



Ms. Martha Williams
Director, U.S. Fish & Wildlife Service
Public Comments Processing
Attn: FWS-R2-ES-2022-0162
MS: PRB/3W
5275 Leesburg Pike
Falls Church, VA 22041-3803

Re: Opposition to designation as the Dunes Sagebrush Lizard as endangered under the Endangered Species Act of 1973

******Delivered Via Public Comment Portal******

October 2, 2023

Director Williams:

We write today to notify you of our opposition to Proposed Rule 88 FR 42661.¹ This rule proposes listing the Dunes Sagebrush Lizard as an endangered species under the Endangered Species Act of 1973 (ESA), as amended.² While we acknowledge the importance of species conservation, we believe it is imperative that your agency consider the far-reaching implication of this listing, particularly on critical sectors of the oil and gas industry which significantly contributes to both the Texas and U.S. economies. It is crucial that the ESA remains true to its original purpose of safeguarding species without being used for political purposes, and that your agency consider existing voluntary conservation agreements that landowners have forged over the years with the federal government, as well as established U.S. Supreme Court precedent. Texas stands as a powerhouse in energy, and this industry is foundational to our state's prosperity. We thus urge you to consider the following points as you deliberate on the proposed rule.

First, no reliable evidence exists proving that oil and gas drilling influences the change in climate conditions in the Permian Basin. In the proposed rule, you cite "climate change and climate conditions" as rationales for your plans for implementation, specifically "hotter, more arid conditions with an increased frequency and greater intensity of drought throughout the species'

¹ Endangered and Threatened Wildlife and Plants; Endangered Species Status for the Dunes Sagebrush Lizard, 88 Fed. Reg. 42661 (July 3, 2023) (to be codified at 50 C.F.R. pt. 17).

² Endangered Species Act of 1973, Pub. L. No. 93-205, 16 U.S.C. § 1531 et seq. (1973).

geographic range.”³ Much evidence exists to prove the contrary. For example, IQAir, a Swiss air quality technology company, designates air quality in the major Permian Basin city of Odessa as “good”—its highest and cleanest designation—and ranks the city as the 5,084th most polluted city on the planet.⁴ Midland, also a major city in the Permian Basin, is ranked as the 3,926th most polluted city. Other sources fail to rank the Permian Basin anywhere near to the top of the world’s—or even the nation’s—air quality polluters.⁵ While some reports have exaggerated the Permian Basin’s contribution to world pollution,⁶ even the Environmental Protection Agency itself concedes that particulate matter trends show a 30% decrease of particulate matter between the years of 2000 to 2022 in the south region, in which the Permian Basin is located.⁷ So, according to both private sources *and the Federal Government’s own data*, there is no argument to be made that oil and gas activity has been the cause of this naturally occurring change in climate in the Permian Basin.

Furthermore, to the extent that pollution *is* a factor in the Permian Basin, most of it likely originates from areas outside of the geographic region. For example, the Texas Commission on Environment Quality’s (TCEQ) assessment of air quality in El Paso—a city near the Permian Basin—found that 60% of the pollutants identified originated from the Mexican City of Juarez.⁸ This is such a problem that the State Legislature passed a law, almost unanimously, to direct the TCEQ to estimate the contribution of foreign emissions in areas of nonattainment in Texas so the state can determine whether to revise its implementation plan to account for these foreign emissions.⁹

Second, no evidence exists as to whether frac-sand mining activities adversely affect the population of the Dunes Sagebrush Lizard, negating the second rationale you cite for implementation of the rule which supposes “habitat loss, fragmentation, and degradation from development by the oil and gas and frac sand mining industries” as reality.¹⁰ In fact, what little evidence does exist on this shows the opposite. Specifically, a 2022 study found that the population of the Dunes Sagebrush Lizard may be *increasing*. The study reveals that “Dunes Sagebrush Lizard captures in 2022 were 1.7 times greater than 2021 and 3 to 4 times greater than in 2019 and 2020,” and that its survival and immigration patterns “were greater in 2022 compared to previous years.”¹¹ Our Land Commissioner Dawn Buckingham sent you a letter on August 25 detailing this study,

³ Endangered and Threatened Wildlife and Plants, *supra* at 42662.

⁴ *World’s Most Polluted Cities*, IQAIR (last visited Sept. 27, 2023), <https://www.iqair.com/us/world-most-polluted-cities>.

⁵ See, e.g., Chris Gilligan, *Countries with the Worst Air Pollution*, U.S. NEWS & WORLD REPORT (Aug. 25, 2023), <https://www.usnews.com/news/best-countries/slideshows/the-most-polluted-countries-in-the-world?onepage>.

⁶ See, e.g., Brett Shipp, *Texas’ Permian Basin Identified as the World’s Top Polluter*, SPECTRUM NEWS 1 (Nov. 16, 2022), <https://spectrumlocalnews.com/tx/south-texas-el-paso/news/2022/11/16/texas--permian-basin-identified-as-the-world-s-top-polluter>.

⁷ U.S. ENVIRONMENTAL PROTECTION AGENCY, *Air Trends, Particulate Matter Trends (PM2.5 Trends)*, <https://www.epa.gov/air-trends/particulate-matter-pm25-trends> (last visited Sept. 27, 2023).

⁸ Hon. Janie Lopez, *Protecting American Jobs and ‘Made in America’*, TEX. PUB. POLICY FOUND., <https://www.texaspolicy.com/protecting-american-jobs-and-made-in-the-usa/>.

⁹ Tex. Health and Safety Code § 382.0175 (b).

¹⁰ Endangered and Threatened Wildlife and Plants, *supra* at 42662.

¹¹ ACRE, M.R. AND M.T. HILL, *DEMOGRAPHIC MONITORING OF THE DUNES SAGEBRUSH LIZARD (SCELOPORUS ARENICOLUS) IN NEW MEXICO* 17 (2022).

further showing that your agency's insistence that the Dunes Sagebrush Lizard is on its way to extinction rejects all available evidence and is speculative at best.¹² As the ESA requires the Secretary to make determinations "solely on the basis of the best scientific and commercial data available," we have major concerns as to whether your agency even has the legal grounds to designate the Dunes Sagebrush Lizard as endangered.¹³

Similarly, your agency's consideration of this rule ignores existing Candidate Conservation Agreements and Candidate Conservation Agreements with Assurances, as outlined by Congressman August Pfluger in his August 30 letter to you.¹⁴ Private landowners in the Permian Basin area have voluntarily subjected the millions of acres of collective land they own to these agreements. The agreements have contributed to the species' habitat gain described above and have helped fund many of the conservation efforts that have allowed for this growth to occur.¹⁵ Designating the lizard as endangered is a slap in the face to the landowners that have made painstaking efforts to help preserve the Dunes Sagebrush Lizard—successfully—and will discourage future voluntary efforts by signaling to landowners that these agreements are essentially meaningless.¹⁶

Lastly, in the case of *Weyerhaeuser Co. v. U.S. Fish & Wildlife Service*,¹⁷ the United States Supreme Court in 2018 ruled in favor of the owners of a well-established commercial timber plantation after your agency attempted to designate the land of this plantation as "critical habitat" for the Dusty Gopher Frog, even though major uncertainty existed as to the population status of the Frog in that geographic area.¹⁸ The case highlighted the legal requirement under the ESA that economic and other relevant impacts be thoroughly considered before designating an area as critical habitat.¹⁹ As previously mentioned, listing the Dunes Sagebrush Lizard as endangered will most certainly disrupt oil and gas operations in West Texas, jeopardizing thousands of jobs and continued economic growth.

While the *Weyerhaeuser* case pertained to the designation of "critical habitat," there is no current effort by your agency to label West Texas as such for the Dunes Sagebrush Lizard. However, the ESA mandates the Secretary of the Interior also designate the "critical habitat" of an endangered species upon listing.²⁰ Considering that the proposed rule indicates the Permian Basin as the

¹² Letter from Tex. Land Comm'r Dawn Buckingham to Amy Lueders, Reg'l Dir., U.S. Fish & Wildlife Serv. (Aug. 25, 2023), <https://www.glo.texas.gov/the-glo/news/press-releases/2023/files/08.25.23-dsl-listing.pdf>.

¹³ Endangered Species Act of 1973, *supra* at Sec. (4)(b)(1)(A).

¹⁴ Letter from U.S. Congressman August Pfluger to Dir. of the U.S. Fish and Wildlife Serv. Martha Williams (Aug. 30, 2023), https://pfluger.house.gov/uploadedfiles/pfluger_dsl_public_hearing_letter.pdf.

¹⁵ *Id.*

¹⁶ *See, e.g.,* PERMIAN BASIN PETROLEUM ASS'N, *PBPA's Response to the USFWS Proposing Listing Dunes Sagebrush Lizard* (June 30, 2023), <https://pbpa.info/newsroom/pbpas-response-to-the-usfws-proposing-listing-dunes-sagebrush-lizard>.

¹⁷ *Weyerhaeuser Co. v. U.S. Fish and Wildlife Serv.*, 139 S.Ct. 361 (2018).

¹⁸ *Id.* at 362.

¹⁹ *Id.* at 370.

²⁰ Endangered Species Act of 1973, *supra* at Sec. (4)(a)(3)(A)(i).

lizard's most probable habitat, it is a near foregone conclusion that designating this area as "critical habitat" will be the next step for your agency should the Lizard be classified as endangered. However, outside of the aforementioned evidence showing a growth in Lizard population in recent years, biologists currently lack certainty about the Lizard's population in the area of Texas due to its elusive nature and difficulty of detection.²¹ Thus, just as with your agency's saga with the Dusty Gopher Frog, the designation of critical habitat for the Lizard in the Permian Basin would likely violate the legal standard adopted in *Weyerhaeuser*.

In conclusion, more evidence must be presented to show the need to designate the Dunes Sagebrush Lizard as endangered at this time. We urge your agency to approach the proposed rule with both a commitment to species protection and a thorough understanding of its potential economic implications—all of which could reverberate far beyond the oil and gas industry. But with respect to just that industry alone, the designation's effect will have inflationary implications for all Americans, considering already escalating oil prices due to President Biden's anti-fossil fuel approach to the energy sector. A comprehensive assessment of these repercussions is essential to make an informed decision that avoids unnecessary harm to our economy. Let the ESA fulfill its intended purpose without being misused for political ends. The delicate balance between environmental conservation and economic stability must be upheld for the wellbeing of our constituents, our state, and our country.

We look forward to your prompt response.

Sincerely,



Kevin Sparks
State Senator
Texas Senate District 31



Charles Perry
State Senator
Texas Senate District 28



Peter P. Flores
State Senator
Texas Senate District 24

²¹ Susan Montoya Bryan, *Rare Lizard Found in Major U.S. Oil Patch Proposed as Endangered Species*, ASSOCIATED PRESS (June 30, 2023), <https://apnews.com/article/rare-lizard-endangered-species-list-oil-40d04848590e6769da39741d902c8998>.