

**BEFORE THE U.S. FISH AND WILDLIFE SERVICE**

**EMERGENCY PETITION TO REVISE**

**THE RED WOLF'S 10(j) RULE**



Photo Credit: B. Barte/U.S. Fish and Wildlife Service

**ANIMAL WELFARE INSTITUTE**  
**CENTER FOR BIOLOGICAL DIVERSITY**  
**ENDANGERED SPECIES COALITION**  
**SOUTH FLORIDA WILDLANDS ASSOCIATION**  
**WILDEARTH GUARDIANS**  
**WILDLANDS NETWORK**  
**WOLF CONSERVATION CENTER**

**MAY 24, 2016**

The Honorable Sally Jewell  
Secretary  
Department of the Interior  
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The Honorable Dan Ashe  
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Dear Secretary Jewell and Director Ashe,

The Animal Welfare Institute, Center for Biological Diversity, Endangered Species Coalition, WildEarth Guardians, Wildlands Network, and the Wolf Conservation Center hereby submit this emergency petition to the U.S. Department of the Interior and the U.S. Fish and Wildlife Service (Service) to strengthen existing regulations for the red wolf to stem the rapid decline of the only wild population of red wolves in the world. In the last several years, the red wolf's wild population has fallen by approximately 50 percent. At present there may as few as 45 red wolves left in the wild, and the species could be soon extirpated if the Service refuses to take action to better protect it. As records recently obtained via a Freedom of Information Act request confirm, the Service is deliberately abandoning the red wolf program against the advice and recommendations of its own staff biologists, who have pressed the Service to better address illegal red wolf shootings. Unfortunately, their calls to action have been ignored and stymied by upper-level political management within the Service.

Our emergency petition requests that the Service meet its mandatory duty to protect and conserve the red wolf by revising the current red wolf regulations under Section 10(j) of the Endangered Species Act in order to reduce shooting deaths, establish additional wild populations of red wolves in the wild, and reclassify all reintroduced populations of red wolves as "essential" experimental populations.<sup>1</sup>

For all of the reasons explained below, the Service must grant our petition and take emergency actions to strengthen and revise the current red wolf 10(j) regulations. Should the Service fail to respond to this petition in a timely manner, the Petitioners may pursue relief in federal court.<sup>2</sup>

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<sup>1</sup> 16 U.S.C. § 1539(j); 50 CFR § 17.84(c)

<sup>2</sup> The Petitioners and their members are "interested persons" within the meaning of the APA. *See* 5 U.S.C. § 553(e) (granting any "interested person the right to petition for the issuance, amendment, or repeal of a rule"); *see also* 5 U.S.C. § 702 & § 551(13) (providing that "agency action" includes "the whole or a part of an agency rule, ... or the equivalent or denial thereof, or failure to act"); *id.* § 706(1) & (2)(A) (granting a reviewing court the authority to "compel agency action unlawfully withheld or unreasonably delayed" and/or to "hold unlawful and set aside agency action ... found to be... arbitrary, capricious, an abuse of discretion")

## **I. The Service is Illegally Dismantling the Once Successful Red Wolf Recovery Program**

Genetically and morphologically distinct from gray wolves, red wolves (*Canis rufus*) are the only wolf species found completely within the United States.<sup>3</sup> Although once abundant across the Southeast and elsewhere, red wolves faced near-extinction by the 1960s due to decades of persecution that aimed to eliminate them from the landscape.

Under a precursor to the Endangered Species Act, the red wolf gained protection as an endangered species in 1967.<sup>4</sup> In 1975, after a remnant population of red wolves was located along the Gulf coast of Texas and Louisiana, the Service captured 17 wild red wolves for a captive breeding program, and thereafter declared red wolves to be extinct in the wild.<sup>5</sup> In 1986, the Service established a “nonessential experimental population” of red wolves at the Alligator River National Wildlife Refuge in northeastern North Carolina, returning the species to the wild after a ten-year absence.<sup>6</sup> Since then, the experimental population area had expanded to include three national wildlife refuges, a Department of Defense bombing range, state-owned lands, and private property, spanning a total of 1.7 million acres.

Reintroduction of these wolves into the wild was a monumental step forward for the red wolf, but the specific language of the 10(j) rule that governs management of this reintroduced population has had negative long-term consequences for the recovery of the red wolf.<sup>7</sup> The existing 10(j) rule is the result of amendments in 1995 to the 10(j) rule that added provisions for taking red wolves on private property.<sup>8</sup> The current 10(j) rule authorizes killing of wild wolves under numerous circumstances, thereby perpetuating the threats that caused the red wolf to decline to near-extinction. The permissive language of that rule has permitted excessive levels of human-caused mortality, preventing the population from growing beyond approximately 100-120 wolves in the wild.<sup>9</sup> The rule’s structure has helped facilitate the Service’s recent abandonment of the program and cause the population to fall by half.

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<sup>3</sup> Nowak 2002, Brzeski et al. 2016

<sup>4</sup> 32 Fed. Reg. 4001 (March 11, 1967)

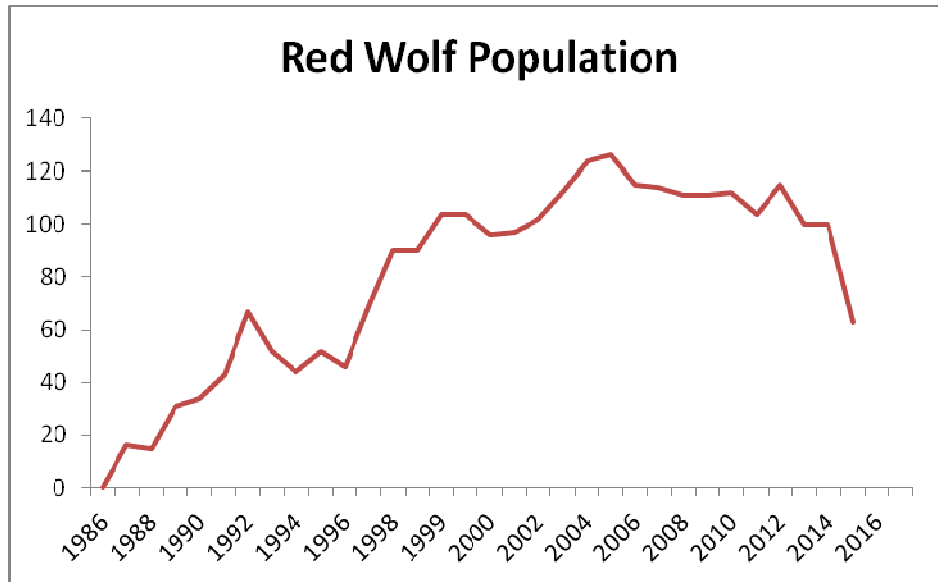
<sup>5</sup> Gilbreath and Henry 1998

<sup>6</sup> 51 Fed. Reg. 26564, 26569 (July 24, 1986)

<sup>7</sup> Phillips 1990

<sup>8</sup> 56 Fed. Reg. 56325 (April 13, 1995)

<sup>9</sup> Hinton et al. 2013, Hinton et al. 2015a, Hinton et al. 2015b

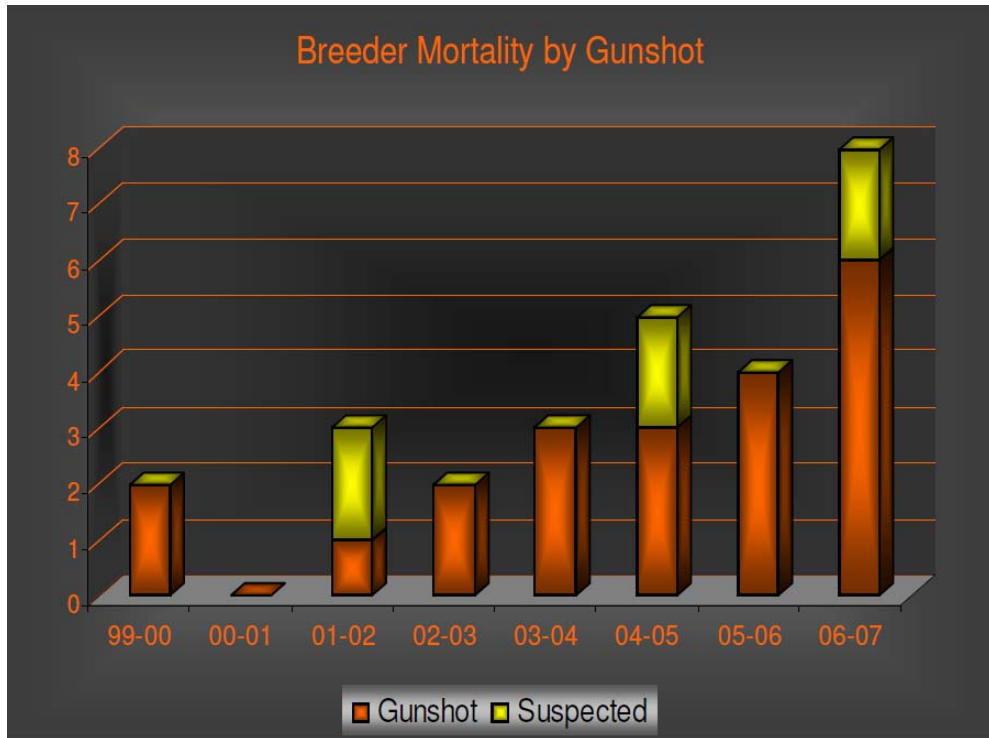


In 2007, the Service completed a five-year status review for red wolves, which recommended that the Service work to establish a second and third red wolf population in the wild.<sup>10</sup> The status review also recommended the implementation of measures to reduce the rate of anthropogenic mortality, including efforts to work with states and local municipalities to enact regulations aimed at reducing gunshot mortality and vehicle strikes. The 2007 status review identified “making improvements in the current experimental rule” as a means of addressing some of the threats and problems with the reintroduction effort.<sup>11</sup> Likewise, since the 2007 review, scientists both within and outside the Service have recommended revising the 10(j) rule.<sup>12</sup>

<sup>10</sup> USFWS 2007, p. 35

<sup>11</sup> *Id.* at 28.

<sup>12</sup> Parker and Phillips 1991, Gilbreath and Henry 1998, USFWS 1999



Source: U.S. Fish and Wildlife Service. 2007.Red wolf (*Canis rufa*) 5-Year Status Review: Summary and Evaluation at page 29.

In May of 2011, the red wolf recovery director, David Rabon, wrote a memorandum to the Service’s Southeast Regional Director explaining why revisions to the 10(j) rule were needed. He explained:

Increasing levels of anthropogenic-caused mortality (e.g., gunshot, illegal trapping, poisoning) in red wolves, public misconceptions about red wolves, and changes in the strategies to manage red wolves and other wild canids warrant a revision and clarification of the NEP [nonessential experimental population] rule. The current NEP rule is no longer effective to address the current and future management needs of the red wolf, and is precluding the development of sound management strategies for this and other species of management interest (e.g., coyotes, foxes).<sup>13</sup>

He further explained:

Since 2004, the [Red Wolf Recovery Program] has witnessed a steady increase in the number of wolves killed by gunshot or other similar illegal activity. We have recorded 83 wolves taken as the result of anthropogenic-caused activities since the wolves were reintroduced in 1987. Beginning in 2004, the number of wolves killed as a result of these types of actions increased to nearly seven (7) wolves per year, compared to about two (2) wolves lost per year between 1987

<sup>13</sup> USFWS 2011b; see also USFWS 2013 at 21 (providing nearly identical information in the draft, unpublished revised 10(j) rule)

and 2003. Furthermore, approximately 60% of the wolves killed have been breeders. This level of take appears to be having a negative effect on population growth because it results in the loss of a breeding pair and potentially their reproductive effort. In addition, responding to the loss of wolves requires an unnecessary reallocation of time and resources to counter its effects (e.g., increased hybridization, increase in the number of coyotes filling space created by the loss of a wolf, reduced recruitment of red wolves). We believe this rise in anthropogenic caused mortality is the result of (1) a misunderstanding of the legality of actions that result in take, (2) a misconception of activities that are exempt from take under the NEP designation; (3) general misconceptions about red wolves and the presence of coyotes; and, (4) an increased interest by the public and the State of North Carolina (i.e., NCWRC) to “manage” nuisance coyotes. We would revise the NEP rule to clarify the legality of actions that constitute take and the exemptions for take of red wolves as it relates to our management strategies (described above) and to reduce the potential for illegal anthropogenic-caused mortality (e.g., gunshot, illegal trapping, poisoning).<sup>14</sup>

In the fall of 2011, the Service included potential updates to the 10(j) rule as part of its unified regulatory agenda that is presented to the White House Office of Management and Budget.<sup>15</sup> The Service explained that the intent of the rule was: “(1) To simplify reintroduced population information; (2) to explain changes in the protocols to manage red wolves and other canids; and (3) to clarify the legality of actions and the exemptions for take of red wolves.”<sup>16</sup> The Service intended to publish a proposed rule by December of 2013 and a final rule by November of 2014.

Despite its clear intention to revise the rule, the Service has not yet done so. However, records from a Freedom of Information Act request show that the Service had completed a draft revision of the rule by 2013. The draft rule confirms several important facts about the red wolf’s recovery:

- “[T]here is likely enough space available for wild red wolves to establish additional territories and that population expansion could continue in subsequent years” in the North Carolina reintroduction area.<sup>17</sup>
- From 1987 through 2013, the leading causes of wild red wolf mortality in North Carolina were: “gunshot (23.6%), vehicle strikes (19.2%), management (4.6%), health-related/disease (15.7%), intraspecific aggression (6.5%), accidental loss during private trapping activity (3.8%), poison (3.0%), other suspected illegal take (3.8%), and unknown causes (19.8%).”<sup>18</sup>
- “The red wolf poses virtually no threat to livestock in situations where its natural prey is abundant. As of June 2013, the reintroduced population of red wolves in northeastern

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<sup>14</sup> *Id.*; see also USFWS 2013 at 23-24 (providing nearly identical information in the unpublished revised 10(j) rule)

<sup>15</sup> USFWS 2011a

<sup>16</sup> *Id.*

<sup>17</sup> USFWS 2013 at 8

<sup>18</sup> *Id.* at 10

North Carolina has been responsible for only 5 confirmed livestock depredations since 1987 (USFWS unpubl.).”<sup>19</sup>

- “In recent years, red wolf mortalities resulting from gunshot have increased substantially.”<sup>20</sup>

Most notably, the unpublished draft rule would have removed the provision found at 50 C.F.R. § 17.84(c)(4)(ii) which allows for incidental take that is “incidental to lawful activities” and would have greatly curtailed take of red wolves when such animals are considered potential nuisance animals.<sup>21</sup>

In July 2014, Ryan Nordsven, a red wolf biologist with the Service, sent an email to the Southeast Regional Director and Assistant Regional Director highlighting the urgent need to revise the 1995 10(j) rule — which included a promise from the Service to revisit the take exemptions in the rule to determine if excessive illegal take of red wolves was occurring — and address the threats to the red wolf:

It has been our experience during the better part of the last decade that excessive taking of red wolves is indeed occurring because of the revised special rule. We believe it has led to not only less wolves on the landscape and less pup recruitment via a high percentage of breeder mortality, but also increased hybridization with coyotes through disruption of pack stability, all of which has greatly hindered our ability to recover red wolves. At any rate, since issuing the statement of intention to “revisit this issue,” almost 20 years have now passed with no reassessment of the rule revision taking place (despite requests from Red Wolf Recovery Program staff to do so).<sup>22</sup>

In addition to Service staff and biologists confirming the need to revise the red wolf regulations, outside scientists have also confirmed the need to bring additional resources to bear to recover the red wolf. A November 2014 Wildlife Management Institute report concluded that although the red wolf reintroduction program has been initially successful, **further recovery depends on establishment of at least two additional populations** and the Service needs to spend more resources to build local stakeholder support for the program.<sup>23</sup>

Unfortunately, and despite the recommendations from staff on the ground to provide more assistance to the red wolf, the leadership of the Service has severely and deliberately mismanaged the Red Wolf Recovery Program, causing significant declines in the red wolf population. The Service eliminated the red wolf recovery coordinator position in August of 2014 without any legitimate rationale to support this decision. It also ended its coyote sterilization

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<sup>19</sup> *Id.* at 20

<sup>20</sup> *Id.*

<sup>21</sup> *Id.* at 37-46

<sup>22</sup> USFWS 2014b

<sup>23</sup> WMI 2014

efforts in early 2015, despite evidence that use of such “placeholder” coyotes reduced production of hybrid litters and thereby limited genetic introgression.<sup>24</sup>

Moreover, citing no legal authority to do so, the Service announced in June of 2015 that it was halting all red wolf releases to do a “feasibility study” of the Red Wolf Recovery Program.<sup>25</sup> Making matters even worse, the Service stopped its public education program. The Service has also curtailed investigations and prosecutions of suspected illegal red wolf mortalities. In fact, the Service did not issued any timely law enforcement press releases seeking information on illegally killed red wolves between 2014 and April of 2016, even though numerous wolves were killed by suspected or confirmed gunshot and/or illegal take during this time period.

Put simply, the Service appears to have washed its hands of the Red Wolf Recovery Program, likely condemning the species to extinction in the wild within the next few years. Since 2013, the Service’s own data shows that the red wolf’s wild population has fallen by nearly 50 percent, as indicated in the table below.<sup>26</sup> To save the red wolf, a stronger 10(j) rule is required to launch additional reintroductions and curtail the discretion of the Service and its Director to prevent any mismanagement of the Red Wolf Recovery Program and to limit further harm to the red wolf by the Service.

## **II. The Red Wolf Must Be Reintroduced To Additional Areas**

The ESA provides that the Service may introduce experimental populations of threatened and endangered species back into the wild in their historic range where they are extirpated.<sup>27</sup> Pursuant to that authority, the 1990 Red Wolf Recovery Plan called for the reintroduction of wolves into at least three areas within the wolf’s historic range (USFWS 1990). Specifically, the Plan’s objectives include:

- Establish and maintain at least three red wolf populations via restoration projects within the historic range of the red wolf. Each population should be numerically large enough to have the potential for the natural evolutionary processes to work within the species; and
- Remove threats of extinction by achieving a wild population of approximately 220 wolves and a population of approximately 330 wolves.<sup>28</sup>

The recent Wildlife Management Institute report (2014) reaffirmed the need for additional reintroduction. The report found that: “Successful accomplishment of the current recovery plan objectives will require identification of suitable areas and reintroduction of red wolves to 2 other distinct locations within historic red wolf range.”<sup>29</sup>

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<sup>24</sup> Hinton and Chamberlain 2014, Gese and Terletzky 2015, Murray et al. 2015.

<sup>25</sup> The Service planned to finish its feasibility study at the end of 2015 but has now pushed back its completion date until summer of 2016 (USFWS 2015).

<sup>26</sup> USFWS 2016

<sup>27</sup> 16 U.S.C. § 1539(j)

<sup>28</sup> USFWS 1990, p. 10

<sup>29</sup> WMI Report at 3



There are many reasons why reintroduction into additional sites is necessary for red wolf survival and recovery. First, a greater number of reintroduction sites allows for the eventual establishment of a healthy metapopulation, featuring interactions between populations to achieve the necessary exchange of genetic material critical to species restoration and eventual delisting. Increased genetic diversity from additional reintroductions will further act to mitigate inbreeding depression associated with small isolated populations.<sup>30</sup>

Expansion of the reintroduction program is also of critical importance to the management of disease.<sup>31</sup> With only one wild red wolf population, disease has the potential to spread and wipe out that population. The establishment of at least two more reintroduction sites within red wolf historic range could partly alleviate disease risk.<sup>32</sup> Furthermore, expanding recovery efforts across the red wolf's historic range will facilitate evolutionary processes, such as natural selection, that are needed to promote adaptation and population persistence in anthropogenic landscapes.<sup>33</sup>

Scientists have developed criteria for assessing potential reintroduction sites.<sup>34</sup> Considerations include: 1) reproductive isolation from coyotes; 2) adequate prey base (i.e. white-tailed deer); 3) minimum space requirements; 4) human and road densities; and 5) tolerant landowners and supportive institutions. Experience has shown that red wolves will use human-associated landscapes and can thrive if protected from shooting and trapping. They prefer lowland forests and wetlands as naturally occurring habitats and agricultural fields and pine plantations as human-altered habitats.<sup>35</sup> Red wolves prefer areas with secondary roads for their hunting and visibility needs as long as human density remains low.<sup>36</sup>

The fear of red wolf hybridization with coyotes has been one of greatest concerns associated with reintroduction efforts. Yet in larger populations, red wolves will likely have less incidence of hybridization with other species of canids, as red wolves will have a larger pool of available mates.<sup>37</sup>

Scientists have identified numerous potential areas for red wolf reintroduction. Possibilities include:

- Central Coastal North Carolina, including Croatan National Forest<sup>38</sup>
- Daniel Boone National Forest in eastern Kentucky<sup>39</sup>

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<sup>30</sup> Brzeski et al. 2014; USFWS 2007, p. 10

<sup>31</sup> Brzeski et al. 2015

<sup>32</sup> Bartel and Rabon 2013

<sup>33</sup> Bartel and Rabon 2013

<sup>34</sup> Kelly et al. 1999, p. 49-52; Shaffer 2007; van Manen et al. 2000

<sup>35</sup> Dellinger et al. 2013

<sup>36</sup> *Id.*

<sup>37</sup> Sparkman et al. 2012, Hinton et al. 2015a, Bohling and Waits 2015

<sup>38</sup> Shaffer 2007

<sup>39</sup> Jacobs 2009

- Central Panhandle in Florida, including Apalachicola National Forest and St. Marks National Wildlife Refuge<sup>40</sup>
- Okefenokee ecosystem in Georgia, including Okefenokee National Wildlife Refuge and Banks Lake National Wildlife Refuge<sup>41</sup>
- Northwestern Alabama<sup>42</sup>
- Everglades National Park and Big Cypress National Preserve<sup>43</sup>

This petition does not analyze the various potential reintroduction areas, but Petitioners ask that the Service use its expertise to establish at least two additional reintroduction sites, consistent with the 1990 Recovery Plan, 2007 status review, and the guidance provided by the Wildlife Management Institute 2014 report.

### **III. The Only Remaining Red Wolves in the Wild Must Be Considered “Essential” Experimental Populations**

Under the ESA, the Service must determine if an experimental population of reintroduced red wolves is “essential to the continued existence of an endangered species.”<sup>44</sup> The consequences of designation as essential or nonessential are significant.<sup>45</sup> If the experimental population is deemed “essential,” the species is treated as “threatened” and can receive the full protection afforded by the ESA, including designation of critical habitat, and all agencies must consult with the Service under Section 7 of the ESA if an action may affect the experimental population.<sup>46</sup> In contrast, critical habitat cannot be designated for nonessential populations, and members are afforded full Section 7 protections only within the National Wildlife Refuge system and the National Park system.

Although the ESA does not define what is required for an experimental designation to be deemed “essential,” the Congressional intent is fairly clear: “The Secretary shall consider whether the loss of the experimental population would be likely to appreciably reduce the likelihood of survival of that species in the wild. If the Secretary determines that it would, the population will be considered essential to the continued survival of the species.”<sup>47</sup> In other words, the relevant question here is whether survival of the red wolf in the wild would be reduced by loss of those wild wolves.

When the red wolf was reduced to captivity in 1980 — causing its extirpation in the wild — the experimental population at Alligator River National Wildlife Refuge should have been considered “essential” to the species’ existence because it was the only wild population in

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<sup>40</sup> van Manen et al. 2000

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> USFWS 1990, p. 13

<sup>44</sup> 16 U.S.C. § 1539(j)(2)(B)

<sup>45</sup> Parker and Phillips 1991

<sup>46</sup> 16 U.S.C. § 1539(j)(2)(C)

<sup>47</sup> H.R. Conference Report No. 835 (quoted in Parker and Phillips 1991)

existence. That population remains the only wild population, so it must, by definition, be considered “essential.”

By deeming that wild population of red wolves as “nonessential,” the Service in effect has suggested that recovery of the red wolf in the wild is optional and that survival of the species in captivity is somehow sufficient. The Service has wrongly argued that a “nonessential” designation is appropriate because red wolf survival is ensured by the strong captive breeding program.<sup>48</sup> But a captive breeding program is not sufficient to ensure “likelihood of survival of that species in the *wild*” and the ESA’s clear goal to achieve the recovery of listed species in the wild.<sup>49</sup>

Moreover, in captive-bred populations, artificial selection may promote traits that make the animal more successful in captivity but less successful in the wild. Wild populations, in contrast, are subject to natural evolutionary process that increase genetic diversity and help ensure that the wolf can survive and recover. Given the importance of these genetically unique wild wolves, the only remaining wild population must be deemed essential.

The Service was wrong when it designated the only wild red wolf population as a nonessential, experimental population. Because the recovery plan calls for at least three reintroduced populations, the next two experimental reintroduced populations — called for in the Recovery Plan and in this petition — should similarly be identified as “essential.” As such, this petition seeks to reclassify reintroduced populations as “essential,” consistent with the conservation purpose of the ESA.

#### **IV. The 10(j) Rule for Red Wolves Must Be Revised To Reduce Shooting Deaths**

The Service has found that gunshot mortality is a “serious threat” to red wolves that is “hampering the ability of the red wolf” to recover.<sup>50</sup> Gunshot mortality has “reduced the number of breeding pairs and pups” and “the population consequences of such mortality is highly limiting.”<sup>51</sup> From 2004 to 2012, the average annual number of gunshot-caused mortalities has increased approximately 375 percent when compared to 1988 to 2003.<sup>52</sup> Between 2012 and 2015, an estimated 30 out of 65 red wolf deaths were caused by shooting.<sup>53</sup>

By lowering the number of red wolves in the recovery area, gunshot mortality also potentially increases red wolf inbreeding and promotes red wolf hybridization with coyotes.<sup>54</sup> Bohling and Waits (2015) found that over half of the observed wolf-coyote hybridization events followed the

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<sup>48</sup> Parker and Phillips 1991

<sup>49</sup> H.R. Conf. Rep. No. 835 (emphasis added); *Trout Unlimited v. Lohn*, 559 F. 3d 946, 957 (9th Cir. 2009) (“the ESA’s primary goal is to preserve the ability of natural populations to survive in the wild.”)

<sup>50</sup> USFWS 2007, p. 28

<sup>51</sup> *Id.* at 29.

<sup>52</sup> Bartel and Rabon 2013

<sup>53</sup> USFWS 2016

<sup>54</sup> Kelly and Phillips 2000, p. 249-51; Hinton et al. 2015a; Way 2014

disruption of a stable breeding pair of red wolves due to mortality of one or both breeders, and that humans caused 69 percent of these deaths, primarily through gunshot mortality prior to the red wolf breeding season. The scientists conclude that disruption of stable breeding pairs of red wolves facilitates hybridization, jeopardizing future recovery of the red wolf.

The current 10(j) rule is the product of amendments in 1995 that liberalized the legal shooting of wolves and has driven much of the gunshot mortality.<sup>55</sup> Indeed, that rule is one of the most liberal rule for killing endangered species ever promulgated. For this reason, the 1995 amendments have been the target of criticism by scientists — even from within the Service — who conclude that too many wolves can be killed under them.<sup>56</sup> This petition requests changes to the red wolf 10(j) rule because the structure of the current 10(j) rule allows people to shoot wolves in too many situations.

One of the most problematic exceptions to the prohibition on take of red wolves is that “[a]ny person may take red wolves found on private land” if “such taking is not intentional or willful.”<sup>57</sup> Anyone can say they mistakenly killed a red wolf by claiming that they believed it was a coyote — and thereby fall within this exception.<sup>58</sup> This permissive allowance of lethal take gives a wink-and-a-nod to anyone that wants to kill a red wolf.<sup>59</sup> Indeed, the previous Coordinator for the Red Wolf Recovery Program explained that “potential mis-management of nuisance canids will most certainly compromise the recovery of the red wolf unless the [non-essential experimental population] rule is revised to address and clarify management strategies and the legal of actions or exemptions of take of red wolves.”<sup>60</sup> Our proposed revised 10(j) rule, provided in the following section of this petition, removes this exception for unintentional take, which will lead to fewer deaths by encouraging people to make a positive identification before shooting. Even so, prosecutorial discretion will likely lead to very few prosecutions of people who claim they did not intend to kill a protected wolf.<sup>61</sup>

The current 10(j) rule also allows private landowners or their agents to kill wolves “in the act of killing livestock or pets.”<sup>62</sup> While the Service has stated that providing tools for private

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<sup>55</sup> 60 Fed. Reg. 18940 (April 13, 1995)

<sup>56</sup> Phillips et al. 2003, USFWS 1999

<sup>57</sup> 50 C.F.R. § 17.84(c)(4)(i)

<sup>58</sup> Recognizing the impact of red wolf shootings based on mistaken identification, the U.S. District Court for the District of North Carolina preliminarily enjoined coyote hunting in the Red Wolf Recovery Area in May 2014 after six red wolves were shot to death in the fall of 2013. *Red Wolf Coal. v. N.C. Wildlife Res. Comm’n*, No. 2:13-CV-60-BO, 2014 U.S. Dist. LEXIS 65601 (E.D.N.C. May 13, 2014). That court order led to a settlement that prohibits night hunting of coyotes in the recovery area and other red wolf protections.

<sup>59</sup> Newsome et al. 2015

<sup>60</sup> USFWS 2011b

<sup>61</sup> Under the “McKittrick Policy,” the U.S. Department of Justice will not prosecute individuals for violating the ESA unless it has proof that a person knew that he or she was killing an endangered species. As such, even outside of the exceptions provided in the 10(j) rule, people can shoot red wolves supposedly mistaken as coyotes without fear of prosecution.

<sup>62</sup> 50 C.F.R. § 17.84(c)(4)(iii)

landowners to defend domestic animals may help build landowners' tolerance for wolves on their property, allowing landowners to *kill* such offending wolves is too severe given the dire status of the wild population of red wolves.<sup>63</sup> Instead, our proposed revised 10(j) rule modifies this exception to allow private landowners or their agents to harass — but not injure or kill — red wolves on their property.

Another problematic aspect of the current 10(j) rule is that it exempts any take on public land that is “incidental to lawful activities, is unavoidable, unintentional, and not exhibiting a lack of reasonable due care.”<sup>64</sup> With the population of wild red wolves reduced to as few as 45 animals, such a broad authorization for incidental take is unwarranted. Instead, our proposed revised 10(j) rule eliminates this provision, just as the Service's staff biologists sought to do in the draft 2013 rule that was never published. Prosecutorial discretion will ensure that people that accidentally kill a red wolf after exercising due care will not be prosecuted.

The current 10(j) rule also provides that private landowners may kill wolves if federal attempts to “capture such animals have been abandoned.” 50 C.F.R. 17.84(c)(4)(v). This exception has led to private landowners killing even non-offending wolves that disperse onto private land, if the Service refuses to take action to capture them. Scientists predicted that such a provision would be “nearly impossible to implement effectively as the wolf population grows because of the difficulties of responding simultaneously to a large number of landowners.”<sup>65</sup> Indeed, experience has shown that this exception has led to a high demand for wolf killings, as the Service has received hundreds of requests from private landowners for removal of wolves and for authorization to kill wolves.

A particularly troubling example of implementation of this rule occurred in 2015, when the Service issued a permit for a landowner to kill a red wolf that had not exhibited any problem behaviors. The private landowner shot and killed the wolf, a denning mother wolf who had previously mothered a total of 16 pups through four separate litters. No effort was made to locate her pups and their fate is unknown.

Our proposed revised 10(j) rule will reduce shooting deaths by removing this exception for private landowners. Harassing wolves on private property to discourage them from entering property is allowed under our proposed revised 10(j) rule, but killing of non-offending wolves cannot be tolerated when the wild wolf population teeters on the brink of extinction. Allowing such killing of endangered wildlife on private land also contradicts traditional notions of wildlife management; private landowners do not own wildlife, which belong to the public and should be managed for the public good. Moreover, harassment is likely more effective than live capture and removal of wolves from private lands because experience has shown that removed wolves will likely return to that same area upon release unless the animal is biologically driven to disperse.<sup>66</sup>

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<sup>63</sup> Chapron and Treves 2016.

<sup>64</sup> 50 C.F.R. 17.84(c)(4)(ii)

<sup>65</sup> Phillips et al. 2003

<sup>66</sup> USFWS 2011; USFWS 2013 at 22-23

The current 10(j) rule also provides that federal agents can kill any wolf “that constitutes a demonstrable but non-immediate threat to human safety or that is responsible for depredations to lawfully present domestic animals or other personal property . . . .”<sup>67</sup> Although we agree human safety must be of paramount importance, the killing of these highly endangered red wolves cannot be tolerated when non-lethal responses like harassment are available.

Finally, our proposed revised 10(j) rule removes reference to defense of human life,<sup>68</sup> as Section 11(a)(3) of the ESA already provides this exception to the prohibition on take.<sup>69</sup> Red wolves pose virtually no risk to human life and including such language just perpetuates negative public attitudes towards these shy animals.

## **V. Proposed Text for Revised 10(j) Rule**

As explained above, we request the following emergency changes to the red wolf 10(j) rule at 50 C.F.R. § 17.84(c):

### **(c) Red wolf (*Canis rufus*).**

- (1) The red wolf populations identified in paragraph (c)(9) of this section are essential experimental populations.
- (2) No person may take this species, except as provided in paragraphs (c)(3), (c)(4), and (c)(5) of this section.
- (3) Any person with a valid permit issued by the Service under § 17.32 may take red wolves for educational purposes, scientific purposes, the enhancement of propagation or survival of the species, zoological exhibition, , and other conservation purposes consistent with the Act and in accordance with applicable State fish and wildlife conservation laws and regulations.
- (4) Any private landowner, or any other individual having his or her permission, may harass members of the experimental population of red wolves while found on his or her property provided that all such harassment is by methods that are not lethal or physically injurious to the red wolf.
- (5) Any employee or agent of the Service or State conservation agency who is designated for such purposes, when acting in the course of official duties, may take a red wolf if such action is necessary to:
  - (i) Aid a sick, injured, or orphaned specimen;
  - (ii) Dispose of a dead specimen, or salvage a dead specimen which may be useful for scientific study; or
  - (iii) Move an animal for genetic purposes.
- (6) Any taking pursuant to paragraphs (c) (3)-(5) of this section must be reported to the U.S. Fish and Wildlife Service Office of Law Enforcement within 24 hours.
- (7) No person shall possess, sell, deliver, carry, transport, ship, import, or export by any means whatsoever, any such species taken in violation of these regulations or in

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<sup>67</sup> 50 C.F.R. § 17.84(c)(5)(iii)

<sup>68</sup> 50 C.F.R. § 17.84(c)(4)(i)

<sup>69</sup> 16 U.S.C. § 1540(a)(3)

violation of applicable State fish and wildlife laws or regulations or the Endangered Species Act.

(8) It is unlawful for any person to attempt to commit, solicit another to commit, or cause to be committed, any offense defined in paragraphs (c) (2) through (7) of this section.

(9) The Fish and Wildlife Service shall maintain at least three essential, experimental populations in the wild within the historic range of the red wolf.

- (i) Red wolves shall be allowed to establish territories and home ranges within their historic range, wherever they are found.
- (ii) The protections of the Endangered Species Act shall apply consistent with paragraphs (c)(2) – (c)(8) wherever red wolves are found in the wild.
- (iii) Other than these small reintroduced populations, the red wolf is extirpated from the wild. Therefore, there are no other extant populations with which the experimental populations could come into contact.

(10) The reintroduced populations will be monitored closely for the duration of the project, generally using radio telemetry as appropriate. All animals released or captured will be vaccinated against diseases prevalent in canids prior to release. Any animal that is determined to be in need of special care will be recaptured, if possible, by Service, Park Service, 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 problems make it necessary to return the animals to a captive-breeding facility.

(11) The status of the red wolf population shall be reviewed every five years to determine future management status and needs. This review will take into account the reproductive success of the mated pairs, movement patterns of individual animals, food habits, and overall health of the population.

## CONCLUSION

For all the reasons provided above, Petitioners request that the Service grant this petition and revise the red wolf 10(j) rule. The recovery of the red wolf in the wild depends in large part on a legal regime that is designed to succeed, and the proposed revisions to the red wolf 10(j) rule would promote wolf recovery by reintroducing wolves to additional locations, reducing shooting deaths, and reclassifying wild red wolf populations as “essential.” Petitioners therefore request that the Service respond to this petition expeditiously and no later than 45 days. If the Service fails to respond, Petitioners may pursue relief through litigation.

Sincerely,

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