



United States Department of the Interior

FISH AND WILDLIFE SERVICE

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In Reply Refer To:
FWS/R4/ES

Memorandum

To: Deputy Regional Director, Southeast Region

From: Assistant Regional Director - Ecological Services, Southeast Region

Subject: Amendments to San Francisco Wind Farm, LLC Incidental Take Permit (ITP), TE104073-2, Set of Findings and Lifting of Partial Suspension of the ITP

I. Proposed Actions

The U.S. Fish and Wildlife Service (Service) issued ITP TE104073-0 on September 12, 2006, pursuant to the Endangered Species Act of 1973, as amended (ESA). The ITP authorized San Francisco Wind Farm, LLC (formerly WindMar Renewable Energy, Inc.) (Applicant) to take Puerto Rican nightjar (*Caprimulgus noctitherus*), brown pelican (*Pelecanus occidentalis occidentalis*), and roseate tern (*Sterna dougallii dougallii*) incidental to construction and operation of a commercial wind-energy project (Project) in Guayanilla, Puerto Rico. The ITP was subsequently amended on April 28, 2011 (TE104073-1), and again on November 19, 2012 (TE104073-2). The applications, documentation, and findings for previous ITP actions are on file with the Service's Southeast Regional Office and the Caribbean Ecological Services Field Office. Throughout this Set of Findings, we will refer generically to TE104073 as the "ITP" and use the amendment number where the context requires.

In 2011, the Service became aware of issues concerning the Applicant's non-compliance with the ITP as well as of possible Project impacts to the Federally-listed Puerto Rican crested toad (*Peltophryne lemur*) (PRCT). After inquiring into these matters, the Service determined that circumstances warranted a Proposal to Partially Suspend the ITP (Proposal), in accordance with 50 C.F.R. § 13.27, and a Finding of Necessity to Amend the ITP (Finding) in accordance with 50 C.F.R. § 13.23(b). The Service issued the Proposal and Finding jointly on November 2, 2011. After considering the Applicant's response to the Proposal and within the prescribed regulatory time frame, the Service issued a Decision of Partial Suspension of the ITP (Decision) on February 2, 2012, which was later clarified in a Correction dated February 24, 2012. The partial suspension applied only to Project activities that were to occur in the Punta Ventana region. To cure the deficiencies that led to the partial suspension, the Service advised the Applicant to amend its habitat conservation plan (HCP) to cover the PRCT. The Service also prescribed remedial measures for restoration of habitats in the Punta Ventana region that had been cleared in excess of that authorized by the HCP and ITP.

The Service advised the Applicant, however, that a total revision of the 2005 HCP was not required. Accordingly, the Applicant prepared an addendum to the HCP in which it analyzed the impacts of the Project on the PRCT and presented a conservation plan for the species. On January 10, 2013, the Applicant submitted its addendum to the HCP. The Applicant also requested amendment of the ITP. This Set of Findings provides the Service's decision on the amendment application and finding in accordance with the National Environmental Policy Act (NEPA). It also documents the Service's decision to lift the partial suspension.

II. Section 10(a)(2)(A) HCP Criteria - Analysis and Findings

1. Criterion – The impact to result from taking.

In 2008, a new breeding population of the PRCT was documented in the Punta Ventana area of the Project site. Further observations provided evidence that this area harbors suitable feeding, sheltering, and breeding habitat for the species. Since 2008, new biological information for this species has been gathered and evaluated. In 2012, the Service determined that an amendment to the existing HCP and ITP were needed to appropriately evaluate, mitigate, and cover for the effects of the Project on the PRCT.

The addendum to the HCP provides information on the distribution of PRCT and estimates incidental take of the species likely to result from Project construction, road improvements, and vehicular access throughout the term of the ITP. Breeding events have been monitored since the species was reported in the Punta Ventana area. Since 2011, Project consultants have conducted surveys for the species at the Ventana breeding pond and the adjacent dry forest areas.

The surveys and observations of recent breeding events have been used by the Applicant to estimate take of adult PRCT and dispersing toadlets resulting from road construction and grading, grading turbine sites, excavation and construction of turbine bases, trenches for turbine interconnection, and road traffic associated with the Project. Take also has been estimated for operations, maintenance, and rotor replacement. The survey findings and observations of the PRCT during and after breeding events constitute the best information available given that no other data are available.

2. Criterion – The steps taken to minimize and mitigate such impacts and the funding that will be available to implement such steps.

The addendum to the HCP provides avoidance, minimization, mitigation, and adaptive management measures. Avoidance measures include construction, operations, and maintenance scheduling to avoid PRCT breeding events and the establishment of a buffer corridor along a ravine where dispersal occurs. Minimization measures include timing the construction and maintenance activities to avoid hours of peak PRCT activity, construction of a PRCT underpass structure at a key dispersal path along one of the roads, and implementation of programs to control invasive predator and competitor species.

Mitigation measures include the donation of 67 ha of dry forest habitat to the Puerto Rico Department of Natural and Environmental Resources (PRDNER), reforestation of 5.1 ha of dry forest, and the funding of monitoring and adaptive management research by a species' expert. The adaptive management research program will encompass genetic research of the Punta Ventana PRCT population, tracking movements of the species, and identification of enhancement measures for the species' conservation such as artificial sheltering sites or the improvement of breeding water bodies.

3. Criterion – Alternative actions to the take that were considered by the Applicant and reasons why such alternatives are not being utilized.

A range of alternatives encompassing the entire Project, including Punta Ventana, were considered during the development of the original HCP. The Service did not believe it was necessary, however, to reconsider Project-wide alternatives for an amendment affecting only one portion of the Project at Punta Ventana. Therefore, we did not require further consideration of alternatives in the addendum to the HCP. Additionally, the Applicant had already begun Project road clearing activities in Punta Ventana and elsewhere within the Project area prior to the current amendment request. The only substantive alternative that might have been considered would have been whether to proceed with the Project in the Punta Ventana area. The Applicant informed the Service, however, that construction needs to occur in this area in order for the entire Project to be viable.

4. Criterion – Other measures the Secretary may require as being necessary or appropriate for the purposes of the HCP.

The ESA does not prohibit ITP applicants from “taking” listed plants on non-federal lands. The Service’s intra-Service section 7 consultation evaluates effects of the ITP on listed plant species, but any conservation measures identified would be voluntary on the applicant’s part. State or territorial laws may be more restrictive than the ESA for plants. In this case, the Applicant has agreed to adjust road alignments within the Project site to avoid populations of the federally-listed endangered *Mitracarpus polycladus* and to implement management measures, including control of exotic vegetation that competes with native dry forest and the species.

III. Public Comment – Analysis and Findings

A Notice of Availability was published in the *Federal Register* from March 12, through April 11, 2013, notifying the public of the availability of the Applicant’s application to amend the ITP, addendum to HCP, and the Service’s supplemental Environmental Assessment (EA).

The Service received seventeen (17) comment letters or communications including a form petition letter signed by over three hundred (300) persons. None of the comments favored ITP amendment. Responses to the substantive comments are presented below.

One commentor requested a thirty-day extension of the comment period because the application was not noticed in local publications. The ESA and the Service's implementing regulation require publication of notice in the *Federal Register*. Moreover, for an ITP amendment, the Service is only required to open the comment period for thirty (30) days.

Many of the comments failed to address the specific action contemplated by the Service, i.e., the amendment of the ITP and addendum to the HCP pertaining to the Punta Ventana area of the Project, but raised issues pertaining to the entire Project, which had not been reopened for review. As noted above, the ITP was partially suspended only as to activities in the Punta Ventana area of the Project site. Activities in the remaining Project area were neither affected by the suspension nor are they subject to renewed evaluation. One commentor specifically requested that the Service analyze the degree to which the effects of the entire Project on the quality of the human environment are likely to be highly controversial. We engaged in a NEPA analysis of the entire Project, however, as part of our deliberations on whether to issue the ITP in 2006. Finally, the activities that are expected to result in incidental take of the PRCT are substantively the same as those previously analyzed during our deliberations on whether to issue the ITP in 2006.

Issues Previously Considered by the Service in its 2006 Decision on Issuance of the ITP

Comment 1. Six commentors allege recurrent illegal construction activities conducted by the Applicant since 2004. The commentors claim that these construction activities caused significant removal of earth crust, filling and obstruction of creeks and wetlands, and destruction of thousands of trees.

Comment 2. Three commentors claimed that the Applicant has affected archaeological sites in the Punta Ventana area since 2004.

Response: The Service evaluated the vegetation removal and road construction activities of 2004 and 2006, as part of its deliberations on whether to issue the ITP in 2006. At that time, we determined that the activities did not constitute factors to disqualify issuance of a permit as set forth in 50 C.F.R. § 13.21.

As part of the deliberations on whether to issue the ITP, the Service consulted with the State Historic Preservation Officer for Puerto Rico and investigated claims of the destruction of cultural resources at the Project. Both the consultation and our investigation resulted in a determination that the Project would not affect cultural resources eligible for the National Register.

We have addressed ITP compliance issues from 2006 to the present in Section V., General Permit Issuance Criteria, below. Aside from the issues addressed in the section below, the Service has no evidence of unauthorized construction activities or disturbance of cultural resources within the Project site, including the Punta Ventana area.

Comment 3. Three comments asserted that the Service should have taken into consideration the Guánica Commonwealth Forest's recognition as a Biosphere Reserve by the UNESCO Man and the Biosphere Program as well as the unique characteristics of the Forest. Further comments expressed concern that there is no buffer zone between the Project site and the Forest and that some of the turbine blades may cross into the Reserve.

Response: We acknowledged Guánica Forest's designation as a Biosphere Reserve in our 2006 EA. While the designation serves to highlight significant natural resources to be considered in making land use decisions, the Biosphere Reserve program does not impose legal responsibilities on the Service. We evaluated the effects of the Project alternatives on the Guánica Forest in our 2006 EA and found the Project would not adversely affect Guánica Forest's value as an ecological preserve.

As part of the mitigation plan in the HCP, the Applicant proposed establishing a conservation easement on 245 ha (612.5 ac). This acreage represents 84% of the entire Project site and serves as a buffer zone between the Project and the Reserve. Moreover, based on information provided by the Applicant, the locations of the turbines have been configured to prevent the turbine blades entering airspace above the Guánica Forest; however, the PRDNER has authorized the Applicant's use of airspace above the lands donated to the agency.

Comment 4. One comment claimed that the local scientific community has reviewed and confirmed that the location of the Project is not suitable for wind energy generation. Another comment indicated that steady trade winds in Puerto Rico are found on the windward, northeast side of the Island.

Response: The Applicant obviously made a business decision regarding where to locate the Project and, apparently, determined that the wind resources at the site were sufficient. The Service's role is to analyze the Project's impacts on Federally-listed species occurring within the Project site and to perform the required NEPA analysis of impacts of the Project on the human environment.

Local Laws and Conservation Lands

Comment 5. Two comments claimed that PRCT habitat in Punta Ventana is considered a biodiversity hotspot and that the habitat is located in a unique and unmatched area in Puerto Rico. The comments also stated that the area has been identified for future expansion of the Guánica Commonwealth Forest.

Comment 6. Seven comments expressed concerns regarding compliance with Commonwealth and Municipal laws and ordinances (e.g., Commonwealth Law No. 292-Law for the Protection and Conservation of the Karstic Physiography of Puerto Rico, a Guayanilla municipal legislative ordinance to designate the PRCT as the representative animal of the municipality, and an ordinance to designate the region between Punta Verraco and Tamarindo as a "Specially Protected Rural Area" and as a "Sanctuary Heritage of Guayanilla").

Comment 7. One comment claimed the Project is not compatible with the Biological Corridor proposed on March 31, 2013, by an executive order of the Governor of Puerto Rico. The proposed Corridor includes Cerro Toro, Punta Verraco, and Punta Ventana.

Response: Condition 11.B. of the ITP, which is a required provision for all ITPs, makes the validity of the ITP conditional upon strict observance of all applicable foreign, state, local, tribal or other Federal law. Furthermore, State and local jurisdictions are responsible for implementing and enforcing their laws, regulations, and ordinances. The issuance of an ITP does not relieve an Applicant of obligations to comply with applicable State and local laws, regulations, and ordinances. It is the Service's understanding that the Applicant has received and/or has applied for State and local permits from the appropriate authorities for matters pertaining to the Project. Moreover, to the Service's knowledge, the Applicant has not been subjected to any administrative, civil, or criminal proceeding that would disqualify it from receiving an ITP pursuant to 50 C.F.R. § 13.21. Lastly, the expansion of the Guánica Forest to include the Project site would likely result from negotiations between the Applicant and Puerto Rico, and the Service has not been apprised of any such negotiations.

Impacts to Bats

Comment 8. One comment claimed that the supplemental EA lacks an acceptable evaluation of bat activity and that preliminary observations at the Guánica Commonwealth Forest revealed a large exodus route of *Pteronotus quadridens* flying into the Project site. The comment also claimed that the Applicant did not follow the Service's Land-Based Wind Energy Guidelines and that serious pre-construction evaluation is still needed.

Response: The comment did not provide site specific data on abundance, distribution, or habitat use of bats in the area. The information available to the Service on bats in the area is a study on the vertebrates of Punta Verraco and Punta Ventana conducted for the Applicant in 2004 by Dr. Richard Thomas. Dr. Thomas's finding was that bats did not appear to be common at either Punta Verraco or Punta Ventana. After forty-seven (47) hours of mist-netting at both sites, Dr. Thomas trapped six individuals of four species of bats. Only two of these species were found in Punta Ventana. According to Dr. Thomas, five of the six bats were of the nectar and fruit-eating species, which tend to fly mainly below forest canopy. No bats were observed flying above canopy height.

The Service's Land-Based Wind Energy Guidelines provide a structured and scientific process for addressing wildlife conservation concerns at all stages of land-based wind energy development. Adherence to these guidelines is voluntary, but they do not relieve any individual, company, or agency of the responsibility to comply with laws and regulations.

Puerto Rican Crested Toad Analyses

Comment 9. One comment claimed that in at least one letter sent to the Service in March

2006, by the Centro Eco-Educativo de Puerto Rico (CEDUCAPR), the Service was asked to conduct comprehensive studies for the PRCT based on reports from locals that the species was sighted in the Punta Ventana and Punta Verraco..

Comment 10. Two comments stated that the Applicant falsely informed the Service that the PRCT was not present on the Project site.

Comment 11. Two comments attributed the lack of PRCT information to insufficient data and the lack of expertise of the personnel conducting studies for the species. According the commentors, factors such as these could lead to erroneous conclusions that distribution of PRCT on the Project site is less than that which actually occurs.

Response: CEDUCAPR recommended long term research to confirm the presence of PRCT in Punta Ventana and Punta Verraco, as they considered it “highly probable” the species occurred there. In 2004, Dr. Richard Thomas conducted surveys of reptiles and amphibians in the areas of Punta Ventana and Punta Verraco and did not find PRCT in either area. At the time the ITP was issued in 2006, the Service did not have reliable evidence that the PRCT was present within the Project site. The first confirmed species report from the Project site was in 2008. Subsequently, surveys have been conducted by qualified personnel in order to monitor the species presence in the Punta Ventana area. The pending request to amend the ITP and associated addendum to the HCP, which arise in part from evidence of the occurrence of the species in the Project site, address the PRCT and provide measures for monitoring and adaptively managing for the species within the area of Punta Ventana.

Comment 12. One comment expressed concerns about the use of a relative abundance index to calculate take of the PRCT and the assumption of detection capability of 50% by the biologist conducting the surveys for the species.

Response: Relative abundance estimates have been routinely used for calculating estimates of actual population sizes in scientific and management-oriented activities. At present, studies providing more accurate estimates of PRCT population size (e.g., between and during breeding episodes) are not available for Punta Ventana and would take considerable time as the PRCT is, to some extent, an opportunistic breeder. Therefore, based on the recommendation of Dr. Robert Powell, the Applicant’s contracted consultant, the relative abundance estimates, which were based on surveys by the Applicant’s biologist, were used as crude estimates of population densities. Hence, estimates were based on the best available information and, given that absolute numbers (i.e., density estimates) are almost certainly imprecise, we believe that the relative number estimates are reasonable and adequately justify the conclusions.

With respect to the assertion of underestimation of the take, given that this calculation was based on relative abundance, take might have been underestimated as well as the population size as both estimates are based on the same data. However, if these parameters are underestimated, it would follow that the actual PRCT population is higher than that previously estimated in Punta Ventana.

With respect to the 50% detection capability of the biologist conducting the surveys, the Applicant contends that the biologist, who has many years of experience in conducting such surveys, could certainly find 50% of toads when carefully searching small areas of the Project footprint just prior to conditioning activities, and 90% of toads on roads and turbine sites post conditioning. There are only a few areas of limestone bedrock with solution holes that could serve as hiding places for the PRCT within the Project footprint. Moreover, once the Project footprint has been conditioned, the detectability of toads is expected to increase as their appearance will be more apparent on smooth surfaces.

Comment 13. One comment claimed that the Service has not conducted pertinent studies in the Project area.

Response: PRCT surveys were conducted before and during the development of the HCP amendment to establish baseline information. The Applicant contracted Dr. Robert Powell, a qualified and well-known herpetologist, to design the studies and get the necessary information on the PRCT. Service biologists met with Dr. Powell in the area of Punta Ventana to discuss the need of information on the species and the methodology proposed by Dr. Powell to get such information for the HCP amendment. Service biologists subsequently conducted a number of site visits with the Applicant's biologist to the Punta Ventana area to evaluate the monitoring of the species. The Service reviewed the study reports and the Applicant's HCP and determined that the surveys and studies were appropriately conducted. Furthermore, funding to conduct the research on the PRCT was part of the mitigation program proposed in HCP and, therefore, a condition of the ITP.

Comment 14. One comment suggested that the PRCT's breeding pond in Punta Ventana likely will be impacted since its major fresh water source, a creek that originates at the Guánica Commonwealth Forest, passes through the Punta Ventana area of the Project where the construction activities will affect water quality conditions due to erosion, oil residuals from construction machinery, and frequent oil spills known to occur at wind turbines.

Response: The Applicant has developed stormwater management and erosion control measures as part of the local permitting processes. These were considered in the Service's biological In addition, the Applicant must comply with the Environmental Protection Agency (EPA) permits, and apply for required permits related to water quality, sedimentation and erosion control. As part of their permit process, EPA will establish site-specific measures and the Applicant will be responsible to comply with permit conditions. Any violation of EPA's permit conditions would be investigated by EPA.

Harm or Jeopardy to Puerto Rican Crested Toad

Comment 15. Two comments alleged that authorizing the amendment of the ITP will essentially sanction and grant immunity to the Applicant to destroy and fragment the

eastern part of the only known natural habitat of the PRCT.

Comment 16. Five comments claimed that amending the ITP would enable the Applicant to directly impact the PRCT's habitat and, thus, kill numbers of the species.

Comment 17. One comment claimed that the Project might impact the PRCT in myriad ways, e.g., reduction in land cover, difficulty in finding food and shelter, disturbance from daytime noises and vibrations, and introduction of new diseases or species.

Comment 18. Two comments stated that all data indicate that the PRCT population in Punta Ventana is crucial to the survival of the species.

Response: The addendum to the HCP evaluates the effects and impacts of the Project on a 5.8 ha (14.3 ac) footprint. It also provides measures to avoid, minimize, and mitigate incidental take of the PRCT. In addition to sections II and IV of this document, the Service, in accordance with section 7 of the ESA and as part of its deliberations on whether to amend the ITP, prepared an amended Biological Opinion (BO) evaluating the effects of the Project on the PRCT. The Service concluded that the Project, as proposed, is not likely to jeopardize the continued existence of the species.

Comment 19. One commentator claimed that the addendum to the HCP fails to take into account that PRCT populations from Tamarindo and Punta Ventana are linked by migrations through the Lluberas trail. The commentator also asserted that the supplemental EA fails to evaluate the extent to which the boundary gate between the Project site and Guánica Commonwealth Forest as well as the dirt roads, breeding pond, and ravine in Punta Ventana would be affected.

Response: It has been hypothesized that there might be some exchange between the PRCT populations of Tamarindo and Punta Ventana. However, the best available information does not demonstrate that the two populations are linked by migrations through the Lluberas trail, and the commentator did not provide data to support this claim. The Service does recognize that PRCT migrations probably occur not only along the Lluberas trail but anywhere toads would find appropriate rather than moving across one open area like the Lluberas trail. The supplemental EA and HCP addendum evaluate the effects of the project on the 5.8 ha (14.3 ac) footprint that will be impacted, and provide mitigation measures to avoid, minimize, and compensate for the incidental take of the PRCT. No adverse effects on the breeding pond and the ravine are anticipated.

Comment 20. One comment claims that the Service must analyze and determine the PRCT's minimum viable population and the effects of Project on the population.

Response: A population viability analysis is not required to analyze the effects of a Project on a species. Our analysis is based, however, on the best available information.

Comment 21. One comment stated that amending the ITP would contradict recent efforts of the Service, PRDNER, Puerto Rico Conservation Trust, and the Association of Zoos

and Aquariums to maximize the PRCT reintroductions in Guayanilla. Another comment urged the Service not to amend the ITP but to continue focusing on proactive recovery actions for the species.

Response: The Service has continued, and will continue, to work with numerous partners on the implementation of recovery actions to benefit PRCT populations in northern and southern Puerto Rico. While an ITP applicant is not required to promote species recovery, the HCP is a mechanism under the ESA that provides for the conservation of the ecosystems upon which listed species depend.

Complaints about Activities Outside the Project Area

Comment 22. Two commentors allege that the Applicant's recent deforestation of approximately fifty (50) acres in Monte Barinas, Guayanilla, during the Puerto Rican nightjar breeding season and construction of dirt roads in violation of the HCP and ITP reflect the Applicant's lack of commitment, credibility and likely unwillingness to comply with the addendum to the HCP and the associated amended ITP.

Comment 23. One comment stated that the Applicant's proposed widening of the diameter of a road within the Project area from 10 to 15 meters and expansion of the Project's geographical area to include the Barinas Hill where a road has been built and widened, could possibly exceed the maximum allowable habitat modification area of 12.2 ha and the amount of take of the Puerto Rican nightjar authorized by the "Environmental Impact Statement (EIS)."

Response: The Applicant prepared an Environmental Impact Statement (Declaración de Impacto Ambiental; DIA-F in Spanish) only to comply with the local government permit process. That document does not serve as an environmental impact statement for any federal action. The commentor assumes the DIA-F authorizes take, but it does not authorize take of any species listed by the State or the Federal government. According to the original HCP, and also the proposed addendum to the HCP, the roads would be widened from 5 meters to 10 meters maximum. This widening would affect 3.6 ha of potential PRCT habitat. The proposed addendum and request to amend the ITP pertain only to the Punta Ventana area of the Project site, and as such, our evaluation is limited to these matters. Potential impacts to the Puerto Rican nightjar within the whole Project were already addressed in the original HCP and ITP. Conditions set forth with respect to the nightjar will remain unaltered. Monte Barinas, Guayanilla lies outside of the Project area. The Service is not aware of any evidence that Puerto Rican nightjars might have been taken there.

ITP Compliance

Comment 24. Six comments claim that the Applicant has harassed and killed PRCTs in violation of the ESA and recommend that the Service revoke the ITP and impose penalties for non-compliance.

Response: Since issuance of the ITP in 2006, the Service has monitored the Applicant's compliance through site visits, meetings, and annual reports. In accordance with C.F.R. 50 §§ 13.27 and 13.28, and as described in section V of this document, the Service has proposed suspending the ITP on two occasions. It was our decision on both occasions, however, not to seek civil or criminal penalties against the Applicant.

Prior to the partial ITP suspension, the Service found insufficient evidence of PRCT take to pursue investigation. However, as described in the November 2, 2011, Proposal to Partially Suspend and Finding of Necessity, the Service determined that the Project could not lawfully proceed at Punta Ventana without amendment to cover the PRCT.

Comment 25. One comment claimed that the Service continued to support the Project during the Puerto Rico Planning Board evaluation process even after the discovery of the PRCT in the Project area. The commentor also alleges that the Service argument in support of the Project was that the species would not be affected because its breeding pond is outside the Project area.

Response: This claim is not correct. The Service's involvement as to the Applicant's Project has been limited to matters pertaining to the incidental take permitting process of section 10(a)(1)(B) of the ESA. The Service did not submit comments to the Board during the siting permit evaluation process. Since the discovery of the PRCT in the Punta Ventana area, the Service has provided technical assistance to the Applicant in establishing conservation measures for the protection of the species in the Project area.

Comment 26. One comment indicated that the ITP contemplated an agreement between PRDNER and the Applicant to transfer 90% of the Project area to the agency. The comment also claims that the agreement was renewed with former PRDNER Secretary Daniel Galán and modified to reduce the area to be transferred by 75%.

Response: Condition 11.G.9 of the ITP states that the Applicant would establish a conservation easement in perpetuity on 245 ha (612.5 ac) of the Project site within 120 days of the date the Project begins to deliver electricity. A conservation easement is not a conveyance or transfer of ownership of property, however, and we find no language in the HCP or ITP regarding any proposal to make such a conveyance. Although the ITP refers to the conservation easement, it does not specify the entity to whom the easement would be granted. The siting consultation authorized by the Puerto Rico Planning Board dated March 4, 2010, requires that the Applicant conserve the 245 ha (83% of the total farm area of 290 hectares) in perpetuity. The siting permit also makes reference to a letter from the PRDNER dated February 1, 2007, establishing that these lands must be protected in compliance with PR Law Number 183-2001 and that the conservation easement must be granted to the PRDNER.

According to additional information provided by the Applicant on May 29, 2013, the Applicant made a full donation of title to PRDNER of a total of 168.3 ha in the Punta Verraco and Cerro Toro on February 14, 2010. The donation consisted of 37.1 ha and 131.2 ha divided in two parcels (Parcels "A" and "C"). In addition, the Applicant placed

a “use limitation” on 29.1 ha in Punta Verraco and Cerro Toro (Parcel “B”) while retaining ownership of the parcel. The use limitation prohibits all uses other than for renewable energy, agro-forestry, and ecotourism.

The addendum to the HCP provides for a donation of title of 67 ha in the Punta Ventana section of the Project to PRDNER. The Applicant also has proposed to place a use limitation, similar to that referred to in the preceding paragraph, on 12 ha in Punta Verraco and Cerro Toro. Thus, 235.3 ha of the Project area would be conserved via the donation of title to PRDNER with 41.1 ha of the area subject to a conservation-related use limitation.

IV. Section 10(a)(2)(B) Permit Issuance Criteria – Analysis and Findings

1. Criterion - The taking will be incidental.

Findings – The Applicant proposes to construct wind power facilities for the purpose of generating electricity for the Commonwealth of Puerto Rico. The Service has no reason to believe that the Project would be unlawful. At the Commonwealth level, the Project was originally proposed by the Puerto Rico Department of Natural and Environmental Resources and the Puerto Rico Energy Department. The Puerto Rico Planning Board approved the siting consultation permit and the Puerto Rico Environmental Quality Board approved the Final Environmental Impacts Statement for the Project. The Service finds that take of the species covered by and in accordance with the amended ITP would be incidental to lawful activities.

2. Criterion - The Applicant will, to the maximum extent practicable, minimize and mitigate the impacts of the taking.

Findings - The Applicant developed measures to avoid, minimize and mitigate the impacts of construction and operation of the proposed wind power facilities on the covered species as described in section II.2, above. The major benefits to PRCT from the addendum to the HCP is the avoidance afforded by the timing of construction, timing of access during operations and maintenance, measures to close or cover construction trenches as soon as possible, an underpass structure at a PRCT dispersal route, conservation of dry forest in perpetuity, adaptive management, and monitoring.

The Service has reviewed these proposed measures and determines that they would minimize and mitigate project impacts to the maximum extent practicable. We recognize that no other projects have had to mitigate impacts to PRCT. The HCP addendum acknowledges this as well and provides adaptive management measures that should provide additional positive benefits to PRCT conservation if those are found to be necessary.

3. Criterion - The Applicant will ensure that adequate funding for the ITP and procedures to deal with unforeseen circumstances will be provided.

Findings -The Applicant allocated funding for implementation of ITP conditions into the project budget in the 2005 HCP. Additional funding commitments are allocated in the HCP addendum.

4. Criterion - The taking will not appreciably reduce the likelihood of the survival and recovery of the species in the wild.

Findings - The wording of this criterion is identical to the “jeopardy” definition in the Service’s section 7 implementing regulation (50 C.F.R. § 402.02), which defines “jeopardize the continued existence of” as “to engage in an action that reasonably would be expected, directly or indirectly, to reduce appreciably the likelihood of both the survival and recovery of a listed species in the wild by reducing the reproduction, numbers, or distribution of that species.” In accordance with section 7 of the ESA, the Service prepared an intra-agency biological opinion to evaluate whether the taking associated with the addendum to the HCP would jeopardize the PRCT. In the biological opinion, which is attached hereto and incorporated herein by reference, the Service concluded that the proposed incidental take of the PRCT is not likely to jeopardize the continued existence of the species.

5. Criterion - Additional measures as required by the Director of the Service will be implemented.

Findings - The HCP has incorporated all elements necessary for issuance of a section 10(a)(1)(B) permit. These elements are addressed elsewhere in this recommendation memorandum. Remedial measures are included among the ITP conditions to restore unauthorized clearing and grading as described in the two proposals to suspend (see section V, below).

6. Criterion - The Director of the Service has received the necessary assurances that the plan will be implemented.

Findings – As described in the HCP and the addendum, the applicant has committed to implementing the conservation, monitoring, and reporting requirements. Any permit issued in this matter would only be effective when the mitigation measures have been carried out in accordance with the special conditions of the permit. Failure to perform the obligation outlined by the conditions of the section 10(a)(1)(B) permit may be grounds for suspension or revocation of the permit.

V. General Permit Issuance Criteria – Analysis and Findings

As noted above for Comment 24, the Service has proposed ITP suspension on two occasions. The Service first proposed to suspend the ITP in February 2011, due to the Applicant's engaging in construction activities that were neither set forth in the HCP nor authorized by the ITP. The Service ultimately decided, however, against ITP suspension on April 27, 2011. That decision was based, in part, on the Applicant's agreeing to implement certain remedial measures as set forth in an amendment to the ITP (TE104073-1). To date, the Applicant has satisfactorily implemented the measures.

The February 2, 2012, partial suspension of the ITP was based, in part, on our finding that the Applicant had engaged in land clearing activity in excess of that provided for in the HCP and ITP. The Applicant has proposed measures in its addendum to the HCP to remediate for the land clearing activities. It is our finding that the proposed measures, when implemented, would address our concerns and adequately remediate the unauthorized land clearing activities. These remedial measures are conditions of the amended ITP.

The partial suspension of the ITP was also based on our Finding of Necessity to address the PRCT and amend the ITP to cover this species. The discovery of PRCT on the Project area, and their unexpectedly wide dispersal throughout Punta Ventana, made it impossible for the Applicant to continue the Project without incidental take authorization for the species.

Because we have determined that the remedial measures set forth in the addendum to the HCP are sufficient to correct the deficiencies set forth in our Proposal and Decision pertaining to the partial suspension of the ITP, we have decided to lift the partial suspension in accordance with 50 C.F.R. § 13.27(a). We also find that both the Applicant's addendum to the HCP to addresses the PRCT, and application to amend the ITP to include and receive incidental take authorization for the species, moot our November 2, 2011, Finding of Necessity to amend the ITP.

One of the bases for permit revocation listed at 50 C.F.R. Part 13.28 is the failure of a permittee to correct within 60 days the deficiencies that led to the suspension. The Service did not realistically expect to conclude revision of the HCP and ITP amendment within 60 days of the partial suspension, and the Permittee actively pursued ITP amendment after the partial suspension went into effect. Therefore, the Service has not had to consider revocation criterion 50 C.F.R. Part 13.28(a)(2).

The Service has no evidence that the Permit amendment application should be denied on the basis of criteria and conditions set forth in 50 CFR 13.21(b)-(c).

VI. National Environmental Policy Act – Analysis and Findings

Amendment of the ITP will result in the authorization of take of Puerto Rican crested toad incidental to the construction and operation of a wind generation facility at

Guayanilla, Puerto Rico. Amendment of the Permit would be predicated on the full implementation of the Permittee's HCP and compliance with all other requirements for ITP issuance, including the terms of the permit. The Applicant modified drafts of the HCP based on pre-application consultations with the Service and provided mitigation and minimization measures for incidental take associated with the proposed wind generation facilities.

Our evaluation in the supplemental EA of the direct, indirect, and cumulative impacts of amending the ITP concluded in finding that the action would not have a significant effect on the human environment. The total effects from amending the ITP would not cause permanent and irreversible changes in the current state of the physical and biological beach environment, infrastructure, societal issues, economics, aesthetics, or public health and safety and, therefore, not affect the sustainability of the human environment. The incremental impact of the proposed action, when added to past, present, and reasonably foreseeable future actions, will not be significant to the human environment.

VI. Recommendations on Amendment of Permit

Based on our findings with respect to the permit amendment application, supplemental environmental assessment, and addendum to the HCP, the Service recommends amending the section 10(a)(1)(B) incidental take permit, TE104073-3, to include measures to remediate for unauthorized land clearing activities in excess of that authorized and to add the Puerto Rican crested toad as a species for which incidental take is authorized. Within the spirit and intent of the Council of Environmental Quality's regulations for the implementation of the National Environmental Policy Act of 1969 (as amended), other statutes, orders, and policies that protect fish and wildlife resources, I have determined a finding of no significant impact for the proposed action. I have also determined that this application meets the issuance criteria of section 10(a)(2)(B) of the ESA.

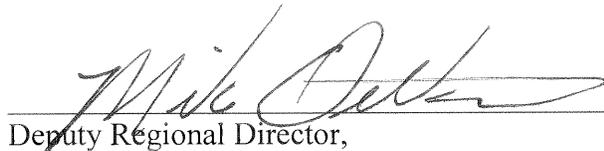
Submittal:



Assistant Regional Director,
Ecological Services

9/3/13
Date

Concurrence:



Deputy Regional Director,

10/18/13
Date

Southeast Region,
Fish and Wildlife Service