Submitted via Email to:
rule-comments@sec.gov

January 2, 2024

Sherry R. Haywood, Assistant Secretary
Securities and Exchange Commission
100 F St., NE
Washington, D.C. 20549-1090

Re: Proposed Rule Change to Amend the New York Stock Exchange Listed Company Manual to Adopt Listing Standards for Natural Asset Companies – File Number SR-NYSE-2023-09

Dear Assistant Secretary Haywood:

I. Introduction

The Women's Mining Coalition (WMC) has grave concerns about the Securities and Exchange Commission's (SEC's) October 4, 2023, proposed rule at Federal Register (FR) Volume 88, No. 191, Pages 68811-68819 to amend the New York Stock Exchange (NYSE) Listed Company Manual to adopt listing standards for Natural Asset Companies (NACs) hereinafter referred to as "the NAC Rule". Establishing NACs on public and National Forest System lands[1] is unlawful because it conflicts with the Federal Land Management and Policy Act of 1976 (FLPMA), 43 U.S.C. §§ 1701 *et seq,* which governs public lands; several statutes pertaining to the management of National Forest System Lands;[2] and the U.S. Mining Law, 30 U.S.C. §§ 21a et seq. Consequently, the NAC Rule must be revised to clearly state that a NAC cannot involve public lands; it can only apply to private lands with a consenting landowner, or state-owned lands where including state lands in a NAC would be consistent with the laws pertaining to specific state-owned parcels.

The NAC Rule clearly contemplates that NACs include public lands stating:

> If the NAC has entered into a license agreement with respect to public lands, shares representing at least 50% of the shares of the NAC's outstanding shares as of the closing of the IPO must be distributed to local communities. (FR at 68815)

About WMC

[1] Hereinafter collectively called "public lands".

[2] Including but not limited to the Organic Act of 1897 (16 U.S.C. §§ 472-478); the Multiple-Use Sustained-Yield Act of 1960 (16 U.S.C. §§ 583 *et seq*); the Forest and Rangeland Renewable Resources Planning Act of 1974 (16 U.S.C. Chapter 36 §§ 1600 *et seq*); and the National Forest Management Act of 1976 (16 U.S.C §§ 1600).

WMC is a grassroots organization with over 200 members nationwide. Our mission is to advocate for today's modern domestic mining industry, which is essential to our Nation. WMC members work in all sectors of the mining industry including hardrock and industrial minerals, coal, energy generation, manufacturing, transportation, and service industries. We convene annual Washington, D.C. Fly-Ins to give our members an opportunity to meet with members of Congress and their staffs, as well as with federal land management and regulatory agencies to discuss issues of importance to both the hardrock and coal mining sectors.

WMC members have extensive experience with FLPMA, the U.S. Mining Law, the National Environmental Policy Act (NEPA), and the surface management regulations governing locatable minerals and mining activities pursuant to the U.S. Mining Law on Bureau of Land Management (BLM)-administered lands (43 CFR Subpart 3809) and National Forest System lands (36 CFR Subpart 228A.) Our Advisory Council is made up of industry experts from all facets of the mining industry. Based on this experience, WMC is well qualified to opine that including public lands and National Forest System lands in the SEC's NAC Rule is unlawful.

II. The SEC's NAC Rule Cannot Change How Public Lands Must be Managed

Federal laws governing the management of the Nation's public lands require these lands to be managed principally for multiple use and sustained yield. For example, the multiple use and sustained yield directive in FLPMA Section 102(a)(7) states: "...it is the policy of the United States that goals and objectives be established by law as guidelines for public land use planning, and that management be on the basis of multiple use and sustained yield unless otherwise specified by law".

In FLPMA Section 102(a)(8), Congress establishes that certain lands must be managed to protect numerous resources:

> the public lands [must] be managed in a manner that will protect the quality of scientific, scenic, historical, ecological, environmental, air and atmospheric, water resource, and archeological values; that, where appropriate, will preserve and protect certain public lands in their natural condition; that will provide food and habitat for fish and wildlife and domestic animals; and that will provide for outdoor recreation and *human occupancy* ***and use*** (emphasis added).

Section 102(a)(12) of FLPMA directs the Secretary of the Interior through its land management agency, BLM, to manage public lands:

> in a manner which recognizes the Nation's need for domestic sources of minerals, food, timber, and fiber from the public lands including implementation of the Mining and Minerals Policy Act of 1970 (84 Stat. 1876, 30 U.S.C. 21a) as it pertains to the public lands.

FLPMA Section 103(c) defines multiple use as:

> The term "multiple use" means the management of the public lands and their various resource values so that they are utilized in the combination that will best meet the present and future needs of the American people; making the most judicious use of the land for some or all of these resources or related services over

> areas large enough to provide sufficient latitude for periodic adjustments in use to conform to changing needs and conditions; the use of some land for less than all of the resources; a combination of balanced and diverse resource uses that take into account the long-term needs of future generations for renewable and non-renewable resources, including, but not limited to, recreation, range, timber, minerals, watershed, wildlife and fish, and natural scenic, scientific and historical values; and harmonious and coordinated management of the various resources without permanent impairment of the productivity of the land and the quality of the environment with consideration being given to the relative values of the resources and not necessarily to the combination of uses that will give the greatest economic return or the greatest unit output.

FLPMA Section 103(h) defines "sustained yield" as:

> The term "sustained yield" means the achievement and maintenance in perpetuity of a high-level annual or regular periodic output of the various renewable resources of the public lands consistent with multiple use.

FLPMA's Section 103(l) unambiguously defines "principal or major uses":

> The term "principal or major uses" includes, *and is limited to*, domestic livestock grazing, fish and wildlife development and utilization, mineral exploration and production, rights-of-way, outdoor recreation, and timber production. (emphasis added)

FLPMA does not define conservation as a principal or major use of public lands. The SEC's NAC Rule cannot categorically dismiss these clear multiple use and sustained yield FLPMA directives. Congress enacted these multiple use and sustained yield principles in 1976. Now, nearly 50 years later, the SEC cannot advance a rule that seeks to override Congressional intent by authorizing NACs to acquire public lands and manage them to specifically prohibit multiple use and sustained yield.

The SEC's NAC Rule unlawfully proposes to substitute non-use for multiple use on NAC-held public lands. There can be no doubt that the SEC's proposed definition of a NAC directly interferes with mandated multiple use and sustained yield principles:

> For purposes of proposed Section 102.09, a NAC is a corporation whose primary purpose is to actively manage, maintain, restore (as applicable), and grow the value of natural assets and their production of ecosystem services. In addition, where doing so is consistent with the company's primary purpose, the company will seek to conduct sustainable revenue-generating operations. **Sustainable operations are those activities that do not cause any material adverse impact on the condition of the natural assets under a NAC's control and that seek to replenish the natural resources being used.** The NAC may also engage in other activities that support community well-being, provided such activities are sustainable (FR at 68811, emphasis added).

Under the SEC's proposed NAC listing rules, NACs would be prohibited from allowing mining, logging, fossil fuel development, and industrial-scale agriculture on NAC-held lands because these activities are explicitly and categorically defined as "unsustainable." Putting public lands off limits to multiple use and sustained yield by sequestering them in NAC-administered conservation investment properties where they must be managed to "not cause any material adverse impact on the condition of the natural assets under a NAC's control and that seek to replenish the natural resources being used" is fundamentally incompatible with FLPMA's mandate that public lands be managed for mining, logging, and other nonrenewable multiple uses that necessarily involve causing changes to the landscape.[3]

By essentially disallowing "principal or major uses" on NAC-held public lands, the SEC's NAC Rule is irreconcilable with FLPMA and is therefore unlawful. On public lands, NACs would eliminate the balance that FLPMA demands. Public land NACs would also make it very difficult to respond effectively to changes in the country's "needs and conditions," which includes the United States policy objective to develop domestic sources of the minerals needed to build the technologies and infrastructure essential to transition away from fossil fuels and toward increased use of renewable energy.

Therefore, the SEC's NAC Rule directly conflicts with both FLPMA and the Biden Administration's stated goals to reach net-zero carbon emissions by 2050. That goal is unachievable without domestic minerals, many of which need to be mined on the Nation's public lands. Including public lands in the NAC Rule would thus exacerbate our dangerous dependence on foreign sources of minerals by putting lands functionally off limits to mineral exploration and development, thereby reducing domestic mineral production.

III. The SEC Has No Legal Authority to Apply the NAC Rule to Public Lands

The NAC Rule is unlawful because Congress has not authorized any agency – including the SEC – to subordinate the multiple use directives in FLPMA by putting conservation of public lands on the same level as all other multiple uses and establishing policy preferences that functionally make conservation the highest and best use of the land. The SEC cannot create NACs on public lands without Congressional action to amend FLPMA and the laws governing National Forest System lands to authorize the SEC to create public land NACs. Unless and until Congress says otherwise, the BLM and the U.S. Forest Service must manage the public lands for multiple use and sustained yield. The SEC's proposed NAC Rule cannot usurp or interfere with these federal land management agencies' jurisdiction over public lands or change the way in which these lands must be managed.

The SEC cannot proceed with the inclusion of public lands in the NAC Rule because it is an unlawful attempt to use the rulemaking process to change FLPMA. In enacting FLPMA, Congress did not give federal agencies the power to establish conservation as a "use" to prohibit other uses and to prioritize that "use" above all others. Conservation is not included in the list of multiple-uses Congress set forth in FLPMA Section 102(a). Neither the federal land management agencies nor the SEC can assert a new sweeping authority to restrict public land uses by putting the lands

[3] FLPMA Section 302(b) mandates that all uses of public lands prevent unnecessary or undue degradation. The federal regulations implementing this environmental protection mandate require avoiding, minimizing, and mitigating impacts at both renewable and nonrenewable resources development projects.

into NACs where multiple land uses are prohibited. Doing so raises Major Questions Doctrine issues similar to those in the U.S. Supreme Court's ruling in *West Virginia v. EPA*, 142 S. Ct. 2587, 2608 (2022).

On May 11, 2023, sixteen western senators sent a letter to the BLM Director, Tracy Stone-Manning, emphasizing that the BLM's Proposed Conservation and Landscape Health Rule[4] violates FLPMA because it is inconsistent with the fundamental purpose of FLPMA's mandate that publicly-owned lands must be managed for multiple-use. The BLM's Proposed Conservation and Landscape Health Rule includes a conservation leasing proposal that is similar to the SEC's inclusion of public lands in the NAC Rule.

In objection to the BLM's Proposed Conservation and Landscape Health Rule, the senators' May 2023 letter states that the BLM's proposed conservation lease: "threatens the longstanding approach governing multiple use on our nation's public lands...[and] includes a number of problematic initiatives that will result in limited access to energy production, grazing, recreation, and other statutory uses as mandated under FLPMA." Their letter questions whether protection and restoration activities, which define conservation, could "override a mandated use enshrined in statute" and asserts that limiting uses is "contrary to the congressional intent to prioritize multiple use of our taxpayer-owned resources." The senators also warn the BLM that it lacks the authority to create conservation leases:

> This new leasing regime opens the door for a new, noncompetitive process designed to lock away parcels of land, with no limits to size, for a period of 10 or more years. It's clear that anti-grazing and anti-development organizations would abuse this tool to attempt to halt ranching and block access to our nation's abundant energy reserves located on public lands.

In our June 16, 2023, comments on the BLM's Proposed Conservation and Landscape Health Rule, WMC agreed with the senators' characterization of the BLM's Proposed Conservation and Landscape Health Rule as responding to special interests that seek to put public lands off-limits to development, contrary to Congress' clear directive in FLPMA that the BLM must manage the public lands for multiple use:

> "...BLM's proposed Public Lands Rule is an effort to empower special interests that have long opposed BLM's statutory mandate by prioritizing non-development over the principles of multiple use and sustained yield. Taking large parcels of land out of BLM's well-established multiple use mandate would cause significant harm to many western states and negatively impact the livelihoods of ranchers, energy producers, and many others that depend on access to federal lands. As such, the proposal should be withdrawn immediately."

It appears that the inclusion of public lands in SEC's NAC Rule is seeking to accomplish a similarly unlawful objective to put lands off-limits to multiple use in conflict with FLPMA and other public land management statutes. WMC is concerned that opponents to mining, grazing, logging and other multiple uses will use the SEC's NAC Rule to create *de facto* private-sector land

[4] BLM's Conservation and Landscape Health Proposed Rule was published on April 3, 2023, in the Federal Register, Vol. 88, No. 63.

withdrawals to eliminate these uses of our Nation's public lands in contravention of existing laws and regulations governing these lands.

IV. State and Federal Elected Officials' Concerns About Including Public Lands in NACs

Several governors and members of Congress have sent letters to the SEC stating their concerns about the NAC Rule. A common theme of these letters is the unlawfulness of including public lands in a NAC.

For example, on October 25, 2023, four governors from western public land states, Governors Gianforte (MT), Gordon (WY), Little (ID), and Lombardo (NV), requested a 90-day comment period extension (which so far has not been granted), stating:

> This rule has wide-ranging implications for the citizens of our states, specifically in our natural resources and agricultural industries...it is difficult to understand why the Departments of the Interior and Agriculture have not been involved with rolling out this rule given its impacts to public lands, national forests and other federal, state, local, and tribal land uses.
>
> In short, this seems to be a subverted, backdoor approach to apply Environmental Social Governance (ESG) principles to land use and management. This is concerning and requires additional time for careful review by states and the public to analyze its impacts.

Subsequently, in their November 2, 2023, letter to the SEC, Senators Crapo (ID), Ricketts (NE), and Risch (ID) voiced their concerns about the applicability of the NAC Rule on public lands:

> The proposed rule would allow for federal lands, including national parks and other publicly owned lands, to be included in private investment portfolios. The proposed rule also allows for NACs to have management authority over assets held in the portfolio, including our public lands. In the proposed rule, the SEC is creating a new incentive for non-government corporate control over our publicly shared lands.
>
> We are concerned that corporate involvement in the stewardship and control of our federal lands would create unintended consequences. The proposed rule could lead to a preservationist-only approach to federal land management instead of an "all-of-the-above" working lands approach as intended by the creation of our federal land programs.
>
> We are also alarmed by the SEC's allowance under the proposed rule of foreign investment in these uniquely U.S. assets. At a time in which we are actively working to deter our adversaries, we should not open our federal lands up to investment from the same adversaries.
>
> This rulemaking comes as other federal agencies work to bolster permanent federal conservation acres...We have concerns about the intentions of prioritizing conservation over the multiple-use approach on our federal lands in tandem with financial incentives for corporate management.

Most recently, the December 15, 2023, letter that thirty House members sent to the SEC Chair, Erik Gerding, echoes WMC's concerns about the SEC's lack of statutory authority to include public lands in NACs and to dictate how these lands should be managed, by pointedly asking: "By what right does the SEC have to confer 'management authority' over federal lands?" The House letter calls the NAC Rule, "complex and based on a novel, nontraditional investing mechanism that would seemingly allow for the buying and selling of certain unidentified "rights" to certain private and public lands, including to foreign nations and noncitizens, to terminate and prevent all economic activities on such properties." These House Members go on to say:

> ...the American people have sufficient time to fully understand and comment on this proposal that has the prospect of substantially upending property rights, with the western United States bearing the brunt of this concept.
>
> This proposal has the possibility to fundamentally change U.S. land access, management, use, and ownership as we know it, including by auctioning our most prized resources off to the highest foreign bidder, including to hostile regimes that clearly do not have our best interests at heart.

The SEC must respond to the governors' and congressional lawmakers' comments and concerns before proceeding further with the NAC Rule. The only way to eliminate these concerns is to revise the NAC Rule to expressly disqualify public lands from being included in a NAC's landholdings.

V. The NAC Rule Conflicts with the U.S. Mining Law

The NAC Rule conflicts with the right to use all lands open to location under the U.S. Mining Law (30 U.S.C. 21a *et seq.)*. Section 22 of the Mining Law states:

> Except as otherwise provided, all valuable mineral deposits in lands belonging to the United States, both surveyed and unsurveyed, shall be free and open to exploration and purchase, and the lands in which they are found to occupation and purchase, by citizens of the United States and those who have declared their intention to become such, under regulations prescribed by law, and according to the local customs or rules of miners in the several mining districts, so far as the same are applicable and not inconsistent with the laws of the United States.

The land use restrictions that would pertain to NACs with public lands directly conflict with Section 22 of the Mining Law because the NAC Rule would sequester lands away in NACs where mineral exploration and mining could no longer occur. As such, the SEC's proposed rule represents a *de facto* and unauthorized withdrawal of NAC lands from operation of the Mining Law.

Just as the NAC Rule cannot ignore or override FLPMA's multiple use and sustained yield mandate, it cannot upend the rights under Section 22 of the Mining Law or FLPMA's explicit policy to preserve rights under the Mining Law except for the four narrow Mining Law changes specified in FLPMA[5].

[5] FLPMA amended the Mining Law in the following narrow ways: 1) Section 314 requires claim owners to record their claims; 2) Section 603 establishes the provisions for mining claims in Wilderness Study Areas; 3) Section 601(f) requires mining activities to comply with an "undue impairment" standard to protect scenic, scientific, and

In FLPMA Section 204, Congress created a mechanism to withdraw lands from operation of the Mining Law, but withdrawals must adhere to the FLPMA Section 204 withdrawal procedures. The SEC cannot override FLPMA Section 204 to create a regulatory withdrawal mechanism to prevent mineral exploration, development, and mining on public lands within a NAC.

Likewise, the NAC Rule cannot be used to create mitigation banks where conservation credits could be sold to third parties as off-site, compensatory mitigation of impacts associated with projects elsewhere on public lands. In other words, NACs cannot create public lands mitigation credits that companies could purchase from the NAC to compensate for unavoidable impacts on other public lands. Moreover, neither the Mining Law nor FLPMA authorize compensatory mitigation. Therefore, NACs cannot sell mitigation credits to offset impacts to public lands from multiple use projects including but not limited to mineral exploration and mining or conventional and renewable energy development projects.

VI. The SEC Must Prepare a NEPA Document to Analyze the NAC Rule

Given the far-reaching implications of the NAC Rule, it is clearly a major federal action that triggers the requirement for the SEC to prepare a NEPA document, either an Environmental Assessment (EA) or an Environmental Impact Statement (EIS), to assess the impacts of the NAC Rule. The Council on Environmental Quality's (CEQ's) 40 CFR Part 1500 regulations that implement NEPA define a major federal action in Section 1508.1 as follows:

> *Major Federal action* includes actions with effects that may be major and which are potentially subject to Federal control and responsibility...
>
> **(a)** Actions include new and continuing activities; ... new or revised agency rules, regulations, plans, policies, or procedures;
>
> **(b)** Federal actions tend to fall within one of the following categories:
>
> > **(1)** Adoption of official policy, such as rules, regulations, and interpretations adopted pursuant to the Administrative Procedure Act (APA), 5 U.S.C 551 *et seq.* that are formal documents establishing an agency's policies which will result in or substantially alter agency programs.
> >
> > **(2)** Adoption of formal plans, such as official documents prepared or approved by federal agencies ***which guide or prescribe alternative uses of Federal resources, upon which future agency actions will be based***. (emphasis added).

Because the NAC Rule will precipitate sweeping changes that alter land management priorities for public lands, it clearly is a major federal action that requires the SEC to prepare an EIS. *See Austin v. Ala. DOT*, No. 2:15-cv-01777-JEO, 2016 U.S. Dist. LEXIS 159113, at *4 (N.D. Ala. Nov. 16,

environmental values of the public lands in the California Desert Conservation Area; and 4) Section 302(b) requires all mineral activities, as well as all other activities on public land, must prevent unnecessary or undue degradation (UUD).

2016) ("An EIS is required before a federal agency undertakes any 'major' federal action 'significantly affecting the quality of the human environment.'") (quoting 42 U.S.C. § 4332(2)(C)).

Because the SEC's acknowledged purpose of the NAC Rule is to create a new class of company, a NAC that can involve public lands, to change the way in which NAC-controlled public lands are managed, and how federal resources are used to prioritize non-use or conservation, it is clear that the NAC Rule would "guide or prescribe alternative uses of Federal resources, upon which future agency actions will be based." Consequently, if the SEC does not remove public lands from the scope of the NAC Rule, it must prepare an EIS for what is obviously a "major federal action". The SEC needs to take a cue from the lawmaker letters described in Section IV and concede that this far-reaching rule will create substantial changes that will cause significant impacts across the western U.S. Removing public lands from the NAC Rule would not necessarily eliminate the SEC's obligation to prepare a NEPA document to evaluate the environmental, socioeconomic, and cultural impacts associated with the proposed rule.

WMC notes that the land use restrictions contemplated on NAC-controlled lands have substantial potential to interfere with more than mineral projects. Anti-development activists could also use NACs to prevent development of solar and wind energy farms and other renewable energy projects including but not limited to transmission infrastructure, hydropower, carbon capture utilization and sequestration projects, and hydrogen and nuclear energy endeavors that are necessary for the clean energy transition and to meet the Nation's CO_2 emission reduction objectives. The SEC's EIS analyzing the proposed NAC Rule must take a hard look at the No Action alternative and a full range of alternatives to quantify how the NAC Rule could interfere with or delay the clean energy transition.

VII. FLPMA Section 209(a) Disqualifies NACs From Purchasing Most Public Lands: The NAC Rule Sets Up Potential Conflicts with Mineral Rights Owners and Future Land Conveyances

Because public lands have been sold and acquired under a number of federal statutes,[6] some lands are split-estate lands where the surface and mineral rights are owned by separate entities. Land sold to a NAC by surface-only owners would set up potential use conflicts between the NAC and the federal or private owners of the mineral estate. The NAC's management of such lands solely for conservation purposes would preclude exploration and development of the mineral estate and disenfranchise the mineral owner.

To avoid split-estate land use conflicts, the NAC Rule must be modified to clarify that NACs are prohibited from purchasing public lands where the mineral estate is currently reserved to the federal government, or in the case of a future sale, must be reserved to the federal government pursuant to FLPMA Section 209(a). Section 209(a) of FLPMA requires the federal government to retain the mineral rights to all public lands sold, with an exception only for Section 206 land exchanges. The FLPMA Section 209(a) mandate that the federal government must retain the mineral estate in most land conveyance situations must be interpreted to mean that Congress intended that the purchaser's deed for such lands would include a reservation of the mineral estate to the federal government for the purpose of allowing future exploration and development. Consequently, except for lands acquired under Section 206 land exchanges, NACs could not

[6] Including but not limited to FLPMA, the Stock-Raising Homestead Act (30 U.S.C. 54 and 43 U.S.C. 299), and the Taylor Grazing Act (43 U.S.C. 315)

purchase public lands with the expectation that they could manage the acquired lands to prevent development of the federal mineral estate.

Additionally, pursuant to the Oregon and California Railroad Lands Act of 1937[7], the BLM must manage the 2.6 million acres of Oregon and California Railroad Lands "for permanent forest production." This is another obvious conflict with future establishment of a conservation-focused NAC on such lands.

VIII. Including Public Lands in the NAC Rule will Increase U.S. Reliance on Foreign Minerals

The U.S. Geological Survey (USGS) tracks the country's reliance on imported minerals in its annual Mineral Commodity Summaries reports. Figure 2 in the 2023 report[8] shows U.S. dependency during 2022 on foreign countries for minerals. Some of the key findings in the 2023 USGS report include the following:

- In 2022, imports made up more than one-half of the U.S.'s apparent consumption for 51 nonfuel mineral commodities, and the United States was 100% net import reliant for 15 of those.

- Of the 50 mineral commodities identified in the "2022 Final List of Critical Minerals," the U.S. was 100% net import reliant for 12, and an additional 31 critical mineral commodities had a net import reliance greater than 50% of apparent consumption.

- For most critical minerals, the U. S. is heavily reliant on foreign sources for its consumption requirements; exceptions include beryllium, magnesium, and zirconium.

Comparing the 2022 report with the 2021 report shows that the U.S. is becoming increasingly dependent on imported minerals. In 2021, the U.S. was 50 percent reliant on 47 minerals. In 2022, that reliance increased to 51 minerals. So rather than reducing our reliance on foreign minerals, the U.S. is headed in the wrong direction.

At a time when demand for the minerals essential to the energy transition is projected to skyrocket, it makes no sense for the SEC to propose a rule that would create *de facto* new public land withdrawal mechanisms resulting in substantially reduced mining of these minerals from public lands. This is the wrong time to implement a NAC Rule that affects public lands and that has the potential to dramatically reduce production of critical minerals.

The NAC Rule is at counter purposes to the critical minerals directive in President Biden's February 2021 Executive Order 14017 "On America's Supply Chains," which directs cabinet officials to develop policies to increase domestic production of critical minerals to reduce the risks associated with the country's dependency on mineral imports. The definition of minerals supply chain in Executive Order 14017 includes "the exploration, mining, concentration, separation, alloying, recycling, and reprocessing of minerals." The SEC's NAC Rule is inconsistent with Executive Order 14017 because it will put both public and private lands off-limits to mineral

[7] 43 U.S.C. §§2601-2634.
[8] https://pubs.usgs.gov/periodicals/mcs2023/mcs2023.pdf

exploration and development and consequently thwart President Biden's stated goals to strengthen domestic critical minerals supply chains in order to lessen the Nation's dependency on foreign minerals.

The NAC Rule is also completely at odds with the June 2021 White House report entitled "Building Resilient Supply Chains, Revitalizing American Manufacturing, and Fostering Broad-Based Growth"[9] ("2021 White House Report") that was prepared in response to Executive Order 14017. The 2021 White House Report includes an entire chapter devoted to critical minerals: "Review of Critical Minerals," prepared by the Department of Defense (DOD). The NAC Rule is incompatible with the following DOD findings in the 2021 White House Report:

- Strategic and critical materials are the building blocks of a thriving economy and a strong national defense. They can be found in nearly every electronic device, from personal computers to home appliances, and they support high value-added manufacturing and high-wage jobs, in sectors such as automotive and aerospace.

- The global supply chain[s for] strategic and critical materials...are at serious risk of disruption—from natural disasters or *force majeure* events...and are rife with political intervention and distortionary trade practices, including the use of forced labor.

- Contrary to a common belief, this risk is more than a military vulnerability; it impacts the entire U.S. economy and our values.

- [T]he need for strategic and critical materials is likely to intensify...[to] enhance or enable...many environmentally friendly "green" technologies, such as electric vehicles, wind turbines, and advanced batteries. A recent report by the International Energy Agency (IEA) notes: "A typical electric car requires six times the mineral inputs of a conventional car and an onshore wind plant requires nine times more mineral resources than a gas-fired plant. Since 2010, the average amount of minerals needed for a new unit of power generation has increased by 50 percent as the share of renewables in new investment has risen."[10]

- Economic efficiency took priority over diversity and sustainability of supply...[and] U.S. manufacturers increasingly lost visibility into the risk accumulating in their supply chains. Their suppliers of strategic and critical materials, and even the workforce skills necessary to produce and process those materials into value-added goods, became increasingly concentrated offshore...[where] disregard for environmental emissions and workforce health and safety could thrive.

- The U.S. Government, collectively, has examined the risk in strategic and critical materials supply chains for decades. Now is the time for decisive, comprehensive action by the Biden-Harris Administration, by the Congress, and by stakeholders from industry and non-governmental organizations to support sustainable production and conservation of strategic and critical materials.

[9] https://www.whitehouse.gov/wp-content/uploads/2021/06/100-day-supply-chain-review-report.pdf
[10] International Energy Agency, *The Role of Critical Minerals in Clean Energy Transitions* (May 2021), https://iea.org/reports/the-role-of-critical-minerals-in-clean-energy-transitions

The incongruity between the country's needs for domestic supplies of critical minerals, as stated in Executive Order 14017 and in the DOD's points listed above, and the inclusion of public lands in the NAC Rule is inexplicable. On the one hand, the Biden administration strongly embraces the need to increase production of domestic critical minerals – including production on public lands where the bulk of the Nation's producing mines are located. But on the other hand, the SEC is proposing a rule that will impede and even prohibit mineral exploration and development on public lands. (WMC notes that eliminating mining and other resource development on private-land NAC's is also inconsistent with the urgent need to increase domestic mineral production and strengthen U.S. mineral supply chains.)

IX. Conclusions

The SEC's NAC Rule appears to be the Administration's carefully orchestrated plan to use the SEC to create the business model for private-sector conservation investments as a way to implement the public lands conservation leases that are a major component of the BLM's Proposed Conservation and Landscape Health Rule. As WMC explained in detail in its June 16, 2023, comments on the BLM's rule, such conservation leases violate FLPMA's multiple use directives and rights under the U.S. Mining Law. Just as the BLM is statutorily precluded from implementing the conservation leases in its Proposed Conservation and Landscape Health Rule, the SEC is similarly barred from including public lands in NACs. The SEC has no statutory basis for creating a regulatory mechanism to authorize what is tantamount to *de facto* private-sector land withdrawals to set aside public lands for their "ecosystem services".

Consequently, the SEC must revise the NAC Rule to clearly prohibit including public lands in NAC landholdings. The proposed NAC Rule, which authorizes public land NACs is unlawful because Congress has not authorized the SEC or any other federal agency to subordinate the multiple use directives in FLPMA and other public land laws. None of the country's laws governing public land use put conservation on the same level as all other multiple uses or establish policy preferences that functionally make conservation the highest and best use of public lands.

The SEC, the BLM, and the U.S. Forest Service cannot make this substantial change to public lands management without Congressional action to amend FLPMA and other land management statutes to authorize this proposed change. Unless and until Congress says otherwise, BLM and the U.S. Forest Service have principal jurisdiction over the management of U.S. public lands. Because Congress has not given the SEC the authority to manage public lands, the SEC cannot exercise executive fiat to confer this authority unto itself.

Finally, WMC questions whether creating NACs is consistent with the Securities Exchange Commission Act of 1934. It is difficult to square SEC's new invention of NACs with the agency's mission statement:

> The Securities and Exchange Commission oversees securities exchanges, securities brokers and dealers, investment advisors, and mutual funds in an effort to promote fair dealing, the disclosure of important market information, and to prevent fraud.[11]

[11]https://www.usa.gov/agencies/securities-and-exchange-commission#:~:text=The%20Securities%20and%20Exchange%20Commission,information%2C%20and%20to%20prevent%20fraud

For the reasons outlined above, the SEC cannot proceed with the NAC Rule until it clarifies that the rule does not apply to the Nation's public lands. Although WMC appreciates this opportunity to provide these comments, we respectfully request that the SEC substantially revise – or preferably withdraw – the NAC Rule.

Sincerely yours,

Emily Hendrickson
WMC President

Debra W. Struhsacker
WMC Co-Founder and Board Member

cc: The Honorable Mike Crapo, U.S. Senator
The Honorable Pete Ricketts, U.S. Senator
The Honorable Jim Risch, U.S. Senator

The Honorable Harriett Hageman, Member of Congress
The Honorable Dan Newhouse, Member of Congress
The Honorable Lauren Bobert, Member of Congress
The Honorable Jake Ellzey, Member of Congress
The Honorable Mike Gallagher, Member of Congress
The Honorable Jim Baird, Member of Congress
The Honorable Burgess Owens, Member of Congress
The Honorable Josh Brecheen, Member of Congress
The Honorable Pete Sessions, Member of Congress
The Honorable Mat Rosendale, Member of Congress
The Honorable Glenn "GT" Thompson, Member of Congress
The Honorable John Moolenaar, Member of Congress
The Honorable Ralph Norman, Member of Congress
The Honorable Pete Stauber, Member of Congress
The Honorable Cathy McMorris Rogers, Member of Congress
The Honorable Blake Moore, Member of Congress
The Honorable Russ Fulcher, Member of Congress
The Honorable Paul Gosar, D.D.S. , Member of Congress
The Honorable Mary Miller, Member of Congress
The Honorable Jeff Duncan, Member of Congress
The Honorable Byron Donalds, Member of Congress
The Honorable Cliff Bentz, Member of Congress
The Honorable Tom Tiffany, Member of Congress
The Honorable Eli Crane, Member of Congress
The Honorable Mike Simpson, Member of Congress
The Honorable August Pfluger, Member of Congress
The Honorable John Curtis, Member of Congress
The Honorable Bill Posey, Member of Congress

The Honorable Keith Self, Member of Congress
The Honorable Randy Weber, Member of Congress
The Honorable Mike Carey, Member of Congress
The Honorable Earl L. “Buddy” Carter, Member of Congress

The Honorable Greg Gianforte, Governor of Montana
The Honorable Mark Gordon, Governor of Wyoming
The Honorable Brad Little, Governor of Idaho
The Honorable Joe Lombardo, Governor of Nevada