



PROTECTING ENDANGERED SPECIES IN TEXAS:

ACTIVIST LAWSUITS VS.
PROACTIVE CONSERVATION



A TEXANS FOR NATURAL GAS SPECIAL REPORT

KEY FINDINGS

1. The ESA has significant impacts in Texas.



There are **97 species** (67 animals and 30 plants) in Texas on the ESA list. In addition, there are 10 candidate species and 62 species awaiting a 12-month finding.



Since 2013, the Texas Legislature has appropriated **\$10 million** for research on Texas species.

2. Activist groups have overwhelmed the U.S Fish & Wildlife Service with listing petitions and lawsuits.



Environmental activists have discovered that **raising ESA concerns** is one of the most effective ways of **impeding energy development**, and they have called the law an “Achilles heel” for operators in Texas specifically.



Between 2007 and 2010, FWS received petitions to list over **1,000 species**. This is more species than had been listed under the ESA in the previous 30 years.



141 ESA lawsuits related to missed deadlines were filed between 2005 and 2015. 79 percent of these lawsuits were filed by environmental groups.



ESA-related lawsuits are deliberately employed as “**psychological warfare**,” according to the Center for Biological Diversity, one of the most litigious “Keep It In the Ground” groups.



Current and former FWS officials say that **activist lawsuits** have actually **impeded government and industry efforts to protect species**.

3. Texas oil and natural gas operators proactively implement conservation efforts to protect species.



Operators site activities to avoid sensitive habit and are using advanced technology, such as horizontal and directional drilling, to **reduce their environmental footprint** and limit surface disturbances.



Six oil and natural gas companies, in a partnership with the National Fish and Wildlife Foundation (NFWF), have committed **\$3.5 million in funding** for conservation projects in the Permian Basin.



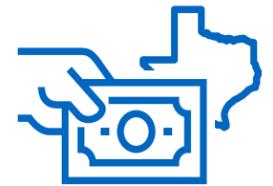
Oil and natural gas companies have enrolled over **9 million acres** in conservation plans and have committed **more than \$50 million** to help fund conservation and restoration programs for the lesser prairie-chicken.



FWS worked with the Texas Comptroller and oil & natural gas operators to **secure protections** for **over 85 percent** of the dunes sagebrush lizard’s habitat.

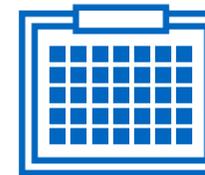


Since implementation of the Texas Conservation Plan, fewer than **300 of 200,000 acres** of the dunes sagebrush lizard’s Texas habitat have been disturbed by program participants.



The state of Texas has allocated more than **\$3.6 million on research** for the Texas hornshell and 11 other freshwater mussels.

4. The ESA could be strengthened and updated to work better for both species and people.



It’s been nearly **three decades** since any updates or changes have been made to the law.



The ESA has largely failed its intended purpose, boasting merely a **two percent recovery rate**, with only 50 species having actually “recovered.”



69 percent of Interstate Natural Gas Association of America members cite “**timing or length of consultation process**” as their number one ESA-related concern.

EXECUTIVE SUMMARY

The Permian Basin and the Eagle Ford Shale are among the most prolific oil and natural gas producing regions in the country. In October 2017, the Permian averaged 2.6 million barrels of oil per day (bbl/d) and 8.9 billion cubic feet of natural gas per day (bcf/d), while the Eagle Ford averaged 1.2 million bbl/d of oil and 6.1 bcf/d of natural gas.¹ Combined, this accounts for over 40 percent of U.S. oil production² and over 16 percent of U.S. natural gas production.³

Yet these regions are under threat from restrictions related to a federal law known as the Endangered Species Act (ESA). The Permian and Eagle Ford are home to several federally-designated “at risk” species and across Texas there are nearly 200 species that are either currently listed as endangered or being considered for listing under the ESA.

The ESA was enacted more than 40 years ago as a means of protecting animals and other wildlife that were at risk of extinction. Unfortunately, today the ESA is often used by activist groups to further their agenda of stopping oil and natural gas production, with little to no benefit for species. Groups such as the Arizona-based Center for Biological Diversity (CBD) and New Mexico-based WildEarth Guardians, among others, use ESA-related lawsuits to attempt to block energy projects that they argue will harm certain species. These groups also file lawsuits to stymie development using species that are not listed under the ESA. For example, in Utah CBD filed suit to block oil and natural gas development on 23 square miles of public land because of purported threats to the greater sage grouse, a species that is not currently listed.

Activist groups also take advantage of strict statutory deadlines regarding the listing of species under the

ESA, which are often impossible for the U.S. Fish and Wildlife Service (FWS) to meet. The groups file hundreds of listing petitions for species, or in some cases bulk petitions that include dozens of species within one petition, overwhelming FWS, and then will sue the government for failure to meet the deadlines. As a result, the federal government will often negotiate a settlement agreement with the groups. The most egregious example is the 2011 mega-settlement with CBD and WildEarth Guardians that set timeframes for making decisions on over 1,000 species, including 22 in Texas. This practice of “sue-and settle” not only impedes important economic development projects, but takes resources away from actual recovery efforts.

Here in Texas, activist groups are preparing a new listing petition for the dunes sagebrush lizard, which could have significant implications for energy production in the Permian Basin. Another petition filed by activist groups seeks emergency protections for the lesser prairie-chicken, which could also impact drilling operations in the area.

While activist groups try to use the ESA to block Texas energy production, oil and natural gas operators are proactively implementing voluntary conservation measures to protect species. Working with state and federal officials, the industry has set aside millions of acres of land for conservation, contributed millions of dollars to research and restoration efforts, and imposed special practices and policies to mitigate impacts to species and habitats. The State of Texas has implemented wide-ranging conservation plans, bringing together a variety of stakeholders, which have strengthened populations and kept species off the ESA list, including the dunes sagebrush lizard and the lesser prairie-chicken. Recognizing the impacts ESA

restrictions can have on economic development, Texas has also invested millions of dollars into research on local species in order to ensure that federal officials have the best available science when making listing decisions. When compared to the tactics employed by activist groups, the voluntary and proactive measures taking place in Texas are more efficient, as they help protect species with positive impacts on the ground, without the economic harm that comes from restrictions associated with the ESA.

Although there is broad support for protecting at-risk species and their habitats, there are areas where the ESA could be improved in order to work better for both species and communities. For example, the law

is not achieving its ultimate goal of species recovery; consulting with the FWS regarding listed species is a long and uncertain process; the voices of states and local stakeholders are often ignored or minimized; listing decisions are not always based on best available science; and the regulatory process can significantly delay important economic development projects.

In this report, we examine the impacts of the application of the ESA in Texas, how the law is used by activist groups as a tool to block energy production, the proactive measures implemented by oil and natural gas operators to conserve and protect species and their habitats, and components of the law that may require updates to fix its myriad problems.

OVERVIEW OF THE ESA

The Endangered Species Act (ESA) was enacted in 1973 with the goal of protecting and recovering animal and plant species that were in danger of becoming extinct.⁴ In signing the act into law, President Richard Nixon noted that it “grants the Government both the authority to make early identification of endangered species and the means to act quickly and thoroughly to save them from extinction.”⁵

The ESA is administered by the U.S. Department of the Interior’s Fish and Wildlife Service (FWS) and the U.S. Department of Commerce’s National Marine Fisheries Service (NMFS). FWS has authority over the vast majority of listed species – those that live on land or in the air. NMFS has jurisdiction over marine wildlife, such as whales and fish species.

Under the law, these federal agencies have the authority to list a species as endangered or threatened. A species listed as endangered is currently at risk of extinction “throughout all or a significant portion of its range.” A threatened species is likely to become an endangered species within the “foreseeable future.”⁶

The law also allows for the designation of critical habitat for listed species. Critical habitat is a specific geographic area with features that are essential to the conservation or recovery of the species.⁷ Last year, FWS updated its regulations for designating critical habitat, greatly expanding the scope of what could be designated.⁸ Critical habitat may now include areas that are not currently occupied by the species, but may one day be needed for its recovery. Roughly half of listed species have critical habitat designations.⁹

⁴ U.S. Fish & Wildlife Service, “Endangered Species Act of 1973”: <https://www.fws.gov/endangered/esa-library/pdf/ESAall.pdf>. ⁵ The American Presidency Project, “Statement on Signing the Endangered Species Act of 1973,” December 28, 1973: <http://www.presidency.ucsb.edu/ws/?pid=4090>. ⁶ U.S. Fish & Wildlife Service, “Endangered Species Act of 1973”: <https://www.fws.gov/endangered/esa-library/pdf/ESAall.pdf>. ⁷ U.S. Fish & Wildlife Service, “ESA Basics,” January 2013: https://www.fws.gov/endangered/esa-library/pdf/ESA_basics.pdf. ⁸ Emily Yehle, “18 states challenge Obama admin’s critical habitat rules,” EE News, November 30, 2016: <https://www.eenews.net/stories/1060046428/>. ⁹ U.S. Fish & Wildlife Service, “Listing and Critical Habitat Frequently Asked Questions”: <https://www.fws.gov/endangered/what-we-do/critical-habitats-faq.html>.

¹ U.S. Energy Information Administration, “Drilling Productivity Report,” October 16, 2017: <https://www.eia.gov/petroleum/drilling/#tabs-summary-2>. ² U.S. Energy Information Administration, “U.S. Field Production of Crude Oil,” October 31, 2017: <https://www.eia.gov/dnav/pet/hist/LeafHandler.ashx?n=PET&s=MCRFPUS2&f=M>. ³ U.S. Energy Information Administration, “U.S. Natural Gas Gross Withdrawals,” October 31, 2017: https://www.eia.gov/dnav/ng/hist/ngm_egg0_fgw_nus_mmcfdm.htm.

Species listed under the ESA, along with corresponding critical habitat if designated, receive special protections. It is illegal to “take” any threatened or endangered species without a special permit. Take is defined as “harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect or attempt to engage in any such conduct.”¹⁰ For critical habitat designations, federal agencies must ensure that they do not permit activities that could cause “harm” or “adverse modification” to the area.¹¹

There are two ways a species can be listed under the ESA. The first is to be nominated by FWS or NMFS based on an internal assessment of the status of a species. The second is through a listing petition filed by a private citizen or group. Using the “best available science,” the agencies consider five factors when evaluating whether a species should be listed: 1) damage to, or destruction of, a species’ habitat; 2) overutilization of the species for commercial, recreational, scientific, or educational purposes; 3) disease or predation; 4) inadequacy of existing protection; and 5) other natural or manmade factors that affect the continued existence of the species.¹²

Once receiving a listing petition, the FWS or NMFS must to the “maximum extent practical” make a finding within 90 days on whether potentially listing the species is warranted. This decision is based on documentation submitted with the petition and any information that the agency has at the time.¹³ If the agency in the 90-day finding determines that the petition contains substantial information to warrant a listing, it proceeds with a “status review” to gather additional information on the species.

As part of the status review, the agency will seek input from a variety of sources including other federal agencies, states, tribes, local governments, universities, and others.¹⁴ This is called the 12-month finding, after which the agency will make a decision on whether the listing is warranted.

If a listing is determined to not be warranted, the process comes to an end.

It’s also possible for the agency to determine that there is enough information to warrant a species listing, but that it is precluded from doing so based on higher listing priorities. In this case the species is designated as warranted but precluded for ESA listing and placed on what’s called the Candidate Species list.¹⁵ While candidate species do not receive specific protection under the ESA, federal agencies may work with states and local stakeholders on conservation efforts to help prevent future listings.¹⁶

If a listing is warranted, a proposed rule will be published that indicates whether the species should be listed as threatened or endangered. The proposed rule is peer-reviewed and the public is allowed to submit comments. Within one year, a final rule will be published, which represents the final step in officially placing an animal or plant on the threatened or endangered species list.¹⁷

¹⁰ U.S. Fish & Wildlife Service, “ESA Basics,” January 2013: https://www.fws.gov/endangered/esa-library/pdf/ESA_basics.pdf. ¹¹ Ibid. ¹² Ibid.

¹³ U.S. Fish & Wildlife Service, “An Introduction to the Endangered Species Act of 1973. Module 4”: <https://www.fws.gov/endangered/about/episodes/11/11%20Transcript.pdf>. ¹⁴ Ibid. ¹⁵ U.S. Fish & Wildlife Service, “Candidate Species Report,” accessed on October 18, 2017: <https://ecos.fws.gov/ecp/report/table/candidate-species.html>. ¹⁶ U.S. Fish & Wildlife Service, “Candidate Species,” October 2017: https://www.fws.gov/endangered/esa-library/pdf/candidate_species.pdf. ¹⁷ U.S. Fish & Wildlife Service, “An Introduction to the Endangered Species Act of 1973. Module 4”: <https://www.fws.gov/endangered/about/episodes/11/11%20Transcript.pdf>.

ESA IMPLEMENTATION IN TEXAS

States play a large role in implementing the ESA and are on the front lines when it comes to conservation and species and habitat protection. Section 6 of the ESA even requires federal agencies to “cooperate to the maximum extent practicable with the States” in implementing the ESA.¹⁸

There are currently 1,456 domestic animals¹⁹ and 945 domestic plants²⁰ listed under the ESA in the United States. Of these, 97 species (67 animals and 30 plants) are currently known to or expected to live in Texas.²¹ In addition, there are 10 species in Texas currently classified as candidate species and 62 species in Texas currently under review and awaiting a 12-month finding.²²

In Texas, the Comptroller’s Office oversees implementation of the ESA. The office seeks to work “with community leaders, businesses, landowners, and other stakeholders to encourage, develop and implement practical, effective, science-based solutions to ESA challenges in Texas.”²³ This is done through state-funded research on local species, on-the-ground conservation efforts to help preclude the need to list certain species under the ESA, helping landowners comply with ESA regulations including consultation, and seeking collaborative solutions to conserve endangered and threatened species while protecting the economy.

In order to provide extra assistance to local governments and communities trying to navigate this complex law, the state legislature in 2009 created the Interagency Task Force on Economic Growth and Endangered Species.

ESA BY THE NUMBERS

1456

Domestic animals listed under the ESA

945

Domestic plants listed under the ESA

97

ESA species found in Texas

10

Candidate species found in Texas

62

Species in Texas under review

¹⁸ U.S. Fish & Wildlife Service, “Endangered Species Act of 1973”: <https://www.fws.gov/endangered/esa-library/pdf/ESAall.pdf>. ¹⁹ U.S. Fish & Wildlife Service, “Listed Animals,” accessed on October 18, 2017: <https://ecos.fws.gov/ecp0/reports/ad-hoc-species-report?kingdom=V&kingdom=I&status=E&status=T&status=EmE&status=EmT&status=EXPE&status=EXPN&status=SAE&status=SAT&fcrithab=on&fstatus=on&fspecrule=on&finvpop=on&fgroup=on&header=Listed+Animals>. ²⁰ U.S. Fish & Wildlife Service, “Listed Plants,” accessed on October 18, 2017: <https://ecos.fws.gov/ecp0/reports/ad-hoc-species-report?kingdom=P&status=E&status=T&status=EmE&status=EmT&status=EXPE&status=EXPN&status=SAE&status=SAT&fcrithab=on&fstatus=on&fspecrule=on&finvpop=on&fgroup=on&family=on&header=Listed+Plants>. ²¹ U.S. Fish & Wildlife Service, “Listed species believed to or known to occur in Texas,” accessed on October 18, 2017: <https://ecos.fws.gov/ecp0/reports/species-listed-by-state-report?state=TX&status=list>. ²² Texas Comptroller of Public Accounts, “Endangered Species Watch”: <https://comptroller.texas.gov/programs/species-economy/watch.php>. ²³ U.S. House Natural Resources Committee, “Testimony of Glenn Hegar,” July 19, 2017: https://naturalresources.house.gov/uploadedfiles/testimony_hegar.pdf.

The Task Force is comprised of state agencies (Texas Department of Agriculture, Texas Parks and Wildlife Department, State Soil and Water Conservation Board, and the Texas Department of Transportation) whose three-fold mission includes assessing the economic impact of ESA, assisting landowners and stakeholders in identifying cost-effective strategies for ESA compliance, and facilitating state and local government efforts for implementing the ESA effectively.²⁴ In 2011, the state legislature also gave the Comptroller authority to coordinate and develop conservation plans and hold federal permits issued by FWS.²⁵

In 2015, Comptroller Glenn Hegar expanded and centralized the agency’s ESA work by creating the Economic Growth and Endangered Species Management Division. In doing so, an increased focus was placed on “good science” and transparency.²⁶

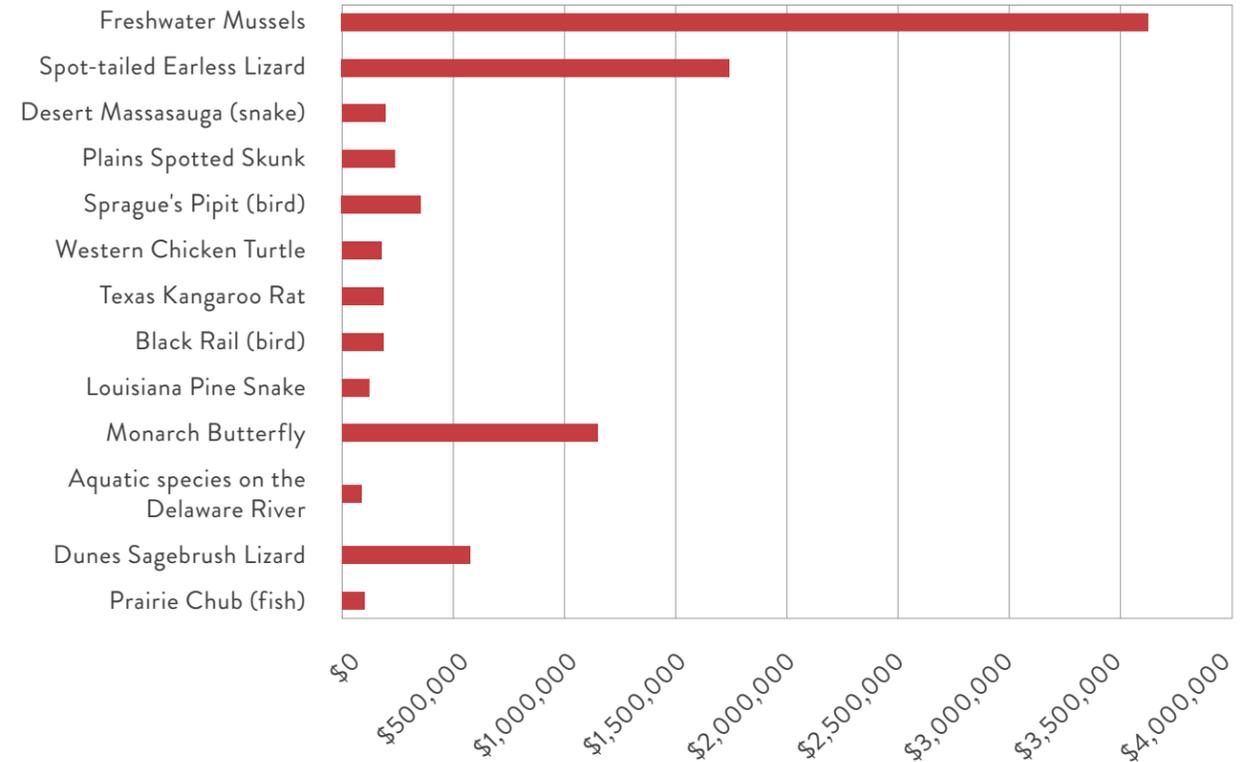
A large part of the Comptroller’s work is gathering scientific data on species through state-funded research. Since 2013, the Texas Legislature has appropriated \$10 million for research on Texas species under ESA consideration. An additional \$5 million has been approved for the 2018-2019 biennium.²⁷

Research has been conducted on over a dozen “game-changing” species in Texas, all of which could have profound economic impacts if listed. Examples include the monarch butterfly, the spot-tailed earless lizard, and several freshwater mussel species. The state contracts with public universities on this research, ensuring that more is known about species populations and their habitats so that the federal agencies charged with making listing decisions have the best and most accurate data.



²⁴ Texas Comptroller of Public Accounts, “Interagency Task Force on Economic Growth and Endangered Species”: <https://comptroller.texas.gov/programs/species-economy/task-force/>. ²⁵ U.S. Government Printing Office, “House Natural Resources Committee Hearing Transcript: Transparency and Sound Science Gone Extinct?,” August 1, 2013: <https://www.gpo.gov/fdsys/pkg/CHRG-113hrg82446/pdf/CHRG-113hrg82446.pdf>. ²⁶ Jackie Benton and Bruce Wright, “Economic Growth and Endangered Species Management,” Fiscal Notes, June 2017: <https://comptroller.texas.gov/economy/fiscal-notes/2017/june-july/endangered.php>. ²⁷ Ibid.

COMPTROLLER RESEARCH FUNDING FOR SPECIES UNDER ESA REVIEW²⁸



Robert Gulley, Director of the Texas Comptroller’s Economic Growth and Endangered Species Management Division, emphasized the importance of the state’s research and the role it can play in the listing process: “The Comptroller believes the best way to ensure economically sound decisions are made is to ensure the science is good and current. And if we do that, the Fish and Wildlife Service will make better decisions and have less impact on the state economy.”²⁹

Indeed, state research and coordination with local governments and agencies is changing the way information is gathered and shared and leading to more informed decision making. It’s also resulting in early, voluntary conservation measures that often times preclude the listing of the species under the ESA.

Dr. Kenneth G. Ostrand, director of FWS’ San Marcos Aquatic Resources Center, has noted:

“We’re getting in early with these species, and typically our job is to catch up. With these animals, we’re at the beginning of the listing process, and actually have the luxury, for once, to approach this in a calm and logical way. Hopefully, it will result in a much greater success in the end, and eliminate the need for [endangered species] listing. It sounds strange, but we’re trying to put ourselves out of business.”³⁰

²⁸ Jackie Benton and Bruce Wright, “Economic Growth and Endangered Species Management,” Fiscal Notes, June 2017: <https://comptroller.texas.gov/economy/fiscal-notes/2017/june-july/endangered.php>. ²⁹ Jackie Benton and Bruce Wright, “Economic Growth and Endangered Species Management,” Fiscal Notes, June 2017: <https://comptroller.texas.gov/economy/fiscal-notes/2017/june-july/endangered.php>. ³⁰ Ibid.

Working with stakeholders, landowners, and government agencies, the Texas Comptroller has had numerous success stories. For example, the state contributed scientific data that helped inform the FWS' decision not to list the Sprague's pipit, a migratory bird that spends the winter in South and West Texas near oil and natural gas operations. The state also developed a nationally recognized Monarch butterfly research program, to gather more information about its migratory path in Texas.³¹ Through meetings and informal working groups, the public has the opportunity to learn about potential ESA listings, voice concerns, and ask questions.

HOW ACTIVIST GROUPS USE ESA TO BLOCK ENERGY EXPLORATION AND PRODUCTION

Activist groups fundamentally opposed to oil and natural gas use the ESA as a tool to block development and further the larger "Keep It In the Ground" campaign. By alleging that oil and natural gas activities could pose a threat to wildlife, or claiming that federal agencies didn't adequately consider the impacts to wildlife when issuing permits, a project could be delayed or even halted. Activist groups have discovered that raising ESA concerns is one of the most effective ways of creating regulatory hurdles to impede energy development. An environmental blogger even admitted that "endangered species may prove to be an unexpected Achilles heel for the Permian drilling industry."³³

Across the country, groups including the Center for Biological Diversity (CBD), Sierra Club, WildEarth

Comptroller Hegar, in recent testimony before Congress, stressed the importance of a state's role in fostering collaboration and public involvement:

"I believe states need, and must be involved in, an open, transparent process for reviewing and conserving species that includes all stakeholders, both public and private. Engaging stakeholders is essential to getting acceptance and buy in with respect to the ESA. This is especially true in states such as Texas, where more than 95 percent of all property is privately owned."³²

Guardians, and the Natural Resources Defense Council (NRDC) claim oil and natural gas projects will harm endangered species. For example, CBD denounced the Keystone XL Pipeline because "virtually any route it could take would intersect with threatened or endangered species." CBD also claims that Arctic drilling could "wipe out" the bowhead whale.³⁴ WildEarth Guardians launched a Frack-Free American West campaign that alleges fish and wildlife "will suffer tremendously" if fracking in the West continues.³⁵

Beyond rhetorical attacks, these groups also use ESA-related lawsuits to target specific energy projects. They admit that the ultimate goal is stopping oil and natural gas activity.

³¹ U.S. House Natural Resources Committee, "Testimony of Glenn Hegar," July 19, 2017: https://naturalresources.house.gov/uploadedfiles/testimony_hegar.pdf. ³² Ibid. ³³ Sharon Kelly, "Protections for Rare and Endangered Animals Under Threat from Permian Basin Drilling Industry," Desmog Blog, November 21, 2016: <https://www.desmogblog.com/2016/11/21/endangered-species-act-crosshairs-permian-basin-oil-and-gas-industry>. ³⁴ Center for Biological Diversity, "The Top Ten U.S. Species Threatened by Fossil Fuels": https://www.biologicaldiversity.org/publications/papers/Fueling_Extinction.pdf. ³⁵ WildEarth Guardians, "A Frack-Free American West": http://www.wildearthguardians.org/site/PageServer?pagename=priorities_climate_energy_frack_free#.WfuldJXrtD_.

For example, CBD and two other environmental groups recently filed suit to "prevent fracking and drilling on 23 square miles of public land in central Utah," claiming that it would pose harm to the greater sage grouse.³⁶ The legal action seeks to stop nine oil and natural gas leases in Nephi, Utah, because "oil and gas drilling and production are known causes of sage grouse habitat destruction." In reality, oil and natural gas producers have been active participants in sage grouse conservation efforts that helped to keep the species off the endangered species list.³⁷

In Ohio, the Sierra Club and CBD tried to halt fracking in the Wayne National Forest. The groups announced their intent to sue the U.S. Forest Service, the Bureau of Land Management, and FWS over lease auctions that they allege violated the ESA.³⁸ Despite environmental assessments showing there would be minimal environmental impacts from oil and natural gas development in the area, Sierra Club claims it could harm "rare and endangered species including bobcats, Indiana bats, timber rattlesnakes, and cerulean warblers."³⁹

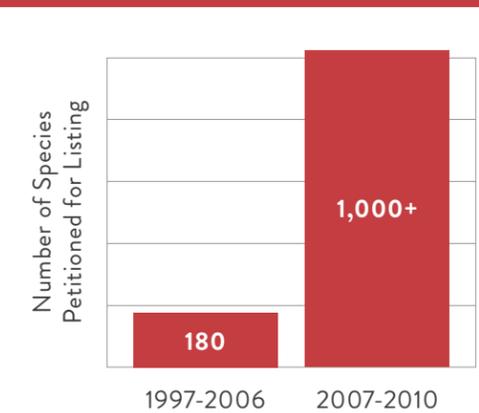
In Florida, the NRDC, CBD, National Parks Conservation Association, and others filed suit to stop oil and natural gas exploration in the Big Cypress National Preserve.⁴⁰ The groups claimed it would negatively impact threatened and endangered species including the Florida panther, the eastern indigo snake, and wood storks.

While these types of lawsuits are certainly noteworthy and contribute to regulatory uncertainty, delays, or even decisions to halt projects, the legal tool most often used

by activist groups is the filing of listing petitions. Environmental activist groups have filed hundreds of listing petitions in an attempt to get new species added to the ESA list, slow down development, and get thousands of acres placed off-limits to oil and natural gas production. The Executive Director for CBD even described these litigious tactics and delays as "psychological warfare," adding that it's a "very underappreciated aspect of environmental campaigning."⁴¹

Over the past decade, environmental groups have increased the practice of filing listing petitions for hundreds of species. According to FWS, between 1997 and 2006 the agency received on average 17 petitions covering 20 species per year. Between 2007 and 2010 FWS received petitions to list over 1,000 species. This is more species than had been listed under the ESA in the entire 30 years prior.⁴²

RISE IN ESA LISTING PETITIONS



³⁶ Center for Biological Diversity, "Legal Action Aims to Block Fracking, Save Utah Sage Grouse," October 31, 2017: http://www.biologicaldiversity.org/news/press_releases/2017/greater-sage-grouse-10-31-2017.php. ³⁷ Darryl Fears, "Decision not to list sage grouse as endangered is called life saver by some, death knell by others," Washington Post, September 22, 2015: https://www.washingtonpost.com/news/energy-environment/wp/2015/09/22/fewer-than-500000-sage-grouse-are-left-the-obama-administration-says-they-dont-merit-federal-protection/?utm_term=.79a7211a132d. ³⁸ Kallish Energy, "Eco-groups threaten suit to block drilling in national forest," February 6, 2014: <http://www.kallishenergy.com/2017/02/06/eco-groups-threaten-lawsuit-block-drilling-ohio-national-forest/>. ³⁹ Sierra Club, "Ban Sought on New Fossil Fuel Leasing in Ohio's Wayne National Forest," Press Release, June 1, 2016: <http://content.sierraclub.org/press-releases/2016/06/ban-sought-new-fossil-fuel-leasing-ohio-s-wayne-national-forest>. ⁴⁰ Natural Resources Defense Council, "Groups Sue to Stop Oil and Gas Exploration in Florida's Big Cypress National Preserve," Press Release, July 27, 2016: <https://www.nrdc.org/media/2016/160727>. ⁴¹ Tony Davis, "Firebrand Ways," High Country News, December 28, 2009: <http://www.hcn.org/issues/41.22/firebrand-ways>. ⁴² U.S. Government Printing Office, "House Natural Resources Committee Hearing Transcript: Transparency and Sound Science Gone Extinct?," August 1, 2013: <https://www.gpo.gov/fdsys/pkg/CHRG-113hrg82446/pdf/CHRG-113hrg82446.pdf>.

“We fully agree with the concern that our resources are better spent on implementing the ESA than on litigation.”

DAN ASHE, FORMER FWS DIRECTOR



Overwhelmed by the number of listing petitions, FWS is often unable to respond within the 90-day timeframe as required by the law. As a result, the activist groups then sue the federal government for failure to act within the statutory deadlines – even though it was the activist groups themselves who caused the delay with their strategy of deliberately overloading FWS. Former Interior Department employee David Willms noted that these deadlines are the “source of the greatest acrimony in ESA implementation.”⁴³

According to the U.S. Government Accountability Office, 141 ESA lawsuits related to missed deadlines were filed between 2005 and 2015. The overwhelming majority (79 percent) of these lawsuits were filed by environmental groups, with CBD being the most active litigant.⁴⁴

Environmental groups claim that the listing petitions and lawsuits are intended to help save endangered species; in reality, their lawsuits take time and money away from real conservation efforts. FWS directors and officials, who have served under both Democratic and Republican administrations, have recognized that the actions of these litigious groups not only impede energy development and economic growth; they also, ironically, impede species recovery.

Former FWS Director Dan Ashe, who served during the Obama Administration, stated that in FY 2011 FWS had \$20.9 million allocated for listings and critical habitat. Of that, at least \$15.8 million was spent on actions related to litigation. “We fully agree with the concern that our resources are better spent on implementing the ESA than on litigation,” said Ashe.⁴⁵

Current FWS Deputy Director Greg Sheehan agrees, saying that “the time and cost of litigation is one of the significant challenges in implementing the ESA.”⁴⁶

⁴³ U.S. House Natural Resources Committee, “Testimony of David J. Wilms,” July 19, 2017: https://naturalresources.house.gov/uploadedfiles/testimony_wilms_withattachment.pdf. ⁴⁴ Michael Bastasch, “Govt Data Confirms Fears The Endangered Species Act Is ‘Held Hostage By Radical Agendas,’” Daily Caller, March 27, 2017: <http://dailycaller.com/2017/03/27/govt-data-confirms-fears-the-endangered-species-act-is-held-hostage-by-radical-agendas/>. ⁴⁵ U.S. House Natural Resources Committee, “Excessive Endangered Species Act Litigation Threatens Species Recovery, Job Creation and Economic Growth,” Press Release, December 6, 2011: <https://naturalresources.house.gov/newsroom/documentsingle.aspx?DocumentID=271408>. ⁴⁶ Michael Doyle, “Famed for lawsuits, enviro group morphs into advocacy,” EE News, July 25, 2017: <https://www.eenews.net/greenwire/stories/1060057865/>.

Jamie Clark, who served as FWS Director during the Clinton Administration, also believes the actions of these groups are extreme: “Citizens need to be able to petition for species in trouble, but this has become an industry.”⁴⁷

Other environmentalists disagree with the tactics employed by these activist groups. Amos Eno, former director of the National Fish and Wildlife Foundation, noted that the federal government could “recover and delist three dozen species” with the resources they spend responding to CBD litigation. “They are one of the reasons the Endangered Species Act has become so dysfunctional. They deserve the designation of eco-criminals,” he added.⁴⁸

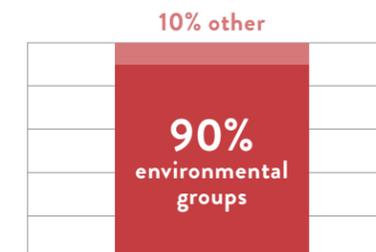
U.S. House Natural Resources Committee Chairman Rob Bishop (R-Utah) has echoed that sentiment, saying that “the statute has been held hostage by radical agendas at the expense of species and taxpayers.”⁴⁹

Facing an onslaught of lawsuits, FWS often seeks settlement agreements. The federal government settled 101 lawsuits between 2005 and 2015, 90 percent of which were with environmental groups.⁵⁰

This practice of sue-and-settle quintupled during the Obama Administration and has become a primary tactic of environmental groups.⁵¹ Unfortunately, often times the negotiations and details of the settlement agreement are done behind-closed-doors, with no input from affected parties, such as private property owners, states, Tribes, or local governments.

⁴⁷ Ted Williams, “Extreme Green,” High Country News, May 31, 2011: <http://www.hcn.org/wotr/extreme-green>. ⁴⁸ Ibid. ⁴⁹ Michael Bastasch, “Govt Data Confirms Fears The Endangered Species Act Is ‘Held Hostage By Radical Agendas,’” Daily Caller, March 27, 2017: <http://dailycaller.com/2017/03/27/govt-data-confirms-fears-the-endangered-species-act-is-held-hostage-by-radical-agendas/>. ⁵⁰ Michael Bastasch, “Govt Data Confirms Fears The Endangered Species Act Is ‘Held Hostage By Radical Agendas,’” Daily Caller, March 27, 2017: <http://dailycaller.com/2017/03/27/govt-data-confirms-fears-the-endangered-species-act-is-held-hostage-by-radical-agendas/>. ⁵¹ U.S. House Natural Resources Committee, “Testimony of Kent Holsinger,” July 19, 2017: https://naturalresources.house.gov/uploadedfiles/testimony_holsinger.pdf. ⁵² Center for Biological Diversity v. Salazar, July 12, 2011: http://www.biologicaldiversity.org/programs/biodiversity/species_agreement/pdfs/proposed_settlement_agreement.pdf. ⁵³ WildEarth Guardians V. Salazar, May 10, 2011: https://www.fws.gov/endangered/improving_esa/joint_motion_re_settlement_approval_filed.pdf. ⁵⁴ Endangered Species Act Congressional Working Group, “Report, Findings and Recommendations,” February 4, 2014: https://naturalresources.house.gov/uploadedfiles/esa_working_group_final_report_and_recommendations_02_04_14.pdf. ⁵⁵ Center for Biological Diversity, “Species by State”: http://www.biologicaldiversity.org/programs/biodiversity/species_agreement/species.html#Texas. ⁵⁶ Michael Doyle, “Lawsuits spur new ESA listings, and some grumbling,” EE News, September 20, 2017: <https://www.eenews.net/greenwire/2017/09/20/stories/1060061221>.

THE ESA AND SUE & SETTLE



Settlements between 2005 and 2015

The largest ESA settlement occurred in 2011, when the Interior Department entered into an agreement with CBD⁵² and WildEarth Guardians.⁵³ As part of this “mega-settlement,” deadlines were set for FWS to make critical habitat designations, final listing decisions on 251 candidate species, and initial listing decisions on over 500 species. In total, the settlement required the federal government to take actions impacting over 1,000 species.⁵⁴

Every state is impacted by this mega-settlement and has at least one species found within its borders. In Texas, there are 22 species included in the agreement.⁵⁵ This includes several species that, if listed, have the potential to interfere with or even block oil and natural gas operations: the Texas hornshell, the dunes sagebrush lizard, and the lesser prairie-chicken. As of September 2017, 188 species have been listed as threatened or endangered as part of this settlement.⁵⁶

In addition to using petitions, lawsuits, and settlement agreements as a way to halt economic development, many also believe that these types of settlement agreements allow third party groups to essentially dictate FWS' agenda and budget. The U.S. Chamber of Commerce outlined this in a report, "Sue and Settle: Regulating Behind Closed Doors,"⁵⁷ noting that by entering into a settlement agreement, "the agency agrees to prioritize the demands of activist groups over and above competing interests."⁵⁸

While the 2011 mega-settlement was supposed to limit litigation and listing petitions from these groups, it hasn't stopped them from coming. The following year, CBD filed yet another petition to list 53 new species across the United States. FWS said they were "disappointed" by the petition, especially since their priorities had already been determined by the 2011 settlement.⁵⁹ In 2016, CBD launched another lawsuit against FWS for failing to act on petitions on more than 417 species.⁶⁰

HOW ENERGY COMPANIES PROACTIVELY HELP SPECIES AND THEIR HABITATS

Oil and natural gas production is a major driver of the Texas economy – directly employing hundreds of thousands of people; generating billions of dollars in tax revenue to fund schools, roads, and emergency services; and providing families and businesses with low cost energy. Spurred by increased production in places like the Permian Basin and Eagle Ford Shale, the industry supported more than 336,000 direct jobs in 2016⁶¹ and generated over \$294 million in production tax revenue in September 2017 alone.⁶²

Conservation and energy production are not mutually exclusive, and companies take numerous steps to ensure that species and habitats, especially at-risk species, are not adversely impacted.

The Texas Parks and Wildlife Department (TPWD) has developed voluntary conservation practices to offer guidance on balancing oil and natural gas development with land conservation. TPWD recognizes that "the extraction of these important below ground resources may be pursued in ways, when practicable, that are compatible with the area's vibrant wildlife and diverse wildlife habitats."⁶³

Careful planning – before, during, and after operations – and the timely execution of those plans are key to ensuring species and their habitat are protected. For example, operators perform surveys and monitor species and habitat near operations to inform future decisions. Knowledge of any potentially sensitive areas of land

⁵⁷ U.S. Chamber of Commerce, "Sue and Settle: Regulating Behind Closed Doors," October 18, 2017: <https://www.uschamber.com/report/sue-and-settle-regulating-behind-closed-doors>. ⁵⁸ U.S. Chamber of Commerce, "Testimony before the House Natural Resources Subcommittee on Oversight and Investigations," June 28, 2017: https://www.uschamber.com/sites/default/files/6.28.17-_statement_for_the_record_for_hearing_on_examining_policy_impacts_of_excessive_litigation_against_the_department_of_the_interior.pdf. ⁵⁹ Allison Winter, "Petitions for new species protection wobble balance in FWS settlement, agency says," EE News, August 7, 2012: <https://www.eenews.net/greenwire/2012/08/07/stories/1059968495>. ⁶⁰ Center for Biological Diversity, "Lawsuit Launched to Speed Endangered Species Act Protection for 417 Species," Press Release: August 23, 2016: https://www.biologicaldiversity.org/news/press_releases/2016/417-species-08-23-2016.html. ⁶¹ Texas Oil and Gas Association, "American Energy Dominance Begins in Texas": <https://www.txoga.org/todd-staples-american-energy-dominance-begins-texas/>. ⁶² Texas Comptroller of Public Accounts, "Monthly State Revenue Watch," October 2017: <https://comptroller.texas.gov/transparency/revenue/watch/>. ⁶³ Texas Parks and Wildlife, "Voluntary Conservation Practices," <https://tpwd.texas.gov/landwater/land/private/voluntary-conservation-practices/>.

WAYS OIL AND NATURAL GAS OPERATORS ELIMINATE, AVOID, MINIMIZE, OR MITIGATE IMPACTS TO SPECIES

- Place infrastructure, such as roads and well pads, away from sensitive areas
- Use horizontal and directional drilling to limit surface disturbances
- Use multi-well pads to drill several wells from a single site
- Consolidate operations to reduce land disturbances and limit fragmentation of habitat
- Use remote monitoring of wells to reduce traffic and the need for additional access roads
- Use high-efficiency mufflers to reduce noise
- Use shields to minimize impacts to lighting
- Install netting and screening over pits and equipment
- Adhere to seasonal and spatial limitations to cater to migration patterns
- Undertake reclamation efforts, removing equipment and returning land to natural state

"By using directional drilling and fracking, we have an opportunity to have a softer footprint on the land."

SALLY JEWELL, FORMER SECRETARY OF THE U.S. DEPARTMENT OF INTERIOR

helps determine where to place infrastructure, such as roads and well pads, in order to minimize any impacts. Throughout the operation phase, companies work to control soil erosion, dust and noise, while limiting traffic and other disturbances to the area. They install netting and screening over pits and equipment to ensure that wildlife, particularly birds, are not entrapped. In certain circumstances, operators also adhere to seasonal and spatial limitations in order to cater to wildlife migration patterns. Once the well has been successfully drilled and enters the production phase, companies undertake reclamation efforts, removing equipment and returning the land to its natural state.⁶⁴

Just as technology has helped facilitate the fracking revolution, new technology is also helping companies reduce their environmental footprint. For example, the use of horizontal and directional drilling has helped limit surface disturbances. The average well site today is 30 percent smaller than it was in the 1970s, but can access up to 60 times more below-ground area.⁶⁵

Horizontal drilling has also allowed operators to drill fewer wells to access the same amount of resources. What once required 16 wells to be drilled in different locations can now be done in just six to eight wells from a single site.⁶⁶ Former Interior Secretary Sally Jewell even praised this practice, noting: "By using directional drilling and fracking, we have an opportunity to have a softer footprint on the land."⁶⁷

⁶⁴ Texas Parks and Wildlife, "Voluntary Conservation Practices": <https://tpwd.texas.gov/landwater/land/private/voluntary-conservation-practices/>. ⁶⁵ Texas Oil and Gas Association, "Environmental Practices in Fracking": <https://www.txoga.org/environmental-benefits-of-fracking/>. ⁶⁶ Ibid. ⁶⁷ National Press Club, "NPC Luncheon with Sally Jewell, Secretary, U.S. Department of the Interior," October 31, 2013: <http://www.press.org/events/npc-luncheon-sally-jewell-secretary-us-department-interior>.

Other practices such as the use of multi-well pads, which allow operators to drill more than 20 wells from a single site,⁶⁸ and the consolidation of operations help reduce land disturbances and fragmentation. Coupled with the remote monitoring of producing wells, these practices reduce traffic and the need for additional access roads.⁶⁹

To help protect species, operators have even adapted equipment to mirror the surrounding environment in order to limit disturbances.⁷⁰ For example, in order to mitigate impacts to the greater sage grouse (a bird whose habitat encompasses some 165 million acres across 11 states), operators have used high-efficiency mufflers to reduce noise and attached shields to equipment to help minimize the impact of intense lighting. To protect species from unwanted predators, operators have buried power lines and restricted high-profile facilities in order to eliminate places from which potential predators could perch.⁷¹

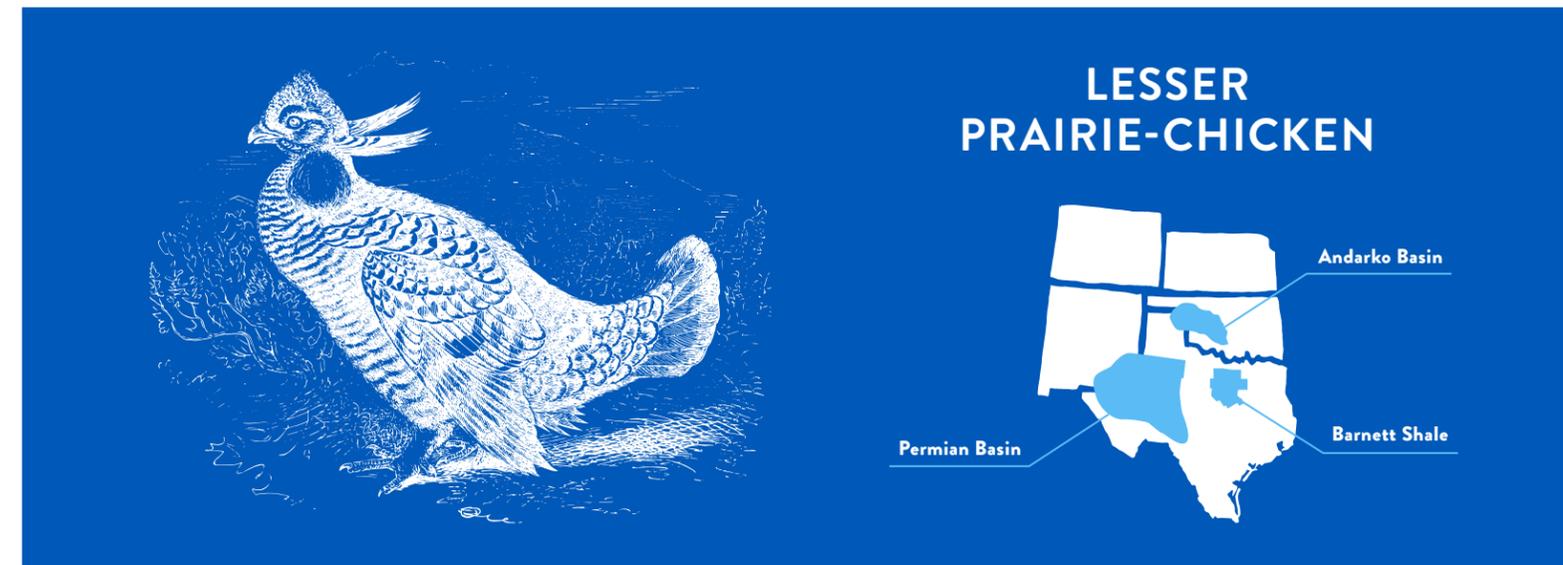
Furthermore, oil and natural gas companies frequently work with federal, state, and local governments on voluntary efforts to conserve species and avoid the need for a federal ESA listing. For example, Candidate Conservation Agreements (CCAs) are voluntary agreements between companies performing activities on federal lands, FWS, and others to reduce threats to at-risk species, in exchange for certain regulatory assurances should the species at question be listed under the ESA. Parties work with FWS to design and implement conservation measures and evaluate their effectiveness. There are also Candidate Conservation

Agreements with Assurances (CCAAs), which are voluntary efforts undertaken between landowners, federal and state agencies, and others to proactively avoid the need for an ESA listing. Under this type of agreement, parties receive regulatory assurances from FWS that if the species is listed, they will not be required to do anything beyond the commitments outlined in the CCAA.⁷² These agreements help incentivize parties to take conservation steps proactively to protect species, without the administrative and costly burden of complying with an official ESA listing.

In Texas, six oil and natural gas companies that operate in the Permian Basin recently announced a partnership with the National Fish and Wildlife Foundation (NFWF) to support conservation projects in the region. The Pecos Watershed Conservation Initiative will identify projects to improve species habitat and water quality and address water scarcity. The companies have committed \$3.5 million over three years for on-the-ground conservation efforts. That amount is being matched by NFWF to bring total funding for the partnership to \$7 million. Jeff Trandahl, NFWF executive director, described the initiative as “a new way for both those who care about wildlife and those seeking to tap the vast Permian Basin oil reserves to work together. All of the partners believe that we will be able to achieve long-term conservation benefits for species and for local communities.”⁷³

The following is a further look at specific species here in Texas and how oil and natural gas operators have participated in, and often times led, conservation efforts.

⁶⁸ Texas Oil and Gas Association, “Environmental Practices in Fracking”: <https://www.txoga.org/environmental-benefits-of-fracking/>. ⁶⁹ Western Energy Alliance, “Evaluation of the NEPA Process as an Adequate Regulatory Mechanism to Eliminate or Minimize Threats to Greater Sage-Grouse Associated with Oil and Natural Gas Development Activities,” July 2014: https://www.westernenergyalliance.org/sites/default/files/images/WesternEnergyAlliance_GRSG_NEPA_Final_071414.pdf. ⁷⁰ Barry Russell, “Energy Production and Species Conservation Working Hand in Hand,” The Hill, May 14, 2015: <http://thehill.com/blogs/congress-blog/energy-environment/241976-energy-production-and-species-conservation-working>. ⁷¹ Western Energy Alliance, “Evaluation of the NEPA Process as an Adequate Regulatory Mechanism to Eliminate or Minimize Threats to Greater Sage-Grouse Associated with Oil and Natural Gas Development Activities,” July 2014: https://www.westernenergyalliance.org/sites/default/files/images/WesternEnergyAlliance_GRSG_NEPA_Final_071414.pdf. ⁷² U.S. Fish & Wildlife Service, “ESA Basics,” January 2013: https://www.fws.gov/endangered/esa-library/pdf/ESA_basics.pdf. ⁷³ National Fish and Wildlife Foundation, “National Fish and Wildlife Foundation Partners with Permian Basin Oil and Natural Gas Companies to Conserve Pecos Watershed in Texas and New Mexico,” Press Release, November 9, 2017: <https://globenewswire.com/news-release/2017/11/09/1178733/0/en/National-Fish-and-Wildlife-Foundation-Partners-with-Permian-Basin-Oil-and-Natural-Gas-Companies-to-Conserve-Pecos-Watershed-in-Texas-and-New-Mexico.html>.



AREA

Texas, Oklahoma, New Mexico, Colorado, and Kansas

HABITAT

Grassland and Areas of Low-lying Brush

NOTABLE FORMATIONS

Permian Basin, Barnett Shale, & Anadarko Basin

The **lesser prairie-chicken** is a medium-sized grouse that inhabits grasslands and areas of low growing bush in the southwest United States. Its habitat is spread across five states including Texas, Oklahoma, New Mexico, Colorado, and Kansas⁷⁴ Its habitat overlaps with significant areas of oil and natural gas production, and FWS notes that petroleum production “is occurring over much of the estimated and historical range of the lesser prairie-chicken.”⁷⁵

In Texas, its area of habitat includes the Permian Basin, which is currently the top oil producing region in the United States at over 2.6 million barrels a day.⁷⁶ It’s the second most productive region in the country for natural gas, producing over 8.9 billion cubic feet per day. The species’ habitat also overlies other notable oil and natural gas formations, including the Barnett

Shale and the Anadarko Basin, creating the potential for the species to significantly impact American energy production across prolific basins and states.⁷⁷ Given the high stakes, oil and natural gas operators joined state wildlife experts, organizations, farmers, ranchers, and other private companies in launching widespread conservation efforts to protect the species and avoid a federal ESA listing.

A significant part of this effort is the Western Association of Fish & Wildlife Agencies’ (WAFWA) Five-State, Range-Wide Conservation Plan. Endorsed by FWS, the voluntary plan created a framework for habitat conservation and mitigation, while enabling various industries (oil and natural gas, wind, electricity, telecommunications, farming, and ranching) to continue to operate.⁷⁸ Companies enrolled in the plan agreed

⁷⁴ U.S. Fish & Wildlife Service, “Species Profile for Lesser Prairie-Chicken”: <https://ecos.fws.gov/ecp0/profile/speciesProfile?spcode=B0AZ>.

⁷⁵ U.S. Fish & Wildlife Service, “Determination of Threatened Status for the Lesser Prairie-Chicken,” Federal Register Vol. 79, No. 69, April 10, 2014: <https://www.fws.gov/policy/library/2014/2014-07302.html>. ⁷⁶ U.S. Energy Information Administration, “Drilling Productivity Report,” October 16, 2017: <https://www.eia.gov/petroleum/drilling/>. ⁷⁷ Independent Petroleum Association of America, “Comments on the U.S. Fish and Wildlife Service’s 90-day Finding on a Petition to List the Lesser Prairie Chicken as an Endangered Species under the Endangered Species Act,” January 30, 2017: <http://esawatch.org/wp-content/uploads/2017/01/IPAA-LPC-90-Day-Comments.pdf>. ⁷⁸ Western Association of Fish & Wildlife Agencies, “Lesser Prairie-Chicken”: http://www.wafwa.org/initiatives/grasslands/lesser_prairie_chicken/.

to set aside land and pay fees to support conservation efforts in exchange for continued access to the lesser prairie-chicken's general habitat area.

Under the plan, for every acre developed by oil and natural gas, two acres are set aside for conservation. Sean Kyle, a WAFWA employee, noted that with the range-wide plan, "there is a way to have development for oil and gas and to have chickens as well."⁷⁹

According to WAFWA, 173 companies enrolled in the plan in the first year. As a result, the lesser prairie-chicken's population increased by 20 percent and nearly 40,000 acres of habitat were conserved. Additionally, the consolidation of oil and natural gas operations resulted in a 23 percent decrease in impacted habitat.⁸⁰ To date, oil and natural gas operators have enrolled over nine million acres in conservation plans and have committed more than \$50 million to help fund conservation and restoration programs.⁸¹

Separately, each of the five states in the species habitat range also deployed their own conservation efforts. In Texas, the Conservation Plan developed by the state included 572,997 enrolled acres. Private landowners voluntarily enrolled 131,000 acres of lesser prairie-chicken habitat in the FWS Partners in Fish & Wildlife Program, over 77,000 acres in the State Acres for

Wildlife Enhancement Program, and 11,000 acres as a permanent preserve.⁸²

The U.S. Department of Agriculture also implemented conservation measures for the lesser prairie-chicken. Its Lesser Prairie-Chicken Initiative, through the Working Lands for Wildlife partnership, has enabled agricultural producers to conserve more than one million acres of prime habitat, with hopes of conserving another 500,000 acres by 2018.⁸³

This effort was described by one former Interior Department official as "totally unprecedented."

Despite the tremendous conservation efforts, FWS in 2014 listed the species as threatened under the ESA. This decision prompted several lawsuits, including from the Permian Basin Petroleum Association (PBPA) in Texas. Ben Shepperd, PBPA president, said the listing of the species would be "economically devastating to this entire five-state region," creating multi-year delays in processing permits and higher costs to the point that drilling may be uneconomical.⁸⁴

In 2015 the U.S. District Court for the Western District of Texas court ruled in favor of PBPA, overturning the threatened listing by FWS. The court agreed that FWS failed to adequately consider the impact of the

DID YOU KNOW?

Protecting the Lesser Prairie-Chicken

Oil and natural gas operators have enrolled over nine million acres in conservation plans and committed more than \$50 million to conservation and restoration programs.

⁷⁹ KFDX, "Oil Downturn Also Affects Lesser Prairie Chicken," 2017: <http://www.myhighplains.com/news/oil-downturn-also-affects-lesser-prairie-chicken/153100696>. ⁸⁰ Bailey Leroux, "Drilling Deeper: In Times Like These," Permian Basin Oil & Gas, June 1, 2015: <https://pboilandgasmagazine.com/drilling-deeper-in-times-like-these/>. ⁸¹ Independent Petroleum Association of America, "Comments on the U.S. Fish and Wildlife Service's 90-day Finding on a Petition to List the Lesser Prairie Chicken as an Endangered Species under the Endangered Species Act," January 30, 2017: <http://esawatch.org/wp-content/uploads/2017/01/IPAA-LPC-90-Day-Comments.pdf>. ⁸² Ibid. ⁸³ United States Department of Agriculture, "Lesser Prairie-Chicken": <https://www.nrcs.usda.gov/wps/portal/nrcs/detail/national/plantsanimals/fishwildlife/?cid=stelprdb1047028>. ⁸⁴ Corey Paul, "Lesser Prairie Chicken Dance," OA Online, March 9, 2014: http://www.oaoa.com/news/business/article_a2be3ad8-a74f-11e3-88c2-0017a43b2370.html.

multi-state conservation plans when determining the true threat to the species.⁸⁵ Shepperd praised the decision by saying, "this ruling serves as vindication of the unprecedented stakeholder participation across the lesser prairie-chicken range."⁸⁶

However, environmental activist groups were not ready to quit fighting for the listing of the lesser prairie-chicken, and in 2016, CBD, WildEarth Guardians, and Defenders of Wildlife filed a petition to FWS seeking emergency protections for the species.⁸⁷ As justification, they cited a WAFWA survey showing a slight decline in the bird's population. Yet WAFWA's grassland coordinator said that people "shouldn't read too much into short-term fluctuations over one or two years" and that lesser prairie-chickens "inhabit a large geographic landscape with highly variable weather patterns, so we expect to see annual and regional population fluctuate."⁸⁸

According to a WAFWA, aerial surveys conducted in 2017 showed that populations of the lesser prairie-chicken have remained stable over the past six years.

The survey found a 34 percent increase in the estimated breeding populations of the bird. Specifically, they found that populations increased in the northeast Texas Panhandle.⁸⁹

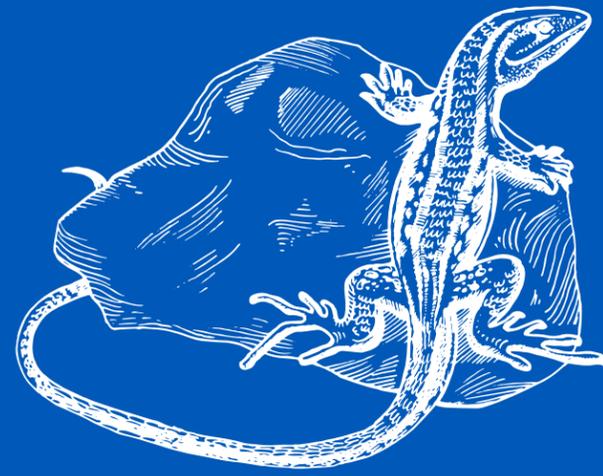
In comments submitted to FWS regarding the new listing petition, the Independent Petroleum Association of America (IPAA) noted:

"There is no basis for FWS to now conclude that [lesser prairie-chickens] meet the ESA's definitions for either threatened or endangered species. Indeed, given the unprecedented conservation efforts, ongoing monitoring program, and the [species'] known resiliency to seasonal drought, the [lesser prairie-chicken's] risk of extinction is remote, not ascertainable from the data available, and essentially unforeseeable. A conclusion otherwise would be arbitrary, capricious, a violation of the ESA, and an abuse of the Service's discretion."⁹⁰

A final listing decision by FWS is expected in early 2018.



⁸⁵ Independent Petroleum Association of America, "Comments on the U.S. Fish and Wildlife Service's 90-day Finding on a Petition to List the Lesser Prairie Chicken as an Endangered Species under the Endangered Species Act," January 30, 2017: <http://esawatch.org/wp-content/uploads/2017/01/IPAA-LPC-90-Day-Comments.pdf>. ⁸⁶ Jared Wilson, "Permian Basin Petroleum Association claims victory in ruling," OA Online, September 3, 2015: http://www.oaoa.com/news/government/article_69bd6956-5244-11e5-8271-e358fdff782.html. ⁸⁷ Scott Streater, "Enviros seek 'emergency' lesser prairie chicken protections," EE News, September 8, 2016: <https://www.eenews.net/eenewspm/stories/1060042539/>. ⁸⁸ Corbin Hiar, "Prairie chicken numbers plunge," EE News, July 1, 2016: <https://www.eenews.net/greenwire/stories/1060039739>. ⁸⁹ Western Association of Fish & Wildlife Agencies, "Aerial Surveys Confirm Lesser Prairie-Chicken Population is Holding Steady," Press Release, June 29, 2017: http://www.wafwa.org/news/e_2036/Lesser_Prairie_Chicken_News_Releases/2017/6/Aerial_Surveys_Confirm_Lesser_Prairie_Chicken_Population_is_Holding_Steady.htm. ⁹⁰ Independent Petroleum Association of America, "Comments on the U.S. Fish and Wildlife Service's 90-day Finding on a Petition to List the Lesser Prairie Chicken as an Endangered Species under the Endangered Species Act," January 30, 2017: <http://esawatch.org/wp-content/uploads/2017/01/IPAA-LPC-90-Day-Comments.pdf>.



DUNES SAGEBRUSH LIZARD



AREA

Southeast New Mexico and West Texas

HABITAT

Shinnery Oak Dunes

NOTABLE FORMATIONS

Permian Basin

The **dunes sagebrush lizard** is a small, three-inch lizard found in shinnery oak dunes in southeast New Mexico and west Texas. While a majority of the population is found in New Mexico, one-third of the lizard's habitat is on private land in seven West Texas counties: Andrews, Crane, Gaines, Winkler, Cochran, Ward, and Yoakum.⁹¹ Like the lesser prairie-chicken, its habitat includes large portions of the Permian Basin.

In 2002, CBD petitioned FWS to list the dunes sagebrush lizard under the ESA. The agency determined a listing was warranted but precluded, and made it a candidate species.⁹² FWS proposed listing the species as endangered in 2010, citing a decline, degradation, and fragmentation of its habitat. The agency claimed increased oil and natural gas development had caused "direct and indirect effects" to its habitat.⁹³

A final listing of the dunes sagebrush lizard as endangered would have not only delayed the permitting process for oil and natural gas operations in the Permian, but would have potentially shut down drilling activity for years while FWS made decisions on critical habitat designations. As PBPA President Ben Shepperd explained, "that means no drilling, no seismic surveys, no roads built, no electric lines."⁹⁴ Debbie Hastings of the Texas Oil and Gas Association (TXOGA) also noted that the consequences of an ESA listing would be "significant to the economic health of Texas."⁹⁵

In response to the proposed listing, oil and natural gas operators in Texas immediately started collaborating with state officials, organizations, and FWS on implementing voluntary conservation measures. The Texas Conservation Plan (TCP) was developed

⁹¹ U.S. Fish & Wildlife Service, "Species Profile for Dunes Sagebrush Lizard": <https://ecos.fws.gov/ecp0/profile/speciesProfile?spcode=C03J>.

⁹² Ibid. ⁹³ Government Printing Office, "Endangered and Threatened Wildlife and Plants; Endangered Status for Dunes Sagebrush Lizard," Federal Register, Vol. 75, No. 239, December, 14, 2010: <https://www.gpo.gov/fdsys/pkg/FR-2010-12-14/pdf/2010-31140.pdf#page=1>.

⁹⁴ Mella McEwen, "Could a three-inch lizard collapse the West Texas oil industry?," Midland Reporter-Telegram, April 23, 2011: <http://www.mrt.com/business/energy/article/Could-a-three-inch-lizard-collapse-the-West-Texas-7435908.php#ixzz1Y94VD6BZ>. ⁹⁵ Kirby Brown, "The Dunes Sagebrush Lizard and the Proposed Texas Conservation Plan," Texas Wildlife, November 2011: https://www.texas-wildlife.org/images/uploads/Dunes_Sagebrush_Lizard_part_2.pdf.

in coordination with FWS. It's a 30-year plan that provides energy producers and private landowners with regulatory certainty and assurances in exchange for implementing conservation measures. The Texas Comptroller holds the federal permit for the plan and is responsible for its implementation.⁹⁶

According to Dr. Benjamin Tuggle, Southwest Regional Director for FWS, avoidance is one of the main conservation measures employed by companies – that is, trying to avoid direct impacts to the dunes where the lizards live. He explained, "it doesn't mean that they cannot drill for oil underneath those habitats. They simply will create their paths in areas where there is not lizard habitat. What we're talking about is avoiding putting things like caliche pads and other types of infrastructure like oil pipes or things like that directly in the habitat itself."⁹⁷

As part of the TCP, oil and natural gas operators reclaimed abandoned drilling pads and roads, rerouted pipelines, removed hundreds of acres of invasive mesquite, and relocated drilling pads to preserve habitats.⁹⁸ Working together, FWS, the Texas

Comptroller, and oil and natural gas operators secured protections for over 85 percent of the lizard's habitat.⁹⁹

In 2012, in large part due to the TCP, FWS withdrew its proposed endangered listing for the dunes sagebrush lizard. In the notice, FWS explained that "threats to the species as identified in the proposed rule no longer are as significant as believed," which was based on an "analysis of current and future threats and conservation efforts."¹⁰⁰

Then-Secretary of the Interior Ken Salazar said the announcement was a "win-win for the Endangered Species Act and its conservation values, as well as oil and gas."¹⁰¹ He also praised the TCP, saying "I'm 100 percent confident that [the conservation agreements] will be effective" and that efforts in the Permian Basin could become a conservation model for the country.¹⁰²

Five years into the plan, it's still working. According to Texas Comptroller Hegar, fewer than 300 of 200,000 acres of the species' Texas habitat have been disturbed by program participants since implementation of the TCP.¹⁰³

DID YOU KNOW?

Protecting the Dunes Sagebrush Lizard

Fewer than 300 of 200,000 acres of the species' Texas habitat have been disturbed by program participants since implementation of the TCP.

⁹⁶ U.S. House Natural Resources Committee, "Testimony of Glenn Hegar," July 19, 2017: https://naturalresources.house.gov/uploadedfiles/testimony_hegar.pdf. ⁹⁷ Terrence Henry, "How the Conservation Plan for the Dunes Sagebrush Lizard Works," State Impact, June 15, 2012: <https://stateimpact.npr.org/texas/2012/06/15/how-the-conservation-plan-for-the-dunes-sagebrush-lizard-works/>. ⁹⁸ Glenn Hegar, "Protecting the Texas Environment and the Economy," Austin American-Statesman, April 6, 2016: <http://www.mystatesman.com/news/opinion/hegar-protecting-the-texas-environment-and-the-economy/6G4JotNGF7qBWWEHXgB5L/>. ⁹⁹ Independent Petroleum Association of America, "IPAA and Allies Challenge Dunes Sagebrush Lizard Lawsuit," Press Release, April 28, 2014: <http://esawatch.org/ipaa-and-allies-challenge-dunes-sagebrush-lizard-lawsuit/>. ¹⁰⁰ Government Printing Office, "Endangered and Threatened Wildlife and Plants; Withdrawal of the Proposed Rule To List Dunes Sagebrush Lizard; Proposed Rule," Federal Register Volume 77, Number 118, June 19, 2012: <https://www.gpo.gov/fdsys/pkg/FR-2012-06-19/html/2012-14818.htm>. ¹⁰¹ Phil Taylor, "FWS chief walks minefield between species and energy boom," EE News, March 7, 2014: <https://www.eenews.net/stories/1059995774>. ¹⁰² Kate Galbraith, "Combs, Oil Groups Applaud Decision to Keep Lizard Off Endangered List," Texas Tribune, June 13, 2012: <https://www.texastribune.org/2012/06/13/texas-oil-groups-applaud-key-lizard-decision/>. ¹⁰³ U.S. House Natural Resources Committee, "Testimony of Glenn Hegar," July 19, 2017: https://naturalresources.house.gov/uploadedfiles/testimony_hegar.pdf.

However, the Texas Comptroller's office recently noted that sand operations in the basin, which provide sand used for hydraulic fracturing, could "significantly impact dunes sagebrush lizard habitat."¹⁰⁴ Due to the increased demand for frac-sand and the resources' proximity to existing oil and natural gas activities, companies have recently started to purchase or lease large tracts of land in the Permian Basin. Unfortunately, frac-sand is the same type of sand preferred by the dunes sagebrush lizard.¹⁰⁵

In 2017, 15 frac-sand companies began or made plans to operate in the area. According to the Texas Comptroller, sand miners have already disturbed more than 271 acres of the lizard's habitat. These actions could undermine the TCP and potentially lead to a future listing of the species.¹⁰⁶

Comptroller Hegar, along with TXOGA and PBPA, have been meeting with sand mining companies to explain

the risk posed to the dunes sagebrush lizard. TXOGA President Todd Staples said they have "urged sand miners to avoid impact to [the lizard's] habitat."¹⁰⁷

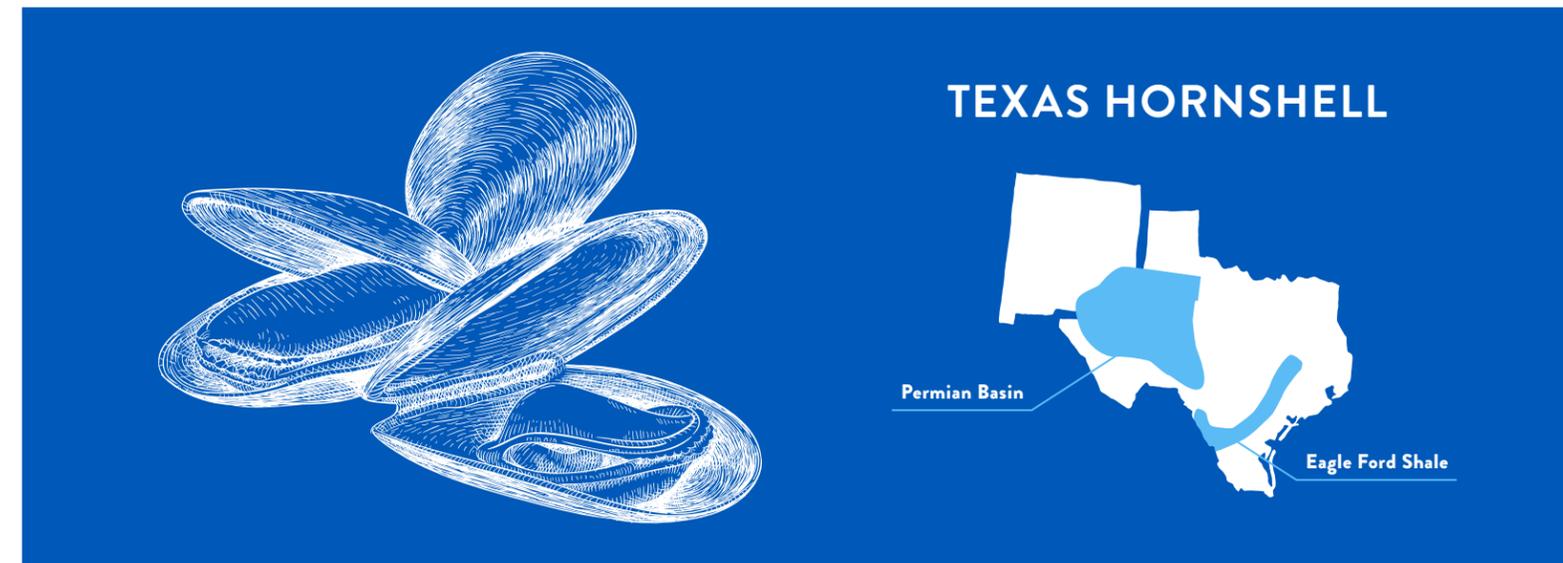
As a result of these conversations, two companies have already changed their project plans and joined the TCP. In addition, they have agreed to contribute funding for mitigation and research within the species habitat. Another two companies designed their operational project plans to avoid the dunes sagebrush lizard's habitat.¹⁰⁸

Nonetheless, CBD and Defenders of Wildlife have filed notice of their intent to petition FWS to list the species.¹⁰⁹

"The Permian Basin is an important economic engine for Texas and the nation, and the last thing that any of [the companies] want to happen is a potential listing," said Comptroller Hegar.¹¹⁰



¹⁰⁴ Texas Comptroller of Public Accounts, "Supplement to July 2017 Monthly Report for the Texas Conservation Plan for the Dunes Sagebrush Lizard," August 20, 2017: https://cci-dev.org/analysis/DSL_sand_mines/doc/TX_comptroller_to_FWS_mining.pdf. ¹⁰⁵ Christopher Matthews, "It's Lizard vs. Oil Magnate in the Latest Fight Over Fracking in Texas Wall Street Journal," October 13, 2017: <https://www.wsj.com/articles/miners-tiptoe-around-lizard-in-latest-fracking-dust-up-1507905320>. ¹⁰⁶ Texas Comptroller of Public Accounts, "Supplement to July 2017 Monthly Report for the Texas Conservation Plan for the Dunes Sagebrush Lizard," August 20, 2017: https://cci-dev.org/analysis/DSL_sand_mines/doc/TX_comptroller_to_FWS_mining.pdf. ¹⁰⁷ Shannon Najmabadi, "Report: Sand miners disturbing threatened West Texas lizard's habitat," Texas Tribune, September 25, 2017: <https://www.texastribune.org/2017/09/25/west-texas-lizard-threatened-sand-miners/>. ¹⁰⁸ Texas Comptroller of Public Accounts, "Supplement to July 2017 Monthly Report for the Texas Conservation Plan for the Dunes Sagebrush Lizard," August 20, 2017: https://cci-dev.org/analysis/DSL_sand_mines/doc/TX_comptroller_to_FWS_mining.pdf. ¹⁰⁹ Christopher Matthews, "It's Lizard vs. Oil Magnate in the Latest Fight Over Fracking in Texas Wall Street Journal," October 13, 2017: <https://www.wsj.com/articles/miners-tiptoe-around-lizard-in-latest-fracking-dust-up-1507905320>. ¹¹⁰ Ibid.

**AREA**

New Mexico and West Texas

HABITAT

Rivers

NOTABLE FORMATIONS

Permian Basin and Eagle Ford Shale

The **Texas hornshell** is a freshwater mussel found in rivers in New Mexico and west Texas. It is known as a filter feeder and helps clean the water, filters sediment, and contributes to nutrient cycling.¹¹¹

In Texas, there are currently four known populations of the species: Pecos River (Val Verde County), Devils River (Val Verde County), Lower Canyons of the Rio Grande (Brewster and Terrell Counties), and Lower Rio Grande near Laredo (Webb County).¹¹² A listing of the Texas hornshell, and any subsequent critical habitat designations, could impact oil and natural gas operations in the Permian Basin and Eagle Ford Shale. The Texas Comptroller's office noted that the "Texas hornshell

occurs in a region with significant economic activity that could be restricted if the species is listed."¹¹³

The Texas hornshell was included in the 2011 mega-settlement with CBD and WildEarth Guardians. In 2016, FWS proposed to list the species as endangered, noting significant population declines in the United States.¹¹⁴ According to FWS' Species Status Assessment Report, the primary threats to the species are changes in habit caused by a loss of flowing water, degradation of water quality, and sedimentation.¹¹⁵ However, many state experts and stakeholders believe the assessment "is scientifically inadequate to support a determination that a listing is warranted."¹¹⁶

¹¹¹ Gabe Saldana, "Researcher looks into declining Texas mussel populations," Phys.org, June 5, 2017: <https://phys.org/news/2017-06-declining-texas-mussel-populations.html>. ¹¹² U.S. Fish & Wildlife Service, "Species Profile for Texas Hornshell": <https://ecos.fws.gov/ecp0/profile/speciesProfile?spcode=F02M>. ¹¹³ Daniel J. Chacón, "Feds put off decision on Texas hornshell's status," The New Mexican, August 10, 2017: http://www.santafenewmexican.com/news/local_news/feds-put-off-decision-on-texas-hornshell-s-status/article_de9177a4-284e-5bae-85d7-e3c692f9259d.html. ¹¹⁴ Government Printing Office, "Endangered and Threatened Wildlife and Plants; Endangered Species Status for Texas Hornshell," Federal Register, Vol. 81, No. 154, August 10, 2016: <https://www.gpo.gov/fdsys/pkg/FR-2016-08-10/pdf/2016-18816.pdf>. ¹¹⁵ U.S. Fish & Wildlife Service, "Species Assessment and Listing Priority Assignment Form," March 1, 2013: https://ecos.fws.gov/docs/candidate/assessments/2013/r2/F02M_I01.pdf. ¹¹⁶ Daniel J. Chacón, "Feds put off decision on Texas hornshell's status," The New Mexican, August 10, 2017: http://www.santafenewmexican.com/news/local_news/feds-put-off-decision-on-texas-hornshell-s-status/article_de9177a4-284e-5bae-85d7-e3c692f9259d.html.

Environmental groups such as CBD claim that “pollution from oil and gas drilling” is contributing to a decline in the species population.¹¹⁷ However, according to the IPAA and API, their member companies do not operate in the species’ habitat. They note: “Industry practices and the terms and conditions of the permits under which we operate for drilling, production, gathering, and transportation activities set requirements and provide guidelines to prevent this from occurring.”¹¹⁸

While oil and natural gas production is carried out near waters where the species can be found, all activities are heavily regulated by the states and must adhere to permitting requirements that already prevent disruption to the Texas hornshell. For example, in order to help conserve and protect the Texas hornshell, oil and natural gas companies locate operations at a safe distance away from water where the species lives, prevent runoff from drilling and production sites, minimize the generation of material that could produce fine sediment, and prevent and/or contain spills that could impact water quality.¹¹⁹

In addition, voluntary Candidate Conservation Agreements and Candidate Conservation Agreements with Assurances are being finalized by stakeholders in Texas and New Mexico, in conjunction with FWS, to provide further protections for the species and its surrounding environment, without requiring a listing under the ESA.¹²⁰

The State of Texas has allocated more than \$3.6 million for research on the Texas hornshell and 11 other freshwater mussels to learn more about their distribution and genetics, as well as conservation tools. “River authorities, agriculture groups, environmental organizations, and energy producers are all involved in our stakeholder process to fine-tune the science and identify conservation opportunities,” said Texas Comptroller Hegar.¹²¹

Megan Hope, a policy analyst in the Texas Comptroller’s office, explained that the research they are funding will help to better understand the magnitude of the threats to the Texas hornshell. “We come in to make sure the [FWS] has as much science on hand as possible to make a decision,” said Hope.¹²²

In August 2017, FWS announced a six-month delay in making a final listing decision for the Texas hornshell in order to receive additional public comments and collect new data about populations of the species in Mexico.¹²³ A final listing decision on the species is expected in early 2018.

FWS is also considering listing 11 other freshwater mussels found in Texas and throughout the country. Many believe that the final decision on the Texas hornshell will serve as a good indication on how FWS may act on the other mussel species. “This move

DID YOU KNOW?

Protecting the Texas Hornshell

The State of Texas has allocated more than \$3.6 million for research on the Texas hornshell and 11 other freshwater mussels.

¹¹⁷ Center for Biological Diversity, “Vanishing Rio Grande Mussel Proposed for Endangered Species Protection,” Press Release, August 9, 2016: http://www.biologicaldiversity.org/news/press_releases/2016/texas-hornshell-08-09-2016.html. ¹¹⁸ Independent Petroleum Association of America, “Comments on Proposed Endangered Species Status for Texas Hornshell,” October 10, 2016: <http://esawatch.org/wp-content/uploads/2016/10/IPAA-on-Texas-Hornshell.pdf>. ¹¹⁹ Ibid. ¹²⁰ U.S. Fish & Wildlife Service, “Service Announces Draft Conservation Agreements to Aid the Texas Hornshell,” Press Release, July 6, 2017: https://www.fws.gov/southwest/es/newmexico/documents/THS_CCAA_NR.pdf. ¹²¹ U.S. House Natural Resources Committee, “Testimony of Glenn Hegar,” July 19, 2017: https://naturalresources.house.gov/uploadedfiles/testimony_hegar.pdf. ¹²² Cassandra Pollock, “The Q&A: Meghan Hope,” Texas Tribune, March 7, 2017: <https://www.texastribune.org/2017/03/07/q-meghan-hope-march8/>. ¹²³ Government Printing Office, “6-Month Extension of Final Determination on the Proposed Endangered Status for Texas Hornshell,” Federal Register, Vol. 82, No. 153, August 10, 2017: <https://www.gpo.gov/fdsys/pkg/FR-2017-08-10/pdf/2017-16887.pdf>.

provides insight into their thinking” on the remaining species, said Charles Randklev, a mussel expert at Texas A&M University.¹²⁴

If FWS does move ahead with an endangered or threatened listing of the Texas hornshell, IPAA and API are requesting that the rule “include guidance specifying that drilling and production operations conducted in compliance with appropriate permits and located at a sufficient distance from waters where the Texas hornshell is found will not result in ‘take’ of the species nor will it adversely modify critical habitat if and when the Service designates critical habitat.”¹²⁵



MAKING THE ESA WORK BETTER FOR TEXANS

Americans support efforts to protect at-risk species. However, since becoming law in 1973, many local, state, and federal leaders have raised concerns and questions about the way in which the ESA is implemented, not to mention its effectiveness.¹²⁶ Former FWS Director Dan Ashe, who served in the Obama Administration, even acknowledged that there is room for change and improvement, telling Congress: “The ESA is a tool by which we conserve our nation’s biological diversity. Like any tool, it can be improved.”¹²⁷

From the need for modernization to its lack of transparency, many question whether the law is working as best it can for both species and people.

“The ESA is a tool by which we conserve our nation’s biological diversity. Like any tool, it can be improved.”

DAN ASHE, FORMER FWS DIRECTOR

¹²⁴ Asher Price, “Texas mussel proposed as endangered, with implications for waterways,” Austin American-Statesman, August 10, 2016: <http://www.mystatesman.com/news/texas-mussel-proposed-endangered-with-implications-for-waterways/7rLrNETDPg6R4o2miCsmT/>.

¹²⁵ Independent Petroleum Association of America, “Comments on Proposed Endangered Species Status for Texas Hornshell,” October 10, 2016: <http://esawatch.org/wp-content/uploads/2016/10/IPAA-on-Texas-Hornshell.pdf>. ¹²⁶ Endangered Species Act Congressional Working Group, “Report, Findings and Recommendations,” February 4, 2014: https://naturalresources.house.gov/uploadedfiles/esa_working_group_final_report_and_recommendations_02_04_14.pdf. ¹²⁷ U.S. Government Printing Office, “House Natural Resources Committee Hearing Transcript: Transparency and Sound Science Gone Extinct?,” August 1, 2013: <https://www.gpo.gov/fdsys/pkg/CHRG-113hrg82446/pdf/CHRG-113hrg82446.pdf>.

OUTDATED

The ESA was last amended in 1988, meaning it has been nearly three decades since any changes or updates have been made to the Act – and the 1988 amendments weren't exactly overhauls. The FWS even acknowledged that “the overall framework of the 1973 Act [is] essentially unchanged.”¹²⁸

But a lot has changed in the world since 1988, and many believe it's time to bring the law into the 21st century. As former U.S. House Natural Resources Committee Chairman Doc Hastings (R-Wash.) once explained, “In 1988 there was no Internet in our homes, people

sent letters instead of emails, we listened to music on a Walkman instead of an iPod, and no one had heard of smart phones or text messages. Today, we wouldn't depend on technology from the 1980s and, similarly, we shouldn't assume that a law last reviewed in the 1980s is the best and most effective for today's world.”¹²⁹

Many activist groups see any effort to update the law as an attempt to weaken protections for species. In reality, the law would be strengthened by better reflecting current scientific methods, technologies, and information gathering practices.

NOT ENOUGH FOCUS ON RECOVERY

While FWS has stated that “full recovery and removal from federal protection” is the “ultimate goal”¹³⁰ of the ESA, many believe this is an area where the agency is falling short, and that not enough emphasis is being placed on species recovery.

According to FWS, there are currently 80 species that have been delisted. However, 10 of these species were delisted because they went extinct, and 20 more were delisted due to data errors – meaning they never should have been listed in the first place. That means that only 50 out of the 2,481 listed species have actually been recovered; a recovery rate of only two percent.¹³¹

By this standard, the ESA is failing to achieve its own self-described goal of species recovery.

DID YOU KNOW?

The recovery rate for endangered species under the ESA is only **two percent**. Many listed species do not even have recovery plans.

¹²⁸ U.S. Fish & Wildlife Service, “A History of the Endangered Species Act of 1973,” August 2011: https://www.fws.gov/endangered/esa-library/pdf/history_ESA.pdf. ¹²⁹ Doc Hastings and Cynthia Lumis, “Improving the Endangered Species Act for the 21st Century,” Daily Caller, March 11, 2014: <http://dailycaller.com/2014/03/11/improving-the-endangered-species-act-for-the-21st-century/>. ¹³⁰ U.S. Fish & Wildlife Service, “Report to Congress on the Recovery of Threatened and Endangered Species,” FY 2013-2014: https://www.fws.gov/Endangered/esa-library/pdf/Recovery_Report_FY2013-2014.pdf. ¹³¹ U.S. Fish & Wildlife Service, “Delisted Species,” accessed October 18, 2017: <https://ecos.fws.gov/ecp0/reports/delisting-report>.

Over the past 44 years, species continue to be added to the list while very few have ever been taken off. Current FWS Acting Director Gregory Sheehan has noted that while the Act has been successful in saving species from going extinct, more work needs to be done on actual recovery efforts:

“I find it helpful to think of the ESA as a hospital, where critically ill patients are admitted in hopes of recovery. We have done a pretty good job of keeping those patients from dying, but not so well on getting them discharged in healthy condition. Therefore, we need to step up our efforts to quickly diagnose the problems, define recovery actions, and get those patients back out into society. The ESA hospital was never intended to keep all patients indefinitely.”¹³²

Section 4 of the ESA calls for the development and implementation of recovery plans to support the conservation and survival of listed species, working towards the goal of being delisted. The plans are to incorporate site-specific management actions, objective and measurable criteria, and an estimate of time and costs.¹³³

Unfortunately, many species do not even have recovery plans. According to FWS' most recent review of its

recovery efforts, 22 percent of listed species are without a recovery plan.¹³⁴ David Wilms, natural resources policy advisor for Wyoming Governor Matt Mead, described these species as being “in purgatory with no discernible path to recovery.”¹³⁵

Simply because a species has a recovery plan does not automatically mean it has seen improvements in its status. Based on FWS' last five-year review of listed species, only six percent were categorized as improving. The vast majority (92 percent) had no change to their listed status.¹³⁶

Environmental activists have acknowledged the slow rate of recovery under the Act, with one environmental lawyer admitting that it could take “a century or more, if ever” for some species to be delisted.¹³⁷ For a law that has massive economic impacts today, this long and poorly defined time frame for recovery should be seen as a major flaw of the existing ESA.

Moreover, if a species has recovered and met the goal outlined in the recovery plan, it can still take years to actually be downgraded or removed from the list. For example, after FWS announced the recovery of the bald eagle, it took eight years and a court order for full delisting.¹³⁸

¹³² U.S. House Natural Resources Committee, “Testimony of Gregory Sheehan,” July 19, 2017: https://naturalresources.house.gov/uploadedfiles/testimony_sheehan.pdf. ¹³³ Government Printing Office, “House Natural Resources Committee Hearing Transcript: Defining Species Conservation Success,” June 4, 2013: <https://www.gpo.gov/fdsys/pkg/CHRG-113hrg81318/pdf/CHRG-113hrg81318.pdf>. ¹³⁴ U.S. Fish & Wildlife Service, “Report to Congress on the Recovery of Threatened and Endangered Species,” FY 2013-2014: https://www.fws.gov/Endangered/esa-library/pdf/Recovery_Report_FY2013-2014.pdf. ¹³⁵ U.S. House Natural Resources Committee, “Testimony of David J. Wilms,” July 19, 2017: https://naturalresources.house.gov/uploadedfiles/testimony_wilms_withattachment.pdf. ¹³⁶ U.S. Fish & Wildlife Service, “Report to Congress on the Recovery of Threatened and Endangered Species,” FY 2013-2014: https://www.fws.gov/Endangered/esa-library/pdf/Recovery_Report_FY2013-2014.pdf. ¹³⁷ Government Printing Office, “House Natural Resources Committee Hearing Transcript: Defining Species Conservation Success,” June 4, 2013: <https://www.gpo.gov/fdsys/pkg/CHRG-113hrg81318/pdf/CHRG-113hrg81318.pdf>. ¹³⁸ Government Printing Office, “Removing the Bald Eagle in the Lower 48 States from the List of Endangered and Threatened Wildlife,” Federal Register Volume 72, Issue 130, July 9, 2007: <https://www.gpo.gov/fdsys/granule/FR-2007-07-09/07-4302/content-detail.html>.

LACK OF TRANSPARENCY AND SOUND SCIENCE

The ESA requires that listing decisions be based on the best available science. However, at times the actual science behind some of the decisions is lacking – either being decades-old or simply unavailable. Texas Comptroller Hegar has emphasized this point, stating that often “relatively little is known about the population, range, habitat and needs of these species, providing a poor basis for decisions that can have major economic consequences.”¹³⁹

For example, lack of sound science helped lead to the 1989 listing of the American Burying Beetle, whose habitat spans across ten states including Texas. The Independent Petroleum Association of America (IPAA) filed a delisting petition in 2015 after demonstrating that the original listing was in error and based on false assumptions of the species’ range and abundance. IPAA recently filed a lawsuit against FWS for failure to act on the petition. In Oklahoma alone, the American Burying Beetle has cost at least \$6.5 million in protection efforts.¹⁴⁰

In 2013, now House Natural Resources Committee Chairman Rob Bishop (R-Utah) uncovered examples where FWS has made recommendations on listing decisions and then gone back to its scientists to ask for data to back-up their conclusion. Bishop called

this process “reversed” and not how ESA decisions are supposed to be made.¹⁴¹ Indeed, working backwards from a conclusion is the opposite of the scientific process.

The scientific data on which the opinions are based are often not publicly available for review and analysis. Scientist and former Interior Department employee Dr. Rob Roy Ramey III strongly believes this lack of transparency should be addressed:

“A requirement that data and methods be provided in sufficient detail to allow third party reproduction would raise the bar on the quality and reproducibility of the science used in ESA decisions and benefit species recovery. Failure to ensure this level of transparency will undermine the effectiveness of the very programs that the data were gathered for in the first place.”¹⁴²

While bipartisanship in Congress is often hard to come by, there appears to be agreement when it comes to the need for increased transparency in ESA decision-making. Congressman Peter Defazio (D-Ore.) questioned FWS about why all data used to make listing decisions is not publicly available. “I don’t understand why we would go down the path of withholding data,” he said.¹⁴³

¹³⁹ U.S. House Natural Resources Committee, “Testimony of Glenn Hegar,” July 19, 2017: https://naturalresources.house.gov/uploadedfiles/testimony_hegar.pdf. ¹⁴⁰ Independent Petroleum Association of America, “Groups Call for Action on American Burying Beetle,” September 21, 2017: <http://www.ipaa.org/groups-call-for-action-on-american-burying-beetle/>. ¹⁴¹ U.S. Government Printing Office, “House Natural Resources Committee Hearing Transcript: Transparency and Sound Science Gone Extinct?,” August 1, 2013: <https://www.gpo.gov/fdsys/pkg/CHRG-113hrg82446/pdf/CHRG-113hrg82446.pdf>. ¹⁴² U.S. House Natural Resources Committee, “Testimony of Rob Roy Ramey II, Ph.D.,” August 2, 2013: <https://naturalresources.house.gov/uploadedfiles/rameytestimony08-02-13.pdf>. ¹⁴³ U.S. Government Printing Office, “House Natural Resources Committee Hearing Transcript: Transparency and Sound Science Gone Extinct?,” August 1, 2013: <https://www.gpo.gov/fdsys/pkg/CHRG-113hrg82446/pdf/CHRG-113hrg82446.pdf>.

BROAD ECONOMIC IMPACTS

Listing species under the ESA and the designation of critical habitat can severely impact all types of economic development – including oil and natural gas production. Complying with ESA regulations is often a long, complicated process involving numerous permits and approvals from different agencies, which often leads to lengthy delays, high costs, expensive modifications, or complete shut-downs of projects.

Trying to get approval of a project that occurs in an area occupied by a listed species can be extremely difficult and requires the navigation of several regulatory obstacles.

If the proposed activity requires a federal permit, the federal agency issuing the permit must assure that the activities will not jeopardize the species or modify its habitat. If the proposed activity “may” result in impacts to the species or habitat, the law (section 7) requires the agency to consult with FWS. As part of this process, FWS will prepare a Biological Opinion to further determine the impacts, which plays a major part in the permitting decision.¹⁴⁴

DID YOU KNOW?

69 percent of INGAA members are concerned with the timing and length of ESA’s consultation process.

For activities on state and private land (which includes most oil and natural gas production in Texas), it’s necessary to obtain an incidental take permit if there’s a listed species in the area. As part of this process, one would need to develop a Habitat Conservation Plan

(HCP). This plan details how one will minimize and mitigate harm to the species. Approval of the plan may further require the completion of an Environmental Assessment or an Environmental Impact Statement. In addition, all incidental take permits go through a 30-day public comment period, giving environmental special interest groups yet another opportunity to shut down or restrict energy development.¹⁴⁵

Oil and natural gas companies already go through a lengthy permit and approval process, which can be slowed as they work their way through consultation with FWS. In a recent survey conducted by the Interstate Natural Gas Association of America (INGAA), 69 percent of its members reported that “timing or length of consultation process” was their number one concern related to ESA’s application and administration.¹⁴⁶ This is because delays and uncertainties can be costly to both companies and consumers. According to INGAA, a two-year delay on a natural gas pipeline project can translate into a cost of approximately \$200 billion (in 2003 dollars) to U.S. gas consumers by 2020.¹⁴⁷

It’s not only oil and natural gas development that’s impacted by the ESA. Renewable energy projects, farming, ranching, logging, military operations, and transportation projects have all been impacted by listed species or the regulatory uncertainty associated with non-listed at-risk species.

For example, a dime-sized endangered spider halted a highway project in San Antonio for years. The project ultimately had to be redesigned and turned into an overpass – at three times the original cost.¹⁴⁸

The listing of the golden-cheek warbler, a small songbird, has not only impeded economic development projects in Central Texas, but also restricted military and training

¹⁴⁴ U.S. Fish & Wildlife Service, “HCPs – Frequently Asked Questions,” April 14, 2015: https://www.fws.gov/Midwest/endangered/permits/hcp/hcp_faqs.html. ¹⁴⁵ Ibid. ¹⁴⁶ Interstate Natural Gas Association of America, “Suggestions on How to Improve the Endangered Species Act,” November 2007: <http://www.ingaa.org/File.aspx?id=5691>. ¹⁴⁷ Ibid. ¹⁴⁸ Vianna Davila, “Highway project stopped by spider will cost three times more to finish,” San Antonio Express News, October 6, 2014: <http://www.mysanantonio.com/news/local/article/Highway-project-stopped-by-spider-will-cost-three-5803112.php>.

operations at Fort Hood. The Commanding General at Fort Hood is one of many officials supporting the delisting of the warbler, largely based on studies that have shown sustained population growth. As reported

in the New York Times, Fort Hood “pays hundreds of thousands of dollars to comply with the act, including funding a biological assessment every five years.”¹⁴⁹

CONCLUSION

Texans understand the important role that oil and natural gas production plays in our daily lives – providing affordable energy to power our homes, businesses, and vehicles; creating good jobs directly for hundreds of thousands of people; providing economic growth; and generating revenue to pay for vital services such as public education, emergency services, and transportation projects. Texas is the largest oil and natural gas producer in the country, meaning the United States’ recent ascent to a world energy leader is in large part due to what has happened in the Lone Star State. This is why it is crucial that regulations, such as the ESA, are not implemented in a way that would unnecessarily restrict this vital source of domestic energy.

The ESA plays an important role in conserving and protecting species. Unfortunately, it is too often used and abused by activist groups to shut down oil and natural gas production and other types of economic development without benefits to species or its habitat. Updates to strengthen the 44-year law would ensure

its focus remains on species recovery instead of a tool for litigation to advance an extreme “Keep It In the Ground” agenda.

Applying more flexible regulatory deadlines, increasing the role of states to conserve species and implement conservation plans, litigation reform, and increasing transparency of the science and data used are a few of the changes that should be considered in order to make the law work better for both species and people.

Meanwhile, oil and natural gas operators in Texas continue to support efforts to protect at-risk, threatened, and endangered species, while also implementing mitigation measures to avoid impacts to species and their habitats. The proactive coordination across industry, landowners, states, and federal officials proves that it’s possible to protect species while allowing for the continued, responsible development of oil and natural gas resources.

¹⁴⁹ David Montgomery, “Threat to Tiny Golden-Cheeked Warbler Is Disputed in Texas,” New York Times, July 31, 2015: <https://www.nytimes.com/2015/08/01/us/threat-to-tiny-golden-cheeked-warbler-is-disputed-in-texas.html>.