

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

NO. \_\_\_\_\_

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

Plaintiffs, )

v. )

NORTH CAROLINA WILDLIFE )  
RESOURCES COMMISSION; JIM )  
COGDELL, JOHN LITTON CLARK, JOE C. )  
BARKER, III, WES SEEGARS, NAT T. )  
HARRIS, JR., DALTON D. RUFFIN, DAVID )  
W. HOYLE, JR., WENDELL (DELL) )  
MURPHY, MARK CRAIG, THOMAS A. )  
BERRY, GARRY SPENCE, JOHN T. )  
COLEY, IV, VERNON (RAY) CLIFTON, )  
JR., THOMAS L. FONVILLE, RICHARD )  
EDWARDS, MICHELL HICKS, TIMOTHY )  
L. SPEAR, in their official capacities as )  
Commissioners of the North Carolina Wildlife )  
Resources Commission; GORDON S. )  
MYERS, in his official capacity as Executive )  
Director of the North Carolina Wildlife )  
Resources Commission, )

Defendants. )  
\_\_\_\_\_ )

**COMPLAINT**

[Fed. R. Civ. P. 7]

**COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF**

1. This case challenges the actions of the North Carolina Wildlife Resources Commission, its members in their official capacity as Commissioners, and Mr. Gordon S. Myers in his official capacity as the Commission’s Executive Director (collectively, “the Commission”) that are causing the illegal take of endangered red wolves in violation of the Endangered Species

Act (“ESA”), 16 U.S.C. § 1531 et seq., and its implementing regulations. Specifically, Plaintiffs challenge the Commission’s actions that permit and authorize the hunting of coyotes within the Red Wolf Recovery Area of North Carolina, in Dare, Tyrrell, Hyde, Washington, and Beaufort Counties.

2. The U.S. Fish and Wildlife Service (“USFWS”) has determined that gunshot mortality is the single biggest threat to the recovery of the wild red wolf population, which lives exclusively within the State of North Carolina.

3. The Commission’s authorization of coyote hunting through its rules, licensing, and other permits causes the illegal take of red wolves to be committed by hunters mistaking red wolves for coyotes. Because of the similarity of appearance between red wolves and coyotes, it is nearly impossible for individual hunters to avoid shooting red wolves. This is especially true under new regulations allowing coyote hunting at night, with spotlights, in the Red Wolf Recovery Area.

4. The Commission’s authorization of coyote hunting through its rules, licensing, and other permits also causes the illegal take of red wolves to be committed through the shooting of coyotes themselves by disrupting red wolf breeding patterns. The shooting of sterilized “placeholder” coyotes allows unsterilized coyotes to move in to red wolf territory, increasing opportunities for interbreeding, decreasing the genetic integrity of the wild population, and injuring red wolves by disrupting population dynamics. The shooting of unsterilized coyotes may also increase opportunities for interbreeding by triggering compensatory reproduction and an increase in the coyote population.

5. By authorizing coyote hunting in the Red Wolf Recovery Area, the Commission has caused and will likely continue to cause the killing, injury, harm, and harassment of endangered

red wolves to be committed in violation of the ESA and its regulations. 16 U.S.C. § 1538(a)(1)(G); 50 C.F.R. § 17.84(c). Plaintiffs seek a declaratory judgment that the Commission has violated the ESA by authorizing, licensing, and permitting coyote hunting resulting in the illegal take of endangered red wolves, and an order enjoining the Commission from continuing to take such actions that violate the ESA.

### **JURISDICTION AND VENUE**

6. This Court has jurisdiction pursuant to 28 U.S.C. § 1331 (federal question); § 2201 (declaratory relief); § 2202 (injunctive relief); and 16 U.S.C. §§ 1540(c) and (g) (ESA district court jurisdiction and citizen suit jurisdiction).

7. Pursuant to the ESA citizen suit provision, 16 U.S.C. § 1540(g), Plaintiffs furnished the Commission and the U.S. Secretary of the Interior with written notice of their intent to bring suit for the violations of law alleged in this Complaint on July 30, 2013, more than sixty (60) days ago. The notice of intent to sue is attached as Exhibit 1. The Commission has not remedied these violations of law.

8. Venue is proper in this district pursuant to 16 U.S.C. § 1540(g)(3)(A), because the violations of the ESA are occurring in this district, and pursuant to 28 U.S.C. § 1391(b), because a substantial part of the events giving rise to the claims occurred in this district.

9. Venue is proper in this division because Plaintiff Red Wolf Coalition has its principal office in Tyrrell County in the division. Local Civil Rule 40.1(c)(1).

### **PARTIES**

10. Plaintiff Red Wolf Coalition (“RWC”) is a non-profit organization founded in 1997 and located in Columbia, North Carolina. It has approximately 400 members and supporters, including 200 members and supporters in North Carolina. RWC advocates for the long-term

survival of wild red wolf populations by teaching about the red wolf and by fostering public involvement in red wolf conservation. Through a variety of programs, RWC provides its members, supporters, and the public with science-based information about the biology and ecology of the endangered red wolf and its value to the eastern North Carolina ecosystem. RWC works with the USFWS Red Wolf Recovery Program on red wolf restoration and management issues in an effort to establish and maintain healthy populations of wild red wolves. RWC also works with other organizations to focus world-wide attention on the effort to ensure the long-term survival of wild red wolf populations.

11. Plaintiff Defenders of Wildlife (“Defenders”) is a national non-profit, public interest organization founded in 1947. Defenders has more than 1,120,000 members and supporters nationwide, including more than 9,600 members and supporters in North Carolina. It also has more than 19,100 members in its “Defenders Electronic Network” in North Carolina. Defenders is dedicated to the protection of all endangered or threatened wild animals and plants in their natural communities, and the preservation of the habitat on which they depend. Defenders advocates new approaches to wildlife conservation that will help prevent species from becoming endangered, and it uses education, litigation, research, legislation, and advocacy to defend wildlife and their habitats. Defenders has long been active in eastern North Carolina, promoting the initial reintroduction of the red wolf to the Alligator River National Wildlife Refuge, and then successfully defending that program in court.

12. Plaintiff Animal Welfare Institute (“AWI”) is a national non-profit, public interest organization founded in 1951. It has approximately 30,000 members and supporters worldwide, including more than 850 members and supporters in North Carolina. AWI is dedicated to alleviating the suffering caused to animals by people and to protecting species threatened with

extinction. AWI's activities focus on minimizing impacts of human actions detrimental to endangered or threatened species, including harassment, habitat degradation, encroachment and destruction, and irresponsible hunting and trapping practices. Through advocacy, litigation, legislation, research, and education, AWI acts to safeguard endangered or threatened wild animals and their habitats and to implement humane solutions to human-wildlife conflicts. AWI works with national and local governments and other policymakers to protect animals, often by preventing actions damaging to species and by promoting effective and safe wildlife protection laws and regulations. AWI helped win passage of the federal ESA, and continues to work with members of Congress to secure funding for USFWS to enforce the ESA. AWI also consulted with the USFWS red wolf recovery team, routinely coordinates with RWC on efforts to address concerns associated with red wolf conservation and recovery, and is working to revise federal regulations in order to further protect the species.

13. Plaintiffs (also "Conservation Organizations") have actively expressed their ongoing concerns about the detrimental impact of coyote hunting on the wild red wolf population, including submitting comments and testifying on the North Carolina coyote night hunting rule. Conservation Organizations successfully challenged the Commission's promulgation of a temporary rule authorizing night hunting of coyotes in state court. See Red Wolf Coal. v. N.C. Wildlife Res. Comm'n, No. 12-CV-012626 (N.C. Super. Ct. Nov. 21, 2012) (order granting preliminary injunction).

14. Conservation Organizations bring this action on behalf of their members and supporters who live and work in the vicinity of the Red Wolf Recovery Area, as well as members from across the country who visit, observe, photograph, and otherwise enjoy red wolves in the wild. These members derive scientific, aesthetic, educational, professional, and recreational

benefits from the presence of red wolves in eastern North Carolina and are harmed by the Commission's authorization of coyote hunting in this area, which has caused and will continue to cause the killing, injury, harm, and harassment of red wolves. This harm will be redressed by an order from this Court declaring that the Commission's authorization of coyote hunting through its rules, licensing, and other permits violates the ESA, and enjoining the Commission from authorizing, licensing, or permitting activities that result in the unlawful take of red wolves.

15. Defendant North Carolina Wildlife Resources Commission is an agency of the State of North Carolina. The Commission is responsible for the management of North Carolina's wildlife resources. N.C. Gen. Stat. § 113-132(b). The Commission is also responsible for enforcing regulations regarding wildlife resources, including all hunting regulations. N.C. Gen. Stat. § 143-254.2(a).

16. The Commission issues hunting licenses that are required under North Carolina law for hunting wild animals. N.C. Gen. Stat. § 113-270.1B.

17. The Commission also prescribes the seasons, bag limits, and manner of take for wild animals. N.C. Gen. Stat. §§ 113-291.1; 113-291.2.

18. The Commission has promulgated a coyote hunting rule that authorizes the day and night hunting of coyotes across North Carolina, including within the Red Wolf Recovery Area. 15A N.C. Admin. Code 10B .0219.

19. The Commission has the authority to issue general hunting licenses authorizing coyote hunting across North Carolina, including within the Red Wolf Recovery Area, N.C. Gen. Stat. § 113-220.1B, and the authority to issue special permits for the nighttime hunting of coyotes on public lands, 15A N.C. Admin. Code 10B .0219(a).

20. Defendant Jim Cogdell is named in his official capacity as Chairman of the North Carolina Wildlife Resources Commission. The Commission Chairman is responsible for guiding and coordinating the official actions and official activities of the Commission in fulfilling its program responsibilities. N.C. Gen. Stat. § 143-243. As Chairman, Mr. Cogdell is a properly named state official with responsibility for all actions challenged in this complaint.

21. Defendant John Litton Clark is named in his official capacity as Vice Chairman of the Commission. As a Commissioner, Mr. Clark is a properly named state official with responsibility for all actions challenged in this complaint.

22. Defendant Joe C. Barker, III, is named in his official capacity as Commissioner. As a Commissioner, Mr. Barker is a properly named state official with responsibility for all actions challenged in this complaint.

23. Defendant Wes Seegars is named in his official capacity as Commissioner. As a Commissioner, Mr. Seegars is a properly named state official with responsibility for all actions challenged in this complaint.

24. Defendant Nat T. Harris, Jr., is named in his official capacity as Commissioner. As a Commissioner, Mr. Harris is a properly named state official with responsibility for all actions challenged in this complaint.

25. Defendant Dalton D. Ruffin is named in his official capacity as Commissioner. As a Commissioner, Mr. Ruffin is a properly named state official with responsibility for all actions challenged in this complaint.

26. Defendant David W. Hoyle, Jr., is named in his official capacity as Commissioner. As a Commissioner, Mr. Hoyle is a properly named state official with responsibility for all actions challenged in this complaint.

27. Defendant Wendell (Dell) Murphy is named in his official capacity as Commissioner. As a Commissioner, Mr. Murphy is a properly named state official with responsibility for all actions challenged in this complaint.

28. Defendant Mark Craig is named in his official capacity as Commissioner. As a Commissioner, Mr. Craig is a properly named state official with responsibility for all actions challenged in this complaint.

29. Defendant Thomas A. Berry is named in his official capacity as Commissioner. As a Commissioner, Mr. Berry is a properly named state official with responsibility for all actions challenged in this complaint.

30. Defendant Garry Spence is named in his official capacity as Commissioner. As a Commissioner, Mr. Spence is a properly named state official with responsibility for all actions challenged in this complaint.

31. Defendant John T. Coley, IV, is named in his official capacity as Commissioner. As a Commissioner, Mr. Coley is a properly named state official with responsibility for all actions challenged in this complaint.

32. Defendant Vernon (Ray) Clifton, Jr., is named in his official capacity as Commissioner. As a Commissioner, Mr. Clifton is a properly named state official with responsibility for all actions challenged in this complaint.

33. Defendant Thomas L. Fonville is named in his official capacity as Commissioner. As a Commissioner, Mr. Fonville is a properly named state official with responsibility for all actions challenged in this complaint.



34. Defendant Richard Edwards is named in his official capacity as Commissioner. As a Commissioner, Mr. Edwards is a properly named state official with responsibility for all actions challenged in this complaint.

35. Defendant Michell Hicks is named in his official capacity as Commissioner. As a Commissioner, Mr. Hicks is a properly named state official with responsibility for all actions challenged in this complaint.

36. Defendant Timothy L. Spear is named in his official capacity as Commissioner. As a Commissioner, Mr. Spear is a properly named state official with responsibility for all actions challenged in this complaint.

37. Defendant Gordon S. Myers is the Executive Director of the Commission. The Commission Executive Director is “charged with the supervision of all activities under the jurisdiction of the Commission [and] serve[s] as the chief administrative officer.” N.C. Gen. Stat. § 143-246. As Executive Director, Mr. Myers is a properly named state official with responsibility for all actions challenged in this complaint.

## **LEGAL BACKGROUND**

### **Endangered Species Act**

38. The fundamental purpose of the ESA is to conserve endangered and threatened species and the ecosystems upon which they depend for survival and recovery. 16 U.S.C. § 1531(b). The ESA defines conservation as “the use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to [the ESA] are no longer necessary.” *Id.* § 1532(3). Accordingly, the ultimate goal of the ESA is not just to save endangered and threatened species from extinction, but to recover these species to the point where they no longer need ESA protection.

39. The ESA's conservation mandate is incorporated into Section 9 of the ESA. Under Section 9, it is "unlawful for any person" to "take [any endangered species] within the United States ...." 16 U.S.C. § 1538(a)(1)(B). In general, this prohibition also applies to threatened species managed by USFWS. 50 C.F.R. § 17.31(a). It is also unlawful for any person to violate regulations pertaining to threatened and endangered species. 16 U.S.C. § 1538(a)(1)(G).

40. The term "take" is defined broadly as "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or attempt to engage in any such conduct." 16 U.S.C. § 1532(19); Defenders of Wildlife v. EPA, 882 F.2d 1294, 1300 (8th Cir. 1989) ("Take is defined in the broadest possible manner to include every conceivable way in which a person ... can 'take' or attempt to 'take' any fish or wildlife") (internal citation omitted). "Harm" means "an act which actually kills or injures wildlife," including habitat modification or degradation that "injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding, or sheltering." 50 C.F.R. § 17.3. "Harass" means "an intentional or negligent act or omission which creates the likelihood of injury to wildlife by annoying it to such an extent as to significantly disrupt normal behavioral patterns which include, but are not limited to, breeding, feeding, or sheltering." Id.

41. It is also unlawful for "any person" to "cause to be committed" any offense described in Section 9, including take of threatened or endangered species, or a violation of regulations pertaining to these species. 16 U.S.C. § 1538(g). The term "person" includes "any officer, employee, agent, department, or instrumentality ... of any State, municipality, or political subdivision of a State ...." Id. § 1532(13).

42. A government entity causes take to be committed when it authorizes activity resulting in take. Courts have established that "a governmental third party pursuant to whose authority an actor directly exacts a taking ... may be deemed to have violated the provisions of the ESA."

Strahan v. Coxe, 127 F.3d 155, 163 (1st Cir. 1997) (holding Massachusetts state officers caused take by licensing and permitting fishing practices that injured endangered Northern Right whales); Sierra Club v. Yeutter, 926 F.2d 429, 438–39 (5th Cir. 1991) (holding Forest Service caused take of endangered red-cockaded woodpeckers by permitting logging practices near nesting colonies); Defenders of Wildlife v. EPA, 882 F.2d at 1301 (holding EPA caused take of endangered species through its registration of pesticides for use by others); Animal Prot. Inst. v. Holsten, 541 F. Supp. 2d 1073, 1078–80 (D. Minn. 2008) (holding state agency caused take of lynx through its licensure of trapping and its regulation of trap uses).

43. To prove a violation of Section 9 of the ESA, a plaintiff need only establish “by a preponderance of the evidence” that the challenged action is “reasonably certain to imminently harm, kill, or wound the listed species.” Animal Welfare Inst. v. Beech Ridge Energy LLC, 675 F. Supp. 2d 540, 563 (D. Md. 2009). See also Marbled Murrelet (Brachyramphus Marmoratus) v. Pac. Lumber Co., 880 F. Supp. 1343, 1367 (N.D. Cal. 1995), aff’d sub nom. Marbled Murrelet v. Babbitt, 83 F.3d 1060 (9th Cir. 1996) (holding injunction is appropriate when an ESA violation is “‘at least likely in the future,’ or [there is] ‘a definite threat of future harm to [a] protected species’”) (internal citation omitted).

44. A government entity is liable for authorizing activities that are reasonably certain to result in take, even if individual licensees or permittees could conceivably perform the activities without killing, injuring, harming, or harassing endangered animals. Holsten, 541 F. Supp. 2d at 1080.

### **Red Wolf 10(j) Rule**

45. Section 10(j) of the ESA governs the reintroduction of threatened or endangered species into portions of their historic ranges. 16 U.S.C. § 1539(j)(2)(A); 50 C.F.R. § 17.81(a).

46. For each population released pursuant to Section 10(j), USFWS must by regulation delineate a population boundary and determine whether that population is “experimental” and whether the population is “essential to the continued existence” of the species in the wild. 16 U.S.C. § 1539(j)(3); 50 C.F.R. § 17.81(c)(2).

47. Each member of an experimental population is “treated as a threatened species,” except that critical habitat may not be designated, and the typical ESA Section 7 consultation requirements may not apply. 16 U.S.C. § 1539(j)(2)(C).

48. Section 10(j) provides USFWS with flexibility in how it manages a reintroduced “experimental, nonessential” (“ENE”) population and it may alter one or more of the ESA’s protections, including the Section 9 take prohibition, for any ENE population. 50 C.F.R. § 17.82; 16 U.S.C. § 1533(d). See Wyo. Farm Bureau Fed’n v. Babbitt, 199 F.3d 1224, 1233 (10th Cir. 2000) (“Congress purposely designed section 10(j) to provide the Secretary [of USFWS] flexibility and discretion in managing the reintroduction of endangered species”). Despite the greater flexibility imparted by a Section 10(j) rule, ENE populations must be managed to “further the conservation of [the] species.” See 16 U.S.C. § 1539(j)(2)(A); 50 C.F.R. § 17.81(b).

49. The specific prohibitions that apply to an experimental population are contained in the species-specific 10(j) rule. See generally 50 C.F.R. § 17.84 (setting forth all species-specific Section 10(j) rules to date). USFWS first promulgated a 10(j) rule for the red wolf (“red wolf rule”) in 1986. Determination of Experimental Population Status for an Introduced Population of Red Wolves in North Carolina, 51 Fed. Reg. 41,790 (Nov. 19, 1986) (to be codified at 50 C.F.R. pt. 17). The rule authorized reintroduction of red wolves into the Alligator River National Wildlife Refuge in Dare County, North Carolina, as an ENE population. Id. The red wolf

reintroduction area was later expanded to include all of Dare County and the adjacent Tyrrell, Hyde, Washington, and Beaufort counties. See 50 C.F.R. § 17.84(c)(9)(i). This area is commonly referred to as the Red Wolf Recovery Area.

50. Under the red wolf rule, no “person” may take a red wolf, except as specifically provided by the rule. 50 C.F.R. § 17.84(c)(2). In addition to management-related take, the following actions within the Red Wolf Recovery Area are allowed as long as they are reported within 24 hours to the refuge manager or the State wildlife enforcement officer for investigation:

- i. The take of a red wolf on private lands if the take is “not intentional or willful, or is in defense of that person’s life or the lives of others”;
- ii. The take of a red wolf on lands owned or managed by Federal, State, or local government agencies if the take is “incidental to lawful activities, is unavoidable, unintentional, and not exhibiting a lack of reasonable due care, or is in defense of that person’s own life or the lives of others”;
- iii. The take by a private landowner, or other individual having the landowner’s permission, of a red wolf on the landowner’s property “when the wolves are in the act of killing livestock or pets” if “freshly wounded or killed livestock or pets are evident”;
- iv. The harassment by a private landowner, or other individual having the landowner’s permission, of a red wolf on the landowner’s property if “all such harassment is by methods that are not lethal or physically injurious to the red wolf”; and
- v. The take by a private landowner of a red wolf on the landowner’s property after efforts by USFWS personnel to capture the animal have been abandoned, provided that USFWS approves the action in writing.

Id. § 17.84(c)(4). Any take that does not fall within one of these limited exceptions, or not reported within 24 hours, is illegal take in violation of the ESA. Id. § 17.84(c)(2); 16 U.S.C. § 1538(a)(1)(G).

51. Under the red wolf rule it is also “unlawful for any person to ... *cause to be committed*” prohibited take. 50 C.F.R. § 17.84(c)(8) (emphasis added).

52. The red wolf rule was promulgated by USFWS to aid conservation of the species and the success of the wild red wolf population. See Determination of Experimental Population Status, 51 Fed. Reg. at 41,792; see also Gibbs v. Babbitt, 214 F.3d 483, 487 (4th Cir. 2000) (noting that Congress enacted Section 10(j) to blunt local opposition to reintroduction programs). The red wolf rule does not change the red wolf's status as an endangered species protected by the ESA.

## **FACTUAL BACKGROUND**

### **The Red Wolf**

53. The red wolf (*Canis rufus*) has been pushed to the edge of extinction. Once common throughout the eastern and south-central United States, most red wolf populations were destroyed by the early 20th Century as a result of intensive predator control programs and the degradation and alteration of habitat. Today, the red wolf is one of the most endangered species in the world.

54. The red wolf was first designated an endangered species in 1967 under the Endangered Species Preservation Act of 1966, the precursor to the federal ESA, 16 U.S.C. § 1531 et seq.

55. By 1975, USFWS determined that the only way to save the red wolf from extinction was to remove all red wolves from the wild and institute a captive-breeding program. More than 400 canids were captured by USFWS, but only 17 were identified as pure red wolves. Fourteen of these wolves became the founding members of the captive-breeding program and the ancestors of all red wolves living today.

56. USFWS declared the red wolf extinct in the wild in 1980.

57. In 1987, four pairs of red wolves bred in captivity were released into the Alligator River National Wildlife Refuge in eastern North Carolina as an experimental population under Section 10(j) of the ESA, 16 U.S.C. § 1539(j). The Red Wolf Recovery/Species Survival Plan, first approved in 1973 and subsequently revised and updated, sets forth an intensive adaptive management plan to protect the red wolf species and to facilitate the recovery of the wild red wolf population.

58. The Red Wolf Recovery Area currently encompasses about 1.7 million acres, including four national wildlife refuges, 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 USFWS and other entities, approximately 100-120 wild red wolves now live within the Red Wolf Recovery Area. The North Carolina red wolves constitute the only wild population of red wolves in the world.

59. USFWS's ultimate goal is to grow the wild population to approximately 220 wolves. However, USFWS has stated that it is unlikely that the red wolf will ever recover to the point that the species will be safe from extinction.

60. Thus, despite robust recovery efforts, the red wolf remains listed as an endangered species. See 50 C.F.R. § 17.11.

### **Coyote Hunting in North Carolina**

61. Under North Carolina law, "no person may hunt, fish, trap, or participate in any other activity regulated by the Wildlife Resources Commission for which a license is provided by law without having first procured a current and valid license authorizing the activity." N.C. Gen. Stat. § 113-270.1B.

62. The Commission has regulatory authority over and responsibility for the administration and issuance of hunting licenses within North Carolina. N.C. Gen. Stat. § 113-

270.2 (Hunting licenses); N.C. Gen. Stat. § 113-276.1 (Regulatory authority of Wildlife Resources Commission as to license requirements and exemptions).

63. A hunting license is required to hunt coyotes. See N.C. Gen Stat. § 113-270.2. The Commission’s regulation governing the hunting of coyotes is found at 15A N.C. Admin. Code 10B .0219. As of January 1, 2012, the rule read:

**15A NCAC 10B .0219 COYOTE**

- (a) There is no closed season for taking coyotes by hunting.
- (b) There are no bag limit restrictions on coyotes.
- (c) Manner of Take. Hunters may use electronic calls.

64. In 2012, the Commission proposed amendments to the coyote rule to allow night hunting of coyotes with artificial lights throughout North Carolina, including within the Red Wolf Recovery Area (“permanent rule”).

65. In an April 16, 2012, comment letter to the Commission, USFWS expressed its concern that the rule changes would increase threats to the wild red wolf population from gunshot mortality. The USFWS comment letter is attached as Exhibit 2.

66. Despite USFWS’s concern, the Commission adopted the rule changes. Under the North Carolina Administrative Procedure Act (“NC APA”), the permanent rule would have become effective on August 1, 2012, but for the fact that the North Carolina Rules Review Commission received over thirty written objections requesting legislative review of the rule.

67. Among the written objections were letters from members of RWC, Defenders, and AWI. By law, the receipt of these objection letters delayed the implementation of the permanent rule until the North Carolina General Assembly had a chance to review the rule.

68. The Commission also promulgated an identical temporary rule that allowed coyote hunting at night with the use of artificial lights throughout North Carolina, including within the



Red Wolf Recovery Area, and would have gone into effect without any delay for legislative review. Conservation Organizations challenged the temporary rule in Wake County Superior Court as violating the NC APA, and on November 21, 2012, the court granted Conservation Organization's Motion for Preliminary Injunction, enjoining coyote night hunting with artificial lights within the Red Wolf Recovery Area. Red Wolf Coal. v. N.C. Wildlife Res. Comm'n, No. 12-CV-012626 (N.C. Super. Ct. Nov. 21, 2012) (order granting preliminary injunction).

69. The General Assembly adjourned on July 26, 2013, without taking action on the permanent rule, at which time the revisions to the coyote hunting rule allowing hunting with artificial lights immediately went into effect.

The coyote hunting rule now provides:

- (a) This Rule applies to hunting coyotes. There is no closed season for taking coyotes. Coyotes may be taken on private lands anytime during the day or night. Coyotes may be taken on public lands without a permit from the hours of one-half hour before sunrise until one-half hour after sunset, and from one-half hour after sunset to one-half hour before sunrise by permit only.
- (b) There are no bag limit restrictions on coyotes.
- (c) Manner of Take. Hunters may use electronic calls and artificial lights.

15A NCAC 10B .0219

### **The Effect of Coyote Hunting on Red Wolves**

70. Coyote hunting harms red wolves and red wolf recovery both directly and indirectly. Coyote hunting creates a direct risk of gunshot mortality for red wolves because red wolves may be mistaken for coyotes and shot. Coyote hunting indirectly harms and harasses red wolves by disrupting the pack structure and breeding habits of both red wolves and coyotes, increasing the problem of interbreeding between the species.

### **Direct Gunshot Mortality of Red Wolves**

71. Direct mortality by gunshot is the single greatest threat to the survival of the red wolf species. Since 2008, up to ten percent of the wild red wolf population has been shot each year, making shooting the leading cause of wild red wolf mortality.

72. Overall, 29 percent of the wild red wolf population was killed by gunshot from 2000 to 2013, an increase of 17 percent from the period of 1987 to 2000, according to a presentation given by Becky Bartel, Assistant Coordinator for the Red Wolf Recovery Program, on August 13, 2013.

73. Red wolves are easily mistaken for coyotes because of the two species' similarity in size and color. The Commission has stated that "[i]n N.C., coyotes may be mistaken for dogs or red wolves, and the existence of ... red wolf-coyote hybrids can make identification difficult." N.C. Wildlife Res. Comm'n, Fox and Coyote Populations Study: Final Report 14 (2012).

74. Since 2008, gunshot has been the confirmed cause of death for 20 red wolves, according to official numbers kept by the USFWS Red Wolf Recovery Program. Gunshot was the suspected cause of death for an additional 18 wolves. Five cut tracking collars were also found during this period, indicating to Red Wolf Recovery Program personnel that wolves may have been shot and disposed of unlawfully. The Recovery Program mortality data chart is attached as Exhibit 3.

75. In 2008, two wolves were confirmed to have died by gunshot. In addition, gunshot was the suspected cause of death for four wolves.

76. In 2009, two wolves were confirmed to have died by gunshot. One of these wolves was shot in Pitt County, outside the Red Wolf Recovery Area. In addition, gunshot was the suspected cause of death for three wolves. Finally, three cut red wolf tracking collars were also found.

77. In 2010, four wolves were confirmed to have died by gunshot. In addition, gunshot was the suspected cause of death for two wolves. Finally, two wolves that were confirmed to have died of health-related causes may have previously been shot.

78. In 2011, three wolves were confirmed to have died by gunshot. In addition, gunshot was the suspected cause of death for five wolves. Finally, one cut red wolf tracking collar was also found.

79. In 2012, six wolves were confirmed to have died by gunshot. One of these wolves was shot in Pamlico County, outside the Red Wolf Recovery Area. In addition, gunshot was the suspected cause of death for three wolves. Finally, one cut red wolf tracking collar was also found. Three shooters who killed red wolves in 2012 reported to the authorities that they had mistaken the wolves for coyotes.

80. So far in 2013, three wolves were confirmed, and one wolf suspected, to have died by gunshot. Two of these wolves were shot outside the Red Wolf Recovery Area, in Pamlico and Franklin counties. Two shooters who killed red wolves in 2013 reported to the authorities that they had mistaken the wolves for coyotes.

81. While gunshot is the confirmed or suspected cause of death for 43 red wolves since 2008 (including cut collars), only ten of these shootings were reported to the authorities by the shooter.

82. Night hunting, as authorized by the revised coyote hunting rule, exacerbates the misidentification problem as it is virtually impossible to distinguish the two species under nighttime conditions.

83. Between the time that the temporary coyote night hunting rule went into effect on August 1, 2012, and the time that the temporary rule was enjoined on November 21, four wolves were confirmed to have been killed by gunshot, and gunshot was the suspected cause of death for an additional two wolves.

84. In its comment letter on the revised coyote hunting rule, USFWS expressed its concerns about red wolf gunshot mortality:

The Service is concerned that the proposed night hunting regulations will result in red wolves being mistaken for coyotes and inadvertently shot ....

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In recent years, gunshot mortality has become a serious threat to the wild population of red wolves. From 1987 to 2003, the Red Wolf Recovery Program documented an average of less than two wolves killed per year by gunshots. Since 2004, red wolves taken by gunshot have substantially increased to about seven wolves per year ....

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[T]hese recent gunshot mortalities have occurred during daylight hours. Providing additional hunting opportunities at night will likely exacerbate the problem and increase the number of animals lost.

Exhibit 2 (Letter from Cynthia K. Dohner, Reg. Dir., U.S. Fish & Wildlife Serv., to Gordon Myers, Exec. Dir., N.C. Wildlife Res. Comm'n (Apr. 16, 2012)).

### **Harm and Harassment of Red Wolves**

85. Beyond the loss of individual animals, gunshot mortality poses a threat to the wild red wolf population by reducing the number of breeding wolves. In the past, gunshot has been the leading cause of death for red wolf breeders (paired adult red wolves that will potentially birth pups in a given calendar year).

86. Coyote hunting also injures red wolves by increasing opportunities for interbreeding between red wolves and coyotes. Interbreeding threatens the genetic integrity of the red wolf

species and has been a major problem since coyotes began moving into the Red Wolf Recovery Area in the 1990s. In an effort to reduce this risk and simultaneously build the wild red wolf population, USFWS implemented a program to sterilize coyotes in the Red Wolf Recovery Area.

USFWS describes the benefits of the program as follows:

The plan effectively uses techniques to capture and sterilize a hormonally intact coyote and then release the sterile canid back into its territory. Sterile coyotes are not capable of breeding, effectively limiting the growth of the coyote population, and are incapable of interbreeding with wild red wolves, abating hybridization events. Ultimately, the “placeholder” coyotes are replaced by larger red wolves naturally by displacing or killing the coyote or via management actions such as removal of the coyote followed by insertion of the wild or translocated wolves.

Id.

87. As described by USFWS, coyote hunting within the Red Wolf Recovery Area impacts the agency’s coyote sterilization program and increases the threat of hybridization:

[F]our sterilized coyotes were lost to gunshot during [October 15 - December 31, 2011]. Gunshot mortality of sterile coyotes increases the potential for hybridization as intact coyotes fill the empty space, generally disrupts coyote dynamics and increases [coyote] compensatory reproduction (i.e., an increase in the number of offspring produced to compensate for the loss of individuals not reaching reproductive age as a result of ecological or social constraints), effectively increasing the coyote population ....

\*\*\*

We are concerned that allowing the hunting of coyotes at night will increase the potential for more red wolves to be killed and more sterilized coyotes to be killed. Killing sterilized coyotes will undermine our management strategy to use coyotes as placeholders in making progress toward red wolf recovery.

Id.

88. Recent studies have confirmed that red wolf shooting deaths also have a significant disruptive impact on red wolf population dynamics and the success of breeding pairs.

## CLAIM FOR RELIEF

(Violation of Section 9 of the Endangered Species Act)

89. The allegations of the preceding paragraphs are incorporated by reference as if repeated and set forth in full herein.

90. ESA Section 9 provides that “it is unlawful for any person [to] violate any regulation pertaining to [an endangered species] and promulgated by the Secretary pursuant to the authority provided by this chapter.” 16 U.S.C. § 1538(a)(1)(G). The red wolf 10(j) rule is a regulation pertaining to an endangered species promulgated pursuant to authority provided by the ESA. See 50 C.F.R. § 17.82. Therefore, any person who violates the provisions of the red wolf rule violates Section 9 of the ESA.

91. Under ESA Section 9 and the red wolf rule it is also unlawful for “any person” to “cause to be committed” a violation of the ESA or the red wolf rule. 16 U.S.C. § 1538(g); 50 C.F.R. § 17.84(c)(8). Therefore, it is unlawful for any person to cause prohibited take of red wolves to be committed.

92. As outlined above, the red wolf rule prohibits intentional or willful take of red wolves on private lands and take that is avoidable, intentional, or exhibiting a lack of reasonable due care on public lands. In addition, all unintentional take is unlawful unless it is reported to a designated official within 24 hours.

93. The preponderance of the evidence shows that the Commission is causing the unlawful take of red wolves to be committed by authorizing coyote hunting within the Red Wolf Recovery Area through its rules, licensing, and other permits, in violation of Section 9 of the ESA. 16 U.S.C. § 1538(a)(1)(G). The Commission authorized coyote hunting within the Red Wolf Recovery Area despite being fully aware that this authorization would result in the killing of red wolves.

94. Defendants' failure to comply with the ESA has injured and continues to injure the Plaintiffs.

**REQUEST FOR RELIEF**

WHEREFORE, Plaintiffs respectfully request that this Court:

- A. Issue a declaratory judgment that the Defendants have violated Section 9 of the ESA by authorizing coyote hunting in the Red Wolf Recovery Area;
- B. Issue an injunction preventing the Defendants from continuing to violate the ESA and from otherwise authorizing, licensing, or permitting activities that result in the unlawful take of red wolves;
- C. Award Plaintiffs the costs of this action, including their reasonable attorneys' fees; and
- D. Grant Plaintiffs such additional relief as the Court deems just and proper.

This the 17th day of October, 2013.

Respectfully submitted,

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