

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA**

No. _____

CENTER FOR BIOLOGICAL DIVERSITY,

Plaintiff,

v.

U.S. FISH AND WILDLIFE SERVICE,

Defendant.

COMPLAINT FOR DECLARATORY
AND INJUNCTIVE RELIEF

INTRODUCTION

1. In this action, the Center for Biological Diversity (“Center”) – an environmental conservation organization that works to protect native wildlife species and their habitats – challenges violations of the Freedom of Information Act, 5 U.S.C. § 552, *as amended* (“FOIA”), or alternatively, the Administrative Procedure Act, 5 U.S.C. §§ 701-06 (“APA”), by the U.S. Fish and Wildlife Service (“Service”) in connection with a FOIA request which the Center filed with the Service on September 9, 2015 (“FOIA Request”) and which relates to the agency’s feasibility review of the recovery program for the red wolf (*Canis rufus*) – the world’s most endangered wild canid.

2. On September 9, 2015, the Center submitted FOIA Request FWS-2015-01403 to obtain records related to the Service’s feasibility review of the Red Wolf Recovery Program and to safeguard the Center’s interests in biodiversity and wildlife protection. Since then, the FOIA Request has been wrought with several delays. The Service has repeatedly failed to provide an estimated date of completion of a determination on the Center’s FOIA Request and has failed to

provide any records that are responsive to the Center's FOIA Request other than a first partial release of only eight records.

3. The Service is unlawfully withholding the records by failing to comply with FOIA's statutory deadlines. The Service's refusal to release records regarding the feasibility review of the Red Wolf Recovery Program directly contravenes FOIA's policy of government transparency. Because prompt access to these records is necessary to effectuate FOIA's purpose, the Center seeks declaratory relief establishing that the Service has violated FOIA, or alternatively, the APA. The Center also seeks injunctive relief directing the Service to provide it with all responsive records without any further delay.

JURISDICTION AND VENUE

4. This Court has jurisdiction over this matter pursuant to 5 U.S.C. § 552(a)(4)(B) and 28 U.S.C. § 1331 because this action arises under FOIA, the APA, and the Declaratory Judgment Act, 28 U.S.C. § 2201.

5. Venue properly vests in this Court pursuant to 5 U.S.C. § 552(a)(4)(B), which provides venue for FOIA cases in this district, and because a portion of the responsive records may be found in this district.

6. Declaratory relief is appropriate under 28 U.S.C. § 2201.

7. Injunctive relief is appropriate under 28 U.S.C. § 2202 and 5 U.S.C. § 552(a)(4)(B).

PARTIES

8. Plaintiff CENTER FOR BIOLOGICAL DIVERSITY is a national, non-profit conservation organization with offices throughout the United States. The Center has 47,955 members. The Center and its members are harmed by the Service's violations of FOIA, or

alternatively the APA, as such violations preclude the Center from understanding why the Service has decided to undertake a feasibility review of the Red Wolf Recovery Program.

9. Defendant U.S. FISH AND WILDLIFE SERVICE is an agency within the Department of the Interior that is charged with implementing the ESA for most terrestrial species, including red wolves. The Service is in possession and control of the records that the Center seeks, and as such, it is subject to FOIA pursuant to 5 U.S.C. § 552(f). The Service is the federal agency responsible for applying and implementing the federal laws and regulations at issue in this Complaint.

STATUTORY BACKGROUND

10. FOIA's basic purpose is to facilitate government transparency. It establishes the public's right to access all federal agency records unless such records may be withheld pursuant to one of nine, narrowly construed FOIA exemptions. 5 U.S.C. § 552(b)(1)–(9).

11. FOIA imposes strict and rigorous deadlines on federal agencies when they receive a request for records pursuant to FOIA. Specifically, an agency must determine whether to disclose responsive records and notify the requester of its determination within 20 business days of receiving a FOIA request, and it must make records “promptly” available unless it can establish that certain unusual circumstances are present and/or that it may lawfully withhold records, or portions thereof, from disclosure. *Id.* §§ 552(a)(3)(A), (a)(6). Also within 20 business days, the agency must inform the requester that it has a right to appeal the agency's determination. *Id.* § 552(a)(6)(A)(i).

12. FOIA places the burden on the agency to prove that it may withhold responsive records from a requester. *Id.* § 552(a)(4)(B).

13. Congress has specified limited circumstances in which federal agencies may obtain more time to make the determination that is required by 5 U.S.C. § 552(a)(6)(A)(i).

14. First, an agency may toll the 20 business-day deadline for up to 10 additional days to seek additional information from a requester. *Id.* § 552(a)(6)(A)(ii).

15. Second, an agency may extend the 20 business-day deadline for an additional 10 business days by giving a written notice to the requester that sets forth “unusual circumstances” that justify a deadline extension, and providing the date by which the agency expects to make the determination. *Id.* § 552(a)(6)(B). However, when invoking such “unusual circumstances,” the agency must provide the requester “an opportunity to limit the scope of the request so that it may be processed within” 20 business days or “an opportunity to arrange with the agency an alternative time frame for processing the request or a modified request.” *Id.* § 552(a)(6)(B)(ii). In addition, when asserting unusual circumstances, the agency “shall make available its FOIA Public Liaison” to “assist in the resolution of any disputes between the requester and the agency.” *Id.*

16. FOIA requires each agency to make “reasonable efforts to search for records” in a manner that is reasonably calculated to locate all records that are responsive to the FOIA request. *Id.* § 552(a)(3)(C)-(D).

17. FOIA requires federal agencies to expeditiously disclose requested records, *see id.* § 552, and mandates a policy of broad disclosure of government records. Any inquiry under FOIA brings with it a strong presumption in favor of disclosure.

18. Congress recognized that in certain, limited instances, records may be withheld as exempt from FOIA’s broad disclosure mandate, and thus created nine categories of exemptions.

Id. § 552(b). These exemptions, however, must be narrowly construed in light of FOIA’s dominant objective of disclosure, not secrecy.

19. The U.S. district courts have jurisdiction “to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant.” *Id.* § 552(a)(4)(B).

20. Alternatively, an agency’s response to a FOIA request is subject to judicial review under the APA. The APA confers a right of judicial review on any person who is adversely affected by agency action, 5 U.S.C. § 702, and authorizes district courts to compel agency action that is unlawfully withheld or unreasonably delayed. *Id.* § 706(1). District courts must set aside any agency action that is found to be “arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law.” *Id.* § 706(2)(A).

STATEMENT OF FACTS

The Red Wolf Recovery Program

21. Although red wolves were historically widespread throughout the south-central and eastern United States, severe habitat degradation and predator control programs destroyed wild red wolf populations by the early 20th Century. These threats drove the red wolf to the brink of extinction. Today, the red wolf is the most endangered canid in the world.

22. The red wolf was first designated an endangered species in 1967 under the precursor to the ESA, the Endangered Species Preservation Act of 1966.

23. In 1973, the Service declared red wolves an endangered species under the ESA and approved the first iteration of a recovery plan for red wolves.

24. By 1975, the Service determined that the only way to save the red wolf from extinction was to remove all red wolves from the wild and to institute a captive-breeding

program. The Service captured more than 400 canids, but only 17 were identified as genetically pure red wolves. Of those red wolves, 14 became the founding members of the captive-breeding program and the ancestors of all red wolves living today.

25. However, due to removal of red wolves from the wild, in 1980 the Service declared red wolves extinct in the wild.

26. In July 1982, the Service approved the first Red Wolf Recovery Plan. This plan was revised, updated, and approved on September 18, 1984.

27. The first step toward recovery for the species was the reintroduction of red wolves at the Alligator River National Wildlife Refuge (“Alligator River NWR”) in northeastern North Carolina. In 1987, enough red wolves had been bred in captivity to begin restoring the wild red wolf population on the Alligator River NWR. The Service subsequently released into the wild four pairs of captive-bred red wolves as an experimental population under Section 10(j) of the ESA, 16 U.S.C. § 1539(j).

28. The Red Wolf Recovery Plan was integrated into a Species Survival Plan (“Red Wolf Recovery Plan/SSP”) in 1990.

29. According to the Red Wolf Recovery Plan/SSP, the Service’s ultimate goal was to grow the wild population to approximately 220 wolves in the Red Wolf Recovery Area.

30. The Red Wolf Recovery Area has grown and today encompasses about 1.7 million acres, including the Alligator River NWR and the Pocosin Lakes National Wildlife Refuge, the United States Air Force’s Dare County Bombing Range, state-owned lands, and private lands. As a result of the coordinated, science-based work of the Service and other entities, the population of wild red wolves successfully grew to 100 individuals in the late 1990s.

31. The wild red wolf population was able to maintain these numbers for more than a decade. From 2002 through 2014 the wild population remained around 100 individuals, peaking at 130 wolves in 2006.

32. In 2013, there were 34 pups born among seven litters in the wild population, in addition to one fostered pup. In the captive population, there were five pups born within one litter.

33. In early June 2015, the Service revised its wild population estimate downward to between 50 and 75 wolves in their native habitats on the Albemarle Peninsula of northeastern North Carolina.

34. On June 30, 2015, the Service published a press release announcing that it ceased reintroducing red wolves into the wild while it gathered additional science and research into the feasibility of recovering the species under the ESA.

35. In January 2016, the Service released a mortality table that recorded red wolf numbers at just 45 known red wolves in the wild. The Service updated the mortality table on March 9, 2016, and confirmed that as few as 45 red wolves remain in the wild.

FOIA Request: FWS-2015-001403

36. On September 9, 2015, the Center submitted its FOIA Request via electronic mail to the Service's Washington, D.C., Headquarters FOIA Officer, at fwhq_foia@fws.gov, and the Southeast Region FOIA Coordinator, at Sharneka_Harvey@fws.gov. The Center requested all records related to the feasibility review of the Red Wolf Recovery Program referenced in the Service's June 30, 2015 press release.

37. The Center submitted its FOIA Request to understand why the Service was undertaking a feasibility review of the Red Wolf Recovery Program – in light of a

comprehensive, independent peer review conducted by the Wildlife Management Institute which concluded that red wolf reintroductions were a success – and to safeguard the Center’s interests in biodiversity and the protection of wildlife.

38. On September 10, 2015, the Service acknowledged the FOIA Request, assigned it tracking number FWS-2015-01403, and assigned it to the Southeast Region Ecological Services Office for response.

39. On September 24, 2015, the Service’s Southeast Region FOIA Coordinator emailed the Center requesting a 10-day extension pursuant to 43 C.F.R. § 2.19. To justify its request for an extension, the Service claimed that the FOIA Request fell within the Complex track, which would delay the final determination to 21 to 60 days. The Service said it would “dispatch a determination” to the Center by October 23, 2015.

40. On October 7, 2015, the Southeast Region FOIA Coordinator emailed the Center asking for clarification on the timeframe of the requested records. The Center clarified that it sought all records from August 11, 2014 – the date Wildlife Management Institute signed a contract with the Service to review and evaluate the Red Wolf Recovery Program – to the present, as well as records generated during the pendency of the request, not to include all form comments and/or emails, but to include emails and/or comments that had unique qualities.

41. The Service provided a partial response containing only eight records on October 20, 2015. In its letter accompanying the response, the Service stated that the remainder of the responsive records was undergoing review, and that “[o]nce the review is complete” the Service would provide a response.

42. On November 4, 2015, the Southeast Region FOIA Coordinator informed the Center that – nearly two months after the date of the request – the Service still had not made a

final determination on whether there were any exemptions that applied to the records. The Service claimed that it would be releasing a second interim response on December 4, 2015, but did not provide an estimated date of completion of a final determination on the FOIA Request.

43. The Service, in response to the Center's inquiry, sent an email on December 15, 2015, stating that it had not reached a final determination on whether the remaining responsive records were exempt from release.

44. On December 22, 2015, the Center sent to the Service a Notice of Deadline Violation letter that requested an estimated date of completion of a determination on the FOIA Request and offered to assist the Service in order to facilitate the release of responsive records.

45. On January 28, 2016, about four and a half months after the date of the FOIA Request, the Center called the Southeast Region FOIA Coordinator to check on the status of the response. The Southeast Region FOIA Coordinator notified the Center that the week prior, responsive records had been sent to the regional Solicitor's Office for review. The Southeast Region FOIA Coordinator planned to follow up with the Solicitor's Office to determine when the records could be released to the Center, but estimated that records would be released by the second week of February.

46. That same day, the Southeast Region FOIA Coordinator sent an email memorializing the phone conversation. In that email, the Service's Southeast Region FOIA Coordinator stated that the Service "hope[d] to provide [the Center] a response on or before February 26, 2016."

47. On February 26, 2016, after receiving no additional records in the over five months since the FOIA Request, the Center emailed the Service requesting a status update and again requesting an estimated date of completion of a determination on the FOIA Request.

48. On March 1, 2016, the Service's Headquarters FOIA Officer stated that someone from the Service would consult with other Service offices and call the Center that day.

49. The next day, March 2, 2016, the Service emailed the Center stating that the agency was "currently consulting with other Department of the Interior offices regarding the releasability of a portion of outstanding responsive records," and that the Service "hope[d] to have a determination in the next two weeks."

50. To date, despite the Center's repeated efforts, the Service has failed to provide any releases of records that are responsive to the Center's FOIA Request other than the first partial release of eight records.

51. Despite the Center's repeated requests for an estimated date of completion of a determination on its FOIA Request, as required by FOIA, 5 U.S.C. § 522(a)(6)(B)(i), the Service failed to provide an estimated date of completion of a determination on the FOIA Request.

CLAIMS FOR RELIEF

FIRST CLAIM FOR RELIEF **VIOLATION OF THE FREEDOM OF INFORMATION ACT**

The Service Failed to Comply with 5 U.S.C. § 552(a)(7)(B)(ii) (Estimated Completion Date)

52. Plaintiff re-alleges and incorporates by reference the allegations made in all preceding paragraphs.

53. Pursuant to 5 U.S.C. § 552(a)(7)(B)(ii), "[e]ach agency shall ... establish a telephone line or Internet service that provides information about the status of a request to the person making the request ... including an estimated date on which the agency will complete action on the request."

54. The Center repeatedly asked the Service for an estimated date of completion of a determination on its FOIA Request, and in so doing, invoked 5 U.S.C. § 552(a)(7)(B)(ii).

55. The Service repeatedly failed to provide an estimated date of completion of a determination on the Center's FOIA Request.

56. The Center's organizational activities have been adversely affected by the Service's violations of FOIA's requirement that the Service provide an estimated date of completion on a FOIA request.

SECOND CLAIM FOR RELIEF
VIOLATION OF THE FREEDOM OF INFORMATION ACT

The Service's Pattern, Practice, and Policy of Violating the Estimated Completion Date Requirement Mandated by FOIA

57. Plaintiff re-alleges and incorporates by reference the allegations made in all preceding paragraphs.

58. The Service's failure to provide estimated dates of completion of final determinations of Plaintiff's FOIA Request represents an ongoing policy, practice, or standard operating procedure ("SOP").

59. A policy, practice, or SOP of refusing to provide estimated dates of completion to requesters is a violation of FOIA. 5 U.S.C. § 552(a)(7)(B)(ii). Such a practice constitutes a failure to adequately respond for purposes of the broad equitable powers provided by FOIA to the Court.

60. The Center is injured by the Service's pattern and practice of disregarding FOIA's requirement to provide an estimated date of completion of a determination on its FOIA Request.

61. Based on the nature of the Center's organizational activities, it will undoubtedly continue to employ FOIA's provisions in record requests to the Service in the foreseeable future.

62. The Center's organizational activities will be adversely affected if the Service is allowed to continue violating FOIA's requirement to provide an estimated date of completion of a determination on its FOIA Request, as it has in this case.

THIRD CLAIM FOR RELIEF
VIOLATION OF THE FREEDOM OF INFORMATION ACT

The Service Violated the Determination Deadline Mandated by FOIA

63. Plaintiff re-alleges and incorporates by reference the allegations made in all preceding paragraphs.

64. The Center has a statutory right to a final determination from the Service on its FOIA Request in a manner that complies with FOIA. The Service violated the Center's rights in this regard by unlawfully delaying its determination beyond the deadlines that FOIA mandates, 5 U.S.C. § 552(a)(6)(A)(i), (ii), for the Center's FOIA Request.

65. The Center's organizational activities will be adversely affected if the Service is allowed to continue violating FOIA's determination deadlines as it has in this case.

66. Unless enjoined and made subject to a declaration of the Center's legal rights by this Court, the Service will continue to violate the Center's rights to receive public records under FOIA.

FOURTH CLAIM FOR RELIEF
VIOLATION OF THE FREEDOM OF INFORMATION ACT

The Service Unlawfully Withheld Records Responsive to the Center's FOIA Request

67. Plaintiff re-alleges and incorporates by reference the allegations made in all preceding paragraphs.

68. The Center has a statutory right to the records it seeks, and there is no legal basis for the Service to assert that any of FOIA's nine exemptions to mandatory disclosure apply to withhold these records from the Center. *See* 5 U.S.C. § 552(b)(1)-(9).

69. The Service violated the Center's rights in this regard by failing to comply with FOIA's determination deadlines and by withholding records that are responsive to the FOIA Request.

70. Based on the nature of the Center's organizational activities, it will undoubtedly continue to employ FOIA's provisions in record requests to the Service in the foreseeable future.

71. The Center's organizational activities will be adversely affected if the Service continues to violate FOIA's disclosure provisions as it has in this case.

72. Unless enjoined and made subject to a declaration of Plaintiff's legal rights by this Court, the Service will continue to violate Plaintiff's rights to receive public records under FOIA.

FIFTH CLAIM FOR RELIEF
VIOLATION OF THE FREEDOM OF INFORMATION ACT

The Service Failed to Provide Reasonably Segregable Portions of Any Lawfully Exempt Records

73. Plaintiff re-alleges and incorporates by reference the allegations made in all preceding paragraphs.

74. The Center has a statutory right to any reasonably segregable portion of a record that contains information that is subject to any of FOIA's exemptions. 5 U.S.C. § 552(b).

75. The Service violated the Center's rights in this regard by unlawfully withholding reasonably segregable portions of any lawfully exempt records that are responsive to the FOIA Request.

76. Based on the nature of the Center's organizational activities, it will undoubtedly continue to employ FOIA's provisions in record requests to the Service in the foreseeable future.

77. The Center's organizational activities will be adversely affected if the Service is allowed to continue violating FOIA's disclosure provisions as it has in this case.

78. Unless enjoined and made subject to a declaration of the Center's legal rights by this Court, the Service will continue to violate the Center's rights to receive public records under FOIA.

SIXTH CLAIM FOR RELIEF
VIOLATION OF THE ADMINISTRATIVE PROCEDURE ACT
(In the Alternative to the First through Fifth Claims)

The Service's Violations of FOIA's Statutory Requirements Constitutes Agency Action
Unlawfully Withheld or Unreasonably Delayed

79. Plaintiff re-alleges and incorporates by reference the allegations made in all preceding paragraphs.

80. The Service unlawfully withheld agency action by failing to comply with the mandates of FOIA consequent to its failure and refusal to: (1) provide the Center with an estimated date of completion of a determination on its FOIA Request; (2) issue a timely final determination on the Center's FOIA Request; (3) provide the Center with records that are responsive to its FOIA Request, which are not within the scope of any of FOIA's exemptions to mandatory disclosure; and (4) provide the Center with reasonably segregable portions of records which may be subject to an exemption. The Service's failures constitute agency action that is unlawfully withheld and therefore actionable pursuant to the APA, 5 U.S.C. § 706(1).

81. Alternatively, the Service unreasonably delayed agency action by failing to comply with the mandates of FOIA consequent to its failure and refusal to: (1) provide the Center with an estimated date of completion of a determination on its FOIA Request; (2) issue a

timely final determination on the Center's FOIA Request; (3) provide the Center with records that are responsive to its FOIA Request, which are not within the scope of any of FOIA's exemptions to mandatory disclosure; and (4) provide the Center with reasonably segregable portions of records which may be subject to an exemption. The Service's failures constitute agency action unreasonably delayed and therefore actionable pursuant to the APA, 5 U.S.C. § 706(1).

82. As alleged above, the Service's failure to comply with the mandates of FOIA has injured the Center's interests in public oversight of governmental operations and is in violation of its statutory duties under the APA.

83. The Center has suffered a legal wrong as a result of the Service's failure to comply with the mandates of FOIA. As alleged above, the Service violated its statutory duties under the APA and injured the Center's interests in public oversight of governmental operations.

84. The Center has no other adequate remedy at law to redress the violations noted above.

85. Plaintiff is entitled to judicial review under the APA, 5 U.S.C. § 702.

SEVENTH CLAIM FOR RELIEF
VIOLATION OF THE ADMINISTRATIVE PROCEDURE ACT
(In the Alternative to the First through Sixth Claims)

The Service's Violations of FOIA's Statutory Requirements Is Arbitrary, Capricious, an Abuse of Discretion, or Otherwise Not in Accordance with Law

86. Plaintiff re-alleges and incorporates by reference the allegations made in all preceding paragraphs.

87. The Service violated FOIA's statutory mandates, consequent to its repeated failure and refusal to: (1) provide the Center with an estimated date of completion of a determination on its FOIA Request; (2) issue a timely final determination on the Center's FOIA

Request; (3) provide the Center with records that are responsive to its FOIA Request, which are not within the scope of any of FOIA's exemptions to mandatory disclosure; and (4) provide the Center with reasonably segregable portions of records which may be subject to an exemption. By repeatedly violating FOIA's statutory mandates, the Service's actions are arbitrary, capricious, an abuse of discretion, or not in accordance with the law and therefore actionable pursuant to the APA, 5 U.S.C. § 706(2)(A).

88. As alleged above, the Service's repeated failure to comply with the mandates of FOIA has injured the Center's interests in public oversight of governmental operations and is in violation of the agency's statutory duties under the APA.

89. The Center has suffered a legal wrong as a result of the Service's failure to comply with the mandates of FOIA. As alleged above, the Service violated its statutory duties under the APA and injured the Center's interests in public oversight of governmental operations.

90. The Center has no other adequate remedy at law to redress the violations noted above.

91. The Center is entitled to judicial review under the APA, 5 U.S.C. § 702.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff prays that this Court:

92. Order Defendant to provide Plaintiff with all records that are responsive to its FOIA Request.

93. Declare that Defendant's failure to provide Plaintiff with an estimated date of completion of a determination on its FOIA Request is unlawful under FOIA, 5 U.S.C. § 552(a)(7)(B)(ii), or alternatively, is agency action that has been unlawfully withheld or

unreasonably delayed, 5 U.S.C. § 706(1), or is arbitrary, capricious, an abuse of discretion, or not in accordance with law, 5 U.S.C. § 706(2).

94. Declare that Defendant's failure to timely make a determination on Plaintiff's FOIA Request is unlawful under FOIA, 5 U.S.C. § 552(a)(6)(A)(i) and (ii), or in the alternative, is agency action that has been unlawfully withheld or unreasonably delayed, 5 U.S.C. § 706(1), or is arbitrary, capricious, an abuse of discretion, or not in accordance with law, 5 U.S.C. § 706(2)(A).

95. Declare that Defendant's failure to disclose the requested records to Plaintiff is unlawful under FOIA, 5 U.S.C. § 552(a)(6)(A)(i), or in the alternative, is agency action that has been unlawfully withheld or unreasonably delayed, 5 U.S.C. § 706(1), or is arbitrary, capricious, an abuse of discretion, or not in accordance with law, 5 U.S.C. § 706(2).

96. Declare that Defendant's failure to provide the Center with reasonably segregable portions of records which may be lawfully subject to a FOIA exemption, as alleged above, is unlawful under FOIA, U.S.C. § 552(a)(7)(b), or in the alternative, is agency action that has been unlawfully withheld or unreasonably delayed, 5 U.S.C. § 706(1), or is arbitrary, capricious, an abuse of discretion, or not in accordance with law, 5 U.S.C. § 706(2).

97. Award Plaintiff its costs and reasonable attorney fees pursuant to 5 U.S.C. § 552(a)(4)(E) or 28 U.S.C. § 2412.

98. Grant such other and further relief as the Court may deem just and proper.

DATED: April 11, 2016

Respectfully submitted,

/s/ Douglas A. Ruley

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