

UNITED STATES DISTRICT COURT  
DISTRICT OF MASSACHUSETTS

RICHARD MAXIMUS STRAHAN,

Plaintiff,

v.

ADMINISTRATOR, NATIONAL OCEANIC  
AND ATMOSPHERIC ADMINISTRATION  
("NOAA");

ASSISTANT ADMINISTRATOR,  
NATIONAL MARINE FISHERIES SERVICE  
("NMFS");

SECRETARY, MASSACHUSETTS OFFICE  
OF ENERGY AND ENVIRONMENTAL  
AFFAIRS ("MEOEEA");

DIRECTOR, MASSACHUSETTS DIVISION  
OF MARINE FISHERIES ("MDMF");

COMMISSIONERS, ATLANTIC STATES  
MARINE FISHERIES COMMISSION  
("ASMFC"); and

MASSACHUSETTS LOBSTERMEN'S  
ASSOCIATION ("MLA"),

Defendants.

CIVIL ACTION 1:18-cv-10392-DJC

**MASSACHUSETTS' OPPOSITION**  
**TO MOTION FOR TEMPORARY RESTRAINING ORDER**

**Introduction**

As regards the Commonwealth defendants, this suit is, in all meaningful respects, another iteration of the same suit plaintiff Richard Strahan has brought against Massachusetts regulators

multiple times before.<sup>1</sup> Pursuant to Fed. R. Civ. P. 65, Plaintiff now moves for a temporary restraining order enjoining defendants Massachusetts Executive Office of Energy and Environmental Affairs Secretary Matthew Beaton and Massachusetts Division of Marine Fisheries Director David Pierce (collectively, “the Commonwealth”) from continuing to license lobster pot gear in Massachusetts waters unless the Commonwealth can demonstrate to the Court that there are no Right Whales in Massachusetts coastal waters. See Plaintiff’s Application for a Temporary Restraining Order (Document 25), Declaration of Richard Maximus Strahan (Document 29, 29-1 and 29-2), and Plaintiff’s hearing request (Document 34, 34-1) (collectively, “the Motion”).

Plaintiff’s vigilant concern for the safety of the right whales is commendable. Nonetheless, in bringing this action, he must still comply with the applicable requirements of the “citizen suit” provision of the Endangered Species Act (“the ESA”), 16 U.S.C. § 1540(g). Because Plaintiff did not provide the mandatory pre-suit notice before filing this action nor has he made a factual showing to support the extraordinary relief he seeks, the Motion must be denied.

#### Factual Background

The Commonwealth’s Division of Marine Fisheries (“MDMF”) has the comprehensive authority and responsibility under Massachusetts law to regulate, manage and protect the Commonwealth’s commercial and recreational marine fisheries resources. Declaration of Daniel J. McKiernan, Deputy Director of the Division of Marine Fisheries (“McKiernan Dec.”) at ¶ 1. MDMF works responsibly to regulate commercial and recreational fisheries based on the best

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<sup>1</sup> See Strahan v. Diodati et al., 755 F. Supp.2d 318 (D. Mass. 2010); Strahan v. Pritchard, 473 F.Supp.2d 230 (D. Mass. 2007); Strahan v. Coxe, 939 F.Supp. 963 (D. Mass. 1996), vacated in part and affirmed in part, 127 F.3d 155 (1<sup>st</sup> Cir. 1997).

available science to ensure that the fisheries and their habitats are sustainably maintained and that protected marine species are conserved. Id. at ¶ 2. Among other things, MDMF regulates fixed gear fisheries, including the setting of lobster traps and gillnets in state waters. Id. at ¶ 3. It has state statutory authority to adopt, amend, or repeal rules and regulations, with the approval of the Governor, necessary for the maintenance, preservation and protection of all marine fisheries resources. Id. It also has authority to permit commercial and recreational fishing in the marine waters of the Commonwealth, including fishing that utilizes fixed gear such as gill nets and lobster traps/pots. Id.

MDMF issues Coastal Lobster permits to authorize commercial lobstermen to fish for lobsters in state waters and Offshore Lobster permits to land lobsters in a Massachusetts port by vessels authorized by NMFS to fish in federal waters. McKiernan Dec. ¶ 4. Permits are issued annually and expire on December 31 of each year. Id. Up to 800 traps may be set by each permit holder, though some fishermen are restricted to lower numbers of traps depending on the Lobster Conservation Management Area fished. Id. MDMF has issued 1,058 of these commercial lobster permits for calendar year 2018. Id.

MDMF also issues Non-commercial Lobster Permits to authorize recreational fishermen to harvest lobsters from state waters. McKiernan Dec. ¶ 5. Up to 10 traps may be set under these permits. Id. MDMF issued 6,537 Non-commercial Lobster Permits for calendar year 2017. Id. DMF expects to issue a similar number of permits in calendar year 2018. Id.

MDMF recognizes the North Atlantic right whale to be a critically endangered species protected under both the federal Endangered Species Act (“ESA”) and the federal Marine

Mammal Protection Act (“MMPA”). McKiernan Dec. ¶ 6.<sup>2</sup> Right whales travel over the course of the year from the Canadian Maritimes down to Florida. Id. A typical annual distribution pattern for right whales includes travel to the United States southeast coast to calve off Georgia and Florida, then the use of feeding grounds in Cape Cod Bay and the Great South Channel in late winter and early spring. Id. Summer feeding grounds include the Bay of Fundy and habitats off Nova Scotia and in the Gulf of St. Lawrence. Id. Even when aggregations of right whales are not actively feeding in Cape Cod Bay, as they have been over the past two months, it is not uncommon for solitary right whales to be observed anywhere within the range of the species. Id.

MDMF’s habitat monitoring activities show that the right whale’s preferred food source, zooplankton (especially *Calanus* copepods), is found in abundance in Cape Cod Bay during the spring. McKiernan Dec. ¶ 7. Zooplankton abundance has been documented to be decreasing in the southeast United States, in the Gulf of Maine (other than Cape Cod Bay) and in the Bay of Fundy. Id. As a consequence, the right whales’ use of Cape Cod Bay as a food source has increased. Id.

Right whales may become entangled in fixed fishing gear (e.g., trap lines, gillnets) set anywhere in the range of the species. McKiernan Dec. ¶8. Entangled right whales are capable of carrying rope and gear long distances. Id. Gear origin can be ascertained by the permit numbers on the entangling gear when – or if -- the gear is retrieved from the whale. Id. However, most right whale entanglements cannot be attributed to a certain fishery because the gear is either not recovered or because the identifying portion of the gear (e.g., the permit numbers on the buoy or the traps or nets) is lost when the whales break the gear during the entanglement. Id.

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<sup>2</sup> Also, the right whale (*Eubalaena glacialis*) is the marine mammal or marine mammal emblem of the Commonwealth. Mass. G. L. c. 2, § 16.

MDMF and the federal National Marine Fisheries Service (“NMFS”) have engaged in extensive efforts to protect and conserve the right whale since the early 1990s. McKiernan Dec. ¶ 9. For example, Cape Cod Bay was first designated a Critical Habitat by NMFS and DMF in 1994. Id. In 2016, NMFS significantly expanded the scope of its Critical Habitat designation to include all of the Gulf of Maine. Id. In the case of MDMF, it has promulgated a series of regulations at 322 Code Mass. Reg. 12.00 over the last two decades that are designed to minimize the likelihood of harm to the right whale and other protected marine species from gear entanglements and vessel strikes. Id. at ¶ 10. More specifically, 322 Code Mass. Reg. 12.03 prohibits the use or abandonment of fixed fishing gear rigged with lines that float at the water’s surface or that use a buoyant ground or buoy lines. Id. at ¶ 11. 322 Code Mass. Reg. 12.06, in turn, establishes year-round restrictions on certain fixed fishing gear, including requiring that gillnets and trap gear be rigged with specified breakaway features and restricting the number of buoy lines used on trap trawls. Id.

No recreational or commercial fisherman permitted by MDMF may fish, set, store, or abandon any trap gear in the Large Whale Trap/Pot Gear Closure Area from February 1<sup>st</sup> through at least April 30<sup>th</sup>. McKiernan Dec. ¶ 12. A map depicting the closure area is contained in 322 Code Mass. Reg. 12.11. Id. The scope and timing of the restricted area is based on the documented co-occurrence of aggregations of right whales with the presence of fixed-fishing gear. Id. This year, in response to the continued presence of large numbers of right whales in the Large Whale Trap/Pot Gear Closure Area, MDMF extended the duration of the Cape Cod Bay portion of the closure area by emergency regulation through May 15, 2018. Id.

In addition to area closures, MDMF has promulgated by emergency regulation at 322 Code Mass. Reg. 12.05, a speed limit of 10 knots or less on vessels measuring less than 65 feet

in overall length operating within the MDMF-established Cape Cod Bay Restricted Area through May 15, 2018. McKiernan Dec. ¶ 13. NMFS already has a regulation in place that imposes the same speed limit on vessels of 65 feet or more in overall length. Id. The purpose of MDMF's new regulation is to enhance the protection of right whales from strikes by small vessels operating in Cape Cod Bay. Id. MDMF intends to promulgate its seasonal small vessel speed limit regulation on a permanent basis. Id.

The joint effort by NMFS, MDMF and other partners to protect right whales includes conducting aerial and vessel-based population surveys each winter/spring in Cape Cod Bay and adjacent waters; this survey program has been in place since 1998. McKiernan Dec. ¶ 14. There is also a related Disentanglement Program directed at removing entangling lines from opportunistically sighted entangled whales and leatherback turtles. Id. The Provincetown Center for Coastal Studies ("PCCS") performs much of the above field work through a contract with MDMF, which is funded by a grant from NMFS with additional funding from the Massachusetts Environmental Trust. Id. The results of the aerial surveys and disentanglement activities are provided to NMFS, which maintains a database for such purpose. Id.

#### Cape Cod Bay Trap Gear Closure

Two decades of aerial survey results have documented the annual presence of large concentrations of right whales from mid-winter through early spring in Cape Cod Bay. McKiernan Dec. ¶ 15. These concentrations of right whales typically peak in April and the whales usually depart by the end of April, but sometimes in early May. Id. Up to two-thirds of the known approximately 450 right whales in the world have been observed in aggregate in the surveys in some years. Id. Peak abundance in Cape Cod Bay has reached up to 200 right whales in a single day. Id. During the closure months of February – April, MDMF staff obtains

locations of observed fixed gear from the aerial surveys and works with the Massachusetts Environmental Police to remove any abandoned or illegally-set lobster traps from the closure area. Id.

MDMF uses the results of the aerial surveys to warn vessel operators to avoid collisions and to determine whether an extension of the Large Whale Trap/Pot Gear Closure time period is warranted because of continued presence of significant numbers of right whales in Cape Cod Bay. McKiernan Dec. ¶ 16. For example, because right whales were still abundant in Cape Cod Bay in the last days of April, 2017, MDMF extended the closure to lobster traps in a portion of Cape Cod Bay for an additional seven days. Id. After four days the survey showed that nearly all the whales had departed and MDMF lifted the closure at that time. Id. This year, as discussed above, MDMF has also extended the closure through May 15<sup>th</sup> based on ongoing sightings of right whales in the Bay and habitat monitoring results suggesting the zooplankton is sufficiently abundant to cause the whales to remain in the area. Id.

PCCS has conducted several aerial surveys of Cape Cod Bay since the beginning of May. McKiernan Dec. ¶17. An aerial survey conducted on May 4, 2018, observed 84 right whales in the Bay. Id. Those survey results led MDMF to extend the Large Whale Trap/Pot Gear Closure time period to May 15, 2018. Id. A partial aerial survey conducted on May 6, 2018, observed 75 right whales in the Bay. Id. A partial aerial survey conducted on May 9, 2018, observed 31 right whales in the Bay. Id.

It is MDMF's expectation that, weather permitting, PCCS will conduct another aerial survey on or before Monday, May 14, 2018. McKiernan Dec. ¶ 17. Based on the results of that survey, or even if the weather does not permit another sufficiently complete aerial survey to

occur, MDMF will determine at that time whether to extend the Large Whale Trap/Pot Gear Closure time period beyond May 15, 2018. Id.

Since the plaintiff's preceding litigation against MDMF concluded in December, 2010, MDMF is aware of one (1) known entanglement of a right whale from gear set in Massachusetts state waters. McKiernan Dec. ¶ 18. In September 2016, a right whale was found entangled on Stellwagen Bank in federal waters from gear that was originally set in Cape Cod Bay; that whale was successfully disentangled by PCCS employees working in the Disentanglement Program. Id.

In April 2018 a right whale named Kleenex was observed by the survey in federal waters of Stellwagen Bank with entangling lines on its body. McKiernan Dec. ¶ 19. This whale was first seen with this entanglement 100 miles off the coast of Delaware in 2014. Id. The origin of that entanglement is unknown, although it involved heavy rope typically used by lobster fishermen in the deeper waters under federal jurisdiction. Id.

#### North Shore Area Open to Regulated Fishing Effort

In the past two weeks, right whales have also been opportunistically sighted by members of the public and observed from NMFS aerial survey planes in other inshore waters off Gloucester and Marblehead. McKiernan Dec. ¶ 20. Those sightings have constituted no more than a dozen whales at a time. Id. An aerial flight conducted by NMFS on May 5, 2018 over that area resulted in the sighting of two (2) right whales. Id. Because there is not the same availability of zooplankton in those inshore waters, MDMF does not expect these whales to aggregate and stay there, as they do in Cape Cod Bay. Id. ¶21. Fixed-fishing gear set in these waters must comply with the gear restrictions established in MDMF's regulations at 322 Code



Mass. Reg. 12.03, 12.04 and 12.06 that are designed to minimize the likelihood of an entanglement of a right whale. Id.

It is MDMF's position that, given the small number of right whales currently present in these inshore waters that are not expected to stay, the resulting degree of risk of a right whale entanglement occurring does not warrant granting the Plaintiff's request that these areas be immediately closed to fixed gear fishing. As a practical matter, it would require the DMF-permitted fishermen to remove their gear from the water, which could take two to three weeks to accomplish. McKiernan Dec. ¶ 21. Consistent with the historical data, MDMF expects that the remaining right whales will have departed from these waters in advance of that timeframe.

MDMF's regulatory and management strategy is to protect all right whales in Massachusetts waters from entanglement. Along with NMFS and partners such as PCCS, MDMF is diligently fulfilling that responsibility, promulgating what may be the most protective set of regulations in the country and conducting robust aerial survey and habitat monitoring efforts. McKiernan Dec. ¶ 22. MDMF continues to evaluate the need for additional regulatory protections as evidenced most recently by promulgation of new regulation imposing a speed limit on small vessels operating in Cape Cod Bay. Id.

#### Procedural Background

On April 13, 2018, Plaintiff filed an amended complaint seeking a declaration that, in issuing in-shore permits for lobster traps and gill nets, the MDMF has authorized vertical lines to be placed in the water, leading directly to entanglements of whales and sea turtles listed as endangered species, in violation of the federal Endangered Species Act, 16 U.S.C. § 1538 *et seq.* Doc. # 11.3 He also seeks an injunction barring MDMF from issuing or renewing any such

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<sup>3</sup> His complaint was filed on February 28, 2018, but it was never served. The Massachusetts

permits in the future, unless or until it can be demonstrated that the gear being used does not have the capacity to cause entanglements. Id. The net effect of the requested injunction, if entered, would be to end commercial fishing for lobsters in Massachusetts state waters as we know it. By order of Court, the Commonwealth's response to the complaint is due June 4, 2018. Doc. # 22.

On May 4, 2018, Plaintiff filed a motion for temporary restraining order without a supporting memorandum. Doc. # 25. On May 6, Plaintiff filed his supporting materials. Doc. ## 27, 29. On the same day, he requested a hearing on his motion, or in the alternative, a subpoena to obtain whale sighting and entanglement data from the Center for Coastal Studies in Provincetown. Doc. # 28. On May 9, he renewed his hearing request. Doc. # 34. The Court set May 11 as the due date for responses, and scheduled a hearing, if necessary, for May 14, 2018.

### ARGUMENT

**1. Plaintiff is not entitled to a temporary restraining order because he failed to provide the Massachusetts defendants with the mandatory pre-suit notice of his claim.**

The Endangered Species Act was enacted in 1973 to prevent the extinction of various species. Strahan v. Roughead, 910 F.Supp.2d 358, 364 (D. Mass. 2012). The North Atlantic right whale is a protected species and has a designated critical habitat. Id. “[T]he ESA prohibits any person from ‘taking’ a listed species.” Id. at 366, quoting 16 U.S.C. § 1538(a)(1)(B).

When a person intends to bring an action alleging a violation of the ESA, there is a mandatory pre-suit notice requirement. “No action may be commenced [by any person on his own behalf to enjoin an alleged violation of the Endangered Species Act] prior to sixty days after written notice of the violation has been given . . . to any alleged violator[.]” 16 U.S.C. §

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defendants received service of the amended complaint on or after April 13, 2018.

1540(g)(2)(A)(i). “A failure to strictly comply with the notice requirement acts as an absolute bar to bringing suit under the ESA.” Sw. Ctr. for Biological Diversity v. U.S. Bur. of Reclamation, 143 F.3d 515, 520 (9th Cir. 1998).

Here, Plaintiff has commenced a civil suit on his own behalf under the Endangered Species Act without alleging he provided, and without actually providing, written notice to the Massachusetts defendants. See Amended Complaint, ¶ 23; see also McKiernan Declaration, ¶ 23. Plaintiff’s failure to provide sixty-days’ notice prior to bringing his claims against the Massachusetts defendants means those claims must be dismissed. Sw. Ctr. for Biological Diversity, 143 F.3d at 520; see also Friends of Animals v. Salazar, 670 F. Supp. 2d 7, 13 (D.D.C. 2009) and cited cases. The Massachusetts defendants intend to present this defense in their response to the complaint (response due June 4, 2018, per order of Court). In the meantime, it follows that because Plaintiff’s claims are subject to dismissal, then his motion for a temporary restraining order should be denied.

**2. Plaintiff is not entitled to a temporary restraining order because he has not shown specific facts that immediate and irreparable injury or loss will result if the order is not granted.**

Plaintiff seeks a temporary restraining order under Fed. R. Civ. P. 65. A temporary restraining order “expires at the time after entry – not to exceed 14 days – that the court sets.” Fed. R. Civ. P. 65(b)(2).<sup>4</sup> He seeks the order to cover the period of time that the right whales are in Massachusetts before they migrate north.

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<sup>4</sup> The rule also requires the movant to “give[] security in an amount that the court considers proper to pay the costs or damages sustained by any party found to have been wrongfully enjoined or restrained.” Id. at 65(c). To the best of the Commonwealth’s knowledge, Plaintiff has neither given security nor moved to have that requirement waived.

The standard for granting a temporary restraining order with notice is not set forth in Fed. R. Civ. P. 65. But, the rule states that an order is available only when “specific facts in an affidavit or a verified complaint clearly show that immediate and irreparable injury, loss, or damage will result to the movant.” Fed. R. Civ. P. 65(b)(1)(A) (discussing issuing a TRO without notice); see also Schofield v. Clark, 686 F.Supp.2d 124 (D. Mass. 2010) (denying motion for temporary restraining order where moving party “has not made a strong showing that he will prevail on the merits of his claim nor has he demonstrated that he faces a significant risk of irreparable harm”).

Plaintiff seeks a temporary restraining order against the Massachusetts defendants<sup>5</sup> “to stop them from licensing and/or deploying lobster pot gear in US coastal waters . . . using ‘vertical buoy lines’” in order to protect northern right whales feeding and inhabiting Massachusetts waters from entanglement. Motion, Doc. # 25 at 1. He contends that it is “an incontrovertible fact that lobster pot fishing using vertical buoy lines routinely entangles these endangered whales.” Id. Yet, Plaintiff has not demonstrated “specific facts in an affidavit or a verified complaint clearly show[ing] that immediate and irreparable injury, loss, or damage will result” if the order is not granted. See Fed. R. Civ. P. 65(b)(1)(A).

Plaintiff has not made an adequate factual showing for relief. One reason is that his papers are contradictory regarding the facts on which he predicates his request for relief. On one hand, he claims “Northern Right Whales are routinely killed and injured by Massachusetts state lobster fisheries operations and in gill nets licensed and regulated by the State Defendants.” Motion, Doc. # 29 ¶ 5. On the other hand, and on the same day, he acknowledged to the Court

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<sup>5</sup> The TRO application refers only to the Massachusetts Office of Energy and Environmental Affairs, not the Massachusetts Division of Marine Fisheries, but DMF is located within the Department of Fish and Game, which is within the EEA.

that he lacks necessary factual data and therefore asks for the Court's assistance to obtain it from a non-party, the Center for Coastal Studies. Motion, Doc. # 28 ("Plaintiff cannot fully argue effectively for the Court granting his TRO or other emergency interlocutory injunctive relief without current whale sighting and entanglement data for Massachusetts' waters."). Another reason is that the First Circuit looks for evidence of "serious physical injury or death" when considering injunctive relief under the ESA. See Animal Welfare Inst. v. Martin, 623 F3d. 19, 26 (1<sup>st</sup> Cir. 2010) (discussing the threat posed by foothold traps to Canada lynx). Plaintiff has not submitted any evidence to show that such a result is imminent in Massachusetts.

In contrast, the Commonwealth has submitted the Declaration of Daniel J. McKiernan, Deputy Director of the Division of Marine Fisheries. In that declaration, Mr. McKiernan explains the Commonwealth's regulatory and management strategy, which is to protect the right whales in Massachusetts waters from entanglement and vessel collision, consistent with the requirements of state and federal laws. Specifically, Massachusetts regulators have made real-time efforts to obtain detailed information about the presence of right whales in Massachusetts state waters, including commissioning aerial surveys to count the number of whales that remain in Cape Cod Bay. The Commonwealth is using that real-time data to make, and continually to refine, decisions about steps that must be taken – including area closures to fixed-gear fishing – to prevent interactions between endangered whales and fishing gear. Plaintiff has adduced no facts to show that the requested temporary restraining order is necessary to prevent imminent harm, or indeed, that such an order would be more effective in preventing such harm than the carefully calibrated, data-driven efforts of the state regulators.

#### Conclusion

For the foregoing reasons, the Motion should be denied.

Respectfully submitted,

COMMONWEALTH OF MASSACHUSETTS  
EXECUTIVE OFFICE OF ENERGY AND  
ENVIRONMENTAL AFFAIRS SECRETARY  
MATTHEW BEATON and  
COMMONWEALTH OF MASSACHUSETTS  
DIVISION OF MARINE FISHERIES  
DIRECTOR DAVID PIERCE,

By their attorney,

MAURA HEALEY  
ATTORNEY GENERAL

/s/ Maryanne Reynolds

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Dated: May 11, 2018

**Certificate of Service**

I hereby certify that this document filed through the ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF), and paper copies will be sent to those indicated as non-registered participants.

/s/ Maryanne Reynolds

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Maryanne Reynolds, BBO # 627127

Dated: May 11, 2018