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Via U.S. Mail and Electronic Mail

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Re: Red-Cockaded Woodpecker ESA Protections

Dear Acting Director Everson and Regional Director Miranda:

This is the fourth letter that the Southern Environmental Law Center has written on behalf of Defenders of Wildlife over the last 16 months regarding our concerns over the U.S. Fish and Wildlife Service's ("USFWS" or "the Service") consideration of removing endangered species protections for the red-cockaded woodpecker. We previously emphasized in our May 1, 2018 letter, as well as our subsequent October 5, 2018 and November 20, 2018 comments on the Service's notice of a status review for the species, that the best available science—namely, the data in the Service's draft Species Status Assessment—demonstrated that the red-cockaded woodpecker remains endangered under the Endangered Species Act.

Since submitting our previous letters and comments, we have requested and reviewed thousands of pages of public records from numerous state and federal agencies engaged in management of the red-cockaded woodpecker. From those documents, we understand that the fundamental data presented in the Service's March 2018 draft Species Status Assessment has not changed. The public records also contain new information about recent severe storm impacts to red-cockaded woodpeckers, reiterating the need to maintain the species' longstanding protections.

These documents further reveal that despite closing the public comment period for the species' status review on October 5, 2018, and making no other public announcements since that time, the Service continues to explore downlisting or delisting the species through closed-door discussions with various agencies. This process appears poised to remove protections from this

iconic and rare Southeastern species while ignoring the best available science and largely excluding the public. In response, state agencies have expressed concern that the Service's plans will undo recovery progress and undermine future management efforts.

The Service has failed to demonstrate that the best available science shows that red-cockaded woodpeckers should not be listed as endangered. The Service must give scientists and species experts the opportunity to evaluate the relevant data and draw conclusions about the species' status, rather than conclude a status change is needed and then find data to fit that conclusion. We call on the Service to engage in an open and transparent status review process grounded in the best available science, and to halt its effort to downlist or delist the red-cockaded woodpecker.

I. Agency Documents Show an Improper Push to Remove Protections for the Species.

After reviewing a final draft Species Status Assessment ("SSA") for the red-cockaded woodpecker, we sent you a letter on May 1, 2018, explaining how the data in this report demonstrated that the red-cockaded woodpecker is still endangered under the standards of the Endangered Species Act. Two months later, on July 6, 2018, we received a response from Mr. Miranda explaining that the Service anticipated announcing a five-year status review for red-cockaded woodpeckers "in the near future" and that the Service anticipated "considering [our] comments at that time." On August 6, 2018, the Service published a notice of initiation for status reviews of 42 southeastern species, including the red-cockaded woodpecker. *See* 5-Year Status Reviews for 42 Southeastern Species, 83, Fed. Reg. 38,320 (Aug. 6, 2018). On October 5, 2018, SELC submitted comments on behalf of 31 conservation organizations, including Defenders of Wildlife, reiterating that the best available science included in the March 2018 Species Status Assessment does not demonstrate that the red-cockaded woodpecker no longer meets the definition of an endangered species.

On November 20, 2018, SELC submitted supplemental comments expressing concern about the recent impacts of Hurricane Florence and Hurricane Michael on red-cockaded woodpeckers, noting that the harm to the species from these and future storms, which continue to be intensified by climate change, must be considered in any changes to the status of the species.

More than a year has passed since the notice of status review was published, yet the Service has not publicly released the status review or species status assessment, or otherwise made any public announcements regarding the Service's review of the red-cockaded woodpecker's status. We also did not receive any response to our November 20, 2018 letter about the impact of recent hurricanes on the species.

Instead, documents we acquired through public records requests to state and other federal agencies¹ indicate that USFWS and other agencies have been coordinating to establish a plan to downlist or delist the red-cockaded woodpecker—without demonstrating that such a change is justified by the best available science and without completing its status review. Indeed, the

¹ SELC submitted a Freedom of Information Act request to the Service on February 14, 2019 (Tracking No. FWS-2019-00453), regarding red-cockaded woodpeckers, but more than seven months later, has not received any documents responsive to this request.

Department of Defense appeared to be pushing for delisting as early as September 2018, before the comment period closed on the Service’s status review.²

Shortly after the close of the status review comment period, a draft planning document between the Service and military—containing comments from Air Force Staff, USFWS staff, and former Region 4 USFWS director Cindy Dohner—evidenced a goal of downlisting or delisting the red-cockaded woodpecker:

By March 31, 2020 complete a final rule to either delist or downlist (with regulatory relief) the RCW through the establishment of long-term management and monitoring implementation requirements to determine commitments for future populations.³

Consistent with this goal, FWS began requesting “management commitments for this species for the foreseeable future,” from Department of Defense installations in December 2018.⁴

Then, in April 2019, Region 4 USFWS Director Leopoldo Miranda sent letters to federal and state partners in red-cockaded woodpecker recovery, stating that

[b]ased on our review of the best available scientific and commercial information, we believe we can propose to reclassify the species to a threatened status under the Endangered Species Act (ESA). Further, if we are able to determine that the current level of management commitments for RCW are reasonably certain to occur for the next 30 years or so (e.g., mid-century), it may be possible that the RCW be considered recovered and suitable for delisting.⁵

The letters went on to explain that the Service was “asking all our partners to provide their anticipated management and monitoring commitments for this species, particularly those commitments that would be maintained even if the species was no longer protected under the ESA.”⁶ The letters requested that stakeholders with primary and secondary core and support populations, as identified under the red-cockaded woodpecker Recovery Plan, commit to “continuing to pursue the current population and management goals for each population as

² DoD Conservation Committee Meeting Notes, at 2, Sept. 11, 2018, Attachment 1. In mentioning a lawsuit challenging the Service’s SSA process, a set of meeting notes suggested that the SSA lawsuit “may become a challenge in the effort to delist the RCW.” *Id.*

³ USFWS and DOD Recovery and Sustainment Partnership Initiative: Red-cockaded Woodpecker (*Picoides borealis*) Action Plan, Nov. 19, 2018 (redline markings omitted), Attachment 2; *see also* USFWS and DOD Recovery and Sustainment Partnership Initiative: Red-cockaded Woodpecker (*Picoides borealis*) Action Plan, Nov. 8, 2018 (including a question from FWS staff about whether a certain item addressed “the range expansion concerns and new mission beddown or is this why down/delisting is needed”), Attachment 3.

⁴ E.g. E-mail from Matthew Dekar, Deputy Chief of Div. of Restoration and Recovery, USFWS Region 4, to Michelle Brown, U.S. Air Force, Dec. 21, 2018 3:21 PM, Attachment 4; Letter from Leopoldo Miranda, Regional Director, USFWS, to Karing H. Ohannessian, Dep. Asst. Sec. of the Navy for Env’t., U.S. Dep’t of Navy, Dec. 21, 2018, Attachment 23.

⁵ E.g. Letter to Alvin A Taylor, Director, S.C. Dep’t of Natural Res., from Leopoldo Miranda, Regional Director, USFWS, Apr. 10, 2019, Attachment 5; *see also* E-mail to Ryan Orndorff, U.S. Airforce, from Leopoldo Miranda, Regional Director, USFWS, Apr. 4, 2019, Attachment 6.

⁶ E.g. Letter to Taylor, Attachment 5, *supra* note 5.

identified in the associated management plan and the RCW recovery plan.”⁷ The Service also made similar requests to “non-federal landowners enrolled in the safe harbor program.”⁸

According to Service documents from shortly after this time, both the red-cockaded woodpecker species status assessment and the status review have been completed. These evaluations, which have not been released to the public, “provided new and updated status information since the 2003 RCW recovery plan.”⁹ While “there have been subsequent SSA edits and revisions,” there have been “no changes to the fundamental data” presented in the March 2018 draft SSA.¹⁰ The Service nevertheless claims that its “analysis continues” while the agency collects information on anticipated management and monitoring commitments from state agencies and private landowners. At the same time, “no thresholds have been identified for a specific set of populations with a pre-defined level of management to support a proposed delisting rule.”¹¹

Notably, these anticipated management and monitoring “commitments” are not binding and not intended to be formalized in any fashion; the Service has “no plans to seek or develop formal or other agreements regarding future management commitments. At the same time, “no thresholds have been identified for a specific set of populations with a pre-defined level of management to support a proposed delisting rule.”

In May 2019, the Service began receiving responses to its requests for management commitments. Several states responded with concerns about being able to make a commitment for the requested 30-year time period, citing funding uncertainties.

II. Indefinite Statements of Possible Future Management Do Not Constitute Recovery.

We are extremely concerned by the Service’s apparent attempt to circumvent the strictures of the ESA by looking to future hypothetical “commitments” solicited in exchange for vague promises of possibly delisting the species. As noted above, the Service does not intend these “commitments” to be binding in any way. The Service also does not have threshold levels of commitments in mind that would be sufficient to support its plans for delisting—in other words, the Service cannot know what future commitments are necessary in order for the red-cockaded woodpecker to be considered recovered under the ESA. The Service would be setting a terrible precedent in taking this course of action, one that runs contrary to the clear purpose of the ESA.

Even if such informal, nonbinding statements forecasting future actions could justify delisting—which they should not—the responses the Service has received reveal the unworkable

⁷ E.g. E.g. Letter to Taylor, Attachment 5, *supra* note 5.

⁸ Red-cockaded Woodpecker Future Management Commitment, Conference Call (April 25, 2019) Q&A’s, at 3, Attachment 7.

⁹ *Id.* at 4.

¹⁰ E-mail from Will McDearman, RCW Recovery Coordinator, USFWS, to Jonathan Burnam, Ga. Dep’t of Natural Res., Wildlife Res. Div., June 18, 2019 2:20 PM Attachment 8.

¹¹ Red-cockaded Woodpecker Future Management Commitment, Attachment 7, *supra* note 8.

and unreliable nature of such an approach. The responses obtained through public records requests largely indicate an inability or unwillingness to make any firm commitments about future management actions. For example, the Air Force’s response letter points to documents that control *current* conservation of red-cockaded woodpeckers, according to its current status as endangered under the ESA, but fails to identify any conservation actions that would be taken if the bird were delisted.¹² Instead, the letter identifies a process through which conservation measures might be identified for the red-cockaded woodpecker once federal protections were removed—without committing to actually evaluate specific measures for red-cockaded woodpeckers under that process if delisted.¹³

Many of the responses from state agencies underscore the need for continued ESA protections for the red-cockaded woodpecker to ensure that resources continue to be available to implement necessary conservation measures. Rather than support delisting, these responses illustrate exactly why the red-cockaded woodpecker likely still merits the protections of endangered status under the ESA.

The Arkansas Natural Heritage Commission stated that “[w]e are not familiar with any science that supports such reclassification” from endangered to threatened and that “requesting management commitments from states for possibly delisting the species seems premature.”¹⁴ The letter concluded that “we find it difficult to provide a valid commitment of RCW work that would occur on Arkansas state lands over the next 30 years should the species be delisted under the ESA.”

In a May 17, 2019 letter, Georgia’s Wildlife Resources Division explained that funding for its red-cockaded woodpecker management comes from grants, the Cooperative Endangered Species Conservation Fund, and ESA Section 6 funding—all of which vary in amount from year to year. Consequently, “it is not possible to make a prediction or firm commitment.”¹⁵ Subsequent correspondence reflects the Service’s pressure on the state agency, with staff commenting that “Leo was upset” that Wildlife Resources Division staff stated they “cannot commit funds for 30 years” and thus Mr. Miranda “asked me to say we intend to manage RCWs and as such will commit to do so.”¹⁶

¹² Letter from Terry G. Edwards, Director, Air Force Civil Engineer Ctr., to Leopoldo Miranda, Regional Director, USFWS, Region 4, May 21, 2019, Attachment 9.

¹³ *Id.* (“If the RCW were to be removed from the list of species protected under the Endangered Species Act, the INRMP planning process is also the means by which goals for the conservation of the species can be sustained on a military installation.”). The letter also explains that if downlisted, the Air Force would incorporate into its INRMPS “land management practices consistent with” any 4(d) rule issued by FWS. In other words, the Air Force would only do the bare minimum required by the law, and not engage in any additional conservation actions for the red-cockaded woodpecker.

¹⁴ Letter to Aaron Valenta, Region 4 Chief, Div. of Restoration and Recovery, USFWS, from Bill Holimon, Director, Arkansas Natural Heritage Commission, May 21, 2019, Attachment 10.

¹⁵ Letter to Aaron Valenta, Region 4 Chief, Div. of Restoration and Recovery, USFWS, from Rusty Garrison, Director, Ga. Dep’t of Natural Res., Wildlife Res. Div., May 17, 2019, Attachment 11.

¹⁶ E-mail from Rusty Garrison, Director, Ga. Dep’t of Natural Res., Wildlife Res. Div. to Matt Elliott, Asst. Chief, Ga. Dep’t of Natural Res., Wildlife Res. Div., June 18, 2018, Attachment 12. Additional e-mail correspondence demonstrates that Director Miranda sent Georgia’s Wildlife Resources Division Director information about “funding

South Carolina expressed similar concerns about its ability to maintain intensive population monitoring and management, noting that this would likely “lead to unidentified trees and clusters being destroyed.”¹⁷ Moreover, all of South Carolina Department of Natural Resources’ red-cockaded woodpecker properties currently rely on intensive habitat management in the form of artificial cavities. Delisting, and the corresponding elimination of Section 6 funding, “would cause many of these currently protected clusters to disappear and likely end SCDNR’s ability to access, monitor, and influence these populations.”¹⁸ As summarized by South Carolina Department of Natural Resources, “South Carolina populations of RCW continue to grow each year and we are on the path to meeting the recovery targets; however, should delisting occur too early, we fear that much of the success we’ve had will be reversed.”¹⁹

Meanwhile, the Service is already coordinating with the military to accept possible future conservation outcomes to offset present-day impacts to existing red-cockaded woodpeckers. In June of this year, the Service’s Raleigh Field Office signed off on a programmatic biological opinion which establishes a program to allow Fort Benning to acquire private property surrounding the base and receive mitigation credit that would allow it to eliminate woodpeckers existing on the base.²⁰ Per the biological opinion, the off-base property acquisitions do not need to have currently suitable habitat—as long as the property might someday support the birds, it could be used to mitigate for on-base impacts to existing red-cockaded woodpeckers. Not only does this “mitigation” approach fall in line with the Service’s apparent attempt to delist red-cockaded woodpeckers based on alleged assurances of future conservation efforts, it also undermines ongoing recovery efforts by allowing for present-day take of red-cockaded woodpeckers, reducing the numbers of a key recovery population, without any indication that population numbers will be maintained under this scheme.

III. Exacerbated Habitat Threats from Severe Storms Must be Considered in the Agency’s Evaluation.

As underscored by many of the responses to the Service’s request for management commitments, red-cockaded woodpeckers rely heavily on carefully managed habitat. Most populations still depend upon installation of artificial cavities, and prescribed burning is often essential to maintaining adequate habitat. As we have highlighted in previous correspondence to the Service, “the present or threatened destruction, modification, or curtailment of [the red-cockaded woodpecker’s] habitat or range,” 16 U.S.C. 1533(a)(1)(A), continues to pose a serious threat to the species. This is particularly true if federal, state, and private entities stop managing habitat for red-cockaded woodpeckers, as would likely happen if the species were delisted.

sources GA can use to manage RCW if de-listed.” See E-mail from Leo Miranda, Director, USFWS Region 4, to Rusty Garrison, Director, Ga. Dep’t of Natural Res., Wildlife Res. Div., May 31, 2019 8:51 AM, Attachment 13.

¹⁷ Letter to Leopoldo Miranda, Regional Director, USFWS, from Robert H. Boyle, JR., Interim Director, S.C. Dep’t Natural Res., May 16, 2019 at 2, Attachment 14

¹⁸ *Id.* at 3.

¹⁹ *Id.*

²⁰ USFWS., Programmatic Biological Opinion: Fort Benning’s Conservation and Crediting Program for the Red-cockaded Woodpecker (*Picoides borealis*) Through Off-Post Conservation and Management of the Longleaf Pine Ecosystem, June 11, 2019, Attachment 15.

Moreover, as we discussed in our previous May 1, 2018 letter, October 6, 2018 status review comments, and November 20, 2018 supplemental comments, hurricanes and severe storm events pose a serious threat, which is being intensified by climate change, to red-cockaded woodpeckers. Indeed, South Carolina’s response to USFWS on future conservation actions noted that “[d]amage from storms routinely impacts South Carolina’s coastal population requiring installation of artificial cavities to mitigate these impacts,”²¹ and specifically identified one population that “[w]ithout inserts . . . will extirpate from storm damage.”²²

New data from the most recent 2018 hurricane season underscore the significant threat that severe storms pose to the red-cockaded woodpecker. For example:

- Hurricane Michael devastated the Silver Lake Wilderness Management Area, Georgia’s largest red-cockaded woodpecker population on state-owned lands. The population lost 154 active cavity trees—roughly half of the total cavity trees on the property—and suffered two killed red-cockaded woodpeckers due to Hurricane Michael.²³ Four red-cockaded woodpecker clusters lost all cavity trees.²⁴
- In Florida, Hurricane Michael destroyed a total of 347 cavity trees across the Apalachicola National Forest, St. Marks National Wildlife Refuge, and Tate’s Hell State Forest populations. Pine trees in two populations on private lands “were completely destroyed” and “[t]hose colonies are now gone.”²⁵
- As of December 12, 2018, the Forest Service had identified 1,409 damaged or destroyed cavity trees within the Apalachicola National Forest—the largest red-cockaded woodpecker population across the species’ range—necessitating installation of 717 inserts in order to maintain four suitable cavities for each of 870 assessed clusters.²⁶ As of February 5, 2019, the Forest Service had increased its estimate of needed inserts to 727 and reported that 25 more clusters needed to be assessed and 130 more inserts still needed to be installed.²⁷
- Hurricane Florence caused significant damage to the red-cockaded woodpecker population at Camp Lejeune, with a “total of 153 RCW trees . . . lost.”²⁸ Base

²¹ Letter to Miranda, from Boyle, at 1, Attachment 14, *supra* note 18.

²² *Id.* at 4 (red-cockaded woodpecker commitment response spreadsheet).

²³ International Paper, Southlands Experimental Forest, Annual RCW Property Data Report (2018), at Sections VIII and IX, Attachment 16. Silver Lake Wilderness Management Area was formerly known as International Paper, Southlands Experimental Forest (“IPSEF”).

²⁴ See PowerPoint Presentation, Red-Cockaded Woodpecker Management Georgia – 2019 (Feb. 2019), at Slide 8, Attachment 17.

²⁵ Arlo Kane, Florida Fish & Wildlife Comm’n, “Impacts of Hurricane Michael to Wildlife, Attachment 18.

²⁶ John Dunlap, RCW Recovery Effort on Apalachicola Nat’l Forest Following Hurricane Michael, Dec. 12, 2018, Attachment 19.

²⁷ Apalachicola Nat’l Forest Hurricane Michael Update, Feb. 5, 2019, Attachment 20.

²⁸ Letter from John R. Townson, Dir. Env’tl Mgmt., U.S. Marine Corps, to Will McDearman, RCW Recovery Coordinator, USFWS, Feb. 27, 2019, Attachment 21.

personnel surveyed the damage and determined that “37 new cavities and 9 restricted cavities were needed,” which were installed by January 2019.²⁹ As explained in a letter to USFWS’s red-cockaded woodpecker recovery coordinator, while “no direct mortality was seen, it is likely that birds were lost during and after the storm,” and “[t]he full impact [of Hurricane Florence] will likely not be known until the upcoming nesting season.”³⁰

In the wake of Hurricane Michael, federal agencies were key to quickly rehabilitating red-cockaded woodpecker habitat. As the Forest Service summarized: “the urgency is we have a lot of damaged red-cockaded woodpecker cavity trees that need to be replaced and our state and private partners don’t have the capacity to get it done quickly.”³¹ The limited capacity of state and private partners to address hurricane damage to red-cockaded woodpecker habitat would only worsen under a scenario where the red-cockaded woodpecker were no longer listed as endangered and thus not eligible for certain funding sources.

This information from the most recent hurricane season—that was not available at the time of the Service’s initiation of the five-year status review—underscores that the red-cockaded woodpecker continues to face serious risks from habitat destruction, which are likely to increase as climate-change spurs more frequent severe storm events. These enormous impacts to red-cockaded woodpecker populations also demonstrate the importance of continued management efforts from state and federal partners in red-cockaded woodpecker recovery efforts—management efforts that largely hinge upon the red-cockaded woodpecker’s listed status under the ESA.

IV. Conclusion

The data presented in the March 2018 draft SSA—which remains unchanged³²—fails to demonstrate that the red-cockaded woodpecker has achieved recovery as envisioned under the ESA, and it therefore should not be reclassified from its status as endangered at this time. Non-binding, informal management “commitments” for indefinite periods of time do not alter this analysis. Moreover, key threats to this species and its habitat, such as the increasingly damaging effects of severe storm events intensified by climate change, persist and the best available scientific information has not demonstrated that they will not continue to endanger the species for the foreseeable future.

We hope you will reconsider any decisions to prematurely remove endangered species protections for the red-cockaded woodpecker and instead facilitate an open and transparent status review process grounded in the best available science to determine the species’ status. We are happy to discuss this matter with you further and answer any questions.

²⁹ *Id.*

³⁰ *Id.*

³¹ E-mail from Dennis Krusac, Endangered Species Specialist, U.S. Forest Serv., to Jonathan Stober, U.S. Forest Serv., et al., Oct. 16, 2018 10:11AM, Attachment 22.

³² E-mail from McDearman to Burnam, Attachment 8, *supra* note 10 (stating in reference to the March 2018 draft SSA “there have been subsequent SSA edits and revisions, though no changes to the fundamental data you have seen”).

Sincerely,



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