



**EWAC<sup>®</sup>**

Energy and Wildlife  
Action Coalition

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**November 14, 2022**

Comments regarding:

**September 14, 2022 Notice of Proposed Rulemaking to List the Tricolored Bat as an Endangered Species**

Submitted by:

**Energy and Wildlife Action Coalition**

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Docket No. FWS-R5-ES-2021-0163

The Energy and Wildlife Action Coalition (“EWAC”)<sup>1</sup> submits these comments in response to the U.S Fish and Wildlife Service’s (“Service”) September 14, 2022 Notice of Proposed Rulemaking to list the tricolored bat (*Perimyotis subflavus*) (“TCB”) as an endangered species under the Endangered Species Act (“Proposed Rule”)<sup>2</sup> and the accompanying TCB Species Status Assessment (“SSA”).<sup>3</sup> EWAC provides these comments on the Proposed Rule and SSA based on the knowledge and experience of its membership.

EWAC appreciates the Service’s work to protect endangered, threatened, and at-risk species, and recognizes the role of regulated industries in environmental stewardship. EWAC members regularly and voluntarily implement meaningful conservation and risk minimization measures to reduce negative impacts that human development activity may have on sensitive species, often partnering with the Service to go beyond regulatory requirements and voluntarily promoting the health and recovery of sensitive species. Particularly with respect to species that are wide-ranging and whose primary threat is not directly caused by development activity, conservation of these species under the Endangered Species Act (“ESA”) poses a unique challenge to both the Service and the regulated community. This unfortunate situation is becoming more common as the effects of climate change and invasive species, including pathogens, are felt in the United States.

TCB is one such species. The primary threat to the species is white-nose syndrome (“WNS”), a devastating infectious disease caused by the fungal pathogen *Pseudogymnoascus destructans* that kills significantly greater numbers of TCB than all other threats to the species combined.<sup>4</sup> As a result, without the discovery of an effective treatment for or prevention of the spread of WNS, additional restrictions on the regulated community in connection with an endangered listing will do little to further TCB conservation and recovery. Conversely, without an efficient ESA compliance mechanism, an endangered listing will have a significant impact on the renewable energy and electric transmission and distribution industries at a time when deployment of these resources is critical. Indeed, Executive Order 14057 declares it a priority to achieve a nationwide energy transition toward a carbon pollution-free electricity sector, which will necessitate the deployment of renewable energy and associated transmission and distribution lines.<sup>5</sup> The regulatory constraints that will occur immediately upon an endangered listing will

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<sup>1</sup> EWAC is a national coalition formed in 2014 whose members consist of electric utilities, electric transmission providers, and renewable energy entities operating throughout the United States, and related trade associations. The fundamental goals of EWAC are to evaluate, develop, and promote sound environmental policies for federally protected wildlife and closely related natural resources while ensuring the continued generation and transmission of reliable and affordable electricity. EWAC supports public policies, based on sound science, that protect wildlife and natural resources in a reasonable, consistent, and cost-effective manner. EWAC is a majority-rules organization and therefore specific decisions made by the EWAC Policy Committee may not always reflect the positions of every member.

<sup>2</sup> 87 Fed. Reg. 56,381 (Sept. 14, 2022).

<sup>3</sup> Species Status Assessment (SSA) Report for the Tricolored Bat (*Perimyotis subflavus*) Version 1.1 (December 2021).

<sup>4</sup> By the Service’s own estimations, WNS has caused estimated tricolored bat population declines of 90-100% across 59% of the species’ range. See SSA at 43.

<sup>5</sup> Executive Order 14057: Catalyzing Clean Energy Industries and Jobs Through Federal Sustainability, 86 Fed. Reg. 70,943 (Dec. 13, 2021).

impede the efforts made by renewable energy and electric transmission and distribution sectors to meet these priorities.

Should the Service ultimately list TCB as threatened or endangered under the ESA, EWAC urges the Service to use all tools at the Service's disposal to ensure that deployment of renewable energy and electric transmission and distribution may continue apace. As written, the Proposed Rule provides little guidance to empower the regulated community to effectively assess and address risk to TCB without project-by-project coordination with the Service. The Proposed Rule also fails to provide clear structure to Service staff charged with administering the listing. Together, these issues are likely to create uncertainty, delay, and increases in project cost and litigation risk for existing facilities and those in development. It is crucial that any regulations promulgated to protect TCB foster effective conservation by focusing on the true threats to the species while ensuring the renewable energy and electric transmission and distribution sectors can continue to work towards achieving the Biden-Harris Administration's stated priorities of addressing climate change, modernizing the power grid, and pursuing environmental justice.<sup>6</sup>

In order to strike the balance of meeting the Service's conservation obligations under the ESA, while ensuring that such actions do not create an administrative logjam for the Service that would unduly impact the electric power sectors' ability to meet the Administration's climate goals or implementation of the recently enacted Inflation Reduction Act, EWAC:

(I) requests that the Service prioritize providing information to the regulated community on how it can assess risk to TCB, including guidance on potential suitable habitat, survey methodologies to determine presence, and seasonality of potential risk related to life-cycle timing throughout its range;

(II) requests that the Service identify, consistent with agency policy,<sup>7</sup> activities that would and would not constitute a violation of ESA section 9 to provide some certainty to the regulated community (e.g., through establishment of no-take guidance or otherwise) and ease the burden on the Service's already strained resources;

(III) suggests the Service proactively work with the electric power sector to determine which ESA compliance tools will best alleviate the impacts of any final listing and help further this Administration's clean energy goals and implementation of the Inflation Reduction Act;

(IV) suggests the Service consider whether it is appropriate to characterize the Southern representation unit ("RPU") as its own distinct population segment

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<sup>6</sup> See Executive Order 13990: Protecting Health and the Environment and Restoring Science to Tackle the Climate Crisis, 86 Fed. Reg. 7,037 (Jan. 25, 2021); Executive Order 14008, 86 Fed. Reg. 48,745 (Aug. 31, 2021). *Fact Sheet: President Biden Sets 2030 Greenhouse Gas Pollution Reduction Target Aimed at Creating Good-Paying Union Jobs and Securing U.S. Leadership on Clean Energy Technologies*; available at: <https://www.whitehouse.gov/briefing-room/statements-releases/2021/04/22/fact-sheet-president-biden-sets-2030-greenhouse-gas-pollution-reduction-target-aimed-at-creating-good-paying-union-jobs-and-securing-u-s-leadership-on-clean-energy-technologies/>.

<sup>7</sup> 59 Fed. Reg. 34,272 (July 1, 1994).

(“DPS”) and to consider whether the Service has the information to make a listing determination for that particular RPU; and recommend separate guidance for this RPU; and

(V) explains its concerns with the Proposed Rule’s singling out of the wind energy industry as a significant stressor on TCB’s health as a species, and requests the Service provide additional analysis to link bat mortalities caused by wind facilities with overall trends in TCB population and abundance, and take into account the positive impact of wind energy on climate change that was identified as another main threat to the species.

**I. The Service must prioritize providing additional technical guidance to the regulated community as soon as possible to allow it to assess and prepare for any final listing, and allow for public review and comment.**

Neither the Proposed Rule nor the SSA provide sufficient information on TCB’s habitat, behavioral, and other ecological needs to allow the regulated community to assess project-related risk to TCB ahead of a final listing decision. Because TCB’s range covers 39 states, and the species uses a broad variety of anthropogenic landscape structures, including buildings, fences, and bridges,<sup>8</sup> listing the species will have a significant impact on many sectors, including renewable energy generation and electric transmission and distribution.

EWAC member projects take many years to develop and often go through multiple federal, state, and local approval processes. Once operating, these projects are additionally held to certain performance obligations. Assessing risk of take and developing an ESA compliance strategy requires time, preparation, and a clear understanding of a species’ reproduction, feeding and sheltering requirements and migratory behavior. To the degree a project proponent believes that take of a species is reasonably certain to occur or that a project with a federal nexus may affect listed species, developing the documentation to support an ESA section 7 consultation or a habitat conservation plan (“HCP”) can be a lengthy process requiring extensive coordination with the Service and perhaps other federal agencies. In short, assessing and then addressing any identified risk is not something that can be done quickly, and without the technical guidance requested herein, a final rule listing TCB as endangered would result in delays in construction or reductions in power production at operating projects and would affect power purchase agreements, performance obligations, and regulatory requirements. In many instances, the consequences of these delays ultimately are borne by rate-paying customers who rely on affordable and reliable electricity.

To appropriately assess risk to TCB and adequately prepare for the impacts of a listing, EWAC members urge the Service to provide more information on the following:

- **Habitat:** Neither the Proposed Rule nor the SSA provide sufficient information on what constitutes suitable habitat for TCB throughout its lifecycle and across the species’ range, nor indicate with specificity to what extent alterations of habitat could cause harm to the species, which is problematic given the SSA describes

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<sup>8</sup> SSA at 16.

summer roosting habitat broadly as “deciduous hardwood forest” and indicates that habitat requirements may differ among TCB RPUs.<sup>9</sup> A project proponent cannot perform a habitat or risk assessment for TCB without an understanding of how the Service characterizes suitable habitat for the species. The Service must provide technical guidance on what constitutes TCB habitat throughout the species’ range and lifecycle, and take RPU differences into account in that guidance. In addition, the Service should provide guidance on appropriate setbacks from summer maternity habitat such as it has done for the Indiana and northern long-eared bat (“NLEB”) and provide information about known hibernacula.

- **Presence/Probable Absence:** The Proposed Rule and SSA do not provide sufficient information for the regulated community to determine presence and/or probable absence of TCB during the summer maternity season. Given the geographical and seasonal variations of TCB across the RPUs, understanding when and how one might identify the presence or probable absence of the species throughout the year is essential to understanding the potential risk to the species and how to avoid or minimize that risk. To avoid construction delays and impacts to power production, address financing concerns, and meet other performance obligations, it is imperative that owners, operators, and developers of renewable energy and transmission and distribution projects begin assessing project risk to TCB ahead of any final rule. Should TCB ultimately be listed, the lack of direction and clarity on how the regulated community can assess risk to TCB within the species’ range or various RPUs renders project planning virtually impossible. EWAC suggests the level of effort for detecting TCB be lower than the Service prescribes for Indiana bat and NLEB in areas where the species do not overlap given the differences in abundance in the southern portion of the TCB range, and rely on acoustic monitoring as a viable option among other more intensive survey methods. Any guidance should include how presence buffers from known and recent records of maternity roosts can be incorporated into project siting based on known or assumed presence of TCB during the summer maternity season.
- **Culverts:** The SSA emphasizes the Southern RPU’s use of anthropogenic structures (e.g., bridges, culverts and abandoned RR tunnels) as wintering habitat, but neither the SSA nor Proposed Rule offer guidance on how a project proponent can assess presence or risk to TCB that may be using these features within or near a project footprint. This uncertainty is compounded by the fact that such structures are often owned and maintained by other entities (e.g., local, state, and federal agencies and private landowners) and may not be accessible for inspection or reasonably managed by project proponents.
- **Resource Equivalency Analysis (“REA”):** EWAC understands the Service has been working to develop a TCB-specific REA by which mitigation offsets for TCB fatalities from wind energy can be assessed, but the REA has not been made

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<sup>9</sup> See *id.* at 17. EWAC notes that deciduous hardwood trees constitute 68% of hardwood forests and oak trees alone comprise 160.3M acres of oak forests in the eastern US – which is 43% of the eastern timberland. USDA, *Field Guide to Native Oak Species* (October 2017) at 1.

available to the public. Wind energy developers and operators should have access to and an opportunity to provide comment on the REA to understand and begin budgeting for the cost of mitigation where the developer or operator has assessed a reasonable certainty of take of TCB and has decided to pursue an incidental take permit. Further, given TCB use of anthropogenic structures such as culverts during certain portions of its lifecycle, particularly in the Southern RPU, EWAC recommends the REA allow for structures to serve as compensatory mitigation and for the Service to accept other non-habitat approaches to compensatory mitigation.

If the Service cannot provide the information set forth above prior to any ultimate listing, the regulated community will be unable to assess its risk to TCB or proactively manage the impact of a final listing on its operating projects and those projects in development. The Service will be overwhelmed by project proponents seeking guidance on a project-by-project basis. The Service should prioritize providing this information to the regulated community and must provide the public an opportunity to review and comment on any TCB guidance before moving forward with any final rule listing TCB.

## **II. EWAC recommends the Service provide no-take guidance and to allow for the public to comment on any such guidance.**

As the Service has recognized, ultimately it is the project proponent that determines whether take is reasonably certain to occur as a result of its activities.<sup>10</sup> Nevertheless, it is long-standing Service and National Marine Fisheries Service policy to “identify, to the maximum extent practicable, those activities that will be considered . . . likely or not likely to result in violation of section 9 at the time a species is listed . . .” (hereafter, “no-take guidance”).<sup>11</sup> No-take guidance is a helpful tool to alleviate some of the regulatory uncertainty prompted by a listing, and is particularly helpful here where the impacts of an endangered listing will be felt broadly across industries in 39 states.<sup>12</sup>

The Service declined to include no-take guidance for TCB in the Proposed Rule. Specifically, the Service indicated the agency is “unable to identify specific activities that would not be considered to result in a violation of section 9 of the Act because [TCB] occurs in a variety of habitat conditions across its range” and because of the likelihood that “site-specific conservation measures may be needed for activities that may directly or indirectly affect the species.”<sup>13</sup> At the same, the SSA indicated TCB is not habitat limited, so the Service has some idea of the types of habitats TCB relies on throughout its life-cycle. The Service must provide information and guidance about TCB behaviors throughout its life-cycle to allow the regulated community to minimize impacts to TCB. Given the expansive range of TCB and the impact an endangered listing will have across the country, it is critical for the Service to provide no-take guidance in any

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<sup>10</sup> United States Department of the Interior, Memorandum from Principal Deputy Director to Regional Directors 1-8, *Guidance on trigger for an incidental take permit under section 10 (a)(1)(B) of the Endangered Species Act where occupied habitat or potentially occupied habitat is being modified*. (Apr. 26, 2018) available at <https://www.fws.gov/sites/default/files/documents/guidance-on-when-to-see-an-incidental-take-permit.pdf>.

<sup>11</sup> 59 Fed. Reg. 34,272 (July 1, 1994).

<sup>12</sup> SSA at 16.

<sup>13</sup> Proposed Rule at 56,389.

final rule or in standalone guidance documents. A failure to do so would unnecessarily increase regulatory uncertainty on existing and new renewable energy and electric transmission and distribution infrastructure and significantly impede clean energy and grid modernization goals and the implementation of the Inflation Reduction Act.

Should the Service develop any no-take guidance, it should also provide the public an opportunity to comment on the proposed guidance to ensure that any ambiguities, confusion, or logistical concerns can be resolved prior to final publication.<sup>14</sup> Below, EWAC offers some suggestions for no-take guidance based on considerations unique to member operations and experiences.

**a. Any no-take-guidance for summer habitat must account for overlapping ranges with other bat species.**

It is important that any no-take guidance be developed with an understanding that the TCB range overlaps with the Indiana bat and NLEB. Measures that would render take of TCB sufficiently unlikely should not be more onerous than measures the Service has recognized render take of the Indiana bat and NLEB unlikely where those species' ranges overlap. To do otherwise would create an untenable situation for the regulated community to determine and address risk for these three species. No-take guidance for TCB should take into account the fact that TCB are habitat generalists and not habitat limited.

**b. No-take guidance for operation of wind energy facilities**

The Service acknowledged in the SSA that feathering and curtailment of wind energy turbines during periods of higher risk have been demonstrated to effectively reduce impacts to bat species,<sup>15</sup> supporting a conclusion that, where implemented, take is even less likely to occur. EWAC recommends the Service establish no-take guidance for existing and new wind energy facilities. EWAC suggests that no-take guidance for wind energy include an acknowledgement that curtailment of wind turbines at wind speeds of 5.0 m/s from sunset to sunrise during fall migration results in significant reductions of bat fatalities<sup>16</sup> and incorporating this curtailment measure will render take of TCB sufficiently unlikely. EWAC also suggests that the Service acknowledge that use of technology (e.g. bat deterrents and smart curtailment systems) can be sufficient to conclude that take of TCB is unlikely. Any no-take guidance should clarify that project proponents may implement approaches to avoid take that differ from the guidance based on the project proponent's assessment of risk and project-specific circumstances. To further ensure that any no-take guidance adopted appropriately considers turbine technology and other practical considerations, the Service should solicit public comment on no-take guidance measures.<sup>17</sup>

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<sup>14</sup> No-take guidance arguably has a regulatory effect and therefore should be made available for public comment. *See e.g., CropLife America v. EPA*, 329 F.3d 876 (D.C. Cir. 2003); *General Electric Co. v. EPA*, 290 F.3d 377 (D.C. Cir. 2002); *Appalachian Power Co. v. EPA*, 208 F.3d 1015 (D.C. Cir. 2000); *Texas v. United States*, 809 F.3d 134 (5th Cir. 2015), *aff'd*, 136 S. Ct. 2271 (2016).

<sup>15</sup> SSA at 127.

<sup>16</sup> *See e.g.,* Bethany R. Straw, et al., *Analytical Assessments in Support of the U.S. Fish and Wildlife Service 3-Bat Species Status Assessment* (January 2022) at 256.

<sup>17</sup> For example, rolling temperature averages and other considerations may warrant inclusion in any no-take guidance to accommodate various turbine technologies.

**c. No-take guidance for electric transmission and distribution infrastructure**

Maintenance and replacement of existing electric transmission and distribution infrastructure is critical to ensuring that all communities have access to safe, reliable, and affordable electricity. Key to operation and maintenance of this infrastructure is the maintenance of the associated rights-of-way. The existence of hazard trees or other vegetative growth can threaten the delivery of power and increase risks to human health and safety. Wildfire,<sup>18</sup> power outages, and other safety risks increase if overgrowth is allowed to remain in rights-of-way. Operators of electric transmission and distribution infrastructure are required by law to maintain rights-of-way to ensure safe and reliable electricity.<sup>19</sup>

EWAC acknowledges that ESA section 9, through the regulatory definition of “harm,” prohibits significant habitat modification where such habitat modification results in death or injury to an identifiable member of a listed species.<sup>20</sup> However, not all habitat modification rises to the level of “harm” in violation of ESA section 9. Entities maintaining electric infrastructure rights-of-way in the TCB range have done so for decades and have had a negligible effect on TCB’s suitable habitat due to the fact that summer (roosting sites) and winter (hibernation sites) habitat is not limiting throughout the range of the species.”<sup>21</sup>

Any no-take guidance should make clear that maintenance activities such as side-trimming and hazard tree removal throughout the growing season are unlikely to result in take of TCB because the species is not habitat limited, and removal or trimming of individual trees or small numbers of trees along existing rights-of-way would not be expected to result in harm. Providing these clarifications is important; otherwise, operators of power line infrastructure may be put in a situation where they have to weigh the risk of ESA violation against taking action to ensure they are meeting the safety and reliability requirements enacted to save lives, ensure electric reliability and protect property.

**d. No-take guidance relative to summer habitat clearing**

EWAC members construct and operate renewable energy projects (wind and solar), electric transmission and distribution facilities, energy storage, and other electric generation facilities within TCB’s range. Development of these facilities can require clearing of habitat that may be suitable for TCB. As noted above, not all habitat modification equates to “harm” in contravention of the ESA section 9 take prohibition, and the Service notes that the severity of habitat loss to TCB is slight.<sup>22</sup> The Service should provide the regulated community with guidelines on when clearing

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<sup>18</sup> Wildfires also pose a risk to TCB; such fires can destroy critical habitat and protected individuals.

<sup>19</sup> Federal Power Act § 16 U.S.C. § 8240 (Electric reliability). *See also* North American Electric Reliability Corporation, *U.S. Reliability Standards*, “All Reliability Standards” for a list of all standards put forth by the Electric Reliability Organization (subject to review and approval by the Federal Energy Regulatory Commission) as authorized under the Federal Power Act, available at <https://www.nerc.com/pa/Stand/Pages/USRelStand.aspx>.

<sup>20</sup> *See Babbitt v. Sweet Home Chapter of Comty.s for a Great Or.*, 515 U.S. 687, 710 (1995) (O’Connor, J., concurring) (defining “significant habitat modification” to include “habitat modification that kills or physically injures animals... [or interferes] with essential behaviors... includ[ing]... breeding, feeding, and sheltering.”).

<sup>21</sup> Proposed Rule at 56,391.

<sup>22</sup> *Id.* at 56,385.



or alteration of potentially suitable habitat is unlikely to result in take.<sup>23</sup> Doing so will provide clarity to the regulated community and reduce the burden on the Service to provide technical assistance or to process permits on a case-by-case basis. Given TCB is a habitat generalist and summer habitat is not a limiting factor,<sup>24</sup> EWAC recommends the Service clarify in any final rule or standalone guidance that clearing of summer habitat outside of the summer maternity season is unlikely to result in take of TCB.

If the Service instead decides to take an approach more like it has taken with Indiana bat and establish clearing thresholds (either in acreage or percentage) during winter clearing for projects that have determined or assumed presence, then the Service should take into account several factors when providing guidance on when clearing is unlikely to result in take of TCB. The Service should consider the challenges of seasonal habitat clearing restrictions as well as variations in wooded habitat and migration timing. For example, within the northern regions of the TCB range, heavy precipitation and low winter temperatures can restrict the schedules of maintenance and construction crews. Habitat availability and the size of forest patches can also vary substantially between parts of the TCB range, as does migration timing. The Service should account for regional differences in severity of seasonal conditions, variations in habitat availability, and variations in migration timing. Finally, the nature of the clearing should be taken into consideration; for example, construction of a new linear right-of-way will have less concentrated impacts to suitable bat habitat in any one location and thresholds are not appropriate. Given TCB are habitat generalists, any threshold-based no-take guidance should be less restrictive than approaches for more habitat specialists such as the Indiana bat.

**e. No-take guidance for hibernacula**

The Service should provide clear direction that avoidance of direct impacts to occupied hibernacula (whether caves or man-made structures) is sufficient to render take of TCB unlikely. Coupled with guidance on how one can assess presence/probable absence of man-made structures, this direction will be helpful for the regulated community. For the Southern RPU, the Service should provide no-take guidance that reflects the wintering behavior of TCB in that RPU. For example, the Southern RPU is known to use culverts and other structures during the winter months, and TCB are accustomed to human activity such as vehicular traffic. And, as noted above, project proponents may not have access to assess TCB presence in culverts as culverts are often owned and maintained by entities other than EWAC members. It is critical that the Service provide guidance on how one can avoid risk during project activities adjacent to these features during the winter.

Again, any proposed no-take guidance should be published for public comment to allow the regulated community to provide input on practical considerations that may warrant inclusion into any final no-take guidance. The Service should publish such guidance for comment prior to any final listing rule to allow Service staff and the regulated community time to understand and be

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<sup>23</sup> The Service has provided similar guidance for the Indiana bat, a habitat-specialist. Given TCB is a habitat-generalist, any TCB no-take guidance for habitat clearing should be less restrictive than for the Indiana bat. *See e.g.*, U.S. Fish and Wildlife Service, *Section 7 Technical Assistance – Summary of Indiana Bat Ecology*, available at: <https://web.archive.org/web/20220121073506/https://www.fws.gov/midwest/endangered/section7/s7process/mammals/inba/INBAEcologySummary.html>.

<sup>24</sup> SSA at 110.

prepared for a listing in the event the Service's final determination is to list the species as endangered.

**III. The Service should proactively collaborate with the electric power sector to use all ESA tools at its disposal to develop industry-specific approaches that will ameliorate the impact of any final listing.**

While the Service has recognized that WNS, not human development activity, poses the greatest threats to TCB, public and private entities engaging in development activities will bear the weight of the compliance burden from this listing. Should the Service proceed with listing TCB as endangered, EWAC urges the Service to work proactively with the renewable energy and electric transmission and distribution sectors ahead of any final listing to identify solutions that ensure conservation of the species, compliance with the ESA, and the safe, reliable, affordable, and timely deployment of electric energy. The Service should leverage the cooperation and resources of the regulated community to find solutions that do not rely on project-by-project ESA section 10 permits, ESA section 7 consultations, or habitat-focused compensatory mitigation. For example, low-effect HCPs, programmatic incidental take permits, general conservation plans, and programmatic biological opinions are options that could be applied in an efficient way that is practicable, reasonable, and commensurate with the impacts to TCB. Additionally, existing in lieu fee programs benefitting listed bat species for the transportation sector should be expanded to include TCB and serve multiple sectors. The Service should promote minimization measures and research opportunities for companies who are advancing technology (e.g., acoustic deterrents and smart curtailment systems) that reduce wind energy impacts to the species. As different solutions work better for different industries, the Service should work collaboratively with the regulated community to ensure appropriate solutions are being used based on industry-specific considerations, and should ensure that renewable energy and electric transmission and distribution industries are not held to a standard beyond what is required by ESA, regulations, and relevant case law.

Given the primary threat to the species is the prevalence of WNS, the Service should also expand acceptable compensatory mitigation for TCB beyond habitat-based solutions. The ESA does not require that mitigation for impacts to species be provided in the form of habitat-based mitigation; nor does it prohibit research as mitigation. Novel threats to the existence of a species should result in novel solutions to provision of mitigation that are specifically targeted at ameliorating those threats. The Service regularly includes research as mitigation in recovery plans. Accordingly, the Service should allow funding for addressing WNS's impacts through research, treatment, or other novel approaches to satisfy compensatory mitigation requirements, in full or in part, for TCB under ESA section 10(a)(1)(B), and to serve as voluntary conservation under ESA section 7 consultations. These measures reduce threats to the species and optimize the production, transmission, and distribution of clean energy. Continued research will provide important data to help the Service and regulated community understand the life history and needs of TCB and inform how best to conserve the species. EWAC understands the Service has historically accepted

research funding as mitigation in exceptional circumstances and believes TCB readily meets those exceptional circumstances.<sup>25</sup>

**IV. The Service should consider whether it is appropriate to characterize the Southern RPU as its own DPS and evaluate whether the Service has the information to make a listing determination on a Southern DPS.**

EWAC encourages the Service to consider whether portions of TCB warrant consideration as a DPS in accordance with the Service’s 1996 policy (“DPS Policy”).<sup>26</sup> The SSA includes information that could support such a finding. For example, the SSA notes that there are genetic variations across the RPUs.<sup>27</sup> Further, the SSA notes there are several behavioral and ecological distinctions unique to the Southern RPU.<sup>28</sup> Data provided in the SSA indicates the distinctions in Southern RPU behaviors have led to less severe WNS impacts to the Southern RPU than the other RPUs. The SSA also notes uncertainty in understanding key life cycles of the Southern RPU.<sup>29</sup> Given this information, EWAC suggests the Service evaluate whether the Southern RPU would appropriately be considered a DPS. If the Service determines the Southern RPU is a DPS, then the Service should also consider whether it has enough information to make a listing determination for the Southern RPU and what the appropriate determination should be. Whether or not the Service concludes separate treatment as a DPS is warranted, the Service should continue to collect and evaluate data on the Southern RPU to inform its administration of the ESA. As described in previous sections, the lack of technical assistance in the Proposed Rule and SSA, seemingly due to a lack of data, make it challenging for the Service to administer the ESA for TCB. This is particularly the case for the Southern RPU.

**V. The Service inappropriately singles out wind energy as a threat to TCB and should revise the SSA to more accurately describe wind energy impacts to TCB.**

Similar to the March 2022 proposed rule to list the NLEB,<sup>30</sup> the Service has singled out production of wind energy as a consequential stressor and having a “medium impact” on TCB.<sup>31</sup> However, the overwhelming cause of the significant species-level decline of TCB is WNS, not

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<sup>25</sup> See 81 Fed. Reg. 95,316, 95,343 (Dec. 27, 2016), 81 Fed. Reg. 83,440, 83,479 (Nov. 21, 2016) (stating “These circumstances may exist when: (a) The major threat to a resource is something other than habitat loss”); withdrawn by 88 Fed. Reg. 36,469 (July 30, 2018). See also Kaheawa Wind Power II Habitat Conservation Plan and Kaheawa Pastures Wind Energy Generation Facility Habitat Conservation Plan, which allow research as part of the compensatory mitigation package.

<sup>26</sup> 61 Fed. Reg. 4,725 (providing “[t]hree elements for the Service to consider in a decision regarding the status of a possible DPS as endangered or threatened under the [ESA].” The elements are: “1. Discreteness of the population segment in relation to the remainder of the species to which it belongs; 2. The significance of the population segment to the species to which it belongs; and 3. The population segment’s conservation status in relation to the Act’s standards for listing”).

<sup>27</sup> SSA at 27-28.

<sup>28</sup> *Id.* at 28.

<sup>29</sup> *Id.* at iv, 14, 36, 67.

<sup>30</sup> 87 Fed. Reg. 16,442 (Mar. 23, 2022).

<sup>31</sup> Proposed Rule at 56,385; SSA at 38.

anthropogenic activity.<sup>32</sup> In its SSA, the Service estimates that currently, WNS is responsible for 90-100% of TCB's population decline over 59% of its range, thus deserving of its categorization as having a "high impact" on the species,<sup>33</sup> while wind energy, responsible for 19-21% population decline over 53% of its range, is categorized as having a "medium impact."<sup>34</sup> The Service's ability to understand the impacts of wind energy on TCB is in large part attributable to the extensive efforts the wind energy industry has voluntarily undertaken to work with the Service to gather and share data; it is one of the few commercial activities where such a detailed dataset is available, which should not be misconstrued to indicate wind operations have more significant implications than most other activities.

The SSA comes to several unsupported conclusions on TCB population size and the projected impacts of wind energy. While the SSA estimates that 3,227 TCBs are killed annually at wind energy facilities based on the 2020 installed megawatt capacity, little to no information is provided on how the loss of 3,227 individuals relates to overall population trends or abundance. In other words, the Service does not provide enough information regarding the overall TCB population and abundance to support characterization of wind energy having a medium impact on TCB, beyond citing to statistical models inclusive of a large number of assumptions. The SSA also does not distinguish between onshore and offshore wind energy impacts; it should be made clear that threats or stresses to cave-dwelling bats from the operation of offshore wind energy have not been documented.

The SSA's unsupported and disproportionate emphasis on wind energy as a threat to TCB does not appear to be based on the best available science and negatively influences the Service's and the public's view of wind energy. Further, it cannot be overlooked that the electric power sector in general, and wind energy in particular has played -- and will continue to play -- a key role in combatting climate change, which ultimately supports TCB's survival as a species. The positive effect of renewable energy, including wind energy, on combatting the impacts of climate change on TCB must be given consideration. In developing the SSA and Proposed Rule, the Service failed to directly acknowledge the effect the listing would have on wind energy deployment and other conservation priorities that address climate change.

## **VI. Conclusion**

EWAC appreciates the Service's consideration of these comments and, in particular, comments relating to how the Service can reduce the impact of a listing by providing ahead of a final listing decision, and with time for public review and comment, technical guidance and working with the regulated community to administer the ESA in way that ensures the efficient development, construction, operation, and maintenance of renewable energy and electric transmission and distribution facilities. EWAC urges the Service to revisit its treatment of the wind energy industry in any final rule and SSA and to base any final listing determination on the best available science. EWAC further encourages the Service to work quickly, using all of the tools at its disposal, to promulgate any final listing rule in a way that minimizes barriers to renewable

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<sup>32</sup> See, e.g., 87 Fed. Reg. at 56,385 ("Although there are other stressors affecting [TCB], the primary factor influencing its viability is [WNS]") and SSA at 33 ("For over a decade, WNS has been the foremost stressor on TCB.").

<sup>33</sup> *Id.* at 43.

<sup>34</sup> *Id.*

energy and electric transmission and distribution infrastructure deployment. EWAC welcomes the opportunity to discuss these comments in greater detail and explore with the Service how to implement the ESA in a way that benefits both TCB and future listed species.

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