

broadly recognized as providing irreplaceable nesting, foraging, and sheltering habitat to birds and other species. The 66,000-acre refuge is composed primarily of bays and estuarine wetlands, with barrier islands that run along the Atlantic Ocean. Nearly 300 species of migratory and resident birds live within Cape Romain. The refuge also harbors species and critical habitat that are protected by the ESA.

3. Since at least 2014, the Service has allowed and facilitated the collection of horseshoe crabs in Cape Romain by commercial harvesters. Horseshoe crab harvesting occurs on a yearly basis when horseshoe crabs spawn in the intertidal zones of islands in the refuge. Areas where the Service has allowed horseshoe crab harvesting to occur are important habitat for migratory birds, along with species listed under the ESA.

4. Despite the importance of the refuge and the overlapping locations used by harvesters and wildlife, the Service has failed to comply with federal law in allowing and facilitating commercial horseshoe crab harvesting. The Service has violated the Refuge Improvement Act and its regulations by failing to determine whether commercial horseshoe crab harvesting is compatible with Cape Romain's purposes, see 16 U.S.C. § 668dd(d)(3)(A)(i), and failing to issue the harvesters a Special Use Permit that authorizes individuals to conduct commercial activities inside of the refuge, see 50 C.F.R. § 27.97. Overall, by authorizing commercial horseshoe crab harvesting in Cape Romain, which has killed chicks, destroyed eggs, disturbed countless birds, and adversely affected their abilities to breed, feed and shelter, the Service has breached its legal obligation under the Refuge Improvement Act to ensure that its management of the refuge will provide for the conservation of wildlife and will not undermine the refuge's purposes. 16 U.S.C. § 668dd(a)(4), (a)(4)(A) (mandating wildlife conservation), (a)(4)(D) (mandating compliance with refuges' purposes).

5. The agency has also failed to comply with the substantive and procedural requirements of the ESA because it has never consulted on the many impacts of horseshoe crab harvesting on ESA-listed species and their critical habitat in Cape Romain. Id. § 1536(a)(2). Commercial horseshoe crab harvesting in Cape Romain is causing the unpermitted take of the threatened red knot, a species of shorebird, in violation of section 9 of the ESA. Id. § 1538(a)(1)(B), (g). Harvesting operations are significantly disrupting red knots' ability to feed on horseshoe crab eggs, which the species depends upon for its survival.

6. Similarly, harvesting operations have resulted in an unauthorized "take" under the MBTA because the process repeatedly disturbs nesting migratory birds, which causes them to flush off their nests, and at times results in their exposed chicks or eggs being eaten by predators or their eggs overheating in the sun. See id. § 703(a).

7. Accordingly, Plaintiff seeks declaratory relief that the Service is in violation of the Refuge Improvement Act, the ESA, and the MBTA. Plaintiff also seeks an order requiring the agency to halt its authorization of horseshoe crab harvesting in Cape Romain until it remedies these violations.

JURISDICTION AND VENUE

8. The Court has jurisdiction over this matter under 28 U.S.C. § 1331 because this case presents a federal question under the laws of the United States, including the Refuge Improvement Act, the ESA, and the MBTA. An actual, justiciable controversy now exists between Plaintiff and Defendant, and the requested relief is proper under 28 U.S.C. §§ 2201-2202, 5 U.S.C. §§ 701-706, and 16 U.S.C. § 1540(g).

9. Venue is proper in this Court pursuant to 28 U.S.C. §§ 1391(b)(2) and 1391(e) because a substantial part of the events giving rise to the claims occurred in this district.

10. Pursuant to 16 U.S.C. § 1540(g), Plaintiff provided Defendant with notice of its ESA violations on May 13, 2020, more than 60 days prior to the commencement of this case. Defendant confirmed receipt of this notice on that same date. Defendant has not cured its violations of law.

PARTIES

11. Plaintiff DEFENDERS OF WILDLIFE is a non-profit membership organization that is one of the nation's leading advocates for endangered species and wildlife conservation. Founded in 1947, Defenders is headquartered in Washington, D.C. and maintains six regional field offices throughout the country. Defenders is a science-based conservation organization with more than 1.8 million members and supporters nationwide and around the world, including approximately 17,500 in South Carolina. Defenders is dedicated to the protection of all native wild animals and plants in their natural communities and the preservation of the habitats upon which they depend. Defenders advocates for new approaches to wildlife conservation that will help keep species from becoming threatened and endangered, and it employs education, litigation, research, legislation and advocacy to defend wildlife and their habitat. Defenders brings this action on its own institutional behalf and on behalf of its members.

12. Members of Defenders visit Cape Romain for several recreational purposes, including boating, wildlife viewing, birding, and photography. Members enjoy birding at the refuge, and have identified many bird species, including American oystercatchers, plovers, and red knots. One member has not yet spotted a red knot in Cape Romain, but it is on his list of birds he hopes to identify. He has ferry tickets for the refuge that he intends to redeem this year. At least one member, who extensively photographs the birds he sees in Cape Romain, has noticed a decline in the size of red knot flocks at the refuge over time, and closely tracks their

declining global populations. Defenders members are concerned that the harvest of horseshoe crabs is contributing to a reduction in bird populations at the refuge.

13. Defendant U.S. FISH AND WILDLIFE SERVICE (“Service”) is a federal agency within the U.S. Department of the Interior (“DOI”) that is responsible for the administration of the National Wildlife Refuge System and the Endangered Species Act on behalf of DOI.

STATUTORY AND REGULATORY FRAMEWORK

I. The Refuge Improvement Act

14. The National Wildlife Refuge System is managed pursuant to the National Wildlife Refuge System Administration Act of 1966, Pub. L. No. 89-669, 80 Stat. 927 (1966), as amended by the National Wildlife Refuge System Improvement Act 1997, Pub L. No. 105-57, 111 Stat. 1252 (1997).

15. The primary mission of the National Wildlife Refuge System is “to administer a national network of lands and waters for the conservation, management, and where appropriate, restoration of the fish, wildlife, and plant resources and their habitats within the United States for the benefit of present and future generations of Americans.” 16 U.S.C. § 668dd(a)(2).

16. The Refuge Improvement Act requires the Service, “[i]n administering the [Refuge] System,” to “provide for the conservation of fish, wildlife, and plants, and their habitats within the System.” *Id.* § 668dd(a)(4), (a)(4)(A).

17. The term “conservation” means “to sustain and, where appropriate, restore and enhance, healthy populations of fish, wildlife, and plants utilizing, in accordance with applicable Federal and State laws, methods and procedures associated with modern scientific resource programs.” *Id.* § 668ee(4).

18. The act further asserts that the agency must “ensure that the mission of the

[Refuge] System . . . and the purposes of each refuge are carried out.” Id. § 668dd(a)(4), (a)(4)(D).

19. According to the Refuge Improvement Act, “[t]he term[] . . . ‘purposes of each refuge’ mean[s] the purposes specified in or derived from the law, proclamation, executive order, agreement, public land order, donation document, or administrative memorandum establishing, authorizing, or expanding a refuge, refuge unit, or refuge subunit.” Id. § 668ee(10).

20. Under most circumstances, “all areas included in the [Refuge System] are closed to public access until and unless [the Service] open[s] the area for a use . . . in accordance with the [Refuge Improvement Act and its regulations]” 50 C.F.R. § 25.21(a); see also United States v. Sams, 45 F. Supp. 3d 524, 525 (E.D.N.C. 2014) (the Refuge Improvement Act “closes national wildlife refuges in all states except Alaska to all uses until opened.”).

21. Under subsection (d) of the Refuge Improvement Act, the Service may “permit the use of any area within the System for any purpose . . . whenever [it] determines that such uses are compatible with the major purposes for which such areas were established.” 16 U.S.C. § 668dd(d)(1)(A). However, with limited exceptions, the Service cannot “permit a new use . . . or expand, renew, or extend an existing use” without first determining whether that use is compatible. Id. § 668dd(d)(3)(A)(i). For a use to be “compatible” it must be “a wildlife-dependent recreational use or any other use of a refuge that, in the sound professional judgment of the [Service], will not materially interfere with or detract from the fulfillment of the mission of the System or the purposes of the refuge.” Id. § 668ee(1).

22. To decide whether a use would be compatible, the Service must engage in a multi-factored analysis called a “compatibility determination.” Examples of requisite considerations during the analysis include the impacts of the use on the refuge’s purpose,

whether the use is a priority public use, and where, when, and how a use would be conducted. 50 C.F.R. § 26.41(a)(6)(i)–(iv), (a)(8). If it is possible for a use to achieve compatibility with modifications, then the Service would use these factors to tailor stipulations necessary to ensure of compatibility. *Id.* § 26.41(a)(11). Compatibility determinations for a refuge must be signed by the Refuge Manager, along with the Regional Chief of the Refuge System. *Id.* § 25.12(a).

23. The Refuge Improvement Act also requires the Service to develop “comprehensive conservation plans” for refuges, 16 U.S.C. § 668dd(e), which “describe[] the desired future conditions of a refuge or planning unit and provide[] long-range guidance and management direction to achieve the purposes of the refuge,” 50 C.F.R. § 25.12. They are intended to “maintain[] and, where appropriate, restore[] the ecological integrity of each refuge and the Refuge System.” *Id.* The Service must manage each refuge “in a manner consistent with [its] plan,” 16 U.S.C. § 668dd(e)(1)(E), and may “revise the conservation plan as may be necessary,” *id.* § 668dd(e)(1)(A)(iv).

24. The Refuge Improvement Act furthermore authorizes the Service to issue regulations to carry out the act. *Id.* § 668dd(b)(5). These regulations “apply to areas of land and water held by the United States in fee title and to property interests in such land and water in less than fee For areas held in less than fee, the regulations . . . apply only to the extent that the property interest held by the United States may be affected.” 50 C.F.R. § 25.11(a).

25. Pursuant to Refuge Improvement Act regulations, no one may conduct commercial activities on a refuge unless they are issued a permit by the Service, often referred to as a “special use permit.” 50 C.F.R. § 27.97. Refuge Improvement Act regulations also assert that “[d]isturbing, injuring, spearing, poisoning, destroying, [or] collecting . . . any plant or animal on any national wildlife refuge is prohibited except by special permit unless otherwise

permitted.” Id. § 27.51(a).

26. In addition, the regulations delineate circumstances when behavior is entirely prohibited, such as “operat[ing] a boat in a reckless or negligent manner, or in a manner so as to endanger or be likely to endanger any . . . wildlife.” Id. § 27.32(b)(2).

II. The Endangered Species Act

27. The ESA is “the most comprehensive legislation for the preservation of endangered species ever enacted by any nation.” Tenn. Valley Auth. v. Hill, 437 U.S. 153, 180 (1978). It was enacted “to provide a program for the conservation of . . . endangered species and threatened species” and “to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved.” 16 U.S.C. § 1531(b).

28. Pursuant to the ESA, “[t]he term “species” includes any subspecies of fish or wildlife or plants, and any distinct population segment of any species of vertebrate fish or wildlife which interbreeds when mature.” Id. § 1532(16).

29. Section 7(a)(2) of the ESA mandates that all federal agencies “insure that any action authorized, funded, or carried out by [the agency] . . . is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of [critical] habitat of such species” 16 U.S.C. § 1536(a)(2); see also 50 C.F.R. § 402.02 (defining “jeopardize the continued existence of” and “destruction or adverse modification”). The Ninth Circuit has described section 7(a)(2) as the “heart of the ESA.” Karuk Tribe of Cal. v. U.S. Forest Serv., 681 F.3d 1006, 1019 (9th Cir. 2012) (quoting W. Watersheds Project v. Kraayenbrink, 632 F.3d 472, 495 (9th Cir. 2011)).

30. To carry out this substantive mandate, all federal agencies are required to consult with the appropriate federal wildlife agency—the Service and/or the National Marine Fisheries

Service (“NMFS”)—on any agency “action” that “may affect” listed species or designated critical habitat. 16 U.S.C. § 1536(a)(2); 50 C.F.R. § 402.14(a).

31. An agency “action” is defined broadly and includes “all activities or programs of any kind authorized, funded, or carried out, in whole or in part, by Federal agencies.” Id. § 402.02. The action must also involve “discretionary Federal involvement or control.” Id. § 402.03.

32. The “may affect” threshold, in turn, is “relatively low.” Karuk Tribe, 681 F.3d at 1027 (quoting Cal. ex rel. Lockyer v. U.S. Dep’t of Agric., 575 F.3d 999, 1018 (9th Cir. 2009)). “Any possible effect, whether beneficial, benign, adverse or of an undetermined character” triggers the consultation requirement. Id. (quoting Lockyer, 575 F.3d at 1018–19; 51 Fed. Reg. 19,926, 19,949 (June 3, 1986)) (emphasis omitted). “An agency may avoid the consultation requirement only if it determines that its action will have ‘no effect’ on a listed species or critical habitat.” Karuk Tribe, 681 F.3d at 1027 (citing Sw. Ctr. for Biological Diversity v. U.S. Forest Serv., 100 F.3d 1443, 1447–48 (9th Cir. 1996)).

33. The action agency must consider listed species and critical habitat within the entire “action area,” which is defined to include “all areas to be affected directly or indirectly by the Federal action and not merely the immediate area involved in the action.” 50 C.F.R. § 402.02. “Effects of the action” are defined as “all consequences to listed species or critical habitat that are caused by the proposed action” and include impacts that “may occur later in time” or “outside the immediate area involved in the action.” Id.

34. To begin the consultation process, the federal agency must contact the appropriate wildlife agency to determine whether listed species or critical habitat “may be present” in the area affected by the proposed action. 16 U.S.C. § 1536(c)(1); Medina Cnty. Env’tl. Action Ass’n

v. Surface Transp. Bd., 602 F.3d 687, 693 (5th Cir. 2010); Forest Guardians v. Johanns, 450 F.3d 455, 457 (9th Cir. 2006).

35. If a species “may be present,” the action agency must prepare a biological assessment. Medina Cnty., 450 F.3d at 694; Forest Guardians, 450 F.3d at 457. If the action agency determines in the biological assessment that the proposed action is “not likely to adversely affect any listed species or critical habitat,” 50 C.F.R. § 402.14(b)(1), and the Service or NMFS (as appropriate) issues a written concurrence with that finding, formal consultation is not required and the consultation process is complete. Id. §§ 402.12(j), (k). Alternatively, if the Service or NMFS determines during informal consultation that the proposed action is “likely to adversely affect” any listed species or critical habitat, formal consultation is required. See id. § 402.13(c); see also id. § 402.12(a).

36. At the end of the formal consultation process, the Service or NMFS issues a biological opinion in which the agency assesses whether the proposed action is likely to jeopardize the continued existence of a listed species or destroy or adversely modify any designated critical habitat. Id. § 402.14(h). If so, the wildlife agency identifies “reasonable and prudent alternatives” that avoid this violation. 16 U.S.C. § 1536(b)(3)(A); 50 C.F.R. §§ 402.02, 402.14(g), (h).

37. Because the agency has an ongoing obligation to comply with the procedural and substantive mandates of section 7, it is legally obligated to reinitiate consultation under several circumstances “where discretionary Federal involvement or control over the action has been retained or is authorized by law.” 50 C.F.R. § 402.16(a). One such circumstance is “[i]f a new species is listed or critical habitat designated that may be affected by the identified action.” Id. § 402.16(a)(4).

38. Section 9(a)(1) of the ESA has been referred to as “[t]he cornerstone of the statute.” Gibbs v. Babbitt, 214 F.3d 483, 487 (4th Cir. 2000). This section prohibits the taking of any endangered species of fish or wildlife. 16 U.S.C. § 1538(a)(1)(B). The ESA allows the Service or NMFS to extend this same prohibition to the taking of threatened species. Id. § 1533(4)(d).

39. According to the ESA, “[t]he term ‘take’ means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.” Id. § 1532(19). The term “harass” is defined as “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.” 50 C.F.R. § 17.3(c).

40. The take prohibition applies to “any . . . entity subject to the jurisdiction of the United States,” including—but not limited to—individuals, private entities, and departments or instrumentalities of the Federal Government. 16 U.S.C. § 1538; id. § 1532(13).

41. Both Congress and the federal courts have called for a broad interpretation of the ESA’s take provision. The legislature, in fact, intended the term “take” to be “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.” S. Rep. No. 93-307 (1973). The Supreme Court in Babbitt v. Sweet Home Chapter of Communities for a Great Oregon acknowledged that “[t]he Committee Reports accompanying the bills that became the ESA . . . make clear that Congress intended ‘take’ to apply broadly” 515 U.S. 687, 704 (1995).

III. The Migratory Bird Treaty Act

42. According to the Supreme Court, the Migratory Bird Treaty Act (“MBTA”) is a

“conservation statute[] designed to prevent the destruction” of migratory birds, Andrus v. Allard, 444 U.S. 51, 52 (1979), and its purpose is a “national interest of very nearly the first magnitude,” Missouri v. Holland, 252 U.S. 416, 435 (1920).

43. Congress enacted the MBTA in 1918 to implement a treaty for “the protection of migratory birds” between Great Britain (on behalf of Canada) and the United States. Act of July 3, 1918, ch. 128, 40 Stat. 755. The objective of the treaty was to create a “uniform system of protection” to “insur[e] the preservation of such migratory birds” because “a lack of adequate protection” for many migratory birds traveling through the United States left them vulnerable to extinction. Convention for the Protection of Migratory Birds, 39 Stat. 1702 (Aug. 16, 1916).

44. Congress broadened the scope of the MBTA to implement similar treaties with Mexico in 1936, Japan in 1972, and the Soviet Union in 1976. Convention between the United States of America and Mexico for the Protection of Migratory Birds and Game Mammals, 50 Stat. 1311 (Feb. 7, 1936) (Mexico Convention); Convention for the Protection of Migratory Birds and Birds in Danger of Extinction, and Their Environment, art. VI, 25 U.S.T. 3329 (Mar. 4, 1972) (Japan Convention); Convention Concerning the Conservation of Migratory Birds and Their Environment, art. IV, 29 U.S.T. 4647 (Nov. 19, 1976) (Russia Convention).

45. The MBTA protects more than 1,000 species of birds found in the United States. See 50 C.F.R. § 10.13.

46. Pursuant to the MBTA “[u]nless and except as permitted by regulations . . . it shall be unlawful at any time, by any means or in any manner, to pursue, hunt, take, capture, [or] kill . . . any migratory bird [or] any part, nest, or egg of any such bird . . . included in the terms of the conventions” 16 U.S.C. § 703(a).

47. Regulations that apply to the MBTA state that “[t]ake means to pursue, hunt,

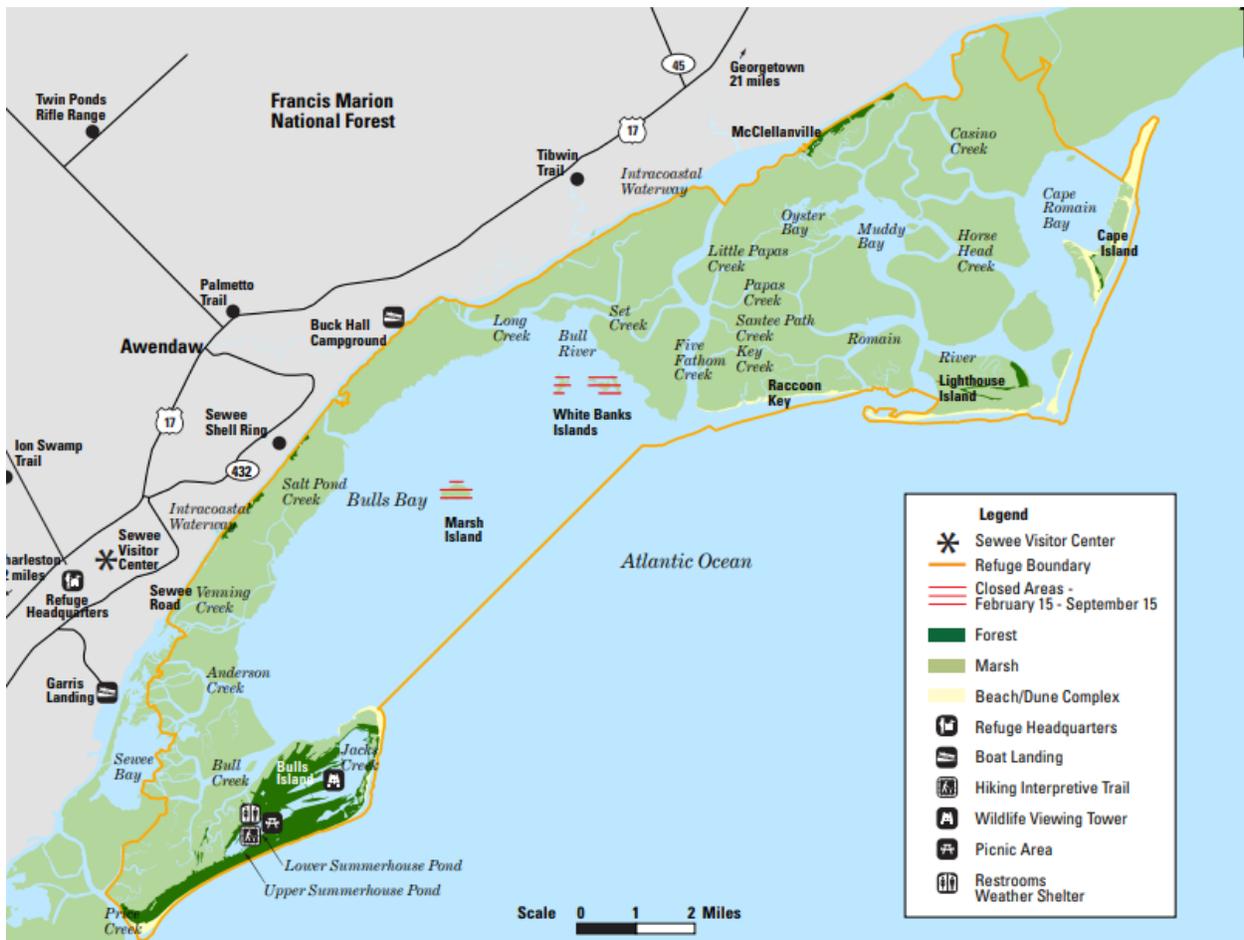
shoot, wound, kill, trap, capture, or collect, or attempt to pursue, hunt, shoot, wound, kill, trap, capture, or collect.” 50 C.F.R. § 10.12. This prohibition applies regardless of whether the take was targeted or incidental to a different activity. Nat. Res. Def. Council, Inc. v. U.S. Dep't of the Interior, No. 18-CV-4596 (VEC), 2020 WL 4605235, at *1 (S.D.N.Y. Aug. 11, 2020).

48. The MBTA authorizes the Service to promulgate regulations permitting the take of migratory birds or any part, nest, or egg thereof. 16 U.S.C. § 704(a).

FACTS GIVING RISE TO PLAINTIFF’S CLAIMS

I. Establishment of Cape Romain National Wildlife Refuge

Map of Cape Romain



Source: U.S. Fish & Wildlife Serv., <https://www.fws.gov/southeast/pdf/map/cape-romain-national-wildlife-refuge.pdf> (last visited Oct. 17, 2020).

49. The State of South Carolina and private citizens granted the federal government interests in the lands that now comprise Cape Romain National Wildlife Refuge.

50. 1930, South Carolina granted to the federal government more than 30,000 acres of the current refuge's lands, which included certain "marsh lands, sand banks, shores, edges and lands uncovered by water at low tide." S.C. Code Ann. § 3-3-210 (2018).

51. In 1932, President Herbert Hoover issued a proclamation establishing Cape Romain on these conveyed lands pursuant to the Migratory Bird Conservation Act. Proclamation No. 2000 (June 6, 1932). The Migratory Bird Conservation Act allows for the designation of refuges "for use as . . . inviolate sanctuar[ies], or for any other management purpose, for migratory birds." 16 U.S.C. § 715d.

52. In 1936, an individual named Gayer Dominick, along with his family, conveyed Bulls Island at Cape Romain to the Service. U.S. Fish & Wildlife Serv., [Welcome to Bulls Island at Cape Romain National Wildlife Refuge](https://www.fws.gov/uploadedFiles/BullIslandTearsheet12%20(1).pdf), [https://www.fws.gov/uploadedFiles/BullIslandTearsheet12%20\(1\).pdf](https://www.fws.gov/uploadedFiles/BullIslandTearsheet12%20(1).pdf) (last visited Oct. 17, 2020).

53. In 1991, South Carolina granted the federal government an interest in additional lands that now constitute Cape Romain by leasing 31,000 acres of land and water for a term of 99 years. [Lease: State of South Carolina Budget and Control Board to the United States Fish and Wildlife Service](#) (Feb. 21, 1991) (Ex. A). The lease granted the state's interest in refuge lands "uncovered by water at low tide, and all waterbottoms and waters which are included within the boundaries of the Cape Romain National Wildlife Refuge . . ." Id. at 1.

54. Thus, the Service today owns more than 30,000 acres of the land in Cape Romain that is uncovered by water at mean low tide in fee title and continues to lease the waters and waterbottoms in the refuge pursuant to the 1991 Lease.

55. The Service developed its Comprehensive Conservation Plan (“CCP”) in 2010, which in part describes the agency’s goals for the refuge and the management actions that it would take to achieve those goals. U.S. Dep’t of the Interior & U.S. Fish & Wildlife Serv., Southeast Region, Comprehensive Conservation Plan: Cape Romain Nat’l Wildlife Refuge: Charleston County, South Carolina at 17 (Oct. 2010) [hereinafter CCP] (Ex. B). The agency engaged in section 7 consultation when it developed the CCP in 2010 pursuant to the ESA, id. at 161-167, and has not reinitiated consultation on that plan.

II. Wildlife Species in Cape Romain

A. Bird Species

56. Cape Romain provides nesting, foraging, and sheltering habitat to shorebirds and seabirds, including species that are listed under MBTA regulations as being protected by the act (“migratory birds”). At least 293 species of birds have been documented in the refuge. U.S. Fish & Wildlife Serv., Cape Romain National Wildlife Refuge Bird List (Aug. 2017), <https://www.fws.gov/southeast/pdf/bird-list/cape-romain-national-wildlife-refuge.pdf>.

57. According to the CCP, the refuge is one of only four sites on the Atlantic Coast of the United States and Canada that has been classified a Western Hemisphere Shorebird Reserve Network Site of international or hemispheric importance. CCP at 50-51. Due to the refuge’s importance for colonial beach nesting birds and nesting shorebirds, the Audubon Society lists Cape Romain as an Important Bird Area. Moreover, the refuge hosts more shorebirds during spring migration than any other area except for Delaware Bay. Id. at 51.

58. Some of the bird species that nest in Cape Romain include Wilson’s plovers, black-necked stilts, brown pelicans, royal terns, least terns, sandwich terns, gull-billed terns, Forster’s terns, common terns, black skimmers, and American oystercatchers. *Id.* at 27. All of these birds are listed under the MBTA. 50 C.F.R. § 10.13. Shorebirds that use the refuge, but do not necessarily nest in it, include ESA-listed *rufa* red knots, sanderlings, short-billed dowitchers, ruddy turnstones, and dunlins. CCP at 58.

59. Some of the islands in Cape Romain where migratory birds engage in feeding, breeding, and/or sheltering include Bulls Island, Little Bulls Island, Marsh Island, Raccoon Key, and the island of White Banks.¹

60. The Cape Romain Refuge Manager (“Refuge Manager”), Sarah Dawsey, has described the refuge as being “extremely important” for shorebirds. Letter from Sarah Dawsey, Refuge Manager, Cape Romain Nat’l Wildlife Refuge, U.S. Fish & Wildlife Serv. to Joel Munn (Nov. 12, 2015) (Ex. C).² Ms. Dawsey has identified Marsh Island as being of particular importance, *id.*, and in a memorandum obtained pursuant to the Freedom of Information Act (“FOIA”), she described specific bird species that nest on Marsh Island as being of “highest” and “high” priority, Memorandum from Sarah Dawsey, Refuge Manager, Cape Romain Nat’l Wildlife Refuge, U.S. Fish & Wildlife Serv. on trespassing onto Marsh Island and White Banks, at attach. 1, 1 (undated) [hereinafter Marsh Island Memorandum] (Ex. D). These species include eastern brown pelicans, royal terns, sandwich terns, Forster’s terns, American oystercatchers,

¹ In this Complaint, Little Bulls Island means the island studied in the 2016 thesis of Fumika Takahashi, “Shorebird Utilization of Horseshoe Crab (*Limulus Polyphemus*) Eggs at Cape Romain National Wildlife Refuge, South Carolina.” See CLEMSON UNIVERSITY TIGERPRINTS, ALL THESES, 2577 at 27, 62 (2016).

² Note that Defenders made one alteration to this record by redacting the address of Mr. Munn.

black-crowned night herons, black skimmers, gull-billed terns, and Wilson’s plovers. Id. All of these species are listed under the MBTA. See 50 C.F.R. § 10.13.

B. Species and Critical Habitat Listed Under the ESA

61. Among other ESA-listed species, the threatened *rufa* red knot, the threatened piping plover, and the threatened Northwest Atlantic Distinct Population Segment (“DPS”) of the loggerhead sea turtle have all been documented within Cape Romain.

1. Rufa Red Knot

62. The *rufa* red knot (*Calidris canutus rufa*) is a small shorebird that forages and roosts in Cape Romain.

63. The Service listed the red knot as threatened under the ESA in 2015. Endangered and Threatened Wildlife and Plants; Threatened Species Status for the Rufa Red Knot, 79 Fed. Reg. 73,706 (Dec. 11, 2014). The agency extended the section 9 take prohibition to the species upon this listing. Id. at 73,728.

64. Red knot populations were decimated in the late 1800s and early 1900s by commercial hunting for sport and food. Endangered and Threatened Wildlife and Plants; Proposed Threatened Status for the Rufa Red Knot, 78 Fed. Reg. 60,024, 60,028 (Sept. 30, 2013). More recently the species’ population has declined from threats to its habitat and prey species.

65. According to the Service, “[r]educed food availability . . . due to commercial harvest and subsequent population decline of the horseshoe crab” at a stopover site used by some red knots, Delaware Bay, “is considered a primary causal factor in the decline of the *rufa* subspecies in the 2000s.” Id. at 60,063.

66. The Service has not consulted on the effects of its management pursuant to the CCP

on the red knot.

2. Piping Plover and its Designated Critical Habitat

67. Named for its melodic mating call, the piping plover (*Charadrius melodus*) is a migratory shorebird that forages and roosts in Cape Romain.

68. The Service first added piping plovers to the endangered and threatened species lists in 1985, in large part due to the disturbance and destruction of its habitat. Endangered and Threatened Wildlife and Plants; Determination of Endangered and Threatened Status for the Piping Plover, 50 Fed. Reg. 50,726 (Dec. 11, 1985).

69. In 2001, the Service designated critical habitat for wintering populations of piping plovers partially in Cape Romain, which includes the beaches on portions of Cape Island, Lighthouse Island, Raccoon Key, and Bulls Island. Endangered and Threatened Wildlife and Plants; Final Determination of Critical Habitat for Wintering Piping Plovers, 66 Fed. Reg. 36,038, 36,069 (July 10, 2001).

3. Northwest Atlantic Ocean DPS of the Loggerhead Sea Turtle

70. The Northwest Atlantic Ocean DPS of the loggerhead sea turtle (*Caretta caretta*) nests in Cape Romain.

71. The species was first designated as threatened under the ESA in 1978. Listing and Protecting Loggerhead Sea Turtles as “Threatened Species” and Populations of Green and Olive Ridley Sea Turtles as Threatened Species or “Endangered Species,” 43 Fed. Reg. 32,800 (July 28, 1978).

72. In 2011, the Service and NMFS revised the loggerhead sea turtle’s designation by asserting that the species is comprised of nine endangered or threatened DPSs, classifying the Northwest Atlantic Ocean DPS as threatened. Endangered and Threatened Species;

Determination of Nine Distinct Population Segments of Loggerhead Sea Turtles as Endangered or Threatened, 76 Fed. Reg. 58,868 (Sept. 22, 2011).

73. In 2014, the Service and NMFS designated critical habitat for the Northwest Atlantic Ocean loggerhead DPS, which, among other areas, includes three islands in Cape Romain: Cape Island, Lighthouse Island, and Racoon Key. Endangered and Threatened Species: Critical Habitat for the Northwest Atlantic Ocean Loggerhead Sea Turtle Distinct Population Segment (DPS) and Determination Regarding Critical Habitat for the North Pacific Ocean Loggerhead DPS, 79 Fed. Reg. 39,756, 39,890 (July 10, 2014).

74. The Service has not consulted on the effects of the CCP on the Northwest Atlantic Ocean DPS of the loggerhead sea turtle, nor on its designated critical habitat in the refuge.

III. The Service's Management of Disturbances in the Refuge

75. To achieve the refuge's purposes, the Service must limit human disturbances of birds and other wildlife in Cape Romain.

76. Human disturbance is a primary cause of declining shorebird populations.

77. Human disturbances can negatively impact some species' abilities to forage, shelter, and breed.

78. Humans can disturb some species of wildlife by generating noises, such as by talking, using motorized boats, paddling nonmotorized boats, and walking on terrain.

79. Humans can disturb certain species of wildlife by using lights, such as boat headlights and flashlights.

80. Finally, some species of wildlife can be disturbed when boat wakes overwash onto areas occupied by shorebirds.

81. The Service has at times taken management actions to decrease human disturbance of birds and other wildlife in Cape Romain.

82. According to the CCP, “[p]roviding undisturbed nesting, roosting, and foraging habitat is the most important role for the management of shorebirds within Cape Romain.” CCP at 51. The CCP also states that the refuge’s “objective” for migrating and wintering populations of shorebirds and for sea birds is to “[p]rovide undisturbed nesting, roosting, and foraging habitat.” Id. at 50, 53.

83. The Service enacted a regulation “to protect nesting birds” by prohibiting any member of the public from accessing the islands of Marsh Island, White Banks, and Sandy Point in Cape Romain from February 15 through September 15 on an annual basis. 50 C.F.R. § 26.34(mm)(1)(v). These temporary closures apply to all areas on these islands above the low mean water mark. Id. They apply to both anchoring boats and foot traffic. Letter from Sarah Dawsey, Refuge Manager, Cape Romain Nat’l Wildlife Refuge, U.S. Fish & Wildlife Serv., to Joel Munn (Apr. 19, 2016) (Ex. E) [hereinafter 2016 Refuge Manager Letter].³

84. The Refuge Manager has remarked that the temporary closures serve “to minimize disturbance of these extremely important bird nesting islands.” Letter from Sarah Dawsey, Refuge Manager, Cape Romain Nat’l Wildlife Refuge, U.S. Fish & Wildlife Serv., to Joel Munn at 1 (May 12, 2014) (Ex. F). According to the Refuge Manager, the temporary closures are “a result of our mandate to fulfill the purpose of the refuge.” 2016 Refuge Manager Letter.

³ Note that Defenders made one alteration to this record by redacting the address of Mr. Munn.

85. The Service also regulates certain commercial activities in Cape Romain to decrease human disturbances of wildlife. Birds in the refuge cannot be adequately protected if the Service does not regulate commercial activities.

IV. Horseshoe Crab Harvesting in Cape Romain

A. Harvesting Overview

86. Since at least 2014, commercial fishermen have harvested horseshoe crabs on islands in Cape Romain every year.

87. When the refuge was first established, the majority of commercially harvested horseshoe crabs collected from Cape Romain were used for either bait or seafood. Today, the majority of horseshoe crabs collected from the refuge are sold to members of the pharmaceutical industry. Pharmaceutical companies use blood from horseshoe crabs to test for contamination of certain medical supplies, although a synthetic alternative to horseshoe crab blood is also available. Horseshoe crabs were not harvested for this purpose when the United States acquired Cape Romain lands in the 1930s.

88. Horseshoe crab harvesting in Cape Romain occurs when horseshoe crabs are spawning during the high tide in the spring through early summer. They spawn in the intertidal zone.

89. Harvesters use motorized boats to access the islands of Cape Romain. When they reach these islands, they pull their boats ashore at times, and they collect horseshoe crabs by walking along the shore, picking up the horseshoe crabs, and putting them in their boats. Among other areas in Cape Romain, harvesters have collected horseshoe crabs from Bulls Island, Little Bulls Island, Marsh Island, and Raccoon Key.

90. In one year of harvesting, harvesters can take more than twenty thousand crabs. See Email from Ryan Wagner, Federal Wildlife Officer, S.C. Lowcountry Complex, U.S. Fish & Wildlife Serv., to Sarah Dawsey, Refuge Manager, Cape Romain Nat'l Wildlife Refuge, U.S. Fish & Wildlife Serv. (June 17, 2014, 15:34 EST) (Ex. G) (stating that harvesters collected 25,000 crabs in 2014).

91. One day of harvesting in Cape Romain can yield several thousand crabs. See, e.g. email from Ryan Wagner, Federal Wildlife Officer, South Carolina Lowcountry Complex, U.S. Fish & Wildlife Serv., to Sarah Dawsey, Refuge Manager, Cape Romain Nat'l Wildlife Refuge, U.S. Fish & Wildlife Serv. (May 19, 2014, 01:29 EST); Email from Ryan Wagner, Federal Wildlife Officer, South Carolina Lowcountry Complex, U.S. Fish & Wildlife Serv., to Sarah Dawsey, Refuge Manager, Cape Romain Nat'l Wildlife Refuge, U.S. Fish & Wildlife Serv. (May 20, 2014, 03:25 EST) (collectively, Ex. H) (Service employee estimated that over a two-day span, harvesters collected more than a combined 6,000 crabs on two islands in Cape Romain).

92. Compared with thirty years ago, the number of horseshoe crabs commercially harvested from the refuge each of the last six years has increased. However, the number of horseshoe crabs in the refuge has decreased. Horseshoe crab harvesting has therefore contributed to a decline in the number of horseshoe crabs at Cape Romain over the last thirty years.

93. One of the individuals engaged in commercial horseshoe crab harvesting in Cape Romain is named Joel Munn. He is at times joined by four or more people during his collection activities in the refuge.

94. In light of refuge regulations prohibiting public access to Marsh Island, White Banks, and Sandy Point, the Service has notified Mr. Munn on multiple occasions, including in

2014, 2015, and 2016, that he is prohibited from collecting horseshoe crabs on Marsh Island. Mr. Munn continues to do so.

95. Below is an undated photograph that Defenders obtained from the Service through a FOIA request, which shows Mr. Munn and his crew harvesting horseshoe crabs above mean low tide on Marsh Island during the island’s temporary closure period:



96. The Service asserted to Mr. Munn that he has access to the entirety of the refuge to engage in commercial fishing, which includes horseshoe crab harvesting, with the exceptions of Marsh Island, White Banks and Sandy Point. 2016 Refuge Manager Letter. In 2016, the Refuge Manager wrote to him on Service letterhead, reasserting that, with those exceptions, “the remainder of the refuge, more than 66,000 acres of land and waters, are open year-round for you to access.” Id. The agency communicated this information to Mr. Munn knowing that he has repeatedly harvested horseshoe crabs on Marsh Island after the Service informed him that he was prohibited from doing so. The Service’s 2016 authorization, therefore, facilitated his continued use of Marsh Island and other areas in Cape Romain for horseshoe crab harvesting.

97. In 2014 and at least one subsequent year, the Service issued Mr. Munn Special Use Permits for after-hours use of Garris Landing, a boat launch in Cape Romain, so that Mr. Munn may have “easier access to [the Bulls Bay] harvest area.” Marsh Island Memorandum at 4;

see also U.S. Dep't of the Interior & U.S. Fish & Wildlife Serv., National Wildlife Refuge System Commercial Activities Special Use Application and Permit (May 15, 2014) (Ex. I). Bulls Island, Little Bulls Island, Marsh Island, and White Banks are all on or in Bulls Bay.

98. The Service has never made a compatibility determination for commercial horseshoe crab harvesting in Cape Romain.

99. The Service has never issued a Special Use Permit for commercial activity involving horseshoe crab harvesting in Cape Romain.

B. Effects of Horseshoe Crab Harvesting on Cape Romain Wildlife

1. Effects of Horseshoe Crab Harvesting on the Red Knot

100. Commercial horseshoe crab harvesting in Cape Romain has resulted in some red knots consuming fewer nutrients than they would otherwise consume if the harvesting were not occurring. As a result, horseshoe crab harvesting in Cape Romain significantly disrupts red knots' feeding behavior.

101. The red knot migrates between its breeding grounds in the Canadian Arctic and its wintering locations, which include areas in the Southeastern United States, the Gulf of Mexico, and South America. 79 Fed. Reg. at 73,706. Most red knots stop about partway through the northbound portion of their migration to refuel by foraging for food. 78 Fed. Reg. at 60,027.

102. When refueling, red knots must build up enough fat for the latter portion of their journey to the Arctic and for their breeding condition. These stopovers are time-constrained, requiring red knots to eat food that is easily digested and nutrient-rich during this period of time. Id. Red knots use horseshoe crab eggs to meet these needs. Id. Each red knot that refuels using horseshoe crab eggs must consume about 400,000 of these eggs. Deborah Cramer, Inside the Biomedical Revolution to Save Horseshoe Crabs and the Shorebirds that Need Them, NAT'L

AUDUBON SOC'Y (2018), <https://www.audubon.org/magazine/summer-2018/inside-biomedical-revolution-save-horseshoe-crabs>.

103. If red knots fail to eat enough horseshoe crab eggs during their stopover window, then they are less likely to survive the remainder of their journey to the Arctic. 78 Fed. Reg. at 60,069 (data demonstrating a correlation between weight gain and survival). Even if they did survive, they would be less likely to successfully reproduce. Id.

104. Some red knots use Cape Romain as the stopover point on their northbound migration. Horseshoe crab eggs are the most important source of food for red knots in Cape Romain during this stopover period.

a. Decline in Nutrient Consumption Caused by Fewer Available Horseshoe Crab Eggs in the Refuge

105. A recent study conducted in Cape Romain observed that areas used by red knots “were significantly correlated to horseshoe crab egg abundance.” Fumika Takahashi, “Shorebird Utilization of Horseshoe Crab (*Limulus Polyphemus*) Eggs at Cape Romain National Wildlife Refuge, South Carolina,” CLEMSON UNIVERSITY TIGERPRINTS, ALL THESES, 2577 at 24 (2016) [hereinafter Takahashi 2016].

106. The density of spawning horseshoe crabs impacts whether foraging shorebirds in Cape Romain are able to access the crabs’ eggs. Id. at 27. This is because horseshoe crabs lay their eggs underground. Id. In order for them to come within certain birds’ reach there must be repeated spawning by multiple crabs in the same area, causing eggs to be distributed onto or just below the earth’s surface. Id.

107. The Takahashi study in part concluded that “[i]f an objective of Cape Romain . . . is to increase favorable foraging habitat for migratory red knots, then Little Bulls Island, Bulls

Island, and Marsh Island may present opportunities to do so based on density of horseshoe crab eggs.” Id. Commercial horseshoe crab harvesters in Cape Romain have decreased the number of horseshoe crab eggs available for red knots to eat this year, when compared to ten years ago.

108. This is because horseshoe crab harvesting in the refuge has decreased the number of horseshoe crabs present in the refuge when compared to ten years ago. A decrease in the number of crabs in the refuge has resulted in a decrease in the number of eggs that are laid there.

109. This decline in the number of horseshoe crab eggs in Cape Romain has decreased the density of eggs that are laid underground. Thus, horseshoe crabs in Cape Romain are laying fewer eggs near the earth’s surface.

110. This has resulted in fewer horseshoe crab eggs within red knots’ reach this year when compared to ten years ago.

111. Some red knots have relocated from foraging in Cape Romain in response to horseshoe crab harvesters decreasing the number of available horseshoe crab eggs. This relocation has caused certain red knots to eat less energy-rich food. For example, some red knots that have relocated from Cape Romain due to harvesting have pivoted to eating coquina clams. These are less nutritious than horseshoe crab eggs.

112. Thus, the lack of available horseshoe crab eggs resulting from commercial horseshoe crab harvesting in Cape Romain has caused a significant disruption in red knots’ feeding behavior.

b. Reduced Nutrient Consumption Caused by Human Disturbances

113. Activities associated with horseshoe crab harvesting also result in disturbances to red knots, such as harvesters walking along island shores and the use of motorized boats. Disturbances like these, especially during the peak migration months of May and August, can

drive red knots to reject foraging habitats that would have otherwise been preferred. See, e.g. 78 Fed. Reg. 60,076–77.

114. Due to these disturbances from horseshoe crab harvesters, some red knots have relocated from their foraging grounds in Cape Romain to areas outside of the refuge. This has resulted in a decline in the number of red knots in the refuge.

115. Red knots that have relocated from foraging in Cape Romain due to harvesters' disturbances have at times eaten less energy-rich food outside of the refuge. This has decreased the amount of nutrients consumed by some red knots.

116. Moreover, research shows that human disturbances can cause a decline in shorebirds' food intake and the amount of time spent foraging. Id. at 60,078. Horseshoe crab harvesting can have the same results on red knots at Cape Romain.

117. Neither horseshoe crab harvesters nor the Service have been issued any permits under the ESA that would allow horseshoe crab harvesting activities in Cape Romain to significantly disrupt red knots' feeding behavior.

2. Effects of Horseshoe Crab Harvesting on the Piping Plover and its Critical Habitat

118. Horseshoe crab harvesting in Cape Romain may affect piping plovers and their critical habitat in the refuge. While the species more regularly uses the refuge in the winter, it has been recorded in Cape Romain during months when horseshoe crabs are known to spawn. See Takahashi 2016 at 82 (documenting piping plover sightings in April 2015).

119. Horseshoe crab harvesting in Cape Romain may affect piping plovers in several ways. Piping plovers can be sensitive to human disturbances. U.S. Fish & Wildlife Serv., Piping Plover (*Charadrius melodus*): 5-Year Review: Summary and Evaluation 17 (Mar. 2020),

https://ecos.fws.gov/docs/five_year_review/doc6378.pdf. They spend more time alert and less time foraging in areas that are disturbed. *Id.* at 16. This can lead to reduced time spent feeding and increased stress levels, resulting in lower body mass in members of the species. *Id.* Human disturbances related to horseshoe crab harvesting activities in Cape Romain, such as ones caused by boating and walking, may result in these and other adverse effects to piping plovers.

120. Horseshoe crab harvesting may affect piping plover critical habitat in Cape Romain in several ways. First, disturbances to piping plovers from human presence can reduce the overall value of piping plover critical habitat. 66 Fed. Reg. 36,079. Harvesting in the refuge may also adversely affect piping plover critical habitat because it can involve pulling boats ashore and walking along the beach. These activities result in sand compaction and degrade the quality of the beaches by possibly crushing food and prey along the shores or leaving behind debris, making the habitat less hospitable.

3. Effects of Horseshoe Crab Harvesting on the Northwest Atlantic Ocean DPS of the Loggerhead Sea Turtle and its Critical Habitat

121. Horseshoe crab harvesting may affect the Northwest Atlantic Ocean DPS of the loggerhead sea turtle and its designated critical habitat in the refuge. While the refuge limits access to certain areas where loggerheads are known to nest, harvesting may occur in locations where sea turtles have not been documented or otherwise may occur in critical habitat where loggerheads are not currently nesting.

122. Horseshoe crab harvesting may affect loggerhead sea turtles and their critical habitat for a number of reasons. Although it is not their primary source of food, loggerhead sea turtles at times eat horseshoe crabs, and harvesting decreases the number of crabs available in the refuge.

123. The activity may also impact the suitability of loggerhead habitat for nesting and the emergence of hatchlings. This is because human footsteps that compact the sand can create obstacles that impair hatchlings' ability to reach the water. Harvesters pulling their boats onto the islands and walking along the shore can also degrade the quality of the beaches by crushing food and prey along the shores or leaving behind debris. This makes the habitat less hospitable and/or creates obstacles between hatchlings and the water.

124. Finally, the presence of humans at night can reduce the quality of loggerhead sea turtle nesting habitat and can even lead to the species rejecting habitat that would otherwise be suitable. Horseshoe crab harvesting at Cape Romain may cause these and other adverse effects.

4. Effects of Horseshoe Crab Harvesting on Migratory Birds

125. Activities associated with horseshoe crab harvesting in Cape Romain can disturb migratory birds at the refuge. These activities include driving motorboats, walking along the shore, standing within a certain distance of the birds, talking, and using artificial lighting. Even occupying the water near a colony of birds at the refuge can be enough to disturb certain species.

126. Among other species of migratory birds that nest in Cape Romain, brown pelicans, great egrets, snowy egrets, black crowned night herons, American oystercatchers, and Wilson's plovers can at times flush in response to boating and to humans walking.

127. Human disturbances from horseshoe crab harvesting at Cape Romain have resulted in the destruction of migratory bird eggs. Depending on the strength of the sun and temperature, eggs at Cape Romain can be destroyed from overheating when migratory birds flush from their nests. See CCP at 51. Migratory bird eggs can also be eaten by predators, such as seagulls, when disturbed nesting birds at Cape Romain flush. Id. Humans collecting horseshoe

crabs in areas at Cape Romain can flush nesting migratory birds in those areas long enough for their eggs to overheat or be eaten by predators.

128. At times, horseshoe crab harvesters at Cape Romain have flushed nesting migratory birds, causing their eggs to overheat or be eaten by predators.

129. Moreover, predators can eat migratory bird chicks that are left exposed in nests after their nesting parents flush. CCP at 51. At times, horseshoe crab harvesters at Cape Romain have flushed nesting migratory birds, resulting in predators eating chicks that remained in the parents' nests.

130. Horseshoe crab harvesters at Cape Romain have also decreased the amount of food available to birds in the refuge. Among other shorebirds, sanderlings, short-billed dowitchers, ruddy turnstones, and dunlins consume horseshoe crabs. CCP at 58. Horseshoe crab harvesting has caused there to be fewer horseshoe crab eggs within these and other birds' reach in Cape Romain compared to if horseshoe crab harvesting were not occurring.

131. Disturbances resulting from horseshoe crab harvesting operations have also adversely affected birds foraging in the same areas of Cape Romain as where crabs are being collected by harvesters. Disturbances caused by horseshoe crab harvesters at Cape Romain can reduce the time migratory birds spend feeding and can result in lowered body mass in certain species. Furthermore, these disturbances can decrease certain migratory birds' use of specific foraging sites in Cape Romain, and can even lead to them abandoning foraging sites altogether.

132. Disturbances caused by horseshoe crab harvesters in Cape Romain can impair the quality of migratory birds' sheltering sites. They can decrease certain migratory birds' usage of these sites, and can even lead to migratory birds abandoning sheltering sites altogether.

CLAIMS FOR RELIEF

I. First Claim for Relief

Violation of the Refuge Improvement Act – Failure to Complete a Compatibility Determination

133. Plaintiff hereby realleges and incorporates each and every allegation set forth in this Complaint as if set out in full below.

134. The Service can open refuge areas to a use after ensuring that the use at issue is “compatible with the major purposes for which such areas were established.” 16 U.S.C. § 668dd(d)(1)(A).

135. To decide whether a use would be compatible, the Service must make a compatibility determination in writing. 50 C.F.R. § 25.12(a). This compatibility determination must take into consideration, among other factors, impacts of the use on the refuge’s purpose, whether the use is a priority public use, and where, when, and how a use would be conducted. Id. § 26.41(a)(6)(i)–(iv), (a)(8).

136. The Service has failed to conduct a compatibility determination for commercial horseshoe crab harvesting in Cape Romain.

137. By failing to conduct a compatibility determination, the Service has failed to comply with the Refuge Improvement Act, see 16 U.S.C. § 668dd(d)(1)(A), and otherwise has acted in a manner that is arbitrary and capricious and not in accordance with law, 5 U.S.C. § 706(1), (2)(A).

II. Second Claim for Relief

Violation of the Refuge Improvement Act – Failure to Issue a Special Use Permit for

Commercial Activity

138. Plaintiff hereby realleges and incorporates each and every allegation set forth in this Complaint as if set out in full below.

139. Refuge Improvement Act regulations prohibit members of the public on any refuge from “conducting a commercial enterprise . . . except as may be authorized by special permit.” 50 C.F.R. § 27.97.

140. The Service has not issued Mr. Munn or any other horseshoe crab harvesters a Special Use Permit authorizing their commercial activities.

141. By failing to issue a Mr. Munn a Special Use Permit, the Service has violated Refuge Improvement Act regulations, see id., and otherwise has acted in a manner that is arbitrary and capricious and not in accordance with law, 5 U.S.C. § 706(1), (2)(A).

III. Third Claim for Relief

Violation of the Refuge Improvement Act – Failing to Provide for Conservation and Undermining the Purposes of Cape Romain

142. Plaintiff hereby realleges and incorporates each and every allegation set forth in this Complaint as if set out in full below.

143. The Refuge Improvement Act requires the Service to “provide for the conservation of fish, wildlife, and plants, and their habitats within the System.” 16 U.S.C. § 668dd(a)(4), (a)(4)(A).

144. The act further asserts that the agency must “ensure that the mission of the [Refuge] System . . . and the purposes of each refuge are carried out.” Id. 668dd(a)(4), (a)(4)(D).

145. Cape Romain was first established “for use as an inviolate sanctuary, or for any other management purpose, for migratory birds.” Proclamation No. 2000 (June 6, 1932).

146. Human disturbances resulting from horseshoe crab harvesting cause the death of

migratory bird chicks, the destruction of migratory bird eggs, a reduction in time that migratory birds spend feeding, and abandonment of otherwise suitable nesting, foraging, and sheltering grounds.

147. Horseshoe crab harvesters alter the terrain used by birds at Cape Romain, including by pulling their boats ashore, walking along the islands, and possibly leaving refuse behind.

148. Service employees have previously asserted that Special Use Permits for a different commercial activity that involves boating—kayak tours—are reasonably necessary to regulate the potential disturbance of birds. Activities associated with commercial horseshoe crab harvesting have more potential to disturb birds than activities associated with kayaking.

149. Pursuant to Refuge Improvement Act Regulations, the Service’s periodic closure of Marsh Island was enacted “to protect nesting birds,” 50 C.F.R. § 26.34(mm)(1)(v), yet commercial horseshoe crab harvesters continue to violate this public access restriction.

150. By allowing and otherwise facilitating Mr. Munn to engage in the commercial harvest of horseshoe crabs in Cape Romain, the Service has violated the Refuge Improvement Act by failing to provide for the conservation of wildlife, see 16 U.S.C. § 668dd(a)(4)(A), failing ensure the purposes of Cape Romain are carried out, see id. § 668dd(a)(4)(D), and otherwise has acted in a manner that is arbitrary and capricious and not in accordance with law, 5 U.S.C. § 706(1), (2)(A).

IV. Fourth Claim for Relief

Violation of the ESA – Failure to Consult on Horseshoe Crab Harvesting Authorization

151. Plaintiff hereby realleges and incorporates each and every allegation set forth in this Complaint as if set out in full below.

152. Section 7(a)(2) of the ESA prohibits federal agencies from taking any action that is “likely to jeopardize the continued existence” of any listed species “or result in the destruction or adverse modification of [critical] habitat.” 16 U.S.C. § 1536(a)(2).

153. To fulfill this substantive mandate, ESA section 7(a)(2) requires federal agencies to consult with the appropriate wildlife agency on any discretionary “agency action” that “may affect” a listed species or critical habitat. *Id.* § 1536(a)(2); 50 C.F.R. §§ 402.03, 402.14(a).

154. Authorizing horseshoe crab harvesting is a discretionary “agency action” that “may affect” certain listed species and critical habitat in Cape Romain, the “action area.” These species and critical habitat include the threatened red knot, the threatened piping plover and its critical habitat, and the threatened Northwest Atlantic Ocean DPS of the loggerhead sea turtle and its critical habitat.

155. By failing to complete section 7(a)(2) consultation regarding these effects, the Service has violated its procedural and substantive obligations under section 7(a)(2) of the ESA, 16 U.S.C. § 1536(a)(2) and otherwise has acted in a manner that is arbitrary and capricious and not in accordance with law. 5 U.S.C. § 706(1), (2)(A).

V. Fifth Claim for Relief

Violation of the ESA – Failure to Reinitiate Consultation on the Cape Romain CCP

156. Plaintiff hereby realleges and incorporates each and every allegation set forth in this Complaint as if set out in full below.

157. Federal agencies have an ongoing obligation to comply with the procedural and substantive mandates of section 7 and are therefore legally obligated to reinitiate consultation on an agency action under several circumstances when “discretionary Federal involvement or control over the action has been retained or is authorized by law.” 50 C.F.R. § 402.16(a). One

circumstance is “[i]f a new species is listed or critical habitat designated that may be affected by the identified action.” Id. § 402.16(a)(4).

158. The ESA incorporates an individual DPS within the definition of the term “species.” 16 U.S.C. § 1532(6). Since the CCP was completed in 2010, the Service has listed the red knot, classified loggerhead sea turtles that use Cape Romain into a DPS, and designated loggerhead sea turtle critical habitat.

159. The agency has ongoing involvement and control over implementing and revising the CCP.

160. By failing to reinitiate and complete section 7(a)(2) consultation regarding the effects of the CCP in light of these new developments, the Service has violated its procedural and substantive obligations under section 7(a)(2) of the ESA, id. § 1536(a)(2), and otherwise has acted in a manner that is arbitrary and capricious and not in accordance with law, 5 U.S.C. § 706(1), (2)(A).

VI. Sixth Claim for Relief

Violation of the ESA – Unpermitted Take of the Red Knot

161. Plaintiff hereby realleges and incorporates each and every allegation set forth in this Complaint as if set out in full below.

162. Section 9(a)(1) of the ESA prohibits the unpermitted take of any endangered species of fish or wildlife, 16 U.S.C. § 1538(a)(1)(B), and the Service may extend this prohibition to threatened species, id. § 1533(4)(d).

163. Take can encompass harassment, id. § 1532(19), which includes creating “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,” 50

C.F.R. § 17.3(c).

164. The Service extended the take prohibition to the red knot, which is listed as threatened. 79 Fed. Reg. 73,743.

165. Red knots have a narrow stopover window on their northbound migration during which they must forage to build up enough energy to power the remainder of their migration to the Arctic. If red knots do not consume enough food during their stopover window, then they are less likely to survive the remainder of their migration or breed.

166. Horseshoe crab harvesting significantly disrupts some red knots' feeding behavior by decreasing the amount of horseshoe crabs available for them to eat, impairing their energy balances, decreasing the rate at which they consume food, decreasing the time they spend foraging, and driving them to forage for food that is less nutrient-rich than horseshoe crabs.

167. This impaired feeding behavior is likely to result in at least one red knot failing to consume enough food during its stopover window to survive the remainder of its journey to the Arctic or to breed.

168. Thus, by allowing or otherwise facilitating horseshoe crab harvesting in Cape Romain, the Service has caused a take of the red knot.

169. The Service and commercial horseshoe crab harvesters in Cape Romain do not have a permit to engage in a take of the red knot.

170. Thus, the Service is causing the unpermitted take of the threatened red knot in violation of Section 9 of the ESA, 16 U.S.C. § 1538(a)(1)(B), and otherwise has acted in a manner that is arbitrary and capricious and not in accordance with law, 5 U.S.C. § 706(1), (2)(A).

VII. Seventh Claim for Relief

Violation of the Migratory Bird Treaty Act

171. Plaintiff hereby realleges and incorporates each and every allegation set forth in this Complaint as if set out in full below.

172. Under the MBTA, “it shall be unlawful at any time, by any means or in any manner, to pursue, hunt, take, capture, [or] kill ... any migratory bird [or] any part, nest, or egg of any such bird... included in the terms of the conventions” 16 U.S.C. § 703(a).

173. MBTA regulations list which species of migratory birds qualify for coverage under the act. 50 C.F.R. § 10.13.

174. Some migratory birds nest in Cape Romain.

175. Horseshoe crab harvesting in Cape Romain has resulted in the destruction of migratory bird eggs from overheating and predation. Horseshoe crab harvesting in Cape Romain has also resulted in the death of migratory bird chicks by exposing them to predators.

176. The Service, as the action agency authorizing horseshoe crab harvesting in the refuge, is therefore in violation of section 703(a) of the MBTA and otherwise has acted in a manner that is arbitrary and capricious and not in accordance with law. 5 U.S.C. § 706(1), (2)(A).

RELIEF REQUESTED

WHEREFORE, the Plaintiff respectfully requests that the Court grant the following relief:

1. Declare that the Service is in violation of the Refuge Improvement Act by failing to conduct a compatibility determination before allowing or otherwise facilitating commercial horseshoe crab harvesting in Cape Romain, 16 U.S.C. §

668dd(d)(1)(B);

2. Declare that the Service is in violation of Refuge Improvement Act regulations by failing to issue a commercial Special Use Permit before allowing or otherwise facilitating commercial horseshoe crab harvesting in Cape Romain, 50 C.F.R. § 27.97;
3. Declare that the Service is in violation of the Refuge Improvement Act by failing to both provide for the conservation of wildlife and carry out the purposes of Cape Romain when allowing or otherwise facilitating commercial horseshoe crab harvesting in Cape Romain, 16 U.S.C. § 668dd(a)(4), (a)(4)(A), (a)(4)(D);
4. Declare that the Service is in violation of ESA section 7(a)(2), by allowing or otherwise facilitating commercial horseshoe crab harvesting in Cape Romain without engaging in ESA consultation, 16 U.S.C. § 1536(a)(2);
5. Declare that the Service is in violation of ESA section 7(a)(2), by failing to reinstate consultation on the Cape Romain CCP, 50 C.F.R. § 402.16(a)(4);
6. Declare that the Service is causing an unpermitted incidental take of red knots in violation of ESA section 9(a)(1) by allowing or otherwise facilitating commercial horseshoe crab harvesting in Cape Romain, 16 U.S.C. § 1538(a)(1)(B);
7. Declare that the Service is in violation of the MBTA, *id.* § 703(a), by allowing or otherwise facilitating incidental take due to commercial horseshoe crab harvesting in Cape Romain;
8. Enjoin the Service from allowing or otherwise facilitating horseshoe crab harvesting in Cape Romain until after it remedies its violations of the Refuge Improvement Act, ESA, and the MBTA;

9. Award the Plaintiff its reasonable costs, and expenses, including attorney fees, associated with this litigation; and
10. Award the Plaintiff any other further and additional relief as this Court may deem just and proper.

This the 19th day of October, 2020.

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