

MIKE CHIROPOLOS
ATTORNEY & COUNSELOR, CHIROPOLOS LAW
3325 MARTIN DRIVE * BOULDER CO 80302
303-956-0595 -- mikechiropoulos@gmail.com

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Sent Via Email:

Jeff Robbins
Acting COGG Director
jeff.robbs@state.co.us

RE: Request for Reconsideration of “Dreamweaver” APD and Location Assessment Form 2A Document No. 401614921 and Form 2 Document No. 401614935 Crestone Peak Resources Operating LLC Sensitive Due to Failure to Consider Key Wildlife Habitat in Original COGCC Review

Dear Director Robbins:

I represent Front Range Nesting Bald Eagle Studies (FRNBES), which is a Colorado-based non-profit conservation and scientific research organization. FRNBES is dedicated to providing scientific information that supports protection of bald eagle populations and habitat across the northern Front Range of Colorado. FRNBES engages in scientific monitoring and data collection and advocates for eagle conservation through legislative, regulatory, and legal efforts.

For the reasons explained below, FRNBES hereby requests that the Colorado Oil & Gas Conservation Commission (COGCC) immediately suspend and reconsider its approval of the Dreamweaver project to ensure that all relevant factors have been considered before any ground-disturbing activities commence that could harm federally protected bald eagles and their habitat and potentially result in violations of the Bald and Golden Eagle Protection Act (BGEPA) and its implementing regulations.

BACKGROUND

This request for reconsideration concerns a non-conventional multi-well pad location known as Dreamweaver. The Form 2A Oil and Gas Location Assessment is COGCC Document No. 401614921 and the Form 2 Application for Permit to Drill is Document No. 401614935. *See* Exhibits 9 and 10. Crestone Peak Resources Operating LLC (Crestone) is the applicant and operator of this project. The general project location is southwest Weld County near Middle Boulder Creek.

The “Construction” section of the Form 2A states that 18.46 acres would be disturbed during construction, and contemplates a 4.07 acre disturbed area after interim reclamation. *See* Exhibit 9 at page 2. “Other facilities” including 22 new well flowlines are enumerated at page 2 of the Form 2A.

It appears that the COGCC approved this application on or around September 21, 2018. To the best of our knowledge, no on-the-ground work has been conducted to date. The COGCC approvals were issued without any disclosure or determination by either the operator or the COGCC that the proposed location is within 1/3 mile of an active bald eagle winter roost site. Roost sites of this kind play a biologically significant role in numerous life stages of the bald eagle, and thus are critically important in terms of their conservation value to preservation of the bald eagle.

In December 2017, Dana Bove—i.e., a representative of FRNBES—shared digital maps with Mike Sherman at Colorado Parks and Wildlife (CPW) and Greg Deranleau of COGCC, which identified the location of the Middle Boulder Creek Winter Roost. Thus, both CPW and COGCC were aware of the Middle Boulder Creek Winter Roost location in close proximity to the proposed Dreamweaver site in advance of Crestone’s submission of Forms 2 and 2A to the COGCC for approval. Indeed, based on several email confirmations, it is FRNBES’s understanding that CPW’s database on eagle habitat was updated to include this information, including so that COGCC would be aware of this roost site in evaluating future applications.

After learning of the COGCC’s Form 2 and 2A Dreamweaver approvals, FRNBES communicated with COGCC and CPW to inform both entities of serious concerns regarding the omission of consideration of the Middle Boulder Creek Winter Roost and the need for analysis of this project under, at minimum, the Oil and Gas Act, the Colorado Habitat Stewardship Act, the 1200 Series in the COGCC Rules titled Protection of Wildlife Resources, applicable CPW guidance and policies, other state laws, and federal laws administered by the U.S. Fish and Wildlife Service, including BGEPA.¹

On January 30, 2019, FRNBES communicated via email with COGCC Environmental Manager Greg Deranleau and received a prompt response on January 31, 2019 stating that at this point COGCC is working with the operator to determine what voluntary measures Crestone will take to avoid or minimize impacts to bald eagles and other sensitive species. However, voluntary measures, especially measures that have conditions that are significantly less stringent than those contained in the science-based CPW 2008 guidelines recommending certain seasonal buffers around active bald eagle nests and roosts, cannot be relied on to avoid disturbance of federally protected eagles. Furthermore, any voluntary measures adopted by Crestone would not be enforceable, they would lack certainty, and would fail to satisfy the legal protections summarized below. Avoidance would require site relocation, but alternative project locations complying with CPW’s science-based raptor buffer recommendations have not been considered by the COGCC in any formal manner.

BALD EAGLE SURVEY DATA AND SCIENTIFIC CONCLUSIONS

Bald eagles are highly social and non-breeding individuals that utilize communal roosts forming around important feeding sites. Communal roosts are often strategically located around profitable food sources (Hansen et al. 1980, Keister et al. 1987, Grubb et al. 1989, Wilson and

¹ Our understanding is that informal discussions of the presence of bald eagles at the Middle Boulder Creek Winter Roost and habitat may have occurred between CPW and Crestone.

Gessaman 2003) and may be established and disbanded in response to availability of these resources (Steenhof 1976, Grubb 1984, Keister et al. 1987). Proposed benefits to non-breeding eagles utilizing communal roosts include a reduction in the cost of thermoregulation, a reduction in the likelihood of being predated either through safety in numbers or improved predator detection, and access to information about the location of food or other resources.

The Middle Boulder Creek Winter Roost is a part of a roost network, with three discrete roost areas that are near evenly dispersed along a 4-mile stream corridor (Exhibit 3). The Middle Boulder Creek Roost comprises four nearby stands of adjacent trees, which collectively comprise an area about 0.7 by 0.4 miles (Exhibit 4). The largest of these three roost areas is located near the confluence of Boulder and St. Vrain Creeks (Confluence Roost); the collective roosting area at the Confluence Roost measures about 0.7 by 0.4 miles. Field studies by FRNBES indicate an integral connectivity between all three of these three local roost areas. Nearing dusk, it is common for the roosting bald eagles to switch positions within each localized roost area, and FRNBES have documented near-dusk flights from one of the three roost areas to another.

As it has done throughout its study area in the northern Front Range of Colorado, FRNBES has compiled extensive survey data for the Middle Boulder Creek Winter Roost and going back to 2017. All data collected by FRNBES follows established and scientifically rigorous protocols used throughout the organization's bald eagle monitoring range. As explained in more detail below, the data clearly establishes that bald eagles regularly and intensely use the Middle Boulder Creek Winter Roost, and therefore Dreamweaver's location presents a serious risk of disturbance and even abandonment of this roost by bald eagles in the future. *See Exhibits 1 and 2.*

The following is a brief summary of bald eagle monitoring observations at the Middle Boulder Creek Winter Roost Site. In 2017, FRNBES observed this roost site on eighteen days spanning the months of February, March, April, September, October and December. During this time period, immature bald eagle counts ranged from 0 to 19 per observation period; and adult bald eagles from 0 to 4 per observation period. The peak count was 23 bald eagles using the site on December 15, 2017. Exhibit 1. In 2018, 37 separate counts over the course of the year observed 0 to 9 immature bald eagles and 0 to 4 adults, with a peak count of 13 bald eagles using the site on December 1, 2018. *Id.* Thus far in 2019, 3 immature bald eagles were observed on January 5, 2019, and 7 immature bald eagles and 2 adult bald eagles were observed before dawn on February, 5, 2019. *Id.*

In an email dated December 5, 2017 to Larry Rogstad of CPW, Dana Bove of FRNBES wrote of an observed disturbance at this roost site by oil and gas workers accessing the area in the early morning of December 5, 2017. As documented in Exhibit 1, 21 bald eagles were counted that morning at the roost, and many of these eagles were observed flushing the roost site (i.e., temporarily abandoning the site due to disturbance) upon arrival of loud work trucks. Roost counts decreased dramatically after December 15, 2017, with total counts of 3 and 2 eagles on December 19 and December 22, respectively, and 0 eagles on December 25, 2017 and January 17, 2018. Photographic records documented by FRNBES show that a large vertical drill rig and workers were present approximately 250 meters south of the core of the Middle Boulder Creek Roost on January 17, 2018 (Exhibit 5). The obvious conclusion from this data is that the

commencement of drilling in close proximity to this roost site—coupled with trucks and other disturbances—significantly decreased the level of bald eagle use of this ecologically important roost site, almost to the point of making such use entirely non-existent.

During October 2018, Anadarko drilling rig #1551 was first observed approximately 100 meters south of the roost core area. *See* Exhibit 6 (photograph). During fifteen surveys while the rig was present between October 2, 2018 and November 12, 2018, no bald eagles were observed at the roost site. *Id.* Once again, this data is consistent with the conclusion that drilling-related disturbances within close proximity to this roost site are adversely affecting bald eagles that would otherwise use this site, thereby impairing their essential biological functions.

Non-breeding bald eagles began to utilize the Middle Roost area on November 26, 2018 (1 immature eagle). Counts increased to 4 eagles on November 29, and further to 13 and 11 eagles on December 1 and December 3, respectively (Exhibit 1). On December 4, 2018, while a FRNBES researcher was observing the roost, several heavy equipment trucks (related to an oil and gas pipeline project by Extraction Oil and Gas) drove down the dirt road north of the roost. Approximately five minutes later, four eagles grouped together at the site began “vocalizing” before leaving and flying north. Several days later (December 9 to December 12), there were no eagles roosting at dusk at the site, again coinciding with heavy equipment and lights related to oil and gas pipeline construction directly west of the roost area (Exhibit 1).

Pipeline construction activity was no longer present near the roost site December 19, 2018, when 3 immature eagles were counted at dusk. Counts of 4, 8, and 3 eagles were documented on December, 24, 26, and 28 respectively. On December 26, 2018 several vehicles and a backhoe were observed near the eastern section of the communal roost area near dusk, and at one point FRNBES observer noted several immature eagles flushing from the roost trees nearby, and flying north. Roost counts at dusk again went zero on December 31, 2018, which was followed by 3 eagles counted on January 5, 2019, and zero again until February 5, 2019, when 9 eagles were counted prior to sunrise in the southern-most extent of the Middle Roost.

Consistent with the extensive observations and monitoring data collected by FRNBES, drilling operations and similar disturbances in the vicinity of the Middle Boulder Creek Winter Roost are resulting in direct, indirect, and cumulative effects to bald eagles that regularly use this roost site. However, the COGCC has never examined these impacts in any meaningful way in connection’s with Crestone’s Dreamweaver application. In order to summarize the types of adverse impacts documented by FRNBES, Exhibits 1 and 2 provide an overview of such effects.

For example, both the male and female of the breeding pair from the Boulder Creek Bald Eagle Nest use the roost site as a part of their near-nest territory, and are frequently observed there throughout the year (Exhibit 3). Field observations indicate that the adult eagles from the Boulder Creek nest, less than 0.5 miles north of the roost, are the primary and perhaps the exclusive adult eagles that utilize the Middle Roost perches outside the November 15 to March 15 time period (CPW winter roost period). The Middle Roost site perches are thus an integral and important part of the near-nest territory of the Boulder Creek nest.

Additional impacts to this pair include active gravel mining activity less than 0.2 miles north of the Boulder Creek nest, and non-conventional multi-well oil and gas activity less than 1 mile west of the nest. In addition, between November 15, 2016 and March 15, 2017, FRNBES, conducted 34 random counts of eagles present at the core of the Middle Boulder Creek Winter Roost Site between dawn and dusk (Exhibit 2); the majority of counts were on separate dates, and where there were multiple daily counts, each count was at least 1 hour apart to ensure against bias. One adult eagle was present during 10 of these 34 counts. Further, 21 counts were recorded during the same monthly time period during 2018. One adult eagle was observed during 8 of those 21 count sessions.

Importantly, however, as documented by in Exhibits 1 and 2, neither of the Boulder Creek nesting eagles or any other eagles were observed perching at the Middle Boulder Creek Communal Roost during both rounds of drilling activity by Anadarko (1/17/18 to completion and 10/2/18 to 11/12/18). On December 2, 2018, 13 eagles were observed in the Middle Boulder Creek Communal Roost, and 11 were observed on December 3, 2018. *See* Exhibit 7. Subsequently, surveys noted crews working for an Extraction subsidiary directly across the creek from the Middle Boulder Creek Communal Roost (*See* comments; Exhibit 1)(in an apparent violation of COGCC regulations and CPW guidance summarized below). *See* Exhibits 12-14. Bald eagle usage immediately fell significantly. *See id.*

The Dreamweaver 21H-N268 Pad Lease Map submitted to COGCC depicts significant additional oil and gas infrastructure and surface disturbances in the vicinity of the proposed location, including disturbances within both 1300 and 2600 feet of the location (approximately ¼ and ½ mile, respectively; 1300 feet is depicted in the map legend). *See* Exhibit 11.

DISCUSSION OF APPLICABLE LAWS, REGULATIONS, AND POLICY

Colorado’s overarching commitment to wildlife declares that: “It is the policy of the state of Colorado that wildlife and their environment are to be protected, preserved, enhanced, and managed for the use, benefit, and enjoyment of the people of [Colorado] and its visitors[.]” CRS § 33-1-101. In addition, the Colorado Habitat Stewardship Act was passed and signed into law in 2007, and is now a part of the Colorado Oil and Gas Act.

The legislative declaration of the Oil and Gas Act provides that the State will foster the responsible, balanced development of oil and gas consistent with “protection of the environment and wildlife resources.” CRS § 34-60102(1)(a)(I). COGCC shall “plan and manage oil and gas operations in a manner that balances development with wildlife conservation in recognition of the state’s obligation to protect wildlife resources and the hunting, fishing, and recreation traditions they support, which are an important part of Colorado’s economy and culture.” *Id.* § 34-60-102(1)(a)(IV). The Habitat Stewardship Act directed COGCC to “promulgate rules, in consultation with CPW, to establish standards for minimizing adverse impacts to wildlife resources affected by oil and gas operations.” *Id.* § 34-60-128(3)(d).

In particular, the Habitat Stewardship Act directs that COGCC “shall administer this article so as to minimize adverse impacts to wildlife resources affected by oil and gas operations.” CRS 34-60-128(2). Minimize adverse impacts is defined to mean “wherever

reasonably practicable, to (i) avoid adverse impacts from oil and gas operations on wildlife resources, (ii) minimize the extent and severity of those impacts that cannot be avoided, (iii) mitigate the effects of unavoidable remaining impacts, and (iv) take into consideration cost-effectiveness and technical feasibility with regard to actions taken and decisions made to minimize adverse impacts to wildlife resources, consistent with the other provisions of the Act.” § 34-60-103(5.5).

The definition is carried forward in the rules and guidance, establishing a clear preference for avoiding impacts rather than merely mitigating such impacts. According to COGCC Guidance:

As stated in Rule 1202.a., the following terms are used to describe the minimization of adverse impacts:

1. *Avoid*: This is the most effective way to address adverse impacts on wildlife from oil and gas operations and is preferred wherever possible.
2. *Minimize*: Implement measures to minimize the extent and severity of those impacts when avoidance is not possible.
3. *Mitigate*: Implement measures to address impacts that cannot be avoided or minimized.

Exhibit 12, COGCC Operator Guidance 1200-Series: Protection of Wildlife Resources at page 3 (underlining emphasis added, italics in original).

Moreover, the 100 Series definitions establish that Sensitive Wildlife Habitat includes “Bald Eagle nest sites and winter night roost sites.” COGCC Rule 1202.a provides that “[t]he purpose of consultation under Rule 306.c is to allow the Director to determine whether conditions of approval are necessary to minimize adverse impacts from the proposed oil and gas operations in the identified sensitive wildlife habitat or restricted surface occupancy area[.]” Rule 306.c governs consultation between COGCC and CPW, and includes “written recommendations to the Commission on conditions of approval necessary to minimize adverse impacts to wildlife resources.” Further, Rule 1202.b provides that, unless excepted, “when a proposed new oil and gas location is located in sensitive wildlife habitat or a restricted surface occupancy area, the Colorado Parks and Wildlife shall consult with the operator, the surface owner, and the Director in accordance with Rule 306.c. prior to approval of a Form 2A to identify possible conditions of approval.”

Here, the existing approvals lack either location or timing measures to protect wildlife resources. CPW was not brought into the process until *after* issuance of the current approvals. No document speaks to avoiding or minimizing wildlife impacts (and in particular impacts to bald eagles known to use the proximately situated roost site). Large- or landscape-scale planning has not occurred. Available agreements have not been used to minimize impacts. As a result, the existing approvals allow intensive surface disturbances and permanent new infrastructure in sensitive bald eagle habitat absent a legally compliant consultation or consideration of the above factors.

In addition to the COGCC's obligations set forth in state law and regulations, CPW has also issued highly pertinent guidance establishing science-based recommendations to avoid the COGCC, other state agencies, and project proponents approving or engaging in activities that will harm bald eagles or their habitat. *See* CPW, Recommended Buffer Zones and Seasonal Restrictions for Colorado Raptors (2008), available at <https://cpw.state.co.us/Documents/WildlifeSpecies/LivingWithWildlife/RaptorBufferGuidelines2008.pdf>. Specifically, CPW recommends the following measures to avoid adverse impacts to bald eagle winter roost sites:

Winter Night Roost: No human encroachment from November 15 through March 15 within ¼ mile radius of an active winter night roost (see 'Definitions' below) if there is no direct line of sight between the roost and the encroachment activities. No human encroachment from November 15 through March 15 within ½ mile radius of an active winter night roost if there is a direct line of sight between the roost and the encroachment activities. If periodic visits (such as oil well maintenance work) are required within the buffer zone after development, activity should be restricted to the period between 1000 and 1400 hours from November 15 to March 15.

Id. at 2. Here, there is a direct line of sight to the communal roost from the proposed project location. However, to FRNBES's knowledge, the COGCC did not condition its project approval on the prohibition of all human encroachment between November 15 and March 15 within a ½ mile radius of the roost site, nor did the COGCC even analyze whether to do so before approving this project or formally consult with CPW concerning the need for adopting such measures to avoid harm to bald eagles using this roost site.²

By failing to analyze—much less adopt—conditions that would require Crestone to implement science-based measures to avoid harming bald eagles that use the Middle Boulder Creek Winter Roost in approving this project (including those strongly recommended by CPW in its 2008 raptor guidance), the COGCC has approved the project in a manner that is likely to result in the unauthorized “take” of bald eagles in violation of federal law. BGEPA “renders it a federal crime to ‘take . . . at any time or in any manner any bald eagle commonly known as the American eagle or any golden eagle.’” *United States v. Dion*, 476 U.S. 734, 740 (1986) (quoting 16 U.S.C. § 668(a)). In particular, BGEPA prohibits the “take” of any bald or golden eagle “without being permitted to do so” by the U.S. Fish and Wildlife Service. 16 U.S.C. § 668(a); *see id.* § 668a (directing that “bald eagles may not be taken for any purpose unless, prior to such taking, a permit to do so is procured from the” Service). “Take” is defined to include “wound, kill . . . molest, or disturb.” *Id.* § 668c. “Take” includes the incidental taking of, as well as intentional actions directed at, eagles. *Id.* Accordingly, because the COGCC approved the Dreamweaver project without even requiring the project proponent to adopt the nominal measures recommended by CPW to avoid or at least minimize disturbance of eagles, this project as approved is likely to result in take of eagles using the Middle Boulder Creek Winter Roost

² CPW broadly defines “human encroachment” to mean “[a]ny activity that brings humans in the area. Examples include driving, facilities maintenance, boating, trail access (e.g., hiking, biking), etc.”

(much as it did with prior drilling and related operations as explained above) placing this project in legal jeopardy.

In sum, the COGCC's approvals failed to consider highly pertinent information concerning wildlife habitat and the application of state and federal law and policy to the facts of this project. Unless the COGCC reconsiders these approvals, the project fails to satisfy the legal safeguards that apply to projects of this kind.

CONCLUSION

The disputed applications did not disclose the existence of sensitive habitat for federally protected wildlife nor did any lawfully required consultation occur with the appropriate state and federal wildlife agencies with jurisdiction over and expertise in bald eagle issues. FRNBES requests that the existing Form 2 and Form 2A be suspended and rescinded for: 1) submission of a new permit acknowledging and analyzing the wildlife issues; 2) consultation between the COGCC and CPW; 3) a detailed analysis of direct, indirect, and cumulative impacts and an alternative site analysis considering potential project locations that would be consistent with CPW's raptor buffer recommendations; and 4) public comment on the full analysis conducted by the COGCC in response to this request for reconsideration.

As the hydraulic fracturing boom expands across the Front Range causing high levels of public concern—including requests for a blanket moratorium—the COGCC should prioritize reconsideration of permits where the existing approvals did not analyze credible documented concerns of potential legal violations. Here, the serious and significant wildlife issues facing federally protected bald eagles and their habitat support reconsideration and an opportunity for members of the public to weigh in on this important matter before any ground-disturbing activities commence.

Thank you for your attention to this request. Please contact me at 303-956-0595 or mike@chiroposlaw.com if I can provide any additional information or to discuss this matter.

Sincerely,



Mike Chiropoulos
Chiropoulos Law

Cc: Greg Deranleau, COGCC
Kristin Cannon and Joe Padia, CPW
Dana Bove, FRNBES

EXHIBIT LIST

- Exhibit 1 FRNBES Middle Boulder Creek communal roost site counts and data (2/24/2017 to 2/05/2019)
- Exhibit 2 FRNBES Middle Boulder Creek communal roost site; Bald Eagle counts from non-roost months (covering data collected from April 2017 through November 2018)
- Exhibit 3 FRNBES map showing the Middle Boulder Creek communal roost site along with two adjacent Bald Eagle communal roost areas, and the Boulder Creek Bald Eagle nest and near-nest territory (defined by extent of active and defended perch locations) [Map Exhibits 3 and 4 are collated in one PDF document]
- Exhibit 4 FRNBES map showing four perch specific areas that comprise the Middle Boulder Creek Communal Roost; approximate location of Dreamweaver well pad and past drill rig location and dates are also plotted
- Exhibit 5 Photograph depicting Anadarko rig and the Middle Boulder Creek communal roost trees in background (January 17, 2018) [Photographic Exhibits 5-8 are collated in one PDF document]
- Exhibit 6 Photograph showing Anadarko drill rig #1551 about 100 meters south of the Middle Boulder Creek communal roost (October 24, 2018)
- Exhibit 7 Photograph depicting at least 8 Bald Eagles in upper branches of the Middle Boulder Creek communal roost (December 2, 2018)
- Exhibit 8 Photograph depicting 9 Bald Eagles (three inside blue circles) perched in cottonwoods within the Middle Boulder Creek communal roost (February 25, 2017)
- Exhibit 9 Form 2A Oil and Gas Location Assessment, COGCC Document No. 401614921
- Exhibit 10 Form 2 Application for Permit to Drill, COGCC Document No. 401614935
- Exhibit 11 Pad Lease Map, Dreamweaver 21H-N268 (Crestone, April 4, 2018) (from COGCC location database)
- Exhibit 12 COGCC Operator Guidance 1200 Series: Protection of Wildlife Resources
- Exhibit 13 CPW Actions to Minimize Adverse Impacts to Wildlife Resources (CPW 2009 Guidance)
- Exhibit 14 CPW Recommended Buffer Zones and Seasonal Restrictions for Colorado Raptors (CPW Colorado Raptor Guidance)