

FILED

IN THE SUPERIOR COURT FOR WAKE COUNTY

WAKE COUNTY NO. 12-CV-012626

BY _____

RED WOLF COALITION,)
DEFENDERS OF WILDLIFE, and ANIMAL)
WELFARE INSTITUTE,)
)
Plaintiffs,)

v.)

NORTH CAROLINA WILDLIFE)
RESOURCES COMMISSION; GORDON S.)
MYERS, DIRECTOR, NORTH CAROLINA)
WILDLIFE RESOURCES COMMISSION,)
)
Defendants.)

ORDER ON MOTION FOR
PRELIMINARY INJUNCTION

THIS MATTER came before the Court on November 21, 2012 on Plaintiffs' Motion for Preliminary Injunction. Upon consideration of the arguments of counsel and the record proper, the Court makes the following findings and conclusions:

FINDINGS OF FACT

1. This is an action for declaratory and injunctive relief to prevent Defendants from allowing coyote night hunting under a temporary rule, which the Plaintiffs claim was adopted without requisite process or sufficient basis in violation of the North Carolina Administrative Procedure Act ("APA").
2. The Complaint in this action was filed on September 7, 2012.
3. Plaintiffs identify themselves, and the Court so finds for the purposes of determining standing to bring this action, as nonprofit organizations with a long history of involvement in efforts to ensure the survival of the wild red wolf population. The Plaintiffs describe their mission as to collectively defend the endangered red wolf species and work to restore the species in the wild through education, litigation, research, legislation, and advocacy.
4. In May 2012, Defendants adopted a permanent rule, 15A N.C. Admin. Code 10B .0219 ("permanent rule"), after public notice and comment, that allows coyote hunting at night with the use of artificial lights on public and private lands throughout North Carolina,

- including in the area designated for the restoration of the endangered red wolf within Dare, Tyrrell, Hyde, Washington, and Beaufort counties (“Red Wolf Recovery Area”).
5. In June 2012, the Rules Review Commission approved the permanent rule. At the time the Rules Review Commission approved the permanent rule, the Rules Review Commission had received written objections (as that term is defined in N.C. Gen. Stat. § 150B-21.3(b2)) from 10 or more persons.
 6. Because 10 or more written objections were been received, the effective date of the permanent rule, as a matter of law, is delayed until “the earlier of the 31st legislative day or the day of adjournment of the next regular session of the General Assembly.” (N.C. Gen. Stat. § 150B-21.3(b1)).
 7. The General Assembly, by delaying the effective date of an agency rule where sufficient public objection is received, has reserved unto itself the right to make the final determination as to whether such an agency rule ought to be made effective.
 8. Because the “next regular session” of the General Assembly has not yet commenced, the permanent rule allowing coyote hunting at night with the use of artificial lights on public and private lands throughout North Carolina, even though approved by the Rules Review Commission, has not yet gone into effect.
 9. In some instances, the APA permits an agency, while it awaits the General Assembly’s approval or disapproval of a rule whose effective date has been delayed because of sufficient public objection, to adopt the same rule as a “temporary rule.” N.C. Gen. Stat. § 150B-21.3(b1).
 10. In this case, the Defendant, with the effective date of the permanent rule delayed pending legislative review, adopted an identical temporary rule that allows night hunting of coyotes with artificial lights throughout North Carolina including within the Red Wolf Recovery Area. The effective date of the Defendant’s temporary rule was August 1, 2012. The Plaintiffs, in this lawsuit, challenge the authority of the Defendant to enact this temporary rule.
 11. It is uncontroverted by the parties to this lawsuit that the red wolf is one of the most endangered species in the world. It was once declared extinct in the wild, but in 1987 four pairs of the red wolves bred in captivity were released into the Alligator River National Wildlife Refuge in eastern North Carolina as an experimental population under the Endangered Species Act. The United States Fish & Wildlife Service (USFWS) developed a Red Wolf Recovery/Species Survival Plan setting forth an intense adaptive management plan to protect the species. Through the coordinated, science-based recovery efforts of the USFWS and other organizations, approximately 100 red wolves -- the last of the wild red wolf species – roam within their natural habitat in the Red Wolf Recovery Area.

12. Coyotes and red wolves, particularly juvenile red wolves, appear strikingly similar and could easily be confused to the untrained eye or when illuminated by only a spotlight at night.
13. Since the temporary rule went into effect on August 1, 2012, at least four red wolves have been killed by gunshot within the Red Wolf Recovery Area.

CONCLUSIONS OF LAW

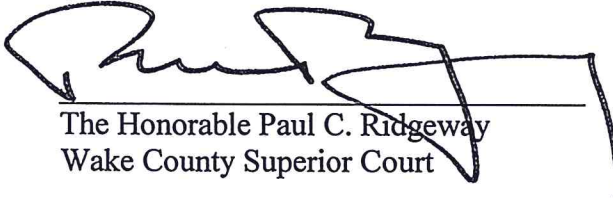
1. Plaintiffs are persons aggrieved by the temporary rule and thus have standing to bring this action and to assert the legal claims herein.
2. The statutory authority of an agency to adopt a temporary rule is not unfettered. A temporary rule can only be adopted if the “immediate adoption of the rule is required by one or more” criteria enumerated in N.C. Gen. Stat. § 150B-21.1 (emphasis added).
3. The parties concede, for the purposes of this hearing, that the sole authority under N.C. Gen. Stat. § 150B-21.1 which might require the immediate adoption of a temporary rule is found in N.C. Gen. Stat. § 150B-21.1(7), which permits the Wildlife Resources Commission to adopt temporary rules if needed to establish any of the following: . . . (b) hunting or fishing seasons, (c) hunting or fishing bag limits, or (d) management of public game lands
4. The Court finds that, as a matter of statutory construction, the words used in N.C. Gen. Stat. § 150B-21.1(7) are unambiguous.
5. The Court also finds that the words of the General Assembly must be strictly construed because they are a derogation from the general rule described above, namely that the General Assembly has reserved unto itself, by delaying the effective date of any proposed rules where sufficient public objection is voiced, the power to have the final approval or disapproval of any proposed rule before it become effective.
6. Strictly construed, N.C. Gen. Stat. § 150B-21.1(7) does not provide sufficient authority to the Defendant to adopt the temporary rule at issue in this case because the temporary rule does not deal solely with seasons, bag limits or public lands, but the temporary rule also authorizes a “manner of take” – the use of artificial lights.
7. The General Assembly has not authorized the Defendant to adopt temporary rules regulating the “manner of take” of wild animals.
8. Because the text of the temporary rule adopted by the Defendant exceeds the authority conveyed to it by the General Assembly in N.C. Gen. Stat. § 150B-21.1, the Court concludes that the Plaintiff has demonstrated a sufficient probability of success on the merits of this case
9. Because the temporary rule substantially affects Plaintiffs’ procedural, recreational, aesthetic, scientific, professional, and educational interests in North Carolina and its wildlife, including the red wolf, Plaintiffs will suffer irreparable harm if the requested

injunction is not issued. The harm alleged by the Plaintiffs, however, is confined solely to the geographic areas of Dare, Tyrrell, Hyde, Washington and Beaufort counties.

Therefore, it is ORDERED that, for good cause shown, pursuant to Rule 65 of the North Carolina Rules of Civil Procedure, the Plaintiffs' Motion is ALLOWED and the Court ORDERS as follows:

1. Defendants are enjoined from allowing night hunting of coyotes with artificial lights within the Red Wolf Recovery Area in Dare, Tyrrell, Hyde, Washington, and Beaufort counties under the temporary rule pending a trial on the merits of this case.
2. Plaintiffs shall not be required to post a security.

This the 21st day of November 2012.



The Honorable Paul C. Ridgeway
Wake County Superior Court