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Plaintiffs Red Wolf Coalition, Defenders of Wildlife, and Animal Welfare Institute (collectively, “Plaintiffs”) submit this memorandum in support of their Motion for Preliminary Injunction. Plaintiffs’ requested injunction is necessary to stop the unlawful killing of highly endangered red wolves caused by coyote hunting in Dare, Tyrrell, Hyde, Washington, and Beaufort Counties in North Carolina (“Red Wolf Recovery Area” or “Recovery Area”). The North Carolina Wildlife Resources Commission, its members in their official capacity as Commissioners, and Mr. Gordon S. Myers in his official capacity as the Commission’s Executive Director (collectively, “the Commission”) are responsible for authorizing, regulating, licensing, and permitting coyote hunting within the State of North Carolina, and therefore are causing and will continue to cause the illegal take of endangered red wolves in violation of the Endangered Species Act (“ESA”), 16 U.S.C. § 1531 *et seq.*, and its implementing regulations.¹

STATEMENT OF THE CASE

The red wolf (*Canis rufus*) is one of the world’s most endangered species, with only about 100 animals living exclusively within Dare, Tyrrell, Beaufort, Hyde, and Washington Counties in Eastern North Carolina. These animals are descendants of a population of only 14 animals that was reintroduced into part of the species’ historic range in North Carolina in 1987. Through the concerted, science-based efforts of the United States Fish and Wildlife Service (“USFWS” or “Service”), Plaintiffs, and others, the red wolf population slowly grew to approximately 130 animals over the course of about twenty years. Over the past decade, however, population growth stalled and the USFWS estimates the current population to only be around 100 animals. See <http://www.fws.gov/redwolf/> (last visited Dec. 13, 2013). During the

¹ On December 3, 2013, Defendants filed a Motion to Dismiss the North Carolina Wildlife Resources Commission and its Commissioners, but not Executive Director Gordon S. Myers, from this case. Dkt. #34. Plaintiffs oppose Defendants’ Motion to Dismiss and intend to file a brief in response. Because the motion does not encompass all defendants, however, its resolution should not impede this Court’s action on Plaintiffs’ Motion for Preliminary Injunction.

same decade, gunshot mortality emerged as the leading cause of death for the species. In recent years, up to 10% of the population has been lost to gunshot annually. Since Plaintiffs filed their Complaint, at least six red wolves have been killed by suspected gunshot.

The Commission's authorization of coyote hunting within the Red Wolf Recovery Area causes the gunshot mortality of red wolves because red wolves are similar in size and coloring to coyotes. In three separate instances in 2012 and another two in 2013, hunters who shot red wolves reported that they did so after mistaking them for coyotes. Rather than respond to this problem and the significant threat that coyote hunting poses to endangered red wolves, however, the Commission in 2012 initiated rulemaking to expand coyote hunting to allow it at night with the use of spotlights, including within the Red Wolf Recovery Area. While red wolves and coyotes are difficult to distinguish during the day, such differentiation becomes virtually impossible at night. The USFWS raised these concerns with the Commission in its rulemaking process, warning that "[t]he Service is concerned that the proposed night hunting regulations will result in red wolves being mistaken for coyotes and inadvertently shot" and therefore undermine joint red wolf conservation efforts. Declaration of Kim Wheeler ("Wheeler Decl."), Pls. Att. 1, Ex. D (Letter from Cynthia Dohner to Gordon Myers, April 16, 2012 ("USFWS Letter")), at 1. The Commission nevertheless finalized its rule, with coyote night hunting becoming fully authorized throughout North Carolina on July 26, 2013.

In addition to direct mortality by gunshot, the Commission's authorization of coyote hunting also causes the take of red wolves indirectly. When individual red wolves are killed, breeding and pack dynamics are often disrupted. Notably, three of the six wolves killed since October 27, 2013, were members of breeding pairs, and all were of reproductive age. Wheeler Decl., Ex. K (The Daily Reflector, "Officials investigate red wolf killings" ("Daily Reflector

article”)), at 2. The recent deaths have resulted in a reduction in breeding pairs in the Red Wolf Recovery Area from eleven to eight. Wheeler Decl., Ex. J (Charlotte Observer, “Fight to save rare red wolves takes grim turn” (“Charlotte Observer article”)), at 1. When such wolves are killed during the fall, not only is there a lost opportunity for them to breed and produce red wolf pups, but reproductive red wolves that have lost their mates have an increased risk of breeding with coyotes. To combat the threat of coyote gene introgression into the red wolf population, the USFWS captures and sterilizes coyotes to prevent hybridization. Gunshot mortality of these *coyotes* also increases the risk of hybrid reproduction by removing animals that are “holding space” and preventing reproductively intact coyotes from moving into red wolf territory.

Without relief from this Court, the Commission’s authorization of coyote hunting will continue to cause the illegal take of red wolves in the Recovery Area. Such ongoing take will irreparably harm Plaintiffs’ interests in enjoying red wolves in the wild. A preliminary injunction protecting the last remaining wild red wolves is in the public interest and will not harm the interests of the Commission.

FACTUAL BACKGROUND

I. Red Wolf

Once common throughout the eastern and south-central United States, red wolf populations were destroyed by the early part of the 20th Century as a result of intensive predator control programs and the degradation and alteration of the species’ habitat. Wheeler Decl., Ex. H (USFWS News Releases), at 1-2. In 1967, the red wolf was designated a federally endangered species under the Endangered Species Preservation Act of 1966, the precursor to the Endangered Species Act of 1973. See Declaration of Lisette Waits (“Waits Decl.”), Pls.’ Att. 2, Ex. M (USFWS, Red Wolf (*Canis rufus*) 5-Year Status Review: Summary and Evaluation (“5-Yr. Rev.”)). By mid-1975, the USFWS concluded that “the only way the red wolf could be saved

from extinction was to capture as many wild animals as possible and place them in a secured captive-breeding program.” Wheeler Decl., Ex. B (USFWS, Red Wolf Recovery/Species Survival Plan (“Recovery Plan”)), Preface. More than 400 canids were captured by the USFWS, but only 17 were identified as pure red wolves. Wheeler Decl., Ex. H (USFWS News Releases), at 1.

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 Section 10(j) of the ESA. Wheeler Decl., Exhibit B (Recovery Plan), at 15; Ex. H (USFWS News Releases), at 2. As a non-essential experimental population, the wild red wolf population is treated as a “threatened species,” except that critical habitat will not be designated for the red wolf and the consultation requirements of Section 7 of the ESA do not apply. 16 U.S.C. § 1539(j)(2)(C); Waits Decl., Ex. M (5-Yr. Rev.), at 25. The North Carolina red wolves make up the world’s only wild population. Waits Decl., Ex. M (5-Yr. Rev.), at 5.

The USFWS Red Wolf Recovery Plan states that the goal of the Red Wolf Recovery Program is “to remove threats of extinction by achieving a wild population of approximately 220 wolves.” Wheeler Decl., Ex. B (Recovery Plan), Preface; Waits Decl., Ex. M (5-Yr. Rev.), at 7. However, the Service has stated that “[c]omplete species recovery permitting delisting will probably never be achieved for the red wolf”; the red wolf remains a listed endangered species. Wheeler Decl., Ex. B (Recovery Plan), Preface; 50 C.F.R. § 17.11.

Since reintroduction in the wild, the red wolf population has grown and the Red Wolf Recovery Area has expanded to four national wildlife refuges, a Department of Defense bombing range, state-owned lands, and private lands, encompassing about 1.7 million acres and spanning the five counties. Wheeler Decl., Ex. H (USFWS News Releases), at 2. Over the past 13 years,

however, red wolf population growth in the Recovery Area has plateaued as gunshot mortality has increased. Waits Decl., ¶ 11.

II. Commission's Role in Coyote Hunting

Under North Carolina law, the Commission has regulatory authority over and responsibility for the administration and issuance of hunting licenses, which are required to hunt coyotes. See N.C. Gen. Stat. § 113-270.1B (“no person may hunt, fish, trap, or participate in any other activity regulated by the Wildlife Resources Commission for which a license is provided by law without having first procured a current and valid license authorizing the activity”); N.C. Gen. Stat. § 113-270.2 (governing hunting licenses); 15A N.C. Admin. Code 10B .0219 (governing coyote hunting). The Commission’s regulation governing the hunting of coyotes is found at 15A N.C. Admin. Code 10B .0219. As of January 1, 2012, the rule read:

15A NCAC 10B .0219 COYOTE

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

In 2012, the Commission proposed amendments to the coyote rule to allow night hunting of coyotes with artificial lights throughout North Carolina, including within the Recovery Area. In response, the Commission received numerous comments expressing concern that the rule changes would increase the gunshot threat to the wild red wolf population. See, e.g., Wheeler Decl., Ex. D (USFWS Letter); Declaration of Donna D. Storie (“Storie Decl.”), Pls.’ Att. 3, ¶ 10; Declaration of T. DeLene Beeland (“Beeland Decl.”), Pls.’ Att. 4, ¶ 13. Despite the concerns expressed, the Commission adopted the permanent rule and it went into effect on July 26, 2013.² The coyote hunting rule now provides:

² The effective date of the final rule was delayed because, pursuant to the North Carolina Administrative Procedure Act (“NC APA”), the North Carolina Rules Review Commission

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.

Pursuant to this rule, the Commission has the authority to issue general hunting licenses that authorize the hunting of coyotes within the Red Wolf Recovery Area, and special permits for the night hunting of coyotes on public lands. See 15A N.C. Admin. Code 10B .0219(a); Defs.' Ans. ¶¶ 15-19.

Plaintiffs submitted a 60-day notice of intent to sue the Commission on July 30, 2013, and filed their Complaint with the Court on October 17, 2013.

III. The Effect of Coyote Hunting on Red Wolves

Coyote hunting causes the take of red wolves in three primary ways: (1) it increases the risk of red wolf gunshot mortality because red wolves may be mistaken for coyotes and shot; (2) it disrupts red wolf breeding dynamics and increases the risk of coyote-red wolf hybridization by killing members of red wolf mating pairs; and (3) it disrupts red wolf breeding by killing sterilized *coyotes* in red wolf habitat, further undermining effective coyote management and increasing the risk of coyote-red wolf hybridization. See Waits Decl., ¶¶ 12-16.

received over thirty written objections requesting that the North Carolina General Assembly review the rule. Among the written objections were letters from members of Plaintiff organizations. While the permanent rule was pending, the Commission promulgated an identical temporary rule that would have gone into effect without any delay for legislative review. Plaintiffs challenged the temporary rule in Wake County Superior Court as violating the NC APA, and on November 21, 2012, the court granted Plaintiffs' Motion for Preliminary Injunction, enjoining coyote night hunting with artificial lights within the Red Wolf Recovery Area. Red Wolf Coal. et al. v. N.C. Wildlife Res. Comm'n et al., No. 12-CV-012626 (N.C. Super. Ct. Nov. 21, 2012) (order granting preliminary injunction). The permanent rule went into effect when the North Carolina General Assembly adjourned on July 26, 2013.

Direct mortality by gunshot has grown to become the leading cause of red wolf mortality. See, e.g., Waits Decl., ¶ 13; Ex. M (5-Yr. Rev.), at 17-19. Overall, 29 percent of red wolf deaths were caused by gunshot from 2000 to 2013, an increase of 17 percent from the period of 1987 to 2000. Wheeler Decl., Ex. L (Bartel, Becky, Data gone wild: Red wolf field updates, Aug. 13, 2013). Since 2008, up to ten percent of the wild red wolf population has been shot each year, and 48 wolves are suspected or confirmed to have been killed by gunshot over this period. See Wheeler Decl., Ex. G (Red Wolf Recovery Program 10-Year Mortality Data Table (“Mortality Table”)).

Red wolves may be mistakenly shot by coyote hunters because coyotes and red wolves are very similar in both size and coloring. See Beeland Decl., Ex. B (USFWS, About the Red Wolf Recovery Program). The Commission itself has recognized that red wolves “look similar” and “may be mistaken for” coyotes. Wheeler Decl., Ex. E (NC WRC, North Carolina Wildlife Profiles: Coyote), at 1. The Commission has also stated that “[i]n N.C., coyotes may be mistaken for dogs or red wolves, and the existence of ... red wolf-coyote hybrids can make identification difficult.” Wheeler Decl., Ex. F (NC WRC, Fox and Coyote Populations Study: Final Report), at 14. Indeed, because of the morphological similarity between the two species, it is “difficult to distinguish the two species in the field” even for a canid scientist or educator observing a red wolf at close range. See Declaration of Dennis Murray (“Murray Decl.”), Pls.’ Att. 5, ¶¶ 10-11; Storie Decl., ¶ 11.

Because of this similarity of appearance and the difficulty of identification, it is not surprising that red wolves have been killed by hunters during the daytime. See, e.g., Wheeler Decl., Ex. D (USFWS Letter), at 2. In the past two years, 5 shooters who killed red wolves reported to the authorities that they had mistaken the red wolves for coyotes. See Wheeler Decl.,

Ex. G (Mortality Table). Night hunting increases the risk that red wolves will be mistakenly shot as it is nearly impossible to distinguish red wolves from coyotes under nighttime conditions.

See, e.g., Wheeler Decl., Ex. D (USFWS Letter), at 2; Storie Decl., ¶ 11.

Beyond the loss of individual animals, coyote hunting causes the take of red wolves by disrupting red wolf breeding when red wolves are shot. Waits Decl., ¶¶ 13-15; Wheeler Decl., ¶ 18. The USFWS has noted that “gunshot mortality must be addressed in order to [maintain] the upward growth of the red wolf” population because “gunshot mortality has reduced the number of breeding pairs and pups” Waits Decl., Ex. M (5-Yr. Rev.), at 28-9. Red wolf breeders (paired adult red wolves that will potentially birth pups in a given calendar year) are disproportionately killed by gunshot. Waits Decl., ¶ 14; Ex. M (5-Yr. Rev.), at 19, 28. In fact, gunshot is “the greatest known cause of breeder mortality.” Waits, Decl., ¶ 14. The death of a breeding wolf has multiple negative effects on the red wolf population, including a reduction in pups recruited per litter and an increase in interbreeding between red wolves and coyotes due to the disruption of stable breeding pairs of red wolves. Waits Decl., ¶¶ 14-15; Beeland Decl., ¶ 18. Coyote-red wolf hybridization threatens the genetic integrity of the red wolf species and could lead to the extinction of the red wolf by “genetic swamping – when the genes of a more common species dominate and replace those of a more imperiled species.” Waits Decl., ¶ 4. The disruption to red wolf breeding caused by gunshot is especially significant because wolves are more likely to be shot during the fall hunting season, which occurs just before the red wolf breeding season. Waits, Decl., ¶ 13; Wheeler Decl., Ex. K (Daily Reflector article), at 2.

Coyote hunting also harms and harasses red wolves because the shooting of coyotes in undermines adaptive management activities aimed at reducing coyote-red wolf hybridization. Reducing the risk of coyote-red wolf interbreeding, including through the sterilization of coyotes

in the Recovery Area, is a key part of the USFWS Red Wolf Recovery Program. See Wheeler Decl., Ex. D (USFWS Letter), at 1-2; Waits Decl., ¶ 8, 9, 10, 11, 16. The sterilization program works in this way:

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.

Wheeler Decl., Ex. D (USFWS Letter), at 1-2. The killing of sterilized placeholder coyotes allows intact coyotes to “fill the empty space” in the ecosystem previously occupied by the placeholder. Wheeler Decl., Ex. D (USFWS Letter), at 2; Waits Decl., ¶ 16. For this reason, the USFWS has stated that the killing of sterilized coyotes “undermin[es] our management strategy to use coyotes as placeholders in making progress toward red wolf recovery.” Wheeler Decl., Ex. D (USFWS Letter), at 2.

The continued take of red wolves caused by the Commission’s authorization of coyote hunting is harming Plaintiffs’ members’ interest in appreciating red wolves in the wild. The six confirmed or suspected red wolf gunshot deaths just since October 27, 2013, as well as ongoing harm and harassment due to disruptions in breeding and red wolf population dynamics, underscore Plaintiffs’ concerns that the authorization of coyote hunting within the Red Wolf Recovery Area impedes recovery of the red wolf species. A preliminary injunction is necessary to preserve the status quo and to protect Plaintiffs from suffering irreparable harm.³

³ Plaintiffs, who have members who regularly look for, observe, study, and appreciate red wolves in the wild, and whose ability to engage in these activities is compromised by red wolf gunshot mortality, have standing to bring this suit. See Wheeler, Storie, Beeland, Liss, and Rylander Declarations, Pls.’ Attachments 1, 3, 4, 8, and 9; see also Friends of the Earth v. Laidlaw Envtl. Serv., 528 U.S. 167, 183 (2000) (“[E]nvironmental plaintiffs adequately allege injury in fact

STANDARD OF REVIEW

The ESA citizen suit provision authorizes this Court “to enjoin any person ... who is alleged to be in violation of any provision” of the ESA. 16 U.S.C. § 1540(g). Generally, “[a] plaintiff seeking a preliminary injunction must establish [1] that 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 Res. Def. Council, 555 U.S. 7, 20 (2008); Pashby v. Delia, 709 F.3d 307, 320 (4th Cir. 2013).

The purpose of a preliminary injunction is to “preserve the status quo until the rights of the parties can be fairly and fully investigated and determined by strictly legal proof and according to the principles of equity.” Wash. Cnty., N.C. v. U.S. Dep’t of the Navy, 317 F. Supp. 2d 626, 631 (E.D.N.C. 2004) (quoting Sinclair Refining Co. v. Midland Oil Co., 55 F.2d 42, 45 (4th Cir. 1932)). “A preliminary injunction is not a final adjudication of the rights of the parties, but rather an order temporarily reserving the rights of the parties.” Id. (citing Duckworth v. James, 267 F.2d 224, 231 (4th Cir. 1959)).

In applying the standard for a preliminary injunction, the Court should be mindful that Congress has clearly spoken “in favor of affording endangered species the highest of priorities.” Am. Rivers v. U.S. Army Corps of Eng’rs, 271 F. Supp. 2d 230, 249 (D.D.C. 2003) (quoting TVA v. Hill, 437 U.S. 153, 194 (1978)). The “incalculable” harm from the loss of an endangered species and the “overwhelming need to devote whatever effort and resources [are]

when they aver that they use the affected area and are persons for whom the aesthetic and recreational values of the area will be lessened by the challenged activity.” (citations omitted); Lujan v. Defenders of Wildlife, 504 U.S. 555, 562-63 (1992) (“Of course, the desire to use or observe an animal species, even for purely aesthetic purposes, is undeniably a cognizable interest for purposes of standing.”); Japan Whaling Ass’n v. Am. Cetacean Soc’y, 478 U.S. 221, 230, n. 4 (1986) (finding that plaintiffs who engaged in “whale watching and studying” had standing to challenge activity that killed whales).

necessary to avoid further diminution of natural and worldwide wildlife resources” tips heavily in favor of protecting endangered species when considering the balance of harms and the public interest. Id. at 261 (quoting TVA v. Hill, 437 U.S. at 177 (internal citation omitted)).

Given the language and intent of the ESA, moreover, even a full ruling on the merits of an ESA section 9 claim may be granted (1) in the face of wholly-future violations of the ESA, where no past violation has occurred, see Animal Welfare Inst. v. Beech Ridge Energy, 675 F. Supp. 2d 540, 560-61 (D. Md. 2009) (hereinafter “Beech Ridge”); and (2) where a plaintiff shows, “by a preponderance of the evidence, that the challenged activity is reasonably certain to imminently harm, kill, or wound the listed species.” Id. at 563. Requiring absolute certainty of future take, “would frustrate the purpose of the ESA to protect endangered species before they are injured and would effectively raise the evidentiary standard above a preponderance of the evidence.” Id. at 564.

ARGUMENT

I. Plaintiffs Are Likely To Succeed on the Merits of Their Claims.

Considered “the most comprehensive legislation for the preservation of endangered species ever enacted by any nation,” the ESA embodies Congress’s “plain intent” to “halt and reverse the trend toward species extinction, whatever the cost.” TVA v. Hill, 437 U.S. at 180, 184. The Fourth Circuit more recently declared that the “overall federal scheme [of the ESA is] to protect, preserve, and rehabilitate endangered species, thereby conserving valuable wildlife resources important to the welfare of our country.” Gibbs v. Babbitt, 214 F.3d 483, 492 (4th Cir. 2000); Beech Ridge, 675 F. Supp. 2d at 543. Section 9 of the ESA, which prohibits the taking of endangered species without a permit or other authorization, is, moreover, the “cornerstone of the statute.” See Gibbs v. Babbitt, 214 F.3d at 487.

This is the legal backdrop against which the Commission has authorized the intentional hunting of coyotes, which are nearly impossible to distinguish from one of the world's most endangered species, in the five-county area where the last 100 wild members of that species currently exist. Moreover, the Commission has not only authorized the continued hunting of coyotes, which is known to cause the take of imperiled red wolves, but has further authorized the hunting of coyotes at night, despite the explicit objections of the USFWS, the expert agency charged with the conservation and stewardship of endangered red wolves. The mistaken identification of red wolves as coyotes has been a known problem for years, and this problem becomes almost insurmountable when visibility is reduced at night. In addition, the Commission was aware that its authorization of coyote hunting was likely to result in the indirect harm of red wolves through disruption of pack dynamics and breeding behavior, including through decreased reproduction and through the risk of producing hybrid litters. Nonetheless, the Commission chose to continue and expand its authorization of activities known to cause the take of red wolves. The Commission has thus violated 16 U.S.C. §§ 1538(a)(1)(G) and 1538(g) by causing the take of endangered red wolves.

A. The ESA Prohibits the Take of Listed Species Except as Specifically Provided

Section 9 of the ESA prohibits any person from “taking” an endangered species. 16 U.S.C. § 1538(a)(1)(B). In general, this prohibition applies equally to threatened species, unless otherwise indicated by a species-specific rule promulgated by the USFWS pursuant to Section 4(d) of the ESA. 50 C.F.R. § 17.31(a); Loggerhead Turtle v. Cnty. Council of Volusia Cnty., Fla., 148 F.3d 1231, 1237 (11th Cir. 1998) (take prohibition applies to threatened species). It is also unlawful for any person to violate regulations pertaining to threatened and endangered species. 16 U.S.C. § 1538(a)(1)(G).

“[T]he ESA broadly defines ‘take’ to mean ‘harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.’” Defenders of Wildlife v. EPA, 882 F.2d 1294, 1300 (8th Cir. 1989) (quoting 16 U.S.C. § 1532(19)); see also Strahan v. Coxe, 127 F.3d 155, 162 (1st Cir. 1997) (“‘Take’ is defined . . . in the broadest possible manner to include every conceivable way in which a person can ‘take’ or attempt to ‘take’ any fish or wildlife”) (quoting S. Rep. No. 93-307, at 7 (1973)). “Harm” means “an act which actually kills or injures wildlife,” including habitat modification or degradation that “injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding, or sheltering.” 50 C.F.R. § 17.3. “Harass” means “an intentional or negligent act or omission which creates the likelihood of injury to wildlife by annoying it to such an extent as to significantly disrupt normal behavioral patterns which include, but are not limited to, breeding, feeding, or sheltering.” Id.

Because the red wolf was reintroduced into eastern North Carolina pursuant to Section 10(j) of the ESA, it is treated as a threatened species for purposes of Section 9. See 16 U.S.C. § 1539(j)(2)(C); Gibbs v. Babbitt, 214 F.3d at 487. Accordingly, the USFWS has promulgated regulations specifying the specific “limited circumstances” in which the take prohibitions of Section 9 do *not* apply to the taking of red wolves. Id. at 488. Under the special rules governing take of the experimental red wolf population in North Carolina, take unrelated to management or education is prohibited except as specifically provided by 50 C.F.R. § 17.84(c)(4). See 50 C.F.R. § 17.84(c)(2). In particular, the following actions within the Red Wolf Recovery Area are allowed as long as they are reported within 24 hours to the refuge manager or the State wildlife enforcement officer for investigation:

- i. The take of a red wolf on private lands if the take is “not intentional or willful, or is in defense of that person’s life or the lives of others”;

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

Id. § 17.84(c)(4). See also Pls.’ Att. 6, at 1 (Letter from Cynthia Dohner to Gordon Myers, Nov. 7, 2012) (“explain[ing] the status of the [experimental red wolf population] under the ESA”).

Any take of members of the experimental population of red wolves that does not fall within one of these limited exceptions, or that is not reported within 24 hours, is illegal take in violation of the ESA. Id. § 17.84(c)(2). Any take that occurs outside the specific exceptions is also in violation of 16 U.S.C. § 1538(a)(1)(G), which makes it unlawful to “violate any regulation pertaining to any such species or to any threatened species of fish or wildlife”

B. The ESA’s Take Prohibition Applies to Third Parties That Authorize Activities Causing Take to Occur

Not only do direct actions causing the take of listed species violate Section 9’s take prohibition, but the plain language of the ESA also prohibits government agencies and officials from authorizing activities that result in the take of listed species. According to the Act, it is unlawful for “any person” to “cause to be committed” any offense described in Section 9, including take of listed species or the violation of regulations pertaining to those species. 16 U.S.C. § 1538(g). The term “person” includes “any officer, employee, agent, department, or instrumentality ... of any State, municipality, or political subdivision of a State” Id.

§ 1532(13). Under the red wolf special rule it is also “unlawful for any person to ... cause to be committed” prohibited take. 50 C.F.R. § 17.84(c)(8).

Courts have consistently held government agencies and officials liable under Section 9 of the ESA for authorizing activities that result in the taking of listed species. “[A] governmental third party pursuant to whose authority an actor directly exacts a taking ... may be deemed to have violated the provisions of the ESA.” Strahan v. Coxe, 127 F.3d at 163 (holding state officers caused take of endangered whales by licensing and permitting fishing); 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 at 1301 (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).

In Defenders of Wildlife v. EPA, the Eighth Circuit concluded that the EPA caused the take of endangered species through its registration of pesticides, even though other persons were manufacturing, distributing, and applying the pesticides. Defenders of Wildlife, 882 F.2d at 1300-01. The plaintiffs argued that the EPA’s continued registration of pesticides containing strychnine was resulting in the poisoning of threatened and endangered species, and thus constituted illegal take under Section 9 of the ESA. Id. at 1298. The Eighth Circuit held that the

EPA’s registration of the pesticides containing strychnine “had a prohibited impact on endangered species.” Id. at 1301. The court first noted that endangered species had eaten strychnine bait, and had died as a result. Id. The court next recognized that the strychnine pesticides could be distributed for use only if they were registered by the EPA. Id.

The court concluded:

Consequently, the EPA’s decision to register pesticides containing strychnine or to continue these registrations was critical to the resulting poisonings of endangered species. The relationship between the registration decision and the deaths of endangered species is clear.

Id. Therefore, even though farmers and ranchers were the persons actually using the pesticides, the Eighth Circuit held that the “EPA’s strychnine registrations constituted takings under the ESA.” Id. at 1303.

Similarly, in Strahan v. Coxe, a conservationist filed an ESA citizen suit against state officials, alleging that the state’s licensing of commercial fishing operations in Massachusetts violated Section 9 of the ESA because it was resulting in the take of endangered whales. The First Circuit concluded that the ESA “not only prohibits the acts of those parties that directly exact the taking, but also bans those acts of a third party that bring about the acts exacting a taking.” Strahan, 127 F.3d at 163. The court therefore held that “a governmental third party pursuant to whose authority an actor directly exacts a taking of an endangered species may be deemed to have violated the provisions of the ESA.” Id.

C. The Commission’s Authorization of Coyote Hunting Is Causing the Take of Red Wolves

As noted above, the Commission’s authorization of coyote hunting in the Red Wolf Recovery Area is causing the take of endangered red wolves in three ways: (1) Red wolves are shot when they are mistaken for coyotes; (2) reproduction and behavioral patterns of red wolves are significantly disrupted, constituting “harm” and “harassment” under the ESA, when their

breeding or pack mates are shot; and (3) reproduction and behavioral patterns of red wolves are disrupted, constituting “harm” and “harassment” under the ESA, when sterilized coyotes are shot and reproductively intact coyotes are allowed to enter the Red Wolf Recovery Area, increasing the risk of hybridization.

Hunting is not allowed in North Carolina without a hunting license issued by the State. See N.C. Gen. Stat. § 113-270.1B; N.C. Gen. Stat. § 113-270.2. Furthermore, hunting is not allowed if it is not in compliance with all applicable laws and regulations. 15A N.C. Admin. Code 10B .0201. The State’s hunting regulations include 15A N.C. Admin. Code 10B .0219, which provides that coyote hunting is authorized year-round within the State of North Carolina, including within the Red Wolf Recovery Area, with no limits or reporting requirements, and, as of August 1, 2013, at night with the use of artificial lights. The Commission has the authority to prescribe the manner of take and to set hunting seasons and bag limits for wild animals not classified as game, such as coyotes. N.C. Gen. Stat. §§ 113-291.1; 113-291.2.

The Commission’s authorization of coyote hunting significantly increases the likelihood of red wolf gunshot mortality due to the similarity in size and appearance of red wolves and coyotes. The record is clear that even experts and those at close range often cannot clearly distinguish between the two species in the wild. See Murray Decl., ¶ 10 (“[B]ecause red wolves and coyotes are morphologically similar and it is difficult to distinguish the two species in the field ... coyote hunters surely are challenged to distinguish between the two.”), ¶ 11 (“[D]ifferentiation between the two groups is a challenge, especially in the field.”); Storie Decl., ¶ 11 (“Despite my years of doing public education regarding red wolves, and my experience with red wolves in captivity, I myself was unable to tell if the animal was a coyote or a juvenile red wolf – and this was looking at the animal close-up. Thus I question whether a hunter is able to

tell the difference between a red wolf and a coyote, especially at a long distance or at night.”); Wheeler Decl., ¶ 12; Beeland Decl., ¶ 14.

The problem of mistaken identity due to similarity of appearance was specifically raised by the USFWS to the Commission during its deliberations regarding the night hunting rule. See Wheeler Decl., Ex. D (USFWS Letter) at 1 (“The Service is concerned that the proposed night hunting regulations will result in red wolves being mistaken for coyotes and inadvertently shot.”) Furthermore, reports from the USFWS Red Wolf Recovery Team have documented that individuals who shot wolves had believed them to be coyotes. See, e.g., Wheeler Decl., Ex. G (Mortality Table), entries for 12/2/05, 10/12/12, 11/15/12, 12/19/12, 1/10/13, and 7/1/13.

In this regard, this case is similar to Strahan v. Coxe, in that it involves a license to take wildlife in a *prescribed* manner. In Strahan, the First Circuit explored the causal connection between the fishing at issue and the take of endangered whales. The Court distinguished the licensure of fishing from the general issuance of drivers’ licenses, which could not be said to *cause* the commission of crimes that happen to involve a car:

[Defendants’] first argument is that the Commonwealth'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 law]. The answer to this argument is that, 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 suggested by the defendants, *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 by exacting a taking....* In this instance, the state has licensed commercial fishing operations to use gillnets and lobster pots in specifically the manner that is likely to result in a violation of federal law. The causation here, while indirect, is not so removed that it extends outside the realm of causation as it is understood in the common law.

Strahan v. Coxe, 127 F.3d at 163-64 (emphasis added). The same is true for the hunting of coyotes in the Red Wolf Recovery Area – and especially at night – because it is not possible for

a person to hunt coyotes in the Recovery Area without the risk of committing unlawful take of red wolves.

The Commission's authorization of coyote hunting also causes the harm and harassment of red wolves through the disruption of red wolf breeding, leading to decreased red wolf reproduction and increased risk of hybridization with coyotes. See Waits Decl., ¶¶ 6-7, 12-17, Ex. I (Bohling and Waits 2011, Assessing the prevalence of hybridization between sympatric *Canis* species surrounding the red wolf (*Canis rufus*) recovery area in North Carolina), at 2153, Ex. J (Bohling 2011, Exploring Patterns and Mechanisms of Red Wolf (*Canis rufus*) Hybridization in North Carolina), at 145 (“Most [hybrid litters] followed the death of at least one member of a breeding pair of red wolves by gunshot.”); Murray Decl., ¶ 12. See also 50 C.F.R. § 17.3 (defining “harm” and “harassment” to specifically include “significant[] impair[ment]” of breeding).

Exactly this type of harm in the form of damage to the genetic integrity of a species was found to warrant issuance of a preliminary injunction in . In that case, the court held that certain snowmobiling activities could harass caribou, in part by driving them away from certain habitat areas essential for connecting different caribou populations. Without communication and interbreeding between these different populations, there would be inbreeding and a loss of genetic diversity, leading to lack of fitness. Id. at 1091. Furthermore, each of these types of take may only occur because coyote hunting is authorized by the Commission. As in Defenders of Wildlife v. EPA, 882 F.2d at 1301, the relationship between the government agency decision and the take of a threatened species is “clear,” and the Commission's authorization of coyote hunting within the Red Wolf Recovery Area should similarly be held to violate the ESA.

The take of red wolves being caused by the Commission is, moreover, likely to be in violation of 50 C.F.R. § 17.84(c). Any take that is not specifically exempted by that rule is prohibited under Section 9 of the ESA. See 50 C.F.R. § 17.84(c)(2) (“No person may take this species, except as provided in paragraphs (c)(3) through (5) and (10) of this section.”). Notably, pursuant to the red wolf special rule, *any* take of a red wolf that is *not reported* to authorities within 24 hours is in violation of the ESA, even if it would otherwise be exempted by the regulation. 50 C.F.R. § 17.84(c). This is a logical requirement to ensure that the red wolf rule, intended to be a mechanism to advance the conservation of an endangered species, does not turn into a gaping hole in the ESA’s statutory scheme. It is also a requirement that was carefully considered by the authorities charged with implementing the ESA. As the Fourth Circuit said of 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' habitats, present a classic case for legislative balancing 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 v. Babbitt, 214 F.3d at 498-99.

Thus, reporting is an essential element of the red wolf rule and its take exceptions, yet USFWS records clearly document that the vast majority of red wolf shootings were *not reported* to authorities as required by the exemptions in 50 C.F.R. § 17.84(c)(4). See Wheeler Decl., Ex. G (Mortality Table), comments column. None of the six red wolves killed by suspected gunshot since Plaintiffs’ Complaint was filed were reported pursuant. See Wheeler Decl., Ex. G (Mortality Table), entries for 10/27/13, 10/28/13, 11/6/13, 11/9/13, 11/16/13, 11/18/13. Indeed, 7 out of 10 red wolves killed by suspected gunshot in 2013, and 7 out of 10 killed by suspected

gunshot in 2012, were not reported to authorities. Id. On these facts, these takes are all in violation of the ESA.⁴

The indirect take by harm and harassment caused by disruptions to red wolf breeding and pack dynamics are similarly caused by the Commission's authorization of coyote hunting and similarly not enumerated in 50 C.F.R. § 17.84(c)(4). As such, these takes are also in violation of the ESA. 50 C.F.R. § 17.84(c)(2).

Notably, even if the Commission's authorization of coyote hunting is not responsible for every gunshot red wolf that appears in the record, or that will occur in the future, the facts demonstrate that the Commission's authorization significantly increases the risk of take of red wolves, and will likely cause the take of red wolves going forward. As explained in Beech Ridge, 675 F. Supp. 2d at 563, the risk of take is what is required for Plaintiffs to show a violation of Section 9 warranting the award of injunctive relief. Requiring absolute certainty of future take "would frustrate the purpose of the ESA to protect endangered species before they are injured and would effectively raise the evidentiary standard above a preponderance of the evidence." Id. at 564. Plaintiffs have shown sufficient likelihood of success on their claim that the Commission's authorization of coyote hunting is likely to cause future take of red wolves to warrant issuance of a preliminary injunction while the Court considers the merits of this case.

⁴ Further evidence of the importance of the reporting requirement to the red wolf conservation strategy is provided by a review of all of the species-specific rules contained at 50 C.F.R. § 17.84. The range and variety of those rules reflect the distinct and specific conservation needs of the different species. "Principles of statutory construction require a court to construe all parts [of a statute] to have meaning and, accordingly, avoid constructions that would reduce some terms to mere surplusage." In re Total Realty Mgmt., LLC, 706 F.3d 245, 251 (4th Cir. 2013) (internal quotations omitted). See also Babbitt v. Sweet Home Chapter of Cmty. for a Great Ore., 515 U.S. 687 (1995) (citing same canon of statutory construction in upholding ESA regulatory definition of harm).

II. Plaintiffs Are Likely to Suffer Irreparable Harm if an Injunction Is Not Granted.

Since Plaintiffs filed their Complaint, as described above, at least six red wolves are known or suspected to have been killed by gunshot. This brings the total for 2013 to 9 confirmed or suspected gunshot red wolves and 14 total red wolf deaths due to human causes. Based on a current population estimate of only 90-110 wolves, this is approximately 8% of the total wild red wolf population killed in less than two months. It is likely, moreover, that more wolves will be shot in the coming weeks. In the winters of 2011-2012 and 2012-2013, a total of 7 red wolves were confirmed or suspected to have been killed by gunshot between mid-December and the end of January. Even these numbers are an underestimate, as they only account for wolves that are radio-collared, and only 61 red wolves in the Recovery Area are collared at this time. See Wheeler Decl., Ex. J (Charlotte Observer article), at 2. Take by harm and harassment is also not included in these calculations. The take of red wolves caused by the Commission's authorization of coyote hunting in the Red Wolf Recovery Area, either directly by gunshot, or indirectly through the harm and harassment caused by disruptions in breeding and pack dynamics, irreparably harms Plaintiffs' recreational and aesthetic interests in observing and enjoying red wolves in the wild.

It is well-established that harm to a plaintiff's aesthetic or recreational interests is a cognizable injury. Fund for Animals v. Lujan, 962 F.2d 1391, 1396 (9th Cir. 1992) (citing Sierra Club v. Morton, 405 U.S. 727, 734 (1972)). A plaintiff's aesthetic and recreational interests are harmed by actions that impair his or her enjoyment of the environment. Sierra Club v. U.S. Army Corps of Eng'rs, 645 F.3d 978, 995-96 (8th Cir. 2011) (finding that construction of a power plant harmed plaintiff by "interfer[ing] with [his] interests in studying and enjoying the environment"). Thus, a plaintiff is harmed by actions that impair his or her ability to enjoy

wildlife in its natural environment. See Humane Soc’y of the U.S. v. Hodel, 840 F.2d 45, 52 (D.C. Cir. 1988) (finding harm where action would “deplet[e] the supply of animals and birds that refuge visitors seek to view”); see also Alaska Fish & Wildlife Fed’n v. Dunkle, 829 F.2d 933, 937 (9th Cir. 1987) (finding that a decrease in the number of migratory birds due to unlawful killing “has injured those who wish to hunt, photograph, observe, or carry out scientific studies on the migratory birds”); see also Japan Whaling Ass’n v. Am. Cetacean Soc’y, 478 U.S. 221, 230, n. 4 (1986) (finding that unlawful killing of whales harmed those who wish to observe or study the whales).

A plaintiff’s recreational and aesthetic interests are also harmed by actions that force him or her to contemplate the violent deaths of animals that the plaintiff enjoys studying or seeing in the wild. See Humane Soc’y v. Hodel, 840 F.2d at 52 (finding harm where the “existence of hunting on wildlife refuges forces [Humane Society] members to witness animal corpses and environmental degradation”); see also Fund for Animals v. Clark, 27 F. Supp. 2d 8, 14 (D.D.C. 1998) (finding that plaintiffs could be harmed by “seeing or contemplating” bison being killed through an organized hunt on federal lands).

Harm to a person’s aesthetic and recreational interests in enjoying wildlife is irreparable harm because it cannot be undone. The Supreme Court has emphasized that “[e]nvironmental 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.” 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). Environmental injuries are irreparable because they affect interests that “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.” See Fla. Key Deer v. Brown, 386 F. Supp. 2d 1281, 1286 (S.D. Fla. 2005), aff’d sub nom. Fla. Key Deer v. Paulison, 522 F.3d 1133 (11th Cir. 2008) (stating that “in determining whether the irreparable injury prong has been satisfied, the Court considers whether environmental harm is likely to occur.”).

Therefore, courts will generally provide injunctive relief when the unlawful killing of endangered or threatened animals is likely. See, e.g., Beech Ridge, 675 F. Supp. 2d at 580 (stating that “[b]ecause the Court has found that the Beech Ridge Project will take Indiana bats, injunctive relief is appropriate”). Courts grant injunctive relief in these circumstances because the injury caused by the killing of wildlife is a paradigmatic example of irreparable harm – the deaths are permanent and cannot be remedied with money damages. See Sierra Club v. Martin, 71 F. Supp. 2d 1268, 1327 (N.D. Ga. 1996) (enjoining logging that would destroy “sensitive plants and animals” because “[n]o monetary award can recompense this injury”); see also Fund for Animals v. Espy, 814 F. Supp. at 151 (enjoining a bison hunt because “the sight, or even the contemplation, of treatment in the manner contemplated of the wild bison ... would inflict aesthetic injury ... not compensable in money damages”).

Plaintiffs will suffer irreparable harm to their recreational and aesthetic interests if this Court does not grant injunctive relief. The gunshot death of red wolves harms the recreational and aesthetic interests of Plaintiffs and their members in two major ways. First, coyote hunting in the Red Wolf Recovery Area is negatively impacting the health and recovery of the wild red wolf population, which affects the ability of Plaintiffs and their members to see, hear, study, track, and otherwise enjoy red wolves in their natural habitat. Wheeler Decl., ¶¶ 22-23; Beeland Decl., ¶¶ 21, 23; Storie Decl., ¶ 17. Second, coyote hunting in the Red Wolf Recovery Area

affects the ability of Plaintiffs and their members to enjoy red wolves in the wild by forcing them to contemplate the violent shooting deaths of red wolves. Wheeler Decl., ¶¶ 17, 20-21; Beeland Decl., ¶ 22; Storie Decl., ¶¶ 12-13.

In this case the loss of even a few red wolves is likely to have a significant impact on Plaintiffs' ability to enjoy red wolves in the wild. As outlined above, it is likely, based on data from past years, that several red wolves will be shot before a final decision can be rendered in this case and that at least some of them will be shot by coyote hunters. Given that there are only about 100 red wolves in the wild, any red wolf deaths have a significant impact on the red wolf population and species recovery. The Fourth Circuit explained:

Once a species has been designated as endangered, there are by definition only a few remaining animals. Therefore, the effects ... should not be viewed from the arguably small [] effect of one local taking, but rather from the effect that single takings multiplied would have on advancing the extinction of a species. Each taking impacts the overall red wolf population ...

Gibbs v. Babbitt, 214 F.3d 483, 498 (4th Cir. 2000).

A recent plateau – and apparent decline⁵ – in red wolf population growth, coupled with consistently high annual gunshot mortality, indicates that the cumulative effect of gunshot deaths is having a population-level impact. Waits Decl., ¶¶ 12-17; Murray Decl., ¶¶ 5-7, 13. While it is impossible to yet know the population impact of the six known or suspected gunshot deaths that have occurred since October 27, 2013, it seems likely that the impact will extend beyond the loss of the individual wolves from the population. All six red wolves of breeding age, and three of the wolves were members of breeding pairs. See Wheeler Decl., Exs. J (Charlotte Observer

⁵ See Waits Decl., ¶ 11; compare Causes of mortality in wild red wolves (*Canis rufus*) 2010-2013, available at <http://www.fws.gov/redwolf/Images/MortalityTable.pdf> (last visited Dec. 13, 2013) (showing decline in known wild red wolves and population estimates from prior years) to Red Wolf Recovery Program website, available at <http://www.fws.gov/redwolf/> (last visited Dec. 13, 2013) (showing drop in wild red wolf population estimate from 2012 to 2013).

article) and K (Daily Reflector article). As stated by the Red Wolf Recovery Program Coordinator, the recent deaths have resulted in a reduction of breeding pairs in the Recovery Area “from 11 breeding pairs to eight [sic] in less than a month [which are] horrific numbers when you’ve got such a small number to begin with.” Wheeler Decl., Ex. J (Charlotte Observer article).

Deaths of breeding red wolves in the late fall and early winter are especially detrimental to the red wolf population because “[w]hen red wolf breeders ... are lost to gunshot mortality just before or during the [late winter] breeding season, hybridization often occurs before new red wolf pairs form” Waits Decl., ¶ 16. Most importantly, as noted above, because coyote hunting is authorized year-round in the Recovery Area, the risk to wolves will continue in the weeks to come. See Wheeler Decl., Ex. G (Mortality Table), entries for December and January deaths.

Based on existing case law and the facts before this Court, Plaintiffs have shown irreparable harm resulting from the Commission’s authorization of coyote hunting within the Recovery Area. The Court should grant Plaintiff’s Motion for Preliminary Injunction to preserve the status quo pending resolution of the merits of this case.

III. The Balance of Harms and the Public Interest Justify Granting Injunctive Relief.

Congress has made it “abundantly clear that it has given the policy of conservation of endangered species ‘the highest of priorities.’” Am. Rivers, 271 F. Supp. 2d at 262 (quoting TVA v. Hill, 437 U.S. at 194). The “‘language, history, and structure’ of the ESA demonstrates Congress’ determination that the balance of hardships and the public interest tips heavily in favor of the protected species.” Nat’l Wildlife Fed’n v. Burlington N. R.R., 23 F.3d 1508, 1511 (9th Cir. 1994) (citing TVA v. Hill, 437 U.S. at 174); Friends of the Earth v. U.S. Navy, 841 F.2d 927, 933 (9th Cir. 1988); Sierra Club v. Marsh, 816 F.2d 1376, 1383 (9th Cir. 1987).

Protection of endangered species is in the public interest because endangered species “are of ‘esthetic, ecological, educational, historical, recreational, and scientific value to the Nation and its people.’” Gibbs v. Babbitt, 214 F. 3d at 487 (quoting 16 U.S.C. § 1531(a)(3) (1994)). In Gibbs, the Fourth Circuit specifically noted that the wild red wolf population creates multiple public benefits, from tourism and opportunities for scientific research to the reduction of animals that harm farming enterprises, such as raccoons, deer, and rabbits. Gibbs v. Babbitt, 214 F.3d at 494-95. Simply put, conservation of the red wolf is in the best interest of the public because “[i]f we conserve the species, it will be available for the study and benefit of future generations.” Gibbs v. Babbitt, 214 F.3d at 496.

While the public interest is harmed by the Commission’s actions causing the unlawful take of red wolves, neither the Commission nor the public will be harmed by an injunction against the continued hunting of coyotes in the Recovery Area. In the Fiscal Note Review for the permanent coyote hunting 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.’ Att. 7 (Fiscal Note Review), at 2 (emphasis added). The Commission also determined that there would be no substantial economic impact, benefit or otherwise, to the public as a result of the permanent rule; thus, no fiscal note was prepared. Id. This lack of economic benefit from coyote hunting stands in contrast to the economic benefits of red wolf conservation. Gibbs v. Babbitt, 214 F.3d at 493-496 (discussing economic benefits of red wolf conservation).

An injunction against coyote hunting in the Recovery Area also will not hinder coyote management. There is evidence that shooting coyotes is an ineffective method of coyote

control, and that shooting coyotes increases coyote nuisance behavior and does not result in reduction of the coyote population. Waits Decl., ¶ 9; Beeland Decl., ¶ 13. Coyote hunting also impedes the USFWS's carefully-considered efforts to control the coyote population in the Red Wolf Recovery Area by killing the sterilized coyotes that keep fertile coyotes out of red wolf territory. Waits Decl., ¶¶ 9, 16.

An injunction against the continued hunting of coyotes in the Red Wolf Recovery Area also will not impose undue obligations on the Commission. Rather than compelling the Commission to take any specific action, an order from this Court enjoining coyote hunting in the Recovery Area will merely end the Commission's continuing violations of the ESA. See Strahan v. Coxe, 127 F.3d at 164 (rejecting defendant state agency's anti-commandeering argument).

Any minimal impacts to the Commission or to the public that may occur cannot overcome the strong public interest in conservation of endangered species codified in the ESA.

Again quoting the Fourth Circuit in Gibbs v. Babbitt:

Extinction, after all, is irreversible. If a species becomes extinct, we are left to speculate forever on what we might have learned or what we may have realized. If we conserve the species, it will be available for the study and benefit of future generations. In any event, it is for Congress to choose between inaction and preservation, not for the courts.

Gibbs v. Babbitt, 214 F.3d 483, 496 (4th Cir. 2000).

Finally, Plaintiffs have narrowly tailored their request for injunctive relief to block coyote hunting in the five-county Red Wolf Recovery Area. This approach will further limit any minimal impacts that the Commission may identify. In light of the ESA's conservation mandate, and the serious threat to red wolves posed by coyote hunting in the Red Wolf Recovery Area, the balance of harms and the public interest demonstrate that Plaintiffs' requested preliminary injunction should be granted.

CONCLUSION

For the above reasons, Plaintiffs respectfully request that this Court grant this Motion for Preliminary Injunction.

Respectfully submitted, this the 16th day of December, 2013.

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CERTIFICATE OF SERVICE

I hereby certify that on December 16, 2013, I electronically filed the foregoing **Memorandum in Support of 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 Defendants. A paper copy is being provided to Judge Boyle via overnight mail.

This the 16th day of December, 2013.

/s/ Sierra B. Weaver
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