

Comments from the Sierra Club Lone Star Chapter Regarding Docket FWS-R2-ES-2020-0065, the Draft Candidate Conservation Agreement with Assurances (CCAA) for the Dunes Sagebrush Lizard

Introduction of the Sierra Club

The Sierra Club is the nation's oldest and largest conservation organization. The Lone Star Chapter is the Texas chapter of the Sierra Club and was incorporated in 1965. We have 30,000 members and another 150,000 supporters. We work to advocate for land and water conservation, clean energy and clean transportation, and appropriate regulation on oil and gas.

We are active at the Texas legislature and opposed the efforts back in 2009 that led to the Comptroller of Public Accounts being given express authority over the development of habitat conservation plans along with oil and gas interests. Indeed, that legislative direction and subsequent efforts led to plans that have failed to protect this unique species. Again, however, there appears to be an effort to prioritize economic development and the oil and gas industry over the conservation of threatened and endangered species and a primary mission of the USFWS. This is disappointing to say the least.

We would also note that since the original discussions, there has been significant development of large-scale sand mining operations, which have further complicated preservation of the species.

The Sierra Club Lone Star Chapter Opposes the Proposed Agreement

The Sierra Club's Lone Star Chapter opposes the adoption of the Candidate Conservation Agreement that the United States Fish and Wildlife Service (the Service) now considers. This agreement, now proposed 8 years after the Service withdrew the proposed listing of the Dunes Sagebrush Lizard blatantly contradicts the findings of that withdrawal. The Service also now is undergoing a 12-month review, which should ultimately end with listing the species.¹ Entering into voluntary agreements at this point would occur solely to undercut the consequence of listing the species.

The Service had, at one time, determined that the listing of the Dunes Sagebrush Lizard (the Lizard) was warranted but precluded by higher priorities.² The listing was withdrawn primarily because the Service found that development would be placed outside the habitat for the Lizard. Now, the Service appears to acknowledge that development will be placed in the habitat, lending specific credibility to the fact that habitat destruction is the primary threat to the Dunes Sagebrush Lizard. The Service has shown bad faith in deciding not to list the species followed by planning for the possible listing of the species.

If the Service truly wished to protect the continued existence of the species, the Service would list the Dunes Sagebrush Lizard rather than engage in inconsequential agreements that serve only to placate industrial actors and undercut the Endangered Species Act.

¹ 85 Fed. Reg. 43,203 (Jul. 16, 2020) (<https://beta.regulations.gov/document/FWS-R2-ES-2018-0093-0001>)

² Endangered and Threatened Wildlife and Plants; Withdrawal of the Proposed Rule To List Dunes Sagebrush Lizard, 77 Fed. Reg. 36,871 (Jun. 19, 2012)

23 Years is an Inappropriate Term for the Permit

The Permit's term is up to 23 years, a completely inappropriate length. In the span of that 23 years, the Lizard could become extinct, endangered to a dangerously small population, or wholly extirpated from the State of Texas, and all the while the Service would have *no* remedy against the State of Texas nor the industry that jeopardizes the Lizard. Should the Lizard be extirpated from the area, the agreement ought to provide for affirmative restoration obligations of the landowners, as well as monetary compensation.

The 23 year period is also an extremely large amount of time from the perspective of climate-related danger and other natural disasters. The Service acknowledges that climate change and other disasters could have an effect on the population of the Lizard. Were a natural disaster to occur or some other detrimental event to New Mexico-based populations of the Lizard, the remaining area that is the subject of this Agreement would be insufficient to provide for the survival of the species. The Service must consider the population density and locations of the other Lizard populations prior to making any such agreement final.

The Service Erred in Withdrawing its Proposal to List in 2012

In 2012, U.S. Fish and Wildlife Service withdrew the proposed rule to list the Dunes Sagebrush Lizard (*Sceloporus arenicolus*). In the justification for withdrawal “[t]he Service concludes that there is sufficient certainty that the commitment to place development outside of the dunes sagebrush lizard’s shinnery oak dune habitat will be implemented and will be effective.”³ This Summary of “Other Natural or Manmade Factors Affecting its Continued Existence” specifically points out that “there is conclusive evidence” of adverse impacts on lizard species. “If dunes sagebrush lizards are exposed to [oil and gas industry-related] pollution, we may expect physiological dysfunction, impaired foraging abilities, increased mortality, and population declines. For this reason, [the Service] believe[s] the exposure to pollutants from oil and gas production may be a factor affecting the survival of individuals and populations located around oil and gas development.”⁴

One could argue that this Plan is evidence of that aforementioned “commitment” but one would be wrong to do so. The Service in 2012 specifically relied on the commitment to habitat preservation and commitment from oil and gas industry to avoid the habitat altogether when deciding not to list the species. Now, the Service hopes to double back and open those portions of the habitat to oil and gas development, despite the fact that their own scientific findings in 2012 would prevent them from doing so.

The Service Failed to Perform a Complete NEPA Alternatives Analysis.

Listing the Species Should be An Alternative

U.S. Fish and Wildlife Service should analyze *listing* the species as an alternative. Rather than engage in this agreement, the Service could list the Dunes Sagebrush Lizard and take action to list the species and designate critical habitat to all of that habitat which is categorized as a “High or Intermediate Suitability Area.” If this is not analyzed as a separate alternative, then it should be analyzed *extensively* under the no action alternative.

³ Id. At 36,897

⁴ Id.

Because there is an outstanding petition for listing and the Service is undergoing a 12-month review, it is at least equally as likely that the species is listed by the middle of 2021. The no action alternative must take into account the potential for listing and how that listing may play out. Were the species to be listed next year, the agreement at hand would be unnecessary as the listing of the species would be infinitely more protective of the species itself. Failing to consider this important factor under NEPA regulations is likely an abuse of discretion.⁵

Proposal of Additional Alternatives

The Service notes that the Texas Comptroller of Public Accounts had at one point proposed an alternative with broader scope. This lends credibility to an alternative that has narrower scope than that which is proposed here. As the Service notes, “NEPA regulations (40 CFR 1502.14(c)) require consideration of reasonable alternatives, which must be practical and technically and economically feasible.”⁶ The Service fails to identify any alternative which would be more protective of the environment and with narrower permitted activities than the proposal. The onus is on the service, pursuant to federal law, to provide alternatives and provide justification as to why they would not be practicable or reasonable. Examples of potential alternatives include excluding any one of those activities from Table 1 in the Draft Environmental Assessment. Excluding specifically “Oil and gas development” or “Sand mining” would likely have a dramatic effect on protecting the Dunes Sagebrush Lizard.

Additionally, the alternatives analysis should at least consider the potential exclusion of high/intermediate suitability habitat altogether, without exception. This alternative is clearly the most protective of the species that would still allow for the agreement to take place on different terms. Failure to consider this important factor under NEPA regulations is likely an abuse of discretion.

The Plan is Insufficient to Protect the Species Because the Primary Threat to the Dunes Sagebrush Lizard is Habitat Loss

“The Service may issue the Permit if it finds that implementation of the CCAA is reasonably expected to provide a net conservation benefit to the species. (50 CFR 17.22(d)(2)(ii); 50 CFR 17.32(d)(2)(ii))”⁷ Any implementation of the agreement as proposed right now would provide a net conservation harm to the species. The Dunes Sagebrush Lizard’s primary threat in the State of Texas is development linked to Oil and Gas.⁸ The current agreement containing provisions that allow for development of any kind will only provide net harm. Additionally, the agreement would permit destruction of habitat and result in further habitat loss.

⁵ See *Dept. of Commerce v. New York* 588 U.S. ___ (2019); see also *Baltimore Gas and Elec. Co. v. Nat. Resources Def. Council, Inc.*, 462 U.S. 87 (1987)

⁶ 2020 Candidate Conservation Agreement with Assurances for the Dunes Sagebrush Lizard (*Sceloporus arenicolus*) in West Texas, Draft Environmental Assessment at 11 (Document ID FWS-R2-ES-2020-0065-0020)

⁷ *Id.* at 1.

⁸ Carrie Baker, *Researchers Identify Unique Populations Of Dunes Sagebrush Lizard*, (Oct. 02, 2020) (<https://today.tamu.edu/2020/10/02/researchers-identify-unique-populations-of-dunes-sagebrush-lizard/>); Chan LM, Painter CW, Hill MT, Hibbitts TJ, Leavitt DJ, Ryberg WA, et al. (2020) Phylogeographic structure of the dunes sagebrush lizard, an endemic habitat specialist. *PLoS ONE* 15(9): e0238194. <https://doi.org/10.1371/journal.pone.0238194>

The Agreement provides that seismic activities in high or intermediate suitability habitat should be “limited to periods of lizard inactivity (October through March)” or “smaller” seismic equipment is being used.⁹ October-March is 1/2 of the calendar year, and even where the activity is happening during a period of “inactivity” the seismic activity would have knowable impacts on any individual lizards in that area, as well as irreparable harm to the habitat itself. Protecting the habitat must be the very point of engaging in an agreement such as this one.

The agreement also provides for surface disturbance where “the mineral estate for which the development was planned cannot be accessed except through the High or Intermediate Suitability area.”¹⁰ This is unsuitable for this agreement altogether. There should be *no disturbance at all* of habitat that is designated high or intermediate suitability area.

Conclusion

The Sierra Club’s Lone Star Chapter opposes the proposed CCAA regarding the Dunes Sagebrush Lizard. The agreement is altogether insufficient to protect the Lizard, and it’s clear that the lizard should be listed as an endangered species due to continued habitat destruction. The 23 year period is a patently absurd time for the agreement as well, as the entire population of the Lizard could be extirpated from the state of Texas in that timeframe. We could also see an entirely different degree of climate-change risk to the species, and the Service would have limited if any recourse to protect the continued existence of the Lizard. No entity should be entitled to destruction or adverse modification of the habitat. It’s also clear that the Service did not engage in a thorough alternatives analysis, as failure to evaluate the potential listing of the species this coming summer is an entirely probable and foreseeable action.

The Sierra Club urges the United States Fish and Wildlife Service to halt the adoption of the proposed agreement on the grounds that it is wholly insufficient to protect the species and the Environmental Assessment is incomplete for the purposes of analysis under the National Environmental Policy Act.

Respectfully,

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⁹ Candidate Conservation Agreement with Assurances for the Dunes Sagebrush Lizard (*Sceloporus arenicolus*) at 54 (Document ID FWS-R2-ES-2020-0065-0019) (<https://beta.regulations.gov/document/FWS-R2-ES-2020-0065-0019>)

¹⁰ Id. at 55