

IN THE SUPERIOR COURT FOR WAKE COUNTY

NO. 12-CV-012626

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WAKE COUNTY, C.S.C.  
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.

MEMORANDUM OF LAW  
IN SUPPORT OF  
PLAINTIFFS' MOTION FOR  
PRELIMINARY INJUNCTION  
AND REQUEST FOR EXPEDITED  
HEARING

[N.C. R. Civ. P. 65]

**INTRODUCTION**

Plaintiffs Red Wolf Coalition ("RWC"), Defenders of Wildlife ("Defenders"), and Animal Welfare Institute ("AWI") (collectively, "Plaintiffs") respectfully submit this Memorandum in support of their Motion for Preliminary Injunction and request for expedited hearing in the above-captioned case.

The North Carolina Wildlife Resources Commission and Gordon S. Myers, the Commission's Executive Director, (collectively "Defendants" or "Commission"), failed to follow the requirements of the North Carolina Administrative Procedure Act ("APA"), N.C. Gen. Stat. § 150B-1 et seq., when adopting a temporary rule to allow coyote hunting at night with artificial lights on public and private lands throughout the state ("temporary rule"), 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"). Defendants' unlawful coyote night hunting rule jeopardizes

the world's last remaining wild population of red wolves. Plaintiffs respectfully request that this Court enjoin the unlawful temporary rule from taking further effect pending a trial on the merits in this case.

### SUMMARY

Earlier this year, Defendants proposed permanent rule changes that would 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, Defendants adopted permanent rule changes ("permanent rule" or "proposed permanent rule") that were substantially different from those published in the Notice of Text. The North Carolina Rules Review Commission ("RRC") reviewed the permanent rule and approved it. Under the 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.

Rather than allowing the permanent rule to proceed through the prescribed legislative review process, Defendants 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 APA.

Defendants' temporary rule allows coyote hunting at night with the use of artificial lights within the Red Wolf Recovery Area. The red wolf is one of the most endangered species in the world. It was once declared extinct in the wild, but through the concentrated, science-based recovery efforts of the United States Fish and Wildlife Service, Plaintiffs, and other organizations, the red wolf was reintroduced into the wild in North Carolina in 1987, and is making steps towards recovery.

Today, only about 100 red wolves currently exist in the wild. Red wolves and coyotes are similar in size, coats, and coloring. Because of this similarity of appearance, red wolves have been killed by hunters during the daytime; indeed, the U.S. Fish and Wildlife Service cites gunshot mortality as a primary risk to the wild red wolf population. Night hunting of coyotes will only exacerbate the problem as it will be nearly impossible to distinguish the difference between red wolves and coyotes under nighttime conditions. Because it puts breeding red wolves and sterilized coyotes at risk, the nighttime hunting of coyotes also increases the risk of red wolf hybridization with coyotes, threatening the genetic integrity of the red wolf species.

Situations like this—where the rule revisions would imperil an endangered species and undermine a decades-long effort to restore that species—underscore the importance of public participation and close adherence to the protective measures embedded in the rulemaking process.

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. On September 7, 2012, Plaintiffs filed a Complaint in this Court seeking a declaratory judgment invalidating the unlawful temporary rule and an injunction against its further effect.

By their Motion for Preliminary Injunction (the “Motion”), Plaintiffs seek to enjoin Defendants from permitting coyote hunting at night with artificial lights throughout North Carolina, including within the Red Wolf Recovery Area. A preliminary injunction against the Defendants is necessary pending a trial on the merits in this case because (a) Plaintiffs are likely to succeed on the merits of their claims that Defendants adopted the temporary rule without the legal justification and process required by the APA; and (b) coyote night hunting with artificial lights in the Red Wolf Recovery Area will result in irreparable injury to the once extinct red wolf. Plaintiffs submit this Memorandum of Law in support of their Motion.

## FACTS

### **I. Rulemaking**

North Carolina General Statutes, Chapter 113, Article 22, governs the regulation of wildlife in the state. North Carolina General Statutes § 113-291.1 sets forth the manner of taking wild animals. For the most part, game animals may only be taken “between a half hour before sunrise and a half hour after sunset.” N.C. Gen. Stat. § 113-291.1(a). The Commission “may adopt rules prescribing the manner of taking . . . wild animals not classified as game.” Id.

Wild animals not classified as game, and for which a season is set, “may be taken during the hours and methods authorized for taking game animals.” 15A N.C. Admin. Code 10B .0201(d). Coyotes are not classified as game. N.C. Gen. Stat. § 113-129 (7b), (7c).

Session Law 2011-369, ratified June 17, 2011, repealed a provision in N.C. Gen. Stat. § 113-291.1(b)(2), which permitted the use of electronic calls for hunting coyotes. Section 4 of Session Law 2011-369 replaced that provision with a provision that allows the Commission to “adopt rules prescribing seasons and the manner of taking wild animals . . . with the use of artificial lights and electronic calls.” The sections of Session Law 2011-369 related to artificial lights and electronic calls became effective on October 1, 2011.

North Carolina Administrative Code Subchapter 10B, Section .219 contains the rules promulgated by the Commission prescribing the seasons and manner of take for coyotes. At the time Session Law 2011-369 was enacted, the rule governing the hunting of coyotes was as follows:

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

(a) No closed season.

(b) Bag Limits: No restriction.

15A N.C. Admin. Code 10B .0219.

In response to Session Law 2011-369, the Commission proposed in August 2011 to amend 15A N.C. Administrative Code 10B .0219 to add the use of electronic calls as a permissible manner

of take when hunting coyotes. These permanent rule changes were proposed to take effect on January 1, 2012. 26 N.C. Reg. 94, 95, 106 (Aug. 1, 2011). While that permanent rulemaking process was pending, the Commission proposed the same changes through a temporary rule permitting the take of coyotes by electronic calls. 26 N.C. Reg. 627, 633 (Oct. 1, 2011); 26 N.C. Reg. 699, 700 (Oct. 17, 2011). The RRC approved the Commission's temporary rule allowing the take of coyotes with the use of electronic calls, effective October 1, 2011. 26 N.C. Reg. 699, 700 (Oct. 17, 2011). Following approval of the temporary rule, the RRC also approved the permanent rule changes, allowing the take of coyotes with the use of electronic calls. As of that amendment, the regulation applicable to coyote hunting 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.

15A N.C. Admin. Code 10B .0219 (Jan. 1, 2012).

That same month, again relying on the passage of Session Law 2011-369, the Commission proposed to amend 15A N.C. Admin. Code 10B .0219 to allow for night hunting of coyotes throughout North Carolina, including within the Red Wolf Recovery Area, with the use of artificial lights. In the Fiscal Note Review for the permanent rule, the Commission concluded: "There will be a non-economic benefit to the regulated community of hunters by providing them with increased hunting opportunities. There *may* also be some benefit to the public by hunter reduction of the non-indigenous coyotes . . . ." Pls.' Ex. 1 (Fiscal Note Review) at 2. (emphasis added.) The Commission also determined that there will be no substantial economic impact, benefit or otherwise, to the public as a result of the permanent night hunting rule; thus, no fiscal note was prepared. Pls.' Ex. 1 (Fiscal Note Review) at 2.

The Commission published its Notice of Text in the North Carolina Register for the permanent rule on February 15, 2012. In its Notice of Text, the Commission published the proposed permanent rule changes as follows:

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

- (a) There is no closed season for taking coyotes by hunting. Coyotes may be taken by hunting anytime during the day or night.
- (b) There are no bag limit restrictions on coyotes.
- (c) Manner of Take. Hunters may use electronic ~~calls~~ calls and artificial lights.<sup>1</sup>

26 N.C. Reg. 1185, 1187 (Feb. 15, 2012).

In response to the Commission's Notice of Text of the permanent rule, it received comments at public hearings and letters from individuals, organizations, and agencies, including the U.S. Fish and Wildlife Service ("USFWS"), the U.S. Department of Agriculture ("USDA"), RWC, and AWI, expressing concerns over the night hunting rule's detrimental impacts on the endangered red wolf population and public safety. See, e.g., Pls.' Ex. 9 (USFWS Comment Letter); Pls.' Ex. 10 (USDA Comment Letter); Pls.' Ex. 12 (Affidavit of Kim Wheeler) ¶ 12; Pls.' Ex. 13 (Affidavit of Donna D. Storie) ¶ 11; Pls.' Ex. 16 (Affidavit of Cathy A. Liss) ¶ 4; Pls.' Ex. 17 (Affidavit of T. DeLene Beeland) ¶ 10. Despite the concerns communicated in the comment letters and at public hearings, the Commission adopted the permanent rule at its May 3, 2012 meeting. Pls.' Ex. 2 (N.C. Wildlife Resources Commission, May 3, 2012 Actions ("WRC Actions") at 4.

As adopted by the Commission, the permanent rule differed substantially from the rule published in the notice of text:

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

- (a) There is no closed season for taking coyotes by hunting. Coyotes may be taken on private lands by hunting anytime during the day or night. Coyotes may be taken on public lands by hunting from the hours of one-half hour before sunrise until one-half hour after sunset, and one-half hour after sunset to one-half hour before sunset by permit only.

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<sup>1</sup> Changes proposed in the Notice of Text to 15A N.C. Admin. Code 10B .0219, as currently codified, are indicated by underline; changes proposed during the rulemaking process after the Notice of Text was published for the permanent rule are hereinafter indicated by underline and *italics*.

- (b) There are no bag limit restrictions on coyotes.
- (c) Manner of Take. Hunters may use electronic calls calls and artificial lights.

See Pls.' Ex. 2 (WRC Actions) at 4 & Ex. P-2 collectively.

At the same time it adopted the permanent rule, the Commission authorized its Director to pursue temporary rulemaking for the night hunting rule in the event it was subsequently delayed until the next legislative session by the RRC's receipt of objection letters. Pls.' Ex. 2 (WRC Actions) at 4.

Even though the proposed permanent rule ultimately adopted by the Commission differed substantially from the rule published in the Notice of Text, the Commission did not publish the revised text of proposed permanent rule in the North Carolina Register or accept comments on the different rule. Instead, the Commission submitted the revised proposed permanent rule to the RRC, which thereafter approved the permanent rule on June 20, 2012 as follows:

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

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

Pls.' Ex. 3 (Rules Subject to Legislative Review); 27 N.C. Reg. 366 (Aug. 1, 2012).

As approved by the RRC, the permanent rule was "different from that originally noticed in the Register." 27 N.C. Reg. 336, 342 (Aug. 1, 2012). Nonetheless, the proposed permanent rule would have become effective on August 1, 2012, but for the fact that the RRC received written objections to the permanent rule from over thirty (30) persons, including members of RWC, Defenders, and AWI. See, e.g., Pls.' Ex. 12 (Wheeler Aff.) ¶ 12; Pls.' Ex. 13, (Storie Aff.) ¶ 11. The objection letters objected to the permanent rule text as published in the Notice of Text, not to the rule text subsequently approved by the RRC and adopted by the Commission. See 26 N.C. Reg. 1185, 1187 (Feb. 15, 2012).

The RRC's receipt of the objection letters delayed implementation of the permanent rule until the General Assembly has the chance to consider the rule during North Carolina's next legislative session scheduled for January 2013. Pls.' Ex. 3 (Rules Subject to Legislative Review). Rather than allow the permanent rule to proceed through the prescribed legislative review process, the Commission submitted to the RRC on July 13, 2012 an identical coyote night hunting rule as a temporary rule:

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

- (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.

*History Note: Authority G.S. 113-134; 113-264; 113-291.1; 113-291.2;  
Eff. July 1, 1993;  
Temporary Amendment Eff. October 1, 2011;  
Amended Eff. January 1, 2012;  
Temporary Amendment Eff. August 1, 2012.*

Answer ¶ 55; Pls.' Ex. 4 (Findings of Need for Temporary Rule) at 1, 9

In its findings of need for the temporary rule ("Findings of Need"), the Commission based the need for the temporary rule on the "effective date of a recent act of the General Assembly," Session Law 2011-369 (effective October 1, 2011) and the Commission's need to establish hunting seasons and bag limits and manage its public game lands under N.C. Gen. Stat. § 150B-21.1(a),

(a)(7). Pls.' Ex. 4 (Findings of Need) at 2. In its Findings of Need, however, the Commission states:

The intent of the proposed temporary rule[] is to liberalize take by extending the open season for . . . coyotes on private lands to include night hours on private lands, and to allow for the use of lights [on] private lands in order to allow landowners and hunters as much flexibility as possible in localized control of these species.

Pls.' Ex. 4 (Findings of Need) at 7.



The Commission further justified its temporary rule by stating:

In order to allow for the use of lights on private lands, it is necessary to extend lawful shooting hours, as well as to provide the manner of take. In addition, the [Commission] has statutory authority to regulate public lands in a manner different from private lands, and these rules do so by making the extended shooting hours and the use of lights inapplicable to public lands. [The Commission] views these modification[s] of lawful hours, manner of take, and no night hunting on public lands as being an exercise of its authority to set seasons . . . and well within the . . . authority to regulate use of public lands under [Commission] management.<sup>2</sup>

Pls.’ Ex. 4 (Findings of Need) at 7-8. Even if the purpose of the temporary rule is to provide private landowners with flexibility to control coyotes on their lands, the temporary rule is unnecessary.

Under the Commission’s current rules, private landowners may take coyotes without a permit while the coyotes are causing damage on their property. 15A N.C. Admin. Code .0106(c)(1). Private landowners, and any other person named in the permit, may also take coyotes under a depredation permit issued by the Commission when coyotes have damaged their property. 15A N.C. Admin. Code .0106(c)(2).

Nonetheless, the RRC subsequently approved the temporary rule. The temporary rule went into effect on August 1, 2012. Pls.’ Ex. 4 (Findings of Need) at 9. A red wolf was found dead by gunshot on September 4, 2012 within the Red Wolf Recovery Area. See Pls.’ Ex. 5 (USFWS Press Release). Upon information and belief, additional wolves have been illegally taken since the rule went into effect. The permanent rule is still pending legislative review. Pls.’ Ex. 3 (Rules Subject to Legislative Review).

## **II. Red Wolf**

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

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<sup>2</sup> Despite the Commission’s statement here that there will be “no night hunting on public lands” under the temporary rule, the rule permits night hunting on public lands with a permit. Pls.’ Ex. 4 (Fiscal Note)

control programs and the degradation and alteration of the species' habitat. Pls.' Ex. 5 (USFWS Press Release). The red wolf was designated a federal endangered species under the Endangered Species Act in 1967. Pls.' Ex. 7 (USFWS Red Wolf 5-Year Review ("5-Year Review")) at 4. By mid-1975, the USFWS concluded that "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." Pls.' Ex. 6 (Recovery/Species Survival Plan), Preface. To protect the species from extinction, the USFWS initiated efforts to conserve the species, including starting a program to breed the species in captivity. Less than twenty (20) of the 400 canids captured by the USFWS as part of this effort were found to be pure red wolves. Pls.' Ex. 5 (USFWS Press Release); Pls.' Ex. 6 (Recovery/Species Survival Plan) at 11-12. The USFWS declared the red wolf extinct in the wild in 1980. Pls.' Ex. 5 (USFWS Press Release).

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 a nonessential experimental population<sup>3</sup> under the Endangered Species Act. Pls.' Ex. 5 (USFWS Press Release). The USFWS developed the Red Wolf Recovery/Species Survival Plan, which sets forth an intense adaptive management plan to protect the red wolf species. See Pls. Ex. 6 (Recovery/Species Survival Plan).

Since reintroduction in the wild, the red wolf population and Red Wolf Recovery Area have expanded beyond the Alligator River National Wildlife Refuge to include the Pocosin Lakes and Mattamuskeet National Wildlife Refuges; the United States Air Force's Dare County Bombing Range; and private property, spanning Dare, Tyrrell, Hyde, Washington, and Beaufort counties. See Pls.' Ex. 5 (USFWS Press Release). A map of the current Red Wolf Recovery Area is attached as

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at 1, 9.

<sup>3</sup> 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); Pls.' Ex. 7 (5-Year Review) at 25. The USFWS has extended the ESA's broad takings prohibitions to North Carolina's red wolf population with certain limited exceptions. 50 C.F.R. § 17.84(c)(2).

Plaintiffs' Exhibit 8. Because of the coordinated, science-based work of the USFWS, RWC, Defenders, AWI, and other organizations, approximately 100 wild red wolves now live in their native habitat within the Red Wolf Recovery Area with the goal, as outlined in the USFWS' Red Wolf Recovery Plan, to remove threats of extinction by more than doubling the current population in the wild. See Pls.' Ex. 6 (Recovery/Species Survival Plan), Exec. Summ. & Preface; Pls.' Ex. 7 (5-Year Review) at 7. These North Carolina red wolves make up the only wild population of red wolves left in the world. Pls.' Ex. 7 (5-Year Review) at 5. "Complete species recovery permitting delisting will probably never be achieved for the red wolf"; thus, despite recovery efforts, the red wolf remains a federally-listed endangered species. Pls.' Ex. 6 (Recovery/Species Survival Plan), Preface; 50 C.F.R. §17.11.

Red wolves and coyotes are similar in size and color. See Pls.' Ex. 18, USFWS Photo Comparison Photo.<sup>4</sup> As the Commission has recognized, red wolves "look similar" and "may be mistaken for" coyotes. Pls.' Ex. 11 (Wildlife Resources Commission, Coyote Profile). Because of their similarity of appearance, red wolves have been killed by hunters during the daytime. See, e.g., Pls.' Ex. 9 (USFWS Comment Letter) at 2; Pls.' Ex. 12 (Wheeler Aff.) ¶ 15. The USFWS cites gunshot mortality as the primary risk to the wild red wolf population. Since 2004, at least 7% of the red wolf population is shot each year. See Pls.' Ex. 9 (USFWS Comment Letter) at 2. Breeding members of the red wolf population, which are critical to population growth, are disproportionately killed by gunshot. Pls.' Ex. 7 (5-Year Review) at 18, 29; Pls.' Ex. 17 (Beeland Aff.) ¶ 12. These daytime shootings are currently the leading cause of red wolf mortality. Pls.' Ex. 9 (UFWWS Comment Letter) at 2; Pls.' Ex. 7 (5-Year Review) at 17-19. The USFWS has described the problem as follows:

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<sup>4</sup> Available at <http://www.fws.gov/redwolf/aboutrecovery.html>.

Whether accidental by licensed hunters, or illegal, gunshot 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].

Pls.' Ex. 9 (USFWS Comment Letter) at 2.

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. See, e.g., Pls.' Ex. 9 (USFWS Comment Letter) at 1- 2; Pls.' Ex. 12 (Wheeler Aff.) ¶¶ 15; Pls.' Ex. 17 (Beeland Aff.) ¶¶ 11. Moreover, red wolves are mostly nocturnal,<sup>5</sup> more likely to be active at night when night-hunting activities are taking place, and are more susceptible to death by gunshot. Pls.' Ex. 17 (Beeland Aff.) ¶ 11.

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 . . . .

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<sup>5</sup> USFWS, Red Wolf Recovery Program, Frequently Asked Questions, *available at* <http://www.fws.gov/redwolf/faq.html>.

[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.

Pls.' Ex. 9 (USFWS Comment Letter) at 1- 2 (emphasis added).

Another risk to red wolf survival is interbreeding with coyotes, which threatens the genetic integrity of the red wolf species. *Id.*; Pls.' Ex. 7 (5-Year Review) at 10. In an effort to reduce this risk and simultaneously build the red wolf population, the USFWS also implemented a program to sterilize coyotes. *Id.* The USFWS has described 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.

Pls.' Ex. 9 (USFWS Comment Letter) at 1- 2.

In its comment letter on the permanent coyote night hunting rule, the USFWS expressed its concern over the rule's impact on its coyote sterilization program and 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.

Pls.' Ex. 9 (USFWS Comment Letter) at 2.

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. Pls.' Ex. 12 (Wheeler Aff.) ¶ 15. 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. Pls.' Ex. 12 (Wheeler Aff.) ¶ 16. Impeding USFWS activities could hamper field work that is essential for the survival of the red wolf species. Id. 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 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 . .

Pls.' Ex. 9 (USFWS Comment Letter) at 2. The USDA similarly expressed concerns over the risks to public safety caused by the night hunting rule in its comment letter:

As you may be aware, the National Forests in North Carolina are the second most visited National Forest in the country. There is a high demand for a wide variety of recreational uses such as camping, hiking, biking, and equestrian use in addition to hunting and fishing. Some 7.5 million visitors come to the National Forests in North Carolina each year. With this level of use we are concerned that night hunting of coyote . . . would compromise public and employee safety; the benefits would not outweigh the risks.

Pls.' Ex. 10 (USDA Comment Letter).

On September 4, 2012, a radio-collared red wolf was found dead by gunshot in western Tyrrell County, near Creswell, North Carolina, within the Red Wolf Recovery Area. See Pls.' Ex. 5 (USFWS Press Release). Upon information and belief, additional wolves have been illegally taken since the unlawful temporary rule went into effect. These wolf deaths highlight Plaintiffs' concerns, as well as those voiced by the USFWS, that the night hunting rule will result in more red wolves lost to gunshot and undermine progress toward red wolf recovery. A preliminary injunction is necessary to preserve the status quo and to protect the red wolf population from irreparable harm.

## ARGUMENT

### **I. Preliminary Injunction Standards**

A preliminary injunction is meant to preserve the status quo during the pendency of litigation and prevent irreparable harm. See A.E.P. Indus. v. McClure, 308 N.C. 393, 401 (1983). A court will grant a motion for preliminary injunction when the Plaintiff shows that (1) it is likely to be successful on the merits of the underlying case and (2) it is likely "to sustain irreparable loss unless the injunction is issued, or if, in the opinion of the Court, issuance is necessary for the protection of a plaintiff's rights during the course of litigation." Id. This standard "does not require a showing that the injury is beyond repair, but that the injury is one to which complainant should not be required to submit or which the other party should be permitted to inflict." Wrightsville Winds Townhouses Homeowners' Assoc. v. Miller, 100 N.C. App. 531, 535, 397 S.E.2d 345 (1990). As explained more fully below, Plaintiffs here meet the standard for preliminary injunction. First, Plaintiffs are likely to prevail in their claim that the temporary rule was illegally adopted. Second, allowing the temporary rule to stand will result in irreparable harm to the endangered red wolf species and Plaintiffs' efforts to protect and preserve that species.

**II. A Preliminary Injunction is Appropriate and Necessary Because the Plaintiffs Are Likely to Prevail on Their Claim that Defendants Unlawfully Adopted the Temporary Coyote Night Hunting Rule**

As explained more fully below, Plaintiffs have made a prima facie showing that Defendants adopted the temporary coyote hunting rule in violation of the APA and that Plaintiffs are aggrieved by Defendants' unlawful rule. A preliminary injunction is appropriate and necessary.

**A. Legal Standards for Agency Rulemaking**

The North Carolina Administrative Procedure Act, N.C. Gen. Stat. § 150B *et seq.*, defines the process by which an agency is authorized to adopt permanent and temporary rules and provides for review in this Court for persons aggrieved by a temporary rule. "A rule is not valid unless it is adopted in substantial compliance with the [APA's rulemaking procedures]." N.C. Gen. Stat. § 150B-18.

**a. Standards under the APA for Adopting Permanent Rules**

N.C. Gen. Stat. § 150B-21.2 sets forth the requirements for adopting permanent rules. Among other requirements, an agency may not promulgate a permanent rule without publishing a notice of text in the North Carolina Register, prepare or obtain a fiscal note where required, hold at least one public hearing after publication of the rule, and accept oral or written comments on the proposed rule. N.C. Gen. Stat. § 150B-21.2.

The notice of text of a permanent rule must include: (1) the text of the proposed rule; (2) a short explanation of the reason for the proposed rule; (3) a citation to the law that gives the agency authority to adopt the rule; (4) the date, time, and place for any public hearing scheduled on the rule; and (5) notification to the public of the period of time during which the agency will accept written comments on the proposed rule and fiscal note, when prepared. N.C. Gen. Stat. § 150B-21.2(c). The agency must accept comments on the text of the proposed rule for at least 60 days after the text is published in the North Carolina Register. *Id.*(f).



An agency must not adopt a permanent rule until the close of the comment period. Id.(g). “An agency shall not adopt a rule that differs substantially from the text of a proposed rule published in the North Carolina Register unless the agency publishes the text of the proposed different rule in the North Carolina Register and accepts comments on the proposed different rule . . . .” Id. An adopted rule differs substantially from a proposed rule if it does one or more of the following:

- (1) Affects the interests of persons who, based on the proposed text of the rule published in the North Carolina Register, could not reasonably have determined that the rule would affect their interests.
- (2) Addresses a subject matter or an issue that is not addressed in the proposed text of the rule.
- (3) Produces an effect that could not reasonably have been expected based on the proposed text of the rule.

Id.

When an agency adopts a permanent rule, it must thereafter submit the adopted rule to the RRC for review. Id. A rule approved by the RRC “becomes effective on the first day of the month following the month the rule is approved” by the RRC, unless the RRC receives written objections to the rule as published in the agency’s notice of text from 10 or more persons. N.C. Gen. Stat. § 150B-21.3(b), (b1), (b2). If the RRC receives “written objections from 10 or more persons . . . requesting review by the legislature,” implementation of the permanent rule is automatically delayed until the General Assembly has the chance to consider the rule during its next legislative session. N.C. Gen. Stat. § 150B-21.3(b1), (b2).

#### **b. Standards under the APA for Adopting Temporary Rules**

An agency may adopt temporary rules only in limited and prescribed circumstances. When a permanent rule is subject to legislative disapproval, the agency may adopt the permanent rule as a temporary rule if (1) the requirements for notice, comment, and objections for the permanent rule have been met *and* (2) the permanent rule could have been legally adopted as a temporary rule under

N.C. Gen. Stat. § 150B-21.1(a) at the time the notice of text for the permanent rule was published in the North Carolina Register. N.C. Gen. Stat. §§ 150B-21.2(c)(9), (f); 150B-21.3(b2).

N.C. Gen. Stat. § 150B-21.1(a) permits an agency to “adopt a temporary rule when it finds that adherence to the [more stringent] notice and hearing requirements [for a permanent rule] would be contrary to the public interest *and* that the immediate adoption of the rule is *required* by one or more” of the reasons enumerated in the APA, including (1) “[t]he effective date of a recent act of the General Assembly,” or (2) the need of the Commission to establish hunting seasons or bag limits or manage public game lands. N.C. Gen. Stat. § 150B-21.1(a) (emphasis added).

Unless otherwise provided by law, an agency seeking to adopt a temporary rule must follow the condensed notice and comment requirements for temporary rules, including (1) providing the text of the rule and a notice of public hearing at least 30 days prior to adopting the temporary rule; (2) “notify[ing] persons on its mailing list maintained pursuant to G.S. § 150B-21.2(d) and any other interested parties of its intent to adopt the temporary rule and of the public hearing”; (3) “[a]ccept[ing] written comments on the proposed temporary rule for at least 15 days prior to adoption of the temporary rule”; and (4) “[h]old[ing] at least one public hearing on the proposed rule.” N.C. Gen. Stat. § 150B-21.1(a3). The “agency must also prepare a written statement of its findings of need for a temporary rule stating why adherence to [the more stringent] notice and hearing requirements [for permanent rules] would be contrary to the public interest and why *immediate adoption of the rule is required*.” N.C. Gen. Stat. § 150B-21.1(a4) (emphasis added).

When an agency adopts a temporary rule it must submit the rule and the agency’s findings of need for the temporary rule to the RRC. If the RRC approves the temporary rule, the temporary rule will be codified into the North Carolina Administrative Code. N.C. Gen. Stat. § 150B-21.1(b). The temporary rule becomes effective on the date codified in the North Carolina Administrative Code. N.C. Gen. Stat. §§ 150B-21.1(d), 21.3(a).

**c. Standard of Review**

“A person aggrieved by a temporary rule adopted by an agency may file an action for declaratory judgment in Wake County Superior Court pursuant to Article 26 of Chapter 1 of the General Statutes.” N.C. Gen. Stat. § 150B-21.1(c). “Filing a petition for rule making or a request for a declaratory ruling with the agency is not a prerequisite to filing” an action for declaratory relief from a temporary rule. N.C. Gen. Stat. § 150B-21.1(c1).

A court will declare an agency rule invalid if it does not meet the criteria for adopting a temporary rule set forth in N.C. Gen. Stat. § 150B-21.1(a) or the criteria set forth in N.C. Statutes § 150B-21.9. N.C. Gen. Stat. § 150B-21.1(c). Thus, a reviewing court will set aside a temporary rule unless the agency adopting the temporary rule established in its findings of need that

adherence to the [permanent rule] notice and hearing requirements . . . would be contrary to the public interest and that the immediate adoption of the temporary rule [was] required by one or more of the following:

- (1) A serious and unforeseen threat to the public health, safety, or welfare.
- (2) The effective date of a recent act of the General Assembly or the United States Congress.
- (3) A recent change in federal or State budgetary policy.
- (4) A recent federal regulation.
- (5) A recent court order.
- (6) The need for a rule establishing review criteria . . . to complement or be made consistent with the State Medical Facilities Plan approved by the Governor . . . .
- (7) The need for the Wildlife Resources Commission to establish any of the following:
  - a. No wake zones.
  - b. Hunting or fishing seasons.
  - c. Hunting or fishing bag limits.
  - d. Management of public game lands [owned, leased, or managed by the Commission] . . . .

N.C. Gen. Stat. §§ 150B-21.1(a), (c); 113-129(8a). Under N.C. Gen. Stat. § 150B-21.9, a court will also set aside a temporary rule unless it meets all of the following criteria:

- (1) It is within the authority delegated to the agency by the General Assembly;
- (2) It is clear and unambiguous;
- (3) It is reasonably necessary to implement or interpret an enactment of the General Assembly . . . ; and

(4) It was adopted in accordance with [the APA's procedure for adopting temporary rules.]

As explained more fully below, Plaintiffs are "aggrieved" by the temporary rule, and they have shown that Defendants (1) lacked authority to adopt the coyote night hunting rule as a temporary rule; (2) failed to show that immediate adoption of the temporary coyote night hunting rule was required; (3) failed to adopt the temporary rule in accordance with the APA's procedures; and (4) adopted an unclear and ambiguous rule that leaves the regulated community without information necessary to comply with the rule. Plaintiffs have therefore shown that they will succeed on the merits of this case.

**B. Plaintiffs are "Persons Aggrieved" by Defendants' Temporary Coyote Night Hunting Rule**

As nonprofit organizations and corporations, Plaintiffs Red Wolf Coalition, Defenders of Wildlife, and Animal Welfare Institute<sup>6</sup> are "persons" according to N.C. Gen. Stat. § 150B-2(7), which defines a "person" as "any natural person, partnership, corporation, body politic and any unincorporated association, organization, or society which may sue or be sued under a common name." Plaintiffs are also "aggrieved" according to N.C. Gen. Stat. § 150B-2(6), which defines a "person aggrieved" as "any person or group or persons of common interest directly or indirectly affected substantially in his or its person, property, or employment by an administrative decision."<sup>7</sup>

Plaintiffs have long been involved in efforts to ensure the long-term survival of wild red wolf populations. Through education, litigation, research, legislation, and advocacy, Plaintiffs collectively defend the endangered red wolf species and work to restore the species in the wild.<sup>8</sup> For example, Defenders of Wildlife was involved in promoting the initial reintroduction of the endangered red wolf into the Alligator River National Wildlife Refuge, and then in successfully defending that

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<sup>6</sup> Pls.' Ex. 12 (Wheeler Aff.) ¶ 2; Pls.' Ex. 14 (Affidavit of Jason C. Rylander) ¶ 3; Pls.' Ex. 16 (Liss Aff.) ¶ 2.

<sup>7</sup> See generally Pls.' Ex. 12 (Wheeler Aff.); Pls.' Ex. 13 (Affidavit of Mark A. MacAllister); Pls.' Ex. 14 (Rylander Aff.); Pls.' Ex. 15 (Storie Aff.); Pls.' Ex. 16 (Liss Aff.); Pls.' Ex. 17 (Beeland Aff.).

program in court.<sup>9</sup> Red Wolf Coalition and Animal Welfare Institute work collectively 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.<sup>10</sup>

In addition, Plaintiffs have staff, members, and supporters who live and work in North Carolina, and who visit, recreate, observe wildlife, photograph, and otherwise use and enjoy North Carolina lands, including those within the Red Wolf Recovery Area.<sup>11</sup> Plaintiffs and their staff, members, and supporters derive scientific, aesthetic, educational, professional, and recreational benefits from wildlife, including the endangered red wolf, and their habitats throughout North Carolina.<sup>12</sup> They also value preservation of opportunities for safe recreation and other uses of North Carolina's lands, including those within the Red Wolf Recovery Area.<sup>13</sup> These interests are protected by the Endangered Species Act and the designation of the red wolf as an endangered species. Gibbs v. Babbitt, 214 F.3d 483, 486 (4th Cir. 2000) (In enacting the Endangered Species Act, "Congress found that many of the species threatened with extinction are of 'esthetic, ecological, educational, historical, recreational, and scientific value to the Nation and its people.'").

Defendants' unlawful adoption of the temporary rule allowing nighttime coyote hunting with artificial lights on public and private lands in North Carolina, including within the Red Wolf Recovery Area, will (1) cause risks to public safety and endangered wildlife; (2) lead to the further destruction and disruption of the last remaining red wolf population; (3) hinder the public's ability to

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<sup>8</sup> Id.

<sup>9</sup> Pls.' Ex. 14 (Rylander Aff. ¶¶ 8, 9, 11).

<sup>10</sup> Pls.' Ex. 12 (Wheeler Aff.) ¶¶ 8-11; Pls.' Ex. 13 (MacAllister Aff.) ¶¶ 6, 8; Pls.' Ex. 15 (Storie Aff.) ¶¶ 6, 7; Pls.' Ex. 6 (Liss Aff.) ¶¶ 4, 7; Pls.' Ex. 17 (Beeland Aff.) ¶¶ 6, 8.

<sup>11</sup> Pls.' Ex. 12 (Wheeler Aff.) ¶¶ 2, 17; Pls.' Ex. 13 (MacAllister Aff.) ¶¶ 3, 8, 9; Pls.' Ex. 14 (Rylander Aff.) ¶¶ 3, 4, 10; Pls.' Ex. 15 (Storie Aff.) ¶¶ 2, 6, 7, 17; Pls.' Ex. 16 (Liss Aff.) ¶¶ 2, 4, 10; Pls.' Ex. 17 (Beeland Aff.) ¶¶ 3, 6, 7.

<sup>12</sup> See generally Pls.' Ex. 12 (Wheeler Aff.); Pls.' Ex. 13 (MacAllister Aff.); Pls.' Ex. 14 (Rylander Aff.); Pls.' Ex. 15 (Storie Aff.); Pls.' Ex. 16 (Liss Aff.); Pls.' Ex. 17 (Beeland Aff.).

<sup>13</sup> Pls.' Ex. 12 (Wheeler Aff.) ¶¶ 9, 10, 17; Pls.' Ex. 13 (MacAllister Aff.) ¶¶ 8, 9, 15; Pls.' Ex. 14 (Rylander Aff.) ¶¶ 4, 5, 10, 14; Pls.' Ex. 15 (Storie Aff.) ¶¶ 6, 7, 16, 17; Pls.' Ex. 16 (Liss Aff.) ¶¶ 9, 10,

experience the red wolf in the wild; and (4) set the stage for similar attempts to subvert the rulemaking process in the future.<sup>14</sup> If allowed to stand, the temporary rule will substantially affect Plaintiffs' and their staffs', members', and supporters' recreational, aesthetic, scientific, professional, and educational interests in North Carolina and its wildlife, including the red wolf.<sup>15</sup> These actual and potential injuries have been and continue to be caused by Defendants' adoption of the temporary rule without legal justification or requisite procedural requirements for temporary rulemaking.

Plaintiffs, as well as their staffs, members, and supporters, are thus aggrieved and irreparably harmed by the Defendants' unlawful adoption of the temporary rule. In addition, Plaintiffs' staffs, members, and supporters who live and work in North Carolina have sustained procedural injury from Defendants' unlawful adoption of the temporary rule.<sup>16</sup> Because Plaintiffs have sustained actual and potential injuries from Defendants' unlawful adoption of the coyote night hunting temporary rule, they are persons aggrieved entitled to relief from this Court.

**C. Plaintiffs Have Shown that Defendants Unlawfully Adopted the Temporary Coyote Night Hunting Rule**

**a. Defendants Failed to Show that Immediate Adoption of the Coyote Night Hunting Rule Was Required**

A reviewing court will declare a temporary rule invalid unless the agency adopting the temporary rule established in its Findings of Need that the immediate adoption of the temporary rule was required by one or more of the reasons set forth by the APA. N.C. Gen. Stat. § 150B-21.1(a), (c). Here, the Commission claims that the temporary coyote night hunting rule was required by the effective date of a recent act of the General Assembly and by the Commission's need to establish

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11; Pls.' Ex. 17 (Beeland Aff.) ¶¶ 5, 6, 7, 8.

<sup>14</sup> See generally Pls.' Ex. 12 (Wheeler Aff.); Pls.' Ex. 13 (MacAllister Aff.); Pls.' Ex. 14 (Rylander Aff.); Pls.' Ex. 15 (Storie Aff.); Pls.' Ex. 16 (Liss Aff.); Pls.' Ex. 17 (Beeland Aff.).

<sup>15</sup> Pls.' Ex. 12 (Wheeler Aff.) ¶ 17; Pls.' Ex. 13 (MacAllister Aff.) ¶ 3; Pls.' Ex. 14 (Rylander Aff.) ¶¶ 3, 4; Pls.' Ex. 15 (Storie Aff.) ¶¶ 17; Pls.' Ex. 16 (Liss Aff.) ¶¶ 10, 11; Pls.' Ex. 17 (Beeland Aff.) ¶ 17.

<sup>16</sup> Pls.' Ex. 12 (Wheeler Aff.) ¶¶ 17, 18; Pls.' Ex. 13 (MacAllister Aff.) ¶¶ 14, 15; Pls.' Ex. 14 (Rylander Aff.) ¶¶ 13, 14; Pls.' Ex. 15 (Storie Aff.) ¶¶ 2, 11; Pls.' Ex. 16 (Liss Aff.) ¶¶ 2, 6, 10, 11; Pls.' Ex. 17 (Beeland Aff.) ¶¶ 3, 16, 17.

hunting seasons and bag limits and manage public game lands. Pls.' Ex. 4 (Findings of Need) at 1, 7, 8. None of these reasons legally justifies Defendants' adoption of the temporary coyote night hunting rule.

**i. No Recent Act of the General Assembly Required the Temporary Rule**

In its Findings of Need for the temporary rule, the Commission claims that the temporary rule was *required* by "a recent act of the General Assembly." The act of the General Assembly the Commission relies on does not require the adoption of the temporary rule.

The Commission claims that Session Law 2011-369 is the recent act of the General Assembly that compelled the need for the temporary rule. Pls.' Ex. 4 (Findings of Need) at 1, 8. Session Law 2011-369's relevant sections state that the "Commission *may* adopt rules prescribing seasons and the manner of taking of wild animals and wild birds with the use of artificial light and electronic calls." (emphasis added.) Session Law 2011-369's relevant language does not *require* the Commission to do anything, much less adopt a temporary rule to allow coyote night hunting with artificial lights. Nor does Session Law 2011-369's relevant language contain any requirement that made it "reasonably necessary [for the Commission to adopt a temporary rule] to implement or interpret an act of the General Assembly." N.C. Gen. Stat. § 150B-21.9.

That Session Law 2011-369 did not require the Commission to adopt the temporary coyote night hunting rule is not only supported by the Session Law's plain language, but also by the Commission's actions taken in response to Session Law, including its decision not to adopt a rule to allow hunting coyotes with artificial lights immediately after the Session Law became effective.

Even before Session Law 2011-369's provisions allowing the Commission to adopt regulations related to taking wild animals with artificial lights and electronic calls became effective in October 2011, the Commission proposed and adopted permanent and temporary rules to add the *use of electronic calls* as a permissible manner of take when hunting coyotes. The Commission did

not take any action to add the use of artificial lights as a permissible manner of taking coyotes as part of that rulemaking process. Nor did the Commission immediately thereafter seek to adopt a temporary rule to add the use of artificial lights as a permissible manner of taking coyotes. Rather, the Commission waited to add the use of artificial lights as a permissible manner of taking coyotes through a traditional permanent rulemaking process that began in January 2012, almost four months after the Session Law's effective date.

Presumably, had Session Law 2011-369 required (or made it reasonably necessary for) the Commission to allow night hunting of coyotes with artificial lights, the Commission would have done so quickly after the Session Law's effective date. But it did not. The Commission only adopted the coyote night hunting rule as a temporary rule once the permanent coyote night hunting rule was made subject to legislative review in July 2012.

Moreover, in its Fiscal Note Review for the permanent coyote night hunting rule, the Commission described the primary benefit of the rule as "providing [the regulated community of hunters] with increased hunting opportunities." Similarly, in its Findings of Need for the temporary rule, the Commission explained the purpose of the rule as providing increased hunting opportunities on private lands. There is nothing requisite about providing hunters with increased hunting opportunities.

Finally, Defendants appear now to argue that, even though the Session Law contains "no express language" that mandated the temporary rule, the rule is appropriate because the Legislature "expect[ed] the Commission to act based on the changes [in the Session Law]." Answer ¶ 154. But, that is not the APA's standard for temporary rulemaking; a temporary rule is authorized when it is "required" by a recent act of the General Assembly. If the General Assembly had "expected"



Defendants to enact a temporary rule to implement the statute, it could have used “shall” instead of “may” or explicitly directed enactment by temporary rule.<sup>17</sup>

Even if Session Law 2011-369 required the Commission to enact the temporary rule, the Session Law is not a “recent act of the General Assembly.” A “recent act of the General Assembly” is one “occurring or made effective no more than 210 days prior to the submission of a temporary rule to the Rules Review Commission.” N.C. Gen. Stat. § 150B-21.1(a2). The Commission submitted the temporary rule to the RRC on July 13, 2012. The relevant sections of Session Law 2011-369 became effective on October 1, 2011, more than 210 days prior to the Commission’s submission of the temporary rule to the RRC on July 13, 2012. Thus, Session Law 2011-369 is not a “recent act of the General Assembly.”

Accordingly, the temporary rule was not required by a recent act of the General Assembly.

**ii. The Commission’s Authority to Set Seasons and Bag Limits Does Not Authorize Temporary Rulemaking Related to the Manner of Take by Use of Artificial Lights**

The Commission claims that the temporary rule was also required by the need of the Commission to establish hunting seasons and bag limits under N.C. Gen. Stat. § 150B-21.1(a)(7)(b). Pls.’ Ex. 4 (Findings of Need) at 1, 7, 8. But, hunting with artificial lights is a manner of take; it is not a hunting season or bag limit. Accordingly, N.C. Gen. Stat. § 150B-21.1(a) cannot serve as the basis for the temporary coyote night hunting rule, and the Commission acted beyond its authority to set seasons and bag limits when it adopted the rule.

The Commission’s “authority to fix seasons includes the closing of seasons completely when necessary and fixing the hours of hunting”; the Commission’s “authority to fix bag limits includes

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<sup>17</sup> See, e.g., 2000 Sess. Laws 172, s. 2.2, as amended by 2000 Sess. Laws 140, s. 92-1(b) (“The Coastal Resources Commission *shall adopt* a temporary rule to establish use standards for waterfront development in urban areas . . . .”) (emphasis added); 2003 Sess. Laws 433, s.4 (“The Environmental Management Commission *shall adopt* temporary and permanent rules to amend North Carolina Administrative Code to incorporate Section 1 of this Act.”) (emphasis added).

the setting of seasons and possession limits.” N.C. Gen. Stat. § 113-291.2. The Commission’s authority to regulate the manner of take is separately derived from N.C. Gen. Stat. § 113-291.1 (Manner of taking wild animals and wild birds). Examples of manner of take include a rifle, a bow and arrow, electronic calls, and artificial lights. N.C. Gen. Stat. § 113-291.1.

The temporary rule provision allowing the take of coyotes with artificial lights does not establish a hunting season or set a bag limit; it simply expands the manner of take. The rule explicitly defines the use of artificial lights as a “manner of take,” not as a season. N.C. Gen. Stat. § 113-291.1. The Commission recognized as much in its Findings of Need for the temporary rule when it explained the need for the rule: “In order to allow for the use of lights on private lands, it is necessary to extend lawful shooting hours . . . , as well as to provide for the *manner of take*.” Pls. Ex. (Findings of Need) at 7.

Even if that the take of coyotes at night with artificial lights could be considered within the Commission’s authority to establish hunting seasons or bag limits, the Commission has failed to demonstrate any “need” to revise the coyote hunting season. The Commission’s adoption of the rule is unauthorized and improper.

**iii. The Commission’s Authority to Manage Public Game Lands Does Not Authorize the Temporary Rule**

The Commission also cites broadly to its authority to manage public game lands under N.C. Gen. Stat. § 150B-21.1(a)(7)(d) as justification for adopting the coyote night hunting rule. Pls. Ex. 4 (Findings of Need) at 4, 8. The Commission’s power to manage its public game lands does not extend so far.

First, the Commission’s power to regulate the manner of taking wild animals is separate and distinct from its power to manage its public lands; therefore, its power to manage public lands cannot serve as the basis for adding artificial lights as a manner of taking coyotes. The Commission’s authority to regulate the manner of take with the use of artificial lights is derived specifically from

N.C. Gen. Stat. §113-291.1; its power to manage public lands is set forth separately in N.C. Gen. Stat. § 113-264. The Commission cannot unilaterally expand its public land management authority to include the manner of take simply because regulating the manner of take is not one of the codified justifications for a temporary rule. Allowing them to do so would ignore the plain language of the APA and set the stage for the adoption of any wildlife-related temporary rule under the guise that it is within the Commission's general public land management authority. It would also run afoul of established principles of statutory construction whereby specific terms of a statute (authority to regulate manner of take) override general terms (authority to manage public game lands). See, e.g., Fourco Glass Co. v. Transmirra Products Corp., 353 U.S. 222, 228 (1957) ("However inclusive may be the general language of a statute, it will not be held to apply to a matter specifically dealt with in another part of the same enactment."); United States v. Estate of Romani, 523 U.S. 517, 532 (1998) (same principle used to resolve conflict between two statutes).

Moreover, the Commission's power to manage public game lands is limited. Under N.C. Gen. Stat. § 113-264, the Commission may "by rule . . . license, regulate, prohibit, or restrict the public as to use and enjoyment of, or harm to, any property of the [Commission]." While the Commission's power under this provision may authorize it to require a permit to enter or hunt on public lands, it does not authorize it to expand the manner of take for hunting coyotes.

The Commission's power to manage public lands also extends only to lands "owned, leased, controlled, or cooperatively managed by either the Department [of Environment and Natural Resources] or the Wildlife Resources Commission." N.C. Gen. Stat. § 113-264(a). The temporary rule goes much further in allowing the use of artificial lights *on private and public lands throughout North Carolina, including on public lands managed by federal agencies.* See, e.g., Ex. 8 (Map of Recovery Area). Therefore, assuming the Commission's power to manage public game lands authorized it to permit the use of artificial lights on public lands, the Commission could do so only on the state's public games lands and not on the federal public lands.

Finally, the Commission has described the purpose of the temporary rule as providing increased hunting opportunities on private lands, not on public lands:

The intent of the proposed temporary rule[] is to liberalize take by extending the open season for . . . coyotes on private lands to include night hours on private lands, and to allow for the use of lights [on] private lands in order to allow landowners and hunters as much flexibility as possible in localized control of [coyotes].

Pls.' Ex. 4 (Findings of Need) at 7. If the intent of the temporary rule was to provide increased hunting opportunities on private lands, then the rule obviously was not necessary for the Commission to manage its public lands.<sup>18</sup> Nor was it necessary given that the Commission's current rules allow private landowners to take coyotes, day or night, when coyotes are causing or have caused damage to their property. 15A N.C. Admin. Code .0106(c). The Commission's reliance on its power to manage public game lands was therefore improper.

**D. The Commission Failed to Follow the Required Procedures for Adopting a Temporary Rule**

Even where a temporary rule is required by one of the enumerated reasons set forth in the APA, which is absent here, an agency must follow a series of mandatory rulemaking procedures for adopting a temporary rule. See N. C. Gen. Stat. § 150B-21.1. A reviewing court will declare a temporary rule invalid unless the agency substantially complies with these requirements. N.C. Gen. Stat. §§ 150B-18; 150B-21.1(a), (c); 21.9. The Commission failed to follow these mandatory procedures when adopting the temporary coyote night hunting rule. Plaintiffs have therefore shown that the rule is invalid.

The Commission failed to submit the temporary rule and a notice of public hearing to the Codifier of Rules at least 30 business days prior to adopting the temporary rule. N.C. Gen. Stat. §

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<sup>18</sup> The Commission states in its Findings of Need that the extended shooting hours and use of artificial lights in hunting coyotes are "inapplicable to public lands." Pls.' Ex. 4 (Findings of Need) at 8. The temporary rule as proposed, and adopted, however allows hunting of coyotes at night with artificial lights on public lands, with a permit.

150B-21.1(a3). The Codifier of Rules was consequently unable to fulfill its duty to publish the proposed temporary rule and the notice of public hearing on the Internet. N.C. Gen. Stat. § 150B-21.1(a3). The Commission failed to notify persons on its mailing list, required to be maintained under N.C. Gen. Stat. § 150B-21.2(d), and any other interested parties of its intent to adopt the temporary rule. N.C. Gen. Stat. § 150B-21.1(a3)(2). The Commission failed to accept comments on the proposed temporary rule. N.C. Gen. Stat. § 150B-21.1(a3). The Commission failed to hold any public hearings on the proposed temporary rule. N.C. Gen. Stat. § 150B-21.1(a3). The Commission failed to establish in its Findings of Need for the temporary rule why adherence to the notice and hearing requirements for a permanent rule would be contrary to the public interest. N.C. Gen. Stat. § 150B-21.1(a4). And, because none of the reasons relied upon by the Commission—a recent act of the General Assembly or the Commission’s need to set hunting seasons or bag limits or manage public lands—required the adoption of the temporary rule, the Commission failed to establish that immediate adoption of the temporary rule was required. N.C. Gen. Stat. § 150B-21.1(a4).

The agency adopted the temporary rule without public participation or legal justification. Because the Commission failed to follow the required procedures for temporary rulemaking, the rule is invalid.

**E. The Commission’s Adoption of the Permanent Rule As a Temporary Rule Violates the APA Because the Permanent Rule Did Not Meet the Criteria for Temporary Rule Adoption**

Rather than follow the requisite procedures for adopting a temporary rule, the Commission tried to circumvent those procedures by improperly relying on N.C. Gen. Stat. § 150B-21.3(b2)’s exception that allows the adoption of a permanent rule as a temporary rule in narrow circumstances. Under this exception, when a permanent rule is subject to legislative disapproval, an agency may adopt “the rule as a temporary rule *if* the [permanent] rule would have met the criteria in G.S. 150B-21(a) [for adopting a temporary rule] at the time the notice of text for the permanent rule was

published in the North Carolina Register” and the requirements for receiving comments and objections on the permanent rule are met. N.C. Gen. Stat. § 150B-21.3(b2) (emphasis added).

For the exception to apply, the Commission must have provided an opportunity for receiving comments and objections on the permanent rule as adopted, see N.C. Gen. Stat. §§ 150B-21.2(c)(9), (f); 150B-21.3(b2), and the permanent rule must also have been required by, for example, “the recent enactment of an act of the General Assembly” or the Commission’s need to set hunting seasons or bag limits or manage its public lands. N.C. Gen. Stat. § 150B-21(a). None of these requirements was satisfied here.

**a. The Commission Failed to Provide An Opportunity For Comment and Objection on the Permanent Rule As Adopted**

To legally adopt a permanent rule as a temporary rule, the Commission must have provided an opportunity for receiving comments and objections on the permanent rule as adopted. See N.C. Gen. Stat. §§ 150B-21.2(c)(9), (f); 150B-21.3(b2). Where a rule substantially changes during the notice and comment period, *i.e.*, its addresses subject matter not addressed in the notice of text of the rule, the APA requires a second notice of text and comment process. N.C. Gen. Stat. § 150B-21.3(g). The Commission adopted a substantially different permanent rule than the rule proposed in its Notice of Text without providing the public with the opportunity to comment on or object to the rule as adopted. Its adoption of the permanent rule as a temporary rule was therefore improper.

The permanent rule changes adopted by the Commission addressed subject matter not addressed in the proposed text of the rule: unlike the proposed rule, the permanent rule changes set forth different hunting practices for private and public lands, including a permit requirement for night hunting on public lands.

Because the adopted rule addressed subject matter not addressed in the proposed text of the rule, the Commission was obliged under the APA to re-notice the substantially changed rule and restart the notice and hearing process. It failed to do so, and the comments and objection letters

received by the Commission were in response to the text of the permanent rule published in the Notice of Text and not to the substantially different text of the adopted permanent rule. Accordingly, the Commission's adoption of the permanent rule as a temporary rule was improper, despite the fact that the permanent rule was subject to legislative disapproval, because the Commission deprived the public of the opportunity to comment on and object to the permanent rule as adopted.

**b. The Permanent Rule Was Improperly Adopted As a Temporary Rule Because Defendants Failed to Show that Immediate Adoption of the Rule Was Required**

To legally adopt a permanent rule as a temporary rule, immediate adoption of the permanent rule must also have been required by one of the reasons enumerated in N.C. Gen. Stat. § 150B-21(a). Thus, even if Defendants satisfied the notice, comment, and objection requirements for the permanent rule, their adoption of the permanent rule as a temporary rule still fails because they failed to identify any such reason.

Defendants did not identify "a recent act of the General Assembly" that "required" the "immediate adoption" of the coyote night hunting rule. N.C. Gen. Stat. § 150B-21.1(a), (a2). Session Law 2011-369 did not *require* Defendants to adopt rules allowing coyote night hunting with artificial light; it permitted Defendants to do so. See Answer ¶ 154. Defendants' "need . . . to establish hunting seasons or bag limits," or to manage public lands does not even authorize, much less require, Defendants to adopt the rule's provision allowing the manner of take of coyotes with artificial lights. N.C. Gen. Stat. §§ 150B-21(a)(7); 113-291.1; 113-291.2; 113-264.

Even if Session Law 2011-369 could arguably be read to require Defendants to take any action, it is not sufficiently *recent*. Defendants did not meet the requirements set for adopting a permanent rule as a temporary rule, N.C. Gen. Stat. § 150B-21.3(b2); therefore the date on which the permanent rule's Notice of Text was published cannot be used in determining whether Session Law 2011-369 is a recent act of the General Assembly. Instead, the relevant date is the date on which the Commission submitted the temporary rule to the RRC. Because the Commission submitted the

temporary rule to the RRC more than 210 days after Session Law 2011-369's effective date, the Session Law cannot serve as the basis for the temporary rule.

The Commission did not meet the necessary criteria for adopting the permanent rule as a temporary rule at the time the Notice of Text for the permanent rule was published in the North Carolina Register, and its adoption of the permanent rule as a temporary rule violates the APA.

**F. The Temporary Rule Is Unclear and Ambiguous**

A reviewing court will declare a temporary rule invalid unless it is "clear and unambiguous."

N.C. Gen. Stat. § 150B-21.9. As adopted, the temporary rule is unclear and ambiguous:

- (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 by hunting without a permit from the hours of one-half hour before sunrise until one-half hour after sunset, and one-half hour after sunset to one-half hour before sunset by permit only.
- (b) There are no bag limit restrictions on coyotes.
- (c) Manner of Take. Hunters may use electronic calls and artificial lights.

Answer, ¶ 55; Pls.' Ex. 4 (Findings of Need) at 1, 9. The Commission's authorizing statute, permanent rules, and temporary rule do not define the terms "private lands" or "public lands." Without definitions of "private lands" and "public lands," it is impossible to determine the scope, application, or requirements of the temporary rule. Moreover, the rule does not define the type of permit that is needed for night hunting of coyotes on public lands or identify the person or agency responsible for issuing the permit. The rule does not describe the procedures for obtaining a permit. The temporary rule does not clarify whether and to what extent the public land managers have the authority to preclude or set limitations on night coyote hunting on the public lands within their jurisdiction.

Accordingly, the temporary rule leaves those individuals who desire to hunt coyotes at night on public lands without guidance on (1) when a permit is required because it fails to define "private lands" and "public lands"; (2) what kind of permit is required; (3) where to apply for a permit; (4)



what procedures must be followed to obtain a permit; and (5) what additional limitations on night coyote hunting, if any, may be set by public land managers on the lands within their jurisdiction.

Because the temporary rule is unclear and ambiguous, it is invalid.

### **III. A Preliminary Injunction is Appropriate and Necessary Because the Plaintiffs Have Shown Irreparable Harm if An Injunction Does Not Issue**

Plaintiffs will suffer immediate and irreparable harm if the requested injunction is not issued.

There are only 100 pure red wolves left in the wild. Gunshot mortality is already the primary risk to the endangered red wolf. A red wolf was found dead on September 4, 2012, killed by gunshot.

Upon information and belief, additional wolves have been illegally taken since the rule went into effect. If an injunction does not issue, additional certain, serious, and irreparable harm to Plaintiffs and the environment will result in the form of further decline of the endangered red wolf species, the death and take of the endangered animals, and the inability of Plaintiffs and the public to protect and experience the endangered red wolf in the wild.<sup>19</sup> Plaintiffs have already suffered irreparable harm from wolf deaths. A preliminary injunction is warranted.

As the United States Supreme Court has emphasized,

Environmental injury, *by its nature*, can seldom be adequately remedied by money damages and is often permanent or at least of long duration, i.e., irreparable. If such injury is sufficiently likely, therefore, the balance of harms will usually favor the issuance of an injunction to protect the environment.

Amoco Prod. Co. v. Vill. of Gambell, 480 U. S. 531, 545 (1987) (emphasis added); S.C. Dep't of Wildlife & Marine Res. v. Marsh, 866 F.2d 97, 100 (4th Cir. 1989) (same). This is so because while environmental injuries are “palpable and concrete, they are not ownership interests in property susceptible to monetary valuation.” Fund for Animals v. Espy, 814 F. Supp. 142, 151 (D.D.C. 1999). In essence, for the purpose of a preliminary injunction, the terms environmental and irreparable are interchangeable modifiers of “harm,” where there is environmental harm there is irreparable harm.

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<sup>19</sup> See generally Pls.’ Ex. 12 (Wheeler Aff.); Pls.’ Ex. 13 (MacAllister Aff.); Pls.’ Ex. 14 (Rylander

See Florida Key Deer v. Brown, 386 F. Supp. 2d 1281, 1286 (S.D. Fla. 2005), aff'd sub nom. Florida Key Deer v. Paulison, 522 F.3d 1133 (11th Cir. 2008) (stating that “in determining whether the irreparable injury has been satisfied, the Court considers whether environmental harm is likely to occur”). In this case, there is ample indication of the risk to the environment in the event that night coyote hunting with artificial lights is allowed to continue under Defendants’ temporary rule.

As discussed above, red wolves were designated a federally endangered species in 1967, and they remain listed as endangered today. When a species is listed under the Endangered Species Act, the goal under the Act is to develop a program for the conservation of the endangered species and to conserve the ecosystems upon which the species depends. 16 U.S.C. § 1531(b). “Once a member of an endangered species has been injured, the task of preserving that species becomes all the more difficult.” Forest Conservation Council v. Rosboro Lumber Co., 50 F.3d 781, 785 (9th Cir. 1995). Courts have recognized that threats of harm to a threatened or endangered species satisfy the required showing of irreparable harm to justify a preliminary injunction. Greater Yellowstone Coal. v. Flowers, 321 F.3d 1250, 1255, 1258-1261 (10th Cir. 2003) (holding that district court abused its discretion in finding that anticipated loss of three bald eagle nests and twelve juvenile bald eagles was too speculative to justify preliminary injunction); Sierra Club v. Norton, 207 F. Supp. 2d 1310, 1340 (S.D. Ala. 2002) (recognizing the statutory goals of the Endangered Species Act and granting a preliminary injunction under NEPA to prevent reliance on an improperly granted incidental take permit that could result in the death of individual members of the endangered Alabama Beach Mouse). Cf. Marbled Murrelet v. Pac. Lumber Co., 83 F.3d 1060, 1064 (9th Cir. 1996) (stating that “an imminent threat of future harm [to a threatened species] is sufficient for the issuance of an injunction” under the Endangered Species Act).

Daytime shootings already pose serious risks to the survival of the last remaining wild red wolves. See, e.g., Pls.’ Ex. 9 (USFWS Comment Letter) at 2; Pls’ Ex. 12 (Wheeler Aff.) ¶ 15.

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Aff.); Pls.’ Ex. 15 (Storie Aff.); Pls.’ Ex. 16 (Liss Aff.); Pls.’ Ex. 17 (Beeland Aff.).

Allowing nighttime hunting of a coyotes—a species that greatly resembles the primarily nocturnal red wolf—doubles the chances that red wolves, including members of breeding pairs, will be lost to gunshot and night hunting increases the likelihood of misidentification. Pls.’ Ex. 9 (USFWS Comment Letter) at 1-2; Pls.’ Ex. 12 (Wheeler Aff.) ¶¶ 15-17; Pls.’ Ex. 17 (Beeland Aff.) ¶ 11. Nighttime coyote hunting in the Red Wolf Recovery Area also increases the risk of red wolf hybridization with coyotes, which threatens the genetic integrity of the red wolf, and could impede the USFWS’ adaptive management activities so critical to restoration of the species. See Pls.’ Ex. 9 (USFWS Comment Letter) at 2; Pls.’ Ex. 12 (Wheeler Aff.) ¶ 16. The recent shooting of a red wolf within the Recovery Area validates these concerns. Pls.’ Ex. 5 (USFWS Press Release).

In Washington County v. U.S. Department of the Navy, the Eastern District of North Carolina held that the disruption of wintering birds and increased threat of bird mortality through collisions with jets, although incalculable, constituted an irreparable harm. 317 F. Supp. 2d 626, 635 (E.D.N.C. 2004), vacated in part sub nom Nat’l Audubon Society v. U.S. Dep’t of the Navy, 422 F.3d 174 (4th Cir. 2005) (instructing district court to modify injunction to allow NEPA-related activities, which would not harm the birds, to proceed). The threats are more calculable here, where daytime coyote hunting in the Red Wolf Recovery Area already creates a significant risk to endangered red wolves and nighttime hunting more than doubles those risks.

Given there are only 100 remaining wild red wolves left, any decline in North Carolina’s wild red wolf population irreparably harms the red wolf, as well as Plaintiffs’ efforts to restore the species. In fact, a single taking impacts the red wolf population. Gibbs v. Babbitt, 214 F.3d 483, 498 (4th Cir. 2000) (“Once a species has been designated as endangered, there are by definition only a few remaining animals . . . . Each taking impacts the overall red wolf population . . . .”)

Based on existing case law and the facts before the Court, Plaintiffs have shown irreparable harm due to the adverse impacts Defendants’ coyote night hunting rule has on the endangered red wolf species. Harm to the environment, in the form of increased mortality risks to the endangered

red wolf and disruption of its recovery in the wild, is exactly the type of injury that preliminary injunctions are designed to prevent.

#### **IV. In Light of the Circumstances of the Case, No Security Should Be Required**

Plaintiffs respectfully submit that, in view of the circumstances of this case, no security should be required.

Under North Carolina Rule of Civil Procedure 65(c):

No . . . preliminary injunction shall issue except upon the giving of security by the applicant, in such sum as the judge deems proper, for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained.

North Carolina courts have concluded that the “as the [judge] deems proper” language “means that there are some instances when it is proper for no security to be required of a party seeking injunctive relief.” Staton v. Russell, 151 N.C. App. 1, 12-13, 565 S.E.2d 103 (2002) (quoting Keith v. Day, 60 N.C. App. 559, 561-62, 299 S.E.2d 296 (1983)). In Keith v. Day, this Court clarified that a court “has power not only to set the amount of security but to dispense with any security requirement whatsoever” under certain circumstances, and advised North Carolina courts to look to federal decisions interpreting the security requirement for guidance. 60 N.C. App. at 560-62.

In environmental cases brought by environmental groups or individuals with limited means, federal courts often “require little or no security.” Bragg v. Robertson, 54 F. Supp. 2d 635, 652 (S.D.W.Va. 1999); see also West Virginia Highlands Conservancy v. Island Creek Coal Co., 441 F.2d 232, 236 (4th Cir. 1971) (affirming district court requirement that nonprofit corporation dedicated to preserving natural, scenic, and historic areas post nominal \$100 bond in preliminary and permanent injunction against forest supervisor and coal company to halt certain mining and timber-cutting activities in forest areas). Requiring little or no security is all the more appropriate where the preliminary injunction would have little impact on the Defendant. See id. (emphasizing the negligible harm to coal company and forest supervisor that would be caused by the injunction when

affirming nominal security). The public interest is another relevant consideration. Id. (finding the nonprofit corporation's interest in preserving natural, scenic, and historic areas aligned with the public interest).

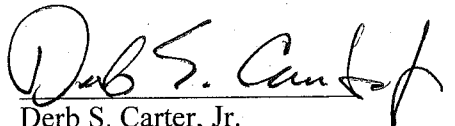
Where, as here, Plaintiffs are nonprofit organizations with an interest in protecting an endangered species and their requested injunction preventing Defendants from allowing coyote night hunting with artificial lights would cause Defendants no harm, little to no security should be required.

### CONCLUSION

For the reasons stated above, Plaintiffs respectfully request that this Court grant Plaintiffs' motion for preliminary injunction and enjoin Defendants from allowing coyote night hunting on public and private lands in North Carolina, including within the Red Wolf Recovery Area. Plaintiffs request that these measures be maintained through the duration of this litigation. Plaintiffs further request that, in light of the increased risk of gunshot mortality to the endangered red wolf and the recent apparent shooting of the red wolf, the Court set this matter for expedited hearing and, in light of the circumstances of this case, that no security be required.

Respectfully submitted this 22<sup>d</sup> day of October, 2012.

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