



March 24, 2016

Via Electronic Mail & Certified Mail, Return Receipt Requested

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Re: Notice of Intent to Sue: Violations of the Endangered Species Act, Red Wolf Recovery Program

Dear Director Ashe, Secretary Jewell:

I. INTRODUCTION

On behalf of the Center for Biological Diversity and Wildlands Network (collectively, “Center”), I hereby provide 60-days’ notice of the Center’s intent to sue Mr. Dan Ashe, the director of the U.S. Fish and Wildlife Service, the U.S. Fish and Wildlife Service (“FWS”), and the U.S. Department of the Interior in connection with violations of the Endangered Species Act, 16 U.S.C. §§ 1531-1544 (“ESA” or “Act”), stemming from FWS’s decisions to: (1) halt release of captive red wolves to the wild and cease landowner education and investigations of dead wolves, which are key components of the recovery program for the red wolf; (2) reassign the program’s recovery coordinator without a replacement for over a year and a half; and (3) reassess whether to continue the recovery program for red wolves at all.¹ As explained below, Director Ashe and FWS’s actions are antithetical to the ESA and must be reversed immediately to avoid suit from the Center.

II. FACTUAL BACKGROUND

The red wolf (*Canis rufus*) was once common throughout the eastern and south-central United States, but its populations were all but destroyed by the early 1900s due to predator control programs and habitat degradation. Combined with current threats to the species including illegal killings, persecution, and inter-species hybridization with coyotes, the red wolf remains one of the world’s most endangered wolf species today with only about 45 left in the wild. It was listed

¹ The Center is a national, non-profit conservation organization supported by more than 991,000 members and online activists. The Center and its members have a longstanding interest in the conservation of endangered and threatened species and their habitats, including the red wolf.

in 1967 under the Endangered Species Preservation Act, the precursor to the ESA, and then listed as endangered when the ESA was passed in 1973.²

In an attempt to save the red wolf from oblivion, in 1975, 17 wild red wolves were captured for captive breeding, 14 of which became the founding members of the captive-breeding program.³ After Congress amended the ESA in 1982 to include Section 10(j), to provide for the designation of specific introduced populations of listed species as “experimental populations,” FWS designated an experimental population for the species and enacted a rule under the new provision in 1986 for the reestablishment of red wolves in the wild.⁴ FWS determined that designation of an experimental population of red wolves “will further the conservation of this species.”⁵

Thus, in 1987, four pairs of red wolves were released in the Alligator River National Wildlife Refuge in Dare County in northeastern North Carolina. With this beginning, the experimental population grew over the following decades and the recovery area expanded to include three additional counties in North Carolina, as well as four national wildlife refuges, a Department of Defense bombing range, state lands, and private lands, encompassing a total of 1.7 million acres.⁶

FWS promulgated the rule to govern the experimental population of red wolves pursuant to Section 10(j) of the ESA because FWS determined it to be “necessary and advisable for the conservation of the species.”⁷ The rule, in part, provides that no “person” may take a red wolf, unless the take is specifically allowed by the rule.⁸ Certain take is authorized for management-related purposes. In addition, certain take within the Red Wolf Recovery Area is allowed so long as the take is reported within 24 hours, including take of wolves for human safety, when wolves are in the act of killing livestock or pets, when evidence of red wolves wounding or killing livestock is evident, for non-lethal harassment, and take by a private landowner on his or her property if efforts by FWS to capture the animal have been abandoned, provided that FWS approves the action in writing.⁹ Take of a red wolf that does not fall within one of these limited

² 32 Fed. Reg. 4001 (Mar. 11, 1967).

³ U.S. DEPARTMENT OF THE INTERIOR, U.S. FISH AND WILDLIFE SERVICE, RED WOLF RECOVERY PROGRAM, 2ND QUARTER REPORT: JANUARY-MARCH 2014 at 2; *but see* U.S. Department of the Interior, U.S. Fish and Wildlife Service, Red Wolf Recovery Plan (1990) (“Recovery Plan”) at 17 (stating that 15 animals became the founding stock of the red wolves existing today).

⁴ 51 Fed. Reg. 26,564 (July 24, 1986); 50 C.F.R. § 17.81(a).

⁵ 51 Fed. Reg. 41,793 (Nov. 19, 1986).

⁶ 50 C.F.R. § 17.84(c)(9)(i).

⁷ 51 Fed. Reg. at 41,792.

⁸ 50 C.F.R. § 17.84(c)(2). The ESA defines “person” broadly to include “an individual, corporation, partnership, trust, association, or any other private entity; or any officer, employee, agent, department, or instrumentality of the Federal Government, of any State, municipality, or political subdivision of a State, or of any foreign government; any State, municipality, or political subdivision of a State; or any other entity subject to the jurisdiction of the United States.” 16 U.S.C. § 1532(13).

⁹ *Id.* § 17.84(c)(4).

exceptions, or which is not reported within 24 hours, is illegal under the ESA.¹⁰ In 1995, FWS revised the 10(j) rule and clarified that private landowners could take “offending” red wolves with an approved take permit issued by FWS.¹¹ “Offending” wolves means wolves that have killed livestock or pets, or harmed personal property.¹²

Reintroduction has been a core component of FWS’s recovery strategy for the species. The Red Wolf Recovery Plan, most recently revised in 1990, calls for the establishment and maintenance of at least three reintroduced populations within the historic range of the red wolf.¹³ The Recovery Plan makes clear that conservation of the red wolf “must be based on viable populations.”¹⁴ While there is no single “magic number” that constitutes a “minimum viable population” (“MVP”) size for the red wolf, FWS determined that a captive population of 320 red wolves and a reintroduced wild population of 220 red wolves “would be able to maintain 80 to 85 percent of the original genetic diversity from the captured wild stock that probably occurred in the wild gene pool” of the species.¹⁵ However, the Recovery Plan also noted that depending on the status of the species’ genetic diversity, or lack thereof, “the MVP might have to be 2,000 [wolves].”¹⁶

The reintroduction of red wolves to the wild – or, more precisely, a small portion of the species’ once-vast, historic range – has been considered one of the world’s most innovative and successful programs to restore a critically endangered carnivore species.¹⁷ Following reintroduction, the red wolf 10(j) population grew steadily, reaching a peak population size of about 130 wolves in 2006. However, after that, the population began to decline steadily through about 2014, at which point the decline steepened. In June 2015, FWS estimated the population to be just 50 to 75 wolves.¹⁸ This year, the agency estimated that the population may be down to just 45 individual wolves in the wild.¹⁹

¹⁰ *Id.* § 17.84(c)(2); 16 U.S.C. § 1538(a)(1)(G); It is also “unlawful for any person to ... cause to be committed” prohibited take. 50 C.F.R. § 17.84(c)(8).

¹¹ *Id.* at 18,943.

¹² 50 C.F.R. § 17.84(c).

¹³ Red Wolf Recovery Plan at 5.

¹⁴ Red Wolf Recovery Plan at 26.

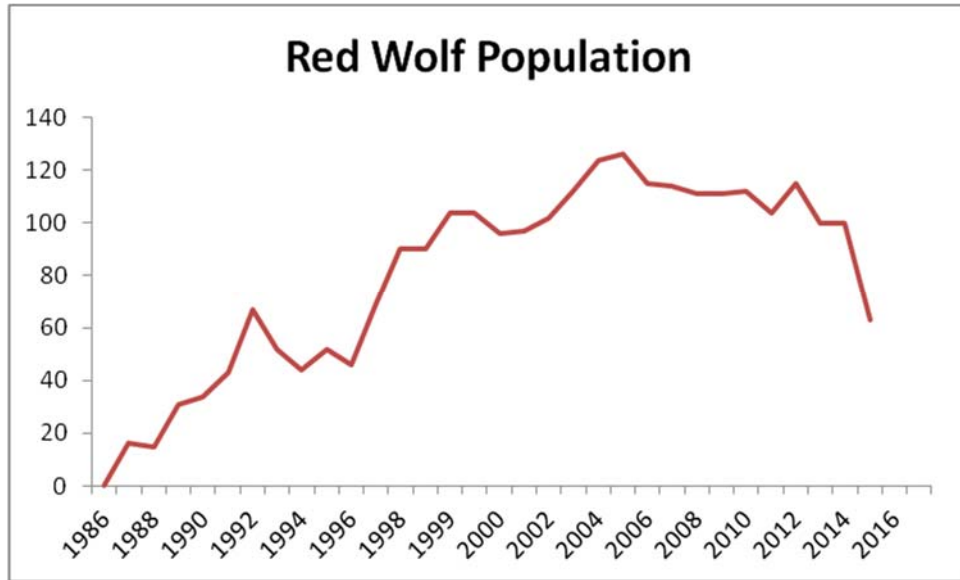
¹⁵ Red Wolf Recovery Plan at 26, 47.

¹⁶ *Id.* at 28. FWS has stated that it is unlikely that the red wolf will ever recover to the point that the species will be safe from extinction.

¹⁷ Red Wolf Recovery Plan at 17.

¹⁸ FWS, Red Wolf Recovery Program Questions and Answers, *available at* <http://www.fws.gov/redwolf/faq.html#halts-reintroductions>.

¹⁹ FWS, Red Wolf Mortality Table (Mar. 9, 2016), *available at* <https://www.fws.gov/redwolf/Images/Mortalitytable.pdf>.



The number of breeding pairs of red wolves has also declined sharply in recent years. FWS estimated there to be 17 breeding pairs of red wolves in the wild in 2012, but by 2015, this number had been reduced to just seven pairs.

A substantial proportion of the recent, high mortality rate for red wolves has been attributed to shooting deaths, which accounted for an estimated 30 out of 65 red wolf deaths from 2012 to 2015.²⁰ The U.S. District Court for the District of North Carolina enjoined coyote hunting in the Red Wolf Recovery Area in May 2014 after six red wolves were shot to death in the fall of 2013.²¹ At that time, there were an estimated 90 to 110 red wolves in the wild.

It is apparent that the recent, steep decline in the red wolf population is also largely due to mismanagement by FWS. In June, 2015, FWS officially “halted” all releases of red wolves from captivity into the recovery area and announced that it was commencing a “review” to determine whether “the overall recovery of the red wolf in the wild is truly attainable”²² In August 2014, FWS reassigned the program’s recovery coordinator and has yet to refill the position a year and a half later. FWS has also curtailed investigations of red wolf mortalities and halted the highly successful education program, another key component of the Red Wolf Recovery Plan. Meanwhile, the recovery program has not issued any law enforcement press releases since October 17, 2014²³ although over 33 wolves have died since then, many due to suspected or

²⁰ FWS, Red Wolf Mortality Table (Jan. 11, 2016).

²¹ *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).

²² U.S. Fish and Wildlife Service: Press Release, *Service Halts Red Wolf Reintroductions Pending Examination of Recovery Program* (June 30, 2015); U.S. DEPARTMENT OF THE INTERIOR, U.S. FISH AND WILDLIFE SERVICE, RED WOLF NON-ESSENTIAL POPULATION MANAGEMENT DECISION Q AND A (July 1, 2015).

²³ FWS, *Press Release: Federal and State Officials Request Assistance in Investigation of Gunshot Red Wolf* (Oct. 17, 2014), available at <https://www.fws.gov/news/ShowNews.cfm?ID=1F16FF2B-E3BC-A09A-2B71ED3DBCBC627D>.

confirmed gunshot and/or illegal take. At this point, FWS is *currently reevaluating whether to continue the Red Wolf Recovery Program at all.*²⁴

It is highly inappropriate and fundamentally contrary to the ESA for FWS – *the very public agency which is tasked with the recovery of the nation’s wildlife* – to cease releases of captive red wolves, mortality and law enforcement investigations, and the education program, and to reevaluate whether to recover red wolves in the wild at all. And from a practical perspective, FWS’s actions are harmful to the Recovery Program, which has seen important successes since it began even while additional progress needs to be made. A 2014 Wildlife Management Institute report concluded that while the program has been successful, recovery still depends on at least two additional populations being established – as required under the Recovery Plan – and that FWS needs to expend more resources to build local stakeholder support for the program.²⁵ FWS’s actions have taken the program directly in the opposite direction while the red wolf population spirals towards extinction in the wild.

III. VIOLATIONS OF THE ENDANGERED SPECIES ACT

A. Failure to Implement the Recovery Plan and to Conserve the Red Wolf

The ESA is the world’s strongest biodiversity-protection law. Its fundamental purpose is “to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved, [and] to provide a program for the conservation of such endangered species and threatened species”²⁶ “Conservation” means “to use and the use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to this Act are no longer necessary.”²⁷ All federal agencies – including FWS – “shall seek to conserve endangered species and threatened species and shall utilize their authorities in furtherance of the purposes of this Act.”²⁸

To meet its purpose, the ESA includes many substantive protections, including the requirement that FWS utilize its programs and authorities “in furtherance of the purposes of this Act” “by carrying out programs for the conservation of endangered species and threatened species”²⁹

²⁴ FWS was supposed to finish its review at the end of 2015 but has now pushed back its completion date until summer of 2016. U.S. FISH AND WILDLIFE SERVICE, UPDATE: RED WOLF RECOVERY REVIEW (Oct. 27, 2015).

²⁵ WILDLIFE MANAGEMENT INSTITUTE, INC., A COMPREHENSIVE REVIEW AND EVALUATION OF THE RED WOLF (*CANIS RUFUS*) RECOVERY PROGRAM (Nov. 14, 2014).

²⁶ 16 U.S.C. § 1531(b).

²⁷ *Id.* § 1532(3).

²⁸ *Id.* § 1531(c).

²⁹ *Id.* § 1536(a)(1). Congress expressly made clear that Section 7(a)(1) of the ESA applies to nonessential experimental populations. *See id.* § 1539(j)(2)(C) (“For the purposes of this Act, each member of an experimental population shall be treated as a threatened species; except that— (i) solely for purposes of section 7 (*other than subsection (a)(1) thereof*), an experimental population determined under subparagraph (B) to be not essential to the

In addition, FWS must “develop and implement plans” – recovery plans – “for the conservation and survival of endangered species and threatened species listed pursuant to this section, unless [FWS] finds that such a plan will not promote the conservation of the species.”³⁰ The D.C. Circuit Court of Appeals has made clear that implementation of recovery plans is not optional – *i.e.*, FWS “*must implement the plan ... [t]hat is, as long as a species is listed as endangered, the agency is obligated to work toward the goals set in the recovery plan.*”³¹

FWS’s actions to jettison the Red Wolf Recovery Program are antithetical to these clear, mandatory duties. Here, the Red Wolf Recovery Program is based on the requirements of the species’ 1990 Recovery Plan, which sets forth, as the species’ “conservation strategy or recovery plan,” the requirement that FWS “[e]xpand” – not reduce – “the population in numbers and range”³² This is primarily accomplished by *releasing* captive red wolves to the recovery area and through the establishment of multiple populations, each with a minimum of 50 to 100 red wolves, to be managed as a metapopulation.³³ Indeed, *nowhere* in the ESA itself or in over 42 years of ESA jurisprudence can the option *not* to implement a recovery plan – or to elect *not* to recover a listed species at all – be found. Thus, this is not a question of agency priorities, but rather, addresses FWS’s blatant failure to comply with its conservation mandates at all, in light of FWS’s decisions to suspend releases of captive red wolves and to reconsider whether to recover the species from its current, steep trajectory toward extinction.

B. Failure to Confer on FWS Decision Not to Release Captive Red Wolves

As a nonessential experimental population, the red wolf population is entitled to another substantive protection – *i.e.*, the requirement, pursuant to Section 7(a)(4) of the ESA, that all federal agencies “confer” on the effects of their actions to experimental populations.³⁴ The definition of agency “action” is broad and includes “all activities or programs of any kind authorized, funded, or carried out, in whole or in part, by Federal agencies in the United States or upon the high seas” including “actions intended to conserve listed species or their habitat”³⁵

continued existence of a species shall be treated, except when it occurs in an area within the National Wildlife Refuge System or the National Park System, as a species proposed to be listed under section 4.”) (emphasis added).

³⁰ *Id.* § 1533(f).

³¹ *Friends of Blackwater v. Salazar*, 691 F.3d 428, 437 (D.C. Cir. 2012) (emphasis added).

³² 1990 Recovery Plan at 31.

³³ *Id.* at 26.

³⁴ 16 U.S.C. § 1536(a)(4) (“Each Federal agency shall confer with the Secretary on any agency action which is likely to jeopardize the continued existence of any species proposed to be listed under section 4”); *id.* § 1540(j)(2)(C) (“[A]n experimental population determined under subparagraph (B) to be not essential to the continued existence of a species shall be treated, except when it occurs in an area within the National Wildlife Refuge System or the National Park System, as a species proposed to be listed under section 4.”).

³⁵ 50 C.F.R. § 402.02.

FWS's June 30, 2015 decision to "halt" red wolf reintroductions is a federal "action" within the meaning of the ESA. FWS did not confer on this decision. Accordingly, FWS is in violation of Section 10(j)(2)(C) of the ESA.³⁶

IV. VIOLATIONS OF THE ADMINISTRATIVE PROCEDURE ACT

Although we are not required to provide formal notice of our intent prosecute FWS's violations of the Administrative Procedure Act, 5 U.S.C. § 706(2)(A), we hereby inform you that unless FWS takes immediate steps to reverse its unlawful actions under the ESA, we will pursue claims regarding violations of the APA as well. FWS's malfeasance, as described above, is fundamentally contrary to the requirements of the ESA and is not supported by the relevant factors, and as such, constitutes agency action that is arbitrary and capricious or not in accordance with law, within the meaning of the APA.

V. CONCLUSION

This letter provides notice that if FWS, Director Ashe, and the Department of the Interior do not immediately and fully resume the Red Wolf Recovery Program, including by ensuring that it is fully staffed, is releasing captive red wolves to the wild, and is undertaking public education about the species and program, and abandons the misguided and unlawful reassessment as to continuance of red wolf recovery, the Center intends to file suit. Please contact me if you have any questions or if you would like to discuss this matter further.

Sincerely,

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³⁶ See, e.g., *Native Ecosystems Council v. Krueger*, 63 F. Supp. 3d 1246 (D. Mont. 2014) (noting that a federal agency must confer with FWS regarding a proposed species if "the project likely would 'jeopardize the continued existence of the proposed species'" (quoting 50 C.F.R. § 402.10 and 402.12.(d)(1)); 16 U.S.C. § 1536(a)(4) (experimental population is entitled to protection as a proposed species under the ESA).