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

NO. 2:15-cv-00042-BO

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

PLAINTIFFS' MEMORANDUM IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

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Plaintiffs Red Wolf Coalition, Defenders of Wildlife, and Animal Welfare Institute (collectively, "Plaintiffs" or "Conservation Organizations") submit this memorandum in support of their Motion for Preliminary Injunction. Plaintiffs' requested injunction is necessary to stop the actions of Defendants U.S. Fish & Wildlife Service ("USFWS" or "the Service"), Dan Ashe, and Cynthia Dohner (collectively, "Defendants") that are jeopardizing the continued existence of the 45-60 wild red wolves left in the world. Defendants have overhauled their interpretation and application of the red wolf rule to dramatically expand their own direct and authorized take—including the harm, harassment, and killing—of this endangered species. Defendants have taken these actions as the already fragile red wolf population has been cut in half in the span of the past two years and as the Service itself has terminated important long-standing management practices for the conservation of the species. Critically, Defendants have taken these actions without any of the evaluation of science, public involvement, and informed decisionmaking required by the Endangered Species Act ("ESA"), 16 U.S.C. § 1531 et seq., and its implementing regulations, and the National Environmental Policy Act, ("NEPA"), 42 U.S.C. §§ 4321-47. Without a preliminary injunction, the population of wild red wolves may well go extinct before Plaintiffs' claims can be resolved.

STATEMENT OF THE CASE

The red wolf (*Canis rufus*) was driven to extinction by persecution, killing, trapping, poisoning and habitat destruction. The red wolf is one of the world's most endangered species, with only about 45 to 60 animals living exclusively within Dare, Tyrell, Beaufort, Hyde, and Washington Counties in Eastern North Carolina. These animals are descendants of a population reintroduced from a captive breeding program into Alligator River National Wildlife Refuge in 1987. Over the red wolf reintroduction program's nearly 30 year history, this population grew and flourished, becoming an endangered species success story and model for carnivore

reintroductions. Now, recent actions of Defendants have put the red wolf the brink of extinction for a second time.

When Plaintiffs were last before the Court in 2014, gunshot mortality was the leading threat to the population's 100 remaining members. See Red Wolf Coal. v. N. Carolina Wildlife Res. Comm'n, No. 2:13–CV–60–BO, 2014 WL 1922234, at *3 (E.D.N.C. May 13, 2014), attached as Attachment 1. Following this Court's injunction, gunshot mortality dropped to the lowest level in decades, yet the population decline did not abate. In November 2015, when Plaintiffs filed this case, Defendants estimated 50-75wild red wolves remained. By March 2016, they estimated only 45-60.

Defendants have released no new population estimates in recent months, but their current actions could not possibly be addressing, let alone reversing, this decline. In sum, the Service has ended the positive conservation measures they have taken for decades and dramatically expanded their actions that are likely to be harmful to the species. Of particular relevance to this case, Defendants have revised their interpretation of 50 C.F.R. §§ 17.84(c)(4)(v) and (c)(10) to allow for the lethal and non-lethal removal of *non-problem* wolves—those that have shown no threat to public safety or private property. Internal Service documents clearly document a previously consistent practice of interpreting these regulations narrowly for the conservation of the species. Their recent reinterpretation has resulted in a greatly expanded practice of the Service capturing, and allowing private landowners to capture, wolves from private land, holding them in captivity for weeks or months, and releasing them either on Alligator River or Pocosin Lakes National Wildlife Refuge, possibly over 100 miles or more from their home territory. This reinterpretation has further resulted in the Service authorizing private landowners to shoot and kill *non-problem* wolves found on private land.

Internal Service documents amply display concerns of Defendants' own biologists with the removal of non-problem wolves and the practice's inability to meet the ESA's mandates to "provide for the conservation of" the species, 16 U.S.C. § 1533(d), act in a manner "not likely to jeopardize the continued existence" of the red wolf species, 16 U.S.C. § 1536(a)(2), and administer the red wolf program "in furtherance of the [conservation] purposes" of the ESA. 16 U.S.C. § 1536(a)(1). Indeed, the red wolf population decline reflects the impossibility of the Service's current practices from complying with either the letter or the spirit of the ESA.

Moreover, these fundamental changes in red wolf management have not gone through the analysis required by NEPA for "major federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332. Instead, these changes have been announced through press releases, phone calls, and a slow trickle of documents released pursuant to the Freedom of Information Act, accompanied by promises that the agency will announce soon whether to continue, modify, or terminate the red wolf recovery program.

Without relief from this Court, the Service will continue to apply the red wolf rule in a manner contrary to the conservation purposes of the ESA, and in a manner that will lead to the imminent extinction of the now-struggling wild red wolf population. Such actions will irreparably harm Plaintiffs' interests in enjoying red wolves in the wild. A preliminary injunction protecting the last remaining wild red wolves from being captured, held, and released into unfamiliar territory or lethally taken by private landowners under the provisions of 50 C.F.R. § 17.84(c) will not harm the interests of the Service and is in the public interest.[1]

[1] On June 14, 2016, Defendants' filed their Motion to Limit the Standard and Scope of Review, Dkt. No. 29. Plaintiffs oppose Defendants' Motion and will soon be filing a separate Motion to Stay Briefing pending resolution of this Motion for Preliminary Injunction.

FACTUAL BACKGROUND

The red wolf (*Canis rufus*) has been pushed to the edge of extinction, now more than once. Once common throughout the eastern and south-central United States, including North Carolina, the red wolf was first designated as endangered in 1967. Determination of Experimental Population Status for an Introduced Population of Red Wolves in North Carolina, 51 Fed. Reg. 41,790 (Nov. 19, 1986); 32 Fed. Reg. 4001 (Mar. 11, 1967) (listing the red wolf as an endangered species). By 1980, the Service had placed the few remaining red wolves in a captive-breeding program and declared the red wolf extinct in the wild. 51 Fed. Reg. at 41,791. Eastern North Carolina's 45 to 60 remaining red wolves make up the world's only wild population. See generally, Declaration of Kim Wheeler ("Wheeler Decl."), Pls. Att. 2, Ex. E (USFWS 2013-2016 Mortality Table (Mar. 9, 2016)) and Ex. B (USFWS 5-Year Status Review (Sept. 28, 2007)) at 5.

The Service's Successful Red Wolf Reintroduction

In 1987, the Service initiated the red wolf recovery program with the release of four pairs of captive red wolves into the Alligator River National Wildlife Refuge ("Alligator River"). Revision of the Special Rule for Nonessential Experimental Populations of Red Wolves in North Carolina and Tennessee, 60 Fed. Reg. 18,940 (Apr. 13, 1995). The Service issued a special rule under ESA Section 10 to establish the reintroduction of red wolves in Alligator River ("red wolf rule"). See generally 51 Fed. Reg. 41,790; see also Gibbs v. Babbitt, 214 F.3d 483, 487-88 (4th Cir. 2000) (describing the history of the red wolf reintroduction). The Service completed an Environmental Assessment ("EA") as required under NEPA when it first promulgated the red wolf rule in 1986. 51 Fed. Reg. at 41,796. The rule authorized the reintroduction of red wolves as an "experimental, nonessential" population and applied the ESA prohibition against take—

defined broadly to include capturing and killing, among other actions—except in "limited circumstances." Id., see Gibbs v. Babbitt, 214 F.3d at 487-88; Red Wolf Coal., 2014 WL 1922234, at *6 ("The red wolf rule experimental population regulations expressly extend the protection on taking under Section 9 to the red wolf population, subject to certain exceptions.")

Relevant here, the red wolf rule provides:

> Any animal 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) (emphasis added), and,

> Any private landowner may take red wolves found on his or her property . . . 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*,

id.§ 17.84(c)(4)(v) (emphasis added). Any take of red wolves which does not fall within one of the limited circumstances specifically identified in the rule violates the ESA. Red Wolf Coal., 2014 WL 1922234, at *6-7.

In 1999, the Service implemented an adaptive management program to control hybridization through interbreeding with coyotes, a leading threat to the species. Declaration of John A. Vucetich ("Vucetich Decl."), Pls.' Att. 3, Ex. B (Stoskopf, et al. Article (2005)). By this time, the red wolf population had grown to 100 individuals. Wheeler Decl., Ex. F (Red Wolf Demographics). The population peaked at 130 wild red wolves in 2006, and from 2002 to 2014, the population was always estimated at 100 or more individuals. Wheeler Decl., Ex. F. The success of the red wolf reintroduction caused it to serve as a model for reintroduction efforts for other species across the country. Declaration of Ben Prater ("Prater Decl."), Pls.' Att. 4, ¶ 24.

The Service's Harmful Reinterpretation of Red Wolf Rule

The text of the regulations above was historically interpreted by Service staff only to apply to "problem wolves." According to Service documents, this was thought to be the reading consistent with the ESA's conservation mandate and the best available science about the impacts of removals on the red wolf population. See Wheeler Decl., Ex. L (USFWS E-mails and Attachment re: Interpretation of 1995 Rule). One 1999 briefing paper stated:

> [R]emoval of wolves in the absence of a problem may be detrimental to the conservation of the species by preventing natural expansion and recovery of the species, and by contributing to the establishment of coyotes. This may result in interbreeding between the two species. Interbreeding with coyotes was the final factor that led to endangerment and near extinction of the species.

Wheeler Decl., Ex. M (USFWS 1999 Briefing Paper), at 2. Another memo noted that removal of *non-problem* wolves "may have a detrimental effect on red wolf recovery efforts by increasing the threat of hybridization." Wheeler Decl., Ex. L, at 7. A 2014 email from Assistant Regional Director Leo Miranda clarified that this was Service policy for nearly twenty years, from 1995 until 2014. Wheeler Decl., Ex. L, at 14.

Beginning in 2014, USFWS departed from this long-standing interpretation of the rule, designed to conserve the wild red wolf population, to an interpretation of the rule designed to allow for the removal of as many wolves as possible from private land. It was during this time that private landowner requests for removal of wolves increased dramatically. See Wheeler Decl., Ex. H (Compiled USFWS E-mails re: Removal Requests). Indeed, multiple public statements and the Service's own website advertise that despite other management changes for the red wolf population, the Service will continue to honor such requests. See., e.g., Wheeler Decl. ¶¶ 16, 20, Ex. G. (Red Wolf Recovery Program FAQ Website (Mar. 23, 2016)). Internal documents show that by October 2014, engendered by a campaign by a handful of landowners

opposed to red wolf reintroduction, the Service had received over 400 requests from private landowners for removal of wolves and for authorization to kill wolves.[2] Wheeler Decl., Ex. H.

Internal documents show that at the same time the Service also reinterpreted 50 C.F.R. § 17.84 (c)(10), which requires the Service to release captured wolves "as soon as possible." According to a 2014 email from Service Assistant Regional Director Miranda, an exception for wolves with "behavioral problems" could be used to hold in captivity for extended periods wolves that instinctually returned to their home ranges. Wheeler Decl., Ex. I (Compiled USFWS E-mails re: Holding Wolves in Captivity), at 7. Even without the "behavior problem" justification, the Service has held wolves repeatedly for weeks or months at a time. See generally Wheeler Decl., Ex. I. In a 2015 e-mail to a private landowner, Assistant Regional Director Miranda stated that two wolves trapped by the landowner "will not be released back into the wild at least until we make a final determination on the future of this population." See Wheeler Decl., Ex I, at 1.

In addition to these broad scale practices of capturing and removing wolves from private property, the Service also in 2014, for the first time ever, issued a private landowner written authorization to kill a red wolf with no evidence of any problem behavior. Wheeler Decl., Ex. J (Feb. 6, 2014 Take Authorization and Renewals), at 1-3. This landowner refused to allow Service personnel on his property, and the Service did not attempt to capture the wolf otherwise—instead, the Service determined that "given our other staffing commitments and lack of access to actively trap on the property . . . we are foreclosed from pursuing the animal on your property and in that sense must abandon efforts to capture and relocate the animal ourselves."

[2] Upon investigation by USFWS, some of these requests were from landowners who were not aware of any wolves on their property. Nonetheless, many were from landowners who believed they had wolves on their property and Service personnel were working with the landowners to investigate any wolves present. See Wheeler Decl., Ex. H.

Wheeler Decl., Ex. J, at 2. Indeed, the Service subsequently "renewed" this same take authorization on September 23, 2014 and again on April 27, 2015, without first attempting to trap any wolves on or near the property in question. Wheeler Decl., Ex. J.

This new interpretation of 50 C.F.R. § 17.84(c)(4)(v) resulted in the death of at least one key member of the red wolf population in 2015. In that case, the Service issued a permit for a landowner who barred the Service access to his property to kill a red wolf that had not exhibited any "problem" or "offending behavior" Wheeler Decl., Ex. K (Compiled USFWS E-mails and Take Authorization re: June 17, 2015 Killed Wolf). The private landowner shot and killed the wolf on June 17, 2015. Wheeler Decl., Ex. K, at 1, 7. The wolf was a denning mother wolf who had previously mothered a total of 16 pups through four separate litters. Wheeler Decl., Ex. K, at 1. Service staff believed the wolf had another litter of pups when it was killed, and may have still been nursing those pups. Wheeler Decl., Ex. K, at 1.

Other Changed Circumstances for the Red Wolf Population

These changes in the Service's implementation of the red wolf rule have not occurred in a vacuum. In January of 2015, the North Carolina Wildlife Resources Commission passed two resolutions urging the Service to end the red wolf recovery program, declare the red wolf extinct in the wild, and remove red wolves from the wild. See Prater Decl., Ex. A. A group of concerned scientists responded to the Commission with a March 1, 2015 letter , urging the Commission to promote red wolf recovery and rescind the resolutions. Declaration of T. DeLene Beeland ("Beeland Decl."), Pls.' Att. 5, Ex. A. A few months later, in June 2015, the Service announced that it was both ending the reintroduction of red wolves into the wild and ending the adaptive management plan that had been so crucial to the success of the red wolf reintroduction. Wheeler Decl., ¶¶ 16, 18; Prater Decl., ¶¶ 19, 21, Ex. E (Gese and Terletzky

Article (2015)), Ex. F (Bohling, et al. Article (2016)); see generally Red Wolf Coal., 2014 WL 1922234, at *8 (discussing harm to USFWS's adaptive management plan when coyote hunting resulted in the shooting of sterile placeholder coyotes). Similar to the rule interpretations described above, these management changes also did not go through any formal process.

Finally, the Service's estimate of the red wolf population size has dropped precipitously since 2014. See Wheeler Decl., ¶ 19. The attached chart from the Service's website shows the overall population numbers from recent years, dropping from 90-110 animals in 2013 and 2014, to 50-75 animals in 2015 and 40-65 animals as of March 9, 2016. Wheeler Decl., Ex. E. This is the only recent information about the population that is readily available to the public via the Service website.[3] According to the 2014 Second Quarter Report for the Recovery Program—the most recent report available on the Service website—only seven breeding pairs remained in the wild. Wheeler Decl., Ex. D (USFWS Quarterly Red Wolf Report, 2nd Quarter Report, January – March 2014), at 3.[4]

[3] Plaintiffs have attempted to gain more information about the current state of the red wolf population and Service management through Freedom of Information Act requests, however, the Service has dragged out responding to these requests and refused to release relevant documents. See e.g. Prater Dec. ¶ 10. Counsel for Plaintiffs have similarly submitted additional requests to the agency, to which the agency has either failed to provide any response or has slowly and inadequately responded with limited records.

[4] Plaintiffs, who have members who regularly look for, observe, study, and appreciate red wolves in the wild, and whose ability to engage in these activities is compromised by the Service's harm to red wolves, have standing to bring this suit. See generally Wheeler Decl.; Prater Decl.; Beeland Decl.; Liss Decl.; MacAllister Decl.; see also Friends of the Earth v. Laidlaw Envtl. Serv., 528 U.S. 167, 183 (2000) ("[E]nvironmental plaintiffs adequately allege injury in fact when they aver that they use the affected area and are persons for whom the aesthetic and recreational values of the area will be lessened by the challenged activity.") (citations omitted); Lujan v. Defenders of Wildlife, 504 U.S. 555, 562-63 (1992) ("Of course, the desire to use or observe an animal species, even for purely esthetic purposes, is undeniably a cognizable interest for purpose of standing."); Japan Whaling Ass'n v. Am. Cetacean Soc'y, 478 U.S. 221, 230, n. 4 (1986) (finding that plaintiffs who engaged in "whale watching and studying" had standing to challenge activity that killed whales).

STANDARD OF REVIEW

The ESA citizen suit provision authorizes this Court "to enjoin any person . . . who is alleged to be in violation of any provision" of the ESA. 16 U.S.C. § 1540(g). Generally, "[a] plaintiff seeking a preliminary injunction must establish [1] that he is likely to succeed on the merits, [2] that he is likely to suffer irreparable harm in the absence of preliminary relief, [3] that the balance of equities tips in his favor, and [4] that an injunction is in the public interest." Winter v. Natural Res. Def. Council, 555 U.S. 7, 20 (2008); League of Women Voters of N.C. v. North Carolina, 769 F.3d 224, 236 (4th Cir. 2014); Pashby v. Delia, 709 F.3d 307, 320-21 (4th Cir. 2013).

The purpose of a preliminary injunction is to "preserve the status quo until the rights of the parties can be fairly and fully investigated and determined by strictly legal proof and according to the principles of equity." Wash. Cnty., N.C. v. U.S. Dep't of the Navy, 317 F. Supp. 2d 626, 631 (E.D.N.C. 2004) (quoting Sinclair Refining Co. v. Midland Oil Co., 55 F.2d 42, 45 (4th Cir. 1932)). "A preliminary injunction is not a final adjudication of the rights of the parties, but rather an order temporarily reserving the rights of the parties." Id. (citing Duckworth v. James, 267 F.2d 224, 231 (4th Cir. 1959)).

In applying the standard for a preliminary injunction, the Court should be mindful that Congress has clearly spoken "in favor of affording endangered species the highest of priorities." Am. Rivers v. U.S. Army Corps of Eng'rs, 271 F. Supp. 2d 230, 249 (D.D.C. 2003) (quoting Tenn. Valley Auth. v. Hill ("TVA"), 437 U.S. 153, 194 (1978)). The "incalculable" harm from the loss of an endangered species and the "overwhelming need to devote whatever effort and resources [are] necessary to avoid further diminution of national and worldwide wildlife resources" tips heavily in favor of protecting endangered species when considering the balance

of harms and the public interest. Id. at 261 (quoting TVA v. Hill, 437 U.S. at 177 (internal citation omitted)).

ARGUMENT

I. Plaintiffs Are Likely to Succeed on the Merits of Their Claims.

Considered "the most comprehensive legislation for the preservation of endangered species ever enacted by any nation," the ESA embodies Congress's "plain intent" to "halt and reverse the trend toward species extinction, whatever the cost." TVA , 437 U.S. 153 at 184. The Fourth Circuit has declared that the "overall federal scheme [of the ESA is] to protect, preserve, and rehabilitate endangered species, thereby conserving valuable wildlife resources important to the welfare of our country." Gibbs, 214 F.3d at 492. Specifically noting the red wolf's experimental status, the Fourth Circuit noted that "it would be perverse indeed if a species nearing extinction were found to be beyond Congress's power to protect" it. Id. at 498.

Indeed, this Court has examined the legal status of the red wolf on multiple occasions. Just two years ago, it rejected a reading of the ESA that would make "Congress' mandated protection of the red wolf [] nothing more than a half-hearted attempt to 'see what happens' after a few red wolves have been reintroduced into the wild." Red Wolf Coal., 2014 WL 1922234 at *8. The Court found in that case that

> by designating the red wolf as protected and dedicating funding and efforts for more than twenty-five years in a program to rehabilitate the once-nearly extinct species, Congress has repeatedly demonstrated that it has chosen to preserve the red wolf—not simply to let inaction determine its fate—and it is not for this Court to permit activities that would have an effect counter to this goal.

Id. (citing Gibbs, 214 F.3d at 496).

This is the legal backdrop against which the Service has quietly overhauled its implementation of the red wolf rule in a manner that directly conflicts with both the specific

requirements and overall intent of the ESA. The agency's legal violations are both substantive and procedural, and all are contributing significantly to the imperilment of the endangered red wolf in the wild. As described more fully below, Plaintiffs are likely to succeed on the merits of their claims that Defendants (1) are failing to provide for the conservation and recovery of the red wolf, and may well be jeopardizing its continued existence in the wild, in violation of ESA Sections 4 and 7, 16 U.S.C. §§ 1533(c)(2), (d), 1536(a), and (2) failed to perform required NEPA analysis under 42 U.S.C. § 4332(C).[5] By demonstrating how Defendants' actions and inactions have harmed and will continue to harm the red wolf population in violation of the ESA, Conservation Organizations meet the necessary threshold to show a likelihood of success on the merits. League of Women Voters, 769 F.3d at 247 ("While plaintiffs seeking preliminary injunctions must demonstrate that they are likely to succeed on the merits, they 'need not show a certainty of success.'" (quoting Pashby, 709 F.3d at 321)).

A. The Service Is Violating the ESA's Requirements to Protect the Endangered Red Wolf.

The Service is also violating the ESA's myriad requirements to provide for the conservation of the species, and indeed, to avoid the likelihood of jeopardy to the species. As detailed above and in the attached declarations, the red wolf population has declined 50% in the course of two years and has now reached critical levels. See, e.g., Vucetich Decl. ¶ 18 ("Such a decline in a population of wolves is catastrophic and indicates the population is in extreme danger of extinction."); Declaration of Marcella Kelly ("Kelly Decl."), Pls.' Att. 6, ¶¶ 18, 20;

[5] Notably, Plaintiffs have also alleged violation of ESA Section 9 because Defendants failed to comply with 50 C.F.R. § 17.84(c)(4)(v) in authorizing private landowners to kill red wolves without Service staff first attempting to remove the wolves non-lethally. Service documents show, however, that these were non-problem wolves that shouldn't have been considered for taking in the first place according to long-standing Service policy, which is the focus of this Motion for Preliminary Injunction. Plaintiffs reserve their Section 9 claim for consideration of this case on its merits.

Declaration of Melissa Karlin ("Karlin Decl."), Pls.' Att. 7, ¶ 10, 12. The Service has directly contributed to this decline through both its lethal and nonlethal removal of wolves from the population. See Vucetich Decl. ¶ 22 ("[F]rom a practical perspective of managing a wild population, [nonlethal] removals are functionally mortalities and are reasonably counted as such in terms of their population impact."); Kelly Decl., ¶ 21; Karlin Decl., ¶ 11. Such removals have impacted the red wolf population through direct mortality, see Wheeler Decl., Ex. K, increased risk of death or injury, Kelly Decl. ¶¶ 16, 19, Karlin Decl. ¶ 11, decreased reproduction, Vucetich Decl. ¶ 22, Kelly Decl. ¶¶ 17, 18, increased risk of hybridization, Vucetich Decl. ¶ 20, Karlin Decl. ¶ 10, and unknown harms to pack dynamics, Vucetich Decl. ¶ 22 ("The specific effect will depend on which animals are removed, how long they are held in captivity, and whether they are able to return to their home range or establish new territory when they are released.").

The effect of the Service's policies related to the take of non-problem wolves on such an imperiled population cannot be understated. Because Defendants' reinterpretation of the red wolf rule is likely to lead to the demise of the red wolf as a species, Plaintiffs are likely to succeed on the merits of their ESA claims.

1. The ESA Requires the Service to Provide for the Conservation and Recovery of the Species.

Congress fundamentally designed the ESA to ensure the conservation of listed species, including the red wolf. See 16 U.S.C. § 1531(c)(1) ("It is further declared to be the policy of Congress 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." (emphasis added)); id. § 1533(d) (requiring USFWS to "provide for the conservation" of listed species); id. § 1536(a)(2) (requiring federal agencies to ensure their actions are "not

likely to jeopardize the continued existence of any endangered species or threatened species"). Each of these requirements is at play in the case before the Court, and under each standard, Defendants' current reinterpretation of the red wolf rule falls far short. See Humane Soc'y of the U.S. v. Kempthorne, 579 F. Supp. 2d 7, 20 (D.D.C. 2008) (requiring agency to explain "how its interpretation serves the ESA's myriad policy objectives," including addressing "any legitimate concerns that its interpretation could undermine those policy objectives").

First, since experimental populations are treated as threatened species in most circumstances, 16 U.S.C. § 1539(j)(2)(C), the red wolf rule must comply with the substantive standard of ESA Section 4(d) "to provide for the conservation of" listed species. 16 U.S.C. § 1533(d), 50 C.F.R. § 17.82. Rules issued pursuant to section 10(j) are "by definition the promulgation of the protective regulations for the species pursuant to the authority of ESA section 4(d)." Defenders of Wildlife v. Tuggle, 607 F. Supp. 2d 1095, 1116-17 (D. Ariz. 2009) (holding that the Service has a non-discretionary duty to ensure that the final rule for reintroduction of Mexican wolves "provides for the conservation" of the species). While "USFWS has discretion to issue the regulations it deems necessary and advisable, [] the regulation *shall* provide for the conservation of such species." Id. (emphasis added).

Second, and related, Section 7(a)(1) imposes a conservation obligation on all federal agencies by directing them to "utilize their authorities in furtherance of the purposes of [the ESA] by carrying out programs for the conservation of endangered species and threatened species." 16 U.S.C. § 1536(a)(1). "The terms 'conserve', 'conserving', and 'conservation' mean to use and the use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to this chapter are no longer necessary," or recovery of the species. 16 U.S.C. § 1532 (3). While the ESA

generally sets forth policies and prohibitions intended to conserve listed species, Section 7 of the Act recognizes the reach and significance of *federal* actions affecting listed species by imposing additional affirmative obligations on agencies like the Service. See TVA, 437 U.S. at 180; Fla. Key Deer v. Paulison, 522 F.3d 1133, 1146–47 (11th Cir. 2008) ("[W]hile agencies might have discretion in selecting a particular program to conserve—an issue we do not decide here—they must in fact carry out a program to conserve, and not an 'insignificant' measure that does not, or is not reasonably likely to, conserve endangered or threatened species."). "Where there is total inaction, the courts have no trouble finding a violation of section 7(a)(1) because the agency has impermissibly read out of existence its substantive requirement to use the agency's authorities by carrying out programs for the conservation of endangered and threatened species." Defenders of Wildlife v. U.S. Fish & Wildlife, 797 F. Supp. 2d 949, 960 (D. Ariz. 2011) (internal quotations omitted).

The Service's current interpretation of the red wolf rule is in direct conflict with the will of Congress in defining the requirements of the ESA. Service staff stated this directly in several memos from 1998 and 1999. See supra at 6-7 (citing Wheeler Decl., Ex. M, at 2 ("removal of wolves in the absence of a problem may be detrimental to the conservation of the species"), Ex. L, at 2 ("concerns about the effect of such removals may have on our ability to recover this species"), at 7 ("it is not possible to recapture, remove, and keep these wolves off a tract of land"), at 12 (regulations are "not in line with traditional wildlife management concepts, that are probably the most lenient regulations for taking any endangered species, and that are not in agreement with other wolf reintroduction projects."). Furthermore, these statements were made when the red wolf population was still increasing, rather than plummeting as is now the case, and before reintroductions and adaptive management were terminated.

Critically, the only other reintroduction in which a similar provision for non-lethal removals was included was criticized by scientific reviewers as inconsistent with recovering the species. See Vucetich Decl. ¶¶ 15, 16, 26. See also Defenders of Wildlife v. Tuggle, 607 F.Supp.2d at 1104-06 (discussing limitations on capture of experimental wolves, including that they be nuisance animals, that there be a limit on capture of females), and 1117 (noting that "if unacceptable levels of take occur, the Biological Opinion or the rule, or both, would be revised"). In these circumstances, the Service is in fact not undertaking any conservation actions at this time. See Fla. Key Deer v. Paulison, 522 at 1146–47. See, e.g., Vucetich Decl. ¶ 28 ("The actions and inactions of the Fish and Wildlife Service are more consistent with abandoning the conservation and recovery of the red wolf than with advancing the conservation and recovery of the red wolf."). Such activities do not meet the bare minimum of what might be considered conservation efforts pursuant to Section 7(a)(1).

Plaintiffs are likely to succeed on the merits of their ESA Section 4(d) and Section 7(a)(1) claims, and until given an opportunity to do so, Plaintiffs interests in the endangered red wolf should be protected by preventing the continued deterioration of the endangered red wolf.[6]

2. **The Service's Actions Are Likely to Jeopardize the Continued Existence of the Red Wolf**

And the Service's actions go even farther toward harming the red wolf. Not only are they not affirmatively providing for the conservation of the species, but they may in fact be

[6] Plaintiffs also alleged a violation of ESA Section 4(c)(2), 16 U.S.C. § 1533(c)(2), for Defendants' failure to perform the mandatory 5-year status review for the red wolf. The last status review was completed in 2007, see Wheeler Decl., Ex. B, which made the five-year status review due four years ago in 2012. As displayed in the 2007 status review, this document is an essential tool for reassessing the management needs of the species to promote its conservation and recovery. Plaintiffs are likely to succeed on the merits of this claim and Defendants' violation combines with their other violations of the ESA to irreparably harm Plaintiffs' interests in enjoying red wolves in the wild.

jeopardizing the continued existence of the species. Plaintiffs are likely to succeed on the merits of their claims that Defendants' have violated both the procedural and substantive requirements of Section 7(a)(2).

Section 7(a)(2) of the ESA requires federal agencies to "insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species . . . ." 16 U.S.C. § 1536(a)(2). This requirement includes both the substantive requirement to avoid the likelihood of jeopardy and the procedural requirement of engaging in consultation to carefully evaluate the effects of the action on listed species. See Fla. Key Deer, 522 F.3d at 1138 ("At the heart of this dispute, and of Congress's plan to preserve endangered and threatened species, is section 7 of the ESA, which places affirmative obligations upon federal agencies.").

> [S]ection 7(a)(2) imposes two obligations upon federal agencies. The first is procedural and requires that agencies consult with the [FWS and NMFS] to determine the effects of their actions on endangered or threatened species and their critical habitat. The second is substantive and requires that agencies insure that their actions not jeopardize the endangered or threatened species or their critical habitat.

Id; see also Nat'l Ass'n of Home Builders v. Defenders of Wildlife, 551 U.S. 644, 626, 2532 (2007) (noting that the "imperative" nature of the Section 7 "mandate is to be carried out through consultation and may require the agency to adopt an alternative course of action").

"If a project is allowed to proceed without substantial compliance with those procedural requirements, there can be no assurance that a violation of the ESA's substantive provisions will not result. The latter, of course, is impermissible." Thomas v. Peterson, 753 F.2d 754, 764 (9th Cir. 1985); see also Greenpeace v. Nat'l Marine Fisheries Serv., 106 F. Supp. 2d 1066, 1072, 1076 (W.D. Wash. 2000) ("In the absence of a completed comprehensive biological opinion [the action agency] has not, and cannot, insure that [the action] will not result in harm to endangered

[species].”). Formal consultation is required if the action “may affect” a listed species and if consultation has not previously been completed regarding the action. 50 C.F.R. § 402.14(a). “Any possible effect [to listed species], whether beneficial, benign, adverse, or of an undetermined character,” triggers this requirement. 51 Fed. Reg. 19,926, 19,949 (June 3, 1986).

As an initial matter, Section 7(a)(2) applies to the red wolf population. This matter was discussed at length in Plaintiffs’ Response to Defendants’ Partial Motion to Dismiss, Dkt. No. 21. ESA Section 10(j) is explicit that “each member of an experimental population shall be treated as a threatened species; except that” a nonessential experimental *population* shall be treated as a species proposed to be listed, “except when it occurs in an area within the National Wildlife Refuge System.” 16 U.S.C. § 1539(j)(2)(C)(i) (emphasis added). The red wolf population clearly occurs within the National Wildlife Refuge System. The original red wolf reintroduction occurred at Alligator River. Wheeler Decl., Ex. D, at 2. The Red Wolf Recovery Area includes not just one, but four wildlife refuges. Wheeler Decl., Ex. D, at 2. And critical for the case before the Court, wolves that are removed from private lands pursuant to the red wolf rule are released onto either Alligator River or Pocosin Lakes National Wildlife Refuge. Defs.’ Answer to Pls.’ First Amend. Compl., Dkt. No. 24, at ¶ 113; Wheeler Decl., Ex. G; see also Gibbs, 214 F.3d at 494 (“Because 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.”).

Section 7 applies to the red wolf population as it exists on both refuge and non-refuge lands, and the Service must re-evaluate its *current* application of the red wolf rule on the *current* population of red wolves. See 50 C.F.R. § 402.02. First, Defendants have recently revised their

interpretation of the red wolf rule, triggering reinitiation of consultation. See 50 C.F.R. § 402.16(c); see e.g. Forest Guardians v. Johanns, 450 F.3d 455, 465–66 (9th Cir. 2006) (Forest Service's inadequate monitoring practices constituted modifications to land management plan, triggering requirement to reinitiate consultation). While the red wolf rule has been in place since 1986, Defendants did not grant their first lethal take authorization to a private landowner until 2014. Defs.' Answer to Pls.' First Amend. Compl., Dkt. 24, ¶ 95; Wheeler Decl, Ex. J. The 2014 authorization and the 2015 authorization to kill wolves clearly reflect a change in previous policy which contemplated granting such authorizations only for "problem wolves." Wheeler Decl., Ex. L. In addition, Service removals of wolves, including of non–problem wolves, have also dramatically increased—largely in response to private landowners' requests for removals and take authorizations.

Second, new information about the Service's re-interpretation on the status of the species and other actions affecting the red wolf population also trigger reinitiation of consultation because they "may affect" the red wolf "in a manner or to an extent not previously considered." 50 C.F.R. § 402.16(a); see Cottonwood Envtl. Law Ctr. v. U.S. Forest Serv., 789 F.3d 1075, 1087–88 (9th Cir. 2015) (Forest Service was required to reinitiate consultation when USFWS significantly revised critical habitat determination); Gifford Pinchot Task Force v. U.S. Fish & Wildlife Serv., 378 F.3d 1059, 1076–77 (9th Cir. 2004), amended sub nom. Gifford Pinchot Task Force v. U.S. Fish & Wildlife Serv., 387 F.3d 968 (9th Cir. 2004) ("If the data is new and the new data may affect the jeopardy or critical habitat analysis, then the FWS was obligated to reinitiate consultation pursuant to 50 C.F.R. § 402.16."). As described above, the red wolf population experienced a sudden drop to 50–75 individuals in 2015, and the population dropped further to 45–60 wolves just in recent months. Wheeler Decl., Ex. E. The Service has stopped

reintroducing wolves—a practice essential to growth of the red wolf population, see Vucetich Decl., ¶ 30; Wheeler Decl., ¶ 16, the Service has stopped sterilizing coyotes, Defs.' Answer to Pls.' First Amend. Compl., Dkt. No. 24, at ¶ 109; Wheeler Decl. ¶ 16 , and the Service is receiving hundreds of wolf removal and take authorization requests from landowners—in numbers never contemplated when the red wolf rule was first promulgated in 1986, Wheeler Decl., Ex. M, at 2 (noting that "[c]ontinuous requests from two to three private landowners to remove red wolves from their property" was creating a workload burden for staff and causing the Service to question how to respond to these requests).

Plaintiffs are likely to succeed on the merits of their claims that the Service violated ESA Section 7. Until the Service completes consultation, its current actions pursuant to its reinterpretation of the red wolf rule, particularly in light of the current state of the population, should be enjoined.

B. The Service Violated NEPA by Failing to Conduct Any Environmental Analysis Prior to Revising Its Red Wolf Rule Implementation.

As described above, the Service has effectively rewritten the red wolf rule in recent years, dramatically expanding the circumstances in which wolves will be removed from private land, as well as those in which private landowners will be authorized to kill wolves on their property. This rewrite is not merely administrative, but goes to the heart of the protections afforded to the endangered red wolf. See, e.g., Gibbs v. Babbit, 214 F.3d at 487 ("The cornerstone of the statute is section 9(a)(1), which prohibits the taking of any endangered species without a permit or other authorization."). At the same time, other circumstances that are critical to the effect of the red wolf rule on the wild red wolf population have also changed significantly—most notably, the ending of red wolf reintroductions, the ending of adaptive management, and the significant decline in the wild red wolf population size. Either the informal rewriting of the red wolf rule or

the catastrophic decline in the red wolf population would be sufficient to warrant re-evaluation of the red wolf rule under NEPA, but here those factors come together. Defendants have violated fundamental procedural safeguards intended to ensure that agency action is informed, based on the best available science, and subject to public scrutiny and thus their revision to the red wolf rule is invalid.

NEPA is an action-forcing statute. Its sweeping commitment is to "prevent or eliminate damage to the environment and biosphere by focusing government and public attention on the environmental effects of proposed agency action." Marsh v. Oregon Natural Res, Council, 490 U.S. 360, 371 (1989) (internal quotation marks omitted) (citing 42 U.S.C. § 4321). NEPA's analysis and disclosure goals are two-fold: (1) to insure that the agency has carefully and fully contemplated the environmental effects of its action, and (2) to guarantee that relevant information is available to the public and other government agencies that play a role in the decisionmaking process. Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 349 (1989); Idaho Sporting Congress v. Thomas, 137 F.3d 1146, 1151 (9th Cir. 1998) overruled on other grounds by The Lands Council v. McNair, 537 F.3d 981 (2008); Western Land Exch. Project v. U.S. Bureau of Land Mgmt., 315 F. Supp. 2d 1068, 1086 (D. Nev. 2004). By focusing the agency's attention on the environmental consequences of its proposed action, NEPA "ensures that important effects will not be overlooked or underestimated only to be discovered after resources have been committed or the die otherwise cast." Robertson, 490 U.S. at 349.

NEPA is required for ESA special rules like that which applies to the red wolf. See In re Polar Bear Endangered Species Act Listing & 4(d) Rule Litig., 818 F. Supp. 2d 214, 238 (D.D.C. 2011) ("The Service erred when it failed to conduct any NEPA review prior to issuing its Special Rule for the polar bear."). The Service completed an EA when it issued the original red wolf

rule. Indeed, the "significance" factors articulated in the Council on Environmental Quality regulations direct agencies to consider, among other factors, "[t]he degree to which the action may adversely affect an endangered or threatened species" under the ESA, 40 C.F.R. § 1508.27(b)(9); "[t]he degree to which the action may establish a precedent for future actions with significant effects or represents a decision in principle about a future consideration" id. § 1508.27(b)(6); and"[t]he degree to which the effects on the quality of the human environment are likely to be highly controversial," id. § 1508.27(b)(4). "An action may be 'significant' if one of these factors is met." Ctr. for Biological Diversity v. Nat'l Highway Traffic Safety Admin., 538 F.3d 1172, 1220 (9th Cir. 2008). See also Steamboaters v. Fed. Energy Regulatory Comm'n, 759 F.2d 1382, 1393 (9th Cir. 1985) (an agency "must supply a convincing statement of reasons why potential effects are insignificant."). An agency does not receive deference in its determination of whether or not NEPA applies to its actions. See In re Polar Bear, 818 F. Supp. 2d at 226. According to the Council of Environmental Quality's guidance on NEPA and its regulations, "[a]n EIS must be prepared if an agency proposes to implement a specific policy" if the policy will have significant environmental effects. 40 Most Asked Questions Concerning CEQ's NEPA Regulations, 46 Fed. Reg. 18,026, 18,033, question 24a (March 23, 1981).

While the agency has not revised the text of its regulations, the unexplained policy revision it has undertaken is effectively the same. A collection of internal agency memos from 1998 and 1999 reveals extensive agency discussions about the capture of non-problem wolves, including alternatives considered and the likely consequences of each. Wheeler Decl., Ex. L. Assistant Regional Director Miranda replies to these memos with the question of "the very last alternative on page 12 is what we have implemented since 1995, Right?" Wheeler Decl., Ex. L., at 14. That alternative is an "Unwritten Policy to not Remove Wolves or Issue Letters in

Absence of a Problem." Wheeler Decl., Ex. L., at 13. Clearly the Service has now reversed course and changed its reading and implementation of the regulations. See Wheeler Decl. ¶ 16. The internal memo notes that these regulations "are not in line with traditional wildlife management concepts, that are probably the most lenient regulations for taking of any endangered species, and that are not in agreement with other wolf reintroduction projects." Wheeler Decl., Ex. L, at 12. This is exactly the type of analysis that should have been undertaken with full input from the public under NEPA, yet no such analysis occurred. Rather, the Service conducted a complete reversal in position without disclosing it or explaining it. See generally, N.Y. Pub. Interest Research Grp., Inc. v. Johnson, 427 F.3d 172, 182-83 (2d Cir. 2005) (agency needed to explain its "180 turn" in position about necessary components for Clean Air Act permits); Sierra Club N. Star Chapter v. LaHood, 693 F. Supp. 2d 958, 973-74 (D. Minn. 2010) (holding that "the agency must explain its reasons for changing its policy.").

Additionally, circumstances have changed significantly since the Service last revised the red wolf rule and program in 1995. 50 C.F.R. § 1502.9(c)(1)(ii). Then, captive red wolves were being reintroduced into the wild population, the population was growing, and the Service was actively managing the population. These changed circumstances warrant a new "hard look" at the Service's actions. See Hughes River Watershed Conservancy v. Glickman, 81 F.3d 437, 443 (4th Cir. 1996) ("NEPA requires agencies to take a hard look at the environmental consequences of their proposed projects even after an EIS has been prepared."); Miccosukee Tribe of Indians of Fla. v. United States, 420 F. Supp. 2d 1324, 1333-34 (S.D. Fla. 2006) (noting that "changes implemented by the Corps could hardly be insignificant" and thus required supplemental NEPA review).

Plaintiffs are likely to succeed on the merits of their claims that the Service violated NEPA. Until the Service conducts a full and public analysis of its *current* application of the red wolf rule on the *current* population of red wolves, its removal of wolves and authorization of private landowners to take wolves pursuant to 50 C.F.R. § 17.84(c) should be enjoined.

II. Plaintiffs Are Likely to Suffer Irreparable Harm if an Injunction Is Not Granted.

Defendants' actions have set the red wolf on a path toward extinction in the wild. Given the current state of the world's only wild population, the interests of Conservation Organizations and their members of seeing, hearing, and enjoying these animals in the wild is at imminent risk of irreparable harm. See Vucetich Decl., ¶ 30 ("With 8 or few breeding pairs, this population is already perilously small and the most likely outcome of the U.S. Fish and Wildlife Service's actions will not easily be undone."). At current severely diminished population levels, the death of even one wolf is likely to have significant repercussions on the red wolf population, both in terms of current numbers and future recovery due to impaired genetic diversity. See Vucetich Decl., ¶ 18 ("The death of a single wolf in a population as small as 45-60 animals could have lasting impacts on the population and impair the ability of the population to recover."); Karlin Decl., ¶ 10.

The Service's direct and authorized take of red wolves irreparably harms Plaintiffs' recreational and aesthetic interests in observing and enjoying red wolves in the wild. See generally, Wheeler Decl.; Prater Decl.; Beeland Decl.; Declaration of Cathy A. Liss ("Liss Decl."), Pls.' Att. 8; Declaration of Mark A. MacAllister ("MacAllister Decl."), Pls.' Att. 9. It is well-established that harm to a plaintiff's aesthetic or recreational interests is a cognizable injury. Fund for Animals v. Lujan, 962 F.2d 1391, 1396 (9th Cir. 1992) (citing Sierra Club v. Morton, 405 U.S. 727, 734 (1972)). A plaintiff's aesthetic and recreational interests are harmed by

actions that impair his or her enjoyment of the environment. Sierra Club v. U.S. Army Corps of Eng'rs, 645 F.3d 978, 995-96 (8th Cir. 2011) (finding that construction of a power plant harmed plaintiff by "interfer[ing] with [his] interests in studying and enjoying the environment"). Thus, a plaintiff is harmed by actions that impair his or her ability to enjoy wildlife in its natural environment. See Humane Soc'y of the U.S. v. Hodel, 840 F.2d 45, 52 (D.C. Cir. 1988) (finding harm where action would "deplet[e] the supply of animals and birds that refuge visitors seek to view"); see also Alaska Fish & Wildlife Fed'n & Outdoor Council v. Dunkle, 829 F.2d 933, 937 (9th Cir. 1987) (finding that a decrease in the number of migratory birds due to unlawful killing "has injured those who wish to hunt, photograph, observe, or carry out scientific studies on the migratory birds"); see also Japan Whaling Ass'n v. Am. Cetacean Soc'y, 478 U.S. 221, 230, n. 4 (1986) (finding that unlawful killing of whales harmed those who wish to observe or study the whales).

A plaintiff's recreational and aesthetic interests are also harmed by actions that force him or her to contemplate the violent deaths of animals that the plaintiff enjoys studying or seeing in the wild. See Humane Soc'y v. Hodel, 840 F.2d at 52 (finding harm where the "existence of hunting on wildlife refuges forces [Humane Society] members to witness animal corpses and environmental degradation …."); see also Fund for Animals v. Clark, 27 F. Supp. 2d 8, 14 (D.D.C. 1998) (finding that plaintiffs could be harmed by "seeing or even contemplating" bison being killed through an organized hunt on federal lands). Such injury is undoubtedly present for Conservation Organizations and their members for both lethal and nonlethal removals. See, e.g., Wheeler Decl. ¶ 30; Beeland Decl., ¶ 11; see also Vucetich Decl. ¶ 24 ("When a wolf is around unfamiliar people or circumstances—such as being held in captivity of released in an unfamiliar area—it experiences negative affective responses (emotions), such as fear and anxiety.").

Harm to a person's aesthetic and recreational interests in enjoying wildlife is irreparable harm because it cannot be undone. The Supreme Court has emphasized that "[e]nvironmental injury, *by its nature*, can seldom be adequately remedied by money damages and is often permanent or at least of long duration, i.e., irreparable." Amoco Prod. Co. v. Vill. of Gambell, 480 U.S. 531, 545 (1987) (emphasis added); S.C. Dep't of Wildlife & Marine Res. v. Marsh, 866 F.2d 97, 100 (4th Cir. 1989) (same). Environmental injuries are irreparable because they affect interests that "are not ownership interests in property susceptible to monetary valuation." Fund for Animals v. Espy, 814 F. Supp. 142, 151 (D.D.C. 1999). In essence, for the purpose of a preliminary injunction, the terms "environmental" and "irreparable" are interchangeable modifiers of "harm." See Fla. Key Deer v. Brown, 386 F. Supp. 2d 1281, 1286 (S.D. Fla. 2005), aff'd sub nom. Fla. Key Deer, 522 F.3d at 1133 (stating that "in determining whether the irreparable injury prong has been satisfied, the Court considers whether environmental harm is likely to occur.").

Therefore, courts will generally provide injunctive relief when the unlawful killing of endangered or threatened animals is likely. See, e.g., Animal Welfare Inst. v. Beech Ridge Energy LLC, 675 F. Supp. 2d 540, 580 (D. Md. 2009) (stating that "[b]ecause the Court has found that the Beech Ridge Project will take Indiana bats, injunctive relief is appropriate …."). Courts grant injunctive relief in these circumstances because the injury caused by the killing of wildlife is a paradigmatic example of irreparable harm – the deaths are permanent and cannot be remedied with money damages. See Sierra Club v. Martin, 71 F. Supp. 2d 1268, 1327 (N.D. Ga. 1996) (enjoining logging that would destroy "sensitive plants and animals" because "[n]o monetary award can recompense this injury"); see also Fund for Animals, 814 F. Supp. at 151 (enjoining a bison hunt because "the sight, or even the contemplation, of treatment in the manner

contemplated of the wild bison . . . would inflict aesthetic injury … not compensable in money damages ….”). Furthermore, because the procedural safeguards of the ESA and NEPA are designed to prevent such substantive, irreparable harm, establishing irreparable harm for procedural violations should not be “an onerous task for plaintiffs.” Cottonwood Envtl. Law Ctr., 789 F.3d at 1091.

Plaintiffs will suffer irreparable harm to their recreational and aesthetic interests if this Court does not grant injunctive relief. The Service’s lethal and nonlethal removals of red wolves, harms the recreational and aesthetic interests of Plaintiffs and their members in two major ways. First, the Service’s direct takes and authorizations for landowner takes harm the health and recovery of the wild red wolf population, which affects the ability of Plaintiffs and their members to see, hear, study, photograph, and otherwise enjoy red wolves in their natural habitat. Second, the direct harm to individual red wolves and their mates or packs affects the ability of Plaintiffs and their members to enjoy red wolves in the wild by forcing them to contemplate the harm and suffering of red wolves.

In this case, the loss of even a few red wolves is likely to have a significant impact on Plaintiffs’ ability to enjoy red wolves in the wild. Given that there are only about 45 known red wolves in the wild, any red wolf deaths have a significant impact on the red wolf population and species recovery. See Vucetich Decl. ¶ 18; Karlin Decl. ¶ 10.

Furthermore, the Fourth Circuit explained regarding red wolves themselves:

> Once a species has been designated as endangered, there are by definition only a few remaining animals. Therefore, the effects … should not be viewed from the arguably small [] effect of one local taking, but rather from the effect that single takings multiplied would have on advancing the extinction of a species. Each taking impacts the overall red wolf population …

Gibbs, 214 F.3d at 498.

Indeed, the wolf killed last June pursuant to a take authorization exemplifies the many layers of harm attendant to private lethal takes of wolves. See, e.g., Wheeler Decl. ¶ 24, Ex. K. The wolf killed was a breeding wolf that had previously mothered 16 pups through 4 different litters. Wheeler Decl., Ex. K. The wolf may have been nursing a litter when killed, and any nursing pups would have been at greater or certain risk of death without their mother. Wheeler Decl., Ex. K. The killed wolf's mate is now more likely to breed with coyotes and contribute to the hybridization of the red wolf and coyote. See Vucetich Decl. ¶ 20; Prater Decl. ¶ 20, Ex. D (Bohling and Waits Article (2015)).

Based on existing case law and the facts before this Court, Plaintiffs have shown irreparable harm resulting from the Service's implementation of a practice of allowing for lethal and non-lethal removal of non-problem wolves and simultaneous abandonment of actively managing the red wolf population. If allowed to continue, the red wolf population will almost certainly continue to decline. The Court should grant Plaintiff's Motion for Preliminary Injunction to ensure that the red wolf population does not continue to spiral toward extinction or become extinct pending resolution of the merits of this case.

III. The Balance of Harms and the Public Interest Justify Granting Injunctive Relief.

Congress has made it "abundantly clear that it has given the policy of conservation of endangered species 'the highest of priorities.'" Am. Rivers, 271 F. Supp. 2d at 261 (quoting TVA, 437 U.S. at 194). The "'language, history, and structure' of the ESA demonstrates Congress' determination that the balance of hardships and the public interest tips heavily in favor of the protected species." Nat'l Wildlife Fed'n v. Burlington N. R.R., 23 F.3d 1508, 1511 (9th Cir. 1994) (citing TVA, 437 U.S. at 174); Friends of the Earth v. U.S. Navy, 841 F.2d 927, 933 (9th Cir. 1988).

Protection of endangered species is in the public interest because endangered species "are of 'esthetic, ecological, educational, historical, recreational, and scientific value to the Nation and its people.'" Gibbs, 214 F. 3d at 487 (quoting 16 U.S.C. § 1531(a)(3) (1994)). In Gibbs, the Fourth Circuit specifically noted that the wild red wolf population creates multiple public benefits, from tourism and opportunities for scientific research to the reduction of animals that harm farming enterprises, such as raccoons, deer, and rabbits. Gibbs, 214 F.3d at 494-95. Simply put, conservation of the red wolf is in the best interest of the public because "[i]f we conserve the species, it will be available for the study and benefit of future generations." Gibbs, 214 F.3d at 496.

While the public interest is harmed by the Service's actions causing the unlawful take of red wolves, neither the Service nor the public will be harmed by an injunction against the continued lethal and non-lethal removal of non-problem red wolves from private lands. The nearly 30-year history of this program has demonstrated that wolves cause very few problems for private landowners. Moreover, Plaintiffs have asked to enjoin only the removal of *non-problem* wolves. This preserves the ability of the Service and individuals to respond to wolves that are threatening human safety or the safety of livestock or pets, and it returns to longstanding Service practice before its recent re-interpretation of its regulations. Wheeler Decl., Ex. L.; see also 50 C.F.R. § 17.84(c)(4)(iii), (iv) (permitting private landowners to take wolves in the act of killing livestock or pets and permitting landowners to harass wolves found on their property). Indeed, enjoining the Service from issuing take authorizations or from responding to every request for removal of non-problem red wolves will reduce the workload of current red wolf staff and allow them to focus, as previously, on affirmative conservation measures to restore the wolf. Such an injunction will not cost the Service additional time, money, or resources.

Any minimal impacts to the Service or to the public that may occur cannot overcome the strong public interest in conservation of endangered species codified in the ESA. Again quoting the Fourth Circuit in Gibbs v. Babbitt:

> Extinction, after all, is irreversible. If a species becomes extinct, we are left to speculate forever on what we might have learned or what we may have realized. If we conserve the species, it will be available for the study and benefit of future generations. In any event, it is for Congress to choose between inaction and preservation, not for the courts.

214 F.3d at 496.

In light of the ESA's conservation mandate, and the serious threat to red wolves posed by the lethal and nonlethal removal of red wolves in the Recovery Area, the balance of harms and the public interest demonstrate that Plaintiffs' requested preliminary injunction should be granted.

CONCLUSION

For the above reasons, Plaintiffs respectfully request that this Court grant this Motion for Preliminary Injunction.

Respectfully submitted, this the 20th day of June, 2016.

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CERTIFICATE OF SERVICE

I hereby certify that on June 20, 2016, I electronically filed the foregoing **MEMORANDUM IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION** with the Clerk of the Court using the CM/ECF system, which will automatically send notification of such filing to counsel for Defendants.

This the 20th day of June 2016.

/s/ Sierra B. Weaver

Sierra B. Weaver