



United States Department of the Interior

FISH AND WILDLIFE SERVICE



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In Reply Refer to:
FWS/R2ES/TE89208D-0

Memorandum

To: Regional Director, Southwest Regional Office, Albuquerque, NM
U.S. Fish and Wildlife Service

From: Assistant Regional Director—Ecological Services, Southwest Regional office

Subject: Findings and Recommendations on Issuance of an Enhancement of Survival Permit (TE89208D-0) for the Dune Sagebrush Lizard (*Sceloporus arenicolus*) to Canyon Environmental, LLC for Candidate Conservation Agreement with Assurances for the Dunes Sagebrush Lizard (*Sceloporus arenicolus*) – dated January 2021, for Andrews, Gaines, Crane, Ector, Ward, and Winkler counties, Texas.

We have analyzed the proposed Candidate Conservation Agreement with Assurances for the Dunes Sagebrush Lizard (*Sceloporus arenicolus*) – dated January 2021, for Andrews, Gaines, Crane, Ector, Ward, and Winkler counties, Texas (2020 TX CCAA) related to the issuance criteria in 50 CFR 17.22(d) and 17.32(d). A large portion of this analysis is the Net Conservation Benefit analysis required in 50 CFR 17.22(d)(2)(ii) and 17.32(d)(2)(ii) and the 2016 revision of the CCAA Policy (81 FR 95164). The Service has determined that a net conservation benefit can be measured using a baseline approach to determine the status quo for the species. This baseline approach compares two scenarios: with and without the CCAA. The conservation measures agreed to by the property owners and the impacts to the species under the CCAA are measured against what will happen to the species and its habitat if the property owners do not agree to those conservation measures and the CCAA. If, for example, it is reasonably certain that the property owner, without the CCAA, would take actions that would have adverse effects on the status of the species or its habitat, then a CCAA that includes conservation measures that reduces those adverse effects in the future is considered to result in a net conservation benefit to the species. Further, the baseline should be evaluated in the context of the maximum level of disturbance that is legally allowable to the applicant.

The proposed CCAA includes conservation measures, such as avoidance, minimization, conservation easements and funding of research that will improve the status of the species, when compared to the baseline of the legally available and likely to occur impact (take) without implementation of the plan. Therefore, the 2020 TX CCAA could be reasonably expected to provide a net conservation benefit and has met all other issuance criteria.

I. DESCRIPTION OF PROPOSAL

Canyon Environmental, LLC (Administrator) has applied to the U.S. Fish and Wildlife Service (Service) for an enhancement of survival permit under section 10(a)(1)(A) of the Endangered Species Act of 1973, as amended (ESA)(16 U.S.C. §1531-1544). Such permits (EOS permit) authorize take that is incidental to otherwise lawful activities (50 CFR 17.3). The requested EOS permit, which is for a period of 23 years, would authorize incidental take of the dunes sagebrush lizard (*Sceloporus arenicolus*) (DSL). The EOS permit, if issued, would not become effective until such time as the DSL may become listed, in accordance with section 10(a)(1)(A) of the ESA and the Service’s Candidate Conservation Agreements with Assurances final rule (81 FR 95164).

The Candidate Conservation Agreement with Assurances (CCAA) for the Dunes Sagebrush Lizard (*Sceloporus arenicolus*) – dated January 2021 (2020 TX CCAA) has been analyzed under the National Environmental Policy Act of 1969 (NEPA).

The issuance of an EOS permit under section 10(a)(1)(A) of the ESA would authorize incidental take of DSL during the implementation of Covered Activities (see below). 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). 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.

Table 1. Total acres reported in Hardy *et al.* (2018).

Habitat Classification	Hardy <i>et al.</i> (2018) Total Acres			
High Suitability	90,308			
Intermediate I Suitability	64,790			
Intermediate II Suitability	63,081			

Low Suitability	69,148			
Total	287,327			

Participants may be from the following industrial sectors: Oil and Gas, Sand Mining, Renewable Energy, Linear Infrastructure, Local Governments, and Agriculture and Ranching. The description of Covered Activities is found in Section 6 of the 2020 TX CCAA, which also includes General Construction. This is a method of enrollment for small projects and miscellaneous participation sectors. Section 6 of the 2020 TX CCAA also lists the various Conservation Measures and Actions that would be covered under the CCAA, and incorporated here by reference.

A total of 34,940 acres of take is requested. This take amount includes the actions of participants and non-participants, including participants in other conservation plans, such as the Texas Conservation Plan CCAA. It is based upon the Hardy *et al.* (2018) model. The total take amount makes up approximately 12 percent of the habitat identified in Hardy *et al.* (2018). Table 2, below, summarizes the anticipated level of take by sector.

Table 2. Summary of Anticipated Impact (Take) by Participation Sectors taken from Table 4 in 2020 TX CCAA, Section 18.3.

Industry Sector	Anticipated Impact (Take) in acres	Percent of Impact
Oil and Gas	15,424	44%
Linear Infrastructure	1,355	4%
Sand Mining	16,560	47%
Renewable	767	2%
Local Government, Agriculture, and Ranching	834	2%
Total Impacts by All Sectors	34,940	100%

Conservation Measures and Actions

The Conservation Measures are to be implemented by the participants and the Conservation Actions are to be implemented by the permit holder/Administrator. The specific Conservation Measures and Actions in the 2020 TX CCAA are fully described in Section 8.3 and Section 8.4, respectively.

A key Conservation Measure is the avoidance of impacts to High and Intermediate Suitability habitat, consistent with the provisions of the CCAA. The 2020 TX CCAA applies some avoidance measures differentially between participant sectors, providing exceptions and options to reclassify habitat based upon presence/absence and micro-site level habitat surveys as new information is developed. Additionally, the 2020 TX CCAA applies conservation differently by sector. For example, only sand mines are allowed the opportunity to contribute conservation acres for any High or Intermediate Suitability habitat that is impacted at a 1:1 conservation to impact ratio. All participants may, in lieu of Habitat Conservation Fees, elect to contribute in-

kind services by implementing Conservation Actions on their enrolled property. Participants also may conduct such Conservation Actions in advance of surface disturbances. In both cases, prior approval by the Administrator is required of those actions as being consistent with the Conservation Strategy and the requirements of this 2020 DSL CCAA.

In addition to avoidance, the 2020 TX CCAA provides for minimization measures, mitigation through conservation easements and other protections, Conservation Actions to be undertaken by the Administrator, and funding of research. Conservation Measures and Conservation Actions include a broad range of actions as outlined in the CCAA. The applicant would consider permanent conservation easements, if available, and other protections and agreements. The CCAA also commits to conducting studies on the DSL to inform adaptive management decisions.

Analysis of Effects under Section 7 of the Endangered Species Act

The Service fully analyzed the effects of the proposed action on the DSL in our Environmental Assessment and conference opinion (CO) for the proposed action. We incorporate both documents herein by reference. We evaluated the proposed plan area for federally listed threatened or endangered species and designated critical habitat and we do not expect adverse effects to any federally listed or proposed species or designated or proposed critical habitat.

After reviewing the current status of the DSL, the environmental baseline for the action area, the effects of the proposed action, and the cumulative effects, it is the Service's conference opinion that the proposed action, issuance of the EOS permit, is not likely to jeopardize the continued existence of the DSL. No critical habitat has been designated for the species; therefore, none will be affected.

II. PUBLIC COMMENT

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 ranging 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. 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.

We reviewed and prepared responses to each substantive comment. Those response to comments are incorporated by reference herein

III. ENHANCEMENT OF SURVIVAL PERMIT CRITERIA – ANALYSIS AND FINDINGS

Section 10(a)(1)(A) requires that the Service determine, after public comment, that issuance criteria (50 CFR 17.22(d) and 17.32(d)) are satisfied before a permit can be issued. The issuance criteria and our analysis and findings follow.

1. The taking of the above listed species will be incidental to an otherwise lawful activity and will be in accordance with the terms of the Candidate Conservation Agreement with Assurances (50 CFR 17.22(d)(2)(i) and 17.32(d)(2)(i)).

There is nothing in this CCAA that will result in purposeful or intentional take other than research that is associated with Adaptive Management actions. If any intentional take is associated with research under the CCAA, a section 10(a)(1)(A) research and recovery permit will be required if the species is listed in the future.

2. The implementation of the terms of the CCAA is reasonably expected to provide a net conservation benefit to the affected covered species by contributing to the conservation of the species included in the permit, and the CCAA otherwise complies with the Candidate Conservation Agreement with Assurances policy available from the Service; (50 CFR 17.22(d)(2)(ii) and 17.32(d)(2)(ii)).

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.

The Service has determined that a net conservation benefit can be measured using a baseline approach to determine the status quo for the species. This baseline approach compares two scenarios: with and without the CCAA. The conservation measures agreed to by the property owners and the impacts to the species under the CCAA are measured against what will happen to the species and its habitat if the property owners do not agree to those conservation measures and the CCAA. If, for example, it is reasonably certain that the property owner, without the CCAA, would take actions that would have adverse effects on the status of the species or its habitat, then a CCAA that includes conservation measures that reduces those adverse effects in the future is considered to result in a net conservation benefit to the species. Further, the baseline should be evaluated in the context of the maximum level of disturbance that is legally allowable to the applicant.

Oil and Gas sector currently may develop one well per 40 acres, standard spacing, and is not restricted based upon the density of pre-existing wells in an area or in the amount of new surface disturbance is able to participate in the CCAA. The CCAA would require, subject to the exemptions in Section 8.3, avoidance of well development in High and Intermediate Suitability areas of DSL Habitat where the well density is equal to or greater than four well pads/mi² but less than 13 well pads/mi², incentivize the use of pre-existing infrastructure, disturbed areas, and the lowest quality DSL habitat through the impact fee structure for participants. Sand mining sector currently has no caps on the acres of new surface disturbance, but participants will be capped at 60 acres of surface disturbance annually, and the fees structure for new surface disturbance will incentivize the use of pre-existing infrastructure and guide impacts to the lower quality DSL habitat. Linear infrastructure and Renewable Energy sectors are also subject to impact fees proportional to the habitat quality and should be incentivized to use lower quality habitats and pre-existing disturbances whenever possible. We anticipate a general change in participant development strategies that will result in a net conservation benefit for the DSL.

3. The probable direct and indirect effects of any authorized take will not appreciably reduce the likelihood of the survival and recovery in the wild of any species (50 CFR 17.22(d)(2)(iii) and 17.32(d)(2)(iii)).

The Service has produced a Conference Opinion analyzing the impacts from the issuance of the EOS permit supported by the 2020 TX CCAA (USFWS 2021). The Service recognizes that the proposed avoidance, minimization, and conservation proposed would not happen without approval of the CCAA and issuance of the EOS permit. The Conference Opinion concludes that the consequences of issuing the permit and implementation of the 2020 TX CCAA is not likely to jeopardize the DSL.

The Service has determined that two other species of fish and wildlife listed under the ESA may occur in the action area. Those species are the endangered northern Aplomado falcon (*Falco femoralis septentrionalis*) and threatened red knot (*Calidris canutus rufa*). These species will not be affected by implementing the CCAA and proposed permit because they are locally extirpated, do not share suitable habitat with DSL, or differ in habitat preferences with the DSL within the Permit Area. Therefore, no effects are expected, and these species were not further discussed in the Conference Opinion. The Service will initiate consultation and evaluate the effects of issuance of the permit and implementation of the CCAA on northern Aplomado falcon and red knot if new information indicates that these species may be affected by the proposed action.

4. Implementing the Candidate Conservation Agreement with Assurances is consistent with applicable Federal, State, and Tribal laws and regulations (50 CFR 17.22(d)(2)(iv) and 17.32(d)(2)(iv)).

The Service is unaware of any law or regulation that would prevent implementation of the CCAA and the accompanying EOS permit. The EOS permit includes a condition ensuring consistency with applicable Federal, State, and Tribal laws and regulations through compliance with 50 CFR 13.28(a)(1)-(4), 50 C.F.R. 17.22(d)(7), 50 C.F.R. 17.32(d)(7). Under these requirements the Service may revoke the EOS permit for certain reasons, including if any applicable State, Federal, or Tribal law or regulation is willfully violated.

5. Implementing the terms of the Candidate Conservation Agreement with Assurances will not be in conflict with any ongoing conservation programs for species covered by the permit (50 CFR 17.22(d)(2)(v)).

The only two conservation programs that are in this area or cover the DSL are the New Mexico combined CCA\CCAA for lesser prairie-chicken and DSL (NM CCA\CCAA) and the Texas Conservation Plan for Dunes Sagebrush Lizard (TCP).

This 2020 TX CCAA is not likely to have a direct impact on the NM CCA\CCAA, which operates through avoidance of high-quality DSL habitat and does not cover any activities in Texas.

The TCP and the 2020 TX CCAA have overlapping Permit Areas. DSL habitat is defined differently between the two plans based on the models used, and protections differ between the plans. The TCP was not written to include sand mines but did enroll several that operate in lower suitability habitat. The 2020 TX CCAA allows enrollment of sand mines, including in High Suitability and Intermediate Suitability habitats as defined by Hardy et al. (2019). This creates a difference between the two plans, which will increase the need for coordination between the two plans in implementing conservation efforts. The CCAA includes a process to refine the habitat modeling, which will include close coordination with the TCP Permit holder, and range-wide with the NM CCA\CCAA Administrator, as provided for in the CCAA. As a result, the Service anticipates no conflicts between the CCAAs.

6. The Applicant has shown capability for and commitment to implementing all of the terms of the Candidate Conservation Agreement with Assurances (50 CFR 17.22(d)(2)(vi) and 17.32(d)(2)(vi)).

The applicant has extensive in permitting and regulatory experience in the mining and oil and gas sectors in Arizona, Utah, Nevada, California, Idaho, Wyoming, Colorado, Montana, Texas, and New Mexico. Mr. Jensen has been involved in conservation planning and management for: Uinta Basin hookless cactus, Utah prairie dog, yellow-billed cuckoo, June sucker, dune sagebrush lizard, lesser prairie chicken, greater sage grouse, burrowing owl, northern long-eared bat, pygmy rabbit, and other species. The Service finds that Chris Jensen has the expertise to fully implement the CCAA as written.

Based upon information provided by the Applicant of a range of potential enrollment scenarios reviewed by the Service, based on an assumed scenario of low Participant enrollment and moderate development for purposes of calculating fee generation under the Plan, anticipated revenue and expenditures during the first six years of implementation are as follows:

	Year 1	Years 2-6
Enrollment Fees	\$130,000	\$260,000
Conservation Fees	\$875,500	\$4,377,500
Implementation Fees	\$725,000	\$3,625,000
Total Revenues	\$1,730,500	\$8,262,500
Administrative Costs	\$725,000	\$3,625,000
Conservation Deployment	\$867,675	\$3,967,875
Reserve Account	\$50,275	\$231,875
Supporting Services/Research	\$87,550	\$437,750

The applicant has not projected financials that support the ongoing implementation of the CCAA and the projected conservation beyond six years, but, they have a fee structure that will provide an adequate amount of money for what they propose to implement. In addition, the CCAA will include periodic third-party audits, a means to increase fees and a changed circumstance to ensure the plan remains financially viable.

IV. GENERAL CRITERIA AND DISQUALIFYING FACTORS - ANALYSIS AND FINDINGS

We have no evidence that the EOS permit should be denied on the basis of the general permitting issuance 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 there are no 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 approving and issuing the EOS permit to authorize incidental take of the DSL by Canyon Environmental, LLC., in accordance with the Candidate Conservation Agreement with Assurances for the Dunes Sagebrush Lizard (*Sceloporus arenicolus*) – dated January 2021, as written.

Regional Director,
Albuquerque, NM

Date

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