



# United States Department of the Interior

## FISH AND WILDLIFE SERVICE

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December 4, 2008

### Memorandum

To: Deputy Regional Director, U.S. Fish and Wildlife Service, Region 2,  
Albuquerque, NM

From: Field Supervisor, U.S. Fish and Wildlife Service, New Mexico Ecological  
Services Field Office, Albuquerque, NM

Subject: Findings and Recommendation on Issuance of an Endangered Species Act section  
10(a)(1)(A) Enhancement of Survival Permit associated with a Candidate  
Conservation Agreement with Assurances for the Lesser Prairie Chicken and  
Sand Dune Lizard, for seven counties in southeastern New Mexico

The U.S. Fish and Wildlife Service's (Service) New Mexico Ecological Services Field Office has worked with Center of Excellence for Hazardous Materials Management (CEHMM/ Applicant) on the development of a Candidate Conservation Agreement with Assurances (CCAA) for the lesser prairie chicken (*Tympanuchus pallidicinctus*) (LPC) and the sand dune lizard (*Sceloporus arenicolus*) (SDL), in seven counties in southern New Mexico, and on the necessary Service documents associated with the accompanying Enhancement of Survival Permit (Permit) application. The LPC and SDL are not a federally-listed species, but they are candidate species and the SDL is listed as endangered by the State of New Mexico. CEHMM and the Service, with assistance from BLM, are the parties to the CCAA, which has a 20-year duration. The Permit is a necessary component for implementation of the CCAA, and the New Mexico Ecological Services Office and Regional Office staff concur that the application and proposed CCAA meet the regulatory and statutory standards required for issuance of the requested Permit. The CCAA, Environmental Assessment under the National Environmental Policy Act (NEPA), and Intra-Service Section 7 Conference Opinion were reviewed by Service personnel at the Regional Office in Albuquerque, and the New Mexico Ecological Services Field Office. None of the reviewers objected to the issuance of the Permit.

### I. DESCRIPTION OF PROPOSAL:

CEHMM submitted an application to the Service for a Permit under section 10(a)(1)(A) of the Endangered Species Act of 1973, as amended (Act). The Permit would support the CCAA for LPC and SDL in approximately 2,200 mi<sup>2</sup> in the southeastern section of the state within portions of the counties of Lea, Eddy, De Baca, Curry, Roosevelt, Quay, and Chaves in New Mexico. The initial focal area of the CCAA will be in Lea, Eddy, and Roosevelt counties. Expansion of the CCAA into the remainder of the LPCs/SDLs currently occupied and suitable, unoccupied habitat throughout New Mexico may be added, contingent upon available funding to provide for

CEHMM's increased workload due to an expanded scope and range. The primary objectives of the CCAA are: (1) reduce impacts to existing habitat for these species and thus, reduce effects to these species within New Mexico, and (2) to reestablish and augment populations of LPC within the covered area. Implementation of the CCAA for LPC and SDL is expected to eliminate or significantly reduce threats to the LPC and SDL such that, when combined with similar actions at other sites, the long-term conservation and recovery of the species within its historic range is expected. The CCAA will also continue the successful cooperative pre-listing recovery efforts for the LPC and SDL that have been accomplished to date, through conservation actions that could not otherwise be required through the Act. With the issuance of the Permit, the Service will provide assurances to CEHMM that no additional conservation measures would be required beyond those specified in the CCAA should the species become listed in the future as long as CEHMM implements and maintains the conservation measures specified in the CCAA in good faith.

The CCAA is expected to serve as a vehicle to remove or reduce threats on enrolled properties and stabilize, if not expand, LPC and SDL populations through implementation of the conservation actions described in the CCAA. This CCAA, combined with the companion Candidate Conservation Agreement (CCA) with the Bureau of Land Management (BLM), Service, and CEHMM for conservation on Federal lands, is likely to serve as a model of cooperative conservation efforts that may facilitate the development of additional CCA and/or CCAA's within the historic range of the LPC, and possibly the small portion of the SDL range in west Texas. The Permit would authorize the incidental take of LPC and SDL in association with implementation of the conservation measures described in the CCAA and the ongoing land uses, as modified by the conservation measures. The Permit would authorize incidental take associated with implementation of conservation commitments and measures described in the CCAA and land uses, primarily oil and gas development and ranching, on the enrolled properties. Although the Permit would be issued upon entering the CCAA, the Permit would not become effective until listing of the LPC and/or the SDL occurred.

The Service has analyzed the potential impact of the CCAA on the human environment and has concluded in its NEPA analysis that there will be no individual or cumulative significant effects on the environment caused by this action. The Service recommends Permit issuance based on the adequacy of the CCAA as measured against the Service's final CCAA policy (63 FR 32726-32736) and the expected benefits to the LPC and SDL that are expected to be achieved through implementation of conservation actions and provisions contained in the CCAA.

## **II. PUBLIC COMMENTS**

The Service published a Notice of Availability of the CCA/CCAA, draft Environmental Assessment, and Receipt of the Permit Application to allow the incidental take of the candidate lesser prairie chicken and sand dune lizard by CEHMM in the Federal Register on October 21, 2008 (73 FR 62526). The Service received thirteen responses on the proposal during the public comment period. The Service's responses to these comments, in summarized form, are addressed below.

## General Comments

- A. **Grazing** – concerned with the statement “Grazing by wildlife or domestic livestock is essential to maintain the health of native grasslands and moderately and lightly grazed areas are necessary on a landscape scale to maintain LPC habitat (Davis 2006).”  
**Action:** Deleted statement.  
**Response:** We have reviewed the literature citation and it does not support this statement. We have removed the statement.
- B. **PVA** - concern about who is doing it, how much and how will it be funded.  
**Action:** None  
**Response:** The PVA is being discussed on a range-wide scale and possibly on a state level. The PVA would be great to have before implementation, but these conservation activities need to be implemented in the near future. The results of a PVA will feed into our adaptive management process and may either lead to emphasis on more critical conservation activities or may result in amendments to the CCA/CCAA. Funding for the PVA is not likely to be solely through the CCA, but will be from multiple partners.
- C. **Conference Opinion** – concerned with the CO “resolving conflicts.”  
**Action:** Reword slightly  
**Response:** Resolution of conflicts is part of the process of consultation and the wording concerning the conference opinion is found in the Act. Section 7 consultation, and in this case conference, may result in changes to the proposed action if an issue or conflict arises during the effects or jeopardy analysis.
- D. **New Mexico State Land Office (NMSLO)** – How will they fit in to the CCAA?  
**Action:** We have been in discussions with the NMSLO prior to the implementation and signature of the CCAA. In these discussions, the NMSLO expressed interest in inclusion in the CCAA.  
**Response:** The CCAA is a voluntary agreement. As a non-Federal landowner the NMSLO may enroll the lands it manages. We have been in discussion with the NMSLO and there is some interest. State lease holders may also enroll their state lease lands to cover their operations, but no active conservation can occur on State Trust Lands without approval of the NMSLO, nor can any commitments be made concerning state trust lands without the approval of NMSLO. However, avoidance and minimization will be implemented by the lease holder.
- E. **Reporting and Compliance Issues** – concerning adequate monitoring and reporting.  
**Action:** Clarify roles and responsibilities, as well as, monitoring and reporting requirements.  
**Response:** We have clarified these sections. Monitoring and reporting are a key element to adapting conservation strategies in an effort to effectively and efficiently implement meaningful conservation on the ground. The loss of individuals in certain areas or

related to certain features on the landscape is important to know as a guide to future implementation of conservation commitments. Restoration and maintenance of habitat may be approached by several methods. It will be through monitoring of results and the reporting process that the most effective will be identified.

F. **Amendments** – concerned with implementation of amendments.

**Action:** Clarify.

**Response:** In the CCAA, any amendments would be part of any post-amendment Certificate of Inclusion (CI). However, for existing CIs, the assurance of no additional land, water, or funding would make adoption of any amendment optional. In the CCA, no such assurance exists. However, under the cooperative nature of the CCA, all parties should be involved in the development of an amendment and how it would be implemented. However, should listing occur, neither agreement is amendable. The Conference Opinion will be converted into a Biological Opinion and future actions of enrollees will be based upon the finalized biological opinion (CCA), and the assurances and permit (CCAA).

G. **Adaptive management** – concerned that the CCA/CCAA has not accurately described Adaptive Management nor do the agreements incorporate research as a necessary component of adaptive management.

**Action:** Clarify.

**Response:** We have clarified this section in the CCA and have added that research projects designed to determine the effectiveness of management practices will be encouraged and utilized to determine what adaptive management is necessary.

H. **RMPA** – The RMPA should be the minimum conservation.

**Action:** Clarify.

**Response:** The CCAA will in effect result in making the action under the RMPA the minimum conservation on the private lands and the Collaborative Conservation Strategy for LPC and SDL in New Mexico will be the guide for further conservation measures on private lands.

I. **Funds, refunds, credits, and accountability** –

**Action:** Clarified

**Response:** CEHMM is a registered 501(c)(3) which is required to go through an independent audit each year, at CEHMM's expense, that is available for public inspection. A credit system for funding paid on a plan of development through the CCA, may be developed for undeveloped well sites, but these credits are to run with the company or the lease and cannot be sold or traded to other companies. In case the CCA is terminated, no refunds of conservation funds are available. These funds will have already been spent or committed.

J. **Threats** – Semantic comments (i.e., misspelled words, reader interpretation of sentence meaning).

**Action:** Clarified.

**Response:** These discrepancies have been identified and corrected in the threats section of the CCA.

K. **Conservation measures** - too vague

**Action:** Identify those conservation measures that are common to all Certificate of Participation (CP)/CI. Then, identify those that are optional and may be used on different properties. Also, refer to the Collaborative Conservation Strategy for LPC and SDL in New Mexico as the guidance document. Insert language that this is not a complete list and that additional measures may be included as long as it meets the conservation goals of the LPC/SDL management guidelines for New Mexico and these agreements.

**Response:** We have clarified the conservation commitments and will use the BLM RMPA as a minimum conservation on private lands and the Collaborative Conservation Strategies for the Lesser Prairie-Chicken and Sand Dune Lizard in New Mexico (2005), as amended will be guidance for additional conservation.

L. **Misc.** –

- LPC lek south of US 82 not viable?

**Action:** Clarify wording.

**Response:** We did not indicate the LPC Lek south of US 82 was not viable, but that we want to establish several other viable populations south of US 82

- Concern over the cumulative effects.

**Action:** None

**Response:** We understand the concern and these agreements are trying to address this issue.

- Quail Unlimited wanting only to kill – Not relevant to CCA/CCAA
- We should wait until the next Administration – The point of these agreements is to initiate conservation prior to listing and waiting for a new administration would not further that purpose.
- Ex-BLM employees kill wild horses – Not relevant to CCA/CCAA

M. **CEHMM's qualifications and process.**

**Action:** inserted information about CEHMM from their website. Need to add information about role and how conservation commitments will be developed.

**Response:** We feel CEHMM is qualified to work with landowners and administer these Conservation Agreements. CEHMM will not be developing the conservation commitments alone. The conservation commitments will be developed jointly with BLM, Service, and other cooperating Agencies like NMDGF.

N. **Preclude the need to list.**

**Action:** Rewrite language to explain that “preclude the need” is based upon the removal of threats and stabilization and improvement of the species' status. The decision to list is

a regulatory process and no Agreement can predetermine the outcome. The actions and successes of the CCA/CCAA will be evaluated based upon implementation, not on intention. The implementation of the CCA/CCAA will be evaluated in accordance with our Policy on the Effectiveness of Conservation Efforts (PECE). This will be then factored into the 5-factor analysis of any future listing decision.

**Response:** We have clarified the language to reflect the process under PECE that would be used to evaluate the effectiveness of the CCA/CCAA in the 5-factor analysis for a listing decision.

O. **Permit** – What is the permit for?

**Action:** Clarify

**Response:** Under the CCAA policy, we may issue a section 10(a)(1)(A) enhancement of survival permit to cover incidental take of either species, that will be effect if either species is listed. The coverage will include incidental take consistent to the level of take under the CCAA prior to listing. This means harm, harass, and mortality from activities that continue on from the CCAA (conservation commitment) and ongoing activities on the property at the level anticipated under the CCAA. Changes in land use or intensity that result in take above that anticipated under the CCAA will need coverage under section 7 consultation or a section 10(a)(1)(B) permit.

P. **Conservation Commitment** – who is developing them and how will they be evaluated.

**Action:** Clarified

**Response:** See Comment M above.

Q. **NEPA** – A statement that NEPA is insufficient without a listing alternative and a concern about accountability.

**Action:** None needed.

**Response:** The inclusion of an alternative that includes the listing of one or both species is not appropriate. Listing is not an existing condition and is not part of the proposed action. Listing would be an independent regulatory action that would occur at a later date. If listing occurs prior to the approval and permit issuance under the CCAA, the CCAA would not be valid. Landowners seeking to implement recovery actions should work to develop a Safe Harbor Agreement at that time. The analysis in the Environmental Assessment (EA) will determine if the proposed action has a significant impact on the human environment and whether an Environmental Impact Statement (EIS) is the appropriate level of analysis.

Concerning Accountability, this is the appropriate level of public review for these agreements. We have received meaningful comments that will improve conservation of these species. Accountability will be through the biological and compliance monitoring required under these agreements and the potential for the Permit to be revoked and CIs to be severed from the agreement for cause. The stipulations referred to in the agreement are to protect the permit holder and the property owners from third party lawsuit, it however, does not reduce the rights of citizens under the ESA to hold the Service

accountable for appropriate administration of the CCAA.

- R. **Agreement Area** – concerned with the differences in the covered areas.  
**Action:** Inserted language to clarify that both the CCA/CCAA cover the same area, but that the CCAA will concentrate on the focal area to insure that implementation does not outstrip resources.  
**Response:** The areas are now consistent.
- S. **Role of New Mexico Department of Game and Fish (NMDGF)** – comments suggesting a stronger role.  
**Action:** Insert NMDGF in appropriate places for development of conservation commitment, monitoring, research, and participation in annual meetings.  
**Response:** We have clarified a more inclusive role for NMDGF.
- T. **Duration of the Agreement and CIs** – comments that they seemed to be short.  
**Action:** None  
**Response:** The duration of the CCAA was to provide long enough time frames to get the conservation activities rolling, but not beyond what CEHMM was willing to commit to, at first. The Agreement is voluntary, renewable, and transferable. As far as the individual landowner's commitment, five years is a balance between what a landowner is willing to commit to and a time frame for meaningful conservation. The CIs are also voluntary, renewable, and transferable. The one caveat to participation is that the assurance of no further commitment of land, water, or funding in the CCAA is only valid during enrollment and the permit's incidental take coverage is only authorized for the level consistent with implementation of the CCAA and land use levels during enrollment.
- U. **Recovery/Conservation** – request for recovery goals and insistent that we refer to recovery rather than conservation.  
**Action:** Include reference to the Collaborative Conservation Strategy for LPC and SDL in New Mexico.  
**Response:** Recovery and recovery planning is a post listing process. Conservation is the appropriate term for candidate species. However, we will use the Collaborative Conservation Strategy for LPC and SDL in New Mexico to guide our conservation goals and activities.
- V. **Intent** – statement on the CCA  
**Action:** None  
**Response:** See Item N.
- W. **Concern that the 500 meter buffer** for tebuthiuron treatments around LPC and SLD habitat is not supported by science and is not consistent with Natural Resources Conservation Service technical bulletin note No. 53.  
**Action:** We had a conference call on December 2<sup>nd</sup> to discuss this issue with NRCS, BLM, CEHMM, and NMDGF. NRCS Technical Bulletin No. 53 is consistent with the

SDL buffers in the CCA/CCAA. NRCS wanted a 100-foot buffer around LPC habitat and more flexibility. We feel this is too small a buffer, and may be detrimental shinnery oak and LPC based upon the most recent literature and expert opinion. We proposed a 100 meter buffer, with post-treatment grazing deferment for two growing season to ensure success, and some requirements about spray patterns. We further included a provision an exception for research into the effects of spraying.

**Response:** Commenter agreed with the 500 m buffer around the SDL habitat. We reduced the buffer around LPC habitat to 100 m, provided conditions for grazing deferment pot-treatment, and a 1.5 mile buffer around active leks. We further provided for exceptions to the buffers and conservation measures for experimental treatments.

- X. **Description of vegetation** in the Affected Environment does not use NRCS Ecological Site descriptions and is too vague.

**Action:** None

**Response:** The vegetation, range condition, and cover as used in the EA is adequate for our purposes of describing the existing environment for our analysis in the EA.

- Y. **Requiring fence markers** up to 2 miles from lek would be too expensive and not scientifically supported.

**Action:** None

**Response:** Since LPC nest within 1.9 miles from the lek and collision with fences is a major source of adult mortality, we feel it is appropriate to leave this conservation measure in the Agreement.

- Z. **12 editorial comments**, some grammatical, some to insert desired language.

**Action:** Reviewed and used as appropriate.

**Response:** We consider the suggested changes as appropriate.

### III. ISSUANCE CRITERIA-ANALYSIS AND FINDINGS

The applicant has met all application requirements for the Permit. In addition, the applicant has met all issuance criteria for the Permit contained in 50 CFR 17.22(d)(1) and 17.32(d)(1) or 50 CFR Part 222. These criteria are detailed below.

#### Enhancement of Survival Permit

1. The take will be incidental to an otherwise lawful activity and will be in accordance with the terms of the Candidate Conservation Agreement with Assurances.

The Service finds that the potential take of LPC and SDL is incidental to otherwise lawful activities. These activities would occur as a result of the Applicant's implementation, and those of Participating Landowners, of the conservation actions described in the CCAA. The Permit would include incidental take associated with: implementation of conservation commitments and measures described in the CCAA and land uses, primarily oil and gas development and ranching, on the enrolled properties. Incidental take authorized under the Permit would be in the form of

harass, harm, and mortality associated with the conservation activities and documented levels of land use in each participant's certificate of inclusion.

2. The Candidate Conservation Agreement with Assurances complies with the requirements of the Candidate Conservation Agreement with Assurances policy.

The Applicant has developed the CCAA and Permit application pursuant to the requirements in the implementing regulations and the issuance criteria for a Permit. Conservation benefits for the LPC and SDL from implementation of the Agreement are expected in the form of avoidance of negative impacts, reduction of threats, enhancement and restoration of habitat intended to contribute to establishing or augmenting, and maintaining viable populations of LPCs and/or SDLs in Lea, Eddy, De Baca, Curry, Roosevelt, Quay, and Chaves counties. In addition, conservation of LPCs and SDLs would be enhanced by improving and encouraging cooperative management efforts between the CEHMM, Service, and Participating Landowners who own and control LPC and/or SDL habitat. Also, this agreement may be used as a model for CCAAs in other parts of the LPCs range to encourage cooperative management and conservation.

In addition to habitat conservation, release of captive-reared LPC that leads to establishment of viable populations in the Planning Area, or augmentation of existing LPC numbers by translocation and release of LPCs from other areas, will contribute to conservation and reduce the need for listing under the Act.

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.

The Act's legislative history establishes the intent of Congress that this issuance criteria be identical to a regulatory finding of no "jeopardy" under section 7 (a)(2) of the Act. As a result, issuance of this section 10(a)(1)(A) Permit was reviewed by the Service according to provisions of section 7 of the Act. In the Intra-Service Section 7 Conference Opinion, which is attached hereto, and incorporated herein by reference, the Service concludes that issuance of an Permit will not jeopardize the continued existence of the LPC or SDL or any other species. The taking associated with the implementation of the CCAA will be incidental to efforts associated with changes in land use practices and conservation actions for LPC and SDL their historic range, and gathering important biological information necessary to continue conservation efforts for the species.

4. Implementation of the terms of the Candidate Conservation Agreement with Assurances is consistent with applicable Federal, State, and Tribal laws and regulations.

The Service is unaware of any law or regulation that would prevent the implementation of the CCAA, and the accompanying Permit. The Permit will include conditions that revoke the take provisions of the Permit if any applicable State, Federal or tribal law or regulation is broken.

5. Implementation of 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.

The CCAA for the LPC and SDL furthers ongoing conservation activities for the species' conservation, and is essential in developing a model agreement that can be used to facilitate additional conservation agreements within the historic range of the LPC and SDL. The Service and BLM have developed a CCA to implement similar conservation measures on Federal lands, within the seven counties in New Mexico covered by the CCAA. The CCA is the basis for the CCAA. This combined effort should provide conservation incentives and result in greater success in reducing threats and stabilizing the status of LPC and SDL.

6. The Applicant has shown capability for and commitment to implementing all of the terms of the Candidate Conservation Agreement with Assurances.

CEHMM has shown their ability through participation in ongoing conservation of LPC and SDL that they can administer the CCAA and work effectively landowners to implement conservation commitments in the CCAA. The funding for implementation will come from several sources and will be in place prior to implementation. CEHMM is also administering the CCA for the BLM and Service. Part of the off set for impacts on Federal lands is compensation through funds, in-kind services, or conservation lands. The funds and in-kind services may be used to implement conservation actions on non-Federal lands. CEHMM will also have assistance from BLM, Service, and NMDGF in determining the conservation priorities. Based on conservation measures described in the CCAA and provisions of the Permit, the Service does not expect any unforeseen circumstances to occur that would preclude the Applicant's funding and implementation of the CCAA.

#### IV. GENERAL CRITERIA AND DISQUALIFYING FACTORS-ANALYSIS AND FINDINGS

The Service has no evidence that the permit application should be denied on the basis of criteria and conditions set forth in 50 CFR, 13.21 (b-c). CEHMM has met the criteria for the issuance of the permit and does not have any disqualifying factors that would prevent the permit from being issued under current regulations.

V. RECOMMENDATIONS ON ISSUANCE OF PERMIT

Based on our findings with respect to the Enhancement of Survival Permit application, CCAA, and conference opinion, the issuance of a section 10(a)(1)(A) enhancement of survival Permit to CEHMM is recommended.

Submittal:

*Acting* *JM Thomas*  
Field Supervisor

*12/4/08*  
Date

Concurrence:

*BA Mills*  
Deputy Regional Director

*5 December 2008*  
Date