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September 14, 2020

Via Email and Certified Mail, Return Receipt Requested

The Honorable David Bernhardt, Secretary
U.S. Department of the Interior
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Ms. Aurelia Skipwith, Director
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Re: Notice of Intent to Sue for Violations of the Endangered Species Act

Dear Secretary Bernhardt, Director Skipwith, and Regional Director Miranda:

On behalf of the Red Wolf Coalition, Defenders of Wildlife, and Animal Welfare Institute (collectively, “Conservation Organizations”), we are writing to notify you of our intent to bring suit against the United States Fish and Wildlife Service (“USFWS” or “Service”) for violations of the Endangered Species Act (“ESA”), 16 U.S.C. §§ 1531-1544, in connection with its policies and management of the endangered red wolf population and the world’s only population of wild red wolves in eastern North Carolina.

The wild red wolf population, which steadily grew from the original reintroduction in 1987 and consistently numbered over 100 wolves between 2002 and 2014, is now down to only nine collared wolves in the wild. Several years ago, the Service triggered this catastrophic decline by terminating its previously successful management measures of releasing captive red wolves into the wild population and adaptive management of coyotes to prevent hybridization with wild red wolves. Now, the Service has adopted and bound itself to a policy actively prohibiting the release of captive red wolves into the historic Red Wolf Recovery Area, claiming that this policy is necessitated by the 1995 red wolf 10(j) rule. This claim is unfounded, and,

with no reproduction in the wild for the past two breeding seasons, this policy will precipitate the extinction of the red wolf in the wild.

The Service is violating ESA Sections 7(a)(1) and 7(a)(2), 16 U.S.C. §§ 1536(a)(1) and (a)(2), by failing to use its authorities to further red wolf recovery and failing to insure that its actions are not likely to jeopardize the continued existence of the red wolf. Indeed, despite having been found in violation of ESA Sections 7(a)(1) and 7(a)(2), 16 U.S.C. §§ 1536(a)(1) and (a)(2), in November 2018 by the U.S. District Court for the Eastern District of North Carolina, the Service has gone on to commit further ESA violations over the past two years.

This letter constitutes written notice required by the citizen suit provision of the ESA, 16 U.S.C. § 1540(g)(1)(A), given 60 days prior to commencement of legal action. *Id.* § 1540(g)(2)(A).

I. BACKGROUND

Congress enacted the ESA in 1973 because species of wildlife and plants across the United States were being “rendered extinct as a consequence of economic growth and development untempered by adequate concern and conservation.” 16 U.S.C. § 1531. In response, the ESA aims “to provide a program for the conservation of such endangered species and threatened species” and a means to conserve the ecosystems on which they depend. *Id.* The goal of the ESA is not just to ensure the continued survival of imperiled species, but rather to bring about their complete recovery to the point at which the conservation measures provided by the statute are no longer necessary. 16 U.S.C. § 1532. As acknowledged by the Supreme Court, “[t]he plain intent of Congress in enacting this statute was to halt and *reverse* the trend toward species extinction, whatever the cost.” *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 184 (1978) (emphasis added). This purpose “is reflected in literally every section of the statute.” *Id.*

Though red wolves were once common across the southern and eastern United States, habitat loss and predator control programs extirpated the red wolf from much of its range, and the species was listed as endangered in 1967. 32 Fed. Reg. 4,001 (Mar. 11, 1967). When the species teetered on the brink of extinction in the 1970s, the Service endeavored to capture the last remaining red wolves from the wild and began a captive breeding population from 14 individuals identified as pure red wolves. *See* 2007 Red Wolf 5-year Status Review at 10, 55. The red wolf was declared biologically extinct in the wild in 1980. *See id.* at 27, 55.

In support of the ESA’s command to conserve and recover species in the wild, Section 10(j) of the Act authorizes USFWS to reintroduce populations of threatened and endangered species within their historic range. 16 U.S.C. § 1539(j). Pursuant to Section 10(j), the Service released four captive-bred red wolf pairs into the wild at Alligator River National Wildlife Refuge in 1987. *See* 56 Fed. Reg. 37,513, 37514 (Aug. 7, 1991); *see also Red Wolf Coal. v. U.S. Fish & Wildlife Serv.*, 210 F. Supp. 3d 796, 799 (E.D.N.C. 2016). As the red wolf population grew, the Service expanded the Red Wolf Recovery Area to include additional federal, state, and private lands, spanning 1.7 million acres across five counties. *See* 60 Fed. Reg. 18,940, 18,941 (Apr. 13, 1995) (reintroduction area expanded in 1993 to include Pocosin Lakes National Wildlife Refuge to “provide the Service with more opportunities to release additional wolves”).

In 1999, the Service developed its Red Wolf Adaptive Management Work Plan (“RWAMWP”) and began sterilizing coyotes to address the threat of hybridization by serving as territorial placeholders. 83 Fed. Reg. 30,382, 30,389 (June 28, 2018) (describing development of RWAMP and its success at limiting genetic introgression). From September 1987 through April 2014, a total of 134 red wolves were released into the five-county Red Wolf Recovery Area. *See* Intra-Service Section 7 Biological Opinion for the Red Wolf (*Canis rufus*) Captive Transfer Program and Associated Wild Release at 3 (Sept. 10, 2015). The reintroduction of red wolves to the Red Wolf Recovery Area was determined to be a “remarkable success,” *see Red Wolf Coal. v. U.S. Fish & Wildlife Serv.*, 346 F. Supp. 3d 802, 807 (E.D.N.C. 2018) (citing 2007 Red Wolf 5-year Status Review), and the red wolf program was used as a model for other predator reintroductions around the world.

The leading threats to the wild red wolf have shifted over time, from vehicle strikes, *see* 2007 Red Wolf 5-year Status Review at 17-19, to gunshot mortality, *see* Letter from USFWS Region 4 Director to N.C. Wildlife Resources Commission (Apr. 16, 2012) (describing increasing threat to wild red wolves of gunshot mortality), to the Fish and Wildlife Service itself. It was not until 2014-2015 that the population decline for the wild red wolf in eastern North Carolina became “catastrophic.” *Red Wolf Coal. v. U.S. Fish & Wildlife Serv.*, 210 F. Supp. 3d at 804. In November 2013, an estimated 100 red wolves persisted in the wild; but that number fell to 50-75 red wolves in 2015 and 45-60 wolves by March 2016. *Id.* at 804-05. By June 2018, the wild red wolf population was down to 24 known animals. 83 Fed. Reg. at 30,388.

As the U.S. District Court for the Eastern District of North Carolina found in November 2018, these declines can be traced to the actions and legal violations of the U.S. Fish and Wildlife Service. *See Red Wolf Coal. v. U.S. Fish & Wildlife Serv.*, 346 F. Supp. 3d 802, 813 (E.D.N.C. 2018). Beginning in 2014 and without formal review or consultation, the Service ceased releasing red wolves from captivity into the wild, ceased actively attempting to manage the threat from hybridization with coyotes, and began authorizing the killing of non-problem red wolves by private landowners. The court found that this abandonment of known conservation measures and the resulting decline in the population to only 40 animals constituted numerous violations of the Endangered Species Act, and also enjoined the Fish and Wildlife Service from authorizing the removal or killing of non-problem red wolves. *Id.*

II. THE CURRENT CRISIS

For the past 22 months since the Court’s ruling, the Service has not released any captive wolves into the wild population and has not resumed its prior proactive management of coyotes to address hybridization risks in the historic Red Wolf Recovery Area. To the contrary, the Service now refuses to release any captive wolves into the Red Wolf Recovery Area under a novel claim that the current red wolf 10(j) rule, which the Service has implemented for 25 years, does not authorize the agency to do so. *See* 83 Fed. Reg. at 30,385 (June 28, 2018). This is despite the fact that the agency also admits the red wolf is in danger of extinction in the wild under current circumstances. *See, e.g.*, 83 Fed. Reg. at 30,389 (“Without substantial intervention, complete loss of the [wild population] will likely occur within as few as 8 years.”); Draft Environmental Assessment for the Proposed Replacement of the Regulations for the

Nonessential Experimental Population of Red Wolves in Northeastern North Carolina (June 1, 2018) [hereinafter “2018 Draft EA”] at 26 (current management “would be expected to lead to the extirpation of red wolves from [North Carolina] . . . due to management limitations (e.g. no implementation of RWAMWP or additional red wolf releases into the population)”).

The undersigned Conservation Organizations are aware of only one instance in which coyotes have been sterilized since 2018, when FWS sterilized 8 coyotes trapped on and released back onto Alligator River National Wildlife Refuge in early 2020. At the same time, the Service has taken no further action since its June 2018 Proposed Rule, which it used as the basis to argue that the Court should not address its legal violations in 2018. *See, e.g., Red Wolf Coal. v. U.S. Fish & Wildlife Serv.*, 346 F. Supp. 3d at 811; USFWS, *Service Extends Red Wolf Review in North Carolina* (Nov. 29, 2018), <https://www.fws.gov/southeast/news/2018/11/service-extends-red-wolf-review-in-north-carolina/>.

Now, only nine collared red wolves remain in the wild. In 2019, for the first time in the history of the North Carolina reintroduction, no wild red wolf pairs bred and no wild red wolf pups were born. Again in 2020, no red wolf pairs bred or produced litters.

III. ESA VIOLATIONS

This letter constitutes 60 days’ written notice prior to commencement of legal action, as required by the citizen suit provision of the ESA, 16 U.S.C. § 1540(g). If the violations detailed in this letter are not remedied within 60 days, we are prepared to bring suit in federal court. 16 U.S.C. § 1540(g).

Two years ago, the United States District Court for the Eastern District of North Carolina held that the Service was in violation of the ESA when it terminated its longstanding, proven conservation measures of red wolf releases and coyote sterilizations and failed to replace them with any comparable conservation measures. *Red Wolf Coal. v. U.S. Fish & Wildlife Serv.*, 346 F. Supp. 3d at 814 (“the recent USFWS decisions . . . amount to a failure [to] comply with its affirmative duty to carry out conservation measures until conservation [is] no longer necessary.”) As the court found, “[a]llowing the wild red wolf population to continue to decline, while having access to methodologies which were previously successful in increasing or maintaining the wild population of the species, is an interpretation and application of the red wolf 10(j) rule that ‘is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.’” *Id.* at 814 (citing *Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)).

Since that time, the remaining wild red wolf population has been halved yet again and has fallen to an unprecedented and dire state. *Compare Red Wolf Coal. v. U.S. Fish & Wildlife Serv.*, 346 F. Supp. 3d at 805 (estimated population as low as 40 wolves in April 2018) *with* https://redwolves.com/newsite/wp-content/uploads/2020/07/ncnep_summary_july_2020.pdf (last accessed Sept. 14, 2020) (nine known wolves and 18-20 estimated total as of July 16, 2020). With only nine collared wolves remaining on the landscape, the wild population is the lowest it has been since the first eight wolves were introduced in 1987. And with no mated pairs in the

Red Wolf Recovery Area today, the population will only continue to shrink without action from the Service.

A. Violations of Section 7(a)(1)

The Service's failure to reinstate its proven conservation measures of captive red wolf releases and coyote sterilizations, or to undertake any comparable conservation measures to save the wild red wolf population from extinction, violates Section 7(a)(1) of the ESA.

Section 7(a)(1) of the ESA imposes an affirmative obligation on USFWS to "utilize [all] programs in furtherance of the purposes of [the ESA]." 16 U.S.C. § 1536(a)(1). The fundamental purpose of the ESA is to conserve threatened and endangered species and the ecosystems upon which they depend, 16 U.S.C. § 1531(b), and all programs administered by USFWS must advance this purpose. Additionally, Section 7(a)(1) mandates that USFWS must utilize its authorities in furtherance of the purposes of the ESA "by carrying out programs for the conservation of endangered species and threatened species." 16 U.S.C. § 1536(a)(1).

Applied here, Section 7(a)(1) of the ESA requires the Service to use its authorities to promote red wolf recovery by carrying out programs for the conservation of the species. 16 U.S.C. § 1536(a)(1). Although the Service receives deference in choosing among conservation measures, it nonetheless must carry out some program to actually conserve the red wolf—individual measures that do not, or are not reasonably likely to, conserve the species are not sufficient for purposes of this section. *See Florida Key Deer v. Paulison*, 522 F.3d 1133, 1146-47 (11th Cir. 2008) ("[W]hile agencies might have discretion in selecting a particular program to conserve . . . they must in fact carry out a program to conserve, and not an 'insignificant' measure that does not, or is not reasonably likely to, conserve endangered or threatened species." (internal quotations omitted)).

The Service is not currently carrying out any program for the conservation of the red wolf, even while the wild red wolf population vanishes before its eyes. To the contrary, the Service has abandoned the Red Wolf Adaptive Management Work Plan that it first implemented in 1999, and has now committed to *prohibit* any captive releases, which it knows to be essential to the red wolf's recovery, *see* 83 Fed. Reg. 30,382, under the 1995 red wolf rule. More than 30 years after releasing the first captive red wolves into the wild, USFWS is now disclaiming its own authority for the reintroduction program that it carried out for decades before pausing releases five years ago. Not only has the Service now prospectively banned captive releases under its new interpretation of the current red wolf rule, but it has also abandoned its 2018 proposal to revise the red wolf 10(j) rule, thereby extending this ban on releases indefinitely.

Such an approach does not comply with Section 7(a)(1), and it flies in the face of previous judicial findings made about the red wolf program itself. As the U.S. District Court for the Eastern District of North Carolina stated clearly:

By designating the red wolf as protected and dedicating funding and efforts for more than twenty-five years in a program to rehabilitate the once-nearly extinct species, Congress has repeatedly demonstrated that it has chosen to preserve the

red wolf—not simply to let inaction determine its fate—and it is not for this Court to permit activities that would have an effect counter to this goal.

Red Wolf Coal. v. N. Carolina Wildlife Res. Comm’n, No. 2:13-CV-60-BO, 2014 WL 1922234, at *8 (E.D.N.C. May 13, 2014) (citing *Gibbs v. Babbitt*, 214 F.3d 483, 496 (4th Cir. 2000) (“It is for Congress to choose between inaction and preservation, not for the courts.”)).

In early 2020, USFWS transferred one wolf from St. Vincent National Wildlife Refuge to Alligator River National Wildlife Refuge and one wolf from Alligator River National Wildlife Refuge to Pocosin Lakes National Wildlife Refuge. In the spring of 2020, there were still no red wolf litters born in the wild. Limited one-time actions such as those taken by the Service last winter do not amount to a program for the conservation of the species. At the start of the red wolf reintroduction program, by contrast, the Service released 42 wolves into Alligator River National Wildlife Refuge within the first five years of the program in order to build a foundation for a wild population. *See* 58 Fed. Reg. 62,086, 62,087. Likewise, the management-zone approach used by the Service to implement coyote sterilizations and removals and adaptively manage coyote-wolf interactions under the Red Wolf Adaptive Management Work Plan for fifteen years effectively addressed the threat of hybridization by preventing genetic introgression. *See* 83 Fed. Reg. at 30,389.

The Service is violating ESA Section 7(a)(1) by failing to provide for the conservation of the species.

B. Violations of Section 7(a)(2)

Section 7(a)(2) imposes a substantive obligation on agencies to insure that any actions they authorize, fund, or carry out are not “likely to jeopardize the continued existence of any endangered species or threatened species.” 16 U.S.C. § 1536(a)(2). This duty is ongoing, *see Conner v. Burford*, 848 F.2d 1441, 1452 n.26 (9th Cir. 1988), and is most often satisfied by undergoing consultation with the relevant expert agency. 16 U.S.C. § 1536(a)(2); *see also* 50 C.F.R. §§ 402.01–402.17 (regulations on consultation). The Service must use the best available science in discharging its duties under Section 7, and must err on the side of protective caution for the endangered or threatened species when in doubt. *See* 16 U.S.C. § 1536(a)(2) (“In fulfilling the requirements of this paragraph each agency shall use the best scientific and commercial data available.”); *Tenn. Valley Auth.*, 437 U.S. at 184 (explaining that the Act represents “the institutionalization of caution”).

Here, the Service has done nothing to ensure that its new and ongoing management of wild red wolves is not likely to jeopardize the continued existence of the species. The Service has not undergone ESA consultation on its new policy of prohibiting captive releases in the Red Wolf Recovery Area, nor has it examined how its ongoing failure to resume its historically successful adaptive management program following the abandonment of its 2018 Proposed Rule is likely to affect the survival and recovery of the species. Indeed, the Service is instead directly overseeing and facilitating the extinction of this species. The inevitability of extinction under current management was acknowledged by the agency itself in its 2018 proposed rule and supporting documents. *See* 83 Fed. Reg. 30,382 (preamble to the Service’s 2018 proposed replacement 10(j) rule, stating that “the release of animals from the captive population into the

nonessential experimental population . . . is vital to maintaining a genetically healthy population.”). *See also* 2018 Draft EA at 21 (“Under this current management, and as indicated Scenario A in the PVA (Faust et al. 2016; Figure 5), the wild red wolf population would likely continue to decrease and would likely become extirpated within between 8 and 40 years.”).

Under Section 7(a)(2) the Service must ensure that its actions, and any actions it funds or authorizes, do not jeopardize the continued existence of the red wolf. The Service has failed in executing these duties and is instead managing the wild population towards extinction.

IV. CONCLUSION

Conservation Organizations request that the Secretary and U.S. Fish and Wildlife Service immediately resume the Service’s prior successful management actions of releasing wolves from captivity into the Red Wolf Recovery Area. Conservation Organizations further request that the Service immediately resume managing coyotes to reduce the threat of hybridization to the remaining wild red wolves. The Service has failed to analyze the harm caused by the abandonment of these management efforts under Section 7, and may not bind itself to any policy prohibiting captive releases unless the impacts of such a policy have been analyzed.

Conservation Organizations request that the Service immediately rectify these violations by providing for the conservation and recovery of the critically endangered red wolf. We request that the Service respond to this letter within 60 days. If you have any questions about the issues raised in this letter, please do not hesitate to contact us.

Sincerely,



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