

Compatibility Determination

(June 2010)

The National Wildlife Refuge System Administration Act of 1966, as amended (16 U.S.C. 668dd-668ee) states that “The Secretary is authorized, under regulations as [s]he may prescribe, to – (A) permit the use of any area within the [National Wildlife Refuge] System for any purpose, including but not limited to hunting, fishing, public recreation and accommodations, and access wherever [s]he determines that such uses are compatible’ and that “... the Secretary shall not initiate or permit a new use of a refuge or expand, renew, or extend an existing use of a refuge, unless the Secretary has determined that the use is a compatible use and that the use is not inconsistent with public safety.” A compatible use is defined as “A proposed or existing 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.” The compatibility determination is to be a written determination signed and dated by the Refuge Manager and Regional Chief of the National Wildlife Refuge System, signifying that a proposed or existing use of a national wildlife refuge is a compatible use or is not a compatible use. Applicable compatibility regulations in 50 CFR Parts 25, 26, and 29 were published in the Federal Register October 18, 2000 (Vol. 65, No. 202, pp 62458 – 62483).

Use: Renewal of Existing Road Right-of-Way

Refuge Name: Lewis and Clark National Wildlife Refuge

Establishing and Acquisition Authority(ies):

- Migratory Bird Conservation Act of 1929 (45 Stat.1222), as amended
- Federal Property & Admin. Services Act of 1949 (P.L. 80-537)
- Refuge Recreation Act (16 U.S.C. 460k-460k-4), as amended)
- Refuge Established 1972

Refuge Purpose(s):

- “To preserve an important wintering and feeding area for migratory waterfowl in the Pacific Flyway” (Migratory Bird Conservation Commission: Memorandum #2 dated September 21, 1971)
- “Wintering area for migratory waterfowl” (Migratory Bird Conservation Commission: Memorandum #7 dated May 14, 1974)
- “...wildlife conservation purposes” (U.S. Department of Labor, General Services Administration, land transfer documents, 41 acre Tongue Point Unit) March 20, 1979

- “... maintain existing habitat for the threatened bald eagle, as well as support it’s eventual recovery.” (U.S. Department of Labor (GSA) land transfer documents of Emerald Heights and Tongue Point Units to the Service) March 15, 1990
- “Public Waterfowl hunting, recreational fishing, and commercial fishing, in accordance with established custom and usage in accordance with State and Federal rules and regulations.” Clatsop County, Oregon, Land donation documents; Bargain and Sale of Deed (4328 acres refuge islands), May 20, 2004

National Wildlife Refuge System Mission:

The mission of the National Wildlife Refuge System is “to administer a national network of lands and waters for the conservation, management, and where appropriate, restoration of the fish, wildlife, and plant resources and their habitats within the United States for the benefit of present and future generations of Americans” (National Wildlife Refuge System Administration Act of 1966, as amended [16 U.S.C. 668dd-668ee]).

Description of Use(s): The Oregon Department of Forestry (ODF) has requested renewal of an existing right-of-way for a road easement issued September 14, 1960 by the Department of Navy, the previous managers of the property. The 50-year easement set to expire this year is for construction, use, maintenance, operation and repair of a road that crosses an approximate .15 acre portion of the southeast corner of the 89 acre Emerald Heights Unit. The unit is located in Clatsop County, Oregon on the outskirts of the City of Astoria. The portion of the road that crosses through refuge land is 105 feet in length. The width to centerline that is maintained is about 30 feet. The road is gated at the junction of Highway 30 which limits public access to the site. The road is used by ODF for management of state forests including transport of minerals and forest products, conducting other forest management activities and fire protection.

Is the use a wildlife-dependant public use?

No, this right-of-way is not a wildlife-dependant public use. However, the existing road has been in place for fifty years and allows ODF to access their lands for management and protection purposes. The road could also be used by refuge personnel to access the lower portion of the unit for biological surveys and other management purposes.

Where would the use be conducted?

The use would be conducted along the 105 foot road right-of-way within the refuge boundary. Please see attached map for the specific location of the road. (SW1/4, Section11, T8N, R9W W.M.)

How and when would the use be conducted?

The use would be conducted continually under these specific terms and conditions referenced in **50 CFR 29.21-4, 1 October, 1990:**

(a) Any right-of-way easement or permit granted will be subject to outstanding rights, if any, in third parties.

(b) An applicant, by accepting an easement or permit agrees to such terms and conditions as may be prescribed by the Regional Director in the granting document. Such terms and conditions shall include the following, unless waived in part by the Regional Director, and may include additional special stipulations at his discretion. See § 29.21-8 for special requirements for electric powerlines and § 29.21-9 for special requirements for oil and gas pipelines.

(1) To comply with State and Federal laws applicable to the project within which the easement or permit is granted, and to the lands which are included in the right-of-way, and lawful existing regulations there under.

(2) To clear and keep clear the lands within the easement or permit area to the extent and in the manner directed by the project manager in charge; and to dispose of all vegetative and other material cut, uprooted, or otherwise accumulated during the construction and maintenance of the project in such a manner as to decrease the fire hazard and also in accordance with such instructions as the project manager may specify.

(3) To prevent the disturbance or removal of any public land survey monument or project boundary monument unless and until the applicant has requested and received from the Regional Director approval of measures the applicant will take to perpetuate the location of aforesaid monument.

(4) To take such soil and resource conservation and protection measures, including weed control on the land covered by the easement or permit as the project manager in charge may request.

(5) To do everything reasonably within his power, both independently and on request of any duly authorized representative of the United States, to prevent and suppress fires on or near, lands to be occupied under the easement or permit area, including making available such construction and maintenance forces as may be reasonably obtainable for the suppression of such fires.

(6) To rebuild and repair such roads, fences, structures, and trails as may be destroyed or injured by construction work and upon request by the Regional Director, to build and maintain necessary and suitable crossings for all roads and trails that intersect the works constructed, maintained, or operated under the right-of-way.

(7) To pay the United States the full value for all damages to the lands or other property of the United States caused by him or by his employees, contractors, or employees of the contractors, and to indemnify the United States against any liability for damages to life, person or property arising from the

occupancy or use of the lands under the easement or permit, except where the easement or permit is granted hereunder to a State or other governmental agency which has no legal power to assume such a liability with respect to damages caused by it to lands or property, such agency in lieu thereof agrees to repair all such damages. Where the easement or permit involves lands which are under the exclusive jurisdiction of the United States, the holder or his employees, contractors, or agents of the contractors, shall be liable to third parties for injuries incurred in connection with the easement or permit area. Grants of easements or permits involving special hazards will impose liability without fault for injury and damage to the land and property of the United States up to a specified maximum limit commensurate with the foreseeable risks or hazards presented. The amount of no-fault liability for each occurrence is hereby limited to no more than \$ 1,000,000.

(8) To notify promptly the project manager in charge of the amount of merchantable timber, if any, which will be cut, removed, or destroyed in the construction and maintenance of the project, and to pay the United States in advance of construction such sum of money as the project manager may determine to be the full stumpage value of the timber to be so cut, removed, or destroyed.

(9) That all or any part of the easement or permit granted may be terminated by the Regional Director, for failure to comply with any or all of the terms or conditions of the grant, or for abandonment. A rebuttable presumption of abandonment is raised by deliberate failure of the holder to use for any continuous 2-year period the easement or permit for the purpose for which it was granted or renewed. In the event of noncompliance or abandonment, the Regional Director will notify in writing the holder of the easement or permit of his intention to suspend or terminate such grant 60 days from the date of the notice, stating the reasons therefore, unless prior to that time the holder completes such corrective actions as are specified in the notice. The Regional Director may grant an extension of time within which to complete corrective actions when, in his judgment, extenuating circumstances not within the holder's control such as adverse weather conditions, disturbance to wildlife during breeding periods or periods of peak concentration, or other compelling reasons warrant. Should the holder of a right-of-way issued under authority of the Mineral Leasing Act, as amended, fail to take corrective action within the 60-day period, the Regional Director will provide for an administrative proceeding pursuant to [5 U.S.C. 554](#), prior to a final Departmental decision to suspend or terminate the easement or permit. In the case of all other right-of-way holders, failure to take corrective action within the 60-day period will result in a determination by the Regional Director to suspend or terminate the easement or permit. No administrative proceeding shall be required where the easement or permit terminates under its terms.

(10) To restore the land to its original condition to the satisfaction of the Regional Director so far as it is reasonably possible to do so upon revocation and/or termination of the easement or permit, unless this requirement is waived in writing by the Regional Director. Termination also includes permits or easements that terminate under the terms of the grant.

(11) To keep the project manager informed at all times of his address, and, in case of corporations, of the address of its principal place of business and the names and addresses of its principal officers.

(12) That in the construction, operation, and maintenance of the project, he shall not discriminate against any employee or applicant for employment because of race, creed, color, or national origin and shall require an identical provision to be included in all subcontracts.

(13) That the grant of the easement or permit shall be subject to the express condition that the exercise thereof will not unduly interfere with the management, administration, or disposal by the United States of the land affected thereby. The applicant agrees and consents to the occupancy and use by the United States, its grantees, permittees, or lessees of any part of the easement or permit area not actually occupied for the purpose of the granted rights to the extent that it does not interfere with the full and safe utilization thereof by the holder. The holder of an easement or permit also agrees that authorized representatives of the United States shall have the right of access to the easement or permit area for the purpose of making inspections and monitoring the construction, operation and maintenance of facilities.

(14) That the easement or permit herein granted shall be subject to the express covenant that any facility constructed thereon will be modified or adapted, if such is found by the Regional Director to be necessary, without liability or expense to the United States, so that such facility will not conflict with the use and occupancy of the land for any authorized works which may hereafter be constructed thereon under the authority of the United States. Any such modification will be planned and scheduled so as not to interfere unduly with or to have minimal effect upon continuity of energy and delivery requirements.

(15) That the easement or permit herein granted shall be for the specific use described and may not be construed to include the further right to authorize any other use within the easement or permit area unless approved in writing by the Regional Director.

Special terms and conditions:

(1) Any cultural and /or paleontological resources (historic or prehistoric sites or object including burials or skeletal material) discovered by the easement holder, or any person working on its behalf, on public or Federal land shall be immediately reported to the authorized officer, Refuge Manager, Lewis and Clark NWR (360-795-3915). Holder, or its representative shall suspend all operations in the immediate area of such discovery until written authorization to proceed is issued by the authorized officer. An evaluation of the discovery will be made by the authorized officer or a Service approved Archeologist to determine the appropriate actions to take pursuant to the provisions of law and 36 Code of Federal Regulations 800.7 (resources discovered during construction) to prevent the loss of significant cultural or scientific values. The holder will be responsible for the cost of the evaluation. Any decision as to proper mitigation measures will be made by the authorized officer after consulting the holder.

Why is this use being proposed?

This use is being proposed as a reauthorization of a preexisting right-of-way for an access road that was granted and constructed prior to November 17, 1990 (603 FW 2.11(H)(3)).

Availability of Resources: No new construction or operational changes are proposed with the permit renewal request. Current administrative costs incurred by the Refuge in administration are minimal, and generally limited to a site visit to monitor for road maintenance activities annually. Since there is no proposed change in operations that would significantly impact Refuge staff or resources, it is determined that adequate resources continue to exist to properly manage this Refuge use.

Anticipated Impacts of the Use(s):

Ongoing impacts to the area would continue through vehicular use of the road and maintenance of the road within the 60-foot right-of-way. The access gate at Highway 30 generally limits vehicle use to ODF personnel. Additional higher volume road traffic may occur if ODF issues timber sails in nearby parcels. Road repairs also may occur within the life of the renewed permit that could require equipment and crews grading and re-rocking portions of the road. All these scenarios are limited in time and scope and are not expected to have any long-term impacts to the parcel.

Congressional intent in applying compatibility reviews to existing rights-of-way (at the time of the National Wildlife Refuge System Administration Act 1997 amendments) dictates that no new interpretation of compatibility requirements established by the Act should be interpreted as finding existing long-term permitted uses of refuges not compatible –presuming no significant changes have occurred to when they were initially permitted (and determined to be compatible). Regulations (50 CFR 25.21 (h)) prescribe that when evaluating compatibility in the re-authorization of these historic rights-of-way, that the analysis of impacts will be based on existing conditions with the use in place, not from a pre-use perspective. In other words, only modifications from the historic permitted use are to be analyzed for impacts. An example of this would be if the proposed renewal requested replacing the existing 10-inch pipeline with a 16-inch pipeline, or if the request desired to replace the existing buried pipeline with a new above ground pipeline, etc. Since the request for permit renewal includes no modifications over the existing operational conditions, there are no significant issues to analyze.

Public Review and Comment:

The following methods were used to solicit public review and comment:

Posted notice at Refuge Headquarters and on Refuge website.

Why was this level of public review and comment selected:

Because this is a renewal of use and to ensure that adequate notification has been provided.

Summarize comments received and any actions taken or not taken because of comments received:

Determination:

Use is Not Compatible

Use is Compatible with the Following Stipulations

Stipulations necessary to ensure compatibility:

All terms and conditions set forth in the original right-of-way permit as granted on September 14, 1960 will be adhered to.

All vegetation removal along the road right-of-way will either be accomplished by mechanical means or if herbicides are used submitted for approval to the Refuge Manager Lewis and Clark NWR.

No herbicides, pesticides, solvents or fuel storage tanks may be stored on the right-of-way.

Justification

The compatibility policy 603 FW 2.11 (H)(3) states that “For uses in existence on November 17, 2000 that were specifically authorized for a period longer than 10 years (such as rights-of-way) our compatibility reevaluation will examine compliance with the terms and conditions of the authorization, not the authorization itself.” ODF has complied with terms and conditions as set forth in the ROW agreement, thus the use is compatible.

Re-evaluation Date: September 14, 2060

NEPA Compliance for Refuge Use Decision (check one below):

Categorical Exclusion without Environmental Action Statement

Categorical Exclusion and Environmental Action Statement

Environmental Assessment and Finding of No Significant Impact

Environmental Impact Statement and Record of Decision

Refuge Determination:

Prepared by: _____ (Signature) _____ (Date)

Refuge Manager/
Project Leader
Approval: _____ (Signature) _____ (Date)

Concurrence

Refuge Supervisor: _____ (Signature) _____ (Date)

Regional Chief,
National Wildlife
Refuge System: _____ (Signature) _____ (Date)