



Converse County Oil and Gas Project
BLM Casper Field Office
Attn: Mike Robinson, Project Manager
2987 Prospector Drive
Casper, WY 82604
blm_wy_casper_wymail@blm.gov

July 25, 2019

Re: Comments on the Supplemental Draft Environmental Impact Statement for Converse County Oil and Gas Project

Dear Mr. Robinson,

Please accept these comments from the Wyoming Outdoor Council and the National Audubon Society regarding the Bureau of Land Management's (BLM) Supplemental Draft Environmental Impact Statement (SDEIS) for the Converse County Oil and Gas Project DOI-BLM-WY-P060-2014-0135-EIS.

Founded in 1967, the Wyoming Outdoor Council is the state's oldest and largest independent conservation organization. Its mission is to protect Wyoming's environment and quality of life for present and future generations.

The National Audubon Society protects birds and the places they need, today and tomorrow. A nonprofit conservation organization since 1905, Audubon works throughout the Americas using science, advocacy, education, and on-the-ground conservation. Audubon Rockies is a regional office of National Audubon Society, working in Wyoming.

The BLM's SDEIS considers several options that would provide operators relief from existing Timing Limitation Stipulations (TLS) through a Land Use Plan (LUP) amendment to the Casper Resource Management Plan (RMP), including existing surface disturbance buffers for non-eagle raptor nests. SDEIS at ES 1-4. These existing buffers prohibit surface disturbance or occupancy within 0.5 miles of raptor nests, except for nine species (red-tailed hawk, Swainson's hawk, American kestrel, osprey, great-horned owl, long-eared owl, northern saw-whet owl, common barn owl, and western screech owl), for which a 0.25 mile buffer is currently required. *Id.* at 4-3. Survey data revealed 481 non-eagle raptor nests in the project area as of 2018. *Id.* at 3-6.

The proposed action, Alternative B, would allow 5000 new oil and gas wells to be drilled on 1,500 multi-well pads over 10 years within the project area. BLM's preferred LUP amendment option, Option 4, would allow operators to request relief from TLS for non-eagle raptor nests by following a "Non-eagle Raptor Timing Stipulation Relief Process Framework" and adhering to a "BLM Authorized Officer Decision Matrix." *Id.* at 2-7 (BLM provides an example Framework and the Decision Matrix at SDEIS Appendix S2).

In its Impact Comparison across alternatives, BLM asserts Option 4 will result in negligible to minor impacts to raptors, defining minor impacts as measurable or perceptible and local, but not affecting the overall viability of the population or subpopulation. Further, BLM claims "[e]ffects would occur outside of critical periods such as breeding or nesting." *Id.* at 2-10.

In its discussion of environmental consequences, BLM notes Alternative B would cause increased impacts to migratory bird habitats, habitat fragmentation, and direct mortality of birds, and potentially increase indirect impacts beyond those described in Alternative A (the no action alternative). *Id.* at 4-2, 3. Alternative B would allow year round drilling and development "to the extent possible" and would allow operators to construct lined reserve pits for flowback water that could adversely impact migratory birds. *Id.*

The preferred LUP amendment option, Option 4, could lead to "long-term habitat loss, degradation, and fragmentation as a result of Project operation" affecting all species within the habitat. *Id.* at 4-7. Option 4 would require applicants to coordinate with BLM and FWS to develop a raptor management plan to avoid or reduce impacts to "minimal levels" as a condition of TLS relief. *Id.* at 4-8. Another option, Option 5, would require applicants to work with BLM and FWS to develop a Migratory Bird Conservation Plan (MBCP – outlined in SDEIS Appendix S3 and summarized at SDEIS 2.4.9). An MBCP would establish and evaluate conservation measures for raptors, require monitoring, and establish adaptive management protocols. BLM maintains that Options 4 and 5 would result in the same degree of impacts to raptors. *Id.*

Several of the species at risk of increased adverse impacts have been identified by federal and state wildlife agencies as species of conservation concern. The US Fish and Wildlife Service (FWS) has identified the burrowing owl, ferruginous hawk, peregrine falcon, prairie falcon, short-eared owl, and Swainson's hawk as Birds of Conservation Concern (BCC). Wyoming Game and Fish Department (WGFD) has identified the American kestrel, burrowing owl, ferruginous hawk, flammulated owl, great gray owl, merlin, northern goshawk, peregrine falcon, short-eared owl, and Swainson's hawk as Species of Greatest Conservation Need (SGCN). *See* Converse County Oil and Gas Draft EIS (2018) at Table 3.18-5. All of these species potentially occur in the project area and could be adversely impacted by the removal of stipulations.

The Outdoor Council and Audubon oppose the BLM's preferred LUP amendment option, Option 4, because of the increased adverse impacts to raptors it would allow, on the grounds that BLM's SDEIS is arbitrary and capricious, does not consider the best available science, and does not evaluate a reasonable range of alternatives. BLM should retain the existing stipulations for non-eagle raptors, or at a minimum require a detailed and rigorous MBCP established in consultation with FWS and reviewed by WGFD prior to granting applicants relief from any stipulations, as discussed in more detail below.

I. The BLM's decision to allow operators relief from TLS is arbitrary and capricious, and is not based on the best available science

The BLM's decision to allow conditional relief from TLS is arbitrary and capricious. BLM and FWS evaluated risks to raptors in the 2007 Casper RMP FEIS and, based on the science available at that time, determined that TLS were necessary; the TLS were not weakened through subsequent amendments and maintenance actions. *See* FEIS for the Casper FO (2007) and the Casper Final Biological Assessment (BA) (2007). Since then, significant new data has emerged on the importance of adequate regulatory mechanisms to conserve migratory bird species. *See, e.g.,* Amano, Tatsuya et. al, "Successful conservation of global waterbird populations depends on effective governance," *Nature* vol. 553, 199–202 (Jan. 11, 2018) [hereinafter "Amano"] (attached as Exhibit 1).¹ These data reinforce the need for strong protections amid widespread and severe global declines in biodiversity. Yet in this SDEIS, the BLM weakens protections for migratory birds by allowing operators relief from the very stipulations they previously determined were necessary and is completing this SDEIS to complete the necessary RMP amendments. However, BLM has still failed to justify selecting an alternative that would remove these stipulations and the ensuing harm to birds, or to provide a detailed plan that could be relied upon to address potential harm. As a result, BLM's decision to allow relief from TLS is arbitrary and capricious.

Section 706(2)(A) of the Administrative Procedures Act (APA) instructs reviewing courts to set aside agency actions that are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." The US Supreme Court elaborated on this standard in *Motor Vehicles*, holding that agency action is arbitrary and capricious where the agency has not taken a hard look at the relevant data and articulated a satisfactory explanation for its action. Agency actions are arbitrary and capricious when the agency has "relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." Courts will uphold reasoned explanations but will not supply an explanation the agency itself has not given. *Motor Vehicles Manufacturers Ass'n v. State Farm*, 463 U.S. 29 (1983).

In the BA for the Casper RMP, FWS recommended a number of proposed protections for fish and wildlife resources, including TLS and monitoring best management practices (BMP) for raptors. Casper BA at 7-14, 15. FWS determined that buffer zones around raptor nests of either 0.25 or 0.5 miles, varying by species, were necessary to protect raptors. *Id.* at 7-70. In developing TLS for raptor nests, BLM considered FWS management guidelines for raptors and Avian protection plan guidelines, as well as *The Wyoming Partners in Flight Wyoming Bird Conservation Plan 2.0*. Casper FEIS at 3-63. Based on these documents, BLM determined that "[m]anagement challenges for raptors generally are directed at activities around nesting habitat, concentration sites (e.g., winter roosts), and foraging areas." *Id.* Further, the Casper FEIS explained that

¹ Available online at <https://www.nature.com/articles/nature25139>

Management actions focus on maintaining the presence of special status raptor species and the habitats upon which they depend in the planning area. Seasonal and spatial protective stipulations are currently applied around identified nest sites and communal roost areas to afford raptors a level of protection from human disturbance and industrial activities.

Id. at 3-77.

The FEIS considers the sensitivity of specific raptor species present in the planning area to human disturbance at 3-78. Later, it considers potential adverse impacts to raptors from development, noting

Human activities, such as OHV use, recreation, and noise from equipment associated with development and surface-disturbing activities, impact some wildlife species. These activities are considered to be *particularly detrimental* to nesting and lekking grouse, *nesting raptors*, and wintering big game. Disturbance impacts range from short-term displacement and shifts in activities to long-term abandonment of home range (Yarmaloy et al. 1988; Miller et al. 1998; Connelly et al. 2000).

Id. at 4-98 (emphasis added).

TLS are an important tool to avoid and minimize these impacts. As the BLM explains

BLM (1992c) identifies declining habitat quantity and quality as the major causes of decreases in raptor populations. In the planning area, disturbance impacts to raptors are minimized by buffer zones around raptor nests.

Id. at 4-110.

The BLM clearly considered TLS necessary for raptor conservation in the Casper RMP, as protections for raptors were considered across all alternatives and ultimately included as required TLS and BMPs. Industry has successfully operated under these protections for over a decade.

Yet now, the BLM proposes to remove these protections without justification. The best available and generally accepted science indicates that stronger protections are required to conserve raptor species. The Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Services (IPBES) recently released a Global Assessment Report on Biodiversity and Ecosystem Services detailing the crisis in global ecosystem and resulting impacts on biodiversity.² The report found up to 1 million species threatened with extinction, including 23% of birds whose habitats have already been impacted by climate change; but also noting that these same species can and do benefit from conservation measures. As discussed in a recent article by Tatsuya Amano, et al., who conducted a significant international study of wetland-drilling birds, the key to stemming species loss is consistent enforcement of regulatory protections. Strong governance correlated closely with biodiversity, and ineffective governance, which included weakly enforced environmental legislation and low levels of investment in conservation, lead to

² Available at <https://www.ipbes.net/news/Media-Release-Global-Assessment>

habitat loss and degradation. For BLM to abandon enforcing necessary regulatory measures will have similar effects. Notably, the FWS is clear that for raptors, the most important protections are seasonal and spatial buffers, stating: “Because many raptors are particularly sensitive to disturbance during the breeding season, we recommend implementing spatial and seasonal buffer zones to protect individual nest sites/territories...” FWS, Wyoming Ecological Services Office, “Raptors in Wyoming.”³

While BLM has evaluated the benefits of year-round drilling for the Operator Group and for certain other types of impacts⁴, the agency has not sufficiently addressed the impacts to raptors. Removing TLS contradicts accepted science and is not justified anywhere in BLM’s analysis.

Further, BLM has not addressed how proposed Option 4 would sufficiently protect raptors. In fact, while purporting to set out criteria for limiting when TLS could be waived, Option 4 still includes an option for the BLM to approve waivers that do not meet its criteria, which states:

If, at any point a situation associated with the relief from timing limitation stipulations request process arises that is not captured by this decision matrix, then the operator, BLM, and USFWS will coordinate and proceed accordingly.

SDEIS at S2-5.

This language highlights how unjustified, and arbitrary and capricious, BLM’s approach to removing TLS is in this SDEIS. BLM’s preferred alternative does not comply with NEPA and cannot be adopted. We note that Options 2 and 3, proposed by the Operator Group, do not even attempt to condition the removal of the TLS and thus suffer from even more fatal flaws than the preferred alternative. Because the BLM has not justified its removal of these stipulations, and has ignored the best available science on raptor conservation, its actions are arbitrary and capricious in violation of the APA.

II. The BLM has not evaluated a reasonable range of alternatives

The BLM has not evaluated a reasonable range of alternatives in this SDEIS. While the Decision Matrix in BLM’s preferred option establishes parameters to guide TLS relief, and Option 5 considers an MBCP established in consultation with FWS, BLM should have considered an option that incorporates both a Decision Matrix to guide BLM’s Authorized Officer in decisionmaking *and* an MBCP written in consultation with FWS, the agency with superior expertise on migratory bird conservation. Ideally WGFD, Wyoming’s state wildlife agency, would have the opportunity to review and provide input on an MBCP. BLM clearly had the capacity to evaluate such an alternative which, while still resulting in increased risk to migratory birds over the original DEIS, would have established sideboards for BLM’s decisions

³ Available at <https://www.fws.gov/wyominges/Species/Raptors.php>.

⁴ See, e.g., Development Scenarios evaluation, https://eplanning.blm.gov/epl-front-office/projects/nepa/66551/105289/139023/Converse_County_Project_Development_Scenarios.pdf.

on TLS relief and ensured robust FWS input on conservation measures, monitoring, and adaptive management protocols.

The National Environmental Policy Act (NEPA) generally requires the BLM to conduct an alternatives analysis for “any proposal which involves unresolved conflicts concerning alternative uses of available resources.” 42 U.S.C. § 4332(2)(E). The regulations further obligate BLM to “rigorously explore and objectively evaluate all reasonable alternatives” including those “reasonable alternatives not within the jurisdiction of the lead agency,” so as to “provid[e] a clear basis for choice among options.” 40 C.F.R. § 1502.14. The range of alternatives is the heart of a NEPA document because “[w]ithout substantive, comparative environmental impact information regarding other possible courses of action, the ability of [a NEPA analysis] to inform agency deliberation and facilitate public involvement would be greatly degraded.” *New Mexico ex rel. Richardson v. BLM*, 565 F.3d 683, 708 (10th Cir. 2009). That analysis must cover a reasonable range of alternatives so that an agency can make an informed choice from the spectrum of reasonable options.

Here, BLM did not consider a reasonable range of alternatives because the agency did not evaluate an option including both a Decision Matrix and an MBCP, and did not “rigorously explore and objectively evaluate” the MBCP option in its DEIS in order to make an informed decision and facilitate public understanding.

In WGFD’s public comments on the original Converse County DEIS, the state wildlife agency emphasized the importance of an MBCP and reiterated its desire to review such a plan before its implementation. WGFD considered an MBCP to be so important that the agency suggested

... the plan should be incorporated as a mitigation measure to reduce impacts to migratory bird species, particularly if year-round drilling will be a component of the preferred alternative.

WGFD Comments on Converse County Oil and Gas Project EIS, 7 (March 12, 2018).

WGFD’s comments raised serious concerns, based on recent research on avian species, regarding potential long-term impacts on species fitness from chronic noise and light pollution in the project area. *See, e.g. Kliet N.J et al, Chronic anthropogenic noise disrupts glucocorticoid signaling and has multiple effects on fitness in an avian community, PNAS Early Edition* 1-10 (2018). WGFD recommended additional mitigation measures to address noise and light pollution. *Id.* From our discussions with WGFD about their forthcoming comments on this SDEIS, we understand that the department continues to have grave concerns about adverse impacts to raptors. Specifically, WGFD is concerned that the BLM’s raptor protection plan lacks clarity, that no technical team has been established to monitor and report publically on raptors’ response to energy development, that coordination between BLM and WGFD has not been spelled out, that nebulous concepts in BLM’s options remain undefined, and that the preferred action risks impacts to ferruginous hawks, which have been identified by both WGFD and FWS as a species of conservation concern.

While BLM's Decision Matrix included in Option 4 is preferable to stripping TLS with no sideboards at all, as contemplated in Options 2 and 3, Option 4 ignores valuable input and oversight from both FWS and WGFD, the very agencies with authority and expertise to appropriately manage wildlife.

An MBCP would have established a data-based approach to development to ensure maximum avoidance and minimization of impacts to non-eagle raptors, applying best available science to implement guidelines and evaluate their efficacy. It would have contained protocols developed for the specific geology, terrain, and nest locations, developed by companies in consultation with FWS. It would have established avoidance and minimization measures that would have helped mitigate the additional risk posed to raptors from flexibility on TLS, and would have required monitoring, annual reporting, and clearly defined adaptive management. Under the BLM's preferred option, operators would benefit from TLS relief, but raptors and the public would not. An MBCP could require a state-of-the-art monitoring program to improve the state of raptor science going forward and improve future decision making. The BLM should require an MBCP that contributes to raptor science and conservation.

It is unclear why BLM neglected to implement a proactive, strategic framework like the MBCP, and instead decided to rely on a less thorough, less collaborative approach. We understand that an MBCP was nearly complete at the time of the SDEIS' release, the product of two years of research, but that BLM chose not to include a draft of the MBCP. The BLM describes the MBCP in a few short paragraphs included below and provides a generic outline at Appendix 3. However, BLM's SDEIS does not "rigorously explore and objectively evaluate" the MBCP option as NEPA requires.

The SDEIS' description of Option 5 states that an MBCP

Would describe conservation measures to protect nesting raptors and evaluate the effectiveness of the measures through monitoring. Based on the continual evaluation of the conservation measures, the MBCP would be adjusted using an adaptive management approach. Monitoring surveys and evaluations regarding the effectiveness of the conservation measures would be implemented as part of the subsequent site-specific analysis.

SDEIS at 4-8.

The outline provided at Appendix S3 describes the MBCP as

... a life-of-project framework for identifying and implementing actions to conserve migratory birds during oil and gas project planning, construction, operation, maintenance, and decommissioning. It is the responsibility of project developers to effectively assess project related impacts to migratory birds and their habitats, and to work to avoid and minimize those impacts.

A MBCP should be updated regularly as new information, including monitoring of project impacts and technical advancements, becomes available. A MBCP is a strategy

for assessing impacts, avoiding/minimizing impacts, guiding current actions, and planning future impact assessments and actions to conserve migratory birds and their habitats. It provides reference to project history and previous impact assessments and actions. A MBCP contains the studies and reasoning leading to project specific design. Oil and gas projects currently in operation which have not been planned, developed, or operated following a MBCP framework, may be able to adopt the framework by providing assessments of impacts to birds with post-construction assessments and adaptive management studies working closely with the U.S. Fish and Wildlife Service.

SDEIS at Appendix S3.

While the aboved referenced SDEIS sections describe the MBCP, nothing in the SDEIS “explores” or “evaluates” the MBCP option. Rather, the BLM simply declares, unconvincingly, that the effects of LUP amendment Option 5 would be the same as those of Option 4. SDEIS at 4-8. BLM makes no effort in the SDEIS to justify this presumption.

The BLM does well to include a Framework and Decision Matrix for relief from stipulations in Option 4, but these are insufficient without an MBCP. For instance, under the Framework a site specific Raptor Protection Plan (RPP) “would suffice as an adequate set of operator committed conservation measures for raptors,” but is not required. SDEIS at S2-1. A site specific RPP “could be” developed in consultation with FWS to meet the requirements for TLS relief, but again is not required. A “Rigorous Monitoring Strategy would be an appropriate process for ensuring species conservation,” but that strategy is not required, nor defined, and “an operator may choose to display a different method of monitoring and adjustment.” *Id.*

An MBCP, by its description above, would have given teeth to conservation measures designed to mitigate the impacts of TLS relief, and ensured appropriate FWS input. The collaboration between BLM and FWS would have helped implement the two agencies’ 2010 MOU on migratory bird conservation, and an option providing for WGFD review of draft MBCP’s would have ensured the project comports with state wildlife management goals and strategies.

Further, a complete MBCP is required to complete a meaningful comparison of Option 4 and Option 5. BLM has taken the position that, in comparison to Options 2 and 3, which would have meaningful impacts on raptors, both Options 4 and 5 would have negligible to minor impacts, based on how they would mitigate potential impacts. NEPA requires that BLM discuss mitigation measures in an EIS. 40 C.F.R. §§ 1502.14, 1502.16. In general, in order to show that mitigation, such as those in Options 4 and 5, will reduce environmental impacts, BLM must discuss the mitigation measures “in sufficient detail to ensure that environmental consequences have been fairly evaluated.” *Communities, Inc. v. Busey*, 956 F.2d 619, 626 (6th Cir. 1992). Simply identifying mitigation measures, without analyzing the effectiveness of the measures, violates NEPA. Agencies must “analyze the mitigation measures in detail [and] explain how effective the measures would be . . . A mere listing of mitigation measures is insufficient to qualify as the reasoned discussion required by NEPA.” *Nw. Indian Cemetery Protective Ass’n v. Peterson*, 764 F.2d 581, 588 (9th Cir. 1985), *rev’d on other grounds*, 485 U.S. 439 (1988). In the SDEIS, BLM has not presented meaningful analysis of Option 5 and this also compromises the

evaluation of Option 5 as an alternative in its current form, and has also prevented an evaluation of an alternative that would have combined the mitigation measures in Options 4 and 5.

The increased threats to raptors from this SDEIS are particularly concerning given DOI's recent reinterpretation of the Migratory Bird Treaty Act (MBTA) in M-37050 (Dec. 22, 2017). The original DEIS for the Converse County Project cites the MBTA as governing the responsibilities of federal agencies in managing migratory bird conservation and protection. Converse County DEIS at 3.18-18. Prior to the release of M-37050, the MBTA was understood to prohibit both intentional and incidental take of migratory birds. *See Solicitor's Opinion M-37041 – Incidental Take Prohibited Under the Migratory Bird Treaty Act* (Jan. 10, 2017). Less than a month after M-37041 was issued, the Acting Secretary of the Interior suspended that opinion pending review. Opinion M-37050 permanently withdrew and replaced M-37041 in December of 2017, revising Interior's interpretation of the MBTA to determine the law does not prohibit incidental take.

This reinterpretation, which is currently being challenged in court, purportedly stripped FWS of its authority to regulate incidental take of migratory birds⁵, so that the agency can now only recommend avoidance, minimization, and mitigation measures to reduce the adverse impacts of incidental take. An MBCP is the appropriate tool to make those recommendations in the absence of regulatory authority.

In conclusion, the BLM's preferred alternative is arbitrary and capricious because the BLM has offered no justification for dismantling longstanding, well-documented protections for raptors, and has not considered the best available science. Further, the BLM did not analyze a reasonable range of alternatives as NEPA requires, because it did not consider an option that provides both a Decision Framework and an MBCP, did not consider consultation with or review by Wyoming's state wildlife agency, and did not rigorously explore or evaluate the MBCP, and instead arbitrarily concluded that it would result in the same impacts as the preferred option.

Sincerely,



John Rader
Conservation Advocate
Wyoming Outdoor Council
262 Lincoln Street
Lander, WY
John@wyomingoutdoorcouncil.org



Nada Culver
Vice President, Public Lands
National Audubon Society
Denver, CO
Nada.culver@audubon.org

⁵ We do not concede that this new interpretation is lawful.

