



United States Department of the Interior

FISH AND WILDLIFE SERVICE

Ecological Services
3425 Miriam Avenue
Bismarck, North Dakota 58501



FEB - 6 2009

RECEIVED

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Public Service Commission
600 East Boulevard, Dept. 408
Bismarck, North Dakota 58505

PUBLIC SERVICE COMMISSION

Re: Notice of Filing and Notice of
Rescheduled Hearings
Whiting Oil & Gas Corporation
6-inch Natural Gas Line &
8-inch Oil Line
Case No. PU-08-843 and PU-08-844

Dear Commissioners:

The U.S. Fish and Wildlife Service (Service) has reviewed the January 22, 2009, Notice of Filings and Notice of Rescheduled Hearings for Case No. PU-08-843, wherein Whiting Oil and Gas Corporation (Whiting) filed an application for a waiver or reduction of certain procedures and time schedules regarding the construction of a 6-inch natural gas pipeline and an 8-inch natural gas pipeline in Mountrail County, North Dakota.

In a September 30, 2008, letter to Whiting's consultants, the Service provided comments and recommendations to avoid and minimize potential impacts to fish and wildlife resources and habitat that may be adversely affected by the proposed pipeline construction (enclosed). The Service is particularly concerned about the disruption of waterfowl or other wildlife during the breeding season (February 1 to July 15). If construction activities are proposed to take place during the breeding season, this could result in the take of migratory birds or active nests. The Service did not receive a follow-up letter from Whiting or their consultants regarding the proposed construction timeline. The Migratory Bird Treaty Act (Act) prohibits the taking, killing, possession, transportation, and importation of migratory birds, their eggs, parts, and nests, except when specifically authorized by the Department of the Interior. While the Act has no provision for allowing unauthorized take, the Service realizes that some birds may be killed by pipeline construction even if all reasonable measures to protect them are used. The Service's Office of Law Enforcement carries out its mission to protect migratory birds through investigations and enforcement, as well as by fostering relationships with individuals, companies, and industries that have taken effective steps to minimize their impacts on migratory birds, and by encouraging others to enact such programs. It is not possible to absolve individuals, companies, or agencies from liability even if they

25 **PU-08-843** Filed: 2/9/2009 Pages: 6
**Letter Comments Re: Disruption of Waterfowl or
Other Wildlife During February Breeding Season**

U S Department of the Interior, Fish & Wildlife Service
Jeffrey K. Towner, Field Supervisor

24 **PU-08-844** Filed: 2/9/2009 Pages: 6
**Letter Comments Re: Disruption of Waterfowl or
Other Wildlife During February Breeding Season**

U S Department of the Interior, Fish & Wildlife Service
Jeffrey K. Towner, Field Supervisor

implement avian mortality avoidance or similar conservation measures. However, the Office of Law Enforcement focuses its resources on investigating and prosecuting individuals and companies that take migratory birds without regard for their actions or without following an agreement such as this to avoid take. We recommend that the measures outlined in the September 30, 2008, letter be included as permit conditions in any permit issued by the Commission.

Thank you for the opportunity to comment on the Notice of Filings and Notice of Rescheduled Hearings. If you require further information, please contact Heidi Kuska of my staff, or contact me directly, at (701) 250-4481, or at the letterhead address.

Sincerely,



Jeffrey K. Towner
Field Supervisor
North Dakota Field Office

Enclosure

cc: Whiting Oil & Gas Corporation, Denver

SEP 30 2008

Mr. Bill Regan
Environmental Project Manager
Merjent, Inc.
615 First Avenue NE, Suite 425
Minneapolis, Minnesota 55413

Re: Whiting Petroleum Corporation –
Robinson Lake Pipeline Projects

Dear Mr. Regan:

We are in receipt of your letter dated September 4, 2008, with regard to a proposed project for Whiting Petroleum Corporation (Whiting) to construct a 17-mile, 8-inch diameter oil pipeline originating at the Robinson Lake Processing Plant, and connecting to a pump station owned and operated by Enbridge Pipeline located at Stanley. We offer the following comments under the authority of and in accordance with the Migratory Bird Treaty Act (16 U.S.C. 703 et seq.) (MBTA), the National Environmental Policy Act of 1969, as amended (42 U.S.C. 4321 et seq.) (NEPA), the Bald and Golden Eagle Protection Act (16 U.S.C. 668-668d, 54 Stat. 250) (BGEPA), Executive Order 13186 “Responsibilities of Federal Agencies to Protect Migratory Birds” and the Endangered Species Act (16 U.S.C. 1531 et seq.) (ESA).

Threatened and Endangered Species

The U.S. Fish and Wildlife Service (Service) concurs with the “not likely to adversely affect” determination for the gray wolf, piping plover, and whooping crane, the “no adverse modification” determination for piping plover critical habitat, and with the “no effect” determination for the Interior least tern and pallid sturgeon.

Your letter does not mention the Dakota Skipper, a candidate species. Potential habitat for the Dakota skipper is located in Mountrail County. In 1995, the Dakota skipper was listed as a candidate species under the ESA. No legal requirement exists to protect candidate species; however, it is within the spirit of the ESA to consider these species as having significant value and worth protecting.

The Dakota skipper is a small to medium-sized hesperiine butterfly associated with high quality prairie ranging from wet-mesic tallgrass prairie to dry-mesic mixed grass prairie.

Rg 9/30/08

Eastern North Dakota prairies inhabited by Dakota skippers are dominated by warm-season or bluestem grasses that always contain wood lilies, harebells, and smooth camas (Royer and Marrone 1992) and that are generally associated with glacial lake margins with alkaline soils (McCabe 1981). Because of the difficulty of surveying for Dakota skippers and a short survey window, we recommend that the project avoid any impacts to potential Dakota skipper habitat. If Dakota skippers may be present near the proposed project, please notify the Service and advise us on how you intend to avoid impacts to skipper habitat.

High Value Habitat Avoidance

As part of the National Wildlife Refuge System, the Service administers fee title Refuge and Waterfowl Production Areas, as well as wetland and grassland easements, throughout North Dakota. As we believe you are aware, a review of our county plat maps indicates that the proposed project crosses a number of Service property interests.

The Service requires that all wetlands under its jurisdiction be avoided during project construction, when possible. Special Use or right-of-way permits will be necessary for any construction resulting in impacts to wetlands protected by easements or fee-title. The issuance of Special Use or right-of-way permits is subject to the final determination of a refuge compatibility review process. This determination may add some time to the review process, so early coordination with the district is important. For Mountrail County, please contact Doug Leschisin, Lostwood Wetland Management District, 8315 Highway 8, Kenmare, North Dakota 58746-9046 (701-848-2466). We have spoken with Mr. Leschisin about this project, and he indicated that he has been working with Whiting both on the previous 16 miles of pipeline along the same right-of-way and on this proposed project. We recommend that you continue to work with Mr. Leschisin on specific siting requirements to avoid or minimize project impacts.

Construction activities should be conducted in a manner that will avoid/minimize impacts to the existing habitat in the project area. The following recommendations are intended to reduce construction related impacts and should be included as permit conditions.

- Schedule construction for late summer or fall/early winter so as not to disrupt waterfowl or other wildlife during the breeding season (February 1 to July 15). If work is proposed to take place during the breeding season or at any other time which may result in the take of migratory birds or active nests, the Service recommends that the project proponent arrange to have a qualified biologist conduct a field survey of the affected habitats to determine the presence of nesting migratory birds. If nesting migratory birds are found, we request you contact this office, suspend construction, or take other measures, such as maintaining adequate buffers, to protect the birds until the young have fledged. The Service further recommends that field surveys for nesting birds, along with information regarding the qualification of the biologist(s) performing the surveys, and any avoidance measures implemented at the project site, be thoroughly documented and that such documentation be shared with the Service and maintained on file by

the project proponent at least until such time as construction on the proposed project has been completed.

- Make no stream channel alterations or changes in drainage patterns.
- Locate construction to avoid placement of fill in wetlands along the route.
- Replace unavoidable loss of wetland habitat with functionally equivalent wetlands.
- Install and maintain appropriate erosion control measures to reduce sedimentation and water quality degradation of wetlands and streams near the project area.
- Reseed disturbed areas with native plant species immediately after construction to reduce erosion.

According to the Service's National Wetland Inventory maps, the construction route intersects a number of wetlands. If construction routes intersect wetlands, streams, or rivers, the Corps of Engineers (Corps) may require a Department of the Army permit, for the placement of dredge or fill material into waters of the U.S., including wetlands, or other impacts to navigable waters. We suggest you contact Mr. Daniel Cimarosti, Regulatory Office, Corps of Engineers, 1513 South 12th Street, Bismarck, North Dakota 58504 (701-255-0015), to determine the Corps' permit requirements.

Thank you for the opportunity to comment on this project. If you require further information or the project plans change, please contact Carol Aron of my staff at (701) 250-4481, or at the letterhead address above.

Sincerely,

Jeffrey K. Towner

Jeffrey K. Towner
Field Supervisor
North Dakota Field Office

cc: Project Leader, Lostwood WMD
(Attn: D. Leschisin)
Regulatory Office, Army Corps of Engineers, Bismarck
(Attn: D. Cimarosti)

Literature Cited

- McCabe, T.L. 1981. The Dakota skipper, *Hesperis dacotae* (Skinner): range and biology, with special reference to North Dakota. *Journal of the Lepidopterist Society* 35(3):179-193.
- Royer, R.A. and G.M. Marrone. 1992. Conservation status of the Dakota skipper (*Hesperis dacotae*) in North and South Dakota. Unpublished report, U.S. Fish and Wildlife Service, Denver, CO. 15 March 1992. 44+pp.
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