

Congressional Involvement in Endangered Species Act Implementation: The Case of the North Atlantic Right Whale

Brett Grosko

Senior Trial Attorney

Wildlife and Marine Resources Section

Environment and Natural Resources Division

Taylor Mayhall

Trial Attorney

Wildlife and Marine Resources Section

Environment and Natural Resources Division

I. Introduction

For centuries, humans hunted North Atlantic right whales (*Eubalaena glacialis*) for their meat in Europe and North America.¹ The species was known as the “first commercial whale” and the “right whale” to hunt because they tend to float when killed, making them easier to retrieve than other targeted whale species. Centuries later, in the United States, “different whaling fisheries developed different customs on when and how whalers could obtain possession of a whale.”² The “‘fast-fish, loose-fish’ rule . . . gave ownership to the whaler who held a whale, dead or alive, attached to their ship by a line.”³ “This rule worked well for right whales, because they did not respond particularly violently when attacked, . . . [and] boats could reasonably expect to maintain a line to a wounded right whale without being capsized or damaged.”⁴ A more recent moniker for North Atlantic right whales is the “urban whale,” due to its tendency to

¹ Alex Aguilar, *A Review of Old Basque Whaling and Its Effect on the Right Whales (Eubalaena glacialis) of the North Atlantic*, 10 REPS. INT’L WHALING COMM’N 191 (1986).

² DALE D. GOBLE ET AL., WILDLIFE LAW: CASES AND MATERIALS 127 (3d ed. 2017).

³ *Id.*

⁴ *Id.*

migrate close to the Canadian and U.S. coastlines near urban areas.⁵ As such, ship strikes and entanglement in vertical lines that fishers use to locate and haul lobster and Jonah crab traps from the seafloor are the most important threats to the North Atlantic right whale today. Entanglements can be lethal or cause painful or debilitating sublethal injuries. For example, vertical lines attached to traps can cut into a whale's flippers or skin, and even when female right whales survive an entanglement, the event can severely reduce their reproductive success.⁶ Cumulatively, centuries of human activity have left their mark. Only a small population of fewer than 360 North Atlantic right whales remain today.⁷ And within the last decade, the population has significantly declined.

This article focuses on litigation brought on by this decline and related to the interaction between the fixed gear fisheries and the North Atlantic right whale, which became so contentious that Congress intervened. This article first provides background on the species, the relevant statutes affecting it, and actions related to fixed gear fisheries taken by the National Marine Fisheries Service (NMFS)—the federal agency tasked with protecting right whales—that were challenged in court.

Next, this article discusses the history of lawsuits involving protection of right whales and the American lobster fishery, particularly focusing on the last six years. The Department of Justice (Department) has defended NMFS in many lawsuits brought in that time under the Endangered Species Act (ESA), challenging NMFS's regulation of the American lobster fishery as it relates to the North Atlantic right whale. This litigation has made national news, often in unexpected ways. For example, in 2022, the Monterey Bay Aquarium Seafood Watch and the Marine Stewardship Council (MSC) changed the sustainability rating of Maine lobster, reportedly as a result of a decision issued in one of the right whale cases discussed below: *Center for Biological Diversity v. Raimondo*.⁸ Then, grocery retailer Whole Foods stopped selling Maine lobster.⁹ One lobster industry

⁵ See THE URBAN WHALE: NORTH ATLANTIC RIGHT WHALES AT THE CROSSROADS (Scott D. Kraus & Rosalind M. Rolland eds., Harv. Univ. Press 2007).

⁶ See, e.g., THE URBAN WHALE, *supra* note 5, at 273, 369; Macquarie University, *Rope Entanglement Cause of Low Breeding Rates in Right Whales, Analysis Finds*, SCIENCEDAILY (Mar. 13, 2024), <https://www.sciencedaily.com/releases/2024/03/240313135554.htm>.

⁷ *North Atlantic Right Whale: About the Species*, NAT'L OCEANIC & ATMOSPHERIC ADMIN. FISHERIES (Oct. 22, 2024), <https://www.fisheries.noaa.gov/species/north-atlantic-right-whale>.

⁸ *Ctr. for Biological Diversity v. Raimondo*, No. 18-112, 2022 WL 17039193 (D.D.C. Nov. 17, 2022).

⁹ *MSC Certificate Suspended for Gulf of Maine Lobster Fishery*, MARINE STEWARDSHIP COUNCIL (Nov. 16, 2022), <https://www.msc.org/en-us/media-center/news->

group, the Massachusetts Lobstermen's Association, filed suit in federal court against MSC's decision.¹⁰ Shortly after the change in sustainability ratings, the White House controversially served Maine lobster at a state dinner honoring the French president.¹¹

This article also describes how, in 2022, Congress stepped into the breach by passing the Consolidated Appropriations Act (CAA), with provisions written directly in response to *Center for Biological Diversity v. Raimondo*.¹² The CAA includes a provision placing a moratorium on further U.S. lobster fishery regulation under the ESA or Marine Mammal Protection Act (MMPA) to protect the North Atlantic right whale until December 31, 2028. Finally, this article provides some historical context, noting that the CAA is one of a handful of instances in which Congress has become involved in how federal agencies should implement the ESA.

II. Factual and statutory background

A. The North Atlantic right whale

The North Atlantic right whale is one of three species of right whales in existence and is found along the east coasts of the United States and Canada.¹³ These massive black whales develop knobby white patches of rough skin called callosities as they grow, creating unique patterns

media/news/msc-certificate-suspended-for-gulf-of-maine-lobster-fishery; Press Release, Monterey Bay Aquarium, Seafood WatchTM Assigns Red Ratings to Canadian and U.S. Fisheries That Pose Dire Risk to the Endangered North Atlantic Right Whale (Sept. 5, 2022).

¹⁰ Class Action Complaint for Damages at 28, *Sawyer v. Monterey Bay Aquarium*, No. 2:23-cv-796 (E.D. La. Mar. 2, 2023), ECF No. 1 (seeking damages in excess of \$75,000 for defamation, later transferred to N.D. Cal.); *Sawyer v. Monterey Bay Aquarium*, No. 5:2023-cv-4994 (N.D. Cal. Sept. 29, 2023) (dismissed for failure to meet class certification requirements). *See also* *Bean Maine Lobster, Inc. v. Monterey Bay Aquarium Found.*, No. 2:2023-129 (D. Me. Mar. 14, 2023) (suit for defamation).

¹¹ *See, e.g.,* Kristina Peterson & Jon Kamp, *Maine Lobster Controversy Pinches Biden's State Dinner With Macron*, WALL STREET J. (Dec. 1, 2022), <https://www.wsj.com/articles/biden-white-house-macron-state-dinner-lobster-maine-11669928651>; Nicholas Reimann, *Biden's First State Dinner Serves Up Lobster—And Controversy*, FORBES (Dec. 1, 2022), <https://www.forbes.com/sites/nicholasreimann/2022/12/01/bidens-first-state-dinner-serves-up-lobster-and-controversy/>; Alex Seitz-Wald, *Biden State Dinner Serves Up Lobster À La Controversy*, NBC NEWS (Dec. 1, 2022), <https://www.nbcnews.com/politics/biden-state-dinner-serves-lobster-la-controversy-rcna59639>.

¹² *Ctr. for Biological Diversity*, 2022 WL 17039193.

¹³ *See North Atlantic Right Whale: About the Species*, *supra* note 7.

that enable scientists to identify individual whales.¹⁴ North Atlantic right whales are baleen whales, which means they strain huge volumes of ocean water through hair-like teeth called baleen that act like a sieve, leaving behind the copepods (tiny crustaceans) and zooplankton that make up their diet.¹⁵ Typically, these whales follow their food to Canadian waters and the coast of New England where they mate; then, they migrate seasonally to their calving grounds off the coasts of South Carolina, Georgia, and northeastern Florida.¹⁶ In recent years, the waters around Nantucket have been an important area for right whales nearly year-round.¹⁷ As the climate changes and the ocean warms, scientists have noticed a northward shift of North Atlantic right whale prey.¹⁸

These enormous mammals mature slowly—female right whales mature around age 10—and reproduce one calf at a time after a year-long pregnancy.¹⁹ North Atlantic right whales should live upwards of 70 years, however, their lifespans have been dramatically cut in modern times, with females only living around 45 years at most.²⁰ Similarly, North Atlantic right whales have historically grown up to 52 feet in length but recently have been documented as growing to shorter adult lengths.²¹ Unlike some cetaceans (like dolphins) that travel in groups, right whales are usually solitary.²²

Before humans started hunting North Atlantic right whales, estimates suggest the population size was as large as 21,000 individuals.²³ Basque whalers in the Strait of Belle Isle region of Canada are thought to have significantly reduced the North Atlantic right whale population by the time colonists in Massachusetts started whaling in the 1600s.²⁴ Colonists targeted these whales for over three centuries.²⁵ For example, records indicate that 29 right whales were killed in Cape Cod Bay in a single day

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *North Atlantic Right Whale: Species Status*, MARINE MAMMAL COMM'N, <https://www.mmc.gov/priority-topics/species-of-concern/north-atlantic-right-whale/> (last visited Oct. 28, 2024).

¹⁸ Erin L. Meyer-Gutbrod et al., *Ocean Regime Shift Is Driving Collapse of the North Atlantic Right Whale Population*, 34 *OCEANOGRAPHY* 22, 26–27 (2021). *See also* U.S. ATLANTIC AND GULF OF MEXICO MARINE MAMMAL STOCK ASSESSMENTS 2022, at 33 (2023) [hereinafter *STOCK ASSESSMENTS*].

¹⁹ *See North Atlantic Right Whale: About the Species*, *supra* note 7.

²⁰ *See id.*

²¹ *STOCK ASSESSMENTS*, *supra* note 18, at 22.

²² *See THE URBAN WHALE*, *supra* note 5, at 19.

²³ *Id.* at 18.

²⁴ *Id.*

²⁵ *See North Atlantic Right Whale: About the Species*, *supra* note 7.

in January 1700.²⁶ The League of Nations declared hunting right whales illegal in 1935, at which time the population may have numbered fewer than 100.²⁷ It took some time, however, for the international community to adopt an effective, legally binding ban on right whale hunting.²⁸

North Atlantic right whales have never recovered to pre-whaling numbers, but scientists believed the population was growing steadily in the mid-to-late 1900s.²⁹ From 1980–1992, at least 145 calves were born to 65 identified females.³⁰ From 1990–2011, the population showed a slow increase to about 480.³¹ A 2017 scientific paper demonstrated for the first time that the population had actually begun to decline six to seven years before in the 2010–2011 timeframe.³² That publication led to a major shift in prevailing scientific understanding and was the main factor behind NMFS’s decision to reinitiate ESA consultation in 2017. This discovery of a decreasing population also lent urgency to the work of the Atlantic Large Whale Take Reduction Team (TRT).³³ In 2017, researchers additionally documented 17 right whale deaths, and the NMFS declared an Unusual Mortality Event that continues today.³⁴ An “Unusual Mortal-

²⁶ See STOCK ASSESSMENTS, *supra* note 18, at 19.

²⁷ *Id.*; Convention for the Regulation of Whaling, Sept. 24, 1931, 155 L.N.T.S. 351 (1935).

²⁸ International Agreement for the Regulation of Whaling, June 8, 1937, 190 L.N.T.S. 80 (1938); Protocol Amending the International Agreement of 8 June 1937, and the Protocol of 24 June 1938, for the Regulation of Whaling, Signed at London, on 26 November 1945, Mar. 3, 1947, 11 U.N.T.S. 43; International Convention for the Regulation of Whaling, Dec. 2, 1946, 161 U.N.T.S. 74; Whaling in the Antarctic (Austl. v. Japan: N.Z. intervening), Judgment, 2014 I.C.J. 226 (Mar. 31). *Cf.* Anthony D’Amato & Sudhir K. Chopra, *Whales: Their Emerging Right to Life*, 85 AM. J. INT’L L. 21 (1991) (arguing that history of international institutions concerned with whaling suggests that policies have generally moved from treating whales as a free, open-access resource to regulation, conservation, protection, and preservation; then policies emerged that entitled whales to live and be left alone); *He Whakaputanga Moana Treaty (Declaration for the Ocean)*, ECO JURIS. MONITOR, <https://ecojurisprudence.org/initiatives/he-whakaputanga-moana-declaration-for-the-ocean-treaty/> (last visited Oct. 25, 2024) (non-binding treaty between indigenous leaders of New Zealand—including the Maori, who trace their ancestry directly back to whales—Tahiti, and Cook Islands that recognizes whales as legal persons).

²⁹ See STOCK ASSESSMENTS, *supra* note 18, at 19.

³⁰ *Id.* at 21.

³¹ *Id.* at 19.

³² Richard M. Pace et al., *State—Space Mark—Recapture Estimates Reveal a Recent Decline in Abundance of North Atlantic Right Whales*, 7 ECOLOGY & EVOLUTION 8730 (2017).

³³ *Atlantic Large Whale Take Reduction Team*, NAT’L OCEANIC & ATMOSPHERIC ADMIN. FISHERIES (Aug. 29, 2024), <https://www.fisheries.noaa.gov/new-england-mid-atlantic/marine-mammal-protection/atlantic-large-whale-take-reduction-team>.

³⁴ *2017–2024 North Atlantic Right Whale Unusual Mortality Event*, NOAA

ity Event” is an MMPA designation for an unexpected and “significant die-off of any marine mammal population” that requires an immediate response.³⁵ As of 2022, 100% of non-calf deaths are believed to be caused by humans.³⁶ Today, approximately 360 right whales remain, including fewer than 70 reproductively active females.³⁷

NMFS determined that the primary causes of right whale mortality and serious injury are entanglement in fishing gear and vessel strikes.³⁸ Because North Atlantic right whales live in and travel along the eastern coast of North America, they are vulnerable to entanglement in the stationary or “fixed” gear that many people use in their fishing businesses.³⁹ The two most common types of fixed gear used in the North Atlantic Ocean are pots (also known as traps) in lobster fishing and gillnets in groundfish, monkfish, and spiny dogfish fishing.⁴⁰ An illustration of the fixed vertical buoy line gear used in lobster fishing is shown in Figure 1.⁴¹ When a right whale encounters lines or nets of fishing gear, it cannot swim backward to disentangle itself, so it may roll, turn, or drag the gear hundreds of miles in an attempt to get free.⁴² Unless the gear is weak enough to break, the right whale may end up wrapping the fishing line around its tail, flippers, body, or even inside its mouth.⁴³ Human efforts to cut off the gear is hampered by the right whale’s nature—massive, free-swimming, uncooperative, and immensely strong, which are all elements that spell danger for a human trying to saw off embedded rope.⁴⁴ A 2021 study concluded that, between 1980 and 2017, over 86% of right whales (642 of 746) had evidence of entanglement interactions, such as scarring.⁴⁵

FISHERIES (Oct. 22, 2024), <https://www.fisheries.noaa.gov/national/marine-life-distress/2017-2024-north-atlantic-right-whale-unusual-mortality-event>.

³⁵ 16 U.S.C. § 1421h(9).

³⁶ See STOCK ASSESSMENTS, *supra* note 18, at 24.

³⁷ See *North Atlantic Right Whale: About the Species*, *supra* note 7.

³⁸ See *2017–2024 North Atlantic Right Whale Unusual Mortality Event*, *supra* note 34.

³⁹ See THE URBAN WHALE, *supra* note 5, at 382.

⁴⁰ *Id.* at 382–83.

⁴¹ *North Atlantic Right Whale: About the Species*, *supra* note 7.

⁴² *Id.* at 384–85.

⁴³ THE URBAN WHALE, *supra* note 5, at 384–85.

⁴⁴ *Id.* at 390–93.

⁴⁵ See STOCK ASSESSMENTS, *supra* note 18, at 26.

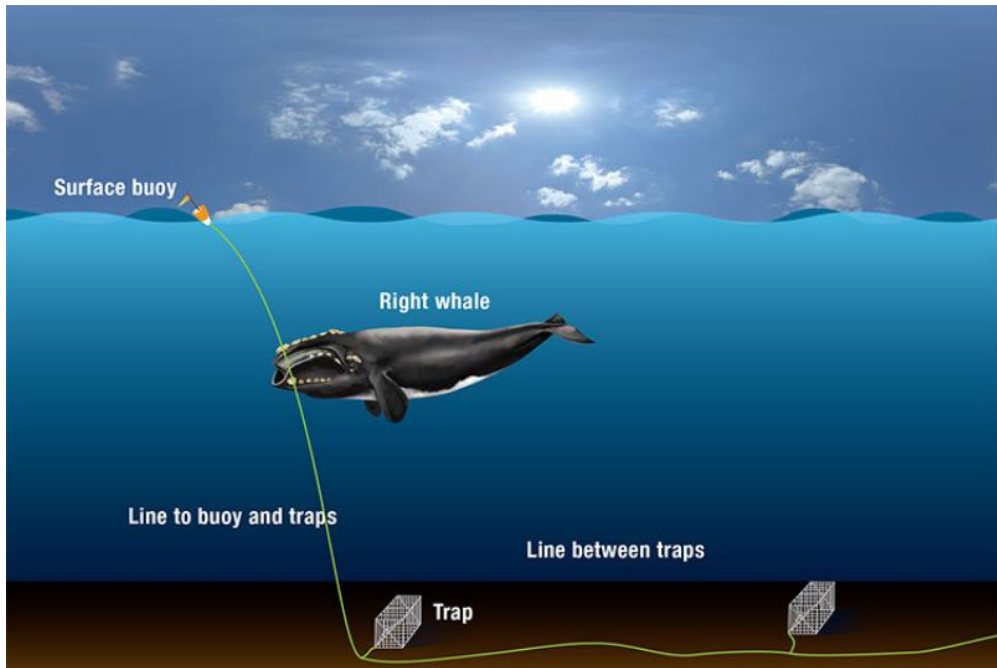


Figure 1: Right Whale Approaching Fixed Vertical Fishing Line

B. Endangered Species Act protections for right whales

North Atlantic right whales have been protected in the United States since species protection legislation was passed, first under the Endangered Species Preservation Act of 1970 and then under the ESA in 1973.⁴⁶ NMFS designated critical habitat for the right whale under the ESA in the 1990s and revised the designation in 2016 to support the species' recovery.⁴⁷

As a listed species, the right whale is entitled to certain protections. For example, it is illegal to “take” right whales without pre-approved authorization.⁴⁸ Whenever an action is authorized, funded, or carried out by a federal agency, like authorization of the American lobster fishery in federal waters, NMFS must consult on the action and determine whether

⁴⁶ Endangered Species Conservation, 35 Fed. Reg. 6069 (Apr. 14, 1970) (codified at 50 C.F.R. pt. 17); Bureau of Sport Fisheries and Wildlife, Fish and Wildlife Service, Dep’t of the Interior, 35 Fed. Reg. 8491 (June 2, 1970) (codified at 50 C.F.R. pt. 17).

⁴⁷ Designated Critical Habitat; Northern Right Whale, 58 Fed. Reg. 38553 (July 19, 1993) (codified at 50 C.F.R. 226); Definition of Critical Habitat, 59 Fed. Reg. 28794 (June 3, 1994) (codified at 50 C.F.R. 226); Critical Habitat for Endangered North Atlantic Right Whale, 81 Fed. Reg. 4838 (Jan. 27, 2016).

⁴⁸ 16 U.S.C. § 1538(a)(1)(B)–(C). *Take* is defined as “to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.” *Id.* § 1532(19); 50 C.F.R. § 222.102.

the action is likely to jeopardize the continued existence of North Atlantic right whales or lead to destruction or adverse modification of the right whale's critical habitat.⁴⁹ If the action is likely to adversely affect North Atlantic right whales, NMFS issues a biological opinion that uses the best available scientific and commercial data to anticipate the expected impact of the action on the species.⁵⁰ If the biological opinion concludes that the action is not likely to jeopardize the continued existence of the right whales but will result in an incidental take of right whales, the biological opinion must include an incidental take statement that specifies "reasonable and prudent measures" that NMFS considers necessary or appropriate to minimize such impact.⁵¹

C. Marine Mammal Protection Act benefits for right whales

North Atlantic right whales (and all marine mammals) have benefited from the protections of the MMPA since Congress passed the statute in 1972. The main purpose of the MMPA is to prevent marine mammal stocks from falling below their "optimum sustainable population" levels, defined as the "number of animals which will result in the maximum productivity of the population or species."⁵² To promote this objective, the MMPA establishes a general moratorium on the "taking" of marine mammals unless authorized and requires NMFS to "prevent the depletion" of marine mammals from incidental take by commercial fisheries.⁵³ The MMPA requires NMFS to prepare a stock assessment report for each marine mammal population in U.S. waters, which must document the population's abundance and trend, describe the fisheries that interact with the stock, and estimate the level of mortality and serious injury caused by those fisheries each year.⁵⁴ Based on the stock assessment report, the

⁴⁹ 16 U.S.C. § 1536(a)(2).

⁵⁰ *Id.*; 50 C.F.R. § 402.14.

⁵¹ 16 U.S.C. § 1536(b)(4)(C)(ii); 50 C.F.R. § 402.14(i)(1)(ii). The ESA has also been referred to as a "statutory ark" (Holly Doremus, *The Purposes, Effects, and Future of the Endangered Species Act's Best Available Science Mandate*, 34 ENV'T. L. 397, 399 (2004)), embodying "institutionalized caution" (Tennessee Valley Authority v. Hill (TVA), 437 U.S. 153, 194 (1978)). *See also id.* at 174 ("[E]xamination of the language, history, and structure of the legislation under review here indicates beyond doubt that Congress intended endangered species to be afforded the highest of priorities.").

⁵² 16 U.S.C. §§ 1361(2), 1362(9). A *stock* is "a group of marine mammals of the same species or smaller taxa in a common spatial arrangement[] that interbreed when mature." 16 U.S.C. § 1362(11).

⁵³ 16 U.S.C. §§ 1372(a), 1387(f)(1).

⁵⁴ 16 U.S.C. § 1386(a). *Serious injury* is defined as "any injury that will likely result in mortality." 50 C.F.R. § 216.3.

agency estimates the “potential biological removal” level for each stock, defined as the “maximum number of animals . . . that may be removed from a marine mammal stock” (excluding natural mortalities) while still “allowing that stock to reach or maintain its optimum sustainable population.”⁵⁵ The North Atlantic right whale is considered one of the most critically endangered populations of large whales in the world, and the potential biological removal level is currently 0.7.⁵⁶ In other words, less than one whale can die each year for it to have a chance of attaining its optimum sustainable population.

The MMPA also instructs NMFS to prepare a “take reduction plan” for each strategic marine mammal stock that interacts with certain types of fisheries.⁵⁷ The goals of a take reduction plan are to reduce mortality and serious injury to less than the marine mammal stock’s potential biological removal level, and it aims to reduce mortality and serious injury to insignificant levels approaching a zero rate.⁵⁸ TRTs, made up of representatives from relevant fisheries, conservation groups, the academic community, and federal and state agencies, develop recommendations for measures to be included in the take reduction plans.⁵⁹ In 1997, NMFS established the Atlantic Large Whale TRT to develop an Atlantic Large Whale Take Reduction Plan. Until 2010, NMFS and the TRT oversaw the steady population growth from about 270 to about 481.⁶⁰

D. The 2021 Atlantic Large Whale Take Reduction Plan Amendment Rule

After NMFS declared the Unusual Mortality Event in 2017 and determined that the right whale population had been in decline since 2010, the agency reconvened the TRT and urged action.⁶¹ The stakeholders engaged in extensive debate and negotiations about how regulated fisheries could minimize harm to the declining right whale population.⁶² On September 17, 2021, NMFS published a final Atlantic Large Whale Take Reduction

⁵⁵ *Id.* §§ 1386(a), 1362(20).

⁵⁶ *See* STOCK ASSESSMENTS, *supra* note 18, at 34.

⁵⁷ 16 U.S.C. § 1387(f)(1). *See also id.* § 1362(19)(C) (defining *strategic stock* as “a marine mammal stock” listed “under the Endangered Species Act”).

⁵⁸ 16 U.S.C. § 1387(f)(2).

⁵⁹ *Id.* § 1387(f)(6).

⁶⁰ *See* STOCK ASSESSMENTS, *supra* note 18, at 19.

⁶¹ Taking of Marine Mammals Incidental to Commercial Fishing Operations; Atlantic Large Whale Take Reduction Plan Regulations; Atlantic Coastal Fisheries Cooperative Management Act Provisions; American Lobster Fishery, 86 Fed. Reg. 51970, 51970–71 (Sept. 17, 2021) (codified at 50 C.F.R. 229, 697).

⁶² *Id.* at 51971.

Plan Amendment Rule (2021 Rule) that included a carefully-designed suite of mitigation measures to reduce incidental mortality and serious injury to right whales in fisheries that use vertical buoy line gear (that is, the American lobster and Jonah crab fisheries).⁶³ The 2021 Rule included: (1) reductions in the number of vertical buoy lines; (2) gear modifications to reduce the strength at which lines will break if a whale gets entangle; (3) one expanded and two new seasonal area closures off the coasts of Massachusetts and Maine; and (4) expanded gear marking requirements to connect ropes more precisely to their respective fisheries.⁶⁴

E. The 2014 and 2021 biological opinions

NMFS has issued several biological opinions as a result of formal consultation under the ESA on the impacts of the American lobster fishery on right whales.⁶⁵ In 2014, NMFS issued a biological opinion that anticipated “take” under the ESA would occur as the result of continued operation of the lobster fishery in federal and state waters managed by NMFS.⁶⁶ The biological opinion, however, did not include an incidental take statement.⁶⁷ NMFS explained that it could not include an incidental take statement because it had not issued an incidental take authorization for right whales under the MMPA.⁶⁸ As described above, the protections for right whales under these two statutes are linked. Before issuing an incidental take statement as part of an ESA biological opinion, the NMFS must make a negligible impact determination under the MMPA. In 2018, environmental non-profit groups challenged NMFS as to this biological opinion.⁶⁹

In 2017, after scientific evidence revealed that the right whale population was declining, NMFS reinitiated consultation. In 2021, NMFS issued a new biological opinion that considered the 2021 Rule measures, all public comments submitted during a comment period, and the Con-

⁶³ *See generally id.*

⁶⁴ *Id.* at 51972–74.

⁶⁵ U.S. NAT’L MARINE FISHERIES SERVS., GREATER ATLANTIC REGIONAL FISHERIES OFF., AUTHORIZATION OF TEN FISHERIES AS AUTHORIZED BY NMFS; THE IMPLEMENTATION OF OMNIBUS EFH AMENDMENT 2 (2021), at 3 (chart listing prior formal consultations) [hereinafter AUTHORIZATION OF TEN FISHERIES].

⁶⁶ U.S. NAT’L MARINE FISHERIES SERV., GREATER ATLANTIC REGIONAL FISHERIES OFF., SECTION 7 CONSULTATION ON THE AMERICAN LOBSTER FISHERY (2014).

⁶⁷ *Id.* at 161.

⁶⁸ *Id.*

⁶⁹ *See* Complaint for Declaratory and Injunctive Relief, Ctr. for Biological Diversity v. Raimondo, No. 1:23-cv-809 (D.D.C. Mar. 27, 2023), ECF No. 1.

servation Framework.⁷⁰ The Conservation Framework was a unique part of the proposed action that committed NMFS to achieving near-zero serious injuries and mortalities from U.S. fisheries for right whales by 2030 through a series of regulatory measures.⁷¹ The 2021 biological opinion anticipated “take” under the ESA would occur as the result of continued operation of the American lobster fishery, but this time, the opinion included an incidental take statement authorizing zero-lethal take of right whales and a determined amount of sublethal take.⁷² In light of the Conservation Framework’s commitment to achieving near-zero take by 2030, the 2021 biological opinion concluded that continued operation of the fishery was not likely to jeopardize North Atlantic right whales.⁷³ Environmental groups and stakeholders in the lobster industry sued NMFS on this biological opinion.⁷⁴ The 2021 biological opinion was ultimately vacated by the U.S. Court of Appeals for the District of Columbia Circuit as to the portions of the opinion addressing right whales and the federal lobster fishery.⁷⁵

III. Litigation and congressional involvement

For years, the tension between federal protection of North Atlantic right whales and regulation of fishing with fixed vertical buoy line gear has led to litigation. Conservation advocates, industry groups, and state stakeholders have all sought rulings favoring their positions, while both state and federal agencies continued to regulate, and Congress looked on. The following subsections summarize the key cases, including some ongoing litigation.

A. Early right whale litigation (First Circuit, District of Massachusetts)

Between 1995 and 2019, one pro se plaintiff interested in protecting the North Atlantic right whale from entanglement in fishing gear brought

⁷⁰ AUTHORIZATION OF TEN FISHERIES, *supra* note 65.

⁷¹ *Id.* at 7–8.

⁷² *Id.* at 389–91.

⁷³ *Id.* at 341.

⁷⁴ *See* Amended Complaint, Ctr. for Biological Diversity v. Ross et al., No. 1:18-cv-112 (D.D.C. Sept. 17, 2021), ECF No. 170; Complaint for Declaratory and Injunctive Relief, Maine Lobstermen’s Ass’n, Inc. v. Nat’l Marine Fisheries Serv., No. 1:21-cv-2509 (D.D.C. Sept. 27, 2021), ECF No. 1.

⁷⁵ Maine Lobstermen’s Ass’n v. Nat’l Marine Fisheries Serv., 70 F.4th 582, 602 (D.C. Cir. 2023).

over 20 cases.⁷⁶ From these cases, four rulings stand out. The first significant ruling dates to 1997, when the U.S. Court of Appeals for the First Circuit upheld, in part, the issuance of an injunction against the Commonwealth of Massachusetts.⁷⁷ In Massachusetts, all commercial fishing vessels in state waters were required to obtain a take permit from the state Division of Marine Fisheries (DMF).⁷⁸ DMF allowed gillnet and lobster-pot fishing gear in certain areas of state waters, as long as a 500-yard buffer zone existed around any right whales.⁷⁹ In the underlying case, the pro se plaintiff challenged DMF's issuance of commercial fishing licenses as violating the ESA and MMPA because the fishing purportedly resulted in take of right whales from entanglement in vertical buoy line gear.⁸⁰ The U.S. District Court for the District of Massachusetts held that it had jurisdiction under the ESA.⁸¹ The district court, however, found that it did not have jurisdiction over the plaintiff's MMPA claim because there is no MMPA citizen-suit provision.⁸²

Finding evidence supporting the allegation that right whales had been entangled in gillnet and lobster-pot fishing gear in Massachusetts waters, the district court granted summary judgment in favor of the plaintiff on his ESA claim and entered a preliminary injunction (PI).⁸³ Instead of implementing the plaintiff's requested protective measures, however, the district court ordered Massachusetts to do the following: (1) apply for an ESA incidental take permit for right whales from NMFS; (2) apply for a take authorization for right whales from NMFS under the MMPA; (3) develop and prepare a proposal to restrict, modify, or eliminate the use of fixed fishing gear in coastal waters of Massachusetts as critical habitat for right whales; and (4) convene an Endangered Whale Working Group to engage in substantive discussions with the plaintiff and other interested parties regarding modifications of fixed fishing gear and other measures to minimize harm to right whales.⁸⁴ On appeal, the First Circuit upheld the district court's finding that Massachusetts' issuance of commercial

⁷⁶ See, e.g., *Strahan v. Sec'y, Mass. Exec. Off. of Energy & Env't Affairs*, 458 F. Supp. 3d 76 (D. Mass. 2020); *Strahan v. Roughead*, 910 F. Supp. 2d 358 (D. Mass. 2012); *Strahan v. Holmes*, 595 F. Supp. 2d 161 (D. Mass. 2009); *Strahan v. Rumsfeld*, No. 1:05-cv-10275, 2005 WL 8176060 (D. Mass. Feb. 11, 2005); *Strahan v. Coxe*, 127 F.3d 155 (1st Cir. 1997); *Strahan v. Linnon*, 966 F. Supp. 111 (D. Mass. 1997).

⁷⁷ *Coxe*, 127 F.3d at 158.

⁷⁸ *Id.* at 159.

⁷⁹ *Id.*

⁸⁰ *Strahan v. Coxe*, 939 F. Supp. 963, 966 (D. Mass. 1996).

⁸¹ *Id.* at 988–89.

⁸² *Id.* at 984–85.

⁸³ *Id.* at 984–985, 992.

⁸⁴ *Id.* at 989–92.

fishing permits violated the ESA.⁸⁵ It also affirmed all injunctive relief, except for the instruction requiring defendants to apply for an MMPA permit.⁸⁶

In 2005, the pro se plaintiff filed suit again in district court, alleging that endangered whales had continued to become entangled in gear licensed by DMF.⁸⁷ After three days of testimony on the plaintiff's motion seeking emergency relief, the district court concluded that the plaintiff had not demonstrated a likelihood of success on the merits.⁸⁸ Nevertheless, the district court established that, in its view, the fishing gear posed a threat to endangered whales and ordered that the state engage in "careful monitoring."⁸⁹

In 2019, the same plaintiff filed another lawsuit in the same vein.⁹⁰ After filing numerous motions requesting emergency injunctive relief, the plaintiff got a hearing before the U.S. District Court for the District of Massachusetts.⁹¹ In its order, the district court found the plaintiff had demonstrated a strong likelihood of success on the merits of his claim that state agency defendants were licensing vertical buoy line gear in a manner which proximately caused right whale entanglement in violation of the ESA.⁹² The court, however, declined to grant a PI for equity reasons.⁹³ Instead, the court ordered the state agency defendants to promptly seek an ESA incidental take permit from NMFS.⁹⁴

The same court held an 11-day trial on an expedited basis to get to the merits. The court dismissed the claims for lack of jurisdiction because the plaintiff had not sufficiently established standing with evidence at the trial.⁹⁵ The court issued an "indicative ruling" as to liability and remedies, in case the plaintiff appealed and the First Circuit reversed its ruling on

⁸⁵ *Coxe*, 127 F.3d at 158.

⁸⁶ *Id.* at 163–64.

⁸⁷ See Verified Amended Complaint for Declaratory and Injunctive Relief and Request for a Jury Trial, *Strahan v. Pritchard*, No. 1:05-cv-10140 (D. Mass. Sept. 30, 2005), ECF No. 66.

⁸⁸ *Strahan v. Pritchard*, 473 F. Supp. 2d 230, 238 (D. Mass. 2007).

⁸⁹ *Id.*

⁹⁰ Verified Complaint for Declaratory, Injunctive, and Other Relief and a Request for a Jury Trial, *Strahan v. Sec'y, Mass. Exec. Off. of Energy & Env't Affs.*, No. 1:19-cv-10639 (D. Mass. Apr. 4, 2019), ECF No. 1.

⁹¹ *Strahan v. Sec'y, Mass. Exec. Off. of Energy & Env't Affairs*, 458 F. Supp. 3d 76, 80–84 (D. Mass. 2020).

⁹² *Id.* at 89.

⁹³ *Id.* at 93–95.

⁹⁴ *Id.*

⁹⁵ *Strahan v. Sec'y, Mass. Exec. Off. of Energy & Env't Affs.*, No. 1:19-cv-10639, 2021 WL 9038570 (D. Mass. Nov. 30, 2021).

standing.⁹⁶ In this 60-page “indicative ruling,” the court opined on the plight of right whales, the take caused by entanglement, and the need for new ropeless gear technology to obviate the need for vertical lines.⁹⁷ The district court stated:

[I]f the First Circuit concludes that Plaintiff has standing, [this] court will enter an injunction directing [DMF] to continue its good faith effort to obtain an Incidental Take Permit, and in the event that these efforts are finally rejected, to cease permitting the deployment of vertical buoy ropes in Massachusetts state waters.⁹⁸

These rulings deeply affected the Commonwealth and led it to make substantial efforts to reduce the unintended but real effect of lobster-pot and gillnet fishing in state waters, including restrictions on the use of certain fishing gear and seasonal closures.⁹⁹

B. Center for Biological Diversity v. Raimondo **(District of Columbia)**

In 2018, four environmental non-profits—the Center for Biological Diversity, Defenders of Wildlife, the Humane Society of the United States, and Conservation Law Foundation—challenged NMFS’s 2014 biological opinion that analyzed the effect of various fisheries on the endangered North Atlantic right whale.¹⁰⁰ Conservation Law Foundation initially brought a separate suit that was consolidated with this one.¹⁰¹ These groups alleged that: (1) the 2014 biological opinion was inadequate under the Administrative Procedure Act (APA) because it did not include an incidental take statement and instead included a “numeric trigger”; (2) NMFS failed to ensure against jeopardy by relying on the inadequate 2014

⁹⁶ Indicative Ruling as to Liability and Remedies, *Strahan v. Sec’y, Mass. Exec. Off. of Energy & Env’t Affs.*, No. 1:19-cv-10639 (D. Mass. Nov. 30, 2021), ECF No. 614.

⁹⁷ See generally *id.*

⁹⁸ *Id.* at 60.

⁹⁹ See *Strahan*, 458 F. Supp. 3d at 88 (describing “serious efforts” Massachusetts had taken as of 2020 “to mitigate the risks” of vertical buoy line fishing gear in Massachusetts coastal waters). See also *North Atlantic Right Whale: In the Spotlight*, NOAA FISHERIES (Oct. 22, 2024), <https://www.fisheries.noaa.gov/species/north-atlantic-right-whale/spotlight> (describing how the Massachusetts Division of Marine Fisheries has led the way in reducing entanglement risk for right whales in state waters).

¹⁰⁰ *Ctr. for Biological Diversity v. Ross*, 349 F. Supp. 3d 38 (D.D.C. 2018).

¹⁰¹ See Minute Order, *Ctr. for Biological Diversity v. Ross*, No. 1:18-cv-112, (D.D.C. May 2, 2018), ECF No. 19 (consolidating with *Conservation L. Found. v. Ross*, No. 1:18-cv-283 (D.D.C.)).

biological opinion in violation of ESA section 7; (3) NMFS unlawfully allowed take of right whales in violation of ESA section 9; and (4) NMFS unlawfully continued authorizing the American lobster fishery without an MMPA take authorization.¹⁰² After briefing on transferring the case to Massachusetts (which the district court denied),¹⁰³ discovery (which the district court allowed for two of the plaintiffs' claims),¹⁰⁴ lodging of the administrative record,¹⁰⁵ and intervention by the Maine Lobstermen's Association and Massachusetts Lobstermen's Association,¹⁰⁶ the parties briefed the merits in cross-motions for summary judgment.¹⁰⁷

¹⁰² Complaint for Declaratory and Other Relief, *Ctr. for Biological Diversity v. Raimondo*, No. 1:18-cv-112 (D.D.C. Jan. 18, 2018), ECF No. 1.

¹⁰³ *Ctr. for Biological Diversity v. Ross*, 310 F. Supp. 3d 119 (D.D.C. 2018).

¹⁰⁴ *Ctr. for Biological Diversity v. Ross*, 349 F. Supp. 3d 38 (D.D.C. 2018).

¹⁰⁵ Notice of Filing the Certified Index for the Administrative Record as to Count I, *Ctr. for Biological Diversity v. Raimondo*, No. 1:18-cv-112 (D.D.C. Aug. 10, 2018), ECF No. 36; Notice of Filing Index to Partial Administrative Record Concerning Defendants' Implementation of the MMPA and ESA, *Ctr. for Biological Diversity v. Raimondo*, No. 1:18-cv-112 (D.D.C. Aug. 17, 2018), ECF No. 37 (the administrative record was supplemented in September 2018, November 2018, and June 2019); Notice of Filing Index to First Supplement to the Administrative Record, *Ctr. for Biological Diversity v. Raimondo*, No. 1:18-cv-112 (D.D.C. Sept. 18, 2018), ECF No. 39; Notice of Filing the Index to the Third Supplement to the Administrative Record, *Ctr. for Biological Diversity v. Raimondo*, No. 1:18-cv-112 (D.D.C. Nov. 1, 2018), ECF No. 46; Notice of Filing Index to Third Supplement to the Administrative Record, *Ctr. for Biological Diversity v. Raimondo*, No. 1:18-cv-112 (D.D.C. June 3, 2019), ECF No. 64.

¹⁰⁶ See Motion to Intervene, *Ctr. for Biological Diversity v. Ross*, No. 1:18-cv-112 (D.D.C. May 30, 2018), ECF No. 24; Motion to Intervene, *Ctr. for Biological Diversity v. Ross*, No. 1:18-cv-112 (D.D.C. Aug. 2, 2018), ECF No. 31 (Maine Lobstering Union and Little Bay Lobster, LLC intervened after the Court's 2020 ruling on summary judgment briefing); Motion to Intervene by Maine Lobstering Union, *Ctr. for Biological Diversity v. Ross*, No. 1:18-cv-112 (D.D.C. May 12, 2020), ECF No. 98; Motion to Intervene by Little Bay Lobster, LLC, *Ctr. for Biological Diversity v. Ross*, No. 1:18-cv-112 (D.D.C. May 13, 2020), ECF No. 102 (the State of Maine filed an amicus brief during the 2020 remedy phase of the case); Amicus Brief by State of Maine, *Ctr. for Biological Diversity v. Ross*, No. 1:18-cv-112 (D.D.C. June 22, 2020), ECF No. 118.

¹⁰⁷ Motion for Summary Judgment, *Ctr. for Biological Diversity v. Ross*, No. 1:18-cv-112 (D.D.C. June 14, 2019), ECF No. 66; Cross Motion for Summary Judgment, *Ctr. for Biological Diversity v. Ross*, No. 1:18-cv-112 (D.D.C. Nov. 15, 2019), ECF No. 81; Memorandum in Opposition to re Motion for Summary Judgment, *Ctr. for Biological Diversity v. Ross*, No. 1:18-cv-112 (D.D.C. June 14, 2019), ECF No. 82; Reply to Opposition to Motion re Motion for Summary Judgment, *Ctr. for Biological Diversity v. Ross*, No. 1:18-cv-112 (D.D.C. Dec. 17, 2019), ECF No. 83; Memorandum in Opposition to re Cross Motion for Summary Judgment, *Ctr. for Biological Diversity v. Ross*, No. 1:18-cv-112 (D.D.C. Dec. 17, 2019), ECF No. 84 (federal defendants first moved to stay the case due to the agency's intent to issue a new biological opinion by July 31, 2020 and issue a regulation amending the Atlantic Large Whale Take Reduction Plan); Motion to Stay, *Ctr. for Biological Diversity v. Ross*, No. 1:18-cv-112

In April 2020, the U.S. District Court for the District of Columbia granted summary judgment on the environmental non-profit plaintiffs' first claim, holding that NMFS's "failure to include an [incidental take statement] in its 2014 [biological opinion] after finding that the American lobster fishery had the potential to harm the North Atlantic right whale at more than three times the sustainable rate is about as straightforward a violation of the ESA as they come."¹⁰⁸

The court invited briefs and held oral argument on the issue of remedy.¹⁰⁹ In August 2020, the court vacated and remanded the portion of the 2014 biological opinion pertaining to the American lobster fishery and the North Atlantic right whale; however, the vacatur was stayed until May 31, 2021.¹¹⁰ On May 28, 2021, NMFS notified the court that it had completed a new, superseding biological opinion.¹¹¹

In September 2021, three environmental plaintiff groups filed an amended complaint challenging the new 2021 biological opinion and 2021 Rule.¹¹² The new complaint alleged four new claims, adding to the previous four claims: (1) the 2021 biological opinion was substantively improper; (2) the 2021 biological opinion again included an unlawful incidental take statement; (3) the 2021 Rule failed to contain measures to reduce right whale mortality and serious injury to below the potential biological removal level within six months of implementation as required by

(D.D.C. Aug. 19, 2019), ECF No. 68 (the court denied the stay); *Ctr. for Biological Diversity v. Ross*, 419 F. Supp. 3d 16 (D.D.C. 2019).

¹⁰⁸ *Ctr. for Biological Diversity v. Ross*, 613 F. Supp. 3d 336, 347 (D.D.C. 2020).

¹⁰⁹ *See* Minute Order, *Ctr. for Biological Diversity v. Ross*, No. 1:18-cv-112 (D.D.C. Apr. 24, 2020), ECF No. 98; Motion for Order on Remedy, *Ctr. for Biological Diversity v. Ross*, No. 1:18-cv-112 (D.D.C. May 15, 2020), ECF No. 105; Response re Motion for Order on Remedy, Motion to Vacate, *Ctr. for Biological Diversity v. Ross*, No. 1:18-cv-112 (D.D.C. June 15, 2020), ECF No. 111; Memorandum in Opposition to re Motion for Order on Remedy, Motion to Vacate, *Ctr. for Biological Diversity v. Ross*, No. 1:18-cv-112 (D.D.C. June 18, 2020), ECF No. 112; Memorandum in Opposition to re Motion for Order on Remedy, Motion to Vacate, *Ctr. for Biological Diversity v. Ross*, No. 1:18-cv-112 (D.D.C. June 18, 2020), ECF No. 114; Response re Motion for Order on Remedy, Motion to Vacate, *Ctr. for Biological Diversity v. Ross*, No. 1:18-cv-112 (D.D.C. June 18, 2020), ECF No. 115; Reply to Opposition to Motion re Motion for Order on Remedy, Motion to Vacate, *Ctr. for Biological Diversity v. Ross*, No. 1:18-cv-112 (D.D.C. July 10, 2020), ECF No. 119.

¹¹⁰ *Ctr. for Biological Diversity v. Ross*, 480 F. Supp. 3d 236 (D.D.C. 2020).

¹¹¹ Notice of Filing Status Update Regarding Completion of New Biological Opinion, *Ctr. for Biological Diversity v. Ross*, No. 1:18-cv-112 (D.D.C. May 28, 2021), ECF No. 135.

¹¹² Amended Complaint, *Ctr. for Biological Diversity v. Ross*, No. 1:18-cv-112 (D.D.C. Sept. 10, 2021), ECF No. 171 (the complaint was amended a few days later); Second Amended Complaint, *Ctr. for Biological Diversity v. Ross*, No. 1:18-cv-112 (D.D.C. Sept. 17, 2021), ECF No. 170.

the MMPA; and (4) NMFS's ongoing failure to reduce right whale mortality and serious injury to below the potential biological removal level within the MMPA's timeline constituted action unlawfully withheld or unreasonably delayed.¹¹³ NMFS lodged a new administrative record in January 2022.¹¹⁴ Having previously only filed an amicus brief at the prior remedy stage, the state of Maine now successfully moved to intervene as a party.¹¹⁵

After the parties briefed the merits in cross-motions for summary judgment, the court once again granted the environmental plaintiffs' motion for summary judgment on July 8, 2022.¹¹⁶ The court identified the "crux of the problem":

[T]he 2021 [biological opinion] projects that in the coming years the American lobster fishery will continue to potentially kill and seriously injure North Atlantic right whales at over three times the sustainable rate . . . even after the implementation of the 2021 Final Rule . . . and even though zero lethal take is authorized [by the 2021 biological opinion].¹¹⁷

The court found two main legal violations. First, NMFS did not meet the "antecedent 'negligible impact' requirement" under the MMPA before issuing the incidental take statement and could not make up for this "failure . . . by setting the level of lethal take authorized at zero."¹¹⁸ Second, the district court held that section 118 of the MMPA requires NMFS to reduce incidental take to a level that is at or below the North Atlantic right whale's potential biological removal level within six months of any amendment to the Atlantic Large Whale Take Reduction Plan.¹¹⁹ Throughout its opinion, the court recognized the difficult role of all parties, including the agency's "considerable effort," the "importance of lobster fishing to the economies of several states," and the environmental plaintiffs' advocacy based on "strict requirements imposed by the MMPA and ESA."¹²⁰

¹¹³ Second Amended Complaint at 4, 31–34, *Ctr. for Biological Diversity v. Ross*, No. 1:18-cv-112 (D.D.C. Sept. 17, 2021), ECF No. 170.

¹¹⁴ Notice of Filing Administrative Record Indices, *Ctr. for Biological Diversity v. Ross*, No. 1:18-cv-112 (D.D.C. Jan. 14, 2022), ECF No. 193. A supplemented administrative record was lodged in February 2022. Notice of Filing Revised Indices for Supplemented Administrative Records, *Ctr. for Biological Diversity v. Ross*, No. 1:18-cv-112 (D.D.C. Feb. 11, 2022), ECF No. 196.

¹¹⁵ Motion to Intervene, *Ctr. for Biological Diversity v. Ross*, No. 1:18-cv-112 (D.D.C. Sept. 24, 2021), ECF No. 172.

¹¹⁶ *Ctr. for Biological Diversity v. Raimondo*, 610 F. Supp. 3d 252 (D.D.C. 2022).

¹¹⁷ *Id.* at 279.

¹¹⁸ *Id.* at 269.

¹¹⁹ *Id.* at 279–80.

¹²⁰ *Id.* at 264–65, 280.

As before, the court invited briefing and held a hearing on the issue of remedy.¹²¹ In its brief, NMFS explained to the court that the “scope of the measures required to reach [the potential biological removal level] will have severe economic and social consequences to the affected fisheries and surrounding communities.”¹²² In November 2022, the court remanded the 2021 Rule without vacatur and ordered NMFS to finalize a new rule by December 9, 2024, which reduces right whale mortality and serious injury in U.S. commercial fisheries to below the species’ potential biological removal level.¹²³

After the passage of the CAA and the D.C. Circuit’s ruling in *Maine Lobstermen’s Association*, discussed below, the *Center for Biological Diversity* court vacated its July 2022 and November 2022 orders and dismissed the case as moot.¹²⁴

C. Maine Lobstering Union v. National Marine Fisheries Service (District of Maine)

In 2021, several industry groups from Maine took specific umbrage with one of the new area closures implemented by the 2021 Rule. A group of plaintiffs led by the District 4 Lodge of the International Association of Machinists and Aerospace Workers (IAMAW), Local Lodge 207, formerly known as the IAMAW Maine Lobstering Union—Local 207 “Maine Lobstering Union” sued NMFS in the U.S. District Court for the District of

¹²¹ Motion for Order on Remedy, Ctr. for Biological Diversity v. Ross, No. 1:18-cv-112 (D.D.C. Aug. 12, 2022), ECF No. 226; Response re Motion for Order on Remedy, Ctr. for Biological Diversity v. Ross, No. 1:18-cv-112 (D.D.C. Sept. 19, 2022), ECF No. 228; Memorandum in Opposition to re Motion for Order, Ctr. for Biological Diversity v. Ross, No. 1:18-cv-112 (D.D.C. Oct. 7, 2022), ECF No. 231; Response re Motion for Order on Remedy, Ctr. for Biological Diversity v. Ross, No. 1:18-cv-112 (D.D.C. Oct. 7, 2022), ECF No. 233; Memorandum in Opposition to re Motion for Order, Ctr. for Biological Diversity v. Ross, No. 1:18-cv-112 (D.D.C. Oct. 7, 2022), ECF No. 234; Response re Motion for Order on Remedy, Ctr. for Biological Diversity v. Ross, No. 1:18-cv-112 (D.D.C. Oct. 7, 2022), ECF No. 235; Response re Motion for Order on Remedy, Ctr. for Biological Diversity v. Ross, No. 1:18-cv-112 (D.D.C. Oct. 7, 2022), ECF No. 236; Reply to Opposition to Motion re Motion for Order on Remedy, Ctr. for Biological Diversity v. Ross, No. 1:18-cv-112 (D.D.C. Oct. 21, 2022), ECF No. 237.

¹²² Response re Motion for Order on Remedy, Exhibit A, at 4, Ctr. for Biological Diversity v. Ross, No. 1:18-cv-112 (D.D.C. Sept. 19, 2022), ECF No. 228 (Declaration of Michael Pentony).

¹²³ Ctr. for Biological Diversity v. Raimondo, No. 1:18-cv-112, 2022 WL 17039193, at *3 (D.D.C. Nov. 17, 2022).

¹²⁴ Ctr. for Biological Diversity v. Raimondo, No. 1:18-cv-112, 2024 WL 324103 (D.D.C. Jan. 29, 2024).

Maine.¹²⁵ While generally in disagreement with the measures regulating lobster fishermen in the 2021 Rule, the Maine Lobstering Union particularly objected to a new measure that closed approximately 970 square miles to lobster fishing in Gulf of Maine Federal waters—known as the Lobster Management Area 1 Restricted Area closure—between October and January.¹²⁶ The Lobster Management Area 1 closure, as well as several other restricted areas, are depicted in Figure 2.¹²⁷ The closure banned vertical buoy line fishing, including lobster fishing, to protect North Atlantic right whales that had been documented as using the same area from October to January.¹²⁸

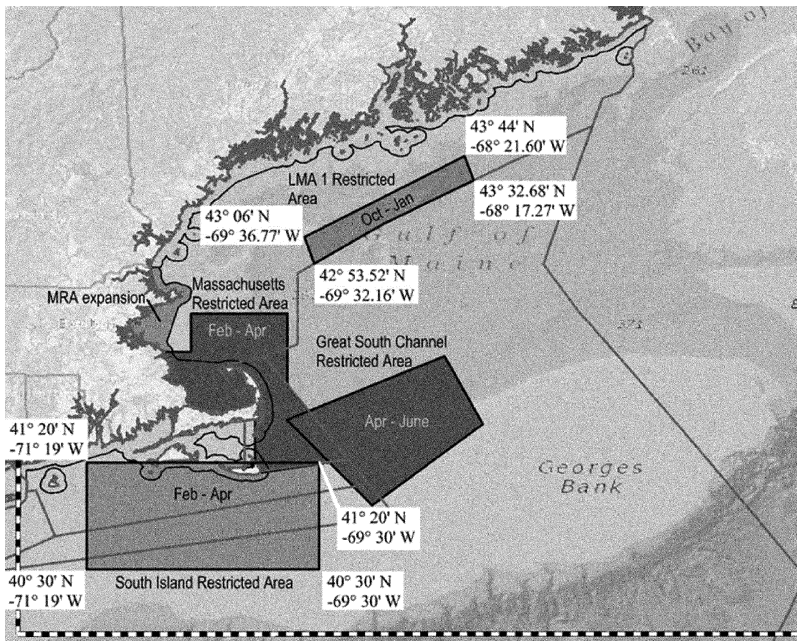


Figure 2: Restricted Areas for Lobster Fishing

Having filed suit days before the closure was scheduled to begin, the Maine Lobstering Union sought an emergency ruling from the district court to prevent implementation of the closure.¹²⁹ After emergency brief-

¹²⁵ Dist. 4 Lodge of the Int'l Ass'n of Machinists & Aerospace Workers v. Raimondo, No. 1:21-cv-275, 2021 WL 4616231 (D. Me. Oct. 6, 2021).

¹²⁶ Complaint for Expedited Declaratory and Injunctive Relief at 4–5, 35–36, Dist. 4 Lodge of the Int'l Ass'n of Machinists & Aerospace Workers v. Raimondo, No. 1:21-cv-275 (D. Me. Sept. 27, 2021), ECF No. 1.

¹²⁷ Taking of Marine Mammals Incidental to Commercial Fishing Operations, 86 Fed. Reg. 51970, 51973 (Sept. 17, 2021) (codified at 50 C.F.R. pts. 229, 697).

¹²⁸ See *id.* at 51970, 51996–97.

¹²⁹ Emergency Motion for Temporary Restraining Order, Preliminary Injunction and Order for Expedited Briefing, Dist. 4 Lodge of the Int'l Ass'n of Machinists & Aerospace Workers v. Raimondo, No. 1:21-cv-275 (D. Me. Oct. 3, 2021), ECF No. 10.

ing, on the Saturday following oral argument, the district court granted Maine Lobstering Union's PI, preventing the closure from going into effect.¹³⁰

NMFS appealed and sought an emergency stay of the district court's relief pending appeal, which the First Circuit granted.¹³¹ In other words, although a bit later than originally scheduled, the First Circuit allowed the closure to go into effect while the appeal was pending. The First Circuit reversed the district court's grant of injunctive relief and sent the case to proceed at the district court level.¹³² The First Circuit's remand specifically addressed the gear that fishers might have placed into the closure area during the time the district court's injunction was in place.¹³³ Several months later, on a non-emergency basis, the First Circuit overturned the district court's ruling on the PI.¹³⁴ Maine Lobstering Union voluntarily dismissed the suit about a month after the First Circuit's ruling.¹³⁵

D. Maine Lobstermen's Association v. National Marine Fisheries Service (District of Columbia)

Also in 2021, the Maine Lobstermen's Association—a non-profit trade association representing more than 1,200 lobster harvesters fishing off the Maine coast—filed suit challenging NMFS's 2021 Rule and 2021 biological opinion on the effects of lobster fishing on the North Atlantic right whale.¹³⁶ The Maine Lobstermen's Association argued that the 2021 biological opinion improperly took an overly protective, “worst case scenario” approach that led to overregulation of the American lobster industry, and because the biological opinion was improper, the 2021 Rule relying on that biological opinion was also improper.¹³⁷ The Maine Lobstering Union, the Massachusetts Lobstermen's Association, and the State of Maine inter-

¹³⁰ Dist. 4 Lodge of the Int'l Ass'n of Machinists & Aerospace Workers v. Raimondo, No. 1:21-cv-275, 2021 WL 4823269 (D. Me. Oct. 16, 2021).

¹³¹ Dist. 4 Lodge of the Int'l Ass'n of Machinists & Aerospace Workers v. Raimondo, 18 F.4th 38 (1st Cir. 2021).

¹³² *Id.* at 43.

¹³³ *Id.* at 50.

¹³⁴ Dist. 4 Lodge of the Int'l Ass'n of Machinists and Aerospace Workers v. Raimondo, 40 F.4th 36 (1st Cir. 2022).

¹³⁵ Stipulation of Dismissal, Dist. 4 Lodge of the Int'l Ass'n of Machinists and Aerospace Workers v. Raimondo, No. 1:21-cv-275 (D. Me. Aug. 24, 2022), ECF No. 81.

¹³⁶ Complaint for Declaratory and Injunctive Relief, Me. Lobstermen's Ass'n v. Nat'l Marine Fisheries Serv., No. 1:21-cv-2509 (D.D.C. Sept. 27, 2021), ECF No. 1.

¹³⁷ *Id.* at 26–30.

vened in support of the Maine Lobstermen's Association.¹³⁸

The case was filed in the District Court for the District of Columbia and assigned to the same judge presiding over the *Center for Biological Diversity v. Raimondo* matter challenging the same 2021 biological opinion and 2021 Rule.¹³⁹ The parties were also identical, as the environmental groups intervened in support of NMFS in this case.¹⁴⁰ The court, however, declined to consolidate the cases.¹⁴¹ As explained above, on July 8, 2022, the court granted summary judgment for the environmental plaintiffs in the *Center for Biological Diversity* challenge, holding that the 2021 biological opinion and 2021 Rule did not go far enough toward meeting the ESA and MMPA requirements to protect right whales.¹⁴² Given that holding, the court asked the parties to submit briefs regarding whether a stay would be appropriate in this case while the parties simultaneously briefed, and the court simultaneously considered a remedy in the *Center for Biological Diversity* case.¹⁴³ Ultimately, the court concluded that a stay would not be appropriate; since the parties spent "significant time and effort" briefing summary judgment, deciding the issues could be helpful for NMFS on remand, and the parties "deserve a determination."¹⁴⁴

The court denied summary judgment on September 8, 2022 for the industry-side plaintiffs.¹⁴⁵ Going through each industry-side objection raised against the merits of the 2021 biological opinion, the court deferred to NMFS's analysis, finding that "NMFS suitably considered the data available at the time of its action and reasonably explained its sci-

¹³⁸ Motion to Intervene by State of Maine Department of Marine Resources, *Me. Lobstermen's Ass'n v. Nat'l Marine Fisheries Serv.*, No. 1:21-cv-2509 (D.D.C. Dec. 16, 2021), ECF No. 21; Motion to Intervene by Massachusetts Lobstermen's Association, *Me. Lobstermen's Ass'n v. Nat'l Marine Fisheries Serv.*, No. 1:21-cv-2509 (D.D.C. Dec. 22, 2021), ECF No. 24; Motion to Intervene by District 4 Lodge of the International Association of Machinists and Aerospace Workers, Local Lodge 207, *Me. Lobstermen's Ass'n v. Nat'l Marine Fisheries Serv.*, No. 1:21-cv-2509 (D.D.C. Dec. 28, 2021), ECF No. 26.

¹³⁹ See discussion *supra* section III.B (discussing *Ctr. for Biological Diversity v. Raimondo*, No. 18-112, 2022 WL 17039193 (D.D.C. Nov. 17, 2022)).

¹⁴⁰ Motion to Intervene by Conservation Law Foundation, Inc., *Ctr. for Biological Diversity, Me. Lobstermen's Ass'n v. Nat'l Marine Fisheries Serv.*, No. 1:21-cv-2509 (D.D.C. Dec. 8, 2021) at ECF No. 16.

¹⁴¹ Minute Order, *Me. Lobstermen's Ass'n v. Nat'l Marine Fisheries Serv.*, No. 1:21-cv-2509 (D.D.C. Dec. 6, 2021), ECF No. 15.

¹⁴² *Ctr. for Biological Diversity v. Raimondo*, 610 F. Supp. 3d 252 (D.D.C. 2022).

¹⁴³ Minute Order, *Me. Lobstermen's Ass'n v. Nat'l Marine Fisheries Serv.*, No. 1:21-cv-2509 (D.D.C. July 22, 2022), ECF No. 66.

¹⁴⁴ Minute Order, *Me. Lobstermen's Ass'n v. Nat'l Marine Fisheries Serv.*, No. 1:21-cv-2509 (D.D.C. Aug. 18, 2022), ECF No. 74.

¹⁴⁵ *Me. Lobstermen's Ass'n v. Nat'l Marine Fisheries Serv.*, 626 F. Supp. 3d 46 (D.D.C. 2022).

entific conclusions.”¹⁴⁶ Regarding challenges to the Conservation Framework, the court found that it “forms a necessary part of the agency’s action” and is therefore reviewable as such, but its analysis and projections are not arbitrary and capricious.¹⁴⁷ Finally, because the court found that the 2021 biological opinion survived against the industry’s challenges, it found that the 2021 Rule’s reliance on the opinion was lawful.¹⁴⁸

Before remedy briefing concluded in *Center for Biological Diversity*, the industry plaintiffs in *Maine Lobstermen’s Association* appealed the summary judgment ruling to the D.C. Circuit.¹⁴⁹ In the midst of briefing, but before oral argument, the district court issued its remedy order in the environmental-side case.¹⁵⁰ Then, Congress passed the CAA (described below) with provisions effectively pausing the implementation of the remedy order in *Center for Biological Diversity*.¹⁵¹ The parties filed supplemental briefs to the D.C. Circuit about whether the CAA mooted out this challenge.

On June 16, 2023, the D.C. Circuit issued a decision reversing the district court’s denial of summary judgment for industry plaintiffs.¹⁵² As a threshold matter, the D.C. Circuit found that the CAA did not moot the case because it is “best read to set a temporary ceiling, not a floor, for compliance” by industry plaintiffs.¹⁵³ Unlike the environmental-side challenge, the industry plaintiffs in this case cared about whether the rule went too far, which was not addressed by the CAA’s provisions deeming the rule “sufficient.”¹⁵⁴ On the merits, the D.C. Circuit concluded that the challenged 2021 biological opinion lacked the necessary scientific substance to be upheld and was contrary to law.¹⁵⁵ The D.C. Circuit warned that ESA section 7 requires agencies to “use the best available scientific data, not the most pessimistic” information.¹⁵⁶ Moreover, while it agreed that agencies faced with limited data need not present “scientific reasons

¹⁴⁶ *Id.* at 57.

¹⁴⁷ *Id.* at 65–68.

¹⁴⁸ *Id.* at 68–69.

¹⁴⁹ Notice of Appeal to D.C. Circuit Court, *Me. Lobstermen’s Ass’n v. Nat’l Marine Fisheries Serv.*, No. 1:21-cv-2509 (D.D.C. Sept. 20, 2022), ECF No. 81.

¹⁵⁰ *Ctr. for Biological Diversity v. Raimondo*, No. 18-CV-112, 2022 WL 17039193 (D.D.C. Nov. 17, 2022).

¹⁵¹ Consolidated Appropriations Act, 2023, Pub. L. No. 117-328, Div. JJ, Tit. I, 136 Stat. 4459, 6089–90.

¹⁵² *Me. Lobstermen’s Ass’n v. Nat’l Marine Fisheries Serv.*, 70 F.4th 582 (D.C. Cir. 2023).

¹⁵³ *Id.* at 593–94.

¹⁵⁴ *Id.*

¹⁵⁵ *Id.* at 596–601.

¹⁵⁶ *Id.* at 599.

or calculated probabilities when no reasons or calculations are possible,” it cautioned that if an agency “lacks a clear and substantial basis for predicting an effect is reasonably certain to occur,” then the effect must be “disregarded in evaluating the agency action.”¹⁵⁷ The D.C. Circuit then vacated the 2021 biological opinion, reasoning that the vacatur would harm no party given the language in the CAA.¹⁵⁸ Finally, the D.C. Circuit remanded the 2021 Rule without vacatur because NMFS “may well be able to explain why [it] does not depend upon the validity of the [2021 biological opinion].”¹⁵⁹

E. 2022 Emergency Rule

After the 2021 Rule went into effect, in January 2022, the Massachusetts DMF sent a letter to alert NMFS to an emerging right whale entanglement risk. Massachusetts’ expansion of a seasonal closure in state waters in 2021 and the subsequent incorporation of that closure into the 2021 Rule inadvertently left an approximately 200 square mile wedge-shaped (Wedge) area open to trap and pot fishing. The Wedge overlapped with an area often used by right whales, creating a significant entanglement risk.¹⁶⁰ Data indicated that lobstermen were parking their gear in the open ocean (“wet storing” their gear), resulting in a significant concentration of trap and pot gear during the closure period. This created an unusually high density of gear in the Wedge from February to April.¹⁶¹ NMFS determined that the Wedge presented an imminent entanglement threat and issued an emergency rule to prohibit trap and pot fishery buoy lines within the area to reduce the incidental mortality and serious injury to right whales.¹⁶² The closure was in effect for the month of April 2022.¹⁶³

¹⁵⁷ *Id.* at 595–96, 599–600.

¹⁵⁸ *Id.* at 601–02.

¹⁵⁹ *Id.* at 602.

¹⁶⁰ Taking of Marine Mammals Incidental to Commercial Fishing Operations; Atlantic Large Whale Take Reduction Plan Regulations, 87 Fed. Reg. 11590, 11592 (Mar. 2, 2022) (codified at 50 C.F.R. pt. 229).

¹⁶¹ *Id.*

¹⁶² See generally *id.*; 16 U.S.C. § 1387(g) (MMPA emergency rulemaking authority, requiring NMFS to “prescribe emergency regulations that, consistent [to the maximum extent practicable] with [any take reduction plan currently in place.] reduce incidental mortality and serious injury in that fishery” if it “finds that the incidental mortality and serious injury of marine mammals from commercial fisheries is having, or is likely to have, an immediate and significant adverse impact on a stock or species”).

¹⁶³ Taking of Marine Mammals Incidental to Commercial Fishing Operations; Atlantic Large Whale Take Reduction Plan Regulations, 87 Fed. Reg. at 11590.

F. Consolidated Appropriations Act

After the 2022 summary judgment and remedy rulings in *Center for Biological Diversity* and while *Maine Lobstermen's Association* was pending before the D.C. Circuit, the TRT reconvened to discuss recommending measures that could comply with the district court's strict timetable set in its 2022 remedy ruling. Since the best potential technological fix—on-demand or “ropeless” systems that do not require a gear-to-buoy tether—was not ready for large-scale deployment, one option would have been to institute more or larger seasonal closures to vertical buoy lines.¹⁶⁴

Before NMFS could formulate or propose any new regulation recommended by the TRT, Congress passed the CAA, and on December 29, 2022, President Biden signed it.¹⁶⁵ The CAA included provisions specific to NMFS's regulation of the American lobster and Jonah crab fisheries with respect to right whales.¹⁶⁶ Senator Angus King from Maine described the toll that the *Center for Biological Diversity* remedy ruling's requirement for future regulations would have on Maine lobster fishers, but he emphasized that he and his colleagues viewed the CAA as “in no way” diminishing “the standards of the [ESA] or the [MMPA]”; rather “it merely pauses that economic death sentence until we have time to know how to navigate the solution.”¹⁶⁷

For example, the CAA deems the 2021 Rule “sufficient to ensure that the continued [f]ederal and [s]tate authorizations of the American lobster and Jonah crab fisheries are in full compliance” with the MMPA and the ESA until December 31, 2028.¹⁶⁸ In section 101(b), however, Congress carved out an exception for “an existing emergency rule, or any action taken to extend or make final an emergency rule that is in place on” the date of enactment that affects the American lobster and Jonah crab fisheries.¹⁶⁹

Section 101(a) also directs NMFS to take a series of actions between enactment and December 31, 2028, to facilitate the development of new fishing gear technologies intended to protect right whales and then to incorporate those technologies into a regulation to take effect by that

¹⁶⁴ *Developing Viable On-Demand Gear Systems*, NE. FISHERIES SCI. CTR., NOAA FISHERIES (July 18, 2024), <https://www.fisheries.noaa.gov/new-england-mid-atlantic/marine-mammal-protection/developing-viable-demand-gear-systems>.

¹⁶⁵ Consolidated Appropriations Act, 2023, Pub. L. No. 117-328, 136 Stat. 4459.

¹⁶⁶ *Id.*

¹⁶⁷ 168 CONG. REC. S9591, S9608 (daily ed. Dec. 20, 2022) (statement of Sen. King).

¹⁶⁸ Consolidated Appropriations Act, 2023, Pub. L. No. 117-328, § 101(a), 136 Stat. 4459.

¹⁶⁹ *Id.* § 101(b).

date.¹⁷⁰ The CAA further instructs NMFS to establish a grant program to facilitate the development of those technologies and to submit annual reports to Congress describing “the actions taken and plans to implement measures expected to not exceed potential biological removal level by December 31, 2028,” the “amount of mortality and serious injury by fishery and country,” and the “proportion of the American lobster and Jonah crab fisheries that have transitioned to innovative gear technologies that reduce harm to” the right whale.¹⁷¹ The CAA authorizes appropriations of up to \$50 million per year between 2023 and 2032—not less than \$40 million of which must be dedicated to the development of innovative gear and technology.¹⁷²

G. Massachusetts Lobstermen’s Association v. National Marine Fisheries Service (District of Columbia)

In February 2023, citing the MMPA and CAA as authority, NMFS published a rule extending the 2022 Emergency Rule to close the Wedge off the coast of Massachusetts from February 1 to April 30, reopening May 1, 2023.¹⁷³ This area is shown in Figure 3.¹⁷⁴

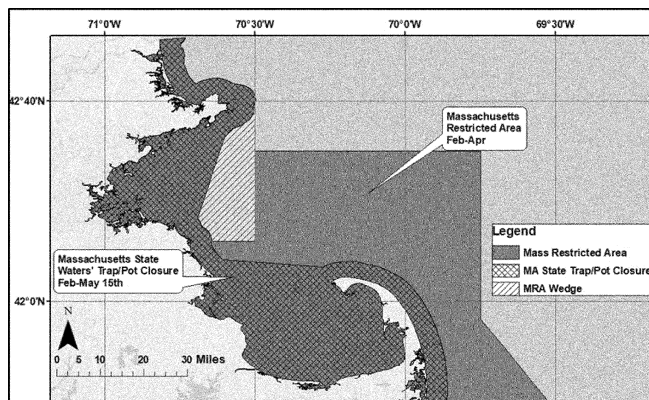


Figure 3: Map Depicting the Wedge Closed by 2022 Emergency Rule Between Other Closure Areas

On February 1 and 2, 2023, the Massachusetts Lobstermen’s Association filed a complaint and motions seeking emergency injunctive relief in

¹⁷⁰ *Id.* § 101(a)(1)–(3).

¹⁷¹ *Id.* § 101(a)(3), 201(a)(1).

¹⁷² *Id.* § 203(a)(1).

¹⁷³ Taking of Marine Mammals Incidental to Commercial Fishing Operations; Atlantic Large Whale Take Reduction Plan Regulations, 88 Fed. Reg. 7362 (Feb. 3, 2023) (codified at 50 C.F.R. pt. 229).

¹⁷⁴ *Id.* at 7362, 8336.

the U.S. District Court for the District of Columbia, specifically seeking to enjoin the 2023 Emergency Rule as violating the CAA.¹⁷⁵ The case was assigned to the same judge presiding in *Center for Biological Diversity and Maine Lobstermen's Association*.¹⁷⁶

After briefing and oral argument on the emergency injunction motion, the court denied the Massachusetts Lobstermen's Association's motion for emergency relief, finding that Plaintiff failed to establish irreparable harm.¹⁷⁷ The court construed the first motion as seeking a temporary restraining order (TRO) and gave Plaintiff an opportunity to file a PI motion with additional testimony substantiating irreparable harm.¹⁷⁸ Plaintiff, however, did not file such a motion. NMFS then successfully moved to dismiss the case as moot when the Wedge reopened on May 1, 2023.¹⁷⁹

H. Massachusetts Lobstermen's Association v. National Marine Fisheries Service (District of Massachusetts)

In September 2023, NMFS published a proposed rule to amend the Atlantic Large Whale Take Reduction Plan to permanently create a seasonal closure of the Wedge by expanding the boundaries of the already-existing Massachusetts Restricted Area to include the Wedge.¹⁸⁰ After a public comment period in February 2024, NMFS issued the Final Wedge Rule.¹⁸¹

¹⁷⁵ Complaint for Declaratory and Other Relief, *Mass. Lobstermen's Ass'n v. Nat'l Marine Fisheries Serv.*, No. 1:23-cv-293 (D.D.C. Feb. 1, 2023), ECF No. 1; Motion for Temporary Restraining Order, Preliminary Injunction, and Stay Pursuant to 5 U.S.C. § 705, *Mass. Lobstermen's Ass'n v. Nat'l Marine Fisheries Serv.*, No. 1:23-cv-293 (D.D.C. Feb. 2, 2023), ECF No. 2.

¹⁷⁶ See Notice of Related Case, *Mass. Lobstermen's Ass'n v. Nat'l Marine Fisheries Serv.*, No. 1:23-cv-293 (D.D.C. Feb. 3, 2023), ECF No. 13 (federal defendants' notice relating the cases); Case Directly Reassigned to Judge James E. Boasberg, *Mass. Lobstermen's Ass'n v. Nat'l Marine Fisheries Serv.*, No. 1:23-cv-293 (D.D.C. Feb. 7, 2023), ECF No. 15 (reassigning case to Judge James Boasberg as there is an earlier related case).

¹⁷⁷ See Minute Entry, *Mass. Lobstermen's Ass'n v. Nat'l Marine Fisheries Serv.*, No. 1:23-cv-293 (D.D.C. Feb. 16, 2023), ECF No. 29 (transcript of proceedings).

¹⁷⁸ See *id.* at 31.

¹⁷⁹ *Mass. Lobstermen's Ass'n v. Nat'l Marine Fisheries Serv.*, No. 23-CV-293, 2023 WL 3231450 (D.D.C. May 3, 2023).

¹⁸⁰ Taking of Marine Mammals Incidental to Commercial Fishing Operations; Atlantic Large Whale Reduction Plan Regulations, 88 Fed. Reg. 63917 (Sept. 18, 2023) (codified at 50 C.F.R. pt. 229).

¹⁸¹ Taking of Marine Mammals Incidental to Commercial Fishing Operations; Atlantic Large Whale Take Reduction Plan Regulations, 89 Fed. Reg. 8333 (Feb. 7, 2024)

The Massachusetts Lobstermen’s Association filed suit again, this time in the U.S. District Court for the District of Massachusetts.¹⁸² The Massachusetts Lobstermen’s Association simultaneously filed a complaint and motion for a TRO and PI, challenging NMFS’s decision to permanently establish a seasonal emergency closure of lobster trap and pot fisheries in the Wedge off the coast of Massachusetts as in violation of the APA, the CAA, and the D.C. Circuit’s ruling in *Maine Lobstermen’s Association v. National Marine Fisheries Service*.¹⁸³

The district court merged the motion for a PI with a “trial on the merits,” pursuant to Federal Rule of Civil Procedure 65(a), concerning whether the CAA precluded NMFS from issuing the Final Wedge Rule.¹⁸⁴ After a hearing as to that statutory question, the district court ruled the plaintiff had standing and that the Final Wedge Rule was inconsistent with the CAA.¹⁸⁵ The court entered judgment for the Massachusetts Lobstermen’s Association and declared that NMFS’s Final Wedge Rule violates the CAA “through December 31, 2028,” and the Final Wedge Rule is “therefore void and unenforceable during that period.”¹⁸⁶ NMFS appealed to the First Circuit where the case is currently pending.¹⁸⁷

IV. Congressional involvement in Endangered Species Act implementation

The CAA changed the state of play for all stakeholders in right whale litigation and regulation, but it was not the first time Congress waded into ESA implementation. It has sought to inject flexibility into the ESA

(codified at 50 C.F.R. pt. 229).

¹⁸² See *Mass. Lobstermen’s Ass’n v. Nat’l Marine Fisheries Serv.*, No. 1:24-cv-10332, 2024 WL 2194260 (D. Mass. Apr. 16, 2024).

¹⁸³ See Complaint for Declaratory and Other Relief, *Mass. Lobstermen’s Ass’n v. Nat’l Marine Fisheries Serv.*, No. 1:24-cv-10332 (D. Mass. Feb. 9, 2024), ECF No. 1; Motion for Temporary Restraining Order, Preliminary Injunction, and Administrative Stay, *Mass. Lobstermen’s Ass’n v. Nat’l Marine Fisheries Serv.*, No. 1:24-cv-10332 (D. Mass. Feb. 9, 2024), ECF No. 3.

¹⁸⁴ See Electronic Clerk’s Notes, *Mass. Lobstermen’s Ass’n v. Nat’l Marine Fisheries Serv.*, No. 1:24-cv-10332 (D. Mass. Mar. 7, 2024), ECF No. 51.

¹⁸⁵ See Electronic Clerk’s Notes, *Mass. Lobstermen’s Ass’n v. Nat’l Marine Fisheries Serv.*, No. 1:24-cv-10332 (D. Mass. Mar. 14, 2024), ECF No. 59; Judgment, *Mass. Lobstermen’s Ass’n v. Nat’l Marine Fisheries Serv.*, No. 1:24-cv-10332 (D. Mass. Mar. 15, 2024), ECF No. 60; Memorandum of Decision, *Mass. Lobstermen’s Ass’n v. Nat’l Marine Fisheries Serv.*, No. 1:24-cv-10332 (D. Mass. Apr. 16, 2024), ECF No. 67.

¹⁸⁶ See Judgment, *Mass. Lobstermen’s Ass’n v. Nat’l Marine Fisheries Serv.*, No. 1:24-cv-10332 (D. Mass. Mar. 15, 2024), ECF No. 60.

¹⁸⁷ See Notice of Appeal, *Mass. Lobstermen’s Ass’n v. Nat’l Marine Fisheries Serv.*, No. 1:24-cv-10332 (D. Mass. May 14, 2024), ECF No. 79.

or sought to mitigate regulatory uncertainty regarding its administration four noteworthy times before enacting the CAA.

A. The God Squad and Tellico Dam

Congress first amended the ESA in response to its on-the-ground effects in 1978. That year, after several years of litigation, the Supreme Court decided *Tennessee Valley Authority v. Hill* concerning completion of Tennessee Valley Authority's (TVA's) Tellico Dam.¹⁸⁸ At the time of the court's decision, the Tellico Dam was "virtually completed."¹⁸⁹ If finished, TVA projected it would impound water over approximately 16,500 acres of farmland and create a 30-mile long reservoir.¹⁹⁰ The reservoir would cover all of the known habitat of the snail darter—a fish species discovered in proximity to Tellico in 1973 by a University of Tennessee ichthyologist and professor.¹⁹¹ Fish and Wildlife Service (FWS) listed the darter as endangered in 1975 and declared the area around the Tellico Dam to be critical habitat in 1976.¹⁹²

Pursuant to ESA section 7, TVA consulted with FWS as to whether the Tellico Dam would jeopardize the snail darter or adversely modify its critical habitat.¹⁹³ There were no modifications that TVA could make to avoid that adverse modification.¹⁹⁴ FWS concluded, based on the "best scientific and commercial data available," that the Tellico Dam was likely to destroy the snail darter's critical habitat.¹⁹⁵ At the district court stage, the court found that it was also "highly probable" that the Tellico Dam would jeopardize the snail darter's continued existence.¹⁹⁶

TVA urged the Supreme Court to rule that the ESA did not prohibit Tellico's completion because it had been authorized, funded, and over 50% constructed before Congress had passed the ESA.¹⁹⁷ Even though Congress had been funding the project since 1966 and halting it would cause the loss of millions of dollars, the court affirmed the Sixth Cir-

¹⁸⁸ *TVA*, 437 U.S. 153 (1978).

¹⁸⁹ *Id.* at 157.

¹⁹⁰ *Id.*

¹⁹¹ *Id.* at 158.

¹⁹² Amendment Listing the Snail Darter as an Endangered Species, 40 Fed. Reg. 47505, 47505–06 (Oct. 9, 1975). See also Endangered and Threatened Wildlife and Plants: Snail Darter, 41 Fed. Reg. 13926–28 (Apr. 1, 1976) (designating critical habitat for the snail darter).

¹⁹³ *TVA*, 437 U.S. at 165.

¹⁹⁴ *Hill v. Tenn. Valley Auth.*, 419 F. Supp. 753, 758 (E.D. Tenn. 1976).

¹⁹⁵ *Id.*

¹⁹⁶ *Id.* at 757.

¹⁹⁷ *TVA*, 437 U.S. at 163.

cuit's injunction.¹⁹⁸ Justice Burger's majority opinion stated that "[i]t may seem curious . . . that the survival of a relatively small number of three-inch fish among all the countless millions of species extant would require the permanent halting of a virtually completed dam for which Congress has expended more than \$100 million" but concluded that "the explicit provisions of the [ESA] require precisely that result."¹⁹⁹ The court made that finding despite the fact that the Tellico Dam was supposed to improve local economic conditions.²⁰⁰ It noted that the final version of the legislation omitted qualifying language, such as a proposal which would have required action agencies to ensure against jeopardy only "insofar as is practicable and consistent with the[ir] primary purposes."²⁰¹

Congress responded to *Tennessee Valley Authority v. Hill* by creating the Endangered Species Committee (also known as "the God Squad") in October 1978, empowering it to exempt an action agency's federal action from the section 7 "no jeopardy" or "adverse modification" requirement.²⁰² The God Squad is composed of the Secretary of the Interior; the Secretary of Agriculture; the Army; the Chairperson of the Council of Economic Advisors; the Environmental Protection Agency Administrator; the Administrator of the National Oceanic and Atmospheric Administration; and one individual from each affected state.²⁰³ If the God Squad grants an exemption, it must also establish reasonable mitigation and enhancement measures that are "necessary and appropriate to minimize the adverse effects" of an approved action on the species or critical habitat.²⁰⁴ It has received six applications, convened twice, and only once provided an exemption.²⁰⁵ The God Squad exempted the Grayrocks dam project in Nebraska from compliance with ESA section 7 concerning effects to the whooping crane, and another time for 13 logging projects that

¹⁹⁸ *Id.* at 174 n.19. *See also* *Hill v. Tenn. Valley Auth.*, 549 F.2d 1064, 1072 (6th Cir. 1977) (Sixth Circuit, noting "continued work [on the dam] violates [ESA section 7]"); *id.* at 1074 (Sixth Circuit, declining to grant itself "license to rewrite" the ESA based on "economic exigencies").

¹⁹⁹ *TVA*, 437 U.S. at 172–73.

²⁰⁰ *Id.* at 157 (citing *Hearings on Public Works for Power and Energy Research Appropriation Bill, 1977, Before the Subcomm. of the H. Comm. on Appropriations*, 94th Cong. 261 (1976)).

²⁰¹ *Id.* at 181 (internal citation omitted).

²⁰² *Id.* *See also* Patrick Parenteau, *The Exemption Process and the God Squad*, in *ENDANGERED SPECIES ACT: LAW, POLICY, AND PERSPECTIVES* 131, 132–33 (3d ed. 2002) (discussing the origination of the committee, which "reflects the tension between the oft-competing goals of species conservation and economic development").

²⁰³ 16 U.S.C. § 1537a(e).

²⁰⁴ CONG. RES. SERV., *ENDANGERED SPECIES ACT (ESA): THE EXEMPTION PROCESS* 8 (2017) [hereinafter *ENDANGERED SPECIES ACT*].

²⁰⁵ *Id.* at 14–24.

would impact the northern spotted owl.²⁰⁶ The latter came in reaction to district judge Redden's order halting logging on Pacific Northwest federal lands managed by the Bureau of Land Management (BLM).²⁰⁷ The Ninth Circuit overturned the logging exemption in spotted owl habitat, finding that the president had improperly discussed the exemption with his cabinet.²⁰⁸ At least one commentator has asserted that the committee did not function as conceived; the committee unanimously declined to exempt Tellico Dam, which they referred to as, *inter alia*, a "turkey" of a project and "ill-conceived."²⁰⁹

In creating the God Squad, Congress did not task the Committee with determining what the impact of the project on the species would be, using the best scientific and commercial data available.²¹⁰ Instead, Congress directed the Committee to determine whether: (1) there are any reasonable and prudent alternatives to the agency action; (2) the project is in the public interest, and its benefits outweigh those of alternative courses of action, consistent with conserving the species or its critical habitat; (3) the action is of regional or national significance; or (4) the action agency made any irreversible or irretrievable commitment of resources.²¹¹ When it met concerning the dam, the God Squad declined to exempt the dam from ESA section 7 compliance. Congress intervened again in 1979, specifically exempting the dam from ESA section 7 compliance.²¹² TVA completed the dam in 1979, but TVA collected snail darters from the Little Tennessee River in 1975 and transplanted them to the Hiawassee and Holston rivers and, later, elsewhere.²¹³ In the years that followed, actions taken by FWS, TVA, and other stakeholders eventually led FWS to delist it in 2022.²¹⁴ The species can now be found in Alabama, Georgia, Tennessee, and Mississippi.²¹⁵

²⁰⁶ *Id.*

²⁰⁷ *Id.*

²⁰⁸ *Portland Audubon Soc'y v. Endangered Species Comm.*, 984 F.2d 1534 (9th Cir. 1993).

²⁰⁹ Parenteau, *supra* note 202, at 144. *See also* Transcript of Endangered Species Comm. Mtg., Dep't of the Interior (Jan. 23, 1979).

²¹⁰ ENDANGERED SPECIES ACT, *supra* note 204, at 14–24 (2017).

²¹¹ 16 U.S.C. § 1536(h). *See also* Bd. of Governors of Fed. Rsrv. Sys. v. Dimension Fin. Corp., 474 U.S. 361, 374 n.7 (1986) (citing Pub. L. No. 95-632, § 5, 92 Stat. 3760); Anthony Lewis, *The Ultimate Corruption*, N.Y. TIMES, Jan. 17, 1980, at A23S.

²¹² ENDANGERED SPECIES ACT, *supra* note 204, at 14–24 (2017).

²¹³ *Id.*

²¹⁴ Endangered and Threatened Wildlife and Plants; Removing the Snail Darter from the List of Endangered and Threatened Wildlife, 87 Fed. Reg. 60298 (Oct. 5, 2022) (codified at 50 C.F.R. pt. 17).

²¹⁵ *Id.*

This new process, however, did not result in an exemption for TVA. In January 1979, the committee unanimously rejected TVA's exemption application for the Tellico Dam, with its Chair, Interior Secretary Cecil Andrus, characterizing the dam as "ill-conceived and uneconomical in the first place."²¹⁶ Congress, however, intervened a second time. Tennessee Representative John Duncan offered an amendment to a 1980 appropriations bill exempting Tellico from ESA section 7.²¹⁷ The Senate approved Representative Duncan's language in September 1979.²¹⁸ President Carter, while expressing regret about the Tellico provision, signed it on September 25, 1979.²¹⁹

B. The Northern Rocky Mountains gray wolf distinct population segment

Congress again directly responded to a court's decision regarding ESA implementation involving the listing status of the gray wolf (*Canis lupus*). In the 1990s, administrative reforms sought to build on the flexibility that Congress had added to the ESA in 1978 and 1982. FWS operationalized habitat conservation plans, "no surprises" and "safe harbors" policies, and candidate conservation agreements allowing for permits for incidental take of listed species.²²⁰ While the species once occupied a large portion of the United States, after the arrival of European settlers, its range began to shrink due to deliberate killings and human agricultural and industrial development. As a result, its range and population substantially declined by the 1970s. Between 1966 and 1976, FWS declared regional subspecies of the gray wolf endangered. In 1995, reintroduction efforts began in Yellowstone National Park. The species began to disperse and re establish itself in the lower 48 states.²²¹

²¹⁶ ENDANGERED SPECIES ACT, *supra* note 204, at 15.

²¹⁷ *Id.*

²¹⁸ *Id.*

²¹⁹ *Id.* (citing Energy and Water Development Appropriation Act, Pub. L. No. 96-69, 93 Stat. 437 (1980)). As approved, the statute provided that notwithstanding ESA Section 7, TVA "is authorized and directed to complete construction, operate and maintain the Tellico Dam and Reservoir project for navigation, flood control, electric power generation and other purposes" An Act Making Appropriations for Energy and Water Development for the Fiscal Year Ending Sep. 30, 1980, and for Other Purposes, Pub. L. 96-69, 93 Stat 437, Title IV.

²²⁰ Goble et al., *supra* note 2, at 1098-99 (discussing "the administrative amendment" from 1994-2001, which amounted to a "fourth Endangered Species Act of 1973"); J.B. Ruhl, *While the Cat's Asleep: The Making of the 'New' ESA*, 12 NAT. RES. & ENV'T 187 (1998) (discussing how Clinton administration overhauled ESA administratively from 1994-2001, which two ESA experts likened to "fourth Endangered Species Act of 1973.").

²²¹ In parallel to this federal effort, the citizens of Colorado approved Ballot Initiative

In the early 2000s, FWS sought to reorganize its gray wolf listings and delist certain listed entities known as “distinct population segments.”²²² Each attempt, however, was met by court challenges and mixed litigation results.²²³ In 2009, FWS published final rules designating and delisting

114 in the November 2020 state election, requiring the Colorado Parks and Wildlife Commission to reintroduce gray wolves in Colorado. COLORADO PARKS AND WILDLIFE, COLORADO WOLF RESTORATION AND MANAGEMENT PLAN (2023).

²²² 16 U.S.C. 1532(16), 1532(a).

²²³ Endangered and Threatened Wildlife and Plants; Final Rule to Reclassify and Remove the Gray Wolf from the List of Endangered and Threatened Wildlife in Portions of the Conterminous United States; Establishment of Two Special Regulations for Threatened Gray Wolves, 68 Fed. Reg. 15804, 15818 (Apr. 1, 2003) (codified at 50 C.F.R. pt. 17) (FWS dividing listing into three DPSs: an (1) Eastern; (2) Western; and a (3) Southwestern segment (designating Eastern and Western segments as threatened, rather than endangered)); *Defs. of Wildlife v. Dep’t of the Interior*, 354 F. Supp. 2d 1156, 1170–72 (D. Or. 2005) (vacating 2003 Rule, finding FWS ignored species’ status in its full range by downlisting it based solely on viability of small population within that segment); *Nat’l Wildlife Fed’n v. Norton*, 386 F. Supp. 2d 553, 584–65 (D. Vt. 2005) (invalidating attempt to designate and delist Eastern DPS because it had impermissibly lumped any gray wolves in Northeast region into Eastern DPS, without determining whether population existed in Northeast of U.S.); Endangered and Threatened Wildlife and Plants; Final Rule Designating the Western Great Lakes Populations of Gray Wolves as a Distinct Population Segment; Removing the Western Great Lakes Distinct Population Segment of the Gray Wolf from the List of Endangered and Threatened Wildlife, 72 Fed. Reg. 6052 (Feb. 8, 2007) (codified at 50 C.F.R. pt. 17) (FWS issuing new rule creating and delisting Western Great lakes gray wolf DPS); *Humane Soc’y of the U.S. v. Kempthorne*, 597 F. Supp. 2d 7 (D.D.C. 2008) (invalidating 2007 Rule concerning Western Great lakes DPS for failing to address statutory ambiguities concerning creation of DPSs for purpose of delisting); Designated Critical Habitat; Northern Right Whale, 58 Fed. Reg. 38553 (Apr. 2, 2009) (codified at 50 C.F.R. pt. 226) (delisting Western Great lakes DPS again); Order of Stipulated Settlement, *Humane Soc’y of the U.S. v. Salazar*, No. 09-cv-1092 (D.D.C. July 2, 2009), ECF No. 27 (2009 stipulated settlement, vacating and remanding 2009 Rule concerning Western Great Lakes DPS to FWS and returning it to prior listing status); Endangered and Threatened Wildlife and Plants; Final Rule to Identify the Western Great Lakes Populations of Gray Wolves as a Distinct Population Segment and to Revise the List of Endangered and Threatened Wildlife, 74 Fed. Reg. 15070 (Apr. 2, 2009) (codified at 50 C.F.R. pt. 17) (FWS delisting or Northern Rocky Mountains gray wolf). In 2012, FWS delisted the species’ populations in Wyoming, which the D.C. Circuit upheld. Endangered and Threatened Wildlife and Plants; Removal of the Gray Wolf in Wyoming from the Federal List of Endangered and Threatened Wildlife and Removal of the Wyoming Wolf Population’s Status as an Experimental Population, 77 Fed. Reg. 55530 (Sept. 10, 2012) (codified at 50 C.F.R. pt. 17); *Defs. of Wildlife v. Zinke*, 849 F.3d 1077, 1093 (D.C. Cir. 2017). Congress members continue to propose gray wolf-specific legislation to this day. H.R. 764, 118th Cong. (2024) (Trust the Science Act, seeking to “require the Secretary of the Interior to reissue regulations removing the gray wolf from the list of endangered and threatened wildlife under the [ESA].”).

the Western Great Lakes Distinct Population Segment and the Northern Rocky Mountain Distinct Population Segment, except it did not delist the gray wolf in Wyoming after finding the state's management plan inadequate.²²⁴ In litigation concerning the case, Judge Donald Molloy of the U.S. District Court for the District of Montana overturned FWS's delisting decision for the Northern Rocky Mountains distinct population segment.²²⁵

Similar to the State of Maine congressional delegates, which spearheaded the effort behind the CAA, the congressional delegates for states impacted by gray wolf presence (that is, Montana and Idaho) introduced and advocated for language in an appropriations bill directing FWS to reissue the 2009 rule delisting the Northern Rocky Mountains distinct population segment.²²⁶ Congress ultimately enacted legislation directing FWS to do so, "without regard to any other provision of statute or regulation," further declaring that FWS's reissued rule would not be subject to judicial review.²²⁷ FWS did as instructed in May 2011.²²⁸ Several environmental groups challenged the constitutionality of the gray wolf appropriations rider, which the district court and the Ninth Circuit rejected.²²⁹

With the gray wolf appropriations bill rider, Congress drew a proverbial line in the sand, demarcating the limits of federal agency power to regulate and judicial review as to an individual species. The groups that pushed for settlement of the issue and deregulation were pleased with this outcome,²³⁰ while conservation advocates were not.²³¹ In the district

²²⁴ Endangered and Threatened Wildlife and Plants; Final Rule to Identify the Western Great Lakes Populations of Gray Wolves as a Distinct Population Segment and to Revise the List of Endangered and Threatened Wildlife, 74 Fed. Reg. 15070 (Apr. 2, 2009) (codified at 50 C.F.R. pt. 17); *id.* at 15123.

²²⁵ *Def. of Wildlife v. Salazar*, 812 F. Supp. 2d 1205, 1207 (D. Mont. 2009).

²²⁶ Press Release, Jon Tester, Tester Successfully Delists Wolves in Montana, Returns Management to State (Apr. 14, 2011) (thanking Representative Mike Simpson from Idaho as co-sponsor).

²²⁷ Department of Defense and Full-Year Continuing Appropriations Act, 2011, Pub. L. No. 112-10, § 1713, 125 Stat. 38, 150 (2011).

²²⁸ Endangered and Threatened Wildlife and Plants; Reissuance of Final Rule to Identify the Northern Rocky Mountain Population of Gray Wolf as a Distinct Population Segment and to Revise the List of Endangered and Threatened Wildlife, 76 Fed. Reg. 25590 (May 5, 2011) (codified at 50 C.F.R. pt. 17).

²²⁹ *All. for the Wild Rockies v. Salazar*, 800 F. Supp. 2d 1123 (D. Mont. 2011).

²³⁰ *See, e.g., U.S. Congress Passes Historic Wolf Legislation*, GAME & FISH MAG. (Apr. 15, 2011), <https://www.gameandfishmag.com/editorial/u.s.-congress-passes-historic-wolf-legislation/347452#replay> ("Rep. Simpson and Sen. Tester, as well as others in the Congressional Sportsmen's Caucus, are to be congratulated for their leadership in this historic move towards delisting of wolves and rightfully returning the species management to professional state wildlife managers . . .").

²³¹ *See, e.g.,* Press Release, Ctr. for Biological Diversity, Tester, Simpson Sneak

court opinion upholding the rider—reflecting some of the tension underlying Congress’s action—the district judge opined:

Inserting environmental policy changes into appropriations bills may be politically expedient, but it transgresses the process envisioned by the Constitution by avoiding the very debate on issues of political importance said to provide legitimacy. Policy changes of questionable political viability, such as occurred here, can be forced using insider tactics without debate by attaching riders to legislation that must be passed.²³²

C. The greater sage-grouse

Congress again took control over ESA implementation with respect to the potential listing of the greater sage-grouse (*Centrocercus urophasianus*). “[Before] the European settlement of western North America in the 19th century, greater sage-grouse occurred in 13 states and three Canadian provinces.”²³³ Currently, the sage-grouse inhabits areas across 11 western states, stretching from eastern Washington, Oregon, and California to western North and South Dakota, south to Colorado, and north into Canada (roughly half of its historical range). Fragmentation and loss of sagebrush habitat are the species’ primary threats.²³⁴ Multiple factors—habitat conversion for agricultural, energy development and urbanization, and physical biological factors such as encroachment by exotic grasses and amplified wildfire cycles—modify the sagebrush habitat on which the species relies. These human-made factors have caused “significant and ongoing population declines” across the bird’s range.²³⁵

Petitions to list the grouse were first filed with FWS in 1999. In 2010, FWS determined that the species merited listing.²³⁶ But FWS also found listing was temporarily precluded by higher-priority listing actions and designated it as a “candidate species.”²³⁷ This designation required FWS to conduct yearly status reviews.

Wolf-Killing Rider into Budget Bill: Precedent-setting Move Would Strip Endangered Species Act Protection from Wolves in Montana, Wyoming, Idaho, Washington, Oregon (Apr. 12, 2011).

²³² *All. for the Wild Rockies*, 800 F. Supp. 2d at 1125.

²³³ U.S. FOREST SERVICE, FREQUENTLY ASKED QUESTIONS: GREATER SAGE-GROUSE STATUS REVIEW (2015).

²³⁴ Press Release, BigGame Forever, USFWS Seeks Science, Data Related to Greater Sage-Grouse and Efforts to Protect Sagebrush Habitat (Aug. 12, 2014).

²³⁵ *Id.*

²³⁶ Endangered and Threatened Wildlife and Plants; 12-Month Findings for Petitions to List the Greater Sage-Grouse (*Centrocercus urophasianus*), 75 Fed. Reg. 13910 (Mar. 23, 2010) (codified at 50 C.F.R. pt. 17).

²³⁷ Expanding the Economic and Innovation Opportunities of Spectrum through In-

This indeterminate status, development pressure, and the controversial nature of the issues led to litigation. In 2015, the FWS determined that a listing for the species writ large was unnecessary because certain conservation plans for the species were sufficiently protective.²³⁸ FWS, however, has reopened comment on the potential listing for a two-state distinct population segment located in Nevada and California.²³⁹ One of the lawsuits resulted in a settlement agreement in which FWS agreed to decide whether to list or remove the bird as a candidate species by September 30, 2015. With that deadline looming, federal and state authorities proposed certain conservation measures to avoid an ESA listing.²⁴⁰ In accordance with that plan, BLM, in cooperation with the U.S. Forest Service (USFS), incorporated species-specific conservation measures in regional planning documents, revising nearly 100 management plans governing tens of millions of public land acres.

At this stage, in December 2014, members of Congress from affected states intervened. They introduced and passed language precluding FWS from listing the grouse. Congress had placed a general moratorium on listing from 1995–1996.²⁴¹ But the 2014 appropriations rider represented the first time Congress had intervened to prevent the listing of a specific species.²⁴²

The legislative rider expressly prohibited federal regulators from devoting funds to ESA rulemakings to protect the greater sage-grouse, and Congress did not stop there.²⁴³ Similar language was included in the ap-

centive Auctions, 77 Fed. Reg. 699934, 70015 (Nov. 21, 2012) (codified at 47 C.F.R. pts. 1, 2, 73).

²³⁸ Endangered and Threatened Wildlife and Plants, 12-Month Finding on a Petition to List Greater Sage-grouse (*Centrocercus urophasianus*) as an Endangered or Threatened Species, 80 Fed. Reg. 59858, 59874 (Oct. 2, 2015) (codified at 50 C.F.R. pt. 17).

²³⁹ Endangered and Threatened Wildlife and Plants; Threatened Status for the Bi-State Distinct Population Segment of Greater Sage-Grouse with Section 4(d) Rule and Designation of Critical Habitat, 88 Fed. Reg. 25613 (Apr. 27, 2023) (codified at 50 C.F.R. pt. 17).

²⁴⁰ *Historic Conservation Campaign Protects Greater Sage-Grouse*, U.S. DEP'T INTERIOR (Sep. 22, 2015), <https://www.doi.gov/pressreleases/historic-conservation-campaign-protects-greater-sage-grouse>.

²⁴¹ Emergency Supplemental Appropriations and Rescissions for the Department of Defense to Preserve and Enhance Military Readiness Act of 1995, Pub. L. No. 104-6, 109 Stat. 73, 86.

²⁴² *Id.*

²⁴³ Sage-Grouse and Endangered Species Conservation and Protection Act, H.R. 4419, 113th Cong. (2013–2014); Consolidated and Further Continuing Appropriations Act, 2015, Pub. L. No. 113-235, § 122, 128 Stat. 2130, 2422 (2014).

propriations bills for the 2015–2023 fiscal years.²⁴⁴ BLM, which manages the largest single share of sage-grouse habitat in the United States (just under 50%), published a draft plan regarding greater sage-grouse conservation and management on public lands in March 2024.²⁴⁵

V. Conclusion

The North Atlantic right whale is an interesting ESA case study. All parties agree that the species' population is at a low level, and that it is critically endangered. All concur that federal laws protect it to some degree. And most of the parties recognize that the state and federal governments and regulated entities must improve the species' outlook. That said, universal agreement has remained out of reach as to how best to move forward. Congress entered the fray in 2022, crafting a compromise involving funds for the development of ropeless fishing gear and a five-year regulatory pause.

The CAA was also part of a long-term pattern of congressional involvement. In keeping with its occasional practice, Congress waded into an ESA implementation situation once again. One Senator asserted that in passing the CAA, Congress was avoiding an “economic death sentence” not just for the Maine American lobster fishery, but for the State of Maine.²⁴⁶ The North Atlantic right whale story sheds light on Congress's willingness to step in when it perceived the costs associated with ESA implementation were too high. Whether the threat that is apparent to Congress is a judicial injunction resulting from enforcement of the adverse modification prohibition (snail darter), continued listing of a controversial species (gray wolf), a potential future listing (greater sage-grouse), or possible future regulation (North Atlantic right whale), Congress has demonstrated its willingness to find new ways to inject flexibility into the ESA.

Congress has used different approaches, introducing a new ESA-wide process (snail darter and the God Squad) but subsequently pivoting to employ project- (snail darter), species- (gray wolf and greater sage-grouse), and industry-specific approaches (North Atlantic right whale). In

²⁴⁴ Consolidated Appropriations Act, 2016, H.R. 2029, 114th Cong. § 117 (2016); Consolidated Appropriations Act, 2017, H.R. 244, 115th Cong. § 113 (2017); Maxine Joselow, *U.S. Moves to Save Imperiled Bird of the West by Limiting Oil Drilling*, WASH. POST (Mar. 14, 2024), <https://www.washingtonpost.com/climate-environment/2024/03/14/greater-sage-grouse-biden-plan/>.

²⁴⁵ Press Release, U.S. Dep't of the Interior, Bureau of Land Mgmt., BLM Proposes Stronger Greater Sage-Grouse Conservation Plans (Mar. 14, 2024).

²⁴⁶ Press Release, Senator Angus King, “An Economic Death Sentence” Averted, King Champions Provision to Pause Lobster Gear Regulations on Senate Floor (Dec. 21, 2022).

addition to the gray wolf and greater sage-grouse, Congress has sought to make species-specific changes to the listing process for at least 11 species. Some of those efforts concerned species that had already been listed.²⁴⁷

One could also view the CAA as part of a long-term conversation between the executive, legislative, and judicial branches about how to balance real human economic interests with society's need to protect wildlife. The ESA recognizes that imperiled species of wildlife and plants "are of [a]esthetic, ecological, educational, historical, recreational, and

²⁴⁷ Polar Bear Delisting Act, H.R. 39, 112th Cong. § 2 (2011) (seeking to delist polar bear, originally listed in 2008); State Sovereignty Wildlife Management Act, H.R. 6485, 111th Cong. 1 (2010) (providing that "inclusion of the gray wolf on lists of endangered species and threatened species under the [ESA] shall have no force or effect"); Restoring State Wildlife Management Act of 2010, S. Res. 3864, 111th Cong. 1 (2010) (seeking "[t]o remove a portion of the distinct population segment of the Rocky Mountain gray wolf from the list of threatened species or the list of endangered species"); Delisting Gray Wolves to Restore State Management Act of 2011, S. Res. 321, 112th Cong. 1 (2011) (seeking "[t]o provide for the status of the Northern Rocky Mountain distinct population segment of the gray wolf"); A Bill to Amend the Endangered Species Act of 1973 to Provide that Act Shall Not Apply to Any Gray Wolf (*Canis lupis*), S. 249, 112th Cong. § 1 (2011) (attempting to delist gray wolf, listed in 1967); H.R. 509, 112th Cong. § 1 (2011) (same); 133 CONG. REC. 35046 (1987) (statement of Rep. Charles Marlenee) (same); 133 CONG. REC. 35039 (1987) (statement of Rep. Charles Stenholm) (advocating for delisting of Concho water snake, listed in 1986 and delisted in 76 Fed. Reg. 66780 (Oct. 27, 2011) (codified at 50 C.F.R. pt. 17)); 133 CONG. REC. 36088 (1987) (statement of Rep. Wes Watkins) (advocating for delisting of leopard darter, listed in 1987); Discredit Eternal Listing Inequality of Species Takings Act, H.R. 1042, 112th Cong. 1 at § 2(3) ("The Delhi Sands Flower-loving Fly's listing . . . may be in conflict with construction or other development projects or other forms of economic activity."). *But see* 133 CONG. REC. 36091 (1987) (statement of Rep. James Jones, arguing that exception for leopard darter would establish a "very bad precedent," because "[w]hile the U.S. [FWS] may be well equipped to assess complicated and often contradictory biological information, we in Congress are not"). *See also id.* at 35040 (statement of Rep. Gerry Studds, stating that congressionally removing specific species "would set an extraordinarily bad precedent"). Others sought to prevent the listing of species under consideration by FWS. Salamander Community Conservation Act, H.R. 6219, 112th Cong. § 2 (2012); Salamander Community Conservation Act, S. Res. 3446, 112th Cong. § 2 (2012) ("Section 4(a) [of the ESA] shall not apply to—(1) the Austin blind salamander; (2) the Georgetown salamander; (3) the Jollyville Plateau salamander; or (4) the Salado salamander."); S. Amdt. 2507 to S. Res. 429, 112th Cong. (2011–2012) ("[t]his Act shall not apply to the lesser prairie chicken"); S. Amdt. 392 to S. Res. 782, 112th Cong. (June 7, 2011) ("[t]his Act shall not apply to the sand dune lizard;"); S. Amdt. 1978 to S. Res. 2204, 112th Cong. (Mar. 28, 2012) (same); Bluefin Tuna Fishermen Employment Preservation Act, H.R. 1806, 112th Cong. 1 (2011) ("[t]he Bluefin tuna may not be treated as an endangered species or threatened species"); Managing Predators Act, H.R. 286, 117th Cong. (Jan. 12, 2021) (seeking to "amend the [ESA] to exclude the gray wolf from the authority of such Act, to remove the gray wolf from the lists of threatened species and endangered species published pursuant to such Act, and for other purposes.").

scientific value to the [n]ation and its people.”²⁴⁸ Some 50 years after Congress passed the ESA, our understanding of the value of species like the North Atlantic right whale continues to evolve. One scholar argues that large whales like North Atlantic right whales are “international public goods,” playing important roles in ocean ecology by redistributing nutrients needed by phytoplankton (nitrogen and phosphorous) through the water column via food consumption and waste.²⁴⁹ And one recent estimate values one large whale over its lifetime and the unwanted carbon that it sequesters from the atmosphere at \$2 million.²⁵⁰ It seems likely that Congress will remain involved to some level in ESA implementation and administration going forward. Time will tell.

About the Authors

Brett Grosko is a senior trial attorney in the Wildlife and Marine Resources Section (WMRS) of the Department’s Environment and Natural Resources Division (ENRD). In that role, he practices appellate and trial court litigation under the federal wildlife and marine resources statutes, including the ESA, MMPA, and Migratory Bird Treaty Act. He is also a Professorial Lecturer in Law at George Washington University Law School, where he teaches Public Natural Resources Law and Wildlife & Ecosystems Law. He received his J.D. from George Washington University Law School, his M.A. in International Affairs from the Johns Hopkins University School of Advanced International Studies, and his B.A. from Georgetown University.

Taylor Mayhall is a trial attorney in the WMRS of the Department’s ENRD. She received her J.D. from the University of Minnesota Law School and her B.A. from Carleton College.

²⁴⁸ 16 U.S.C. § 1531(a)(3).

²⁴⁹ Ralph Chami et al., *Nature’s Solution to Climate Change: A Strategy to Protect Whales Can Limit Greenhouse Gases and Global Warming*, INT’L MONETARY FUND (2019) (discussing “whale conveyor belt”).

²⁵⁰ *Id.*