

IN THE SUPERIOR COURT FOR WAKE COUNTY

FILED

NO. 12-CV-012626

2012 OCT 22 PM 4: 16

WAKE COUNTY, C.S.C.

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.

BY _____

PLAINTIFFS' MOTION FOR
PRELIMINARY INJUNCTION
AND REQUEST FOR EXPEDITED
HEARING

[N.C. R. Civ. P. 65; Local Rule 2.8]

Plaintiffs, Red Wolf Coalition ("RWC"), Defenders of Wildlife ("Defenders") and Animal Welfare Institute ("AWI") (collectively the "Plaintiffs"), pursuant to Rule 65 of the North Carolina Rules of Civil Procedure, respectfully move the Court for a preliminary injunction against Defendants North Carolina Wildlife Resources Commission and Gordon S. Myers, Executive Director, North Carolina Wildlife Resources Commission (collectively "Defendants" or "Commission"), to prevent an unlawful temporary rule from harming the last remaining wild wolf population, and request an expedited hearing on the matter pursuant to Local Rule 2.8. In support of this Motion for Preliminary Injunction ("Motion"), Plaintiffs incorporate by reference the arguments and materials submitted in connection with their Motion, including the Memorandum of Law and Exhibits, and show the Court the following:

1. On September 7, 2012, the Plaintiffs filed a Complaint in the above-captioned action challenging Defendants' adoption of a temporary rule without requisite process or

sufficient basis that allows coyote hunting at night with the use of artificial lights on public and private lands throughout North Carolina, including in the area designated for the restoration of the critically endangered red wolf within Dare, Tyrrell, Hyde, Washington, and Beaufort counties (“Red Wolf Recovery Area”). Given that death by daytime gunshot is already the single greatest risk to the survival of the red wolf species, allowing coyote hunting at night with artificial lights within the Red Wolf Recovery Area doubles the risks of mortality to the last remaining wild red wolf population. In their Complaint, Plaintiffs seek a declaratory judgment that Defendants adopted the temporary rule in violation of the North Carolina Administrative Procedure Act (“APA”), N.C. Gen. Stat. § 150B-1 et seq., and an injunction preventing the rule from taking further effect pending a trial on the merits in this case. The Complaint is incorporated herein by reference.

2. Temporary rules are permitted under the APA only in limited and prescribed circumstances. An agency “may adopt a temporary rule when it finds that adherence to the notice and comment 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).

3. Defendants here failed to identify any act of the General Assembly that required the adoption of the temporary coyote night hunting rule. Defendants claim that Session Law 2011-369 is the recent act of the General Assembly that compelled the need for the temporary rule. However, Session Law 2011-369’s relevant sections state merely that the “Commission may adopt rules prescribing seasons and manner of taking wild animals . . . with the use of

artificial light.” Session Law 2011-369 did not require the Commission to adopt the temporary coyote night hunting rule. Accordingly, the temporary rule was not required by a recent act of the General Assembly.

4. Even assuming 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 Rules Review Commission (“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. Therefore, Session Law 2011-369 is not a “*recent* act of the General Assembly,” and cannot serve as justification of the temporary rule.

5. Defendants also claim that the temporary rule was necessary to “establish hunting seasons” and “bag limits” under N.C. Gen. Stat. § 150B-21.1(a)(7)(b), (c). The Commission’s authority to fix seasons and bag limits is limited to “the closing of seasons completely when necessary and fixing the hours of hunting” and “the setting of seasons and possession limits,” N.C. Gen. Stat. § 113-291.2; it does not permit the Commission to regulate the manner of take. The temporary rule provision allowing the take of coyotes with artificial lights does not establish a hunting season or bag limit; it simply expands a manner of take. See N.C. Gen. Stat. § 113-291.1 (setting forth examples of manners of take, including artificial lights). Therefore, the Commission’s reliance on the need to establish hunting seasons and bag limits to permit the take of coyotes at night with artificial lights is unauthorized.

6. Defendants also claim that the temporary rule was necessary for the Commission's "management of public game lands" under N.C. General Statutes § 150B-21.1(a)(7)(d). However, the Commission's power to manage its public lands cannot serve as the basis for allowing night hunting on private and public lands throughout North Carolina with the use of artificial lights because the Commission's power to manage public lands does not include the power to regulate the manner of taking coyotes with artificial lights. Compare N.C. Gen. Stats § 113-264 with N.C. Gen. Stat. § 113-291.1. Even if it did, the Commission's power would extend only to those lands within North Carolina that the state owns or manages. N.C. Gen. Stat. § 113-264 (a). In addition, in its Findings of Need for the temporary rule, the Commission itself made clear that the intent of the rule was to increase opportunities for taking coyotes on private lands, not on public lands. If the intent of the 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. 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 in adopting the temporary rule was therefore improper.

7. The Commission also failed to follow the mandatory rulemaking procedures set forth in N.C. Gen. Stat. § 150B-21.1(a)-(b3) for adopting a temporary rule. A temporary rule is not valid unless it is adopted in accordance with the APA's rulemaking procedures. N.C. Gen. Stat. § 150B-18. As explained previously, the Commission failed to identify justification for the immediate adoption of the temporary rule as required by N.C. Gen. Stat. § 150B-21.1(a). 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—authorized the

adoption of the temporary rule. The Commission failed to establish that adherence to the notice and hearing requirements for a permanent rule would be contrary to the public interest or that immediate adoption of the temporary rule was required. N.C. Gen. Stat. § 150B.21.1(a), (a4). The Commission also adopted the temporary rule without providing the public with notice, opportunity for comment, or a hearing as required by N.C. Gen. Stat. § 150B.21.1(a2), (a3). Because the Commission failed to follow the required procedures for temporary rulemaking, the Commission did not have authority to adopt the coyote night hunting rule as a temporary rule.

8. The Commission's unlawful adoption of the temporary rule occurred while an identical permanent rule is pending legislative review. 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. The Commission did not satisfy the requirements of the exception; therefore, Defendants' adoption of the permanent coyote night hunting rule as a temporary rule was improper.

9. Because the Commission did not meet the requirements as set forth in N.C. Gen. Stat. § 150B-21.3(b2) for adopting a permanent rule as a temporary rule, 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. Rather, it is the date on which the Commission submitted the temporary rule to the RRC that must be used to determine whether Session Law 2011-369 is sufficiently "recent" to justify temporary rulemaking. Even if Session Law 2011-369 required the adoption of the temporary coyote night hunting rule, which it did not, the Session Law was made effective more than 210 days prior to the date the Commission submitted the temporary rule to the RRC, and it is not a "*recent act of the General Assembly.*"

10. Finally, in order to be valid, a temporary rule must be “clear and unambiguous.” N.C. Gen. Stat. § 150B-21.9. The Commission’s temporary rule, as adopted, 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.

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. The rule does not define the type of permit needed for night hunting of coyotes on public lands or identify the person or agency responsible for issuing the permit. The rule also 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. Because the temporary rule fails to provide individuals who wish to hunt coyotes at night with artificial lights guidance on where such hunting is permitted, when and what kind of a permit is required, how to obtain a permit, and whether and to what extent public land managers may set limitations on night coyote hunting, the rule is unclear, ambiguous, and invalid.

11. 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 in 1987 four pairs of the red

wolves bred in captivity were released into the Alligator River National Wildlife Refuge in eastern North Carolina as an experimental population under the Endangered Species Act. The United States Fish & Wildlife Service (“USFWS”) developed a Red Wolf Recovery/Species Survival Plan setting forth an intense adaptive management plan to protect the species. Through the coordinated, science-based recovery efforts of the USFWS and other organizations, such as Plaintiffs, approximately 100 red wolves—the last of the wild red wolf species—roam within their natural habitat in the Red Wolf Recovery area.

12. Death by gunshot is already the single greatest risk to the survival of the remaining wild red wolves. Allowing coyote hunting at night with artificial lights within the Red Wolf Recovery Area, as permitted under Defendants’ unlawful temporary rule, doubles the risks of mortality to the wild red wolf population. It also increases the risks of red wolf hybridization with coyotes.

13. 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.

14. 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 red wolves have been illegally taken since the temporary rule went into effect. 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 in violation of the APA, and (b) coyote night hunting with artificial

lights in the Red Wolf Recovery Area will result in irreparable injury to Plaintiffs and potential extirpation in the wild of the once extinct red wolf.

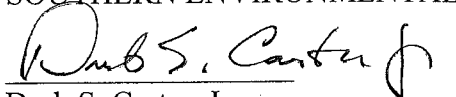
15. Plaintiffs respectfully submit that, in view of the circumstances of this case, the court exercise its discretion to require no security or only a nominal security and set the matter for expedited hearing as permitted under Local Rule 2.8.

WHEREFORE, Plaintiffs respectfully request that:

1. The Court enter a preliminary injunction enjoining the Commission's temporary rule that allows coyote night hunting with artificial lights throughout North Carolina, including within the Red Wolf Recovery Area;
 2. The Court order the injunction to remain in effect for the duration of this litigation.
 3. The Court order that no security be required.
 4. The Court set this matter for expedited hearing for the week of October 29, 2012;
- and
5. The Court grant such other and further relief as is just and proper.

Respectfully submitted this 22^d day of October, 2012.

SOUTHERN ENVIRONMENTAL LAW CENTER



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CERTIFICATE OF SERVICE

I hereby certify that I have this 22nd day of October, 2012, served a copy of the documents listed below on the following parties:

Motion for Preliminary Injunction, Memorandum in Support of Preliminary Injunction, Exhibits 1-18 in Support of Preliminary Injunction, and Proposed Order

By Messenger to:

C. Norman Young, Jr.
Assistant Attorney General
North Carolina Department of Justice
114 West Edenton Street
Raleigh, NC 27603

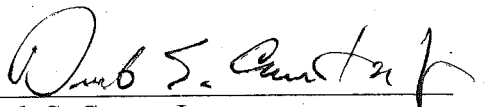
Attorney for Commission and Gordon Myers

By US Mail to:

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North Carolina Department of Justice
9001 Mail Service Center
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Attorney for Codifier of Rules and Rules Review Commission

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