DEFENDERS OF WILDLIFE
CENTER FOR BIOLOGICAL DIVERSITY

March 14, 2013

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The Honorable Kenneth Salazar
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Also Via Certified Mail, Return Receipt Requested

RE: 60-day notice of intent to sue over violations of Section 4 of the Endangered Species Act ("ESA"); Actions Relating to the June 19, 2012 Decision Not to Add the Dunes Sagebrush Lizard to the List of Threatened or Endangered Wildlife and to Designate Critical Habitat Under the ESA.

Defenders of Wildlife and the Center for Biological Diversity hereby provide this 60-day notice of our intent to sue the U.S. Fish and Wildlife Service ("Service") and the U.S. Department of the Interior over violations of Section 4 of the Endangered Species Act ("ESA") for failing to list the dunes sagebrush lizard ("lizard") as a threatened or endangered species and to designate critical habitat under the ESA. The best scientific evidence on the status of the species supports the conclusion that the lizard is endangered or threatened throughout all or a significant portion of its range as a result of a multitude of factors, including a) the present or threatened destruction, modification, or curtailment of its habitat or range and b) the inadequacy of existing regulatory mechanisms. This notice is provided in fulfillment of the requirements of the citizen suit provision of the ESA. 16 U.S.C. § 1540(g).

Defenders of Wildlife and the Center for Biological Diversity support incentives to increase public and private investments in the conservation of all wildlife, including imperiled or declining species that have not yet received protection under the ESA. For these species, earlier conservation may reduce the overall time and cost of recovery or even eliminate or reduce threats sufficiently to avoid the need for listing. For the reasons that follow, however, we believe that the Service's decision not to list the dunes sagebrush lizard based upon two candidate conservation agreements was a violation of Section 4 of the ESA.

BACKGROUND

The dunes sagebrush lizard (*Sceloporus graciosus arenicolus*), also known as the sand dune lizard, is a small species of lizard that is only found in shinnery oak sand dune habitat, located in southeastern New Mexico and West Texas. Shinnery oak sand dune habitat has declined, is fragmented, and is threatened by herbicides and oil and gas development on public and private lands, among other things. Existing regulations to protect the lizard are inadequate to ensure the continued existence of the species.

The lizard has been a candidate for listing since 1982 but the Service took no action to list the species under the ESA. The Center for Biological Diversity petitioned the Service to list the lizard as endangered or threatened in 2002. In response to that petition, the Service found the lizard warranted listing but was precluded by other priorities, and placed it again on the candidate list in December 2004 with a listing priority number of 2, the highest possible priority for a subspecies.

In December 2008, the Service finalized a combined candidate conservation agreement ("CCA")/candidate conservation agreement with assurances ("CCAA") for New Mexico. The New Mexico agreement describes a host of measures to avoid, minimize, and mitigate harmful impacts to the lizard, including "no leasing of lands within Conservation Lands" to oil, gas or wind power development. The Service concluded, however, that the New Mexico agreement standing alone did not alleviate enough threats to avoid listing. Thus on December 14, 2010, the Service proposed to list the lizard as endangered throughout its range, noting at the time that the 3-inch long reptile "faces immediate and significant threats due to oil and gas activities, and herbicide treatments." 75 Fed. Reg. 77,801 (Dec. 14, 2010).

The Service then finalized another CCAA covering the species' range in Texas in February 2012. The New Mexico CCA/CCAA involves 29 enrolled companies and landowners for a total of 650,241 acres—83% of the existing lizard habitat in New Mexico. The Texas program covers 71% of mapped lizard habitat, or 138,640 acres. 77 Fed. Reg. at 36,884-85. As with the New Mexico CCAA, both agreements offered private and state landowners an important incentive to participate: a legal assurance that if the lizard became listed, the landowners will not be required to take any conservation measures or face any land use restrictions beyond those identified in the agreement. But as will be described further below the Texas agreement in particular contains numerous serious flaws that make the Service's approval of it and reliance upon it extremely concerning.

In June 2012, the Service reversed course and formally declined to list the lizard, claiming that state-led voluntary conservation efforts to protect the lizard's shinnery oak dune habitat and reduce impacts from Permian Basin drilling now cover roughly 90 percent of the lizard's habitat in New Mexico and 70 percent of its habitat in Texas. 77 Fed. Reg. 36,872 (June 19, 2012). In addition, the Service cited new scientific information from Texas A&M University that has identified additional occupied sites for the lizard, especially in Texas. *Id.* As described more fully below, these findings do not sufficiently support the Service's "not warranted" decision.

The Service is required to "list" species of plants and animals as endangered or threatened if it determines that the species is facing extinction due to "the present or threatened

destruction, modification, or curtailment of its habitat or range; overutilization for commercial, recreational, scientific, or educational purposes; disease or predation; the inadequacy of existing regulatory mechanisms; or other natural or manmade factors affecting its continued existence." 16 U.S.C. § 1533(a)(1)(A)-(D). In making listing decisions, the Service must rely "solely on the basis of the best scientific and commercial data available." 16 U.S.C. § 1533(b)(1)(A). An "endangered species" is defined as "any species which is in danger of extinction throughout all or a significant portion of its range." *Id.* § 1532(6). A "threatened species" is "any species which is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range." *Id.* § 1532(20).

THE SERVICE'S "NOT WARRANTED DETERMINATION" IS ARBITRARY AND CAPRICIOUS

The Service acted arbitrarily and capriciously by relying on the Texas CCAA and New Mexico CCA/CCAAs to reach the conclusion that the lizard no longer faced extinction due to "the present or threatened destruction, modification, or curtailment of its habitat or range." 16 U.S.C. § 1533(a)(1)(A). Just two years earlier, the Service proposed to list the lizard as endangered, noting that it "faces immediate and significant threats due to oil and gas activities, and herbicide treatments." 75 Fed. Reg. 77,801. At the time the New Mexico CCA/CCAA was already in place, and the Service concluded that it alone was not sufficient to protect the lizard.

The Service changed its mind after approving a hastily prepared Texas CCAA. It now claims that the two state conservation agreements taken together are sufficient to eliminate identified threats to the species, even though the Texas CCAA was only finalized in 2012, is voluntary, and does not actually specify what on-the-ground conservation measures are required for any particular enrolled landowner. The new Texas CCAA was only a few months old and had no track record of success. Thus, it was impossible to know at the time the proposed rule was withdrawn whether the plan was, in fact, addressing known threats to the species.

Additionally, the Service failed to identify reasonable assurances that the measures outlined in the CCA/CCAA will ever be implemented in a manner that will reduce threats to the species. To begin with, participation in the Texas CCAA is voluntary and with the principal rationale for developing the plan, i.e., avoiding an ESA listing, having now been accomplished, there is little incentive for additional landowners to participate. Moreover, the CCAA fails even to specify what on-the-ground conservation measures are required for any particular enrolled landowner. Indeed, the key avoidance and minimization recommendations for oil and gas developments are vague and filled with discretionary language such as "where possible" or "when feasible in the reasonable judgment of the participant" or "when practical." In other words, a participant in the plan could entirely fail to take any recommended conservation measures based on a subjective assessment of feasibility and still be counted as a participant.

Compounding the deficiencies in the Texas CCAA, under the agreement and pursuant to Texas state law, the FWS is prohibited from reviewing individual certificates of inclusion and, therefore, will be completely blocked in the future from being able to directly monitor and assess the effectiveness of the CCAA. The Texas CCAA is structured such that the Texas Comptroller's office is the actual holder of or signatory to the Service's agreement.

Individual landowners get certificates of inclusion from the Comptroller. The Comptroller, working through a contractor, collects information on performance from the landowners and sends FWS an annual summary of compliance (a summary that FWS will have no independent way to validate). Moreover, Texas confidentiality law actually prohibits disclosure of the CI's to any person, including a "federal agency." So by state law, FWS could not possibly have seen the certificates or known what agreements were actually made to protect the lizard at the time the agency made the decision not to list.

The FWS's decision is contrary to well-established case law holding that future or unproven conservation measures cannot be a basis for refusing to list a species as endangered or threatened under the ESA. *See, e.g., Ctr. for Native Ecosystems v. U.S. Fish & Wildlife Serv.,* 795 F. sup. 2d 1199 (D. Colo. 2011); *Or. Natural Res. Council v. Daley*, 6 F. Supp. 2d 1139, 1154 (D. Or. 1998); *Ctr. for Biological Diversity v. Morgenweck*, 351 F. Supp. 2d 1137 (D. Colo. 2004). The Service has failed utterly to explain how these uncertain, unproven, voluntary agreements have completely alleviated "immediate and significant threats" that just two years ago prompted the Service to propose an endangered listing. Indeed, the Service actually knows very little about the biological effectiveness of these agreements—i.e. whether they have improved the status of the lizard. The Service cannot independently verify compliance under the Texas CCAA and does not even know the details of specific landowner agreements in that state. Under these circumstances, the Service's conclusion that "those conservation efforts address threats throughout the range of the dunes sagebrush lizard, and are adequate to reduce the threats to the species such that it no longer meets the definition of endangered or threatened" simply lacks a rational basis. 77 Fed. Reg. at 36881.

Even if it could be demonstrated that these CCAAs have indeed reduced threats to the lizard throughout all or a significant portion of its range, the Service also appears not to have adequately considered whether a threatened listing might have been appropriate instead. Although the Service asserts throughout the final rule that the lizard no longer meets the definition of a threatened or endangered species, it unlawfully concludes and fails to explain why the lizard no longer meets the definition of a threatened species. Indeed, it is difficult to understand how a species can go from warranting listing as "endangered" to not warranting listing at all in the span of 18 months without a finding that scientists significantly undercounted the species or presenting compelling evidence of a conservation strategy that has already recovered the species.

The ESA also requires a determination of whether any species is endangered or threatened based on the "inadequacy of existing regulatory mechanisms." 16 U.S.C. 1533(a)(1)(D). As an initial matter, the New Mexico CCA/CCAA and Texas CCAA are voluntary conservation agreements that are not legally binding and may be terminated at any time. As the Service itself recognizes and various courts have held, these agreements may not legally be considered regulatory mechanisms for the purposes of analysis under Section 4(a)(1)(D) of the ESA. Such agreements may more appropriately be considered in the listing process under Section 4(b)(1)(A) to the extent that they can be shown to address identified threats to the species. The Service concedes that "current regulations under state and local laws are not designed, nor have provisions to protect the dunes sagebrush lizard from habitat loss." 77 Fed. Reg. at 36,896. Although the final rule goes on to discuss conservation measures implemented by the Bureau of Land Management ("BLM"), the majority of lizard habitat is found on private land. Moreover, in its discussion of the BLM's policies in the proposed

rule, the Service squarely rejected such measures, pursuant to Resource Management Plan Amendments, as inadequate. The BLM's new explanation of its efforts appears to have satisfied the Service, but nowhere does the Service demonstrate that these measures are demonstrably aiding the species and certain to continue in the future. *Save Our Springs v. Babbitt*, 27 F. Supp. 2d 739, 748 (W.D. Tex. 1997) (holding that conservation measures must have "a proven track record for effectiveness in protecting the species"). With no state or local regulatory mechanisms to point to and no proven track record for public land management, the Service's conclusions are irrational and erroneous.

THE SERVICE'S PECE ANALYSIS IS ARBITRARY AND CAPRICIOUS

The listing determination also violates the Service's "Policy for Evaluation of Conservation Efforts When Making Listing Decisions" ('PECE'). Issued in 2003, the PECE policy sets criteria to be used "in determining whether formalized conservation efforts that have yet to be implemented or to show effectiveness contribute to making listing a species as threatened or endangered unnecessary." 68 Fed. Reg. 15,100. The two key factors in this evaluation are: "(1) for those efforts yet to be implemented, the certainty that the conservation effort will be implemented and (2) for those efforts that have not yet demonstrated effectiveness, the certainty that the conservation effort will be effective." *Id.* at 15,114. The PECE policy repeatedly speaks of "certainty." Given that the Service has not reviewed the Texas certificates of inclusion, does not know how many certificates exist, and does not even have the ability to possess them under Texas confidentiality rules, it is difficult to see how a court could conclude that the Texas CCAA is "sufficiently certain to be implemented and effective so as to have contributed to the elimination or adequate reduction of one or more threats to the species identified through the section 4(a)(1) analysis." PECE analysis at 3.

Indeed, recent cases make clear that the Service cannot rely on speculative future regulatory and non-regulatory conservation measures in making listing decisions. *In re Polar Bear Endangered Species Act Listing and Section 4(d) Rule Litigation*, 794 F. Supp. 2d 65 (D.D.C. 2011) ("As other courts have found, the ESA does not permit FWS to consider speculative future conservation actions when making a listing determination."); *Biodiversity Legal Found. v. Babbitt*, 943 F. Supp. 23, 26 (D.D.C. 1996); *Fund for Animals v. Babbitt*, 903 F. Supp. 96, 113 (D.D.C. 1996). *See also, e.g., Or. Natural Res. Council v. Daley*, 6 F. Supp. 2d 1139, 1154 (D. Or. 1998) (criticizing reliance on a regulatory mechanism where there is no assurance that the "measures will be carried out, when it will be carried out, nor whether they will be effective in eliminating the threats to the species.").[1]

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[1] Although the PECE policy contemplates that agreements containing sufficiently certain future actions may be considered in making listing decisions, courts have held future efforts to a high standard. Judge Sullivan in the polar bear case noted: "Moreover, established agency policy requires that in making a listing determination FWS may only consider formalized conservation efforts that have been implemented and have been shown to be effective." 794 F. Supp. 2d at 113 n.56 (citing the PECE policy). Other courts concur that the PECE policy requires certainty that current conservation measures are actually being implemented and effectively aiding the species. *Alaska v. Lubchenco,* 825 F. Supp. 2d 209 (D.D.C. 2011) (holding that conservation measures "must actually be in place and *have achieved some measure of success* in order to county under the Service's policy" (emphasis added));

The PECE analysis for the Texas Conservation plan concedes that the Service "do[es] not know which specific conservation measures are going into each Certificate of Inclusion" yet the Service nonetheless claims that "the TCP as a whole limits the amount of habitat loss within dunes sagebrush lizard habitat to 1% in the first three years." PECE analysis at 23. There are many problems with this statement, including the question of whether habitat proxies alone can adequately account for species take, but fundamental among them is the fact that the Service simply has no idea what measures are going to be adopted on which lands and whether the landowner will in fact implement them. Indeed, the Service has no certainty that it can achieve this 1% limit because it hasn't enrolled 99% of the habitat at the time of the withdrawal decision. Thus the Service is speculating that future enrollment will close the gap to 1%, but there is no reason to believe that will occur, as landowners no longer have an incentive to enroll additional property.

This case is similar to *Save Our Springs v. Babbitt*, 27 F. Supp. 2d 739 (W.D. Tex. 1997), in which the court remanded the Service's decision not to list the Barton Springs salamander. There the salamander had also been a category 2 candidate species and the region had prepared a final rule to list the species, but before it was approved representatives from the state of Texas met with Interior officials and developed a conservation agreement. On the basis of this agreement, the Service withdrew its proposed rule and decided not to list the salamander. The court held that the Conservation Agreement did not support the Service's decision because "[t]he effect of the measures articulated in the Conservation Agreement on the species is speculative. There are no assurances that the measures will be carried out, when they will be carried out,[2] nor whether they will be effective in eliminating the threats to the species." *Id.* at 744. The ESA mandates that FWS "cannot use promises of proposed future actions as an excuse for not making a determination based on the existing record." *Id.* at 747. In words that seem especially relevant here the court emphasized:

> The Secretary placed the continued existence of a species, found only on place in the natural world, in the hands of state agencies and a Conservation Agreement with no proven track record for success. It may well come to pass that the Conservation Agreement passes with flying colors in its intended effect of eliminating the risk to the species and is the best possible way to accomplish that aim. However, absent some historical data to back the decision that the Conservation Agreement is sufficient to adequately protect the species, it is arbitrary and capricious to conclude that at this time.

Marincovich v. Lautenbacher, 553 F. Supp. 2d 1237 (D. Idaho 2008) (holding that NMFS need not give weight to future conservation efforts).

[2] The Texas CCAA also does not provide a schedule for when participants would undertake conservation action (even though the PECE policy states that an implementation schedule is the basis for determining whether there are "provisions for monitoring and reporting progress."). In fact, the PECE analysis punts on this issue, saying that "Despite not having an implementation schedule, the Service has determined that the plan has sufficient structure, regulatory mechanisms, and planning to achieve the necessary conservation benefit." PECE analysis at 35. This conclusion is irrational.

Id. at 748-49. The same is true here. Under the ESA, the Service is obligated to list a species if any one of the five listing factors is triggered. The final decision does not adequately explain away the "imminent and significant" threats identified in the proposed rule. It relies on the notion that the Texas CCAA provides protections to the lizard sufficient to abate all remaining threats. The Service's analysis of the five listing factors essentially comes down to blind faith in the possibility that the Texas CCAA, when combined with New Mexico's more transparent effort, eliminates risk to the species. Even if this were true, FWS could not have so concluded because the Texas CCAA in particular is not sufficiently certain to be implemented and effective and FWS does not even possess the relevant information necessary to evaluate that CCAA. The Service's decision violates the ESA and its own policies and is arbitrary and capricious.

THE SERVICE FAILED TO APPLY THE BEST AVAILABLE SCIENCE TO THE LISTING DECISION

The Service failed to utilize the best available scientific and commercial data as the ESA requires. 16 U.S.C. § 1533(b)(1). First, it is apparent that the Texas CCAA/HCP was drafted hastily in an environment of considerable political pressure. *See Save Our Springs v. Babbitt*, 27 F. Supp. 2d at 745, 748 (finding that political pressures unduly influenced a decision not to list the Barton Springs Salamander). The Service then issued its decision only a few months later, during which time the Service could not possibly have evaluated the Texas CCAA/HCP sufficiently to conclude, as it did, that threats to the species were abated to the point where a species proposed for listing as endangered in fact requires no federal protection. This is especially true when one considers that the Service has not even seen and cannot obtain the conservation agreements registered with the state to determine their rigor.

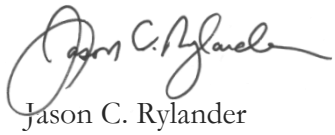
Second, the Service claims that between publication of the proposed rule and its ultimate not warranted finding, scientists discovered more lizards in more places. But limited evidence of additional populations of lizards, put forth by the Service, does not fully explain the Service's reversal. The Service states that the lizard occurs in "an area of sufficient size and distribution that it is expected to be resilient to random natural impacts," 77 Fed. Reg. at 36,898, and that the species has not "currently declined to the point that it is subject to impacts from stochastic events…" *Id.* But the Service fails entirely to discuss what size and distribution is sufficient to warrant a threatened or endangered finding. Nor does it analyze or explain why the current population is large enough to be resilient to stochastic events or has "sufficient resilience, redundancy, and representation to be viable now and in the foreseeable future." *Id.* The Service's analysis here falls short.

Third, the not warranted finding states that "habitat restoration done through the award system will offset and have the positive effect of decreasing habitat fragmentation and providing for the long-term conservation of the species." *Id.* 36,885. This statement conflicts with the Service's conclusion in the December 2010 proposed rule, which states that "for now there are no known methods to restore the dunes sagebrush lizard habitat." The "not warranted" finding fails entirely to explain this discrepancy and cites to no new research that would support the notion that there have been advances in habitat restoration sufficient to warrant a new conclusion.

CONCLUSION

The Service's determination that the listing of the dunes sagebrush lizard is "not warranted" and its related failure to designate critical habitat for the species violates Section 4 of the ESA and the Service's own policies for assessing whether to list a species as threatened or endangered. If the Service does not act to remedy these violations within 60-days, Defenders of Wildlife and the Center for Biological Diversity will initiate litigation in federal district court against the Service concerning these violations and will seek declaratory and injunctive relief and reasonable attorneys fees and costs. If you would like to discuss these issues or believe that anything stated above is in error, please contact me at 202-682-9400 x. 145. We appreciate your consideration of these concerns.

Sincerely,



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