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

NO. 2:15–CV–42–BO

RED WOLF COALITION, *et al*.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	**RESPONSE IN OPPOSITION TO DEFENDANTS' MOTION TO LIMIT THE STANDARD AND SCOPE OF REVIEW**
	)	
UNITED STATES FISH AND WILDLIFE SERVICE, *et al*.,	)	[Local Civil Rule 7.1(e)]
	)	
Defendants.	)	
_____	)	

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This case (and Plaintiffs' pending Motion for Preliminary Injunction) arise from Defendants' blatant dereliction of their duties under the Endangered Species Act ("ESA" or "the Act") and the National Environmental Policy Act ("NEPA") regarding the endangered red wolf. As Plaintiffs have detailed in their Second Amended Complaint ("SAC"), ECF No. 37, and Memorandum in Support of Motion for Preliminary Injunction, ECF No. 32, the U.S. Fish and Wildlife Service ("Service" or "USFWS") is not just standing by and watching, but is in fact unlawfully taking red wolves and facilitating the second extinction of the species in the wild.

Although Defendants claim that discovery in this case would somehow be "uncharted," their arguments mischaracterize Plaintiffs' claims and misrepresent applicable caselaw. Plaintiffs' ESA citizen suit claims alleging ESA violations, as well as their claims for agency actions "unlawfully withheld" under both the ESA and NEPA, necessarily do not have a record. These claims fall squarely into the category for which courts have regularly found discovery to be appropriate. Defendants cannot cite any binding, on-point precedent that this Court's review should be limited to a purported "administrative record" created subsequent to Plaintiffs' challenge. Indeed, Defendants do not cite a single case that is remotely similar to the one before the Court. Simply put: there is no record in this case. Defendants' assertion to the contrary is a self-serving attempt to thwart this Court's review.

While Defendants minimally gesture at the *standard* of review to be applied to Plaintiffs' claims, clearly the objective and focus of the instant Motion is on the *scope* of review, and in particular, on whether Plaintiffs have the right to seek discovery. Indeed, a motion to establish the standard of review at this early stage in the litigation can only be interpreted as yet another delay tactic from an agency seeking to avoid the Court's engagement with the serious issues

currently before it. For the reasons discussed below, the Court should reject the Service's attempt to limit its consideration of relevant evidence.

I. PLAINTIFFS ARE ENTITLED TO DISCOVERY BECAUSE THE APA SCOPE AND STANDARD OF REVIEW DO NOT GOVERN PLAINTIFFS' ESA CITIZEN SUIT CLAIMS.

Five of Plaintiffs' six claims arise under the citizen suit provision of the ESA. In *Bennett v. Spear*, 520 U.S. 154 (1997), the Supreme Court made clear that the 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." *Id*. at 173. Thus, a violation of the substantive requirements of the ESA is reviewed under the ESA citizen suit provision and not the Administrative Procedure Act ("APA"). *See, e.g. 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) (explaining that under *Bennett*, "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).

A. The APA Does Not Govern the Scope or Standard of Review for Plaintiffs' ESA Section 9 Claims.

Plaintiffs' First Claim for Relief arises under Section 9 of the ESA, 16 U.S.C. § 1538(a)(1)(G). Plaintiffs specifically allege that the Service has "violated and will continue to violate Section 9 of the ESA by authorizing the private lethal take of red wolves in contravention of the plain language of the red wolf rule by failing to first attempt and then abandon efforts to

capture the wolves in question, as required by 50 C.F.R. § 17.84(c)(4)(v). SAC, ECF No. 37, ¶ 120.

First, it is beyond dispute that Section 9 cases almost universally involve discovery. *See, e.g.*, *Animal Welfare Inst. v. Beech Ridge Energy LLC*, 675 F. Supp. 2d 540, 564–80 (D. Md. 2009) (*"Beech Ridge"*) (discussing factual evidence regarding likely future take of endangered bats); *Marbled Murrelet v. Pacific Lumber Co.*, 880 F. Supp. 1343, 1345–65 (N.D. Cal. 1995) (discussing factual evidence regarding likely future take of endangered seabirds). Indeed, this Court entered exactly this type of discovery order in *Red Wolf Coalition v. North Carolina Wildlife Resources Commission*, No.2:13-CV-60-BO, ECF No. 96 (attached as Exhibit 1).

Second, it is widely accepted—including in the Fourth Circuit—that Section 9 cases are evaluated under the typical preponderance-of-the-evidence standard rather than under the APA-specific arbitrary-and-capricious standard. *See Defenders of Wildlife v. Bernal*, 204 F.3d 920, 925 (9th Cir. 2000) (noting preponderance-of-the evidence standard as plaintiffs' burden of proof at trial on an ESA Section 9 claim); *Hill v. Coggins*, No. 2:13-CV-00047-MR-DLH, 2016 WL 1251190, at *14 (W.D.N.C. Mar. 30, 2016) (applying preponderance-of-the-evidence standard to ESA Section 9 claim); *Beech Ridge*, 675 F. Supp. 2d at 563 ("[I]n an action brought under § 9 of the ESA, a plaintiff must establish, by a preponderance of the evidence, that the challenged activity is reasonably certain to imminently harm, kill, or wound the listed species.").

That the Service is a federal agency is irrelevant. *See, e.g.*, *Or. Natural Desert Ass'n*, 593 F. Supp. 2d 1217, 1220-21 (D. Or. 2009) (holding that the U.S. Forest Service was subject to ESA citizen suit claims that "do not challenge specific administrative decisions" and "are not limited by the APA scope of review."). Here, it is undisputed that the USFWS has authorized private landowners to shoot and kill endangered red wolves, which has resulted in the death of a

known adult female red wolf.[1] It is also undisputed that the USFWS granted such permission after landowners would not provide access to their property.[2] Because Plaintiffs do not seek review of Defendants' past actions, but rather seek to enjoin future unlawful take authorizations, however, the relevant questions are neither the agency status of Defendants nor their past actions, but whether Defendants are likely to continue to authorize take unlawfully. *See Beech Ridge*, 675 F. Supp. 2d at 560 ("the ESA's citizen-suit provision provides for injunctive relief which by design prevents *future* actions that will take listed species") (emphasis in original).

Multiple courts have discussed at length the significance of Section 9 and the injunctive relief available to address it being *forward looking*. The Ninth Circuit analyzed the ESA's legislative history on this point in *Forest Conservation Council v. Rosboro Lumber Company*, quoting:

> Injunctions provide greater opportunity to attempt resolution of conflicts *before* harm to a species occurs.... The ability to enjoin a violation of the Act rather than the ability only to prosecute a completed violation will better serve the interests of the public, the *potential* violator and the *potentially* harmed species.

50 F.3d 781, 786 (9th Cir. 1995) (emphasis in original) (internal citation omitted). The court in *Stout v. U.S. Forest Service*, 869 F. Supp. 2d 1271, 1281 (D. Or. 2012), similarly observed:

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[1] An email from USFWS Regional Director Pete Benjamin, Ex. K to Wheeler Decl., ECF No. 32-14, states that the wolf had previously mothered a total of 16 pups through four separate litters, and that, "[b]ased on her localized movement patterns this spring, we suspect she had another litter." That same email stated that, "[b]ased on inspection of the carcass, she appeared to have been nursing" at the time she was shot. *Id*. Nevertheless, Defendants denied any knowledge of whether the wolf was denning or nursing in their Answer to Plaintiffs' Second Amended Complaint. ECF No. 40, ¶ 105.

[2] *Compare* ECF No. 32-14 ("Given our lack of access to actively trap on the property we conclude that we are foreclosed from pursuing any animals that may be on your land and in that sense must abandon efforts to capture and relocate the animals ourselves.") *with* ECF No. 40, ¶ 104 ("Defendants admit that the Service issued a take authorization to a landowner in May 2015 pursuant to 50 C.F.R. 17.84(c)(4)(v) after trapping efforts coordinated, authorized, and approved by the Service failed to capture the red wolf in question.").

> It is difficult to see how a claim regarding § 9's take prohibition could be analyzed pursuant to anything but a *de novo* standard with the admission of extra record evidence. Utilizing an arbitrary and capricious standard, or excluding extra record evidence, would be particularly bizarre in those suits brought to enjoin entirely future actions or those actions for which there is not an administrative record.

Id. at 1276 n.1 (holding that "legitimate and material disputes regarding a number of issues" "require the benefit of live testimony and exhibits during trial").

Thus, the Service's purported "record" for granting the *past* take authorization in 2015 is irrelevant to Plaintiffs' ESA citizen suit claim seeking to enjoin *future* unlawful take authorizations. Plaintiffs are entitled to discovery about the frequency of removal requests, how the Service typically responds to removal requests, and how the Service does or does not "abandon efforts" in attempting to remove wolves from private lands, among other subjects, to support Plaintiffs' request that the Court enjoin the Service from issuing take authorizations in the future without first abandoning efforts to capture wolves as required by 50 C.F.R. § 17.84(c)(4)(v).[3]

B. The APA Does Not Govern the Scope of Review for Any of Plaintiffs' ESA Citizen Suit Claims.

Plaintiffs are similarly entitled to discovery into the Service's unwritten policies and practices regarding the highly endangered and declining population of wild red wolves for their other citizen suit claims alleging substantive ESA violations. Plaintiffs' Second Claim for Relief

[3] In a brief footnote, Defendants cite to a Fifth Circuit case for the proposition that Section 9 claims are governed by the APA. *See* Defs.' Mem. Supp. Mot. to Limit Standard and Scope of Review at 5 n.3 (citing *Sierra Club v. Glickman*, 67 F.3d 90, 95 (5th Cir. 1995)). Distinct from the case before this Court, however, that case *was* one in which the Forest Service had taken action on an administrative record. Indeed, the reviewing court articulated the claim as "the Interim Guidelines violated § 9" rather than that the Forest Service violated Section 9. Here, Plaintiffs argue not that the red wolf rule violates § 9, but that the USFWS's implementation has resulted and will likely to continue to result in unlawful take authorizations. Furthermore, while the court ruled that the APA provided the *standard* of review, it said nothing about the *scope* of review and whether discovery should be allowed.

alleges that the Service's recent reinterpretation of its own regulations is failing to provide for the conservation of the species as required by 16 U.S.C. § 1533(d). SAC ¶¶ 122–128. Plaintiffs' Third Claim for Relief alleges that the Service has failed to complete the mandatory five-year status review that was required by 16 U.S.C. § 1533(c)(2). SAC ¶¶ 130-133. Plaintiffs' Fourth Claim for Relief alleges that Defendants are violating 16 U.S.C. § 1536(a)(1) by "administering the red wolf recovery program in direct contravention of the ESA requirement to administer the program in furtherance of the conservation purposes of the ESA," and in the alternative, that they are violating ESA Section 7(a)(1) "by managing the four wildlife refuges in the Red Wolf Recovery Area in direct contravention of the ESA Section 7(a)(1)'s requirements to administer them in furtherance of the conservation purposes of the ESA." SAC ¶¶ 135–138. Finally, Plaintiffs' Fifth Claim for Relief alleges that Defendants are failing to ensure that their implementation of 50 C.F.R. § 17.84(c) is not likely to jeopardize the continued existence of the red wolf. SAC ¶¶ 140-149.[4] None of these claims challenges any particular formal agency decision-making process, but rather charges that the agency's current and ongoing application of its regulations—in the context of the current and ongoing decline in both the red wolf population and other red wolf conservation measures—is not providing for the survival and recovery of the red wolf population in the wild.

Courts have found that exactly these types of claims are not limited to the administrative record. *See Wash. Toxics Coal.*, 413 F.3d at 1034 (upholding district court review outside an

[4] Plaintiffs' Third and Fifth Claims for Relief are citizen suit claims like the others discussed in this section, but they are also closely related to the failure-to-act claims discussed *infra*, Section II. ESA Section 4, 16 U.S.C. § 1533, requires that a status review be conducted for the red wolf "at least once every five years," but the Service has not completed one since 2007. ESA Section 7's [16 U.S.C. § 1536] substantive mandate for agencies to ensure against jeopardy can only be met through consultation. *Thomas v. Peterson*, 753 F.2d 754, 765 (9th Cir. 1995). Here, the Service has failed to undergo that required process. As discussed below, there is necessarily no record to review for such failure-to-act claims.

administrative record in an ESA Section 7 failure-to-consult case). "Because [the ESA] independently authorizes a private right of action, the APA does not govern the plaintiffs' claims." *Id*. While Defendants stress that *Washington Toxics* is not binding on this Court, they rely instead on *American Canoe Ass'n v. EPA*, 46 F. Supp. 2d 473 (E.D. Va. 1999), which is also not binding on this Court and which, unlike *Washington Toxics*, has not been broadly endorsed by other courts. *See, e.g., Conservation Cong. v. Finley*, No. C 11-04752 SC (LB), 2012 U.S. Dist. LEXIS 61634, at *9-16 (N.D. Cal. May 2, 2012) (discussing *American Canoe* and *Washington Toxics* and following the latter to allow plaintiffs discovery against the Forest Service for their ESA citizen suit claims). Moreover, even the court in *American Canoe* found that "circumstances may justify expanding the record or permitting discovery" and invited the plaintiffs to identify the nature of discovery needed. 46 F. Supp. 2d at 477. The same was true in the district court proceedings of *National Wildlife Federation v. Hanson*, 859 F.2d 313 (4th Cir. 1998), on which Defendants and the *American Canoe* court rely. *See Nat'l Wildlife Fed. v. Hanson*, 623 F. Supp. 1539, 1542 (E.D.N.C. 1985) (noting that the Army Corps of Engineers' six-volume administrative record was properly supplemented with four additional volumes from the plaintiffs).[5]

[5] Defendants incorrectly suggest that *Washington Toxics* is no longer good law because of a statement made in the subsequently decided *Karuk Tribe of Cal. v. U.S. Forest Serv.*, 681 F.3d 1006, 1017 (9th Cir. 2012). Multiple courts have rejected this assertion. *E.g., Nw. Coal. for Alts. to Pesticides v. EPA*, 920 F. Supp. 2d 1168, 1174 (W.D. Wash. 2013) ("*Karuk Tribe* cannot reasonably be read to implicitly or silently overrule the Ninth Circuit's reasoned holdings that, in circumstances where a plaintiff challenges a federal agency's failure to act under the citizen suit provision of the ESA, review is not confined to an administrative record."); *Ellis v. Housenger*, No. C-13-1266 MMC, 2015 WL 3660079, at *3 (N.D. Cal. June 12, 2015) (rejecting argument that *Karuk Tribe* overruled *Washington Toxics*). Moreover, the plaintiffs in *Karuk Tribe* do not appear to have requested discovery or in any way questioned the adequacy of the record before the court.

Defendants have overstated their case in their attempt to limit this Court's review. Plaintiffs' citizen suit claims do not implicate any administrative process under the APA. Instead, these claims stem from the totality of circumstances with regard to the Service's recent actions and inactions related to the red wolf population, and the consequent effects on the red wolf population. Specifically, the Service is authorizing the lethal and nonlethal removal of wild red wolves in the face of a "catastrophic" population decline, *see* Vucetich Decl., ECF No. 32-17, ¶¶ 18, 22, 28, 30, and at the same time as it has stopped reintroducing red wolves and complying with its own successful adaptive management program. *Id*. ¶¶ 19-21, 30. Such facts are not information to be found in a hypothetical agency record. Plaintiffs are entitled to discovery about the management practices the agency has been undertaking and continues to undertake with regard to the endangered red wolf, as well as information about the current state of the population, to demonstrate that the Service is failing to conserve and ensure against jeopardy to the species. Similarly, Plaintiffs are entitled to introduce expert testimony evaluating these facts.

Regarding the *standard* of review applicable to these claims, Plaintiffs note that courts have applied 5 U.S.C. § 706(2) even in cases that are not decided on the administrative record. *See Western Watersheds Project v. Kayenbrink*, 632 F.3d 472, 497 (9th Cir. 2010) (following *Washington Toxics* to consider evidence outside the administrative record while applying the APA standard of review to the evidence before it). This provision requires reviewing courts to "hold unlawful and set aside agency action, findings, and conclusions found to be [] arbitrary, capricious, or otherwise not in accordance with law … [or] without observance of proper procedure required by law. 5 U.S.C. §§ 706(2)(A)&(D).

Plaintiffs contend that Defendants have acted "not in accordance with law" and "without observance of proper procedure required by law." Such standards should in no way limit this Court's access to the documentation necessary for Plaintiffs to demonstrate such violations.

II. PLAINTIFFS ARE ENTITLED TO DISCOVERY ON THEIR FAILURE-TO-ACT CLAIMS BECAUSE THERE IS NO RECORD FOR THE COURT TO REVIEW.

Plaintiffs' Sixth Claim for Relief asserts that Defendants violated NEPA by failing to complete either an Environmental Assessment ("EA") or Environmental Impact Statement ("EIS") on their new implementation of the red wolf rule in light of significant new information, SAC ¶¶ 151–155. This claim is brought pursuant to Section 706(1) of the APA to "compel agency action unlawfully withheld or unreasonably delayed." 5 U.S.C. § 706(1).[6] Such claims are distinct from those brought pursuant to 5 U.S.C. § 706(2), which evaluate the sufficiency of agency action already taken. Once again, Defendants fail to acknowledge this distinction.[7]

Because the agency has failed to act in a 706(1) case, "there is no 'administrative record' for a federal court to review." *Nat'l Law Ctr. on Homelessness & Poverty v. U.S. Dep't of Veterans Affairs*, 842 F. Supp. 2d 127, 130 (D.D.C. 2012); *see also Watersheds Project v. Pool*,

[6] To the extent Defendants assert that Plaintiffs did not adequately plead their NEPA claim as a failure-to-act claim, Plaintiffs note the inclusion of the APA as a jurisdictional statute in their Second Amended Complaint. *See* SAC ¶ 6. The Fourth Circuit recognizes that "[t]ime and again the Supreme Court has reiterated that Rule 8(a)(2) sets forth a 'liberal pleading standard[],'" which merely requires that the defendant be given "fair notice" of a plaintiff's claims. *McCleary-Evans v. Md. Dep't of Transp., State Highway Admin.*, 780 F.3d 582, 588 (4th Cir. 2015), *cert. denied*, 136 S. Ct. 1162 (2016) (quoting *Erickson v. Pardus*, 551 U.S. 89 (2007)). Defendants are certainly on "fair notice" of Plaintiffs' NEPA claim, as demonstrated by Defendants' arguments to this point in the instant motion.

[7] As noted above, APA failure-to-act cases are also instructive for two of Plaintiffs' ESA claims which are similarly situated although brought under the ESA rather than the APA. *See* SAC ¶¶ 129-133 (Plaintiffs' Third Claim for Relief that Defendants violated ESA Section 4, 16 U.S.C. § 1533, by failing to conduct the mandatory five-year status review); SAC ¶¶ 140-149 (Plaintiffs' Fifth Claim for Relief that Defendants violated Section 7, 16 U.S.C. § 1536, by failing to conduct formal consultation regarding their new interpretation of the red wolf rule in light of significant new information).

942 F. Supp. 2d 93, 100 (D.D.C. 2013) ("Because this case is about agency inaction in response to the 2006 Determinations, rather than agency action, this case may not be resolved solely based on the administrative record."); *Wildearth Guardians v. U.S. Fed. Emergency Mgmt. Agency*, No. CV 10-863-PHX-MHM, 2011 WL 905656, at *2 (D. Ariz. Mar. 15, 2011) (explaining that a NEPA claim to "compel agency action unlawfully withheld or unreasonably delayed" is not limited to an administrative record because there is not a final agency action." (quoting 5 U.S.C. § 706(1)). As the Ninth Circuit has succinctly explained, "In such cases, review is not limited to the record as it existed at any single point in time, because there is no final agency action to demarcate the limits of the record." *Friends of the Clearwater v. Dombeck*, 222 F.3d 552, 560 (9th Cir. 2000).

Following this common-sense understanding that there can be no administrative record when an agency has not acted, district courts across the country have consistently recognized the prudence of, and have allowed, discovery in cases challenging an agency's failure to act. *See, e.g.*, *Milanes v. Chertoff*, No. 08 CIV. 2354 (LMM), 2008 WL 2073420, at *1 (S.D.N.Y. May 13, 2008) ("agency delay is not necessarily a discrete event resulting from a decision based upon some sort of administrative record, but may be simply a course of conduct, after-the-event justifications for which may need to be explored by plaintiffs."); *Litvin v. Chertoff*, 586 F. Supp. 2d 9, 12 (D. Mass. 2008) ("The question of whether that delay is unreasonable goes to the merits of the case, not this court's jurisdiction, and is better addressed after Parties have engaged in discovery."); *Shinnecock Indian Nation v. Kempthorne*, No. 06-CV-5013 JFB ARL, 2008 WL 4455599, at *3 (E.D.N.Y. Sept. 30, 2008) (determining that "the parties will proceed with discovery" on the plaintiff's unreasonable-delay claim under the APA); *Sierra Club v. U.S. Dep't of Transp.*, 245 F. Supp. 2d 1109, 1118–19 (D. Nev. 2003) (noting that a NEPA failure-to-act

claim is not limited to the administrative record, and permitting discovery on that claim). Following the reasoning of these courts, Plaintiffs are entitled to discovery on their claim that the Service has failed to act as required by the ESA and NEPA.

In contrast, Defendants cite almost exclusively (and inappositely) to cases involving a challenge to *the sufficiency* of a final agency decision—such as an ESA biological opinion, ESA listing decision, or NEPA EIS. These cases are plainly distinguishable from this one. *See, e.g.*, *Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 653–55 (2007) (challenge to biological opinion); *Grand Canyon Trust v. U.S. Bureau of Reclamation*, 691 F.3d 1008, 1012-13 (9th Cir. 2012) (challenge to biological opinion and EIS); *Meister v. U.S. Dep't of Agric.*, 623 F.3d 363, 371 (6th Cir. 2010) (challenge to forest management plan and EIS); *Cabinet Mountains Wilderness/Scotchman's Peak Grizzly Bears v. Peterson*, 685 F.2d 678, 680–81 (D.C. Cir. 1982) (challenge to biological opinion and environmental assessment); *Fisher v. Salazar*, 656 F. Supp. 2d 1357, 1358 (N.D. Fla. 2009) (challenge to ESA critical habitat decision); *Audubon Naturalist Soc'y of the Cent. Atl. States, Inc. v. U.S. Dep't of Transp.*, 524 F. Supp. 2d 642, 659–60 (D. Md. 2007) (challenge to EIS); *Habitat Educ. Ctr., Inc. v. Bosworth*, 363 F. Supp. 2d 1090, 1097, 1111–12 (E.D. Wis. 2005) (challenge to EIS and "no effect" determination in biological assessment); *Hodges v. Abraham*, 253 F. Supp. 2d 846, 850 (D.S.C. 2002) (challenging final record of decision and EIS); *Am. Wildlands v. Norton*, 193 F. Supp. 2d 244, 247 (D.D.C. 2002) (challenge to decision not to list westslope cutthroat trout under the ESA); *Cross Timbers Concerned Citizens v. Saginaw*, 991 F. Supp. 563, 565-66 (N.D. Tex. 1997) (challenge to EPA approval of water quality standards); *Krichbaum v. Kelley*, 844 F. Supp. 1107, 1112-13 (W.D. Va. 1994) (challenge to environmental assessment).

Plaintiffs' primary claims in the current litigation are that significant changes to the red wolf recovery program have occurred without public input or scrutiny, and indeed, that many have not even been officially announced after the fact. These changes include changes to the Service's interpretation of its regulations, changes to the red wolf population numbers, and changes to other red wolf management, including the discontinuation of red wolf reintroductions and adaptive management. *See* ECF No. 32 at 6–8 (describing changed application of the red wolf rule, changed management of the red wolf species, and changed population estimates, all gleaned informally).

Thus, while Defendants could appropriately have conducted an analysis and made announcements about these changes in a draft and final NEPA documents with an administrative record, they have not done so here. Any attempt to produce an administrative record in this instance would be no more than a *post hoc* rationalization made to justify the actions already taken. *See, e.g.*, *Friends of the Clearwater*, 222 F.3d at 560 (distinguishing between challenges to "the propriety of a final agency action" and challenges "to compel an agency to act in the first instance"). The Service should not be permitted to invent a non-existent record in order to avoid discovery on Plaintiffs' challenge to the Service's wholesale failure to undertake *any* final agency action by completing an EA or EIS as required by NEPA.

III. FAIRNESS AND DUE PROCESS FAVOR DISCOVERY AT THE OUTSET OF THIS LITIGATION.

Despite Defendants' clear failures to comply with the substantive and procedural requirements of the ESA and NEPA, Defendants state that they are compiling an administrative record that they will produce by July 15, 2016. But since the agency has not yet acted, the notion of an "administrative record" is simply fiction. *Cf. Nw. Coal.*, 920 F. Supp. 2d at 1174 (holding that an agency "cannot, by semantics alone, turn [its] inaction into action"). This Court should

not permit the Service to manufacture a self-serving compilation of defensive evidence attempting to justify the agency's failures to comply with the ESA and NEPA. Allowing Defendants to submit a "record" would enable them to decide what evidence is relevant to Plaintiffs' claims. This would be a particularly inequitable result here, where the Service has spent recent years withholding information about the red wolf population from the public and from Plaintiffs in particular.

Indeed, Plaintiffs and counsel for Plaintiffs have submitted numerous requests for documents to the Service pursuant to the Freedom of Information of Act ("FOIA") since 2015, but have received nothing remotely resembling an administrative record for any of Plaintiffs' claims. For example, on May 5, 2015, counsel for Plaintiffs requested various documents related to private landowner requests for removal of red wolves pursuant to 50 C.F.R. § 17.84, the current status of the Service's adaptive management program, and the release of red wolves into the Red Wolf Recovery Area. *See* Exhibit 3. USFWS issued a final response, including a partial denial, on November 2, 2015. *Id*. Counsel for Plaintiffs appealed that denial on November 30, 2015, *id*., but USFWS has not responded to that appeal.

On July 27, 2015, counsel for Plaintiffs requested various documents related to any ESA Section 7 consultations or NEPA evaluations related to the interpretation and implementation of 50 C.F.R. §§ 17.84(c)(4)(v) and (c)(10), USFWS's removal of red wolves from private lands, take permits to private landowners, and USFWS's methodology for estimating the red wolf population. *See* Exhibit 4. USFWS produced a final response on June 9, 2016, nearly 11 months later, and counsel for Plaintiffs plan to appeal the Service's partial denial by July 19, 2016. *Id*.

On February 9, 2016, counsel for Plaintiffs requested documents related to red wolf population estimates, USFWS's interpretation and implementation of 50 C.F.R. § 17.84(c), and

lethal and non-lethal removal of red wolves from private lands. *See* Exhibit 5. Five months later, USFWS still has not responded to this request.

Counsel for Plaintiffs requested additional documents from USFWS on June 28, 2016, related to the capture and holding of red wolves in captivity since February 2016, the release and monitoring of red wolves since February 2016, and any communications with landowner Jett Ferebee who has requested and received authorization to non-lethally and lethally take wolves on his property. *See* Exhibit 6. This most recent FOIA request was filed days after this Court's status conference on June 23, 2016, ECF No. 38, when Plaintiffs became aware of email correspondence to Defendants from Mr. Ferebee questioning Defendants' representation to the Court that there are no pending requests to remove wolves from their property. *See* Notice of New Information Supporting Plaintiffs' Motion for Preliminary Injunction, ECF No. 41.

Thus, while Plaintiffs have sought to engage with the Service regarding the future of the red wolf program, they have been repeatedly thwarted by the Service's unwillingness to be forthcoming, even as required by FOIA. The documents listed above are documents that Plaintiffs are entitled to through discovery, and that this Court needs to fully evaluate Plaintiffs' claims. To allow the Service to produce an "administrative record" in such circumstances would only distract the Court with a *post hoc* justification that apparently was not identifiable enough to release through FOIA. Moreover, allowing the Service to dictate the scope of the evidence that Plaintiffs can put forth would be extremely prejudicial to Plaintiffs, who already bear the burden of proving their claims against Defendants.

The district court—not the Service—has discretion to determine the appropriate scope of review and discovery, and principles of justice and efficiency favor the more complete record that results from discovery. *Wild Fish Conservancy v. Nat'l Park Serv.*, No. C12-5109 BHS,

2012 WL 5384896, at *1 (W.D. Wash. Nov. 1, 2012) ("Even if confusion exists regarding discovery in ESA citizen suit cases, the Court finds that a completely developed record is the best solution, at trial and on appeal, for the just, speedy, and inexpensive determination of Plaintiffs' claims."); *see also Nw. Coal.*, 920 F. Supp. 2d at 1175 (noting the preference for a "completely developed record" and that "district courts wield great discretion in setting the scope of administrative review in citizen suit cases").

The Federal Rules of Civil Procedure encourage a broad scope of discovery:

> Unless otherwise limited by court order, the scope of discovery is as follows: Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit. Information within this scope of discovery need not be admissible in evidence to be discoverable.

Fed. R. Civ. P. 26(b)(1). Indeed, even where there exists an administrative record to review, there are broadly accepted exceptions courts regularly employ to allow discovery in the service of justice and efficiency. The District of Columbia Circuit Court of Appeals has enumerated several instances when discovery is needed in record review cases:

> exceptions to the general rule [that judicial review of agency action is limited to the administrative record] have been recognized (1) when agency action is not adequately explained in the record before the court; (2) when the agency failed to consider factors which are relevant to its final decision; (3) when an agency considered evidence which it failed to include in the record; (4) when a case is so complex that a court needs more evidence to enable it to understand the issues clearly; (5) in cases where evidence arising after the agency action shows whether the decision was correct or not; (6) in cases where agencies are sued for a failure to take action; (7) in cases arising under the National Environmental Policy Act; and (8) in cases where relief is at issue, especially at the preliminary injunction stage.

Esch v. Yeutter, 876 F.2d 976, 991 (D.D.C. 1989).

This Court allowed discovery in reviewing the sufficiency of NEPA analysis—i.e., a case with an administrative record—in *National Audubon Society v. U.S. Department of the Navy*, 2:04-CV-2-BO, attached as Exhibit 7. Quoting the Second Circuit, it found that "[t]o limit the judicial inquiry regarding the completeness of the agency record to that record would, in some circumstances, make judicial review meaningless and eviscerate the very purposes of NEPA." *Id*. at 4 (quoting *Nat'l Audubon Soc'y v. Hoffman*, 132 F.3d 7, 15 (2nd Cir. 1997)). In that case, the court noted the "inconsistencies and contradictions" in the Navy's documentation that "call into question the complete nature of the Navy's NEPA analysis," and went on to note that the plaintiffs had "pointed to evidence that raises a substantial question of whether the Navy simply backed into the NEPA analysis and crafted an administrative record to fit its pre-determined conclusion." *Id*. at 5. As there, the Court here must consider evidence beyond that presented by the agency in order to "effectively determine" whether the agency "in fact considered relevant factors," "a function well within the Court's authority." *Id*.

Because there is no administrative record in this case, it is impossible to know what exceptions might apply, but one could imagine circumstances in which all of them could be relevant to this case, thus rendering discovery entirely appropriate even under APA review and the caselaw Defendants have put forth. Here, the concern is not just the completeness of the evidence before the Court, however, but also the timeliness of the Court's ability to act. As discussed at length in Plaintiffs' Motion for Preliminary Injunction, ECF No. 31, and accompanying Memorandum in Support, ECF No. 32, the wild red wolf population has dropped precipitously over the past two years, and that decline is ongoing. For that reason, Plaintiffs have requested both emergency relief barring the Service from undertaking or approving any lethal or non-lethal removals of red wolves in the absence of some demonstrated threat to human

safety or the safety of livestock or pets, as well as the prompt initiation of discovery to resolve this case on the merits. *See* ECF No. 25-1 (Plaintiffs' proposed discovery timeline).

Should this Court allow the Service to lodge what it has forecast to be a "voluminous record" on various agency decisions that do not appear to exist in the first instance, Plaintiffs hereby expand their request for injunctive relief to include the requests for information set forth in their Notice filed with the Court on June 22, 2016, ECF No. 35. Such information is the minimum necessary to ensure that further relief from this court can be provided to guarantee against irreparable harm during any review and further motions practice regarding the contents of an administrative record.

CONCLUSION

Plaintiffs have demonstrated that the APA scope and standard of review do not apply to their ESA citizen suit and NEPA failure-to-act claims. Plaintiffs are entitled to discover relevant evidence and to present expert testimony. Because Defendants have not taken final agency actions, an administrative record does not exist. This Court should therefore deny Defendants' motion and enter a discovery order consistent with Plaintiffs' proposed discovery timeline, ECF No. 25-1. The Court should also grant Plaintiffs' Motion for Preliminary Injunction to ensure maintenance of the status quo and the continued survival of the wild red wolf during the prompt resolution of this litigation.

Respectfully submitted, this the 8th day of July, 2016.

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CERTIFICATE OF SERVICE

I hereby certify that on July 8, 2016, I electronically filed the foregoing **RESPONSE IN OPPOSITION TO DEFENDANTS' MOTION TO LIMIT THE STANDARD AND SCOPE OF REVIEW** 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 8th day of July 2016.

/s/ Sierra B. Weaver
Sierra B. Weaver