



United States Department of the Interior

FISH AND WILDLIFE SERVICE

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Memorandum

To: Regional Director, Southwest Regional Office, Albuquerque, New Mexico

Through: Assistant Regional Director – Ecological Services, Southwest Regional Office, Albuquerque, New Mexico

From: Field Supervisor

Subject: Findings and Recommendations on Issuance of an Amended Incidental Take Permit (ES89394D) for the Lesser Prairie-Chicken (*Tympanuchus pallidicinctus*; LEPC) to LPC Conservation, LLC for the Amended Renewable (Wind and Solar) Energy, Power Line, and Communication Tower Habitat Conservation Plan for the Lesser Prairie-Chicken, covering portions of Texas, New Mexico, Oklahoma, Kansas, and Colorado.

I. DESCRIPTION OF PROPOSAL

LPC Conservation, LLC (applicant) has applied to the U.S. Fish and Wildlife Service (Service) for an amended incidental take permit (permit) under section 10(a)(1)(B) of the Endangered Species Act of 1973, as amended (ESA)(16 U.S.C. §1531-1544). Such permits authorize take that is incidental to otherwise lawful activities (50 CFR 17.3). The *Renewable (Wind and Solar) Energy, Power Line, and Communication Tower Habitat Conservation Plan* (HCP) was approved and permitted by the Service on December 1, 2021. At the time of approval and permit issuance, the plan area for the HCP was the 2013 LEPC Estimated Occupied Range (EOR) boundary plus a 10-mile buffer. In 2022, after the Service's approval of the HCP and issuance of the permit, the Lesser Prairie-Chicken Interstate Working Group revised the EOR of the LEPC to expand the range boundaries north and east to include LEPC occurrence documented in Colorado and to connect to the Kansas Shortgrass/Conservation Reserve Program Mosaic. The proposed amendment updates the HCP and permit to incorporate the revised EOR boundary and expand the plan area boundaries in the HCP accordingly. The amendment does not change the covered activities, estimated take of LEPC, measures to minimize and mitigate impacts, or reporting requirements outlined in the original HCP.

The proposed amendments to the HCP and permit have been analyzed in an Environmental Assessment (EA) in accordance with the National Environmental Policy Act of 1969 (NEPA). The HCP, incorporated herein by reference, describes measures to minimize and mitigate impacts from any expected incidental take of the LEPC.

As discussed in Section 1.7 of the HCP, the permit would only authorize incidental take of LEPC associated with otherwise lawful activities. Projects seeking to enroll in the HCP and obtain coverage would be required to provide documentation of ESA compliance for species not covered under the permit as part of the application package, which would be reviewed by both the Applicant and the Service prior to approval (see Section 8.4 of the HCP). Considering that no other species are covered in the HCP or permit, the “No Surprises Rule,” (codified at 50 CFR 17.22 b) are only applicable for the LEPC.

Analysis of Effects

The Service fully analyzed the effects of the proposed action on the LEPC in our EA and Biological Opinion (BO) for the proposed action. We incorporate both documents herein by reference.

The amendments do not change the effects of this HCP and permit on the LEPC and thus the effects analysis detailed below is consistent with that set forth within the *Findings and Recommendations* document supporting the 2021 HCP approval.

Full implementation of the HCP is expected to potentially affect 500,00 acres of suitable LEPC habitat (300,000 acres of suitable LEPC habitat in the Northern DPS and 200,000 of suitable LEPC habitat in the Southern DPS), resulting in take in the form of harm. Mitigation is being accomplished by acquiring strategically located, permanent mitigation to fully offset take both spatially and temporally. Once take is quantified, using habitat as a proxy, that take must be mitigated for using the tiered mitigation system established within the HCP based upon the relative value of the habitat as defined by the Southern Great Plains Crucial Habitat Assessment Tool. Impacts to higher priority areas will require higher mitigation ratios as compared to impacts in lower priority areas. Overall, the mitigation ratios average 2 acres of mitigation for every 1 acre of impact. Additionally, all impacts must be offset using mitigation occurring in a priority area of equivalent or higher value areas as defined by the Southern Great Plains CHAT. The HCP requires all mitigation be in place and meeting performance standards prior to impacts occurring to ensure there is no temporal loss for the species. After year 5, or the first 50,000 acres of mitigation are sold, for every 1 acre of impact the HCP requires mitigation includes a minimum of 1 acre of restoration to result in no net loss of habitat. The remainder of the required mitigation can be targeted at additional restoration efforts or habitat enhancement.

Impacts to the Northern DPS of the LEPC habitat proposed in the HCP is estimated to be less than 10 percent of all species habitat within Northern DPS. Impacts to the Southern DPS of the LEPC habitat proposed in the HCP is estimated to be less than 20 percent of all species habitat with this Southern DPS. Based on the distribution of the LEPC and its habitat and mitigation requirements described in the HCP, the Service has determined that the amount of requested incidental take for both the Northern and Southern DPS of the LEPC is so minor that it is not likely to jeopardize the species

in either DPS. Critical habitat has not been designated for the species therefore no adverse modification of critical habitat will occur.

II. PUBLIC COMMENT

A Notice of Availability of the amended HCP and accompanying EA was published in the Federal Register on January 14, 2025 (90 FR 3241). The public comment period closed on February 14, 2025.

We received four total comments. Two of the comments received were non-substantial and one comment was supportive of the amendment. The final comment asked if the Service had fully evaluated the effects of noise of the covered activities on the LEPC. While this comment was beyond the scope of the proposed amendment, the Service wrote a response which documents that we fully considered the effects of noise of the covered activities on the LEPC prior to approving the original HCP and there is no new scientific information available on this issue. Two comments received were anonymous, the comment in support was from Colorado Parks and Wildlife, and the final comment was from a graduate student. Full responses to all comments are in Appendix E of the final EA.

III. INCIDENTAL TAKE PERMIT CRITERIA - ANALYSIS AND FINDINGS

1. The proposed taking will be incidental to otherwise lawful activities.

We find that the take will be incidental to otherwise lawful activities, including activities required for construction, operations, and maintenance of wind, solar, and transmission line development as well as management actions on mitigation lands (see section 2 of the HCP for a complete discussion of covered activities). The take of individual LEPC will be primarily due to the indirect impacts of habitat destruction and/or alteration.

2. To the maximum extent practicable, avoid, minimize, and mitigate for the impacts of such taking.

The applicant has committed, to the maximum extent practicable, to minimize and mitigate the effects of taking LEPC. To minimize impacts, the HCP is designed to encourage avoidance of LEPC habitat and minimization when complete avoidance cannot be accomplished by the utilization of the methodology to quantify impacts and the tiered mitigation ratios. This system results in projects which are strategically located to occur in lower priority areas that have existing impacts and would require less mitigation than would projects built in higher priority areas with fewer existing impacts. Additionally, the HCP requires noise and timing restrictions during the breeding season to further minimize impacts. The mitigation is commensurate with the level of take anticipated. In addition, the applicant has included provisions for changed circumstances that are foreseeable. These strategies will ensure that impacts from the proposed taking are minimized and mitigated to the maximum extent practicable. For a complete discussion on the proposed minimization and mitigation actions see section 5 in the HCP.

3. Ensure adequate funding for the plan will be provided.

The total cumulative cost of implementing the HCP for the 30-year period is approximately \$3,625,755,592, assuming full utilization of all take. The applicant has incorporated these costs into the project's capital costs. For a complete discussion on funding see section 7 of the HCP.

4. The proposed taking will not appreciably reduce the likelihood of the survival and recovery of the species in the wild.

As the Federal action agency considering whether to issue an amended permit to the applicant, we have reviewed the proposed action under section 7 of the ESA. Our BO concluded that issuance of the amended permit will not jeopardize the continued existence of the covered species in the wild. No critical habitat has been designated for the covered species, thus none will be affected. The HCP only covers the LEPC; participants must avoid or receive separate take authorization, as necessary for other federally listed species that occur within their respective project area(s) in order to be eligible for enrollment in the HCP. Therefore, the LEPC is the only species addressed in the BO. Prior to enrollment in the HCP, all prospective participants must provide documentation of ESA compliance for species not covered under the permit. Therefore, the issuance of the permit will not result in jeopardy of non-covered listed species and no adverse modification of any designated critical habitat within the permit area is expected.

5. The Applicant has met other requirements imposed by the Secretary of the Interior, such as monitoring and reporting.

We assisted the applicant in the development of their HCP and the proposed amendment. We commented on draft documents, participated in numerous meetings and conference calls, and worked closely with the applicant during every step of plan and document preparation, so that conservation of the covered species would be assured and recovery would not be precluded by the covered activities. The HCP incorporates our recommendations for minimization and mitigation of impacts, as well as steps to monitor the effects of the HCP and ensure success. Monitoring, as well as coordination and reporting mechanisms, have been designed to ensure that changes in conservation measures can be implemented if proposed measures prove ineffective (adaptive management) or impacts exceed estimates (changed circumstances). It is our position that no additional measures are required to implement the intent and purpose of the HCP and its associated permit.

6. The Secretary of the Interior has received assurances that the plan will be implemented.

Chapters 4 and 5 of the HCP address the implementation, including identifying how the applicant will ensure that avoidance and minimization measures will be properly implemented. This plan for implementation provides assurances to the Service that the applicant will fully implement the HCP.

IV. GENERAL CRITERIA AND DISQUALIFYING FACTORS - ANALYSIS AND FINDINGS

We have no evidence that the amended permit should be denied on the basis of the criteria and conditions set forth in 50 CFR 13.21 (b)-(c). The applicant has met the criteria for the issuance of the permit and does not have any disqualifying factors that would prevent the permit from being issued under current regulations.

V. RECOMMENDATION ON PERMIT ISSUANCE

Based on the foregoing findings with respect to the proposed action, we recommend issuance of an amended permit to authorize incidental taking of the LEPC by the applicant, in accordance with the amended HCP and BO.

Deputy Regional Director,
Southwest Region