

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
NORTHERN DIVISION

NO. _____

RED WOLF COALITION,)
DEFENDERS OF WILDLIFE, and)
ANIMAL WELFARE INSTITUTE,)
)
Plaintiffs,)
)
v.)
)
THE UNITED STATES FISH AND)
WILDLIFE SERVICE; DAN ASHE, in his)
official capacity as Director of the United)
States Fish and Wildlife Service; CYNTHIA)
K. DOHNER, in her official capacity as)
Regional Director of the United States Fish)
and Wildlife Service Southeast Region.)
)
Defendants.)
_____)

COMPLAINT

[Fed. R. Civ. P. 7]

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

1. This case challenges the actions of the United States Fish and Wildlife Service (“USFWS” or “Service”), Dan Ashe, in his official capacity as Director of the USFWS, and Cynthia K. Dohner, in her official capacity as Regional Director of the USFWS for the Southeast Region (collectively, “Defendants”), that are jeopardizing the continued existence of the last 50 to 75 red wolves living in the wild. Defendants have failed to manage the dramatically reduced red wolf population so as to ensure its survival and promote its recovery, engaging in such counterintuitive actions as suspending red wolf reintroductions and ceasing coyote sterilizations. Plaintiffs challenge Defendants’ actions authorizing individual landowners to shoot and kill red wolves, in violation of the Endangered Species Act (“ESA”), 16 U.S.C. § 1531 et seq., and its

implementing regulations, 50 C.F.R. § 17.84(c), and Defendants' failure to comply with statutorily required non-discretionary duties necessary to provide for the conservation and recovery of the species under the ESA, the National Environmental Policy Act ("NEPA"), 42 U.S.C. §§ 4321–47, and the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701–06.

2. In 2014, Defendants for the first time used the red wolf regulation at 50 C.F.R. § 17.84(c) to authorize a private landowner to shoot and kill a non-offending endangered red wolf purely because that wolf was on private property and that landowner would not allow USFWS personnel to enter his property to capture and remove the wolf non-lethally. A second take authorization granted to another landowner resulted in the death of an adult female red wolf in June 2015 that was known to have mothered a total of 16 pups through four litters and that was showing denning behavior at the time of the shooting death. This wolf had not caused any harm or demonstrable risk to life or property.

3. These take authorizations are in direct violation of the plain language of 50 C.F.R. § 17.84(c), which requires that USFWS personnel "abandon efforts" to capture wolves on private property prior to issuing such take authorizations. Moreover, these take authorizations reflect a reversal of Defendants' previous policy and interpretation of the red wolf regulation to only grant take authorizations for "offending" wolves that have killed livestock or pets or otherwise harmed personal property. This change in interpretation has resulted in and will continue to cause the unnecessary deaths of a highly endangered and declining species, substantially impairing the continued recovery and viability of the red wolf population in violation of the ESA's mandates to "provide for the conservation of" the species, 16 U.S.C. § 1533(d), act in a manner "not likely to jeopardize the continued existence" of the red wolf species, 16 U.S.C. § 1536(a)(2), and

administer the red wolf program “in furtherance of the [conservation] purposes” of the ESA.
16 U.S.C. § 1536(a)(1).

4. Defendants have further violated the ESA and NEPA by revising their interpretation of the red wolf rule to facilitate the lethal take of endangered red wolves without conducting the accompanying statutorily mandated analyses required by the ESA, 16 U.S.C. § 1536(a)(2), and NEPA, 42 U.S.C. § 4332(2)(C). This is especially critical because, according to USFWS population estimates, the red wolf population has recently declined dramatically to only 50 to 75 animals, down from over 100 less than two years ago. Notably, Defendants have also failed to conduct the statutorily required five-year status review of the red wolf population, which should have been completed in September 2012. 16 U.S.C. § 1533(c)(2).

5. Plaintiffs seek declaratory and injunctive relief to address these ongoing violations of federal law, including an order enjoining Defendants from authorizing any further lethal take by private landowners, a date certain by which the agency must finalize the 5-year status review required by Section 4 of the ESA, and requiring USFWS to complete Section 7 consultation and supplemental NEPA review on the current status of the red wolf program governed by 50 C.F.R. § 17.84(c).

JURISDICTION AND VENUE

6. This Court has jurisdiction pursuant to 28 U.S.C. § 1331 (federal question); 28 U.S.C. § 2201 (declaratory relief); 28 U.S.C. § 2202 (injunctive relief); 16 U.S.C. §§ 1540(c) and (g) (ESA district court jurisdiction and citizen suit jurisdiction); and 5 U.S.C. §§ 701–06 (Administrative Procedures Act).

7. Pursuant to the ESA citizen suit provision, 16 U.S.C. § 1540(g), Plaintiffs furnished the U.S. Secretary of the Interior, USFWS Director, and USFWS Regional Director for the

Southeast Region with written notice of their intent to bring suit for the violations of law alleged in this Complaint on September 1, 2015, more than sixty (60) days ago. The notice of intent to sue is attached as Exhibit 1. The Service has not remedied these violations of law.

8. Venue is proper in this district pursuant to 16 U.S.C. § 1540(g)(3)(A), because the violations of the ESA are occurring in this district, and pursuant to 28 U.S.C. § 1391(b), because a substantial part of the events giving rise to the claims occurred in this district.

9. Venue is proper in this division because Plaintiff Red Wolf Coalition has its principal office in Tyrell County in the division. Local Civil Rule 40.1(c)(1).

PARTIES

10. Plaintiff Red Wolf Coalition (“RWC”) is a non-profit organization founded in 1997 and located in Columbia, North Carolina. RWC has approximately 5,000 members and supporters, including 1,000 members and supporters who reside in North Carolina. RWC advocates for the long-term survival of wild red wolf populations by teaching about the red wolf and by fostering public involvement in red wolf conservation. Through a variety of programs, RWC provides its members, supporters, and the public with science-based information about the biology and ecology of the endangered red wolf and its value to the eastern North Carolina ecosystem. RWC works with the USFWS Red Wolf Recovery Program on red wolf restoration and management issues in an effort to establish and maintain healthy populations of wild red wolves. RWC also works with other organizations to focus world-wide attention on the effort to ensure the long-term survival of wild red wolf populations.

11. Plaintiff Defenders of Wildlife (“Defenders”) is a national non-profit, public interest organization founded in 1947. Defenders has more than 1,120,000 members and supporters nationwide, including more than 9,600 members and supporters in North Carolina. It also has

more than 19,100 members in its “Defenders Electronic Network” in North Carolina. Defenders is dedicated to the protection of all endangered or threatened wild animals and plants in their natural communities, and the preservation of the habitat on which they depend. Defenders advocates new approaches to wildlife conservation that will help prevent species from becoming endangered, using education, litigation, research, legislation, and advocacy to defend wildlife and their habitats. Defenders has long been active in eastern North Carolina, promoting the initial reintroduction of the red wolf to the Alligator River National Wildlife Refuge, and then successfully defending that program in court.

12. Plaintiff Animal Welfare Institute (“AWI”) is a national non-profit, public interest organization founded in 1951. It has approximately 30,000 members and supporters worldwide, including more than 850 members and supporters in North Carolina. AWI is dedicated to alleviating the suffering caused to animals by people and to protecting species threatened with extinction. AWI’s activities focus on minimizing impacts of human actions detrimental to endangered or threatened species, including harassment, habitat degradation, encroachment and destruction, and irresponsible hunting and trapping practices. Through advocacy, litigation, legislation, research, and education, AWI acts to safeguard endangered or threatened wild animals and their habitats and to implement humane solutions to human-wildlife conflicts. AWI works with national and local governments and other policymakers to protect animals, often by preventing actions damaging to species and by promoting effective and safe wildlife protection laws and regulations. AWI helped win passage of the federal ESA, and continues to work with members of Congress to secure funding for USFWS to enforce the ESA.

13. Plaintiffs (also “Conservation Organizations”) have actively expressed their ongoing concerns about the management of North Carolina’s red wolf population. Efforts to address the

leading threats to the species have included a successful suit to enjoin coyote hunting in the Red Wolf Recovery Area due to its impact on wolf populations. See Red Wolf Coal. v. N.C. Wildlife Res. Comm'n, No. 2:13-CV-60-BO, 2014 WL 1922234, at * 10-11 (E.D. N.C. May 13, 2014).

14. Plaintiffs have also urged USFWS to conduct the 5-year status review required by the ESA, and to use its authorities in furtherance of the conservation and recovery of the red wolf in the wild.

15. Conservation Organizations bring this action on behalf of their members and supporters who live and work in the vicinity of the Red Wolf Recovery Area, as well as members from across the country who visit, observe, photograph, and otherwise enjoy red wolves in the wild. These members derive scientific, aesthetic, educational, professional, and recreational benefits from the presence of red wolves in eastern North Carolina and are harmed by Defendants' actions which have caused and will continue to cause the killing, injury, harm, and harassment of red wolves. This harm will be redressed by an order from this Court declaring that the Service's authorization of private landowners to shoot and kill non-problem red wolves violates the ESA; enjoining the Service from granting such take authorizations; and requiring the Service to complete the past-due 5-year status review required by the ESA and the analysis required by NEPA.

16. Defendant USFWS is a federal agency located within the United States Department of the Interior. The Service is responsible for administering the ESA's provisions for all terrestrial wildlife and freshwater fish.

17. The Service promulgates and administers regulations governing reintroduced "experimental populations" of endangered species, including red wolves in Eastern North Carolina, pursuant to Section 10(j) of the ESA, 16 U.S.C. §1539(j); 50 C.F.R. § 17.84(c).

18. Defendant Dan Ashe is named in his official capacity as Director of the United States Fish and Wildlife Service. As such, he is charged with administering the ESA as it applies to terrestrial animals, including the red wolf.

19. Defendant Cynthia K. Dohner is named in her official capacity as Regional Director of the United States Fish and Wildlife Service Southeast Region. The Southeast Region includes North Carolina and the Red Wolf Recovery Area. As such, Ms. Dohner is responsible for enforcing the red wolf rule and managing the Red Wolf Recovery Program.

LEGAL BACKGROUND

ESA Conservation Purpose and Statutory Scheme

20. The fundamental purpose of the ESA is to conserve endangered and threatened species and the ecosystems upon which they depend for survival and recovery. 16 U.S.C. § 1531(b). The ESA defines conservation as “the use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to [the ESA] are no longer necessary.” *Id.* § 1532(3). Accordingly, the ultimate goal of the ESA is not just to save endangered and threatened species from extinction, but to recover these species to the point where they no longer need ESA protection.

21. To achieve this conservation goal, Section 4(d) of the ESA requires USFWS to issue regulations “to provide for the conservation of . . . species” listed as threatened under the ESA. 16 U.S.C. § 1533(d).

22. This ESA conservation mandate requires the use of all necessary measures to promote the recovery of a listed species. 16 U.S.C. § 1532(3).

23. Because experimental populations are treated as threatened species under the ESA, 16 U.S.C. § 1539(j)(2)(C), rules adopted for such populations must comply with the ESA conservation mandate to provide for the conservation and recovery of such species.

24. Section 4 of the ESA further requires USFWS to complete a review of the status of an endangered or threatened species at least once every five years so as to ensure the species receives the correct amount of protection under the ESA. 16 U.S.C. § 1533(c)(2). The status review process involves a thorough review of the “best scientific and commercial data available” so that USFWS may carefully evaluate the recovery progress of a species and the adequacy of its current ESA listing status. See 50 C.F.R. §§ 424.11, 424.21.

25. Through such a review, USFWS ultimately determines whether to recommend that a species be delisted, “changed in status from a threatened species to an endangered species,” or “changed in status from an endangered species to a threatened species.” 16 U.S.C. § 1533(c)(2).

26. USFWS has completed three such status reviews for the red wolf, with the most recent status review released in September 2007. See Ex. 1, App. 4. This status review was informed by an examination of the red wolf recovery plan, the species survival plan, the adaptive management work plan in place at the time, and scientific evidence regarding red wolves. Id. at 4. The 2007 status review specifically evaluated red wolf population trends and the adequacy of existing regulatory mechanisms. Id. at 10-12 and 24-28.

ESA Prohibitions on Take of Protected Species

27. The ESA’s conservation mandate is incorporated into Section 9 of the ESA. Under Section 9, it is “unlawful for any person” to “take [any endangered species] within the United States” 16 U.S.C. § 1538(a)(1)(B). In general, this prohibition also applies to threatened species managed by USFWS. 50 C.F.R. § 17.31(a). It is also unlawful for any person to violate regulations pertaining to threatened and endangered species. 16 U.S.C. § 1538(a)(1)(G).

28. The term “take” is defined broadly as “to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or attempt to engage in any such conduct.” 16 U.S.C. § 1532(19); Defenders of Wildlife v. EPA, 882 F.2d 1294, 1300 (8th Cir. 1989) (“Take is defined in the broadest possible manner to include every conceivable way in which a person . . . can ‘take’ or attempt to ‘take’ any fish or wildlife”) (internal citation omitted). “Harm” means “an act which actually kills or injures wildlife,” including habitat modification or degradation that “injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding, or sheltering.” 50 C.F.R. § 17.3. “Harass” means “an intentional or negligent act or omission which creates the likelihood of injury to wildlife by annoying it to such an extent as to significantly disrupt normal behavioral patterns which include, but are not limited to, breeding, feeding, or sheltering.” Id.

29. It is also unlawful for “any person” to “cause to be committed” any offense described in Section 9, including take of threatened or endangered species, or a violation of regulations pertaining to these species. 16 U.S.C. § 1538(g). The term “person” includes “any officer, employee, agent, department, or instrumentality . . . of any State, municipality, or political subdivision of a State” Id. § 1532(13).

30. A government entity causes take to be committed when it authorizes activity resulting in take. Courts have established that “a governmental third party pursuant to whose authority an actor directly exacts a taking . . . may be deemed to have violated the provisions of the ESA.” Strahan v. Coxe, 127 F.3d 155, 163 (1st Cir. 1997) (holding Massachusetts state officers caused take by licensing and permitting fishing practices that injured endangered Northern Right whales); Sierra Club v. Yeutter, 926 F.2d 429, 438–39 (5th Cir. 1991) (holding Forest Service caused take of endangered red-cockaded woodpeckers by permitting logging practices near nesting colonies); Defenders of Wildlife v. EPA, 882 F.2d at 1301 (holding EPA caused take of

endangered species through its registration of pesticides for use by others); Red Wolf Coal., 2014 WL 1922234, at *10-11 (enjoining state coyote hunting because of increased unintentional gunshot of red wolves related to coyote hunting); Animal Prot. Inst. v. Holsten, 541 F. Supp. 2d 1073, 1078–80 (D. Minn. 2008) (holding state agency caused take of lynx through its licensure of trapping and its regulation of trap uses).

31. To prove a violation of Section 9 of the ESA, a plaintiff need only establish “by a preponderance of the evidence” that the challenged action is “reasonably certain to imminently harm, kill, or wound the listed species.” Animal Welfare Inst. v. Beech Ridge Energy LLC, 675 F. Supp. 2d 540, 563 (D. Md. 2009); see also Marbled Murrelet (*Brachyramphus Marmoratus*) v. Pac. Lumber Co., 880 F. Supp. 1343, 1367 (N.D. Cal. 1995), aff’d sub nom. Marbled Murrelet v. Babbitt, 83 F.3d 1060 (9th Cir. 1996) (holding injunction is appropriate when an ESA violation is “‘at least likely in the future,’ or [there is] ‘a definite threat of future harm to [a] protected species’”) (internal citation omitted).

32. A person, including a government entity or government official, is liable for authorizing activities that are reasonably certain to result in future take. See Animal Welfare Inst., 675 F. Supp. at 563; Holsten, 541 F. Supp. 2d at 1080; see also Red Wolf Coal., 2014 WL 1922234 at *7 (E.D. N.C. May 13, 2014).

ESA Section 7 Consultation Requirements

33. Section 7 of the ESA directs federal agencies to “utilize their authorities in furtherance of the purposes” of the ESA “by carrying out programs for the conservation” of species protected under the ESA. 16 U.S.C. § 1536(a)(1). This includes a requirement that the Department of the Interior, as the agency administering the ESA, “review other programs

administered by [the Department] and utilize such programs in furtherance of the purposes of this chapter.” Id.

34. Section 7 of the ESA imposes a consultation requirement for federal agencies to “insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species” 16 U.S.C. § 1536(a)(2).

35. Thus, Section 7 imposes a procedural requirement for agencies to engage in the consultation process, and a substantive requirement that the agencies ensure their actions do not jeopardize the continued existence of species protected by the ESA.

36. Formal consultation is required if the action “may affect” a listed species and if consultation has not previously been completed regarding the action. 50 C.F.R. § 402.14(a). “Any possible effect [to listed species], whether beneficial, benign, adverse, or of an undetermined character, triggers the formal consultation requirement” 51 Fed. Reg. 19,926, 19,949 (June 3, 1986). If, on the other hand, the action agency concludes that the action is not likely to have an adverse effect and USFWS concurs in writing with that determination, then consultation may proceed informally. See 50 C.F.R. § 402.12(k)(1).

37. In formulating its biological opinion through the consultation process, USFWS must evaluate the “effects of the action” together with “cumulative effects” on the listed species. 50 C.F.R. § 402.14(g)(3)-(4). This multi-step analysis requires FWS to consider:

- a. the direct, indirect, interrelated, and interdependent effects of the proposed action, 50 C.F.R. § 402.02;
- b. the “environmental baseline” to which the proposed action will be added, which includes all “past and present impacts of all Federal, State, or private actions and other human activities in the action area, the anticipated impacts of all proposed Federal projects in the action area that have already undergone formal or early Section 7

consultation, and the impact of State or private actions which are contemporaneous with the consultation in process,” id.; and,

- c. any “future State or private activities, not involving Federal activities, that are reasonably certain to occur within the action area of the Federal action subject to consultation.” Id.

38. An action agency’s duty to insure against jeopardy or adverse modification continues after the completion of Section 7 consultation. See, e.g., Defenders of Wildlife, 882 F.2d at 1300. The action agency must immediately reinstate consultation with USFWS if “new information reveals effects of the action that may affect listed species . . . in a manner or to an extent not previously considered” or if “the amount or extent of taking specified in the incidental take statement is exceeded.” 50 C.F.R. §§ 402.14(i)(4), 402.16(a).

39. When the USFWS issued the initial 1986 red wolf rule, it engaged in Section 7 consultation and determined that reintroduction of the red wolf and the accompanying special red wolf rule were not likely to jeopardize the continued existence of the species.

Red Wolf 10(j) Rule Under the ESA

40. Section 10(j) of the ESA governs the reintroduction of threatened or endangered species into portions of their historic ranges. 16 U.S.C. § 1539(j)(2)(A); 50 C.F.R. § 17.81(a).

41. For each population released pursuant to Section 10(j), USFWS must by regulation delineate a population boundary and determine whether that population is “experimental” and whether the population is “essential to the continued existence” of the species in the wild. 16 U.S.C. § 1539(j)(3); 50 C.F.R. § 17.81(c)(2).

42. Each member of an experimental population is “treated as a threatened species,” except that critical habitat may not be designated, and the typical ESA Section 7 consultation requirements apply only when the species “occurs in an area within the National Wildlife Refuge System or the National Park System.” 16 U.S.C. § 1539(j)(2)(C).

43. Section 10(j) provides USFWS with flexibility in how it manages a reintroduced “experimental, nonessential” (“ENE”) population and it may alter one or more of the ESA’s protections, including the Section 9 take prohibition, for any ENE population. 50 C.F.R. § 17.82; 16 U.S.C. § 1533(d). See Wyo. Farm Bureau Fed’n v. Babbitt, 199 F.3d 1224, 1233 (10th Cir. 2000) (“Congress purposely designed section 10(j) to provide the Secretary [of USFWS] flexibility and discretion in managing the reintroduction of endangered species”). Despite the greater flexibility imparted by a Section 10(j) rule, ENE populations must be managed to “further the conservation of [the] species.” See 16 U.S.C. § 1539(j)(2)(A); 50 C.F.R. § 17.81(b).

44. The specific prohibitions that apply to an experimental population are contained in the species-specific 10(j) rule. See generally 50 C.F.R. § 17.84 (setting forth all species-specific Section 10(j) rules to date). USFWS first promulgated a 10(j) rule for the red wolf (“red wolf rule”) in 1986. Determination of Experimental Population Status for an Introduced Population of Red Wolves in North Carolina, 51 Fed. Reg. 41,790 (Nov. 19, 1986). The rule authorized reintroduction of red wolves into the Alligator River National Wildlife Refuge in Dare County, North Carolina, as an ENE population. Id. The red wolf reintroduction area was later expanded to include all of Dare County and the adjacent Tyrrell, Hyde, Washington, and Beaufort counties. See 50 C.F.R. § 17.84(c)(9)(i). This area is commonly referred to as the Red Wolf Recovery Area.

45. Under the red wolf rule, no “person” may take a red wolf, except as specifically provided by the rule. 50 C.F.R. § 17.84(c)(2). In addition to management-related take, the following actions within the Red Wolf Recovery Area are allowed as long as they are reported within 24 hours to the refuge manager or the State wildlife enforcement officer for investigation:

- i. The take of a red wolf on private lands if the take is “not intentional or willful, or is in defense of that person’s life or the lives of others”;
- ii. The take of a red wolf on lands owned or managed by Federal, State, or local government agencies if the take is “incidental to lawful activities, is unavoidable, unintentional, and not exhibiting a lack of reasonable due care, or is in defense of that person’s own life or the lives of others”;
- iii. The take by a private landowner, or other individual having the landowner’s permission, of a red wolf on the landowner’s property “when the wolves are in the act of killing livestock or pets” if “freshly wounded or killed livestock or pets are evident”;
- iv. The harassment by a private landowner, or other individual having the landowner’s permission, of a red wolf on the landowner’s property if “all such harassment is by methods that are not lethal or physically injurious to the red wolf”; and
- v. *The take by a private landowner of a red wolf on the landowner’s property after efforts by USFWS personnel to capture the animal have been abandoned, provided that USFWS approves the action in writing.*

Id. § 17.84(c)(4) (emphasis added). Any take that does not fall within one of these limited exceptions, or not reported within 24 hours, is illegal take in violation of the ESA. Id. § 17.84(c)(2); 16 U.S.C. § 1538(a)(1)(G).

46. Under the red wolf rule it is also “unlawful for any person to . . . *cause to be committed*” prohibited take. 50 C.F.R. § 17.84(c)(8) (emphasis added).

47. The red wolf rule was promulgated by USFWS to aid conservation of the species and the success of the wild red wolf population. See 51 Fed. Reg. at 41,792; see also Gibbs v. Babbitt, 214 F.3d 483, 487 (4th Cir. 2000) (noting that Congress enacted Section 10(j) to blunt local opposition to reintroduction programs). The red wolf rule does not change the red wolf’s status as an endangered species protected by the ESA.

48. The take exceptions found at 50 C.F.R. § 17.84(c)(4) reflect a revision to the original red wolf 10(j) rule in 1995. See Revision of the Special Rule for Nonessential Experimental Populations of Red Wolves in North Carolina and Tennessee, 60 Fed. Reg. 18940 (Apr. 13,

1995). The revision was meant to clarify the circumstances in which private landowners could respond to wolves on their property. Id. at 18940.

49. The 1995 rule revision included the clarification that “private landowners will be permitted to take *offending* animals upon written approval by the Service.” Id. at 18943. This use of the word “offending” followed a discussion of how it would be “highly objectionable to owners of livestock and pets to be unable to kill a predator that is engaged in killing their livestock or pets.” See id.

50. The clarification regarding private take of offending animals was made in relation to instances when prior written approval is required by the Service. As such, the 1995 Rule Revision demonstrates the Service’s intention to limit take solely to “offending” wolves, pursuant to the 50 C.F.R. § 17.84(c)(4)(v) take exception permitting take “after efforts by USFWS personnel to capture the animal have been abandoned, provided that USFWS approves the action in writing.” 50 C.F.R. § 17.84(c)(4)(v).

51. In 1999, the Service issued a guidance document (hereinafter “USFWS Guidelines”) to further clarify the application of the red wolf rule and take exceptions to wolves on private lands. See Ex. 1, App. 16. These USFWS Guidelines distinguished between “problem” and “non-problem” wolves and prescribed different procedures for such problem and non-problem wolves.

52. According to the USFWS Guidelines, problem wolves were defined as those that have caused or exhibit behavior suggesting that they are likely to cause property loss. For such wolves, the USFWS Guidelines instruct field personnel to respond within 48 hours, determine if the wolf is in fact a problem wolf, and then capture and remove the wolf or employ “a behavioral modification technique.” Ex. 1, App. 16. If capturing the alleged problem wolf is “not successful

or feasible, lethal means could be employed or written permission may be provided according to the specifications provided in the current red wolf rule.” Id. These procedures for responding to problem wolves mirror those required by 50 C.F.R. § 17.84(c)(4)(v).

53. In contrast, the USFWS Guidelines for non-problem rules do not include any provisions for lethal take, requirements for Service staff to attempt to capture the wolf, or possibility of written take permission being given to a landowner after abandonment of USFWS efforts. Ex. 1, App. 16.

National Environmental Policy Act

54. NEPA requires agencies to prepare an environmental impact statement (“EIS”) before undertaking a major federal action that will significantly affect the quality of the human environment. 42 U.S.C. § 4332(2)(C).

55. The EIS serves three primary functions. First, it ensures that an agency takes a hard look at the direct, indirect, and cumulative environmental impacts of a proposed action. Second, it guarantees that the agency considers a range of reasonable alternatives to accomplish the underlying goals of the proposed action and considers options that may have fewer adverse impacts on the environment before deciding whether to undertake the project in the form proposed. Finally, the EIS presents detailed information about a proposed action, its impacts, and reasonable alternatives to the public and other agencies, so that they may participate in the decision-making process.

56. To implement the requirements of NEPA, the Council on Environmental Quality (“CEQ”) has promulgated regulations applicable to all federal agencies. See 40 C.F.R. §§ 1500-1508 (“CEQ regulations”).

57. In assessing whether a proposed action significantly affects the environment and thus requires the agency to complete an EIS, the CEQ regulations direct agencies to consider, among other factors: “[t]he degree to which the action may adversely affect an endangered or threatened species” under the ESA, 40 C.F.R. § 1508.27(b)(9); “[t]he degree to which the action may establish a precedent for future actions with significant effects or represents a decision in principle about a future consideration” 40 C.F.R. § 1508.27(b)(6); and “[t]he degree to which the effects on the quality of the human environment are likely to be highly controversial” 40 C.F.R. § 1508.27(b)(4).

58. CEQ regulations also provide that an agency may complete an environmental assessment (“EA”) to assist in determining whether a full EIS is necessitated by a particular federal action. 40 C.F.R. §§ 1501.4, 1508.9.

59. The “effects” that must be discussed in the EIS include, among other considerations, the direct environmental impacts of the proposed action, the indirect effects of the proposed action, and the cumulative impacts of the proposed action. 40 C.F.R. §§ 1502.16(a) – (h), 1508.7.

60. CEQ regulations further require that an agency “shall” prepare a supplement to an EIS where “significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts” arise. 40 C.F.R. § 1502.9(c)(1).

61. In issuing the original red wolf rule in 1986, the Service completed an EA which concluded that the rule was not a major federal action which would significantly affect the quality of the human environment, and in turn, no EIS was completed. See 51 Fed. Reg. at 41,796.

62. In revising the red wolf rule in 1995, the Service again completed an EA and determined that the rule revision did not trigger the requirement for an EIS. See 60 Fed. Reg. at 18,946-47.

63. An agency's failure to comply with NEPA may be challenged through the provisions of the Administrative Procedures Act, 5 U.S.C. §§ 701-06.

FACTUAL BACKGROUND

The Red Wolf

64. The red wolf (*Canis rufus*) has been pushed to the edge of extinction. Once common throughout the eastern and south-central United States, most red wolf populations were destroyed by the early 20th Century as a result of intensive predator control programs and the degradation and alteration of habitat. Today, the red wolf is one of the most endangered species in the world.

65. The red wolf was first designated an endangered species in 1967 under the Endangered Species Preservation Act of 1966, the precursor to the federal ESA, 16 U.S.C. § 1531 et seq.

66. By 1975, USFWS determined that the only way to save the red wolf from extinction was to remove all red wolves from the wild and institute a captive-breeding program. More than 400 canids were captured by USFWS, but only 17 were identified as pure red wolves. Fourteen of these wolves became the founding members of the captive-breeding program and the ancestors of all red wolves living today.

67. USFWS declared the red wolf extinct in the wild in 1980.

68. In 1987, four pairs of red wolves bred in captivity were released into the Alligator River National Wildlife Refuge in eastern North Carolina as an experimental population under Section 10(j) of the ESA, 16 U.S.C. § 1539(j). The Red Wolf Recovery/Species Survival Plan, first approved in 1973 and subsequently revised and updated, sets forth an intensive adaptive management plan to protect the red wolf species and to facilitate the recovery of the wild red wolf population. The North Carolina red wolves constitute the only wild population of red wolves in the world.

69. According to the Red Wolf Recovery Plan, USFWS' ultimate goal is to grow the wild population to approximately 220 wolves in the Red Wolf Recovery Area. However, USFWS has stated that it is unlikely that the red wolf will ever recover to the point that the species will be safe from extinction.

70. The Red Wolf Recovery Area currently encompasses about 1.7 million acres, including four national wildlife refuges, the United States Air Force's Dare County Bombing Range, state-owned lands, and private lands. As a result of the coordinated, science-based work of USFWS and other entities, the population of wild red wolves successfully grew to 100 individuals in the late 1990's.

71. The population was able to maintain these numbers for more than a decade. From 2002-2014 the population was never estimated below 100 individuals, peaking at 130 wolves in 2006.

72. However, in early June 2015 USFWS revised its population estimate downward to between 50 and 75 wolves.

73. In 2011-2012, the Service documented 17 breeding pairs of red wolves. In 2013-2014, only eight were reported. Similarly dramatic declines have occurred in the number of

observed pups, with the Service locating 40 wild pups in 2012, 40 in 2013, 19 in 2014, and only seven in 2015.

74. This dramatic population loss has accompanied a surge in human-caused red wolf deaths, such as from gunshot. Because red wolves mate for life, the death of any individual has a disruptive effect on the population's reproductive stability.

75. Recent studies have confirmed that red wolf shooting deaths also have a significant disruptive impact on red wolf population dynamics and the success of breeding pairs. For example, the death of a red wolf during breeding season increases the likelihood that the surviving mate will interbreed with a coyote.

Gunshot Mortalities and Coyote Hunting

76. From 2012 to date, gunshot accounted for 24 out of a total of 61 red wolf deaths according to official numbers kept by the USFWS Red Wolf Recovery Program.

77. Many of these shootings were accidental as individuals legally hunting coyotes mistook red wolves for nearly indistinguishable coyotes. The North Carolina Wildlife Resources Commission has stated that “[i]n N.C., coyotes may be mistaken for dogs or red wolves, and the existence of . . . red wolf-coyote hybrids can make identification difficult.” N.C. Wildlife Res. Comm’n, Fox and Coyote Populations Study: Final Report 14 (2012).

78. Following the gunshot deaths of six red wolves over a four week period in the fall of 2013, and a corresponding finding that irreparable harm was likely to result if coyote hunting was allowed to continue, the U.S. District Court for the Eastern District of North Carolina enjoined coyote hunting the Red Wolf Recovery Area in May 2014. Red Wolf Coal., 2014 WL 1922234, at *10-11.

79. The number of red wolf deaths fell significantly following this injunction, from eight suspected or confirmed gunshot deaths in 2012 and nine in 2013, to four in 2014—only two of which occurred after the Court’s injunction—and three deaths to date in 2015, including one that was authorized by USFWS.

USFWS’s Recent Reversals in Recovery Efforts

80. At the same time that numbers of wild red wolves began to decline, and even as the USFWS expressed concern about coyote hunting, the USFWS revised key interpretations and applications of the red wolf rule in a manner harmful to the continued successful management of the red wolf population.

81. As noted above, the red wolf rule allows the Service to authorize lethal take by private landowners only after “*efforts by project personnel to capture such animals have been abandoned*,” provided that the Service project leader or biologist has approved such actions in writing.” 50 C.F.R. § 17.84(c)(4)(v) (emphasis added).

82. While the rule provides no further definition of “efforts” or “abandoned”, context and the plain language of the rule make clear that those efforts must have been undertaken “by project personnel” and they must be focused on “captur[ing]” the animal.
50 C.F.R. § 17.84(c)(4)(v).

83. Written authorization to take a wolf was first granted to a private landowner under this provision on February 6, 2014. See Ex. 1, App. 1.

84. The Service concluded that “though we cannot confirm that the animal is a wolf and we have *not attempted to capture it*, we can state at this time given our other staffing commitments and lack of access to actively trap on the property that we are foreclosed from

pursuing the animal . . . and in that sense must abandon efforts to capture and relocate the animal.” Id. (emphasis added).

85. This authorization conflicts with the plain language of the underlying regulation which requires that Service personnel must first have made efforts to capture the wolf prior to issuing an authorization for private take.

86. The red wolf rule’s exemption for take by private landowners does not refer to efforts to access the property or staffing constraints, but instead makes clear that the Service must undertake to remove the wolf from private property before USFWS personnel may authorize private lethal take.

87. Upon information and belief, the February 6, 2014 authorization was never acted upon.

88. Beginning in late summer of 2014, USFWS personnel began receiving hundreds of form letter requests for removal of wolves on private land which included requests for take permits in the event USFWS personnel could not capture the wolves within 30 days. The majority of these requests came from property owners with no evidence of red wolves on their land.

89. On January 29, 2015, the North Carolina Wildlife Resources Commission adopted a resolution urging the Service to declare the red wolf extinct in the wild in North Carolina and to terminate the Red Wolf Reintroduction Program for free-ranging wolves in North Carolina. This same day, the North Carolina Wildlife Resources Commission also adopted a resolution requesting the removal of 64 red wolves released on to private lands.

90. Around this same time, in late 2014/early 2015 USFWS issued a second take authorization to another private landowner after Service personnel were barred from conducting removal activities on his property.

91. That landowner shot and killed a six year old denning mother red wolf on June 17, 2015. This red wolf had previously mothered a total of 16 pups through four separate litters.

92. This wolf had exhibited no previous “offending” or “problem” behavior, as required for a private take authorization under the Service’s Guidelines and former interpretation of the red wolf rule’s private take exemption.

93. USFWS personnel subsequently began coordinating with the USFWS Regional Office to issue an additional take authorization to this same landowner for a second, larger animal that may have been the mate of the killed mother red wolf.

94. On June 30, 2015, the Service announced that it was suspending its reintroduction of red wolves into the wild. See Press Release, Tom MacKenzie, U.S. Fish and Wildlife Serv., “Service Halts Red Wolf Reintroductions Pending Examination of Recovery Program” (June 30, 2015), *available at* http://www.fws.gov/news/ShowNews.cfm?ref=service-halts-red-wolfreintroductions-pending-examination-of-recovery-prog&_ID=35109.

95. The Service has also stopped sterilizing coyotes in the Red Wolf Recovery Area.

96. The Service has stated that it will not resume these and other red wolf management efforts until it completes its review of the red wolf program in summer 2016.

CLAIMS FOR RELIEF

FIRST CLAIM FOR RELIEF:

Defendants Violated Section 9 of the ESA by Authorizing Private Lethal Take of Red Wolves Without Satisfying the Requirements of 50 C.F.R. § 17.84(c)(4)(v)

97. The Conservation Groups incorporate by reference the allegations of paragraphs 1–96 as if set forth in full.

98. Section 9 of the ESA makes it unlawful for any person to “take” an endangered species or to “violate any regulation pertaining to such species or to any threatened species of fish or wildlife.” 16 U.S.C. § 1538(a)(1)(B), (a)(1)(G).

99. These prohibitions extend to officers, employees, agents, departments, or instrumentalities of the Federal Government who “cause to be committed” a violation of Section 9 or its implementing regulations. 16 U.S.C. § 1538(g); *id.* § 1532(13). As such, these prohibitions apply to USFWS and USFWS personnel.

100. The red wolf rule’s take exemption allowing lethal take by private landowners requires USFWS personnel to first attempt and then abandon efforts to capture the wolf in question. See 50 C.F.R. § 17.84(c)(4)(v). On at least the two occasions discussed above, USFWS personnel did not undertake efforts to capture the wolves that it authorized landowners to kill.

101. Defendants have violated and will continue to violate Section 9 of the ESA by authorizing the private lethal take of red wolves in contravention of the plain language of the red wolf rule by failing to first attempt and then abandon efforts to capture the wolves in question, as required by 50 C.F.R. § 17.84(c)(4)(v).

SECOND CLAIM FOR RELIEF:

Defendants Violated Section 4 of the ESA by Administering the Red Wolf Rule in a Manner that is Failing to Provide for the Conservation of Red Wolves

102. The Conservation Groups incorporate by reference the allegations of paragraphs 1–101 as if set forth in full.

103. Until on or about February 6, 2014, USFWS interpreted the take exceptions of the red wolf rule consistent with USFWS Guidelines and the explanation accompanying the 1995 Rule Revision, so that USFWS did not authorize private take of non-problem or non-offending wolves.

104. Previously, USFWS interpreted the provisions of 50 C.F.R. § 17.84(c)(4)(v) to apply only to wolves considered to be “problem” or “offending” wolves.

105. USFWS has now significantly reinterpreted 50 C.F.R. § 17.84(c)(4)(v) to authorize the private lethal take of non-problem, non-offending wolves.

106. USFWS has also significantly reinterpreted 50 C.F.R. § 17.84(c)(4)(v) to authorize the private lethal take of red wolves without first attempting to capture and remove such animals from private land.

107. Such an interpretation and application of 50 C.F.R. § 17.84(c)(4)(v) fail to “provide for the conservation” of the red wolf population, in violation the requirements of Section 4(d) of the ESA, 16 U.S.C. § 1533(d).

THIRD CLAIM FOR RELIEF:

Defendants Violated Section 4 of the ESA by Failing to Conduct the Mandatory Five-Year Status Review of the Red Wolf Species

108. The Conservation Groups incorporate by reference the allegations of paragraphs 1–107 as if set forth in full.

109. Under Section 4 of the ESA, USFWS is required to conduct a review of the red wolf's status "at least once every five years" to determine whether its status under the ESA should be changed. 16 U.S.C. § 1533(c)(2).

110. USFWS's most recent red wolf status review was released in September 2007. As such, USFWS was required to complete a new status review no later than 2012.

111. As of the date of the filing of this Complaint, USFWS has failed to complete a status review, more than three years after such a status review was due.

112. By failing to complete the five-year status review by 2012, USFWS is in direct violation of Section 4(c)(2) of the ESA. 16 U.S.C. § 1533(c)(2).

FOURTH CLAIM FOR RELIEF:

Defendants Violated Section 7 of the ESA by Failing to Administer the Red Wolf Recovery Program in Furtherance of the Conservation Purposes of the ESA

113. The Conservation Groups incorporate by reference the allegations of paragraphs 1–112 as if set forth in full.

114. Section 7 of the ESA requires the USFWS to administer the red wolf program "in furtherance of the purposes" of the ESA, "by carrying out programs for the conservation" of listed species. 16 U.S.C. § 1536(a)(1).

115. By authorizing the private lethal take of non-problem wolves, including a denning mother wolf, Defendants are failing to administer the red wolf recovery program "in furtherance of the purposes" of the ESA. See id.

116. This is especially true in light of new population estimates and changes in red wolf management, including stopping coyote sterilizations, red wolf reintroductions, and other efforts necessary to conservation.

117. USFWS's current management of the Red Wolf Recovery Program pursuant to its current interpretation of 50 C.F.R. 17.84(c) has and will continue to cause harm to the red wolf population. USFWS actions such as authorizing lethal take by private landowners, as well as abandoning efforts to reintroduce red wolves and sterilize coyotes, do not further the conservation purposes of the ESA.

118. Defendants have violated and will continue to violate Section 7(a)(1) of the ESA by administering the red wolf recovery program in direct contravention of the ESA requirement to administer the program in furtherance of the conservation purposes of the ESA.

FIFTH CLAIM FOR RELIEF:

Defendants Violated Section 7 of the ESA by Failing to Reinitiate Consultation to Ensure that Administration of the Red Wolf Recovery Program Pursuant to 50 C.F.R. § 17.84(c) is Not Likely to Jeopardize the Continued Existence of the Red Wolf Species

119. The Conservation Groups incorporate by reference the allegations of paragraphs 1–118 as if set forth in full.

120. Section 7 of the ESA requires USFWS to complete an intra-agency consultation to “insure that any action authorized, funded, or carried out by [USFWS] . . . is not likely to jeopardize the continued existence of” a threatened species. 16 U.S.C. § 1536(a)(2).

121. The Service must reinitiate consultation if “new information reveals effects of the action that may affect listed species . . . in a manner or to an extent not previously considered.”

122. USFWS conducted consultation on the 1987 version of 50 C.F.R. § 17.84(c) and determined that those regulations were not likely to jeopardize continued existence of the red wolf species as it existed at that time.

123. USFWS's recent revision of its interpretation of the red wolf rule's take exemptions and new information about the status of the species and USFWS management under 50 C.F.R. § 17.84(c) requires reinitiation of consultation.

124. Defendants failed to reinitiate consultation to ensure that its actions are not likely to jeopardize the continued existence of the red wolf population, in violation of Section 7 of the ESA, 16 U.S.C. § 1536(a)(2).

SIXTH CLAIM FOR RELIEF:

Defendants Failed to Comply with NEPA Upon Reversing the Previous USFWS Interpretation of the Red Wolf Rule and Deciding to Curtail Their Red Wolf Management and Recovery Efforts

125. The Conservation Groups incorporate by reference the allegations of paragraphs 1–124 as if set forth in full.

126. Pursuant to NEPA, USFWS is required to complete an EIS prior to taking a major federal action significantly affecting the quality of the human environment, 42 U.S.C. § 4332(2)(C), or complete an EA to assist in determining whether a full EIS is required by the action. 40 C.F.R. §§ 1501.4; 1508.9.

127. In revising previous interpretations of 50 C.F.R. § 17.84(c), including to allow private lethal take of a highly endangered and declining species, Defendants have taken a major federal action that significantly affects the human environment.

128. Defendants previously completed EAs upon promulgating and revising the red wolf regulations.

129. Defendants have not completed any NEPA analysis concerning its reinterpretation of 50 C.F.R. § 17.84(c) in light of the current status and management of the species.

130. Defendants have violated NEPA in failing to prepare an EA or EIS to analyze the impacts of its revised interpretation of the red wolf rule's take exemption provision under 50 C.F.R. 17.84(c)(4)(v).

REQUEST FOR RELIEF

WHEREFORE, Plaintiffs respectfully request that this Court:

A. Issue a declaratory judgment that

1. Defendants have violated the red wolf rule, 50 C.F.R. § 17.84(c)(2), and Section 9 of the ESA, by authorizing private landowners to lethally take red wolves on their property contrary to the express terms of 50 C.F.R. § 17.84(c)(4)(v);
2. Defendants have violated Section 4 of the ESA by failing to provide for the conservation of the red wolf and failing to administer the red wolf program in furtherance of the purposes of the ESA through its new interpretation and application of 50 C.F.R. § 17.84(c)(4)(v);
3. Defendants have violated Section 7 of the ESA by failing to undergo consultation to ensure that application of 50 C.F.R. § 17.84(c)(4)(v), in light of baseline information, is not likely to jeopardize the continued existence of the red wolf;
4. Defendants have violated NEPA by failing to comply with NEPA requirements to determine the impacts of interpreting the take exemptions of the red wolf rule in the manner described herein; and
5. Defendants have violated Section 4 of the ESA by failing to complete the required five-year status review of the red wolf no later than 2012;

B. Issue an injunction preventing Defendants from continuing to apply the provision found at 50 C.F.R. §17.84(c)(4)(v) in the manner described herein and requiring

Defendants to complete the past-due mandatory five-year status review under ESA Section 4.

- C. Issue an injunction requiring Defendants to evaluate current management of the red wolf recovery program under 50 C.F.R. § 17.84(c) in light of current circumstances as required by ESA Section 7, and requiring Defendants to comply with NEPA;
- D. Award Plaintiffs the costs of this action, including their reasonable attorneys' fees; and
- E. Grant Plaintiffs such additional relief as the Court deems just and proper.

This the 12th day of November 2015.

Respectfully submitted,

/s/ Sierra B. Weaver

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