

October 2, 2023

Via Electronic Submission

Martha Williams

Director

U.S. Fish and Wildlife Service
Attn: FWS-R2-ES-2022-0162, MS: PRB/3W
5275 Leesburg Pike
Falls Church, VA 22041-3803

Re: Proposed Rule, U.S. Fish and Wildlife Service: Endangered and Threatened Wildlife and Plants; Endangered Species Status for the Dunes Sagebrush Lizard, 88 Fed. Reg. 42,661-42,677 (July 3, 2023)

Dear Director Williams:

We appreciate the opportunity to comment on the United States Fish and Wildlife Service's ("FWS") proposal to list the dunes sagebrush lizard as an endangered species under the Endangered Species Act of 1973, as amended ("ESA"). Our Coalition consists of the United States Chamber of Commerce ("Chamber"), Independent Petroleum Association of America ("IPAA"), National Stone, Sand & Gravel Association ("NSSGA"), New Mexico Farm and Livestock Bureau ("NMFLB"), and the Texas Farm Bureau ("TFB") (collectively, the "Coalition"). The Coalition of trade associations and member companies represented in this letter includes a wide cross-section of industries, including energy, mining, and other community stakeholders.

The U.S. Chamber of Commerce is the largest business trade association in the world, representing more than 3 million companies of all sizes and sectors. The Independent Petroleum Association of America is a national upstream trade association representing thousands of independent oil and natural gas producers and service companies across the United States. Independent producers develop 91 percent of the nation's oil and natural gas wells. These companies account for 83 percent of America's oil production, 90 percent of its natural gas and natural gas liquids (NGL) production, and support over 4.5 million American jobs. The New Mexico Farm and Livestock Bureau ("NMFLB") is the largest grass-roots general farm organization in the state of New Mexico, representing over 20,000 members. Agriculture represents over 13% of the economy of the state (approximately \$3.44 billion). The New Mexico Farm and Livestock Bureau advocates on behalf of its membership in legislative, regulatory, and litigation matters. Texas Farm Bureau is the largest general farm organization in Texas and represents more than 548,000 member families.

The dunes sagebrush lizard shares its range with oil and gas operations in New Mexico and Texas, as well as critical sources for hydraulic fracturing sand (“frac sand”). This is no doubt one of the reasons why it has been the focus of repeated efforts to petition FWS to list it as an endangered species, and one of the reasons why states, federal agencies, and companies have already taken important steps to further the conservation of the species. Our Coalition’s members will be directly and indirectly impacted by this listing, as it will affect the price and availability of domestic oil and natural gas by restricting operations in some of the most productive basins in the country, and the broader availability of frac sand. These effects will cascade through the supply chain and increase the price of many other industrial and consumer goods.

The Coalition recognizes the important conservation goals of the ESA and supports collaborative efforts among industry, states, and federal agencies, including FWS, to further those ends. However, the Coalition is concerned that the proposed listing will unnecessarily and detrimentally affect America’s energy security and economy and will have unintended implications on the Administration’s energy transition and infrastructure goals. We believe it is possible to protect the dunes sagebrush lizard without incurring these adverse effects. Instead of finalizing the proposed listing, the Coalition encourages FWS to withdraw the proposal and continue to work with states, conservation groups, and industry stakeholders to address concerns through Candidate Conservation Agreements (“CCAs”), Candidate Conservation Agreements with Assurances (“CCAAs”), and other federal and state mechanisms. Unfortunately, once the dunes sagebrush lizard is listed, FWS will lose the flexibility needed to find creative solutions that work for both the species and the American public. While there is more work to be done, the CCA and CCAA processes provide a promising way to collaboratively address conservation of the dunes sagebrush lizard. FWS should continue to use these tools rather than finalize a listing at this time. By continuing to engage with private parties and states in these conservation efforts, FWS will also encourage such collaboration in the future, which will be essential to meeting the Administration’s energy transition goals.

In addition to failing to consider the extent to which conservation of the dunes sagebrush lizard can be addressed through these voluntary efforts, the Coalition is also concerned that the FWS has failed to account for the protections already provided through available measures, and those already imposed by the Bureau of Land Management (“BLM”) on public lands and those already implemented by existing enrollees in CCA and CCAAs. As FWS notes, much of the area where the dunes sagebrush lizard is found occurs on public lands or lands already enrolled in voluntary protection programs, and existing requirements or programs have taken steps to

account for the lizard's conservation.¹ The Coalition is therefore concerned that a final designation listing the dunes sagebrush lizard, if it does not at least take into account these tools and the conservation effect they are having and will continue to have, is unlikely to withstand legal challenge under either the ESA or the Administrative Procedure Act ("APA"). Likewise, while FWS justifies its proposed listing based on a loss or fragmentation of habitat, it has not adequately demonstrated how the losses it describes have impacted the dunes sagebrush lizard at a species level as required by the ESA and APA. Our concerns are more fully outlined below, and we have attached materials relevant to these protections and FWS's prior determination not to list the dunes sagebrush lizard as endangered for your consideration and inclusion in the record.

The proposed listing is premature, and FWS should instead continue to pursue voluntary efforts in collaboration with the states, sister agencies, and private parties to conserve the dunes sagebrush lizard.

FWS has long recognized that there are significant benefits to promoting early actions to conserve candidate species—those species being considered for listing under the ESA. FWS adopted an approach to encourage the voluntary conservation of species at the candidate stage in order to make future listing under the ESA unnecessary. As FWS's 2008 guidance on CCAAs makes clear, the principal goal of CCAAs is to render listing of a species unnecessary through coordination of conservation efforts with states, private landowners, and other non-federal partners.² As FWS has recognized, these efforts are also consistent with Congress's finding in the ESA that "encouraging the States and other interested parties . . . to develop and maintain conservation programs . . . is a key . . . to better safeguarding, for the benefit of all citizens, the Nation's heritage in fish, wildlife, and plants."³

As FWS has explained, the use of conservation agreements "before species are listed and their habitats become highly imperiled increases the likelihood that simpler, more cost-effective conservation options are available, and that conservation efforts will succeed."⁴ In a CCAA, non-Federal property owners agree to implement the CCAA's specific conservation measures that reduce or eliminate threats to the species on their

¹ Endangered and Threatened Wildlife and Plants; Endangered Species Status for the Dunes Sagebrush Lizard, 88 Fed. Reg. 42,661, 42,671–72 (proposed July 3, 2023) (to be codified at 50 C.F.R. Part 17) (hereinafter "Proposed Rule").

² See U.S. Fish and Wildlife Service ("FWS"), *Using Existing Tools to Expand Cooperative Conservation for Candidate Species Across Federal and non-Federal Lands* 1, 2 (2008).

³ FWS, Policy for Evaluation of Conservation Efforts When Making Listing Decisions, 68 Fed. Reg. 15,100, 15,113 (Mar. 28, 2003) (citing 16 U.S.C. 1531 (a)(5)).

⁴ FWS, *Candidate Conservation Agreements with Assurances*, <https://www.fws.gov/service/candidate-conservation-agreements-assurances> (last visited Aug. 15, 2023); FWS, *Candidate Conservation Agreements*, <https://www.fws.gov/service/candidate-conservation-agreements> (last visited Aug. 15, 2023).

land.⁵ These agreements provide meaningful benefits to declining species because FWS enters into such agreements only after determining that “the conservation measures to be implemented address the key current and anticipated likely future threats that are under the property owner’s control and will result in a net conservation benefit to and improve the status of the covered species.”⁶

These agreements are an important tool for species conservation, and they provide greater flexibility than simply listing the species under the ESA for creatively and pragmatically balancing the needs of both the species and other land users interests because they are living documents that use adaptive management principles.⁷ By contrast, once a species is listed under the ESA, the listing triggers a number of statutory obligations and significantly constrains the opportunities for stakeholders to implement innovative approaches to conservation. When listing the species is not necessary, as here, listing creates unnecessary burdens on both FWS and private parties and diverts resources from other conservation measures that might more cost-effectively address risks to the species. In order to incentivize future participation in these agreements, it is important that FWS does not prematurely abandon such efforts in favor of a listing.

The approach of using conservation agreements is therefore in keeping with the directive in Executive Order 13,563, which instructs that our regulatory system “must identify and use the best, most innovative, and least burdensome tools for achieving regulatory ends.”⁸ President Biden recently reaffirmed this same principle in his Executive Order on Modernizing Regulatory Review.⁹ Conservation agreements do just this by focusing on key threats to a species and therefore allow FWS to give the highest priority to addressing concerns that FWS expects to achieve the most benefit for the species.¹⁰

Existing conservation agreements already provide protections for the dunes sagebrush lizard from such key threats. They do so while balancing the effective conservation of the dunes sagebrush lizard with the economic importance of private activities occurring in the vicinity, including those associated with the oil, natural gas, and frac sand industries. The Coalition respectfully submits that it is still too early in the conservation agreement process to use the blunt approach of listing the dunes sagebrush lizard as endangered, particularly given the effectiveness of conservation

⁵ See FWS, National Oceanic and Atmospheric Administration (“NOAA”), Candidate Conservation Agreements With Assurances Policy, 81 Fed. Reg. 95,164 (Dec. 27, 2016).

⁶ *Id.* at 95,170.

⁷ See FWS, U.S. Bureau of Land Management (“BLM”), *Candidate Conservation Agreement for the Lesser Prairie-Chicken and Sand Dune Lizard In New Mexico 2* (Dec. 8, 2008), https://ecos.fws.gov/docs/plan_documents/ccaa/ccaa_919.pdf.

⁸ Exec. Order No. 13,563, 76 Fed. Reg. 3821 (Jan. 18, 2018).

⁹ Exec. Order on Modernizing Regulatory Review, Sec. 1 (Apr. 6, 2023).

¹⁰ See 81 Fed. Reg. at 95,165.

measures across much of the species' range. The use of conservation agreements, in conjunction with state and BLM efforts on public lands, has successfully provided many protections for the dunes sagebrush lizard in New Mexico, and there is room to continue to expand these efforts to an even greater portion of the dunes sagebrush lizard's habitat going forward. Currently, approximately 85% of the dunes sagebrush lizard range in New Mexico now enjoys some form of protection.¹¹ Since the New Mexico agreements were finalized in 2008, they have been joined by 40 oil and natural gas companies and 37 ranchers. Those companies and ranchers have enrolled 539,046 acres of shinnery oak duneland habitat and 637,577 acres of the surrounding supportive matrix habitat. As the New Mexico CCA notes, the "CCA provides a comprehensive and strategic landscape level approach to addressing the conservation needs" of the dunes sagebrush lizard.¹² To protect areas occupied or suitable for occupancy, the current conservation agreement in New Mexico prohibits surface occupancy; the construction of new roads, buried pipelines, and power lines; off highway vehicle traffic; and limits seismic exploration.¹³

The latest conservation agreements available in Texas also provide protection for the dunes sagebrush lizard with, among other things, efforts to use existing roads and rights-of-way, minimize well pad density and off highway vehicle activity, and limit seismic activity.¹⁴ Although work remains to be done in Texas, the latest CCAA in Texas was only issued in 2021, and has not had time to mature like the New Mexico conservation agreements. Rather than reaching a determination to list at this time, the Coalition encourages FWS to continue to work collaboratively with land owners and businesses through these voluntary mechanisms to address impacts to the dunes sagebrush lizard.

FWS has not explained why a listing is warranted in light of existing protections for the dunes sagebrush lizard.

Using and considering the existing protection mechanisms is not only good policy, it is also required by the ESA and the APA. Before finalizing any listing FWS must analyze and explain why the protections in existing New Mexico and Texas CCA and CCAA programs and any other federal or state-based protections are insufficient to preclude a listing, and why the species is in danger of extinction throughout all or a significant portion of its range as required by the ESA.¹⁵ In making a listing decision, the FWS's actions are governed by section 4(b)(1) of the ESA, which requires that a listing decision be made "solely on the basis of the best scientific and commercial data

¹¹ FWS, *Species Status Assessment for the Dunes Sagebrush Lizard* 81 (Apr. 2023) [hereinafter "SSA"].

¹² FWS, BLM, *supra* note 7, at 6.

¹³ *Id.* at 27.

¹⁴ FWS, *2020 CCAA for the Dunes Sagebrush Lizard in West Texas* 56-57 (Jan. 19, 2021), https://ecos.fws.gov/ecp/report/conservation-plan?plan_id=4776.

¹⁵ See 16 U.S.C. 1533; 50 C.F.R. part 424.

... and after taking into account those efforts, if any, being made by any State or foreign nation, or any political subdivision of a State or foreign nation, to protect such species”¹⁶ The text of the ESA thus requires the FWS to consider conservation measures currently being undertaken by other entities in determining whether listing of a species is warranted. The implementing regulations for the ESA similarly provide that the Secretary “shall take into account . . . those efforts, if any, being made by any State or foreign nation, or any political subdivision of a State or foreign nation, to protect such species”¹⁷ Moreover, one of the listing factors FWS must consider is “other natural or manmade factors” that affect a species’ continued existence.¹⁸ FWS has interpreted this provision to require the Service “to consider the conservation efforts of not only State and foreign governments but also of Federal agencies, Tribal governments, businesses, organizations, or individuals that positively affect the species’ status.”¹⁹

And as FWS noted in the New Mexico CCA, “[a]lthough the FWS cannot absolutely guarantee that listing will never be necessary, this CCA seeks to implement conservation measures on Federal lands, which, when combined with those benefits that would be achieved if conservation measures in the CCAA are implemented, would preclude or remove any need to list” the dunes sagebrush lizard.²⁰ Yet the proposed listing does not justify why a listing is nonetheless warranted, or why FWS cannot effectively leverage these agreements and partnerships to further protect the dunes sagebrush lizard.

Separate and apart from the CCA in place for New Mexico, BLM’s “Special Status Species Resource Management Plan Amendment” (“RMPA”) for southeast New Mexico establishes important protections for the dunes sagebrush lizard that serve as minimum requirements that will be applied to all future Federal activities, regardless of whether a permittee or lessee participates in this CCA.²¹ As FWS notes, BLM has closed approximately 300,000 acres to future oil and gas leasing, closed approximately 850,000 acres to wind and solar development, reclaimed 3,500 acres of abandoned well pads and associated roads, and implemented control efforts for invasive mesquite.²² FWS does not appear to have articulated why a listing determination is still warranted in light of these existing, binding protections covering a large portion of the

¹⁶ 16 U.S.C. § 1533(b)(1)(A).

¹⁷ 50 C.F.R. § 424.11(g).

¹⁸ 16 U.S.C. § 1533(a)(1).

¹⁹ 68 Fed. Reg. at 15,100.

²⁰ FWS, BLM, *supra* note 7, at 6.

²¹ BLM, Pecos District Office, *Special Status Species Record of Decision and Approved Resource Management Plan Amendment* (Apr. 2008), [https://eplanning.blm.gov/public_projects/lup/72502/96636/116702/PDO - CFO-RFO - 2008 - Special Status Species ROD and Approved RMP Amendment.pdf](https://eplanning.blm.gov/public_projects/lup/72502/96636/116702/PDO_-_CFO-RFO_-_2008_-_Special_Status_Species_ROD_and_Approved_RMP_Amendment.pdf); FWS, BLM, *supra* note 7, at 2.

²² Proposed Rule at 42,672; SSA, *supra* note 11, at 80.

dune sagebrush lizard's habitat.²³ Before finalizing any listing determination, FWS must analyze these protections and explain why the listing criteria for the dunes sagebrush lizard have still been met in light of these protections.

The Coalition is also concerned with the accuracy data that FWS is relying on when assessing the protections in place for the dunes sagebrush lizard range. One external statement indicated that through state and private conservation efforts in New Mexico alone, "1,905,120 acres had been enrolled in [CCA/CCAAs] by the ranching community and 2,230,066 acres in the CCA/CCAAs by the oil and natural gas industry to protect the Dunes Sagebrush Lizard."²⁴ However, the proposed listing reports that only 539,046 acres of shinnery oak duneland habitat and 637,577 acres of supportive matrix habitat have been enrolled in a CCA or CCAA.²⁵ This is a large discrepancy that FWS should account for to ensure accurate numbers are being used in this listing determinations.

In addition, to the extent that FWS claims that listing the dunes sagebrush lizard as endangered is necessary because 35% of the New Mexico habitat of the dunes sagebrush lizard is on privately owned and State-managed lands,²⁶ the Coalition notes that 85% of the habitat lands in New Mexico are currently enrolled in a CCA or CCAA, meaning that, at a minimum, the majority of that private and state land has some protections for the dunes sagebrush lizard.

The proposed listing also fails to consider the conservation benefits of any Texas agreements, stating that

we would not know the location of the habitat being avoided. Thus, based on performance of these plans to date, we do not expect these agreements to have a measurable effect in protecting the dunes sagebrush lizard or its habitat in Texas into the future. Therefore, we did not include potential future conservation efforts resulting from these plans in our scenarios projecting the species' future status. We did not adjust our future projections of oil well density or sand mining to account for these agreements.²⁷

By failing to assess the effects of these protections, and dismissing any benefits they may have on the species, FWS risks violating both the ESA and APA. As required by FWS policy, the Service should determine that this formalized conservation effort that

²³ BLM-owned land accounts for 51% of the Mescalero Sandhills, and approximately 32% of the total habitat of the dunes sagebrush lizard (based on the estimated 1,254,747 acres of habitat). SSA at 47, 95.

²⁴ See Bob Campbell, *Lizard Threatens Energy Industry Again Congressman, Senator, Oil and Gas Groups Denounce Federal Move*, OA [Odessa American] Online (July 15, 2023), <https://www.oaoa.com/local-news/lizard-threatens-energy-industry-again/>.

²⁵ Proposed Rule at 42,672.

²⁶ See Proposed Rule, at 42,672.

²⁷ *Id.* at 42,670.

“has recently been implemented but has yet to show effectiveness provides a high level of certainty that the effort will be implemented and/or effective and results in the elimination or adequate reduction of the threats.”²⁸ At the very least, FWS should provide additional time for parties to enroll in the Texas CCAA before reassessing whether any listing action is necessary or prudent given the effectiveness of similar measures in New Mexico.

FWS also reports that 4,564 acres “of dunes sagebrush lizard habitat was negatively impacted by the [Texas Conservation Plan] between 2012 and 2018.”²⁹ However, FWS failed to report the benefits achieved by the Texas Conservation Plan (“TCP”) in that time frame, such as the amount of habitat acres preserved when companies built projects elsewhere. FWS also failed to connect the impacts to habitat to any resulting impacts to the population numbers of lizards or to a species-level impact to the lizard. Coalition requests that FWS further develop the record regarding the success of previous and current conservation efforts.

Moreover, because the dunes sagebrush lizards in New Mexico and Texas are not distinct populations, FWS must consider the New Mexico and Texas efforts in tandem when considering whether a listing is warranted. Given the robust protections in place in New Mexico, and the extent of the lizard’s range governed by such protections, any additional protection in Texas is best viewed as an added benefit but as not essential to ensuring that the species is not in danger of extinction throughout all or a significant portion of its range as required by the ESA.³⁰

FWS should also provide more explanation of its reason to list the species as endangered rather than threatened, especially considering that it projects that all of the main dune sagebrush lizard phylogenetic lineages “will still have extant populations” by 2050 and that the vast majority of its range in New Mexico already has protections.³¹ In addition, in order to meet the requirements of the APA, if FWS chooses to finalize the proposed listing, the Coalition requests that FWS detail its efforts to engage with industry members and landowners to enroll them in the latest CCAA. FWS also should explain why it believes continued efforts to enroll these parties in the new CCAA will not work, such that a listing is warranted.

The proposed listing fails to adequately explain FWS’s change in position, particularly in light of additional conservation measures taken since FWS previously withdrew its determination to list the dunes sagebrush lizard.

²⁸ 68 Fed. Reg. at 15,113.

²⁹ Proposed Rule at 42,672.

³⁰ See 16 U.S.C. 1533; 50 C.F.R. part 424.

³¹ SSA, *supra* note 11, at 128.

As FWS is aware, this is not the first time that the Service has considered listing the dunes sagebrush lizard in response to litigation pressure from outside groups. In 2012, FWS withdrew a determination to list the dunes sagebrush lizard based on analysis of current and future threats and conservation efforts.³² FWS found that the best scientific and commercial data available indicated that the threats to the dunes sagebrush lizard and its habitat had been reduced to the point that the species did not meet the statutory definition of an endangered or threatened species,³³ a decision upheld after review in federal court.³⁴ While FWS may change positions after due consideration of relevant factors, the Coalition is concerned that FWS has not sufficiently acknowledged and articulated its justification for doing so here in light of its previous findings and the additional conservation measures taken since that determination.

Specifically, instead of using reliable population survey data, FWS appears to have extrapolated that a listing is warranted from potential threats to shinnery oak dune habitat. In order to comply with the ESA and APA, and particularly in light of its prior determination, FWS must demonstrate that the impacts to habitat that it describes have resulted in an impact *to the species* and not just to its habitat, such that those impacts now justify a listing under the ESA.

FWS cannot address climate change impacts on species like the dunes sagebrush lizard without state and voluntary protections outside of a listing decision.

FWS repeatedly points to climate change and its impact on the dune sagebrush lizard's habitat in the proposed listing.³⁵ To the extent FWS believes that climate change threatens the species, a listing would be counterproductive in addressing this threat. More specifically, the Administration has determined that transitioning to lower carbon energy sources is critical to addressing climate change.³⁶ And as the Administration has recognized, doing so will require adding a significant number of new, renewable energy sources and infrastructure in the near term.³⁷ Adding these new projects will inevitably create additional tensions involving sensitive species like the dunes sagebrush lizard as at least some of the projects may create or exacerbate concerns about habitat impacts or fragmentation similar to those described in the proposed listing. But listing the dunes sagebrush lizard or other similarly situated species will create significant additional regulatory hurdles and delays in getting such

³² FWS, Endangered and Threatened Wildlife and Plants; Withdrawal of the Proposed Rule To List Dunes Sagebrush Lizard, 77 Fed. Reg. 36,872 (June 19, 2012).

³³ *Id.*

³⁴ *Def. of Wildlife and Ctr. for Biological Diversity v. Jewell*, 70 F. Supp. 3d 183 (D.D.C. 2014), *aff'd*, 815 F.3d 1 (D.C. Cir. 2016).

³⁵ See, e.g., Proposed Rule at 42,662.

³⁶ See, e.g., Executive Order on Tackling the Climate Crisis at Home and Abroad, Sec. 207 (Jan. 27, 2021).

³⁷ *Id.*

projects online, and thus be counterproductive to addressing any climate impacts that are impacting these species.

Instead, states, agencies, and energy project proponents will need to work together collaboratively and creatively to find workable solutions specific to the species and project locations. FWS can best foster an atmosphere where such collaboration is possible by demonstrating a commitment to these approaches. A premature decision to list the dunes sagebrush lizard would have broader implications on FWS's ability to protect other species: by ignoring these voluntary efforts to conserve the dunes sagebrush lizard, as FWS will discourage industry members and land owners from entering into such agreements in the future. FWS should instead use this as an opportunity to further engage with these parties to craft a workable solution that can hopefully also serve as a model for future public-private conservation.

As a result, the Coalition respectfully urges FWS to withdraw its proposed listing and instead continue to work collaboratively with industry members on conservation solutions.

The proposed listing is detrimental to energy security, the economy, and the energy transition.

The Coalition raises these concerns with FWS's proposal because listing the dune sagebrush lizard as endangered under the ESA would have significant implications on our energy security and economy. The lizard's range overlaps with an important region for domestic oil and gas production and for sourcing frac sand vital to energy production elsewhere in the country. We outline these considerations below to help FWS understand why continuing to work through alternative conservation approaches is essential.

The importance of energy security and the role of hydraulic fracturing.

Energy security is the "uninterrupted availability of energy sources at an affordable price."³⁸ Energy security plays a key role in the United States' economic success by ensuring that there are readily available sources of energy capable of supporting America's economy.³⁹ Fortunately, the United States is currently a net exporter of energy, which limits our vulnerability to foreign disruptions of energy supplies, whether attributable to geopolitics, weather, market volatility, terrorism, or some other source of risk.⁴⁰ The United States' ability to export petroleum has also helped the broader

³⁸ Int'l Energy Agency ("IEA"), *Energy Security: Reliable, Affordable Access to All Fuels and Energy Sources*, <https://www.iea.org/topics/energy-security> (last visited Aug. 16, 2023).

³⁹ See *id.*

⁴⁰ See U.S. Dep't of Energy ("DOE"), *Valuation of Energy Security for the United States* 2, 12 (2017), [https://www.energy.gov/sites/prod/files/2017/01/f34/Valuation%20of%20Energy%20Security%20for%20the%20United%20States%20\(Full%20Report\)_1.pdf](https://www.energy.gov/sites/prod/files/2017/01/f34/Valuation%20of%20Energy%20Security%20for%20the%20United%20States%20(Full%20Report)_1.pdf).

global community weather the volatility that can result from conflicts or political disturbances in other, less stable, regions of the world. As demonstrated by the supply shortages and increased prices resulting from Russia's invasion of Ukraine, this disruptive chain of events is far from hypothetical.⁴¹ As a result of that conflict, our domestic price of oil rose so sharply that the Biden Administration released a record amount of oil from the U.S. Strategic Petroleum Reserve.⁴² Our allies in Europe fared worse. Last summer, European natural gas prices were 610% higher than the previous summer, resulting in significantly higher electricity prices—roughly five times higher than the previous year.⁴³ Indeed, governments intervened as many in Europe and the UK faced crushing energy prices.⁴⁴

Supply diversity, particularly global supply diversity derived from increased domestic production, is one of the key tools to temper these kinds of threats to energy security. Greater supply diversity softens the effect on price that any one disruption can cause in the wider energy market.⁴⁵ For the United States, our access to rich, diversified sources of oil and natural gas, including from our federal lands, provides an essential source of supply diversity. As the U.S. Department of Energy has observed, our “highly diversified” oil and natural gas industry has, through “technical innovation and entrepreneurial initiative,” spurred “a renaissance in oil and gas production in the United States over the last decade” that “has improved domestic, and thus global, energy security.”⁴⁶ In 2019, the United States produced record levels of crude oil (12.2 million barrels per day) and natural gas (40.7 trillion cubic feet)—increases of 11.3% and 10.6% from 2018 levels, respectively.⁴⁷ The United States, as a result, enjoyed its best

⁴¹ Scott Patterson and Sam Goldfarb, *Why Are Gasoline Prices So High? Ukraine-Russia War Sparks Increases Across U.S.*, Wall St. J. (Apr. 1, 2022), <https://www.wsj.com/articles/why-gas-prices-expensive-11646767172>.

⁴² Timothy Puko et al., *Biden to Draw Down Oil Reserves in Bid to Ease Gas Prices*, Wall St. J. (Mar. 31, 2022), https://www.wsj.com/articles/crude-oil-prices-drop-as-biden-plans-to-tap-strategic-oil-reserves-11648738097?mod=article_inline.

⁴³ Suriya Jayanti, *Europe's Energy Crisis Is Going to Get Worse. The World Will Bear the Cost*, Time (Aug. 30, 2022), <https://time.com/6209272/europes-energy-crisis-getting-worse/>.

⁴⁴ *Id.*; Keith Anderson, *Grasping the Nettle of the Energy Affordability Crisis*, Scottish Power (Aug. 14, 2022),

https://www.scottishpower.com/news/pages/grasping_the_nettle_of_the_energy_affordability_crisis.aspx; David Blackmon, *The EU Vows To Solve Energy Price Problem It Helped To Create*, Forbes (Aug. 30, 2022), <https://www.forbes.com/sites/davidblackmon/2022/08/30/the-eu-vows-to-solve-energy-price-problem-it-helped-to-create/?sh=74c41b28d7c2>.

⁴⁵ See DOE, *supra* note 40, at 44.

⁴⁶ *Id.* at 12.

⁴⁷ See Glob. Energy Inst., U.S. Chamber of Commerce, *Index of U.S. Energy Security Risk* 5 (2020), https://www.globalenergyinstitute.org/sites/default/files/2020-10/024036%20Global%20Energy%20Institute%20US%20Index_Web.pdf.

energy security since 1970⁴⁸ and became a net energy exporter for the first time since 1952.⁴⁹

Hydraulic fracturing is a key part of the technical innovation identified by the Department of Energy and plays a key role in the success of our current energy security outlook. Major advances in hydraulic fracturing and horizontal drilling technologies have made the extraction of unconventional natural gas and oil more cost-effective and technologically feasible and have significantly increased the production of oil and natural gas from wells while limiting additional surface disturbances by limiting the number of additional well pads that would otherwise be required to reach the same oil and gas reserves.⁵⁰ As BLM has explained,

When oil and gas wells are developed horizontally, fewer wells must be drilled to effectively produce the fluid mineral resources, substantially reducing the overall amount of surface disturbance from new well pads, roads pipelines, etc. Additionally, when multiple horizontal wells are drilled on a single pad, further surface disturbance is prevented. Drilling and hydraulically fracturing horizontal wells is a direct means of minimizing and mitigating surface impacts that would otherwise be expected as typical results of oil and gas development. Not only are multi-well pads being developed, but also centralized water handling and fracking facilities to service them, greatly reducing the surface disturbance that could otherwise be associated with drilling and completing multiple wells.⁵¹

In this way, hydraulic fracturing also limits the impacts of energy development on the habitat of species like the dunes sagebrush lizard, including habitat concerns specifically identified by FWS in the proposed listing.

⁴⁸ *Id.* (Table 1). In fact, after the United States received a record-high risk score of 100.9 in 2011, its score fell in seven of the subsequent eight years to a record low of 70.1 in 2019. *Id.* at 4.

⁴⁹ See U.S. Energy Info. Admin. (“EIA”), *U.S. Energy Facts Explained*, <https://www.eia.gov/energyexplained/us-energy-facts/imports-and-exports.php> (last updated June 10, 2022).

⁵⁰ Cong. Rsch. Serv., R43148, *An Overview of Unconventional Oil and Natural Gas: Resources and Federal Actions* 1, 4, 6 (2015); Office of Fossil Energy, U.S. Department of Energy, *Environmental Benefits of Advanced Oil and Gas Exploration and Production Technology* Fact Sheet 8 (1999); Am. Petroleum Inst., *Environmental Benefits of Hydraulic Fracturing and Horizontal Drilling*, <https://www.api.org/~media/files/oil-and-natural-gas/hydraulic-fracturing/environmental-stewardship/hydraulic-fracturing-and-horizontal-drilling-provide-environmental-benefits.pdf>.

⁵¹ BLM, *Hydraulic Fracturing White Paper* 9-10 (June 24, 2015), https://eplanning.blm.gov/public_projects/nepa/119017/171237/208180/Hydraulic_Fracturing_White_Paper_FINAL.pdf.

A key element of hydraulic fracturing is the use of frac sand, which is used to prop open tight shale oil and natural gas formations once they have been fractured.⁵² Frac sand is specialized and must meet “strict mineralogical and textural specifications” in order to successfully act as a proppant for these operations.⁵³ Indeed, the specifications for frac sand are based on standards determined by the American Petroleum Institute and the International Organization for Standards.⁵⁴ “The optimal frac sand is a naturally occurring, unconsolidated silica sand or friable sandstone that has a nearly pure quartz composition, crush-resistant grains, high sphericity/roundness of grains, and a uniformly medium- to coarse-grain size.”⁵⁵ Sand that meets these specifications is not found everywhere, which is why sand from specific regions of the country have achieved prominence and preference in the industry.⁵⁶ The economics of frac sand are also influenced by the “deposit’s areal extent and thickness, textural uniformity, accessibility at or near the surface, nearness to trucking and rail transportation routes, and proximity to the active unconventional petroleum basins.”⁵⁷

When hydraulic fracturing rose in prominence, sand suppliers found reserves of effective and highly economical naturally occurring frac sands in West Texas, some of which occur in areas that overlap with the range of the dunes sagebrush lizard.⁵⁸ Sourcing frac sand from these West Texas mines is significantly more economical than shipping in frac sand from other source locations such as Wisconsin, with one source estimating the shipping costs of the Texas sand were a third the cost of shipping Wisconsin frac sand.⁵⁹ The ability to use locally sourced frac sand in the Permian Basin lowers energy production costs and also reduces the carbon footprint of frac sand. At least seventeen frac sand mines in the region would be affected by this proposed listing, representing a significant percentage of our domestic frac sand supply.⁶⁰ Some estimates indicate that around a quarter of the domestic frac sand supply may be sourced from this region.⁶¹ Simply put, access to frac sand from this region is important

⁵² Alison Sider, *Demand for Sand Takes Off Thanks to Fracking*, Wall. St. J. (Aug. 4, 2014), <https://www.wsj.com/articles/demand-for-sand-takes-off-thanks-to-fracking-1407193760>.

⁵³ Mary Ellen Benson & Anna B. Wilson, U.S. Geological Survey, U.S. Department of the Interior, Report No. 2015-1107, *Frac Sand in the United States—A Geological and Industry Overview* 1 (2015).

⁵⁴ *Id.* at 2.

⁵⁵ *Id.* at 1-2.

⁵⁶ Sider, *supra* note 52.

⁵⁷ Benson & Wilson, *supra* note 53, at 2.

⁵⁸ Ryan Dezember, *The New Texas Gold Rush: Buying Sand for Fracking*, Wall. St. J. (Sept. 14, 2017), <https://www.wsj.com/articles/the-new-texas-gold-rush-buying-sand-for-fracking-1505386800>.

⁵⁹ David Wethe, *Why This Sand From Texas Is Suddenly Worth \$80 a Ton*, Time (July 10, 2018), <https://time.com/5334407/west-texas-sand-billions/>.

⁶⁰ Proposed Rule at 42,668; see also Christopher M. Matthews, *It’s Lizard vs. Oil Magnate in the Latest Fight Over Fracking in Texas*, Wall. St. J. (Oct. 13, 2017), <https://www.wsj.com/articles/miners-tiptoe-around-lizard-in-latest-fracking-dust-up-1507905320>.

⁶¹ Wethe, *supra* note 59.

to America's continued ability to produce oil and natural gas at affordable prices while limiting surface disturbances.

As a result, listing the dunes sagebrush lizard under the ESA would negatively impact domestic oil and natural gas production, and thus our energy security, because the lizard is believed to inhabit areas where oil and natural gas drilling occur, as well as key areas where frac sand is sourced.⁶²

Listing the Dune Sagebrush Lizard would have broader economic impacts that may be mitigated by pursuing other means of species conservation.

As noted above, listing the dunes sagebrush lizard would impact domestic oil and natural gas production because the dunes sagebrush lizard's range overlaps with prominent oil and natural gas production fields and key sources of frac sand. These effects on oil and natural gas production would in turn be felt throughout the U.S. economy in a number of ways.

First, the oil and natural gas industry directly creates well-paying jobs. The U.S. oil and natural gas industry's total employment impact is estimated at 11.3 million domestic jobs, or 5.6% of total U.S. employment.⁶³ "Each direct job in the oil and natural gas industry support[s] an additional 3.5 jobs elsewhere in the U.S. economy."⁶⁴ In addition to providing jobs, oil and natural gas production quite literally powers the U.S. economy.

At the consumer level, energy needs represent a meaningful portion of everyday Americans' budgets, whether it be the prices consumers pay at the pump, the amounts spent on power or heating bills, or the price tags on countless consumer goods.⁶⁵ Oil and natural gas are critical to allowing Americans to affordably power the vehicles that deliver their products or allow them to commute to work, and represent the vast majority of energy consumed for these transportation purposes.⁶⁶ Approximately 60% of all American households rely on natural gas for heating their homes and water, cooking, and drying clothes, making them especially sensitive to fluctuations in the price of natural gas.⁶⁷ These everyday Americans "can't easily cut [their energy] consumption

⁶² See, e.g., Proposed Rule at 42,667–68.

⁶³ See PWC & Am. Petroleum Inst., *Impacts of the Oil and Natural Gas Industry on the U.S. Economy in 2019* E-1 (2021), <https://www.api.org/-/media/files/policy/american-energy/pwc/api-pwc-economic-impact-report.pdf>.

⁶⁴ *Id.* at E-2.

⁶⁵ See DOE, *supra* note 40, at 31–34; see also Josh Mitchell, *Soaring Energy Prices Raise Concerns About U.S. Inflation, Economy*, Wall St. J. (Oct. 10, 2021), https://www.wsj.com/articles/soaring-energy-prices-raise-concerns-about-u-s-inflation-economy-11633870800?st=rx3j3jxhf6ivnp7&reflink=desktopwebshare_permalink.

⁶⁶ See DOE, *supra* note 40, at 32–33.

⁶⁷ See EIA, *Natural Gas Explained: Use of Natural Gas*, <https://www.eia.gov/energyexplained/natural-gas/use-of-natural-gas.php> (last updated Apr. 28, 2023); see also DOE, *supra* note 40, at 34.

on short notice, as they can with discretionary purchases, so higher prices act as a tax, draining the money they have available to spend on other goods and services.”⁶⁸ When high energy prices force consumers to cut discretionary spending, the reduction carries negative consequences for the economy and helps explain why high energy prices often precede recessions.⁶⁹ Indeed, unreliable or unaffordable energy sources can have a disproportionately high impact on poor, minority, and environmental justice communities.⁷⁰ Manufacturers also use oil and natural gas as a feedstock or as a fuel for production. A stable and affordable supply of oil and natural gas is therefore critical to ensure adequate production of petrochemicals, medical devices, plastics, solvents, fertilizers, and many other products that American consumers use on a regular basis.⁷¹

Oil and natural gas are also essential to the electric generation and industrial sectors, such that fluctuations in supply and price can contribute to or hinder economic growth. Since 2005, the annual consumption of natural gas has grown by nearly 41%, or 9 trillion cubic feet, with the electric generation (up 60%) and industrial (up 28%) sectors comprising nearly 90% of the increase in annual consumption.⁷² Natural gas has displaced other power generation sources to become the primary fuel for electric power generation over the previous decade.⁷³ Any decrease in supply of domestically produced natural gas could result in electricity shortages, increased rates, and decreased reliability of electric power across America. It also could chill investments into grid hardening and expansion that are necessary to accommodate new and renewable sources of energy, and to meet increased electricity demand.

⁶⁸ See Mitchell, *supra* note 65; see also DOE, *supra* note 40, at 32–34.

⁶⁹ See Mitchell, *supra* note 65; see also DOE, *Valuation of Energy Security*, *supra* note 40, at 32 (“As a result of those higher [transportation fuel] prices, households and businesses are able to spend less on other goods and services and invest less. Those decisions create indirect costs on the economy, with effects that can last for several quarters.”).

⁷⁰ See, e.g., Mikyla Reta & Elise Gout, *Advancing Equity Through Grid Modernization*, CAP (Apr. 28, 2021) (“Low-income households are particularly burdened by electricity costs, as energy bills account for a much larger portion of their monthly income than those of wealthier households. Among these low-income households, people of color suffer from energy insecurity more than white people, and [African-American] families have been found to have the highest rates of energy insecurity across all levels of income.”); Michelle Graff et al., *Which Households Are Energy Insecure? An Empirical Analysis of Race, Housing Conditions, and Energy Burdens in the United States*, 79 Energy Rsch. & Soc. Sci. 102144 (2021) (finding that 33% of low-income households have received at least one disconnection notice, that 13% were disconnected from their electric utility service at least once, and that African-American and Hispanic households are more likely than white households to be energy insecure).

⁷¹ See IEA, *The Future of Petrochemicals: Towards More Sustainable Plastics and Fertilisers* 11 (2018), https://iea.blob.core.windows.net/assets/bee4ef3a-8876-4566-98cf-7a130c013805/The_Future_of_Petrochemicals.pdf (Petrochemicals “are set to account for more than a third of the growth in oil demand to 2030, and nearly half to 2050, ahead of trucks, aviation and shipping.”).

⁷² See Ctr. for Climate and Energy Sols (C2ES), *Climate Solutions: Technology Solutions: Natural Gas*, <https://www.c2es.org/content/natural-gas/> (last visited Aug. 28, 2023).

⁷³ *Id.*

Domestic oil and natural gas will continue to play an important role in the ongoing energy transition.

The Coalition appreciates the importance of renewable energy sources and the energy transition. While these sources of energy will play a role in our future energy security, they are not yet ready to provide for America's current energy needs. As of now, less than 14 percent of domestic energy is produced from renewable sources.⁷⁴ Fossil fuels currently produce the vast majority of the country's energy. Crude oil and natural gas plant liquids produce a third of America's energy, while natural gas produces another third.⁷⁵ Beyond the present term, the U.S. Energy Information Administration projects that oil and natural gas will remain the most-consumed sources of energy in the United States through 2050.⁷⁶ Decreased domestic oil and natural gas production could jeopardize electric reliability across America, especially at peak demand times.

Furthermore, the expansion of renewable energy is likely to be a slow process given the significant barriers to developing these projects and connecting them to existing energy infrastructure. For example, the development of offshore wind farms has recently stalled due to rising prices and logistical issues, with approximately \$33 billion in planned spending delayed in the U.S. and in Europe.⁷⁷ Many windfarms are attempting to renegotiate power prices or risk losing their financing.⁷⁸ These delays likely will prevent the United States and Europe from reaching their 2030 offshore wind goals.⁷⁹ Other roadblocks include the weather dependency of many renewable generation sources that lack reliable battery storage and deployment⁸⁰ and reliable access to markets in rare earth metals and critical minerals that serve as critical components for batteries, electric vehicles, solar panels, and wind turbines.⁸¹ The vast

⁷⁴ EIA, DOE/EIA-0035(2023/7), *Monthly Energy Review July 2023* 4 (2023), <https://www.eia.gov/totalenergy/data/monthly/archive/00352307.pdf>.

⁷⁵ *Id.*

⁷⁶ See EIA, *Today in Energy: EIA Projects U.S. Energy Consumption Will Grow Through 2050, Driven by Economic Growth* (Mar. 3, 2022), <https://www.eia.gov/todayinenergy/detail.php?id=51478>.

⁷⁷ Mari Novik & Jennifer Hiller, *Wind Industry in Crisis as Problems Mount*, Wall St. J. (Aug. 7, 2023), <https://www.wsj.com/articles/wind-industry-hits-rough-seas-as-problems-mount-5490403a>.

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ See NOAA, *Atmospheric Science for Renewable Energy Challenges*, <https://www.esrl.noaa.gov/gsd/renewable/challenges.html> (last visited Aug. 16, 2023) (discussing weather forecasting technologies that must be optimized and developed to help forecast renewable energy generation).

⁸¹ See IEA, *The Role of Critical Minerals in Clean Energy Transitions: World Energy Outlook Special Report* (Mar. 2022), <https://iea.blob.core.windows.net/assets/ffd2a83b-8c30-4e9d-980a-52b6d9a86fdc/TheRoleofCriticalMineralsinCleanEnergyTransitions.pdf>; see also U.S. Geological Surv., *Mineral Commodity Summaries 2023*, at 142–43 (Jan. 31, 2023), <https://www.kriittisetmateriat.fi/wp-content/uploads/2023/02/Mineral-Commodity-Summaries-2023-USGS-Jan-2023.pdf> (noting that China was the source of 74% of rare earths imported to the U.S. between 2018 and 2021, produced more

majority of the metals and minerals needed to manufacture batteries, electric vehicles, solar panels, and wind turbines are produced and refined outside of the U.S., primarily in China.⁸² As a result, we cannot presently assume that these materials will be reasonably available at an affordable price from foreign trade partners. As the energy transition encounters these challenges, it is important that we continue to have a reliable, affordable, and diversified domestic source of oil and natural gas to maintain consistent access to energy.

Until additional renewable capacity can be added to our energy infrastructure and reliably and affordably support a greater portion of our domestic energy needs, domestic sources of natural gas also provide a meaningful way for the Administration to make progress towards its GHG emissions reductions goals.⁸³ Electric generation from natural gas has already played a role in reducing GHG emissions, and will continue to do so.⁸⁴ By fostering access to natural gas reserves instead of limiting it, America can continue to reduce GHG emissions while renewable energy technology develops.

In addition to continuing to play an important role in supplying America's energy needs, oil and natural gas are also integral to the development of America's renewable energy infrastructure. Petrochemicals and petroleum products are important base materials for renewable infrastructure, such as the layers of copolymers between photovoltaic solar panels⁸⁵ and the plastics, resins, and fiberglass in wind turbines.⁸⁶

In sum, both long-term energy security (timely investments to supply energy in line with economic developments and environmental needs) and short-term energy security (the ability of the energy system to react promptly to sudden shifts in the supply-demand balance) are crucial to our economy's ability to function. As a result, diversified sources of oil and natural gas, and the ready availability of frac sand, are crucial to national economic health and growth. Because the range of the dunes sagebrush lizard overlaps with the region that is crucial to our domestic energy security, FWS should

than half of the total rare earths mined worldwide in 2021 and 2022, and has more than one-third of the total worldwide reserves of rare earths).

⁸² IEA, *supra* note 81, at 12.

⁸³ Exec. Order No. 14,057, 86 Fed. Reg. 70,935, 70,935 (Dec. 13, 2021).

⁸⁴ See EPA, EPA 430-R-22-003, *Inventory of U.S. Greenhouse Gas Emissions and Sinks* ES-8 to ES-9, 2-11 to 2-13 (2022), <https://www.epa.gov/system/files/documents/2022-04/us-ghg-inventory-2022-main-text.pdf>.

⁸⁵ See Am. Fuel and Petrochemical Mfrs., *Renewable Energies Rely on Petrochemicals from Oil and Natural Gas* (Mar. 4, 2019), <https://www.afpm.org/newsroom/blog/renewable-energies-rely-petrochemicals-oil-and-natural-gas>.

⁸⁶ See Leon Mishnaevsky, Jr. et al., *Materials for Wind Turbine Blades: An Overview*, 10 Materials 1285 (2017), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5706232/pdf/materials-10-01285.pdf>; Christopher Mone et al., Nat'l Renewable Energy Lab'y, NREL/TP-6A20-66861, *2015 Cost of Wind Energy Review* 65 (2017), <https://www.nrel.gov/docs/fy17osti/66861.pdf>.

continue to commit to working to find collaborative alternatives to conserve the species that do not require a listing under the ESA.

The proposed listing could create safety and reliability issues due to the need for regular operations and maintenance activities for transmission infrastructure that crosses the dunes.

In order to maintain the safety and reliability of the electric transmission system within the species range, regular operations and maintenance (O&M) activities associated with existing transmission and distribution lines need to occur on an ongoing basis. Typical maintenance for both types of lines include tree trimming and/or removal of any potential vegetation within Rights-of-Way (ROWs) and easements that may interfere with the lines, keeping the ROW mowed and/or cleared to the width of the established easement, bulldozing dunes under lines to maintain proper ground clearance according to electric code, rebuilding lines, and repairing or replacing equipment as necessary. The majority of these maintenance activities are accessed by vehicles travelling within the easement, with occasional access occurring outside the ROW.

If the Dunes Sagebrush Lizard is listed, then providing authorization for these types of essential O&M activities for critical infrastructure under Section 10 of the ESA would be complex, increase costs for ratepayers, and place additional, unnecessary administrative burdens on already taxed service staff. These complexities further exemplify why FWS should reconsider the proposed listing in favor of continuing working with stakeholders on voluntary conservation efforts. However, should the Service move forward with listing the species, at a minimum, it should only be listed as threatened, with an ESA Section 4(d) rule crafted exempting these types of O&M activities associated with critical electric infrastructure.

Conclusion

The Coalition appreciates the opportunity to comment on the proposed listing. For the reasons stated above, and based on the information included in this letter, we urge FWS to withdraw the proposed listing at this time and continue to pursue collaborative efforts with industry, sister agencies, and the states to protect the dunes sagebrush lizard.

Sincerely,

U.S. Chamber of Commerce
Independent Petroleum Association of America
National Stone, Sand & Gravel Association
New Mexico Farm and Livestock Bureau
Texas Farm Bureau