



VIA CERTIFIED MAIL  
RETURN RECEIPT REQUESTED

October 11, 2011

Henry Sansing, Manager  
Noxubee National Wildlife Refuge  
2970 Bluff Lake Road  
Brooksville, Mississippi 39739

Ken Salazar, Secretary of the Interior  
U.S. Dept. of the Interior  
1849 C Street, N.W.  
Washington, D.C. 20240

Daniel M. Ashe, Director  
United States Fish and Wildlife Service  
1849 C Street, NW  
Washington, D.C. 20240

### **Sixty-Day Notice of Intent to Sue Pursuant to the Endangered Species Act**

Dear Sirs,

The Noxubee National Wildlife Refuge (“Noxubee”) and the United States Fish and Wildlife Service (“FWS”) are hereby notified that Wild South and the Center for Biological Diversity intend to file suit, pursuant to the citizen suit provision of the Endangered Species Act (“ESA”), 16 U.S.C. § 1540(g), to challenge the failure of Noxubee and FWS to: (1) timely reinstate consultation concerning the ongoing impacts of the Noxubee Comprehensive Conservation Plan on the endangered red-cockaded woodpecker (“RCW”), including an approximately 25% decrease in the number of clusters at Noxubee; (2) insure that the Comprehensive Conservation Plan, and amendments proposed to that Plan by way of the now-draft Habitat Management Plan, will not jeopardize the continued existence of RCW or result in the adverse modification of its critical habitat; and (3) consult on site-specific projects and activities on the Noxubee National Wildlife Refuge in order to insure that these projects and activities are not likely to jeopardize the continued existence of threatened and endangered species or result in the adverse modification of their critical habitat.

**I. Identity of the Organizations Giving Notice:** The name, address, and phone number of the organizations giving notice of intent to sue under the ESA are:

Wild South  
16 Eagle Street, Suite 200  
Asheville, North Carolina 28801  
Tel: 828-258-2667

Center for Biological Diversity  
P.O. Box 710  
Tucson, Arizona 85702-0710  
Tel: 520-623-5252

## **II. Counsel for the parties giving notice:**

Rachel S. Doughty, Attorney  
231 Mullen Avenue  
San Francisco, CA 94110  
Tel: 828-424-2005

Marc D. Fink, Attorney  
Center for Biological Diversity  
209 East 7<sup>th</sup> Street  
Duluth, Minnesota 55805  
Tel: 218-464-0539

## **III. Requirements of the ESA**

Section 7 of the ESA requires Noxubee, in consultation with FWS, to insure that any action authorized, funded, or carried out by the wildlife refuge is not likely to (1) jeopardize the continued existence of any threatened or endangered species or (2) result in the destruction or adverse modification of the critical habitat of such species. 16 U.S.C. § 1536(a)(2). “Action” is broadly defined to include all activities or programs of any kind authorized, funded, or carried out by federal agencies, including actions directly or indirectly causing modifications to the land, water, or air; and actions intended to conserve listed species or their habitat. 50 C.F.R. § 402.02.

For each federal action, Noxubee must request from FWS whether any listed or proposed species may be present in the area of the agency action. 16 U.S.C. § 1536(c)(1); 50 C.F.R. § 402.12. If listed or proposed species may be present, Noxubee must prepare a “biological assessment” to determine whether the listed species may be affected by the proposed action. *Id.* If Noxubee determines that its proposed action may affect any listed species or critical habitat, the wildlife refuge must engage in formal consultation with FWS. 50 C.F.R. § 402.14. To complete formal consultation, FWS must provide Noxubee with a “biological opinion” explaining how the proposed action will affect the listed species or habitat. 16 U.S.C. § 1536(b); 50 C.F.R. § 402.14.

If FWS concludes that the proposed action “will jeopardize the continued existence” of a listed species, the biological opinion must outline “reasonable and prudent alternatives.” 16 U.S.C. § 1536(b)(3)(A). If the biological opinion concludes that the action is not likely to jeopardize the continued existence of a listed species, and will not result in the destruction or adverse modification of critical habitat, FWS must provide an “incidental take statement,” specifying the amount or extent of such incidental taking on the listed species, any “reasonable and prudent measures” that FWS considers necessary or appropriate to minimize such impact, and setting forth the “terms and conditions” that must be complied with by Noxubee to implement those measures. 16 U.S.C. § 1536(b)(4); 50 C.F.R. § 402.14(i).

In order to monitor the impacts of incidental take, Noxubee must monitor and report the impact of its action on the listed species to FWS as specified in the incidental take statement. 16 U.S.C. § 1536(b)(4); 50 C.F.R. §§ 402.14(i)(1)(iv), 402.14(i)(3). If during the course of the action the amount or extent of incidental taking is exceeded, Noxubee must reinitiate consultation with FWS immediately. 50 C.F.R. § 401.14(i)(4).

The reinitiation of consultation is required and must be requested by Noxubee or FWS if (1) the amount or extent of taking specified in the incidental take statement is exceeded; (2) new

information reveals effects of the action that may affect listed species or critical habitat in a manner or to an extent not previously considered; (3) the action is modified in a manner that causes an effect to the listed species or critical habitat that was not considered in the biological opinion; or (4) a new species is listed or critical habitat designated that may be affected by the identified action. 50 C.F.R. § 402.16.

After the initiation or reinitiation of consultation, Noxubee is prohibited from making any irreversible or irretrievable commitment of resources with respect to the agency action which may foreclose the formulation or implementation of any reasonable and prudent alternative measures. 16 U.S.C. § 1536(d).

Section 9 of the ESA and its implementing regulations prohibit the unauthorized “take” of listed species. 16 U.S.C. § 1538(a)(1); 16 U.S.C. § 1533(d); 50 C.F.R. § 17.31. “Take” is defined broadly to include harming, harassing, trapping, capturing, wounding or killing a protected species either directly or by degrading its habitat. *See* 16 U.S.C. § 1532(19). Taking that is in compliance with the terms and conditions specified in a biological opinion is not considered a prohibited taking under Section 9 of the ESA. 16 U.S.C. § 1536(o)(2).

#### **IV. Significant New Information and Modifications Since the 2004 Comprehensive Conservation Plan**

Subsequent to the 2004 Comprehensive Conservation Plan, there has been significant new information revealing potential affects of the continued implementation of the Plan on RCW. This new information includes, but is not limited to, the significant reduction in RCW clusters on the Noxubee National Wildlife Refuge. The Comprehensive Conservation Plan stated that at the time of its adoption, there were 45 groups of RCW located on Noxubee. In 2011, however, Noxubee has only 34 active clusters, and 6 of these 34 remaining clusters have only one RCW, meaning there will be no reproduction in these 6 clusters.

Noxubee is also proposing significant modifications to the 2004 Comprehensive Conservation Plan that would cause adverse impacts to RCW that were not previously considered. For instance, even through numbers of RCW on Noxubee are significantly decreasing, Noxubee has prepared a draft Habitat Management Plan (HMP) that would significantly increase logging in RCW habitat. The draft HMP proposes to log twice as much pine habitat as compared to the 2004 Comprehensive Conservation Plan.

#### **V. Site-Specific Projects and Activities on the Noxubee National Wildlife Refuge**

Noxubee routinely authorizes site-specific projects and activities on Noxubee which may adversely affect RCW and other threatened and endangered species, and their critical habitat. Prior to authorizing these projects and activities, Noxubee regularly fails to insure, in consultation with FWS and pursuant to Section 7 of the ESA, that these projects and activities are not likely to jeopardize threatened or endangered species or result in the adverse modification of their critical habitat. These projects and activities include logging and road building within the recognized habitat of threatened and endangered species.

## **VI. Noxubee and FWS Violations of the ESA**

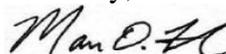
Noxubee and FWS have failed to timely reinitiate and complete the reinitiated consultation regarding the continued implementation and adverse impacts of the 2004 Comprehensive Conservation Plan on RCW, in violation of the ESA. 16 U.S.C. §§ 1536(a)(2), 1536(b)(1)(A), 1536(c)(1); 50 C.F.R. §§ 402.12, 402.14, 402.16. By failing to timely reinitiate and complete consultation on the 2004 Comprehensive Conservation Plan, despite significant new information and modifications to the Plan, Noxubee and FWS are failing to insure that the Plan is not likely to jeopardize RCW or result in the adverse modification of its critical habitat. 16 U.S.C. §§ 1536(a)(2).

Noxubee and FWS are failing to consult on site-specific projects and activities on the Noxubee National Wildlife Refuge which may adversely affect threatened and endangered species and their critical habitat, in violation of the ESA. 16 U.S.C. § 1536(a)(2). As part of this failure, Noxubee is failing to request from FWS which listed species may be present, and is failing to prepare biological assessments. 16 U.S.C. §§ 1536(b), 1536(c). Noxubee and FWS are thereby also failing to insure that that these projects and activities are not likely to jeopardize the continued existence of listed species or their critical habitat. 16 U.S.C. § 1536(a)(2).

## **VII. Conclusion**

For the above stated reasons, Noxubee and FWS have violated and remain in ongoing violation of the ESA. If these violations of law are not cured within sixty days, Wild South and the Center for Biological Diversity intend to file suit for declaratory and injunctive relief, as well as attorney and expert witness fees and costs. 16 U.S.C. § 1540(g). This notice letter was prepared based on good faith information and belief after reasonably diligent investigation. If you believe that any of the foregoing is factually erroneous or inaccurate, please notify us promptly.

Sincerely,



Marc D. Fink  
Center for Biological Diversity  
209 East 7<sup>th</sup> St.  
Duluth, Minnesota 55805

cc: Eric H. Holder, Jr., Attorney General of the United States