

U.S. Fish and Wildlife Service
Southwest Regional Office
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FINDING OF NO SIGNIFICANT IMPACT

Issuance of a Section 10(a)(1)(A) Enhancement of Survival Permit and Approval of the Candidate Conservation Agreement with Assurances for the Dunes Sagebrush Lizard (*Sceloporus arenicolus*) (CCAA) in Andrews, Gaines, Crane, Ector, Ward, and Winkler Counties, Texas

We prepared an Environmental Assessment (EA), incorporated by reference, for the issuance of a section 10(a)(1)(A) Enhancement of Survival Permit (Permit) and approval of the *Candidate Conservation Agreement with Assurances for the Dunes Sagebrush Lizard (Sceloporus arenicolus)* (CCAA) in Andrews, Gaines, Crane, Ector, Ward, and Winkler Counties, Texas.

The Permit Area of the CCAA includes non-federal properties within portions of Gaines, Andrews, Winkler, Ward, Ector, and Crane counties, Texas. The total area is approximately 287,327 acres of habitat as modelled by Hardy *et.al.* (2018), referred to herein as DSL Habitat. Hardy *et.al.* (2018) categorized suitable habitat into four classifications:

- High Suitability – areas where DSL breed, feed, shelter, and establish home ranges, which includes shinnery oak (*Quercus havardii*) dunelands, dunes, blowouts (basically bowl-shaped depressions among sand dunes), barren sand, and shinnery oak mixed with ephemeral grasses and forbs;
- Intermediate I Suitability – areas that include shinnery oak-honey mesquite duneland with grassy or barren sandy dune areas when intermixed; areas used for dispersal and where DSL may breed, feed, and shelter;
- Intermediate II Suitability – areas with mesquite composing less than 25 percent and shinnery oak shrubland/flats; areas used for dispersal of both adults and juveniles; and
- Low Suitability – composed of shinnery oak-honey mesquite shrubland and grasslands; potentially used for dispersal.

We received multiple comments during the public comment period. A summary of the public participation process can be found below. A response to the public comments received is attached to the EA.

Preferred Alternative

The preferred alternative is the proposed action. The proposed action is the issuance of a 10(a)(1)(A) Enhancement of Survival Permit (Permit) to Canyon Environmental, LLC (Applicant) and approval of the proposed *Candidate Conservation Agreement with Assurances for the Dunes Sagebrush Lizard (Sceloporus arenicolus)* (CCAA). The CCAA would operate under a programmatic structure. There would be a single permit holder (the Applicant) and a single CCAA under which multiple participants could be enrolled through certificates of inclusion (CIs). Individual oil and gas, sand mining, renewable energy, linear infrastructure, local government, and agricultural entities interested in participating in the CCAA and seeking incidental take coverage under the permit (should the species be listed in the future) could enroll properties under the CCAA and permit via a CI. Coverage under the permit would only apply to oil and gas exploration and development, sand mining, renewable energy development and operations, linear infrastructure construction and operations, local government activities, agricultural and ranching activities, and general construction activities within the CCAA Permit Area (Covered Activities) on and/or associated with enrolled properties in the CCAA through execution of a CI in compliance with all elements of the CCAA. The conservation strategy of the CCAA will be implemented by the Applicant, with input from the Service, a Participant Committee, and an Adaptive Management Committee, as described in the CCAA. Specific conservation measures include avoidance, minimization, and mitigation and are tailored for each enrolled industry sector. New surface disturbance in DSL habitat triggers the payment of habitat conservation fees and the implementation of conservation measures to minimize the impacts of the disturbance. The Applicant intends to use the conservation fees and enrollment fees to implement conservation actions consistent with the conservation strategy. Costs associated with administering the CCAA are covered through the payment of implementation fees by participants.

Conservation implemented under the CCAA is intended to provide a net conservation benefit to the DSL relative to the environmental baseline, which is marked by the absence of federal regulatory and land management authority to conserve and protect an unlisted species and its habitat on private property in West Texas. Further, the baseline should be evaluated in the context of the maximum level of disturbance that is legally allowable to non-Federal property owners. The proposed action includes approval and implementation of a voluntary conservation program that would be reasonably expected to provide a net conservation benefit to the DSL, the effects of which include mitigating impacts to relevant environmental resources associated with those legally allowable activities by non-Federal property owners. While conservation implemented as a result of the proposed action would be reasonably expected to provide a net conservation benefit, it is not anticipated that the proposed action will eliminate all impacts from underlying lawful activities by participants in the CCAA and non-participants relative to the environmental baseline.

As stated in the CCAA, the requested term of the Permit is 23 years from the date the Permit is signed and the CCAA is approved. The Permit, and subsequent CIs, would become effective and authorize incidental take of the DSL should the DSL become federally listed during the life of the Permit and CCAA, as long as the Applicant and enrolled participants are in compliance with the terms and conditions of the CCAA, Permit, and individual CIs.

The Permit, and subsequent CIs, would authorize incidental “take” of the DSL associated with implementation of Covered Activities. Because take of individual DSL would be difficult to detect, take of DSL would be quantified using the acres of DSL Habitat impacted through implementation of Covered Activities by participants in the CCAA. As proposed in the CCAA, the Permit would authorize incidental take of DSL associated with impacts up to a maximum of 34,940 acres of disturbance to DSL Habitat [as classified by Hardy *et al.* (2018)] within the Covered Area (approximately 12 percent of DSL Habitat modeled by Hardy *et al.* (2018) within Texas). The actual incidental take authorized for an individual participant and its enrolled property will be described in the participant’s CI, such that overall authorized take by participants can be managed over time based on the performance of the plan, including for purposes of evaluating adaptive management triggers, changed circumstances, and unforeseen circumstances. The total maximum take figure is a ceiling that is inclusive of all disturbance of DSL Habitat within the Covered Area by participants and non-participants, including those allocated in other conservation plans such as the Texas Conservation Plan (TCP).

The Applicant has developed, and proposes to implement, the CCAA. This CCAA is a conservation strategy that includes such actions and measures the Applicant and enrolled participants have voluntarily agreed to undertake. These actions and measures include acquiring conservation easements and other protections to create contiguous areas of High and Intermediate Suitability DSL Habitat, and the implementation of selected avoidance and minimization measures to reduce habitat loss and fragmentation in High and Intermediate Suitability DSL Habitat areas. As stated in the issuance criteria, the implementation of the conservation strategy must be reasonably expected to provide a net conservation benefit to the species. Status refers to populations of the species, whereby populations are stabilized, the numbers of individuals are increased, or it may refer to improvement of species’ habitat on the enrolled property.

Other Alternatives Considered

We considered one alternative to the proposed action as part of this process, the No Action Alternative. We also considered several alternatives that were dismissed because they were either not reasonable or did not meet the purpose and need, as reflected in the EA and response to comments.

Under the No Action Alternative, the CCAA would not be implemented, and the Service would not issue a Section 10(a)(1)(A) Permit to the Applicant for activities covered in the CCAA.

Industrial and economic activities resulting in the disturbance of DSL Habitat are ongoing and would continue on private property across the Permit Area as legally allowable without being subject to the conservation measures required under the CCAA. This includes ongoing commercial, industrial and other activities such as oil and gas development and sand mining in DSL habitat, which do not require approvals from the Service or other Federal agencies to be conducted on private property in West Texas.

Under the No Action Alternative, private property owners could engage in conservation management activities aimed to benefit the DSL individually at their discretion, but any actions taken would not be provided regulatory assurances unless obtained on a project-by-project basis. As a result, there would be no readily accessible incentives to encourage conservation activities, and the activities would not be part of an integrated conservation strategy for the benefit of the DSL.

Should the DSL become listed in the future, private property owners engaged in activities that could result in take of DSL could modify their activities to avoid take or seek authorization from the Service for take incidental to otherwise lawful activities. Such authorization could occur on a project-by-project basis or through a programmatic action. The project-by-project compliance approach could result in uncoordinated conservation measures that would not be as productive or beneficial for the DSL as implementation of the CCAA.

Public Participation

Formal public scoping was conducted with a 30-day public comment period opened on July 15, 2020, with the publication of a Notice of Intent in the Federal Register (85 FR 43254). We received 15 comments from consultants, non-governmental organizations, industry representatives, the applicant, law firms, and private landowners. Comments received concerned the application of the CCAA policy standard, lack of outreach by the Applicant to potential participants and landowners, and some technical comments on hydrology and conservation of the DSL (Docket: FWS-R2-ES-2020-0065, www.regulations.gov). These were shared and discussed with the Applicant.

A Notice of Availability of the Candidate Conservation Agreement with Assurances for the Dunes Sagebrush Lizard (*Sceloporus arenicolus*) – dated November 2020 and accompanying draft EA was published in the Federal Register on November 20, 2020 (85 FR 74370). The public comment period closed on December 21, 2020. We received comments from 29 individuals or organizations. Some of the comments we received were not substantive, such as those that merely express support for, or opposition to, the CCAA. Substantive comments included the adequacy of the EA, the application of the CCAA policy standard, the ability of the CCAA to result in DSL conservation, administration of the CCAA, and numerous technical comments related to aspects of the CCAA.

Determination

Significance, as used in NEPA, requires considerations of both context and intensity. Context means that the significance of an action must be analyzed in several contexts such as society as a whole (human, national), the affected region, the affected interests, and the locality. The Covered Area (*i.e.*, area subjected to effects resulting from the proposed action) is limited to the State of Texas, and covers approximately 0.16 percent (449 square miles; 6 counties) of the State of Texas (268,597 square miles; 254 counties). Almost all of the Covered Area is privately owned and rural, and is currently subject to disturbance from lawful ongoing and future activities in each of the sectors included as Covered Activities. Changes to these resources would typically be limited to the area of disturbance or areas within the immediate vicinity. Because the CCAA includes conservation measures aimed at the protection, conservation and enhancement of the Covered Species and DSL Habitat on enrolled properties, the impacts of the proposed action are anticipated to result in a range of negligible to moderate incremental impacts to the evaluated resources beyond conditions described in the No Action Alternative. However, implementation of Conservation Measures in the Covered Area under the proposed action would also result in negligible to moderate benefits to evaluated resources that offset the adverse impacts associated with Covered Activities. Therefore, due to the scale of the Covered Activities and the offsetting beneficial effects of the proposed action, the context of the impacts is not significant to the quality of the human environment in the region, the State, or the Nation.

Intensity refers to the severity of the impacts. We have considered the following regulatory factors in evaluating intensity.

- (1) Impacts that may be both beneficial and adverse. A significant effect may exist even if the Federal agency believes that on balance the effect will be beneficial.

The EA has indicated that the proposed action is expected to result in:

- minor to moderate short- and long-term impacts and benefits to the Covered Species and is reasonably expected to provide a net conservation benefit;
- negligible impacts and benefits to hydrology and water, and cultural resources;
- minor short-term impacts and minor to moderate short- to long-term benefits to soils and wildlife;
- minor short-term impacts and minor short- to long-term benefits to vegetation;
- negligible impacts and minor short- to long-term benefits to Listed, Proposed, Candidate Species (not Covered in the CCAA) and minor to moderate short- to long-term impacts and minor short- to long-term benefits to State-listed species;
- and minor to moderate short- to long-term impacts and benefits to land use and ownership.

The expected benefits of the proposed CCAA would occur through implementation of proposed minimization and offsetting conservation measures. The extent of these benefits will depend on the level of enrollment, consistency of implementing the avoidance and minimization measures, and level of long-term habitat protection realized through implementation of the CCAA. The CCAA is reasonably expected to provide a net conservation benefit to the DSL and DSL Habitat relative to the environmental baseline described in the No Action Alternative, which is marked by the absence of federal regulatory and land management authority to conserve and protect an unlisted species and its habitat on private property in West Texas.

No significant adverse or beneficial impacts to the evaluated resources are expected to result from the proposed action.

- (2) The degree to which the proposed action affects public health or safety.

No effects to public health or safety are expected to result from the proposed action.

- (3) Unique characteristics of the geographic area such as proximity to historic or cultural resources, park lands, prime farmlands, wetlands, wild and scenic rivers, or ecologically critical areas.

No adverse long-term impacts to historic or cultural resources, park lands, prime farmlands, wetlands, wild and scenic rivers, or ecologically critical areas are expected to result from the proposed action.

- (4) The degree to which the effects on the quality of the human environment are likely to be highly controversial.

We have no evidence to suggest that the effects on the quality of the human environment are likely to be highly controversial.

- (5) The degree to which the possible effects on the human environment are highly uncertain or involve unique or unknown risks.

None of the effects of the CCAA are highly uncertain because we can reasonably anticipate the beneficial effects of the proposed conservation measures on the human environment. None of the effects of the CCAA involve unique or unknown risks. Many of the proposed conservation measures in the CCAA are focused on avoiding and

minimizing impacts to DSL Habitat, along with habitat preservation. None of the conservation measures are utilizing practices that are not already common.

- (6) The degree to which the action may establish a precedent for future actions with significant effects or represents a decision in principle about a future consideration.

Future actions would be reviewed on their own merits. Thus, the proposed CCAA would not establish a precedent for future actions or represent a decision in principle about future actions with potentially significant environmental effects.

- (7) Whether the action is related to other actions with individually insignificant but cumulatively significant impacts. Significance exists if it is reasonable to anticipate a cumulatively significant impact on the environment. Significance cannot be avoided by terming an action temporary or by breaking it down into small component parts.

The proposed CCAA is not directly related to any other action.

- (8) The degree to which the action may adversely affect districts, sites, highways, structures, or objects listed in or eligible for listing in the National Register of Historic Places or may cause loss or destruction of significant scientific, cultural, or historical resources.

The EA has indicated that no adverse impacts to districts, sites, highways, structures, or objects listed in or eligible for listing in the National Register of Historic Places; or, significant scientific, cultural, or historical resources are expected to result from the proposed action.

- (9) The degree to which the action may adversely affect an endangered or threatened species or its habitat that has been determined to be critical under the Endangered Species Act of 1973.

The EA has indicated that no federally listed or proposed species are located in the Permit Area, and there is no designated or proposed critical habitat in the Permit Area. Therefore, no adverse impacts to federally listed or proposed species are expected to result from the proposed action.

- (10) Whether the action threatens a violation of Federal, State, or local law or requirements imposed for the protection of the environment.

The purpose of the CCAA is to promote conservation of the DSL and the habitat upon which they depend for breeding, feeding, sheltering and dispersal. Depending on the level of enrollment, consistency of implementing the proposed avoidance and minimization measures, and level of long-term habitat protection realized through implementation of the CCAA, the CCAA would protect the environment, and as such would not violate applicable Federal, State, or local law or requirements imposed for the protection of the environment.

Based on information in the EA and supporting data in Service files, we have determined that issuance of the Permit and approval of the CCAA is not a major Federal action that would significantly affect the quality of the human environment within the meaning of section 102(2)(c) of the National Environmental Policy Act of 1969 (NEPA). Accordingly, the preparation of an Environmental Impact Statement on the proposed action is not warranted. Therefore, the Service has made a finding of no significant impact as allowed by NEPA regulation and supported by Council on Environmental Quality guidance.

Regional Director
Southwest Region

January 20, 2021
Date

ENVIRONMENTAL ACTION STATEMENT (EAS)

Within the spirit and intent of the Council on Environmental Quality's regulations for implementing the National Environmental Policy Act (NEPA), as well as other statutes, orders, and policies that protect fish and wildlife resources, I have established the following administrative record. In addition, I have determined that the action of issuance of a Section 10(a)(1)(A) Enhancement of Survival Permit and approving the CCAA:

_____ is a categorical exclusion as provided by 516 DM 2, Appendix 1 and 516 DM 6, Appendix 1 and no further NEPA documentation is necessary.

_____ is found not to have significant environmental effects as determined by the attached Environmental Assessment and Finding of No Significant Impact.

_____ is found to have significant effects, and therefore further consideration of this action will require a notice of intent to be published in the Federal Register announcing the decision to prepare an EIS.

_____ is not approved because of unacceptable environmental damage, or violation of Fish and Wildlife Service mandates, policies, regulations, or procedures.

_____ is an emergency action within the context of 40 CFR 1506.11. Only those actions necessary to control the immediate impacts of the emergency will be taken. Other related actions remain subject to NEPA review.

Other supporting documents:

XX Environmental Assessment

XX Biological Opinion

XX Findings Document

Regional Director,
Southwest Region

Date