



ENVIRONMENTAL LAW & POLICY CENTER

November 15, 2024

Sara Siekierski, Refuge Manager
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RE: U.S. Fish & Wildlife Service's Draft Compatibility Determination for Saginaw Bay Pipeline Company Right-of-Way-Renewal Within the Kirtland's Warbler Wildlife Management Area under Seney National Wildlife Refuge management

Dear Ms. Siekierski:

The Environmental Law & Policy Center ("ELPC") appreciates the opportunity to comment on the proposed Draft Compatibility Determination for Saginaw Bay Pipeline Company Right-of-Way-Renewal ("Draft CD") in the Seney National Wildlife Refuge that was posted on the United States Fish and Wildlife Service's website on October 17, 2024. ELPC is a not-for-profit public interest legal and policy advocacy organization focused on environmental and conservation issues in the Midwest, including work to protect our National Wildlife Refuges.

I. INTRODUCTION

Kirtland's Warbler Wildlife Management Area (the "WMA") is a place of local, regional, and international ecological significance. Congress established the WMA in 1980 in order to protect the endangered Kirtland's warbler, which relies on young jack pine forests in the upper Great Lakes region as critical nesting grounds. Owing in significant part to the establishment of the WMA, the population of the Kirtland's warbler has stabilized and Kirtland's warbler has been delisted. The WMA also provides important habitat for other threatened, endangered or candidate species, including the northern long-eared bat, the eastern massasauga rattlesnake, the tri-color bat and the Monarch butterfly.

ELPC submits these comments to express our concerns that the Draft CD misstates the requirements of the 1997 National Wildlife Refuge System Improvement Act (the "1997 Refuge Act"). 16 U.S.C. § 668dd. Both the 1997 Refuge Act and the U.S. Fish and Wildlife Service's regulations require the Service to consider whether an existing use is compatible when the Service re-authorizes that use. The 1997 Refuge Act does not provide an exemption for the renewal of existing uses, as the Draft CD appears to suggest.

ELPC further shares our concern that the Draft CD does not establish sufficient protections for habitat and wildlife and that it does not comply with the Service's proposed Biological Integrity, Diversity, and Ecological Health rule, published earlier this year. *See* National Wildlife Refuge System; Biological Integrity, Diversity, and Environmental Health, 89 Fed. Reg. 7345 (proposed Feb. 4, 2024) (to be codified at 50 C.F.R. pt. 29) (BIDEH Rule). In order to ensure compliance with that rule and to adequately protect wildlife, ELPC recommends that the Refuge take the following actions in a revised draft CD for the reasons explained in more detail below:

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1. Reduce the term of the renewed right-of-way from the current proposal of 30 years to allow for more regular reconsideration of the pipeline's compatibility.
2. Expressly prohibit activities that would expand, modify or otherwise alter the size or footprint of the existing pipeline, without making a new compatibility determination.
3. Expressly prohibit any work that damages jack pine habitat without a site-specific compatibility determination.
4. Add specific limitations to protect nesting birds.

ELPC appreciates that the WMA's current management understands the importance of protecting habitat and wildlife. However, given the length of the proposed use we believe it is essential that the Service establish written stipulations that will control the proposed use for the full right-of-way term. For that reason, ELPC urges the Service to revise the Draft CD in accordance with these recommendations.

II. DISCUSSION

A. The Draft CD should clarify the standard for renewal of existing rights-of-way.

The 1997 Refuge Act confirmed that the mission of the National Wildlife Refuge System is the "conservation, management, and where appropriate, restoration of the fish, wildlife, and plant resources and their habitats within the United States." 16 U.S.C. § 668dd(a)(2). To that end, the Service may not "expand, **renew**, or extend an existing use of a refuge, unless [the Service] has determined that the use is a compatible use and that the use is not inconsistent with public safety." 16 U.S.C. § 668dd(d)(3)(A)(i) (emphasis added). The Refuge Act defines a compatible use as "a wildlife-dependent recreational use or any other use of a refuge that, in the sound professional judgment of the Director, will not materially interfere with or detract from the fulfillment of the mission of the System or the purposes of the refuge." 16 U.S.C. § 668ee(1).

As the Draft CD recognizes, the Kirtland's warbler WMA has one statutory purpose: to conserve "(A) fish or wildlife which are listed as endangered species or threatened species or (B) plants ...16 U.S.C.1534 (Endangered Species Act of 1973)." Draft CD at 1. Hence, the Service must determine that the proposed use, right-of-way renewal for an existing pipeline of the Saginaw Bay Pipeline Company, is compatible with that statutory purpose before renewing the use.

That does not appear to be the approach that the Draft CD adopts. Instead, the Draft CD states:

Congressional intent in applying compatibility reviews to existing right-of-way permits (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).

It is unclear exactly what the Service means by this, but the above statement appears to imply that the Service does not need to consider the compatibility of long-standing uses when

renewing new rights-of-way for those uses. The Service does not provide support for its analysis of “Congressional intent,” such as a citation to legislative history or a discussion of the text of the Refuge Act itself.

In any event, that is not what the text of the Refuge Act requires. Section (d)(3)(A)(i) of the Refuge Act states that the Service must determine that a use itself is compatible when the service “**renew(s) or extends(s)** an existing use” of the refuge. 16 U.S.C. § 668dd(d)(3)(A)(i) (emphasis added). Similarly, the Refuge Act requires a compatibility determination when the Service “permit[s] the use, or grants easements in, over, across, upon, through, or under any areas within the System for purposes such as but not necessarily limited to, powerlines, telephone lines, canals, ditches, pipelines, and roads.” 16 U.S.C. § 668dd(d)(1)(B). Moreover, the Refuge Act requires the Service to “provide for the elimination or modification of any use as expeditiously as practicable after a determination is made that the use is not a compatible use.” 16 U.S.C. § 668dd(d)(3)(B)(vi). These provisions would lose their meaning if existing uses were exempted from a compatibility determination.

The Draft CD may be relying on 16 U.S.C. § 668dd(d)(3)(B)(vii), which requires “reevaluation of each existing use . . . if conditions under which the use is permitted change significantly or if there is significant new information regarding the effects of the use.” That provision states that “in the case of any use authorized for a period longer than 10 years (such as an electric utility right-of-way), the reevaluation required by this clause shall examine compliance with the terms and conditions of the authorization, not examine the authorization itself.” *Id.*

That provision applies to *reevaluation* of existing, permitted uses when circumstances surrounding the original use change. It does not apply to the *renewal* of expired rights-of-way. The reevaluation provision is inapplicable to the present circumstances. We urge the Service to revise its discussion of the Refuge Act’s compatibility requirement in order to clarify that a renewal of an expired right-of-way requires a determination that the use itself is compatible.

B. The Service should explain why it is adopting the maximum 30-year term for renewing and extending the Saginaw Bay pipeline.

The Draft CD proposes a 30-year right-of-way for the Saginaw Bay natural gas pipeline. Under the Service’s regulations, rights-of-way “granted under authority of section 28 of the Mineral Leasing Act of 1920, as amended, for pipelines for the transportation of oil, natural gas, synthetic liquid or gaseous fuels, or any refined product produced therefrom,” may not exceed 30 years in duration. 50 CFR § 29.21-3. The Draft CD accordingly proposes to provide a right-of-way for the maximum duration allowable under the Service’s regulations.

The Draft CD does not explain why that maximum, 30-year term is appropriate. Pursuant to the proposed term, the Service would not reevaluate the pipeline’s compatibility again until 2054. Given the Refuge Act’s emphasis on eliminating uses that are not compatible—that is, which interfere with or detract from the mission of the WMA—the Service should, at a minimum, explain why a shorter term would not be more aligned with the Refuge Act’s objectives. If no specific rationale exists for providing a 30-year-term, the Service should establish a shorter term to allow for regular reconsideration of the pipeline’s compatibility with the WMA’s wildlife purposes.

C. The Draft CD should adopt clearer stipulations to protect wildlife and habitat over the full term of the proposed use.

The Service's regulations require that all compatibility determinations must detail "the nature and extent of the use," and the "stipulations necessary to ensure compatibility[.]" 50 C.F.R. § 26.41(a). Under the Service's "policy for determining compatibility," these stipulations "must be detailed and specific." 603 FW 2.12(A)(11). Moreover, "[i]f the use cannot be modified with stipulations sufficient to ensure compatibility, the use cannot be allowed." *Id.*

The Draft CD contains nine stipulations. Draft CD at 14-16. While some of these stipulations place limitations on the potential for the proposed use to damage wildlife and habitat, others are insufficiently detailed and specific. Moreover, as outlined below, several stipulations have gaps that could allow for activities that are not compatible with the WMA's wildlife purposes.

- **Stipulation 1** states that Saginaw Bay Pipeline Company ("Pipeline Company") must "[a]dhere to all terms and conditions set forth in the right-of-way permit as granted." Draft CD at 14. It is unclear whether this stipulation refers to the existing right-of-way permit or to the Draft CD itself. The Service should clarify what terms and conditions this stipulation references. If the stipulation refers to the existing right-of-way permit, the Service should attach that permit so that the terms and conditions therein are available for public review and comment. If the stipulation refers to some other document, the Service should make that document available for public comment.
- **Stipulations 2 and 3** require the Pipeline Company to obtain a Special Use Permit prior to maintenance activities. However, while Stipulation #3 notes that special use permit will "include provision that ensure disturbance to wildlife and public use, impacts to habitat and other resources, is avoided or minimized," Stipulation #2 does not contain any such provision. To avoid confusion, we recommend that the Service add a standalone stipulation requiring that any Special Use Permits issued to the Pipeline Company will include provisions that ensure disturbances to wildlife, habitat, and other resources, are minimized.
- **Stipulations 2 and 3**, and the Draft CD as a whole, do not sufficiently distinguish between "maintenance" which may occur with a special use permit, and more substantial upgrades or expansions of the pipeline. For example, the Draft CD states that "the 16-inch pipeline is being maintained with no expected modifications or changes to the existing infrastructure." Draft CD at 14. This leaves open the possibility that the Pipeline Company could make presently unexpected changes to the existing infrastructure that have a significant impact on the WMA. ELPC recommends adding a stipulation that limits maintenance to activities necessary to allow for continued, safe operation of the existing 16-inch pipeline. Any activities that would expand, modify or otherwise alter the size or footprint of the existing pipeline or change the operating pressure of the existing pipeline would require a new Compatibility Determination. 16 U.S.C. § 668dd(d)(3)(A)(i).
- **Stipulation 5** allows for the use of pesticides and herbicides with a Special Use Permit but does not place any other conditions on their use. The Service's Proposed BIDEH rule

allows pesticide use “as part of an integrated pest management plan, when necessary to meet statutory requirements, fulfill refuge purposes, and ensure biological integrity, diversity, and environmental health.” We recommend that the Service revise Stipulation #5 to align with the BIDEH rule. At minimum, the Service should require a new Compatibility Determination for any proposed use of pesticides demonstrating that the use is necessary to meet statutory requirements, fulfill refuge purposes, and ensure biological integrity, diversity, and environmental health.

- **Stipulation 8** requires a new Compatibility Determination for any work that leads to permanent loss of wetlands, springs, or stream habitat. As noted above, the Kirtland’s warbler nests primarily in young jack pine forest. ELPC recommends adding a stipulation to require a site-specific Compatibility Determination for any work that has potential to damage warbler nesting habitat. The Service should conduct an assessment of any proposed work to evaluate the risk that work poses to warbler habitat and determine whether a site-specific Compatibility Determination is necessary.
- Finally, ELPC recommends that the Service clarify the precautions that the Pipeline Company and the Service will take to avoid harm to the four endangered, threatened or candidate species in the WMA. The Draft CD states that the proposed permit renewal and future maintenance will have no effect on endangered or threatened species but does not explain that conclusion. The Service should explain the basis for that finding and provide a stipulation requiring the Pipeline Company to avoid harm to those species. The Service should also clarify that the Service itself will assess whether any proposed work on the right-of-way will present a threat to endangered or threatened species and will require mitigations if so.

By strengthening and clarifying the stipulations in accordance with these recommendations, the Service will ensure that activities on the right-of-way for the length of the right-of-way term will remain compatible with the WMA’s wildlife purposes, as the Refuge Act requires.

III. CONCLUSION

The Environmental Law & Policy Center appreciates the opportunity to provide input on the Draft Compatibility Determination for Saginaw Bay Pipeline Company Right-of-Way Renewal for the Kirtland’s Warbler Wildlife Management Area. ELPC encourages the Service to revise the Draft CD in accordance with the recommendations above. We would be pleased to discuss these recommendations with the Refuge Manager and the Service.

Respectfully submitted,

/s/ Wendy Bloom

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