

March 7, 2022

**Via Federal eRulemaking Portal**

Mr. Aaron Valenta  
Public Comments Processing  
Attn: FWS-R4-ES-2019-0018  
U.S. Fish and Wildlife Service  
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**Re: Revised Proposal to Downlist the Red-Cockaded Woodpecker with a Section 4(d) Rule; Docket No. FWS-R4-ES-2019-0018**

Dear Mr. Valenta:

The Southern Environmental Law Center submits the following comments on behalf of a broad coalition of conservation groups working in the Southeast in response to the U.S. Fish and Wildlife Service's ("FWS" or "Service") revised proposed downlisting and accompanying rule for the red-cockaded woodpecker. [Proposed] Reclassification of the Red-Cockaded Woodpecker From Endangered to Threatened With a Section 4(d) Rule, 87 Fed. Reg. 6,118 (Feb. 3, 2022) (to be codified at 50 C.F.R. §§ 17.11(h) and 17.41(h)).

We previously submitted comments on the Service's proposed downlisting in December 2020, and we incorporate those comments by reference here.<sup>1</sup> Additionally, we have sent the Service a series of letters over the past four years chronicling concerns with its red-cockaded woodpecker decision-making, including letters about a draft SSA, the still-incomplete status review for the species, and data about climate change-caused impacts to the species and its habitat.<sup>2</sup>

The Service's revised proposal does not address any of the shortcomings we previously identified about how the decision to downlist is premature. Nonetheless, the revision markedly improves both the clarity and efficacy of the proposed Section 4(d) rule for providing red-

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<sup>1</sup> See Comment Letter from SELC on Proposal to Downlist the Red-Cockaded Woodpecker with a Section 4(d) Rule (Dec. 7, 2020) [hereinafter "SELC Proposed Downlisting Comments"], *available at* <https://www.regulations.gov/comment/FWS-R4-ES-2019-0018-0180>; *see also* [Proposed] Reclassification of the Red-Cockaded Woodpecker From Endangered to Threatened With a Section 4(d) Rule, 85 Fed. Reg. 63,474 (Oct. 8, 2020).

<sup>2</sup> See Letter from SELC Regarding Species Status Assessment (May 1, 2018), Att. 11 to SELC Proposed Downlisting Comments, *supra* note 1; SELC Comments on Notice of Initiation of Status Review for Red-cockaded Woodpecker (Oct. 5, 2018), Att. 12 to SELC Proposed Downlisting Comments, *supra* note 1; SELC Supplemental Comments on Notice of Initiation of Status Review for Red-cockaded Woodpecker (Nov. 20, 2018), Att. 13 to SELC Proposed Downlisting Comments, *supra* note 1; Letter from SELC Regarding Red-Cockaded Woodpecker ESA Protections (Oct. 7, 2019), Att. 14 to SELC Proposed Downlisting Comments, *supra* note 1.

cockaded woodpecker conservation in the event the species is nonetheless downlisted. Below, we briefly highlight our continued concerns with the proposal to reclassify the red-cockaded woodpecker in the first instance, then offer comments on the changes that the Service has made to the proposed 4(d) rule and suggestions for additional ways in which the proposed rule can be clarified, strengthened, and improved.

## **I. UNADDRESSED DEFICIENCIES WITH DOWNLISTING TO THREATENED**

As we repeatedly discussed in our prior correspondence, the red-cockaded woodpecker has not yet recovered to a point that scientifically supports downlisting. By its own terms, the Service’s revised proposal does not address or respond to any of the concerns with the proposed downlisting. *See* 87 Fed. Reg. at 6,119 (stating that the notice will “only discuss those topics directly relevant to the revisions [the Service is] proposing to the section 4(d) rule”). As detailed further below, we remain concerned that the decision to downlist the red-cockaded woodpecker before it has achieved the applicable recovery standards, and while it still faces substantial threats from habitat loss and climate change, sets a precedent for listing decisions that are motivated more by interagency politics than by science.

### **A. Threats to Red-Cockaded Woodpecker Recovery Are Ongoing.**

The red-cockaded woodpecker was once widespread across the Southeast, but by the time it was listed as endangered in 1970,<sup>3</sup> fewer than 10,000 individuals remained.<sup>4</sup> Over the last 50 years, red-cockaded woodpecker numbers have increased as a result of strong endangered species protections and active management efforts aimed at its recovery. However, the species still persists in mostly small, heavily fragmented populations,<sup>5</sup> and continues to be threatened by climate change and habitat loss.<sup>6</sup>

Red-cockaded woodpeckers have unique habitat requirements for old-growth pine forests because they “nest and roost in cavities they excavate in living pines”<sup>7</sup> that are “generally 60-80 years” old.<sup>8</sup> The cavity-excavation process is a multi-year undertaking.<sup>9</sup> While red-cockaded woodpeckers prefer longleaf pines, they also use loblolly, slash, and shortleaf pines for

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<sup>3</sup> *See* Reclassification of the Red-Cockaded Woodpecker, 85 Fed. Reg. at 63,476 (citing 35 Fed. Reg. 16,047 (Oct. 13, 1970)).

<sup>4</sup> U.S. Fish & Wildlife Serv., Recovery Plan for the Red-Cockaded Woodpecker (*Picoides borealis*) Second Revision 1 (Jan. 27, 2003) [hereinafter “Recovery Plan”]. By contrast, the Service has estimated that historical, pre-European settlement populations of red-cockaded woodpeckers numbered between 1 million to 1.6 million family groups. *See* U.S. Fish & Wildlife Serv., Species Status Assessment Report for the Red-cockaded Woodpecker (*Picoides borealis*), Version 1.3, at 7, 19 (Apr. 2020) [hereinafter “Final SSA”].

<sup>5</sup> *See* SELC Proposed Downlisting Comments, *supra* note 1, at 2; *see also* Ralph Costa, U.S. Fish & Wildlife Serv., Red-Cockaded Woodpecker (*Picoides borealis*) 5-Year Review: Summary & Evaluation, 7–9 (2006) [hereinafter “2006 Status Review”] (explaining that red-cockaded woodpeckers are threatened with extinction in part because of the isolated nature of fragmented populations and risks associated with inherently small populations, such as loss of genetic diversity).

<sup>6</sup> *See* SELC Proposed Downlisting Comments, *supra* note 1, at 16–21; *see also* Recovery Plan at 1; Final SSA at 73.

<sup>7</sup> Recovery Plan at 32.

<sup>8</sup> Recovery Plan at 34.

<sup>9</sup> Recovery Plan at 33, 35.

constructing their cavities.<sup>10</sup> The mature, living pines used by the red-cockaded woodpecker best thrive in fire-maintained pine forests, savannahs, flatwoods, sandhills, and woodlands, as regular forest fires reduce plant competition and maintain open mid-stories necessary for native plants and prey to thrive.<sup>11</sup> Unfortunately, longleaf pine ecosystems “are now among the most endangered systems on earth.”<sup>12</sup> To combat the devastating effects of habitat loss on the species, the Service and its partners have engaged in intensive habitat management, which additionally benefits the numerous other rare species that inhabit longleaf pine ecosystems,<sup>13</sup> many of which specifically utilize abandoned red-cockaded woodpecker cavities.<sup>14</sup> The red-cockaded woodpecker remains a highly “conservation reliant species” today. 87 Fed. Reg. at 6,120.<sup>15</sup>

Additionally, and as we have repeatedly highlighted in past comments to the Service, the red-cockaded woodpecker is threatened by impacts from climate change, including increasingly severe and more frequent storm events throughout its range, sea level rise, and rising temperatures.<sup>16</sup> These threats are anticipated to cause large amounts of habitat loss, some of which are already being observed.<sup>17</sup> In our December 2020 comments, we specifically noted how red-cockaded woodpeckers are endangered by such impacts throughout a significant portion of their range.<sup>18</sup> Data already demonstrate that population productivity is declining in the southwest portion of the species’ range, and this trend is likely to be exacerbated by climate change as more suitable habitat is lost.<sup>19</sup> In other areas, concurrent threats from direct habitat destruction in addition to climate impacts from sea level rise and hurricanes, stand to have a

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<sup>10</sup> *Id.* In fact, in South Florida, south of the longleaf pine range, red-cockaded woodpeckers can only excavate cavities in slash pine trees. U.S. Fish & Wildlife Serv., *Red-cockaded woodpecker: Picoides borealis*, in USFWS, MULTI-SPECIES RECOVERY PLAN FOR SOUTH FLORIDA, 4-473 – 4-502 (2019), <https://www.fws.gov/verobeach/MSRPPDFs/RedCockadedWoodpecker.pdf>.

<sup>11</sup> Recovery Plan at 44–45.

<sup>12</sup> *Id.*

<sup>13</sup> See SELC Proposed Downlisting Comments, *supra* note 1, at 4–7.

<sup>14</sup> See *id.*

<sup>15</sup> See also Final SSA, at 129, 134.

<sup>16</sup> We most recently highlighted these climate impacts in a letter sent on April 23, 2021, provided as Attachment A to these comments. Letter from SELC Regarding Halting Proposal to Downlist the Red-Cockaded Woodpecker, at 3–5 (Apr. 23, 2021) [hereinafter “SELC April 2021 Letter on Halting Downlisting”], Att. A. We discussed climate impacts in detail in prior correspondence as well. See, e.g., Comment Letter from SELC on Proposed Downlisting, *supra* note 1, at 18–21 (Dec. 7, 2020); Letter from SELC Regarding Species Status Assessment, *supra* note 2, at 10 (May 1, 2018); SELC Comments on Notice of Initiation of Status Review for Red-cockaded Woodpecker, *supra* note 2, at 10–11 (Oct. 5, 2018); SELC Supplemental Comments on Notice of Initiation of Status Review for Red-cockaded Woodpecker, *supra* note 2, at 1–3 (Nov. 20, 2018); Letter from SELC Regarding Red-cockaded Woodpecker ESA Protections, *supra* note 2, at 6–8 (Oct. 7, 2019).

<sup>17</sup> See, e.g., Emily Ury et al., *Rapid Deforestation of a Coastal Landscape Driven by Sea Level Rise and Extreme Events, Ecological Applications* (Apr. 4, 2021), Att. 9 to SELC April 2021 Letter on Halting Downlisting, *supra* note 16.

<sup>18</sup> See also Jacob Malcom and Andrew Carter, (2021) *Better Representation Is Needed in U.S. Endangered Species Act Implementation*, FRONT. CONSERV. SCI., 9–10 (Apr. 20, 2021) 2:650543 (critiquing the Service’s interpretation of red-cockaded woodpecker representation data), <https://doi.org/10.3389/fcosc.2021.650543>, Att. 10 to SELC April 2021 Letter on Halting Downlisting, *supra* note 16.

<sup>19</sup> See Stephanie M. DeMay and Jeffrey R. Walters, *Variable Effects of a Changing Climate on Lay Dates and Productivity Across the Range of the Red-cockaded Woodpecker*, THE CONDOR: ORNITHOLOGICAL APPLICATIONS (Oct. 2019), <http://dx.doi.org/10.1093/condor/duz048>, Att. 11 to SELC April 2021 Letter on Halting Downlisting, *supra* note 16.

devastating impact on known coastal populations of red-cockaded woodpeckers.<sup>20</sup> We have previously highlighted the damage from recent hurricanes<sup>21</sup> and provided further evidence of how rising temperatures will exacerbate pre-existing range loss.<sup>22</sup> The revised rule provides no new analysis or new information to suggest this has changed since the proposal in 2020, nor does it attempt to discuss or rebut any of the substantial threats that remain for red-cockaded woodpeckers. *See* 87 Fed. Reg. at 6,119.

## **B. The Service’s Listing Outcome Was Predetermined.**

As we have repeatedly explained to the Service in past comment letters, the Service’s own targets for downlisting still have not been met.<sup>23</sup> Despite this—and as detailed in our December 2020 comment letter and prior letters to the Service—public records reveal that the Service had been planning for years to delist or downlist the red-cockaded woodpecker, without first consulting the best available science and without undertaking a legally-required status review of the species.<sup>24</sup> As we explained previously, the Department of Defense began pushing for delisting as early as fall 2018—less than a year after Region 4 Director Leopoldo Miranda first announced the “Wildly Important Goal” of delisting, downlisting or precluding the need to list 30 species per year,<sup>25</sup> and before the comment period had even closed on the Service’s initiation of a status review for the red-cockaded woodpecker.<sup>26</sup> In April 2019, the FWS workplan included “downlisting or delisting” red-cockaded woodpeckers, and the Region 4 Director began reaching out to state and federal partners seeking prospective “management assurances” in an attempt to claim the red-cockaded woodpecker “suitable for delisting,” based on these possible “assurances,” and before actually achieving recovery in the wild.<sup>27</sup> These actions and communications all indicate a predetermined goal of removing protections for the red-cockaded woodpecker without regard for the best available science. Such tunnel vision is

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<sup>20</sup> *See, e.g.*, U.S. Fish & Wildlife Serv., Biological Opinion for Cainhoy Plantation Multi-family Residential and Commercial Development, FWS Log #: 04E2018-CPA-0027 (Nov. 15, 2018), <https://ecos.fws.gov/tails/pub/document/11660271>.

<sup>21</sup> *See, e.g.*, SELC Comments on Notice of Initiation of Status Review for Red-cockaded Woodpecker, *supra* note 2, at 10–11 (Oct. 5, 2018); SELC Supplemental Comments on Notice of Initiation of Status Review for Red-cockaded Woodpecker, *supra* note 2, at 1–3 (Nov. 20, 2018).

<sup>22</sup> *See* SELC April 2021 Letter on Halting Downlisting, *supra* note 16, at 4, Att. 12 (map of red-cockaded woodpecker vulnerability to climate change).

<sup>23</sup> *See, e.g.*, SELC Proposed Downlisting Comments, *supra* note 1, at 13–15.

<sup>24</sup> *See* SELC Proposed Downlisting Comments, *supra* note 1 at 8–28. The ESA provides that “[t]he Secretary shall make determinations . . . after conducting a review of the status of the species.” 16 U.S.C. § 1533(b)(1)(A) (emphasis added). The Service’s own regulations further emphasize the requirement to prepare a status review prior to reclassifying a species’ status, stating a species “shall be listed or reclassified . . . after conducting a review of the species’ status.” 50 C.F.R. § 424.11(c) (emphasis added); *see also id.* § 424.11(e) (emphasizing requirement to complete status review prior to delisting).

<sup>25</sup> *E.g.* Jimmy Tobias, Pacific Standard, *Fish and Wildlife is ‘Conserving’ Imperiled Animals by Denying Them Protection*, May 1, 2019, <https://psmag.com/environment/fish-and-wildlife-is-conserving-nearly-extinct-animals-by-denying-them-protection>.

<sup>26</sup> *See* SELC Proposed Downlisting Comments, *supra* note 1, at Att. 15 (DoD Conservation Committee Meeting Notes, at 2, Sept. 11, 2018).

<sup>27</sup> SELC Proposed Downlisting Comments, *supra* note 1, at 10–11; *see also id.* Att. 21 (Letter to Alvin A Taylor, Director, S.C. Dep’t of Natural Res., from Leopoldo Miranda, Regional Director, USFWS, Apr. 10, 2019); *id.* Att. 22 (E-mail to Ryan Orndorff, U.S. Airforce, from Leopoldo Miranda, Regional Director, USFWS, Apr. 4, 2019).

antithetical to science-based decision-making and the precautionary conservation approach enshrined in the ESA.

## **II. THE 4(D) RULE MUST BE FURTHER STRENGTHENED TO CONSERVE THE RED-COCKADED WOODPECKER**

In our December 2020 comment letter, we detailed the numerous ways in which the former proposed 4(d) rule would have failed to provide for the conservation of the red-cockaded woodpecker, including that it: (1) failed to include necessary specificity required to meaningfully interpret and enforce the rule; (2) put the largest recovery populations at risk by removing take protections on military installations; and (3) was overly deferential to broad state management plans that lacked meaningful oversight or any conservation benefits. The former proposed rule fell short of the ESA’s requirement that 4(d) rules must “provide for the conservation of” listed species. 16 U.S.C. § 1533(d). We strongly support the Service’s decision to revise its prior proposed 4(d) rule for this reason, and we appreciate the efforts that the Service has made to respond to our prior critiques of the rule. While the red-cockaded woodpecker should retain its endangered species status and full take protections under Section 9, as explained above, we offer comments here on the ways in which the Service’s revised proposed rule better provides for the conservation of the species to meet the statutory requirements of the ESA, as well as the ways in which the proposed rule should be further revised and strengthened.

### **A. The Red-Cockaded Woodpecker Requires Full Section 9 Take Protections.**

As the Service recognizes in its instant proposed rule revision, all rules promulgated pursuant to Section 4(d) of the ESA must “provide for the conservation of” listed species. 16 U.S.C. § 1533(d); 87 Fed. Reg. at 6,119; *see also Defenders of Wildlife v. Tuggle*, 607 F. Supp. 2d 1095, 1116–17 (D. Ariz. 2009) (holding that while “USFWS has discretion to issue the regulations it deems necessary and advisable, [] the regulation *shall* provide for the conservation of such species” (emphasis added)). The ESA defines “conservation,” in turn, to mean “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,” i.e. to the point at which it has achieved recovery. 16 U.S.C. § 1532(3).<sup>28</sup>

As previously established, the red-cockaded woodpecker is still very much in danger of extinction, and its recovery requires the full extent of protections provided by the ESA. For that reason, the Service’s starting point in the revised rule of providing full Section 9 take protections and subsequently carving out narrow exceptions to those take protections represents a substantial improvement over the prior proposed 4(d) rule. *See* 87 Fed. Reg. at 6,122 (explaining that the prior proposed rule created confusion and proposing in its revision to “adopt[] the same prohibitions that apply to an endangered species under section 9 of the Act and 50 CFR 17.21”). The previous proposal, by contrast, started from the opposite default of allowing all forms of red-

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<sup>28</sup> “Such methods and procedures include, but are not limited to, all activities associated with scientific resources management such as research, census, law enforcement, habitat acquisition and maintenance, propagation, live trapping, and transplantation, and, *in the extraordinary case* where population pressures within a given ecosystem cannot be otherwise relieved, may include *regulated* taking.” *Id.* (emphasis added).

cockaded woodpecker take and defined only narrow prohibitions on such take, with broad exceptions. *See* 85 Fed. Reg. at 63,498. We appreciate the Service’s acknowledgement that the woodpecker in fact continues to require most, if not all, of its current protections if it is to maintain a positive trajectory towards recovery.

## **B. Clarified Definitions in the Revised Rule Need Further Refinements.**

In our December 2020 comments, we provided detailed critiques of the proposed rule’s failure to define key terms, which would have left its provisions susceptible to loose and inconsistent interpretations. We also urged that the proposed rule should incorporate well-understood, scientifically-based definitions and recovery standards that can already be found within the Recovery Plan.

We strongly support the improvements that the Service has made in this regard in the revised proposed rule. Specifically, we appreciate that the revised proposed rule now incorporates the same definitions for “cluster,” “active cluster,” and “inactive cluster” that are accepted amongst woodpecker biologists and appear within the Recovery Plan.<sup>29</sup> Likewise, we strongly support the Service limiting the definition of “habitat management activities,” which may be exempted from take prohibitions under certain provisions, to activities that are “intended to maintain or improve the quality and/or quantity of red-cockaded woodpecker habitat.” These changes help to address our concerns that the prior proposed rule created myriad loopholes for “habitat management” activities that were not geared towards woodpecker conservation, and other activities that may have destroyed cavity trees within active clusters.

However, several of the definitions in the revised proposed rule still require further clarifications, safeguards, or revisions. For instance, the examples of “activities intended to maintain or improve the quality and/or quantity of red-cockaded woodpecker habitat,” given under the revised proposed rule’s definition of “habitat management activities” should be revised further. At least two of the examples currently given are overly broad and do not provide sufficient guardrails to ensure against clear-cutting practices—undertaken under the guise of providing future opportunities for new longleaf pine growth—that may have detrimental effects on current active clusters.<sup>30</sup> Specifically, the example of “*regenerating areas of older pine forest to increase and maintain sustainable current and future habitat for red-cockaded woodpeckers*” is problematic because it gives no assurances that large swathes of a forest stand’s oldest trees will not be cut down to “regenerate” future habitat.

Similarly, the example of “*converting planted pines to more fire-tolerant, site-appropriate native pines found within the associated native pine, fire-dependent ecosystem*” represents a precarious undertaking that must be done with expert guidance and caution. Large-scale efforts to remove loblolly or slash pine, in the hope of replacing it with longleaf pine, can

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<sup>29</sup> Recovery Plan at 36 (defining “cluster”), 72 (defining “active cluster”), 295 (defining “inactive cluster”).

<sup>30</sup> *See, e.g., Sierra Club v. Lyng*, 694 F. Supp. 1260, 1272 (E.D. Tex. 1988), *aff’d in relevant part, vacated in part sub nom. Sierra Club v. Yeutter*, 926 F.2d 429 (5th Cir. 1991) (finding that the Forest Service’s “even-aged” management practices permitting clear cutting within 200 feet of red-cockaded woodpecker cavity trees and retaining midstory hardwood resulted in red-cockaded woodpecker takings and were likely to jeopardize the species’ continued existence).

fail if not conducted with utmost care and caution.<sup>31</sup> Again, this type of undertaking can indeed be valuable for red-cockaded woodpecker conservation efforts, but it must be carefully planned out in consultation with the Service.

The revised proposed rule may allow for military installations, the Forest Service, or other federal agencies to approach red-cockaded woodpecker habitat management, and harvest potential nest trees, with a primary goal of generating timber sale revenue under the veil of efforts to improve woodpecker habitat. The Fish and Wildlife Service should create a separate subsection to specify that the take exemptions provided under this rule *do not* extend to these and other activities that involve the removal of a stand's oldest and most valuable trees; instead such activities may only be undertaken in consultation with the Service.

### **C. Military Exemptions Require Further Oversight and Guidance.**

The overall improvements that the Service has made throughout the rule, such as linking “habitat management activities” with a purpose of maintaining or improving woodpecker habitat and applying default Section 9 take protections, provide baseline improvements in the take exemption provided for habitat management activities on military installations. We appreciate the Service’s clarification in the preamble that Section 7 consultation obligations and incidental take statement obligations will still fully apply to projects on military installations, and we support the inclusion of explicit annual reporting requirements.

However, we remain greatly concerned by the role that the Department of Defense has played to date in pushing to downlist or delist the red-cockaded woodpecker, with the goal of reducing or eliminating its legal obligations to continue to conserve the species. As we detailed in our prior comment letter, the Service appeared to work hand-in-hand with the military towards this goal. For example, the Service entered into an Interagency Agreement with the Army, signed on the same day that the Service announced its proposal to downlist the red-cockaded woodpecker, that appears to set a goal of eliminating Section 7 consultations on Army installations and instead fulfilling all Section 7 obligations with general consultation on an Integrated Natural Resources Management Plan (“INRMP”).<sup>32</sup> If the Service is serious about its

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<sup>31</sup> See, e.g., Recovery Plan at 69 (explaining that loblolly maximizes early height growth and minimizes taproot growth, while the reverse is true for longleaf and south Florida slash pine); 98–105(silviculture); 110–16 (habitat restoration); see also J. Walker et al., *User’s Guide—Establishing Longleaf Pine Seedlings Under a Loblolly Pine Canopy, SERDP Project RC-1474*, at 5 (Feb. 2017) (“Establishing longleaf seedlings under loblolly pine rather than longleaf pine presents distinct challenges. Loblolly trees produce abundant seeds that germinate and rapidly reach heights that can shade out longleaf pine seedlings established at the same time. Additionally, loblolly pines have different root distributions and may compete differently than longleaf pine with planted seedlings. Light environments might also differ under longleaf and loblolly pine canopies.”), <https://www.serdp-estcp.org/content/download/41837/398791/file/RC-1474%20User's%20Guide.pdf>.

<sup>32</sup> See INTERAGENCY AGREEMENT BETWEEN THE U.S. FISH AND WILDLIFE SERVICE AND THE U.S. ARMY FOR THE CONSERVATION OF NATURAL RESOURCES ON ARMY CONTROLLED LANDS (Sept. 25, 2020), Att. 70 to SELC Proposed Downlisting Comments, *supra* note 1. The Agreement states a goal of “[f]acilitating the utilization/acceptance of the INRMPs as the document by which an installation will manage, monitor, and support its responsibilities under the Endangered Species Act, *for meeting consultation requirements*, making the process of species conservation simpler and more efficient.”

commitment to meeting its Section 7 obligations, it must explicitly rescind this Agreement with the Army.

Furthermore, as we detailed in our prior comments, it is imperative that the Service take a precautionary approach to this proposed military exemption and make it as limited as possible to ensure that the largest and most important red-cockaded woodpecker recovery populations will not backslide on their recovery progress.<sup>33</sup> Approximately one third of all known red-cockaded woodpecker clusters exist on military lands,<sup>34</sup> and military bases house two-thirds of “very high resilience” and “high resilience” recovery populations.<sup>35</sup> Because the revised rule still grants great discretion to military installations to take red-cockaded woodpeckers, many of the concerns raised in our December 2020 comments remain.

Specifically, we previously emphasized that INRMPs are inherently broad, descriptive documents that are geared towards a primary goal of ensuring no net loss of military capability, rather than positive gains in conservation.<sup>36</sup> INRMPs typically do not contain the level of detail that would be required to ensure that any habitat management activities or military training activities allowed under this section of the proposed rule would have actually been subject to advanced planning and meaningful review by the Service.<sup>37</sup> Furthermore, Service documents that we discussed and attached in our prior comment letter strongly suggest that the Service’s involvement in INRMP review and consultation is minimal in practice.<sup>38</sup>

We strongly recommend that the Service revise and strengthen this provision in multiple ways. First, compliance with the *Management Guidelines for the Red-cockaded Woodpecker on Army Installations* must be a requirement of the regulation for the take exception to apply.<sup>39</sup> Second, the rule should include a requirement that each INRMP under this rule has an Endangered Species Management Component (“ESMC”) and that the Service is involved in annual reviews and periodic revisions of both the INRMP and ESMC. Alternatively, the Service could design this portion of the rule to mirror the provision for federal land agencies at section (h)(4)(ii) by requiring that: (A) the installation details all habitat management activities and training activities for which this take exemption is expected to apply within its INRMP; and (B) the “habitat management activities incorporate appropriate conservation measures to minimize or avoid adverse effects of these habitat management activities on red-cockaded woodpecker foraging habitat, on clusters, and on the species’ roosting and nesting behavior to the maximum extent practicable.” See 87 Fed. Reg. at 6,130.

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<sup>33</sup> See SELC Proposed Downlisting Comments, *supra* note 1, at 29–34.

<sup>34</sup> Based on calculations from figures in the Final SSA (~37.6%) and 2015 Ad Hoc Report, *available at* <https://164.159.171.28/ecp0/reports/implementation-activity-status-ore-report?documentId=100035&entityId=107> (~32.6%).

<sup>35</sup> See Final SSA at 106 (high resilience populations), 137 (very high resilience populations).

<sup>36</sup> See SELC Proposed Downlisting Comments, *supra* note 1, at 31–33.

<sup>37</sup> See SELC Proposed Downlisting Comments, *supra* note 1, at 31–33.

<sup>38</sup> See SELC Proposed Downlisting Comments, *supra* note 1, at 32.

<sup>39</sup> See 87 Fed. Reg. at 6,124.



Third, the rule text should provide more specificity on what must be included in the military installations' required annual reports on red-cockaded woodpeckers. At minimum, the rule should require reporting on all the categories of information suggested in the proposal's preamble, including: the property's recovery goal; the number of active, inactive, and recruitment clusters; information on habitat quality; and the number of artificial cavities the property installed. 87 Fed. Reg. at 6,125. Detailed survey history information should be included in these reports as well, so that population trends on the installation can easily be tracked over time based on up-to-date survey results.<sup>40</sup>

Fourth, the rule should require assurances that DoD installations will in fact "continue to manage towards larger populations" as the preamble indicates. 87 Fed. Reg. at 6,125. We are concerned that some installations are effectively viewing the recovery goal as a *ceiling* for their RCW populations and engaging in unnecessary take that prevents the population from growing beyond the recovery goal. To prevent this from happening, the rule should contain explicit requirements that installations may only avail themselves of this exemption if *on-base* population trends have been stable or increasing for the last five consecutive years.

Finally, the Service should provide clarity around long-term habitat projects in the vicinity of military bases that certain military installations are currently utilizing to offset their destruction of red-cockaded woodpecker habitat on the base.<sup>41</sup> In essence, these programs attempt to rely on an installation's promises that it will restore off-base habitat that it has acquired, which may not be suitable for either nesting or foraging, to offset takes from the destruction of currently suitable nesting and/or foraging habitat within the installation.<sup>42</sup> FWS must at minimum ensure that schemes like this do not fall under military "habitat management and military training activities" envisioned by the proposed rule.

#### **D. Exemptions for Federal Land Management Agencies Need Further Refinement.**

Generally, we support the Service's decision to remove the prior proposed rule's exemption for "habitat restoration activities carried out in accordance with a management plan providing for red-cockaded woodpecker conservation developed in coordination with, and approved by, the Service or a State conservation agency." As we detailed in our previous comments, the prior exemption was overly broad and improperly delegated the Service's authority to State conservation agencies with differing, and potentially conflicting, missions and

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<sup>40</sup> For example, the Digital Annual Reporting Tool ("DART") that has already been used by many red-cockaded woodpecker stakeholders allows for this data to be centrally stored and tracked over time. *See infra* Section II.D.

<sup>41</sup> In a separate provision of the preamble, for example, the Service stated that it "would, under certain conditions, except incidental take associated with habitat management activities on Federal lands that have short-term adverse effects to red-cockaded woodpeckers, but that are intended to provide for improved habitat quality and quantity in the long term, with coinciding increases in numbers of red-cockaded woodpeckers, if these activities are detailed in a management plan that can adequately address site-specific considerations." 87 Fed. Reg. at 6,125.

<sup>42</sup> *See, e.g.*, Programmatic Biological Assessment for Red-cockaded Woodpecker Recovery and Sustainment Program for Marine Corps Base Camp Lejeune (July 2012) at i (explaining that "the RCW recovery goal at MCB Camp Lejeune can be reduced" in return for identifying and managing off-base properties with the *potential* to increase the woodpecker population), *available at* [https://www.fws.gov/mississippi/\\_pdf/2\\_USMC\\_7a1\\_plan\\_9\\_July\\_2012.pdf](https://www.fws.gov/mississippi/_pdf/2_USMC_7a1_plan_9_July_2012.pdf).

duties.<sup>43</sup> The new proposal’s more limited exemption for “habitat management activities intended to restore or maintain red-cockaded woodpecker habitat *on Federal land management agency properties*,” 87 Fed. Reg. at 6,130 (emphasis added), by contrast, has a more workable scope and increased oversight that can better provide for the conservation of the species.

Specifically, we support the revised proposed rule’s requirement for federal land management agencies to avoid or minimize adverse effects of these activities on all clusters of red-cockaded woodpeckers (not just active clusters) and find this to be in line with federal agencies’ overarching duties to provide for the recovery of threatened and endangered species. *See, e.g.*, 16 U.S.C. § 1536(a)(1). We further appreciate the requirement that federal habitat management plans under this section must describe the habitat management activities that will be undertaken in detail, as well as the preamble’s reassurances the plans will undergo Section 7 review by the Service.

Likewise, we value the proposed rule’s requirement that the federal land management agency must report annually to the Service regarding its red-cockaded woodpecker populations, but we believe this provision should be strengthened by adding subsections to the rule text detailing the minimum requirements for these reports. The examples listed in the preamble of “the property’s recovery goal; the number of active, inactive, and recruitment clusters; information on habitat quality; and the number of artificial cavities the property installed” should all be included within the rule text as minimum reporting requirements. 87 Fed. Reg. at 6,125. Better yet, the Service should ensure that properties use a uniform reporting system, such as the Digital Annual Reporting Tool (“DART”) that has already been used by many red-cockaded woodpecker stakeholders, so that data can be more easily compiled and compared across sites.<sup>44</sup>

However, we also find the proposed rule’s requirement for “Federal habitat management activities [to] incorporate appropriate conservation measures to minimize or avoid adverse effects of these habitat management activities on red-cockaded woodpecker foraging habitat . . .” to be insufficiently protective as written. 87 Fed. Reg. at 6,130. The current text of the rule fails to adequately conserve foraging habitat on federal lands because the “definitions” section of the rule defines foraging habitat as “habitat that generally consists of mature pines with an open canopy, low densities of small pines, a sparse hardwood and/or pine midstory, few or no overstory hardwoods, and abundant native bunchgrass and forb groundcovers.” 87 Fed. Reg. at 6,129. This is nearly identical to the Recovery Plan’s definition of “*suitable* foraging habitat,” which is only a subset of the “adequate” habitats in which red-cockaded woodpeckers may actually forage.<sup>45</sup> As currently written, the proposed rule could allow for the destruction of “adequate” foraging habitat, which is antithetical to Federal agencies’ duties to recover species under the ESA. The proposed 4(d) rule must be revised accordingly. The rule could accomplish

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<sup>43</sup> *See* SELC Proposed Downlisting Comments, *supra* note 1, at 34–36.

<sup>44</sup> *See, e.g.*, Conecuh National Forest 2019 DART Report, Att. B.

<sup>45</sup> *See* Recovery Plan at 59 (diagramming the difference between “adequate” and “good” foraging habitat); 293 (describing “suitable foraging habitat” as the equivalent of “good quality” foraging habitat); *see also id.* at 8 (“the threat to woodpecker populations from low-quality or insufficient foraging habitat is not as immediate as threats from habitat fragmentation and lack of suitable nesting habitat”).

this by either requiring that federal agencies avoid or minimize all adverse effects within 0.8 km (0.5 mi) of a cluster's center,<sup>46</sup> or by requiring federal agencies to avoid or minimize adverse effects to any habitat within this area not currently meeting the definition of "suitable" foraging habitat, but which could potentially be restored to meet this definition. These revisions should help to ensure that habitat upon which red-cockaded woodpecker clusters in fact depend for their foraging and survival receives adequate protections from harvesting and other forms of take.

Finally, as discussed in Section II.B, above, any activities aimed at habitat or pine conversion should only be undertaken in close coordination with the Service, on a project-by-project basis, rather than as a routine action allowed by an overarching habitat management plan.

### **E. Exemptions for Prescribed Burns and Herbicide Use by Private Landowners Should be Further Clarified.**

We generally support the Service's efforts to improve clarity and create avoidance and mitigation requirements for take exemptions that would apply on private lands under the proposed 4(d) rule. However, the term "known active clusters" in part C of that exemption<sup>47</sup> creates confusion, and the proposed rule as currently written may disincentivize private landowners from having their lands regularly surveyed by licensed professionals.

Specifically, the exemption's requirement that prescribed burns and herbicides on private land are applied "in a manner that minimizes or avoids adverse effects to *known active clusters* . . ." contains inherently problematic novel terminology. The term "known active cluster" is undefined within the text of the rule and creates conflict with the definitions contained in the Recovery Plan.<sup>48</sup> A "known active cluster" is an inherently ephemeral concept, because the activity status of a cluster cannot be determined unless and until that cluster has been surveyed. The use of this term is concerning in this context because, according to the preamble, the revised proposed rule "*does not* require private landowners to survey for new clusters prior to carrying out a burn or using herbicides." 87 Fed. Reg. at 6,127 (emphasis added).<sup>49</sup> Thus, the proposed rule could give the impression that active clusters which have not been professionally surveyed within a reasonable timeframe and are therefore not "known" to the property owner may be taken under this exemption.<sup>50</sup>

To better protect the species, and to provide internal consistency within the rule, the avoidance and mitigation requirements on private landowner activities should ideally be modified to apply to *all* clusters, like the exemption for federal land management agencies' properties. Short of that, however, the Service could still modify the rule in a way that places a lower respective burden on private landholders but better provides for woodpecker conservation

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<sup>46</sup> See Recovery Plan at 195 ("Assessment of Foraging Habitat").

<sup>47</sup> Proposed for codification at 50 C.F.R. § 17.41(h)(4)(iii)(C).

<sup>48</sup> See, e.g., Recovery Plan at 36 (defining "cluster"), 72 (defining "active cluster" and discussing "known clusters"), 295 (defining "inactive cluster").

<sup>49</sup> This also appears to conflict with the Recovery Plan's requirement that a cluster's activity status cannot be determined by one visit alone and must instead be determined by expert biologists under a cluster-specific monitoring program. See Recovery Plan at 295.

<sup>50</sup> Recovery Plan at 295.

on private lands. Specifically, 50 C.F.R. § 17.41(h)(4)(iii)(C) could read: “Applies prescribed burns and herbicides in a manner that minimizes or avoids adverse effects to ~~known~~ active clusters and red-cockaded woodpecker roosting and nesting behavior to the maximum extent practicable.” The rule or preamble should also clarify that, in accordance with the Recovery Plan, all clusters that have been active within the last five years will continue to receive the same default protections as active clusters.<sup>51</sup>

Additionally, the “privately owned properties” provision of the proposed rule should be strengthened in several other ways. First, the rule should do away with the term “compatible with” in its provision for “[a]pplication of prescribed burns or herbicides on private lands when *compatible with* maintaining any known red-cockaded woodpecker populations . . .” 87 Fed. Reg. at 6,130. The phrase is confusing and adds no value to the regulation; the provision should instead have a straightforward requirement that known red-cockaded woodpecker populations must be maintained if these activities are to be undertaken without a take permit. Second, the rule should explicitly incorporate the Recovery Plan’s methods for cavity tree protection. *See* 87 Fed. Reg. at 6,127 (citing Recovery Plan at 201–05). Third, the activities under this provision should not be allowed to occur during nesting season without a take permit, which should set out specific requirements for how to avoid and minimize disturbances to roosting and nesting behavior.

#### **F. Continuing to Ensure Proper Installation and Maintenance of Artificial Cavities is Necessary for Red-Cockaded Woodpecker Recovery.**

As we have discussed previously, red-cockaded woodpeckers depend upon the installation of artificial cavities. Ensuring these cavities are properly installed and maintained is critical to ongoing conservation and recovery of the species. As such, the revised rule’s training requirements are an important improvement from the initial proposed rule. The currently-proposed provision needs some clarification, however, as subsection (h)(4)(iv)(A)(1) states that it applies if the “individual conducting the installation, maintenance, or replacement” has “[h]eld a valid Service permit for that purpose in the past and has continued to install, maintain, and replace cavities since the expiration of their permit.” This phrasing implies that persons who are *currently* working illegally under *expired* permits will be allowed to conduct these actions in the future. The proposed regulation must be revised to clarify that this applies only to persons who are in full compliance with permitting for as long as the permitting requirement remains in effect.

### **III. NEEDS FOR ONGOING CONSERVATION AND EFFECTIVE IMPLEMENTATION OF THE REVISED PROPOSED RULE**

It is imperative that the Service continue to ensure necessary financial resources and dedicated staff for red-cockaded woodpecker conservation. As the Service itself admits, “the red-cockaded woodpecker is a conservation-reliant species ‘highly dependent on active conservation management with prescribed fire, beneficial and compatible silvicultural methods to regulate forest composition and structure, the provision of artificial cavities where natural

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<sup>51</sup> Recovery Plan at 72; *see also id.* at 180 (“Recently abandoned clusters should be managed with the same intensity as active clusters.”).

cavities are insufficient, translocation to sustain and increase small vulnerable populations, and effective monitoring to identify limiting biological and habitat factors for management.” 87 Fed. Reg. at 6,120 (citing Final SSA at p. 129). We remain concerned that the decision to downlist the red-cockaded woodpecker from endangered to threatened may deprioritize resources away from red-cockaded woodpecker conservation. Without sufficient funding, active management efforts will likely begin to decline,<sup>52</sup> which would in turn cause the species’ recovery progress to backslide.<sup>53</sup>

Accordingly, we are deeply concerned by the closure of the Service’s sub-office in Southern Pines, North Carolina, and the loss of staff that formerly worked full-time on the Sandhills, including in important roles such as the North Carolina Sandhills Safe Harbor Agreement coordinator. It is imperative that the Service maintain dedicated field staff to oversee continued red-cockaded woodpecker recovery. Likewise, it is imperative that the Service continue to provide sufficient dedicated Section 6 funds and other funding to state wildlife agencies and other agencies to undertake red-cockaded woodpecker conservation efforts into the future.

Finally, we provide comments on the Service’s request for feedback on other provisions it should consider for this rule and how it can streamline the rule’s implementation. See 87 Fed. Reg. at 6,119 (comment requests #12 and #13). While we do not take issue with the use of stock language on red-cockaded woodpecker biology and habitat requirements, and believe that these should be consistent across Section 7 consultation documents, we are concerned that “streamlining” efforts often involve attempts to cut legal corners and result in undermining conservation goals.

In the North Carolina Sandhills, specifically, FWS has introduced a self-certification scheme that relies on stale and rough-scaled mapping data to allow private landowners to “certify” that no red-cockaded woodpeckers are present on their land to be harmed by their clearcutting and/or property development activities, thereby precluding the need for incidental take permitting.<sup>54</sup> We have strong concerns regarding the current use of this program in the Sandhills,<sup>55</sup> and we urge the Service not to adopt programs like this at a larger scale, as they appear to contravene the agency’s duties under the ESA to further conservation and recovery.

To streamline the standards that the Service applies in its Section 7 consultations and various reviews under this 4(d) rule, we urge the Service to uniformly require adherence to the red-cockaded woodpecker recovery standards for foraging habitat, as articulated in the Recovery Plan.<sup>56</sup> The Service could make these recovery standards easily accessible on its web page, along with examples of “best management practices” for herbicide use and controlled burning, or

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<sup>52</sup> See, e.g., SELC Proposed Downlisting Comments, *supra* note 1, at 11 (discussing funding requirements to maintain management efforts).

<sup>53</sup> See SELC Proposed Downlisting Comments, *supra* note 1, at 38–39 (detailing the dire outcome of the Draft SSA’s low management scenario).

<sup>54</sup> U.S. Fish & Wildlife Serv., *Red-Cockaded Woodpecker (RCW) Online Project Review Process For Sandhills Ecoregion Of North Carolina*, <https://www.fws.gov/raleigh/NCRCWOnline.html>.

<sup>55</sup> See NC Sandhills Red-Cockaded Woodpecker Recovery Working Group, Letter to Pete Benjamin, USFWS Raleigh Field Office Supervisor (Sept. 20, 2021), Att. C.

<sup>56</sup> See, e.g., Recovery Plan at 187–95 (recovery standard for foraging habitat).

other relevant guidance documents mentioned within the rule or preamble. *See* 87 Fed. Reg. at 6,127.

#### IV. CONCLUSION

The Service's proposal to downlist the red-cockaded woodpecker remains premature and unsupported by the best available science. Despite this, we appreciate the efforts the Service has made to clarify and improve the accompanying section 4(d) rule in this revised proposal. We encourage the Service to incorporate our suggestions in order to better ensure the red-cockaded woodpecker retains the protections it needs to truly achieve recovery in the future.

Sincerely,



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