November 14, 2022

Via electronic submission (http://www.regulations.gov)
Attn: FWS-R5-ES-2021-0163
United States Fish and Wildlife Service
MS: PRB/3W
5275 Leesburg Pike
Falls Church, VA 22041-3803

Re: FWS-R5-ES-2021-0163; Proposed Rule to List the Tricolored Bat (*Perimyotis subflavus*) as an Endangered Species

Dear Sir or Madam:

GPA Midstream Association ("GPA Midstream") appreciates this opportunity to submit comments on the U.S. Fish and Wildlife Service's ("Service" or "FWS") proposed rule to list the tricolored bat (*Perimyotis subflavus*) as an endangered species pursuant to the Endangered Species Act ("ESA") (hereinafter the "Proposed Rule" or "Proposal"[1]).

GPA Midstream has served the U.S. energy industry since 1921 and has over 60 corporate members that directly employ more than 56,000 employees that are engaged in a wide variety of services that move vital energy products such as natural gas, natural gas liquids ("NGLs"), refined products, and crude oil from production areas to markets across the United States, commonly referred to as "midstream activities." The work of our members indirectly creates or impacts an additional 396,000 jobs across the U.S. economy. GPA Midstream members gather over 77% of the natural gas and recovers more than 80% of the NGLs such as ethane, propane, butane, and natural gasoline produced in the United States from more than 380 natural gas processing facilities. In the 2019–2021 period, GPA Midstream members spent over $100 billion in capital improvements to serve the country's needs for reliable and affordable energy.

GPA Midstream members have extensive gas and NGL operations that cover much of the 39-state range of the tricolored bat habitat area and will be directly impacted by the Proposed Rule. While GPA supports the Service's efforts to protect threatened and endangered species when there is sound scientific justification for such a listing determination, GPA is concerned the Service's Proposed Rule is not based on the best available science and would fail to meaningfully combat any decline in the tricolored bat population where the major contributing factor is the naturally-occurring White Nose Syndrome ("WNS"), as opposed to human activities to be regulated under

[1] 87 Fed. Reg. 56,381 (Sept. 14, 2022) ("Proposed Rule").

the ESA.[2] At this stage, GPA opposes the Proposed Rule where it lacks foundation in best available science and unnecessarily affects different industries engaged in low-impact activities.

Instead, GPA urges the Service to reconsider its proposed classification, if any classification is warranted, and instead classify the species as threatened. A threatened classification is more readily supported by the underlying species status assessment[3] ("SSA") and would better allow the Service to focus its efforts on scientific exploration[4] to better understand the populations most at risk of WNS and more carefully curate and protect those populations and corresponding hibernacula most in need of support. Because oil and gas activities—midstream, in particular—sought to be regulated by the proposed reclassification do not contribute to any decline in the species and have little to no impact on the harm caused by WNS, such refocused efforts would allow the Service to more effectively expend resources focusing on specific populations and regions most impacted by WNS and understanding the root cause of WNS.

I. The Service Should Withdraw the Proposed Rule as Not Based on the Best Scientific Data Available

The Service must rely on the "best scientific and commercial data available" when conducting the fact-intensive analysis necessary to determine whether a species is threatened or endangered.[5] Despite this mandate, the Service's Proposed Rule specifically requests comments regarding the tricolored bat's "biology, range and population trends" and "additional info concerning historical and current status, range, distribution, and population size of [the tricolored bat] including locations of any additional populations."[6] And the 2021 SSA appears to rely on a large number of unpublished reports and data[7] while omitting important studies that provide more support for potentially listing the species as threatened, as opposed to endangered, where the bat's population is affected unevenly by WNS depending on geographical area and a number of other factors.[8] Not only does this make it difficult or near-impossible for GPA to verify information

[2] 87 Fed. Reg. at 56,384.

[3] U.S. Fish & Wildlife Serv., *Species Status Assessment (SSA) Report for the Tricolored Bat (Perimyotis subflavus)* (Dec. 2021) ("SSA").

[4] *See, e.g.*, Katherine O'Neil, *New treatment offers hope for bats battling white nose syndrome*, Science News for Students (July 26, 2019), https://www.sciencenewsforstudents.org/article/new-treatment-offers-hope-bats-battling-white-nose-syndrome (describing successful bacterial treatment of WNS).

[5] 16 U.S.C. § 1533(b)(1); *see also* 5 U.S.C. § 706 (an agency action that is contrary to law must be set aside by a reviewing court).

[6] 87 Fed. Reg. at 56,382.

[7] SSA at 28, 38, 39, 77, 106, 107, 126, 127, 142, 144, 149, 156.

[8] *See, e.g.*, Roger W. Perry, *SSA Peer Response*, at 3 (Mar. 31, 2021) ("Perry Peer Review"); Roger W. Perry & Phillip N. Jordan, *Survival and persistence of tricolored bats hibernating in Arkansas mines*, Journal of Mammalogy, Volume 101, Issue 2, at 535–543 (Apr. 8, 2020), https://doi.org/10.1093/jmammal/gyaa016 (concluding after a five-year study that bat populations "in individual mines varied greatly in survival rates, with one mine displaying annual survival rates as high as 0.706 and another as low as 0.101. Differences in survival among bats in different mines could not definitively be attributed to WNS, but may have varied based on a combination of

included in the SSA and provide meaningful comments to the Service, but it also illustrates the shortcomings of the Service's purported "best available data."

This reliance on subpar data is concerning. The Service cannot and should not classify the tricolored bat as endangered without first fully understanding the bat's range, distribution, and population size. The SSA acknowledges the lack of full understanding of the population's range and relies heavily on hibernacula surveys that fail to account for the bat's full population as there is also evidence that hibernacula is "probably only a fraction of the actual number of sites where [the tricolored bat] hibernates."[9] Indeed, the Service itself concedes that it lacks "perfect knowledge of current colony abundance and population trend because hibernacula are not surveyed every year nor concurrently, and there are likely many undocumented hibernacula."[10] Dependence on flawed data that relies solely on hibernacula with larger concentrations of tricolored bat may skew the data on survival.[11]

As one peer reviewer pointed out, the Service has essentially grouped all tricolored bats together into a single "population" for the purpose of this listing.[12] But due to the bat's purportedly expansive range—39 states, Washington D.C., and 4 Canadian provinces—the Service must take care to fully understand the individual populations present in the U.S., the impacts of WNS or other factors on each individual population within the bat's range, distribution within each population, and then determine which, if any, individual populations should appropriately be listed as endangered, threatened, or not listed at all.[13]

WNS, disturbance, mine climate, and other unknown factors. Further, some hibernacula may have served as temporary winter shelter for young transient males. Sites housing small colonies of hibernating bats may result in high survival rates despite WNS, and protecting these smaller sites may be important for overall species perseverance.").

[9] Perry Peer Review at 1.

[10] SSA at 88.

[11] Perry Peer Review at 1 ("I believe that many (if not the majority) of [the tricolored bat] may be distributed in numerous small (and often unidentified) hibernacula during winter. Large concentrations of this species is more of an oddity than a norm. They generally avoid one another during hibernation and do not cluster. Further, data sets based mostly on large concentrations of this species, often in association with myotis colonies, makes them more vulnerable to WNS and may skew the data on survival in hibernacula. Because of limited resources for monitoring, managers/researchers tend to visit a small number of sites with the greatest numbers of bats (unless they are endangered) instead of visiting numerous sites that house only small groups of bats. Missouri alone has over 6,400 caves and I bet most of those contain tricolored bats in winter. These sites are mostly on private lands and are not surveyed for bats. Another example; Heath et al (1986) found PESU in every abandoned mine they searched (27 total) in Arkansas, regardless of size or climate and recent surveys of many of those sites found [tricolored bats] still occupying these mines (Heath, D.R., D.A. Saugey, and G.A. Heidt. 1986. Abandoned Mine Fauna of the Ouachita Mountains, Arkansas: Vertebrate Taxa. Journal of the Arkansas Academy of Science 40:33-36).").

[12] Perry Peer Review at 1 ("What is considered a 'population' and what are the geographic boundaries of each 'population'? Are there more than one population? Does every site consist of a population?").

[13] *Id.*

Moreover, the SSA accounts primarily for potential impacts to the population by WNS and wind energy development, but fails to discuss the nuance of spatially altered impacts to the tricolored bat, such as how habitat management may impact the species. This is of particular importance to GPA and its members as they work to increase the foraging habitat for bat populations generally through the development of re-vegetated linear projects. Not only is it counterproductive to impose lengthy regulatory processes on actions that primarily benefit bat species in need of such habitat, but these positive actions—including other ongoing conservation projects—are not truly accounted for in the SSA's analysis of impacts to the species.

Finally, the SSA also fails to meaningfully address the potential evolution of the species to better handle WNS. European bats survive when infected by the same WNS-causing fungus during hibernation due to a sufficient baseline level of key immune parameters developed in the species over time.[14] Studies in the U.S. have similarly indicated that survivors of WNS have endured genetic changes and suggest that survivors "rapidly evolve to resist the fungal disease."[15]

Ultimately, these various errors and gaps or omissions in the underlying record require the Service to withdraw the Proposed Rule and complete a more thorough assessment of the species' population and range. Additionally, the Service should review all published, non-speculative data regarding impacts of WNS consistent with ESA requirements.

II. Final Rule Must Ensure Prompt Regulatory Response from the Service

The primary threat to the tricolored bat is WNS, not the human activities potentially prohibited pursuant to the ESA if the Proposed Rule becomes final. It is therefore difficult to determine how the tricolored bat benefits from such a listing and the Service should weigh this factor more heavily.[16] Should the Service nevertheless make final its proposed listing, GPA recommends that the Service carefully consider listing the species only as threatened, thereby providing the Service additional resources to more carefully curate solutions specific to the tricolored bat and the industries or activities most likely causing harm to the bat.

With either listing, the Service should utilize creative implementation strategies that will minimize the regulatory burden on the public across the 39-state range of the bat. At minimum, GPA urges the Service to publish guidance regarding those activities not expected to affect the

[14] Marcus Fritze, Sebastien J. Puechmaille, David Costantini, Jörns Fickel, Christian C. Voigt & Gábor Á. Czirják, *Determinants of defence strategies of a hibernating European bat species towards the fungal pathogen Pseudogymnoascus destructans*, Developmental & Comparative Immunology (2021); *see also* Leibniz Inst. for Zoo & Wildlife Rsch., *European hibernating bats cope with white-nose syndrome which kills North American bats*, ScienceDaily (Feb. 3, 2021), www.sciencedaily.com/releases/2021/02/210203123404.htm.

[15] Sarah A. Gignoux-Wolfsohn, Malin L. Pinsky, Kathleen Kerwin, Carl Herzog, MacKenzie Hall, Alyssa B. Bennett, Nina H. Fefferman & Brooke Maslo, *Genomic signatures of selection in bats surviving white-nose syndrome*, Molecular Ecology (Jan. 21, 2021); *see also* Todd Bates, *Deadly White-Nose Syndrome Changed Genes in Surviving Bats*, Rutgers (Feb. 4, 2021), https://www.rutgers.edu/news/deadly-white-nose-syndrome-changed-genes-surviving-bats.

[16] 87 Fed. Reg. at 56,385.

tricolored bat. This would include those activities occurring within the habitat of a known tricolored bat population but that would not result in harm, or any form of prohibited take, of the bat. Such activities include the midstream oil and gas activities and routine clearing in areas uninhabited by the tricolored bat.

Because the listing of the tricolored bat as endangered will potentially result in a significant increase in the number of applications for incidental take permits (ITP) and associated habitat conservation plans (HCPs) under ESA Section 10, it will impact a multitude of industries in the species' 39-state range, not just the industries identified by the Service as problematic, such as wind energy development.[17] Obtaining an ITP can be a lengthy, expensive process that requires involvement by the Service and the preparation of a habitat conservation plan (HCP). It will be infeasible for each project or activity that is reasonably certain to take the tricolored bat to obtain an individual ITP.

Thus, where appropriate, the Service should commit sufficient resources to the development of regional or industry-wide programmatic HCPs with associated ITPs that allow parties to opt in through certificates of inclusion as a result of this proposed action. However, if it proves difficult to find a party willing to be the master permittee for one or more of these programmatic HCPs, the Service should consider developing a general conservation plan (GCP), which is a Service-initiated process that allows parties to apply for and receive an individual ITP when they can demonstrate compliance with the conservation and mitigation requirements of the GCP. Streamlined ESA compliance options for projects without a federal nexus are vital to avoiding serious impairment of important projects and activities that are not, as the Service recognizes, the cause of the tricolored bat's decline.[18]

The Service must ensure adequate and prompt action is taken to ensure that these non-impactful activities are not arbitrarily put on hold until a full regulatory process has commenced—a process unlikely to even identify the presence of the tricolored bat.

III. Designating Critical Habitat is Not Warranted

Although GPA urges the Service to reconsider this listing and, at most, list the tricolored bat as threatened and not endangered, GPA agrees with the Service's conclusion that a critical habitat designation is not prudent or determinable at this time. As discussed above, the Service's SSA includes a variety of omissions and errors regarding the tricolored bat's range and distribution and GPA reminds the Service that it must ensure valid and timely notice and comment is available to the public for any proposed designation in the future.

Should the Service determine at a later date that a critical habitat designation is warranted, GPA reserves its right to comment on such proposed designation and urges the Service at this time

[17] *Id.*

[18] *See id.*

to severely limit any such designations so as to effectively protect only those populations at risk of, for example, human interruption of hibernation activities within known hibernacula.

IV. FWS Should Delay the Effective Date of an Endangered Listing by Six Months

If FWS still concludes that the tricolored bat warrants listing as an endangered species after obtaining and fully evaluating the best scientific and commercial data available, the Service should delay the effective date of the final listing decision by six months. Doing so would provide Service staff, other federal agencies, and the regulated community much-needed time to prepare for the far-reaching consequences that would result from the change. In particular, it would help protect billions of dollars in public and private infrastructure investment, much of which relies on time-limited funds, that otherwise would be jeopardized by the sudden increase in regulatory overreach and time-consuming and costly permitting process and biological assessment requirements that would come to be associated with various transportation projects throughout the species' 39-state range. Consistent with the terms of 50 C.F.R. § 424.18(b)(1), the Service has ample authority to establish an appropriate effective date for its final rule. For the reasons stated above, that effective date should be no sooner than six months after FWS publishes the final listing decision in the Federal Register.

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GPA urges the Service to withdraw its proposed listing of the tricolored bat and reconsider the best plan of action in light of the bat's largest threat, WNS, as opposed to regulated activities that would bear the brunt of the classification's effects with little to no benefit to the bat's future survival. 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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GPA Midstream Association