IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
NORTHERN DIVISION

NO. 2:15-cv-00042-BO

RED WOLF COALITION, DEFENDERS OF WILDLIFE, AND ANIMAL WELFARE INSTITUTE, Plaintiffs, v. THE UNITED STATES FISH AND WILDLIFE SERVICE; DAN ASHE, in his Official capacity as Director of the United States Fish and Wildlife Service; and CYNTHIA K. DOHNER, in her official capacity as Regional Director of the United States Fish and Wildlife Service Southeast Region, Defendants.	**REPLY IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION** [Local Civil Rule 7.1(f)]

Defendants' response to Plaintiffs' Motion for Preliminary Injunction boils down to two irrelevant assertions. First, that Plaintiffs have not challenged a final agency action, and second, that the Service has no immediate plans to remove red wolves or grant take authorizations. At the same time, Defendants assert that review of Plaintiffs' claims must be based on a purported "administrative record," and advertise that they will continue their wolf removal policies. As demonstrated below, Defendants misrepresent both Plaintiffs' claims and the facts on which they are based in their attempt to avoid review of their actions that have led— and continue to contribute—to the dramatic decline of the world's only wild population of highly endangered red wolves. Indeed, additional new evidence provides further support for Plaintiffs' claims.[1] Defendants' arguments should be rejected and this Court should grant Plaintiffs' Motion for Preliminary Injunction.

I. PLAINTIFFS ARE LIKELY TO SUCCEED ON THE MERITS OF THEIR CLAIMS.

The crux of Defendants' response to all of Plaintiffs' claims appears to be that because the Service has not analyzed or publicly noticed its recent actions regarding the red wolf regulations, the legality of their actions cannot be evaluated. This is not the case. Defendants' current interpretation and implementation of the red wolf rule are directly violating the

[1] New evidence presented in this Reply includes documents from the partial "administrative record" Defendants lodged with the Court on July 15, 2016, ECF No. 44, as well as documents released July 13, 2016 in response to a June 28, 2016 FOIA request from Plaintiffs' counsel, *see* ECF No. 42-7. It also includes a June 2016 red wolf population viability analysis that was publicly distributed on July 18, 2016. To the extent Defendants suggest that documents other than those they choose are inappropriate for the Court to consider in evaluating Plaintiffs' Motion, there is no legal basis for this approach. *See, e.g. Am. Rivers v. U.S. Army Corps of Engineers*, 271 F. Supp. 2d 230, 247 (D.D.C. 2003) (citing *Esch v. Yeutter*, 876 F.2d 976, 991 (D.C. Cir. 1989)) (rejecting motion to strike expert declarations supporting motion for preliminary injunction). This is especially true in this case where not only is there no administrative record, but also where Defendants have not yet produced what they claim the Court should evaluate. *See* ECF No. 44. The Court should reject Defendants' request, included in a footnote, to strike Plaintiffs' supporting exhibits.

substantive and procedural mandates of the Endangered Species Act ("ESA") and the National Environmental Policy Act ("NEPA"). Plaintiffs are not challenging final agency action under the Administrative Procedure Act ("APA") and therefore Defendants' arguments are inapposite.

A. Defendants Cannot Avoid Review of Plaintiffs' Claims By Mischaracterizing Them as APA Challenges.

As with Defendants' Motion to Limit the Standard and Scope of Review, ECF No. 30, the vast majority of cases on which Defendants rely bear no resemblance to the case before the Court. *See* Pls.' Resp. to Defs.' Mot., ECF No. 42 at 10–11. Instead of challenging a final rule, a final environmental impact statement, a final biological opinion, or any other similar document, Plaintiffs challenge Defendants' ongoing actions and inactions implementing the red wolf rule. *See id.* at 5–9. For the same reasons that Defendants' mischaracterization of Plaintiffs' claims should not determine the evidence before this Court, it also should not limit the availability of preliminary relief.

Courts have repeatedly found that citizen suits challenging substantive violations of the ESA are not APA cases. *See, e.g.*, *Bennett v. Spear*, 520 U.S. 154, 173 (1997) (ESA citizen suit provision "is a means by which private parties may enforce the substantive provisions of the ESA against regulated parties – both private entities and Government agencies – but is not an alternative avenue for judicial review of the Secretary's implementation of the statute"); *Wash. Toxics Coal. v. EPA*, 413 F.3d 1024, 1034 (9th Cir. 2005) ("Plaintiffs' suits to compel agencies to comply with the substantive provisions of the ESA arise under the ESA citizen suit provision, and not the APA."); *Envtl. Prot. Info. Ctr. v. Timber Co.*, 255 F.3d 1073, 1079 (9th Cir. 2001) ("the substantive obligation imposed on the FWS to ensure that no action authorized by it is likely to jeopardize a [listed] species" arises under the ESA citizen suit provision, not the APA). In this context, final agency action necessary for APA challenges is not required. *See Wash.*

Toxics, 413 F.3d at 1033 (finding that pesticide registration is ongoing agency action and that ESA requirements continue beyond initial approval); *Turtle Island Restoration Network v. Nat'l Marine Fisheries Serv.*, 340 F.3d 969, 974 (9th Cir. 2003) (distinguishing between ESA and APA "action" to determine that issuance of fishing permits triggers Section 7 of the ESA); *see also Friends of the Clearwater v. Dombeck*, 222 F.3d 552, 560 (9th Cir. 2000) ("An action to compel an agency to prepare an SEIS, however, is not a challenge to a final agency decision, but rather an action arising under 5 U.S.C. § 706(1), to 'compel agency action unlawfully withheld or unreasonably delayed.'").

Under Defendants' theory, in contrast, a citizen would never be able to challenge an agency's ongoing violations of the ESA unless and until the agency reached a formal, final decision. Similarly, citizens would never be able to bring a failure to act claim. In such a world, agencies could entirely avoid judicial review by avoiding rulemakings or completing final decisions. Such a result was surely not contemplated by Congress when it passed the APA to provide relief against "final agency action for which there is no other adequate remedy in a court." 5 U.S.C. § 704. *E.g. Bowen v. Mass.*, 487 U.S. 879, 903-04 (1988) (discussing congressional intent of APA to provide "a broad spectrum of judicial review of agency action"). The APA does not protect Defendants from their failures in the instant case.

B. Defendants Have Reinterpreted the Red Wolf Rule In a Way That is Detrimental to the Red Wolf Population.

As explained in Plaintiffs' opening brief, up until 2014, Defendants interpreted the red wolf rule to allow for the removal of problem wolves only. ECF No. 32 at 6-7. Defendants' assertions to the contrary are entirely unsupported and, indeed, belied by documents contained in the "administrative record" they have recently begun to produce.

A February 24, 2015 memorandum from USFWS Regional Director Cindy Dohner clearly articulates the Service's current interpretation of the red wolf rule, as well as the fact that this is a *change* from previous practice. [2] That document states explicitly that the

> first step is an interim phase that requires that the Service manage and operate the reintroduction program from federal lands; all landowner removal requests be honored; and, if recapture efforts are not successful, that we issue "take" authorizations to those landowners as described in our 10(j) rule.

Ex. 1 at 3. The memo goes on to explain that "[t]hese changes include, but are not limited to, management of wolf populations only from federal lands, *a significant amount of wolves, currently on private lands, will be removed from the wild*." *Id*. (emphasis added). And the memo states "It is very important to point out that all alternatives (below), including this first step (above), *require environmental compliance process*." *Id.* (emphasis added). Thus, according to the Southeast Regional Director of the USFWS herself, (1) Defendants intentionally changed their interpretation and application of the red wolf rule in 2015, and (2) that reinterpretation was significant enough to trigger environmental reviews, including compliance with the ESA and NEPA. [3]

This 2015 memo is in stark contrast to a December 2013 email, in which the Red Wolf Recovery Coordinator explained that the Service "fully considered and resolved" the issue of how to respond to landowner removal requests in 1999, and has operated according to the 1999 Guidelines document since its creation. *See* Ex. 2; *see also* Wheeler Decl., Ex L at 7, ECF No.

[2] Notably, Plaintiffs were unsuccessful in obtaining this and other documents from the Service pursuant to FOIA, even though it was produced as part of the agency's purported "administrative record." Plaintiffs maintain their opposition to this case being limited to an administrative record for the reasons set forth at ECF No. 42.

[3] The impact of this policy change is reflected in recently received FOIA documents. A December 21, 2015 e-mail references five removal requests under discussion at one time that would affect more than 20 wolves. *See* Ex. 3. At that time, 20 wolves would have encompassed nearly half of the known population.

32-15 (the 1999 Guidelines). These Guidelines were not a mere recommendation—they represent the policy applied by the Service with regard to removal requests from approximately 1999 to 2014 . *See* Ex. 2; Wheeler Decl., Ex L, at 14, ECF No. 32-15 (e-mail from Assistant Regional Director Leo Miranda saying "So, the very last alternative on page 12 is what we have implemented since 1995, Right?" in reference to the policy of not removing wolves or issuing take authorizations in the absence of a problem).

C. Other New Information Also Requires Reevaluation of the Red Wolf Rule in Light of the ESA's Conservation Mandate.

Plaintiffs explained in their opening brief that it is not just the Service's reinterpretation of the red wolf rule that requires compliance with the ESA and NEPA, but that new information about the status and management of the population also requires reevaluation of the impact of the rule on the red wolf population. Additional new information heightens the need for relief.

A recently released Population Viability Analysis highlights the current dire status of the population. In particular, it finds that the Service's current management of the red wolf population is almost certain to cause the extinction of the wild red wolf population, possibly within 8 years or less. *See* Ex. 4 at 28. This same analysis explains that the greatest chance for success for the red wolf is to manage the wild and captive red wolf populations as a single, metapopulation rather than treating them as separate, isolated populations. *Id.* at 30. With proper management of the wild red wolf population, and with the reinitiation of releases of red wolves into the wild, the wild red wolf population could recover, grow, and stabilize. [4] *See id*. at 29–30.

[4] Despite Defendants' assertions that they are still conducting active management of the red wolf population, the evidence used to support these claims tells a different story. Exhibits 6 and 7 to Defendants' Response contain limited records about two red wolves captured from private land, held in captivity, and eventually released on June 24, 2016. *See* ECF No. 43-6, 43-7. Collaring and vaccinating two wild wolves that were in the Service's care only because of a previous removal is not active management. Occasional telemetry flights, Exhibit 8, and genetic testing

Defendants have violated the ESA and NEPA by implementing the red wolf rule in a manner inconsistent with the conservation of the red wolf, and by failing to conduct any analysis of their current interpretation of that rule in light of the current status of the red wolf population.

II. DEFENDANTS ARE LIKELY TO CONTINUE TO REMOVE WOLVES AND THE RISK OF HARM REMAINS IMMINENT.

Defendants' other primary defense to Plaintiffs' Motion is that they have no immediate plans to remove wolves from private lands or grant private landowners take authorizations and will give Plaintiffs and the Court ten-days' notice if they change their mind. This nonbinding assertion does not remedy Plaintiffs' claims, either as a matter of law or as a matter of fact. The Court should reject the Service's attempt to avoid review of its ongoing violations of the ESA.

A. Defendants' Promises Do Not Reduce the Likelihood of Irreparable Harm.

Defendants claim that their proposal to provide 10-days' notice of any red wolf removal or take authorization removes the imminence of harm required for a preliminary injunction. Such claims have been consistently rejected by the courts, even where defendants have proposed much larger windows of notice. Defendants' attempt to simply delay this Court's consideration of Plaintiffs' claims should be rejected because the purpose of a preliminary injunction is to "preserve the status quo until the rights of the parties can be fairly and fully investigated and determined by strictly legal proof and according to the principles of equity," *See Wash. Cnty., N.C. v. U.S. Dep't of the Navy*, 317 F. Supp. 2d 626, 631 (E.D.N.C. 2004) (quoting *Sinclair Refining Co. v. Midland Oil Co.*, 55 F.2d 42, 45 (4th Cir. 1932)).

"[A]n action for an injunction does not become moot merely because the conduct complained of was terminated, *if there is a possibility of recurrence*, since otherwise the

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of a single litter of pups, Exhibit 9, likewise do not indicate the Service is actively managing the population. *See* ECF No. 43-8, 43-9.

defendant's [sic] would be free to return to their old ways." *Fed. Trade Comm'n v. Affordable Media, LLC.*, 179 F.3d 1228, 1237 (9th Cir. 1999) (internal quotations omitted) (emphasis in original); s*ee also Doe v. Duncanville Independent School Dist.*, 994 F.2d 160, 166 (5th Cir. 1993) (determining that defendant's voluntary cessation "does not preclude a finding of irreparable injury"). Non-binding promises of termination are treated with even greater skepticism. *See, e.g.*, *Lyons P'Ship, L.P. v. Morris Costumes, Inc.*, 243 F.3d 789, 800 (4th Cir. 2001) (finding "defendants' bald assertions" that they would cease alleged wrongful conduct insufficient to eliminate "the plaintiff's reasonable expectation that the alleged violation will recur in the absence of a court order" (internal quotations omitted)); *Boardman v. Pac. Seafood Grp.*, 822 F.3d 1011, 1023 (9th Cir. 2016) (upholding grant of preliminary injunction despite a defendant's voluntary termination of activity and assurance of a 60-day notice before resuming activity); *U.S. v. Fang*, 937 F. Supp. 1186, 1200 (D. Md. 1996) ("According to conventional preliminary injunction analysis, the mere declaration by a defendant that a challenged activity will cease . . . does not preclude issuance of the injunction.").

Cascadia Wildlands v. Kitzhaber is especially instructive for this Court. No. 3:12-CV-00961-AA, 2012 WL 5914255 (D. Or. Nov. 19, 2012). In that case, the plaintiffs challenged eleven timber sales as violating the ESA due to impacts on the marbled murrelet. *Id*. at *1. In response to a motion for preliminary injunction, the defendants asserted they had not taken any action on the timber sales since before the motion was filed, and had no intention of acting on the timber sales for the pendency of the lawsuit. *Id.* If their plans changed, the defendants would provide the plaintiffs with 60-days' notice. *Id.* The Court squarely rejected the defendants' suggestion that this resolved the motion for preliminary injunction, determining that "[b]ecause defendants have retained the right to simply resume logging operations after providing notice, a

possibility of recurrence of the allegedly illegal logging activities exists." *Id.* at *2. These facts mirror those of the instant matter, with the exception that Defendants here have offered a mere 10 days compared with the 60-days' notice offered in *Cascadia Wildlands*. Defendants' non-binding assurance not to lethally or non-lethally remove wolves, and offer of 10-days' notice to Plaintiffs and this Court if this should change, do not alter that Plaintiffs are likely to suffer irreparable harm prior to the resolution of this case if a preliminary injunction is not issued.

B. Evidence Shows that the Service will Continue to Engage in Removal Activities.

Additionally, Defendants' promise regarding their intention not to grant further landowner requests for the removal of red wolves from private property is so narrow as to be meaningless. Ample evidence shows that red wolves are likely to continue to be removed and held during the pendency of this litigation.

First, the specific language of Defendants' assertions regarding their intent not to issue take authorizations is important. While the Service claimed in their June 21st letter to Plaintiffs, *see* ECF No. 34, and at the June 23rd hearing in this matter that they did not have any current removal or take authorization requests, they admitted that was only their representation as of *that day*. Indeed, while Defendants repeated their intention in their Response on July 8, 2016, Defendants specifically did *not* again claim to have no current pending take authorization or removal requests. *See* ECF No. 43 at 8–9. As noted in Plaintiffs' Notice of New Information for Preliminary Injunction, ECF No. 41, a private landowner recently emailed the Service stating he had a pending request for a take authorization. While Defendants assert that this request was "resolved," either the resolution was not communicated to the landowner or else he effectively repeated his previous request in the June 27th e-mail he sent to FWS. Moreover, the USFWS website still states that the Service will "continue our efforts to remove red wolves from private

lands when requested to do so by the landowner. Private landowners also will be allowed to take animals when authorized by a permit in accordance with our regulation." *See* https://www.fws.gov/redwolf/faq.html (last visited July 22, 2016).

Second, the Service appears poised to remove wolves from private property preemptively, without a specific, new removal request, but based on knowledge of past removal requests. A June 10, 2016 Service e-mail explained that if red wolves recently released from captivity "wind up back on those properties, or other properties we know they are not welcome, we would try to remove them . . . we'll abide by our rules that say wolves are to be removed from lands where they are not welcome." Ex. 5. Because these recently released wolves are fitted with GPS collars regularly reporting their location, preemptive removal without a specific landowner request is entirely possible. *See id.*

Third, documents show that the Service has been authorizing landowners to use private trappers to capture wolves. To the extent that the Service has authorized private landowners to hire private trappers to capture red wolves on private property, the Service cannot predict when it may receive another removal request, and cannot in good faith give 10-days' notice before responding to such a captured wolf. E-mail correspondence indicates that wolves were captured by a private trapper and removed from private lands in February 2016. *See* Ex. 6. Specifically, this e-mail refers to two "yearlings that were captured by private trappers on or near Ventures in February." *Id.*

An attachment to Defendants' response drives home the harm caused by removing red wolves from private land, including by private trappers. *See* Ex. 13 to Defs.' Resp., ECF No. 43-13. Of 13 animals caught on this property from 2001 to 2015, 7 died within months or a few years of being captured, 2 more were euthanized soon after being captured (one due to poor

health and the other due to a leg injury apparently caused by trapping the animal), and 1 unaccounted-for red wolf is suspected dead as a result of foul play. For example, a red wolf captured by a private trapper on January 23, 2014 suffered a foot injury as result of the trapping efforts, and was held in captivity for several months. Upon release, the wolf was killed by vehicle strike.

Any wolf that has been removed from the landscape is not contributing to the population in terms of reproduction and holding space, and hence should be considered a mortality for management purposes. *See* Vucetich Decl., at ¶ 22, ECF No. 32-17. This is true whether USFWS is actively removing wolves, allowing private trappers to remove wolves, or simply maintaining wolves in captivity. Each of these aspects of wolf removal goes to Plaintiffs' irreparable harm and must be addressed through a preliminary injunction.[5]

CONCLUSION

As shown above, it is only a matter of time before the Service takes exactly the action Plaintiffs have sought to enjoin. Plaintiffs are likely to succeed on the merits of their claims and urge the Court to grant their Motion for Preliminary Injunction to preserve their interests during the pendency of this lawsuit.

[5] In addition, a December 2015 necropsy report in the partial administrative record states that a red wolf was "gunshot by a farmer" on October 27, 2015, and that "the farmer had a take permit from the USFWS." *See* Ex. 7. Yet Defendants have represented to the public and this Court that only one wolf has been killed pursuant to a take authorization, on June 17, 2015. *See* Defs.' Opp. to Pls.' Mot. for Prelim. Inj., at 3, ECF No. 43 ("[T]he Service used [the take provision] only twice to issue authorizations to private landowners, and only one wolf has been lethally taken.").

Respectfully submitted, this the 22nd day of July, 2016.

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CERTIFICATE OF SERVICE

I hereby certify that on July 22, 2016, I electronically filed the foregoing **REPLY IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION** with the Clerk of the Court using the CM/ECF system, which will automatically send notification of such filing to counsel for Defendants.

This the 22nd day of July 2016.

/s/ Sierra B. Weaver
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