



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

July 25, 2024

The Honorable Deb Haaland
Secretary
U.S. Department of the Interior
1849 C Street, N.W.
Washington, D.C. 20240
*Via Email: exsec@ios.doi.gov; exsec_exsec@ios.doi.gov; Deb_Haaland@ios.doi.gov
and CMRRR: #9589 0710 5270 0480 3230 54*

The Honorable Martha Williams
Director
U.S. Fish and Wildlife Service
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*Via Email: fws_director@fws.gov; Martha_Williams@fws.gov
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Re: State of Texas's 60-day Notice of Intent to File Suit

Dear Secretary Haaland and Director Williams:

On May 20, 2024, the U.S. Fish and Wildlife Service and the U.S. Department of the Interior (collectively, the “**Service**”) listed the dunes sagebrush lizard (“**DSL**”) as an endangered species under the Endangered Species Act (“**ESA**”), 16 U.S.C. §§ 1531, *et seq.* *Endangered and Threatened Wildlife and Plants; Endangered Species Status for the Dunes Sagebrush Lizard*, 89 Fed. Reg. 43,748 (May 20, 2024) (to be codified at 50 C.F.R. § 17.11) (“**Final Rule**”). The Final Rule violates the ESA and the Administrative Procedure Act (“**APA**”), 5 U.S.C. §§ 551, *et seq.* On behalf of the State of Texas, and pursuant to the citizen suit provisions of the ESA, this letter serves to notify you that the State of Texas intends to file suit against the Service. 16 U.S.C. § 1540(g)(1)(C).

Texas is the nation’s largest producer of oil and natural gas. According to the U.S. Energy Information Administration, Texas produced 42% of the nation’s crude oil and 27% of its marketed natural gas in 2022. *Texas State Energy Profile*, U.S. Energy Information Administration (June 15, 2023), eia.gov/state/print.php?sid=TX. Additionally, the industry’s importance to the State’s economy cannot be overstated. In fiscal year 2023, the Texas oil and natural gas industry paid \$26.3 billion in state and local taxes and state royalties. *2023 Annual Energy & Economic Impact Report*, Texas Oil & Gas Association (Jan. 30, 2024), <https://www.txoga.org/2023eeir>. In 2023, the Texas Permanent School Fund and the Permanent University Fund, both of which support public education in Texas, each received \$1.8 billion from the state’s oil and natural gas royalties. *Id.*

Texas agriculture also represents a vital economic sector for the state and nation's economy. According to the United States Department of Agriculture's report on total cash receipts, Texas is the nation's fourth largest agriculture-producing state and, as of 2022, represents 5.6% of the nation's agriculture production. Texas also specifically represents 8.5% of our nation's meat production and 36.8% of our nation's cotton production, respectively. *Farm Income and Wealth Statistics* (Feb. 7, 2024), <https://data.ers.usda.gov/reports.aspx?ID=17844>.

The entire range of the DSL overlaps with the Permian Basin, a sedimentary basin in western Texas and southeastern New Mexico that is the highest producing oil field in the country, *see* U.S. Fish and Wildlife Service, *Species Status Assessment for the Dunes Sagebrush Lizard 3* (2024) [hereinafter 2024 SSA Report], and which covers 75,000 square miles—almost the size of the entire State of Nebraska. Texas has worked with private landowners in the Permian Basin area to help establish voluntary conservation agreements to protect the DSL. The ability to manage wildlife resources at the state level is especially important in Texas, where most land is privately owned. Texas's collaboration with private landowners to achieve conservation while safeguarding private property rights and enabling economic development is crucial to the success of conservation efforts. The Final Rule threatens to derail these conservation efforts, while also failing to consider the best available data.

I. BACKGROUND

A. Endangered Species Act

Under the ESA, the Service can list a species as “endangered” when it is “in danger of extinction throughout all or a significant portion of its range,” or as “threatened” when it is “likely to become an endangered species within the foreseeable future.” 16 U.S.C. § 1532(6), (20). However, the Service must make its listing determinations “solely on the basis of the best scientific and commercial data available” and must take into account conservation efforts made by states. *Id.* at § 1533(b)(1)(A); *see also* 50 C.F.R. § 424.11(g) (requiring the Service to take into account efforts being made by states to protect species “whether by predator control, protection of habitat and food supply, or other conservation practices, within any area under its jurisdiction”).

The Service's evaluation of conservation efforts that have not yet been implemented or have not yet demonstrated effectiveness is guided by its *Policy for Evaluation of Conservation Efforts When Making Listing Decisions*, 68 Fed. Reg. 15,100 (Mar. 28, 2003) (“**PECE Policy**”). The PECE Policy directs the Service to consider: (1) the certainty that the conservation effort will be implemented, and (2) the certainty that the conservation effort will be effective. *Id.* at 15,114–15.

The ESA also requires the Service to designate critical habitat “on the basis of the best scientific data available and after taking into consideration the economic impact, . . . and any other relevant impact, of specifying any particular area as critical habitat.” 16 U.S.C. § 1533(b)(2). A species' “critical habitat” is the specific area within its range that is “essential to the conservation of the species and . . . which may require special management considerations or protection.” *Id.* § 1532(5)(A).

B. Administrative Procedure Act

The APA governs the federal rulemaking process and provides standards applicable when federal agencies propose and adopt final rules and regulations. 5 U.S.C. §§ 551(4), 553. Before adopting a final rule, an agency must publish notice of the proposed rulemaking in the Federal Register and provide the public with an opportunity to participate in the rulemaking process through the submission of written comments. *Id.* § 553(b)-(c). The published notice must contain “either the terms or substance of the proposed rule or a description of the subjects and issues involved.” *Id.* § 553(b)(3).

The APA provides for judicial review of final agency actions by persons adversely affected by such actions. *Id.* § 702. A reviewing court shall “hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” *Id.* § 706(2)(A). Agency action may also be set aside if it is found to be “in excess of statutory jurisdiction, authority, or limitations” or “without observance of procedure required by law.” *Id.* § 706(2)(C)-(D).

II. BASIS FOR THE STATE’S CHALLENGE

A. The Service failed to make its determination solely on the basis of the best available data.

The ESA requires that the Service make its endangered determination “*solely* on the basis of the best scientific and commercial data available.” 16 U.S.C. § 1533(b)(1)(A) (emphasis added). In making its endangered determination, the Service relied on the Species Status Assessment for the Dunes Sagebrush Lizard (“**SSA Report**”) to “represent[] a compilation of the best scientific and commercial data available concerning the status of the species.” 89 Fed. Reg. 43,748; *see also* 2024 SSA Report. Nevertheless, for the reasons detailed below, the Service failed to make its determination solely on the basis of the best available data.

1. The Service lacks basic data about DSL population size and range-wide occupancy.

As an initial matter, the Service acknowledges “[t]here is no range-wide population size estimate for the DSL.” 2024 SSA Report at 39. The Service points to “differences in land access, survey protocols, and survey intensity across the range in New Mexico and Texas” as reasons for the difficulty in developing DSL population estimates. *Id.* In Texas specifically, the Service identifies “limited access to private lands” as a reason for the limited or otherwise lacking survey data. *Id.* at 43. However, the Service did review a 2021 study evaluating DSL population viability in New Mexico. *See* 2024 SSA Report at 39; Leavitt, D. J. and M. R. Acre, *Population Viability Analysis for Dunes Sagebrush Lizard in New Mexico* (2021). Although this 2021 study provided estimates of DSL population abundance, which potentially could have been used as a basis for estimating DSL demographics, the Service decided to “not rely on this model in our listing determination.” 89 Fed. Reg. 43,751.

Instead, the Service uses a “refined habitat model” as a surrogate for estimating DSL population and habitat quality. 2024 SSA Report at 92. This model indirectly estimates DSL population based on the presence of the shinnery oak duneland habitat. The Service utilized this model because it determined the DSL is a “habitat specialist that only occurs within the shinnery oak duneland

ecosystems.” *Id.* at 14. But the Service acknowledges that this method “provides an indirect measure of DSL resiliency since it equates the presence of habitat with the presence of the species” and “the presence of habitat [does not guarantee] the presence of the DSL.” *Id.* at 90.

This refined habitat model serves as the Service’s foundation for assessing the current and future status of the species. As a result, the Service’s endangered determination for the DSL is based on the present and likely future condition of the shinnery oak duneland habitat, and *not* on the condition or viability of the species itself. Wild horses may utilize open grassland for habitat; but not all open grassland habitat is home to wild horses.

2. The Service’s “refined habitat model” is not based on the best available data and fails as a reliable surrogate to evaluate the DSL’s habitat availability.

To assess the DSL’s habitat availability and quality, the Service looked to existing habitat models developed to classify DSL habitat in different areas of its range. Specifically, the Service considered models developed by Hardy *et al.* (2018) and Johnson *et al.* (2016). *Id.* To the extent it is appropriate to use a habitat model as the basis for assessing the DSL’s viability, these models may represent the best available data. Even assuming that much, however, the Service decided to “refine” these habitat models and exclude certain areas from the core “shinnery oak duneland” habitat classification. *See id.* at 90–92. For example, the Service arbitrarily omitted from the DSL’s habitat any areas with honey mesquite cover of five percent or more, even though the Hardy *et al.* (2018) and Johnson *et al.* (2016) studies documented DSL occurrence in such areas. *Id.* As a result, the Service’s “refined habitat model” is not based on the best available data and does not even accurately or reliably assess the DSL’s habitat availability.

3. The Service’s habitat quality classification is not based on the best available data and improperly relies on arbitrary metrics about oil and gas development.

In addition to its arbitrary assessment of the DSL’s habitat *availability*, the Service similarly evaluated the DSL’s habitat *quality* using arbitrary metrics and flawed assumptions. To assess habitat quality, the Service developed multiple categories to represent the quality under different levels of oil and gas development and historic herbicide usage:

- Minimally Disturbed (habitat with <5 well pads/mi² and no history of herbicide spraying);
- Disturbed (habitat with 5-12 well pads/mi² and no history of herbicide spraying);
- Degraded (≥13 well pads/mi² and/or history of herbicide spraying); and
- Non-Habitat Habitat (human development devoid of habitat). *Id.* at 93-94.

These habitat-quality categories are purportedly based on oil and gas well pad density. However, this density metric is primarily derived from a 1998 study conducted prior to the recent development and prevalence of horizontal drilling. *See* 2024 SSA Report at 92; *see also* *Horizontally Drilled Wells Dominate U.S. Tight Formation Production*, Today in Energy (June 6, 2019), <https://www.eia.gov/todayinenergy/detail.php?id=39752> (finding the percentage of horizontal well production in the Permian Basin rose from approximately 4% in 2004 to approximately 93% in 2018).

With this advance of horizontal drilling, many wellheads can be clustered together at a single well pad, resulting in the use of fewer well pads. As a result, the 1998 study improperly conflates “well density” with “well pad density.” This is important because fewer well pads (i.e., lower well pad density) means less surface disturbance, and therefore less potential disturbance to DSL habitat.

Although the Service acknowledged this issue in its response to comments in the Final Rule and made conforming changes in both the Final Rule and the SSA Report, its decision to list nonetheless still relies on the conclusions from this 1998 study. Furthermore, the study itself found that areas with well densities of 13.63 wells/mi² were not a threat to DSL viability and persistence and concluded that “at present regions of well density greater than 25 [wells]/mi² support substantial populations” of DSL. Sias, Don and Snell, Howard, *The Sand Dune Lizard *Sceloporus arenicolus* and Oil and Gas Development in Southeastern New Mexico* 23 (1998).

4. The Service’s conclusion that frac sand mining poses a serious risk to DSL is arbitrary and lacks a factual basis.

As the Service acknowledges, frac sand mining is a relatively new activity and only became prevalent in the area in 2017. 89 Fed. Reg. 43,753. As a result, there is little data evaluating the effects of frac sand mining on DSL or shinnery oak dune habitats. Indeed, the Service recognizes “[t]here are currently no peer-reviewed studies on the impacts of sand mines on the dunes sagebrush lizard.” *Id.* To reach its conclusion that frac sand mining poses a serious risk, the Service instead relied on literature examining completely different activities and settings. Doing so was arbitrary.

5. The Service’s assessment of future DSL habitat conditions is speculative and not based on the best available data.

As part of its habitat-quality assessment, the Service projected the effects of future oil and gas development on DSL habitat. However, this projection of future conditions is based on the same outdated assumptions regarding well pad density and is therefore inherently compromised for the same reasons as discussed above. Additionally, the Service’s reliance on Pierre *et al.* (2020) to project future landscape alteration due to oil and gas development is similarly flawed. *See* 2024 SSA Report at 114. The Pierre *et al.* (2020) study, even though published in 2020, relies on historical drilling data, with 76% of the wells included in the data set being drilled before 2008. Pierre, J.P., *et al.*, *Projected Landscape Impacts from Oil and Gas Development Scenarios in the Permian Basin, USA* (2020). Therefore, the Pierre *et al.* (2020) study, and the conclusions drawn from it, do not represent contemporary drilling practices and certainly cannot accurately project future oil and gas impacts on DSL habitat.

Similarly, the Service asserts climate change is a factor “that *may* influence the condition of DSL in the future.” Again, this argument falls outside of the ESA requirement for endangered determination to be based “*solely* on the basis of the best scientific and commercial data available.” 2024 SSA Report at 113 (emphasis added). The Service itself concedes in the Final Rule that the effects of climate change on individual DSLs are “relatively unknown.” 89 Fed. Reg. 43,762. Therefore, the best available data does not provide a non-speculative basis to predict any real, predictable, or measurable impacts that may or may not be associated with climate change risks on DSL habitat.

6. Ultimately, the best available data does not support the Service's determination that the DSL is "endangered" under the ESA.

The Service's determination to list the DSL as an endangered species is undercut by its recognition that the DSL is not, in fact, in danger of extinction throughout all or a significant portion of its range. Indeed, the Service concedes that the DSL "still occupies much of its range" and that the DSL "may persist over the next several decades" even in areas the Service determined to be highly degraded. 89 Fed. Reg. 43,766. Further, the SSA Report ultimately concludes that the DSL habitat is sufficient to support viable DSL populations and habitat conditions will continue to support DSL populations through 2050. *See* 2024 SSA Report at 131. Therefore, it is not consistent with the ESA or the best available data to conclude that the DSL is "in danger of extinction throughout all or a significant portion of its range." 16 U.S.C. § 1532(6).

B. The Service failed to adequately consider existing voluntary conservation measures.

Although the Service acknowledges the existence of voluntary conservation efforts in Texas, it improperly and summarily disregards these efforts. The Texas Conservation Plan ("TCP") was initially developed in 2011 to prevent incidental takings of the DSL. *See* 89 Fed. Reg. 43,763. The TCP was recently revised in 2020, resulting in the Service issuing a revised enhancement of survival permit. *Id.* Even though the Service admits it is "unsure of the extent of conservation measure implementation in Texas, as well as the locations of areas where conservation is occurring," it summarily and arbitrarily concludes these efforts will not be effective. *Id.* at 43,750. Accordingly, the Service arbitrarily ignored its own PECE Policy and the ESA's requirements.

C. The Final Rule suffers from vagueness.

The Final Rule is arbitrary, an abuse of discretion, and not in accordance with the law because it is overly vague and fails to provide the public with adequate guidance regarding the activities that may result in a violation of the Rule. The Final Rule fails to describe the prohibited actions with the level of specificity required by the Service's own policy regarding identification of activities covered by the Section 9 take prohibition. *See Endangered and Threatened Wildlife and Plants: Notice of Interagency Cooperative Policy for Endangered Species Act Section 9 Prohibitions*, 59 Fed. Reg. 34,272 (July 1, 1994). Under this policy, the Service must, at the time of listing, identify activities that will be considered likely to result in a violation of the take prohibition "in as specific a manner as possible." *Id.*

The Service has not met this standard. Instead, the Service merely states it is "unable to identify specific activities that will not be considered likely to result in a violation of section 9 of the Act beyond what is already clear from the Act's descriptions of prohibitions or already excepted through our regulations." 89 Fed. Reg. 43,768. This overly vague description of the prohibited activities does not comport with the Service's policy to identify activities subject to the take prohibition "in as specific a manner as possible."

Finally, the Service found that designation of a critical habitat for DSL is prudent but "not determinable at this time." *Id.* at 43,748. Although the ESA allows the Service to delay designation of

critical habitat for one additional year, failure to make such designation concurrently with the endangered listing creates regulatory uncertainty for the State and the regulated community.

III. CONCLUSION

Accordingly, the State of Texas intends to file suit against the Service for the violations described above if the Service does not withdraw its unlawful rule within 60 days. Thank you for your attention to this matter.

Respectfully,

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