

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

No. 2:20-CV-00075-BO

RED WOLF COALITION,)	
DEFENDERS OF WILDLIFE, and)	
ANIMAL WELFARE INSTITUTE,)	
)	
Plaintiffs,)	RESPONSE & OBJECTIONS TO
)	DEFENDANTS' RELEASE PLAN
v.)	
)	
THE UNITED STATES FISH AND)	
WILDLIFE SERVICE; MARTHA)	
WILLIAMS, in her official capacity as)	
Principal Deputy Director of the United States)	
Fish and Wildlife Service; LEOPOLDO)	
MIRANDA, in his official capacity as)	
Regional Director of the United States Fish)	
and Wildlife Service Southeast Region, ¹)	
)	
Defendants.)	
)	

In accordance with this Court’s Order on Plaintiffs’ Motion for Preliminary Injunction [DE 25], Plaintiffs Red Wolf Coalition, Defenders of Wildlife, and Animal Welfare Institute (collectively “Conservation Groups”) submit the following objections to Defendants’ “Plan to Release Red Wolves into the North Carolina Non-essential Experimental Population” [DE 32-2]. Despite the plan’s schedule and discussion of various release techniques that the Fish and Wildlife Service (“USFWS” or “Service”) *could* undertake, Defendants’ plan ultimately commits to releasing only two adult red wolves over the next year. Furthermore, it fails to support or

¹ Pursuant to Federal Rule of Civil Procedure 25(d), Martha Williams, Principal Deputy Director exercising authority of the Director of the U.S. Fish and Wildlife Service, is substituted for Aurelia Skipwith, former Director.

explain why such a meager release that is so at odds with the agency’s past practice in growing the population is appropriate to address the threat of irreparable harm to Conservation Groups that the Court already found in this case. As detailed below, the agency’s plan instead presumes failure, rehashing arguments previously rejected by this Court on multiple occasions. In order to prevent irreparable harm to Conservation Groups, Defendants must be required to conduct a significant enough infusion of wolves into the wild population to actually ensure that the wolves can reproduce, hold territory, and function as a wild population. More certainty and ongoing supervision from this Court is needed to ensure that the Court can grant ultimate relief on the merits of Conservation Groups’ claims.

Conservation Groups specifically request that the Court order Defendants to: (1) release at least eight red wolves over the next year pursuant to their plan, rather than the two currently committed to; (2) promptly develop new, meaningful performance measures that allow the Court to track progress under the plan; and (3) disclose on an ongoing basis certain categories of essential information about the wild and captive red wolf populations. Conservation Groups also request the Court retain ongoing supervision over implementation of the plan.

I. Defendants’ Plan Fails to Include Sufficient Commitments

Conservation Groups filed this case on November 16, 2020, alleging that Defendants are violating the Endangered Species Act (“ESA”) and Administrative Procedure Act by, among other things, implementing a new policy barring the release of red wolves from Species Survival Plan (“SSP” or “captive”) breeding facilities into the wild in North Carolina. [DE 1]. In Plaintiffs’ Motion for Preliminary Injunction, Conservation Groups requested this Court to order Defendants to develop a plan to, “with the advice and consent of the Red Wolf Species Survival Program, resume the release of captive red wolves into the Red Wolf Recovery Area by releasing

at least two pairs of captive red wolves, no later than May 31, 2021, AND release at least four additional captive red wolves, or two pairs, before December 31, 2021.” Pls.’ Mot. Prelim. Inj. at 4–5 [DE 12]. Conservation Groups further requested that Defendants release at least four wolves from the captive population into the Red Wolf Recovery Area each year thereafter until a final order is issued in this case, and that Defendants provide ongoing periodic updates to the Court with essential information about the wild population. *Id.* at 4. Conservation Groups’ materials supporting this request included scientific articles, expert declarations, and evidence of past Service practice demonstrating the efficacy of this approach. *See, e.g.*, Pls.’ Mem. Supp. Mot. Prelim. Inj. at 4–6, 34–35 [DE 13]; Pls.’ Reply Supp. Mot. Prelim. Inj. at 10 [DE 22]; Wheeler Decl., Att. I at Tbl. 1 [DE 13-11] (USFWS Responses in Support of Settlement Agreement); Revision of the Special Rule for Nonessential Experimental Populations of Red Wolves in North Carolina and Tennessee, 60 Fed. Reg. 18,940, 18,940–41 (Apr. 13, 1995) (detailing release of 42 wolves during first five years of reintroduction—an average of eight wolves per year).

In granting Conservation Groups’ motion, the Court found that the Service’s policy against releasing red wolves into the wild was likely to “hasten the extinction of red wolves in the wild,” Order on Mot. Prelim. Inj. at 10 [DE 25], and determined that injunctive relief was warranted because “the extinction of the wild red wolf during the pendency of this litigation would indeed hinder this Court’s ability to render any meaningful judgment, and the exigency of the extinction of the wild red wolf population in the Red Wolf Recovery Area demands such relief.” *Id.* at 11. While the Court afforded Defendants the latitude to “draft a plan to release captive red wolves into the Red Wolf Recovery Area in consultation with their scientists and experts in the field,” *id.* at 12, it also specified that “Defendants’ release plan should include

metrics which can be used to measure performance so that the parties may return to the Court in six months with a joint status update.” *Id.*

Rather than develop a plan that includes identifiable and enforceable metrics like a number of releases, a goal to be achieved, or an explanation of why their plan will avoid irreparable harm to Conservation Groups, Defendants’ plan instead lays out a discretionary menu of potential release strategies from March 2021 through May 2022—with dwindling specificity in later stages of the plan. Such strategies include possible translocations from St. Vincent Island National Wildlife Refuge, pup fostering from the captive population, and/or releases of adult pairs (or, less likely, family groups) from the captive population. Release Plan at 1–2 [DE 32-2]. Even though these are identified as options, Defendants’ plan largely discounts their efficacy and suggests that these releases will not be workable for various reasons. *See, e.g., id.* at 4 (downplaying likelihood of pup fostering), *id.* at 5 (downplaying likelihood of adult and family group releases from the SSP). Throughout the plan, Defendants almost entirely fail to discuss what is needed to ensure success, essentially approaching the plan through a lens of anticipated failure.²

The plan contains only one actual commitment: that the Service has identified “a reasonably suitable pair” of captive red wolves that the agency will release from the SSP into the wild North Carolina population in summer 2021. *Id.* at 1, 5. Indeed, the plan prioritizes the

² Defendants’ plan also takes credit for actions that were ongoing prior to Conservation Groups’ lawsuit. Release Plan at 4 [DE 32-2]. In fact, a previous red wolf transfer from St. Vincent National Wildlife Refuge was discussed in the parties’ recent briefs, *see Pls.’ Mem. Supp. Mot. Prelim. Inj.* at 17-18 [DE 13], and Defendants raised the 2020-2021 transfer of two red wolves included in the USFWS release plan at the Court’s hearing on that motion. *See also Second Supplemental Declaration of Ben Prater (“Second Suppl. Prater Decl.”), Ex. 1, Att. A* (November 2020 plan discussing 2020-2021 plans for transfers from St. Vincent National Wildlife Refuge). Because these were transfers from one National Wildlife Refuge to another, they were not subject to the Service’s policy barring releases from the SSP, and they have occurred independent of Conservation Groups’ case and this Court’s Order.

value of animals to the SSP, currently numbering 250 animals, rather than the wild population, currently numbering fewer than 10 animals—despite the purpose of the SSP being to re-establish wild populations of red wolves. Release Plan at 5 [32-2] (claiming SSP does not have any pairs of wolves “currently available” that meet the Service’s criteria for “ideal” pairs to release); Suppl. Wilhelm Decl., Att. A at 4 [DE 22-5] (October 2020 Population Analysis & Breeding and Transfer Plan) (stating SSP population of 250 wolves is managed “toward the goal of supporting the reintroduction and conservation of the species in their historical range”).

Defendants’ plan also sets forth “performance measures,” Release Plan at 6–7 [DE 32-2], but it does not include *any* metrics to account for releases of wolves from the captive population into the wild, ostensibly the topic of the plan. Similarly, none of Defendants’ performance measures address expanding the pool of red wolves in the SSP that the Service would deem suitable for release in the future. Instead, the “performance measures” claim to evaluate survival of wolves on the ground, population size, and reproductive output, even though the plan does not in any way address the circumstances that would allow these metrics to be achieved.

II. Affording Defendants Unlimited Discretion, As They Request, Will Result in Irreparable Harm to Conservation Groups

Instead of developing a plan to release wolves that is actually aimed at averting extinction of the world’s only wild red wolf population, Defendants appear to have taken this opportunity to reiterate their arguments about why they should not release any captive wolves into the wild in North Carolina. As Conservation Groups explained in their Motion for Preliminary Injunction and supporting materials, and as discussed further below, the release of only two wolves from the captive population is unsupported by science, inconsistent with the agency’s own past

practice, and fundamentally insufficient to ensure the continued existence of a functional population of red wolves.

A. The Plan Prioritizes the Captive Population Over the Wild Population Without Justification

Underlying Defendants' insufficient release plan are the fundamental problems that "the Service continues to evaluate the role that the NC NEP will play in red wolf recovery," Release Plan at 2 [DE 32-2], and that the agency continues to "emphasize the importance of the captive breeding population" based on its claim that red wolf releases to the wild somehow undermine the agency's "recovery goal identified for the captive population." *Id.*; *see, e.g.*, Defs.' Mem. Opp'n to Mot. Prelim. Inj. at 1, [DE-17] (discussing need to "build the capacity of the captive population"); *id.* at 9 (alleging without support "a substantial risk of disrupting the capacity building for the long-term viability of the red wolf"). At base, Defendants continue to advance the argument that recovery of the red wolf should take place in captivity rather than the wild.

Defendants' prioritization of the 250-member captive population over the fewer than 10 known members of the wild population fundamentally disregards the ESA's requirement that the Service must protect the red wolf from extinction in the wild. *See, e.g.*, 50 C.F.R. § 402.02 (defining "jeopardize the continued existence of" to mean "to reduce appreciably the likelihood of both the survival and recovery of a listed species in the wild"); Prater Decl., Att. K [DE 13-30] (USFWS Document re: Essential Population Status) ("[R]elying solely on a captive breeding program is not sufficient to ensure 'likelihood of survival of that species in the wild' and doing so would violate the ESA's clear mandate to achieve the recovery of listed species in the wild."). It simply is not relevant or appropriate for Defendants to argue that releases from the captive population "will set the Service back in achievement of its recovery goal for red wolves of 52 breeding pairs in the SSP." *See* Release Plan at 6 [DE 32-2]. Worse, this claim is also simply

incorrect. While the 52 breeding pairs concept appears to harken back to the Service’s prior misinterpretations of the 2016 Red Wolf Population Viability Analysis (“PVA”), the authors of that analysis have repeatedly refuted this misuse of their findings. *See* Prater Decl., Att. M [DE 13-32] (2016 PVA Author Letter) (admonishing the Service for using “*many alarming misinterpretations* of the PVA as justification[s]” for the agency’s proposed abandonment of red wolf recovery in North Carolina) (emphasis added). The scientists explicitly stated that “[t]he SSP is under no risk of extinction;” “the SSP can support releases to the wild without significant demographic impact at its current size;” and “52 is not a magic number.” *Id.* at 1–2 (emphasis added); *see also* Vucetich Decl. ¶ 24 [DE 13-34] (“Not only will such releases be extremely helpful for the wild population, but there are no reasons to think they would harm the captive population.”). By way of comparison, when the Service released four pairs of red wolves in 1987 to start the initial reintroduction in eastern North Carolina, only around 80 wolves were in the SSP. *See* Determination of Experimental Population Status for an Introduced Population of Red Wolves in North Carolina, 51 Fed. Reg. 41,790, 42,792 (Nov. 19, 1986); *see also* Second Suppl. Prater Decl., Ex. 1, Att. C at 4, Figure 1 (February 25, 2021 Letter from Wildlands Network to USFWS) (showing no decline in SSP from 1987 releases).

The Service’s plan also omits any consideration of how releasing wolves from captivity into the wild will in fact free up scarce room in the SSP for captive breeding and likely enhance the genetic health of both the captive and wild populations. *See* Wilhelm Decl. ¶ 13 [DE 13-18] (“Since not all of the wolves can breed every year due to capacity issues”); *id.* ¶ 15 (“. . . . SSP capacity can limit opportunities for breeding.”); *id.* ¶ 16 (“When the SSP releases wolves from the captive population into the wild, the releases improve the genetics of the wild

population and improve the health of wolves on the ground.”); Suppl. Wilhelm Decl. ¶¶ 4–5 [DE 22–4]. A November 4, 2020 USFWS memorandum recognized as much, stating,

The SSP coordinator has been consulted and confirmed that the SSP has several good candidate red wolf males for release into the wild without it being detrimental to the SSP. And it would in fact be beneficial to the SSP because it would free up one spot of space.

Second Suppl. Prater Decl., Ex. 1, Att. A at 3 (USFWS, Red Wolf NEP Winter Plan 2020). Yet Defendants’ release plan suggests the opposite without explanation.

The release plan’s focus on achieving “52 breeding pairs in the SSP” seems to be yet another attempt to rationalize why the agency should not be required to avert the extinction of the wild red wolf population in North Carolina. The Service’s continued emphasis on the captive population undermines the agency’s release plan that is supposed to prevent irreparable harm to Conservation Groups’ interests in conserving endangered red wolves *in the wild*.

B. The Plan Does Not Promote the Resumption of Red Wolf Reproduction in the Wild

As Conservation Groups explained in their Motion for Preliminary Injunction, there have been no mated pairs of red wolves or red wolf litters born since 2018. Pls.’ Mot. Prelim. Inj. at 3 [DE 12]; Pls.’ Mem. Supp. Mot. Prelim. Inj. at 9 [DE 13]. Dr. Vucetich stated in his declaration that “[t]he absence of any breeding pairs is very disturbing and indicates that something is very wrong with how the wild population is being managed, perhaps having been allowed to become too small to facilitate pairbonding.” Vucetich Decl. ¶ 19 [DE 13-34].

Yet Defendants make no attempt to suggest that their offered commitment of releasing two wolves over the next year would be sufficient to remedy this fundamental problem or ensure against extinction of the red wolf in the wild during the pendency of this litigation, which is essential to protecting this Court’s ability to enter meaningful relief on the merits. *See Order on Mot. Prelim. Inj.* at 11 [DE 25]. This Court determined that Conservation Groups demonstrated

irreparable harm, highlighting the lack of red wolf reproduction in the wild population for the past two seasons, and the fact that roughly half of the seven³ known wolves present in November 2020 were nine or ten years old and thus likely to die of natural causes in the near future. *See Order on Mot. Prelim. Inj.* at 10 [DE 25] (detailing risk of imminent extinction of the wild population and corresponding irreparable harm to Conservation Groups). Without reproduction and sufficient releases to offset predictable mortality events, the wild red wolf population will only continue on its downward trajectory. *See, e.g.,* Prater Decl. ¶¶ 31–32 [DE 13-19] (“Given the extremely small size of the current wild red wolf population, and in light of current mortality and the likelihood of future mortality, the population is incapable of growing on its own at a rate sufficient to overtake mortality in the long term.”).

The Service’s central objective in its plan should accordingly be to restart reproduction in the wild to prevent this irreparable harm. Reproduction in the wild is the only way to ensure pup-fostering takes place, which the agency maintains is the best way to release captive wolves into the wild. Release Plan at 4 [DE 32-2]. Yet the plan fails to take necessary action designed to do this.

Conservation Groups have provided ample support that a meaningful infusion of red wolves is needed as soon as possible to restart breeding in the wild. *See, e.g.,* Prater Decl., Att. L at 26 [DE 13-31] (PVA) (“A shorter term, intense level of releases can help boost the NENC population demographically, . . . virtually eliminating the chance of extinction.”); Vucetich Decl. ¶ 23 [DE 13-34] (“[B]y releasing around 8 animals a year, in a few years the wild population

³ Despite Defendants’ representation that, “[a]s of March 1, 2021, there are 10 known red wolves in the NC NEP,” it is unclear how Defendants are calculating this number. Defendants averred in their Answer to Plaintiffs’ First Amended Complaint, filed February 12, 2021, that the population numbered 10 at that time, *see* Answer at ¶ 41 [DE 30], yet the release plan explains that one wolf was killed by a vehicle on February 20, 2021. *See* Release Plan at 4 [DE 32-2]. Thus, it appears that there are actually only nine known red wolves in the wild at this time.

could be around 30 wolves which would be much more comfortable.”); *see also* Second Suppl. Prater Decl., Ex. 1, Att. B at 2 (February 19, 2021 Letter from Secretary Wilson to Acting Secretary de la Vega) (“The release of multiple pairs of wolves will be required over the next year to jumpstart the effort [to recover the species].”). Dr. John Vucetich previously explained, “[b]olstering the abundance of wild red wolves in the immediate, near-term is key to helping the population persist in the short-term as well as getting the population to where it can have reproducing breeding pairs in the long-term.” Vucetich Decl. ¶ 23 [DE 13-34]. Indeed, the Service released an average of eight wolves per year during the first five years of the reintroduction. 60 Fed. Reg. 18,940, 18,940–41 (Apr. 13, 1995). And a review of those initial years of the red wolf reintroduction effort emphasized the importance of “numerous releases over an extended period of time,” and how captive-born wolves “serve as the catalyst for population formation.” *See* Prater Decl., Att. J at 17 [DE 13-29] (Phillips et al. 2003). The review considered a release event successful if it resulted in pups being born in the wild. *Id.* at 7, Tbl. 11.1. Despite this evidence and past practice, Defendants’ release plan provides little more than the same trickle of only one to two wolves per year that the Service has provided, to no improvement, since 2020.

III. The Plan Needs Additional Certainty and Support

As discussed above, the discretion that USFWS has afforded itself not only in developing its plan, but in *whether* to carry out the plan’s core components, renders it incapable of providing the relief that Conservation Groups require to avoid irreparable harm. Without greater assurances for success, the plan is tantamount to a suggestion “that Congress’s mandated protection of the red wolf is nothing more than a half-hearted attempt to ‘see what happens’ after a few red wolves have been reintroduced into the wild”—a position rejected by this Court. *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).

Accordingly, Conservation Groups request that this Court require USFWS to (1) release at least eight wolves over the next year according to the options identified in the plan or otherwise;⁴ (2) impose meaningful performance measures; and (3) submit additional information necessary to assess the effectiveness of the plan. Conservation Groups also ask this Court to exercise ongoing supervision of the Service's implementation of the release plan in order for the Court to determine the success of the plan going forward. Defendants' current plan asks the Court for a blank check to continue to violate the ESA and jeopardize the continued existence of the red wolf in the wild. Instead, the Court should require more commitments from Defendants, and to explain and seek approval for any deviation from their release plan.

First, the Court should mandate that each envisioned release event provided for in Defendants' release plan creates a rebuttable presumption that Defendants will in fact undertake the identified release event irrespective of the conditional language in the plan. Exceptions should be allowed only if authorized by the Court or agreed to by Conservation Groups based on compelling evidence from Defendants. In the alternative, this Court should order Defendants to proceed with implementing Phase I of the plan and submit a revised plan for Phase II with appropriate commitments. In either of these circumstances, the Court should require the release of at least eight red wolves over the next year.

Conservation Groups' request for the release of at least eight wolves over a year in order to ensure a functional population of red wolves persists in the wild is consistent with the release

⁴ Importantly, regardless of any modifications to the release plan that may be required, the Court should require the agency to proceed with releasing the two wolves identified in its release plan this summer, as well as any pup-fostering opportunities that may arise.

plan USFWS has submitted to this Court, if only that plan is made binding on the agency. This Court should accordingly *require* USFWS to release the wolves it says it will *consider* releasing in the plan, including pup fostering in April-May each year, the release of wolf pairs from the SSP in June-August 2021, December 2021-March 2022, and April-May 2022, and the release of family groups and individual wolves from the SSP in December 2021-March 2022 and April-May 2022. *See* Release Plan at 3.⁵ If pup fostering cannot take place in 2021, as the Service indicates is likely to be the case, the agency should release other wolves to ensure a total of eight animals are released from the SSP during the first year of the plan.

Second, the plan's performance measures should be fundamentally reconsidered to match the plan being developed. Each of the release events identified in the plan should serve as a metric to be reported to the Court: did the Service release a family group or two pairs in winter 2021-2022, and if not, why not? As noted above, none of the current performance measures are designed to evaluate the effectiveness of the plan to *release wolves*. Instead, the existing performance measures appear designed to measure the effectiveness of USFWS's management of the population on the ground, while the plan includes no actions to that effect.

In addition, if the agency is to be judged on the efficacy of its management of the wild population as the release plan's current performance measures would do, USFWS should also include in its plan measures that will encourage survival and reproduction. In light of USFWS's claims about the limited number of wolves in the SSP that are suitable for release, the agency should also include metrics to measure progress toward increasing the number of SSP wolves ready for release. Given the agency's emphasis on the SSP planning process that takes place in

⁵ As noted above, the transfer of wolves from St. Vincent National Wildlife Refuge should be maintained, but is not appropriately considered as part of USFWS's release plan as it predated Conservation Groups' lawsuit.

July, *see* Release Plan at 6 [DE 32-2], the Court should also require the agency to update the Court on decisions made at that meeting regarding wolves selected to be released in the future.

Finally, as noted above, Defendants have provided little support for their plan, including no information about the current population on the ground. Beginning at the six-month status conference included in the Court’s order and continuing through status conferences every six months for the duration of the litigation, the Service should provide:

- the number of red wolves in the wild and SSP populations;
- demographic information about the wild red wolf population, including age, sex, pack status, and reproductive capacity;
- what methods will be used to acclimate wolves within the SSP and once transferred to North Carolina, and how long those acclimation periods will last;
- how many captive wolves in the SSP are fed a natural diet and are not on exhibit or otherwise are not habituated to humans; and
- a list of scientific experts consulted in developing the plan or any future iterations of the plan.

Finally, Conservation Groups request that the Court hold regular status conferences, not only after the first six months as the Court ordered, but also every six months thereafter as the Service moves forward with implementation of the release plan. Notably, the first status conference will take place after the July 2021 SSP meeting and would allow the Service to discuss with Conservation Groups and the Court the outcome of any breeding and/or pup fostering this spring and plans for the wolves to be released in the summer or fall. To prepare for each of these status conferences, Conservation Groups request that Defendants submit documents supporting their decision-making at each juncture.

CONCLUSION

For the reasons discussed herein, this Court should order that Defendants (1) release eight wolves over the next year pursuant to their release plan, (2) develop new, appropriate performance measures, and (3) disclose additional information necessary to assess the effectiveness of the plan. In addition, this Court should maintain ongoing oversight of the release plan's implementation to determine if additional measures are necessary to protect Conservation Groups and their members from irreparable harm during the pendency of this litigation.

Respectfully submitted, this the 15th day of March, 2021.

/s/ Sierra B. Weaver
Sierra B. Weaver
N.C. State Bar No. 28340
sweaver@selcnc.org
Derb S. Carter, Jr.
N.C. State Bar No. 10644
dcarter@selcnc.org
Ramona H. McGee
N.C. State Bar No. 47935
rmcgee@selcnc.org
Elizabeth R. Rasheed
N.C. State Bar No. 55635
erasheed@selcnc.org

SOUTHERN ENVIRONMENTAL LAW CENTER
601 West Rosemary Street, Suite 220
Chapel Hill, NC 27516
Telephone: (919) 967-1450
Facsimile: (919) 929-9421

Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on March 15, 2021, I electronically filed the foregoing **RESPONSE & OBJECTIONS TO DEFENDANTS' RELEASE PLAN** 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 15th day of March, 2021.

/s/ Sierra B. Weaver
Sierra B. Weaver