UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
NORTHERN DIVISION
No. 2:15-CV-00042-BO

RED WOLF COALITION, *et al*. ,	)
	)
Plaintiffs,	)
v.	)
	)
THE UNITED STATES FISH and WILDLIFE SERVICE, *et al*.,	)
	)
	)
Defendants.	)

DEFENDANTS' COMBINED BRIEF IN SUPPORT OF DEFENDANTS' CROSS-MOTION FOR SUMMARY JUDGMENT AND IN OPPOSITION TO PLAINTIFFS' MOTION

The case that confronts the Court today is not the same case that the Court evaluated in 2016 in connection with Plaintiffs' motion for a preliminary injunction. In the almost two years that have passed, the U.S. Fish and Wildlife Service ("the Service") has extensively reviewed its red wolf recovery program to determine how best to stop the species' decline and save it from extinction. As a result of its efforts, the Service is currently implementing a plan to remake its management of the species to better ensure its continued survival and recovery. Plaintiffs' challenges to the Service's management of the red wolf population circa 2016 are simply no longer relevant or justiciable. Moreover, a thorough and complete analysis of Plaintiffs' claims as articulated in their summary judgment brief reveals that they are meritless. Plaintiffs misrepresent the facts and ignore the requirements of the Endangered Species Act ("ESA"), the National Environmental Policy Act ("NEPA"), and the rule governing management of the red wolf population, 50 C.F.R. § 17.84(c) ("Red Wolf Rule"), to allege legal violations where none exist. Plaintiffs then rely on these manufactured wrongs to seek extraordinary mandatory injunctive relief that has no basis in law or equity and is beyond this Court's power to grant. For these reasons and those described further below, Plaintiffs' motion for summary judgment should be denied, and Defendants' motion for summary judgment should be granted.

BACKGROUND[1]

I. ESA SECTION 10(j) EXPERIMENTAL POPULATIONS

The ESA was enacted "to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved, [and] to provide a program for the conservation of such endangered species and threatened species." 16 U.S.C. § 1531(b). In 1982, Congress added Section 10(j) to expand the ESA's protections to a third category of species, "experimental populations." 16 U.S.C. § 1539(j). An experimental population is a population of endangered or threatened species

[1] Additional background information is provided in Defendants' Combined Response to Plaintiffs' Statement of Uncontested Facts and Affirmative Statement of Uncontested Facts, which is incorporated here by reference.

released outside their current range, if the population is wholly separate geographically from nonexperimental populations of the same species. 16 U.S.C. § 1539(j)(1), (2).

Before Section 10(j) created the "experimental" designation, "[l]ocal opposition to reintroduction efforts . . . stemming from concerns about the restrictions and prohibitions on private and Federal activities contained in sections 7 and 9 of the Act, severely handicapped the effectiveness of [reintroductions] as a management tool." 51 Fed. Reg. 41,790-02, 41,790 (Nov. 19, 1986). Aware of this, Congress constructed Section 10(j) "to increase the Service's flexibility in reintroducing endangered species into portions of their historic range," *Gibbs v. Babbitt*, 214 F.3d 483, 487 (4th Cir. 2000), and "to address federal agencies' frustration over political opposition to reintroduction efforts." *Defenders of Wildlife v. Tuggle*, 607 F. Supp. 2d 1095, 1100 (D. Ariz. 2009). The goal of Section 10(j) was to "mitigate[] perceived conflicts with human activity from reintroduction of endangered or threatened species by clarifying and limiting ESA responsibilities incumbent with experimental populations in the hope of encouraging private parties to host experimental populations." *Id.*

Congress gave the Service "flexibility and discretion" in managing experimental populations by treating them differently than other listed species. *Wyo. Farm Bureau Fed'n v. Babbitt*, 199 F.3d 1224, 1233 (10th Cir. 2000). Each experimental population is governed by its own special rule that provides for its management and permits certain activities that might otherwise be prohibited, including take.[2] 16 U.S.C. § 1539(j)(2); *see also Wyo. Farm Bureau Fed'n,* 199 F.3d at 1233. Additionally, before an experimental population is released into the wild, the ESA requires the Service to determine whether the population is "essential" or "nonessential" to the continued existence of the species. 16 U.S.C. § 1539(j)(2)(B).

II. THE RED WOLF RECOVERY PROGRAM

A. History

[2] Take is defined to mean harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct. 16 U.S.C. § 1532 (19).

The red wolf originally inhabited large portions of the southeastern United States, but its numbers declined significantly over time due to land changes, predator control efforts, and expanding coyote populations. 51 Fed. Reg. at 41,791. By the 1970s, red wolves occupied only a small coastal area in southeast Texas and southwest Louisiana. 51 Fed. Reg. at 41,791. At that time, to save the species from extinction, the Service began capturing wild red wolves and placing them in a captive breeding program. 51 Fed. Reg. at 41,791; 82 Fed. Reg. at 23,518. This decision was based on the critically low numbers of animals left in the wild, their poor physical condition, and the threat posed by an expanding coyote population. 51 Fed. Reg. at 41,791. Through the captive breeding program, the Service effectively managed the population until it was stable, with sufficiently large numbers to support a reintroduction effort. 51 Fed. Reg. at 41,791-92; 82 Fed. Reg. at 23,518-19. The first mainland reintroduction of red wolves occurred in 1987, when the Service introduced a nonessential experimental population of red wolves into the Alligator River National Wildlife Refuge in Dare County, North Carolina. 60 Fed. Reg. 18,940-01, 18,940 (Apr. 13, 1995). Alligator River National Wildlife Refuge was selected as the reintroduction site due to the absence of coyotes, lack of livestock operations, and availability of prey species. 82 Fed. Reg. 23,518, 23,519 (May 23, 2017). Additionally, as required by ESA Section 10(j), the Service promulgated the Red Wolf Rule in 1986 to govern management of this nonessential experimental population. *See* 50 C.F.R. § 17.84(c); 51 Fed. Reg. 41,790-02; 56 Fed. Reg. 56,325-01 (Nov. 4, 1991) (1991 amendments); 60 Fed. 18,940-01 (1995 amendments). In 1991, another nonessential experimental red wolf population was introduced into the Great Smoky Mountains National Park, but that restoration attempt was terminated in 1998 due to low pup survival and the inability of the wolves to establish home ranges within the park. 63 Fed. Reg. 54,151-02, 54,152 (Oct. 8, 1998).

B. Take authorizations and removals

Unlike endangered species, nonessential experimental populations like the red wolf are not categorically protected from take. Instead, the Red Wolf Rule identifies numerous circumstances when red wolves can be legally removed or lethally taken. 50 C.F.R. § 17.84(c). Two of the Red Wolf Rule's

take and removal provisions are at issue here. The first, 50 C.F.R. § 17.84(c)(4)(v), is a take provision added in 1995. It provides:

> "[a]ny private landowner may take red wolves found on his or her property [within the experimental population area] after efforts by project personnel to capture such animals have been abandoned, [p]rovided that the Service project leader or biologist has approved such actions in writing and all such taking shall be reported within 24 hours . . . ."

50 C.F.R. § 17.84(c)(4)(v). The second, 50 C.F.R. § 17.84(c)(10), addresses wolf removal. It states, in relevant part:

> [a]ny animal that is determined to be in need of special care or that moves onto lands where the landowner requests their removal will be recaptured, if possible, by Service and/or Park Service and/or designated State wildlife agency personnel and will be given appropriate care. Such animals will be released back into the wild as soon as possible, unless physical or behavioral problems make it necessary to return the animals to a captive-breeding facility."

50 C.F.R. § 17.84(c)(10).

The Service has only ever issued two take authorizations to private landowners pursuant to 50 C.F.R. § 17.84(c)(4)(v), and only a single wolf has been killed. In February 2014, the Service issued a take authorization to a landowner of approximately 2,600 acres. USFWS-0029877.[3] For over a decade preceding that authorization, the Service worked with the landowner to non-lethally remove wolves on his land that were destroying the landowner's game, harming his economic interests in leasing hunting and guiding rights, and scaring his children. *Id*. (referring to prior Service efforts to remove wolves non-lethally); USFWS-0029366 ("Prior to issuance of our original authorization you had demonstrated that wolves were consistently using your property despite continued efforts by Service personnel and private trappers hired by you to remove said animals); *id*. ("Over the years many attempts have been made to remove wolves from your property, and while these efforts have often been successful wolves have continued to occupy your land"); USFWS-0029523 (same); USFWS-0017260 (timeline of trapping efforts on landowners' property beginning in 2001); USFWS-0017186 (landowner email from 2013 stating, "[f]or years I have tried unsuccessfully to have red wolves removed from my property by the Department of Interior"); USFWS-0017193 (email discussing Service non-lethal removal efforts on

[3] Entire documents from the administrative record are cited by their beginning Bates number only.

landowner's property); USFWS-0017189 (landowner email detailing nonlethal trapping and removal efforts). Eventually, it became clear that certain wolves could not be trapped despite the Service's best efforts. *Id*. Therefore, the Service was forced to abandon those efforts to remove the wolves nonlethally and issue an authorization for the landowner to take one wolf on his property. USFWS-0029877. Although the landowner requested renewal of this authorization twice, it was not ultimately used and expired. USFWS-0029366; USFWS-0029523.

In May 2015, the Service issued one[4] take authorization to the owners of approximately 8,000 acres who use their land for farming and hunting and complained of wolves killing deer. USFWS-0012593; USFWS-0029306 to 0029312. As with the other landowner, the Service had also worked extensively with these landowners to manage red wolves on their land, including the capture and removal of two wolves. *Id*.; USFWS-0012279. However, as with the other landowner, it became clear that certain wolves could not be captured, and the Service was forced to abandon its efforts and issue a take authorization. USFWS-0012593 ("[E]fforts have been made to remove wolves from your property, and while these efforts have been successful at least one collared animal (possible [sic] a red wolf) is continuing to occupy your land."). One adult female red wolf was ultimately lethally taken from the property, and the authorization expired. *Id*.

Since 1987, the Service has non-lethally removed red wolves that strayed from federal land onto private property when requested to do so by landowners. USFWS-0000253. When a wolf is captured, it is held at either the Alligator River or Pocosin Lakes National Wildlife Refuges, where it is evaluated and then rereleased back into the wild as soon as possible. ECF 32-10 at 4.[5] The timing of release depends on the needs of the individual wolf and is a decision made by knowledgeable staff familiar with the wolf's

[4] Plaintiffs incorrectly characterize the May 2015 take authorization as two separate authorizations. Pls.' SJ Memo at 12. In reality, the Service issued one authorization in May 2015 for the take of a single wolf to two landowners that collectively owned the land at issue. *See* USFWS-0012593; Benjamin Depo. (5/31/17) 236:21-237:10, 244:11-17.

[5] Filed documents are cited by the page number included in the ECF stamp.

temperament and habitat and the location of its capture. Wolves released too soon will leave federal lands and return to their area of capture, only to face the same private landowner who will, again, request their removal. The Service's ultimate goal in timing releases is to increase survivorship when the wolf returns to the wild.

C. Releases from the captive breeding population

When the nonessential experimental population of red wolves was first introduced into North Carolina, four pairs of red wolves were removed from the captive breeding population and released into the wild. 56 Fed. Reg. at 56,327. As originally conceptualized, the red wolf reintroduction would only require release of up to six mated pairs of red wolves over a one year period. USFWS-001513 (describing "reintroduction and reestablishment of the red wolf on Alligator River NWR" involving "[a]cclimating and releasing up to six mated pairs of animals over a 1-year period"). At that time, the Service anticipated that the wild population could "eventually" number 25-35 animals. 51 Fed. Reg. at 41,792. Over time, without any statutory or regulatory mandate to do so, the Service periodically released additional red wolves from captivity into the wild population, ultimately releasing a total of 134 wolves. USFWS-0017274; USFWS-0017179. Despite this significant influx of red wolves from captivity into the nonessential experimental population, the wild population has continually declined since approximately 2005-2006. Defs.' App. at 11, Red Wolf 2018 Species Status Assessment ("SSA") at 31; USFWS-0030194. In 2015, the Service exercised its discretion to stop releasing wolves so it could assess the impact of the practice on both the captive and wild populations as part of an overall program review. USFWS-0017269.

D. Coyote sterilizations

When the Service originally established the North Carolina nonessential experimental population of red wolves, the area lacked a significant coyote presence. 82 Fed. Reg. at 23,518. However, coyotes have expanded into the area and now pose a significant threat to the species through hybridization. 82 Fed. Reg. at 23,519. In an attempt to address this, the Service began sterilizing coyotes in 2000 as part of a non-binding Adaptive Management Plan, without any statutory or regulatory mandate to do so.

USFWS-0014726 (2000 Red Wolf Adaptive Management Plain explaining that it specifies "framework and general goals" and "retains the flexibility to adapt to new findings"); 82 Fed. Reg. at 23,518; SSA at 34. However, as the species' population numbers continued to decline despite coyote sterilizations and the Service encountered difficulties receiving required permits from the state, in its discretion, the Service stopped sterilizing coyotes in 2014 so it could fully evaluate the practice in the context of overall species management. USFWS-0017178.

E. Current status

The only experimental red wolf population currently in the wild is the one at issue in this case. 82 Fed. Reg. at 23,519. That population is nonessential and defined to include only red wolves present in Dare, Tyrell, Hyde, Washington, and Beaufort counties. 60 Fed. Reg. at 18,940. The number of wolves in the nonessential experimental population has fluctuated significantly since its introduction, increasing from eight original members to a high of approximately 120-130 wolves. USFWS-0030196; Defs.' App. at 1 ("4.24.18 Press Release"). However, since approximately 2005-2006, the number of wolves in the nonessential experimental population has continually declined. SSA at 31; USFWS-0030194. The nonessential experimental population is currently estimated to number 44 wolves. SSA at 29. An additional 231 wolves exist in 43 facilities as part of the captive breeding program. *Id*.

To assess the species' population decline along with its overall recovery needs, the Service began a comprehensive review of the program in June 2015. USFWS-0017269; USFWS-0041783. This review included assembling a recovery team to analyze the program and offer recommendations, a Population Viability Assessment, a Species Status Assessment, and a Five-Year Status review. USFWS-0041850; USFWS-0035679; SSA; Defs.' App. at 108 ("5-Year Review"); USFWS-0041783. The Service's review ultimately concluded that the population's decline has various causes. SSA at 31-53. These include direct mortality, like gunshot, vehicle collisions, illness, intraspecies strife, poisoning, and other suspected illegal activity, as well as indirect factors, like coyote introgression and sea level rise, which has caused (and will continue to cause) flooding of the nonessential experimental population area. *Id*. Currently, the birth rate of the wild nonessential experimental population is insufficient to overcome the losses to

mortality, and coyote introgression is further reducing births of pure red wolves. SSA at 53. The red wolf also faces significant problems in captivity – the Service's review revealed that the foundational captive breeding population was not secure due to decreasing genetic diversity. SSA at 4, 29, 70; USFWS-0035681 to 82; USFWS-0041785; 82 Fed. Reg. at 23,519.

Based on its analysis of the best available science, the Service projects that the red wolf population could be extirpated in as few as 8 years. SSA at 70. To avoid this possibility, the Service developed a new plan for species management. ECF 61 ("Defs.' Notice of Review"); USFWS-0041783; Defs.' App. at 7 ("Miranda Dec."); 82 Fed. Reg. at 23,518. The hallmark of its new approach will be managing the captive and wild populations together as one meta-population to ensure species recovery. Defs.' Notice of Review; USFWS-0041783; 82 Fed. Reg. at 23,519; Miranda Dec. This will allow the Service to secure the captive population, which is the genetic fail-safe for the species and the key to any successful reintroduction. SSA at 4; USFWS-0041783; 82 Fed. Reg. at 23,519. The Service's plan also calls for resuming red wolf introductions and coyote sterilizations. 82 Fed. Reg. at 23,519 (explaining new proposal for species involves introducing wolves from captivity into wild and managing the population through "control of coyotes and hybrids"); 5-Year Review at 6 (indicating Service will need to continue implementing Red Wolf Adaptive Management Plan in future plans for species). The Service intends to implement its plan by replacing the existing Red Wolf Rule with a new rule to reflect its studied approach to govern species management. USFWS-0041783; 82 Fed. Reg. at 23,519; Miranda Dec.

To that end, on May 23, 2017, the Service published an advanced notice of proposed rulemaking and a notice of intent to prepare a NEPA document. 82 Fed. Reg. 23,518-01. That notice explained the Service's intentions to propose a new red wolf rule and prepare a draft environment review pursuant to NEPA and solicited public comment. *Id*. In June 2017, the Service held two public scoping meetings to seek further input on its proposal. *Id*. Since that time, the Service has continued its rulemaking efforts, reviewing public comments and preparing a proposed rule. As part of this process, the Service will undertake all required NEPA and ESA analyses. USFWS-0041791-92; 82 Fed. Reg. at 23,518-20;

Miranda Dec. Before June 27, 2018, the Service intends to 1) announce the availability of its NEPA documents for public comment, 2) initiate ESA Section 7 consultation on the preferred alternative identified in the NEPA document, and 3) publish a proposed new red wolf rule in the Federal Register. Miranda Dec. The Service intends to finalize or withdraw the proposed rule by November 30, 2018. *Id*.

During this rulemaking process, the Service continues to effectively and actively manage the wild, nonessential experimental population. These management activities include monitoring radio-collared red wolves by air and ground and monitoring all wolves using remote sensing cameras and scent stations to assess movements, pack dynamics, and general health; investigating wolf mortalities and taking appropriate follow-up actions, including performing lab analysis; performing veterinary care, vaccinations, and genetic analysis; and promoting education and public awareness through various outreach activities. *Id*. The 2017 Fiscal Year Red Wolf Recovery Program budget was approximately $1.1 million – the highest budget for any species in the Service's Southeast Region. *Id*.

STANDARD OF REVIEW

This Court has previously ruled that, "because the ESA and NEPA provide no standard of review, the Court will apply the APA's arbitrary and capricious standard to plaintiffs' claims." *Red Wolf Coal. v. U.S. Fish & Wildlife Serv*., 210 F. Supp. 3d 796, 802 (E.D.N.C. 2016). Under the APA's standard of review, courts may set aside an agency's decision only if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). "Review under this standard is highly deferential, with a presumption in favor of finding the agency action valid." *Ohio Valley Envtl. Coal. v. Aracoma Coal Co.,* 556 F.3d 177, 192 (4th Cir. 2009); *see also Cent. Elec. Power Co-op., Inc. v. Se. Power Admin.*, 338 F.3d 333, 337 (4th Cir. 2003) ("Given the expertise of agencies in the fields they regulate, a presumption of regularity attaches to administrative actions."). "Especially in matters involving not just simple findings of fact but complex predictions based on special expertise, 'a reviewing court must generally be at its most deferential.'" *Ohio Valley Envtl. Coal.*, 556 F.3d at 192 (quoting *Baltimore Gas & Elec. Co. v. Natural Res. Def. Council*, 462 U.S. 87, 103 (1983)). "If an agency's

decision was based on a consideration of the relevant factors and there has been no clear error of judgment, [the Court] must uphold it." *Cent. Elec. Power Co-op., Inc.*, 338 F.3d at 337.

Claims governed by the APA's standard of review are appropriately resolved on summary judgment. "A court conducting judicial review under the APA does not resolve factual questions, but instead determines whether or not as a matter of law the evidence in the administrative record permitted the agency to make the decision it did . . . summary judgment becomes the mechanism for deciding, as a matter of law, whether the agency action is supported by the administrative record and otherwise consistent with the APA standard of review." *Hoffler v. Hagel*, 122 F. Supp. 3d 438, 446 (E.D.N.C. 2015) (internal quotation and citation omitted), *aff'd in part, dismissed in part sub nom. Hoffler v. Mattis*, 677 F. App'x 119 (4th Cir. 2017); *see also Occidental Eng'g Co. v. I.N.S.*, 753 F.2d 766, 769–70 (9th Cir. 1985) (holding that a "court is not required to resolve any facts in a review of an administrative proceeding . . .. . . summary judgment is an appropriate mechanism for deciding the legal question of whether the agency could reasonably have found the facts as it did."); *Kight v. United States*, 850 F. Supp. 2d 165, 169 (D.D.C. 2012) ("[S]ummary judgment serves as the mechanism for deciding, as a matter of law, whether the agency action is supported by the administrative record and otherwise consistent with the APA standard of review."); *see also* ECF 30 at 13-14.

ARGUMENT

I. THE COURT LACKS JURISDICTION TO HEAR PLAINTIFFS' CLAIMS BECAUSE THEY ARE MOOT.

The doctrine of mootness "describes a situation where events in the world have so overtaken a lawsuit that deciding it involves more energy than effect, a waste of effort on questions now more pedantic than practical." *Winzler v. Toyota Motor Sales U.S.A., Inc.,* 681 F.3d 1208, 1209 (10th Cir. 2012). Such are the circumstances here. Because of actions taken by the Service after this case was filed, Plaintiffs' claims are moot and should be dismissed.

A. Plaintiffs' Third Claim is Constitutionally Moot.

Under Article III of the Constitution, federal courts may only decide actual cases or controversies. *See Iron Arrow Honor Soc'y v. Heckler*, 464 U.S. 67, 70 (1983). "When a case or controversy ceases to exist, the litigation becomes moot and the federal court no longer possesses jurisdiction to proceed." *Leggett v. Solomon*, No. 5:14-CT-3228-FL, 2017 WL 421915, at *3 (E.D.N.C. Jan. 31, 2017). "Simply stated, a case is moot when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." *Powell v. McCormack*, 395 U.S. 486, 496 (1969).

Plaintiffs' third claim for relief no longer presents a justiciable case or controversy. In that claim, Plaintiffs accuse the Service of violating ESA Section 4, 16 U.S.C. § 1533(c)(2), which says the Service "shall conduct, at least once every five years, a review of all [listed] species." ECF 37 ("Compl.") at 29. When this case was filed in November 2015, the Service had not completed a status review of the red wolf since September 2007. *See* USFWS-0005317. Over the course of this litigation, however, the Service has undertaken a comprehensive review of the species and the red wolf recovery program. *See supra* Background § II.E. This review included completion of a new species status assessment on April 19, 2018, and five-year status review pursuant to 16 U.S.C. § 1533(c)(2) on April 23, 2018. SSA and 5-Year Review. Therefore, the Service is now in compliance with 16 U.S.C. § 1533(c)(2), and Plaintiffs have received the exact relief they requested in their Complaint related to their third claim. *See* Compl., Request for Relief (C) (asking Court to "require[e] Defendants to . . . complete the past-due mandatory five-year status review under ESA Section 4"). Plaintiffs no longer have a legally cognizable injury that could be redressed by an order of this Court, and their third claim should be dismissed as moot. *See, e.g., Fla. Home Builders Ass'n v. Norton*, 496 F. Supp. 2d 1330, 1333 n.3 (M.D. Fla. 2007) (denying as moot plaintiffs' claim regarding overdue five-year status review of Red–Cockaded Woodpecker because the Service had "since completed review of the" species); *Friedman's, Inc. v. Dunlap*, 290 F.3d 191, 197 (4th Cir. 2002) ("[O]ne such circumstance mooting a claim arises when the claimant receives the relief he or she sought to obtain through the claim."). Plaintiffs seem to concede this point, since their summary judgment motion does not seek any relief specific to their third claim or 16 U.S.C. § 1533(c)(2). *See* ECF

79 ("Pls.' SJ Mot.") (dropping request for completion of five-year status review that had been included in Complaint).

B. Plaintiffs' Remaining Claims are Prudentially Moot.

Even if a claim is not constitutionally moot, it may be moot for prudential reasons. *S-1 v. Spangler*, 832 F.2d 294, 297 (4th Cir. 1987) ("The discretionary power to withhold injunctive and declaratory relief for prudential reasons, even in a case not constitutionally moot, is well established."). "[T]he doctrine of prudential mootness … has particular applicability in cases … where the relief sought is an injunction against the government." *S. Utah Wilderness All. v. Smith*, 110 F.3d 724, 727 (10th Cir. 1997). The Fourth Circuit considers three factors when assessing prudential mootness: "(1) the court's inability to give an effective remedy because of developed circumstances; (2) the sensitivity and/or difficulty of the dispositive issue; and (3) the likelihood that the challenged act would recur and evade review." *Smyth v. Carter*, 88 F. Supp. 2d 567, 570–71 (W.D. Va. 2000) (citing *Spangler,* 832 F.2d at 297–98 and *United States v. (Under Seal)*, 757 F.2d 600, 602–04 (4th Cir. 1985)). Applying these factors, it is apparent that Plaintiffs' first, second, fourth, fifth, and sixth claims ("remaining claims") are prudentially moot and should be dismissed.

All Plaintiffs' remaining claims challenge the Service's alleged "interpretation" or "implementation" of the existing Red Wolf Rule. *See* Compl. at 27 (alleging Service violated ESA Section 9 by not complying with Red Wolf Rule); ECF 81 ("Pls.' SJ Memo.") at 19-22 (same); Compl. at 28-29 (alleging Service's "interpretation and application of the red wolf rule" violated ESA Section 4(d)); Pls.' SJ Memo. at 22-24 (same); Compl. at 29-30 (claiming Service's "current management of the Red Wolf Recovery program pursuant to its current interpretation of" the Red Wolf Rule violates ESA Section 7(a)(1)); *id*. at 30-32 (alleging Service violated ESA Section 7(a)(2) by not consulting regarding "the effect of the red wolf rule" and not "ensur[ing] that the current administration of the red wolf rule is not likely to jeopardize the continued existence" of the species); Pls.' SJ Memo. at 29-31 (same); Compl. at 32-33 (alleging the Service "violated NEPA in failing to prepare an EA or EIS to analyze the impacts of

its revised interpretation of the red wolf rule"); Pls.' SJ Memo. at 31-34 (alleging Service must "re-evaluat[e] the red wolf rule under NEPA").

However, as explained above, the Service intends to promulgate a new rule to govern management of the red wolf population that will *supersede* the existing Red Wolf Rule at issue in this case. *See supra* Background § II.E. The Service has already published an advance notice of proposed rulemaking and notice of intent to prepare a NEPA document and has held public scoping meetings. 82 Fed. Reg. 23,518. Before June 27, 2018, the Service also intends to 1) announce the availability of its NEPA document for public comment, 2) initiate ESA Section 7 consultation on the preferred alternative identified in the NEPA document, and 3) publish a proposed new red wolf rule in the Federal Register. Miranda Dec. [6] All of these activities will occur before summary judgment briefing in this case concludes on June 27, 2018. *See* ECF 70. Additionally, the Service intends to finalize or withdraw the proposed rule by November 30, 2018, just months after the conclusion of summary judgment briefing. *Id.*; Miranda Dec.

As these developments show, "events have simply overtaken the pace of this litigation," and the Court is now unable to give an effective remedy – the first factor in the prudential mootness test. *Bahnmiller v. Derwinski*, 923 F.2d 1085, 1089 (4th Cir. 1991) (dismissing claims because "[w]ithdrawal or alteration of administrative policies can moot an attack on those policies"); *see also United States v. (Under Seal)*, 757 F.2d at 602–04 (dismissing case as prudentially moot because "in realistic terms" "supervening events" made it impossible for the Court to give "any effective and suitable remedy" to appellees). For example, as relief for Plaintiffs' fifth and sixth claims, the Complaint asks the Court to "[i]ssue 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

[6] Prudential mootness determinations may rest on agency representations included in a declaration. *See, e.g., Or. Nat. Res. Council v. Keys*, No. CIV. 02-3080-CO, 2004 WL 1048168, at *6, *10 (D. Or. May 7, 2004) (dismissing plaintiffs' ESA Section 7 claim as prudentially moot because agency submitted declaration indicating its intention to proceed with consultation by date certain), *report and recommendation adopted*, No. CIV.02-3080-C0, 2004 WL 1490320 (D. Or. June 29, 2004).

NEPA." Compl., Request for Relief (C). But ordering the Service to conduct ESA Section 7 and NEPA analyses related to the *current* rule, which may be superseded in a matter of months, is an immense waste of agency time and resources and lacks "sufficient utility to justify decision of this case on the merits." *Spangler*, 832 F.2d at 297.

Plaintiffs apparently understood this and changed the relief they requested from the Complaint, which sought ESA Section 7 and NEPA analyses of "*current* management of the red wolf recovery program under" the Red Wolf Rule, to their summary judgment motion, which asks the Court to "[r]equire that any *subsequent* modification to the historic implementation of the red wolf rule or the longstanding red wolf adaptive management program go through required analyses under the ESA, NEPA, and the Administrative Procedure Act." *Compare* Compl., Request for Relief (C) (emphasis added) *with* ECF 79 ("Pls.' SJ Mot.") at 2 (emphasis added). Among many other problems with this revised request detailed below, *see infra* Argument § III, the relief it seeks is already occurring – before June 27, 2018, the Service will initiate ESA Section 7 consultation and make available for review a NEPA document that evaluates the *new* proposed red wolf rule. Miranda Dec. These analyses will necessarily involve evaluation of the Service's current management of the species as compared to proposed future management. With these environmental analyses already planned, a Court order requiring the same would have no real effect. *See Oregon Nat. Res. Council*, 2004 WL 1048168, at *10 (dismissing an ESA Section 7(a)(2) claim as prudentially moot because agency was "in the process of reinitiating consultation"); *Am. Littoral Soc'y v. U.S. E.P.A. Region*, 199 F. Supp. 2d 217, 246 (D.N.J. 2002) ("[C]ommencement of consultation is sufficient to moot plaintiffs' claim for failure to consult as required by section 7(a)(2) of the ESA."); *Smyth*, 88 F. Supp. 2d at 571 (dismissing case as prudentially moot "because the plaintiffs already received what they ultimately sought").

Plaintiffs' first, second, and fourth claims suffer a similar fate. As relief for these claims, Plaintiffs ask the Court to permanently maintain its preliminary injunction preventing the Service from taking red wolves "pursuant to" the Red Wolf Rule; however, such an injunction will become meaningless when the Red Wolf Rule it references is superseded. *See* Pls.' SJ Mot. at 2; *Red Wolf Coal.*,

219 F. Supp. 3d at 807. Additionally, Plaintiffs make the extraordinary request that the Court order the Service to reinstate coyote sterilization and red wolf releases or explain why such actions are not necessary to provide for the conservation of the red wolf. Pls.' SJ Mot. at 2. But the Service has already proposed resuming these activities and intends to evaluate their role in the revised red wolf program. 82 Fed. Reg. 23,519; 5-Year Review at 6. Therefore, practically speaking, the Court cannot award effective relief for these claims. *See Nationwide Mut. Ins. Co. v. Burke*, 897 F.2d 734, 739–40 (4th Cir. 1990) (finding case prudentially moot because "intervening events" had rendered a decision by the Court irrelevant); *Rio Grande Silvery Minnow v. Bureau of Reclamation*, 601 F.3d 1096, 1112 (10th Cir. 2010) (finding plaintiffs' ESA claim moot because requested injunction "would have no effect in the real world").

The second prudential mootness factor also favors dismissal. This factor considers "the sensitivity and/or difficulty of the dispositive issue" involved in the case. *Smyth*, 88 F. Supp. 2d at 571. Plaintiffs brought six claims involving complicated scientific questions and technical analyses of the ESA and NEPA, which have resulted in factual and expert discovery; detailed motion to dismiss, preliminary injunction, and summary judgment briefing; and expert reports. Moreover, in their summary judgment motion, Plaintiffs seek extraordinary permanent mandatory injunctive relief that will require careful consideration by the Court. *See infra* Argument § III. In such circumstances, the Court "should not engage in what would be meaningless adjudication of an issue of considerable difficulty." *Burke*, 897 F.2d at 739–40.

The final prudential mootness factor considers the likelihood that the challenged act would recur and evade review. *Smyth*, 88 F. Supp. 2d at 570–71. Here, all Plaintiffs' remaining claims attack the Service's interpretation or implementation of the current Red Wolf Rule. However, the Service intends to replace that rule with a new one and has taken concrete steps towards that action. *See supra* Background § II.E. If a new red wolf rule is promulgated, then there will be no likelihood that the Service will resume implementing or interpreting the superseded Red Wolf Rule. *See Alabama Hosp. Ass'n v. Beasley*, 702 F.2d 955, 961 (11th Cir. 1983) ("Newly promulgated administrative regulations can have the effect of

mooting a previously viable case . . . and [t]he mere possibility that the [government] might rescind its recent amendment does not, for purpose of mootness, enliven the controversy."); *Rio Grande Silvery Minnow*, 601 F.3d at 1116 ("[E]ven when a legislative body has the power to re-enact an ordinance or statute, ordinarily an amendment or repeal of it moots a case challenging the ordinance or statute."); *Veasey v. Wilkins*, No. 5:14-CV-369-BO, 2015 WL 7776557, at *1 (E.D.N.C. Dec. 2, 2015) ("When a legislature amends or repeals a challenged law, any case challenging the prior law is moot."). It is possible that the Service may not finalize its proposed rule, but this action would not "evade review," since Plaintiffs can bring a new lawsuit challenging its withdrawal. *See, e.g., Envtl. Integrity Project v. McCarthy*, 139 F. Supp. 3d 25, 39 (D.D.C. 2015) ("[T]he withdrawal of a proposed rule after a notice and comment period is subject to judicial review under the APA"); *Smyth*, 88 F. Supp. 2d at 571 (dismissing case as prudentially moot because, "even if the challenged act recurred, the act would not evade review").

Thus, all three prudential mootness factors indicate that Plaintiffs' remaining claims should be dismissed. Put simply, "events [have] so overtake[n] [this] lawsuit that the anticipated benefits of a remedial decree no longer justify the trouble of deciding the case on the merits." *Winzler,* 681 F.3d at 1210. Therefore, "equity . . . demand[s] not decision but dismissal." *Id.*

II. EVEN IF PLAINTIFFS' CLAIMS ARE NOT MOOT, THEY SHOULD BE DISMISSED BECAUSE THE SERVICE'S ACTIONS COMPLY WITH THE ESA AND NEPA.

If the Court finds that it has jurisdiction to decide this case, Plaintiffs' claims still fail because the Service's actions regarding the red wolf comply with both the ESA and NEPA. The Court's preliminary injunction opinion does not foreclose this conclusion, since it only assessed Plaintiffs' "likelihood," not "certainty," of success on some, but not all, of their claims. *See Red Wolf Coal.*, 210 F. Supp. 3d at 802, 804 n.3 ("[A] movant need not necessarily demonstrate a likelihood of success on all claims in order to obtain a preliminary injunction."). As the Fourth Circuit has explained, "[t]he fact that a preliminary injunction is granted in a given circumstance . . . by no means represents a determination that the claim in question will or ought to succeed ultimately; that determination is to be made upon the 'deliberate investigation' that follows the granting of the preliminary injunction." *Smyth ex rel. Smyth v. Rivero*, 282

F.3d 268, 276 (4th Cir. 2002). As shown below, a "deliberate investigation" of the specific legal requirements and relevant facts reveals that each of Plaintiffs' claims lack merit and should be dismissed.

A. The Service Has Not Violated NEPA.

The crux of Plaintiffs' sixth claim for relief is that the Service, in view of the declines in the red wolf population, has failed to re-evaluate the red wolf program and conduct NEPA analysis. The Court should deny this claim, however, because Plaintiffs have failed to challenge a final agency action or identify a major federal action taken by the Service that would require new or supplemental NEPA review. Furthermore, as previously articulated, Plaintiffs' current NEPA claim is untenable because the Service, in proposing a new red wolf rule, has already commenced new NEPA review.

1. Plaintiffs Fail To Challenge A Discrete and Final Agency Action.[7]

Plaintiffs' NEPA claim is not justiciable because it fails to challenge a final agency action. Since NEPA does not provide a private right of action or waiver of sovereign immunity, Plaintiffs necessarily rely on the right of action and waiver provided by the APA, 5 U.S.C. § 702. The APA provides that "[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof." 5 U.S.C. § 702. "Agency action," in turn, is defined to include "the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act." 5 U.S.C. § 551(13); *see also Norton v. S. Utah Wilderness All. ("SUWA")*, 542 U.S. 55, 62 (2004) (recognizing that the categories of agency action identified in 5 U.S.C. § 551(13) are "circumscribed" and "discrete"). As the Supreme Court has recognized, a "person claiming a right to sue must identify some 'agency action' that affects him in the specified fashion; it is judicial review thereof to which he is entitled." *Lujan v. Nat'l Wildlife Fed.*, 497 U.S. 871, 882 (1990). Put another way, a plaintiff "must direct its attack against some particular 'agency

[7] Defendants maintain their position that the lack of final agency action also invalidates Plaintiffs' ESA claims, as explained in Defendants' opposition to Plaintiffs' motion for summary judgment. *See* ECF 43 ("Defs.' PI Opp'n") at 10-16. Because this Court held that Plaintiffs' ESA claims are brought "pursuant to the citizen suit provision" and not the APA, Defendants will not repeat their arguments here. *Red Wolf Coal.*, 210 F. Supp. 2d at 801. However, Defendants preserve their objections to this conclusion.

action' that causes it harm." *Id.* at 891; *see also Vill. of Bald Head Island v. U.S. Army Corps. of Eng'rs*, 714 F.3d 186, 193 (4th Cir. 2013) (stating that '[t]he term 'action' as used in the APA is a term of art that does not include all conduct such as, for example, constructing a building, operating a program, or performing a contract. Rather, the APA's definition of agency action focuses on an agency's determination of rights and obligations, whether by rule, order, license, sanction, relief or similar action.") (internal citation omitted). 5 U.S.C. § 704.

The APA also requires that an agency action be "final" to be reviewable. This finality requirement applies in cases asserting NEPA violations. *See Lujan*, 497 U.S. at 882. Final agency actions are actions which (1) "mark the consummation of the agency's decision-making process" and (2) "by which rights or obligations have been determined, or from which legal consequences will flow." *Bennett v. Spear*, 520 U.S. 154, 178 (1997) (quotation omitted); *see RCM Techs. v. U.S. Dep't. of Homeland Sec.*, 614 F. Supp. 2d 39, 45-46 (D.D.C. 2009) (noting that the action not be merely tentative or interlocutory and that "[r]ights or obligations are determined by a policy when it is a 'binding rule'"); *see also Allergan, Inc. v. Burwell*, No. 13-00264 (RJL), 2016 WL 1298960, at *6 (D.D.C. Mar. 31, 2016) (stating that "agency action is final when it is 'definitive . . . [and not] 'subject to further agency consideration or possible modification.'" (internal citations omitted)).

Here, Plaintiffs fail to challenge any rule, order, license, or sanction implemented by the Service within the meaning of 5 U.S.C. § 551(13), much less a "final" one. Plaintiffs do not, and could not, challenge the 1986 Red Wolf Rule or 1995 revisions to the Red Wolf Rule, as such a claim would be time barred. *See Jersey Heights Neighborhood Ass'n v. Glendening*, 174 F.3d 180, 186 (4th Cir. 1999) (noting six-year statute of limitations for NEPA claims). Nor could Plaintiffs challenge the February 2014 or May 2015 take authorizations themselves, as they have expired. *See supra* Background § II.B. Plaintiffs challenge instead what they assert is an "informal re-write" of the Red Wolf Rule, without providing any substantive explanation of the nature of that purported activity and how it comports with the requirements of 5 U.S.C. § 704 and 5 U.S.C. § 551(13). *See* Pls.' SJ Memo at 31-32. But no such "informal re-write" of

the Red Wolf Rule occurred. Rather, the Service has merely applied the take and removal provisions at 50 C.F.R. § 17.84(c)(10) and (c)(4)(v) as they were written.

Plaintiffs rely on internal agency documents—"the 1999 Guidelines"— to argue that a "reinterpretation" of the Red Wolf Rule occurred. However, these internal documents do not evidence any "agency action." Rather, they reflect internal deliberations among red wolf recovery *field staff* on the Service's authority to issue removal requests and take authorizations. *See* USFWS-0011557 to 0011559; *United States v. Odabashian*, No. 95-2361 G/BRE, 1999 WL 33944059, at *6 (W.D. Tenn. May 18, 1999) ("Internal agency guidelines . . . are generally nonbinding on agency action."); *see also Abenaki Nation of Mississquoi v. Hughes*, 805 F. Supp. 234, 243 (D. Vt. 1992) (noting that an agency is not bound by the informal statements of its employees); *Defs. Of Wildlife v. Jewell*, 815 F.3d 1, 12 (D.C. Cir. 2016) (noting that "the comments by a random Service employee about a need for higher enrollment levels among the top-three habitat categories at best indicate a lack of consensus within the Service; they do not bind the Service . . . ."). The documents discuss whether 50 C.F.R. § 17.84(c)(10) and (c)(4)(v) require that the animals be "problem" wolves before they can be removed from private land, and expressly acknowledge that—under the current Red Wolf Rule—no such "problem" requirement exists. *Id.* (stating "[w]e need to resolve to *change our regulations* to reflect that we will remove wolves only when there is an associated problem such as depredation," and criticizing the regulations as written, and suggesting they should be amended, because they allow take of non-problem wolves) (emphasis added). Simply put, the author of these documents—a field staff member—expressed disagreement with the Red Wolf Rule's directives and sought to evade them.[8] *Id*. The Service, therefore, did not "re-write" the Red Wolf Rule when it granted the take authorizations or removed "non-problem" wolves as Plaintiffs contend, but merely confirmed the rule's appropriate application, which did not create any new rights or obligations, and is thus not a final agency action reviewable by this Court. *See Bennett v. Spear*, 520 U.S. at 178.

[8] The documents then cannot be fairly construed as establishing a position binding on the Service. *See Spirit Lake Tribe v. North Dakota*, 262 F.3d 732, 742 (8th Cir. 2001) (finding that an unpublished intra-office memo did not establish a position binding on the government).

Because Plaintiffs have failed to challenge a final agency action, the Court should deny Plaintiffs' sixth claim.

2. Plaintiffs Fail to Challenge a Major Federal Action.

Plaintiffs next contend that the agency revised its policy regarding the management of red wolves without conducting NEPA analysis. Pls.' SJ Memo. at 34. However, because Plaintiffs fail to identify a major federal action taken by the Service that would require NEPA analysis, the Court should deny Plaintiffs' sixth claim.

Only major federal actions trigger NEPA review. *Sw. Williamson Cty. Cmty. Ass'n v. Slater*, 173 F.3d 1033, 1036 (6th Cir. 1999); *see also* 42 U.S.C. § 4332(2)(C) (requiring a comprehensive environmental impact statement for major federal actions significantly affecting the quality of the human environment). And for major federal action to have occurred, an agency must have taken some overt action. *See Defenders of Wildlife v. Andrus*, 627 F.2d 1238, 1245 (D.C. Cir. 1980). NEPA's implementing regulations provide that such an overt act may occur upon an agency's adoption of official policy, adoption of formal plans, adoption of formal programs, or approval of specific projects. *See* 40 C.F.R. § 1508.18.

Here, Plaintiffs allege that the Service implemented an "unexplained policy revision" that requires NEPA review. Pls.' SJ Memo at 34. Despite their efforts, however, Plaintiffs have failed to identify any agency decision formally adopting a new official policy. As previously explained, the Service simply applied the Red Wolf Rule as written, and that alone is insufficient to trigger new NEPA obligations.

Plaintiffs also err in their assertion that the Service was required to supplement its pre-existing NEPA analysis. The duty to supplement an environmental analysis such as the one at issue here flows from the Council on Environmental Quality's regulations, which provide that supplemental environmental analysis is required when an agency makes "substantial changes in [a] proposed action that are relevant to environmental concerns," or when "[t]here are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts." 40

C.F.R. § 1502.9(c). As the Supreme Court has explained, however, this duty does not apply where the proposed major Federal action that is the source of the original NEPA compliance obligation has already been completed. *SUWA*, 542 U.S. at 73 (declining to require supplementation because approval of the land use plan completed the proposed action and, thus, there was no major Federal action left to occur). Here, Plaintiffs have failed to identify any ongoing or proposed major federal action that could require supplementation, and they naturally cannot rely on the 1995 revisions to the Red Wolf Rule or the expired take authorizations because those federal actions have been completed. Accordingly, Plaintiffs are unable to sustain a cognizable NEPA claim.

But even if Plaintiffs could satisfy the threshold requirement that there be some "major Federal action left to occur," *SUWA*, their arguments would fail because they cannot show that "[t]here are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts." 40 C.F.R. § 1502.9(c). Plaintiffs contend that the Service's termination of certain adaptive management practices—including red wolf reintroductions—have caused "significant changes" in the red wolf population by contributing to the species' "catastrophic decline," *see* Pls.' SJ Memo at 31-34, but there is no evidence to substantiate Plaintiffs' claim. Indeed, the decline in the red wolf population is not the result of a "shift in management perspective and rule interpretation by [the Service]." *Red Wolf Coal.*, 210 F. Supp. 3d at 804-05; *see also* Pls.' SJ Memo at 31-34. The Species Status Assessment demonstrates that between 1983 and 2013, management actions ranked as one of the least attributable causes of red wolf mortality. SSA at 31-32. Rather, the species' decline has been caused by a variety of factors unconnected to the Service. *See supra* Background § II.E. Additionally, in the face of these multiple threats, coyote sterilizations and red wolf introductions—both of which continued until approximately 2014-2015—were insufficient to stop the population's decline, which began in approximately 2005-2006. *Id.*; *See* L. Miranda Dep. Tr. At 104:1-20, 105:1-5, 20-22; *see also* USFWS-0030175.

As for Plaintiffs' contention that new NEPA analysis is required, as previously explained, the Service is in the process of preparing a new red wolf rule and has commenced the NEPA process, which

the Service anticipates will be finalized by November 30, 2018. Miranda Dec. The agency has already completed the scoping process and prepared a draft NEPA analysis which will be available for public comment by June 27, 2018. *Id*. Plaintiffs' argument that the Court should require the Service to perform new NEPA analysis, *see* Pls.' SJ Memo at 32-34, is thus no longer tenable, since the Service is already performing this activity. Similarly, the Court's previous determination that Plaintiffs are likely to succeed on the merits of their NEPA claim because the Service failed to perform "further NEPA analysis" no longer applies. *Red Wolf Coal.*, 210 F. Supp. 3d at 805. Therefore, Plaintiffs' sixth claim should be dismissed.

B. The Service Has Not Violated ESA Section 9.[9]

Plaintiffs' first claim should be dismissed because the Service has not violated ESA Section 9. That section provides, in relevant part, "with respect to any endangered species of fish or wildlife listed pursuant to section 1533 of this title it is unlawful for any person subject to the jurisdiction of the United States to . . . take any such species." 16 U.S.C. § 1538 (a)(1)(B). On its face, Section 9 applies only to endangered species. *Id*. However, the Fourth Circuit has held that the Service also "extended the takings prohibitions of section 9(a)(1) to the experimental red wolf population with certain exceptions" identified in the Red Wolf Rule.[10] *Gibbs*, 214 F.3d at 488.

Plaintiffs allege the Service violated ESA Section 9 by issuing take authorizations that did not comply with the take exceptions outlined in the Red Wolf Rule, specifically, 50 C.F.R. § 17.84(c)(4)(v). Pls.' SJ Memo. at 18-22. As explained above, the Service has only issued two take authorizations pursuant to this provision – one in February 2014 and another in May 2015. *See* Background § II.B. And, as Plaintiffs acknowledge, only the May 2015 authorization was used to take a wolf. *Id*.; Pls.' SJ Memo.

[9] Plaintiffs did not move for a preliminary injunction based on their ESA Section 9 claim, so the Court's preliminary injunction opinion did not address it. *Red Wolf Coal.*, 210 F. Supp. 3d at 802 n.1.

[10] However, at least one Court has held that ESA Section 9 does not apply to experimental populations. *See WildEarth Guardians v. Lane*, No. CIV 12-118 LFG/KBM, 2012 WL 6019306, at *10-11 (D.N.M. Dec. 3, 2012), *as amended* (Dec. 4, 2012).

at 19, 21. Therefore, the Service could not have violated ESA Section 9 in connection with the February 2014 take authorization, since no wolves were taken as a result of that authorization.

Plaintiffs allege the May 2015 authorization failed to comply with 50 C.F.R. § 17.84(c)(4)(v) in several ways but fail to show that it exceeds the sideboards established in the Rule. First, Plaintiffs selectively quote from the take authorization to argue that the Service did not attempt to nonlethally remove wolves on the property before issuing the authorization. Pls.' SJ Memo. at 19-20. But this is simply not true. The Service had extensively worked with the landowner to nonlethally remove wolves before it issued the take authorization. *See* Background § II.B; USFWS-0012593 ("[E]fforts have been made to remove wolves from your property, and while these efforts have been successful at least one collared animal (possible [sic] a red wolf) is continuing to occupy your land."); USFWS-0029306 to 0029312; USFWS-0012279. It was only after these efforts proved unsuccessful that the Service "abandoned" them and issued the May 2015 take authorization. USFWS-0012593. It does not matter that Plaintiffs think the Service should have continued efforts to capture wolves on the property – the Red Wolf Rule does not dictate the type, scope, or length of the efforts required, which are questions left to the Service's expert discretion. The Red Wolf Rule requires only that a take authorization be issued "after efforts by project personnel to capture such animals have been abandoned." 50 C.F.R. § 17.84(c)(4)(v). The Service complied with this requirement before it issued the May 2015 authorization.

Next, Plaintiffs complain that the May 2015 take authorization was signed by Pete Benjamin. Pls.' SJ Memo. at 20-21. This does not violate 50 C.F.R. § 17.84(c)(4)(v), however, since that provision allows a Service "project leader" to issue a take authorization, and Mr. Benjamin, as a field supervisor, certainly meets this qualification. USFWS-0012594. Relatedly, Plaintiffs point to the preamble to the 1995 amendment that added 50 C.F.R. § 17.84(c)(4)(v) and allege that it shows a take authorization must be issued "on site of the depredation." Pls.' SJ Memo. at 20. Critically, this language does not appear in the Red Wolf Rule itself; therefore, it is not a requirement of the Red Wolf Rule that can be violated. *See Jurgensen v. Fairfax Cty., Va.*, 745 F.2d 868, 885 (4th Cir. 1984) ("The preamble no doubt contributes to a general understanding of a statute, but it is not an operative part of the statute.") (internal quotations

omitted). Moreover, the phrase "on site of the depredation" used in the 1995 preamble does not refer to the physical location where a take authorization letter must be authored and delivered, as Plaintiffs allege – it would be illogical to require that an authorization be physically written and handed out in a specific location to be valid. Rather, "on site of the depredation" appears to modify the word "biologist," explaining that a biologist who worked on the site of a depredation could issue a take authorization. 60 Fed. Reg. at 18,943.

Additionally, contrary to Plaintiffs' representations, the 1995 preamble does not say that a depredation must occur before a take authorization can be issued under 50 C.F.R. § 17.84(c)(4)(v). Rather, the reference to depredation in the preamble is made as part of a larger discussion of *examples* of circumstances that could justify taking a red wolf. *Id*. Authorized takes based on depredation are addressed in other provisions of the Red Wolf Rule besides 50 C.F.R. § 17.84(c)(4)(v). *See* 50 C.F.R. §17.84(c)(4)(iii) ("Any private landowner . . . may take red wolves found on his or her property . . . when the wolves are in the act of killing livestock or pets."); *id*. at (c)(5)(iii)("Any employee or agent of the Service or State conservation agency . . . may . . . take an animal . . . which is responsible for depredations to lawfully present domestic animals or other personal property."). In contrast, the take provision at 50 C.F.R. § 17.84(c)(4)(v) does not include a depredation requirement. It was added in 1995 to address take of unwanted wolves. As the 1995 preamble explains, "individuals may not want the animals on their property because they fear them or consider them a nuisance," so the Red Wolf Rule was being "modified to provide that *all* landowner requests to remove wolves from their property will be honored." 60 Fed. Reg. at 18,943-44 (emphasis added); *see also id*. at 18,946 (explaining "programs to purposely reintroduce predators, such as the red wolf, must be accompanied by provisions to protect private property from the presence of such reintroduced animals *if the landowner does not want them on his property*") (emphasis added).

Finally, Plaintiffs object in a footnote that it was an agent of the landowners, not the actual landowners themselves, that lethally took the wolf authorized in May 2015. Pls.' SJ Memo. at 21 n.3. However, this is an unsupported, overly restrictive reading of 50 C.F.R. § 17.84(c)(4)(v). The 1995

preamble explains (in the very sentence that follows the one Plaintiffs quote for the "on site of the depredation" language) that take authorizations should specify "the authorized personnel (landowner and a limited number of his agents)" that could take a wolf. 60 Fed. Reg. at 18,943. The May 2015 authorization did just that, providing authorization to the landowners "and [their] agents (e.g., property manager Mr. REDACTED)" to conduct a lethal take. USFWS-0012594.

As this discussion shows, the Service complied with 50 C.F.R. § 17.84(c)(4)(v) when it issued the one authorization that resulted in the take of a red wolf. Therefore, Plaintiffs' first claim should be dismissed.

C. The Service Has Not Violated ESA Section 4(d).

Plaintiffs' second claim argues that the Service violated ESA Section 4(d) by allegedly reinterpreting the Red Wolf Rule's take and removal provisions, 50 C.F.R. §§ 17.84(c)(4)(v) and (c)(10), "in a manner detrimental to red wolf conservation." Pls.' SJ Memo. at 15. However, these arguments are meritless.

First, it is necessary to consider the applicability of ESA Section 4(d). It states, "[w]henever any species *is listed as a threatened species* pursuant to subsection (c) of this section, the Secretary shall issue such regulations as he deems necessary and advisable to provide for the conservation of such species." 16 U.S.C. §§ 1533(d) (emphasis added). Recent caselaw calls into doubt whether the requirements of ESA Section 4(d) extend beyond species "listed as threatened" to experimental populations "treated" as threatened species in certain circumstances, like the red wolf. In *Center for Biological Diversity v. Jewell*, the U.S. District Court for the District of Arizona dismissed an ESA Section 4(d) claim brought in connection with an experimental population of Mexican wolves, finding "[t]he Ninth Circuit has rejected the argument that a Section 10(j) regulation must meet the requirements of ESA Section 4(d)." No. CV-16-00094-TUC-JGZ, 2018 WL 1586651, at *13 n.12 (D. Ariz. Mar. 31, 2018). In so holding, the Court cited *United States v. McKittrick*, 142 F.3d 1170, 1176 (9th Cir. 1998), which also rejected an ESA Section 4(d) challenge because the Court held that regulations for experimental populations must only comply with the requirements of ESA Section 10(j), not Section 4(d). Certainly, if the Red Wolf Rule

itself was not required to comply with ESA Section 4(d), then the Service could not have violated that section by allegedly reinterpreting the Red Wolf Rule.

Similarly, on its face, ESA Section 4(d) governs the *issuance* of regulations, not subsequent "interpretations" of regulations or rules. 16 U.S.C. §§ 1533(d) (". . . the Secretary shall *issue* such regulations . . .") (emphasis added). Here, Plaintiffs challenge a "reinterpretation" of the Red Wolf Rule that they allege occurred some twenty-seven years after the rule was initially promulgated. ESA Section 4(d) does not reach this far. Instead, if Plaintiffs believe the Red Wolf Rule complied with ESA Section 4(d) when it was originally promulgated, then their objections to the Service's alleged "reinterpretation" are more correctly viewed as an alleged violation of the Red Wolf Rule itself, not ESA Section 4(d).

Regardless, even if ESA Section 4(d) does apply here, Plaintiffs' second claim should still be dismissed because the Service has complied with the section's requirements. ESA Section 4(d) expressly gives the Service discretion to decide what regulatory provisions are "necessary and advisable to provide for the conservation" of species. 16 U.S.C. §§ 1533(d); *see also Forest Guardians v. U.S. Fish & Wildlife Serv*., 611 F.3d 692, 698 n.6 (10th Cir. 2010) ("[I]t is through administrative rulemaking that [threatened species] receive a measure of the ESA's protections . . . and they do so only to the extent that the FWS considers the protections to be necessary and appropriate for their conservation."); *WildEarth Guardians v. Salazar,* 741 F. Supp. 2d 89, 93 (D.D.C. 2010) (finding "the Secretary has the discretion, under ESA subsection 4(d)" to issue "necessary and advisable" regulations). Here, the Secretary found it "necessary and advisable " for the conservation of the red wolf to promulgate regulations that include specific provisions requiring the Service to remove red wolves from private property upon request and issue take authorizations to private landowners if unwanted wolves cannot be removed non-lethally. As explained above, the Service has not "reinterpreted" these provisions – it is simply following the directives of the regulations as they were written. *See supra* Argument § II.A. This means Plaintiffs' real complaint is not with the Service's alleged "reinterpretation" of the regulations but with the regulations themselves. However, Plaintiffs are time-barred from bringing a Section 4(d) challenge to the validity of the Red Wolf

Rule since it was promulgated in 1986 and amended in 1995, and the applicable six-year statute of limitations ran long ago. *See, e.g., Strahan v. Linnon*, 967 F. Supp. 581, 607 (D. Mass. 1997).

Moreover, the Red Wolf Rule as both promulgated and interpreted *does* provide for the conservation of the species in compliance with ESA Section 4(d). The Service's ability to remove and lethally take red wolves on private land provides it with the flexibility required to effectively manage the population and increase public support for the program by assuring private landowners that they will not be required to host wolves on their land if the wolves are unwanted. *See supra* Background § I, Argument § II.B. As the 1995 preamble to the Red Wolf Rule explains, "provisions to protect private property from the presence of . . . reintroduced animals if the landowner does not want them on his property . . . [are] necessary in order to obtain local public support, which is essential to success. Without such support, reintroductions are doomed, because the animals can be efficiently eliminated, as evidenced by past history." 60 Fed. Reg. at 18,946; *see also* 51 Fed. Reg. at 41,794 ("[T]he whole intent of the experimental population provision of the Act is to eliminate the requirement for absolute protection of reintroduced animals, in order to foster the chances of reintroduction . . . Without management flexibility, the current reintroduction effort would be much less likely to succeed.") *Wyo. Farm Bureau Fed'n,* 199 F.3d at 1231 ("Congress added section 10(j) . . . to address the Fish and Wildlife Service's and other affected agencies' frustration over political opposition to reintroduction efforts perceived to conflict with human activity.").

The Service has used its authority under 50 C.F.R. § 17.84(c)(10) numerous times to safely remove unwanted red wolves on private land, ensuring they are not incidentally or purposefully taken by unhappy landowners. *See supra* Background § II.B. Removed wolves were cared for in captivity and rereleased as soon as possible onto federal land, thereby continuing to contribute to the population. *Id*. In its expert discretion, the Service assessed how long each wolf must be held and released each in the time necessary to guarantee the highest chances of survival. *Id*. Similarly, before the Court's preliminary injunction, when the Service received a request to take a wolf pursuant to 50 C.F.R. § 17.84(c)(4)(v), it exhausted all its efforts to non-lethally capture the unwanted wolves and rerelease them onto federal land.

Id. In so doing, the Service has saved numerous wolves from being killed. In fact, only one wolf has ever been lethally taken pursuant to this provision. *Id*.

Admittedly, it may be difficult initially to understand how allowing removals and lethal takes of individual red wolves can further the species' conservation; however, when these activities are understood in the larger context of the experimental population as whole, whose very existence depends on public acceptance, it is reasonable to conclude that such provisions are "necessary and advisable" for species conservation. Courts have frequently found that allowing lethal takes of individual members of a species can further its conservation. *See Tuggle*, 607 F. Supp. 2d at 1101 (discussing Mexican wolf 10(j) rule and noting that allowing take of species "was necessary to make reintroduction compatible with current and planned human activities, such as livestock grazing and hunting and was critical to obtaining needed State, Tribal, local, and private cooperation"); *Trout Unlimited v. Lohn*, 559 F.3d 946, 961-62 (9th Cir. 2009) (dismissing Section 4(d) challenge to regulations that allowed for lethal take of some members of threatened species because "agency's reasonable judgment" concluded that such takes would support species conservation); *Nat'l Wildlife Fed'n v. Burlington N.R.R. Inc.*, No. CV-91-79-GF, 1992 WL 613680, at *2 (D. Mont. May 28, 1992) (acknowledging Service's regulations allowing limited take of grizzly bears promoted conservation of the species as required by Section 4(d)); *Ca. State Grange v. NMFS*, 620 F. Supp. 2d 1111, 1200 (E.D. Cal. 2008) (describing NMFS decision to prohibit take of steelhead in certain circumstances but not others as consistent with Section 4(d)'s allocation of discretion to the agency "to extend or not extend take protections as deem[ed] necessary for the conservation of such species.") (internal quotations omitted). Therefore, the Service has not violated ESA Section 4(d), and Plaintiffs' second claim should be dismissed.

D. The Service Has Not Violated ESA Section 7(a)(1).

Plaintiffs are similarly unsuccessfully with their fourth claim, which alleges the Service violated ESA Section 7(a)(1) "[b]y terminating [red wolf introduction and coyote sterilization] programs and failing to replace them with any comparable conservation measures." Pls.' SJ Memo. at 27. But this argument fails on multiple fronts. First, and most fundamentally, such a claim cannot stand against the

agency that administers the Act. Plaintiffs' position relies on a misreading of ESA Section 7(a)(1), which provides:

> The Secretary [of the Interior] shall review *other programs* administered by him and utilize such programs in furtherance of the purposes of this chapter. All *other Federal agencies* shall, in consultation with and with the assistance of the Secretary, utilize their authorities in furtherance of the purposes of this chapter by carrying out programs for the conservation of endangered species and threatened species listed pursuant to section 1533 of this title.

16 U.S.C. § 1536 (a)(1)(emphasis added). The second sentence of Section 7(a)(1) applies only to "all *other* Federal agencies," *i.e.*, agencies *other than* the Department of the Interior. *Pyramid Lake Paiute Tribe of Indians v. U.S. Dep't of Navy*, 898 F.2d 1410, 1416 (9th Cir. 1990) ("The Act also provides, in section 7(a)(1), that federal agencies *outside the Interior Department* shall execute their programs in a manner consistent with the conservation of endangered and threatened species.") (emphasis added); *id*. at 1417 n.15 (noting that while ESA Section 2(c)(1) – which is not at issue in this case – imposes conservation obligations on "all Federal Departments and agencies," Section 7(a)(1) "merely points out that in exercising their duty to conserve, *non-Interior Department agencies* must do so in consultation with the Secretary. After all, it would have made no sense for Congress to have required the Interior Department, as lead agency for implementing the Act, to consult with itself." (emphasis added)); *Miccosukee Tribe of Indians v. United States*, 528 F. Supp. 2d 1317, 1327 (S. D. Fla. 2007) ("Since FWS administers [the] ESA, it would be illogical to read ESA § 7(a)(1) to require FWS to consult with the Secretary regarding a program that it already administers and serves as chief consultant"), *rev'd on other grounds*, 566 F.3d 1257 (11th Cir. 2009); *Conservancy of Sw. Fla. v. U.S. Fish & Wildlife Serv.,* No. 2:10-CV-106-FTM-SPC, 2011 WL 1326805, at *6-*7 (M.D. Fla. Apr. 6, 2011) ("[T]he second portion of § 1536(a)(1) refers to the obligations of *other* government agencies, not defendants" Department of Interior and the Service.). Therefore, the second sentence of Section 7(a)(1) does not impose any obligations on the Department of the Interior or its components, including the Service, and is thus inapplicable here.

The first sentence of Section 7(a)(1) does apply to the Service, but it only instructs the Secretary of the Interior to review "other programs" *outside the ESA* and to utilize those "other" non-ESA programs

in furtherance of the ESA's purposes. *City of Santa Clarita v. U.S. Dep't of Interior*, No. CV02-00697 DT (FMOX), 2006 WL 4743970, at *11 (C.D. Cal. Jan. 30, 2006) ("Section 7(a)(1) of the ESA…imposes a requirement on the Secretary of Interior to 'review other programs' (i.e., programs not arising under the ESA)"). Thus, ESA Section 7(a)(1) imposes no affirmative obligation on the Service within the context of its implementation of the ESA, including its management of the Red Wolf Recovery Program. Plaintiffs' interpretation of ESA Section 7(a)(1) as applying to the Service would strip the term "other" of any meaning, violating the canon of statutory interpretation that every word in a statute is intended to serve a useful purpose and should be given effect. *See United States v. Menasche*, 348 U.S. 528, 538-539 (1955).

Plaintiffs do not address the applicability of ESA Section 7(a)(1) to the Service in their summary judgment brief. In fact, all the cases they cite in support of their Section 7(a)(1) argument involve courts applying the section to agencies *other than the Service*. *See* Pls.' SJ Memo. at 27-29 (citing *Fla. Key Deer v. Paulison*, 522 F.3d 1133, 1145-47 (11th Cir. 2008) (applying Section 7(a)(1) to FEMA)*; Sierra Club v. Glickman*, 156 F.3d 606, 618 (5th Cir. 1998) (applying Section 7(a)(1) to USDA); *Defs. of Wildlife v. U.S. Fish & Wildlife*, 797 F. Supp. 2d 949, 955-60 (D. Ariz. 2011) (applying Section 7(a)(1) to Forest Service); *Ctr. for Biological Diversity v. Vilsack*, 276 F. Supp. 3d 1015, 1031 (D. Nev. 2017) (applying Section 7(a)(1) to USDA)). To be clear, Defendants do not contend that the Service is above the requirements of the ESA. Numerous ESA provisions impose obligations upon the Service. However, the language of ESA Section 7(a)(1) makes plain that it does not apply to the Service in the manner that Plaintiffs contend.

Regardless, even if ESA Section 7(a)(1) was applicable to the Service's actions regarding the red wolf, there would be no violation here. Agencies have significant discretion when determining how to comply with Section 7(a)(1), a fact Plaintiffs themselves acknowledge. *See* Pls.' SJ Memo. at 27; *Defenders of Wildlife v. U.S. Fish & Wildlife Serv.*, 797 F. Supp. 2d at 960 ("Under ESA, action agencies have substantial discretion in determining how best to fulfill their section 7(a)(1) obligations."); 51 Fed. Reg. 19,926, 19,934 (June 3, 1986) ("[T]he Act does not mandate particular actions to be taken by Federal agencies to implement 7(a)(1)"). As a result, "it is clearly beyond this court's authority to order

that any specific conservation measure be undertaken" pursuant to Section 7(a)(1). *WaterWatch of Or. v. U.S. Army Corps of Eng's*, No. CIV. 99-861-BR, 2000 WL 1100059, at *11 (D. Or. June 7, 2000*).* But this is exactly what Plaintiffs seek – they object to the Service's decision to temporarily stop Plaintiffs' preferred conservation measures, namely, coyote sterilizations and wolf introductions, and ask the Court to order the Service to resume these activities. Pls.' SJ Mot. at 2 (requesting that Court order Service to resume coyote sterilization and red wolf releases). Plaintiffs' displeasure, however, cannot be the basis of a Section 7(a)(1) violation. *See Defs. of Wildlife v. Babbitt*, 130 F. Supp. 2d 121, 135 (D.D.C. 2001) (rejecting Section 7(a)(1) claim because "this court is not the proper place to adjudge and declare that defendants have violated the ESA as a matter of law by not implementing the processes listed by plaintiff." (internal quotations omitted)).

Moreover, Plaintiffs have not shown that temporarily halting coyote sterilizations and red wolf introductions harms species' conservation. Plaintiffs wrongly argue that the red wolf's population decline, *which began in approximately 2005*, was somehow caused entirely by the Service's temporarily stopping these actions *in approximately 2014-2015*. The timing of the decline proves that this cannot be, however, and Plaintiffs have offered no evidence supporting their allegation beyond conjecture. In actuality, the Service's comprehensive program review found that multiple factors unconnected to the Service have contributed to the red wolf's decline. *See supra* Background § II.E.

Plaintiffs also argue that because the Service is not currently introducing wolves or sterilizing coyotes, the Service "is not currently undertaking *any* significant actions to conserve" the red wolf in violation of Section 7(a)(1). Pls.' SJ Memo. at 29 (emphasis added). But this is simply not true. As explained above, the Service continues to actively manage the red wolf population and pursue conservation of the species in a myriad of ways, including monitoring wolves to assess movements, pack dynamics, and general health; investigating mortalities and taking appropriate follow-up actions; performing veterinary care, vaccinations, and genetic analysis; and promoting education and public awareness. *See supra* Background § II.E. These are all "significant actions" meant to conserve the species and are a far cry from the "total inaction" necessary for a Section 7(a)(1) violation. *Defs. of Wildlife v.*

U.S. Fish & Wildlife, 797 F. Supp. 2d at 953; *see also Defs. of Wildlife v. Babbitt*, 130 F. Supp. 2d at 135 (rejecting Section 7(a)(1) claim because "[t]he record does not support a finding that defendants have *failed entirely* to carry out programs for the conservation of the" species at issue) (emphasis added). Thus, even if this Court were to determine 7(a)(1) was applicable, the Service's decision to temporarily stop implementing Plaintiffs' preferred conservation measures does not violate ESA Section 7(a)(1). Therefore, Plaintiffs' fourth claim should be dismissed.

E. The Service has not violated ESA Section 7(a)(2).

The Service's actions regarding the red wolf also comply with ESA Section 7(a)(2), and Plaintiffs' fifth claim alleging otherwise should be dismissed. Section 7(a)(2) requires "[e]ach federal agency . . . in consultation with and with the assistance of" the Service 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). If an agency determines that its actions "may affect" a covered species, then the agency must pursue either informal or formal consultation under Section 7(a)(2). 50 C.F.R. §§ 402.13-402.14. Formal consultation is not required if an agency determines that its action is not likely to adversely affect a covered species. *Id*. If formal consultation is required, the Service prepares a biological opinion stating whether its proposed action is likely to "jeopardize the continued existence of" any covered species. 16 U.S.C. § 1536(a)(2); 50 C.F.R. § 402.14. If such a determination is reached, the biological opinion includes a reasonable and prudent alternative to the proposed action that will avoid jeopardizing the species. 16 U.S.C. § 1536(b)(4).

Significantly, though, the requirements of Section 7(a)(2) do not apply to actions that may affect members of nonessential experimental populations (like the red wolf) when those members occur on private land, outside the National Wildlife Refuge System or National Park System. 51 Fed. Reg. at 41,790. Instead, in such situations, members of nonessential experimental populations are treated as species "proposed to be listed," which are not subject to ESA Section 7(a)(2).[11] 16 U.S.C. § 1539

[11] Species proposed to be listed are subject to ESA Section 7(a)(4), which only requires an informal conference, the results of which are advisory and do not require a limitation on the commitment of

(j)(2)(C)(i); 51 Fed. Reg. at 41,790-91; *see also N.M. ex rel. Richardson v. Bureau of Land Mgmt.,* 565 F.3d 683, 700-01 (10th Cir. 2009) ("The ESA provides that nonessential experimental populations outside the National Park and National Wildlife Refuge system are treated as 'proposed to be listed' rather than endangered or threatened . . . the § 7(a)(2) formal consultation process applies only to species listed as threatened or endangered and not to species that are merely proposed for listing."); *WildEarth Guardians v. United States Dep't of Justice,* 283 F. Supp. 3d 783, 814 (D. Ariz. 2017) (holding that because "Mexican gray wolves do not occur in an area within the National Wildlife Refuge System or the National Park System," they "are treated as a species proposed to be listed, not as a threatened species," and "Section 7's consultation requirements do not apply").

The specifics of Plaintiffs' Section 7(a)(2) claim have been a moving target throughout this case. *Compare* ECF 3 at 27-28 (initial complaint alleging failure to *reinitiate* consultation) *and* Compl. at 31-32 (same) *with* Pls.' SJ Memo. at 22-24 (no mention of reinitiation). In their most recent iteration of this claim, Plaintiffs allege the Service violated Section 7(a)(2) because it "did not undergo consultation when the agency decided in 2014 to begin granting lethal take authorizations or expanding its removal of wolves from private lands, nor when it terminated red wolf releases and coyote sterilization." Pls.' SJ Memo. at 23. This claim fails on multiple fronts.

First, as explained above, Section 7(a)(2) is inapplicable to actions that may affect red wolves on private land. As a result, the Service was under no obligation to consult pursuant to Section 7(a)(2) regarding the effects of issuing authorizations to private landowners to take wolves on private land, removing wolves from private land, or performing any other action that may have affected red wolves on private land. The preamble to the Red Wolf Rule expressly cites this private land exemption as a "management advantage" generated by the population's nonessential status, explaining, "[o]ff of the refuge (i.e., on the Dare County Bombing Range or on private lands), the nonessential experimental

resources. 16 U.S.C. § 1536(a)(4) (describing consultation requirements for only those actions likely to jeopardize "species proposed to be listed"); *see also New Mexico ex rel. Richardson v. Bureau of Land Mgmt.,* 565 F.3d 683, 700-01 (10th Cir. 2009).

population would be treated as if it were a species proposed for listing, rather than a listed species," and Section 7(a)(2)'s consultation requirements would not apply. 51 Fed. Reg. at 41,792.

Additionally, Plaintiffs fail to identify any "action" that would require Section 7(a)(2) consultation. The ESA regulations define "action" as "all activities or programs of any kind *authorized, funded, or carried out*, in whole or in part, by Federal agencies." 50 C.F.R. § 402.02 (emphasis added); *see also* 16 U.S.C. § 1536(a)(2). "Of particular significance is the affirmative nature of these words—'authorized, funded, carried'—and the absence of a "failure to act" from this list." *W. Watersheds Project v. Matejko*, 468 F.3d 1099, 1107–08 (9th Cir. 2006). Courts have frequently held that the duty to consult under Section 7(a)(2) stems from "affirmative" action only. *See, e.g., id*.; *Cal. Sportfishing Prot. All. v. FERC*, 472 F.3d 593, 595 (9th Cir. 2006) ("The ESA and the applicable regulations, however, mandate consultation . . . only before an agency takes some affirmative agency action, such as issuing a license"); *Salmon Spawning & Recovery All. v. Basham*, 31 C.I.T. 706, 707–08 (2007) ("Ample case law reiterates that the § 7(a)(2) duty to consult is triggered by *affirmative actions*." (internal quotations omitted)); *Wild Equity Inst. v. U.S. E.P.A.*, 147 F. Supp. 3d 853, 866 (N.D. Cal. 2015) ("The duty to engage in ESA consultation is triggered only by an affirmative agency act or authorization; the mere existence of unexercised authority to take additional action is insufficient.").

Put another way, "'inaction' is not 'action' for section 7(a)(2) purposes." *Matejko*, 468 F.3d at 1108. *Not* introducing red wolves into the wild and *not* sterilizing coyotes are not actions "authorized, funded, or carried out" by the Service. They are *inaction*. *See, e.g., Int'l Ctr. For Tech. Assessment v. Thompson*, 421 F. Supp. 2d 1, 10–11 (D.D.C. 2006) (holding FDA decision not to engage in enforcement activity was not agency action requiring ESA compliance). Therefore, the Service was under no duty to consult pursuant to Section 7(a)(2) regarding the effects of *not* introducing wolves and *not* sterilizing coyotes.

The Service's alleged "revised interpretation" of the Red Wolf Rule's take authorization and removal provisions also fails to qualify as an "action" requiring Section 7(a)(2) consultation. First, as previously discussed, no such "reinterpretation" of the Red Wolf Rule occurred. *See supra* Argument §

II.A. Next, even if it had, an agency's "interpretation" of a regulation is not an "action" requiring ESA Section 7(a)(2) consultation. As the Tenth Circuit explained, "the very definition of 'action' in § 402.02 tells us that the '*promulgation* of regulations,' not the regulations themselves, constitutes 'action.'" *Forest Guardians v. Forsgren*, 478 F.3d 1149, 1159 (10th Cir. 2007). This is why the Service plans to initiate Section 7(a)(2) consultation before June 27, 2018, in connection with the proposed promulgation of a new rule to govern management of the red wolf population. Miranda Dec. However, the Service is not also required to consult regarding its "interpretation" or day-to-day implementation of a previously-promulgated rule, since such a requirement would require near constant consultation when an agency interprets and applies rules and regulations in its daily management of species. *See Forsgren*, 478 F.3d at 1159 (rejecting proposition that agency regulations constitute ongoing agency action that requires consultation regarding their application).

Finally, Plaintiffs argue the Service violated the "substantive" requirements of ESA Section 7(a)(2) by allegedly failing to ensure the Service's "revised interpretation of 50 C.F.R. § 17.84(c), its termination of coyote sterilization, and its termination of red wolf releases" were not likely to jeopardize the continued existence of the red wolf. Pls.' SJ Memo. at 31. To reach this conclusion, Plaintiffs posit a series of hypotheticals – *if* the Service had evaluated these alleged "actions" pursuant to Section 7(a)(2), *then* it would have concluded that they "may affect" the red wolf, *then* formal consultation requiring a biological opinion would have been required, and *then* that biological opinion "likely would have found" that the alleged actions would jeopardize the species. Pls.' SJ Memo. at 30-31. However, such unsupported assumptions are insufficient to prove a substantive violation of Section 7(a)(2). Plaintiffs' real complaint is *procedural*, not substantive – they object to the Service's alleged failure to follow Section 7(a)(2)'s procedures for consultation. *See, e.g., Ctr. for Biological Diversity v. E.P.A.*, 861 F.3d 174, 183 (D.C. Cir. 2017) (identifying failure to make effects determination and consult under Section 7(a)(2) as procedural errors). As Plaintiffs themselves point out, when Section 7(a)(2)'s procedures are not followed, it is impossible to determine whether an agency violated the section's substantive requirement to insure agency actions are not likely to jeopardize a covered species. *See* Pls.' SJ Memo. at

23 (citing *Thomas v. Peterson*, 753 F.2d 754, 763 (9th Cir. 1985), *abrogated by Cottonwood Envtl. Law Ctr. v. U.S. Forest Serv.*, 789 F.3d 1075 (9th Cir. 2015), and *Greenpeace v. Nat'l Marine Fisheries Serv.*, 106 F. Supp. 2d 1066 (W.D. Wash. 2000)). Therefore, Plaintiffs cannot prove a substantive violation of ESA Section 7(a)(2) has occurred.

Setting aside Plaintiffs' hypotheticals, the facts show that the Service is currently working to ensure the red wolf is protected against jeopardy. As previously explained, the Service has proposed a new plan to manage the species and will conduct both NEPA and ESA Section 7(a)(2) reviews to evaluate any effects on the red wolf. *See supra* Background § II.E. For this reason, as well as the others outlined above, the Service is in compliance with ESA Section 7(a)(2), and Plaintiffs' fifth claim should be dismissed.

III. PLAINTIFFS ARE NOT ENTITLED TO THEIR REQUESTED RELIEF.

In their summary judgment motion, Plaintiffs make the extraordinary request that the Court not only maintain permanently its September 2016 preliminary injunction but that it also issue mandatory permanent injunctive relief 1) requiring the Service "to either reinstate coyote sterilization and red wolf releases or explain why such action is not necessary to provide for the conservation of the red wolf" and 2) requiring "that any subsequent modification to the historic implementation of the Red Wolf Rule or the longstanding red wolf adaptive management program go through required analyses under the ESA, NEPA, and the Administrative Procedure Act before they take effect." Pls.' SJ Mot. at 2. However, no basis exists to award Plaintiffs such unprecedented relief.

First, Plaintiffs did not request either of these mandatory injunctions in their complaint. Compl. at 33-34. Therefore, Plaintiffs cannot now request them in their summary judgment motion. *See S. Walk at Broadlands Homeowner's Ass'n, Inc. v. OpenBand at Broadlands, LLC*, 713 F.3d 175, 184 (4th Cir. 2013) ("It is well-established that parties cannot amend their complaints through briefing."); *Housecalls Home Health Care, Inc. v. U.S. Dep't of Health & Human Servs.*, 515 F. Supp. 2d 616, 623 (M.D.N.C. 2007) (rejecting request for relief that would force government action because plaintiffs "did not request this relief in their complaint"); *Groves v. City of Darlington*, No. 4:08-CV-0402-TLW-TER, 2010 WL

5257231, at *3 (D.S.C. June 1, 2010) (recommending "Plaintiffs' Motion be denied because the Complaint does not address the relief they seek in their Motion"), *report and recommendation adopted,* No. 4:08-CV-0402-TLW-TER, 2010 WL 5257232 (D.S.C. Dec. 17, 2010).

Next, Plaintiffs fail to meet the "high bar" required for a mandatory permanent injunction. *SAS Inst., Inc. v. World Programming Ltd.*, 874 F.3d 370, 385 (4th Cir. 2017). "Injunctive relief—especially mandatory injunctive relief—is a 'drastic and extraordinary' remedy, available only in unusual situations." *Sierra Club v. Virginia Elec. & Power Co.,* 247 F. Supp. 3d 753, 765 (E.D. Va. 2017) (quoting *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 165 (2010)). It "'does not follow from success on the merits as a matter of course.'" *SAS Inst., Inc.*, 874 F.3d at 385 (citing *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 32 (2008)). To receive such a "drastic and extraordinary remedy," a plaintiff must show "(1) that it has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction." *Id.*

Defendants briefed and the Court evaluated factors one, three, and four[12] in connection with Plaintiffs' motion for a preliminary injunction. Defs.' PI Opp'n; *Red Wolf Coal.*, 210 F. Supp. 3d 796. Defendants will not repeat their arguments here; however, circumstances have significantly changed since the Court granted Plaintiffs' preliminary injunction in September 2016, such that these factors tip further in favor of denying injunctive relief. First, the mandatory injunctive relief that Plaintiffs seek in their summary judgment motion was not at issue in Plaintiffs' motion for a preliminary injunction, which sought only a traditional "prohibitory" injunction against issuance of take authorizations. ECF 31 ("Pls.' PI Mot."). Therefore, the hurdle for granting the mandatory injunctive relief that Plaintiffs now seek is significantly higher than it was for their preliminary injunction. *See, e.g., Sweis v. U.S. Foreign Claims Settlement Comm'n*, 950 F. Supp. 2d 44, 48 (D.D.C. 2013) ("[W]hen a party is seeking a mandatory

[12] As this Court has held, "[w]hen the government opposes injunctive relief, the final two factors to be considered merge." *Red Wolf Coal.*, 210 F. Supp. 3d at 806.

injunction . . . that would alter the status quo rather than preserve it, the moving party must meet a higher standard than in the ordinary case by showing 'clearly' that he or she is entitled to relief or that extreme or very serious damage will result from the denial of the injunction." (internal quotations omitted)).

Applying this heightened standard, it is apparent that Plaintiffs have not suffered an irreparable injury. Since the preliminary injunction was granted, no red wolves have been taken pursuant to 50 C.F.R. § 17.84(c)(4)(v), and no wolves are likely to be taken in the future pursuant to this provision because the Service intends to supersede and replace it with a new red wolf rule. *See supra* Background § II.E. The balance of equities and public interest also favor denying Plaintiffs' request for mandatory injunctive relief, since granting it would interfere with the Service's ability to evaluate, pursue, and enact the Service's new plan for the species by diverting already overburdened agency resources. *See supra* Background § II.E. Granting Plaintiffs' request would also exclude the public at-large and state and local governments from the decision-making process regarding the future of the red wolf, since the Court itself would dictate how the species should be managed. In comparison, the Service's current rulemaking efforts have involved, and will continue to involve, significant public participation. *See* 82 Fed. Reg. 23,518-01 (seeking comments and setting public meetings). In fact, the Service must "consult with appropriate State fish and wildlife agencies, local governmental entities, affected Federal agencies, and affected private landowners in developing and implementing experimental population rules." 50 C.F.R. § 17.81(d). Any 10(j) regulation shall, "to the maximum extent practicable, represent an agreement between the Service, the affected State and Federal agencies, and persons holding any interest in land which may be affected by the establishment of an experimental population." *Id.; see also* 1982 U.S.C.C.A.N. at 2834 ("Changes in the [10(j)] regulations should only be made after close consultation with all of the affected parties")." In sum, Plaintiffs have not shown that mandatory injunctive relief is warranted under the governing test.

Moreover, the mandatory injunctions that Plaintiffs seek are too vague and ambiguous for the Court to award. Federal Rule of Civil Procedure ("FRCP") 65(d) requires that "every order granting an injunction . . . must . . . state its terms specifically" and "describe in reasonable detail – and not by

referring to the complaint or other document – the act or acts restrained or required." This is because "[a]n injunction is an equitable remedy, which must be feasible in order to be granted." *Trantham v. Henry Cty. Sheriff's Office*, No. 4:10CV00058, 2011 WL 863498, at *6 (W.D. Va. Mar. 10, 2011), *aff'd,* 435 F. App'x 230 (4th Cir. 2011). "[T]he specificity provisions of Rule 65(d) are no mere technical requirements. The Rule was designed to prevent uncertainty and confusion on the part of those faced with injunctive orders, and to avoid the possible founding of a contempt citation on a decree too vague to be understood." *CPC Int'l, Inc. v. Skippy Inc.,* 214 F.3d 456, 459 (4th Cir. 2000) (quoting *Schmidt v. Lessard,* 414 U.S. 473, 476 (1974)).

Plaintiffs' requested mandatory injunctions do not meet the requirements of FRCP 65(d). For example, Plaintiffs ask the Court to "reinstate coyote sterilization and red wolf releases," but they do not explain what such "reinstatement" entails. Where would the sterilizations and releases occur? With what frequency? For what duration? Performed by whom? Using what funds? Similar questions permeate Plaintiffs' request that the Court require "any subsequent modification to the historic implementation of the red wolf rule or the longstanding red wolf adaptive management program go through required analyses under the ESA, NEPA, and the [APA] before they take effect." What qualifies as a "subsequent modification"? What is the "historic implementation of the red wolf rule" or the "longstanding red wolf adaptive management program"? And what specific analyses are required "under the ESA, NEPA, and the Administrative Procedure Act"? Such uncertainties foreclose the availability of this relief. *See, e.g., Schmidt*, 414 U.S. at 476 ("[B]asic fairness requires that those enjoined receive explicit notice of precisely what conduct is outlawed.")

Furthermore, Plaintiffs' request that the Court order the Service to perform the "required analyses under the ESA, NEPA, and the [APA]" on any future "modification" to "implementation" of the Red Wolf Rule or the red wolf "adaptive management program" is precisely the type of vague, overbroad, "obey the law" injunction that Courts routinely reject as impermissible under FRCP 65 (d). *See, e.g., Davis v. Richmond, Fredericksburg & Potomac R. Co*., 803 F.2d 1322, 1328 (4th Cir. 1986) (vacating portion of injunction that required defendant to "obey the statute"); *Perez v. Ohio Bell Tel. Co.,* 655 F.

App'x 404, 410 (6th Cir. 2016) (cataloging circuits that reject "obey the law" injunctions and holding that "[i]njunctions that do no more than compel compliance with existing law are overly broad and do not comply with Federal Rule of Civil Procedure 65"). For example, in *Wildearth Guardians v. Board of County Commissioners for County of Catron*, plaintiffs sought an order that would have enjoined defendants from "continuing to violate the ESA" by engaging in actions that plaintiffs alleged caused take of the Mexican wolf. No. CV 07-00710 MV/WDS, 2008 WL 11327379, at *6, *9 (D.N.M. Sept. 30, 2008). The Court refused plaintiffs' request because an order "generally enjoining action in violation of the ESA is subject to conflicting interpretations and confusion," and "given the tenor of this lawsuit and the arguments currently before the Court . . . , it is reasonable to believe virtually any action taken by the Commission concerning the Mexican wolves would draw fire from Wildearth resulting in more litigation over the nature and breath of the injunction." *Id*. at *9. Undoubtedly, such would happen here if Plaintiffs' requested mandatory injunctions were granted.

Plaintiffs' request that the Court order the Service to reinstate coyote sterilizations and red wolf releases is particularly egregious, as it asks the Court to disregard the separation of powers and dictate how an executive branch agency must exercise its discretion in matters committed to the agency's expertise. Neither coyote sterilizations nor red wolf releases are required by any statute, regulation, or other law. *See supra* Background §II.C-D. They are both purely discretionary management practices that the Service has performed from time-to-time in the past, based on its expert judgment. *Id*. If the Court now *requires* the Service to take these actions, the Court would impermissibly invade the domain of the agency. The Supreme Court has repeatedly warned courts that they are not empowered to enter injunctions that inject the court into day-to-day management decisions of administrative agencies. *See, e.g., SUWA*, 542 U.S. at 67 (discussing limitations on courts' ability to issue orders that would inappropriately "inject[] the judge into day-to-day agency management"); *Miguel v. McCarl*, 291 U.S. 442, 451 (1934) (court has authority to "compel action, when refused, in matters involving judgment and discretion, but not to direct the exercise of judgment or discretion."). Accordingly, lower courts have refused to issue or uphold injunctions that would "effectively result[] in an encroachment by the judiciary

on the operation, exercise of discretion and policy of an agency of the Executive branch." *Nat. Res. Def. Council v. Kempthorne*, No. 1:05-CV-1207 OWW TAG, 2007 WL 1989015, at *15 (E.D. Cal. July 3, 2007); *see also, e.g., Bresgal v. Brock*, 843 F.2d 1163, 1171 (9th Cir. 1987) (holding injunction was overbroad because it "intrude[d] unnecessarily on the administrative function of the agency"); *Cobell v. Norton*, 428 F.3d 1070, 1076 (D.C. Cir. 2005) (rejecting injunction that affected issues "require[ing] both subject-matter expertise and judgment about the allocation of scarce resources, classic reasons for deference to administrators.").

Plaintiffs' requested injunction requiring coyote sterilizations and red wolf introductions violates these core principles of administrative law and judicial review. Plaintiffs ask the Court to step into the shoes of the Service and require it to manage the red wolf population using two specific practices preferred by Plaintiffs. This goes far beyond ordering the Service to comply with a law, perform a legally required environmental analysis, or refrain from engaging in a particular action. Plaintiffs ask the Court to mandate affirmative agency behavior that is committed to its discretion, and this is impermissible. *See, e.g., City of Tacoma, Washington v. F.E.R.C.*, 460 F.3d 53, 75 (D.C. Cir. 2006) ("[E]xpert agencies (such as . . . the Fish and Wildlife Service) are far more knowledgeable than other federal agencies about the precise conditions that pose a threat to listed species, and . . . those expert agencies are in the best position to make discretionary factual determinations about whether a proposed agency action will create a problem for a listed species and what measures might be appropriate to protect the species"); *Defs. of Wildlife v. Bureau of Ocean Energy Mgmt*., 684 F.3d 1242, 1248–49 (11th Cir. 2012) ("[W]hen it is making predictions, within its area of special expertise, at the frontiers of science as opposed to simple findings of fact, a reviewing court must generally be at its most deferential.") (internal quotation omitted). As we have explained, the Service is currently undertaking environmental analyses and rulemaking procedures to attempt to stop the red wolf's decline and ensure its conservation. *See supra* Background § II.E. Issuing Plaintiffs' requested mandatory injunctive relief would inappropriately interfere with this process and substitute Plaintiffs' preferences for agency expertise. *Otay Mesa Prop., L.P. v. United States Dep't of the Interior*, 144 F. Supp. 3d 35, 54 (D.D.C. 2015) ("[I]f the agency has acted in an area where

there is scientific and technological uncertainty, courts must proceed with particular caution, avoiding all temptation to direct the agency in a choice between rational alternatives." (internal quotations omitted)).

Additionally, if such an injunction was entered, it would potentially "require very extensive Court supervision" to determine compliance and referee disputes between the parties, further intruding into the agency's day-to-day operations. Courts have refused to issue injunctions that would require such policing by the Court. *See Nat. Res. Def. Council, Inc. v. EPA,* 966 F.2d 1292, 1300 (9th Cir. 1992) (refusing to issue injunction that would require "potentially extensive supervision of the EPA"); *Trantham*, 2011 WL 863498, at *6 (rejecting requested injunction that "would require very extensive Court supervision.").

Finally, Plaintiffs' requested injunction requiring the Service to perform various environmental analyses on "any *subsequent* modification to the historic implementation of the Red Wolf Rule or the longstanding red wolf adaptive management program" also is impermissibly overbroad because it reaches well beyond the circumstances of this case. *See Kentuckians for Commonwealth Inc. v. Rivenburgh*, 317 F.3d 425, 436 (4th Cir. 2003) ("[A]n injunction should be carefully addressed to the circumstances of the case." (internal quotation omitted)).[13] "An injunction should be tailored to restrain no more than what is reasonably required to accomplish its ends . . . Although injunctive relief should be designed to grant the full relief needed to remedy the injury to the prevailing party, it should not go beyond the extent of the established violation." *Hayes v. N. State Law Enf't Officers Ass'n*, 10 F.3d 207, 217 (4th Cir. 1993) (vacating injunction that was not "properly tailored to the wrong found in th[e] case"); *see also Kentuckians*, 317 F.3d at 436 (vacating injunction as overbroad because the injury it would remedy was "far broader than the scope of injury for which [plaintiffs] sought relief."). Here, Plaintiffs ask the Court to enter an injunction that would affect "subsequent modifications" that have not yet occurred and are not at issue in this case. In this case, Plaintiffs complain about the Service's alleged *current* "interpretation" of the Red Wolf Rule. Therefore, any relief awarded to Plaintiffs should be limited to that current

[13] Additionally, as explained above, the Service is *already* performing these analyses in connection with the new red wolf rulemaking. *See supra* Argument § I.B.

"interpretation" and cannot reach into the future to constrain the Service's ability to make unidentified "subsequent modifications."

"In many cases . . . an injunction risks awarding more relief than is merited." *SAS Inst., Inc.,* 874 F.3d at 385. Granting Plaintiffs their requested mandatory injunctive relief would do just this. Therefore, Plaintiffs' request should be denied.

CONCLUSION

For the above-stated reasons, Plaintiffs' motion for summary judgment should be denied, Defendants' cross-motion should be granted, and all Plaintiffs' claims should be dismissed with prejudice.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on April 26, 2018, I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system, which will send notification of this filing to the attorneys of record.

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