



August 31, 2021

Via electronic submission (<http://www.regulations.gov>)

United States Fish and Wildlife Service

Attn: FWS-R2-ES-2021-0015

MS: PRB/3W Leesburg Pike

Falls Church, VA 22041-3803

Re: Docket No. FWS-R2-ES-2021-0015; Threatened Species Status with Section 4(d) Rule for the Northern Distinct Population Segment and Endangered Status for the Southern Distinct Population Segment of the Lesser-Prairie Chicken; Proposed Listing

Dear Sir or Madam:

GPA Midstream Association (“GPA Midstream”) appreciates the opportunity provided by the U.S. Fish and Wildlife Service (“Service”) to submit comments on the Service’s proposal to list the Southern Distinct Population Segment (“DPS”) of the Lesser Prairie-Chicken (“LEPC”) as an endangered species and the Northern DPS of the LEPC as a threatened species under the Endangered Species Act (“ESA”) (hereinafter the “Proposed Listing”¹).

GPA Midstream has served the U.S. energy industry since 1921 and has approximately 70 corporate members that directly employ more than 75,000 employees that are engaged in a wide variety of services that gather, move, and process vital energy products such as natural gas, natural gas liquids (“NGLs”), refined products, and crude oil from production areas to markets, commonly referred to as “midstream activities,” across the U.S. GPA Midstream members account for more than 90% of the NGLs—such as ethane, propane, butane, and natural gasoline—produced or recovered in the U.S. from more than 400 natural gas processing facilities. The work of our members indirectly creates or impacts an additional 450,000 jobs across the U.S. economy.

GPA Midstream opposes the Proposed Listing, because the LEPC’s stable population and the effectiveness of past, ongoing, and future conservation measures preclude such a listing. The Agency should instead find that any ESA listing here is not warranted. Should the Service nonetheless determine to move forward with the Proposed Listing, the Agency should ensure industrial activities related to maintenance and upkeep of current infrastructure permitted under any applicable 4(d) rule is applied fairly and evenly across business sectors.

¹ 86 Fed. Reg. 29,432 (June 1, 2021) (hereinafter “Proposed Rule”).

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1. The LEPC range-wide population is stable and not in danger of becoming extinct now or in the near future

Contrary to the Proposed Listing, the Service’s March 2021 Species Status Assessment Report (“SSA Report”) and other available data demonstrate the LEPC population is stable, despite naturally-occurring fluctuation, and has actually increased range-wide in recent years.² While the estimated population fluctuates across its historical geographic range, the data suggests a shift in the population range and not a steady decline range-wide.³ For example, the Short-Grass/CRP ecoregion (part of the northern DPS) historically accounted for a low number of LEPCs. That ecoregion has now seen an expansion of the known LEPC range and an increase in the abundance of the LEPC—and it is estimated to “contain the majority of LEPC compared to the other ecoregions” at this time.⁴ While this increase in population may be a direct result of local and state habitat rehabilitation and conservation efforts, as described in more detail below, this stable and increasing population in no way warrants the Proposed Listing.⁵

The latest aerial survey from the Western Association of Fish and Wildlife Agencies (“WAFWA”), released in 2020, also shows that LEPC “population estimates remain stable from the previous survey and—more importantly—the estimated number of birds has increased since surveys began in 2012.”⁶ By contrast, the Service’s Proposed Listing selectively highlights individual years with low estimated population sizes and asserts that is indicative of a downward trend. However, this claim fails to account for the natural fluctuation in the LEPC population, often due to stochastic events associated with extreme weather conditions such as snow storms or drought, that has long been present.⁷ Because the four primary ecoregions of the LEPC span a

² U.S. Fish and Wildlife Service, Species Status Assessment Report for the Lesser-Prairie-Chicken (*Tympanuchus pallidicinctus*), Version 2.2, at 65, Figure 3.2 (March 2021) (hereinafter “SSA Report”) (showing range-wide total trending upwards since 2013).

³ Kansas Department of Wildlife, Parks, and Tourism, “Lesser Prairie Chicken Population Surveyed Range-Wide” (Oct. 11, 2012) (last accessed July 26, 2021, at <https://ksoutdoors.com/KDWP-Info/News/News-Archive/2012-Weekly-News/10-11-12/LESSER-PRAIRIE-CHICKEN-POPULATION-SURVEYED-RANGE-WIDE>) (Biologists discovered leks in Kansas beyond what was thought to be the northern limit of the historic range of the species and noting LEPC numbers have largely increased in the northern portion of its range while declining in the southern portion leaving biologists to believe “this expansion may represent a northward shift in the population of the species caused by climatic conditions associated with changing precipitation patterns.”)

⁴ SSA Report, at 16; *see also id.*, at xi (The Short-Grass Prairie/CRP Mosaic Ecoregion has maintained the largest LEPC population since the early 2000’s despite there being “very few birds in this area in the 1980’s” and “quasi-extinction risks calculated from past ground-based surveys for this ecoregion were at or near 0 in the 30-year projections.”).

⁵ *Id.*, at 15.

⁶ Western Association of Fish and Wildlife Agencies (“WAFWA”), “Aerial Surveys Document Stable Lesser Prairie-Chicken Population Trends” (July 16, 2020) (last accessed July 27, 2021, at <https://wafwa.org/aerial-surveys-document-stable-lesser-prairie-chicken-population-trends/>) (Note also that the population’s most significant decline occurred around 2012–13 after significant drought).

⁷ SSA Report, at xi (“Weather conditions are critical aspects influencing the temporal fluctuations of LEPC populations that produce dramatic annual fluctuations in LEPC abundance. Under wet and mild weather conditions, LEPC populations will increase, and under drought or extreme weather conditions, LEPC populations will decrease.”); *see also* 74 Fed. Reg. 57,803, 57,827 (Nov. 9, 2009) (assigning an LPN of two, down from an eight the previous year, to the LEPC after two years of significant drought within the contiguous U.S.); *see also* Roger Wolfe, WAFWA, “Aerial Surveys Confirm Upward Trend in Lesser Prairie-Chicken Population” (July 10, 2019) (last

large geographic landscape with “highly variable weather patterns,” differences in population fluctuations among the ecoregions do not warrant differentiation in the regulatory treatment of populations within these regions.⁸ Moreover, the Service has consistently found changing the status of the LEPC was unjustified, because “barring prolonged drought, the species’ status is improving overall and should continue to improve in future years.”⁹ It is unclear from the Proposed Rule what data or other information has triggered the Service’s dramatic shift in its longstanding approach, as the population fluctuation over the past two decades has been demonstrably weather-related.

Indeed, the LEPC population “regularly fluctuate[s] up and down from year to year due to changes in habitat conditions, which are primarily influenced by rainfall patterns.”¹⁰ And in 2020, the spring’s estimated breeding population remained significantly larger than the population in 2013 following two years of severe drought.¹¹ In general, populations “have responded positively in recent years to increased and timely rainfall in the majority of the bird’s range.”¹² This fluctuation in population is also apparent in the SSA Report, which similarly illustrates the LEPC population fluctuating in recent decades but *increasing* in recent years.¹³ WAFWA explicitly concluded that 2020 population estimates indicated a “stable population *across the range* and apparent increases in the shortgrass prairie ecoregion of northwest Kansas and the shinnery oak ecoregion of eastern New Mexico and the Texas Panhandle,” despite population decreases in certain regions.¹⁴ WAFWA’s monitoring-based three- and five-year trends similarly indicate that the LEPC population is stable.¹⁵

This upward trend in population is not new and calls into question the need for the Proposed Listing at this time. For example, WAFWA’s 2017 Annual Report estimated that LEPC

accessed July 26, 2021, at <https://krtnradio.com/2018/07/11/aerial-surveys-confirm-upward-trend-in-lesser-prairie-chicken-population/> (“This approximately 30% annual increase is good news, but we know that year-to-year fluctuations are the norm with upland birds like the lesser prairie chicken The most encouraging result from the survey is the steadily increasing population trend over the last six years, which likely reflects improving habitat conditions.”).

⁸ WAFWA, “Aerial Surveys Document Stable Lesser Prairie-Chicken Population Trends” (July 16, 2020) (last accessed July 27, 2021, at <https://wafwa.org/aerial-surveys-document-stable-lesser-prairie-chicken-population-trends/>).

⁹ 66 Fed. Reg. 54,807, 54,817 (Oct. 30, 2001).

¹⁰ WAFWA, “Aerial Surveys Document Stable Lesser Prairie-Chicken Population Trends” (July 16, 2020) (last accessed July 27, 2021, at <https://wafwa.org/aerial-surveys-document-stable-lesser-prairie-chicken-population-trends/>).

¹¹ *Id.*

¹² *Id.*

¹³ SSA Report, at 64–65 (emphasis added).

¹⁴ WAFWA, “Aerial Surveys Document Stable Lesser Prairie-Chicken Population Trends” (July 16, 2020) (last accessed July 27, 2021, at <https://wafwa.org/aerial-surveys-document-stable-lesser-prairie-chicken-population-trends/>).

¹⁵ *Id.*

abundance increased in three of four ecoregions.¹⁶ And, notably, an assessment conducted in 2012 to provide recommendation and analysis to The Lesser Prairie-Chicken Interstate Working Group had previously concluded that “86% of the species’ distribution exhibit[ed] population growth (>2% annually) with *low* probability of extinction.”¹⁷ The 2012 assessment pooled data from 1997–2011 for the four LEPC ecoregions to estimate annual rates of change, average growth rate, variation of quasi-extinction probability, and population equilibrium.¹⁸ To account for concerns related to a potential population decline in 2012, the assessment went as far as to assume a 50% decline in trend, range-wide, to “demonstrate what [sic] effect it may have on the entire range.”¹⁹ Even with this assumption, range-wide analysis indicated the “species as [a] whole has grown at a rate of 10.6% since 1997 with low probability of extinction” and that “if the range-wide population trends did decrease by as much as 50% in 2012, populations are projected to be 73% greater than in 1997, and likelihood of population persistence remains high (>96%).”²⁰ In contrast to when the listing recommendation was made for the LEPC in 1997, when the average populations from 1980–1997 were declining at an average annual rate of 3.7%, population growth saw a 6.9% increase annually from 1997–2012.²¹

The natural shift in the LEPC population northward and its stable range-wide population hardly gives rise to the Service’s decision to list the LEPC as threatened, much less endangered in the southern DPS. And, in light of extraordinary conservation and mitigation efforts in recent years, the Proposed Listing falls short of its obligations under either the ESA or the Administrative Procedure Act.

2. Existing regulatory mechanisms and voluntary conservation measures for the LEPC are adequate, effective, and not properly accounted for in the Proposed Listing

Both local, state, interstate, and even voluntary conservation efforts have been incredibly effective at stabilizing and increasing the LEPC population, as described above, and create

¹⁶ WAFWA, “The 2017 Lesser Prairie-Chicken Range-wide Conservation Plan Annual Progress Report,” at 6 (March 2018) (last accessed July 27, 2021, at https://wafwa.org/wp-content/uploads/2020/07/LPCRWP_AnnualReport_2017.pdf) (although the Shinnery Oak Ecoregion was estimated to have decreased by 18% in 2016, the estimated decline was not statistically significant ($P>0.1$) whereas the increasing trend in the range-wide population had been statistically significant ($P=0.06$) since 2013, when drought subsided across much of the range. The average rate of annual increase was 2,391 birds).

¹⁷ Christian Hagen, “An Assessment of Population Dynamics and Persistence of Lesser Prairie-Chickens; A Recommendation and Analysis to the Lesser Prairie-Chicken Interstate Working Group,” at 3 (June 1, 2012) (last accessed July 27, 2021, at https://www.fws.gov/southwest/es/documents/R2ES/LitCited/LPC_2012/Hagen_2012.doc).

¹⁸ *Id.*, at 1.

¹⁹ *Id.*

²⁰ *Id.*, at 3.

²¹ *Id.*

additional habitat to benefit the long-term sustainability of the LEPC.²² Despite the voluntary and mandatory programs currently in place, the Service has given little weight and credit to the programs' success.

Since at least 2001, "all States within occupied range of the lesser prairie-chicken [have committed] significant resources via personnel, outreach, and habitat improvement incentives to landowners to recover the species."²³ This is directly reflected in statements by the KDWPT disagreeing with the Service's decision to propose listing the NPS of the LEPC as threatened: "For several years now, our staff have done a stellar job partnering with local landowners, the Lesser Prairie-Chicken Interstate Working Group, and fellow wildlife biologists from our neighboring states to implement the 'Lesser Prairie-Chicken Range-wide Conservation Plan' (RWP). While this proposed listing does not adequately reflect the success of our efforts in Kansas, we're confident in the value of the range-wide plan and will continue managing this important species to the very best of our ability, alongside our partners."²⁴

Moreover, since 2014, WAFWA and the state wildlife agencies of Colorado, Kansas, New Mexico, Oklahoma, and Texas have worked together on the Lesser Prairie-Chicken Range-wide Plan ("Conservation Plan"). The Conservation Plan was specifically developed to "ensure long-term viability of the lesser prairie-chicken through voluntary cooperation by landowners and industry. The plan allows industry to continue operations, while reducing and mitigating impacts to the bird and its grassland habitat. Industry contributions support conservation actions implemented by participating private landowners."²⁵

This is not the first time that the Service has chosen not to account adequately for these conservation efforts—as the Service's previous failure to do so caused a court to vacate a previous LEPC listing.²⁶ Here, the Service's Proposed Listing again fails to adequately consider these efforts and is inconsistent with its previous listing for the LEPC in 2014. When the Service previously listed the LEPC in 2014, the Service determined the population warranted only a "threatened" listing.²⁷ At that time, the Conservation Plan and various other efforts were in their

²²WAFWA, "Aerial Surveys Document Stable Lesser Prairie-Chicken Population Trends" (July 16, 2020) (last accessed July 27, 2021, at <https://wafwa.org/aerial-surveys-document-stable-lesser-prairie-chicken-population-trends/>).

²³ 66 Fed. Reg. 54,807, 54,817 (Oct. 30, 2001).

²⁴ Kansas Outdoors, "KDWPT Maintain Key Role in Lesser Prairie Chicken Conservation Despite Proposed Federal Listing" (May 28, 2021) (last accessed July 27, 2021, at <https://ksoutdoors.com/KDWP-Info/News/Weekly-News/5-28-21-Lesser-Prairie-Chicken-Proposed-Listing/KDWPT-Maintains-Key-Role-in-Lesser-Prairie-Chicken-Conservation-Despite-Proposed-Federal-Listing>).

²⁵ Roger Wolfe, WAFWA, "Aerial Surveys Confirm Upward Trend in Lesser Prairie-Chicken Population" (July 10, 2019) (last accessed July 26, 2021, at <https://krtmradio.com/2018/07/11/aerial-surveys-confirm-upward-trend-in-lesser-prairie-chicken-population/>).

²⁶ *Permian Basin Petroleum Ass'n v. Dep't of the Interior*, 127 F. Supp. 3d 700 (W.D. Tex. 2015) (Court struck down Service's previous "threatened" listing for the LEPC because the agency failed to consider important and material information related to ongoing conservation efforts to make a proper ESA evaluation in accordance with its PECE, which requires a two-part (15 criteria) analysis).

²⁷ 79 Fed. Reg. 19,974 (April 10, 2014); *see also* 81 Fed. Reg. 47,047 (July 20, 2016) (withdrawing previous listing consistent with court decision discussed *infra*).

early stages. Not only have these ongoing efforts clearly been successful, but the Service’s 2014–15 statements predicting voluntary efforts would fail—such as “if a listing of the lesser prairie-chicken is precluded, much of the incentive for industry to enroll in the range wide plan would be removed after March 31, 2014”²⁸—have been proven to be untrue.

As of mid-2020, after the previous listing had been vacated, industry partners had committed over \$60 million in enrollment and mitigation fees to pay for conservation actions, and landowners across the range have agreed to conserve over 130,000 acres of habitat through 10-year and permanent conservation agreements.”²⁹ Indeed, the population has more than doubled since WAFWA and its partners launched the Conservation Plan in 2014.³⁰ WAFWA had seen an approximate 30% annual increase likely reflecting improved habitat conditions,³¹ and this trend has only continued in recent years, as detailed further above. The LEPC population has more than doubled since WAFWA and its partners launched the Conservation Plan in 2014.³²

Although the Service mentions a number of the existing conservation efforts underway,³³ the Service’s ultimate Proposed Listing fails to account for these efforts in the meaningful manner required by both the ESA and the Service’s own Policy for Evaluation of Conservation Efforts When Making Listing Decisions (“PECE”).³⁴ The Proposed Listing also tends to exclude the effects of state-owned or privately-owned or -managed banking efforts, including those occurring in New Mexico.³⁵ The Service has also failed to acknowledge or account for other conservation

²⁸ *Permian Basin*, 127 F. Supp. 3d at 712.

²⁹ WAFWA, “Aerial Surveys Document Stable Lesser Prairie-Chicken Population Trends” (July 16, 2020) (last accessed July 27, 2021, at <https://wafwa.org/aerial-surveys-document-stable-lesser-prairie-chicken-population-trends/>);

³⁰ *Id.*

³¹ *Id.*

³² *Id.*

³³ SSA Report, at iv–v (“Range-wide efforts include the Western Association of Fish and Wildlife Agencies’ (WAFWA) LEPC Range-wide Conservation Plan, the U.S. Department of Agriculture (USDA) Natural Resources Conservation Service’s (NRCS) LEPC Conservation Initiative and Environmental Quality Incentives Program, and the USDA Farm Service Administration’s Conservation Reserve Program.” “There are numerous conservation efforts being led by state and regional programs such as: Kansas Department of Wildlife Parks and Tourism’s Habitat First; the Service’s Partners for Fish and Wildlife Program in all five LEPC states; the Shortgrass Prairie Initiative in Colorado by The Nature Conservancy and Colorado Department of Transportation; Colorado Parks and Wildlife LEPC Habitat Improvements Program; U.S. Forest Service (USFS) Cimarron and Comanche National Grasslands management; Oklahoma Department of Wildlife Conservation LEPC CCAA; The Nature Conservancy properties in New Mexico; the New Mexico Candidate Conservation Agreement and CCAA; U.S. Bureau of Land Management (BLM) Lesser Prairie-Chicken Habitat Preservation Area of Critical Environmental Concern; and Prairie Chicken Areas owned by New Mexico Department of Game and Fish.”).

³⁴ *Permian Basin Petroleum Ass’n*, 127 F. Supp. 3d 700 (underscoring the importance of a thorough and comprehensive review of conservation efforts, and related factors, in determining the ESA status of a particular species).

³⁵ Proposed Listing, at 29,469; *see generally* New Mexico Land Conservancy, “A ‘Lek up’ for the Lesser Prairie Chicken in New Mexico!” (Dec. 19, 2019) (last accessed July 26, 2021, at <https://nmlandconservancy.org/2019/12/19/a-lek-up-for-the-lesser-prairie-chicken-in-new-mexico/>) (This includes conservation and mitigation banking aimed to protect the Southern DPS occurring on private lands in New Mexico

efforts such as extraordinary, four-year reintroduction project undertaken by the Colorado Parks and Wildlife, Kansas Department of Wildlife, and the U.S. Forest Service to re-establish the LEPC on native sand sagebrush and grasslands spanning 330,000 acres between Colorado and Kansas.³⁶

Ultimately, the various local, state, and voluntary programs in place provide substantial and sufficient protections to the LEPC and its habitat. The success of these programs illustrate there is no need for additional, federally-prescribed measures and requirements.³⁷ Without a documented need to improve species population growth and habitat conservation, the Proposed Listing is simply without merit. Further, contrary to the Service's past assertions, the actual data in the record before the Service prove that voluntary efforts are more likely to increase and improve *without* mandated federal programs, because these voluntary programs provide private actors more flexibility in determining how best to conserve and preserve the LEPC and its habitat. A thorough review of all relevant data supports a finding that any listing of the LEPC is unwarranted.

3. Any Listing of the LEPC should include a rule permitting incidental take for certain oil and gas activities

In accordance with section 4(d) of the ESA, the Service has the authority to create special regulations for threatened species and the Service here has explicitly asked for input regarding any section 4(d) rules. If the Service nonetheless determines, albeit without actual support, that the DPS of the LEPC warrants listing as “threatened,” GPA Midstream respectfully requests—and supports—the imposition of a 4(d) rule that would provide flexibility to the oil and gas industry to continue upkeep, routine maintenance, or otherwise necessary activities similar to the 4(d) rule already proposed for agricultural activities.

Despite “cropland conversion” and “roads” accounting for a majority of anthropogenic or manmade impacts on any measured habitat loss within the LEPC's range, the Proposed Listing permits “Continuation of routine agricultural practices on existing cultivated lands.”³⁸ Permitted activities include “[p]lowing, drilling, disking, mowing, or other mechanical manipulation and management of lands;” “[r]outine . . . replacement, upgrades, maintenance, and operation of existing infrastructure such as buildings, irrigation conveyance structures, fences, and roads;” and the “[u]se of chemicals.”³⁹

In light of the impacts of agricultural land use on the LEPC's various ecoregions, extending similar or in-kind rules to the oil and gas industry is more than appropriate. For example, cropland

such as Weaver Ranch, MPP, Kyle Dillard, the NMFLPC Management Areas, Tomahawk Conservation Bank, and Lost Draw Conservation Bank.).

³⁶ Colorado Parks and Wildlife, “Biologists release lesser prairie chickens in Colo. (Apr. 25, 2019) (last accessed July 27, 2021 at <https://www.morningagclips.com/biologists-release-lesser-prairie-chickens-in-colo/>) (Notably, the century-old cropland conversion leading to the Dust Bowl in 1932, severe snowstorms in 2006, and severe drought from 2007 onward are listed as factors leading to population decline).

³⁷ *Colorado River Cutthroat Trout v. Salazar*, 898 F.Supp.2d 191, 201–03 (D.C. Cir. 2012) (stating the Service should pay more attention to the voluntary and state/regional conservation plans that have had success already in determining whether threats to the population are warranted).

³⁸ Proposed Rule, at 29,476.

³⁹ *Id.*

conversion and roads account for 37% and 17% of the impacted land within the Short-grass/CRP Ecoregion, respectively, compared to only 4% for petroleum production.⁴⁰ And in the Sand Sagebrush Ecoregion, cropland conversion accounted for 32% of impacted region compared to only 5% for petroleum production.⁴¹

As the Service has determined these agricultural activities would not impact or further deteriorate the populations in these various ecoregions,⁴² the Service must necessarily determine the same with regard to similar oil and gas activities where existing infrastructure exists. If there is to be a listing, then such a 4(d) rule exempting these activities strikes an appropriate balance between LEPC protection and protection of domestic energy independence that is also vital to both the affected local and state economies. Further, and also after the previous attempt to list the LEPC failed, approximately 160 oil, gas, wind, electric, and pipeline companies enrolled about *nine million* acres under the Conservation Plan—committing over \$43 million for conservation.⁴³ These participants should be exempted under a 4(d) rule, consistent with the Service’s previous determination.⁴⁴

GPA Midstream appreciates the opportunity to submit these comments on the Proposed Listing and is standing by to answer any questions you may have.

Respectfully submitted,



Matt Hite
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⁴⁰ SSA Report, at 67, Table 3.4.

⁴¹ SSA Report, at 73, Figure 3.6 (transmission lines also account for only 5%).

⁴² Proposed Rule, at 29,476.

⁴³ WAFWA “Press Release: WAFWA Lesser Prairie-Chicken Range-Wide Plan Nears 4 Million Acres” (July 1, 2014) (last accessed July 28, 2021, at <https://www.wildlife.state.nm.us/wafwa-lesser-prairie-chicken-range-wide-plan-nears-4-million-acres/>).

⁴⁴ See 79 Fed. Reg. 20074 (April 10, 2014).