



November 20, 2008

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New Mexico Ecological Services Field Office
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VIA FAX & EMAIL

Re: Lesser Prairie-Chicken & Sand Dune Lizard Conservation Agreements

Dear Acting Supervisor Hein,

WildEarth Guardians submits the following comments on the lesser prairie-chicken and sand dune lizard Candidate Conservation Agreement (CCA), Candidate Conservation Agreement with Assurances (CCAA), and accompanying Environmental Assessment (EA). The proposed agreements are a collaboration between the U.S. Fish and Wildlife Service (FWS), Bureau of Land Management (BLM), and the Center of Excellence in Hazardous Materials Management (CEHMM). While FWS's Federal Register notice only invites comments on the CCAA, we include comments on the CCA here, as they are interconnected and both of concern. We have serious problems with the proposed agreements. They are an attempt to avoid Endangered Species Act (ESA) listing for two species that urgently require listing and to avoid full ESA enforcement should these species be listed.

The Folly of Attempting to Preclude Listing

We are simply amazed that FWS is still trying to avoid listing of the lesser prairie-chicken and sand dune lizard:

Although the FWS cannot absolutely guarantee that listing will never be necessary, this CCA seeks to implement conservation measures on Federal lands, which, when combined with those benefits that would be achieved if conservation measures in the CCAA are implemented, would preclude or remove any need to list the LPC and SDL. CCA at p. 2.

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The proposed agreements' stated purpose of avoiding listing conflicts sharply with the best available science, which shows that biologically these two species warrant listing. Regarding the sand dune lizard, it is simply too late to avoid listing this species without violating the ESA. WildEarth Guardians submitted a petition in April 2008 to emergency list the sand dune lizard under the ESA.¹ In that petition, we discussed Snell et al. (1997), a scientific report that expressed concern that no management strategy might be able to save the lizard from extinction. We further documented in the petition that FWS has repeatedly noted this concern in candidate listing forms for the sand dune lizard. In other words, for more than a decade, scientists have warned that the sand dune lizard may be so endangered it may not be possible to prevent its extinction. Now is not the time to try to dodge listing this extremely imperiled reptile. Nor could the agreements plausibly alleviate the need for listing, as they do not include the Texas portion of this species' range. As discussed below, it is also not clear whether they include its entire range in New Mexico.

Similarly, FWS should not attempt to avoid listing of the lesser prairie-chicken. This bird species has declined by 90% over the past century and is facing an explosion of threats including, but not limited to, oil and gas, climate change, wind power, and conversion of habitat to cropland. We documented the perils facing this bird in our June 9, 2008 report "Lesser Prairie-Chicken: A Decade in Purgatory."² The report was issued on the tenth anniversary of this species' designation as an ESA candidate. Moreover, the proposed agreements only cover a portion of the lesser prairie-chicken's range. The lesser prairie-chicken's range extends across 5 states, and this agreement only affects one of those states: New Mexico.

While we appreciate conservation measures adopted for the lizard and prairie-chicken, these species need to be listed. Courts have long held that conservation agreements that are voluntary and speculative (which these agreements are) cannot substitute for listing. The proposed agreements do not remove or reduce all of the listing factors delineated in the ESA at Section 4(a)(1). 16 U.S.C. § 1533(a)(1). For the lesser prairie-chicken, an example of a factor the agreements do not reduce is drought and climate change, which would be categorized under the ESA as listing factor E: "other natural or manmade factors affecting its continued existence." 16 U.S.C. § 1533(a)(1)(E). The CCA notes that nest failure occurs frequently for lesser prairie-chickens during drought, citing a study that found 0 of 11 nests hatched during a severe drought. CCA at p. 4. Drought may increasingly threaten this species, given climate change forecasts of extended drought in the southwest.³ On this basis alone, the species likely warrants listing.

¹See WildEarth Guardians Request for Emergency Listing of the Sand Dune Lizard Under the Endangered Species Act, dated April 9, 2008. This petition is hereby incorporated by reference.

²WildEarth Guardians submitted this report to FWS via email dated November 20, 2008. This report is hereby incorporated by reference.

³Climate change impacts in New Mexico are documented in Floyd, Randy (2006). Climate change impacts on natural systems in New Mexico. New Mexico Department of Game and Fish report dated July 19, 2006 and Enquist, Carolyn, and Dave Gori (2008). Implications of Recent Climate Change on Conservation Priorities in New Mexico. Report from The Nature Conservancy and Wildlife Conservation Society, dated April 2008. Online at: http://nmconservation.org/NM_ClimateChange.htm. Discussion of climate change impacts in the southwestern U.S. can be found at: Intergovernmental Panel on Climate Change. 2001. IPCC Special Report on The Regional Impacts of Climate Change An Assessment of Vulnerability. See <http://www.grida.no/climate/ipcc/regional/index.htm>; U.S. Global Change Research Program. 2000. US National Assessment of the Potential Consequences of Climate

Regarding the sand dune lizard, it requires immediate listing given the forecast for over a decade that this species is so imperiled it may be impossible to pull it back from the brink of extinction. In the CCA, FWS indicates that ESA listing factor E threatens the sand dune lizard through exposure to toxic chemicals and hydrogen sulfide emissions and the following dynamics:

The species is an extreme habitat specialist associated with a single plant species that exists in an ecosystem that was previously more widespread and is now relict. Factors such as short life span, small clutch size, and the presence of natural competitors and predators contribute to the precarious status of this species. The species occurs in a fragmented range where populations are not connected for genetic exchange and are vulnerable to genetic drift and population loss due to random events. Because the species is not known to cross large expanses of unsuitable habitat, there is little chance of suitable habitat being recolonized without human intervention. Additionally, many natural events can quickly impact the shinnery oak system that would be equal to spraying with an herbicide or mechanically removing vegetation. Sudden Oak Death, drought, freezes, infestation of root boring insects, and a known lepidopteran parasite can quickly defoliate and kill giant stands of shinnery oak (Peterson and Boyd 1998). CCA at p. 18.

The CCA and CCAA fail to significantly reduce this listing factor, and this factor is one of a multitude of threats facing the lizard.

None of the proposed agreements, EA, or *Federal Register* notice mention the FWS's Policy for the Evaluation of Conservation Efforts when making listing decisions (PECE). The CCA and CCAA would likely fail to meet PECE requirements. The central requisites for PECE are that conservation agreements have a high certainty of being implemented and that the agreements will be effective in conserving the target species. 68 FR 15100-15115. Assured funding, quantitative benchmarks for objectives, detailed steps for implementing a conservation effort that reduces threats, and sufficient participation are some of the elements in PECE. The proposed agreements fail in all of these regards. Of most significance, there is a lack of quantitative objectives for species recovery and no certainty of funding, given that it is entirely voluntary to enroll and for enrollees to contribute funds. Under the Administrative Procedure Act, it would be arbitrary and capricious of FWS to approve the proposed agreements given their failure to meet PECE requirements.

Variability and Change. See Sector: Water Resources at <http://www.usgcrp.gov/usgcrp/nacc/water/default.htm>; Smith, S.J., A.M. Thomson, N.J. Rosenburf, R.C. Izaurrealde, R.A. Brown, and T.M.L. Wigley. 2005. Climate Change Impacts for the Conterminous USA: An Integrated Assessment - Part 1. Scenarios and Context. *Climatic Change* 69 (1): 7-25; Seager, R., M. Ting, I. Held, Y. Kushnir, J. Lu, G. Vecchi, H. Huang, N. Harnik, A. Leetmaa, N. Lau, C. Li, J. Velez, and N. Naik. 2007. Model projections of an imminent transition to a more arid climate in southwestern North America. *Science* 316: 1181-1184; National Science & Technology Council, Committee on Environment & Natural Resources. 2008. Scientific Assessment of the Effects of Global Change on the United States at <http://www.climatescience.gov/Library/scientificassessment/Scientific-AssessmentFINAL.pdf>. Issued May 2008.

Threats to the Lesser Prairie-Chicken and Sand Dune Lizard

The CCA fails to fully disclose the threat of livestock grazing to the lesser prairie-chicken. The CCA states,

Grazing by wildlife or domestic livestock is essential to maintain the health of native grasslands and moderately and lightly grazed areas are necessary on a landscape scale to maintain LPC habitat (Davis 2006). CCA at p. 9.

While grazing by wildlife is essential to maintain healthy grasslands that evolved with those wildlife, grazing by domestic livestock is not. Furthermore, the Davis (2006) report was a New Mexico Department of Game and Fish report examining the prairie-chicken population in New Mexico. It does not constitute a study on grazing in healthy grasslands and therefore is an improper citation.

The CCA is unduly agnostic about the impacts of oil and gas on lesser prairie-chickens. While the CCA describes these impacts as “poorly understood” (CCA at p. 10), the fact that oil and gas activities harm the lesser prairie-chicken in multiple ways has been known for at least a decade. In 1997, the Carlsbad and Roswell Field Offices of the BLM adopted resource management plans and amendments that provided protection for the species from the disturbance from oil and gas during the breeding season. FWS recognized the threat to lesser prairie-chickens from oil and gas in its 1998 “warranted but precluded” decision for this species. For example, FWS wrote:

Because lesser prairie-chickens often nest within a 3 km (1.9 mi) radius of a lek, restrictions on drilling within 200 m will not protect all or even a majority of nesting habitat. 63 FR 31400, 31405.

Despite its initially agnostic tone, the CCA itself documents that oil and gas can negatively impact lesser prairie-chickens in a number of ways.

It is unclear whether the CCA considers disease and predation a threat. The CCA states,

Although the FWS has found no information on disease in LPCs and impacts of predators on LPCs at various life stages, there is now indication that either of these factors have risen to the level that they threaten the continuing existence of the species. CCA at p. 13.

Given the wording, it seems that FWS meant to write “no” instead of “now”, which substantially changes the meaning of this sentence. Please clarify.

Regarding fence collision, the CCA states:

With 14 percent of adult LPC mortality in New Mexico attributable to collision with man-made structures, the negative effect of fence collisions on long-term population viability for the LPC cannot be understated. CCA at p. 14.

Understated appears to be an incorrect word choice; overstated makes more sense, as 14% of adult mortality from any cause is significant.

Geographic Scope

The proposed agreements are inconsistent about their scopes. CCAA is ambiguous about its geographic scope, stating that the planning area is Lea and Eddy counties but that the rest of these two species' ranges in New Mexico may be added. CCAA at p. III.⁴ The CCA describes its scope as southeastern New Mexico. CCA at p. 20. The EA describes the planning area as "approximately 2,200 mi² in the southeastern section of the state within portions of the counties of Lea, Eddy, DeBaca, Curry, Roosevelt, Quay, and Chaves." EA at p. 11. The CCAA, CCA, and EA should all be consistent regarding their geographic scope.

Conservation Measures

While the CCA and CCAA includes lists of conservation measures for both species, these are menus, the exact combination of which will presumably be left to CEHMM in the implementation phase. This makes it very difficult to analyze which measures will be implemented in which locations and whether populations and habitat of the target species will recover as a result. Indeed, there is a lack of actual objectives in the proposed agreement. Certainly there is a lack of quantifiable objectives toward species recovery. These are fatal flaws.

Lesser Prairie-Chicken

While the measures for the lesser prairie-chicken described at p. 21 of the CCA could theoretically conserve the species, it is unclear which measures will apply where. Moreover, some are written without any specificity or quantification – e.g., #3, 5, and 9 and are therefore not certain to result in significant conservation of this species.

In addition to being vague, the conservation measures are not certain to be implemented in a way that results in lesser prairie-chicken recovery. If a company is willing to pay more funds (as specified in the CCA's Appendix C and presumably the CCAA's Appendix C, which was missing⁵), it could drill more new well locations in lesser prairie-chicken habitat. The CCA and CCAA presumes there will be less harm to lesser prairie-chicken habitat because of financial incentives, but lucrative wells could reduce the financial incentives and disincentives in the CCA, thus making it more profitable to destroy habitat than to, for example, directionally drill a well. Certainly none of the amounts in the Contributions Table at Appendix C of the CCA could compete with a lucrative Permian Basin lease.

Furthermore, if a company opts to complete in-kind conservation measures rather than pay funds, CEHMM has the authority to approve implementation of those measures. We are very concerned that this provides too much authority to a private organization, as we discuss below.

⁴The CCAA failed to include page numbers, and we therefore cite from this document according to section numbering.

⁵The Contributions Table was missing from the CCAA.

Regarding the lesser prairie-chicken, the CCA provides no specifics about the terms of the CCA for a livestock operator. CCA at p. 40.

We are also concerned that dependence on lesser prairie-chicken propagation and release ignores the past failures of attempted releases of this species.

Sand Dune Lizard

A key component of the sand dune lizard's conservation measures appears undone: mapping by FWS and BLM of the lizard's occupied or suitable areas, unoccupied dune complexes, and shinnery oak corridors. CCA at p. 22. Without this map, it is difficult to evaluate where threats exist and how the CCA and CCAA will address these threats.

Moreover, some of the measures specified for the sand dune lizard at p. 22 of the CCA are among the "foundational" conservation measures in the BLM's special status species resource management plan amendment. They appear to have been packaged up in the CCA in order to provide federal lands permittees immunity from ESA requirements, not to provide significant conservation benefits.

Alarming, Appendix C includes a payment level for up to 16 wells per square mile, although sand dune lizards have been demonstrated to decline sharply when well densities exceed 13 wells per square mile.

For both the lesser prairie-chicken and the sand dune lizard, there appears to be a double standard between how wind power is treated versus oil and gas drilling. For wind power, there appears to be zero tolerance for impacts to the two species: "Avoid leasing any lands within the Conservation Lands to wind power development (including any appurtenant turbine towers, roads, fences, or power lines)." CCAA at part V(k).⁶ Alternatively, there is accommodation for oil and gas drilling: "Avoid well pad construction within 1.5 miles of an active lek, (as defined in the Strategy and/or RMPA), unless reviewed and approved by the CEHMM and FWS." CCAA at part V(r). If anything, wind power should be given more advantages in lesser prairie-chicken habitat than oil and gas drilling, given that the latter harms the habitat as well as resulting in more climate change, which also adversely impacts the lesser prairie-chicken. We would argue that lesser prairie-chicken habitat needs to be protected from all forms of energy development, but there is an especial need to protect it from fossil fuel extraction.

Failure to Quantify Incidental Take

The CCAA and CCA fail to quantify incidental take. CCAA at Part VIII. Moreover, landowners are not required to notify FWS prior to incidental take (*Id.*), which will make it impossible for FWS to minimize incidental take post-listing, despite the legal requirement that it do so. The CCA references a conference opinion (at p. 3), which should have been appended to the EA so that the public could better evaluate the environmental impacts of the proposed agreements.

⁶There is a typo in the CCAA, as there are two item (k)'s.

Adaptive Management & Uncertainty

We are concerned by the vagueness of these agreements, the lack of certainty that the conservation benefit will make up for reduced ESA protections should the species get listed, and the twenty-year period for which the agreements will be in effect. What conservation measures will be taken, where, and will those change in the 20-year duration of the CCAA? Will participating landowners get immunity from incidental take liability even if it turns out conservation measures are not resulting in adequate conservation to prevent extinction at the landscape scale? While the CCA states that adaptive management will be employed (p. 24), there is no certainty provided to the sand dune lizard and lesser prairie-chicken that new information will be translated into effective conservation measures, particularly given the large role that CEHMM will have in the implementation of the proposed agreements.

Turning Over Species Management to Private Organization

We are very concerned that the CCA and CCAA will turn over management for two highly imperiled ESA candidate species to a private 501(c)(3) organization, CEHMM, for twenty years. The proposed agreements provide a central role for CEHMM: it is charged with implementing the CCA and CCAA. Among other duties, CEHMM will enroll participants, provide technical guidance, determine success of conservation measures, manage funds, release lesser prairie-chickens, and prepare annual reports. FWS and BLM will play a backseat role at best. CCA at p. 23 and CCAA at part V.

CEHMM therefore assumes weighty responsibilities with these agreements. However, judging from its website, the only involvement this organization appears to have in endangered species conservation is the current effort on the lizard and prairie-chicken. In addition, the organization's website does not list staff, but technical contributors. It is unclear how the technical contributors interact with CEHMM, as most of them appear to be full-time university staff. In addition, the board members of this organization do not appear to have backgrounds in endangered species conservation.⁷

Flaws in the Environmental Assessment

The EA is insufficient for a variety of reasons. It fails to disclose full environmental impacts from the proposed agreement. For instance, if the species are listed under the ESA and the CCA and CCAA are not finalized, the full force of the ESA's protection for these species would be in effect. In the event of species listing, ESA protection will be diminished if these agreements are finalized, as there would be broad incidental take coverage. Likewise, the range of alternatives should have included a "listing" alternative, which discusses how the preferred alternative diminishes ESA protection for these species were these candidates actually listed.

In addition, given the potential for significant reductions in ESA protection for the sand dune lizard in the majority of its range, an Environmental Impact Statement is required.

⁷See <http://www.cehmm.org>, visited November 20, 2008.

Conclusion

WildEarth Guardians has grave concerns about the proposed candidate conservation agreements. FWS should not be attempting to avoid listing of the sand dune lizard and lesser prairie-chicken. These species are highly imperiled and badly need federal protection under the ESA. Furthermore, the conservation measures provided are vague but provide broad immunity for participants from the full force of the ESA. There are no quantifiable recovery goals in the proposed agreements, rather just a menu of choices which may or may not result in conservation progress for these imperiled species.

We would like to make a special plea. The ESA has been found by FWS to be 99% effective in preventing extinction of listed species. In contrast, species awaiting listing under the ESA have gone extinct will in candidacy limbo. The sand dune lizard was supposed to be proposed for listing by September 30, 2008. FWS Director Dale Hall told Congress he would do so. The species has not yet proposed, but we are optimistic that a proposal is forthcoming. The language in the proposed agreements that they may “preclude” listing is rather discouraging. FWS should not be talking about precluding listing of the sand dune lizard, rather FWS should be listing the sand dune lizard. Similarly with the lesser prairie-chicken: this species has waited long enough for federal protection.

Let me use an analogy. The question of whether to list a species or not is akin to a doctor telling a patient whether or not he has cancer. The answer is science-based, and it is a yes or a no. The diagnosis must come first, and it is critical to moving forward with treating the patient. If the patient has cancer, then there can be a discussion about what treatments would be best: diet, surgery, radiation, chemotherapy? With the test results already in (in the form of “warranted” findings for both species), please give us the diagnosis quickly: list the lesser prairie-chicken and sand dune lizard. *Then* mull over treatments: what should be in the recovery plan? Should there be reintroduction, and how should that be structured? Can carefully designed habitat conservation plans help address non-federal lands management for these species? With further delay in listing (and now talk of precluding listing), we fear the patients are languishing, unassisted, while the cancer of habitat destruction and the many other threats they face are ushering in their demise.

Sincerely,



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