human conflicts within developed areas within and adjacent to the refuge. Use of bait was employed in part to avoid harvest of sows and sows with cubs. Participation in the hunt was high due to interest and available access on state lands within the area, but harvest was closely monitored, with males selectively harvested and sows with cubs being excluded from harvest due to their identification at bait stations. The total harvest did not exceed expected levels. Thus, actions to date do not indicate a conservation concern.

In some areas of the State, the result of being able to target boars resulted in increased survival of cubs and a net increase in the bear populations.

Public input is also an essential component to natural resource management in Alaska under both federal and state regulatory processes, as required in ANILCA and the Alaska Constitution. ANILCA established subsistence RACs, which are comprised of residents of established regions, to review proposals for regulations, policies, management plans and other matters relating to subsistence uses of fish and wildlife, and advise the Service and the Federal Subsistence Board on decisions concerning the take of fish and wildlife on federal lands within their respective regions. While not specifically related to this rulemaking, ANILCA also established subsistence resource commissions to similarly advise the National Park Service on decisions affecting subsistence use of fish and wildlife on national parks and monuments in Alaska. The Alaska

[19] Harper and L. A. McCarthy, editors. Brown bear management report of survey and inventory activities 1 July 2010–30 June 2012. Alaska Department of Fish and Game, Species Management Report ADF&G/DWC/SMR-2013-4, Juneau.

Constitution established advisory committees, which are also comprised of local residents who write proposals, provide formal comments and testify at Alaska Board of Game meetings. Both the Federal Subsistence Board and the State Boards of Fisheries and Game use open public processes to enact fish and wildlife regulations. Likewise, current federal ANILCA implementing regulations also require an open public process when restricting or closing fish and wildlife resources.

Public participation in these regulatory processes would be significantly reduced by the proposed rule, which prohibits subsistence hunting under state regulations, thereby denying the public the opportunity to participate in both the harvest and the public regulatory process, and further preempts harvest opportunities the Service deems, absent a public process, to be "particularly effective" and/or "predator control." Opportunities to provide input are further reduced by indefinite timeframes for temporary closures, without accompanying opportunities to review and comment on "proposed" extended restrictions or closures. Reducing or eliminating any of these valuable opportunities for the public to participate in and provide input on proposed authorizations or restrictions, including passing on "traditional knowledge" of the resource, can result in uninformed management decisions that can directly impact wildlife populations, associated public use opportunities, and rural Alaska's non-cash subsistence economy.

Further, the EA repeatedly refers to the application of the proposed rule to "*fish* and wildlife," (italics added) and, in particular, the application of a management regime that focuses on maintaining a new interpretation of the term "natural diversity" in combination with terms from the Service's BIDEH policy for fish and wildlife. However, it does not analyze any of the effects of these concepts to the management and use of fish, either on or off the refuge system, for subsistence, recreation, or in the context of commercial fisheries. To indicate that these so called mandates only apply to wildlife, specifically, the take of predators, results in an inadequate analysis. The absence of any discussion regarding fish (resident and anadromous) is a significant omission especially given the emphasis placed on other wildlife species. An analysis of the effect of the proposed rule on these resources and their uses is a particularly important consideration given that fish comprise over 50% of the wild foods harvested by rural Alaskans, and state management that includes significant efforts to support the commercial fishing and guiding industries through very specific population goals and objectives.

Improper use of a categorical exclusion

The EA does not evaluate the reasonably foreseeable effects of all aspects of the proposed rule because some aspects were categorically excluded: "*The Department of the Interior (DOI) Categorical Exclusion 43 CFR 46.210 (i) (Policies, directives, regulations, and guidelines: that are of an administrative, financial, legal, technical, or procedural nature) applies to some of the proposed rule.*" We strongly object to the Service's categorical exclusion of these aspects of the rule for these reasons:

• To fully comply with the NEPA-implementing regulations and Service policy guidance in the *Handbook* and at 550 FW 3, all provisions of the rule should have been analyzed in the EA. The proposed rule constitutes a major practical change to 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.*

• All aspects of the rule, together, may constitute connected, cumulative, or similar actions (40 CFR 1508.25). Connected actions are those that are closely related and should be discussed in the same NEPA document. Cumulative actions are those that may have cumulatively significant impacts. Similar actions are those with common timing or geography. We are concerned that the Service may be dividing the rule into 2 segments analyzed in 2 separate NEPA documents — some in the EA and some in the categorical exclusion — which may mask or hide the true significance of the effects of the actions being proposed. All of these actions should be analyzed in the same NEPA document for a proper perspective on their environmental impacts.

• The portions of the rule which have been categorically excluded under 43 CFR 46.210(i) meet the criteria at 43 CFR 46.215(c) for extraordinary circumstances: "[*I]nvolve unresolved conflicts concerning alternative uses of available resources [NEPA section 102(2)(E)]*", and 43 CFR 46.215(e): *"(e) Establish a precedent for future action or represent a decision in principle about future actions with potentially significant environmental effects*." These extraordinary circumstances preclude the use of a categorical exclusion (40 CFR 1508.4).

• At a minimum, it is the duty of the Service to explain in the EA why some aspects of the rule are analyzed separately in a categorical exclusion, which has not been done. Without this explanation we cannot understand why and we do not agree that the proposed rule should be split into separate NEPA processes.

In sum, all aspects of the proposed rule should have been analyzed in a single EA or EIS under the requirements of the agency's own *Handbook.* All provisions should have been analyzed in the same EA or EIS as connected, cumulative, or similar actions under the NEPA-implementing regulations. In any event, there may be extraordinary circumstances, such as conflicts over alternative uses of available resources and precedent for future actions, which preclude use of the categorical exclusion procedure. Finally, the Service has explained none of this in the EA, which violates the transparency and public review goals of NEPA.

Inadequate analysis

The Council on Environmental Quality (CEQ) regulations at 40 CFR 1508.4 and Department of Interior (DOI) NEPA procedures at 516 DM 1-6 both require sufficient information as to why the action will not have a significant effect on the environment per 40 CFR 1508.13. Based on the paucity of information (data) provided in the EA regarding the overall effects of the proposed rule - even given its limited scope - it is not possible for the Service to make a Finding of No Significant Impact (FONSI) that is not arbitrary and capricious.

Instead of quantifying the proposed action as required by the *NEPA for National Wildlife Refuges: A Handbook*, the EA simply describes the actions and their impacts in generalities. The actions and impacts of the no-action alternative appear to be overstated, while those of the preferred alternative appear to be understated, but both lack quantification and specific characterization. For example, the following chart provides examples of the predicted adverse impacts if the proposed action, Alternative 2, were selected and implemented, according to the EA:

Context	***Intensity***	***Reasons for non-significance***
"Impact" on availability of coyote resource to subsistence users, p. 49	Not provided	"predators would continue to be harvested on refuges with other methods and means under State general harvest regulations," p. 50
"could lead to confusion for all users," p. 50	Not provided	
"could impact Federally qualified subsistence users due to differing boundaries between State and Federal," p. 50	Not provided	
"could impact the subsistence mixed economy by reducing cash income opportunity on refuges in Alaska," p. 51	Not provided	
"would eliminate guiding for brown bear baiting conducted under State regulations," p. 51	Not provided	Would not eliminate all brown bear hunting, p. 50
"be an immediate impact on subsistence users involved with the commercial aspects of these proposed prohibitions," p. 51	Not provided	
"could also have an indirect impact on those who receive subsistence harvests through sharing," p. 51	Not provided	NOTE: "little is known about the level of involvement of subsistence users with these prohibited methods and means," p. 51
Impact to "the mixed cash subsistence	"It is unknown," p.	"little is known as to how

economy associated with Alaska refuges," p. 52	52	much, if at all, [prohibited methods and means] have been integrated into the cash economy of nearby villages," p. 52
"there may be a direct effect to big game hunting on refuges by decreasing their ability to use certain methods and means if these methods and means were prohibited," p. 53 "big game hunting may decrease if a hunter's preferred hunting method is prohibited. " Rule p. 24	"big game hunting on refuges would change minimally," p. 54 "Since only a small fraction of big game hunters would choose not to hunt on refuges under the proposed rule, the impact would be minimal." Rule p. 24-25	"most likely be offset by other sites (located outside of refuges) gaining participants," p. 54 "represent a small fraction of all big game hunting on refuges," Rule p. 24
"Another direct effect would be expenditures by hunters' on both the local as well as the State- wide economy," p. 54	"the impact would be minimal," p. 54 "net loss to the local communities would be no more than $5.9 million annually, and most likely considerably less because few hunters use the prohibited methods and those hunters that do would likely choose a substitute site," Rule p. 25	
"Small businesses within the retail trade industry (such as hotels, gas stations, taxidermy shops, etc.) may be impacted from some decreased refuge visitation," p. 54	"it is unlikely that a substantial number of small entities would have more than a small impact," p. 54	
"People harvesting wildlife under sport/general regulations will in some cases have smaller populations of prey species to harvest in the short-term, which could adversely impact hunter success and effort," p. 55	"we do not expect that the rule would have a significant economic effect on a substantial number of small entities in Alaska,"	

	Rule p. 25	

Given the content of the EA, as summarized in the table above, the FWS cannot write or sustain a FONSI that is not arbitrary or capricious for these reasons:

• Most of the adverse impacts in the EA have not been assessed as to their intensity. Note the many vacant cells in the middle column. It is simply not possible to find an environmental consequence to be "not significant" if its size (intensity, importance, dimension, gravity, etc.) is not known or revealed.

• None of the adverse impacts in the EA have been assessed usefully as to their intensity. "Minimal" and "small" and "few" are not proper measures of impact. These are characterizations of what the intensity is, but not the actual intensity. Thus the EA fails all tests of detail, accuracy, and transparency.

• One of the rows — the effect on the mixed cash subsistence economy associated with Alaska refuges — is explicitly "unknown." This one row alone is an admission of a gap in relevant information that renders a FONSI impossible.

• The EA does not provide any measure of effects for the no-action alternative, though it presents a long list of potential adverse environmental effects. A Federal agency may not consider at the time of decision a course of action that has not been the subject of an EIS or a finding that an EIS is not necessary — such as we would see in a FONSI. It is not remotely possible for the Service to write a FONSI on the no-action alternative because of the lack of detailed information on the intensity of any of the environmental consequences of Alternative 1 as we see it here in this EA. Yet the Service characterizes the no-action alternative to be within the "range of alternatives" to be considered at the time of decision. Even to consider adopting Alternative 1 at the time of decision is a procedural violation unless Alternative 1 were first made the subject of a FONSI on the same basis as Alternative 2.

• The EA does not disclose any of the methods used in the analysis of impacts. Without showing its methods — basically, without showing its work — the Service has deprived the readers of the fundamental transparency necessary for compliance with NEPA. And necessary for the reader to understand the context and intensity of the environmental consequences of the proposed action — which is the basic task of the EA. Failure to disclose methods of analysis is also a violation of 40 CFR §1502.24 (agencies "shall identify any methodologies used").

Additional technical comments regarding the EA's analysis of trophic cascades (Page 40, Section 4.3, Terrestrial Mammals and Habitats) are provided in the attached appendix.

National Implications and Controversy

The State, the Alaska Board of Game, and numerous other local and national stakeholder organizations have expressed significant concerns with the proposed rule and have indicated their intention to provide written comments; including the Alaska Federation of Natives, the Association of Fish and Wildlife Agencies, and the majority of ANILCA-established RACs.

At the local level, during the March 2016 All Federal Subsistence Regional Advisory Council (RAC) meeting, seven of the ten RACs passed motions to submit formal comments in opposition to the proposed rule. While one supported the proposed rule and two did not take any action, the RACs opposing the proposed rule have responsibility for approximately 90% of refuge lands in Alaska. Their primary concerns were 1) the individual prohibitions of state authorized uses under 50 CFR 36.32(d)(1)(v) would limit subsistence opportunities for harvest without reasonable identification of conservation concerns, and 2) the shift from active to passive fish and wildlife management on refuges would negatively affect subsistence opportunities through reduced abundance of wildlife. Additionally, there were concerns expressed that the criteria under 50 CFR 36.32(b) applicable to any allowance for predator control on Service administered lands were so difficult to meet, it was unlikely that predator control activities to enhance abundance of harvested species could be conducted under any circumstances.

Also at the local level, several State of Alaska Fish and Game ACs, that are chartered under the State's constitution and responsible for providing input on wildlife management issues statewide, have submitted comments expressing concerns related the proposed rule's negative effects to subsistence use and wildlife management. For example, the Koyukuk River Advisory Committee (KRAC), whose members all qualify as federal subsistence users, unanimously opposed the rule and submitted written comments to that effect on February 24, 2016).

> "*The KRAC discussed the proposed rule allowing for future arbitrary regulation reductions by using primarily; biological integrity, diversity, and environmental health [BIDEH] criteria. The BIDEH language gives too much leeway to wildlife managers judgment and interpretation*." The KRAC also noted that, "*During the meeting several of the KRAC members expressed concern that current State of Alaska predator harvest regulations would be precluded, arbitrarily without a scientific basis. Most members believe from personal experience, that predator harvest needs to be maintained for non-subsistence users under State of Alaska regulations, as well as rural subsistence uses*."

Nationally, the American Wildlife Conservation Partners (AWCP), which consists of conservation organizations representing millions of hunters, anglers, professional wildlife managers and scientists, submitted a letter to U.S. Fish and Wildlife Director Dan Ashe on February 19, 2016, expressing grave concerns on the proposed rule.

> *Many of our organizations will submit comments for the record, but we wish to succinctly apprise you in general of our serious objections to this proposal. First, the proposal if promulgated* ***would fundamentally change the very successful federal-state relationship in managing NWRs, by usurping the authority of AKDFG to sustainably manage fish and wildlife for both non-subsistence and subsistence use.*** *Second, we believe that the proposed regulation is* ***contrary to both the Alaska National Lands Conservation Act (ANILCA) and the National Wildlife Refuge System Improvement Act (NWRSIA).*** *Third, it* ***gives preeminence through rule promulgation to this Biological Integrity, Diversity, and Environmental Health (BIDEH) policy over the other 13 responsibilities given the Secretary for managing NWRs in NWRSIA, and over all other NWRS policies****. Congress assigned no priority to those 14 responsibilities, expecting the*

> *Secretary to equally fulfill all that were relevant to each refuge, and certainly all with respect to management of the System. Finally, this proposed rule* ***tees up litigation to apply it to all NWRs nationally because the Secretary is directed to not only manage each refuge but all refuges as a System, of which the Alaska NWRs constitute a majority percentage.*** *A national application of this rule would* ***universally usurp state fish and wildlife agency authority to manage fish and wildlife on NWRS in cooperation with the USFWS, and adversely impact Americans*** *who pursue fish and wildlife dependent recreation on refuges.* [Emphasis added]

The AWCP also requested the rule be withdrawn so that the Service could work with ADF&G and stakeholders on an alternative approach: "*We respectfully request that you withdraw this proposed language and work with the Alaska Department of Fish and Game (AKDFG), and our community, on an alternative approach that could be supported by our community*." Of note, among the many organizations that undersigned AWCP's comments, two are currently headed by former Directors of the U.S. Fish and Wildlife Service.

Also on the national scale, at a December 3, 2015 hearing before the U.S. Senate Committee on Energy and Natural Resources, the national Association of Fish and Wildlife Agencies, which is comprised of all 50 state fish and wildlife agencies, expressed concerns in its testimony from a state fish and wildlife management perspective. AFWA's comments are extensive and are included an an attachment to these comments; however, their key concern is the proposed rule's effect on the diminishment of the management authority of the state(s), which is contrary to the intent of ANILCA (for Alaska) and the NWRSIA (all states). AFWA is concerned that while the proposed rule is presented as specific to Alaska, should it be finalized, it provides a mechanism through litigation to be applied to the entirety of the refuge system.

The Congressional Sportman's Foundation (CSF) submitted testimony to the U.S. Senate Committee on Environment and Public Works on February 18, 2016, outlining their concerns for the proposed rule and supporting the comments previously provided by AFWA at the U.S. Senate Energy and Natural Resources Committee hearing on December 3, 2015. In particular, the CSF stated that "*If implemented, we feel these rules will represent a dangerous precedent for stripping state fish and wildlife agencies of their authority to manage fish and wildlife within their respective borders*." The CSF requested that the Senate subcommittee do everything in its power to encourage federal managers (e.g. USFWS and the National Park Service) to engage in a more collaborative process with state fish and wildlife management agencies, sportsman's groups, and other affected entities when developing rules concerning wildlife management on federal land.

In addition, individual states have indicated that they too disagree with the Service's characterization of this rule as being solely limited in impact to Alaska, a concern which the Service has not addressed and which indicates a level of controversy far beyond that of an EA. At a recent AFWA national meeting, these other states have expressed intent to comment in opposition to the proposed rule.

Proposed Rule Warrants Analysis in an Environmental Impact Statement (EIS)

The severely limited description and analysis of effects precludes the Service from making a proper FONSI. NEPA (40 CFR 1502.1) requires the Service to show evidence to support why they are making a decision:

> *It shall provide full and fair discussion of significant environmental impacts and shall inform decision makers and the public of the reasonable alternatives which would avoid or minimize adverse impacts or enhance the quality of the human environment…. Statements shall be concise, clear, and to the point,* ***and shall be supported by evidence*** *that the agency has made the necessary environmental analyses*. (Emphasis added)

Even if this critical information is provided in an addendum, errata sheet or the body of a FONSI, providing it after the public comment period is insufficient as the public would not have had an opportunity to consider the information in an analytical fashion and to provide comments to inform the final decision.

Conclusion

The EA does not analyze and evaluate the proposed rule's effects to management of wildlife, predators, prey, fish, habitat and public uses, including subsistence and priority public uses under the NWRSIA within the Alaska Region, or the potential effects of implementing national policy in this manner to the entire refuge system. Further, because of the national implications, other states should have been consulted with prior to the publication of the proposed rule. The aspects of the rule which have been categorically excluded under 43 CFR 46.210(i) meet the criteria for extraordinary circumstances and therefore should have been analyzed in the EA, or more appropriately, as indicated above, in an EIS.

6. **The Federalism determination in the Services' analysis of the proposed rule is incomplete.**

The Federalism section simply concludes, without any explanation, that the "*proposed rule does not have significant Federalism effects. A federalism summary impact statement is not required. [The] proposed rule, if adopted would affect the public use and management of Federal lands managed by USFWS in Alaska and would not have a substantial direct effect on State or local governments in Alaska.*"

The State manages fish and wildlife on all lands in Alaska, including 76 million acres of federal refuge lands managed by the USFWS in Alaska. State management of fish and wildlife resources provide for both consumptive and other public uses on refuge lands. The proposed rule will displace state control over management and regulation of fish and wildlife resources.

A rule affecting over 76 million acres in Alaska (about 20% of the State) most certainly has significant effect on Alaska, its citizens, and the citizens of the United States. On May 20, 2009, President Obama issued a Memorandum for the Heads of Executive Departments and Agencies that stated in part that: "[t]*hroughout our history, State and local governments have frequently protected health, safety, and the environment more aggressively than has the national Government . . . In recent years, however, notwithstanding Executive Order 13132 of August 4,*

1999 (Federalism), executive departments and agencies have sometimes announced that their regulations preempt State law, including State common law, without explicit preemption by the Congress or an otherwise sufficient basis under applicable legal principles." (74 Fed. Reg. 24693). The Memorandum goes on to instruct federal agencies to include preemptive statements in regulation only when there is a sufficient legal basis as per preemption principles and in accordance with Executive Order 13132 (64 Fed. Reg. 43255). That Executive Order (E.O.) instructs agencies to take national action limiting the "*policymaking discretion of the States . . . only when there is constitutional and statutory authority for the action and the national activity is appropriate in light of the presence of a problem of national significance*."

We therefore conclude that the proposed rule, which promulgates the goal of conservation of biological integrity, diversity, and environmental health, is not an instance where Congress authorized the FWS to preempt state authority to manage fish and wildlife. We further conclude that the proposed rule has no basis in federal statute and is in fact contrary to several federal statutes, nor does it address a problem of national significance. The proposed rule therefore is inconsistent with the direction from President Obama with respect to implementation of the E.O. 13132.