



**EWAC**<sup>®</sup>

Energy and Wildlife  
Action Coalition

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**June 28, 2023**

Comments regarding:

**U.S. Fish and Wildlife Service, Draft Compatibility Determination for issuance of a Right-of-Way permit for Tri-State for limited use of airspace outside pre-existing easement, Seville National Wildlife Refuge**

Submitted by:

**Energy and Wildlife Action Coalition**

Filed via email to [R2\\_plancomments@FWS.gov](mailto:R2_plancomments@FWS.gov)

The Energy and Wildlife Action Coalition (“EWAC”)<sup>1</sup> submits these comments in support of the U.S. Fish and Wildlife Service’s (“USFWS”) Draft Compatibility Determination for issuance of a Right-of-Way permit to Tri-State Generation and Transmission Association (“Tri-State”) for limited use of airspace outside its pre-existing easement across the Sevilleta National Wildlife Refuge (“NWR”) (“Draft Compatibility Determination”).

This Compatibility Determination would facilitate the colocation of a transmission line for the SunZia Southwest Transmission Line Project (“SunZia Project”) with an existing Tri-State transmission line, where that existing line crosses the Sevilleta National Wildlife Refuge (“NWR”). SunZia Transmission, LLC (“SunZia”) and Tri-State have proposed rebuilding Tri-State’s existing 115-kV line, replacing the existing H-frame structures with double-circuit, monopole structures. This will allow addition of SunZia’s nominal 525-kV High-Voltage Direct Current (HVDC) line to the same set of structures.

Tri-State’s line is located within a 50-foot easement that predates the land donation that created the Sevilleta NWR in 1973. The total number of structures within the Sevilleta NWR would be reduced compared to the existing line, from 95 to about 71. Modeling of the anticipated effect of wind on the longer spans has shown that, due to the narrow width of the existing easement and using standard NESC clearance criteria, conductor wires are likely to sway beyond the boundaries of the existing easement during certain wind conditions. Accordingly, Tri-State and SunZia have applied to U.S. Fish and Wildlife Service (“USFWS”) for a right-of-way limited to aerial line sway (commonly called “blowout”) beyond the easement boundaries. The construction and operation of the co-located transmission line is otherwise addressed by rights conferred by the existing easement.

Projects like this contribute to the much-needed upgrade of the nation’s electric transmission grid while protecting National Wildlife Refuge System resources. While the shift to less carbon intensive electricity generation, including carbon free wind and solar generation, is accelerating, the Biden Administration has announced ambitious goals to decarbonize the electric power sector and address climate change impacts by 2035 and 2050, respectively. To achieve these goals, the highest one-year installation levels of renewable generation capacity achieved to date would need to be doubled to quadrupled on an annual basis going forward. Moreover, bringing that degree of installed capacity to market will necessitate the modernization and dramatic expansion of our transmission and distribution system.

In some parts of the country, it will be necessary to cross a National Wildlife Refuge to build out our nation’s critical transmission infrastructure. The law that governs management of National Wildlife Refuges expressly authorizes those crossings. The National Wildlife Refuge

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<sup>1</sup> EWAC is a national coalition formed in 2014 whose members consist of electric utilities, electric transmission providers, and renewable energy entities operating throughout the United States, and related trade associations. The fundamental goals of EWAC are to evaluate, develop, and promote sound environmental policies for federally protected wildlife and closely related natural resources while ensuring the continued generation and transmission of reliable and affordable electricity. EWAC supports public policies, based on sound science, that protect wildlife and natural resources in a reasonable, consistent, and cost-effective manner. EWAC is a majority-rules organization and therefore specific decisions made by the EWAC Policy Committee may not always reflect the positions of every member.

System Administration Act,<sup>2</sup> as amended by the National Wildlife Refuge System Improvement Act of 1997,<sup>3</sup> (“Refuge Act”) authorizes rights-of-way and easements across refuges for “powerlines” and other linear infrastructure.<sup>4</sup> However, it also requires that the transmission crossing be a “compatible” use.<sup>5</sup>

The requirement that proposed uses of refuge lands, including easements or rights of way for power lines and other linear infrastructure, be compatible with refuge purposes has been part of the law since 1966.<sup>6</sup> Under the Refuge Act, a proposed use is “compatible” if it will not materially interfere with or detract from the fulfillment of the mission of the National Wildlife Refuge System or the purposes of the individual Refuge.<sup>7</sup>

The compatibility definition was added to the Refuge Act in 1997,<sup>8</sup> thereby codifying the definition USFWS had used for many years.<sup>9</sup> The 1997 House Report for the Refuge System Improvement Act acknowledged the existence of rights of way for transmission lines and other utilities on Refuge System lands and stated: “The Committee does not intend for this Act to in any way change, restrict, or eliminate these existing rights-of-way, whether established by easement or permit, or to grant the USFWS any authority that does not already exist to do so.”<sup>10</sup> Interior Secretary Babbitt, who negotiated the terms of the 1997 Act with the House, in response to questioning in the Senate, agreed that it did not change the criteria for granting rights-of-way through refuges.<sup>11</sup> The Refuge System Improvement Act did not limit or expand what uses might be deemed compatible by USFWS under the Refuge Act but rather established a standardized process for making a determination of compatibility.

On October 18, 2000, USFWS published final regulations and a compatibility policy implementing the Refuge System Improvement Act.<sup>12</sup> The preamble for the regulations included the agency’s response to public comments on the draft regulations and policy, where USFWS cites the aforementioned House Report discussion of existing rights of way and implemented changes to the final regulations and policy in response to these public comments.<sup>13</sup>

The published compatibility policy was written to be incorporated in the USFWS Manual<sup>14</sup> and to provide general guidance for compatibility determinations beyond the procedures set out in

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<sup>2</sup> 16 U.S.C. §§ 668dd–668ee.

<sup>3</sup> Pub. L. 105-57, 111 Stat. 1253.

<sup>4</sup> 16 U.S.C. § 668dd(d)(1)(B).

<sup>5</sup> 16 U.S.C. §§ 668dd(d)(1)(B), 668(d)(3)(A)(i), 668ee(1).

<sup>6</sup> Pub. L. 89-669 (Oct. 15, 1966).

<sup>7</sup> 16 U.S.C. § 668ee(1).

<sup>8</sup> Pub. L. 105-312 (Oct. 9, 1997).

<sup>9</sup> Floor statement of Congressman Young, bill sponsor, H 3230, Cong. Rec. Vol. 143 (June 3, 1997).

<sup>10</sup> *National Wildlife Refuge System Improvement Act of 1997*, H. Rep. 105-106 at 13.

<sup>11</sup> Interior Secretary Babbitt, in written response to questions presented for the Senate hearing on the bill, stated: “This point needs to be emphasized – the current statutory provisions and criteria for granting rights-of-way through refuges are not changed by S. 1059 or its companion House bill, H.R. 1420.” *Hearing before Senate Environment and Public Works Committee regarding S. 1059, National Wildlife Refuge System Improvement Act of 1997*, S. Hrg. 105-286 at 28 (July 30, 1997).

<sup>12</sup> 65 Fed. Reg. 62484 (Compatibility Policy), 62458 (regulations) (Oct. 18, 2000).

<sup>13</sup> 65 Fed. Reg. at 62470.

<sup>14</sup> 603 FW Ch. 2.

the regulations.<sup>15</sup> The policy identifies exceptions when a compatibility determination is not required,<sup>16</sup> including when a non-federal party is exercising reserved property rights:

There are other circumstances under which compatibility requirements may not be applicable. The most common exceptions involve property rights that are not vested in the Federal Government, such as reserved rights [...] In some cases, these exceptions may include water rights, easements, or navigable waters.<sup>17</sup>

This exception aligns closely with congressional intent regarding existing rights-of-way, discussed above. Responding to public comments on the policy's exceptions to when a compatibility determination is required, USFWS declined to make changes, finding the list in the policy sufficient as written.<sup>18</sup>

Consistent with the Refuge Act and the USFWS Handbook, the rebuild of the Tri-State transmission line does not require a compatibility determination, since it relies on rights under the existing easement and does not require USFWS authorization. However, before the USFWS can authorize the aerial right-of-way requested by Tri-State and SunZia, it is required to make a determination that the use is compatible with the purpose of the Sevilleta NWR and the mission of the National Wildlife Refuge System. The Draft Compatibility Determination responds to that requirement.

Applying the straightforward criteria of the Refuge Act, USFWS has correctly concluded that the issuance of a right-of-way for the limited use of airspace beyond a pre-existing easement is compatible, as it will not materially interfere with or detract from the mission or purpose of the Sevilleta NWR. Co-location of a new transmission circuit within an existing easement minimizes impacts to the Refuge while facilitating a material upgrade to the transmission system. The resulting set of transmission lines would not materially interfere with or detract from the purposes of the Sevilleta NWR, or the mission of the Refuge System.

This is the type of National Wildlife Refuge crossing that must be approved if we are to achieve the necessary buildout of our nation's transmission infrastructure.

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<sup>15</sup> 65 Fed. Reg. at 62475.

<sup>16</sup> 603 FW 2.10.B.

<sup>17</sup> 603 FW 2.10.B, 65 Fed. Reg. at 62488.

<sup>18</sup> 65 Fed. Reg. at 62468.