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September 1, 2015

Via Email and Certified Mail, Return Receipt Requested

The Honorable Sally Jewell, Secretary
U.S. Department of the Interior
1849 C Street, NW
Washington, D.C. 20240

Ms. Cynthia K. Dohner, Regional Director
Southeast Region
U.S. Fish and Wildlife Service
1875 Century Boulevard NE, Suite 400
Atlanta, GA 30345

Mr. Dan Ashe, Director
U.S. Fish and Wildlife Service
1849 C Street, NW
Washington, DC 20240

**Re: 60-Day Notice of Intent to Sue for Violations of the Endangered Species Act:
Illegally Authorizing the Take of Red Wolves**

Dear Secretary Jewell, Director Ashe, and Regional Director Dohner:

On behalf of the Red Wolf Coalition, Defenders of Wildlife, and Animal Welfare Institute (collectively, "Conservation Organizations"), we are writing to notify you of our intent to bring suit against the United States Fish and Wildlife Service ("USFWS" or "Service") for violations of the Endangered Species Act ("ESA"), 16 U.S.C. §§ 1531-1544, in connection with its actions authorizing the take of red wolves by private landowners within the Red Wolf Recovery Area of eastern North Carolina, the location of the world's only wild population of red wolves. Relatedly, we also notify the Service of our intent to bring suit over the Service's failure to undertake the analyses required by 16 U.S.C. § 1536(a)(2) and 16 U.S.C. § 1533(c)(2).

As described more fully below, the Service's authorization of take pursuant to 50 C.F.R. § 17.84(c)(4)(v) after only cursory steps to remove wolves from private property is a direct violation of the rule governing the conservation and management of the wild red wolf population.¹ Furthermore, any interpretation of 50 C.F.R. § 17.84(c)(4)(v) that would allow the pattern and practice of granting the take authorizations described herein violates the ESA Section

¹ See 50 C.F.R. § 17.84(c) (setting forth narrow exceptions to the broad prohibition on the taking of a red wolf); see also Revision of the Special Rule for Nonessential Experimental Populations of Red Wolves in North Carolina and Tennessee, 60 Fed. Reg. 18940, 18943 (Apr. 13, 1995) (discussing 50 C.F.R. § 17.84(c) and the exceptions contained within that rule).

4(d) mandate “to provide for the conservation of” the species.² Finally, by failing to undergo consultation on the effect of this interpretation on the current population of red wolves, which USFWS estimates to be only 50-75 animals, the agency is violating the ESA Section 7 mandate to ensure “in consultation with and with the assistance of the Secretary” that the agency’s activities are “not likely to jeopardize the continued existence” of the red wolf species.³

Based on publicly available information, 50 C.F.R. § 17.84(c)(4)(v) was first used by USFWS to authorize a private landowner to lethally take an endangered red wolf in 2014, with one additional take authorization granted by USFWS in late 2014 or early 2015. Despite specific regulatory language requiring that take authorizations only be granted to private landowners after the Service has abandoned efforts to remove red wolves from private property, the USFWS take authorization in both known instances followed landowner refusal to allow Service personnel to remove wolves from their property by non-lethal means.⁴ By authorizing the intentional lethal take of “one of the world’s most endangered canids”⁵ absent a serious attempt to remove the animals through non-lethal means, the Service has caused the take of at least one red wolf⁶ in violation of 50 C.F.R. § 17.84(c) and 16 U.S.C. § 1538(a)(1)(G).

Furthermore, in neither case of USFWS authorizing private landowner take pursuant to 50 C.F.R. § 17.84(c)(4)(v) had the wolf engaged in “problem” or “offending” behavior,⁷ which had previously been required. Any interpretation of the red wolf rule that would allow the intentional lethal take of non-problem wolves by private landowners violates the ESA Section 4(d) mandate that regulations “provide for the conservation” of the species.⁸ This apparent shift in interpretation is compounded by the failure of USFWS, in violation of 16 U.S.C. § 1536(a)(2), to engage in ESA Section 7 consultation to ensure that its activities are not “likely to jeopardize the continued existence” of the red wolf.

Lastly, USFWS has failed to conduct a five-year status review of the red wolf as required under Section 4(c)(2) of the ESA.⁹ The most recent five-year status review for the red wolf was completed in September 2007.¹⁰ Pursuant to its duty to conduct a review “at least once every five

² 16 U.S.C. § 1533(d); *see also* 16 U.S.C. § 1531(c)(1) (declaring the “policy of Congress that all Federal departments and agencies shall seek to conserve endangered species and threatened species”).

³ 16 U.S.C. § 1536(a)(2).

⁴ *See* Letter from Leopoldo Miranda, Assist. Reg. Dir., U.S. Fish & Wildlife Serv., to John J. Ferebee, Jr. (Feb. 6, 2014) (granting a take authorization to a private landowner), attached in Appendix 1; *see also* Press Release, U.S. Fish & Wildlife Serv., U.S. Fish and Wildlife Service Authorizes a Private Landowner to Kill a Red Wolf (June 25, 2015), attached in Appendix 2, *available at* <http://www.fws.gov/news/ShowNews.cfm?ID=2F897A7F-953F-D88E-BDA858B0795E5D40>.

⁵ *Red Wolf Recovery Program*, U.S. FISH & WILDLIFE SERV. (last accessed Aug. 31, 2015), attached in Appendix 3, <http://www.fws.gov/redwolf/>.

⁶ *See* Press Release, *supra* note 4.

⁷ *See* Miranda Letter, *supra* note 4 (containing no mention of problem behavior); *see also* Press Release, *supra* note 4 (containing no mention of depredation or property damage).

⁸ 16 U.S.C. § 1533(d).

⁹ 16 U.S.C. § 1533(c)(2).

¹⁰ U.S. FISH & WILDLIFE SERV., RED WOLF 5-YEAR STATUS REVIEW: SUMMARY AND EVALUATION (Sept. 28, 2007), attached in Appendix 4, *available at* <http://www.fws.gov/redwolf/archives/5YearReview.pdf>.

years,”¹¹ the Service was required to conduct a review no later than 2012. In direct violation of this mandate, the Service has not conducted the required statutory review.

This letter constitutes notice as required by Section 11(g)(2)(A) of the ESA, 16 U.S.C. § 1540(g)(2)(a), prior to commencement of legal action. The following violations are alleged:

1. Violations of 50 C.F.R. § 17.84(c)(2) and ESA Section 9(a)(1)(G), 16 U.S.C. § 1538(a)(1)(G), by authorizing private lethal take of red wolves without satisfying the requirements of 50 C.F.R. § 17.84(c)(4)(v);
2. Violations of ESA Section 4(d), 16 U.S.C. § 1533(d), by interpreting 50 C.F.R. § 17.84(c)(4)(v) in a way that fails to “provide for the conservation” of red wolves;
3. Violations of ESA Section 7(a)(1), 16 U.S.C. § 1536(a)(1), by failing to administer the red wolf program “in furtherance of the purposes” of the ESA;
4. Violations of ESA Section 7(a)(2), 16 U.S.C. § 1536(a)(2), by failing to undergo consultation on its revised interpretation and implementation of 50 C.F.R. § 17.84(c)(4)(v) to ensure that such interpretation is not “likely to jeopardize the continued existence” of the red wolf species; and
5. Violations of ESA Section 4(c)(2), 16 U.S.C. § 533(c)(2), by failing to conduct a mandatory five-year status review of the red wolf species.

If the Service fails to act within 60 days to remedy these violations, Conservation Organizations will pursue litigation over these claims.

I. FACTUAL BACKGROUND

a. The Red Wolf

Red wolves (*Canis rufus*) were once common throughout the eastern and South Central United States,¹² but predator control programs and habitat loss resulted in the extirpation of the wild population from much of its range by the early 20th Century.¹³ The red wolf was designated as an endangered species in 1967 under the Endangered Species Preservation Act of 1966, the precursor to the Endangered Species Act.¹⁴

In 1975, the USFWS determined that “the only way the red wolf could be saved from extinction was to capture as many wild animals as possible and place them in a secured captive-

¹¹ 16 U.S.C. § 1533(c)(2); *see also* 50 C.F.R. § 424.21 (“At least once every five years, the Secretary shall conduct a review of each listed species . . .”).

¹² U.S. FISH & WILDLIFE SERV., RED WOLF RECOVERY PROGRAM 2ND QUARTER REPORT 2 (2014), attached in Appendix 5, available at http://www.fws.gov/redwolf/Images/20140522_RedWolf_QtrReport_FY14-02.pdf. The Service regularly released quarterly reports for the red wolf recovery program from October 2009 through March 2014. *See Recovery Program Documents*, U.S. FISH & WILDLIFE SERV. (last accessed Aug. 31, 2015), attached in Appendix 6, available at <http://www.fws.gov/redwolf/documents.html>. The 2014 second quarter report is the most recent of such reports posted on the Red Wolf Recovery Program website. *See id.* It appears that the Service has stopped producing these reports without public explanation.

¹³ *See* U.S. FISH & WILDLIFE SERV., RED WOLF RECOVERY/SPECIES SURVIVAL PLAN 8-9 (1990) (describing the “Demise of the Species”), attached in Appendix 7, available at http://ecos.fws.gov/docs/recovery_plan/901026.pdf.

¹⁴ 32 Fed. Reg. 4001 (Mar. 11, 1967) (listing the red wolf as an endangered species).

breeding program.”¹⁵ More than 400 wild canids were captured, but only seventeen were identified as pure red wolves.¹⁶ Fourteen of these wolves would become the founding members of the captive breeding program and the ancestors of all wild red wolves existing today.¹⁷ The red wolf was declared extinct in the wild in 1980.¹⁸

In 1982, Congress amended the ESA to allow the reintroduction of populations of endangered species to portions of their historic range in order to further the conservation of such species.¹⁹ In 1987, the Service released an experimental population of four pairs of captive bred red wolves into Alligator River National Wildlife Refuge in eastern North Carolina.²⁰ At that time, USFWS developed the Red Wolf Recovery/Species Survival Plan,²¹ and in 1999 began implementing an adaptive management plan to protect the species.²²

b. Population Trends

Since reintroduction into the wild, the red wolf population has grown and the Red Wolf Recovery Area has expanded into four national wildlife refuges, a Department of Defense bombing range, state-owned lands, and private lands, encompassing a total of approximately 1.7 million acres.²³ Despite significant positive momentum in the mid-2000s, however, the population has never approached the recovery objective of 220 wild individuals.²⁴

From 1999 to 2014, the wild red wolf population consisted of approximately 100 individuals.²⁵ In 2006, this number peaked at around 130 wolves.²⁶ A five-year status review of the red wolf population conducted in 2007 concluded that “considering the grave challenges red wolves faced when first listed ... efforts to restore, recover and conserve them have been remarkably successful.”²⁷ By the late 2000s, however, the population began to recede from its peak.

This decline largely tracked a significant increase in red wolf mortality by gunshot.²⁸ From 2012 to June 30, 2015, gunshot accounted for twenty-three out of a total of fifty-eight red

¹⁵ RED WOLF RECOVERY PLAN, *supra* note 13, at Preface.

¹⁶ U.S. FISH & WILDLIFE SERV., RED WOLF RECOVERY PROGRAM BROCHURE 3 (2006), attached in Appendix 8, available at <http://www.fws.gov/southeast/pubs/alwolf.pdf>.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ 16 U.S.C. § 1539(j).

²⁰ Determination of Experimental Population Status for an Introduced Population of Red Wolves in North Carolina, 51 Fed. Reg. 41,790 (Nov. 19, 1986).

²¹ See RED WOLF RECOVERY PLAN, *supra* note 13, at 12-18.

²² See U.S. FISH & WILDLIFE SERV., THE ENDANGERED RED WOLF – PROGRAM REPORT – WINTER, 2008 (2008), attached in Appendix 9, available at http://www.fws.gov/redwolf/Reviewdocuments/RW_ProgramReport_2008.pdf.

²³ RED WOLF RECOVERY PROGRAM 2ND QUARTER REPORT, *supra* note 12, at 2.

²⁴ Compare RED WOLF RECOVERY PLAN, *supra* note 13, at Executive Summary (stating red wolf recovery objective of 220 wild individuals), with U.S. FISH & WILDLIFE SERV., RED WOLF DEMOGRAPHICS (detailing population estimates), attached in Appendix 10, available at http://www.fws.gov/redwolf/Reviewdocuments/RedWolf_demographics.xlsx.

²⁵ RED WOLF DEMOGRAPHICS, *supra* note 24.

²⁶ *Id.*

²⁷ RED WOLF 5-YEAR STATUS REVIEW, *supra* note 10, at 33.

²⁸ RED WOLF 5-YEAR STATUS REVIEW, *supra* note 10, at 28-29.

wolf deaths.²⁹ USFWS has itself acknowledged the grave threat that gunshot poses to red wolf recovery efforts.³⁰ Gunshot deaths affect breeding wolves disproportionately,³¹ and the death of wolves during breeding season threatens the viability of the population by increasing the likelihood that the surviving mate will interbreed with a coyote.³² Over a thirteen year observation period, eleven out of twenty-three hybridization events where the history of the event was known followed the loss of one or both members of a stable breeding pair to anthropogenic causes.³³ Nine of those eleven losses were attributed to gunshot.³⁴

Following the gunshot deaths of six red wolves over a four week period in the fall of 2013, and a corresponding finding that irreparable harm was likely to result if coyote hunting was allowed to continue, the U.S. District Court for the Eastern District of North Carolina enjoined coyote hunting in the Red Wolf Recovery Area in May 2014.³⁵ The number of deaths fell significantly following the injunction, from eight suspected or confirmed gunshot deaths in 2012 and nine in 2013, to four in 2014 – including only two following the Court’s injunction – and two so far in 2015.³⁶

A decrease in the number of red wolves breeding pairs and pups has been observed in recent years.³⁷ More than fifteen breeding pairs were observed for every mating season in the decade prior to 2012.³⁸ In 2012, however, only thirteen breeding pairs were observed,³⁹ and in 2013 the number dropped to only eight breeding pairs, the lowest number since 1999.⁴⁰ Similar declines in the number of red wolf pups have been observed. The Service located forty pups in 2012,⁴¹ thirty-four in 2013,⁴² nineteen in 2014,⁴³ and only seven in the 2015 whelping season.⁴⁴ USFWS now estimates the wild population at only 50-75 individuals.⁴⁵

²⁹ U.S. FISH & WILDLIFE SERV., CAUSES OF MORTALITY IN WILD RED WOLVES (*CANIS RUFUS*) 2012-2015 (June 30, 2015), attached in Appendix 11, available at <http://www.fws.gov/redwolf/Images/Mortalitytable.pdf>.

³⁰ Letter from Cynthia K. Dohner, Reg. Dir., U.S. Fish & Wildlife Serv., to Gordon Myers, Exec. Dir., N.C. Wildlife Res. Comm’n (April 16, 2012), attached in Appendix 12; see also RED WOLF 5-YEAR STATUS REVIEW, *supra* note 10, at 28 (“Gunshot mortality is a serious threat to red wolves.”).

³¹ RED WOLF 5-YEAR STATUS REVIEW, *supra* note 10, at 19, 29 (“Of 67 known mortalities for breeding red wolves only, our data show 32% . . . killed by gunshot . . .”).

³² Justin H. Bohling & Lisette P. Waits, *Factors Influencing Red Wolf-Coyote Hybridization in Eastern North Carolina*, 184 BIOLOGICAL CONSERVATION 108, 108 (2015), attached in Appendix 13, available at http://www.researchgate.net/publication/272198334_Factors_influencing_red_wolfcoyote_hybridization_in_eastern_North_Carolina_USA.

³³ *Id.* at 113.

³⁴ *Id.*

³⁵ *Red Wolf Coal. v. N.C. Wildlife Res. Comm’n*, 2014 WL 1922234 (E.D.N.C. May 13, 2014).

³⁶ CAUSES OF MORTALITY, *supra* note 29.

³⁷ RED WOLF DEMOGRAPHICS, *supra* note 24.

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.*

⁴⁴ Emery P. Dalesio, *Wild Red Wolf Count Falls as Fewer Parents Making Fewer Pups*, WRAL (July 25, 2015), attached in Appendix 14, <http://www.wral.com/wild-red-wolf-count-falls-as-fewer-parents-making-fewer-pups/14794393/#mUUVE6IjGEJ7PgeK.99>.

⁴⁵ CAUSES OF MORTALITY, *supra* note 29.

c. Take Authorizations

On February 6, 2014, USFWS granted its first ever take permit to a private landowner under 50 C.F.R. § 17.84(c)(4)(v) (“Red Wolf Rule”), which provides that USFWS may authorize the intentional take of a red wolf on private property after USFWS has “abandoned efforts” to remove the wolf.⁴⁶ In granting the 2014 take authorization, the Service acknowledged that it had made no attempt to capture the individual or even to verify its identity.⁴⁷ USFWS nevertheless found that it “must abandon efforts” given “other staffing commitments and lack of access to actively trap on the property.”⁴⁸ No mention was made of the wolf exhibiting “offending” or “problem” behavior.⁴⁹

Another such permit was issued to a different landowner pursuant to 50 C.F.R. § 17.84(c)(4)(v) in late 2014 or early 2015.⁵⁰ On June 17, 2015, this landowner shot and killed a mother wolf exhibiting denning behavior.⁵¹ This female wolf had previously produced four litters of pups.⁵² USFWS statements indicate that the permit was granted after the landowner refused to allow Service personnel onto his property to remove the wolf by nonlethal means.⁵³ The Service declared its efforts “abandoned” and justified the authorization based on the landowner’s prior “due diligence” to capture the wolf.⁵⁴ As in the previous case, there was no indication that this wolf had engaged in any “problem” or “offending” behavior.⁵⁵

II. LEGAL BACKGROUND

The ESA established Congressional policy that “all Federal departments and agencies shall seek to conserve endangered species and threatened species and shall utilize their authorities in furtherance of the purposes of this chapter.”⁵⁶ The term “conserve” means “to use . . . all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures [of the ESA] are no longer necessary.”⁵⁷

a. ESA Section 9

Section 9 of the ESA makes it unlawful for any person to “take” an endangered species⁵⁸ or to “violate any regulation pertaining to such species or to any threatened species of fish or

⁴⁶ 50 C.F.R. § 17.84(c)(4)(v).

⁴⁷ See Miranda Letter, *supra* note 4.

⁴⁸ *Id.*

⁴⁹ See *id.*

⁵⁰ See Press Release, *supra* note 4.

⁵¹ Jeff Hampton, *Endangered Red Wolf Legally Killed in N.C., Puppies May be in Danger*, THE VIRGINIAN-PILOT (June 25, 2015), attached in Appendix 15, <http://hamptonroads.com/2015/06/endangered-red-wolf-legally-killed-nc-puppies-may-be-danger>.

⁵² *Id.*

⁵³ Press Release, *supra* note 4.

⁵⁴ *Id.*

⁵⁵ See *id.*

⁵⁶ 16 U.S.C. § 1531(c)(1).

⁵⁷ 16 U.S.C. § 1532(3).

⁵⁸ 16 U.S.C. § 1538(a)(1)(B).

wildlife.”⁵⁹ The term “take” is defined broadly as “to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or attempt to engage in any such conduct.”⁶⁰

In addition to prohibiting the direct take of a listed species, the ESA makes it unlawful for any person to “cause to be committed” any offense described in Section 9, including the take of an endangered species or a violation of regulations expanding protections to other listed species.⁶¹ The term “person” includes “any officer, employee, agent, department, or instrumentality of the Federal Government,” and thus includes USFWS.⁶² Accordingly, under Section 9, “a governmental third party pursuant to whose authority an actor directly exacts a taking . . . may be deemed to have violated the provisions of the ESA.”⁶³ Authorizing the lethal take of red wolves by private landowners, particularly where such authorization did not meet the requirements of the Red Wolf Rule, as discussed below, constitutes a violation of Section 9 of the ESA.

b. ESA Section 4(d)

Experimental populations are treated as threatened species for the purpose of regulating take.⁶⁴ Section 4(d) of the ESA, 16 U.S.C. § 1533(d), requires that “[w]henver any species is listed as a threatened species . . . the Secretary shall issue such regulations as he deems necessary and advisable to provide for the conservation of such species.”⁶⁵ Rules adopted for an experimental population may “contain applicable prohibitions, as appropriate, and exceptions for that population,”⁶⁶ and they must comply with the ESA Section 4(d) mandate to “provide for the conservation” of the species.⁶⁷

“[C]onservation” requires the use of all measures to promote the recovery of a listed species.⁶⁸ Accordingly, regulations cannot just safeguard a species from imminent extinction, but

⁵⁹ 16 U.S.C. § 1538(a)(1)(G).

⁶⁰ 16 U.S.C. § 1532(19); *see also* *Defenders of Wildlife v. EPA*, 882 F.2d 1294, 1300 (8th Cir. 1989) (“Take is defined in the broadest possible manner to include every conceivable way in which a person can ‘take’ or attempt to ‘take’ any fish or wildlife.”).

⁶¹ 16 U.S.C. § 1538(g).

⁶² 16 U.S.C. § 1532(13).

⁶³ *Strahan v. Cox*, 127 F.3d 155, 163 (1st Cir. 1997) (holding Massachusetts officials liable under Section 9 of the ESA for licensing and permitting fishing practices that injured endangered whales); *see also* *Sierra Club v. Yeutter*, 926 F.2d 429, 438-39 (5th Cir. 1991) (finding that the U.S. Forest Service caused the take of endangered red-cockaded woodpeckers by permitting logging practices near nesting colonies); *Defenders of Wildlife*, 882 F.2d at 1301 (holding that EPA caused the take of endangered species through its registration of pesticides for distribution and use); *Animal Protection Inst. v. Holsten*, 541 F. Supp. 2d 1073, 1078-1080 (D. Minn. 2008) (finding that a state agency violated Section 9 of the ESA through its authorization of trapping activities that resulted in the take of the endangered lynx); *Pac. Rivers Council v. Or. Forest Indus. Council*, 2002 WL 32356431 at *11 (D.Or. 2002) (finding that a state forester’s authorization of logging operations that are likely to result in take is sufficient for liability under the ESA).

⁶⁴ 16 U.S.C. § 1539(j)(2)(c); *see also* 50 C.F.R. § 17.82 (“Any population determined by the Secretary to be an experimental population shall be treated as if it were listed as a threatened species for purposes of establishing protective regulations under section 4(d) of the Act . . .”).

⁶⁵ 16 U.S.C. § 1533(d).

⁶⁶ 50 C.F.R. § 17.82.

⁶⁷ *Defenders of Wildlife v. Tuggle*, 607 F.Supp.2d 1095, 1116-17 (D. Ariz. 2009) (“USFWS has discretion to issue the regulations it deems necessary and advisable, but the regulation ‘shall’ provide for the conservation of such species.”).

⁶⁸ 16 U.S.C. § 1532(3).

must actively serve to rebuild the population to a point where they no longer require protection. As discussed below, implementing an interpretation of the Red Wolf Rule to allow for the intentional lethal take of non-problem wolves fails to “provide for the conservation” of the red wolf species and is in violation of Section 4(d) of the ESA.

c. ESA Section 10(j) and the Red Wolf Rule 50 C.F.R. § 17.84(c)(4)(v)

In 1982, Congress enacted Section 10(j) of the ESA, 16 U.S.C. § 1539(j), to govern the reintroduction of listed species to portions of their historic range where they no longer occur.⁶⁹ Section 10(j) authorizes the Service to release an “experimental population” of a threatened or endangered species to “further the conservation of such species.”⁷⁰ Members of experimental populations are treated as members of a threatened species with certain limited exceptions.⁷¹ Just as the Service may define the prohibitions and protections applicable to a threatened species, it may also do the same for experimental populations.

The Service first promulgated a 10(j) rule for the red wolf in 1986 to foster its reintroduction into the Alligator River National Wildlife Refuge in Dare County, North Carolina.⁷² As the population grew, the Red Wolf Rule underwent revisions to address the take of wolves by private persons.⁷³ The current rule reflects these 1995 revisions and sets forth a narrow list of circumstances in which take by private persons is permitted:

- (i) Any person may take red wolves found on private land in the areas defined in paragraphs (c)(9)(i) and (ii) of this section, Provided that such taking is not intentional or willful, or is in defense of that person's own life or the lives of others . . . ;
- (ii) Any person may take red wolves found on lands owned or managed by Federal, State, or local government agencies in the areas defined in paragraphs (c)(9) (i) and (ii) of this section, Provided that such taking is incidental to lawful activities, is unavoidable, unintentional, and not exhibiting a lack of reasonable due care, or is in defense of that person's own life or the lives of others . . . ;
- (iii) Any private landowner, or any other individual having his or her permission, may take red wolves found on his or her property in the areas defined in paragraphs (c)(9) (i) and (ii) of this section when the wolves are in the act of killing livestock or pets, Provided that freshly wounded or killed livestock or pets are evident . . . ;
- (iv) Any private landowner, or any other individual having his or her permission, may harass red wolves found on his or her property in the areas defined in

⁶⁹ 16 U.S.C. § 1539(j).

⁷⁰ 16 U.S.C. § 1539(j)(2)(A).

⁷¹ 16 U.S.C. § 1539(j)(2)(C).

⁷² Determination of Experimental Population Status, *supra* note 20.

⁷³ Revision of the Special Rule for Nonessential Experimental Populations of Red Wolves in North Carolina and Tennessee, 60 Fed. Reg. 18940, 18943 (Apr. 13, 1995).

paragraphs (c)(9) (i) and (ii) of this section, Provided that all such harassment is by methods that are not lethal or physically injurious to the red wolf . . . ;

- (v) Any private landowner may take red wolves found on his or her property in the areas defined in paragraphs (c)(9) (i) and (ii) of this section after efforts by project personnel to capture such animals have been abandoned, Provided that the Service project leader or biologist has approved such actions in writing

50 C.F.R. § 17.84(c)(4)(i)-(v). Any take by private individuals that does not fall within one of these limited exceptions is an illegal take in violation of the ESA.

Of these exceptions, Section 17.84(c)(4)(v) is the only one to allow the intentional take of wolves not imminently threatening persons or property. Such authorization of private landowner take may be granted by USFWS only “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”⁷⁴

d. USFWS Application of 50 C.F.R. § 17.84(c)(4)(v)

50 C.F.R. § 17.84(c)(4)(v) allows USFWS to authorize the lethal take of red wolves by private landowners if USFWS has “abandoned efforts” to capture the animal. As discussed above, USFWS acknowledged that it had made no attempt to capture the animals in question when it issued lethal take authorizations to private landowners. The granting of these take authorizations was therefore in direct violation of the requirements of the Red Wolf Rule.

Further, when it adopted the lethal take provision as part of 50 C.F.R. § 17.84(c), USFWS clarified that the exception would only be applied to “offending animals”:

It is highly objectionable to owners of livestock and pets to be unable to kill a predator that is engaged in killing their livestock or pets. This, in turn, leads to the erosion of public support for predator reintroductions, which is essential if this effort is to be successful. Also, there may be a time lapse before offending animals settle into a predictable pattern whereby they can be recaptured Therefore, a rule revision provides that private landowners will be permitted to take *offending animals* upon written approval by the Service project leader or biologist on site of the depredation. This approval will be provided when the Service abandons attempts to capture the *offending animal*.⁷⁵

The fact that § 17.84(c)(4)(v) only authorizes the take of “offending” animals is further embodied in USFWS guidance documents interpreting the provision. Guidance issued by USFWS in 1999 prescribes removal standards for “problem” and “non-problem” wolves.⁷⁶ “Problem” wolves are those that have caused or exhibit behavior suggesting that they are likely

⁷⁴ 50 C.F.R. § 17.84(c)(4)(v).

⁷⁵ Revision of the Special Rule, *supra* note 73 (emphasis added).

⁷⁶ U.S. FISH & WILDLIFE SERV., GUIDELINES FOR APPLYING THE CURRENT RED WOLF RULE TO REQUESTS TO REMOVE RED WOLVES FROM PRIVATE LAND (eff. Jan. 28, 1999), attached in Appendix 16.

to cause property loss.⁷⁷ For such wolves, the Service is to follow procedures mirroring those required by § 17.84(c)(4)(v).⁷⁸

This same guidance document also sets out USFWS policy for the removal of non-problem wolves. In doing so, it makes no mention of lethal take, abandonment of efforts, or authorization of private action.⁷⁹ The Service maintained this position as recently as 2007.⁸⁰ In 2014, however, in an apparent shift in interpretation, the Service began extending 50 C.F.R. § 17.84(c)(4)(v) to authorize the take of non-offending wolves.⁸¹

Such an interpretation greatly expands the number of wolves potentially subject to lethal take, and calls into question the level of protection they are receiving on private lands. Again, “[b]ecause so many members of this threatened species wander on private land, the regulation of takings on private land is *essential* to the entire program of reintroduction and eventual restoration of the species.”⁸² Authorizing landowners to lethally take non-problem wolves undermines the protections provided by their threatened status and results in a failure to “provide for the conservation of the species” under Section 4(d) of the ESA⁸³

e. ESA Section 7(a)(1) and 7(a)(2)

Section 7 of the ESA imposes additional conservation obligations on federal agencies. Section 7(a)(1) requires USFWS to “utilize [all] programs in furtherance of the purposes of [the ESA].”⁸⁴ The fundamental purpose of the ESA is to conserve threatened and endangered species and the ecosystems upon which they depend,⁸⁵ and all programs administered by USFWS must advance this purpose. By authorizing the intentional lethal take of non-problem wolves by private landowners absent any attempt to remove the animals by non-lethal means, USFWS has failed to utilize the Red Wolf Rule “in furtherance of the purposes” of the ESA.

Section 7(a)(2) requires every federal agency to consult with USFWS 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”⁸⁶ Where USFWS is the acting agency, intra-agency consultation is required. In conducting consultations, the Service

⁷⁷ *Id.*

⁷⁸ Compare *id.* (providing that USFWS personnel may attempt to capture a problem wolf, but “if capture is not successful or feasible, lethal means could be employed or written permission may be provided according to the specifications provided in the current red wolf rule”), with 50 C.F.R. § 17.84(c)(4)(v) (allowing USFWS to grant written authorization for private take only after abandoning efforts to capture and remove the animal).

⁷⁹ See GUIDELINES, *supra* note 76.

⁸⁰ RED WOLF 5-YEAR STATUS REVIEW, *supra* note 10, at 26 (“For example, the [Red Wolf Rule] that contain[s] necessary prohibitions and exceptions allow[s] for take of red wolves which constitute a demonstrable threat to human safety or livestock, provided it has not been possible to eliminate such threat by live capture and relocation of the wolf.”).

⁸¹ See Part I(c), *supra* notes 46-55.

⁸² *Gibbs v. Babbitt*, 214 F.3d 483, 494 (4th Cir. 2000) (emphasis added).

⁸³ 16 U.S.C. § 1533(d).

⁸⁴ 16 U.S.C. § 1536(a)(1).

⁸⁵ 16 U.S.C. § 1531(b) (“The purposes of this chapter are to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved, to provide a program for the conservation of such endangered and threatened species.”).

⁸⁶ 16 U.S.C. § 1536(a)(2).

must consider all new circumstances including the current size of the population and any changes in regulations.

USFWS engaged in consultation on the effect of the 1986 rule reintroducing red wolves into eastern North Carolina, and found that the reintroduction of the red wolf and the accompanying rule were not likely to jeopardize the continued existence of the species.⁸⁷ The Service has not engaged in any consultation on the red wolf population since that time.

Significant new circumstances exist warranting reinitiation of consultation on the Red Wolf Recovery Program. The wild population of red wolves has declined from 130 individuals in 2006 to 50-75 in 2015.⁸⁸ Breeding pairs have decreased from an observed seventeen in 2007 to only eight in 2013,⁸⁹ and the number of observed pups decreased from forty-six in 2011⁹⁰ to just seven in 2015.⁹¹ In the context of such a dramatic population decline, interpreting an existing regulation in a new way to authorize the lethal take of a non-problem wolf following landowner refusal to allow USFWS to remove the wolf in a non-lethal manner does not further the conservation of the species, and indeed may jeopardize its continued existence in the wild.

Furthermore, USFWS has recently made significant changes to the Red Wolf Recovery Program. In June 2015, the agency announced that it was no longer reintroducing red wolves into eastern North Carolina.⁹² In addition, while adaptive management has been an important component of red wolf conservation⁹³, important measures have been discontinued. Most notably, USFWS is no longer conducting sterilization of coyotes in the Red Wolf Recovery Area, a key management activity to address the threat of hybridization. All of the significant changes in the red wolf population, in combination with the Service's new management practices and shifts in the interpretation of the Red Wolf Rule, call for a reexamination of the status of the species and a determination of whether its regulations are still serving their intended purpose of providing for the recovery of the red wolf. The Service's failure to conduct such a reexamination and engage in Section 7 consultation is in violation of the ESA.

f. ESA Section 4(c)(2)

Once a species has been listed as endangered or threatened, the ESA requires USFWS to conduct a review of the species' status "at least once every five years."⁹⁴ The purpose of this review is to determine whether the species should be delisted, "changed in status from a

⁸⁷ See Memorandum from Reg. Dir., U.S. Fish & Wildlife Serv., to Refuge Manager, Alligator River NWR (Apr. 23, 1986), attached in Appendix 17.

⁸⁸ See Part I(b), *supra* notes 23-45.

⁸⁹ See Part I(b), *supra* notes 23-45.

⁹⁰ See Part I(b), *supra* notes 23-45.

⁹¹ See Part I(b), *supra* notes 23-45.

⁹² See U.S. FISH & WILDLIFE SERV., RED WOLF NON-ESSENTIAL POPULATION MANAGEMENT DECISION Q & A (July 1, 2015), attached in Appendix 18, available at <http://www.fws.gov/southeast/es/pdf/red-wolf-faq-july-1-2015.pdf>.

⁹³ https://www.fws.gov/redwolf/Images/20130211_RWAMP_2013-2015.pdf.

⁹⁴ 16 U.S.C. § 1533(c)(2) ("[t]he Secretary shall conduct, at least once every five years, a review of all [listed] species . . .") (emphasis added); see also 50 C.F.R. § 24.21 ("At least once every five years, the Secretary shall conduct a review of each listed species to determine whether it should be delisted or reclassified."); *Fla. Home Builders Ass'n v. Norton*, 496 F. Supp. 2d 1330, 1336 (M.D. Fla. 2007) (discussing the "mandatory" and "nondiscretionary" duty of USFWS to conduct five-year status reviews pursuant to Section 4(c)(2)).

threatened species to an endangered species,” or “changed in status from an endangered species to a threatened species.”⁹⁵

To date, USFWS has conducted three status reviews for the red wolf, with the most recent status review released in September 2007.⁹⁶ Pursuant to its duty to conduct a review “at least once every five years,”⁹⁷ the Service was required to conduct a review no later than 2012. The agency, however, has yet to conduct such a review and remains in direct violation of Section 4(c)(2) of the ESA.

III. NOTICE OF VIOLATION

Based on the foregoing, the Conservation Organizations hereby provide notice of the following allegations:

1. USFWS has violated and will continue to violate 50 C.F.R. §§ 17.84(c)(2), (c)(4)(v), and 16 U.S.C. § 1538(a)(1)(G) through its authorization of the private lethal take of red wolves without satisfying the requirements of 50 C.F.R. § 17.84(c)(4)(v);
2. USFWS has interpreted 50 C.F.R. § 17.84(c)(4)(v) in a way that fails to “provide for the conservation” of the red wolf in violation of Section 4(d) of the ESA, 16 U.S.C. § 1533(d);
3. USFWS has failed to administer the red wolf program “in furtherance of the purposes” of the ESA in violation of 16 U.S.C. § 1536(a)(1);
4. USFWS has failed to undergo consultation pursuant to 16 U.S.C. § 1536(a)(2) on its revised interpretation and implementation of 50 C.F.R. § 17.84(c)(4)(v) to ensure that such interpretation is not “likely to jeopardize the continued existence” of the red wolf; and
5. USFWS has failed to conduct a mandatory five-year status review of the red wolf species in violation of 16 U.S.C. § 1533(c)(2).

IV. CONCLUSION

Conservation Organizations request that the Secretary immediately stop granting permits for landowners to lethally take red wolves on private land pursuant to 50 C.F.R. § 17.84(c)(4)(v). Before any such permitting resumes, USFWS must undergo Section 7 consultation on its interpretation of 50 C.F.R. § 17.84(c)(4)(v) to ensure that implementation of this regulation is in furtherance of the ESA’s conservation mandate and not likely to jeopardize the continued existence of the 50-75 animals remaining in the wild. The Service also must immediately complete a five-year status review of the red wolf pursuant to 16 U.S.C. § 1533(c)(2).

⁹⁵ 16 U.S.C. § 1533(c)(2).

⁹⁶ RED WOLF 5-YEAR STATUS REVIEW, *supra* note 10, at 5.

⁹⁷ 16 U.S.C. § 1533(c)(2).

Conservation Organizations urge the Service to take all necessary measures to avoid the unlawful future taking of red wolves and to contact us within 60 days to discuss their obligations under the ESA. If you have any questions about the issues raised in this letter, please feel free to contact us at any time.

Sincerely,

A handwritten signature in black ink, appearing to read "Sierra B. Weaver". The signature is fluid and cursive, with a large initial "S" and a long, sweeping underline.

Sierra B. Weaver
Southern Environmental Law Center

Kim Wheeler
Red Wolf Coalition

Jason C. Rylander
Defenders of Wildlife

Cathy Liss
Tara Zuardo
Animal Welfare Institute