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

CASE NO.: 2:13-CV-60-BO

RED WOLF COALITION, DEFENDERS OF WILDLIFE, and ANIMAL WELFARE INSTITUTE, Plaintiffs, v. NORTH CAROLINA WILDLIFE RESOURCES COMMISSION; JIM COGDELL, JOHN LITTON CLARK, JOE C. BARKER, III, WES SEEGARS, NAT T. HARRIS, JR., DALTON D. RUFFIN, DAVID W. HOYLE, JR., WENDELL (DELL) MURPHY, MARK CRAIG, THOMAS A. BERRY, GARRY SPENCE, JOHN T. COLEY, IV, VERNON (RAY) CLIFTON, JR., THOMAS L. FONVILLE, RICHARD EDWARDS, MICHELL HICKS, TIMOTHY L. SPEAR, in their official capacities as Commissioners of the North Carolina Wildlife Resources Commission; GORDON S. MYERS, in his official capacity as Executive Director of the North Carolina Wildlife Resources Commission, Defendants.	**DEFENDANTS' MEMORANDUM IN RESPONSE TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION**

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NOW COME defendants North Carolina Wildlife Resource Commission ("Commission"), Jim Cogdell, John Litton Clark, Joe C. Barker, III, Wes Seegars, Nat T. Harris, Jr., Dalton D. Ruffin, David W. Hoyle, Jr., Wendell (Dell) Murphy, Mark Craig, Thomas A. Berry, Garry Spence, John T. Coley, IV, Vernon (Ray) Clifton, Jr., Thomas L. Fonville, Richard Edwards, Michell Hicks, and Timothy L. Spear, in their official capacities as Commissioners of the North Carolina Wildlife Resources Commission, and Defendant Gordon S. Myers, in his official capacity as Executive Director of the North Carolina Wildlife Resources Commission, in response to the Plaintiffs' Motion for Preliminary Injunction.

INTRODUCTION

The Plaintiffs allege that Defendants are in violation of the Endangered Species Act ("ESA") by permitting and authorizing the hunting of coyotes within the red wolf reintroduction area, which includes Dare, Tyrell, Hyde, Washington, and Beaufort Counties in North Carolina. As further explained below, the red wolf population in North Carolina has been designated as a "nonessential experimental population." As such, the red wolf population receives less protection under the ESA than endangered species. In fact, the United States Fish and Wildlife Service ("FWS") rule applicable to the red wolf population allows "takes" of wolves on private property that are not intentional or willful. Ignoring this critical distinction, the Plaintiffs attempt to stretch the principles of vicarious liability as applied to State licensing agencies further than any case they have cited in their memorandum. The Plaintiffs have also failed to show that irreparable harm to the red wolf population as a whole will occur between now and the trial if an injunction is not issued. Such a showing is required in order to justify, as the Fourth Circuit has described, the "extraordinary" remedy of injunctive relief. Finally, issuing an injunction will likely cause harm to landowners that use coyote hunting as an essential management tool. At the

same time an injunction would likely cause essential landowner support for the red wolf program to erode, causing harm to the red wolf population the Plaintiffs seek to protect.

STATEMENT OF THE FACTS AND REGULATORY BACKGROUND

Endangered Species Act

The ESA was enacted "[i]n response to growing concern over the extinction of many animal and plant species." *Gibbs v. Babbitt*, 214 F.3d 483, 487 (4th Cir. 2000). The ESA protects three categories of species: 1) endangered (in danger of extinction throughout all or a significant portion of its range); 2) threatened (likely to become an endangered species within the foreseeable future; and 3) experimental populations (an endangered or threatened species reintroduced outside of the current range of the species). *Animal Welfare Inst. v. Martin*, 588 F. Supp. 2d 70, 97 (D. Me. 2008) (citation omitted). "Endangered Species are entitled to the highest level of protection." *Id.* at 97-98. Threatened and experimental populations, on the other hand, are afforded fewer protections. *See id.*

Endangered and Threatened Species

Section 9 of the ESA prohibits the "taking" of an endangered species. 16 U.S.C. § 1538(a)(1)(B). The ESA defines "take" as: "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or attempt to engage in any such conduct." *Id.* at § 1532(19). Endangered species cannot be taken even incidentally to otherwise lawful activities unless authorized under an incidental take permit issued by the FWS. 16 U.S.C. § 1539(a)(1)(B).

The ESA authorizes the FWS to issue necessary regulations for the conservation of threatened species. *Id.* at § 1533(d). The FWS rules generally prohibit the taking of threatened species. 50 C.F.R. § 17.31. Incidental take permits can be obtained for incidental takes of threatened species. 50 C.F.R. § 17.32.

Experimental Populations

Prior to 1982, the FWS faced significant local opposition to the reintroductions of endangered species within their historical ranges. *Gibbs,* 214 F.3d at 487. This opposition was due to the fact that, at that time, reintroduced species were treated the same as any other endangered species. *Id.* In 1982, Congress added section 10(j) to the ESA "to address the [FWS'] and other affected agencies' frustration over political opposition to reintroduction efforts perceived to conflict with human activity." *Wyo. Farm Bureau Fed'n v. Babbitt,* 199 F. 3d 1224, 1231 (10th Cir. 2000). Section 10(j) allows the FWS to designate as "experimental" reintroduced populations of endangered or threatened species. *Id.* at 1232 (citing 16 U.S.C. § 1539(j)). Furthermore, section 10(j) vests the Secretary with authority to "identify experimental populations, determine whether such populations are essential or nonessential, and, consistent with that determination, provide control mechanisms (i.e., controlled takings) where the Act would not otherwise permit the exercise of such control measures against listed species." *Wyo. Farm Bureau,* 199 F.3d at 1233; *see also* 16 U.S.C. § 1539(j). A population may be designated as "nonessential" only after the FWS determines that it is not "essential" to the continuation of the species. 16 U.S.C. § 1539(j)(2)(B). Unlike all endangered and most threatened species, the FWS rules allow the take of nonessential experimental populations in certain circumstances without the need for an incidental take permit. 50 C.F.R. § 17.84

"Prior to these provisions, attempts to reintroduce red wolves and other endangered species, particularly predators, were routinely unsuccessful because of local opposition." 60 Fed. Reg. 18,940, 18,945 (Apr. 13, 1995). "Congress hoped the provisions of section 10(j) would mitigate industry's fears that experimental populations would halt development projects, and, with the clarification of the legal responsibilities incumbent with the experimental populations,

actually encourage private parties to host such populations on their lands." *Wyo. Farm Bureau,* 199 F. 3d at 1232.

The 10(j) Rule for Red Wolves in North Carolina

The red wolf was declared extinct in the wild in 1980. Pursuant to section 10(j) of the ESA, a proposed rule to introduce red wolves into Alligator River National Wildlife Refuge in Dare County, North Carolina, was published in the Federal Register on July 24, 1986. 51 Fed. Reg. 26,564. This introduced red wolf population in North Carolina was determined by the FWS to be a "nonessential experimental population." 51 Fed. Reg. 41,790 (Nov. 19, 1986). The FWS stated that nonessential experimental status was determined "because the species is fully protected in captivity in six different locations, and all animals released into the wild can be quickly replaced through captive breeding." *Id.* [1] The Alligator River reintroduction site (the "reintroduction area") is defined by 50 C.F.R. § 17.84 (c)(9)(i) and includes all of Dare, Tyrrell, Hyde, Washington, and Beaufort Counties.

The final 10(j) Rule outlined a reintroduction plan for red wolves in the 120,000 acre Alligator River National Wildlife Refuge in eastern North Carolina as a nonessential experimental population, and outlined certain circumstances under which a taking of introduced red wolves would be allowed. *Gibbs*, 214 F.3d at 487-88; *see generally* 51 Fed. Reg. 41,790. The FWS stated in the 1986 Federal Register notice that, where a red wolf was accidentally taken, for example, by a person engaged in otherwise lawful activity such as hunting or trapping,

[1] In the mid-1970s efforts had begun to create a breeding population of captive red wolves with the intention of reintroducing them into the wild. Four hundred wild canids were examined through the recovery program, with 43 being admitted into the breeding/certification program as probable red wolves. Of those 43 wild canids, 15 became the founding stock of the red wolf recovery program. In November 1986 four pairs of adult red wolves were shipped to the Alligator River National Wildlife Refuge in North Carolina for the purpose of reintroduction.

the service would not prosecute for the taking of a red wolf that was "unavoidable, unintentional, and did not result from negligent conduct lacking reasonable due care." *Id.* at 41,792.

In 1995, the 10(j) Rule was amended to allow taking of red wolves on private land so long as such takes are not "intentional or willful." *See* 60 Fed. Reg. at 18947*; see also* 50 C.F.R. § 17.84(c)(4)(i). Other situations in which a take of a red wolf is allowed include: "in defense of that person's own life or the lives of others;" on public land incidental to lawful activities that are "unavoidable, unintentional, and not exhibiting lack of reasonable due care;" and when the wolves are in the act of killing livestock or pets. *Id.* at § 17.84(c)(4)(i)-(iii). Private landowners may also take red wolves found on their property after efforts by FWS personnel to capture such animals have been abandoned. *Id.* at 17.84(c)(4)(v). "These flexible rules are considered key to public acceptance of the reintroduced population." 51 Fed. Reg. at 26,566.

Today, it is estimated that there are between 100 and 120 red wolves present in the recovery area. Affidavit of David Cobb ("Cobb Aff."), Defs.' Att. 1, ¶ 10. The true red wolf carrying capacity for the reintroduction area is unknown at this time. *Id.* As part of a Memorandum of Agreement ("MOA") between the FWS and the North Carolina Wildlife Resources Commission ("WRC"), the WRC and the FWS will be working together in a joint effort to determine the carrying capacity in the reintroduction area. *Id.* at ¶ 10; Affidavit of Gordon S. Myers ("Myers Aff."), Defs.' Att. 2, ¶ 9.

While the rate of suspected gun deaths has gone up, the overall mortality rate has remained fairly constant since 2000. Cobb Aff., ¶ 10. The "Mortality Table" included in Plaintiffs' Memo as Wheeler Decl. Exhibit G indicates that the number of suspected gunshot deaths range from 14 to 28 per year with an average of 20. Cobb Aff., ¶ 10. With the majority of these suspected gunshot deaths, it is not noted whether the wolves were killed by a coyote

hunter due to mistaken identity or whether the wolves were killed intentionally. The Mortality Table also assumes that "cut collars" are the result of gunshot deaths. The Defendants are unaware of any data supporting this assumption or the Plaintiffs' broader contention that hunting coyotes at night has resulted in an increase in red wolf gunshot mortalities. Myers Aff., ¶ 9.

When the experimental red wolf population was first introduced in the 1980s, the service believed the reintroduction area was coyote-free. *See* Cobb Aff., ¶ 10 (citing Red Wolf Recovery/Species Survival Plan, U.S. Fish and Wildlife Service, October 1990, p. 15). By 1999, the FWS considered hybridization between red wolves and coyotes the principal threat to recovery efforts. Cobb Aff., Ex. C. In an effort to combat hybridization, the FWS currently employs a management plan that, in part, implements the so-called "placeholder theory." The FWS describes the "placeholder theory" as using the sterilization of coyotes to hold space (i.e. be placeholders) to prevent the influx of reproducing coyotes while waiting for a dominant red wolf to take over the range. USFWS Red Wolf Recovery Program, http://www.fws.gov/redwolf/wolvesandcoyotes.html/ (last visited Jan. 13, 2014).

The Commission's Coyote Hunting Rule

In 1993, the WRC promulgated a rule permitting the hunting of coyotes statewide. The current rule reads as follows:

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

15A NCAC 10B .0219. The portion of the rule regarding night hunting of coyotes was added in 2012. The NWRC has not yet established permits that would allow night hunting on public

lands and, therefore, no permits allowing night hunting on public lands have been issued. Myers Aff., ¶ 14.

ARGUMENT

The Fourth Circuit Court of Appeals has recognized that "preliminary injunctions are extraordinary remedies involving the exercise of a very far-reaching power to be granted only sparingly and in limited circumstances." *MicroStrategy Inc. v. Motorola, Inc.,* 245 F.3d 335, 339 (4th Cir. 2001) (quoting *Direx Israel, Ltd. v. Breakthrough Med. Corp.,* 952 F.2d 802, 811 (4th Cir. 1992)) (internal quotations omitted). In order to obtain a preliminary injunction, a plaintiff must establish that "(1) he is likely to succeed on the merits, (2) that he is likely to suffer irreparable harm in the absence of preliminary relief, (3) that the balance of equities tips in his favor, and (4) that an injunction is in the public interest." *Winter v. Natural Resources Defense Council, Inc.,* 555 U.S. 7, 20 (2008). The plaintiff has the burden of proving "by a clear showing" that these factors support a decision to issue a preliminary injunction against the defendant. *Mazurek v. Armstrong,* 520 U.S. 968, 972 (1997). The moving party must independently satisfy all four factors. *Winter,* 555 U.S. at 20. For the reasons set forth below, the Plaintiffs have not satisfied any of these four factors and their Motion should be denied.

I. Plaintiffs are not likely to succeed on the merits of their claims.

Because the Plaintiffs do not allege that the Defendants directly take red wolves, they must prove that the Defendants, as a result of administering and enforcing 15A NCAC 10B .0219, are vicariously liable for the illegal take of red wolves committed by others. In attempting to attach vicarious liability to the Defendants for the alleged failure to report incidental takes, the Plaintiffs erroneously rely on the holding in *Strahan v. Coxe,* 127 F. 3d 155, 163 (1st Cir. 1997), that "[A] governmental third party pursuant to whose authority an actor directly exacts a taking .

. . may be deemed to have violated the provisions of the ESA." (Pls.' Memo p. 15). In making this argument, the Plaintiffs ignore the critical fact that the red wolf population in the Alligator River reintroduction area is, by law, deemed a nonessential experimental population. Therefore, none of the cases cited by the Plaintiffs in support of their vicarious liability argument are applicable to the red wolf population at issue in this case. Instead, all of the cases cited by the Plaintiffs involve endangered or threatened species that cannot be taken, even incidental to otherwise lawful activities, without an incidental take permit.[2] The 10(j) Rule was promulgated precisely so that individuals could take red wolves under certain circumstances without the need for a permit. *See Gibbs*, 214 F.3d at 498. This distinction between the protections afforded endangered species and nonessential experimental populations is fatal to the Plaintiffs' claims.

A. The WRC cannot be held vicariously liable for the unintentional take of red wolves caused by misidentification on private lands.

The Plaintiffs point to six alleged takings that have occurred since October 27, 2013, in order to "underscore" their need for a preliminary injunction. (Pls.' Memo p. 9). All six of these wolves were found on private land. Wheeler Decl., Ex. G. (Mortality Table). In fact, all but four red wolves suspected of dying by gunshot reported over the last twelve years were reported on private land. *Id.* The take of red wolves in the reintroduction area is regulated by 50 C.F.R. § 17.84(c). The take of red wolves on private land within the reintroduction area is specifically addressed by 50 C.F.R. § 17.84 (c)(4)(i), which states:

[2] *See* Pls.' Memo p. 15 ("*Sierra Club v. Yeutter*, 926 F.2d 429, 438–39 (5th Cir. 1991) (holding Forest Service caused take of endangered woodpeckers by permitting logging near nesting colonies); *Defenders of Wildlife v. EPA*, 882 F.2d 1294, 1301 (8th Cir. 1989) (holding EPA caused take of endangered species through its registration of pesticides for use by others); *Aransas Project v. Shaw*, 835 F. Supp. 2d 251, 264 (S.D. Tex. 2011) (holding state agency caused take of whooping cranes through its water permitting activities); *Animal Prot. Inst. v. Holsten*, 541 F. Supp. 2d 1073, 1078–80 (D. Minn. 2008) (holding state agency caused take of lynx through its licensure of trapping and its regulation of trap uses); *Loggerhead Turtle v. Cnty. Council of Volusia Cnty., Fla.*, 896 F. Supp. 1170, 1180–81 (M.D. Fla.1995) (holding county caused take of threatened sea turtles by authorizing beach driving).").

> Any person may take red wolves found on private land in the areas defined in paragraphs (c)(9) (i) and (ii) of this section, *Provided that such taking is not intentional or willful,* or is in defense of that person's own life or the lives of others; and that such taking is reported within 24 hours to the refuge manager (for the red wolf population defined in paragraph (c)(9)(i) of this section), the Park superintendent (for the red wolf population defined in paragraph (c)(9)(ii) of this section), or the State wildlife enforcement officer for investigation.

(emphasis added). As noted above, the FWS had interpreted the 1986 rule to allow accidental takes so long as they were "unavoidable, unintentional, and did not result from negligent conduct lacking reasonable due care." 51 Fed. Reg. at 41,793. In 1995, the FWS, recognizing that such language was "subject to differing legal interpretations," amended the rule to state that "only intentional or willful take will be prosecuted on private lands." 60 Fed. Reg. at 18,944. The FWS went on to state that "[t]he basic premise is that a red wolf that is incidentally taken in any type of legal activity on private lands will not be a violation of the special rule." *Id.*

> [T]his provision will make the taking of a red wolf on private lands a *specific intent crime.* This provision will apply to all private landowners. The concept of a general intent violation (i.e. avoidable take or *take through mistaken identity*) that was present in the earlier rule is now used only on lands owned or managed by Federal, State, or local government agencies.

Id. at 18,946 (emphasis added). These statements were made in direct response to a comment raised by the WRC that the 10(j) Rule should be clarified "in order to prevent the prosecution of well-intentioned citizens who may kill a red wolf, believing it to be a coyote." *Id.* at 18,945-46. Thus, the FWS contemplated the very scenario on which the Plaintiffs now base their lawsuit, and specifically exempted such takings from the ESA take prohibitions.

"[A] specific intent crime is one in which the defendant acts not only with knowledge of what he is doing, but does so with the objective of completing some unlawful act." *United States v. Blair*, 54 F.3d 639, 642 (10th Cir. 1995). Since the 10(j) Rule makes the take of red wolves on private property a specific intent crime, a person who shoots a red wolf on private land due to

mistaking the wolf for a coyote cannot be found to have violated the ESA, so long as the take is reported to the appropriate authorities. This is because such individual would not have *specifically* intended to kill a red wolf. If the individual is not liable for violating the ESA, the State cannot be held vicariously liable because there is no violation of the ESA.

The WRC rule allowing coyote hunting does not allow or otherwise condone intentional and willful taking of red wolves. Since the 10(j) Rule allows takes, so long as such takes are not intentional or willful, WRC cannot, as a matter of law, be held vicariously liable for the shooting deaths of red wolves.

B. The WRC cannot be held vicariously liable for a third party's violation of the 24-hour notice requirement.

The Plaintiffs attempt to attach vicarious liability to the Defendants for a third party's failure to report an otherwise lawful take within 24 hours. (Pls.' Memo p. 14). This argument is also, as a matter of law, without merit.

i. This Court lacks jurisdiction to hear the Plaintiffs' failure to report argument due to Plaintiffs' failure to comply with the requirements of section 1540(g) of the ESA.

As an initial matter, the Plaintiffs' 60-day notice did not specify that the WRC rule was causing the failure to report. Thus, this Court does not have jurisdiction to address this issue. Pursuant to section 1540(g) of the ESA, a citizen may not bring suit prior to sixty days after "written *notice of the violation* has been given to the Secretary, and to any alleged violator[.]" 16 U.S.C. § 1540(g)(2)(A)(i) (emphasis added). This 60-day notice is jurisdictional. *Save the Yaak Comm. v. Block*, 840 F.2d 714, 721 (9th Cir. 1988); *Shenandoah Ecosystem Def. Group v. United States Forest Serv.*, 144 F.Supp. 2d 542, 553 (W.D. Va. 2001).

> The purpose of the 60-day notice provision is to put the [defendants] on *notice of a perceived violation of the statute* and an intent to sue. When given notice, the [defendants] have an opportunity to review their actions and take corrective

> measures if warranted. The provision therefore provides an opportunity for settlement or other resolution of a dispute without litigation.

Southwest Ctr. for Biological Diversity v. U.S. Bureau of Reclamation, 143 F.3d 515, 520 (9th Cir. 1998) (citation omitted) (emphasis added). "[T]he notice must adequately inform the [defendant] of the exact grievance against it, if it is to fulfill this purpose." *Water Keeper Alliance v. U.S. Dep't of Defense*, 271 F.3d 21, 30 (1st Cir. 2001).

The Plaintiffs' 60-day notice, attached as Exhibit 1 to the Complaint, alleges that the WRC is causing illegal takes of red wolves because coyote hunters were shooting red wolves due to mistaking them for coyotes. The 60-day notice also sets forth their placeholder argument. However, the 60-day notice does not specify that the commission's rule is causing violations of the 24-hour notice requirements. The notice does not mention any alleged 24-hour notice violations. Even the Complaint does not specifically allege that the WRC rule is causing violations of the 24-hour notice requirement. The allegations relating to the 24-hour notice were not raised by the Plaintiffs until their Motion for Preliminary Injunction. The Defendants assumed that the Plaintiffs, in their 60-day notice, were claiming that the act of shooting due to mistaken identity was the alleged "violation" (which, as discussed above, is not in and of itself a violation). The Defendants received no notice prior to the Plaintiffs' Motion that they intended to argue that the Defendants were somehow causing violations of the 24-hour reporting requirement. Therefore, such arguments should not be considered by this Court.

ii. The holding in *Strahan* does not support the Plaintiffs' contentions.

In *Strahan,* the First Circuit found that Massachusetts State officials could be liable for a take under the ESA by licensing gillnet and lobster pot fishing in which endangered Northern right whales could become entangled. *Strahan*, 127 F. 3d at 165. Unlike the red wolf population at issue here, the Northern right whale is considered an endangered species that could not be

taken, even incidental to an otherwise lawful activity, unless an incidental take permit had been obtained. *Id.* at 158. The Defendants in *Strahan* argued that the State's licensure of a generally permitted activity does not cause the taking any more than its licensure of automobiles and drivers solicits or causes federal crimes, even though automobiles it licenses are surely used to violate federal and state laws. *Id.* at 163-64. In response to this argument, the court in *Strahan* noted the following:

> whereas it is possible for a person licensed by Massachusetts to use a car in a manner that does not risk the violations of federal law . . . *it is not possible for a licensed commercial fishing operation to use its gillnets or lobster pots in the manner permitted by the Commonwealth without risk of violating the ESA* . . . Thus, the state's licensure of gillnet and lobster pot fishing does not involve the intervening independent actor that is a necessary component of the other licensure schemes which it argues are comparable. Where the State has licensed an automobile driver to use that automobile and her license in a manner consistent with both state and federal law, the violation of federal is caused only by the actor's conscious and independent decision to disregard or go beyond the licensed purposes of her automobile use and instead to violate federal, and possibly state, law.

Id. at 164 (emphasis added). The court's conclusion in *Strahan*, that it was not possible for a fishing operation to use its gillnets in the manner permitted by the state of Massachusetts without risk of violating the ESA, was based on the fact that the species involved in that case was listed as endangered. *Id.* No takes of the endangered whales involved in *Strahan*, intentional or unintentional, were allowed absent an incidental take permit.

In the instant case, similar to the example of the automobile license, an individual authorized to hunt coyotes pursuant to 15A NCAC 10B .0219 may do so without risk of violating the ESA. As explained above, if a hunter, following State regulations, mistakenly identifies a red wolf as a coyote and shoots that red wolf, he will not have committed a violation of the ESA unless he fails to report the taking within 24 hours. The WRC rule does not cause or otherwise allow hunters *not* to report the taking of a red wolf. The failure of a hunter to report

the taking is caused by that individual's conscious and independent decision, which, as explained in *Strahan*, is not attributable to the State. Therefore, the Defendants cannot be held vicariously liable as a matter of law.

C. The WRC cannot be held vicariously liable for the unintentional take of red wolves caused by misidentification on public lands.

The Plaintiffs do not distinguish takes on private land from those on public land. As stated above, in over twelve years, only four wolves suspected of dying as a result of gunshots were reported on public lands, the last of which was found on September 12, 2011. Wheeler Decl., Ex. G. (Mortality Table). Thus, it is assumed that takes on private, not public land, are the driving force behind the Plaintiffs' motion for preliminary injunction. However, the Defendants briefly address the issue below.

With regard to public land, the 10(j) Rule states that:

> Any person may take red wolves found on lands owned or managed by Federal, State, or local government agencies in the areas defined in paragraphs (c)(9) (i) and (ii) of this section, Provided that such taking is incidental to lawful activities, is unavoidable, unintentional, and not exhibiting a lack of reasonable due care, or is in defense of that person's own life or the lives of others, and that such taking is reported within 24 hours.

50 C.F.R. § 17.84(c)(4)(ii).

Even if wolves have been killed by coyote hunters due to mistaken identity, the State cannot be held vicariously liable. As the court in *Strahan* pointed out, state agencies are held vicariously liable for violating the ESA only when it is not possible to perform the licensed activity in a manner permitted by the state "without risk of violating the ESA." *Strahan*, 127 F.3d at 165. Here, it is certainly possible for people to hunt for coyotes as allowed by the WRC rule without violating the 10(j) Rule. Therefore, the Defendants cannot be held vicariously liable for the take of red wolves on public land.

Furthermore, out of these four reported deaths, only three were officially found to be the result of gunshot. Although the chart does not make such distinctions, it is highly likely those three confirmed deaths were found on FWS refuge land. The table indicates that two of these wolves, listed as found on November 28, 2005, in Hyde County and October 4, 2010, in Dare County, were found on federal land. Wheeler Decl., Ex. G. (Mortality Table). It is likely that they were found on FWS refuge land as refuge land accounts for a large amount of federal land in those two counties. Furthermore, the table also indicates that one of the wolves, listed as found on November 28, 2005, was found on public land in Washington County. The table does not indicate whether the wolf was found on federal or State land. *Id*. However, it is likely that this wolf was also found on refuge land, considering that a large portion of the Pocosin Lakes refuge is within that County. Coyote hunting on FWS refuge land is prohibited. Myers Aff., ¶ 14. Plaintiffs have failed to demonstrate that these coyotes were taken by otherwise law-abiding coyote hunters and therefore the WRC cannot be held vicariously liable for what could well be illegal activities conducted outside the confines of the WRC's rule.

Finally, only one wolf suspected of being killed by gunshot was found on State land (September 12, 2011). Wheeler Decl., Ex. G. (Mortality Table). First, the official cause of death was undetermined. Second, just because it was found on State land does not necessarily mean it was shot on State land. It is possible that the red wolf was moved post mortem from private to public land to dispose of the carcass. It is also possible that the wolf was not shot by a hunter who had mistaken the wolf for a coyote but by someone who intended to kill a wolf, which is not allowed by WRC rules. Without more evidence, why this lone wolf reported on State lands was killed is left to speculation.

The Plaintiffs, citing *Animal Welfare Inst. v. Beech Ridge Energy*, 675 F. Supp. 2d 540, 560-61 (D. Md. 2009), state that a ruling on the merits can be granted "in the face of wholly-future violations of the ESA, where no past violation had occurred." (Pls.' Memo p. 11). However, *Animal Welfare Inst.* involved the permitting of facilities that were not yet built. There was no past history on which to rely. *Animal Welfare Inst.* 675 F. Supp. 2d at 560. The court in that case ruled in favor of the plaintiffs because the challenged activity was "reasonably certain" to cause a take of the listed species. *Id.* at 563. Here, except for the night hunting permit provision under which no permits have been issued, the WRC rule regarding coyote hunting, as applied to public lands, has been the same since 1993. In all this time, the Plaintiffs can only cite one incident of a red wolf found on State land that the authorities suspected, but could not confirm, was shot. Hence, based on the evidence presented, the Plaintiffs would not be likely to succeed on the merits of any claim relating to activities on public land as the challenged activity is not "reasonably certain" to cause the take of red wolves. Therefore, the Defendants cannot be held vicariously liable for the take of red wolves on public land.

D. The WRC cannot be held liable under the Plaintiffs' "placeholder theory."

The Defendants also cannot, as a matter of law, be found vicariously liable for causing a violation of the 10(j) Rule under the "placeholder" theory brought forth by the Plaintiffs. Again, an individual will not be held to have violated the 10(j) Rule if the take of a wolf on private land was not intentional or willful. In order to find a hunter liable under the Plaintiffs' placeholder theory, it would have to be determined that the hunter killed a "placeholder" coyote with the specific intent of harming a red wolf. As is the case with the 24-hour notice, a hunter's deliberate attempt to harm a red wolf is that individual's conscious and independent decision to violate federal law. Therefore, the Plaintiffs' argument is inconsistent with the First Circuit's

decision in *Strahan.* As the FWS stated when promulgating the 10(j) Rule, the incidental take provisions on private land "places trust in the public to be responsible citizens by obeying the special rule." 60 Fed. Reg. at 18,944. The WRC rule places that same trust in the public.

Furthermore, while the Plaintiffs' Motion is based on, and their Memorandum details, allegations that the Defendants engage in conduct detrimental to the placeholder theory, in reality the Defendants have consistently worked with the FWS to assist in implementing this management strategy. "[B]ecause coyotes are state trust resources, the USFWS must receive state authorization to capture, sterilize, and subsequently release coyotes back into the wild. The North Carolina Wildlife Resources Commission authorizes these core elements of the USFWS' adaptive management strategy." Myers Aff., ¶ 6.

It is important to note that, at this time, the placeholder theory is still that – just a theory. Cobb Aff., ¶ 14-17. Scientific opinion varies as to whether the "placeholder theory" works or if it is sustainable in the Alligator River recovery area. Myers Aff.,¶ 8. The FWS' Red Wolf Recovery Program Coordinator, David Raybon, has stated that ". . . preventing hybridization using reproductive sterilization techniques is heavy handed and a short-term strategy to jump start red wolf colonization." Myers Aff., Exhibit C: Hinton, J.W., Chamberlain, M.J., and Rabon, D.R. Jr.. Red Wolf (Canis rufus) Recovery: A Review with Suggestions for Future Research. Animals 2013, 3, 722-44. Implementation of the placeholder theory in the reintroduction area makes a number of assumptions which require further testing. Cobb Aff., ¶ 17. Whether the placeholder theory will work on such a large scale, and in an area with a continually changing coyote population, is still unknown. Cobb Aff., ¶ 13. As part of the MOA entered into between the FWS and the WRC, testing the placeholder theory has been deemed the top priority. Myers Aff., ¶ 8. As science-based organizations, the FWS and the WRC constantly

evaluate the effectiveness of management techniques. *Id.* If science does not support the implementation of the placeholder theory in the reintroduction area, use of the placeholder theory will be modified or cease. *Id.* Plaintiffs should not use this lawsuit to force a management strategy upon FWS and WRC when both agencies are currently in the process of determining its viability and effectiveness.

The Plaintiffs have not cited, nor are the Defendants aware of, any cases in which anyone was deemed to have violated the ESA by allegedly taking an unlisted species, which, in turn, may cause harm to a protected species based on a management theory. Therefore, the Defendants cannot be held vicariously liable under the Plaintiffs' "placeholder theory" argument.

E. The FWS 10(j) rule, not the WRC rule, is the crux of the Plaintiffs' concerns.

While the Plaintiffs have made their displeasure with the WRC rule clear, the Plaintiffs' real issue lies with the FWS 10(j) Rule, not the WRC's rule. The Plaintiffs' declarant T. Delene Beeland makes it clear that the Plaintiffs' true problem is with the 10(j) Rule, and not 15A NCAC 10B. 0219, by stating:

> it is my understanding that if a hunter is engaged in a lawful activity (such as coyote hunting), and they shoot a red wolf while pursuing that activity, then literally *no legal action can be taken against them*. This means that a very cynical person could say they were out hunting coyotes when they 'accidentally' shot a red wolf. In this way, red wolves could be maliciously targeted on purpose and if the shooter is caught or questioned, all they need to do is state they thought they'd shot a coyote and there will be no charges brought against them. This is simply unacceptable. *It provides a legal way* in which the second extermination of red wolves in the wild can be enacted.

Beeland Decl. ¶ 16 (emphasis added). As stated above, the FWS was aware of the possibility that red wolves could be mistakenly identified as coyotes and shot and promulgated language making such takes lawful. The FWS passed the 10(j) Rule in order to gain support for the reintroduction. *See* 51 Fed. Reg. at 26,566 ("These flexible rules are considered a key to public

acceptance of the reintroduced population."). The FWS found the risk to the red wolf population acceptable when balancing the harm to the wolves versus the benefits from local public and political support. It is highly likely that it would not have been possible for the FWS to reintroduce the red wolf experimental population without such allowances. The Fourth Circuit has said the following regarding the red wolf rule:

> The specific needs of individual species, as well as the balance to be struck with landowners in or near the species' habitat, presents a classic case for legislative balancing. Here [the 10(j) Rule] was promulgated precisely so that private landowners could take red wolves under certain circumstances . . . . These provisions may ease tensions between the red wolves and private landowners . . . . How these lines should be drawn and this balance struck is grist for the legislative and administrative mill and beyond the scope of judicial competence.

Gibbs, 214 F.3d at 498-99. The Plaintiffs are clearly passionate about the red wolf program and have different opinions from the Defendants as to what regulations should be promulgated. However, as the Fourth Circuit in *Gibbs* noted when property owners challenged the 10(j) Rule:

> If [plaintiffs] think this regulation unwise, they must make their plea to Congress. The judiciary lacks the delegated powers of the FWS . . . . Separation of powers principles mandate that we leave decisions such as these to Congress and to agencies with congressionally sanctioned expertise and authority.

Gibbs, 214 F.3d at 498. The Plaintiffs may present their arguments in a petition for amended rulemaking with the FWS. However, due to the clear language contained in the 10(j) Rule, which allows takes that are not otherwise "intentional and willful," such arguments must fail, as a matter of law, before this Court.

F. *Strahan* has never been adopted by the Fourth Circuit and should not be.

As stated above, due to the fact that the present case involves a nonessential experimental population and not an endangered species, this case is clearly distinguishable from *Strahan* and the other cases regarding vicarious liability cited by the Plaintiffs. However, the Defendants maintain that the First Circuit's reasoning in *Strahan* applying vicarious liability under the ESA

to state permitting agencies, has never been cited with approval by either the Supreme Court or the Fourth Circuit, and was wrongly decided.

The court's basis in *Strahan* for holding the state defendants vicariously liable was due to the language in section 9 of the ESA which states in pertinent part that it is unlawful to "cause" the take of an endangered species. *Strahan*, 127 F. 3d at 164. The court in *Strahan* did not, and could not, cite to any statutory language indicating that Congress actually meant for the term "cause" to include state and local licensing and permitting. Under the ESA, Congress explicitly extended vicarious liability to federal permitting and licensing agencies. Section 7(a)(2) of the ESA requires federal agencies to consult with the FWS to ensure that protected species will not be jeopardized as a result of "any action *authorized*, funded, or carried out by such agency." 16 U.S.C. § 1536(a)(2) (emphasis added). No parallel responsibility is stated in the ESA for state and local governments.

The *Strahan* basis of liability would lead to absurd results. Major land developments and resource extractions often require a multitude of permits. The commercial fishing operations in *Strahan* are no different. If the commercial fishing operations had obtained incidental take permits from the National Marine Fisheries Service ("NMFS") prior to obtaining a state fishing license, there would have been no violation of the ESA. The logic in *Strahan* leads to the absurd result of holding the first agency to permit an activity, which requires multiple permits, vicariously liable for violating all laws within the jurisdiction of the other permitting agencies. As Professor Ruhl explains:

> If a city approves an industrial plant site plan and detailed development agreement before any other agency with jurisdiction issues its permit, has the city violated, say, Section 404 of the Clean Water Act covering the plant's fill of wetlands, Section 402 of the Clean Water Act covering stormwater discharges from the construction activity, the provisions of the Clean Air Act covering the plant's air emissions, . . . After all, the site plan is discretionary, and, arguably, it is "not

> possible" to use the development agreement without triggering all those other legal requirements . . . . There is simply no principled distinction between the multi-permit scenario as outlined and the state's fishing gear permit in *Strahan.* Commercial fishing operations require two independent permits: a state permit *and*, if they posed a threat of causing take, an ESA permit.

J.B. Ruhl, *State and Local Vicarious Liability Under the ESA*, 16 Nat. Resources & Env't 70 (2001). It is illogical that this result was intended by Congress. Indeed, taken to its logical conclusion, the results from such reasoning would be absurd, and courts should never construe statutes to produce absurd results. *See Helvering v. Hammel*, 311 U.S. 504, 511 (1941).

Furthermore, in an effort to work its way around a Tenth Amendment anti-commandeering argument, the First Circuit reasoned that the district court did not order the state defendants to take any specific action to further the goals of the ESA when it enjoined the defendants from issuing gillnet licenses. *Strahan,* 127 F.3d at 170. Theoretically, in order to avoid liability under *Strahan*, state permitting agencies may have to create conditions in their permits and licenses to ensure licensees or permittees do not take a protected species. The ESA only explicitly requires federal permitting agencies to take such action. Such actions should be administered and enforced by the FWS and NMFS pursuant to their rules and incidental take permit requirements and not by the States as part of their separate regulatory programs. There is no indication that Congress intended otherwise. Therefore, this Court should not interpret the term "caused" to include State permitting and licensing.

Because Plaintiffs have not demonstrated a likelihood of success on the merits, their motion for preliminary injunction should be denied. *See Winter*, 555 U.S. at 20.

II. The Plaintiffs have not shown that they are likely to suffer irreparable harm.

A preliminary injunction cannot issue unless the applicant can demonstrate that, without the requested relief, it will suffer "irreparable harm." *Winter*, 555 U.S. at 20. To obtain a

preliminary injunction, a plaintiff "must establish that irreparable harm is likely, not just possible." *Id.* The required irreparable harm "must be neither remote nor speculative, but actual and imminent." *Direx Israel, Ltd. v. Breakthrough Med. Corp.*, 952 F.2d 802, 812 (4th Cir. 1992). The Supreme Court has made it clear that the moving party must make such a showing of irreparable harm even when, unlike the case here, the plaintiffs have established that they are likely to succeed on the merits. *Winter*, 555 U.S. at 20.

The Supreme Court has held, even under the context of the ESA, that courts are "not mechanically obligated to grant an injunction for every violation of the law." *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 193 (1978). Courts have held that "irreparable harm to ESA-listed species must be measured at the species level" – thus an injunction can only be justified if there is irreparable harm to the species as a whole. *Nw. Envtl. Def. Ctr. v. U.S. Army Corps of Eng'rs*, 817 F. Supp. 2d 1290, 1315 (D. Or. 2011) (citing *Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv.*, 422 F.3d 782, 796 (9th Cir. 2005); *see also Water Keeper Alliance v. U.S. Dep't of Defense*, 271 F.3d 21, 34 (1st Cir. 2001); *Animal Welfare Institute v. Martin*, 623 F.3d 19, 29 (1st Cir. 2010) (upholding denial of an injunction when harm would have "only a negligible impact on the species as a whole"). This line of reasoning is logical and consistent with the language of the ESA. Congress could not have believed that all takes cause irreparable harm. Otherwise they would not have created mechanisms that allow for takes in certain instances, such as incidental take permits. *See* 16 U.S.C. §§ 1536(b)(4), 1536(o)(2), 1539(a),(b). Accordingly, the Plaintiffs must present a "concrete showing of probable deaths during the interim period and of how these deaths may impact the species." *Water Keeper Alliance*, 271 F.3d at 34.

The Plaintiffs allege that they "will suffer irreparable harm to their recreational and aesthetic interests if this Court does not grant injunctive relief." (Pls.' Memo p. 24). However, they have failed to show that it is likely that the red wolf population as a whole will suffer irreparable harm in the interim period between now and the trial that justifies the extraordinary remedy of an injunction.

A. Plaintiffs have failed to show that they are likely to suffer irreparable harm resulting from potential takes on private lands during the time frame before the trial on the merits.

As stated above, the 10(j) Rule clearly makes takes on private land a specific intent crime. 60 Fed. Reg. at 18,946. Thus, it is not possible for the Plaintiffs to succeed on the merits with regard to takes on private land. However, even assuming *arguendo* that each and every take by gunshot was an unlawful take attributable to the Defendants, including those occurring on private land, the Plaintiffs have still not shown irreparable harm requiring a preliminary injunction until a trial on the merits.

The majority of the reported deaths by gunshot occur between October 1st and January 1st of each year. Wheeler Decl., Ex. G. (Mortality Table). The mortality table shows only twenty reported deaths suspected of being caused by gunshot over the course of the last twelve years during the period between January 1st and October 1st.[3] *Id.* This comes out to an average of less than two suspected gunshot deaths per year between those months. During those same months over the twelve year period, there were thirty-four deaths suspected of being caused by a vehicle, which is a rate of almost three a year. Plaintiffs' own declarant notes that "a wild red wolf is 7.2 times more likely to be killed by gunshot during the hunting season." Waits Decl., ¶ 13. Factors

[3] Two reported suspected gunshot deaths in April 2010 are not included in this number because the official cause of death was later determined to be heartworm.

other than the fall hunting season play into this seasonal variation as well. Juvenile dispersal of red wolves primarily occurs during the fall and early winter. Myers Aff., ¶ 9. Also, this is the time following harvest of agricultural row crops, which removes visual barriers that otherwise screen canids from view. *Id.* Therefore, because of seasonal factors including the aforementioned, the Plaintiffs fail to show they are likely to suffer irreparable harm prior to a full trial on the merits that warrants the "extraordinary remedy" of a preliminary injunction.

B. The Plaintiffs fail to show that they are likely to suffer irreparable harm due to potential failures to report takes.

Assuming *arguendo* that the Defendants' licensing of coyote hunting causes the alleged failure of a coyote hunter to report an unintentional take, which the Defendants adamantly deny, the Plaintiffs fail to show that this alleged failure irreparably harms their "aesthetic and recreational interests." The duty to report comes after the animal has already been shot. The Plaintiffs fail to provide a showing of probable deaths or any other irreparable harm suffered resulting from the failure to report. The failure to report a shooting does not cause a wolf to die. The service has stated that the importance of the 24-hour reporting requirement was simply to allow Service personnel to respond quickly "in order to minimize conflicts and retrieve any carcasses for necropsy before such carcasses deteriorate to the degree that necropsy results are compromised." 60 Fed. Reg. at 18,945. Assuring that the 24-hour reporting requirements are followed *after* a wolf has already been fatally shot would not remedy the harm the Plaintiffs allege is being caused to the red wolf population or the Plaintiffs' interests.

The Plaintiffs have not even made the necessary showing of harm relating to the failure to report to establish Article III standing. The Constitution limits the jurisdiction of federal courts to resolving "Cases" and "Controversies." U.S. Const. art. III, § 2, cl. 1. One aspect of the case-or-controversy requirement is that a federal lawsuit must seek to prevent or redress an

"actual or imminently threatened injury" to the Plaintiffs. *Summers v. Earth Island Inst*., 555 U.S. 488, 492 (2009). To satisfy the injury in fact requirement, Plaintiffs must show that the Defendants have invaded "a legally protected interest that is 'concrete and particularized.'" *Friends of Earth, Inc. v. Gaston Copper Recycling Corp.*, 204 F.3d 149, 156 (4th Cir. 2000) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)). "The relevant showing for purposes of Article III standing . . . is not injury to the environment but *injury to the plaintiff*." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 181 (2000) (emphasis added). Plaintiffs have failed to show any "actual or imminently threatened injury," irreparable or otherwise, to their interests due to the alleged failure to report.

C. Plaintiffs have failed to show that they are likely to suffer irreparable harm resulting from potential takes on public lands.

As stated above, the Plaintiffs fail to make any distinction as to the shootings on public land. Even if they were to raise this distinction, they must show that such takes will likely cause irreparable harm to the red wolf population. They have not, and cannot, make such a showing.

First, while it is possible that a wolf could be shot by a coyote hunter due to mistaken identity on public land, it cannot be found to be likely considering only four wolves suspected of dying of gunshot were found on public land in the last twelve years. It is even less likely that such an isolated event would cause irreparable harm. "The death of a single animal may call for injunction in some circumstances, while in others the death of one member is an isolated event that would not call for judicial action, because it has only a negligible impact on the species as a whole." *Animal Welfare Institute*, 623 F.3d at 29. At best, the Plaintiffs may be able to show that three or four isolated events over the course of the last twelve years have occurred on public land. These events have had a negligible impact on the red wolf population as a whole.

As stated above, the coyote hunting rule as it applies to public land, apart from allowing night hunting permits of which none have been issued, has been the same since 1993, and the last record of a wolf found on public land which was suspected of dying by gunshot was found on September 12, 2011. Wheeler Decl., Ex. G. (Mortality Table). It is incumbent upon the Plaintiffs to explain why a regulation that has been in effect for the last twenty years is, in fact, only now creating irreparable harm. The Plaintiffs fail to do so. *See Winter,* 555 U.S. at 23 (2008) (reversing an injunction based in part on observing that "this is not a case in which the defendant is conducting a new type of activity with completely unknown effects on the environment . . . the plaintiffs are seeking to enjoin . . . training exercises that have been taking place . . . for the last 40 years."). Clearly, the Plaintiffs have failed to show irreparable harm to the red wolf population if a preliminary injunction relating to public land is not granted.

D. Plaintiffs have failed to show that they are likely to suffer irreparable harm resulting from the alleged take of "placeholder" coyotes.

Finally, the Plaintiffs fail to show that they are likely to suffer irreparable harm resulting from the alleged take of "placeholder" coyotes. The Plaintiffs claim "coyote hunting also harms and harasses red wolves because the shooting of coyotes in [sic] undermines adaptive management activities." (Pls.' Memo p. 8). As stated above, the placeholder theory is, nonetheless, a theory, whose effectiveness in the recovery area is currently being jointly reviewed by the implementing agencies – the FWS in cooperation with the Defendants, the WRC. Cobb Aff., ¶ 13. The Plaintiffs fail to allege irreparable harm, instead relying on an almost two year old statement from the FWS that "the killing of sterilized coyotes 'undermin[es] our management strategy'." (Pls.' Memo p. 9). Subsequent to making that statement, the FWS entered into an agreement with the Defendants to test the placeholder theory in the reintroduction area. (Myers Aff., ¶ 8; Myers Aff., Exhibit B). The Plaintiffs are not simply trying to extend

vicarious liability beyond the scope of any existing law; they are also attempting to mandate an unproven management strategy. Furthermore, the Plaintiffs' claims of "undermining a strategy" do not rise to the level of irreparable harm required for granting an injunction. Therefore, the Plaintiffs have failed to show irreparable harm to the red wolf population as a result of alleged takes of coyotes.

III. The balance of harm and the public interest is not in favor of an injunction.

The Supreme Court in *Winter* emphasized that district courts should "pay particular regard" to whether granting injunctive relief is in the public interest. *Winter,* 555 U.S. at 24. For the following reasons, issuance of injunctive relief in this case is not in the public interest as it will cause harm to property owners as well as to the red wolf population itself.

A. The public's interest in preserving individual members of a nonessential experimental population does not rise to the same level as its interest in protecting individual members of a species listed as endangered.

First, the Plaintiffs begin their public interest argument by citing to case law discussing the public interest in protecting endangered species. Specifically, the Plaintiffs cite to cases involving species listed as endangered. (Pls.' Memo p. 15). Again, the Plaintiffs ignore the distinction between endangered and nonessential, experimental populations. By its very definition, the reintroduced red wolf population is "nonessential." The loss of a nonessential, experimental population is not "likely to appreciably reduce the likelihood of the survival of the species in the wild." *See* 50 C.F.R. § 17.80(b). The FWS specifically stated at the beginning of the red wolf experiment that the taking of red wolves from captivity to introduce them into the wild "would pose no threat to the survival of the species *even if all* of these animals, once placed in the wild, were to succumb to natural or man-caused factors." 51 Fed. Reg. 26,566 (July 24, 1986) (emphasis added). Therefore, while the interest in maintaining experimental populations

should not be entirely discounted, the public's interest in protecting individual members of the red wolf nonessential, experimental population does not rise to the same level as protecting individual members of a species listed as endangered. This fact must be kept in mind when determining whether an injunction is in the public interest.

B. An injunction will cause harm to private landowners.

In recent years, the increasing number of coyotes in the Albemarle Peninsula has had significant negative impacts on private property. Attached to this memorandum are the affidavits of landowners who collectively own or manage more than 50,000 acres of land in the Albemarle Peninsula. *See* Affidavit of Phillip R. Barker ("Barker Aff."), Defs.' Att. 3; Affidavit of Anson Byrd ("Byrd Aff."), Defs.' Att. 4; Affidavit of Michael P. Johnson, ("Johnson Aff."), Defs.' Att. 5; Affidavit of Michael A. Noles ("Noles Aff."), Defs.' Att. 6; Affidavit of Benjamin Simmons, Jr. ("Simmons Aff."), Defs.' Att. 7. These landowners use their land for hunting and/or farming and have all suffered harm as a result of coyotes on their land. *Id.* In particular, coyotes have greatly impacted deer populations by directly killing deer and also driving them off of land. *Id.* As a result, hunting land becomes less valuable and, in some cases, people have given up leases. Byrd Aff., ¶ 5. Coyotes have decimated the quail population in some areas. Simmons Aff., ¶ 7. Mr. Johnson testifies that in the last 2-3 years, "coyotes have taken between 100 and 150 of my captive mallards resulting in a loss of $2,000 to $3,000." Johnson Aff., ¶ 7.

These landowners have been forced to take management measures to combat the onslaught of coyotes on their land. Mr. Noles testifies that he has developed "habitat that is conducive to deer and rabbit production but also restricts the ability of coyotes to hunt." Noles Aff., ¶ 5. Additionally, he shoots coyotes on sight, and 25-50 coyotes have been killed on his land in the last 3-4 years. *Id.* Messrs. Barker, Byrd, Johnson, Noles, and Simmons all believe

that coyote hunting is a necessary management tool. As stated by Mr. Johnson, "There are no other predators to take coyotes, but us." Johnson Aff., ¶ 9. An injunction in this case would eliminate that management tool, and "would cause irreparable harm to landowners' ability to protect private property and manage native wildlife." Byrd Aff., ¶ 6.

C. An injunction would actually cause harm to the red wolf population by eroding landowner support "essential" to the program.

Landowners are critical to the success of the red wolf program. Public support is integral to the reintroduction of endangered species through experimental populations. Myers Aff., ¶ 10. The FWS has explained that prior to the section 10(j) provisions, "attempts to reintroduce red wolves and other endangered species, particularly predators, were routinely unsuccessful because of local opposition." 60 Fed. Reg. at 18,945. "[I]n order to insure that other agencies and the public would accept the proposed reintroduction, the FWS relaxed the taking standards for [red] wolves found on private land under its authority over experimental populations." *Gibbs*, 214 F.3d at 488. The FWS has stated that local landowner support for the red wolf program is "essential" and that without such support "reintroductions are doomed." 60 Fed. Reg. at 18,946. During public meetings on the red wolf project, "some expressed concern about the effect of red wolves on activities on private land. The Service assured them that, because free-ranging wolves are legally classified as members of an experimental nonessential population, the wolves would not negatively impact legal activities on private or Federal land." *Id.* at 18,941. The FWS further articulated the need for public support, stating

> People resent infringement upon the traditional uses of the land. Public land is often heavily used, and has been for generations, by the local public, who are often resistant to any regulatory and/or land management changes. Private landowners can be even more resistant to proposals that may, or just appear to, affect traditional uses of the land . . . . The traditional land uses continued after the site became a national wildlife refuge, including farming the large agricultural fields, hunting, trapping, firewood gathering, etc. . . . . We have found these uses

> are not incompatible with red wolf restoration, and the decision not to infringe on these uses because of the red wolf reintroduction is believed to have positively affected public attitudes towards reintroduction.

(Myers Aff., Exhibit D: "Red Wolf Reintroduction Lessons Regarding Species Restoration," Red Wolf Management Series Technical Report No. 12, p.7 (May 2000)).

The 10(j) Rule allows landowners to request the FWS remove red wolves from their land. *See* 50 C.F.R. § 17.84(c)(4)(v). Nevertheless, many landowners allow red wolves to remain on their land. Simmons Aff., ¶ 6; Noles Aff., ¶ 6. Landowners also allow FWS staff on their land and provide FWS with essential information such as reported sightings. *Id*. The first two wild born red wolves were born on the land of Mr. Simmons who, at the time, was cautiously optimistic of the reintroduction experiment. Simmons Aff., ¶ 6. Mr. Noles saved carcasses to feed red wolves in the Alligator River National Wildlife Refuge and helped biologist retrieve trapped red wolves. Noles Aff., ¶ 6. It was Congress's intent that the interests of these landowners be balanced against the interests of the species in order to obtain support for reintroductions. *See Gibbs*, 214 F.3d at 498-99.

Local landowners consider coyote hunting a valuable tool. *See* Barker Aff.; Byrd Aff.; Johnson Aff.; Myers Aff.; Noles Aff.; Simmons Aff. Night hunting is an important tool because coyotes and a majority of their prey are nocturnal." Noles Aff., ¶ 7. Of the WRC districts in which portions of the red wolf recovery area overlap, commenters supported night hunting of coyotes by a three-to-one margin (391 in favor and 136 opposed). Myers Aff., ¶ 13. Four out of five county boards of commissioners representing the red wolf recovery area adopted resolutions expressly opposing any ban to coyote hunting. Myers Aff., ¶ 13, Exhibits E-H. It is highly likely that private landowners now aiding the program, by providing territory for wolves and providing information to the FWS, will no longer support the red wolf program if they are unable

to protect their property from coyotes. *See* Simmons Aff., ¶ 8. Granting the Plaintiffs the relief they seek would mean that, coyotes, an unlisted, non-native, invasive, predatory animal that has been known to damage property and kill livestock and pets, would receive unprecedented full protection from hunting. Considering that the majority of free-range red wolves now occupy private lands, it is critically important to maintain landowners' support for the red wolf recovery program. Myers Aff., ¶ 13. Therefore, an injunction is likely to cause irreparable harm to the red wolf reintroduction experiment by undermining local support in the Albemarle Peninsula. As such, an injunction would not be in the public interest.

CONCLUSION

For the foregoing reasons, Plaintiffs' motion to for Preliminary Injunction should be denied.

This the 17th day of January 2014.

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CERTIFICATE OF SERVICE

I hereby certify that on January 17, 2014, I electronically filed the foregoing Defendant's Memorandum in Response to Plaintiff's Motion for Preliminary Injunction with the Clerk of the Court using the CM/ECF system which will automatically send notification of such filing to counsel for the Plaintiffs.

This the 17th day of January 2014.

/s/ Scott A. Conklin
Scott A. Conklin