



**EWAC**<sup>®</sup>

Energy and Wildlife  
Action Coalition

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**August 23, 2023**

Comments regarding:

**U.S. Fish and Wildlife Service, Proposed Rule regarding Streamlining Permitting of Rights-of-Way Across National Wildlife Refuges and Other U.S. Fish and Wildlife Service-Administered Lands**

Submitted by:

**Energy and Wildlife Action Coalition**

Filed electronically at: <https://www.regulations.gov>

Docket ID FWS-HQ-NWRS-2019-0017

The Energy and Wildlife Action Coalition (“EWAC”)<sup>1</sup> submits these comments in response to the U.S. Fish and Wildlife Service’s (“USFWS”) July 24, 2023 notice of a proposed rule to streamline the process for permitting of rights-of-way across National Wildlife Refuge System lands and other USFWS-administered lands (“Proposed Streamlining Rule”).<sup>2</sup> USFWS has indicated that the Proposed Streamlining Rule is intended to align its processes with those of other Department of Interior bureaus and to reduce the amount of time required to process applications for rights-of-way across USFWS-managed lands.

Improvements to the approach USFWS takes to authorizing rights-of-way across the lands it manages would make an important contribution to the much-needed upgrade of the nation’s electric transmission grid while protecting National Wildlife Refuge System resources. Our nation is engaged in an accelerated shift to less carbon-intensive electricity generation, including carbon-free wind and solar generation. Connecting new renewable energy generation and utility-scale storage to consumers requires the modernization and dramatic expansion of our electric transmission and distribution system. Additionally, the Biden Administration has announced ambitious goals to decarbonize the electric power sector and address climate change impacts by 2035 and 2050, respectively. To meet 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.

To integrate this new generation into the U.S. electrical grid, it will be necessary in some parts of the country to cross a National Wildlife Refuge or other lands managed by USFWS. The law that governs management of National Wildlife Refuges expressly authorizes those crossings. The National Wildlife Refuge System Administration Act,<sup>3</sup> as amended by the National Wildlife Refuge System Improvement Act of 1997,<sup>4</sup> (“Refuge Act”) authorizes rights-of-way and easements across refuges for “powerlines” and other linear infrastructure.<sup>5</sup> However, it also requires that the transmission crossing be a “compatible” use.<sup>6</sup>

In general, EWAC supports the Proposed Streamlining Rule. Below we explain why we support certain aspects of the USFWS’s proposal and suggest clarifications based on the experience of EWAC members.

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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.

<sup>2</sup> 88 Fed. Reg. 47442 (July 24, 2023).

<sup>3</sup> 16 U.S.C. §§ 668dd–668ee.

<sup>4</sup> Pub. L. 105-57, 111 Stat. 1253.

<sup>5</sup> 16 U.S.C. § 668dd(d)(1)(B).

<sup>6</sup> 16 U.S.C. §§ 668dd(d)(1)(B), 668dd(d)(3)(A)(i), 668ee(1).

## I. When Compatibility Determination is Required

The Proposed Streamlining Rule would add an acknowledgement of the compatibility-determination requirement to the USFWS right-of-way regulations.<sup>7</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>8</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>9</sup> The compatibility definition was added to the Refuge Act in 1997,<sup>10</sup> thereby codifying the definition USFWS had used for many years.<sup>11</sup> On October 18, 2000, USFWS published final regulations and a compatibility policy implementing the Refuge System Improvement Act.<sup>12</sup> The published compatibility policy was written to be incorporated in the USFWS Manual<sup>13</sup> and to provide general guidance for compatibility determinations beyond the procedures set out in the regulations.<sup>14</sup> The proposed provision appropriately cross references 50 C.F.R. § 26.41, the USFWS compatibility policy.

EWAC suggests one clarification to the proposed language regarding compatibility determinations. Proposed section 29.21-3 recognizes that not all rights-of-way across USFWS-managed lands require compatibility determinations. In the preamble for the Proposed Streamlining Rule, USFWS explains that among those circumstances are activities authorized by a pre-existing right-of-way (i.e., one that was in existence before the land was acquired by the United States).<sup>15</sup> However, this exception is not expressly included in the proposed language of the regulation, which recognizes access to privately owned minerals and access “required by any other prevailing provision of law.”<sup>16</sup> EWAC suggests adding “or to activities authorized by pre-existing rights-of-way” after the comma following “privately owned minerals.” If this clause is not included because USFWS typically would not issue a right-of-way for that use, then a note to that effect should be included in any final regulation.

## II. Application Procedures

EWAC supports the proposed use of Standard Form (“SF”) 299 for right-of-way applications.<sup>17</sup> USFWS regulations currently provide that no special form of application is required. In practice, USFWS already has begun requesting that applicants submit an SF-299. Since this is the same form used by the Bureau of Land Management, this change will be more efficient, provide USFWS with more complete information, and make the process more transparent for applicants.

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<sup>7</sup> Proposed 50 C.F.R. § 29.21-3.

<sup>8</sup> Pub. L. 89-669 (Oct. 15, 1966).

<sup>9</sup> 16 U.S.C. § 668ee(1).

<sup>10</sup> Pub. L. 105-312 (Oct. 9, 1997).

<sup>11</sup> Floor statement of Congressman Young, bill sponsor, H 3230, Cong. Rec. Vol. 143 (June 3, 1997).

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

<sup>13</sup> 603 FW Ch. 2.

<sup>14</sup> 65 Fed. Reg. at 62475.

<sup>15</sup> 88 Fed. Reg. at 47443.

<sup>16</sup> Proposed 50 C.F.R. § 29.21-3.

<sup>17</sup> Proposed 50 C.F.R. § 29.32-4.

USFWS also has appropriately differentiated between the information needed to support a compatibility determination and the greater detail regarding right-of-way location and other specifics that must be provided later in the application process. Since the compatibility determination is a threshold requirement, in implementing these regulations USFWS should limit the information it requests to what is needed to make that determination. However, the level of detail for the environmental analysis supporting an application that would be required by proposed section 29.21-4(b)(2)(i) should be more flexible. The proposed provision would require sufficient data to support preparation of an environmental assessment (“EA”) or environmental impact statement (“EIS”) to satisfy requirements of the National Environmental Policy Act (“NEPA”). While NEPA’s requirements may need to be satisfied before USFWS can make a compatibility determination, a right-of-way application should be deemed complete before all information that may be needed to prepare an EA or EIS has been submitted. The development of an EA or an EIS is expensive and time-consuming, and typically involves extensive collaboration with USFWS and other stakeholders. Also, some applications may qualify for a categorical exclusion, and so not require the same level of detailed environmental information. Applicants should be required to provide the information needed for preparation of NEPA documents, but only after their applications have been found to be complete, and in response to consultation with the USFWS personnel who are processing the application. It also could be helpful to expressly incorporate USFWS “appropriate use” determinations in this regulation,<sup>18</sup> as a tool for screening applications before completion of extensive and expensive NEPA processes.

EWAC notes that the existing and Proposed Streamlining Rule require<sup>19</sup> an applicant to provide environmental analysis and other information that typically will require access to the USFWS-managed lands for biological and cultural surveys and other data collection. USFWS should consider addressing in any final rule how that access will be authorized. This could be included in the new subsection that discusses the required pre-application meeting.<sup>20</sup>

### **III. Reimbursement of Costs**

The Proposed Streamlining Rule would require an applicant to pay the USFWS’s estimate of application processing costs up front, before the application will be processed.<sup>21</sup> This should be limited to the estimated cost of USFWS staff time and not include the cost of preparing environmental review documents to satisfy National Environmental Policy Act (“NEPA”) requirements. Since NEPA documents are typically developed by third-party contractors, and Environmental Assessments may be developed by the applicant, arrangements for these costs should be made separately.

### **IV. Conclusion**

EWAC supports the Proposed Streamlining Rule, subject to the suggested improvements above. The development of renewable energy on public lands is a national priority. To make that a reality, we also will need to construct new electric power lines that cross public lands, including lands administered by USFWS. The permitting of rights-of-way for these projects is contemplated

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<sup>18</sup> See USFWS Handbook, 603 FW 1.

<sup>19</sup> Proposed 50 C.F.R. § 29.21-4(b).

<sup>20</sup> Proposed 50 C.F.R. § 29.21-4(a).

<sup>21</sup> Proposed 50 C.F.R. § 29.21-6(a)(4).

by the Refuge Act, as amended, and the Proposed Streamlining Rule should help facilitate those rights-of-way, where they prove necessary.

Please feel free to contact the following EWAC representatives:

Jennifer A. McIvor, EWAC Policy Chair, [jennifer.mcivor@brkenenergy.com](mailto:jennifer.mcivor@brkenenergy.com), 712-352-5434

John M. Anderson, EWAC Executive Director, [janderson@energyandwildlife.org](mailto:janderson@energyandwildlife.org), 202-508-5093

Brooke Marcus, Nossaman LLP, [bmarcus@nossaman.com](mailto:bmarcus@nossaman.com), 512-813-7941