

Locke Lord QuickStudy: Playing Chicken: What USFWS' Proposed Listing of the Lesser Prairie Chicken Means for Energy Companies

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On May 24, 2021, the U.S. Fish and Wildlife Service (FWS) released a proposed rule to list two distinct population segments (DPS) of the lesser prairie chicken (LEPC) under the Endangered Species Act (ESA). If the listing decision is finalized as currently proposed, the Southern DPS (which covers LEPC populations in West Texas and New Mexico) will be listed as endangered, and the Northern DPS (which covers populations in the Northern Panhandle of Texas, Oklahoma, Kansas, and Colorado) will be listed as threatened with a 4(d) rule prohibiting take from most activities. These listings would result in the most extensive protections yet for the species, with the most significant implications for energy development in the affected regions.

LEPC Listing and Litigation History

The status of the lesser prairie chicken has been the subject of a great deal of controversy and litigation, particularly over the last ten years. The bird was first listed as a threatened species on April 10, 2014, finally settling several years of litigation by environmental organizations against the FWS in response to the FWS' 1998 determination that listing of the LEPC was "warranted but precluded" by other priorities.

The 2014 final listing rule was subject to the FWS' "blanket 4(d) rule" which was then in effect, which by default extended the ESA's section 9 take prohibition to all species listed as threatened. However, the FWS' listing rule was challenged by several New Mexico counties and oil and gas interests who argued that the FWS had not given appropriate consideration to the effect of various voluntary conservation efforts being implemented by states and industry. Those plaintiffs ultimately prevailed, and on September 1, 2015 the listing was vacated by a federal district court on the grounds that the FWS had not properly applied its own Policy for the Evaluation of Conservation Efforts when making its listing determination. In response to the court's ruling, the FWS published a final rule formally de-listing the species on July 20, 2016. Our previous QuickStudies addressing the original listing decision and the court decision vacating that listing can be found [here](#).

Not long after the FWS de-listed the LEPC, several environmental groups again sued the FWS seeking to force it to list the species once again. After several delays, the FWS entered into a settlement with those plaintiffs requiring it to publish its new listing determination by May 26, 2021. The proposed rule released on May 24

satisfies that obligation, but if finalized, will undoubtedly spawn a new round of litigation that will again seek to challenge the listing.

Effect of the Proposed Listing

The FWS is proposing to list the Northern DPS of the LEPC as threatened and the Southern DPS as endangered. Because the [blanket 4\(d\) rule is no longer in effect](#), the proposed rule includes a species-specific 4(d) rule that would extend the ESA's section 9 take prohibition to the Southern DPS, meaning direct or indirect take of LEPC would be prohibited for LEPC populations. Importantly, the ESA's definition of "take" includes not just killing but "harm" and "harassment" as well. ? The term "harm" includes significant habitat modification or degradation that actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering. "Harass" includes an intentional or negligent act which creates ?the likelihood of injury to wildlife by annoying it to such an extent as to significantly disrupt ?normal behavioral patterns including breeding, feeding, or sheltering.? Thus, activities that interfere with the LEPC's normal activities, and particularly those taking place near a LEPC lekking (mating) site, can result in a prohibited take even if the activity merely causes the birds to avoid the area.

In an attempt to address the widespread impact of this prohibition, the previous 4(d) rule for the LEPC specifically exempted incidental take by companies that had enrolled in the Range-Wide Conservation Plan developed by the Western Association of Fish and Wildlife Agencies (WAFWA), although that plan was not without its own issues and limitations and not widely subscribed. The proposed 4(d) rule would only provide exemptions for take in the Northern DPS resulting from continuation of existing agricultural practices or implementation of prescribed fire for the purpose of grassland management. Thus, incidental take resulting from the development of energy projects, including oil and gas exploration and production and wind and solar energy, would be prohibited. As noted, this expressly includes actions that would result in lesser prairie chicken avoidance of an area during seasonal periods, such as construction of energy infrastructure.

The listing of the LEPC and the associated prohibition against incidental take is likely to be a significant issue for traditional and renewable energy developers alike. Various mechanisms have been developed over the last several years to help mitigate the impact of a renewed listing of the LEPC on these industries, such as the Range-Wide Oil and Gas Candidate Conservation Agreement with Assurances and the LPC Conservation Draft HCP for wind and solar projects and transmission lines, among others. However, these mechanisms are not available in all areas or not available yet, and will not necessarily be applicable to all projects. Further, they may still involve significant restrictions or costs for participation, particularly costs for mitigation, which could render them impracticable for many companies.

If and when the proposed listing becomes final, pre-construction surveys will become even more important prior to siting new any development. Developers or operators of energy projects within the range of each LEPC DPS may need to modify their projects to avoid take or alter their construction and operation schedules to allow time to obtain individual take authorization or seek some other solution where avoidance is not feasible. Companies should be aware that obtaining individual take authorization is a complex and expensive process in its own right and can be expected to take several years and involve many difficult issues.

Comments Due July 30

The proposed rule was scheduled to be published in the Federal Register today, June 1, 2021, and the FWS will accept comment for a period of 60 days. Among the topics on which the FWS is specifically seeking comment are whether the 4(d) rule should exempt other forms of take from the prohibition, and whether it should exempt take by those participating in WAFWA's Range-Wide Plan. The FWS is also seeking comment on which areas would be appropriate to designate as critical habitat for the LEPC, as the proposed rule states that the FWS currently lacks sufficient information to make a determination regarding critical habitat at this time.

Locke Lord has significant experience assisting clients in navigating LEPC issues during the previous listing and litigation, and is following the current listing process closely. For questions regarding the proposed listing, how it may impact your projects, or to discuss potential comments on the proposal, please contact the authors.

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