



United States Department of the Interior

FISH AND WILDLIFE SERVICE

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



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In Reply Refer To:
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Memorandum

To: Field Supervisor, Bureau of Land Management, Buffalo Field Office,
Buffalo, Wyoming

From: Field Supervisor, U.S. Fish and Wildlife Service, Wyoming Field Office,
Cheyenne, Wyoming

Subject: Comments on Yates Request for Modification of Lease Stipulations and Lancer
Deferred Wells

This memorandum is in response to a letter dated September 7, 2012, from Mr. Bill Ostheimer of your staff requesting comments regarding Yates Petroleum Corporation's (Yates) request to replace a No Surface Occupancy (NSO) lease stipulation attached to Federal oil & gas lease WYW-153062 with either a Timing Limitation Stipulation (TLS) or Controlled Surface Stipulation (CSU). The stipulation attached to the lease includes a NSO for all of section 15, T44N, R76W, for the protection of a bald eagle (*Haliaeetus leucocephalus*) communal winter roost site located on the northwest side of North Pumpkin Butte (Figure 1). The Bureau of Land Management, Buffalo Field Office (BLM) has deferred a decision on four proposed coalbed natural gas wells in the Lancer plan of development (POD) (Lancer 1 CS Federal #5, Lancer 1 CS Federal #8, Lancer 1 CS Federal #9, and Lancer 1 CS Federal #10), which are proposed within the boundaries of this NSO.

In your letter, you request the U.S. Fish and Wildlife Service (Service) review potential impacts and provide recommendations for avoidance and minimization of impacts associated with the proposed four coalbed natural gas wells within a NSO created for the protection of a bald eagle winter roost site.

The proposed actions for review are: (1) a request by Yates to replace a NSO lease stipulation attached to Federal oil & gas lease WYW-153062 for the protection of a bald eagle winter roost site with either a TLS or CSU and (2) a decision regarding the four deferred applications for permit (APD) to drill within a NSO created for the protection of a bald eagle winter roost site.

In response to your request, we are providing you with comments in accordance with the Memorandum of Understanding (MOU) implementing Section 365 of the Energy Policy Act of 2005 (Public Law 109-58). The Service provides recommendations for protective measures for

threatened and endangered species in accordance with the Endangered Species Act (Act) of 1973, as amended (16 U.S.C. 1531 et seq.). Protective measures for migratory birds are provided 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 and the Fish and Wildlife Act of 1956, as amended, 70 Stat. 1119, 16 U.S.C. 742a-742j.

Recommendations

Based on the Service's review of the Lancer 1 POD four deferred well locations (Lancer 1 CS Federal #5, Lancer 1 CS Federal #8, Lancer 1 CS Federal #9, and Lancer 1 CS Federal #10), we are providing the following recommendations which should minimize impacts to bald eagles using the North Pumpkin Butte winter roost site:

Lancer 1 CS Federal #5 and Lancer 1 CS Federal #8: Placement of Federal wells and/or access roads within 0.5-mile buffer around the roost, may create a situation where eagles abandon the roost site due to human disturbance associated with activity at the well location and along the access road during the bald eagle winter roost period (November 1 through April 1).

We recommend the Lancer 1 CS Federal #5 and Lancer 1 CS Federal #8 well locations and access roads be relocated outside the 0.5-mile buffer for the North Pumpkin Butte bald eagle winter roost site. If this is not possible, human disturbance associated with construction, operation and/or maintenance at the well pads and access road may result in roost abandonment and possible violations of the MBTA and/or BGEPA.

Lancer CS Federal #9 and Lancer CS Federal #10: Both of these well locations are outside of the Service's 0.5-mile buffer for the North Pumpkin Butte bald eagle winter roost site. The 0.5-mile buffer is the Service's minimum buffer recommendation. Eagles are sensitive to human disturbance near winter roost sites and sensitivity to disturbance may vary between individual eagles based on topography, density of vegetation, and intensity of activities. Modification of protective buffers may be considered where biologically supported and developed in coordination with the Service's Wyoming Ecological Services Field Office.

The current information on bald and golden eagle use of the North Pumpkin Butte winter roost site is limited and is based on a relatively small number of eagle surveys conducted in association with proposed federal projects in the area since 2005, during one or two surveys conducted each year. Because these are aerial surveys, they usually occur on the mildest winter days. The Service recommends winter-long surveys of the North Pumpkin Butte winter roost site to determine the extent of use throughout the winter and to ensure eagles using these sites are afforded adequate protection pursuant to the BGEPA.

Specific Comments

On August 22, 2012, Mr. Bradley Rogers (Fish and Wildlife Biologist), of my staff, attended a site visit to the four deferred Lancer POD well locations within the bald eagle NSO with Mr. Bill Ostheimer (Supervisory Natural Resource Specialist), Ms. Debby Green (Natural Resource Specialist) and Ms. Darci Stafford (Wildlife Biologist), of the BLM, and Mr. Bud Stewart (Energy Development Biologist) of the Wyoming Game and Fish Department. During the site visit we reviewed the proposed locations for the Lancer CS Federal #5, Lancer CS Federal #8, Lancer CS Federal #9, and Lancer CS Federal #10, their respective access roads and viewed the bald eagle winter roost site from the well locations. The following photographs were taken from the proposed well locations during the onsite.

Lancer 1 CS Federal #5 (SWNW, Section 15, T44N, R76W): The proposed location and access road are in the Section 15 NSO. They are also within the Service's recommended 0.5-mile buffer for the bald eagle winter roost site. The proposed well is approximately 0.32-miles from the December, 29, 2007, roost where 27 bald eagles were observed. It is approximately 0.7-miles from the February 28, 2007, roost where 4 bald eagles and 9 additional eagles of unidentified species (likely golden eagles) were observed. It is 0.36-mile from the December 9, 2008, roost where 13 bald eagles were observed, 0.36-mile from the December 16, 2008, roost where 22 bald eagles were observed and 0.40-mile from the February 7, 1985, roost where 7 bald eagles were observed.

Photo 1



Facility: Yates Petroleum Corporation Lancer 1 CS Federal #5

Location: SWNW, Section 15, T44N, R76W, Campbell County, Wyoming

Photographer: Bradley Rogers, Fish and Wildlife Biologist, U.S. Fish and Wildlife Service

Camera: Kodak DX7630 **Digital image:** 100_0922_2.jpg

Description: Photo from proposed Lancer 1 CS Federal #5 well location looking northeast with direct line-of-sight of bald and golden eagle winter roost sites.

Lancer 1 CS Federal #5 (SWNW, Section 15, T44N, R76W) continued:

Photo 2



Facility: Yates Petroleum Corporation Lancer 1 CS Federal #5

Location: SWNW, Section 15, T44N, R76W, Campbell County, Wyoming

Photographer: Bradley Rogers, Fish and Wildlife Biologist, U.S. Fish and Wildlife Service

Camera: Kodak DX7630 **Digital image:** 100_0923_2.jpg

Description: Photo from proposed Lancer 1 CS Federal #5 well location looking east with direct line-of-sight of bald and golden eagle winter roost sites.

Lancer 1 CS Federal #8 (NESW, Section 15, T44N, R76W): The proposed location and access road are in the Section 15 NSO. They are also within the Service's recommended 0.5-mile buffer for the bald eagle winter roost site. The proposed well is approximately 0.31-miles from the December, 29, 2007, roost where 27 bald eagles were observed. It is 0.23-mile from the December 9, 2008, roost where 13 bald eagles were observed, 0.23 from the December 16, 2008, roost where 22 bald eagles were observed and 0.27-mile from the February 7, 1985, roost where 7 bald eagles were observed.

Photo 3



Facility: Yates Petroleum Corporation Lancer 1 CS Federal #8

Location: NESW, Section 15, T44N, R76W, Campbell County, Wyoming

Photographer: Bradley Rogers, Fish and Wildlife Biologist, U.S. Fish and Wildlife Service

Camera: Kodak DX7630 **Digital image:** 100_0927_2.jpg

Description: Photo from proposed Lancer 1 CS Federal #8 well location looking east with the bald eagle winter roost 0.23 mile from well stake, behind hill. Although out of line-of-sight the proposed location is less than 0.25 mile of the December 9, 2008, roost where 13 bald eagles were observed and the December 16, 2008, roost where 22 bald eagles were observed.

Lancer CS Federal #9 (SWSW, Section 15, T44N, R76W): This proposed location is in the Section 15 NSO. This proposed location is outside the Service's recommended 0.5-mile buffer for the bald eagle winter roost.

Photo 4



Facility: Yates Petroleum Corporation Lancer 1 CS Federal #9

Location: SWSW, Section 15, T44N, R76W, Campbell County, Wyoming

Photographer: Bradley Rogers, Fish and Wildlife Biologist, U.S. Fish and Wildlife Service

Camera: Kodak DX7630 **Digital image:** 100_0930_2.jpg

Description: Photo from proposed Lancer 1 CS Federal #9 well location looking northeast with the bald eagle winter roost 0.65-mile from well stake, behind hill.

Lancer CS Federal #10 (SWSE, Section 15, T44N, R76W): This proposed location is in the Section 15 NSO. It is outside the Service's recommended 0.5-mile buffer for the bald eagle winter roost.

Photo 5



Facility: Yates Petroleum Corporation Lancer 1 CS Federal #10

Location: SWSE, Section 15, T44N, R76W, Campbell County, Wyoming

Photographer: Bradley Rogers, Fish and Wildlife Biologist, U.S. Fish and Wildlife Service

Camera: Kodak DX7630 **Digital image:** 100_0929c.jpg

Description: Photo from proposed Lancer 1 CS Federal #10 well location looking northeast with the bald eagle winter roost 0.55 mile from well stake, behind hill in left side of photo.

Project Background

On May 9, 1984, the Service issued a memorandum providing concurrence with the BLM's determination, pursuant to the Act, of "no effect" to bald eagles based on the protections contained in the Buffalo Resource Area's biological assessment and Final Environmental Impact Statement (FEIS) for the 1985 Resource Management Plan (RMP), which included the use of a NSO as part of the protections necessary to avoid and minimize adverse effects to the bald eagle, listed as an endangered species under the Act, at the time.

In 1997, Yates purchased Federal oil and gas lease WYW-153062 with full knowledge that the lease included a NSO stipulation on Section 15, T44N, R76W, for the protection of a bald eagle winter roost site.

In Yates' letter of April 15, 2010, they state, "the Powder River Basin Oil and Gas Project (PRBOGP) EIS and current Buffalo RMP do not provide NSO protection for winter roost sites." It is the Service's understanding that the 1985 RMP remains the current RMP for the Buffalo Field Office. The PRBOGP FEIS and Record of Decision (ROD) amended the 1985 RMP to address oil and gas development in the Powder River Basin. The following Terms and Conditions¹ were included in the December 17, 2002, biological opinion:

T&C9. A year-round disturbance-free buffer zone of 0.5 mile will be established for all bald eagle roost sites. This buffer zone restriction may be adjusted based on site specific information through coordination with and with written concurrence of the Service's Wyoming Field Office.

T&C10. An additional seasonal buffer zone of 0.5 mile will be established for all bald eagle roost sites (November 1 - April 1). This buffer zone will start at the outside boundary of the 0.5 mile year-round disturbance-free buffer zone and extend out an additional 0.5 mile. However, within this seasonal buffer zone less restrictive measures such as remote monitoring of wells and/or restricting well maintenance visitations or human activity critical to project operations to between 9:00 AM and 3:00 PM may be allowed after coordination with the Service's Wyoming Field Office and a demonstration that measures more protective of bald eagles are not reasonable or feasible.

In the Service's March 23, 2007, biological opinion Terms and Conditions 9 and 10 were combined into the following Term and Condition:

T&C4. The Service has combined and clarified the BLM's CM8 and CM9. A year-round disturbance-free buffer zone of at least 0.5 mile shall be established for known active bald eagle nests and winter roosts. Additionally, a 1-mile limited activity zone shall be established for known active nests and roosts (February 1 to August 15 and November 1

¹ In order to be exempt from the prohibitions of section 9 of the Act, the Bureau must comply with the following terms and conditions (T&C), which implement the reasonable and prudent measures described above and outline required reporting/monitoring requirements. These terms and conditions are nondiscretionary.

to April 1, respectively). In coordination with the Service and based on site-specific actions and/or site specific biology, the BLM may modify the distance and/or timing measures to allow certain activities.

Yates' letter states, "Through the March 23, 2007, biological opinion for the Powder River Basin Oil and Gas Project (PRBOGP), issued by the Service, the bald eagle received additional protection measures so that the Service could concur with a may affect/not likely to adversely affect determination by the Bureau (BLM)."

As a point of clarification the Service's 2007 section 7 consultation contained an informal consultation (page 3), including conservation measures which would allow the Service to concur with a may affect, not likely to adversely affect determination by the BLM. The 2007 section 7 consultation included a formal consultation (page 8), which contained the Service's biological opinion, incidental take statement and terms and conditions, which provided the Service the ability to concur with may affect, likely to adversely affect determinations by the BLM. These two options were provided as a means to further streamline energy consultations associated with the PRBOGP.

Yates contends that the biological opinion is no longer valid. Although the bald eagle no longer requires protection under the Act, the requirements for areas free from human disturbance for nesting, foraging and winter roosting remain essential to their continued recovery. Habitat loss and human disturbance continue to be the primary threats to the bald eagle's continued recovery. Because bald eagles are particularly sensitive to human disturbance at their nests and communal roosts, protective buffers are needed around these areas. For these reasons, the Service recommends land management agencies continue to implement the conservation measures in their planning documents that allowed for the recovery and delisting of the bald eagle. In addition, the protections provided to the bald eagle under the MBTA and the BGEPA remain in place, and include a prohibition on disturbance.

Yates' letter identifies item number 3 in the Service's Wyoming-specific guidelines for bald eagles as part of their rationale for removal or modification of the NOS stipulation. However, all three of the following items in the Service's Wyoming-specific guidelines should be considered when planning the location of proposed infrastructure and facilities:

1. Conduct surveys within 0.5 mile of proposed activity for eagle nests and/or roosts during the appropriate time of year. Contact the Service's Ecological Services Wyoming Field Office if your project will occur within 0.5 mile of a known nest or roost to determine the potential impact of your activity to nesting and/or roosting bald eagles.
3. Avoid disturbance within 0.5 mile of communal winter roosts from November 1 to April 1.
4. Avoid construction of above-ground structures within 0.5 mile of bald eagle nest sites and communal winter roost sites. Below ground structures (e.g., pipelines, buried power lines, fiber optic lines) may be sited closer as long as construction occurs outside of the active nesting or roosting season and will not result in the loss of alternate nest sites or roost trees.

The guidelines are further caveated with the following guidance:

Sensitivity to disturbance by roosting and nesting bald eagles may vary between individual eagles based on topography, density of vegetation, and intensity of activities. Modification of protective buffer recommendations may be considered where biologically supported and developed in coordination with the Service's Wyoming Ecological Services Field Office.

We appreciate your coordination with our office. If you have any questions regarding this memorandum, the status of the golden eagles in Wyoming, BGEPA permits, or if you require technical assistance regarding the Act, MBTA or BGEPA, please contact Bradley Rogers at (307) 684-1046.

Attachment (1)

cc: BLM, Supervisory Natural Resources Specialist, Buffalo, WY (B. Ostheimer)
BLM-State Office, Wildlife Biologist (D. Saville)
USFWS, Special Agent, Cody, WY (D. Rippetto)
WGFD, Statewide Habitat Protection Coordinator, Cheyenne, WY (M. Flanderka)
WGFD, Non-Game Coordinator, Lander, WY (B. Oakleaf)

Bald Eagle (*Haliaeetus leucocephalus*)

Wyoming Distribution (Nesting) by County: Albany, Big Horn, Campbell, Carbon, Converse, Fremont, Goshen, Hot Springs, Johnson, Laramie, Lincoln, Natrona, Niobrara, Park, Platte, Sheridan, Sublette, Sweetwater, Teton, Uinta, Washakie, Weston

The U.S. Fish and Wildlife Service (Service) removed the bald eagle, except in portions of Arizona, from the list of threatened and endangered species under the Endangered Species Act (16 U.S.C 1531 et seq.). However, the protections provided to the bald eagle under the Migratory Bird Treaty Act, 16 U.S.C. 703 (MBTA), and the Bald and Golden Eagle Protection Act, 16 U.S.C. 668 (Eagle Act) remain in place. The term “disturb” under the Eagle Act 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” (72 FR 31332).

Adult eagles establish life-long pair bonds and build large nests in the tops of large trees near rivers, lakes, marshes, or other wetland areas. During winter, bald eagles gather along open water to forage and night roost in large mature trees, usually in secluded locations that offer protection from harsh weather. Bald eagles often return to use the same nest and winter roost year after year.

Habitat loss and human disturbance remain as potential threats to the bald eagle's continued recovery. Because bald eagles are particularly sensitive to human disturbance at their nests and communal roosts, protective buffers are needed around these areas.

The Service has developed National Bald Eagle Management Guidelines (accessible at: <http://www.fws.gov/pacific/eagle/NationalBaldEagleManagementGuidelines.pdf>) to advise land managers when and under what circumstances the protective provisions of the MBTA and Eagle Act may apply to their activities. Please note that in more open habitats typical to Wyoming, in addition to the general recommendation in the national guidelines, additional conservation recommendations may also be necessary (our Wyoming specific recommendations are described below).

For infrastructure (or facilities) that have increased potential to cause eagle mortality (e.g., wind turbines, guyed towers, airports, waste water disposal facilities, transmission lines, etc.), we recommend locating the infrastructure outside of areas with high levels of eagle use (i.e., away from areas used for nesting, foraging, roosting or migrating) and outside of eagle travel corridors between such high-use areas. If the wildlife survey data available for the proposed project area and vicinity do not provide the detail needed to determine normal bird habitat use and movements, we recommend collecting that information prior to determining locations for infrastructure with increased potential for causing eagle mortalities. We also recommend contacting the Service’s Wyoming Ecological Services office for project specific recommendations.

Attachment 1

When the proposed infrastructure and facilities do not pose an increased risk of direct mortality, we recommend using the following general guidelines for work within Wyoming in order to avoid disturbing eagles and adequately protecting their habitat:

1. Conduct surveys within 0.5 mile of proposed activity for eagle nests and/or roosts during the appropriate time of year. Contact the Service's Ecological Services Wyoming Field Office if your project will occur within 0.5 mile of a known nest or roost to determine the potential impact of your activity to nesting and/or roosting bald eagles.
2. Avoid project-related disturbance and habitat alteration within 0.5-mile of bald eagle nests from the period of early courtship to post-fledging of chicks (January 1 through August 15).
3. Avoid disturbance within 0.5 mile of communal winter roosts from November 1 to April 1.
4. Avoid construction of above-ground structures within 0.5-mile of bald eagle nest sites and communal winter roost sites. Below ground structures (e.g., pipelines, buried power lines, fiber optic lines) may be sited closer as long as construction occurs outside of the active nesting or roosting season and will not result in the loss of alternate nest sites or roost trees.

A protective buffer for foraging areas (i.e., a linear length of river) will also be needed if the proposed activity may preclude use of foraging areas (e.g., extensive human activities on or near the water).

In Wyoming, the nesting season occurs from February 1 to August 15 and bald eagle nest buffers should receive full implementation during this time period. For some activities (construction, seismic exploration, blasting, and timber harvest), a larger buffer around the nest may be necessary.

Sensitivity to disturbance by roosting and nesting bald eagles may vary between individual eagles based on topography, density of vegetation, and intensity of activities. Modification of protective buffer recommendations may be considered where biologically supported and developed in coordination with the Service's Wyoming Ecological Services Field Office.

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.