

United States District Court

District of Massachusetts

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Case Name: Strahan v. Administrator, National Oceanographic and Atmospheric Agency et al
Case Number: [1:18-cv-10392-DJC](#)
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Docket Text:

Judge Denise J. Casper: ELECTRONIC ORDER entered denying [25] Motion for TRO, [28] Motion for Discovery and [34] Motion to Expedite. Plaintiff Richard Maximus Strahan, acting *pro se*, moves this Court to issue a temporary restraining order ("TRO") against Defendants Secretary of the Massachusetts Executive Office of Energy and Environmental Affairs ("MEOEEA"), Director of the Massachusetts Division of Marine Fisheries ("MDMF") (collectively, "Massachusetts Defendants") and the Massachusetts Lobstermen's Association, Inc. ("MLA") to prevent their licensing and deployment of lobster pot fishing gear in all Massachusetts coastal waters until they can demonstrate that there are no right whales "likely to be in said waters for the foreseeable future," D. 27 at 8. D. 25 at 1. Strahan also moved for a hearing on the TRO motion and the issuance of a subpoena, D. 28, and moved for the Court's expedited review and ruling on the TRO, D. 34. After a hearing and for the reasons stated below, the Court DENIES Strahan's TRO motion, D. 25, DENIES without prejudice Strahan's discovery motion, D. 28, and DENIES as moot his motion to expedite, D. 34.

Strahan alleges that around 150 right whales are currently "feeding and inhabiting" Massachusetts coastal waters and they are "routinely" entangled in lobster pot vertical buoy lines, causing serious injury and death to members of this critically endangered species. D. 25 at 1; D. 27 at 2. Strahan argues that due to the decline in right whale population in recent years, a single whale death can be the "tipping point that will eliminate the possibility of" preventing extinction of the species. D. 27 at 4. He thus contends that Defendants' authorization of lobster pot fishing violates Section 9 of the Endangered Species Act, 16 U.S.C. § 1538 ("ESA"). D. 25 at 2.

The Court considers the following factors when reviewing this motion: (1) Strahan's likelihood of success on the merits of his claims; (2) the potential for irreparable harm if the injunction is denied; (3) the balance of hardship to the parties; and (4) the public interest. Animal Welfare Inst. v. Martin, 623 F.3d 19, 26 (1st Cir. 2010). "Under the ESA, however, the balancing and public interest prongs have been answered by Congress' determination

that the 'balance of hardships and the public interest tips heavily in favor of protected species.'" Strahan v. Coxe, 127 F.3d 155, 160 (1st Cir. 1997) (quoting Nat'l Wildlife Fed'n v. Burlington N. R.R., 23 F.3d 1508, 1510 (9th Cir. 1994)). Finally, although Strahan seeks a TRO, which may be issued without notice, Fed. R. Civ. P. 65(b)(1), Strahan has provided written notice, so the ex parte provisions do not apply.

1. Strahan has Failed to Demonstrate a Likelihood of Success on the Merits

Likelihood of success on the merits is the most critical factor in the inquiry. New Comm Wireless Servs., Inc. v. SprintCom, Inc., 287 F.3d 1, 9 (1st Cir. 2002). "Where the interim relief sought by the plaintiff is essentially the final relief sought, 'the likelihood of success [on the merits] should be strong.'" Strahan v. Pritchard, 473 F. Supp. 2d 230, 235 (D. Mass. 2007) (quoting In re Pye, 37 F.3d 58, 63 (1st Cir. 1994)). Strahan's requested preliminary relief mirrors the final injunctive relief he seeks under § 9, D. 11 at 22. "Section 9 of the ESA prohibits any person from 'taking' a listed species," with "taking" defined "in the broadest possible manner to include every conceivable way in which a person can 'take' or attempt to 'take' any fish or wildlife." Strahan v. Roughead, 910 F. Supp. 2d 358, 366 (D. Mass. 2012) (quoting S. Rep. No. 93-307, at 7 (1973)); see 16 U.S.C. §§ 1532, 1538. Entanglement of right whales in fishing gear constitutes a "taking" under the ESA. Coxe, 939 F. Supp. at 984. "Under the ESA, injunctive relief cannot issue based solely on the possibility that an endangered species might be disturbed. A plaintiff must show actual harm or harassment." Pritchard, 473 F. Supp. 2d at 235.

First, Strahan has failed to demonstrate his fulfillment of the ESA's mandatory notice requirement. The ESA imposes a mandatory 60-day pre-suit written notice requirement to all citizen suits. 16 U.S.C. § 1540(g)(2). This notice requirement is jurisdictional, see Me. Audubon Soc'y v. Purslow, 672 F. Supp. 528 (D. Me. 1987), aff'd, 907 F.2d 265 (1st Cir. 1990), and serves to "put agencies on notice of a perceived violation" and give them "an opportunity to review their actions and take corrective measures if warranted," short of litigation, Water Keeper All. v. U.S. DOD, 152 F. Supp. 2d 163, 172-73 (D.P.R. 2001) (quoting Sw. Ctr. for Biological Diversity v. U.S. Bureau of Reclamation, 143 F.3d 515, 520 (9th Cir. 1998)). All Defendants contend that Strahan failed to provide this notice. D. 42 at 3; D. 46 at 6; D. 47 at 11; D. 48 at 2. Strahan argues that he did provide the 60-day notice, D. 43; D. 51 ¶ 1, but he does not provide any documentation to support his assertion. Without demonstrating that he provided this notice, the Court will be unable to review Strahan's claims. See Strahan v. Coxe, 939 F. Supp. 963, 976 (D. Mass. 1996). At minimum, Strahan's failure to provide notice casts doubt on his likelihood of success.

Second, Strahan has not made a "strong" showing of likelihood of success on the merits of his ESA claim. Strahan argues that the Massachusetts Defendants "have been in continuous violation of the ESA's Section 9 prohibitions" since this Court granted his injunction for ESA violations in 1996, Coxe, 939 F. Supp. at 992. D. 27 at 8. The present record, however, does not reflect this contention. Defendants state they know of only one entanglement from gear set in Massachusetts since 2010, when a whale was found entangled in 2016 and was successfully disentangled. D. 47-1 ¶

18. According to Strahan, this April, two whales were seen trapped in buoy lines: a humpback whale in Cape Cod Bay and a right whale in other Massachusetts coastal waters. D. 27 at 3. Efforts were made to disentangle the [right] whale but they failed, Strahan alleges. *Id.* Massachusetts Defendants contend, however, that this right whale was first viewed "with this entanglement 100 miles off the coast of Delaware in 2014" and that while the source of the buoy line is unknown, the rope is typical of deeper waters in federal jurisdiction. D. 47-1 ¶ 19. Moreover, as the Court discusses in Part 2, *infra*, Strahan's argument that Defendants' lobster fishing practices have not changed since 1996 is also contradicted by the record. *See* D. 47-1 ¶¶ 9-15. "[A] plaintiff seeking a preliminary injunction must offer proof beyond unverified allegations in the pleadings." Strahan v. Roughead, No. 08-cv-10919-MLW, 2010 WL 4827880, at *10 (D. Mass. Nov. 22, 2010) (quoting Palmer v. Braun, 155 F. Supp. 2d 1327, 1331 (M.D. Fla. 2001)). Strahan has not shown that right whales have been entangled in Massachusetts coastal waters due to actions taken—or not taken—by Defendants here. *See Pritchard*, 473 F. Supp. at 238.

Thus, Strahan has not demonstrated a sufficient likelihood of success to warrant the TRO that he now seeks.

2. Strahan Has Not Made a Sufficient Showing of Irreparable Harm

Strahan must demonstrate a "strong likelihood" that absent an injunction, right whales will suffer irreparable harm. Coxe, 939 F. Supp. at 984. In light of the Massachusetts Defendants' actions to prevent right whale entanglement, Strahan has not made this showing here. Contrary to Strahan's assertion that "[n]othing has changed" since 1996, D. 27 at 8, Massachusetts Defendants have promulgated a series of regulations designed to protect right whales and other marine species, including requiring that gillnets and trap gear have breakaway features and limiting speeds and sizes of vessels in certain coastal waters. D. 47 at 5-6; D. 47-1 ¶¶ 9-14; D. 47-3; see 322 CMR 12.00 et seq. Regulations prohibit use of trap gear in a specific closure area between February 1 and April 30, based on the documented co-occurrence of aggregations of right whales with the presence of fixed-fishing gear in this location. D. 47-1 ¶ 12. MDMF uses aerial and vessel-based population surveys to monitor coastal waters. D. 47 at 6. On May 4, 2018, after an aerial survey observed 84 right whales in Cape Cod Bay, the Massachusetts Defendants issued an emergency regulation extending their temporary prohibition of lobster pot fishing there to May 15, stating that the duration of this closure extension may be shortened or further prolonged based on the results of continuing aerial surveys. D. 34-1. A partial aerial survey on May 9th observed 31 right whales in Cape Cod Bay, D. 47-1 ¶ 17; D. 47-6, and on May 14th, a full bay-wide survey observed zero right whales in Cape Cod Bay. D. 53 ¶ 3; D. 53-1. The right whales' departure is consistent with their feeding and migration patterns observed since 1998. D. 53 ¶ 4. In light of the lack of evidence that these Defendants' activities damage right whales, coupled with the evidence that Massachusetts Defendants are monitoring the whales and none remain feeding in Cape Cod Bay, the Court is not persuaded that right whales will suffer irreparable harm absent the injunctive relief Strahan presently seeks on an expedited basis.

3. Balance of Equities

The Court appreciates the value of protecting this endangered species, but the Court cannot say based on this record that the balance of the equities favors Strahan, particularly where the MLA has provided evidence of harm lobstermen will suffer if they are unable to set gear for the season. D. 46-1 ¶¶ 13-15; see Pritchard, 473 F. Supp. 2d at 241. In sum, the Court is unconvinced that the expedited preliminary injunctive relief Strahan seeks is appropriate. Given the comprehensive regulatory scheme in this area, managed by the MDMF and developed with the use of extensive data, D. 47-1 ¶¶ 1-5, 10-14; see D. 53 ¶¶ 2-4, the remedy that Strahan seeks is not warranted. Cf. Coxe, 127 F.3d at 168-69. Whether Strahan, as Chief Science Officer of Whale Safe USA, D. 29 ¶ 1, disagrees with the current regulatory scheme is not the same as providing a sufficient basis for the "extraordinary and drastic remedy" that is preliminary injunctive relief, Munaf v. Geren, 553 U.S. 674, 689 (2008). The Court thus DENIES Strahan's motion for a preliminary injunction, D. 25. Given the Court's disposition of Strahan's first motion, the Court DENIES his motion for expedited review, D. 34, as moot.

Additionally, Strahan also seeks a subpoena for all whale sighting and entanglement data in possession of Massachusetts Defendants. D. 28. Assuming this case proceeds against the present Defendants (the Court notes that there is one unripe motion to dismiss pending on behalf of one Defendant, D. 32)—the relevant data upon which Massachusetts Defendants rely will be subject to discovery. The Court thus DENIES D. 28 without prejudice to renew if such data is not produced in the course of discovery.

(McKillop, Matthew)