Holland & Hart



Katy Riker

Associate
208.383.5102
Boise
KDRiker@hollandhart.com



Murray Feldman

Partner
208.383.3921
Boise
mfeldman@hollandhart.com

FWS Updates Right-of-Way Regulations for National Wildlife Refuge Lands

Insight — January 14, 2025

Law360 - Expert Analysis

This article appeared in Law360 on January 15, 2025 and is reprinted with permission. All rights reserved.

On December 11, 2024, the Department of the Interior's Fish and Wildlife Service revised its regulations covering rights-of-way across National Wildlife Refuges and other Service-administered lands.[1] The revised regulations became effective on January 10, 2025. The updates provide a clearer permit application process, and may reduce permitting delays and costs for certain parties seeking rights-of-way through Service-administered areas. Permit applicants can also expect increased up-front costs and stricter right-of-way permit terms and conditions. We discuss these upcoming regulatory changes below.

I. Background

The Service has management authority over more than 96 million terrestrial acres and an additional 760 million acres of submerged lands nationwide. Of these terrestrial acres, 76.8 million are in Alaska, with the remaining acres spread across the lower 48 states and Hawai'i.[2] Most Service-managed land is part of the National Wildlife Refuge System ("Refuge System").[3] Refuge System lands differ from other public lands because wildlife conservation is the overarching management consideration under the National Wildlife Refuge System Administration Act of 1966, as amended by the National Wildlife Refuge System Improvement Act of 1997. The Service reviews every activity occurring on Refuge System lands for compatibility with this overarching purpose.

This conservation purpose does not mean that all human activity is prohibited. For instance, wildlife-dependent recreation is "directly related to the mission" of the Refuge System.[4] Also, mining and mineral leasing laws apply to lands within the Refuge System to the same extent they applied before October 15, 1966, unless the Secretary of the Interior has withdrawn the land from mineral entry.[5] Other major developments within the Refuge System can include transmission and power lines, canals, pipelines, roads and highways, and other infrastructure projects.[6] To construct these features, a project proponent must obtain a right-of-way permit from the Service. The Service may only issue rights-of-way through Refuge System lands when they are "compatible with the purpose for which these [refuges] are established."[7] Even though courts afford the

Service discretion in determining compatibility, compatibility determinations can create fodder for judicial challenges to the Service's right-of-way permitting decisions.[8] When the Service cannot certify a use as compatible with a refuge's purpose, Congress must act to authorize the use.[9]

II. Clearer Application Process

The prior regulations were fairly general and high-level, noting, for example, that "no special form of application is required."[10] The regulations also directed the applicant to provide the Service with materials necessary to conduct evaluations under the National Environmental Policy Act, National Historic Preservation Act, and other laws, all of which have substantial analysis requirements.[11] The revised regulations provide clarity by directing applicants to apply for rights-of-way using Standard Form 299 and provide greater insight into the materials the Service needs to process a right-of-way application. For example, the revised regulations create instructions for mapping, survey plats, vegetation management plans, and financial assurances.[12]

The revised regulations build in a preapplication meeting process for the right-of-way permit applicant to confer with the Service prior to applying for a right-of-way. These meetings can be a valuable opportunity for applicants to engage with the Service prior to gathering detailed construction and environmental information. Delays in the permitting process often arise when the Service determines an application is incomplete.[13] This new process aims to reduce these delays by allowing the Service and the permit applicant to share information so the Service can accurately determine the documentation it will need to process an application. During these meetings, the Service will give applicants general timeline and cost estimates for the Service's application review and processing.

III. Changing Fee Structure

Under the prior regulations, a right-of-way applicant had to pay an application fee based on mileage or acreage, depending on the type of right-of-way.[14] When the costs to process an application exceeded the amounts set forth in the regulation's acreage/mileage fee schedule, the Service required the applicant to make periodic payments before the Service performs work.[15] The revised regulations create a front-loaded payment system where the Service estimates the cost of processing at application submission and the applicant pays this fee up front.[16] Right-of-way applicants may experience increased application costs at the outset, but this structure may reduce the need to pay ongoing fees to the Service for application processing.

The revised regulations also change the structure for monitoring fees. As a term and condition to right-of-way permits, applicants must allow the Service to monitor the construction, operation, and maintenance of right-of-way facilities.[17] Like application fees, these monitoring fees were previously set based on mileage or acreage. If monitoring costs exceeded these outlined fees, the Service could require that periodic payments be replenished prior to the Service engaging in monitoring activities. The

revised regulations provide that the Service will estimate its monitoring costs during the permit preapplication and application phase. Based on this estimate, the Service can use its discretion to impose a lump-sum payment for monitoring prior to issuing the right-of-way permit or impose periodic payments at intervals not exceeding five years.[18]

The revised regulations also expand the categories of individuals eligible for application fee waivers. Along with federal agencies, state and local governments are exempt from paying application fees.[19] Under the revised regulations, private individuals may seek a waiver if the "proposed right-of-way contributes to the Service's operation or maintenance of the refuge."[20]

IV. Eliminating Appraisals

The Service eliminated the prior appraisal requirements at 50 C.F.R. § 29.21-7. This regulation provided that the payment by right-of-way holders for use and occupancy of the Service's lands would be at "fair market value [or fair market rental value] as determined by appraisal by the [Service]."[21] The Service identified its appraisal process as a significant cause for delay in its right-of-way permitting process.[22] Now, the Service can use any Department of the Interior-approved methods to determine fair market or fair market rental value, including fee schedules.

V. New Terms and Conditions

The prior regulations provided terms and conditions that applicants must agree to, unless they are waived by the Service.[23] The Service also had discretion to prescribe more terms and conditions beyond those contained in the regulations.[24] The revised regulations expressly outline new terms and conditions, including indemnification provisions and work notification requirements. The revised regulations also require some permit holders to provide for habitat connectivity "to the maximum extent possible" through the use of wildlife-friendly fencing, bird perches or perch deterrents, fish-passable culverts, vegetative screening, or other mechanisms the Service requests.[25]

VI. Conclusion

Obtaining a right-of-way across or over Refuge System lands can be challenging due to the Service's statutory requirement to conduct a compatibility determination. Overall, these updated regulations should benefit right-of-way permit applicants by increasing early engagement with the Service, the Service's flexibility to determine market values, and the clarity for right-of-way fee structures and permit terms and conditions.

---

[1] 88 Fed. Reg. 99732 (Dec. 11, 2024).

[2] *Id.* at 99733.

[3] *See* National Wildlife Refuge System Administration Act of 1966, as amended by the National Wildlife Refuge System Improvement Act of

1997, 16 U.S.C. 668dd-668ee.

[4] *Id.* § 668dd(c).

[5] *Id.*; 50 C.F.R. § 27.64 (“Prospecting, locating, or filing mining claims on national wildlife refuges is prohibited unless otherwise provided by law”).

[6] 16 U.S.C. § 668dd(d)(1)(B).

[7] *Id.*

[8] 50 C.F.R. § 29.21 (2024) (defining "compatible use" as any wildlife-dependent recreational use or any other use of a national wildlife refuge that, based on sound professional judgment, will not materially interfere with or detract from the fulfillment of the National Wildlife Refuge System mission or the purposes of the national wildlife refuge); *see, e.g., Stevens Cnty. v. U.S. Dep't of Interior*, 507 F. Supp. 2d 1127, 1132 (E.D. Wash. 2007) (upholding a non-compatibility determination for livestock uses within the Little Pend Oreille National Wildlife Refuge).

[9] U.S. Fish and Wildlife, Rights-of-Way and Road Closings, Manual 340 FW 3 (July 28, 1993).

[10] 50 C.F.R. § 29.21-2 (2024).

[11] *Id.* § 29.21-2(a)(4) (2024).

[12] *Id.*

[13] 86 Fed. Reg. 5120 (Jan. 19, 2021).

[14] 50 C.F.R. § 29.21-2(a)(2) (2024).

[15] *Id.* § 29.21-2(a)(2)(ii)(D) (2024).

[16] 50 C.F.R. § 29.18 (effective Jan.10, 2025).

[17] 50 C.F.R. § 29.21-4(b)(13) (2024); 50 C.F.R. § 29.18(b) (effective Jan. 10, 2025).

[18] 50 C.F.R. § 29.18(b) (effective Jan. 10, 2025).

[19] *Id.* § 29.21-2(a)(2)(i)(A), (B) (2024).

[20] *Id.* § 29.18(c)(iii) (effective Jan. 10, 2025).

[21] *Id.* § 29.21-7 (2024).

[22] Streamlining U.S. Fish and Wildlife Service Permitting of Rights-of-Way, 86 Fed. Reg. 5121–5122 (Jan. 19, 2021).

[23] 50 C.F.R. § 29.21-4 (2024).

[24] *Id.*

[25] *Id.* § 29.20(d)(8) (effective Jan. 10, 2025).

Subscribe to get our Insights delivered to your inbox.

This publication is designed to provide general information on pertinent legal topics. The statements made are provided for educational purposes only. They do not constitute legal or financial advice nor do they necessarily reflect the views of Holland & Hart LLP or any of its attorneys other than the author(s). This publication is not intended to create an attorney-client relationship between you and Holland & Hart LLP. Substantive changes in the law subsequent to the date of this publication might affect the analysis or commentary. Similarly, the analysis may differ depending on the jurisdiction or circumstances. If you have specific questions as to the application of the law to your activities, you should seek the advice of your legal counsel.