



United States Department of the Interior

FISH AND WILDLIFE SERVICE

Ecological Services
5353 Yellowstone Road, Suite 308A
Cheyenne, Wyoming 82009



In Reply Refer To:
06E13000/WY12CPA0071

MAR 21 2012

Jon Sweet, Permit Coordinator
Wyoming Department of Environmental Quality
2100 West 5th Street
Sheridan, Wyoming 82801

Dear Mr. Sweet:

Thank you for your letter of January 23, 2012, received in our office on January 26, regarding the Cash and North Fork Amendments to mine permit number 339C (Project) for Black Hills Bentonite, LLC (BBH). This mine will be located about 12 miles northwest of Kaycee in Johnson County, Wyoming in Sections 15, 22, 23, and 26 of T45N, R83W.

In order to comment on this Project, we requested additional information from Bruce Lawson of BHB. On March 15, 2012, we received an email from Mr. Lawson that included the wildlife inventory and associated maps. Additional information regarding access roads and operational periods were answered in an email from Mr. Lawson received on March 19, 2012.

You have requested information regarding species listed under the Endangered Species Act of 1973, as amended (Act), 16 U.S.C. 1531 *et seq.* In response to your request, the U.S. Fish and Wildlife Service (Service) is providing you with recommendations for protective measures for threatened and endangered species in accordance with the Act. We are also providing recommendations concerning migratory birds in accordance with the Migratory Bird Treaty Act (MBTA), 16 U.S.C. 703, and the Bald and Golden Eagle Protection Act (BGEPA), 16 U.S.C. 668. Wetlands are afforded protection under Executive Orders 11990 (wetland protection) and 11988 (floodplain management), as well as section 404 of the Clean Water Act. Other fish and wildlife resources are considered under the Fish and Wildlife Coordination Act, as amended, 16 U.S.C. 661 *et seq.*, and the Fish and Wildlife Act of 1956, as amended, 16 U.S.C. 742a-742j.

Recommendations: We recommend the Project be undertaken outside of the migratory bird-nesting season (February 1 – August 31). If this is not possible, removal of vegetation should take place outside the nesting season to prevent take of migratory birds, nests, and chicks. We also recommend that migratory bird surveys should be conducted on the mine permit area including a buffer of 0.5 mile (1 mile for ferruginous hawks) of the permit area prior to land clearing or mining. It is notated in the mine plan that access to the permit area is restricted from April 5 until June 15, per an agreement with the private lands owners.

Bald Eagle/Raptor: Enclosed please find our general recommendations for the protection of bald eagles and other raptor species. We strongly encourage Project proponents to fully implement the protective measures described in the enclosures in order to help ensure compliance with the MBTA and the BGEPA. We are also available to assist you in developing a Project specific plan to address the MBTA and BGEPA concerns.

If surveys identify active raptor nests, please implement the species-specific buffers identified in the Protections for Raptors attachment. These buffers should be utilized until the Project is completed, or until the young have fledged, or the nest fails and is no longer active that year. If avoidance of existing nests is not possible, mitigation measures should be developed in coordination with the Service and WGFD to avoid nest failure.

In accordance with Section 7(c) of the Act, we have determined that the following species or their designated habitat may be present in the proposed Project area. We would appreciate receiving information as to the current status of each of these species within the proposed Project area.

**Endangered, Threatened, Proposed, and Candidate Species
and Their Designated and Proposed Critical Habitat That Occur
in or May Be Affected By Actions in the proposed Project Area**

March 2012

<u>Species</u>	<u>Scientific Name</u>	<u>Status</u>	<u>Habitat</u>
Greater Sage-grouse	<i>Centrocercus urophasianus</i>	Candidate	Sagebrush communities

Greater Sage-grouse: The Service has determined that the greater sage-grouse (*Centrocercus urophasianus*) warrants listing under the Act, but the development of a proposed listing rule is precluded by other higher priority listing actions. As a result, the greater sage-grouse has been placed on the list of candidate species. Candidates are reviewed annually to determine if they continue to warrant listing or to reassess their listing priority. Ideally, sufficient threats can be removed to eliminate the need for listing, in which case sage-grouse would no longer be a candidate. If threats are not addressed or the status of the species declines, a candidate species can move up in priority for a listing proposal.

Please see our recent *Federal Register* notice (75 FR 13910; March 23, 2010: available at http://www.fws.gov/wyominges/Pages/Species/Findings/GrtSageGrouse_CandidateBulletin.html) on greater sage-grouse for detailed information concerning the status of the species. Greater sage-grouse are dependent on sagebrush habitats year-round. Habitat loss and degradation, as well as loss of population connectivity have been identified as important factors contributing to the decline of greater sage-grouse populations rangewide. Therefore, any activities that result in loss or degradation of sagebrush habitats that are important to this species should be closely evaluated for their impacts to sage-grouse.

We recommend you contact the Wyoming Game and Fish Department to identify important greater sage-grouse habitats, recommended seasonal restrictions within the Project area, and

appropriate measures to minimize potential impacts from the proposed Project. The Service recommends surveys and mapping of important greater sage-grouse habitats where local information is not available. The results of these surveys should be used in Project planning to minimize potential impacts to this species. No Project activities that may exacerbate habitat loss or degradation should be permitted in important habitats.

The State of Wyoming has adopted a "Greater Sage-grouse Core Area Protection" Executive Order 2011-5 to ensure greater sage-grouse conservation. The recommendations of the State Sage-grouse Implementation Team and State of Wyoming's Greater sage-grouse "Greater Sage-grouse Core Area Protection" Executive Order 2011-5 state that development of any type in the identified core areas is done only when no decline to the species can be demonstrated. Executive Order 2011-5 further states the burden of proof for showing development does not affect sage-grouse rests with the industry or proponent in question, and any research they feel is necessary to convey this, should be conducted outside of core areas. If a proposed Project is located in an area designated by the State of Wyoming as a core sage-grouse population area, we recommend you pursue additional consultation with the Wyoming Game and Fish Department on the core area strategy as appropriate.

For our internal tracking purposes, the Service would appreciate notification of any decision made on this Project (such as issuance of a permit or signing of a Record of Decision or Decision Memo). Notification can be sent in writing to the letterhead address or by electronic mail to FW6_Federal_Activities_Cheyenne@fws.gov.

We appreciate your efforts to ensure the conservation of Wyoming's fish and wildlife resources. If you have questions regarding this letter or your responsibilities under the Act and/or other authorities or resources described above, please contact Genevieve Skora of my office at the letterhead address or phone (307) 772-2374, extension 225.

Sincerely,



R. Mark Sattelberg
Field Supervisor
Wyoming Field Office

Enclosures (1)

cc: Black Hills Bentonite, LLC, Mine Development & Reclamation Manager, Mills, WY
(B. Lawson)
BLM, Endangered Species and Fisheries Program Lead, Cheyenne, WY
(C. Keefe) (ckeefe@blm.gov)
WDEQ, LDQ District III, Sheridan, WY (S. Page)
WGFD, Non-game Coordinator, Lander, WY (B. Oakleaf)
WGFD, Statewide Habitat Protection Coordinator, Cheyenne, WY (M. Flanderka)

U.S. Fish and Wildlife Service, Wyoming Ecological Services Field Office

Protections for Raptors

Raptors, or birds of prey, and the majority of other birds in the United States are protected by the Migratory Bird Treaty Act, 16 U.S.C. 703 (MBTA). A complete list of migratory bird species can be found in the Code of Federal Regulations at 50 CFR 10.13. Eagles are also protected by the Bald and Golden Eagle Protection Act, 16 U.S.C. 668 (Eagle Act).

The MBTA protects migratory birds, eggs and nests from possession, sale, purchase, barter, transport, import, export, and take. The regulatory definition of take, defined in 50 CFR 10.12, means to pursue, hunt, shoot, wound, kill, trap, capture, or collect, or attempt to hunt, shoot, wound, kill, trap, capture, or collect a migratory bird. Activities that result in the unpermitted take (e.g., result in death, possession, collection, or wounding) of migratory birds or their eggs are illegal and fully prosecutable under the MBTA. Removal or destruction of active nests (i.e., nests that contain eggs or young), or causing abandonment of an active nest, could constitute a violation of the MBTA, the Eagle Act, or both statutes. Removal of any active migratory bird nest or any structure that contains an active nest (e.g., tree) where such removal results in take is prohibited. Therefore, if nesting migratory birds are present on or near a project area, project timing is an important consideration during project planning. As discussed below, the Eagle Act provides additional protections for bald and golden eagles and their nests. For additional information concerning nests and protections under the MBTA, please see the U.S. Fish and Wildlife Service's (Service) Migratory Bird Permit Memorandum, MBMP-2.

The Service's Wyoming Ecological Services Field Office works to raise public awareness about the possible occurrence of birds in proposed project areas and the risk of violating the MBTA, while also providing guidance to minimize the likelihood that take will occur. We encourage you to coordinate with our office before conducting actions that could lead to the take of a migratory bird, their young, eggs, or active nests (e.g., construction or other activity in the vicinity of a nest that could result in a take). If nest manipulation is proposed for a project in Wyoming, the project proponent should also contact the Service's Migratory Bird Office in Denver at 303-236-8171 to see if a permit can be issued. Permits generally are not issued for an active nest of any migratory bird species, unless removal of the nest is necessary for human health and safety. If a permit cannot be issued, the project may need to be modified to ensure take of migratory birds, their young or eggs will not occur.

For infrastructure (or facilities) that have potential to cause direct avian mortality (e.g., wind turbines, guyed towers, airports, wastewater disposal facilities, transmission lines), we recommend locating structures away from high avian-use areas such as those used for nesting, foraging, roosting or migrating, and the travel zones between high-use areas. If the wildlife survey data available for the proposed project area and vicinity do not provide the detail needed to identify normal bird habitat use and movements, we recommend collecting that information prior to determining locations for any infrastructure that may create an increased potential for avian mortalities. We also recommend contacting the Service's Wyoming Ecological Services office for project-specific recommendations.

Additional Protections for Eagles

The Eagle Act protections include provisions not included in the MBTA, such as the protection of unoccupied nests and a prohibition on disturbing eagles. Specifically, the Eagle Act prohibits knowingly taking, or taking with wanton disregard for the consequences of an activity, any bald or golden eagle or their body parts, nests, chicks or eggs, which includes collection, possession, molestation, disturbance, or killing. The term "disturb" is defined as "to agitate or bother a bald or golden eagle to a degree that causes, or is likely to cause, based on the best scientific information available, (1) injury to an eagle, (2) a decrease in its productivity, by substantially interfering with normal breeding, feeding, or sheltering behavior, or (3) nest abandonment, by substantially interfering with normal breeding, feeding, or sheltering behavior" (50 CFR 22.3 and see also 72 FR 31132).

The Eagle Act includes limited exceptions to its prohibitions through a permitting process. The Service has issued regulations concerning the permit procedures for exceptions to the Eagle Act's prohibitions (74 FR 46836), including permits to take golden eagle nests which interfere with resource development or recovery operations (50 CFR 22.25). The regulations identify the conditions under which a permit may be issued (i.e., status of eagles, need for action), application requirements, and other issues (e.g., mitigation, monitoring) necessary in order for a permit to be issued.

For additional recommendations specific to Bald Eagles please see our [Bald Eagle information web page](http://www.fws.gov/wyominges/Pages/Species/Species_SpeciesConcern/BaldEagle.html) (http://www.fws.gov/wyominges/Pages/Species/Species_SpeciesConcern/BaldEagle.html).

Recommended Steps for Addressing Raptors in Project Planning

Using the following steps in early project planning, agencies and proponents can more easily minimize impacts to raptors, streamline planning and permitting processes, and incorporate measures into an adaptive management program:

1. Coordinate with appropriate Service offices, Wyoming Game and Fish Department, Tribal governments, and land-management agencies at the earliest stage of project planning.
2. Identify species and distribution of raptors occurring within the project area by searching existing data sources (e.g., Wyoming Game and Fish Department, Federal land-management agencies) and by conducting on-site surveys.
3. Plan and schedule short-term and long-term project disturbances and human-related activities to avoid raptor nesting and roosting areas, particularly during crucial breeding and wintering periods.
4. Determine location and distribution of important raptor habitat, nests, roost sites, migration zones and, if feasible, available prey base in the project impact area.
5. Document the type, extent, timing, and duration of raptor activity in important use areas to establish a baseline of raptor activity.
6. Ascertain the type, extent, timing, and duration of development or human activities proposed to occur, and the extent to which this differs from baseline conditions.
7. Consider cumulative effects to raptors from proposed projects when added to past, present, and reasonably foreseeable actions. Ensure that project mitigation adequately addresses cumulative effects to raptors.
8. Minimize loss of raptor habitats and avoid long-term habitat degradation. Mitigate for unavoidable losses of high-valued raptor habitats, including (but not limited to) nesting, roosting, migration, and foraging areas.
9. Monitor and document the status of raptor populations and, if feasible, their prey base post project completion, and evaluate the success of mitigation efforts.
10. Document meaningful data and evaluations in a format that can be readily shared and incorporated into wildlife databases (contact the Service's Wyoming Ecological Services office for details).

Protection of nesting, wintering (including communal roost sites), and foraging activities is considered essential to conserving raptors. In order to promote the conservation of migratory bird populations and their habitats, Federal agencies should implement those strategies directed by [Executive Order 13186, "Responsibilities of Federal Agencies To Protect Migratory Birds"](#) (66 FR 3853).

Recommended Seasonal and Spatial Buffers to Protect Nesting Raptors

Because many raptors are particularly sensitive to disturbance (that may result in take) during the breeding season, we recommend implementing spatial and seasonal buffer zones to protect individual nest sites/territories (Table 1). The buffers serve to minimize visual and auditory impacts associated with human activities near nest sites. Ideally, buffers would be large enough to protect existing nest trees and provide for alternative or

replacement nest trees. The size and shape of effective buffers vary depending on the topography and other ecological characteristics surrounding the nest site. In open areas where there is little or no forested or topographical separation, distance alone must serve as the buffer. Adequate nesting buffers will help ensure activities do not take breeding birds, their young or eggs. For optimal conservation benefit, we recommend that no temporary or permanent surface occupancy occur within species-specific spatial buffer zones. For some activities with very substantial auditory impacts (e.g., seismic exploration and blasting) or visual impacts (e.g., tall drilling rig), a larger buffer than listed in Table 1 may be necessary, please contact the Service's Wyoming Ecological Services office for project specific recommendations on adequate buffers.

As discussed above, for infrastructure that may create an increased potential for raptor mortalities, the spatial buffers listed in Table 1 may not be sufficient to reduce the incidence of raptor mortalities (for example, if a wind turbine is placed outside a nest disturbance buffer, but inadvertently still within areas of normal daily or migratory bird movements); therefore, please contact the Service's Wyoming Ecological Services office for project specific recommendations on adequate buffers.

Buffer recommendations may be modified on a site-specific or project-specific basis based on field observations and local conditions. The sensitivity of raptors to disturbance may be dependent on local topography, density of vegetation, and intensity of activities. Additionally, individual birds may be habituated to varying levels of disturbance and human-induced impacts. Modification of protective buffer recommendations may be considered where biologically supported and developed in coordination with the Service's Wyoming Ecological Services Field Office.

Because raptor nests are often initially not identified to species (e.g., preliminary aerial surveys in winter), we first recommend a generic raptor nest seasonal buffer guideline of January 15th – August 15th. Similarly, for spatial nesting buffers, until the nesting species has been confirmed, we recommend applying a 1-mile spatial buffer around the nest. Once the raptor species is confirmed, we then make species-specific and site-specific recommendations on seasonal and spatial buffers (Table 1).

Activities should not occur within the spatial/seasonal buffer of any nest (occupied or unoccupied) when raptors are in the process of courtship and nest site selection. Long-term land-use activities and human-use activities should not occur within the species-specific spatial buffer of occupied nests. Short-term land use and human-use activities proposed to occur within the spatial buffer of an occupied nest should only proceed during the seasonal buffer after coordination with the Service, State, and Tribal wildlife resources management agencies, and/or land-management agency biologists. If, after coordination, it is determined that due to human or environmental safety or otherwise unavoidable factors, activities require temporary incursions within the spatial and seasonal buffers, those activities should be planned to minimize impacts and monitored to determine whether impacts to birds occurred. Mitigation for habitat loss or degradation should be identified and planned in coordination with applicable agencies.

Please contact the Service's Wyoming Ecological Services Field Office if you have any questions regarding the status of the bald eagle, permit requirements, or if you require technical assistance regarding the MBTA, Eagle Act, or the above recommendations. The recommended spatial and seasonal buffers are voluntary (unless made a condition of permit or license) and are not regulatory, and they do not supersede provisions of the MBTA, Eagle Act, Migratory Bird Permit Memorandum (MBMP-2), and Endangered Species Act. Assessing legal compliance with the MBTA or the Eagle Act and the implementing regulations is ultimately the authority and responsibility of the Service's law enforcement personnel. Our recommendations also do not supersede Federal, State, local, or Tribal regulations or permit conditions that may be more restrictive.

Table 1. Service's Wyoming Ecological Services Field Office's Recommended Spatial and Seasonal Buffers for Breeding Raptors**Raptors of Conservation Concern (see below for more information)**

Common Name	Spatial buffer (miles)	Seasonal buffer
Golden Eagle	0.50	January 15 - July 31
Ferruginous Hawk	1.00	March 15 - July 31
Swainson's Hawk	0.25	April 1 - August 31
Bald Eagle	see Bald Eagle information web page ¹	
Prairie Falcon	0.50	March 1 - August 15
Peregrine Falcon	0.50	March 1 - August 15
Short-eared Owl	0.25	March 15 - August 1
Burrowing Owl	0.25	April 1 - September 15
Northern Goshawk	0.50	April 1 - August 15

Additional Wyoming Raptors

Common Name	Spatial buffer (miles)	Seasonal buffer
Osprey	0.25	April 1 - August 31
Cooper's Hawk	0.25	March 15 - August 31
Sharp-shinned Hawk	0.25	March 15 - August 31
Red-tailed Hawk	0.25	February 1 - August 15
Rough-legged Hawk (winter resident only)	----	----
Northern Harrier	0.25	April 1 - August 15
Merlin	0.50	April 1 - August 15
American Kestrel	0.125	April 1 - August 15
Common Barn Owl	0.125	February 1 - September 15
Northern Saw-whet Owl	0.25	March 1 - August 31
Boreal Owl	0.25	February 1 - July 31
Long-eared Owl	0.25	February 1 - August 15
Great Horned Owl	0.125	December 1 - September 30
Northern Pygmy-Owl	0.25	April 1 - August 1
Eastern Screech -owl	0.125	March 1 - August 15
Western Screech-owl	0.125	March 1 - August 15
Great Gray Owl	0.25	March 15 - August 31

¹ http://www.fws.gov/wyominges/Pages/Species/Species_SpeciesConcern/BaldEagle.html**Raptors of Conservation Concern**

The Service's Birds of Conservation Concern (2008) report identifies "species, subspecies, and populations of all migratory nongame birds that, without additional conservation actions, are likely to become candidates for listing" under the Endangered Species Act (16 U.S.C 1531 et seq.). This report is intended to stimulate coordinated and proactive conservation actions among Federal, State, and private partners. The Wyoming Partners in Flight Wyoming Bird Conservation Plan identifies priority bird species and habitats, and establishes objectives for bird populations and habitats in Wyoming. This plan also recommends conservation actions to accomplish the population and habitat objectives.

We encourage project planners to develop and implement protective measures for the Birds of Conservation Concern as well as other high-priority species identified in the Wyoming Bird Conservation Plan. For

Enclosure

additional information on the Birds of Conservation Concern that occur in Wyoming, please see our Birds of Conservation Concern web page.

Additional Planning Resources

Avian Power Line Interaction Committee (APLIC). 2006. Suggested Practices for Avian Protection on Power Lines: The State of the Art in 2006. Edison Electric Institute, APLIC, and the California Energy Commission. Washington, D.C. and Sacramento, CA.

Edison Electric Institute and the Raptor Research Foundation. 1996. Suggested Practices for Raptor Protection on Power Lines - The State of the Art in 1996. Washington, D.C.

Edison Electric Institute's Avian Power Line Interaction Committee and U.S. Fish and Wildlife Service. 2005. Avian Protection Plan Guidelines.

Edison Electric Institute and the Raptor Research Foundation. 1994. Mitigating Bird Collisions with Power Lines - The State of the Art in 1994. Washington, D.C.

U.S. Fish and Wildlife Service. 2000. Siting, Construction, Operation and Decommissioning of Communications Towers and Tower Site Evaluation Form (Directors Memorandum September 14, 2000), Arlington, Virginia.

U.S. Fish and Wildlife Service. 2007. National Bald Eagle Management Guidelines. United States Department of Interior, Fish and Wildlife Service, Arlington, Virginia. 23 pp.

Wyoming Game and Fish Department Internet Link to Raptor Information

References

50 CFR 10.12 – Code of Federal Regulations. Title 50--Wildlife and Fisheries, Chapter I--United States Fish and Wildlife Service, Department of the Interior, Part 10--General Provisions.

50 CFR 10.13– Code of Federal Regulations. Title 50--Wildlife and Fisheries, Chapter I--United States Fish and Wildlife Service, Department of the Interior, Part 10--General Provisions.

50 CFR 22.3 – Code of Federal Regulations. Title 50--Wildlife and Fisheries, Chapter I--United States Fish and Wildlife Service, Department of the Interior, Part 22—Eagle Permits.

50 CFR 22.25– Code of Federal Regulations. Title 50--Wildlife and Fisheries, Chapter I--United States Fish and Wildlife Service, Department of the Interior, Part 22—Eagle Permits.

66 FR 3853 - Presidential Documents. Executive Order 13186 of January 10, 2001. Responsibilities of Federal Agencies To Protect Migratory Birds. Federal Register, January 17, 2001.

72 FR 31132 - Protection of Eagles; Definition of "Disturb". Final Rule. Federal Register, June 5, 2007.

74 FR 46836 - Eagle Permits; Take Necessary To Protect Interests in Particular Localities. Final Rule. Federal Register, September 11, 2009.

U.S. Fish and Wildlife Service. 2003. Migratory Bird Permit Memorandum, MBMP-2, Nest Destruction (Directors Memorandum April 15, 2003), Washington, D.C.

Enclosure

U.S. Fish and Wildlife Service. 2008. Birds of Conservation Concern 2008. United States Department of Interior, Fish and Wildlife Service, Division of Migratory Bird Management, Arlington, Virginia. 85 pp.