

**Questions and Answers:
Biological Opinion for Implementation of the Conservation Reserve Program
in the Occupied Range of the Lesser Prairie-Chicken**

- 1. Does the prohibition on take of a species listed under the Endangered Species Act (ESA) apply to everyone, regardless of whether their action is funded or authorized by a federal agency?**

Yes. Section 9 of the ESA makes it illegal for a person to take an endangered or threatened species without authorization.

- 2. What is the definition of take?**

Take means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, collect, or attempt to engage in any such conduct. The definition of harm “means an act which actually kills or injures wildlife. Such act may include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering.” Harass is defined as “an intentional or negligent act or omission which creates the likelihood of injury to wildlife by annoying it to such an extent as to significantly disrupt normal behavioral patterns which include, but are not limited to, breeding, feeding and sheltering.”

- 3. What are the responsibilities of the USDA Farm Service Agency (FSA) under the ESA?**

Section 7 of ESA requires federal agencies to use their legal authorities to aid in the conservation of listed species and to ensure that the effects of actions they authorize, fund or carry out are not likely to jeopardize the continued existence of listed species. The Biological Opinion (Opinion) evaluated the activities associated with implementation of the Conservation Reserve Program (CRP) under section 7(a)(2) of ESA and the Service concluded that the CRP planning processes, conservation practices, technical practices and related conservation measures described in the Opinion were not likely to jeopardize the continued existence of the lesser prairie-chicken.

- 4. Are landowners participating in CRP held to any higher standard than landowners that are not participating in CRP when it comes to the ESA compliance?**

No. The ESA “take” provisions apply to landowners participating in CRP and those that are not participating in CRP. The Opinion provides an exemption from the section 9 prohibition on “take” of lesser prairie-chicken by CRP participants if the take is incidental to implementing the conservation practices and conservation measures described in the Opinion.

5. What is the benefit of the Biological Opinion to CRP participants?

CRP participants who follow their conservation plans and inadvertently harm, harass or possibly kill individual lesser prairie-chickens or destroy lesser prairie-chicken nests are protected under the Opinion. When implementing conservation practices and conservation measures in accordance with the Opinion, CRP participants are provided legal coverage for actions that may result in incidental taking of lesser prairie-chickens and they can be confident in knowing that their actions are not prohibited or subject to penalty under the ESA.

6. Does the haying/grazing frequency (1 in 3 years) start this year or do the last 2 years of haying/grazing count in the wait period?

The conservation measures in the Opinion limiting the frequency of haying and grazing to 1 in 3 years within the Southern Great Plains Crucial Habitat Assessment Tool (CHAT) categories 1, 2 or 3 apply to haying and grazing activities occurring on or after April 14, 2014. Haying and grazing activities completed prior to this date are not considered in the frequency determination. However, the condition of the vegetation and other resources on the land that may have been affected by previous haying and grazing activities must be assessed and meet the site-specific CRP conservation plan provisions pertaining to the proposed use before haying or grazing activities can take place.

The application of the haying and grazing frequency restriction is based on activities occurring on the enrolled acres regardless of whether the haying or grazing activities occur under different contracts after April 14, 2014. Establishment of a new CRP contract due to a change in ownership, re-enrollment of the acres, or some other event requiring a new contract on the same acres does not re-set the frequency of haying and grazing on those acres.

7. Who will be the one that determines when there is a lek site within 1.25 miles of a proposed wind tower?

The FSA is responsible for evaluating the environmental effects of wind towers proposed for CRP enrolled land including whether the proposed wind facility is within CHAT categories 1-3 or within 1.25 miles of a known lek.

8. In addition to the maps of the CHAT areas, are maps available of the active lek sites?

The CHAT is the primary source for lek location information and delineates the CHAT categories identified in the Opinion. This information is updated on a regular basis. The CHAT map is available at the following link: <http://kars.ku.edu/geodata/maps/sgpchat/>. FSA is responsible for providing the information necessary for determining the applicability of the conservation measures in the Opinion, including the location of lek sites. FSA is also

responsible for identifying the specific information source and whether there are any limitations regarding use of the information.

9. Can a CRP participant buy out part of the acreage of a CRP contract in order to put up a new wind turbine?

Yes. However that portion of the CRP acreage removed from the contract would no longer be covered for any incidental take that may occur as a result of actions evaluated in the Opinion; and any action converting the cover previously under CRP contract to energy development would not be covered by the Opinion. The remaining CRP acreage may also lose coverage under the Opinion for incidental take if the wind turbine and associated infrastructure would adversely affect use by lesser prairie-chicken of the remaining CRP acreage.

10. Is early land preparation allowed in the final year of the contract within the “Action Area” of the Opinion?

Yes, but early land preparation within the Action Area (the 85 counties that encompass the current estimated occupied range of the lesser prairie-chicken and a 10-mile buffer) must be deferred until after the primary nesting and brood-rearing season.

Primary Nesting and Brood Rearing Seasons Established By State

State	Primary Nesting/Brood Rearing Season
Colorado	March 15 – July 15
Kansas	April 15 – July 15
New Mexico	March 1 – July 1
Oklahoma	May 1 – July 1
Texas	March 1 – June 1 (Grazing) March 1 – July 1 (Haying)

11. Will CRP participants be able to convert their conservation cover to crop production when their contracts expire?

Yes. Lands currently enrolled in CRP and future enrollments can be returned to crop production after contract expiration without any additional section 7 consultation provided the conversion activity occurs outside the primary nesting and brood-rearing season in accordance with an approved conservation plan developed by NRCS or a Technical Service Provider (TSP) prior to the conversion activity. Following the completion of activities that return the land to agricultural production, coverage under the Opinion ends. Participants are under no obligation to convert expired land to crop production and those who choose to continue implementing their conservation plan after contract expiration will be covered by the Opinion until the land is returned to agricultural production or when the land ceases to provide wildlife habitat values of benefit to the lesser prairie-chicken and associated species.

12. If the land is converted from CRP cover back to agriculture under the Opinion, is the landowner exempt from ESA regulations because the land will then be considered agriculture?

Yes, provided the lands meet the exemption under the 4d rule for continuation of routine agricultural practices on cultivated lands. There are two tests for eligibility under the agricultural exemption. The first is that the land must meet the definition of cropland under 7 CFR 718.2. Lands enrolled in CRP retain their cropping history and meet this requirement. The second test is that lands must have been cultivated, meaning tilled, planted or harvested, within the 5 years preceding the proposed routine agricultural practice that may otherwise result in take. The action of conversion to agricultural production covered under the Opinion meets this requirement by establishing cultivation on the converted lands.

13. If the CRP contract expires after April 14, 2014, but remains in original cover and is grazed for 3 years, can a producer request to convert to cropping after this period of time?

The predictability provided for the conversion to crop production after CRP contract expiration continues for up to 30-years from the issuance of the Opinion as long as the producer is following their conservation plan developed by NRCS or TSP in accordance with the Opinion.

14. Does the Opinion apply to a former CRP participant whose contract expired or terminated 6 years ago, but whose land has remained in cover until April 14, 2014?

No. CRP contracts that expired prior to April 14, 2014 are not covered under the Opinion. FWS and NRCS are working to develop a process for determining when requests to convert existing grassland not covered by the Opinion to crop production may have adverse effects on lesser prairie-chickens. NRCS will not provide technical assistance to a producer wishing to break sod if the action is likely to have adverse effects on the lesser prairie-chicken unless the producer obtains a permit to lawfully implement actions under ESA.

15. Do conservation measures in the FSA Opinion that are applicable in the 85-county Action Area apply to the entire County unless conservation measures are more specific as to where they apply?

Yes. Conservation measures identified in the Opinion apply to the entire county for each of the counties in the action area unless a conservation measure identifies a more specific area, such as the CHAT areas.

16. Does regulatory predictability provided by the Opinion extend beyond CRP enrollment to include other farm or ranch acreage?

No. Incidental take under the Opinion applies only to acres currently enrolled and land that will be enrolled in CRP within 30 years from the date of the Opinion (i.e., before April 14, 2044).

17. Can an introduced species be included in the native species seed mix required for cover establishment on new CRP enrollments?

Yes, as long as it is a non-invasive species included as a small proportion of the native species mix designed to benefit the lesser prairie-chicken. The native species mix must have been established through the State Technical Committee in consultation with the appropriate state and federal agencies (see conservation measures 1 and 3 under cover establishment on page 37 of the Opinion).

18. What if the producer does not want to modify his plan to be consistent with the FSA Biological Opinion?

In order to receive take coverage and predictability under the Opinion, conservation plans must be modified to be consistent with the conservation measures and associated planning activities within the Opinion. FSA is committed to administering the CRP program for the benefit of the participants consistent with the Opinion within the action area and may, as a last resort, for cases where the participant elects not to modify the conservation plan, administratively terminate the contract in accordance with part 15 B of the CRP Appendix to the contract.

19. If participants choose not to sign the modified conservation plan, will they be permitted to withdraw from CRP without penalty for early contract termination?

The decision to permit participants to withdraw from CRP with or without penalty rests with USDA and Congress. Program participants who withdraw from CRP prior to contract expiration and discontinue implementation of their conservation plan will not be covered by the Opinion unless they are withdrawing in accordance with an administratively or statutorily authorized early withdrawal.

20. The Biological Opinion makes reference to a suggested residual stubble height of 10 inches following harvesting, haying or grazing. Can you clarify what suggested means?

The Opinion references a suggested average of 10 inches of residual stubble being left following harvesting, haying, or grazing of CRP fields. This is a suggested and not an absolute requirement. Given the diversity of plant communities present across the range of the lesser prairie-chicken, the amount of forage removed or left should be in keeping with specific lesser

prairie-chicken life cycle requirements (e.g., adequate nesting cover), site and climate conditions, and plant resiliency to and recovery following harvesting, haying, or grazing. Livestock forage needs should be balanced with habitat requirements of the lesser prairie-chicken.

Conservation measure number 1 under forage harvesting (page 44 of the Opinion) and prescribed grazing (page 45 of the Opinion) provides for coordination among FSA, NRCS, the State fish and wildlife agency, the Service and State Technical Committee to identify appropriate restrictions on cover management practices so as to avoid and minimize adverse effects to the LPC. This conservation measure can be used to help determine the appropriate stubble height that will meet LPC life cycle requirements based on site and climatic conditions.

21. Does FSA need to disclose to producers that are thinking about putting ground into or reoffering ground into CRP that they will be subject to regulations after their contract expires?

Yes, it is always important to discuss the full program and implications of enrolling lands into CRP. The Opinion describes the actions covered after contract expiration and the 4d rule describes routine agricultural practices exempt from the take prohibitions of the ESA on eligible lands. Producers also need to be informed of the benefits of enrollment due to the regulatory predictability provided by the Opinion.

22. The USDA Secretary's plan is that all USDA agencies should be able to answer questions between agencies and with other federal, state and local government agencies. How can we adhere to this plan and yet tell our customers that we cannot answer their questions?

An effort is underway to develop fact sheets and training for agency staff on implementation of the Opinion and related conservation efforts to ensure that customers are provided with consistent responses to their questions and to make the information available online so it can be updated as needed to answer new questions and ensure the material remains current.