

# SOUTHERN ENVIRONMENTAL LAW CENTER

Telephone 919-967-1450

601 WEST ROSEMARY STREET, SUITE 220  
CHAPEL HILL, NC 27516-2356

Facsimile 919-929-9421

October 23, 2012

***Via Certified Mail, Return Receipt Requested***

Mr. Ken Salazar  
Secretary  
U.S. Department of the Interior  
1849 C Street, NW  
Washington, D.C. 20240

Mr. Gordon S. Myers  
Executive Director  
North Carolina Wildlife Resources  
Commission  
1701 Mail Service Center  
Raleigh, NC 27699-1701

**Re: 60-Day Notice of Intent to Sue for Violations of Section 9 of the Endangered Species Act and Section 6 Cooperative Agreement—Causing the Take of the Endangered Red Wolves**

Dear Secretary Salazar and Director Myers:

We write on behalf of the Red Wolf Coalition, Defenders of Wildlife, and Animal Welfare Institute (collectively, “Conservation Organizations”), to notify you of our intent to bring suit against the North Carolina Wildlife Resources Commission, and Mr. Myers as the Commission’s Director (collectively, the “Commission”), for violations of the Endangered Species Act (“ESA”), 16 U.S.C. § 1531 *et seq.*, in connection with the Commission’s adoption of temporary and permanent rules that authorize nighttime hunting of coyotes with artificial lights throughout North Carolina, including within the area designated for the restoration of the endangered red wolf within Dare, Tyrrell, Hyde, Washington, and Beaufort counties (“Red Wolf Recovery Area”), where the last remaining 100 wild red wolves exist.

As described more fully below, the Commission’s temporary and permanent coyote nighttime hunting rules, as well as any permits issued thereunder, have and will harm, harass, injure, and kill ESA-listed red wolves. *Id.* § 1538(a)(1)(G); 50 C.F.R. § 17.84(k). These actions constitute unlawful take in violation of ESA Section 9 and the Commission’s Section 6 cooperative agreement with the U.S. Fish and Wildlife Service.

This letter constitutes notice required by Section 11(g) of the ESA, 16 U.S.C. § 1540(g), prior to commencement of legal action. If the Commission does not take action within 60 days to remedy its violations of the ESA, Conservation Organizations will pursue litigation over these claims.

## I. BACKGROUND

### a. Red Wolf<sup>1</sup>

Once common throughout the eastern and south-central United States, red wolf (*Canis rufus*) populations were destroyed by the early part of the 20th Century as a result of intensive predator control programs and the degradation and alteration of the species' habitat. The red wolf was designated a federal endangered species under the Endangered Species Act in 1967.<sup>2</sup> By mid-1975, the U.S. Fish and Wildlife Service ("USFWS" or "Service") determined that "the only way the red wolf could be saved from extinction was to capture as many wild animals as possible and place them in a secured captive-breeding program."<sup>3</sup> The USFWS thereafter initiated efforts to conserve the species, including starting the program to breed the species in captivity. More than 400 canids were captured by the USFWS, but only 17 were identified as pure red wolves. Fourteen of these wolves would become the founding members of the captive-breeding program and the ancestors of all red wolves existing today. The USFWS declared the red wolf extinct in the wild in 1980.

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 USFWS developed the Red Wolf Recovery/Species Survival Plan, which sets forth an intense adaptive management plan to protect the red wolf species.

Since reintroduction in the wild, the red wolf population has grown and the Red Wolf Recovery Area has expanded to four national wildlife refuges, a Department of Defense bombing range, state-owned lands, and private lands, encompassing about 1.7 million acres. Because of the coordinated, science-based work of the USFWS and other organizations, approximately 100 wild red wolves now live within the Red Wolf Recovery Area with the goal "to remove threats of extinction by achieving a wild population of approximately 220 wolves."<sup>4</sup>

The North Carolina red wolves make up the only wild population of red wolves left in the world. "Complete species recovery permitting delisting will probably never be achieved for the red wolf"<sup>5</sup>; thus, despite the recovery efforts, the red wolves remain a listed endangered species. See 50 C.F.R. § 17.11.

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<sup>1</sup> Unless otherwise indicated, the facts in this section are summarized from the U.S. Fish and Wildlife Service's press release regarding the recent red wolf death, *available at* <http://www.fws.gov/southeast/news/2012/048.html>, and its Red Wolf Recovery Program Brochure, *available at* <http://www.fws.gov/southeast/pubs/alwolf.pdf>.

<sup>2</sup> The red wolf was originally listed as endangered under the Endangered Species Preservation Act of 1966, the precursor to the Endangered Species Act. The red wolf remains listed as an endangered species under the Endangered Species Act. 50 C.F.R. § 17.11.

<sup>3</sup> USFWS, Red Wolf Recovery/Survival Plan, Preface (1990), *available at* [http://ecos.fws.gov/docs/recovery\\_plan/901026.pdf](http://ecos.fws.gov/docs/recovery_plan/901026.pdf).

<sup>4</sup> Red Wolf Recovery Program, 3rd Quarter Report, April-June 2012, at 2, *available at* <http://www.fws.gov/redwolf/reports.html>.

<sup>5</sup> USFWS, Red Wolf Recovery/Survival Plan, Preface (1990).

## **b. The Commission's Rulemaking**

Earlier this year, the Commission proposed permanent rule changes to 15A North Carolina Administrative Code 10B .0219 to allow coyote night hunting with artificial lights throughout North Carolina and published the text of the permanent rule in the North Carolina Register ("Notice of Text"). After receiving public comments on the permanent rule as published in the Notice of Text, the Commission adopted the permanent rule changes ("permanent rule"). The North Carolina Rules Review Commission ("RRC") reviewed the permanent rule and approved it. 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 RRC received over thirty written objections requesting legislative review of the rule. By law, the RRC's receipt of these objection letters delays the implementation of the permanent rule until the General Assembly has the chance to review the rule during North Carolina's next legislative session, scheduled to convene in January 2013. Unless the Legislature acts on the rule during the legislative session, the permanent night hunting rule will go into effect.

Rather than allowing the permanent rule to proceed through the prescribed legislative review process, the Commission undermined the rulemaking process by submitting an identical night hunting rule as a temporary rule without the requisite process or basis required for temporary rules under the NC APA.

Just like the permanent rule pending legislative review, the Commission's temporary rule allows coyote hunting at night with the use of artificial lights throughout North Carolina, including within the Red Wolf Recovery Area. Because the Commission adopted the temporary rule in violation of the NC APA and without regard to the rule's impacts on the last remaining wild red wolf population, Conservation Organizations filed a lawsuit in Wake County Superior Court seeking a declaratory judgment invalidating the temporary rule and an injunction against its further effect.

As explained more fully below, death by daytime gunshot is the single greatest risk to the survival of the wild red wolf species. Allowing coyote hunting at night with artificial lights within the Red Wolf Recovery Area, as permitted under the Commission's permanent and temporary rules, doubles the risk of mortality to the wild red wolf population and increases the risk of red wolf hybridization with coyotes. The temporary rule went into effect on August 1, 2012. On September 4, 2012, a red wolf was found dead by gunshot within the Red Wolf Recovery Area. Upon information and belief, additional wolves have been illegally taken since the rule went into effect.

## **c. By Allowing Coyote Night Hunting, the Commission Jeopardizes Red Wolf Recovery and Survival**

The Commission's recent decision to allow for night hunting of coyotes via rulemaking dramatically harms the red wolf population, prevents expansion and recovery of red wolves, and hinders the public's ability to experience the red wolf in the wild.

Red wolves and coyotes are very similar in size and color. Because of this similarity of appearance, red wolves have been accidentally killed by hunters during the daytime. Indeed, the

USFWS cites gunshot mortality as a primary risk to the wild red wolf population.<sup>6</sup> Breeding members of the red wolf population, which are critical to the growth of the population, are disproportionately killed by gunshot.<sup>7</sup> The USFWS has described the problem as follows:

[G]unshot mortality since 2004 is hampering the ability of the red wolf [population] to continue its upward trend in growth. Since 2004, gunshot mortality has reduced the number of breeding pairs and pups . . . and otherwise removed growth potential . . . . We believe gunshot mortality must be addressed in order to [maintain] the upward growth trend of the red wolf [population].<sup>8</sup>

Night hunting will only exacerbate these problems as it will be nearly impossible to distinguish the difference between red wolves and coyotes under nighttime conditions. Moreover, red wolves are mostly nocturnal,<sup>9</sup> and are therefore more likely to be active at night when night-hunting activities are taking place and more susceptible to death by gunshot. Concerned over the risk of increased red wolf mortality, the USFWS submitted a comment letter on the permanent coyote night hunting rule explaining:

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

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. Last year (2011), at least seven red wolves were investigated as killed by gunshots during the fall hunting seasons for deer and bear (October 15-December 31) . . . . Gunshot mortality of red wolves reduces the number of breeding animals, disrupts population dynamics, reduces recruitment, and increases an opportunity for hybridization between wolves and coyotes . . . .

[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.<sup>10</sup>

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<sup>6</sup> USFWS, Red Wolf 5-Year Status Review: Summary & Evaluation (2007) (“USFWS 5-Year Review”), at 17-19, 29, *available at* <http://www.fws.gov/southeast/5yearReviews/5yearreviews/RedWolf-5YrR.pdf>.

<sup>7</sup> *Id.*

<sup>8</sup> USFWS 5-Year Review at 29.

<sup>9</sup> USFWS, Red Wolf Recovery Program, Frequently Asked Questions, *available at* <http://www.fws.gov/redwolf/faq.html>.

<sup>10</sup> Letter from Cynthia K. Dohner, Regional Director, USFWS, to Gordon Myers, N.C. Wildlife Resources Commission (April 16, 2012) (“USFWS Comment Letter”) at 1-2.

Another risk to red wolf survival is interbreeding with coyotes, which threatens the genetic integrity of the red wolf species. In an effort to reduce this risk and simultaneously build the red wolf population, the USFWS also implemented a program to sterilize coyotes. The USFWS describes the benefits of this 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.<sup>11</sup>

As described by the USFWS, the night hunting rule impacts the agency’s coyote sterilization program and increases red wolf 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 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.<sup>12</sup>

The coyote night hunting rule also jeopardizes the safety and activities of USFWS personnel and other biologists who closely monitor and manage the red wolf packs and population. Active and intense management of the red wolf population is essential to its survival as a species. USFWS personnel must closely monitor red wolf locations, live-trap and test pups to determine their genetic makeup, sterilize coyotes to prevent hybridization, and remove all hybrid animals from the area or sterilize them to prevent them from producing offspring. Impeding USFWS activities could hamper field work that is essential for the survival of the red wolf species. In its comment letter on the permanent rule, the USFWS emphasized its concerns over the risks it posed to its Red Wolf Recovery team:

We are concerned about the safety of Red Wolf Recovery Program biologists too. While our field activities are typically conducted during the

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<sup>11</sup> USFWS Comment Letter at 1-2.

<sup>12</sup> Id. at 2 (emphasis added.)

daytime, occasionally our work, such as trapping, and that of our biologists must be done at night. As you may know, a law enforcement officer was killed in another state that currently allows hunting coyotes at night.

None of us wants to create a situation where that tragedy would be repeated. The potential for someone to get shot while legally hunting coyotes at night because of mistaken identity or because they were shooting at a canid being handled by our biologists is real. Night hunting presents a threat to the safety of our biologists, and to the general public, domestic pets and livestock, and non-targeted wildlife . . . .<sup>13</sup>

On September 4, 2012, a radio-collared red wolf was found dead in western Tyrrell County, near Creswell, North Carolina, within the Red Wolf Recovery Area. Upon information and belief, additional red wolves have been illegally taken since the temporary coyote night hunting rule went into effect. These incidents reinforce the fact that the Commission's coyote night hunting rules results in the illegal take of red wolves and undermines progress toward red wolf recovery.

To reduce the risks gunshot poses to red wolf recovery, the USFWS has recommended developing cooperative actions with the Commission that will "result in significant reduction" of the "loss of red wolves caused by gunshot."<sup>14</sup> The Commission's decision to provide additional hunting opportunities at night will not reduce these problems, but will exacerbate the problems and increase the number of animals lost.

## II. STATUTORY FRAMEWORK

### a. ESA Section 9 Take Prohibition

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). This 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). This prohibition generally applies to threatened species as well. 50 C.F.R. § 17.31(a).

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." *Id.* § 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."). Under the statute, "harm" means "an act which actually kills or injures wildlife" "by significantly impairing essential behavioral patterns, including breeding . . ." 50 C.F.R. § 17.3. "Harass" means "an intentional or negligent act or omission which creates the likelihood of injury . . . by annoying it to such an extent as to significantly disrupt normal behavior patterns which include, but are not limited to, breeding, feeding or sheltering." *Id.*

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<sup>13</sup> *Id.* at 2.

<sup>14</sup> USFWS 5-Year Review at 36.

In addition to prohibiting direct take, it is also unlawful for “any person” to “cause to be committed” a taking of any endangered species within the United States. 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 . . .” and thus includes Mr. Myers and the Commission. *Id.* § 1532(13). Accordingly, under Section 9, “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 official liable under Section 9 for licensing and permitting fishing practices that injured endangered whales); *Sierra Club v. Yeutter*, 926 F.2d 429, 438-39 (5th Cir. 1991) (finding Forest Service caused take of endangered red-cockaded woodpecker by permitting logging practices near nesting colonies); *Defenders of Wildlife*, 882 F.2d at 1301 (holding EPA caused take of endangered species through its registration of pesticides for use by others); *Pac. Rivers Council v. Oregon Forest Indus. Council*, No. 02-243-BR, 2002 U.S. Dist. LEXIS 28121, \*31-33 (D. Or. Dec. 23, 2002) (finding state forester’s authorization of logging operations that are likely to result in a take is itself a cause of a take).

Further, an agency’s failure to regulate in a way that avoids take of a listed species can constitute prohibited Section 9 take. See *Loggerhead Turtle v. Cnty. Council of Volusia Co.*, 896 F. Supp. 1170, 1180-81 (M.D. Fla. 1995), *rev’d on other grounds*, 148 F.3d 1231 (11th Cir. 1998) (holding county government caused take of endangered sea turtles through its authorization of vehicular beach access during turtle mating season); *Animal Protection Inst. v. Holsten*, 541 F. Supp. 2d 1073, 1078-1080 (D. Minn. 2008) (holding state natural resources agency liable for causing risk of take of lynx through its licensure of trapping and its regulations of trap uses).

“[I]n keeping with its commitment to species conservation, the ESA states that a state law may be more restrictive than the provisions of the Act, but not less.” *Gibbs v. Babbitt*, 214 F.3d 483, 487 (4th Cir. 2000) (citing 16 U.S.C. § 1535(f)). To further the conservation purposes of the ESA, the USFWS may enter into cooperative agreements with any State to establish and maintain “an adequate and active program for the conservation of endangered and threatened species.” 16 U.S.C. § 1535(c).

#### **b. ESA Section 10(j) Experimental Populations**

In 1982, Congress enacted Section 10(j) of the ESA to address the reintroduction of listed species. Section 10(j) authorizes the Service to release an “experimental population” of any threatened or endangered species to “further the conservation of such species.” 16 U.S.C. § 1539(j)(1), (2). The Service may issue “protective regulations” for the experimental population that include all relevant prohibitions and exceptions to the ESA’s prohibition of take as necessary to conserve the species. 16 U.S.C. § 1533(d); 50 C.F.R. § 17.82.

An experimental population is “treated as a threatened species,” except that critical habitat will not be designated and the typical ESA Section 7 consultation requirements may not apply. *Id.* § 1539(j)(2)(C).<sup>15</sup>

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<sup>15</sup> See also USFWS 5-Year Review at 29.

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

The Service first promulgated a 10(j) rule for the red wolf in 1986 to foster wolf reintroduction. 51 Fed. Reg. 41,790 (Nov. 19, 1986). The rule authorized reintroduction of captive wolves into the Alligator River National Wildlife Refuge, in Dare County, North Carolina. *Id.* The red wolf reintroduction area was expanded to include all of Dare County and the adjacent Tyrrell, Hyde, Washington, and Beaufort counties. 50 C.F.R. § 17.84(c)(9). The red wolf population was determined to be a “nonessential experimental population.” 50 C.F.R. § 17.84(c)(1). Under this designation, the red wolf is treated as a “threatened species,” except that critical habitat will not be designated for the red wolf and Section 7’s consultation requirements do not apply where the wolf occurs outside National Wildlife Refuge and National Park lands. 16 U.S.C. § 1539(j)(2)(C).<sup>16</sup>

The Service has extended the ESA’s broad takings prohibitions to the experimental red wolf population with certain limited exceptions: no “person, agency, or organization” may take a red wolf, except as specifically provided by the rule. 50 C.F.R. § 17.84(c)(2). Under this species-specific rule, the following actions within the Red Wolf Recovery Area are exempt from the ESA’s broad take prohibition, as long as they are reported within 24 hours to the Refuge Manager or the State wildlife enforcement officer for investigation:

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

50 C.F.R. § 17.84(c)(4). Any take committed that does not fall within one of these limited exceptions is an illegal take in violation of the ESA. *Id.*(c)(2).

### **d. USFWS Cooperative Agreement with North Carolina Wildlife Resources Commission**

Pursuant to Section 6(c) of the ESA, the USFWS entered into a cooperative agreement with the Commission to further establish and maintain “an adequate and active program for the

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<sup>16</sup> See also USFWS 5-Year Review at 25.



conservation of endangered and threatened species.” 16 U.S.C. § 1535(c). The Commission’s compliance with the ESA and the cooperative agreement (“Cooperative Agreement”) is a prerequisite to Federal funding. *Id.*<sup>17</sup>

In the Cooperative Agreement, North Carolina declared, through the Commission, that it “wishes to administer its ‘wildlife’ program for the conservation of endangered or threatened fish or wildlife in harmony with the terms and spirit of the [ESA].” Among other things, the USFWS agreed to provide funding for the Commission’s programs that “conserve[e]” endangered or threatened species and the Commission agreed to carry out its programs in a manner that will “benefit” resident Federally-listed endangered and threatened species.<sup>18</sup> The Commission also “agree[d] not to engage in, or issue a permit authorizing, the taking of resident Federally-listed endangered or threatened fish or wildlife . . . without prior issuance of a permit [by the USFWS or as otherwise authorized by the Cooperative Agreement].”<sup>19</sup> Under the Cooperative Agreement, for example, the Commission has limited authority to take without a permit a resident Federally-endangered species for conservation purposes, as long as the take is “not reasonably anticipated to result in . . . the death or permanent disabling of the specimen.”<sup>20</sup>

In its comment letter to the permanent coyote night hunting rule, the USFWS notified the Commission of its concerns that the Commission’s adoption of the coyote night hunting rule is in violation of the Cooperative Agreement.

Section 6 requires that in order to be eligible for Federal funding, State programs must be in accordance with the purposes and policies of the ESA and provide an adequate and active program for the conservation of listed species. The amendments to allow night hunting have the potential to result in authorized take of red wolves.<sup>21</sup>

We share the USFWS’ concerns that the Commission is in violation of its Section 6 Cooperative Agreement and question the Commission’s eligibility for Federal funding.

### III. NOTICE OF VIOLATION

The Commission is violating and will continue to violate Section 9 of the ESA and the Cooperative Agreement. As federal case law makes clear, 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*, 127 F.3d at 163; 16 U.S.C. § 1538(g) (prohibiting any person from “caus[ing an ESA violation] to be committed”).

Here, the Service’s 10(j) regulation governing the red wolf experimental population prohibits, for example, take—and thus prohibits the Commission from causing take— on federal and state public lands unless 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

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<sup>17</sup> See also USFWS Comment Letter at 3.

<sup>18</sup> Cooperative Agreement ¶ 1.

<sup>19</sup> *Id.* ¶ 2(a).

<sup>20</sup> *Id.* ¶ 2(a), (b).

<sup>21</sup> USFWS Comment Letter at 3.

life or the lives of others.” 50 C.F.R. § 17.84(c)(2). In addition, a take on private land is illegal under the ESA unless it is reported within 24 hours to the Refuge Manager or the State wildlife enforcement officer and (1) is “not intentional or willful, or is in defense of that person’s life or the lives of others” or (2) occurs “when the wolves are in the act of killing livestock or pets” if “that freshly wounded or killed livestock or pets are evident.” *Id.*

When adopting the coyote night hunting rule, the Commission was well-aware that daytime shootings are already the primary threat to red wolf recovery.<sup>22</sup> Yet the Commission authorized nighttime coyote hunting on public and private lands, effectively doubling the avoidable risks of wolf mortality by gunshot, despite clear evidence that shootings have caused and will continue to cause take, injury, and death to the endangered red wolves. By allowing night hunting of coyotes, a species frequently mistaken for the red wolf, the Commission is committing an avoidable, unreasonable, and unlawful take of the red wolf by gunshot. *See, e.g., Strahan*, 127 F.3d at 163.

By adopting the night coyote hunting rule, the Commission is similarly unlawfully harming and/or harassing the red wolf. 50 C.F.R. § 17.3 (“harm” means “an act . . . that actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering”; “harass” means any “intentional or negligent act or omission which creates the likelihood of injury . . . as to significantly disrupt normal behavioral patterns which include, but are not limited to, breeding, feeding, or sheltering”). As explained above, the Commission’s coyote night hunting rules result in the increased deaths of red wolves—disproportionately deaths of breeding red wolves—and sterilized coyotes. The Commission’s night hunting rules thus greatly increase risks to the wolves’ territory, breeding patterns, population dynamics, recruitment, and hybridization with coyotes,<sup>23</sup> and thus effect illegal take by harm or harassment of the red wolf. 50 C.F.R. § 17.3.

The USFWS agrees: the Commission’s rule “amendments to allow night hunting have the potential to result in unauthorized take of red wolves.”<sup>24</sup> The recent illegal red wolf take just confirms the risk to wolves caused by coyote night hunting. Where “[e]ach taking impacts the overall red wolf population,” *Gibbs*, 214 F.3d at 498, the risks of take caused by the Commission’s night hunting rules must be alleviated.

#### IV. CONCLUSION

We request that the Commission immediately halt coyote night hunting within the Red Wolf Recovery Area to ensure compliance with federal law and its Cooperative Agreement. We are hopeful that the Commission will take all necessary measures to avoid the unlawful future

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<sup>22</sup> *See, e.g.,* USFWS Comment Letter.

<sup>23</sup> USFWS Comment Letter at 2.

<sup>24</sup> USFWS Comment Letter at 3.

taking of the red wolves, and that the agencies' representatives will contact us within 60 days to discuss their obligations under the ESA. If you have any questions about the issues raised in this letter, please feel free to contact us at any time.

Sincerely,



Derb S. Carter, Jr.  
Southern Environmental Law Center

Kim Wheeler  
Red Wolf Coalition

Jason C. Rylander  
Defenders of Wildlife

Cathy Liss  
Tara Zuardo  
Animal Welfare Institute

cc: Mr. Daniel M. Ashe, USFWS, Director (via U.S. Mail)  
Ms. Cynthia Dohner, USFWS, Regional Director, Southeast Region (via U.S. Mail)  
Mr. C. Norman Young, Jr., Assistant Attorney General (via U.S. Mail)