



October 2, 2023

Comments regarding:

July 3, 2023 Proposed Rule to List the Dunes Sagebrush Lizard as Endangered under the Endangered Species Act

Submitted by:

Energy and Wildlife Action Coalition

Filed electronically to the attention of:

Public Comments Processing
Attn: FWS-R2-ES-2022-0162
U.S. Fish and Wildlife Service
MS:PRB/3W
5275 Leesburg Pike
Falls Church, VA 22041-3803

Docket No. FWS-R2-ES-2022-0162

The Energy and Wildlife Action Coalition (“EWAC”)¹ submits these comments in response to the United States Fish and Wildlife Service’s (“Service”) June 27, 2023 Notice of Proposed Rulemaking (“Proposed Rule”)² to list the dunes sagebrush lizard (*Sceloporus arenicolus*) (“DSL”) as endangered under the Endangered Species Act (“ESA”) and the accompanying species status assessment (“SSA”)³ supporting the Proposed Rule. EWAC provides these comments on the Proposed Rule and the SSA based on the knowledge and experience of its membership.

As the Service is aware, listing of species under the ESA often creates a disruptive and significant burden on the regulated community. The “take” prohibition of ESA section 9 (“Section 9”) and interagency consultation requirements of ESA section 7 frequently cause delay in project delivery and interruptions to project operations, and inject uncertainty into the project planning process. Whenever the Service considers listing species under the ESA, the agency should take proactive steps, using existing Service policy and guidance, to ensure that maintenance and deployment of critical infrastructure and essential services, such as renewable energy and electric transmission and distribution infrastructure, can continue in an efficient manner. Further, whenever possible, the Service should give proper consideration to formalized, voluntary efforts supporting species’ recovery and conservation. The Service should allow these voluntary efforts to demonstrate their effectiveness before considering listing the species, which burdens the Service and regulated community with formal take authorization and permitting under section 10 of the ESA. These proactive steps are critical to ensure the Biden-Harris Administration’s goals to reduce greenhouse gas emissions, bolster resilience to the impacts of climate change⁴ and deliver much-needed improvement of this nation’s electric and communication infrastructure,⁵ particularly to communities who are historically underserved,⁶ will be met.

As described in greater detail below, in order to ensure efficient administration of the ESA and secure the production and transmission of clean, reliable, and affordable energy, EWAC encourages the Service to: (1) give due consideration to existing conservation efforts for the DSL and similarly situated species to encourage continued voluntary, industry-led efforts to address at-

¹ EWAC is a national coalition formed in 2014 whose members consist of electric utilities, electric transmission providers, and renewable energy entities operating throughout the United States, and related trade associations. The fundamental goals of EWAC are to evaluate, develop, and promote sound environmental policies for federally protected wildlife and closely related natural resources while ensuring the continued generation and transmission of reliable and affordable electricity. EWAC supports public policies, based on sound science, that protect wildlife and natural resources in a reasonable, consistent, and cost-effective manner. EWAC is a majority-rules organization and therefore specific decisions made by the EWAC Policy Committee may not always reflect the positions of every member.

² 88 Fed. Reg. 40,764 (June 22, 2023) (“Proposed Rule”).

³ U.S. Fish and Wildlife Service – Southwest Region, Species Status Assessment for the Dunes Sagebrush Lizard, Version 1.2 (April 2023).

⁴ See Executive Order 13,990: Protecting Health and the Environment and Restoring Science to Tackle the Climate Crisis, 86 Fed. Reg. 7037 (Jan. 25, 2021).

⁵ See Fact Sheet: The American Jobs Plan, available at: <https://www.whitehouse.gov/briefing-room/statements-releases/2021/03/31/fact-sheet-the-american-jobs-plan/>.

⁶ EWAC notes the Biden-Harris Administration’s focus on advancing environmental justice when addressing the climate crisis. See Executive Order 13,990: Protecting Health and the Environment and Restoring Science to Tackle the Climate Crisis, 86 Fed. Reg. 7037 (Jan. 25, 2021).

risk species and provide regulatory certainty; (2) abide by the Service’s policy to identify to the extent practicable specific activities that will not result in violations of the “take” prohibitions of Section 9; (3) more precisely identify where DSL and its habitat are likely to occur in the landscape; and (4) engage in early coordination with the regulated community to identify efficient ESA compliance pathways.

EWAC welcomes additional discussion with the Service on solutions that result in greater regulatory clarity and effective conservation for listed and sensitive species, including the DSL.

I. The Service Should Give Proper Consideration to Formalized Conservation Programs for the DSL in New Mexico and Texas.

The Service continues to be dismissive of industry-led efforts to conserve listed and at-risk species in a proactive manner. As discussed in greater detail in EWAC comments submitted in response to the Service’s June 1, 2021 Proposed Rule Listing Two Distinct Population Segments of the Lesser Prairie-chicken and Proposed Issuance of a Section 4(d) Rule,⁷ we believe it is neither lawful nor advisable for the Service to disregard conservation solutions implemented by the regulated community.⁸ Section 4 of the ESA and existing Service policy require the agency to consider certain pre-listing conservation measures when making a listing determination. In the context of determining whether a species should be listed as threatened or endangered under the ESA, section 4 of the ESA requires the Service to take “into account those [conservation] efforts, if any, being made by any State . . . or political subdivision of a State” to protect the species at issue.⁹ In 2003, the Service and the National Marine Fisheries Service (collectively, “Services”) announced the Policy for Evaluation of Conservation Efforts When Making Listing Decisions (“PECE Policy”),¹⁰ which expressly recognized that the ESA imposes a statutory obligation on the Services to consider “formalized conservation efforts” undertaken by “State and . . . Federal agencies, Tribal governments, businesses, organizations, or individuals that positively affect the species’ status.” The PECE Policy describes formalized conservation efforts as those “identified in a conservation agreement, conservation plan, management plan, or similar document,¹¹ including formalized conservation efforts that “have not yet been implemented or have been implemented, but have not yet demonstrated whether they are effective at the time of a listing decision.”¹² In evaluating whether formalized conservation efforts adequately protect the species at issue, the PECE Policy requires the Services to implement a two-part analysis. First, for those efforts yet to be implemented, the Services will evaluate the certainty that the conservation effort

⁷ 86 Fed. Reg. 29,432 (June 1, 2021).

⁸ See EWAC, Comments Regarding the June 1, 2021 Notice of Proposed Rule Listing Two Distinct Population Segments of the Lesser Prairie-Chicken under the Endangered Species Act and Proposed Issuance of a Section 4(d) Rule, at 6-7 (Sept. 1, 2021), available at: https://downloads.regulations.gov/FWS-R2-ES-2021-0015-0365/attachment_1.pdf.

⁹ 16 U.S.C. § 1533(b)(1)(A).

¹⁰ *Policy for Evaluation of Conservation Efforts When Making Listing Decisions*, 68 Fed. Reg. 15,100 (Mar. 28, 2003).

¹¹ *Id.*

¹² *Id.* at 15,113.

will be implemented. Second, for those efforts that have not yet demonstrated effectiveness, the Services will evaluate the certainty that the conservation effort will be effective.¹³

EWAC is concerned that in the Proposed Rule, the Service does not adequately consider formalized conservation programs that have been implemented in both New Mexico and Texas in order to protect the DSL. There currently exist no fewer than three formalized programs specifically benefitting the DSL:

- The Candidate Conservation Agreement for the Lesser Prairie-Chicken (*Tympanuchus pallidicinctus*) and Sand Dune Lizard (*Sceloporus arenicolus*) in New Mexico, which includes a candidate conservation agreement with assurances for non-federal landowners (collectively, the “New Mexico CCA/CCAA”);¹⁴
- The 2020 Candidate Conservation Agreement with Assurances for the Dunes Sagebrush Lizard (*Sceloporus arenicolus*) in West Texas (“2020 CCAA”);¹⁵ and
- The Texas Conservation Plan for the Dunes Sagebrush Lizard (“TCP”).¹⁶

Additionally, in 2005, a working group comprised of federal, state, and local officials, along with private stakeholders, published the Collaborative Conservation Strategies for the Lesser Prairie-Chicken and Sand Dune Lizard in New Mexico,¹⁷ which provided guidance in the development of the Bureau of Land Management’s (“BLM”) Special Status Resource Management Plan Amendment (“RMPA”) and the New Mexico CCA/CCAA. According to the SSA, the RMPA addressed threats to the DSL caused by oil and gas development and herbicide application and set forth guidelines on how to develop around DSL habitats. Among other things, the RMPA called for the removal of nearly 43,000 acres of DSL habitat from future oil and gas leasing.¹⁸ The RMPA was approved in 2008 and, since that time, BLM has closed 120,000 hectares to oil and gas leasing and approximately 345,000 hectares to wind and solar development. More than 1,400 hectares of abandoned well pads and access roads have been reclaimed, and BLM has implemented mesquite control on more than 335,000 hectares of BLM-managed lands.¹⁹

The New Mexico CCA/CCAA has, by all accounts, been a success. According to the SSA, “40 oil and gas companies and 37 ranchers have enrolled a total of 214,144 [hectares] of the

¹³ *Id.* at 15,114-15. The PECE Policy lists fifteen total criteria for the Services’ analysis: nine to direct its determination of the certainty that a given conservation effort will be implemented, and six for the certainty of whether the effort will be effective. *Id.*

¹⁴ U.S. Fish and Wildlife Service, U.S. Bureau of Land Management, Center of Excellence for Hazardous Materials Management, Candidate Conservation Agreement for the Lesser Prairie-Chicken (*Tympanuchus pallidicinctus*) and Sand Dune Lizard (*Sceloporus arenicolus*) in New Mexico, (Dec. 8, 2008).

¹⁵ Canyon Environmental, LLC, 2020 Candidate Conservation Agreement with Assurances for the Dunes Sagebrush Lizard (*Sceloporus arenicolus*) in West Texas (2020).

¹⁶ Texas Comptroller, Texas Conservation Plan for the Dunes Sagebrush Lizard (*Sceloporus arenicolus*), Permit No. TE55322A-2 (2012).

¹⁷ SSA at 80.

¹⁸ *Id.*

¹⁹ *Id.* at 80-81.

duneland habitat and 258,018 [hectares] of the surrounding supportive matrix habitat.”²⁰ Astoundingly, the collective efforts in New Mexico have resulted in enrollment of approximately 85 percent of the range of the DSL within New Mexico.²¹ While the conservation plans covering the range of the DSL in Texas have not seen the kind of participation as the ongoing efforts in New Mexico, they should not be ignored. For example, according to a 2021 annual report from the TCP, despite a very short implementation timeframe to date, more than 5,700 acres have been enrolled in that plan in connection with sand mining activities, and the program administrator for that plan is actively seeking participants.²²

In the Proposed Rule (and in other recent listings and proposed listings), the Service gives very little credence to the formalized conservation programs aimed specifically at reducing threats to at-risk species. By minimizing the efforts of public and private stakeholders to preserve sensitive species, the Service discourages participation in these plans, provides little incentive to the regulated community to undertake voluntary efforts aimed at conservation in the future, and misses opportunities to provide regulatory certainty to project proponents and to ease the administrative burden on the agency resulting from species listings. Consistent with the requirements in section 4 of the ESA and PECE Policy, EWAC requests that the agency give due consideration to formalized conservation efforts for the DSL in any final rule.

II. The Service Should Provide Guidance Under Section 9 of the ESA for Activities Not Likely to Take the DSL.

EWAC is concerned regarding the lack of guidance in the Proposed Rule on how take of the DSL can be avoided. Should the Service move forward listing the DSL as endangered, the Service must provide guidance to the regulated community on what kinds of activities would not violate the Section 9 prohibition on “take” for project proponents within the range of the DSL. Service policy requires the agency to identify “to the maximum extent practicable at the time a species is listed those activities that would or would not constitute a violation of [S]ection 9 . . .”²³ In the preamble to the Proposed Rule, the Service indicates it is unable to identify any activity that would not be considered to result in a take of the DSL;²⁴ however, EWAC recommends the Service consider recognizing in any final rule that the following activities would not violate the “take” prohibition of Section 9:

- Operations and maintenance of existing electric infrastructure and rights-of-way within the range of the DSL;²⁵

²⁰ *Id.* at 81.

²¹ *Id.*

²² Proposed Rule at 42,673; American Conservation Foundation, Annual Report 2021, Texas Conservation Plan for the Dunes Sagebrush Lizard, at 21, 24-25 (2021).

²³ *Endangered and Threatened Wildlife and Plants: Notice of Interagency Cooperative Policy for Peer Review of Endangered Species Act Activities*, 59 Fed. Reg. 34,272 (July 1, 1994).

²⁴ Proposed Rule at 42,675.

²⁵ Operations and maintenance of existing infrastructure includes, but is not limited to, trimming vegetation that overhangs or encroaches into rights-of-way and easement areas, removing vegetation within rights-of-way and easement areas that could interfere with the safety and reliability of relevant infrastructure, mowing and clearing

- De minimis new disturbance of potential DSL habitat associated with access to existing electric infrastructure and rights-of-way;
- De minimis new disturbances associated with expansion of existing rights-of-way.

It is critical for national interests that operation and maintenance of renewable energy and electric transmission and distribution infrastructure can continue with minimal disruption.²⁶ The activities described above are unlikely to have a negative impact on DSL as the activities would occur in previously disturbed areas and would not result in alteration of significant areas of potential DSL habitat.

III. The Service Should Clarify Where the DSL Habitat is Located with Greater Specificity.

In addition to concerns about regulatory certainty described above, EWAC is also concerned that the lack of specificity in the Proposed Rule and SSA describing where DSL may occur on the landscape will prove challenging for members making plans for new projects or for operating and maintaining existing projects within the species' historic range. In any final rule, the Service should provide clarification as to where suitable DSL habitat is likely to be located on the landscape, and should be careful not to include areas that are not likely to support DSL. The Service states in the Proposed Rule that the DSL requires a "large, intact, shinnery oak duneland ecosystem" in order to "facilitate the completion of their life history and maintain healthy populations."²⁷ In part due to the specificity of the DSL's habitat requirements, the species' distribution within its range is described as "patchy and fragmented."²⁸ In the Proposed Rule, the Service states the DSL's habitat patches can shift over time, and thus it is necessary to "include the consideration of currently unoccupied but potentially suitable habitat patches within the species' range."²⁹ While EWAC recognizes the difficulty inherent in mapping the habitat for a species such as the DSL, particularly where the agency lacks GIS data, we also encourage the Service to be as precise as possible in describing and identifying the components of suitable habitat. To the degree the Service may be considering use of shapefiles for identifying potential occurrence of DSL, EWAC is supportive of efforts to provide more precision than would occur if the agency described occurrence on a county-by-county level. Doing so will provide the regulated community with greater clarity for project planning purposes, including determining when coordination with the Service may be appropriate, and reduce unnecessary regulatory burden.

rights-of-way and easement areas to the width established by agreements with landowners, bulldozing under transmission and distribution lines to maintain ground clearances in accordance with relevant statutes and regulations, rebuilding existing infrastructure, and repairing and replacing equipment.

²⁶ See Executive Order 14,057: Catalyzing Clean Energy Industries and Jobs Through Federal Sustainability, 86 Fed. Reg. 70,943 (Dec. 13, 2021) (declaring it a priority to achieve a nationwide energy transition toward a carbon pollution-free electricity sector, which will, out of necessity, require deployment of renewable energy and associated transmission and distribution lines).

²⁷ Proposed Rule at 42,666. The Service further states the DSL is reliant on "very specific and restricted habitat type." *Id.* at 42,667. See SSA at 28-34 (describing the unique habitat supporting DSL).

²⁸ SSA at 18.

²⁹ Proposed Rule at 42,666.

IV. The Service Should Begin Working with the Energy Generation Transmission and Distribution Sectors to Identify Efficient ESA Compliance Mechanisms.

In the event the Service lists the DSL under the ESA, EWAC encourages early coordination with the regulated community to identify ESA compliance pathways that will ensure the goals of the Biden-Harris Administration for addressing climate change, modernizing the power grid, and pursuing environmental justice are met, and that these compliance pathways consider operational, financial, and other constraints faced by the renewable energy and electric transmission and distribution sectors. For example, early identification of potentially acceptable means to minimize and mitigate impacts to DSL, research and monitoring needs, and whether the Service will consider allowing research as a potential conservation measure could assist project proponents in planning for future needs and assist the Service in obtaining the data it lacks regarding the species' life cycle and habitat needs.

V. Conclusion.

EWAC appreciates the Service's consideration of these comments. By incorporating EWAC's comments, the final rule will be more consistent with the Biden-Harris Administration's stated goals relating to climate change, cleaner energy, grid modernization, and environmental justice.³⁰ EWAC would welcome the opportunity to discuss the comments in greater detail with the Service.

Please feel free to contact the following EWAC representatives:

Jennifer A. McIvor, EWAC Policy Chair, jennifer.mcivor@brkenergy.com, 712-352-5434

John M. Anderson, EWAC Executive Director, janderson@energyandwildlife.org, 202-508-5093

Brooke Marcus, Nossaman LLP, bmarcus@nossaman.com, 512-813-7941

³⁰ See Executive Order 13990, "Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis," 86 Fed. Reg. 7037 (Jan. 25, 2021).